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Contents * Tables des matières

Articles

Jurisprudence

Book Reviews * Comptes rendus

Chronicle ⁎ Chronique

Obituaries ⁎ Notes nècrologiques

Treaties ⁎ Traitès

Bibliography ⁎ Bibliographie

A R T I C L E S

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Preparatory Measures for the Implementation of the Convention on the Law of the Sea

by WOJCIECH GÓRALCZYK

The Role of the Preparatory Commission

On 10 December, 1982, the United Nations Convention on the Law of the Sea was signed in Montego Bay by 119 States. Until 9 December, 1984, the closing date for signature, 159 signatures had been appended[1]. In accordance with Article 308, the

"Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession".

Until 9 December, 1984 only thirteen States and the United Nations Council for Namibia had ratified the Convention.[2] None of the big powers or martime States had been among them. One may ask what is the prospect for more ratifications and entry into force of the Convention? It is difficult to answer this question. Decisions to ratify or to postpone ratification are dependent on many different factors. Nonetheless the position of many States is known. The Soviet Union and other socialist States have expressed many times their intention to accept the Convention, and unless something unforeseeable should occur, one may expect their ratifications to come. The majority of developing States, with few exceptions, support the Convention, and those thirteen ratifications mentioned above were made by developing States. The position of Western highly industrialized States is more differentiated. The United States under the Reagan ad-

[1] Cf. "Law of the Sea Bulletin", No. 4, February, 1985, pp. pp. 1—6. Text of the Convention (A/CONF.62/122) in Third United Nations Conference on the Law of the Sea. Official Records (further as Off. Rec.), vol. 17.

[2] Cf. "Law of the Sea Bulletin", No. 4, pp. 2—6.

ministration have been hostile to the Convention and have been boycotting the preparatory measures for its implementation. The United Kingdom and the Federal Republic of Germany criticized certain provisions of the Convention (mainly Part XI) and their position with regard to the Convention has been very reticent. Consequently, they have not signed it. However, as signatories of the Final Act of the Conference on the Law of the Sea, they have been participating as observers in the activities of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea. France and Japan, though they have signed the Convention, have been hesitating whether to ratify it. Their final decision will depend, *inter alia*, on the results of activities of the Preparatory Commission. Finally, certain Western States (for instance Austria, Australia, Norway, Portugal) seem to be satisfied with the Convention and ready to accept it.

The General Assembly of the United Nations at its sessions in 1983 and in 1984 adopted resolutions calling upon members to ratify the Convention on the Law of the Sea and to ensure its entry into force. The resolutions were adopted by a great majority of votes.[3]

In connection with this it would be useful to quote Article 18 of the Vienna Convention on the Law of Treaties. In accordance with that Article, a State which has signed the treaty

"is obliged to refrain from acts which would defeat the object and purpose of a treaty until it shall have made its intention clear not to become a party to the treaty".

Such is the obligation of all States signatories to the Convention on the Law of the Sea.

In most cases, a State which signed a treaty bears only that obligation prior to the entry into force of the treaty. Usually, in the period between the signature of a treaty and its entry into force, no special activities on the international level are needed. For instance, the four Geneva Conventions on the law of the Sea adopted in 1958 needed no special measures to be taken before their entry into force (with the exception of usual functions performed by the depository).

On the other hand, it was recognized that, with respect to the Montego Bay Convention on the Law of the Sea, certain preparatory measures should be taken to prepare and facilitate its entry into force. Appropriate provisions were included in the Final Act of the Third UN Conference on the Law of the Sea, namely in Resolution I concerning the establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea and in

[3] Cf. A/RES/38/59 A and A/RES/39/73.

Resolution II — Governing Preparatory Investments in Pioneer Activities relating to Polymetallic Nodules.[4]

In the Convention itself, in Article 308, paras, 4 and 5, two references to the Preparatory Commission and its activities have been included and in such a way a legal link has been established between preparatory activities and subsequent activities of the Sea-Bed Authority after the entry into force of the Convention.

The question of the Preparatory Commission was for the first time raised in 1979 by the President of the Conference — ambassador H. S. Amerasinghe. At that time the negotations on the substantive provisions of the convention were almost completed (or seemed to be almost completed) when the President drew the attention of the Conference to the question of the final clauses of the convention. One of the items to be discussed was identified as "Entry into force (of the convention) (including consideration of a Preparatory Commission)".

In his note dated 23 July, 1979,[5] the President placed the question of the entry into force of the convention and of the establishment of the Preparatory Commission in the category of "controversial items".

At the eighth session of the Conference, after the discussion at the Informal Plenary, the need to establish a Preparatory Commission was recognized.[6] What reasons, in the opinion of the Conference, would justify the establishment of a Preparatory Commission?

At the beginning it was recognized that a Preparatory Commission should "make arrangements for the establishment of the International Sea-bed Authority."[7] The primary objective of the Commission should be "to enable the Authority and its principal organs to function as soon as possible after entry into force (of the Convention). This would cover arrangements for the establishment of the main organs — Assembly, Council, Law of the Sea Tribunal, Sea-bed Disputes Chamber [...]."[8]

The majority was in favour of a rather limited mandate of the Commission. In this respect, the President's note of 14 August, 1979. may be quoted:

"On the question of the mandate of the Commission, it was emphasized that the Commission is a preparatory and not an executive body. It would thus only do some groundwork regarding the establishment of the Authority. Its mandate would, therefore, include. for example, the preparation of the rules and regulations for the Authority

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[4] A/CONF.62/121 (Off. Rec., vol. 17).

[5] Informal document FC/1. Cf. also Off. Rec., vol. 13, p. 109.

[6] See A/CONF.62/L.44 (Off. Rec., vol. 13, pp. 109, 110) and A/CONF.62/SR.120 (*ibid.*, p. 13).

[7] See A/CONF.62/L.55, para. 1 (Off. Rec., vol. 13, p. 90).

[8] See A/CONF.62/L.55, Annex I, para. 3 (*ibid.*, p. 92).

and preparation for the convening of the first session of the Assembly and the Council. There was the view, accordingly, that the Commission would not have any right to authorize exploration and exploitation of the sea-bed resources or grant contracts for exploitation but merely to prepare the regulations for that purpose [...]."[9]

Such a mandate of the Commission would be similar to mandates of other preparatory bodies for international organizations. In this connection it should be noted that the Conference had at its disposal an analytical document drawn up by the Secretariat on "Instruments establishing preparatory bodies for international organizations".[10]

Establishment of preparatory commissions for international organizations is current practice, though not in every case followed. Among precedents considered by the Conference were certain instruments establishing preparatory bodies for international organizations within the United Nations system, including "Agreement on Interim Arrangements for the Preparatory Commission of the United Nations". Thus, at the beginning, the idea of establishment of the Preparatory Commission for the Sea-bed Authority was neither unusual nor exceptional. It was, rather, consistent with normal practice.

However, a new question was raised at the Conference, namely, the necessity of establishment of a preparatory investment protection system. This question had been linked with the mandate of the Preparatory Commission.

The question of preparatory investment protection was raised by the United States. Then the US proposal was supported by other highly industrialized States with developed marine technology.

It is obvious that the industrial mining and processing of manganese nodules would be a complicated activity requiring new technologies and know-how. The complete system to transform nodules into metals may be divided into three major stages: mining, transportation, processing. However, prospecting and exploration activities to identify the richest nodule deposits, sampling and mapping them, constitute the first step in deep-sea mining.

Certain consortia conducted such preparatory activities for the exploitation of manganese nodules for many years. Their activities resulted in the identification of potential nodule deposits which could be exploited as first generation mine sites. Some of them have already tested their mining systems at sea and have succeeded in raising nodules from a depth of around 5,000 metres. The processing techniques and metallurgical problems of recovering metals from nodules have been essentially solved.

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[9] Informal document FC/9.

[10] Informal document FC/8.

It goes without saying that such preparatory investments in the mining of manganese nodules involved substantial expenditure and, until now, millions of dollars have been spent.

Four multinational consortia have been involved in preparatory activities for deep se-bed mining. In all of them the share of participation of American capital has been very important.[11] It was obvious that the consortia were seeking protection for their investments both at the national and international level. Their first achievement was at the national level: in 1980 in the United States, the Deep Sea-bed Hard Mineral Resources Act was passed.[12] Similar legislative acts were subsequently adopted in the Federal Republic of Germany,[13] the United Kingdom[14] and France.[15]

The unilateral legislation on deep seabed mining met with a stormy reaction from the developing States. The legislation was declared by them to be

"contrary to international law and [...] therefore incapable of giving rise to any rights whatsoever".[16]

Thus it became clear that the municipal legislation was not sufficient for the protection of investments in deep-sea mining made prior to the entry into force of the Convention on the Law of the Sea.

In April 1980 (that is, prior to the passing of the Deep Sea-bed Hard Mineral Resources Act) the United States Delegation tabled an informal proposal regarding investment protection that tended to establish a link between the Preparatory Commission and a preparatory investment protection system.[17] The US proposal provided for priority for the pre-Convention investor if mining rights for the same area are claimed by later applicants, and the transformation of priority claims into legal rights to mine a site, once the Convention has come into force.

At the beginning, the developing States rejected the concept of preparatory investment protection. However, they had to recognize that without a satisfactory protection for investments made prior to the entry into force of the

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[11] Cf. Sea-bed Mineral Resource Development: Recent Activities of the International Consortia (ST/ESA/107), pp. 10, 11.

[12] See "International Legal Materials," vol. 19, 1980, No. 4, pp. 1003—1020.

[13] See *Bundesgesetzblatt*, Teil I, Nr. 50, 22 August, 1980, pp. 1457—1460.

[14] See "International Legal Materials," vol. 20, 1981, No. 5, pp. 1217—1227.

[15] See "Journal Officiel de la République Française," No. 301, 24 décembre, 1981, pp. 3499—3500.

[16] Off. Rec., vol. 14, p. 4.

[17] See Informal Working Paper by the United States; An Approach to Interim Protection of Investment, IA/1 of 2 April, 1980 and IA/1 of 11 August, 1980 (revised version). Cf. also Uwe JENISCH: *Bridging the Gap for Seabed Mining: Preparatory Instruments for the New Law of the Sea Convention*, "San Diego Law Review,", vol. 18, 1981, No. 3, pp. 409—413.

Convention, the United States and other industrialized States would never ratify the Convention. After long and difficult negotiations, which proved the realism of all sides and wisdom and diplomatic skill of the President of the Conference, ambassador Tommy Koh, Resolution II — Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules — was drafted.

Under Resolution II, the Preparatory Commission has been provided with very extensive functions, including executive functions and power to adopt decisions binding upon States and other "pioneer investors".

At the same time, as was mentioned above, a link has been established between activities of the Preparatory Commission and the Sea-bed Authority. In accordance with Article 308, paragraph 5, of the Convention

"The Authority and its organs shall act in accordance with resolution II of the Third United Nations Conference on the Law of the Sea relating to preparatory investment and with decisions of the Preparatory Commission taken pursuant to that resolution".

Thus has been established the system of preparatory investment protection.

As has been pointed out, since the beginning of the discussion on the Preparatory Commission, it had been recognized that one of its functions should be to make arrangements for the establishment of the main organs of the Sea-bed Authority — Assembly and Council. The Enterprise was not mentioned. Formally the Enterprise does not belong to the category of main organs, but in accordance with Article 158, paragraph 2, it constitutes

"the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1".

Article 170 specifies:

"The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to Article 153, paragraph 2 (a), as well as the transporting, processing and marketing of minerals recovered from the Area".

It is well known that the developing States have been the protagonists of the establishment of such an international enterprise. Moreover, they insisted that the Sea-bed Authority (through the Enterprise) should have the exclusive right to explore and exploit the resources of the international area. After difficult negotiations the Conference worked out a compromise formula, namely, the so called "parallel system of exploitation", which was reflected in Article 153, paragraph 2:

"Activities in the Area shall be carried out [...] (a) by the Enterprise, and (b) in association with the Authority by State Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States [...]".

Making the compromise, and accepting the parallel system of exploration and exploitation, the developing States sought to obtain guarantees that the parallel system would be workable and viable, i.e., that the Enterprise would have financial and technological means to start its operations simultaneously with national operators, that is private groups (consortia) and state enterprises.

Therefore, when the industrialized States raised the question of preparatory investment protection to guarantee the rights of national investors and thus to facilitate and accelerate the commencement of their activities in the international area, the developing States put forward a demand that in the preparatory period, that is prior to the entry into force of the Convention, appropriate arrangements should be made to enable the Enterprise to begin its operations simultaneously with pioneer investors.[18]

This link between preparatory investment protection and the arrangements for the early operations of the Enterprise was immediately seized upon by representatives of the industrialized States.[19] In such a way, arrangements for the early start of the Enterprise's operations have become the *quid pro quo* for the preparatory investment protection system. In accordance with Resolution I — the Preparatory Commission has to establish a special commission for the Enterprise, which

"shall take all measures necessary for the early entry into effective operation of the Enterprise". (paragraph 8).

Besides that, it was recognized by the Conference that two other matters need certain preparatory measures to be taken prior to the entry into force of the Convention.

Those were the problems

"which would be encountered by developing land-based producer States likely to be most seriously affected by the production of minerals derived from the Area [...]"

and arrangements for the establishment of the International Tribunal for the Law of the Sea.

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[18] Or in accordance with the wording of Resolution II: "[...] to ensure that the Enterprise is able to carry out activities in the Area in such a manner as to keep pace with States and other entities." (para. 12).

[19] Two members of the delegation of the United States (Robert Knecht and Ray Meyer) in the interview published in "Neptune" stated *inter alia*: "Q[uestion]: What do you think the developing nations have to gain from the preparatory investment proposal? A[nswer]: Primarily, they will have a live and functioning industry to support treaty ratification. That industry will be speaking from the point of view of having real investments at risk. The proposal will also keep technology development and exploration going and this will be an advantage for the Enterprise in being able to acquire technology earlier and get into business sooner." ("Neptune", No. 17, August, 1980, p. 4).

Such was the background of the establishment of the Preparatory Commission and of the definition of its mandate.

The Preparatory Commission has been entrusted with the following tasks:

1) to prepare the entry into effective operations of the Sea-bed Authority;

2) to put into operation a system of preparatory investment protection;

3) to ensure that the Enterprise will be provided with the funds, technology and expertise necessary to enable it to keep pace with States and other entities engaged in activities in the international sea-bed area;

4) to prepare recommendations with a view to minimizing adverse effects of deep-sea mining on developing States being land-based producers of metals to be ectracted from manganese nodules;

5) to make arrangements for the commencement of activities of the International Tribunal for the Law of the Sea.

It should be stressed that almost all tasks of the Preparatory Commission stem from Part XI of the Convention (only the arrangements for the entry into operation of the Tribunal are not exclusively linked with that part of the Convention). Part XI of the Convention has expressed the principle that the sea-bed and the ocean floor beyond the limits of national jurisdiction and their natural resources are the common heritage of mankind and has provided for an international machinery to organize, carry-out and control activities in the international area. To put that machinery into operation would be a difficult task without precedent, which obviously requires organized preparatory activities. That explains why the Preparatory Commission had to be established and why it has been endowed with such an extensive mandate.

Legal Basis of the Establishment and Activities of the Preparatory Commission

The establishment of the Preparatory Commission was provided for in Resolution I adopted by the Conference on the Law of the Sea. The Resolution was included in the Final Act of the Conference. Certain functions of the Preparatory Commission, concerning preparatory investment protection, have been embodied in Resolution II, which has the same legal status as Resolution I.

There are many precedents for the establishment of preparatory bodies for international organizations by resolutions of the conferences which have adopted statutes of those organizations. However, other methods of establishment of preparatory commissions are also in use, namely by separate instruments and by provisions included in the convention on the establishment of the organization itself.[20] All kinds of instruments establishing preparatory bodies have one important feature in common: they are effective from the day of their adoption or signature.

Similarly, Resolution I, as a decision of the Third UN Conference on the Law of the Sea, has been effective as from 10 December, 1982.

What is the exact legal character of Resolution I? It was not signed separately but included in the Final Act of the Conference, which was signed by participants of the Conference. It constitutes a decision of the Conference, and the intention of the Conference was to make it binding. Binding upon whom? Certainly upon States that signed both the Final Act and the Convention and then have participated in the work of the Preparatory Commission. It seems that also upon States which signed only the Final Act and then have participated in the work of the Commission as observers.

Thus the legal effects of Resolution I would be the same as those of an agreement setting-up a preparatory body for an organization and entering into force upon signature.

However, not only Resolution I and Resolution II, which have the same legal status, constitute the legal basis for the activities of the Preparatory Commission. In many cases the Commission should be guided by provisions of the Convention itself. References to the Convention are to be found in many provisions of both resolutions, for instance in paragraph 5, subpara. (e), paras. 10 and 11 of Resolution .I and in the preambular paragraph and paragraph 1 of Resolution II. In paragraph 1, subpara. (f) of Resolution II we read: "Area", "Authority", "activities in the Area" and "resources" have the meanings assigned to those terms in the Convention. In other words, the Commission in its activities should always be guided by the provisions of the Convention, particularly by Part XI and annexes pertaining to that part.

In enumerating legal instruments governing activities of the Commission, one should also mention the Rules of Procedure of the Third United Nations Conference on the Law of the Sea,[21] which in accordance with paragraph 4 of Resolution I, applied *mutatis mutandis* to the adoption of rules of procedure of the Commission. Since the Commission at the end of its first session adopted its own rules of procedure, the former ones ceased to be applicable.

Thus we come to another legal basis of activities of the Commission, namely to its own resolutions having binding character, and constituting what may be called the internal law of the Commission. The Preparatory

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[20] Cf. Informal document FC/8.

[21] A/CONF.62/30/Rev.3.

Commission, like many international organizations, has the right to adopt legal rules that regulate its internal matters. At its 5th plenary meeting, on 8 September, 1983, the Preparatory Commission adopted two resolutions concerning internal problems of the Commission falling under the category of internal law, namely a resolution on Structure of the Preparatory Commission, Functions of the Organs and Bodies of the Preparatory Commission, Officers and Venue and a resolution on Rules of Procedure on Decision-making.[22] At the 6th plenary meeting, on the same day, the Commission adopted Rules of Procedure of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea.[23]

To some extent also the Charter of the United Nations and regulations adopted by the General Assembly are applicable to the Preparatory Commission. In accordance with paragraph 14 of Resolution I, the Preparatory Commission is financed

"from the regular budget of the United Nations, subject to the approval of the General Assembly [...]".

The secretariat services of the Commission are provided by the United Nations (para. 15 of the same resolution). Thus the Staff Regulations binding on the United Nations staff are applicable to the personnel temporarily working for the Commission.

It seems that the enumeration of different legal sources from which stem the legal norms concerning different aspects of activities of the Preparatory Commission demonstrates the complexity of legal problems with which the Preparatory Commission may be confronted.

Establishment and Duration of the Preparatory Commission

Formally, the Preparatory Commission established by Resolution I adopted by the Conference on the Law of the Sea simultaneously with the Convention on 10 December, 1982. The wording of the Resolution seems to be unambiguous: "There is hereby established the Preparatory Commission [...]" (para. 1). Since Resolution I has been effective as from 10 December, 1982, the date of signing of the Final Act of the Conference, the Preparatory Commission actually has been established by the adoption of Resolution I.[24]

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[22] LOS/PCN/27.

[23] LOS/PCN/28.

[24] However, sometimes the wording of international documents may be misleading. Let us take for instance the last sentence of the preamble of the Charter of the United

The Commission should be convened by the Secretary General of the United Nations upon signature of or accession to the Convention by 50 States. This occurred on 10 December, 1982, when the Convention was signed by 119 States. The Commission should meet no sooner than 60 days and no later than 90 days after that date. It met for the first time on 15 March, 1983, that is a few days after the time-limit fixed in Resolution I.

The question of the duration of the Preparatory Commission caused certain minor problems. In a note of the President of the Conference, it was suggested that the life of the Commission should last at least until entry into force of the Convention and until the first meetings of the Assembly and the Council of the Ses-bed Authority are convened.[25]

In the discussion the view was expressed that, lacking the sufficient number of ratifications or accessions (that is 60), the Convention might not enter into force for years. The question was raised whether it would not be wise to prescribe a time-limit for the activities of the Commission. The Group of 77 proposed that the Commission should not continue indefinitely if the Convention had not entered into force after a certain period (five years was mentioned). However, other delegations regarded such a provision as not appropriate and their point of view prevailed. The proposal of the Group of 77 was not retained in Resolution I.[26]

The opinion was also expressed in the discussion that, though "the life of the Preparatory Commission should not be unduly long",[27] it might be useful to extend it beyond the convening of the Assembly. The latter view finally prevailed and the following wording was adopted:

> "The Commission shall remain in existence until the conclusion of the first session of the Assembly, at which time its property and records shall be transferred to the Authority". (Resolution I, para. 13).

Nations: "Accordingly, our respective Governments [...] have agreed to the present Charter of the United Nations and do hereby stablish an international organization to be known as the United Nations." The problem is that by adopting and signing in San Francisco the Charter they neither have agreed to it nor have established the United Nations. The consent to be bound by the Charter has been expressed by ratification (not by signature) and the United Nations has been established when the Charter entered into force, that is on 24 October, 1945.

[25] See Off. Rec., vol. 13, p. 93.

[26] The question was not purely academical. For instance the Havana Charter for the International Trade Organization has never entered into force and the preparatory body for ITO (Interim Commission for International Trade Organization) was finally dissolved in 1951.

[27] A/CONF.62/L.70, para. 19 (Off. Rec., vol. 15, p. 149).

Sessions of the Commission. Time and Venue

Paragraph 12 of Resolution I provides:

"The Commission shall meet at the seat of the Authority if facilities are available; it shall meet as often as necessary for the expeditious exercise of its functions".

From the beginning it has been understood that the Commission should work in sessions. In accordance with rule 9 of Rules of Procedure "[...] sessions of the Preparatory Commission shall be held as decided by the Commission".[28]

The first session of the Commission was opened on 15 March, 1983; it was scheduled for a period of 4 or 6 weeks (up to 8 or 22 April). At the meeting on 8 April it was decided to suspend the work and to resume the session in August or September. The resumed first session was held from 15 August to 9 September, 1983.

At the first session the Commission decided to hold one regular session per year at the seat of the Authority, for a period of four weeks. It was also decided to hold one session of working groups of the Commission per year for the same period of four weeks. It was suggested that working groups might meet in Kingston or at a seat of the United Nations, that is, in New York or Geneva.

In 1984 the Commission held its second session in Kingston from 19 March to 13 April and the session of working groups in Geneva from 13 August to 5 September. In 1985 the first part of the third session was held in Kingston from 11 March to 4 April and the resumed third session in Geneva from 12 August to 4 September.

The Commission fixed without difficulty the timing of its sessions, but the question of venue has turned out to be controversial. At the Conference certain delegations (including those of Western and Eastern European States) preferred as the location of the Preparatory Commission the United Nations headquarters. There were at least two reasons to justify such a position: all of them had permanent missions in New York and Geneva and when meetings of the Commission are held at the UN headquarters, the expenditures are lower both for delegations and for the United Nations.

However, when the Conference decided to locate the permanent seat of the Sea-bed Authority in Jamaica, Jamaica persuaded the majority of developing States to insist on the location of the Preparatory Commission at the seat of the Authority. This was reflected in paragraph 12 of Resolution I, subject to availability of appropriate facilities.

The decision taken at the first session, namely, every year to meet

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[28] LOS/PCN/28, p. 3.

for four weeks in Kingston and four weeks in New York or Geneva, constituted a kind of compromise. To avoid a contradiction with the wording of paragraph 12 of Resolution I, it was agreed that in New York or Geneva only working groups would meet.

However, the above mentioned decision has not definitely settled the controversy in respect of the venue of sessions of the Preparatory Commission. Jamaica, as host country both for the Authority and for the Preparatory Commissions, has insisted that all sessions of the Commissions should be held in Kingston.

Membership

The membership of the Preparatory Commission was from the very beginning a controversial issue. The President of the Conference in his note (PC/1) enumerated three possible solutions, namely to extend the membership of the Commission to 1) signatories of the Final Act of the Conference; 2) signatories of the Convention; 3) States consenting to be bound by the Convention through ratification. The third option was very soon discarded as impracticable, so only the first two options have remained.[29]

Representatives of a majority of Western States proposed that the composition of the Preparatory Commission be based on signature of the Final Act, in order to ensure broad and representative membership in the Commission.[30] They maintained that some States might encounter delay in the signing of the Convention owing to their internal legislative procedures, and would thereby be precluded from becoming members of the Preparatory Commission at an early stage.

The Group of 77 and socialist States[31] argued, on the contrary, that only signatories of the Convention should become members of the Preparatory Commission. They considered the signing of the Convention as a minimum requirement for membership in the Commission: those who are not willing to assume any obligation are not entitled to have any rights. Finally a compromise formula was accepted, namely, that States which had signed

[29] Cf. A/CONF.62/L.55 (Off. Rec., vol. 13, p. 92).

[30] Cf. for instance a statement of the delegate of the United Kingdom (A/CONF.62/C.1/SR.50, Off. Rec., vol. 15, p. 72). Cf. also A/CONF.62/L.70 (Off. Rec., vol. 15, p. 149).

[31] However, the delegate of Poland favoured making signature of the Final Act of the Conference the criterion for membership of the Commission (Cf. A/CONF.62/C.1/SR.51, para. 10; Off. Rec., vol. 15, p. 74).

only the Final Act would be allowed to participate as observers without the right to take part in the decision making process.

Paragraph 2 of Resolution I reads as follows:

"The Commission shall consist of the representatives of States and of Namibia, represented by the United Nations Council for Namibia, which have signed the Convention or acceded to it. The representatives of signatories of the Final Act may participate fully in the deliberations of the Commission as observers but shall not be entitled to participate in the taking of decisions".

The text may seem clear, though usually observers have no right to "participate fully in the deliberations", however, at the first session of the Commission certain controversies have arisen in respect to its interpretation and the exact status of observers. This happened when the rules of procedure were discussed and when certain informal bodies of the Commission had to be established.

The first problem to be decided was: should observers be taken into consideration in counting for a quorum? The question had to be decided in a situation when such States as the United Kingdom, the Federal Republic of Germany, Italy, Spain and Belgium had the status of observers.[32] In the Draft rules of Procedure of the Preparatory Commission [...],[33] presented as an informal working document by the United Nations Secretariat, no answer was given. On the contrary, it contained a reference to observers in square brackets and it read as follows:

"The Chairman may declare a meeting open and permit the debate to proceed when representatives of at least [...] members (and observers referred to in rule 2) participating in that session of the Preparatory Commission are present".

The group of socialist States, as well as developing States, proposed the deletion of words in square brackets".[34] A different point of view was held by the group of Western European and other States. In their working paper they proposed the following wording of the relevant rule of procedure:

"The Chairman may declare a meeting open [...] when representatives of at least one third of the members and observers [...] are present".[35]

From a strictly legal point of view that position was untenable. The question of a quorum first of all is connected with the taking of decisions. Observers have not been entitled to participate in the decision making process. Besides that, it is a rather common practice that only

[32] Moreover, companies having their nationality have participated in the consortia engaged in pioneer activities in sea-bed mining.

[33] LOS/PCN/WP.1.

[34] Cf. LOS/PCN/WP.3, LOS/PCN/WP.3/Rev.1 and LOS/PCN/WP.9.

[35] See LOS/PCN/WP.5.

the presence of a fixed number of fully-fledged members of a body makes its transactions valid. Therefore, the position of the developing and socialist States finally prevailed over that of the Western States.[36]

Another sensitive problem was connected with the conduct of business in the Preparatory Commission, and the extent of influence observers might have on the decision taken in this connection.

The following controversial questions had to be decided:

1) Who may speak in favour and against the imposition of the time-limit on speeches?

2) Who may rise to a point of order and who may appeal against the ruling of the Chairman made in this respect?

3) Who may move the adjournment of the debate on the question under discussion and who may speak in favour and against such a motion?

4) Who may move the closure of the debate and who may speak against it?

5) Who may move the suspension or the adjournment of the meeting and who may speak in favour of and against the motion?

All five questions have similar character and therefore the position of each group of States (i.e. developing, socialist and Western States) was identical in respect of all questions. Developing and socialist States answered that only representatives of members may act in respect to the conduct of business, while the answer of Western States was that representatives both of members and of observers may act.

Let us take as an example the adjournment of the debate. In the informal draft the Secretariat proposed the following wording:

> "During the discussion of any matter, a representative may move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion, two representatives may speak in favour of, and two against the motion, after which the motion shall be immediately put to the vote".

That text was not satisfactory for the socialist and developing States and they proposed to insert in the first and second sentences the words "of members" after the words "representatives".

After a discussion a compromise formula was worked out: the words "of members" has been added only in the second sentence. Thus a representative of an observer may move the adjournment of the debate, but only

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[36] Cf. Rule 16: "1. The Chairman may declare a meeting open and permit the debate to proceed when representatives of at least one third of the members participating in that session of the Preparatory Commission are present. 2. The presence of representatives of a majority of the members participating in that session shall be required for any decision to be taken."

representatives of members may speak in favour of or against the motion. The logic of such a solution lies in the reasoning that the speeches in favour of or against the motion constitute the beginning of the process of decision-making and observers are not entitled to participate in that process.[37] Similar solutions have been adopted in all controversial rules mentioned above.[38]

Another controversial question connected with the rights of observers blocked the work of the first session for one week. It related to the participation of observers in an informal group, whose mandate was to discuss and negotiate the rules of procedure. This controversy has also been resolved by a compromise consisting in the limited participation of observers in the work of that informal group.

How to look at all those controversies? It depends what objectives are to be attained and what are the best methods to attain them. It seems that the great majority would like to induce States which have signed only the Final Act to sign also the Convention, and thus to become members of the Preparatory Commission. Would the equalization of the status of observers with that of members be the best incentive to attract them to sign the Convention?

The question of status of observers lost its significance partially on 9 December, 1984, when the time-limit for signing the Convention elapsed. Many States which did not sign the Convention in Montego Bay appended their signatures later and thus have become members of the Commission. However, the Federal Republic of Germany and the United Kingdom continue to participate in the work of the Commission as observers.

Financing of the Preparatory Commission

Financing of the Preparatory Commission was another controversial issue. The President of the Conference in his note pointed out that

"According to United Nations practice, such expenses are met by a loan provided by the United Nations under arrangements for repayment of the loan by the future organization. These arrangements also require the Secretary-General of the United Nations

[37] The Latin American Group declared in its working paper: "Non-participation of observers in decision-making. [...] It was agreed that the rules of procedure should be so formulated as to ensure respect for the principle that decision-making is limited to the signatories of the Convention. Accordingly, where the rule involves the process of decision-making, the right should be limited to representatives and members [*sic*!] and should not extend to other representatives." (LOS/PCN/WP.9, p. 2).

[38] Cf. rules 22, 23, 24 and 25.

to service the Preparatory Commission. There are also precedents for Government advances to be made against future contributions to the organization where funds are insufficient".

He proposed that the expenses of the Preparatory Commission should be met by a loan.[39]

However, the concept of a loan proposed by President Amerasinghe was rejected by the Group of 77 and the Eastern European (socialist) States. They pointed to the legal as well as practical difficulties involved and argued further that until the Authority is established the United Nations regular budget should finance the Commission. On the other side the Western States were of the opinion that observers or member States of the United Nations who are not signatories of the Convention should not be compelled to contribute to the financing of the Preparatory Commission. The controversy continued for months but finally the approach of the developing and socialist States was adopted. The wording of paragraph 14 of Resolution I reads as follows:

"The expenses of the Commission shall be met from the regular budget of the United Nations, subject to the approval of the General Assembly of the United Nations".

However, the controversy still continues. Notwithstanding the approval given by the General Assembly, the United States of America had been opposing the financing of the Commission from the budget of the United Nations, and declared that it would not contribute to the financing of the Commission.

Functions and Powers of the Commission

The functions of the Commission may be roughly divided into three categories:

1) Procedural and organizational matters of the Preparatory Commission itself;

2) Arrangements for the establishment and the commencement of activities of the Sea-bed Authority and of the Tribunal for the Law of the Sea;

3) All matters connected with the implementation of Resolution II concerning the pioneer investment in the sea-bed activities.

Functions falling within the first two categories are more or less

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[39] "12. The expenses of the Preparatory Commission shall be met a loan provided by the United Natiōns and, for this purpose, the Preparatory Commission shall make the necessary arrangements with the appropriate authorities of the United Nations, including arrangements for the repayment of the loan by the Authority." (PC/2; Off. Rec., vol. 13, p. 94).

normal functions of a preparatory body, though in certain cases decisions taken by the Preparatory Commission will be far more important than those taken by other preparatory bodies for international organizations.

However, the functions of the Commission exercised under Resolution II and its powers resulting therefrom go far beyond the usual practice of preparatory bodies. As will be demonstrated later, the Commission will perform regulatory (legislative) and managerial functions in respect of the international sea-bed area and its resources, which have been recognized by the Convention as the common heritage of mankind.

The different tasks of the Commission resulting from Resolutions I and II should be carried out in a certain sequence dictated by their very nature.

It had been obvious that the Commission had to begin with procedural and organizational questions. In a note prepared by the Secretariat, it was rightly pointed out that.

> "The first task of the Commission is to adopt its own rules of procedure so as to set the stage for consideration of other matters, including the question of the organization of its work. The rules in themselves would reflect some basic organizational decisions which would in turn influence the subsequent organization and programming of work".[40]

The second urgent task of the Commission is the adoption of rules, regulations and procedures which are necessary for the implementation of Resolution II, namely for the receipt, processing and registration of applications for pioneer areas and pioneer investor status. In general, functions of the Commission linked with pioneer investment must have certain priority over those concerning the establishment of the Sea-bed Authority and the Tribunal, since pioneer investors will operate in the period of the functioning of the Preparatory Commission, while the Sea-bed Authority and the Tribunal will begin to carry out their functions when the Commission has practically terminated its activities.

Therefore, at the end of the first session, the Commission decided that

> "consistent with the mandate contained in Resolution II relating to pioneer investment, the elaboration and adoption of rules, regulations and procedures for the implementation of Resolution II shall be considered as a matter of high priority [...] at its next session".[41]

The main protagonist of the expeditious elaboration and adoption of rules and regulations which would enable the Commission to process applications for pioneer investor status was the Soviet Union. The USSR was the first State to declare its intention to apply to the Preparatory Commission on behalf of its enterprise for registration as a pioneer investor.[42]

[40] LOS/PCN/1, para. 3, p. 1.
[41] LOS/PCN/27, para. 2, p. 1.
[42] Cf. LOS/PCN/4.

Now, turning back to the division of functions of the Commission into three categories, it is suggested to analyze them in the above mentioned order.

Procedural and organizational problems of the Commission were as follows: to adopt its own rules of procedure, to take decisions on the structure of the Commission and the establishment of its subsidiary bodies, to elect the Chairman of the Commission and other officers. The Group of socialist States insisted that all those questions should be decided simultaneously and by consensus. This point of view finally prevailed, with one exception; the Chairman was elected at the first part of the first session. At the end of the resumed first session all other questions were settled. Thus the Commission fulfilled its first task and has prepared the procedural and organizational framework for the work on substantive issues.

Now, let us turn to the matters connected with the establishment and the commencement of activities of the Sea-bed Authority and of the Tribunal for the Law of the Sea.

Among the tasks of the Commission, prominent place is occupied by the rule-drafting. In particular the Commission should elaborate:

— draft rules of procedure of the Assembly and of the Council of the Sea-bed Authority (Resolution I, para. 5 (b));[43]

— draft rules, regulations and procedures, as necessary, to enable the Authority to commence its functions, including draft regulations concerning the financial management and the internal administration of the Authority (Resolution I, para. 5 (g)).

The drafts of regulatory acts to be elaborated under para. 5 (g) are denominated as "rules, regulations and procedures". However, in a concrete regulatory act it would be rather difficult, if not impossible, to distinguish which provisions constitute "rules" and which provisions should be called "regulations" or "procedures". Therefore, the three terms in most cases are used together.

They were also used together in Annex III to the Convention, entitled Basic Conditions of Prospecting, Exploration and Exploitation. Article 17 of Annex III, lists the matters on which the Authority should adopt rules, regulations and procedures. They should cover, *inter alia*, administrative procedures relating to prospecting, exploration and exploitation of the mineral resources of the international area, operations in the international area and financial matters. Those rules, regulations and procedures will consititute the so-called "mining code" of the Sea-bed Authority. The draft of that mining code is to be elaborated by the Preparatory Commission.[44]

[43] See LOS/PCN/WP.14, WP.20, WP.20/Rev.1, WP.21, WP.23, WP.25, WP.26.

[44] See LOS/PCN/SCN.3/WP.1, WP.2, WP.2/Add.1, WP.3, WP.3/Add.1, WP.4, WP.5, WP.6.

Obviously, the Commission may adopt only draft rules, regulations and procedures, but in accordance with Article 308, paragraph 4 of the Convention,

"The rules, regulations and procedures drafted by the Preparatory Commission shall apply provisionally pending their formal adoption by the Authority in accordance with Part XI".

The legal meaning of that provision is first of all that rules elaborated by the Commission will be applied by the Authority (by its organs) until it formally adopts its own rules. In certain cases the Authority may easily adopt its own rules and change the draft rules worked out by the Preparatory Commission. Such is for instance the case with rules of procedure of the Assembly and the Council. The Assembly may adopt them by a two-thirds majority of the members present and voting, provided that such majority includes a majority of the members participating in the session,[45] and the Council by a three-fourths majority of the members present and voting with the similar proviso that such majority includes a majority of the members of the Council.[46]

However, it will be very difficult to change the draft rules, regulations and procedures concerning exploration and exploitation of sea-bed resource, that is, the so-called "mining code". Those rules should pass successively through three organs of the Authority, namely the Legal and Technical Commission, the Council and the Assembly. And, most importantly, the Council must adopt them by consensus.[47] Thus every member of the Council has practically the right of veto, and may block the adoption of rules, regulations and procedures, perpetuating in such a way the "provisional" application of draft rules worked out by the Preparatory Commission.

The foregoing analysis demonstrates how extensive are the powers of the Commission. In the sphere of law-making, its powers are greater than those of the majority of international organizations. Moreover, the legislative acts of the Commission may prejudge for years the conditions of access to and exploration and exploitation of sea-bed resources in the international area.

Other tasks of the Commission to ensure the entry into effective operation without undue delay of the Authority, enumerated in Resolution I, are as follows:

— to prepare the provisional agenda for the first session of the Assembly

[45] Cf. Art. 159, para. 8.
[46] Cf. Art. 161, para. 8 (c) and Art. 162, para. 2(e).
[47] Cf. Art. 162, para. 2(o).

and of the Council and, as appropriate, make recommendations relating to items thereon; (para. 5 (a));

— to make recommendations concerning the budget for the first financial period of the Authority; (para. 5 (c));

— to make recommendations concerning the relationship between the Authority and the United Nations and other international organizations; (para. 5 (d));

— to make recommendations concerning the Secretariat of the Authority; (para. 5 (e));

— to undertake studies, as necessary, concerning the establishment of the headquarters of the Authority, and make recommendations relating thereto: (para. 5 (f)).

Thus the Preparatory Commission has to prepare the first sessions of the Assembly and of the Council and to make studies and recommendations on all important organizational matters with the Authority will be confronted at the beginning of its activities.

Another task of the Commission is to undertake studies and to make recommendations on the problems which would be encountered by developing land-based producer States likely to be most seriously affected by the production of minerals derived from the international area with a view to minimizing their difficulties and helping them to make the necessary economic adjustment, including studies on the establishment of a compensation fund (para. 5 (i)). This special task of the Preparatory Commission has resulted from the provisions of the Convention (in particular Articles 150 and 151) aimed at the protection of developing States being land-based producers of nickel, cobalt and manganese, and to a lesser degree of copper.[48]

And last but not least, the Preparatory Commission has to take measures for the early entry into effective operation of the Enterprise.

These may include: studies on different operational options; project formulation, including feasibility study; staffing requirements, including training; choice of technologies; projection of financial requirements. Furthermore, the function of the Commission is to arrange for exploration of reserved areas (i.e. reserved for the Enterprise), for training of Enterprise personnel and for transfer of technology to the Enterprise.[49]

On all questions discussed until now the Preparatory Commission shall

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[48] Cf. documents of Special Commission 1: LOS/PCN/SCN.1/WP.1, WP.2, WP.2/Add.1, WP.2/Add.2, WP.3, WP.4.

[49] Cf. documents of Special Commission 2: LOS/PCN/SCN.2/WP.1, WP.1/Add.1, WP.2, WP.3, WP.4, WP.5, WP.6 and LOS/PCN/SCN.2/L.1, L.2, L.2/Add.1, L.2/Rev.1, L.3.

prepare the final report for the submission to the Assembly of the Authority at its first session. The importance of the final report for the work of the Authority cannot be overestimated: it will contain directives for the planning of activities of the Authority in the most crucial and decisive period of its existence following entry into force of the Convention on the Law of the Sea.[50]

Now, let us turn to the functions entrusted to the Commission with respect to the establishment of the International Tribunal for the Law on the Sea.

The Commission should prepare a report containing recommendations regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea. That report will be submitted to the meeting of the States Parties to the Convention convened by the Secretary General of the United Nations, in accordance with Annex VI, Article 4. Resolution I does not explain what should be understood by "practical arrangements". It seems, however, that the term has to be interpreted rather broadly, as covering not only strictly "practical arrangements" but also legal arrangements. The Secretariat in its working paper identified, *inter alia*, the following items to be dealt with by the Commission: site, financing, privileges and immunities, staff rules, rules of the Tribunal, meeting of States Parties on the Tribunal.[51]

In accordance with Article 1 of the Statute the seat of the Tribunal shall be in Hamburg in the Federal Republic of Germany. However, that decision was taken subject to the requirement that the host country should have ratified the Convention by the time of its entry into force and should remain a Party to it thereafter.[52]

The present position of the Federal Republic of Germany, which has not signed the Convention, may cause the revision of that decision. Indeed, it would be difficult to make practical arrangements for the headquarters of the Tribunal and to negotiate a draft headquarters agreement with a State which is not signatory of the Convention and may not reasonably be expected to ratify it by the time of its entry into force.

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[50] It was rightly pointed out by Mati L. Pal: "The Preparatory Commission itself is the most important planning body for the Authority. It is a unique body in that its work goes beyond traditional planning for an international organization.... [...] In fact, the most significant contribution of the Commission to the planning for the Authority will comprise of its rule-drafting work, the work of the two Special Commissions, specifically mentioned in the Resolution I [...] and its implementation of Resolution II governing preparatory investment in pioneer activities relating to polymetallic nodules." (Planning for the International Sea-bed Authority).

[51] LOS/PCN/WP.14, pp. 23—26.

[52] Cf. Off. Rec., vol. 15, p. 176.

Implementation of Resolution II Governing Preparatory Investment in Pioneer Activities

The question of implementation of Resolution II constitutes the most important and a most complex function of the Preparatory Commission. It consist primarily of the setting up and administering of a system for the protection of preparatory investment in pioneer activities relating to manganese nodules and for a smooth transition from the interim arrangements under Resolution II to the permanent system that will govern the exploration and exploitation of mineral resources of the international area after the entry into force of the Convention and the establishment of the Sea-bed Authority.

The practice of the Commission under Resolution II probably will be decisive for the fate of the whole Convention on the Law of the Sea. The Convention cannot be put into operation without Part XI, and Part XI is based on the idea of the common heritage of mankind to be administered by an international machinery, namely by the Sea-Bed Authority. The administration of preparatory investment by the Commission will constitute a test for the viability of the whole international system of exploitation of the sea-bed resources. Activities of the Commission in this respect must constitute an incentive for States, state enterprises and private consortia to invest in sea-bed mining and for States to ratify the Convention. Otherwise, the idea of the common heritage of mankind may be frustrated and never put into operation.

The second task of the Commission under Resolution II is to prepare the early entry into effective operation of the Enterprise — to keep pace with other investors, explorers and exploiters of the international sea-bed area. The developing States have considered the realization of this task of the Commission as being of the greatest importance. However, it will not be possible to achieve this goal without the cooperation of pioneer investors. In accordance with paragraph 12 of Resolution II, they have to carry out exploration in the areas reserved for the Enterprise, provide training for personnel designated by the Commission and perform the obligations prescribed in the Convention relating to transfer of technology. Thus the fate of the Enterprise is closely linked with that of pioneer investors. Resolution II identifies eight potential pioneer investors: four national investors and four multinational consortia.[53] The status of a pioneer investor may also, under certain conditions, be conferred on developing States and entities possessing their nationality. Under the system of limitation of production

[53] For their identity and composition see: Sea-bed Resource Development: Recent Activities of International Consortia (ST/ESA/107 and Add.1).

of minerals from the sea-bed (provided for in Article 151 of the Convention) the eight prospective pioneer investors and the Enterprise will most likely be the only deep sea-bed miners for next decades.

Thus decisions of the Preparatory Commission concerning pioneer investors will prejudge for many years who will have access to the international sea-bed area and on what conditions they will explore and exploit its resources.

It must be stressed that the functions of the Preparatory Commission in relation to pioneer investors go far beyond the usual functions of a preparatory body of an international organization; even more: in this field the Commission will act as an interim Sea-bed Authority, and since the functions and powers of the Sea-bed Authority exceed those of the majority of other international organizations, having in principle only co-ordinating powers, similarly the functions and powers of the Preparatory Commission will exceed their functions.[54]

In accordance with Article 157 of the Convention, the Authority organizes and controls activities in the international area, with a view to administering its resources. The Preparatory Commission will perform similar functions in the interim period, that is, until the entry into force of the Convention.[55] Under Resolution II, the Commission will have also broad regulatory powers.

In this connection it is worth recalling that Resolution II is not self-executing. On the contrary, to make it operational, the Preparatory Commission has to adopt rules, regulations and procedures concerning, *inter alia*, submission of applications for registration as pioneer investors, registration of pioneer investors, allocation of pioneer areas, relinquishment of portions of pioneer areas, monitoring of pioneer activities by the Preparatory Commission, monitoring of the status of each pioneer investor and financial matters, including payment of application fees and determination of the amount of periodic expenditures to be incurred by investors with respect to the allocated pioneer areas. Of course, rules, regulations and procedures concerning the submission of applications, their processing and registration as pioneer investors are needed most urgently. Without them the Commission cannot "begin to function" in the meaning of paragraph 2. of Resolution II, that is, cannot perform its functions in respect of pioneer investors: the Commission cannot consider and register applications for the status of pioneer investor without rules, regulations and procedures.

[54] Cf. W. GÓRALCZYK, *The International Sea-bed Authority*, "Polish Yearbook of International Law", 1983, pp. 77—93.

[55] During the pre-convention period pioneer investors are confined to prospecting and exploration for polymetallic nodules in an allocated area; commercial exploitation is excluded until the Convention enters into force.

At its 5th plenary meeting on 8 September, 1983, the Preparatory Commission adopted on the suggestion of the Chairman the Procedures and Guidelines for Registration of Pioneer Investors under Resolution II.[56] However, the document needed further elaboration and it was decided that that question should be considered as a matter of high priority. As the basis of its work the Commission had before its working documents prepared by the Secretariat (draft rules for the registration of pioneer investors and draft rules on confidentiality of data and information),[57] two working papers[58] and suggestions by the Chairman of the Preparatory Commission on certain rules.[59] By the end of the third session certain issues still remained unresolved, among them the issue of confidentiality and that of the group of technical experts which would help the Commission to examine applications. Thus the Commission was not yet ready to "begin to function" under paragraph 2 of Resolution II and to register the first pioneer investors.

There is, however, another precondition for the registration of pioneer investors. In accordance with paragraph 5 (a) of Resolution II any State, before making application to the Commission under paragraph 2, shall ensure that areas in respect of which applications are made doo not overlap one another or areas previously allocated as pioneer areas. The States concerned should keep the Commission currently and fully informed of any efforts to resolve conflicts with respect to overlapping claims and of the results thereof.

There are, in principle,[60] eight potential pioneer investors: four States enumerated in Resolution II or entities having their nationality or effectively controlled by them and four multinational consortia identified in the document: Sea-bed Mineral Resources Development: Recent Activities of the International Consortia (ST/ESA/107 and Add. 1).

Until now four States have submitted applications for registration, namely on 20 July, 1983 the Soviet Union on behalf of the Soviet enterprise "Southern Production Association for Marine Geological Operations"

[56] See LOS/PCN/27.

[57] LOS/PCN/WP.16 and LOS/PCN/WP.16/Rev.1.

[58] LOS/PCN/WP.18 submitted by Belgium, France, Federal Republic of Germany, Italy, Japan, the Netherlands and the United Kingdom and LOS/PCN/WP.19 submitted by Bulgaria, German Democratic Republic, Hungary, Poland and the USSR.

[59] LOS/PCN/WP.24.

[60] Under para. 1 (a) (iii) also developing States which signed the Convention or entities having their nationality or effectively controlled by them, under certain conditions, may be registered as pioneer investors. A request was also made for an additional mine site for the Eastern European (socialist) States (Cf. LOS/PCN/L.19, p. 8).

("Yuzhmorgeologiya"),[61] on 12 January, 1984 India,[62] on 21 August, 1984 Japan on behalf of the Japanese enterprise "Deep Ocean Resources Development Co., Ltd."[63] and on 22 August, 1984 France on behalf of "Associations française pour l'etude et la recherche des nodules (AFERNOD)".[64]

On the other hand, the four consortia with an important share of participation of American capital have not shown any intention to apply to the Preparatory Commission for registration as pioneer investors. Instead, they have based their activities on unilateral legislation and on the Provisional Understanding regarding Deep Sea-bed Matters signed at Geneva on 3 August, 1984 by the United States of America, the United Kingdom, the Federal Republic of Germany, Italy, Belgium, France, Japan and the Netherlands.[65] The Understanding was drawn up on the initiative of the United States and its real aim has been to bypass the Convention and the international system of preparatory investment protection and to establish an alternative règime of mutual recognition of claims to mine sites in the international sea-bed area. The participation of Japan and France in the Provisional Understanding has seriously complicated the resolution of conflicts with respect to overlapping claims.

Four international consortia as well as the French national enterprise "AFERNOD" and Japanese national enterprise "DORD" negotiated and reached in 1983 "Agreements for voluntary conflict resolution". Only after that were France and Japan ready to negotiate on conflict resolution with the Soviet Union within the framework of Resolution II.

After the long preliminary negotiations conducted in 1984 during the summer session, with the help of the Chairman of the Preparatory Commission Mr. Joseph Warioba, an understanding was achieved amongst the parties concerned (i.e. France, India, Japan and the Soviet Union). The understanding contained principles of the resolution of conflicts among applicants as well as a procedure for conflict resolution.[66] The understanding fixed 4 March, 1985 as a time-limit for the completion of negotiations.

In the first stage of negotiations it was discovered that overlaps did exist between the application areas of Japan and the Soviet Union and between those of France and the Soviet Union. In the case of India, there was no overlap in the area identified as its application area. The

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[61] LOS/PCN/30.

[62] LOS/PCN/32.

[63] LOS/PCN/50.

[64] LOS/PCN/51.

[65] See the letter of the Permanent Mission of Japan to the United Nations, dated 3 August, 1984.

[66] Cf. LOS/PCN/L.8.

three States having overlaps agreed to underake further consultations.[67]

By letter dated 28 February, 1985, France, Japan and the Soviet Union informed the Commission that

> "The French and Soviet delegations were not able to settle their conflict [...] due to the magnitude of the overlapping ascertained. [...] The conflict concerning the overlapping between the Japanese and Soviet application areas has been provisionally solved during the negotiations. This solution will be finalized simultaneously with, and depending on, the outcome of the solution of the French-Soviet conflict".[68]

During the spring session of the Commission in 1985, further consultations and negotiations were conducted with the participation of the Chairman of the Commission. In his statement made on 3 April, 1985, the Chairman informed the Commission:

> "It appears to me that more time is required for consideration and reflection before a solution can be finally arrived at".[69]

Thus, the Preparatory Commission could not yet begin to perform its executive functions resulting from Resolution II. Let us try to identify them.

The Commission will:

— receive applications for registration as pioneer investor;

— examine applications;

— decide to register the applicant as a pioneer investor;

— designate the part of the pioneer area which is to be reserved for the conduct of activities by the Enterprise and allocate the other part of the area to the pioneer investor;

— collect fees paid by pioneer investors;

— fix the amount of periodic expenditures the pioneer investor has to incur;

—monitor activities of pioneer investors; their compliance with the Convention, Resolution II, and rules, regulations and procedures adopted by the Commission;

— monitor the relinquishment by pioneer investors of portions of the pioneer areas (to revert to the international area);

— provide pioneer investors with certificates of compliance with the provisions of Resolution II.

The above, not comprehensive, enumeration of functions of the Preparatory Commission confirms that the mandate of the Commission is much broader than that of other preparatory bodies for international organizations and even broader than mandates of the majority of such organizations.

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[67] Cf. LOS/PCN/L.19, p. 7.

[68] LOS/PCN/56.

[69] LOS/PCN/L.19, p. 7.

Structure of the Commission. Officers

One of the first tasks of the Preparatory Commission was to take a decision on its own structure; to establish subsidiary bodies and to allocate to each of them concrete issues, that is to define their mandates. The decision had to be taken in conformity with the relevant provisions of Resolution I (in particular paras. 7, 8 and 9) and should assure the most adequate structure of the Commission for the effective performance of its broad powers and functions.

Moreover, the adopted solution should satisfy the interests and political aspirations of different States and groups of States. Indeed, the question of the structure of the Commission was closely interrelated with the question of election of officers. Different proposals concerning, for instance, the number of subsidiary bodies to be set up were to a great degree dictated by considerations connected with the distribution of posts in the bureaux of those bodies.

In accordance with the provisions of Resolution I, the Preparatory Commission may, in principle, establish such subsidiary bodies as it considers necessary for the exercise of its functions (para. 7). However, Resolution I obliges the Commission to establish two "special commissions": the special commission for the Enterprise and to entrust to this special commission the functions referred to in paragraph 12 of Resolution II, that is, to take measures necessary for the early entry into effective operation of the Enterprise (para. 8); and the special commission on the problems of developing land-based producer States (para. 9). Thus, the Preparatory Commission, in structuring its subsidiary bodies, has been to some degree bound by the provisions of paras. 8 and 9. Two subsidiary bodies mentioned in those paragraphs had to be established and to be called "special commissions". It was also evident, though Resolution I has been silent on this question, that a third special commission should be established for the International Tribunal for the Law of the Sea.

However, other questions, namely the total number of special commissions, the allocation of issues between the Plenary and subsidiary bodies and the functions of governing bodies, have not been so clear.

The Eastern European (socialist) Group proposed the following solution: to establish four subsidiary bodies (special commissions) enjoing equal status; the Preparatory Commission and the special commissions shall be headed by bureaux, consisting of the Chairman and four Vice-Chairmen, elected in conformity with the principle of equal representation of the regional groups; all members of these governing bodies (25 persons, i.e. 5 persons from each regional group) shall constitute a General Committee of the Preparatory Commission. With regard to the mandates of special commissions, the Eastern European Group proposed the same allocation of issues to three special commissions, as was mentioned above. It resulted from Resolution I and from the general agreement that one commission should deal with the problems of the Tribunal. The fourth commission should take up the question of drafting of rules, regulations and procedures concerning activities in the international area (the so-called mining code) as well as rules, regulations and procedures for the exercise by the Preparatory Commission of its powers and functions under Resolution II. The peculiarity of the Eastern European Group proposal was the idea to entrust the Bureau of the Preparatory Commission (composed of five persons — one from each regional group) with the exercise of the executive functions assigned to the Preparatory Commission under Resolution II; all executive decisions should be taken by consensus.[70]

The Chinese delegation also proposed the establishment of four special commissions; however, its suggested that members of the General Committee should be selected in accordance with the principle of "equitable geographical distribution". The principle of equitable geographical distribution amounts to the election of a majority of developing States.[71]

The Group of Western European and other States, similarly to the socialist Group, suggested the selection of officers in accordance with the principle of regional parity. Western States proposed the establishment of five working groups (special commissions).[72] The Asian Group also favoured the establishment of five special commissions.[73]

The Group of 77 as a whole, for obvious reasons, was against the principle of regional parity in the elections of officers; instead the Group advocated equitable geographical representation. The most controversial question was — which body should be entrusted with matters pertaining to pioneer investors. Within the Group of 77 two views were expressed: either those matters should be dealt with by the Plenary or by a subsidiary organ chaired by a member of the Group of 77.

After long negotiations conducted under the direction of Mr. Warioba, Chairman of the Preparatory Commission, a compromise formula was worked out and on 8 September, 1983 the decision was taken by consensus.[74]

The Preparatory Commission consists of the Plenary, as the principal organ, and four special commissions of equal status, as its main organs. The special commisions are as follows:

— Special Commission 1 on the problems of developing land-based

[70] Cf. LOS/PCN/WP.2.
[71] Cf. LOS/PCN/WP.4.
[72] Cf. LOS/PCN/WP.6.
[73] Cf. LOS/PCN/WP.7.
[74] Cf. LOS/PCN/27. annex I.

producer States; this commission has been entrusted with the functions referred to in paras. 5 (i) and 9 of Resolution I.

— Special Commission 2 for the Enterprise; entrusted with functions referred to in paragraph 8 of Resolution I and paragraph 12 of Resolution II.

— Special Commission 3 for the preparation of rules, regulations and procedures for the exploration and exploitation of the Area (sea-bed mining code) (Resolution I, para. 5 (g)).

— Special Commission 4 for the Tribunal (Resolution I, para. 10).

As to the composition of the special commissions, it had been unanimously felt that they should be composed of all members of the Preparatory Commission and such was the final decision.

The Plenary has been entrusted, *inter alia*, with the following functions:

— the preparation of rules, regulations and procedures on the administrative, financial and budgetary matters of the Authority (para. 5 (g) of Resolution I);

— the implementation of Resolution II (para. 5 (h) of Resolution I) — with the exception of executive functions entrusted to the General Committee;

— the preparation, consideration and adoption of the final report for the presentation to the first session of the Assembly of the Sea-bed Authority;

— the presentation of the report on the arrangements for the establishment of the Tribunal.

The Commission also decided to establish a General Committee consisting of the Chairman and other officers of the Plenary (that is, vice-chairmen and Rapporteur) and of officers of special commissions.

As to the number of officers, it was decided that the Preparatory Commission would elect a Chairman, 14 vice-chairmen and a Rapporteur-General, as well as a chairman and four (4) vice-chairmen of each special commission. Thus the General Committee is composed of 36 members.

In the election of officers two principles had to be observed:

1) each regional group should be represented by at least one of its members in each of the organs; 2) in the General Committee as a whole the equitable geographical distribution of membership should be ensured.[75]

The General Committee will act on behalf of the Preparatory Commission as the executive organ for the administration of Resolution II. Certain concrete executive functions of the General Committee have been identified in Procedures and Guildelines for Registration of Pioneer Investors under Resolution II[76] and elaborated in Draft Rules for the Registration of

[75] For the composition of the General Committee see LOS/PCN/INF/2.

[76] Cf. LOS/PCN/27, annex II.

Pioneer Investors.[77] The General Committee will examine the content of applications, designate the part of the application area to be reserved for the Enterprise and will allocate the other part of the application area to the pioneer investor. (Rule 17). It will also take a decision on registration of the pioneer investor (Rule 18).

It seems that the structure of the Preparatory Commission is well-balanced and that it will be adequate to deal with all matters entrusted to the Commission. Certain socialist and Western States considered that the General Committee is too numerous, but the Group of 77 insisted on adequate representation of developing States in that body, which led to the increase in its membership.

Finally, it should be noted that the Preparatory Commission may also establish other subsidiary bodies. At the first session it was decided that the Plenary as well as the special commissions would set up working groups of the whole. At the resumed first session only those working groups were convened.

Decision-making

The decision-making process in international organizations is a very sensitive issue. On the one side there are proponents of the principle "one state one vote" and of taking decisions by a simple or two-thirds majority of votes. For obvious reasons such is the general position of the Group of 77. Owing to the number of its members (not 77 but more than one hundred) the Group of 77 has always at its disposal the majority of votes in the universal international organizations.

On the other side, Western States and socialist States are always in the minority. However, they have their own interests, own ideologies and are not ready to surrender them to the will of the majority. Moreover, in certain cases only the developed States have the means to carry into effect the decisions of international organizations; only they have the funds, technology and know-how.

In defending their interests the developed States have been against the taking of decisions by a simple majority of votes or even by a two-thirds majority of votes. At the Third United Nations Conference on the Law of the Sea, they put forth the idea of weighted votes, of group voting system which would guarantee them real participation in the decision-making process.

How to resolve this controversy? It seems that in the present world all States have to recognize their interrelationship, the interrelationship

[77] See LOS/PCN/WP.16/Rev.1.

of their interests. The only way to ensure international cooperation (and international organizations constitute the institutionalized fora for such cooperation) is to take into account and to weigh the interests and needs of all states and groups of states to arrive at compromise solutions striking a balance between different and often contradictory aspirations and claims. The decision-making process should be inducive to such balanced decisions.

Of course, from this point of view, the best process of decision-making would be to take them by consensus. The Third United Nations Conference on the Law of the Sea worked for many years on the basis of consensus and arrived at mutually agreeable solutions. Only in extreme circumstances, when the United States withdrew its consent to the negotiated texts, did the Conference come to vote.

The voting system adopted for the Sea-bed Authority, generally speaking, guarantees that the interests of the main groups of States will be taken into account. The two main decision-making bodies of the Authority are the Assembly and the Council. In the Assembly, decisions on questions on substance are taken by a two-thirds majority of votes, provided that such majority includes a majority of the members participating in the session. On the other hand, the voting system in the Council is more complex. Certain decisions on questions of substance are taken by a two-thirds majority of members, others are taken by a three-fourths majority, while the most sensitive issues are to be decided by consensus (Art. 161, para. 8). An analysis of the voting system in the Sea-bed Authority demonstrates that nothing can be decided against the will of the developing States, but the position of other groups of States must also, to a reasonable degree, be taken into account.

Now, turning back to the Preparatory Commission. Resolution I did not contain provisions on the decision-making system in the Commission, with one exception. The rules of procedure of the Third United Nations Conference on the Law of the Sea applied *mutatis mutandis* to the adoption of the rules of procedure of the Commission, including the elaboration and adoption of the rules on decison-making. In other words, until the Commission adopted its own rules of procedure, the rules of the Conference applied, but only to the adoption of the Commission's own rules.

At the beginning of the first session, the regional groups presented their general position in respect of the decision-making process in the Preparatory Commission. The Group of Eastern European (socialist) States insisted that all decisions on questions of substance should be taken by consensus.[78] Also the Western States favoured the broadest possible application of the principle of consensus. The Group of 77 proposed that, in principle,

[78] Cf. LOS/PCN/WP.3. Rule 35.

decisions on matters of substance should be taken by a two-thirds majority; however, the Latin American Group and African Group in their working papers recognized that certain categories of matters should be decided by consensus.[79] Such were the initial positions of the regional groups.

In the process of long negotiations a compromise formula has been worked out in which the principle of consensus found a prominent place.[80] The provisions on decision-making are to be found in rules 32 — 36 and 44.

Rules 32 — 36 are applicable to decision-making in the Plenary. Decisions on procedural questions are taken by a majority of the representatives present and voting (Rule 34). The broad range of decisions on substantive matters are to be taken by consensus. In accordance with Rule 35, consensus is required to take decisions on the following matters:

a) All matters which require consensus under the Convention on the Law of the Sea, including decisions requiring consensus under Articles 160, paragraph 2 (e), 161 and 162, and annex IV, Article 11, paragraph 3.

This category comprises, *inter alia*, rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the international area (Art. 162, para. 2 (o) (i)) was well as rules, regulations and procedures relating to prospecting, exploration and exploitation in the international area and the financial management and internal administration of the Authority (Art. 162, para. 2 (o) (ii)). In other words, the elaboration of draft regulatory acts for the Authority should be based on consensus.

b) Rules and procedures for the implementation of Resolution II, and for the establishment of adequate machinery to administer the regime for the protection of pioneer investors.

c) Rules and regulations relating to the exploration and exploitation of the area.

This point might seems superfluous taking into account the content of point (a). However, it may be applicable to rules and regulations relating to the exploration of the area in the interim period, that is before the entry into force of the Convention.

d) The final reports of the Preparatory Commission on all matters within its mandate; provided, however, that in the final part of the period of one year commencing from the date of deposit of the sixtieth instrument of ratification of or accession to the Convention, the rule of a two-thirds majority shall apply for the approval of the reports, if it is not possible to reach consensus.

The *raison d'être* of such a proviso is to avoid the blocking of the

[79] Cf. respectively LOS/PCN/WP.9 and WP.11.

[80] Cf. LOS/PCN/28.

adoption of the final reports and thus to ensure that when the first session of the Assembly of the Authority is convened, it will have the report of the Preparatory Commission as a basis for its work.

e) In cases where financial obligations which are not provided for in the approved budget of the United Nations are imposed on States.

From the enumeration of matters which require consensus, it is evident that the most important decisions of the Preparatory Commission have to be taken by consensus.

Decisions on other substantive matters (i.e. on matters not mentioned in Rule 35), Plenary shall take by a two-thirds majority of the representatives present and voting, provided that such a majority includes at least a majority of the members participating in that session of the Preparatory Commission (Rule 36 (a)). However, paragraph (b) of Rule 36 contains the following provision:

"Before a matter of substance is put to the vote every effort should be made to reach agreement by consensus and no voting shall take place until all efforts at consensus have been exhausted".

Rule 35 bearing on decisions taken by consensus is applicable only to the Plenary, while in special commissions and other subsidiary bodies, formally the principle of consensus is not applicable.

Instead, decisions on matters of substance shall be taken by a two-thirds majority of the representatives present and voting (Rules 44 and 47). The provision contained in rules 44 and 47 constituted a concession made to the developing States. Of course, though legally consensus is not required for decision-making in special commissions, probably in practice the principle of consensus will be adhered to also in those bodies.

In evaluation of the real scope of application of the principle of consensus by the Preparatory Commission, it should be kept in mind that the decisions of the special commission and other subsidiary bodies will be submitted to the Plenary and will need its approval. That means that final decisions will require consensus in accordance with the provisions of Rule 35.

One important question has bot been resolved in the rules of procedure adopted by the Commission at the end of its first session, namely what decision-making system will be applicable to the executive decisions of the General Committee relating to the régime of pioneer activities. This question has been reserved for further consideration and Rule 54 states:

"These rules are without prejudice to other special rules and procedures which may be established by the Preparatory Commission to govern specific substantive matters, including those relating to the implementation of Resolution II [...]"

Concluding the remarks on the decision-making system in the Preparatory Commission, one may express the opinion that the Commission will follow the example of the Third United Nations Conference on the Law of the Sea and will make every effort to take all decisions on questions of substance by consensus. It may be foreseen that the Preparatory Commission will resort to voting only in extreme cases, when a State or States evidently will obstruct the progress of work in the Commission and will be unwiling to conduct serious negotiations aimed at a reasonable compromise.

Character of Decisions of the Preparatory Commission

As has been pointed out, the Commission will adopt a broad range of binding decisions. They will be applicable not only to the internal matters of the Commission, but also will have bearing on the activities of States and other entities in the international area.

Some decisions will have temporary validity (until the entry into force of the Convention and taking by organs of the Sea-bed Authority of decisions superseding those adopted by the Preparatory Commission), while others will be obligatory also after the entry into force of the Convention.

Let us look more closely at the issue of the legal character of decisions taken by the Preparatory Commission. One may distinguish the following categories of decisions of the Commission:[81]

1. Decisions which are immediately binding regarding the internal management of the Preparatory Commission but which, by their nature, have no effect beyond its duration. This category includes all procedural, organizational and administrative matters, such as, for instance, adoption of the rules of procedure, the decision to set up a subsidiary organ, including the definition of its mandate, the decision in respect of the duration and venue of the session, etc.

2. Decisions of a regulatory character and decisions taken in individual cases, which are immediately binding and which will be binding on the Authority in accordance with Article 308, paragraph 5 of the Convention. This category includes all decisions under Resolution II regarding operations under the pioneer régime, such as consideration of applications, registration, allocation of pioneer areas, and so on.

3. Decisions regarding the preparation and adoption of draft rules, regulations and procedures under Resolution I, para. 5 (b) and (g), which will be provisionally binding on the Authority upon entry into force of the Convention in accordance with Article 308, paragraph 4. These draft rules, regulations and procedures will be included in the Final Report of the Preparatory Commission (Resolution I, para. 11). As was pointed out, the reversal of certain categories of them will require the decision of the Council taken by consensus.

[81] This categorization is based on the informal document prepared by the Secretariat of the Preparatory Commission.

4. Decisions involving measures necessary for the early entry into effective operation of the Enterprise, including matters pertaining to exploration of reserved areas, training of personnel, transfer of technology, etc., taken in accordance with Resolution II, paragraph 12. Some of these decisions may be of the same nature as those referred to in category 2 above, and will be binding on the Authority under Article 308, paragraph 5 of the Convention. Certain decisions may involve the adoption by the Preparatory Commission of draft rules, regulations and procedures as under category 3 above, which will be provisionally binding upon the Authority in accordance with Article 308, paragraph 4 of the Convention. Still other decisions may have the character of recommendations to be submitted to the Authority.

5. Decisions regarding recommendations and studies of the Preparatory Commission which will be submitted to the Authority. This includes matters under Resolution I, para. 5 (a), (c), (d), (e), (f) and (i). These matters will also be included in the Final Report.

6. Decisions regarding recommendations concerning the International Tribunal for the Law of the Sea, which will be included in a separate report to be submitted to a meeting of States Parties to the Convention convened in accordance with Annex VI, Article 4. This encompasses all matters under paragraph 10 of Resolution I.

The enumeration of different categories of decisions to be taken by the Preparatory Commission demonstrates once more the scope of its functions and powers, going far beyond the usual functions and powers of preparatory bodies of international organizations.

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Throughout this paper, the uniqueness of the Preparatory Commission for the Sea-bed Authority and for the International Tribunal for the Law of the Sea and the great importance of tasks with which it has been entrusted has been many times underlined. However, the work of the Preparatory Commission has no value in itself but only as a preparatory activity for the entry into force of the Convention on the Law of the Sea and the establishment of an international régime and machinery for the management of the common heritage of mankind. In such a way, all assertions underlining the importance of the establishment and activities of the Preparatory Commission have a relative value: all depends on the entry into force of the Convention, on its wide acceptance by all groups of States, and on the universality of the international régime for deep sea-bed mining.

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The Exclusive Economic Zone

by JANUSZ SYMONIDES

1. The Origin of the Concept of the Economic Zone

The concept of the economic zone, which has led to farreaching changes in the law of the sea, and which is sometimes desribed as "revolutionary", appeared in inter-State relations at the beginning of the 1970s. The term "economic zone" was first formulated at the XIIth Session of the 1971 Afro-Asian Legal Consultative Committee in Colombo.[1]

A year later, in June 1972, the concept was defined with more clarity at the African States Regional Seminar at Yaoundé. The African States stated thereat that they had the right to establish beyond the limits of the territorial sea an economic zone, over which they would exercise exclusive jurisdiction for the purpose of control, regulation and exploitation of the living resources of the sea. Such a zone — they maintained — would not infringe the freedom of the navigation, and overflight, and of the laying of submarine cables and pipelines. The respective document of the Seminar stressed that the exploitation of the zone would be open both to land-locked and semi-land-locked African States.[2]

In May 1973, the Organization of African Unity issued a Declaration which recognized the rights of coastal States of establishing a 200 mile exclusive economic zone in which they would exercise permanent sovereignty over all living and mineral resources, and manage the zone without interfering with other lawful use of the sea, corresponding to the freedom of navigation, and overflight, and of the laying of cables and pipelines. Moreover, the Declaration stated that scientific research and the control of pollution

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[1] *Asian-African Consultative Committee, Report of the Twelfth Session held in Colombo 18th to 27th January, 1971*, p. 242. The term was first used by the delegate of Kenya and reporter of the subcommittee for the law of the sea, Pinto, who in his report stated that one of the basic questions discussed in the Committee had been the right of the coastal State to "a zone of exclusive economic jurisdiction" on the waters adjacent to its territorial sea.

[2] *Conclusion of the General Report of the African States Regional Seminar on the Law of the Sea, held in Yaounda from 20 to 30 June, 1972.* Doc. A/AC. 138/79 of 21 July, 1972, A/8721, pp. 73—76.

should be subordinated to the jurisdiction of coastal States. It also reiterated the right of land-locked and other disadvantaged States to participate in the exploitation of the living resources of adjacent zones on a par with the nationals of coastal States on the basis of African solidarity and such regional and bilateral agreements that might be concluded.[3]

As to the activities of the United Nations it should be noted that the Resolution 2750 C/XXV of the UN General Assembly of 17 December, 1970 on convening in 1973 a Conference on the Law of the Sea, while enumerating the problems which should be dealt with by the future Conference, did not mention among them economic zones. This question was first and formally put forward in the Sea-Bed Committee in 1971 when a group of 32 Asian and African countries submitted a working paper on a comprehensive list of problems of the law of the sea pursuant to the Resolution 2750 C/XXV of the UN General Assembly.[4] During the work of the Committee, in the period of 1971—1973. a document on the economic zone was submitted for the first time by Kenya on 7 August, 1972,[5] which was subsequently replaced by an almost indentical proposal of 14 African States, submitted on 16 July, 1973.[6] All these proposals formulated the right of establishing a 200-mile economic zone beyond the teritorial sea, in which the coastal States would exercise sovereignty over renewable and non-renewable natural resources. They also pointed to the rights and interests of developing, land-locked, and geographically disadvantaged States therein. Also Australia and China, as well as Norway and Pakistan submitted documents envisaging the right to an economic zone.[7] But it was the position of the majority of developing countries that led the Sea-bed Committee to include in the agenda of the Third Conference the question of economic zones.

The opinion that it was the African, or rather Afro-Asian, States that had been the actual sponsors of the concept of the economic zone did not imply calling in question the role played by the Latin American countries, and especially that of the Caribbean States, in working out this concept. On the other hand, the belief frequently voiced in the literature that the concept of the economic zone can be directly traced

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[3] *Organization of African Unity, Declaration on the Issues of the Law of the Sea,* Doc. A/AC, 138/89.

[4] Doc. A/AC. 138/58.

[5] Doc. A/AC. 138/SC, II/L. 10.

[6] Doc. A/AC. 138/SC. II/L. 40. The proposal was sponsored by Algeria, Cameroun, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Tunisia. They were joined by Zaire as the 15th State.

[7] Doc. A/AC. 138/SC. II/L. 34, A/AC. 138/SC. II/L. 36, A/AC. 138/SC. II/L. 52, correspondingly.

to Latin-American claims to a 200-mile territorial sea is a far-flung simplification, since it is probably only the 200-mile breadth of the economic zone that can be ascribed to these claims.[8] Undoubtedly, much greater impact had been exerted by the concept of the patrimonial sea formulated in the Declaration of Santo Domingo, approved by the Conference of the Caribbean States.[9] With all their convergent or even identical elements, there are rather essential differences between both concepts. Thus, for instance, the Latin American countries did not envisage any right in respect of the access of land-locked and geographically disadvantaged States to the natural resources, and put a lesser stress on the economic and profit-oriented character of the zone. Also the term "patrimonial" unavoidably suggested the acquisition of property rights to the zone. In spite of these rather important differencies, revealed by a number of documents and statements, both proposals had been treated interchangeably, and that undoubtedly made it easier for the Latin American States to express their support for the concept of the economic zone.

The right of coastal States to establish economic zones was — unconditionally or conditionally — recognized by the majority of the participants in the Third Conference already at the Caracas Session in 1974. The only State which raised a strong objection to it was Belgium.[10] Although a group of land-locked and geographically disadvantaged States did not use, in a document sumbitted by them,[11] the term "exclusive economic zone", did not indicate its breadth, or mention sovereign rights, it nevertheless recognized the title of coastal States to establish economic zones for the purpose of research and exploitation of their living and mineral resources, provided that the right to participate in research and the exploitation of living resources on equal and non-discriminatory terms has been granted. The socialist States stressed that they were ready to accept the establishment

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[8] Rather claims to 200 mile maritime zone, which had been laid by Chile and Peru in 1947, were more closely linked with the economic zone. Declaration of these States, and also the claims of Costa Rica (1949), Ecuador (1950 and 1955) and Honduras (1951) envisaged the establishment of protection and control zones, provided that they would not infringe the freedom of navigation.

[9] *Declaration of Santo Domingo approved by the Meeting of Ministers of the Specialized Conference of the Carribean Countries on the Problems of the Sea, held on 7 June, 1972.* Doc. A/AC. 138/80. The Declaration was signed by the following (ten) States: Colombia, Costa Rica, Dominican Republic, Haiti, Honduras, Guatemala, Mexico, Nicaragua, Trinidad and Tobago, and Venezuela. However, Barbados, Guyana, Jamaica, Panama and El Salvador did not sign it, though they had participated in the Conference. The concept of the patrimonial sea had emerged earlier, formulated by Vargas Carreno.

[10] Cf. Van der Essen's statement. *Third United Nations Conference on the Law of the Sea, Official Records*, vol. 1, p. 146.

[11] Doc. A/CONF. 62/C. 2/L. 39 submitted on 5 August, 1974.

of economic zones, provided that mutually acceptable decisions (in the framework of a package deal) were taken in respect of other questions of the law of the sea, such as: 12-mile breadth of the territorial sea, freedom of navigation and scientific research work, and the determination of the outer limits of the continental shelf.[12] Also the developed States, such as the FRG, France, Japan and the United States, formulated certain conditions under which they would be inclined to grant their support for the concept of the economic zone in the framework of a more comprehensive package-deal solution.

A wide support that had been given to the right of establishing economic zones had undoubtedly led to a situation in which, while by the start of the Third Conference (1973) there had been practically no economic zone in existence, Bangladesh first established an economic zone already in 1974, inducing thus other coastal States to follow suit.

In justifying claims to the economic zone, the whole range of arguments came into play: from indicating the necessity of preserving the living resources from over-exploitation to stressing their importance to the national economies of coastal States, and to arguing that the existing freedom-of-the-sea principle was inequitable since the developing States cannot, for lack of means, fully utilize it. It was also noted that the exercise of sovereign rights beyond the limits of the territorial sea was not an absolute novelty in the law of the sea, since it had been already recognized in respect of the continental shelf, while the special interests of coastal States as to the protection and utilization of living resources in the zone adjacent to the territorial sea had been recognized during the 1958 Geneva Conference.

Inasmuch as the very right of establishing the economic zone had been recognized relatively soon, the discussion concerning its legal substance as well as the scope of rights and duties of coastal States, and of third States, had been a protracted one, and the basic compromise had been achieved only after several years of negotiations. What decided about the outcome of these negotiations was the wareness of the far-reaching consequences and changes which this concept — according to its final shape — would introduce into the law of the sea.

2. Legal Substance of the Exclusive Economic Zone

Article 55 of the Convention, adopted after protracted and difficult negotiations, stipulates that the exclusive economic zone is an area situated

[12] Cf. a draft of articles concerning the economic zone, submitted by Bulgaria, Byelorussian SSR, GDR, Poland, Ukrainian SSR and USSR. Doc. A/CONF. 62/C. 2/L. 38. The concept of the economic zone was also endorsed by Chairman of the Polish Delegation, S. Trepczyński, in his statement at the Plenary Session of the Conference.

beyond the territorial sea and adjacent thereto. It is subject to a specific legal régime, according to which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the Convention. Considering that from the very beginning of the Third Conference there existed three basic points of view on the 200-mile zone — the first recognizing it as a territorial sea,[13] the second — as an area of a special character (*sui generis* area), and the third — as part of the high seas — we may reach the conclusion that Article 55 consitutes a victory of the intermediate conception, distinguishing the economic zone both from the territorial sea and the high seas. In fact, however, the accepeted solution, if we also take into account the provisions of Articles 58 and 86, is a compromise hammered out between the States recognizing the economic zone as a *sui generis* area and those recognizing it as part of the high seas. The efforts of a number of maritime States, including the socialist, land-locked and geographically disadvantaged ones, to achieve the recognition of the economic zone as part of the high seas resulted primarily from the desire that the so-called communication freedoms of the high seas should be maintained, and that the gradual transformation of the high seas into territorial seas should be avoided. Although almost all the proposals concerning the economic zone and submitted to the Caracas Session demanded that the freedom of navigation and overflight, and of the laying of cables and pipelines should be maintained, there were still doubts of whether these freedoms, as to their scope and "quality", were similar to those that were binding on the high seas. These doubts, however, were dissipated neither by the Informal Single Negotiating Text (ISNT) nor by the Revised Single Negotiating Text (RSNT), and the more so, since the article defining the high seas had excluded the economic zone therefrom.

A group of coastal States, formed at the IV Session, with highly active Canada, Iceland, Kenya, Mexico, Norway, Peru and Tanzania, took the stand that, since they would anyway possess sovereign rights over the economic zone in respect of the exploitation of natural resources, the economic zone may not necessarily be regarded as part of the high seas, but should be treated as a *sui generis* area, being neither the territorial sea nor the high seas. A similar point of view was expressed in the Introduction to the Revised Single Negotiating Text by the Chairman of the II Committee, A. Aguilar.[14]

[13] Such standpoint was taken, frequently without much consistence, by some Latin American States, such as Brazil, Ecuador, Panama, Peru, Uruguay.

[14] Doc. A/CONF. 62/WP. 8/Rev. 1. Part II. Revised Single Negotiating Text of 6 May, 1976. He stated in item 17 of his Introduction: "Nor is there any doubt that the exclusive economic zone is neither the high seas nor the territorial sea. It is a zone *sui generis*."

In the ensuing discussion, the supporters of keeping future economic zones within the high seas or — in other words — of retaining the freedom of the high seas in economic zones, submitted extensive and convincing argumentation for such a solution. First of all, they called attention to the fact that the key premise of the concept of *sui generis* area, according to which the exercise of certain rights and jurisdiction was supposedly incompatible with the legal status of the high seas, was questionable. For the international law of the sea encompasses similar institutions as, for instance, the high-sea contiguous zone which, in spite of certain strictly defined competences exercised by the coastal State therein, remains part of the high seas. Article 24 of the Ist Geneva Convention of 1958 leaves no room for doubt in this respect.[15] Moreover, it was indicated that the basic legal elements of the high seas status (such as the inappropriateness of the high seas and the binding, though modified, freedom of the high seas principle) were still obligatory in the economic zone, while the preservation of the three freedoms of the high seas, and especially that of navigation, was in the interest of the whole international community.

The attempt to qualify the status of the economic zone as a *sui generis* area was also questioned in view of the fact that international law does not recognize any intermediate category of the sea waters which are neither under the sovereignty of the coastal State, nor part of the high seas. The contention that the economic zone would acquire a *sui generis* legal character was not an attempt at positive defining it, but at its negative exclusion, an indication what it is not.[16] Also the negative consequences of recognizing

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[15] It states: "1. *In a zone of the high seas contigous to its territorial sea* [italics — *J.S.*] the coastal State may exercise the control necessary to:

a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

b) punish infringement of the above laws and regulations committed within its territory or territorial rea. A similar institutions are, *mutatis mutandis*, the high sea zones with their exclusive fishing rights or the protection zones of the biological resources of the sea.

[16] Argumentation for recognizing the economic zone as the high seas has been widely presented in the Polish literature. Cf. W. GÓRALCZYK, *Rozszerzenie władzy państw nadbrzeżnych na obszary morskie* [*The Expansion of the Jurisdiction of Coastal States over Maritime Areas*], in: *Aktualne problemy prawa morza* [*Topical Problems of the Law of the Sea*], Gdańsk 1976, pp. 80—82; Z. KNYPL, *Dostęp państw o niekorzystnym położeniu geograficznym do stref ekonomicznych państw nadbrzeżnych* [*Access of Geographically Disadvantaged States to Economic Zones of Coastal States*], Gdańsk 1981, pp. 8—12: B. KWIATKOWSKA-CZECHOWSKA, *Morska strefa ekonomiczna* [*The Maritime Economic Zone*], "Przegląd Stosunków Międzynarodowych", 1979, No. 6, pp. 22—26; J. SYMONIDES, *Morska strefa ekonomiczna* [*The Maritime Economic Zone*], "Sprawy Międzynarodowe", 1976, No. 12, pp. 10—14. From among non-Polish publications we may indicate, for instance, B. H. OXMAN, *The*

the economic zone as a *sui generis* area were indicated, and that was quite obvious in relation to the so-called residual rights, that is, to situations when a conflict of interests would arise between the coastal State and any other State or States, while no convention had conferred rights of jurisdiction on the coastal State. Article 59 of the Convention explains that such a conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the importance of the interests involved to the parties as well as those of the international community as a whole. It is doubtful whether the indication embodied in this Article supplies a reliable basis for resolving conflicts of this kind. Contrariwise, such doubts would not arise if the economic zone was recognized as part of the high seas.

Attempts undertaken at the Vth Session by a group of land-locked and geographically disadvantaged States to reach a compromise resulted in failure. On the other hand, the proposal submitted by the United Arab Emirates, demanding the introduction of a distinct stipulation, namely that freedoms enjoyed in the economic zone were the same as those enjoyed in the high seas, provoked a lively discussion. The coastal States expressed their willingness to discuss it, provided that other Articles, and particularly the definition of the high seas, excluding the economic zone therefrom, would remain unaltered. A compromise was finally achieved at the VIth Session as a result of the work of an informal group comprising 14 States. The results were set out by the reporters — Mexico and Norway. On the one hand, the proposed text endorsed the view that the economic zone should be recognized as a *sui generis* area, being neither part of the territorial sea nor part of the high seas, and, on the other, it introduced a firm assertion that the communication freedoms binding in the economic zone were the high seas freedoms. This solution was agreed on by the majority of States, with reservations of the socialist States which consequently opposed the recognition of the economic zone as a *sui generis* area. The proposed amendments and additions were incorporated in the Composite Negotiating Text of 1977.[17]

In the end, this compromise was reiterated in Articles 55, 58 and 86 of the Convention without any alterations. Thus the assertion that the economic

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Third United Nations Conference on the Law of the Sea: The 1977 New York Session, "American Journal of International Law", 1978, No. 1, pp. 67—71; M. SCERNI, *La zone économique exclusive: son importance, sa nature juridique et les problèmes principaux y relatifs*, "Thesaurus Acroasium", vol. 7, The Law of the Sea, p. 168 ff; J. P. QUENEUDEC, *Un problème en suspense: la nature de la zone économique*, "Revue Iranienne des Relation Internationales", 1975—1976, No. 5—6, pp. 39—52.

[17] Doc. A/CONF. 62/WP. 10.

zone enjoys a specific legal régime, and that pursuant to Article 86 it is not part of the high seas, is accompanied by the explanation that the communication freedoms enumerated in Article 58 are identical with those formulated in Article 87 of Part VII of the Convention on the high seas, and a further explanation contained in Article 86 that the exclusion of the economic zone from the high seas does not entail any abridgement of the freedoms enjoyed by all States in that zone.

In conclusion, it may be said that the specificity of the economic zone régime consists, on the one hand, in exercising within it the sovereign rights of the coastal State, and, on the other. in a parallel existence of the rights of third States, ensuing particularly from the fact that pursuant to Article 58 the economic zone is functionally, within the scope of communication freedoms, an area where the principle of the freedom of high seas is obligatory, and where the provisions on the high seas, as formulated in Articles 88—115, are to be applied. As a consequence, the provisions on the high seas regulate, and are part and parcel of the legal status of the economic zone.[18]

3. Rights and Duties of the Coastal State in the Economic Zone

From the very beginning of the Third Conference, a rather comprehensive enumeration of the rights and duties of the coastal State, and of third States, in the economic zone constituted an essential part of considerations of how its future legal status was to be shaped. As a consequence, Article 56 of the Convention sets out the rights and jurisdiction of the coastal State in the following way:

"1. In the exclusive economic zone, the coastal State has:

"a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

"b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

[18] A. P. MOVČAN, *Novyj etap v razvitii morskogo prava*, "Sovetskoe Gosudarstvo i Pravo", 1983, No. 2, p. 42, rightly states that the scope and character of the rights of coastal States, and also of the rights and freedoms of all others, has been determined by the provisions of Part V concerning the exclusive economic zone, and in Part VII on the high seas. The provisions of these Parts taken as a whole, have led to the creation of a new institution of the law of the sea — the exclusive economic zone.

(i) the establishment and use of artificial islands, installations and structures;
(ii) marine scientific research;
(iii) the protection and preservation of the marine environment;
"c) other rights and duties provided for in this Convention".

What ensues from the above-quoted formulation is that the coastal State exercises sovereign rights over the resources of the economic zone and its economic utilization, but does not exercise these rights over the zone as such. Only those rights are qualified as sovereign that are related to the conduct of economic activities in the economic zone, in accordance with its purpose and character.[19]

Not all rights and not the whole jurisdiction of the coastal State have been set out in Part V of the Convention, which deals with the exclusive economic zone.[20] Out of the sovereign rights, Part V deals specifically with exploration, conservation and management of living and non-living resources, but in respect of the resources of the sea-bed and its subsoil it refers to the provisions of Part VI of the Convention, devoted to the continental shelf.

Although situated within the 200 mile economic zone, the sea-bed may, from the geomorphological point of view, be described only partially, and not as a whole, as the continental shelf, it nonetheless has this quality within the meaning of Article 76, as in the instance of the western coast States of Latin America.

From among the three kinds of jurisdiction enjoyed by the coastal State, Part V deals only with that exercised over artificial islands, installations and constructions,[21] while the rights of the coastal State in respect of scientific research and the conservation of the marine environment are determined in Parts XI and XII of the Convention.

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[19] The hierarchy of rights was more extended in the first texts of the Conference; apart from the sovereign rights and the problems of jurisdiction, these texts also mentioned exclusive jurisdiction which, pursuant to Article 45 of the ISNT, was to be extended over economic activities aimed at the production of energy from water, currents and winds, and over scientific research. The term "exclusive jurisdictions" was regarded as improper in respect of scientific research, since the accepted régime for that research offers no justification for treating the rights of the coastal State as exclusive. Consequently, the activities aimed at the production of energy were included in the term "sovereign rights".

[20] No part of the Convention contains provisions that would more closely define the rights and duties of the coastal State with respect to the production of energy from water, currents and winds.

[21] Pursuant to Article 60 the coastal State has, in the exclusive economic zone, the exclusive right to construct, and to authorize and regulate the construction, operation and use of a) artificial islands; b) installations and structures for the purposes provided for in Article 56 and other economic purposes; c) installations and structures cohich may interfere with the excercise of the rights of the coastal State in the zone.

As the provisions determining the rights and duties of the coastal State in relation to fisheries constitute, as it were, the gist of its legal status, they require a more careful analysis. According to Article 61, the coastal State has the duty to determine the allowable catch of the living resources in its economic zone. It shall also, taking into account the best scientific evidence available to it, ensure, through proper conservation and management measures, that the maintenance of its living resources is not endangered by overexploitation and, moreover, maintain them at a level which can produce the maximum sustainable yield.[22]

The Convention has established a new and fundamental principle regulating fisheries in the economic zone, namely that of the optimum utilization of living resources. So the coastal State shall determine its capacity to harvest the living resources in its economic zone and in case it cannot harvest the entire allowable catch, it shall give other States access to the thus created surplus. In giving access to other States, the coastal State shall take into account all relevant factors, including, i.a., the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of Articles 69 and 70 concerning the right of access for land-locked and geographically disadvantaged States, the requirements of developing States in the sub-region and region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks. Allowing to harvest surpluses, the coastal State, pursuant to Article 62(4), has the right of licensing, determining the species which may be caught, regulating seasons and areas of fishing, requiring informations and reports, placing observers or trainees on board alien fishing vessels, establishing terms and conditions relating to joint ventures, requiring the transfer of fisheries technology, etc. In the discussion on this Article, it was noted that so widely expanded rights of the coastal State would enable it to discriminate against vessels flying particular flags, or else to restrict access to surplus harvesting.

[22] It is worth while to notice that the provisions of the Convention relating to the allowable catch and the duty to ensure proper management and conservation had been inspired by the proposal of the socialist States, submitted in Caracas. Doc. A/CONF. 62/C. 2/L. 38. Cf. on this matter S. ODA. *Fisheries under the United Nations Convention on the Law of the Sea*, "American Journal of International Law", 1983, No. 4, p. 743. During the Third Conference, a number of delegations, among them also the Polish, proposed that, in asserting their resources, the coastal States take into account the results of research conducted by universal, subregional or regional international organizations. Otherwise, in view of the sometimes occuring lack of scientific and technical facilities or lack of the necessary coordination of estimates concerning bigger areas, the assessment of resources may be subject to even serious errors and inaccuracies.

The Convention also regulates the rights and duties of the coastal State in a few specific situations. Thus, for instance, according to Article 63, where the same stock or stocks of associated species occur within the exclusive economic zone of two or more coastal States, these States shall seek, either directly or through appropiate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks. Moreover, where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks shall seek, either directly or through appropiate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.[23] The same principle of co-operation also applies to highly migratory species.

Also specific rights of the coastal State have been formulated in respect of anadromous stocks and catadromous species.[24] In the first case, States in whose rivers anadromous stocks originate bear a special responsibility. They shall ensure their conservation and determine their total allowable catch. Fisheries for these stocks shall be conducted only within the economic zones. The Convention requires to take account of the interests of the States which are engaged in fisheries of these stocks and in which this provision would result in economic dislocation, as well as of the States participating in measures to renew anadromous stocks.

As to catadromous species, the responsibility for management of these species lies with the State in whose waters they spend the greater part of their life cycle. Harvesting of these species shall be conducted only within the economic zones. In cases where catadromous fish migrate through the exclusive economic zone of another State, the management of such fish shall be regulated by agreement between the States concerned. Article 65 provides that in respect of marine mammals the coastal State or a competent international organization has the right to prohibit, limit or regulate their exploitation more strictly than stipulated in Part V of the Convention. Thus the management principles for the living resources, and especially the principles for the living resources, and especially the principle of their optimum utilization, may not be observed with respect to marine mammals.

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[23] In connection with Article 63, Argentine, with the support of Canada, undertook the attempt at modifying this Article in that she proposed that the coastal State should acquire the right to regulate the catch of a given species in those areas of the high seas that are adjacent to the economic zone. Among others, also Poland pronounced itself against this proposal which had been a successive example of the "national jurisdiction creeping over the sea".

[24] Cf. Articles 66 and 67, correspondingly.

It should be also noted, for the purpose of presenting the rights to the living resources in full, that pursuant to Article 73 the coastal State may take such measures to ensure compliance with its laws and regulations on fisheries as may be necessary, including boarding, inspection, arrest and judicial proceedings.[25]

Provisions concerning fishing activities in the economic zone provide not only rights, but also impose specific duties on coastal States. Inasmuch as the rights are fully guaranteed, there are no efficient means to secure compliance with duties; too frequently, as with the obligation to grant access to the catch surplus, they are formulated in a manner leaving in practice the State concerned with a considerable freedom of action and assessment. For, what other meaning could be ascribed to the stipulation that, in giving access to its economic zone, the coastal State may take into account its national interests.

4. Rights and Duties of Other States in the Exclusive Economic Zone

Although the economic zone has been defined as exclusive, not only the coastal State but also other States have rights thereto. These rights may be divided into two categories: those guaranteed to the whole international community, and those enjoyed only by particular groups of States.

4.1. Freedom of Navigation and Overflight and of the Laying of Cables and Pipelines in the Economic Zone

In the economic zone, conformably to Article 58, all States, both coastal and land-locked, enjoy the freedoms of navigation, overflight and of the laying of submarine cables and pipelines (as referred to in Article 87), and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines. Article 87 also mentions, apart from above-quoted three freedoms, the freedom to construct artificial islands and other installations, and the freedoms of fishing and scientific research. The comission of these

[25] This Article provides that arrested vessels and their crews shall be promptly released upon the posting of reasonable security. Penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

freedoms in Article 58 signifies that they are not binding in the economic zone. The freedom of fishing has been eliminated entirely, and as to the freedom of constructing artificial islands and installations, it has been entirely erased in respect of islands, while the question whether or not other States have, in accordance with Article 60, the right to build installations and constructions for other purposes than economic, but not colliding with the exercise by the coastal State of its rights in the zone, remains still at issue.

As to the freedom of scientific research in the economic zone, Article 246 of the Convention stipulates that, in the exercise of their jurisdiction, coastal States have the right to regulate, authorize and conduct marine scientific research. However, certain restrictions of the freedom of the coastal State in that respect are imposed by the stipulation that, in normal circumstances, coastal States shall grant their consent for marine scientific research in their economic zones if they are planned by other States or competent international organizations for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind.[26]

The question which is not only theoretically but also practically of essential significance concerns the uncertainty whether the freedoms of navigation, overflight and laying of submarine cables and pipelines, which are valid in the economic zone and enjoyed by the whole international community, are as valid in their scope as the freedoms of the high seas, or whether they may be limited by the coastal State. This uncertainty arises especially in the context of Article 58(3) which states that, in exercising their rights and performing their duties in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal

[26] According to Article 246/5/, coastal States may withold their consent to the conduct of marine scientific research if it: a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living: b) involves drillinginto the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment; c) involves the construction, operation or use of artificial islands, installations and structures; and d) is based on inaccurate informations regarding the nature and objective of the research project or if the researching State or competent international organization has outstanding obligations to the coastal State. The Convention also requires that a State intending to undertake scientific research shall, not less than six months in advance of the expected starting date of the research, provide the coastal State with a full description of the research project containing a number of detailed informations. Moreover, States and competent international organizations shall comply with specific conditions to ensure the coastal State, if it so desires, the right to participate or be represented in the research project, to receive preliminary reports, and to be provided with access to all data and samples derived from the research and with assessment of such data, samples and research results.

State and shall comply with the laws and regulations adopted by it. Thus we may ponder on whether the Convention gives priority to the economic interests of the coastal State, and whether it enjoys full fredom in applying laws enacted by it.

The contention that the interests of the coastal State have top priority does not hold water, since — as Article 56(2) stipulates — in exercising its rights and performing its duties in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention. And what is more, Article 60 devoted to artificial island, installations and structures in the exclusive economic zone, explicitly states that

> "Artificial islands, installations and structures and safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation".

Hence this provision explicitly gives top priority to the interests of international navigation.

May navigation in the economic zone be subject to specific and arbitrary limitations on the part the coastal State? The answer is in the negative. For Articles 88 to 115 on the high seas apply to the economic zone, though on the understanding that they are conformable with the provisions on the economic zone. Thus each State, both coastal and land-locked, enjoys the righ of navigation. This refers both to merchant ships and warships possessing the nationality of one subject on conditions fixed by that subject. For warships and non-commercial government ships enjoy complete immunity, that is, are subject to the jurisdiction of the flag State only. They may exercise jurisdiction over vessels flying a foreign flag if there is reasonable ground for suspecting that the vessel in question has committed an act of piracy, is engaged in the slave trade or in unathorized broadcasting, lacks any nationality or — while flying a foreign flag or refusing to show its flag — is of the same nationality as the warship. Also from the point of view of the right of hot pursuit the economic zone is part of the high seas. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State, but may be continued in the economic zone as well as on the high seas. Attempts undertaken by some States to limit the right of hot pursuit were repulsed by the Third Conference.

Certain discretion of the coastal State to limit the freedom of navigation ensues from the provisions of the Convention relating to the conservation of the marine environment, but without giving that State a complete freedom of arbitrary actions. Conformably to Article 211, coastal States establish rules and standards to prevent, reduce and control pollution from vessels, in accordance with the generally accepted international rules and standards. Where coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required in view of the existing oceanographical and ecological conditions, protection of its resources and the particular character of its traffic, the coastal States, after appropiate consultations with States concerned through the competent international organization, may direct a communication to that organization concerning that area and information on necessary reception facilities. Whereupon, within 12 months after receiving such a communication, the organization shall determine whether the conditions in that area correspond to the requirements set out above. If the organization so determines, the coastal States may, for that area, adopt laws and regulations for the purpose of implementing such international rules and standards or navigational practices as may be applicable for special areas. In the light of these requirements, it would be difficult to maintain that the coastal State has a complete freedom of action in establishing special areas which may be justified not only by the interests of that State, but also by those of the whole international community.

The Convention also envisages in Article 234 the right of the coastal State to adopt and enforce laws and regulations for the prevention, reduction and control of the pollution of the marine environment from vessels in ice-covered areas within the limits of the exclusive economic zone, where severe climatic and water conditions create exceptional hazards to navigation, and where the pollution of the marine environment could cause irreversible disturbance of the ecological balance. As a matter of fact, this provision sanctions the practice initiated by Canada already before the establishment of economic zones.

As to the freedom of overflight with respect to the economic zone, the Convention does not invest the coastal State with any special rights to regulate it, but the provisions governing the laying of submarine cables and pipelines on the sea-bed are identical with those relating to the continental shelf. According to Article 79, and without discrimination between the continental shelf situated within the economic zone and beyond its limits, all States are entitled to lay submarine cables and pipelines on the continental shelf. Moreover, subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables and pipelines. The delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of the coastal State.

4.2. The Rights of Land-locked and Geographically Disadvantaged States

Almost identical provisions of Articles 69 and 70 confer on land-locked and geographically disadvantaged States the right to participate, on an equitable basis, in the exploitation of an appropiate part of the surplus of the living resources of the economic zone of coastal States of the same subregion or region. The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements. These shall take into account, i.a.: a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State; b) the extent to which the land-locked or geographically disadvantaged State is participating or is entitled to participate under existing agreements in the exploitation of living resources of the economic zones of other coastal States; c) the extent to which other land-locked and geographically disadvantaged States are participating in the exploitation of a given zone; and d) the nutritional needs of the populations of the respective States. The rights to participate in the exploitation of the surplus of other resources of the economic zone of the developed land-locked and geographically disadvantaged States are restricted to the economic zones of the developed coastal States. The rights granted under Articles 69 and 70 cannot be transferred to third States or their nationals by lease or licence or by establishing joint ventures.

The fight for the right of access of land-locked and geographically disadvantaged States to the exploitation of the living resources of economic zones lasted almost throughout the Third Conference. Although this right had been proclaimed already in the 1970s in African drafts concerning the economic zone, it was questioned at the Conference by a group of territorialists, especially in relation to the geographically disadvantaged States. It was, however, recognized in respect of the land-locked States, though to a far insufficient degree.[27]

The position of the group of land-locked and geographically disadvantaged States in the matter of access had been formulated already at the 1974 Session,[28] and further expanded in subsequent documents and papers worked out at Sessions that followed. It boiled down to the requirement of access to the exploitation of living resources on a non-discriminatory basis and irrespective of the existence of a surplus. This group put also forward a claim to priority of access to resources. Although the question

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[27] Already the Negotiating Text, prepared by Galindo Pohl, granted in its Article 57 the land-locked States the right to participate, on an equitable basis, in the exploitation of the living resources of adjacent coastal States, but limited this right to the surplus only.

[28] Doc. A/CONF. 62/C. 2/L. 39.

of access to the living resources had been recognized as one of the seven key issues on whose solution depended the successful outcome of the Conference, the claims of land-locked and geographically disadvantaged States remained unsatisfied.

Articles 69 and 70 of the Convention represent a compromise achieved as a result of the work of the IVth Negotiating Group, established in 1978 under the chairmanship of Ambassador Nandan. They disregard the position of land-locked and geographically disadvantaged States, since their right of access has been limited to the surplus only; also the rights of these States have no priority to the claims of developing States or States whose economies have suffered detrimental effects resulting from the establishment of economic zones, and whose nationals have habitually fished in the zone. And finally, the right of access has been limited to "the same subregion or region" without a clear definition of those terms. Thus, if we assume that the enclosed and semi-enclosed seas constitute the subregions and regions of the geographically disadvantaged States bordering these seas, there is no chance that these States will find any surplus at all.

Thus, from the point of view of the Polish fishing interests, we may state that neither the provisions of Article 62, nor those of Article 70 protect our interests as a State which has suffered specific damages as a result of the establishment of economic zones, and which belongs to States traditionally fishing in a number of regions, as well as a State of a geographically disadvantaged position.

5. Settling of Disputes Concerning the Excercise by the Coastal State of Its Sovereign Rights in the Economic Zone

In so far as the agreement on compulsory settlement of disputes resulting from infringement in the economic zone of navigation, overflight and of the laying of cables and pipelines, as well as on matters subject to the jurisdiction of coastal States,[29] was relatively easy to achieve, the question of settlement of disputes in matters subject, pursuant to Article

[29] Cf. Article 297 of the Convention. Pursuant to Article 287, the parties concerned may, by means of a written declaration, choose one or more means for the settlement of disputes concerning the interpretation or application of the Convention. The options include: a) International Tribunal of the Law of the Sea; b) International Court of Justice; c) an arbitral tribunal constituted in accordance with Annex VII; d) a special arbitral tribunal constituted in accordance with Annex VIII.

56 of the Convention, to the sovereign rights of coastal States led to protracted controversions at the Third Conference. Also this question was regarded at the VIth Session as one of the seven most important issues on whose settlement the eventual success of the Conference depended.

The basic divergence of viewpoints consisted in whether or not the right of access to the living resources in economic zones was to be guaranteed by a possible recourse to judicial or arbitration proceedings. States interested in access, that is, in long-distance fishery, and the land-locked and geographically disadvantaged States, claimed that without recourse to a binding decision the principle of optimum utilization of the living resources might become a dead letter, since the coastal States could arbitrarily desist from determining their fishing capacity or surplus, preventing thus its harvesting. Also the management and protection of living resources, as was indicated, was not an indifferent matter to the international community which was interested in maintaining their productivity at the highest level. However, the coastal States argued, since their rights to the living resources had been qualified as sovereign, that they could not accept the viewpoint that the exercise of these rights be assessed, and in a binding form at that, by an international court or arbitrary tribunal, considering that this could — through the abuse of law or frequent recourse to binding procedures entailing the peaceful settlement of disputes — prevent them from the effective exercise of rights granted to them by the Convention.

In order to achieve a compromise, a special Negotiating Group had been established at the VIIth Session, under the chairmanship of Ambassador C. Stavropulos. Composed of 36 States, the Group,[30] after intense negotiations also conducted in a more restricted circle, managed to get a "conditional consensus", contingent upon the acceptence of a package deal comprising additionally the question, negotiated in the IVth Group, of the access of land-locked and geographically disadvantaged States to the living resources of the economic zone. The compromise solution consisted in the formula of compulsory conciliation. Thus compulsory, but not binding conciliation was to be applied to three kinds of disputes: a) when the living resources are endangered through insufficient conservation and management measures, b) when the coastal State refuses to determine, at the request of another State, the allowable catch and its harvesting capacity in respect of the stocks which that other State is interested in fishing, and c) when the coastal State has groundlessly refused to allocate to any State the whole or part of the fishing surplus. Since the Vth Negotiating Group had also dealt with the question of the abuse of law, it came forward with

[30] Doc. A/CONF. 62/63. The group was open and each of the participants in the Conference could participate on equal footing in its work.

a proposal, on the motion of the Mexican delegation, to include in the Convention an appropiate provision which would stipulate that States should fulfil in good faith the assumed obligations and should exercise their rights, jurisdiction and freedoms recognized by the Convention in a manner precluding an abuse of law.

The proposed compromise formula[31] was adopted by the Conference and included in Article 297(3), while the provisions in respect of implementing the Convention in the spirit of good faith entered eventually into Part XVI of the Convention as Article 300. Although the adopted compromise formula was far from satisfying the reasonable claims of States enjoying, pursuant to Articles 62, 69 and 70, the right of access to the fishing surplus in economic zones, they have come to the conclusion that in view of their inability to get through the conception envisaging binding settlement of fishing disputes the provisions stipulating for compulsory conciliation have created a minimum of security.[32]

Conciliatory proceedings in fishery matters may be instituted at the request of any party to the dispute pursuant to Section 2 of Annex V.[33] They are terminated by the acceptance of a non-binding report which is transmitted to appropiate international organizations. Its publication, which is tantamount to an appeal to the public opinion, is to be a factor inducing the coastal State to take into consideration the recommendations contained therein. Article 297 of the Convention also contains a formula to the effect that agreements concluded pursuant to Articles 69 and 70 shall include a clause on measures which the parties shall take in order to minimize the possiblity of disagreement concerning the interpretation or application of the agreement, and on how they shall proceed if a disagreement has nevertheless occurred.

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[31] Doc. NG5/16.

[32] In a discussion, which took place at the Plenary Session of the Conference, Algeria, Singapore, Swaziland and Switzerland, from among the group of land-locked and geographically disadvantaged States, spoke for the acceptance of this compromise. Reservations were submitted by the deap-sea fishing States — Japan and the Soviet Union, postulating further negotiations.

[33] Annex V provides that the conciliation commission consists of five members, of which two are nominated by each party (only one may be its national) from the list of conciliators kept by the UN General Secretary. The four appointed conciliators appoint a fifth conciliator who shall be chairman. The conciliation commission, unless the parties otherwise agree, determines its own procedure. The commission shall present its report within 12 months of its constitution.

The work of the Third Conference was accompanied by the practice of unilateral establishing 200 mile economic and fishing zones.[34] Considering that already before the closure of the Conference in 1980 there had existed 42 economic zones, 12 fishing zones and 21 States had claimed a 200 mile territorial sea,[35] we may safely state that the consecutive process of dividing the natural resources of our planet has been terminated. The widespread practice of establishing economic zones justifies the thesis that the right to establish them may be at present regarded as a customary norm. But that cannot be said in respect of the legal status of economic zones, the rights and duties of coastal States and other States in the zone. That is so because laws on the economic zone, enacted by particular States, are not entirely compatible with the wording of the Convention. For instance, in a number of cases the jurisdiction over marine scientific research has been qualified as exclusive, the rights of other States neglected, and the rights of establishing special zones and limiting the freedom of navigation exercised in a manner incompatible with the Convention.[36]

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[34] Also Poland established on 17 December, 1977 a fishing zone pursuant to the Law on the Polish Sea Fishery Zone (see "Dziennik Ustaw" [Journal of Laws] of 22 December 1977, No. 37, item 163). The establishment of the Polish Fishery Zone was prompted by the necessity to enhance the protection of the living resources in waters adjacent to the Polish coast. As indicated by the Commission of Foreign Trade and Maritime Economy, Commission of Foreign Affairs, and the Legislative Commission of the Seym, the introduction of 200 mile economic or fishing zones by successive States, the danger that the fishing fleets of States from beyond the Baltic Sea would engage in the exploitation of its living resources, and the simultaneous establishment of the Swedish fishery zone, had created the danger of over-exploitation of the remaining part of the Baltic, and also endangered the Polish fishery interests which anyway were exposed to serious losses as a result of depriving Polish fishermen of the rights to fish in the Common Market zone.

The Law on the Polish Sea Fishery Zone relating to part of the high seas adjacent to the Polish territorial sea ensures that Polish fishing vessels have exclusive right to exploit the living resources thereof. At the same time, it provides that foreign fishing vessels may fish therein on the basis of an international agreement and according to rules and terms of Fishing in the Polish Sea Fishery Zone of 22 December, 1977, established by the Order of the Minister of Foreign Trade and Maritime Economy (see "Dziennik Ustaw" of 29 December, 1977, No. 38, item 175). These measures are to enhance the protection of the living resources of the zone and to ensure their rational utilization through, i.a., determining each year the total allowable catch.

[35] Cf. Z. KNYPL, *op. cit.*, p. 12; J. CARREZ, *Les problèmes de la pêche a la Conférence sur le droit de la mer et la practique des Etats*. "Revue Générale du Droit International Public", 1980, No. 3, p. 744.

[36] For instance, the Portuguese law of 28 May, 1977 mentions the right of innocent passage through the zone (but not the freedom of navigation), and a similar wording has been adopted by the Maldivian bill of 5 December, 1976. Then, the Indian law of 25 August, 1976 envisages the determining of special regions within any part of the

Thus we can assert that unless the Convention becomes effective there will be no uniform implementation of particular provisions pertaining to the economic zone.

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economic zone. Cf., on the same matter, S. A. GURIEW, *Problemy torgovogo moreplavanija v ekonomicheskih zonah*, "Sovetskoe Gosudarstvo i Pravo", 1978, No. 8, p. 113. From the point of view of its conformity with the Convention, the Soviet law on the economic zone of 28 February, 1984 can be regarded as exemplary. Cf. "Vedomosti Verhovnogo Soveta SSSR", No. 9 (2239) of 29 February, 1984.

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International Economic Equity

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In the context of international economic relations, equity means, firstly, a set of principles beyond the range of international law which bears the significance of norms of moral behaviour. Secondly, equity is a collection of the most important moral rules which are applicable to the system of international economic law, govern that system with a view to ensuring its internal morality, have a positive character by the fact of their quotation in the sources of law. Thirdly, equity means the use of the right rule in the right circumstances with regard to the right person. In the first sense, equity as a notion is external to the system of international law. In the second and third senses, it is inherent in the system. From yet another point of view, the first sense and the second one create the notion of material equity. In the third sense, equity is equivalent to fairness. In other words, it provides justification for the use of international economic law.

As one looks at international economic relations, it is seen that there has never been a situation wherein the principles of international equity could have been exclusively beyond the range of international economic law because at least some of the principles are included in the provisions of international economic law. However, moral rules are noted to have been applied to an ever larger extent in the system of international law in parallel to its growth. This is reflected in such epoch-making documents as the League of Nations Covenant after World War I, the Charter of the United Nations after World War II and more recently in the principles of a new international economic order laid down in consequence of the process of decolonization. Hence, it may be concluded that the various periods of history have their own different concepts of international economic equity. This is something that makes a comparative approach to such concepts a fairly tenable idea. In the age of capitalism (1648—1870) international economic equity was based on the principle of equality and reciprocity. In the age of imperialism (1870—1960) that principle was abandoned and replaced by the one of discrimination, especially in the relations between the colonial powers and their dependent territories. In the years of post-colonialism after 1960 the principle of equality was re-defined to give it the sense of material equality following from the favoured treatment as a principle of international law. This historical perspective makes it possible to ask whether, if at all, international law was a reflection of any form of international equity during the age of imperialism. Obviously enough in relations between the imperialist powers and their dependent territories the rudiments of equity were those of formal equality enjoyed by both sides as partners to international trade treaties in which formal equality was recognized as a principle of formal equality.

Classical considerations of the subject of equity are often confined to seeking a reply to the question of to what extent international economic relations reflect the distinction between distributive and commutative equity. They also strive to determine the extent to which Aristotle's formula of equity is used to regulate the current state of international economic relations. Consequently, one may say that international relations based on distributive equity were characteristic of the age of capitalism, those based on commutative equity were characteristic of the relations between the industrialized States and the developing countries over the time of post-colonialism, while the present time is an era in which relations between individual industrial democracies continue to proceed in accordance with the principle of distributive equity. But in fact an approach like this does not allow us to make inquiries into international economic equity since relations between any groups of states are for the most part based on distributive and commutative equity alike. Their principles can be adapted to each other only when each case is assessed on its own merits to determine the interaction of equality, reciprocity, privileged treatment and discrimination.

I. Equity as Reflected in International Economic Law

At the present time, the problem of international economic equity continues to recur with the establishment of a new international economic order and with the adoption of the law of the sea.

The Declaration on the Establishment of a New International Economic Order (dated 1 May, 1974) recalls equity as one of its five principles. The Charter of Economic Rights and Duties of State (dated 14 December, 1974) declares that its fundamental purpose is "to promote the establishment of the new international economic order, based on equity." Cooperation is encouraged on the basis of mutual advantage and equitable benefit, the need is stressed to achieve more rational and equitable international economic relations and it is considered that genuine cooperation among states is essential for achieving a just and rational development of all parts of the world. Throughout the text of the Declaration reference is made to a just and equitable economic and social order. Furthermore, it says that economic and other relations of states shall be governed by the following principles: mutual and equitable benefit, the remedying of injustices which have been brought about by force and deprive a nation of the natural means necessary for its normal development, promotion of international social justice. In several places of the text, the Declaration mentions equity in the context of specific economic terms. For instance, Article 6 of the Declaration mentions "stable, remunerative and equitable prices." Article 8 says that "States should cooperate in facilitating more rational and equitable international economic relations." Article 10 says that all states have the right "to share equitably in the benefits." Article 14 stresses that "coordinated efforts shall be made to solve in an equitable way the trade problems of all countries" and that states shall take "measures designed to attain stable, equitable and remunerative prices for primary products." Article 25 calls on the international community to help the developing countries to overcome their particular difficulties. Article 26 says that international trade should be conducted on the basis of mutual advantage and equitable benefits. Article 28 determines that all states shall have the duty "to promote just and equitable terms of trade" for the developing states. Article 29 says that in the exploration of the sea-bed and ocean floor, of the subsoil thereof and in the exploitation of the resources of the area

> "the benefits derived therefrom are shared equitably by all states, taking into account the particular interests and needs of developing countries."[1]

In the mind of the lawyer, fairness is most often associated with equity which he regards as a system of principles existing in parallel to the common law of Great Britain. However, it is doubtful whether the system that the laywer has in mind, can be applied to international economic relations between the developed and the developing countries. For instance, it would be contrary to the principle of equity to insist, as in the Grisbadarn case, that changes in the currently existing state of affairs should be made to the least possible extent. Among the classical principles of British equity the one saying "equity will not suffer a wrong to be without a remedy" seems to be the only applicable one.[2] Furthermore, we believe that in efforts to provide interpretation of the principles of the new international economic order attention should be drawn first of all to equity in the understanding given it by ethics, i.e. that equity is a category

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[1] For the texts see, for instance, A. W. ROVINE, *Digest of United States Practice in International Law 1974*, Washington 1975, pp. 492—504.

[2] W. FRIEDMANN, *The Contribution of English Equity to the Idea of an International Equity Tribunal*, London 1935, p. 35 and 39.

of moral behaviour. In sum, we think an approach of this kind clearly shows that moral precepts are already used in the restructuring of international economic law.

The idea of equity occupies a very important place also in the United Nations Convention on the Law of the Sea. In the preamble to the Convention, it is said that the achievement of the goals of the Convention

> "will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked."

The idea of equity is expressed also in yet another context wherein the belief is maintained that

> "the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights."

Furthermore, the States parties to the Convention recognize the desirability of establishing through the Convention

> "a legal order for the seas and oceans which will facilitate international communication and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources."

They are aware of the historic significance of the Convention "as an important contribution to the maintenance of peace, justice and progress for all peoples of the world."

In Article 59 of the Convention equity is said to be the basis of the resolution of conflicts arising between the interests of the coastal state or any other State or States. According to the article, such conflicts should be resolved

> "in the light of all the relevant circumstances taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

Article 69, paragraph 1 gives land-locked States the right to participate, on an equitable basis, in fishing within the exclusive economic zones of coastal States of the same subregion or region. But the terms of such participation should take into account "the relevant economic and geographical circumstances of all the states concerned." They should also take into account the needs and interests of the coastal States, the needs and interests of other land-locked States and those of geographically disadvantaged States. Such needs and interests ought to be taken care of in a bilateral agreement between the land-locked State and the coastal State. Under the provision of Article 89, paragraph 4 developed land-locked States are entitled to participate in fishing within the exclusive economic zones of developed coastal States of the same subregion or region to the extent to which the coastal State has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in states whose nationals have habitually fished in the zone. In the same way, Article 70, paragraph 1 gives geographically disadvantaged States the right to participate, on an equitable basis, in fishing within the exclusive economic zones of coastal States of the same subregion or region.

There are several other articles in the Convention on the Law of the Sea wherein the principle of equity is put forward. And so under the provision of Article 74, paragraph 1 the delimitation of the exclusive economic zone between States with opposite or adjacent coasts is to be effected by agreement and in order to achieve an equitable solution. In accordance with Article 76, paragraph 8 information on the limits of the continental shelf is to be submitted by the coastal State to the Commission on the Limits of the Continental Shelf — the latter to be established under Annex II on the basis of equitable geographical representation. Article 82, paragraph 4 says that the payments or contributions made through the International Sea-bed Authority shall be distributed by the Authority to States parties to the Convention "on the basis of equitable sharing criteria." Under the provisions of Article 83, paragraph 1 the delimitation of the continental shelf between States with opposite or adjacent coasts is to be effected by agreement and "in order to achieve an equitable solution." In Article 140, paragraph 2 it is said that the International Sea-bed Authority is to "provide for the equitable sharing of financial and other economic benefits."[3]

The examples quoted above seem to suggest that in the Convention on the Law of the Sea justice is basically taken to mean equity as a process through which competing states parties balance up the proportion of their own interests by means of special agreements which take into account a variety of factors as distinguished by the Convention. Now, it is impossible to say what the proportion may be like in view of the fact that no agreement has so far been concluded. It seems doubtful, too, whether future agreements of this kind may be used to devise a mathematical formula for use in deciding on the proportion. Yet, there is no doubt that the formula of equity is a departure from the principle of justice as we know it from the rule of *qui priore est tempore, potior est iure* or from that of *iustitia distributiva*. The earlier cited examples provide evidence that in fact the Convention on the Law of the Sea is founded on Artistotle's concept of *iustitia commutativa*.[4] In this regard

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[3] Doc. A/CONF. 62/122 of 7 October, 1982.

[4] With regard to the Tunisia-Libya continental shelf the International Court of Justice decided: "to apply equitable principles as part of international law, and to balance up

let us recall the fact that in the case of the North Sea shelf the principle of distributive justice underlies the International Court of Justice award that the sharing of the shelf must be a proportional one. On the other hand, the principle of commutative justice underlies the International Court of Justice award in the case of the Tunisia-Libya shelf.[5]

Apart from the idea of equity, the Convention on the Law of the Sea appeals to the principle of fairness as when under the provisions of Article 150, letter f, it recognizes that one of the policies of the International Sea-bed Authority is to promote just and stable prices remunerative to producers and fair to consumers. And when in the same letter f of Article 150 it is said that the Authority is to act with a view to ensuring "the promotion of long-term equilibrium between upply and demand" it seems that from among all possible meanings of just, remunerative and fair prices the choice is made in favour of that price which helps to achieve the long-term equilibrium between supply and demand. Thereafter, we realize that the Convention rejects the idea according to which a fair price is the one reflecting the value of human labour inputs or the one reflecting the value of human labour inputs with the addition of fair profits.

From the remarks made so far it follows that the tendency currently prevailing in international economic relations is the one to depart from distributive justice and to move towards the commutative one.

Nevertheless, the idea of distributive justice continues to figure prominently in the sources of law, especially with regard to prices in international trade. In the Declaration on the Establishment of a New International Economic Order, dated 1 May, 1974, it is recognized that one of the major objectives is to achieve

> "a just and equitable relationship between the prices of raw materials, primary commodities, manufactured and semi-manufactured goods explorted by the developing countries and the prices of raw materials, primary products, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy."

In a similar vein the Charter of Economic Rights and Duties of States says in Article 28 that

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the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the extent weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation, nor is it an operation of distributive justice." Continental Shelf, "ICJ Reports," 1982, p. 60 para. 71, quoted also in M. B. FELDMAN, *The Tunisia-Libya Continental Shelf Cases, Geographic Justice or Judicial Compromise?*, AJIL, vol. 77, 1983, No. 2.

[5] M. B. FELDMAN, *op. cit.*, p. 228.

"all States have the duty to cooperate in achieving adjustments in the prices of exports of developing countries in relation to prices of their imports so as to promote just and equitable terms of trade for them, in a manner which is remunerative for producers and equitable for producers and consumers."

On the basis of the above quotations, it may well be said that a fair price is understood to be the one which helps to ensure an equitable relationship between the prices of goods exported by the developing countries and the prices of goods imported by them from the developed states.

So far as prices in international trade are concerned equity can assume a variety of meanings. In the scholastic philosophy of Saint Thomas Aquinas an equitable price is the one reflecting the value of a thing. According to him, it is allowable to increase the price by a profit margin at any rate not exceeding 50 per cent of the value. Otherwise one is faced with unfair dealing liable to and deserving punishment. In his philosophy, the leading idea is that of interchangeable justice, with equality being its basic component. Apart from fairness, one can speak of the bargaining of prices on condition that this does not involve unfair dealing.[6] It is in this sense that the idea of equitable prices is known to have been explored by the classical writers on international law such as Francisco Suarez in *De Legibus*,[7] Hugo Grotius in *De Iure Belli et Pacis*[8] and Emerique Vattel in *Le droit des gens*.[9] It should be noted that the new element in the works of the last two authors is that they consider the problem of a monopolistic price and conclude that a price of this kind is contrary to the law of nations. In contemporary terms, the problem of equitable prices has become the basis on which efforts are taken to resist sanctions and spread the use of the concept of a fair price. In general, the present-day approach to proces is that the profit margin should not exceed 10 per cent of the value of goods.[10]

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[6] SAINT THOMAS AQUINAS, *Summa theologica*, Paris 1864, qu. 77, Art. 1, Art. 2. It is noted that in the philosophy of Saint Thomas Aquinas *iustum pretium* shows the character of a term pertaining to economics rather than ethics and as such it should be related to the notion of economic value. A. NATTEL, *Nauka o słusznej cenie (iustum pretium) u św. Tomasza z Akwinu* [*On the Teaching of Just Prices (Iustum Pretium) by Saint Thomas Aquinas*], Kraków 1938.

[7] F. SUAREZ, *De Legibus* (II 13—20). *De Iure Gentium*, edicion critica bilingüe por L. Perena, V. Abril y P. Suner, Madrid 1973, Cap. XX.4.

[8] HUGONIS GROTI, *De Iure Belli et Pacis*, ed. P. C. Molhuysen, Lugduni Batavorum 1909, vol. 1, Chapter XII, Part XIX, Chapter XVI.

[9] E. VATTEL, *Le droit des gens ou principes de la loi naturelle*, Nouvelle édition pas M. P. Pradier-Fodéré, Paris 1863, Book I, Chapter VIII, para. 86—88, 91, Book II, Chapter I, para. 33.

[10] J. GILAS, *Ceny — perspektywa prawnomiędzynarodowa* [*Prices — A View from International Law*. "Ruch Prawniczy, Ekonomiczny i Socjologiczny," 1975, No. 4, p. 3.

Equitable prices may be seen also as stable ones, not subject to the influence of a changing environment in the market and maintained as such over longer periods of time. It is precisely this sense that is given equitable prices within the Council for Mutual Economic Assistance which uses world market prices of the years directly preceding its negotiations as the basis of its own price determination. The price-fixing basis is in force over one-year periods. By applying this technique, the CMEA has succeeded in protecting its own prices against the adverse effect of short-term changes in the market. However, it has failed to secure the prices against the negative impact of world market developments over longer times.[11]

With regard to market prices, equity may also signify the maintenance of such prices that could help to achieve equilibrium between supply and demand. This kind of approach to the equitability of prices is characteristic of the neo-liberal school.[12] Its classical interpretation can be found in the works of Samuel Pufendorf who points to the changing nature of the value of goods. He shows that the value of goods has different meanings in different places and at different times. It is dependent on a variety of circumstances .uch as whether there is a war going on in a given region. It also depends very much on the relationship of supply and demand. In consequence, contracts on the sale and purchase of goods are bound to reflect distributive justice on the basis of equality, thereby also showing the equivalence of trade.[13] Furthermore, the concept of equitable prices acquires a modified sense in international agreements on the sale of primary products. However, the respective modifications are not limited to the principle of commutative justice only and are a combination of both the commutative and distributive justice. The international agreements on the sale of primary commodities include provisions that strive to prevent high prices from being used and to protect the interests of all States involved, those of producers and exporters, as well as those of importers and consumers.[14] Under the agreements, provisions are made to set the limits of price fluctuations and to fix prices below their market levels through the well-known mechanism of buffer stocks at times when supply exceeds demand. At other times, i.e. when demand

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[11] A. WASILKOWSKI, *Socjalistyczna integracja gospodarcza. Zarys problematyki prawnej* [*Socialist Economic Integration. An Outline of Legal Problems*], Warszawa 1974, p. 203.

[12] F. A. HAYEK, *The Principles of a Liberal Social Order*, "Il Politico," 1966, No. 4, p. 610.

[13] S. PUFENDORF, *Elementorum Iurisprudentiae Universalis Libri Duo*, Oxford 1931, vol. 2, def. X, def. XIII, p. 72 ff. and p. 177.

[14] Article 57 of the Charter of Havana says that the objective of international agreements on primary products is to attain "a reasonable degree of stability on a basis of such prices as are fair to consumers and provide reasonable return to producers."

exceeds supply, such buffer stocks are released to maintain prices within the limits of fluctuation. For instance, the cocoa agreement of 1973 allows the price of a pound of cocoa to fluctuate from twenty-three to thirty-two cents in the US dollar currency.[15] However, within the framework of international economic development equitable prices are understood to be not so much a factor of the maintenance of world economic equilibrium but rather as a factor that allows the developing nations to make maximum profits.[16]

In conclusion it may be said that in accordance with the provisions of international economic law equitable prices are the ones that include a profit margin not exceeding 10 per cent, that retain a longer-term stability and that in addition promote the prosperity of all nations, in particular that of the developing States. By this token, the ethical factor, i.e. the idea of human solidarity, comes into the sphere of economic and legal provisions. For it is precisely the concept of equitable prices that helps to implement the principle of the equality of mankind, to make humanity a still more democratic environment and to ensure a greater measure of democracy in international law.

There still remains the problem of fair prices which should be looked at in yet another context.[17] Fair prices are the ones which are not subject to monopolistic manipulation. They are the ones which, at the initial stage, are not lower than the value or world market prices or those prevailing in importer markets. In this connection, it seems appropriate to remind ourselves that the origin of resistance to unfair prices can be traced back to Grotius and Vattel, opposed as they were to the growth of monopolies in the sphere of trade and prices.

Predatory pricing is known to have occurred in the practice of trade and legislation of the capitalist states. It is less known in the system of international law. It occurrs in tied sales in which additional products sold at high prices in conjunction with the main product or products are a source of huge profits. Such transactions are concluded only when major technological improvements in additional products allow to put up a monopolistic price. In this connection, it should be recalled that law courts have often rejected complaints against predatory pricing and have not so far construed any binding rule of law.[18] Even though predatory prices

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[15] *Digest of United States Practice in International Law*, 1973, ed. by A. W. ROVINE, Washington 1974, p. 367.

[16] Doc. UN TD/B/C. 1926 of 25 October, 1966.

[17] L. RODRIGUEZ-ARIAS BUSTAMANTE, *Derecho y Economia*, in: *Memoria del X Congreso Mundial Ordinario de Filosofia del Derecho y Filosofia Social*, Mexico 1981, vol. 1, p. 31.

[18] J. G. SIDAK, *Debunking Predatory Innovation*, "Columbia Law Review," vol. 83, 1983, No. 5, pp. 1121—1149.

are often below the value, their profitability continues to be good in the conditions of heavy demand. Their profitability is further enhanced by the fact that they hold out the promise of a monopolistic position in the market which will facilitate the establishment of much higher prices in the longer run. It should be recalled that in the United States of America, ever since the publication by Professor Areeda and Professor Turner of their joint article on the subject in 1975, the principle that putting up below-the-cost prices is contrary to the rule of anti-monopolistic law has been accepted in 65 per cent of all United States courts.[19] Within the European Community, so far law courts have tried no case involving predatory prices, but it is argued that such prices would be contrary to Article 86 letter a of the Treaty of Rome. However, in its award concerning the case of the United Brands Company, the European Tribunal takes the position that it would be in contravention of the Treaty of Rome to sell goods at prices that are unfair either in themselves or by the fact of comparison with the prices of comparable competitive products.[20]

Not only is dumping regarded as being contrary to the principle of fair prices but likewise as being unjust on the grounds that its use gives a possibility of raising prices in the domestic market.[21] It is said that justice in this field of international economic relations may be restored by the enactment of anti-dumping legislation to protect the interests of foreign producers faced with unfair competition. On the other hand, the ethical basis of equitable prices assumes general equality of states and people — therefore, it may be included in the doctrine of general solidarity. Furthermore, the principle of fair prices is a reflection of economic liberalism and in the capitalist world it gives only formal expression to the idea of equality. For, in spite of the fact that anti-dumping legislation is laid down as part of national law only in the main capitalist States and in Yugoslavia

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[19] R. O. ZERBE jr., D. S. COOPER, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, "Texas Law Review," vol. 61, 1982, No. 4, pp. 655—715.

[20] D. J. ASHLEY, *Predatory Pricing under Article 86 of the Treaty of Rome*, "The International and Comparative Law Quarterly," 4th Series, vol. 32, No. 4, pp. 1004—1012.

[21] O. Schachter fails to see the difference between just prices and fair prices, O. SCHACHTER, *Just Prices in World Markets: Proposals de lege ferenda*, AJIL, vol. 69, 1975, No. 1, pp. 101—109. He uses the two alternately and in parallel to each other (just and fair prices). In view of the interrelationship of fairness nd justice, some writers conceive justice as fairness. The supporter of this concept of justice, John Rawls, points to the concept of an agreement (as put forward by Kant and Rousseau) and says that justice as fairness "conveys the idea that the principles of justice are agreed to in an initial situation that is fair." J. RAWLS, *A Theory of Justice*, Cambridge 1977, p. 12. A situation of this kind may occur when the parties have equal positions. But, from the economic point of view, are the positions of a buyer and a seller equal to each other?

and although developing countries are States parties to the General Agreement on Tariffs and Trade (GATT), as a matter of fact GATT's Anti-dumping Code has had very little effect on all such countries.[22] It should be added, however, that anti-dumping and countervailing duties, although originally intended to help remove quantitative and qualitative barriers in trade, in reality have become instruments of new economic protectionism. It is noted that the imposition of the duties as intensified in the course of the 1980s. Originally intended to give protection against below-the-cost prices the duties are now used for the purpose of protection of one's own national industries, a protection in no other case available on the grounds of national law. At the same time, such instruments have gone out of political control and are now in the hands of the very industries searching for protection.[23] Expressing the same thought that the anti-dumping and countervailing duties are means of discrimination against exports from the developing states, the delegate of Sri Lanka to the 1984 session of UNCTAD said that the duties were in reality new weapons used by the protectionist lobby.[24] The further evidence of figures supports the claim that there is often no substantiation for the use of the duties. Between 1979 and 1982 50 per cent of all hearings on the establishment of the duties were discontinued either as a result of the complaint being withdrawn or because no evidence was gathered to support the charge of dumping or subsidized prices.[25] In a similar way the duties are used to curb the exports of goods from the socialist states. For example, the export of goods from the socialist states to the European Economic Community accounts for only 8 per cent of total EEC imports, but as much as 50 per cent of all EEC-initiated investigations concerned with dumping charges have been conducted against goods exported by the socialist States.[26]

The problem of justice occurs also in the monetary fields as part of overall economic relations. We have in mind the very specific issue of the parity of national currencies. Several centuries ago Nicolaus Copernicus said the following:

"the estimated value of a coin is legitimate and equitable only when it contains slightly less gold or silver than the amount that can be purchased for it, namely, only so less

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[22] H. W. de JONG, *The Significance of Dumping in International Trade*, "Journal of World Trade Law," 1968, No. 2, pp. 162—188. L. RODRIGUEZ-ARIAS BUSTAMANTE, *op. cit.*, p. 31.

[23] Report of the Trade and Development Board on its Twenty-Eighth Session. UNCTAD Doc. TD/B/997 of 23 May, 1984, p. 97.

[24] *Ibid.*, p. 102.

[25] *Ibid.*, p. 107.

[26] *Antidumpingerfahren-Instrument des Aussen Wirtschaftlichen Protektionismus der EG*, Institut für Internationale Politik und Wirtschaft der DDR, "Berichte," 1983, No. 7, p. 47.

as would be necessary to deduct for minting expenses, for the mint-mark should in a sense give dignity to the material."[27]

In contemporary currency relations it is regarded as being contrary to the principle of justice to devalue currencies so as to lead to the lowering of sums due to foreign creditors. Let us recall in this regard the words of French scholar Charles Dupuis who says that a devaluation of this kind

"c'est, à mon sens, un indice certain de la régression morale qui marque la période postérieure à 1914 — régression morale qui devait entraîner nécessairement une régression juridique — que la désinvolture avec laquelle les Etats, par les voies scabreuses de l'inflation et de la stabilisation, ont ruiné leurs créanciers et tous les créanciers porteurs de titres libellés en monnaie dépréciée et que l'indulgence quasi universelle dont ont bénéficié les auteurs de ces opérations blâmables."[28]

At the time when the Articles of Agreement on the International Monetary Fund were adopted, the intention was to stabilize currency exchange rates proceeding from the assumption that the consent of the Fund would not have to be sought for adjustments of up to 10 per cent. It was also aid that adjustments of over 10 per cent would have to be approved by the Fund in order to correct a fundamental disequilibrium.[29] By this token, all other adjustments would be regarded as being unjust in the understanding of material justice. Nonetheless, we have to agree with Frederick A. Mann who says that

"the maintenance of stable currencies is still largely an aim, a policy, a hope and that the law has not yet succeeded in so regulating it as to give it the status of a fully and effectively enforceable legal principle"

and that

"conventional international law has not yet eliminated the State's power, though it has substantially reduced the State's right to regulate the value of its currency."[30]

In international currency relations, the problem of justice is related to efforts to oppose currency controls which mean

"All enactments which control the movement of currency, property and services for the purpose of protecting the financial resources of a country."[31]

It follows from the bilateral agreements that such controls are accused of being discriminatory in the sense of unequal treatment of country nationals

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[27] NICOLAUS COPERNICUS, *On the Way of Minting a Coin*, in: *The Discourses of Nicolaus Copernicus on Coin and His Other Writings on Economics*, ed. by J. Dmochowski, Warszawa 1923, p. 56.

[28] Ch. DUPUIS, *Règles générales du droit de la paix*, RCADI 1930 (II), vol. 32, p. 164.

[29] Art. 4, para 5, letters c and f.

[30] F. A. MANN, *Money in Public International Law*,, RCADI, 1959/I, vol. 96, p. 47.

[31] *Ibid.*, p. 56.

(national clause) as distinct from foreign nationals holding the citizenship of the most privileged State (the most-favoured-nation clause).[32]

The problem of justice is also reflected in that part of the system of international economic law that deals with compensation. With the pursuit of the policy of nationalization, international law comes under strong pressure to make provisions concerning compensation for the infringement of rights. The result is a formula according to which claimants are paid full, immediate and effective compensation consisting of *lucrum emergens* and *lucrum cessans*. The supporters of the inclusion of *lucrum cessans* in the amount of compensation usually point to a number of arbitral awards. So, in the case of the Greek Telephone Company the arbitral award of 3 January, 1935 ordered compensation to be paid for what the company would have obtained if the contract had been fulfilled. In the case of *Robert May* v. *Guatemala* it was decided on 16 November, 1900 that the claimant was "entitled to all the profit to be derived from the railroad until the completion of the term." In the case of *Percy Shufelt* (US) v. *Guatemala* the arbitral award said that *lucrum cessans* was to be included in the amount of compensation and added that it should not be "too remote or speculative." However, in the case of *Liamco v. Libya* the arbitral award of 12 April, 1977 did not include *lucrum cessans* in the amount of compensation. The award first noted the absence of convergence of Libyan and international law and on this basis argued that in lieu of prompt, adequate and effective compensation the equitable compensation should be offered in recognition of the sovereignty of States over their natural resources and of the right of States to nationalize them.[33] The underlying assumption was that it was lawful to nationalize the company's concession even before the completion of its term since the act of nationalization was not a discriminatory one and was not accompanied by acts of lawlessness. In itself, the act of nationalization would not be a lawless one if adequate compensation was made. *Lucrum*

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[32] *ICJ Pleadings. Case Concerning the Right of the United States of America in Morocco*, vol. 1, p. 578.

[33] *Ad hoc Arbitration Liamco v. Libya, Award of April 12, 1977*, "Yearbook of Commercial Arbitration," vol. 6, 1981, pp. 89—118. On May 24, 1982 an arbitral award was granted concerning the case of *the Government of the State of Kuwait* v. *the American Independent Oil Company* (AMINOIL). In the award, the payment of equitable compensation was justified in accordance with the International Court of Justice advisory opinion of 25 October, 1956 and with the Court's position taken in its award of 15 December, 1949 concerning the Straits of Corfu and the North Sea continental shelf. In each case the International Court of Justice said that the principle of justice should be implemented in a situation in which compensation could not be made under any specific rule of law. "Yearbook of Commercial Arbitration," vol. 9, pp. 78—79.

cessans could not be regarded as an element of compensation since, considering the time factor, it went beyond the period of nationalization. If the concession had foreseen *lucrum cessans*, the arbitration tribunal investigating the case would have had to refrain from demanding the payment of *lucrum cessans* on the grounds of either imprévision or *rebus sic stantibus*.

At the same time, there is the question of what currency should be used to offer compensation for the failure to fulfil one's economic obligations. For instance, among the principles of the new international economic order there is the one that says that bearing in mind the entirety of the measures of nationalization the competent State is that of the location of an investment project. In this regard, let us recall Article 2, paragraph 2, point c of the Charter of Economic Rights and Duties of States as saying that each state has the right

"to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers as pertinent."[34]

Apart from the new international economic order, the problem of justice also arises in the pursuit of treaty and foreign policies of the major capitalist States. In this regard, the United States of America provide one of the best illustrations in the form of official statements of its policy makers and of the treaties negotiated to date. Furthermore, there is the publication entitled *Restatement of the Law. Foreign Relations Law of the United States II*, edited by the American Institute of Law. Therein, in the paragraphs dealing with the subject, it is stressed that just compensation must meet the conditions of adequacy, reasonable promptness and effectiveness. As regards the currency of compensation, paragraph 190 of the publication determines that reparations must fulfil the requirement of a proper form, this meaning cash or property readily convertible into cash. The other requirement is that the currency of compensation should be the one of the country of a foreigner at the moment of a delict or the currency convertible into the former one and transferable before or after the conversion to the country of citizenship of a foreigner. The conversion or transfer may be delayed only in order to ensure the availability of foreign currencies for the purchase of goods and services of great importance for the health and prosperity of the people in the country making the compensation.[35] However, considering the various practices of States and the various systems

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[34] GA Res. 3281/XXIX/.

[35] *Restatement of the Law. Foreign Relations Law of the United States, Second*, St. Paul 1965, p. 569.

of law in the context of justice and equitableness, it may well be said that compensation should be made in the currency in which losses are incurred. In the event of impossibility or unjustifiability of applying the solution, compensation should be made in the currency of the state suffering the damage or else in the currency of the place of payment. In a situation in which such solutions cannot ensure the compensating state the availability of foreign currencies for the purchase of goods or services of great importance for the health and prosperity of the people of the State bearing the responsibility, compensation should be made in its own national currency. Furthermore, the currency agreed on in direct negotiations should not be accepted as the currency in which compensation is to be paid. This is because first direct negotiations are a form of regulated legal self-aid and make the obvious necessity of compensation dependent on the simplest approach to the settlement of international disputes. Secondly, they blur the difference between responsibility and international disputes. Therefore, if the party causing the damage is unable to compensate the other party for it within a definite time in *moneta leasionis* and thereafter in *moneta loci solutionis* or *moneta debitoris*, the question of payment in the creditor's currency should come within the jurisdiction of the International Court of Justice.[36]

II. International Economic Equity and the Problem of Equality and Reciprocity

Classical ethics maintains the identity of equity and equality in accordance with the philosophy of Aristotle saying that "equity is equality." This is probably due to the fact that in the Greek language the word *isotes* standing for equality is a better expression of equity than the word *dikaiosyne* which is habitually used to denote equity.[37] It must be remembered, however, that the fundamental principle of international law is the one of sovereign equality, i.e. the equality of rights and duties for partners in international economic law, and perhaps more often their equality in the face of law.[38] It might be inferred as result that by taking this approach to equality justice is or may be administered. But as soon as we arrive at this conclusion we run the risk of perpetuating economic inequality.

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[36] J. GILAS, *Problem właściwej waluty odszkodowania w prawie międzynarodowym* [*The Problem of an Appropriate Currency of Compensation in International. Law*], "Przegląd Stosunków Międzynarodowych," 1981, No. 2—3, pp. 139—150.

[37] G. VLASTOS, *Justice and Equality*, in: *Social Justice*, ed. by R. B. Brandt, Englewood Cliffs 1962, p. 31.

[38] V. KOUTIKOV, *Principjet za wzaimnostta i negovoto priloženije v meždunarodnoto publično i meždunarodnoto častno pravo*, "Trudove po Meždunarodno Pravo" Sofije 1967, vol. 1, pp. 37—64.

For equity may be interpreted not only as taking advantage of equal chances but likewise and may be more frequently as taking equal shares. The latter view receives support from J. Rawls who takes a neo-liberal approach to the concept of equity and from J. Feinberg who is more inclined to the comparative study of the problem. Both arrive at a conclusion that absolute equality needs not necessarily ensure equity. They say that on the contrary equity may in practice signify the use of discrimination against some partners in order to facilitate the attainment of objectives sought by law.[39] Such voices are echoed by some tribunal awards. For instance, it is unthinkable to accept the equality of all national currencies and to rely on the use of just one to one rate of exchange. In this regard, there is evidence in the award granted by the Oberlandsgericht of Berlin on 4 March, 1922 with regard to the rate of exchange of the Polish zloty currency and the German mark, a rate maintained by the Polish law of 20 November, 1919 on the grounds of nominal parity between the Polish currency and that of Germany. The award specifically said that when a State, be it in just one region of its territory, took measures to enforce parity between its own currency and that of another State, the said State was regarded as striving by inadmissible means to exert influence on the value of the other State's currency and indirectly on the entirety of economic relations between the two States involved. Furthermore, the enforcement of parity of the two currencies caused serious damage to the German economy and was therefore contrary to the aims of German law.[40]

The International Court of Justice has often drawn attention to the absence of relationship between equality and equity, as when in the case of the North Sea shelf it argued that equity did not necessarily mean equality since it was hardly possible to make radical and all-round changes in nature.[41]

Any review of the sources of international law will show that the principle of equality comes to the forefront of this branch of law. At the same time, it is noted that the process of putting the principle into precise form involves other codes of behaviour, notably those of reciprocity as the most conspicouus feature of the new international economic order This also holds true for the CMEA which, even though its member — States

[39] J. RAWLS, *op cit.*, p. 60, J. FEINBERG, *Comparative Justice*, in: J. FEINBERG, *Rights, Justice and the Bounds of Liberty. Essays in Social Philosophy*, Princeton 1980, p. 267, A. ERH-SOON TAY, *The Concept of Justice as Social Regulator in Law, Politics, Economics and Culture*, in: *Memoria del X Congreso Mundial Ordinario de Filosofia del Derecho y Filosofia Social*, Mexico 1981, vol. 4, p. 5—16.

[40] *Juristische Wochenschrift*, 1922, pp. 1131—1134.

[41] "ICJ Reports" 1969, p. 49.

accept the principle of sovereign equality in economic cooperation, does not regard formal equality as an end in itself and strives to pursue the aim of reciprocity on the basis of mutual benefit.

The discrepant interpretation of the principle of equality, on the one hand implying equal chances and on the other equal shares, leads to two distinctly different approaches to international law. First of all, it is seen that relations between the developed States are regulated in conformity with the principle of equal chances. Secondly, the principle of equal shares with the addition of economic preferences is operational in the field of international economic development. The latter is used to compensate the developing countries for their unequal treatment.[42] It is argued, therefore, that economic preferences for the developing countries seek to ensure effective equality. Incidentally it is noted that surprisingly enough the term of "preferential equality" appears to be in ever more frequent use.[43]

The dual condition of the provisions of law, of which some tend to give preferences to the developing countries and by this token depart from the rule of equality towards law, is seen in the international sugar and rubber agreements of 1979. These agreements are regarded as exceptions to the rule, adhered to after 1945, that international agreements on primary commodities should proceed from the assumption of equality.[44] The sugar and rubber agreements make clear distinctions with regard to economically developing importers, economically developing exporters, economically land-locked exporters and small-size exporters.

According to Article 51 of the sugar agreement, the developed importing States have the duty to ensure access to their sugar markets for sugar exports from the developing countries. Under Annex A to the agreement, Canada has agreed to bring down its annual sugar production to only

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[42] N. LUSSON-LEROUSSEAU, *Les accords de produits de base, instruments de régulation des marchés*, RGDIP, vol. 85, 1981, p. 46.

[43] This term is quoted by K. SKUBISZEWSKI, *Karta gospodarczych uprawnień i obowiązków państw* [*The Charter of Economic Rights and Duties of States*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny", 1981, No. 2, p. 95. He finds justification for this term in the principle of equality understood as giving priority to politics "whose end is to make well-off those who are badly-off." T. HONDERICH, *The Question of Well-Being and the Principle of Equality*, "Mind," vol. 90, 1981, No. 360, p. 493. The principle of giving preferences to the developing countries is also called the principle of compensation due to the fact that "reciprocity between those who are unequal in economic strength is a contradiction in economic terms." The latter statement comes from S. S. Ramphal, Attorney General and Minister of External Affairs of Guyana. It is quoted by H. WOODING, *Regional Integration in the Carribbean and the Commonwealth*, in: *International Economic and Trade Law. Universal and Regional Integration*, ed. by C. M. Schmitthoff, K. R. Simmonds, Leyden 1976, p. 56.

[44] N. LUSSON-LEROUSSEAU, *op. cit.*, pp. 49—50.

20 per cent of the former output. Finland has undertaken not to grow sugar beets on an area exceeding 25,000 hectares. Japan has agreed to import no less than 1,500,000 tons of sugar. New Zealand has decided to import the whole amount of sugar it needs for home consumption. Sweden has agreed to limit the area under sugar beet cultivation to 400,000 hectares.[45]

Economic preferences are by no means a product of the recent history of international economic relations. They are much older.[46] For instance, Boris Nolde has found out that such preferences were in fact included in the 1703 Methuen Treaty between England and Portugal. Therein, Portugal agreed to import English-made cloth on condition that England would agree to import Portuguese wines and would charge duties on the Portuguese wines that would be one-third lower than the duties imposed on the import of French wines to England. If England had failed to give such preferences Portugal would have been free to impose a ban on the imports of cloth made in England.[47]

Economic favours are known to have been conceded in relations between States sharing adjacent borderline zones, between States maintaining especially friendly relations, between those being politically and economically dependent (protectorates, colonies, former colonies). They are also known to have occurred in relations between States situated in the same region of the world and those setting up a tariff union, a free trade zone or other economically integrated structures. Recently it has been generally accepted to concede favours to the developing countries.[48] Preferences given within

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[45] A. J. PEASLEE, *International Governmental Organizations*, The Hague 1975, third revised edition, Part II, pp. 383—423.

[46] Preferences are non-returnable favours. D. VIGNES, *La clause de la nation la plus favorisée et sa pratique contemporaine. Problèmes posés par la Communauté Economique Européenne*, RCADI, vol. 130, 1970/II/, p. 318. In the Tariff Union of Equatorial Africa tariff exemptions are used as "reciprocal preferential regime" with regard to some products in the course of transportation on the territories of the member states. For the text see: *Basic Documents of African Regional Organizations*, New York 1972, vol. 2, pp. 726—728. *Customs Protocol on the Application of a Reciprocal Preferential Regime of 23, 27 and 29 February, 1963, Annexes. Conditions d'application du régime préférentiel réciproque aux marchandises obtenues par la transformation de produits importés de pays tiers.*

[47] B. NOLDE, *Droit et technique des traités de commerce*. RCADI, vol. 3, 1924/II, p. 306.

[48] The concession of favours on various accounts is foreseen in Article 6 of the Treaty on Friendship and Settlement between the United Kingdom and Switzerland of 14 August, 1948 (UNTS, vol. 33, 1949, item 509). In Latin America, in order to increase the effectiveness of the most-favoured-nation clause for the countries of the region, it has been decided to exclude the applicability of the benefits to States from beyond the region of Latin America. This approach is known as the Clause of Bello. F. V. GARCIA-AMADOR, *Universalism and Regionalism in International and Trade Law: The Experience of Latin America*,

economic integrations are distinctly different from privileges. For, without losing the character of privileges, they often exist in a setting that makes their withdrawal quite impossible. This is due to the fact that the national economies of individual countries become integrated to the extent that it is impossible to break economic ties without causing serious economic disturbances. In consequence, once granted economic favours assume an irreversible character.

Economic preferences are given on various accounts. They are, therefore, privileges the exercise of which is excluded, among other things, from the applicability of the most-favoured-nation clause. It is to be noted that the latter clause is not applicable in the relations with the contracting party granting privileges to a third party not subject to the favoured clause. In effect, one is confronted with a situation wherein a State or States are granted preferences recognized in or by means of agreements with other States. Considering the fact that no customary or optional procedures are adopted in international conomic relations, there is no doubt that special favours conceded to another State reflect the pursuit of specific treaty policies towards that particular country. The exclusion from the applicability of the most-favoured-nation clause, just because it is put in identical words in a great number of international agreements, is a signal that an establishment of some procedure may be well under way.[49] On the other hand, the fact that provisions for the exclusive treatment still need to be made in a great number of international agreements proves that it has not yet turned into a customary law. The situation was the same even at the time of the signing of the General Agreement on Tariffs and Trade — the exclusive treatment failed to receive enough support to become a customary law and continued to be just one of the provisions binding on the States Parties to GATT.[50] In this context, it should be recalled that in 1960 the Soviet Union had every right to call on Italy to given the Soviet partner the same preferences which the EEC countries had received from Italy before.[51]

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in: *International Economic and Trade Law. Universal and Regional Integration*, ed. by C. M. Schmitthoff, K. R. Simmonds, Leyden 1976, pp. 36—37. Originally, the basis of preferences for the developing countries was provided in General Principle Eight of the Final Act of the Geneva Conference of 1964 on the Subject of Trade and Development and in Art. 36, point 8 of GATT (amended). M. VIRALLY, *Le principe de réciprocité en droit international contemporain*, RCADI, vol. 122, 1967, p. 95.

[49] *Kurs meždunarodnovo prava*, Moskva 1968, vol. 4, pp. 268—270.

[50] A History of GATT Stipulation: E. PIONTEK, *Unia celna i strefy wolnego handlu a GATT* [*Tariff Unions, Free Trade Zones and GATT*], "Sprawy Międzynarodowe," 1974, No. 4, pp. 113—121.

[51] D. VIGNES, *op. cit.*, p. 288.

The most important system of general preferences is the one adopted by UNCTAD in 1972 in view of the spreading use of the most-favoured-nation clause. It was assumed then that the very principle of non-discrimination, even though it was helpful in removing trade barriers, was not strong enough to given the developing countries equal opportunities of competition in world markets.[52] The general preferences are now given by the EEC countries, and also by Finland, Norway, Sweden, Switzerland and the United States of America. From among the socialist States, the Soviet Union, Bulgaria and Czechoslovakia are the ones to give such preferences.[53]

The way in which the general preferences are given is either through putting specified goods on the positive list drawn up according to the BTN systematics or through not putting them on the negative list. The procedure consists in granting total exemption from the payment of duties or in reducing their amount by 30, 33, 40 and 50 per cent. The concessions may reach the allowable volume of imports (for example, 50 per cent) and may apply to goods originating from countries recognized by UNCTAD as the developing ones, i.e. from those of the Group of 77.[54] They take the form of approvals concerning levels, ceilings and maximum national quotas. Exports exceeding the quotas are subject to the most-favoured-nation clause. For instance, the United States authorities refuse to offer further concessions to a country whose exports of a given product to the United States in the preceding year is above 50 per cent of the whole quota of the product allowed for imports to the United States.[55]

In 1984, the developed countries ame up with a proposal to diversify the generalized system of preferences in accordance with development levels in the developing countries, to give greater benefit to the least developed countries.[56] Yet, during the session of the Special Committee on Preferences

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[52] A. K. KOUL, *The Legal Framework of UNCTAD in World Trade*, Leyden, Bombay 1977, pp. 120—121.

[53] It should be remembered that the United States, Japan and the EEC countries receive from the developing countries 90 per cent of all goods sent to the countries-givers of preferences. Doc. TD/B.C. 5/52 Rev. 1, New York 1978. The generalized system of preferences and the multilateral trade negotiations. Study by the UNCTAD Secretariat, p. 5.

[54] A. K. KOUL, *op. cit.*, pp. 132—143.

[55] *Ibid.*, p. 17.

[56] For example, this kind of diversification is put to use by Czechoslovakia on the basis of the Federal Foreign Trade Minister's decision of 3 December, 1981. Exemptions of up to 100 per cent are granted 28 states, including among them Afghanistan, Bangladesh, Arab Republic of Yemen, People's Democratic Republic of Yemen, Laos, Tanzania, Ethiopia, Uganda. Exemptions of up to 75 per cent are granted 88 other countries including among them Cuba, Mozambique, Zimbabwe. UNCTAD TD/B/GSP/CZECH. 2 of 14 July, 1982. According to the preferential lists drawn up by Austria, 31 least developed states are fully exempted from the payment of duties, reduced duties are effective with regard to some other developing countries and also duties of the same amount are to be paid by both groups of the developing countries. Doc. TD/B/GSP/AUSTRIA/9 of 7 October, 1982.

the delegates representing the countries of the Group of 77 recognized the proposed diversification as being contrary to the principle of liberalism and equity. They said it was intended to keep up trade barriers with disadvantage to the other developing countries, except for the least developed ones. The delegates of Brazil and Egypt said that the proposed diversification was contrary to the principle of non-discrimination as put forward in Resolution 6/IX adopted by the Special Committee.[57] The delegate of Malaysia drew attention to the fact that the proposal would undermine the effectiveness of the generalized system of preferences as an instrument of development.[58]

GATT is the other international organization that operates a system of general preferences, as seen in its decision adopted during the Round of Tokyo on 28 November, 1979. The decision bound the States Parties not to create technical obstacles to imports from the developing countries, with special regard to those imports which are not necessary, to give the developing countries special and diversified treatment and technical assistance to enable them to adjust to the standards of their industrialized partners. They were also asked to regard subsidization by the developing countries as an exception and as an instrument of economic development, on condition that such subsidization should not bring about serious disturbances in trade conducted by the other States Parties and that it should be gradually eliminated with the attainment by the developing nations of higher levels of economic development. Finally, in order to promote economic development, GATT's decision of 28 November, 1979 granted the developing countries "evolutionary treatment," i.e. treatment to be diversified with regard to the instruments of cooperation for development within the framework of GATT. That decision has not produced any concrete, non-returnable privilege. Nevertheless it has helped to enhance the regard for such treatment as an acceptable exception to Article One of GATT.[59]

In sum, the privileged treatment as a departure from the principle of equality may be an equitable one only when that treatment is founded on the principle of international moral behaviour. In the event of privileges given on a neighbourly or regional basis, their use is justified by neighbourly solidarity. Favours conceded to the developing countries are justified by the shared feeling of human solidarity. Furthermore, the privileges given on a neighbourly basis are justified by utilitarian considerations, reciprocity being their essence. The ones given the developing countries or those

[57] *UNCTAD. Trade and Development Board Official Records of 23rd Session. Report of the Special Committee on Preferences on Its 10th Session 11—22 May, 1981*, Supplement No. 2, Doc. TD/B/853, TD/B/C.5/78, p. 7.

[58] *Ibid.*, p. 9.

[59] J. LEBULLENGER, *La portée des nouvelles règles du GATT en faveur des parties contractantes en voie de développement*. RGDIP. 1982. No. 2. pp. 254—304.

encountering an economic breakdown, have human solidarity at their centre and are justified by the higher reason of moral behaviour. Thus, it is seen that at the basis of international moral behaviour there is the principle of moral behaviour of people who recognize that one cannot stay indifferent to hinger and poverty suffered by whole groups of states.

III. International Equity and Economic Discrimination

The use of discrimination boils down to the fact that one or many partners receive treatment less generous than the one given all the other partners in identical or comparable situations.[60] It is closely associated with the exercise of privileges and means that as soon as some partners enjoy privileges others are automatically subject to the act of discrimination.[61] By this token, each treaty that lays down privileges, and especially preferences, is bound to bring about discrimination. It follows from the above that the system of international economic law should function to the greatest possible extent in conformity with universal treaties or at least with those aspiring to universality. On the other hand, discrimination may be prevented by the widespread use of the most-privileged-nation treatment which, because of its multilateral effect, may eventually succeed in meeting the requirement of an average and common standard.[62]

However, in view of the distinction between formal and material equity, it is noted that discriminatory practices become contrary to the system of international law in consequence of the violation of formal justice, i.e. when the same situations are not handled in the same manner. But even any deviation from material equity will in itself become discriminatory since, by the fact of association with inequity, it inevitably signifies that some partners take action conducive to inequity and against the interests of all partners.[63]

The different elements of discrimination may be discerned by means of a comparative analysis of the treaties signed by other partners and by finding out that one contracting party derives economic benefits while the

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[60] G. SCHIAVONE, *Il principio di non-discriminazione nei rapporti commerciali internationali*, Milano 1966, p. 4.

[61] *Ibid.*

[62] G. SCHWARZENBERGER, *The Most-Favoured-Nation Standard in British State Practice*, BYBIL, vol. 22, 1945, p. 99. The author defines the most-favoured-nation treatment as "an agency of equality which establishes equality of opportunity on the highest possible plane: the minimum of discrimination and the maximum of favours conceded to any third State."

[63] J. RAWLS, *op. cit.*, p. 62.

other party incurs damages. In this regard, conclusive evidence is provided by the International Court of Justice award dated 27 August, 1952 concerning the United States citizens in Morocco. In the award, the Moroccan decree of 30 December, 1948 was recognized as being contrary to law and as being discriminatory. The International Court of Justice pointed to the Treaty of Algesiras as providing for the observance of trade equity between foreign powers and showed that France was exempted from the customs control of non-currency imports to Morocco while the United States of America was submitted to them. The International Court of Justice stated in conclusion that the different treatment of the two powers was not in keeping with the Treaty of Algesiras which the United States of America could use to claim treatment as preferential as that of France.[64] Nonetheless, in the absence of such and similar treaties the different treatment of foreigners on account of their nationality is not regarded as being inadmissibly discriminatory, in the light of international law. It may be regarded at the very most as an unfriendly action, providing justification for retaliatory measures.[65]

Discrimination is known to have occurred in the field of prices. We have in mind the fact that within the same time products or services are sold or done at prices not reflecting their actual cost. Discriminatory prices also occur when one and the same product is sold one and the same buyer at different prices and when the implementation of contracts takes place at identical prices but without regard for different costs.

One of the cases involving the use of discriminatory prices is that of the United Brands Company selling bananas at different prices to importers from different countries. After the investigation of the case by the EEC Commission, the EEC Tribunal shared the Commission's view that the United Brands Company had committed an act of violation of the Treaty of Rome, in terms of Article 86(c). In particular, the EEC Tribunal said that

> "The interplay of supply and demand should [...] only be applied to each stage where it is really manifest (and therefore that) the mechanisms of the market are adversely affected if the price is calculated by leaving out one stage of the market and taking into account the law of supply and demand as between the vendor and the ultimate purchaser and not as between the vendor (UBC) and the purchaser (the ripener/distributors)."[66]

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[64] *ICJ Reports of Judgments, Advisory Opinions and Orders*, 1952, p. 13.

[65] A. Ch. KISS. *L'Abus de droit en droit international*. Paris 1952, p. 72.

[66] L. Z. di VALGIURATA, *Price Discrimination under Article 86 of the EEC Treaty. The United Brands Case*, "The International and Comparative Law Quarterly," vol. 31, 1982, No. 1, 4th Series. pp. 36—58. The quoted excerpt from the EEC Tribunal award is on page 46.

In conformity with the system of international law, economic sanctions are also regarded as being discriminatory. In the past, sanctions assumed a non-organized character. Today and for the most part they are called counter-measures. In the past, States used to introduce *tarifs de combat.* Any response to their introduction was inevitably bound to trigger off a tariff war. In fact, however, such tariff wars were waged with a view to establishing a new conventional regime in relations between states, on the whole more convenient to the more powerful party. Hence, they were regarded as a measure aimed at introducing a new international custom which would ultimately take the shape of an agreement.[67]

Furthermore, sanctions having the character of retaliations and reprisals have little in common with equity. It is Aristotle who says that

> "Relation does not suit the idea of distibutive justice, neither does it suit the idea of commutative justice."[68]

Assuming that equity and justice are built into the system of international law any departure, even though it may have taken place before, is regarded as being contrary to equity and justice. Attempting to recall the idea of proportionality and equality does not give reprisals the quality of justice since proportionality and equality are only derivatives and not the basic characteristics of justice. Moreover, it is seen that retaliations and reprisals often miss to abide by the principle of proportionality. For they may be applied in response to moves against the political interests of a State. Furthermore, even if they are applied in response to jeopardizing the economic interests of a State, it is hardly possible to measure the economic value of such moves on both sides. For instance, does the withdrawal of import quotas have the same worth as the act exproporiation of foreign property?[69] In the past, even though there might have been an imbalance of trade between States, no retaliatory measures were applied to avoid endangering the economic interest safeguarded by the treaties. For example, in the 18th century Denmark, Norway and Sweden were engaged in the pursuit of mercantilist policies discriminating against British-made imports, especially against those of cloth made in England. Although England had retaliatory measures under active consideration, it never applied them. The reason was quite simple: England needed Danish and Norwegian wood which had been imported at very low duties and without which the growth of

[67] B. NOLDE, *Droit et technique des traités de commerce*. RCADI. vol. 3. 1924/II, p. 454.

[68] ARISTOTELES, *Etyka Nikomachejska* [*Nikomachean Ethics*], trans. by D. Gromska, Warszawa 1956. Book V, 4, 1132b 22—25, p. 176.

[69] Cf. the Cuban Law No. 851 of 6 July, 1960. I. SEIDL-HOHENVELDERN, *Reprisals and the Taking of Private Property*, in: *De Conflictu Legum*, Leiden 1962, pp. 470—479.

shipbuiding and other industries was not possible in England. Furthermore, the import of North American wood, which would make it easy to retaliate, in fact never took place. As a result, in 1737 England's Board of Trade decided against the use of retaliatory measures in view of the impossibility of obtaining substitutes from other sources and regardless of the recommendations to this effect from the British envoy to Copenhagen, Walter Titley. In a similar way, it was decided to reject the suggestion to use reprisals in trade with Denmark in the wake of the Seven-Year War.[70]

Anti-dumping and counterveiling duties are also of the character of sanctions. Anti-dumping duties are used to balance up the margin of dumping, i.e. the difference between the value of products and their selling price. Counterveiling duties are applied with a view to levelling up the value of subsidies which make it possible to sell products below world prices. In view of the discriminatory nature of such duties, international agreements now tend to define the circumstances in which the duties may be imposed, as well as the terms of their imposition. With regard to GATT, the problem is resolved in the Dumping Code drawn up pursuant to Article 6 of GATT. Article 8 of the Code provides that all Parties to GATT may impose anti-dumping duties and decide themselves whether their amount should be equal to or lower than margin of dumping. It is desirable, though, that their amount should be lower if thus it compensates for damages to national industries. They should be collected in a non-discriminatory manner, i.e. from all exporters using the technique of dumping in a given market. If the antidumping duties are higher than the margin of dumping, the surplus should be returned as soon as possible. The Code also provides that such duties may be collected on a temporary basis and on behalf of third countries. The Code recognizes subsidized exports as being undesirable and subject to negotiations between states concerned, including the Parties to GATT. It is assumed in the Code that the subsidization of exports should be discontinued from 1 January, 1958.[71]

Already in the years between the two world wars, the practice of boycotting was regarded as being a form of retaliation. Refusuals to buy goods coming from a specified State, which is what a boycott is after all, are known to have occurred in international relations on many occasions. In 1908, a major part of the population of Turkey took recourse to a boycott to protest against the annexation of Bosnia and Herzegovina by Austria-Hungary. In 1909, Turkey applied a boycott against Greece in order to force the latter country not to support the rebels of Crete. In

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[70] H. S. K. KENT, *War and Trade in Northern Seas. Anglo-Scandinavian Economic Relations in the Mid-Eighteenth Century*, Cambridge 1973, pp. 5—13.

[71] K. JUNCKERSTORFF, *Antidumping Recht*, Berlin 1974, pp. 243—254.

1924, Egypt used a boycott against British-made goods. However, China is the greatest contributor to the practice of boycotts, as shown in the following examples: in 1905 it boycotted US-made goods in retaliation for immigration restrictions affecting Chinese ethnic groups in the United States; in 1908, Japanese-made goods were boycotted by China in retaliation for the action of Japanese authorities to seize the "Tatsu Maru" steamer on the charge of smuggling. Japanese-made goods were boycotted by China successively in 1915, 1925, 1927 and 1929. During the famous Chinese boycott of 1931—32, the League of Nations as asked to review the situation.[72]

Boycotts should no doubt be recognized as being discriminatory. It is sometimes argued that if boycotting is done by non-violent means, if there is no encroachment upon a trade treaty in the part concerning the allocation of import quotas, if it is not announced directly by the State but undertaken by its population, there is no breaking of international law and thereupon no responsibility devolves upon the State concerned. On this subject, H. Lauterpacht takes the following view:

> "The view that a boycott is an act of economic force identical or comparable with military force in the shape of war is based on a manner of speach. Undoubtedly an economic boycott is an instrument of struggle. But it is a peaceful contest as compared with the physical violence of international or civil war."[73]

More and more often the view seems to be endorsed that even though a boycott may be announced by private persons without any cooperation on the part of the State, it still causes responsibility of that State within the framework of indirect responsibility, i.e. for not taking measures to prevent an act of infringement of international law. This view is a generalized one and tends to disregard a number of precedents such as the following ones: the Swiss government issued a decision on 21 January, 1939 making organizers of an economic boycott against foreign powers amenable to a penalty of 2,000 Swiss francs or of imprisonment for a period of three months; the Tribunal of Peace in Marseilles issued a decision on 18 October, 1938 according to which it was illegal on the part of the union of longshoremen of Marseilles to boycott the Spanish ships (in September 1937) and the Japanese ones (in March 1938).[74]

In addition to non-government boycotts, there are the ones which become sanctions if imposed by international organizations. It is still problematic whether boycotts ordered by governments may be justified as a means of retaliation. It is known that reprisals as acts of violation of international

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[72] H. LAUTERPACHT, *Boycott in International Relations*. BYBIL, 1933, pp. 125—127.

[73] *Ibid.*, p. 139.

[74] Ch. ROUSSEAU, *Le boycottage dans les rapports internationaux*. "Revue Générale de Droit International Public," vol. 62, 1958, No. 1, p. 20.

law have justification in similar, preceeding acts of the breaking of international law by other states. Such acts should adhere to the principle of proportionality implying that one act should be to the extent of the preceding infringement upon international law, committed by another State. Yet, there are precedents which seem to suggest that boycotts may be imposed in response to actions of States taken in fields other than the economic ones — for instance, on 23 August, 1951 the United States Senate by a majority of 81 votes passed a resolution imposing an economic boycott against Czechoslovakia in order to make the latter country relase William Oatis, an American newsman sentenced to ten years in prison on the charge of spying, in Prague on 4 July, 1951. There seems to be no instance showing the imposition of boycotts in accordance with the principle of proportionality, i.e. showing that it is ordered by another State as a response to the infringement of economic interests of the State. Therefore, a boycott imposed by the State is regarded as being contrary to international law and as causing responsibility to fall on that State, in keeping with the principle that it is only international organizations which have the right to order boycotts.[75]

Embargo is the most frequently used means of discrimination. In *The Annals of Spring and Autumn* Confucius says that in 651 B.C. the Chinese States known as the League of Kwei-chu signed a treaty in which one of the five provisions barred the ban on grains and flour exports to the member-States of the league. In defiance of the treaty five years later the ruler of the Chi-n State imposed a ban concerning the principality of Ch-in. Incidents of this kind are known to have occurred fairly often in the Chinese States.[76]

In itself, embargo means an official prohibition to export or import specified goods and in a broader sense also to enter into specific transactions or provide specific services.[77] Embargo may be imposed as a means of retaliation by one state or by an international organization as a sanction. In the first case, embargo ought to meet the requirements of proportionality. Most often, however, such requirements fail to be fulfilled because embargoes are used for the purposes of a generally unfriendly policy of one State towards another. In this sense, embargoes are acts of the use of economic strength and although the use of economic strength is not expressly prohibited, it is inferred that its use should be limited to situations leading to international tensions. However, it is admissible to impose embargo as an international sanction of the United Nations if its imposition is

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[75] *Ibid.*, pp. 5—25.

[76] K. IRIYE, *The Principles of International Law in the Light of Confucian Doctrine*, RCADI, vol. 120, 1967/I/, p. 32.

[77] L. DUBOIS, *L'embargo dans la pratique contemporaine*, "Annuaire Français de Droit International," vol. 13, 1967, pp. 99—103.

decided on by the competent organ of the United Nations and with regard to the right circumstances, i.e. if a State commits an act of gross violation with regard to the Charter of the United Nations. Yet, the use of embargo by regional organizations of States may be questioned as shown by the embargoes imposed by the Organization of American States against Guatemala in 1954, the Dominican Republic in 1960 and Cuba in 1962.[78] The Organization of American States is set up for the purpose of a peaceful settlement of international disputes and may impose embargoes if it is so decided by the United Nations Security Council.

Much attention has been given to the question of the Arab embargo against the Western States supporting the policies of Israel. It is often said that the Arab embargo did not violate any specific international agreements with the State against which it was used. In this context, it is especially pointed to the United States-Saudi Arabia agreement of 1933, the United States-Iraq agreement of 1938 and the one between the United States and the Sultanates of Maskitu and Oman of 1958. It is further indicated that these agreements fo not contain any provisions which would not allow the Arab states to use embargo or cut down the supplies of oil. It is also stressed that the Arab embargo was used in conformity with Article 21 of GATT as allowing each State Party to take

> "Any action which it considers necessary for the protection of its essential security interests [...] taken in time of war or other emergency in international relations."[79]

Nonetheless it seems that the weak point of this reasoning may be seen in disregarding the fact the League of Arab States has no right to order economic sanctions without the approval of the United Nations Security Council. The Arab embargo, although its beginnings go back to the Middle East War of October 1973, was ordered also by the States neutral to that armed conflict which in fact had ended, and as a result the Arab States could not regard themselves as being in a State of permanent warfare with Israel.

The United Nations Security Council may impose economic sanctions but because there is a breach of international economic law by any State, but because it determines the existence of any threat to peace, arsing in connection with the fact of non-compliance by that State with its political obligations. As shown by the example of the sanctions imposed by the United Nations Security Council on Rhodesia, such measures may include a ban on financial credits, bank settlements, imports, exports and

[78] *Ibid.*, p. 122.

[79] J. J. DWEIK, *Organizacje międzynarodowe do spraw wydobycia i eksportu ropy naftowej OPEC, OAPEC* [*International Organizations for the Exploitation and Export of Oil OPEC and OAPEC*], Warszawa 1982, pp. 271—273 (a doctoral dissertation presented at the Department of Law and Administration, Warsaw University, under the supervision of E. Piontek).

transit, as well as a prohibition to maintain communication with and transportation through the territory of the State subjected to such measures.[80] The sanctions against Rhodesia also show that their imposition must be accompanied by efforts of individual members of the United Nations to implement Security Council resolutions. In view of the lack of enforcement procedures to carry out Security Council decisions, there arises a need for individual States to lay down a legal basis in their legislation for the imposition of such international sanctions since the national law of individual countries most often provides for the imposition of sanctions in the event of war and not in the event of the existence of any threat to peace. Bearing in mind the existencê of economic integrations, the use of sanctions requires prior consulations within such regional organizations as for example the Benelux Economic Union or the European Economic Community. It is not surprising, therefore, that it takes much time to introduce national laws applicable to Security Council sanctions. It is not unexpected either that appropriate provisions do not achieve a required degree of uniformity. Of course, this is due to the fact that in individual countries the view held by the foreign ministries that political aims must be given first priority is not often shared by the economic affairs ministries which regard their own economic aims as being of no less primary importance (this holds true especially for the question of the status of sea ports).[81]

The use of economic sanctions to achieve political aims is not so typical of international law as is the use of such sanctions authorized by the statutes of international economic organizations. The review of the statutes shows that the failure to fulfil one's economic obligations, as arising from the statutes, involves such sanctions as suspension of the right of membership and expulsion from membership (organizational sanctions),[82] reduction of

[80] UN Security Council resolutions No. 216/1965/ of 12 November, 1965, No. 217/1965/ of 20 November, 1965, No. 221/1966/ of 9 April, 1966, No. 232/1966/ of 16 December, 1966, No. 253/1968/ of 29 May, 1968, No. 277/1970/ of 18 March, 1970, No. 288/1970/ of 17 November, 1970, No. 318/1972/ of 28 July, 1972, No. 320/1972/ of 29 August, 1972, No. 333/1973/ of 22 May 1973, No. 388/1976/ of 6 April, 1976, No. 409/1977/. In addition, it is to be noted that in the United Nations sanctions against the Republic of South Africa a ban was included on the sale of oil and oil products to that country, on the location of investment projects in the Republic of South Africa and Namibia, on transit and the transfer of technology. A/RES/36/121 of 8 February, 1982, A/RES/36/172 of 27 January, 1982.

[81] P. J. KUYPER, *The Implementation of International Sanctions, the Netherlands and Rhodesia*, Alphen aan en Rijn 1978, pp. 233—239.

[82] Art. 4, para. 5, Afro-Asian Rural Reconstruction Organization Constitution, 31 March, 1962, Art. 17, para. 4, Art. 18, para. 1 of the Charter of the Alliance of the Cocoa Producers, 24 March, 1970, Art. 67, Art. 68 International Coffee Agreement 1968, Art. 5 of the Articles of Agreement on the International Institute for Cotton 17 January, 1966, Art. 27 of the International Agreement Concerning the International Institute of Refrigeration December 1, 1954 as modified on 2 September, 1967, Arts 68, 69 of the International Sugar Agreement 1 January, 1969.

export quotas, prohibition of transportation, transit or re-exports of additional quantities of primary commodities to the free-economy markets, forfeiture of economic rights and privileges, recognition of financial deficits in raw materials.[83]

Prohibition to use discrimination is the basic principle of international law and is a reflection of equity in international relations. It is helpful in promoting the use of the principle of formal reciprocity. It is further strengthened by international public law banning the use of discrimination on the grounds of differences in social and economic systems. In other circumstances, it is inadmissible to use discrimination as being contrary to specific international economic provisions. For example, discrimination against foreigners is a delict of the States Parties to GATT, on the basis of Articles 9, 13 and 17. It is also recognized as such in Article 4 of the Treaty of the European Community of Coal and Steel and in Article 7 of the Treaty of Rome establishing the European Economic Community.

In promoting the prohibition of discrimination in international relations, no doubt the most important role is played by GATT. It is so stated in Article 1 of GATT concerning the most-favoured-nation clause and is further referred to in all provisions of GATT making a distinction between admissible and inadmissible forms of discrimination. The admissible forms are those resulting from privileges used in tariff unions, free trade zones, with regard to traffic in adjacent borderline regions. The admissible forms of discrimination are also those of preferences given the least developed countries and those of duties imposed against dumping and subsidization. All other forms of discrimination are regarded as being inadmissible.[84]

Prohibition to use discrimination is also one of the fundamental principles of the European Economic Community. In addition to prohibiting the use of discrimination against foreigners, Article 7 of the Treaty of Rome prohibits discrimination in the field of prices and terms of transportation, as well as the use of dominant positions of producers. This shows that the prohibition of discrimination is associacied with the recognition of reciprocity and, in a more general sense, with equity.[85] In the Treaty of the European Community of Coal and Steel, Article 4 point b puts forward a general principle prohibiting the use of discrimination, Article 60 forbids the use of price discrimination, Article 70 does not allow it with regard to the

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[83] In particular Art. 38, Art. 40, para. 1, Art. 48, para. 8 of the International Coffee Agreement 1968, Arts 31, 32 of the International Sugar Agreement 1 January, 1969, Art. 23 of the Fourth International Tin Agreement 1 July, 1970.

[84] J. JUSZKIEWICZ, *Kwestia dyskryminacji w Układzie ogólnym w sprawie cel i handlu* [*The Question of Discrimination in the General Agreement on Tariffs and Trade*], "Sprawy Międzynarodowe," 1978, No. 10, pp. 104—120.

[85] M. WYBO, *Discrimination et Marché Commun*, Paris 1966, pp. 2—5.

terms of transportation and Article 63 does not permit it to be used with regard to buyers.[86] The relevant awards provide evidence that in so far as the implementation of these provisions is concerned, the generally held view is that discrimination means "*le traitement inégal dans des conditions comparables.*"[87] It is shown that, for instance in the domain of prices, discriminatory practices can take the form of sales with unallowable rebates returned to the buyer as checks or of price cuts regardless of the price actually included in invoices. The other forms of discrimination may be those of *commandes détournées* wherein export cargoes are re-directed to national buyers. There may be also those of quality manipulations wherein higher-quality products are sold as being of lower quality.[88]

Prohibition to use discrimination is known to have occurred in other trade treaties, For example, in accordance with the trade treaties concluded by the United States before the last war it is agreed to impose currency controls in a manner designed to avoid discriminating against nationals of the other party and those of any third party. After the last war, the United States have concluded trade treaties which say that currency controls should not be imposed in a way unnecessarily harmful to or arbitrarily discriminating against the economic interests of nationals and companies of the other party.[89]

The use of discrimination is not always inconsistent with international law. For instance, the kind of discrimination arising from the sanctions of international organizations may be intended to restore other goods the possession of which has been violated by the State amenable to the decision on discrimination against it. The other kind of discrimination arising from the most-favoured clause of others is often provided for in international law since it reflects the principle of commutative justice. In this regard, it should be said that international law is not opposed to discrimination in general, it is opposed to discrimination in particular when it is used arbitrarily, unfairly nd inappropriately.[90] Its main feature is, therefore, the use of an inappropriate form or the use of an appropriate form

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[86] *Ibid.*, pp. 9—98.

[87] Haute Autorité c. Klockner Werks Ag et Hoesch Ag.

[88] M. WYBO, *op cit.*, p. 47.

[89] S. D. METZGER, *Exchange Controls and International Law*, in: *Legal Problems of International Trade*, ed. by P. O. Proehl, Urbana 1959, pp. 315, 323, F. A. MANN, *op. cit.*, p. 72.

[90] Max Huber as an arbitrator in the Affaire des Biens Britanniques au Maroc Espagnol. "Reports of International Arbitral Awards," vol. 2, p. 652: "*discrimination manifestement arbitraire contre les étrangers pourrait éventuellement justifier une intervention de droit international.*" E. VATTEL. *Le droit des gens*, Book II, Chapter 7, para. 84: "manifest and tangible injustice."

with regard to the wrong partner. In sum, inappropriate legal qualifications underlie the use of discrimination which is, therefore, contrary to the principle of "treat like cases alike."[91]

The above remarks may be applied also to the sanctions imposed by the United States against Poland after 13 December, 1981, including the suspension of the landing rights for Polish commercial flights to the United States, suspension of Poland's rights of fishing in United States waters, prohibition to grant Commodity Credit Corporation loans for the purchase by Poland of US grains and suspension of the most-favoured-nation clause for Poland. These sanctions were imposed by the United States on a unilateral basis and had no legal basis of a decision of the United Nations Security Council or of that of any other international organization of which Poland was a member. They cannot be recognized as being retaliatory measures because the Polish authorities did not threaten any United States interests by the introduction of martial law in Poland. It might be assumed that the United States Administration took recourse to *actio popularis*, i.e. to unfriendly moves in response to encroachments upon the property protected by the entire international community and thereupon in the name of the whole international community. On the other hand, the principle of *actio popularis* is not known to international law according to which individual States are allowed to protect only their own interests and the protection of the interests of the international community is left to the United Nations and to other regional organizations such as the Organization of American States, the Organization of African Unity and the League of Arab States. The United States ordered their sanctions on the grounds of human rights violations in Poland. However, the United States are not bound by those United Nations covenants on human rights to which Poland is a signatory. Moreover, the covenents do not give States authorization to use sanctions in the event of human rights violations by individual countries, and determine that the system of monitoring the observance of human right should be based on the mechanism of control and on the settlement of disputes. Therefore, it is clearly seen that the United States sanctions against Poland cannot be regarded as reflecting the principle of justice in international economic relations. From the point of view of commutative political justice, the sanctions may be said to be lacking the substantiation of international public law and to be assuming the character of arbitrary actions since they deviate from

[91] P. MEYER, *Justice in Politics*, in: *Legal Essays. A Tribute to Frede Castberg*, Oslo 1963, pp. 125—134.

the principle of "treat like cases alike." As shown by the International Lawyers Committee, since the end of World War II material law has been imposed in several tens of cases throughout the world and in no case has its imposition evoked a United States response comparable to that of the sanctions against Poland.

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Some Reflections Concerning the Evolution of International Arbitral and Judicial Rules of Procedure

by JAN KOLASA

I

In the general theory of law a basic distinction is made between the substantive law and the adjective law, or law of procedure. This division has been known for a long time and is generally accepted both in theory and in practice. In general, the criterion of this division amounts to the fact that substantive rules formulate various rights, while procedural rules regulate the conditions, methods and procedures of seeking judical protection for substantive rights.

It is surprising that this division, so essential in the theory and practice of domestic law (civil, penal and administrative) is not appreciated in the theory of international public law and usually remains unnoticed by international lawyers. Only exceptionally, here and there, can be found short remarks, loosely connected with this issue.[1]

According to G. Schwarzenberger, whose opinion is characteristic, there is no possibility of applying the division into substantive and procedural law to international public law. In his view, this division is closely connected with compulsory jurisdiction of courts and the application of it makes sense and is possible only with respect to domestic law. He explicitly states:

> "International customary law lacks a compulsory judicial organization and, thus, the distinction between procedural and substantive law."

What is more, he states that even in the present partly organized international community "it would be inaccurate to introduce this dichotomy."[2]

It appears that not only the question of the dichotomy is relevant

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[1] There exist, however, various interesting publications on arbitral or judicial procedure alone.

[2] G. SCHWARZENBERGER, *International Law*, 3rd ed., London 1957, vol. I, pp. 584—585.

here but that — in that author's view — procedural law in its proper meaning has not developed yet in international law. The opinion of this outstanding international lawyer is thus precise and univocal. However, his attitude towards international law can be controversial as he treats it as a rather static field of law, laying stress on customary law. It appears that he has not noticed new trends in the developement of contemporary conventional law, especially the law relating to peaceful settlement of international disputes.

First of all, it is not at all comprehensible, why Schwarzenberger so closely binds the division into substantive and procedural law with the existence of compulsory jurisdiction. The lack of an international legislature of general powers to enact rules of law and the lack of compulsory jurisdiction by international courts are, without doubt, the general features, characteristic of the system of international public law. These deficiencies are evident when international law is compared to domestic law. Over centuries this has not, however, impeeded neither the making of nor the applying this law. What more — with the exception of a few extreme cases — nobody has ever negated on this basis the legal character of substantive rules of international law. The lack of compulsory jurisdiction is just a feature of this law and this does not deprive its substantive rules of the value of legal norms. Why then should this hamper the development of international procedural law? Practice shows that international arbitration had developed for centuries and that the judgements of these courts always were and still are binding on the parties. In this sense they were as a rule respected by States in international practice.

As a matter of fact, jurisdiction, no matter if compulsory or optional, has to apply a more or less developed procedure, that is — legal rules must be observed and developed according to competences possessed by an organ. The argument that procedural rules applied and developed by international arbitration are neither peremptory nor of a universal nature cannot be a substantial obstacle to their recognition as rules of procedural law. It is known that a great majority of rules of international public law are neither peremptory nor of universal nature. In principle, they are *ius dispositivum*. Particular rules and institutions of this law can have a very differenciated subjective range. However, one must admit that the development of international judicature is less dynamic and its role in practice incomparably less significant than that of the domestic jurisdiction of States. That is why one can to some extent comprehend that

"the conception that a legal right may exist without an enforceable judicial remedy is alien to the thinking of practitioners of private law."[3]

[3] H. W. BRIGGS, *The Law of Nations, Cases, Documents and Notes*, New York 1958, p. 20.

But it seems that this should not regard theorists of law in general, especially theorists and practitioners of international public law.

Ch. G. Fenwick, a well-known and recognized international lawyer, presents a different view in this matter. Observing the practice and the development of new trends of international law, he notices the formation of a basis for the division of the system of international law into substantive and procedural rules. He links the beginnings of justifying such a division with the evolution of international arbitration on the turn of the 19th and 20th centuries.[4]

Fenwick's view is characteristic in that — unlike Schwarzenberger — he does not consider compulsory adjudication to be a condition *sine qua non* for the division of international law into substantive and procedural law. In his opinion, the sole fact that arbitration procedure has developed, is sufficient. After all, for an international lawyer the term of judicature *sensu largo* comprises international arbitration.

Following Fenwick's idea, one can go further and consider this matter from a slightly different point of view. It is doubtful whether such overwhelming significance should be given to the problem of legal value of procedural rules and, consequently, to the legal character of their source. It seems that of greater significance is their function, that is — regulating the conditions, methods and procedures of seeking judicial protection for the rights of legal subjects. Thus, the fundamental criterion of the division of international law into procedural and substantive law lies in the difference of their functional character. Substantive rules have a function different from that of the procedural rules of law. Thus it seems that the source of controversies arising during discussions concerning the division of international law into substantive and procedural law lies in the approach to this matter. A close analogy to the domestic law of States can only lead to misapprehension. The starting point should not be the analogy to domestic law but the reference to the very nature of the system of international public law.

II

A historical view on the process of the overgrowing of substantive rules of international law with procedural rules of law shows that this evolution has lasted for a very long time. As is known, the history of arbitration can be traced to the oldest period of the development of international law and the international community. It was well known and applied in ancient Greece and Rome.[5] It was also widespread in

[4] Ch. G. FENWICK, *International Law*, 3rd ed., New York 1948, p. 507.

[5] See, f.e., C. PHILLIPSON, *International Law and Customs of Ancient Greece and Rome*, London 1911, vol. 2, p. 61 ff; L. EHRLICH, *Prawo międzynarodowe* [*International Law*], Warszawa. 1958, pp. 395—397.

medieval Europe. However, with the development of the sovereignity of States and with the consolidation of the doctrine of independent rulers, arbitral jurisdiction became rare. But even then it happened that e.g., peace treaties provided that remaining disputes would be settled by commissions set up by both parties.[6]

An especially important date is the year 1794, when — subsequent to the action of the American Secretary of State, Jay — a treaty between America and Great Britain was concluded (the so-called Jay Treaty). The Treaty provided that any contentious matter between these States would be settled by mixed commissions, that is commissions composed of American and British nationals appointed by both States in question and members co-opted by arbitrators appointed directly by the parties to the dispute.[7]

But it was only by the end of the 19th century that arbitration revieved and acquired a new significance. It was then that arbitral procedure acquired prestige and authority as the just and equitable means for the settlement of international disputes. Especially the success of arbitration in the dispute of 1872 between the United States and Great Britain (Alabama Claims) advanced arbitration procedure in the theory and led to its consolidation in the practice of international relations. The peaceful settlement of this well-known dispute on the one hand and memories of wars which had often torn Europe in the second half of the 19th century on the other, brought strong public support for the development and consolidation of international law and for a wider than in the past use of arbitration in settling disputes between States. Parliaments of many States (Great Britain, Italy, the United States, the Netherlands and Sweden) adopted respective resolutions. The number of cases in the 19th century where arbitration was used is estimated by different authors at well over a hundred, sometimes even more. The differences in the estimations arise from the lack of accord as to whether some cases can be included in the category of international arbitration.[8]

As arbitration became more widely used, a greater attention was given to the neccessity to elaborate, unify and make common a suitable arbitral procedure. Not long after its creation, the Institute of International Law undertook this task. Already in 1875 is elaborated and presented for the use of States "a body of rules of arbitral procedure."[9] In this way

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[6] L. EHRLICH, *op. cit.*, p. 395.

[7] J. B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, Washington 1898, vol. 5, p. 4720.

[8] L. EHRLICH, *op. cit.*, p. 66.

[9] "Annuaire de l'Institut de Droit International", vol. 1, p. 126 ff. See Ch. G. FENWICK, *op. cit.*, p. 512.

already in 1875 a document which could be called the first code of procedural law, naturally concerning arbitral procedure, was created. It was elaborated not by politicians, representatives of States, but by a group of prominent international scholars. Thus it could not as such be called a draft international treaty. The Institute of International Law, aware of the necessity to elaborate and unify such a procedure in one document, submitted it to States for voluntary use in case of need, that is in case a compromise concerning an arbitration tribunal was concluded or if the dispute was to be submitted before a particular arbitrary organ. The result of the work of the Institute can thus be recognized as a private codification of international arbitral procedure.

A significant step in this matter with regard to arbitration practice was the first Conference of American States which took place in the years 1889—1890. In the course of its debates the representatives of States elaborated a *Plan of Arbitration*, in which the obligation of States was formulated to bring disputes to arbitrary settlement in all matters. With the exception, however, of cases which in the opinion of the parties to a controversy, might imperil their independence. But even this restrictive clause of such a general character turned out to be an inadequate safeguard for their sovereignity. The convention was not ratified. However, even conventions which have not been ratified can be of great significance for the development of international law. This unratified treaty became an inspiration for introducing obligatory arbitration into many bilateral treaties concluded between American States.[10]

The general recognition of international arbitration as a formal international procedure is linked only with the Hague Conventions.

The first Hague Conference convened in 1899 was the greatest conference convened to the end of the 19th century not for the purpose of settling some current political problems, but for the purpose of developing and codyfying international law, especially in the sphere of limiting hostilities and of peaceful settlement of international disputes. The Conference adopted three conventions, three declarations, one resolution and six voeux. The first convention was the *Convention for the Pacific Settlement of International Disputes*. It was signed by 16 States, which was not at all a small number taking into consideration the times and the subject of the regulation.

The task to further develop and precise the law of nations in this subject was continued at the Second Hague Conference convened in 1907. The Conference adopted 14 conventions, the title of the first of which was again the *Convention for the Pacific Settlement of International Disputes*.

[10] Ch. G. FENWICK, *op. cit.*, p. 512.

This was a legal act elaborated in detail, composed of 97 broad articles grouped in the following parts:[11]

Part I: *The Maintenance of General Peace* (Art. 1),

Part II: *Good Offices and Mediation* (Arts. 2—8),

Part III: *International Commissions of Inquiry* (Arts. 9—36),

Part IV: *International Arbitration* (Arts. 37—90),

Part V: *Final Provisions* (Arts. 91—97).

As can be seen, Part IV, which is of particular interest for us, is the broadest. It is composed of over 50 articles. Its contents can best be illustrated by the titles of its four consecutive chapters:

Chapter I: *The System of Arbitration* — provisions with respect to the object, scope, subject and significance of arbitral judicature (Arts. 37—40),

Chapter II: *The Permanent Court of Arbitration* — the powers and structure of the judicial organ created (Arts. 41—50),

Chapter III: *Arbitration Procedure* — arbitration procedure set about fully and precisely (Arts. 51—85),

Chapter IV: *Arbitration by Summary Procedure* — simplified procedure (Arts. 86—90).

It follows from this enumeration that the chapter on arbitral procedure is the longest one. In its 34 articles consecutive stages and steps of procedure have been regulated, such as: conclusion of a compromise or a special clause for submission to arbitration (Arts. 52—54), election of arbitrators and of the umpire (Arts. 55—59), seat of the Permanent Court of Arbitration (Art. 60), languages (Art. 61), appointment of agents by parties (Art. 62). The consecutive articles directly concern the course of the court hearings and the deliverance of the judgement. These matters are first dealt with by Article 63 which stipulates that as a general rule arbitral procedure comprises two distinct phases: pleadings and oral discussions. Written procedure consists in

"the communication by respective agents to the member of the tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents called for in the case".

In turn, the proper oral discussions consist in

"the oral development before the tribunal of the arguments of the parties".

The discussions are only public if it be so decided by the tribunal and with the assent of the parties to the dispute (Art. 66). The discussions are under the control of the president who declares the discussion closed

"when the agents and counsel of the parties have submitted all the explanations and evidence in support of their case" (Art. 77).

[11] English Text — P. B. POTTER, *An Introduction to the Study of International Organization*, 4th ed., New York 1935, p. 538—559.

After that, the tribunal considers its decisions in private and the proceedings remain secret. All questions are decided by a majority of the members of the tribunal (Art. 78). The arbitrary award must give the reasons on which it is based and it is read out in public sitting in the presence of the agents and counsels of the parties to the dispute. The judgement

"duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal" (Art. 81).

Each party pays its own expenses and an equal share of the expenses of the tribunal (Art. 85).

The Hague Conventions greatly contributed to the development of international judicature. Above all, for the first time in the history of the development of the international community, a Permanent Court of Arbitration with the seat at the Hague was established. This Court is up to the present

"accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention" (Art. 41).

Apart from that it was explicitly stated that the tribunal

"is authorized to declare its competence in interpreting the compromis"

and it is

"entitled to issue rules of procedure for the conduct of the case [...] and to arrange all the formalities required for dealing with the evidence" (Arts. 73 and 74).

Thus, in the field of international arbitration general treaty rules of universal scope were created. These rules regulated the structure, competences and procedure of the Permanent Court of Arbitration as an international organ composed of independent judges acting as international functionaries. What is more, it is significant that the competences of the international arbitration court to complete and develop its procedure were confirmed by treaty law.

A great progress was made especially in the matter of arbitral procedure, that is — generally speaking — in the development and codification of international procedural law. The very nature of this progress lies, above all, in the fact that the question of arbitral procedure became subject of a special international conference of a global scope. The Conference, composed of representatives of States, embraced arbitral procedure in a systematized and fairly complete system, in one legal act in the form of general convention. This achievement in the development and codification of arbitral procedure was to serve not only the Permanent Court of Arbitration but every other international organ of arbitration as well. Naturally, in the course of the deliberations, there were efforts to elucidate and precise the legal value of procedural rules with respect to the parties to the dispute and the arbitral organ.

The necessity of such a codification was derived from the observation that, in spite of a century-old practice, it had turned out that in arbitral procedure there existed no general legal rules, accepted by States. The lack of such rules was considered to cause lengthiness, incertitude and various other difficulties in the efficient settling of disputes by arbitration. A compromise concluded between parties was remedial only to some extent. It remained a fact that in spite of a more efficient functioning of arbitration and in spite of developing provisions of compromises inserted in treaties the still existing lack of

"*règles fondamentales communes concernant la procédure à suivre par les arbitres produit des conséquences de plus en plus dommageables.*"[12]

A high regard was expressed for the work of the Institute of International Law in this field. Already in 1875 the Institute worked out *Règlement pour la procédure arbitrale* recommending its acceptance — whole or partial — by States bringing a dispute before any international arbitration organ. This weighty work of scholars was completed by other outstanding lawyers and was enriched by the practice of numerous international arbitration organs in the last quarter of the 19th century. It was realized that the Hague Conferences had been convened in a favourable situation as in their work to complete a body of procedural rules aiming at a better comprehension and settlement of disputes they could benefit from two sources — theory and practice.[13] Great attention was given to various codifications of arbitral procedure drawn up for the use of different arbitration commissions. At the same time, however, it was emphasized that arbitral procedure hitherto had in principle been laid down by arbitrators themselves or by parties to a general treaty or to a special one, the use of which had been determined beforehand. Whereas the Hague Conferences dealt with permanent arbitral procedure of a general scope.[14]

Besides, the Conference did not aim at including all procedural matters in its codification. It was limited to crucial issues. Too detailed rules could have lead to "*un embarras et un danger*". Apart from that, attention was paid not to overstep justified limits which could be accepted by States. Furthermore, the legal character of procedural rules was clearly defined. These rules were put at the disposal of parties to a dispute as auxiliary, optional rules. That means that States were always free to change them or even discharge from them completely. These rules can be effective

[12] *Conférence Internationale de la Paix, La Haye 18 mai — 29 juillet 1899*, Nouvelle édition, La Haye 1907, Première Partie, p. 98.

[13] *Ibid.*, Première Partie, p. 98 and *Deuxième Conférence Internationale de la Paix*, La Haye 15 juin — 18 octobre 1907. *Actes et Documents*, La Haye 1908, vol. 1, p. 390.

[14] *Conférence 1899*. Quatrième Partie, p. 3.

only to the extent of the consent of States acting before an arbitration organ.[15]

So, the Hague Convention comprises the most general and most basic rules of arbitral procedure, leaving to the arbitration court

"the right to determine its own rules of procedure in accordance with circumstances and experience acquired".[16]

Such rules of procedure are adopted by the arbitration organ by a majority vote in the form of a resolution. Thus it has the character of a unilateral act. However, an explicit restriction has been made that the right of the court to determine its own rules of procedure does not include the right to modify the provisions of the Convention. It had been emphasized that the court was a judicial, not a legislative organ. Any changes proposed by the court as regards procedural provisions contained in the Convention cannot as such have any legal effect unless accepted by parties to the Convention.[17] In that case the legal basis of the procedural rules, will not be the resolution of the court but the explicit or implied will of States, parties to the Convention.

Thus, rules of arbitral procedure have two different sources and, consequently, their legal value is different. The set of general rules which, included in international conventions, are of fundamental importance for international arbitration, should be regarded in the first place. These are classical treaty rules laid down by States and can be changed by States only. Apart from that there exist various sets of detailed rules of procedure and various casual procedural decisions of particular arbitration organs. The formal source of such rules is a unilateral act of a collegiate arbitration organ. The Permanent Court of Arbitration is obliged to notify the parties to the Hague Convention of the rules of procedure adopted by it, so that potential parties to the dispute can get aquainted with them in advance.[18] Both conventional rules and unilateral rules of procedure are binding on the parties to a dispute. They are, however, *sui generis ius dispositivum*, which means that with the consent of the parties and the tribunal, they can be changed, modified and even substituted for other procedural rules.

The great contribution of the Hague Conferences to the development and codification of international arbitration law should be assessed in accordance with the general spirit of international arbitration and the specific character of international public law. The parties to the dispute have kept their freedom to decide whether to submit the dispute to

[15] *Ibid.*, Première Partie, p. 98.

[16] *Deuxième Conférence*, vol. 1, p. 390.

[17] *Ibid.*

[18] *Ibid.*

arbitration and they have retained their influence on the composition of the arbitration organ. However, in case the dispute is to be settled by the Permanent Court of Arbitration the freedom to select arbitrators is limited to the previously determined list of candidates to be found in the secretariat of the tribunal. The permanent character of this tribunal consists, in principle, in the existence of a permanent list of candidates from which parties to a dispute can select a body of arbitrators for the hearing of their case. The parties also retain, as has already been mentioned, the possiblity to influence the arbitration procedure. They can accept the procedural rules, reject all of them or accept them with some modifications. For the use of these rules is of an optional character (Art. 51 of the Convention).

Considering the Hague Conventions from the point of view of the general development of international law one can remark that they introduced a new trend to the development and codification of international law — a trend of procedural rules in their widest meaning. For they concern not only procedural matters in the narrow sense but also the competences and organization of arbitration courts. It is therefore not accidental that some scholars connect with this period, that is with the turn of the 19th and 20th centuries, the creation of a basis for the introduction of the division of international law into substantive law and law of procedure. So, it was not long ago that international jurists began to differentiate between substantive law and law of procedure. It should be emphasized that at that time in the development of procedural rules of international law, international lawyers sought measures to condemn and limit wars, by opposing to them an accessible and generally accepted arbitration procedure.[19] Thus, the development of arbitral procedure was linked at that time, and probably today too, with the specific role of international law in an organized international community.

The condification and development of arbitral procedure, initiated by the Hague Conventions was continued in the first half of the 20th century and lasts up to the present. Specific efforts in this matter were especially made by the League of Nations and nowadays by the United Nations. As regards the times of the League of Nations, the General Act of 1928 for the pacific settlement of international disputes[20] should be mentioned. Within the framework of the United Nations this question was the subject of interest of the International Law Commission. During the first days of its existence it selected 14 topics of international law for codification, giving

[19] See Ch. G. FENWICK, *op. cit.*, p. 507.

[20] In 1949 the General Assembly of the United Nations revised its provisions, "UN Yearbook," 1950, p. 862.

priority to the following three: 1. the law of treaties, 2. arbitral procedure and 3. the regime of the high sea.[21] In this way the problem of arbitral procedure became one of the most important and most urgent tasks of the International Law Commission, established for the development and codification of international law. Arbitral procedural rules were thus officially introduced into the system of contemporary international law by an organ very much authorized to do so.

The Commission began its work with a great energy. The starting point was the ascertainment that

"arbitral procedure as it stands to-day contained loopholes, through which states were enabled to evade obligations, (to bring the dispute before arbitration organ) either by making it impossible for the arbitral tribunal to be constituted, or by hampering its functioning".

Therefore, the object of the new code of arbitral procedure was first of all to fill the gaps.[22]

The code of arbitral procedure was prepared in the manner and form provided for a multilateral convention concluded under the auspices of the United Nations. The material prepared by the Commission was presented for consideration and possible comments of governments and then returned back to the Commission until the final arrangement of the official version.

The basic *Draft on Arbitral Procedure* consisting of 32 articles was prepared already in 1950. In a report annexed to the text, the Commission pointed out that the existing arbitration practice had been codified and the draft based on the rule that

"arbitration is a method of settling disputes between States in accordance with law, as distinguished from the political and diplomatic procedures of mediation and conciliation".

On the other hand,

"in order to render the arbitration procedures as effective as possible, it had thought to introduce new methods for solving difficulties with respect to the drafting of a compromis and the constitution of an arbitral tribunal".

In order to safeguard the desired effectiveness of arbitration and maintain

"the independent standing of arbitral tribunals in their capacity as international organs"

provisions relating to

"the continutity od arbitral tribunals once constituted"

in a given case were also added. Also in the interests of the effectiveness of arbitral tribunals were formulated

[21] *Ibid.*, 1948/49, p. 949.
[22] *Ibid.*, 1950, p. 862.

"provisions based on the generally accepted principle that the arbitral tribunal has legal power to determine its own jurisdiction in conformity with the instrument creating it and to decide on its procedure".[23]

The *Draft on Arbitral Procedure* composed of 32 articles was divided into the following seven chapters:

Chapter I: *The Undertaking to Arbitrate* (Arts. 1—2),
Chapter II: *Constitution of the Tribunal* (Arts. 3—8),
Chapter III: *The Compromise* (Arts. 9—10),
Chapter IV: *Powers of the Tribunal* (Arts. 11—12),
Chapter V: *The Award* (Arts. 23—28),
Chapter VI: *Revision* (Art. 28),
Chapter VII: *Annullment of the Award* (Arts. 30—32),

It is striking that the questions of the constitution of an arbitral tribunal, conclusion of a compromise and the powers of the tribunal, were included in the frame of procedural rules, while, at the same time, there is no chapter on arbitral procedure *sensu stricto*. Stress was laid on detailed development and precise formulation of the powers of the tribunal (Arts. 11—22). That was, by the way, in conformity with the general assumption of the International Law Commission that there was no need

"to frame detailed rules of arbitral procedure, which were liable to vary according to the circumstances of each arbitration".

The Commission aimed above all at introducing new and vital general provisions rendering the institution of arbitration an organ of settlement of disputes between States more rigoristic than before. The dual aspect of the prepared draft of the arbitral code was emphasized. On the one hand, it was to be a codification of existing law, and on the other

"a formulation of what the Commission considered to be desirable developments in the field."[24]

Generally, States raised objections to directing arbitral procedure in this way. It was argued that the presented *Draft on Arbitral Procedure* goes too far away from "the accepted norms of international arbitration". It was suggested that the proposed procedure headed for transforming arbitration into judicature in the strict sense. Reference was made mainly to these provisions which prescribed bringing various questions arising in arbitral practice before the International Court of Justice. It was argued that such a solution would introduce the International Court of Justice as a court of revision and thereby detract from the efficiency of arbitration organ and discourage States from bringing disputes before it. The group

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[23] *Ibid.*, 1952, pp. 792—795.
[24] *Ibid.*, 1953, p. 671.

of States mostly opposed to the draft maintained that it encroached upon their sovereignity and tended to remove the flexibility that was one of the most valuable and characteristic features of international arbitration.[25]

The opposition of States was so strong that the Commission had to consider whether — in spite of this reluctance — it should risk presenting the draft convention for signature and ratification by States, or whether it should contend itself with submitting

"a set of rules which might inspire States in drawing up provisions for inclusion in arbitration agreements".

In the end, the Commission decided in favour of the second alternative. In coming to this conclusion the Commission recognized that the *Draft on Arbitral Procedure* prepared by it

"went beyond what the majority of Governments would be prepared to accept in advance as a general multilateral treaty of arbitration".

For the draft treaty which had been prepared was to apply automatically after signature and ratification by States to the settlement of all future disputes between them. The re-cast of this draft so that it might be accepted by a majority of States would mean an alteration in the whole concept on which the draft was based. In these circumstances the elaborated text was presented without changes, but not as a draft of general multilateral convention, but only as a "set of rules", which States could use as models in concluding bilateral and multilateral arbitral agreements.[26]

This significant undertaking of the International Law Commission, — in spite of the alteration of the original concept of a multilateral treaty — was not in vain. Its unquestionable achievements in the perfection of international arbitration were vital for the theory and the cognizance of not only lawyers but politicians as well. Many difficult and doubtful issues were broadly considered by most outstanding theoreticians and practitioners of international law. The difficult road to the further development of this field of international law was wiped clear in the direction of adopting a more efficient and rigorous settlement of international disputes by arbitration. The achievement of the International Law Commission in this field constitutes a complementation of that of the Hague Conferences. While the Hague Conventions laid special emphasis on arbitral procedure in the strict sense, the draft of the International Law Commission emphasized questions concerned with the constitution of an arbitration organ, its powers, and especially with the strengthening of its powers in relation to the parties to the dispute.

[25] *Ibid.*, p. 675 and *ibid.*, 1955, p. 339.
[26] *Ibid.*, 1958, p. 384.

The Hague Conventions, the General Act of the League of Nations and the Draft on Arbitral Procedure of the International Law Commission are, of course, only the most significant examples and represent only the best known and general trend in the development of international arbitral procedure. Undertakings on a smaller scale, of a bilateral or regional character were conducted beside, or rather in parallel, with this trend. What also is important and significant here, is that intergovernmental international organizations became involved in the framework of arbitral procedure. Their contribution to this matter is both interesting and valuable. As a result of all these undertakings, international arbitral law finds a broader expression in distinct, formal sources of its own, that is, in treaties, resolutions of international organs, general principles of law recognized by civilized nations (Art. 38, para. 1 c of the Statute of the International Court of Justice) and, of course, in practice, which leads to the evolution of customary rules. But that is a different topic.

III

An especially important step in the development of international adjudication and of procedural law was the establishment in 1920, for the first time in the history of the international community, of a permanent international court in the strict sens of the term. In the system of the League of Nations it was called the Permanent Court of International Justice, while in the system of the United Nations it bears the name of the International Court of Justice. The present Court is one of the six principal organs of the United Nations. The Statute on the basis of which it was established and is functioning forms an integral part of the Charter of the United Nations (Art. 92 of the Charter).

The Statute of the International Court of Justice is composed of 70 articles grouped in five chapters:

Chapter I: *Organization of the Court* (Arts. 2—33),
Chapter II: *Competence of the Court* (Arts. 34—38),
Chapter III: *Procedure* (Arts. 39—64),
Chapter IV: *Advisory Opinions* (Arts. 65—68),
Chapter V: *Amendment* (Arts. 69—70).[27]

Being a court in the strict sense the Court is composed of 15 independent judges elected by two organs of the United Nations (the General Assembly and the Security Council) independently of one another. The judges are

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[27] *ICJ, Acts and Documents Concerning the Organization of the Court*, No. 4, 1978, pp. 61—89.

elected for a period of nine years. The tribunal is competent to settle all disputes which the parties refer to it (Art. 36, para. 1). Naturally, these have to be legal disputes. The Court decides on the disputes in accordance with international law (Art. 38).

The broadest chapter: *Procedure* regulates the following matters: official languages, way of bringing cases before the Court, representation of parties by agents. The actual procedure comprises — like in arbitration — two distinct phases: written and oral proceedings. The written proceedings — again, like in arbitration — consist in

"the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support" (Art. 43, para. 2).

The oral proceedings consist in

"the hearing by the Court of witnesses, experts, agents, counsel, and advocates" (Art. 43, para. 5).

The hearing is under the control of the president or of the vice-president (Art. 45). The hearing is public, unless the Court decides otherwise or unless the parties demand that the public be not admitted (Art. 46). The deliberations of the Court take place in private and remain secret (Art. 54, para. 3). The judgement is passed by a majority of judges present, it states the reasons on which it is based and is final and without appeal (Arts. 55, 56, 60).

Article 30 of the Statute grants the Court the power to determine its own rules of procedure. The scope of the Court's rules of procedure has been defined as follows:

"The Court shall frame rules for carrying out its functions, in particular, it shall lay down rules of procedure".

Article 51 refers to such rules of procedure stipulating that

"during the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure".

The right of the Court acting as an international organ to determine its own rules of procedure is evident. Even if the Statue contained no explicit authorization, the Court could lay down its own rules of procedure. For such is the common practice of international judicature and international organizations.[28]

[28] Cf. J. H. RALSTON, *The Law and Procedure of International Tribunals*, Stanford 1926, p. 198 and J. KOLASA, *Rules of Procedure of the United Nations General Assembly. A Legal Analysis*, Wrocław 1967, pp. 63—70.

The present *Rules of Procedure* of the International Court of Justice[29] constitute a broad legal act, composed of 109 articles, grouped in four parts: Part I: *The Court* (Arts. 1—21); Part II: *The Registry* (Arts. 22—29); Part III: *Proceedings in Contentious Cases* (Arts. 31—101); and Part IV: *Advisory Proceedings* (Arts. 102—109).[30]

Part III (*Proceedings in Contentious Cases*) is not only the broadest, but also of paramount importance for the development of judicial procedure. It constitutes a significant development of and it complements the provisions of the Statute concerning proceedings before the Court. In consequence, it develops and complements general and universal rules of treaty law, binding on all parties to the Statute. This part is composed of sections which are further divided into subsections. The titles of consecutive sections inform of the contents of their provisions:

Section A. Communications to the Court and Consultations (Arts. 30—31); *Section B. The Composition of the Court for Particular Cases* (Arts. 32—37); *Section C. Proceedings before the Court* (Arts. 38—72); *Section D. Incidental Proceedings* (Arts. 73—89); *Section E. Proceedings before the Chambers* (Arts. 90—93); *Section F. Judgments, Interpretation and Revision* (Arts. 94—100); and *Section G. Modifications proposed by the Parties* (Art. 101).

The procedure binding on parties to the dispute and on the Court has thus been embraced in two legal instruments[31] of a different character. The rules formulated by the Statute are treaty provisions laid down by States. They form an integral part of the Charter of the United Nations and — in consequence — they have the value of legal rules, universally binding. On the other hand, the *Rules of Procedure of the Court* constitute

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[29] Painstaking preparations of the first rules of procedure of this judicial organ lasted a considerable time. Successive versions of the complete rules as well as particular articles were widely discussed. Experience gained in the course of codification and development of arbitral procedure was widely used. In spite of the long practice of arbitration many doubts and controversial matters arised again and again. They concerned both the general nature of the complete set of rules of procedure treated as a general legal act and particular procedural provisions. Finally, the first rules of international judicial procedure in the strict sense were unanimously adopted at the 40 meeting of the Permanent Court of International Justice on 24 March, 1922 (See discussion and texts of drafts in *PCIJ, Acts and Documents Concerning the Organization of the Court*, Series D, No. 2, Leyden 1922). These rules of procedure were changed several times both by the PCIJ and by the present Court. The present version is from 1978. A short history of successive modifications can be found in "ICJ, Yearbook 1978—1979", The Hague, pp. 2—3.

[30] *ICJ, Acts and Documents Concerning the Organization of the Court*, No. 4, 1978, pp. 91—161.

[31] There are, of course, various additional resolutions of a more general nature and particular procedural decisions of the Court. See, e.g., *Resolution Concerning the Internal Judicial Practice of the Court* (12 April, 1976), *ICJ, Acts and Documents*, No. 4, pp. 165—173.

a legal act passed by the body of judges by majority vote (Art. 55 of the Statute). It is an unilateral act. It can be changed by the Court in the same way in which it is adopted.[32] Both, the procedural rules comprised by the Statute and those found in the *Rules of Procedure* are binding on parties to the dispute and on the Court.

There are, however, some exceptions to this general principle of international judicature *sensu stricto*. In some cases parties may appoint their national judges. Furthermore,

"the parties to a case may jointly propose particular modifications or additions"

to the *Rules of Procedure* established by the Court (Art. 101). Such proposals require, however, the assent of the Court and may concern only Part III of the *Rules of Procedure* (*Proceedings in Contentious Cases*) and not all its provisions. Provisions included in *Section F — Judgements, Interpretation and Revision* (Arts. 93—97) — have been excluded.

The Court of European Communities differs considerably from everything which has so far developed in international judicature of a general or regional range. While the European Communities cannot be described as a traditional international organization, their Court is not a simple counterpart to the International Court of Justice, either. It is a unique Court which has very little in common with the International Court of Justice.

A cursory glance at the treaties establishing the European Communities visualize the rich and differenciated functions of their Court. In the rough, the functions can be comprised in three basic groups:

1. Functions of an international court in a strict sense — settling disputes between member-States, arising in the course of implementation of the treaties establishing the Communities;

2. Functions of a constitutional court — passing judgements on the constitutional lawfullness of acts (that is on their accordance with constitutional treaties) as well as on the rightfullness from the economical point of view of resolutions adopted by organs of the Communities. Within this scope not only States but also particular organs of the Communities, different corporate bodies and even natural persons can apply to the Court for nullifying a decision of an organ of the Communities or can bring an action against them on the lack of appropriate action.

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[32] It is difficult to agree with view with regard to the rules of procedure of the International Court of Justice that "although made by the Court and not by States, these (rules of procedure) must be regarded as forming part of conventional law [...]". S. ROSENNE, *The International Court of Justice. An Essay in Political and Legal Theory*, Leyden 1957, p. 213; this view is shared by G. SCHWARZENBERGER who attributes to the rules laid down by the ICJ the same legal value as the rules contained in the Statute of the ICJ have (*International Law*, London 1949, vol. 1, pp. 408—409).

3. Functions of administrative jurisdiction — settling any disputes between the Communities and their employees and disputes concerning the reparation of damages caused by institutions and officials of the Communities while carrying out their functions.[33]

Apart from such a wide range of powers and apart from the fact that not only States but international organizations, corporate bodies and even natural persons, can appear before the Community Court, the compulsory jurisdiction of the Court for all member-States is a novelty of no lesser importance. The judgements are subject of compulsory enforcement on the territory of all member-States, just like the judgements of domestic courts. Thus, it is a kind of judicature very near to the domestic judicature of States.

The basic principles of the organization, competences and procedure of the Court of the European Communities are comprised by treaties establishing the Communities and by the Protocol on the Statute of the Court of Justice annexed to these treaties.[34] Article 188 of the Constitutional Treaty of the European Economic Community, found in the last chapter (*The Court*), stipulates:

> "The Statue of the Court of Justice shall be laid down in a separate Protocol. The Court of Justice shall adopt its rules of procedure. They will be submitted to the Council for unanimous approval".[35]

The contents and character of such rules of procedure of the Court are more closely defined in Art. 44 of the Statute of the Court:

> "The rules of procedure of the Court provided for under Article 188 of this Treaty (establishing EEC) shall contain, apart from the provisions contemplated by the Statute, any other provisions necessary for its application and, where necessary, for its completion".

These provisions confirm the wide powers of the Court of the Communities as regards the contents of the rules of procedure adopted by it. Such rules of procedure require, however, an unanimous approval by the Council of the European Communities. This kind of approval is rather exceptional as regards an independent principal organ of an international organization, what more — an independent judicial organ. This can be explained only to some extent by the fact that provisions concerning the right to adopt rules of procedure expressly refer to broadening and even complementing procedural provisions found in the Statute of the Court, which, after all, is a multilateral international treaty. The rules of procedure of the Court of the Communities constitute then a broad legal act of a complex character.

Like in the case of the International Court of Justice, the source

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[33] See G. BOBER, *Judicial Control of the European Communities*, London 1962, pp. 21—29.

[34] See, e.g., Part V, Section IV of the Treaty Establishing EEC.

[35] Cf. Art. 160 of the Treaty Establishing EAEC.

of the basic procedure of the Court of the European Communities can be found in the constitutional treaty of each Community, in the Statute of the Court and in its rules of procedure.[36] However, in contradistinction to the rules of procedure adopted autonomously by the International Court of Justice, the rules of procedure of the Court of the Communities represent a legal act of two organs of the Communities. For, while it is adopted by the Court, it has to be approved — and the approval must be unanimous — by an intergovernmental organ possessing important legislative competences.

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In the development of the procedural law of international courts fundamental transformations have occurred. The starting point was a modest procedure determined *ad hoc* by arbiters and parties to a dispute. In the 19th century, in order to adjust this matter in treaties and rules of procedure, various attempts were made which found their expression especially in the Hague Conventions. So, the turn of the 19th to the 20th centuries brought the development and codification of arbitral procedure (in the broadest meaning of the term) in international conventions of a general range, as well as the establishment of the Permanent Court of Arbitration. The procedure is facultative — it is binding only when parties to the dispute do not decide otherwise.

The establishment of international court in the strict sense of the term brought about the introduction in practice of a binding procedure stipulated in an international treaty, which the Statute of the International Court of Justice is. This procedure is further developed and completed in the rules of procedure laid down by the Court. In contradistinction to arbitration, parties to a dispute cannot freely determine the procedure and select the body of judges. Pursuant to the Statute of the International Court of Justice, they have, however, retained the freedom to decide whether to bring the case before the Court.

The creation of the Court of the European Communities led to the establishment of compulsory jurisdiction of the Court for the member-States of the European Communities. In this way the last obstacle, which had hindered some sceptics to notice the development and functioning of international procedural law in international judicial practice, was removed.

For an international lawyer, however, the existence of compulsory

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[36] There are, of course, various other legal acts of a lesser significance, e.g., the so-called additional rules of procedure provided by the proper rules of procedure.

jurisdiction for States as well as the question whether procedural rules are of peremptory or optional character, is not of great importance. It suffices that such rules are operational in the practice of international judicature and that they play the role assigned to them by theory and practice. For it is the functional criterion which is decisive and which underlines the division of legal rules into substantive and procedural law. The character of international procedural law and its legal substance cannot be assessed by comparing it to the domestic law of States. It can be assessed only against the background of the whole system of international public law.

It is beyond any doubt that — in contradistinction to the system of domestic law — in the development of international public law particular stress was laid on substantive law and on obligations of States. The development of remedies and procedural law was left far behind. That is a matter of course when one remembers that the role of jurisdiction in international law is very different from the role which this institution plays in domestic law. That does not mean, however, that there exists no international procedural law at all and that the role it plays in this system is not expressly determined.

Observing today the general development of international law one must remark that it embraces new fields of international relations and that its structure is becoming more and more differentiated. Widely discussed today are, for example, such branches of international law as institutional law, that is the law of international organizations. More attention is paid to the so-called internal law of international organizations, that is the law adopted by particular organs of organizations. The study of the evolution of arbitral and judicial rules of procedure shows that they embrace ever more wide range of problems and they rank high in the system of contemporary international law. In consequence, they should be more fully and consciously included in this development trend of international law which is linked with the institutionalization of the international community. International courts are, after all, international organizations in the widest meaning of the term. Their procedural law probably consitutes the oldest thread in the development of the rich and important part of international law which procedural law of international organizations is today.

The structure and legal nature of international procedural law developed and applied by international judicial organs should thus be considered and assessed in relation to the procedural law of international organizations. Apart from that, one must bear in mind that judicial organs have a certain distinct functional feature and that in jurisdiction procedural rules concern not only judicial organs, but to a great extent — they Adirectly create rights and obligations for States, parties to a dispute. A comparative approach to judicial procedure and the procedure of international organizations will allow a better comprehension of the substance and nature of international procedural law, which at present constitutes an important part of the whole system of international law. And one should moreover bear in mind that with the advancing institutionalization of international relations, its structure and legal nature will further develop and differentiate. This process must find its reflection in the theory of sources of contemporary international law. For, we are concerned here with the establishment of binding rules of international law, for which the formal source can be found in unilateral acts of organs of international organizations. Arbitration and judicature play an important role in this process.

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A propos du statut juridique du Programme Interkosmos

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I. La coopération multilatérale entre les pays membres du Conseil d'Assistance économique mutuelle s'étend à des terrains toujours nouveaux. Elle ne se borne pas à une coopération strictement économique, mais englobe aussi dans une mesure toujours grandissante la coopération scientifique et technique et cela dans les secteurs de pointe. C'est le cas, entre autres, de la coopération de 9 pays socialistes (Bulgarie, Cuba, Hongrie, Monogolie, Pologne, République Démocratique Allemande, Roumanie, Union Soviétique et Tchécoslovaquie) en matière d'exploration et d'utilisation de l'espace à des fins pacifiques, amorcée dans les années 1965—1967, et qui depuis 1970 s'appelle officiellement Programme Interkosmos [1].

Cette coopération a pour base juridique formelle des accords intergouverenementaux sous forme d'échange de lettres entre les chefs de gouvernement des pays susmentionnés [2]. Déjà dans une première période, dans chacun de ces pays ont été institués des organes nationaux de coordination et des groupes mixtes permanents de travail, et en même temps ont commencé à se tenir périodiquement des sessions d'une Conférence des chefs d'organes nationaux de coordination [3]. C'est précisément à la session d'une telle Conférence, tenue à Moscou le 14 octobre 1968, que fut adopté un Règlement provisoire des groupes de travail susmentionnés [4]. En some, dès cette première période la coopération mutuelle était réalisée par l'intermédiaire des organes spécialisés nationaux et internationaux.

L'expérience acquise et les résultats positifs de cette coopération ont permis de l'asseoir sur des bases juridiques plus solides, ce qui s'est traduit par la signature le 13 juillet 1976 à Moscou de la convention internationale (intergouvernementale) des 9 pays sur la coopération en matière

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[1] Cf. *Meždunarodnye organizacii socialističeskich gosudarstv. Spravočnik*, Moskva 1980, p. 203.

[2] *Ibid.*

[3] Cf. *Mnogostoronnee èkonomičeskoe sotrudničestvo socialističeskih gosudarstv (dokumenty 1972—1975)*, sous la dir. de P. A. Tokareva, Moskva 1976, p. 268.

[4] Texte dans *Mnogostoronnee...*, pp. 268—271.

d'exploration et d'utilisation de l'espace à des fins pacifiques[5]. De cette manière le Programme Interkosmos a obtenu une base formelle sous forme de traité, laquelle toutefois n'a pas de caractère constitutif à l'égard du Programme, mais englobe sous forme de tratité les structures et les formes d'activité déjà existantes des pays coopérants[6].

La convention de 1976 résultait de la réalisation d'un programme complexe et avait pour but de poser des bases juridiques à une coopération qui se développe depuis 1967 dans le domaine de l'exploration et de l'utilisation de l'espace cosmique.

Les Parties à cet Accord ont convenu que dans le cadre du programme Interkosmos leur coopération sera réalisée dans les domaines suivants:
— les recherches sur les propriétés physiques de l'espace,
— la météorologie spatiale,
— la biologie et la médicine cosmique,
— les télécommunications spatiales,
— l'étude du milieu natural à l'aide de moyens cosmiques.

Les dispositions de l'Accord (art. 3) définissent les formes de cette activité. Ce sont notamment: l'envoi dans l'espace d'engins cosmiques, la construction d'appareils de recherches spatials, les expériences effectuées à l'aide de fusées géophysiques. Cette liste n'est évidemment pas exhaustive et conformément à l'art. 4 de l'Accord les participants au Programme peuvent élargir les champs aussi bien que les formes de leur coopération.

L'article 5 de l'Accord confie la coordination des travaux liés à sa réalisation à un organe national de coordination pour la recherche et l'utilisation de l'espace.

L'Accord définit d'une façon très générale les moyens de réalisation de la coopération. Il déclare seulement (art. 6) que cette coopération doit être planifiée. Elle se réalisera sur la base des programmes et des plans définissant les conditions des recherches ainsi que des expériences concrètes. Cette disposition précise qu'aux travaux de réalisation du Programme peuvent participer, suivant l'intérêt qu'ils auront manifesté, tous ou quelques-uns seulement des pays participants.

L'Accord définit le mode de financement des recherches. Le principe est que chaque pays participant finance les travaux et les initiatives de ses institutions nationales. Un accord spécial peut fixer un autre mode de financement.

L'organe qui réalise le Programme par voie de décisions et de recommandations est la Conférence des chefs d'organes nationaux de coordi-

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[5] Texte *Mnogostoronnee... (dokumenty 1975—1980)*, Moskva 1981, pp. 267—271. En mai 1979, la Republique Socialiste du Vietnam a adhéré à la Convention.

[6] Cf. *Meždunarodnye organizacii...*, p. 204.

nations. De sa compétence relèvent toutes les questions concernant l'organisation de la coopération, y compris la création et les activités des groupes permanents mixtes de travail.

Les dispositions de l'Accord définissent d'une façon très générale les modalités d'activité de la Conférence. Elles prévoient que les sessions de cet organe doivent se tenir au moins une fois par an et qu'une telle session sera présidée par le chef de l'organe national du pays où elle se tient. Dans l'intervalle des sessions les fonctions de président de la Conférence sont assumées par le président de l'organe national du pays dépositaire de l'Accord, donc de l'URSS (art. 12, 2e phrase de l'Accord).

Aux termes de l'art. 18 de l'Accord, la Conférence adopte des décisions et des recommandations à la majorité des voix. Chaque chef d'organe national dispose d'une voix. Il n'est pas précisé quelles matières sont l'objet de recommandations et quelles de décisions.

Les décisions et recommandations de la Conférence ne sont pas obligatoires pour ces pays participants qui n'ont pas voté pour leur adoption. Les dispositions de l'Accord offrent à ces pays la possibilité d'adhérer aux décisions et recommandations antérieurement adoptées. En ce qui concerne les problèmes de coopération qui concernent quelques-uns seulement des pays membres, ils sont examinés par la Conférence seulement avec le consentement des chefs d'organes nationaux de ces pays.

L'art. 9 de l'Accord prévoit que les expériences cosmiques concertées sont réalisées par les institutions intéressées dans le cadre des groupes permanents mixtes de travail pour les principales orientations de la coopération.

L'Accord de 1976 n'a pas modifié les principes d'activité des groupes de travail. L'on peut reconnaître que tant les dispositions de l'Accord concernant l'étendue de la coopération que celles relatives à la création et à l'activité des groupes de travail pétrifient une pratique existant depuis 1967.

Cette conclusion se trouve justifiée dans une grande mesure par le fait que jusqu'à présent l'activité des groupes de travail de l'Interkosmos est basée sur un document du 14 juin 1968. C'est un Règlement temporaire des groupes permanents mixtes de travail pour les principales orientations de la coopération des pays socialistes en matière d'exploration et d'utilisation de l'espace à des fins pacifiques, règlement adopté à la réunion de Moscou des représentants des organes nationaux de coordination.

Le Règlement, invoquant les recommandations de la conférence des experts, représentants des pays socialistes pour l'exploration et l'utilisation de l'espace à des fins pacifiques (Moscou, du 5 au 12 avril 1967), a institué quatre groupes de travail correspondant aux principales orientations de la coopération des pays socialistes dans les recherches spatiales. En particulier ont été créés les groupes:

— de physique nucléaire,

— debtélécommunication cosmique,
— de météorologie cosmique,
— de biologie cosmique,
— de télédétection (depuis 1976).

Conformément au Règlement, il a été établi que ces groupes comprendraient des représentants des pays membres à raison de cinq personnes par pays au maximum. Tenant compte de la possibilité de modification du profil des recherches menées par un groupe de travail, le Règlement permet de modifier la composition du groupe per les pays intéressés.

Les travaux des délégations de différents pays dans les groupes de travail sont dirigés par les organes nationaux de coordination. Ces organes sont tenus d'assurer aux délégations nationales toute assistance à leur activité de fond ou organisationnelle.

Le § 2 du Règlement définit largement, mais avec précision, les tâches fondamentales de ces groupes.

Les groupes de travail sont reconnus être des institutions responsables de l'exécution et du développement du programme fixé de coopération dans les directions d'activité tracées. Les groupes de travail sont également responsables de la qualité des travaux exécutés en commun. Ils ont le devoir d'étudier et de décider des questions techniques et scientifiques qui surgiront pendant la réalisation des recherches communes.

En particulier, les groupes de travail sont tenus:

— de s'occuper régulièrement de la mise en oeuvre des protocoles (accords) portant dur des thèmes concrets de coopération;

—d'examiner les propositions de nouveaux travaux et de développer les nouvelles formes et méthodes de coopération;

— d'élaborer des projets de protocoles (d'accords) concernant des thèmes, des expériences et d'autres travaux communs concrets;

— d'examiner les propositions concernant l'élaboration et la préparation des appareils scientifiques, de l'outillage et des installations dans les entreprises des pays participant à la coopération;

— d'élaborer des programmes de coopération dans le lancement de spoutniks et de fusées à des fins d'exploration et d'utilisation de l'espace;

— de préparer des propositions pour les plans de conférences, de symposiums et de stages scientifiques;

— d'exécuter d'autres entreprises scientifiques nécessaires à la mise en oeuvre du programme concerté de coopération.

Les tâches et les devoirs des groupes de travail sont donc très vastes et l'on peut en déduire que selon la volonté des Parties à l'Accord ces groupes de travail constituent l'instrument fondamental de sa réalisation.

Les devoirs des groupes en matière de réalisation du programme de coopération concernent tous ses aspects, à savoir:

— la planification de la coopération, entre autres en préparant des accords appropriés;

— la surveillance de l'exécution par les pays membres des protocoles (accords) antérieurement conclus;

— les avis donnés sur les projets de travaux de préparation d'appareils scientifiques aux fins de la coopération;

— la programmation des travaux de recherche en matière de réalisation du Programme et de détermination des formes de ces travaux.

Il résulte de cette liste que les groupes de travail se voient confier les fonctions de planifier et de prévoir des recherches, de veiller à leur réalisation et de les coordonner.

La forme fondamentale des activités des groupes de travail est représentée par les conférences qui doivent se tenir en fonction des besoins, mais en tout cas au moins une fois par an. Le Règlement prévoit également que les conférences doivent être convoquées successivement dans tous les pays participant aux travaux du groupe donné.

Le président de la conférence doit être élu parmi les représentants du pays d'accueil.

Le président préside la session. Le Règlement précise qu'il dirige les activités du groupe jusqu'à la session suivante, en ajoutant qu'il s'agit seulement des activités organisationnelles.

Le Règlement autorise la convocation des sessions plénières d'un groupe ou à composition restreinte. Mais dans l'un et l'autre cas, tous les membres du groupe doivent être invités à participer à la session. Les pays participant aux travaux du groupe sont tenus de répondre aux propositions concernant l'organisation des sessions. Dans un seul cas à la session peuvent être invités les représentants de certains pays seulement, à savoir lorsque l'un des pays déclare qu'il n'est pas intéressé aux travaux sur les problèmes qui seront examinés à la session donnée.

Des experts et des spécialistes invités par les différents pays peuvent également participer aux travaux du groupe indépendamment de ses membres permanents.

Les services administratifs de la session sont à la charge du pays accueillant et c'est lui qui supporte les frais d'organisation de la session.

Le Règlement donne aux groupes de travail le droit de prendre des décisions et des recommandations. La compétence *ratione materiae* du groupe n'est pas diversifiée, la situation donc est la même que pour les décisions de la Conférence des chefs d'organes nationaux de coordination.

A l'issue d'une session du groupe, il est dressé un procès-verbal où sont consignés les résultats des travaux ainsi que les décisions et les recommandations adoptées.

Il résulte du Règlement que les décisions et recommandations des groupes de travail concernant les problèmes scientifico-techniques et scientifico-

-méthodologiques entrent sans délai en vigueur dans les pays qui se sont prononcés pour leur adoption. Quant aux décisions et recommandations concernant les questions organisationnelles et financières (y compris celles qui résultent des recommandations et décisions concernant les questions scientifico-techniques), elles entrent en vigueur après leur adoption (examen et approbation) par l'organe national de coordination, conformément à la procédure en vigueur dans la pays donné.

L'organe national est tenu d'informer le président du groupe de travail, dans un délai de deux mois au maximum après la session du groupe, de l'adoption ou de l'abrogation d'une décision ou recommandation. Le président du groupe informe de la position adoptée par l'organe de coordination les autres pays intéressés.

S'il n'est pas possible d'approuver les décisions ou recommandations du groupe dans le délai prescrit, celui-ci peut être prolongé, mais il faut que le pays intéressé fasse une déclaration et en informe tous les pays participant à la session du groupe.

En reconnaissant à chaque participant aux travaux du groupe le droit de déclarer l'intérêt qu'il porte à tout problème faisant l'objet de travaux, le Règlement oblige le groupe à chercher dans ses travaux que ses décisions et recommandations soient acceptables pour tous les pays intéressés.

A défaut d'unanimité, les décisions et recommandations deviennent obligatoires pour ces pays seulement qui se sont prononcés pour leur adoption. Cette disposition du Règlement prévoit l'adoption de décisions à la majorité des voix.

Le Règlement offre la possibilité d'adhésion aux recommandations de décisions adoptées par le groupe de travail, mais il précise que les problèmes organisationnels ou financiers qui peuvent se poser à cette occasion doivent être examinés séparément par le groupe e travail et par l'organe national de coordination.

Quand on analyse les compétences normatives des groupes de travail, il faut attirer l'attention sur deux traits spécifiques qui les distinguent des compétences normatives accordées au Conseil d'Assistance économique mutuelle et à d'autres organisations économiques des pays socialistes.

Les décisions des groupes de travail peuvent être prises à la majorité des voix. Par ailleurs, les recommandations et décisions portant sur le fond, c'est-à-dire sur les questions scientifico-techniques et scientifico-méthodologiques, entrent en vigueur sans approbation préalable. Seules sont soumises à l'approbation de l'organe national de coordination les décisions et recommandations prises en matière financière et organisationnelle.

Cette spécificité des compétences normatives des groupes de travail de l'Interkosmos se laisse expliquer par l'objet des travaux de ces organes.

Une analyse des procès-verbaux des groupes de travail (pour les années 1979—1982) permet de constater qu'outre les spécialistes participant aux travaux d'un groupe donné ou, encore, outre quelques spécialistes peu nombreux dans le domaine de la science dont ce groupe s'occupe, il serait difficile de trouver des personnes compétentes capables d'apprécier les décisions prises par le groupe de travail. La problématique des travaux de ces groupes est tellement spécialisée que son appréciation échappe au contrôle de ceux qui ne sont pas des savants ou des techniciens hautement spécialisés.

Les solutions du Réglement ne suscitent pas de difficultés dans la pratique. Les tentatives de révision du Règlement faites en 1980/81 n'ont pas abouti à des résultats positifs et le projet de modification ne s'écartait sensiblement pas en principe du texte actuellement en vigueur.

A la XV^e Session de la Conférence des chefs d'organes nationaux de coordination des pays participant au Programme Interkosmos, qui s'est tenue en 1982 à Bucarest, les délégations de la Hongrie et de la RDA ont fait des propositions tendant à accoroître l'efficacité des travaux des groupes de travail. Ces propositions concernent uniquement l'organisation des travaux pendant les sessions des groupes de travail. Ainsi, il est proposé que l'ordre du jour des débats soit strictement fixé, que chaque session comporte deux phases: la première serait consacrée aux rapports d'activité des différentes sections du groupe, tandis que la seconde — à la discussion des problèmes résultant de ces rapports ainsi qu'à l'élaboration des décisions et recommandations à prendre par le groupe.

Ces propositions visent à définir avec plus de précision la forme des rapports des sections, à mettre en ordre les documents insérés au procès-verbal de session et à abréger la durée des travaux sur des problèmes concrets, en attirant également l'attention sur les possibilités d'abréger la durée des sessions.

Bien que ces propositions portent sur d'étroites questions d'organisation, elles sont intéressantes parce qu'elles traduisent l'intérêt porté par les participants aux questions formelles. Il y a lieu de supposer que la tendance à l'amélioration des travaux des groupes de travail peut aboutir à une discussion sur leurs compétences fondamentales et par conséquent à une nouvelle rédaction du Règlement.

Il semble que tant les considérations de fond que de forme laissent admettre que la coopération des pays socialistes dans le domaine es recherches spatiales a pour forme fondamentale les groupes permanents de travail dont nous parlons.

Les groupes de travail ont le droit de prendre des décisions et recommandations obligatoires sur le fond pour les pays membres sans approbation préalable.

La conférence des chefs d'organes nationaux de coordination n'est pas un organe supérieur par rapport aux groupes de travail; elle peut être qualifiée d'organe de coordination des travaux de recherche menés par les différents groupes de travail et aussi d'organe hautement spécialisé de planification et de prévision des recherches sur l'utilisation de l'espace.

II. La question se pose de savoir qu'est-ce que le Programme Interkosmos du point de vue juridique? Il s'agit notamment de savoir si nous sommes en présence d'une organisation internationale ou bien si l'on n'est pas fondé le prétendre?

Il convient de faire remarquer que dans la doctrine socialiste ce problème n'a pas été jusque-là suffisamment éclairci. C'est W. S. Wiériéchetchetine, internationaliste soviétique, qui a consacré relativement le plus de place à cette problématique dans ses publications[7].

En étudiant le statut juridique de l'Interkosmos, cet auteur arrive à la conclusion que puisque dans ce cas «les attributs d'une organisation internationale tels qu'un acte constitutif spécial, un secrétariat international et un budget commun font défaut», l'Interkosmos ne peut pas être considéré comme une organisation internationale au sens strict de ce terme[8].

Mais en même temps cet auteur déclare qu'en tenant compte du fait qu'en vue d'assurer la réalisation du programme a été créé un système international spécial soigneusement organisé sous forme de sessions annuelles des commissions mixtes permanentes de travail, l'Interkosmos peut être qualifié comme «une organisation internationale en train de formation qui déjà dans sa forme actuelle a, dans plusieurs cas, le droit d'agir dans les relations internationales comme un tout»[9].

Parmi les auteurs polonais, c'est Z. M. Klepacki qui se prononce sur la matière qui nous intéresse, sans que son point de vue soit tout à fait consistant. D'un côté, il ne classe pas l'Interkosmos dans les organisations internationales en déclarant que «formellement c'est un programme et non une organisation internationale»[10]. D'un autre côté, cependant, il affirme qu'en tenant compte des faits tels que le fondement juridique, la qualité de membre qu'ont les participants au Programme, la structure et le but de celui-ci, ce ne serait pas une erreur grave que de le reconnaître comme une organisation internationale des pays socialistes[11].

L'auteur soviétique G. M. Viéliaminoff propose une solution spécifique de ce problème qui, comme on voit, est assez controversé. Il examine

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[7] Cf. W. S. VEREŠČETIN, *Meždunarodnoe Sotrudničestvo v Kosmose. Pravovye voprosy*, Moskva 1977, pp. 31—50, IDEM: *Razvitie Sotrudničestva v programme «Interkosmos»*, «Sovetskoe Gosudarstvo i Pravo», 1980, n° 7.

[8] VEREŠČETIN, *Meždunarodnoe...*, p. 42.

[9] IDEM, *Razvitie...*, pp. 109—110.

[10] Z. M. KLEPACKI, *Organizacje międzynarodowe państw socjalistycznych* [*Les organisations internationales des Etats socialistes*], Warszawa 1981.

[11] V. *Supra*.

la position de l'Interkosmos par rapport à d'autres groupements internationaux semblables des pays du CAEM, en particulier le Conseil de mandataires et les centres de coordination destinés à l'élaboration de divers problèmes, les formes particulières de la coopération entre les académies des sciences de ces pays, etc.[12].

L'auteur écrit que dans les cas analysés il s'agit de groupements internationaux possédant certaines caractéristiques de l'organisation internationale, mais chez lesquels quelques-unes de ces caractéristiques ne sont pas définies avec assez de clarté. Par ailleurs on ne peut pas apercevoir chez les créateurs de ces groupements un consentement clairement exprimé à ce qu'ils soient traités comme des organisations internationales[13]. Aussi cet auteur propose-t-il d'appeler ces groupements «para-organisations internationales»[14].

Avec la conception de Viéliaminoff polémique P. A. Tokarieva qui conteste la légitimité de l'insertion des groupements en question dans la catégorie d'organisations internationales, car leur caractère juridique est entièrement différent de celui des autres organisations économiques interétatiques des pays du CAEM[15].

Cependant, cette critique de Tokarieva semble manquée dans une certaine mesure, parce que Viéliaminoff ne classe pas du tout les groupements susmentionnés dans la catégorie d'organisations internationales au sens strict du mot. Mais il est vrai par ailleurs que le terme de «para-organisation» ne semble pas heureux, car il suggère que malgré tout nous sommes bel et bien en présence d'organisations internationales quoique d'un genre particulier.

Mais regardons de plus près en quoi consistent ces caractéristiques de l'Interkosmos qui pourraient témoigner en faveur de son caractère d'organisation internationale. Si nous laissons de côté la convention multilatérale de 1976 laquelle, avons-nous souligné, n'avait pas un caractère constitutif du Programme Interkosmos, le fait le plus frappant est l'institution de deux organes à caractère international: la Conférence des chefs d'organes nationaux de coordination et les groupes mixtes permanents de travail pour les orientations essentielles de la coopération.

L'existence de ces organes permanents au sein du Programme Interkosmos ne fait pas de doute. Néanmoins, la question se pose de savoir si ce sont des organes d'une organisation internationale ou bien tout simplement

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[12] Cf. G. M. VELJAMINOV, *Socialističeskaja integracija i meždunarodnoe pravo*, Moskva 1982, pp. 110—113.

[13] V. *Supra*, p. 114.

[14] V. *Supra*.

[15] P. A. TOKAREVA, *Meždunarodnyj organizacionno-pravovoj mehanizm socialističeskoj èkonomičeskoj integracii*, Moskva 1980, pp. 185—187.

des organes communs des Etats coopérants? Une analyse plus poussée des dispositions de la Convention de 1976 confirme la seconde thèse.

Il est caractéristique que dès le début, l'art. 1er de la Convention stipule que les Parties «contribueront par tous les moyens au développement des institutions intéressées de leurs pays dans l'exploration et l'utilisation de l'espace à des fins pacifiques». L'on met donc l'accent avant tout sur la coopération des organes nationaux compétents des pays participants.

L'art. 6 évoque la coopération des institutions nationales compétentes sur la base des programmes et des plans concertés, le principe étant posé que chacune des Parties contractantes finance les travaux et entreprises réalisés par les institutions nationales sur la base des programmes et plans susmentionnés.

C'est seulement l'art. 7 qui parle des organes permanents susmentionnés et cela dans le contexte de la prise de décisions et recommandations concernant les programmes et les plans, et aussi dans celui de l'examen de l'organisation de la coopération, y compris la création et l'activité des groupes mixtes permanents de travail. Les recommandations et décisions sont adoptées par la Conférence des chefs d'organes nationaux qui se réunit au moins une fois par an. Citons la disposition caractéristique en vertu de laquelle dans l'intervalle des sessions de la Conférence «la coordination générale de activités des organes nationaux en matière d'exécution de la présente Convention est assurée par l'organe national du pays dépositaire», c'est-à-dire par l'Union Soviétique.

Il s'ensuit qu'il n'existe pas ni ne fonctionne un organe international vraiment permanent comme on en trouve généralement dans les organisations internationales (Secrétariat, Bureau), et que la mission de coordination est confiée dans le cas de l'Interkosmos à un organe national de l'Etat déterminé participant à la coopération.

Aux termes de l'art. 8, les recommandations et décisions sont prises à la majorité des voix des chefs d'organes nationaux et elles ne sont pas obligatoires pour les Parties contractantes qui ne se sont pas prononcées pour leur adoption. Cette solution par le côté négatif est assez originale et il résulte *a contrario* que les décisions et recommandations sont en principe obligatoires pour les parties qui se sont prononcées pour leur adoption, ce qui, à notre avis, aurait dû être dit expressément en premier lieu.

En ce qui concerne les décisions des groupes mixtes permanents de travail, un Règlement provisoire de ces groupes du 14 juin 1968 en indique le genre et la procédure suivant laquelle elles sont prises.

Les groupes de travail prennent donc eux aussi es recommandations et des decisions (§ 4); celles concernant les matières scientifico-techniques et scientifico-méthodologiques deviennent obligatoires sans délai pour les pays qui se sont prononcés pour leur adoption. En revanche, les recommandations et décisions concernant les questions organisationnelles et financières acquièrent force obligatoire après examen et approbation par les organes nationaux de coordination, conformément à la procédure fixée dans chaque pays.

Quelles conclusions découlent-elles des dispositions précitées?

Il convient tout d'abord de faire remarquer que l'on parle de recommandations et de décisions prises par les organes du Programme Interkosmos, donc d'une catégorie d'actes qui est propre en général aux organes d'une organisation internationale. Mais en même temps — fait que l'on ne rencontre plutôt pas dans les organisations internationales — les recommandations et décisions ne sont pas diversifiées en fonction de leur object. Dans cette situation, l'on ne sait pas quand, dans quelles situations, on adopte des décisions et quand des recommandations, ce qui est d'autant plus étonnant que les unes et les autres sont également obligatoires dès leur adoption.

Le fait précisément que les actes en question ont force obligatoire dès leur adoption peut s'expliquer par ce qu'il ne s'agit pas de décisions prises par des organes d'une organisation internationale quand il est logique qu'une décision exprimant la volonté de l'organisation en tant que telle doive être adoptée (approuvée) par les différents pays membres pour qu'ils soient liés par elle. Dans l'Interkosmos, du fait justement que nous sommes en présence de l'expression d'une volonté directe des Etats, on a pu renoncer à l'approbation supplémentaire des décisions prises pour leur conférer force obligatoire.

C'est donc un argument de plus en faveur de la thèse selon laquelle les organes susmentionnés du Programme Interkosmos ne sont pas des organes d'une organisation internationale en tant que sujet distinct des pays coopérants, mais que ce sont des organes communs de ces Etats, exprimant directement leur volonté. Et puis, c'est aussi un argument de plus à l'appui de l'opinion que l'existence d'organes permanents à caractère international ne constitue pas à elle seule une preuve suffisante qu'il s'agit d'une organisation internationale, dès que ces organes n'ont pas le caractère d'un tout distinct des Etats et n'expriment pas leur propre volonté. Pour cette raison, nous ne pouvons partager la thèse de W. Morawiecki, selon laquelle «la capacité des organes de manifester leur volonté distincte non identique à la volonté de tous les pays membres, ou la possession d'une personnalité juridique distincte» ne sont pas des traits caractéristiques nécessaires d'une organisation internationale [16].

Une preuve encore en faveur de la thèse refusant à l'Interkosmos le caractère d'une organisation internationale peut être empruntée à l'art. 15 de la Convention de 1976. Il y est dit que chaque Partie contractante «peut se retirer de la présente convention...». L'on peut donc se retirer

[16] MORAWIECKI, *op. cit.*, pp. 30—31.

de la convention mais non «de l'organisation» pour la simple raison qu'une telle organisation n'existe pas.

A la lumière de ce qui précède, il ne paraît pas possible de qualifier l'Interkosmos comme une organisation internationale, car ce programme manque de trait caractéristique, à notre avis, fondamental, qu'est pour l'organisation internationale la personnalité juridique distincte exprimant sa propre volonté.

Il convient de souligner que même Viériéchtchetine, partisan de la thèse selon laquelle l'Interkosmos serait une organisation internationale en train de formation agissant dans de nombreux cas comme un tout, convient que ce programme était créé non pas comme une organisation internationale, mais comme un genere particulier d'activité commune des Etats socialistes[17].

Il convient également de rappeler la thèse de Viéliaminoff d'après laquelle la condition indispensable à remplir pour un groupement international pour qu'il puisse être qualifié d'organisation internationale est «au moins la reconnaissance tacite indubitable de ce groupement par ses fondateurs comme une organisation internationale»[18]. En fait, pour qu'un groupement donné ait le caractère incontestable d'organisation internationale, il faut que cela découle expressément des faits objectifs (avant tout tel que la personnalité juridique distincte des Etats membres), a partir desquels on peut interpréter de façon indubitable la volonté des Etats de créer précisément une organisation internationale.

Il y a donc lieu de partager l'opinion que «la Convention de 1976 n'avait pas pour but de créer une organisation internationale autonome», mais «que sur la base de cette Convention a été créé un système déterminé de coopération internationale dans le domaine de la conquête de l'espace à l'aide de la jonction d'organes internationaux et nationaux»[19]. Un système de coopération multilatérale a été créé, doté d'éléments institutionnels, mais qui n'est pas une organisation internationale.

Constater que l'Interkosmos n'est pas, sous sa forme et à l'étape actuelle, une organisation internationale ce n'est pas évidemment préjuger l'évolution des formes juridiques de cette coopération multilatérale des pays du CAEM. Non seulement il n'est pas exclu, mais il est probable qu'à mesure que s'approfondit cette coopération et qu'augmentent les possibilités d'une plus vaste participation à celle-ci des différents pays, les Etats participants arrivent à la conclusion qu'il est dans leur intérêt commun de transformer la coopération sous sa forme actuelle en une organisation internationale. A cet effet, la volonté des Etats devrait être

[17] VEREŠČETIN, *Razvitie sotrudničestva...*, p. 109.
[18] VELJAMINOV, *op. cit.*, p. 114.
[19] *Meždunarodnye organizacii...*, p. 205.

expressément formulée dans de concrètes dispositions de droit international.

Il n'est pas exclu que les Etats participants y soient incités également par des considérations d'ordre extérieur, à savoir les exigences d'une vaste coopération internationale. Par exemple, l'Interkosmos est indubitablement intéressé à une coopération permanente avec le Comité de l'ONU pour l'utilisation pacifique de l'espace. Cependant, comme on le sait, les dispositions actuelles relatives à ce Comité prévoient qu'en principe seules des organisations internationales peuvent obtenir le statut d'«observateur» auprès du Comité. Pour cette raison, la transformation formelle du Programme Interkosmos en une organisation internationale faciliterait la coopération avec le système des Nations Unies. Le désir des pays réalisant le programme Interkosmos de faire connaître leurs opinions à l'extérieur s'est manifesté ne fût-ce que par la lettre adressée par les comités nationaux de coordination réunis à Berlin le 24 octobre 1984 à la 39e session de l'Assemblée générale des Nations Unies au sujet de la démilitarisation de l'espace.

Toutefois, indépendamment des possibilités de transformer à l'avenir l'Interkosmos en une organisation internationale, l'on peut dès à présent envisager l'opportunité de renforcer les éléments institutionnels existants, par exemple en accordant au président actuel de la Conférence des chefs d'organes nationaux de coordination le droit de représenter l'Interkosmos, dans l'intervalle des sessions, dans les relations extérieures avec des pays tiers et avec des organisations internationales.

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Remote Sensing of the Earth from Outer Space and the International Law

by RENATA SZAFARZ

A comprehensive study of opinions and propositions presented by States with respect to the legal regulation of remote sensing of the earth, of provisions contained in the text of Draft Principles prepared by the Legal Sub-Committee of the Outer Space Committee of the UNO (see the annex to the present paper) and of opinions of the legal doctrine on the subject allows for the formulation of the following *de lege ferenda* propositions and conclusions:[1]

1. The future convention on remote sensing of the earth from outer space could include the following definition of this activity (instead of the one accepted at present by the Legal Sub-Committee of the Outer Space Committee in its Draft):

For the pursposes of this Convention:

(a) The term "remote sensing of the earth" means the performance from outer space, for civilian purposes, of observations and measurements of natural resources of the earth as well as of circumterrestial, overground and underground environment, its elements and phenomena and their transmission to earth-bound stations.

2. Even if distinct legal regimes for the dissemination of primary data and of analysed information are not introduced in the future convention, I believe it to be proper to maintain these terms instead of a general but inaccurate notion "of results of remote sensing of the earth" (this notion was included in the Mexican draft). Consequently the present definitions of "primary data" and of "analysed information", contained in the Draft Principles of the Legal Sub-Committee, should be upheld as valid.

3. Further elaboration of notions "States carrying out programmes for

[1] The present paper repeats conclusions contained in a monography entitled *Badanie Ziemi z kosmosu w świetle prawa międzynarodowego* [*Remote Sensing of the Earth from Outer Space in the Light of International Law*] by the same author.

remote sensing" and "States participating in remote sensing", accepted in the Draft of the Legal Sub-Committee, seems desirable. This would help to specify which rules refer to States sending the remote sensing satellites only and which apply also to States possessing only the earthbound stations. It is also important to consider a third category of States, namely those possessing certain sensing devices which operate from foreign satellites.

4. The present international law does not interdict the sensing of the earth from outer space without the consent of States. Neither the Outer Space Treaty nor the rules of customary law prohibits the performance of this activity. Thus, in accordance with the judgement of the Permanent Court of International Justice in the *Lotus* case, where it was declared that any activity which is not prohibited is legal and therefore permitted, it can be assumed that remote sensing of the earth commenced without the consent of a sensed State is valid and permitted under the present state of law.

The present practice in remote sensing has become a matter of routine and a conviction has established itself that States have "a legitimate right" [2] to conduct such an activity.

5. It seems, that as a result of activities of space powers and of not unconditional consent of the international community, a new customary norm of the international law is being formed stating that: It is permitted to initiate and conduct the exploration of the earth from outer space, for non-military purposes, under the condition of direct or indirect notification of States whose territories are a subject of such an activity. Such notification should provide the sensed States with a possibility to file a request for obtaining access to data acquired by remote sensing of their territories or eventually of territories of other States.

6. Remote sensing of the earth, like any other space activity is governed by the provisions of the Outer Space Treaty of 1967. Therefore its conduct should comply with the basic features and general conditions forseen in this convention. First of all, the spirit as well as the letter of the Outer Space Treaty imposes on States carrying out remote sensing an obligation to promote the widest possible international cooperation and to create conditions for the non-space States to participate in their programmes. The teleological interpretation of the provisions of the Outer Space Treaty seems to provide the following guidelines for the conduct of space States in the field of remote sensing:

(a) Public opinion and the Secretary General of the UNO should be informed about the civilian sensing carried on, preferably before its commencement, during and/or after the fulfilment of such programmes

[2] C. Q. CHRISTOL, *The Modern International Law of Outer Space*, New York–Oxford–Toronto–Sydney–Paris–Frankfurt 1982, p. 757.

(especially Art. XI of the Outer Space Treaty of 1967 and Art. IV of the Convention on Registration of Objects Launched into Outer Space of 1975).

(b) The unprohibitive terms (the costs) should be fixed for the carrying out of research programmes on the request of non-space States.

(c) The establishment of the unprohibitive conditions (e.g. the costs) for non-space States which conduct their own research programmes with the help of foreign satellites. In this context, all efforts aiming at privatisation or commercialisation of remote sensing activities should be judged as having a negative influence on possibilities of economically weaker States, and especially of the developing States, to benefit from the said technology.

7. It seems that a demand for prior notification of remote sensing activities is just and reasonable. It may take a form of appropriate notifications being presented to the Secretary General of the UNO, and through him to the interested States — such a procedure is forseen in the Principle XIII of the Legal Sub-Committee's Draft.

8. So far, no customary norms have been established in the international law concerning the disclosure and dissemination of data and information obtained from remote sensing of the earth. Both, the Outer Space Treaty of 1967 and the general international law permit of free disclosure and dissemination of such data and information. For it is doubtful whether the principle of permanent sovereignty over natural resources covers also information on data and information obtained by remote sensing which concerns not only States directly involved in remote sensing but also States possessing the earthbound stations for reception and transformation of such data.

According to the Article XI of the Outer Space Treaty of 1967, States are free to determine the scope of diclosed data and information obtained as a result of space research.

In the light of the actual state of law the practice of both the Soviet Union (the dissemination of data and information only with the consent of sensed States) and the United States (free dissemination of data and information obtained by remote sensing) should be recognized as permitted.

9. Sensed States should be granted access to data and information concerning their territories always before any other State (see the alternative solution contained in the Principle XII of the Draft of the Legal Sub-Committee).

10. A requirement of prior consent of sensed States for the dissemination — by sensing States of data and information concerning their natural resources is pertinent in its nature. However, the present and the foreseeable future developments in the field of remote sensing radically undermine its essence. More and more States and international organizations are engaged in this activity: the USSR, the USA, Japan, India, France, the Netherlands, the European Space Agency as well as States possessing earth-bound stations. Therefore the establishment in this situation of a requirement of consent of sensed States would be rather pointless since too many States (30 according to some sources) would possess such an information anyhow. These States would then acquire a rather privileged position if compared with other States.

It seems that the solution of a deadlock in the Legal Sub-Committee on this, so far the most controversial issue (see a not agreed upon Principle XV of the Draft) is connected, among other things, with the acknowledgement by States of the above situation.

11. Independently of the fact that the legal status of primary data and of analysed information obtained by remote sensing is different, I believe that both should be disseminated on the same terms, bearing in mind however that the latter should be more expensive.

12. This future convention should also regulate the settlement of disputes concerning it's implementation and interpretation. This should also cover the question of international responsibility for damages inflicted when the eventual utilization of results obtained by remote sensing is harmful to the interests of a sensed State.

13. A point of view is supported here that the Draft Principles prepared in the Legal Sub-Committee only slightly expand (in its agreed portion) the principles contained in the Outer Space Treaty of 1967, in the Convention on Registration of Objects Launched into Outer Space of 1975 and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[3]

14. The process of working out and the results of efforts undertaken to prepare the Draft Principles regulating remote sensing of the earth from outer space, show clearly that this Document is being considered in a political organ and that it concerns a new field of States' activities. The efforts of the International Law Commission, especially in the field of codification of law, are by far more effective.

15. Until the impasse in the work of the Legal Sub-Committee on the Draft Principles on remote sensing is solved, the remote sensing activities will continue without any particular legal regulation.

16. Sensing States are at the same time in the position of sensed States. It seems therefore that the Draft concerns them in both situations.

17. The final provision of the future convention on remote sensing

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[3] See eg. C. Q. CHRISTOL, *Remote Sensing and International Law*, "Annals of Air and Space Law", vol. 5, 1980, p. 375; J. L. MAGDÉLENAT, *The Major Issues in the "Agreed" Principles on Remote Sensing*, "Journal of Space Law", vol. 9, 1981; No. 1–2, p. 116; I. A. VLASIC, *The Evolution of the International Code of Conduct to Govern Remote Sensing by Satellites: Progress Report*, "Annals of Air and Space Law", vol. 3, 1978, p. 564.

should also contain an article regulating the amendment procedure to this convention. The technological developments may make it imperative to introduce such amendments.

Moreover, the final provisions could also include an article analogous to Article VII of the Convention on Registration of Objects Launched into Outer Space of January 14, 1975.[4] For international organizations, such as the ESA, should have the possibility to participate in a regulation concerning their activities, e.g. remote sensing.

18. Today, when we are faced with the operation of several independent remote sensing systems, the question of their co-ordination and eventual complementation arises, with a view of making these systems more effective. In the future, an international organization should be established to coordinate this activity and which at the same time would guarantee the access of non-space States to data and information. The creation of such an organization would also help to remove existing doubts concerning the harmful effects of the utilization of this technology.

19. The legal regulation of remote sensing of the earth from outer space should also fulfil a more general role, one which M. Lachs assignes to the space law as a whole:

> "Thus law would be able to respond by providing rules of conduct, restrain or prevention; [...] and to ensure, by means of co-operation, that the great riches of the universe are used with conscious moderation in the interest of all nations".[5]

Annex

Text of Draft Principles on Remote Sensing of the Earth from Outer Space as Contained in the Report of the Legal Sub-Committee on Its 1984 Session (UN Doc. A/AC.105/337, 1984, pp. 14—18).
(The text within brackets is still to be agreed upon).

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[4] See "Dziennik Ustaw PRL" [Journal of Laws] 1979, No. 5 item 22, annex, Article VII provides:

"1. In this Convention, with the exception of Articles VIII to XII inclusive [the final provisions — *R.S.*], references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

"2. States members of any such organization which are States Parties to this Convention shall take all appropriate steps to ensure that the organization makes a declaration in accordance with paragraph 1 of this article".

[5] M. LACHS, *The Law of Outer Space*, Leiden 1972, p. 150.

Principle I

For the purpose of these principles with respect to remote sensing of the natural resources of the earth and its environment:

(a) The term "remote sensing of the earth" means "remote sensing of the natural resources of the earth and its environment";

(b) The term "primary data" means those primary data which are acquired by satellite-borne remote sensors and transmitted from a satellite either by telemetry in the form of electromagnetic signals or physically in any form such as photographic film or magnetic tape, as well as preprocessed products derived from those data which may be used for later analysis;

(c) The term "analysed information" means the end-product resulting from the analytical process performed on the primary data as defined in paragraph (b) above combined with data and/or knowledge obtained from sources other than satellite-borne remote sensors.

Principle II

Remote sensing of the earth from outer space and international co-operation in that field [shall] [should] be carried out for the benefit and in the interest of all countries irrespective of their degree of economic or scientific development, and taking into consideration, in international co-operation, the particular needs of the developing countries.

Principle III

Remote sensing of the earth from outer space [shall] [should] be conducted in accordance with international law, including the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, and the relevant instruments of ITU.

Principle IV

1. States carrying out programmes for remote sensing of the earth from outer space [should] [shall] promote international co-operation in these programmes. To this end, sensing States [should] [shall] make available to other States opportunities for participation in these programmes. Such participation should be based in each case on equitable and mutually acceptable terms due regard being paid to principles....

2. In order to maximize the availability of benefits from such remote sensing data, States are encouraged to consider agreements for the establisot of shared regional facilities.

Principle V

Remote sensing of the earth from outer space [should] [shall] promote the protection of the natural environment of the earth. To this end States participating in remote sensing [should] [shall] identify and make available information useful for the prevention of phenomena detrimental to the natural environment of the earth.

Principle VI

States participating in remote sensing of the earth from outer space [should] [shall] make available technical assistance to other interested States on mutually agreed terms.

Principle VII

1. The United Nations and the relevant agencies within the United Nations system should promote international co-operation, including technical assistance, and play a role of co-ordination in the area of remote senisng of the earth.

2. States conducting activities in the field of remote sensing of the earth [shall] [should] notify the Secretary-General thereof, in compliance with article XI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

Principle VIII

Remote sensing of the earth from outer space should promote the protection of mankind from natural disaster. To this end, States which have identified primary data from remote sensing of the earth and/or analysed information in their possession which would be useful in helping to alert States to impending natural disasters, or in assissting States to deal with natural disasters should as promptly as possible, notify those States affected or likely to be affected of the existence and availability of such data and/or information. Such data and/or information should, upon request, be disseminated as promptly as possible.

Principle IX

Taking into account the principles II and III above, remote sensing data or information derived therefrom [shall] [should] be used by States in a manner compatible with the legitimate rights and interests of other States.

Principle X

States participating in remote sensing of the earth either directly or through relevant international organizations [shall] [should] be prepared to make available to the United Nations and other interested States, particularly the developing countries, upon their request, any relevant technical information involving possible operational system which they are free to disclose.

Principle XI

[States [shall] [should] bear international responsibility for [national] activities of remote sensing of the earth [irrespective of whether] [where] such activities are carried out by governmental [or non-governmental] entities, and [shall] [should] [guarantee that such activities will] comply with the provisions of these principles].

Principle XII

A sensed State [shall] [should] have timely and non-discriminating access to primary data obtained by remote sensing of the earth from outer space, concerning its territory, on [agreed], reasonable terms and [no later than] [before] access is granted to any third State. [To the greatest extent feasible and practicable], [this principle shall also apply to analysed information].

Principle XIII

[A State intending to conduct or conducting activities and/or programmes for remote sensing of the earth from outer space shall notify promptly the Secretary-General of the United Nations of the nature, estimated duration of the programme, and the geographic area covered as well as any major modification of the programme. The Secretary-General shall immediately disseminate the information thus received to the States concerned and shall publish it accordingly. A State conducting activities and/or programmes for remote sensing of the earth from outer space should also furnish such information to the extent practicable directly to any State which so requests].

Principle XIV

[A State carrying out remote sensing of the earth [shall] [should] without delay consult with a State whose territory is sensed upon request of the latter in regard to such activity, [in particular dissemination of data and information,] in order to promote international co-operation, friendly relations among States and to enhance the mutual benefits to be derived from this activity].

Principle XV

[States carrying out remote sensing of the earth shall not, without the approval of the States whose territories are affected by these activities, disseminate or dispose of any data or information on the natural resources of these States to third States, international organizations, public or private entities].

Principle XVI

[Without prejudice to the principle of the freedom of exploration and use of outer space, as set fourth in Article I of the Treaty on Principles Govering the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, remote sensing of the earth [should] [shall] be conducted with respect for the principle of full and permanent sovereignty of all States and peoples over their own wealth and natural resources [with due regard to the rights and interests of other States and their natural and juridical persons in accordance with international law] [as well as their inalienable right to dispose of their natural resources] [and of information concerning those resources].].

Principle XVII

[Any dispute that may arise with respect to the application of [activities covered by] these principles [shall] [should] be resolved by prompt consultations among the parties to the dispute. Where a mutually acceptable solution cannot be found by such consultations it [shall] [should] be sought through other [established] [existing] procedures for the peaceful means of settlement of disputes mutually agreed upon by the parties concerned.].

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Problems of the Militarization of Space and International Law

by ANDRZEJ JACEWICZ

The conquest of space by man has since the outset been accompanied by an interest in the possibility of military uses of space on the part of the military circles. These circles soon became sponsors of diverse space undertakings. For many years now, space has been used for military purposes. It is estimated that about three-fourths of the satellites in orbit perform various functions of a military nature, primarily in the field of reconnaissance and communications.

What has been going on in space so far is the type of activity for military purposes which described as "auxiliary-servicing" or "passive". However, there is a growing danger of weapons being deployed in space and also of space becoming a future battlefield. One of the causes of this situation is the development of anti-satellite weapons designed to render satellite harmless. Anti-satellite weapons may be based either outside space or in space. The notorous American Strategic Defense Initiative could become another source of danger. As is known, the United States has decided to start research on the deployment in space of a system of defence against enemy strategic ballistic missiles. We do not want to go into the technical details of the future weapons. Let us only note that especially the weapons developed within the SDI would be based on the application of high-energy laser microwave and charged particle beams.

Let us now consider the question of militarization of space from the viewpoint of international law. Does the fact that space is free for exploration and use by all States signify an unlimited freedom? What is permitted, and what is not, in the field of military activity in space in the light of international agreements in force? In other words, what is the scope of demilitarization and neutralization of space?

I. The Scope of Demilitarization and Neutralization of Space in the Light of International Agreements

The concepts "demilitarization" and "neutralization" occur in international law either separately or jointly. Demilitarization means the obligation of

States, arising from an agreement, not to maintain military objects and installations and armed forces in a definite territory.[1] Demilitarization may be either complete or partial. Neutralization means a treaty exclusion of the possibility to conduct armed operations in a given territory as well as the prohibition to use this territory as a base for conducting such operations.

International agreements containing provisions in the question of limitation of the militarization of space have been arranged according to the weight of the provisions comprised therein, with priority being given to multilateral agreements.

1. The Outer Space Treaty

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty)[2] is the most important multilateral agreement containing provisions concerning the question under discussion. The Treaty was opened for signature simultaneously in Moscow, London, and Washington on 27 January, 1967, and entered into force in 10 October of that year. Article IV of the Treaty provides:

"States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

"The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited."

Let us try to analyze and interpret the above-quoted provisions. The Treaty introduces the full prohibition of the militarization of celestial

[1] Since demilitarization — as indicated by the ethymology of this term — presupposes the elimination of military installations and withdrawal of troops already stationed in a given territory, some authors, when speaking of territories which have not been previously militarized, use the term "non-militarization" instead of demilitarization (e.g. E. STEIN, *Legal Restraints in Modern Arms Control Agreements*, "The American Journal of International Law," 1972, pp. 259—260). It appears, however, that the term "demilitarization" has in practice proved to be so very capacious that it can be successfully used in the meaning of non-militarization.

[2] For the text of the Treaty as well as the texts of other documents quoted in this article (unless otherwise indicated in a footnote), see: J. GOLDBLAT, *Agreements for Arms Control: A Critical Survey*, London 1982.

bodies and only a partial prohibition of the militarization of outer space.

Article IV, paragraph 1 applies to the whole outer space. It prohibits the militarization of space as far as mass destruction weapons are concerned. Although the wording of this paragraph seems to be generally clear and understandable, it may be worth while commenting on two expressions: "orbit around the earth" and "any other kinds of weapons of mass destruction". What do these expressions mean?

The expression "orbit around the earth" means the complete orbit around the earth. It follows therefrom that objects carrying mass destruction weapons placed in a fractional orbit go beyond the scope of the prohibition formulated in Article IV, paragraph 1. Such an approach was clearly intended by the drafters of the Treaty.[3] The solution adopted means that the prohibition contained in Article IV, paragraph 1 does not embrace, for example, intercontinental ballistic missiles with nuclear warheads flying in orbit only a part of the earth's circumference.[4]

And what about the expression "any other kinds of weapons of mass destruction"? A Soviet author writes that

> "The specificity of mass destruction weapons consists in that their use leads to immense casualties not only in the region in which they have been used, but also far beyond its boundaries. These weapons, 'blind' by their very nature, in their action and consequences, inevitably obliterate any divisions between the armed forces and the civilian population, between military and non-military targets".[5]

Traditionally, mass destruction weapons comprised, in addition to nuclear weapons, also bacteriological and chemical weapons. Today, mass destruction weapons also include radiological weapons. It is also possible to construct other kinds of mass destruction weapons.

Do the new types of weapons now under elaboration, such as laser weapons or other directed-energy weapons, also belong to mass destruction weapons? If the answer to this question were affirmative, these weapons would be embraced by the prohibition formulated in Article IV, paragraph 1 of the Outer Space Treaty. The assertion, however, that these weapons have a "blind" character does not seem correct. On the contrary, these weapons by their very nature can clearly distinguish targets of attack.

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[3] P. C. DEMBLING, *Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, in: *Manual of Space Law*, vol. 1, New York-Alphen aan den Rijn 1979, p. 14.

[4] In the Treaty between the USA and the USSR on the Limitation of Strategic Offensive Arms of 18 June, 1979, the parties undertook, in Article IX, paragraph 1 (c), not to develop, test or deploy "systems for placing into Earth orbit nuclear weapons or any other kind of weapons of mass destruction, including fractional orbital missiles." So far the Treaty has not been ratified by either party.

[5] A. I. POLTORAK, in: A. I. POLTORAK, L. I. SAVINSKIJ, *Vooružonnye konflikty i meždunarodnoe pravo. Osnovnye problemy*, Moskva 1976, p. 310.

Article IV, paragraph 2 of the Outer Space Treaty pertains only to the moon and other celestial bodies. Stipulating that these bodies are to be used exclusively for peaceful purposes, the Treaty recognizes as impermissible not only the installing of mass destruction weapons (according to Article IV, paragraph 1), but also the establishment of military bases, installations, and fortifications, the testing of any type of weapons, and the conduct of military manoeuvres. Does the enumeration of activities prohibited on the moon and other celestial bodies mean that the prohibition formulated in Article IV, paragraph 2 is limited only to these activities?

Article I of the Antarctic Treaty of 1 December, 1959, which is generally believed to have served as the model for drafting Article IV, paragraph 2 of the Outer Space Treaty, stipulates:

"1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons.

"2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose".

The omission of the expression "inter alia" in Article IV, paragraph 2 of the Outer Space Treaty has led some Western lawyers to conclude that the Treaty

"gives the impression that a more limited demilitarization of the Moon and other celestial bodies was intended than of Antarctica, and that their use for peaceful purposes does not exclude measures of defence."[6]

It appears that this is an incorrect approach. Although the enumeration of activities prohibited on the moon and other celestial bodies is not preceded by "inter alia", one should assume, taking into account the first sentence of paragraph 2 and, in this connection, the function of the subsequently enumerated prohibitions, that the intention of the drafters of the Outer Space Treaty was the full demilitarization of the moon and other celestial bodies.

One should note that the list of activities prohibited in Article IV, paragraph 2 of the Outer Space Treaty has been expanded as compared with article I of the Antarctic Treaty to include the establishment of military installations. Considering the broad scope of the term "installations", we have here, in fact, the full prohibition of militarization.

Such an interpretation seems to be confirmed by the last two sentences of Article IV, paragraph 2, which make exception for the use of military personnel for scientific research or for any other peaceful purposes and for

[6] J. E. S. FAWCETT, *International Law and the Uses of Outer Space*, Manchester 1968, pp. 34—35.

the use of equipment or facility necessary for peaceful exploration of the moon and other celestial bodies. This exception would be unnecessary if the demilitarization of the moon and other celestial bodies were to have a limited scope.[7] Only such activity of the armed forces is permitted which does not serve military purposes. One should also note that although in Article I, paragraph 1 of the Antarctic Treaty the list of prohibited concrete activities of a military nature is preceded by "inter alia", while Article IV, paragraph 2 of the Outer Space Treaty lacks this expression, in both treaties the exception which permits the use of military personnel and equipment for peaceful purposes has in fact the identical character.

The prohibition contained in Article IV, paragraph 1 pertains to both the moon and other celestial bodies as well as the rest of outer space. The prohibitions formulated in paragraph 2 concern only celestial bodies. The correctness of such a distinction has been called in question, since it may lead to the conclusion that space, excluding celestial bodies, can be used for non-peaceful purposes. The proposals set forth during negotiations on the Treaty to extend the prohibitions contained in paragraph 2 to embrace the whole outer space, have not been accepted, however. Some authors point out that any military uses of space must be limited to non-aggressive purposes, in accordance with Article III of the Treaty,[8] which reads:

> "States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding".

The above-quoted provision extends the binding force of international law to the whole outer space. International law, however, does not contain a pronciple prohibiting armaments. Also, one cannot but agree with the view that

> "Indeed, Article III of the Space Treaty, which provides that the activities in the exploration and use of outer space, including the moon and other celestial bodies shall be carried out in accordance with international law including the UN Charter, is not enough to substitute a provision on general demilitarization of outer space."[9]

How should one evaluate the formulation of Article IV of the Outer Space Treaty? A Polish author has written on this subject:

> "[...] the activity prohibited by the treaty so far has not been practiced at all; and these kinds of military activity in space which are already practiced, have been neither

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[7] G. M. MELKOV, *Juridičeskoe značenie termina "isključitelno v mirnyh celah"*, "Sovetskij Ježegodnik Meždunarodnogo Prava," 1971, p. 159.

[8] P. C. DEMBLING, *op. cit.*, p. 14.

[9] N. M. POULANTZAS, *The Outer Space Treaty of January 27, 1967: A Decisive Step Towards Arms Control, Demilitarization of Outer Space and International Supervision*, "Proceedings of the Tenth Colloquium on the Law of Outer Space," 1967, p. 211.

prohibited nor limited. This fact is emphasized by those commentators who sceptically assess the demilitarization value of the treaty. Their otherwise correct observations do not get to the crux of the matter inasmuch as the treaty of 27 January, 1967, is not a disarmament treaty. The demilitarization clauses are only one of its elements, taken into account to the extent to which this was practically possible in the existing situation. The contracting parties should be given credit for the fact that they took the full advantage of the negotiating possibilities existing at the given stage."[10]

2. The Moon Agreement

On 18 December, 1979, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement) was opened for signature in New York. The Agreement entered into force on 11 July, 1984. From the viewpoint of the questions under discussion here, the Agreement is a step forward as compared with the Outer Space Treaty. The problem of demilitarization, and also neutralization, of the moon is dealt with in Article 3 of the Agreement, which reads:

"1. The moon shall be used by all States Parties exclusively for peaceful purposes.

"2. Any threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited. It is likewise prohibited to use the moon in order to commit any such act or to engage in any such threat in relation to the earth, the moon, spacecraft, the personnel of spacecraft or man-made space objects.

"3. States Parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.

"4. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the moon shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration and use of the moon shall also not be prohibited."

Although Article 3 refers only to the moon, in fact the prohibitions contained therein have a broader scope. According to Article 1, paragraph 1, the provisions of the Agreement relating to the moon shall also apply to other celestial bodies within the solar system, other than the earth, except in so far as specific legal norms enter into force with respect to any of these celestial bodies. In turn, Article 1, paragraph 2 provides that for the purposes of the Agreement reference to the moon shall include orbits around or other trajectories to or around it. Does this mean, in connection with paragraph 1, that the provisions of the Agreement relating to the moon (including orbits and trajectories) will apply to other celestial bodies also including orbits around and trajectories to and around them? Such an

[10] J. SZTUCKI, *Układ w sprawie kosmosu* [*The Outer Space Treaty*], "Sprawy Międzynarodowe," 1967, No. 4, p. 53.

interpretation, a correct one as it appears, has been offered by Soviet authors.[11]

Analyzing the solutions adopted in Article 3 of the Agreement, one should say that they have not been limited to a confirmation of the full demilitarization of the moon and other celestial bodies, previously introduced by Article IV, paragraph 2 of the Outer Space Treaty, but have also proclaimed neutralization of these bodies. Attempts are at times made to minimize the significance of Article 3, paragraph 2 of the Moon Agreement or to derive entirely wrong conclusions therefrom. For example, France, upon signing the Agreement, offered the following explanation:

"France is of the view that the provisions of Article 3, paragraph 2, of the Agreement relating to the use or threat of force cannot be construed as anything other than a reaffirmation, for the purposes of the field of endeavour covered by the Agreement, of the principle of the prohibition of the threat or use of force, which States are obliged to observe in their international relations, as set forth in the United Nations Charter."[12]

Such an interpretation attempts to limit the meaning of Article 3, paragraph 2 of the Agreement to a repetition of Article 2, paragraph 4 of the UN Charter. It fails to perceive that if the meaning of the provisions in question were so narrow, they would be unnecessary in view of the wording of Article 2 of the Agreement, which says that all activities on the moon, including its exploration and use, shall be carried out in accordance with international law, in particular the Charter of the United Nations and taking into account the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October, 1970, in the interests of maintaining international peace and security and promoting international cooperation and understanding with due regard to the corresponding interests of all other States parties.

The principle which enjoins States to refrain from the threat or use of force is regarded as the cornerstone of the contemporary law of nations and the UN Charter. The above-mentioned Declaration on Principles lists this principle in the first place. So if the Moon Agreement were only to confirm the binding force of this principle, Article 3, paragraph 2 would be unnecessary since this question is clearly formulated in Article 2. It appears, however, that the formulation of Article 3, paragraph 2 leads to an entirely different conclusion. Article 2, paragraph 4 of the UN Charter prohibits the threat or use of force

[11] A. I. RUDEV, *Predotvratit militarizacju kosmosa*, "Sovetskoe Gosudarstvo i Pravo," 1983, No. 1, p. 68.

[12] Quoted from: E. GALLOWAY, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, "Annals of Air and Space Law," 1980, p. 493.

"Against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".

Article 3, paragraph 2 of the Moon Agreement prohibits "any threat or use of force or any other hostile act or threat of hostile act". Thus, it would be an absolute prohibition of resorting not only to force, but also to other hostile acts. The extension of the prohibition to include the latter was designed, as it seems, to embrace also such activities which not necessarily come within the scope of what is meant by the threat or use of force in the sense of the use of armed forces or weapons.

In the discussion on Article 3, paragraph 4 of the Agreement, the question of the exhaustive or exemplary enumeration of activities prohibited arises again. Regrettably, as was the case with Article IV, paragraph 2 of the Outer Space Treaty, here, too, we do not find the expression "inter alia", which could univocally resolve the dispute. The lack of this expression can be explained by the fact that the introduction of such a formula in the Moon Agreement, albeit it would clarify the question of Article 3, paragraph 4, could be used *a contrario* by the proponents of the view about the incomplete prohibition of the militarization of celestial bodies in Article IV, paragraph 2 of the Outer Space Treaty. As we have written while analyzing this paragraph, although the expression "inter alia" could be helpful there, in fact the list of activities prohibited in this paragraph seems to make the prohibition of militarization complete.

What seems to support the interpretation that any activities for military purposes are prohibited on the moon and other celestial bodies, and the thesis about the complete demilitarization of these bodies, is both Article 3, paragraphs 1 and 4 *in fine* as well as Article 3, paragraph 2 discussed above. If the moon (and other celestial bodies) are to be used exclusively for peaceful purposes, if any threat or use of force or any other hostile act or threat of hostile act on the moon (and other celestial bodies) is prohibited, if it is prohibited to use the moon (and other celestial bodies) in order to commit any such act or to engage in any such threat, one can hardly assume that any militarization, even limited, of the moon (and other celestial bodies) is permitted. The only exception provided for in Article 3, paragraph 4 *in fine* is the use of military personnel for scientific research or for any other peaceful purposes and the use of any equipment or facility necessary for peaceful exploration and use of the moon (and other celestial bodies).

Parenthetically, it seems worth while citing, by way of example, some deceitful arguments which Western science employs in order to "prove" that the Agreement permits the presence of weapons on the moon (and other celestial bodies). The eminent American specialist in space law, S. Gorove, says that what testifies to the incomplete demilitarization of celestial bodies is the prohibition of resource to force or hostile acts. For if there were to be no weapons on the moon and other celestial bodies, such a prohibition would be unnecessary.[13] First, it would not be unnecessary for, as we have said, one can imagine hostile acts without the use of weapons in the oridinary meaning of this word. Second, it appears that the course of reasoning should be reversed. Since the aim is the prohibition of resorting to force and hostile acts on the moon and other celestial bodies, the demilitarization of the latter is introduced and the prohibition to use them in order to commit any such acts. Third, one can imagine the use or threat of force by means of weapons placed outside the moon and other celestial bodies. There may be no weapons on these bodies, but this does not mean that the neutralization of these bodies is unnecessary. Fourth, if we assumed that Gorove's reasoning was correct, the neutralization of any territory accompanied by its demilitarization would be illogical. Examples provided by international practice seem to demonstrate that States represent a reverse standpoint in this matter.

"In neutralized territories, it is prohibited, as a rule, to maintain installations serving war preparations and the preparation of the armed forces."[14]

3. The Limited Test Ban Treaty

The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Limited Test Ban Treaty) was signed in Moscow on 5 August, 1963. The Treaty came into force on 10 October, 1963. The very name of the Treaty indicates the subject matter and scope of the prohibition formulated therein. Article I of the Treaty provides:

"1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

"(a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas [...]."

This means that the Treaty is applicable to all nuclear explosions, save underground explosions; the latter, however, in the light of Article 1, paragraph 1 (b), must not cause radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted.

It is believed that the Treaty in question was in fact the first norm of space law and the first step towards the demilitarization of space.[15] It is still of significance in relation to space for those States parties which have not adhered to the later, farther-going agreements prohibiting the militarization of space.

[13] S. GOROVE, in: *International Law Association. Paris Conference (1984). Discussion Paper on the Legal Aspects of the Present and Projected Military Uses of Outer Space*, p. 9.

4. The Environmental Modification Convention

The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Environmental Modification Convention) was opened for signature in Geneva on 18 May, 1977. It entered into force on 5 October, 1978. Article I, paragraph 1 of the Convention stipulates:

"Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."[16]

The use of environmental modification techniques for military purposes can be compared to the use of mass destruction weapons. The presence of such weapons in space is prohibited. As regards the so-called ecological weapons, their emplacement in space or on the earth cannot be prohibited. What can be prohibited is the use of these weapons, that is, the application of environmental modification techniques as an equivalent of weapons. The Environmental Modification Convention prohibits the use of environmental modification techniques for military purposes or other hostile purposes, thereby constituting an essential supplement to the prohibition formulated in Article IV of the Outer Space Treaty.

The ABM Treaty

The Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty) was signed in Moscow on 26 May, 1972. The Treaty entered into force on 3 October, 1972. Although it is a bilateral agreement, its importance is out of any proportion to the number of its signatories in view of the fact that the parties to the Treaty are two superpowers which have outdistanced the rest of the world in the field of the arms race and achievements in the exploration and use of space.

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[14] C. BEREZOWSKI, *Prawo międzynarodowe publiczne* [*Public International Law*], part I, Warszawa 1966, p. 263.

[15] J. SZTUCKI, *Problemy prawne kosmosu* [*The Legal Problems of Outer Space*], Warszawa 1965, p. 95.

[16] Article II explains that "the term 'environmental modification techniques' refers to any technique for changing - through the deliberate manipulation of natural processes — the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space". Understandings regarding the Convention, which were not incorporated into the Convention but are part of the negotiating record and were included in the report transmitted by the Conference of the Committee on Disarmament to the UN General Assembly in September 1976, offer an interpretation of the terms "widespread", "long-lasting" and "severe" and give examples of the possible effects of the use of environmental modification techniques.

The provisions of the Treaty have assumed additional significance in the context of the US Strategic Defense Initiative, which provides for the creation in the future of space-based weapons (first of all, laser weapons permitting the defence of the US territory against enemy ballistic missiles. One should recall that the philosophy at the root of the ABM Treaty was founded on the assumption that since the USSR and US territories would be exposed to a ballistic missile strike by the partner, in practice the sides would refrain from attempting such a strike, which obviously would be accompanied by a similar counterstrike leading to mutual destruction.

In concluding the Treaty, the sides undertook to limit weapons serving to intercept and destroy ballistic missiles. For the purposes of the Treaty, an ABM system was defined as "a system to counter strategic ballistic missiles or their elements in flight trajectory", consisting at that time (in 1972) of ABM interceptor missiles, ABM launchers, and ABM radars (Article II). In Article III, the sides undertook not to deploy ABM systems or their components. An exception from this rule was the possibility of creating two ABM system deployment areas, with definite parameters.[17] In Article V, paragraph 1, the ABM Treaty stipulated:

"Each Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based".

The question arises as to whether this obligation applies to systems known upon the conclusion of the Treaty and listed in Article II, or whether it concerns any weapons serving to counter strategic ballistic missiles, including, for example, laser weapons. Article V, paragraph 1 seems to suggest the latter interpretation.

It is claimed, however, that something else results from paragraph D of the Agreed Interpretations (Initial Statements), a document regarding the ABM Treaty, agreed upon and initialed by the Heads of the delegations on 26 May, 1972. Paragraph D says:

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

Since "specific limitations" are only to be subject to consultations and amendments (provided for in Articles XIII and XIV), it may appear that

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[17] The Protocol to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, which was signed on 3 July, 1974, and entered into force on 24 May, 1976, limits this possibility to one ABM system deployment area for each State party.

these limitations are not embraced by the ABM Treaty. Such an interpretation not infrequently can be encountered in Western science. J. Goldblat, for example, writes that the development of ABM systems based on other physical principles has not been prohibited by the Treaty, since in a statement attached to the Treaty the parties agreed that in the event of such new means being created in the future, their specific limitations would be subject to discussion and agreement.[18]

Such an interpretation, however, overlooks the fact that the aim of paragraph D of the Agreed Interpretations is to insure fulfilment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty. The formula about specific limitations evidently pertains to possible problems connected with limitation of fixed land-based ABM systems, as provided in Article III, and not to the development, testing, and deployment of ABM systems based otherwise, including space-based systems.[19]

Let us note that the US official standpoint to this question was clearly defined by State Secretary W. Rogers in Congress, who commenting on the ABM Treaty before the Senate Committee on Foreign Relations, said on 19 June, 1972:

> "Perhaps of even greater importance as a qualitative limitation is that the parties have agreed that future exotic types of ABM systems, i.e. systems depending on such devices as lasers, may not be deployed, even in permitted areas".[20]

An identical view was presented by Ambassador G. Smith, Director of the US Arms Control and Disarmament Agency and head of the US delegation to the Strategic Arms Limitation Talks (SALT), who, in a statement made before the Senate Committee on Armed Services on 28 June, 1972, said:

> "The development and testing, as well as deployment, of sea-, air-, space-based, and land-mobile devices is prohibited. Of perhaps even greater importance, the parties have agreed that no future types of ABM systems based on different physical principles from the present technology can be deployed unless the treaty is amended."[21]

It might appear that the problem does not exist. One should bear in mind, however, that the ABM Treaty prohibits only the development,

[18] J. GOLDBLAT, *op. cit.*, p. 30. Cf. also: B. JASANI, *The Arms Control Dilemma — An Overview*, in: *Space Weapons — The Arms Control Dilemma*, London-Philadelphia 1984, p. 34; P. NAHIN, *Space-Based Directed-Energy Beam Weapons*, in: *ibid.*, p. 99.

[19] A. ROSAS, *The Militarization of Space and International Law*, "Journal of Peace Research", 1983, pp. 359—360; P. L. MEREDITH, *The Legality of a High-Technology Missile Defence System: The ABM and Outer Space Treaties*, "The American Journal of International Law," 1984, p. 420.

[20] *Secretary Rogers Urges Senate Support of the ABM Treaty and Interim Agreement of Strategic Offensive Arms*, "The Department of State Bulletin," 1972 (No. 1724), p. 52.

[21] *The SALT Agreement and U.S. National Security, ibid.*, 1972 (No. 1727), p. 148.

testing, and deployment of ABM systems and components which are space-based. There is no mention in the Treaty about scientific research, and the US side maintains that the present SDI research comes within the scope of such scientific research and, consequently, is consistent with the Treaty. The opinions of scholars on this subject are divided. Some authors share the American point of view.[22] But different opinions are being voiced, too. The noted Argentine specialist in space law, A. A. Cocca, says that scientific research is the first step toward development, testing, and deployment and, consequently, is also prohibited.[23] It has also been observed that "the distinction between research and development is not clear-cut."[24]

Formally speaking, one should admit that the ABM Treaty does not prohibit scientific research. Considering the problem from the viewpoint of purpose, however, it is evident that costly and complicated research is conducted in order to make use of its results. What seems dangerous is the US administration's campaign, publicized by American mass media, concerning alleged violations of the ABM Treaty by the USSR, designed, as it seems, to clear the ground for possible violations of the Treaty by the United States.[25]

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We have presented above the limitations formulated so far in international agreements, concerning the militarization of space. One should remember, however, that the obligation to observe these limitations rests upon the States parties to these agreements. Most of these agreements have been adhered to by a smaller or larger, but generally considerable, number of States, with the exception of the Moon Agreement. Unfortunately the latter has been ratified neither by the USA nor by the USSR.

II. "Use Exclusively for Peaceful Purposes". The Content and Scope of the Concept

While considering the question of the scope of the prohibition of militarization of outer space, one cannot refrain from examining more

[22] D. GOEDHUIS, A. A. GOROVE, N. M. MATTE, in: *International...*, pp. 11, 12, and 13, respectively.

[23] A. A. COCCA, in: *ibid.*, p. 12.

[24] P. L. MEREDITH, *op. cit.*, p. 422. An additional complication, pointed out in literature, is created by the fact that the development of ABM systems is in practice similar, and at times identical, to the development of some anti-satellite systems and may be conducted under the guise of the latter (D. SHAPLEY, *Strategic Doctrine, the Militarization and the "Semi-Militarization" of Space*, in: *Space...*, p. 68).

[25] B. KELLER, *U.S. Interprets ABM Treaty as Allowing Tests of Space Arms*, "International Herald Tribune", 22 April, 1985, p. 1.

closely the concept of use exclusively for peaceful purposes. This expression, encountered in many resolutions of the UN General Assembly devoted to space, can also be found in the Outer Space Treaty and the Moon Agreement. It might appear, if we address ourselves to the afore-cited formulations of Article IV of the Outer Space Treaty and Article 3 of the Moon Agreement, that the meaning of this formula should not give rise to controversies. This is not so, however. A heated dispute is going on between both official representatives of governments and scholars over not only the content of this expression, but also its spatial scope.

1. The Content

One of the interpretations asserts that in contemporary international law the word "peaceful" is a synonym of the term "non-aggressive". The main exponent of such a view, as far as States are concerned, is the United States. This view is also shared by a considerable part of Western scholars. It is obvious that the adoption of such a standpoint is tantamount to expressing an opinion on the scope of the prohibition of the militarization of outer space. Attempts are being made to legalize the application of some military programmes, presented as non-aggressive, on the moon and other celestial bodies.

Another approach to the principle of "use exclusively for peaceful purposes" maintains that the term "peaceful" means "non-military". Such a view is represented in the international arena, *inter alia*, by the Soviet Union. As far as science goes, it is shared by both lawyers from socialist States as well as a considerable percentage of Western theorists.

It appears that, generally speaking, the term "peaceful" can be used in the sense of "non-aggressive". This is, however, only its basic meaning resulting from the UN Charter. In addition, there exist international agreements which ascribe to this formula a much broader meaning. According to these agreements, peaceful purposes mean non-military purposes. For example, the afore-quoted Article 1 of the Antarctic Treaty unequivocally means by use exclusively for peaceful purposes the use of Antarctica in a manner eliminating any measures of a military nature, whether aggressive or non-aggressive. The expression "for peaceful purposes" in the sense "for non-military purposes" has also been used with respect to the use of nuclear energy in the Statute of the International Atomic Energy Agency of 26 October, 1956.

In what sense is the formula "exclusively for peaceful purposes" applied in space law? Article IV, paragraph 2 of the Outer Space Treaty includes in the concept of use exclusively for peaceful purposes the prohibition of such activities as the establishment of military bases, installations, and fortifications, the testing of any type of weapons, and the conduct of military manoeuvres. Thus, it is a prohibition of undertakings serving military purposes. The Outer Space Treaty does not say whether these undertakings would serve aggressive purposes or the repelling of a possible attack. The same conclusion results from Article 3 of the Moon Agreement, which does not limit itself to the prohibition of the militarization of the moon and other celestial bodies, but also provides for their neutralization. Both the first and the second agreement permits the use of military personnel and of any equipment or facility for peaceful purposes, or, as one should presume, for non-military purposes.

M. Lachs rightly argues that

"If it was intended to forbid aggressive use only, mere reference to international law and the Charter of the United Nations would be sufficed".

Article III of the Outer Space Treaty and Article 2 of the Moon Agreement explicitly refer to the application of international law and the UN Charter to the activities of States in the exploration and use of space.

"Had only this prohibition been contemplated", writes Lachs, referring to aggressive activities in outer space, "the additional words 'for peaceful purposes' would have been redundant. And yet they were expressly written into the basic international instruments governing the question. They can therefore hardly be considered as meaningless, the expression of a pious desire devoid of legal effects."[26]

B. Cheng, while presenting an identical course of reasoning, asserts that the interpretation of the term "peaceful" as merely "non-aggressive" could lead to the paradoxical conclusion that *a contrario* outer space beyond the moon and other celestial bodies remains open for aggressive activities.[27]

It appears that both the Outer Space Treaty and the Moon Agreement define activities not serving peaceful purposes in a manner which does not leave much room for doubt. Thus, one cannot but suspect of lack of good faith those governments and those lawyers who attempt to reduce the concept of use exclusively for peaceful purposes in these agreements merely to activities of a non-aggressive character.

What arguments are offered by proponents of the view that the term "peaceful purposes" is a synonym of non-aggressive purposes?[28] They confine themselves quite frequently to the general statement that such a meaning of the term "peaceful" has taken shape in international law. Addressing themselves to the UN Charter, they fail to notice that some

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[26] M. LACHS, *The Law of Outer Space. An Experience in Contemporary Law-Making*, Leiden 1972, p. 106. Cf. also IDEM, *The International Law of Outer Space*, "Recueil des cours de l'Académie de droit international de la Haye," 1964, vol. III (113), pp. 90—91.

[27] B. CHENG, *The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use*, "Journal of Space Law," 1983, p. 104.

[28] For a review of this argumentation and its critique in Polish legal literature, see J. SZTUCKI, *Problemy... [The Legal Problems...]*, pp. 91 ff.

international agreements — as we have pointed out above — impart to this term the meaning "non-military". This also concerns the Outer Space Treaty and the Moon Agreement.

Other basic arguments include the assertion that the identification of "peaceful" with "non-military" was allegedly inconsistent with the right of States to self-defence, guaranteed in Article 51 of the UN Charter. Referring to this assertion, a Polish author remarks:

> "The right of every State to individual or collective sel-defence does not mean that States enjoy unrestrained freedom in the selection of means, ways, or places of exercise of this right. [...] It appears, however, that the supporters of the above-cited view have become entangled in sophistry which would inevitably lead to the conclusion, absurd from the viewpoint of logic and false from the viewpoint of international law, that disarmament or military prohibitions were allegedly inconsistent with the right to self-defence, and thus with the UN Charter!" [29]

The argument is also being cited that in practice it is impossible to distinguish activities for peaceful purposes (in the sense of non-military purposes) from activities for military purposes. We shall revert to this question in part III of this paper. At this point, we only want to remark that the difficulties with distinguishing activities for military purposes and for non-military purposes do not seem greater than those connected with distinguishing military activities for aggressive and non-aggressive purposes. In fact, a noted Western specialist in space law remarks, the identification of peaceful purposes with non-aggressive ones leads to the legalization of any military activity. He writes:

> "It has been submitted that since defensive and deterrent capabilities serve the cause of peace, it is only when such devices are intentionally used for aggressive purposes that they lose their peaceful status. As all arms have deterrent capabilities, States — on the basis of such a contention — would be able to claim that any arms on the moon would constitute a use of the moon for peaceful purposes." [30]

2. The Spacial Scope

Does the legal obligation of use exclusively for peaceful purposes apply only to the moon and other celestial bodies, or does it embrace the whole outer space? Article IV, paragraph 2 of the Outer Space Treaty expressly refers to the use exclusively for peaceful purposes of the moon and other celestial bodies. Only Article IV, paragraph 1 refers to the whole outer space in the context of the prohibition of the emplacement in it of mass destruction weapons. Also Article 3 of the Moon Agreement speaks of

[29] *Ibid.*, pp. 93—94.

[30] D. GOEDHUIS, *Some Observations on the Efforts to Prevent a Military Escalation in Outer Space*, "Journal of Space Law," 1982, p. 17.

the use exclusively for peaceful purposes of only the moon (and other celestial bodies). This seems to induce the conclusion that the spacial scope of the formula "exclusively for peaceful purposes" should be construed as pertaining only to the moon and other celestial bodies.

Such a view, however, is not shared by a certain number of lawyers, who consider it to be too restrictive. In support of the contention that "use exclusively for peaceful purposes" concerns not only the moon and other celestial bodies, but the entire outer space, various provisions, other than Article IV, of the Outer Space Treaty are cited.

Attention is being drawn to the provisions of the preamble to the Treaty, which recognize

"the common interest of all mankind in the progress of the exploration and use of outer space or peaceful purposes",

express the desire

"to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,"

and take account of United Nations General Assembly resolution 110 (II) of 3 November, 1947,

"which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression,"

considering this resolution to be "applicable to outer space". Also cited are Articles I, III, and IX of the Treaty, with emphasis on the following fragments: in Article I —

"The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries";

in Article III — activities in space shall be carried on

"in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding";

and in Article IX —

"In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty."

In conclusion, the author of the above-cited argumentation says:

"Obviously, it would be impossible to implement the benefit and interest of all countries (mentioned in Art. I), further the interest of maintaining international peace and security (mentioned in Art. III) and finally the principle of cooperation and mutual assistance (mentioned in Art. IX), unless the obligation of exclusively peaceful use is valid for the entire space".

Under the circumstances, the only correct interpretation is that the Outer Space Treaty as a whole provides for the obligation of the use exclusively for peaceful purposes of the whole space, irrespective of the concrete obligations formulated in Article IV with respect to the moon and other celestial bodies.[31]

What can be said about the above-cited reasoning? It is actually founded on some arbitrariness in the interpretation of Article IV, or even on slighting its content. Thus, one cannot but agree with the following polemic with such argumentation:

"The Treaty is very explicit on the question of exclusively peaceful uses so that it does not present a problem of interpretation. The phrase 'exclusively for peaceful purposes' is used in only one operative part of the Treaty — Article IV, paragraph 2 — which is limited to the Moon and other celestial bodies. Where provisions are intended to have wider application, the Treaty uses the phrase 'outer space, including the Moon and other celestial bodies'".

It is further argued that the fact that the Treaty limits use exclusively for peaceful purposes to the moon and other celestial bodies does not mean that the drafters of the Treaty have left outer space aside, as a sphere of lawlessness and aggression. After all, Article III of the Treaty provides that the activities of States in outer space are governed by international law, including the UN Charter.

"Article III forbids in outer space the uses of force forbidden to States on Earth by the Charter of the United Nations. Article IV goes further and forbids on the Moon and other celestial bodies military activities legal on Earth and in outer space generally under the Charter."[32]

Let us add that in their activities for military purposes, States are obliged — according to Article IX of the Treaty — to take account of the interests of other States parties to the Treaty.

One can say that, considering the aims which guide the advocates of the thesis that "use exclusively for peaceful purposes" encompasses the whole outer space, meaning its complete demilitarization, the attempts at such an interpretation of the Outer Space Treaty enlist support (although — as we point out later on — it does not seem to be a realistic solution). One can also regret that the drafters of the Treaty evinced some inconsistency, introducing, on the one hand, the obligation of the use of outer space to the benefit and in the interest of all States (Article I) and in the

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[31] I. HERCZEG, *Problems of Interpretation of the Space Treaty* of 27 January, 1967. Introductory Report, "Proceedings of the Tenth Colloquium on the Law of Outer Space", 1967, p. 106. In Polish legal literature, a similar argumentation is employed by A. GÓRBIEL, *Istota i ograniczenia prawne wolności kosmosu* [*The Essence and Legal Limitations of the Freedom of Outer Space*, "Acta Universitatis Lodziensis. Nauki Humanistyczno-Społeczne," 1979, pp. 15—16.

[32] E. GALLOWAY, in: I. HERCZEG, *op. cit.*, pp. 106—107.

interest of maintaining international peace and security and promoting cooperation and mutual understanding (Article III) and, on the other hand, limiting the prohibition of activities for military purposes exclusively to the moon and other celestial bodies. Article IV, paragraph 2 is unequivocal in this matter. It appears that it was an intended inconsistency, which took into account the definite practical eterminants existing at the time when the Treaty was negotiated and signed.

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Summing up the reflection on the content and spacial scope of the formula "use exclusively for peaceful purposes", one should say that in the existing space agreements, namely the Outer Space Treaty and the Moon Agreement, this formula means the use exclusively for non-military purposes of the moon and other celestial bodies. Thus, an extensive analysis has confirmed our contentions expressed in part I of the present paper.

III. The Model *de lege ferenda*

1. The Postulated Scope of the Demilitarization and Neutralization of Outer Space

How should the question of demilitarization and neutralization of outer space be regulated in the future, if agreement is reached in this matter? Should the existing prohibition of mass destruction weapons in space be extended to include all types of weapons, or could we go even further and introduce in the entire outer space the prohibition of any activities for military purposes? As we have pointed out in part II of this paper, some lawyers would like to infer such a prohibition from the Outer Space Treaty. Such a prohibition also frequently appears in literature as a solution *de lege ferenda*.

The extension of the prohibition of use for military purposes to encompass the entire outer space seems to be an alluring alternative in view of its global character. But is this alternative feasible? In order to resolve any problem correctly, it is necessary to grasp and take into account its determinants. In the light of the situation existing in space at present, could the complete demilitarization of the entire outer space be achieved?

It should be remembered that there do not exist on the earth means constituting an alternative to satellites. The latter, in view of the continuing arms race, are assuming immense military significance. One should not expect, too, that the States possessing objects serving such activities would, or even could, consent to their elimination. What has been achieved in Antarctica, an American author writes, seems doubtful as far as outer space goes.

"Antarctica became a sanctuary from military competition precisely because it was too remote and inhospitable a site. A weapon or surveillance post stationed in Antarctica is 10 000 km from the borders of either the USA or the USSR; a satellite in outer space, however, can orbit within 150 km of any point on the globe. The great powers will readily forego such useful military vantage points."[33]

It is believed that so far there are no weapons in outer space. Only preparations are under way to extend the arms race to space. The fact that offensive and defensive military satellite systems are expected to be developed only in the future does not mean, however, that we should overlook the "passive" form of the militarization of space. This "passive" militarization certainly does not contribute to the halting of the arms race on the earth. At the same time, the fact that satellites today are of such tremendous military importance have caused them to be added to the already long list of potential targets of attack in any future war between the two superpowers. In view of the great role which satellites play, *inter alia*, in reconnaissance and communications, they create a temptation to destroy them or render them harmless in order to paralyze enemy moves. Given the very great dependence of the army on a relatively small number of satellites (their number is now estimated at about 200), there exists the possibility of winning considerable superiority in a possible armed conflict through the neutralization of enemy satellites by means of anti-satellite weapons. The motivation for developing systems of such weapons is intensified by the fact that satellites are very sensitive to any damage. It is believed that also in the future most satellites will remain relatively "defenceless."

Since, however — as we have pointed out above — the elimination of "passive" military activities from space seems now impossible, a more reasonable alternative to the development of anti-satellite weapons, which intensifies the arms race and creates the risk of war in outer space, would be the "protection" of all satellites, including those working for military purposes. We are well aware of the fact that the postulate of tolerating "passive" military activities in space may sound somewhat paradoxical. Instead of proposing the complete prohibition of the use of space for military purposes, we suggest the protection of such military activities in space. But setting aside the now unrealistic postulate of the full demilitarization of space, we believe that tolerating "auxiliary–servicing" military satellite systems is a lesser evil than a vision of space as the theatre of armed clashes.[34]

[33] D. L. HAFNER, *Anti-Satellite Weapons: The Prospects for Arms Control*, in: *Outer Space — A New Dimension of the Arms Race*, London 1982, p. 315.

[34] As C. Rosin, an eminent American specialist in space missile technology, remarks in an interview for a Soviet weekly, "There exists one more alarming element. Namely, satellites are exposed to the destructive influence of meteorite particles, and besides there happen technical breakdowns in them. Every incident of this kind, if it occurs after anti-satellite

As regards "auxiliary-servicing" activities for military purposes, for the time being they ought to be tolerated. In fact, the causes of these activities are to be found outside space and result from the character of the arms race going on on the earth. It does not seem possible to limit these activities without major disarmament measures. On the other hand, we must note that an increasing number of practicians and theorists perceive the positive aspects of these activities, primarily, though not only, as regards the verification of disarmament agreements. It is also worth noting that, for example, Article XII of the ABM Treaty provides for the use by each party of "national technical means of verification at its disposal", and these means also include reconnaissance satellites.

Irrespective of the above, however, it seems that in order to achieve the prohibition under international law of any activities for military purposes, it is necessary to be able to precisely distinguish satellites. Considering the universal character of the functions they perform, this is a very difficult task. One can even encounter the opinion that

"the question is the difficulty in finding any action in outer space which is without military significance".[35]

A large number of satellites are dual-purpose devices. They perform functions of both a military and civilian nature. The prohibition of any activities which may be used for military purposes, for example, the work of satellites serving the needs of meteorology or navigation, would in effect limit to a very great extent the use of outer space for peaceful purposes.[36]

Do the above contentions mean that we accord with the thesis, advanced by Western science, about the impossibility of drawing a distinction in practice between the use of space for peaceful purposes and for military purposes? In fact, such a distinction seems to be of little practical value. Of course, as regards the already existing injunctions to use the moon and other celestial bodies exclusively for peaceful purposes, it is necessary to seek methods permitting to distinguish between undertakings for military and non-military (peaceful) purposes. It appears, however, that in elaborating future legal solutions concerning the prohibition of the militarization of the whole outer space, it would be necessary to reject the formula in question. As S. Gorove writes,

"It would appear much more productive to abandon the artificial and essentially relative distinction between peaceful and military purposes or peaceful and aggressive purposes,

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systems have been put in operation, could be interpreted as an aggressive action and have tragic consequences" ("Nowe Czasy," 1985, No. 8, p. 23).

[35] O. O. OGUNBANWO, *International Law and Outer Space Activities*, The Hague 1975, p. 29.

[36] Parenthetically, let us note that none of the satellites so far launched into space has been registered as performing functions of a military nature (D. GOEDHUIS, *Some...*, pp. 15, 18).

and focus instead on the prohibition or permission of the particular activity involved."[37]

Reverting to the proposal of "protection" of all satellites, including those working for military purposes, it seems that in order for this proposal to be acceptable it must be founded on the assumption that, while being — as literature figuratively describes them — "the eyes, ears and voices of modern military forces,"[38] they will not become means of attack if, for example, later or particle beam systems are installed on them. The temptation to develop and deploy anti-satellite systems created by the permission to use space objects for military purposes in a "passive" manner is incomparable with the temptation that might arise as a result of the emplacement in space of any type of weapons, irrespective of whether they would serve to destroy targets in space, in the atmosphere or on the earth. Hence, the primary aim which ought to be striven for is the legal prohibition of placing any type of weapons in outer space.

It is a truism that, as a rule, it is easier to prevent something than to correct the situation after the fact. If the arms race is extended to outer space, reversing it will be a difficult, and perhaps even unfeasible task.

What scope would the future prohibition of the militarization of the whole space have? Taking into account the present use of space for military purposes in a "passive" manner and desiring to prevent space from turning into the battlefield of a future war or the base for actions against objects in the atmosphere or on the earth, which, in practice, would have the same consequences, one should postulate the prohibition of the placement in space any type of weapons and outside space of any type of weapons designed to be used in space. The latter formulation would concern the deployment of anti-satellite systems based outside space. The optimum solution could take into account the prohibition of the development and testing of any space-based weapons (anti-satellite systems and systems to be used against objects outside space) as well as anti-satellite weapons based outside space. Such a demilitarization of space could be accompanied by its neutralization, i.e. the prohibition of resorting to force (and perhaps to any other hostile acts) both in space and from space.

2. Drafts of International Agreements

The question of extension of the prohibition of the militarization of outer space has been discussed both in the bilateral Soviet-American forum and on a multilateral plane. In the past few years, three concrete drafts of international agreements in this matter have been submitted. As a detailed

[37] S. GOROVE, *Studies in Space Law: Its Challenges and Prospects*, Leyden 1977, p. 91.
[38] D. L. HAFNER, *op. cit.*, p. 313.

analysis of these drafts would require too much space, we confine ourselves to presenting and briefly evaluating the fundamental assumptions of these proposals.[39]

In 1979, in the Geneva Disarmament Committee, Italy submitted a draft Additional Protocol to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies.[40] The most important solutions were presented in Article 1. Paragraph 1 of this article provides that outer space shall be used for peaceful purposes only. Any measures of a military or other hostile nature are prohibited. Such measures include the establishment of military bases, installations, and fortifications, the stationing of devices having the same effect, the launching into earth orbit or beyond of objects carrying weapons of mass destruction or any other types of devices designed for offensive purposes, the conduct of military manoeuvres, as well as the testing of any type of weapons. On the other hand, paragraph 2 permits the use of military personnel or equipment for scientific research and any other peaceful purposes and for the purpose of control of disarmament and security agreements.

The Protocol explicitly enjoins the use of the whole space exclusively for peaceful purposes and prohibits any measures of a military or other hostile nature. As regards diverse space objects serving military purposes in a "passive" manner, Article 1, paragraph 2 makes only one exception — for control systems designed to ensure compliance with disarmament and security agreements. Any other "auxiliary-servicing" military activities would be prohibited. But what did the authors of the draft have in mind when they introduced the prohibition of objects carrying "any other devices designed for offensive purposes"? The following commentary can be found in literature.

"On the one hand, the proposal is directed towards a prohibition of any measure of a military or other hostile nature in outer space, but on the other hand, in its second part, it refers to a prohibition of launching types of devices for 'offensive' purposes. Does this mean that the launchings in outer space including the Moon of any devices for 'defensive' purposes are to be allowed? Does this not contradict the proposal to prohibit any measure of a military nature?."[41]

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[39] For more on this subject, see A. JACEWICZ, *Projekty umów międzynarodowych w przedmiocie demilitaryzacji i neutralizacji kosmosu* [*Draft International Agreements on the Demilitarization and Neutralization of Outer Space*], "Postępy Astronautyki," 1985, No. 3-4 See also: S. DANIELSSON, *Examination of Proposals Relating to the Prevention of an Arms Race in Outer Space*, "Journal of Space Law," 1984; F. LAY, *Space Law: A New Proposal, ibid.*, 1980.

[40] UN Doc. CD/9 (26 March, 1979).

[41] D. GOEDHUIS, *What Additional Arms Control Measures Related to Outer Space Could Be Proposed*?, in: *Outer...*, p. 304.

The Protocol seems to overlook the question of anti-satellite weapons acting from the earth or the atmosphere, where they are deployed until their actual application.

"Thus, the proposed prohibition would unfortunately not ban the ASAT systems we know of today".[42]

It appears that the prohibition of anti-satellite systems could embrace not only their deployment, but also their development and testing. A similar postulate can be put forward as far as other space-based weapons are concerned.

The draft Protocol makes the impression of not having been elaborated carefully enough, both in terms of content and editorially. The ambiguous formulations make difficult an evaluation of the content of the Protocol.

In 1981 in the United Nations forum, the Soviet Union submitted a Draft Treaty on the Prohibition of the Stationing of Weapons of Any Kind in Outer Space.[43] In Article 1, paragraph 1 of the draft Treaty, the parties would undertake not to place in orbit around the earth objects carrying weapons of any kind, install such weapons on celestial bodies, or station such weapons in outer space in any other manner, including on reusable manned space vehicles of an existing type or of other types which may be developed in the future. Article 3 contains the obligation of the States parties not to destroy, damage or disturb the normal functioning or change the flight trajectory of space objects of other States parties, if such objects were placed in orbit in strict accordance with Article 1, paragraph 1 of the Treaty. Article 4 provides for national technical means of verification of the Treaty.

The Soviet proposal, in prohibiting the militarization of space, does not forbid any military activity in space, limiting the prohibition to the placing in space of any type of weapons. It is worth noting that we do not find in it the formula concerning the obligation of the use of space exclusively for peaceful purposes. Such a solution seems to be a balanced and realistic one.

The subject matter of the Treaty is broader than it might be inferred from its title. The Treaty provides for the "protection" of satellites of other States if they have been placed in orbit in accordance with Article 1, paragraph 1, in other words, if they do not carry any type of weapons. One can presume that the prohibition encompasses any means that might be used for this purpose. In view of Article 3, a Polish scholar has postulated the inclusion in the title of the Treaty of the phrase "and of Disturbance of the Functioning of Space Objects of Other States Parties",

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[42] S. DANIELSSON, *op. cit.*, p. 5.
[43] UN Doc. A/36/192 (20 August, 1981).

so that it corresponded in full to the basic content of the Treaty.[44]

In connnection with Article 3 of the draft, there arises a certain doubt. The prohibition of destruction, damaging, etc., of space objects of other States pertains to objects not carrying any weapons. This may lead *a contrario* to the conclusion that the prohibition does not embrace space objects carrying weapons. Irrespective of the question of qualification of a given object as one carrying weapons and the possibility of an error or abuse in this field, such a solution would be inconsistent with Article 2, paragraph 4 of the UN Charter, which forbids States to resort to use or threat of force in international relations.[45] One can presume that this was not the intention of the drafters of the Treaty.

It also appears that the Soviet draft has another defect: it omits the question of anti-satellite weapons acting from the earth or the atmosphere. True, a prohibition of the use of such weapons could be inferred from Article 3, but the Treaty does not prohibit the development, deployment, and testing of these weapons, and such a prohibition would be desirable. The same postulate can be addressed to the development and testing of space-based weapons designed to attack targets outside space.

In 1983, the Soviet Union presented in the UN forum yet another proposal, the draft of a Treaty on the Prohibition of the Use of Force in Outer Space and from Space Against the Earth.[46] Article 1 of the Treaty prohibits the use or threat of force in outer space and the atmosphere and on the earth through the utilization, as a means of destruction, of space objects in orbit around the earth, on celestial bodies or stationed in space in any other manner. The prohibition also embraces the use or threat of force against space objects in orbit around the earth, on celestial bodies or stationed in outer space in any other manner. Article 2 of the draft specifies activities which States parties to the Treaty, in accordance with the provisions of Article 1, undertake not to conduct. They are listed in five paragraphs: 1 — the testing or deployment by placing in orbit around the earth or stationing on celestial bodies or in any other manner any space-based weapons for the destruction of objects on the earth, in the atmosphere or in outer space; 2 — the use of space objects in orbit around the earth, on celestial bodies or stationed in outer space in any other manner as means to destroy any targets on the earth, in the atmosphere or in outer space; 3 — the destroying, damaging, disturbing the normal functioning or changing of the flight trajectory of space objects of other

[44] W. MULTAN, *Zakaz wykorzystania kosmosu do celów wojskowych* [*The Prohibition of the Use of Outer Space for Military Purposes*], "Sprawy Międzynarodowe," 1982, No. 1—2, p. 49.

[45] S. DANIELSSON, *op. cit.*, p. 7,

[46] UN Doc. A/38/194 (23 August, 1983).

States; 4 — the testing or creating new anti-satellite systems (the existing anti-satellite systems are to be destroyed); 5 — the testing or use of manned spacecraft for military, including anti-satellite, purposes. Article 4 of the draft concerns verification. Its provisions are identical to the solutions adopted in the 1981 draft.

What can we say about the above-presented draft? In terms of subject matter and the precision and clarity of provisions, it is a step forward as compared with the Soviet proposal of 1981. The draft introduces the prohibition of any weapons in space, weapons designed to attack targets both in space and outside it. Space objects, while themselves being "under protection," could not be used as means of destruction of any targets in space or outside it. The States parties would destroy all anti-satellite systems in their possession and would not try to develop new ones. There is a slight ambiguity in the provision prohibiting the testing and use of manned spacecraft for military purposes, for if we assumed that, in the context of Article 1, use for military purposes is understood as the use or threat of force, such a prohibition would result from Article 2, paragraphs 1, 2, and 3, and its repetition would be unnecessary. If, on the other hand, "military purposes", referred to in Article 2, paragraph 5, meant all such purposes, e.g. reconnaissance or communications, the prohibition formulated here would go beyond the formula of Article 1, of which Article 2 is only a an explication.

It appears, too, that since the Treaty would prohibit, in addition to the use and deployment, also the development and testing of new anti-satellite systems and enjoin the destruction of the already existing systems, the prohibition of development and testing could be extended to all space-based weapons. True, the prohibition of the development, testing, and deployment of ABM systems or their components results from the ABM Treaty. This is, however, a bilateral agreement. Besides, one can image space-based weapons designed to attack targets other than enemy ballistic missiles.

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For various reasons, it was not possible to begin work on the Italian draft of 1979 and the Soviet draft of 1981. Will the situation change in the case of the recent Soviet proposal?[47] The fact that the Soviet Union and the United States are conducting in Geneva bilateral negotiations on preventing the spread of the arms race to outer space is of tremendous

[47] For more on the subject of US obstruction to the development of constructive law-making work in the United Nations in the question of prevention of the militarization of space, see: Z. GALICKI, *Zakaz militaryzacji kosmosu — problemy do rozstrzygnięcia* [*Prohibition of the Militarization of Outer Space — Problems to Be Resolved*], "Wojsko Ludowe," 1984, No. 11, pp. 64—68.

significance. This, however, does not eliminate the necessity of multilateral negotiations and a multilateral agreement in this field. Unfortunately, cheap optimism would be out of place here.

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Some Legal Problems Arising with the Use of Reusable Space Transportation Systems*

by JERZY RZYMANEK

1. Introduction

Professor Cezary Berezowski, the famous Polish expert in international law, thought that lawyers should follow the break — throughs in technology, which expand the exploration and use of outer space.[1]

There are many reasons to belive that the introduction of reusable vehicles, such as the Space Shuttle, is one of the most promising developments in the field of space transportation technology. Although, the United States Space Shuttle is the only vehicle of this type which is fully in operational phase, the USSR, France and European Space Agency member-States, as well as Japan are working on similar projects.[2] The large number of missions, and the growing proportion of these missions with a more or less commercial character, have made economic factors increasingly important. The future development of space transportation systems will depend largely on cost considerations.[3] The reusable vehicles are one of the ways by which cost reductions can be achieved.

As the progress is made in space transportation systems, the economic and social implications of it should be carefully studied, in order to enable progressive development and codification of the law of outer space.

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* This paper is an extract from the monograph by the same author prepared for the Polish Academy of Sciences, *Zagadnienia polityczno-prawne systemów transportowych wielokrotnego użycia* [*Legal and Political Issues Inherent in Reusable Space Transportation Systems*].

[1] C. BEREZOWSKI, *Międzynarodowe prawo lotnicze* [*International Air Law*], Warszawa 1964, p. 5.

[2] See, "Aviation Weekly & Space Technology", 4 October, 1982 and June 6, 1983; "Air et Cosmos", 19 mars 1983 and 10 mars 1984.

[3] Report of the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space, Vienna, 9-21 August 1982, United Nations A/CONF.101/10, p. 31.

2. Legal Nature of Reusable Vehicles

One of the issues widely discussed in the works of space lawyers, long before the first Space Shuttle flight took place, was the legal nature of the Shuttle.[4] The reason is obvious, reusable vehicles can operate in air space, as well as, in outer space. Therefore the answer to the question what is the legal nature of the Shuttle has far-reaching significance in both domestic and international law.

It was not the first time when lawyers were supposed to answer the question pertaining to the legal status of vehicles having the ability to operate in two different environments. In air law similar problems were connected with the introduction of hovercraft and amphibian.[5] However, the present problem was more complicated, as none of the space law conventions defines the term "spacecraft". Besides, even if one considers that the Space Shuttle is partially a spacecraft and partially an aircraft,[6] the problem remains unresolved, as the boundry between outer space and air space is not established by agreement among States, and we would not know when the rules of space law instead those of air law should be applied to it.

The question whether the shuttle is an aircraft under the domestic laws of the United States was answered in the response[7] of the Chief Counsel of the Federal Aviation Administration to the NASA General Counsel of 11 March, 1977. The Chief Counsel of the FAA stated that the Space Shuttle would be considered a space vehicle and not an aircraft within the meaning of the Federal Aviation Act of 1958. In the new Section 308 of the National Aeronautics and Space Act, which became law on 8 August, 1979,[8] a "space vehicle" is defined as

> "an object intended for launch, launched or assembled in outer space, including the Space Shuttle and other components of a space transportation system".[9]

With regard to international space law the matter was solved when the United States began to register the Shuttle under the regime of the

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[4] See, I. H. Ph. DIEDERIKS-VERSCHOOR, *The Legal Aspects of the Space Shuttle*, "Annals of Air and Space Law", 1976; G. P. SLOUP, *A Guide for Space Lawyers to Understanding the NASA Space Shuttle and the ESA Spacelab*, "Zeitschrift für Luft und Weltraumrecht", 1977, Heft 3.

[5] N. N. SMYSLOV, *Pravovoj status vozdušnovo sudna* [*Legal Status of Aircraft*], in: *Meždunarodnoe vozdušnoe pravo* [*International Air Law*], Moskva 1981, pp. 6, 7.

[6] As Tamm suggests, see: I. H. Ph. DIEDERIKS-VERSCHOOR, *op. cit.*, p. 199.

[7] For the text of the response see, G. J. MOSSINGHOFF and G. P. SLOUP, *Legal Issues Inherent in Space Shuttle Operations*, "Journal of Space Law", 1978, No. 1, pp. 65—66.

[8] G. P. SLOUP, *Liability and Insurance Aspects of the Space Transportation System Under the New Section 308 of the National and Aeronautics and Space Act*, "Annals of Air and Space Law", 1979, note 11.

[9] G. P. SLOUP, *op. cit.*, p. 643.

Convention on Registration of Objects Launched into Outer Space of 14 January, 1975.[10]

It is worth mentioning here that the practice had solved another problem widely discussed, that of the Spacelab registration. Some authors maintained that

"nothwithstanding the fact that Spacelab is dependent on Space Shuttle during its fight, the Agence (ESA) having launched a space object would be entitled to register it independently from the registration of the Space Shuttle as a whole".[11]

Other authors were of the opinion that for the time the Spacelab is attached to the Shuttle, it is one unit with one registration number.[12] During the first flight of Spacelab the practice to register the complex Space Shuttle-Spacelab as the single unit was established.[13]

The fact that the Space Shuttle is considered to be "space object" or "spacecraft" does not mean that the legal nature of all reusable vehicles is determined. Future developments of space transportation technology may give rise to similar problems once again. Especially it might be the case with regard to the Soviet project called "Albatros". In this project the first stage of the space transportation system resembles hydrofoil boat, the second stage aircraft and the third the Space Shuttle orbiter.[14] Therefore the question can be asked whether all three stages should be treated as "space object" despite the fact that neither the first stage, nor the second will ever reach outer space.

In order to solve such problems it might be useful to introduce into space law terminology the term "space transportation system", which could be defined as

"system of means of transportations used to carry persons and payloads from the Earth to outer space, and from outer space to the Earth".

3. Jurisdiction and Control

The Outer Space Treaty in its Article VIII provides that the State party on whose registry an object launched into outer space is carried

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[10] Challenger on its mission STS-8 had for instance international registration number 89-A. "Astronautyka", 1984, No. 6, p. 18.

[11] See, M. G. BOURÉLY, *Legal Regime of International Space Flight: Legal Issues Relating to Flights of the Spacelab*, in: *Space Shuttle and the Law*, ed. by Stephen Gorove, 1980, p. 75.

[12] I. H. Ph. DIEDERIKS-VERSCHOOR, *op. cit.*, p. 200.

[13] Columbia with Spacelab on its board had the international registration number 1983-116 A, see "Letectvi a Kosmonautika," 1984, No. 7, p. 24.

[14] Z. PAPROTNY, *Radziecki wahadlowiec* [*Soviet Shuttle*], "Astronautyka," 1983, No. 1, pp. 17, 18.

shall retain jurisdiction and control over such object and any of its personnel while in outer space. Although, the jurisdictional problems arising in connection with the use of reusable vehicles present themselves in the operation of other types of spacecraft, the unique capabilities of reusable vehicles enhance their importance.

First of all, the Shuttle has the ability to transport a number of space objects such as satellites, platforms, get-away specials during one flight. Many of these objects can be registered to other States than the United States. Therefore, the problem arises which of the States involved retains the jurisdiction and control over the object on board of the Shuttle.

In agreements signed by the United States with the foreign States relating to launch services for the satellite projects and payloads, this question was regulated in the following way. The Article V of the agreement with Indonesia reads:

> "The Government of the Republic of Indonesia as the State of Registry shall register each Palapa-B space object separated into earth orbit from the STS and shall fournish appropriate information regarding the space object to the Secretary General of the United Nations. The Government of the Republic of Indonesia shall have jurisdiction and control over Palapa-B space objects upon separation from their respective launch vehicles into earth orbit. The Government of the United States will register the STS and those components of Palapa-B spacecraft not separated from the STS, as a single space object."[15]

Other agreements signed by the United States have similar provisions.[16] In view of these provisions, foreign registered space objects remain under the jurisdiction and control of the United States, as long as, they are within the confines of the Shuttle. It is only upon separation from the launch vehicle, when the foreign government takes over the jurisdiction and control from the United States. However, some doubts about this clear division of jurisdiction and control, were rised in connection with the failure of Western Union Westar 6 and Indonesian Palapa-B-2 payload assist modules during STS Mission 10 in February 1984, resulting in placing the satellites in improper geosynchronous transfer orbits.

It is a well known fact that after the failure of Westar 6 which had been launched first, Indonesia initialy did not want to confirm its permission for launching Palapa-B, preferring to bring it back to earth in order to check the functioning of its payload assist module. It was only after

[15] See: Memorandum of Understanding Between the Directorate General of Posts and Telecommunications of the Republic of Indonesia and the United States National Aeronautics and Space Administration Concerning the Furnishing of Launching and Associated Services for Palapa-B Spacecraft, 9 April, 1979, T.I.A.S. 9457.

[16] See, for instance Article V of the Memorandum of Understanding Between the National Aeronautics and Space Administration of the United States of America and the Consiglio Nazionale Delle Ricerche of Italy Concerning the Furnishing of Launching and Associated Services for the IRIS Payload, 23 July, 1981, T.I.A.S. 10230.

NASA had declined to grant reflight quarantee, in such a case, Indonesia gave the permission.[17]. It leads us to the conclusion, that the United States jurisdiction and control over foreign registered space object on-board of the Shuttle does not cover ultimate decision with regard its launching, which rests with the State of Registry.

The State of Registry retains jurisdiction and control over any personnel of space object. One of the features of reusable vehicles such as the Space Shuttle will be the increasing number of foreign personnel. The participation of foreign personnel in the Shuttle flights results from the international agreements concluded by the United States, as well as, world-wide NASA policy.

In the agreement with Members of the European Space Research Organization (ESA now) it was stated that:

"The Government of the United States will provide Spacelab crew opportunities to nationals of the European Partners in connection with their space missions involving Spacelab. It is contemplated that a European crew member will be included in the flight crew of the first Spacelab flight."[18]

Under the current NASA policy any country flying a "major" satellite on the Shuttle may request a ride for one of its nationals.[19]

Insofar as the United States domestic law is concerned, it should be pointed out that with respect to criminal jurisdiction some authors expressed the opinion that implementing legislation may be needed.[20] In the light of the famous *US v. Cordova* case, such opinions were comprehensible. The defendant Cordova was charged with assault of several passengers and crew members of a US flag aircraft while the aircraft was flying over the high seas. Although the court did find the defendant guilty of offences charged, it arrested its judgment of conviction since it had found that it did not have jurisdiction in the case to begin with. As a result of this case, Congress passed an amendment to the Extraterritorial Jurisdiction of Title 18, United States Code.[21]

In the National Aeronautics and Space Administration Authorization Act, 1982 the Congress extended its jurisdiction over crimes aboard the

[17] See, *Air et Cosmos*, 11 février, 1984.

[18] See, Agreement Between the Government of the United States of America and Certain Governments Members of the European Space Research Organization, for a Cooperative Programme Concerning the Development, Procurement and Use of a Space Laboratory, in Conjunction With the Space Shuttle System, 14 August, 1973, Art. VII F. For the text see, "Journal of Space Law", 1974, vol. 2:1.

[19] See, "Flight International", 7 January, 1984 p. 32.

[20] S. GOROVE, *op. cit.*, p. 55.

[21] G. P. SLOUP, *Legal Regime of International Space Flights: Criminal Jurisdiction and Command Authority Aboard the Space Shuttle-Spacelab*, in: *Space Shuttle and the Law*, *op. cit.*, p. 82.

spacecraft. The term "special maritime and territorial jurisdiction of the United States" as used in Section 7 of Title 18, United States Code includes now:

"Any vehicle used or designed for flight or navigation in space on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard."[22]

The Outer Space Treaty does not necessarily create exclusive jurisdiction for the State of Registry.[23] The jurisdiction of other States can be based on such principles of their respective criminal laws as in example the active personality or nationality principle, the protective or protected interest principle, the passive personality principle and the universality principle.[24]

With regard to the jurisdiction and control, it is necessary to note that none of the space law conventions differentiates the term "personnel" of space object, despite the fact that the legal status of all persons aboard spacecraft cannot be the same. International law recognizes that the ship or aircraft commander is the representative of the State of nationality of such ship or aircraft to whom the State's jurisdiction has been delegated to maintain discipline and protect the persons and property on board.[25] Therefore, the commander of spacecraft should have analogous authority.

The authority of the Space Transportation System commander is established in the United States Code of Federal Regulations, Subpart 1214.7.[26] Under this Subpart the STS commander has the authority to enforce order and discipline during all phases of an STS flight, to take whatever action in his/her judgment is necessary for the protection, safety and well-being of all personnel and onboard equipment, including the STS elements and payloads. The commander shall have authority throughout the flight to use any reasonable and necessary means, including the use of physical force, to achieve this end. The authority of the commander extends to

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[22] See, National Aeronautics and Space Administration Authorization Act, 1982, Senate, 97th Congress, Ist Session No. 124, report No. 97—100, p. 54.

[23] S. GOROVE, *op. cit.*, p. 6. For different opinion see, V. S. VEREŠEHETIN, *Pravovoe položenije meždunarodnych kosmičeskich ekipažei*, "Sovetskoe Gosudarstvo i Pravo", 1973, No. 3, p. 96.

[24] G. P. SLOUP, *op. cit.*, p. 80.

[25] G. J. MOSSINGHOFF and G. P. SLOUP, *op. cit.*, pp. 40, 41.

[26] Code of Federal Regulations, Title 14 — Aeronautics and Space, Part 1200 to End. Revised as of 1 January, 1981.

any and all personnel on board the Orbiter, including Federal officers and employees and all other persons whether or not they are US nationals.

It is worth noting that the term "personnel on board" refers to

"those astronauts or other persons actually in the Orbiter or Spacelab during any flight phase of an STS flight (including any persons who may have transferred from another vehicle) and including any persons performing extra-vehicular activity associated with the mission."

The Subpart also provides that

"whoever willfully violates, attempts to violate, or conspires to violate any provision of this subpart or any order or direction issued under this subpart shall be fined not more than 5,000 or imprisoned not more than 1 year, or both."

4. International Liability

The international rules and procedures concerning liability for damage caused by space objects are established in 1972 Liability Convention.[27] Under the Convention the following parties can be liable for damage:

1) a State which launches a space object,
2) a State which procures the launching of a space object,
3) a State from whose territory a space object is launched,
4) a State from whose facility a space object is launched.

However, as Professor Jerzy Rajski rightly remarks, among liable parties should also be:

1) a State participating in technical operations connected with launching, maintaining in outer space or retriving of a space object, and
2) a State, whose interest in space venture is of such importance that it is participating in the financing of this venture.[28]

The Liability Convention provides in Article V that:

"Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused."

Reusable vehicles capability of carring several payloads and unpreteted amount of international involvement in their use may cause some problems in the implementation of the Convention, as there will be often several parties liable. For instance, under the Convention the United States and all foreign users of the Space Shuttle shall be jointly and severally liable

[27] Convention on International Liability for Damage Caused by Space Objects, opened for signature 29 March, 1972, *United Nations Treaty Series*, vol. 961, No. 13810.

[28] J. RAJSKI, *Odpowiedzialność międzynarodowa za szkody wyrządzone przez obiekty kosmiczne* [*International Liability for Damage Caused by Space Objects*], Warszawa 1974, p. 56.

for any damage caused. In accordance with the Section 308 of the National Aeronautics and Space Act of 1958, the term "user" includes

"anoyone who enters into an agreement with the Administration for use of all or a portion of a space vehicle, or who owns or provides property to be flown on a space vehicle, or who employs a person to be flown on a space vehicle."

There is no doubt that each of the users outlined above, procures the launching of a space object for the purpose of the Liability Convention. Therefore if a user is a foreign government, a foreign non-governmental entity, or a foreign national, a foreign State will be a launching State under the Convention. As a result, a State flying a small self-contained payload for a payment of $ 10,000 to NASA, will be jointly and severally liable with a State which flies a satellite worth of $ 85 million. Therefore an orderly and equitable allocation of risks of liability is of vital importance.

Article V of the Liability Convention in paragraph 2 provides that:

"The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable."

However, it also says that

"Such agreement shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable."

Joint and several liability of launching States does not end with the successfull launching of a space object. It will last the lifetime of this object. This may yield bizarre results. Suppose the Shuttle places in orbit four satellites which are registered to four different States — A, B, C, D. The launching is successful and each of these satellites is inserted into proper orbit. However, one year after the launching of the satellite registered to the State A deorbits and its fragments are causing damage to residents of a third country on earth. The United States and States A, B, C, and D as launching States under the Liability Convention shall be jointly and severally liable for this damage. That means that the third State may seek the entire compensation from any of these States. Let us assume that the State sustaining the damage seeks the compensation from the State B. What is the link between the damage and the State B? Only the fact that the satellites from States A and B were flown on the same Space Shuttle flight.

Also, in a case that the third State seeks the compensation from the United States, the link between the liable party and the occurrence of damage seems to be rather loose. Why should the State which has not any jurisdiction and control over a space object be liable for damage caused by this object? As we can see the Liability Convention spreads liability broadly, but it may unfairly apportion liability among jointly liable States.[29]

The fact that the registration of a space object does not affect the liability resulting from damage caused by this object under the Convention, may in future hamper the operation of outer space common carriers, as the States and business shall be reluctant to assume such liability risk. A common carrier's legal responsibilities generally end with the safe delivery of the goods to the final destination, which for the STS would mean insertion into the proper orbit.[30]

In order to limit the possibility of an unfair apportion of liability among jointly liable States and to enable further development of space transportation systems, it would be advisable to link liability with registration of a space object, in cases when damage occurs after successful launching.

Actually, NASA requirements stipulate that the user must attempt to obtain 500 million in liability coverage at a reasonable premium. If a company believes that the premium for such coverage is excessive, it can apply to NASA for a waiver to launch on the Shuttle with less than 500 million in coverage provided by the company itself. During the fifth shuttle mission, Satellite Business Systems and Telesat Canada have purchased over 1 billion in insurance coverage on their spacecraft payloads for the fifth shuttle mission. There is concern that when the Space Shuttle begins launching three and four communications satellites on the same mission, the coverage requirements will exceed underwriter capabilities.[31]

The third party liability regarding satellites launched with NASA assistance is set out in Launch Agreements. For example, the respective provision of the Launch Agreement concluded between the United States and Indonesia[32] reads:

> "The user shall obtain, at no cost to NASA, insurance protecting the User, the United States Government and, to the extent the United States Government is liable to reimburse them for costs they incur for liability, the United States Government's contractors and sub-contractors from any third party Liability for Damage arising out of the performance of this Agreement during the risk period."

A further provision of the agreement provides that if NASA determines that it is not feasible for the user to obtain insurance or is unable to obtain adequate insurance, NASA may provide the user insurance and/or

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[29] M. A. ROTHBLATT, *International Liability of the United States for Space Shuttle Operations*, "The International Lawyer", Summer 1979, No. 3, p. 478.

[30] G. J. MOSSINGHOFF and G. P. SLOUP, *op. cit.*, pp. 59, 60.

[31] See: "Aviation Weekl & Space Technology", November 15, 1982.

[32] Launch Agreement 1163-001, dated 9 December, 1980, quoted in Martin Menter, Legal Responsibilities for Outer Space Activities, Proceedings of the Twenty-Sixth Colloquium on the Law of Outer Space, p. 126 and notes 67, 68.

indemnification for a reasonable fee to be agreed upon by the user and NASA.[33]

There is another problem with regard to the Liability Convention, which results from progress in space transportation technology. At present, it is not only possible to launch space objects, but also to retrive them from outer space. Therefore, the question arises whether this new activity is covered by the Convention which speaks only about liability of launching States. Despite the fact that the answer should be affirmative in view of the purpose and subject of the Convention, which is a full and equitable measure of compensation to victims of damage caused by space objects, some changes in the Convention's wording might be useful.

5. Concluding Remarks

The purpose of this article has been to present some legal problems inherent in reusable space transportations systems operations. As these systems are expected to provide economical and routine access to space and to permit establishing a more permanent presence of man in outer space, its legal and political implications should be studied.

Although, due to the limited scope of this article, such problems as legal aspects of space flight and environmental protection, have not been discussed, it seems that the considerable impact of new space transportation systems on the space law has been felt. It is this writer's belief that future operation of reusable space transportation systems shall be one of factors marking the change of the space law from the present phase of general principles and rules into the complex system of detailed regulations. As Professor Stephen Gorove rightly remarked, it will result in

> "elevating space law from the realm of a discipline, that up to now has been regarded by many as elusive and theoretical into the realm of a discipline getting closer to the practical aspects and, eventually, the daily practice of law."[34]

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[33] *Ibid.*

[34] S. GOROVE, *op. cit.*, p. 396.

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Inter-departmental Agreements in the Law of Treaties and Polish Practice

by MACIEJ LIS

International treaties are the main legal instrument of shaping international relations. Thus, it is not surprising that they are a subject of constant interest of the theory of international public law. However, the numerous theoretical elaborations seldom take into consideration contemporary treaty practice. This practice reflects many significant evolutionary processes, especially in States which actively participate in international treaty relations. The decentralization of treaty-making powers and the difficulties connected with an univocal determination of the legal character of obligations imposed by agreements concluded by organs at a lower level can be call upon as examples of the above mentioned processes.

This article is concerned with a fragment of Polish treaty-making practice accomplished by ministries and other equivalent departmental organs. Although the number of these agreements is significant, they have not been yet a subject of closer interest in the literature. That is characteristic not only of Polish authors. M. Frankowska rightly points to the lack of interest in the matter concerned, finding this fact alarming in a situation where in Polish treaty practice more than a half of agreements concluded are inter-departmental ones[1].

This article concerns Polish department treaty practice in the period of its significant intensification, that is mainly in the 1970s. The extent of this practice can be illustrated by the example of the Committee on Radio and Television Matters "Polskie Radio i Telewizja" which concluded over 30 agreements in the decade in question. The practice of the Department of Foreign Trade developed in a similar way. Annually it concluded several agreements in the forms of mere protocols on additional deliveries of goods.

In total, about 400 inter-departmental agreements concluded in the

[1] M. FRANKOWSKA, *O działalności traktatowej Polski* [*Polish Treaty Practice*], "Przegląd Stosunków Międzynarodowych", 1981, No. 2—3, p. 111.

years 1950—1980 have been considered in this study. That seems a representative number comprising agreements concluded by all departments. Naturally, not all information could be expressly utilized in this article. Its scope allows only an exemplary illustration of general trends in the development of the departmental treaty practice.

The main objective of this paper is the present action of the particularities of inter-departmental agreements in relation to other treaties (inter-State and inter-governmental ones). The specific features are demonstrated against the background of the very notion of an inter-departmental agreement and the competence to conclude such agreements. On examining their contents and the legal norms which regulate their functioning a few significant conclusions *de large ferenda* could be arrived at.

I. The Concept of Inter-departmental Agreement

Theoretical divisions of international treaties depend on a subjectively chosen criterion[2]. The most frequent criteria of division are: number of the parties, period of operation, subject matter, concluding subjects, possibility of accession and the relation to other treaties.[3] It would be difficult to present all the possibilities in this respect as treaty practice is constantly developing. Essential here is, however, that in the theory of international law agreements which can be recognized as inter-departmental are sometimes singled out.

The specification of this category of treaties has occurred in the course of discussions on the general notion of international agreement. The principal criterion on which this specification is based is the organ competent to conclude a treaty on behalf of a State. And so, Heads of States conclude solemn "inter-state agreements", while ministers and other similar organs — "inter-departmental agreements".[4] When distinguishing inter-

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[2] As P. Fauchille rightly pointed out: "*Les diverses classifications des traités ou conventions internationales sont nombreuses que les auteurs qui s'en sont occupés* [...]", P. FAUCHILLE, *Traité de droit international public*, Paris 1921—1926, Tome I-er, p. 397.

[3] For a broader look on the division of international treaties in theory, cf. K. STRUPP (ed.), *Wörterbuch des Völkerrechts*, Berlin 1925, vol. 2, p. 61 and 2nd edition, Berlin 1962, vol. 3, p. 529, ff., see also P. REUTER, *Introduction au droit des traités*, Paris 1972, p. 42 ff. (points 71—81).

[4] For example, in Polish literature: J. MAKOWSKI, *Organa państwa w stosunkach międzynarodowych. Zjazdy i konferencje międzynarodowe. Umowa międzynarodowa* [*State Organs in International Relations. International Congresses and Conferences. International Treaties*], Warszawa 1955, pp. 144—145; A. KLAFKOWSKI, *Prawo międzynarodowe publiczne* [*International Public Law*], 2nd edition, Warszawa 1976, p. 92; L. GELBERG, *Zarys prawa międzynarodowego* [*An Outline of International Law*], 2nd edition, Warszawa 1977, pp. 54—55; M. FRANKOWSKA, *Umowy międzynarodowe w formie uproszczonej* [*International Agreements*

departmental agreements this term is sometimes used (inter-departmental agreements, *Resort-übereinkommen, meževedmostvennye soglašenija*). More frequently such agreements have been however, referred to as an example of a broader category, that is "agreements in simplified form" (*accords en forme simplifiée*) or "administrative agreements" (in the USA — executive agreements, *accords administratifs, Verwaltungs-übereinkommen*).

It should be noted that the criterion of the concluding organ does not change the fact that it is the State and not the authorized organ which is a party to the treaty[5] for the division does not imply recognition of the organ as a subject of law.[6] The view prevails that in the sphere of international public law the organs of the State act only as representatives of a subject of law.[7] In the sphere of this law an organ can exercise no other rights than those of the State.

Because of differences of opinions on such issues as the concept of the treaty in general, time of their formulation, various criteria of division, etc., it is difficult to systematize those opinions on inter-departmental agreements.

In Poland most attention to this category of agreements has been paid by M. Frankowska, who, on thorough examination of the problem of agreements in simplified form, notes that inter-departmental agreements rank high among them.[8] She defines an inter-departmental agreement as "a declaration whose purpose is to bind a State legally, delivered by a minister" which will be effective if it concerns "matters which another State may in good faith recognize as falling within the competence of a minister in connection with his ordinary functions".[9] A similar definition of inter-departmental agreementes was formulated by W. Braś who maintains that they are

"concluded between ministers of different States and that their subject is to regulate in international relations matters concerning particular fields of administration or national economy, subordinate to the ministers".[10]

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in Simplified Form], Warszawa—Wrocław 1981, p. 60 and 62. Only A. Wasilkowski employs a different criterion to attain an identical division of treaties — the criterion of expression of will, A. WASILKOWSKI, *Socjalistyczna integracja gospodarcza* [*Socialist Economic Integration*], Warszawa 1974, p. 61.

[5] Such was the opinion of, for example, L. BITTNER, *Die Lehre von völkerrechtlichen Vertragsurkunden*, Leipzig 1924, p. 51, 54. See also J. C. BLUNTSCHLI, *Das Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, Nördlingen 1979, p. 249.

[6] Such an objection as regards the above mentioned division was raised by J. MAKOWSKI, *op. cit.*, p. 145.

[7] Cf. L. GELBERG, *op. cit.*, p. 55.

[8] M. FRANKOWSKA, *Umowy...* [*International Agreements...*], p. 50 ff. and Chapter V.

[9] M. FRANKOWSKA, *Wprowadzenie do prawa traktatów* [*An Introduction to the Law of Treaties*], Warszawa 1972, p. 57.

[10] W. BRAŚ, *Międzynarodowe publiczne prawo kolejowe* [*International Public Railway Law*], Warszawa 1968, p. 27.

Such agreements have been of interest also to other Polish authors H. de Fiumel, for example, believes that

"obligations imposed by them are binding upon States [...] and may concern a subject-matter which basically falls within the objective competence of a particular minister".[11]

K. Skubiszewski notices that inter-departmental agreements "appertain to the international obligations of States" and that their departmental character follows from their conclusion "between ministeries".[12]

Thus, it can be observed that, in accordance with the opinions of Polish authors, inter-departmental agreements are a source of international law and their content falls within the ordinary functions of the concluding organ, most often of a minister.

Similar elements, characteristic of that category of treaties, are underlined by authors of other countries. Most attention to inter-departmental agreements is paid by Russian publicists.[13] For instance, N. V. Mironov regards inter-departmental agreements as a kind of contractual form concluded by departments of States (*vedomstva*) within their competence determined by municipal law.[14] He emphasizes that they are concluded in matters falling within the scope of activity of a departmental organ.[15] Thus, according to this author, the capacity to conclude such treaties is limited by the objective competence (subject-matter) of the organ. A slightly different opinion is presented by G. I. Tunkin who regards inter-departmental agreements as the result of performing, by a minister of a delegation granted by other, superior organs. The latter organs can designate a competence to conclude inter-departmental agreements of a wider subject-matter than that of the concluding minister.[16]

Also other writers draw attention to the necessity of a connection

[11] H. de FIUMEL, *Znaczenie umów międzynarodowych w procesie socjalistycznej integracji gospodarczej* [*The Significance of International Treaties in the Process of Socialist Economic Integration*], in: Z. KLEPACKI (ed.), *Socjalistyczna integracja gospodarcza* [*Socialist Economic Integration*], Warszawa 1974, p. 82.

[12] K. SKUBISZEWSKI, *Glosa do Uchwały pełnego składu Izby Cywilnej* [*A Gloss to the Resolution of the Full Entire of the Civil Chamber*], 5 Oct., 1974, IIICZP 71/73, "Państwo i Prawo", 1977, No. 8—9, pp. 257—258.

[13] This kind of treaty, formerly called "komisariacke soglašenija", has been known to Soviet Theory for a long time. Cf. V. N. DURDENEVSKII, *Meždunarodnye dogovory v konstitucionnom prave Sojuza SSR*, "Sovetskoe Pravo", 1925, No. 4, p. 24 ff.

[14] N. V. MIRONOV, *Pravovye formy socialističeskoi integracii* (*meždunarodnye mežvedomstvennye soglašenija*), Moskva 1977, p. 21.

[15] N. V. MIRONOV, *Juridičeskaja priroda meždunarodnyh mežvedomstvennyh soglašenii*, in: E. USENKO (ed.), *Mežvedomsvennye svjazi v uslovjah socialističeskoi ekonomičeskoi integracii*, Moskva 1973, p. 30.

[16] G. I. TUNKIN (ed.), *Meždunarodnye pravo*, Moskva 1974, p. 193.

between the contents of an inter-departmental agreement and the subject-matter of the concluding organ.

Already E. de Vattel noticed that there existed agreements concluded by ministers within the limit of their competence.[17] A similar view was expressed by P. Fauchille.[18] M. Sibert states:

> *"S'ils sont conclus c'est pour le compte de l'Etat dans l'intérêt de tous ces "services publics" dont les gouvernants ont la charge [...]".*[19]

The connection between the contents of an agreement and the objective competence of the concluding organ was also outlined by H. Kelsen, in whose opinion:

> "Certain functionaries [...] actually conclude treaties on behalf of their States with regard to matters of merely administrative or technical character falling within their competence [...]. The validity of these treaties [...] can be based only on the above-mentioned rule of international law".[20]

Apart from the connection between the contents of an agreement and the range of subject-matter of the concluding organ, also other features of inter-departmental agreements have been distinguished. For example, L. Oppenheim underlines that

> "The main reason for adopting this form of treaty is that it is attended by a smaller degree of formality [...]".[21]

Inter-departmental agreements in simplified form are, according to Ch. Rousseau, characteristic in that they are concluded *"sans l'intervention formelle de l'organe étatique investi du treaty-making power"*.[22] In the opinion of L. Wildhaber examples of that kind of treaties are

> "Agreements concluded by an organ in which the municipal constitution did not [...] vest treaty-making power (minister instead of head of State)".[23]

A. Verdross points to an analogical lack of constitutional specification of concluding organs, acknowledging the practice of States as being decisive.[24]

This brief review of theoretical opinions allows the conclusion that, in general, this kind of treaty is recognized as a not formalized type of

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[17] E. de VATTEL, *Le Droit des Gens ou principes de la loi naturelle*, Paris—Lyon 1829, T. I, p. 377 (§ 156).

[18] P. FAUCHILLE, *op. cit.*, p. 292.

[19] M. SIBERT, *Traité de droit international public. La droit de la paix*, T. II, Paris 1951, p. 182.

[20] H. KELSEN, *Principles of International Law*, New York 1958, p. 325.

[21] L. OPPENHEIM, *International Law. A Treatise*, vol. 1: *Peace*, ed. VII, London—New York—Toronto, 1948, p. 812.

[22] Ch. ROUSSEAU, *Droit international public*, Paris 1973, p. 23.

[23] L. WILDHABER, *Treaty-Making Power and Constitution. An International and Comparative Study*, Basel 1972, p. 141.

[24] Cf. A. VERDROSS, *Völkerrecht*, Wien 1964, p. 158.

agreement concluded on behalf of States by departments within their objective competence.[25]

When discussing the concept of inter-departmental agreement, one should not limit oneself to the views represented in theory, since sometimes States define such agreements by internal legal regulations. In the Polish People's Republic an act which contains a "legal" definition of inter-departmental agreement is the Resolution of the Council of State and the Council of Ministers of 28 December, 1968 concerning the Conclusion and Denounciation of International Treaties.[26] This Resolution regulates the competences and cooperation of legislative organs and State administration in treaty practice. Thus its provisions allow to determine the scope of the concept of an inter-departmental agreement as regards Polish treaty practice.

Paragraph 1, point 1, of the Resolution refers to the criterion of the concluding organ, for it divides agreements "concluded by the Polish People's Republic" into:

> "State, governmental and inter-departmental ones. State agreements are signed on behalf of the Council of the State, governmental agreements — on behalf of the Council of Ministers, inter-departmental — by the competent minister or on his behalf".

Thus it has been expressly stated that in Poland inter-departmental agreements are binding upon the State and are signed by a competent minister or on his behalf. This, so to say, "subjective determination" of the notion of inter-departmental agreement is completed by paragraph 23 of the above-mentioned Resolution. According to it:

> "provisions [...] concerning ministers [...] apply respectively to:
> "1) Heads of Commissions and Committees which are supreme organs of state administration and Heads of central organs of administration and economy [...],
> "2) The General Prosecutor of the Polish People's Republic".

Thus, the circle of organs which conclude inter-departmental agreements on behalf of the Polish People's Republic is very broad. According to the provisions of the above-mentioned act, an agreement is of inter-departmental character if it is signed by one of the enumerated organs or on their behalf. This subjective determination of the notion of an inter-departmental agreement is completed as concerns its range of subject-matter in paragraph 4 of the Resolution which provides that as inter-departmental agreements are concluded those agreements whose subject-matter falls within

[25] It is worth mentioning that the practice in this matter outran the provisions of Article 7 of the Convention on the Law of Treaties of 1969.

[26] This is an example of a "self-contained" decision. For a critique of this kind of legal acts, cf. J. STEMBROWICZ, *Rada Ministrów w PRL, naczelny, wykonawczy i zarządzający organ władzy państwowej* [*The Council of Ministers in the Polish People's Republic. A General, Executive and Administering Organ of State Authority*], "Państwo i Prawo," 1970, No. 8—9, p. 212.

the competence of one minister if they are not of fundamental importance or if not otherwise agreed by the parties.

On the basis of the above, one can ascertain that, according to the Polish internal legal order, international inter-departmental agreements are those which are signed by a minister or on his behalf, by heads of other supreme or central organs of administration and economy and by the General Prosecutor, under the condition that the subject-matter of the agreement falls within the competence of one of the above-mentioned organs. This very broad definition of inter-departmental agreement can be acknowledged as a "legal" one. It is not, however, devoid of inaccuracy.

According to the Resolution the essence of an inter-departmental agreement lies in its signature by a competent organ (or on its behalf). Thus, the signature is a sufficient determinant of the inter-departmental character of an agreement. In consequence, the signing organ needs not express its definite consent to be bound by the agreement. For, pursuant to the Resolution, inter-departmental agreements can be subject to approval of the Council of Ministers or of its President. Such approval does not deprive the agreement of its inter-departmental character. In other words, the two-stage (complex) procedure of concluding the agreement has no effect on its inter-departmental character.

Such a regulation does not seem appropriate. Pursuant to the treaty practice, confirmed in Article 11 of the Vienna Convention on the Law of Treaties, the consent of a State to be bound by a treaty may be expressed in various ways. For example, signature and approval are distinguished as two different means of expressing consent applied in different procedures. The signing of an agreement, as an expression of definite consent to be bound by a treaty may be expressed in various ways. For example, signature and approval are distinguished as two different means of expressing consent applied in different procedures. The signing of an agreement, as an expression of definite consent to be bound by a treaty in a simple (one-stage) procedure (under conditions stipulated in Article 12 of the Convention), signifies the acceptance of contractual obligations without the need of posterior acceptance or approval, So, if a minister (or other departmental organ) finally concludes a treaty by means of signature, he will be the organ to conclude the treaty on behalf of his State. It appears, however, that the situation changes if the treaty requires approval, that is — when it is concluded in a complex procedure.

An approval makes the moment of the final expression of consent dependant upon the accord of an organ different from that signing the treaty, that is — upon the Government or the Prime Minister. In consequence, these organs, and not the minister, are the concluding organs, for the treaty's effectiveness depends on their will. Thus, contrary to the provisions of domestic law, from the mere signing of a treaty by a departmental organ does not follow its inter-departmental character. This character depends on the effect of the signature, which in a simple procedure constitutes the final expression of consent to be bound by a treaty. Naturally, treaties will be of inter-departmental character when signed on behalf of a minister or when requiring his posterior approval. If, however, the approval of a different organ is required the agreement is deprived of this character.

Bearing in mind the above-mentioned remarks, one can acknowledge that an inter-departmental agreement is a concordant statement of will with a purpose to cause legal effects for States, delivered in a final way by departmental organs within their objective competence.

Referring to the definition of "treaty" in the Convention on the Law of Treaties, an inter-departmental treaty may be defined as an agreement between States, in written form, regulated by international law, included in simplified form by ministers or other equivalent organs within their obejctive competence.

II. The Competence of the Organs of the Polish People's Republic to Conclude Inter-departmental Agreements

A State, as a sovereign subject of law, concludes international treaties through its organs.[27] It has the power to determine the organs exercising *ius tractatum* on its behalf. This problem, however, is not indifferent to international law.

In the theory of international law there is no agreement as to whether the subject-matter of this law includes the question of competence of State organs to conclude international treaties.[28] However, as S. Nahlik rightly points out, the controversy on this point is only apparent. For, even when international law refers to domestic law in this matter, that does not exempt from examining the internal regulations of competence. Domestic law, in turn, grants pertinent competences to similar organs and this concurrence constitutes a practice from which a customary rule of international law is derived.[29]

Rules of law which determine the competence to conclude treaties

[27] For a broader look on treaty practice of other states, cf. H. BLIX, *The Treaty Makers Handbook*, New York 1973.

[28] Cf. D. ANZILOTTI, *Lehrbuch des Völkerrechts*, Band 1, Berlin 1929, p. 273; H. KELSEN, *op. cit.*, pp. 323—325; J. MAKOWSKI, *op. cit.*, p. 8; M. FRANKOWSKA, *Umowy...* [*International Agreements...*], p. 233 ff.

[29] S. E. NAHLIK, *op. cit.*, p. 111.

(including inter-departmental ones) are thus found in both domestic and international law.[30] It appears then that the granting of these competences to departments is the consequence of a parallel influence of several factors. On the one hand, with the development of the functions of States, a specialization of international relations has occurred. On the other hand, with regard to the necessity of a more effective international traffic, a decentralization of the competences of State organs is taking place and this also concerns treaty-making power.

a) Competence Arising from Rules of Domestic Law

As is widely known, the competence of State organs to conclude international treaties is derived from the so-called Head of State theory or the constitutional theory.[31] It should be stressed, however, that a constitutional determination of competences of departmental organs in this regard is exceptional. Usually, these competences are regulated, in a very differenciated manner, in legal acts of a lower rank, sometimes difficult to insight by other contracting parties.[32]

Analogically in the Polish People's Republic, respective competences of departmental organs have not been provided for in acts of fundamental importance. Article 41 of the Polish Constitution stipulates only that "ministers direct definite branches of state administration".[33] Some authors see in this provision an authority of ministers to act also in external matters, including the capacity to conclude international treaties.[34] It seems,

[30] For a broader look on reciprocal dependence of both legal planes in this matter, cf. M. FRANKOWSKA, *Organizacja działalności traktatowej PRL* [*The Organization of Treaty Practice in the Polish People's Republic*], in: M. FRANKOWSKA (ed.) *Podstawy prawno-organizacyjne stosunków PRL z zagranicą* [*Bases of Legal and Organizational Relations of Poland with Foreign Countries*], Wrocław 1983, p. 68 ff.

[31] For a closer look on these theories, cf. H. BLIX, *Treaty-Making Power*, London—New York 1960, p. 370 ff.; M. FRANKOWSKA, *Umowy...* [*International Agreements...*], pp. 233—244.

[32] Cf. L. WILDHABER, *op. cit.*, pp. 124—141. Among more recent ones, differing regulations, one should note, among others, the Soviet Law on the procedure of concluding and denunciating of international treaties of 6 July, 1977, publ. in "Vedomosti Verhovnogo Soveta SSSR", No. 28 of 1978, pos. 439. For a broader lock on this act and the legislative practice of other States, cf. M. FRANKOWSKA, *Umowy...* [*International Agreements...*], pp. 117—194.

[33] The unified text was published in "Dziennik Ustaw PRL," 1976, No. 7, item 36.

[34] For example, S. ROZMARYN, *Skuteczność umów międzynarodowych w prawie wewnętrznym PRL* [*The Effectiveness of International Treaties in the National Law of the Polish People's Republic*], "Państwo i Prawo," 1962, No. 11, p. 952. Cf. also the polemic remarks by K. SKUBISZEWSKI, *Miejsce traktatów w porządku prawnym PRL* [*The Place of Treaties in the Legal Order of the Polish People's Republic*], "Sprawy Międzynarodowe," 1973, No. 1, pp. 80—86.

however, that such an extensive interpretation of a fundamental act is not appropriate.[35] For, these competences should be regulated in a fundamental act in an explicit and univocal manner.

Thus, one must look for competences of departments in internal acts of a lower rank. With respect to the way of regulation of the matter in question, these acts can be divided into:

a) generally regulating the treaty practice of domestic organs (including departments) and coordinating this practice;

b) authorizing *expressis verbis* concrete departmental organs to conclude international treaties;

c) granting certain powers in the domain of foreign relations to ministers and equivalent organs, for example, powers to conduct or organize cooperation or to represent States in a given domain.

In the first group of acts the most significant role is played by the above-mentioned Resolution of the Council of State and the Council of Ministers of 28 December, 1968 on the Conclusion and Denunciation of International Treaties. It plays an essential role, for, together with several executive acts, it regulates the whole treaty practice of the departments. Its provisions concerning competences are of universal character, that is, they can be applied to every organ specified in the Resolution as a departmental organ. It can thus be acknowledged that, on the basis of this act, treaty-making power of every department can be implied.

Another act, falling within group (a) of substantial importance for treaty practice of departments was the Resolution of the Council of Ministers No. 196 of 11 August, 1973 concerning the organization and coordination of foreign relations.[36] This Resolution did not regulate the issue of treaty-making power directly but it had an effect on the practice, for it designated departmental organs as leading organs, responsible for the international coordination of the treaty practice.

The second group of acts (b), that is expressly authorizing concrete departments to conclude international treaties, is not numerous. One should bear in mind, however, that these express stipulations are in a way supplementary, for they only confirm the competences arising from the Resolution of 1968.

Organs which are *expressis verbis* granted competences to conclude

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[35] It is worthwile noting that the constitutional regulations of competences to conclude treaties were often criticised in Polish literature. Cf. note 34.

[36] This resolution was derogated by the Decree of the Council of Ministers changing the Decree on the Detailed Scope of Activity of the Minister of Internal Affairs, "Dziennik Ustaw PRL," 1984, No. 44, item 230. A presentation of the provisions of the above Resolution seems, however, useful as it was in force in the period of intensive treaty practice of departments.

international treaties are: the Minister of Foreign Trade, Minister of Transport, Minister of Communications and the Minister of Labor, Wages and Social Affairs.

The scope of activity of the Minister of Foreign Trade comprises, among other things,

"matters of foreign trade and the connected with them economic cooperation with foreign countries [...], particularly negotiating international treaties [...], signing [...] trade agreements and other economic agreements".[37]

Numerous examples of the treaty practice of this department, especially in the trade turnover with socialist countries, grant it an important position among other departmental organs. That is also reflected in regulations of international law, which will be presented below.

The scope of activity of the Minister of Transport also includes "matters relative to treaties and conventions concerning international rail, road and aerial transport".[38] The competences of the Minister of Communications have been determined in an analogically broad way and embrace, among others, "matters relating to international postal and telecommunication treaties".[39] These two departmental organs are expressly authorized to conclude international treaties in the whole range of their objective competence.

This respective competences of the last enumerated organs expressly authorized to conclude treaties, that is of the Minister of Labor, Wages, and Social Affairs, are regulated in a slightly different manner. This organ has the power to

"conclude and implement inter-departmental agreements concerning social matters, especially social insurance".[40]

In other words, according to the act regulating its scope of activity in detail, this organ can conclude treaties only as regards a part of its

[37] Paragraph 3, point 2 in connection with Paragraph 1 of the Decree of the Council of Ministers of 24 April, 1974 concerning the detailed scope of activity of the Minister of Foreign Trade and Naval Economy, "Dziennik Ustaw PRL," 1974, No. 17, item 93. By the Law of 3 July, 1981 this departmental has been divided into the Ministry of Foreign Trade and the Office of Naval Economy ("Dziennik Ustaw PRL", No. 17, items 80 and 81). So far, however, on the basis of the new Law no decree on the detailed scope of activity of these organs has been issued.

[38] Paragraph 1, point 21 of the Decree of the Council of Ministers of 10 October, 1957 on the Detailed Scope of Activity of the Minister of Transport, "Dziennik Ustaw PRL," 1957, No. 50, item 245.

[39] Article 2, point 5 of the Decree-law of 11 March, 1955, "Dziennik Ustaw PRL," 1955, No. 50 item 254.

[40] So provides paragraph 2, point 6 of the Decree of the Council of Ministers of 26 June, 1972, "Dziennik Ustaw PRL", 1972, No. 28, item 201.

scope of activity. In fact, the treaty practice of this department is, however, broader.

The third group of acts of domestic law (c) granting certain powers to departments in the domain of foreign relations is the most numerous. It concerns especially acts adopted in the last decade determining the objective competence of particular departmental organs. They recommend that these organs should conduct and organize international cooperation or represent States in foreign relations in matters falling within their competence. These recommendations can be carried into effect also in the form of international inter-departmental agreements.

The scope of the present study does not allow a detailed presentation of the respective provisions of the above-mentioned acts of domestic law. In general, they authorize the organs of this group:

— to represent in matters falling within the subject-matter of the department;

— to develop cooperation with foreign countries to a full extent;

— to develop only scientifical and technological cooperation.

Cooperation with foreign countries to full extent of the objective competence of an organ and the general representation of the State can be performed, for example, by the Committee on Radio and Television Matters "Polskie Radio i Telewizja", by the Ministers of: Engineering Industry, Power Industry and Atonomic Energy, Culture and Art, as well as by the Polish Academy of Sciences, the Polish Committee of Normalization and Measures, the Board of Patents of the Polish People's Republic.[41]

A limited, scientifical and technical cooperation is provided for in acts determining the scope of activity of, for example, the Central Board of Geology and the Ministers of: Materials Management, Metallurgy, Administration and Local Management, Building Industry and Materials, Home Trade and Services; Science, Higher Education and Technology.[42]

[41] Cf. respectively: Law of 2 December, 1960 on the Committee on Radio and Television Matters "Polskie Radio i Telewizja", Article 2, point 6, "Dziennik Ustaw PRL", 1960, No. 54, item 307: paragraph 2, point 4 of the Decree concerning the detailed scope of activity of the Minister of Engineering Industry, "Dziennik Ustaw PRL", 1976, No. 14, item 87; paragraph 1, point 2 of the Decree concerning the detailed scope of activity of the Minister of Engineering and Atomic Energy, "Dziennik Ustaw PRL", 1976. No. 14. item 83; Article 2. point 4 and Article 3 of the Law on the Polish Academy of Sciences, "Dziennik Ustaw PRL", 1970, No. 4, item 35; paragraph 2, point 10 and point 22 of the Decree concerning the detailed scope of activity of the Polish Committee on Normalization and Measures, "Dziennik Ustaw PRL", 1972, No. 29, item 204.

[42] Cf. respectively: paragraph 1, point 14 of the Decree concerning the detailed scope of activity of the Minister of Metallurgy, "Dziennik Ustaw PRL," 1976, No. 14, item 85; paragraph 4, point 4 of the Decree concerning the detailed scope of activity of the Minister of Materials Managements, "Dziennik Ustaw PRL," 1976, No. 14, item 88; paragraph 1, point 7 of the Decree concerning the detailed scope of activity of the Minister of Building Industry and Materials, "Dziennik Ustaw PRL," 1964, No. 8, item 52.

In practice, the differences outlined above are only apparent. This follows from the general authorization foreseen in the Resolution of 1968. It should be noted that some departments by acts of domestic law possess no powers to promote cooperation with foreign countries. Nevertheless such cooperation is implemented by them and the competence for it is also based on the Resolution of 1968.[43]

From the above review of regulations of treaty-making power in Polish domestic law it follows that the fundamental role in this matter is played by acts of lower rank. Their scope is the broadest and they concern all departmental organs. This kind of legal regulation of competences does not seem adequate. It would for many reasons be more appropriate to regulate such vital issues in fundamental acts, above all — because of the need to ensure their accessibility to the other parties of treaties, bearing in mind the provision of Article 46 of the Convention on the Law of Treaties.

b) Competences Arising from Rules of International Law

Both, international law, customary and contractual, and rules of internal law may concern the problem of competence. The practice of concluding inter-departmental agreements is today widely and generally accepted. The similarity of domestic regulations of competence to conclude such treaties along with the already universal practice developed over a considerable time, allow the conclusion that there exists already a customary rule of international law recognizing departmental organs as authorized to enter into obligations, binding upon States in matters falling within their scope of activity.

Although the problem has been noticed, it has not been fully reflected in the Convention on the Law of Treaties. Pursuant to Article 7 of the Convention, Heads of State, Heads of Governments and Ministers for Foreign Affairs in virtue of their function are entitled to act on the international plane. As a result of the postulate of elasticity, which S. Nahlik rightly points to, the provisions of the Convention also reflect the treaty practice of departments. Treaties may be concluded without producing full powers if it appears from the practice of the States concerned or from other circumstances that such was their intention.[44]

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[43] For a broader look, cf. S. E. NAHLIK, *op. cit.*, p. 114, and by the SAME AUTHOR, *Wstęp do nauki prawa międzynarodowego* [*An Introduction to the Theory of International Law*], Warszawa 1976, p. 196.

[44] These departments include, among others, mining industry, forestry and wood industry, light industry, chemical industry, education, justice and also the Superior Mining Board, the Chief Statistical Office.

The following statement of the Drafting Committee is a confirmation that departmental practice was noticed:

"In that connexion, the Drafting Committee believed that several problems relating to the question of full powers could be solved by referring to the practice of States. In States where a Minister was responsible for a certain sector of foreign affairs, for example the Minister for Commonwealth Relations in the United Kingdom and the Minister for International Trade, in some other countries the reference to 'the practice of the State concerned' might relieve the Minister of the need to produce full powers when negotiating a treaty on a matter within his competence".[45]

Besides this, far from perfect, general regulation by international law, the authority to act by departments on behalf of States is found in many particular norms of this law. It is impossible to present the provisions of all treaties to which Poland is a party which contain pertinent authorizations. Usually, such provisions are found in executive clauses of principal treaties, in respect, to which inter-departmental agreements are executive. In these clauses, the departmental organs competent to conclude executive agreements may either be expressly mentioned or not specified at all. In the latter case, the departmental character of the concluding organ is implied from the subject-matter of the basic treaty and from the range of issues to be regulated in the executive agreement. In this case, the expressions most frequently used in basic agreements are: "competent organs of the contracting parties"[46] or "competent central organs of the contracting parites".[47] At this point it should be mentioned that in these cases it happens that the basic agreement imposes on the parties a reciprocal obligation to notify which organs are regarded as competent to conclude inter-departmental executive agreements.[48]

More often, however, the parties explicitly determine the departmental organs competent to enclude executive agreements. So, for example, Article 17 of the Agreement of 24 April, 1978 between the Governments of

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[45] United Nations Conference on the Law of Treaties, First Session, *Official Records*, A/CONF. 39/11, pp. 185—186.

[46] Such an expression is, for example, used in Article 11 of the Inter-governmental Treaty on Cooperation and Mutual Aid in Customs Matters, concluded by socialist States in Berlin on 5 July 1962. Respective executive agreements were concluded by the Ministers of Finance and Ministers of Foreign Trade. For texts of these agreements, see: F. JARZYNA, *Umowy graniczne PRL* [*Boundary's Treatles of the Polish People's Republic*], Warszawa 1974, pp. 213, 240 and 244.

[47] For example, Articles 8 and 15 of the Intergovernmental Convention concluded by Poland and Bulgaria concerning cooperation in the Field of Protection and Quarantine of Plants, "Dziennik Ustaw PRL", 1970, No. 2, item 7.

[48] For example, Article 27 of the Agreement between the Governments of Poland and Hungary concerning International Motorcar Traffic, concluded on 18 July, 1965, "Zbiór umów PRL" [Collection of Treaties of the Polish People's Republic], 1965, p. 56.

Poland and the Union of Soviet Socialist Republics concerning Air Communication contains an executive clause which authorizes "civil aviation authorities" to conclude executive agreements. Article 1 of the Agreement stipulates in turn that in the case of Poland "civil aviation authorities mean the Minister of Transport".[49] Other departments which are explicitly granted by executive clauses competences to conclude inter-departmental agreements are, for example, the Chief Statistical Office,[50] the Minister of Justice and the General Prosecutor,[51] and the Polish Academy of Sciences.[52]

Usually, basic agreements not only determine organs competent to conclude inter-departmental agreements, but also refer to the contents of such agreements and the procedure of their conclusion. So, for example, the Agreement between Poland and Bulgaria concerning Cooperation in the Field of Protection and Quarantine of Plants stipulates in Article 13 that agreements are to be concluded by an exange of letters.[53]

Apart from contractual sources, competences of departments to conclude treaties may also arise from other sources of international law. An example from the practice of socialist States are recommendations of organs of the Council for Mutual Economic Aid and other organizations of these States. Moreover, acts of the CMEA anticipate the need of a permanent expansion of direct inter-departmental legal connections, at the same time obliging states to reciprocally notify of the contents of domestic rules of competence.[54]

Striving for the broadening of these connections, the recommendations of the CMEA also comprise directives which are to be applied when

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[49] Cf. also Articles 9 and 15 of an agreement on the same subject concluded between the Governments of Poland and Liban on 25 April, 1966, *ibid.*, 1969, p. 15.

[50] For example, Article 16 of the Agreement between the Governments of Poland and GDR on Cooperation and Mutual Aid in Customs Matters of 5 September, 1957, text in: F. JARZYNA, *op. cit.*, p. 265.

[51] For example Article II of the Supplementary Agreement to the Agreement between Poland and the Soviet Union on Legal Aid and Legal Relations in Civil, Family and Penal Matters of 28 December, 1957, "Dziennik Ustaw PRL", 1958, No. 32, item 147.

[52] For example, Article 3 of the Agreement between Poland and Austria on Cultural and Scientific Cooperation of 14 July, 1972, "Dziennik Ustaw PRL", 1973, No. 29, item 161. For a broader look on treaty practice of that organ see, among others, W. KRAUZE, T. WUJEK, *Współpraca naukowa PRL z zagranicą [Scientific Cooperation of the Polish People's Republic with other Countries]*, Warszawa 1974, pp. 66—68. It should be stressed that the Academy, in accordance with domestic law, exercises functions of a supreme State organ.

[53] See note 47.

[54] For example points 1.1., 1.2. and 1.4. of Chapter VIII of the Integrated Plan of Further Deepening and Improving the Cooperation and Development of Socialist Integration of Member States of the Council for Mutual Economic Aid, adopted on the XXV Session of the Council in 1971.

drafting of some inter-departmental agreements, for example, those concerning scientific and technical cooperation.[55] With regard to the constant development of treaty practice of departments of member-States, organs of the CMEA are frequently striving to establish legal frameworks for the coordination of this regional practice.

At this point it should be noted that because of the possibility of different regulations of matters of competence in domestic and international law there exists a danger of a conflict between both legal systems. Apart from that, discrepancies between the contents of inter-departmental agreements are possible. Because of lack of a clear determination of treaty-making power in domestic law, a departmental organ can in good faith conclude a treaty whose content is inconsistent with the treaty concluded by another organ.

In conclusion, one may state that the problem of competences of departmental organs has not been fully and clearly regulated in Polish domestic law. Considering the significance of this problem, it seems desirable, therefore, that a legal act of fundamental imporatance should be adopted. This would be justified, if not for other reasons, by the fact that the contents of an act such as the Resolution of 1968, are practically inaccessible to the other parties of a treaty. In consequence, a violation of such an act cannot be considered as manifest to the parties.

International law, too, in its universal treaty regulation does not fully reflect the existing treaty practice of departments. Thus, generally, one may state that the binding legal regulations of both legal systems do not keep up with changes resulting from the contemporary treaty practice of States.

III. Characteristic Features of Inter-departmental Agreements Concluded by the Polish People's Republic

The principal feature of inter-departmental agreements results from the very criterion of classification of international treaties, also used to specify this kind of agreements. This feature is the departmental character of the concluding organ. Apart from that, however, Polish departmental treaty practice allows to distinguish a number of other characteristics of this source. These features follow from the object of the agreements (effectiveness

[55] Cf. for example, point 10.1. of Organizational and Methodical Legal and Economic Bases of Scientific and Technical Cooperation of Member-States of the CMEA, adopted in 1975 by the Committee for Scientific and Technical Cooperation of the CMEA, text in: "Ekonomičeskoe Sotrudničestvo Stran-Členov SEV", 1975, Mo. 6, p. 91 ff.

of legal turnover), the objective competence of the concluding organ as well as the relation to other international treaties. These features usually appear jointly.

Inter-departmental agreements are most frequently concluded by organs of two States. Up to the present, multilateral agreements of this kind have been rare. Usually, multilateral agreements are combined with the implementation by socialist States of integration processes, which are deepening and, for the very nature of things, have a multilateral character. As examples of multilateral inter-departmental agreements may serve the Agreements of 1951 concerning railway transport between socialist States.[56] As K. Skubiszewski rightly pointed out, that there is an inconsistency in the composition of contracting parties to these agreements, for they include railway boards and departments, subordinate to the boards. This variety does not, however, deprive the agreements of inter-departmental character.[57]

Sometimes a situation may arise that an inter-departmental agreement is the only possible form of reaching a common goal. This is the case, for example, in the border cooperation at meeting points of State borders of more than two countries.[58]

However, as has already been mentioned, at present the most usual form of developing international cooperation on a departmental level takes place by means of bilateral agreements.[59]

This results mainly from their executive character in relation to other international treaties. These in turn are, as a rule, also of bilateral character. Inter-departmental agreements, which have already been mentioned, are usually concluded in order to carry out a clause of the principal agreement, seldom — of a different common act of will of States (for example, the provisions of joint inter-governmental or departmental com-

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[56] Agreements concerning International Railway Passenger Transport (SMPS) and International Railway Commercial Transport (SMGS) or 1 November, 1951, concluded by Ministries administering Public Railways of socialist States. Text in: B. REUTT, *Podstawowe dokumenty RWPG* [*Basic Documents of the CMEA*], Warszawa 1972, pp. 485—506 and 507—535.

[57] K. SKUBISZEWSKI, *Glosa*... [*A Gloss*...], p. 258.

[58] An example of this kind of treaty is the Agreement concluded on 27 March, 1957 by Ministers of Internal Affairs of Poland, GDR and Czechoslovakia concerning Means of Maintaining the Boundary Mark on the Meeting Point of State Borders, text in: F. JARZYNA, *op. cit.*, p. 103 ff.

[59] From about 50 treaties concluded by the Committee for Radio and Television Matters almost all are bilateral. Bilateral are also all agreements on additional supplies of goods concluded by the Polish Ministry of Foreign Trade. So are agreements concluded by the Ministry of Home Trade and Service with respective departments of other Socialist States, concerning the exchange of trade surplus.

missions) or an act of an international organization (for example, recommendations of the CMEA).[60]

It is characteristic that the general scope of regulation of inter-departmental agreements, that is, their subject-matter, is closely linked with the objective competence of the concluding organ. Thus, unlike State or governmental agreements, the subject-matter of inter-departmental agreements — naturally, if they are concluded without special full powers — cannot be broader than the scope of activity of a departmental organ. This direct connection, which can be defined as the functional character of inter-departmental agreements, clearly follows, as has been discussed, from domestic law.[61]

This is a very significant feature of inter-departmental agreements. If there is no such correspondence, ministers have no implied powers and special full powers are required. The present practice of Polish departmental organs generally confirms this feature. Inter-departmental agreements are concluded by organs whose objective competence corresponds to the contents of the agreements. It thus appears that it is the planned subject-matter of a future contractual regulation that decides which department is competent to conclude the agreement.[62] Consequently, the Resolution of 1968 rightly includes in the category of inter-departmental agreements those agreements whose subject-matter falls within the competence of one department, and in the category of governmental agreements those whose subject-matter corresponds to the objective competence of several departments.

On the other hand, nowadays, in face of a progressing decentralization of competences and with the practice of concluding by governments agreements of a more fundamental importance, it is difficult to follow

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[60] It is worthwile noting that inter-departmental agreements may be concluded in order to implement an executive clause of another inter-departmental agreement. For example, the so-called "working protocols" concluded by the Committees for Radio and Television Matters of Poland and the GDR (for the years 1978—1979) constitute an implementation of the provisions of the five-year agreement of 7 April, 1978, concluded by these organs.

[61] That is why it is as a rule recognized that ministers have implied powers, to conclude a treaty, if in good faith it can be assumed that the contents of the agreement remain in close relation to the subject-matter of the ministers. See M. FRANKOWSKA, *Wprowadzenie...* [*Introduction...*], p. 56. Cf. the work indicated there: J. M. JONES, *Full Powers and Ratification*, Cambridge 1946, p. 61.

[62] Naturally, that does not mean that departmental organs which conclude a treaty must have identical names. The only determinent is their objective competence. So, for example, the Agreement on Economic, Scientific and Technical Cooperation in the Field of Sea Fishery of 27 June, 1974 was signed on behalf of Poland by the Minister of Foreign Trade and Naval Economy and on behalf of Bulgaria — by the Minister of Agriculture.

this principle rigorously. A practice is emerging that several departmental organs can act on behalf of their State. These organs must be, however, of the same level and as such it seems that the inter-departmental character of the agreement is preserved.[63] Such situation, although not fully in conformity with domestic law, is justified. For, in different States the same matters may fall within the objective competence of one or several departmental organs. And a standarization of the subject-matters of organs so that they be identical in different States seems unrealistic.

Another group of features of inter-departmental agreements is connected with the procedure of their conclusion. The process of concluding an international treaty can be divided into two basic stages. The first stage ends with the adoption of the text and is preparatory. The second stage constitutes the proper conclusion of a treaty by a definite expression of consent to its legal effects.

The need of elasticity and effectiveness of legal turnover has caused a simplification of formalities in both stages.

In the first stage the simplification concerns activities connected with signing of full powers (if required), approval of draft negotiation instructions and draft treaties, the determination of time and place of negotiations, as well as the exchange of letters constituting an agreement. Unlike in the case of other treaties, competent ministers (and other departmental organs) by themselves, that is without engaging the Minister of Foreign Affairs, produce full powers to sign, initial or negotiate inter-departmental agreements. These organs prepare, also by themselves, draft inter-departmental agreements and negotiating instructions.[64]

Without any participation of the Minister for Foreign Affairs the above-mentioned organs also fix the time and place of negotiations and perform other necessary functions (for example, those of depositaries).[65] Thus, one can note that as departmental organs took over the competences to conclude this kind of agreements they were granted powers to perform such acts which in the case of other agreements fall within the scope of activity of the Minister of Foreign Affairs.

This independence, although resulting from the need to make legal

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[63] For example, the Agreement on Scientific and Technical Cooperation concluded on 11 February, 1977 on behalf of Poland by the Minister of Mining and the Minister of Chemical Industry and on behalf of Romania by the Minister of Mining, Oil and Geodesy.

[64] Cf. the Letter of the Minister of Foreign Affairs No. DPT 1212, 12/68. Analogously, Annex to the Order No. 4 of 19 September, 1969 regulating the Procedure of Conclusion and Denounciation of International Treaties.

[65] Cf. respectively paragraphs 12, 14 and 15 of the Resolution of 1968.

turnover more effective, can, however, lead to negative consequences. One of them is the danger that the Minister of Foreign Affairs may not be fully aware of his State's current obligations arising from inter-departmental agreements. In order to prevent this, departmental organs are obliged to notify the Minister about the entry into force, title, date and place of conclusion (or termination) of an inter-departmental agreement. These notifications should be sent without delay and listed in the special register of inter-departmental agreements kept by the Minister of Foreign Affairs.[66]

Like the preparatory stage, the final procedure through which agreements are concluded is, as a rule, simplified and one-stage. Notwithstanding differences in the meaning of the notion of agreements in simplified form,[67] in this case what matters is the common practice of expressing consent to be bound by an inter-departmental agreement only by signature or by an exchange of letters, without the need of later ratification. Exemption from ratification being impled, mere signature of an agreement is sufficient today to establish a new legal relation in reciprocal inter-State relations.[68]

So, in Polish practice, it is characteristic of inter-departmental agreements that the procedure of their conclusion is simplified (signature or exchange of letters) and ratification is not necessary.

Another feature of inter-departmental agreements is linked with the problem of registration and publication. As practice shows, these agreements are usually neither registered in the Secretariat of the United Nations nor published in the United Nations Treaty Series. Their internal publication is also rare in Poland. There are, however, no formal obstacles rendering it impossible to register and publish the agreements on the international plane. The provision oi Article 102 of the Charter of the United Nations mentioning "every treaty and every international agreement" — speaks for a universal application of this Article. M. Brandon also points to this, maintaining that:

> "It must be assumed that the Committee did not intend to exclude commercial contracts and other technical agreements concluded, for instance, on a ministerial or departmental level between two or more States".[69]

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[66] Practice not always confirms that this obligation is fulfilled. Besides, these notifications concern treaties already concluded which considerably impairs the controlling function of the Minister of Foreign Affairs.

[67] For a broader look, cf. M. FRANKOWSKA, *Umowy... [International Agreements...]*, p. 60 ff., L. WILDHABER, *op. cit.*, p. 135 ff.

[68] Cf. S. E. NAHLIK, *Kodeks... [The Code...]*, p. 123 and 131—134.

[69] M. BRANDON, *Analyses of the Terms "Treaty" and "International Agreement" for Purposes of Registration under Article 102 of the UN Charter*, "American Journal of International Law," vol. 47, 1953, p. 52.

The above view is implied from the statement of the Sixth Committee of the United Nations General Assembly made on 29 October, 1974:

"A great many of the international agreements concluded were of a financial, commercial or technical character, and the Ministries of Finance, Commerce and soforth [...]. The Charter referred to 'every treaty or international agreement' the members of the Committee would probably agree that commercial, financial and other technical agreements and treaties all belonged in that category [...]".[70]

An analogical view, confirming the inclusion of inter-departmental agreements in the category of agreements subject to registration and publication, can be found in the Repertory of Practice of the United Nations Organs. As an example of agreements subject to such proceedings postal agreements are mentioned:

"Postal agreements (even though concluded, for example, between the respective postmasters-general) were considered as subject to registration, provided that the States parties to the agreement were formally bound thereby".[71]

In spite of these univocal opinions and statements, inter-departmental agreements are registered and published only exceptionally pursuant to Article 102 of the Charter.[72] Considering that these agreements often appear in practice and regulate a wide area of inter-State relations this situation does not seem desirable.

Internal publication of inter-departmental agreements concluded by Polish departmental organs is also rare. Treaties subject to ratification are obligatorily published in the "Dziennik Ustaw" [Journal of Laws]. By decision of the Premier, issued at the request of the Minister of Foreign Affairs, governmental agreements, not subject to ratification, only may be published[73]. As far as inter-departmental agreements are concerned Polish Law does not provide for their publication. There was only one exceptional case, the Protocol on the Implementation of the Convention between Poland and Czechoslovakia concerning Border Traffic, concluded by the representatives of Ministers for Internal Affairs of both States on 23 September, 1959.[74] Agreements are sometimes officially published in departmental

[70] United Nations Official Records of the Second Session of the General Assembly. Sixth Committee, Legal Questions, Summary Records of Meetings 16 September—26 November, 1947, Doc. A/380, p. 116.

[71] Repertory of Practice of United Nations Organs, Volume V, Articles 92—111 of the Charter, New York 1955, p. 295.

[72] There are no such examples in Polish practice. In foreign practice there are very few examples in the field of departmental postal agreements. Cf. "United Nations Treaty Series" vol. 5, 1947, No. 34, vol. 93, 1951, No. 1300 and 1301.

[73] Paragraph 18, point 1 and 2 of the Resolution of 1968.

[74] Published in "Dziennik Ustaw PRL", 1960, No. 27, item 155.

records.[75] In this respect Polish practice differs from that of other States.[76] The lack of official publication of agreements makes their implementation by national organs difficult and thus can negatively influence their effectiveness in domestic law.[77]

To characteristic features of inter-departmental agreements belongs also their simplified structure. The difference in relation to State or governmental agreements results from the subject-matter, the executive character and the simplified procedure of conclusion. In general, it can be noted that preambles to these agreements and other contents of enacting clauses are frequently ommitted. The latter ones usually depend on the contents of respective principal agreements, to which inter-departmental agreements are executive. For example the dependence of the period of operation of an inter-departmental agreement upon the respective period determined in the basic agreement; the subordination of the entry into force of an inter-departmental agreement to the conditions provided for in the principal agreement, etc.

The above presentation of characteristic features is not exhaustive and is limited to the most typical ones resulting from the treaty practice of Polish departmental organs. All these features are a consequence of the substantial difference between this category of agreements and other agreements. This distinction consists in the departmental character of the concluding organ and the resulting limited functions which such organs can perform in external State relations.

IV. Conclusions

The fragment of the problem of inter-departmental agreements presented above allows a number of conclusions.

An inter-departmental agreement, being a kind of international treaty, plays an important role in this category of sources of international law. The theory of international law, although seldom referring to agreements of this kind, recognizes them as a formal source of shaping international

[75] For example "Dziennik Taryf i Zarządzeń Komunikacyjnych" [Journal of Tariffs and Transport Orders] of the Department of Transport. The only extensive, but unofficial collection in which inter-departmental agreements are also published is "Zbiór Umów PRL" [Collection of Treaties of the Polish People's Republic] issued by the Polish Institute of International Affairs.

[76] For example, the Sovet *Sbornik dejstvujuščih dogovorov, soglašenii i konvencii zaklučenyh SSR a inostrannymi gosudarstvami, Vypusk I—30,* Moskva 1922—1976.

[77] Cf. K. SKUBISZEWSKI, *Glossa...* [*A Gloss...*], pp. 257—259 and by the SAME AUTHOR, *Miejsce...* [*The Place...*], pp. 80—86. See also, M. FRANKOWSKA, *Umowy...* [*International Agreements...*], pp. 182—188.

inter-State relations. Thus, a departmental organ does not act on its own behalf, but it is a State which is the party to such a treaty.

The subject-matter of the agreements is closely linked with the functions of the concluding organ, that is, with such a scope of its activity which other parties can in good faith accept.

In Polish treaty practice, based on domestic law, the number of departments concluding agreements is very large. Besides traditional departments, administred by ministers, it comprises also other organs, for example, the Committee on Radio and Television Matters, the General Prosecutor and the Polish Academy of Sciences.

Inter-departmental agreements fall, as a rule, within the subject-matter of one department. However, in Polish practice there also exist inter-departmental agreements concluded at the same time by several departments acting together on behalf of the State. The number of participants does not deprive the agreement of the character of a bilateral inter-departmental agreements.

As regards treaty-making power, the competences of departments are regulated, above all, by domestic law. In this case, however, the rules arising from international law are also applied. Polish domestic law is far from perfection in this matter. The regulations are found in acts of a lower rank and their contents are practically inaccessible to the remaining parties of the treaty. Besides, such acts being not of fundamental importance their violation would not be evident to other parties. Moreover, the acts of a higher rank regulating in detail the scope of activity of departmental organs do not contain identical provisions as regards the external competence of the organs.

Competences are often confirmed in executive clauses of other international treaties. The already general international practice of concluding agreements by departmental organs allows to imply the treaty making power of these organs. This results from the functions performed by them, the great number of such agreements and the long practice. This great implication is only limited by the subject-matter of the departmental organ concerned.

In general, one may state that both domestic and international regulations of matters of treaty making power do not keep up with the rapid development of treaty practice.

Inter-departmental agreements have a number of features which clearly distinguish them from other international treaties. They are as a rule bilateral, limited in subject-matter, of an executive character and they have a simplified structure. They are concluded in a simplified procedure and many functions which are performed in relation to other agreements by the Minister of Foreign Affairs have been taken over by the respective departmental organs.

As a negative feature of these agreements one should consider the lack of their international and domestic publication and the lack of registration in the Secretariat of the United Nations. This leads to definite unfavourable consequence for the effectiveness of these agreements in relation to the organs of the United Nations and in domestic law.

The above ascertained features of inter-departmental agreements, although enabling a clear distinction of this category of agreements, do not infringe on the international character of obligations imposed by them. They allow, however, to put forward the problem of their full submission to the Convention on the Law of Treaties. For, they are an expression of present treaty practice differing from the standard normative solutions of the Convention certain distinctions (for example, as regards the category of organs not having to produce full powers or the problem of registration and publication). In this connection, there arises a broader problem: can the existing practice constitute a sufficient justification for departing by States from obligations resulting from the Convention? This question is of particular importance in face of the tendency of progressing decentralization of the treaty making by domestic organs on behalf of States.

In any case, it seems that the decentralization of *ius tractatuum* should be accompanied by a full and univocal regulation in domestic law. This tendency should also be a subject of intense study in the theory of international law.

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La place du Conseil d'Assistance économique mutuelle dans le système des organisations internationales économiques des Etats socialistes

par WOJCIECH FORYSIŃSKI

I

Le Conseil d'assistance économique mutuelle entretient des contacts réguliers avec environ 60 organisations internationales. Il a les rapports les plus étendus et les plus réguliers avec plus de 20 organisations internationales économiques créées par les Etats socialistes, surtout ceux qui font partie du Conseil. En règle générale, les accords passés entre ces pays et le CAEM servent de base juridique à ces contacts.

Les Status du CAEM, dans leur première version, ne contiennent pas de dispositions spéciales concernant les accords du Conseil avec les autres organisations internationales créées par les pays membres. Cependant, on peut faire remarquer qu'une telle disposition a été inérée comme article XII, al. 2, après l'entrée en vigueur du Protocole concernant les modifications des Statuts du CAEM, adopté à la XXXIII^{e} session de l'Organisation en 1979[1]. Cette disposition prévoit que les organisations internationales créées par les pays membres du Conseil en vue de coopérer dans les différents domaines de l'économie, de la science et de la technique, continuent à entretenir des rapports conventionnels avec le Conseil, tandis que le CAEM coordonne les activités de telles organisations avec les siennes sur la base des accords passés avec elles.

Dans son intervention à la XXXIII^{e} session du CAEM, le président du Comité exécutif, K. F. Katouchev, en exposant les propositions de modification des Statuts, a déclaré que la disposition en question détermine la position centrale du CAEM dans le système de coopération et pose une base juridique à l'exercice par le Conseil d'une direction générale des activités des organisations économiques internationales[2].

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[1] Ce protocole n'a pas encore été ratifié par tous les Etats membres du CAEM.

[2] K. F. KATUŠEV, *Vystuplenie na XXXIII Zasedanii Sesii SEV 27 ijula 1979 g. Press--Bjulleten' Sekretariata SEV*, Moskva 1979, n° 7, p. 29.

Il y a lieu d'expliquer ce que signifient les «organisations économiques internationales». Ce terme a été introduit par le «Programme complexe d'approfondissement et s'amélioration de la coopération et du développement de l'intégration économique socialiste des pays membres du CAEM», adopté par la XXV^{e} session du Conseil[3]. Le chapitre VII, point 2 de ce document prévoit qu'il s'agit d'organisations créées en vertu d'accords entre les gouvernements des pays intéressés ou entre les organes d'Etat ou les organisations économiques d'Etat, dès qu'ells ont le droit de passer de tels accords. C'est donc une définition très générale, comportant des organisations de caractère divers et fondées sur de différentes bases juridiques.

Le «Programme complexe» distingue les organisations économiques interétatiques et les organisations économiques internationales[4]. Le «Programme complexe» classe entre autres dans les organisations économiques internationales instituts, centres, sociétés mixtes, bureaux de commerce et autres unités.

Comme on le voit, les termes utilisés dans ce classement diffèrent sensiblement de la terminologie juridique polonaise. C'est notamment le cas de l'appellation «organisations économiques internationales», employée en polonais principalement pour désigner les organisations internationales dont font partie des Etats. Aussi la délégation polonaise à la Conférence des représentants des pays membres du CAEM pour les questions juridiques (cet organe s'occupait entre autres de la problématique des organisations économiques) avait-elle proposé que l'on envisageât de changer l'appellation «organisations économiques internationales» en «organisations économiques communes», considérant que le premier terme a une large signification et que son emploi risque de provoquer de nombreux malentendus[5]. D'ailleurs de nombreux spécialistes ont exprimé la même opinion[6]. Cependant, tous les documents du CAEM utilisent les termes adoptés par le «Programme complexe». Afin d'éviter toute confusion, ces terms sont employés dans cet article.

Les dispositions susmentionnées du «Programme complexe» permettent de diviser les organisations avec lesquelles le CAEM a passé des accords en organisations économiques interétatiques et organisations économiques

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[3] *Kompleksowy program...* [*Programme complexe...*], Warszawa 1971.

[4] Chapitre VII, p. 3 du Programme complexe.

[5] *Protokol 7 zasedanija Soveščanija Predstavitelej Stran Členov SEV po Pravovym Voprosam*, Sekretariat SEV, 1972.

[6] Cf. W. W. FOMIN, *Otnošenija SEV s meždunarodnymi ėkonomičeskimi organizaciami socialističeskih gosudarstv*, dans: *SEV — osnovnye pravovye problemy*, sous la dir. d'E. T. Usenko. Moskva 1975, p. 289. La notion d' «organisations communes» est employée également par J. JAKUBOWSKI, *Międzynarodowe organizacje gospodarcze krajów RWPG. Zagadnienia prawne* [*Les organisations économiques internationales des pays du CAEM. Problèmes juridiques*], Warszawa 1980.

internationales (y compris les unions économiques internationales) créées en vertu d'une convention internationale qui ont pour membres non pas des Etats mais des unités économiques d'Etat.

La doctrine a déjà fait maintes fois remarquer que la conclusion de ces accords avait abouti à la naissance d'un système spécifique de coopération et de coordination des activités des organisations économiques internationales des Etats socialistes, système où un rôle prépondérant est joué par le CAEM[7]. Ces organisations sont considérées, conjointement avec le Conseil, comme la partie la plus importante du mécanisme institutionnel de l'intégration économique socialiste[8].

Le but essentiel de cet article est d'essayer de démontrer le rôle joué par le CAEM dans le système des organisations économiques internationales des Etats socialistes. De telles tentatives avaient déjà été faites[9], mais comme les rapports entre le CAEM et les organisations avec lesquelles il a conclu des accords se sont profondément modifiés, elles ne relètent plus l'état juridique existant. D'importants amendements ont été apportés aux Statuts du CAEM, le Conseil a pris des décisions significatives pour ces rapports, et enfin au cours des trois dernières années il a conclu nombre de nouveaux accords qui n'ont pas encore fait l'objet d'analyse scientifique.

Cependant, quand on présente les rapports actuels du CAEM avec les autres organisations créées par les Etats socialistes, et quand on cherche à en établir les origines, one ne peut pas renoncer à rappeler, ne serait-ce que brièvement, comment ces rapports ont évolué.

II

Dans une version primitive, les Statuts du CAEM prévoyaient à leur article XI que le Conseil peut nouer et entretenir des rapports avec les organisations économiques de l'ONU et avec d'autres organisations économiques, et que le caractère et la forme de ces rapports sont déterminés par le Conseil de concert avec ces organisations[10]. Cette

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[7] Z. M. KLEPACKI, *Organizacje międzynarodowe państw socjalistycznych* [*Les organisations internationales des Etats socialistes*], Warszawa 1981, p. 131.

[8] P.ex. E. T. USENKO, *Kompleksnaja programma socialističeskoj èkonomičeskoj integracii i rol' SEV v ego osuščestvlenii*, dans: *SEV — osnovnye...* (v. note 6).

[9] Cf. Z. M. KLEPACKI, *Podstawy prawne oraz zasady współpracy i koordynacji działalności socjalistycznych organizacji międzynarodowych. Polska i Świat* [*Les fondements juridiques et les principes de la coopération et de la coordination des activités des organisations internationales socialistes*], in: *Polska i Świat*, sous la dir. de H. Olszewski, Poznań 1978.

[10] Art. XI des Statuts du CAEM, Dz. U. (J. des L.) 1960, n° 35, texte 197.

disposition était indubitablement applicable aux rapports du Conseil avec les autres organisations économiques des Etats socialistes.

Le 16 octobre 1962, en application de la délégation prévue à l'art. XI précité, fut signé un Protocole sur le caractère et les formes de la coopération entre le CAEM et l'Organisation pour la collaboration des chemins de fer (OCCF)[11].

Le protocole prévoit que la collaboration entre les organisations réalisée sur la base de réciprocité consistera avent tout en mesures tendant à une coordination des plans de travail des organes du CAEM et de l'OCCF dans le domaine des questions liées au transport ferroviaire et routier et les voies de transport, en préparation commune des matériaux concernant ces questions et en échange de procès-verbaux des réunions de ces organes et d'autres publications[12].

Il y a lieu de croire qu'à l'époque cette forme de coopération entre les organisations internationales n'était pas encore considérée comme particulièrement souhaitable puisque des accords semblables n'ont pas été conclus avec d'autres organisations internationales des Etats socialistes déjà existantes[13].

Cette situation a radicalement changé vers la fin des années soixante. La création par les Etats membres du CAEM de quelques nouvelles organisations économiques interétatiques ainsi que le développement de la coopération au sein du Conseil, et en particulier les préparatifs de sa transformation en une organisation de type intégrationniste, ont eu pour effet qu'il fallait une coopération plus étroite entre le CAEM et les autres organisations des Etats socialistes. Les décisions du Comité exécutif et de la XXIV^{e} session du CAEM en 1970 y ont attiré l'attention[14]. En 1970 et 1971, le Conseil a conclu des accords sur le caractère et les formes de sa coopération avec six organisations internationales.

Les rapports entre le CAEM et ces organisations fondés sur les accords précités étaient analogues à ceux entre le CAEM et l'Organisation pour la collaboration des chemins de fer. Cette coopération devait s'appuyer pleinement sur le principe de réciprocité. Cependant, ces rapports se sont très rapidement et sensiblement modifiés par suite de l'adoption en 1971 par la XXV^{e} session du Conseil du «Programme complexe».

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[11] *Podstawowe dokumenty RWPG i organizacji wyspecjalizowanych. Wybór i opracowanie B. W. Reutt* [*Documents fondamentaux du CAEM et des organisations spécialisées. Choix et commentaire B. W. Reutt*], Warszawa 1972, pp. 191—193.

[12] *Ibid.*

[13] C'est-à-dire avec l'Institut uni des recherches nucléaires, l'Organisation de coopération des pays socialistes dans le domaine des liaisons électriques et postales et le Dispatching central des systèmes énergétiques unis.

[14] Cf. le Communiqué sur la XXIV^{e} Session du CAEM, «Trybuna Ludu» du 15 mai 1970.

Ce programme prévoit entre autres que les Etats membres du CAEM doivent faire le nécessaire pour que les organisations économiques internationales qu'ils créeraient à l'avenir tiennent compte dans leur activité des décisions du CAEM relatives à la coopération dans les domaines concernés. D'autre part, ces Etats sont engagés à prendre des mesures garantissant une coordination convenable des activités du CAEM avec celles des organisations interétatiques existantes ou à créer par les pays intéressés, conformément aux principes du CAEM, nanties d'une large responsabilité dans le domaine économique, scientifique et technique. Il a été arrêté que la coordination des activités concernant les questions d'intérêt commun pour le CAEM et des organisations concernées se fera sur la base de conventions et de protocoles passés entre eux. Ces conventions doivent notamment prévoir que ces organisations coopéreront avec le CAEM en tant qu'organisations spécialisées, et par ailleurs doivent régler les questions de la délimitation et de la coordination des activités entre ces organisations d'un côté et du CAEM de l'autre. En instituant de nouvelles organisations économiques interétatiques les Etats membres du Conseil doivent insérer dans leurs documents normatifs les clauses réglant leurs rapports avec le Conseil. Les organisations spécialisées demeurent autonomes et fonctionnent sur la base de leurs actes constitutifs[15].

Il convient de faire remarquer que ni les documents constitutifs des organisations économiques interétatiques créées par les pays membres du Conseil et fonctionnant au moment de l'adoption du Programme complexe, ni les Conventions de coopération conclues avec le CAEM ne remplissaient les conditions précitées. C'est pourquoi, en mai 1972, dans les protocoles sur le caractère et les formes de coopération, passés par le CAEM avec les organisations économiques interétatiques dont seuls faisaient partie les Etats membres du Conseil, ont été apportés des amendements tenant compte des dispositions du «Programme complexe»[16]. Elles ont été également prises en considération par les protocoles ultérieurs.

En revanche n'ont pas été modifiés les protocoles passés entre le CAEM, l'Organisation pour la collaboration des chemins de fer et l'Institut unifié des recherches nucléaires. Les droits et devoirs découlant pour les parties de ces protocoles sont réciproques. Le fait que les rapports entre le CAEM et ces organisations s'appuient exclusivement sur le principe de réciprocité résulte, semble-t-il, de ce qu'en font également partie — outre les Etats membres du Conseil — d'autres Etats socialistes: la République

[15] Chapitre XVI, pts 5 et 6 du Programme complexe.

[16] Par échanges de lettres ont été complétés les protocoles sur le caractère et les formes de la cooperation entre le CAEM, «l'Intermetal», l'Organisation de coopération de l'industrie des roulements à billes, le Dispatching central des systèmes énergétiques unis et le Parc collectif des wagons.

Populaire de Chine, la République Populaire et Démocratique de Corée et la République Populaire d'Albanie qui depuis 1961 ne participe pas aux travaux des organes du Conseil.

Les développements qui suivent porteront sur les rapports entre le CAEM et les organisations économiques internationales dont font partie uniquement des pays membres du Conseil.

Les accords passés par le CAEM avec ces organisations prévoient non seulement des droits et devoirs réciproques des parties, mais aussi des droits et devoirs unilatéraux du Conseil. Dans le premier groupe rentre par exemple le devoir de coordination mutuelle des activités dans les matières d'intérêt commun des deux organisations, avant tout dans les matières liées à l'laboration et la réalisation des initiatives prévues par le «Programme complexe». Le Conseil possède également des droits unilatéraux. C'est avant tout le droit qu'ont ses organes d'adresser des recommandations aux organes de l'autre partie et de leur demander des informations sur les résultats de l'étude de ces recommandations.

Aux droits du CAEM correspondent des obligations des organisations économiques interétatiques. Celles-ci doivent prendre des mesures garantissant la prise en considération des recommandations du CAEM dans leur activité, et aussi informer les organes du Conseil sur les résultats de l'étude de leurs recommandations.

Il faut également faire remarquer que l'accord entre le CAEM et «Interelektro» prévoit que cette organisation examinera non seulement les recommandations mais aussi les décisions des organes du Conseil concernant les matières liées aux activités de «Interelektro» [17]. La convention constitutive et les Statuts de «Interelektro» prévoient en outre que cette organisation présente annuellement au Comite exécutif du Conseil une information sur ses activités. Il en résulte le droit du CAEM de demander de telles informations de «Interelektro» [18].

Les dispositions en question imposent également des obligations aux organes du Conseil. Ces organes sont tenus d'examiner les questions soumises à leurs délibérations par les organisations économiques interétatiques et d'informer des résultats de leur examen.

On peut voir que les accords passés par le CAEM avec les organisations économiques interétatiques dont seuls faisaient partie des Etats membres du Conseil, ont lié leurs activités à celle du CAEM plus étroitement que les accords avec l'Organisation pour la collaboration des chemins

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[17] Art. 4 du Protocole sur le caractère et les formes de la coopération entre le CAEM et «l'Interelektro», Z. M. KLEPACKI, *Organizacje międzynarodowe...*, p. 716.

[18] Art. VII, al. 5 de l'Accord sur la création de l'Interelektro, Z. M. KLEPACKI, *Organizacje międzynarodowe...*, p. 706, et l'art. II, al. 2 — m) des Statuts de l'Interelektro, *ibid.*, p. 711.

de fer ou avec l'Institut des recherches nucléaires. En effet, ils ont attribué au Conseil des droits et obligations supplémentaires. C'est précisément en considération de la position du CAEM dans ses rapports avec ces organisations que celles-ci sont dans ces accords qualifiées d'organisations spécialisées.

Des dispositions semblables sont insérées dans les protocoles sur le caractère et les formes de la coopération passés par le CAEM avec la Banque internationale de coopération économique et la Banque internationale d'investissement. Ces accords ne prévoient pas toutefois que les banques sont des organisations spécialisées du CAEM mais qu'elles entretiennent avec le Conseil des rapports conventionnels [19].

Le fait que les droits et obligations qui résultent pour les parties des accords conclus avec des banques internationales ressemblent à ceux découlant des accords passés avec d'autres organisations économiques interétatiques, incite certains auteurs à affirmer que la Banque internationale de coopération économique et la Banque internationale d'investissement sont des organisations spécialisées du Conseil. Z. M. Klepacki écrit, par exemple, — en classant dans les organisations spécialisées du Conseil non seulement les deux banques mais aussi l'Organisation pour la collaboration des chemins de fer et l'Institut unifié des recherches nucléaires, dont les rapports avec le CAEM s'appuient sur des principes semblables — que les quatre organisations susmentionnées peuvent être reconnues non seulement comme des organisations collaborant avec le CAEM, mais aussi comme des organisations *de facto* spécialisées de ce Conseil [20]. Certains auteurs soviétiques expriment une opinion semblable [21]. Il semble cependant qu'il faut partager l'opinion de P. A. Tokarieva, qui écrit que l'une des conditions *sine qua non* de la reconnaissance d'une organisation économique internationale comme une organisation spécialisée du Conseil consiste à lui conférer un tel statut dans l'accord conclu entre les organisations concernées [22].

Le système des accords passés par le CAEM avec d'autres organisations économiques internationales créées par des Etats membres du Conseil a été complété par les accords conclus avec des unions économiques internationales. Précisons tout de suite que déjà les conventions constitutives et les statuts de ces unions prévoient la liaison de leurs activités avec celles du CAEM. Ces questions sont réglées en détail par les protocoles

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[19] V. Lettre concernant l'additif au Protocole sur le caractère et les formes de la Coopération entre le CAEM et la Banque internationale de coopération économique, Z. M. KLEPACKI, *Organizacje międzynarodowe...*, p. 545 et le Protocole sur la Coopération entre le CAEM et la Banque internationale d'investissement, *ibid.*, p. 678.

[20] Z. M. KLEPACKI, *Podstawy prawne...*, p. 205.

[21] P. ex. A. B. ALTŠULER, *Sotrudničestvo socialističeskih gosudarstv (rasčoty, kredity, pravo)*, Moskva 1973, p. 80.

[22] P. A. TOKAREVA, *Učreždenie mežgosudarstvennyh èkonomičeskih organizacij stran členov SEV*, Moskva 1976, p. 57.

concernant les contacts directs entre le Secrétariat du CAEM et les organes exécutifs des unions économiques internationales. En 1974 et 1975, le Conseil a conclu des accords avec cinq unions de ce genre[23].

Les protocoles relatifs aux contacts directs entre le Secrétariat du CAEM et les organes exécutifs des unions économiques internationales, de même que les protocoles concernant le caractère et les formes de coopération entre le CAEM et les organisations économiques internationales créées par des Etats membres du Conseil prévoient double sorte de droits et obligations des parties: réciproques et unilatéraux.

Dans les rapports avec les unions économiques internationales le Conseil est représenté par le Secrétariat. Le Secrétariat du CAEM et les organes exécutifs des unions sont tenus d'entretenir des contacts de travail permanents en vue d'assurer une liaison étroite entre l'activité de ces unions et les travaux des organes correspondants du Conseil dans les questions d'intérêt commun pour les deux parties. Il a été souligné qu'il s'agit avant tout de questions liées à la mise en oeuvre de certaines initiatives du «Programme complexe». Les contacts mutuels doivent consister en échange de matériaux concernant les questions intéressant les deux parties et d'informations sur les résultats des réunions et des conférences auxquelles de telles questions ont été examinées ainsi qu'en échange d'informations sur les travaux envisagés. Les représentants d'une partie peuvent participer, sur invitation de l'autre, aux réunions et conférences de ses organes lors de l'examen des questions d'intérêt commun. Les deux parties sont engagées à prendre des mesures nécessaires pour assurer le caractère confidentiel des documents et informations qu'elles se communiquent et qui ne peuvent être publiés. Les organes responsables de l'entretien des contacts mutuels doivent communiquer pour examen aux organes de son organisation les matériaux et informations obtenus de l'autre partie qui suscitent la nécessité de prendre des décisions appropriées.

Aux droits unilatéraux du CAEM appartient la faculté de prendre des décisions et recommandations concernant le travail des unions économiques internationales. Les unions doivent tenir compte de ces décisions dans leurs activités.

On peut à ce propos mentionner un droit unilatéral du Conseil, bien qu'il ne résulte pas des accords en question, mais des conventions constitutives et des statuts des unions économiques internationales. Ils prévoient le droit du Conseil de recevoir de ces unions des rapports d'activité[24].

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[23] Le 31 décembre 1974 avec l'Intertekstilmasz, le 29 janvier 1975 avec l'Interatominstrument, le 1er avril 1975 avec l'Interatomenergo, le 29 avril 1975 avec l'Interhimwolokno, et le 30 avril avec l'Intermetalopribor.

[24] P. ex. l'art. 2 de l'Accord sur la création de l'Interatomenergo et l'art. 2 des Statuts de cette union. «Ekonomičeskoe Sotrudničestvo Stran Členov SEV», 1976, n° 2.

L'analyse des accords susmentionnés passés par le CAEM avec les organisations économiques internationales (avec les organisations économiques interétatiques et les unions économiques internationales) créées par des Etats membres du Conseil, fait aboutir à la conclusion que ces accords, servant de base légale à l'activité du Conseil en tant que tel, sont devenus en même temps la base légale de son activité en tant qu'organisation pilote dans le système des organisations économiques internationales des Etats socialistes. Mais il convient de ne pas oublier que la place du CAEM dans ce système a été définie par le «Programme complexe» et que la conclusion des accords en question a créé le cadre juridique du fonctionnement de ce système.

Les règles régissant l'édification et le fonctionnement de ce système ont été hautement appreciées par de nombreux auteurs. Z. M. Klepacki, par exemple, écrit que «la création d'un système de coopération et de coordination des activités des organisations socialistes économiques interétatiques a mis de l'ordre dans le fonctionnement du mécanisme compliqué de coopération multilatérale et d'intégration des Etats socialistes»[25]. Cet auteur estime par ailleurs que la formation du système en question a abouti à un resserrement de la coopération entre le CAEM et ces organisations ainsi qu'à un fonctionnement plus efficace de celles-ci[26].

Cette opinion, bien que représentative de toute la doctrine des Etats socialistes, semble trop optimiste. Le CAEM a cependant plus sévèrement jugé les règles de l'édification et du fonctionnement du système en question. Le document adopté en 1978 par la XXXIII^e Session du CAEM et intitulé «Les orientations fondamentales du perfectionnement de l'organisation de la coopération multilatérale des pays membres du CAEM et des activités du Conseil», constate que les organisations économiques internationales créées par les Etats membres du CAEM, et notamment les unions économiques formées ces dernières années, ne travaillent pas avec assez d'efficacité, et que leurs activités ne sont pas suffisamment liées à celles du Conseil[27].

L'adoption de ce document a amorcé une étape importante des activités du Conseil. Car bien qu'on ait constaté que le système organisationnel de la coopération multilatérale des Etats membres du Conseil garantit les conditions nécessaires au développement des liens économiques réciproquement avantageux, on a en même temps fait remarquer que l'analyse des formes et des méthodes de coopération des Etats membres du Conseil montre que plusieurs éléments de ce système exigent à être perfectionnés et conformés aux nouvelles tâches de la coopération à l'étape actuelle de son développement.

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[25] Z. M. KLEPACKI, *Organizacje międzynarodowe...*, p. 126.

[26] *Ibid.*

[27] *Osnovnye napravlenija dalnejšego Soveščenstvovanija organizacij mnogostronnego sotrudničestwa stran členov SEV i dejatel'nosti Soveta*, Sekretariat SEV, Moskva 1978.

Cela concerne également les rapports du Conseil avec les autres organisations économiques internationales des Etats membres du Conseil.

En adoptant comme point de départ les dispositions des «Orientations fondamentales», on a procédé à une modification poussée de ces rapports, à leur adaptation aux nouveaux besoins de la coopération. Les travaux y relatifs sont suffisamment avancés pour qu'il paraisse opportun de tenter de définir la place que le CAEM occupe actuellement dans le système des organisations économiques internationales.

III

De point de départ de l'analyse des rapports actuels entre le CAEM et les autres organisations économiques internationales des pays membres du Conseil doivent servir les dispositions des «Orientations fondamentales», et notamment celles qui apportent à ces rapports certains éléments nouveaux, définissent les nouveaux droits et devoirs du Conseil.

Le chapitre IV de ce programme du CAEM intitulé «La direction générale des activités des organisations économiques internationales par le CAEM et le relèvement de l'efficience de leur travail» peut être considéré comme un développement des dispositions du «Programme complexe». Ce développement consiste en ce que certaines règles prévues par ce document pour les relations entre le CAEM et les organisations économiques internationales (par example la coordination et la délimitation des compétences), ou certaines directives que les Etats devraient suivre en créant de nouvelles organisations de ce genre (p.ex. leur création liée à la réalisation du «Programme complexe» et l'insertion obligatoire dans les documents normatifs de ces organisations des dispositions fixant leurs rapports avec le CAEM), ont été étendues à toutes les organisations économiques internationales. D'autre part, les règles de la coordination des plans des organisations et de leurs activités ont été précisées davantage, et en même temps ont été définis les devoirs en cette matière des deux parties en présence (les organes du Conseil et les organisations économiques internationales).

Ce qui se laisse tout d'abord remarquer c'est le fait que dans les «Orientations fondamentales» a été accepté — pour la première fois d'une façon aussi expresse — le rôle pilote du CAEM dans le système des organisations économiques internationales des pays membres du Conseil. Il est en effet dit dans ce texte que le CAEM assume la direction générale des activités de ces organisations. Il convient de souligner que cette direction est exercée à l'égard aussi bien des organisations économiques interétatiques que des organisations économiques internationales. C'est une solution nouvelle car la situation de ces organisations dans leurs rapports avec le CAEM n'a pas été jusque-là identique.

Cette direction générale, confiée au CAEM, des organisations économiques internationales est liée à l'attribution de droits déterminés au Conseil et aux obligations déterminées qui lui sont imposées dans le domaine de ses relations avec ces organisations. Il a été arrêté que le Comité exécutif ou un organe sectoriel correspondant du Conseil — et dans certains cas le Comité du CAEM pour la coopération scientifique et technique — veillent aux activités des organisations économiques internationales et examinent périodiquement les rapports de leur activité et de l'orientation de leurs futurs travaux. Il convient de rappeler que les accords en vigueur au moment de l'adoption des «Orientations fondamentales» ne donnaient pas ces pouvoirs au Conseil. Seul le Protocole concernant le caractère et les formes de coopération avec «Interelektro» prévoyait que cette organisation informerait chaque année le Comité exécutif de ses activités. Des clauses semblables ont été insérées dans les conventions de fondation et les statuts des unions économiques internationales, mais elles n'ont pas trouvé de reflet dans les procès-verbaux des contacts directs entre le Secrétariat du CAEM et les organes exécutifs de ces unions.

Les «Orientations fondamentales» prévoient également que les organisations économiques internationales doivent être guidées par les décisions qui leur sont adressées par les Sessions, par le Comité exécutif du CAEM et par les autres documents normatifs adoptés au sein du Conseil. Elles doivent aussi tenir compte des recommandations d'autres organes du CAEM dès qu'elles concernent leurs activités. Cette disposition déroge sensiblement à celles adoptées jusque-là, prévoyant que les organisations économiques internationales doivent prendre des mesures pour qu'elles tiennent compte dans leurs activités des recommandations des organes du Conseil les concernant et qu'elles doivent informer les organes du CAEM des résultats de l'examen de leurs recommandations. Dans l'accord passé avec «Interelektro», seulement, il était prévu que cette organisation examinera non seulement les recommandations, mais aussi les décisions des organes du CAEM. Les accords avec les unions économiques internationales prévoyaient déjà plus tôt qu'elles devraient tenir compte dans leurs activités des recommandations et des décisions des organes du CAEM, prises dans les matières concernant le travail des unions.

Les dispositions précitées des «Orientations fondamentales» montrent que certaines décisions du CAEM, servant de fondement légal aux activités du Conseil lui-même, devraient servir également de base légale aux activités des organisations économiques internationales, créées par les Etats membres. Cela concerne en particulier précisément les «Orientations fondamentales»[28].

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[28] Pour ce qui est du caractère juridique de ce document, v. Z. SZANIAWSKI, W. FORYSIŃSKI, *Podstawowe kierunki doskonalenia współpracy krajów członkowskich RWPG* [*Les orientations fondamentales de l'amélioration de la coopération des pays membres du CAEM*], «Zeszyty Naukowe Instytutu Badania Prawa Sądowego», 1981, n° 14.

Cette conclusion se trouve confirmée par une analyse du «Rapport sur la réalisation pratique des Orientations fondamentales», notamment dans la partie concernant la direction des activités des organisations économiques internationales et l'accroissement d'efficience de leur travail[29]. Ce rapport, préparé sur ordre du Comite exécutif a été examiné à la XXXIV^e Session du CAEM en juin 1980. Il résulte de ce rapport qu'avant même la conclusion avec le Conseil de nouveaux accords, les organisations économiques internationales avaient procédé à l'application des «Orientations foundamentales». L'example en peut être la communication par les organisations aux organes sectoriels du Conseil et au Comité exécutif du CAEM des rapports et des informations sur leurs activités. En 1979, le Comité exécutif par exemple a examiné les rapports et informations communiqués par les organisations économiques internationales: le Dispatching central des systèmes energétiques unis, «Intermetal» et «Agromasz» ainsi que par l'union économique internationale «Interatominstrument».

Le rapport informe élagement que, quidées par les dispositions des «Orientations fondamentales», toutes les organisations économiques ont procédé avec l'aide des organes du CAEM, à une analyse de leurs activités et pris des mesures concrètes en vue de perfectionner et d'accroître leur efficience.

Il convient également de faire remarquer que, comme il résulte du rapport, en vue de concentrer les efforts des organes du Conseil et des organisations économiques internationales sur la préparation et la réalisation en commun des entreprises productives, scientifiques et techniques, la majorité des organisations économiques interétatiques et toutes les unions économiques internationales participent à la mise en oeuvre du «Programme complexe» et des programmes de coopération pluriannuels dans les domaines déterminés[30]. Le rapport énumère les tâches concrètes des différentes organisations entreprises en relation avec la réalisation de ces documents.

L'adoption des «Orientations fondamentales» a donné un coup de départ au processus de la transformation des rapports du CAEM avec les autres organisations créées par les Etats membres du Conseil. Ce processus a trouvé son reflet dans les amendements aux Statuts du CAEM adoptés par la XXXIII^e Session du Conseil en 1979. Parmi les dispositions que l'on avait alors décidé d'insérer aux Statuts il y avait également celle concernant les rapports du Conseil avec les autres organisations internationales

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[29] *Doklad o praktičeskoj realizacii osnovnyh naprawlenij... osobenno v časti obespečenija rukovodstva dejatel'nost'ju meždunarodnyh èkonomičeskih organizacij i povyšenija effektivnosti ih raboty*, Sekretariat SEV, Moskva 1980.

[30] Pour ce qui est des programmes pluriannuels de coopération dans des domaines déterminés, v. entre autres J. KOWALEWSKI, *Wieloletnie programy współpracy* [*Les programmes pluriannuels de coopération*], «Sprawy Międzynarodowe», 1978, n° 9.

créées par les pays membres du Conseil. Nous en avons parlé au début de cet article; ajoutons encore qu'elle traduit les tendances qui se sont dessinées dans les «Orientations fondamentales».

Attirons ici l'attention sur une intéressante régularité. L'adoption par une session du Conseil d'un document-programme — le «Programme complexe» et les «Orientations fondamentales» en sont un certainement — a toujours entraîné la nécessité d'amender les Statuts du Conseil et de beaucoup d'autres documents, y compris bien entendu des accords que le CAEM avait passés avec les autres organisations internationales créées par les Etats membres du Conseil. Tant après l'adoption du «Programme complexe» que des «Orientations fondamentales», le Conseil a conclu de nouveaux accords ou modifié ceux déjà existants. Les documents-programmes ne se substituent pas évidemment à ces accords, mais permettent de prévoir les changements qui y seront apportés.

Dans le «Rapport sur la réalisation pratique», que nous avons mentionné ci-dessus, il est dit qu'en développant les dispositions des «Orientations fondamentales» concernant la direction générale exercée par le CAEM sur les activités des organisations économiques internationales des Etats membres du Conseil, le Comité exécutif a approuvé les projets de nouveaux protocoles sur le caractère et les formes de coopération entre le CAEM d'un côté et «Intermetal» et la Banque internationale d'investissement de l'autre, et que l'on a élaboré le projet d'un protocole modèle sur les contacts directs entre le Secrétariat du CAEM et les organes exécutifs des unions économiques internationales.

En 1980, le Conseil a conclu de nouveaux accords avec le Centre international d'Information scientifique et technique, l'Organisation de coopération de l'industrie des roulements à billes, «Agromasz» et le Parc collectif des wagons. D'autre part, le Conseil a noué des rapports conventionnels avec le Conseil d'exploitation collective des conteneurs dans les transports internationaux, qui en vertu de cet accord est devenue la dixième organisation spécialisée du CAEM [31].

Les protocoles sur le caractère et les formes de la coopération, passés par le CAEM avec ces organisations économiques interétatiques prévoient qu'elles resteront liées par des rapports conventionnels avec le Conseil en tant que ses organisations spécialisées. Leurs activités seront coordonnées avec celle du CAEM dans les domaines définis par les protocoles, et avant tout dans les matières liées à la réalisation de entreprises prévues par le «Programme complexe» et par les programmes pluriannuels de coopération dans des domaines déterminés. Par ailleurs, ces organisations

[31] Ces accords ont été publiés dans *Mnogostoronnee èkonomičeskoe sotrudničestvo socialističeskih gosudarstv*, sous la dir. de P. A. Tokareva, Moskva 1981.

devront exercer leurs propres activités sur la base de leurs actes de fondation et d'autres documents normatifs.

Dans leurs activités, les organisations spécialisées doivent être guidées par les décisions les concernant des Sessions et du Comité exécutif du CAEM et aussi par d'autres documents normatifs ou méthodiques adoptés au sein du CAEM. Elles doivent aussi tenir compte des décisions les concernant des autres organes du CAEM, prises sur les questions liées à leurs activités, définir les mesures tendant à l'exécution de ces décisions et en informer les organes du Conseil. Les organes compétents du CAEM doivent à leur tour examiner les questions qui leur sont soumises par les organisations spécialisées et informer des résultats de leur examen.

Du côté du CAEM les contacts avec les organisations parties aux accords signés doivent être entretenus par le Secrétariat du Conseil et une commission permanente dont le profil correspond à celui d'activités de l'organisation donnée. Exceptionnellement, l'entretien des rapports avec le Centre international d'information scientifique et technique sera assuré non pas par une commission permanente, mais par le Comité du CAEM pour la Coopération scientifique et technique.

Les protocoles prévoient que les organisations doivent prendre des mesures garantissant la coordination des plans de travail des organisations spécialisées avec ceux des organes compétents du CAEM. A cet effet, les organes des deux parties doivent échanger, suivant une procédure fixée d'avance, les projets de leurs plans de travail, assurer leur liaison et concerter l'étude en commun de certains problèmes. En préparant les matériaux concernant les problèmes d'intérêt commun et exigeant une étude commune, elles doivent aussi avoir entre elles des contacts nécessaires. Elles doivent également échanger des procès-verbaux ou leurs extraits des réunions et des conférences ayant pour object des problèmes d'intérêt commun, et aussi, en vertu d'une entente bilatérale, d'autres matériaux destinés aux réunions et conférences auxquelles sont invités les représentants des organes de l'autre partie.

Les organes d'une partie ont également le droit de soumettre aux délibérations des organes de l'autre partie leurs propositions, la participation des représentants des deux organisations à ces délibérations étant assurée.

Les organisations spécialisées sont engagées à soumette annuellement aux commissions du Conseil qui coopèrent avec elles des rapports sur leurs activités et les orientations des futurs travaux.

Dans des cas justifiés, il est possible d'instituer des groupes temporaires de travail pour l'étude et l'élaboration des problèmes intéressant les deux parties. D'autre part a été réglée la question de la participation d'une partie aux travaux des organes de l'autre. Il a été arrêté que dans certains cas les spécialistes des organisations spécialisées peuvent être utilisés dans l'élaboration par les organes représentatifs du CAEM ou le Secrétariat du Conseil des questions liées à l'activité de leur organisation. Les organes compétents des deux parties peuvent se proposer mutuellement la participation de leurs représentants aux réunions et conférences organisées par l'autre partie et consacrées aux problèmes d'intérêt commun.

Les organisations sont tenues de garder secrètes les pièces et informations échangées qui ne sont pas destinées a être publiées.

L'analyse des protocoles passés par le CAEM au début des années 1980 mène à la conclusion que, tout comme les protocoles antérieurement en vigueur, ils contiennent deux sortes de dispositions: celles prévoyant des droits et obligations des parties et celles prévoyant des droits unilatéraux du CAEM et des obligations correspondantes des organisations spécialisées.

Pour déterminer la place que le CAEM occupe actuellement dans le système des organisations économiques internationales créées par les Etats membres du Conseil, il est intéressant d'analyser ces clauses qui prévoient des droits et obligations du CAEM à caractère unilatéral. L'on peut y voir seulement une concrétisation des dispositions des «Orientations fondamentales» et du nouvel article XII des Statuts du Conseil. Leur insertion dans les protocoles sur le caractère et les formes de la coopération a fait que la position du CAEM dans ses rapports avec ses organisations spécialisées a été sensiblement renforcée par rapport à la période précédente.

Le nouvel accord avec la Banque internationale d'investissement confirme, lui, l'opinion déjà exprimée que cette organisation ne peut pas être classée dans les organisations spécialisées du CAEM. Les rapports entre le CAEM et la Banque sont fondés dans une grande mesure sur la réciprocité, et la Banque est tenue seulement de tenir compte dans son activité des recommandations des organes du CAEM qui concernent les questions d'intérêt commun. En comparant les obligations de la Banque avec celles des organisations spécialisées, on peut constater que la Banque est restée une organisation internationale autonome, tandis que l'autonomie des organisations spécialisées a été limitée.

En terminant on peut constater que le CAEM occupe une place centrale dans le système des organisations économiques internationales créées par les Etats socialistes. Les rapports du Conseil avec ces organisations dont le cadre juridique formel est constitué par les accords passés avec elles sont toutefois sérieusement diversifiés. Pratiquement seuls ont le caractère des rapports à part entière les rapports avec ces organisations économiques interétatiques dont font partie, outre les pays membres du Conseil, d'autres pays socialistes également. La place centrale du CAEM parmi ces organisations résulte de la comparaison de leurs compétences plutôt que des accords de coopération.

Deux banques internationales créées par les Etats membres du CAEM sont plus étroitement liées au Conseil. Le CAEM non seulement coopère avec elles, mais encore peut exercer une certaine influence sur leurs activités. Elles restent toutefois des organisations internationales autonomes.

L'analyse des rapports du Conseil avec ses organisations spécialisées mène à la conclusion que l'autonomie de celles-ci est très sérieusement limitée. Le CAEM possède à leur égard des pouvoirs impératifs, exerce une direction générale de leurs activités. Il convient de faire remarquer que ni l'Organisation des Nations Unies ni l'Organisation des Etats Américains ne jouent un tel rôle à l'égard de leurs agences spécialisées, bien qu'elles coordonnent leurs activités et examinent leurs rapports.

Un autre groupe d'organisations avec lesquelles le CAEM entretient d'étroits rapports comprend les unions économiques internationales. Les dispositions des «Orientations fondamentales» arrêtent que le Conseil doit assumer une direction générale de ces organisations également.

La position du CAEM dans les rapports avec les différentes organisations économiques internationales des Etats socialistes n'est donc pas la même dans tous les cas et pour la définir il faut tenir compte non seulement des accords passés entre le CAEM et les organisations, mais aussi des dispositions des Statuts du Conseil et des décisions-programmes du CAEM ainsi que des traits spécifiques de chacune de ces organisations.

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International Civil-Law Conventions: Some Questions of Application and Interpretation

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I. The Internationalization of Civil Law

The importance of international conventions as a source of the civil law has only recently been noticed in the Polish jurisprudence. This statement may be proved by the fact that in the basic textbook on the general part of civil law by A. Wolter,[1] where sources of the civil law are enumerated, international conventions are not mentioned among these sources. The same disregard of international conventions has been shown by other authors of textbooks on civil law (e. g. Radwański, Szer, Wiszniewski). On the other hand, in the *System of Civil Law* (vol. 1) by S. Grzybowski the international conventions have been mentioned among other sources of the civil law, ranking after the statutes.[2] Since it would be difficult to assume that this controversy concerning the question of a fundamental significance may be due to an oversight, it should be ascribed to the difference of views concerning the role and significance of international conventions (and other international acts) as instruments governing the civil-law relationships, as well as their place in the systematization of law. Such differences of views may be found not only in the Polish jurisprudence. They are consequent on a progressive internationalization of various fields of law (not only of the civil law) causing problems to scholars accustomed to deal with traditional classifications.

A uniform regulation of civil-law relationships introduced by international conventions dates from the second half of the 19th century; the Paris Convention of 1883 on the protection of industrial property is generally

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[1] A. WOLTER, *Prawo cywilne — zarys części ogólnej [Civil Law — Outline of General Part]*, Warszawa 1977, p. 53—79.

[2] S. GRZYBOWSKI, *System prawa cywilnego* [*System of Civil Law*], vol. 1, Warszawa 1974, p. 51.

mentioned as the first international treaty which introduced such a regulation.[3] Later on, uniform regulations have been introduced by international conventions in various branches of transport (railway, maritime, air, road, multimodal),[4] bills of exchange and cheques[5] or international sale of goods.[6] Apart from international conventions in the field of the substantive civil law, a number of conventions in other fields closely connected with the civil law have been accepted. In particular conventions on the private international law [the Hague conventions), on the civil procedure and arbitration may be mentioned. These conventions require periodical revisions and adaptation to the changing social and economic relationships. Some tens of inter-governmental and non-governmental organizations are concerned with drafting of the relevant texts; the institutional system of international co-operation is being expanded and its methods of work improved.

Uniform rules introduced by the international conventions may be found in various fields of law. Considerable progress has been achieved in the administrative law (international traffic, communications, etc.) and in the labour law. As far as the civil law is concerned the internationalization is intensive in these parts of the civil law which govern the international economic relationships; the uniform law facilitates the concluding and performing of international transactions. It is much less intensive in such fields as the law of property or family law — with exception of regulations in force in some strongly integrating regions (e.g. the Nordic countries) where — apart from conventions — also other methods are applied to obtain the unification of laws.

The growth of the international legislation demonstrated by the increasing number of international rules governing the gradually extending spheres of social relationships is an indication of the strengthening of international communities which create these rules. This process, which is more extensive within certain regions or integrating groups of countries than on the world's scale, conforms with general laws of growth of the humanity. It means that we are passing to a higher level of organization of the international community and the future of mankind may depend on the way in which this process will develop. If it is not broken or hampered we may reckon with a further expansion of the international legislation,

[3] J. JAKUBOWSKI, *Prawo jednolite w międzynarodowym obrocie gospodarczym* [*Uniform Law in International Intercourse*], Warszawa 1972, p. 11 ff.

[4] Berne railway conventions CIM and CIV, several civil-law conventions concerning maritime shipping, the Warsaw Air Convention with amendments, the Geneva Convention on the road transport of goods (CMR) etc.

[5] The Geneva conventions concerning bills of exchange and cheques (1930—1931).

[6] The Hague conventions of 1964, the UN conventions of 1974 and 1980 concerning the international sale of goods.

which will exercise a growing influence on the internal legal order of countries participating in this process. The international rules exercise their regulatory functions within the framework of the legal order of these countries, besides the norms of a purely domestic origin; this may create certain problems for both the theory and practice. The rules of international conventions are not created by a domestic legislator — even after their transformation into the law — but by the diplomatic conference of governments, i.e. by an "international legislator". Their aim is not to protect the interests of the ruling class in the given country, but they express a compromise achieved on the international level by States having various socio-economic systems, which responds to the needs of the international community.

It seems that these very general remarks concerning the much discussed (esp. in the West-European and American literature) problem of the "common law of mankind" or "world's law"[7] have been indispensable before touching the basic topic of this article, i.e. the international conventions governing the civil-law relationships and their functions — i.e. the problem of the internationalization of the civil law. Actually this "internationalization" concerns only a marginal part of the Polish civil law, and namely rules of essential importance for international relationships (patent and copyright law, bills of exchange and cheques, transport law). Nevertheless, looking at the problem in a time perspective, we must expect a further progress of this internationalization (a progressive codification of the international trade law is in the programme of work of the UNCITRAL). There are no indications that the progressive development of the international legislation could be stopped, although its importance for each particular country may depend on this country's level of economic and cultural exchanges with abroad. The changes in quantity bring about changes in quality. Not only an article of the convention introducing a civil-law norm but also an article of the domestic law incorporating the conventional rule may be considered — in the field of civil law — as a new legal phenomenon which requires an appropriate treatment.

There is also another argument justifying the necessity to consider this problem in its wider sense — not only by applying the historical approach, but also by considering its universal aspect. The unification of law is a process on the world's scale, causing problems and reactions in different countries participating therein; in our research concerning this problem we have to refer to the comparative law.

[7] C. W. JENKS, *The Common Law of Mankind*, London 1958; P. C. JESSUP, *Transnational Law*, New Haven—London 1956; E. LANGEN, *Transnational Commercial Law*, Leiden 1973.

II. The International Legislation Concerning the Civil-Law Relationships: Some Questions of Classification

When considering the problem of international conventions it seems to be necessary to consider also where the rules determined by these legal instruments belong, and in particular whether they form part of the internal law (civil or commercial) or of the international law. In respect of the international trade law this question was examined by J. Jakubowski who considered three different solutions: to treat it as a part of the internal legal order, as a part of the international law, or finally — to treat it as a distinct system of norms. In the conclusion of these considerations the learned author was inclined to treat the civil-law norms unified on the international 'scale as a part of the international law.[8] In this view he was guided by the criterion of the source of law, assuming that every norm created on the international level belongs to the international law. At the same time he postulated a differentiation of the international law having regard to the difference of subjects to whom the norms of the international law are applicable, and to the differing nature of these norms. This view, shared also by other international jurists, has led to the putting in one bag of everything which may be described as "international", and has exercised a certain influence on the division of fields of the legal research and education. A subject called "International law and international relationships" has been introduced into the programme of the legal studies in Poland. It has covered not only the public international law but also the uniform law (applicable not only to sovereign States but mostly to individuals or corporate bodies), and even the private international law.

Taking into consideration the progressive internationalization of various branches of law it may seem that any classification by which all norms of an international origin and all norms concerning relationships containing an international element are to be treated as one distinct subject — for the purpose of research and in the educational programmes — may have negative effects. From the international jurists it would require a high degree of knowledge of all these fields of law which are subject to a progressive internationalization; this would be unrealistic since we may observe an entirely opposite trend — specialization in some narrow fields of law concerning specific relationships. As far as the uniform law is concerned the international jurists restrict generally their interest to certain questions connected with the creation of this law and the binding effect there-of — which opents the way for the discussion of questions as transformation, incorporation, reception or "presentation", but seldom are interested in the

[8] J. JAKUBOWSKI, *op. cit.*, p. 44.

contents of these norms. On the other hand, jurists who specialize in these fields of law which undergo the internationalization may feel to be relieved, especially in their teacher's duties, from the obligation to consider the norms of an international origin, although these norms, together with the norms of the domestic law, govern certain fields of relationships.

It has also been proposed to consider the civil-law conventions as belonging to the private international law because of links with the international relationships, which are common to them; consequently certain problems created by the uniform law are considered in the textbooks on the private international law. This may be substantiated because the uniform law, similarly as the private international law, has to solve (or eliminate) conflicts of legal systems. But even in that case the interest of jurists specializing in the conflicts law is restricted to some general questions connected with the application of the uniform law (its functions, relation to the conflicts law, rules of construction) but does not cover the analysis of its substantive norms. On the other hand, jurists who specialize in some narrow fields of law (often having a complex nature) which are strongly internationalized (air or maritime law) consider international conventions as an important source of substantive law and undertake research and analysis of their rules. It follows therefrom that these conventions are the matter of common interest for jurists specializing in the civil law (or its subdivisions), the private international law and even the public international law.

It may seem that the dichotomy of the internal and international law (if the latter is understood as the law governing the interstate relationships) has become inadequate in the period of progressing internationalization of social relationships. The traditional divisions are too schematic and of little usefulness not only in that case. In the era of progressing complexity of these relationships, which process is reflected in the sphere of law, some very coherent sets of rules are being formed which escape the traditional classifications. Discussions concerning the economic law and its place in the system of law may serve as a good example thereof. The solution of the question classification of the civil-law norms of international conventions cannot be found in an unacceptable extension of the notion of international law, encompassing every norm created "on the international level". Such a notion of international law would include not only the civil-law norms of international conventions, but also a variety of rules relating to the civil-law relationships which are created by the resolutions of international organizations, both intergovernmental (e.g. General Conditions of the CMEA) and non-governmental (rules of the International Chamber of Commerce) as well as international commercial customs, which rules are generally considered in the texbooks on civil, economic or commercial law.

International conventions in the field of the civil law are regulations which find no place in the traditional dichotomy of the internal and international law. They are created by agreements reached among States and as such they belong to the international law. On the other hand, they contain rules governing the civil-law relationships of non-sovereign subjects, which rules — following certain acts undertaken by a contracting State in accordance with its legal system — become parts of its internal legal order and as such constitute a source of its civil law. As a rule in the same convention we find norms of the international law which determine the obligations of the State to introduce certain regulations by exercising its sovereign powers, and these particular civil-law regulations which — as soon as the State has fulfilled its international obligation — create certain rights and obligations for persons or bodies indicated in these regulations, and are applied by State organs, in particular by courts. In some earlier conventions rules belonging to different legal orders (internal, international) have even not been clearly distinguished in the outlay of the convention. In the modern conventions this distinction is quite often clearly made: uniform rules applicable to non-sovereign subjects are contained in the appendices to the proper convention, which determines the international obligations of States.

It has already been mentioned that to consider such legal instruments as belonging to the international law because of their origin may not be helpful in developing the research concerning their role and functions, the analysis of their contents as well as problems of their application and construction. While the importance of such uniform rules increases — in the relations incident to the international transport the provisions of the international conventions have already a wider application than the provisions of domestic laws — we are getting aware that we need a proper approach to this, in a certain sense, new phenomenon in the civil law. In the field of relationships covered by the uniform international regulation the law-making process has now two phases. The provisions are prepared and accepted by way of an agreement of States reached on the international level, but they become effective in respect of each particular State on the strength of an internal act of that State. Thus the role of the domestic legislator becomes very restricted, in particular in these legal systems (as the Polish one) where a civil-law convention, after having been ratified and officially published, is effective *proprio vigore*, without necessity to enact a law incorporating the convention. The main tasks of the legislator — the working out of principles and legislative solutions — are the concern of the "international legislator"; of course the fact that the domestic legislator is relieved from this burden does not justify its complete inactivity.

It follows therefrom that in respect of the uniform civil-law norms under consideration we may observe a two-level law-making process marked by a dualism of legislators and of legal instruments (international, internal) as necessary to provide an effectively binding legislation.[9]

III. The Aims of the Civil-Law International Conventions and the Practice of States: from the "Nationalization" of the Uniform Law to the Internationalization of the Domestic Legal Systems

With regard to the appreciation of the basic aims of international civil-law conventions we may observe a revision of views prevailing in the international doctrine, which has caused changes in the legislative practice of States and in the court practice. Here also a historical approach may be instructive. As we know the first attempts to unify the rules of the civil law incident to international transactions were undertaken in the second half of the 19th century. In that period national codifications of the civil and commercial law were developed. In the international trade, where the necessity of uniform regulations was most strongly felt, the rules of these codifications eliminated or at least restricted the application of the customary *lex mercatoria* which had brought about a certain degree of international uniformity. Countries of the common law system have presented a noteworthy exception. In these countries courts have still referred to the rules of the "law merchant", while at the same time their national legal systems based on judicial precedents have been built up. Although the national codifications were inspired by the rules of the *lex mercatoria,* the legislators were also guided by the national interests of particular countries; in consequence thereof differences which had existed in the customary law were deepened and petrified. Conflicts of national legal systems became apparent and proper methods had to be found to solve these conflicts. The basic method applied consisted in referring to the norms of the private international law, which would indicate the proper national legal system. In the same period many countries introduced statutory enactments on the private international law, attempts were undertaken to unify its norms, and the theory of this branch of law was developed.

The method of solving the conflicts between national legal systems by referring to the norms of the private international law has not lost its

[9] This particular nature of the civil-law conventions was indicated, among others, by Battifol; he stated that while the making of these conventions presents problems belonging to the public international law and partly to the constitutional law, questions relating to their application belong to the private law, since the conventions are applied by the courts together with other private-law enactments, H. BATIFFOL, *Traité élémentaire de droit international privé,* Paris 1949, p. 35.

importance up to the present days. Nevertheless it has its weaknesses from the point of view of safety of international transactions, which aspect is of considerable importance in the international economic relationships. The conflicts law applied by courts is still not uniform — after nearly 100 years of work of the Hague Conference of the Private International Law the attempts to unify it still meet with serious obstacles. Thus in the international cases doubts arise which law may be applied by the court or arbitrators as the proper law of the case. This uncertainty is increased by a common lack of experience of courts and arbitrators in the application of the conflicts law. In the contractual relationships this uncertainty may in a considerable degree be eliminated if the parties to the contract agree on the proper law of the contract and their choice of law is legally effective. But even the parties' choice of the proper law does not eliminate difficulties and delays connected with the application by the court of the foreign law — finding its contents, proper interpretation of its norms, applying the public order clause etc. For these reasons, besides the work concerning the unification of conflicts norms, work has been undertaken to obtain the unification of norms of the substantive law and the international convention has become a basic instrument of the unification.

The aim of an international convention in the field of the civil law is to bring about the uniformity of rules relating to certain relationships or situations on the international level. On the level of national legal systems this aim may, however, be given effect in different ways; either by treating the provisions of a convention as a uniform legal regime governing relationships covered by this convention, or by unifying the rules of national laws through the introduction of provisions in harmony with the convention. This double role which may be played by a convention follows from the different approach taken by the national legal systems of States participating in the international unification of law to the instruments of the international legislation,[10] which is a problem of the constitutional law of these States. This difference of approach has been reflected both in the descriptions of international conventions as in the contents of their final clauses, which determine the way in which the contracting States may make the convention effective.

At the time when work on the international civil-law conventions was commenced (and for many years since that time) national legal systems were much more closed than it is now, when various fields of social relationships undergo a progressive internationalization. Thus where a conflicts norm

[10] Comp. J. HONNOLD, *The Reconciliation of International and National Codifications of International Trade Law*, in: *International Economic and Trade Law* (eds C. M. Schmitthoff and K. R. Simmonds), Leyden 1976, p. 81.

indicated a particular system of national law, this system only was applicable to a given relationship or situation. It was assumed that the role of an international convention was to make the rules of the national laws (to be applied in comformity with the conflicts rules) uniform, but not to create a distinct legal regime which would eliminate the necessity to refer to conflict rules. In Great Britain up to now the courts do not apply the provisions of the ratified conventions but apply internal acts incorporating these provisions.[11] Sometimes the entrance into force of such an act may be suspended up to the moment, when the convention enters into force in the international relationships, which may depend on the fulfilment of certain conditions.[12] In the Nordic countries and in the Federal Republic of Germany conventions become parts of the internal legal order on the strength of incorporating laws. On the other hand, the French and Italian courts, when deciding on an international case covered by a ratified convention, apply directly the convention and in cases not covered by the convention — their domestic or foreign law in accordance with the conflicts norm. Poland belongs to this latter group of States. The constitutional principle according to which a ratified and properly promulgated convention is binding *proprio vigore* has been confirmed by court decisions applying directly the provisions of the ratified conventions.

The way in which the international obligation of a contracting State may be performed is often determined by the provisions contained in the protocol of signature of the convention. In the protocols of signature of some maritime law conventions it has been provided that the contracting State may reserve itself the right to give effect to the convention either by giving its provisions the force of law or by introducing its provisions into the domestic legislation.[13] Some countries applying incorporating laws have made use of this right and have amended only their domestic laws by making the provisions of these laws conforming — not always exactly — to the rules of the conventions. Article 17 of the Paris Convention on the protection of industrial property provides that the Convention may be given effect by bringing the internal legislation in conformity with the Convention. The protocols of signature of the Geneva conventions of the

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[11] K. R. SIMMONDS, *The Interpretation of the Hamburg Convention*; a note on Article 3, in: *The Hamburg Rules on the Carriage of Goods by Sea* (ed. S. Mankabady), Leyden—Boston 1978, p. 121; any convention affecting private rights or liabilities becomes part of the English law only after the enactment of a relevant statute by the Parliament.

[12] E.g. the British Carriage of Goods by Sea Act, 1971 which entered into force only in 1977, simultaneously with the entering into force of amendments to the international convention, which amendments were introduced into the British law by this Act.

[13] The protocols of signature of the Brussels Convention of 1924 concerning the limitation of liability of owners of sea-going vessels.

conflicts of laws in the matter of bills of exchange (1930) and cheques (1931) provide that the contracting States shall exchange information on the laws enacted for the purpose of giving effect to the convention (point "c").

Seemingly these two methods of performing the international obligation by the contracting State give an identical result. This view probably prevailed when protocols of conventions admitting alternative methods of giving effect were signed. The method consisting in bringing the domestic legislation in conformity with the provisions of the convention has an advantage of simplicity. Instead of creating two legal regimes — regime of the convention and that of the domestic law — the courts of a State, in which the convention has been given effect by an appropriate reform of the domestic law, apply only the latter, provided that it is the proper law of the case in accordance with the conflicts law. But the simplicity of this method has caused difficulties in the achievement of the basic aim of a civil-law convention, which is the introduction of a fully uniform regulation for a determined sphere of relationships. Especially where the amendment of the domestic legislation has not been made by way of an enactment incorporating the full text of the relevant provisions of the convention, but by amending the legal provisions in force to assimilate them to the rules of the convention, departures from the text of the convention are quite often. They may just follow from difficulties to translate the authentic text of the convention into the language of the state which intends to introduce the rules of the convention into its domestic legislation. By using this method the international convention performs only the role of an instrument providing an assimilation of internal legal systems, without assuring a full uniformity of regulation.

On the other hand, in the legal systems of States in which the provisions of ratified conventions are binding *proprio vigore* the dualism of legal regimes may give rise to certain problems (delimitation, priorities), but the possibility to refer directly to the convention, and in particular to its authentic text, secures better the uniformity in the application of the international rules.

An analysis of the final clauses of international civil-law conventions and of the practice of States in which conventions are given effect by way of enactments incorporating their rules, indicates a growing conviction that the role of the convention cannot be restricted to the assimilation of domestic legal systems. In the titles of international conventions the formula indicating that the aim of the convention is the "unification of rules" concerning certain matters[14] is no more in use. Also options given to

[14] In a numerous group of the civil-law conventions presented by the Brussels conventions of maritime law this formula was used in the descriptions of the conventions up to sixties,

States as to the method of giving effect to the convention have now been removed from the final clauses even in these conventions which are to substitute the earlier ones in which such options were reserved for the contracting States.[15]

A change may also be noticed in the practice of States in which the constitutional law requires special enactments in order to give to the provisions of a civil-law convention the binding force in their internal legal order. Instead of enacting laws based on conventions or amending the existing laws, the enactments incorporate now the full texts of conventions; in this way differences between conventional and statutory rules may be avoided. This practice has brought about an assimilation of the two methods of giving effect to a convention and indicates a change of approach of these States to the instruments of international legislation. Instead of "nationalizing" the rules of the convention by building them into the internal legal order, we witness an internationalization of the domestic legal systems.[16] This change of practice has had already certain consequences in the application and interpretation of the incorporated rules. Some traditional concepts concerning the forms of the domestic legislation may be revised. The enactment of codes containing rules governing certain fields of relationships which undergo a progressive internationalization (shipping, commerce) may not be feasible. The internal coherence and stability, which are characteristic features of the codified legal systems,

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and then it was abandoned. While the air transport conventions (Warsaw 1929, Guadalajara 1961) concern the "unification of rules" other European transport conventions, such as Berne railway conventions or the CMR Convention do not contain any more this formula either in the description or in the introductory provisions. The same may be said of the civil-law conventions accepted under the auspices of the United Nations or its specialized organizations.

[15] The UN Convention on the Carriage of Goods by Sea of 1978 has imposed on the contracting states an obligation to apply its provisions to contracts of carriage covered by the Convention (Art. 30.3) not permitting any reservations. This presents a considerable difference if compared with the earlier Brussels Convention of 1924 on bills of leading.

[16] Some essential changes in the ways in which the civil-law conventions are made effective have been reported from the Nordic countries, where traditionally the conventions have been "transformed" into domestic laws, in which terms and expressions appropriate to national legal systems have been used. However, this practice has not been common; in Sweden some conventions have been made effective without transforming their contents (e.g. the railway CMI Convention). In this connection a statement of the Swedish Minister of Justice contained in a official declaration has been cited (K. PINEUS, *Le droit maritime suédois*, Göteborg 1971, pp. 17—19). He stated that in connection with a growing number of conventions accepted by Sweden the traditional method was no more adequate, and that the progressing international co-operation in the field of law would require a greater formal conformity of various national legal systems. This indicates a clear turn towards the internationalization of national legal systems.

are weakened through the introduction of legal concepts or notions accepted as result of compromises achieved on the international level as well as through often occurring changes of the international regulations. Consequently in a number of countries having codified systems of the commercial or maritime law, more and more matters are governed by special laws. In France its famous and influential codification of maritime law (*II Book of the Commercial Code*) has now been practically substituted by distinct laws covering main fields of maritime law.

In spite of this assimilation of methods applied to give effect to the provisions of the civil-law conventions, differences following from the application of these methods remain essential. Provisions of a convention which is binding *proprio vigore* have — within the scope of relationships covered by the convention — priority over the provisions of the domestic law (statutory or customary) as long as the convention remains binding as an instrument of the international law. If, however, the binding force to its provisions has been given by a statute, questions of priority are governed by general rules such as *lex posterior derogat priori.*[17]

In the legal systems of these free-market countries, where the dualism of legal regimes is accepted, efforts are made to avoid differences between the internal and international legislation, assuming that in respect of certain fields of relationships both aims of the convention should be achieved: creation of a uniform legal regime for international relationships and unification of domestic laws. This is generally postulated for the transport law. In Poland, differences between these regimes are essential and even increasing because the ratification of international conventions is not followed by appropriate amendments of the domestic legislation. In some cases such differences may even be substantiated by socio-economic reasons: it would require, however, an objective analysis in every case. In most cases the differences may be ascribed to a protracted legislative action.

IV. The Uniform Substantive Law and the Conflicts Law

The uniform substantive regulation of the civil-law relationships and the conflicts law may be considered as two different methods serving the same general aim, i.e. the elimination of conflicts between legal systems in case of relationships containing an "external" or "international" element. Question may arise whether these methods exclude each other or whether they cooperate in the achievement of this aim. A full presentation of this problem would exceed the scope of this article but it should be mentioned

[17] R. K. SIMMONDS, *op. cit.*, p. 121.

that the previously indicated double role of the civil-law convention must be taken into consideration when we try to find answer to this question.

Fr. Rigaux in the introduction to the collective work on the international economic contract[18] expressed the view that it would be illusory to accept that the uniform law could eliminate the conflicts law and that the freedom of choice of law, which is the basic rule of the conflicts law, is a "higer order" rule in relation to the uniform law. Although this latter view was expressed in connection with the application of the Uniform Hague Law of 1964 concerning the international sale, which Law in its Article 3 clearly admits the possibility to exclude its application by the parties to contract of sale, certain generalizations contained in its formulation indicate a definite concept of relationship existing between the uniform law and the conflicts law. It is fully logical provided that we consider that the role of an international convention is restricted to the unification of rules belonging to the legal systems of various States. Even if we assume that the provisions of laws of various States after the unification have an identical wording, legal norms expressed by these provisions may not have an identical meaning since the rules of the convention, after having been built into various legal systems, are subjected to the rules of construction appropriate to these systems. Thus the conflict of legal systems may be weakened but not eliminated and the conflicts law preserve its importance.

The problem may look different if we consider that the provisions of the convention present a distinct international regime directly applicable to the relationships covered by the convention. It would follow from this assumption that in respect of these relationships the rules of the international regime should apply with exclusion of the application of the conflicts law, including the rule on the choice of law. The proper law of the case indicated by the conflicts norm would be applicable only to questions not covered by the convention. But where the provisions of an international convention concerning contracts are *ius dispositivum*, parties to a contract will be allowed to exclude the application of these provisions. This may also be achieved by incorporating into the contract the provisions of a determined domestic legislation. Such an exclusion would be based, however, on the substantive rule of freedom of contract but not on the conflicts law rule on the choice of law. This view, which may be open to discussion, is based on an assumption quite opposite to that accepted by Fr. Rigaux: superiority of the uniform law as a method of regulation of the civil-law international relationships in relation to the conflicts law.

A certain illustration of the problem may be the case in which the

[18] *Le contrat économique international — stabilité et évolution. Travaux des VIIès Journées d'études juridiques Jean Dabin*, Bruxelles—Paris 1975, p. 10.

Supreme Court of Poland decided on the 21 April. 1979 (III CRN 305/78).[19] In this case the Supreme Court applied to a question governed by the international convention in force in Poland (Brussels Convention of 1924 on bills of lading — the Hague Rules) the American Carriage of Goods by Sea Act, 1936 (in accordance with the bill of lading clause incorporating the COGSA 1936) and gave consideration to the interpretation of this Act prevailing in the American judicature. The COGSA 1936 is the transformation of the provisions of the above Convention into the domestic law of the USA in an appropriate form, which was allowed by the protocol of signature; in Poland, however, the authentic text of the Convention has binding force. In this case, therefore, Poland and the USA have fulfilled their international obligations in different ways. This decision of the Supreme Court may be subject to criticism as far as the application of law is concerned (the text of the Convention differs from the text of the COGSA 1936). It seems that the Polish Court should have applied directly the provisions of the Hague Rules and on the ground of these provisions should have considered whether the American COGSA 1936 could have been effectively incorporated in the bill of lading. The effectiveness of such an incorporation might have been doubtful since the provisions of the Hague Rules are semi-imperative, i.e. the carrier's liability as determined by the Convention can neither be exempted nor lessened by a bill of lading clause. It should be mentioned, however, that this aspect of the case has not at all been considered by the Supreme Court.

V. The Interpretation of the Uniform Law: Unification of Approach and Methods

The interpretation of the civil-law provisions contained in the international conventions should be subjected — because of their origin — to special rules and application of special methods. This basic view has been convincingly proved by Jakubowski,[20] who has presented also the views on this important question prevailing in the international doctrine. which are not free from serious controversies.

The view that in respect of the civil-law conventions it is indispensable to apply some appropriate rules of construction and follow special directives when employing basic methods of interpretation applicable in respect of the domestic law is based on an assumption that although the convention becomes part of the internal legal order of the state which has accepted

[19] "Orzecznictwo Sądów Powszechnych i Komisji Arbitrażowych", 1980, No. 5, item 82.
[20] J. JAKUBOWSKI. *op. cit.*, p. 55 ff.

it, nevertheless it is still something like a "foreign body" in this order. Created on the international level the convention presents a compromise not only in the sphere of the socio-economic interests, but also in the sphere of legal concepts and notions appropriate to the legal systems of the contracting States, which have contributed to its creation. It serves a superior aim which is the uniformity of regulation of the international civil-law relationships. In this connection one should stress the importance of the comparative approach (in order to avoid differring interpretations by the courts of the participating countries) and of the historical approach (making use of the *travaux preparatoires*). In the directives concerning the application of the basic methods of interpretation stress is laid on the importance of the linguistic interpretation. The systematic interpretation, with reference to the system of the domestic law, is criticised and considered as unacceptable. It is suggested that one should be very careful in the application of the functional (teleological) interpretation, unless it refers to the aims of the convention expressly indicated in its preamble.

It is obvious that the way, in which the civil-law provisions of an international convention have been given effect in the internal order of the contracting State, is not indifferent for the question of their interpretation by the courts of that State, since it determines the role given to the convention in its legal order. In some States, and the United Kingdom may be a good example thereof, there have been strong tendencies to "nationalize" the ratified conventions by building their provisions into the domestic statutory law. Consequently these provisions have been interpreted like the provisions of the domestic law, without paying much attention to their international origin.

But in the last 20 years the approach of the British jurisprudence to the problem of interpretation of statutes giving effect to the international civil-law conventions has considerably changed. According to Simmonds[21] the British courts in a number of decisions have determined some important rules of construction of statutes enacted for the purpose of giving effect to international conventions. When interpreting such a statute one should presume that the Parliament, when enacting it, intended to fulfil the international obligation of the United Kingdom. It would follow therefrom that the text of the convention should serve to explain the meaning of the statutory provisions. The law-making practice has also been changed. Instead of statutes based on the rules of conventions, the texts of conventions have been reproduced in the annexes to the statutes.[22] In this way the

[21] R. K. SIMMONDS, *op. cit.*, p. 121.

[22] E.g. The Carriage of Goods by Road Act 1965 and the Carriage of Goods by Sea Act 1971.

Parliament draws the attention of the courts that the relevant statutory provisions shall be interpreted as the provisions of international legal instruments. This has been a "novum" in the British jurisprudence and soon divergences of views have appeared in respect of the rules of construction which should be applied to the provisions of international conventions included in such annexes. In 1977 the House of Lords delivered a decision in a case concerning the application of the Geneva Convention on the road carriage (CMR).[23] The question under consideration was whether it would be admissible to make use of the foreign language (French) authentic text of the Convention, where the English text annexed to the statute was also authentic. The views of the judges were divided but the majority found that it would be admissible. A further difference of views concerned the question whether it would be admissible in every case or only if the English text were not clear.

Special importance has generally been attached to the linguistic interpretation of provisions of international conventions. It serves best the reliability of regulation indispensable in the international relationships and secures a uniform interpretation of international rules. But the meaning of certain terms employed in a convention is not always indentical with the meaning of their linguistic equivalents in other legal systems. In case where the rules of a convention had been incorporated into the domestic law, which then was applied by courts, it was quite natural that the terms which had been taken over from the convention were given the same meaning they had in the domestic law. Such a practice, pretty common in the earlier British judicature, has now been criticized by the House of Lords. It has been indicated that one should aim at obtaining an international uniformity in the interpretation of conventions so that one cannot be guided exclusively by the principles appropriate to the internal legal system. In the British judicature we may observe also a certain change concerning the application of the functional interpretation. It has quite often been criticised as not leading to the international uniformity. But in a widely discussed case *The Morviken,* in which the House of Lords delivered a decision of the 25 November, 1982, one of the judges (lord Diplock) expressed the view that the provisions of an international convention should not be interpreted "with a narrow literalism" and that the aims of the convention should be considered. A similar but even clearer directive may be found in the decision of the US Federal Court of Appeal concerning the Warsaw Air Convention.[24] In this decision the

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[23] A. C. HARDINGHAM, *Damages under CMR: The Decision of the House of Lords,* "Lloyd's Maritime and Commercial Law Quarterly", 1978, pp. 51—55.

[24] M. R. McGILCHRIST, *Legislative History as an Aid to Interpretation,* "Lloyd's Maritime and Commercial Law Quarterly", 1978, pp. 68—73.

Court — while stressing the importance of international uniform regulation — considered that it is essential that the international convention should be interpreted in accordance with its basic aims, which may be achieved by both a strict or broad interpretation of its provisions, as the case may be. In this particular case the Court filled a certain lacuna in the provisions of the Warsaw Convention (in its 1929 version), being directed by a "general philosophy" of the Convention, as determined by the history of this international legislation — i.e. supplementing the functional interpretation by the historical one. This constituted a serious departure from the linguistic interpretation and entering on a slippery road which may only undermine the uniformity of application of the international legislation. That such a discretion in the use of the functional interpretation may present a real danger to the uniformity may be confirmed by the decision of the Supreme Court of Canada.[25] When applying the Hague Protocol of 1955 (amending the Warsaw Convention) the Court took the view that this Convention constituted an encroachment on the rights of the individual passenger, and for that reason its provisions should be restrictively interpreted. It seems that such a discretion in defining the "general philosophy" of an international legal instrument, which expresses a compromise achieved on the international level by certain groups of interest, may only lead to different interpretations, thus undermining the uniformity of the regulation. A wide discretion given to the courts in the selection of methods of interpretation and directives for their application indicates that it may be necessary to seek a unification of the rules of construction applicable to international conventions. It has been suggested by Simmonds[26] that the courts should refer to the rules of construction of international treaties and in particular to Articles 31—32 of the 1969 Convention on the law of treaties. This suggestion seems to be pertinent, since the above mentioned provisions express some generally accepted rules of construction applied to the international treaties.

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[25] *Montreal Trust Company v. Canadian Pacific Airlines Ltd. — 1977*, in: *2 Lloyd's Reports*, p. 80.

[26] R. K. SIMMONDS, *op. cit.*, pp. 118—123.

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Le contrat d'édition en droit international privé polonais

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1. Introduction

Le contrat d'édition est une forme largement appliquée dans les rapports internationaux de mise à profit et de diffusion d'oeuvres de l'esprit. Il convient donc de voir comment le droit international privé polonais règle la question du droit applicable à ce contrat. Cette étude se propose de définir les règles de l'indication du droit compétent pour apprécier la conclusion, la validité et les effets de ce contrat au plan des obligations, autrement dit le statut contractuel du contrat d'édition. Quant au problème du droit applicable aux droits d'auteur constituant l'objet du contrat, on ne s'en occupera pas ici bien que ce problème ne soit pas indifférent à l'appréciation du rapport d'édition dans son ensemble[1].

La loi applicable à un contrat d'édition peut être déterminée seulement après qu'on aura établi quelle est la règle du droit international privé dont relèvent les états de fait que les différents systèmes juridiques désignent par la notion de contrat d'édition. La loi polonaise du 12 novembre 1965 portant droit international privé[2] n'emploie dans aucune de ses dispositions le terme «contrat d'édition». Il faut donc établir d'abord quelles situations juridiques rencontrées dans les rapports juridiques peuvent être reconnues comme un «contrat d'édition» et voir ensuite quelle est,

[1] V. W. POPIOŁEK, *Prawo właściwe dla praw autorskich* [*La loi applicable aux droits d'auteur*], «Studia Juridica Silesiana», vol. 2, 1977, p. 62 et suiv. Pour la question de la délimitation do statut contractuel et du statut du droit d'auteur, v. IDEM, *Umowa wydawnicza w polskim prawie prywatnym międzynarodowym* [*Le contrat d'édition en droit international privé polonais*]. Kraków 1982. p. 132 et suiv.; IDEM. *Kolizyjna problematyka wykorzystania praw autorskich w ramach umowy wydawniczej [La problématique des conflits de lois en relation avec l'exploitation des droits d'auteur dans le cadre du contrat d'édition],* «Studia Prawnicze», 1980, n° 1/2.

[2] Dziennik Ustaw [Journal des Lois] n° 46, texte 290. Traduction française parue dans la «Revue Critique de Droit International Privé, 1966, p. 323 et suiv.

parmi les règles de conflit prévues par la loi précitée de 1965, celle dont le champ d'application comporte ces situations.

Dans tous les systèmes juridiques, les fonctions socio-économiques du contrat d'édition sont les mêmes ou rapprochées, et l'on peut dans une certaine mesure les examiner indépendamment de telle ou telle forme juridique. Les parties cherchent, au moyen du contrat qu'elles passent et qu'elles exécutent, à reproduire plusieurs exemplaires identiques d'une oeuvre de l'esprit faisant l'objet du droit d'auteur et à la diffuser sur un territoire déterminé bien que les modes, la portée et la fonction de cette diffusion puissent être variées. Cet objectif détermine le mode de règlement de nombreuses questions relatives aux droits et obligations des subjets d'un tel contrat, puisque sa forme juridique est une conséquence directe que le législateur et la jurisprudence déduisent de la fonction qu'elle remplit dans les conditions socio-économiques déterminées.

Le but fondamental du contrat d'édition est donc d' «éditer» l'oeuvre donnée et, partant, de rendre accessibles à la population un grand nombre de ses exemplaires. L' «édition» c'est, la plupart du temps, la multiplication de l'oeuvre par des méthodes d'impression ou similaires. Ainsi la réalisation de la fonction propre à ce contrat dépend-elle avant tout d'une activité économique déterminée que doit entreprendre l'une des parties — l'éditeur.

La comparaison des solutions adoptées par divers systèmes juridiques[3] nous autorise à conclure qu'en droit international privé, nous sommes en présence d'un contrat d'édition et du rapport d'édition qui en résulte lorsqu'en vertu d'un contrat passé entre l'éditeur et une personne se comportant comme celle qui a le droit de faire multiplier et diffuser une oeuvre de l'esprit protégée par le droit d'auteur, un rapport se forme entre les parties, rapport dont le contenu minimum comprend: l'obligation de l'éditeur à éditer l'oeuvre, c'est-à-dire à publier un nombre multiple de ses exemplaires, et l'obligation de l'autre partie à ne pas accomplir des actes susceptibles d'empêcher l'éditeur à exécuter son obligation.

Le contrat d'édition est donc avant tout une source d'obligations réciproques des parties au contrat. Il y a donc lieu de reconnaître que ce contrat relève des règles de conflit prévues au chapitre IX de la loi de 1965, dans les articles 25—29, dans des règles concernant les obligations contractuelles.

2. La loi compétente pour les obligations découlant d'un contrat d'édition

a) L'applicabilité de la loi de 1965 au contrat d'édition

La loi de 1965 règle le problème de la loi compétente pour les

[3] Cf. en cette matière W. POPIOŁEK, *Umowa wydawnicza* [*Le contrat d'édition*], p. 14 et suiv.; J. SERDA, *Umowa wydawnicza. Pojęcie — funkcja — struktura* [*Le contrat d'édition. Notion, fonction, structure*], Kraków 1980, p. 15 et suiv.

obligations contractuelles dans les articles 25—29. Les rapports entre les règles que contiennent ces dispositions et l'ordre dans lequel elles sont appliqueées ne suscitent pratiquement pas de doutes sérieux. L'importance fondamentale revient à la règle de l'art. 25 § 1, admettant le choix de la loi. A défaut de choix, entre en jeu l'art. 28 prévoyant pour les obligations qui résultent des contrats passés à la bourse la compétence de la loi en vigueur au siège de la bourse, et pour les obligations conclues aux foires la compétence de la loi qui y est en vigueur. En tant que disposition contenant une règle spéciale, l'art. 28 passe avant les art. 26, 27 et 29. En ce qui concerne les autres contrats, la loi compétente est celle de l'Etat où les parties ont leur siège ou domicile (art. 26). C'est seulement lorsque les parties n'ont pas de siège ni domicile dans un même Etat qu'entrent en jeu les règles spéciales de l'art. 27[4] concernant les divers types de contrats. Cet article contient une disposition spéciale indiquant la loi compétente pour les obligations découlant des contrats «de transfert des droits d'auteur» (art. 27 § 1 point 4)[5]. Comme nous allons le voir plus loin, son champ d'application comprend également les obligations découlant du contrat d'édition, aussi là devrait-il s'arrêter en principe le processus de la recherche de la loi compétente pour ce contrat. S'il est impossible d'etablir le domicile ou le siège de l'éditeur (et aussi le siège de son entreprise si le contrat a été conclu dans le cadre des activités de cette entreprise — art. 27 § 3[6]), c'est la loi de l'Etat où le contrat a été conclu qui est applicable[7].

[4] Cf. K. PRZYBYŁOWSKI, *Nowe polskie unormowanie problematyki kolizyjnej prawa prywatnego międzynarodowego* [*Les nouvelles règles polonaises concernant les conflits de lois en droit international privé*], «Studia Cywilistyczne», vol. 8, 1966, p. 28; B. WALASZEK, M. SOŚNIAK, *Zarys prawa międzynarodowego prywatnego* [*Précis de droit international privé*], Warszawa 1973, p. 170; B. GAWLIK, M. PAZDAN, *Umowy licencyjne w obrocie międzynarodowym* [*Les contrats de licence dans les échanges internationaux*], Katowice 1976, p. 116; E. WIERZBOWSKI, *Międzynarodowy obrót prawny w sprawach cywilnych* [*Les rapports juridiques internationaux en matière civile*], Warszawa 1971, p. 274; J. SKĄPSKI, *Umowa licencyjna w polskim prawie prywatnym międzynarodowym* [*Le contrat de licence dans le droit international privé polonais*], «Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej», vol. 1, 1973, p. 374; W. LUDWICZAK, *Międzynarodowe prawo prywatne* [*Droit international privé*], Warszawa 1979, p. 206.

[5] Et non seulement des «contrats d'édition» comme l'indique la traduction inexacte publiée dans la «Revue Critique de Droit International Privé».

[6] L'art. 27, § 3 trouve également application dans les matières relevant de l'art. 26; cf. B. GAWLIK, M. PAZDAN, *op. cit.*, p. 117. Une opinion différente est représentée par J. SKĄPSKI, *Les obligations en droit international privé dans le cadre du commerce extérieur des pays socialistes*, *Recueil des Cours*, 1973, vol. 2, p. 544.

[7] Lorsqu'on n'arrive pas à établir les faits dont dépend la compétence de la loi étrangère ou larsqu'on n'est pas en mesure de constater quel est le contenu de la loi étrangère applicable, on applique, conformément à l'art. 7 de la loi de 1965, la loi polonaise.

A la lumière donc des dispositions de la loi de 1965, à défaut de choix de la loi (et si le contrat n'a pas été conclu à une foire), la loi compétente pour le contrat d'édition est celle de l'Etat où les deux parties ont leur siège ou domicile (ou le siège de l'entreprise), où a son siège ou domicile l'éditeur (ou le siège de l'entreprise), ou encore, dans la situation particulière prévue à l'art. 27 § 2, la loi de l'Etat où le contrat a été conclu.

b) Le choix de la loi

Dans son article 25 § 1, la loi de 1965 dit que «les parties peuvent soumettre leurs rapports dans le domaine des obligations contractuelles à la loi choisie par elles». Par cela même, conformément à l'opinion générale de la doctrine, ce texte admet le choix de la loi. Cette solution est une suite de l'opinion bien établie dans la législation, la doctrine et la pratique polonaises, et aussi universellement admise dans le monde.[8]

La doctrine polonaise est concordante à reconnaître[9] le choix de la loi comme un point de rattachement. L'élément de liaison d'un rapport contractuel avec une loi déterminée est la réalisation de la volonté des parties sous forme du choix par elles accompli de cette loi. La *lex fori* tranche de nombreux problèmes relevant de «l'admissibilité du choix de la loi»[10], entre autres les questions suivantes: pour quels types de rapports on peut choisir une loi; faut-il que le contrat donné ait un caractère international et comment il faut entendre ce terme; faut-il qu'entre la loi choisie et le contrat il y ait un rapport d'un type déterminé; à quel moment le choix peut intervenir, est-il possible de le modifier ou abolir plus tard; peut-on choisir plusieurs lois; est-il possible de choisir sous condition ou avec terme; le choix peut-il être présumé; les parties doivent-elles choisir une loi concrète ou bien suffit-il d'indiquer des fondements à sa définition; le choix peut-il porter uniquement sur le droit positif d'un Etat concret?

Je me bornerai à traiter d'un seul des problèmes susmentionnés[11]. L'article 25 § 1 de la loi de 1965 n'autorise à soumettre un rapport

[8] V. par exemple *Handbuch der Internationalen Vertragsgestaltung*, sous la dir. d'O. Sandrock, vol. 1, Heidelberg 1980, p. 138 et suiv.

[9] Ainsi J. SKĄPSKI, *Autonomia woli w prawie prywatnym międzynarodowym w zakresie zobowiązań z umów* [*L'autonomie de la volonté en droit international privé dans le domaine des obligations contractuelles*], Kraków 1964, p. 103 et suiv.; M. SOŚNIAK, *Précis de droit international privé*, Warszawa 1976, p. 127; B. WALASZEK, M. SOŚNIAK, *op. cit.*, p. 164; W. LUDWICZAK, *op. cit.*, p. 130.

[10] Ainsi J. SKĄPSKI, *Autonomia...*, p. 122 et suiv.; M. SOŚNIAK, *op. cit.*, p. 130.

[11] Pour les autres, v. J. SKĄPSKI, *Autonomia...*, p. 123 et suiv.

contractuel à la loi choisie que si cette loi reste «en relation avec l'obligation». La question de l'interprétation de cette formule est controversée dans la doctrine polonaise. De l'avis de W. Ludwiczak[12], l'expression «rester en relation avec l'obligation» est une disposition en blanc à tel point qu'en pratique elle aboutit aux mêmes résultats que le choix illimité de la loi. J. Skąpski arrive en fait à la même conclusion[13]. Il semble toutefois qu'il faut qu'entre le rapport donné et la loi choisie il y ait une relation à caractère objectif. Telle est l'opinion de la majorité de la doctrine polonaise[14], ce qui ne signifie pas que *de lege ferenda* ne soit admissible un choix illimité de la loi. Sous ce jour, il faut considérer comme juste la tendance générale de la doctrine polonaise à entendre librement la notion de «relation» et, partant, à interpréter extensivement le § 1 de l'art. 25. Aussi sera-t-on en présence d'une «relation» dans les cas de divers liens factuels, donc objectifs, mais pas nécessairement à caractère spatial. On peut citer l'exemple du contrat d'édition qui se réalise en relation avec un contrat d'option antérieurement passé entre les mêmes parties. Il serait sans doute juste de juger admissible le choix pour le contrat d'édition de la même loi que pour le contrat d'option, bien que cette loi ne reste en aucune relation, même relation spatiale largement entendue, avec le contrat d'édition. Il faut également se demander si l'on peut admettre le choix pour le contrat d'édition de la loi compétente pour les droits d'auteur qui sont l'objet de ce contrat. Etant donné le principe de territorialité qui est universellement admis pour les droits d'auteur, on ne peut trouver juste un tel choix à la lumière de l'art. 25 § 1, loraque le contrat donné transfère à l'éditeur des droits déterminés dans le «monde entier». Car il existe autant de lois compétentes pour les droits d'auteur qu'il y a, dans la situation donnée, des systèmes juridiques accordant protection à ces droits. Les parties donc pourraient en fait avoir un choix illimité de la loi. Mais si le champ des effets dispositifs du contrat est limité à un groupe de pays (p.ex. l'éditeur acquiert des droits pour tous les pays germanophones), le choix de la loi de l'un de ces pays semblerait fondé, malgré l'absence d'un lien spatial quelconque avec le rapport contractuel en matière d'édition.

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[12] *Op. cit.*, p. 203.

[13] Bien que les motifs invoqués par cet auteur soient différents, v. J. SKĄPSKI, *Umowa...*, pp. 369—372.

[14] Cf. p.ex. M. SOŚNIAK, *op. cit.*, 125; M. PAZDAN, *Wybór prawa właściwego w kontraktach zawieranych w międzynarodowym obrocie handlowym [Le choix de la loi compétente dans les contrats passés en commerce international]*, «Przegląd Spraw Międzynarodowych», vol. 5, 1976, p. 5; H. TRAMMER, *Sprawy czysto majątkowe w polskim prawie międzynarodowym prywatnym [Les affaires perement patrimoniales en droit international privé polonais]*, «Prawo w Handlu Zagranicznym», vol. 19—20, p. 22.

D'après l'opinion adoptée en Pologne[15], le choix de la loi est un acte juridique de droit international privé. Il faut donc trancher deux questions, à savoir celle de l'existence même du choix de la loi (la question de savoir si une volonté concordante des parties sur ce point a été exprimée), et celle de la validité du choix accompli. Dans les deux cas c'est en principe la loi d'autonomie qui est valable[16]. Cependant, la capacité des parties de faire le choix relève de la loi indiquée par les règles de conflit du droit international privé relatives à la capacité (art. 9 dn la loi de 1965), car on ne trouve pas de raison valable à appliquer ici autre critère que pour le contrat principal[17]. Quant à la condition de forme du contrat de choix, elle est appréciée à la lumière de la règle de conflit admettant le choix de la loi. En droit polonais, l'analyse de l'art. 25 § 1 de la loi de 1965 fait admettre la règle que le choix peut être effectué suivant la forme qu'il plaira aux parties d'adopter[18].

c) La loi compétente pour le contrat d'édition à défaut de choix de la loi

A défaut de choix de la loi, peuvent servir à indiquer la loi compétente pour le contrat d'édition et les effets d'obligation qui en résultent les règles prévues par les art. 28, 26, 27 § 1 point 4 et, en relation avec ce dernier, l'art. 27 § 2. Par ailleurs, l'art. 27 § 3 est applicable en ce qui concerne le champ d'application des art. 26 et 27 § 1 point 4.

L'article 28 prévoit pour les obligations découlant des contrats passés en bourse la compétence de la loi en vigueur au siège de la bourse, et pour les contrats passés aux foires (aux marchés publics) la compétence de la loi en vigueur dans ces lieux. Pour savoir si les règles de l'art. 28 sont applicables aux obligations découlant d'un contrat d'édition, il faut préciser le sens des deux notions: le contrat en bourse et le contrat passé aux foires (aux marchés publics).

La première de ces notions est indissolublement liée à l'institution de la bourse. On peut admettre que la notion de bourse qui soit satisfaisante pour le droit international privé signifie les rencontre fixes de personnes se réunissant en un lieu et un temps déterminés en vue de conclure des transactions commerciales ainsi que de personnes servant d'intermédiaires dans lesdites transactions, pour autant que ces conditions sont organisées

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[15] Ainsi J. SKĄPSKI, *Autonomia...*, pp. 129—130; M. SOŚNIAK, *op. cit.*, p. 127; H. TRAMMER, *op. cit.*, p. 21; M. PAZDAN, *op. cit.*, p. 43.

[16] Cf. J. SKĄPSKI, *Autonomia...*, p. 131 et suiv.; M. PAZDAN, *op. cit.*, p. 44; W. LUDWICZAK, *op. cit.*, p. 205.

[17] Ainsi J. SKĄPSKI, *Autonomia...*, p. 131; W. LUDWICZAK, *op. cit.*, p. 205; B. GAWLIK, M. PAZDAN, *op. cit.*, p. 106.

[18] Ainsi J. SKĄPSKI, *Autonomia...*, p. 158; B. GAWLIK, M. PAZDAN, *op. cit.*, p. 106.

ou surveillées par l'Etat et subordonnées à un règlement déterminé[19]. La bourse a pour but de faciliter les échanges commerciaux mais en même temps de limiter la liberté d'action des participants à ces échanges en les subordonnat — surtout en ce qui concerne les modalités de négociation et de transaction — aux règles des statuts ou du règlement de la bourse. Le contrat en bourse se caractérise non pas tant par son objet que précisément par un mode spécifique de sa formation, étroitement lié à l'organisation et au fonctionnement de la bourse.

La notion de contrat en bourse ne peut être applicable au contrat d'édition. Ce qui milite principalement en faveur de cette thèse c'est le fait qu'il n'existe actuellement aucune institution qui corresponde à la définition de la bourse et soit utilisée pour la formation des contrats d'édition. Aussi qualifier un contrat d'édition de contrat relevant de la règle en question n'aurait-il pas de signification pratique. Les transactions portant sur les droits d'auteur, notamment les contrats d'édition n'exigent pas le recours au mécanisme propre au caractère institutionnel de la bourse. Le système simplifié des transactions à la bourse n'est pas adapté à la spécificité des contrats d'édition qui concernent un objet hautement individualisé qu'est l'oeuvre de l'esprit. Aussi leur contenu est-il généralement complexe, ce qui exige des négociations plus longues qu'à la bourse, lors même que le contrat est passé par deux éditeurs sur un formulaire indiquant les conditions générales du contrat.

C'est pourquoi, si l'on parle parfois dans la pratique de «bourses d'éditeurs», les contrats d'édition y passés ne sauraient être considérés comme des «contrats en bourse» au sens de l'art. 28 rel phrase. Car le terme «bourse» est employé dans ces cas non pas pour désigner une institution spécifique et le mécanisme y afférent de la formation des contrats, mais exclusivement pour souligner le fait que plusieurs contrats d'un type déterminé sont passés entre plusieurs contractants exerçant une activité similaire dans un même lieu et temps. Dans une telle situation, on peut tout au plus parler de foire. Il faut entendre par cette notion également une des formes d'organisation du marché mais remplissant une autre fonction que la bourse[20]. Dans ce marché, il ne s'agit pas de soumettre les modalités de la transaction à des règles strictemet déterminées, mais d'offrir à de futurs contractants éventuels, la possibilité de prendre contact, de connaître les offres ou enfin la publicité. D'autre part, la conclusion des contrats concrets à la foire n'est pas exclue. Néanmoins, ce n'est

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[19] V. pour plus de détails M. A. ZACHARIASIEWICZ, *Prawo właściwe dla kontraktów giełdowych i kontraktów zawieranych na targach [La loi compétente pour les contrats passés en bourse ou à la foire]*, «Problemy Prawne Handlu Zagranicznego», vol. 3, 1979, p. 125 et suiv.

[20] *Ibid.*

pas là l'objet de la foire et c'est pourquoi les contractants ne sont concernés que dans une faible mesure par les règlements en vigueur à une foire.

Il résulte de ce qui précède qu'en principe les contrats de tous les types peuvent être passés à une foire. Un contrat d'édition passé à une foire[21] et portant sur les droits qui y sont offerts doit donc relever de la règle de l'art. 28 2^e phrase, car le champ d'application de cette règle est déterminé uniquement par l'accomplissement de l'acte juridique en un lieu déterminé et non par le caractère de la transaction lié à ce lieu. Cela du reste est confirmé par la pratique consistant non seulement en ce que les contractants passent des contrats à l'occasion de leur participation à une foire de livres ou de disques par exemple, mais en ce que l'on organise des foires spéciales d'éditeurs qui ont pour tâche d'initier les intéressés aux activités éditrices dans divers pays et aussi de faciliter une large diffusion d'oeuvres par l'échange de droits appartenant à de différents éditeurs.

La thèse que les obligations en matière d'édition relèvent de la règle de l'art. 26 ne peut susciter le moindre doute, car cette règle concerne toutes les obligations, quel que soit le contrat qui est à leur origine. Le fait qui en impose l'application c'est seulement le domicile ou le siège des contractants dans le même Etat.

En revanche, ce qui exige un examen plus attentif c'est la qualification du champ d'application de la règle de l'art. l'art. 27 § 1 point 4, que le législateur appelle «contrat de transfert des droits d'auteur». Il y a lieu de trancher le point de savoir si le contrat d'édition — dont le trait susceptible d'être jugé caractéristique en droit international privé est, entre autres, l'autorisation donnée à l'éditeur de publier l'oeuvre concernée (avec l'intention de n'engendrer que des effets d'obligation) — peut être considéré comme un contrat de transfert des droits d'auteur.

Ce qui distingue la règle prévue à l'art. 27 § 1 point 4 des autres règles contenues dans ce paragraphe (fondées sur le principe de la prestation caractéristique[22]), c'est un trait particulier essentiel pour sa qualification. Cette règle concerne l'ensemble des contrats de divers types qui représentent un groupe distinct en raison de leur objet (le droit d'auteur) et non,

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[21] Quant à la notion du «contrat passé à la foire», cf. *ibid.*

[22] Pour plus de détails sur cette matière v. M. A. ZACHARIASIEWICZ, *Teoria charakterystycznego świadczenia w doktrynie i orzecznictwie zachodnioeuropejskim* [*La théorie de la prestation caractéristique dans la doctrine et la jurisprudence ouest-européennes*], «Studia Juridica Silesiana», vol. 3, 1978, p. 50 et suiv.; du MÊME AUTEUR, *Prawo właściwe dla zobowiązań z umów w wybranych systemach prawa prywatnego międzynarodowego* [*La loi compétente pour les obligations contractuelles dans les systèmes choisis de droit international privé*], Warszawa 1982.

comme dans les autres cas, en raison d'un type déterminé de contrat.

La notion du «contrat de transfert des droits d'auteur» est donc une catégorie collective, englobant divers types de contrats, dont le trait commun est «le transfert des droits d'auteur». Une telle solution rappelle celle de l'art. 25 § 2, où le critère de distinction à des fins de qualification intérieure fait l'objet de contrat (immeuble), et aussi la règle de l'art. 28 2[e] phrase, dont le champ d'application comprend les contrats groupés en considération du lieu de leur formation.

La thèse que l'objet du contrat contribue à l'éclaircissement des notions déterminant le champ d'application de l'art. 27 § 1 point 4, est justifiée avant tout par ce que ce champ ne comprend pas les «contrats de transfert» des droits sur les biens immatériels qui ne sont pas des droits d'auteur. Mais il résulte que ce champ d'application englobe les contrats réglés par les autres dispositions du § 1 de l'art. 27 ayant pour objet le «transfert des droits d'auteur». Cela concerne p.ex. le contrat de vente. Ce qui milite en faveur de ce point de vue c'est le but socio-économique de ces contrats, consistant en obtention par des sujets déterminés des prérogatives découlant des droits d'auteur.

Pour pouvoir constater que l'art. 27 § 1 point 4, peut servir de fondement à l'indication de la loi compétente pour le contrat d'édition, il faut nécessairement trouver la question suivante: quels sont les effets que doivent produire les contrats pour que la notion du «contrat de transfert des droits d'auteur» soit applicable à ces derniers[23]?

Précisons d'abord que cette formule correspond à la terminologie de la loi du 10 juillet 1952 portant droit d'auteur[24], concernant un groupe strictement déterminé de contrats. Cela pourrait faire croire que le législateur avait l'intention d'adopter une qualification d'après la *lex fori*. Mais une telle opinion serait injuste. La doctrine polonaise a formulé et résolument adopté l'opinion selon laquelle il faut qu'il y ait une interprétation spéciale propre aux notions utilisées par les règles de conflit[25]. Il est vrai que la qualification d'après la *lex fori* permettrait à soumettre, sans grande difficulté, les obligations découlant des contrats d'édition à la compétence de la règle prévue à l'art. 27 § 1 point 4, puisque d'après le droit

[23] En raison de la diversité des contrats passés dans la pratique des transactions portant sur les droits patrimoniaux d'auteur, il y a lieu de considérer comme inopportunes les tentatives de préciser davantage le champ d'application de la règle en question par une exemplification de différents types de contrats. Du reste le législateur lui-même fait porter l'attention sur les effets des contrats en utilisant la formule «contrat de transfert du droit d'auteur» et en indiquant ainsi le sens à suivre par la qualification.

[24] J. des L. n° 34, texte 234.

[25] V. avant tout K. PRZYBYŁOWSKI, *Prawo prywatne międzynarodowe. Część ogólna* [*Droit international privé. Partie générale*], Lwów 1935, p. 104; cf. également B. WALASZEK, M. SOŚNIAK, *op. cit.*, p. 86; W. LUDWICZAK, *op. cit.*, p. 77.

d'auteur polonais le contrat d'édition est un contrat de transfert des droits d'auteur. Cependant, cela aurait été en contradiction avec la notion de contrat d'édition, adoptée dans la présente étude précisément à des fins de qualification, en s'appuyant sur sa fonction socio-économique. Il faut donc admettre que l'emploi par la loi de 1965 d'une notion connue du droit polonais ne signifie aucunement qu'il concerne seulement les contrats que la loi de 1952 sur le droit d'auteur considère comme les contrats de transfert des droits d'auteur.

En partant de cette hypothèse on peut, semble-t-il, admettre que sont «contrats transfert des droits d'auteur» tous les contrats en vertu desquels on doit disposer, dans l'acception la plus large du terme, d'un droit d'auteur. Il ne s'agit donc pas ici des contrats par lesquels un sujet titulaire du droit d'auteur, s'engage à transférer à une autre personne la plénitude ou une part déterminée du droit d'auteur, mais des contrats ayant pour effet l'obtention par «l'acquéreur du droit» des prérogatives de jouir du droit d'auteur, quel que soit le type de l'acte de disposition qui sera la source de ces prérogatives. En ce sens, ce ne seront donc pas seulement les contrats obligeant à transférer un droit au sens strict du terme (p.ex. le contrat de vente des droits d'auteur), mais aussi les contrats obligeant à grever le droit d'auteur d'un droit absolu nouvellement institué, sans l'intention d'un transfert simultané des droits d'auteur (p.ex. les contrats instituant sur les droits d'auteur des droits réels limités), et enfin même les contrats qui doivent produire des effets de pure obligation en vertu desquels l' «acquéreur du droit» obtient des prérogatives déterminées, efficaces *inter partes*, de jouir du droit d'auteur.

Ce qui milite en faveur d'une aussi vaste interprétation du champ d'application de la règle de l'art. 27 § 1 point 4, c'est avant tout le but commun à tous les contrats susmentionnés. Car dans les rapports, en particulier internationaux, il s'agait de permettre à une autre personne que le sujet originaire du droit d'auteur de jouir de ce dernier. Ce fait justifie une solution uniforme de conflit de lois. En revanche, si l'on voulait admettre que le champ d'application de la règle en question ne compred que les contrats devant aboutir au transfert (au sens strict) du droit d'auteur, il faudrait soumettre le contrat d'édition qui a également pour effet le transfert du droit d'auteur — à la compétence de la loi indiquée par la règle de l'art. 27 § 1 point 4, tandis qu'un contrat à but identique mais qui doit avoir pour effet de grever le droit d'auteur du droit d'édition nouvellement créé, serait soumis à la compétence de la *lex loci contractus*, conformément à l'art. 29. Par ailleurs, faire dépendre la qualification du champ d'application du genre de l'effet escompté dans le domaine du droit d'auteur, ce serait faire appliquer, par la voie de conséquence, pour retenir cette qualification, la loi régissant la naissance et le caractère de ces effets, donc la loi compétente pour les droits d'auteur. Comme un contrat d'édition concret peut produire, suivant les pays, des effets différents en cette matière, il faudrait admettre qu'il est soumis à la compétence de différentes lois, en fonction du point de savoir s'il doit entraîner le transfert du droit d'auteur ou produire un autre effet.

Il faut également ajouter qu'en principe tout contrat permettant à l'une des parties de jouir du droit d'auteur sans le transférer, peut être conclu comme le contrat obligeant au transfert. Cela signifie que la mise en oeuvre de la fonction socio-économique de ces contrats, laquelle cependant doit décider de la qualification, ne dépend pas du fait de savoir s'ils doivent s'accompagner du transfer (au sens strict) du droit d'auteur.

Un argument important qui milite en faveur du point de vue exposé ici réside également dans la solution par le législateur de la question du point de rattachement. La construction de l'art. 27 § 1 est fondée sur la conception de la prestation caractéristique, et en ce qui concerne les contrats de transfert des droits d'auteur, c'est la prestation de l'acquéreur du droit qui est reconnue comme caractéristique. Dans le cas du contrat d'édition ce point de vue est pleinement justifié[26]. Car l'appréciation du point de savoir laquelle des prestations des parties au contrat d'édition peut être reconnue comme caractéristique doit être fondée sur la comparaison de l'importance que présentent les prestations réciproques pour atteindre les buts socio-économiques du contrat. Un élément particulièrement important du contenu du rapport d'édition est l'obligation de l'éditeur à multiplier et à diffuser l'oeuvre protégée par le droit d'auteur. Il y a donc lieu d'opposer la prestation de l'éditeur, consistant à jouir de l'oeuvre dans une mesure déterminée, à la prestation de

[26] En ce qui concerne les autres contrats, on peut y distinguer, en prenant en considération la fonction qu'ils remplissent dans les rapports socio-économiques: les contrats dont le but principal est de rendre accessibles au public les oeuvres protégées par le droit d'auteur (p.ex. le contrat de représentation d'une oeuvre au théâtre), les contrats permettant à l'acquéreur d'exploiter une oeuvre sans que cette exploitation consiste à la diffusion (p. ex. les contrats entre les auteurs d'apports à une oeuvre cinématographique et ses producteurs) et tous les contrats ayant pour but seulement la transmission du droit d'auteur, sans obligation d'exploiter ce dernier de quelque façon que ce soit (p. ex. la vente de droits d'auteur). Pour ce qui est des contrats classés dans le dernier groupe, on peut affirmer que la prestation qui leur est caractéristique est celle de l'aliénateur du droit. Les sujets originaires des droits d'auteur ont surtout en vue d'assurer la diffusion d'oeuvres ou bien une autre façon d'en jouir, aussi concluent-ils par principe des contrats qui obligent à jouir de l'oeuvre dans une mesure déterminée. La prestation de l'exploitant de l'oeuvre («acquéreur du droit») pourra en règle générale être reconnue comme prestation caractéristique dans ces contrats. Le législateur, en fixant le centre de gravité du rapport contractuel dans l'Etat du domicile ou du siège de ce sujet n'a donc pas dérogé au principe de prestation caractéristique. En étandant le champ d'application de la règle de l'art. 27, § 1 point 4) à divers types de contrats, il devait se décider à une généralisation convenant le mieux aux situations les plus fréquentes dans les échanges internationaux.

l'auteur consistant à ne pas accomplir des actes susceptibles d'empêcher l'éditeur de s'acquitter de son obligation. Dans la pratique, centt dernière prestation concerne les actes de disposition que l'auteur accomplit à l'égard des droits qui lui appartiennent.

L'exécution de son obligation par l'éditeur est liée, afin de garantir que le but du contrat soit convenablement atteint, à la nécessité d'exécuter plusieurs actes juridiques et factuels, tels que la rédaction de fond et la rédaction technique de l'original de l'oeuvre; les actes tendant à assurer la reproduction des copies de l'original dans sa propre entreprise ou dans une autre entreprise exerçant ce genre d'activité; les actes liés à la diffusion, donc, entre autres, la conclusion des contrats avec des distributeurs d'oeuvres, la publicité, la traduction de l'oeuvre lorsque sa diffusion doit se faire à l'étranger, l'exportation des exemplaires imprimés, etc. Ces actes ne peuvent, évidemment, être énumérés qu'à titre exemplaire, car leur nombre et leur genre dépend étroitement du genre de l'oeuvre, du contenu du contrat et, éventuellement, de tous les autres aspects factuels. Tous les actes susmentionnés sont concentrés au centre d'activité économique de l'éditeur, donc dans la pratique à son domicile ou siège (siège de son entreprise). Le caractère diversifié de ces actes tendant à atteindre un but déterminé fait que les fonctions exercées par l'éditeur rappellent la prestation de services spécialisés[27]. On peut dire également que si autrefois l'éditeur n'avait qu'à verser un à-valoir sur les frais de l'impression de l'oeuvre, aujourd'hui il fait figure d'intermédiaire de fait entre les auteurs et les imprimeurs, les traducteurs, les agents de publicité, les libraires, etc.

Cette caractéristique de la prestation de l'éditeur résulte de ce que les créateurs, pour éviter le risque lié à la conclusion et l'exécution de nombreux contrats avec de nombreux sujets, n'entreprennent pas d'éditer leurs oeuvres eux-mêmes, mais en confient l'original à celui qui est spécialisé dans une telle activité, puisque, par principe, il l'exerce à titre professionnel.

La conclusion d'un contrat d'édition a pour but de transformer une activité littéraire ou artistique de telle façon qu'elle devient accessible au public[28]. Il ne s'agit donc pas principalement de ce qu'une oeuvre soit

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[27] Cf. J. MACKENSEN, *Der Verlagsvertrag im internationalen Privatrecht*, München 1965, pp. 82—84; W. HOFFMANN, *Die Urheberrechtsverträge im internationalen Privatrecht*, «Rabels Zeitschrift für ausländisches und internationalen Privatrecht», vol. 5, 1951, p. 761; H. BATIFFOL, *Les conflits de lois en matière de contrats*, Paris 1938, p. 227.

[28] Cf. J. MACKENSEN, *op. cit.*, p. 85; W. HOFFMANN, *op. cit.*, p. 760; M. ISSAC, *Verlagsvertrag mit einem Ausländer*, «Zeitschrift für internationales Privat-und öffentliches Recht», vol. 13, 1903, p. 376; Z. KUČERA, *Mezinárodni právo soukromé*, Praha 1975, p. 172; H. TRAMMER, *op. cit.*, p. 25; v. également F. SCHNITZER, *Handbuch des internationalen Privatrecht*, vol. II, Basel 1958, p. 714; F. MÀDL, *Foreign Trade Monopoly. Private International Law*, Budapest 1967, p. 83; E. VITTA, *Diritto internazionale privato*, vol. III, Torino 1975, p. 420.

créée et que des droits attachés à cette oeuvre soient acquis par l'éditeur. Car l'auteur consent seulement à ce que son oeuvre soit exploitée de façon déterminée, tandis que l'éditeur entreprend une vaste activité économique organisée, dans le cadre d'une entreprise spécialement crée à cet effet, afin d'assurer la réalisation de la fonction indiquée du contrat d'édition. Cette activité toutefois dépend évidemment de la création de l'oeuvre par l'auteur et de sa communication à l'éditeur. Aussi peut-on se demander si, dans le cas d'un contrat d'édition d'une oeuvre future, obligeant l'auteur à créer une oeuvre, ne faudrait-il pas reconnaître cette prestation comme caractéristique. Mais contre une telle solution milite avant tout le fait que plus d'une fois la prestation effectuée par l'auteur a un caractére secondaire dans son activité quotidienne. S'agissant d'écrivains professionnels, elle est bien, à dire vrai, caractéristique de leur activité professionnelle, mais non pas pour l'acte réglé par le contrat d'édition dont le but fondamental est la diffusion de l'oeuvre fournie par l'auteur, indépendamment du fait que cette oeuvre soit née ou non en vertu d'un contrat. D'autre part, il faut faire remarquer que l'appréciation, du point de vue juridique, de la prestation de l'auteur dans un tel contrat (création de l'oeuvre) est en principe impossible. Une telle possibilité serait, au fond, en contradiction avec la notion même de création. En revanche, il est indubitablement possible de constater si la prestation de l'éditeur est exécutée conforment au contrat. C'est pourquoi semble just l'opinion que l'on ne peut chercher le point juridique de gravité d'un rapport d'obligation qu'en s'appuyant sur la prestation dont l'appréciation juridique est possible[29]. Cela ne signifie pas toutefois qu'il serait juste d'affirmer que la prestation de l'éditeur a «plus de poids» ou qu'elle «présente une plus grande importance» que la prestation de l'auteur. Tout au contraire, du point de vue social c'est avant tout la création qui mérite la protection et c'est elle qui est «plus importante» que l'activité de l'éditeur. L'appréciation de l'activité sociale des parties à un contrat d'édition ne saurait cependant avoir d'influence sur la décision concernant le point de savoir laquelle des prestations est caractéristique du contrat. Car ce n'est pas elle qui détermine la fonction socio-économique de ce contrat.

N'est pas non plus décisive pour la réalisation de cette fonction la prestation de l'auteur sous forme des droits déterminés accordés à l'éditeur. On peut donc affirmer que ce qui distingue par principe les uns des autres les différents types de contrats ce n'est pas la prestation susmentionnée de l'auteur, mais la prestation de son contractant sous forme de telle ou telle exploitation de l'oeuvre. C'est précisément l'obligation de l'éditeur à éditer l'oeuvre qui est une caractéristique particulière distinctive du

[29] Cf. J. MACKENSEN, *op. cit.*, pp. 89—90 et les auteurs y cités.

contrat d'édition. Pareillement, ce qui distingue la majorité des contrats d'auteur des autres contrats, ce n'est pas le fait que, dans leur cadre, on dispose — dans une large acception du terme — d'un droit (même si c'est un droit aussi spécifique que le droit d'auteur), mais le fait qu'il est possible sur cette base d'exploiter l'oeuvre dans des limites déterminées. La façon dont l'oeuvre est exploitée décide de la fonction socio-économique du contrat donné.

Finalement donc, on peut dire que cette fonction, en cas de contrat d'édition, est réalisée par l'éditeur, tandis que l'auteur crée «seulement» une base à son activité[30]. Il s'ensuit que c'est la prestation de l'éditeur qui devrait être reconnue comme caractéristique de ce type de rapports. A la lumière des principes généraux de la théorie de la prestation caractéristique, pour désigner le lien du rapport d'édition avec un Etat, il faut se référer au point de rattachement du domicile ou du siège de l'éditeur. Ce qui milite encore en faveur de ce point de vue c'est le fait que les éditeurs, exerçant en règle générale leur activité à titre professionnel, passent un très grand nombre de contrats avec des auteurs de divers pays. L'application du droit en vigueur au siège de l'éditeur permet de traiter de façon uniforme tous les contrats passés avec des contractants étrangers, indépendamment de leur domicile, siège ou nationalité. Par conséquent, dans un Etat, tous les auteurs sont traités de façon égale, ce qui est conforme au principe général de la protection internationale des droits d'auteur.

Il résulte des remarques qui précèdent que, sur la base de l'art. 27 § 1 point 4 de la loi de 1965, la prestation de l'éditeur ou d'un autre sujet «acquéreur du droit» n'est pas caractéristique par ce qu'il doit acquérir un droit d'auteur ou parce qu'il est généralement obligé à payer une rénumération à son contractant. Sa situation juridique est bien plus riche et plus compliquée et ne dépend pas en principe de ce qu'il devient sujet de droit d'auteur acquis de façon dérivée et translative. Si l'on constate que le contrat donné doit avoir pour effet l'obtention par un «acquéreur du droit» des droits de jouir de l'oeuvre dans des limites déterminées, l'obligation découlant d'un tel contrat devrait être soumise à la compétence de la loi indiquée par la règle de l'art. 27 § 1 point 4. Ce qui décidera donc du champ d'application de cette règle

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[30] Cf. W. HOFFMANN, *op. cit.*, p. 761; J. MACKENSEN, *op. cit.*, p. 91; A. TROLLER, *Das internationale Privat- und Zivilprossrecht im geweblichen Rechtsschutz und Urheberrecht*, Luzern 1952, p. 221; F. VISCHER, *Internationales Vertragsrecht*, Bern 1962, p. 124; J. P. NIBOYET, *La théorie de l'autonomie de la volonté, Recueil des Cours*, vol. 1, 1927, p. 102; K. KNAP, O. KUNZ, *Mezinárodni právo autorské*, Praha 1981, p. 303 et suiv.; E. ULMER, *Intellectual Property Rights and the Conflict of Law*, Deventer 1978, p. 48 et suiv.

ce sera la fonction[31] que remplissent dans les rapports juridiques les contrats concrets et non l'intention de provoquer un effet dispositif sous forme de transfert d'un droit.

L'interprétation historique des dispositions de la loi de 1965 également milite en faveur de l'application de cette règle au contrat d'édition, et en même temps en faveur d'une vaste qualification du champ d'application de la règle en question. Dans les premiers projets de la loi de 1965, la disposition correspondant à l'actuel point 4 du § 1 de l'art. 27 réglait le problème de la loi applicable au contrat d'édition seulement. L'adoption, dans le projet V de 1964[32], de la formule qui allait ensuite passer dans le texte définitif de la loi, témoigne de l'intention d'élargissement du champ d'application de la règle dont nous parlons. Comme ce qui décide de la nature du contrat d'édition ce n'est pas l'obligation à transférer un droit d'auteur ou un autre acte de disposition le concernant, mais le but du contrat (l'édition de l'oeuvre), il serait difficile d'admettre que la Commission de codification ait jugé opportun, par le changement de formule précité, d'exclure du champ d'application de la règle de l'art. 27 § 1 point 4 le contrat d'auteur le plus répandu dans la pratique.

Ajoutons enfin que la doctrine étrangère juge comme évidente la compétence de la loi indiquée à l'art. 27 § 1 point 4 pour les obligations en matière d'édition[33].

Constater que les obligations découlant d'un contrat d'édition sont soumises à l'article 27 § 1 point 4, c'est conclure à l'application à leur égard des §§ 2 et 3 de l'art. Il s'ensuit que si l'on n'arrive pas à établir quel est le domicile ou le siège de l'éditeur ou le siège de son entreprise, c'est la loi où le contrat a été conclu qui sera applicable. Cette étape marquera la fin de la recherche de la loi applicable aux obligations découlant du contrat d'édition, à moins que, dans une situation concrète, il soit impossible d'établir quel est le lieu de formation du contrat. Dans ce cas, conformément à l'art. 7 de la loi de 1965, c'est la loi polonaise qui sera applicable.

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[31] Cette fonction également décidera de la délimitation du champ d'application de l'art. 27, § 1 point 4 et de l'art. 29. Le vaste champ d'application de la première règle permet de constater que seuls seront soumis à la compétence de la *lex loci contractus* ces contrats concernant les droits d'auteur qui ne servent pas de base à la jouissance de ces droits.

[32] Projet de loi portant droit international privé, envoyé par la lettre du président du Conseil des ministres du 31 juillet à la Diète de la Rèpublique Populaire de Pologne, 3ᵉ législature, 8ᵉ version, imprimé n° 197.

[33] Cf. p.ex. O. KUNZ, *Některe kolizni otázky smluv v oblasti autorského práva*, «Studie z Mezinárodniho Práva», 1967, vol. 12, p. 182; E. VITTA, *op. cit.*, p. 420.

d) La signification des notions déterminant les points de rattachement des règles indiquant la loi applicable au contrat d'édition

La loi de 1965 admet comme points de rattachement fondamentaux dans le domaine des obligations contractuelles le domicile de la personne physique, le siège de la personne morale et le siège de l'entreprise. Ces notions demandent à être précisées.

Le domicile est l'une des notions à une grande richesse de signification [34], aussi une importance particulière revient-elle au choix d'une telle méthode de qualification qui permettrait par principe d'indiquer un seul Etat où se trouve le domicile de la personne donnée. Cette condition est remplie par la méthode d'interprétation fonctionnelle proposée pour ce point de rattachement dans la doctrine polonaise [35]. Elle permet entre autres de faire dépendre l'interprétation de la notion de domicile utilisée dans différentes règles de conflit de lois de la fonction que ces règles remplissent en droit international privé en tenant compte des circonstances qui ont servi au législateur de base pour fonder la solution sur ce point de rattachement et non pas sur un autre.

Dans le cas des obligations contractuelles, le législateur a jugé, en considération des besoins des rapports juridiques, que ce point de rattachement serait le meilleur, car le domicile est un fait visible à l'extérieur et un lieu de concentration de l'activité économique de la personne donnée. On attache donc ici une importance prépondérante aux liens factuels. En ce qui concerne l'interprétation de la notion visée, cela conduit à renoncer aux constructions juridiques définissant le domicile de façon artificielle (comme le font p.ex. les art. 26 et 27 du Code civil polonais) au profit d'éléments factuels par lesquels on entend des circonstances objectives (le fait de résider effectivement en un lieu déterminé) et subjectives (l'intention d'établir une résidence fixe). Il y a donc lieu d'admettre qu'une personne déterminée a un domicile sur le territoire de l'Etat donné, seulement et toujours lorsque les deux circonstances susmentionnées sont réunies conjointement.

Il faut faire remarquer qu'une telle façon d'entendre le domicile n'exclut pas les cas de double (multiple) domicile. Dans la doctrine polonaise on admet généralement [36] que ce problème est réglé par analogie

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[34] Cf. A. MĄCZYŃSKI, *Zamieszkanie jako podstawa łącznika normy kolizyjnej* [*Le domicile en tant que point de rattachement d'une règle de conflit de lois*], «Zeszyty Naukowe Uniwersytetu Jagiellońskiego», 1978, vol. 81, p. 90 et suiv.

[35] Ainsi entre autres K. PRZYBYŁOWSKI, *op. cit.*, p. 118; A. MĄCZYŃSKI, *op. cit.*, p. 54; M. PAZDAN, *Dziedziczenie ustawowe w prawie prywatnym międzynarodowym. Metody regulacji właściwości prawa [La succession ab intestat en droit international privè. Les méthodes de réglementation de la loi compétente]*, Katowice 1973, p. 88.

[36] Ainsi M. SOŚNIAK, *op. cit.*, p. 43; B. WĄLASZEK, M. SOŚNIAK, *op. cit.*, p. 72; M. PAZDAN, *Dziedziczenie...*, p. 40.

avec l'art. 2 de la loi de 1965. Dès lors que l'un des domiciles qui entrent en jeu est le domicile en Pologne, il est recommandé d'appliquer la loi polonaise, et, lorsque ce sont des domiciles exclusivement dans des pays étrangers, la loi de l'Etat avec lequel la personne donnée est «le plus étroitement liée». Ainsi conçue, cette analogie ne me paraît pas adéquate, du moins en ce qui concerne les rapports contractuels. En adoptant dans les règles des art. 26 et 27 le domicile comme point de rattachement, le législateur voulait soumettre les rapports contractuels à la loi de l'Etat, ou par principe se concentrent les intérêts économiques des sujets de ces rapports ou même les intérêts encore plus étroits liés à un rapport concret. Cette solution mène à l'application de la loi de l'Etat qui n'est pas du tout lié aux intérêts économiques de la personne donnée (art. 2, § 1), ou bien de la loi de l'Etat où se trouve «son principal, prépondérant champ d'activité», mais non lié à un rapport concret qui se rattache au domicile dans un autre pays. Il semble qu'il faudrait chercher la solution de ce problème directement dans le § 2 de l'art. 2, en interprétant l'expression «le lien le plus étroit» que l'on y trouve comme le «principal, prépondérant champ d'activité» de la persone donnée, toutefois non pas par rapport à l'ensemble de ses activités, mais en considération du rapport concret pour lequel nous cherchons la loi applicable. Au cas où l'on constate une multiplicité de domiciles, de l'éditeur par exemple, il faut d'abord essayer d'établir auquel de ces domiciles est lié au rapport d'édition (en prenant en considération les faits tels que la tenue de la correspondance concernant le contrat donné, l'exécution de différentes obligations découlant du contrat, la conclusion des contrats avec les imprimeries, les traducteurs, etc. domiciliés ou ayant leur siège dans l'Etat donné, etc.), et appliquer la loi qui y est en vigueur, qu'elle soit polonaise ou autre. C'est alors seulement, lorsqu'on n'aura pas réussi à établir avec lequel des domiciles est lié un rapport concret, on aura recours à la signification générale de la règle de l'art. 2 § 2.

L'expression «le siège de la personne morale» n'est pas univoque, tout comme «le domicile». Une bonne interprétation de cette expression exige d'abord que l'on précise le terme «personne morale». La doctrine polonaise est unanime à admettre[37] que ce terme doit être entendu largement, qu'il englobe non seulement les êtres juridiques qui sont des personnes morales en vertu de la loi de leur siège, mais aussi les organisations ayant une personnalité juridique partielle. A des fins de qualification, il faut donc considérer comme personnes morales les collectivités qui se

[37] Cf. B. WALASZEK, M. SOŚNIAK, *op. cit.*, p. 76; M. SOŚNIAK, *op. cit.*, p. 44; W. LUDWICZAK, *op. cit.*, p. 141; E. WIERZBOWSKI, *op. cit.*, pp. 53, 236; J. JAKUBOWSKI, *Osoby prawne w polskim prawie międzynarodowym prywatnym* [*Les personnes morales en droit international privé polonais*], «Państwo i Prawo», 1969, n° 8/9, p. 270.

caractérisent par une certaine autonomie économique et se comportent dans les rapports juridiques comme si elles étaient réellement des personnes morales, c'est-à-dire dotées par la loi de la personnalité juridique. Comme ces organisations fonctionnent généralement là où se trouve leur siège, aussi, en considération de la nécessité de protéger la confiance du contractant dans les faits visibles, faut-il soumettre à la loi du siège la capacité juridique de ces organismes ainsi que les obligations qui naissent en relation avec leur activité.

Ce qui précède présente une grande importance pour les rapports dans le domaine des éditions, car les contrats d'édition peuvent être passés, avant tout du côté de l'éditeur, par divers sujets. Dans la pratique, il est vrai, ce sont la plupart du temps des entreprises spécialisées, dont le statut juridique ne suscite pas par principe de doutes, mais il peut y avoir aussi divers organismes sociaux, depuis par exemple les comités de parents, à travers les différentes associations, les sociétés, les sujets de droit public, jusqu'aux organisations internationales de droit public. Du côté de «l'aliénateur du droit», on peut fréquemment rencontrer des sociétés ou des associations d'auteurs, dont le statut juridique n'est pas, non plus, toujours bien clair. Il s'ensuit que seule une interprétation très générale de la notion de personne morale permet-elle d'indiquer la loi applicable aux contrats d'édition avec de tels sujets, en se référant à leur siège.

En ce qui concerne la notion de siège, la doctrine polonaise est concordante à admettre[38] l'interprétation attribuant une signification décisive aux éléments factuels. Elle admet donc universellement le critère de siège «réel» et rejette l'hypothèse acceptant les dispositions fictives du statut de la personne morale en cette matière. Afin d'établir quel est le siège «réel», il faut prendre en considération l'état factuel dans son ensemble, en particulier le lieu où se trouve le centre d'administration et de disposition de la personne morale (donc son organe de gestion). Car c'est là que se concentre la principale activité de la personne morale, c'est là où l'on décide de toutes ses affaires.

Cette méthode d'interprétation n'exclut pas l'hypothèse d'un double (ou multiple) siège de la personne morale. Le critère déterminant le siège avec lequel la personne morale est le plus étroitement liée, doit être, selon la doctrine polonaise[39], le lieu où se trouve et fonctionne «la partie

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[38] Ainsi M. SOŚNIAK, *op. cit.*, p. 100; B. WALASZEK, M. SOŚNIAK, *op. cit.*, p. 76; E. WIERZBOWSKI, *op. cit.*, p. 53; B. GAWLIK, M. PAZDAN, *op. cit.*, p. 134; J. JAKUBOWSKI, *op. cit.*, p. 270; W. LUDWICZAK, *Przynależność osób prawnych w świetle prawa prywatnego międzynarodowego* [*La nationalité des personnes morales à la lumière du droit international privé*], «Ruch Prawniczy, Ekonomiczny i Socjologiczny», 1968, n° 3, p. 130.

[39] Cf. B. WALASZEK, M. SOŚNIAK, *op. cit.*, pp. 77—78; M. SOŚNIAK, *op. cit.*, pp. 45, 101.

la plus essentielle de l'administration» de cette personne. Cette opinion demande à être quelque peu modifiée en ce qui concerne les rapports contractuels. D'abord, lorsque l'un des sièges de la personne morale est en même temps siège de l'entreprise dont l'activité a servi de cadre à la conclusion du contrat donné, on applique la loi de l'Etat du siège de l'entreprise, même si «la partie la plus essentielle de l'administration» de la personne morale donnée se trouve dans un autre Etat (art. 27, § 3). Dans le cas où l'on ne peut établir en toute certitude où se trouve l'administration de la personne morale donnée, tandis que l'obligation donnée ne rentre pas dans les activités de l'entreprise, il semble inopportun de chercher «la partie la plus essentielle» de son administration. Il sera plus juste sans doute de retenir celui des sièges qui entrent en compte auquel est lié le rapport contractuel donné (par le fait qu'il est lié à l'activité ou aux intérêts de l'organe qui s'y trouve de la personne morale). C'est là en effet que se trouve la partie de l'administration «la plus essentielle» pour le rapport donné.

Le dernier des points de rattachement qui entrent en jeu dans le contexte des art. 26 et 27, § 1 point 4, est le siège de l'entreprise. Il faut tout d'abord préciser le sens du terme «entreprise». La loi emploie ce terme au sens fonctionnel[40]. Cela signifie que par cette notion il faut entendre tous les «organismes» économiques exerçant professionnellement une activité organisée, par exemple les éditions. Lorsque cette activité est exercée sur le territoire de nombreux pays, il y a lieu de reconnaître que s'y trouvent des entreprises distinctes, quel que soit leur statut formel.

Cette interprétation, identifiant au fond l'entreprise à l'activité, implique une explication aussi de la notion de «siège de l'entreprise». L'entreprise a son siège dans l'Etat où se concentre son activité essentielle, c'est-à-dire où «...est durablement localisé un centre, qui n'est pas nécessairement le principal, d'activité [...] de l'entreprise donnée[41]». Une telle interprétation de la notion de «siège de l'entreprise» écarte le problème de son siège multiple, car dans une situation concrète on pourra parler de plusieurs entreprises et non d'une seule ayant son siège dans plusieurs pays.

Ce point de rattachement est applicable toutes les fois où l'obligation découle du contrat conclu dans les limites d'activité de l'entreprise, et ce sont le contenu et les effets de ce contrat qui en décident dans chaque cas concret[42].

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[40] Ainsi M. PAZDAN, *Zdolność do czynności prawnych osób fizycznych w polskim prawie prywatnym międzynarodowym* [*La capacité d'exercice des personnes physiques en droit international privé polonais*], Kraków 1971, p. 76.

[41] M. PAZDAN, *Zdolność...*, p. 77.

[42] Quant à la signification des notions «lieu» et «moment de la formation du contrat» (employées à l'art. 27, § 2 et l'art. 29), v. W. POPIOŁEK, M. A. ZACHARIASIEWICZ, *Pojęcia "chwila" i "miejsce zawarcia umowy" w polskim prawie prywatnym międzynarodowym*

3. La loi applicable au contrat d'édition dans la loi de 1965 au regard des solutions adoptées dans d'autres systèmes juridiques

Les analyses qui précèdent de la solution du problème de la compétence de la loi régissant le contrat d'édition par la loi de 1965, permettent maintenant d'apprécier cette solution.

La vaste possibilité que prévoit le texte de 1965 de choisir la loi est certainement juste. En revanche, il ne paraît pas opportun d'y apporter des restrictions de la façon dont le fait l'art. 25, § 1 de la loi. Cela non seulement ne correspond pas aux tendances contemporaines de la doctrine et de la pratique du droit international privé, mais encore peut être une source de sérieuses difficultés liées par exemple à l'interprétation de la notion de «relation avec l'obligation». De ce point de vue également il faut proposer l'admission *de lege ferenda* du choix sans restriction. L'on doit reconnaître comme suffisante à cet égard la référence à la notion d' «internationalité» du rapport d'édition.

La solution de la question de la loi applicable au contrat d'édition dans la situation où les parties n'ont pas choisi de loi, doit également être appréciée d'une manière positive.

En laissant ici de côté les art. 26 et 28 qui ne présentent pas de grande importance pratique pour les rapports d'édition, il convient avant tout de souligner que l'idée qui avait présidé à la solution prévue à l'art. 27, § 1 de la loi de 1965 fait partie des méthodes les plus répandues en Europe de solution des conflits de lois dans le domaine des obligations contractuelles, en quête de voies intermédiaires entre les règles synthétiques de conflit de lois et le principe de l'analyse individuelle des circonstances de chaque cas.

Dans le contexte de la règle de la prestation caractéristique adoptée à l'art. 27, § 1, le fait de soumettre les obligations découlant du contrat d'édition à la compétence de la loi du domicile ou du siège de l'éditeur ne saurait susciter des doutes. En cette matière particulière également, la solution de la loi polonaise correspond à celle de certaines législations et aux opinions représentées dans la doctrine et la jurisprudence de nombreux systèmes juridiques[43].

Les notions de «moment» et de «lieu de formation du contrat» en droit international privé polonais], «Problemy Prawne Handlu Zagranicznego», vol. 5, 1981, p. 42 et suiv., et les auteurs y cités.

[43] Cf. p.ex. le § 12, al. 1 — m) de la loi de 1975 de la République Démocratique Allemande sur l'application de la loi aux rapports internationaux civils et familiaux, au droit du travail et aux accords économiques internationaux; le § 25 — c) de la loi hongroise de 1979 sur le droit international privé; le § 43, al. 1, 2^{e} phrase de la loi autrichienne de 1978 concernant le droit international privé; cf. également l'art. F, al. 2 du projet d'E. Ulmer (dans: E. ULMER, *op. cit.*, p. 100); v. également les auteurs cités dans les notes 27—30 et la jurisprudence qu'ils citent.

Il faut également reconnaître comme juste la décision du législateur en matière de points de rattachements utilisés à l'occasion de la mise en oeuvre du principe de prestation caractéristique. Déjà les partisans de la conception de la prestation caractéristique avaient attiré l'attention sur la supériorité des points de rattachement personnels par rapport à ceux du lieu d'exécution, aussi la solution choisie par le législateur polonais ne devrait-elle pas susciter de doutes sérieux, d'autant plus que le point de rattachement du lieu d'exécution n'a jamais joui d'une particulière faveur en droit international privé polonais.

L'appréciation en principe positive de la solution adoptée par la loi de 1965 n'exclut cependant pas certaines remarques critiques portant sur la conception générale de cette solution et sur la solution de la question particulière du contrat d'édition.

La solution de la loi de 1965 semble trop rigide, elle n'admet aucune dérogation aux principes adoptés. Une liberté de manoeuvre a été laissée au juge seulement en matière d'interprétation. Cependant, le recours à la qualification est, notamment en ce qui concerne le champ d'application des règles de l'art. 27, § 1, non seulement difficile, mais de plus crée un danger réel de dénaturer les intentions du législateur. D'autre part, ce recours n'est pas en mesure d'élargir le champ d'application de ces règles à un degré qui correspondrait aux exigences des rapports internationaux contemporains.

La solution de la loi de 1965 produit des effets défavorables de double sorte. D'un côté, dans le cas des contrats où l'on arrive à distinguer une prestation caractéristique, mais qui ne figurent pas sur la liste prévue à l'art. 27, § 1, cette solution aboutit à l'application de la loi du lieu de la formation du contrat (conformément à l'art. 29). D'un autre côté, dans le cas du contrat d'édition, étant donné le caractère absolument obligatoire de la règle de l'art. 27, § 1 point 4, elle oblige à appliquer dans chaque situation la loi de l'éditeur, lors même que l'ensemble des circonstances justifie de façon évidente l'application d'une autre loi.

Il semble donc, étant donné les besoins des rapports, que plus avantageuse serait une solution plus souple qui permettrait d'éviter de tels effets mais en même temps garantirait la sûreté du droit, au moins à un degré semblable à la solution actuelle, Sans entrer dans les détails de la question de savoir quelle forme législative une telle solution devrait revêtir, je tiens à souligner qu'en tout cas le fait d'ajouter de nouveaux types de contrats à la liste de l'art. 27, § 1 ne changera rien au fond du problème. Même une liste très détaillée cessera à un moment de répondre aux exigences des rapports socio-économiques en développement, qui décident de la naissance de nouveaux rapports d'obligation et du dépérissement des anciens.

Il n'est pas non plus avantageux sans doute de renoncer à une liste et de lui substituer une règle générale faisant appliquer par exemple la loi «la plus étroitement liée à l'obligation». Car une telle déclaration n'explique pas (au moins approximativement) quelle est la loi «la plus étroitement liée» à l'obligation.

A la lumière de ce qui précède, deux solutions paraissent possibles: une règle générale faisant appliquer la loi de l'Etat où lf tie tenue à une prestation caractéristique a son domicile ou son siège[44], ou bien une telle règle complétée d'une liste des dispositions spéciales concernant p.ex. les rapports les plus fréquents dans la pratique[45].

La première solution, présupposant la formulation des règles spéciales par la jurisprudence, ne semble pas acceptable en Pologne, étant donné le peu d'expérience des juges habitués à utiliser les règles concrètes de solution de conflits de lois. C'est la seconde solution qui paraît plus avantageuse, en posant le principe qu'elle permettrait aussi, dans des cas particulièrement justifiés, de déroger aux règles spéciales[46]. Les contrats ne figurant pas sur la liste seraient soumises à la compétence de la loi indiquée par les règles construites sur la base de la règle générale de la prestation caractéristique, sauf que là également des dérogations exceptionnelles seraient possibles[47].

Le contrat d'édition, relativement facile à situer dans le cadre de la conception de la prestation caractéristique, pourrait se trouver dans le second groupe de contrats, à moins que l'on ait inclus dans le premier une règle concernant l'ensemble des contrats d'auteur comme le fait l'art. 27, § 1 point 4.

La façon dont est formulée cette dernière disposition peut, elle aussi, susciter des doutes, et cela indépendamment de ce qui a été dit plus haut de la construction générale de la solution de la loi de 1965.

Vu la spécificité des transactions commerciales portant sur les droits d'auteur patrimoniaux, il convient de juger fondée la distinction des contrats d'auteur faite par l'art. 27, § 1 point 4, au moyen du critère d'objet. Le législateur n'a pas tenté, à juste titre, d'exemplifier des types de contrats d'auteur. Cependant l'expression «les contrats de transfert des droits d'auteur» mène à englober par la règle contenue dans cette disposition, à côté par exemple du contrat d'édition, également des contrats dans lesquels la prestation caractéristique est exécutée par l'aliénateur du droit (par exemple

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[44] P.ex. l'art. 4 de la Convention de la CEE sur la loi compétente pour les obligations contractuelles signée le 12 juin 1980 à Rome.

[45] Comme p.ex. dans la loi de 1975 de la RDA ou dans la loi tchécoslovaque de 1963 concernant le droit international privé et processuel.

[46] Comme p.ex. dans la loi hongroise de 1979.

[47] Comme p.ex. dans la loi yougoslave de 1982 sur la solution des conflits de lois avec les dispositions d'autres Etats en matière de certaines relations.

la vente des droits d'auteur). L'on peut évidemment argumenter que ces contrats étant très rares dans la pratique, il est inutile d'en tenir compte dans la problématique des conflits de lois concernant les contrats d'auteur et que, étant donné la justesse de l'observation sur la concordance de la solution de l'art. 27 § 1 point 4, avec la pratique prépondérante, il est inutile de demander sa modification. Cependant, un tel point de vue présuppose une appréciation de certains rapports contraire aux principes de la construction du § 1 de l'art. 27.

Une concordance plus complète de la solution spéciale en matière de contrats d'auteur avec le principe de la prestation caractéristique peut être obtenue par des changements concernant le point de rattachement (par la distinction de divers types de contrats d'auteur et ensuite par la détermination de la loi qui leur est applicable selon les règles spéciales), ou bien par une délimitation différente du champ d'application de la règle de conflits de lois adéquate.

La doctrine et la jurisprudence d'autres systèmes proposent deux critères de classification des contrats d'auteur. Les uns, dans le souci de préserver l'unité du statut contractuel et du statut de l'auteur, estiment que les contrats d'exploitation d'une oeuvre dans un Etat doivent être soumis à la compétence de sa loi. Quant aux contrats prévoyant l'exploitation de l'oeuvre dans plusieurs Etats, ils doivent être soumis à la compétence de la loi de l'Etat qui présente le plus d'intérêt pour l'exploitation de l'oeuvre[48]. Les autres distinguent les contrats obligeant l'acquéreur d'un droit d'auteur à son exploitation et les contrats ne lui imposant pas cette obligation. Les contrats du premier type devraient être soumis à la compètence de la loi en vigueur au siège de l'acquéreur, et les autres à la loi de l'Etat où l'aliénateur du droit a son siège ou domicile[49].

La réception de l'une de ces solutions par le droit polonais semblerait inopportune. Sans parler du fait que le bien-fondé de telles divisions n'est aucunement indiscutable, il faut en tout cas constater qu'il n'est pas opportun d'allonger la liste des règles spéciales dans le domaine des obligations contractuelles.

Il serait plus correct, semble-t-il, de délimiter autrement le champ d'application de la règle de l'art. 27, § 1 point 4.

Le législateur emploie l'expression «les contrats de transfert des droits d'auteur», ce qui nous amène à expliquer cette notion du point de vue des effets dispositifs des rapports contractuels. Le trait commun de la majorité de ces rapports, reflétant leur fonction socio-économique, n'est cependant pas tel ou tel acte de disposition accompli par l'auteur sur le

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[48] Ainsi R. PLAISANT, *L'exploitation du droit d'auteur et les conflits de lois*, «Revue Internationale de Droit d'Auteur», vol. XXXV, 1962, p. 95.

[49] Ainsi A. TROLLER, *op. cit.*, p. 223; J. MACKENSEN, *op. cit.*, p. 79.

droit qui lui appartient, mais de droit (et en principe le devoir) prenant naissance chez son partenaire d'exploiter ce droit dans une mesure déterminée. Il semble donc que le champ d'application de la règle de l'art. 27, § 1 point 4, devrait être défini par la formule «les contrats d'exploitation des droits d'auteur» [50]. Il comprendrait tous les contrats dont le but immédiat est la jouissance des droits découlant du droit d'auteur par une autre personne que le titulaire primaire de ce droit sans égard au point de savoir si cette jouissance doit consister par exemple à multiplier et à diffuser l'oeuvre (contrat d'édition), à diffuser l'oeuvre par divers spectacles (contrats avec les entrepreneurs de théâtre, les distributeurs de films) ou bien à utiliser les apports d'auteur (contrats passés par les auteurs avec les producteurs de films). Les autres contrats rentreraient dans le champ d'application des différentes règles de l'art. 27, § 1 (p.ex. le contrat de vente).

Suivant les propositions *de lege ferenda* ci-dessus, le contrat d'édition rentrerait soit dans le champ d'application de la règle de l'art. 27, § 1 point 4, convenablement modifiée, ou bien, en cas de renoncement à la règle spéciale des contrats d'auteur, la loi applicable serait indiquée par une règle construite sur la base de la règle générale de la prestation caractéristique. En même temps, la reconnaissance tant de la règle spéciale que de la règle générale comme indices pour le juge permettrait, dans des cas exceptionnels et particuliers, de renoncer à l'application de la loi de l'Etat du domicile ou du siège de l'éditeur.

[50] Ainsi le § 12, al. 4 de la loi de la RDA de 1975; le § 43 de la loi autrichienne de 1978; l'art. F du projet d'E. Ulmer. Il semble que le champ d'application de cette règle devrait également englober les contrats d'exploitation d'autres droits sur les biens immatériels (ainsi le projet d'E. Ulmer).

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Nouvelle législation des changes en Pologne

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I. Principes fondamentaux de la législation socialiste des changes. II. Sources de la législation des changes dans les pays socialistes européens. III. Objets de la législation des changes. IV. Opérations en devises. V. Sujets de la législation des changes. VI. Droits des sujets soumis à la législation des changes. VII. Autorisations en matière de changes. VIII. Comptes en devises. IX. Obligations, interdictions et autres règles.

I. Dans les pays socialistes, la monnaie circule uniquement à l'intérieur de chaque Etat; elle est au service exclusif de l'économie nationale et sert de moyen de paiement entre les sujets économiques, les personnes physiques et morales. Conformément au principe adopté dans les pays socialistes, la monnaie nationale ne peut pas circuler à l'étranger, servir dans les transactions avec l'étranger, ou être exportée à l'étranger. C'est une monnaie uniquement nationale. Il en résulte que le règlement des dettes et des obligations avec l'étranger s'effectue en monnaie de l'autre partie et lorsque cette monnaie ne peut être utilisée à cette fin, le règlement s'effectue en monnaie d'un pays tiers, pour la plupart en une monnaie librement convertible ou en or.

Pour pouvoir effectuer des paiements en monnaie étrangère, il faut évidemment en avoir. Dans la plupart des cas, on obtient cette monnaie grâce aux exportations de marchandises et de services, monopolisées par l'Etat socialiste. L'Etat concentre également entre ses mains des recettes en monnaies étrangères à divers autres titres. C'est un principe que l'Etat se réserve également, contre paiement en monnaie nationale, tous versements (à quelques exceptions près) en monnaies étrangères, reçus par des établissements non étatiques, entre autres par des personnes physiques.

Le monopole de l'Etat socialiste en matière de changes englobe non seulement les monnaies étrangères — espèces ou monnaie scripturale — mais aussi toutes les devises qui sont, dans l'acception classique du terme, non seulement des espèces, mais également des titres à court terme, libellés en monnaies étrangères et convertibles, donc — remplissant ces conditions — lettres de change, chèques, bons de caisse, versements télégraphiques, virements, mandats de paiements, accréditifs, etc. Ce monopole s'étend aux dépôts bancaires, dépôts d'épargne, valeurs immobilières, obligations et métaux précieux (or et platine), sauf les objets utilitaires (bijoux, etc.). Le monopole ne se limite pas au droit de l'Etat d'exiger qu'on lui cède les versements actuels sous une des formes susmentionnées, mais il se traduit par l'obligation de déclarer, de rapatrier et de céder à l'Etat les devises possédées à l'étranger. Outre le domaine monétaire, il s'étend aussi à tous les biens mobiliers et immobiliers, aux droits sur les biens situés à l'étranger et aux créances sur l'étranger à divers titres.

La masse monétaire ainsi rassemblée est utilisée par l'Etat socialiste pour couvrir les dépenses en monnaies étrangères. Il s'agit en premier lieu de couvrir les dettes à titre des importations de marchandises et de services (monopolisées, tout comme les exportations — le monopole du commerce extérieur) ainsi que toutes autres dépenses extérieures découlant des tâches de l'Etat. Mais en même temps l'Etat peut autoriser à dépenser à l'étranger des sommes en monnaies étrangères en possession de certains sujets en Pologne et en outre met, contre paiement d'une contrepartie en monnaie nationale, à la disposition de la population et des établissements de l'économie socialiste et non socialiste des monnaies étrangères destinées à des dépenses à l'étranger que l'Etat reconnaît comme justifiées pour des raisons sociales, économiques, etc.

Ainsi esquissées, les recettes et dépenses globales en monnaies étrangères dans le domaine des règlements avec l'étranger et avec des étrangers séjournant sur le territoire de l'Etat concerné, la possession de monnaies, la circulation des monnaies à travers les frontières (transport, transfert), etc. — appartiennent au monopole de l'Etat.

Il convient à la législation des changes de donner une forme concrète à ces règles et tendances générales, en définissant les droits et obligations, les interdictions et les autorisations, ainsi que les notions de devises, d'opérations en devises et de sujets concernés par cette réglementation. La législation des changes doit aussi déterminer le montant et les conditions de paiement des indemnités de séjour, des salaires, des bourses, des retraites de vieillesse, des pensions alimentaires, des frais de voyage, etc. destinés à être payés à l'étranger. C'est donc une tâche importante pour cette législation que de fixer des règles de paiements à l'étranger ou à l'intérieur du pays, effectués en monnaie étrangère ou en monnaie nationale en faveur des étrangers. Cella implique aussi la fixation des règles de déclaration de douane et de la vente obligatoire de devises à l'Etat par les établissements de l'économie socialiste et non socialiste et par les personnes physiques. Enfin, la législation des changes est appelée à régler les dépenses à faire et les recettes à percevoir sur la territoire polonais par les personnes étrangères, tant en monnaire étrangère que nationale.

II. Dans une étude consacrée à la législation des changes des Etats socialistes européens[1], Mme Wanda Wojtowicz attire avant tout l'attention sur le fait que dans le système socialiste la législation des changes concerne aussi bien les établissements du secteur socialiste que le secteur non étatique y compris les personnes physiques. Cette législation traite différemment les établissements de l'économie socialiste et les autres sujets, et définit les compétences des organes d'administration conformément aux principes généraux socialistes.

Il faut ajouter que la législation socialiste des changes apparaît dans une des formes suivantes: 1) une loi générale en matière de changes, développée par des actes d'exécution, ou 2) plusieurs actes juridiques qui règlent les différents problèmes. On trouve la première forme en Pologne[2], en Tchécoslovaquie, en Hongrie, en République Démocratique Allemande, en Roumanie et partiellement en Bulgarie et la deuxième forme en URSS[3].

Au lendemain de la deuxième guerre mondiale, on a appliqué en Pologne le décret du président de la République, en date du 26 avril 1936, avec amendements successifs d'avant-guerre et de 1950. Cette législation fut abrogée par la loi du 28 mars 1952 (Dziennik Ustaw n° 21, texte 133). Cette nouvelle loi avait un caractère fort restrictif et interdisait les opérations en devises entre les ressortissants polonais d'une part, et entre ceux-ci et les étrangers séjournant en Pologne, de l'autre. Cependant, cette même loi (art. 10 et 11) autorisait le ministre des Finances à déroger à certaines de ses dispositions. Dans l'exercice de cette compétence, le ministre des Finances a contribué, par ses décisions, à libéraliser successivement ce système. Le système ainsi modifié a servi de base pour la nouvelle loi de 1983 qui reprend souvent certains principes antérieurement en vigueur.

La loi actuelle (Prawo dewizowe) du 22 novembre 1983 relative à la législation des changes (Dziennik Ustaw n° 63, texte 288) s'étend aux domaines suivants (art. 1er de la loi):

1) la possession des devises en Pologne par les personnes nationales ou étrangères, ainsi que la possession à l'étranger des devises par les personnes nationales;

2) les opérations en devises, ainsi que les principes de la fixation et

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[1] Voir W. WOJTOWICZ, *Ustawodawstwo dewizowe europejskich krajów socjalistycznych* [*La législation des changes des pays socialistes européens*], «Studia Prawnicze», 1982, pp. 259—288.

[2] Aussi bien la loi du 28 mars 1952 que la loi actuelle du 22 novembre 1983.

[3] En Tchécoslovaquie — la loi du 21 décembre 1970, en Hongrie — le règlement du Conseil des ministers du 17 janvier 1974, en République Démocratique Allemande — la loi du 19 décembre 1973, en Roumanie — le décret de 1960, dont le texte unifié date du 19 avril 1972, en Bulgarie — la loi générale sur les devises de 1966 et le règlement du 23 décembre 1975 sur le financement des établissements de l'économie planifiée, en URSS — la législation de 1976 (sources citées d'après W. WOJTOWICZ, *op. cit.*).

de la réalisation de créances et d'obligations pécuniaires dans le cadre de ces opérations;

3) l'obligation de déclarer par des personnes nationales de leurs biens situés à l'étranger et l'obligation des personnes étrangères de déclarer leurs biens situés en Pologne, ainsi que les restrictions concernant certaines opérations n'étant pas des opérations en devises;

4) les compétences en matière de changes des organes de l'Etat ainsi que l'étendue et les principes des fonctions de contrôle en matière de changes.

III. La notion de devises apparaît dans la législation de presque tous les Etats socialistes européens qui distingue les devises dites absolues et les devises dites relatives.

D'après la nouvelle loi polonaise (art. 6, 1), la notion de devises, qualifiées en doctrine d'absolues, comprend:

1) les espèces (billets de banque et pièces), ayant cours légal, qui servent de moyens de paiement à l'étranger, ainsi que celles qui ont perdu cette qualité, mais sont remboursables; la loi qualifie toutes ces espèces de monnaies étrangères;

2) les billets de Trésor, les chèques, les lettres de change, les accréditifs, les mandats de paiement, les mandats et chèques de voyage, libellés en monnaies étrangères;

3) les actions, les obligations, les reçus de dépôt et les lettres de gage, ainsi que les livrets d'épargne, les livrets de dépôts en banque et les autres documents d'épargne, émis ou libellés en monnaies étrangères;

4) l'or et le platine non transformés ou sous forme de lingots, de monnaies frappées après 1850, de semi-produits (excepté ceux utilisés dans la technique dentaire), ainsi que les ouvrages en or ouen platine qui d'habitude ne sont pas fabriqués en ces métaux.

D'après la loi (art. 6, 2), les devises, qualifiées en doctrine de relatives, sont:

1) les espèces de la République Populaire de Pologne (les billets de banque et les pièces) ayant cours légal, qui servent de moyens de paiement en Pologne, ainsi que celles qui ont perdu cette qualité, mais sont remboursables; la loi appelle ces espèces la monnaie polonaise,

2) les billets de Trésor, les chèques, les lettres de change, les accréditifs, les mandats de paiement, les mandats et chèques de voyage, libellés en monnaie polonaise,

3) les actions, les obligations, les reçus de dépôt et les lettres de gage, ainsi que les livrets et autres documents d'épargne émis ou libellés en monnaie polonaise,

4) les coupons-réponse de poste internationaux émis en Pologne — si les valeurs susmentionnées constituent un moyen de paiement ou font

l'objet de transactions avec des personnes étrangères, entre ces personnes ou à leur ordre ou en leur faveur même sans ordre, ainsi que dans les cas d'exportation et de transit de ces devises à travers le territoire de la République Populaire de Pologne.

La possession par des personnes nationales et par des personnes étrangères de biens situés respectivement à l'étranger et en Pologne, la conclusion d'un contrat économique concernant la prestation mutuelle à titre gratuit de services et de choses n'ayant pas la qualité de devises, l'acceptation par la personne nationale d'un don constituté d'objets autres que devises de la part d'une personne étrangère, la disposition par des personnes nationales des biens situés à l'étranger, ces biens n'ayant pas la qualité de devises, la procuration accordée en vue de recevoir à l'étranger des biens n'étant pas considérés comme devises ou la constatation d'acquisition de la succession à l'étranger — peuvent aussi être considérées comme devises relatives *sui generis* étant donné que dans tous ces cas une autorisation spéciale est obligatoire (chapitre 4 de la loi, art. 27 et 29—32).

D'autre part, le ministre des Finances, par voie de règlement, peut reconnaître comme devises autres documents émis ou libellés en monnaie polonaise ou étrangère.

En cherchant une généralisation de la notion d'objets soumis à la législation des changes, on peut constater que le droit polonais considère comme devises dites absolues les monnaies étrangères, les documents les représentant, l'or et le platine, tandis que la catégorie des devises dites relatives englobe les monnaies polonaises et les documents les représentant, s'ils font l'objet d'opérations avec des personnes étrangères ou d'exportation, d'importation ou de transit à travers la Pologne. En outre, certaines autres opérations ainsi que la disposition de certains autres biens n'ayant pas la qualité de devises nécessitent une autorisation spéciale, ce qui donne que la législation des changes équivaut à un contrôle extensif des relations économiques avec l'étranger et à l'égard des étrangers. Le nombre important d'objets soumis à la législation polonaise des changes est semblable au même nombre dans d'autres pays socialistes, mais les solutions ne sont pas identiques.

IV. Selon la loi polonaise de 1983 (art. 7), les opérations en devises (*obrót dewizowy*) englobent:

1) la conclusion d'un contrat et autres opérations ne résultant pas d'un contrat, mais ayant ou devant avoir pour conséquence l'obligation de paiement en devises, le transfert des titres de propriété ou de possession de devises ou le transfert d'une créance ou d'une obligation portant sur les devises,

2) la réalisation des paiements en devises ou un autre transfert des titres de propriété ou de possession de devises,

3) l'exportation des devises à l'étranger, leur importation de l'étranger et leur transit à travers le territoire de la République Populaire de Pologne.

Sont aussi considérées comme opérations en devises:

1) la disposition entre personnes nationales ayant pour objet les devises dites relatives (cf. la définition dans le paragraphe III de notre étude) à l'ordre des personnes étrangères ou en leur faveur même sans ordre,

2) la constitution d'un mandat en vue de percevoir des devises à l'étranger,

3) la conclusion à l'étranger entre personnes étrangères d'un contrat ayant pour conséquence le transfert des titres de propriété ou de possession de devises se trouvant en Pologne.

En essayant de créer une définition doctrinale, plus générale, on pourrait tirer des dispositions de la loi la conclusion suivante: les opérations en devises sont: les transferts et les actes juridiques ayant ou devant avoir pour conséquence les transferts des titres de propriété ou de possession de devises, ainsi que les transferts physiques de toute sorte de devises par les frontières polonaises, y compris leur débarquement et embarquement des bateaux étrangers dans un port polonais (je pense que la dernière règle concerne aussi les avions), bref — tous les transferts juridiques des devises, ainsi que tous les transferts physiques par les frontières polonaises. De cette façon, la loi assure à l'Etat un contrôle universel sur toutes les opérations en devises et même, plus largement, sur certaines relations entre les personnes nationales et étrangères concernant certains biens n'ayant pas la qualité de devises.

V. Sachant quelles sont, d'une façon générale, les opérations en devises, il faut maintenant présenter les sujets de ces opérations.

D'après la loi (art. 2), la catégorie des personnes nationales englobe:

1) les ressortissants polonais ayant leur domicile en Pologne,

2) les étrangers ayant, avec le consentement des autorités polonaises compétentes, leur domicile en Pologne,

3) les personnes morales ainsi que les organisations et institutions qui ne jouissent pas de la personnalité juridique, ayant leur domicile en Pologne, ainsi que leurs succursales et représentations ayant leur domicile en Pologne,

4) les succursales et les représentations, avec siège en Pologne, des personnes morales et des organisations ou institutions qui ne jouissent pas de la personnalité juridique dont le siège est situé à l'étranger et qui exercent en Pologne une activité professionnelle,

5) les enterprises qui exercent en Pologne une activité économique, appartenant aux personnes étrangères,

6) les représentations diplomatiques et les consulats polonais, ainsi que

d'autres représentations polonaises bénéficiant d'immunités et de privilèges diplomatiques ou consulaires.

Sont reconnues par la loi en question comme personnes étrangères (art. 3):

1) les étrangers ayant leur domicile à l'étranger,

2) les ressortissants polonais ayant leur domicile à l'étranger,

3) les personnes morales ainsi que les organisations et institutions qui ne jouissent pas de la personnalité juridique, ayant leur siège à l'étranger, de même que leurs succursales et représentations ayant leur siège à l'étranger,

4) les succursales et les représentations, avec siège à l'étranger, des personnes morales et des organisations ou institutions qui ne jouissent pas de la personnalité juridique, dont le siège est situé en Pologne,

5) les succursales et les représentations, avec siège en Pologne, des personnes morales et des organisations ou institutions qui ne jouissent pas de la personnalité juridique, dont le siège est situé à l'étranger et qui n'exercent pas en Pologne une activité professionnelle,

6) les organisations et institutions internationales, ainsi que leurs succursales et représentations,

7) les représentations diplomatiques étrangères, consulats et autres représentations étrangères bénéficiant d'immunités et de privilèges diplomatiques ou consulaires.

Les ressortissants polonais et les étrangers domiciliés en Pologne conservent le statut de personnes nationales même durant leur séjour à l'étranger. Les étrangers et les ressortissants polonais domiciliés à l'étranger conservent le statut de personnes étrangères même pendant leur séjour en Pologne.

Le ministre des Finances est compétent pour définir, en cas de doutes, le statut à l'égard de la législation des changes de toute personne physique ou morale, nationale ou étrangère, de même que conférer le statut de personne nationale à une personne considérée comme étrangère par la loi en question.

Le trait caractéristique qui distingue les personnes nationales et étrangères est le domicile — en Pologne ou à l'étranger. De cette façon, le législateur polonais a choisi la distinction la plus simple, permettant en même temps de tirer les conséquences économiques des différences entre ces deux catégories. Dans d'autres pays socialistes, les distinctions sont plus compliquées.

VI. Après avoir défini les notions de devises, d'opérations en devises et de sujets de la législation des changes, la loi énonce les droits et les devoirs dans ce domaine.

Les personnes physiques nationales peuvent posséder des devises en Pologne (art. 10). Elles peuvent également déposer les monnaies étrangères aux comptes ouverts en Pologne dans les banques polonaises spécialisées dans les opérations en devises — *banki dewizowe* (art. 12). Pendant leur séjour à l'étranger, ces mêmes personnes peuvent disposer — en faveur de personnes étrangères et à titre d'une donation en faveur de personnes nationales — de monnaies étrangères et d'autres devises: 1) obtenues durant leur séjour à l'étranger grâce aux contrats de travail ou autres occupations professionnelles; 2) obtenues à l'étranger à titre de donations de la part de personnes étrangères; 3) acquises en Pologne pour une libre utilisation (art. 17, 1). Si elles ont eu leur domicile à l'étranger et sont venues en Pologne pour s'y établir, elles peuvent posséder et disposer librement seulement des devises laissées à l'étranger avant leur venue en Pologne (art. 18).

Toutes les personnes nationales, physiques et morales, peuvent, dans les domaines définis par la loi et avec le consentement du ministre compétent, conclure avec des personnes étrangères les contrats concernant la création de société ou entreprises avec la participation de capital étranger ainsi que les contrats établissant les principes d'une coopération financière (art. 19).

Les personnes étrangères peuvent (art. 14) posséder en Pologne des devises apportées de l'étranger et en disposer en observant les règles de la loi, ainsi que de les exporter à l'étranger après avoir déduit le montant du change obligatoire pour couvrir leurs frais de séjour en Pologne. Elles peuvent aussi posséder en Pologne de la monnaie polonaise et des monnaies étrangères obtenues en Pologne en conformité avec les dispositions de la loi, ainsi qu'en disposer en observant les dispositions précitées. Elles peuvent déposer la monnaie polonaise et les monnaies étrangères aux comptes ouverts en Pologne dans des banques polonaises spécialisées dans les opérations en devises. Les paiements dus à ces personnes en monnaie polonaise à titre de contrats ou d'autres titres conformes aux règles de la loi peuvent être versées aux comptes distincts ouverts en Pologne dans des banques polonaises spécialisées dans les opérations en devises; cependant, les retraits de ces comptes ne peuvent avoir lieu qu'après avoir obtenu une autorisation spéciale.

Plusieurs autres opérations en devises pour lesquelles une autorisation n'est pas exigée, sont énumérées à l'art. 20 de la loi qui contient 14 catégories de ces opérations. Les dimensions de notre article ne nous parmettent pas de présenter ces opérations en détail.

VII. Les autorisations en matière de changes (*zezwolenia dewizowe*) sont accordées par les organes d'administration compétents et portent sur la possession de devises, sur les opérations en devises ou autres opérations indiquées par la loi. Ces autorisations peuvent avoir un caractère général ou individuel et elles peuvent être conditionnelles. Les autorisations générales sont accordées à l'ensemble ou à un groupe de personnes nationales ou étrangères trandis que les autorisations individuelles ont un caractère nominal. L'autorisation accordée à une partie d'un contrat est valable également pour l'autre partie ainsi que pour les tiers concernés par ce contrat, à moins que l'organe compétent n'en décide autrement.

A l'exclusion des affaires relevant de la compétence du ministre du Commerce extérieur, ces autorisations sont délivrées par le ministre des Finances. Une autorisation du ministre des Finances est notamment exigée pour admettre, dans un accord sur les opérations en devises avec l'étranger, les paiements en monnaie polonaise, pour effectuer des paiements en monnaie polonaise en Pologne dans le contexte des opérations en devises avec l'étranger, pour exporter à l'étranger de l'or ou du platine ayant la qualité de devises, pour posséder des devises, en Pologne ou à l'étranger, par des personnes morales nationales et les organisations ou institutions nationales qui ne jouissent pas de la personnalité juridique. D'une manière générale, la compétence du ministre des Finances en matière de ces autorisations n'est pas limitée et elle revêt un caractère discrétionnaire.

Le ministre du Commerce extérieur est autorisé par la loi à accorder des autorisations en ce qui concerne le commerce extérieur et les services ayant trait à ce commerce. Les autorisations générales dans ce domaine sont accordées en accord avec le ministre des Finances, et les autorisations individuelles concernant des opérations déterminées par le ministre des Finances en concertation avec le ministre du Commerce extérieur.

Narodowy Bank Polski (NBP) — Banque Nationale de Pologne — accorde des autorisations individuelles conformément aux directives établies par le ministre des Finances en concertation avec le président de la NBP. Ces autorisations concernent p. ex. les opérations en devises relevant de la compétence du ministre des Finances, la disposition de biens en possession à l'étranger, les opérations prévues dans l'art. 29 (la conclusion dans le domaine des opérations avec l'étranger d'un contrat ayant un caractère économique et relatif à la prestation mutuelle à titre gratuit des services ou des choses qui n'ont pas la qualité de devises), et l'art. 30 (l'acceptation de certains dons offerts par les personnes étrangères aux personnes nationales).

Dans son arrêté du 10 mars 1984 (Monitor Polski n° 7, texte 52), le ministre des Finances a accordé une autorisation générale à effectuer 58 catégories d'opérations en devises. Les autorisations énumérées au chapitre 1^{er} de cet arrêté concernent des opérations appelées diverses — 20 paragraphes, dont un contient 13 points, et aux chapitres 2—5 les opérations classées concernant notamment la location et le bail, les contrats de transport international de personnes, les contrats de transport international et d'assurance de marchandises, l'exportation et l'importation des devises ainsi que le change de monnaies étrangères au moment du passage de la frontière d'Etat.

VIII. L'article 12 de la nouvelle loi prévoit que les personnes physiques nationales peuvent déposer les monnaies étrangères aux comptes ouverts en Pologne dans les banques polonaises spécialisées dans les opérations et l'article 15 prévoit le même droit pour toutes les personnes étrangères, dans ce dernier cas ce droit s'appliquant également à la monnaie polonaise. Pour assurer la réalisation de ces droits, le ministre des Finances et le président de la NBP ont émis le 30 novembre 1984 un arrêté relatif aux comptes bancaires des personnes physiques nationales en monnaies convertibles (Monitor Polski, n° 27, texte 182).

L'arrêté autorise les personnes physiques nationales à avoir des comptes «A» et «N» dans une des cinq monnaies convertibles suivantes: le dollar US, le mark ouest-allemand, la livre sterling, le franc français et le franc suisse; le président de la NBP peut élargir cette liste. Les deux comptes peuvent être ouverts et tenus à la NBP, à la banque Polska Kasa Opieki, S.A., et à la Bank Handlowy, S.A. Il n'est pas autorisé de recevoir aux comptes susmentionnés des retraites de vieillesse, des pensions et prestations du même caractère en provenance de l'étranger et certains autres versements, à moins que le titulaire du compte obtienne une autorisation spéciale.

Le titulaire d'un compte «A» ou «N» peut retirer les sommes déposées soit en espèces soit sous forme de virement, chèque ou mandat ou une autre forme convenue avec la banque. Les sommes en question peuvent être retirées en Pologne en monnaies convertibles, en autres monnaies étrangères définies par le président de la NBP, en bons de la banque Polska Kasa Opieki S.A. ou en monnaie polonaise. Si le titulaire du compte veut effectuer un paiement autre que celui admis par arrêté en question, une autorisation spéciale est indispensable. Les héritiers et les légataires — personnes physiques nationales, auxquels le compte est dévolu, peuvent en disposer dans mêmes conditions que le titulaire défunt après avoir produit un document certifiant leurs droits de succession et le paiement de l'impôt sur les successions. En cas de départ pour l'étranger ou d'établissement définitif à l'étranger ainsi qu'en cas de dévolution des sommes déposées aux comptes «A» ou «N» à une personne étrangère, une autorisation spéciale est indispensable.

Selon l'arrêté précité, au compte «A» peuvent être versées les monnaies convertibles reçues par mandats bancaires et postaux, chèques, lettres de change et accréditifs monétaires étrangers, ainsi que les montants rapatriés de l'étranger par le titulaire du compte à condition de produire un certificat délivré par un bureau des douanes au passage de la frontière — au plus tard 6 mois à partir de la réception de ces documents ou de la déclaration de devises à la frontière. En plus, le § 3,2 de cet arrêté énumère 14 autres catégories de paiements en monnaies étrangères qui peuvent être effectués en Pologne au compte «A». L'importance de toutes ces opérations c'est qu'elles doivent être documentées. Sans documents, ces sommes ne peuvent pas être versées au compte «A», mais seulement au compte «N».

Outre les sommes que l'on peut retirer aussi bien du compte «A» que du compte «N», les titulaires des comptes «A» peuvent également effectuer: des virements à titre de donation aux comptes «A» des membres de leur plus proche famille[4], ces membres ayant le statut de la personne nationale; des transferts à l'étranger de sommes nécessaires pour couvrir les frais de voyage et de séjour du titulaire du compte et des membres de sa plus proche famille, ainsi que pour l'achat de marchandises et de services; des transferts des cotisations aux organisations étrangères dont est membre soit le titulaire du compte, soit sa plus proche famille, à condition que l'appartenance à ces organisations est conforme au droit polonais. Les titulaires des comptes peuvent ordonner tous ces virements et transferts même durant leur séjour à l'étranger.

Les dépôts aux comptes «A» rapportent des intérêts annuels suivants: payables immédiatement 5%, déposés à 12 mois 9%, à 24 mois 10%, à 36 mois 11%. Le paiement des intérêts s'effectue dans la monnaie du compte. Si l'on retire le dépôt, même une partie, avant le délai, les intérêts baissent à 3%.

Les versements de monnaies étrangères au compte «N» sont libres, c'est-à-dire sans nécessité de certifier l'origine des monnaies possédées. Les titulaires des comptes «N» peuvent utiliser les sommes déposées à ces comptes pour les achats dans des magasins en Pologne spécialisés dans la vente en devises de certains produits. Ils peuvent également transférer ces sommes à titre de donation aux comptes «N» de membres de leur plus proche famille — ces membres ayant le statut de la personne nationale. Les sommes détenues au compte «N» pendant au moins un an peuvent être transférées au compte «A». Les titulaires des comptes peuvent ordonner tous ces virements et transferts même pendant leur séjour à l'étranger. Les dépôts aux comptes «N» ne rapportant pas d'intérêts.

IX. Aux droits étudiés ci-dessus, il faut opposer les obligations, interdictions et autres règles.

Conformément aux deux règles fondamentales de la législation des changes en Pologne, on ne peut pas effectuer des opérations en devises sans autorisation, à moins que la loi admette des exceptions (art. 11); en outre, dans le domaine des opérations en devises avec l'étranger, les

[4] D'après l'article 8,4 de la loi, le terme «les membres de la plus proche famille» concerne les époux, les ascendants, les descendants, les frères et soeurs, les parents des époux, les belles-filles, les beaux-fils, les adoptés et les adoptants ainsi que tout enfant recueilli étant à charge de ladite famille qui bénéficie à ce titre d'une allocation familiale.

paiements afférents aux contrats ou aux autres opérations s'effectuent en monnaie étrangère (art. 21).

Toutes les personnes nationales sont tenues de (chapitre 3, art. 21—26): introduire dans tous contrats la clause selon laquelle les paiements qui en résultent seront effectués en monnaie étrangère; exiger les créances pécuniaires qu'elles ont à l'étranger pas plus tard qu'à la date d'échéance et rapatrier ces montants en Pologne; opérer les paiements en faveur des personnes étrangères pas avant la date d'échéance; effectuer les paiements avec l'étranger par l'intermédiaire d'une banque polonaise en Pologne, à moins d'obtenir une autorisation spéciale. Pour compenser les créances pécuniaires mutuelles avec l'étranger une autorisation est également nécessaire.

Les personnes physiques nationales sont obligées, une fois leur séjour à l'étranger terminé, de rapatrier en Pologne, au plus tard dans un délai d'un mois, les monnaies et autres devises dont elles disposaient au moment où leur séjour à l'étranger s'est terminé (art. 17,2 de la loi).

Les personnes morales nationales ainsi que les organisations et institutions qui ne jouissent pas de la personnalité juridique doivent, immédiatement après avoir reçu un avis de transfert de devises en leur faveur, revendre à une banque polonaise en Pologne, spécialisée dans les opérations en devises, toutes les monnaies étrangères reçues à titre de leurs créances à l'étranger, à moins d'obtenir une autorisation spéciale dérogeant à cette obligation (art. 24).

Les personnes étrangères sont obligées à changer leurs monnaies étrangères contre la monnaie polonaise pour couvrir leurs frais de séjour en Pologne (art. 14,1 de la loi).

Les personnes nationales, à l'exception des catégories énumérées à l'article 2, points 2, 4, et 5 de la loi (v. supra), sont obligées de déclarer à la Narodowy Bank Polski leurs biens possédés ou perdus à l'étranger. Les biens du Trésor public doivent être déclarés par les établissements étatiques responsables de la gestion de ces biens.

Les personnes étrangères, à l'exception des catégories énumérées à l'article 3, points 4, 6 et 7 de la loi (v. supra), sont obligées de déclarer à la NBP la possession et la perte de leurs biens situés en Pologne. Si ces biens se trouvent en possession ou sous la gestion d'une autre personne que le propriétaire, c'est cette personne qui est obligée à faire la déclaration.

Dans l'exercice de ses compétences, le ministre des Finances coordonne les activités en matière de devises menées par les organes autorisés par la loi. Il exerce également une surveillance générale des opérations en devises, en assurant une application uniforme de la législation des changes par les organes compétents. Dans le domaine du commerce extérieur et des services liés, ces tâches incombent au ministre du Commerce extérieur agissant en coopération avec le ministre des Finances.

Le contrôle de l'application des dispositions en matière de changes et notamment étudiées dans les paragraphes IV, VI et IX de notre article est confié par la loi au ministre des Finances et à ses organes, au président de la NBP, au ministre du Commerce extérieur, aux banques spécialisées dans les opérations en devises, aux organes de l'administration des douanes, au corps des gardes-frontières, aux organes de l'administration des postes — chaque organe dans les limites de sa compétence et conformément aux arrêtés des ministres compétents.

Les personnes nationales et étrangères sont obligées de fournir aux organes de contrôle de devises les informations, explications et documents concernant les affaires soumises au contrôle. En passant la frontière, elles doivent aussi déclarer et, sur demande, faire voir les devises possédées; elles peuvent mettre en dépôt des organes de l'administration des douanes les devises dont l'importation, l'exportation ou le transit sont interdits, excepté la monnaie polonaise importée par les personnes étrangères ou importée par les personnes nationales qui l'ont auparavant exportée en transgressant la loi; les devises déposées peuvent être retirées dans un délai d'un an, sinon elles deviennent la propriété du Trésor sans indemnité.

Conformément à l'article 42 de la loi, la Cour Suprême d'Administration examine les recours introduits contre les décisions administratives concernant le statut des personnes physiques et morales, nationales et étrangères, à l'égard de la législation des changes (art. 4,1 de la loi) ainsi que contre les refus d'autorisations concernant: a) le droit des personnes morales nationales et des organisations ou institution qui ne jouissent pas de la personnalité juridique à posséder des devises en Pologne ou à l'étranger (art. 13 de la loi); b) la conclusion dans le domaine des opérations avec l'étranger d'un contrat ayant un caractère économique et concernant la prestation mutuelle à titre gratuit des services ou des choses qui n'ont pas la qualité de devises (art. 29 de la loi); c) l'acceptation de certains dons offerts par les personnes étrangères aux personnes nationales (art. 30 de la loi).

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Polish Court Judgments in International Civil Law Cases

by MACIEJ TOMASZEWSKI

Tort Liability

Road accident in Poland — Applicability of Polish law — Scope of applicability of *lex delicti* — Reimbursement claim of a foreign social security agency — Lack of grounds for admitting the claim under Polish law.

The Supreme Court, Civil and Administrative Chamber. Verdict of 29 November, 1983, (I CR 266/83) in a suit instituted by Allgemeine Ortskrankenkasse fuer den Kreis Warendorf in Bochum, West Germany, against Państwowy Zakład Ubezpieczeń in W. over a financial obligation ("Orzecznictwo Sądu Najwyższego", seria cywilna, 1984, No. 7, item 120).

During a sojourn in Poland, West German citizen Elfride T. was injured in a road accident as the minibus driven by her husband Walter T. collided with a tractor driven by Jan T., who was subsequently found guilty of causing the accident and sentenced by a penal court. On 28 October, 1981, the Voivodship Court in Warsaw awarded the injured party due compensation from Państwowy Zakład Ubezpieczeń (PZU, the State Insurance Agency) for the injury sustained as a result of the disturbance of health through the accident, the sum of 16,200 zlotys, taking into account the sum of DM 1,400 paid on that account prior to the hearing of the case (converted into zlotys according to the exchange rate in force on the day of the verdict) and the sum of 1,946 zlotys on account of loss to property, for a total of 18,166 zlotys together with interest; the court dismissed the claim for a supplementary annuity requested in connection with the loss of ability to work as unsubstantiated.

In this case, the plaintiff, the district social security agency of Warendorf, West Germany, sued PZU for the reimbursement of the amount of DM 3,168.04, having paid the injured party sick benefit of DM 8,322 for the period from 23 March, 1976 to 29 July, 1977; from the latter amount, the sum of DM 5,153.96 was deducated as it had earlier been paid to the injured party by the Warta Insurance and Reinsurance Society acting on behalf of the defendant; the suit was lodged with the Voivodship Court in Warsaw and the claim was connected with mandatory civil liability insurance of motor vehicles.

In a verdict of 21 March, 1983, the Voivodship Court admitted the claim. PZU appealed to the Supreme Court, which dismissed the claim, presenting the following justification:

"Sick pay is a financial benefit from social security, to which an employee is entitled in the event of becoming unable to work due to illness during the duration of employment on the principles defined in the law of 17 December, 1974 (text with amendments in "Dziennik Ustaw" — Journal of Laws No. 30/1983, item 143). The reimbursement of the sick pay paid to an employed can be demanded by the employer or by Zakład Ubezpieczeń Społecznych (Social Security Agency), whichever supplied the pay, from the perpetrator of the act which led to the benefit having been paid, on the basis of Article 197 of the law of 28 March, 1983 on social security ("Dziennik Ustaw," No. 51, item 396, with amendments; Cf. resolutions of the (enlarged) Supreme Court of 10 October, 1972, OSNCP of 1973, vol. 6, item 95, and of 30 October, 1976, OSNCP of 1977, vol. 3, item 42). If sick pay was supplied to an employee injured in a road accident, then, within the framework of mandatory vehicle insurance, reimbursement can also be demanded from PZU (resolution of the Supreme Court of 20 October, 1977, OSNCP of 1978, vol. 8, item 130).

"In the case under review, sick benefit was paid to the injured party by the plaintiff, the Ortskrankenkasse, according to the social security regulations in force in the country of which the injured person was a citizen, and on the basis of the said regulations it sued PZU for reimbursement of the money on account of the mandatory civil liability insurance of the person who caused the accident.

"Although, according to 31 Article, paragraph 1 of private international law, the provisions of Polish civil law, and especially the provisions of the civil code on torts, are to be applied to the assessment of the effects of the road accident in which the insured party was involved in Polish territory (and there for also the provisions of the executive order on madatory vehicle insurance of 28 November, 1974 as amended, in connection with paragraphs 16 and 17 of the order — at present the executive order of 30 November, 1981 is in force), and *lex delicti* also applies to reimbursement claims of third parties which satisfies the claims for damages of the insured party (Cf. the resolution of the (enlarged) Supreme Court of 26 April, 1982, III CZP 61/60), yet when the reimbursement claim is advanced by a foreign social security agency, which had paid a citizen of its country a social security benefit under the regulations of the foreign country and which demands the reimbursement from the institution or person responsible for the injury under Polish law (Article 31, paragraph 1 of private international law), the provisions of Polish law, applicable to the case, provide no grounds for admitting the reimbursement claim.

"This is because under Article 1 of private international law, that law contains conflict rules for international personal and property relations exclusively within the realm of 'civil, family and guardianship law and labour law,' and as such these rules cannot be applied to social security legislation (which governs relations of what is essentially an administrative-legal nature) nor determine the applicability of the legislation to international relations (and thereby also to claims for reimbursement of social security benefits that had been provided), e.g., in the case of reimbursement of a sick benefit paid to the injured party.

"This view — with regard to the reimbursement of the cost of medical care of a person injured in a traffic accident in the territory of Poland, borne by a foreign social security agency (a benefit from the domain of civil law) — was expressed by the Supreme

Court in the resolution of 26 March, 1982 quoted above. It applies all the more to social security benefits, such as sick benefit.

"On the other hand, the awarding such reimbursement to a foreign social security agency would be possible on the strength of pertinent international agreements (conventions) or intergovernmental agreements or on the principle of reciprocity observed by both sides. For the reasons given above, the legal basis for the reimbursement under Polish law would be immaterial if the benefit had been paid by a Polish social security agency (Article 197 of the law of 1983, or Article 122 of the law of 22 January, 1968 on the general employee pension scheme, invoked by the Voivodship Court), regardless of the fact that Article 122 only settles the reimbursement claims of a State body with regard to obligations due (from a non-state-owned employer or other persons) and according to civil law does not provide for the return of benefits paid out of social security, e.g., sick pay, whereas the possibility of making an analogy is ruled out because of the nature of the benefits (from social security), for the reimbursement of these benefits, which would consequently be passed on to other subjects, would require a definite legislative provision. In this particular case, the reimbursement of a social security benefit, especially sick pay, is not settled through definite agreements nor is the principle of reciprocity in operation (it was not demonstrated by the plaintiff), therefore the reimbursement claim is dismissed as not legally justified."

NOTE: The verdict presented above is the second judgment of the Supreme Court rejecting a reimbursement claim of a foreign social security agency on account of having paid benefits to persons injured in road accidents in Polish territory.

In the resolution of seven judges of 26 March, 1982, the Supreme Court expressed the view (Cf. "Polish Yearbook of International Law", vol. 13) that

"A foreign social security agency, which under the law of its country, has too reimburse the costs of medical care, has no right to claim such costs from the person responsible for the damage, under Polish law, when the injured party underwent medical treatment at the expense of the agency as a consequence of traffic accident in Polish territory."

In this verdict, the Supreme Court referred to that resolution, which only deals with the reimbursement of the cost of medical attention of a person injured in a traffic accident in Poland covered by a foreign social security agency and declared that the view expressed therein applies all the more to social security benefits such as sick pay etc.

The Supreme Court appears to be right in insisting that the problem of admissibility of reimbursement claims of a third party, which satisfies the damages claims of the injured person, falls within the scope of *lex delicti*. It is also doubtless that if an accident which occurred in Polish territory was caused by a Polish citizen whereas the injured party was a foreigner, then the proper law for the tort obligation, i.e., the delictual status, is Polish law, because according to Article 31, paragraph 1 of the 1965 law on private international law

"An obligation not arising out of a legal transaction is subject to the law of the state in which the event that was the source of the obligation occurred."

However, the provisions of Polish law do not envisage the possibility of suing the persons responsible for the loss or their insurers for the reimbursement of the benefits paid to the injured party by foreign social security agencies. Neither does the law on private international law provide grounds for applying, through some special connecting factor, a foreign social security legislation that envisages such a possibility. Given this state of affairs, according to the Supreme Court, the granting of reimbursement claims of foreign social security agencies could only be possible on the basis of international agreements in this respect or of a mutually observed principle of reciprocity. Strictly speaking, it seems, however, that even actual reciprocity would not be sufficient because no binding provision of Polish law in this matter refers to it.

Recognition of a Foreign Judgment

Divorce granted in Denmark by an administrative body — Judgments that are subject to recognition under Polish civil procedure code — The significance of the public order clause — The admissibility of recognition of a foreign administrative divorce in Poland.

The Supreme Court, Civil and Administrative Chamber. Decision of 20 September, 1983 (II CR 278/83) on the motion of Anna Teresa P. with the participation of Per Kristgaard P. for the recognition of a divorce decree ("Orzecznictwo Sądu Najwyższego", seria cywilna, 1984, No. 4, item 61).

Polish citizen Anna Teresa P. was married to Danish subject Per Kristgaard P. on 25 November, 1980 in a Polish State Registry Office. Afterwards, they lived together in Denmark. The marriage was dissolved by a binding divorce decree of the Country Office in Nordjyllende, Denmark of 6 November, 1981. Anna Teresa P. field a motion with the Voivodship Court in Szczecin for the recognition of the validity of the divorce decree in the Polish territory. The Voivodship Court dismissed the motion on the ground that in view of Article 1145, paragraph 1 of the civil proceure code it is not possible for Polish courts to recognize a divorce granted by a foreign administrative body.

The petitioner applealed the decision to the Supreme Court, which annulled the decision and returned the matter to the Voivodship Court in Szczecin for reexamination.

In the reasons of its decision, the Supreme Court declared the following:

"The judgments of foreign courts in civil law matters which in Poland fall within the powers of courts are effectire in Poland, subject to their recognition by Polish court. as provided by Article 1145, paragraph 1 of the civil procedure code. In other countries, there has been a tendency to transfer such cases to the jurisdiction of administrative bodies.

The petitioner submitted for recognition a divorce decree issued by a foreign State administrative body, which was solely empowered to issue such a decision. This confronted the Voivodship Office with the question whether Article 1145, paragraph 1 of the civil procedure code should be applied in the literary sense — as the Court had done — or whether it should be accepted that the notion 'judgments of foreign courts' extends, by the legislator's will also to judgments (acts) in civil cases which the foreign law transferred to the exclusive jurisdiction of administrative bodies.

"The real meaning of a legal provision can only be determined when its purpose has been established. The role of Article 1145, paragraph 1 of the code of civil procedure [k.p.c.] should be examined in conjunction with subsequent provisions, especially Article 1146, paragraph 1, point 5 of the code of civil procedure, in which the lawmaker formulated the fundamental premise for recognition of foreign judgments Article 1146, paragraph 1.5, in turn, is closely connected with Article 6 of private international law, which puts emphasis on the negative effects of applying foreign law in the Polish legal order. The conjunction of these provisions shows that the purpose of Articles 1145 through 1149 of the code of civil procedure is the protection of the legal order in force in Poland from such foreign judgments whose effects would be incompatible with the fundamental principles of that order.

"It follows from the above that the establishment of the fact that the judgment was made in a country whose law does not make the admissibility of a dissolution of marriage contingent on the emergence of complete and lasting disruption of conjugality, does not in itself constitute an obstacle to the recognition of that judgment by Polish court. As has been said, the refusal to recognize a judgment based on premises unknown to the Polish law may only be considered if it is established that such recognition would entail effects contradicting the fundamental principles of the legal order in force in Poland.

"In Denmark, as well as in other Scandinavian countries, an administrative body may pronounce a divorce upon ascertaining that the premises specified in the law have been met (e.g., separation, the settlement of property and maintenance issues and custody over the children) after the mandatory reconciliation efforts produced no positive outcome (Law No. 256 of 4 June, 1969). Such a judgment (act) need not, in given circumstances, violate the fundamental principles of the Polish legal order. In view of the above, and also of the idea of a just appraisal of legal relations in international intercourse, it can be accepted that the real meaning of the requirement specified in Article 1145, paragraph 1 of the code of civil procedure to the effect that the foreign judgment be made by a court, is such that when foreign law so provides, it may also be a judgement (act) passed by an organ other than a court.

"This interpretation of Article 1145, paragraph 1 of the code of civil procedure was made by the Supreme Court in the decision of 2 September, 1975, I CR 559/75 (unpublished) and upheld — despite contradictions over the doctrine — in the decision of 18 November, 1982, I CR 386/82 (unpublished). It is difficult to accept the different position of the Supreme Court, expressed in the decision of 10 January, 1978, I CR 308/77 (unpublished) and later invoked by the Voivodship Court because the Supreme Court then assumed that the clear and unequivocal wording of Article 1145, paragraph 1 of the code of civil procedure denies the possibility of its functional interpretation and its should therefore be applied strictly. After all, the need to resort to this method of interpretation also arises when the hypothesis of the legal norm being interpreted is expressed clearly and unequivocally but some important considerations suggest that this norm should also govern other, similar situations that were not expressly specified in the hypothesis of the norm in question. The establishment of the real contents of the said regulation, taking into account the function it is supposed to fulfil, was already justified by the principle accepted in international civil procedure of respecting the jurisdiction of foreign courts and other bodies and of the judgments and other acts originating from these bodies.

"The decision appealed against was therefore nullified in order to establish whether there existed other premises specified in Article 1146 of the code of civil procedure as pertinent to the recognition in Polish territory of the administrative divorce decree submitted by the petitioner (Article 388, paragraph 1 of the code of civil procedure)".

NOTE: A serious divergence of views as to the efficiacity in Polish territory of foreign administrative divorces has emerged, both in Polish court judgments and doctrine. This is related to the fact that the provisions of the Polish civil procedure (Article 1145 ff.) expressly provide only for recognition of judgments of foreign courts.

In the unpublished decision of 2 September, 1975, (I CR 559/75), the Supreme Court found it admissible to recognize the efficacity of a divorce decree passed by an administrative body (so-called Fylksmann) in Norway, adopting an extensive and functional interpretation of the pertinent provisions of the code of civil procedure. According to the Supreme Court,

"The real meaning of the requirement laid down by Article 1145 of the code of civil procedure to the effect that the foreign judgment be made by a court is such that if the foreign law so envisages, it may also be a judment made by a different body than a court,"

provided of course that this applies to what is a civil case in the understanding of Polish law.

A totally different position was taken by another set of Supreme Court judges in the decision of 10 January, 1978, (Cf. "Polish Yearbook of International Law", vol. 10, pp. 264—266), who dismissed an appeal to a decision of the Voivodship Court in Warsaw, which refused to recognize a divorce decree passed by a Danish administrative body on the ground that in the light of Article 1145, paragraph 1 of the code of civil procedure only foreign judicial judgments, and not administrative ones, can be recognized in Poland. The Supreme Court subscribed to this point of view and said, among other things, that

"The wording of the provision to the effect that only judgments made by courts are subject to recognition is so clear and unequivocal as to rule out the application of functional interpretation."

Besides, the Supreme Court then also voiced the view that the recognition of the efficacity of a foreign administrative divorce decree is impossible in the light of the public order clause (Article 1146, paragraph 1, point 5 of the code of civil procedure) because the principle of a court divorce is one of the fundamental principles of the legal order of the Polish People's Republic.

This restrictive view of the Supreme Court was based on the views advanced by some Polish authors, especially by J. Jodłowski, who in his works (Cf. *Uznawanie i wykonywanie zagranicznych orzeczeń sądowych na the orzecznictwa Sądu Najwyższego* [*Recognition and Implementation of*

Foreign Courts Judgments in the Light the Decisions of the Supreme Court], "Biblioteka Palestry," Warszawa 1977, p. 43 ff; *Problemy uznawania zagranicznych rozwodów administracyjnych* [*Problems of Recognition of Foreign Administrative Divorces*], "Palestra," 1979, No. 11—12, p. 16 ff) expressed himself in favour of a literal interpretation of Article 1145 of the code of civil procedure, i.e., of the possibility of recognizing the efficacity of only foreign court judgments and insisted that the recognition of a foreign administrative divorce would violate the fundamental principles of the legal order in Poland.

On the other hand, the author of this review came out strongly in favour of using the functional interpretation, extending the scope of application of code of civil procedure provisions to rulings of foreign administrative bodies in civil matters (Cf. M. Tomaszewski, *W sprawie skuteczności w Polsce zagranicznych rozwodów administracyjnych* [*On the Effectiveness of Foreign Administrative Divorces in Poland*], "Państwo i Prawo", 1979, No. 8—9, p. 118 ff. Cf. also by the same author *Les réactions de la doctrine à la création du droit par les juges en droit international privé*, "Travaux de l'Association H. Capitant", tome 31, Paris 1980, p. 475). In my opinion, it is in particular wrong to assume that a divorce pronounced by an administrative body cannot be recognized as valid in the light of the public order clause, and that the principle of courts ruling on divorce is a fundamental principle of the legal order of the Polish People's Republic. I have also drown attention to the fact that a purely literal interpretation of Article 1145 of the code of civil procedure, ruling out the possibility of recognizing the efficacity of foreign administrative decisions in family matters leads in practice to glaringly unjust results (*summum ius, summa iniuria*) which contradict the goals of the judiciary and the goals of the Polish People's Republic mentioned in the general interpretational directive of Article 4 of the Civil Code. Finally, I have also emphasized that if there are no grounds for questioning the jurisdiction of a foreign State in a given case, then it should be assumed for the sake of consistency that it is also up to that state to decide which of its agencies is competent to handle the matter.

The fact that the Supreme Court once again revised its stand and returned to the one it had adopted in 1975 deserves approval. It can only be hoped that this approach to the question of recognition the efficacity of foreign administrative divorces, which corresponds to the requirements of contemporary intenational turnover, will be maintained by Polish courts in practice in the future.

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Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw

by ANDRZEJ W. WIŚNIEWSKI

1. Award of 14 January, 1984, in the Case No. 72/84

The contract in accordance with which the commission agent concluded another contract in his own name but on the account of the principal is — regardless of the name used by the parties — not a pure agency but a commission agency contract. At the commission of sale the commission agent is bound to pay for the goods supplied by the principal regardless of whether he was paid by the buyer for — inasmuch as the party chosing the buyer and determining the payment conditions — he bears the trade risk connected with the implementation of the commission contract.

Excerpt from Reasons

On 18 May, 1984, the Court of Arbitration at the Polish Chamber of Foreign Trade (PCFT) received the claim of a Dutch citizen, residing in Rotterdam (Holland) having authorization to perform economic operations in small production by his foreign enterprise in Poland, regarding adjudication on his behalf by the Court from the Polish foreign trade enterprise "D" of the amount of DM 107,392.75 with interests and costs of proceedings. This amount represents the purchase price of goods supplied prior to 21 July, 1983, by the claimant and sold next by the defendant to an English company.

The claimant referred to the text of the agency contract of 23 December, 1982, concluded with the defendant, attached to the claim. The claimant charged that, although the contract was called an agency contract, yet some clauses included in it, essential for the assessment of the character of the legal relationship between the parties, were contradictory. The claimant asserted that the foreign trade enterprise "D" acted as a commission agent, in its own name and on the account of the claimant, hence — contrary to the name — the contract involved the institution of commission agency.

The claimant stated in the calim that — summoned on 22 March, 1984, to remit payment — the defendant refused to do so, arguing that, as per the contract, he will transfer the amount due to the account of the claimant after he has received payment from the English company.

In reply to the claim received by the Court of Arbitration on 3 December, 1984 the defendant admitted the fact of having sold to England the goods specified in the claim under the contract of 23 June, 1983, on conditions of a documentary collection payable within 14 days. However, the buyer had not paid for the commodities so far, in connection with which the defendant started action against him at the Court of Arbitration at the PCFT for the payment of the amount in question.

The defendant stated in reply to the claim that he acted in accordance with the text of the above-mentioned paragraph 1 of the agency contract to the account of the claimant which means that the economic effects of the transaction in question involved only the claimant and not the defendant who receives for his operations merely a commission. Further on the defendant claimed that, as per paragraph 16 of the agency contract, he was only responsible for "exercising due diligence at the implementation of contracts with the foreign party". while "the risk connected with the realization of the contract was to be borne by the claimant"; the claimant did not prove, either, that the defendant had assumed the *del credere* liability.

The defendant denied the argumentation of the claimant and moved for the dismissal of the claim and for having the claimant pay the costs of proceedings.

The panel of arbitration, after having examined the case at sessions of 9 November and 12 December, 1984, decided the following.

The parties agreed that the claimant had delivered to the English firm the goods by the intermediary of the defendant, although the only document existing between the defendant and the claimant determining the conditions of that delivery was the mentioned agency contract on cooperation of 23 December, 1982. However, the delivery took place on the basis of the contract with the defendant of 23 June and the annex to it of 1 July, 1983. The defendant received an export licence for export of those goods, issued by the Ministry of Foreign Trade. The defendant admitted that he had not paid the claimant for the exported goods. Consequently, it remained to be decided when the amount in question had been due: regardless of whether the defendant received payment from the foreign contracting party, or after it had been received.

The correct answer to the question formulated in that way depended on the assessment of the legal character of the relationship between the parties, specifically on the reply to the question whether it had been a pure agency or a commission agency contract. As per paragraph 1 the subject of the contract is the engagement of the agent (defendant) to act as the intermediary trading with the goods of the principal in the own name of the agent but to the account of the principal. On the other hand, paragraph 13 reads that

"the commission agent will receive from the foreign consignee payment for the dispatched goods in accordance with the concluded export contracts, as per the payment conditions laid down in them".

Also paragraph 16, in spite of the condition laid down in paragraph 1 that contracts would be concluded in the name of the defendant, states that

"the agent is responsible for diligence at the implementation of the contracts with foreign consignees, while as regards all the rest the responsibility and the risk connected with the realization of the contract under reference is borne by the commission agent."

The use in paragraph 1 of the words "in the own name of the agent" meaning the defendant, points clearly that the parties desired to base the commercial intermediation on the commission contract (Art. 765 of the Civil Code) and not on the agency contract (Art. 758). The agency contract consists namely in a regular intermediation at the conclusion of contracts by the person giving the order and on his behalf, or in the conclusion of such contracts in the name of the commissioning party. Such an intention of the parties was, besides, obvious in the light of the fact that the claimant had no concession for direct foreign trade, neither did he have the licence required by the currency law for dealing in foreign currency; thus he could not become subject of the legal relation with the foreign buyer, which would have been the case, could his export deals be treated as based on an agency contract. Moreover, the contract of 23 June and the annex of 1 July, 1983, was concluded by the defendant not in the name of the claimant, but exclusively in the name of the defendant. In this transaction the claimant was involved only as the principal, thus he was not a party to this contract and annex.

Under Article 766 of the Civil Code the defendant should have made the transfer of the claim to the claimant, since he acquired it from the buyer on his behalf. The contract in Section V for payment to the account of the defendant with the Bank PKO S.A. Bank in Warsaw within 14 days from the presentation of the invoice, copy of the note of consignment, and of the CBS certificate. The fact that the defendant did not receive his money so far is of no significance, as the trade risk connected with the implementation of the commission contract burdens the commission agent. For it had been he who chose the buyer of the goods and laid down the payment conditions. And it had been he who became the debtor of the claimant.

Considering those conditions the entire claimed sum had to be adjudicated from the defendant, with legal interest in the amount of 8% p.a. calculated from the date on which the claim was submitted.

2. Award of 10 April, 1984, in the Case No. 177/80

As per paragraph 67a and 67d of the CMEA general conditions of delivery (g.c.d.), required from the claimant is the proof of the causal link between the damage he suffered and the breach of contract by the defendant. If the contract does not stipulate that the party will charter transportation means from a third party, the contractual penalties paid by that party to those persons do not represent the damage having a causal link with any possible holding up of those means by the other party to the contract.

Excerpt from Reasons

The parties — the defendant, a Polish foreign trade enterprise, and the claimant, a Czechoslovak foreign trade enterprise — concluded on 22 June, 1978, a contract for the delivery of goods. It was agreed in the contract that the delivery will take place by the claimant's own cisterns, marked "P". It was provided that the cisterns may remain free of charge for 8 days on Polish territory; should they be kept longer, the buyer (the claimant) would have to pay the amount of US $20 for each day of delay. This stipulation of the contract was amended by the annex of 11 July, 1978 reading:

"Delivery will be made in cisterns of the seller 'P'. The buyer shall be bound to empty the cisterns within a maximum of 24 hours and return them immediately to the indicated address" (franco the Czechoslovak border).

The claimant moved by claim of 10 July, 1980, for adjudication on his behalf of the amount of US $17,000 or 46,644 Swiss francs, depending whether the panel of arbitration will observe the validity of the clause of the contract involving the contractual penalty, or will adopt as basis of ITS ruling the text of the annex. The claimant also indicated that the amount of 46,644 Sfr. represented the compensation for holding up the cisterns which he had to pay to the Austrian firm G.P.R. whose services he used when shipping in its cisterns the goods to the defendant. The firm G.P.R. cahrges 46 Fr. per day for the delay. As per calculation of the claimant, the entire delay caused by the exceeding of the 24-hour deadline amounted to 1014 days.

The defendant moved for dismissal of the claim. He assumed that the amendment of the provision of the conctract on penalty for holding up cisterns abrogated entirely the previous text, together the clause involving the contractual penalty, while the new text — the one in the annex — does not anticipate any sanction for holding up cisterns. The defendant contested the legitimacy of the demand of payment of 46,644 Swiss francs, since payment on behalf of the Austrian firm for holding up cisterns was not justified by the text of the contract, nor did anything indicate that the payment of the sum in question was closely connected with the delivery to the defendant.

The claimant brought up arguments against the opinions indicated above. He pointed out that he had incurred a loss. He refered to paragraph 27a and 27d of the CMEA g.c.d. claiming that under the provisions mentioned he has the right to compensation, for the defendant had not properly fulfilled the duties resulting from the contract having not sent back the cisterns within 24 hours after their arrival.

On the other hand, the claimant changed the demand of the claim, should the panel of arbitration assume validity of the contract as worded in the annex. The claimant reduced the demand in Swiss currency to the sum of 8,272 francs that he had paid to a Aest German company for the holding up of cisterns.

In order to reach a settlement in this case it is necessary first to determine the legal basis on which the demand of the claimant rests. The opinions of the parties regarding the construction of the contract are divergent. Under one of the opinions it is assumed that the annex of 11 July, 1978 did not abrogate the text of the contract regarding the contractual penalty. The second opinion is that the annex abrogated the involved clause of the contract and introduced the provision on the obligation of sending back the cistern within 24 hours, without mentioning, however, any sanction for holding it up. The text of the annex indicates that the second opinion should be accepted as correct.

This does not mean that the defendant is fully exempted from the liability for violating the duty of emptying and sending back the cisterns within 24 hours. The exclusion of the contractual penalty from the text of the contract does not exempt the debtor from the liability for damage caused by an improper implementation of his engagement. The debtor is liable for not observing the diligence required in relations of this kind — a due diligence (Art. 255, para. 1 and Art. 472 of the Polish Civil Code in connection with para. 67a and 67d CMEA g.c.d.).

It is a well-known fact that cisterns are costly transportation means of liquid goods and their improper handling may cause great damage. The claimant, making reference to paragraph 67a and 67d of the CMEA g.c.d., was right in founding his claim on the basis of the defendant's obligation to compensate the damage. It was, therefore, his burden to prove the damage, the fault of its doer, and the causal relation between the fault and the damage. The claimant was unable to meet those demands. The damage was not demonstrated by means of documents which would indicate the days of the arrival and departure of each wagon. The specifications alone of the claimant, not supported by documents, are no evidence in the understanding of the civil substantive and procedural law. Considering absence of such data it is, moreover, difficult to perceive the fault of the claimant in the delayed return of the cisterns, and — even more — it is not possible to see any relation between the damage and the fault.

The claimant transgressed, moreover, the provisions of the contract by the fact of not having shipped the goods in his own cisterns (cisterns "P") but chartered them from foreign enterprises. In the instance of the Austrian firm he did not even present either the invoice, or any evidence of payment for the carriage. Among the documents included in the files of the case there are, on the other hand, two invoices of a firm from the Federal Republic of Germany. There is, however, no evidence of payment, and it is by no way possible to establish the amount of the claim since both invoices were made out for the entire duration of the lease of cisterns, namely for 3 months. It is impossible to find out how long the cisterns were handled by the claimant. For those reasons the claim is subject to dismissal.

3. Award of 13 April 1984, in the Case No. 119/83

The formulation in the contract of the date of delivery as "I—IV quarter 1982" should be understood — in the light of CMEA g.c.d., and of the usual practice of the parties — in such a way that the parties admit beforehand partial deliveries in separate quarters, but the buyer will not be in default if he performs all the deliveries by the end of 1982.

Excerpt from Reasons

The claimant, a foreign trade enterprise from the German Democratic Republic — filed with the Court of Arbitration at the PCFT in Warsaw a claim for adjudication from the defendant, a Polish foreign trade enterprise, of the sum of 14,949.87 roubles, with interests of 4% p.a. and costs of arbitration proceedings. The claim embraces seven contracts. With regard to five of them, involved is the contractual penalty for delay in deliveries; with regard to two contracts — for delivery of goods of an improper quality.

Replying to the claim, by letter of 27 September, 1983, the defendant recognized in full the claim of the claimant with respect to four contracts, while the claim regarding the fifth contract, amounting to 323,44 roubles, was recognized by him as having no legal grounds.

The issue of interpretation of the clause of the contract reading: "date of delivery: I—IV quarters 1982", remained controversial.

Both before the hearing and during it, both parties to the litigation assumed an entirely different attitude. The claimant (both in his letter of 26 January, 1984, and during the hearing) claimed that there had existed, for years, between the parties the usage of concluding contracts for delivery of spare parts with such a clause, and that this clause was unmistakably understood in such a way that the goods to be supplied within the given calendar year were distributed proportionally, both as regards their value and kind, over the separate quarters. The claimant further explained that the parties had to understand the clause of the contract in that way, for otherwise they would not insert in the contract the designation of the delivery terms by quarters, but would limit themselves to designate the quarter or the year when deliveries should be effected and, whenever necessary, reservations that earlier deliveries were admissible. The claimant, when asked by the Court to submit evidence that there had existed, for years, between the parties the contract practice described by him declared that he could submit several contracts to support his statement, but did not have them right now at the hearing. The claimant also explained that, after conclusion of the contract, he did not attempt to undertake with the defendant any closer definition of the delivery dates, as this was not even necessary in view of the contract practice observed by the parties.

As regards the defendant, he supported his view that the clause of the contract regarding delivery terms had to be understood in such a way that he executed his duty of delivery of goods on time if he completed all the deliveries by 31 December, 1982. The defendant submitted with his letter of 19 January, 1984, documentary evidence that the controversial deliveries were performed by him on 28 June, 15 September, 21 October, 1982 and 30 December, 1982. The submitted evidence was not contested by the claimant either before the hearing or during it.

The defendant declared during the hearing that, actually, the parties did conclude in the past contracts with clauses laying down delivery dates like in the contract in dispute, but those clauses caused disagreements and, for this reason, this contract practice had been discontinued for many years now. To avoid doubts, contracts include either clauses saying that deliveries have to be successive, or the mass of goods is divided among the separate quarters.

This attitude of the defendant is confirmed by the documents attached to the claim and involving the other contracts. In the first contract, after the formulation: "Liefertermin: II, III u. IV Quart. 1981", there had been added by hand: "I/1982 je Quartal 25%," and in the second, after the formulation "Liefertermin: II, III, IV Quartal 1981", the hand-written insertion reads: "I/1982 je 25%". The hand-made insertions were initialled on both contracts.

In its interpretation of the text of the contract clause at issue, after examination of all circumstances of the case, the Court came to the conclusion that, by formulating the delivery date: "Liefertermin: I—IV Quartal 1982" the parties actually admitted partial deliveries within the duration of the separate quarters of the calendar year. The contract was implemented from the end of the second quarter 1982 until the end of the year. However, by not having laid down in the contract the volume of the separate partial deliveries, and not having even determined the character of those deliveries as successive deliveries; and by not having undertaken any action aiming at a more detailed establishment of the delivery date indicated in the contract, the parties admitted thereby the possibility of implementing even all the deliveries specified in the contract in the fourth quarter 1982.

In the opinion of the panel of arbitration, the delivery date formulated in such a way does not give any legal ground for charging contractual penalties for delay in the delivery of goods before the end of the fourth quarter of 1982.

4. Award of 15 May 1984, in the case No. 199/83

(Calculation of compensation for delay in the delivery of goods due to the retailer).

Excerpt from Reasons

I. The contract and the arbitration clause

The parties concluded on 19 May, 1979, a contract of cale by the defendant (a Polish foreign trade enterprise) to the claimant (a company from the Federal Republic of Germany) of goods on FOB Rotterdam conditions. The price was laid down as per the mean Platta (Rotterdam) quotations on the day of loading minus US $10.

The contract included an arbitration clause under which the disputes that might arise from the contract were submitted alternately to "ad hoc" arbitration ih the country of the defendant or, in the event the Polish party were to be the defendant — to the Court of Arbitration at the PCFT. On that basis the claimant brought up this case to the Court of Arbitration. The Polish law was to be the proper law of contract.

II. Facts of the case

Under provisions of the contract the loading had to take place between the 26 and 30 May, 1979. In connection therewith the claimant concluded two charter contracts with a shipowning company in Hamburg for shipment of the goods by two ships ("D" and "M"). With consent of the defendant the date of the loading was established for the lay days: 28 May through 3 June, 1979. Later on the defendant asked the claimant to postpone the date of loading of the second lot of goods for 10 days, from 10 to 20 June, 1979.

The ship "D" arrived at the port of G. on 24 May to take aboard on that date, with consent of both parties, the first lot of goods. The loading strated on 25 May, 1979, at 01:00 hours.

After loading of 6,231.871 tons it was found out that they did not meet the conditions stipulated in the contract. Consequently, by order of the defendant, the entire batch was unloaded. The ship was directed without any load to Świnoujście where she took aboard a load for another contracting party of the claimant. The loading of the second batch envisaged for the lay days 10—20 June, 1979, was not effected due to non-availability of proper goods.

After those events the parties decided to implement the contract at later dates. The first lot of 7,477,977 tons was loaded aboard ship "C" on 20 August, 1979. The second, of 5,811,659 tons, was taken aboard on 13 September, 1979 by ship "D".

III. The attitude of the parties

The events here described caused damage to the claimant which the defendant did not deny. The claimant demanded adjudication on his behalf of the sum of DM 653,297.41 with 9% of interests from 5 October, 1979. The defendant recognized the demand of the claimant regarding DM 88,599.19 and moved for dismissal of the claim of the remaining amount. Moreover, he moved for summoning as side intervenients:

1. the Polish enterprise "Z",
2. the Port Board at G.

The enterprise "Z" attended the hearing on behalf of the defendant. The Port Board at G. did not take part in the dispute considering his participation not to be necessary.

The claims of the claimant consisted of the following items:

1) DM 192,736.24 — compensation, paid by the claimant to the shipowner for the non-effected shipment;

2) DM 87,500 — for the lease of premises intended for storage of the purchased goods;

3) DM 100,000 — compensation paid by the claimant to his recipient;

4) DM 305,960.04 — for loss of profit, to include the sums of DM 42,241 and 31,906.01;

5) DM 41,250 — for demurrage of ship "D" during voyage started on 13 September, 1979.

Ad 1. The sum due to the shipowner, namely DM 192,736.24, consists of, as calculated by the claimant: freight charges for deliveries not effected, namely for the cancelled loading of ship "D" in May 1979, and for the not effected shipment of the goods by ship "M" in June 1979. Should the shipments been duly effected, the two indicated ships would have taken aboard 6,231 tons each. Namely: 6,231 × 27.50 (freight cost per ton) = 171,352.50. From this amount the claimant deducts, in the instance of ship "D", the sum of DM 25,820 (representing unpaid canal charges, saved port fees, and unused container). Thus, the total compensation paid to the shipowner for the not performed voyage of ship "D" has to amount to DM 145,532.50. In connection with the not effected voyage of ship "M" the Polish claimant demands the sum of DM 37,203.74, consisting principally of freight charges (6,231 tons a 27 DM) minus DM 128,433.26 for the voyge from Świnoujście to Amsterdam. This amounts to DM 39,803.74. To that sum the claimant adds DM 7,400 in port charges borne at Świnoujście. All in all, the claim amounts to DM 47,203.74.

The total amounts therefore to:	145,532.50
	+ 47,203.74
	192,736.24

The defendant recognized of the sum DM 145,532.50 merely the amount of DM 4,538.45 on the reason that he deducted from the sum of DM 143,680, adjudicated at arbitration proceedings in London on 4 October, 1980, on behalf of te shipowner from the claimant for voyage of ship "D" in May 1979, the amount of DM 139,141.53, being the sum economized on shipment of other goods by that ship in May 1979. This sum, namely DM 139,141.53, represents the cost of freight from Świnoujście to Amsterdam.

The defendent accepted, in principle, the demand of DM 47,203.74 correcting, however, this amount to DM 45,920.74.

Regarding the other parts of the claim represented by charges on behalf of the shipowner. the defendant moved for their dismissal.

Ad 2. The rent for the lease of the warehouse in Antwerp for the goods purchased from the defendant amounted to DM 87,500.00. In view of difficulties in getting storage space, the claimant was forced to conclude a contract for the duration of 30 days for a warehouse of 32,500 cu.m. capacity. The lease contract was concluded on 23 May, 1979. Although the warehouse was not utilized as the claimant did not deliver the goods, the rent for it had to be paid.

The defendant moves for dismissal of the demand here discussed bringing up two reasons. The first consists in the statement that the claimant concluded the contract for the rent of storage space on 23 May, 1979, while he sold the goods he had to receive from the defendant on 25 May, 1979 on cif Rotterdam conditions. It results therefrom, claimed the defendant, that the goods had to be supplied to Rotterdam, and not to Antwerp. As the result: the contract for the rent of warehouse was concluded at the risk of the claimant and there is no connection whatever between that contract and the delivery of goods by the defendant.

Secondly, the defendant was of the opinion that the pay of rent for the lease of premises in Antwerp was connected with the issue of lost profit for which the claimant sues in a separate demand involving the sum of DM 305,960.04, thence he sued twice for the same claim.

Ad 3. The claimant justified his claim by bringing up that he had paid the sum of DM 100,000 to his recipient for the loss that enterprise suffered by the failure to receive the goods from the defendant by 31 May, 1979. The receiver purchased from the claimant the goods at the price of US $339.75; the price per ton amounted in Rotterdam on 29 May, 1979, to 350 dollars. The receiver calculated his loss at $12 per ton which amounts to $150,000 at delivery of 12,500 tons, thus approximately DM 300,000. By negotiations with "Eurol" company the claimant negotiated compensation amounting to DM 100,000 which had been paid.

The defendant refused to recognize the sum of DM 100,000 because of an inadequate documentation of this expense, specifically because merely a photocopy of the contract concluded with "Eurol" had been submitted, and it had not been signed by that firm. The next objection of the defendant was that the claimant did not prove at what date the delivery on his behalf had to be effected, did not submit evidence of purchase by the receiver of the goods in lieu of the non-effected delivery, submitted on negotiations with "Eurol" a note signed only by him; neither did he prove the transfer on behalf of "Eurol" of the sum of DM 100,000 by a financial or bank document.

Ad 4. The claimant demanded adjudication of DM 305,960.04 for absence of profit, including in that amount the sums of DM 42,241 and DM 31,906.01.

The amount of DM 305,960.04 involved the losses resulting from the non-loading of ships "D" and "M" in June 1979. The claimant assumed that those ships would have taken aboard 6,232 tons each. The total of the shipped goods would have amounted, therefore, to 12,462 tons. The claimant assumed that, having paid to the defendant $312.50 per ton, and sold the goods at the price of 339.75, he would have made a profit of 27.25 per ton which would yield him a profit amounting to $339,644, namely DM 648,700.04, at the rate then in force. After deduction from the sum of DM 648,720.04 of the freight amounting to DM 342,760, the anticipated profit would amount to DM 305,960.04, the sum sued for in the claim.

The further part of the lost profit involves, according to the claimant, the voyages of ships "C" (August 1979) and "D" (September 1979).

The ship "C" loaded on 20 August, 1979 7,477,977 kg of goods. That lot was sold by the claimant at $335 per ton. The difference between the purchase price ($312.50) and the sales price amounted to $22.50. The proceeds were, therefore, of $168,387, equalling DM 306,670.44. After deduction of freight costs (DM 205,644.36) the profit amounted to DM 101,026.08.

The ship "D" loaded on 31 September, 1979, 5,611,659 kg of goods. The claimant sold those goods at $325 per ton; having paid for them $312.50 per ton, he obtained a profit of $12.50 per ton, namely $72,645 (DM 132,941.69). In this instance the freight charges amounted to DM 159,820.67.

As calculated by the claimant, the profit on both deliveries amounted to:

$$\begin{array}{rl} & \text{DM } 101{,}026.80 \text{ ("C")} \\ + & \text{DM } 132{,}941.69 \text{ ("D")} \\ \hline & \text{DM } 233{,}968.49 \end{array}$$

minus freight of ship "D" DM 159,820.67
total of profit = DM 74,147.87

From this sum the claimant deducted DM 31,906.01 representing the rebate of $3.— per ton that he had to grant to the purchasing company in view of the improper kind of the goods. In that way the claimant calculates his profit on both deliveries at $43,241.83.

The defendant opposed to the calculation of the claimant his own opinion, stating first of all that the claimant had not been right in adopting the same price for the deliveries not effected in May and June, 1979, namely $312.50 per ton. Making reference to the contract, the defendant took as basis the price resulting from the mean price quotations FOB Rotterdam acc. to Platta at the date of making out the bill of leading for the given load, reduced by $10.

The defendant recognized of the claim of the claimant, regarding the loss of profit, the sum of DM 38,140, adopting as price of the non-effected shipment by ship "D" the same price as the one adopted by the claimant, namely $312.50 per ton; while adopting for the non-effected shipment by ship "M" the price of $335 per ton. In the latter instance, by selling the goods to "Eurol" at the price of $339.75, the claimant would have gained merely $4.75 per ton.

Besing on the adopted assumptions, the defendant calculated that the actual profit of the claimant would have amounted to DM 38,240, which the defendant recognizes.

The defendant considered the reduction of price amounting to $3 per ton, granted to one of the buyers, as non-justified. He first of all took up that the goods had been sold on FOB conditions and had been received by "Polcargo" as being appropriate.

Ad 5. The sum of DM 41,250 involved demurrage charges of ship "D" in connection with the September voyage. In view of doubts of the claimant as to quality of the delivery, the goods were submitted to examination which caused delay in the unloading. The defendant, in view of the attitude taken up in the preceding point, did not recognize that amount.

IV. Settlement of the case

Ad 1. From the sum demanded the amount of DM 181,938.97 was adjudicated. Controversial in this point is the issue of costs of voyage of ship "D" which, on 27 May, 1979, sailed from port G. without load, and took aboard at the port of Świnoujście goods for a third party who was the contracting party of the claimant. The claimant burdened the defendant for the entire freight. The objection of the defendant consisted in that the burdening of the defendant with the entire freight was not justified, as the ship sailed unloaded merely to the port of Świnoujście.

The examination of legitimacy of opinions of the parties requires in this point an exact reminding of the facts. The ship, after the failed loading at G. sailed unloaded to Świnoujście where, with consent of the parties, she loaded goods contracted by the claimant for a third party. Planned for the shipment of those goods was the ship "M", then on her way to Stockholm, from where she had to sail to Świnoujście, but did the return voyage unloaded.

The claimant did not demand from the defendant payment for the voyage (DM 128,344.26) but requested adjudication on his behalf of full costs of ship "D" voyage from Świnoujście to Amsterdam. In that way the claimant vindicates compensation for the loss incurred by the failure to load ship "D" at the port G.

The claimant was entitled to compensation for the unloaded voyage, for he incurred a loss due to departure of ship "D" unloaded.

Speculations of the defendant that the ship "M" would not arrive at the port of Świnoujście on the date agreed upon do not find justification in the materials collected in the case. It is to be brought up that even should the ship "M" have been late, there would not have been a voyage without load, but merely damage caused by delay.

However, the amount of the damage was not determined by the costs of sailing of ship "M" but by those of ship "D" which — as brought up by the claimant on the basis of the invoice — have amounted to DM 139,141.52. In the relations between the parties it is this sum which should be deducted from the costs of voyage without load and not the amount of DM 128,344.26. This is why the sum of DM 192,736.24 demanded by the claimant should be adjudicated, reduced by DM 10,797.27 (139,141.52 minus 128,344.26).

The amount due for the non-effected sailing of ship "M" in June 1979, in the sum of DM 47,203.74, was recognized by the defendant as being DM 45,920.74. The defendant did not convincingly document the reduction of that amount, while no objection can be made to the calculation of the claimant. This was why the sum of DM 181,938.97 (192,736.24 minus 10,797.25) should be adjudicated within limits of the shipowner's costs.

Ad 2. The specified demand should be dismissed in full. The respective argumentation is closely connected with the issue of loss of profit (ad 4) and it is in that point that the reasons will be indicated.

Ad 3. The demand should be entirely dismissed. The claimant asserts having paid to the recipient the sum of DM 10,000 for the loss incurred by the firm for not having received the goods the claimant had to supply under the contract concluded with the defendant.

The legitimacy of such a demand requires demonstration that the recipient incurred an actual loss, namely proof what had been the price of the acquisition and sale of the goods substituted to those he did not receive from the claimant. An abstract calculation based on the price difference is no evidence of the occurrence of the damage. In such a situation the possibility of control whether the sum paid by the claimant involves the actual damage is eliminated from examination by the panel of arbitration.

Ad 4. The loss of benefit in the mentioned sum was the effect of the loss of profit the claimant was justified to expect on the basis that the goods purchased by him at the price of $312.50 were sold at $339.75 per ton. Considering that the defendant did not supply the goods, the deal had not been made. The calculation of the loss of benefit was correctly made by the claimant.

The defendant did not, in principle, put into doubt compensation for the absence of profit. He was, however, of the opinion that — as per the contract — the purchase price of the goods by the claimant was agreed upon at the mean price according to Platta quotations FOB Rotterdam on the date of loading. While that price amounted on the day of loading of the goods by ship "D", namely on 25 May, 1979, to the sum of $312.50 per ton, on 29 May, 1979, indicated as the day of loading by ship "M", it amounted to $335 per ton (345 minus the contractual 10). The profit of the claimant made on the sale of the goods would amount, in the opinion of the defendant, to only $4.75 per ton, and not to $27.25. In that way the totality of the lost profit amounted to, after conversion into DM, to only the sum of DM 38,140.00.

The defendant did incorrectly adopt in his calculation for the planned transport by ship "M" the mean price of 29 May, 1979. The loading had been, on the motion of the defendant, postponed to the days 10—20 June, 1979. Although there is no documentary evidence in the files of the case as to the anticipated day of loading, yet — taking as basis Platta quotations FOB Rotterdam for the period from June 10 to June 20, 1979 — it is possible to determine $322.50 as the mean price. After deduction of $10 we obtain the sum of $312.50 per ton, on the basis of which the claimant correctly calculated the benefit he lost.

At examination of the issue of lost benefit that occurred due to the unsuccessful or non-effected supply of the goods by the defendant, the further course of implementation of the contract must not be disregarded. As desired by the parties, the contract was implemented by two lots of deliveries shipped by ships "C" (loading day 20 August, 1979) and "D" (loading day 13 September, 1979).

The claimant indicated that he gained DM 101,026.80 on the lot of goods shipped by ship "C". In fact, however, after detailed calculation, that profit amounted to DM 102,261.33. The issue of profit gained on the shipment of goods by ship "D" is not clear. It resulted indirectly from calculation of the claimant that he lost on that deal DM 26,878.92 (the difference between payment for the goods by the buyer from the claimant and the freight). It was hard to adopt this calculation as being true. The claimant was a businessman, familiar with principles of commercial calculation. He always had the possibility of avoiding loss by not undertaking the transaction at the given moment. He also could renounce the contract, or demand from the defendant a reduction of the purchase price. Thus, the risk should not be shifted on the defendant. There had undoubtedly been an error in the calculation of the claimant. The claimant, in his letter of 5 October, 1979, stated his approximate profit from the sales of goods carried by ship "D" in September 1979 as being DM 52,000. This amount is very probable, so that it is subject — like the sum of profit in the case of shipment by vessel "C" — to deduction from the overall sum of lost benefit (compensation *lucri cum damno*). Thus the calculation was the following: DM 305,960.04 minus DM 154,261.53 (102,261.53+52,000) produces the sum of DM 151,698.51.

From that amount shall be deducted the sum of DM 31,906.01 with which the claimant burdened the defendant for the rebate granted to the recipient of the goods. The defendant shall not be made responsible for the price reduction indicated above. The goods were loaded in Gdańsk in the form compatible with contract stipulations. This was stated at the moment of loading by the superintendence company provided for by the contract. The contract between the parties was concluded on FOB conditions as per Incoterms. Under point B.2 of those trade terms definitions, the buyer bears all the costs and risks connected with the goods to the moment when they actually went aboard ship at the port of loading.

The claimant defended his position in this issue by charging that the statement of the superintendence company was forged. This charge was not supported by any evidence, thus there are no grounds for complying with it. Consequently, DM 119,792.50 remain to be adjudicated.

In connection with the issue of loast benefit there remains, as announced above, the problem of rent for the leased floating premises, in the amount of DM 87,500.00. The claimant concluded a contract for rent of premises for the purchasńd goods without arranging it with the defendant. It is to be taken into consideration that, should the May and June deliveries have been effected in due time, the issue of compensation for the paid rent would not have arisen at all. The rent would have been covered from the profit. As compensation for the lost profit is in this proceedings adjudicated to the claimant, there are no grounds for treating the dues for the rent as loss for which the defendant would have to be liable.

Ad 5. The claim was subject to dismissal. The need for a quality claim was not to be charged to the defendant, as was stated in the previous point of this settlement, and the loading documents were submitted on time, in conformity with the bank guarantee opened by the claimant and by the bank.

BOOK REVIEWS * COMPTES RENDUS

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Essays in International Law in Honour of Judge Manfred Lachs, edited by Jerzy Makarczyk, The Hague, Martinus Nijhoff Publishers, 1984, 760 pp.

Essays in International Law in Honour of Judge Manfred Lachs represent a rather unique event in our legal literature. This extensive volume which contains over 50 treatises in English or French, has been not only perfectly edited but also beautifully and quickly published. This assignment was undertaken to commemorate a very special occasion, the 70^{th} anniversary of a known and widely recognized Authority on international law and Judge of the International Court of Justice in the Hague.

The graphic lay out of this book is matched by its content. The list of authors writing essays "in Honour of Judge Manfred Lachs" contains 51 names. And they are luminaries of international law from the whole world: from Warsaw and Moscow, from Japan, Australia, Canada, the United States and from Western Europe. The editor thus faced no problem in finding authors but rather with a proper systematization of presented papers, bearing in mind the diversity of the issues discussed. A tribute should be paid to J. Makarczyk, who edited this book, for his efforts to organize these essays into five subject-groups, though several of his decisions may give rise to certain doubts.

The volume is opened by an introduction and a very scrupulously prepared list of the Celebrity's publications. In the introduction, the author A. Łopatka portrays Professor Lachs's career in the following fields of his activities: as a diplomat, as a scholar, as a teacher and as a judge. For over 20 years Professor M. Lachs has been closely connected with the Polish Ministry of Foreign Affairs and through 40 years of his work with the United Nations and other international organizations. He fulfilled many different functions within the United Nation system and finally has been elected to the highest office, that of a judge of the International Court of Justice.

Being a judge of the ICJ he remained a scholar and a teacher. The full list of his works, published in periodicals of many countries and in different languages, covers over 5 pages. These studies, widely known and acknowledged, are often called upon by all authors as a valuable source of scientific inspiration and an important confirmation of their own reflections.

Essays contained in this exceptional publication have been divided into the following subject-groups: 1) theory of international law, 2) International Court of Justice and peaceful settlement of disputes, 3) international organizations, 4) law of the sea and the law of outer space, 5) varia.

The first part of the volume is by far the most extensive (22 authors) and it contains papers covering the most diverse range of problems. Certain issues are repeated and thus complement each other. Most of the deliberations included therein refer to important changes in the present international law, in the scope of its regulation and in its character (S. Bastid, C. Chaumont, K. Mbaye, E. McWhinney, N. A. Ushakov, G. I. Tunkin, A. Wasilkowski). The importance of codification processes of international law is discussed by three authors (S. E. Nahlik, J. J. A. Salmon, K. Wolfke) from different point of view. Among other works attention should be paid to papers "A la recherche de doctrines perdues" (E. Ustor) and "Teachings and Teaching in International Law". This last paper by R. Y. Jennings, develops ideas contained im Professor Lachs's latest book, from which the author has borrowed his title, about the importance of the proper teaching process of international law. The author comes to the conclusion that at present "both the teaching and the teachings of international law is important as never before" (p. 131).

The second part which contains 9 articles is less diverse. The Manila Declaration on peaceful settlement of disputes is discussed in two papers (B. Broms, M. Šahović). G. Geamanu writes about negotiations. Further works are directly concerned with the following aspects of activities of the International Court of Justice: advisory opinions (T. O. Elias), the Court's adjudication, general principles of law and unilateral decisions (R. Monaco and P. de Visscher), submission of disputes (H. Mosler) and intervention in international legal proceedings (G. Morelli). In this group of papers our attention is drawn to a paper on judicial philosophy of Manfred Lachs (L. V. Prott). In a conclusion to the above article it is stated that the influence of M. Lachs "on the Court's philosophy, reputation and acceptance has been substantial" (p. 423).

The third part of this book contains 7 papers. Two of them (by T. M. Franck and S. M. Schwebel) deal with the position and powers of the Secretary General of the UN. The first article analyses the present practice and the second considers the possibility of conferring of new powers on the Secretary General. Two essays contain reflections connected with certain concepts and notions of theory and practice of international organizations such as the conception of resolution and decision or the notion of corporation in international public law (J. Kolasa and Y. Yokota). An article by M. Virally on resolutions of such organizations should also be placed in this part and not in the first subject-group.

The remaining essays consider the following issues: the influence of operations of international organizations on the internal legal order of States (H. Bokor-Szegö), the role and significance of the ICJ in the interpretation of statutes of international organizations (J. Makarczyk) and the UN activities with respect to developing countries (W. D. Verwey). The analysis of the present practice leads J. Makarczyk to the conclusion that the interpretation of statutes of international organizations should be bestowed upon the ICJ and not be dependent on the majority systems existing in given bodies of international organizations. He concludes further that "the activities of the JCJ in this field, no matter the inevitable shortcomings, should be intensified for the benefit of what may still be saved of the rule of law in international relations" (p. 518). Verwey on his side presents an opinion that the attitude o the General Assembly of the United Nations towards developing countries supports the conclusion that "it cannot be denied that the LDC's have become recognized as a special category of subjects under international law" (p. 555).

In the fourth part the legal problems of two spaces, the sea and the outer space, have been combined. This part is clearly dominated by issues closely connected with the Conference on the Law of the Sea and with the new legal regime of the seas. The authors consider the following themes: the international customary law and the Conference on the Law of the Sea (E. J. Aréchaga), the exclusive economic zone (J. Castanẽda), the settlement of disputes in the light of the Convention on the Law of the Sea (E. J. Manner and S. Oda), codification of the law of the sea (D. Vignes) and the marine flag and the responsibility of States (N. Singh). The remaining two essays consider questions of criteria of delimitation of boundaries between States and areas not under their jurisdiction (R. Bierzanek), and of limitation and prohibition of the use of outer space for military purposes (V. S. Vereshchetin).

Generally speaking, this part of the *Essays* is dominated by the issue of peaceful settlement of disputes in the light of the Convention on the Law of the Sea. E. J. Manner presents a detailed analysis of the provisions regulating the settlement of disputes that may arise between neighbouring States with respect to demarcation of their sea boundaries. S. Oda describes the problem of compulsory settlement of disputes and comes to a conclusion that such a competency has been introduced in this Convention on a very limited scale. In his opinion such a solution "reflects the contemporary situation of the law of the sea and the positions taken by the individual States of the world today focards the new regime they have together so painstakingly contrived" (p. 655).

The fifth part contains only four articles on the following issues: treaties on armaments control aiming at reducing of military effects on environment (H. Blix), certain commercial obligations and the GATT (R. S. J. MacDonald), the law regulating the control and reduction of armaments (B. V. A. Röling) and reflections concerning Francis Vitoria in connection with the 500th anniversary of his birthday (A. Truyol y Serra). This last essay should be placed, however, in the first, theoretical part of the volume.

As it can be seen from the above review the range of issues discussed in this volume is a very wide one. Furthermore the richness of fundamental problems involved and the highest scientific authority of authors, representing different legal traditions and political orientations, bestow upon this publication a very unique standing. Without any doubt it will be welcomed with a great interest by international lawyers. And it will be carefully studied and widely quoted by them. This book will promote even greater interest im Professor Lachs's scientific works. And through this it will be the most lively and lasting form of honouring the anniversary of Manfred Lachs, the Professor and the Judge.

Jan Kolasa

Jan CZAJA, *Prawnomiędzynarodowy status Watykanu* [*International Legal Status of the Vatican City*], Warszawa 1983, PWN.

This book has been published in a very appropriate moment. The Vatican has always played a very important role in international relations and since the pontificate of John XXIII this role has increased substantially and is still growing. The interest in the Vatican's diplomacy has always been significant throughout the world and in Poland has been especially strong since for the first time in history a Pole was elected Pope.

Several books concerning the Vatican have been published recently in Poland but all of them either ommitted or considered the international legal aspects of the Vatican in a very limited scope. The reviewed book is the first spacious monography to consider the international legal status of the Vatican as a whole. Thus it will certainly initiate great interest.

It should be underlined from the beginning that the work of J. Czaja has been based upon solid sources. This is composed of both documents and multi-language scientific as well as publicistic literature. The term "international legal status" is understood by the author in a very wide sense, thus besides reflections concerning the field of international law many elements connected with the international policy of the Vatican are also included in this book.

The status of the Vatican for long has been a subject of many discussions and controversies in the doctrine of international law. The main source of these controversies is the unusual and dual nature of the Vatican and the author uses this term as a combined description of both the Holy See and the Vatican State. The international status of the Roman Catholic Church and the exceptional position of the Pope as its Head is also a subject of consideration.

If the Holy See is comprehended as a complex of central organs of the Roman Catholic Church with the Pope as its Head and the Vatican State as a geopolitical unit created by the Lateran Treaty of 11 February, 1921, it is necessary to differentiate these two institutions despite the existence of organic links between them. It seems obvious that among these two institutions the Holy See is chronologically earlier and essentially more important. What is then its international status?

According to the general international practice and the almost universal opinion expressed by the doctrine of international law the Holy See is a subject of international law and it was so during the period of 1870—1929 when there existed the no-papal State. J. Czaja not only shares but also extensively motivates this fundamental opinion (pp. 25—26, 59—61, 119—135). In the science of international law the issue of whether the Holy See belongs to the category of sovereign or non-sovereign subjects of international law is also discussed. The author convincingly expresses himself in favour of the first solution of this problem (pp. 135—144).

What then is the State–City of Vatican from the point of view of international law? The doctrine is divided as to whether the Vatican State is a state in the sense of international law. The author answers this question negatively, for he considers it as a non-sovereign formation, though possessing certain attributes of international subjectivity (pp. 145—167).

The qualification of the Vatican State as a separate from the Holy See subject of international law is not new in the doctrine. It should be acknowledged that this thesis has been substantially developed by the author However, I am not convinced as to its validity.

The treatment of the Vatican as the union of two distinct subjects is proper in the light of the canonical law, but — in spite of a common belief — it seems meaningless from the point of view of international law. The international subjectivity is not an antonomous attribute but it occurs in relation to other subjects of international law. These other subjects, practically states and international organizations, deal with only one and the same subject though it appears either as the Holy See or the Vatican State. A forcible example which speaks in favour of this point of view — though the author uses it to advocate the opposite thesis — is provided by the participation of the Vatican in theInternational Atomic Energy Agency. For the Vatican has been a member of this organization first as the Vatican State and later as the Holy See without the use of withdrawal or admission procedures (pp. 130 and 132). This was not an exchange of subjects as it is claimed by the author, but a transition of character if not only a replacement of names of the same subject.

If the Holy See and the Vatican State were to be considered as two separate subjects of international law they could at the same time be parties to the same international agreements, members of the same international organizations, could participate in the same international conferences or maintain diplomatic relations with the same states. None of these have ever happened in the past and nothing points to the possibility of their occurrence in the future. These two institutions never acted in relations with each other as distinct subjects of international law. If the Holy See always represents the Vatican State in international relations and *vice versa*, their unification in this respect is complete and unchangeable.

This thesis, about the common international subjectivity of the Holy See and the Vatican State simplifies the solution of the issue whether the latter is a state in the meaning of international law. An argament about the dual international subjectivity of the Vatican City inclines to the acceptance of a negative conclusion, since due to the dependence of the Vatican State on the Holy See, the former lacks the element of sovereignty. This is the opinion of the author who questions the state character of the Vatican (pp. 96, 167, 183—184 and 295). Whereas the argument about the uniform international subjectivity allows for the qualification of the Vatican State's status together with powers which are vested and are executed by the Holy See. The Holy See is not an external element in relation to the Vatican State which provides the later with the valour of sovereignty and thus can be considered as a state in the light of international law. It is yet another issues if it is a state in any other sense.

There remains a problem of the international relation of the Vatican State which was created in 1929 to the papal state which existed before 1870. The author restrains himself to a short reflection on restitution in a certain way (p. 140), and he states several times that the Latern Treaty established a new subject of international law (pp. 104, 145 and 282). He recalls, however, the fact that the former papal state and the papacy existed as the same subject of international law (p. 101). This fact can also be call upon when a thesis of the uniform international subjectivity of the Holy See and the Vatican State is being formulated today.

There is no need to point that the presented diversity of opinions does not speak against the scientific quality of the reviewed book. Its author showed a great deal of erudition and uncommon inquiring disposition.

Lech Antonowicz

Tadeusz JASUDOWICZ, *Normy regionalne w prawie międzynarodowym [Regional Norms in International Law*], Toruń 1983, Wydawnictwo Uniwersytetu im. Mikołaja Kopernika.

The problems of the international legal systems binding groups of States connected either by their geographical location or by social and political systems has been for long a subject of interest of the doctrine of international law. During the interwar period a significant importance was acquired by the legal acts of American States. After World War II the law of the European communities was established and this law occupies an intermediary position between the international law and the internal law. The Soviet authors distinguish specific legal norms regulating relations between the socialist States. The cooperation of the Baltii States in the field of protection and exploration of this sea is of exemplary character.

This book summarizes the author's hitherto conducted studies on elements of regionalism in the international law. It considers the premises on which regional norms are based, the very notion of a regional norm of international law, then the sources of these norms and the means of determination of their essence as well as problems of validity and implementation of regional norms.

The author begins his considerations with the analysis of the notions of universality and uniformity of international law and with a short review of historical development of international law. Special emphasis is placed on the concept of Eurocentralism and on the influence of tradition and practice of States in different regions of the world on the development of international law. It has been stated by the author that at the present we are faced with a rapid development of regional norms, while the recognition of the superior character of the Charter of the UN and of *ius cogens* concept represents the universalistic tendency. He also rightly observed (p. 43) that the mentioned growth of the regional regulations did not undermine the universal character of the international law.

Before attempting to analyse the specific regional norms of the international law, the author had to define the notion of "region". He has considered the importance of regionalism in international law in three aspects: sociological (as a condition of establishment of an environment in which regional norms can develop and function), organizational (from the point of view of a creation and functioning of international organizations) and in normative aspect. In the opinion of the author all these elements are complementary to each other, however, the fusion between the sociological and organizational elements is of special significance. At the same time it has been pointed out that though the activities of international organizations can have a significant influence upon the formulation of particular norms, this does not, however, constitute a *sine qua non* condition for the establishment of the regional law. Thus this element should not be overestimated.

Further on, T. Jasudowicz, considered the problems of international organizations created in accordance with the chapter VIII of the UN Charter. A distinction was made here with respect to organizations created in conformity with Articles 51, 52 and 53 point 1 of the Charter. He has rightly stated that, though the statutes of several international organizations contain provisions clearly pointing to the fact that these organizations were established within the system of the United Nations (eg. Article 1 of the Charter of the Organization of American States), in fact they exceed this framework. The author expresses an interesting opinion (p. 77) that all regional organizations, including the regional organizations of economic integration, are bound by the general international law. This notion seems to derive from the acceptance of the thesis of an unquestioned supremacy of the international law. It should be considered, however, whether the international integrational organizations, which occupy a special position, are bound by the *iuris cogentis* norms only or also by customary norms or by any other norms. The notice should also be taken of a fact that the author seems to negate the distinct character of the internal legal systems of integrational organizations in respect to the international law. This is presented, however, in an unclear and inconsistent manner. T. Jasudowicz proposes to describe these legal systems by a notion of "transnational law". This notion has been introduced by Ph. Jessup and P. Lalive and covers the law regulating the "quasi-international" agreements concluded by the subjects of the international law with the legal persons of private law (according to the conception of the mentioned authors this system could be based upon the general principles of law).

When defining the essence of the regional norm, a subjective and territorial criterion is used by the author (p. 117). In his opinion such norms can be formulated on different levels and can be binding in different fields. The author excluded the possibility of recognition of bilateral norms as regional norms (pp. 74 and 249). Such an eventuality was accepted, however, with respect to the general norms. We have to agree with an opinion that at present a truly universal norms are exclusively of a customary character and are often created upon the fundation of a multilateral convention.

The second part of this book contains the analysis of the problems connected with the sources of the international law and with the means of determination of the essence of international norms. The regional agreements are the basic source of these norms and especially the statutes of regional international organizations. The problem of existence and of scope of validity of the regional customary norms is a subject of controversy in the doctrine of international law. This issue is considered by the author with references to the jurisprudence of the PCIJ and the ICJ (p. 148) and he has arrived at a conclusion that it is proper to speak about the existence and validity of the particular norms. The criteria contained in the Article 38, point 1 of the Statute of the ICJ are fully applicable to the evaluation of regional customary norms, though this Article has been often criticized as restraining the notion of custom in the international law. The author has also presented interesting considerations concerned with the differentiation between international customs and international good manners. The question of a binding character of a customary norm in relation to a State which has opposed in a clear manner the introduction of such a norm is also discussed. The presentation by T. Jasudowicz of problems related to the legal character of resolutions of international organizations creates certain doubts. The author seems to distinguish these resolutions as an intermediary element in relation to the sources of the law and the means of designation of the essence of legal norms. The practice of international organizations provides very few examples of norms directly binding the member-States. An example of the law of the EEC cited by the author, is not representative enough due to the recognized distinction of solutions accepted by the European communities (this has been also noticed by the author, p. 205). While accepting the indirect influence of the jurisprudence of regional courts (which similarly to the practice of the ICJ accept the principle of uniformity of judgements) and of the doctrine of the international law, the author has rejected the law-making character of resolutions of political conferences as well as of the so-called political doctrines — common especially in the American practice (besides the mentioned Monroe doctrine, also the doctrines of Estrada. Tobar and others). In the final part the author analysed the problem of codification of the regional law and its influence upon the validity of customary norms.

The last part of this book is devoted to problems of validity, of application and interpretation of the regional norms. It is the assumption of the author that these norms are in operation among the States of the same region. A possibility of extension of regional norms also upon States not participating in the process of their creation seems to be of great scientific interest. Such a possibility is allowed for by the author (p. 256) but his fundations are not convincing. It seems that such a situation shall be limited to the regional norms of the *ius cogens* character (see p. 295) or to the customary law (this issue was a subject of jurisprudence by the ICJ in the Asylum case; a critical standpoint of the Court in respect to this issue has created a certain amount of criticism in the doctrine) — in the remaining cases this will depend on a clear statement of intention issued by the interested States. As far as the mutual relation of the general law and the regional law is concerned, the author is of the opinion that the consideration of regional norms as particular norms and the application to them of the principle of *lex specialis* is not always proper. In many cases general norms regulate the process of creation and interpretation of the regional norms. Thus the hierarchical superiority has been gained only by general norms of *ius cogens* character.

This book by T. Jasudowicz is valuable first of all due to the range of problems it considers. Regional norms gain ever larger importance. A bibliography collected by the author deserves a special attention (he has selectively considered the legal problems of the European communities; these considerations are founded exclusively upon a book of H. Schermers and it is doubtful whether it can provide a complete picture of the legal system of the EEC and its characteristic elements; a very interesting monography by T. Schweissfurth on socialist international law has been probably published when the reviewed book was completed). The riches of material has one significant — weakness — among many citations the very thought of the author seems to disappear. Despite this shortcoming this book deserves a throughout lecture.

Władysław Czapliński

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Le 70ème anniversaire du Professeur Manfred Lachs

Les milieux de la science juridique polonaise ont commémoré le 70ème anniversaire du Professeur Manfred Lachs, membre de l'Académie polonaise des Sciences et juge à la Cour internationale de Justice.

Une session, organisée à cet effet par l'Institut de l'Etat et du Droit de l'Académie polonaise des Sciences, a réuni, le 8 septembre 1984, à Varsovie, plus de 150 personnes venues de Pologne et de l'étranger. Les plus hautes autorités polonaises ont été représentées par le Professeur Henryk Jabłoński, président du Conseil de l'Etat, Stanisław Gucwa, maréchal de la Diète et par Mieczysław F. Rakowski, vice-premier ministre du gouvernement polonais. Les participants ont également salué le président de la Cour internationale de Justice, le juge T. O. Elias, venu spécialement à Varsovie. L'Académie polonaise des Sciences a été représentée par son vice-président, le Professeur Władysław Markiewicz et par le secrétaire scientifique de l'Académie, le Professeur Zdzisław Kaczmarek.

La cérémonie a été inaugurée par le Professeur Adam Łopatka, directeur de l'Institut de l'Etat et du Droit de l'Académie. En exprimant sa joie de pouvoir accueillir cet éminent juriste dans le bâtiment de l'Académie, le Professeur Łopatka a rappelé les principales sphères d'activités du Professeur Lachs: diplomate, enseignant, chercheur et juge.

Dans ses activités diplomatiques, le Professeur Lachs fut, durant de longues années (1947—1960), directeur du département juridique au ministère polonais des Affaires étrangères. En tant que conseiller du ministre, il a assisté et travaillé à la formulation du célèbre plan Rapacki (1958). une initiative polonaise visant à l'instauration d'une zone dénucléarisée en Europe centrale. Le Professeur Lachs représentait également la Pologne au cours de vingt sessions de l'Assemblée générale de l'ONU, et il a notamment été président du Comité juridique de l'Assemblée générale et du Sous-comité juridique pour l'utilisation pacifique de l'espace extra-atmosphérique.

En tant que chercheur, le Professeur Lachs a consacré son premier livre, édité en 1945 à Londres, au problème des crimes nazis. Parmi les autres domaines de recherches du Professeur Lachs figurent le droit des traités, le droit des organisations internationales et le droit de l'espace extra-atmosphérique.

De 1949 à 1952, le Professeur Lachs enseignait à l'Académie des sciences politiques à Varsovie pour devenir ensuite (à partir de 1952) professeur à la faculté de droit de l'Université de Varsovie. Dans les années 1962—1966, il était directeur de l'Institut de l'Etat et du Droit de l'Académie polonaise des Sciences. Il est également, depuis 1963, membre de l'Institut de droit international.

En 1966, le Professeur Lachs est élu juge à la Cour internationale de Justice pour occuper, de 1973 à 1976, le poste de son président.

En terminant son discours, le Professeur Łopatka a transmis ses félicitations personnelles et a lu quelques messages de félicitation adressés au Professeur Lachs par des personnalités politiques et scientifiques connues, dont notamment le président de la République autrichienne, Rudolf Kirchschlaeger.

Les paroles d'estime et de félicitation ont ensuite été prononcées par le Professeur Markiewicz et par les collègues du Professeur Lachs, y compris ses anciens élèves qui occupent actuellement des fonctions de responsabilité au ministère polonais des Affaires étrangères.

En s'adressant à l'auditoire, le Professeur Lachs a exprimé ses remerciements pour les félicitations qui lui ont été adressées. Il a rappelé les principaux moments de sa vie de diplomate et d'enseignant pour apprécier, dans la perspective du temps, les évènements auxquels il avait participé. Il a également présenté le rôle et les tâches du droit des gens dans le monde contemporain et l'importance du droit international pour le maintien de la paix et de la sécurité internationales.

Au cours de la cérémonie, le Professeur Łopatka a remis au Professeur Lachs un recueil d'études de droit international édité à l'occasion de son 70$^{\text{éme}}$ anniversaire. Cer-épais volume de 760 pages contient des contributions (en français ou en anglais) de cinquante spécialistes de droit international. Le livre est divisé en quatre parties répondant aux domaines sur lesquels se concentrent les activités scientifiques du Professeur Lachs: la théorie du droit international, les organisations internationales, la Cour internationale de Justice et le règlement pacifique des différends ainsi que le droit de la mer et de l'espace extra-atmosphérique. Ce recueil d'intéressantes études contribuera sans doute au développement du droit des gens en Pologne et à l'étranger.

Jerzy Kranz

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Transformations in Contemporary International Law

(All-Polish Scientific Conference at Jabłonna, 30 May—2 June. 1985)

In the conference organized by the Polish Institute of International Affairs and the Institute of State and Law of the Polish Academy of Sciences participated about 60 representatives of practice and theory of the international public law. The debate was initiated with two addresses. Professor Manfred Lachs, member of the Polish Academy of Sciences, Judge of the International Court of Justice in the Hague, while welcoming the initiative of convening the conference, at the same time stressed a necessity of considering in the process of creation, interpretation and application of the international law, more then ever the interests of the whole international community. Dr. Stanisław Pawlak, Director of the Law and Treaty Department, Ministry of Foreign Affairs, referred to the most up-to-date directions in the development of the international law with special emphasis on the needs and interests of the Polish People's Republic.

In the successive eight lectures and in the discussion of the problems of new phenomena, in ways of the creating of international law, of its contents and functions were taken up. Three of them focused on the question of sources of the international law. Professor Stanisław Nahlik in his lecture pointed out that after World War II the tendency to progressive codification of the international law had comprised international organizations, both regional and universal including the UN, and also some varied fields and problems of international law. The way from a draft to the entry into force of a convention goes through an adoption of a treaty text by the vote of the twoo-thirds of the States (present and voting), or by the consensus. It seems to meet the once indispensable requirement of unanimity for a draft convention to be accepted. Even in the case, when a convention does not enter into force because of the delay in the ratification process, its legal value remains considerable; the object and puropse of a treaty is under protection (Art. 18 of the Vienna Convention of the Law of Treaties), the customary rules are often confirmed, and sometime a non-binding treaty makes inspiration for creating new customary rules.

Professor Krzysztof Skubiszewski characterized non-binding decisions of conferences and international organizations (neither being acts of an international legislation, nor new sources of law) as the new and substantial phenomenon in the sphere of international law-making. They fulfil various functions — being suplementary means of law-stating, a relevant proof of the practice and *opinio iuris* as far as customary rules are concerned; they could also accelerate a law establishing process, affect a substance of negotiated treaties, or ultimately have a rank of law-making acts for a State. In the realm of legal policy they show in which direction the development of law is due, which concepts and ideas are to be realised by the future law.

Professor Karol Wolfke proposed an universal classification of rule-making factors, regarding not only "sources in formal meaning" and "sources in material" meaning but also all other phenomena to be hardly qualified within a traditional pattern of sources.

The successive two lectures, mutually supplementing, referred to the new domains and functions of the international law. Professor Janusz Symonides concentrated on the estimation of the state of international law in realm of exploitation of the high seas, exploitation of outer space, protection of environment, maintaining of peace and international security. Furthermore such still unregulated questions were raised: peaceful uses of the open sea and seabed beyond the limits of national jurisdiction, delimitation of outer space, status of the geo-stationary orbit, principles of teledetection, problem of preventing of the arms race in outer space, oxygen and water circulation in the nature, non-use of military force and material guarantees making impossible a use of force.

Professor Andrzej Wasilkowski has found a particular phenomenon in the overall concept or — in his words — philosophy of international law, is the development of the function of regulating the inter-State relations up to the entering in realm of civil rights and establishing of international standard for treating citizens by their own States. Of similar importance seems to be the development of the projecting function, expressed by the inventiveness in creation of new principles of international law and by the appearence of the function of levelling the non-legal differences, what is especially evident in the process of shaping of the new international economic order. The creation of new principles remaining in an undetermined relation to the established ones makes the law system incoherent, and thus a directive line for the law-making process seems to be the principle of equity.

In the next lecture Professors Henryk de Fiumel and Jerzy Makarczyk have agreed with the Professor Rozmaryn's opinion that the international treaties binding on Poland have caused legal consequences on the national legal order by *proprio vigore*. The legal foundation is a silent consent of the Polish State for the validity of the binding international treaties in the national legal order, from the very title of their validity on the legal-international plane. They have adopted the general assumption that the international treaties concluded by Poland which entered into force in the legal-international sense are *ipso iure* valid in the national law order. It means in turn that both the administrative and judicial organs have the obligation to comply with such treaties, while the individuals and non-State entities may draw from them relevant rights and duties, as well as refer to them.

Associate Professors Jan Sandorski and Jerzy Tyranowski have described the principles of socialist internationalism functioning in the relations between socialist States as legal principles in the initial phase of their transformation from customary rules of particular character into conventionally established ones. They have also noticed the parallel validity — in the relations between socialist countries — of general principles of the international law. The lack of definition of the named principles complicated their doctrinal interpretation, and therefore the presenters' postulate for a detailed definition of these principles in a separate legal act.

Professor Wojciech Morawiecki has concentrated on the limits of the implied powers of international organizations. In the internal sphere of functioning of an organization these competences are illimitable, while in the external sphere the States joining an organization may agree for awarding it with limited implied powers and with residual capability of acting. In the case of the statutory powers of an organization to fulfil some determined external functions one could, by means of functional interpretation, educe from them more substantial implied powers. It may open, however, a hazardous way of unending interpretation process.

Both the lectures and pronouncement by Professor Andrzej Całus on the relation between the international public law and similar disciplines have created an extremely interesting basis for a many-sided discussion. Apart from the lecturers many other experts of international law participated in the discussion: Prof. R. Bierzanek, Assoc. Prof. Z. Brodecki, Dr. A. Burzyński, Prof. W. Góralczyk, Assoc. Prof. G. Grabowska, Prof. J. Kolasa, Dr. J. Kranz, Dr. J. Menkes, Assoc. Prof. A. Michalska, Assoc. Prof. E. Piontek, Assoc.

Prof. K. Równy, Prof. R. Sonnenfeld, Assoc. Prof. R. Szafarz. A concordant opinion was expressed that the main prerequisites of transformations in the international law were on one had the enormous growth and differentiation of the composition of the international society which was followed by a change in the established system of values towards a greater justice and equality. On the other hand — the technological progress and resulting directly from it the necessity to cover new domains by the regulations of international law. The intensification of codification processes, which are taken most of all by international organizations, as well as lawyers representing different groups from all over the world including the developing countries, can strenghten the rules of the traditional customary law. However, in the face of divergencies of interests and difficulties with working out of international treaties the rules of customary law still remain an important part in the system of sources of law. Emphasis was put on the significant role of other rule-making factors in the law-making process. It has been stated that there is a lack of correlation between the validity of a rule and its effectiveness whereby the most important for the effective validy of law is the principle of good faits activity in the field of law as well as politics. Demand was repeated for regulating the place of the international law in the legal order of the Polish People's Republic. This should be done in the legislative or constitutional way. It is admitted that by now the International Law Commission does not play the most important role in the law-making process. It does not realize the function of progressive law development and law codification. It fails to work out model principles and hardly analyze the trends appearing in international practice and connected with a necessity of regulating and solving of the so-called global mankind problems. Furthermore, an opinion prevailed on incoherence of the international public law system and on the need of the revision of notions functioning within. In this context a crucial role was attributed to major institutions grouping international lawyers.

OBITUARIES * NOTES NÉCROLOGIQUES

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Ludwik Gelberg
(1908—1985)

Ludwik Gelberg, professeur à l'Institut de l'Etat et du Droit de l'Académie polonaise des sciences, est décédé subitement le 12 mars 1985. Avec cette disparition, la science polonaise du droit international a perdu un homme qui fut étroitement lié à son évolution depuis quarante ans.

Le Professeur Gelberg est né le 14 juin 1908 à Atzgersdorf (Autriche). Il a terminé ses écoles, jusqu'au baccalauréat, à Żółkiew (région de Lwów). Dans les années 1926—1934, il étudia le droit et les sciences économiques à Vienne, à Florence et à Lwów, en obtenant la licence des sciences économiques à Florence (en 1930) et la maîtrise (*magister iuris*) à la Faculté de droit de l'Université de Lwów (en 1934). De 1934 jusqu'à 1939, il est avocat stagiaire à Żółkiew et à Lwów. Dans la période 1939—1941, il fut conseiller juridique d'établissements économiques soviétiques à Lwów. De 1941 à 1947, il séjourne en Union soviétique où il fut conseiller juridique et enseigna le droit international et le droit constitutionel aux écoles supérieures de Tachkent, de Minsk et de Moscou. En 1946, il obtint, à l'Institut fédéral des sciences juridiques de Moscou, le grade de candidat des sciences juridiques, reconnu ensuite par l'Université de Varsovie comme correspondant au doctorat des sciences juridiques en Pologne. La thése de doctorat avait pour sujet l'extradition des criminels de guerre.

Le Professeur Gelberg regagna la Pologne vers la fin de 1947 et depuis cette date jusqu'à 1950 il dirigea le départment du droit international à l'Institut polonais des affaires internationales à Varsovie. Pendant les onze années qui suivirent (1950—1961), il dirigea le département du droit international à l'Ecole centrale du service extérieur où il occupa notamment les fonctions de doyen de la Faculté diplomatique et consulaire (en 1951) et de recteur adjoint (1952—1954).

En 1954, il fut nommé professeur et, depuis 1962, il travailla à l'Institut de l'Etat et du Droit de l'Académie polonaise des sciences.

L'oeuvre du Professeur Gelberg englobe plus de cent articles et monographies concernant le droit des gens et l'histoire des relations internationales. Il s'agit aussi bien des publications en polonais qu'en langues russe, anglaise, française et allemande. Caractériser ses activités scientifiques n'est pas chose facile, car il s'intéressa à plusieurs domaines. Rares sont les secteurs du droit international ou de l'histoire des relations internationales qui n'ont pas été enrichis par ses travaux. Il suffit de citer, à titre d'exemple, quelques-uns de ses travaux et notamment *Zagadnienia członkostwa ONZ* [*La questions de l'appartenance à l'ONU*), écrit avec Juliusz Suchy en 1953, *Piractwo no morzach chińskich. Próba oceny prawnej* [*Piraterie dans les mers chinoises. Essai d'apréciation juridique*] en 1956, *Układ warszawski. Studium prawnomiędzynarodowe* (*Pacte de Varsovie. Etude de droit international*) en 1957, *Kryzys Karaibski 1962 roku. Problemy prawa międzynarodowego* [*Crise des Caraïbes de 1962. Problèmes de droit international*] en 1964, *Powstanie Polski Ludowej. Problemy prawa międzynarodowego* (*Naissance de la Pologne populaire. Problèmes de droit international*] en 1970. *Niemcy po drugiej wojnie światowej. Reflekcje o sytuacji prawnej* [*L'Allemagne au lendemain de la deuxième guerre mondiale. Rèflexions sur la situation juridique]* en 1971, *Problemy prawne współpracy pństw bałtyckich* [*Problèmes juridiques de la cooperation des Etats du littoral de la Baltique*] en 1976, *Normalizacja stosunków PRL—RFN* [*Normalisation des rapports entre la Pologne populaire et la Rèpublique fédérale d'Allemagne*] en 1978, ou *Maritime Cooperation of the Baltic States* en 1981.

Si l'on voulait chercher les sujets préférés par le Professeur Gelberg, il faudrait mettre l'accent sur les problèmes polono-allemands et le droit de la mer. Il convient également de souligner la réaction rapide du Professeur aux évènements internationaux d'actualité. Enfin, en tant qu'enseignant, le Professeur Gelberg fut l'auteur de *Zarys prawa międzynarodowego* [*Précis de droit international*], un manuel édité en 1967 et réédité à deux reprises en 1977 et 1979.

Les voyages à l'étranger, accompagnés souvent d'un programme scientifique, furent une grande passion du Professeur Gelberg. Pendant ces séjours, il enseigna ou donna des conférences aux universités soviétiques, ouest-allemandes, argentines, bulgares et autres. Il fut également patron de sept thèses de doctorat et membre du jury de doctorat et d'habilitation.

La mort subite du Professeur Gelberg a provoqué, parmi tous ceux qui l'ont connu, une profonde émotion. Quoique âgé, le Professeur Gelberg fut, jusqu'à ses derniers jours, un homme très animé et dynamique. Il ne cessait pas d'écrire et de publier et il avait plusieurs projets scientifiques à réaliser. Rien ne permettait de croire à cette subite disparition, d'autant plus que, comme le disait souvent le Professeur, jamais de sa vie il ne fut gravement malade.

Ayant une grande facilité de contract avec les gens, le Professeur Gelberg fut lié par une amitié avec ses anciens élèves. Si nous le rencontrions d'abord dans la salle de cours, ce fut ensuite la table de bridge qui nous réunissait, car le bridge fut un des loisirs préférés par le Professeur. La mort subite du Professeur Gelberg crée un vide. Un ami, un homme intéressant et une personnalité originale a disparu.

Lech Antonowicz

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Accords internationaux entrés en vigueur à l'égard de la Pologne en 1984

La liste publiée ci-dessous comprend les plus importants accords internationaux. bilatéraux et multilatéraux, entrés en vigueur à l'égard de la Pologne (ou dénoncés par elle) en 1984. Les arrangements administratifs (accords conclus au niveau de ministres) sont absents de ce registre qui ne contient que des accords conclus au nom du Conseil de l'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 de la Pologne, le Conseil de l'Etat — composé de 17 députés à la Diète (Parlement) — est le seul organe autorisé à ratifier et à dénoncer les traités. Indépendamment de la ratification, le consentement à être lié par un accord peut aussi être exprimé par le Conseil des ministres qui le donne sous forme d'approbation (*approval*), soit sous forme de signature par un plénipotentiaire dûment autorisé; certains accords sont conclus par échange de notes. Enfin, les ministres ont également la compétence pour conclure des accords internationaux, à condition toutefois que la matière soit du ressort d'un ministre.

La Constitution poloniase ne précise pas quels sont les accords qui nécessitent la procédure de ratification. Selon la résolution conjointe du Conseil de l'Etat et du Consel des ministres, en date du 28 décembre 1968, relative à la conclusion et à la dénonciation des traités, sont soumis à la procédure de ratification les traités ayant une importance particulière dont:

— les traités de paix ainsi que les traités d'amitié, de coopération et d'assistance mutuelle,

— d'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,

— d'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 bilatéraux et multilatéraux 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. Il n'existe pas en Pologne un recueil complet des traités liant la Pologne.

Les traités bilatéraux figurent sur cette liste par pays, dans l'ordre alphabétique (alphabet français), selon le schéma suivant: titre du traité, lieu et date de sa signature, mode d'expression par la Pologne du consentement à être liée, date de l'entrée en vigueur à l'égard de la Pologne.

Les traités multilatéraux observent le même schéma.

Traités bilatéraux

Afghanistan

— Programme de coopération entre les ministères des Affuaires étrangères pour les années 1984—1985, Kaboul, le 11 juin 1984; signature; le 11 juin 1984.

République Démocratique Allemande

— Accord sur l'organisation du séjour de la jeunesse et d'enfants de la RDA en Pologne et de la jeunesse et d'enfants polonais en RDA pendant les vacances en 1984, Varsovie, le 24 janvier 1984; signature; le 1er février 1984.

— Accord conclu entre l'Office aux affaires de la Jeunesse du Conseil des ministres polonais et le même Office en RDA concernant leur coopération au cours des années 1984—1985, Varslovie, le 24 janvier 1984; signature; le 25 janvier 1984.

— Protocole relatif aux fournitures réciproques de marchandises et aux services en 1984, Varsovie, le 11 février 1984; signature; le 11 février 1984.

— Protocole relatif aux fournitures réciproques de marchandises et aux services en 1985, Berlin, le 21 décembre 1984; signature; le 21 décembre 1984.

Angola

— Accord d'amitié et de coopération, Luanda, le 4 décembre 1978; ratification; le 11 avril 1984.

Bulgarie

— Programme à long terme de développement continu et d'approfondissement de la coopération économique, scientifique et technique, Varsovie, le 5 avril 1984; signature; le 5 avril 1984.

— Déclaration commune polono-bulgare, le 5 avril 1984; signature; le 5 avril 1984.

République Populaire de Chine

— Accord de coopération économique et technique, Varsovie, le 30 juin 1984; signature; le 30 juin 1984.

— Protocole relatif à la création d'un comité intergouvernemental polono-chinois en matière de coopération économique, commerciale, scientifique et technique, Varsovie, le 30 juin 1984; signature; le 30 juin 1984.

— Programme des échanges culturels et scientifiques pour les années 1985—1986, Varsovie, le 15 septembre 1984; signature; le 15 septembre 1984.

Chypre

— Consular Convention, Nicosia, 3 July 1980; ratification; 18 August 1984.

Cuba

— Accord sur l'assistance juridique en matière civile, familiale et pénale, Havana, le 18 novembre 1982; ratification; le 24 août 1984.

Etats-Unis

— Agreement on the Use by Polish Vessels of the Facilities of the Louisiana Offshore Oil Port (LOOP), Washington, 30 March 1984; exchange of notes; 10 April 1984.

Grèce

— Agreement on the Development of Economic, Industrial and Technical Cooperation, Athens, 18 December 1980, approval; 2 August 1984.

Hongrie

— Programme complexe de développement des relations entre la Pologne et la Hongrie pour les années 1984—1990, Varsovie, le 24 octobre 1984; signature; le 24 octobre 1984.

— Protocole relatif aux fournitures réciproques de certaines marchandises et aux paiements en 1985, Budapest, le 24 novembre 1984; signature; le 24 novembre 1984.

Italie

— Accord sur la navigation maritime commerciale, Varsovie, le 3 juillet 1974; approbation; le 14 septembre 1984.

— Accord sur la création des instituts de culture en Pologne et en Italie, Varsovie, le 21 décembre 1984; signature; le 21 décembre 1984.

— Protocole relatif à l'approfondissement de la coopération industrielle sur les marchés des pays tiers, Varsovie, le 21 décembre 1984; signature; le 21 décembre 1984.

Kiribati

— Consular Convention, Bairiki Tarawa, Warsaw, exchange of notes, 22 March 1984.

Koweit

— Agreement on Cultural and Scientific Cooperation for the years 1984—1986, Kuwait, 15 November 1982; ratification; 1' March 1984.

Laos

— Accord de coopération culturelle et scientifique, Vientiane, le 18 septembre 1979; ratification; le 27 mars 1984.

Mongolie

— Accord sur la coopération dans les recherches géologiques de certains minéraux utiles en Mongolie, Oulan-Bator, le 9 mars 1984; 1984 signature; le 9 mars 1984.

Nicaragua

— Accord sur la suppression des visas pour les titulaires des passeports diplomatique et de service, Managua, le 27 janvier 1984; signature; le 13 mars 1984.

Norvège

— Agreement Relating to the Exports from Poland of Certain Textile Products, Oslo, 6 December 1984; signature; 6 December 1984.

Roumanie

— Programme à long terme de développement de la coopération économique, scientifique et technique, Varsovie; le 8 juin 1984; signature; le 8 juin 1984.

— Protocole relatif aux fournitures réciproques de certaines marchandises et aux paiements en 1985, Varsovie, le 8 décembre 1984; signature; le 8 décembre 1984.

Suède

— Programme of Cultural, Scientific and Educational Cooperation For the Academic Years 1984/85 and 1985/86, Stockholm, 11 April 1984; signature; 11 April 1984.

Tchécoslovaquie

— Protocole relatif aux échanges de marchandises et aux paiements pour 1985, Prague, le 20 novembre 1984; signature; le 20 novembre 1984.

— Accord sur les conditions téchniques et économiques du transit de la énergie électrique transférée de l'URSS en Tchécoslovaquie à travers le réseau électro-énergétique polonais, Katowice; le 2 décembre 1984; signature; le 2 décembre 1984.

Union Soviétique

— Accord sur l'ouverture des filiales de la Maison de la Science et de la Culture Soviétiques à Gdańsk et à Katowice, Varsovie, le 19 juillet 1984; échange de notes; le 19 juillet 1984.

Traités multilatéraux

— Le Statut de la Conférence de La Haye sur le droit international privé, le 31 octobre 1951; ratification; le 29 mai 1984.

— Accord relatif aux transports internationaux de denrées périssables et aux engins spéciaux à utiliser pour ces transports (ATP), Genève, le 1^er^ septembre 1970; approbation; le 15 mai 1984 (réserve à l'art. 15 par. 2 et 3).

— International Convention for the Safety of Life at Sea, London, 1 November 1974; ratification; 15 June 1984.

— Protocol relating to the International Convention for the Safety of Life at Sea, London, 17 February 1978; ratification; 15 June 1984.

— Convention internationale sur les normes de formation des gens de mer, de délivrance des brevets et de veille, Londres, le 7 juillet 1978; ratification; le 28 avril 1984.

— Protocole portant modification de la Convention internationale pour l'unification de certaines règles en matière de connaissement du 25 août 1924, Bruxelles, le 21 décembre 1979; ratification; le 6 octobre 1984 (réserve à l'art. III).

— Protocole portant modification de la Convention internationale sur la limitation de la reponsabilité des propriétaires de navires de mer du 10 octobre 1957, Bruxelles, le 21 décembre 1979; ratification; le 6 octobre 1984.

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Private International Law

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