

PL ISSN 0554—498X

POLISH YEARBOOK OF
INTERNATIONAL LAW

XVII

1988

POLISH YEARBOOK OF
INTERNATIONAL LAW

XVII

ACADÉMIE POLONAISE DES SCIENCES
INSTITUT DE L'ÉTAT ET DU DROIT

ANNUAIRE POLONAIS
DE DROIT INTERNATIONAL

XVII

1988

OSSOLINEUM

MAISON D'ÉDITION DE L'ACADÉMIE POLONAISE DES SCIENCES

POLISH ACADEMY OF SCIENCES
INSTITUTE OF STATE AND LAW

POLISH YEARBOOK OF
INTERNATIONAL LAW

XVII

1988

WROCLAW-WARSZAWA-KRAKÓW-GDAŃSK-LÓDŹ

ZAKŁAD NARODOWY IMIENIA OSSOLIŃSKICH
WYDAWNICTWO POLSKIEJ AKADEMII NAUK

1990

EDITORIAL COMMITTEE * COMITE DE REDACTION

LECH ANTONOWICZ, REMIGIUSZ BIERZANEK, WOJCIECH
GÓRALCZYK, ROMAN JASICA, JERZY KRANZ, MANFRED
LACHS, JERZY MAKARCZYK, JANUSZ MICKIEWICZ, STA-
NISŁAW E. NAHLIK, JERZY RAJSKI, KRZYSZTOF SKUBI-
SZEWSKI, JANUSZ SYMONIDES, ANDRZEJ WASILKOWSKI,
KAROL WOLFKE . .

EDITORIAL BOARD * REDACTION

ANDRZEJ WASILKOWSKI (EDITOR-IN-CHIEF),
JERZY RAJSKI (DEPUTY EDITOR-IN-CHIEF),
RENATA SZAFARZ (DEPUTY EDITOR-IN-CHIEF),
JANUSZ STAŃCZYK (SECRETARY)

ADDRESS OF THE EDITORIAL BOARD * ADRESSE DE LA RÉDACTION

Institute of State and Law, Polish Academy of Sciences
Institut de l'État et du Droit Académie polonaise des sciences
Nowy świat 72
00-330 Warszawa

© Copyright by Zakład Narodowy im. Ossolińskich
Wydawnictwo. Wrocław 1990

Contents * Table des matières

Articles

MARIAN BANACH, International Status of an Accredited Foreign Correspondent with Special Consideration of the Polish Practice	7
REMIGIUSZ BIERZANEK, Some Remarks on "Soft" International Law	21
TADEUSZ ERECIŃSKI, Problems in the Administration of Evidence Arising from the Rules of the International Commercial Arbitration	41
GENOWEFA GRABOWSKA, Independence of the International Civil Servants	61
RYSZARD HARA, Jurisdiction of States in Outer Space	75
ANNA MICHALSKA, La protection internationale du droit à la vie (problèmes choisis)	85
RUDOLF OSTRIHANSKY, Advisory Opinions of the International Court of Justice as Reviews of Judgments of International Administrative Tribunals	101
MAKSYMILIAN PAZDAN, Conclusion, révision et résolution du contrat de specialisation et de coopération dans la productions selon les CGSC du CAEM	123
JERZY RAJSKI, Compensation Contracts in International Economic Intercourse in the Light of Contractual Practice	147
JERZY RZYMANEK, Protection of Outer Space Environment: Urgent Necessity and Challenge for International Law	157
STANISŁAW SOŁTYSIŃSKI, The Proper Law of Know-How Contracts	175
JANUSZ STAŃCZYK, Application for Interpretation of a Judgment Delivered by the International Court of Justice	193
JANUSZ SYMONIDES, Freedom of Navigation in International Straits	211
RENATA SZAFARZ, Remote Sensing of the Earth from Outer Space and Us Regulation in the UN Resolution of 1986	229

Jurisprudence

MACIEJ TOMASZEWSKI, The Polish Court Judgments in International Civil Law Cases	243
ANDRZEJ W. WISNIEWSKI, Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw	251

Notes and Comments * Notes et commentaires

Military Activities in Outer Space	259
--	-----

Book Reviews * Comptes rendus

- JAN BIALOCERKIEWICZ. *Powstanie i rozwój prawa międzynarodowego gospodarczego. Studium z zakresu doktryny i źródeł [La naissance et l'évolution du droit international économique. Une étude de la doctrine et des sources]* - by Jerzy Kranz 275
- RENATA SZAFARZ, *Badanie Ziemi z kosmosu w świetle prawa międzynarodowego [Remote Sensing of the Earth from Outer Space in the Light of International Law]* — by Jerzy Rzymanek 276
- JERZY TYRANOWSKI. *Zasada nienaruszalności granic w prawie międzynarodowym [Principle of Inviolability of Frontiers in International Law]* — by Andrzej Jacewicz 279

Chronicle * Chronique

- Forty Years of Jurisprudence of the International Court of Justice [The Second Polish Scientific Conference on International Law, Jabłonna, 30 June — 2 July, 1988] — by Joanna Gomula and Janusz Stańczyk 283

Obituaries * Notes nécrologiques

- REMIGIUSZ ZAORSKI (1912—1987) — by Andrzej Straburzyński 287

Treaties * Traités

- International Treaties Entered into Force in Relation to Poland in 1987 — by Joanna Gomula 289

Bibliography * Bibliographie

- Polish Bibliography of International Law, 1987 — compiled by Anna Szklennik 293

A R T I C L E S

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVII, 1988
PL ISSN 0554-498X

International Status of an Accredited Foreign Correspondent with Special Consideration of the Polish Practice

by MARIAN BANACH

I

The Conference on Security and Cooperation in Europe (CSCE) ending 1 August, 1975, with the signing of the Final Act, started a new stage of international cooperation on this Continent. The contacts established between the States involve now almost all the spheres of political, economic, cultural and social coexistence of the nations. On the basis of the wording of the Final Act of the CSCE, the States undertook the obligation to cooperate in spheres which were not regulated to that day. In normalized spheres, new aspects of cooperation emerged between the States.¹ The political importance of the CSCE document is universally known. The stage of international relations which started earlier and was called the phase of pacific coexistence was only now formally corroborated in the Final Act. The text of this document favours the trends of the present international relations by making possible — from a legal view-point — the setting up of such structures and forms of international relations which should be adapted not only to the present territorial, political, social and economic factual situation in Europe, but also to the radical changes which are taking place at full speed.² As soon as the signatures of their full-powered representatives were applied, the States assumed the responsibility to realize the trends and activity methods laid out by the Final Act.³

¹ Text of the Final Act of CSCE, see — *Sprawy Międzynarodowe*, 1975, No. 10.

² See M. DOBROSIELSKI, "Konferencja Bezpieczeństwa i Współpracy w Europie" [Conference on Security and Cooperation in Europe], *Sprawy Międzynarodowe*, 1975, No. 10, p. 23.

³ The fact should be noted that for the first time on the arena of international politics, in a multilateral agreement with non-socialist States, the agreement was signed in the name of the socialist countries, by the general secretaries or first secretaries of the party, emphasizing, thereby, the leading role of the communist and workers' parties in these States.

In the group of problems contained in the "third basket", the problem of cooperation between the States with regard to information exchange found its due place; it was recognized by the governments of many States and by international organizations as an element of a State's foreign policy in international relations. This was reflected in agreements, declarations and statements of a bilateral nature. On an universal scale, the sphere of information exchange was regulated for the first time on such a scale in the Final Act of the CSCE.⁴

It was a difficult task to establish the criteria which should guide the States of different social and political systems in international relations with regard to information exchange. This was revealed by the reports of proceedings of the Geneva and Helsinki conferences.

Mass media play a special role in the sphere of international information exchange. Therefore attempts were made, at the time of the League of Nations and later by the United Nations (UN) and its specialized organization, the UNESCO, to introduce an uniform practice of the States concerning information.⁵

Apart from the already existing form of information exchange, i.e. the accredited correspondent, a new form of institutionalized exchange was developed owing to the changing structure of international relations, i.e. institutes and information and culture centres of the States situated abroad.⁶ The characteristic feature of both these forms is their information function. In the case of an accredited foreign correspondent, this activity is of outstanding importance and consists in gathering information in the State of residence for the use of his own country; whereas the task of institutes

⁴ The first and only attempt of a multilateral regulation of the mentioned problem during the period between the two wars, was the international convention on the use of radiophony in favour of peace, signed in Geneva on 23 September, 1936. cf. R. BIERZANEK, *Współczesne stosunki międzynarodowe [Contemporary International Relations]*, Warszawa 1972, p. 272; and B. SUJKA, "Międzynarodowa działalność propagandowa i informacyjna" [International Propaganda and Information Activity], *Sprawy Międzynarodowe*, 1973, No. 6. At present there are attempts to regulate multilaterally the problem of information exchange on a regional scale. The Lima conference of the ministers of foreign affairs of non-involved States adopted many resolutions, and among other things one resolution concerning the problem of mass media (resolution VI). Text of resolution see: *Międzynarodowa Polityka*, Beograd, October 5, 1975.

⁵ Cf. R. BIERZANEK, *op. cit.*, p. 272 and P. MAĆKOWIAK: *Zagadnienie wolności informacji w pracach Organizacji Narodów Zjednoczonych [The Question of Freedom of Information in the Works of the United Nations]*, Warszawa 1971 and the SAME AUTHOR: *Zagadnienie wolności informacji w pracach UNESCO [The Question of Freedom of Information in the Works of the UNESCO]*, Warszawa 1972.

⁶ Terminology *in extenso* according to *Dziennik Ustaw PRL [Journal of Laws of the Polish People's Republic further as dziennik Ustaw PRL]*, 1975, No. 3, item 10.

and information and cultural centres consists in information and cultural activity propagating their own country in the State of residence.

Diffusion of information about their own country is performed on the principle of equal rights with regard to the cultural activity carried on by the receiving State.

Cooperation concerning information exchange is one of the new spheres of the States' activities. The information is transmitted from the territory of one State to that of another one, through the mediation of institutions or persons, i.e. the aforementioned accredited foreign correspondents and information agencies.⁷ These forms of the States-activities remained until now outside the range of international law regulations on a very large scale. The institution of foreign correspondents reveals some features adopted from the sphere of diplomatic and consular law.⁸

At these problems were neither regulated by the convention on diplomatic relations of 18 April, 1961, nor by the convention on consular relations of 24 April, 1963, they were normalized by the States in bilateral agreements, and, thus, many different solutions appeared. An attempt to standardize the diversified practices applied by the States is now after the adoption of the Final Act of CBCE to be expected.⁹ The general aims and principles formulated in this multilateral agreement are to be followed by the states they enter into bi- and multilateral agreements which concretize the resolutions contained in the Final Act.¹⁰ It seems that the states will continue to prefer

⁷ An extensive list of news-agencies, both world-wide (TASS, AP, UPI, AFP) and national, may be found in the works: *Handbook of News Agencies*, Prague, 1969; and S. BEGLOV, *Mir pressy i pressa mira*, Kiev 1975.

⁸ Reference is made to the so-called corps of accredited foreign correspondents; the accreditation of a specific person as correspondent should be preceded — according to the diplomatic practice — by the acceptance of the person proposed as correspondents (agrément, agreement) by the receiving State; the practice “to expel” correspondents (recognized as persons *non grata*) in case of committing by them obvious infringements which should in a normal situation constitute without application of a kind of “immunity” (quasi-immunity, facilitation, conveniences) an infringement of the law in the receiving State and should come under the proceedings of the authorities or the courts.

⁹ The practice of the States may lead under certain defined conditions to the forming of a custom. A sanctioned custom is transformed into a legal norm “which is recommended on the presumption of general acceptance” (as a result of its acceptance during a long time). Cf. in this case: M. IWANEJKO, “Efekty jednolitych klauzul traktatowych” [The Effects of the Homogeneous Treaty Clauses], *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1961, No. 3, p. 110.

¹⁰ Cf. “Deklaracja o zasadach i środkach rozwoju współpracy kulturalnej i naukowej, informacji oraz stosunków międzyludzkich między Polską a Francją” [The Declaration on the Principles and the Means of Development of Cultural and Scientific Cooperation, Information and Interhuman Relations between Poland and France], *Sprawy Międzynarodowe*, 1975, No. 10, p. 163.

bilateral agreements which may better and fuller regulate the relations than the more universal multilateral agreements. This is also linked with the special position of the Final Act of CSCE.¹¹

II

The activity of the foreign correspondent should be treated as one of the extra-institutional forms. The correspondents may be classified according to the time of their stay on the territory of a State into: permanent correspondents — who are accredited, and temporary ones — who are assigned to a certain task or are performing only certain activities on the said territory. There is also a certain class of permanent foreign correspondents who are accredited to universal organizations, such as the League of Nations or the United Nations.¹² A special press service is attached to the UN specialized organizations, and to international governmental and non-governmental organizations, in connection with the debates of the highest statutory body (THE GENERAL CONFERENCE, THE CONGRESS, THE GENERAL ASSEMBLY, THE COUNCIL, THE COMMITTEE).

In case of an armed conflict the information is transmitted by war correspondents acting on the territory involved by the armed conflict. The 4th Hague convention of 18 October, 1907, on laws and customs of land war, in chapter II concerning war prisoners, and later the 3rd Geneva convention of 12 August, 1949, on the treatment of war prisoners, include the war correspondents among the persons accompanying the armed forces* of their own country of their own accord.

The character and mode of action of the war correspondents differ from the activity of the foreign correspondents, as they act on the territory

¹¹ See J. SYMONIDES, "Deklaracja zasad stosunków międzypaństwowych KBWE" [The Declaration of the Principles of Interstate Relations CSCE], *Sprawy Międzynarodowe*, 1975, No. 10, p. 23; and A. D. ROTFELD, "Konferencja Bezpieczeństwa i Współpracy w Europie. Zagadnienia prawne" [Conference on Security and Cooperation in Europe. Legal Problems], *Państwo i Prawo*, 1976, No. 1—2, p. 73 ff. W. POEGGEL, "Kwestia obowiązującego charakteru Aktu Końcowego przy szczególnym uwzględnieniu 10-ciu zasad" [The Question of the Binding Nature of the Final Act with Particular Regard to the Ten Principles], *Przegląd Stosunków Międzynarodowych*, 1976, No. 1, p. 11 ff.

¹² The League of Nations was the first international organization which introduced a system of accrediting journalists, granting them definite facilities, quasi-privileges. See more extensively on this subject: P. MAĆKOWIAK, *op. cit.*, p. 4; Government Press Services, League of Nations, Geneva 1935; or United Nations Correspondents Association, New York 1965.

of their own State, even when it is an occupied territory and they are engaged in transmitting information about their own State.¹¹

Apart from foreign correspondents, press-attache's should also be mentioned who are acting within the diplomatic representation of the delegating State and are members of its diplomatic staff.

The foreign correspondents are differently treated depending on their position and the nature of their functions. The foreign correspondent is permanently employed; his task consists in gathering and transmitting information; outside his own country he proves his identity by a passport or some other document recognized on international scale.¹² The status of this category of persons has been normalized in multilateral international and bilateral agreements, as well as by the practice of the States which has developed some form of customs, and by the home legislation of every State. The hitherto existing differentiation had made it impossible to establish uniform standards for the activity of persons of this category, irrespectively of the economic and political system of the State of which they are citizens or which they represent on account of their function. This gap was filled up by the resolutions passed in the Final Act of CSCE.

Today's pattern of a foreign correspondent differs slightly from the "model" correspondent of a dozen or several dozen years ago. The difference comes, among others, from the change in the nature of international relation and from the role attributed now to information. If, in the past, the foreign correspondent was a "monopolist" in transmitting news between States, now he is one of the many international legal instruments in this sphere of activity.¹⁵

When acting as mediator in transmitting information, a foreign correspondent should be guided not only by his own views, but also by the views of the institution which he is representing abroad. These remarks may be

¹³ The problem of war correspondents was the object of an international convention. The project submitted in 1971 by the Committee of Expert of the UN anticipated the creation of a special international institution authorized to issue some documents to journalists leaving to the front testifying that they were neither soldiers nor a political mission and stating that they were under the protection of the States-consignatories of the Convention. The diplomatic Conference of 1975 on the problems of "the international human law to be applied during armed conflicts" included one resolution under the heading "Journalists working on dangerous missions". The resolution is dated 16 April, 1975, doc. CDDH/1/293.

¹⁴ Doc. A/8036, August 25, 1970.

¹⁵ More on this subject see: R. STARZYŃSKI, *Agencje informacyjne. Dzieje, stan obecny i znaczenie prasowych agencji telegraficznych 1836-1935* [*Information Agencies. History, Present Situation and the Significance of Telegraphic Press Agencies 1835-1935*], Warszawa 1935, p. 49.

applied to foreign correspondents both from the western and socialist States.¹⁶

In Poland, there are at present about 70 permanent accredited foreign correspondents. They represent: press agencies, daily newspapers, magazines, broadcasting and television stations.¹⁷ The conditions of their stay on the territory of Poland are normalized by: the law of 29 March, 1963, concerning foreigners; the joint instructions of the Ministers of Interior and Foreign Affairs of 13 March, 1967, with regard to the stay conditions of the permanent foreign correspondents on the territory of the Polish People's Republic; and also the departmental regulations.¹⁸ The law on foreigners provides that a separate treatment regarding the conditions of crossing the boundaries of the People's Poland and sojourning on our territory should be applied to those foreigners who come to Poland to perform some specific professional activities. These conditions were regulated by separate agreements concluded between the Minister of the Interior and the interested ministers. The joint instructions specify when the permanent correspondent may sojourn on the territory of Poland to perform his journalistic functions. A foreign correspondent's sojourn on the territory of our country depends on obtaining an "accreditation" from the Ministry of Foreign Affairs.¹⁹ In accordance with the instruction, permanent press, radio and television correspondents may solicit an accreditation; the same refers to photo-reporters, film and television recorders acting for foreign press and photo-

¹⁶ The problem is broadened by J. B. ADAMS, "What the Foreign Correspondent Does from Newspaper's Readers," in: *Journalism Quarterly*, Spring 1966, p. 300 ff. Cf. also: I. KRASICKI, "Korespondent zagraniczny — jego rola i zadania" [The Foreign Correspondent's Role and Tasks], *Zeszyty Prasoznawcze*, 1964, No. 4, pp. 3—9; and T. E. KRUGLAK, *The Foreign Correspondents: A Study of the Men and Women Reporting for the American Information Media in Western Europe*, Geneva 1955.

¹⁷ *Prasa Polska*, 1976, No. 2.

¹⁸ Text of the law concerning foreigners of 29 March, 1963, see: *Dziennik Ustaw PRL*, No. 15, item 77, *Zarządzenie Ministrów Spraw Wewnętrznych i Spraw Zagranicznych z 13 marca 1967 r.* [Regulation of the Minister of the Interior and the Minister of Foreign Affairs dated 13 March, 1967].

¹⁹ The conception of "accreditation" in its exact meaning should be referred to the province of diplomatic and consular law where it stands for the authentication of a person (a diplomat, a consul) by means of a letter of credence — in the case of a diplomat, and by consular credentials in the case of a consul, for performing the functions determined in the attesting document. Cf. in this matter Art. 14 of the Vienna Convention on diplomatic relations of 18 April, 1961. A. GÓRBIEL, *op. cit.* In a wider interpretation there is also the possibility to accredit an expert or a correspondent in the receiving State. This is confirmed by the fact that the obligation of being accredited to the seat of UN in New York journalists and the technical staff of permanent delegations to the UN. Cf. Comments of E. J. OSMAŃCZYK, *Encyklopedia Spraw Międzynarodowych i ONZ* [Encyclopedia of International Affairs and the United Nations], Warszawa 1974, p. 20.

graphic agencies, daily papers, magazines, film, radio and television enterprises. The fact of accreditation is confirmed by the Ministry of Foreign Affairs which issues an accreditation card. This document entitles its bearer to carry on his journalistic activities on the territory of Poland.

When performing his journalistic functions, the accredited foreign correspondent is entitled to avail himself of the information and the help of the Ministry of Foreign Affairs. The foreign journalists are attended by the Polish Agencies "Interpress".²⁰ The section of accredited correspondents in the Polish Agency "Interpress" keeps the foreign correspondents under its direct "care". They also get help from other sections, such as: the press and photoservice sections, the section for foreign cooperation and others.

The Polish Agency "Interpress" receives and organizes the stay of foreign press, radio, and television journalists. It arranges press conferences with the leading ministries and with active members of the political, economic, cultural and social life of our country. It ensures the technical and organizational conditions of the stay of radio and television teams. The contacts with this agency facilitate the realization of the tasks assigned to the accredited foreign correspondents by their own papers. They also facilitate the moving about in the receiving country.

The Polish regulations make it possible for members of the permanent foreign correspondents family to become active as journalists if they obtain accreditation on the principles conceded to foreign correspondents. The persons employed by a permanent foreign correspondent may perform only technical functions and they are not entitled to carry on a journalistic activity and to gather information either in its own name or on behalf of their employer, the foreign correspondent.

Bilateral international agreements signed by Poland with other countries also regulate the position of the permanent foreign correspondents accredited in our country. The agreements on cultural cooperation (or cultural and scientific), the protocols, plans and programmes should also be included among such agreements. Using the reciprocity principle, they regulate the exchange of journalists, press, radio, television, press agencies, film and television operators, and photographers between the interested States. In the agreements concerning cultural cooperation, the general principles of an ex-

²⁰ The matter is regulated by the agreement between the Ministry of Foreign Affairs of the Polish People's Republic and the Polish Agency "Interpress".

change in many spheres of cultural life are quoted.²¹ These resolutions are subsequently specified in the agreements concluded directly either between the press organizations of two countries, or between their radio and television institutions or press and photographic agencies. These agreements normalize the technical and organization questions as well as the merits of the problems.²²

In accordance with the principle of reciprocity, the States treating in these agreements the journalists of the other party in the same way as their journalists are treated by the other State. There are some cases of levelling the position of journalists of another State with that of the first State's own journalists (National Standard).

The accredited correspondents whose activity exceeds the boundaries of one State are predestined to obtain a special legal status in international relations.

The special legal status, aiming to protect the interests of the delegating State, is to enable some categories of persons

“to fulfil the tasks, functions or missions with which they were charged, to ensure their personal safety, their freedom and their independence with regard to the authorities of the receiving State”.²³

“The permanent gathering and transmitting of information from the territory of the State to which they are accredited” belong to the tasks of the foreign correspondents.²⁴ It matters that these activities should be carried on in a proper and efficient manner; to ensure freedom of communication both on the territory of the admitting state and outside of it, represents to the foreign correspondents one of the conditions for gathering and transmitting information on international scale.²⁵

Although the foreign correspondents are not included in the official representation of a State abroad which enjoys diplomatic and consular privileges and immunities, also reserved for international officials, they have,

²¹ Art. II of the cultural agreement between the People's Poland and Holland of 22 August, 1967, mentions the promotion of cooperation between “specialists in the sphere of mass media” and in Art. 4 of the agreement of the cultural cooperation between the People's Poland and GDR of 8 January, 1952 the parties agreed to “facilitate the activity of press correspondents.”

²² E.g.: The agreement on cooperation concerning television between the Polish Radio and Television Committee “Polskie Radio i Telewizja” and the Czechoslovakian Television of 27 April, 1963. The agreement on radio cooperation between the Committee on Radiophonic Affairs “Polskie Radio” and the Committee on Radiophonic Affairs “Mongolian Radio” of 26 May, 1954.

²³ J. SUTOR, *Przywileje i immunitety międzynarodowe [International Privileges and Immunities]*, Warszawa 1973, p. 34.

²⁴ Cf. Note of UN General Secretary, Doc. A/8036, 25 Aug., 1970.

²⁵ N. HILL, *International Relations, Documents and Readings*, New York 1950, p. 516.

as it seems, obtained some facilities in the technical and organization scope of transmitting information, owing to the tasks they are performing. The States have decided to protect the foreign correspondents on a scale which should enable them to carry on their professional activity.

Just as in the case of representative's of the "traditional" foreign service, in the instance of the foreign correspondents, the principle to enable their activity is binding, i.e. everything necessary to the performing of their functions should be ensured.²⁶ The Vienna Convention of 1961 on diplomatic relations accepted the principle of functionality. It is the sum of both principles: proportionality and to make achievement possible.

Most of the States do not agree to grant privileges to the foreign correspondents, even on a restricted scale, notwithstanding the increased staff of the foreign service of a State which means the spreading of privileges and immunities beyond the traditional circle of the diplomatic and consular representatives of the States. Therefore, the latest foreign literature of public international law and also the home literature use the "term" of "international privileges and immunities" to stress the fact that the category of persons entitled to benefit by it has increased.²⁷ The persons availing themselves of it are talked of as the quasi-diplomatic or non-diplomatic staff of the delegating State. At the same time, the States, recognizing the great importance of the foreign correspondents' activity in their country, consent to treat this group of persons in a special way, distinguishing it from common foreigners who enjoy a normal status. This special treatment consists in granting only certain privileges to the foreign correspondents, whereas they are granted no immunities whatever. In practice, a definition of the foreign correspondent's position as based on "privileges" is avoided, in order to avoid association with privileges granted to diplomats and consuls. Instead, the word "facility" is commonly used. This facility consists in granting more rights either in the sphere of material law or in formal law than those to which a foreigner is entitled on the territory of a country. It may be therefore, discussed whether "such a facility" is not *de facto* a "limited privilege".

The differentiated practice of the States in treating foreign correspondence favours now a multilateral settlement of the problem. Certain principles may be, therefore, determined, acceptable to most States, which should be guided by them in international relations. They will act as directions when entering into bilateral agreements.

A comparative study of the home legislation of the States shows that.

²⁶ L. EHRLICH, *Prawo międzynarodowe [International Law]*, Warszawa 1958.

²⁷ Cf. remarks of J. SUTOR upon this subject: *op. cit.*, p. 66 and C. W. JENKS, *International Immunities*, London 1961.

notwithstanding some difference expressed in the practices of the States, some principles were formed as to the way of treating accredited foreign correspondents. One may, therefore, speak of a similar treatment of accredited foreign correspondents in the admitting State. The law-making process with regard to the international protection of the foreign correspondents has reached the point when the hitherto binding international custom favours taking up of a codification initiative, at least on a regional European scale. In no case does it mean that the hitherto used form of bilateral cooperation between the States should be given up.

In the part of the Final Act of CSCE on cooperation in human and other fields, there is a passage devoted to the "bettering of the working conditions of journalists". Its wording refers also to the journalists accredited to the receiving State. It involves not only the journalists working for the press, the radio, the television or the film, but also, on observing the respective rules, the persons regularly and professionally employed in the already mentioned mass media as technicians, photographers or operators.²⁸

"The improvement of conditions" means that the applications submitted by journalists to obtain visas should be considered with good will and in a proper and reasonable time. The States, signatories of the Final Act of the CSCE, commit themselves to grant on the basis of an agreement, reiterated visas for a definite time to the permanently accredited journalist. The Final Act of CSCE recommends that the States should conclude bilateral agreements in this matter.²⁹

The Final Act advises the States to ensure better and fuller facilities for the journalists, personal contacts with their sources of information. The States are to make it possible that the journalists accredited permanently or temporarily should transmit information resulting from their professional activities; as a whole, following the usual course and, rapidly, along the channels admitted by the participating States.³⁰

The above mentioned recommendations adopted within the frames of CSCE seem to corroborate the advanced proposition that foreign correspondents (journalists) enjoy a special status. It concerns some facilities connected with the performance of the journalists' professional activities only. It does not mean, as was said before, that they do not benefit by privileges and more so by immunities in the admitting State. The text of the Final Act of CSCE bears it out:

²⁸ This concerns the case when citizens of the delegating state perform professionally their journalistic activity in favor of the receiving State. Cf. footnote to the Final Act..., p. 145.

²⁹ Cf. the Final Act..., p. 145.

³⁰ The Final Act..., p. 145.

“the participating States confirm that the journalists cannot be expelled or otherwise punished in consequence of their legally performed professional activity”.³¹

At the same time, however, the States received that:

“in case when an accredited journalist is to be expelled, he will be informed of the reason of this act and may apply for a reconsideration of his case”.³²

Summing up, stress should be laid on the fact that the institution of an accredited foreign correspondent is now one of the many legal international instruments, by means of which cooperation and exchange in the field of information are realised in international relations. These prospects laid out by the CSCE seem favourable to the institutions and persons who are helping to effect the exchange of information in international relations. Everything now depends on the future practice of the States.

Supplement

The Work of Journalist and Foreign Correspondents under the Conditions of Martial Law in the Polish People's Republic

The changes made by a state in home legislation involve their international implications. They can refer to various fields of activity of a State in its relations with other countries. Such was the case when martial law was introduced in Poland.

As a result of introducing martial law, the Prime Minister issued the regulation concerning the work of foreign correspondents and Polish journalists on the territory of the Polish People's Republic.¹ The regulation stated that its aim was to enable foreign correspondents and Polish journalists to do their work on the one hand and to warrant the supervision over their work in such a way that it will not impend the public order compulsory under martial law on the other hand.

It was acknowledged that accredited correspondents could still do their work if they had a card confirming their accreditation.² Apart from it under the conditions of material law they had to have a certificate entitling them to do their journalist job under material

³¹ Cf. the Final Act..., p. 146.

³² *Ibid.*

¹ Cf. the regulation No. 2 issued by the Prime Minister of the Polish People's Republic on 12 January, 1982. (*Monitor Polski*, 1982, No. 2).

² The card was issued on the basis of the regulations published by the Minister of the Interior and the Minister of Foreign Affairs on 13 March, 1967, concerning the conditions of stay of permanent foreign correspondents on the territory of the Polish People's Republic — see the *Monitor Polski*, 1967, No. 19, item 94 and the unpublished regulation by the Minister of Foreign Affairs dated 10 May, 1967, referring to accreditation and activity of permanent foreign correspondents on the territory of the Polish People's Republic.

law. The certificate was issued by the Head of the Press Centre affiliated to the Ministry of Foreign Affairs on the commission of the Minister of Foreign Affairs.³

As to the correspondents who stayed temporarily on the territory of the Polish People's Republic, they could do their work if they had a visa entitling them to cross our border and to stay on the territory of the Polish People's Republic. Furthermore, they had to possess the same certificate which was required of accredited foreign correspondents. The principles and forms of issuing the above-mentioned certificates as well as the principles of performing journalist work by foreign correspondents staying on the territory of the Polish People's Republic under martial law were to be determined by the Minister of Foreign Affairs in consultation with the Minister of National Defence and the Minister of the Interior.⁴

The Minister of Foreign Affairs was also to establish the principles of recording journalist materials by means of "magnetic recordings" and "light pictures" and the principles of transferring abroad these materials by foreign correspondents who stayed on the territory of the Polish People's Republic under the conditions of martial law.⁵

Casistry of the provision of the regulation No.2 issued by the Prime Minister dated 12 January, 1982, in relation to foreign correspondents is worth nothing. Before martial law was introduced in Poland as a result of an agreement signed between the Ministry of Foreign Affairs and the Polish Agency "Interpress", the latter dealt with all problems relating to foreign correspondents.

As far as Polish journalists are concerned, they could do their journalist duties on the ground of a card issued by an editor-in-chief of their own newspapers and magazines and a special permission entitling them to do their job under martial law. The permission was granted to a journalist by a press spokesman for the government on editor-in-chiefs application.⁶ When the permission was granted the regulation said that it was issued for an indicated time and it had to contain the data referring to the person's identity who was granted this permission as well as the name of a newspaper or a magazine where a journalist was employed. Moreover, the permission determined an area where a journalist could do his duties. Polish journalists who possessed the above-named permission could take photos and motion pictures and record TV pictures including the area where a ban on taking such photos and pictures was introduced.

Publication of journalist materials (it referred to Polish journalists) was done under the conditions defined in the regulation issued by the President of the Censorship dated 11 December, 1981.⁷

However, the transmission of journalist materials by both foreign correspondents and Polish journalists by means of communication was done in accordance with the principles defined in the regulations of chapter I in the decree issued by the Cabinet on 12

³ Cf. para. 1. part 1 of the regulation No. 2 issued by the Prime Minister on 12 January, 1982. see note 1.

⁴ The author of the present paper did not manage to determine if on the strength of the declaration para. 1. part 3 of the regulation No. 2 issued by the Prime Minister on 12 January, 1982, such a regulation was published by the Minister of Foreign Affairs.

⁵ Cf. para. 1. part 4 of the regulation No. 2 issued by the Prime Minister. see above.

⁶ Cf. para 2. of the regulation No. 2. by the Prime Minister. see above.

⁷ Cf. para. 4 part 2 of the regulation No. 2 by the Prime Minister, the cited document and the regulation issued by the President of the Head Of The Supervising Publications and Spectacles concerning the principles and forms of granting permissions for circulation publications and spectacles and proceedings concerning the use of enterprises, machines and printing equipment under martial law (*Monitor Polski*, 1981. No. 20. item 278).

December, 1981, referring to the execution of regulations of martial law decree in the field of communication⁸ and in the acts publisher on their basis.

The regulation No. 2 issued by the Prime Minister on 12 January, 1982, introduced a ban on gathering materials which referred to defence and military problems except information passed by a spokesman for the government and by the authorized representatives of the organs of defence department by foreign correspondents and Polish journalists who did not have appropriate certificates and permissions. Information was usually delivered at special press conferences arranged for journalists and correspondents in the Press Centre affiliated to the Ministry of Foreign Affairs and information included in the news report PPA.⁹ The above-mentioned ban on journalist materials also referred to the activity of military controlled units.

As both Polish journalists and foreign correspondents were faced with difficulties in gathering press materials, the regulation recalled¹⁰ the principles of the resolution issued by the Cabinet on 7 February, 1978, which was still in force. According to the principles, the institutions were obliged to make available materials which were interesting to Polish journalists and foreign correspondents, in accordance with the rules defined in the resolution¹¹ and by the superior organs of the institutions under the stipulation that they would keep a State and official secret when they furnish journalists with information.

A great number of limitations referring to Polish journalists and foreign correspondents resulted from the above analysed principle of the regulation. They were connected with gathering journalist materials, publishing and sending them abroad. They also included the fact that the journalists apart from accreditation had to possess certificates (permissions) and they were not allowed to move on the whole territory of the Polish People's Republic.¹²

The Press Centre affiliated to the Ministry of Foreign Affairs dealt with foreign correspondents staying in the Polish People's Republic during the period of martial law. This job was previously done by the Polish Agency "Interpress". It can be concluded that an agreement between the Ministry of Foreign Affairs and the Polish Agency "Interpress"¹³ was suspended from 13 December, 1981.

⁸ *Dziennik Ustaw PRL*, 1981, No. 29, item 160.

⁹ Cf. para. 7. the regulation No. 2 by the Prime Minister on 12 January, 1982, the quoted document.

¹⁰ Cf. para. 8 of the quoted regulation.

¹¹ Cf. the resolution of the Cabinet dated 17 February, 1978, concerning further information improvement for mass-media — see *Monitor Polski*, 1978, No. 5, item, 21.

¹² Before martial law was introduced, foreign correspondents who had an accrediting card, move freely on the whole territory of our country. Under the conditions of martial law they could move only in Warsaw. The Press Centre affiliated to the Ministry of Foreign Affairs arranged special journey outside the capital for foreign correspondents to the places named by them.

¹³ An unpublished agreement.

Some Remarks on "Soft" International Law

by REMIGIUSZ BIERZANEK

The Concept and Scope of "Soft" International Law

For a number of years in discussions on contemporary international law more and more often the metaphorical expression: "soft" international law has appeared, which is contrasted with "hard" international law, that is international law in the traditional, strict sense of the word.

The term "soft" law is almost generally admitted unsatisfactory and it raises many objections. The French jurist J. Dupuy remarked jocosely in the recapitulation of the debate of an international colloquy devoted to international legal aspects of the protection of environment that the expression "soft law" is for a jurist as disappointing as "soft drink" for a smuggler who needs something stronger to drink to keep up his morale.¹ Individual authors use other terms. Schächter uses the term "non-binding agreements",² but it was deservedly met with the objection that from a logical point of view it is inconsistent (*contradictio in adjecto*), for these agreements are to some extent binding on the contracting parties.³ Unquestionably, the term "*de facto* agreement"⁴ is not satisfactory, either, as it concerns agreements in the normative sphere and not in the factual. Another suggested term: "non-legal norms"⁵ is too capacious containing i.a. rules of international courtesy and international morality, and it also loses the notional nexus of "soft" law with "hard" law: "soft" law often fulfills functions similar

¹ Cf. *La protection de l'environnement et le droit international, Colloque 1973*, Leiden 1975, p. 623.

² O. SCHÄCHTER, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, April 1977, p. 299.

³ M. BOTHE, "Legal and Non Legal Norms: A Meaningful Distinction in International Relations", *Netherlands Yearbook of International Law*, 1980, p. 67.

⁴ F. ROESSLER, "Law, *de facto* Agreements and Declarations of Principle in International Economic Relations", *German Yearbook of International Law*, 1978, p. 67.

⁵ M. BOTHE, *op. cit.*, p. 65.

to the functions of “hard” law and many a time it acts as a substitute. Various other terms were proposed: “weak” law, “para-legal” (*para-juridiques*) obligations or “pre-legal” (*préjuridiques*); “imperfect” law (*lex imperfecta*).

The term “soft” law was used for the first time by the distinguished English jurist A. Mac Nair.⁶ Its advantage is that it embraces the whole of the subject and not just individual categories of normative acts.

The scope of the normative acts, falling within “soft” law, is wide. The resolutions of organs of international organizations ought to be mentioned in the first place. A particularly rich source of “soft” international law are resolutions of the General Assembly of the United Nations. Next, into “soft” international law included are different kinds of intergovernmental bilateral and multilateral agreements upon which the parties have not imposed conventional rigour of international law for various reasons, as well as international agreements which have not been ratified yet (or at all) or approved by a competent State organ. With respect to the last category doubts are expressed whether it is not more proper to treat them as a separate problem. “Gentleman’s agreements” are also included in “soft” law. They are defined as agreements concluded verbally by plenipotentiaries (usually by ministers of foreign affairs) and treated as personal obligations of those who has concluded them.⁷

In certain situations the States consider to own advantage not to impart the character of norms of “hard” international law to norms established at international conferences out of consideration for the matter which is the object of the regulation. The Final Act of the Conference on Security and Cooperation in Europe in 1975 can serve as an example. It contains ~ in addition to norms restating the adopted principles of the Charter of United Nations and other principles of international law — many agreed rules of procedure in different spheres of State policy. The participants in CSCE were in agreement that under the present conditions of international relations the Final Act should not be promoted to an international treaty in the full sense of the word and for that reason they decided that the Act was not subject to registration provided for international agreements in Article 102 of the Charter of United Nations, but will only be handed over to the UN Secretary General with the purpose of distributing it among all members

⁶ Cf. G. J. H. van HOOFF, *Rethinking of the Sources of International Law*, Deventer 1983, p. 187.

⁷ Cf. J. MAKOWSKI, *Podręcznik prawa międzynarodowego [Textbook of International Law]*, Warszawa 1948, p. 441; R. SONNENFELD, “Gentleman’s agreements a umowy międzynarodowe” [Gentleman’s Agreements and International Treaties], *Sprawy Międzynarodowe*, 1958, No. 12, p. 44 ff.

as an official document of the Organization. Nonetheless, the participating States assumed definite obligations in the Final Act expressed in its final part:

"The Participants States... declare their resolve, in the period following the Conference, to pay due regard and implement the provisions of the Final Act of the Conference".

It does not seem possible what are precisely the normative acts creating the rules of "soft" international law. To some extent also non-governmental organizations can be co-authors of this law. A characteristic example is the activity of the International Committee of the Red Cross in the non-conventional sphere, that is, in domains not covered by the rights granted to the Committee in the Geneva Conventions on protection of victims of war (the so-called Red Cross Conventions). Thus on the basis of the By-Laws of the International Committee of the Red Cross, which is an association registered in Switzerland and made up exclusively of Swiss citizens, the Committee has a right to humanitarian initiative. It goes without saying that these by-laws cannot create legal obligations for States which are parties to the Geneva Conventions. But/moreover, at international conferences of the International Red Cross in which participate delegates of national societies of the Red Cross and Red Crescent, delegates of the International Committee of the Red Cross, League of the Red Cross and the Red Crescent Societies and delegates of all States which are parties to the Geneva conventions, resolutions are adopted entrusting the International Committee of the Red Cross with humanitarian actions, among others for the benefit of political prisoners. The jurists dealing with this problem express the opinion that although obviously the resolutions of the International Conference of the Red Cross are not legally binding for the States and a State has a right not to agree to political prisoners being visited by the delegates of the Committee, such resolutions are of a "para-legal" character entitling the Committee to offer services in this respect. J. Moreillon argues that they create a framework within which the International Committee of the Red Cross may feel more unconstrained when interceding in this matter with the States, and the states — less free in their actions directed at own citizens.⁸ K. Kocel states that the proposition of ICRG to visit political prisoners cannot be treated as inadmissible interference in a State's internal affairs.⁹ It seems that such features entitle the mentioned norms to be included in "soft" international law.

⁸ J. MOREILLON, *Le Comité International de la Croix-Rouge et la protection des détenus politiques*, Genève 1973, p. 66.

⁹ K. KOCEL, "Działalność Międzynarodowego Czerwonego Krzyża w sytuacjach napięcia i zamieszek wewnętrznych" [Activities of the International Red Cross in Situations of Tension and International Unrest], *Państwo i Prawo*, 1986, No. 2, p. 77.

The Binding Force of “Soft” Law

For a number of years considerations concerning the legal nature of “soft” law have above all concentrated on resolutions of international organizations, and on the resolutions of the General Assembly of the United Nations in particular. Many studies have been devoted to this problem.¹⁰ Without entering into particulars it can be stated that among the resolutions of the General Assembly many authors distinguish the category of declaration and other resolutions of significance to international law, although the rules of conduct contained in these resolutions are not *sensu stricto* provisions of international law as they are neither provisions of binding international agreements nor rules of customary law. There is concurrence of opinions that the resolutions of the General Assembly cannot lay a claim to be the source of international law equally with international treaties and custom. It must be reminded that the San Francisco conference rejected the proposal of the Philippine delegation tending toward granting the General Assembly of UN the power of legislating. Nevertheless, the great majority of the authors assume that the above statement does not mean that those resolutions lack legal significance. Lauterpacht wrote of the resolutions of the General Assembly.:

“Whatever may be the content of the recommendation and whatever may be the nature of the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to resolutions of the General Assembly”.¹¹

The same author was of the opinion that there existed two types of legal obligations: legal obligations which are “rudimentary, elastic and imperfect intangible and almost nominal” such as the obligation to give due consideration in good faith to the Resolution of the General Assembly, and other legal obligations which are “automatic” and require that full effect be given to the Resolution of the General Assembly.¹² Lachs maintains that the

¹⁰ Of the more important the following should be mentioned: J. CASTAÑEDA, “Valeur juridique des résolutions des Nations Unies”, *Recueil des Cours de l'Académie de Droit International* (further on quoted RÊADI), 1970, vol. 1, p. 205 ff; O. ASAMOAH, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague 1966; A. J. P. TAMMES, *Decisions of International Organs as a Source of International Law*, RCADI, 1958, vol. 2; M. VIRALLY, “Valeur juridique des recommandations des organisations internationales”, *Annuaire Français de Droit International*, 1956; K. SKUBISZEWSKI, *Uchwały prawotwórcze organizacji międzynarodowych [Law-making Resolutions of International Organizations]*, Poznań 1965.

¹¹ *ICJ Reports*, 1955, p. 119 ff.

¹² Cited from D. H. N. JOHNSON, “The Effect of Resolutions of the General Assembly of the UN,” *British Yearbook of International Law*, 1955/1956, p. 105.

resolutions of the General Assembly, although they are not *lex perfecta* do not lack all legal significance; under concrete circumstances the Resolution of the General Assembly has a certain moral value, a persuasive weight which is to be reckoned with.¹³ According to Schachter in consequence of the activities of the organs of UN

"We now have — whatever its shortcomings — a functioning system both for examining and evaluating State behaviour on the basis of widely accepted norms and for generating new, more concrete rules to meet felt necessities",¹⁴

Wengler regards resolutions of international organs as secondary forms of creation of international law, and he takes a note of the increasing significance of this "secondary international law" (*sekundäres Völkerrecht*).¹⁵ In Buza's opinion, resolutions of the General Assembly "cannot be considered interference in internal affairs", because "being doubtlessly of political force, do not entail coercitive measures".¹⁶ According to Fenwick resolutions adopted at international conferences, although they may be considered to be moral obligations only

"they have been regarded *de facto* as creating binding obligations, so that a State neglecting to comply with them may be called to account by the other parties to the declaration".¹⁷

With time discussions on "soft" law have increased the scope of their considerations, aiming at certain generalizations including not only resolutions of organs of international organizations, but other kinds of "soft" law as well. The American jurist Baxter has attempted certain systematization of legal and political effects of "soft" law. He concludes that if States have some sort of written norm consented to by the States involved, the future course of discussion, negotiation, and even agreement will not be the same as they would have been in the absence of the norm. Once a matter has become the subject of such a norm, the matter can no longer be asserted to be one within the reserved domain or domestic jurisdiction of the State. Norms of "soft" law establish new standards of relevance for the negotiations between the parties, certain arguments will be ruled out, for instance,

¹³ M. LACHS, "Współczesne organizacje międzynarodowe i rozwój prawa międzynarodowego" [Contemporary International Organizations and the Development of International Law], *Państwo i Prawo*, 1963, No. 12, p. 834 ff. and "O potrzebie konkretyzacji prawnych zasad współistnienia" [On the Need of Specification of Legal Principles of Coexistence], *Państwo i Prawo*, 1963, No. 5—6, p. 783.

¹⁴ O. Schachter in the review of R. Higgins's book in *American Journal of International Law*, January 1965, p. 170.

¹⁵ W. WENGLER, *Völkerrecht*, Berlin 1964, vol. 1, p. 319.

¹⁶ L. BUZA, *The Trend of Development of International Law, Questions of International Law*, Budapest 1964, p. 9 ff.

¹⁷ C. G. FENWICK, *International Law*, New York 1965, p. 97.

economic considerations as possible justification for the use of force under Article 5 of the resolution of the General Assembly on Definition of Aggression of 1974. The same author observes that since the written norms of that kind “will carry a different legal impact, falling short of obligation in the strict sense, generalizations are difficult”.¹⁸

Opinions are expressed that “soft” law is not governed by international law as it was not covered by the definition of international treaty enclosed in Article 2a of the Vienna Convention of 1969. Schächter polemizes with this opinion arguing that a paradox may be seen in this reasoning. For when it is said that non-binding agreements are not governed by international law, that assertion must itself be a rule of international law, *ergo* the first assertion cannot be true, if it is not true then the second one is false and not applicable, and also that the Swiss amendment aiming at the exclusion of “political declarations” and “gentlemen’s agreements” from the scope of the convention was rejected. Schächter maintains that even if the conclusion is accepted that such agreements are not governed by international law, it does in no way mean that they do not have legal implications. The author expresses the opinion that applying general rules, pertinent to international treaties, to non-binding agreements is convenient and reasonable provided that it is not contrary to the nature of a specified agreement.¹⁹ According to him the conclusion that a non-binding agreement do not give rise to legal responsibility is not an analytical proposition (i.e. does not simply follow from the definition of a non-binding agreement), it is an empirical conclusion based on state practice.

“There has been no indication that the parties have treated nonperformance as a ground for reparations or legal sanctions... however, it is quite different from stating that the agreement need to be observed or that the parties are free to act as if there were no such agreement”.²⁰

Should international courts take into account norms of “soft” law when settling disputes? Up to the present there have been no judicial decisions in this respect. In the Greek-Turkish relations the question arose whether a joint communique concerning the exchange of views between Foreign Ministers signed in 1975, on the subject of turning over the dispute about the frontier of the continental shelf to the International Court of Justice, came under “hard” law, as Greece maintained, or “soft” law (Turkey’s standpoint). ICJ did not settle this question; it did not adopt a position

¹⁸ R. BAXTER, “International Law in ‘Her Infinite Variety’,” *The International and Comparative Law Quarterly*, 1980, p. 565.

¹⁹ O. SCHÄCHTER, *The Twilight Existence ...*, pp. 300 and 301.

²⁰ *Ibid.*, p. 300. Similarly J. DUPEY (in: *La protection...*, p. 626) writes that although this law is “soft” it does give a legal title which substantiates the adopted standpoint.

on this question as it was of the opinion that the object of the communiqué had not been unconditional acceptance of the obligation to submit the dispute to the jurisdiction of ICI.²¹ According to Bothe the Court could apply such norms if it is permitted to decide *ex aequo et bono*.²²

It should be noted that in discussions concerning the characteristics of "soft" law compared with "hard" law many authors point out the "softness" of obligations contained in many norms of "hard" law which leads to the blurring of boundaries between these two kinds of law. Baxter states that

"provisions of treaties may create little or no obligation, although inserted in a form of instrument which presumptively creates rights and duties, while on the other hand, instruments of lesser dignity may influence or control the conduct of States or individuals to a certain degree, even though their norms are not technically binding".

An example of "soft" wording is Article IV of the Nuclear Test Ban Treaty signed in 1963 in which it was reserved that

"each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country".

In Baxter's opinion political treaties are particularly exposed to the operation of *rebus sic stantibus* clause and are "legally fragile". Therefore the opinion that written norms can be divided into binding and non-binding is too simplistic. In the treaties many "empty formulae" can be found while such agreements as the Final Helsinki Act "create something less than strict legal obligations but are not lacking in legal influence or impact".²³ Weil is also of the opinion that the fact of a rule being "soft" or "hard" does not change its normative nature and he enumerates a number of clauses weakening the binding force of treaty provisions.²⁴

Theoretical Aspects of "Soft" Law

In the last couple of years the doctrine has been showing an increasing interest in the whole of norms of "soft" law and not just in individual categories of normative acts. The opinions concerning the function of "soft" law in contemporary international relations, as well as the evaluation of the

²¹ ICJ Reports, 1978 (Judgement — p. 44).

²² M. BOTHE, *op. cit.*, p. 87.

²³ R. BAXTER, *op. cit.*, p. 550 ff.

²⁴ P. WEIL, "Vers une normativité relative en droit international", *Revue Générale de Droit International Public*, 1982, p. 7 ff.

binding force of this law, are divergent and they represent a great variety of theoretical and legal conceptions.

“Soft” Law as Moral Norms

Some jurists treat with great understanding the developmental trend of the international community expressing itself in the more and more frequent use of “soft” international law by States, but they are however reluctant to recognize “soft” law as a kind of legal norms of a lesser binding force. Therefore they seek to combine “soft” law with moral and political norms, explicitly granting, however, certain legal features to these norms.

In this respect interesting is the argumentation of the French jurist M. Virally, presented in connection with the resolution of the General Assembly of UN concerning the Second UN Development Decade. In a legal analysis of this resolution Virally states that we are dealing with a resolution of a special kind, probably unique, adopted in unusual conditions, as to which doubts may arise whether it really contains recommendations. The General Assembly proclaimed the Second Decade in it and adopted the international strategy of development. In the resolution it was declared, quoting the preamble of the Charter of UN and its Articles 55 and 56:

“governments designate the 1970s as the Second UN Development Decade and pledge themselves, individually and collectively to pursue policies designed to create a more just and rational world economic and social order.... they subscribe to the goals and objectives of the Decade and resolve to take measures to translate them into reality”.

According to the author these measures are not arbitrary, but defined in the strategy of development. The purport of the resolution is thus renewed assumption and renewal of obligations incurred in the Charter. In consequence Resolution 2626/XXV adopted by the General Assembly should be treated not as a recommendation but as an accord between the governments which had participated in preparatory negotiations concerning obligations on their part, at least those accepted without reserve. Considering the legal aspect of the resolutions of the General Assembly they are not legal obligations, but only moral and political.²⁵

Next, Virally considers the substance of moral and political obligations in comparison with legal obligations. Law may be treated from the point of view of the possibility of dispute and bringing a matter before the court. This point of view corresponds with the widely accepted positivistic doctrine. It is a casuistic approach to law with which moral and political obligations

²⁵ M. VIRALLY, “La deuxième décennie des Nations Unies pour le développement”, *Annuaire Français de Droit International*, 1970, p. 9 ff.

would not have any legal effects. However, it does not seem possible to agree with such a conclusion, treating law scientifically. A jurist who does not wish to be just a casuist cannot avoid the question why law is applied spontaneously and what are the motivations of those who apply it without any compulsion: here “moral” and “political” obligations stop being not serious. It is true that often private interests prompt subjects of international law to adhere to accepted obligations. Virally argues that it is not satisfactory.

“Regardless of what cynics and pseudo-realists think, moral factors are significant as well also in international relations. A jurist, and an international lawyer in particular, cannot free himself from dealing with a specifically moral notion such as good faith (not to mention other moral notions, for instance, justice and solidarity). In fact, a moral obligation is at bottom an obligation of good faith. ...Good faith concerns not only the duty of performing obligations (Article 26 of the Vienna Convention on treaty law), but it also includes restraint in assuming obligations of which it is known that they cannot be met and making injudicious promises”,²⁶

What is the difference between “soft” and “hard” international law? Virally who treats commitments based on resolutions of organs of UN as moral obligations defines this difference as follows:

“A legal obligation is irreversible, or, strictly speaking, can be changed or cancelled only in a formal way provided by law and within legitimate limits. A moral obligation is less constraining (*contraignant*): it is possible to return to the matter of cancelling or changing the obligation when there is adequate ground, that is in all circumstances allowed by good faith. ...The ties of a moral obligation are looser than ties of a legal obligation, nevertheless a moral obligation is binding on the person who undertook it. If a State is to undertake an obligation of which all consequences and future developments cannot be foreseen and in the issue it does not know whether it is able to acquit itself in full, good faith and sense should induce it to undertake a moral obligation and not a legal obligation”,²⁷

Virally, moreover, observes that governments turn out to be more careful in this field than jurists for whom law is irrelevant to morality, and obligations only moral and political have no value; on the contrary, it may be regarded that in many cases the States discharge their legal obligations in full rather out of consideration for their moral and political aspects than on the account of their legal nature.

In his penetrating analysis of the resolution of the General Assembly concerning the Second Development Decade Virally pays a particular attention to the efforts of delegations of many States which had attached great significance to individual expressions in the course of working out the text of the resolution, and then they raised objections excluding the binding force of

²⁶ *Ibid.*, p. 29.

²⁷ *Ibid.*

individual provisions of the resolution in relation to a given State. In his final remarks the author declares that attaching great weight to moral and legal obligations can be on no account regarded as underestimation of legal obligations which predominate over moral and political obligations through precision of wording and remain a model owing to their precision and formal discipline, as well as to certitude which they allow to attain. In many cases, however, like for instance with respect to Development Decade, the rise to the level of legal wording is not possible, because the object, in this case the strategy of development, does not allow it.²⁸

The connection of "soft" law with morality has been noticed also by another French jurist, J. Dupuy. He refers to the view of G. Scelle who defined law as a combination of ethics and power and he states that "soft" law concerns social ethics which it proclaims; the authorities are however not yet ready and have not agreed to grant legal value to this ethics and to put it fully into force: so, one could speak of imperfect law, but this formula would not suffice as it should be proved that it is already law, although its definition has not been worked out and has not reached the required degree in detail.²⁹

The opinions treating "soft" law as moral norms are undoubtedly deviations from traditional law doctrine which characterized morality as "exclusively inner experience", while law is an inner and outer experience. The first of these norms are autonomous, the others — heteronomous.³⁰ According to L. Petrażycki's terminology — moral norms are norms one-sidedly imperative, therefore not creating basis for claims, while legal norms are imperative and attributive, that is generating claims. This does not, however, mean that in positive international law there are no connections between law and morality, as more than once did the norms of international agreements refer to moral norms (for instance, the Martens clause in the 4th Hague Convention of 1907 puts under obligation to observe the principles of humanitarianism and requirements of public conscience; Article 227 of the Versailles Treaty provided bringing to justice of Wilhelm II Hohenzollern for "a supreme offence against international morality and the sanctity of treaties").

"Soft" Law as Political Norms

The Ukrainian jurist I. I. Lukasuk has put forward the proposition to distinguish a separate category of norms valid in international relations,

²⁸ *Ibid.*, p. 30.

²⁹ J. DUPUY, in: *La protection...*, p. 625.

³⁰ J. MAKOWSKI, *op. cit.*, p. 1.

namely political norms. He states that there has been an increase in the number of political norms included in joint declarations, communiqués, final documents which are not of legal, but of political validity. These norms are — beside norms of international law — means of regulation of international relations. Because politics and law link in the process of regulation of international relations. Both underestimating and overestimating of the role of each of the two types of regulation can affect the whole system of guidance of international relations adversely. Attempting to define the significance of both types of norms Lukašuk expresses the opinion that legal means play in the general system of controlling international relations a lesser role than political means, however, they are indispensable for the functioning of the system as a whole.³¹

Virally has also separated political norms from legal norms, but he treats political obligations in close connection with moral obligations. He makes an interesting attempt to define the political obligation and its consequences in international relations. He maintains that it is the expression of political will, that is, of definitive decision; without such decision no obligation, including legal obligation, has any chances of fulfilment. But, moreover, a political obligation concerns the political situation of the person who assumes the obligation, in relation to public opinion or political partners. The failure to meet one's political commitment brings about disadvantageous consequences for the person who has failed to meet his obligation: it is either loss of prestige, or the lessening of the credibility of his words, or else the worsening of his political relations with the partners — those are consequences which a respectable government does not ignore. Generally speaking, constant fulfilment of political obligations produces opposite effects. In practice it is difficult to separate the moral aspect from the political aspect: the mere fact that one can dispute the good faith of the partner is an attempt on his prestige and the trust one puts to his promises.³²

"Soft" Law as a Significant Element in the Development of Customary Law

Many authors link the binding force of "soft" law with the process of formation of customary law. The notion of customary law was formulated already by Roman jurists. Later juristic generations did not introduce any significant new elements to the definition of customary law, although discussions concerning the problems of this law had been very lively. It is still

³¹ I. I. ŁUKASZUK, "Prawo w systemie stosunków międzynarodowych" [Law in the System of International Relations], *Sprawy Międzynarodowe*, 1977, No. 2, p. 41 ff.

³² M. VIRALLY, *op. cit.* pp. 29 and 30.

a prevailing opinion that for the creation of customary law two elements are necessary: practice (*usus*) and conviction that the norm is valid in law (*opinio juris sive necessitatis*). While in the past centuries the requirement was for the practice to be long-lasting (*longaevus usus, vetustas*), and continuous and uninterrupted (*actus continui et non interrupti*), and medieval glossators tried to substantiate this requirement by postulating at least 10-years of practice based on at least two acts, in discussions on “soft” law the condition of long duration was questioned. The specific features of our epoch were referred to an epoch characterized by “historical acceleration” and incessant contacts between States, in particular on the forum of international organizations. Postulated is the speeding up of the process of creation of customary law through relying more on the intellectual and political element (*opinio juris*) than on a long lasting repetition of precedents.

Dupuy argues that at present consciousness precedes existence in the process of creation of customary norms, which means that intellect, being one of the significant components of customary law, precedes practice, in contrast with the ordinary process of creation of customary rules, where fact precedes law. Therefore one does not speak of custom yet and obscure formulae, such as soft law, are used, as all of this a project which should be followed by practice.³³

Some jurists advance the claim that a certain kind of resolutions of the General Assembly, namely some solemn declarations passed by UN the General Assembly, “are the State practice and as such are evidence of customary international law”. Since the General Assembly consists of States, its declarations are not only acts of UN, *xut* also acts of the community of States; if individual States can affect the development of international law, then it is easy to understand that a community of States can do the same. In the practice of UN a “declaration” is a formal and solemn instrument suitable for rare occasions when principles of great and enduring significance are proclaimed. Out of consideration for a more solemn form and significance of the declaration it can be stated that it expresses a great expectation of the organ passing the declaration that the members of the international community will respect it. In consequence, as the expectation gradually proves true in the practice of States, the declaration — by custom -- may become recognized as establishing rules binding the States.³⁴

It is beyond any doubt that the resolutions of the General Assembly may play an important role in the process of creation of customary law. The resolutions often contain legal statements towards which individual

³³ J. DUPUY, *L'avenir du droit international dans un monde multiculturel*, La Haye 1984, p. 454, and in: *La protection...*, p. 624.

³⁴ O. Y. ASAMOAH, *op. cit.*, pp. 24 and 241.

States adopt positive or negative positions; from such a game of statements and standpoints customary law may come into being.

The Australian jurist, who has been participating in the works of UN, sir Kenneth Bailey, has noticed that today a resolution can, from the legal point of view, look as a recommendation, or even a simple wish. But it should be kept in mind that propaganda can create pressure, this pressure can lead to practice, and practice — may create law.³⁵

In newer monographs devoted to customary law a distinct tendency prevails to weaken the traditional requirements. Instead of at least two examples of practice, one suffices: the custom derives much of authoritativeness from the consent of the States in custom-forming acts.³⁶

Some authors aim at a closer definition of conditions in which a resolution of the General Assembly may be treated legally binding. In Dupuy's opinion this concerns resolutions establishing the existence of rules and norms which have already won minimum recognition and practice necessary for customary law and which are already accepted by the international community — if State too representative do not raise too strong objections. He maintains that poor States can be representative if it is of prime concern to them as it happens in relation to the right of development; at present a representative State does not have to be, as it was said once upon a time, a member of the Holy Alliance or the European Council. The notion of representative State has become democratized with the increase of the number of States.³⁷ According to Zadoroznyi, resolutions which received two-thirds or more votes of members of the General Assembly representing three main groups of contemporary States (socialist, capitalist and neutral), naturally including the Great Powers, should be regarded as the source of international law.³⁸ Jenks allows "legislation by consensus" in relation to areas beyond the legislative jurisdiction of any State such as outer space: there is no interference here in anybody's existing jurisdiction.³⁹

It is worth mentioning that norms included in a convention signed by most but not all States, may become norms of customary law generally binding. An often quoted example are the rules of the Hague Regulations of 1907, concerning the laws and customs of war on land. Although the

³⁵ Quoted from H. GOLSONG, "Le droit international d'aujourd'hui: les tendances qui se manifestent", in: *Le droit international d'aujourd'hui*, Neuchâtel 1974, p. 104.

³⁶ A. D'AMATO, *The Concept of Custom in International Law*, Ithaca 1971, pp. 91 and 270.

³⁷ J. DUPUY, in: *La protection...*, p. 624.

³⁸ G. P. ZADOROŽNYJ, *Mimoe sossuscestvovanie i mezunarodnoje pravo*, Moskva 1964, p. 327.

³⁹ C. W. JENKS, *A New World of Law*, London 1969, p. 205.

clause included in the 4th Hague Convention, which has the Regulations annexed, clearly proclaims that the provisions included in the Regulations are binding only in relations between contracting States and that only on the condition that all of those at war are parties to the convention (the so called *si omnes clause*), both during the First and the Second World Wars the rules of the Regulations were considered binding — despite the fact that not all of the States at war had been parties to the 4th Hague Convention. This was explicitly declared by the Nürnberg Tribunal which justified its standpoint by referring to the fact that in 1939 the mentioned provisions drawn up by the convention had been recognized by all civilized nations and they were considered a collection of laws on land warfare and customs of a declaratory nature, which are referred to by Article 6 of the International Military Tribunal.⁴⁰ Similarly, the Tokyo Tribunal stated that the convention remains a good evidence of the customary law of nations to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation.⁴¹

Moreover, examples can be quoted that the provisions of the convention which did not enter into force at all as a result of an insufficient number of ratification, can acquire validity of “hard” international law as norms of customary law. In this way, for instance, the provisions of the Vienna Convention of 1969, before it entered into force, were generally recognized as norms of customary law, which was clearly stated by the International Court of Justice in the advisory opinion concerning Namibia.⁴²

The Contents of “Soft” Law

The norms of “soft” international law cover a wide field of international relations, but they differ from each other not only as to the types of normative acts in which they have been inserted, but also as to the subject they regulate. In comparison to “hard” law a distinct tendency prevails for the State to choose “soft” law when obligations of a general nature, not precise enough to include them in a strict legal formula, obligations concerning the general future conduct of States in a given field of relations are concerned. This is not a characteristic trait of all norms of “soft”

⁴⁰ T. CYPRIAN, J. SAWICKI, *Materiały norymberskie [Nürnberg Materials]*, Warszawa 1948, p. 235.

⁴¹ Judgement in the case of Hirohito and others — *Annual Digest and Reports of Public International Law Cases*, 1948 (case 118).

⁴² ICJ, 1971, p. 47.

law: for instance, gentleman's agreements usually concern a strictly defined regulation of one legal relation (for example, gentleman's agreement concerning geographical distribution of non-permanent member of the UN Security Council). If treaties which have not been ratified are to be included in "soft" law, then from the nature of things it results that the wording of these treaties differs in nothing from the ratified treaties, and the same text of "soft" law acquires the quality of "hard" law at the right time and under the right conditions after the agreements have been ratified.

Some resolutions of international organizations — for instance concerning technical matters of aerial navigation — show a far-reaching degree in detail. It is often easier for experts appointed by international organizations to reach agreement than for diplomats representing governments. Sometimes resolutions of international organizations provide for a detailed procedure aimed at supervision of the execution of the resolution.⁴³

In the literature on the subject much place is devoted to characteristic features of the contents of most of the norms of "soft" law, differentiating this law from "hard" law, and in particular characteristic features of the contents of resolutions of the UN General Assembly. Dupuy defines the norms of "soft" law as "programmatic law" (*droit programmatique*). The contents of this law concerns the future and is connected with objectives and intentions which are to be realized, unless it is only of declaratory nature ascertaining the existence of norms already in force. Thus it would be proper to call it "the law of directives", although the author considers this notion deceitful, as according to the Treaty of Rome concerning the formation of the Common Market directive have a different meaning.⁴⁴ Virally, referring in his opinion to the resolution of the General Assembly concerning the international strategy of development, places great emphasis on the close connection of the resolution's legal nature with its subject.⁴⁵ Dupuy calls in particular the law of environmental protection "expediency law" (*droit de finalité*), while the classical international law was the law of relations (*droit relationnel*) and formal law meaning that it allowed States to remain in diplomatic relations with each other, conclude agreements and solve problems — though the law itself did not deal with these problems. As soon as law abandons the purely formal and abstract sphere in order to deal with social, and economic problems of the environment, it gives itself certain purposefulness for which it does not yet have all technical means.⁴⁶

⁴³ K. SKUBISZEWSKI, *op. cit.*, p. 175; M. BOTHE, *op. cit.*, p. 86.

⁴⁴ J. DUPUY, in: *La protection...*, p. 625.

⁴⁵ M. VIRALLY, *op. cit.*, p. 20 ff.

⁴⁶ J. DUPUY, in: *La protection...*, p. 621.

It is not difficult to understand that the development of international relations, and cooperation of States within international organizations in particular, has created the need for working out and adopting normative acts of which the contents differs from that of traditional norms of international law regulating relations between States and delimiting the competence of States. The working out of programmes and assumption of obligation by the States to implement them requires norms formulated differently — rather indicating directives of activity than strict formulation of rights and duties. On account of a more and more wide-spread adoption of planning of development of economic and social life also the legislations of particular countries contain more and more directive resolutions which differ from norms strictly establishing the extent of rights and duties.

In contemporary international relations many norms of “soft” law owe their existence to political compromise. When on the forum of international organizations difference of opinion arises whether to conclude a new multilateral international agreement or find the case immature, agreements to make an appropriate declaration is reached by way of compromise between States postulating the maximum and the minimalists. Such declaration is often substituted later by a convention regulating this field in a more detailed way and using legal wording (for instance, after the adoption of the Declaration on liquidation of all forms of racial discrimination by the UN General Assembly in 1963, in 1965 an international convention concerning this subject was signed; after the adoption of the General Declaration of Human Rights in 1948, after not less than 18 years the Covenants on Human Rights were passed; in 1959 the Declaration on a child’s rights was passed and up to the present preparatory works on the text of the convention concerning this matter are under way).

It is no coincidence that in particular in the field of human rights protection exist many normative acts containing norms of “soft” law: such norms are often “easier to accept” by a State for reasons of prestige.⁴⁷ “Soft” law is applied in situations when the other party is mistrusted, when for reasons of prestige it is easier for the states to accept *modus vivendi*, or in constantly changing situations (for instance, monetary agreements in Western countries).⁴⁸ The need for quick action speaks often for the choice of “soft” law: sometimes quick action is necessary, while treaties do not always guarantee immediate regulation. The moment a treaty comes into force is sometimes considerably delayed and in relation to some, often numerous, States it never arrives.⁴⁹

⁴⁷ M. BOTHE, *op. cit.*, p. 90.

⁴⁸ K. SKUBISZEWSKI, *op. cit.*, p. 175.

⁴⁹ M. BOTHE, *op. cit.*, p. 92.

Final Remarks

Although the discussion of the problem of "soft" international law is far from elucidating all issues connected with the binding force of this law and reasons for its development and determination of its relation to "hard" law, it allows to draw some conclusions.

1. The prolific development of "soft" international law has become a historical fact and a lasting element of contemporary international relations. There is no indication that in the foreseeable future this law may stop evolving and lose its significance. From a jurist's position it is to be regretted because "soft" law creates so many problems; it would be to more advantage if the norms of this law could be replaced by more precise and less controversial, strictly legal, formulations -- norms of "hard" law. From the position of a political scientist it is easy to understand the reasons why States are not prepared to assume obligations which are legally rigorous, but instead they are willing to assume more flexible, "soft" obligations in their relations with other States and international organizations.

Such obligations "bridge the gap between a legal vacuum and the full acceptance of a legal principle through treaty or custom", as there exist many reasons, often of international character which prevent the conclusion of a formal treaty, but they do not interfere with the acceptance of principles which would be contained in the agreement.⁵⁰ If it is to be assumed, using the terminology of social sciences, that social norms create positiveness of expectations generally desired for integration processes, then it has to be stated that obligations falling within the domain of "soft", law create such positiveness in a given sphere of international relations in lesser degree than *sensu stricto* legal obligations. Nevertheless they create more positiveness than if this sphere had not been subject to any control and the States had retained unrestricted freedom of action. It results from practice that as a rule States assume international obligations seriously — including those which they clearly consider lacking legal character. Such being the case it is difficult to agree with opinions rejecting the concept of "soft" law and negatively appraising its development.⁵¹

⁵⁰ Such evaluation of declarations adopted by the General Assembly is put forward by W. Friedman in the preface to the book of O. Y. ASAMOAH, *op. cit.*, p. v.

⁵¹ G. ARANGIO RUIZ (*The Declaration of Friendly Relations and the System of Sources of International Law*, Alphen aan Rijn 1979, p. 29 and 196) is of the opinion that the concept of "soft" law is "of highly questionable usefulness", that at present it has become a "discovery" and "fashion". The resolutions of the General Assembly should be appraised in terms of regulatory impact obviously conceivable also for hortatory enactments, not in terms of degree of binding force or "softness" and "hardness". Similarly, P. WEIL (*op. cit.*, p. 9) considers a great number of norms of "soft" law to be symptomatic of the weakness of the international normative system.

A number of jurists point out with reason the negative phenomena connected with the evolution of "soft" international law. It seems that there exists full concurrence of opinions that possibly clear boundaries between "hard" and "soft" law should be maintained. In connection with this indicated is the danger of "smuggling pseudo-norms which derive from formally non-binding recommendations of international organizations" into international law⁵² and the possibility of avoidance of problems in the sphere of national legislative procedures and in consequence law is not created when it should be created.⁵³ Thus there is a danger that "soft" law may restrict the formation and application of "hard" law. The obliteration of boundaries between the two types of laws may, moreover, lead to undesired consequences in the sphere of interstate law and policy.

M. Bothe expresses fears that the executive authority of States, in which specified powers to ratify international agreements are divided between the parliament and executive authority, may be interested in evading the obligation of obtaining the parliament's consent to ratify the agreement by concluding it in the form of "non-legal" norms.⁵⁴

The comprehension of developmental processes of the international community, including the tendency to create norms of "soft" international law with qualities not fully satisfying for jurists, may safeguard against an unrealistic attribution of too great significance to the functions of law in contemporary international relations. Those who contribute to the creation of law "imperfect" in some respects in comparison with the law *sensu stricto*, but often reflecting the needs of the international community integrated better than the contemporary one, should be aware of the advantages as well as of disadvantages of "soft" laws further development of international relations may lead to a condition in which many rules of "soft" law will be turned into "hard" law and acquire full effectiveness.

2. An important function performed by "soft" law in the contemporary

⁵² K. WOLFKE, *Kilka refleksji na temat rozwoju i kodyfikacji prawa międzynarodowego* [Some Reflections on the Subject of Development and Codification of International Law], Wrocław 1984, p. 9.

⁵³ M. BOTHE, *op. cit.*, p. 94.

⁵⁴ *Ibid.*, p. 90. R. Baxter informs that during and after the Vietnam War the President of the United States has made Commitments on behalf of the US without the consent of the Senate. This was being justified by the fact that the Constitution obligates to obtain the consent of the Senate only in relations to treaties. In connection with the criticism of this situation the new statute (Case Act P. L. 92—403 as Amended) requires that the Department of State hands over the text of such agreement to the Congress within 60 days from the moment of entering into this obligation, and if the agreement had been oral — that it submits a relevant writing. Other departments and agencies of the government are obliged to notify the Department of State about concluded international agreements within 20 days from the date of conclusion (*op. cit.*, p. 554 ff).

world is reducing of the shortcomings and inconveniences connected with the traditional process of creation of international law. Contemporary international relations, like many other contemporary phenomena, are characterized by "historical acceleration" which in the field of law expresses itself in the demand for urgent legal regulations in many areas, while the process of creation of norms of international law is very slow. Customary law is *ex definitione* the result of a longer process and despite all the ingeniousness on the part of some authors it is not possible to produce it "immediately". The ratification of multilateral agreements lasts for years and as a rule it does not include a good part of members of the international community. At this juncture "soft" law bridges the severe gap however, imperfectly — between the needs and the possibilities for their prompt satisfaction. There have been cases that creators of conventions, in the face of difficulties to reach an arrangement, relegated to norms less perfect than legal norms hoping that future would bring legal regulations. For example, the pre-ambule to the 4th Hague Convention of 1907 declares that until a more complete code of the laws of war has been issued the principles of the law of nations should be applied as they result from the usages established among civilized peoples, from the laws of humanity and dictates of the public conscience. Nowadays such functions are performed by resolutions of the UN General Assembly as well as by other norms of "soft" law, substituting "persuasive authority" for legal validity *sensu stricto*.

3. Unlike the well worked out problems connected with international law *sensu stricto*, enjoying the output of the doctrine, the problems of "soft" law require penetrating and detailed research. There are still no answers yet to many questions, including questions of great practical significance. Many problems are debatable, even the name of this category of norms has not been definitely established. A particularly important problem for the practice is termination of legal validity and interpretation of norms of soft law: whether and to what extent should all or some provisions of the Vienna Convention on treaty law be *per analogiam* applied.

It seems to be beyond any doubt that the category of "soft" law is a collective notion and that only in few points the same binding force should be joined with all kinds of normative acts containing norms of "soft" law. This concerns in particular resolutions of organs of international organizations which contain — sometimes in the same resolution — the confirmation of binding norms of customary law and new norms of conduct.⁵⁵

⁵⁵ R. BAXTER (*op. cit.* 550) observes that "one instrument may contain both provisions creating precise legal obligations and norms of such a vague and general character that it is clear that they were not intended to be enforced".

Thus the method of individual treatment of particular normative acts should be widely applied, examining above all to what extent the parties intended to enter into obligations contained in a given act according to the basic rule of interpretation of treaties expressed by Grotius at the birth of the science of international law: the measure of proper interpretation is the drawing of conclusions on the basis of signs being the most probable expression of will.

4. The development of “soft” international law seems to make re-examination of views concerning the theory of the source of international law necessary. One of the foundations of the science of international law: the axiom that custom and international treaty are the sources of this law, has been weakened due to authorizing the ICJ to apply general principles of law recognized by civilized nations and — as subsidiary means for termination of law-judicial decisions and teachings of the most qualified publicists. W. Friedman accurately notices that at present

“But in order to cope with the diversity of international law in our time, we have to look to a far greater variety of sources of international law and we shall have to recognize that, in accordance with the many-sided character of international law, these sources may vary greatly in intensity”.⁵⁶

According to Baxter a lawyer should treat “by understanding the infinite variety of ways in which legal norms may reflect different intensities of agreement”. The lawyer’s task “is not only to interpret the resulting consensus but also to make understandings between States as flexible an instrument as possible in order to encourage agreement”.⁵⁷

It should be added that elements indicating the existence of a hierarchy of norms appear also in international law *sensu stricto*, to mention Article 103 of the UN Charter instituting its regulations as a kind of international constitutional law, and Article 53 of the Vienna Convention on treaty law concerning imperative norms (*jus cogens*).

⁵⁶ W. FRIEDMAN in the preface to the book of O. Y. ASAMOAH, *op. cit.* V.

⁵⁷ R. BAXTER, *op. cit.*, p. 565 ff.

Problems in the Administration of Evidence Arising from the Rules of the International Commercial Arbitration

by TADEUSZ ERECIŃSKI

Arbitration is the currently predominant method of the settlement of disputes arising in international commercial relations. In the practice of the international trade the parties concerned very often seek arbitration whose proceedings are governed by the rules established by the specialized bodies concerned with international arbitration (arbitral associations, foreign commerce chambers, the UN Commission for International Trade Law).¹ Among the norms especial attention should be given to the regulations concerning evidence and the administration of evidence, as these are crucial to the outcome of the proceedings. The present paper is intended to provide an analysis of these regulations which are contained in the selected provisions of the permanent courts of arbitration and also in the international rules established to govern the proceedings of *ad hoc* arbitration, with a view to assessing their usefulness in the settlement of international commercial disputes, notably those arising between the subjects belonging to the different legal families and systems. The procedure of the administration of evidence has always been deeply affected by the principles and techniques employed in the legal proceedings proper to the place of arbitration or the customs adhered to by the arbitrators and the parties concerned. However, when the parties to the dispute belonged to different legal systems applying proceedings based on different principles² the need would arise for the parties to work out rules of conduct common or acceptable to

¹ The questions relating to the law applicable to arbitral procedure were discussed in the present writer's article: "Zagadnienia prawa właściwego i postępowania dowodowego w międzynarodowym arbitrażu handlowym" [Problems of the Applicable Law and the Administration of Evidence in International Commercial Arbitration], *Państwo i Prawo*, 1987, No. 9. The article included also the presentation of selected national arrangements with regard to the questions specified in the title.

² For instance the Anglo-Saxon methods of the hearing of witnesses and expert-witnesses differ substantially from the continental methods of the conduct of administration of evidence.

both sides concerned. It was as early as the 1970s that the circles including experts in international commercial arbitration engaged in the debate aimed at the creation of the principles providing for the uniformity of the administration of evidence.³ The debate produced these principal ideas:

a) The administration of evidence by the international commercial arbitration is to be based upon the principle of equal treatment of the parties concerned and free evaluation of evidence. Arbitral awards should be issued by the arbitrators after careful and exhaustive examination of all the aspects of the given case and the whole of the evidence.

b) A middle-of-the-road solution shall be found between the inquisitorial system of the presentation of evidence and that of adversary trial, lest one side or the other favouring one of the systems should be the privileged part.* Evidence should therefore be first presented by the parties which are normally represented in the arbitration proceedings by experienced lawyers. Arbitrators must, however, have the right to claim further evidence when they deem it essential to the settlement of dispute. The oral examination of case with the participation of parties concerned should be well prepared.

c) Unlike the procedure applied in the national arbitration, international arbitral proceedings should rely to a larger extent on documents as essential evidence. As far as possible the arbitrators should seek to arrive at a settlement of dispute exclusively through examination of the available documents, including written statements by the sides concerned and other persons. Affidavit should be allowed in dealing with legal questions.

d) The hearing of witnesses should allow of compromise. The oral hearing of a witness should be done by the arbitrators, but the parties must have equal right to ask questions upon the consent by the presiding arbitrator. The specific additional circumstances of a case may also legitimize the employment of the techniques of examination and cross-examination of witnesses (eg. the arbitration being held for the parties to which the system of common law applies).⁵ This however ought to be left to the arbitrators decision. No oaths should be claimed from the witnesses.

e) The expert's opinion should only be concerned with purely technical points. The expert should as far as possible be appointed by way of

³ Cf. materials of the working meeting in London, 1974. Interim Meeting of the International Committee for Commercial Arbitration (*Arbitration*, vol. 41, 1974), and also materials of the international congress of commercial arbitration in New Delhi, 1975 and Mexico, 1978.

⁴ Cf. J. ROBERT, "Administration of Evidence in International Commercial Arbitration", *Yearbook Commercial Arbitration*, vol. 1, 1976, p. 223.

⁵ *Ibid.*, p. 224.

agreement of the parties and when this method cannot be employed, by the court of arbitration. The arbitrators should also provide precise definitions of the scope of the expert's responsibilities. The expert should also have the opportunities of supplementing if necessary the previously given opinion in the course of oral examination of the case. The court of arbitration can also rely on an expertise supplied upon request of one of the parties, provided that it has been prepared by an internationally recognized organization.

Let us now try to establish whether these proposals have been reflected in the existing rules of permanent courts of arbitration, rules of arbitration and the model law of UNCITRAL.

I. Rules and Regulations of Permanent Courts of Arbitration

1. The London Court of Arbitration

The court has been operating since 1892. However, the special provisions on international arbitration were formulated only when the Court's rules which took effect as of 1 September, 1978 were being drafted." International arbitration was defined as arbitration between parties neither of which or at least one is engaged in commercial activities in Great Britain. An important feature of the 1978 regulations was their correlation with the UNCITRAL arbitration rules.⁷ The correlation includes in the first place the auxiliary applicability of the UNCITRAL rules for the purpose of fulfilment of the potential gaps in the provisions of the London regulations and in the second place it is the arrangement that the arbitration in London will basically proceed in accordance with the UNCITRAL arbitration rules exclusive of those provisions of the London court regulations that are inconsistent with their UNCITRAL counterpart.

It is also worth noting that the 1978 regulations markedly restricted the possibility of application in the international arbitration of the renown English procedure of special case, i.e. reduced the opportunities of the arbitrators' referring legal questions to State courts of justice. The issuing in England of the 1979 Arbitration Act made it also imperative to introduce

⁶ Apart from the general provisions applicable to arbitration and the rules on minor questions, provisions with regard to international arbitration were formulated in Part II of the 1978 rules.

⁷ The Rules of Arbitration of the UN Commission of International Trade; Law (UNCITRAL) were adopted as Resolution No. 31/98 by the UN General Assembly on 15 December, 1976.

further changes in the rules governing international arbitration and the adjustment of the regulations of the London court to the changes introduced to the 1979 Act. This was done in the rules of international arbitration adopted on 1 January, 1981. The rules provided for the establishment of important novelties in the procedure of the London court. The new rules which were referred to with some exaggeration by some as those times' most sophisticated rules of arbitration⁸ contained lucid and very flexible provisions, which enabled their application to dispute between contracting partners from different States with different legal systems.

The 1981 Rules did not require rigid application of any of the standard procedures and offered the parties and the arbitrators the opportunity of establishing a procedure as they wished, provided it should lead to efficient, cheap and ultimate settlement of disputes. Article 5 of the Rules invested the arbitrators with a very broad scope of jurisdiction rights and powers. They were all additionally listed in a separate annex to the Rules for the sake of clarity. Article 7 has general provisions with regard to meetings and hearings, which gives the arbitrators the right to choose the stage of the proceedings at which these are to be held.

The annex listed the aspects of the English legal system that were most useful and practical for the purpose of the pursuit of the international arbitration, and also the rules that had not been applied in the English arbitration until then. These were based upon the arrangements characteristic of the arbitration of the continent.⁹ The annex set a distinction between the scope the jurisdiction of the arbitrator and his powers. It also stressed that the arbitrator's jurisdiction and powers must not exceed the limits established by the relevant law, which meant that the Rules explicitly recognized the binding of the arbiters by *ius cogens lex loci arbitrationis*. Among the concluding remarks is the point dotting the i-s and crossing the t-s. It says that when offered by the local law the powers exceeding the scope set by the rules an arbitrator can use them.

With regard to the arbitrators jurisdiction there are listed, *inter alia*, the following powers to do with the administration of evidence; the right to decide on all legal questions emerging in the course of arbitration, an ascertainment of the changes introduced by the 1979 Arbitration Act and abandonment of the special case procedure; the right to claim information from a party as to the further actual and legal aspects of the case; the right to receive and examine written and oral evidence an arbitrator

⁸ Cf. P. SIEGHART, "International Arbitration Rules of the London Court of Arbitration", *Arbitration*, 1981, p. 130 ff.

⁹ *Ibid.*, p. 132.

deems relevant, regardless of whether it is strictly permissible by law or not;¹⁰ the right to hold a meeting or an oral examination of a case in England and elsewhere. Where the scope of the powers of the arbitrators is concerned, it was, unlike the aspects of jurisdiction, dependent upon the presence or absence of the parties' choice to have things handled differently. Consequently the rules place emphasis on the arbitrator's easement towards the parties. An arbitrator must not do anything he is not expected to do and is obligated to do all the parties to the dispute want him to, as far as is allowed by the relevant law. In doing so an arbitrator may act not only upon request of the parties to the dispute but also on his own initiative, in which case he must not issue an order or instruction without addressing the parties by written or oral communication. Apart from these qualifications the arbitrator's powers in the administration of evidence include: the extending and reducing of the terms provided for by the relevant rules; the possibility of relying on his own professional knowledge or experience in the given area or of appointing one or more advisors or experts to provide assistance in the handling of a case (this meaning also the interpretation of the provisions of the law). Arbitrators can also restrict or exclude a party's right to quote evidence of the expert's opinion; command the parties to submit written statements and witnesses' submissions to the Secretary of a court of arbitration for further legal proceedings; indicate the writers of the statements who should appear before the court of arbitration for oral examination; establish which witnesses are to appear as well as the order of the appearances and the mode of the examination (the London regulations provide for the possibility of choosing the witnesses to be examined by the court after holding the relevant consultations with the parties and also of restricting the techniques of examination and cross-examination); conduct the indispensable enquiries; command the parties to provide particular items for examination; command a party to supply a document in its possession.

Some of these powers are quite unprecedented in the English arbitration. For instance, the possibility of arbitrators conducting their own enquiries represents a clear extension of their inquisitorial powers within the system which had previously been working upon the principle of adversary trial. The stage of discovery of documents which used to be obligatory in the English legal proceedings often caused protraction of the proceedings.

¹⁰ The English law on evidence is complicated and has the rules concerning acceptability of evidence that were formulated at the time when almost all cases were examined by the jury, while, in the event of the normal trial at court it takes a lot of time and effort to meet all those formal requirements. The rules exclude the requirements and command the arbitrators to apply the test of whether the evidence is relevant, instead.

The new rules permit the abandonment of this procedure. Thus these new powers exemplify the going far beyond the framework of the traditional arbitration proceedings. Moreover, for all the dependence those powers show upon the attitudes of the parties they represent a significant step forward in the process of the assimilation of the English arbitration proceedings to the procedures applied on the Continent.

In 1985 the 1981 Rules were supplemented so as to adjust their provisions to the latest trends in the international arbitration.¹¹ The 1985 modified version of the Rules is longer and more elaborate. In the realm of the administration of evidence the supplementary measures included the taking of another step towards the abandonment of the oral examination of cases characteristic of the common law system by permitting the presentation of written statements and the serving of documents before the trial and not only in the course of it. Nevertheless, Article 10 of the new rules stresses the right of a party to the oral examination even in such cases in which the court of arbitration has deemed it unnecessary. Article 13 provides that the arbitrators may, if they choose, claim the presentation by the parties of documents and other items for examination. Consequently this Article excludes the right to approach common court of law in that matter, which in turn, precludes the possibility of the potential prolongation of the arbitration procedure on this account. Article 12 explicitly invests the court of arbitration with the right to appoint experts, and the parties with the right to address questions to such an expert. Moreover, the parties may also appoint their own expert-witnesses. On the other hand, though Article 12, paragraph 2 provides for the arbitrator's right to restrict the number of or even to oppose the appointment of witnesses or expert-witnesses.

2. The Court of the International Chamber of Commerce

The Rules of the International Chamber of Commerce¹² provided that the arbitral proceedings under its auspices should be consistent with the Rules. In the event of the Rules being silent or of the absence of the relevant rules of the proceedings at court in the Rules, the parties should be the

¹¹ Cf. M. HUNTER, J. PAULSSON, "A Commentary on the 1985 Rules of the London Court of International Arbitration", *Arbitration*, 1985, p. 333.

¹² Cf. for instance, *International Chamber of Commerce Arbitration. Part IV: Hearings, Proof and Ancillary Proceedings*, New York, London, Rome 1984, G. SACERDOTTI, "The New Arbitration Rules of ICC and UNCITRAL", *Journal of World Trade Law*, vol. 11, 1977, T. M. de HANCOCK, "The ICC Court of Arbitration", *Journal of International Arbitration*, vol. 1, 1984.

first to set the rules. It is only when the parties fail to take their positions in this matter that the procedure should be defined by the arbitrators by referring or not to a municipal procedural law to be applied to the arbitration (Article 11 of the Rules). This means that the present version of the ICC Rules invests the arbitrators with the right to fill the gaps in the procedural rules not necessarily by referring to the relevant rules of arbitration proceedings (i.e. in the majority of cases to the law of the place of arbitration), and moreover, only with regard to the matters which the rules do not settle.¹³ It is, however, assumed that the adopted rules of conduct must not be inconsistent with the absolutely binding rules of the law of the place of arbitration (*lex loci arbitrationis*).¹⁴ The rules and the organization and the mode of conduct of the ICC are intended to combine the pluses of the *ad hoc* arbitration and those of the institutional arbitration.¹⁵ The parties were granted a large margin of freedom in the selection of the mode of the conduct of arbitration along with the reliable, judging by their record, mechanisms for efficient organization of the arbitration procedure offered by the Chamber and its Secretariat.

The ICC Rules invest the parties with the full right to fix the place of arbitration, also providing that it is only when they fail to fix it, that the decision is to be made by the Court of Arbitration (Article 12 of the Rules).¹⁶

The Rules do not have too many provisions with regard to the administration of evidence. This can partly be accounted for by pointing out that since the ICC arbitrators come from different parts of the world the Rules were conceived so as not to definitely decide certain controversial matters.¹⁷ Before proceeding with the preparation of the case, the arbitrator shall, in keeping with Article 13 draw up, on the basis of the documents or in the presence of the parties and in the light of their most recent submissions, a document defining his Terms of Reference. This document shall include *inter alia* a summary of the parties' respective claims, definition of the issues to be determined; the place of arbitration and the particulars of the applicable procedural rules. This is equivalent to the stage

¹³ Cf. F. EISEMANN, "Arbitration under the ICC Rules", *International and Comparative Law Quarterly*, vol. 15, 1966, p. 732, E. J. COHN, "The Rules of Arbitration of the ICC", *ICLO*, vol. 14, 1965, p. 150, 153 ff.

¹⁴ E. J. COHN, *op. cit.*, p. 153.

¹⁵ Cf. T. M. de HANCOCK; *op. cit.*, p. 27.

¹⁶ Interesting facts on the actual choices in this matter are provided by de HANCOCK, *op. cit.*, pp. 30—31.

¹⁷ Cf. F. EISEMANN, "The Revised Rules of ICC Arbitration", *Yearbook Commercial Arbitration*, vol. 1, 1976, p. 169.

of instruction in the French procedure. The document shall be signed by the parties and the arbitrators and transmitted to the Court of the ICC.

The procedure defined by the ICC Rules shows a large degree of flexibility, it requires the observance of the principle of adversary trial. The proceedings may include the hearing of the parties in person, yet the case may be decided on the relevant documents alone. The provision of Article 14 provides that the cases should be examined within as short a time as possible by all appropriate means which however are not specified. The further provisions of the Rules indicate that what is meant by the means are the parties' written statements and documents, the hearings of the parties conducted in accordance with the principle of the adversary trial system (if requested by one of the parties) as well as the submissions of the witnesses and experts. When the parties agree to and request, the arbitrator can decide on questions of validity and authenticity of the documents (Art. 14, para. 3).

The Rules have no particulars with regard to the mode of the hearing of the witnesses, which enables the selection of any method that appears to be appropriate both for the countries with civil law systems and the Anglo-Saxon examination and cross-examination.¹⁸ The arbitrator is also invested with the power to put a witness under the oath, however the arbitrators' usual practice in this respect is to adhere to the relevant law of civil procedure (*lex loci arbitrationis*). The arbitrator may, of his own motion choose to hear the parties and any other person in the presence of the parties, provided they have been duly summoned. Moreover, the arbitrator has the power in all cases independently to choose to appoint one or more experts, define their terms of reference, receive their reports and/or hear them in person (Art. 14, para. 2). This provision covers both the legal and technical matters.

3. The Court of the Chamber of Commerce in Zurich

The Rules of the Zurich Chamber of Commerce represent another type of the regulation of procedural matters.¹⁹ The procedure of the arbitration conducted under the auspices of the Chamber is based on the 1977 Rules, which did not invest the parties with the right to choose the rules of procedure to be applied in the arbitral proceedings. The administration of evidence is conducted in accordance with the rules proper to the code of civil procedure of Zurich and the law of the system of administra-

¹⁸ Cf. F. EISEMANN, "Arbitration under...", p. 733; E. J. COHN, *op. cit.*, pp. 154—155.

¹⁹ Cf. *Die Internationale Schiedsgerichtsbarkeit in der Schweiz*, 1979, p. 89 ff. E. KÜSTER, "Zurich-Siege d'arbitrage international", *Revue de l'arbitrage*, 1982, p. 9 ff.

tion of justice of the canton. The court of arbitration may, but in a very rare case, decide to apply another procedure, especially pursuant to the rules of the Swiss federal law of civil procedure (Article 37 of the Rules). Thus, the afore-mentioned Rules fill all the gaps in the provisions governing the arbitral proceedings. However, the court of arbitration may in extraordinary cases decide differently, namely to fill the gaps in the procedural rules itself (Art. 41). Nevertheless the second sentence of the provision explicitly says that the court of arbitration is obligated strictly to adhere to the binding rules of the Swiss law, especially those with regard to the possibility of the lodging of appeals with the Supreme Court of the canton of Zurich from the award of the court of arbitration (Art. 241, para. 2 and 255 of the code of civil procedure for Zurich). Moreover, in either instance the parties shall be given opportunity to discuss the outcome of the administration of evidence. Zurich (the seat of the Chamber of Commerce) is to be the permanent place of arbitration.

The arbitral proceedings may, however, be pursued also in other localities (Art. 22).

The party submitting the complaint should, *inter alia*, identify the real and legal grounds for the lodging of the claim enclosing all evidence in its possession (Art. 29). The defendant party should, in response to the compliant, name the evidence it is going to employ and enclose the relevant documents in its possession (Article 30 of the Rules).

The trial shall be held as a rule, however the proceedings may be limited, depending upon the decision of the presiding arbitrator to the written communication.

Other Court

The rules of the majority of other permanent courts of arbitration operating in Western Europe are not so much concerned with the cognizance of disputes arising in the international commercial arbitration, although they too, have examined the ever-increasing number of such cases in the recent years. A good example in this context are the rules on the administration of evidence formulated in the rules of the Institute of Arbitration of the Stockholm Chamber of Commerce²⁰ which also apply to the settlement of commercial disputes between the USA and the USSR, and also the rules of the Vienna Court of Arbitration.

Under the Stockholm rules the law of civil procedure to be applied

²⁰ Cf. U. K. NORDENSON, "The Arbitral Proceedings in International Arbitration in Sweden", *Swedish and International Arbitration*, Stockholm 1984, p. 19 ff. R. SCHÜTZE, D. TSCHERNING, W. WAIS, *Handbuch des Schiedsverfahrens*, Berlin, New York 1985, p. 440 ff

is the Swedish law of arbitration with the supplements and changes stemming from the rules (Art. 5). Article 15 provides in turn, that the court of arbitration shall employ the mode of proceedings conformable to the wishes of the parties concerned. Oral examination of the case is to be the principle in the proceedings. The courts sets the timing of the individual acts of the arbitration proceedings. The court of arbitration may, especially during initial stage of the proceedings, authorize the presiding arbitrator to take all indispensable measures to do with the conduct of the proceedings. The claimant party and the defendant are obligated under Article 14 of the Rules to submit to the court of arbitration respectively in the complaint and the response the statements as to the principal evidence they are going to produce. The rules have no further provisions with regard to the administration of evidence, which means that the administration is to be conducted in line with the Swedish law of arbitration.

The recent years have seen the growth of the role, especially in the commercial East-West relations, of the Vienna Court of arbitration (Das Schiedsgericht bei der Bundeskammer der Gewerblichen Wirtschaft). This has become even more conspicuous ever since the Austrian law on chambers of commerce was altered in 1974. The operations of the Vienna Court are based on the rules issued in 1974 and altered in 1983.²¹

The rules provide for far-reaching powers of the parties in the establishment of the arbitration proceedings. In the event of the parties' failure to work out an agreement the decisions are taken by the arbitrators. The oral examination of evidence is to be applied on request of one of the parties (para. 21 of the Rules), in practice though it has been a commonplace. The arbitrators may, if they deem it necessary, demand the presentation of extra evidence or summon the experts for additional hearing.

II. The Rules of the Procedure in the *ad hoc* Arbitration

The need for the uniformity of the *ad hoc* arbitration has made it imperative for the different international organizations to draw up model rules of arbitration for the settlement of disputes. Until mid 1970s the following were employed most often in the settlement of commercial disputes: the Rules of the UN Economic Commission for Europe of 1966, the Rules and Terms of Conciliation drawn up by the UN Economic Commission for Asia and Far East of 1966, and the Rules of Procedure of the the Inter-American Arbitration Commercial Commission of 1969. In 1976 the UN

²¹ Cf. W. MELIS, "Das Schiedsgericht des Bundeskammer der Gewerblichen Wirtschaft", *Der Geschäftler*, 1975, p. 18 ff and 1983, p. 140 ff.

General Assembly approved the UNCITRAL arbitral rules whose practical applications have earned them substantial popularity. There are also more and more commonly employed in the arbitration.²² The UNCITRAL rules have also been adopted by the Inter-American Arbitration Commercial Commission with but only minor modifications.

1. The Arbitral Rules of the UN Economic Commission for Europe²³

Despite their relatively numerous provisions with regard to the judicial proceedings the rules include few provisions on the administration of evidence.²⁴ With respect to the potentiality of some matters remaining unsettled the Rules provide, unlike the ICC Rules, that the gaps are to be filled by the arbitrators at their discretion.²⁵ This difference is not as essential as it might seem to be on the face of it, for the national legislations invest the arbitrators with a large margin of freedom in the selection of the mode of proceedings they deem appropriate. After all the arbitrators are obligated closely to adhere to the absolutely binding rules of the law of the place of arbitration. Unlike the ICC rules the rules of the Economic Commission for Europe do not require a formal definition of the principles of the arbitrators' work. Under the rules of the Commission oral examination of cases is to be the established practice in the arbitral proceedings. It is only with the parties consent that the arbitrators may settle a dispute without holding an oral examination of the case (Art. 23). Article 22 provides, in its second sentence that the arbitrators should in all matters ensure the parties the opportunity of the presentation of their respective standpoints.²⁶ This concerns also the proceedings based solely upon documents, in which case the parties must be given the opportunity of the presentation of their respective submissions by written communication. In the course of the trial, in turn, each party has the right to comment upon all submissions of the other party.

²² For instance, the Soviet-American commercial agreement of 1977 included a provision instructing the inclusion in the arbitral clause in contracts concluded by subjects coming from the two States of a proviso stipulating the employment of UNCITRAL Rules.

²³ Cf., for example E. J. COHN, "The Rules of Arbitration of the United Nations Economic Commission for Europe", ICLQ, vol. 17, 1967; S. MATYSIK, "Arbitraż *ad hoc* według regulaminu Europejskiej Komisji Gospodarczej" [*Ad Hoc* Arbitration by the Rules of the UN Economic Commission for Europe], *Palestra*, 1975, No. 9, p. 44.

²⁴ This is discussed in detail by COHN, "The Rules...", p. 359 ff.

²⁵ In the event of absence of different provisions in the rules, the arbitrators shall be empowered to conduct arbitration in the mode they deem appropriate. They must, however, give the parties a fair hearing in keeping with the principle of equality (Art. 22).

²⁶ Give the parties a fair hearing.

The *Rules of the Economic Commission for Europe* include no provisions on the very essential question of whether the arbitrators are obligated to rely exclusively on the evidence submitted by the parties or they may, as the arbitrators do under the ICC rules, examine the case of their own motion. The rules of the Economic Commission permit the admission of evidence which has not been quoted by the parties in two events. Article 24 explicitly provides that the arbitrators may appoint an independent expert. They may do so even if the parties have already submitted another opinion or opinions. Likewise, the arbitrators are free to go beyond the evidence from the documents supplied by the parties and may require from a party the presentation of additional documents and submissions as well as set the timing for this to be done (Art. 24). In the view of Cohn²⁷ since the arbitrators may claim the presentation of additional documents and submissions irrespective of whether the parties have offered to submit them or not, they are also entitled to the admission of the submissions by witnesses who have not been summoned by the parties. On the other hand though, the arbitrators are not obligated to examine the whole of the evidence submitted by the parties. They have the right to selection of the evidence to be used in the examination of the case so as to focus on the part of it they deem indispensable for a prompt making of the final judgment. The court of arbitration may choose to carry out the whole of the proving procedure or authorize one of the arbitrators to examine the specific evidence. Although as many as 4 provisions of the rules are concerned with the trial, the rules have no provisions as to the mode of the conduct of the hearing of evidence. It is not specified, for example, who is to perform the hearing of the witnesses. This and other related matters are left at the discretion of the court of arbitration.

2. The UNCITRAL Rules of Arbitration

The rules²⁸ have not been adopted as an international convention. Their application is therefore purely contractual i.e. it is binding for the parties only when they declare in unison their adherence to the rules in the event of the emergence of a dispute. Moreover, the individual provisions of the

²⁷ E. J. COHN, "The Rules..." p. 964.

²⁸ Cf., for example B. von HOFFMANN, "UNCITRAL Rules für internationale Schiedsverfahren", *Recht der Internationalen Wirtschaft*, 1976, No. 1, P. SANDERS "Commentary on UNCITRAL Arbitration Rules", *Yearbook Commercial Arbitration*, vol. 2, 1977; J. PIRRUNG, "Die Schiedsverfahrensordnung der UNCITRAL", *RIW*, No. 9; J. JAKUBOWSKI, A. W. WISNIEWSKI, "Regulamin arbitrażowy UNCITRAL" [The UNCITRAL Rules of Arbitration], *Problemy prawne handlu zagranicznego*, vol. 3, 1979.

rules may be modified by the parties under the relevant agreement. Thus the parties' will to use the rules in the specific case of arbitration represents the source of the binding force of the rules. They may also be applied before the permanent courts of arbitration. The American Arbitration Association has stated for instance that it was willing to pursue its arbitration by the UNCITRAL rules.²⁸ Article 1, paragraph 2 of the rules also implies that the proceedings based on their provisions must not be inconsistent with the mandatory rules of the law applicable to the arbitration. This rule provides rationalization for the standpoint of the majority of judicature and the principal trend in the doctrine that despite the growing significance and the progressing consolidation of commercial customs in the international commercial arbitration such a mode of proceedings continues to remain *de lege lata* linked to and under a certain impact of the national law and that completely non-national proceedings are, for the time being, impossible. The wording of Article 1, paragraph 2 of the UNCITRAL rules indicates that in the light of their underlying philosophy, national law may recognize some of the rules of its law of arbitration as mandatory which consequently must not be excluded under the relevant agreements between the parties, whereas where other provisions are concerned the parties may enjoy full contractual freedom.³⁰ Thus having decided to adhere to the UNCITRAL rules in the arbitration of disputes the parties concerned exclude the application of the rules of the national law of arbitration except the mandatory rules.

Article 15, paragraph 1 provides that in keeping with the rules the court of arbitration may pursue arbitration in the mode it deems appropriate, however, the parties concerned should receive equal treatment, and at every stage of the proceedings either party should enjoy full freedom and have the opportunity to present its standpoint. This means that the arbitrators are not obligated to quote regulations of a particular national law of arbitration or the law of civil proceedings when confronted with the matters of procedure which are not covered by the rules. While some of the afore-discussed rules of permanent courts of arbitration provide for auxiliary application of the rules of a national law, the juxtaposition of Article 15 and Article 1, paragraph 2 leads one to believe that the UNCITRAL rules exclude the auxiliary application of the law.³¹ All the gaps and doubts arising in the course of arbitration pursued in accordance with

²⁹ Cf. J. M. RHODES, L. SLOAN, "The Pitfalls of International Commercial Arbitration", *Vanderbilt Journal of Transnational Law*, vol. 17, 1984, p. 21 ff.

³⁰ Cf. B. von HOFFMANN, *op. cit.*, p. 4 and PIRRUNG, *op. cit.*, p. 517.

³¹ K. H. BÖCKSTIEGEL, "The Relevance of National Arbitration Law for Arbitrations under the UNCITRAL", *Journal of International Arbitration*, 1984, p. 227.

the rules should be filled or removed by the arbitrators in the manner they deem most appropriate (which however does not preclude the possibility of lodging appeals with regard, for example, to the place of arbitration or another national law). A different view is held by P. Sanders, who in the commentary to Article 15 of the Rules says that the gaps are to be filled by way of reference to the law applicable at the place of arbitration, unless the parties have decided differently.¹²

The UNCITRAL Rules have, but few references to the national law of arbitration. Apart from the afore-mentioned event of mandatory rules the application of the national law is indispensable in two instances unless. First it is when a motion is tabled requesting the application of provisional security measures (Art. 26, para. 3); and second, indispensable is the fulfilment of the requirements of the national law with regard to the registration of arbitral award in the country in which it has been issued. This means that the rules are intended to bring arbitral proceedings pursued in conformity with their provisions as far as possible into international dimension.

With regard to the selection of the place of arbitration the rules stipulate that given the parties failure to choose the place of arbitration it is to be selected by the court of arbitration taking account of the circumstances involved (Art. 16, para. 1). The choice of the place of arbitration by the parties or by the arbitrators is essential, for the arbitration is conducted in keeping with the mandatory rules existing at the place where it is held. Thus, while the parties can hardly evade the consequences of the general correlation of arbitration and the mandatory rules of the place of arbitration, they can freely select, by choosing the place of arbitration, such national law of arbitration whose mandatory norms are, as they see it, most convenient.

The UNCITRAL Rules concerning the administration of evidence are quite laconic. One may easily infer from their substance that the evidence used in the particular part of the proceedings is required to be easily accessible to reflect the standpoints of either party and to be available for free examination. Under Article 24, paragraph 1 the burden of the proof of the quoted facts is to be shouldered by the party which refers to them to explain its claims or for the purpose of defence. Facts and evidence should be presented in the first place by the parties. The court of arbitration may, if it deems it necessary, demand even before the possible holding of the trial that a party should supply at the specified date a summary of documents and other evidence the party is going to produce to support

³² P. SANDERS, *op. tit.*, p. 176, cf. also the same author's, "Procedures and Practices under the UNCITRAL Rules," *The American Journal of Comparative Law*, vol. 27, 1979, p. 459.

the facts quoted as reasons for the lodging of a statement of claim or in response to a statement of claim. The court can thus obtain better information on the range of evidence the parties are going to produce and the methods of administration of the evidence to be employed already at the start of the proceedings. This is an attempt to bridge the gap between the continental and Anglo-Saxon systems. The court of arbitration is not obliged to, but it can collect complete information on facts and evidence at the parties' disposal already at the initial stage of the proceedings. Besides, the application of the principle of the conduct of proceedings in the presence of the parties concerned may be restrictive, for as part of arbitral proceedings the court of arbitration can claim the presentation at a fixed date of documents and other evidence. The UNCITRAL Rules have not gone as far as to provide for the court's of arbitration allowing *ex officio* the presentation of evidence, the practice permitted by the permanent courts of arbitration in the socialist countries. The rules only provide for approaching the parties concerned in that matter. The rules have no mention of the consequences of the parties ignoring such appeal. It is, however, to be assumed that the court of arbitration is entitled to take requisite measures when faced with the parties failure to prove the particular facts relating to the case. The rules also include an explicit stipulation that whether the proposed evidence is to be allowed or not is to be decided by the court of arbitration (Art. 25, para. 6). This means that the court need not accept the whole of the proposed evidence, if it decides that some aspects of the case have already been sufficiently explained.

The court of arbitration is to assess the proving which has already been done in accordance with the principle of free judgment of evidence. This is clearly implied by the wording of Article 25, paragraph 6 of the rules.

The Rules contain no critical remarks on the nature of the various types of evidence. It is certain though, that they allow the presentation of all types of documents which are perceived to be the principal evidence, as well as the conduct of the proving on the basis of the witnesses' submission, the expert's opinion and inspection. Where the proving based on the witnesses' submissions is concerned, the rules invest the court with complete freedom as to the mode of the conduct of the proving. This means that the court of arbitration is not obligated to stick to the mode of *legis loci processus* envisaged for the hearing of witnesses.³³ Thus a departure from the Anglo-Saxon methods of examination in chief and cross-examination can no longer be referred to as the grounds to blame the court for inadequate conduct of the proceedings. Thus the provision laid down in Article 25, paragraph 4

³³ Cf. J. JAKUBOWSKI, A. W. WISNIEWSKI, *op. cit.*, pp. 32—33.

of the Rules reflects the views received among the experts of international commercial arbitration. While, Article 25, paragraph 5 permits the application of the Anglo-Saxon institution of affidavit: a witness may provide evidence by supplying a written statement bearing his/her signature.

With regard to the experts' opinions, the rules clearly follow the continental pattern of this type of evidence: the expert acting as the court's assistant by the court's appointment. An expert (or experts) are thus appointed under Article 27 by the court of arbitration which also defines the subject of the expertise to be provided by the appointee/s/. The expert is obligated to supply his opinion by written communication and the parties concerned are to supply him with all information he needs as well as to allow the investigation of all necessary documents or items he requests. Potential disputes between a party and the expert as to the relationship between the requested information or item and the expert's opinion are to be decided by the court of arbitration (Art. 27, para. 2). Having received the expert's opinion the court of arbitration is to transmit a copy of the report to the parties which may comment upon it by written communication. Moreover, on request of one of the parties the expert may appear before court for additional hearing in which case the parties are allowed to ask him questions (Art. 27, para. 4).

However, the rules did not represent a full departure from the Anglo-Saxon concept of the expert witness, for Article 27, paragraph 4 permitted the presentation by either party during the trial of such expert-witnesses who would come up with submissions with regard to the matter of the case under examination. The mode of their hearing should be the same as that employed in the hearing of witnesses.

The individual evidence may be produced beyond the place of arbitration. Under Article 16, paragraphs 2 and 3 of the rules, the court of arbitration may hold a session at any place they deem appropriate in consideration of the circumstances relating to the case, in order to conduct the hearing of witnesses, examine the documents, goods or other items. The court of arbitration may also decide that the hearing of witnesses should be executed at any place external to the state which the parties or arbitrators have selected as a place of arbitration. Should this be the case though, it is to be remembered that the proving to be done in another State should be done in conformity with the mandatory rules of the court concerning arbitration.

III. UNCITRAL Model Law on International Commercial Arbitration

This final part of the present paper is concerned with provisions on administration of evidence contained in the UNCITRAL Model Law on

International Commercial Arbitration.³⁴ The final decision by the Commission of International Trade Law with regard to the making of choice between the proposal of an international convention and the unified law emerged from a considerable hesitation. The decision was in favour of a model law permitting the individual states to introduce uniform solutions as to the relationship of international commercial arbitration and domestic law.

The UNCITRAL model law invests the parties with full freedom in the selection of procedure to be employed at the court of arbitration. The norm providing for the equal treatment of the parties and their right to unrestrained presentation of the viewpoints on the case (Art. 18) was brought into prominence among the other rules. It was stipulated that in the event of the absence of an agreement between the parties the court may, in keeping with the relevant provisions of the model law, conduct arbitration in a mode it deems appropriate (Art. 19). The provision also explicitly provides that the powers of the court relate to permissibility, adequacy and relevance of each piece of evidence. The wording of this rule is not very lucid but it may well be assumed that given the absence of a different agreement between the parties it permits also the court *ex officio* allowing the presentation of evidence.

Where the place of arbitration is concerned the model law provides for the parties freedom to select it. It also authorizes the court of arbitration to make the decision given the absence of the relevant agreement by the parties.

Since the model law is to be a basis for the establishment of the individuals national legislations, it has no regulations as to the question of the consistency of the rules of the court with the mandatory rules *lex loci arbitrationis*, but only lists the circumstances in which a State court may interfere in the arbitral proceedings. The provisions of the model law imply that the place of arbitration is the factor responsible for the choice to adhere to the model law. It is therefore the place of arbitration that determines the selection of the law to be applied in the arbitration and defines the scope of competence of state courts to interfere in the course of the proceedings.³⁵ By pointing to the State courts' competence

³⁴ Model Law was adopted by the UN Commission of International Trade Law on 21 June, 1985. Cf. for example, J. SZASZ, "Introduction to the Model Law of UNCITRAL on International Commercial Arbitration", *Rassegna dell'Arbitrato*, vol. 24, 1984; K. H. BÖCK-STIEGEL, "Das UNCITRAL-Modell-Gesetz für die internationale Wirtschafts-Schiedsgerichtsbarkeit", *RIW*, 1984, No. 9, and T. SZURSKI, "Projekt prawa modelowego w sprawie międzynarodowego arbitrażu handlowego" [Draft Model Law of International Commercial Arbitration], *Problemy prawne handlu zagranicznego*, vol. 10, 1986.

³⁵ Cf. Report of UNCITRAL Working Group, Doc. A/CN 9/246 of 6 March, 1984. *Rassegna dell'Arbitrato*, 1984, para. 167, p. 104.

to perform certain functions in the course of arbitration e.g. in Article 34, paragraph 2. The model law recognizes the right of the State court to reversal of an arbitral award in the event of the emergence of the circumstances specified in the provision, including also a party's inability to present its viewpoint, the inconsistency of the arbitral procedure with the parties' agreement and the rules of the model law the parties have failed to exclude, and also the inconsistency of the award with the public order. All this leads one to believe that although the model law is undoubtedly intended to ensure for a continued internationalization of the arbitral proceedings and to restrict the dependence of the proceedings upon the rules of the court applicable at the place of arbitration, it provides for no complete exclusion of the links with rules, seeking only to settle the matters of procedure within the framework of the model law. This prompts the conclusion that the drafters of the law decided to stick to the approach that since international arbitration is not a supranational procedure it must provide for definite, real correlation with the national law.³⁶

As regards the presentation of evidence at the initial phase of the proceedings, the model law does not establish the obligation to quote evidence in the statement of claim or in the response to the statement of claim. Under Article 23 of the model law, the parties may, but are not obligated to, enclose the relevant documents and quote documents or other evidence they are going to employ in explaining their respective positions on the case.

In comparison with the afore-discussed rules of permanent courts of arbitration the provisions on evidence and administration of evidence contained in the model law are more elaborate. They are extensive regulations of Article 24 (the hearings and proceedings carried out by written communication), Article 25 (consequences of non-appearance of the parties), Article 26 (an expert appointed by the court of arbitration) and Article 27 (the State court's assistance in the production of evidence). Moreover, Article 20, paragraph 2 permits, unless the parties choose differently, the hearing of witnesses, experts, the parties, inspection of goods or items, examination of documents beyond the place of arbitration, or at any other place the court of arbitration deems appropriate and suitable.

The model law in all the afore-quoted rules and regulations underlines the priority of the autonomy of the parties' will — unless the parties decide differently. An adjustment of the model law will thus only be necessary in the event of the absence of a different agreement by the parties or when the particular provisions of the model law belong to the category that may be excluded under a relevant agreement of the parties. The

³⁶ Cf. J. SZASZ, *op. cit.* 10.

category includes the provisions which have no proviso that the parties may decide differently.

The court of arbitration decides, unless the parties adopt a different procedure, whether the trial is to be held or the proceedings are to rely upon examination of documents and other materials. However, even when the parties decide that the proceedings are to rely upon documents, the court of arbitration may hold on request of a party a session for the presentation of evidence or the hearing of reasons (Art. 24, para. 2).

The court of arbitration may also, unless the parties decide differently, appoint an expert or experts for the purpose of the presentation of opinions with regard to the questions indicated by the court. The court may instruct the parties to provide the expert with the needed information or to supply or make available the relevant documents, goods and other items for inspection (Art. 26, para. 1). Given the absence of a different arrangement by the parties, on request of a party or when the court of arbitration deems it necessary an expert having supplied an opinion in writing or after presenting an oral report should take part in the trial in the course of which the parties can ask him questions and summon witnesses and experts in the particular aspects of the dispute. This provision represents another example of an attempt to bridge the gap between the concept of common law and civil law countries.

The arrangements the model law provides for may in practice operate properly when the parties settle all procedural details. The heretofore record of international commercial arbitration indicates though, that the parties rarely work out detailed regulations with regard to the different aspects of the arbitral proceedings. In spite of the relatively large number of procedural regulations the model law does not fully decide all the matters of procedure. As a result of this imperfection the arbitrators will often be shouldering the responsibility of the management of these matters. It may, however, be legitimate to fear that the arbitrator's nationality, meaning also his affiliation to a particular legal system or a family of laws may prove crucial to the course and nature of the administration of evidence and also prove to be responsible for its similarity to one or another national system of proving.

For all these qualifications the model law may, when adopted by the legislations of the individual States, lead to a real unification of the rules of operation of the international commercial arbitration.³⁷ Also, the present work on reform of civil procedure ongoing in this country offers the

³⁷ The model law has recently been adopted by the Canadian Law (of the Quebec and Columbia provinces).

opportunity of seeking a large-scale adjustment of the provisions of the Polish law to the model law. Part III of the Polish code of civil procedure seems to be the right place to be supplemented by the new book of rules governing developments in the subject-area under discussion.

Independence of the International Civil Servants

by GENOWEFA GRABÓWSKA

International administration is the realm that presents unique evidence corroborating the wisdom of the saying: "Like the official like the administration". Hence a proper selection of officials often proves crucial to the subsequent operations of the whole of an international organization. Before becoming officials of international secretariats they were, by virtue of their citizenships subject to the exclusive authority of their respective States. One could, therefore, wonder whether an official taking up a job in an international organization continues to remain under control of the State from which he comes or on the contrary, now being an official of an international administration he can enjoy full independence, or perhaps becomes a "servant of two masters", i.e. his State and the organization. Majority of those interested in the evolution of the international public function speak out in favour of the second option arguing that it is the principle of the independence of the staff that is crucial to the effectiveness of the organization.

The concept of the independence as referred to international civil servants means that in the discharge of their responsibilities they shall not be subject to or submit to an influence of any kind exerted by their own respective States, other States as well as any authority external to the organization.

1. A History of the Independence

1. League of Nations

International civil service originated with the nascency of the League of Nations but the Covenant of the Organization had no mention of the international composition of its Secretariat. The rules governing the selection of the officials of the League were formulated only in the course of the operations of the Organization. It was as early as 1920 that Lord A. Balfour wrote in a report submitted to the Council of the League:

“... the members of the Secretariat once appointed are no longer the servants of the country of which they are citizens but become, for the time being, the servants only of the League of Nations. Their duties are not national but international”.¹

This approach was re-affirmed in the Staff Regulations of the Secretariat of the League of Nations, adopted in 1922. Article 1 of the Regulations binding the officials down to act exclusively for the benefit of the Organization forbid them to seek or receive instructions from any government or authority external to the Secretariat of the League.² It was also stressed that the officials of the League were to be perfectly impartial and uncommitted in the discharge of their responsibilities. They were expected to collect information and compile documents as well as to form foundations for the making of decisions but “without suggesting what these decisions should be”.

The independence of the officials of the League was also to be ensured by the international composition its Secretariat. Had one or a number of States outnumbered the others therein, the impartiality of the international civil service would have been gravely imperilled and a group of privileged State would inevitably have been given the opportunity indirectly to affect the operations of the whole of the Organization. To prevent this the Regulations of the Secretariat of the League established under Article 15 and 16 the priority in the recruitment of the staff for the citizens of the States that had not had “their” representatives in the Secretariat until then. It was even proposed that a principle of equitable geographical representation³ should be adopted to set a proportion of the seats in the Secretariat to the size of a State, the number of its population or the size of the membership dues to be supplied.

The efforts by the individual States to include in the Secretariat a maximum number of their citizens reflected most of all the States’ contention for the reinforcement of their standing and prestige in the League, but were not aimed at the solidifying of the independence of the Organization’s officials.⁴ The over twenty-year-old records of the League reveal that the

¹ *League of Nations, Official Journal*. June 1920. vol. I. p. 137.

² Staff Regulations of the Secretariat of the League of Nations. Geneva 1945. see also Dag HAMMARSKJÖLD, *The International Civil Servant in Law and in Fact*. Oxford University Press 1961, p. 5.

³ A relevant proposal was first submitted to the 4th Committee of the League’s Assembly in 1921 by William Meyer the delegate of India. see S. BASDEVANT, *Les fonctionnaires internationaux*, Paris 1931, p. 143.

⁴ One may point here to the glaring example of the behaviour of the fascist Italy and Germany towards their citizens acting as officials of the League — see M. BEDJAOUI, *Fonction publique internationale et influences nationales*, Paris 1958, p. 68; A. PLANTEY, *Droit et pratique de la fonction publique internationale*. Paris 1977. p. 113.

pattern of the independent international civil servant was strongly desired and fully approved of, most of all by the staff of the League and the States that had already brought large numbers of their own citizens into the Secretariat.

2. The United Nations

The Charter of the United Nations reaffirms the principle of the exclusive liability of the Secretary General for the work of the Secretariat responsible to him and the Secretariat's duty to submit to the exclusive authority of the Secretary General.⁵ The independence of the staff of the Secretariat (in particular their exemption from the possible pressure of the member-States) is additionally safeguarded by such privileges and immunities as are necessary for proper exercise of their functions in connection with the Organization. (Art. 105, paragraph 2 of the UN Charter).⁶ This could be the only instance in international law of a privilege being accorded potentially to serve to protect a person from the pressure of his own State, which is the case when there is a conflict between an official of an organization engaged in the discharge of his international functions and his State seeking to make him protect a national interest.⁷

The position of Secretariats in the structure of the organizations just like their internal arrangement is intended to highlight their fully independent and international character. Secretary General of the UN is referred to, for instance, as "the chief administrative officer of the Organization" (Art. 97 of the Charter) in which capacity he acts in the meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council (Art. 98 of the Charter). Moreover, he may bring to the attention of the Security Council "any matter which — in his opinion — may threaten the maintenance of international peace and security" (Art. 99 of the UN Charter). Considering the broad power the Secretary-General was invested with, he must also possess such

⁵ Similar provisions can be found in the regulations of specialized organizations — see for instance Articles 8 and 9 of the ILO Constitution; Articles VII and VIII of the FAO Constitution, Article VI of the UNESCO Constitution.

⁶ Cf. also Article 67 of the WHO Constitution, Article 19 of the UNESCO Headquarters Agreement; or Article XIII of the FAO Headquarters Agreements.

⁷ Wilfred Jenks, the English lawyer made this firm assertion as early as 1943: "It is no part of the duty of an international official to protect or advance the interest of his country of origin; that is the duty of the responsible representatives of that country on policy-making bodies, and of its permanent representatives accredited to the international institutions in question". See R. S. JORDAN, J. P. RENNINGER, "The Changing Concept of the International Civil Service", in: *The International Civil Service. Changing Role and Concepts*, New York 1980, p. 2.

a scope of freedom and independence as is necessary for the discharge of his statutory responsibilities. The UN Charter gives legal form to the customary wording of the principle of independence with additional adjustment of its substance to the needs and conditions in which the contemporary international civil service operates. Article 100 of the Charter provides that in the performance of their duties, the Secretary-General and the staff shall not seek or receive instruction from any Government or from any other authority external to the UN. They shall refrain from any action which may reflect on their position as international officials responsible only to the UN.

Each member-State of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary General and the staff and not to seek to influence them in the discharge of their responsibilities.

This provision both defines the scope of independence of the officials of the organization and lays down the rules binding them to observe the principle of independence. The principles defined in Article 100 of the Charter are absolutely binding norms and as such must not be excluded or altered differently than under a legal act equal in rank to the UN Charter.⁸

The question of the interpretation of the principle of independence has also been commented upon by officials of international organizations. It was first raised by Albert Thomas, member of the French cabinet, who later became Director of the ILO office. An unquestionable patriot, Thomas attempted to draw a line between the duties an official has to his native country and international responsibilities confronting him as an official of the organization. He got a good opportunity to make his point on this question when the Permanent Court of International Justice was to give an advisory opinion on the ILO scope of competence. Thomas addressed the Tribunal to present, as Director of the Office, the Organization's opinion including the reasons invalidating the standpoint of the French government. Among the remarks he made were the following:

“[...] Although I am an international official, I cannot forget my nationality. Being French, I cannot forget that it is the Government of the French Republic which has requested an opinion. Members of the Court are better able to understand than any one else what my sentiments are on such an occasion. But as Director of the International Labour Office and moreover in this particular case as Secretary-General to the Conference, I represent the interests of this great Organization and moreover as regards any anxiety which might be caused by my own individual sentiments, I have enough confidence in

⁸ Almost all specialized organizations adopted a similar definition of the principle of independence of the Chief of an organization and its Secretariat.

my compatriots [...] in their love of truth and justice [...] to appear before you with a tranquil conscience [...]”.⁹

A similar message was conveyed to the representatives of the staff of UNESCO by M. Maheu the organization’s Director-General: when he said:

“[...] It is a grave error to believe that international service requires you to forget, or worse, to repudiate your respective countries. If we are international, it is not because of the effects of a particular nature, but it is because of our work, or function. Our work, our function, our point of view are far from being incompatible with what we are by our nationality, and it is our privilege to proclaim here all that is universal in our different cultures and our national histories. Far from being without a country, we belong, on the contrary, to all countries”.¹⁰

Both of these statements reveal the awareness of the grave dilemma confronting international officials. When faced with a conflict of national responsibilities *versus* international obligations, an official ought to bear it in mind that as a member of an international body he is expected to handle specific international tasks, and his mission is to serve all States sometimes even at the cost of the abandonment of the protection of the interests of his own country.

The native States of the officials should, realising how unique and difficult their roles are, assist them in the performance of their international tasks and not hamper their work by exerting pressure and insistence that they should favour national interests.

II. The Present-day Practice

1. The Safeguards of the Independence

For all the explicit acknowledgement of the concept of the independence of international officials in the rules and regulations of the different organizations, it has not been always adhered to in the practical activities of States. This very fragile institution has proved to be extremely vulnerable to the adverse effects of the times characterized by increased political tension. The abnormalities in the adherence to the principle of independence have always occurred in the two realms; the relations between an organization and a Member-State with respect to the recruitment of the officials, and in the tripartite relations: between an official, his State and the administrative authorities with respect to the discharge of the function i.e. the employment of an official in the organization.

⁹ F. WOLF, *The International Civil Servant*, Geneva 1967, pp. 14—15.

¹⁰ *Ibid.*, p. 15.

The independence of officials in the course of the recruitment is sufficiently safeguarded by the constitutions of the individual organizations which provide for the exclusive responsibility of the chief of the organization for the composition of the Secretariat. However, neither constitutions nor staff rules and regulations provide for the States' participation in the recruitment of the personnel. Despite the absence of such provisions there are ways in which the member-States of the organizations can take part in the recruitment of the personnel. It is not an uncommon behaviour of States to exert pressure upon not only their candidate for the post of an official but even upon the administrative chief of the organization in order to push their national interests through. This is the case when, for instance, an organization is looking for candidates for future officials among the civil servants of the individual states, which is not a typical mode of recruitment but it has already been employed by some organizations.¹¹ It is natural that since the organizations can hardly do the recruitment work themselves the job is readily done by the individual member-States. The full approval of cooperation of States and organizations in this field should be coupled by the taking of measures designed to ensure that the States' behaviour in the preparations for the recruitment be characterized by the absence of any sign of partiality and that it be aimed at recommending the candidates who could best serve the organizations' objectives rather than show useful in the pursuit of their native states' interests.

A State may also exert pressure upon the organization demanding that it should increase the number of officials from the relevant country by resorting to an interpretation of the principle that "the staff of the Organization should have an international composition and that its basis would be as geographically broad as possible" (Art. 101, para. 3 of the UN Charter, Art. VIII, para. 3 of the FAO Constitution). Such claims of States have even been endorsed in a number of resolutions adopted by the UN General Assembly instructing the Secretary General that the under-represented States¹² should be favoured in the selection of staff for the Secretariat. Some States tend to see the principle of "equitable

¹¹ P. TAVERNIER, "Les accords de recrutement des fonctionnaires des Nations Unies par voie de concours", *Annuaire Française de Droit International*. 1980. p. 503; Y. CHAPEL, *Formation et perfectionnement des fonctionnaires internationaux et européens*. Bruges 1975. p. 47.

¹² J. O. JONAH, "Independence and Integrity of the International Civil Service: The Role of Executive Heads and the Role of States", *Journal of International Law and Politics*, 1982. p. 847; it is to be deplored that the group of under-represented States comprises all the socialist States. see R. BARNES, "Tenure and Independence in the United Nations International Civil Service", *Journal of International Law and Politics*. 1982. pp. 774—775.

geographical distribution” almost as a gauge governing the employment policy in the organizations’ Secretariats. They keep relevant records¹³ to compare the percentages of their own officials’ employment in an organization with officials coming from other States. These are used for sending warnings to the Secretaries of the organizations notifying them about the possible upsetting of the numerical parity and demanding the restoration of the desired proportions.

It is therefore to be explained now whether the constitutional rules with respect to “geographical distribution” (e.g. Art. VI. para. 4 of the UNESCO Constitution, Article VII, para. D of the IAEA Statute) provide for the possession by the States’ concerned of the relevant rights. In other words, it is the question of whether States can approach the Secretary of the given organization requesting the raising of the employment quota for their citizens, or to the contrary the provisions with respect to the equitable geographical distribution are referred exclusively to the Secretary of the organization with a view to facilitating his selection of a multinational composition of the Secretariat. As is known the Secretariat is a working administrative body and not a body performing the functions of representation. Its composition is determined most of all by the professional skills of the staff, while the criterion of the geographical distribution of recruitment sources is only taken account of when allowed of by the existing circumstances.

It is therefore natural that States ought not to insist that the Secretary of the given organization should raise employment quota for their citizens. Consequently resort to pressure of any kind is particularly inadmissible as means of seeking the fulfilment of such aspirations.

The type of contract to be made with an official and the duration of his employment in the Secretariat of the organizations is also decided upon by its Secretary (or Director) General. However, the member-States hold the view which is not exceptional, that it is them that should decide the type of contract and duration of employment of their citizens beyond the individual countries. Such positive “overlapping of competence” quite frequently gives rise to practical conflicts.¹⁴

Candidates for the post of the official are mostly (when employed in an international organization for the first time) public officers. An officer solicitous about the progress of his career shall only take up a job

¹³ J. A. SALMON. “La pratique du pouvoir executif,” *Revue Belge de Droit International* vol. 2, 1981—1982, p. 687. The writer quotes remarks by the Belgian Minister of Finance on: “Proportion de citoyens belges employés dans divers organisations internationales”.

¹⁴ D. RUZIÉ, “Le non-renouvellement des contrats à durée déterminée et l’ingérence des États (A propos de l’affaire Balio)”, *Annuaire Française de Droit International* 1972, pp. 378—391.

in the Secretariat of an organization having received the relevant permission of his former employer: the State. It is the State that decides whether the permission is to be of unlimited duration, or stands over a definite, short period, after which the official must either apply for extension of the permission, or give up the job in the organization altogether. States are generally more willing to grant their citizens permissions for employment of limited rather, than unlimited duration in the organization. Socialist States usually refuse to agree to their citizens' employment in Secretariats of organizations under permanent nominations¹⁵ explaining their decisions by pointing to their concern about the maintenance of the officials' ties with their mother-tongues, culture and national tradition as well as their being indispensable as officials for their individual States' civil services. The legal device of secondment has been established for the purpose of managing such cases.¹⁶ A State delegates its citizen to work for an organization which temporarily entrusts him with performance of international tasks. The position of an official delegated only for a year or two to work for the organization is quite different both in psychological and even political terms than the position of an official holding the permanent employment. A delegated official can hardly be expected fully to subordinate his sentiments and national interests to international interests of the entire organization once his recent past was, and imminent future will be strongly determined by his obligations to the national administration. The scope of independence of such an official is indirectly proportional to the power of the impact exerted by his State. In other words: the shorter term of secondment and the stronger the State's pressure, the smaller scope of independence of the official. Still to say that the institution of secondment should not be employed at all, appears to be too far-going a judgement.¹⁷ A reasonable number of delegated officers are needed by an

¹⁵ T. MERON, "In RE Rosescu and the Independence of the International Civil Service", *American Journal of International Law*, vol. 4, 1981, p. 924.

¹⁶ Secondment is not defined either in the statutes or staff rules of the relevant organizations. The nature of the institution is defined somewhat more precisely by two judgments of the UN Administrative Tribunal: UNAT Judgment No. 92, on the case of Higgins of 1964; and UNAT Judgment No. 192 on the case of Levic of 1974. The secondment involves a tripartite arrangement binding the three subjects: the State, the organization and the official. Under the arrangement a State, as the permanent employer consents to its citizen's taking up a temporary job in the organization. When the term of the secondment expires the permanent employer (the State) is obligated to re-employ the former officer — see D. W. BOWETT, "Tenure, Fixed Term, Secondment from Governments: The United Nations Civil Service and the European Civil Service Compared", *Journal of International Law and Politics*, 1982, pp. 799—804.

¹⁷ Dag HAMMARSKJÓLD, *op. cit.*, pp. 18—19.

organization especially for the performance of its highly specialized tasks not infrequently requiring technical or diplomatic skills.

Besides, the pressure of States can be observed not only in the course of the recruitment of the personnel but also during the officials' discharge of their functions within the organization, and especially with their attempts to extend their contracts for a specified term. Actually, it is only the officials holding termless job in the organizations (permanent contracts provided for e.g. by Regulation 104; paragraph 13 of the UN Staff Regulations, or by Regulation 104, paragraph 7 of the UNESCO Staff Regulations who can successfully withstand the pressure of their individual States. While the renewal, or extension of the contract of an official appointed for a specified period always requires in each such case the consent of the officials native State. That such consent is required when an official delegated temporarily to work for an organization wants to have his contract renewed is legitimate or even indispensable. Yet, demanding the State's consent in other cases is rationalized neither by the organizations' rules nor by their practice.

The record of the United Nations and of the specialized organizations clearly demonstrates that the Secretaries (or Directors) General of the organizations refuse to renew a contract given the absence of approval by the official's native State. When in doubt as to whether the consent was necessary or not, the chief of the administration would choose to act cautiously and refrain from the taking of measures threatening deterioration of the organization's relations with the given member-State. While, in the case when the Administrative Tribunal would find an error underlying the refusal to let the official have his contract extended the official could well hope for at least a generous compensation.¹⁸

The requirement that a State should consent to the extension of an official's employment in an organization was sanctioned in the judicial decisions of the Administrative Tribunals¹⁹ and consequently established as an additional, non-statutory condition supplementing Article 101, paragraph 1 of the UN Charter concerning the employment of the staff of the UN

¹⁸ For instance ILO AT, Judgment No. 191 on the case of Balio of 1972, ruled the alternative of renewing the relevant contract for another 3 years, or the payment of the indemnity of FF 100,000 — see D. RUZIÈ, *op. cit.*, p. 390.

¹⁹ A similar spirit seems to have underlay Judgment No. 192 by the UN Administrative Tribunal on the case of Levic of 1974. The ruling was commented upon as follows in the literature of this subject-area: "This statement of the tribunal suggests approval of the practice requiring governmental consent for the extension of the term of an official on secondment, which, in effect gives governments a veto power over extensions of such appointments" — see T. MERON, "In RE Rosescu...:", p. 918.

Secretariat. The establishment of this new principle and its introduction into the practice of the organizations appears to have restricted not only the independence of the officials but also, in a sense, the right of the organization's Secretary freely to select the members of the Secretariat.

2. The Threats to Independence

Additional remuneration offered by some States to their citizens acting as officials of international organizations represents a special threat to the officials' independence and impartiality. Such a situation involves the two sides' behaviour inconsistent with the rules of the international public function. On the part of the State it is the offer of an actual presentation of reward to the official,²⁰ and on the part of the official it is the acceptance of such reward, gift or another "tangible proof" of the State's benevolence to its citizen.²¹ Such practice was resolutely opposed by the Federation of International Civil Servants' Associations on the grounds of its representing a threat to the independence of international civil service. The Organization also demanded that the General Assembly and the UN Secretary General should promptly take measures aimed at curbing the practices.²²

The FRG, Japan and the United States were the first to offer additional remuneration to their citizens working for international organizations.²³

The rules approved by the Bundestag in 1979 provided that the German citizens employed in international organizations can upon the presentation of an appropriate application obtain additional remuneration of 80 per cent of the difference between the pay of the organization's official and that of a German Federal or State civil servant posted abroad. The granting of the right to the additional remuneration was coupled by the clause stating that it should be considered with every single case if the Federal Republic has a special interest in paying such compensation.²⁴ These regulations may have been intended to make the German citizens more willing to take up jobs in international organizations.

The domestic legal regulations of Japan provided as early as 1970 that civil servants could throughout their employment in an international

²⁰ E.g. Article 58 of the ICAO Convention, Article VII of the IAEA Statute; Article 37 of the WHO Constitution.

²¹ E.g. Article 1—6 of the Statue and provision 101 8 of the UNESCO staff rules; Article 1—7 of WHO staff rules.

²² J. O. JONAH, *op. cit.*, pp. 845—846.

²³ T. MERON, "Status and Independence of the International Civil Servant", *Recueil des Cours de l'Académie de Droit International*, 1980-11, p. 323.

²⁴ *Ibid.*

organization receive in Japan a pay not higher than their previous remuneration. In practice, however, the rule was adopted that the size of the additional remuneration paid to an official of an international organization would amount to 70 per cent of the pay he received in Japan. The US government seeking to encourage the country's civil servants to take up jobs in international organizations established the device of equalization payment: the difference between the pay of the organization's official and remuneration the person concerned is entitled to as a public officer. The equalization payment is offered to the person who having completed service in an international organization starts over as an employee of the State civil service. It also needs noting that in the US and Japan additional remuneration can only be granted to person delegated to work for international organizations, whereas in the FRG all citizens acting as officers of the organizations are entitled to such a reward.

It is difficult to establish whether these three States only show so much concern about the well-being of their citizens acting as civil servants in international organizations. There are important reasons²⁵ to believe that other States too offer "their" officers fringe benefits which are not always formally announced.

Since international organizations provide pay schemes²⁶ which by all standards are exceptionally attractive it seems that the competitive payments from the State dramatically bloating the volume of the officials' earnings may evoke concern over their actual independence. The afore-quoted principle that an official must not "serve two masters" should also apply in judging the acceptance of rewards from two, in a sense, competitive sources, and consequently prevent civil servants from taking advantage of the opportunities arising in this respect. An identical opinion was expressed in 1980 by International Civil Service Commission (ICSC) which additionally pointed out that "there was no economic justification for supplementary payments".²⁷

International law explicitly denounces the offering of supplementary payments to international civil servants, proceeding from the assumption that they represent a breach of the principle of equality of officials of the organization and also a restriction of their independence. Still the States concerned continue systematically to supply the civil servants with supplementary

²⁵ See, Report of the Special Committee for the Review of the United Nations Salary System, *General Assembly, Official Records*, XXVII Session, Supp. No. 28/A/8728 at 153—154; T. MERON, "Status...", p. 324.

²⁶ See for instance R. SZAWLOWSKI, *Les finances et le droit financier d'un organisation internationale intergouvernementale*, Paris 1969, pp. 76—87.

²⁷ T. MERON, *Status...*, p. 325.

payments contending that this behaviour is not only fully legal but also legitimate. They proceed from the assumption that the problem of the treatment of their own citizens belongs to the scope of internal competence of each State. Moreover, since such behaviour does no harm to anyone, while on the contrary represents a source of significant income for the officials, then pursuant to Article 2, paragraph 7 of the UN Charter there are no grounds for an organization to intervene or interfere in internal affairs of the donor State, an even more inadmissible as the States concerned see it, type of behaviour. It seems that the UN General Assembly should feel compelled by practice under discussion and the continuation of the dispute between international organizations and some States as to the priority of international norms over the internal ones to transmit the matter to investigation by the International Court of Justice.

*

* *

The tradition of the independence of international civil servants is neither too old nor fully solidified. This is not to be wondered at considering that it is said to have originated from the principle of independence of civil service which, as is known has not been included by all States in their legal systems.

Some safeguards of the independence of officials were laid down in the first place in the constitutions of the Organizations — the documents defining the specific obligations to be fulfilled by the parties concerned. In formal-legal terms the safeguards provide sufficient groundwork for the creation of independent international civil service. The practical experience, however, has shown that the officials are faced with the risk of a loss or significant restriction of their independence in at least two situations.

When a State resorting to pressure, attempts to use the officials' international status for the pursuit of its own interests and when the officials' nomination and subsequently renewal of the contract with the organization depend upon the relevant consent by the State. However the inference that a complete independence of an official may only be ensured by offering him a "permanent" appointment appears to be an oversimplification. Permanent employment obviously boosts the personnel's sense of security and independence but this can hardly be guaranteed. It seems that whether staff of an organization choose to and can use their independence or not depends upon the style of the operations of the organization, its position in the world and its behaviour towards the States concerned.

However, while the provisions of international law resolve the problem of the independence of the officials unambiguously pointing to the organization

as a sole employer to which an official is subordinated, the international practice shows substantial departure from this pattern. States refuse to give up (and they may hardly be expected to choose to act differently) attempts aimed to participate in the recruitment of the officials, who when finally on their jobs in an organization, are often reminded by their States of the duties they are expected to fulfill as their citizens. Besides, such pursuits are often given good rationalization to,²⁸ for States take pleasure in quoting their noble intentions or even the principles of international law (e.g. the principle of equality).

Thus the applicability and effects of the principle of the independence of officials show marked dichotomy of international theory and praxis; of the interest of an organization seeking to ensure its officials and independent position, and the interests of States seeking to include in the Secretariats of the individual organizations maximum numbers of their citizens in order to use them to affect the operations of the organizations. In practice the scope of the independence of the officials is most likely to prove to be a resultant of the conflicting aspirations of these two subjects: the State and the organization.

The contradictions may either evolve into conflicts or be removed by way of diplomatic pursuits, depending upon the sides concerned ability to display tactful and politic attitudes.

²⁸ One of the quoted reasons is, for instance, national security or "vital interest" of a State. Worth noting in passing is also the disgraceful record of the United States in the Me Carthy era including the proposed checking of the national loyalty of the citizens employed in international organizations — M. BEDJAOUÏ, *Fonction...*, p. 70

Jurisdiction of States in Outer Space

by RYSZARD HARA

The right to exercise jurisdiction over persons, property and acts which are found or which take place within the confinements of its territory, is one of the basic prerogatives of every State. In municipal law, the notion of jurisdiction is usually defined as a power or authority of a court to render a valid judgment in any case that is properly presented.¹ In international law, this notion embraces a number of judicial, legislative and administrative powers of a State to regulate the rights and obligations of its citizens and to determine the legal status of its objects.² In other words, it is the "accumulation of particular rights"³ which allows any State to take unilateral action, valid with respect to other States. Jurisdiction should be therefore considered as a basic attribute, upon which States exercise their "fundamental powers" as subjects of international law/

Although there exist a close and direct connection between jurisdiction, as defined above, and the concept of sovereignty these notions should not be identified. The former is only one of the elements of the latter or rather, it is the form of manifestation of sovereignty and does not exhaust all the prerogatives of sovereignty which is often referred to as "supreme authority over people, resources and institutions".⁵ It should also be pointed out here

¹ E.g. D. M. WALKER, *The Oxford Companion to Law*, 1980, p. 678; J. A. BALLANTINE, *Law Dictionary*, 1948, p. 707.

² See e.g. BROWNLIE, *Principles of Public International Law*, Oxford 1973, p. 291.

³ *Ibid.*, p. 110.

⁴ M. LACHS, *The Law of Outer Space*, Sijthoff-Leiden 1972, p. 69.

⁵ S. GOROVE, "Sovereignty and the Law of Outer Space: Re-examined", *Annals of Air and Space Law*, vol. 2, 1977, p. 312; See also V. S. VERESHCHETIN, who states that "The Soviet doctrine of international law prefers the interpretation, according to which the notions of sovereignty and jurisdiction do not have the same meaning, though they are closely interconnected. The extent of rights and powers derived from jurisdiction is more restrictive than that implied by sovereignty as a whole", "Legal Status of International Space Crews", *Annals of Air and Space Law*, vol. 3, 1978, p. 547. Similarly I. BROWNLIE, *op. cit.*, who describes the difference in the following way: "Jurisdiction refers to particular aspect of the general legal competence of States often referred to as sovereignty".

that jurisdiction has its source in the very existence of a State, it is not conferred upon States by international law. This law only determines the scope and limits of jurisdiction.⁶ Therefore, as one authority has observed

“Jurisdiction..., is concerned with what has been described as one of the fundamental functions of public international law, viz. the function of regulating and delimiting the respective competences of States”.⁷

The delimitation of these powers acquires a special importance when States conduct their activities on areas not subject to the territorial jurisdiction of any State, that is in the so-called international spaces. By the virtue of the principle of sovereign equality every State has the right to engage in any activity, which is consistent with international law, on these areas and this right is of *erga omnes* character. Therefore, it is the task of international law to provide equal legal protection to corresponding interests of States. For this reason, with great amount of probability, it can be assumed that the solution of legal problems which may arise amounts, in its essence, to the allocation of specific jurisdictional competencies among the States involved”.⁸

In order to conciliate particular interests of States with the general interest of the international community in the orderly exploration and use of international regions, the principle of nationality has been accepted to provide a legal base for allocation of jurisdictional prerogatives. According to this principle every State exercises exclusive jurisdiction (unless specific exceptions are provided for by international law) over persons and objects which possess its nationality. The legal link between the State and the subjects of jurisdiction is established in the first case, by an act of granting or recognizing of citizenship and in the second case, by an act of registration in a national register. Both of these acts are regulated by the municipal laws of particular States and as such, they belong to the category of unilateral acts which have an international legal effect.

It should be pointed out here that in the light of the relevant international conventions, the jurisdiction of the State of registry (the flag-State) is prevailing, on international areas, over any other possible title to execute

⁶ The PCIJ proclaimed in the “Lotus” case that “all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction. within these limits, its title to exercise jurisdiction rests in its sovereignty”. *Collection of Judgments*, series A, No. 10, p. 19.

⁷ F. A. MANN, “The Doctrine of Jurisdiction in International Law”. *Recueil des Cours*, vol. 1, 1964, p. 15.

⁸ A. CSABAFI, *The Concept of State Jurisdiction in International Space Law*. The Hague 1971, p. 4.

certain powers, e.g. over the personal jurisdiction.⁹ For this reason, this kind of jurisdiction is often referred to as “supremacy” — the resulting prerogatives concern not only the object but any person on board and events taking place therein as well. In the legal literature, the term “quasi-territorial” is equally often used to describe this type of jurisdiction.¹⁰ It should be also underlined here that only a registry entered in a national register is recognized as “a sole determinant” of nationality of objects.¹¹ At the same time, international law requires such objects to be registered in one State only. The State of registry is under a legal obligation to exercise effectively its jurisdiction and control over any object in question, in administrative, technical and social matters.¹² This obligation has been established as a necessary condition for securing the deployment of objects on international areas in accordance with the international obligations of the State of registry.

Generally speaking the same principles apply to the activities of States in outer space, including the Moon and other celestial bodies. Article VIII of the Outer Space Treaty of 1967¹³ states, in an univocal manner, that

“A State, Party to the Treaty, on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body”.

It is therefore the State of registry, and no other State, which is entitled to exercise powers resulting from exclusive jurisdiction, with respect to all

⁹ See e.g. Article 17 of the Chicago Convention of 1944, Article 5, paragraph 1 *in fine* and Article 6, paragraph I of the Convention on the High Seas of 1958, and Article VIII of the Outer Space Treaty of 1967.

¹⁰ E.g. B. CHENG, “The 1967 Space Treaty”, *Journal du Droit International*, vol. 95, 1968, No. 3, p. 570; G. SCHWARZENBERGER, *A Manual of International Law*, London 1967, p. 94.

¹¹ The ICJ underlined in its advisory opinion concerning the Constitution of the IMCO that “The conclusion the Court reaches is that where in Article 28 (a) “ship-owning nations” are referred to, the reference is solely to registered tonnage. The largest ship-owning nations are the nations having the largest registered ship tonnage”, *Reports of Judgments*, 1960, p. 170.

¹² An extensive list of duties of the flag-State is contained in Article 94 of the Convention on the Law of the Sea of 1982.

¹³ The following abbreviations are used in the present paper: the Outer Space Treaty for the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies of 1967 and the Rescue and Return Agreement for the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space of 1968, and the Moon Agreement for the Agreement Governing the Activities of States on the Moon and other Celestial Bodies of 1979.

matters related to its space objects. It also results, from the above cited provision, that other States are under the legal obligation not to interfere with such prerogatives.

The problem of States' jurisdiction in outer space is complicated by the fact that different terms are used by the space law conventions to denote the addressess of rights and obligations foreseen in these instruments. The Outer Space Treaty establishes a general rule that the right of jurisdiction is vested in the State of registry. This right is supplemented by a duty to return any such object or component parts to the State of their registry, if such objects are found beyond the territorial limits of that State. On the other hand, the Rescue and Return Agreement of 1968 uses the term "the launching authority" to indicate a subject to whom objects found are to be returned (Art. 5). The issue in question is further muddled by the fact that according to the Outer Space Treaty and the Convention on Liability of 1972 it is "the launching State" which is internationally liable for damages caused by its objects on the Earth or in outer space (Art. VII and 2—3 respectively). The term "launching State" is subsequently defined, by both of the mentioned instruments, as a State which launches or procures the launching of a space object or from whose territory or facility such an object is launched.

This inconsistency in the terminology has led to many speculations evolving round the problem of determination of subjects responsible for damages caused by space objects as well as entitled to receiving such objects, if found by other States. The whole matter has been clarified, to some extent, by the Convention on Registration of Objects Launched into Outer Space of 1975. By the virtue of Article 2, paragraph 1, of this treaty a launching State, defined as above, "shall register the space object by means of an entry in a appropriate registry which it shall maintain". In the situation where there are two or more launching States, it is required

"that they shall jointly determine which one of them shall register the object in accordance with paragraph 1 of this Article ... and without prejudice to appropriate agreements concluded or to be concluded among launching States on jurisdiction and control over the space object and over personnel thereof" (Art. II, para. 2 *in fine*).

Generally speaking the provisions cited above reaffirm the principle that every object in outer space shall be registered in one State only and upon this State international law confers all the consequences arising out of the act of registration. However, in the case of joint launchings, States involved are free to allocate jurisdictional prerogatives among themselves, irrespectively of the registration. Thus a situation can arise in which one State will register a space object but another will be entitled — by the virtue of a bilateral agreement — to execute in practise jurisdiction and control

over such an object. Nevertheless, for the third State it is always the State of registry which is empowered to perform exclusive jurisdiction and consequently which bears international responsibility for the proper conduct of space vehicle and its crew.¹⁴

It is interesting to note here that only the conventions on the law of the sea (that is the Convention on the High Seas of 1958 and the Convention on the Law of the Sea of 1982) contain provisions which deal with the situation when a ship is sailing under the flags of two or more States. According to Articles 6, paragraph 2 and 92, paragraph 2 respectively such ship may be treated as an object without nationality.

As it was already mentioned, the exclusive jurisdiction of the State of registry applies — by the virtue of Article VIII — to space objects and their component part while in outer space or on a celestial body. When such objects are found on a territory of another State they should be dealt with according to the mentioned Article 5 of the Rescue and Return Agreement. First of all the territorial State shall inform the launching authority (the State of registry) of its findings and, upon the request of this authority, return such an object. It is therefore quite clear that the territorial State should undertake any steps necessary for the protection of such an object until it is handed over to the representatives of the State of registry. Any expenses incurred during the recovery and rescue operations are to be borne by the State of registry (Art. 5, para. 5). If the findings in question are reported and the request for return is not filed the territorial State can consider the object found within its territory as *res nullius* and thus capable of appropriation.

A corresponding duty of the State of registry has been established to the effect that it should take effective steps to eliminate possible danger of harm which may result from the launching of its object upon the territory of another State. These steps include, among other things, providing any significant information concerning the construction and the nature of fuel used in such objects. Also any technical assistance required by this territorial State in order to secure the safe recovery should be provided by the State of registry upon the request.

The Moon Agreement of 1979 confirms the exclusive jurisdiction of the State of registry over its space vehicles, facilities, equipment, stations and

¹⁴ Article VI of the Outer Space Treaty. A. A. COCCA stated in this respect that "... State may be considered responsible by merely registering the vehicle, even though it may not launch, nor promote, nor use its territory or facility for the launching of the vehicle". "Fundamental Principles of Space Law: a Latin American Viewpoint", in: in: E. Mc WHINNEY and M. A. BRADLEY (ed.), *New Frontiers in Space Law*, Sijthoff-Leyden 1969, p. 69.

their personnel on the Moon and other celestial bodies. Although the term "the State of registry" is not expressly used by the instrument in question its meaning is clearly defined by the relevant provisions. The jurisdiction of the State of registry extends also over any area of a celestial body which is required for the needs of the station or facility. The State establishing such an object is under an obligation to inform the Secretary General of the United Nations of the location and purpose of this station.¹⁵ In the legal doctrine of space law doubts arose as to the consequences of the right to establish manned or unmanned stations on celestial bodies. They concerned the fact that the long-lasting or even permanent occupation of given areas of celestial bodies may result in their appropriation by the State of registry. For this reasons the concept of "functional jurisdiction" has been proposed to substitute the concept of exclusive jurisdiction. The former was defined as

"the right of a State in international law to regulate the rights of persons, to affect property, things, events, and occurrences in designated zones in outer space or areas on celestial bodies, by legislative, executive or juridical means, to the extent and for the period of time that is necessary to safeguard and secure its rights to explore and exploit outer space including celestial bodies".¹⁶

It results from the above cited statement that jurisdiction so defined can be exercised only in order to provide protection of a clearly indicated activity, only as long as this activity is conducted and only over a certain area of a celestial body. Because of the fact that the principle of non-appropriation of outer space and celestial bodies has been so firmly established the introduction of yet another legal concept into the body of treaty law relating to the space activities will serve no practical purpose. Furthermore, by the virtue of Article 11, paragraph 2 of the Moon Agreement the Moon and other celestial bodies are not subject to national appropriation by means of use or occupation, or by any other means. The placement of personnel or of any kind of installations, irrespectively of the duration of their deployment does not, therefore, create the right of ownership over the surface or the sub-surface of the Moon or any areas thereof. This regulation seems to provide the entirely adequate protection for the interests of the international community.

The exclusive jurisdiction exercised by States over their objects in international spaces is not of unlimited nature. International law formulates clearly defined exceptions to this, otherwise generally binding principle. Among most often cited examples of such exceptions the right of universal

¹⁵ Article 9 of the Moon Agreement.

¹⁶ A. CSABAFI, *op. cit.*, p. 131.

repression of piracy, the right of hot pursuit and, to some extent, the right of visit are mentioned.

The right of visit requires a few words of commentary since this right, as formulated by the both general space conventions (i.e. the Outer Space Treaty and the Moon Agreement) has a somehow different legal character. By the virtue of Article XII of the Outer Space Treaty

“all stations, installations, equipment and space vehicles on the Moon and other celestial bodies shall be open to representatives of other States. Parties to the Treaty, on a basis of reciprocity”.

Furthermore, the same Article requires an advance notice of any projected visit to be given to the State of registry

“in order that appropriate consultations may be held... to secure safety and to avoid interference with normal operations in the facility to be visited”.

In practice, therefore, the right of visit can be executed only upon a conclusion of an agreement between States concerned.

The Moon Agreement regulates the issue in question in a seemingly more coherent manner. Its Article 15, paragraph 1 empowers any State Party to

“assure itself that the activities of other States, Parties in the exploration and use of the moon are compatible with the provisions of this Agreement. To this end all space vehicles, equipment, facilities, stations and installations... shall be open to other States Parties”.

The stipulation requiring such visits to be based upon the principle of reciprocity was thus abandoned. However, this has not resulted in any significant change in the legal character of visits in question, besides conferring upon them the character of inspections. It is still required to give reasonable advance notice of such a visit “in order that appropriate consultations” may be held. Therefore, the State of registry can refuse to open its facilities on celestial bodies to the representatives of other States if on the grounds that such a visit may cause interference with the normal operations in the facility to be visited only.¹⁷

Basically the same rules apply to the jurisdiction over persons in outer space and on celestial bodies. In this case also, by the virtue of Article VIII of the Outer Space Treaty it is the State of registry of an object that is entitled to exercise jurisdiction over any personnel thereof. Though the term used by

¹⁷ Compare with Article VII of the Antarctic Treaty of 1959: “All areas of Antarctica, including all stations, installations and equipment on those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection by any observers designated in accordance with paragraph 1 of this article”. See also Article 22 of the Convention on the High Seas of 1958.

the Treaty is that of "personnel" it can be assumed that the legal norms in question should apply not only to those who are in actual control of a space object or fulfil any other functions connected with its operations but also to any other person aboard. If any such person enters the space object or a station of another State he automatically shall fall within the jurisdiction of that State.¹⁸ with two exceptions. First of all, if such a visit is conducted upon an agreement concluded in accordance with Article XII of the Outer Space Treaty and Article 15. paragraph 1 of the Moon Agreement, the visiting personnel remains under the jurisdiction of their State. And secondly, if the stay of such persons within the confinements of objects or stations of another State is due to the distress, emergency landing or any other accident, any such person should be promptly and safely returned to the State registry of their vehicle.¹⁴

Certain limitations of the jurisdiction of the State of registry with respect to persons other than its own personnel arise also from the recognition of astronauts "as envoys of mankind in outer space" (Article V of the Outer Space Treaty). The Rescue and Return Agreement further elaborates the obligation of States to render all possible assistance to such persons in case of distress. These obligations include, among other things, the duty to take all possible steps to rescue such persons and to render them all necessary assistance (Art. 2), to extend assistance in any rescue and search operations conducted by the State of registry or by any other, State (Art. 3) and finally, the already mentioned duty to return such persons to the State of registry of their space object.

The legal protection offered to astronauts and personnel of a space should not be interpreted as implying that such persons

"are placed above the law and therefore exempted from bearing the consequences of any unlawful acts they may commit, while, for instance, in the airspace of another State or having landed on its territory".²⁰

The recognition of astronauts as envoys of mankind does not confer upon them any privileges other than those formulated by the legal instruments in question.

The Moon Agreement contains several provisions, related to the legal status of persons, which require a short commentary. First of all, any person

¹⁸ M. LACHS represents a different point of view: "...men remain under the jurisdiction of the State on whose registry the space object in which they travelled is carried. It may well be envisaged that they shall remain under that jurisdiction even if they enter an installation or station established on a celestial body by another State", *op. cit.*, 71.

¹⁹ Article V of the Outer Space Treaty in connection with Article 4 of the Rescue and Return Agreement..

²⁰ M. LACHS, *op. cit.*, p. 72.

on the Moon is recognized by this instrument as an astronaut within the meaning of Article V of the Outer Space Treaty and as part of personnel of a space object within the meaning of the Rescue and Return Agreement. Accordingly, States are under a legal obligation to adopt all practicable measures to safeguard the life and health of any person on the Moon and to offer shelter in their stations or other installations to persons in distress (Art. 10). In this respect the Moon Agreement goes much further than any other international instrument regulating the activities of States in international regions. By the virtue of Article 12, paragraph 3

“in the event of an emergency involving the threat to human life. States Parties may use the equipment, vehicles, installations, facilities or supplies of other States Parties on the Moon”.

This provision provides an unique example of limitation of jurisdiction of the State of registry by the way of a treaty. The practical implementation of this provision may be the source of serious conflicts. First of all, because the execution of the right foreseen is not restrained, by a requirement to obtain a consent from the State of registration, in order to cover the most immediate situations. It may even be the case that the State of registry will not be informed of the eventual use of its stations since the notification is required to be made either to that State or the Secretary General of the United Nations. Secondly, though any State may use the equipment or objects of another State in an emergency involving the threat to human life only, it is left to the former to decide whether or not a given situation amounts to such a threat.

Intentions behind the presented provision are clear. The aim was to provide all possible protection to human life in a very hostile environment. However, the further elaboration of Article 12 is needed if this provision is to serve at all its purpose. The Agreement is silent on the question of compensations for damages caused in due course of the use so allowed and it provides no regulation of the problem of responsibility for excessive or unnecessary use. In this case the procedure of settlement of disputes by the way of consultations may prove to be inadequate.²¹

In the conclusion to the remarks presented so far it should be stated that the analysis of the concept of States' jurisdiction in outer space or in any other international area should not be limited to its positive aspect only. In other words we should bear in mind not only the rights that are conferred but also corresponding obligations. Because of the very fact that international confirms certain exclusive prerogatives of States, this law also requires these rights to be executed in a prescribed manner. However, the obligations placed

²¹ Article 15, paragraph 2 and 3 of the Moon Agreement.

upon States in this respect are of very limited nature. The increasing use of outer space for military purposes is one of many examples which may be called upon to support such a statement.

Because of the development of space systems which are related to the SDI we face now an arm race being introduced into a space which was once declared a province of all mankind, with all the positive consequences. And though the principles of cooperation and mutual assistance are written down into the body of treaty law regulating the activities of States in outer space, their practical implementation is far from what has been expected. It is therefore the most important task of international law to provide stronger and, thus, more reliable safeguards for the community interests in outer space. To achieve this end a more univocal legal regulation is needed in order to avoid its "interpretation from the point of view of national interests only. This in turn requires the acceptance of a new attitude towards the very functions of international law, and, of certain over-national values which are common to the international community as the whole.

La protection internationale du droit à la vie (problèmes choisis)

ANNA MICHALSKA

I. Le droit à la vie fait partie des normes impératives du droit (*ius cogens*)

L'importance du droit à la vie n'exige aucune justification. La protection de ce droit constitue une condition préalable pour que l'individu puisse jouir des autres droits et libertés. Pour cette raison la protection internationale du droit à la vie mérite une attention particulière.

Dans tous les instruments internationaux en matière de droit de l'homme, le droit à la vie figure en tête des droits garantis. L'article 3 de la Déclaration Universelle des Droits de l'Homme est le premier texte international de portée universelle à proclamer le droit à la vie en termes suivants: « Tout individu a droit à la vie, à la liberté et à la sécurité de sa personne ». Le Pacte international relatif aux droits civils et politiques affirme que « Le droit à la vie est inhérent à la personne humaine. Ce droit doit être protégé par la loi. Nul ne peut être arbitrairement privé de la vie » (l'article 4).

D'une manière analogue, la Convention européenne des droits de l'homme dispose dans son article 2 que « Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement, sauf en exécution d'une sentence capitale... ». La Déclaration américaine des droits et des devoirs de l'homme reconnaît ce droit dans l'article premier: « Tout être humain a droit à la vie, à la liberté, à la sécurité et à l'intégrité de sa personne ». La Convention américaine des droits de l'homme dispose: « Toute personne a droit au respect de sa vie. Ce droit doit être protégé par la loi, en général, à partir de la conception. Nul ne peut être arbitrairement privé de la vie » (l'article 4). La Convention africaine prévoit que « La personne humaine est inviolable. Tout être humain a droit au respect de sa vie » (l'article 4). Et enfin, la Déclaration islamique des droits de l'homme dispose que: « La vie humaine est sacrée et inviolable et tous les efforts doivent être accomplis pour la protéger. En particulier, personne ne doit être exposé à de blessures ni à la mort, sauf, sous l'autorité de la Loi » (l'article 1).

Les instruments internationaux de protection des droits de l'homme attribuent non seulement une place particulièrement importante au droit à la vie, mais cherchent également à l'entourer des garanties spéciales. Le fait, que le droit à la vie soit le seul droit qualifié d'inhérent dans le Pacte politique, souligne sa primauté et son appartenance intrinsèque à l'être humain. La norme relative au respect du droit à la vie est applicable en toutes circonstances, indépendamment du temps et du lieu, et n'admet aucune dérogation. Lorsqu'une situation d'exception peut autoriser la suspension des droits protégés, le droit à la vie ne peut être jamais dérogé¹.

Il faut souligner que le concept juridique de dérogation doit absolument être distingué de celui d'exception; le droit à la vie ne peut faire l'objet d'aucune dérogation. Ce que les différents textes internationaux édictent après avoir proclamé le caractère fondamental du droit à la vie, ne sont que des restrictions insérées dans des clauses spécifiques d'exception, le peine de mort par exemple².

Cette impossibilité de dérogation nous conduit à considérer la norme relative au droit à la vie comme une norme impérative du droit international au sens de l'article 53 de la Convention de Vienne de 1969 sur le droit des traités¹.

Le droit à la vie fait partie du *ius cogens*, c'est-à-dire, qu'il est une des « quelques rares règles essentielles auxquelles la conscience commune des membres de la société internationale ne saurait admettre de dérogation »⁴. Cette qualification est soutenue dans le Rapport présenté à la 37^e session de la Commission des Droits de l'Homme: « The right to life... is a fundamental right in any society, irrespective of its degree of development or the type of culture which characterizes it. This right forms part of *ius cogens* in international human rights law. The preservation of this right is one of the essential functions of the State... »⁵.

¹ A. C. KISS, J. B. MARIE, *Le droit à la vie*, « Revue des Droits de l'Homme », 1974, vol. VII, no 2—4, p. 340.

² L. BOISSON DE CHAZOURNES, *Les garants du droit à la vie*, Centre d'études et de recherches de droit international et des relations internationales de l'Académie de Droit International de la Haye, 1983, p. 3 (polycopié).

³ « ...une norme impérative du droit international général est une norme acceptée et reconnue par la communauté internationale des Etats dans son ensemble, en tant qu'une norme à laquelle aucune dérogation n'est permise... ».

⁴ En font notamment partie: les règles fondamentales de caractère humanitaire, l'interdiction du génocide, de l'esclavage, de la discrimination raciale, la protection des droits essentiels de la personne humaine. Voir: R. AGO, *Droits des traités à la lumière de la Convention de Vienne*, « Recueil des Cours de l'Académie de Droit International », 1971, vol. 134, pp. 323—324.

⁵ U. N. Doc. A/37/564, paragraphe 22.

La jurisprudence de la Cour internationale de Justice confirme le caractère impératif de la norme relative au droit à la vie. L'avis consultatif sur les réserves à la convention pour la prévention et la répression du crime de génocide précise que « les principes qui sont à la base de la convention sont des principes reconnus par les nations civilisées comme obligeant les Etats même en dehors de tout lien conventionnel... »⁶. L'arrêt dans l'affaire de Barcelona Traction considère les principes et les règles concernant les droits fondamentaux de la personne humaine comme des « obligations des Etats envers la communauté internationale dans son ensemble »; ces obligations « concernent tous les Etats »⁷.

L'arrêt dans l'affaire du personnel diplomatique a confirmé l'opposabilité à tous les Etats des obligations découlant des « droits fondamentaux énoncés dans la Déclaration Universelle »⁸, et donc du droit fondamental à la vie.

Ainsi, le caractère impératif de la norme relative au droit à la vie est reconnu par les textes internationaux, par la doctrine et par la pratique internationale. Nous avons cité ci-dessus seulement quelques exemples des opinions de la communauté internationale. Cependant, si les textes internationaux proclament le droit à la vie en termes semblables ou presque identiques, les dispositions juridiques sont susceptibles des interprétations différentes.

L'objet de cet article n'est pas d'apporter une réponse aux problèmes philosophiques du droit à la vie. Mon objectif consiste plutôt à soumettre un certain nombre de principes et de normes à la réflexion. Ce sont les instruments internationaux relatifs aux droits de l'homme qui serviront de point de départ à cette étude. A travers des instruments, à travers de la jurisprudence internationale et la doctrine, j'envisage de mettre en relief quelques tendances qui se manifestent dans l'interprétation du droit à la vie.

II Le droit à naître est-il protégé par les instruments internationaux?

Le droit à naître est considéré comme le droit de conserver la vie par l'embryon ou le fœtus, jusqu'à la naissance et au-delà⁹. Ce droit n'est

⁶ Avis du 28 Mai 1951, CIJ, *Recueil 1951*, p. 23.

⁷ Arrêt du 5 Février 1970, CIJ, *Recueil 1970*, p. 32.

⁸ Arrêt du 24 Mai 1980, CIJ, *Recueil 1980*, p. 42.

⁹ J. GOBRY. *Ke droit à naître*, Memoria del X Congreso Mundial Ordinario de Filosofia del Derecho y Filosofia Social. Universidad Nacional Autonoma. Mexico. 1982. vol. III. p. 143.

pas protégé *expressis verbis* par les traités internationaux en matière des droits de l'homme. Ces instruments n'accordent la protection du droit à la vie qu'à « l'individu » à « la personne humaine » etc. Selon les conceptions habituelles la personne humaine n'existe qu'à partir de la naissance.

La Convention américaine est la seule qui reconnaît une certaine protection à l'enfant conçu, mais pas encore né. Néanmoins, le terme « en général » signifie que des exceptions sont admissibles. Il faut souligner qu'au cours des travaux préparatoires on a proposé à plusieurs reprises d'insérer une prescription analogue dans le Pacte politique¹⁰.

L'interprétation du droit à la vie faisait l'objet de plusieurs décisions internationales. Surtout la législation sur l'avortement, adoptée par les Parties Contractantes de la Convention européenne et de la Convention américaine, faisait l'objet de plusieurs requêtes. Les requérants alléguaient soit que la législation visée était contraire au droit à la vie (de l'enfant à naître), soit qu'elle constituait une ingérence injustifiée dans le droit (des parents) au respect de la vie privée.

En ce qui concerne l'interprétation de la Convention américaine, l'affaire Baby-boy contre les Etats Unis, semble être la plus pertinente¹¹. Le requérant prétendait que l'avortement constituait une violation du droit à la vie, protégé « à partir de la conception ». La Commission inter-américaine se référait à l'article 1 de la Déclaration américaine des droits de l'homme de 1948 qui prévoit: « Chaque individu a droit à la vie », sans mentionner la protection à partir de la conception. D'après la Commission, la disposition de la Convention (l'article 4) ne pouvait pas être considérée comme une nouvelle idée de la vie.

La question de savoir si l'enfant à naître bénéficie des garanties prévues à l'article 2 de la Convention européenne a été discutée dans le cadre de la célèbre affaire Brüggeman et Scheuten contre la République Fédérale d'Allemagne¹². A la suite de l'arrêt de la Cour constitutionnelle fédérale la loi portant l'amendement du Code penal a été adopté. Elle a réaffirme le principe que l'avortement constitue une infraction pénale, mais prévoit que, dans des cas déterminés quand l'intéressée se trouve dans une situation

¹⁰ Voir notamment l'amendement de la Belgique, du Brésil, du Maroc, du Mexique et du Salvador qui tendait à remplacer le 0 1 de l'article 6 par le texte suivant: « Le droit à la vie est inhérent à la personne humaine. Ce droit est protégé par la loi, dès la conception ». Cette proposition a été rejeté par 31 voix contre 20, avec 17 abstentions, U.N.Doc. A/C3/L.654.

¹¹ Case no 2141, Interamerican Commission on Human Rights, Ten Years of Activities 1971—1981, General Secretariat O. A. S., p. 199.

¹² Requête no 6959/75. « Annuaire de la Commission des Droits de l'Homme », 1978, vol. XVIII, p. 100.

de détresse, un avortement pratiqué par un médecin avec le consentement de l'intéressée, après une consultation médicale, n'est pas punissable. La Cour constitutionnelle a résumé ainsi les motifs de cette décision: « Le devoir de protection du droit à la vie interdit non seulement une intervention directe de l'Etat dans la vie de l'enfant à naître, mais exige également qu'il la protège et la favorise. Le devoir de l'Etat de protéger la vie de l'enfant à naître s'applique même contre le gré de la mère. La protection de la vie de l'embryon a en principe la priorité sur le droit d'autodétermination de la femme enceinte tout au long de la grossesse et ne peut être considérée comme pouvant faire l'objet d'une dérogation pendant une certaine période ». Selon la Cour, le droit à la vie est garantie à quiconque vit, et on ne peut faire aucune distinction entre les différentes phases de la vie ou entre les enfants nés et les enfants à naître. Les requérantes avaient soutenu que l'arrêt de la Cour, aussi bien que la loi portant amendement du Code pénal, s'ingéraient en particulier dans leur droit au respect de leur vie privée, garantie par l'article 8 paragraphe 1 de la Convention, cela parce qu'elles ne pouvaient pas avorter librement en cas de grossesse indésirable. La Commission a reconnu qu'une réglementation de l'interruption des grossesses non désirées ne constituait pas une ingérence dans le droit au respect de la vie privée de la mère. En même temps, la Commission n'a pas examiné si l'enfant à naître devait être considéré comme une « vie » au sens de l'article 2 de la Convention.

Dans une autre affaire introduite devant la Commission européenne, le requérant avait posé la question de savoir « si le droit à avoir une descendance est un droit inaliénable de l'homme et, dans la négative, dans quelles conditions et circonstances ce droit peut lui être dénié; d'autre part, les droits reconnus à l'homme s'appliquent pleinement à l'embryon humain dès sa conception, et dans la négative, à quels stades de son développement l'être humain commence à jouir partiellement ou pleinement de ces droits ». La Commission a déclaré ne pas être compétente d'examiner *in abstracto* si la loi était conforme aux dispositions de la Convention.

Le droit à naître faisait l'objet d'une requête dans laquelle le requérant prétendait être victime d'une violation de plusieurs articles de la Convention par High Court of Justice. Cette Cour a rejeté sa demande tendant à empêcher l'interruption de la grossesse de son épouse. D'après l'avis de la Commission, l'expression « toute personne » dans la Convention et le contexte dans lequel ce terme est employé dans l'article 2, tendent à étayer la thèse qu'il ne s'applique pas à l'enfant à naître. Selon la Commission, elle n'est pas appelée à décider si l'article 2 ne concerne pas du tout le

¹³ Requête no 867/60 X contre la Norvège. « Annuaire... », 1961, vol. IV, p. 251.

foetus ou, au contraire, lui reconnaît un droit à la vie. D'après la Commission, l'autorisation d'interrompre la grossesse est compatible avec l'article 2, paragraphe 1 de la Convention ; si l'on admet que cette disposition s'applique à la phase initiale de la grossesse, l'avortement se trouve couvert par la limitation implicite du « droit à la vie » du foetus en rapport avec la protection de la vie et de la santé de la femme¹⁴ \

L'opinion de la Commission ne signifie pas que l'avortement peut être pratiqué sans aucune restriction¹⁵ \ L'avortement pratiqué pour des raisons économiques, ou en vue de résoudre la question de l'explosion démographique, a été considéré par la Commission interaméricaine comme une « violation grave et manifeste du droit à la vie ».

Les deux Commissions ont, à plusieurs reprises, exprimé l'opinion que l'avortement est admissible et il ne constitue pas la violation du droit à la vie s'il est pratiqué pour protéger la vie ou la santé de la mère. Aussi la stérilisation pratiquée en vue de protéger la santé de la femme et avec son consentement, ne peut être considérée comme violation de l'article 2 de la Convention européenne. Néanmoins, dans certaines conditions, la stérilisation peut être considérée comme une violation du droit à procréation¹⁶ \

La doctrine n'est pas unanime. On observe récemment une tendance vers la reconnaissance du droit à naître comme un droit absolu¹⁷. Mais la discussion se situe plutôt au niveau des principes généraux qu'au niveau de la réglementation juridique. Néanmoins, une tendance vers la protection du droit à naître se dégage récemment de certains instruments internationaux. La Déclaration des droits de l'enfant reconnaît explicitement la protection de « l'enfant à naître ». Dans son préambule elle affirme que l'enfant « ...a besoin d'une protection spéciale [...] notamment d'une protection juridique appropriée, avant comme après la naissance ». Le quatrième principe du même texte ajoute : « ...une aide et une protection spéciale doivent lui être assurées [...] notamment des soins prénatals et postnatals adéquats ». On trouve des dispositions analogues dans le projet de convention sur la protection internationale de l'enfant qui est en cours d'élaboration.

¹⁴ Requête no 8418/79 X contre Royaume Uni. « Annuaire... », 1980, vol. XIX, p. 244.

¹⁵ Voir à ce propos : R. J. COOK, M. B. DICKENS, *La législation de l'avortement dans les pays du Commonwealth*, Organisation Mondiale de la Santé, Genève, 1979, pp. 121.

¹⁶ La décision n'était pas publiée. Voir P. SIEGHART, *The International Law of Human Rights*, Clarendon Press, Oxford, 1983, p. 132.

¹⁷ Voir par exemple E. W. KEYSERLINGK, *The Right of the Unborn Child to Prenatal Care*, « Revue de Droit », University Québec, no 13, 1982, pp. 71—83; Y. DINSTEIN, *The Right to Life, Physical Integrity and Liberty, The International Bill of Human Rights*, Columbia University Press, New York, 1981, pp. 115—137; F. PRZETACZNIK, *The Right to Life as a Basic Human Right*. « Revue des Droits de l'Homme », vol. IX, no 4/1976, pp. 585—609; J. GOBRY, *Le droit à naître*, p. 146.

La Déclaration de Genève de l'Association Médicale Mondiale prévoit « le respect de la vie humaine à partir de la conception ». Le code éthique, élaboré par la même organisation, énumère parmi les devoirs du médecin celui de « protéger la vie humaine à partir de la conception ». On peut se demander si les auteurs de ces textes ont voulu aller jusqu'à la reconnaissance du droit à naître en tant qu'un droit absolu. Le fœtus, par sa mère, jouit d'une protection spéciale; on pourrait rappeler ici le principe de la protection de la maternité reconnu dans de nombreux instruments internationaux. Néanmoins, il me semble difficile de soutenir l'opinion que le droit à naître est protégé par le droit international.

Le droit international reconnaît le droit de fonder la famille. Ce droit, formulé en termes presque identiques dans les différents instruments internationaux, implique le droit de donner la vie et le corollaire qui en découle — le droit de ne pas donner la vie. A partir du moment où le droit de fonder la famille est reconnu, il est difficile de refuser aux parents le droit de déterminer les dimensions de cette famille. Il existe un texte international qui tire explicitement cette conséquence du principe de la liberté de fonder la famille — c'est la Déclaration sur le progrès et le développement dans le domaine social (adoptée en 1969). Son article 4 proclame que « les parents ont le droit exclusif de déterminer librement, en toute responsabilité, le nombre et l'échelonnement des naissances ». La question qu'on peut poser à cet égard est de savoir si le droit de planifier des naissances implique le droit de disposer librement des moyens permettant d'exercer cette planification et si l'autorité publique, agissant en vue de protéger le droit à naître, est compétente pour interdire l'avortement? L'interdiction de l'avortement par des mesures législatives, ne constituerait-elle pas une violation du droit des parents à déterminer le nombre des naissances? Autrement dit, l'interdiction de l'avortement ne serait-elle pas contraire à la liberté de procréation?

Dans certaines conditions, l'avortement est une condition *sine qua non* de la protection de la vie de la mère. Le médecin doit donc choisir: sauver la vie de l'enfant conçu, ou bien la vie de sa mère. Ces contradictions ne sont pas et ne peuvent pas être résolues d'une manière catégorique par des mesures juridiques. Ce sont des problèmes philosophiques, religieux et moraux de la hiérarchie des valeurs protégées.

III. La portée de la protection internationale du droit à la vie

Le Pacte politique et les conventions régionales prévoient que le droit à la vie doit être protégé par la loi. Cela signifie que l'Etat est le principal sujet des obligations découlant du droit à la vie.

l'Etat est responsable du fait de l'exercice de la fonction législative. La responsabilité d'un Etat est engagée quand il adopte une loi contraire aux obligations internationales. Si un Etat n'abroge pas une loi contraire à ses obligations internationales ou s'il n'adopte pas une loi conformément à ces obligations, la responsabilité internationale d'un tel Etat est également engagée¹⁸.

L'Etat est responsable des actes accomplis par ses fonctionnaires tels que des militaires ou des policiers. La position occupée par l'agent dans la hiérarchie administrative ainsi que les qualifications de droit interne ne sont pas prises en considération. Un exemple est donné par l'affaire Chypre contre Turquie. La Commission européenne a établi que la Turquie n'a pas respecté l'article 2 de la Convention du fait d'agissements des soldats turcs sur le territoire chypriote¹⁹.

Pour protéger le droit à la vie, l'Etat est notamment obligé de respecter le droit à la vie, de prévenir les violations de cette norme et de réprimer les transgressions²⁰. Les observations qui suivent seront consacrées aux exemples d'actes des organes d'Etat qui doivent être accomplis dans le cadre des obligations de respecter et de prévenir. L'obligation de répression ne fait aucun doute; si l'Etat n'a pas pu prévenir les atteintes au droit à la vie, il doit en toutes circonstances les réprimer.

Il paraît qu'à l'heure actuelle ce n'est pas la peine de mort qui constitue la menace la plus grave au droit à la vie. Au centre de la discussion il faudrait mettre plutôt d'autres questions: le recours à la force par les autorités publiques, les phénomènes et les pratiques nouveaux qui constituent une violation ou une menace du droit à la vie.

1. L'obligation de respecter le droit à la vie

La façon dont on définit les conditions du respect du droit à la vie dans le Pacte politique et dans la Convention européenne est différente. Selon le Pacte, nul ne peut être « arbitrairement privé de sa vie », sans aucune exception à ce principe. Une solution analogue est prévue par la Convention américaine. La Convention européenne prévoit que « la mort ne peut être infligée à quiconque intentionnellement ». La mort n'est pas

¹⁸ Affaire relative à certains intérêts allemands en Haute Silésie polonaise. Arrêt du 25 Mai 1926. CPU, Série A, no 7, p. 19. Cette responsabilité s'étend également aux actes constitutionnels, voir avis de 12 Février 1932 relatif au traitement des nationaux polonais à Danzig. CPU, Série B, no 23, p. 24.

¹⁹ Requêtes 6780/74 et 6950/75. Annuaire 1975, vol. XVII.

²⁰ Voir sur ce sujet, L. BOISSON DE CHAZOURNES, *op. cit.*, pp. 3—11.

considérée comme une violation du droit à la vie dans des cas qui sont limitativement énumérés:

- a) pour assurer la défense de toute personne contre la violence illégale,
- b) pour effectuer une arrestation régulière ou pour empêcher l'évasion d'une personne régulièrement détenue,
- c) pour réprimer, conformément à la loi, une émeute ou une insurrection (l'article 2, paragraphe 2).

L'expression « arbitrairement » a provoqué une discussion au cours des travaux préparatoires du Pacte politique, car on lui reprochait d'être trop vague et équivoque. Les membres de la Commission des Droits de l'Homme ne pouvaient pas se décider pour le sens de ce terme; certains étaient d'avis qu'il signifiait « illégalement », certains l'interprétaient comme « injustement », d'autres, enfin, lui attribuaient les deux significations à la fois. Quelques représentants ont préféré la formule de l'article 2 de la Convention européenne. Toutefois, la majorité n'a pas été d'accord, en considérant que toute énumération serait nécessairement incomplète²¹.

D'après l'interprétation classique l'expression « la privation arbitraire » de la vie était interprété comme privation « sans une procédure conforme au droit »²². Une nouvelle interprétation, beaucoup plus large, est en train de développement. D'après cette interprétation, expression en question englobe:

- 1) le génocide,
- 2) les crimes contre l'humanité,
- 3) les crimes de guerre²³,
- 4) la privation de la vie en conséquence de l'agression incompatible avec la Charte de l'ONU,
- 5) les exécutions arbitraires et sommaires²⁴,
- 6) les tortures et les traitements inhumains qui provoquent la mort des détenus ou des condamnés²⁵,
- 7) les disparitions involontaires ou forcées,

²¹ U. N.Doc. A/C.3/L.651, A/3764, p. 37.

²² P. HASSAN, *The world «arbitrary» as used in the Universal Declaration of Human Rights: «illegal» or «unjust»?», «Harvard International Law», 1969, vol. X, pp. 225—262.*

²³ «States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life». Report of the Human Rights Committee. General Comments. General Assembly, Official Records, Thirty-Seventh Session, Supplement no 40, p. 93.

²⁴ Voir à ce propos, Exécutions sommaires et arbitraires. Rapport de M. S. Amos Wako présenté à la 39^e session de la Commission des Droits de l'Homme, U.N.Doc. E/CN.4/1983, paragraphe 16.

²⁵ «If a person dies as a result of torture or of cruel inhuman degrading treatment that amounts to arbitrary execution», U.N.Doc. E/CN.4/1983, paragraphe 621.

- 8) la privation de la vie en conséquence de Tabus de pouvoir,
- 9) la violation massive et flagrante des droits de l'homme.

L'importance essentielle pour l'interprétation des dispositions mentionnées a le Code de conduite pour les responsables de l'application des lois, adopté par l'Assemblée générale des Nations Unies en 1979²⁶. Son article 3 prévoit que « les responsables de l'application des lois peuvent recourir à la force seulement lorsque cela est strictement nécessaire et dans la mesure exigée par l'accomplissement de leurs fonctions ». Le commentaire du Comité des rédacteurs, considéré comme partie intégrante de ce code, rappelle des conditions essentielles permettant aux responsables de l'application des lois de recourir à la force: nécessité absolue, proportionnalité de la mesure avec le but légitime poursuivi, recours aux armes à feu s'il y a une mise réelle en danger de la vie d'autrui.

Le Comité des droits de l'homme dans ses rapports annuels a formulé, à plusieurs reprises, les règles de comportement des agents de la force publique²⁷. Dans la jurisprudence internationale on a aussi précisé la signification des dispositions conventionnelles; au niveau universel, la plus pertinente semble l'opinion exprimée dans l'affaire Pedro Pablo Camargo contre la Colombie. Selon le Comité, la privation de la vie avait le caractère arbitraire et intentionnel pour des raisons suivantes: la police a employé l'arme sans en prévenir d'avance; la police n'a pas donné aux personnes rassemblées ni possibilité de se disperser, ni le temps d'expliquer la cause et l'intention de leur rassemblement; rien ne prouvait que la police était obligée d'utiliser la force pour se défendre ou défendre des tiers, et que cette action était nécessaire pour procéder à l'arrestation ou pour empêcher la fuite des personnes concernées. Il est à noter que l'action de la police a été qualifiée de violation de l'article 6 du Pacte, bien que'elle fût conforme à la législation interne de Colombie²⁸.

Les conditions du recours à la force par les autorités publiques ont fait l'objet de quelques décisions de la Commission européenne. Une attention spéciale mérite ici l'affaire O. Farrel contre le Royaume Uni dans laquelle la Commission a formulé l'opinion que le recours à la force devait être proportionnel à des circonstances²⁹. Dans une autre

²⁶ U.N.Doc. A/3764.

²⁷ Voir par exemple, «If a law enforcement agent uses greater force than is necessary to achieve a legitimate objective and a person is killed that would amount to an arbitrary execution». Report of the Human Rights Committee. General Comments. General Assembly, Official Records, Thirty-eighth Session, Supplement no 40, p. 16.

²⁸ Communication no 11/45. Report of the Human Rights Committee. General Assembly, Official Records, Thirty-seventh Session, Supplement no 40, p. 137.

²⁹ Requête no 9013/80. « Annuaire... ». 1981, vol. XX, p. 98.

affaire, la Commission a reconnu que « l'ensemble des circonstances... ne permet nullement de penser que le gendarme aurait eu l'intention de donner la mort... », en d'autres termes que la mort aurait été infligée intentionnellement, au sens de l'article 2, paragraphe 1 de la Convention. En conséquence la requête a été rejetée comme irrecevable³⁰.

Le traitement des prisonniers à la lumière de l'article 2 de la Convention a fait aussi l'objet de quelques requêtes. Par exemple, le requérant alléguait la violation de l'article 2 parce qu'il était maltraité par un gardien de prison. Un autre requérant déclarait ne pas être en état de supporter la détention en prison à cause de la maladie et estimait que, dans ces circonstances, la détention constituait pour lui une atteinte au droit à la vie³¹.

Dans d'autres affaires, la Commission a exprimé l'opinion qu'une politique administrative et une série d'actions mettant en danger le droit à la vie pouvaient également constituer une violation de l'article 2 de la Convention¹².

Dans la pratique des organes internationaux, on a formulé quelques principes généraux concernant le recours à la force. Néanmoins, le terme « arbitraire » n'est pas défini d'une manière précise. Il paraît que les conditions énumérées dans l'article 2 paragraphe 2 de la Convention européenne soient, surtout grâce à la jurisprudence internationale, plus précises que celles du Pacte politique.

2. Obligation de prévention

L'obligation de respecter le droit à la vie implique la protection contre toute atteinte à la vie de la part des autorités publiques. L'Etat assume donc une obligation négative: de ne pas donner la mort.

L'obligation de prévention implique la protection contre tout acte illégal des autorités publiques, mais aussi des particuliers. L'opinion que l'Etat assume la responsabilité pour les actes des particuliers a été exprimée par les rédacteurs du Pacte politique¹¹ et elle est partagée par la doctrine³².

L'étendue de l'obligation de prévention est déterminée surtout par l'interprétation de la notion « le droit à la vie » ou, plus précisément,

³⁰ Requête no 2758/66 X contre la Belgique, « Annuaire... », 1969, vol. XII, p. 175.

³¹ Requête no 4203/69 X contre le Royaume Uni, « Annuaire... », 1970, vol. XIII, p. 837.
Requête no 434/1969. J. Simon-Herold contre l'Autriche, « Annuaire... », 1971, vol. XIV, p. 356.

³² Les requêtes introduites par le gouvernement Irlandais contre le Royaume Uni: no 5310/71, no 5451/72, « Annuaire... », 1972, vol. XV, p. 77.

³³ U.N.Doc. 2929, chapitre VI.

³⁴ Y. DINSTEIN, *The Right to Life...*, p. 119.

de la notion «la vie». Il s'agit de savoir si le droit à la vie est considéré par les instruments internationaux comme le droit à l'existence physique ou bien comme le droit à la subsistance. A travers des instruments internationaux et de la jurisprudence internationale, on observe une évolution des opinions sur cette questions.

A l'époque de l'élaboration de la Déclaration Universelle, on pouvait remarquer la tendance à considérer le droit à la vie comme le droit à la subsistance. Le projet présenté par le Chili prévoyait que le droit à la vie «...comprend le droit à la subsistance et à l'entretien pour ceux qui ne peuvent subvenir eux-mêmes à leurs besoins; il implique que l'Etat a le devoir de veiller à ce que cette subsistance soit effectivement assurée»³⁵. Le Président du Comité de rédaction déclarait que la question qui nous occupe ici est celle de la protection de la vie humaine et du droit à l'existence. L'intention du Comité de rédaction était la limitation des notions de liberté et d'intégrité, alors que la proposition du Chili tendait à développer considérablement ces idées³⁶. Au cours de la négociation du Pacte politique, le droit à la vie était interprété strictement comme le droit à l'existence physique. L'accent était mis sur deux questions: le commencement et la fin de la vie.

Le droit à un certain niveau de vie est reconnu dans le Pacte économique, dont l'article 11 précise le contenu: «...une nourriture, un vêtement et un logement suffisants, ainsi qu'une amélioration constante des conditions d'existence». Dans les instruments plus récents, par exemple, dans la Déclaration sur le progrès et le développement dans le domaine social, dans la Déclaration universelle pour l'élimination définitive de la faim et de la malnutrition, adopté en 1974, une nouvelle conception du droit à la vie se dégage. On parle de la nécessité de créer des conditions socio-économiques pour que la vie soit protégée d'une manière effective. Le droit à la vie est considéré par ces instruments en tant que le droit à la subsistance, bien que cette expression ne figure pas dans les textes. Le droit à la subsistance est reconnue explicitement dans le droit humanitaire³⁷.

Le droit à la subsistance est étroitement lié aux droits sociaux et économiques. La réalisation de ces droits vise à assurer un certain standard minimum de la vie. Ce standard n'est pas défini d'une manière précise.

³⁵ Pour les détails voir. A. VERDOODT, *Naissance et signification de la Déclaration Universelle des Droits de l'Homme*, Louvain-Paris, 1964, p. 96 et suiv.

³⁶ Observation faite par René Cassin, U.N.Doc. e/CN.4/SR.13.

³⁷ L'article 54 du Protocole Additionnel I prévoit: « Protection des biens indisponibles à la survie de la population civile », l'article 61 du même Protocole envisage « l'aide à la sauvegarde des biens essentiels à la survie ». L'article 14 du Protocole Additionnel II prévoit: « Il est interdit d'attaquer, de détruire, d'enlever ou de mettre hors d'usage à cette fin, des biens indisponibles à la survie de la population civile ».

mais ses éléments essentiels sont formulées dans les textes internationaux. Il faut donc constater que le droit à la vie considéré traditionnellement comme une liberté individuelle se développe graduellement vers le droit de la vie, c'est à dire le droit à un certain niveau de la vie.

L'évolution de la doctrine est aussi très significative. J. E. S. Fawcett, dans le commentaire à la Convention européenne écrivait «...is not life, but the right to life, which is to be protected by law»³⁸. Selon Y. Dinstein, la question de la qualité de la vie reste en rapport avec la réalisation des droits sociaux et économiques, tandis que le droit à la vie «...is the right to be safeguarded against (arbitrary) killing»³⁹. F. Przetacznik distingue ces deux notions: le droit à la vie (right to life), protégé par l'article 6 du Pacte politique et le droit de la vie (right to living), protégé par le Pacte économique⁴⁰.

Une idée diamétralement opposée a récemment été soutenue par B. G. Ramcharan qui écrivait: «The duty of the State to assure satisfaction of the survival requirements of every person within its jurisdiction must be considered as unavoidable component of the right to life in its modern sense»⁴¹. Cette conception du droit à la vie est sans doute discutable. Néanmoins, dans la jurisprudence internationale on trouve des arguments de poids pour la soutenir.

La Commission européenne a explicitement réaffirmé que l'Etat était obligé non seulement de s'abstenir de donner la mort intentionnellement, mais aussi de prendre des mesures nécessaires à la protection de la vie. Elle estime donc que la première phrase de l'article 2 de la Convention (le droit de toute personne à la vie est protégé par la loi) impose à l'Etat une obligation plus large que celle de la deuxième phrase (la mort ne peut être infligée à quiconque intentionnellement...). Des exemples de «mesures nécessaires» ont été fournis par la Commission dans cette affaire².

Les mesures nécessaires peuvent consister à accorder aux particuliers

³⁸ J. E. S. FAWCETT, *The Application of the European Convention on Human Rights*, Oxford, 1969, pp. 30—31.

³⁹ Y. DINSTEIN, *op. cit.*, p. 115.

⁴⁰ F. PRZETACZNIK, *op. cit.*, p. 591.

⁴¹ B. G. RAMCHARAN, *The Concept and Dimensions of the Rights of Life*, in: *The Right to Life in International Law*, Dordrecht-Boston-Lancaster, 1985, p. 6.

² Requête no 7154/75. Association X contre le Royaume Uni. «Annuaire de la Commission», 1979, vol. XIX, p. 31. Pendant une campagne de vaccination, un certain nombre d'accidents mortels se sont produits. Le système de surveillance (le contrôle de la fabrication et de la distribution des vaccins, la diffusion d'une documentation sur les risques médicaux et contre-indications connues etc.) établi par l'Etat, a été considéré comme suffisant et la Commission a admis que «l'Etat n'a pas omis de prendre les mesures pour protéger la vie».

une protection personnelle⁴³. Ces mesures peuvent, dans certaines conditions, consister à fournir de soins médicaux gratuits lorsque la vie d'une personne est menacée*.

La Commission européenne apprécie le comportement d'un Etat par rapport au degré du danger de la mort d'un individu. Les actions requises d'un Etat sont celles qui de façon directe empêcheront la survenance de la mort. Le Comité des Droits de l'Homme a une conception de la protection du droit à la vie beaucoup plus extensive.

Le Comité considère que l'Etat doit prendre toutes les mesures qui, de façon directe ou indirecte, à court ou à plus long terme, empêchent des atteintes au droit à la vie. On retrouve cette conception dans ses rapports annuels. Le Comité exprimait, à plusieurs reprises, l'opinion qu'il était indispensable de prendre toutes les mesures possibles pour réduire la mortalité ou pour éliminer la malnutrition et les épidémies. Après avoir examiné les rapports présentés par les Etats, le Comité demandait des renseignements sur les efforts entrepris en vue de réduire la mortalité infantile et sur les dispositions juridiques régissant la protection de la santé publiques. Des renseignements ont été demandés sur les mesures prises par les gouvernements pour faire du droit à la vie une réalité et notamment les mesures concernant les prestations et services de maternité, les niveaux de nutrition des enfants et des adultes, la protection de l'environnement. La lutte contre la drogue et contre la mortalité, l'organisation d'un système efficace de santé publique ont également fait l'objet des demandes du Comité. On a souligné que l'article 6 du Pacte politique imposait aux autorités non seulement l'obligation de s'abstenir de priver arbitrairement un individu de la vie, mais aussi de prendre des mesures positives pour réduire la mortalité infantile, l'analphabétisme, le chômage. On peut citer plusieurs exemples semblables.

Cette prise de position du Comité nous permet de dégager certains traits caractéristiques de la nouvelle conception du droit à la vie, développée et soutenue par B. G. Ramcharan. Selon cette conception, les obligations de l'Etat en matière de prévention concernent en l'occurrence aussi bien

⁴³ Requête no 604073. X contre Friande. « Annuaire... ». 1973, vol. XVI, p. 389. La Commission estimait que l'Etat n'est pas obligé d'accorder des services permanents d'un garde du corps exige par le requérant -- « pendant une période de temps indéfinie ».

⁴⁴ Requête no 6839/74. X contre Irlande. « Annuaire... », 1977, vol. XVII, p. 78. La requérante a fait valoir que le refus des autorités de délivrer à sa fille, gravement invalide, une « carte médicale » qui lui donnerait le droit à des soins gratuits et à d'autres avantages sociaux constituait une violation du droit à la vie, garanti par l'article 2 de la Convention. La requête a été rejetée comme mal fondée; La Commission a estimé que le niveau des ressources des parents était suffisant pour pouvoir assurer des soins médicaux à leur fille.

l'individu, que la collectivité, la population vivant dans son territoire. Le droit à la vie, considéré traditionnellement, comme un droit individuel, devient donc en même temps un droit collectif.

On observe actuellement une tendance vers la révision du contenu « des droits de l'homme » et une extension considérable de ce terme, par rapport aux définitions et classifications traditionnelles. Les orientations principales de cette évolution se manifestent au niveau des instruments internationaux, au niveau de leurs mise en oeuvre et au niveau de la doctrine. Cette évolution engendre des discussions et des controverses concernant aussi bien les principes que l'efficacité de la protection internationale⁴⁵. On peut se demander si ces tendances ne risquent pas de dévaloriser les droits de l'homme traditionnels? Aujourd'hui la question reste encore ouverte, mais la conclusion viendra avec la pratique de la mise en oeuvre des droits de l'homme par les Etats.

⁴⁵ R. PELLOUX, *Vrais et faux droits de l'homme. Problèmes de déontion et de classification*, « Revue du Droit Public et de la Science Politique en France et à l'Étranger », no 1—2/1981, pp. 56—68.

Advisory Opinions of the International Court of Justice as Reviews of Judgments of International Administrative Tribunals

by RUDOLF OSTRIHANSKY

Judicial review of judgments of international administrative tribunals by means of advisory opinions of the International Court of Justice has become an important part of the advisory activity of the ICJ since early seventies. Four such opinions have been delivered until now. The first one related to four judgments (Nos. 17, 18, 19 and 21) of the Administrative Tribunal of the ILO (the ILOAT) concerning officials of UNESCO (Messrs. Duberg and Leff and Mrs. Wilcox and Mrs. Bernstein).¹ The remaining three related to the judgments of the United Nations Administrative Tribunal (the UNAT), as a result of the special procedure for review established in 1955. They concerned judgments No. 158 (*Fasla v. the Secretary-General*),² No. 273 (*Mortished v. the Secretary-General*)³ and No. 333 (*Yakimetz v. the Secretary-General*)⁴

These three opinions constitute almost a half of the all advisory opinions rendered by the Court in the 1970s and 1980s.⁵ This shows the considerable importance of that kind of activity of the Court and stimulates some remarks on that subject.

The present article will focus on the common problems of rendering opinions being reviews of judgments of administrative tribunals. Accordingly,

¹ Judgments of the Administrative Tribunals of the International Labour Organisation upon complaints made against the UNESCO, *ICJ Reports 1956*, p. 77.

² Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, *ICJ Reports 1973*, p. 166.

³ Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, *ICJ Reports 1982*, p. 325.

⁴ Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, *ICJ Reports 1987*, p. 18.

⁵ The remaining opinions were given in the Namibia, Western Sahara and Interpretation of the Agreement between the WHO and Egypt cases. Another opinion (related to an obligation to enter into arbitration between the UN and the United States) was rendered in April 1988.

particular issues of each case, although having sometimes a big importance (like the question of acquired rights of international civil servants), are omitted in this paper. The main problems discussed here are the grounds for jurisdiction of the Court, main objections regarding the Court's competence to render such opinions, and the appropriateness of that kind of activity of the Court.

I. Legal Grounds for Using the Court to Review Judgments of Administrative Tribunals

1. A Specific Basis for the Jurisdiction

The Statute of the ICJ provides no specific grounds for the use of the Court as an instance of appeal in disputes between organizations and their staff members. Such a possibility was discussed at the San Francisco Conference establishing the United Nations (and the ICJ). The delegation of Venezuela proposed to formulate Article 34 of the Statute of the ICJ in the following way:

"1. With the exception of the provisions in paragraph 2 of this Article, only States or Members of the United Nations may be parties in cases before the Court.

2. As a Court of Appeal, the Court will have jurisdiction to take cognizance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations when the appeal would be provided in the Statute of such Tribunals".⁶

This proposal did not, however, gain the required support and was not accepted.

Specific grounds are included in the statutes of the ILOAT and the UNAT. Article XII of the Statute of the ILOAT, introduced in 1946,⁷ states as follows:

"1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

"2. The opinion given by the Court shall be binding".⁸

⁶ *Documents of the United Nations Conference on International Organization*, vol. 13, p. 482, reproduced in *ICJ Reports 1956*, p. 160.

⁷ This Article was included, when the former Administrative Tribunal of the League of Nations was converted into the ILO Administrative Tribunal.

⁸ *ICJ Reports 1956*, p. 78.

Paragraph 5 of Article II, to which a reference is made, deals with a possibility of settling disputes between other international organizations and their officials by the Tribunal.

The Statute of the UNAT (created in 1949) originally provided no such possibility. Article 10 of the text adopted in 1949 stated that judgments were final and without appeal. This provision, confronted with the status of this Tribunal as a subsidiary organ of the General Assembly, caused the controversy as to the binding force of judgments of the UNAT in relation to the General Assembly. This controversy was settled by the ICJ in its advisory opinion on "Effect of Awards of Compensation made by the United Nations Administrative Tribunal," delivered in 1954.⁹ In this opinion the Court stated that the General Assembly was bound by the judgments of its subsidiary organ.¹⁰

Disappointment of several States, caused by that opinion, stimulated the General Assembly to start preparations for the inclusion of some kind of control mechanism in the Statute of the Tribunal. A Special Committee was established, and on the basis of its recommendations a new Article 11 was included in the Statute (GA Res. 957 (X)).¹¹

The system of recourse to the ICJ is more complicated than in the Statute of the ILOAT. Applications for review may be sent by Member States, the Secretary General, or the person in respect of whom a judgment has been rendered. There are four grounds for applying for the review:

- a) The Tribunal has exceeded its jurisdiction or competence;
- b) It has failed to exercise jurisdiction vested in it;
- c) It has erred on a question of law relating to the provisions of the Charter of the United Nations;
- d) It has committed a fundamental error in procedure which has occasioned a failure of justice.

Those applications are considered by the Committee on Applications for Review of Judgments of the United Nations Administrative Tribunal, specially established for that purpose.

The Committee is composed of States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. The members of the Committee are States, not their representatives. Therefore the ICJ pointed out the irregularity,

⁹ *ICJ Reports 1954*, p. 47.

¹⁰ *Ibid.*, p. 53.

¹¹ The drafting history of this Article is presented in a detailed manner in: D. PRATAP, *The Advisory Jurisdiction of the International Court*, Oxford 1972, pp. 68—71; see also WOONSANG CHOI, "Judicial Review of International Administrative Tribunal Judgments", in: *Contemporary Issues in International Law. Essays in Honour of Louis B. Sohn*, ed. by T. Buergenthal, Kehl-Strasbourg-Arlington 1984, pp. 347—348.

which had occurred at its 20th session in 1981. The representative of Sierra Leone had been the Chairman of the Sixth Committee on a relevant session of the General Assembly. He had been, however, unable to participate in the work of the Committee on Applications during its 20th session. He had designated the representative of Canada, who had been a Vice-Chairman of the Sixth Committee, to act in his place. The Court stressed the irregularity of such replacement, because Canada had not been one of the States composing the General Committee at the relevant time.¹² Despite that improper composition of the Committee the Court decided to comply with its request.¹³

If the Committee decides that there is a substantial basis for the application, it will request an advisory opinion of the Court.

2. Legality of the Extra-statutory Basis for the Jurisdiction of the Court

Several doubts were raised as to the legality of conferring the competence upon the ICJ by other documents than the Statute of the Court. Judge Cordova vigorously advocated this point of view in 1956, stressing the importance of a rejection of the proposal to include a specific provision to that end, presented at the San Francisco Conference:

“To my mind, this failure of the Venezuelan amendment amounts to an advanced denial and clear rejection of all Requests for Advisory Opinions having the effect of an appeal, presented on the basis of Article XII and 11 of the respective Statutes of the two Administrative Tribunals”.¹⁴

The Court has found a basis for its competence in the discussed cases in general norms relating to its advisory function, i.e. in Article 96, paragraph 2 of the Charter of the United Nations and Article 65, paragraph 1 of the Statute of the Court. In the opinion of 1956 the Court stated that the UNESCO Executive Board in formulating the request exercised a power conferred upon that organization by Article IX of the Agreement between UNESCO and the United Nations.¹⁵ This Article¹⁶ deals with a general power of UNESCO to request advisory opinions.

Similarly, in the opinion of 1973 the Court expressly named Article 96, paragraph 2 of the Charter as a basis of the power of the Committee

¹² *ICJ Reports* 1982, pp. 342—343.

¹³ *Ibid.*, pp. 347—348.

¹⁴ *ICJ Reports* 1956, p. 161.

¹⁵ *Ibid.*, pp. 83—84.

¹⁶ After revision of the Agreement in 1962 it has become Article X.

on Applications to formulate the request.¹⁷ Both Article 96 and Article 65 were cited by the Court in its opinions of 1987.¹⁸

This puts forward the question of reconciliation of these grounds with the rejection of the Venezuelan amendment. It is true that non-acceptance of such amendment should serve as a directive against the interpretation of other provisions extending the competence of the Court to the same effect. But a closer look at both provisions shows that the accepted grounds are not identical with the rejected proposal of Venezuela. The latter related to the competence in contentious cases, while both Article 96 of the Charter and Article 65 of the Statute deal with advisory opinions. Therefore the rejection of the Venezuelan proposal should be interpreted as a clear bar only in contentious proceedings, and not in advisory ones. The problem of compatibility of reviews of judgments with advisory procedure will be discussed later.

The acceptance of general provisions as the basis for the competence of the Court to deal with appeals from judgments of the administrative tribunals raises the question of interrelations between those provisions and specific grounds established in Articles XII and 11 of the statutes of the Tribunals. As far as the formulation of requests remains within the scope of both Article 65, paragraph 1 of the Statute of the ICJ and the specific provision of the statute of the proper tribunal, no actual problem arises. But only in two requests (out of total four) the formulation corresponded directly with the text of the relevant provision.¹⁹ In the application for review of the Judgments of the ILOAT, the second question did not relate to any of the grounds specified in Article XII, i.e. to the decision of the Tribunal confirming its jurisdiction or to a fundamental fault of procedure. The Court refused to answer that question, stating:

“Undoubtedly, UNESCO has the general power to ask for an Advisory Opinion of the Court on questions within the scope of its activity. But the question put to the Court has not been put in reliance upon the general power of UNESCO to ask for an Advisory Opinion. It has been expressly linked with Article XII. [...] In the Request for an Advisory Opinion. Question II has been placed within the orbit of Article II. Actually, it is outside that Article. Accordingly, it cannot be considered by the Court for the purpose of acting upon the request made to it”.²⁰

A more complicated situation appeared in connection with the application for review of Judgment No. 273 of the UNAT. The request was formulated

¹⁷ *ICJ Reports 1973*, p. 173.

¹⁸ *ICJ Reports 1987*, para. 23.

¹⁹ *ICJ Reports 1973*, p. 167, *ICJ Reports 1987*, para. 1.

²⁰ *ICJ Reports 1956*, p. 99.

by the Committee on Application in general terms²¹ and verbally not confined to the four specific grounds provided in Article 11 of the Statute of the UNAT. The records of the Committee meetings show that two such grounds were actually selected by the Committee and voted on.²² But this made no impact on formulating of the request.

The Court, after deliberation, decided to confine itself in answering the question to the two grounds identified by the Committee. It expressly proclaimed the primacy of Article 11 over the actual terms of the request. It also stressed the intention of the Committee to remain within the scope of Article 11 in constructing the request.²³

Judge Oda came to a different conclusion, stating that the deliberations in the Committee did not convincingly indicate any reasonable grounds for objecting the judgment of the UNAT, and that therefore the Court should have declined to answer the request.²⁴

As we see, in both cases the Court curtailed the opinion in such a manner that it needed not to deal with the problem of the requests being outside the scope of specific grounds, while remaining within the scope of general grounds. This judicial caution calls for admiration, but it should not close our eyes on the existence of this potential problem.

Article 65, paragraph 1 requires that the request must come from a duly authorized body. The UN specialized agencies (with the sole exception of UPU) are authorized to request advisory opinions, and the source of that power lies in agreements between those organizations and the United Nations.²⁵ Such a way of extending the authorization fully complies with the requirements stated in Article 96, paragraph 2 of the Charter. That power to request advisory opinions is broader than the scope of Article XII of the Statute of the ILOAT, which determines only two grounds from formulating such requests. This discrepancy applies to the powers of ILO, UNESCO, FAO, ITU, WMO, WIPO and IAEA.

A similar situation occurs in connection with Article 11 of the Statute of the UNAT. The Committee on Applications may request opinions only on four enumerated grounds. But the other organs of the United Nations, especially the General Assembly, have a more general power. Moreover, an access to that Tribunal is open to the staff of ICAO and IMO. It is unclear, whether Article 11 is applicable to judgments concerning the staff

²¹ *ICJ Reports 1982*, p. 326.

²² *Ibid.*, pp. 330—331.

²³ *Ibid.*, pp. 348—350.

²⁴ *Ibid.*, pp. 400—401.

²⁵ See e.g. *International Court of Justice Yearbook 1981—1982*, pp. 53—58.

of those organizations.²⁶ But both organizations are empowered to request opinions on legal questions arising within the scope of their activities, and disputes with their staff are undoubtedly within that scope.

Finally, IBRD, IFC and IDA are authorized to request opinions. Staff disputes of those organizations are settled by the World Bank Administrative Tribunal, in the Statute of which no recourse to the ICJ is provided for.²⁷

This last issue shows much similarity to the situation concerning judgments of the UNAT before 1955. Accordingly, the remarks included in the advisory opinion on "Effect of Awards" retain their value in solving the discussed question. The Court stated in this opinion:

"In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect".²⁸

In other words, any attempt to introduce a review of judgments outside the scope of relevant provisions of a statute of an administrative tribunal cannot be successful. Therefore the Court should deny to answer to such a request, although it is still competent to comply with it. A different situation would occur, if the Committee on Applications formulated the request going beyond the scope of the four grounds expressed in Article 11 of the Statute of the UNAT. Then the request should be rejected on the grounds that the Committee exceeded its competence.

This analysis shows that the provisions of Article XII of the Statute of the ILOAT and Article 11 of the Statute of the UNAT constitute no separate basis for the Court's competence, but oppositely, they limit *de facto* the general competence of the ICJ to deal with requests for advisory opinions.²⁹

The Statute of the ILOAT provides that organizations, which have recognized the jurisdiction of the Tribunal, may request advisory opinions of the Court, on the grounds specified in Article XII. Among those organizations there are several, which have not acquired the general competence to make such requests. They are UPU, CERN, EFTA, World Tourism Organisation, Inter-Parliamentary Union and some others.³⁰

²⁶ In a footnote in the *ICJ Yearbook 1981—1982*, p. 54 such applicability is denied.

²⁷ C. F. AMERASINGHE, "The World Bank Administrative Tribunal", *International and Comparative Law Quarterly*, vol. 31, 1982, No. 4, pp. 748—764.

²⁸ *ICJ Reports 1954*, p. 56.

²⁹ K. J. KEITH, *The Extent of the Advisory Jurisdiction of the International Court of Justice*, Leyden 1971, p. 76.

³⁰ *The ICJ Yearbook 1981—1982*, p. 55.

Those organizations cannot claim Article 96, paragraph 2 or Article 65, paragraph 1 as a basis for the Court's competence. Therefore the question of legality of such possible requests (expressly provided for in the Statute of the ILOAT) arises. K. J. Keith³¹ suggests in that connection the advisability to consider Article 36, paragraph 1 of the Statute of the ICJ as a possible basis for the Court's competence. The relevant passage of that paragraph states:

"The jurisdiction of the Court comprises [...] all matters specially provided for [...] in treaties and conventions in force".

The word "matter", opposedly to the designations "case" and "dispute", used in paragraphs 1 and 2 of Article 36, does not necessarily suggest the contentious character of the issue. The main problem is, however, that the Statute of the ILOAT is neither treaty nor convention, but a resolution of the International Labour Conference. Keith has stressed in this connection the contractual element in opening of the ILOAT to other organizations,³² but it should not conceal the fact that the Statute does not meet the requirements of Article 36, paragraph 1 of the Statute of the ICJ.

Accordingly, any attempt to request advisory opinions by UPU or an organization not being a specialized agency of the United Nations, but empowered by the Statute of the ILOAT should be rejected by the Court, due to lack of the proper authorization by the General Assembly.

II. Objections to the Competence of the Court to Deal with Reviews of Judgments of Administrative Tribunals

Several objections were raised as to both competence and appropriateness of the Court to deal with such reviews. Objections regarding the competence relate to three issues: performing contentious jurisdiction in an advisory form, solving matters not on a basis of international law and the lack of a proper authorization of the Committee on Applications.

1. Applying the Advisory Procedure to Contentious Cases

The first main objection is that the advisory procedure in the discussed cases is applied to disputes of adversary character, and moreover, disputes between parties having no access to the Court. The problem of compatibility of this way with Article 34, paragraph 1 of the Statute of the ICJ,

³¹ K. Y. KEITH, *op. cit* pp. 41–44.

³² *Ibid.*, pp. 43–44.

stating that only States may be parties in cases before the Court, arises. In the opinion of 1956 the Court reduced this problem to the question of equality between parties,³³ coming to the conclusion that such equality was actually respected in that dispute. In all four opinions it was stressed that the background of requests for the opinions does not transform the opinion into a judgment, and the advisory function into one of settling of disputes.³⁴

The most relevant passage appears in the opinion of 1973:

“...the existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court’s opinion, does not change the advisory nature of the Court’s task, which is to answer the questions put to it with regard to a judgment”.³⁵

Different attitudes to this problem were taken by Judges Cordova in 1956 and Morozov in 1973 and 1982,³⁶ who argued that the individuals were *de facto* parties to the proceedings. This criticism is shared by Woonsang Choi, who sees the decisive argument for a contentious character of the review procedure in the binding effect of the opinions.³⁷

The position taken by the Court may be defended by placing the problem on a formal ground: if an organ requesting the opinion is competent under the Charter and the Statute of the ICJ to formulate such a request, the Court will be competent to deal with the request (which does not mean that it will have to comply with it).³⁸ A situation analogous to the “Eastern Carelia” case dealt by the PCIJ does not appear here, because both the Executive Board of UNESCO and the Committee on Applications have been expressly authorized to formulate exactly such requests and a circumvention of the law cannot be charged.

Judge de Castro has followed this line of reasoning stressing that the application of advisory procedure to the review of judgments should not be treated as *fraus legis*, but instead it is a legitimate development of the law.³⁹

This standpoint does not, however, dispel all the doubts. It seems that the competence of the Court to deal with applications for review of judgments should be found in norms limiting the grounds of review

³³ ICJ Reports 1956, p. 85.

³⁴ ICJ Reports 1956, p. 84; ICJ Reports 1973, pp. 171—172; ICJ Reports 1982, p. 333; ICJ Reports 1987, para. 24.

³⁵ ICJ Reports 1973, p. 171.

³⁶ Judge Cordova: ICJ Reports 1956, pp. 158—164; Judge Morozov: ICJ Reports 1973, p. 297 and ICJ Reports 1982, pp. 435—436.

³⁷ WOONSANG CHOI, *op. vit.*, pp. 354—355.

³⁸ K. J. KEITH, *op. cit.*, p. 179.

³⁹ Judge de Castro (diss. op.) ICJ Reports 1973, p. 275.

to enumerated issues,⁴⁰ and in weakening (in Art. 11 of the Statute of the UNAT) of the binding force of the opinions. This enables to detach (to some extent) a case tried by the administrative tribunal and the proceedings before the Court, and helps to uphold the Court's assertion that the opinion is not a review of the actual substance of the judgment.⁴¹ With unlimited possibility of challenging the judgments, the identity of both cases would be not objectable.

The arguments brought here in a support of the Court's attitude do not mean that the opposite assertions cannot be legitimately upheld. They show, however, that the statement of conformability of proceedings in discussed cases with the requirements of Article 34 of the Statute cannot be rejected as manifestly ill-founded.

2. The Competence of the Court to Deal with Issues of International Administrative Law

Administrative tribunals settle disputes between organizations and their officials on a basis of a part of so-called internal law of international organizations, called international administrative law.⁴² The main part of that law is included in resolutions of appropriate organs of international organizations, named usually staff regulations and staff rules.

The well-known Article 38 of the Statute of the ICJ states that the Court decides in accordance with international law, and then the list of sources follows. Resolutions of international organizations are not included in that list. Article 68 of the Statute refers the Court performing the advisory function to provisions of the Statute applying in contentious cases "to the extent to which it recognizes them to be applicable".

The question of legality of basing the opinions of the Court on international administrative law has therefore arisen. Judge Cordova in 1956 and Judge Gros in 1973 gave a negative answer to it. Judge Cordova supported the full applicability of Article 38 in advisory proceedings. Consequently he limited the competence *ratione materiae* of the Court to inter-state law.⁴³ Judge Gros did not uphold the statement of the full applicability of Article 38 in such definite manner, but nevertheless he stressed that the Court was bound by the general terms of that Article and was competent

⁴⁰ Similarly Judge Gros, who has accepted this argument only as regards to the ILOAT, *ICJ Reports 1973*, pp. 267—269.

⁴¹ The Court stated that in all four opinions: *ICJ Reports 1956*, pp. 98—99, *ICJ Reports 1973*, pp. 187 ff. *ICJ Reports 1982*, pp. 355—356, *ICJ Reports 1987*, pp. 33—34.

⁴² E.g. C. W. JENKS, *The Proper Law of International Organisations*, London-Dobbs Ferry 1962.

⁴³ *ICJ Reports 1956*, pp. 165—166.

to answer legal questions only of an international nature. He maintained that the law applied in cases concerning reviews of judgments of international administrative tribunals was not international law.⁴⁴

The first of these charges can be refuted on grounds of the constant practice of the Court to treat resolutions of international organizations as a pertinent source in advisory proceedings.⁴⁵ Also the letter of Article 65 of the Statute of the Court, stating that the Court “may give an advisory opinion on any legal question” is summoned for the support.⁴⁶

The objection raised by Judge Gros is more difficult to reject. The fragment of Article 65 quoted above cannot be interpreted as enabling the Court to unlimited discussing of any legal question. It would run counter to the provision of Article 2, paragraph 7 of the Charter, prohibiting intervention in matters being essentially within the domestic jurisdiction of States. Accordingly the argument that the advisory opinions must relate to legal questions having an international character is convincing.

The most obvious way of defending decisions of the Court to comply with the requests is treating international administrative law as a part of international law. This idea is supported by many distinguished international lawyers,⁴⁷ although the opinion of separability of the spheres of both legal regimes is also shared by many writers.⁴⁸ The Court carefully avoided to answer to that question, but overcoming of the objection of Judge Gros (who expressly excluded international administrative law from international law) may be interpreted as a suggestion that questions of international administrative law belong to issues having an international character.

Another way of supporting the legitimacy of the position taken by the Court leads through the interpretation of the notion of domestic jurisdiction. Domestic jurisdiction is attributed to States. No such domestic jurisdiction of international organizations exists (the jurisdictional immunity of organizations

⁴⁴ *ICJ Reports 1973*, p. 257.

⁴⁵ A good example is the opinion on “Namibia” question (*ICJ Reports 1971*, p. 16). Generally see: A. BASAK, *Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice*, Wrocław 1969.

⁴⁶ K. J. KEITH, *op. cit.*, p. 141.

⁴⁷ E.g. C. W. JENKS, *op. cit.*, p. 3; K. SKUBISZEWSKI, *Uchwały prawotwórcze organizacji międzynarodowych [Law-making Resolutions of International Organizations]*, Poznań 1965, pp. 30—31; H. WALDOCK, “General Course of Public International Law”, *RCADI*, vol. 106, 1962/11, pp. 99—101; I. DETTER, *Law Making by International Organisations*, Stockholm 1965, p. 328.

⁴⁸ E.g. L. FOCSANEANU, “Le droit interne de l’Organisation des Nations Unies”, *Annuaire Français de Droit International*, vol. 3, 1957, pp. 325—344; G. BALLADORE-PALLIERI, “Le droit interne des organisations internationales”, *RCADI*, vol. 127, 1969/11, pp. 1—38; A. PLANTEY, *The International Civil Service. Law and Management*, New York-Paris-Barcelona 1981, pp. 5 and 50.

may be only a partial substitute). Therefore, the general requirement of delivering advisory opinions in accordance with international law may be interpreted as excluding from competence *ratione materiae* only internal affairs of States.⁴⁹

An additional argument may be drawn from the practice of the Court in contentious cases. The PCIJ settled two disputes solely on a basis of municipal law of States.⁵⁰ Similarly the ICJ did not reject the French application in the "Certain Norwegian Loans" case on a basis of a collision with provisions of Article 38. So, if the Court may in certain circumstances deal with cases relating to municipal law, the more it will be competent to answer the request of a duly authorized organization in matters of its internal law.⁵¹

A different approach to the discussed problem was taken by K. Kocot, who after analysis of the opinion of 1956 came to the conclusion that the Court had adjudicated on the basis of international law, treating the internal law of UNESCO as an element of the factual situation.⁵² Kocot's construction may be, however, simplified to the remark that the Court did not decide on the merits of the dispute between UNESCO and its four complaining civil servants, but only supervised the proper functioning of the ILOAT. Norms regulating the functioning of the administrative tribunal were therefore the basis of the opinion. Those norms belong also the domain of internal law of international organizations, although not necessarily to the branch directly related to the rights and duties of staff members.

3. Authorization of the Committee on Applications to Request Advisory Opinions

Requests concerning applications for review of judgments of the UNAT are formulated by the Committee on Applications, being a subsidiary organ of the General Assembly, and created in resolution 957 (X) amending the Statute of the UNAT.

The controversy has arisen, whether the Committee meets the requirements

⁴⁹ The PCIJ came close to this line in delivering the opinion on "Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City", PCIJ, Series A/B, No. 65.

⁵⁰ "Serbian Loans", PCIJ, Series A, No. 20, and "Brazilian Loans", PCIJ, Series A, No. 21.

⁵¹ F. SEYERSTED, "Settlement of Internal Disputes of Intergovernmental Organisations by Internal and Externed Courts", *Zeitschrift für ausländisch-öffentliches Recht und Völkerrecht*, vol. 24, 1964, p. 104.

⁵² K. KOCOT "Nowe tendencje w dziedzinie prawa traktatów" [New Trends in the Law of Treaties], *Zeszyty Naukowe Uniwersytetu Wrocławskiego*, seria A, Nauki Społeczne, No. 34 Prawo VIII, 1961, p. 198.

of Article 96, paragraph 2 of the Charter, and especially whether the requests concern legal questions arising within the scope of its activities.

The Court dealt with this issue in the opinion of 1973.⁵³ The objections were clearly formulated in the dissenting opinion of Judge Morozov⁵⁴ and the separate opinion of Judge Oneyama.⁵⁵ Two principal grounds were indicated: 1) the establishment of the Committee was not in conformity with provisions of Articles 7 and 22 of the Charter and accordingly this organ cannot be authorized to request advisory opinions, and 2) the Committee requested an advisory opinion not in the scope of its own activities, but in the scope of the activities of another body—the UNAT.

Judge Gros went even further in this direction, stating:

“This Committee, devoid as it is of permanence and of continuity of its composition, and not accumulating any experience, is merely a kind of occasional panel meeting at irregular intervals, or a conference of member States, but certainly not an organ in the proper, institutional sense of the word”.⁵⁶

The Court, in upholding the competence of the Committee to request advisory opinions, strongly relied on its previous opinion on “Effect of Awards”. The Court recognized that the General Assembly, when it had established the UNAT, had not been delegating the performance of its own functions.⁵⁷ The Tribunal has been nevertheless treated as validly established.

Functions of the Committee are complementary to those exercised by the Tribunal. Therefore the recognition of legality of the establishment of the Tribunal should be enlarged also to the creation of the Committee.

The second objection seems to be more justified, because the sole function of the Committee is to examine applications for review and to formulate requests for advisory opinions. The Court tried to overcome this obstacle by stressing that the primary function of the Committee is not requesting advisory opinions, but the examination of objections to judgments.

“When it does find that there is a substantial basis for the application, the legal questions which the Committee then submits to the Court clearly arise out of the performance of this primary function of screening the applications presented to it. They are therefore questions which, in the view of the Court, arise within the scope of the Committee’s own activities; for they arise not out of the judgments of the Administrative Tribunal but out of objections to those judgments raised before the Committee itself”.⁵⁸

⁵³ *ICJ Reports 1973*, pp. 172—175.

⁵⁴ *Ibid.*, pp. 298—300.

⁵⁵ *Ibid.*, pp. 225—229.

⁵⁶ *Ibid.*, p. 259.

⁵⁷ *ICJ Reports 1954*, p. 61.

⁵⁸ *ICJ Reports 1973*, p. 174.

This argumentation is not particularly convincing, due to the different position of legal questions being subject of requests of the Committee, and those of other organs or organizations. The Committee puts forward requests not in questions appearing during its own activities, but in questions sent to the Committee "from the outside".

On the other hand, the interpretation presented by the Court has been the only way to uphold the Court's jurisdiction. While not free from grave doubts, it cannot be perceived as manifestly contrary to the provisions of Article 96, paragraph 2 of the Charter. It should be treated as a development of the law by the interpretation of the Court.

III. Appropriateness of Rendering the Opinions

Article 65, paragraph 1 of the Statute of the ICJ is permissive and does not oblige the Court to give an advisory opinion. The Court, however, has established a principle that only compelling reasons would justify a refusal to reply to the request. This principle was stressed in all four opinions relating to review of judgments of administrative tribunals,⁵⁹ as well as in a number of other opinions.⁶⁰ Nevertheless, in the opinions of 1956, 1973 and 1982, several objections to the appropriateness of such reply were indicated in separate and dissenting opinions of judges. Two principal grounds for those objections may be identified: the lack of equality between parties and the incompatibility of proceedings in the Committee on Applications with a judicial character of review.

1. Lack of Equality between Parties

The question of equality between parties looks somewhat different in both procedures for review. Article XII of the Statute of the ILOAT gives the power to request a review of a judgment only to one party — to the organization. The Court, in discussing the request sent by UNESCO to review the four judgments of the ILOAT, was aware of this inherent inequality, and stated:

"According to generally accepted practice, legal remedies against a judgment are equally open to either party. [...] However, the advisory proceedings which have been

⁵⁹ *ICJ Reports 1956*, p. 86; *ICJ Reports 1973*, p. 183; *ICJ Reports 1982*, p. 347; *ICJ Reports 1987*, para. 25.

⁶⁰ E.g. "Interpretation of Peace Treaties with Bulgaria, Hungary and Romania" (First Phase), *ICJ Reports 1950*, p. 72, "Certain Expenses of the United Nations", *ICJ Reports 1962*, p. 155; "Namibia", *ICJ Reports 1971*, p. 27.

instituted in the present case involve a certain absence of equality between UNESCO and the officials both in the origin and in the progress of those proceedings".⁶¹

However, the Court stated that the potential inequality did not materialize in the discussed case, because the officials had been successful in the proceedings before the ILOAT and accordingly had no reasons for complaint. So the inherent inequality did not affect the actual proceedings.⁶² This standpoint was criticised by Judges Winiarski and Klaestad.⁶³

In the Statute of the UNAT access of both parties to the Committee on Applications is assured. Moreover, also the member-States may apply for a review of judgment. Such a situation occurred in 1981, when the United States applied for a review of the Judgment No. 273 of the UNAT. The Committee found that the application had a substantial basis and formulated the request for an advisory opinion.

The applied procedure raised (among other things) the question of equality between parties. The United States were at that time a member of the Committee and took an active part in deliberations and voting. On the other hand, the Committee refused to comply with the request of the counsel for the staff member to be given an opportunity to participate in the proceedings of the Committee, at which the United States' application was considered.⁶⁴ This caused practical inequality between the respective positions of the United States and the staff member in the Committee. The Court pointed out that departure from the requirements of the judicial process, nevertheless it did not consider that irregularity as a compelling reason to decline a reply to the request.⁶⁵

This attitude raised much criticism among the minority of the Court. Judges Ruda⁶⁶ and El-Khani⁶⁷ indicated that the inequality described rightly by the Court should have amounted to the "compelling reason" to refuse to render the opinion.

One preliminary comment should be made: the lack of equality in the situation which occurred in the discussed case, is still smaller than in the proceedings under the Statute of the ILOAT. The acceptance of this procedure should therefore, on a basis of the *a maiori ad minus* principle,

⁶¹ *ICJ Reports 1956*, p. 85.

⁶² *Ibid.*

⁶³ *Ibid.*, pp. 108 and 112, respectively.

⁶⁴ *ICJ Reports 1982*, pp. 345—346.

⁶⁵ *Ibid.*, pp. 345 and 347—348.

⁶⁶ *Ibid.*, p. 375.

⁶⁷ *Ibid.*, p. 451.

lead to the same acceptance of the procedure provided for in Article 11 of the Statute of the UNAT, despite the described irregularities.

Another aspect of inequality relates to the proceedings before the Court. Individuals have no direct access to the Court, they cannot transmit pleadings; nor can they participate in oral proceedings. Conversely, organizations and States are entitled to take part in both written and oral proceedings.

The Statute of the ILOAT provides no remedy for such inequality. In the only case concerning reviews of judgments of this Tribunal, some practical measures were, however, undertaken. The observations of the counsel for the staff members were transmitted to the Court by UNESCO, as an appendix to the statement of the organization. The extent of the observations was not verified by the organization.⁶⁸ The Court dispensed with oral proceedings in this case and accordingly no actual inequality in that phase arose.

The Court stressed that the absence of equality between parties had therefore only a nominal character.⁶⁹ Judges Winiarski, Klaestad and Sir Muhammad Zafrulla Khan disagreed with this statement, pointing out that sending of observations by one party through the intermediary of the other party does not conform to the standards of equality before the Court.⁷⁰ Sir Muhammad Zafrulla Khan stressed also that UNESCO had been entitled to appear before the Court to request for an oral hearing. The Court would have found it difficult to refuse the request. This would destroy the carefully balanced equality. Therefore

“a single State or international organization to whom notice is sent under paragraph 2 of Article 66 can exercise a veto upon the Court’s authority to deliver an opinion”.⁷¹

This last charge is not particularly convincing from the practical point of view. Only the organization interested is entitled to request an opinion in accordance with Article XII. That Article is the only way to challenge a judgment of the Tribunal. It is unlikely for the organization pleading for review to request an oral hearing and to eliminate in this way the only opportunity to review the judgment. The more probable is such a request sent by a State, but still the danger should not be overemphasised.

Article 11 of the Statute of the UNAT provides some safeguards for

⁶⁸ L. GROSS, “Participation of Individuals in Advisory Proceedings Before the International Court of Justice: Question of Equality Between the Parties”. *American Journal of International Law*, vol. 52, 1958. No. 1, pp. 19—20.

⁶⁹ *ICJ Reports 1956*, p. 86.

⁷⁰ *Ibid.*, pp. 107 (sep. op. J. Winiarski), 110 (sep. op. J. Klaestad) and 114 (sep. op. J. Sir Mahummad Zafrulla Khan).

⁷¹ *Ibid.*, p. 115.

the position of the staff member concerned. In paragraph 2 of that Article the Secretary General is obliged to arrange the transmission of the views of the staff member to the Court. So individuals still have no direct access to the Court (establishment of such access would be contrary to the Statute of the Court) and must send their observations through the intermediary, but this channel does not depend on a goodwill of the organization.

As far as oral proceedings are concerned, the General Assembly recommended in resolution 957 (X) that States and the Secretary General should not make oral statements before the Court in proceedings under Article 11.⁷² This recommendation is not binding on the member-States and nor even on the Secretary General.⁷³ In the three cases already settled by the Court, fortunately there was no request for an oral presentation, with the exception of such request presented by a staff member,⁷⁴ which could not be granted on the formal basis.

But still the hypothetical problem of handling such requests remains. The Court has pointed out that the holding of public hearings is a matter within the discretion of the Court.⁷⁵ This does not lead, however, to the assumption that in any case of the nature discussed here the Court may and should dispense with the oral proceedings. The requirement of obtaining the fullest possible evidence and arguments must be fulfilled and both the parties and the Court cannot be deprived of the opportunity of an additional presentation of material. This may lead, however, to not only nominal, but also actual inequality of parties before the Court and in this way run counter to the requirements of the judicial process.

Generally, the position taken by the Court to consider only the actual equality of parties in any particular case is highly controversial. This concept is open to doubts, because it reduces the problem to certain ancillary issues, without touching the general position of both parties before the Court. On the other hand, two out of four cases were instituted by staff members. The treatment of the discussed procedure as not conforming to the judicial character of the Court would weaken the position of the already weaker party—the official. This indicates, however, that the advisory way is not fully appropriate for dealing with reviews of judgments.

2. Political Character of the Committee on Applications

The second main objection related to the composition of the Committee

⁷² *ICJ Reports 1973*, pp. 180—181.

⁷³ L. GROSS, *op. cit.*, pp. 30—31.

⁷⁴ *ICJ Reports 1973*, pp. 181—182.

⁷⁵ *Ibid.*, p. 181.

on Applications. Existence of an intermediate step between two phases of judicial proceedings, on which the case is handled by a political organ, was perceived by several judges as incompatible with a judicial character of the disputes.⁷⁶

This question was discussed already during the debates concerning the establishment of the Committee.⁷⁷ Supporters of this concept stressed that the Committee would have no discretionary powers to request an opinion, but it would be only entrusted with powers to examine the existence of specified legal grounds, for the protection of the Court from frivolous applications.

The Court pointed out the political character of the Committee and the legal functions performed by that organ, but

“[...] there is no necessary incompatibility between the exercise of these functions by a political body and the requirements of the judicial process, inasmuch as these functions merely furnish a potential link between two procedures which are clearly judicial in nature”.⁷⁸

In discussing this objection two issues should be separated: the legality of the intermediate step, and the appropriateness to situate the Committee on that step. The intermediate step is necessary to open the way to the Court for affected staff members. An organ transmitting applications of staff members must have some control over the content of those applications. The lack of such control would be contrary to Article 96, paragraph 2 of the Charter, limiting the scope of subjects entitled to request the opinions. An organ being only a “request-box” should not have been treated as authorized under the terms of Article 96, paragraph 2.

True, that an organ composed of independent legal experts would better fit the requirements of the judicial process than a political body. But from the establishment of an independent body of legal experts there is only one small step to equip it with the function of a regular court of appeal. Such development would be in many respects more desirable than the existing procedure.⁷⁹ However, not being the most desirable does

⁷⁶ *ICJ Reports 1973*, pp. 258—260 (diss. op. J. Gros); *ICJ Reports 1982*, pp. 374—375 (sep. op. J. Ruda), and, to some extent, *ICJ Reports 1987*, pp. 76—79 (sep. op. J. Elias).

⁷⁷ WOONSANG CHOI, *op. cit* pp. 362—364.

⁷⁸ *ICJ Reports 1973*, p. 176.

⁷⁹ This was stressed i.a. by Judges Lachs (*ICJ Reports 1973*, p. 214), Elias (*ICJ Reports 1987*, p. 79) and Ago (*ICJ Reports 1987*, p. 109), as well as a number of writers, e.g. M. AKEHURST, *The Law Governing Employment in International Organizations*, Cambridge 1967, p. 23, and G. VANDERSANDEN, “Administrative Tribunals, Boards and Commissions”, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, inst. 1, Amsterdam-New York-Oxford 1981, p. 3.

not necessarily mean inappropriate. The decision of approval or disapproval of an imperfect procedure depends on the flexibility of the supreme judicial body. The tolerance of the Court is understandable for the same reason, than in the other doubtful situations discussed above.

3. Instituting of the Review Procedure by a Member-State

According to Article 11, paragraph 1 of the Statute of the UNAT, an application for review may be presented by a member-State. Such a situation occurred in 1981, in connection with the Judgment No. 273. Apart from the question of inequality in the Committee, discussed above, a more fundamental problem has arisen: the compatibility of an application for review formulated by a third party, not participating in the dispute before the Tribunal, with requirements of the judicial process.

The Court stated in this context:

"[...] although a member-State of the United Nations be not a party to a judgment rendered by the Administrative Tribunal in a dispute between a staff member and the Organization, it may well have a legal interest in giving rise to a review of the Judgment".⁸⁰

The Court also stressed that the request came from the Committee, and not from a member-State,⁸¹ and accordingly it did not differ substantially from other requests coming from the same source.

Judge Ruda, while agreeing that the State did not become a party to the proceedings, pointed out another contradiction. The Committee opposed the judgment, which the Secretary-General gave acquiescence to. This constituted a contradictory situation, in which two organs of the Organization being a party to the litigation had taken mutually excluding attitudes.⁸²

This objection should be defeated on the following grounds. Parties to the original dispute are a staff member and the organization (usually represented by the chief administrative officer). But the system of settlement of a dispute is also within the Organization. Both the Tribunal and the Committee are subsidiary organs of the United Nations. The Organization appears in a double role: as a party to the litigation and as a forum of the litigation. These roles should not be confused. The task of the Committee is to assist the system of adjudication in the proper discharging of its functions. Therefore the position taken by the Committee cannot fall in contradiction with the position presented by the Secretary General.

⁸⁰ *ICJ Reports 1982*, p. 335.

⁸¹ *Ibid.*, pp. 335—336.

⁸² *Ibid.*, pp. 374—375.

Admittedly, also in cases, when the Committee upheld applications presented by staff members, the position taken by that organ differed fundamentally from that taken by the Secretary General.

The right of a member-State to introduce an application for review to the Committee should be derived from the functional character of the international legal personality of the organization. Being a subject of international law, an organization does not cease to be a forum articulating the interests of the member-States. This point was stressed by Judge Lachs:

“The conclusions to be drawn are that the relationship lies basically between the staff member and the Organization and that, at that level, a member State, as such, cannot be regarded as an outsider”.⁸³

Therefore the charge of inadmissibility of a review originated from a member-State should be rejected.

IV. Conclusions

The Court bases its competence to render opinions in the cases discussed above on the general provisions of Articles 96, paragraph 2 of the Charter of the United Nations and 65, paragraph 1 of the Statute of the ICJ. The specific provisions in Article **XII** of the Statute of the ILOAT and Article 11 of the Statute of the UNAT do not constitute any separate grounds. On the other hand, conformity with these provisions is the requirement to challenge the validity of judgments of administrative tribunals. Therefore the specific provisions may be interpreted as limitations of the general competence of the Court.

Objections to the competence of the Court and to the appropriateness of rendering opinions may be overcome through the particular interpretation developed by the Court. Although that interpretation sometimes does not look convincingly (especially in the question of conformity of requesting opinions by the Committee on Applications with Article 96, paragraph 2 of the Charter), nevertheless it never can be perceived as contrary to the letter of documents governing the activity of the Court.

The existence of so many dubious points indicates, however, that the advisory way is not particularly fortunate for reviewing judgments of administrative tribunals. The establishment of a regular appellate court seems to be much more desirable than maintaining the existing procedure.⁸⁴

⁸³ *Ibid.*, p. 413.

⁸⁴ See fn. 79 above.

If the present system remains, it will be worth to consider the appropriateness to create a special chamber of the Court, on the basis of Article 26, paragraph 1 of the Statute, to deal with such opinions, due to the peculiar features of the law applied in those cases.⁸⁵

⁸⁵ For details see R. OSTRIHANSKY, "Chambers of the International Court of Justice", *International and Comparative Law Quarterly*, vol. 37, 1988, No. 1, pp. 51—52.

Conclusion, révision et résolution du contrat de spécialisation et de coopération dans la production selon ces CGSC du CAEM

par MAKSYMILIAN PAZDAN

I. Remarques préliminaires

1. En vue de faciliter la réalisation des objectifs du Conseil d'Aide Economique Mutuelle on a assez tôt tenté d'uniformiser les règles fondamentales de droit civil des échanges économiques dans les relations entre les pays membres du CAEM. En 1951 le Conseil a recommandé de se baser — lors de l'établissement des conditions générales de livraison des marchandises — sur les recommandations qu'il a élaborées sous le nom des « conditions générales uniformes des contrats de livraison mutuelle des marchandises entre parties »¹.

Un progrès considérable dans l'oeuvre de l'unification du régime juridique des rapports économiques a été réalisé dans la deuxième moitié des années cinquante et au début des années soixante. En 1957 la Commission du Commerce Extérieur du CAEM a approuvé les conditions générales multilatérales de livraison des marchandises (CGL) CAEM 1958 qui sont entrées en vigueur le 1er janvier 1958. En 1962 sont entrées en vigueur les conditions générales du montage (CGM) CAEM ainsi que les conditions générales du service technique (CGST) CAEM 1962. D'autre part, les conditions de

¹ Au sujet des conditions générales de la période d'avant 1958 voir A. S. KOROLENKO. *Torgovyje dogovory i soglašenija SSSR s inostrannymi gosudarstvami*. Moskva 1953. p. 186 et suiv.; R. BYSTRICKY, A. J. LANDA. *De l'unification des normes juridiques régissant le contrat de vente internationale*. « Revue de droit contemporain » 1954, no 1. p. 75 et suiv.; M. M. BOGUSŁAWSKI, *Pravovoje regulirovanie vnesnetorgovoj kupli - prodazi v otnošenijach metdu socialističeskimi stranami*. Dans: *Problemy meždunarodnogo častnogo prava*. Réd. L. A. Lune, Moskva 1960. p. 30 et s.; J. JAKUBOWSKI. *Prawne ramy obrotu handlowego między krajami socjalistycznymi* [Le cadre juridique des rapports commerciaux entre les pays socialistes]. « Państwo i Prawo » [L'Etat et le Droit] (plus loin: PIP). 1961. v. 10. p. 530; Du même auteur, *Umowa sprzedaży w handlu międzynarodowym* [Le contrat de vente dans le commerce international], Varsovie 1966. p. 197 et suiv.; Du même auteur. *Prawo jednolite w międzynarodowym obrocie gospodarczym* [Le droit uniforme dans les rapports économiques internationaux]. Varsovie 1972 p. 175 et suiv.; J. SKĄPSKI. *Wybrane aktualne*

générales de sécurisation de livraison des pièces de rechange pour les machines et installations livrées entre les pays membres du CAEM (ainsi que la Yougoslavie) furent adoptées en 1966.

Dans les années suivantes on a entrepris les démarches visant le perfectionnement de la régulation uniforme² et on a aussi poursuivi les efforts en faveur de l'extension de portée de la régulation uniforme.

En 1968, la Commission du Commerce Extérieur du CAEM a approuvé une nouvelle version, revue et modifiée des conditions générales de livraison, des marchandises (CGL CAEM 1968). Elles sont entrées en vigueur le 1er

problemy polskiego prawa międzynarodowego prywatnego w zakresie zobowiązań z umów [Les problèmes actuels choisis du droit international privé polonais en matière d'obligations résultant des contrats]. Dans: *Rozprawy Prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego* [Les Dissertations Juridiques. Livre commémorant l'oeuvre scientifique de Kazimierz Przybyłowski]. Cracovie - Varsovie 1964. p. 276 et suiv.; Du même auteur. *Autonomia woli w prawie międzynarodowym prywatnym w zakresie zobowiązań z umów* [L'autonomie de la volonté dans le droit international privé dans le domaine des obligations n'aitout des contrats] Cracovie 1964 p. 94 et suiv.; M. G. ROZENBERG *Unifikacja norm o wnešnetorgovoj postaoke stran-clenow SEW*. «Sovetskoe Gosudarstvo i Pravo» 1969. v. 7, p. 52; I. Šas. *Obscie uslovija postavok SEW*, Moskva 1978, p. 60 et suiv.; J. RAJSKI, *Les principes du droit commercial international de certains pays socialistes européens*. «Recueil des Cours» 1982 v. 174 p. 74 et suiv.; W. 1AD7FR dans: *Komentar na obsci uslovija za dostavka na stoki mezdu orijanizaciji nu straniteclenki no SIV*. Oeuvre collective. Red. W. Tadžer. Sofia 1980. p. 10 et suiv.

² Le processus de perfectionnement du droit commun du CAEM a été traité par de nombreux auteurs. En dehors des publications évoquées au p. 1 voir surtout: J. JAKUBOWSKI. *Integracja gospodarcza krajów RWPG a niektóre problemy unifikacji prawa*. [L'intégration économique des pays de CAEM et certains problèmes de l'unification du droit]. PIP. 1970. v/5. p. 679 et suiv.; Du même auteur. *Le développement du droit économique communautaire de pays du CALM et les problèmes posés par son application* «Journal du droit international» (cité par la suite comme durent) 1973, no 3, p. 676 et suiv.; A. BURZYŃSKI, J. JAKUBOWSKI. *Rozwój wspólnego prawa gospodarczego krajów RWPG* [Le développement du droit économique communautaire des pays du CAEM]. «Sprawy międzynarodowe» [Affaires Internationales]. 1976. no 1. p. 67 et suiv.; A. TYNEL. *System kar umownych w ogólnych warunkach dostaw RWPG 1986* [Le système des pénalités dans les conditions générales de livraison CAEM 1968]. Varsovie 1972. p. 12 et suiv.; du même auteur. *25 lat tworzenia jednolitego prawa gospodarczego krajów RWPG* [25 années de création d'un droit économique uniforme des pays du CAEM]. «Przegląd Stosunków Międzynarodowych» [La Revue des Relations Internationales]. 1974. no 3-4. p. 7 et suiv.; du même auteur. *Aktualne problemy doskonalenia owd RWPG* [Les problèmes actuels de perfectionnement des CGL CAEM]. «Przegląd Stosunków Międzynarodowych» [La Revue des Relations Internationales]. 1978. no 5. p. 51 et suiv.; du même auteur. *Umowy o świadczenie usług technicznych we wspólnym prawie gospodarczym krajów RWPG*. [Les contrats concernant la prestation du service technique dans le droit communautaire des pays du CAEM]. Varsovie 1979. p. 9 et suiv.; du même auteur. *Kolejne zmiany i uzupełnienia ogólnych warunków dostaw RWPG 1968/1975* [Les nouvelles modifications et compléments aux conditions générales de livraison CAEM 1968 1975]. «Przegląd Ustawodawstwa Gospodarczego» [La Revue de la Législation-Economique, 1979, no 10, p. 286 et

janvier 1969 et furent par la suite trois fois modifiées (1975, 1979, 1988). L'année 1973 a apporté les nouvelles versions des CGM. CGST et des conditions générales de sécurisation de livraison des pièces de rechange de CAEM et de la Yougoslavie. Les conditions générales du service technique furent par la suite modifiées en 1982.

Enfin, le 1er janvier 1980 sont entrées en vigueur les conditions générales de spécialisation et de coopération dans la production entre les organisations économiques des pays membres du CAEM (CGSC CAEM) adoptées en janvier 1979, en forme de recommandation du Comité Exécutif du CAEM.

Les travaux réalisés dans les années soixante-dix et au début des années quatre-vingt constituèrent la réalisation de l'objectif indiqué dans le Programme complexe d'intensification et du perfectionnement constant de la coopération et de développement de l'intégration économique socialiste des pays membres du CAEM, adopté lors de la XXV-ème session du Conseil (tenue en juillet 1971 à Bucarest)³.

2. Aujourd'hui, le caractère normatif des actes ci-dessus énumérés du droit uniforme du CAEM ne soulève point de doute dans ce sens que ces actes constituent des sources de droit⁴. Ainsi leurs dispositions lient les parties

suiv.; du même auteur. *Zmiany ogólnych warunków obsługi technicznej* [Les modifications des conditions générales du service technique] • «Rynki Zagraniczne» [Marchés Etrangers] 1983, no 10—11, p. 4; A. M. ALEKSEEV, A. I. VIKENTEV, B. P. MIROŚNICENKO, *Socjalistická integracija i jeje preimusestva pered kapitalističeskoj*. Moskva 1975. p. 361; L. A. LUNC, *Kurs meidunarodnogo časnogo prava. Obsčaja čast*, Moskva 1973, p. 92 et suiv.; *Osobennaja čast*. Moskva 1975. p. 143 et suiv.; E. 7. USENKO. *Ekonomičeskoje sovieščanie stran-clenow SEW i nekotorye pravovye problemy socialističeskoj integracii i sochramenija mira*, «Sovetskoe Gosudarstvo i Pravo», 1985, no 6, p. 90 et suiv.

³ Au suiet du Programme complexe voir.; W. SEIFFERT. *Theoretische Probleme der Herausbildung des Sozialistischen Internationalen Wirtschaftsrechts*, «Staat und Recht», 1972, v. 3. p. 368 et suiv.; du même auteur *Der Prozess der Herausbildung des Rechtssystemes der Sozialistischen Wirtschaftssintegration*, «Staat und Recht» 1972, v. 8, p. 1305 et suiv.; A. N. TALALAEV, *Mezdunarodno-pravovye aspekty socialističeskoj ekonomiceskoj integracii*, «Pravovedenie» 1972, v. 1. p. 7 et suiv.; E. I. USENKO. *Pravovye aspekty kompleksnoj programma socialističeskoj ekonomiceskoj integracii*. «Sovetskoe Gosudarstvo i Pravo» 1973, no 7 p. 63 et suiv.; B. W. RFU7T *Kompleksowy program socialistyčzna integracii gospodarczej w dzialaniu* [Le Programme complexe de l'intégration économique socialiste en pratique] dans: *Socialistyčzna integracija gospodarcza* [L'intégration économique socialiste]. Red. Z. M. KLEPACKI. Varsovie 1974. p. 239 et suiv.; A. WASILKOWSKI. *Socialistyčzna integracija gospodarcza* [L'intégration économique socialiste]. Varsovie 1974. p. 6 et suiv.; O. KUNZ. *K právní povaze komplexního programu dalsiho prohlubování a zdokonalování spolupráce a rozvoje socialistické ekonomické integrace*. «Pravnik» 1974. no 3. p. 153 et suiv.; R. BYSTRICKY. *Le droit de l'intégration économique socialiste*. Genève 1979. p. 42 et suiv.. p. 89 et suiv.

⁴ Voir J. SKAŃSKI. *Wybrane aktualne problemy...* p. 276 et suiv.; du même auteur. *Autonomia woli...* p. 95 et suiv.; J. JAKUBOWSKI. *Umowa sprzedaży...* p. 211; du même auteur. *Próby unifikacji prawa w ramach RWPG* [Les tentatives d'unification du droit dans

indépendamment de la volonté de celles-ci. Il est également superflu pour les parties de se référer à un acte de droit uniforme du CAEM. Pour la constatation qu'un rapport donné est subordonné à un acte de droit uniforme du CAEM il suffit d'établir qu'il relève du champ d'application de cet acte.

L'étendue de la liberté contractuelle des parties lors de la conclusion d'un contract subordonné aux conditions générales CAEM est précisée par les dispositions de ces conditions.

La littérature juridique d'une manière assez générale souligne le caractère autonome (part rapport au droit civil national des pays membres du CAEM des conditions générales CAEM⁵. On accentue également le principe de la priorité du droit unifié par rapport au droit national⁶. On postule enfin de profiter au maximum des possibilités d'interprétation qu'offre un acte de droit unifié applicable.

le cadre du CAEM], «Sprawy Międzynarodowe» [Affaires Internationales] 1965, v. 9 p. 39 et suiv.; A. OSIK. *Ogólne warunki montażu RWPG 1962* [Les conditions générales du montage CAEM 1962], «Prawo w Handlu Zagranicznym» [Le Droit dans le Commerce Extérieur] 1963, v. 2, p. 43 et suiv.; A. TYNEL. *System kar...* p. 13; du même auteur. *Umowy...* p. 18; V.S. POZDNAKOV, M. ROZENBERG dans: *Eksportno-importnyje operacii. Pravovoe regulirovanie*. Réd. V. S. POZDNAKOV. Moskva 1970, p. 39; L. A. LUNC. *nešnetorgovaja kupla-prodaza*, Moskva 1972, p. 8 et suiv.; B. WALASZEK, M. SOSNIAK. *Zarys prawa międzynarodowego prywatnego* [Précis de droit international privé], Varsovie 1973, p. 180; R. KEMPER, H. STROHBACH, H. WAGNER. *Die Allgemeinen Lieferbedingungen des MGW — 1968 in der Spruchpraxis sozialistischer Aussenhandelsschiedsgerichte*. Kommentar, Berlin 1975, p. 50 et suiv.; I. ŠAS. *Obšće uslovija...* p. 83 et 84; A. WISNIEWSKI. *Zwolnienie od odpowiedzialności kontraktowej na podstawie ogólnych warunków dostaw RWPG* [Dispense de la responsabilité contractuelle en vertu des conditions générales de livraison CAEM], Varsovie 1979, p. 11; M. A. ZACHARIASIEWICZ. *Problematyka kolizyjna umów eksportu kompletnych obiektów* [Les problèmes de conflit des contrats d'exportation des établissements complets] dans: *Zagadnienia prawne eksportu kompletnych obiektów przemysłowych* [Questions juridiques liées à l'exportation des établissements industriels complets], Réd. M. PAZDAN et A. TYNEL, Katowice 1980, p. 93 suiv.; J. RAJSKI. *Les principes...* p. 75; L. KOŁAKOWSKA. *Umowa specjalizacji i kooperacji produkcji w ramach RWPG* [Le contrat de spécialisation et de la coopération dans la production dans le cadre du CAEM], Varsovie 1981, p. 100.

⁵ Voir en particulier L. A. LUNC. *Vnesnetorgovaja kupla-prodaza...* p. 8; du même auteur. *L'objet et les principes fondamentaux du droit international privé en URSS et dans les autres pays socialistes européens*, Clunet 1973, v. L p. 99, du même auteur; *Kurs [...] osobennaja časť* p. 145; J. JAKUBOWSKI. *Prawo jednolite...*, p. 184 et suiv.; L. RÜSTER. *Akty prawne Rady Wzajemnej Pomocy Gospodarczej a prawo wewnętrzne państw członkowskich* [Les actes juridiques du Conseil d'Aide Economique Mutuelle et le droit national des pays membres] dans: *Prawo międzynarodowe a prawo wewnętrzne w świetle doświadczeń państw socjalistycznych* [Le droit international et le droit national à la lumière de l'expérience des pays socialistes], Wrocław-Varsovie-Cracovie-Gdańsk 1980, p. 151.

⁶ Voir J. JAKUBOWSKI. *Prawo jednolite...*, p. 184; R. BYSTRICKY. *Le droit...* p. 210.

3. Le champ d'application des CGSC a été précisé dans leur § 1. Conformément à cette disposition, les CGSC s'appliquent à des contrats civils multilatéraux de spécialisation et de coopération dans la production passés entre les organisations économiques ressortissantes de plus de deux pays membres du CAEM (§ 1 al. 1). Les CGSC CAEM ne peuvent s'appliquer aux contrats passés entre les organisations économiques ressortissantes de deux pays membres du CAEM que dans la mesure où cela a été convenu d'une façon bilatérale (§ 1 al. 3).

La disposition du § 3 al. 1 des CGSC statue que peuvent être parties du contrat de spécialisation et de coopération dans la production « les organisations économiques (personnes de droit privé) habilitées à conclure de tels contrats conformément à la législation du pays dans lequel l'organisation a son siège ». Cependant, selon le § 3 al. 2 des CGSC — « l'organisation économique qui n'est pas habilitée à effectuer des opérations du commerce extérieur participe au contrat conjointement avec l'organisation dotée du pouvoir d'effectuer de telles opérations ». Les deux organisations forment, dans un tel cas, une partie du rapport contractuel⁷.

Les CGSC ne comprennent pas de définition du contrat de spécialisation et de coopération dans la production. On n'y trouve pas non plus la définition des notions de la spécialisation et de la coopération. Ceci crée des difficultés d'interprétation. Lors de cette interprétation on se sert en général d'autres documents du CAEM⁸.

⁷ Voir L. KOŁAKOWSKA. *Umowa...* p. 34.

⁸ Il s'agit de tels documents comme: « Les principes fondamentaux du portage international socialiste du travail » approuvés à la IVe session du CAEM en décembre 1961. le document adopté à la 65^e séance du Comité Exécutif du CAEM le 13 décembre 1973 intitulé: « sur les problèmes juridiques liés à la conclusion et la à réalisation des contrats de spécialisation et à de coopération dans la production. le Programme complexe... » de 1971.

Parmi les nombreuses opinions exprimées dans la littérature au sujet des notions citées dans le texte voir M. M. BOGUSLAVSKI. *Pravovye regulirovanija mezdu narodnych chozjastvennyh otoszenij*. Moskva 1970. p. 147 et suiv.; Cz. GOLEMINOW. *Rola umów w organizowaniu i realizowaniu międzynarodowej socjalistycznej kooperacji i specjalizacji produkcji* [Le rôle des contrats à l'organisation et à la réalisation de la coopération et de spécialisation socialiste internationale dans la production. «Prawo w Handlu Zagranicznym» [Le Droit dans le Commerce Extérieur]. v. 22 (1969). p. 17; J. F. KORMNOW. *Specializacija i kooperacija proizvodstva stran SEW w uslovijach socialističeskoj ekonomičeskoj integracii*. Moskva 1972. p. 83 et suiv.; J. JAKUBOWSKI. *Z problematyki prawnej umów kooperacyjnych między przedsiębiorstwami polskimi i firmami RFN* [Swr les problèmes juridiques des contrats de coopération conclus entre les entreprises polonaises et celles de la RFA]. «Przegląd Stosunków Międzynarodowych» [La Revue des Relations Internationales]. 1974. v. 5. p. 5 et suiv.; S. SZCZYPIORSKI. *Nowe formy i metody wymiany międzynarodowej* [Les nouvelles formes

4. Encore avant l'entrée en vigueur des CGSC on exprimait dans la littérature des opinions que le contrat de spécialisation et de coopération dans la production constitue un type nouveau de contrat⁹, formé dans la pratique des rapports internationaux ou bien qu'il est un contrat *sui generis*¹⁰.

Après l'entrée en vigueur des CGSC on a pu rencontrer des opinions que ce contrat constitue un contrat nommé¹¹. On souligne également que le règlement des CGSC est trop laconique et qu'il considère uniquement

et méthodes des échanges internationaux], Varsovie 1976. p. 143 et suiv.; J. WEISS. *Koordinacja gospodarcza w ramach RWPG [La coordination économique dans le cadre du CAEM]*. «Studia Cywilistyczne» [Etudes de Droit Civil] v. 27 (1976). p. 49 et suiv.; E. TABACZYŃSKI. *Kooperacja przemysłowa z zagranicą [La coopération industrielle avec Vêtranger]*. Varsovie 1976. p. 15 et suiv.; J. MISALA. *Podstawowe formy handlu Wschód-Zachód [Les formes fondamentales des rapports commerciaux Est-Ouest]* dans: *Handel Międzynarodowy [Le commerce international]* Réd. P. BOŻYK. Varsovie 1977. p. 361; L. KOŁAKOWSKA. *Umowa...* p. 5 et suiv.; J. POCZOBUT, A. W. WISNIEWSKI. *W sprawie charakteru prawnego umowy kooperacji [Swr le caractère juridique du contrat de coopération]*. «Problemy Prawne Handlu Zagranicznego» [Les Problèmes Juridiques du Commerce Extérieur] t. 5 (1981). p. 48 et suiv.

⁹ Voir M. M. BOGUSLAVSKI: *Pravovoje regulirovanie...* (1970). p. 174; A. TYNEL. *Umowy o specjalizacji i kooperacji produkcji w ramach RWPG [Les contrats de spécialisation et de coopération dans la production dans le cadre du CAEM]*. «Biuletyn Naukowy Zakładu Spraw Międzynarodowych w Opolu» [Le Bulletin Scientifique de la Section des Affaires Internationales à Opole, 1973, no 2, p. 13; J. JAKUBOWSKI. *Pojęcie dostawy [La notion de fa livraison]* «Studia Prawnicze» [Etudes Juridiques] 1974. v. 4. p. 114.

¹⁰ Z. NANOWSKI. *O niektórych zagadnieniach prawnych związanych z umowami o specjalizacji i kooperacji produkcji między partnerami z krajów socjalistycznych [Sur certaines questions juridiques liées aux contrats de spécialisation et de coopération dans la production conclus entre les partenaires des pays socialistes]*. «Prawo w Handlu Zagranicznym» [Le Droit dans le Commerce Extérieur] v. 16 (1976). p. 155.

¹¹ Voir J. POPOVA. *Les contrats de spécialisation et de coopération industrielle dans le CAEM*. Clunet 1980 no 1. p. 85; L. KOŁAKOWSKA. *Umowa...* p. 69; L. KOŁAKOWSKA dans: *Zarys systemu wspólnego prawa gospodarczego RWPG [Précis du système de droit communautaire du CALM]*. v. 2. Varsovie 1986. p. 203 et 206; A. TYNEL. *Umowa specjalizacji i kooperacji produkcji w ramach RWPG. Podstawowe problemy prawne [Le contrat de spécialisation et de coopération dans la production dans le cadre du CAEM. Les problèmes juridiques fondamentaux]* dans: *Prawne problemy międzynarodowej kooperacji przemysłowej [Les problèmes juridiques de la coopération industrielle internationale]*. Varsovie 1982. p. 48; Ć. GOLEMINOV. *SEV — specializacija i kooperirovanie proizvodstva. Pravovye voprosy*. Moskva 1986. p. 72.

D'autre part selon A. W. WIŚNIEWSKI. *Problemy odpowiedzialności w dziedzinie międzynarodowej kooperacji przemysłowej [Les problème de la responsabilité dans le domaine de la coopération industrielle internationale]* dans: *Prawne problemy międzynarodowej kooperacji przemysłowej [Les problèmes juridiques de la coopération industrielle internationale]*. Varsovie 1981. p. 127 «...On ne peut sans réserve approuver l'opinion qu'après l'entrée en vigueur des CGSC le contrat de spécialisation et de coopération deviendra un contrat nommé».

la version fondamentale du contrat de spécialisation et de coopération dans la production¹².

Le contrat de spécialisation et de coopération dans la production peut être classé parmi les contrats visant l'organisation des rapports¹³. Conformément au § 22 al. 1 des CGSC les parties de ce contrat sont tenues « d'assurer la conclusion d'accords de livraison de la production spécialisée ». On a donc présumé que les contrats exécutifs seront en principe conclus séparément.

5. La conclusion du contrat a été réglée au § 5 des CGSC. Les dispositions suivantes des CGSC se rapportent à la forme (§ 6), précisent l'importance des annexes (§ 7) ainsi que règlent l'entrée en vigueur du contrat (§ 10), le lieu de la conclusion du contrat entre absents (§ 8) et les cas où le contrat est complété ou précisé (§ 11). D'autre part, au § 12, il est dit que les dispositions de la section III des CGSC doivent être appliquées également en cas de révision et de modification du contrat.

Les dispositions des CGL CAEM réglant la conclusion du contrat sont en principe des dispositions obligatoires¹⁴ (*caris cogentis*). L'étendue de la liberté contractuelle y a été admise d'une façon assez restrictive. Un autre modèle a été adopté dans les CGSC CAEM. Conformément au

¹² Voir entre autres A. I YNEL *Umowa specjalizacji...* (1981). p. 49 et 53.

¹³ Voir S. WŁODYKA, *Porozumienia gospodarcze [Les accords économiques]*, Varsovie 1978. p. 53 et suiv. L'auteur a procédé à la différentiation entre les accords économiques qui ne font pas naître des droits et obligations en matière des prestations économiques mais organisent seulement d'une façon directe ou indirecte la collaboration économique des parties dans une autre forme et les contrats relatifs aux prestations résultant directement de la coopération; voir aussi G. DOMAŃSKI. *Umowy w zakresie kooperacji produkcji przemysłowej w PRL [Les contrats en matière de la coopération dans la production industrielle en République Populaire de Pologne]*. Varsovie 1980. p. 26 qui constate que « dans les les rapports de coopération il faut distinguer les contrats organisant ces rapports des contrats exécutifs qui sont conclus entre unités qui coopérant ».

Voir également W. A. LAWROW. *Sootnošenie dogovora o specializacii i kooperacii proizvodstva i kontrakta vnesnetorgovoj kupli-prodaži postavki specializirovannoj produkcii* dans: *Wtoroj Mezhdunarodnyj Simpozium po problemam prava SEW (Varna 1986)*, Sofia 1985. p. 139 et suiv.

¹⁴ M. T. ROZENBERG: *Obščije uslojija postavck SEW 1986 goda* «Sovetskij Ežegodnik Meždunarodnogo Prava» 1969, p. 85 et suiv.; A. TYNEL. *Zawarcie, zmiana i rozwiązanie umowy oraz jej forma we wspólnym prawie gospodarczym RWPG [La conclusion, la modification et la résolution du contrat et sa forme dans le droit économique communautaire du CAEM]*. «Problemy Prawne Handlu Zagranicznego» [Les Problèmes Juridiques du Commerce Extérieur], t. 1 (1977), p. 131 et suiv.; L. KOŁAKOWSKA, *Problematyka zawarcia umowy w zunifikowanych normach prawnych krajów RWPG [Les problèmes liés à la conclusion des contrats dans les normes juridiques unifiées des pays du CAEM]*. «Zeszyty Naukowe Instytutu Badania Prawa Sądowego» [Les Cahiers Scientifiques de l'Institut de Recherche sur le Droit Judiciaire], v. 16 (1983), p. 219.

§ 5 al. 8 des CGSC les parties peuvent convenir « d'un autre mode de conclusion du contrat » que celui prévu par les dispositions des CGSC.

Parmi les modes de conclusion du contrat on distingue traditionnellement sa conclusion en résultat des négociations ainsi qu'au moyen de l'offre et de son acceptation. Les dispositions des CGSC ne parlent pas de cette énumération d'une façon expresse. Elle peut cependant — comme il le semble — être mise à profit lors de l'analyse des dispositions des CGSC concernant la conclusion du contrat.

Il faut bien sûr être conscient du fait qu'un contrat, pour pouvoir exister, demande des déclarations de volonté conformes des parties¹⁵. Cette conformité survient lorsque les déclarations de volonté de toutes les parties du contrat vont dans le même sens donc lorsqu'il existe un consensus quant à la création en vertu du contrat d'un rapport juridique uniforme au contenu précis ou quant aux autres effets juridiques (modification ou suppression d'un rapport juridique).

IL Guide de conclusion des contrats de coopération (1987)

6. En dehors des CGSC, une attention particulière doit être également prêtée au « Guide pratique de conclusion des contrats de coopération par les organisations économiques ressortissantes des pays membres du CAEM » élaboré par la Commission Permanente chargée des Problèmes Juridiques du CAEM le 4.XII.1987. Ce Guide n'a pas de caractère normatif (c'est-à-dire il n'est pas obligatoire à suivre par les parties). Les parties sont libres de l'utiliser lors de la conclusion des contrats de coopération. Le Guide contient des indications portant sur le contenu du contrat (son objet ainsi que les droits et obligations des parties), sa conclusion et forme, son entrée en vigueur, révision et expiration ainsi que des propositions des clauses contractuelles pertinentes.

Il convient ici de remarquer que les auteurs du Guide n'ont pas utilisé la notion de la « spécialisation » et ont employé uniquement les termes de la « coopération internationale dans la production » et du « contrat de coopération internationale dans la production ».

Comme il en résulte de l'Introduction au Guide, celui-ci a été conçu

¹⁵ Voir Z. RADWAŃSKI. *Teoria umów [Le rhéorie des contrats]*. Varsovie 1977. p. 62; S. GRZYBOWSKI. *System prawa cywilnego. 7. T Część ogólna [Le système du droit civil. Volume 1. Partie générale]*, Wrocław-Varsovie-Cracovie-Gdańsk 1974, p. 574 et suiv.; M. KEMPER. H. STROHBACH. H. WAGNER. *Die Allgemeinen Lieferbedingungendes RGW 1968 in der Spruchpraxis sozialistischer Aussenhandelsschiedsgerichte. Kommentar*. Berlin 1975. p. 103.

comme un document capable d'être appliqué à l'égard des contrats de coopération passés par les organisations économiques ressortissantes de deux pays. Dans ce cadre, la délégation roumaine a exprimé une opinion distincte. Selon elle, le Guide ne peut pas être traité comme un document applicable aux contrats de coopération passés par les organisations économiques ressortissantes de deux pays.

Dans l'Introduction on a également mentionné que lors de la formulation du Guide on a tenu compte du type fondamental des rapports contractuels couverts par le contrat de coopération dans la production c'est-à-dire le contrat de coopération dans la production complémentaire et la production des ensembles, pièces et/ou produits semi-finis. Néanmoins, le Guide, conformément à l'indication contenue dans l'Introduction — peut être appliqué également à la rédaction des contrats relatifs à d'autres types de coopération si les traits caractéristiques d'un contrat donné ne s'y opposent pas. Il peut donc être appliqué à la conclusion des contrats multilatéraux de coopération dans la production passés par les organisations économiques ressortissantes de plus de deux pays. Dans chaque cas les parties doivent prendre en considération les traits spécifiques des rapports de coopération donnés.

Le Guide recommande une préparation soignée du contrat de coopération (point 4 du Guide).

Quant à la conclusion du contrat et à son entrée en vigueur, le Guide formule les recommandations suivantes:

a) le contrat de coopération internationale dans la production doit être rédigé par écrit; ceci concerne également la révision, les compléments au contrat ou la résolution du contrat (p. 5 du Guide);

b) il est nécessaire que le contrat soit conclu *inter praesentes*; il faut indiquer la date de sa conclusion (cette date est en général la date de sa signature) — p. 6 du Guide;

c) dans la période de l'élaboration du contrat les parties doivent s'informer mutuellement de l'exigence d'autorisation d'un organe étatique compétent, prévue par leurs législations nationales respectives (p. 7 du Guide).

Si une telle autorisation n'est pas requise, les parties doivent préciser non uniquement la date de la conclusion du contrat mais également la date de son entrée en vigueur (les parties peuvent convenir que le contrat entrera en vigueur au moment de la signature ou à une date précisée par les parties par exemple après l'écoulement d'un certain délai après sa signature).

Si la législation nationale, au moins de l'une des parties prévoit l'autorisation de l'organe étatique compétent le contrat ne peut entrer en vigueur qu'à la date à laquelle cette autorisation aura été accordée (le

contrat peut être muni dans un tel cas d'une clause prévoyant que les parties feront tout leur possible pour que cette autorisation soit obtenue avant l'expiration du délai précis et que dans le cas contraire le contrat sera considéré sans effet).

Il convient de remarquer que les recommandations formulées au p. 7 du Guide demeurent en connexion avec la § 10 des CGSC (qui sera par la suite l'objet de l'analyse de l'auteur).

III. Les négociations

7. La notion des négociations est une notion imprécise. Elle est donc traitée d'une façon différente par la doctrine¹⁶.

Dans le cadre des CGSC il faut opter pour l'interprétation de la notion des négociations dans le sens large. Ainsi, les négociations comprennent non seulement l'échange des déclarations de volonté visant la concertation des dispositions particulières du contrat projeté mais également d'autres formes d'actions mutuelles réciproques des parties entreprises en vue d'aboutir à un accord.

Les effets juridiques des comportements particuliers des négociateurs dépendent de leur caractère. De cette sorte, une autre signification doit être attaché aux déclarations de volonté faites au cours des négociations et une autre — au comportement n'ayant pas ce caractère. En ce qui concerne une déclaration de volonté portant les éléments constitutifs de l'offre avec observation simultanée des conditions formelles (voir le § 6 des CGSC), les effets juridiques seront ceux prévus pour la soumission de l'offre.

L'ouverture des négociations n'a lieu que lorsque toutes les parties du contrat projeté se sont engagées dans l'activité visant l'établissement de son contenu. De cette sorte, l'invitation aux négociations ne constitue pas une part intégrale des négociations car au moment de sa formulation les autres négociateurs ne sont pas encore présents¹⁷. Les négociations peuvent être précédées par l'invitation à la soumission de l'offre. Il arrive également que les négociations débutent après la réception de l'offre par le destinataire (destinataires).

Il est parfois difficile de préciser le moment de la clôture des né-

¹⁶ Voir dans le cadre du droit polonais les énonciations de J. GÓRSKI. *Przygotowanie umowy w świetle kodeksu zobowiązań* [L'élaboration du contrat dans le cadre du code des obligations]. Poznań 1938. p. 12 et suiv.; et de B. GAWLIK. *Procedura zawierania umowy na tle ogólnych przepisów prawa cywilnego (art. 66—72 k.c.)* [La procédure de la conclusion du contrat sur le fond des dispositions générales du droit civil — art. 66—72 du Code Civil]. Cracovie 1977. p. 7 et suiv.

¹⁷ Dans le même sens dans le droit polonais B. GAWLIK. *Procedurap.* 18.

gociations. Si les négociations aboutissent à un résultat positif on peut les considérer comme closes au moment de l'élaboration du projet convenu du contrat. On peut les traiter comme closes sans résultat positif lorsque l'une des parties a fait savoir d'une manière expresse ou présumée (*per facta concludentia*) qu'elle s'en est retirée. Il n'y a évidemment pas d'obstacles à ce que les négociations une fois rompues ne puissent à tout moment être reprises à nouveau.

8. On doit faire une distinction entre la clôture des négociations et le moment de la conclusion du contrat.

En vertu du § 5 al. 1 lettre « a » des CGSC le contrat est considéré comme conclu — en cas où il est conclu entre présents — au moment de sa signature par les parties contractantes.

La signature du projet du contrat (convenu en résultat des négociations), rédigé par écrit, signifie en principe que le contrat a été conclu. Le projet du contrat convenu par les parties, même s'il a été rédigé en forme écrite, n'est jusqu'au moment de la signature qu'un projet et n'a pas de caractère obligatoire pour les parties. Chaque partie est en principe libre de décider si elle va apposer sa signature sous ce projet ou si elle refusera de la signer. Une autre question qui se pose c'est le problème de la responsabilité pour le dommage causé au partenaire (partenaires) en cas de refus non-justifié de la signature d'un projet de contrat convenu en résultat des négociations.

Il n'y a pas bien sûr d'obstacles à ce que les parties attribuent au texte du contrat élaboré au cours des négociations, en le stipulant d'une façon expresse dans le contrat, un caractère non obligatoire malgré la signature. Dans un tel cas, le texte convenu du contrat conserve son caractère du projet et le contrat sera considéré comme conclu après que les parties l'aient muni (plus tard) de leurs signatures exprimant leur ferme volonté de la conclusion du contrat. De même doit être traité le contrat uniquement paraphé (et non-signé) par les parties.

En principe, le procès-verbal dressé pendant les négociations dans lequel les parties décrivent uniquement les résultats des négociations c'est-à-dire précisent les questions préliminairement convenues et indiquent les problèmes demeurant contradictoires ne constitue pas un contrat, même si un tel procès-verbal a été signé par les parties.

Pendant les négociations il peut arriver que les parties conviennent des dispositions essentielles (donc suffisantes à l'existence du contrat) et ont l'intention de poursuivre la discussion sur les questions détaillées mais elles veulent également que l'accord atteint sur les points essentiels soit pour elles obligatoire de façon qu'aucune des parties ne puisse se retirer de ce qu'il a été déjà convenu. Les parties peuvent alors signer le contrat

portant sur les points convenus et reportant les autres questions aux négociations futures. Néanmoins, l'existence d'un contrat de spécialisation et de coopération dans la production peut être admise uniquement au cas où les parties ont convenu d'un contenu minimal de ce contrat permettant de traiter ce contrat conclu comme un contrat de spécialisation et de coopération dans la production.

9. Parfois les négociations aboutissent seulement à la concertation d'un projet de contrat et à ce qu'une des organisations économiques participant aux négociations s'engage à organiser la conclusion du contrat. Une telle situation est prévue au § 5 al. 1 lettre b des CGSC. Le contrat sera alors conclu en résultat de la notification à l'organisation qui s'est engagée à organiser la conclusion du contrat par les autres négociateurs, des « notifications d'acceptation du projet du contrat sans modification ».

IV. Offre ferme (offre dans le sens strict)

10. Les dispositions des CGSC ne contiennent pas de définition d'offre. N'y sont pas non plus précisés les éléments constitutifs de l'offre. Au § 5 al. 4 on a seulement constaté que: « l'offre lie son auteur sauf indication contraire ou si elle est retirée avant ou en même temps qu'elle parvient à son destinataire ».

En vertu de la disposition citée, l'offre lie en principe son auteur; elle ne peut être retirée à moins que ce retrait ne soit notifié avant ou en même temps que la réception de l'offre par le destinataire. Cependant l'auteur de l'offre peut la priver de son caractère ferme en le précisant d'une façon expresse dans l'offre.

Les différences entre une offre ferme et une offre dépourvue de ce caractère sont si considérables qu'on peut avoir des doutes si l'emploi de la notion de « l'offre » pour les deux situations est exact.

Pour cette raison, le cas de l'offre non ferme sera traité séparément. En ce moment l'analyse portera sur l'offre ferme (l'offre dans le sens strict).

11. L'offre (dans le sens strict) constitue une déclaration de volonté de son auteur faite à l'autre partie (ou aux autres parties) qui contient une proposition ferme de conclusion de contrat, précise au moins les dispositions essentielles (*essentialia negotii*) de ce contrat et lie l'auteur jusqu'à l'expiration du délai indiqué dans l'offre ou dans les dispositions légales (dans le cas analysé il s'agit des dispositions de CGSC).

L'offre est une déclaration unilatérale de volonté d'un genre particulier.

C'est pourquoi, ce n'est pas toute proposition de conclusion du contrat ayant la forme d'une déclaration de volonté qui constitue une offre. On peut parler de l'offre lorsque cette proposition réunie les conditions suivantes:

— du contenu de la proposition et de la manière de la déclaration de volonté résulte d'intention ferme de la conclusion du contrat;

— le contenu de la déclaration est « complet » c'est-à-dire qu'il comporte au moins les *essentialia negotii* du contrat proposé (le contenu minimal de l'offre).

12. L'offre (dans le sens strict) créé pour l'auteur une sorte d'engagement¹⁸ Celui-ci s'exprime dans le fait que les destinataires peuvent par simple acceptation de l'offre amener à la conclusion d'un contrat au contenu proposé par l'auteur de l'offre. L'effet et en même temps l'essence de cet engagement est la restriction de la liberté de décision de l'auteur de l'offre aussi bien quant à la conclusion du contrat que quant à la révision du contrat projeté. Au moment de la soumission de l'offre (de sa notification au premier destinataire) l'auteur se trouve privé du droit à une révision quelconque des dispositions de l'offre et la décision finale en matière de la conclusion du contrat appartient aux destinataires). L'auteur de l'offre ne peut plus, en principe, prévenir la conclusion du contrat. Le fait si le contrat sera conclu dépend alors exclusivement du comportement des destinataires.

¹⁸ Voir B. GAWLIK. *Procedura...* p. 48 et suiv.; M. KEMPER. H. STROHBACH. H. WAGNER. *Die Allgemeinen...* p. 105. Dans la doctrine polonaise on a essayé d'expliquer en quoi consiste l'engagement de l'auteur de l'offre et la position juridique du destinataire. De multiples partisans s'est acquise l'opinion que le destinataire jouit d'un droit subjectif constitutif qui consiste à qu'il peut au moyen de son propre comportement par l'acceptation de l'offre causer la conclusion du contrat et la naissance d'un rapport juridique. Voir J. GÓRSKI. *Przygotowanie umowy...* p. 55; S. GRZYBOWSKI. *System...* p. 553; A. WOLTER. *Prawo cywilne. Zarys części ogólnej [Le droit civil. Précis de la partie générale]*. Varsovie 1977 p. 269. Cette opinion a cependant aussi des adversaires. Parmi eux entre autres S. SZER. *Prawo cywilne. Część ogólna [Le droit civil. Partie générale]*, Varsovie 1967, p. 120 et suiv. et B. GAWLIK. *Procedura...* p. 48 et 50. S. SZER constate que le droit subjectif ne peut pas naître ni exister en dehors d'un rapport juridique en constituant *ex definitione* un élément essentiel du rapport juridique. C'est pourquoi, fausse est la constatation que dans la période d'état d'engagement par l'offre le destinataire jouit d'un droit subjectif constitutif.

Pour expliquer la situation juridique de l'auteur de l'offre et du destinataire. B. Gawlik emploie deux notions corrélatives: compétence et engagement. Le destinataire est compétent à agir dans le cadre de l'acceptation de l'offre de dont l'effet est la conclusion du contrat tandis que l'auteur de l'offre en corrélation est lié par l'engagement par l'offre. Cet auteur s'oppose à la thèse que le destinataire jouit d'un droit subjectif constitutif; il est d'avis qu'il faut remplacer cette notion par la notion d'incident juridique. La présentation de l'offre et son acceptation constituent ensemble un élément d'incident juridique qui en vertu de la loi fait naître un rapport juridique.

13. Conformément au § 5 al. 1 lettre « b » des CGSC le contrat est considéré comme conclu — entre absents — au moment où la dernière notification d'acceptation du projet du contrat sans modification parvient à l'organisation qui organise les négociations (lorsqu'il s'agit d'un contrat élaboré à partir d'un projet commun) ou au moment où cette notification parvient à la partie qui a fait l'offre (lorsqu'il s'agit d'un contrat fondé sur une offre émanant de l'une des parties). En vertu du § 5 al. 2 des CGSC, la notification de l'acceptation du projet du contrat ou de l'offre est considérée faite à temps lorsqu'elle parvient à l'organisation économique, prévue à l'alinéa 1 lettre « b » dans le délai convenu par les parties et si le délai n'est pas prévu par les parties ni fixé dans l'offre — dans un délai de 90 jours à partir du jour de la fin de l'élaboration du projet ou de l'envoi de l'offre.

V. Acceptation de l'offre ferme

14. L'acceptation de l'offre consiste à une telle déclaration de volonté du destinataire (destinataires) de l'offre par laquelle il exprime son accord pour la conclusion d'un contrat au contenu proposé par l'auteur de l'offre¹⁹. La déclaration d'acceptation de l'offre est une déclaration unilatérale faite avec l'intention de produire un effet juridique en forme de la conclusion du contrat. De même que l'offre, la déclaration de son acceptation doit être classée parmi les déclarations adressées à un destinataire précis. C'est pourquoi, son efficacité dépend de sa notification au destinataire. Le contenu d'une déclaration d'acceptation de l'offre doit être conforme au contenu de l'offre. Il doit en résulter que le destinataire accepte l'offre dans toute son étendue et qu'il l'accepte uniquement dans son étendue (l'auteur néglige ici les effets imposés aux parties par les dispositions légales). La déclaration de l'acceptation de l'offre aboutit à la conclusion du contrat lorsqu'elle parvient à l'auteur de l'offre dans le délai prescrit (c'est-à-dire dans la période de la durée d'engagement par l'offre).

15. Il en résulte du § 5 al. 6 lettre « b » des CGSC que la réponse à l'offre contenant des modifications ou des compléments est considérée comme une nouvelle offre.

Le point de vue que l'acceptation de l'offre effectuée sous réserve de modification ou des compléments de son contenu constitue une nouvelle

¹⁹ Voir B. GAWLIK, *Procedura...* p. 67 et suiv.

offre a été généralement accepté par la législation nationale²⁰. Une telle solution a été prévue également au § 1 al. 1 des CGL CAEM 1968/1975 dans leur rédaction de 1979 et se trouve incluse au § 3 al. 5 des CGL CAEM 1968/1988.

On peut — comme il le semble — admettre que la réponse du destinataire ayant le caractère d'une contre-offre (nouvelle offre) élimine totalement la force probante de l'offre originale²¹.

Au cas où le destinataire accepte l'offre en complétant son contenu par des dispositions nouvelles ou modifiées, les positions de l'auteur de l'offre et du destinataire se trouvent inversées. Un tel changement des rôles de l'auteur et du destinataire ne justifie aucune exception aux règles générales en vigueur de conclusion des contrats. Pour la conclusion du contrat s'avère indispensable l'acceptation de cette nouvelle « offre » par toutes les organisations économiques devant être parties du contrat de spécialisation et de coopération dans la production.

La déclaration d'acceptation de l'offre comprenant l'acceptation de l'offre se limite souvent en pratique aux mots « oui » ou « je suis d'accord », « j'accepte l'offre » etc. Parfois son contenu est plus riche (contient une répétition, parfois dans une autre rédaction ou ordre, des clauses de l'offre).

La réponse du destinataire n'est pas toujours construite d'une façon claire. Assez souvent, il faut procéder à l'interprétation de la réponse du destinataire pour constater si les déclarations de l'auteur et du destinataire sont conformes, si la condition fondamentale de la conclusion du contrat a donc été réalisée (c'est-à-dire si un consensus a été établi).

Sur la base de toutes ces considérations il ne faut pas formuler la conclusion qu'un consensus ferme des parties doit dans chaque cas couvrir tous les

²⁰ Voir Part. 68 du Code Civil polonais, l'art. 161 du Code Civil de la République Soviétique Fédérative Russe, le § 213 al. 2 du Code Civil hongrois le § 112 du Code du Commerce International tchécoslovaque et le § 31 du GIW de la RDA avec l'exception prévue au § 30 al. 3 du GIW.

En vertu du § 30 al. 3 du GIW si la déclaration d'acceptation de l'offre diffère de l'offre dans ses points non-essentiels, le contrat est considéré comme conclu si l'auteur de l'offre ne réagit pas immédiatement.

Dans la littérature de la RDA on admet que la notion des points non-essentiels du contrat doit être interprétée en raison des « circonstances » du rapport contractuel. Voir H. RUDOLPH dans: *Kommentar zum Gesetz über internationale Wirtschaftsverträge — GIW vom 5 Februar 1976*. Berlin 1979, p. 108. Il ne semble pas qu'on puisse admettre dans le cadre des CGSC CAEM la solution semblable à celle prévue au § 30 al. 3 du GIW. Pour l'instant, il n'y a pas de fondement juridique en la matière.

²¹ Dans le même sens, dans le cadre du droit polonais Z. RADWAŃSKI, *Teoria umów...* p. 76.

éléments indiqués dans l'offre. On ne peut pas éliminer d'avance une situation où l'offre (hormis les propositions formulées d'une façon ferme) contient également des clauses qui, conformément à la volonté de l'auteur — seront l'objet de futures négociations. Au cas où l'auteur ne fait pas dépendre la conclusion du contrat dans le cadre des dispositions fermes de l'offre de la concertation d'autres éléments du contrat proposé, on peut admettre — si le point de vue pareil est présenté par les destinataires dans leurs déclarations d'acceptation de l'offre — que le contrat a été conclu dans la limite du premier groupe des dispositions²².

16. Dans les dispositions des CGSC (§ 5 al. 1 lettre « b » on a prévu les modes suivants de conclusion du contrat entre absents:

a) la transmission à l'organisation économique qui organise les négociations des notifications d'acceptation du projet du contrat sans modification par les autres parties du contrat;

b) la transmission à l'auteur de l'offre des notifications d'acceptation de l'offre par tous les destinataires.

Dans le premier cas dans une situation impérative se trouve l'organisation économique qui organise les négociations qui en principe ne peut pas toute seule prévenir la conclusion de contrat. Sa situation est semblable à celle de l'auteur de l'offre. Les CGSC n'apportent pas de réponse à la question si cette organisation peut-avant la réception des notifications d'acceptation du projet du contrat — renoncer à sa fonction en avisant les autres organisations économiques.

Il n'y pas non plus dans les CGSC d'indication comment traiter l'acceptation du projet du contrat avec modification (au § 5 al. 6 lettre « b » on parle uniquement de l'acceptation de l'offre avec modification). Une chose est certaine — le contrat dans un tel cas ne sera plus conclu. Mais il semble qu'il n'y a pas d'obstacles à ce qu'une telle déclaration soit traitée comme une nouvelle offre et que soient applicables d'une façon appropriée les dispositions du § 5 al. 6 lettre « b » des CGSC.

L'acceptation de l'offre conduit à la conclusion du contrat (est une acceptation effective du point de vue juridique) si elle parvient au destinataire dans le délai prescrit donc dans la période de la durée d'un engagement par l'offre.

Conformément au § 5 al. 2 des CGSC la notification de l'acceptation du projet du contrat ou de l'offre est considérée faite à temps lorsqu'elle parvient à l'auteur ou à l'organisation économique qui organise les négociations dans le délai prescrit (dans le délai convenu par les parties ou fixé dans

²² Dans le même esprit dans le cadre du droit polonais Z. RADWAŃSKI. *Teoria umów...* p. 76.

l'offre et si les parties n'ont pas convenu de délai ou s'il n'a pas été fixé dans l'offre-dans un délai de 90 jours à partir du jour de la fin de l'élaboration du projet ou de l'envoi de l'offre).

Conformément au § 5 al. 7 des CGSC l'organisation prévue à l'alinéa I lettre « b » est tenue d'informer les parties de la date de la conclusion du contrat dans les 10 jours qui suivent sa conclusion. Comme on peut en juger ce devoir repose sur l'organisation qui organise les négociations. Il semble cependant qu'un devoir semblable incombe également à l'auteur de l'offre.

Le délai prévu au § 5 al. 7 est incontestablement un délai d'instruction²³.

La disposition du § 5 al. 3 statue que s'il se manifeste que la notification parvenue avec retard a été expédiée avant l'expiration du délai prévu au § 5 al. 2 des CGSC, elle n'est considérée comme tardive (avec l'effet de la non-conclusion du contrat) que dans les cas où la partie qui a fait l'offre notifie sans délai à l'autre partie la réception de la notification tardive. Si l'auteur de l'offre ne profite pas de cette possibilité (n'informe pas l'autre partie de la réception de la notification tardive), le contrat doit être considéré comme conclu.

La disposition citée soulève quelques doutes. On n'y a pas précisé de quoi s'agit-il dans la notification (dont on parle dans sa première partie): est-ce la notification de l'acceptation de l'offre ou est-ce la notification d'acceptation du projet du contrat (et peut-être l'une et l'autre). Dans la partie finale de cette disposition on parle seulement de la partie qui a fait l'offre. Cela peut suggérer que la disposition concerne uniquement les effets de la réception par l'auteur de l'offre d'une notification tardive d'acceptation de l'offre expédiée avec observation des délais prévus au § 5 al. 2 des CGSC et n'englobe pas les cas où le retard se rapporte aux notifications d'acceptation du projet du contrat (expédiées avec observation des délais prévus au § 5 al. 2 des CGSC). Ainsi donc, si le contrat est conclu par l'acceptation du projet élaboré en commun par les parties, dans le cas de l'arrivée d'au moins une notification d'acceptation du projet du contrat (expédiée dans le délai prescrit) le contrat n'est pas conclu²⁴.

Il convient de remarquer qu'un tel point de vue révèle des doutes. Comme il semble, on ne peut cependant *de lege lata* appliquer les

²³ Voir B. FEDOROWICZ. *Ogólne warunki specjalizacji i kooperacji produkcji między organizacjami państw członkowskich Rady Wzajemnej Pomocy Gospodarczej (komentarz)* [Les conditions générales de spécialisation et de coopération dans la production entre les organisations des pays membres du Conseil d'Aide Economique Mutuelle — commentaire], Varsovie 1981. p. 9.

²⁴ Cependant B. Fedorowicz (*Ogólne warunki...* p. 9) applique le principe exprimé au § 5 al. 3 des CGSC également au cas où la conclusion du contrat a lieu par l'acceptation d'un projet du contrat élaboré en commun.

dispositions du § 5 al. 3 des CGSC à la situation où le retard concerne la notification d'acceptation du projet du contrat élaboré en commun par les parties dans le cas où l'organisation économique qui organise les négociations a reçu au moins une notification tardive d'acceptation du projet du contrat élaboré en commun par les parties malgré que cette notification fut expédiée avant le délai prévu au § 5 al. 2 des CGSC. La conclusion du contrat va dépendre de la volonté des parties. Les parties peuvent dorénavant exprimer leur accord à traiter le contrat comme conclu malgré la réception d'une notification tardive du projet du contrat expédiée dans le délai prescrit. L'organisation économique qui organise les négociations doit d'ailleurs s'efforcer d'entreprendre des démarches visant la présentation des opinions des parties en matière de la conclusion du contrat.

Il n'y a pas dans les CGSC d'indication précise comment doit être traitée la notification d'acceptation du projet du contrat expédiée après l'expiration du délai prescrit. Il semble qu'il n'y pas d'obstacles à ce qu'elle puisse être traitée comme une offre visant la reinitiation de la « procédure » de la conclusion du contrat. Une telle solution est visiblement adoptée à l'égard de l'acceptation tardive de l'offre au § 5 al. 5 lettre « a » des CGSC.

VI. Le lieu et la date de la conclusion du contrat; rentrée en vigueur du contrat

17. Conformément au § 5 al. 1 lettre « a » des CGSC le contrat de spécialisation et de coopération dans la production conclu entre présents sera conclu au moment de sa signature par toutes les parties. Il semble que le lieu de la conclusion du contrat sera celui de sa signature (et non celui de l'élaboration du projet).

18. Le contrat de spécialisation et de coopération dans la production — entre absents — s'il est conclu à partir d'un projet élaboré en commun — est considéré comme conclu au moment où la dernière notification d'acceptation du projet du contrat sans modification parvient à l'organisation qui organise les négociations et lorsqu'il s'agit d'un contrat fondé sur un projet présenté par l'une des parties constituant une offre au moment de la dernière notification d'acceptation de l'offre. De la même façon sera aussi établi (à défaut d'indication précise contenue dans l'offre) le lieu de la conclusion du contrat.

19. Une distinction doit être faite entre le moment de la conclusion du contrat et le moment de son entrée en vigueur (c'est-à-dire le moment

de l'acquisition de la force probante par le contrat). Conformément au § 10 al. 1 des CGSC « auf dans les cas où le contrat en dispose autrement, celui-ci entre en vigueur le jour de sa conclusion ». Les parties jouissent de cette sorte d'une liberté quant à la détermination du moment de l'entrée en vigueur du contrat de spécialisation et de coopération dans la production. Evidemment, le moment de l'entrée en vigueur du contrat, déterminé par les parties ne peut être que postérieur au moment de sa conclusion. Il n'est pas cependant exclu l'extension de la régulation admise dans le contrat sur les rapports nés entre les parties encore avant le conclusion de ce contrat.

Au § 10 al. 2 des CGSC on a prévu une condition qui doit être réalisée pour que le contrat puisse entrer en vigueur. En vertu de cette disposition « si la législation du pays de l'une des parties contractantes exige l'approbation du contrat par un organisme étatique compétent, le contrat entre en vigueur le jour de l'obtention de la dernière approbation nécessaire, sauf si un moment différent a été convenu par les parties » (il ne peut bien sûr s'agir que d'un moment postérieur). Ce n'est pas une condition dans le sens strict du mot mais one condition résultant d'une disposition légale (*conditio iuris*). Cette appréciation ne change pas par les respect par les parties de l'indication comprise au § 10 al. 3 des CGSC par l'inclusion dans le contrat d'une clause ajournant sont entrée en vigueur jusqu'à l'obtention de l'approbation. La subordination de l'entrée en vigueur de contrat à l'obtention de l'approbation en vertu du § 10 al. 2 va fonctionner également au cas où les parties n'ont pas observé l'indication formulée au § 10 al. 3 des CGSC. Les auteurs des CGSC ont pris donc en considération les conséquences d'une action « forçante » de certaines normes nationales et d'un tel caractère sont incontestablement les dispositions prévoyant la condition de l'approbation (consentement à la conclusion) du contrat par l'organisme étatique compétent.

La disposition du § 10 al. 3 des CGSC prévoit également certaines obligations pour la partie dont le pays exige l'approbation du contrat. Cette partie doit prendre toutes les mesures appropriées pour l'obtention d'une telle approbation. Elle doit également informer sans tarder l'autre partie ou l'organisation chargée d'organiser les négociations de la décision de l'organisme étatique compétent approuvant le contrat ou de manque de cette décision dans un délai établi au § 10 al. 4. Il semble qu'une plus grande précision consécutive de l'obligation générale « prendre toutes les mesures » formulée au § 10 al. 3 des CGSC est admissible.

En vertu du § 10 al. 3 des CGSC, la partie concernée doit s'adresser sans délai à l'organisme étatique compétent en vue d'obtenir son approbation, motiver sa demande d'une façon appropriée, présenter les documents ou informations nécessaires, faire usage, le cas échéant, des mesures de recours

etc. A défaut d'exécution de ces obligations la parties est soumise à une responsabilité sur son patrimoine²⁵

Conformément au § 10 al. 4 des CGSC «dans le cas où le contrat n'est pas approuvé, conformément à l'ai. 2 dans un délai de 3 mois à partir de la date de sa conclusion ou dans un autre délai convenu par les parties, de même que s'il a été approuvé avec réserve, on considère qu'il n'entre pas en vigueur».

VII. Offre sans engagement Acceptation de l'offre sans engagement

20. En vertu du § 5 al. 4 l'auteur de l'offre peut y stipuler expressément que son offre n'est pas une offre ferme. Une telle réserve est en pratique appelée: « sans obligation », « sans engagement » ou d'une façon semblable.

Il en résulte de la disposition citée qu'à défaut d'une élimination expresse de la force probante de l'offre par son auteur, il y a présomption de la force probante de l'offre.

La question qui se pose est la suivante: quels sont les effets juridiques provoqués par la soumission de l'offre sans engagement. Il n'y pas de doute qu'une telle offre ne fait pas naître l'état l'engagement caractéristique pour l'offre ferme. La position juridique des destinataires de l'offre sans engagement est également différente.

Il est aussi évident qu'une offre sans engagement peut être uniquement une telle déclaration de l'auteur de l'offre qui à tous les traits de l'offre ferme à l'exception de son caractère ferme. Une offre sans engagement doit donc préciser le texte du contrat proposé (ou tout au moins ses *essentialia negotii*).

21. Il n'est pas clair s'il est admissible et si oui quels seront les conséquences de la détermination dans une offre sans engagement d'un délai pendant lequel l'auteur de l'offre va attendre une réponse de la part du destinataire. Dans la jurisprudence — dans le cadre des dispositions des CGL — on observe la tendance à traiter une telle offre presque de la même manière qu'une offre ferme²⁶.

Il semble que lors de la considération du caractère de l'offre il ne faut pas trop rapidement formuler des conclusions à partir du fait de la détermination dans l'offre du délai d'attente de la réponse, si en même temps on a d'une façon expresse évoqué son caractère sans engagement.

²⁵ *Ibidem.* p. 12.

²⁶ Voir M. KEMPER. H. STROHBACH. H. WAGNER. *Die Allgemeinen...* p. 104 et la décision du Tribunal d'Arbitrage de Berlin 23/67 qui y est analysée.

Il faut ici faire la distinction entre la détermination par l'auteur de l'offre du délai d'engagement par l'offre et du délai d'attente de la réponse. Le seul fait de détermination dans l'offre du délai d'attente de la réponse ne prive pas — comme je le pense — l'offre sans engagement de son caractère non ferme. La signification décisive aura alors l'inclusion dans l'offre d'une clause prévoyant son caractère sans engagement. On ne peut voir une contradiction interne que dans le cas d'inclusion simultanée dans l'offre d'une clause de caractère non ferme de cette offre et de la détermination du temps d'engagement de l'offre.

Une déclaration portant le nom d'une offre sans engagement qui ne comporte pas *&essentialia negotii*, précisées par l'auteur n'as pas évidemment de caractère d'offre (même de celle sans engagement); elle doit être traitée uniquement comme une invitation à la soumission d'offres ou à l'ouverture des négociations.

La doctrine n'est pas unanime quant au caractère de la déclaration qui du point de vue des conditions relatives au contenu a les traits de l'offre mais comporte une clause prévoyant son caractère non ferme. On peut rencontrer de nombreuses opinions attribuant à une telle déclaration le caractère d'une invitation à la soumission d'offres²⁷. Dans ce sens vont également les décisions de certains tribunaux d'arbitrage²⁸. Il existent cependant d'opinions opposées. On propose, qu'au cas où l'auteur (de l'offre sans engagement) reçoit la réponse du destinataire sur son acceptation et ne se prononce pas, le contrat soit considéré comme conclu²⁹. L'auteur de l'offre sans engagement doit donc — au cas où il reçoit la notification d'acceptation de l'offre — présenter une attitude active. S'il veut empêcher la conclusion du contrat, il doit en informer le destinataire. On avance également que lors de l'évaluation si dans le cas présenté le contrat a été conclu, il faut prendre en considération le comportement des parties après l'échange des déclarations antérieures (soumission de l'offre sans engagement et déclaration de son acceptation) et le fait que les parties peuvent exprimer leur volonté de traiter le contrat comme conclu également *per facta concluden.fia*³⁰.

²⁷ Voir M. SCKNIAK. F. ZACHARIASIEWICZ. *Import kompletnych obiektów przemysłowych [Importation des établissements industriels complets]*. Varsovie 1977. p. 58; A. TYNEL. *Zawarcie...* p. 131 statue qu'il est douteux que l'offre sans engagement « puisse être considérée comme une offre dans le sens traditionnel de cette notion »; B. FEDOROWICZ. *Ogólne warunki...* p. 9; Voir aussi dans le cadre du droit polonais J. GYRSKI. *Przygotowanie umowy...* p. 41; B. GAWLIK. *Procedura...* p. 9.

²⁸ Voir la décision du Tribunal d'Arbitrage de Sofia 27/65 analysée par M. KEMPER. H. STROHBACH. H. WAGNER. *Die Allgemeinen...* p. 104.

²⁹ Voir M. KEMPER. H. STROHBACH. H. WAGNER. *Die Allgemeinen...* p. 104.

³⁰ *Ibidem*.

Le problème analysé n'a pas été résolu d'une façon expresse dans les CGSC. Il est cependant très douteux si on peut *de lege lata* attribuer au silence de l'auteur de l'offre qui a reçu la réponse des destinataires en matière d'acceptation de l'offre, les conséquences tellement importantes pour pouvoir considérer le contrat conclu. Dans le cas analysé, l'auteur de l'offre doit bien sûr informer sans tarder les destinataires sur sa décision finale en matière de la conclusion du contrat. Une telle opinion est basée sur les principes régissant la coopération des organisations économiques des pays membres du CAEM. Cependant, je ne pense pas que le silence de l'auteur de l'offre puisse être traité comme son consentement à la conclusion du contrat. Il semble qu'il faut exiger de sa part qu'il se prononce dans une déclaration expresse ou présumée (*per facta concludentia*). L'exécution du contrat par l'auteur de l'offre va, comme je pense, constituer une preuve suffisante de son intention de traiter le contrat comme conclu.

On peut, bien sûr, défendre une opinion plus rigoureuse et exiger la présentation par l'auteur de l'offre d'une déclaration écrite exprimant son intention de conclusion du contrat (confirmant la conclusion du contrat). Une telle attitude serait comme il semble l'exemple d'un rigorisme excessif. Les exigences formelles sont déjà remplies au moment où la déclaration comprenant l'offre (sans engagement) et la notification d'acceptation ont été rédigées en forme écrite.

22. En cas d'une offre verbale sans engagement et de son acceptation écrite, il sera nécessaire pour la conclusion du contrat, que l'auteur de l'offre fasse une déclaration écrite exprimant son accord à la conclusion du contrat.

VIII. Révision ou résolution du contrat

23. Conformément au § 48 des CGSC le contrat de spécialisation et de coopération dans la production prend fin :

- a) à l'expiration de la durée prévue;
- b) par consentement des parties;
- c) par suite d'une dénonciation unilatérale du contrat.

Cependant, en vertu du § 49 des CGSC, la dénonciation unilatérale du contrat n'est admise qu'aux cas prévus dans les CGSC (par exemple: le § 31 al. 2) ou dans le contrat. Selon le § 50 al. 2 des CGSC « si le contrat ne prévoit pas un délai différent, la résolution unilatérale entre en vigueur quatre mois après la date de la lettre notifiant cette résolution ».

La disposition du § 49 des CGSC prévoit la possibilité, pour chacune d'autres parties du contrat, de s'adresser au tribunal d'arbitrage avec une requête demandant la reconnaissance de cette dénonciation unilatérale comme

nulle par manque de fondement juridique (manque de justification légale appropriée). La fin du contrat de spécialisation ou de coopération dans la production (pour causes quelconques) ne provoque pas automatiquement la fin des accords conclus en vue de sa réalisation, sauf stipulation contraire du contrat (§ 51 des CGSC). Conformément au § 52 des CGSC, après la fin de ce contrat, restent en vigueur les obligations de secret ainsi que les autres engagements dont l'existence après la fin du contrat a été expressément prévue par les parties (voir le § 17 des CGSC).

24. Les questions des compléments et des précisions apportées au contrat après sa conclusion ont été réglées dans le CGSC d'une façon séparée. En vertu du § 11 « chacune des parties peut formuler des propositions en vue de compléter et de préciser le contrat, en particulier en tenant compte des volumes et des délais de livraison précisés par les conventions commerciales à long terme ainsi que par des protocoles annuels y annexés ».

L'apport des compléments ou des précisions au contrat a lieu lorsque toutes les parties du contrat auront accepté la proposition présentée. Au cas de formulation d'une proposition relative aux compléments ou précisions au contrat par l'une des parties, les autres parties doivent se prononcer expressément en cette matière. D'autre part, le silence gardé par l'une des parties ne peut pas être traité comme une acceptation de la proposition.

Une distinction doit être faite entre la proposition catégorique en matière des compléments ou des précisions et la proposition de considération et discussion de l'opportunité d'apport des compléments ou précisions au contrat. Une telle proposition doit être traitée comme une invitation à la présentation des propositions fermes ou à l'ouverture des négociations. L'entrée en vigueur des compléments ou précisions va dépendre de la confirmation ferme de la proposition formulée également par la partie qui en est le premier auteur.

On a justement remarqué dans la littérature polonaise que l'adaptation, par les parties, du contrat de spécialisation ou de coopération dans la production aux « volumes et délais de livraison précisés par les conventions commerciales à long terme ainsi que par des protocoles annuels y annexés » (§ 11 des CGSC) dépend d'elles-mêmes³¹. En cas d'inobservation par les parties de cette indication, le rapport contractuel reste inchangé.

La disposition du § 12 des CGSC impose l'application de la section III des CGSC aux cas de révision et de modification du contrat.

³¹ Voir B. FEDOROWICZ, *Ogólne warunki...*, p. 13.

IX. La forme du contrat

25. L'exigence d'un écrit pour le contrat de spécialisation et de coopération dans la production ainsi que pour l'offre et l'acceptation de l'offre est stipulé par le § 6 al. 1 des CGSC. Conformément au § 12 des CGSC, cette exigence s'applique également aux compléments et précisions apportées au contrat. Conformément au § 50 al. 1 des CGSC, la déclaration sur la résolution unilatérale du contrat est faite par écrit. Les CGSC ne prévoient pas d'une façon expresse l'exigence de la forme écrite pour la résolution du contrat par voie de l'accord des parties. Il semble cependant — en tenant compte de la disposition du § 6 al. 1 des CGSC — qu'il faut opter en faveur de l'opinion prévoyant la nécessité la forme écrite également dans ce dernier cas.

En vertu du § 6 al. 2 des CGSC « sont considérées comme faites par écrit également les notifications par télégraphe ou par télécopieur ».

Conformément au § 9 des CGSC dès le moment de la conclusion du contrat, « toute correspondance antérieure devient nulle à moins que les parties n'aient décidé autrement dans le contrat ».

Selon le § 7 « toutes les annexes au contrat, prévus expressément ou déterminables par référence en font partie intégrante ».

Compensation Contracts in International Economic Intercourse in the Light of Contractual Practice

by JERZY RAJSKI

I

1. A good of international economic operations is performed in the form of transactions in which the contracting parties agree that specified non-monetary performances (supply of goods, rendering of services) of one of them are compensated by non-monetary performances of the other party.¹ Such transactions, concluded by parties from different States which are sometimes of different social and economic systems, vary widely in their contents, as well as legal form. Compensation elements of international economic transactions give them specific purport which influences their nature and legal structure.

2. International contractual practice, although far from being uniform, has come up with a number of solutions in this field. Their significance is undoubtedly influenced by the lack of appropriate legal regulations (both on an international scale and in the law of individual States). In such situation the examination of this practice seems particularly useful. This paper presents some results of research concerning international compensation contracts. 87 contracts concluded by parties from 21 States were examined.

II

3. The above research confirms opinions expressed in the doctrine indicating

¹ According to some estimates international compensation transactions have accounted in 1983—1985 between 20—40 per cent of the world trade. See J. RAJSKI, *International Compensation Trade*, in: *International Economic Law...* and the writings referred to there. See also C. GUYOT, "Counter-trade Recent Legal Developments and Comparative Study", *Revue de Droit des Affaires Internationales*, 1986, No. 8, p. 759 ff.

lack of agreement in international contractual practice concerning both the notion of compensation contracts and specification of their different types. Agreement on uniformity of the used terminology has not been achieved which can become the source of many doubts and misunderstandings. The concluded agreements are often left undefined marked with a registration number only (over half of the examined contracts). In many cases (18) they are simply called compensation contracts (clauses) regardless of their nature. Only in 19 cases the contracts were defined (barter contract, counter-purchase contract or buy-back contract). In the latest situations it occurs that contracts of different nature and contents have the same name (for example among some "compensation contracts" there were counter-purchase contracts; two contracts entitled "clause on counter-purchase" are in essence quasi-barter and so on). This confirms the urgent need for introducing a certain minimum terminological order in this field corresponding to a specified typology of compensation contracts.

4. The types of compensation contracts concluded in international economic transactions depend above all on the nature of the economic operation which is regulated by the specified contract. The exchange of compensation performances may be made in two ways. The parties can agree on *direct* exchange of these performances or carry it out *through the medium* of money. In the second of the above cases each party is obliged to pay the other party for performed non-monetary performances; compensation is then expressed in appropriate balancing of payments of both parties resulting from the performed non-monetary performances. Compensation relations with the participation of two subjects can be more complicated as besides them, and sometimes even in the place of one of them, third persons enter who realize compensation performances (in the examined contracts realization of performance by third persons was established *expressis verbis* in 18 cases, and in a number of others such possibility had been foreseen).

5. The legal form of the compensation transaction is adjusted to its nature and to the ends the parties intend to attain. In this respect two basic solutions can be distinguished; a) mono-contractual (the single contract option); b) multi-contractual (the multiple contractual option). In the first case all rights and duties of the contracting parties resulting from the compensation transaction are contained in the contents of one contract. This solution is as a rule applied in practice in situations in which the parties agree on a direct and simultaneous compensatory exchange of goods or services. In the remaining cases the parties give preference to express the rights and duties in two (or more) contracts. Sometimes other considerations justify the acceptance of such solution (e.g. the parties

wish to avoid complications connected with taking up credits or bank guarantees, or insuring the export transaction).

6. Among the variety of legal forms in which the discussed types of transactions are concluded, in international contractual practice 4 main types can be distinguished:

- (i) barter contract (*troc. Tauschgeschäft*);
- (ii) quasi-barter contract, sometimes called compensation contract in the strict sense of the word (*contract de compensation Kompensationsvertrag*);
- (iii) counter-purchase contract (*contre-achat Gegenkauf*);
- (iv) buy-back contract (*achat en retour Produktabnahmevertrag¹ or Rückkaufgeschäft*).

III

7. The single-contract solutions are applied relatively less often in contractual practice of international economic intercourse. In the writings, however, a number of such compensation transactions have been indicated including, for instance, the exchange of ten huge passenger planes, the so called Jumbo Jets — Boeing 747, for petroleum (Saudi Arabia)/ exchange of tyres, bicycles and looms for 2,000 tons of cocoa (Chinese People's Republic — Ghana), or exchange of bauxite for foodstuffs (USA — Jamaica).⁴ Lack of appropriate data does not allow verification of the accuracy of

² They are most often distinguished in legal writings. See e.g. M. FONTAINE, "Aspects juridiques des contrats de compensation" *Droit et pratique du commerce international*, 1981, No. 2, pp. 179 ff.; A. FLIEGER and J. VÖLTER, "Der Kompensationsvertrag" in: *Handbuch des Aussenhandelsverträge*, vol. 4, Berlin 1982, pp. 252 ff.; C. GUYOT, "Countertrade..." pp. 760 ff.; J. LOCHNER, "Guide to Countertrade and International Barter", *The International Lawyer*, 1985, No. 4, pp. 725 ff.; P. MISHKIN, "Countertrade and Barter: The Basic Legal Structure", *The International Business Lawyer*, 1986, No. 2, pp. 7 ff.; F. NIGGEMANN, "Gestaltungsformen und Rechtsfragen bei Gegenschäften", *Recht der Internationale Wirtschaft*, 1987, No. 3, pp. 170 ff.; J. RAJSKI, "Some Legal Aspects of International Compensation Trade", *The International and Comparative Law Quarterly*, 1985, No. 1, pp. 128 ff.; C. M. SCHMITHOFF, "Countertrade", *Journal of Business Law* 1985, No. 2, pp. 115 ff.; P. VERZARIU, *Commercio reciproco, trueque y compensaciones*, Bogota 1985, pp. 11 ff.; T. B. McVEY, "Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas", *Law and Policy in International Business*, 1984, No. 1, pp. 1 ff.

³ *Trade News, Euromoney Trade Financial Reporter*, February 1985, pp. 7 and 36.

⁴ *Trade News, Euromoney Trade Financial Reporter*, September 1984, p. 7.

⁵ E. C. LEE, "Bauxite for Butter: The US — Jamaican Agreement and the Future of Barter in US Trade Policy", *Law and Policy in International Business*, 1984, No. 2, pp. 239 ff.

classifying the above transactions (sometimes concluded between governments of interested States) as barter.

In the group of examined contracts they account for a very small percentage (I managed to find only three such contracts of which only one is a barter contract in its pure form). These contracts contain in the preamble stipulations stating clearly the will of the parties committing themselves to counter-exchange of specified goods. Next they name the goods which are the objects of exchange, criteria for their quality evaluation and terms of delivery. In two cases the right of each of the parties to quality control of the goods before dispatch has been reserved. In one case the evaluation of the quality of goods by a third person (specialized organization) has been provided for. The parties have also agreed on the contents of *force majeure* clause exempting from liability for not performing the obligation, or performing it improperly. The principles concerning liability under the rules of warranty of quality of delivered goods have been laid down separately. In two contracts it was agreed that if a promised performance is not accomplished in stated time, the second party is entitled to demand payment being equivalent to the unaccomplished performance which releases it from waiting for delivery of the specified goods. Moreover, mutual bank guarantees securing payment of the above amount were provided for. One of the discussed contracts is very concise (3 typewritten pages), and the remaining ones are quite extensive (from 50 to 10 typewritten pages) and contain over a dozen resolutions each.

IV

8. Compensation transactions performed in the form of counterpurchase or buy-back purchase are, unlike barter (or quasibarter), implemented on the basis of two or more contracts under which the parties are committed to perform specified non-monetary performances.

Most often concluded in international economic intercourse are counter-purchase contracts. This statement generally expressed in the legal writing⁶ has found full confirmation in the dossier on contracts which was prepared for the purpose of this research. Counter-purchase contracts constitute 90 per cent of all obtained contracts (79). Their extensive use in international economic intercourse is generally justified by their considerable flexibility enabling to take account of great variety of compensation transactions (the

⁶ See e.g. M. FOUNTAINE, *op. cit.*, p. 138; A. FLIEGNAR and J. VÖLTER, *op. cit.*, p. 264; J. LOCHNER, *op. cit.*, p. 730; P. MISHKIN, *op. cit.*, pp. 14—15; F. NIGGEMANN, *op. cit.*, p. 171.

opinion of the doctrine in this respect does not differ from the views of representatives of practice obtained by the author). Counter-purchase contracts are treated as kind of frame-agreements laying down rules on the basis of which the parties commit themselves to conclude realization agreements on performing non-monetary performances (sale, supply, service, and so on). So, the name does not fully correspond to the contents of the contract.

In practice counter-purchase contracts are concluded in two ways;

a) as agreements separated from the contracts labelled as: basic, principal, primary or simply export contracts;

b) as documents annexed to the above contracts.

Thus the compensation transaction envisaged by the parties as a whole is expressed in the form of a specific "contractual triangle": principal contract, counter-purchase agreement and realization contracts. Together these contracts form a legal mechanism enabling the parties to accomplish economic operations in which one of the parties agrees to purchase goods from the other party if the second party agrees to purchase specified goods from the first party. These obligations are from a legal point of view objects of separate (although bound up with one another) transactions implemented on the basis of different agreements, which when joined together form a contractual complex embodying all of the interlocking components of the counter-purchase transaction.

9. Counter-purchase contracts which were the subject matter of my research are characterized by a specific contents in which the following significant elements can be distinguished:

a) They contain stipulations indicating their legal link with the principal contract. Most often they are worded as follows:

"In connection with the conclusion of the contract No. ... concerning ... [principal contract -- *J. P.*] the parties agree that...".

The contents of the following contractual clauses can serve as example:

"Im Zusammenhang mit dem Abschluss des Vertrages Nr. ... über die Lieferung von ... haben die Parteien folgende Vereinbarung getroffen:..." (Bulgarian-FRG contract of 1986).

"A la suite du contrat no ... conclus pour la livraison des ... l'Acheteur s'engage envers le Vendeur à lui acheter des ... (French-Romanian contract of 1984)".

Sometimes a counter-purchase contract is concluded somewhat earlier than a principal contract. Then the discussed clause can be as follows:

"Company [American company — *J. R.*] agrees to buy products ... from ... (Indian company) upon the date of conclusion of the contract [principal contract — *J. R.*]

b) The most significant stipulations concern the obligation of the exporter (from principal contract) to purchase specified products (services) from the

other party. The above products (services) are as a rule described in a general way. Many of the analysed agreements have a list of goods attached to them from among which the exporter can make his choice.

Sometimes the goods are specified more precisely. For instances, the Bulgarian-FRG contract of 1986 speaks of "agricultural products". Also, such indications as "product from foreign trade firm X" (Austrian-Czechoslovakian agreement of 1980) can be encountered. The scope of the above duty of the exporter is sometimes established in the form of specified amount of the value of the principal contract. Here is a typical example of such stipulation:

"[the exporter — J. R.] agrees to purchase goods ... worth not less than ... of the value of ... [of principal contract — J. ?.]" — Polish-FRG contract of 1984.

c) The agreements also contain stipulations determining the period during which the exporter has to perform his counter-purchase obligation (in the examined contracts it was generally 1 -- 3 years; in 9 cases it was shorter and in one longer -- 5 years). One of the following solutions was adopted here:

(i) the exporter can perform his obligation any time within the agreed period;

(ii) the exporter ought to purchase the products in specified amounts and at prescribed time (usually periodically, for example, every 6 months or yearly).

d) Some agreements contain stipulations concerning quality requirements of products. Most often they are formulated in broad terms. For example, they state that the products should "comply with the standards of the international market" or be of "commercial Quality" (*qualité marchande*).

In 4 cases the right to quality control by an independent expert chosen by both parties was provided for, and at the same time it was provided that his decision was binding on both parties. In the French-Yugoslavian contract of 1982

"the performance is declared unfulfilled in case of refusal to subject the goods to control or acknowledge the decision ... (of the expert) which causes the contract to expire".

e) Clauses contained in the agreements concerning the effect of non-performance improper performance of the obligation are of great significance. They provide the duty of payment of stipulated penalty usually ranging from 10 to 25 per cent of the value of the non-performed obligation of purchase; in one case it was set on a lower level -- 5 per cent, and in 4 cases on a higher level — from 50 to 100 per cent.

In a number of agreements an explicit stipulation was included according to which the payment of stipulated penalty does not release the obligator

from the assumed obligation. In general, bank guarantees securing the payment of stipulated penalty are provided for as well.

0) The agreements also contain clauses of more general nature, for example, *force majeure* clause, choice of law clause and arbitration clause.

10. The conclusion of a counter-purchase contract in the form of an annex to the principal contract can sometimes raise doubts as to its legal nature. The Polish-FRG contract of 1985 can serve as an example.

The counter-purchase obligation of the West German exporter has been enclosed in annex No. 6 to the principal contract under a rather general title *Gegenschaftsklauzel*.⁷ In the introduction this document provides that the parties agreed that "within the scope of contract No. ..." [principal contract — *J. R.*] the exporter is obliged to purchase from the importer "parts and elements worth minimum 20 per cent of the value of the contract".

From the above it could result that the obligation of purchase is a part of the principal contract. The contents of the agreement, however, indicates its dependent (although connected with the principal contract) nature of the above obligation ("this clause is in force only in relation to contract No. ... and ought to be considered separate from all other obligations resulting from it").

The autonomy of the above obligation is also confirmed by other stipulations contained in the above clause which refer to the procedure and terms of payment, and the establishment of stipulated penalty as sanction of not performing the obligation or performing it improperly. What more, the adoption in the discussed document of the arbitration clause also seems to confirm its autonomous character and linkage with the principal contract. For it stipulates that

"in relation to all differences concerning payment or legal disputes which may arise in connection with this contract or *Gegenschaftsklauzel* and which will not be settled by compromise such arbitration clause as in contract No. ... [principal contract — *J. R.*] will be applied".

11. A buy-back contract is a long-term agreement by virtue of which a party under an obligation to build a plant, to deliver equipment, licences or know-how for an industrial installation undertakes to purchase products resulting from this plant or those installations over a fixed period

⁷ This term is usually used in Austrian, Swiss and West-German legal writings as a generic term for all compensation trade contracts. See e.g. F. NIGGEMANN, *op. cit.*, p. 170. In East-German writing the term "Gegenschaft" is sometime used to mean the counterpurchase. See e.g. A. GLIEGNER and J. VÖLTER, *op. cit.*, p. 254 and pp. 264 ff.

of time as a total or part payment. So, as distinct from a counter-purchase contract, in this case the object of the exporter's obligation are products resulting from the imported plant or technology. Thus the contents of an obligation of buy-back purchase can be defined rather precisely. This fact is of great significance concerning the nature of the discussed agreement. As distinct from counter-purchase contracts which are as a rule formulated in a general and concise way (on the average 3-4 typewritten pages), buy-back contracts are more elaborate (a dozen or dozens of typewritten pages).

Buy-back agreements are of a specific nature. They are characterized by flexibility of some clauses which allow to solve many problems (which can arise within the period of performance of the obligation resulting from it) not always foreseeable at the moment of conclusion of the agreement. It has to be emphasized that the period during which the fulfillment is to take place is generally distant from the moment of conclusion of the agreement, and it is also of longer duration than in counter-purchase contracts (in the examined agreements it amounted to from 3 to 20 years).

12. In buy-back contracts, which constituted the subject matter of my research, the following characteristic stipulations can be distinguished:

a) containing explicit and precise definition of the link with the principal contract. Also the objective of the agreement is emphasized, which is the payment of dues resulting from the principal contract. An example of such a stipulation,

"In order to secure payment of dues including interests [resulting from the principal contract — *J. R.*] within 5 years, the sale ... within 5 years should reach ... U.S. dollars" [ChPR-USA contract of 1982].

b) The most important are very extensive stipulations concerning the obligation of the exporter (from the principal contract) to purchase agreed products from the importer. These products are generally defined quite precisely. According to their nature the parties use different criteria (technical standards, specification, designs, and so on).

c) The agreements indicate both the quantity (and value) of purchased goods and the period of realization of this purchase. In three of the discussed cases they do it in the form of a "time-table" of purchases (supplies) indicating that in successive years they should reach a definite volume (quantity or weight and value). It is interesting to note that the parties at the same time agree that each proceeding year they will definitely establish the exact volume of the purchase through negotiations.

d) A number of agreements concern the criteria of evaluation of the quality of products and its control. The parties often reserve for the buyer

the right to control the manufacturing process of given products. In some cases cooperation between the parties develops. For instance, in accordance with a contract concluded by a Chinese enterprise with an American company, the company entered into an obligation to send technical experts to supervise installation of supplied machinery and train the Chinese personnel (for a period of 3 months). In the buy-back agreement it was stipulated that 4 American technicians would stay in the factory after the mentioned training course had ended (the period and aim of their stay in the factory was not specified; it can be assumed that they are to give professional advice without the right to participate in the management of manufacturing processes of the factory).

e) A characteristic feature of the discussed agreements are extensive stipulations concerning price setting on specified products and terms of payment. This is quite complicated as the buy-back obligation can be performed only after commencement of manufacturing and it lasts for a specified long period of time. In the examined contracts one of the two following methods of price setting was applied:

(i) reference to “market prices” or “current prices” on the international market (in one case restricted to Western Europe) at the time of purchase;

(ii) the prices is agreed on through negotiations and at the same time certain elements are established which ought to be taken into consideration.

f) The scope of the obligation of buy-back is usually established with respect to the “value” of the principal contract and it ranged in the examined contracts from 20 to 100 per cent.

g) A number of stipulations concern payment (mechanism, timelimits, guarantees). As in counter-purchase agreements, also in these contracts there are included clauses of a more general nature, for instance, *force majeure* clause and choice of law clause. They also often contain the so called hardship clause putting the parties under obligation to seek negotiations in order to “adjust” the stipulations of the agreement to changed circumstances. Below is the contents of this clause from the Italian-Indian agreement of 1984:

“If in the course of the contract being in force changes impossible to foresee occur on the world market concerning [a given product — *J. R.*] such as, for instance, change in the sphere of its usage, and if in consequence thereof the buyer or seller encounter considerable difficulties while performing their obligations, they should meet with the purpose of finding a solution acceptable to both parties”.

h) In the discussed agreements clauses concerning determination and settlement of disputes are more developed than in other contracts. This is surely connected with the fact that the risk of such disputes arising is greater in this case than in other international commercial contracts. Consequently, the agreements provide for a defined procedure of dispute

settlement by way of negotiation. Arbitration clauses usually contain an indication that only if the dispute is not settled in the above way each of the parties may bring the case before arbitration court.

V

13. The great development of compensation transactions in international economic operations has brought about the formation of various contractual forms complying with the needs of practice. As yet this trend is not accompanied by the development of appropriate legal regulations (both on a national and international scale). In this situation compensation transactions in the international economic intercourse create vast possibilities for constructive investiveness of contractual practice. This phenomenon is, however, accompanied by some dangers resulting from the lack of legal guidelines. International contractual practice endeavours to find a way out by formulating typical solutions the spread of which creates a certain degree of safety and stability of protection of the parties' rights. This practice is at the stage of continuous development and is far from full uniformity. Its examination allows to determine the trends of development which enable to achieve a greater degree of uniformity. Thus the legislator may be given material substantiating the elaboration of appropriate legal regulations.

Protection of Outer Space Environment: Urgent Necessity and Challenge for International Law

by JERZY RZYMANEK

Space technology has been developing very rapidly, resulting in increasing use of space for scientific purposes, experimentation and applications. Current applications include communications, navigation, remote sensing and meteorology. Next steps are going to be space manufacturing, space biology and space power systems. The thirty year old experience and the progress of astronautics has made sophisticated space industry a fact of life.¹ It is very likely that at the turn of the century we will witness the industrialization of outer space.²

Bearing in mind a deleterious effect of industrialization on the environment of the Earth, we should study the effects of space activities on outer space environment. All possible consequences of space industrialization and ways and means of protection of outer space environment should be established.³

"The open nature of the space environment and its importance for all states on the globe, as well as experiences with pollution problems on the surface of the earth, demonstrate

¹ Remark made by Professor Alexander DUNAEEV, Chairman of Glavkosmos, at the 2nd International Conference and Exhibition on the Commercial and Industrial Uses of Outer Space, Montreux, Switzerland 21—25 February, 1988. See his paper, *The Soviet Space Technology: Trends of Development and Opportunities of Using It on a Commercial Basis*.

² Industrialization of outer space is defined as: "the process of gradual incorporation of space segments into national economy". See: S. D. GRISHIN, L. W. LESKOV, *Industrialization of Outer Space, Problems and Perspectives*, (in Russian) Moscow Nauka 1987, p. 6.

³ The danger constituted by long-term plans of space industrialization was rightly noted by E. G. ZHUKOVA-VASILEWSKAYA in her paper, "The International Legal Protection of Space Environment: The Quest for Ways of Solving the Problem", *Proceedings of the 30th Coll. on the Law of Outer Space*, New York 1988, pp. 189—190.

the need to ensure effective legal protection before the rising volume and variety of space activities produce serious damage".⁴

Potential Hazards to Outer Space Environment

The problem of potential hazards of altering space environment was already discussed even before the launching of the first Spoutnik in 1957. In 1956 at the 8th Congress of International Astronautical Federation in Rome experts for the first time discussed the issue of interplanetary contamination.⁵ In the late 1950s, the International Council of Scientific Unions (ICSU) formed the Committee on Contamination by Extraterrestrial Exploration. The Committee warned international community:

"early exploration attempts or ill-considered experiments [...] might result in biological, chemical or radiological contamination of the lunar or planetary surfaces such as to complicate or render impossible further studies of scientific importance".⁶

Since 1959, the problem has been dealt with in the Committee on Space Research (COSPAR). In May 1962 it established a Consultative Group on the Potentially Harmful Effects of Space Experiments. The Consultative Group prepared a report in 1962 in which it stated that some possible pollution-related alterations "could cause interference in future experiments or can be considered harmful in other ways and that further studies are necessary". On the basis of this report the COSPAR adopted a resolution which was subsequently supported by the Scientific and Technical Subcommittee on the Peaceful Uses of Outer Space of the United Nations. Thus the report has influenced the elaboration of the Outer Space Treaty and in particular the formulation of the Article IX.⁷

The problem of protection of the near-earth environment was given careful consideration at the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space, which was held in 1982. The report of the Conference made it clear that the increase in the number of both space objects and launches resulting from rapid advances in space

⁴ K.-H. BÖCKSTIEGEL, *Space Law — Changes and Expectations at the Turn to Commercial Space Activities*, Lecture at The Forum Internationale, The Hague, The Netherlands, 21 November, 1986.

⁵ J. GOSPODAREK, "Prawo kosmiczne a ochrona środowiska naturalnego" [Space Law and Protection of Natural Environment], *Astronautyka*, 1976, No. 1, p. 22.

⁶ UN Doc. A./C.1/SR.1345 (COSPAR Observer, 5 December, 1963), cited in H. A. BAKÉR, "The Sci-Lab Perception: Its Impact on Protection of the Outer Space Environment", *Proceedings of the 30th Coll. on the Law of Outer Space*, p. 121.

⁷ *Ibid.* See also: M. GRZEGORCZYK, "Prawo kosmiczne" [Space Law], *Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace Prawnicze*, Zeszyt 59, 1973, p. 32.

technology, was not an unmixed blessing. In particular the report drew attention on such problems as: the possible danger associated with environmental modifications caused by space activity — pollution and reactions resulting from rocket launches, the disturbances in the ionosphere due to release of gases by rockets, the release of chemically reactive substances i.e. metal vapours into space, use of ion engines for propulsion, the growing number of space debris.⁸

Many of these dangers are rather speculative, as their environmental risks and potential harmful effects still require detailed studies. However, as it was correctly pointed out by N. Jasentuliyana, it might be useful to try to divide the environmental problems arising, or potentially arising, from space activities into three groups:

1) those which seem sufficiently important and well defined to justify beginning international discussions now;

2) those which seem important but are not adequately understood and hence might justify a cooperative international research programme,

3) those for which the available evidence does not indicate a need for any efforts other than the normal scientific research and technological precautions that are already being undertaken. N. Jasentuliyana is of the opinion that the problem of precautions on the use of nuclear power sources containing radioactive material belongs to the first of these groups, the problem of space debris to the second, while all other dangers mentioned above fall into the third one.⁹

Nuclear Power Sources

The UN Committee on the Peaceful Uses of Outer Space has been considering for several years the problem relating to the use of nuclear power sources in outer space. However, the Legal Sub-Committee has reached the agreement only on text of two principles: on international notification in case of risk of re-entry into the Earth's atmosphere of a spacecraft with a nuclear power source on board, and on assistance to States which might be affected by such a re-entry. It has also been agreed that international law is applicable to the use of nuclear power

⁸ *Report of the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space*, Vienna, 9—21 August, 1982, A/CONF. 101/10 pp. 71—74.

⁹ N. JASENTULIYANA, "Priorities for International Protection of the Space Environment", paper presented at the International Colloquium, Environmental Aspects of Activities in Outer Space — State of the Law and Measures of Protection, Cologne, May 16—19, 1988 (farther referred to as the International Colloquium in Cologne), pp. 3—17.

sources in space. Requirements for safety assessments of systems prior to launch and agreed safety criteria for use of nuclear power sources, as well as other important issues are still under negotiations. Since there is a number of substantial disagreements with regard to these issues, the negotiations on the text of principles will go on for a few years.¹⁰

Space Debris

The ever increasing number of objects of various size orbiting the Earth have become a potential hazard to present and future space activities. As of 30 September, 1987, the Satellite Situation Report, based on data from the tracking network of the North American Aerospace Defence Command, listed 1,725 payloads and 5,170 debris, thus a total number of 6,895 objects in orbit around the Earth.¹¹ It is estimated that of the total population of trackable space objects in orbit: 2—5% are operational payloads, 21% are non-operational payloads, 25% are mission related debris, and 49% are debris from satellite break-ups.¹²

The number of untrackable very small space debris is unknown. Some experts have suggested that there are about 48,000 objects of 1 cm or more in size, and millions to billions of chips in the millimeter and submillimeter range.¹³ It is important to note that even these small untrackable particles

¹⁰ *Ibid.* The Working Group of the Scientific and Technical Sub-Committee, is considering *inter alia*, the problem of complete dispersal (burn-up) of the fuel of a nuclear reactor versus intact re-entry of the reactor. The Working Group has stated recently that the feasibility and safety aspects of the two concepts require further information and investigation. The *Report of the Working Group on the Use of Nuclear Power Sources in Outer Space on the Work of Its Sixth Session*, UN Doc. A/AC.105/409, Annex III, para. 7, at p. 29, cited in, V. KOPAL, "Some Remarks on Legal Aspects of Space Debris", paper presented at the International Colloquium in Cologne, p. 6.

¹¹ *Satellite Situation Report*, NASA, Goddard Space Flight Center, Greenbelt, Maryland, USA, cited in, L. PEREK, "Space Debris", paper presented at the International Colloquium in Cologne, p. 2.

¹² The sensitivity of radars permits the detection of objects of 4 cm diameter at 200—300 km altitude, or 10 cm diameter at 1,000 km, or 1 m at 5,000 km altitude. Optical methods permit the detection of 15 cm objects at 5,000 km and 1 m at the geostationary orbit at a distance of almost 36,000 km. D. J. KESSLER, "Orbital Debris Issues", *Advances in Space Res.*, vol. 15, 1985, No. 2, p. 3, cited in L. PEREK, *op. cit.*, p. 2.

¹³ D. KESSLER, "Space Debris: More Than Meets the Eye", *Sky and Telescope*, June 1987, p. 587, cited in: J. H. CARVER, "Protecting the Environment of Outer Space", paper presented at the International Colloquium in Cologne, p. 9.

can cause severe damage to spacecraft or kill an astronaut performing extra-vehicular activities, since their relative velocities are of 9 km/s.¹⁴

The bigger is size of a space object, the higher is probability of its collision with space debris. The risk of an impact of an object larger than 1 cm for the manned module of the space station is up to 2.5% in 30 years. The probability of a collision for the whole space station is 19%, but it would not be probably dangerous to astronauts.¹⁵

Origin of Space Debris

Debris may originate from normal functioning of the launching vehicle and spacecraft — the rejected shrouds, spent rocket stages, covers explosive bolts used in separation of stages. Prime source of space debris are, however, explosions of space objects. The explosions can be unintentional — such as explosions of rocket upper stages containing residual liquid propellants, and intentional — explosions in military operations such as ASAT tests, satellite disturbance, etc.

Up to end of 1986 there were 86 fragmentations of various kinds, which resulted in 5,963 catalogued fragments.¹⁶

It is unknown how many untrackable particles between 1 and 10 cm, were created by explosions. Computer simulation for the explosion of the upper stage of the Ariane rocket V-16, which occurred on 13 November, 1986, has shown that it could generate about 1,870 untrackable fragments.¹⁷ The simulations of the 25 most important explosions permitted to determine the altitude distribution of the density for all objects larger than 1 cm, which cannot be derived from any catalogue. It has shown that there are two peaks of the object density — at 800 km and at 1,500 km, where the collision risk is high.¹⁸

¹⁴ In case of collision with large object, the mass ejected from large object will be more than 100 times the mass of a small object. A flake of paint of a diameter of 0.2 mm made a pit of almost 5 mm diameter in the outside window of the Challenger during its flight STS-7. There are reasons to believe that collisions with space debris have destroyed such satellites as GEOS-2, Cosmos 954 and Cosmos 1257. See, L. PEREK, *op. cit.*, p. 8.

¹⁵ The manned module of the space station is planned to be shielded by a double wall against particles smaller than 1 cm. Shielding against bigger particles is generally considered to be unfeasible since the weight penalty would be unacceptable. See, D. REX, "Space Debris Its Origin and Suggestions for Future Avoidance", paper presented at the International Colloquium in Cologne, pp. 1—5.

¹⁶ See, L. PEREK, *op. cit.*, pp. 4, 5; D. REX, *op. cit.*, p. 2.

¹⁷ The simulation was made in the Institute of Space Technology and Nuclear Reactor Technology of the Technical University of Braunschweig, FRG.

¹⁸ D. REX, *op. cit.*

Self-cleaning Effect in Near Earth Environment

Due to the braking effect of atmospheric gases, space objects spiral down into denser layers of the atmosphere where the drag is more powerful and the spiralling accelerated. This self-cleaning effect is, however, very slow and depends on the altitude of an object.¹⁹ The time of descend depends also on solar activity, since one of the consequences of high solar activity is an increase of the density of the upper atmosphere.²⁰

At the geostationary altitude — 36,000 km, there is almost none self-cleaning effect, so objects launched to that orbit will stay there forever.

The Present State of Law

The mere fact that among over 100 agreements listed in the Register of International Treaties and Other Agreements in the Field of Environment prepared by the United Nations Environment Programme (UNEP), only the Outer Space Treaty is mentioned, indicates that the protection of space environment is at its very initial stage.²¹

Space Law Treaties

The Outer Space Treaty

The Outer Space Treaty of 1967 provides in Article IX:

“State Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from introduction of extraterrestrial matter and, where necessary shall adopt appropriate measures for this purpose”.

Many detailed analyses of this provision were made by eminent space lawyers. These analyses lead to a conclusion that the degree of protection of outer space environment mandated by Article IX is limited and not sufficient to cover all the problems arising from environmental risks.²²

¹⁹ For example, it takes 1200 years to descend from an altitude of 1000 km to 900 km, 378 years to descend from 800 km to 500 km, 516 days to descend from 400 km to 300 km, while from 200 km to the ground only 4 days. L. PEREK, *op. cit.*, pp. 4, 5.

²⁰ *Ibid.*

²¹ See, UNEP Register of May 1985, UNEP/GC/Information (11) Rev. 1, cited in Sylvia OSPINA, “Outer Space: Common Heritage or ‘Common Junkyard’ of Mankind?”, *Proceedings of the 30th Coll. on the Law Outer Space*, p. 229 and note II at p. 232.

²² See: He QIZHI, “Towards of International Control of Environmental Hazards of Space Activities”, *Proceedings of the 30th Coll. on the Law of Outer Space*, p. 138; Sylvia Maureen WILLIAMS, “Environmental Risks and Space Activities”, *ibid.*, p. 183; Patricia M. STERNS and Leslie I. TENNEN, “Principles of Protection of the Outer Space Environment in the Corpus Iuris Spatialis”, *ibid.*, p. 175.

Article IX raises many substantial doubts concerning its applicability and interpretation. Some authors maintain that the obligation contained in Article IX is limited to "studies" and "exploration" and does not cover exploitation of outer space resources.²³ Bearing in mind that exploitation of outer space, and in particular space industrialization will have a very important impact on space environment, the fact that such a fundamental weakness of Article IX has been noted cannot be underestimated.

Article IX does not define such important notions as "harmful contamination" and "adverse changes". There is a great diversity of opinion in doctrine of space law as to the interpretation of these terms.²⁴ Consequently, there are differences of opinion as to what is the scope of protection against pollution of space environment under Article IX. For instance, G. Reijnen writes that "Article IX refers to contamination-specific, biological form of pollution called back contamination of the Earth, as a consequence of space missions returning to Earth". In her opinion the problem of space debris, would under strict interpretation fall outside the scope of this article.²⁵ The prevailing opinion, however, is that Article IX does apply to space debris.²⁶ Nevertheless, there is no doubt that there are some potential hazards to space environment other than contamination which are not covered by this article.²⁷

Article IX provides for international consultations in a case of space activity or experiment which would cause potentially harmful interference with activities of other State parties. Such consultations should be undertaken

²³ I. I. KUSKUELIS, "Functional Approach and Beyond: Towards A Functional Aerospace Environmental Regime", *Proceedings of the 30th Coll. on the Law of Outer Space*, p. 232; G. M. DANILENKO, *Space Activities and Customary Law of Environmental Protection*, paper presented at the International Colloquium in Cologne, p. 5.

²⁴ For a comprehensive study of different interpretation of these and other notions used in terminology of environmental protection of space, see; G. GAL, "Treaty Law Problems of Space Environmental Protection:: *de lege ferenda* Tasks for International Legislation", paper presented at the International Colloquium in Cologne, pp. 6—11.

²⁵ G. C. M. REIJNEN, "Environmental Pollution of Outer Space, in Particular of the Geostationary Orbit", *Proceedings of the 30th Coll. on the Law of Outer Space*, p. 158.

²⁶ See, I. H. Ph. DIEDERIKS-VERSCHOOR, "Legal Aspects of Environmental Protection in Outer Space Regarding Debris", *Proceedings of the 30th Coll. on the Law of Outer Space*, p. 131; C. OKOLIE, *ibid.*, p. 421; D. E. REIBEL, "Prevention of Orbital Debris", *ibid.*, p. 150; K. SCHWETJE, *Current U.S. Initiatives to Control Space Debris*, *ibid.*, p. 165.

²⁷ For instance harms resulting from high frequency emission of microwave, which can generate electric or magnetic fields at large distances from the satellite. In order to avoid situations when some harms are not covered by Art. IX, Andrzej Górbiel suggests a very broad interpretation of the notion "contamination", which would cover all possible form or instance of harmful interference. A. GÓRBIEL, "International Legal Protection of the Outer Space Environment Against Harmful Contamination", *Postępy Astronautyki*, 1987, No. 1/2, pp. 109—110.

by the State which is going to be engaged in the potentially harmful activity. It may also be requested by any State party to the Outer Space Treaty, which has a reason to believe that an activity or experiment planned by another State Party would cause potentially harmful interference with activities in the peaceful exploration and use of outer space.

Although the consultation procedure mentioned above can be a very useful instrument in dealing with environmental hazards to outer space its efficiency is limited by its non-compulsory character, lack of rules of procedure and terms of consultation, as well as, determination of their legal consequence. Thus consultation provision of Article IX is an extremely weak one.²⁸

It should be also noted that the consultation provision of Article IX refers only to potentially harmful interference of the activities of one State by those of another State, and not to the pollution of outer space by those activities.²⁹ This reflects the whole attitude to the problem of protection of outer space environment, when the Outer Space Treaty was drafted. Negotiating history of Article IX of the Treaty shows that it was drafted from "sci-lab perspective" what according to H. A. Baker means that

"the value of outer space, including the Moon and other celestial bodies, is limited to its use as a laboratory for scientific activity and that any proposed space activity will be assessed as a potentially harmful to outer space environment if, and only if, it threatens the future use of outer space for scientific purposes".³⁰

Thirty years after the launch of first Spoutnik, and twenty years after the adoption of the Outer Space Treaty, we have to realize that outer space ceased to be only a kind of laboratory for scientists, it is a part of human environment in which mankind will live and work for all times. Therefore its protection has to be a valid goal in itself. Hence, an "environmental perspective" is required. It means that "The regulator examines the total system under consideration, identifies the needs of the system and provides rules to manage that system in an ecologically beneficial manner".³¹

The Moon Treaty of 1979

The main guiding provisions for environmental protection of the Moon Treaty can be found in its Article VII. The article contains a broad definition of environmental harm to the Moon —

²⁸ The need of developing and concretizing the consultation provision has been noted by many space lawyers see: He QIZHI, *op. cit.*, p. 138; A. McCLOUD, "Space Pollution", *Proceedings of the 30th Coll. on the Law of Outer Space*, p. 143; V. VERESHCHETIN, E. VASILEVSKAYA, E. KAMETSKAYA, *Outer Space: Politics and Law*, Progress Publishers, Moscow 1987, p. 85.

²⁹ It was correctly noted by REIJNEN, see, G. C. M. REIJNEN, *op. cit.*, p. 158.

³⁰ H. A. BAKER, *op. cit.*, p. 121.

³¹ *Ibid.*, p. 126.

“the disruption of the existing balance of its environment, whether by introducing adverse changes in that environment, its harmful contamination through the introduction of extra-environmental matter or otherwise”.

The State Parties are obliged to take measures to prevent such a harm, and to inform the Secretary General of the United Nations of the measures adopted with that respect. The State Parties are also obliged, to the maximum extent feasible, to notify to the Secretary General in advance of all placements by them of radioactive materials on the moon and of the purposes of such placements.

Article VII provides also for consideration of the designation of some areas of the moon, which have special scientific interest, as international scientific preserves. Special protective arrangements may be agreed for them by State Parties, in consultation with the competent organs of the United Nations.

Although the Moon Treaty represents an advance in developing environmental space law, it neither formulates definitions of such notions as “adverse changes”, “harmful contamination”, nor establishes standards of operational conduct of space activities. Consequently the obligations of States regarding environmental protection are ambiguous and are not legally enforceable.³² It should be also noted that by April 1988 there were only 7 State Parties of the Moon Treaty, none of them being a space power.³³

Agreement on the Rescue of Astronauts

Article 5, paragraph 4 of the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, of 1968, provides that if a Contracting Party has a reason to believe that a space object or its component parts, recovered by it may be of hazardous or deleterious nature, the Party may so notify the launching authority, which is obliged to take effective steps immediately to eliminate possible danger or harm. Neither “danger” nor “harm” are defined, but they may involve environmental hazards.³⁴ However, as it was correctly

³² This provision should be applied with respect to the Nuclear Power Source on the Moon. A. D. TEREHOV, “The Use of Nuclear Power Sources in Outer Space”, in: *International Nuclear Law*, ed. by A. I. IOYRYSH, A. M. PETROSIAN, V. F. PETROVSKI, Moscow 1987, Nauka, (in Russian), p. 336.

³³ The following States are parties to the Moon Treaty: Philippines, Uruguay, Chile, The Netherlands, Austria, Pakistan, Australia, cited in: Eilene GALLOWAY, “The Present Status of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies”, paper presented at the International Colloquium in Cologne, p. 1.

³⁴ See, E. GALLOWAY, *op. cit.*, p. 6; E. G. ZHUKOVA-VASILEWSKAYA, *op. cit.*, p. 8.

pointed out by Carl Q. Christiol, Article 5 “does not make provision for a non-launching authority to take preventive action against a non-functional space object in space or orbiting debris”, so States have not “suitable guidance for dealing, prior to the manifestation of harms, with a potentially harm-producing, non-functional object or orbiting debris.”³⁵

The Liability Convention

The Convention on International Liability for Damage Caused by Space Object of 1972, contains in Article I (a) the definition of the term “damage”. The “damage” is limited to loss of life, personal injury or other impairment of health, or loss or damage to property of States or of persons, natural or juridical or property of international intergovernmental organizations. Thus the Convention does not cover damage to the environment of outer space as such.³⁶ It only covers damage to persons and property caused by space objects. Although there is a possibility that certain kind of such losses may be linked with environmental harm, majority of environmental hazards for outer space is not embraced by the Convention.

Other International Instruments The 1963 Test Ban Treaty

Under Article 1 of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, of 1963, the Parties have undertaken 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, in the atmosphere and beyond its limits including outer space.

The Test Ban Treaty was aimed at prevention of pollution by nuclear fall-out resulting from nuclear explosions. Thus this kind of space activities is prohibited. The Treaty restricts, however, only activities of State Parties. It is therefore binding only some of space powers. In this context it is reassuring that the People's Republic of China, although not being the party to the Treaty, did recently declare that it “had not undertaken

³⁵ C. Q. CHRISTIOL, “Environmental Aspects in Outer Space — Suggestions for Legal Measures and Instruments for Dealing with Space Debris”, paper presented at the International Colloquium in Cologne, p. 33.

³⁶ J. RAJSKI, *Odpowiedzialność międzynarodowa za szkody wyrządzone przez obiekty kosmiczne* [International Liability for Damages Caused by Space Objects], Warszawa 1974, PWN, p. 166.

nuclear tests in atmosphere for many years, and will never undertake any more nuclear tests in atmosphere in the future”.³⁷

The ENMOD Convention

The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, of 1977, provides in Article I that each State Party 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 an other State Party. The term “environmental modification techniques” is defined in Article II as referring 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”.

The impact of the ENMOD convention on environmental protection of outer space is lessened by its Article III which provides:

“The provision of this Convention shall not hinder the use of environmental modification techniques for peaceful purposes and shall be without prejudice to the generally recognized principles and applicable rules of international law concerning such use”.

Thus the convention would not apply to other kinds of outer space modifications than military or hostile.

Customary Space Law

There is an agreement in the doctrine of space law that the fundamental principles of the Outer Space Treaty are of universally binding character.³⁸ Some of these principles such as freedom of exploration of outer space and non-appropriation of outer space, were created by the practice of States before the conclusion of the Outer Space Treaty, which proves that custom was the first source of international law of outer space. However, later on one could see predominance of treaty over custom in the formation of international space law.

Space law, as it was rightly pointed out by Sir Robert Jennings, is

³⁷ Statement by Chinese Premier Zhao Ziyang at the Chinese People’s Conference for Maintaining World Peace, *Renmin Ribao*, 22 March, 1986, cited in He QIZHI, *op. cit.*, p. 138 and note 1 at p. 140.

³⁸ V. S. VERESHCHETIN, G. M. DANILENKO, “Custom as a Source of International Law of Outer Space”, *Journal of Space Law*, 1985, No. 1. p. 33.

“a law propelled into rapid development by the very technology it has to control [...]. One might say that a rapidly evolving new subject could have a little if any place for custom in the classical sense of slowly evolving usage gradually taking upon itself the lineaments of law”.³⁹

It has been pointed out in doctrine of international law that international custom, is of rather secondary importance for the regulation of environmental protection, and that it is very unlikely that by a means of accepted practice detailed technical rules, necessary for protection of environment could arise.¹⁰

Furthermore, custom is based on the practice of States. Thus the very fact that environmental problems of outer space have emerged, may be considered as proving the lack of State practice with this respect. Thus G. Danilenko is right when he notes, that there are

“difficulties in developing sufficiently persuasive argument that in present space law there exist autonomous customary rules on the protection of the Earth and outer space environment”.⁴¹

Principles of International Law

The basic principles of international law also apply to cooperation of States in protection of natural environment. Since the 1972 Stockholm Conference on the Human Environment and the adoption of the Declaration on the Human Environment, some specific principles with this respect have been formulated.

The most important of them is the principle of protecting the environment, which provides

“that States should take measures either unilateral or joint, to preserve the environment and secure the rational utilization of natural resources for the well-being of the present and future generations”.⁴²

For the protection of outer space environment of vital importance

³⁹ Sir Robert JENNINGS, “Customary Law and General Principles of Law as Source of Space Law”, a short summary of the paper presented at the International Colloquium in Cologne, p. 1.

⁴⁰ K. KOCOT, *Prawnomiędzynarodowe zasady sozologii [International Legal Principles of Environmental Protection]*, Warszawa 1977, p. 171; D. RAUSCHNING, “Customary International Law and General Principles of International Law Concerning the Protection of Outer Space from Pollution?”, an abstract of the paper presented at the International Colloquium in Cologne.

⁴¹ G. M. DANILENKO, “Space Activities and Customary Law of Environmental Protection”, paper presented at the International Colloquium in Cologne.

⁴² *International Law, A Textbook*, edited by G. I. Tunkin, Moscow Progress Publishers, 1986, p. 478.

is the principle of not inflicting damage on the environment beyond national State jurisdiction. This principle was formulated in the Principle 21 of the Stockholm Declaration.

It provides:

“States have, in accordance with the UN Charter and principles of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction”.

The origin of this principle may be seen in famous Roman maxime “*sic utere tuo ut alienum non Idedaes*”.⁴³ Eminent space lawyer G. Galloway, has expressed opinion that “agreement on avoiding pollution, contamination, and other hazards has been accepted guiding principle since the opening of the space frontier”/⁴⁴

There are opinions that Principle 21 is generally regarded as a reflexion of existing customary law.⁴⁵ Polish eminent international lawyer K. Kocot is of the opinion that the whole Stockholm Declaration ranks among these instruments of international law, which can be taken into consideration by the International Court of Justice, in the light of the UN General Assembly resolution 3233 (XXIX) of 22 November, 1974.¹⁶

German lawyer D. Rauschnig, thinks, however, that although Principle 21 of the Stockholm Declaration may be applicable to protection of outer space from pollution, it would not be capable of resolving special questions, such as prevention of space debris.⁴⁷

Some other principles of international legal protection of environment are believed to be emerging:

1) the principle of ecological evaluation, which provides that States are obliged to carry out a preliminary evaluation of the ecological consequences

⁴³ See, K. WOLFKE, *Międzynarodowe prawo środowiska, Tworzenie i egzekwowanie [International Environmental Law, Making and Enforcement]*, Prace Wrocławskiego Towarzystwa Naukowego, Seria A, No. 205, Wrocław 1979, p. 73; S. V. VINOGRADOV, *International Law and Protection of Atmosphere* (in Russian), Nauka, Moscow 1987, p. 83.

⁴⁴ E. GALLOWAY, *op. cit.*, p. 8.

⁴⁵ See, *International Law, A Textbook...*, p. 478. G. DANILENKO, *Space Activities...*, p. 9. To support his argument Danilenko refers to: 1) the UN General Assembly resolution on international responsibility of States in regard to environment which declared that Principle 21 lays down the basic rules governing this matter (UN Doc. A/Res.2996/1972); 2) opinions of some States i.e. statement by the Canadian government (UN Doc. A/CONF. 48/14), p. 115); 3) the incorporation of Principle 21 into the Charter of Economic Rights and Duties of States (UN Doc. A/Res. 3281/1974); 4) opinions of eminent scholars.

⁴⁶ K. KOCOT, *op. cit.*, p. 88.

⁴⁷ D. RAUSCHNING, *op. cit.*, para. 5.

of activities that may exert a harmful influence on the environment beyond their national jurisdiction;

2) the principle of exchanging information, which provides that States whose activities may cause serious damage to the environment and to the interests of other States are obliged to provide those other States with the relevant information;

3) the principle of mutual consultations, which provides that States concerned are obliged to consult one another with regard to activities that are potentially dangerous for the environment/⁸

The survey of existing State of law concerning protection of outer space environment reveals that at present there is no adequate legal framework which could take on serious hazards to space environment resulting from developing space activities. The problem of the present legal situation is, as prof. K. H. Böckstiegel rightly points out, that space law has established the principle of freedom of exploration and use of outer space. It has so far failed to establish needed limitations to the exercise of that freedom, to protect equal opportunity for space activity of others, and protect mankind today and tomorrow from unacceptable risks/⁹

Courses of Action to Deal with Environmental Risk of Activities in Outer Space

The issue of environmental risk of activities in outer space is of a vital importance to all States. There is a growing conviction in scientific and technical circles that preventive and removal measures cannot wait much longer. Since, the present codification of space law is inadequate for providing necessary legal basis for those measures, new ways and means, both technical and legal have to be found to deal such a situation.

The most important thing is to identify the environmental risks of space activities and to assess their harmful effect on environment. Only then, the adequate preventive action can be chosen. In this context, it is important that both in the United States and the ESA member countries, special working groups have been established to deal with space debris.⁵⁰

⁴⁸ *International Law, A Textbook...*, p. 479.

⁴⁹ Concluding remark of Prof. Karl-Heinz Böckstiegel at the International Colloquium in Cologne.

⁵⁰ In 1981, NASA implemented a ten year space debris assessment plan, its goal is to lay a foundation for US and international agreements on this issue. In spring 1987, ESA appointed a working group on space debris which is to submit its final report in the summer of 1988. See, F. K. SCHWETJE, *op. cit.*, p. 168, J. REIFAHRT, "Environmental Aspects of Activities in Outer Space, Suggestions for Legal Measures and Instruments", a summary of the paper presented at the International Colloquium in Cologne.

Technical Means

The simplest way of protecting the outer space environment is to minimize the number of the useless and inactive objects in outer space. It can be achieved by adopting technical rules and standards with regard to design of space object and procedures of space conduct.

According to L. Perek:

— the design of a space object should restrict to a minimum the number of debris generated during its mission, in particular of debris with long lifetimes;

— the design of a space object should permit its removal, after termination of its mission, into a disposal orbit, or initiate its intended decay;

— intentional explosions of space objects should be prohibited, and unintentional explosions should be prevented;

— collision avoidance through traffic separation should be discussed on an international level;

— mechanism for collecting, processing and timely dissemination of data on space objects should be considered.⁵¹

Debris clean-up operations of the space environment have been suggested by some scientists, but at present they are not technically and economically feasible.⁵²

Legal Means and Ways

In international environmental law-making science and technology occupies very important role, since it permits to assess the actual deterioration of the environment, indicates remedial measures and checks their effectivity.⁵³ Therefore many legal experts have pointed out the need of establishing an international group of technical experts which could recommend operational standards for various space activities and prescribe preventive or remedial measures.⁵⁴

⁵¹ L. PEREK, *op. cit.*, pp. 9—14; see also J. H. CARVER, *op. cit.*, pp. 9—14; D. REX, *op. cit.*, pp. 6, 7.

⁵² They include "orbiting trash can" with robot arms that could pick up old satellites and large chunks of debris, which would be carried back na forth by Shuttle; large orbiting plastic foam bubble for cleaning small items from orbit, etc. See, F. K. SCHWETJE, "Space Law: Considerations for Space Planners", *Rutgers Computer Technology Law Journal*, vol. 12, 1987, p. 277.

⁵³ K. WOLFKE, *op. cit.*, p. 172.

⁵⁴ See, G. GAL, *op. cit.*, p. 14; S. GOROVE, "Man-made Space Debris: Data Needed for Rational Decision", *Proceedings of the 30th Coll. on the Law of Outer Space*, p. 135; He QIZHI, *op. cit.*, p. 140; A. McCLOUD, *op. cit.*, p. 144; N. JASENTULIYANA, *op. cit.*, p. 22; G. JAENICKE, "Environmental Risks from Activities in Outer Space, Suggestion for Legal Measures and Instruments", paper presented at the International Colloquium in Cologne, p. 4.

Such a group of technical experts can be established on the basis of a new universal convention on protection of outer space environment, or on the basis of a bilateral or multilateral agreement between space powers, or within the framework of a new international space organization. Irrespectively of its legal basis, such a group of experts would fulfil an essential task of providing law makers with scientific facts, since “the foundation of space law must rest upon the scientific and technological facts essential for the success of functioning space activities”.⁵⁵

From a strictly legal point of view the following legal means can be used for dealing with environmental risks of space activities:

1) an amendment of the existing *corpus iuris spatialis* with complementary rules concerning definitions of ambiguous terms;⁵⁶

2) an elaboration of a protocol complementary to the Outer Space Treaty, which would reaffirm its commandements and develop its general principles, as well as, contain concrete and specific provisions and definitions of such terms as “pollution”, contamination, etc.;⁵⁷

3) an adoption of a new and formal statement of basic principles relating to debris, pollution and contamination problems;⁵⁸

4) an elaboration of a separate convention which would deal exclusively, but comprehensively with the protection of the environment of outer space against the risks of space activities. The convention should authorize the contracting States or a Council to establish operational standards of conduct of space activities;⁵⁹

5) an agreement concluded between the space powers USA, USSR, and ESA member-States, to which other space powers like China, Japan, India could be requested to accede;⁶⁰

6) the negotiations of a series of bilateral agreements among the entities possessing space capabilities;⁶¹

7) unilateral declarations of self-commitment by the space powers;⁶²

⁵⁵ E. GALLOWAY, *op. tit.*, p. 22.

⁵⁶ G. GAL, *op. cit.*, p. 11., However, he prefers an adoption of a new convention.

⁵⁷ A. A. COCCA, “Protocol on Environmental Consequences of Activities in Outer Space”, paper presented at the International Colloquium in Cologne, pp. L—18. A. Cocca is of the opinion that one of the most important principles contained in the Protocol should be “that Outer Space including the Moon and other celestial bodies are a Common Heritage of Mankind”.

⁵⁸ C. CHRISTIOL, *op. cit.*, p. 38.

⁵⁹ G. JAENICKE, *op. cit.*, p. 3.

⁶⁰ J. REIFARTH, *op. cit.*, p. 3.

⁶¹ C. CHRISTIOL, *op. cit.*, p. 43.

⁶² J. REIFARTH, *op. cit.*

8) an establishment of a new and universal international space organization;⁶³

9) an establishment of a special organization dedicated only to the safety of space activities and operations;⁶⁴

10) an establishment of a body consisting of space resource countries, which would allow also for membership of operational agencies like ESA and even private launching firms;⁶⁵

Any of these legal instruments or institutions should provide for clear operational rules of conduct of space activities creating specific obligations for States and other entities engaged in space activities. Non-observance of the prescribed operational conduct should result in international liability by fault under Article III of the Liability Convention. The compulsory dispute settlement should be established.⁶⁶

Conclusions

The environmental risks of space activities cannot longer be ignored. Joint action of scientists and lawyers should be undertaken to persuade the law makers that timely measures, both technical and legal, must be adopted to ensure protection of outer space, air and earth environment against harmful effects of space activities. The freedom of exploration and use of outer space has to be restricted, where space activities may gravely endanger outer space environment. We should realize that the interest in the prevention of pollution and contamination of outer space is not only of a global character, but also timeless, since outer space belongs as well to future generations.

⁶³ C. CHRISTIOL, *op. cit.* pp. 39—42.

⁶⁴ *Ibid.*, p. 46.

⁶⁵ *Ibid.*, p. 43.

⁶⁶ G. JAENICKE, *op. cit.*, p. 8.

The Proper Law of Know-How Contracts

by STANISŁAW SOŁTYSIŃSKI

1. Introduction

Know-how contracts have become one of the basic vehicles of transfer of technology. On the account of their economic function and legal structure they are most often approached as a type of licence agreements.¹ The object of this paper is an attempt to answer the question which law governs a know-how contract with a foreign element in the case when parties have not chosen the legal system governing the contract. The prime objective of my considerations is to look for the answer against the background of Polish conflict of laws. However, in view of absence of detailed regulations of this issue in the Statute on Private International Law² and the necessity to reach for *analogia legis*, the first part of the paper is devoted to legal comparative analysis. The notions adopted in newer foreign legislations and publications on the subject are instrumental for the choice of the best solution within the scope of Polish private international law, both *de lege lata* and *de lege ferenda*.

¹ Cf. S. SOŁTYSIŃSKI, *Licencje na korzystanie z cudzych rozwiązań technicznych* [Licence to Use Somebody Else's Technical Solutions], Warszawa 1970, p. 140 ff. The term used in this paper and typology of licence contracts have been adopted in Polish literature on the subject. Cf. J. SZWAJA, "Licencje w obrocie uspołecznionym" [Licence in Socialized Transactions], in: *Nowe instytucje prawa wynalazczego* [New Institutions of Law on Inventions and Industrial Designs], Wrocław 1976, pp. 129—130; R. MARKIEWICZ, "Umowy licencyjne między jednostkami gospodarki uspołecznionej" [Licence Contracts between Socialized Economy Units], *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, 1976, No. 14, p. 9; M. BYRSKA, "Obrót licencjami w krajach RWPG" [Licence Transactions in COMECON Countries], *Państwo i Prawo*, 1986, No. 11, p. 83 ff. Amended law on inventions and industrial designs assumed that for various unpatented designs respective regulations on patent licences should be applied. Cf. Article 48 of the law of 19 October, 1972, on inventions (*Dziennik Ustaw* [Journal of Law], 1948, No. 33, item 177).

² Law of 12 November, 1965, *Dziennik Ustaw*, No. 46, item 290, here-and-after cited as Polish Private International Law.

At the outset of the discussion it is necessary to define the terminology. In my understanding the term “know-how” means

“knowledge and experience of technical, commercial, administrative, financial nature or any information of a different character which can be applied practically in economic activities or in exercising a profession”.³

This definition includes both technical and non-technical innovations. The information can be confidential or within the public domain. I also assume that the term “known-how agreements” is not restricted to jural acts patterned after patent licences,⁴ but includes legal transactions the economic function of which is analogous to transfer of right (e.g. sale or exchange of know-how). Indeed, contracts, the subject matter of which is only to *render* non-confidential information *accessible* to a recipient or to *assim* secret know-how, cannot be treated as licences since the supplier of technology does not grant any permission in the first case and in the second case — he loses the power of disposition of know-how. Nevertheless, these transactions show a number of similarities to licences concerning *permission* to use confidential information or information protected by intellectual property rights (e.g. patents or rights to utility models grants). However, in this paper considerations dealing with contracts concerning the supply of information being in the public domain will be treated separately.

I have already stressed that the adopted definition of know-how treats technical and non-technical information uniformly (e.g. commercial, financial experience, etc.). Such broad concept of know-how is accordant with trends prevailing in the legislation of developed countries.⁵ It has to be, however, mentioned that in many countries a narrower scope of know-how is subject to protection, and at least, some forms of practical experience cannot be recognized as objects of professional secrecy suitable for exploitation by way of licence agreements (e.g. medical or environment protection experience).⁶

³ This definition is modelled after a denomination suggested by International Association for Protection of Industrial Property Right in 1974 which was met with wide approval in legal literature. International Association for the Protection of Industrial Property Right, *Yearbook*, vol. 1, 1974, p. 47.

⁴ Cf. Article 48 of Law on Inventions and Industrial Designs.

⁵ For example, Article 86 and 87 of the civil code of Hungarian People's Republic (1979) distinguish “economic, technical and organization” information. Paragraph 1 (4) of the US uniform law on protection of commercial and professional secrets (Uniform Trade Secret Act, 1979) treats technical and non-technical secrets uniformly.

⁶ For example, Peruvian law protects only confidential information concerning manufacturing (Art. 87 and 88 of decree No. 18—350 (1970), *El Peruano*, 30 July, 1970). Also American law allows disclosure of certain data obtained from private contracting parties by the government on the basis of the law of freedom of information. Cf. *Public Citizen Health Research Group, v. FDA*, 704 F 2d (1980).

However, in view of the dominant trend of development of law, which essentially, declares for uniform treatment of various forms of know-how, I have resigned from a separate analysis of contacts concerning the transfer of information of non-technical character.

2. Survey of Solution Found in Foreign Legislation

The development of comprehensive legislation concerning conflict of laws occurred only after World War I. However, statutes regulating problems of choice of law concerning transfer of technology have appeared only during the last twenty years. Still, none of the enactments I know contains separate choice of law rules regulating exclusively know-how agreements. Irrespective of the fact whether a given rule provides for the application of the law of the exporter or importer, in most cases know-how contracts are subjected to the same law that governs contracts for the exploitation of patented inventions, industrial designs, utility models, etc.

The tendency to uniformly treat all contracts on transfer of technology is particularly visible in the legislation of developing countries. In the 1970s in many countries comprehensive enactments were issued regulating in detail almost all essential problems connected with importation of technology.⁷ One of the issues regulated in these legal acts is the problem of the proper law of contracts concerning transfer of technology. Some developing countries have introduced provisions providing explicitly or implicitly for the exclusive jurisdiction of the law of the State in which the importer of technology has his seat or residence, or in which the object of the licence is exploited. The restrictions of the principle of freedom of choice of law for all contracts on transfer of technology, including know-how contracts, is usually imposed by way of one of the following:

1. by rules providing, in principle, for the exclusive jurisdiction of the law of the recipient country;
2. by rules prescribing that the examined contracts shall contain a clause providing for the choice of the law of the recipient country;

⁷ Cf. W. POPIOŁEK, "Prawo właściwe dla zobowiązań z umów o korzystanie z cudzych rozwiązań technicznych zawieranych w obrocie z krajami rozwijającymi się" [Proper Law of Obligations from Agreements concerning Use of Somebody Else's Technical Solutions concluded in transactions with Developing Countries]. *Problemy Prawa Wydawniczego i Patentowego*, vol. 2, Katowice 1976, p. 105 ff. (here: pp. 117—120); A. SOBERANIS, *La Regulation de las Invencciones y Areas y de la Transjerencia Technologica*, 1979; A. CORREA, "Transfer of Technology in Latin America: A Decade of Control", *Journal of World Trade Law*, vol. 15, 1981, p. 388 ff.

3. by rules forbidding registration or approval of contracts providing for the jurisdiction of any other law than the law of the importing country;

4. by rules which do not explicitly forbid the adoption of a foreign law but grant proper organs the power to reject the approval or registration of a contract not providing for the exclusive jurisdiction of the law of the State in which the imported technology is to be utilized.

The first solution, adopted for instance in Mexico, takes the shape of a "unilateral" conflict-of-laws rule, coupled with the prohibition to choose foreign law except in cases when the freedom of such choice of law or the applicability of foreign law is foreseen by a binding international agreement.⁸ The remaining three types of restrictions of freedom of choice of law, introduced for instance in Ecuador, Colombia, Venezuela, Peru, India, Nigeria and the Philippines, are often interpreted as rules prescribing direct application of the law of the country importing the technology.⁹ A more detailed analysis of some legislations of developing countries proves that this conclusion cannot be considered axiomatic. In spite of the literal wording of special regulations issued to enable the recipient country to exercise a stricter control over the importation of technology, they are said to leave parties a margin of freedom to select the law of their choice.¹⁰ Nevertheless, the applicability of the law of the State in which the technology is to be used is adopted almost commonly in developing countries. This tendency has been expressed i.a. in Provision No. 24 of the Andean Pact. It states the following:

"No contract concerning investment or transfer of technology may contain a clause excluding disputes or conflicts from the exclusive jurisdiction of the law or courts of law of the importing country [...]".¹¹

Developing countries have emphasized their will to subordinate the analysed contracts to the law of the importing State at the Conference of the United Nations devoted to a Universal Code of Conduct for Transfer of Technology, which has been debated for years. In the initial stage of work on this

⁸ Cf. compilation of legislations of developing countries published in: *Compilation of Legal Materials Dealing with Transfer and Development of Technology*, UNCTAD, TD/B/C6/1981, here-and-after cited as *UNCTAD Compilation*.

⁹ G. CABANELLAS, "Applicable Law under International Transfer of Technology", *International Review of Industrial Property and Copyright*, 1984, p. 47.

¹⁰ Such opinion was expressed by A. Boggiano on Argentinian regulations concerning transfer of technology of 1977, *Derecho Internacional Privado*, 1978, pp. 766—769.

¹¹ Source: *UNCTAD Compilation*, p. 321. I am using the terms "importing country" and "recipient country" interchangeably for the territory on which the technology is utilized irrespective of the fact whether the State is party to the contract. If the importer is a legal person having its seat in State A but industrial application of know-how is to take place in State B. then the latter territory should be recognized as the "recipient country".

fundamental document, which was to be one of the most important elements of the New Economic Order, they demanded the recognition of the principle of *exclusive jurisdiction* of the law of the recipient country. At present, due to the opposition of both the developed free-maker-economy and socialist countries, which also protect the principle of freedom of choice of law,¹² at present all regional groups show an inclination towards a compromise which would lie in the acceptance of *status quo*. The recently submitted compromising drafts grant the parties to transnational technology transactions the right to choose law governing their contracts, provided that it is not contrary to mandatory norms of the State importing the technology.¹³ This compromise, therefore, would resolve itself into the approval of the existing legal position which is characterized by a great variety of solutions, from recognition of unlimited freedom of choice of law to total rejection of this principle and its substitution by the requirement of the exclusive jurisdiction of the law of the state importing technology.

Just the opposite tendency to the one in developing countries can be observed in some socialist countries and within the emerging uniform law of COMECON. In the GDR contracts of transfer of technology are governed by the law of the State of the licensor. It seems that the term "use agreements" (*Nutzungsverträge*) includes not only patent licences, but know-how licences as well.¹⁴ A similar solution has been adopted in Hungary where contracts, the subject-matter of which is utilization of industrial property rights, are governed by the law of the state on the territory of which is the seat or residence of the exporter of technology.¹⁵ This regulation is also applicable to know-how licences, because the civil code of the Hungarian People's Republic grants the holder of economic, technical and organizational secrets a subjective intangible right (*Immaterialgüterrecht*). So, these agreements are examples of contracts which have as their object the exploitation of the intangible property right, within the meaning of paragraph 25 (d) of Hungarian Private International Law.¹⁶

¹² Cf. S. SOŁTYSIŃSKI, "Choice of Law and Choice of Forum in Transnational Transfer of Technology Transactions", *Recueil des cours*, vol. 196, 1986—I, pp. 251—257; G. WILNER, "Applicable Law and Dispute Settlement in the Transfer of Technology Code", *Journal of World Trade*, vol. 17, 1983.

¹³ UNCTAD, TD/Code TOT/47 (1985). Suppl. F.

¹⁴ Cf. paragraph 12 (1) of Conflict of Laws Statute of GDR of 5 December, 1975, GBl.I, p. 748.

¹⁵ See paragraph 25 (d) of decree on private international law, *Magyar Kozlony*, No. 33, item 495 (1979).

¹⁶ Cf. note 5 *supra* and A. VIDA, "Die Immaterialgüterrechte im ungarischen Gesetz über das Internationale Privatrecht, Gewerblicher Rechtsschutz und Urheberrecht", *Int. Teil* (1984), pp. 213—215. Cf. by the SAME AUTHOR: "Immaterialgüterrechtlicher Sonderschutz des Know-How im Ungarn", *GRUR Int.*, 1979, No. 7, p. 33 ff.

The applicability of the law of the exporting country, and regardless whether it concerns patented solutions or know-how, has also been adopted in standardized licence agreement forms and standardized know-how contract forms elaborated under the auspices of COMECON.¹⁷ These standards do not make uniform law as yet, and they become binding only when adopted by parties to an international contract.

The applicability of the law of the licensee is provided by two new European statutes relative to conflict of laws. In compliance with paragraph 43 of the Austrian Private International Law¹⁸ agreements concerning intellectual property are subject to the law of the State on the territory of which the licence has been issued. The Statute does not refer to *lex loci actus*, but to the licensed territory i.e. the State in which the technology is to be utilized. As it is a point at issue whether know-how may be considered the object of intellectual property in the light of Austrian law, the mentioned choice of law rule can be applied to know-how contracts only by way of analogy. The scope of the pertinent choice of law rules in the new Yugoslavian law on conflict of laws is broader. According to the Statute of 17 July, 1982, on Private International Law — if the parties have not chosen law

“[...] for the contract of transfer of technology licenses and similar agreement applies the law of the place of the seat (residence) of the *acquirer of technology* of the moment of the conclusion of the agreement” [italics and translation supplied by the author].¹⁹

As was to be expected, a different solution can be found in the Swiss Statute on Private International Law of 1987.²⁰ It provides that in a case when parties to a contract concerning utilization of intellectual property rights have not agreed otherwise, the contract is subject to the law of the State of the licensor's seat. This regulation will probably be applied by way of analogy to know-how contracts. It is surprising, however, that the victory of this idea came only at the last moment under the influence of the lobbying efforts of Swiss economic circles. The last bill provided for the applicability of the law of the licensee and several distinguished experts

¹⁷ W. LINDEN, “Kollisionsrechtliche Fragen des GIW und Musterlizenzverträge — RWG”, in: *Lizenzen, ökonomische und juristische Probleme des Ideenhandels*, ed. W. Linden, Halle 1978; M. PAZDAN, “Umowy licencyjne w obrocie pomiędzy państwami RWPG” [Licence Contracts in Transactions between COMECON States], *Problemy Prawne Handlu Zagranicznego*, vol. 10, Katowice 1986, p. 105; M. BYRSKA, *op. cit.*, p. 85.

¹⁸ Statute on Private International Law, published in: *Rebels Zeitschrift*, 1979, vol. 43, p. 383; “Verträge über Immaterialgüterrechte sind nach dem Recht des Staates zu beurteilen, für den das Immaterialgüterrecht übertragen oder eingeräumt wird”.

¹⁹ *Zakon o Rjesovanju Sukoba Zakona*, translation of the text from German, *Rebels Zeitschrift*, vol. 49, 1985, p. 544.

²⁰ Swiss Private International Law of 19 December, 1987.

on law of intellectual property and private international law supported this solution.²¹

In other legislations of developed countries detailed solutions concerning conflict of laws for agreements of transfer of technology cannot be found. Such being the case, if the parties do not choose law, these contracts are as a rule governed by either a basic conflict of laws rule for all contracts not subject to specific regulation (e.g. to the law of the characteristic performance) or to the conflict of laws rule of "last resort" (e.g. *lex loci actus*). Other solutions based on attempts to use analogy *legis* are also found.

3. A Review of Foreign Doctrine

In the last decade a significant change has occurred in the opinions of foreign legal doctrine on the subject of the proper law for licence contracts concerning intellectual property. Today the view that the law of the territory for which the licence has been granted is in closer connection with the obligation than the law of the seat of the licensor predominates not only in developing states, but also in many developed countries.²² As regards know-how agreements the opinions of the commentators are more divided. It seems that in many European countries the view prevails that if the parties have not chosen law, these obligations should be governed by the law of the state of the exporter's seat. I have used the expression "should be governed" to emphasize that according to the prevailing point of view the law of the seat (place of residence) of the licensor of unpatented technology should be recognized as the most closely connected with the obligation.

In my research I have not come across any publications devoted exclusively to conflict of laws of know-how agreements. This problem is treated in works dealing with transfer of technology as something of minor importance. Some authors suggest different treatment of patent licences and know-how agreements, but they do not state reasons for their standpoint. It is to be presumed that they often attribute crucial significance

²¹ A. TROLLER, *Immaterialgüterrecht*, Stuttgart 1985, p. 862; G. MODIANO, "International Patent Licensing Agreement and Conflict of Laws", *Intellectual Property Law Review*, 1981; F. FISCHER, A. von PLANTA, *Internationales Privatrecht*, Bale (1982), p. 179. Contra F. DESSEMONTET who declares for the application of the law of the licensor, "Le contrats de licence en droit international privé", in: *Mélanges publiés par la Faculté de droit de Lausanne, Hommage au Guy Flattet*, Lausanne 1985, p. 441 ff.

²² For more information see S. SOLTYSIŃSKI, "Choice of Law...", p. 307 ff.

to the traditional opinion according to which know-how agreements do not have a subjective intangible right as their object. This point of view is particularly predominant in developing countries which see in the refusal to classify know-how into the category of proprietary intellectual or industrial property a panacea for escaping the danger of a further strengthening of the position of the technology exporter. Indeed, the notion of "licence" assumes that the licensee must obtain a permission to utilize the supplied technology from the licensor. The licensor's power to grant a license to use his confidential know-how suggests that the intangible is the object of a right. As I have already mentioned, apart from the United States, also Hungary has recognized the right of the holder of confidential know-how.²³

The dispute concerning the legal nature of confidential information is not decisive for the settlement of the issue which law should govern international know-how agreements. In developing countries, which often treat know-how only as a secret protected *de facto*, the doctrine and legislation declare equally decidedly for subjecting contracts for the supply of know-how to the law of the State in which they are utilized.²⁴ Among the few statements of representatives of developing countries whose conflict-of-laws classification of patent licences and know-how agreements is different, a note should be made on M. Janjić's standopint.²⁵ This author advocated the applicability of the law of the licensee in *mixed* contracts which include patents and know-how. His opinion on subjecting "pure" know-how agreements to the law of the exporter was met with disapproval during work on Yugoslavian Statute on Conflict of Laws of 1982, which uniformly treats both types of agreements of transfer of technology in paragraph 20 (18).

In developed States, in which there are no special choice-of-laws rules regulating proper law for the contracts in question the opinions are divided. In Europe adherents of the theory of characteristic performance support subordination of know-how contracts to the law of the seat of the supplier (licensor)

²³ Cf. note 16. The Supreme Court of the United States recognized that confidential information concerning trade secrets is a type of "property". Although the notion of "property" differs from continental understanding of "ownership" but it has all essential attributes of a subjective right. The last category is speciality of jurisprudence of legal cultures of continental Europe. For more information see S. SOLTYSIŃSKI, "Are Trade Secrets Property?". *International Revue of Industrial and Intellectual Property*, vol. 3, 1986, p. 331 ff.

²⁴ Cf. Report of the Intergovernmental Group of Experts on an International Code of Conduct on the Transfer of Technology, 1976, UN Doc. T.D./A.C/1/4.

²⁵ M. JANJIĆ, *Ugovory o licenci*, 1967, p. 105.

of technology.²⁶ It has to be noted, however, that the author of one of the best known commentaries devoted to know-how agreements decidedly speaks for the applicability of the law of the territory on which the transferred know-how is utilized.²⁷ In his opinion it is there that most of the obligations are fulfilled and that territory is the centre of gravity of the obligation.

In the Anglo-American system, where the determination of law applicable to a given contract takes most often place on the basis of flexible directives aiming at finding the law most closely connected with a concrete relationship,²⁸ there is a reluctance to establish easy-to-apply or hard-and-fast, conflict-of-laws rules. According to many American experts, a know-how agreement can maintain a stronger or weaker link with the territory for which the licence has been granted, depending on circumstances. Despite these reservations, it must be noted that experts on know-how agreements whose knowledge of commercial and legal realities is deeper than that of theoreticians of conflict of laws often emphasize the risk run by the exporter of technology when taking advantage of his own economic power and subordinating the contract to the law of the place of his seat because of danger of not complying with regulations concerning the regulation of transfer of technology and antitrust legislation of the recipient country, which often results in a refusal of recognition or enforcement of a judicial (arbitration) decision rendered by a foreign court (arbitral tribunal) against the importer of technology. Thus a dispute settled in court or by arbitration on the basis of the law of the licensor can turn out to be an empty victory. According to these authors mechanical preference for the choice of the law of one of the US states is often justified insufficiently; particularly in export transactions to European countries, whose legal systems secure satisfactory and sometimes even more advantageous legal guarantees to the holder of technology than American law.²⁹

²⁶ For instance, F. DESSEMONTET, "Transfer of Technology under UNCTAD and EEC Draft Codifications", *Journal of International Law and Economics*, vol. 12, 1979, 47 ff., 55. Compare also the article by this author quoted in note 21 *supra*.

²⁷ H. STUMPF, *Der Know-How Vertrag*, 1977, p. 156; G. HENN, *Patent-und Know-how Vertrag* (1988), pp. 242. Contra: K. KREUZER, *Know-how Verträge im Deutschen Internationalen Privatrecht, Festschrift für von Caemmerer*, Tübingen 1978, pp. 710—724.

²⁸ Cf. for instance paragraph 188 Restatement of Conflict of Laws 1971.

²⁹ For instance, S. TIMBERG, "Foreign Licensing Programs: Their Planning and Formulation", in: *The Law and Business of Licensing*, vol. 3, New York 1980, pp. 66—67; R. GOLDSCHIEDER, "Minimizing Disputed Licensing Agreements", in: *Licensing Handbook*, ed. R. GOLDSCHIEDER, G. MAIER, New York 1986, p. 65. The author supports the law of the licence acquirer in the context of all types of licence agreements concerning transfer of technology and he suggests the choice of another law if the first option causes real danger for the interests of the licensor. See also M. JAGER, *Trade Secrets Law Handbook*,

Participants in the PUGWASH conference in 1974 also declared for subordinating all agreements concerning transfer of technology to the law of the recipient State.³⁰ The former president of the Licensing Executives Society — International hinted that the proposal was acceptable to exporters of technology provided that the partners retained the freedom to choose the law and settle disputes by arbitration.³¹

The standpoint of the US legal doctrine and commentators is of special value considering the fact that the United States is the centre of world-wide operations of transfer of technology and has the greatest practical experience in this field.

This brief survey of foreign legal literature proves that the choice of proper law of know-how contracts does not depend on the qualification of the legal status of confidential information (subjective right, property or “possession” of a secret), but, above all, on the comparison of all relevant points of contacts of these agreements with the respective territories of the exporter and importer of technology and the parties to such contracts. Moreover, while choosing among the two rival solutions (the law of the importer or the law of the exporter) one should inquire which of the two solutions is more consistent with the feeling of justice. It should be also noted that the view prevails that patent licences and know-how contracts should be treated uniformly by private international law and be subjected to the same law.

4. Proper Law of Know-How Contracts under Polish Private International Law

This study is the first elaboration in Polish literature devoted to conflict of laws of know-how contracts. I suppose that authors who have earlier declared for the application of the law of the State of the seat (residence) of the exporter of patent licences express a similar standpoint concerning

New York 1984, pp. 70—72 (the law of the place of conclusion of a contract or rather, in accordance with Restatement, the law of the place of the strongest connection with the obligation and parties to legal actions).

³⁰ UN Doc. TD/B/AC/11/L.12 (1974), chapter 7, point 12. The participants of the Pugwash conference held in Geneva in 1974 worked out the project of a universal code of transfer of technology. Its basic assumptions were accepted by developing countries. These states, called “Group of 77” submitted their own project at the forum of UNCTAD.

³¹ M. FINNEGAN, “Code: A Panacea or Pitfall”, in: *The Law and Business of Licensing* (...), note 29 *supra*, vol. 4, p. 520, 431. The view presented in this paper is also shared by P. EHRENHAFT “Unavoidable Choices in ‘4 T’s\ A Review of ‘Choice of Law and Choice of Forum in Transnational Transfer of Technology Transactions (1986)”, *University of Pennsylvania Journal of International Business Law*, 1989, pp. 7—9.

know-how contracts.³² According to the majority of Polish doctrine, the fact that confidential know-how is the object of a legally protected interest and not of a subjective right cannot lead to the conclusion that a contract concerning the supply of information not protected by an exclusive right should not be governed by the same conflict-of-laws rule which applies to sales (Art. 27, paragraph 1, point 1 of the law), or to contracts for the acquisitions of copyrights (Art. 27, para, 1, point 4 of the law). The two provisions embody A. Schnitzer's propositions based upon the concept of "characteristic performance and deal with jural acts of dispositional-obligatory character having as their object the so called subjective rights". Assuming the correctness of such assumption one should agree with the opinion of those authors who *de lege lata* do not see any possibility for avoiding the application of Article 29 of the law (*lex loci actus*).³³ Such solution would, however, mean attaching too great importance to formal criteria. The interpretation of meagre and fragmentary rules of private international law must of necessity often resort to analogy *legis*, in order to arrive at a solution consistent with important interests of the *forum*, the need for ensuring confidence in international economic relations and with the principle of justice. Neither subjecting know-how agreements to the law of the exporter (seller), nor to the place of conclusion of the contract, promise the achievement of these objectives.

The Polish economic system has many features in common with the more developed countries of the Third World. Our foreign trade deficit in know-how transactions will be increasing for many years, even assuming the most optimistic prognosis of development. Thus it would be contrary to our interests to interpret the law in a way which pays a bonus in most

³² Cf. J. SKĄPSKI, "Umowa licencyjna w polskim prawie prywatnym międzynarodowym" [Licence Agreement in Polish Private International Law], in: *Prace z zakresu prawa cywilnego i praw na dobrach niematerialnych* [Works in the Field of Civil Law and Intangible Right], *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, 1973, No. 1, p. 378; A. KOPFF, in: *Prawo wynalazcze. Zagadnienia wybrane* [Law on Inventions and Industrial Designs. Selected Problems], ed. S. GRZYBOWSKI and A. KOPFF, Warszawa 1978, p. 534; M. PAZDAN, *Prawo właściwe dla kontraktu licencyjnego w obrocie międzynarodowym* [Proper Law for Licence Contract in International Transactions], Katowice 1976, p. 11. Emphasizing the controversial nature of all three possible conclusion *de lege lata*, namely, the law of the licensor, the law of the licensee and the law of the place of conclusion of the agreement, M. Pazdan is inclined towards the latter solution in relation to patent licences. As concerns know-how agreements the author declares for the applicability of the law indicated on the basis of analogy as provided by Article 27, paragraph 1 item of the Law (the law of the seller). See also M. BYRSKA, *op. cit.*, p. 88 (the law of the exporter of technology).

³³ W. POPIOŁEK, *Prawo właściwe...* [Proper law...], p. 114. I represented this view till not long ago. Cf. S. SOLTYSINSKI "Umowy licencyjne..." [Licence Agreements...]. Katowice 1970—1971, p. 47.

situations to our stronger contracting partners. The disinclination for emphasizing the latter argument generally advanced in Western and developing countries is shown by some representatives of Polish doctrine of conflict of laws. Accentuating interests of one's own country while searching for new legislative solutions is sometimes treated as violation of "savoir vivre" in the field of conflict of laws. In my opinion, resignation from promotion of the forum's interests can only take place when the postulated solution would be, for instance, contrary to generally adopted conflict-of-laws rules or if it would make international cooperation difficult. It is a paradox that during a recent debate concerning regulation of proper law for contracts of transfer of technology in Swiss Private International Law, adherents of the law of the exporter of technology adduced solutions prevailing in some socialist countries and in standardized contract forms of COMECON, where the theory of characteristic performance had been recognized earlier than in the native legislation of A. Schnitzer, the author of this notion.³⁴ This doctrine of conflict of laws, easy to apply, but serving the interests of the party which is, as a rule, stronger economically, has been adopted in legislations of some socialist countries without deeper economic reflection.³⁵ Arguing against the Swiss bill supporting the law of the importer of technology, an adherent of A. Schnitzer wrote:

The solution offered in Article 119 of the Bill [...] is wrong. It is not consistent with the theory of characteristic performance [...]. It is not consistent with interests of business and, above all, with interests of the Swiss economy, which is more often a licensor than a licensee".³⁶

Meanwhile, the standpoint argued for, supporting subordination of know-how to the law of the place of the seat of the licensee, is being widely adopted in literature and practice of developed capitalist countries.

The same arguments that induced me to support the law of the recipient

³⁴ Quoted from F. DESSEMONTET, "Le contrats de licence...", p. 449.

³⁵ Cf. for example, M. BYRSKA, *op. cit.*, p. 83 ff. The author approved the solutions concerning conflict of laws found in standardized agreement forms of COMECON without considering the arguments of opponents of subjecting agreements on transfer of technology to the law of the exporter.

³⁶ Quoted from F. DESSEMONTET, "Le contrats de licence...", p. 453 (translated by S. Sołtysiński). It is worth noting that while among the Swiss *experts* preparing the bill prevailed the point of view defended in this paper, the Parliament chose the opposite solution in accordance with the interest of the Swiss economy. I have emphasized this fact to point out the myth without foundation of alleged substantive neutrality of Swiss private law. In fact it is difficult to find a law more convenient for the party stronger economically. The choice of the mentioned law by weaker parties and "import" of some Swiss conflict of law rules by developing countries require great caution. See further S. SOŁTYSIŃSKI, "Choice of Law...".

of technology against the background of patent licences speak for submitting know-how contracts to the law of the place of seat (residence) of the licensee.³⁷ In both situations we deal with a long-term contract within which most components of the obligation are fulfilled in the licensed territory (e.g. transfer of information, training of the transferee's staff, supervising the start-up and putting into operation of the plant, long-term exploitation of technology, quantity and quality control of licensed goods, use of trade mark granted to the licensee, etc.). The territory of the licensor is, as a rule, although not always, the place of monetary payments³⁸ and relatively often — the place where a part of performances falling within the scope of technical assistance are accomplished. But except for preparation of plant designs and tender documents the center of gravity of engineering services is usually localised in the licensee's territory. In situations with additional duties such as technological cooperation, exchange of improvements, joint sales, etc., it is difficult to indicate *in abstracto*, which of these duties remain in closer connection with the territory of the country of the licensor or the licensee.

Private international law must take into account not only the conflict of interests of the parties but, above all, the conflict of interests of countries concerned. Almost completely ignored, especially in the legal doctrine of socialist countries, is the problem of the extent of the risk usually borne by the country on the territory of which the imported technology is utilized. The know-how exporter ordinarily bears the risk equivalent to the value of the licence fee and preliminary costs for conclusion of the contract. Only exceptionally there are risks of divulging supplied secrets. Moreover, there are numerous possibilities for decreasing this danger by way of "black box" agreements or having the mutual performances subject to bank guarantees. The risk of the importer and the country in which he operates is incomparably greater. It includes the value of all investments accompanying the implementation of the licence, the price and economic value of which are for the recipient country possible to verify only after many years.³⁹

³⁷ S. SOŁTYSIŃSKI, „Prawo właściwe dla licencji patentowych w polskim prawie międzynarodowym prywatnym” [Proper Law of Patent Licences in Polish Private International Law], *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1986, No. 2, p. 15 ff.

³⁸ Licence payments are sometimes performed in third countries. Moreover, monetary performances of the licensee are, as a rule, realized through his bank and is subject to local fiscal regulations.

³⁹ For illustration it is worth mentioning that the purchase of licence for a new type of tractor from the firm Massey-Fergusson by "Ursus" (Poland) required accompanying investments in dozens of new factories. Due to a fatal choice of the licensed technology, poor negotiations skills, and the upheavals of the 1980s, Polish tractor industry suffered losses in billions of dollars.

Due to a worse bargaining position of the importer of technology, these risks are almost never insured or covered by bank guarantees. As a rule, the exporter makes the conclusion of the contract dependent upon exempting him from all types of risks by the licensee, including shifting potential responsibility from the licensor to the importer in relation to claims of third parties, (e.g. claims for losses caused to these persons resulting from the application of the imported technology).⁴⁰ The recipient State is interested in applying its own law to any agreements concerning importation of technology, including know-how agreements, which are implemented on its territory not only out of consideration for foreign trade balance and plans of economic development, but also in view of their social and ecological consequences. Conscious of the risks brought about by the application of new technologies, especially in production of pharmaceuticals and food-stuff, technology exporters usually seek to decline all responsibilities for defects of the licensed product. However, the evaluation of the legality of these exculpatory clauses can be made only in the light of the legislation of the State where the technology is used.⁴¹ The danger of inflicting damage on consumers and the natural environment in the country importing trade secrets is greater than when importing patented inventions, as many patent offices examine the submitted inventions from the point of view of safety of use.

The presented arguments seem strong enough to postulate the subjection of know-how agreements to the same conflict of laws rule which is applicable to dispositions of copyrights (Art. 27, para. 1, point 4 of Polish Private International Law). As know-how contracts also cover objects of *intellectual* creativity (intangibles) this suffices to propose an interpretation based on analogy *legis*. This circumstance together with the presented arguments of economic and social nature, speak for rejection of other possible interpretations on the basis of analogy *legis*, namely subjecting know-how agreements to the law of the seller. Similar arguments (Art. 27, para. 1, point 1) speak against a formally correct solution which would aim at subjecting the examined contracts to the law of the place of their conclusion. The connecting factor of "the last resort" provided in Article 29 of the Law (*lex loci actus*) refers to the law of a third country having no significant relationship with the obligation of the parties apart from the fact that it is the place where the contract is made.

The circumstance that Article 27, paragraph 1, point 4 of the Law

⁴⁰ R. GOLDSCHIEDER, *op. cit.* p. 61—62.

⁴¹ The possibility of a licensor's liability on the score of "product liability" is indicated in American literature by A. CASCIO, "Key Provisions for Technology Licensing Agreements", in: *Technology Licensing*, 1987, pp. 170—173.

concerns the disposal of subjective rights while the status of confidential know-how is in Poland controversial,¹² should not have a great bearing on the interpretation of conflict of laws rules. Firstly, the problem of legal status of know-how is controversial not only in Poland, but in most legal systems. It is beyond any doubt, however, that the increasing economic position of know-how results in gradual extension of the scope of protection of the holder's interests and there appear first statutes recognizing confidential know-how as object of proprietary right or a form of property.¹³ It is, however, significant that irrespective of the fact whether know-how is thought of as a good protected by a subjective right, imperfect intangible/⁴ or value protected only indirectly by rules of the law of tort and unfair competition, it is treated similarly to subjective rights in international trade practice. Even opponents of recognition of know-how as intellectual property assume the necessity for taking advantage of the institution of assignment sale, licence and other legal forms of disposition, that is, they treat it in all significant aspects as a right. Even in developing countries which sometimes reject the notion of "know-how licence", other legal forms of disposal of these goods, such as assignment or sale, are recognized and local binding legal regulations often hold the supplier responsible for legal defects (!) of know-how.¹⁵

For the qualification of conflict-of-laws rules it should be significant that both in our domestic law, as well as abroad, know-how agreements are based on principles which evolved in the field of patent licences and not contracts of sale or rendering of services. In the practice of international trade, the transfer of know-how and patents takes place jointly so often that it is, as a rule, not possible to establish which of the two elements of performance is of crucial significance/⁶ It must be also taken into account

⁴² In Poland i.a. S. Grzybowski, A. Kopff and S. Sołtysiński have declared for the recognition of the holder's right in a trade secret. B. Gawlik, A. Szajkowski, R. Markiewicz and M. Staszków are of a different opinion. These views have been compiled by A. SZAJKOWSKI *Wynalazki wspólne. Aspekty prawne [Joint Investments, Legal Aspects]*, Ossolineum 1982, p. 277 ff. J. Szwaja has recently pointed out the evolution towards the recognition of confidential know-how as the object of industrial property, in: "Osiągnięcia naukowo-techniczne a ochrona własności przemysłowej" [Scientific and Technical Achievements and Industrial Property Protection], ZNUJ PWiOWT (1987), book 44, pp. 19—21.

⁴³ Cf. S. SOŁTYSIŃSKI, "Choice of Law...", pp. 327—328. See also IAPP, *Yearbook*, vol. 1, 1983, p. 102 ff. See also J. SZWAJA, *op. cit.*, pp. 16—22.

⁴⁴ Cf. A. WISE, *Trade Secrets and Know-How Throughout the World*, New York 1981, vol. 3, pp. 3—4; A. VIDA, "Immaterialgüterrechtlicher Sonderschutz...", p. 334.

⁴⁵ For example in Mexico and Spain. Cf. A. WISE, *Trade Secrets...*, vol. 5, para. 10.09.16 (Spain) and para. 1.08/5/ (Latin America).

⁴⁶ Many adherents of the theory of characteristic performance share this standpoint. Cf. F. DESSEMONTET, *Le contrats de licence...*, p. 440 ff.

that the term “acquirer of the right” in the understanding of Article 27, paragraph 1, point 4 of the Polish Private International Law has been interpreted very liberally for a long time. It embraces both assignment and copyright licenses.⁴⁷ Having decided to apply this rule to know-how contracts, we treat assignments (e.g. sale) and all types of licenses concerning technological solutions uniformly.

In one respect do the arguments supporting the subordination of patent licenses to the law of the recipient seem *prima facie* stronger than in case of the analysed know-how contracts. The consideration to avoid the splitting of obligation statute and patent statute⁴⁸ has no close counterparts in contracts concerning import of production secrets or management. Know-how is not protected anywhere by monopolies modelled on exclusive rights, the archetype of which is patent. Thus in the country importing know-how technology not so many public policy rules of direct applicability operate which cannot be excluded by conscious choice of law of another State. However, the danger of splitting statutes and conflict of rules belonging to two legal systems is also present if the postulate of applicability of the law of the seat of the licensee is rejected. It is the result of differences in legal protection granted by various legislations to the holder of know-how and the spreading of systems of control of import of technology. Just as against the background of patent licences, the possibility to grant know-how license in the territory of a concrete State cannot be safely subjected to the law of the exporter. For instance, “PolSERVICE”, Poland, cannot effectively grant know-how licence in Brazil, even if the Brazilian partner agrees to such contract, signs the agreement in Warsaw and agrees to have the contract subject to Swiss law, because the Brazilian Decree No. 0015/1975 forbids even the use of the term “licence” with reference to technology not protected by a patent of that country.⁴⁹ As definitions of protected know-how evolved in the case law or adopted in laws of individual States are not identical, also in this case one can speak of differences in the field of the law of the country for the territory of which the know-how license was granted and where the protection of such intangible is sought (*lex loci protectionis sensu largo*). Just as with reference to patent licences, it should be assumed that the law on the territory of the licensee determines the possibility and conditions for granting a licence, what types of know-how are protected by local law and sanctions threatening the recipient

⁴⁷ W. POPIOŁEK, *Umowa wydawnicza w polskim prawie prywatnym międzynarodowym* [Publisher's Agreement in Polish Private International Law], Warszawa—Kraków 1982, pp. 75—76.

⁴⁸ Cf. S. SOŁTYSIŃSKI, “Prawo właściwe...” [Proper Law...], pp. 25—27.

⁴⁹ Art. 4.5.2.VI—VII of decree, UNCTAD Compilation, pp. 37—38.

and third parties in case of extra-contractual liability. The law of the recipient country also determines whether the licensor is entitled to assign or grant such licence, and also whether the importer had acquired the right to use know-how from a licensee acting without a legal title. Arguments against subjecting these disputes to the law of the exporter or law of a third state are similar to those concerning the administration of patent laws. Moreover, many duties of the recipient laid down by the rules and regulations of Polish law (i.e. the law of the licensor), for instance an obligation to refrain from further use of know-how after the contract expires and to safeguard the secret, would violate rules of direct application in force in Brazil (the law of the recipient country).⁵⁰ Attempts to apply the law of the State of the exporter when settling a dispute threaten the parties to such contracts with serious complications, regardless of the fact where the dispute is adjudicated. Since national systems of technology import controls regulate by way of public policy rules of direct applicability many aspects of the agreements' *contents* (e.g. payment, scope of technical assistance, restrictive clauses, liability by way of guarantee for physical and legal defects etc.), subjecting know-how agreements to the law of the exporter causes danger of splitting the obligation statute. Although this risk is less serious in transactions involving parties only from developed countries, but there are also numerous public policy rules of direct applicability which interfere deeply in the sphere of autonomy of will of parties to all agreements of transfer of technology (e.g. antitrust and financial laws, regulations concerning strategic control of export, rules regulating consequences of the so called product liability, etc.).

The advantage of the advocated solution lies in uniform treatment of basic agreements of transfer of technology. Know-how licenses occur not only in the context of patent licences, but also in the framework of agreements concerning copyright. The extension of copyright protection to computer programs by over 40 States has brought about the utilization of the institution of licence in dissemination of these utilitarian innovations. In case of disclosure of confidential information concerning *software*, combined with licensing a copyright program, we deal with mixed contracts — as in licences embracing disposition of patent and know-how — which should be subject to, if possible, the same law and uniform conflict of laws qualification.

The law of the situs of the acquirer of technology should be also applied into mixed contracts, covering both confidential and non-confidential know-how. I assume, however, that secrets constitute an essential part of such obligation. Only in relation to contracts which have as their object disclosure of know-how being in the public domain there appear doubts concerning the possibility

⁵⁰ *Ibid.*

to use analogy *legis* of Article 27, paragraph 1, point 4 of the Law. In the latter case the supplier does not dispose of a right or "defective" intangible "located" in the licensed territory. These agreements, depending on the concrete situation, should be qualified as contracts on rendering services and less often as legal acts similar to contracts for work. However, considering the facts that fulfilment of the parties' obligations and the effects of import of technology are above all concentrated in the State of the recipient one should not be tempted to apply by way of analogy any of the connecting factors specified in Article 27, paragraph 1 indicating the applicability of the law of the exporter. Thus *de lege lata*, I declare for, not without hesitation, the inconvenient connecting factor of the law of the place of conclusion the contract (Art. 29 of the Law).

De lege ferenda all contracts of transfer of technology, including agreements concerning disclosure of know-how being in the public domain, should be subject to the personal law of the importer on the condition that its situs is located in the country being the centre of the exploitation of technology (licensed territory). If the licence has been granted in the territories of several States, it must be found which of them constitutes the centre of economic exploitation of the transferred technology. It is often the case that it is the territory on which the recipient has his seat. The new rules of private international law should give courts freedom to select the proper law in a situation where the seat or place of residence of the recipient does not coincide with the territory which is the centre of economic exploitation of the acquired technology. In the last case proper law should be established according to a general directive which would prescribe search for a legal system most closely connected with the obligation and the parties concerned.

Application for Interpretation of a Judgment Delivered by the International Court of Justice

by JANUSZ STAŃCZYK

A judgment of the International Court of Justice¹ is a decision in accordance with international law in a dispute submitted to the Court by States. Depending on the method of instituting proceedings before the Court — by notification of a Special Agreement or by an Application — the dispute is defined either by the provisions of such an agreement or in submissions of the parties (conclusions) contained in pleadings or produced in the course of hearings. For various reasons the judgment of the Court itself may give rise to a new dispute between the parties — a dispute as to the meaning or scope of the decision rendered. As regards such situations the Statute of the ICJ places at the disposal of every party an appropriate procedural device — the possibility to request the Court to construe its decision.²

States do not, however, have recourse to this method too frequently. Both Hague Courts delivered only four decisions in response to applications for interpretation. Two of those judgments³ were rendered by the Permanent Court of Justice,⁴ and the remaining two — by the ICJ.⁵

¹ Hereinafter referred to as the ICJ or the Court.

² Article 60 provides:

“The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party”.

³ Interpretation of Judgment No. 3 (Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly), Judgment of March 26th, 1925, PCIJ. Series A, No 4 — Series C, No. 6 Suppl. Vol. Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), Judgment of December 16th. 1927, PCIJ, Series A, No. 13; Series C, No. 13—V.

⁴ Hereinafter referred to as the PCIJ.

⁵ Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case, Judgment of November 27th, 1950. *ICJ Reports 1950*, p. 395. Application for Revision and Interpretation of the Judgment of 24 February, 1982 in the Case concerning

1. Incidental Jurisdiction

A decision of the Court containing the interpretation of a judgment can be delivered because a case has been earlier submitted to the ICJ and concluded by a judgment on the merits. Naturally, this presupposes that the Court was exercising its jurisdiction on the basis of consent of both parties to the case, even if the jurisdiction was contended by one of them (through raising a preliminary objection) at the preliminary stage of the proceedings. Delivery of a judgment on the merits — and a request for interpretation may concern only this judgment — amounts to the Court having the required jurisdiction in the case, the principal case. When interpreting a judgment the Court derives its jurisdiction from an objective fact — the existence of the judgment and previously — from jurisdiction exercised in the case finalized by its delivery. Thus Rosenne is right in defining this type of jurisdiction of the Court as incidental jurisdiction⁶ in opposition to jurisdiction in the principal case. As regards a request for interpretation of a judgment (as well as an application for revision of a judgment) the ICJ exercises this jurisdiction after proceedings in the principal case have been closed.⁷ Thus proceedings which lead to an interpretative judgment are derivative in relation to proceedings in the principal case.

This relationship is simple in the case of a permanent judicial body such as e.g. both Hague Courts. As regards arbitral tribunals, that is, bodies of a *functus officio* character, the relationship should be contemplated in a special agreement. Historians of arbitration can, in consequence, adduce only sporadic examples of decisions interpreting previously rendered arbitral awards — that was, at least, the case in the 19th century.⁸ During the second Hague Conference the Italian delegation proposed (despite opposition of the British delegation) to accept the rule that arbitral awards can be

the Continental Shelf (Tunisia/Libyan Arab Jamahiriya). Judgment of 10 December. 1985. *ICJ Reports 1985*, p. 192.

⁶ Rosenne supports the use of this term also in relation to the indication of provisional measures, intervention, counter-claims and jurisdiction in procedural matters. Sec: S. ROSENNE. *The Law and Practice of the International Court*. Leyden 1965. vol. I, p. 422 ff.

⁷ As regards other situations in which incidental jurisdiction is exercised (cf. *supra note*) by the Court, an application for the institution of respective proceedings is submitted in the course of the principal case. The presently binding Rules of Court (revised in 1978) name these proceedings as incidental : Rosenne defines them as interlocutory proceedings. S. ROSENNE. *The Law and Practice....* vol. 2. p. 52S ff,

⁸ L. CAVARÉ. "Les recours en interprétation et en appréciation de la légalité devant les tribunaux internationaux", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 15, 1954, No. 3, pp. 497-198.

interpreted by the tribunal which delivered them. As a result, the Convention for the Pacific Settlement of Disputes (18 October, 1907) provides in Article 82 that a dispute concerning interpretation, if there are no provisions to the contrary (that is any provisions in the special agreement), should be submitted to the tribunal which rendered the award.⁹ Subsequent agreements, as well as those concluded nowadays, concerning the bringing of disputes before arbitral courts, frequently contain provisions on interpretation of (future) awards.¹⁰ It should be added that those provisions are sometimes applied.¹¹

It has been mentioned above that in the case of a request for review of a judgment the Court's jurisdiction is incidental in relation to its jurisdiction in the principal case, the latter being verified according to Articles 36 and 37 of the Court's Statute. Proceedings in a case of interpretation of a judgment are not, however, incidental, such as provisional measures proceedings or proceedings concerning intervention.¹² The latter are comprised in the principal case while an application for interpretation initiates a separate case. A State instituting such a case bases the Court's jurisdiction on Article 60 of the Statute. The proceedings in question do not require consent of both parties for the Court to deal with the application in the same way as in the case in which the judgment was delivered.¹³

⁹ This rule, in conformity with the maxim concerning authoritative interpretation *eius est interpretari cuius est condere*, was included in the Model Rules on Arbitral Procedure elaborated by the International Law Commission and brought to the notice of the Members of the UN by the General Assembly in Resolution 1262 (XIII) of 14 November, 1958. Article 33 provided further that if, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and the parties have not agreed upon another solution, the dispute may be referred to the ICJ at the request of either party. See "Model Rules on Arbitral Procedure, Report of the International Law Commission covering the work of its Tenth Session, April 28 — July 4, 1958"; *UN General Assembly Official Records Thirteenth Session, Supplement No. 9 (A/3859)*, p. 86.

¹⁰ E. ZOLLER, "Observations sur la révision et l'interprétation des sentences arbitrales", *Annuaire français de droit international*, 1978. p. 330.

¹¹ The best known recent example was the decision of 14 March, 1978, delivered by an arbitral tribunal which had been established in the case concerning the delimitation of the continental shelf between the United Kingdom and France. The decision interpreted the award of 30 June, 1977. See *Reports of International Arbitral Awards*, vol. 18, p. 271 ff.

¹² See Rules of Court (the title of Section D, Part III).

¹³ It would be interesting to recall that in the course of preparation of the draft Statute of the PCIJ within the Advisory Committee of Jurists there was accord as to including in the provision defining the type of cases which the future Court would be competent

to deal with also interpretation of previously rendered judgments. Among legal disputes to be settled by the Court exercising compulsory jurisdiction in relation to all Members of the League of Nations disputes concerning interpretation of judgments were mentioned under letter e (at present Article 36, paragraph 2 of the Statute). In the final stage of the works the enumeration of legal disputes being upheld, a separate provision on interpretation of

The first interpretative judgment delivered by the Chamber of Summary Procedure of the PCIJ in 1925 treated the issue of jurisdiction in a broader manner. Proceedings before the Chamber were initiated by an application for interpretation of the judgment rendered by the Chamber in 1924 in a dispute between Bulgaria and Greece. The application submitted by Greece referred to three problems which, in the opinion of this State, required clarification by the Court. The representative of Bulgaria supplied written observations which presented the Bulgarian stand on these issues.

When dealing with the request of Greece the Chamber of Summary Procedure considered it appropriate to examine, in the first place, the problem of jurisdiction. It satisfied itself that Bulgaria had not contested the Court's jurisdiction and that this jurisdiction thus ensued from the consent of both parties to the proceedings. The Court found, in consequence, that there was no need to consider the issue whether the required jurisdiction, could be based exclusively on a unilateral declaration (submitted by Greece).¹⁴

The approach of the judges forming the Chamber may seem more comprehensible in the light of subsequent decisions in the above case. The Court found it impossible to comply with the request of Greece for the reason that the matters contained in the request concerned difficulties in implementing a provision which had previously been subject to divergent interpretation on the part of Greece and Bulgaria (the last dispute was settled in Judgment No. 3) and this problem had not been submitted to the Court. The special agreement concluded by both States did not contain consent for the matters (which later became the subject of the request for interpretation of Judgment No. 3) to be determined by the Court. To that effect the subject of Greece's request was outside the jurisdiction which the parties had granted to the Court in the principal case.

In the above case the judges forming the Chamber of Summary Procedure overlooked the significance of Article 60 of the Statute as the jurisdictional title in proceedings concerning an application for interpretation. The ICJ did not, although encouraged to do so, follow that example 60 years later when dealing with an application for revision and in-

judgments was added to the chapter on procedure. The provision was, finally, included in the Statute of the PCIJ while the enumeration of legal disputes was reduced by the category of disputes concerning interpretation of judgments during works of the Subcommittee of the Third Committee of the First League Assembly in 1920. See *Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee with Annexes*, The Hague 1920, p. 253 (proposal of Phillimore), p. 275 (Descamps), p. 547 (Root, Phillimore), p. 566 (Draft Scheme), pp. 570, 665, 669, 673, 727—9, 744; pp. 544, 547 (works of the Subcommittee).

¹⁴ Interpretation of Judgment No. 3, PCIJ, Series A, No. 4, p. 6.

interpretation of the judgment in the case concerning the Continental Shelf (Tunisia/Libya; Judgment of 24 February, 1982), filed by Tunisia.

The Special Agreement concluded between Tunisia and Libya provided that in case an agreement on delimitation (the principles and rules of which were to be determined by the Court) would not be reached by the parties within a given period, both parties were to go back to the Court and request a clarification of the judgment¹⁵ which would facilitate reaching the agreement.

In the Judgment of 24 February, 1982, the Court referred briefly to the above provision (Article 3) of the Special Agreement remarking that Tunisia and Libya had presented divergent interpretations of it. The Court, however, when defining the limits of the jurisdiction conferred upon it by the parties, did not consider it necessary to settle the question of a proper interpretation of this provision.¹⁶ As if anticipating further occurrences. Judge Gros dealt with this problem and rejected the passive stand of the Court.¹⁷

In July 1984 Tunisia filed an application for revision and interpretation of the above judgment.¹⁸ Both Tunisia's application and the written observations filed in response by Libya expressed the respective States' opinions on the significance and legal value of Article 3 of the Special Agreement; these opinions were upheld during hearings.

As the jurisdictional title of its application in the part concerning interpretation of the 1982 Judgment Tunisia invoked Article 60 of the Court's Statute. It explained further that Article 3 of the Special Agreement could not have the effect of derogating from the provisions of the Statute. Unable to reach agreement with Libya on making a joint request to the

¹⁵ "...any explanations or clarifications...". Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), *ICJ Reports 1982*, p. 9.

¹⁶ *Ibid.*, pp. 40—41.

¹⁷ In his dissenting opinion Judge Gros expressed his doubts as to the way in which the Court had dealt with the determination of the extent of its jurisdiction. He stated that the Court should have considered the relationship between Article 3 of the Special Agreement and Article 60 of the Statute as well as Article 94 paragraph 2 of the Charter. In Judge Gros' opinion if Article 3 were to be a weakened version ("une version affaiblie") of Article 60 of the Statute (what followed from Libya's argumentation), the Court should have asked itself whether that was acceptable. In consequence, Judge Gros reached the conclusion that by declining to reject in an outright manner Libya's contentions with respect to Article 3 of the Special Agreement, the Court had allowed upholding uncertainties as to the scope of the parties' obligations assumed under Article 2 of the Special Agreement (interpreted by Libya as a *pactum de negotiando*), *ibid.*, pp. 143—147.

¹⁸ Application instituting Proceedings filed in the Registry of the Court on 27 July, 1984, Application for Revision and Interpretation of the Judgment of 24 February, 1982, pp. 28—30.

Court — which was a necessary condition under Article 3 — Tunisia was forced to file an application by itself on the basis of Article 60 of the Statute. Tunisia suggested, however, that if the Court found it possible to accept filing an application founded upon Article 3 by one party only, this provision should also be considered as a jurisdictional basis of its application.¹⁹

In its response Libya contended that the Court had no jurisdiction to admit the Tunisian request. Libya considered that the parties had an obligation first to exhaust the remedy under Article 3 of the Special Agreement. In consequence Libya held that since Tunisia had refused to cooperate in making a joint presentation of the disputed matters before the Court, it had debarred itself of resort to Article 60 of the Statute.²⁰ Later, however, Libya acknowledged its previous argumentation as too formal — and not wanting to deprive itself of the possibility to present its position on the merits of Tunisia's request it stated that it had chosen not to rely exclusively on what might be regarded as a "technical bar". Tunisia's application was, in the opinion of Libya, so lacking merit that Libya preferred to oppose it.²¹

This time the Court dealt with this problem adopting the view that this change of approach did not allow an unambiguous conclusion that Libya had waived its jurisdictional objection based on Article 3 of the Special Agreement.²² The Court recalled that jurisdiction in contentious cases is based on the consent of States — parties to a dispute. From this

¹⁹ Evolving this argument Prof. Dupuy held in the course of hearings that Article 3 of the Special Agreement was in fact a supplementary measure of Article 60 of the Statute which the parties had formulated having in mind concordant work on the implementation of the Judgment of the Court (that is conclusion of an agreement concerning the delimitation of the continental shelf). Prof. Dupuy also presented an argument of a subsidiary character — if the Court recognized the method provided in Article 3 as having priority — stating that also in that case Tunisia had the right to file an application for interpretation without cooperation on the part of Libya. The latter State would be obliged to appear before the Court, CR 85/15, pp. 22—24.

²⁰ *Observations of the Socialist People's Libyan Arab Jamahiriya on the Application of Tunisia for Revision and Interpretation of the Judgment of 24 February. 1982. 15 October. 1984*, vol. 1, pp. 45—53.

²¹ *ICJ Reports 1985*, pp. 215—216. In keeping with this stand, in the course of hearings Libya contended that Tunisia's request should not be admitted on the grounds contemplated by Article 60 of the Statute — see the statement of Libya's Counsel — Prof Queneudec, CR 85/17, pp. 36—47.

²² The change in Libya's position was evaluated differently by Judge Ruda in his separate opinion. He stated that Libya had waived the jurisdictional objection. As to the relationship between Article 3 and Article 60 Judge Ruda's stand was in principle concurrent with that of Tunisia, *ICJ Reports 1985*, pp. 233—234.

it follows that although States are free to make their consent to the seisin of the Court subject to pre-conditions, the latter must be consistent with the Statute. In this way the Court rejected Libya's contention that Article 60 the Statute and Article 3 of the Special Agreement were of equal legal value. For, the Court, passing over the issue of whether or not States could validly derogate from provisions of the Statute — and in this way the Court did not give an answer *in principio* — acknowledged that it cannot be lightly implied that a State waives its right ensuing from Article 60 of the Statute. In consequence, the Court stated that Article 3 of the Special Agreement cannot be interpreted as excluding access to the provisions of the Statute.²³

The example of Tunisia's request demonstrates that as a consequence of a Special Agreement being subordinate to the Statute, it is not possible to deprive a State of its right ensuing from Article 60 by including in the Special Agreement provisions on an alternative procedure. The rejection of such a possibility by the Court leaves no room for doubt.²⁴

2. Admissibility

The jurisdictional title of an application for interpretation of a judgment of the ICJ is found in Article 60 of the Court's Statute. This means that the Court will admit any application requesting the interpretation of a previously rendered judgment. This is not, however, tantamount to the Court making the requested interpretation - whether or not it would be consistent with the submissions of the Applicant State. The reason for this is the provision of Article 60 of the Statute which formulates certain conditions of admissibility of a request for interpretation of a judgment.

Unlike Article 61 of the Court's Statute which concerns an application for revision of a judgment, Article 60 does not contain the notion "admissible". This results from the fact that when dealing with an application for revision, the Court gives a separate judgment on the admissibility of the application. In the case of a request for interpretation the Court first examines its admissibility and then, after having decided positively in this matter, makes the requested interpretation. All this is included in one judgment.²⁵

²³ *Ibid.*, p. 216.

²⁴ E. DECAUX, "L'arrêt de la Cour internationale de Justice sur la demande en révision et interprétation de l'arrêt du 24 février 1982 en l'affaire du plateau continental (Tunisie/Libye)", *Annuaire français de droit international*, 1985, pp. 337—338.

²⁵ This applies analogously to the interpretation of arbitral awards. The decision on interpretation of the Judgment in the case of delimitation of the Continental Shelf

Conditions of Admissibility

The conditions of admissibility of a request for interpretation are provided for in Article 60 of the Statute.²⁶ And so, the Court can open proceeding after having received a request submitted in compliance with this provision on the condition that:

— the real purpose of the request is to obtain an interpretation of the judgment, that is, to obtain clarification of the meaning and scope of what the Court has decided with binding force. The object cannot be solely to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would be contrary to its provision that a judgment is final and without appeal;

in addition, it is necessary that there should exist a dispute (between the parties to the principal case) as to the meaning or scope of the judgment.

The above conditions of admissibility of a request for interpretation were formulated by the Court in its Judgment of 27 November, 1950, concerning the interpretation of the Judgment in the Asylum Case (Colombia/Peru). They are in principle convergent to the conditions of admissibility laid down by the PCIJ in the Judgment of 16 December, 1927, concerning the interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów, Germany v. Poland).²⁷

Request for Interpretation of the Judgment in the Asylum Case

The request was made by Colombia on the day of the delivery of the judgment by the ICJ. Colombia was of the opinion that the judgment has gaps which, in consequence, made its implementation impossible. Consequently it submitted to the Court three questions concerning the meaning of the Judgment of 20 November, 1950: first, whether the qualification of the offence attributed to the Peruvian refugee made by the Colombian Ambassador had been correct and, if so, what legal effect should ensue; second, whether Peru was entitled to demand the surrender of the refugee, and third, whether the Court's holding on the counter-claim submitted by

(United Kingdom/France) was founded upon Article 10, paragraph 2 of the Special Agreement concluded by the parties to the dispute. This provision was clearly based on Article 60 of the ICJ Statute (conditions of admissibility of the request; not invoking the notion of admissibility itself). United Kingdom's request for interpretation was objected to by France "under the heading of" admissibility. In its decision the arbitral tribunal also used the notion of admissibility. *Repurls of International Arbitral Awards*, vol. 18, pp. 282—283, 285—296, 329—330.

²⁶ They are repeated in Article 98 of the Rules of Court.

²⁷ PCIJ, Series A, No. 13, p. 10.

Peru implied that Colombia was bound to surrender the refugee.

When submitting these questions Colombia was aware that they were conspicuously concrete when compared to the abstract character of requests in the principal case.²⁸ The sense of them being posed is clarified by excerpts from the motives of the application for interpretation, in which Colombia expresses its conviction that the legal qualification of the offence of which the applicant for asylum had been accused by the State to which he had recourse, admitted by the Court²⁹ would be considered as null and void because a dispute had arisen on the preliminary and theoretical question of the right to qualification in matters of asylum.³⁰

In its request for interpretation of the Judgment in question Colombia did not refer to the conditions for admissibility formulated in Article 60 of the Statute. It did so in a letter sent to the Court in reply to the observations presented by the Agent of Peru contesting the admissibility of Colombia's request. Peru held that Colombia's request aimed at obtaining a new decision of the Court supplementing the previous one under the pretense of a request for interpretation. The judgment itself was perfectly clear — in the opinion of Peru — and did not call for interpretation. In response Colombia indicated that Peru's remarks proved the existence of a dispute; referring to the object of the application it actually admitted that it had in mind obtaining a declaration on the part of the Court with regard to certain motives underlying the Judgment in the Asylum Case.³¹

Examination of Colombia's request by the ICJ was limited to the admissibility matters. Considering the first question submitted to it, the Court acknowledged that it had not been raised in the submissions in the principal case (and those submissions had fixed the limits of the decision in the case). As to the two remaining questions the Court applied the same argument. And so, Colombia's questions were in fact a new question

²⁸ In its submissions Colombia maintained that it was competent to qualify the offence of which the refugee had been accused according to the terms of the Havana Convention on Asylum of 1928 (two other international agreements invoked by Colombia were not admitted by the Court) and that Peru was bound to give guarantees for the safe departure of the refugee from the country. In its counter-claim Peru contended that the grant of asylum by the Colombian Ambassador had been made in violation of the said convention and that, in any case, the maintenance of the asylum constituted a violation of that treaty. Asylum case (Colombia/Peru), *ICJ Reports 1950*, p. 271.

²⁹ In fact the Court recognized only the provisional qualification (given the urgency of the matter) which is not binding on and may be contested by the territorial State. *ICJ Reports 1950*, p. 288 (operative part of the Judgment), pp. 273—278 (reasons in point of law).

³⁰ *ICJ Reports 1950*, p. 398.

³¹ *Ibid.*, pp. 400—401.

which could not be decided by the means of interpretation — thus the condition of admissibility relating to the object of the request had not been fulfilled in this case.

The Court explained further — this time *ex abundante cautela* — that one could not treat as a dispute in the meaning of Article 60 of the Statute the fact that one State found the judgment obscure while the other considered it perfectly clear. A dispute requires a divergence of views on definite points. In the case of Colombia's request the existence of such a dispute had not been brought to the attention of the Court; moreover, the very date of the Colombian request (a few hours after the judgment in the principal case had been delivered) showed that such a dispute could not have arisen.³²

Tunisia's Request for Interpretation of the Judgment in the Case concerning the Delimitation of the Continental Shelf (Tunisia/Libya)

Unable to reach an agreement as to the delimitation of the continental shelf Tunisia and Libya requested the Court to determine the principles and rules of international law applicable for the delimitation and to specify precisely the practical way in which they applied “so as to enable the experts of the two countries to delimit these areas without any difficulties”.³³ By the Judgment of 24 February, 1982, the ICJ decided the dispute. The implementation of the judgment encountered, however, serious difficulties. As a result Tunisia filed an application which was in fact a combination of several distinct requests. Recurring to the partition of the area of delimitation into two sectors made by the Court in the 1982 Judgment — as regards the first sector Tunisia presented an application for revision and a request for interpretation as one of two subsidiary requests³⁴ while as regards the second sector — a request for interpretation as the

³² *Ibid.*, pp. 402—404. The Judgment was passed by a majority of votes. The only Judge in favour of the admissibility of the request (Caicedo Castilla, Judge *ad hoc* appointed by Colombia) in a short declaration expressed his view that Article 60 of the Statute should be interpreted broadly as regards the notion of a dispute, what the PCIJ had done in the Judgment concerning the interpretation of Judgments Nos. 7 and 8 (Chorzów Factory). Let us recall the PCIJ found it sufficient that the parties display in fact divergent viewpoints concerning the meaning or scope of a judgment without it being necessary to articulate them in a specified manner. With regard to the case in question the PCIJ acknowledged that the dispute may be defined by invoking the diplomatic correspondence between Germany and Poland in consequence of Judgment No. 7 and statements of their representatives made in the course of hearings in the proceedings leading to the delivery of Judgment No. 9, PCIJ. Series A, No. 13, pp. 10—12.

³³ *ICJ Reports 1982*, p. 21.

³⁴ The other subsidiary submission was a request to correct an error (*erreur matérielle*).

principal request and subsidiarily — a request to order an expert survey.³⁵

Differently than with regard to the problem of jurisdiction the Court considered separately the problem of admissibility in relation to both requests for interpretation. In Tunisia's opinion the object of the first request was to obtain the Court's declaration that the co-ordinates of the point (which lay at the outer limit of the territorial sea) through which the delimitation line in the first sector of the delimitation was to pass, had not been decided by the ICJ with a binding effect on the parties to the case. Tunisia argued that the criteria used by the Court when determining the co-ordinates of the point could not be simultaneously applied. As a result Tunisia requested an explanation as to the hierarchy within the compass of those criteria.³⁶

Libya demanded that Tunisia's request be found inadmissible, arguing that its object indicated an attempt to change what the Court had decided with binding force. It contended further that Tunisia had not proved the existence of a dispute as to the meaning and scope of the judgment in the principal case.³⁷

Libya's objections did not convince the Court which took the view that Libya's approach to the request for interpretation (first sector) was a rejection of the interpretation proposed by Tunisia rather than an objection to the admissibility of the request. Thus the contention that no dispute existed was without object; the Court recalled in this context the dictum of the PCIJ Judgment No. 13 (Interpretation of Judgments No. 7 and 8) according to which it is sufficient for a rejection of such an objection that the parties show in fact (that is, not necessarily in a formal way) themselves as holding opposite views with regard to the meaning or scope of a judgment of the Court. In consequence, the Court found Tunisia's request for interpretation of the 1982 Judgment (first sector) admissible.³⁸

As regards the part of the Judgment relating to the second sector

³⁵ *ICJ Reports 1985*, pp. 195—196.

³⁶ Cf. the Statement of Prof. Dupuy, CR 85/15, pp. 25—28.

³⁷ Cf. Prof. Queneudec's arguments, CR/85, pp. 37—47.

³⁸ Proceeding to the merits the Court rejected the interpretation proposed by Tunisia. The Court ascertained that it had relied on an erroneous construction of respective parts of the 1982 Judgment. In this Judgment the Court had determined one criterion for the delimitation line — by marking two points through which it was to run. Both the decision on admissibility of the request and the decision on the rejection of Tunisia's demands gained unanimous support of the judges, *ICJ Reports 1985*, pp. 229—230. In consequence, the Court acknowledged that the request for the correction of an error was without object.

of the delimitation³⁹ Tunisia submitted a request for interpretation arguing that the most westerly point of the Gulf of Gabes lay at a different latitude than that indicated by the Court. It contended that the decision of the Court had merely given the notion of the most westerly point of the Gulf of Gabes and the co-ordinates of that point (its latitude) was given by the ICJ only approximately.⁴⁰

Once again Libya raised objections against the admissibility of Tunisia's request. It argued, like in the case of the request for interpretation of the part of the Judgment concerning delimitation in the first sector, that this request was also an attempt to revise what the Court had already decided. It affirmed that when determining the bearing of the delimitation line experts should confine their work (in the discussed context) to the application of suggestions formulated in the 1982 Judgment, including the co-ordinate of the most westerly point of the Gulf of Gabes. In Libya's view this co-ordinate, although referred to only in the reasons in point of law and not in the operative part of the judgment — determined with binding force the task of the experts, at least its final location may have deviated from the latitude given by the Court only in seconds, and not in minutes or degrees.⁴¹

An analysis of the views of both parties brought the Court to a positive decision on the admissibility of the request for interpretation of the 1982 Judgment (second sector). In the first place, the positions of both parties were clearly opposable — thus a dispute existed — as regards the relationship between the most westerly point of the Gulf of Gabes⁴² and the intersection of the shoreline by the parallel 34°10'30" north. There was a dispute between the parties as to what had been decided by the Court with binding force: whether the Court had identified the turning point between the first and the second sectors of the delimitation line (lying on the parallel going through the point identified by the Court as furthest to the west) as lying on, or very near, the parallel 34°10'30", or whether the Court had merely found that the turning point should be drawn through whatever the Parties' experts might regard as the most westerly point of the Gulf.

As to the second condition of admissibility of a request for interpretation

³⁹ Within that sector the delimitation line changed its bearing by increasing its inclination angle (calculated in relation to the meridian) thus allocating to Tunisia a greater area of the continental shelf than in the first sector. Cf. the map annexed to the 1982 Judgment, *ICJ Reports 1982*, p. 76.

⁴⁰ Cf. Prof. Virally's arguments, CR 85/14, pp. 66—67.

⁴¹ Cf. Prof. Bowett's statement, CR 85/18, pp. 31—36.

⁴² That is the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, *ICJ Reports 1985*, p. 222.

the Court also established that it had been satisfied. However, it took care to underline that this did not apply to what could be interpreted in Tunisia's request as a call upon the Court to answer questions exceeding the scope of the judgment in the principal case or the request for revision⁴³ Next the Court proceeded to consider the merits of the request for interpretation.⁴⁴

It has been mentioned above that Tunisia's application was in fact a combination of connected or distinct requests. In relation to the part of the 1982 Judgment concerning the first sector the request for interpretation contained requests subsidiary to that in the application for revision. The request to correct an error was of similar nature. As regards the second sector the request for interpretation contained a principal request; the subsidiary request concerned an expert survey to be ordered by the Court⁴⁵

In consequence, the Court had to deal with the possibility of joining different requests in one proceeding. Proceedings initiated by an application for revision are derivative from the principal case — analogically to proceedings concerning interpretation of a judgment. In both cases the Court's jurisdiction — if initial or alternative procedure of requesting an interpretation of a judgment is disregarded (*vide supra*)—is incidental; it ensues from jurisdiction in the principal case. States filing one of the requests invoke as its jurisdictional title the respective provisions of the Court's Statute (Article 60 or Article 61). In the case of a request for correction of an error the Court's jurisdiction has no grounds in any provision of the Statute or Rules of Court; the possibility of correcting a (formal) error results from the inherent jurisdiction exercised by the Court as a judicial body⁴⁶ In sum, what

⁴³ *Ibid.*, pp. 222—223.

⁴⁴ The Court rejected the demand of Tunisia contained in the request for interpretation (second sector) to recognize a given latitude as that of the most westerly point of the Gulf of Gabes. The Court admitted, however, that the co-ordinate specified in the reasons in point of law of the 1982 Judgment was not binding on the parties. It explained further that the point should be located in the indicated area, acknowledging that it was to be the most westerly point of the Gulf of Gabes (taking into account the low-water line and not the baseline from which the breadth of the territorial sea is measured) which had been chosen by the Court as an objective reference-point for reflecting the change in direction of Tunisia's coastline, *ibid.*, pp. 223—227. It should be emphasized that the Court's decision — just like that concerning the request for interpretation (first sector) — was unanimous. In his separate opinion Judge Oda expounded that while finding both requests for interpretation, in principle, inadmissible (being in fact disguised requests for revision of the 1982 Judgment) he agreed with the Court's appraisal of their contents, *ibid.*, pp. 230, 236 ff.

⁴⁵ The purpose of the survey was to ascertain the exact co-ordinates of the most westerly point of the Gulf of Gabes.

⁴⁶ *ICJ Reports 1985*. p. 198. See E. DECAUX, *op. cit.* pp. 341—342.

applications for revision, interpretation and correction of an error have in common is that they do not require — in principle — considerations of (potentially complex) jurisdictional matters. Applications for revision and interpretation are also connected in that in the first stage of the proceedings the Court should deal with their admissibility taking into account the conditions of admissibility as contemplated in the respective provisions of the Statute.

This is, however, where the similarity of both procedures ends. Pursuant to Article 61, paragraph 2 of the Statute the stage of examination of the admissibility of a request for revision of a judgment should be concluded by the delivery of a judgment of the Court; if the Court's decision in this matter is positive, another stage is opened — the stage of considering the merits of the request for revision. With respect to a request for interpretation the proceedings are not divided into two formal stages. Both the examination of the admissibility of a request and considerations on its merit⁴⁷ are included in one decision.⁴⁸

In the 1985 Judgment, however, the Court found it possible to join an application for revision (stage of admissibility of the request) with other requests requiring considerations on the merits. The Court ascertained that no provision in the Statute and Rules operates as a bar to such a procedure which in a given case had practical advantages⁴⁹

One of those advantages, it turned out, was the fact that the Court had put to a good use the context of examining the request for revision in order to raise a few issues significant for the merits of the request for interpretation (first sector). When investigating whether Tunisia's request fulfilled the requirements of Article 61 of the Statute the Court did not content itself with considering the first condition and a negative decision in this regard would be decisive of the inadmissibility of the request — but entered upon an analysis of the second one. The Court explained that

⁴⁷ The Court may accept or reject submissions of the Applicant and in the latter case — if the Court thinks it appropriate — it may give a proper interpretation of the judgment. It should be noted that as regards demands contained in a request for interpretation the principle *nec ultra petita* is not applicable. The limits of the dispute are not necessarily determined by demands of the parties; the Court adopts here a more flexible view, attempting to eliminate all controversies as to the meaning and scope of the judgment in the principal case. The PCIJ took the view (accepted by the ICJ in the 1985 Judgment) that it should not consider itself bound by the formulae chosen by the parties — so as to reply simply "yes" or "no" — but should be able to take an unhampered decision. PCIJ. Series A, No. 13, pp. 15—16. Sec Ch. de VISSCHER, *Problèmes d'interprétation judiciaire en droit international public*, Paris 1963, pp. 256—257.

⁴⁸ See Articles 98 and 99 of the Rules of Court.

⁴⁹ *ICJ Reports 1985*, pp. 197—198.

in the special circumstances of the present case” such a solution could be useful because the application for revision was accompanied by a request for interpretation⁵⁰ In consequence, the part of the Judgment dealing with the merits of the request for interpretation (first sector) contains a reference to the reasons in point of law of the part concerning the application for revision⁵¹

The request for interpretation was submitted subsidiarily, like the request for correction of an error. The two requests could not, however, be dealt with at the same time and the Court chose to consider them in accordance with Tunisia’s suggestion⁵² The Court eventually found that Tunisia’s request for rectification of an error was without object — again invoking considerations relating to the application for revision⁵³ The Court acted analogically in relation to the request for interpretation of the 1982 Judgment (first sector). Thus the rejection of both requests had a common ground; it was a natural consequence of the fact that the respective objects of the requests were similar and their purpose was in fact a correction of the delimitation line determined by the Court?¹ Libya’s argumentation in this regard was accurate?’

3. Proceedings in the Case of a Request for Interpretation

The proceedings are initiated by the submission to the Court of a request for interpretation of a judgment by one of the parties to the principal

⁵⁰ *Ibid.*, p. 207.

⁵¹ *Ibid.*, p. 230 (see also p. 220). This joint treatment of both requests was opposed to by Judge *ad hoc* Bastid who stated that the grounds of the Court’s dismissive findings regarding Tunisia’s request for interpretation should not be based on a link with the application for revision and in consequence the subsidiary interpretation could not be understood according to paragraphs 32—39 of the Judgment, *ibid.*, pp. 250, 252.

⁵² Application for Revision and Interpretation of the Judgment of 24 February, 1982, in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), pp. 20, 22, 23; CR 85/15 p. 34.

⁵³ *ICJ Reports 1985*, pp. 220—221, 230.

⁵⁴ Such a formulation of Tunisia’s demands had surely been influenced also by a recent arbitral settlement, namely the Arbitral Tribunal’s decision in the dispute between the United Kingdom and France concerning the delimitation of the continental shelf (interpretation). As a result of the UK request the Tribunal corrected a technical error thus changing the operative part of its judgment and making it consistent with the reasons in point of law (which corresponded to the Tribunal’s intention). The Court took care in underlining that it was making the correction in virtue of its original jurisdiction, *Reports of International Arbitral Awards*, vol. 18, pp. 299—300. See E. ZOLLER, *op. cit.*, pp. 344—345.

⁵⁵ See the reasoning of Prof. Bowett, CR 85/17, pp. 69—72.

case. The parties may, however, request an interpretation of a judgment by means of a special agreement which they notify to the Court⁵⁶ The Statute of the ICJ does not provide for any time-limit for such an initiative.⁵⁷

A request for interpretation of a judgment opens contentious proceedings. This results from the fact the the request is admissible upon the conditions that a dispute exists, moreover, the Rules of Court do not contemplate any special regime for "derivative" proceedings as it is. the provisions of Part III of the Rules of Court concerning contentious proceedings apply to proceedings in the case of a request for interpretation of a judgment.

Under the provisions of the Rules of Court an application for interpretation (or special agreement concluded for this purpose) should indicate the precise point or points in dispute as to the meaning or scope of the judgment. The request is transmitted to the other party which is also entitled — within a time-limit fixed by the Court to file written observations. Since in the case of a request for interpretation no preliminary objections (within the meaning of Article 79 of the Rules of Court) may be raised, the proceedings are one-stage only, although the Court may deal with both the admissibility of the request and its substance.

The parties should appoint their agents⁵⁸ They can also have the assistance of a team of counsels and advocates. The practical usefulness of such a step results from the fact that the Court may — if it considers it necessary — provide possibilities for the parties of further explanations: written or oral. In 1985 the Court provided the latter possibility for both Tunisia and Libya.⁵⁹

The Rules of Court contemplate that if a judgment (in the principal case) was delivered by the Court, it is the Court that will consider the

⁵⁶ See Article 98, paragraph 2 of the Rules of Court.

⁵⁷ Differently in the case of an application for revision of a judgment — Article 61, paragraphs 4 and 5 of the Statute. States submitting a dispute to an arbitral tribunal usually fix a time-limit within which a request for interpretation may be made. L. CAVARÉ, *op. cit.*, p. 498.

⁵⁸ In the case of interpretation of the judgment in the Asylum case the parties did not appoint their agents because the request for interpretation was filed on the day of the delivery of the judgment in the principal case. In consequence, in the interpretation proceedings (which lasted, in sum, 7 days), the parties were represented by the same persons who had been acting as agents in the principal case.

⁵⁹ The PCIJ acted analogously in the proceedings concerning the interpretation of Judgments Nos. 7 and 8. The two remaining cases (Interpretation of Judgment No. 3 and Interpretation of the Judgment in the Asylum Case) lacked oral proceedings.

request for interpretation. If, however, the judgment was passed by a Chamber, its interpretation should be made by the same Chamber.⁶⁰

In the latter case a difficulty may arise if the judgment in the principal case has been delivered by an *hoc* Chamber.⁶¹ The parties to the proceedings concerning interpretation of a judgment have the right to appoint a judge *ad hoc*.⁶²

The Court's decision concerning a request for interpretation of a judgment is in the form of a judgment. It has a declaratory character, for it is limited to a clarification of what the Court has previously determined with a binding force. This follows from the general legal principle of *res iudicata*.⁶³ In consequence, a judgment on interpretation can only explain a matter which has been previously brought before the Court by means of a special agreement or in the final submissions of the parties.⁶⁴

In the recent years the list of the ICJ has been considerably enriched. Although it cannot be maintained that a fundamental change in States' attitudes towards its jurisdiction has occurred, there is a notable tendency to take initiatives establishing precedents (intervention under Article 62 of the Statute, revision, correction of an error in a judgment; referring disputes to *ad hoc* chambers) or to have recourse to measures not employed for a long time (intervention under Article 63, interpretation). All these constitute significant events in the development of the Court's jurisprudence.

⁶⁰ Cf. judgments in the principal case and concerning interpretation delivered by the Chamber of Summary Procedure (Interpretation of Judgment No. 3) of the PCIJ in 1924 and 1925.

⁶¹ This difficulty was noticed by S. ROSENNE. *Procedure in the International Court. A Commentary on the 1978 Rules of the International Court of Justice*. The Hague-Boston-London 1983. p. 207.

⁶² In the Asylum Case (interpretation) Colombia and Peru appointed the same judges as in the principal case. This model would have probably been upheld in the proceedings concerning the interpretation of the 1982 Judgment had not the judge *ad hoc* appointed by Tunisia in the principal case become a Judge of the Court in the meantime. Libya appointed the same judge. *ICJ Reports 1950*. pp. 269. 399: 1982 p. 24: 1985 p. 194.

⁶³ The Arbitral Tribunal stated in the case concerning the delimitation of the continental shelf, interpretation (United Kingdom/France : "Interpretation is a process that is merely auxiliary, and may serve to explain, but may not change what the Court has already settled with binding force as *res iudicata*". *Reports of International Arbitral Awards*, vol. 18, pp. 295—296 and 318.

⁶⁴ S. ROSENNE. *The Law and Procedure*, vol. 1. p. 429; also see: M. SCERNI. "La procédure de la Cour permanente de Justice internationale". *Recueil des cours de l'Académie de Droit International*, vol. 65. 1938-111. p. 678.

The judgment concerning the application submitted by Tunisia is also of vital importance for this development. The part dealing with demands relating to interpretation of the judgment in the principal case, contains important considerations of the problem of jurisdiction. When appraising the admissibility of Tunisia's request the Court had recourse to the PCIJ'S conclusions (Interpretation of Judgments Nos. 7 and 8) and the Judgment concerning the interpretation of the Asylum case Judgment, in this way laying stress on the consistency and predictability of its jurisprudence. The arguments presented by the Parties, both in writing and in the course of hearings, were broad as never before. It does not seem, however, that a request for interpretation is to become a routine motion of States bringing their disputes before the Court. It appears that difficulties in implementing the Court's judgments are due to the Court's tasks being determined (in a special agreement or the final submissions) with lack of precision — they are formulated in a too abstract manner in relation to the factual dispute between the parties (Asylum case) or with a certain margin of incertitude as to the obligations of the parties resulting from a decision of the Court (Tunisia/Libya case).

Freedom of Navigation in International Straits

by JANUSZ SYMONIDES

1. The Concept and Types of Straits Used for International Navigation

1.1 The Concept of an International Strait

In international law there exist various definitions of straits. With a certain simplification they can be reduced to two basic types. And so, definitions can be distinguished either referring only to geographical elements or taking also account of the functional factor.

The first type of definition of a strait is presented in Polish literature by C. Berezowski and W. Góralczyk who hold that "a marine strait is a natural connection of two areas of open waters".¹ Respect to the functional element is, in turn, paid by A. Klafkowski who defines straits as follows: "marine straits are natural water ways of an international importance, connecting seas and oceans".²

International law does not deal with all straits within the geographical meaning of the word but only those which can be regarded as international, that is, those used for international navigation. A correct definition should take into account both the geographical and the functional element. In the Corfu Channel case the International Court of Justice held that the decisive criterion for recognizing a strait as an international maritime way is its geographical situation, that is, it must connect two parts of the high seas, and the fact that it is used for international navigation.³

¹ C. BEREZOWSKI, *Prawo międzynarodowe publiczne [Public International Law]*, Par I, Warszawa 1966, p. 229. This is repeated by W. GÓRALCZYK, *Prawo międzynarodowe publiczne w zarysie [An Outline of Public International Law]*, Warszawa 1977, p. 217. A similar definition of marine straits was adopted by Z. SARNA, *Międzynarodowe publiczne prawo morskie w czasie pokoju [International Law of the Sea in Times of Peace]*, Kraków 1932, p. 172.

² A. KLAFKOWSKI, *Prawo międzynarodowe publiczne [Public International Law]*, Warszawa 1966, p. 149.

³ *International Court of Justice, Reports 1949*, p. 26 ff.

Within the World Ocean there exists a large — even difficult to specify — number of geographic straits. They differ in topography as well as breadth. Some separate continents, e.g. the Strait of Gibraltar, others stretch between continents and islands, e.g. La Manche, still others separate islands, e.g. the Great Belt. Some connect high seas and oceans, others make possible access to waters of gulfs. Depending on their geographic situation, oceanic, archipelagic and arctic straits can be distinguished. However, such distinction and classification is of no greater significance. For, only two geographical elements matter for the construction of a definition of an international strait: 1) it must be a natural water way, 2) connecting two areas of the high seas (exclusive economic zones) or their parts.

The first element allows to distinguish straits from channels and is a specific justification for the freedom of passage through inlets connecting two water areas on which freedom of navigation holds. In practice a question may arise whether work carried out by the coastal State with the object of deepening, widening or removing obstacles from sealanes, can be interpreted as changing the character of the waterway from a natural to an artificial one. The issue is not only theoretical.

If the waterway is not natural then, in consequence, it can be treated as a channel which would result in the right of the coastal State to determine its legal status/ A cogent solution of this issue is based on the rule that if a strait had been used for international navigation before the works were carried out, then any works improving or maintaining its usefulness for navigation do not change its natural character.⁵

Traditionally it has been underlined in literature and jurisprudence that an important geographical element, necessary for recognizing a strait as international is the fact that it connects two seas or parts of the high seas. This criterion was widened by Article 16, paragraph 4 of the Geneva Convention on Territorial Sea and the Contiguous Zone.

At the Geneva Conference in 1958 Portugal and Great Britain suggested extending the proposal of the International Law Commission and covering in Article 16 by the right of free passage not only straits connecting high seas but also other waterways — straits leading to territorial waters

⁴ There also arises the problem of charges for passage. In the case of straits passing ships pay only for specific services rendered to them while when passing through a channel they pay charges connected with its maintenance for navigation.

⁵ Similarly M. L. LOPATIN, *Meidunarodnye proliivy i kanaly: pravovye aspekty*, Moskva 1985, p. 16.

of another State.⁶ The proposal was accepted and the final version of Article 16, paragraph 4 reads as follows:

“There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State”.

An indispensable requirement for a strait to be classified as international is its use for international navigation. This criterion is not too precise and can be variously comprehended, all the more since sometimes there are attempts to distinguish straits important for the whole international community which connect two parts of the high seas — international ones, from regional straits connecting high seas and enclosed or semienclosed seas, leading to internal waters of the State bordering the strait.⁷ This division can be contested and Bruel is right in dividing straits into only two categories: straits of international importance and those lacking it.⁸ The first category doubtlessly embraces straits of regional importance.

Does there exist any generally recognized standard or criterion which makes it possible to determine that a strait is used for international navigation? The only criteria to be applied here are whether the straits in question lie on the way of or constitute a part of an international sea route. There is, however, neither a criterion of tonnage nor one of the minimum number of ships which must pass through a strait, which *ipso facto* would eliminate all doubts in this regard. The difference in the degree of exploitation of various straits is considerable. It suffices to mention that in the mid-1970s nearly 400 thousand ships passed through the Strait of La Manche, over 150 thousand went through the Strait of Gibraltar and over 20 thousand — through the Black Sea straits.

Considering this issue the International Law Commission suggested the adoption of an additional qualification — straits used “regularly” for international navigation.⁹ The proposal was rejected at the First Geneva Conference in 1958 as too narrow. In the above-mentioned judgment the International Court of Justice rejected the proposal to recognize as used for international navigation only straits through which passage is necessary

⁶ The proposal was provoked by the special situation of the Strait of Tiran which forms a narrow passage between the Red Sea and the Gulf of Akaba. The waters of the strait constitute the territorial sea of Egypt and Saudi Arabia. In 1948 Israel violated the truce with Egypt and gained a belt of 6 kilometers along the Gulf of Akaba. This entailed a problem of passage through the strait and access to a port established by Israel.

⁷ P. BARABOLLA, “Vaznejše meždunarodnye prolivy”, in: *Sovremennoe meždunarodnoe morskoe pravo*, Moskva 1974, p. 197.

⁸ E. BRUEL, *International Straits*, vol. 1, London 1947, *passim*.

⁹ Cf. *Yearbook of International Law Commission*, vol. 2, 1956, p. 273.

due to a lack of an alternative route. In the Court's words, it is sufficient for a strait to be useful for international navigation. In the case of straits situated away from sea routes and sporadically used for navigation this requirement is not satisfied. In literature straits situated along the North Maritime Route of the Soviet Union and Canada do not fall within the category of those having an international character.¹⁰

Finally, for attributing an international character to a strait a juridical element, that is, the legal character of the waters forming the strait is of crucial importance. If the strait is situated within internal waters it is subject to the sovereign rights of the coastal State which regulates matters concerning transit.

If both coasts of a strait are those of one State only and it connects the high seas with a land-locked sea surrounded by the territory of this State (e.g. the frequently cited example of the Strait of Kerch connecting the Sea of Azov with the Black Sea), then the waters forming the strait are internal waters, subject to full sovereignty of that State. If a strait connects two areas open for international navigation, there is a possibility of an alternative regime depending on its width. If it is so narrow that transit is possible only through the territorial sea of the coastal State — it is a territorial strait. Its status is irrespective of the fact that there are one more States bordering on it. However, when the width of the strait exceeds the double width of the territorial sea then the part of the waters over which sovereignty cannot be claimed by any of the coastal States, constitutes the high seas. From the point of view of international law such a situation does not result in any particular problems and any doubts can be resolved by invoking the rule of freedom of navigation binding in those straits.

It is necessary to specify the legal regime only in relation to territorial straits. That is so because the legal situation of the waters forming those straits does not fully correspond to the legal status of the territorial sea. Differences concern in particular the possibility of suspending innocent passage and passage of warships.

1.2. Types of Straits According to Their Legal Regime in the Montego Bay Convention

While customary and conventional law prior to the Third Conference provided two legal solutions of the status of straits used for international navigation: a specific regime for the Baltic and Black Sea straits and the

¹⁰ L. M. ALEXANDER, "Uncertainties in the Aftermath of UNCLOS III: The Case for Navigational Freedoms", *Ocean Development and International Law*, vol. 18, No. 3, pp. 337—338.

Magellan Strait due to international agreements concerning those straits, and the non-suspendable right of innocent passage for both merchant vessels and warships through the remaining international territorial straits, the Montego Bay Convention brought about a significant change by introducing a new institution — the right of transit passage through straits used for international navigation.

Anticipating further considerations it can be noted that provisions on the right of transit passage concern the majority of straits used for international navigation connecting two parts of high seas where there is unlimited freedom of navigation. In straits connecting the high seas or an exclusive economic zone with the territorial sea, the right of innocent passage holds. The same applies to straits which have been formed by an island. In that case provisions on transit passage do not apply to a strait situated between an island and the mainland if there exists a route seaward of the island of similar convenience with respect to navigational and hydrographical characteristics. Finally, provisions on transit passage do not apply to straits the legal regime of which has been regulated by long-standing international agreements.

From hitherto practice and the provisions of the Convention it follows that there are three different co-existing legal situations with respect to straits used for international navigation which are formed by waters of the territorial sea:

- 1) the right of transit passage with respect to straits used for international navigation connecting two parts of the high seas or economic zones;
- 2) the right of innocent passage through straits connecting the high seas or economic zone with the territorial sea and straits between an island and the mainland if there exists a route of similar convenience at their "external" side;
- 3) specific legal status arising from international agreements — concerns three straits.

Two legal solutions in relation to straits other than territorial may be added:

- 4) total freedom of navigation in straits wider than 24 nautical miles (in the part constituting high seas or exclusive zone);
- 5) freedom of regulation of transit by the coastal State in relation to local straits situated in internal waters.

Thus, we have five possible parallel legal solutions.

It should be expounded that in the case of straits which have a belt of the high seas or an exclusive economic zone but due to navigational conditions it is impossible to pass through them without passing through the territorial waters, depending on the concrete situation (1 or 2), passage through such straits can be either transit passage or innocent passage.

Freedom of navigation in straits formed by high seas water or those of an exclusive economic zone does not release passing vessels and ships from taking account of, on the one hand, the navigational interest of other users and, on the other hand, the rights of coastal States in their economic zones. Thus, there is no room for doubt that warships should retain from any exercise. fishing vessels — from fishing activities and research ships — from carrying out of research Coastal States, in turn, must have in mind navigational interests when creating artificial islands or carrying out economic activities in their waters.

13. Straits of Special Legal Régime

The Montego Bay Convention does not change the legal status of straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits (Art. 35). This requirement is obviously fulfilled in agreements regulating the legal status of the Baltic and Black Sea straits as well as the Magellan Strait.

It happens that Gibraltar is unjustly mentioned among straits the legal status of which has been determined conventionally.¹¹ Article 7 of the agreement concluded in 1904 by France and Great Britain and the Convention of 1912 signed by France and Spain contain identical provisions stipulating that in order to secure free transit through the Strait of Gibraltar both governments, parties to the agreement, agree to prevent the erection of any fortifications in the Moroccan part of the coast.¹² These provisions prove, however, that the contracting parties had no intention to determine the legal status of Gibraltar and accepted obligations as to the prevention of its fortification only with the view of ensuring the long-standing and customary recognized freedom of navigation. As such these agreements can hardly be referred to as “specifically relating” to the Strait of Gibraltar.

The wording “straits of special legal régime” appears to suggest a fundamental difference in their status as compared to that of other international straits. In substance, they do not differ essentially as far as freedom of passage of merchant vessels is concerned. Pursuant to the provisions of the Convention they enjoy non-suspendable freedom of passage which can be qualified as a right of transit. The passage of ships in those straits

¹¹ D. COLOMBOS, *The International Law of the Sea*, Russian translation, Moskva 1975, pp. 204—205.

¹² See M. L. LOPATIN, *op. cit.* 101.

differs slightly: it is free in the Strait of Magellan, limited to some extent in the Black Sea Straits and has not been conventionally regulated with respect to the Baltic straits.

2. The Concept of Transit Passage through Straits Used for International Navigation

2.1. Adoption of the "Right of Transit Passage" at the Third Conference

The problem of ensuring freedom of navigation through straits used for international navigation became an issue of special importance already before the Third Conference on the Law of the Sea in connection with the apparent trend to extend the breadth of the territorial sea and the perspective of reaching agreement on the adoption of 12 nautical miles as its maximal acceptable limit. This meant a change in the legal situation of many straits of great importance for international navigation, to mention only the Strait of Gibraltar, Strait of Dover, Bering Strait, Bab-el-Mandeb, Malacca and many others. It suffices to point out that while in 1960 only 28 straits used for international navigation were fully encompassed by territorial waters and the rest allowed transit in conformity with the rule of freedom of navigation, like on the high seas, as a result of the adoption of the 12 miles width the number of territorial straits would increase to 116.¹³

Thus the international community was faced with the crucial question as to which legal solution should be accepted, whether to apply to these straits the regime of innocent passage binding on the territorial seas or to attempt to work out a new solution which would guarantee freedom of navigation and overflight in straits. The latter standpoint was more justified as the law of the sea lacked in essence conventional norms regulating passage through straits used for international navigation and the sole instruction in this matter was found in the above-mentioned Article 16, paragraph 4 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone which prohibited the suspension of innocent passage in straits used for international navigation.

Straits used for international navigation have an enormous economic and strategic importance. Without ensuring in those straits the freedom of navigation and overflight, the freedom of navigation and overflight

¹³ The number of straits which can be encompassed by waters of a 12 mile territorial sea varies according to different authors from 100 to 120. As the number of 116 such straits is the most frequent it will be accepted in this paper.

on the high seas and economic zones would lose its significance. Any disturbances in passage of ships and the possibility of making arbitrary decisions as to its character and impeding it by strait States would have negative or even catastrophic consequences for trade and international safety. What more, the increase in trade and international exchange of goods and passenger traffic, in inter-dependence between States leads in a natural way to a greater significance of freedom of passage and overflight in straits. They have become a kind of junctions in the world system of communication by sea and by air.

Dangers connected with the possibility of limiting freedom of navigation through straits by strait States were not only illusory. They found an expression in 1971 in the approach of Indonesia and Malaysia towards legal issues concerned with the Malacca Strait which in these States' view lacked an international character. This — according to those States — entitled the coastal States to a complete freedom of regulation of matters connected with the protection of the strait against pollution. These States rejected the 1971-IMO proposal of a system of demarcation of traffic in the strait, moreover, they were considering an introduction of fees for passage.

Both at the Conference and in the preceding work of the Sea-Bed Committee two principal standpoints were presented. One was aimed at limiting hitherto freedom of navigation through straits by extending to them the regime of the territorial sea while the other strove for up-holding the existing freedom of passage with, however, a number of modifications taking account of interests of States bordering on straits. The first position was supported by strait and archipelagic States and some developing States while the latter was defended by the Great Powers (with the exception of People's Republic of China), socialist States and most of the developed Western States.

The concept of joint treatment of passage through the territorial sea and straits used for international navigation was presented at Committee II by Fiji¹⁴ and Yemen, Malaysia, Morocco and Oman.¹⁵ Earlier, a document was forwarded by Cyprus, Greece, Indonesia, Morocco, Philippines, Spain and Yemen which provided that navigation through the territorial sea and international straits should be dealt with as a single regime since the straits form part of territorial seas.¹⁶

A single regime for navigation through territorial seas and straits must logically have resulted in basing passage through straits on the rule of

¹⁴ Doc. A/CONF. 62/C. 2/L. 19. Draft articles relating to passage through the territorial sea.

¹⁵ Doc. A/CONF. 62/C. 2/L. 16. Draft articles on navigation through the territorial sea, including straits used for international navigation.

¹⁶ Doc. A/AC. 138/SC. II/L. 18.

“innocent passage”. As, however, the concept of “innocent passage” in relation to passage in territorial seas was not detailed enough, the draft proposals introduced provisions transgressing customary law and the relevant provisions of the First Geneva Convention of 1958.

The suggestion to base the status of the straits on a modified concept of innocent passage could not be accepted by marine States for the reason, above all, that its adoption would limit the freedom of passage through straits in force at the beginning of the Third Conference. A uniform regime for passage through territorial seas and straits is based upon the controversial assumption that the relation of interests of the coastal State and the international community is the same in both cases. In reality, that is not so. While use of the territorial sea by third States is incidental, with regard to straits other States are often forced to use them; thus, the interest in maintaining freedom of navigation is of an objective character.

The right of transit passage was presented in the Sea-Bed Committee in documents forwarded by the United States¹⁷ and the Soviet Union.¹⁸ At the Caracas Session more detailed proposals were presented by some socialist States¹⁹ and Great Britain.²⁰

According to the American proposal, which was the most-reaching, not only in straits used for international navigation between two parts of the high seas but also between the high seas and the territorial sea, all ships and aircraft should be entitled to the same freedom of navigation and overflight for the purpose of transit as on the high seas. In their oral statements American delegates underlined that preserving the freedom of navigation in straits used for international navigation is a *sine qua non* condition for the acceptance of a 12-mile territorial sea by the United States.

Suggestions made by socialist States and the United Kingdom were more conciliatory.

The socialist States proposed that transit passage would be the rule binding in straits used for international navigation between two parts of the high seas. For straits used for international navigation connecting the high seas with the territorial sea of one or more States, the rule of innocent passage of all ships would be applied; the passage would be non-suspendable.

¹⁷ Draft articles on breadth of the territorial sea, straits and fisheries. A/AC. 138/SC. II/L. 4. The proposal was presented on 30 July 1971.

¹⁸ Draft articles on straits used for international navigation. A/AC. 138/SC. II/1./7. Document present on 25 July, 1972.

¹⁹ CONF. 62/C. 2/L. 11.

²⁰ CONF. 62/C. 2/L. 3.

Another criterion of distinction was put forward in the British proposal, according to which transit passage would be effective in straits if there were no routes of similar convenience through the high seas or in the case of a strait formed by an island belonging to the coastal State, if there is no route of similar convenience seaward of the island. If there are no alternative convenient routes through the high seas, the straits will be governed by the innocent passage rule. Both proposals (the British only with regard to the part concerning islands) were finally accepted.

While the right of transit passage through straits used for international navigation was the subject of fierce negotiations at the first sessions of the Conference, beginning from the Fourth Session in 1976 the negotiation text was introduced to consecutive drafts without significant changes and was finally included in the Convention.²¹

Transit passage was defined in Article 38, paragraph 2 which expounds that it

“means the exercise [...] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”.

All ships and aircraft are entitled to transit passage which cannot be impeded. The Convention defines the duties of ships and aircraft during transit passage and specifies the rights and duties of States bordering on straits. To fully comprehend the substance of the right of transit passage it is necessary to compare it with the right of innocent passage.

2.2. Differences between the Right of Transit Passage and the Right of Innocent Passage

A comparison of respective provisions of the 1982 Convention allows to ascertain significant differences between transit passage and innocent passage. A specification of those differences should be commenced by noting that while innocent passage embraces three directions of navigation: simple passage — traversing the territorial sea without calling at a roadstead or port facility of the coastal State and passage through the territorial sea connected with proceeding to or from internal waters and port facility of the coastal State, transit passage covers only straight traversing of the

²¹ In reaching final agreement a significant role was played by a special consultative group composed of nineteen States co-chaired by Great Britain and Fiji. While at its fifth session Committee II recognized the issue of straits as one of four priority matters and established a special group in order to discuss the problem, already at the sixth session the right of transit passage in straits used for international navigation was declared as agreed upon despite some objections raised by Spain and Greece at the eleventh session.

strait (territorial sea) between one part of the high seas or an exclusive economic zone or another part of the high seas or an exclusive economic zone.²² Ships and aircraft can proceed to port facilities of the State bordering the strait but in that case the determination of the conditions of entry rests upon the coastal State. The next difference resolves itself into the way in which innocent passage and transit passage is defined. While the former is presented from a rather negative side by Article 19 which stipulates that passage remains innocent as long as it is not prejudicial to the peace, good order or security of the coastal State and lists twelve kinds of activities which deprive it of its "innocent" character, in the second case the definition is "positive": it points out that transit passage means exercising in accordance with Part III of the Convention of freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. There is no mention as to when the passage would lose its "transit" character.

The fundamental difference between the two institutions follows logically from the difference in the way of defining each of them. In the case of passage through the territorial sea which is not innocent the coastal State may impede such passage whereas no such possibility exists in respect of transit. Similarly, as regards innocent passage, pursuant to Article 24 a State may hamper it under the condition that it does it in accordance with the Convention, while in the case of transit such action is completely excluded.

In both cases coastal States may designate sea lanes and prescribe traffic separation schemes. However, while in the territorial sea the State may designate them taking into account recommendations of competent international organizations,²³ in the case of transit of straits the role of organizations is greater since such corridors and separation schemes may be adopted by the State bordering on the strait under the condition that they are accepted by the international organization.

In respect of legislation the competence of the concerned States also varies. Article 21 lists eight directions of regulation with regard to innocent passage; there are only four in the case of transit and, moreover, the freedom of action of such States is limited. Nor does Part III mention the possibility of civil and penal jurisdiction with regard to transit passage.

²² In connection with the general practice of establishing economic zones by coastal States situations when the territorial sea passes to the high seas are exceptional. This, however, is of no greater significance as from the point of view of freedom of navigation the legal status of an economic zone is identical to that of the high seas.

²³ Other factors which should be taken into account are: channels customarily used for international navigation, special characteristics of ships and channels, and intensity of traffic.

The difference between innocent passage and transit passage finds another expression in the respective treatment of ships with special characteristics and submarines. The Convention provides that tankers, nuclear powered ships and ships carrying nuclear or other dangerous or noxious substances may be required to use designated sea lanes and traffic separation schemes while provisions on transit of straits are silent on this matter; as such it can be assumed that there is no such possibility.²⁴

Pursuant to the Geneva Convention on Territorial Sea and the Contiguous Zone as well as Article 20 of the Montego Bay Convention submarines are required to navigate on the surface and to show their flag. This issue brought about fierce discussion at the Third Conference. The demand of strait States to extend this rule to transit passage was objected to by marine States, especially by the United States.²⁵

Among arguments for submerged passage (which may be discussed) was the fact this is the natural way of navigation of submarines during which they are better controllable and quicker. A submarine navigating on the surface can, sometimes, cause greater threats and its passage is slower. Moreover, in straits which were to become territorial due to the extension of the breadth of the territorial sea to 12 miles, submarines had navigated submerged and had fully mastered this way of navigating. It was also pointed out that transit through straits does not exclude but, on the contrary, assumes freedom of navigation also under water. Finally, it was indicated that submarines should refrain from threat or use of force independently of their situation. Eventually, Part III of the Convention concerning straits used for international navigation does not provide for the requirement that submarines navigate on the surface which should be interpreted *a contrario* — that they have the right of submerged passage through the strait.

At the initial stage of the discussion at the Third Conference it was contested that the future Convention on the Law of the Sea should regulate overflight in straits. The advocates of this standpoint drew attention to the inability of defining the legal status of the marine area without referring to the legal position of the air space above it. Such a solution could have occurred only on the assumption that States renounce their sovereignty in the area over their territorial sea. Matters connected with overflight had been regulated at the Geneva Conference on the Law of the Sea in 1958.

²⁴ Similarly, there is no requirement that nuclear powered ships and ships carrying nuclear or other dangerous or noxious substances have documents and take special safety precautions provided for such ships by international agreements.

²⁵ The United States underlined that this matter was of considerable significance for them and in the case of no agreement being reached they would reserve for themselves the right of bilateral negotiations with strait States.

Extending the territorial sea up to 12 nautical miles raised a crucial problem, namely — whether freedom of overflight hitherto enjoyed by civil and military aircraft in straits enclosed within the widened territorial sea, would cease to exist or would be maintained and to what degree. A general reference to the Chicago Convention of 1944 did not guarantee the right of overflight since the Convention does not concern State aircraft and it allows the limitation or even suspension of overflight of private aircraft over the territorial sea. Agreement was finally reached on the question that overflight constitutes an integral part of free transit of straits and has to be expressly confirmed in the Convention.

States bordering on straits strove for securing a right to enact laws and regulations concerning safety of air navigation.²⁶ It can be interjected that the proposal of eastern European States foresaw for States the right to determine air traffic corridors, the altitude of the flight and the communication frequency with aircraft. These matters were eventually passed on to ICAO and an international authority in respect of control of air traffic.

Recognition of the right of overflight of civil and military aircraft over straits used for international navigation is a fundamental difference between transit passage and innocent passage. The latter does not provide for such a possibility and overflight depends, in consequence, exclusively on the approach of the coastal State. As such, as W. Riphagen rightly holds, the regime of transit passage is closer to freedom of navigation on the high seas than is innocent passage through the territorial sea,²⁷

Poland's standpoint, supporting freedom of navigation through straits, is determined by her national interest. Our country borders on semienclosed sea with the only way out (notwithstanding the Kiel Channel limited to passage of ships up to a determined tonnage) through the Baltic straits. Our traditional trade routes lead to the Mediterranean and Far East which makes necessary passage through other straits. Thus we have a profound interest in ensuring freedom of transit for all our ships and vessels. We also must have the possibility of individual and collective self-defence — as the United Nations Charter, provides which is connected with the right of free passage of warships through straits. As such, our concern for a proper regulation of the status of marine straits is fully comprehensible.

At the Third Conference the Polish delegation, co-author of the draft proposal presented by six socialist States, pronounced for freedom of transit

²⁶ As late as at the eleventh session a proposal supporting this viewpoint was presented. Doc. A/CONF. 62/L. 123.

²⁷ W. RIPHAGEN, *La navigation dans le nouveau droit de la mer*, RGDIP, 1980, p. 167.

of an over straits, and pointed out that basing the status of straits on the unprecise and subjectively appraised concept of “innocent passage” could lead to discrimination of certain States and limitation of freedom of passage of their ships.²⁸

3. Rights and Duties of States Bordering on Straits Used for International Navigation

Article 34 of the Convention expounds that the regime of transit of straits used for international navigation does not affect the exercise by the States bordering on the straits of their sovereignty or jurisdiction over their territorial sea — waters, air space, bed and subsoil. The territorial sea does not cease to be part of the territory of a State which is free to regulate matters connected with the exploitation of natural and mineral resources. However, the sovereignty or jurisdiction must conform to the provisions of Part III of the Convention and other rules of international law which means that in practice the legal status of a territorial sea constituting a strait used for international navigation differs considerably from the status of other waters forming the territorial sea.

3.1. Rights

Pursuant to Article 41 States bordering on straits have the right to designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.²⁹ Such States may, when circumstances require, substitute other sea lanes or traffic separation schemes for those previously designated or prescribed. Such sea lanes and traffic separation schemes should conform to generally accepted international regulations. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, relevant proposals should be referred to the competent international organization (in this case IMO). The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with State bordering on the strait.

²⁸ Cf. the statement of the Polish delegate, J. SYMONIDES, Doc. A/CONF. 62/C 2/SR. 13.

²⁹ In 1965 IMO adopted for the first time a resolution calling upon all governments to recommend to their ships that they observe the traffic separation scheme determined for the Strait of Dover. The solution initiated analogous solutions in other straits. W. RYMARZ, *Międzynarodowe prawo drogi morskiej [International Law of Maritime Routes]*, Gdańsk 1985, p. 199 ff.

In other words, the organization does not have the right to impose its own solutions, not agreed upon with the States concerned. In the case of straits on which more than one State is bordering, the States concerned shall cooperate in formulating proposals of sea lanes and traffic separation schemes in consultation with the competent international organization. A traffic separation scheme was introduced in consultation with IMO in the Strait of Dover and the Singapore and Malacca Straits.

According to Article 42 States bordering on straits may adopt laws and regulations in respect of:

- a) the safety of navigation and the regulation of maritime traffic;
- b) the prevention, reduction and control of pollution;
- c) the prevention of fishing, including the stowage of fishing gear;
- d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering on straits.

Provisions concerning the adoption of laws and regulations, apart from the above limitations to four spheres only, also contain additional restrictions of the freedom of action of strait States. And so, regulations in respect of the safety of navigation may deal only with sea lanes and traffic separation schemes, as provided by Article 41. This eliminates the danger that in practice strait States would, by detailed regulations of the safety of navigation and maritime traffic, substantially limit the right of transit passage.

With regard to the prevention of pollution, States bordering on straits shall *give effect to applicable international regulations* regarding the discharge of oil, oily wastes³⁰ and other noxious substances. Thus they do not have liberty of action in this sphere; from this provision it follows only that they may give effect to agreements irrespective of them being parties to those agreements or not.

The protection of fishing has been treated wider which has no direct effect on the right of transit passage. Finally, the possibility to adopt laws and regulations in respect of the loading or unloading of any commodity, currency or person is not too far-reaching since States, according to the 1982 Convention, have the right of determining a zone contiguous to the territorial sea for the purpose of protection of their customs, fiscal, immigration and sanitary interests.

The list is exhaustive and as such other matters connected with transit passage may not be subject to legislative regulation.

³⁰ Spain undertook efforts to widen the scope of this provision by eliminating the term "oily" in respect of wastes. Eventually the proposal was not put to the vote. Press Release SEA/154, p. 38.

Moreover, a State bordering on a strait may not take measures in order to secure execution of its laws and regulations. It does not have a possibility of controlling or arresting of ships. The only exception, provided by Article 236, is action taken in relation to a ship (but not a vessel or ship entitled to immunity) which has violated laws and regulations causing or threatening to cause serious damage to the marine environment of the strait. When taking these preventive measures, appropriate guarantees following from Articles 223—232 should be observed.

3.2. Duties

Application by States bordering on straits of laws and regulations concerning transit passage must not result in *denying, hampering or infringing* the right of transit passage nor in formal or factual discrimination of foreign ships.

Strait States shall not impede transit passage. Poland contributed to the discussion on this subject by drawing attention to the duty of coastal States to refrain from placing structures of any kind which could hamper or obstruct the passage of ships through such straits. A proposal to formulate such a duty was presented by Poland already in the Preparatory Committee on 8 August, 1973,³¹ and later introduced into the joint draft of socialist States. It was reflected in drafts of other States and in discussion. The intention of the proposal was not to deprive the coastal States of their sovereign right to fish, explore or exploit the natural resources but only to stress that coastal States should take account of the interest of the international community — the interest of international navigation. The right of transit passage would remain only theoretical if coastal States had an unlimited power of hauling cables, pipe-lines or building bridges or artificial islands which would considerably hamper the possibility of using a strait.³²

States bordering on straits are also obliged to give due publicity to

³¹ Doc. A/AC. 138/SC. II/L. 49.

³² This matter is of practical importance for the Baltic States. The bridge over the Little Belt renders impossible the passage of ships higher than 33 meters. In this situation the only strait through which larger ships can pass (including super-tankers) is the Great Belt. However, since 1934 proposals have been put forward to construct a bridge over this strait. Referring to the wording in the proposal of socialist States the representative of Denmark expounded that considering the insular character of the country where the main island is separated from other parts of the country and neighbouring Sweden by narrow straits, the construction of tunnels and bridges is of essential social and economic importance for Denmark and that an appropriate decision had been arrived at by the Danish parliament. However, the plans take full account of the postulate not to hamper the passage of ships in transit.

laws and regulations adopted by them as well as to any danger to navigation or overflight of which they have knowledge. All sea lanes and traffic separation schemes should be clearly indicated on charts to which due publicity should also be given.

States bordering on a strait and other States should cooperate on the basis of an agreement in the establishment and maintenance in a strait of necessary navigational and safety aids or for the prevention, reduction and control of pollution from ships.

At the end of the Third Conference, in April 1982, States bordering on the Strait of Malacca, that is — Malaysia, Indonesia and Singapore, reached an agreement with its main users — Great Britain, France, Japan, USA and USSR, according to which in order to secure the safety of navigation and the maintenance of the marine environment, it is essential to give a binding legal force to recommendations of IMO.³³ Action taken by these strait States with the view of ensuring the compliance with the rules in question shall not be treated as denial, hampering or infringement of the right of transit passage.

4. Duties of Ships and Aircraft During Transit Passage

While exercising the right of transit passage ships and aircraft are obliged to proceed without delay. The requirement of continuous and expeditious transit excludes the right to stop and anchor unless rendered necessary by *force majeure* or distress. Passing ships shall refrain from any threat to the safety of the coastal State, its sovereignty, territorial integrity or political independence. Although the Convention does not contain detailed provisions on this matter, it is without doubt prohibited for warships to carry out manoeuvres, exercise or practice with weapons, landing or taking on board of aircraft.³⁴ This follows from the prohibition of both any action against the coastal State and any action not customarily connected with passage or overflight. All ships, including research and hydrographic ships, must not carry out research or survey activities without the consent of coastal States. Fishing vessels shall not engage in fishing activities.

Passing ships have also the duty to comply with laws and regulations adopted by States bordering on straits and generally accepted regulations,

³³ Doc. A/CONF. 62/L. 145. Annex of 25 April, 1982.

³⁴ In literature there are also counter opinions, namely that the lack of provisions regulating this matter and the fact that these issues cannot be regulated by States bordering straits results in an ambiguous situation. Cf. D. PHARAND, "International Straits", in: *The Law of the Sea*, Thessaloniki 1978, p. 83.

procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea. The same applies to generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

Aircraft in transit passage have a duty to observe the Rules of Air established by the International Civil Aviation Organization (this applies both to civil and State aircraft) and to monitor at all times the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

If a flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity acts in a manner contrary to laws or regulations adopted by strait States or to the provisions of Part III of the Convention, it shall bear international responsibility for any loss or damage which results to States bordering on straits.³⁵

³⁵ Unlike in the case of innocent passage a strait State cannot — in the case of transit passage — call upon a ship to leave its territorial sea.

Remote Sensing of the Earth from Outer Space and Its Regulation in the UN Resolution of 1986

by RENATA SZAFARZ

I. General Remarks

The remote sensing of the Earth from outer space¹ means in practice the carrying out from outer space of observations and measurements of natural resources of the Earth, of natural phenomena and of the Earth's environment and subsequent transmission of such data to ground stations. According to the UN Resolution on Principles Relating to Remote Sensing of 1986 which was accepted upon a motion of the Committee on the Peaceful of Outer Space,² the term "remote sensing" means

"the sensing of the Earth's surface from space by making use of the properties of electromagnetic waves emitted, reflected or diffracted by the sensed objects, for the purpose of improving natural resources management, land use and the protection of environment". [Principle I (a)].

The remote sensing operations can be performed for both, military and

¹ On the subject of remote sensing see in the Polish literature: K. WIEWIÓROWSKA, „Teledetekcja satelitarna w świetle prawa międzynarodowego” [Remote Sensing in the Light of International Law], *Postępy Astronautyki*, 1977, No. 4; J. RZYMANEK, „Problemy polityczno-prawne teledetekcji satelitarnej” [Political and Legal Problems of Remote Sensing], *Postępy Astronautyki*, 1984, No. 1; A. GÓRBIEL, „Teledetekcja satelitarna” [Remote Sensing], in: *Międzynarodowe prawo kosmiczne [International Space Law]*, Warszawa 1985; R. SZAFARZ, „Prace Podkomitetu Prawnego Komitetu Kosmicznego ONZ nad zasadami dotyczącymi zdalnego badania Ziemi” [Works of the Legal Sub-Committee of the UN Space Committee on the Principles Relating to Remote Sensing], *Postępy Astronautyki*, 1983, No. 3—4 and „Satelitarna teledetekcja Ziemi a prawo międzynarodowe” [Remote Sensing of the Earth and International Law], *Postępy Astronautyki*, 1985, No. 3—4.

² Resolution of the General Assembly of the UN 41/65. UN Doc. A/Res/41/65. This resolution is included in their works by R. SZAFARZ, *Badanie Ziemi z kosmosu w świetle prawa międzynarodowego [Remote Sensing of the Earth in the Light of International Law]*, Wrocław 1987 and C. D. CLASSEN, *Fernerkundung und Völkerrecht, Völkerrechtliche Probleme der Fernerkundung der Erde aus dem Weltraum*, Berlin 1987.

civilian purposes. The present paper is devoted only to the latter aspect of such activities.

The results of the remote sensing are defined as primary data, processed data and analysed information. According to the already mentioned Resolution the term "primary data" means "the raw data that are acquired by remote sensors borne by a space object and that are transmitted or delivered to the ground from space by telemetry in the form of electromagnetic signals, by photographic film, magnetic tape or any other means".³ The term "processed data" means "the products resulting from the processing of the primary data, needed to make such data usable".⁴ Finally, the term "analysed information" means "the information resulting from the interpretation of processed data, inputs of data and knowledge from other sources".⁵

Information obtained from the remote sensing activities are of the unique character. Such data, which relates to vast areas of land, is acquired at equal intervals of time and thus a continuous observation of processes undergoing in the Earth's environment is possible. If we take into an account the fact that such information on e.g. the state of forests, on the state of land use for on the state of pollution of land and sea environment, is of certain economic significance, it is not surprising that the whole issue of remote sensing has been, and still is, a very sensitive political problem.

Although the remote sensing operations are as old as the space flights themselves,⁶ they have been conducted on a wider scale and in the more specialized manner since the late 1960s. Such operations were started of course by the two space powers: the Soviet Union and the United States. The Soviet Union carried out the remote sensing of the Earth with the help of the manned Sojuz space vehicle, the orbital stations (Salut) and Meteor and Cosmos sputniks. The United States deployed Landsat, Seasat, Nimbus-G and HCMM satellites for the same purpose — Skylab station and the space-shuttle were also used. At present, India (the Bhaskara satellite) and France (SPOT satellite) are carrying out similar operations. Japan, China, the Netherlands, Federal Republic of Germany and the European Space Agency are planning to place in orbit their own remote sensing satellites within the next ten years. Ground stations capable of reception of data gathered by space objects are operating in over 20 countries. Even larger number of States possess special centres for the processing of such data. There are plans for regional centres for Africa — under the auspices of the

³ UN Doc. A/Res/41/65, principle 1 (a).

⁴ *Ibid.*, principle I (c).

⁵ *Ibid.*, principle I (d).

⁶ E. BROOKS, "Technological and Legal Aspects of Environmental Monitoring", *Journal of Space Law*, vol. 1, 1973, No. 1, p. 8.

UN Economic Commission — and under the auspices of the Organization of American States.

In Poland, the Centre for Processing of Air and Satellite Pictures of the Institute of Geodesy and Cartography established in 1976. The Institute of Geology (Warsaw) operates its own department for interpretation of satellite and air photographs. According to A. Linsenbarth the Centre “carries out the research work in the field of remote sensing and renders specialized services to the different sectors of the national economy”.⁷ The same author further states that the remote sensing data is obtained at present from the Landsat satellites through the Centre of Data EROS (Sioux Falls in the United States) and the ground station in Fucino, near Rome.⁸

The remote sensing devices are undergoing continuous improvements. At present, they are capable of identifying objects of 10 meters or less in size as well as areas of 3—15 sq. meters.⁹

Among others things we can list the following achievements in the field of remote sensing:

— New oil-bearing areas have been discovered by the Soviet scientists.¹⁰

— The Soviet astronauts photographed 5.6 sq.km of the territory of the Soviet Union, saving at the same time the amount of 50 millions of roubles.¹¹

— The remote sensing technics have been used to verify the localization of inflows of the Amazon river. The course of these inflows differs substantially from that which is marked on the newest maps (sometimes even up to 20 km) and their direction differs up to 90 degrees. At the same time, a number of islands of the size of 200 sq.km was discovered — these islands did not appear on any of the maps prepared so far.¹²

— Bolivia used the remote sensing data (collected by the Landsat satellites) to prepare geological maps, to catalogue the possible forms of land

⁷ A. LINSENBARTH, “Aktualne i perspektywiczne możliwości wykorzystania teledetekcji w gospodarce narodowej” [Actual and Future Prospects of the Use of Remote Sensing in the National Economy], *Biuletyn Instytutu Geodezji i Kartografii*, supplement to the *Przegląd Geodezyjny*, 1978, No. 1, p. 31.

⁸ *Ibid.*

⁹ See C. Q. CHRISTOL, “Remote Sensing and International Law”, *Annals of Air and Space Law*, vol. 5, 1980, p. 380 and N. M. MATTE, *Aerospace Law, From Scientific Exploration to Commercial Utilization*, Toronto — Paris 1977, p. 117.

¹⁰ According to H. de SAUSSURE, “Remote Sensing by Satellite: What Future for an International Regime?”, *American Journal of International Law*, 1977, No. 4, p. 715.

¹¹ According to W. D. BORDUNOV, V. N. MARKOV, *Kosmos — zemlja — pravo*, Moskva 1978, p. 11.

¹² *The United Nations and Outer Space*, the United Nations, 1977, pp. 13—14.

uses, to track the localization of pipelines and to mark the mining regions of concentrated lithium.¹³

— Canada uses the Landsat data to survey the distribution and the movements of ice floats and icebergs. Such an information helps to improve the shipping on the northern waters.¹⁴

— Potentially rich resources of copper have been discovered in Pakistan.¹⁵

E. Galloway evaluates the diversity and the scope application of data obtained from Landsat satellites as significantly exceeding the expectations.¹⁶ On the other hand, however, a feeling of anxiety can be observed among the non-space States. This feeling directly results from the fact that the sensed States have no possibility to control the process of gathering by the space powers of information concerning their territories. If we add to this the possibility that such an information may be used in a manner detrimental to the interests of the sensed States, it is not surprising that non-space States attached so much importance to the need to supplement the remote sensing activities with the adequate legal regulation. Though the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 1967 covers also the remote sensing operations, its regulation is however not sufficient. On 19 May, 1978 another legal instrument dealing with the remote sensing was signed by the States members of the "Intercosmos" Programme in Moscow. The Convention on Transmission and Utilization of Data of Remote Sensing of the Earth from Outer Space is of course of regional character and will be dealt with in the last point of this paragraph.

The task of drafting of the legal principles relating to the remote sensing was undertaken by the UN Committee on the Peaceful Uses of Outer Space and its Legal Sub-Committee. In the period of 1970—1986 a number of different proposals was presented to the Legal Sub-Committee. Such drafts were prepared by: Argentina, the Soviet Union, Canada, Brazil, France (two versions). The Soviet Union and France (jointly), Argentina and Brazil (jointly), the United States, Mexico and Austria. On the basis of these proposals the Legal-Sub-Committee tried to elaborate an uniform text of principles, for many years, however, without success. The negotiations came to

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ According to N. M. MATTE, H. de SAUSSURE, *Legal Implications of Remote Sensing from Outer Space*, Leyden 1976, p. XII (Preface).

¹⁶ E. GALLOWAY, "Remote Sensing from Outer Space: Legal Implications of Worldwide Utilization and Dissemination of Data", in: N. M. MATTE and H. de SAUSSURE (ed.), *Legal Implications of Remote Sensing from Outer Space*, Leyden 1976, p. 91.

a deadlock mainly due to the lack of agreement on the basic issues such as the access and dissemination of information and data obtained from the remote sensing activities. The final draft of principles prepared by the Sub-Committee was abandoned due to the further and more acute diversity of opinions. In this situation a completely new text of principles was elaborated by the Working Group on Remote Sensing in 1985. This draft was accepted by consensus by the Legal Sub-Committee and, in 1986, by the Space Committee itself.¹⁷ During its XVI session the General Assembly of the UN adopted a resolution containing these principles. The future will show whether this resolution marks only the beginning of treaty regulation of remote sensing or whether it will be the final document on the issue in question.

II Principles Relating to the Carrying out of the Remote Sensing

At the beginning, the opinions questioning the legality of the remote sensing activities under the terms 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 of 1967 were presented. For example M. G. Markov, though accepting that the Outer Space Treaty contains no clear prohibition of such activities stated that the teleobservations of foreign territories by space objects, without the consent of interested States, is illegal in the light of space law for it violates the principle of "common interests".¹⁸ The author has here in mind the contradiction of remote sensing with Article I of the Outer Space Treaty which states that the activities in exploration of outer space should be conducted "for the benefit and in the interest of all countries".¹⁹ A similar point of view was presented by M. A. Ferrer who stated that the Outer Space Treaty which contains the positive international law of *communis iuris* character, allows to undertake space activities, however, if this Treaty requires such activities to be conducted in the interest of all States, it cannot be interpreted as authorizing any activity which is detrimental to the State laying below.²⁰

¹⁷ See i.a. UN Doc. WG/RS/1986/CRP.1/Add.1.

¹⁸ M. G. MARKOV. "Implementing the Contractual Obligation of Art. I para. 1 of the Outer Space Treaty 1967". *Il Diritto Aereo*, vol. 50, 1974, No. 2, p. 156; see the SAME AUTHOR, *Traité de droit international public de l'espace*, Fribourg — Genève — Paris — New York 1973, p. 574.

¹⁹ *Dziennik Ustaw [Journal of Laws]*, 1968, No. 14, item 82.

²⁰ M. A. FERRER, "Legal Aspects of International Cooperation in Remote Sensing", in: *Proceedings of the Twentieth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation, 1977*, New York 1978, p. 511.

An opposite point of view is advocated by e.g. C. Q. Christol, who writes that hitherto existing practice proves that the remote sensing is in the interest of the world community. States, international organizations and individuals were beneficiaries of such activities. Not a single case of damages to the interests of institutions or individuals can be noted.²¹

As far as the attitude of States is concerned, it is to be underlined that developed States, both socialist and capitalist, as well as a substantial number of developing countries accepted and recognized the legality of remote sensing of the Earth (including the natural resources) in the light of the Outer Space Treaty of 1967. Those States which questioned the legality of remote sensing (without filing an official protest) under the terms of the Outer Space Treaty of 1967 have put forward different arguments than inconsistency of such operations with Article I, paragraph 1 of this Treaty.²²

Although the remote sensing may cause a certain contradiction (these activities are carried out in outer space, where the principle of freedom of research is the binding rule but they are directed towards the Earth and the areas under the exclusive jurisdiction of particular States) it is not illegal — neither under the terms of the Outer Space Treaty nor in the light of customary law. The initial doubts were subsequently clarified by intensively developing practice. It is enough to say that over 110 States, in some form or another, take part in remote sensing activities (including also the recipients of data and information obtained from the remote sensing).

The already mentioned UN resolution on remote sensing can be also called upon as a proof of legality of such operations. This document contains the following principles governing the conduct of remote sensing:

Principle I, cited above in section I, clarifies the meaning of terms used by this resolution. Thus, the term “remote sensing activities” means “the operation of remote sensing space systems, primary data collection and storage stations, and activities in processing, interpreting and disseminating the processed data” (point e).

Principle II

“Remote sensing activities shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic, social or scientific and technological development, and taking into particular consideration the needs of the developing countries.

²¹ C. Q. CHRISTOL, *The Modern International Law of Outer Space*, New York — Oxford — Toronto — Sydney — Paris — Frankfurt 1982, p. 756.

²² See also C. Q. CHRISTOL, “Remote Sensing and International Law”, *Annals of Air and Space Law*, vol. 5, 1980, p. 393.

Principle III

“Remote sensing activities shall be conducted in accordance with international law, including the Charter of the United Nations, 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 the International Telecommunication Union.

Principle IV

“Remote sensing activities shall be conducted in accordance with the principles contained in Article I of the Treaty on Principles Governing the Activities of States in Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, which, in particular provides that the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and stipulates the principle of freedom of exploration and use of outer space on the basis of equality. These activities shall be conducted on the basis of 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, in accordance with international law, of other States and entities under their jurisdiction. Such activities shall not be conducted in a manner detrimental to the legitimate rights and interests of the sensed State.

u Principle V

“States carrying out remote sensing activities shall promote international cooperation in these activities. To this end, they shall make available to other States opportunities for participation therein. Such participation shall be based in each case on equitable and mutually acceptable terms.

Principle VI

“In order to maximize the availability of benefits from remote sensing activities, States are encouraged, through agreements or other arrangements, to provide for the establishment and operation of data collecting and storage stations and processing and interpretation facilities, in particular within the framework of regional agreements or arrangements wherever feasible.

Principle VII

“States participating in remote sensing activities shall make available technical assistance to other interested States on mutually agreed terms.

Principle VIII

“The United Nations and the relevant agencies within the United

Nations system shall promote international cooperation, including technical assistance and coordination in the area of remote sensing.

Principle IX

“In accordance with Article IV of the Convention on Registration of Objects Launched into Outer Space and Article XI of the Treaty on Principle Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, a State carrying out a programme of remote sensing shall inform the Secretary-General of the United Nations. It shall, moreover, make available any other relevant information to the greatest extent feasible and practicable to any other State, particularly any developing country that is affected by the programme, at its request.

Principle XIII

“To promote and intensify international cooperation, especially with regard to the needs of developing countries, a State carrying out remote sensing of the Earth from space shall, upon request, enter into consultation with a State whose territory is sensed in order to make available opportunities for participation and enhance the mutual benefits to be derived therefrom.

Principle XIV

“In compliance with Article VI 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, States operating remote sensing satellites shall bear international responsibility for their activities and assure that such activities are conducted in accordance with these principles and the norms of international law, irrespective of whether such activities are carried out by governmental or non-governmental entities or through international organizations to which such States are parties. This principle is without prejudice to the applicability of the norms of international law on State responsibility for remote sensing activities”.

The following remarks and conclusions can be formulated on the basis of the above cited regulation:

1. The provisions in question recognize in principle the legality of remote sensing activities under the terms 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 of 1967.

2. The principles listed above do not require the sensed States to give their permission or consent for the remote sensing of their territories.

3. Consequently, no notification of the sensed States is needed if their territories are subject of remote sensing activities. Principle IX requires

only that the information about the launching in outer space of remote sensing satellites (like any other space object) be transmitted to the Secretary-General of the United Nations. In the light of the same principle, the State carrying out activities in remote sensing shall provide to the interested State, and upon its request, any other information on the programme to the extent decided upon by the former.

4. The practical implementation of just principles of cooperation and coordination in carrying out of remote sensing activities will require the manifestation of good-will by space powers.

5. The resolution underlines — in accordance with the present tendency in international law — the need for special consideration of the needs and interests of the developing countries.

6. Although the principle IV mentions the principle of full and permanent sovereignty of all States and peoples over their own wealth and resources, its impact has been softened, however, by the following statement: “with due regard to the rights and interests, in accordance with international law, of other States and entities under their jurisdiction”. It seems therefore that the introduction of the above mentioned principle has rather declaratory than legal significance, even more so that this principle had no effect upon the regulation of an issue of dissemination of remote sensing data and information (see below; the original sponsors of this principle, namely the socialist States, drew from it an obligation to obtain a consent of the sensed State for the dissemination of the said data).

III. Principles Relating to the Disclosure and Dissemination of the Remote Sensing Information and Data

The issue of disclosure and dissemination of results obtained from the remote sensing activities (whether allowed or not and if so, upon what conditions) is viewed as the most important and, at the same time, the most delicate problem connected with the remote sensing. This question has, until now (1986), caused most of the discussion and in the opinion of J. L. Magdelénet it is almost explosive.²³

Among the sources of the said controversies the following are most frequently mentioned: the subjects carrying out the remote sensing activities (mainly States) are in the possession of information of significant economic value (e.g. on natural resources, the scope of land use), thus they are in

²³ J.-L. MAGDELÉNAT, “The Major Issues in the ‘Agreed’ Principles on Remote Sensing”, *Journal of Space Law*, vol. 9, 1981, No. 1—2, p. 117.

a much better position in any negotiations with the sensed States. The latter obtain the information concerning their own territory with certain delay with respect to the sensing States or even States possessing centres for reception and processing of the primary data — this depends mainly on the accepted legal solutions in this matter. Furthermore, States which accepted the policy of limited and exclusively internal access to the more detailed maps of their territories are of an opinion that the unconstrained disclosure of remote sensing data (concerning e.g. the localization of objects) may endanger their national security. Consequently, the whole issue of the degree of control over information on their natural resources that is possessed by the sensed States is politically extremely sensitive.²⁴

The practice in the field of the disclosure and dissemination of remote sensing data is far from being uniform. The United States as well as the States possessing the ground stations connected with the Landsat system, disclose and disseminate the data in question without any limitations. The Soviet Union, on the other hand, has, so far, disclosed the obtained information of local character (distributive capacity of up to 50 m.) only upon a permission of the sensed State. After the adoption of the UN resolution of 1986 the Soviet Union abandoned the requirement of the consent of a sensed state for the disclosure and dissemination of data and information concerning it (information from Moscow "Intercosmos" Conference, September 1989).

In this situation, there is no question of customary rules to be established with respect to the matter under the discussion. All that can be said here is that under the terms 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 of 1967 (Art. XI²⁵) as well as in the light of the general international law the practice of both, the United States and the Soviet Union was admissible. The already mentioned Article XI of the Treaty of 1967 allows the Sensing States to decide upon the scope of disclosed data and information obtained from the remote sensing activities.

The drafts of legal principles relating to remote sensing contained

²⁴ D. S. MYERS, *Remote Sensing and National Sovereignty over Natural Resources: Assessment of the Mexican View, Paper Presented to International Studies Association Meeting, Mexico City, April, 1983*, p. 7.

²⁵ Article XI of the Outer Space Treaty of 1967 states: "In order to promote international cooperation in the peaceful exploration and use of outer space, States, Parties to the Treaty, conducting activities in outer space, including the Moon and other celestial bodies, agree to inform the Secretary-General of the United Nations as well as the public and international scientific community to the greatest extent feasible and practicable, of the nature, conduct, location and results of such activities. On receiving the said information, the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively".

different solutions of the issue in question. Finally, the following principles were accepted in the UN resolution of 1986:

Principle X

“Remote sensing shall promote the protection of the Earth’s natural environment. To this end, States participating in remote sensing activities that have identified information in their possession that is capable of averting any phenomenon harmful to the Earth’s natural environment shall disclose such information to States concerned.

Principle XI

“Remote sensing shall promote the protection of mankind from natural disasters. To this end, States participating in remote sensing activities that have identified processed data and analysed information in their possession that may be useful to States affected by natural disasters, or likely to be affected by impending natural disasters, shall transmit such data and information to States concerned as promptly as possible.

Principle XII

“As soon as the primary data and the processed data concerning the territory under its jurisdiction are produced, the sensed State shall have access to them on a non-discriminatory basis and on reasonable cost terms. The sensed State shall also have access to the available analysed information concerning the territory under its jurisdiction in the possession of any State participating in remote sensing activities on the same basis and terms, taking particularly into account the needs and interests of the developing countries”.

The above cited provisions allow a formulation of the following conclusions:

1. First of all, the States participating in the remote sensing activities are under an obligation to provide the interested States with any information and data concerning any phenomenon harmful to the Earth’s natural environment or natural disasters. It can be assumed that in this case the position of the Soviet Union and the United States will be uniform. From the very beginning this problem has not been controversial.

2. The interpretation of principle XII leads to a conclusion that the remaining data and information can be transferred either with or without the permission of the sensed States. The sensing States are, however, under an obligation not to discriminate the sensed States. As far as the analysed information are concerned, the particular account should be taken by the sensing States of the needs and interests of the developing countries.

3. On the basis of the principle of non-discrimination the sensed States should obtain access to remote sensing data and information no later than any other third State. Consequently, such access cannot be granted to the third State and refused to the sensed State.

4. In the light of principle XII, the remote sensing data is transferred upon a request of the interested State (the sensed State or any third State). It seems, however, that in the situation when a State A ask for the information concerning State B, the sensing State should, on its own initiative, offer these results to State B.

5. It should be underlined here that the remote sensing data and information are provided on the basis of financial reimbursement. Until recently, the United States provided such data free of any charge.

6. Generally speaking principle XII can be viewed as a compromise. The basic divergencies relating to the issue of disclosure of the remote sensing information to the Third States were not overcome.

IV. Regional Solutions Accepted in the Field of Remote Sensing in the Moscow Convention of 1978

The States participating in the "Intercosmos" programme, namely the socialist States, accepted on 19 May, 1978, in Moscow the Convention on the Transfer and Utilization of Data of Remote Sensing of the Earth Outer Space.²⁶ This Convention, besides the preamble, consists of seven substantial articles, one provision on the settlement of "problems" that may arise in due course of the application of the Convention and six final clauses.

Article I defines certain terms used in the Convention, such as: "the remote sensing of the Earth from outer space", "remote sensing data", "information" and "the Earth's natural resources". It is worth-while to cite at least the first definition. Thus the term "remote sensing of the Earth from outer space" means "the observation and measurements of energy and polarization characteristics of radiation of land masses, the ocean and the atmosphere (own and reflected) which allow for the localization and description, using the properties of electromagnetic waves, of the nature of changes in the natural phenomena, natural resources of the Earth as well as man-made objects" (Art. I, para. a).

The very issue of permissibility of activities in remote sensing is not solved *expressis verbis*. However, in the light of the preamble and other provisions of the Convention one can conclude that the Parties accepted

²⁶ See *Dziennik Ustaw*, 1980, No. 10, item 27.

the unconditional admissibility of such activities. The Moscow Convention in a very general terms deals (in the preamble) with the international cooperation in the field of remote sensing at the stage of actual carrying out of such activities. Article II contains a clear recommendation for the Parties to undertake such a cooperation at the stage of elaboration and utilization of remote sensing data. Articles III and VII state that details of such cooperation are to be worked out on the basis of bilateral and multilateral agreements to be concluded by the Parties. Therefore, the Moscow Convention itself provides only a general legal framework for the international cooperation in the field of remote sensing.

Articles IV and V of the Moscow Convention are of greatest importance for the matters discussed in this paper. Article IV states:

“The Contracting Party, which possess the primary data of spatial resolution of less than 50 m and concerning the territory of another Contracting Party, shall refrain from publication of such data without an explicit permission of the Party whose territory has been the subject of remote sensing activities nor shall it use such information in any manner detrimental to the interests of this Contracting Party”.

Article V contains the following regulation:

“The Contracting Party which obtains through decoding and interpretation any remote sensing data or information on natural resources or economic potential of any other Contracting Party, shall refrain from publication or transferring of such data to anyone without the explicit permission of that Contracting Party nor shall it use this or any other information in any manner that may be detrimental to this Party”.

It results clearly from the preamble that the Parties to the Moscow Convention, establishing the obligation to obtain a consent of the sensed State for dissemination of data and information concerning this State, recognized the fact that the sovereignty of States covers also any information on their natural resources.

Contrary to the regulation contained in the UN resolution on Principles relating to remote sensing of the Earth from space, the Moscow Convention is silent on the obligation of sensing States to offer access to data to the relevant States. On the other hand, this convention reflects the position on the matters in question presented by the Soviet Union in the Legal Sub-Committee of the UN Space Committee.

The final provision of the Moscow Convention (Art. VI) establishes the responsibility of Parties “for national researches in the field of utilization of data of remote sensing of the Earth from space, concerning the territory of other Contracting Parties”.

The analysis of the Moscow Convention leads to a conclusion that its main aim is to provide protection to the remote sensing data and information against third States. This convention can not, however, prevent the third

States from acquiring such information from other States carrying out remote sensing activities.

V. Final Remarks

1. The basic inequality in position of space and non-space States can be mitigated first of all by the good will of space powers and secondly by the multiplicity of competitive remote sensing systems. As the result, the ability of access of the non-space States to remote sensing data and information shall increase.

2. The increasing commercialization of remote sensing activities can result in restriction of access to the remote sensing data on the side of poorer States, including the developing countries.

3. If a convention regulating the remote sensing activities is going to be elaborated it is proposed that certain general and not precise terms, present in the UN resolution, should be omitted.

4. It seems that the establishment of an international organization regulating the remote sensing activities shall be to the benefit of the international community. Such an organization should possess both, the space segment and the ground stations. Such a proposal, however, is at present unrealistic.

The Polish Court Judgments in International Civil Law Cases

by MACIEJ TOMASZEWSKI

Distribution of an Inheritance

Settlement before the court on distribution of an inheritance — A foreign person being a party to the settlement — Agreement in court between the heirs, viewed in the light of foreign exchange regulations — Foreign exchange licence not required.

Resolution by the bench composed of seven judges of the Supreme Court of 17 June, 1987, (III CZP 87/86) on the motion by the Minister of Justice requiring reply to a legal question (*Orzecznictwo Sądu Najwyższego*, seria cywilna, 1988, No. 2—3 item 24).

On 31 October, 1986 Minister of Justice submitted to the Supreme Court the motion requiring a reply to the legal question of whether the conclusion of an agreement in court with regard to the case on distribution of an inheritance involving a party being a foreign person is contingent upon the possession of foreign exchange licence.

Having examined the motion the Supreme Court lodged the following resolution having the force of a legal rule:

“The conclusion of agreement in court between heirs appearing in a case on distribution of an inheritance involving a party being a foreign person is not contingent upon possession of foreign exchange licence”.

In explaining the resolution the Supreme Court supplied an analysis and interpretation of the relevant regulations. The Foreign Exchange Law, of 22 November, 1983 *Dziennik Ustaw* — [*Journal of Laws*] No. 63, item 288 stating, i.a.:

“Under Article 7, paragraph 1, point 1 of Foreign Exchange law the term ‘foreign exchange dealings’ means the making of a contract or an act other than a contract one leading to or designed to lead to the payment with foreign currencies, or the conveyance of property or the possession of foreign currencies, or the assignment of a claim or obligation concerning foreign currencies. This provision, covering three categories of dealings: the

conclusion of a contract; making of an act which is not a contract but produces effects identical with those resulting from a contract; and also the cession of a claim (assignment) or obligation (the taking over of a debt), specifies neither a single example of contracts in question, nor acts which are not contracts. It is to be assumed in this context that the regulation under discussion takes account of all kinds of contracts, and also all kinds of noncontractual acts made, not only by domestic and foreign persons directly involved in foreign exchange dealings but also by state agencies, (the provision laid down in Art. 20, pt 1 would be irrelevant if Art. 7 did not concern State agencies) which result in transfer of foreign exchange values possessed by one person (natural or legal) to another person. This meets well the common understanding of dealings which includes exchange of goods and services. In the light of the provision laid down in the aforesaid Article 7, paragraph 1, point 1 of Foreign Exchange Law the question requiring consideration is whether agreement on distribution of an inheritance (a relevant settlement before the court), involving a party being a foreign person and concerning, *inter alia*, foreign currencies entails or may entail effects envisaged in the regulation in question, i.e. whether such agreement may be looked upon as an act of foreign exchange dealings for the making of which under Article 11 of Foreign Exchange Law — it is necessary to have foreign exchange licence.

“When a foreign person is the sole heir testamentary or **statutory**; he or she is also the one to come upon the death of the decedent into ownership and possession of all component making up the inheritance including absolute foreign exchange values (Art. 6, para. 1 of the foreign exchange regulations) and relative foreign exchange values (Art. 6, para. 2). The heir’s acquisition of foreign exchange values just like of other components of property, including the rights and obligations which could become foreign exchange values in the future (for instance as a result of alienation of items making up the inheritance) is not in such a case an effect of making a contract or a legal act other than a contract but is a result of an event giving birth to legal consequences; i.e., the death of a person, in which case one is by no means confronted with foreign exchange dealings in the sense received by Foreign Exchange Law, including most of all its Article 7.

“The devolution of an inheritance, upon the heirs by mere operation of law, involving no need for their engaging in legal acts takes place also when there are several heirs, irrespective of whether they are domestic or foreign persons in the meaning the Foreign Exchange Law and without regard to the assets of the inheritance. All these persons take over the rights and duties of the decedent and become joint owners entitled to the acquisition of their fraction of the inheritance composed of all things and rights including also foreign exchange values if these are part of the inheritance. No foreign exchange licence can be required as precondition of the acquisition of an inheritance, for devolution and acquisition of rights by way of succession represents no foreign exchange dealing.

“Moreover, the presence of more than one heir as well as the fact that one of them is a foreign person does not make it necessary or even desirable to conduct distribution proceedings on the object of the inheritance which also holds true for the question of the conclusion of agreement (settlement before the court) on distribution of the inheritance or the obtaining of a judicial decision in this regard. The distribution of an inheritance will be completely superfluous in the event when the inheritance is made up exclusively of foreign exchange values deposited in banks, especially on foreign currency accounts. For the disposition of such inheritance it will do to produce the judicial confirmation of the acquisition of the inheritance, determining the relevant part (fraction) for each heir in the inheritance.

“The facts that: 1. The devolution of all property rights and obligations of a decedent regarded as an inheritance, including also foreign exchange values, to a heir or heirs

(testamentary as well as statutory) takes effect by mere operation of law upon the death of the decedent, the event entailing legal consequences and does not represent foreign exchange dealings in the meaning of Article 7 of Foreign Exchange Law, and 2. the fact that not every event of the acquisition of inheritance by more than one heir entails the need for distribution of inheritance assets, can hardly be without influence on the question whether an agreement on the distribution of inheritance (and consequently also an agreement in court) concluded by heirs acquiring jointly (in fractions) the whole of the inheritance including arrangements as to the mode of the realization of their respective rights, represents an act of foreign exchange dealings for which foreign exchange licence is required.

“Taking into consideration the rules on inheritance laid down in the civil code (which has no restrictions with regard to foreign heirs) and the aforementioned determinants, it is to be assumed that the heirs’ agreement as to the mode of the realization of their legitimate rights represents a special type of agreement involving no foreign exchange dealings. The theory underlying the point of view is that since each of the heirs has the right to all objects making up the inheritance including foreign exchange values (constituting to be sure only a fraction of it) even before the conclusion of the relevant agreement, one can hardly speak of the transfer under agreement of foreign exchange value formerly belonging to one person to the benefit of another person, which is a distinctive feature of foreign exchange dealings. Apart from the afore-quoted arguments, there are more reasons supporting this viewpoint which grow out of the provisions enshrined in the Foreign Exchange Law, namely:

“1) the making of donations in the form of foreign exchange values (except Polish currency remaining abroad) by foreign persons and receipt thereof by domestic persons do not require the individual licence (Art. 20, pt. 7 of Foreign Exchange Law);

“2) The statutory heirs are in most cases the closest relations in the meaning received in Article 8 of Foreign Exchange Law. They do not have to obtain the relevant licence to make donations between them, except the donation to the benefit of a foreign person (Art. 20, pt. 14 of Foreign Exchange Law);

“3) Where testamentary heirs are concerned, the general foreign exchange licence contained in Article 20, point 3 of Foreign Exchange Law to deal in the last will with foreign exchange values covers not only the very possibility of drafting the last will but also the possibility of the enforcement of its provisions. It would be inconsistent with the nature of the licence to assume that in the event of the drafting of last will defining the allotment of the property including foreign exchange values for the benefit of two heirs, i.e. in the case when two heirs are appointed, the enforcement of their right to the inheritance would have to entail their seeking to obtain an additional individual foreign exchange licence even if only one of the heirs were a foreign person in the meaning received in Article 3 of Foreign Exchange Law.

That the legislators should assume a special approach towards the treatment of those acquiring foreign exchange values through inheritance becomes even more clear in consideration of the fact that the general foreign exchange licence has been granted (Art. 20, pt. 3 of Foreign Exchange Law) allowing not only delivery in this country of foreign exchange value from the inheritance (opened in this country) to the domestic heirs and legatees, but also to a foreign diplomatic mission or consular office entitled to the receipt of such values under the relevant international agreement or on the basis of reciprocity for the benefit of heirs and legatees being foreign persons. One can hardly approve of the legislators’ defining an agreement on distribution of inheritance concluded by heirs including a foreign person as an act of foreign exchange dealings being subject to foreign exchange supervision and requiring the issue of an individual licence on the one hand, while at the same time, granting the general foreign exchange licence meaning the exemption from the foreign exchange supervision such acts clearly failing under the definition of

foreign exchange dealings, as delivery of foreign currencies to heirs and legatees being foreign persons acting through diplomatic missions or consular offices.

“The points made in connection with the interpretation of Articles 7 and 20 of Foreign Exchange Law add legitimacy to the answer quoted in the resolution whose implications are however restricted to the situation when the heirs acquiring by operation of law or under the last will the inheritance including foreign exchange values are the sole parties to distribution proceedings and settlement before the court. The answer in question does not apply to the cases in which a person who is not a heir (e.g. buyer of a share in an inheritance) is a party to such proceedings and a relevant agreement in court”.

Recognition of a Foreign Judgment

Divorce decree issued by a court in the Federal Republic Germany — The decree, contains no decision as to the maintenance obligation of the divorced spouses towards their child — The admissibility of recognition in the light of the public policy clause.

Decision of the Supreme Court of August 19, 1985 (II CR 2/6/86) on the motion by Grażyna D. involving Piotr D. on this recognition of the decision by the foreign court (*Orzecznictwo Sądu Najwyższego*, seria cywilna, 1987, No. 11 (191)).

Under the decision of 20 March, 1986 the Voivodship Court in Jelenia Góra recognized the verdict by a court of the Federal Republic of Germany on the dissolution by divorce of the matrimony of Piotr D. and Grażyna D., also entrusting with Grażyna D. the exercise of parental authority over her minor daughter Maria Patrycja D.

The prosecutor lodged an appeal from the decision arguing:

“The recognition of the verdict would entail consequences inconsistent with the fundamental principles of the legal order of the Polish People’s Republic, for the verdict took no account of the decision on the maintenance obligation laid down in Article 58, paragraph 1 of the Polish Family and Guardianship Code”. The prosecutor argued that the verdict by the Court of the FRG is inconsistent with the interest of the child and provides for the imposition of the whole of the maintenance obligation upon mother — Grażyna D. and consequently claimed the change of the original decision and dismissal of the motion of Grażyna D. on the recognition of the foreign divorce decree”.

The Supreme Court dismissed the prosecutor’s appeal giving the following reasons of its decisions:

“Pursuant to Article 1146, paragraph 1, point 5 of the Code of Civil Procedure a decision by a foreign court is subject to recognition, unless it is inconsistent with the fundamental principles of the legal order of the Polish People’s Republic. In other words, the refusal to recognize a decision is to be deemed legitimate when the foreign decision is

inconsistent with the fundamental principles of this country's political system or with the fundamental principles governing the individual realms of the law.

"The principle laid down in Article 58, paragraph 1 of the Code of Civil Procedure under which divorce decree shall specify the amount of maintenance and education costs to be covered by each of the spouses' is not a fundamental principle. Nor are the principles laid down in Article 58 of the c.c.p. on deciding *ex officio* on the exercise of parental authority over the child, and also the principle in force since 1 March, 1976 (Art. 58, para. 2 amended under the law of 19 December, 1975 on the change of the family and guardianship code — *Dziennik Ustaw*, No. 45, item 234) on the making of decisions with regard to the mode in which the divorced parents are to use the common apartment.

"While, the fundamental principle of family law is the protection of welfare of minor children included in the constitutional principle of care for the upbringing of the young generation (Art. 5, pt. 7; Art. 79, para. 1 of the Constitution of the PPR).

"The divorce decree specifying no maintenance obligation of parents towards their child represents a clear breach of Article 58, paragraph 1 of the Family and Guardianship Code having the nature of *ins cogens*. Yet, it does not violate the fundamental principles of this country's legal system, in particular the principles governing civil and family laws. The provision of Article 1146, paragraph 1, point 5 of the Code of Civil Procedure does not require that foreign judicial decisions should be perfectly compatible with all, even the essential provisions of the Polish law. Likewise, Article 6 of Private International Law (the Act of 12 November, 1965 — *Dziennik Ustaw*, No. 40, item 290) does not concern all the principles of the legal order of the PPR, but only the fundamental principles (cf. the decision by the Supreme Court of 21 April, 1978 fM CR 65/78, OSNCP 1979, book 1, item 12).

Thus the absence of a decision with regard to the maintenance obligation of the divorced spouses towards their child laid down in Article 58, paragraph 1, of the F.G.C., like the absence in the divorce decree of decisions with regard to parental authority or common apartment of the divorced spouses laid down in Article 58, paragraph 1 and paragraph 2 of the F.G.C. does not preclude under Article 1146, paragraph 1, point 5 of the Code of Civil Procedure the recognition of such a decree.

"The fact that no maintenance was assigned to the child of the divorced spouses by the divorce decree represents of course no *res indicata* in this matter. The child has always the right to bring an action for maintenance. Besides, the decision on maintenance obligation defined in a divorce decree applies only to the period after the decree has become final.

"It is also to be remembered that Article 58 of F.G.C. unlike the explicit provision enshrined in Article 32 of the former Family Code of 27 June, 1950 (*Dziennik Ustaw*, No. 34, item 308) does not provide that divorce cannot be decreed unless it includes decisions on the rights and duties of both spouses towards their minor children and their property'. This leads one to believe that the question of the divorced spouses' obligation to supply maintenance to their child and consequently the obligation to decree it, is despite its importance, one of the secondary matters listed in Article 58, paragraph 1 and paragraph 2 of F.G.C. and not a fundamental question or principle in the meaning received in Article 1146, paragraph 1, point 5 of the Code of Civil Procedure.

"The adoption of a different approach which was defined in the appeal against the judgment under discussion, precludes the recognition of any foreign judicial decision showing even a slightest inconsistency with the norms of the Polish law. In making its final decision on the basis of Article 387 of the C.C.P. in connection with Article 13, paragraph 2 of F.G.C. the Supreme Court proceeded from the assumption that the appeal against the original verdict is legally unfounded and the relevant stipulation of law and order does not exclude the recognition of the divorce decree issued by the German court".

Recognition of a Foreign Judgment

A decision by a court of the Federal Republic of Germany ascertaining the rights to inheritance — The absence of the exclusive jurisdiction of Polish courts as a premise of the recognition — The exclusive jurisdiction of Polish courts in cases on the inheritance of the ownership right to an apartment in a cooperative housing society in Poland.

Decision of the Supreme Court of 13 October, 1986 (I CR 272/86) on the motion of Zofia Wanda S. with the participation of Georgi Favid K. concerning the recognition of decision of a foreign court judgment (*Orzecznictwo Sądu Najwyższego*, seria cywilna, 1987, No. 12, item 213).

Under decision of 16 April, 1986 the Voivodship Court in Warsaw dismissed the motion by Zofia Wanda S. on the recognition of efficacy within the territory of Poland of the decision of the district court in Frankfurt on the Main ascertaining the inheritance of the property of Wera K., a citizen of the Federal Republic of Germany. The assets of the inheritance comprised, *inter alia*, the ownership right to an apartment in a Polish cooperative housing society. In the appeal addressed to the Supreme Court the appellant claimed the reversal of the original decision and re-examination of the case because of the Voivodship Court's failure to take account of essential circumstances and the alleged presence of contradiction between the findings of the Court and the existing evidence (Art. 368, pts. 3, 4 of the C. C. P.).

The Supreme Court dismissed the appeal providing the following explanation of its decision:

"The claimant rightly contends that the Voivodship Court has failed to clarify the case with regard to the condition of reciprocity applicable to the recognition of the Polish courts' decrees on inheritance by the courts of the Federal Republic of Germany. However, the claim cannot be allowed for other reasons.

"Under Article 1146, paragraph 1, point 2 of the C. C. P. a decision by a foreign courts is subject to recognition, given the fulfilment of the condition of reciprocity, *inter alia*, when the case does not belong, in the light of the Polish Law, or an international treaty, to the exclusive jurisdiction of the Polish courts.

"The question of national jurisdiction in inheritance cases is governed by the provisions enshrined in Article 1102, paragraph 1 of the C. C. P. in connection with Article 1108 of the C. C. P. Pursuant to Article 1102, paragraph 1 of the C. C. P. the exclusive national jurisdiction covers, *inter alia*, the cases on rights in property and on possession of a real estate in Poland. While, under Article 1108 of the C. C. P. national jurisdiction covers cases on inheritance when the decedent was a Polish citizen at the time of his death, or having no citizenship was domiciled in Poland. *A contrario* Article 1108, paragraph 1 of the C.C.P. implies the absence of national jurisdiction in such cases when the decedent was a citizen of a foreign State at the time of his death.

"The provision laid down in Article 1108, paragraph 1 of the C. C. P. shows clear and close connection with the provision of Article 1102, paragraph 1 of the C. C. P. which has

been included in the title II comprising common regulations for national jurisdiction both in contentious and non-contentious proceedings. The provision under discussion has, in the first place due to its location in the code, priority over the provisions concerning national jurisdiction both in the contentious and non-contentious proceeding and it was superfluous to quote it in the title concerning the national jurisdiction in non-contentious cases. Thus, although Article 1108, paragraph 1 of the C. C. P. does not provide that the national jurisdiction depends upon the movable or immovable nature of assets situated in Poland the interpretation of this provision in connection with Article 1102, paragraph 2 of the C. C. P. the view that the legal proceedings on inheritance bequeathed by a foreigner with regard to the rights in property making up part of inheritance in Poland is subject to exclusive national jurisdiction of the Polish courts. The provision laid down in Article 1102, paragraph 1 of the C. C. P. does not justify the view that in such an event national jurisdiction covers the whole of the inheritance, which could be inferred from the decision of the Supreme Court of 22 February, 1966 (III CR 395/65/OSNCP 1966, book 11, item 197). The decision includes the contention: 'when the proceedings on inheritance bequeathed by a foreigner concern the real estate in Poland, the case is subject to exclusive national jurisdiction in line with Article 1102 of the C. C. P.).

"The adoption of the above-quoted interpretation of Article 1102, paragraph 1 of the C. C. P. involved the problem crucial to the settlement of the case, namely the explanation of the sense of the term 'cases concerning rights in property' in the meaning received in this provision, and also the need to determine whether the term covers the ownership right to an apartment in a cooperative housing society or not.

"The linguistic interpretation of the provision under discussion, taking account of the usage of term 'cases concerning rights in property' without any restriction or exclusion, leads to the conclusion that the legislator intended to establish the term in its broad sense covering all connotations of rights in property rooted in the Civil Code such so the ownership and other rights in property (different than ownership) including limited rights in property. Since ownership right to apartment in a cooperative housing society represents a limited right in property and is subject to inheritance (Art. 223, para. 1 of law on cooperative societies) and also the relevant dossier includes evidence indicating that the inheritance bequeathed by Wera K. includes the ownership right to an apartment in a cooperative housing society in Poland, the inheritance proceedings in respect of this right are subject under Article 1102, paragraph 1 of the C. C. P. to exclusive national jurisdiction. This means the absence of the grounds defined in Article 1146, paragraph 1, 2 of the C. C. P. for the recognition of efficacy of the decision in Poland, which also unequivocally justifies dismissal of the motion in question and renders irrelevant the examination of the question of reciprocity with procedural means defined in Article 1143, paragraph 2 of the C. C. P.

For all these reasons the decision that has been appealed against is to be deemed legal, which accounts for the dismissal of the appeal (Art. 387 of the C. C. P. in connection with Art. 13, para. 2 of the C. C. P.)".

Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw

by ANDRZEJ W. WISNIEWSKI

1. Award of 22 January, 1988, Cases No. 85/84 and 143/W/85

1. An agreement containing amendments to an earlier contract should in this part be construed as an element of this contract and shall be governed by the same applicable substantive law.

2. A protocol of understanding providing, on the occasion of settling the parties' accounts resulting from sales contracts, for prolongation of an agency contract between them, has in this part the character of a letter of intent and cannot be treated as basis for a claim of damages on account of the alleged lost commission.

Facts

The parties, a Polish foreign trade enterprise (f.t.e.) and an Italian company, have concluded in April and July 1982 six separate contracts providing for the deliveries of certain quantities of skin clothes and fur products. At that time, the parties were also bound by an agency agreement of 4 January, 1982, providing for the representation of the Polish f.t.e. on the Italian market by its Italian partner.

The Italian buyer failed to pay a part of the contractual price due under four of those six contracts. After prolonged negotiations, during which the parties i.a. concluded an agreement (protocol of understanding) of 19 February 1983, in order to settle mutual claims, the Polish seller filed with the Court a statement of claim for 2,029,454.20 FRG marks as the unpaid part of the price.

The Court's competence in the case resulted from arbitration clauses attached to each of the four mentioned contracts, which clauses were made out as separate documents and signed by both parties.

The Italian respondent moved for the claim to be dismissed. In addition to other arguments, he stated his own claims against the seller to the amount of 2,040,009 FRG marks, initially requiring this sum to be set off with the seller's claim. On 29 October, 1985, the respondent filed with the Court a formal mutual claim to the amount of 2,455,282 mk.

There followed a prologned preparatory stage during which the parties exchanged a number of procedural writings, the Italian buyer several times changing his opinion as to the basis and amount of his claims and also offering various defences against the Polish seller's claims, the latter consequently denying these claims and defences. Reassuming, the respondent buyer asserted that:

1) He had suffered a loss of 1,100,000 mk. constituting the expected commission under the agency agreement of 4 January, 1982, prolongation of which was promised to him under the protocol of understanding of 19 February, 1983, but never took place;

2) He had had to pay 631,796 mk. as customs tariffs and taxation on account of the deliveries made by the seller under contracts of 1982 (he demanded the repayment of this amount as cost incurred uselessly because of improper quality of the delivered goods);

3) The seller's improper performance had caused the buyer to suffer effective damage in the amount of 506,486 mk. and loss of profit in the amount of 207,000 mk.;

4) He had suffered also because of general crisis circumstances on the Italian market resulting in non-payments and bankruptcy of his local customers.

In the mutual claim respondent introduced the agency agreement of 1982 as a new legal basis for the dispute. The agency agreement, similarly to the 1982 contracts of sale, contained an arbitration clause providing for the competence of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw. Unexpectedly, it was the Polish claimant who put to doubt the competence of the Court as to the part of mutual claim relying upon the agency agreement, submitting that the claim of loss of the expected commission is not a claim under this agreement which, as the result of non-prolongation, expired on 31 December, 1983.

The question of the Court's competence in this matter was deliberated upon by the arbitrators as well as — pursuant to paragraph 17, section 1 of the Court's Rules — the Presidium of the Court which settled this question by way of a decision. The Court found itself competent on the basis of the arbitration clause in question by the following premises:

1) The arbitration clause was drafted in line with the provisions of Article I, section 1, letters a and b of the European Convention on International Commercial Arbitration made in Geneva on 21 April, 1961, and ratified by both

Italy and Poland; the contents of the clause correspond with the requirements resulting from the Rules of the Court;

2) The dispute as to the loss of commission is "connected with the agency agreement" thus falling within the meaning of the arbitration clause and, as such, is subject to this clause.

During the proceedings the parties have twice undertaken attempts to arrive at an amicable settlement, however they could not reach a suitable agreement.

Excerpt from Reasons

1. Question of the Proper Law of Contact

The parties failed to agree in the contracts and agreements being the basis of their dispute upon the issue of the applicable law. During the proceedings, respondent motioned for the dispute to be settled on principles of equity (without applying any specific substantive law). Claimant rejected this proposal. Respondent expressed then his opinion that the dispute relating to the mutual claim in its part based upon the agency agreement should be settled on the basis of substantive Italian law, as the law of the agent's place of business.

On grounds of paragraph 29, section 1 of its Rules, the Court decided that the dispute as a whole should be settled on the basis of Polish substantive law. The Court came to the opinion that the questions connected with the agency agreement have only incidental character in relation to the sales contracts and that the dispute by its nature is contained within the salepurchase relationship. By force of Article 27, paragraph 1, Article 1 of the Polish Act on Private International Law of 1965, obligations resulting from sales contracts are subject to the law of the seller's place of business.

2. Admissibility of the Mutual Claim

The claimant put to doubt the procedural admissibility of the mutual claim and motioned for this claim to be remitted to separate proceedings.

The Court rejected this motion, finding the joint settlement of both principal and mutual claims admissible on grounds of Article 204 of the Polish Code of Civil Procedure; in accordance with the requirements of Article 204 both claims are capable of mutual set-off, and it is the standing practice of this Court to admit a mutual claim even after the first session of the Court.

3. Award as to the Merits of the Principal Claim

From the evidence submitted by the parties the Court found that on the date of signation of the 1983 protocol of understanding and taking into

account the provisions thereof respondent owed claimant the following amounts;

1) 1,889,436 mk. on account of non-paid invoices regarding the deliveries of skin clothes;

2) 477,670 mk. on account of non-paid invoices regarding the delivery of fur products;

i.e., on the whole, 2,367,106 mk. Later, respondent paid to claimant an amount of 65,000 mk. and returned to him goods to the value of 272,652 mk. Consequently, on the date of the statement of claim, the respondents' debt amounted to 2,029,454 mk.

Of this amount the Court awarded to the claimant 1,755,040 mk. with interest. The Court relied in this respect upon the non-contested facts that under four contracts, claimant sold to respondent and delivered to him certain amounts of goods and that respondent failed to pay the price. Under all the contracts the buyer's duty to pay the price was unconditional and unrelated to possible later reclamations of quality. In fact, the buyer attempted to pay for the goods delivering — pursuant to the provisions of contracts — to the Polish consulate in Milan certain guarantee cheques as the security for payment of the price. However, the cheques proved to be worthless.

As to the resting amount of 254,414 mk., the Court dismissed the claim. The Court relied upon the provision of the 1983 protocol of understanding by which claimant agreed to pay to respondent this amount as compensation for the latter's damages due to the improper performance of four contracts and to the difficult business relations on the Italian market. This Court found that the formulation of Point III of the protocol, by which "[...] the respondent's indebtedness is hereby reduced by the amount of 254,414 mk.," brought about legal effects as on the day of signation. The question raised by claimant whether this provision should be read as concerning compensation or price rebate given by commercial reasons, had no importance for this purpose.

4. Award on the Merits of the Mutual Claim

The mutual claim consists of two separate items:

1) the claim of compensation in the amount of 1,100,000 mk. for the loss of commission due to non-prolongation of the agency agreement, which prolongation was provided for in Point VIII of the 1983 protocol of understanding;

2) the claim of damages in the amount of 1,345,282 mk. for improper performance of the four 1982 contracts of sale.

The key problem for the appreciation of the claim ad 1) is the legal character of the 1983 protocol of understanding. The Court found that this

understanding could not be treated as a separate transaction creating new legal relationship between the parties; it did not represent also an out-of-court settlement, or novation, or agreement to make a contract (within the meaning of, respectively, Arts 917, 506 and 389 of the Polish Civil Code).

The parties undertook in the protocol to ascertain facts and commercially to regulate disputes which emerged under contracts as well as to express their expectations as to their future cooperation. Consequently, the understanding in its first part bore a contractual character and modified certain obligations resulting from the sales contracts, and in the second part it represented a letter of intent. It did not change the legal basis for the buyer's obligations; he continued to be the seller's debtor under the contracts of sale.

The Court came to the opinion that the declarations in the second part of the protocol regarding the unlimited in time continuation of mutual cooperation and prolongation of the agency contract did express only the parties' future intents and cannot form a basis for a claim of damages.

The Court could not accept respondent's opinion according to which the latter would be entitled to damages for lost commission based on the alleged binding force of the promise to prolong the agency agreement and on the assumed six years of the expected duration of his agreement, while at the same time in the part relating to the sales contracts the understanding would be invalid, resulting in the alleged claimant's duty to return respondent the part of price paid by the latter after signing the protocol and to pay the price of the goods returned to claimant afterwards.

The Court finally decided that in the part relating to the contracts of sale the understanding was binding and had brought about respective legal effects immediately upon its signation. As to the part regarding future cooperation, the Court found that the understanding had lost its effectivity in view of further events taking place on the side of respondent. On 25 May, 1983, respondent sent claimant a letter in which he admitted his inability to fulfill the terms of the understanding and proposed new, different conditions of cooperation which were not accepted by claimant. This letter presented for claimant a sufficient reason to treat the understanding as terminated in its second part by respondent and to undertake cooperation on the Italian market with another partner.

The Court found also that since the parties' dispute was based on sale and not agency relationships, respondent could not rely for his exemption upon circumstances prevailing on the Italian market in 1982—1984. As an independent retailer, he must bear the risk of such events as insolvency and bankruptcy of his clients as well as liquidation proceedings, disputes and court proceedings resulting therefrom.

The burden of proving the claimant's, as the seller's, liability under the mutual claim, lies with respondent. He did not, in the opinion of the Court, discharge this burden satisfactorily. His assessment of the amount of damages was changed several times, varying from 760,900 mk. (before the 1983 protocol of understanding) to 6,795,000 mk. in one of his procedural writings. Various claims and documents to justify them were presented to the Court without clear order, so that connections between pieces of evidence and items of the mutual claim were impossible to establish. Respondent failed to indicate which of those items pertained to which of the four separate contracts of sale, as well as which claim referred to damages for delay in delivery and which — quality reclamations. The evidence presented to the Court was selected at random from the respondent's files regarding the transaction with the claimant and did not prove any losses attributable to the claimant's improper performance of contracts.

Reasuming, the Court decided the mutual claim to be dismissed, with an exception of the amount of 252,414 mk. due to respondent by force of the 1982 protocol of understanding, which amount had been deducted from the amount of the principal claim.

2. Award of 7 April, 1988, Case No. 100/86 and 138/W/86

Before the Court of Arbitration, admissibility of a mutual claim must be assessed — in view of the provision of paragraph 110 of the CMEA General Conditions of Delivery — under the requirements of Article 204, paragraph 1 of the Polish Code of Civil Procedure. According to this paragraph, a mutual claim is admissible when it is connected with the principal claim or when both claims are capable of mutual satisfaction by set-off.

Excerpt from Reasons

Claimant, a GDR foreign trade enterprise (f.t.e.), filed with the Court a statement of claim for 47,358 roubles with interest and costs of proceedings from a Polish f.t.e., as contractual penalty for delay in deliveries. Respondent filed a mutual claim for 48,730,64 rbl. motioning for the set-off of this amount with the amount of the principal claim, and demanding award for the difference (1,372.64 rbl.) plus interest and costs of proceedings.

During the proceedings the parties concluded a settlement which resulted in a withdrawal of the entire principal claim. However, the Polish respondent

did not withdraw his mutual claim; he only limited it to the amount of 5,367,04 rbl. plus interest and costs.

The GDR claimant submitted that:

1) The mutual claim was not admissible under paragraph 26 of the Rules of the Court of Arbitration; in his opinion, only a mutual claim resulting from the same legal relationship as the principal claim would have been admissible;

2) The whole dispute should have been treated as totally settled by the parties' out-of-court settlement and withdrawal of the principal claim;

3) Respondent filed with the Court of Arbitration in Berlin a claim for 53,876.12 rbl. including also major items of the mutual claim in this case.

The Court of Arbitration decided as follows:

1. In view of the withdrawal of the principal claim, the proceedings in this matter should be discontinued. The withdrawal took place before indicating of the date of the first hearing; therefore, 75 per cent of the Court's fee already paid is to be returned to claimant and the resting 25 per cent finally borne by him.

2. As to the admissibility of the mutual claim, the claimant's opinion could not be sustained.

Paragraph 26 of the Rules of the Court does not set any conditions for the admissibility of a mutual claim. Consequently, in accordance with paragraph 110 of the CMEA General Conditions of Delivery 1968/75 the question should be settled under the Polish law as the proper law of contract. The Polish Code of Civil Procedure was to be applied; pursuant to Article 204, paragraph 1 of the Code, a mutual claim is admissible if it is connected with the claimant's claim or if both claims may be settled in the way of a set-off. The Polish law does not require a stricter connection between the principal and mutual claim. The connection required by Article 204 there existed in this case. Therefore, the mutual claim was admissible.

3. As to the merits of the mutual claim, the Court found that it was not proved by respondent. The respondent's assertion that it had not been contested by claimant in his writing of 17 September, 1987, could not, in the Court's opinion, be justified by the wording of this writing; moreover, even such non-questioning would not be tantamount to admitting the claim since an admittance had to be express.

Consequently, the mutual claim had to be dismissed.

NOTES AND COMMENTS * NOTES ET COMMENTAIRES

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVII, 1988
PL ISSN 0554-498X

Military Activities in Outer Space

The Continuing Conflicts in the Interpretation of the Legal Rules Governing Military Space Activities. The answers reflecting the viewpoints of Polish lawyers on the questions set in the questionnaire of the Chairman of the Space Law Committee of the International Law Association in connection with the Warsaw ILA Conference (21—27 August, 1988).

The International Space Law Commission of the Polish Astronautical Association including members of the Polish ILA Branch with the Head of its Space Law Committee, Professor Andrzej Wasilkowski has undertaken, in consultation with Professor Daniel Goedhuis, the Chairman of the ILA Space Law Committee, and with the approval and consent of the Executive Council of the Polish Branch, to give its contribution of substance to the preparations for the Warsaw ILA Conference.

In October 1987 the Chairman of the ILA Space Law Committee sent to the Polish Commission a questionnaire on the continuing conflicts in the interpretation of the legal rules governing military space activities requesting the presentation of the viewpoints of Polish lawyers on the questions it carried.

The draft answers to the questions set in the questionnaire were provided by Dr. Ryszard Hara, Dr. Andrzej Jacewicz and Dr. Jerzy Rzymanek. The answers were subsequently discussed at two sessions of the Commission which were held in January 1988. Participating in the discussions apart from the rapporteurs were also Dr. Jerzy Kranz, Dr. Jacek Machowski, Dr. Janusz Prystrom and Professor Andrzej Wasilkowski. The final editing of the text done by Dr. Andrzej Jacewicz, the Chairman of the International Space Law Commission of the PAA took account of the opinions presented by the participants in the discussion.

The present publication is a slightly revised and abridged version of the text sent, in February 1988 to the Chairman of the ILA Space Law Committee.

Question I

What are your views on the legal implications of the provision laid down in Agreed Statement D, annexed to the ABM Treaty of 1972?

Answer

The reading of Agreed Statement D in the broad context of the relevant provisions of the ABM Treaty leads on to believe that it applies to the fixed land-based ABM systems and components. The ABM Treaty determines the permitted quantity of such installations using the old-type technology. Should fixed land-based anti-ballistic systems based on other physical concepts be developed in the future (the development, testing and deployment of ABM systems and components based differently is unconditionally prohibited) the relevant quantitative terms regarding the replacement of the old-type installations would be established under a relevant amendment to the ABM Treaty in line with the corresponding decision by the Parties to the Treaty.

Commentary

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”, “currently” (i.e. in 1972) consisting of: ABM interceptor missiles, ABM launchers, and ABM radars (Art. II 1). The ABM system was therefore described in terms of its tasks rather than its technology. The inclusion of the word “currently” indicates that the enumeration of ABM components has a functional nature and the concept of ABM system also covers other conceivable components.

Article I (2) provides that each of the two Parties agrees

“not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III.”

While, Article V(1) of the Treaty says:

“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 juxtaposition of the above quoted Articles I(2) and V(1) demonstrates that the exception provided for by Article II with regard to the prohibition of deployment of ABM defences can only apply to fixed land-based ABM systems and components.

Article III allows the possibility of creating two ABM system deployment areas, one centered on the Party's national capital, the other containing ICBM (intercontinental ballistic missile) silo launchers. Some very explicit

reservations with regard to the sizes of the relevant areas as well as the quantity and quality of ABM components have also been established. The 1974 Protocol to the Treaty limits each Side to one ABM deployment area.

Article IV of the ABM Treaty stipulates that the limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. The Treaty does not ban development and testing of fixed land-based ABM systems or components, with some exceptions (Art. V(2)). The Treaty provides that, subject to its other provisions, "modernization and replacement" of ABM systems or their components "may be carried out" (Art. VII). Is that to say that should new "exotic" ABM systems be developed their deployment would be permitted?

The conclusion that deployment of any kind of ABM systems and components other than those listed in Article III is inadmissible is rather natural. Still, the presumable determination of the Parties to the Treaty to clarify the handling of "exotic" systems and components was reflected in a relevant statement. Agreed Statement D read:

"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".

Agreed Statement D implies that the purpose the Parties set themselves is to retain the general prohibition of deploying ABM systems and their components with the exception provided for in Article III, and that in the event of a future possibility of replacing ABM components allowed under Article III with components based on other physical principles it would be necessary to introduce a relevant amendment to the Treaty. Worth noting is the fact that the statement applies only in cases where the new components (based on new physical principles) *substitute* for one of the three *permitted* types of components. As the concept of ABM system includes the system of any design or vintage that counters strategic ballistic missiles or their elements in flight trajectory, it is logical to infer that the prohibition of developing, testing, and deploying expressed in Article V(1) concerns all ABM systems and components which are based in the mode specified therein. Agreed Statement D does not apply to Article V(1) of the ABM Treaty. One is not confronted here with the problem of substitutes for the permitted systems and components for the Treaty envisages no permitted devices except the fixed land-based ones.

On 6 October, 1985, the then Assistant to the President for National Security Affairs, R. McFarlane came up with the opinion that the ABM Treaty explicitly allows testing and developing of ABM systems based on new physical concepts including the basing in space. Such reading of the ABM Treaty had occasionally been aired before by Western authors, most of whom were not lawyers. This did not trigger unusual heat for both Parties to the agreement, the USSR and the US, regularly reaffirmed that they deemed illegal the development, testing, and deployment of sea-based, air-based, space-based, or mobile land-based ABM systems or components.

It is to be explicitly pointed out that the so-called "new reading" of the ABM Treaty is incompatible both with the text of the agreement and with its purpose. Nor is it legitimized by considerations of historical-nature. The relevant provisions of the Treaty have been discussed above. It is to be remembered that the overall purpose of the ABM Treaty is to bar defence of the national territories of the Parties against strategic ballistic missiles, so as to make retaliatory weapons on both sides survivable. This was done by restricting the permitted US and Soviet defences to virtually symbolic proportions. That the number of allowed regions of deployment of fixed land-based ABM systems was reduced in the 1974 Protocol to one against two permitted by the Treaty clearly reflects the intent of the Parties. Can the measures allowed consistent with the "new reading" of the ABM Treaty be described differently than as seeking an end clearly inconsistent with the basic aim underlying the conclusion of the Treaty?

Apart from banning the deployment of ABM systems, both States renounced in the Treaty to provide a base for defence of the territories of their respective countries. As one advances the theory that the development and testing of futuristic ABM systems and components which are space-based would not clearly violate the prohibition expressed in Article V(1) it is to be remembered that all this would be incompatible with the requirement not to create a base for defence of the territory of each Party.

The historical sources such as the available official documents or facts quoted by those directly engaged in SALT I, a prelude to the conclusion of the ABM Treaty, demonstrate that at the time when the agreement was signed and ratified it was believed to ban development and testing of all ABM systems and components in any basing mode other than fixed land-based mode.

The "new reading" of the ABM Treaty by the US Administration triggered tough criticism on the part of the NATO allies of the US. It was also met with opposition in US Congress. However, harshest criticism was aired by the Soviet Side which strongly condemned it, describing the "new reading" of the ABM Treaty as a "deliberate deceit".

The "new reading" of the ABM Treaty begun by McFarlane was first

referred to in statements by Administration officials as "a moot point", but soon became "the correct legal" interpretation of the Treaty. Although it has been consistently stressed that advocates of President Reagan continued abiding by the restrictive interpretation, still the facts of the summit talks in Reykjavik seem to demonstrate that while the President refrains from calling things by their proper names he actually recognizes the legitimacy of the "new interpretation" of the ABM Treaty. For what different sense might be ascribed to the US proposal that "neither the United States nor USSR deploy advanced strategic defenses for 10 years while conducting research, development, and testing, which are permitted by the ABM Treaty"? This statement by no means concerns development and testing of fixed land-based ABM systems but refers in all likelihood to space-based ones which are indeed supposed to be heart of the futuristic ballistic missile defence of the US. Isn't such an attitude evidenced by the fact that the rival Soviet proposal providing that the USSR and the United States would undertake in the course of ten years not to use their right to withdraw from the termless ABM Treaty and in the course of this period strictly to observe all its provisions, i.e. to abide by the prohibition of testing all space elements of an ABM defence in outer space except for research and testing conducted in laboratories, was referred to by the American Side as an unacceptable amendment to the Treaty which could kill the SDI programme?

There are good reasons to believe that the gap between the standpoints in question has not been bridged, which is discussed in more detail in the Answer to Question IV/1.

Question II

What are your views on the latest developments regarding to use of ASAT weapons?

Answer

In reply to this point we wish to stress the close relationship between the development and the testing of ABM systems and ASAT systems. In the first place the current spectre of the establishment of the multilayer antimissile space-based defence fuels the interest in developing ASAT systems which could constitute both one of the modes of neutralizing such systems, and of shielding them. Secondly, the development and testing of some ABM systems and components often proves to be less or more similar to the development and testing of some antisatellite (ASAT) systems. Much ASAT technology has ABM implications since the basic functions of tracking, pointing, and destroying objects in space are broadly similar, which creates opportunities for undertaking actions prohibited by the ABM

Treaty under the guise of them allegedly relating to ASAT systems. This makes imperative a full-scale international legal settlement of the problem of development, testing and deployment of space-based weapons or those designed for use in outer space. That the moratoria regarding the ASAT systems' testing are now in force is of minor importance for there are no underlying legal terms specified in relevant treaties.

Commentary

The principal reason underlying the development of ASAT systems is the growing role of satellites used for military purposes. These are becoming the eyes, the ears and the voice of the present-day armed forces generating the temptation of their neutralization or destruction with the view to paralysing the movements of the enemy.

It seems that for the time being the "passive" military activity in outer space must be put up with. In fact it is inherently linked to the arms race on the earth. All this considered it seems that to abandon such intents and extend protection over all satellites including the military ones might be more sensible than to develop ASAT systems thereby fueling the risk of outbreak of a war in outer space. For the former to be acceptable though, the satellites remaining objects working for military purposes must not become combat installations designed to destroy targets in outer space or in the atmosphere or on the earth. Such a threat is rooted in the prospect of deployment of systems or components of antimissile defence in outer space.

The development, testing and deployment of ABM space-based systems and components is prohibited under the ABM Treaty. However it is to be taken account of in the first place that the agreement could be eroded by elusive interpretation of its provisions. Secondly, the prohibitions laid down in the ABM Treaty might be subject to evasive treatment on false grounds that in question are not ABM systems or components but ASAT systems. In fact the functions performed by both these systems are quite similar. Hence the insistence on both strict observance of the restrictions laid down in the ABM Treaty and supplementing them with an agreement banning development, testing and deployment of ASAT systems.

Question III

What are your views on the permissibility or non-permissibility of military uses of space stations?

Answer

None of the existing agreements of international space law of universal

applicability uses the term "space station". Consequently space stations have not acquired a special legal status as yet. International space law applies to any space activity including the kind that employs or will employ space stations.

A complete demilitarization of the moon and other celestial bodies as well as their neutralization preclude military uses of space stations situated thereon.

The employment of space stations located in outer space for military purposes is not prohibited but is subject to numerous restrictions. Banned is the deployment of nuclear weapons or other mass destruction weapons at such space stations. Banned is the conduct of any nuclear weapon testing or any nuclear explosions in outer space. Forbidden is also the using of space stations for military purposes based on environmental modification techniques.

Apart from these restrictions, military uses of space stations located in outer space are permissible unless their military applications are aggressive. It is also required that the planning of the applications should take due account of the relevant interests of the States engaged in the utilization of outer space. One risk military uses of space stations involve is their potentially becoming target of attack in an armed conflict.

Restrictions on permissibility of the utilization of space stations for military purposes may also stem from agreements other than those of universal application.

Such restrictions may be rooted in the domestic legislation of States.

Commentary

The term "space station" is not used in any of the existing agreements of international space law of universal application. In a not-too-distant future when space stations become basic devices serving man in the exploration and utilization of outer space there will also emerge a need for providing an elaborate definition of their legal status.

The term "space station" may be defined as a multipurpose object or set of objects serving to ensure man's permanent presence beyond the earth and its air space. The presence of man beyond the earth can be direct: manned space stations, or indirect: unmanned stations. The phrase "beyond the earth and its air space" covers both the outer space and the moon and other celestial bodies. Thus the determination of the permissibility of military uses of space stations is contingent upon their location, since their status has not defined in legal terms. Hence the division of space stations into:

1. stations based on the moon and other celestial bodies, and
2. stations based in outer space.

1. Space Stations Based on the Moon and Other Celestial Bodies

The 1967 Outer Space Treaty provides in Article IV (2) that "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". Article IV(1) also institutes the prohibition of the installation of nuclear weapons and other mass destruction weapons. The moon and other celestial bodies were thereby completely demilitarized. To guarantee this the Outer Space Treaty established the principle reading:

"All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity" (Art. XII).

The complete demilitarization of the moon and other celestial bodies was reaffirmed and elaborated upon in the 1979 Moon Agreement governing the activities of States on the moon and other celestial bodies. The Agreement also prohibited resort to any threat or use of force or any other hostile act or threat of hostile act on the moon and other celestial bodies. Banned was also the using of the moon and other celestial bodies in order to commit any such act or to engage in any such threat in relation to the earth, the moon, a spacecraft, the personnel of spacecraft or man-made space objects. Those measures all meant the neutralization of the moon and other celestial bodies within the solar system. An identical legal status was established for the orbits around the moon and other celestial bodies as well as trajectories to or around thereof (Art. 3) in connection with Art. 1 (1) and (2).

The Moon Agreement extended the system of the verification of the observance of its provisions.

2. Space Stations Based in Outer Space

Most significant in the judgment of the permissibility of military utilization of space stations situated in outer space is Article IV of the Outer Space Treaty in which "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". Space stations situated in outer space e.g. orbital space stations are a special type of space objects covered by the definition of the prohibition of deployment of weapons of mass destruction. The prohibition would exist also in the event of the exclusion of space stations from the category of space objects, for weapons of mass destruction cannot be placed in outer space in any manner whatsoever.

Already in the 1963 Limited Test Ban Treaty its Parties undertook to prohibit, to prevent and not carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under their jurisdiction or control in the atmosphere, under water and in outer space (Art. I (1)). The implication of the prohibition is not only the unlawfulness of nuclear weapon tests space stations but also of the testing of other types of weapons involving nuclear explosions. Thus consequently the conduct of the testing of X-ray lasers on space stations appears to be illegal for the testing involves mininuclear explosions.

Since demilitarization of outer space has, as yet, been incomplete it might be assumed that space stations based therein can be used for military purposes. The only additional restriction supplementing the above-listed principles is the requirement that military operations must be carried on in accordance with international law including the Charter of the United Nations (Article III of the Outer Space Treaty), and with due regard to the corresponding interests of other States Parties to the Treaty (Article IX of the Outer Space Treaty). The practice of the application of the Treaty prompts the conclusion that it follows from the afore-mentioned facts that military applications must not be of aggressive nature. The reference made in the Treaty to the Charter of the United Nations indicates that each State Party has the inalienable right to self²defence carried on either by a given State or in alliance with other States in the event of an armed attack (Art. 51 of the United Nations Charter) which can also be exercised in outer space.

Military uses of space stations can be submitted to a limited system of verification under Articles IX and X of the Outer Space Treaty. Those provide for the possibility of requesting consultation if a State Party to the Treaty has reasons to believe that an activity or experiment planned by another State Party in outer space would cause potentially harmful interference with activities in the peaceful exploration and use of outer space. Envisaged is also the possibility of States Parties submitting requests to be afforded the opportunity to observe the flight of space objects launched by other States Parties to the Treaty. The nature of such an opportunity for observation and the conditions under which it could be afforded are to be determined by agreement between the States concerned.

An examination of permissibility of the uses of space stations for peaceful purposes must also take account of the obligations stemming from the 1977 Environmental Modification Convention. Under its Article I(1) States Parties to the Convention undertook

“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”.

The term "environmental modification techniques" means all techniques designed intentionally to modify the processes occurring in nature including dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere, atmosphere or outer space. States Parties to the Convention cannot therefore use space stations for the pursuit of such purposes.

In view of the States' right to defence to be pursued by one State or a group of States it cannot be ruled out that outer space will become a scene of war operations. Since no detailed legal regulations regarding the mode of the conduct of war operations in outer space are available, the laws and customs of land and maritime warfare should apply therein by way of analogy. In this context it is to be noted that the military utilization of space stations involves the risk of the Parties to the armed conflict recognizing them as "military objectives" in the sense defined by the 1977 Protocol (I) Additional to the 1949 Geneva Conventions. The definition contained therein determines:

"Military objective are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" (Art. 52(2)).

Although the deployment of antimissile, and antisatellite weapons on space stations, as well as the establishing of command centres thereon is not forbidden, it may be recognized as a use making "an effective contribution to military action" and consequently render them targets of attack. The risk involved might be especially high with space stations of mixed civilian-military nature, for the specificity of the space environment may impede or even totally frustrate practical execution by the Parties to the conflict of the precautionary measures envisaged in Protocol (I) consisting in removing the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives (Art. 58).

The restrictions on the permissibility of military utilization of space stations may stem from international obligations of a State engaged in the construction and use of a station laid down in agreements other than those of universal application to which the State is a Party. One example of such an agreement is the ABM Treaty concluded by the USA and the USSR. Under the obligations stemming from this Treaty its States Parties are not allowed to use space stations for deployment or testing of antimissile defence systems. Also the Convention setting up the European Space Agency puts its Member-States under specific obligations. Article II provides:

"The purpose of the Agency shall be to provide for and to promote for exclusively peaceful purposes, cooperation among European States in space research and technology and their space applications, with a view to their being used for scientific purposes and for operational space applications systems".

That the Agency includes as many as three neutral States: Austria, Switzerland and Sweden indicates that the phrase "for exclusively peaceful purposes" refers to civilian objectives. All other interpretations might provoke doubts regarding the neutral ESA Member-States' observance of their international obligations.

The neutral States' obligations are not only their international obligations. The neutrality is also reflected in their Constitutions and other acts of their respective domestic laws. This leads one to believe that the permissibility of military uses of space stations should also be viewed in terms of the domestic laws of the States which are engaged in their construction or utilization.

All this considered there are good reasons to believe that the United States' suggestion that each of the Parties engaged in the construction of a space station should determine the types of activity compatible with the requirement of utilization for exclusively peaceful purposes in relation to its elements of the station might raise serious objections on the part of the ESA Member-States. In practical terms the acceptance of the suggestion could mean the approval of unrestricted utilization of the stations which would be inconsistent with the ESA Convention and the domestic laws of its neutral Member-States, and also with the prohibition of their undertaking such international obligations which might engage them in a war.

With complete demilitarization of the moon and other celestial bodies, the only partial demilitarization of outer space might encourage a strong trend toward the utilization of orbital space stations for military purposes subsequent upon the identification of their extensive applicability. At the same time States seeking to economize on their individual space programmes will be confronted with the need for combining their efforts geared to the construction of space stations. This might restrict military utilization of space stations, for when they become internationally-owned space objects their utilization would be reduced to a lowest level acceptable by the State most affected by the relevant restrictions.

Question IV

What are your views on the way which might be pursued, aimed at reaching a compromise on the present conflicts mentioned above?

1. The Problem of Agreement on the Question of Interpretation of the ABM Treaty

Answer

Where the elimination of the differences in the interpretation of the ABM Treaty is concerned it is to be noted that as a result of the Washington summit meeting in December 1987 the leaders of the USSR

and the USA instructed their delegations to Geneva talks to work toward the completion of a relevant agreement.

However, both the examination of the remark concerning this question contained in the Joint Statement and reports on the subsequent developments during the Soviet-American Geneva negotiations justify caution in the forecasting of the nature of the future settlement with regard to the interpretation of the ABM Treaty.

Commentary

Following the Soviet-American summit meeting held in Washington in December 1987 the two Parties pointed out in the Joint Statement:

“Taking into account the preparation of the treaty on strategic offensive arms, the leaders of the two countries also instructed their delegations in Geneva to work out an agreement that would commit the Sides to observe the ABM Treaty, as signed in 1972, while conducting their research, development, and testing as required, which are permitted by the ABM Treaty, and not to withdraw from the ABM Treaty for a specified period of time. Intensive discussions of strategic stability shall begin not later than three years before the end of the specified period, after which, in the event the Sides have not agreed otherwise, each Side will be free to decide its course of action. Such an agreement must have the same legal status as the treaty on strategic offensive arms, the ABM Treaty, and other similar, legally binding agreements”.

Undoubtedly the instruction to negotiate an agreement on the ABM Treaty the leaders of the USA and the USSR gave to their respective delegations was an auspicious move.

It is to be remembered that it is the concern of both superpowers to negotiate in 1988 a treaty on a 50 per cent reduction of strategic offensive weapons. Besides, the fact that December 1987 saw the successful conclusion of the process which led to the signature of the Treaty on the elimination of intermediate-range and shorter-range missiles was clearly not insignificant.

Irrespective of the improvement of the atmosphere in the relations between the two superpowers which was coupled by the signature of the INF Treaty it is to be noted that the agreement features the inspection on-site as one of the measures of verification, which is an unprecedented development. Should this measure of verification be successfully employed for the ABM Treaty, which is not unlikely under the present circumstances, the never-ending mutual resentment and distrust regarding the breaches of the agreement might be eliminated at last.

There is, however, an issue which has to be brought home. The ABM Treaty was based on the philosophy of mutual deterrence. Strategic defence represents a negation of this concept. The underlying contradictory premises of the two doctrines make the simultaneous maintenance of their strategic purposes difficult or impossible to achieve. A choice between the two must

be made. The heretofore progress of developments seems to indicate that the Administration of President Reagan advocates the pursuit Of the SDI programme.

Regrettably the definition of the objective to be pursued by the Parties to the ABM Treaty was imprecise enough to justify the fear that the respective Soviet and American perceptions of the functions of the Treaty may have nothing in common. In fact the principal difference with regard to the reading of the ABM Treaty seems to persist. That the document includes, most presumably on the request of the United States, the remark on research, development and testing permitted under the Treaty prompts a legitimate supposition that the American Party insists on a broad reading of the agreement. The Soviet Side in turn appears to have taken advantage of certain differences of terminology between the official English and Soviet language versions of the ABM Treaty to imply that it was determined to continue to stick to the traditional reading. In fact the English original of the Treaty uses identical terminology both in Article V(1) which forbids "to develop (and "to test") ABM systems and components other than fixed land-based, and also in Article IV concerning the permissibility of "development" (and "testing") of the latter. In the Russian original Article V(1) has the term "sozdavat" (and "ispytyvat"), while in Article IV the terms "razrabotka" (and "ispytaniye") are used. The term "razrabotki" is found in the Russian language version of the Joint Statement. The use of the word may have been motivated by the desire to imply that what the Soviet Union considers to be the permitted development and testing are the types specified in Article IV i.e. those relating to fixed land-based facilities.

Eloquent is also the stressing of the importance of the observance of the *original* provisions of the 1972 ABM Treaty. As is known to the Soviet Side this means the traditional restrictive reading of the agreement. While, the United States points out that the classified negotiating record could legitimize a broader interpretation. According to the Legal Adviser of the Department of State the interpretative public statements

"made at or near the time of the Treaty signature and ratification offer fairly consistent support for the broader interpretation now adopted as US Government policy. In contrast several later statements favor the 'restrictive' view of the Treaty".

It is to be assumed that the earlier readings reflected the true meaning of the Treaty more accurately than the later ones.

In the Joint Soviet-US Summit Statement the leaders of the USA and the Soviet Union raised the question of working toward the completion of the treaty on the reduction and limitation of strategic offensive arms. The public statements made by representatives of the US Administration clearly reveal the pursuit of separate treatment of this question and the

problems relating to the reinforcement of the ABM Treaty. The Soviet Union in turn hold the view that it is the strict observance of the ABM Treaty in line with its traditional interpretation that the success of negotiations on the reduction of strategic offensive arms depends upon. Whether this viewpoint will be consistently adhered to and if this will make the United States try and meet the Soviet Union half way with regard to the reinforcement of the ABM Treaty might be known in not-too-distant a future.

2. The Question of the Prohibition of the ASAT Systems

Answer

The establishment of the ASAT systems ban for all its compatibility with the interests of all States using outer space has met with impediments which seem mainly to result from the interdependence of those systems and the ABM systems.

Commentary

The establishment of the prohibition of development, testing and deployment of antisatellite systems is compatible with the interests of all the States using satellites directly or indirectly, which holds true especially of the satellites used for military purposes. Yet, there are restricting factors which were discussed in the Answer to Question II. There is a strong relationship between ASAT and ABM technologies, and the technical, political, and diplomatic actions taken in one sphere will almost certainly affect the other.

The establishment of the prohibition of ASAT systems may only be rational given the preservation and reinforcement of the ABM Treaty. However the latter might frustrate the development and deployment of the antisatellite space-based defence. Highly unlikely is also the drawing up of a treaty forbidding ASAT systems and providing for protection of satellites given their performance of role of installations combatting ballistic missiles or other objectives. An ABM test could be carried out under the guise of an ASAT test and an ASAT test could be carried out under the guise of an ABM test. It is, however, to be noted that while only part of ASAT facilities have the ABM properties, almost all ABM space-based facilities have the ASAT properties.

In the past the question of verification was pointed to as a stumbling bloc impeding the establishment of the ASAT systems ban. The example of the marked extension of the previously applied methods of verification within the INF Treaty shows that with goodwill demonstrated by the Parties concerned the problem might be resolved. It seems that where the

ASAT systems ban is concerned the application of a future treaty should not be restricted to the superpowers only. There is, however, no certainty as to the likelihood of the creation of international satellite monitoring, a highly desirable measure, or other international means of verification. Until quite recently the proposals regarding the creation of an international verification mechanism were obstructed by the superpowers. The USSR revealed a change in its approach as early as 1985 in connection with the plans to set up the World Space Organization. In March 1987 the Soviet Union put forward its proposal on the verification of non-deployment of space weapons through the international inspectorate at the Disarmament Conference in Geneva. The body would have the right of access to on-site inspection of all space objects and launch vehicles, as well as the monitoring of launchers. Unfortunately, the US has not accepted the principle of international verification as yet.

Many States hold the view that the ASAT systems ban is an initiative which ought to be realized as soon as possible. That the Soviet Union has carried out tests of those systems since 1982, and US Congress has prohibited the providing of financial support for the testing are auspicious developments, too.

Congress has also declared that no funding will be approved for SDI tests which breach the "traditional interpretation" of the ABM Treaty. Thus there exists a *de facto* superpower moratorium on space weapon testing. This might constitute a good departure point for the start of constructive negotiations on banning weapons in outer space.

However, a distinction should be drawn between the attitudes of the executive and legislative branches within the United States. Regrettably the Administration is committed to the pursuit of ASAT weapons and SDI. The decisions of Congress have been undermined and pressure has been exerted upon congressmen so that they choose not to vote for the extension of their validity.

3. The Problem of the Scope of the Prohibition of the Utilization of Space Stations for Military Purposes

Answer

As regards the prohibition of weaponizing space stations the settlement of this question is contingent upon the settlement of questions being considered in connection with the prospect of the reinforcement of the ABM Treaty and the establishment of the ASAT systems ban.

The possibility of the establishment of limitations with regard to the

scope of the "passive" activity pursued for military purposes by national space stations appears to be rather unlikely.

Commentary

The establishment of protection of satellites and of the prohibition of the weaponization of outer space might prevent the uses of space stations incompatible with the purpose of the two measures. This however involves the impediments discussed in the Answer to Question IV(1—2).

As regards the establishment of the prohibition of or restrictions on the utilization of space stations for "passive" military activity we are inclined to believe that there are no chances whatsoever of the States concerned adopting such measures. Although the Draft Treaty on the Prohibition of the Use of Force in Outer Space and From Space Against the Earth presented to the General Assembly of the United Nations in 1983 by the Soviet Union did include the Parties' commitment "not to test or use manned spacecraft for military, including antisatellite, purposes" it was met with criticism that the proposed measures were too radical.

A complete abandonment or even a mere radical limitation of the "passive" pursuit by individual States of military purposes is not very likely to take place in a foreseeable future. The factors enhancing abandonment or a radical limitation might be, in the first place: resolute disarmament measures taken in relation to land-based installations, and, in the second place, the introduction on an ever larger scale of international mechanisms designed to take over some of the functions now performed by military satellites. It is, however, to be noted that as regards the internationalization of verification carried on by means of satellite monitoring, to mention but one example, there is just one State, the USA opposing the concept. Some hopes are being raised by the proposed regional agreements on the establishment of satellite monitoring agencies.

Anyhow a discussion of the limitation or prohibition of a particular type of space activity can only be rational given the possibility of practical identification of the type of activity in question. On the one hand this might be achieved by the establishment of more effective methods of verification, and on the other a modification of the system of registration of space objects aimed at putting the States concerned under the obligation to provide promptly more extensive information on the nature of the satellites they launch. Regrettably a sober judgment of the situation leads one to believe that the likelihood of a prompt achievement of a relevant agreement by all States engaged in space activity appears to be very small.

BOOK REVIEWS * COMPTES RENDUS

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVII, 1988
PL ISSN 0554-498X

Jan BIAŁOCERKIEWICZ, *Powstanie i rozwój prawa międzynarodowego gospodarczego. Studium z zakresu doktryny i źródeł [La naissance et l'évolution du droit international économique. Une étude de la doctrine et des sources]*, Toruń 1987 (éditions de l'Université Nicolas Copernic do Toruń), 314 pp.

Le livre de M. Białocerkiewicz est consacré à l'examen de la nature et des sources du droit international économique.

Dans le premier chapitre, l'auteur se concentre sur la présentation de la doctrine en matière de définition du droit international économique. En distinguant entre la notion restrictive de droit économique international (normes du droit interne régissant les relations économiques extérieures) et la notion extensive de droit des transactions économiques internationales (toutes les normes appliquées aux transactions dépassant le cadre national), M. Białocerkiewicz situe le droit international économique à mi-chemin des notions précitées (pp. 34 - 35). Selon sa définition, le droit international économique comprend les normes d'origine internationale, spécifiques en raison de leur objet, qui organisent, coordonnent ou régissent directement les relations entre des sujets dont les activités économiques dépassent le cadre national (p. 44). Cette définition met l'accent sur la participation des Etats dans la création des normes de cette branche du droit international et elle implique la limitation de l'autonomie de la volonté des sujets auxquels ces normes s'adressent. Cependant, elle ne signifie pas que les Etats sont les seuls destinataires de ces normes, car — selon l'auteur — elles s'appliquent également aux relations entre les personnes physiques ou morales et aux relations entre celles-ci et les Etats (p. 45).

Dans le deuxième chapitre, l'auteur présente, dans une perspective historique, les principales doctrines économiques en aboutissant à la conclusion que le développement du droit international économique et le renforcement du rôle des Etats dans la réglementation internationale économique constituent une réponse aux insuffisances des théories du libéralisme économique.

Les chapitres qui suivent sont consacrés à la présentation des sources du droit international économique et notamment aux principes généraux du droit international public et aux principes généraux du droit (chapitre III). Quant aux premiers, il les déduit surtout de l'article 2 de la charte des Nations unies en les adaptant aux relations économiques; quant aux seconds, il les considère comme des directives d'interprétation du droit international économique.

Les accords internationaux constituent la source suivante (chapitre IV). Après quelques observations générales, l'auteur présente les plus importantes dispositions économiques du traité de Versailles de 1919 et poursuit son analyse dans la période contemporaine en abordant la réglementation internationale du travail et de la sécurité sociale (conventions

de l'Organisation internationale du Travail) ainsi que celle des produits de base. Si les accords bilatéraux ont contribué à la naissance des standards de traitement économique internationaux (traitement national, clause de la nation la plus favorisée), les premiers accords multilatéraux ont jeté les bases de la future coopération internationale et notamment des plusieurs organisations internationales.

Le chapitre V est consacré au rôle des organisations internationales dans le développement du droit international économique, de celles notamment qui exercent des fonctions de réglementation et de coordination (GATT, FMI, CNUCED).

Les problèmes de l'unification internationale des règles juridiques en matière économique sont abordés au chapitre VI. L'auteur y énumère les principales conventions consacrées à ce sujet et se penche notamment sur l'unification des normes au sein des Communautés européennes et du Conseil d'assistance économique mutuelle (Comecon). Conformément à sa définition (v. *supra*), l'auteur estime que les standards internationaux, conditions générales, accords types et autres règles de ce genre font partie du droit international économique uniquement lorsqu'elles ont leurs origines dans une forme du droit international public (pp. 213 - 215).

Le chapitre VII est consacré à la spécificité des différends internationaux économiques et aux méthodes de leur solution dans les statuts de certaines organisations internationales.

Dans le dernier chapitre, l'auteur mentionne les tendances évolutives du droit international économique et notamment diverses résolutions adoptées dans le cadre de la campagne en faveur d'un nouvel ordre économique international.

La structure du livre reflète la définition du droit international économique adoptée par l'auteur et se fonde sur la présentation des sources de ce droit. Cette méthode et les résultats obtenus ne sont pas un succès. Les diverses parties du livre sont trop descriptives sans être exhaustives. En souffre également la profondeur analytique, car le sujet est énorme, les théories nombreuses et le volume d'un livre limité.

Jerzy Kranz

Renata SZAFARZ, *Badanie Ziemi z kosmosu w świetle prawa międzynarodowego* [*Remote Sensing of the Earth from Outer Space in the Light of International Law*], Wrocław 1987, Ossolineum, 186 pp.

Man's presence in outer space has barely started 30 years ago, but already now space flight ceased to be an unusual and exciting event. Astronautics is becoming more and more a part of our every day life, what requires clear and precise legal regulation.

Space law cannot be considered any more an exotic branch of international law. It has become a kind of *droit du milieu*, like air law and law of the sea, which regulate human activity in a specific environment.

The book under review deals with legal problems of remote sensing of the Earth. The importance of this new application of space technology is frequently compared with breakthrough in science in connection with the invention of microscope. Today remote sensing is an indispensable tool in meteorology, geology, cartography and in many other fields.

Such a common application of remote sensing, and its potential to provide unrestricted insight into territory of States, require intervention of international law.

The book is a one of very few in socialist States, and the first in Poland, a monograph of legal problems of remote sensing. It is also the first published monograph, which was prepared as a part of studies on "Political, Legal and Economic Aspects of Peaceful Uses

of Outer Space”, which are undertaken with support of the Committee on Space Research of the Polish Academy of Sciences.

The monograph is analytical, and thus reflecting the present state of international law, where precise legal regulation of remote sensing is still lacking. The book is based on the study of general rules of space law, existing State practice, opinions of States expressed at the international conferences and in the international organizations, as well as, on the opinions of eminent scholars.

The author rightly points out that the complexity of legal problems of remote sensing is due to the fact that it is an activity embracing two spheres — outer space and the Earth, where the two different legal principles apply — freedom of exploration and State’s sovereignty. A major issue which arises is: to what extent the rights and obligations of States — both States carrying out remote sensing and sensed States — are governed by the principle of freedom of exploration and use of outer space, and to what extent by the principle of State’s sovereignty (p. 7). This central problem is examined in the whole book, since many specific questions depend on how it is resolved.

The book has a very clear and logical composition which reveals its analytical character.

First chapter deals with general issues such as: the basic notions of remote sensing, its practical applications, and work in the United Nations on legal principles governing remote sensing. The author carries out detailed analysis of proposed definitions of remote sensing pointing out that they contain too many technical details. She suggests that the definition should emphasize that the final results of remote sensing is transmission of data to ground stations, and formulates her own definition according to which “remote sensing means the performance from outer space, for civilian purposes, of observations and measurements of natural resources of the Earth, as well as, of circumterrestrial, over-ground and underground environment, its elements and phenomena and their transmission to ground stations” (pp. 16 and 180).

It seems, however, that the author’s attempt to formulate a definition without technical terms has failed, since it includes also visual observations carried out by astronauts. The emphasis put on transmissions of data to ground stations is rather unnecessary, since signals aimed at search for extra-terrestrial intelligence within CETI—SETI programme only are sent to outer space. Lawyers trying to formulate general definitions should take into consideration the high degree of technical complexity of space activities. Otherwise legal rules elaborated by them will not permit to satisfy the needs of international community created as a result of development of space technology.

Second chapter deals with principles governing remote sensing. The author arrives at the correct conclusion that the present international law does not interdict the sensing of the Earth from outer space without the consent of sensed States, and consequently remote sensing undertaken without such a consent is permitted. She also questions a thesis hold by some States, that the UN General Assembly resolutions on permanent sovereignty over natural resources call for exclusivity on data and informations on their whereabouts.

The author is of the opinion that “as a result of activities of space powers and of not unconditional consent of the international community, a new customary rule of international law is being formed stating that: It is permitted to initiate and conduct the sensing of the Earth from outer space, for non-military purposes, under the condition of indirect (through the Secretary General of the UN) informing other States (pp. 104 and 181). She maintains that calls for imposing strict limits on remote sensing from outer space are not realistic, far more proper and practical solution would be to introduce responsibility of subjects carrying out remote sensing when the eventual use of results obtained by remote sensing is harmful to legitimate rights and interests of a sensed State.

In the third chapter the principles of disclosing data and informations are discussed. The author points out that "both the Outer Space of Treaty of 1967 and the general international law permit a free disclosure and dissemination of data and information obtained by remote sensing" and that "States are free to determine the scope of disclosed data and information resulting from remote sensing" (pp. 129 and 182).

R. Szafarz criticizes all efforts aiming at privatization and commercialization of remote sensing activities, since in her opinion, it would have a negative influence on possibilities of economically weaker States, and especially developing countries to benefit from this technology. In our opinion the author's anxiety with this respect is unfounded. Private company does not have to charge more for data and information resulting from remote sensing than State does. On the contrary, it has to offer better price or more attractive services to get into market. Private company is more interested than governmental agency in wide dissemination of data and information, since its profits depend on it. Besides, States carry out remote sensing first of all for their own benefit, while private company cares for satisfying existing demand and even tries to stimulate it.¹

R. Szafarz herself in final conclusions and remarks points out that "only existence of a few, or even better of a dozen competitive remote sensing systems will ensure real access to data and informations required by States" (p. 166). The establishment of such competitive systems is now a reality. Three commercial companies compete on remote sensing market — French "SPOT-IMAGE", US "EOSAT" and Soviet "SOJUZKARTA".

The last, fourth chapter discusses the convention on the dissemination and use of data of remote sensing from outer space of May 18, 1978, concluded in Moscow by 6 socialist States. Poland ratified this convention in 1979. Article IV of the convention provides that consent of sensed State is required for dissemination of data relating to its territory if their spatial resolution is finer than 50 metres. The principles adopted by the UN General Assembly do not provide for any consent of sensed State. Thus, the convention should be amended, or it might be renounced by State Parties.

the book was written in 1984, but by mere chance three year long editorial process, enabled the author to supplement it with the Annex updating informations about the COPUOS work on remote sensing which was accomplished in the meantime, so it contains the text of principles on remote sensing adopted by the UN General Assembly in December 1986 in resolution 41/65. The book has also an English version of more important conclusions and final remarks, as well as, of table of content. This monograph is an important contribution to the development of Polish doctrine of space law. It is a profound and detailed study of remote sensing based on an extensive literature of the subject.

Certain weakness of the book lies in its avoidance of technical aspect of remote sensing. As a result in its extensive bibliography containing over 100 books and articles, there is only one on scientific and technical problems of remote sensing written in 1978, and in 20-page subsection "The Emergence and Practical Application of Remote Sensing" technical data are quoted from works of eminent space lawyers. Yet, there is an extensive technical literature on remote sensing in Poland, and since many years national conferences on remote sensing have been taking place in our country.

Had the author payed more attention to the achievements of Polish science and technology in this field, and their practical importance, the book would have been more interesting for Polish reader, while preserving its legal character.

Jerzy Rzymanek

See: J. RZYMANEK, "Problemy prawne komercjalizacji teledeiekcii" [Legal Problems of Commercialization of Remote Sensing], *Postępy Astronautyki* No. 12 pp. 129—143.

Jerzy TYRANOWSKI, *Zasada nienaruszalności granic w prawie międzynarodowym* [*Principle of Inviolability of Frontiers in International Law*], Warszawa 1987, PISM, 142 pp.

Professor Jerzy Tyranowski, head of the Department of International Law of the Adam Mickiewicz University in Poznan has been known as the author of a number of publications concerned with problems relating to the position of frontiers in international law. His recent book on the principle of inviolability of frontiers has six chapters: I. "The Principle of Territorial Integrity as Viewed by International Law", II. "Inviolability of Frontiers in the Light of Universal International Law", III. "The African Regional Principle of Inviolability of Frontiers: the Principle of *uti possidetis iuris*", IV. "The European Regional Principle of Inviolability of Frontiers", V. "The Principle of Inviolability of Frontiers, and Territorial Claims": VI. "Inviolability of Frontiers of the Polish People's Republic".

The writer begins with quoting facts in favour of the theory that international law does include a separate, independent principle of territorial integrity, which is followed by the inference that in progress now is the process of emergence of the principle of inviolability of frontiers from the said principle. The CSCE Declaration on Principles Guiding Relations between participating States, which besides eight other points also includes the principles of territorial integrity and inviolability of frontiers, appears to be a climax of the process in question.

The principle of inviolability of frontiers, says Professor Tyranowski is an offshoot of the principle of territorial integrity from which it also derives its strength. The offshoot continues to represent partly a component of the principle of territorial integrity, but it is also in part an independent entity carrying special meaning. The independent implications of the new principle of inviolability of frontiers, whose evolution is still in progress, appear to involve the protection of a State territory against territorial claims. This aspect of the principle is, as part of universal international law, reflected and explicated in the law of treaties, and also in the provisions of the law of the succession of States. In regional terms the principle of inviolability of frontiers also shows peculiar implications taking account of the given region's specific conditions.

Pride of space in the book (some one-third of it) is devoted to the discussion of what the writer terms as the European regional principle of inviolability of frontiers. The author contends that the principle is largely a result of the consistency the States-Parties to the Warsaw Treaty have displayed in their pursuit of the elaboration of such a norm by demanding the recognition of all frontiers now existing in Europe. Tyranowski describes the process of the principle's formation on the all-European scene, highlighting the role the treaties concluded with the Federal Republic of Germany by the Soviet Union, Poland, the German Democratic Republic and Czechoslovakia in 1970—1973 played in this respect. The provisions with regard to inviolability of frontiers contained in these agreements include two principal elements: the mutual recognition of frontiers, and the renunciation of territorial claims in the bilateral relations. The Treaty between the USSR and the FRG, apart from having implications reaching beyond the realm of the two Parties mutual relations also commits the two Parties to recognize the frontiers of all European States and also to renounce territorial claims towards any other European State. Although the agreements imposed practical obligations upon a limited number of Parties only, their conclusion was indispensable in the light of the position held by the FRG, for it enabled the inclusion of the principle of inviolability of frontiers in the code of rules governing the relations between the States-Parties to the CSCE Final Act.

These remarks prompt the natural question of how the principle of inviolability of frontiers differs from the principle of territorial integrity which provides for the integrity

(inviolability) of a State territory and its immunity, and does belong to the set of principles listed in the CSCE Declaration. In Tyranowski's view the novelty in question is the fact that the States participating in the Conference on Security and Cooperation in Europe undertook to refrain from the making of any territorial claims. This also means the renunciation of such claims by those States which formerly had been advancing them. Consequently, as the recognition of a frontier means, in terms of international law, most of all, the renunciation of territorial claims *vis-à-vis* the area encompassed by the frontier, then conversely the renunciation of territorial claims is tantamount to the recognition of the frontier. This leads one to conclude that the establishment of the principle of inviolability of Frontiers has resulted in the mutual recognition of frontiers by those States participating in the CSCE which were previously engaged in the disputes involving territorial claims. Thus, the European regional principle of inviolability of frontiers has implications reaching further than those of the universal principle which provides for the prohibition of advancing territorial claims inconsistent with international law, meaning in other words claims of clearly political nature. Where the European dimension is concerned, the principle of inviolability of frontiers provides for mutual recognition of territorial claims and consequently, the recognition of specific frontiers which emerged in the wake of World War II and the post-war developments.

Tyranowski also provides a separate treatment of the question of inviolability of frontiers of the Polish People's Republic. The author examines in great detail the opinions advanced in the West German doctrine of international law in favour of the theory that the recognition of the western frontier of Poland by the FRG and the GDR might not be binding for the future united German State. Tyranowski convincingly dismisses such views and winds up this part of his argument by making this point: "Since the existence of two separate German States has won general recognition; the four Powers have 'exhausted' their terms of reference with regard to the eventual shape of the Polish-German frontier; and the questioning of the shape of the frontiers is prohibited by virtue of the principle of inviolability of frontiers, then consequently in the event of a possible unification of the two German States the 'normal' succession of States would apply. The united German State being a successor of the GDR and the FRG will be, obligated in line with the principle of inviolability of frontiers established under the relevant treaties, to adhere to, or speaking in more precise terms, bound *ipso jure* by the treaties concerning the question of frontiers having each of those States as a party".

The present writer does not subscribe to all views contained in the book. In this opinion it might even be well-worth pondering whether there really is a need for establishing in international law an independent new principle of inviolability of frontiers, and whether, considering all the qualifications Tyranowski advances as to the scope of its applicability, the principle is as essential as he seems to suggest. Naturally, this doubt does not concern the European regional principle of inviolability of frontiers, for since such a principle was included in the code of principles enshrined in the CSCE Declaration along with the principle of territorial integrity and the principle of refraining from the threat or use of force, it would be inconsistent with the good faith to assume that the fact has no legal implications.

Tyranowski holds the view that in universal terms the principle of inviolability of frontiers bans only the advancing of territorial claims which are not based upon international law. Yet, it does not represent, in Tyranowski's opinion an obstacle to the States' changing of their frontiers. The claims can only be regarded as admissible when they are based upon international law. Still, it is the author of the book who insists that arguing in favour of a territorial claim on the grounds of its being based upon international law need not necessarily result in the recognition of its legitimacy. In the event of a State explaining its claim by quoting reasons stemming from international law, the claim can hardly

become political, upon its subsequent determination as being unfounded. Doesn't this observation lead one to conclude that the practical meaning of the principle under discussion is ambiguous?

That the monograph by Tyranowski provokes discussion can by no means be seen as its minus but rather as a plus. It is also to be noted at this point, that no ideas found in the book, no matter how controversial are vague and can hardly be deemed to have been supplied at random. The book is very well written and appears to be a product of careful and deep reflections.

Since the question of inviolability of frontiers has special practical implications for Poland, and no monograph concerned with this subject-area has been supplied before by a specialist in international law, the Polish reader may rightly derive satisfaction from the fact that the important gap has been filled by a Polish writer.

Andrzej Jacewicz

Forty Years of Jurisprudence of the International Court of Justice

The Second Polish Scientific Conference on International Law (Jablonna, 30 June — 2 July, 1988)

The Second Scientific Conference on International Law organized by the Institute of State and Law of the Polish Academy of Sciences and the Polish Institute of International Affairs took place at Jablonna at the turn of June and July 1988. The Conference was devoted to the jurisprudence and procedure of the International Court of Justice. Nearly 50 representatives of the theory and practice of international law from all over Poland participated in the meeting.

After opening of the Conference the floor was given to its honorary guest, Professor Manfred Lachs, Judge of the International Court of Justice who stressed the topicality of the subject under discussion, indicating that at present the ICJ finds itself at a specific stage of development with a recent evolution of viewpoints as to its role and place in contemporary international relations.

At the conference eight lectures were presented, each concentrating on various aspects of the activity of the ICJ.

In the first lecture Professor Janusz Symonides dealt with the functions of international courts. Focusing on the Hague Court — incidentally also on other international courts, including the future Law of the Sea Tribunal — he discussed reasons of disinclination for or underestimation of international courts by States. He also considered the proper course to be taken in order to overcome the reluctant attitudes towards the ICJ and to make a fuller use of the Court's work. The lecture contained a number of proposals formulated in doctrine in view of broadening the Court's competences and strengthening mechanisms of implementation of its judgments.

The paper presented by Professor Renata Szafarz concerned evolution of attitudes of States towards the jurisdiction of the International Court of Justice. The Author outlined the practice of States as concerns acceptance of the Court's jurisdiction — and the practical use of these jurisdictional titles for bringing cases before the Court by way of an application or granting it *ad hoc* jurisdiction for settling particular, concrete cases—by way of compromise. The Court has a moderate popularity among Western States while there can be noticed an increasing confidence on the part of Third World countries and growing interest in the Court among Socialist States.

Professor Krzysztof Skubiszewski brought up the subject of custom in the jurisprudence of the ICJ concentrating on the problem of the Court's concept of practice — the substance of international customary law. The Author discussed different types of comportment contributing to law-making practice including the role of protest, the significance of various acts of State (legislation, administrative acts and judicial decisions), functions of treaties, the role of non-binding resolutions of conferences and international organizations. Considerations concerning practice were supplemented by remarks on the other element of custom — *opinio juris*. and its place in the jurisprudence of the Hague Court.

Professor Jan Kolasa in his paper dealt with the development and legal character of procedural norms of the ICJ. Some light was thrown on rules contained in the Statute of the ICJ. its Rules of Procedure resolutions and orders, as well as (to a certain extent) rules resulting from a determined practice of the Court. Their legal character and transformations were presented. The Author underlined the law-making role of the Court in determining rules of procedure. He spoke against easy analogies to domestic law in this regard.

Professor Genowefa Grabowska's lecture was concerned with advisory opinions of the ICJ. It began with a presentation of the origin of this institution and proceeded to such issues as competence of the ICJ to render advisory opinions, organs entitled to request advisory opinions, legal character of advisory opinions and rules regulating procedure before the Court.

In his lecture on equity in the jurisprudence of the ICJ Professor Wasilkowski assumed an analysis of various functions of equity in contemporary international law. contending dial it is possible to determine resolutely the relation between equity and law only in certain situations. He spoke for self-sufficiency of the notion of equity as far as the necessity of applying legal rules is concerned and against ambiguous notions of the principle or principles of equity. Proceeding to an analysis of the jurisprudence of the ICJ the Author presented the Court's view that when it invokes equity, it applies equity *infra legem*. He next underlined that the ICJ does not engage in general considerations on the subject of equity but when striving for an equitable solution the Court concentrates instead on examining concrete circumstances of a case.

The next lecture by Professor Wojciech Góralczyk concerned the problem of delimitation of maritime territories. The Author pointed out that the issue docs not have an exclusively technical character but is of vital economic significance. Two rules can be taken into account when delimitation is to be made: the rule of equidistance, the application of which could lead to manifestly unjust results, and equity. In its judgments the ICJ rejected the first principle as not being a customary, norm and based its decisions on equity but *legem*. In its judgments on delimitation the Court held a consequent line.

Professor Janusz Tyranowski analysed the problem of State territory and its boundaries in the jurisprudence of the ICJ. He discussed such issues as prohibition of the use of force against territorial integrity of a State, establishing State boundaries and delimitation of territory, change of the legal title to territory as a result of acquiescence and estoppel, the principle of *uti possidentis* as a basis of a title to territory and historical titles to territory.

An extremely interesting and vivid discussion followed, inspired by the presence of a Judge of the ICJ. Apart from Professor M. Lachs and the lecturers many other experts of international law took the floor, among others : Professor R. Bierzanek. Dr J. Kranz, Professor K. Lankosz. Director J. Łukasik. Professor K. Łukaszuk. Professor J. Makarczyk, Dr B. Przewoźnik. Professor K. Skubiszewski, Professor R. Sonnenfeld. Professor A. Straburzyński, Professor K. Wolfke.

In the course of the discussion a general reflection prevailed that the activity of the Hague

Court tends towards strengthening of the rule of law and international cooperation in a situation of a variety of cultures; there was a debate as to whether it could lead to the creation of a common legal culture. The change in attitudes of States, especially Third World countries and Socialist States, towards the ICJ was taken note of. There was an agreement that this had been caused by recent judgments of the ICJ. In particular the judgment in the case *Nicaragua v. the United States*, in which the Court had considerably advanced the rule of law i.a. by revindicating Article 4, paragraph 2 of the Charter of the United Nations.

Factors restraining the activity of the ICJ were also discussed. In the discussion concentrated here on two such factors: excessive formalism of procedure before the Court (considerably attenuated by the last changes of the Rules of Procedure of the ICJ) and the possibility of presenting by Judges of separate opinions to judgments. There was accord as to the importance of rules of procedure which significantly influence the substance of a judgment and on which to a great degree depends arrival at the substantive truth. Implementation of some procedural solutions, such as Chambers, was noted with satisfaction.

When considering the problem of custom it was repeatedly underlined that although the Court had often invoked customary law, it had not always been explicit in presenting the requirements of establishing of a customary norm, in particular its second element — *opinio juris*. However, the participants in the discussion expressed a view that the ICJ had not departed from traditional concepts of international law in its judgments. The discussion was not limited to the ICJ as such; general issues were brought up such as the manner of manifesting both elements of custom; notice was drawn to the evolution which the subjective element had undergone; also the mutual inter-relation of practice and *opinio juris* as well as the relation between treaty and customary law were considered.

Similarly, in the discussion of equity not only its place in the jurisprudence of the ICJ was considered, but — broadly — its place in the contemporary international law; whether it should be classified as a general principle of law, a fundamental directive of law, a principle of interpretation; also discussed were i.c. the relations of equity and the *bona fide* principle, justice proportionality.

There was disagreement as to the value — in general — of advisory opinions of the ICJ although the opinion prevailed that they significantly contributed to the development of international law and even had an influence on its codification. Stress was laid on the difficulties connected with the new role of the ICJ as a court of appeal from decisions of administrative tribunals; it was noted that the existing imperfect system creates problems of participation of individuals in proceedings before the Court and contrary to the Court's Statute changes the character of advisory opinions from advisory to binding.

The discussion on delimitation of maritime and State territories focused on concepts applied by the ICJ in its decisions. The debaters agreed that the Court's judgments in these matters had been a significant contribution to the development of international law.

Joanna Gomula and Janusz Stańczyk

OBITUARIES * NOTES NECROLOGIQUES

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVII, 1988
PL ISSN 0554-498X

Remigiusz Zaorski (1912—1987)

On 7 July, 1987, died suddenly Remigiusz Zaorski Professor at the Faculty of Law and Administration of the Gdańsk University.

Professor Zaorski was an internationalist whose work was always governed by the principle: *In mari vita tua*, that is — the motto of the Gdańsk University. His scholarly production, beginning with his work entitled *Jurisdiction over Contiguous Sea* for which in 1946 he received an award of the Minister of Navigation and Foreign Trade, was always connected with the sea.

Professor Zaorski was born on 1 October, 1912. He studied at the Faculty of Law of the Poznań University and later at the Faculty of Law of the Warsaw University. After having graduated he began to attend a seminar headed by Professor Cezary Berezowski and to work on his doctor's thesis on the legal status of the territorial sea. Because of the outbreak of war he could not defend his doctor's thesis earlier than after liberation. In 1948 Remigiusz Zaorski was granted a scholarship by the Commission on Reconstruction of Polish Science for the purpose of preparing a paper on free port zones. He became Professor in 1954. In October 1958 he was nominated professor and in February 1976 he became full professor.

Professor Zaorski's association with the Coast can be traced back to 1946 when he accepted the post of director of the Maritime Law Division at the Baltic Institute in Gdańsk. Next, from 1957 to 1970, he was director of the Maritime Institute in Gdańsk. At the same time he was engaged in the didactic activity — he was a lecturer at the Higher School of Maritime Trade in Sopot, the Higher Economic School in Sopot and the Centre for Social Studies and Navy Headquarters in Gdynia. In the years 1964—67 he was a lecturer and head of the Department of International Law at the Copernicus University in Toruń and in the years 1967—70 he held the chair of international law at the Higher Economic School in Sopot. At the Gdańsk University, established in 1970, Professor Zaorski became head of the International Law Department which he had organized. He was also the director of the Institute of Legal and Constitutional Studies of the Gdańsk University until he retired in 1981. Even then he maintained strong links with the University as a lecturer in the field of the law of the sea.

Professor Zaorski's scholarly achievements have found their expression in over one hundred works. They all bear a mark of versatile erudition, arduous amassment and utilization of immense material and its penetrating appraisal. Much attention was paid by the Professor to codifications in the field of the law of the sea within the framework of the United

Nations. Among many of his works on this subject the following monographies deserve special notice: *The Geneva Conventions on the Law of the Sea* (Gdynia 1962) and *The Exploitation of Biological Resources of the Sea in International Law* (Gdynia 1967).

The picture of Professor Zaorski's achievements would not be complete without mentioning and underlining his personal contribution to public activity. He assumed i.a. the task of vice-president of the Sea Research Committee (1964—73), president of the Scientific Council of the Baltic Institute (1972—77), he was a member of scientific councils at the Marine institute of Fising (1967—70) and at the Ministry of Navigation (1969—70).

Professor Zaorski was also engaged in the work on the international forum. In 1958 he was a member of the Polish delegation at the Conference of the Law of the Sea in Geneva and in 1968 he represented Poland at the International Oceanographic Commission. On several occasions he acted as an expert: in the Polish-American negotiations concerning the granting of fishing rights to Polish fishing vessels in the American exclusive fishing zone (1969), at the working group elaborating the status of the International Oceanographic Commission (1969), at a session of the Sea-bed Committee (1971), in negotiations of Baltic States on the agreement on regulation of fishery on the Baltic Sea and at the conference of Baltic States concerning the Convention on the protection of the living resources of the Baltic Sea (1973).

For his contributions and achievements Professor Zaorski received a number of state and departmental awards, i.e. the Officer's Cross and the Cavalier Cross of Revival of Poland, Golden Cross of Merit and Medal of the 10th Anniversary of People's Poland.

Professor Zaorski's extensive practice and his personal involvement in numerous activities won him the respect of all. He was always ready to serve with his work, experience and advice. He enjoyed authority both among students and research workers.

Professor Zaorski will always remain in the memory of those who has the chance to work with him.

Andrzej Straburzyński

T R E A T I E S * T R A I T E S

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVII, 1988
PL ISSN 0554-498X

International Treaties Entered into Force in Relation to Poland in 1987

The list of treaties published below includes the main international agreements, both bilateral and multilateral, which became binding on Poland in 1987. Inter-departmental agreements i.e. agreements concluded on the level of ministries have been omitted. The list contains only agreements concluded on behalf of the Council of State or the Government of the Polish People's Republic.

Pursuant to the Polish Constitution the only organ authorized to ratify and denounce international treaties is the Council of State. According to Polish law consent to be bound by an international treaty may also be expressed by the Council of Ministers either in the form of approval or by signature of a duly authorized plenipotentiary. Some treaties are concluded by exchange of notes. Also, capacity to conclude international treaties rests with the ministers on condition that the subject-matter regulated by the treaty falls within the scope of activity of the minister.

The Polish Constitution does not specify which international agreements require ratification. According to the Joint Resolution of the Council of State and the Council of Ministers of 28 December, 1968 concerning the conclusion and denunciation of treaties, the procedure of ratification should be applied to treaties of particular significance, such as:

- peace treaties and treaties of friendship, cooperation and mutual assistance,
- other treaties of political character,
- treaties concerning matters regulated, in domestic law, by acts of law,
- treaties containing solutions different to those adopted in domestic legislation,
- other treaties for which Poland has accepted the procedure of ratification in order to satisfy the legal requirements of the other contracting party, or if the parties have agreed to follow this procedure for some other particular reasons.

The Resolution of 1968 does not specify which treaties should be submitted to the procedure of approval.

In practice only 15 to 20 per cent of treaties concluded by Poland are subject to ratification. All treaties which have been ratified are published in *Dziennik Ustaw [Journal of Laws]*. Not ratified treaties are published very selectively. There exists no official collection of treaties in Poland.

The list of bilateral treaties has been arranged country by country, in alphabetical order (English alphabet), according to the following scheme: title of the treaty, place and date of signature, way of expressing consent by Poland to be bound by the treaty, date of its entry into force in relation to Poland. The list of multilateral treaties observes a similar scheme. Titles of treaties concluded in a language different from English or French have been translated into English.

Bilateral Treaties

Algeria

— Long term trade agreement; Warsaw, 11 September, 1986; approval; 10 October, 1987.

Argentina

— Agreement on cultural and scientific cooperation; Buenos Aires, 2 October, 1984; ratification; 23 April, 1987.

Bulgaria

— Agreement on direct cooperation in production, science and technology between Polish and Bulgarian enterprises and organizations; Warsaw, 10 April, 1987; approval; 19 June, 1987.

Canada

— Memorandum of Understanding relating to the export from Poland of certain textiles and textile products for import into Canada; Warsaw, 2 September, 1986; approval; 1 January, 1987.

— Long Term agreement on the development of economic and industrial cooperation; Warsaw, 4 May, 1987; signature; 4 May, 1987.

China

— Agreement concerning the re-establishment of a Consulate General of the Polish People's Republic in Gangzhou and another Consulate General in a Polish city; Peking, 11 November, 1987; exchange of notes; November, 1987.

Czechoslovakia

— Agreement on cooperation in the development of technology, production and export of the family of tractors; Prague, 20 February, 1987; signature; 20 February, 1987.

Hungary

— Agreement on the fundamental principles of cooperation of economic organizations and on the establishment of mixed enterprises; Warsaw, 27 October, 1987; signature; 27 October, 1987.

Italy

— Protocol relating to the development of economic, industrial and technical cooperation in the field of motor industry; Rome, 19 November, 1987; signature; 19 November, 1987.

Kampuchea

— Accord sur la création d'une Commission Polono-Kampuchéenne de Coopération Economique, Scientifique et Technique; Phnom Penh; 19 février, 1987; signature; 19 février, 1987.

Korean Democratic Republic

— Agreement on legal assistance in civil, family and penal matters; Phenian, 28 September, 1986; ratification; 20 June, 1987.

— Agreement on conversion of the Korean-Polish Maritime Brokers Company into the

Korean-Polish Shipping Company — a Joint Stock Limited Liability; Phenian, 11 February, 1987; approval; 24 September, 1987.

Libya

— Agreement on legal assistance in civil, family and penal matters; Tripolis, 2 December, 1985; ratification; 3 March, 1987.

— Agreement on social security matters Tripolis, 2 December, 1986; ratification; 1 March, 1987.

Portugal

— Accord concernant les transports routiers internationaux; Lisbonne, 22 avril, 1986; approbation; 21 février, 1987.

Soviet Union

— Protocol on the establishment of the Inter-Governmental Commission on Culture and Scientific Cooperation; Moscow, 4 January, 1987; signature; 4 January, 1987.

— Agreement concerning conditions of sojourn and activity on the territory of the Soviet Union of the Polish executive organization participating in the construction of the pressing mill "2000" at Magnitorsk; Moscow, 29 January, 1987; signature; 29 January, 1987.

— Agreement on cooperation in the years 1986—1990 in the management of gas deposits at Jamburg, in the construction of a gas main from Jamburg to the West boundary of the Soviet Union and of other industrial plants on the territory of the Soviet Union, and on the supply of gas from the Soviet Union to Poland; Moscow, 29 January, 1987; signature; 29 January, 1987.

— Agreement on granting a credit to the Polish Government; Moscow, 28 April, 1987; signature; 28 April, 1987.

o

United States

— Agreement on cooperation in science and technology and its funding; Warsaw, 28 September, 1987; signature; 28 September, 1987.

Multilateral Treaties

— Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea; Athens, 13 December, 1974; ratification; 28 April, 1987.

— Agreement on Import Licensing Procedures; Geneva, 12 April, 1979; approval; 27 March, 1987.

— Protocol on the Privileges and Immunities of INMARSAT; London, 1 December, 1981; adhesion; 28 February, 1987.

Joanna Gomula

BIBLIOGRAPHY * BIBLIORAPHIE

POLISH YEARBOOK
OF INTERNATIONAL LAW
VOL. XVII, 1988
PL ISSN 0554-498X

Polish Bibliography of International Law, 1987

Public International Law

BOOKS

BARCZ Jan: System prawny RFN wobec norm prawa międzynarodowego. Doktryna i praktyka konstytucyjna [Legal System of the FRG and the Norms of International Law. Doctrine and Constitutional Practice]. Warszawa: 1986, Wydawnictwo Prawnicze 308 pp., bibliography, summary in German.

BIAŁOCERKIEWICZ Jan: Powstanie i rozwój prawa międzynarodowego gospodarczego. Studium z zakresu doktryny i źródeł [Creation and Development of International Economic Law, Study on Doctrine Sources. Toruń: University of Mikołaj Kopernik 314 pp., bibliography, Rés.

GÓRALSKI Witold M.: Federalny Trybunał Konstytucyjny a stosunki zewnętrzne Republiki Federalnej Niemiec [The Federal Constitutional Tribunal and External Relations of the Federal Republic of Germany]. Warszawa: Polski Instytut Spraw Międzynarodowych 379 pp., bibliography.

KONWENCJE konsularne PRL. Wybór i wprowadzenie Janusz Symonides. Cz. 1—2. [Consular Conventions concluded by the Polish People's Republic. Selection and Introduction by Janusz Symonides. Part. 1—2]. Warszawa 1986: Polski Instytut Spraw Międzynarodowych 386 pp.+354 pp.

MICHAŁOWSKA-GORYWODA Krystyna, MORAWIECKI Wojciech, MULEWICZ Jarosław: Międzynarodowe Organizacje Gospodarcze. T. 2. Główne organizacje powszechnie i grupowe [International Economic Organizations. Vol. 2: The Main Universal and Group Organizations. Warszawa: Państwowe Wydawnictwo Naukowe 308 pp.

MORAWIECKI Wojciech: Międzynarodowe organizacje gospodarcze. T. 1. International Economic Organizations. Vol. 1]. Warszawa: Państwowe Wydawnictwo Naukowe 318 pp., bibliography.

RADZAJ Aleksander: Prawnomiędzynarodowa ochrona ofiar wojny [International Legal Protection for the War Victims]. Wojskowa Akademia Polityczna 85 pp., bibliography.

RÓWNY Kazimierz: Wolność żeglugi tranzytowej na rzekach międzynarodowych [Freedom of Transit Navigation on the International Rivers]. Wrocław 1986: Ossolineum, Instytut Państwa i Prawa 135 pp., bibliography, summary in English.

SAWICKI Stefan: Immunitet jurysdykcyjny konsula. Studium prawnomiędzynarodowe [Consul Jurisdictional Immunity. International Legal Study]. Warszawa: Państwowe Wydawnictwo Naukowe 228 pp., bibliography.

SKIBIŃSKI Jerzy: Sprawa traktatu pokoju z Niemcami po II wojnie światowej [Problem of Peace Treaty with Germany after World War II]. Warszawa: Państwowe Wydawnictwo Naukowe 404 pp. bibliography, summaries in German and Russian.

STOSUNKI NRD — RFN. Dokumenty, wypowiedzi, chronologia [Relations between GDR — FRG. Documents, Statements, Chronology]. Warszawa: Polska Agencja Prasowa V, 96 pp.

SZAFARZ Renata: Badanie Ziemi z kosmosu w świetle prawa międzynarodowego [Remote Sensing of Earth from Outer Space in the Light of International Law]. Wrocław: Ossolineum 186 pp., bibliography, summary in English.

WALCZAK Aleksander: Międzynarodowa Organizacja Morska [International Maritime Organization]. Szczecin: Szczecin Wyższa Szkoła Morska 59 pp.

ARTICLES

ABRASZEWSKI Andrzej, RYSZKOWSKI Janusz: Kryzys finansowy ONZ i próby jego rozwiązania [The UN Financial Crisis and Attempts to Solve It]. *Sprawy Międzynarodowe* No. 6 pp. 79—92.

ALEKSANDROWICZ Tomasz R.: Państwo jako podmiot aktu terrorystycznego o charakterze międzynarodowym [The State as the Subject of Terroristic Act of International Character]. *Zeszyty Naukowe ASW* No. 48 pp. 93—107.

BIENKOWSKA Ewa: Deklaracja ONZ o podstawowych zasadach sprawiedliwości dla ofiar przestępstwa i nadużyć władzy [The UN Declaration of Fundamental Principles of Justice for Victims of Crime and Power Abuse]. *Państwo i Prawo* No. 6 pp. 88—96.

BIERZANEK Remigiusz: “Miękkie” prawo międzynarodowe [“Soft” International Law]. *Sprawy Międzynarodowe* No. 1 pp. 91—106.

BIERZANEK Remigiusz: Ochrona dziecka w czasie konfliktów zbrojnych w świetle prawa międzynarodowego [Protection of the Child during the Armed Conflicts in the Light of International Law]. *Acta Universitatis Wratislaviensis Prawo* No. 159 pp. 9—25.

BRODECKI Zdzisław: Odpowiedzialność za szkodę jądrową w stosunkach międzynarodowych [Nuclear Damage Liability in International Relations]. *Sprawy Międzynarodowe* No. 10 pp. 69—82.

CZAPLIŃSKI Władysław: Konwencja wiedeńska o sukcesji państw w odniesieniu do mienia państwowego, archiwów i długów państwowych [Vienna Convention on Succession of States in Respect of State Property, Archives and State Debts]. *Państwo i Prawo* No. 9 pp. 86—96.

CZAPLIŃSKI Władysław: Problematyka obywatelstwa w stosunkach konsularnych NRD i RFN z państwami trzecimi [Problem of the Citizenship in Consular Relations of the GDR and FRG with the Third Countries]. *Przegląd Stosunków Międzynarodowych* 1986 No. 3 pp. 35—46.

CZAPLIŃSKI Władysław: Sukcesja i identyczność państw w Niemczech po II wojnie światowej w świetle prawa międzynarodowego [Succession and Identity of States in Germany

after World War II in the Light of International Law]. *Przegląd Zachodni* No. 2 pp. 47—69.

CZECZOT-GAWRAKOWA Barbara: Bibliography of International Law 1984. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 323—331: Bibliography...1985... vol. 15, 1986/1988, pp. 331—339.

CZUCHRA Iwona: O potrzebie prawnego wprowadzenia w życie niektórych rezolucji IMO [On the Need of a Legal Regulation of Introducing into Practice of Some of the IMO Resolutions]. *Technika i Gospodarka Morska* 1986 No. 11 pp. 555—556.

DARANOWSKI Piotr: Norma samow wykonalna w krajowym porządku prawnym [The Self-executing Norm in Internal Legal System]. *Przegląd Stosunków Międzynarodowych* No. 2 pp. 47—64.

FIGARSKI Jerzy M.: W sprawie powołania sądów morskich [On the Problem of Setting up the Marine Courts]. *Technika i Gospodarka Morska* No. 8/9 pp. 409—410.

FIUMEL Henryk de, MAKARCZYK Jerzy: Le problème de la force obligatoire des normes du droit international dans l'ordre juridique national. *Polish Yearbook of International Law 1986 (1988)* vol. 15, pp. 11—28.

FIUMEL Henryk de, SZANIAWSKI Zbigniew: A propos du statut juridique du programme Interkosmos. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 121—133.

FORYSIŃSKI Wojciech: La place du Conseil d'assistance économique mutuelle dans le système des organisations internationales économiques des Etats socialistes. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 207—222.

GABRYELSKA-STRABURZYŃSKA Barbara, STRABURZYŃSKI Andrzej: Wyłączna strefa ekonomiczna a wolność żeglugi [The Exclusive Economic Zone and Freedom and Navigation]. *Acta Universitatis Wratislaviensis Prawo* No. 159 pp. 41—57.

GILAS Janusz: Interpretacja polityczna umów międzynarodowych [Political Interpretation of Treaties]. *Przegląd Stosunków Międzynarodowych* 1986 No. 6, pp. 7—16.

GILAS Janusz: Status prawnomiędzynarodowy Zatoki Pomorskiej [International Legal Status of the Pomeranian Bay]. *Technika i Gospodarka Morska* No. 6 pp. 299—301.

GILAS Janusz: Trwałość fundamentów jaltańsko-poczdamskich a tendencje ich rewizji [Persistence of Jalta-Potsdam Fundamentals and Some Tendencies towards Their Revision]. *Przegląd Stosunków Międzynarodowych* No. 1 pp. 17—30.

GOMUŁA Joanna: Accord internationaux etrés en viquer à l'égard de la Pologne en 1984. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 319—322.

GOMUŁA Joanna: Accords internationaux entrés en viquer à l'égard de la Pologne en 1985. *Polish Yearbook of International Law 1986 (1988)* vol. 15 pp. 327—330.

GRABOWSKA Genowefa: *lus legationis* w prawie międzynarodowym [*lus legationis* in International Law]. *Acta Universitatis Wrattisliensis Prawo* 159 pp. 57—69.

GÓRALCZYK Wojciech: Preparatory Measures for the Implementation of the Convention

- on the Law of the Sea. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 7—42.
- GÓRBIEL Andrzej: International Legal Protection of the Outer Space Environment against Harmful Contamination. Preliminary Remarks. *Postępy Astronautyki* No. 1/2 pp. 109—129.
- GÓRBIEL Andrzej: Międzynarodowy Instytut Prawa Kosmicznego [The International Institute of the Outer Space Law]. *Astronautyka* 1986 No. 4 pp. 18—19.
- GÓRBIEL Andrzej: Zanieczyszczanie kosmosu w świetle prawa międzynarodowego [The Outer Space Pollution in the Light of International Law]. *Astronautyka* 1986 No. 5 pp. 19—20.
- JABŁOŃSKI Eugeniusz: Dlaczego izby morskie działają przy sądach wojewódzkich? [Why Marine Chambers Work at District Courts?]. *Technika i Gospodarka Morska* No. 8/9 pp. 407—409.
- JABŁOŃSKI Eugeniusz: Izby morskie czy sądy morskie? [The Marine Chambers or Marine Courts?]. *Technika i Gospodarka Morska* No. 3 pp. 125—128.
- JACEWICZ Andrzej: The Problem of Legality of the Space-based Ballistic Missile Defense. *Postępy Astronautyki* No. 1/2 pp. 17—36.
- JACEWICZ Andrzej: Problems of Militarization of Space and International Law. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 145—171.
- JERZMAŃSKI Jan: Ochrona środowiska a prawa człowieka w prawie międzynarodowym [Environmental Protection and Human Rights in International Law]. In: *Human Rights for Natural Environment*, Wrocław, Ossolineum, Instytut Państwa i Prawa pp. 143—157, summaries in English and German.
- KNYPL Zenon: Przygotowania do wejścia w życie konwencji o prawie morza [Preparations for the coming into Force of the Convention on the Law of the Sea]. *Technika i Gospodarka Morska* No. 4 pp. 185—187.
- KOLASA Jan: Regulamin Stałego Trybunału Sprawiedliwości. Początki międzynarodowej procedury sądowej [Regulation of the Permanent Court of International Justice. The Beginning of International Procedure]. *Acta Universitatis Wratislaviensis Prawo* No. 159 pp. 69—83.
- KOLASA Jan: Some Reflections Concerning the Evolution of International Arbitration and Judicial Rules of Procedure. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 99—119.
- KOWALSKI Andrzej: Konwencja prawa morza 1982: Rzeczywistość i perspektywy [Convention on the Law of the Sea 1982: Reality and Perspectives]. *Państwo i Prawo* No. 4 pp. 64—75.
- KOWALSKI Andrzej: Współczesne rozumienie wolności mórz [Contemporary Meaning of Freedom of the Sea]. *Sprawy Międzynarodowe* No. 3 pp. 91—104.
- KOWALSKI Piotr: Międzynarodowe koncepcje prawa do rozwoju jako nowego prawa człowieka [International Concepts of the Right to Development as a New Human Right]. *Sprawy Międzynarodowe* No. 10 pp. 103—112.

KUKUŁKA Józef: Problemy kształtowania się wspólnot międzynarodowych [Problems of International Communities Shaping]. *Stosunki Międzynarodowe* vol. 5 pp. 7—25, summaries in English and Russian.

KUŹNIAR Roman: Wyspecjalizowane systemy międzynarodowej ochrony praw człowieka [Specialized Systems of International Protection of Human Rights]. *Przegląd Stosunków Międzynarodowych* 1986 No. 6 pp. 17—33.

LANKOSZ Kazimierz: Interpretacja statutu organizacji międzynarodowej. Interpretacja “kontraktu” czy “ustawy” [Interpretation of the Statute of International Organization. Interpretation of “the contract” or “the Law”]. *Zeszyty Naukowe Akademii Ekonomicznej Kraków* 1986 No. 216 pp. 191—203, summaries in English and Russian.

LANKOSZ Kazimierz: Tekst z San Francisco. Jego interpretacja poprzez stosowanie. Praktyka Narodów Zjednoczonych i zmiany w Karcie NZ [The San Francisco Text. Its Interpretation through Application]. *Przegląd Stosunków Międzynarodowych* 1986 No. 6 pp. 35—45.

LIS Maciej: Inter-departmental Agreements in the Law of Treaties and Polish Practice. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 183—206.

LOPUSKI Jan: International Civil-law Conventions: Some Questions of Application and Interpretation. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 223—239.

ŁOŚ-NOWAK Teresa, KEGEL Teresa: Factors determining the Sovereignty of the Modern State. *Polish Political Science* 1986 vol. 16 pp. 185—204.

ŁUKASZUK Igor I.: Zasada pokojowego współistnienia [The Principle of Peaceful Coexistence]. *Sprawy Międzynarodowe* No. 6 pp. 17—30.

ŁUKASZUK Leonard: Rola organizacji międzynarodowych w prowadzeniu morskich badań naukowych [The Role of International Organizations in Conducting Marine Research]. *Sprawy Międzynarodowe* No. 6 pp. 105—116.

ŁUKASZUK Leonard: Suwerenność a problemy harmonizacji i unifikacji systemów prawnych państw RWPG [Sovereignty and Problems of Harmonization and Unification of the CMEA States' Legal Systems]. *Sprawy Międzynarodowe* No. 9 pp. 115—126.

MACHIŃSKA Hanna: Zmiany kompetencji Wspólnoty Europejskiej w dziedzinie ochrony środowiska [Changes in the European Community Competences in Environmental Protection]. *Sprawy Międzynarodowe* No. 7/8 pp. 141—150.

MALENDOWSKI Włodzimierz: Układy i organizacje regionalne w systemie bezpieczeństwa międzynarodowego [Agreements and Regional Organizations in the System of International Security]. *Zeszyty Naukowe Akademii Spraw Wewnętrznych* No. 46, pp. 22—42, summaries in English, German and Russian.

MICHALSKA Anna: Interpretation of the International Covenants on Civil and Political Rights in the Light of Reports of the Human Rights Committee. *Polish Yearbook of International Law 1986 (1987)* vol. 15 pp. 45—70.

MICHALSKA Anna: Pakty Praw Człowieka a regulacje regionalne w dziedzinie praw człowieka [The Covenants on Human Rights and Regional Regulations in the Domain of Human Rights]. *Państwo i Prawo* No. 2 pp. 3—19.

MICHAŁEK Jan J.: Nowa runda rokowań wielostronnych GATT [New Round of GATT Multilateral Negotiations]. *Sprawy Międzynarodowe* No. 2 pp. 43—56.

- MŁYNARCZYK Jerzy: Nowelizacja kodeksu morskiego 1986 [Amendment of the Polish Maritime Code in 1986]. *Technika i Gospodarka Morska* 1986 No. 11 pp. 551—555.
- MORAWIECKI Wojciech: Legal Regime of the International Organization. *Polish Yearbook of International Law* 1986 (1987) vol. 15 pp. 71—101.
- NAHLIK Stanisław E.: On Codification of International Law. *Polish Yearbook of International Law* 1986 (1988) vol. 15 pp. 103—118.
- OSTRIHANSKY Rudolf: Izby Międzynarodowego Trybunału Sprawiedliwości [Chambers of the International Court of Justice]. *Sprawy Międzynarodowe* No. 7/8 pp. 151—160.
- PASZYŃSKI Marian: Organizacje międzynarodowe a bezpieczeństwo ekonomiczne [International Organizations and Economic Security]. *Sprawy Międzynarodowe* No. 1 pp. 23—40.
- PASZYŃSKI Marian: Proces zmian w RWPG a jej stosunki zewnętrzne [Process of Changes in the CMEA and its External Relations]. *Sprawy Międzynarodowe* No. 11 pp. 47—60.
- POLACZEK Stanisław: Problemy UNCTAD w opiniach polityków i ekspertów [The UNCTAD Problems in Opinions of Politicians and Experts]. *Sprawy Międzynarodowe* No. 3 pp. 119—124.
- POPIUK Irena: *Ius cogens* a internacjonalizm socjalistyczny we wspólnocie państw socjalistycznych [*Ius cogens* and Socialist Internationalism in the Community of Socialist Countries]. *Stosunki Międzynarodowe* vol. 5 pp. 27—54, summaries in English and Russian.
- RADZAJ Aleksander: Z zagadnień kodyfikacji prawa wojennego [Some Problems on Codification of the Law of War]. *Acta Universitatis Wratislaviensis Prawo* No. 159 pp. 133—131.
- RZYMANEK Jerzy: Problemy prawne komercjalizacji teledetekcji satelitarnej [Legal Problems of Commercialization of Remote Sensing of Earth]. *Postępy Astronautyki* No. 1/2 pp. 129—145.
- RZYMANEK Jerzy: Some Legal Problems Arising with the Use of Reusable Space Transportation Systems. *Polish Yearbook of International Law* 1985 (1987) vol. 14 pp. 173—182.
- SAWICKI Jerzy: Consular Immunity from Jurisdiction in International Law and Consular Conventions binding on Poland. *Polish Yearbook of International Law* 1986 (1988) vol. 15 pp. 119—134.
- SAWICKI Stefan: Immunitet jurysdykcyjny konsula w sprawach o wykroczenia [The Consul Jurisdictional Immunity in the Matters of Petty Offences]. *Wojskowy Przegląd Prawniczy* No. 1 pp. 53—61.
- SAWICKI Stefan: Immunitet jurysdykcyjny przedstawiciela konsularnego. Zakres podmiotowy [Jurisdictional Immunity of Consular Representative. Subjective Scope]. *Zeszyty Naukowe Akademii Spraw Wewnętrznych* No. 46 pp. 136—151, summaries in English, German and Russian.
- SAWTCKI Stefan: Konsul honorowy [The Honorary Consul]. *Sprawy Międzynarodowe* No. 6 pp. 117—126.
- SAWICKI Stefan: Osoby korzystające z ochrony międzynarodowej na podstawie konwencji z 1973 [Persons enjoying International Protection according to the 1973 Convention]. *Nowe Prawo* No. 9 pp. 88—95.

SAWICKI Stefan: Zwalczenie przestępstw przeciwko osobom korzystającym ze szczególnej ochrony międzynarodowej [Combating Offences against the Persons enjoying Special International Protection]. *Zeszyty Naukowe Akademii Spraw Wewnętrznych* No. 48 pp. 82—92.

SAWICKI Stefan: Państwo jako podmiot aktu terrorystycznego o charakterze międzynarodowym [The State as the Subject of Terroristic Act of International Character]. *Zeszyty Naukowe Akademii Spraw Wewnętrznych* No. 48 pp. 93—107.

SKUBISZEWSKI Krzysztof: Non-binding Resolutions and the Law-Making Process. *Polish Yearbook of International Law 1986 (1988)* vol. 15 pp. 135—161.

SKUBISZEWSKI Krzysztof: Rezolucje Zgromadzenia Ogólnego ONZ a powstanie prawa zwyczajowego [The UN General Assembly Resolutions and Creation of Customary Law]. *Acta Universitatis Wratislaviensis Prawo* No. 159 pp. 131—141.

SKUPIŃSKI Jan: Prohibition of Torture and Other Inhuman Treatment [The Development of International Legal Regulation within the United Nations]. *Polish Yearbook of International Law 1986 (1988)* vol. 15 pp. 163—192.

SONNENFELD Renata: Immunitet jurysdykcyjny państwa: Nowe tendencje i otwarte problemy. (Uwagi na marginesie projektu kodyfikacyjnego KPM-ONZ) [Jurisdictional Immunity of the State: New Trends and Open Questions. (Remarks on the Draft of the UN CIL Codification)]. *Acta Universitatis Wratislaviensis Prawo* No. 159 pp. 151—162.

SOSNOWSKI Leszek: Hacia la codificación del asilo diplomático en el derecho internacional. *Estudio Latinoamericanos* vol. 19 1985 pp. 147—166.

STAŃCZYK Janusz: Pojęcie wspólnego dziedzictwa ludzkości w prawie kosmicznym [Notion of the Common Heritage on Mankind in the Outer Space Law]. *Studia Prawnicze 1986 (1987)* No. 3/4 pp. 213—248.

STAŃCZYK Janusz: Sprawa Nicaragua c. USA przed Międzynarodowym Trybunałem Sprawiedliwości [Nicaragua, USA case before the International Court of Justice]. *Studia Prawnicze* No. 4 pp. 95—140.

STAŃCZYK Janusz: The International Court of Justice on the Competence and Function of the Security Council [Related to the Cases brought before It]. *Polish Yearbook of International Law 1986 (1988)* vol. 15 pp. 193—216.

SUCHOCKA Hanna: Charakter praw mniejszości etnicznych i językowych w świetle art. 27 Paktu Praw Obywatelskich i Politycznych i niektórych konstytucji europejskich [A Nature of Ethnic and Linguistic Minorities Rights in the Light of Article 27 of the International Covenants on Civil and Political Rights and in Some of the European Constitutions]. *Przegląd Stosunków Międzynarodowych* No. 2 pp. 97—111.

SYMONIDES Janusz: Prawo międzynarodowe a utrzymanie pokoju i bezpieczeństwa [International Law and the Maintenance of Peace and Security]. *Państwo i Prawo* No. 3 pp. 23—36.

SYMONIDES Janusz: Sea-bed and Ocean Floor — the Common Heritage of Mankind. *Polish Political Science 1986* vol. 16 pp. 159—174, English version.

SYMONIDES Janusz: *Status quo* i zmiana międzynarodowa a bezpieczeństwo Europy [European Security: *Status quo* and International Change]. *Sprawy Międzynarodowe* No. 7/8 pp. 15—26.

SYMONIDES Janusz: *Territorial Asylum*. *Polish Yearbook of International Law* 1986 (1988) vol. 15 pp. 217—232.

SYMONIDES Janusz: The Exclusive Economic Zone. *Polish Yearbook of International Law* 1985 (1987) vol. 14 pp. 43—63.

SZAFARZ Danuta: Poland's Multilateral Treaty Relations. *Polish Yearbook of International Law* 1986 (1988) vol. 15 pp. 233—242.

SZAFARZ Renata: Remote Sensing of the Earth from Outer Space and the International Law. *Polish Yearbook of International Law* 1985 (1987) vol. 14 pp. 135—143.

SZANIAWSKI Zbigniew, FORYSIŃSKI Wojciech: Le problème d'application de la Convention sur le statut juridique, les privilèges et les immunités des organisations économiques interétatiques fonctionnant dans certains domaines de coopération. *Polish Yearbook of International Law* 1986 (1988) vol. 15 pp. 29—44.

SZMYT Andrzej: Organizacja legislacyjnych prac przygotowawczych w Urzędzie Gospodarki Morskiej [Management of Legislative Preparatory Work in the Maritime Economy Office]. *Technika i Gospodarka Morska* 1986 No. 12 pp. 613—615.

SZNAJDER Andrzej: Joint ventures na Węgrzech [Joint Ventures in Hungary]. *Sprawy Międzynarodowe* No. 11 pp. 113—120.

SZPAK Leon: Prawo konfliktów zbrojnych wobec nowych środków walki. The Law of Armed Conflicts and New Means of Warfare. *Acta Universitatis Wratislaviensis Prawo* No. 159 pp. 163—173.

TYNEL Andrzej: Podstawy prawne współpracy naukowo-technicznej RWPg [Legal Foundations of CMEA Scientific and Technological Cooperation]. *Sprawy Międzynarodowe* No. 1 pp. 107—120.

WAJDA Stanisław: O potrzebie zmiany regulacji traktatowych dotyczących użytkowania wód Odry [On a Need of Change of Treaty Regulation concerning the Exploitation of Oder River Waters]. *Przegląd Zachodni* No. 2 pp. 87—107.

WASILEWSKI Tadeusz: Systemy kontroli zinstytucjonalizowanej w procesie implementacji porozumień rozbrojeniowych [System of Institutional Control in Process of Implementation of Disarmament Treaties]. *Studia Nauk Politycznych* No. 3 pp. 73—91, summaries in English, French and Russian.

WASILKOWSKI Andrzej: Zawieranie i publikowanie umów międzynarodowych [Conclusion and Publication of International Treaties]. *Gazeta Prawnicza* No. 20.

WISNIEWSKI Andrzej W.: Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw. *Polish Yearbook of International Law* 1985 (1987) vol. 15 pp. 287—302.

WIZIMIRSKA Barbara: Indyjskie koncepcje bezpieczeństwa międzynarodowego [The India's International Security Concepts]. *Sprawy Międzynarodowe* No. 12 pp. 41—56.

WOJEWÓDKA Czesław: Działalność UNCTAD w dziedzinie portów [The UNCTAD Activities in the Sphere of Ports]. *Technika i Gospodarka Morska* No. 6 pp. 286—287.

WOLFKE Karol: International Law Making Factors. An Attempt at Systematization. *Polish Yearbook of International Law 1986 (1988)* vol. 15 pp. 243—250.

WORONIECKI Jan: Propozycje reformy ONZ [Proposals for the UN Reform]. *Sprawy Międzynarodowe* No. 4 pp. 99—117.

Private International Law

BOOKS

PAZDAN Maksymilian: Prawo prywatne międzynarodowe [Private International Law]. Warszawa: PWN pp. 262. bibliography.

STOSUNKI rentowe PRL-RFN. Zagadnienia art. 16 umowy z 1975 r. Wybór dokumentów. Wstęp, wybór i opracowanie Jan Barcz [Relation between Poland and FRG, concerning Pensions in Connexion with Art. 16 of the 1975 Treaty. Selection of Documents. Introduction, Selection and Elaboration by Jan Barcz]. Warszawa 1986 (1987): Polski Instytut Spraw Międzynarodowych, pp. 195.

ARTICLES

BURZYŃSKI Andrzej: Ustawa o spółkach z udziałem zagranicznym — podstawowe założenia regulacji [Law on Joint Ventures with Foreign Participation — Basic Principles of Regulation]. *Przegląd Ustawodawstwa Gospodarczego* 1986 No. II pp. 305—310.

CISZEWSKI Jan: Norms of Competence concerning Competence of Law and Organs in Civil and Family Matters in Agreements Concluded between Poland and Socialist States. *Polish Yearbook of International Law 1986 (1988)* vol. 15 pp. 277—300.

ERECIŃSKI Tadeusz: Zagadnienia prawa właściwego i postępowania dowodowego w międzynarodowym arbitrażu gospodarczym [The Issue of the Law to be Applied and Hearing of Evidence in International Commercial Arbitration]. *Państwo i Prawo* No. 9 pp. 49—63.

HOŁOWIŃSKI Jan: Zmiany w polskim kodeksie morskim dotyczącym umów czarterowych [Changes in the Polish Maritime Code concerning Charter Contracts]. *Technika i Gospodarka Morska* No. I pp. 20—22.

JABŁOŃSKI Eugeniusz: Wysokość szkody jako kryterium obowiązku zgłoszenia wypadku morskiego do Izby Morskiej [Extent of a Damage as a Criterion for the Obligation to Notify the Maritime Chamber of an Accident at the Sea]. *Technika i Gospodarka Morska* No. 1 pp. 17—19.

JANKOWIAK Ludwik: Międzypaństwowe umowy towarowe a przyszłość handlu surowcami [Inter-state Commodity Agreements and Prospects for the Trade with Raw Materials]. *Przegląd Stosunków Międzynarodowych* 1986 No. 3 pp. 7—18.

KOWALEWSKI Adam, ŁUKOWICZ Maciej: Konwencja o ograniczeniu odpowiedzialności za roszczenia morskie — 1976 [Convention on Limited Liability Regarding Marine Claims — 1976]. *Technika i Gospodarka Morska* No. 3 pp. 128—130.

MINGGI Sun: Chińskie reguły rozliczania awarii wspólnej [Chinese Rules of Settling General Average]. *Technika i Gospodarka Morska* No. 5 pp. 241—242.

NOWINA-KONOPCZYNA Wanda: Konwencja multimodalna “prawem właściwym” dla praktyki? [Is a Multimodal Convention a “Conventional Law” for Practice?]. *Technika i Gospodarka Morska* No. 8/9 pp. 412—414.

NOWINA-KONOPKA Piotr: Umowa o usługę operatora terminalu kontenerowego — typowe klauzule umowne [Container Terminal Operator's Service Agreement — Typical Agreement Clauses]. *Technika i Gospodarka Morska* No. 12 pp. 601—604.

PIETRZYKOWSKI Krzysztof: Nowe prawo o aktach stanu cywilnego a prawo międzynarodowe prywatne [New Law on Civil Registry of Birth, Marriage and Death and Private International Law]. *Nowe Prawo* No. 5 pp. 17—28.

POPIOŁEK Wojciech: Le contrat d'édition en droit international privé polonais. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 241—264.

SKRZYDŁO-TEFELSKA Ewa: Posiadanie stanu cywilnego dziecka we francuskim prawie rodzinnym i prawie prywatnym międzynarodowym [Having the Civil Status of a Child under French Family Law and under Private International Law]. *Państwo i Prawo* No. 12 pp. 78—87.

TOMASZEWSKI Maciej: Polish Court Judgments in International Civil Law Cases. *Polish Yearbook of International Law 1985 (1987)* vol. 14 pp. 279—285.

TYNEL Andrzej: Odpowiedzialność z umów o współpracy naukowo-technicznej w ramach RWPG [I], [II] [Liability of Contracts on Scientific and Technical Cooperation within the CMEA [I], [II]]. *Przegląd Ustawodawstwa Gospodarczego* No. 10, pp. 253—258; No. 11 pp. 300—304.

WISNIEWSKI Andrzej W.: Review of Awards of the Court of Arbitration at the Polish chamber of Foreign Trade. *Polish Yearbook of International Law 1986 (1988)* vol. 15 pp. 301—310.

WISNIEWSKI Andrzej W.: Szczególna krajowa regulacja stosunków cywilnoprawnych a międzynarodowy obrót gospodarczy [Specific National Law Regulations and International Economic Turnover]. *Państwo i Prawo* No. 6 pp. 27—43.

ZIELIŃSKI Maciej: Międzynarodowe konwencje morskie a swoboda umów jednostek gospodarczych [International Maritime Conventions and the Freedom of Agreements Concluding by the Economic Units]. *Technika i Gospodarka Morska* No. 11 pp. 548—550.

ZIELIŃSKI Władysław: Obywatelstwo dzieci w świetle obowiązującego prawa [Nationality of a Child in the Light of Law in Force]. *Nowe Prawo* No. 3 pp. 11—22.

PRINTED IN POLAND

Zakład Narodowy im. Ossolińskich — Wydawnictwo Wrocław, Oddział w Warszawie 1990 r. Objętość 21,40 ark. wyd., 19 ark. druk. (25,27 A1). Warszawska Drukarnia Naukowa, Warszawa ul. Śniadeckich 8. Zam. 128/89.

INP PAN

P-1045