STUDY PAPER

COLLECTION OF STUDY PAPERS (1988 - 1991)

INTERNATIONAL STUDIES CENTER

Ministry of Foreign Affairs of Thailand

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Foreword

Between 1988-1991, the International Studies Center (ISC) published several papers under the ISC Study Paper Series. Most of these papers are in English but some are in Thai. They cover a variety of subjects, namely, international relations, economics, and international law.

As these papers are no longer available, and because they represent an important record of the ISC's work in its early years, the Advisory Board suggests that the ISC undertake to reprint them together in a single volume so that they can be accessed easily. The ISC is able to obtain the original copies of 5 Study Papers and has them reprinted in this "Collection of Study Papers (1988-1991)".

The ISC wishes to express its appreciation to the authors: Dr. Kriangsak Kittichaisaree; Dr. Anuson Chinvanno; Dr. Chitriya Pinthong; Mr. Boonlert Wongpiboon; and Dr. Chulacheeb Chinwanno, for undertaking the task of writing these Study Papers for the ISC. Their papers continue to be valuable to the study of diplomatic history and relevant as a source for the study of international affairs.

International Studies Center
July 2020

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Proceedings of the International Symposium
23-25 November 1988, Cha-Am, Thailand

REGIONAL COOPERATION
ON THE LAW OF THE SEA
ASEAN AND THE EC PERSPECTIVES

Edited by
KRIANGSAK KITTICHAISAREE

Organized by the International Studies Centre.
linstitute of Foreigm Affairs. Bangkok. in Cooperation
with the Internatiomal Law Association of Thailand and
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PREFACE

An international symposium on a current topic of international law was being contemplated by the International Studies Centre (ISC) of the Institute of Foreign Affairs when the topic **Regional Cooperation on the Law of the Sea : ASEAN and the EC Perspectives** was suggested. I was then honoured with the task of elaborating the theme. The rationale and objectives both the ISC and I had in mind were set out in the invitation brochure as follows:

"The Third United Nations Conference on the Law of the Sea (UNCLOS III) has had a unique place in the history of international conferences. Arguably, it was the first-ever international **legislative** conference which enabled States to conclude a **universal** treaty. The objectives of settling the legal order in the oceans, pre-empting deterioration of conflicts in ocean use, and sharing of marine resources are attractive enough to have induced 159 signatures to, and 35 ratifications of, the Law of the Sea Convention within 6 years after its adoption by UNCLOS III in 1982.

All the six Member States of the Association of Southeast Asian Nations (ASEAN) have signed the Convention. Indeed, the Philippines and Indonesia have even gone further by ratifying it, thus showing their willingness to be fully committed to the provisions of the Convention to which no reservation is permitted.

The newly extended jurisdiction over marine space has given rise to crystallization of competing interests and claims. Ironically, what was conceived for the sake of the order in the oceans might eventually transpire to be a major cause of chaos in the sea.

The ASEAN States border enclosed or semi-enclosed seas. Existing cooperation in multifarious fields within this regional organization has not been emulated in the area of ocean use, unfortunately. Therefore, it is high time that attention be duly paid to this matter, with examples being drawn from other regions and from regional groupings such as the European Economic Community (the EEC).

It is hoped that this Conference will enhance better regional cooperation within ASEAN. This objective will be achieved once an ASEAN Member State has clearer understanding of the positions or views of the others which happen to be consonant with its own. There will also be plenty of opportunities to explore ways and means to promote cooperation in various aspects of the law of the sea, both intra-regionally and inter-regionally (e.g., with the EEC).

Conflicts will be avoided if and when each State is able to maximize its maritime interests without also encroaching upon those of another State.

With the participation of the EEC, a new dimension will be added to the theme of this Conference, making it the first-ever conference on the law of the sea which combines the EEC's perspective with that of ASEAN. Learning from each other's experience is valuable for the future implementation of the law of the sea as well as for the cooperation between these two regions of everlasting friendship."

Alas, one year passed by before I could find time to take up editing the proceedings of this Symposium! I am confident, however, that the value of the presentations can withstand the test of time - at least for years to come.

I would like to express my utmost thanks to the organizers, sponsors and participants for having made this project successful, and to my colleagues at the Ministry of Foreign Affairs, whose names appear at the end of this book, for having facilitated my editorial tast. Of the latter category, Mrs. Walaya Sukhasvasti na Ayudhya deserves a special mention.

Editor

OPENING ADDRESS

by

H.E. Dr. Thanat Khoman*

Chairman of the Policy Council of the ISC and
Chairman of the International Law Association of Thailand

I would like to join in welcoming all the participants who have come from near and far, especially those who have come a long way to be with us. We are very glad that all the relevant authorities have come to discuss this important problem of the law of the sea.

I did not have the chance to attend any of the UN Conferences on the Law of the Sea. While I was a member of the International Law Commission, I did not have the privilege of taking up the question of the law of the sea, either. But, judging from the result, there is still a lot to be done in this field, especially among us who are members of ASEAN.

We hope that this Symposium will help in some way to put law and order rather than chaos in the relationship in the maritime areas of our region. Although the duration of this Symposium is very short and you have to work harder as a result, I do hope that you will contribute to the improvement in the situations with regard to the law of the sea.

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*Minister of Foreign Affairs (1959-1971), Deputy Prime Minister (1980-1982), former Member of the International Law Commission and former Chairman of the UN Trusteeship Council.

Message from H.E. ACM Siddhi Savetsila*

Minister of Foreign Affairs of Thailand

It gives me great pleasure to extend a warmest welcome to all distinguished participants at this important gathering this afternoon. This symposium on "Regional Cooperation on the Law of the Sea : ASEAN and the EC Perspectives" has successfully brought together several distinguished experts in the field from academic circles and government agencies of ASEAN and the European Community. This symposium is also being honoured with the presence of Mr. Satya Nandan, Undersecretary-General of the United Nations, and Special Representative of the Secretary-General for the Law of Sea. It is hoped, therefore, that the symposium will make substantial contributions towards the law of the sea issues and a better understanding between our two regions.

The ocean, with its living resources, serves as a major source of protein diet for the world population. It provides highly valuable non-living and mineral resources, particularly in the form of oil and gas; and it has long served as an important means of international transportation. The significance of the law of the sea, one of the oldest branches of international law, can therefore never be overstated, as it regulates the international practice over the wide-ranging uses of the sea. Such significance is manifested by the fact that between 1973-1982 all nations, large or small, coastal or land-locked, maritime or non-maritime, participated in the Third United Nations Conference on the Law of the Sea, or UNCLOS III. After nine years of deliberations, the Conference became the most important international law-making conference of recent time. The 1982 Law of the Sea Convention that followed represents a comprehensive legal treaty in this subject, and has already attracted 159 signatures and 35 ratifications. All the six Member States of ASEAN have also signed the Convention and two of them have now ratified it.

Undoubtedly, one of the important impacts of this Convention is the promotion of regional cooperation which can be found in several parts throughout the Convention, particularly those concerning living resources management and marine environment protection. The need for such international cooperation stems from the fact that these living resources and marine ecological system transgress the sea areas regardless of national boundaries and jurisdictions. On the other hand, this Convention is also well-known for its economic orientation and reflects the current global concern to improve the well-being and prosperity of the world' s population especially in the developing world. Regional cooperation is therefore deemed not just desirable but necessary if these resources are to be utilized most effectively and the marine environment best protected for the benefit and well-being of all mankind. In this regard, we, in Southeast Asia, are fortunate to have ASEAN as a regional institution which will certainly be able to play a substantial role in strengthening the cooperation efforts over the matters concerning the law of the sea.

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*Air Chief Mauhell Siddhi Savetsila was Minister of Foreign Affairs between 1980-1990. He also served as Deputy Prime Minister in 1986.

I, therefore, would like to commend the International Studies Centre and the International Law Association of Thailand for jointly organizing this symposium with the generous assistance of the Friedrich Ebert Stiftung. The symposium is the first-ever gathering on the law of the sea that is specifically designed to draw on the perspectives from these two regional groupings, namely, ASEAN and the European Community. It shall enable experts from the two different regions of the world to exchange views and experiences on the law of the sea in their respective regions. The forum shall also provide exemplary opportunities to explore ways and means of possible cooperation in various aspects of the law of the sea both within ASEAN and between ASEAN and the European Community, which could be of great benefit to the peoples of both regions.

May I wish you every success in your deliberations.

Message from H.E. Judge Nagendra Singh*
of
The International Court of Justice

While sincerely welcoming the delegates to the Symposium on Regional Cooperation on the Sea, may I congratulate the sponsors of this meeting for their brilliant thought of taking full advantage of the efforts of the European Community to further the progress in Asia on the right lines and to advance the cause of establishing a legal regime of the seas based on UNCLOS III. The presence of EEC representatives will not only throw valuable light on the subject but provide an impetus for the whole of Asia which cannot afford to lag behind in establishing a rule of law to govern the inter-State maritime relations of this vast continent. The International Court of Justice has played a major role in resolving disputes pertaining to maritime boundaries of States bordering the Mediterranean region and the North Sea. The last case brought on the Register of the Court was filed a few months back this year by Denmark against Norway, asking for the delimitation of the area between Greenland and the Norwegian Island of Jan Mayen. Looking to the valuable basic rules formulated by UNCLOS III to regulate the inter-State maritime relations, it is most essential that this formidable convention on the subject embodied in UNCLOS III should be soonest ratified and brought into operation. The machinery for settlement of maritime disputes has to be established as visualised by UNCLOS III and no time need be lost in that direction.

I have no doubt that with the cooperation of the representatives from the European Community this symposium convened in Thailand will make an everlasting contribution towards the implementation of UNCLOS III and thereby greatly help to promote international cooperation with a view to evolving a peaceful regime throughout the world. While again sincerely congratulating the Goverment of Thailand for its valuable efforts in the right direction may I wish this symposium all success in its endeavours.

* Judge Nagendra Singh, former President of the International Court of Justice, died of heart attack on 11 December 1988. This message was possibly the last he had ever written for any symposium.

SESSION I:

INTERNATIONAL LEGAL ORDER IN THE OCEANS

Chairman : Professor Vincente Abad Santos

THE 1982 UN CONVENTION ON THE LAW OF THE SEA AND CUSTOMARY INTERNATIONAL LAW

by

*Satya Nandan**

STATUS OF THE CONVENTION

The Convention opened for signature on 10 December 1982. By 9 December 1984 - the closing date for signature - 159 signatures were appended. These signatories included all the ASEAN countries and all but two of the current members of the European Economic Community. What is important also is that the Convention was signed by the European Economic Community as a collective entity.

According to its provisions, the Convention will come into force one year after the 60th ratification or accession. So far, 35 instruments of ratification have been deposited with the Secretary-General. At least four other States have indicated that they have completed the internal legislative procedures to enable them to deposit their instruments of ratification shortly. It is therefore very likely that by the middle of 1989 we should have obtained at least 40 ratifications.

The pace of ratification of this very complex and comprehensive Convention is comparable to that of the four 1958 Geneva Conventions on the Law of the Sea and the 1969 Vienna Convention on the Law of Treaties. All of these, however, required a smaller number of States to ratify in order to come into force than the 60 required for the Convention on the Law of the Sea. (An analysis of this has been provided in Law of the Sea Bulletin No.11, published by the Office for Ocean Affairs and the Law of the Sea). At the present rate, it appears that the Convention should come into force by 1992.[1]

In the meantime, since 1983 the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea has been meeting twice a year to prepare for the coming into force of the Convention. In addition, it has also been discharging its mandate as an executive body for the registration of pioneer investors under resolution II of the Third United Nations Conference on the Law of the Sea.

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*Undersecretary-General of the United Nations and Special Representative of the UN Secretary-General for the Law of the Sea.

[1]As of 1 September 1989, the Convention obtained 42 ratifications. By January 1991, the number of ratifications had increased slightly to 45. (Editor)

The Preparatory Commission, which works in its Plenary and four Special Commissions, has been preparing the internal rules for the functioning of the different organs of the Authority. It has been drafting a mining code based on the provisions of the Convention which will govern all aspects of the relationship between the Sea-Bed Authority and entities -- whether State or private enterprises -- engaged in deep sea-bed mining activities. The Commission is also preparing for the establishment of the Enterprise, the operating arm of the Authority, and studying the various operational options available to it for undertaking mining activities on its own. As regards the International Tribunal for the Law of the Sea, the Commission has virtually completed the drafting of the rules of procedure for the conduct of cases before the Tribunal. There are other matters, such as the headquarters agreements for the various institutions to be established under the Convention, and financial and staff regulations, which are being prepared. In addition, the Commission is studying the potential impact of sea-bed mining on landbased producers of minerals that are to be produced from the sea-bed and the various means for minimizing possible adverse effects.

In general, the work of the Preparatory Commission is progressing very satisfactorily. There are, of course, a number of matters that are still to be negotiated, some of them are not too difficult, others are more complex in that they go to the core of the mining system that is to be established. As in all such negotiations, the successful resolution of problems is very much dependent on proper timing. One of the factors that has, to some extent, delayed intensive negotiation on outstanding issues has been the Commission's desire to give the United States an opportunity to review its own position, in anticipation of the recent Presedential election, and to participate in the Commission's work. We shall see what will be the attitude of the new Administration on this matter. Quite clearly, through dialogue and negotiation, it is possible at least to make an honest effort to resolve outstanding issues. Our concern at the United Nations is to ensure universal participation in the Convention. On the other hand, we recognize that, given the broad support which the Convention already enjoys, it will come into force in any case.

During the last five years, the most successful achievement of the Preparatory Commission has been the registration of the first four applicants, namely France, India, Japan and the Soviet Union, as pioneer investors under resolution II of the Third United Nations Conference on the Law of the Sea. The practical, pragmatic and responsible manner in which the Commission dealt with the registration bodes well for the future operations of the International Sea-Bed Authority. The issues involved in the registration process were very complex. Three out of four applicants had overlaps in the area claimed by them. This was further compounded when it was discovered that one of the applicants had overlaps with at least three other claimants outside of the Preparatory Commission. It took more than three years to disentangle these overlaps. The matter was further complicated by the fact that the United States, where the three private consortia are based, is not a participant in the work of the Commission, with the result that parallel work had to be done within the framework of the Preparatory Commission and outside of it between the seven States involved in the different consortia and one of the applicants for registration. It is a tribute to all concerned that it was possible eventually for the Preparatory

Commission to register all four applicants free of any overlaps and create conditions for the registration of potential applicants.

Before the registration was concluded, a report on the applications had to be submitted by a group of 15 technical experts from all regions of the world, who met in New York and who were charged to review the applications and to recommend the selection of mine sites to be reserved for the Authority on the one hand and those to be allocated to the respective applicants, in accordance with the parallel system which constitutes the foundation of the international sea-bed regime. This Group of Experts was sworn to maintain the confidentiality of the data and information submitted to it. The Group undertook its task in a most exemplary manner as an expert body and came up with unanimous recommendations in respect of each of the applications, thereby considerably facilitating the work of the Commission. In particular, the Group was able to assess the difficult question of whether the two sites submitted in each application were of equal estimated commercial value, as required under resolution II.

The final registration was an historic occasion in that it has established an interim regime for deep sea-bed mining. The rights and obligations arising out of the registration of pioneer investors will be recognized by the International Sea-Bed Authority when the Convention comes into force. This is specifically provided for in paragraph 8 of resolution II of the Third United Nations Conference on the Law of the Sea. Since registration, the Commission has been considering how the obligations that have arisen as a consequence of registration and which are required to be performed before the Convention enters into force, are to be implemented. Despite some earlier differences, there is considerable common ground and, hopefully, in Spring 1989 when the Commission meets again an agreement would be reached on this issue also.[2]

As regards the future work of the Commission, I should add that considerable ground has already been broken and the remaining work can be completed well in time before the Convention comes into force.

THE 1982 UN CONVENTION ON THE LAW OF THE SEA AND CUSTOMARY INTERNATIONAL LAW

There are two salient elements in the definition of customary international law: i) substantial and uniform State practice and ii) *opinio juris,* i.e, the feeling that the practice is felt by those who follow it to be an obligatory one. As to the time factor, it is enough to cite this dictum of the International Court of Justice in the *North Sea Continental Shelf Cases:*

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that

[2]The agreement was reached in summer 1990. (Editor)

of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

In the light of the definition of customary international law, it is useful to examine the development of State practice in relation to the Convention. Undoubtedly, the 1982 United Nations Convention on the Law of the Sea has considerably influenced State practice. Many of the concepts and norms embodied in the Convention are being adopted in the national legislation of States. Let us now look at some of the important subject areas :

TERRITORIAL SEA

The Convention has positively influenced th establishment of a 12-nautical-mile limit for the terrilorial sea. There are to-date 106 States which have established 12-mile territorial sea limits. In addition, there are 18 other States which are within this limit and whose claims range from 3 to 6 miles. Thus, there are altogether 124 States which are within the 12 mile limit. It must be noted that some States have rolled back their claims which extended beyond the 12-mile limit. Others, on the other hand, have extended it to 12 miles.[3] There is, therefore, a convergence towards the Convention limit. While the breadth of 12 miles can be considered as part of customary international law, it is difficult to assess from national legislation whether the regime of transit passage through straits used for international navigation has become part of customary international law or not. So far, I know of only one State, namely the United Kingdom, a non-signatory to the Convention, which has expressly provided for the right of unimpeded passage through such straits for merchant vessels and war ships and the right of overflight. Most other strait States have remained silent on this question. If we continue to accept that the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone embodies customary international law, then one has to accept that the regime for passage through straits used for international navigation under that convention was innocent passage which was not premised on any limit as to the breadth of the territorial sea. The question therefore arises as to what extent the transit passage regime for straits used for international navigation in a 12-mile territorial sea has become part of customary international law.

CONTIGUOUS ZONE

There are now 22 States with a 24-nautical-mile contiguous zone and 9 others with varying distances within that limit.[4] By and large, State practice in respect of the contiguous zone is consistent with the 1982 Convention which in itself followed the 1958 Geneva Convention except for the extension of the limit from 12 to 24 nautical miles.

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[3]As of May 1990, there are 126 States which are within the 12-mile territorial sea limit. 110 of them claim 12-mile limits. (Editor)

[4]As of May 1990, there are 32 States with a 24-nauticle-mile contiguous zone and 6 others with varying distances within that limit. (Editor)

EXCLUSIVE ECONOMIC ZONE

As regards the exclusive economic zone, 74 States have legislation or declarations adopting it. There are 18 States which have claimed only a 200-nautical-mile fishery zone and 4 other States which have a fishery zone of 12-50 nautical miles.[5] Incidentally, I should mention that only 3 States[6] out of 12 EEC members have an exclusive economic zone. Some others have claimed exclusive fishery zones. I should note, however, that there is no basis for a 200-nautical-mile fishery zone other than through the concept of an exclusive economic zone.

The national legislation of most coastal States invariably asserts the right to explore and exploit all the resources found in the waters superjacent to the sea-bed and its subsoil in a 200-nautical-mile zone. A closer examination of this legislation raisers a number of questions which relate to the very essence of the compromises that led to the acceptance of this new concept in the Convention. For instance, legislation of States on this subject does not always provide for access to the surplus of living resources to third States, especially landlocked and geographically disadvantaged States (see, for example, article 69 of the Convention). The regime applying to artificial islands, installations and structures constructed for non-economic uses in the EEZ has been put into question by some States claiming exclusive jurisdiction over all types of artificial islands, installations and structures (article 60 of the Convention).

Some 90 coastal States have enacted legislation claiming jurisdiction over marine scientific research in their economic zones. Some 24 coastal States have promulgated detailed regulations and procedures for the conduct of marine scientific research in their exclusive economic zones. Most of these instruments have been significantly influenced by the consent regime embodied in the Convention. It seems, however, that the provisions of these legislative acts have not always been honoured in practice. In these circumstances, while it may be said that the general concept of the exclusive economic zone constitutes part of customary international law-a view supported by the International Court of Justice-it is, however, open to question whether certain specific norms which were fundamental to the acceptance of this concept are also part of customary international law.

THE CONTINENTAL SHELF

As regards the continental shelf, claims of States are based on several different criteria. Many States have superimposed the concept of the exclusive economic zone over their continental shelf legislation based on the exploitability criteria as contained in the 1958 Convention. Only 3 States have so far actually adopted the technical criteria of the outer limits of the continental shelf as contained in article 76 of the Convention. There are 17 States which have claims up to the outer edge of their continental margin. There are another 50 States which have based their claims on 200-meter-depth-plus-the-exploitability criterion. Another 4 States have claimed just

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[5] As of May 1990, 79 States claim an exclusive economic zone , while 16 others claim a 200-nautical-mile fishery zone. The number of those claiming a fishery zone of 12-50 nautical miles remains the same. (Editor)

[6] France, Portugal and Spain. (Editor)

200 nautical miles and a further 2 States have based their claims on the alternative of 200 nautical miles or 100 nautical miles from the 2500 meter isobath.[7] While the notion of the natural prolongation of land territory as contained in article 76 of the Convention is generally accepted as customary international law and was, in fact, inspired by the decision of the International Court of Justice in the *North Sea Continental Shelf Cases* for instance, the technical criteria set in article 76 for the limits of the continental shelf, however, have not been generally adopted in State practice. State practice is also silent on the question of revenue sharing from the exploitation of continental shelf resources bevond the 200-mile limit. The technical criteria for defining the limits of the continental shelf and the question of revenue sharing were important aspects of the mini-package in the negotiation on the continental shelf jurisdiction beyond 200 miles. In the light of the current disparate practices of States, one has again to examine to what extent the provisions of the Convention have become part of customary international law.

DEEP SEA-BED MINING REGIME

Part XI of the Convention dealing with the mining of the resources of the deep sea-bed poses more interesting questions. Section II of that part which deals with the principles governing the international sea-bed area is based on the 1970 Declaration of Principles. This declaration established that the international sea-bed area and its resources are the common heritage of mankind. It was adopted by consensus in the General Assembly and formed the basis for 9 years of negotiations at the Conference. To what extent can one consider this principle of common heritage to have been incorporated in the body of customary international law? There are, of course, well-known disagreements on certain provisions in Part XI of the Convention. On the other hand, there are a large number of provisions in that part which have never attracted the criticisms of any State. What is the status of this latter group of provisions?

How does one consider the implementation of resolution II as regards State practice ? Resolution II was adopted by a plenipotentiary conference. It created a machinery for the registration of pioneer investors. Though an interim regime, it creates permanent rights and obligations for the pioneer investors which will be specifically recognized under the Convention. The decision to register and create these binding rights and obligations was unanimously taken by over 120 States. The decision-makers included a majority of the major powers including one super power. The

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[7] As of May 1990, the bases for continental shelf claims are as follows:

Criteria	Number of States
Depth (200 m) plus exploitability	42
Breadth (200 nm) plus continental margin	21
Continental margin	1
Exploitability	4
Breadth (200 nm or 100 nm from the 2,500-m isobath)	2
Breadth (200/350 nm)	1
Breadth (200 nm)	6

(Editor)

countries whose claims were registered are important States. No State has objected to the act of registration that has taken place. This registration was essentially based on the principle of common heritage of mankind and, in fact, anticipates the regime embodied in the Convention for the development of the resources of the international sea-bed area. The procedures followed for the registration were similar to those which would be followed under the parallel system contained in Part XI of the Convention. Here is a case of over 120 States acting collectively to implement what they consider to be the present deep sea-bed mining regime. The question then arises as to how this collective executive act of a large number of States is different from the individual legislative acts of States, with respect to the 12-mile territorial sea or the 200-mile exclusive economic zone, or the continental shelf. Should the collective act of such a large number of States be considered as establishing customary international law with respect to certain basic principles of the deep sea-bed mineral regime? To what extent can the States which acted to create rights and obligations for the four pioneer investors deny the existence of a regime for deep sea-bed mining even though there may be some disagreements on certain details of that regime? Can any of these States now revert back to the assertion that exploitation of the resources of the deep sea-bed is a freedom of the high seas?

This brief examination illustrates the need for careful study and evaluation of current State practice in relation to the 1982 UN Convention on the Law of the Sea. One has to ascertain how consistent they are with the provisions of the Convention. Assertions for or against the proposition that the Convention, apart from its Part XI, has become part of customary international law, are often simplistic or self-serving. One also has to examine the history of the negotiations leading to the adoption of the Convention, in particular the procedures followed. Right from the beginning, i.e. in 1970, there was a call by the General Assembly for a comprehensive convention on the law of the sea. At the beginning of the Conference inself, there was discussion as to whether there should be several conventions or one comprehensive convention. Subsequently, the Rules of Procedure, including a gentlemen's agreement which accompanied the adoption of those rules, clearly show that all participants in the Conference had agreed to a comprehensive Convention. Indeed, it was the accepted practice that no part of the Convention would be adopted or voted upon separately until the total package was ready for adoption -- and this was, in fact, followed.

The successive revisions of the negotiating texts, while originally prepared under the responsibility of the President of the Plenary and the Chairmen of each of the Main Committees in their individual capacities, could only be undertaken by a collegium composed of the President and all the Chairmen -- and that, too, after ascertaining whether the proposed changes had broad and substantial support in the plenary of the Conference. Thus, it was quite clear that agreement on one part was premised on agreement on other parts of the package. Not only that -- there were mini-packages on important matters within the overall package. Some of these I have already referred to. While a few States at the time of signature of the Convention expressed their reservations on certain specific provisions of Part XI of the Convention and sought its improvement, all who signed the Convention, however, accepted the package. Can one now,

therefore, say that individual parts of this Convention stand alone and some of it can be selected as reflecting customary international law? And can one say that certain elements of the mini-package can be separated from other elements which form part of that package?? Even in the case of a number of old concepts, as reflected in the 1958 Convention, modifications were made in the course of the negotiations for the 1982 Convention. When speaking of customary international law, does one distinguish, therefore, between the norms contained in the 1958 Convention and the new elements which were incorporated in the 1982 Convention, following long and arduous negotiations? Clearly, a lot of questions arise when one considers the subject of customary international law in relation to the 1982 UN Convention on the Law of the Sea. In my view, it is not possible at this stage to provide clear answers. Rather than argue the point of what is and what is not customary international law, it is in the interest of all to have clear and certain law by common consent. The best hope for this is the 1982 UN Convention. It would be difficult to repeat the achievements of this Convention if we were to start afresh or to rely on nebulous assertions of customary international law. I firmly believe that the Convention is the best point of reference for what the law of the sea should be today and I hope that the difficulties and differences that still prevail with regard to the deep sea-bed mining part of the Convention will be resolved.

I firmly believe that it is in the interest of all to contribute towards the achievement of this goal.

THE VISIONS OF THE ASEAN STATES AT THE TIME OF UNCLOSS III AND NOW

by
Jorge Coquia*

Fourteen years have already passed since the first substantive session of the Third United Nations Conference on the Law of the Sea met in Caracas. Another six years may be added if we consider the work started in 1968 by the *ad hoc* committee created by the United Nations General Assembly, later reconstituted into a permanent committee of the General Assembly, to study the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction.

Not very many in the international community then realized the magnitude of work and the time needed to complete a new code of the law of the sea. The report of the Preparatory Committee then recommended a much wider range of subjects to be considered by the forthcoming conference. The Committee report, consisting of six volumes of 1060 pages, recommended two main subjects, namely, (1) the consideration and adoption of a treaty for an international regime with appropriate international machinery for the area of the sea-bed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction, and (2) a review and revision of the existing law of the sea.[1]

Most nations, especially the Third World Countries to which ASEAN belong, had great expectations from the Third United Nations Conference on the Law of the Sea, which was convened for its organization work in New York in 1973.[2]

Aside from revision of the traditional rule of the sea, a new law would offer an opportunity to share in the untapped rich resources of the ocean and to improve the living standards of poor countries. The ASEAN States, with a combined population of 270 million and composed of six States (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand) with varied geographical characteristics, have more or less common interests as far as the law of the sea is concerned. Two of them are the foremost advocates of the archipelagic doctrine. Three include within their maritime jurisdiction the busiest navigation routes. Four have fishing as their principal industry. And one is dependent on shipping. Two have extensive offshore exploration and exploitation of minerals. Two of the members are major producers of some of the minerals to be produced from the deep sea-bed and are likely to be adversely affected by the production of the minerals therefrom.

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(1)U.N. Doc. A/8021, 8421, 8721, 9021 (1970-73).

(2)A/Res. 3067 (XXVIII).

Paradoxically, it was a big maritime power (the U.S.A.'s Truman Proclamation of 1945) that triggered the world demand for the extension of maritime frontiers although maritime powers later resisted Third World countries, including the ASEAN member States, in their demands to have wider jurisdiction over their coastal areas. Indeed, the reform of the traditional rules of the sea was to generate better opportunities in sharing the resources of the sea formerly dominated by maritime powers. The freedom of the sea principle formulated centuries ago by maritime powers was no longer consistent with the demand of States to search for food and minerals for surviral. To ASEAN, a new law of the sea could be a just and rational law to bring about productive balances in the world economic order.

THE INTERESTS OF ASEAN

The Association of Southeast Asian Nations (ASEAN) was formally organized in Bangkok on 8 August 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand. In January 1984 Brunei was admitted as member of the Association. As expressed in the ASEAN Declaration, the aims of the Association are essentially to accelerate the economic growth, social progress and cultural development of the region, to promote regional peace and stability on the basis of respect for justice and the rule of law, and to promote active cooperation and mutual assistance on matters of common interests.

On 27 November 1971, ASEAN declared in Kuala Lumpur that their region is a zone of Peace, Freedom and Neutrality.

The six ASEAN countries with a total land area of about 3 million and a half square kilometers have, under the 1982 U.N. Convention, gained substantial maritime area as a result of the endorsement of the archipelagic doctrine and the 200-n.m. exclusive economic zone. Their original objective of having the archipelagic waters under the absolute jurisdiction of the State has not been fully realized. The maritime powers used to object to the archipelagic doctrine as it did not only restrict the mobility of their vessels but also lessened the maritime area for the exploration and exploitation of ocean resources. At the start of the opening session of the Third United Nations Conference on the Law of the Sea, however, when a substantial number of States manifested their support of the doctrine, the maritime powers relented in their objections, but still with some reservations. The basic principle as presented by archipelagic States[3] to the Sea-Bed Committee, that all waters enclosed within the archipelagic baselines belonged to and are subject to the sovereignty of the archipelagic States, has not been fully realized as maritime powers have demanded unimpeded passage through such waters.

Nonetheless, with the "great sea rush" triggered by the "Truman doctrine" in 1945, most nations began expanding their maritime territory. The original ASEAN States saw an opportunity to extend jurisdiction over wider areas of their coasts as an additional source of food, minerals and energy for their growing population. THe ASEAN States supported the 200-n.m.

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[3]Fiji, Indonesia, Mauritius and the Philippines. Report of the Committee. UN Gen. Ass Off. Rec. 28th Session Supp. 21, Vol. III, pp. 1-2.

exclusive economic zone as now incorporated in the 1982 United Nations Convention on the Law of the Sea.

Brunei

Brunei, which was admitted as a member of ASEAN in January 1984, is situated on the northwestern coast of Borneo, bounded on all sides by the Sarawak territory. It has an area of about 2,226 square miles, with a coastline of about 100 miles.

Although Brunei did not participate in the Third United Nations Conference on the Law of the Sea, it has taken interest in the beneficial provisions of the 1982 Convention, such as a proclamation of its 200-n.m. exclusive economic zone. Among all the ASEAN members, Brunei succeeded most in land and offshore oil exploration.

Indonesia

Indonesia, with a total land area of 741,097 square miles, is the largest archipelagic State in the world. It is composed of several thousand islands which extend about 3,200 miles from east to west through three time zones (East, Central and West Standard Time). With a coastline of 19,784 nautical miles, its archipelagic baselines have enclosed about 666,000 square nautical miles of waters which include such important straits as Sunda, Sumba, Lombok, Ombai, Molucca and Macarros.

An additional area of about 19,000 square nautical miles is within the jurisdiction of Indonesia under the 12-mile territorial sea as approved in the Convention.

Through Act No.5 (1983), Indonesia proclaimed its exclusive economic zone which covers an area of 1,577,300 square nautical miles, and is ranked third in the world in terms of the biggest area of the exclusive economic zone.

For Indonesia, the most important part of the Convention is Chapter IV governing archipelagic States, especially the articles on passage of foreign vessels. The islands of Indonesia lie astride some of the most important navigation routes. All maritime traffics in the region (Southwest Asia connecting the Indian and Pacific Oceans) have to pass through waters within the jurisdiction of Indonesia.

Of the four types of transit passage recognized in the Convention, Indonesia is most concerned with the archipelagic sealanes passage and transit passage through straits used for international navigation. The demands, especially from maritime powers, of unimpeded passage through archipelagic waters finally prevailed over the original principle proposed by the archipelagic States that all waters enclosed by archipelagic baselines belonged to and were subject to the sovereignty of the archipelagic States. The compromise as now provided in the Convention is that transit passage is allowed through sealanes designated by the archipelagic States as defined by a series of continuous axis lines from the entry points of passage routes to the exit points (Art. 53(3) of the Convention).

Transit passage through straits used for international navigation was another concern of Indonesia. The long debates between straits States and maritime powers resulted in a compromise as now provided in Article 38 of the Convention. The compromise guarantees the freedom of navigation and overflight with the requirement that it should be unimpeded. To Indonesia, the compromise has put a greater burden on the coastal States bordering such straits as compared to the user States. In addition, the coastal States are also required to give appropriate publicity to any danger to navigation or overflight within such straits.[4]

Malaysia

An independent federation of States, Malaysia comprises two distinct regions separated by the South China Sea. West Malaysia is on the Malay Peninsula, while more than 400 miles to the east is East Malaysia (Sarawak and Sabah) on the island of Borneo. The State has a total land area of 143,662 square miles and a coastal length of about 32,000 kilometers.

Malaysia proclaimed its exclusive economic zone in 1980.[5] The Proclamation includes provisions on fisheries, protection and preservation of marine envernment, and enforcement. It proclaims a distance of 200 nautical miles from its baselines as its exclusive economic zone and specifically prohibits any person from exploring or exploiting living or non-living resources therein unless authorized under the said Act. The said area is called the Malaysia fisheries waters and is governed by the Fisheries Act of 1985.[6]

The boundaries of the exclusive economic zone still have to be delineated.[7]

Phillippines

As an oceanic archipelago, The Philippines is composed of 7,101 islands, situated about 600 miles off the southeastern coast of the Asia mainland and lying at the western margin of the Pacific Ocean. It is bounded by the South China Sea to the west and the north, the Pacific Ocean to the east, and the Celebes Sea and the coastal waters of Borneo to the south. It has a total land area of 115,850 square miles, with a coastline of approximately 10,850 statute miles. As early as 18 September 1968, the Philippines drew its archipelagic baselines enclosing all the outermost islands, thereby claiming a total maritime area of 257,400 square nautical miles.[8]

As early as 1978, the Philippines proclaimed its 200-mile exclusive economic zone,[9] and gained an estimated area of 652,000 square nautical miles. This area can still be increased in

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(4)"Passage Through Waters within National Jurisdiction, Indonesian Perspective", Indonesian national Team, **SEAPOL STUDIES No.6 (a)**, Institute of Asian Studies, Chulalongkorn University, Bangkok.

(5)To be followed by the EEZ Act No.311 of 1984.

(6)Act No.317, Laws of Malaysia.

(7)H. Yusof, "Paper on Malaysia: The United Nations Convention on the Law of the Sea in Southeast Asia," **(SEAPOL STUDIES, No.2, Chulalongkorn University, Bangkok).**

(8)Republic Act No. 3046 as amended by Republic Act No. 5446 (1961).

(9)Presidential Decree No. 1599 (11 June 1978).

view of the Philippine claim over the Kalayaan group of islands under Presidential Decree No. 1596 (11 June 1978). Two bills are pending before the Congress of the Philippines to include the Kalayaan Group within the archipelagic baselines. The economic zone area as estimated above may not be within the actual jurisdiction of the Philippines due to possible overlapping claims with Taiwan, Indonesia, Vietnam, Malaysia, and the sovereign owner or owners of the Paracels.

The Philippine authorities have anticipated the problem of overlapping maritime areas by providing in its proclamation that where the outer limits of the zone as thus determined overlap the exclusive economic zone of an adjacent or neighboring State, the common boundaries shall be determined by agreement with the State concerned or in accordance with pertinent generally recognized principles of international law on delimitation.

Extension of maritime areas by coastal States gives rise to disputes regarding delimitation of maritime zones. Hence, concern was expressed in this regard during the negotiations at the Third United Nations Conference on the Law of the Sea. In fact, one unfortunate incident has already taken place: certain Malaysian authorities arrested and detained three Philippine fishing vessels and 49 members of the crew, allegedly for fishing within the former's exclusive economic zone. The evidence presented in court revealed that the Philippine fishing vessels had been apprehended within the maritime zone of the Philippines. This resulted in their acquittal by the Malaysian court seised with the case. Nonetheless, Malaysian officials still insisted that the area was within Malaysia's exclusive economic zone. Diplomatic talks have, therefore, been proposed by the Philippines to amicably settle the issue in accordance with Article 74 of the 1982 United Nations Convention on the Law of the Sea. A similar provision in Article 83 has stipulated for the case of overlapping continental shelf claims. Both articles provide similar procedure to settle overlapping claims. Pending agreement, the States concerned, in the spirit of understanding and cooperation, are to enter into provisional arrangements of a practical nature. During this transitional period, the States concerned are obligated not to jeopardize or hamper the reaching of the final agreement.

Most of the Southeast Asia States cluster around shallow seas close to each other and problems will certainly arise on the extents of their exclusive economic zones and of the continental shelves.

With measurements drawn from its archipelagic baselines, Indonesia's economic zone will possibly overlap those of Malaysia, the Philippines, Vietnam, and even Papua New Guinea. Likewise, the exclusive economic zones of Thailand, Singapore, Indonesia, Brunei and the Philippines may overlap. It is expected of course that the ASEAN members, in the spirit of cooperation and amity as expressed in their founding Declaration, can settle any dispute through amicable means. The ASEAN members have committed themselves, in their Declaration, to active cooperation and mutual assistance with one another.

Having ratified the Convention, the Philippines is bound to comply with the requirement of entering into amicable settlement of disputes with any of its neighbours on overlapping maritime claims. The Philippines is now in the process of enacting legislation to implement the pertinent provisions of the Convention.

The Philippines is not fully satisfied with the regime of the archipelagic States as now formulated in the Convention. Up to the last moment of the Conference, the Philippines maintained that all the waters enclosed by the archipelagic baselines were internal waters. Nevertheless, it proposed a compromise to distinguish the regime of the passage of commercial vessels from that of passage of warships. The unimpeded passage through archipelagic sealanes designated by the coastal State poses a threat not only to the security of the State, but may also endanger the marine environment. Anyone can imagine the tremendous damage to marine environment when an oil tanker or a vessel carrying toxic, harmful or noxious substances breaks up right at the heart of an archipelago.

Singapore

The Republic of Singapore, consisting of Singapore island and 54 islets, is situated in the southern extremity of the Malay Peninsula. By virtue of its geographical position and with only 28 nautical miles of coastline, Singapore can claim only about 100 square nautical miles of economic zone. The Singaporean delegation headed by Ambassador Tommy Koh, who became President of the Third Conference, took a very active part in the deliberations at that Conference. Despite the attempt of the United States to reopen discussions on the deep sea-bed provisions, Ambassador Koh was able to secure the approval of the Convention during the eleventh session of the Conference.

Singapore was also a leader of the land-locked and geographically disadvantaged States. It can be said that the group of land-locked, shelf-locked and geographically disadvantaged States are biggest beneficiaries of the Convention, as they are afforded opportunities, for the first time, to share in the resources of the ocean. To mention one significant gain, they have obtained the right of to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all States concerned (Art. 79 of the 1982 Convention, and see also Arts. 69-70).

Singpore borders on two of the busiest straits of the world, namely, the Malacca and Singapore Straits, thus making shipping its principal industry. From Singapore's view, the Convention is not entirely satisfactory as three are certain provisions that do not meet its expectations.[10]

Although Singapore still adheres to the 3-n.m. territorial sea limit,[11] it has now accepted the 12-n.m. limit of teeritorial sea under the 1982 convention. To avoid unnecessary disputes, Singapore initiated negotiations for the delimitation of its maritime boundaries with its neighbours. Its boundary to the north is still governed by an agreement signed on 19 October 1927 between the United Kingdom and the Sultan of Borneo. An agreement on the boundary to the south of Singapore was concluded between Indonesia and Malaysia in 1973.

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(10)Chao Hick Tin, "Paper on Singapore: Law of the Sea", (**SEAPOL STUDIES NO.2**, Chulalongkorn University, Bangkok).

(11)Territorial Waters Act, 1978 of the United Kingdom.

The issue of unimpeded transit through international straits was one key issue that concerned Singapore. It was one of the hotly-debated issues at the Third Conference. Maritime powers faced a problem upon the approval of the 12-n.m. territorial sea when most of the international straits would be treated as either internal waters or territorial waters. Arturo Tolentino, head of the Philippine delegation, in his statement before the Second Committee of the Third Conference, said that the reasonable solution to the issue lied in the character of interest of foreign States whose vessels would want to pass through the straits. He supported the position that granted the right of innocent passage of foreign merchant vessels through such straits. The right of innocent passage of merchant vessels, it was argued, served the general interest of the international community. Foreign warships could not be placed in the same category as foreign merchant vessels, said the argument, because while merchant ships promoted international trade and development, warships served only the individual interests of maritime powers. Eventually, a compromise in the form of the transit passage regime was finally agreed upon and incorporated in Articles 37-44 of the 1982 Convention. Transit passage through straits used for international navigation means the unimpeded right of all ships and aircraft solely for the purpose of continuous and expeditious passage. The Convention, however, imposes on foreign ships and aircraft the duty to refrain from committing any act prejudicial to the interests of States bordering the straits.

Thailand

Situated on the Indo-China peninsula, with an area of 514,000 square kilometers, Thailand is a State whose coasts are both adjacent and opposite to the territories of other States in the region. Malaysia, Kampuchea, and Vietnam are neighbouring countries to the east of the Gulf of Thailand. Indonesia, Burma and Malaysia are to the west of the Andaman sea side. Although it has a limited coastline of 1,468 miles, Thailand can claim an area of 94,700 square nautical miles for its exclusive economic zone.

Thailand is dissatisfied with many of the provisions of the 1982 United Nations Convention on the Law of the Sea. In fact, Thailand was one of the 17 States that abstained from voting for the Convention. The Thai delegation criticized the provisions on the settlement of delimitation of the exclusive economic zones and the continental shelves as largely devoid of meaning and that they might lead to different ways of interpretation.[12]

Due to the potential disputes it may have with its neighbouring States, Thailand insisted on a more precise formulation for the settlement of disputes.

Thailand's maritime boundary delimitation could be disputed in two different ways: (1) delimitation conflict on the territorial sea between Thailand and adjacent coastal States, and (2) a conflict on the continental shelf between Thailand and the adjacent or opposite coastal States.[13]

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[12]Third United Nations Conference on the Law of the Sea. **Official Records**, Vol.XIII, 3 April 1980, p.32.

[13]C. Pachusanond, "Thailand and Settlement of Disputes in the 1982 Law of the sea Convention," **SEAPOL Studies No.2 (c)**, Institute of Asian studies, Chulalongkorn University, Bangkok.

The unsettled delimitation of maritime zones resulted in the arrest and detention of a number of Thai fishing vessels and their crew in some of the neighbouring States.

As an aid to the peaceful settlement of the disputes, Thai jurists have published treatises on maritime boundary delimitations. I refer of a recent work of our distinguished colleague Kriangsak Kittichaisaree entitled *THE LAW OF THE SEA and Maritime Boundary Delimitation in South East Asia* (Oxford University Press, 1987). Although this book focuses of Southeast Asia, legal analyses are treated in a global context. Indeed the problem of delimitation of maritime boundaries will continue to occupy interests for some considerable time to come.

Thailand was one of the States that opposed the concept of the exclusive economic zone as it might be disadvantageous for its fishing industry. Among all the ASEAN members, Thailand has the most developed fishing industry. Under the concept of the exclusive economic zone, areas which were formerly high seas, and therefore open for fishing by any State, come under the exclusive economic zone of a coastal State.

Thailand eventually accepted the exclusive economic zone concept together with States with distant-water-fishing fleet, such as Japan, the U.S.S.R., and the United States.

THE ASEAN VISION NOW

The 1982 United Nations Convention on the Law of the Sea, as the new code of the law of the sea, consists of two main parts, namely, (1) a revised edition of the traditional law governing the law of the sea, and (2) the establishment of an international regime and a machinery for the exploration and exploitation of the resources of the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.

What is the ASEAN vision now on the first part of the Convention?

At this stage, we have a little over half of the number of ratifications required for the Convention to enter into force. Nonetheless, despite numerous unsatisfactory provisions of the Convention, the ASEAN members are now cooperating with the other States to speed up the entry into force of the Convention. Their voices were heard in the drafting of this new code, and they now desire to have the revised law of the sea fully fulfilling their need. The new treaty is an answer to their demands for the expansion of their coastal maritime zones as an additional source of food for their increasing population. The sea should no longer be used as a battleground, but as a zone of peace and freedom. The easier access to the wealth of the oceans as now guaranteed by the new Convention is perceived as a means for the Third World States, such as the ASEAN member States, to close the gap between the rich and the poor countries. All the ASEAN member are now in the process of promulgating their national legislation to implement the first part of the Convention.

The ASEAN Vision on the International Sea-Bed Regime

The ASEAN vision on the deep sea-bed mining, the second main part of the 1982 Convention, however, is not quite optimistic. Manganese nodules discovered on the deep ocean floor have been perceived as a potential source of wealth. Through the initiative of the Third World countries, the United Nations General Assembly adopted the "Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof Beyond the Limits of National Jurisdiction" The Declaration proclaimed that the international area of the sea-bed and its resources are the "common heritage of mankind" and the exploitation thereof shall be carried out for the benefit of mankind as a whole" The Declaration conceived of an international machinery to be established by an international treaty of a universal character. The regime shall provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal. To the ASEAN members who belong to the Third World, the exploitation of the wealth discovered on the ocean floor and the subsoil thereof is a new economic frontier, the last hope for lesser developed States to share the wealth of the world. The international regime can be related to the search for a new and more equitable order in world economic relations as envisaged in the relevant UN General Assembly's resolutions, programmes of economic action and Charter of Economic Rights and Duties of States. To the ASEAN members, the establishment of an international regime to explore and exploit the deep sea-bed has offered a unique opportunity to combine the implementation of the Common Heritage of Mankind concept with a significant contribution towards the creation of a new international economic order. The new untapped world resources are expected to provide a substantial income in order to raise the living standards of the poorest of the world. The new law of the sea is viewed as an integral part of the New International Economic Order.

After the seemingly endless debates at the Third Conference, the principle and spirit of the Common Heritage of Mankind was finally drafted and approved as now provided in Part XI of the 1982 Convention. To the big disappointment of many in the international community, the richest and most developed State has refused to sign the Convention in spite of its delegation's active role in the negotiations. Aside from refusing to sign the new treaty, the United States has been putting roadblocks to see to it that the Convention will not enter into force. The United States has questioned resolutions passed by the General Assembly to finance the costs of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea from the United Nations' regular budget. The United States contends that the Preparatory Commission should be funded only by the countries that have signed the treaty. Under its initiative, the United States organized a group of industrialized States and signed a "mini-treaty" with the aim of exploring and exploiting the deep sea-bed resources outside the Convention.

What is more. the records of the proceedings of the debates in the on-going Preparatory Commission show that most of the issues considered in the Third Conference are being debated

all over again. In the formulation of the rules and procedure of the organs of the Authority and the drafting of a mining code to regulate the deep sea-bed mining, such issues as the precise role of the Enterprise, the mining arm of the Authority, the transfer of technology, training of personnel, the obligations of pioneer investors are still being debated in the Preparatory Commission.

Nonetheless, the work of the Preparatory Commission is moving slowly but steadily. 159 States have already signed the Convention and 35 have already retified it.(14) They are now actively participating in the proceedings of the Preparatory Commission in the hope that the Convention will soon enter into force. The ASEAN members in concert with the Group of 77 are determined to make the visions they have at the beginning of the Third Conference fully realized. The vision of ASEAN will indeed be realized soon with the full cooperation and assistance of the European Economic Community.

THE 1982 LAW OF THE SEA CONVENTION FROM THE PERSPECTIVE OF A RATIFIER

by

Hasjim Djalal *

The two previous speakers, Mr.Nandan and Judge Coquia, are from Fiji and the Philippines, respectively. Their countries are archipelagic States and they have ratified the 1982 Convention. Indonesia is both an archipelagic State and a ratifier of the Convention. So what I am going to say is just an addition to the essence of what these two speakers have already said.

Why have Indonesia, Fiji, and the Philippines ratified the Convention? In fact, the EEC as an organization has already signed the Convention. The EEC should go ahead and ratify it.

The nature of the 1982 Convention

From Indonesia's perspective, the 1982 Convention contains three major elements.

(1) It simply codifies the existing law and reaffirms what has been in the Geneva Conventions on the Law of the Sea of 1958. For instance, some of the rules on internal waters, normal baselines, and the high seas are basically replicas of the 1958 Conventions.

(2) It clarifies the uncertainty in the existing law and expands the meanings of the law. For example, the maximum breadth of the territorial sea is now 12 n.m. It does difines more clearly the regime of innocent passage through the territorial sea. In fact, it specifies a new outer limit of the continental shelf as well as that of the contiguous zone. Normal geographical meanings in some words may not have the same meanings in the legal sense. This is apparent from the case of the 'continental shelf' whose new definition is a result of negotiations at UNCLOS III.

(3) The 1982 Convention creates new regimes. For instance, it develops a new notion of transit passage through straits used for international navigation. The traditional regime under customary law is one of a non-suspendable or innocent passage. Although archipelagoes have been in existence from time immemorial, the regime of archipelagic States is a creation of UNCLOS III. Derogation of rights in the archiplegic waters therefore depends on the applicability of the 1982 Convention. The exclusive economic zone (EEZ) was first mentioned at the annual session of the Asian-African Legal Consultative Committee held in Colombo, Sri Lanka, in 1971. The EEZ concept was formulated at UNCLOS III. So were the regime of enclosed and semi – enclosed seas, the nation of the geographically disadvantaged States, the deep sea-bed mining regime, and the dispute settlement part, to name just a few examples.

The 1982 Convention is very comprehensive, covering numerous subjects. However, there remain some unsettled issues. It is unsettled whether warships exercising the right of innocent

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passage through the territorial sea have to notify or ask for authorization from the coastal State. Wreckages in the archipelagic waters and on the continental shelf are subject to an unclear regime. These wreckages are abundant in the Indonesian archipelago and on the Malaysian and Singaporean continental shelves.

The Convention strives to balance conflicting interests. There are packages on all the issues under the Convention which are in turn subject to one overall package that has been agreed upon in terms of its generality and fullness. Compromise was reached between land-locked and geographically disadvantaged States, on the one hand, and coastal States, on the other, whereby the latter is accorded sovereign rights over the adjacent EEZ while the former is entitled to have access to the resources therein. The conflict between the EEZ States (the 'economists') and the continental shelf states (the 'marginists') who wanted to have sovereign rights over the seabed beyond 200 n.m. from their coasts was also settled by compromise. The outer limit of the continental shelf is defined, leaving the sea-bed area up to the continental margin subject to a revenue-sharing formula. On the deep sea-bed area beyond the limits of national jurisdiction, the 'Common Heritage of Mankind' concept fought the freedom of the sea argument. In the end, a compromise in the form of the 'parallel' system of deep sea-bed mining materialized. On straits, Indonesia, Malaysia and the Philippines used to argue that the regime of navigation through straits depended on the nature of coastal States' right over the water lane. This is the 'unitary regime' view. That is to say, if a strait is part of the territorial sea, then the regime of innocent passage would apply. The maritime powers argued for a *sui generis* regime, independent of the fact that a strait is in a territorial sea or other jurisdictional zones. The compromise is very much in favour of the maritime powers who have secured the *sui generis* regime in the shape of transit passage through straits used for international navigation and archipelagic sealane passage. On marine scientific research, a compromise was reached in the form of the 'implied consent' regime whereby consent is deemed to have been given by the coastal State after an expiry of a specified period of time. On pollution control, there is an obligation to cooperate. Binding decisions under the dispute settlement part may be drastic but for the choice of courts and tribunals built in the Convention.

As such, although a ratifying State cannot accept every part of the Convention, it can accept the Convention as a whole. After some 15 years of open negotiations, balance and compromises have been struck. UNCLOS III was the largest legislative conference we have ever known, reflecting aspiration of mankind and aiming at providing legal order of the ocean. To date, the Convention has received 159 signatures—117 signatures on the first day it was open for signatures. The Convention will certainly create rules and order in the sea as well as establish a useful code for maritime relationship among nations.

Why did Indonesia ratify the 1982 Convention?

(1) As a country surrounded by the sea on all sides, Indonesia is interested in all parts of the Convention.

(2) The Convention is not the end, but the beginning of a new stage, that is, the stage

of implementation nationally, regionally and internationally. This is the most important aspect of this Convention.

(3) The Convention is a good framework for stability in the region and it opens up possibilities of cooperation not only within ASEAN but also between ASEAN and other regional organizations like the EEC.

(4) The Convention recognizes Indonesia's basic national interests in the archipelago. However, Indonesia has to pay for this recognition by sacrificing the Indonesian straits. The regime of transit passage through straits which did not exist before is now part of the 1982 Convention. Equally, Indonesia has to accept the archipelagic sealane passage despite the fact that under Indonesian law there is no such passage. Indonesia has to respect certain rights of its neighbours in the archipelagic waters. Indonesia has to agree with the principle of production limitation formula for deep sea-bed mining under the Convention which is not as stringent as a land – based producer of minerals like Indonesia would have preferred. Indonesia may have to pay contributions to the International Sea-Bed Authority. Based on the UN-assessed contributions, Indonesia's contributions should be approximately 0.14 per cent of the budget of the Authority; that is, in the region of 100,000 US dollars per year. Of the ASEAN countries, Indonesia will be the largest contributor.

What did Indonesia have to do before ratifying?

(1) The various government departments and authorities had to be convinced that Indonesia should ratify the Convention. This was not easy. Up to this very day, the Indonesian Navy is still not convinced that Indonesia has to give up the Indonesaian straits.

(2) The Convention had to be translated into the Indonesian language for parliament to scrutinize.

(3) Public opinions had to be galvanized to support the Convention.

(4) Parliament had to be convinced why it was good for Indonesia and the world to ratify the Convention.

(5) The authorities had to decide whether to ratify the Convention first then adjust national legislation later or the other way round. Over 50 Indonesian laws would have to be amended as a result. In the end, Indonesia decided to ratify it first and Indonesia would still have sufficient time to adjust its national legislation in compliance with the Convention.

What would happen if the 1982 Convention does not enter into force?

In that case, other countries would not be entitled to claim in Indonesia's archipelago the rights accorded by the Convention unless they have also ratified the Convention. As a corollary, a country like the U.S.S.R. which has signed the Convention is in a relatively better position to claim the rights in Indonesian waters than the U.S.A. and some European country which have not signed it but which also assert the same rights. Uncertainty would creep in if the Convention does not enter into force. Therefore, failure to ratify or accede to the Convention will bring us problems. Let all States ratify the Convention and live happily ever after!

DISCUSSIONS

Mrs.Heliliah Yusof

The visions of the ASEAN States may be divided into 3 phases: pre-UNCLOS III, during UNCLOS III, and post-UNCLOS III. The first and the second phases are colsely related. When one looks at the various packages one sees a varying degree of collaboration. This was apparent in the case of collaboration between Malaysia, Indonesia and Singapore regarding the Malacca Strait and the right of passage; and between Malaysia, the Philippines and Indonesia, in particular, on the archipelagic State concept. Apart from that, ASEAN consultations took place throughout UNCLOS III.

At the post-UNCLOS III stage, when one talks of cooperation one means an era of implementation of the 1982 Convention. As Dr.Djalal put it, after 10 December 1982 we are in the implementation stage. As a non-ratifier, Malaysia faces the problem whether to ratify the Convention first and then adjust its legislation later or the other way round. Already, with one piece of Malaysian legislation, it has given rise to an outcry of incompatibility with the Convention. So, one can imagine the trepidation if Malaysia were to endeavour enacting anything at all at this stage.

As for cooperation, the visions remain ones of protection of national interests. As far as the experience of the Attorney-General's Department is concerned, there are multifarious laws which have to be brought in conformity with the Convention—even the Continental Shelf Act enacted in 1966. But this stage is incomplete. Some of the concern is expressed here that the period of examination of the provisions of the Convention should not take long, and the all of us should ratify the Convention soon. However, this is a 'chicken-and-egg' question, not in view of the conflicting claims but of the incompatibility that it has given rise to.

At the pre-UNCLOS III stage, cooperation had been transient, as expressed in some of the continental shelf agreements between Malaysia and Indonesia, whereby Malaysia had used straight baselines in the places where Malaysia would not otherwise have been entitled to. Before the final conclusion of UNCLOS III, Thailand and Malaysia had reached a Memorandum of Understanding on the Continental Shelf, which is reflective of of model of a 'would-be' cooperation for subsequent areas, such as in the Strait of Torres between Papua New Guinea, and perhaps in the Beagle Channel between Argentina and Chile.

In the ASEAN framework, the search is for a translation of the big package into a smaller package capable of being implemented in accordance with the Convention. Nonetheless, it will still be based on protection of national interests. For example, in the Strait of Malacca, the envisaged cooperation w ill still be principally between Indonesia and Malaysia because they have utmost concern over navigation and pollution in the Strait. In the South China Sea, the concern will be different, with the exploitation of the EEZ and the continental shelf stealing the limelight.

Records at UNCLOS III reveal the visions and perception of how the course of cooperation could be charted. Bounded by the Straits of Malacca and Johore and by the incident of geographical separation into two parts, Malaysia's visions may not be the same as those of others. Cooperation that Malaysia thinks of is beyond the delimitation lines. This is the reason why Malaysia's Exclusive Economic Zone Act of 1984 (Act No.311) is silent on the actual EEZ boundary line and it remains unpublished what the actual line should be like.

Judge Coquia went into the history of ASEAN. If the underlying objective has been mutual cooperation, and there have been various ASEAN committees on trade matters together with trade dialoques with the EEC, then why not on the law of the sea matters as well? There are three pre-requisites : 1) the political will, 2) understanding, and 3) perception of the issues. Understanding and perception of the various departments on what the ASEAN visions should be are equally important. Judge Coquia has identified what the main interests are. It is now the question of identifying the priorities in the different marine areas. It has to be worked out within the framework of mutual cooperation, and for that matter Malaysia still looks up to the Treaty of Amity and Cooperation in Southeast Asia.*

Professor Willem Riphagen

I agree with Ambassador Djalal that the 1982 Convention is not the end but the beginning of a new process of negotiation.

In accordance with a traditional rule of international law, treaties only bind States that have given their consent to be bound thereby. Rules of customary international law can be created through State practice and *opinio juris.* As a matter of fact, the traditional rule takes as a point of departure the actual sovereignty of each State in the form of consent, but I suggest that this is not the right way to approach the law of the sea. In any case, any number of ratifications for a treaty to enter into force is always arbitrary.

There are still a lot to negotiate. The 1982 Convention just indicates the ways for States to make arrangements *inter se,* but in many fields it simply does not stipulate precise obligations.

Not all provisions of the Convention have to be translated into national legislation. Some of them can be translated into arrangements between States and national legislation should allow this accommodation through international intercourse.

Dr. Kriangsak Kittichaisaree

I wish Judgge Coquia could have elucidated the rationale lying behind the Philippine Declaration made at the time of its signing and at the time of its ratification of the 1982 Convention. I also could not agree with his view that 'shelf-locked' States are the biggest beneficiaries under the 1982 Convention. Thailand is shelf-locked and we cannot concur with that view!

At the time of UNCLOS III, each Member State of ASEAN had divergent interests as well as priorities which they either separately or jointly strived to enhance. At the same time ,

*See Appendix 1.

these individual interests had to be reconciled with the interests of the Group of 77 as a whole. We are now in the post-UNCLOS III era. It is high time that Member States of ASEAN reconcile their maritime interests and priorities *inter se* through cooperation and harmonization of national laws, regulations, and policies.

Most parts of ASEAN Member States border enclosed or semi-enclosed seas. Their geography bears semblance to that of the EEC Member states. However, unlike the EEC, ASEAN as an organization does not have any authority to issue regulations or directives to coordinate and harmonize national policies and measures. For ASEAN, it is horizonal, not vertical or top-down, decision making.

It is very surprising that ASEAN has no priority for maritime issues. This is despite the fact that the ocean yields substantial income for its peoples and, for the two archipelagic States who are members of ASEAN, the sea is the very vitality of their nationhood. Time is now certainly ripe for ASEAN to become more conscious of the significance of regional cooperation on ocean use.

I would go a bit further than Mr.Nandan by saying that the rule of law to govern ocean use is now encapsulated in the 1982 Convention. In the *North-Sea Continental Shelf Cases* (ICJ-Reports 1969, at p.42, para. 73), the International Court of Justice stated that the low number of ratifications and accessions to a treaty may negate any implied positive acceptance of its provisions. However, the number of 35 ratifications to date is not low when compared with other conventional agreements. What is more, the 1969 Vienna Convention on the Law of Treaties had been followed by international tribunals and by the International Court of Justice itself long before its entry into force on 27 January 1980, and even in regard to States which had not ratified it or evinced any intention to do so. As Judge Loder, the first President of the Permanent Court of International Justice said in the *Lotus Case* : international law is a summation of consensus of opinions of States. What is paramount is the fact that the provisions of the 1982 Convention have been accepted by a general consensus of opinions among specially affected States. The UN Secretary-General was therefore right when he said, at the time of the signing ceremony of the Convention on 10 December 1982, that: "In order to affirm that international law is now irrevocably transformed, so far as the seas are concerned, we need not wait for the process of ratifcation of the Convention to begin" (UN Press Release,SEA/MB/11,p.1)

In any case, the provisions of the Convention are the result of the package deal struck at UNCLOS III. An intrinsic value of the package deal lies in the fact that it serves as a decisive aid to interpretation of the meaning and rationale of a particular provision of the Convention. It also elucidates the interwoven relationship between rights and their inherent duties. For instance, the concept of EEZ as a legal norm comprises not only the 200-n.m. distance criterion, but also the detailed balance of rights and duties, such as those enshrined in Article 56 and Article 58 of the Convention. As the concept of EEZ does not exist in vacuum, States cannot pick and choose a certain right without also observing the duty attached thereto.

National laws of ASEAN States must be consistent with the provisions of the 1982 Convention. The two ratifiers have the obligation to observe the terms of the Convention, Any dev-

iation from the Convention, which permits no reservation, is not legally justifiable. For the other States which are signatories, they have the obligation to refrain from acts which would defeat the object and purpose of the Convention. (Article 18 of the Vienna Convention on the law of Treaties). The object and purpose of the Convention are clearly to found an equitable regime for the law of the sea which has universally binding force. National laws of these signatories which are incompatible with the provisions of the Convention are deviant practice that can only undermine the Convention, and not sustain it.

Years after years, we have seen the UN General Assembly Resolutions on the Law of the Sea adopted by an overwhelming number of States. Although UN Resolutions do not, strictly speaking, have legally binding force, they may have some normative evidentiary value of *opinio juris*. States must act consistently w ith the provisions of the Convention as they have expressly pledged to do.

Whatever may be the status of Part XI of the Convention (the deep sea-bed mining part), the package deal governing the rest of the Convention must stand. I would go a bit further than Dr.Djalal by saying that those States that have not ratified the Convention must, nevertheless, adhere to the "package deal" at UNCLOS III otherwise they would not be entitled to the rights accorded by the Convention.

Having said that the legal framework for regional cooperation among ASEAN Member States is the 1982 Convention, I hope that we can find concrete and specific suggestions and means for our governments to achieve this common beneficial goal.

Dr.Hasjim Djalal

With regard to ASEAN cooperation on the law of the sea affairs, I am one of those who regret that this has not taken place as it should have. But this is not for lack of effort on our part. In 1971, Indonesia took the initiative in reconciling the various interests of the ASEAN countries. With the full cooperation of the Philippines, we had an ASEAN experts meeting on the law of the sea in Manila in May 1971. Unfortunately, the meeting did not go very far because of the perception of some ASEAN countries that there was nothing 'ASEAN' about the law of the sea, and that the matter should be solved internationally rather than regionally The issue of straits, for instance, was regarded at that time not as a cause for regional concern, but as a matter to be settled in the context of a proper law of the sea negotiation. This was equally the case regarding the other issues dealing with the continental shelf, EEZ, arhipelagic waters, and so forth. The Manila meeting was the first, the last, and the only meeting among ASEAN experts on the law of the sea.

Now the 1982 Convention has come into existence and most of the problems have been solved on a global context in a global treaty. I see no reason now why ASEAN member countries could not cooperate in implementing the Convention. Here I agree with what my colleague Kriangsak has said : we should do it on the basis of the 1982 Convention which all of us have signed. In order to make it more effective, all of us should now ratify the 1982 Convention.

With respect to customary international law, for a long time there has been 'rebellion'

among the developing countries against the so-called 'customary international law' for many reasons. One reason is that everybody generally disagrees as to what a rule of customary international law is. People have to debate for many years before they know what that rule is. The debate is not necessarily conclusive. It depends on who said a lot at a particular point in time. So there is an element of uncertainty, especially for the developing countries that were born after the Second World War. The second reason, which is more fundamental, is that newly independent States did not participate in formulating that part of international law or they might have been victimized by it. As a result, these States are reluctant to abide by it, assuming one can find out what it is. Therefore, there is a tendency for them to rely on what they have agreed to, that is, conventional law. This explains why they spent so much time negotiating at UNCLOS III. The 1982 Convention clarifies customary international law and brings in the largest participation by States.

Do we have to follow the 1982 Convention even though it has not entered into force? In many ways, yes. However, it is not fair that by ratifying the Convention, ratifiers should be penalized for having to abide by it all the time while non-ratifiers can pick and choose. Since our national laws have not been abolished, in some cases we have to resort to our national laws because the 1982 Convention is not in force yet. It is important to bear this in mind.

Mr. S. Tiwari

I would like to join Dr. Djalal and Dr. Kriangsak in saying that all States should follow the 1982 Convention whether it is in force or not. The Convention is unique in the history of treaties. It was hoped that with the 1982 Convention a greater degree of certainty would be created. However, we have been witnessing a disturbing trend whereby States are steering their national legislation away from the Convention. How should this trend be arrested?

Dr. B.A. Hamzah

I would like to clarify an incident cited by Judge Coquia. It is true that Malaysian authorities arrested the Philippine fishing vessels. These vessels were arested in the Malaysian maritime zone. The solution was political one. The vessels and their crew were released because we thought that the relations between the two countries were more important.

I mostly agree with Dr. Djalal's view. I disagree with him, however, when he said that non – ratifiers would lose most of the benefits accorded by the Convention. Ratification is both a legal as well as a political process. Selective ratification has been in practice and it is not unusual for a State to select certain provisions in a particular treaty. For instance, Indonesia itself is not a party to 58 Geneva Conventions, except the 1958 High Convention, yet Indonesia still benefited from the provisions of all the four Geneva Conventions of 1958.

There are some provisions in the 1982 Convention which may reverse *opinio juris*. For example, the right of innocent passage in the international waterway, although not being considered in real terms as a customary rule, has now received emerging consensus that it can become part of customary law.

By signing a treaty, the signing State indicates that it is willing to go further. It is a question of timing and self-adjustment before one can ratify a treaty. We have to be realistic on this point. I go along with Dr. Kriangsak when he said that so long as the intention is not to jeopardize or defeat the object and purpose of the 1982 Convention, which are to establish an international maritime order, signing States are not obliged to ratify the Convention when they are not ready. Certain adjustments are necessary. If States were forced to ratify the Convention within a specified time-frame, they might not ratify it at all!

Dr.Phiphat Tangsubkul

I would like to hear about the UN's future roles on this matter in this region.

Mr.Satya Nandan

One of the most important aspects of the 1982 Convention which is not to be found in The earlier conventions on the law of the sea is the reference to regional and sub-regional cooperation which have become a focus of this Symposium.

ASEAN countries should not be discouraged by the existing problems. The Convention provides you with the basic framework to deal with all these problems.

In fact, in the Convention there are a number of problems of regional character belonging to this area which we try to resolve. The passage between Sabah and West Malaysia through the Indonesian archipelagic waters is a case in point. Fishing dispute among the ASEAN countries is another. The Convention should not fall into disarray. I have no doubt that should this Convention fail, States will move towards further nationalization of the oceans.

The UN's purpose is to try to promote the complete adoption of the Convention in all aspects in State practice. Customary international law is evidenced by State practice. State practice is not consistent, and it is a grave concern to us that State practice is moving away from the Convention. We would end up with the Convention which has become hollow.

The UN is happly to inform you that we have just received a letter from the Philippine Mission to the UN, New York, stating that despite the Philippine Declaration at the time of signing and of ratifying the Convention, the Philippines w ill conform with the provisions of the Convention.*

Mr.Raymond Lim

Regarding the 49 Philippine fishermen arrested by Malaysian authorities, they were arrested in the disputed area claimed by both the Philippines and Malaysia. The Malaysian Court of Session in Kota Bahru rejected the fishermen's defence that they had been fishing in disputed waters. The Court held that it had to apply Malaysian municipal law rather than

*See Appendix 2.

international law, but actually acquitted the defendants on the ground that the prosecution could not prove an offence under the Malaysian Fisheries Act of 1985. This incident highlighted the need for cooperation. If we enforced our national law strictly, then it would give rise to tensions in the region.

If we regard the 1982 Convention as representing customary international law, one problem we should address is that of 'persistent objectors' We can have the Convention and its ratifiers, but what should we do with non-ratifiers who claim to benefit from the Convention because of State practice and *opinio juris* arising out of the Convention? These non—ratifiers may have persistently objected to the provisions they dislike and, as a consequence, are not bound by such provisions.

SESSION II:

POTENTIAL COOPERATION IN ASEAN AND IN THE EC

Chairman : Dr. Hasjim Djalal

THE CUSTOMARY INTERNATIONAL LAW OF FISHERIES, AND THAT CONCERNING RIGHTS OF PASSAGE, MARINE POLLUTION AND SCIENTIFIC RESEARCH

by
Professor Willem Riphagen

When talking about customary international law we must realise the fundamental tension, inherent in international law, between mankind and individuals, split up by the concept of the sovereign States. The ILS (International Legal System) is a perpetual compromise disigned to ease this tension by providing a framework for cooperation between States. Rules concerning division must be complemented by rules concerning connection. This is particularly clear in matters relating to the sea, the "natural frontier" between **all** states.

The historical development of the law of the sea shows an increasing awarenes of the non-viability of purely spatial divisions, whether in the form of the Bulla Aurea of 1493, or in that of the Grotian concept of stateless domain. Functional distinctions impose themselves as regards human activities at sea. Navigation, exploitation of living resources, exploitation of non-living resources, and military uses are the main distinctions; pollution of the marine environment, and marine scientific research have a special position. All sorts of possible overlap have to be taken into account. Nor can the land/sea interrelationship, natural of artificial, be overlooked; thus the spatial parameter returns! Could one really expect all the resulting problems to be regulated in detail by "customary international law"? Fortunately states do not necessarily exercise the sovereign rights that they claim to have! The traditional requirement for customary international law to be based on practice plus *opinio iuris* rather ignores the necessity of *ad hoc* accommodation, so admirably expressed - for the regime of the EEZ - in art. 59 of the 1982 Convention. Particularly significant is the reference there to "the...importance of the interests involved...to the international community as a whole"; a clear reminder of the old *jus communicationis:!* In the field of **fisheries** we are nowadays of necessity far removed from the *mare liberum* concept! Nevertheless it has not entirely disappeared, if only because of the mobility of the fish themselves. Surely the transition from "free for all" (implying first come first served) to "common heritage of mankind" (implying distribution according to need) **could** have been effected in this field, at least theoretically. However, spatial adjacency, rather than functional activity, has won the day, but with important exceptions! (to be compared with intertemporal law). The common heritage concept underlies the duty to take measures against **over-exploitation.** Just like other protection of the environment this is essentially an international task, irrespective of territory or nationality, and dictated by scientific evidence. Scarcity requires distribution; here the spatial and personal parameters crop up again.

The LOS Convention give a clear priority ot the coastal State, which determines its capacity to harvest, and the total allowable catch, but is also under a duty to avoid **under-**exploitation by giving other States access to the curplus, if any. In this connection the land/sea-

interrelationship is given attention by a special reference to land-locked and geographically disadvantaged States. Furthermore the migratory habits of certain species are taken into account by allocating them irrespective of the place where they happen to be present during their life span. All this, and the conservation and management of fish outside the EEZ clearly requires bilateral, sub-regional, regional and global cooperation between States in order ot arrive at equitable arrangements between coastal States and flag States. The same is essentially true for "the common law of mankind" in the field of **protection and preservation of the marine environment.** In this field, as in that of "the law of international (inland) watercourses" we are approaching the topic, which, in the ILC, is called "liability for the injurious consequences of acts not prohibited by international law" Starting from a macro-situation we are all interested in, we have to try to translate the common requirements in terms of exercise of national sovereignty and of bilateral, multilateral and universal legal relationships between States; again the traditional concept of "customary international law", based as it is on micro-stuations, can hardly provide more than a framework, an "object and purpose" without a treaty, a "duty to cooperate" without precisely defined substantial rules of contact, an order to "make the best of it" in a world split up in sovereign States. Only a relatively small part of pollution of the marine environment is due to navigation, but here two different "interests of the international community as a whole" may come into conflict! A balance has to be found between the non-communication of pollution and the communication of international trade. Quite naturally, the possible clash is particularly acute in the field of enforcement; arrest is in principle incompatible with movement. The external conduct of a ship is, to a certain extent; separable from its internal "design, contruction, equipment and manning"; spatial (coastal State) considerations are more relevant to the first, personal (flag State) considerations more relevant to the second; again, cooperation is required in all the areas connected with the sea, including "internal waters" and, again, States do not, for obvious reasons, always exercise the sovereign rights they claim. It would go too far here to describe in detail the complex compromise indicated in the 1982 Convention. Two points however merit particular attention: port State jurisdiction and the prompt release of vessel procedure, because they illustrate the delicate balance between the two "international community interests"; indeed the random coincidence of those interests (macro) with the interests of a particular coastal State or a particular flag State (micro) makes the balance so delicate! While most "customary international law" concerns duties to refrain from exercising sovereignty, the macro-interests of mankind may require a duty to exercise sovereignty. The primary duty is that of the flag State to adopt laws and regulations (art.211(2)) and enforce them (art.217). Such laws and regulations shall at least have the same effect as that of generally accepted **international** rules and standards established through the competent international organization or general diplomatic conference. These minimum standards also determine the enforcement jurisdiction of other States. Surely, coastal States may adopt rules going further than the international rules, or establish particular requirements as a condition for the entry of foreign vessels into their ports (art.211(3)). But the former rules can only apply to conduct within the internal waters, territorial sea and EEZ of the coastal State and are without prejudice to the rights of passage; in particular, they shall not apply to the design construction or equipment of foreign ships to the extent they are not in conformity with the international standards (art.217(2)), (also art.211(6)(c)) Port State jurisdiction is limited to **discharge** in violation of the international rules, and if the discharge has taken place beyond the **territorial sea** of the port

State, the proceedings can be taken over by the flag State (except in the case of **major** damage to a coastal State, or **repeated** disregard by the flag State of its primary obligations in this field) (art.228). The port State, in a case of violation of international rules relating to "seaworthiness" of vessels, may also permit the vessel tto proceed only to the nearest appropriate repair yard (art.219); even in that case, the flag State may seek release of the vessel. This prompt release of vessels and crew, upon the posting of a reasonable bond or other financial security, is submitted to a **special** international judicial procedure of a compulsory character ascertaining a binding decision even without cooperation of the defendant (art.292), and no exhaustion of local remedies is required. Clearly then the freedom of movement of ships, also underlying the old international arbitration case of the Costa Rica Packet, and the "anti-Lotus" rule of art.97, is still a principle of "customary international law"; at the same time, also in this field cooperation between State is required; as to particular requirements of entry into ports conditions, art.211(3) refers to such co-operative arrangements between port States and their effect vis-a-vis flag States.

The continuing validity of this principle of freedom of movement of ships is also evident in the detailed provisions of the 1982 Convention of the various **passage rights;** here again all waters connected with the sea are involved, but also the spatially determined State sovereignty. Indeed, since all States have the right to sail ships flying their flag on the high seas, land-locked States should enjoy freedom of transit through the territory of transit States by all means of transport (arts.90 and 125). Other particular land/sea interrelationships of a geographical nature have to be taken into account in the reduction of land/sea frontier **zones** into frontier **lines;** here again the main counterpoint is the avoidance of situations of "cut off" (see e.g. art.7(6)). The latter idea also underlies the various regimes of passage from one part of the seas to another. Transit itself is no problem; the presence of the foreign ship is both functionally and temporally limited. It is the possible **external** conduct of the ship in relation to **localized** coastal State interests **during** its presence that calls for a balance between flag State and coastal State powers. This balance is customarily epitomized by the adjective "innocent", in itself not a particularly clear concept! There is a wide divergence between the duty to abstain as e.g. formulated in art.24(1) and the right to act, as formulated in art.125(3)! As to sea areas there is no "full" territotrial sovereignty. On the other hand, it is interesting to note the increasing importance or the spatial concept of "sea lanes" (including traffic separation schemes). Significantly, "the use of recognized sea lanes essential to international navigation" (art.60(7)) has been given priority over the construction of installations and structures for economic purposes (see also arts.60(3) and 261). Again, all this, in order to be worked out in detail, requires cooperation between States, particularly where **new** spatial limits are drawn to "national jurisdiction" Regional cooperation is referred to in arts. 51, 70(2), 122 and 123.

The duty of cooperation between States is even more prominent in the field of **marine scientific research,** since it serves as a tool for acquiring **knowledge** of the marine environment, and thereby, in principle, has a bearing on all human activities in that environment. Of course, the acquistion of this knowledge does, in the present days, not necessarily imply an activity at sea (remote sensing), whereas, on the other hand, scientific research may be conducted at sea, which has no bearing on the marine environment as such (e.g. gravitation measurements). The

possible links between marine scientific research and other activities at sea necessitate again an accommodation of coastal States' interests in respect of resources and security and flag States conducting marine scientific research at sea. Again, delimitation **lines** in the seas are, as such, hardly relevant for the marine environment as a whole. As in regard of passage, one could have expressed the balance in terms of "innocence" of marine scientific research, i.e. in terms of the intended uses to be made of the knowledge acquired by such research. But it is obvious that in the field of scientific research, as the Romans said, *ius in causa positum,* all depends on the particular circumstances of the case, on the "distance" between a particular marine scientific research project and resources and security interests. Only international cooperation in good faith can create favourable conditions for mutual benefits to be derived, for coastal States and flag States alike, from the results of marine scientific research. These considerations underly the relevant provisions of the 1982 Convention (arts.243 and 247) and the so-called "consent principle" in its various modalities. In these modalities (express consent; duty to give consent under certain circumstances; implied consent (arts.247 and 252); right to require suspension or cessation (art. 253); dispute settement (art.297(2)) spatial distinctions reappear.

By way of **conclusion** it may be repeated that the typical characteristic of "the seas" as a "frontier zone" common to all States, requires a careful balancing of rights and of duties, both of "coastal" States and of "flag" States. New spatial delimitation lines **only** cannot solve the problems; on the contrary, they underline the necessity of cooperation between States, each of which is, after all, at least potentially both a "coastal" and a "flag" State. Such cooperation will often have to specify "quantities" rather than abstract "qualities" Under those circumstances "customary international law" can only give a **framework,** and in this respect, in the fields discussed in this paper, the 1982 LOS Convention, even if, or so long as, it is not in the full sense "binding" on a particular State or States, points the way to the development of "conventional" law.

THE INTERNATIONAL LAW OF FISHERIES IN THE EEC

by

Robert C. Fischer*

Introduction

1. Among the regional economic organisations, the European Economic Community pursues a comprehensive economic integration among its Member States : It establishes an Economic Union, founded upon a common market and accompanying policies.

The common market covers the free movement between the Member States not only of goods, but also of persons, services and capital. The policies range from fully integrated common policies—e.g. in the field of competition, agriculture, fisheries, transport and commercial policy—to more or less coordinated national policies—e.g. monetary, social and general economic policies.

Since this Economic Union englobes all economic relations between the Member States, the Community is necessarlly also concerned, directly or indirectly, with all economic relations between its Member States and the outside world.

2. This Economic Union is supported by a strong legal integration between the Member States of the European Community.

Acting through its own institutions, the Community may not only take decisions which are binding on its Member States, but may also enact regulations which are binding and directly applicable in all Member States.

These powers include the authority to enter into international commitments, which will be binding not only on the Community itself, but also on its Member States, and which may, moreover, under certain conditions, even apply directly within all the Member States.

3. This treaty-making power of the European Communities was initially only recognized for areas explecitly mentioned in the EEC Treaty, i.e. mainly the area of the common commercial policy (covering customs and other foreign trade matters).

The increasing effect of the Community's internal policies in other areas of Member States' external economic reletions has finally led to the recognition of the idea, advanced by the European Comminssion and supported by the Court of Justice of the Communities in a series of decisions, that the Community has also implied treaty-making powers. These implied powers extend to all matters within the internal powers of the Community (parallelism of external and internal powers). Areas in which the Community has since exercised its implicit treaty-making power include particularly fisheries and transport policies and environment protection.

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*Legal adviser to the Commission of the European Communities. This paper expresses the personal view of its author.

4. The Community's powers with respect to the external economic relations may be exercised either by the adoption of autonomous measures or by the conclusion of international agreements. In either case, Member States cease to be competent with regard to matters dealt with by the Community.

In areas essential for the establishment and the functioning of the common market, the Community's competence is exclusive even before it is exercised, although Member States may, in case the Community fails to act, retain certain transitional competences. Such areas include fisheries and transport.

The line separating the Community's powers from those remaining to the Member States as well as the line which defines the area within which the Community's powers are exclusive, even before they are exercised, are not stable, New powers may be transferred to the Community under a general safeguard clause in the constituent EEC Treaty or by amendments to that treaty, whereas the areas where Member States retain transitional competences will shrink whenever the Community implements its own objectives.

5. This division of powers between the Community and its Member States has important consequences for the application of international lay in the relations between the Member States and in those between the Community and/or one or more of its Member States, on the one hand, and third countries or international organisations, on the other hand.

Although the Community was estabilshed by a treaty under international law, Community law, i.e. the body of law created by the institutions of the Community, is not international law, but shows more resemblance with domestic law, and more particularly with the federal law of a federal State.

In relations between the Member States Community law (the EEC Treaty and secondary Community law, i.e. law enacted by the institutions of the Community pursuant to that treaty) prevails over international agreements between the Member States.

Rights and obligations arising from agreements concluded before the EEC Treaty between one or more Member States, on the one hand, and one or more third countries, on the other, are, of course, not affected by the EEC Treaty and subsequent Community law, but the Member States concerned must take all appropriate steps to eliminate incompatibilities with Community law.

Finally, within the scope of its external powers, the Community may, where appropriate and feasible, take over the rights and obligations arising from Member States' agreements with third countries, or have those agreements adapted or terminated. New agreements concluded by Member States in disrespect of the Community's exclusive external powers cannot prevail over Community law, without prejudice to the effects of such agreements under international law.

Consequently, in the area of fisheries, which falls within the exclusive powers of the Community, it is for the Community to take responsibility for the rights and obligations towards

third countries which result from the law of the sea and from any international agreement in that area. In intra-Community relations, fisheries will essentially be governed by Community law and by such principles and rules of the law of the sea which are compatible with Community law and the Community's exclusive competence in the matter.

In other words, in the area of fisheries, and more particularly the conservation and management of fishery resources, it is no longer each Member State, but the Community which assumes the responsibilities of a coastal State for the exclusive economic zones, or fishery zones, established by its Member States, as well as the responsibilities of any State for its fishing vessels, wherever they operate, in its own zone, in that of another coastal State, or in the high seas.

The EEC's Common Fisheries Policy

General Scope

6. The main body of the EEC's Common Fishery Policy, including its regime for the conservation and management of fishery resources, deals with the operation of fisheries and with the trade in fishery products within the Community's Economic Union and more particularly within its common market. The main elements of this policy are therefore determined by the principles and requirements of the common market, such as in particular the free circulation of fishery products between the Member States within the framework of a common market organisation for these products, the equal access of all Community fishermen to the fishing zones of each Member State and consequently the pooling of these fishing zones into one Community fishing zone, and a structural policy.

The three panels of this policy, market organisation, conservation and management of resources and structural policy, all contribute to the pursuit of the objectives of the Common agricultural and fishery policy, which include the increase of productivity by promoting technical progress and by ensuring the rational development of production and the optimum utilisation of the factors of production, in particular labour; thus ensuring a fair standard of living for the fishing community, in particular by increasing the individual earnings of persons engaged in this sector; stabilizing markets; assuring the availability of supplies; and ensuring that supplies reach consumers at reasonable prices. The policy should take account of the special nature of fishery activities, resulting from social structures and structural and natural disparities between the various regions, the need to effect the appropriate adjustments by degrees, and the fact that in the Member States the fishing activity constitutes a sector closely linked with the economy as a whole.[1]

Development from 1958 till 1983

7. The EEC's common market was progressively established during a transitional period from 1958 to 1970. For agriculture and agricultural products the operation of the common

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[1] Art. 39 of the EEC Treaty

market must be accompanied by a Common Agricultural Policy. The same applies to fisheries and fishery products because the EEC Treaty considers the latter agricultural products.

8. In 1970, the Common Fisheries Policy (CFP) comprised a Common Market Organisation (CMO) for fishery products and a structural policy for fisheries.

9. The Common Market Organisation established:

- the free circulation of fishery products within the Community, which includes the right for any Community fishing vessel to land their catches directly in any other Member State; and the right of equal access;

- a common import and export system towards third countries (including custom duties, quantitative restrictions, etc.);

- arrangements for regulating the market in fishery products in order to support a price and supply policy (including market interventions, export restitutions and safeguard measures). For the implementation of these arrangements an important role was entrusted to the independent producer organisations in the various Member States. These market interventions and export restitutions were paid for by the Member States and fully reimbursed by the Community.

10. The Structural policy intended to promote the improvenment and the adaptation of the structural situation in the fishing industry, with the coordinating and financial assistance of the Community. It also established the important principle of equal access for all Community fishing vessels to the fishing zones of all Member States (which in 1970 did not exceed 12 nautical miles).

The possibility to take measures for the conservation and management of fishery resources was also created, but not effectively used in the first years, the adoption of the necessary measures being left to the Member States.

11. The Act of Accession of 1972, setting out the accession condition for Denmark, Ireland, Norway and the United Kingdom (Norway finally decided not to accede), provided for the adoption by the Community before 1979 of the necessary measures for the conservation of fishery resources.

It also contained a temporary derogation from the principle of equal access, by authorizing Member States to reserve fishing in their coastal waters up to 6 and in certain areas up to 12 miles "to vessels which fish traditionally in those waters and which operate from ports in that geographica coastal area" Member States availing themselves of that derogation, however, had to respect "the special fishing rights" and the other "existing fishing activities" which other Member States enjoyed in these coastal waters on 31 January 1971.

12. In the early 1970's, these fishery conservation and management measures were undertaken by each Member State within its own fishing zone. In waters beyond the fishing zones,

such measures were undertaken by Member States within the framework of the relevant international organisations of which they were members, in particular the North-East Atlantic Fisheries Organisation (NEAFC) and the International Convention for the North-West Atlantic Fisheries (ICNAF). The Community had, at that time, only observer status inthese organisations.

13. In the mid-seventies the NEAFC and other organisations added quantitative catch limitations (TACs and quotas) to the panoply of conservation measures. These quotas were negotiated and adopted by the participating Member States. They were in fact treated by each Member State as a definite, national quota, although, according to the Commission, the total volume for all Member States should have been negotiated and accepted as a Community quota, and then autonomously allocated by the Community between the interested Member States.

14. This national management of the NEAFC quotas was challenged by Dutch fishermen as incompatible with the Common Market Organisation for fishery products and with the Community's exclusive competence with respect to conservation measures.

In an important judgment of 14 July 1976, the Court of Justice of the European Communities confirmed the Community's exclusive competence for the conservation and the management of fishery resources, not only within the fishing zones of the Member States (then not exceeding 12 miles) but also beyond. The Court allowed, however, the Member States to apply provisionally national quotas until the Community had become a full member of these organisation and at the latest until the end of 1978.

15. In the same year the negotiations on the UN Law of the Sea Convention, in which the Community participated as an observer, reached a point where a large number of coastal States were likely to extend their fishing zones up to 200 miles, which in several cases would seriously affect the Community's fishing activities.

In view of that situation, the Council of the European Communities (i.e. the Council of Ministers, the policy making institution of the Community), during a meeting in the Hague adopted on 3 November 1976 a comprehensive programme on the Community's policy for the conservation and management of fishery resources (the so-called "Hague Resolutions").

These resolutions provided for:

- the simultaneous extension by all Member States of their fishing zones in the North Sea and the North Atlantic up to 200 miles with effect from 1 January 1977, fishing within this zone (the Community's fishing zone) being subject to the Community's Fisheries Policy, in particular with respect to the conservation and management of resources;

- the negotiation of fishing agreements between the Community and third countries concerned and corresponding steps with regard to the NEAFC, the ICNAF and other fishery organisations;

- a fair allocation of available resources among the Community's fishermen, which should take particular account of traditional fishing activities, the specific needs of areas particularly dependent on fishing and related industries and the loss of fishing potential in the waters of third countries.

The maritime waters which the Community exercises its exclusive competence with regard to the conservation and managerment of fishery resources are all the maritime waters which fall under the sovereignty or jurisdiction of the Member States, i.e. the 200 miles zones in the North Atlantic and the North Sea, the more recently extended fishing zones of Denmark and the Federal Republic of Germany in the Baltic, the fishing limits in the Mediterranean, which at present do not exceed 12 miles, and the fishing zones established by France around its overseas departments of Guadeloupe, Martinique and Guiana, in the Caribbean and Reunion, in the Indian Ocean. The Community's fisheries policy does not apply to the other overseas territories of France and the United Kingdom and the fishing zones around these territories.

The establishment of these fishing zones falls within the exclusive competence of the Member States. Any dispute relating to this matter, including the determination of baselines, the delimitation of the territorial sea and the exclusive economic zone, whether between Member States, between Member States and third countries or in relation to the high seas, has to be dealt with by the Member States concerned, in accordance with international law.

16. Although the creation of a Community fishing zone of 200 miles in the North Sea took effect on 1 January 1977, the deliberations on a Community regime for the conservation and management of fishery resources were not achieved till 23 January 1983.

In the meantime, an incomplete provisional regime was applied, with certain interruptios, and negotiations with third countries resulted in certain fishing agreements, bilateral as well as multilateral.

17. A few years later, on 1 January 1986, Spain and Portugal acceded to the Community. In the area of fisheries, the Act of Accession of 1985 provides for a progressive integration between both new Member States and the Community of Ten over a period expiring at the end of 2002 at the latest. Substantial transitional measures, temporarily derogating from the general rules of the Community's Fisheries Policy, were, indeed, considered to be necessary because of the importance of the Spanish fishing fleet as compared to the fleet of the old Community.

The Present Community System for the Conservation and Management of Fishery Resources

18. Under this system, which entered into operation on 25 January 1983,[2] the community has fully assumed and carried out its exclusive competence and responsibility for the conservation and management of fishery resources.

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[2] See the relevant regulation in Appendix 3.

The system, accordingly, applies not only to all fishing activities within the Community's fishing zone, but also to all fishing activities by Community vessels carried out in waters beyond that zone, whether on the high seas or within the waters of third countries. Under the first aspect, the Community carriers out the rights and duties of a coastal State, under the latter it assumes the responsibilities of a State whose vessels fish beyond its own fishing zone.

19. The objectives of this system are "to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions"

For these purposes, the system consists of conservation measures, rules for the use and distribution of resources, special provisions for coastal fishing and control measures.

20. The conservation measures must be formulated in the light of the available scientific advice and, in particular, of a report to be prepared by the Community's Scientific and Technical Committee for Fisheries. This expert committee, operating under the auspices of the Commission, is consulted on a regular basis and draws up an annual report on the situation of the fishery resources, on the necessary conservation measures and on the scientific and technical facilities available within the Community. These facilities are those existing in various Member States, the Community itself does not carry out fishery research. An important source for scientific information and advice is also the action carried out under the International Convention for the Exploration of the Sea (ICES), which is the multilateral framework for the exchange of scientific information and advice on fisheries in North-East Atlantic.

21. The conservation measures may include in particular the establishment of zones where fishing is prohibited, or restricted to certain periods, types of vessel or fishing gear or to certain end-uses (e.g. only for human consumption). They may furthermore set standards for fishing gear (e.g. types of net, mesh sizes, and types of fishing vessel) and minimum fish sizes. Finally, conservation measures may also restrict fishing effort, in particular by quantitative limits on catches.

22. Among the conservation measures applied by the Community, limitation of fishing effort has always played an essential role because of the structural overcapacity of the Community's fishing fleet.

This overcapacity had caused a depletion of important stocks, which in turn exacerbated even more the imbalance between capacity and resources. In addition, the creation by third countries of 200 miles fishing zones had led to losses of important fishing possibilities, which were not compensated by those available in the Community's own 200-mile zone in the North Atlantic and the North Sea.

23. Ever since 1983, and even under the provisional and incomplete system applied from 1977 till 1983, the Community has relied, for the restriction of fishing effort, on quantitive catch limitations, i.e. on measures fixing the total allowable catch (TAC) for a particular stock or group of stocks.

TACs, however, are not the only type of measures to limit fishing effort. Certain other types are accasionally also used by the Community, either in combination with TACs, or as an

alternative. Thus the transitional regime applicable between Spain and Portugal and the other Member States provides for a limitation of the number of vessels and of fishing days per vessel, in addition to TACs, whereas various agreements with countries in Africa and on the Indian Ocean provide no or few catch limitations, but rely mostly on limitations of vessels, vessel capacity and fishing days.

24. In fixing TACs the Community acts in the first place by virtue of its responsibility for the conservation of the living resources in the exclusive economic zones of its coastal Member States. When stocks occur not only in the Community's fishing zone but also in the fishing zones of other coastal States, the Community seeks to agree with the other State or States concerned on the TAC for such stocks. For that purpose, and also in the exchange of reciprocal fishing possibilities in each other's zones, fisheries agreements were concluded between the Community and Norway and Sweden.

Similarly, for stocks which are occurring partly or entirely in the high seas, the Community cooperates with other fishing nations and coastal States within the framework of international organisations. Thus the Community is a contracting party to the North Atlantic Fisheries Organization (NAFO) Convention and participates as such in the negotiation and implementation of conservation measures for the NAFO Regulatory Area, i.e. the waters in the North West Atlantic which are beyond the fishery zones of the coastal States in that area. This cooperation in the NAFO Regulatory Area covers not only the application of quantitative catch limitations, but also extends to inspection and control measures and the Community participates in the application of the joint international inspection scheme adopted by NAFO in February 1988.

The Community's responsibilities within NAFO were initially determined by its position as an important coastal party in that area, until Greenland left the Community, under an agreement of 1984, and became an overseas country.

At present, the Community's action in NAFO is mainly determined by its responsibilities as a fishing State which has to cooperate with the other States interested in the fisheries in that area.

25. Thus, whenever the Community fixes for a particular stock or group of stocks a TAC—and for stocks occurring partly beyond its fishing zone the Community's share of a TAC—the Community has to respect the relevant rules of the international law the sea. The TACs are fixed—autonomously or in agreement with other interested States—for the conservation of the living resources of the sea. Similarly, if the Community determines its share of a TAC extending beyond its own fishing zone, it has to take account of the legitimate interests which other States have, under the law of the sea, in the part of the stock occurring outside the Community's fishing zone.

However, once the total volume of catches available to the Community is determined in the form of a Community TAC, the Community's share in a TAC, or of fishing possibilities obtained in the fishing zones of third countries, then the allocation of these fishing possibilities among the fishermen of the Community is purely an internal matter, which is exclusively governed by Community law.

26. Under the present system, the Community has decentralized the management of these limited catch possibilities for Community fishermen.

The TACs and other catch volumes available to the Community are distributed between the Member States in the form of quotas and each Member State must distribute its quotas among all vessels flying is flag or registered within its territory and must moreover ensure that these quotas are not overfished by any of its vessels.

In addition, all Member States must cooperate with each other and with the Commission in the application and monitoring of this management system.

27. A crucial and extremely sensitive element of this decentralized system is the distribution of the quotas between the Member States. According to the relevant Community provisions this allocation must be "fair" and must assure each Member State "relative stability of fishing activities for each of the stocks considered"

For a fair allocation of available resources, particular account must be taken of traditional fishing activities, the specific needs in the areas particularly dependent on fishing and its dependent industries, and loss of fishing potential in the waters of third countries.

In order to contribute to a greater stability of fishing activities, the allocation of the quotas was based on the catches of the fleets of the different Member States with respect to the different stocks and fishing areas during a reference period (1973-1978). As a result Member States received in 1983, for each of the stocks and fishing areas, quotas which reflected, in a certain percentage, their share in each of these fishing activities during the reference period. These same percentages were then also applied for the allocation of quotas in the subsequent years.

In order to safeguard the particular needs of regions where local populations were especially dependent on fisheries and related industries, certain catch possibilities were specifically set aside for these regions in such a manner that the Member State concerned had a guaranteed minimum quota for these fishing activities which was sufficient to cover the needs of these regions.

28. The conservation and management system created in 1983 also contains another advantage for coastal fisheries. In order to enable inshore fishermen to cope with the results of the extension of the fishing limits to 200 miles, the preferential regime for fishing in coastal waters which was created in 1972, when Denmark, Ireland and the United Kingdom acceded to the Community, has been adapted and extended until 1992, with the possibility of a further extension until 2002,

Under this extended regime coastal Member States are authorized to reserve fishing in coastal waters up to 12 miles to vessels traditionally fishing in those waters and operating from ports in that geographical coastal area, under the condition that they respect the special fishing rights and the order existing fishing activities of other Member States in these waters.

29. It seems important to stress that the allocation of quotas between the Member States is in no way related to the fishing zones of the individual Member States.

TACs are fixed and subsequently allocated in the form of quatas for fishing areas which are determined in accordance with the requirements of the management of each particular stock. They are usually defined by reference to the divisions or subdivisions used for statistical purposes by international scientific organisations such as ICES.

Nor are the volumes of quotas allocated to Member States in any way related to the importance of the fishing resources occurring within their respective fishery zone or the their capacity to harvest such resources.

Quotas may, and most often do, give vessels of a particular Member State fishing possibilities in parts of the Community's fishing zone well beyond the fishing zone of that Member State, as well as fishing possibilities in waters beyond the Community's fishing zone. And the harvesting capacity beyond which available catch possibilities are to be shared w ith third countries is not that of each Member States for its own zone, but that of all Member States together for the entire fishing zone of the Community. For the Community as a whole its harvesting capacity is well above its resources and this situation is unlikely to change for years to come.

30. The quotas allocated to a Member State must be distributed by that Member State among its own fishermen. Member States can, at present, freely choose their own quota management system, provided they act in conformity with the Community's stocks which are placed under a TAC and must prevent its vessels from overfishing its quotas.

For that purpose the Community has established a comprehensive system of control measures, which defines the minimum measures all Member States have to apply. Member States are, however, free to adopt stricter control measures for their own vessels.

The minimum control measures provide for a close cooperation between the flag States of the fishing vessels and the Member States where these vessels land their catches (the freedom to land in other Member States is a consequence of the common market) and also between the former and latter States and the Commission. These minimum control measures include:

1) the flag State must control the catches and landings made by its vessels for any stock under a TAC and must, for landings or transshipments made beyond its own fishing zone, require its vessels to report directly to its own authorities;

2) Member States where catches of stocks under a TAC are landed or transshipped must have these operations duly registered and regularly reported, via the Commission, to the flag States of the vessels concerned;

3) as soon as the flag State finds that its vessels risk exceeding a TAC or quota, it must prohibit all its vessels from fishing the stock concerned.

When the Commission finds that this situation occurs, either upon information from the flag State or on its own initiative, it issues a regulation prohibiting any fishing on the stock concerned by all vessels of that flag State as well as any landings or transshipments in any of the Member States of catches made in violation of that regulation.

Under such a Commission regulation, which is binding and directly applicable in all Member States, under the EEC Treaty, any Member State can prosecute under its own law vessels flying the flag of another Member State which land catches in violation of that regulation. Such prosecution would have been more difficult, if not impossible, if fisherman had only acted in violation of a regulation issued by his flag State under domestic law.

4) This cooperation between Member States has been reinforced recently. If a Member State fails to adequately prosecute any person responsible for illegal landings, that Member State may have the quantity of the illegal landing deducted from its own quota, even if that landing was committed by vessels flying the flag of another Member State.

32. Under the Community's conservation and management system each Member State must also, within its own territory and within all maritime waters subject to its sovereignty or jurisdiction, monitor fishing and related activities and inspect fishing vessels.

These control activities must be carried out in order to ensure compliance not only with the TAC and quota measures mentioned above, but with all other conservation and management measures.

This obligation concerns not only the vessels flying the flag of the inspecting State, but also vessels of other Member States or of third countries. On the other hand, these Community provisions do not affect the rights Member States may have under international law to inspect vessels flying their flag on the high seas and within the fishing zones of other coastal States.

If the competent authorities of a Member State find that any conservation or management measure is not complied with, they must take penal or administrative action against the master fof the vessel or any other person responsible.

33. Under the present system the monitoring and inspection of fishing activities and vessels is the task of the competent authorities of the Member States. The task of the Commission is rather to control through its very small inspectorate the monitoring and inspection activities of the Member States. In all these matters a close cooperation between the national authorities *inter se,* as well as between them and the Commission is required and provided for.

DISCUSSIONS

Professor I.A. Ronquillo*

Customary International Law of the Fisheries

Prior to the deliberations at UNCLOS III large areas in the Western Pacific and in the South China Sea were part of the high seas. As such, distant fishing nations like Japan, South Korea, Taiwan, and even Thailand used to fish in some of these areas. In fact, some fishing vessels did not respect the Treaty of Paris of 1898 between Spain and the U.S.A. on the limits of the territorial waters of the Philippines, and fishing vessels had entered the Sulu Sea to fish for tuna by longline for a long time. From 1947 onwards, we have apprehended tuna longliners and even confiscated sets of longlines laid out in the Sulu Sea. This shows the extent of fishing activities of distant fishing nations using highly sophisticated fishing techniques.

With the popularization of the regime of the EEZ at UNCLOS III, the whole of the South China Sea became the EEZs of the surrounding coastal States. In fact, only a small portion of the Western Pacific Ocean outside the 200-n.m. EEZ of the Philippines still remains part of the high seas. This situation has led to different problems at present. Some countries have recognized the right of access by other States and sold licences to distant fishing nations to fish in their EEZ. This is true especially in the case of the Pacific Island nations.

In some areas, the distant fishing countries, realizing the inability of many coastal States to monitor and safeguard their EEZ frontier, just poach in these waters where they used to fish prior to the EEZ regime. The Philippines and probably all the other ASEAN countries have experienced poaching by distant fishing nations, especially in most areas of the South China Sea. A *modus operandi* has been suggested for this region to have a regional body responsible for the management of the marine fishery resources. As early as 1978, I realized the importance of joint tuna management in the Western Pacific. A paper was prepared and published by the International Centre for Living Aquatic Resources Management (ICLARM). Indonesia and the Philippines have sizeable tuna fisheries, and a joint management project may not be given priority by other ASEAN nations. Probably Japan, Taiwan and South Korea which undertake fishing activities in the Western Pacific Ocean and the South China Sea, and which may be considered the distant fishing nations in the region, would be more interested in the project.

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*The editor learnt with deepest regret that Professor Ronquillo had died of heart attack in April 1989.

Valencia, Marsh and Bardach proposed an ASEAN Institute for Marine Resources Management for the region as an answer to the great need to manage the fisheries of the ASEAN nations for their growing populations, notably in Indonesia and the Philippines.

The Indo-Pacific Fisheries Commission is FAO's oldest regional body and it is concerned with development and proper utilization of fishery resources. However, it is purely an advisory body with no regulatory powers, unlike other regional fishery bodies such as the Inter-American Tropical Tuna Commission.

Philppine purse seiners have been fishing in the southern part of the Kalayaan Islands for a decade. Philippine Muro-ami vessels reach as far as Maclesfield Banks and there they encounter trawlers from other nations. Similarly, Philippine longliners encounter Taiwanese longline vessels in Scarborough Reef and the Kalayaan Islands.

This traditional fishing right of States is for the time being worthwhile exploring to continue the good relationship in the South China Sea. The fact is that in view of the limited funds of the ASEAN nations for monitoring and surveillance of their EEZs it is probable that Taiwanese, South Koreans and Japanese longliners also fish in the Western Pacific Ocean on the eastern side of the Philippines. It is possible that purse seiners of foreign nations may be operating also in the area.

ASEAN should explore the possibilities of requesting assistance from the EEC countries in the form of loans, of ocean-going fisheries research vessels to determine the mesopelagic fishery resources in the ASEAN regional seas, i.e., the Philippine seas, the Celebes Sea, and the South China Sea. This has to be done on a regional basis although the Philippines has already approached Norway informally for the possibility of such assistance to determine its mesopelagic and small pelagic species in its deep archipelagic and EEZ waters.

Further, the establishment of an ASEAN Institute for Marine Research may be considered by the ASEAN Committee on Science and Technology, with possible sponsorship by the EEC. At present, there is a project funded by the EEC based in Thailand which is being implemented by the SEAFDEC Marine Fisheries Department. I hope that this is just a beginning of the cooperation between the two regions.

It would be a very important gesture on the part of the EEC if it assists the ASEAN nations on stock assessment of their pelagic (tunas) and small pelagic species. There is a common state of over-exploitation of the small pelagics in the ASEAN nations. Likewise, none of us knows the magnitude of the tuna resources of the region.

In view of the high rate of population increase in the ASEAN countries, it is most significant to put the ASEAN nations on a firm footing, fisheries-wise, as generally Southeast Asian people depend so much on fisheries for their livelihood.

The opportunities for the EEC to help the region are so plenty, and the beneficiaries are so numerous that a success in this endeavour will be recognized and most useful is the region in the near future.

Rights of Passage

The ASEAN countries are in a region which includes some of the most important straits used for international navigation. Examples of these straits are the Malacca Strait, Lombak-Makkasar Strait, Bashi Channel, Sibutu Passage, Balabac Strait and San Bernardino Strait, to name a few, which are used by the EEC countries in their trade and oil transportation to and from countries, and by the world's military powers.

A great portion of the crude oil from the Middle East passes through these straits for Japan, South Korea, the U.S.S.R., the Philippines, Guam, etc. The South China Sea is also used by Japanese vessels to transport oil from Indonesia to other countries in the Western Pacific.

The possibility, therefore, of having common provisions on the regulation of passages in these straits would encourage more trade and shipping arrangements for safe passage in the South China Sea by all users for the benefit of all, especially for the ASEAN countries. It appears that prevention of marine pollution caused by oil spills is now a problem of the users of the seaways rather than that of the coastal States themselves. Foremost among the major users of the straits are Japan, the U.S.S.R. and the United States.

The importance of these straits to the industrial countries and Asia demands that they be open at all times for passage by oil tankers and cargo vessels exporting products to and from the South China Sea countries, as well as for passage of warships between the Indian Ocean, the South China Sea, and the Pacific area.

The lanes used for passage in the South China Sea are considered ideal by users as they are treated equally by coastal States.

Indications are all for the greater use of the South China Sea as a seaway by maritime States, as more European coastal powers, besides the People's Republic of China (P.R.C.), Taiwan and South Korea, are all progressively increasing their trade. The South China Sea traffic therefore is increasing rapidly, and even the PRC has noted the repid development of the States in the region. It is projected that through the year 2000 we can expect that the P.R.C. as well as other nations will make more use of the South China Sea passage.

The Spratlys and the Palawan Passage have been used, from time immemorial, as major routes linking Hong Kong, Manila, Singapore and leading to northeast ASEAN ports. It would be for the benefit of the ASEAN States to maintain the *status quo* on passage in the South China Sea even if sovereignty over the disputed Spratly and Paracel Islands is eventually settled. Probably a common solution to defer assertion of sovereignty over the islands is in order so that the area may be further developed, fisherise-wise.

The presence of Soviet bases in Camran Bay in Vietnam and the U.S. bases in Japan, Guam and the Philippines and the P.R.C. navy are important power balancing components for the safe use of the South China Sea and other straits used for passage. This necessitates a very sophisticated political policy for international navigation in the South China Sea.

The EEC countries which have very large market in these parts of the world should also act as a balancing power vis-a-vis the great maritime power display that is visible in the ASEAN region. It will be for the benefit of the whole world if the *status quo* on passage through these straits used for international navigation is maintained. This would mean that the passage through the South China Sea and the straits is not to be impeded by strait States for various nationalistic reasons prejudicial to the users of such straits and in disregard of the 1982 Law of the Sea Convention. A sort of compensation or assistance to developing straits nations would be to develop some critical areas nearest to the straits in order to safeguard navigation; to finance the necessary moniforing of international passages; and to safeguard the straits from pollution.

Marine Pollution

Several bodies have been formed to safeguard the ASEAN region from marine pollution. Moreover, the UN Environmental Programme (UNEP) has formulated the Marine Environment and Coastal Areas of the East ASEAN Region. Unfortunately, not all ASEAN nationls have signed this cooperative agreement that would ensure safety against marine pollution.

Some nations have set up within their countries facilities that could contain and clean up marine pollution by oil, and it is hoped that all ASEAN countries would likewise do the same. The Philippines has such a facility in Davao where training is also conducted for the region. This is supported by U.N. funds, and is important in view of the importance of the abatement of marine pollution in the Celebes Sea, which is very much an enclosed area. All nations which are users of the South China Sea should consider this a very important programme and maritime powers should assist the ASEAN States, as well as those other States which are not members of ASEAN but bordering the South China Sea, by establishing or making available their own facilities to prevent the spread of oil over large areas of the South China Sea in cases of marine accidents. Studies have been made in this area and trajectories have been set to determine the flow of oil in cases of massive oil spills not only from tankers but also from offshore oil rigs.

The ASEAN nations should consider their own needs for such awareness programme and set up necessary laboratories to study marine pollution in appropriate area of their countries, either through the Committee on Science and Technology (COST). The EEC may give technical as well as financial assistance to ASEAN to set up these facilities that would enhance marine environmental protection.

Marine Scientific Research

Some of the most important oceanographic discoveries of the world were made in the ASEAN countries by the great worldwide expeditions like the Challenger's Expendition, the Snellius Expedition of the Natherlands, the R/V S.F. Baird's Expedition, and the Galathea Expedition of Denmark, the U.S. Wildlife Service Expedition as well as the Albatross Expedition of 1903 by the U.S.A. Worldwide marine scientific expeditions used the ASEAN region as their base in their worldwide research on new species of marine organisms as well as studies of new oceano-

graphic phenomena. Consequently, Indonesia and the Philippines, being archipelagic States, are always visited by scientific expeditions from developed countries such as France, the United Kingdom, the U.S.A., Japan, the U.S.S.R., and Scandinavian countries. Before UNCLOS III, much of the marine waters outside the territorial sea were considered international waters and marine scientific expeditions moved around the world much more freely than today.

Under the 1982 Law of the Sea Convention, however, research vessels have to get consent from coastal States before research work can be undertaken in their EEZ. Coastal States may not appreciate the importance of marine scientific research as a contribution to the science of oceanography. The large membership of the coastal States in the Intergovernmental Oceanographic Commission (IOC) of UNESCO helps in this direction. One of its important activities is to encourage marine scientific research worldwide thru the cooperative active of its Member States. However, many coastal States are still reluctant to give permission to developed maritime countries to undertake scientific research in their marine waters.

One of the most important arrangements that may be made for the benefit of ASEAN, through ASEAN's Committee on Science and Technology and its Sub-Committee on Marine Sciences and the EEC, would be to set up a common stand on the procedure on which researching States may get permission to undertake marine scientific research. Such arrangement would be beneficial to the region by speeding up the improvement of more up-to-date knowledge on the scientific study of the living resources of the sea as well as the physical and chemical characteristics of the marine waters in the ASEAN region.

The Indo-Pacific area is the centre of marine life and this is well known worldwide. There are more species of plants and animals in the Indo-Pacific area than in any other part of the world, making it a haven for scientific study for biological and oceanographic work. A number of EEC nations have given assistance to some ASEAN nations. Denmark, for example, helped establish marine biological research in Phuket, Thailand, and recently, the Netherlands helped Indonesia in oceanographic research. It would be a lasting contribution to the marine science if the EEC countries could set up national marine laboratories in the different member nations of ASEAN. The EEC may also consider setting up sister laboratories in exchange for certain research privileges but which at the same time provide these developing States with technical assistance in the form of equipment, training and collaborative work in marine research.

I am sure that such bilateral or multilateral arrangements would enhance greatly the relationship between the ASEAN nations and the EEC countries, particularly in the development of marine scientific research in the region.

Dr.Jumpot Saisunthorn

Why do we need regional cooperation among ASEAN countries? Article 123 of the 1982 Law of the Sea Convention seems to supply a satisfactory answer to this question. Pursuant to that Article, States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under the 1982 Convention.

Cooperation can be achieved in at least three areas; namely, fishery, marine scientific research, and environment protection.

With regard to fishery cooperation, the need for such cooperation is apparent in the case of stocks occurring within the EEZs of two or more coastal States or both within an EEZ and in an area beyond and adjacent to it. This is dealt with in Article 63 the 1982 Convention. A unilateral activity regarding such stocks by one coastal State will inevitably affect another coastal State's exploitation of these stocks.

However, it is difficult to perceive that ASEAN will, in the near future, achieve satisfactory measures in fishery cooperation. This is due to the existence of certain problems, such as overlapping claims over the EEZ, and to the fact that some Member States of ASEAN are more capable of distant fishing than others. Another important reason why fishery cooperation has not been successfully worked out is that the fishery issue is usually dealt with at bilateral level, without being brought into a regional forum which would be more suitable for successful cooperation.

Chairman

I would like to take the privilege of the Chair to summarize the main points of discussion.

The theme of the discussion is extremely important. We have discussed four areas of possible cooperation: fishery, navigation, marine scientific research, and the protection of marine environment. Mr.Fischer did not mention the EEC having jurisdiction over marine scientific research, however.

Perhaps, we should pinpoint the following aspects:

1. Is ASEAN cooperation in the law of the sea matters necessary or possible? The answer seems to be in the positive.

2. Are we going to do it in the context of ASEAN or outside it? If we are going to do it in the context of ASEAN, we may not go very far. The EEC has done it within the context of the EEC in specified areas where the EEC Member States have agreed to transfer jurisdiction to the EEC. So ASEAN is far behind the EEC in this respect. If we are going to do it outside the ASEAN context, that is, cooperation with non-ASEAN countries, we have to think about where the cooperation should be undertaken. In semi-enclosed seas? In areas under national jurisdiction? What subjects should we concentrate on? All, if possible?

3. In view of the limited jurisdiction of the EEC on specified subjects, could the EEC undertake to cooperate with the ASEAN countries in the subjects under their jurisdiction? Or should ASEAN Member States undertake to cooperate with members of the EEC rather than with the EEC as a whole?

Mrs.Heliliah Yusof

It is possible and necessary to have ASEAN cooperation in the law of the sea matters. However, we are still a long way from achieving the position where the EEC is today.

Southeast Asian geographical situations impose themselves on the law of the sea in this region. Conflicting claims over marine areas preceded the 1982 Convention. Even that Convention makes exceptions for the cases of claims of sovereignty and sovereign rights when it comes to the compulsory dispute settlement part.

The fisheries legislation of Malaysia was preceded by the Proclamation issued, in the wake of the closing chapter of UNCLOS III, by Malaysia's constitutional Monarch. The Malayaian legislation may not be ideal in every aspect.

With regard to the case of the Philippine fishermen arrested by Malaysian enforcement authorities, the Malaysian magistrate in that case made an ironical finding. He found that they had been arrested within the co-ordinates of Malaysia's EEZ. *In Mortensen v. Peters* (1906) 8 F. (J.) 93. Court of Justiciary, Scotland], it was held that a court of municipal law is to apply municipal law and not internatinal law. However, the magistrate then relied on a provision in the Malaysian Penal Code which stipulates than if there is doubt as to the state of mind of the accused in the sense that they may not aware that they are committing an offence at the time of their arrest, then they are not guilty as charged. So, the magistrate acquitted these Philippine fishermen and ordered the release of their fishing vessels. The prosecutor sought an appeal on points of law. Now, some people are alleging that Malaysia is not acting in accordance with the Convention! As an illustration of ASEAN cooperation, the Prime Minister of Malaysia, after being contacted by the President of the Philippines, issued a directive that the appeal be dropped for the sake of friendly relations between Malaysia and the Philippines. The boats were released and the fishermen who had already been on bail were exonerated. That is an example of ASEAN cooperation. It is not right ot accuse Malaysia of applying its EEZ law discriminately.

To answer the question how and where cooperation should take place outside the ASEAN context, I would refer to the following. Since 1971, Malaysia has concentrated on the Strait of Malacca because fisheries and marine pollution are all there. This is a place where cooperation with non-ASEAN countries can be undertaken with a view to preventing pollution and facilitating navigation in the Strait.

Mr. S. Tiwari

We must cooperate in the law of the sea matters, especially in this close-knitted region.

The fisheries provisions of the 1982 Convention provides for the determination of allowable catch and allocation of surplus. Could Mr.Fischer and Professor Riphagen tell us how we could give effect to such provisions effectively?

Enforcement and prompt release of vessels on the posting of reasonable amount of bond and other security are very important for many participants at UNCLOS III. Fishermen are at the mercy of other coastal States when they are far away from home. Recent experiences have shown that high amount of bond would give rise to imprisonment of the arrested fishermen. This has worsened the law of the sea rather than improved it as envisaged by the 1982 Convention.

Professor Willem Riphagen

The idea of cooperation is generally accepted here. Of course, it is difficult to translate abstract ideas into concrete ones. The 1982 Convention merely points the way. It does not give sufficient rights or duties in every area.

On prompt release of vessels and crew, it is clear that the 1982 Convention gives much weight to their release.

The law of the sea cannot provide solutions for everything. Municipal courts of many countries are not familiar with the law of the sea so solutions have to be found elsewhere. Again, the final solution is cooperation, through treaties, for instance.

Mr.Robert Fischer

The EEC Member States also have problems concerning delimitation of their respective fishery zones. Nonetheless, this is not relevant to the fishery management in the EEC since the EEC treats the entire zone as being subject to an overall management by the EEC through a common fishery policy.

Delimitation problems with third countries are left to be solved through normal practice and principles regarding delimitation. This obstacle has not prevented us from cooperating with one another.

Scientific advice is a basis for proper fishery management. Conservation and exploitation should be balanced on a lasting basis. Enforcement is an important component of conservation and management policies. It is undertaken by national authorities of each Member State within its own jurisdiction. The EEC does not impose sanctions in fishery matters. Member States must make sanctions possible. Fishermen of each Member State must also know the rules in the EEC fishery policy. There is a network of fishery agreements with Norway, Sweden, and African countries, covering all species including tunas. Compensation is provided in the agreement in return for the right to fish in these countries. Such compensation may be in the form of technical assistance. Cooperation can also take place outside the framework of fishery agreements. The Lome Convention, for instance, has a provision on fishery cooperation and technical assistance. There is also cooperation with ASEAN.

Within the context of ASEAN, ASEAN countries should agree on the framework under which sharing of resources can take place. Some principles may be established and there may have to be procedures under which arrangements can be negotiated. Delimitation problems are delicate but they should not obstruct progress on the substance which will be the proper conservation and management of resources in the region.

Chairman

We have with us Mr.Bertil Roth from a Nordic country. I wonder if he could enlighten us a little bit on the Nordic experience on cooperation.

Mr.Bertil Roth

Cooperation in the Nordic countries is quite developed. To this end, a number of conventions have been concluded between the Nordic countries **inter se** as well as with neighbouring Socialist countries.

Dr.Kriangsak Kittichaisaree

The EEC mechanism and experience may be emulated by ASEAN. ASEAN must now designate or set up a body to tackle the utilization of marine fishery resources as well as policies and fish trade in ASEAN countries. The ASEAN Standing Committee is now in the process of adopting the project 'Monitoring, Control and Surveillance of Fisheries in the EEZ of ASEAN Countries' This is a later stage in the process of utilization of fishery resources. The determination of the total allowable catch (TAC) and allocation of surplus come at an earlier stage. Pooling manpower resources and scientific know-how would facilitate the ascertainment of the maximum sustainable yield (MSY), TAC and surplus for allocation among ASEAN countries. Fishermen from ASEAN countries habitually and traditionally fished in the waters washing these shores long before the crystallization of the EEZ concept. Their interests and livelihood must be accomodated and adjusted as smoothly as possible. In addition, ASEAN Member States must cooperate, with all the outside help they can get, to conduct marine scientific research in their waters.

ASEAN must also be alert to the protection of marine environment, including the possibility of dumping of toxic wastes in its waters. The existing ASEAN mechanism is clearly not satisfactory. As a result, most parts of ASEAN's maritime areas are polluted. ASEAN should assert that its waters are "special areas" and that "special circumstances" exist for it to take more stringent measures such as those mentioned in Article 211(6) of the 1982 Convention.

In the case of navigation, what all ASEAN Member States have to do in terms of cooperation is to strictly follow the compromise regime incorporated in the 1982 Convention.

Chairman

There is reluctance in ASEAN to enlarge cooperation and jurisdiction. This reluctance is to be overcome before ASEAN cooperation in the law of the sea can proceed satisfactorily.

Dr.Phiphat Tangsubkul

Various provisions in the 1982 Convention stipulate that States should cooperate with one another. We are now in the stage of implementation and, as a regional grouping, ASEAN has a duty to promote cooperation. An ASEAN country should be in a better position to cooperate with another ASEAN country than with non-ASEAN countries, be they in fishery, environmental or other matters.

In this respect, I would like to refer to the recommendations made by the Southeast Asian Project on Ocean Law, Policy and Management (SEAPOL) to its Conference on Ocean

Development and Management in Southeast Asia: Prospects for Implementation of the U.N. Convention on the Law of the Sea, held in Bangkok in April 1987, which state, *inter alia,*

A. The ASEAN Member States should promulgate a declaration pledging commitment to a policy of regional cooperation in appropriate contexts of ocean development and management, in the spirit of the all-pervasive cooperative ethic of the 1982 Convention.

B. Consultative machinery should be established under ASEAN auspices for designating areas and issues under the Convention that lend themselves to this mode of implementation.

C. Consideration might be given to proposing that an effort be made to negotiate a Southeast Asian treaty for cooperation in marine scientific research between ASEAN and non-ASEAN in the region.

Mr. Weerawit Weeraworawit

Unlike the EEC, each individual member of ASEAN must agree before an ASEAN position can be adopted. This is because ASEAN has no legal personality separate from that of its members. A common ASEAN policy on the law of the sea is, therefore, more difficult to materialize. It might be more realistic for ASEAN countries to try to solve their problems on the law of the sea together, if and when the problems arise.

Miss Christine Alfsen

All recommendations made to regional organizations like the Economic and Social Council for Asia and the Pacific (ESCAP) are not feasible if the national governments themselves do not take the recommendations up.

Frameworks for regional cooperation are not lacking. The Southeast Asian Fisheries Development Centre (SEAFDEC), for example, has been providing a framework for regional cooperation in fisheries in the Southeast Asian region. If the countries concerned have common interests then cooperation is easy to attain. For instance, in the South Pacific, regional cooperation is almost a fact of life. The South Pacific countries' capability to fish is almost non-existent. Rather than being a forum for intra-regional cooperation, the South Pacific Fishery Forum has become a forum for negoliation with third countries on fishery exploitation.

Dr. B.A. Hamzah

Cooperation is to be dealt with initially on a bilateral basis. Bringing issues into ASEAN may create more problems rather than solve them. This is a question of modality.

Certain aspects of the EEC, which is a common market, do not fit in the ASEAN framework. Therefore, while we can learn from the EEC experience, we cannot follow its examples in all cases.

Chairman

There was an attempt from ASEAN to cooperate with the South Pacific island nations. After several years, the desire of the South Pacific nations was simply lost because of the inability of ASEAN, as an organization and with its existing mechanism, to respond. But when the ASEAN countries walked outside the ASEAN platform, things were different. Cooperation was eventually achieved through a non-formal type of cooperation within the Pacific Economic Cooperation Conference, where the ASEAN countries responded to the South Pacific nations outside the context of ASEAN and its confusing mechanism and formality. The result is magnificent. This kind of possibility of cooperation through a multilateral forum should be explored much further.

Dr. Thanat Khoman

Recently, a number of unilateral acts have been taken in maritime matters in this region, costing a lot of damage, lives and losses of wealth. This kind of happenings is not conducive to the enhancement of ASEAN, which I have a privilege of being an architect, co-founder or midwife in bringing this organization into life. It would be a great pity if this organization were to flounder in the ocean. We should be fully enlightened that cooperation, understanding and sympathy between members should be the law of the bay.

We had difficulties in setting up this regional organization. We had failed many times before ASEAN was founded. We set up the Association of Southeast Asia (ASA) and it failed. We set up the Asia-Pacific Council and it collapsed because of international circumstances, especially the entry of the People's Republic of China into the United Nations. Lastly, after an armed conflict between some countries in the region, we were wise enough to organize ourselves into ASEAN, which has become a subject for envy throughout the world. We have succeeded against all odds. This is no small success.

On the law of the sea, I would like to quote some of the sentences in the Symposium brochure which I fully endorse:

'Existing cooperation in multifarious fields within this regional organization has not been emulated in the area of ocean use....

It is hoped that this Conference will enhance better regional cooperation within ASEAN. This objective will be achieved once an ASEAN Member State has clearer understanding of the positions or views of the others which happen to be consonant with its own....

Conflicts will be avoided if and when each State is able to maximize its maritime interests without also encroaching upon those of another State.'

Fortunately, this Conference has participants from ASEAN member countries, the U.N., ESCAP and the EEC. Their guidance is much needed. The law of the sea is important, but it is a lame duck. The 1982 Convention is not a fully-fledged treaty. A lot of improvements have to be made. I hope that this Conference will help us overcome our difference in opinions—for better cooperation for our own interests, for our respective nations and, perhaps, for all who like to work with us and who like to support us.

SESSION III:

DISPUTE SETTLEMENT

Chairman : Mr.S. Tiwari

Chairman

The 1982 Law of the Sea Convention is a complex, comprehensive document which endeavours to cover all aspects of the law of the sea. To make the Convention effective, the dispute settlement part must also be equally innovative. Instead of having compulsory dispute settlement in all cases, the Convention also provides for conciliation as an alternative. The dispute settlement part, like all the other parts of the Convention, is a result of compromise at UNCLOS III. It also bears in mind the reality of the outside world.

Dispute Settlement : The EC Experiences

by

Mr. Robert C. Fischer

The system of settlement of disputes between the Member States of the European Community (EC) is completely different from other systems of dispute settlement. The EC system uses the lagal system which resembles federal law rather than international law. Besides, such a system has the EC Commission as guardian of the Treaty of Rome, which establishes the EC, and of the EC law. The duty of the EC Commission is to prevent any EC member from violating the obligations under the Treaty. If any Member State violates its obligations, it will be sued by either the EC Commission itself or by another EC member in the EC Court of Justice. The penalty in this case is usually a financial one.

Disputes can be settled in the EC Court of Justice as well as by the parties to a dispute by way of the EC law. For example, fishery disputes can be settled through the EC common fisheries law.

However, in terms of enforcement, the EC legal system still has to rely on consent of the EC Member States. Without such consent, the EC will find it difficult to exercise any enforcement action against its members.

Nevertheless, if a dispute is partly related to the EC Treaty, though not exactly governed by it, it can only be settled through an agreement between the parties in dispute.

If a dispute is related to the internal security of an EC Member State, a measure deviating from the EC Treaty is allowed in order to settle such a dispute.

It should, however, be noted that a dispute between an EC member and a non-EC country cannot be brought to the consideration of the EC Court of Justice. This situation is usually covered by a provision in a separate treaty between the EC and that third party.

Dispute Settlement: The ASEAN Experiences

by

Justice Abad Santos

All the six members of ASEAN are also members of the United Nations. For that reason, it might be pertinent to recall the relevant provisions of the UN Charter; namely, Article 1, Article 2 (2) and (3) and Article 33.

ASEAN is a regional agency, one of whose objectives is to settle disputes by pacific means, as it is set out in the Treaty of Amity and Cooperation in Southeast Asia of 1976, especially in the preamble and in Chapter IV (Pacific Settlement of Disputes). The High Council envisaged by the Treaty to settle disputes has never been organized. Therefore, disputes have to be settled by *ad hoc* methods on a bilateral arrangement.

At the time of the dispute between the Philippines and Indonesia over the island of Miangas or Palmas, lying nearer to the Philippines than to Indonesia, I was then Secretary of Justice of the Philippines and Mochtar Kusumaatmadja was Minister of Justice of Indonesia. I offered to purchase Miangas from Indonesia because the island practically intruded into the Philippines' backyard. Mochtar declined the offer. That was when Mochtar and I were negotiating an extradition treaty, which was subsequently signed in Jakarta in February 1976. We have had economic ties with Indonesia. Once, we sold a quanity of rice to Indonesia but Indonesia was not satisfied with its quality. It lodged a complaint with us and we settled the dispute by paying compensation to Indonesia, who was able to build an embassy in Manila out of it!

In 1978, Mochtar informed me that Indonesia was about to issue a proclamation on its EEZ. I decided that the Philippines should follow the Indonesian example and Presidential Decree No.1599 Establishing the EEZ of the Philippines was issued. Under Section 1 of the Decree, where the outer limit of the zone overlaps the EEZ of an adjacent or neighbouring State the common boundary shall be determined by agreement with the State concerned or in accordance with pertinent generally recognized principles of international law on delimitation. Malaysia also issued its own EEZ proclamation. In April 1988, 49 Philippine fishermen were arrested by Malaysian authorities on the charge of illegal fishing in Malaysian waters. Their detention was so long that one fisherman actually died during the detention. At their trial, Professor Ronquillo had to testify in the Malaysian court on their behalf. The fishermen were acquitted on the ground that they lacked criminal intent. The Malaysian prosecution appealed. President Aquino of the Philippines made a personal appeal to Prime Minister Mahatir of Malaysia and the appealed was not pursued.

We are all members of ASEAN who are committed to the principle of pacific settlement of disputes. The case of the fishermen could have been settled more expeditiously. One Thai official told me that a number of Thai fishermen and vessels were detained in some neighbouring countries on the charge of illegal fishing in the waters where the Thais claimed to have traditional fishing rights. I think we should settle all our differences in a really friendly manner.

DISCUSSIONS

Mr. Phan Wannamethee

When ASEAN cannot solve a problem, what does it do? First, it may put the problem under the carpet and not highlight it. What is a problem today may cease to be so in the future. Second, it tries to raise the problem and wait for the right moment when a solution can be found after a change in time and circumstances.

I would like to shed some light on the history of the Treaty of Amity and Cooperation in Southeast Asia. I was involved in its drafting as early as 1972. When the ASEAN Foreign Ministers held a special meeting in Kuala Lumpur in November 1971, they had a number of things in mind. They came up with the Declaration of Southeast Asia as a Zone of Peace, Freedom and Neutrality. They also appointed a group of senior officials who had two mandates : to study the ways and means to broaden the areas of cooperation in order to solidify and strengthen ASEAN, and to study how to realize the objectives contained in the Declaration. The first meeting was held in Baguio in 1975. Dr. Ingles of the Philippines was the only lawyer among us. He suggested that we needed to have some study on pacific settlement. At the succeeding meeting in Singapore in the same year, the draft Treaty of Amity and Cooperation in Southeast Asia was finished, with Dr. Ingles' draft pacific dispute settlement part incorporated therein at the last stage. This is the only ASEAN agreement written in all national languages of each ASEAN country.

Dr. B.A. Hamzah

Dispute settlement comes at the very end of the process. What is more important is dispute **management.** There should be a mechanism established for this purpose. A diplomatic approach should go side by side a legal approach. Under international law, the States concerned must give their consent to have their dispute settled by a third party. Only if all the six ASEAN countries accept the compulsory jurisdiction of the International Court of Justice and only if all the ASEAN countries ratify the 1982 Convention can a comprehensive dispute settlement mechanism become a reality in ASEAN. Even so there is always a caveat. For instance, Article 297 of the 1982 Convention sets out limitations on the applicability of the compulsory dispute settlement part under that Convention.

The Treaty of Amity and Cooperation in Southeast Asia provides a dispute settlement mechanism that should not be overlooked. However, ASEAN is another mechanism in itself. We should move away from legal rigidity towards unilateral confidence-building measures which are to be developed by each ASEAN country on its own. The creation by Malaysia and Thailand of the Joint Development Area in their overlapping continental shelf area in the Gulf of Thailand is an example to follow. In the case of the claims over the Commodore Reef and its maritime zones, the countries concerned should refrain from fishing and military activities in the area if aggravation of the situation is to be avoided. The same may be said in relation to the slaims over the Spratly islands, where three of four of the ASEAN countries are also involved.

Mr. Bertil Roth

Sweden has to negotiate maritime boundary delimitation agreements with Norway, Denmark and the U.S.S.R. The EEZ and continental shelf boundaries in the Baltic are difficult to delimit. Negotiations must envisage the possibility of a compromise.

With regard to overlapping maritime claims between the U.S.S.R. and Sweden, although Sweden is convinced of its legal grounds and has proposed to the U.S.S.R. many times that the dispute be settled by the International Court of Justice, the U.S.S.R. has declined. Sweden has also proposed a non-binding dispute settlement option. The U.S.S.R., however, has taken the position that negotiation is the best solution. So far, the dispute remains unsettled. There is no way out or possibility of solution in sight.

Mr. Vasin Teeravechayan

The Treaty of Amity and Cooperation in Southeast Asia provides in Article 2 and Article 13 that settlement of disputes among ASEAN countries shall be through friendly negotiations. Article 14 of the Treaty mentions a High Council, which actually has not been set up yet. This High Council comprises a representative at ministerial level from each of the Parties. Upon mutual agreement of the disputed Parties, the High Council will take cognizance of the dispute and shall recommend to the Parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation.

Among the ASEAN countries, at the moment, there are some areas where conflicts may arise. Due to the failing of UNCLOS III to agree on definite principles for delimitation of maritime boundaries and the exceptions specified in Part XV of the Convention, the conflicts on fisheries, overlapping claims of EEZ and boundary disputes could be resolved by the principle of ASEAN settlement of disputes rather than by resorting to any compulsory adjudication. Settlement of disputes by friendly negotiation stems from the traditional notion and practice of ASEAN nations. This is confirmed by the examples mentioned by Professor Santos.

Time may be now ripe to concretize the principle in the Treaty of Amity and, if possible, to add more procedural details to facilitate the actual functioning of the mechanism.

Professor Willem Riphagen

Although dispute management and dispute settlement are closely related, they are different situations. In the law of the sea, negotiation is an integral feature in the dispute settlement process. In other words, there is an obligatory duty imposed on States to negotiate.

There has been a progress in third-party dispute settlement in the law of the sea matters. This is evident from the fact that in recent years the International Court of Justice has been requested more and more often to settle maritime boundary disputes.

Dr.Hasjim Djalal

It took Indonesia 3 years to persuade Singapore to conclude a territorial sea boundary agreement with Indonsia. Thailand and Indonesia reached an agreement on their maritime boundaries after 3-4 rounds of negotiation. Negotiation often takes time, and it may not succeed at all.

Indonesia' philosophy is: "Try to avoid problems before they arise" That is to say, one should settle problems before one knows too much about them! The territorial sea boundary agreement with Malaysia was settled in one session in 1969 because at that time neither country knew too much about maritime boundary-making. This philosophy is different from that of the West.

If a problem continues to exist, we should try to settle it through negotiation and consultation, as envisaged in the Treaty of Amity. Going to court can only make lawyers rich. However, it may help the governments concerned avoid public scrutiny if the result is not what is expected. This is probably a reason why Canada prefers to go to court to settle their maritime disputes.

Indonesia does not close the door to third-party dispute settlement, but that should be the last resort.

Dr.Chumporn Pachusanond

Article 297 of the 1982 Convention, which sets out limitations on applicability of the compulsory dispute settlement part of the Convention, as well as Article 298, which sets out optional exceptions to compulsory dispute settlement, may make it difficult to achieve dispute settlement at all. Consultation and negotiation are the more realistic alternatives.

Professor Willem Riphagen

The last speaker gave a very one-sided interpretation ofthe provisions of Part XV of the 1982 Convention. The emphasis of Part XV is on compulsory conciliation. Article 297 was cautiously drafted to reflect the real world. The words 'manifestly' and 'arbitrarily' mentioned in that Article leaves room for objective determination by a third party with regard to the actions by the coastal State in the exercise of its sovereign rights.

Dr. B.A. Hamzah

At the Seventh Session of UNCLOS III, coastal States said 'No' to compulsory dispute settlement procedures in the case of fishery disputes. Yet, Part XV of the 1982 Convention is extremely comprehensive. It should suffice to take care of all types of disputes.

Dr.Kriangsak Kittichaisaree

I concur with Professor Riphagen on this point. If there is an abuse of discretion or wrongful exercise of the coastal State's sovereign rights, that State is susceptible of being subject

to compulsory dispute settlement under the 1982 Convention.

I would like to ask Dr.Djalal how Indonesia will solve the disputes over the 'Timor Gap', and over navigation in the Indonesian archipelago.

Dr.Hasjim Djalal

In the case of the overlapping claims between Indonesia and Australia over the 'Timor Gap', both countries have now reached an agreement to designate the area a 'Zone of Cooperation', with Indonesia operating in the northtern part and Australia in the southern part.* We hope that this solution will be a lasting one. We have used a lot of examples from the Japan-Korea agreement, and from the Thailand-Malaysia agreement which deal with this type of situation.

Indonesia's recent closure of its straits for the purpose of military exercise by Indonesia gave rise to a widespread outcry. This closure is not contrary to the 1982 Convention, which is, in any case, not yet in force. The sealanes mentioned in that Convention have not yet been designated. Since the Convention is not in force, some of our people have to go back to the existing Indonesian legislation. Even if the Convention were to enter into force, there is nothing in the Convention which prohibits the coastal State from exercising its sovereignty in its straits. It should be noted that Indonesia also allows Malaysia and Singapore to exercise their military activities in the Indonesian waters from time to time.

The U.S.A., Japan and Australia complained that not sufficient notification on the closure of straits had been given by Indonesia, and that there was no substitution for passage as stipulated in Article 53(7) of the 1982 Convention. However, Indonsia did not make such a substitution specifically because sealanes have **never** been designated in the first place, and because Article 53(12) of the Convention stipulates that in this case the routes normally used for international navigation should be used. Article 53(4) also specifically provides that 'duplication of route of similar covenience between the same entry and exit points shall not be necessary'. It is not fair that the countries which have not ratified the Convention, or, in some cases, not even signed it, should have demanded this from Indonesia.

Dr.Phiphat Tangsubkul

If the 1982 Convention has not come into force, do ships have to follow sealanes? What about warships, do they have the right of innocent passage?

Dr.Hasjim Djalal

Under Indonesia's legislation, warships navigating outside sealanes have to inform us (although it is understood that no sealanes have been designated by Indonesia yet!). In practice, passage of warships is made known to us somehow. But these warships have refused to acknowledge that they have notified us despite the fact that they have let jus know through an exchange of information which is not necessarily an official notification. This practice still continues

*See Appendix 4.

The question is what would happen if they go outside sealanes? In the case of submarines, they enjoy the right of innocent passage. In the case of warships, we are not sure now whether they have to give us prior notification.

In 1985, President Ronald Reagan signed a trade agreement with Indonesia which, *inter alia,* recognizes Indonesia's archipelagic regime in return for the right of passage stipulated in the 1982 Convention, and not under the existing Indonesian legislation. The agreement was ratified in 1988.

SESSION IV:

OVERALL EVALUATION OF THE ASEAN SITUATION AND SUGGESTIONS FOR THE FUTURE

Chairperson : Mrs. Helileah Yusof

STATEMENT BY DR.PHIPHAT TANGSUBKUL*

I. Introduction

The nature of jurisdiction claimed among ASEAN States dating from 1945, or just after the Second World War, has varied according to geographical, political, and socio-economic background, but can be divided into three categories:

1) The claims within extended adjacent maritime areas;
2) The claims within the framework of the United Nations;
3) The claims within the limited extension of Anglo-Saxon three-mile territorial sea.

1. The claims within extended adjacent zones, a departure from the classical international law of the sea, have been based on the desire to exploit the economic potential of the adjacent sea and continental shelves. A precedent for this was set by the 1945 Truman Proclamation.

The movement for extension of marine area in the Southeast Asian region, however, was started by the two archipelagic States, the Philippines and Indonesia, who first presented a theory that is now known as the "archipelagic State concept"

2) The claims within the framework of the United Nations.

Malaysia and Thailand are the only two ASEAN members who signed and ratified the four 1958 Geneva Conventions on the Law of the Sea. Both countries have adopted the straight baseline methods in a reasonable manner and have claimed 12 mile territorial sea over the seas along their coasts. In other words, claims made by these two coastal States fall more or less within the framework of the United Nations Conventions.

3) The claims within the limited extension of Anglo-Saxon three-mile territorial sea

The two ASEAN Member States who are the new comers in discussion on issues relating to the law of the sea are Singapore and Brunei, due to the fact that Singapore receded from Malaysia and became a member of the international community on 9 August 1965 while Brunei, until recently a United Kingdom protectorate, became independent on 1 January 1984 and is now responsible for its own foreign affairs. Both countries clung to the Anglo-Saxon three-mile limit. However, on 15 September 1980, the Foreign Ministry of Singapore issued a statement announcing that this island State would extend its territotial sea limit up to a maximum of 12 n.m. and recognize the EEZ concept. Brunei now recognizes a 12-mile territorial sea limit as well.

II. Claims of ASEAN States Relating to the Law of the Sea : A Summary

a) Archipelagic Concept

After the Truman Proclamation on the Continental Shelf in 1945, the Philippines was one of the first in the region to establish jurisdiction over resources on the continental shelf, although initially in a limited manner. This was done in the Petroleum Act of 1946, which declared that all petroleum resources or natural gas contained on the continental shelf, or its analogue in an archipelago, belonged to the State.

*Director of the Southeast Asian Project on Ocean Law, Policy and Management (SEAPOL)

Indonesia became the first to break with "traditional" patterns when it unilaterally claimed through the Ministerial Decree of 13 December 1957 (also known as the Djuanda Declarations) that an archipelago was to be considered as one single unit, with the islands and the waters between and around to be seen as an integrated whole. The Indonesian claim encompassed a total area of 666,000 square nautical miles. But the Philippines was the first country to declare this concept in 1955 on historical grounds. Applying the straight baselines of the archipelago concept, it defined its "inland waters" and, using the concept of historical international treaty limits, defined its territorial seas. (This accounted for 148,921 square nautical miles of national waters.)

Professor Mochtar Kusumaatmadja, one of the main architects of the Indonesian archipelagic theory, on the other hand, suggested that the use of the terms internal waters and "territorial waters" was confusing since these terms had definite meanings in the contemporary international law of the sea, It might perhaps be better to replace them with the term "archipelagic waters". Therefore, archipelagic waters would become a *sui generis* regime comprising both the internal waters and the territorial waters.

b) Straits used for international navigation

The most controversial issue concerning the extension of the territorial sea limit is the extension of jurisdiction over straits. According to traditional international law, international straits were treated as part of the high seas with complete freedom of navigation. But as trade increased and ocean traffic was intensified, especially with supertankers appearing on the scene, the need for certain regulation of navigation and control of pollution in narrow strips of waters such as straits became necessary. It was such need coupled with concerns for security and territorial integrity that led coastal States to assert their territorial sea limits in straits areas.

Although such claims did recognize innocent passage, the maritime States protested strongly They basically argued that if the territorial sea limit were to be extended from 3 to 12 nautical miles, many important straits would be totallly within the territorial sea of the straits States; and that even if the principle of innocent passage was observed, foreign ships passing through would have to follow the laws of the coastal States during the passage through territorial waters. In order to overcome the deadlock between the straits States and user States, a completely new concept of "transit passage" was introduced by Great Britain at UNCLOS III. Under the 1982 Convention, the sovereignty over the territorial seas of States bordering straits is acknowledged. States bordering straits have the right to designate sea lanes and regulate marine traffic in the straits, to set up anti-pollution regulations, and to regulate fishing. The interests of the maritime States, on the other hand, are safeguarded by the provisions of "transit passage" which, according to the Convention, apply only to straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.

At least three ASEAN States need to reconcile coastal and transit interests. In the Straits of Malacca and Singapore the prospect of a catastrophic oil spill by a transit tanker has been a matter of serious concern for many years. For the bordering States of Malaysia, Singapore, and Indonesia, the risk of a grounding or a collision in these narrow, shallow, and often congested waters has raised the need for special environmental safeguards, especially since the grounding

of the Showa Maru in the Straits of Singapore in 1975. A tripartite declaration issued in 1971 outlined the concerns of the three strait States, and provided the basis for their common approach to the treatment of the straits issue at UNCLOS III.

c) The EEZ

Beyond the archipelagic waters, Indonesia and the Philippines claimed another 200 n.m. of jurisdiction under the concept the exclusive economic zone.

Between 1978 and 1981, of the six Member States of ASEAN, only two, Singapore and Brunei, did not make any formal claim to an EEZ. All the other four made EEZ claims in one form or another.

EEZ claims among ASEAN States

State	Date	Form	Area (1,000 sq.km.)
Philippines	11 June 1978	Proclamation	551.4
Indonesia	21 March 1980	Declaration	1,557.3
Malaysia	25 April 1980	Proclamation	138.7
Thailand	23 February 1981	Proclamation	27.6

These four claims, taken together, have brought under national jurisdiction over 2,275,000 sq.km as against 2,650,000 sq.km. of all Southeast Asian nations (Asean States, Burma, Vietnam and Kampuchea) which claim the EEZ.

d) The continental shelf

Over the last two decades Asean States have accumulated considerable experiences in the treatment of ocean boundary delimitation issues, especially with regard to continental shelf or sea-bed boundaries.

Indonesia started negotiating the first continental shelf boundary agreement in the region the treatment of ocean boundary delimitation issues, especially with regard to continental shelf Australia, India and Papua New Guinea.

Thailand, although having reached several agreements relating to the delimitation of the continental shelf boundaries with its neighbours, still has several other boundaries to be settled with non-ASEAN States.

On 21 December 1971, Thailand concluded agreements relating to the delimitation of the continental shelf boundaries in the northern part of the Strait of Malacca with Malaysia and

Indonesia. It also concluded another tripartite treaty in the Andaman Sea off the western entrance of the Straits of Malacca on 22 June 1978. In the same year, Thailand and India signed an agreement on the delimitation of sea-bed boundary in the Andaman Sea between the Nicobar Islands and the western coasts of Thailand.

However, there are overlapping sea-bed boundaries between Thailand and Cambodia, Thailand and Vietnam, and Thailand and Malaysia in the Gulf of Thailand.

Malaysia reached an agreement with Indonesia relating of the delimitation of the continental shelves in the Straits of Malacca and the South China Sea in 1969.

The sea-bed boundary delimitation between Malaysia and Thailand in the Gulf of Thailand, however, has not been settled due to the recent discovery of two shells of natural gas. On 21 February 1979, Malaysia and Thailand agreed on a joint development area of 2,107.17 square nautical miles, which has been divided by a median line to distinguish areas of jurisdiction over criminal offences. A joint authority will be established to regulate the exploration and exploitation of the sea-bed. The agreement will last for fifty years in the absence of any agreement about the final boundary settlement. The Philippines has not yet reached an agreement relating to the delimitation of the continental shelf boundaries with its neighbours, Indonesia and Malaysia. The major obstacles are: firstly, Indonesia still refuses to recognize the Philippines claim over the "historic waters" that enclose the Palmas Island of Indonesia, and secondly, the question of Sabah is still not settled with Malaysia. The Philippines and Malaysia are also facing one of the most complex claims to the Spratly islands.

III. Coperation among ASEAN Relating to Development and Management of Marine Resources

For living resources

There are many institutions dealing with fishery activities. The ASEAN Committee on Fisheries has been established. The International Centre for Living Aquatic Resources Management (ICLARM) and the Southeast Asian Fisheries Development Centre (SEAFDEC) are other examples of such institutions.

The 1984 FAO World Fisheries Conference was a milestone in setting the guideline for specific action plans to develop and manage fisheries wisely. This was followed in February and October 1985 by SEAFDEC/FAO Meetings, the first Meeting was on shared stocks and the second on fisheries development, planning and management.

For non-living resources

The ASEAN Committee on Petroleum (ASCOPE) has an objective of promoting cooperation in terms or technical assistance, information, marine pollution and even to secure supplies in time of shortage of oil among ASEAN States.

Besides, we also have the ASEAN Committee on Science and Technology (COST), the Federation of ASEAN Shippers' Council, etc.

IV. Protection of Marine Environment

The various kinds of activities towards the use of the sea in Southeast Asia, especially the exploitation of non-living resources, raise the question of the possibility of marine pollution, as well as transportation of sea-bed oil and gas production through pipelines and by tankers.

After the Showa Maru accident, the three strait States reached an agreement in 1977 towards the navigational safety in the Straits. Although Asean States have not ratified the MARPOL Canventions of 1973-1978, they have a particularly good record in regional consultation on matters of common national concern. They have a considerable incentive to develop new ideas and techniques for a collective approach to the control of vessel-source pollution in their waters.

However, no source of marine pollution is more serious in Southeast Asia than that of land-based pollution. So far, Singapore is the only country in the region which adopts and enforces strict regulations designed to control waste disposal. The other governments are, of course, aware of the dimensions of the problems, but many solutions would cut too deep into the country's expenses. At the regional level, ASEAN Member States have made a considerable effort to adopt an Action Plan, under UNEP auspices, for the protection of marine environment.

Implementation Stage

There seems to be three principal types of problems associated with the application of the EEZ provisions of the Convention : problems associated with boundary-making, the exercise of discretion, and the good faith requirement.

First, because of their proximity to one another in semi-enclosed seas, most of the coastal States of the region find their EEZ claims overlap with those of their neighbours.

Second, much of the language constituting the EEZ regime, though obligatory in form, seems to rest on the discretion of the coastal State. The coastal State is given wide or almost unlimited role. Although the coastal State's sovereign rights aim at the exploration and exploitation of natural resources in the EEZ, they do not own the zone. However, the fishery provisions in Articles 61-67, for example, grant coastal States the preeminent role in determining the ways and means to exploit the fishery resources in their EEZs.

All ASEAN States have signed the 1982 Convention on the Law of the Sea. They should now proceed, both severally and collectively, to the various tasks of implementation, by appropriate modes, within the contexts of primary interests and responsibility.

Special attention should be paid to the possibility of conflicts between national and international laws in contexts such as archipelagic water, straits, and EEZs. Every effort should be made to bring existing national legislation and other forms of State practice **into line** with the releveant provisions of the Convention. To be ideal, all ASEAN States should ratify the 1982 Convention or create a new machinery to proceed to the implementation of the 1982 Convention. With the establishment of such machinery, ASEAN States could seriously start to enter into arrangements concerning the enforcement of national measures designed to regulate the development and

management of ocean resources within the new areas of national jurisdiction. The implementation thus could be in various modes—through the incorporation and adoption of entitlements under the new of the sea; the enactment of national laws and regulations; the application of prescribed criteria and formulae for specific purposes; the discharge of certain financial obligations; and above all, the taking of diplomatic and organizational initiatives with a view to giving effect to various forms of cooperative action. To be able to achieve such a dream, political will of policy makers among ASEAN countries has to be built up.

If ASEAN could have any role to play at all, it should:

1) guarantee the freedom of navigation;
2) develop and manage marine resources;
3) protect marine environment;
4) train ASEAN nationals in marine scientific research; and
5) promote tourism.

In this regard, ASEAN would appreciate receiving from the EEC assistance in marketing, know-how, and exchange of technical information.

Perhaps, ASEAN could also make a joint declaration on the Spratly claims in order to settle this dispute *inter se* as well as with the other claimants.

Dr.Nurhassan Wirajuda

In the ASEAN maritime region, there are three main groups of States: three zone-locked States (Thailand, Malaysia and Brunei), one geographically disadvantaged State (Singapore), and two archipelagic States (the Philippines and Indonesia). Yet, the capability of these States does not necessarily correspond to their geographical characteristics. For instance, Thailand and Singapore are among the most advanced in terms of fishing.

Before UNCLOS III, there was no formal ASEAN stand on almost all the law of the sea issues. At UNCLOS III, Indonesia and the Philippines led the way and mustered support from their ASEAN friends behind them. The general ASEAN spirit of cooperation has provided a climate for understanding of some of these issues which concern the ASEAN region and facilitated some of the compromises. These are reflected in some treaties relating to boundary delimitation, and the treaty on the archipelagic State concept between Indonesia and Malaysia, as well as in the pacific dispute settlement scheme enumerated in the 1976 Treaty of Amity and Cooperation in Southeast Asia.

On ASEAN's future, the stage of implementation is the new stage we are now in. We should not lose the momentum. With regard to Indonesia, there have been cooperation with the U.S.A. in the area of marine scientific research and the navigation rights.

Mr.Raymond Lim

ASEAN Member States generally have a clear appreciation of the need for cooperation because this is inevitable.

Cooperation does not necessarily depend on the settlement of disputes by legal means. Certain disputes are politically sensitive. We are to concentrate on practical arrangements, such as the Joint Development Area between Thailand and Malaysia in the Gulf of Thailand. Even in the Strait of Malacca in the 1970s, the States concerned agreed to separate the issue of the international status of the Strait from that of international navigation. Thus, in areas which are particularly contentious, one should rely more on diplomacy rather than legal hypotheses.

Dr.Hasjim Djalal

I agree that we should find the practical ways and areas to cooperate. It is impractical to renegotiate the 1982 Covention. So, the question is what should we do within the framework of the 1982 Convention in order to cooperate with one another?

The ASEAN framework is insufficient for the purpose of practical cooperation in the law of the sea matters. The problem lies in the fact that ASEAN is already saddled with its own prolems and may not accord sufficient attentiol to new issues such as the law of the sea.

Justice Jorge Coquia

Ratification of the 1982 Convention by all the ASEAN countries would be a constructive move towards regional cooperation on the law of the sea because they would then be involved in the implementation of the Convention all together.

Dr.Jumpot Saisunthorn

We should not debate on whether cooperation should take place within or outside the ASEAN framework. Anything that works should do. We should start from the areas that cause less conflict before proceeding on to deal with more complicated areas.

Chairperson

Personally, I have no doubt about the urgency of the ratification of the 1982 Convention. We need some machinery. The issues of fishing, shipping, and coastal area management may be taken up. But where should we take these issues to have them solved? The most tangible machinery in ASEAN is the ministerial conferences. They may solve the issues if the participating countries have the requisite political will.

SESSION V:

CONCLUSIONS

Chairman : Justice Jorge Coquia

This is the time to take stocks of what we have been discussing in these past few days. I do hope that we have accomplished the mandate entrusted to us. The new dimension of this Symposium is the involvement of the EEC, who shares with us the experiences in that organization.

Mr.Robert Fischer

I would like to thank Ambassador Phan Wannamethee and the International Studies Centre for their hospitality. The duration of this Symposium is very short, yet we have tried to cover all aspects of the law of the sea and regional cooperation.

Representatives of the six ASEAN countries have come here to examine what they have in common, the implications of the evolving law of the sea for the ASEAN region, and to identify problems, ways and means to deal with these implications. This is a new area. The implementation of the new law of the sea has just started. The frameworks at a national level for dealing with the new law of the sea are being shaped. Inter-regional arrangements are being forged.

Maybe that in order to ensure general acceptance of the 1982 Convention as it stands, certain adaptations will prove necessary. But, apart form that, the essential elements of the Convention are to stay.

The EC has some experiences in the law of the sea matters, such as fisheries, protection of marine environment, and marine transport or navigation. The EC does not act on its own, but in cooperation with other States. Marine scientific research is an area in which the EC is promoting. Although the EC is an economic union, part of its dealings with the problems is relevant and may exist in the ASEAN context, as in the case of fishery management problems (the determination of TAC, allocation of surplus etc.). The EC countries share surplus of TAC among themselves as well as with non-EC countries. It is up to ASEAN to pick up the pieces of the EC examples and experiences. The new law of the sea problems did not exist at the time of the establishment of either the EC or ASEAN. ASEAN has shown a remarkable capacity to achieve cooperation between ASEAN members and has attained outstanding successes. There is no doubt whatsoever that ASEAN countries will find ways and means to deal with the law of the sea problems where they all have common interests. ASEAN and the EC will undoubtedly, within the existing relationship, find ways to cooperate in these new areas.

Mr. S. Tiwari

I would like to thank the organizers of this Symposium for their efficiency and hospitality

I would categorize the achievenents of this Symposium under 4 headings:

1. Creation of goodwill
2. Opportunity to learn about what the ASEAN States think about ratification and implementation problems

3. Cooperation
4. How relevant are the EC experiences to us?

1. Creation of goodwill

Each contribution from the participants has created an atmosphere conducive to the openness of discussions. As a result, people can now see problems from various angles. Clarification and exposition of the many facets of the 1982 Convention, which is a very complex document, lead to mutual understanding among ourselves. The process of confidence building is enhanced.

2. Ratification and implementation of the Convention

There is a general understanding among us here that ratification of the Convention is a good thing and will be in the interest of all.

On implementation, it is important that our national legislation must be consistent with the provisions of the Convention. National authorities must be convinced that their national interests will be served in the long run if they enact legislation consistent with the Convention. In this regard, it is heartening to learn that the Philippines has now officially accepted that its Declaration made at the time of signing and ratification of the Convention is not consistent with the Convention, and that the Philippines will rectify its internal laws so as to be consistent with the Convention.* I hope also that some of our ASEAN colleagues whose national legislation is not consistent with the Convention will make concerted attempt to amend it. Fisheries are an important issue. One cannot treat problems of fisheries entirely as if they were local cases. Some liberal attitude ought to be taken in this area because it affects livelihood of fishmen who have to face a sudden change in the fishery regime.

3. Cooperation

The Symposium has given us food for thought as to which areas we should concentrate our cooperation on and in which forum.

4. The EC experiences

We have now learned how the EC handles the law of the sea, especially in the fishery context. It is a good idea for us to look at these experiences from a dispassionate angle, without getting involved in any controversy, in order to try to understand each other better before we can strive towards cooperation among ourselves.

Mr. Norbert von Hofmann (FES)

FES is a political organization whose objective is the promotion of international understanding in a democratic spirit for the constituion of peace all over the world. I am resident director of FES in Thailand who has to take up new responsibilities elsewhere soon. This Symposium is an appropriate closing chapter of my duty here.

*See Appendix 2.

FES is very privileged to cooperate with the ISC in organizing this Symposium. FES' cooperation with the Ministry of Foreign Affairs of Thailand and the ASEAN Secretariat has gone back many many years.

I am a 'political engineer' by training. Yet, I realize that this Symposium is timely and urgently needed. It is a sign of closer cooperation among ASEAN countries on the law of the sea. At least, it is a small step to overcome differences which still exist among the ASEAN States, in a spirit of ASEAN solidarity which has made ASEAN a successful organization.

Such a small step has definitely been made here, and I will report to my Board in the Federal Republic of Germany that it was certainly worthwhile for FES to support this event.

May I also take this opportunity to congratulate Mr.Fischer, who represents the EEC efficiently. I agree with him that it is difficult to see to what extent there can be cooperation between ASEAN and the EEC. Both organizations are in different stages of development and, to some extent, they have different objectives. Still, experiences and mistakes made in Europe can be learned here and it is up to you as to what extent you can make use of such experiences. I can assure you that FES is prepared to continue supporting dialogues between experts on the law of the sea from both regional organizations.

Finally, Mr.Chairman, allow me to thank all the participants for their active participation and contributions which impress me a lot. Nobody tries to put problems under the carpet. I am very impressed by the openness and frankness of the speakers. I also should like to thank my friends from the ISC for the excellent arrangement which has made this Symposium a great success.

Chairman

Before I give the floor to the Director of the ISC, I would like to express the most sincere thanks to the organizers of this Symposium on behalf of all the participants. When we go back home we should be in a position to inform our respective Governments what we have learned at this Symposium.

Mr.Phan Wannamethee (Director of the ISC)

In the past few days, we have reached consensus on at least two things: (1) we should ratify the 1982 Law of the Sea Convention, and (2) there is an agreement on the desirability for regional cooperation.

Where will the requisite political will and commitment come from? Political will can derive from two elements: (1) **the tangible element,** that is when the ASEAN States see the advantage of cooperation for the sake of their common interests so that they can justify cooperation before the public; and (2) **the intangible element** of goodwill, trust and confidence.

On the existing ASEAN framework, there is the ASEAN Agreement on the Conservation of Natural Resources, dated 9 july 1985.* (I was ASEAN Secretary-General at that time). This Agreement has been regarded by several environmentalists as one of the best frameworks for comprehensive regional cooperation on environmental protection. The Agreement mentions, in several places, protection of marine environment and international cooperation, especially on information of assistance.

Where do we go from here? One has to start somewhere. Cha-am is the true beginning of our road towards regional cooperation in the law of the sea!

*See ASEAN Document Series 1967-1988 (Third Edition) (ASEAN Secretariat, Jakarta, May 1988), pp. 409-420.

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Appendix 1

ASEAN FOUNDING DOCUMENTS

(a) DECLARATION OF ASEAN CONCORD BALI, 24 FEBRUARY 1976

The President of the Republic of Indonesia, the Prime Minister of Malaysia, the President of the Republic of the Philippines, the Prime Minister of the Republic of Singapore and the Prime Minister of the Kingdom of Thailand:

REAFFIRM their commitment to the Declarations of Bandung, Bangkok and Kuala Lumpur, and the Charter of the United Nations;

ENDEAVOUR to promote peace, progress, prosperity and the welfare of the peoples of member states;

UNDERTAKE to consolidate the achievements of ASEAN and expand ASEAN cooperation in the economic, social, cultural and political fields;

DO HEREBY DECLARE:

ASEAN cooperation shall take into account, among others, the following objectives and principles in the pursuit of political stability:

1. The stability of each member state and of the ASEAN region is an essential contribution to international peace and security. Each member state resolves to eliminate threats posed by subversion to its stability, thus strengthening national and ASEAN resilience.
2. Member states, individually and collectively, shall take active steps for the early establishment of the Zone of Peace, Freedom and Neutrality.
3. The elimination of poverty, hunger, disease and illiteracy is a primary concern of member states. They shall therefore intensify cooperation in economic and social development, with particular emphasis on the promotion of social justice and on the improvement of the living standards of their peoples.
4. Natural disasters and other major calamities can retard the pace of development of member states. They shall extend, within their capabilities, assistance for relief of member states in distress.
5. Member states shall take cooperative action in their national and regional development programmes, utilizing as far as possible the resources available in the ASEAN region to broaden the complementarities of their respective economies.
6. Member states, in the spirit of ASEAN solidarity, shall rely exclusively on peaceful processes in the settlement of intra-regional differences.
7. Member states shall strive, individually and collectively, to create conditions to the promotion of peaceful cooperation among the nations of Southeast Asia on the basis of mutual repect and mutual benefit.
8. Member states shall vigorously develop an awareness of regional identity and exert all efforts to create a strong ASEAN community, respected by all and respecting all nations on the basis of mutually advantageous relationships, and in accordance with the principles of self-determination, sovereign equality and non-interference in the internal affairs of nations.

AND DO HEREBY ADOPT

The following programme of action as a framework for ASEAN cooperation.

A. Political

1. Meeting of the Heads of Government of the member states as and when necessary.
2. Signing of the Treaty of Amity and Cooperation in Southeast Asia.
3. Settlement of intra-regional disputes by peaceful means as soon as possible.
4. Immediate consideration of initial steps towards recognition of and respect for the Zone of Peace, Freedom and Neutrality wherever possible.
5. Improvement of ASEAN machinery to strengthen political cooperation.
6 Study on how to develop judicial cooperation including the possibility of an ASEAN Extradition Treaty.

7. Strengthening of political solidarity by promoting the harmonization of view, coordinating position and, where possible and desirable, taking common actions.

B. Economic

1. Cooperation on Basic Commodities, particularly Food and Energy
   (i) Member states shall assist each other by according priority to the supply of the individual country's needs in critical circumstances, and priority to the acquisition of exports from member states, in respect of basic commodities, particularly food and energy.
   (ii) Member states shall also intensify cooperation in the production of basic commodities particularly food and energy in the individual member states of the region.
2. Industrial Cooperation
   (i) Member states shall cooperate to establish large scale ASEAN industrial plants, particularly to meet regional requirements of essential commodities.
   (ii) Priority shall be given to projects which utilize the available materials in the member states, contribute to the increase of food production, increase foreign exchange earnings or save foreign exchange and create employment.
3. Cooperation in Trade
   (i) Member states shall cooperate in the fields of trade in order to promote development and growth of new production and trade and to improve the trade structures of individual states and among countries of ASEAN conducive to further development and to safeguard and increase their foreign exchange earnings and reserves.
   (ii) Member states shall progress towards the establishment of preferential trading arrangements as a long term objective on a basis deemed to be at any particular time appropriate through rounds of negotiations subject to the unanimous agreement of member states.
   (iii) The expansion of trade among member states shall be facilitated through cooperation on basic commodites, particularly in food and energy and through cooperation in ASEAN industrial projects.
   (iv) Member states shall accelerate joint efforts to improve access to markets outside ASEAN for their raw material and finished products by seeking the elimination of all trade barriers in those markets, developing new usage for these products and in adopting common approaches and actions in dealing with regional groupings and individual economic powers.
   (v) Such efforts shall also lead to cooperation in the field of technology and production methods in order to increase the production and to improve the quality of export products, as well as to develop new export products with a view to diversifying exports.
4. Joint Approach to International Commodity Problems and Other World Economic Problems
   (i) The principle of ASEAN cooperation on trade shall also be reflected on a priority basis in joint approaches to international commodity problems and other world economic problems such as the reform of international trading system, the reform of international monetary system and transfer of real resources, in the United Nations and other relevant multilateral fora, with a view to contributing to the establishment of the New International Economic Order.
   (ii) Member states shall give priority to the stabilisation and increase of export earnings of those commodities produced and exported by them through commodity agreements including bufferstock schemes and other means.
5. Machinery for Economic Cooperation

Ministerial meetings on economic matters shall be held regularly or as deemed necessary in order to:

   (i) formulate recommendations for the consideration of Governments of member states for the strengthening of ASEAN economic cooperation;
   (ii) review the coordination and implementation of agreed ASEAN programmes and projects on economic cooperation;
   (iii) exchange views and consult on national development plans and policies as a step towards harmonizing regional development; and
   (iv) perform such other relevant functions as agreed upon by the member Governments.

C. Social

1. Cooperation in the field of social development, with emphasis on the well being of the low-income group and of the rural population, through the expansion of opportunities for productive employment with fair remuneration.

2. Support for the active involvement of all sectors and levels of the ASEAN communities, particularly the women and youth, in development efforts.

3. Intensification and expansion of existing cooperation in meeting the problems of population growth in the ASEAN region, and where possible, formulation of new strategies in collaboration with appropriate international agencies.

4. Intensification of cooperation among members states as well as with the relevant international bodies in the prevention and eradication of the abuse of narcotics and the illegal trafficking of drugs.

D. Cultural and Information

1. Introduction of the study of ASEAN, its member states and their national languages as part of the curricula of schools and other institutions of learning in the member states.

2. Support of ASEAN scholars, writers, artists and mass media representatives to enable them to play an active role in fostering a sense of regional identity and fellowship.

3. Promotion of Southeast Asian studies through closer collaboration among national institutes.

E. Security

Continuation of cooperation on a non-ASEAN basis between the member states in security matters in accordance with their mutual needs and interests.

F. Improvement of ASEAN machinery

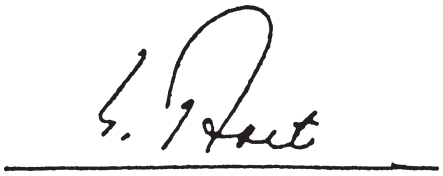
1. Signing of the Agreement on the Establishment of the ASEAN Secretariat.

2. Regular review of the ASEAN organizational stucture with a view to improving its effectiveness.

3. Study of the desirability of a new constitutional framework for ASEAN.

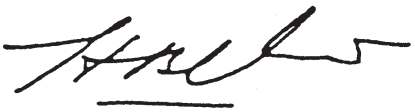
DONE at Denpasar, Bali, this Twenty-Fourth Day of February in the year One Thousand Nine Hundred and Seventy-Six.

For the Republic of Indonesia:



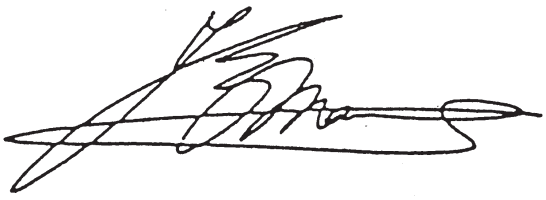
SOEHARTO
President

For Malaysia:



DATUK HUSSEIN ONN
Prime Minister

For the Republic of the Philippines:



FERDINAND E.MARCOS
President

For the Republic of Singapore:



LEE KUAN YEW
Prime Minister

For the Kingdom of Thailand:



KUKRIT PRAMOJ
Prime Minister

(b) TREATY OF AMITY AND COOPERATION IN SOUTHEAST ASIA BALI, 24 FEBRUARY 1976

The High Contracting Parties;

CONSCIOUS of the existing ties of history, geography and culture, which have bound their peoples together;

ANXIOUS to promote regional peace and stability through abiding respect for justice and the rule or law and enhancing regional resilience in their relations;

DESIRING to enhance peace, friendship and mutual cooperation on matters affecting Southeast Asia consistent with the spirit and principles of the Charter of the United Nations, the Ten Principles adopted by the Asian-African Conference in Bandung on 25 April 1955, the Declaration of the Association of Southeast Asian Nations signed in Bangkok on 8 August 1967, and the Declaration signed in Kuala Lumpur on 27 November 1971;

CONVINCED that the settlement of differences or disputes between their countries should be regulated by rational, effective and sufficiently flexible procedures, avoiding negative attitudes which might endanger or hinder cooperation;

BELIEVING in the need for cooperation with all peace-loving nations, both within and outside Southeast Asia, in the furtherance of world peace, stability and harmony;

SOLEMNLY AGREE to enter into a Treaty of Amity and Cooperation as follows:

CHAPTER 1
Purpose and Principles

ARTICLE 1

The purpose of this Treaty is to promote perpetual peace, everlasting amity and cooperation among their peoples which would contribute to their strength, solidarity and closer relationship.

ARTICLE 2

In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles:

a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
b. The right of every State to lead its national existence free from external interference, subversion or coersion;
c. Non-interference in the internal affairs of one another,
d. Settlement of differences or disputes by peaceful means;
e. Renunciation of the threat or use of force;
f. Effective cooperation among themselves.

CHAPTER II
Amity

ARTICLE 3

In pursuance of the purpose of this Treaty the High Contracting Parties shall endeavour to develop and strengthen the traditional, cultural and historical ties of friendship, good neighbourliness and cooperation which bind them together and shall fulfill in good faith the obligations assumed under this Treaty. In order to promote closer understanding among them, the High Contracting Parties shall encourage and facilitate contact and intercourse among their peoples.

CHAPTER III
Cooperation

ARTICLE 4

The High Contracting Parties shall promote active cooperation in the economic, social, technical, scientific and administrative fields as well as in matters of common ideals and aspiration of international peace and stability in the region and all other matters of common interest.

ARTICLE 5

Pursuant to Article 4 the High Contracting Parties shall exert their maximum efforts multilaterally as well as bilaterally on the basis of equality, non-discrimination and mutual benefit.

ARTICLE 6

The High Contracting Parties shall collaborate for the acceleration of the economic growth in the region in order to strengthen the foundation for a prosperous and peaceful community of nations in Southeast Asia. To this end, they shall promote the greater utilization of their agriculture and industries, the expansion of their trade and the improvement of their economic infra-structure for the mutual benefit of their peoples. In this regard, they shall continue to explore all avenues for close and beneficial cooperation with other States as well as international and regional organisations outside the region.

ARTICLE 7

The High Contracting Parties, in order to achieve social justice and to raise the standards of living of the peoples of the region, shall intensify economic cooperation. For this purpose, they shall adopt appropriate regional strategies for economic development and mutual assistance.

ARTICLE 8

The High Contracting Parties shall strive to achieve the closest cooperation on the widest scale and shall seek to provide assistance to one another in the form of training and research facilities in the social, cultural, technical, scientific and administrative fields.

ARTICLE 9

The High Contracting Parties shall endeavour to foster cooperation in the furtherance of the cause of peace, harmony, and stability in the region. To this end, the High Contracting Parties shall maintain regular contacts and consultations with one another on international and regional matters with a view to coordinating their views, actions and policies.

ARTICLE 10

Each High Contracting Party shall not in any manner of form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party.

ARTICLE 11

The High Contracting Parties shall endeavour to strengthen their respective national resilience in their political, economic, socio-cultural as well as security fields in conformity with their respective ideals and aspirations, free from external interference as well as internal subversive activities in order to preserve their respective national identities.

ARTICLE 12

The High Contracting Parties in their efforts to achieve regional prosperity and security, shall endeavour to cooperate in all fields for the promotion of regional resilience, based on the principles of self-confidence, self-reliance, mutual respect, cooperation and solidarity which will constitute the foundation for a strong and viable community of nations in Southeast Asia.

CHAPTER IV
Pacific Settlement of Disputes

ARTICLE 13

The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.

ARTICLE 14

To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.

ARTICLE 15

In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.

ARTICLE 16

The foregoing provision of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other High Contracting Parties not party to the dispute from offering all possible assistance to settle the said dispute. Paties to the dispute should be well disposed towards such offers of assistance.

ARTICLE 17

Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33 (1) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

CHAPTER V
General Provision

ARTICLE 18

This Treaty shall be signed by the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand. It shall be ratified in accordance with the constitutional procedures of each signatory State.

It shall be open for accession by other States in Southeast Asia.

ARTICLE 19

This Treaty shall enter into force on the date of the deposit of the fifth instrument of ratification with the Governments of the signatory States which are designated Depositories of this Treaty and of the instruments of ratification or accession.

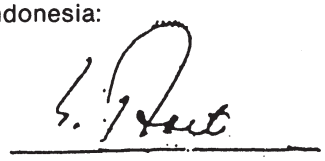
ARTICLE 20

This Treaty is drawn up in the official languages of the High Contracting Parties, all of which are equally authoritative. There shall be an agreed common translation of the texts in the English language. Any divergent interpretation of the common text shall be settled by negotiation.

IN FAITH THEREOF the High Contracting Parties have signed the Treaty and have hereto affixed their Seals.

DONE at Denpasar, Bali, this twenty-fourth day of February in the year one thousand nine hundred and seventy-six.

For the Republic of Indonesia:



SOEHARTO
President

For Malaysia:



DATUK HUSSEIN ONN
Prime Minister

For the Republic of the Philippines:



FERDINAND E.MARCOS
President

For the Republic of Singapore:



LEE KUAN YEW
Prime Minister

For the Kingdom of Thailand:



KUKRIT PRAMOJ
Prime Minister

(c) DECLARATION OF THE ADMISSION OF BRUNEI DARUSSALAM INTO THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS JAKARTA, 7 JANUARY 1984

The Minister for Foreign Affairs of the Republic of Indonesia, the Minister of Foreign Affairs of Malaysia, the Minister of State for Foreign Affairs of the Republic of the Philippines, the Minister for Foreign Affairs of the Republic of Singapore, and the Minister of Foreign Affairs of the Kingdom of Thailand

HAVING CONSIDERED the communication of Brunei Darussalam expressing her desire and interest to become a member of the Association of Southeast Asian Nations (ASEAN);

HAVING REGARD to the ASEAN Declaration of 1967 establishing ASEAN wherein it was declared that the Association is open for participation to all States in the South-East Asian Region subscribing to the aims, principles and purposes of ASEAN;

HAVING REGARD to the Declaration of ASEAN Concord of 1976; and

HAVING REGARD to the unanimous expression by the member states of ASEAN of their agreement to admit Brunei Darussalam to membership;

and

The Minister for Foreign Affairs of Brunei Darussalam representing Brunei Darussalam

HAVING SOLEMNLY accepted the conditions of membership; and

HAVING AGREED to subscribe or accede as the case may be, to all the Declarations and Treaties of ASEAN;

Now therefore, the ASEAN Foreign Ministers and the Foreign Minister of Brunei Darussalam hereby agree and declare as follows:

1. Brunei Darussalam becomes the sixth member state of ASEAN,
2. Brunei Darussalam solemnly agress to subscribe or accede as the case may be, to all the Declarations and Treaties of ASEAN.

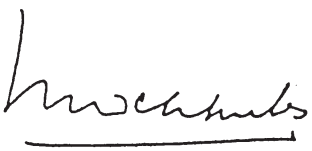
This Declaration of Admission of Brunei Darussalam, done at Jakarta on the Seventh Day of January in the Year One Thousand Nine Hundred and Eighty-Four, shall be deposited with the ASEAN Secretariat.

For Brunei Darussalam



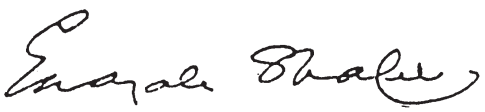
H.H.PRINCE MOHAMED BOLKIAH
The Minister for Foreign Affairs
of Negara Brunei Darussalam

For Indonesia



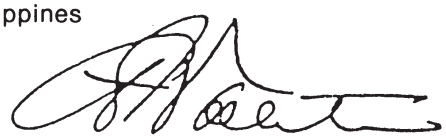
PROF.DR.MOCHTAR KUSUMAATMADJA
The Minister for Foreign Affairs
of the Republic of Indonesia

For Malaysia



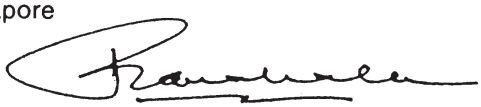
TAN SRI M.GHAZALI SHAFIE
The Minister of Foreign Affairs
of Malaysia

For the Philippines



ARTURO M.TOLENTINO
The Minister of State for Foreign
Affairs of the Republic of the Philippines

For Singapore



S.DHANABALAN
The Minister for Foreign Affairs
of the Republic of Singapore

For Thailand



A.C.M.SIDDHI SAVETSILA
The Minister of Foreign Affairs
of the Kingdom of Thailand

Appendix 2

The Philippine Declarations on the 1982 Law of the Sea Convention and Subsequent Reactions

PHILIPPINES

[Original : English]

1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;

2. Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of 10 December 1898, and the Treaty of Washington between the United States of America and Great Britain of 2 January 1930;

3. Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defense Treaty between the Philippines and the United States of America of 30 August 1951, and its related interpretative instruments; nor those under any other pertinent bilateral or multilateral treaty or agreement to which the Philippines is a party;

4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto;

5. The Convention shall not be construed as amending in any manner any pertinent laws and presidential decrees or proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippines Constitution;

6. The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic State over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security;

7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation;

8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty.

Objection by Bulgaria to the Understanding recorded upon signature by the Philippines and confirmed upon ratification

The U.N. Secretary-General received from the Government of Bulgaria, on 17 September 1985, the following objection concerning the understanding recorded by the Philippines:

[Original: English]

"The People's Republic of Bulgaria is seriously concerned by the actions of a number of States which, upon signature or ratification of the United Nations Convention on the Law of the Sea, have made reservations conflicting with the Convention itself or have enacted national legislation which excludes or modifies the legal effect of the provisions of this Convention in their application to those States. Such actions contravene article 310 of the United Nations Convention on the Law of the Sea and are at variance with the norms of customary international law and with the explicit provision of article 18 of the Vienna Convention on the Law of Treaties.

"Such a tendency undermines the purport and meaning of the Convention on the Law of the Sea, which establishes a universal and uniform regime for the use of the oceans and seas and their resources. In the note verbale of the Ministry for Foreign Affairs of the People's Republic of Bulgaria to the Embassy of the Philippines at Belgrade, the Bulgarian Government has rejected as devoid of legal force the statement made by the Philippines upon signature, and confirmed upon ratification, of the Convention.

"The People's Republic of Bulgaria will oppose in the future as well any attempts aimed at unilaterally modifying the legal regime established by the United Nations Convention on the Law of the Sea."

Objection by Australia to the Understanding recorded upon signature by the Philippines and confirmed upon ratification*

On 3 August 1988, the U.N. Secretary-General received from the Government of Australia the following objection concerning the understanding recorded by the Philippines:

[Original: English]

"Australia considers that this declaration made by the Republic of the Philippines is not consistent with article 309 of the Law of the Sea Convention, which prohibits the making of reservations, nor with article 310 which permits declarations to be made 'provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.'

"The declaration of the Republic of the Philippines asserts that the Convention shall not affect the sovereign rights of the Philippines arising from its Constitution, its domestic legislation and any treaties to which the Philippines is a party. This indicates, in effect, that the Philippines does not consider that it is obliged to harmonize its laws with the provisions of the Convention. By making such an assertion, the Philippines is seeking to modify the legal effect of the Convention's provisions.

"This view is supported by the specific reference in the declaration to the status of archipelagic waters. The declaration states that the concept of archipelagic waters in the Convention is similar to the concept of internal waters held under former constitutions of the Philippines and recently reaffirmed in article 1 of the New Constitution of the Philippines in 1987. It is clear, however, that the Convention distinguishes the two concepts and that different obligations and rights are applicable to archipelagic waters from those which apply to internal waters. In particular, the Convention provides for the exercise by foreign ships of the rights of innocent passage and of archipelagic sea lanes passage in archipelagic waters.

"Australia cannot, therefore, acept that the statement of the Philippines has any legal effect or will have any effect when the Convention comes into force and considers that the provisions of the Convention should be observed without being made subject to the restrictions asserted in the declaration of the Republic of the Philippines."

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*Communicated to Member States by Depositary Notification C.N.173. 1988.TREATIES-1 of the United Nations Secretariat.

Declaration by the Philippines concerning an objection by Australia to the Understanding recorded upon signature by the Philippines and confirmed upon ratification*

On 26 October 1988, the U.N. Secretary-General received from the Government the Philippines the following declaration concerning the said objection made by Australia;

[Original: English]

"The Philippine declaration was made in conformity with article 310 of the United Nations Convention on the Law of the Sea. The declaration consists of interpretative statements concerning certain provisions of the Convention.

"The Philipine Government intends to harmonize its domestic legislation with the provisions of the Convention.

"The necessary steps are being undertaken to enact legislation dealing with archipelagic sea lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention.

"The Philippine Government, therefore, wishes to assure the Australian Government and the States Parties to the Convention that the Philippines will abide by the provisions of said Convention."

*Communicated to Member States by Depositary Notification C.N.254. 1988. TREATIES-2 of the United Nations Secretariat.

Appendix 3

COUNCIL REGULATION (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 43 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Whereas the Council of the European Communities has agreed that the Member States should act in concert to extend their fishing zones to 200 nautical miles with effect from 1 January 1977 along their North Sea and North Atlantic coastlines, without prejudice to action of the same kind in respect of other fishing zones within their jurisdiction, in particular in the Mediterranean; whereas, since that time and on this basis, the Member States concerned have also extended their fishing limits in certain areas of the West Atlantic, the Skagerrak and the Kattegat and the Baltic Sea; whereas, in this context, in view of the over-fishing of stocks of the main species, it is essential that the Community, in the interests of both fishermen and consumers, ensure by an appropriate policy for the protection of fishing grounds that stocks are conserved and reconstituted; whereas it is therefore desirable that the provisions of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (3) be supplemented by the establishment of a Community system for the conservation and management of fishery resources that will ensure balanced exploitation;

Whereas this system should in particular include conservation measures which may involve, by appropriate means, limitations of the fishing effort, rules for the use of resources, special provisions for inshore fishing and supervisory measures;

Whereas measures regulating fishing effort may include restrictions, established by species or group of species, on catches, with overall catches being limited by reference to a stock or group of stocks;

Whereas the overall catch should be distributed among the Member States;

Whereas conservation and management of resources must contribute to a greater stability of fishing activities and must be appraised on the basis of a reference allocation reflecting the orientations given by the Council;

Whereas, in other respects, that stability, given the temporary biological situation of stocks, must safeguard the particular needs of regions where local populations are especially dependent on fisheries and related industries as decided by the Council in its resolution of 3 November 1976, and in particular Annex VII thereto;

Whereas, therefore, it is this sense that the notion of relative stability aimed at must be understood:

Whereas there should be special provisions for inshore fishing to enable this sector to cope with the new fishing conditions resulting from the institution of 200-mile fishing zones; whereas, to this end, Member States should be authorized to maintain in an initial stage until 31 December 1992 the derogation regime defined in Article 100 of the 1972 Act of Accession and to generalize up to 12 miles the limit of six miles prescribed in that Article; whereas, pursuant to the Act of Accession, these measures constitute the arrangements succeeding

(1) OJ No C 228, 1. 9. 1982, p. 1.
(2) OJ No C 57, 7. 3. 1977, p. 44.
(3) OJ No L 20, 19. 1. 1976, p. 19.

those provided for up to 31 December 1982: whereas this regime, after possible adjustment, will be applicable for a further period of 10 years and after this period the Council will be asked to decide upon the provisions which could follow;

Whereas it is necessary to specify the rights which each Member State may enjoy during this period in accordance with this regime;

Whereas specific arrangements of fishing effort should be agreed for certain sensitive regions, taking into consideration the problem of certain coastal fisheries as well as the need to regulate fishing activity in a coastal band;

Whereas, to that end, there is need, among other things, to institute a licensing system;

Whereas the creation of a Community system for the conservation and management of fishery resources should be accompanied by the institution of an effective system of supervision of activities in the fishing grounds and on landing;

Whereas, with a view to the preparation of the scientific and technical information to be used to assess the situation regarding the biological resources of the sea as well as the conditions for ensuring the conservation of stocks, a Scientific and Technical Committee of an advisory nature should be set up under the auspices of the Commission;

Whereas, to facilitate implementation of this Regulation, a procedure should be laid down for close cooperation between the Member States and the Commission within a Management Committee,

HAS ADOPTED THIS REGULATION:

Article 1

In order to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions, a Community system for the conservation and management of fishery resources is hereby established.

For these purposes, the system will consist, in particular, of conservation measures, rules for the use and distribution of resources, special provisions for coastal fishing and supervisory measures.

Article 2

1. The conservation measures necessary to achieve the aims set out in Article 1 shall be formulated in the light of the available scientific advice and, in particular, of the report prepared by the Scientific and Technical Committee for Fisheries provided for in Article 12.

2. The measures referred to in paragraph 1 may include, in particular, for each species or group of species:

(a) The establishment of zones where fishing is prohibited or restricted to certain periods, types of vessel, fishing gear or certain end-uses;

(b) the setting of standards as regards fishing gear;

(c) the setting of a minimum fish size or weight per species;

(d) the restriction of fishing effort, in particular by limits on catches.

Article 3

Where, in the case of one species or a group of related species, it becomes necessary to limit the catch, the total allowable catch for each stock or group of stocks, the shares available to the Community as well as, where applicable, the total catch allocated to third countries, and the specific conditions for taking these catches, shall be fixed each year.

The shares available referred to in the first subparagraph shall be increased by the total of Community catches outside the waters under the jurisdiction or sovereignty of the Member States.

Article 4

1. The volume of the catches available to the Community referred to in Article 3 shall be distributed between the Member States in a manner which assures each Member State relative stability of fishing activities for each of the stocks considered.

2. On the basis of the consents of the report

referred to in Article 8, the Council, acting in accordance with the procedure laid down in Article 43 of the Treaty, shall enact provisions effecting the adjustments that it may prove necessary to make to the distribution of the resources among Member States in consequence of the application of paragraph 1.

Article 5

1. Member States may exchange all or part of the quotas in respect of a species or group of species allocated to them under Article 4 provided that prior notice is given to the Commission.

2. Member States shall determine, in accordance with the applicable Community provisions, the detailed rules for the utilization of the quotas allocated to them. Detailed rules for the application of this paragraph shall be adopted, if necessary, in accordance with the procedure laid down in Article 14.

Article 6

1. As from 1 January 1983 and until 31 December 1992, Member States shall be authorized to retain the arrangements defined in Article 100 of the 1972 Act of Accession and to generalize up to 12 nautical miles for all waters under their sovereignty or jurisdiction the limit of six miles laid down in that Article.

2. In addition to the activities pursued under existing neighbourhood relations between Member States, the fishing activities under the arrangements established in paragraph 1 of this Article shall be pursued in accordance with the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where these activities are pursued and the species concerned.

Article 7

1. For species of special importance in the region referred to in Annex II (A) which are biologically sensitive because of their exploitation characteristics, fishing activities will be governed by a licensing system managed by the Commission on behalf of the Community.

2. Vessels which comply with the minimum characteristics laid down in Annex II (C) and which exercise their activity on the species specified in Annex II (B) shall be subject to the system referred to in paragraph 1.

Where the fishing effort of vessels which do not comply with the minimum characteristics provided for in the first subparagraph is likely to jeopardize the satisfactory development of the stocks concerned as a result of a significant increase in such activity as compared with that carried out on the date of entry into force of this Regulation, the minimum characteristics specified in Annex II (C) may be reduced or specific measures adopted to monitor such activity.

3. For each Member State, the number of vessels referred to in the first subparagraph of paragraph 2 which may exercise their activity simultaneously is specified in Annex II (D). The activity of these vessels within the meaning of paragraphs 1 and 2 is subject to a radio communication procedure designed to inform the competent monitoring authorities of their movements on entering and leaving the aforementioned region.

4. The specific monitoring measures referred to in the footnote to Annex II shall be adopted without prejudice to the provisions of Article 11 of Council Regulation (EEC) No 2057/82 of 29 June 1982 establishing certain supervisory measures for fishing activities by vessels of the Member States[1] and of Article 8 (2) of Council Regulation (EEC) No 171/83 of 25 January 1983 laying down certain technical measures for the con-servation of fishery resources[2].

5. The detailed rules for the application and the procedure for the establishment of licences and the communication of the movements of vessels shall be determined in accordance with the procedure laid down in Article 14.

Article 8

1. Before 31 December 1991, the Commission shall submit to the Council a report on the fisheries situation in the Community, the economic and social development of the coastal areas and the state of the stocks and their likely evolution.

2. On the basis of this report and taking account of the objectives set out in Article 4 (1), the Council, acting in accordance with the procedure laid down

[1] OJ No L 220, 29. 7. 1982, p.1

[2] OJ No L 24/3, 27.1.83, p.14.

in Article 43 of the Treaty, shall decide on the adjustments to be made to the arrangements referred to in Articles 6 and 7.

3. The Commission shall submit to the Council, during the 10th year following 31 December 1992, a report on the economic and social situation of coastal regions, on the basis of which the Council, acting in accordance with the procedure laid down in Article 43 of the Treaty, shall decide on the provisions which, once the 10-year-period mentioned in this paragraph has expired, could follow the arrangements referred to in Articles 6 and 7.

Article 9

1. Member States shall supply the Commission, at its request, with all the information relevant to the implementation of the Regulation.

2. The Commission shall each year forward to the European Parliament and the Council a report on the application of measures taken pursuant to this Regulation.

Article 10

Supervisory measures shall be adopted to ensure compliance with this Regulation and with the measures adopted in implementation thereof.

Article 11

The measures referred to in Articles 2, 3, 4(1), the second subparagraph of Article 7(2), Articles 7(4) and 10 shall be adopted by the Council acting by a qualified majority on a proposal from the Commission.

Article 12

The Commission shall set up under its auspices a Scientific and Technical Committee for Fisheries. The Committee shall be consulted at regular intervals and shall draw up an annual report on the situation with regard to fishery resources, on the ways and means of conserving fishing grounds and stocks and on the scientific and technical facilities available within the Community.

Article 13

1. A Management Committee for Fishery Resources, hereinafter called 'the Committee', is hereby established, consisting of representatives of the Member States, under the chairmanship of a representative of the Commission.

2. Within the Committee the votes of the Member States shall be weighed in accordance with Article 148 (2) of the Treaty. The chairman shall not vote.

Article 14

1. Where the procedure laid down in this Article is the be followed, the chairman shall refer the matter to the Committee either on his own initiative or at the request of the representative of a Member State.

2. The representative of the Commission shall submit a draft of the measures to be taken. The Committee shall deliver its opinion on such measures within a time limit which the chairman may fix on the basis of the urgency of the questions under consideration. An opinion shall be adopted by a majority of 45 votes.

3. The Commission shall adopt measures which shall be immediately applicable. However, if these measures are not in accordance with the Committee's opinion, they shall forthwith be communicated by the Commission to the Council. In that event the Commission may defer application of the measures on which it has decided for not more than one month from the date of such communication.

The Council, acting by a qualified majority, may take a different decision within one month.

Article 15

The Committee may examine any other question referred to it by its chairman either on his own initiative or at the request of the representative of a Member State.

Article 16

This Regulation shall enter into force on the day of its publication in the Official Journal of the European Communities.

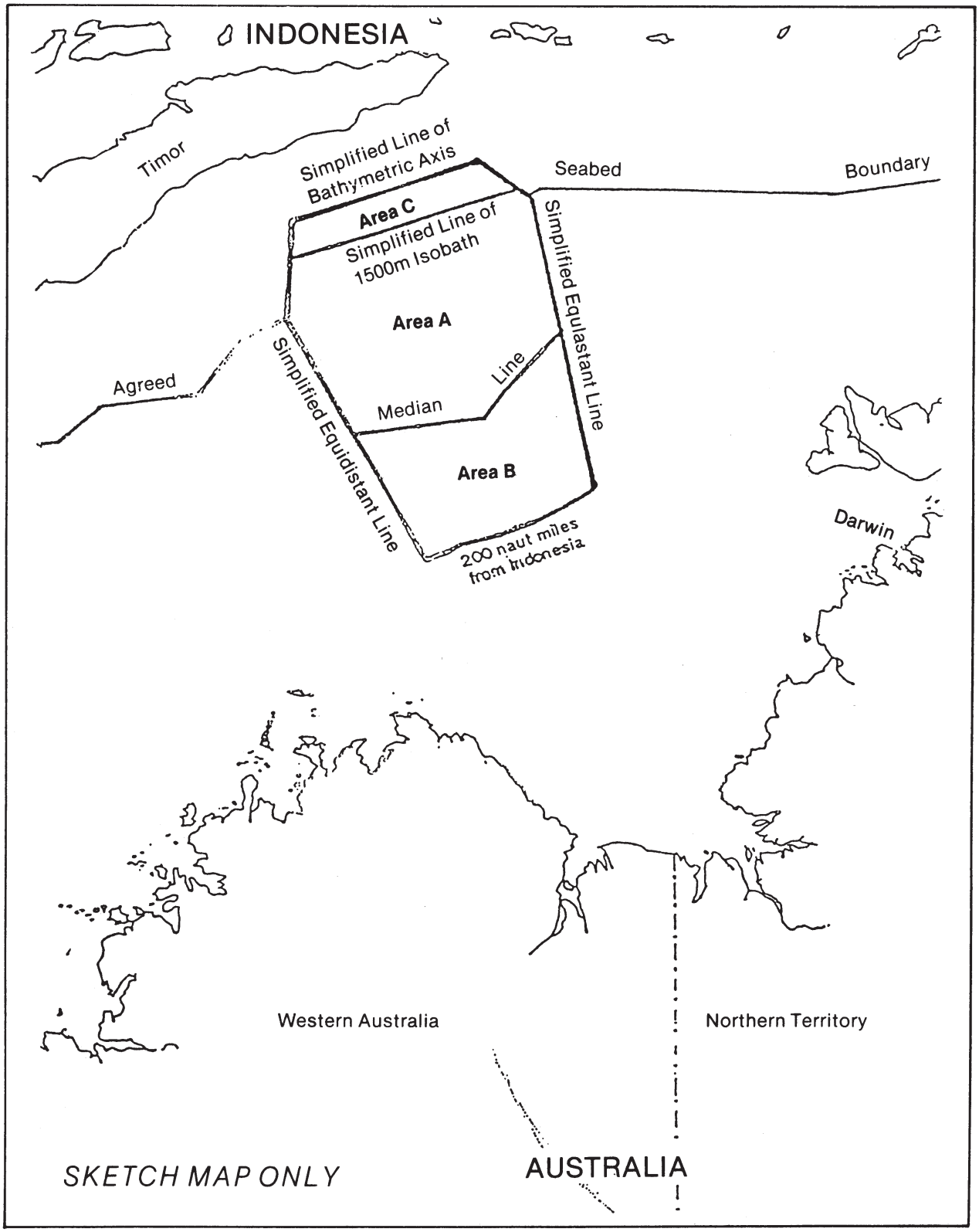
This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 25 January 1983.

For the Council
The President
J.ERTL

Appendix 4

INDONESIA-AUSTRALIA ZONE OF COOPERATION in the "Timor Gap"



TIMOR GAP : JOINT STATEMENT

Following is the text of the Joint Statement issued by the Australian Minister for Foreign Affairs and Trade, Senator Gareth Evans, and the Indonesian Foreign Minister, Mr.Ali Alatas, following their talks in Jakarta on 25 October 1988.

1. The Minister for Foreign Affairs of the Republic of Indonesia and the Minister for Foreign Affairs and Trade of Australia took note of the result of the Ninth Meeting of Senior Officials of Indonesia and Australia on the delimitation of continental shelf boundaries between the two countries, held in Jakarta on 3-4 September 1988. The two Ministers studied carefully the recommendation of the Meeting on the establishment of a Zone of Cooperation in the area between the Indonesian Province of East Timor and Northern Australia (the "Timor Gap") for cooperation in petroleum exploration and exploitation, and the basic principles to govern the Zone, to be elaborated in a comprehensive Agreement. The recommended Zone of Cooperation will constitute a provisional arrangement pending agreement on the delimitation of a permanent continental shelf boundary.

2. The two Ministers hereby announce their Governments' endorsement to the recommendation of the Meeting and agreed that appropriate steps will be taken for the purpose of elaborating a comprehensive Agreement on the Zone of Cooperation. The two Ministers expressed their desire that such an agreement should be concluded between the two countries within one year.*

3. The Zone of Cooperation will be delineated in the northern side by a simplified bathymetric axis line, in the southern side by the 200 nautical mile line measured from the Indonesian archipelagic baselines, and in the eastern side and western side by equidistance lines. The establishment of the Zone and its delineation will not prejudice the respective positions of the two Governments on a permanent continental shelf delimitation in the area and will not in any way be construed as affecting the respective sovereign rights claimed by each side in the Zone of Cooperation.

4. The Zone of Cooperation will comprise three component areas, namely Areas A, B and C as in the attached sketch map. A joint development regime will apply in Area A and there will be established a Ministerial Council and a Joint Authority. In Area B the relevant Australian legal regime will apply, and in Area C the relevant Indonesian legalregime will apply subject to a regime of sharing in tax returns applicable in each of the two areas and a process of notification and consultation between the two Governments through the Joint Authority on petroleum exploration and development activities.

5. The two Ministers believe that the establishment of the Zone of Cooperation will further strengthen the relations between the two countries.

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*The Treaty was signed on 11 December 1989. Indonesia ratified it on 7 January 1991.

Appendix 5

PROGRAMME OF THE SYMPOSIUM

TUESDAY, 22 NOVEMBER 1988

	Arrival of Overseas Participants (Lodging at Hotel Tara, Bangkok)
19.30	Informal Dinner at Hotel Tara

WEDNESDAY, 23 NOVEMBER 1988

08.03	Bus leaves Hotel Tara for Regent Cha-am Beach Hotel
11.30	Check-in at Regent Cha-am Beach Hotel
12.00	Lunch (Tapien Tong Grill Room)
14.00	OPENING SESSION
	Opening Address : H.E.Dr. Thanat Khoman Chairman of the Policy Council International Studies Centre, Institute of Foreign Affairs and Chairman of the International Law Association of Thailand
	Welcoming Message of H.E.Air Chief Marshal Siddhi Savetsila, Minister of Foreign Affairs
14.30-17.45	SESSION I : INTERNATIONAL LEGAL ORDER IN THE OCEANS
	CHAIRMAN : Professor Vicente Abad Santos Professor of Law Emeritus University of the Philippines
	(1) "The 1982 Law of the Sea Convention and Customary International Law" Mr. Satya Nandan UN Under-Secretary-General
	(2) "The Visions of the ASEAN states at the Time of UNCLOS III and Now" The Hon. Justice R. Coquia Legal Adviser Department of Foreign Affairs The Republic of the Philippines

(3) "The 1982 Law of the Sea Convention from the Perspective of a Ratifier"
Dr. Hasjim Djalal
Head of Research and Development Agency
Indonesian Department of Foreign Affairs
The Republic of Indonesia

Discussants (1) Ms. Heliliah Yusof
Head, Advisory and International Division
Attorney General's Department
Malaysia
(2) Professor Willem Riphagen
Former Member of the International Law Commission
(3) Dr. Kriangsak Kittichaisaree
Department of Treaties and Legal Affairs
Ministry of Foreign Affairs of Thailand

16.00 Coffee Break

16.15-17.45 SESSION I (Continued)

19.00 Dinner at the *Loy Krathong* Festival
(Dress : Casual)

THURSDAY, 24 NOVEMBER 1988

09.00-12.30 SESSION II : POTENTIAL COOPERATION IN ASEAN AND IN THE EC

CHAIRMAN : Mr. James Chiew
Deputy Senior Counsel
Attorney General's Chambers
Ministry of Law
Brunei

(1) "The Customary International Law of the Fisheries, and that Concerning Rights of Passage, Marine Pollution and Scientific Research"
Professor Willem Riphagen
Former member of the International Law Commission

(2) "The International Law of Fisheries in the EC"
Mr. Robert Fischer
Legal Adviser
EC Commission

Discussants (1) Professor Inocencio Ronquillo
Consultant
Bureau of Fisheries and Aquatic Resources
The Republic of the Philippines

(2) Dr. Jaturon Thirawat
Faculty of Law
Thammasat University

10.30-10.45 Coffee Break

11.00-12.30 SESSION II (Continued)

12.30-14.00 Lunch

14.15-17.30 SESSION III : DISPUTE SETTLEMENT

CHAIRMAN : Mr. S. Tiwari
Senior State Counsel
Attorney General's Chambers
The Republic of Singapore

(1) "Dispute Settlement : the EC Experiences"
Distinguished Speaker from EC

(2) "Dispute Settlement : the ASEAN Experiences"
Distinguished Speaker from ASEAN

Discussants (1) Dr. B.A. Hamzah
Senior Fellow
Institute of Strategic and International Studies
Malaysia

(2) Mr. Bertil Roth
Counsellor
Swedish Embassy
Bangkok

(3) Mr. Vasin Teeravechyan
Department of Treaties and Legal Affairs
Ministry of Foreign Affairs of Thailand

15.45-16.00 Coffee Break

16.00-17.30 SESSION III (Continued)

19.30 Dinner

FRIDAY, 25 NOVEMBER 1988

09.00-12.15 SESSION IV : OVERALL EVALUATION OF THE ASEAN SITUATION AND SUGGESTIONS FOR THE FUTURE

CHAIRMAN :Ms. Heliliah Yusof
Head, Advisory and International Division
Attorney General's Department
Malaysia

	SPEAKER	: Dr. Phiphat Tangsubkul Director, SEAPOL Programme Institute of Asian Studies Chulalongkorn University
	DISCUSSANT	: Dr. Nurhassan Wirajuda Directorate of Legal and Treaties Affairs Department of Foreign Affairs The Republic of Indonesia Mr. Raymond Lim Faculty of Law National University of Singapore
10.30-10.45	Coffee Break	
10.45-12.15	SESSION IV (Continued)	
12.15-13.45	Lunch	
14.00-16.00	CONCLUDING SESSION CHAIRMAN : Dr. Hasjim Djalal CONCLUSION REMARKS : EEC Speaker : Distinguished Speaker from EC ASEAN Speaker : Distinguished Speaker from ASEAN CLOSING REMARKS : Mr. Norbert von Hofmann, FES, Bonn Dr. Thanat Khoman Chairman of the Conference	
19.00	Dinner	

SATURDAY, 26 NOVEMBER 1988

09.00	Bus Leaves Regent Cha-am Beach Hotel for Hotel Tara, Bangkok
12.00	Lunch at Hotel Tara
AFTERNOON	FREE

SUNDAY, 27 NOVEMBER 1988

DEPARTURE OF PARTICIPANTS

Appendix 6

LIST OF PARTICIPANTS

CHAIRMAN OF THE CONFERENCE

Dr.Thanat Khoman
Chairman of the Policy Council
Institute of Foreign Affairs
Ministry of Foreign Affairs and
President of the International Law
Association of Thailand

CONFERENCE ORGANIZER

Mr.Phan Wannamethee
Director
International Studies Centre
Institute of Foreign Affairs of Thailand

SECRETARIAT SERVICE

Mr.Udomphol Ninnad
International Studies Centre

Miss Ladda Pongtunyaviriya
International Studies Centre

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Justice Jorge R. Coquia	Legal Adviser Department of Foreign Affairs The Republic of the Philippines
Dr. Hasjim Djalal	Research and Development Agency Department of Foreign Affairs The Republic of Indonesia
Mr. Lim Tech Ee	Assistant Director Marine Department The Republic of Singapore
Mr. Robert Fishcer	Legal Adviser Commission of the European Communities
Mr. Annuar Hamid	Principal Assistant Secretary Malaysia
Dr. B.A. Hamzah	Senior Fellow Institute of Strategic and International Studies Malaysia
Mr. Norbert von Hofmann	Friedrich Ebert Stiftung, Bonn The Federal Republic of Germany
Mr. Raymond Lim	Faculty of Law National University of Singapore
Mr. Satya Nandan	Under-Secretary-General and Special Representative of the Secretary-General for the Law of the Sea United Nations Headquarters
Professor Willem Riphagen	Former Member of the International Law Commission
Professor Inocencio Ronquillo	Consultant Bureau of Fisheries and Aquatic Resources The Republic of the Philippines

Mr.Alias Hj Shari	Fisheries Department Ministry of Development Brunei Darussalam
Professor Vicente Abad Santos	Professor of Law Emeritus University of the Philippines The Republic of the Philippines
Mr. S. Tiwari	Senior State Counsel Attorney-General's Chambers The Republic of Singapore
Mr.Latif Tuah	Political Department Ministry of Foreign Affairs Brunei Darussalam
Dr.Nurhassan Wirajuda	Head, Sub-Directorate of Territorial Treaties Directorate of Legal and Treaties Affairs Department of Foreign Affairs The Republic of Indonesia
Mrs.Heliliah Yusof	Head, Advisory and International Division Attorney-General's Department Malaysia

OTHER PARTICIPANTS

Mr.Bertil Roth	Counsellor Swedish Embassy Bangkok
Mr.Gatot Hendrarto	Attache of the Narcotic Affairs Embassy of the Republic of Indonesia Bangkok
Mr.Friedhelm Ingo Gertner	Director Friedrich Ebert Stiftung Bangkok
Mr.Pieter J. Bakker	Chief, Mineral Resources Section National Resources Division ESCAP, Bangkok
Ms.Christine Alfsen	Marine Affairs Officer Natural Resources Division ESCAP, Bangkok

THAI PARTICIPANTS

Asst.Prof.Dr.Prasit Aekaputra	Faculty of Law Thammasat University
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Mr.Marut Jitpatima	ASEAN Department Ministry of Foreign Affairs
Dr.Warawit Kanithasen	Department of Treaties and Legal Affairs Ministry of Foreign Affairs
Dr.Sorajak Kasemsuvan	ASEAN Department Ministry of Foreign Affairs
Dr.Kriangsak Kittichaisaree	Department of Treaties and Legal Affairs Ministry of Foreign Affairs
Police Colonel Niwes Naksomboon	Marine Police Division Ministry of Interior
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Dr.Virachai Plasai	Department of Treaties and Legal Affairs Ministry of Foreign Affairs
Mr.Chirdchu Raktabutr	Department of Treaties and Legal Affairs Ministry of Foreign Affairs
Mr.Chainarong Sulaimhad	Department of Fisheries Ministry of Agriculture and Cooperatives
Mr.Vara-poj Snidvongs	Policy and Planning Division Ministry of Foreign Affairs
Dr.Jumpot Saisunthorn	Faculty of Law Thammasat University

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Mr.Weerawit Weeraworawit	Department of Treaties and Legal Affairs Ministry of Foreign Affairs



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Saranrom Palace Bangkok

STUDY PAPER
INTERNATIONAL LAW PROGRAMME

DEEP SEABED MINING AND ITS REFLECTIONS ON CONTEMPORARY INTERNATIONAL LAW

BY
DR. KRIANGSAK KITTICHAISAREE

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INTERNATIONAL STUDIES CENTRE

Established in 1967, the Institute of Foreign Affairs is dedicated to providing in-service training mainly for Thailand's foreign, service officers as well as other government officials in order that they may be able to carry out their duties with professional efficiency.

The Institute has since extended its activities to include research and studies on wide-ranging interational issues, through seminars, discussions, lectures and speeches by distinguished Thai and foreign government leaders, scholars and researchers. This extended sphere of activities of the Institute has now been put under the new body, the International Studies Centre (ISC) which was formed in April 1987.

The Centre's major objective is to encourage studies and analysis of relevant policies and issues in various aspects of international affairs, including

- international politics,
- interational law,
- international economics,
- international and regional organizations

The Centre aims to create opportunities for policy and issue-related discussion for the benefit of the formulation and conduct of foreign policy. Another objective of the Centre is to promote public awareness and understanding of major foreign policy issues.

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STUDY PAPER
INTERNATIONAL LAW PROGRAMME

DEEP SEABED MINING AND ITS REFLECTIONS ON CONTEMPORARY INTERNATIONAL LAW

KRIANGSAK KITTICHAISAREE

INTERNATIONAL STUDIES CENTRE
BANGKOK, THAILAND
1989

ABOUT THE AUTHOR

Kriangsak Kittichaisaree won a scholarship from the Thai Government to study in the U.K., the U.S.A., and back to the U.K. again, from the high school level until he finally got a Ph.D, in Law from Cambridge University, having amassed some awards, distinctions, fun and troubles along the way. Now with, the Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand, he deals with international legal issues for a living.

Besides his other international engagements, he has been Thai delegate to the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea (the PrepCom) since its 5th (Resumed) Session in New York (July-August 1987). Since the 6th Session in Kingston, Jamaica (March-April 1988), he has been an original member of the Group of 16, representing the Group of 77 in the Consultative Group of 33. He has also been elected Chairman/ Co-ordinator of the Group of 77 in Special Commission 2 (The Enterprise), presently the most important of the four Special Commissions of the PrepCom, as from August 1988 during the 6th (Resumed) Session in New York.

His other publications include: *The Law of the Sea and Maritime Boundary Delimitation th Southeast Asia,* (Oxford University Press, 1987); and, as editor, Proceedings of the Symposium on *Regional Cooperation on the Law of the Sea: ASEAN and the EC Perspectiues* (forthcoming).

He plans to present, at some point in time, two more international law books: *International Law of Fisheries in the Exclusive Economic Zone; A Handbook for Practitioners,* and a book about the Enterprise of the International Sea-Bed Authority.

DEEP SEABED MINING AND ITS REFLECTIONS ON CONTEMPORARY INTERNATIONAL LAW

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FOREWARD

The UN General Assembly in its resolution 2749 (XXV) of 16 December 1970 declared that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national juridiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States. This concept of Common Heritage of Mankind is reaffirmed in the 1982 Law of the Sea Convention.

Dr. Kriangsak Kittichaisaree's Paper on "Deep Seabed Mining and Its Reflections on Contemporary International Law" draws on his research at Cambridge University and his experiences with the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea (the PrepCom). In this paper, the author does not confine his findings only to the legal issues, but also looks into their implications for international economic issues. He examines the historical evolution of the deep seabed mining regime under the 1982 Law of the Sea Convention, the law governing deep seabed mining and the potential effects on the Southeast Asian States as a case study for Third World States.

This Study Paper is the inaugural issue of the studies under the International Law Programme of the International Studies Centre, whose objective is to encourage the study of major policy issues relating to various aspects of international affairs including international law. I am indebted to Dr. Kriangsak Kittichaisaree who kindly responded to my request to undertake this study. I hope that this paper will contribute to the understanding and appreciation of the significance of this subject particularly to the developing countries and I share the author's conviction that by supporting the principle of the Common Heritage of Mankind and the implementation of the provisions of the Convention, the developing States are on course to advance the international economic order based on equity and justice through the evolutionary international law.

Phan Wannamethee
Director
International Studies Centre
Institute of Foreign Affairs of Thailand

March 1989
Bangkok

PREFACE

The First United Nations Conference on the Law of the Sea was convened in 1958 in an attempt to formulate a set of rules, rights and obligations of States pertaining to the sea as well as to the continental shelf. The Second Conference, held two years later, was geared to resolving the difficult question of the maximum breadth of the territorial sea. Over a decade was spent on the Third Conference and its preparatory stages whose goal was to establish, once and for all, the **one** and only comprehensive and universal legal regime for the sea. Ironically, deep seabed mining, which was the genesis of this last Conference, has been the major stumbling block to a universal acceptance of the 1982 United Nations Convention on the Law of the Sea conjured up by the Third Conference. Whither the law of the sea: confusion, conflicts or upheavals? The stakes involved are enormously high in terms of international law and order, economic gains, and international political influence. Thus, although this seminal work is confined to international law as seen from a perspective of someone with extensive legal training, it also has far-reaching implications for the issues of international economics and politics of the present days and their bearings on posterity. Reference to Southeast Asian positions are made merely as examples of the stances of the Third World or the Group of 77, to which the Southeast Asian States also belong.

The research was undertaken at Cambridge. The author was financially indebted to the Thai Government for its scholarship, to the Committee of Vice-Chancellors and Principals of the Universities and Colleges in the U.K. for its Overseas Research Students' Award, and to Cambridge University for its Chancellor's Bursary. Invaluable experiences and insights have been gained through the author's participation in the Preparatory Commission for the International Sea-Bed Authority and for the Tribunal for the Law of the Sea (the PrepCom) since the 5th Session held in New York between 27 July and 21 August 1987. However, the inspiration behind, approach to, and initial learning of, the subject were owed to Harvard Law School and to the author's most beloved life-long friend of the Harvard days.

It was Ambassador Phan Wannamethee and the International Studies Centre (ISC) of the Ministry of Foreign Affairs of Thailand who solicited publication of this work to launch a new project of learned publications. This writing is an amended and updated version of what was previously prepared as an annex to a three-part Ph.D. thesis entitled "The 1982 Law of the Sea Convention and the Protection of State Interests in Maritime Natural Resources: With Special Reference to Southeast Asia", submitted to Cambridge University in April 1986, and a revised Part I of which was published in September 1987 by the Oxford University Press (Oxford, Singapore, New York) under the title: "The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia."

The views and any shortcomings found herein are the author's very own, and cannot be attributed to the Ministry of Foreign Affairs of Thailand or the Thai Government whatsoever.

SELECT ABBREVIATION, ACRONYMS, AND SYMBOLS

A.F.D.I	Annuaire français de droit international
A.J.I.L	American Journal of International Law
Amer. Soc. Int'l L.	American Society of International Law
ante	See above, *(Supra)*
Bangkok Symposium-Dec. 1981	International Symposium on "The New Law of the Sea in Southeast Asia: Developmental Effects and Regional Approaches" (ed. by D.M. Johnston *et. al.*), (1983)
Brownlie, Ian	Ian Brownlie, *Principles of Public International Law*, 2 nd ed. (1973), 3 rd ed. (1979)
Cam.L.J.	Cambridge Law Journal
CCOP	The Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas
CHM	The Common Heritage of Mankind
Current Leg. Prob.	Current Legal Problems
Dupuy, R-J. (ed. 1982)	*The Management of Humanity's Resources: The Law of The Sea,* (Workshop, the Hague, 29-31 October 1981)
ed.	edited by; ....edition
esp.	especially
et seq. ; et sequel	and the following pages
F. 2d.	(U.S.) Federal Court Reports, 2nd edition
FEER	Far Eastern Economic Review
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Hague Recueil	Recueil des Cours de l' Académie de droit international de la Haye
Harv. Int'l L.J.	Harvard International Law Journal
ibid.	in the same work just quoted; by the same author just quoted
I.C.J.	The International Court of Justice
id.	The author just quoted
I.L.C.	The International Law Commission
I.L.M.	International Legal Materials
infra	below; farther or later in this work
Int'l. & Comp. L.Q.	International and Comparative Law Quarterly
Int'l. L. J.	International Law Journal
Int'l. L. Assoc.	International Law Association
Int'l. Org.	International Organization
...J. Int'l. L.	...Journal of International Law
J. Maritime L. & Commerce	Journal of Maritime Law and Commerce

J. World Trade L.	Journal of World Trade Law
L. & Contemporary Problems	Law and Contemporary Problems
...L.J.	...Law Journal
loc. cit.	in the chapter of the book, or at the place in the periodical mentioned
L.Q.R.	Law Quarterly Review
...L. Rev	...Law Review
L. Sea Inst. Proc.	Proceedings of the Law of the Sea Institute
Natural Resources J.	Natural Resources Journal
Ocean Devel. & Int'l L.	Ocean Development and International Law
O'Connell	D.P. O'Connell, *The International Law of the Sea,* vol.I (1982), vol.II (1984), ed. by I.A. Shearer
op. cit.	in the same book cited
O.R.	Official Records
P.C.I.J.	The Permanent Court of International Justice
per **(Latin)**	as stated by; in the words of
Proc.	Proceedings
Proc. of Acad. Poli. Sci.	Proceedings of the Academy of Political Science
Ramkhamheng Symposium 1977	Proceedings of the Symposium on "The Protection of Thai National Interests in the Sea and the Emerging Trend of the Law of the Sea", held at Ramkhamheng University, Bangkok, Thailand, 18-19 January 1977. (Thai Language)
Reso.	Resolution
R.G.D.I.P.	Revue générale de droit international public
R.I.A.A.	United Nations, Reports of International Arbitration Awards
Sess.	Session
Suppl.	Supplement
UNCLOS I	The First United Nations Conference on the Law of the Sea, 1958, Geneva
UNCLOS II	The Second United Nations Conference on the Law of the Sea, 1960, Geneva
UNCLOS III	The Third United Nations Conference on the Law of the Sea, 1973-82
UN. Doc.	United Nations Documents
UN / GA.	United Nations, General Assembly
U.S.	U.S. Supreme Court Reports
Va. J. Int'l. L.	Virginia Journal of International Law
Vanderbilt J. Trans. L.	Vanderbilt Journal of Transnational Law
...Y.B.	...Yearbook
...Y.B. Int'l. L.	...Yearbook of International Law
Y.B. Int'l L. Comm'n	Yearbook of the International Law Commission
Z.a.ö.R.u.V	Zeitschrift für ausländisches öffenliches Recht und Völkerrecht

I. CHARACTERISTICS OF CONTEMPORARY INTERNATIONAL LAW AS GENERALLY UNDERSTOOD PRIOR TO THE PHENOMENON OF THE DEEP SEABED MINING REGIME UNDER THE 1982 LAW OF THE SEA CONVENTION

Before the emergence of the deep seabed mining regime under the 1982 Law of the Sea Convention, the following characteristics were considered the most fundamental to the infrastructure of contemporary international law.

(i) The Sovereign Equality of States

All States are equal and, as a corollary, one sovereign cannot encroach upon the territorial integrity, independence or authority of another sovereign. This principle is also enshrined in Article 2 (1) and (4) of the United Nations Charter.

(ii) Consent of Sovereign States

Rules of international law are created by the consent of sovereign States to be bound by those rules. The role of States' consent is prominent throughout Chapter II of the Statute of the International Court of Justice, which elaborates the competence of the World Court.

Whilst Article 38(1) of the Statute specifies that sources of international law are to derive from international conventions, custom, and the general principles of law, it has not failed to add that these must be (expressly) recognized or accepted by the States concerned as binding upon themselves. Nothing can prevent sovereign States to agree to confer rights and incur obligations *inter se* through a treaty or a convention. Speaking of a customary rule of international law, it is understood that there was a **consensus** among States at the time of its formulation that the rule was to become binding on all States. Owing to the requirement of consent, a treaty or an international convention cannot bind non - States Parties unless it has become a rule of customary international law recognized as such. In a similar vein, general principles of law are those so widely accepted that can be said to have widespread State consent to it being part of international law.

(iii) Effectiveness of Enforcement Mechanism Depends on the Power behind It

The mechanism to enforce international law differs from the one which enforces domestic law. The international community does not have the police authority in the sense known on the domestic plane. Reciprocity or retaliation is used to deprive the rights and entitlement of the deviant States. Sanctions may take place when certain States join forces to penalize the State who defies a peremptory norm of general international law *(jus cogens)* akin to public policy or *ordre public* in domestic law. Enforcement is likely to be effective when the enforcer is in a stronger position than the deviant State.

Such basic tenets are replete with inherent anomalies and contradictions. In practice, Third World States, especially the former colonies, are bound by rules of customary international law which they may have strongly opposed. This should come as no surprise. The process of formation of a customary rule is time-consuming. Almost all the extant rules were formulated among the Christian European States at the height of their power and influence hundreds of years ago. Then, only "civilized States" were equal. The requisite consent for the recognition of a rule of customary law belonged to this coterie of Western Powers, and no one else. Yet the rule had to be universally observed by the civilized and non - civilized States alike. However, only civilized States were entitled to withhold their consent to be bound by a particular rule, thus becoming what was subsequently called "persistent objectors" who were not bound thereby.

After being recognized as equally "civilized", Third World States and former colonies find themselves equal with the rest only in principle, but not in reality. Rules which were formulated without their consent and which they have found oppressive continue to apply to them despite their persistent objection. International stability is usually invoked in support of the retention of these rules, and the joint opposition of the newly civilized States usually succumbs to the stronger power and influence of those wishing to retain the rules which were formulated to enhance and preserve their own interests.

The deep seabed mining regime under the 1982 Law of the Sea Convention is the first successful reversal of the above - mentioned unjust infrastructure of contemporary international law. Its effect is far - reaching for the future of international legal order and well - being of mankind.

II DEEP SEABED MINING

(A) Background

The background and legislative history of the deep seabed mining issue and UNCLOS III have been subject to extensive documentation and accounts.[1] Another detailed excursion into this well-trodden path will serve no useful purpose. A brief description of the scenario will suffice.

The HMS *Challenger* expedition between 1873 and 1876 led to a discovery of deep seabed nodules rich in several minerals. However, they remained a mere scientific curiosity until the 1950's when rising prices of metals and advances in technology gave rise to the interest in the commercial exploitation of these minerals which lie at the depths ranging from 12,000 to 20,000 feet (or from 3,200 to 6,000 metres) on the ocean floors. They have been proved to be rich in manganese, copper, nickel and cobalt, four of the metals vital to industrial development and strategic superiority.[2]

In his now historic address before the First Committee of the U.N. General Assembly on 1 November 1967, Ambassador Arvid Pardo of Malta called the attention of the international community to the deep seabed minerals which could contribute to the elimination of the gap between the developed and the developing States.[3] He proposed that the seabed and ocean floors beyond national jurisdiction be a 'common heritage of mankind' to be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole, with preferential consideration to the needs of poor

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1. See, e.g., M.H. Nordquist and Choon-Ho Park (eds.), *Report of the United States Delegation to the Third United Nation Conference on the Law of the Sea*, (The Law of the Sea Institute, Univ. of Hawaii, Honolulu; *Occasional Paper No. 33*, 689 pp.) (1983) ; UNCLOS III, *O.R.*, vols. I – XV; *The Law of the Sea : United Nations Convention on the Law of the Sea (with Index and Final Act of UNCLOS III)* [1983, U.N., New York], pp. xx – xxiv (Introduction by Bernardo Zuleta); and the Final Act (*ibid.*, pp. 158 – 174); E.L. Evriviades, "The Third World's Approach to the Deep Seabed", (1982) 11 *Ocean Devel. & Int'l L.* 201 – 264; James K. Sebenius, *Negotiating the Law of the Sea*, (Harvard Univ. Press, 1984; 251 pp.; Harvard Economic Studies, vol. 154); Norma C. Araiza, *The Deep Seabed Mining Regime : The North – South Controversy from a Third World Perspective*, (LL.M. thesis, Harvard Law School, Spring 1983), pp. 4 – 66; E. Luard, *The Control of the Sea – Bed*, (1974); R.P. Anand, *Legal Regime of the Seabed and the Developing Countries*, (1976); Roderick Ogley, *Internationalizing the Seabed* (1984); Judith T. Kildow, *Deepsea Mining*, (The M.I.T. Press, 1980). Cf. Theodore G. Kronmiller, *The Lawfulness of Deep Seabed Mining*, vol. I (1980), chap. I.

2. John L. Mero, *The Mineral Resources of the Sea*, (Elsevier Pub. Co. 1965), chap. VI: "The Deep – Sea Floor", esp. p. 127 *et seq* ("Manganese Nodules"), chap. VII: "Ocean Mining Methods" and chap. VIII "Some Economic and Legal Aspects of Ocean Mining"; Alexandra Merle Post, *Deepsea Mining and the Law of the Sea*, (1983), chapters 1 – 5, and 7; Norma C. Araiza, *op. cit.*, pp. 4 – 12; R.D. Eckert, *The Enclosure of Ocean Resources*, (1979), pp. 214 – 237; J.E. Flipse, "Deep Seabed Mining Technology and Its Impact on the Law of the Sea", in *Proceedings of the 9th Annual Conference of the Law of the Sea Institute*, Univ. of Rhode Island, (1975), pp. 325 – 333; H.D. Drechsler, "Exploitation of the Sea : A Preliminary Cost – Benefit Analysis of Nodule Mining and Processing", (1973), *1 Maritime Studies & Management* 53 – 66.

3. UN/GA *OR.*, 22th Sess; Agenda Item No. 92; see also his Note Verbale (17 Aug. 1967); "Whose is the Bed of the Sea?" (1968), 62 *Proceedings of the Amer. Soc. Int'l L.* 216 at 225 – 226; *The Common Heritage*, (Selected Papers on Ocean and World Order 1967 – 1974), (1975), Int'l Oceanic Institute, Univ. of Malta, *Occasional Paper No. 3*, pp. 40 – 41. Cf. a similar view of John L. Mero, "A Legal Regime for Deep Seabed Mining", (1970), *7 San Diego L. Rev.* at 490.

countries. Although the common heritage concept was by no means novel,[4] it came to be discussed in an international forum for the first time in that year, setting into motion international reactions. On 15 December 1969, the U.N. General Assembly passed the "Moratorium resolution", declaring that, pending the establishment of the envisaged international regime, States and persons must refrain from all activities of exploitation of the resources of the seabed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction (the "deep seabed").[5] In the following year, a Declaration of Principles [General Assembly Resolution 2749 (XXV)] solemnly declared the deep seabed area to be the common heritage of mankind (CHM), not subject to appropriation by any means by States or persons, but to be open to use exclusively for peaceful purposes by all States without discrimination.[6]

In late 1973, UNCLOS III was convened, with the deep seabed mining issue as the pivot[7], culminating in the adoption of the Law of the Sea Convention on 30 April 1982 by the vote of 130 in favour, 4 against, with 14 abstentions.[8] When the Convention was open for signature on 10 December 1982,[9] 117 States together with the Cook Islands (a self-governing associated State) and the U.N. Council for Namibia signed it.[10] Notwithstanding, there are 35 ratifications to date, being 25 short of the

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4. It dated back to the 19th century, and was referred to by Prince Wan Waithayakorn of Thailand, President of UNCLOS I, in his opening speech of that Conference in 1958 *(U.N. Doc. A/Conf. 13/SR.1 (1958)*, [B. Zuleta, *ante*, note 1, at p.xx]; O'Connell, vol. I, p. 459 and accompanying notes; A.De Marffy and R-J. Dupuy, in R-J. Dupuy [ed. 1982], p. 188; B. Zuleta, *ibid.*, pp. 374-375.

5. General Assembly Resolution 2574-D (XXIV), *(UN/GA.O.R., U.N. Doc. A/7630* (1969), *reprinted* in *Y.B. of U.N.* (1969), pp. 69-70). It was passed by the vote 62:28:28, with most of the industrialized States, including the U.S.A., the U.K., the U.S.S.R., France Australia, Canada, Japan and Norway voting against it. The vote of the Southeast Asian States was as follows: Malaysia, Singapore and Thailand in favour, Burma, Indonesia, Laos and the Philippines abstaining; with Cambodia being absent.
See also T.C. Kronmiller, *op. cit.*, pp. 29-33; N.C. Araiza, *op. cit.*, pp. 19-22; O'Connell, vol. I, pp. 459-463.

6. It was adopted on 17 December 1970 by 108 votes to none, with 14 abstentions. [*UN/GA O.R.*, 25th Sess., *Resolutions, Suppl. No. 28 (A/8028)*, at pp. 24-25; *U.N. Doc. A/8028 (1971), reprinted* in *Y.B. of U.N.* (1970), pp. 78-79 and in (1970), 10 *I.L.M.* 230]. See also *UN/GA O.R.*, 25th Sess., Plenary Meetings, vol. III (A/PV. 1933), at p. 19 for the vote.
See also : E.L. Evriviades, *loc. cit.*, at 211; Araiza, *op. cit.*, pp. 22-27.
The wording of the Declaration clearly connotes the access by States rather than joint ownership by them as understood by some authors [e.g. L.F.E. Goldie, (1973) 7 *Int'l Lawyer* 796 at 820].
See : A. Pardo and C.Q. Christol, *infra*, note 63, at pp. 657-659.

7. Araiza, *op. cit.*, p. 28 *et sequel;* Evriviades, *loc. cit.*, at 213-214; A.M. Post, *op. cit.*, chapters 8-12; Kronmiller, *op., cit.*, pp. 53-93.

8. Israel, Turkey, Venezuela and the U.S.A. were the four States voting against it. Only the U.S.A. did so on the ground of its dissatisfaction with the deep seabed mining regime as embodied in the Convention. (U.N. Dept. of Public Information, Press Section, *Background Release SEA/498*, 3 Dec. 1982: "Law of the Sea Convention to be Signed in Jamaica at Final Session of Conference, 6-10 Dec.", pp. 6-7, *reprinted* in Nordquist and Park (eds.), *ante*, note 1, p. 599).

9. The 1982 Law of the Sea Convention, Article 305(2).

10. *The Times* (London), 12 Dec. 1984, p. 6.

requisite 60 ratifications for the Convention to enter into force.[11]

The 1982 Convention reaffirms that the deep seabed and all its resources are the CHM to be regulated by the International Seabed Authority (the "Authority") set up thereunder.[12] The Conference also adopted additional resolutions. Resolution I establishes the Preparatory Commission to make arrangements enabling the Authority (and the International Tribunal for the Law of the Sea) to be set up and operate. The Preparatory Commission is also entrusted to carry out functions under Resolution II, which governs preparatory investment in pioneer activities prior to the entry into operation of the Authority.[13]

A later study reveals that the deep seabed ferro-manganese nodules and crusts, which are the principal minerals of great economic potential, are mostly concentrated in a few areas of the Pacific Ocean, particularly the Northwest Pacific. The other seabed areas appear to have no sufficiently promising mineral concentrations to justify as mining sites.[14] A published estimate for development costs of one integrated deep

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11. The Convention will enter into force 12 months after the date of the 60th instrument of ratification or accession. (The 1982 Convention, Article 308).
Fiji was the first to ratify the Convention, and on the very day it was open to signatures. The other ratifying States are mostly in Africa or the Caribbean, with the Philippines, the 11th ratifier, as the first Southeast Asian State to have ratified the Convention. On 3 February 1986, Indonesia became the second Southeast Asian State which ratified the Convention, and the 25th State to have done so.

12. The 1982 Convention, preamble and Part XI.
For a trenchant comment on these provisions see: Arvid Pardo, "A New Order for the Oceans", *South* (Magazine), May 1984, pp. 73 – 74.

13. See: Peter Brueker, "Preparatory Investment under the Convention and the PIP Resolution", in Albert W. Koers and Bernard H. Oxman (eds.), *The 1982 Convention on the Law of the Sea* [1984] 17 *L. Sea Inst. Proc.* 181 at 183 – 186, for the legal effect of Resolution II.
See also : E.D. Brown, "Seabed Mining From UNCLOS III to PrepCom.", (1984) 8 *Marine Policy* 151 at 158 – 162; Lee Kimball, "Conference Report: Preparatory Commission: The Long Road to Success", (1984) *ibid.* 363 at 363 – 364. Also : Sally Meese, "Law of the Sea and 'Other Minerals' ", (1983) 7 *Marine Policy* 123 – 124, for the relationship between the Preparatory Commission and the issue of the deep seabed minerals other than nodules.
It may be noted, however, that only 1 – 5% of the world's off – shore oil and gas is estimated to lie beyond 200 n.m. from the coasts. [Ann L. Hollick, *United States Foreign Policy and the Law of the Sea*, (1981), p. 385]. See also : M.L. Pirapongse Kasemsri, *Ramkhamheng Symposium 1977*, p. 39.

14. Peter Halbach, "Deep – Sea Metallic Deposits", (1984) *9 Ocean Management* 35 – 60. Cf. also some earlier estimates : *Seabed Mineral Series*, vol. I: "Assessment of Manganese Nodule Resources : The Data and the Methodologies", (1982), (Crane, Russak & Co.Inc., N.Y., in co – operation with the U.N.); John M. Murphy, "Deep Ocean Mining : Beginning of a New Ear", (1975 – 76) 8 *Case Western Reserve L. Rev.* at 47; M.A. Dubs, "Industry's Assessment of the Hard Mineral Situation", in U.S. Congress, Senate Committee on Commerce, *The Oceans and National Economic Development*, 93rd Congress, 1st sess., 1973, pp. 60 – 67; K.O. Emery and B.J. Skinner, "Mineral Deposits of the Deep Ocean Floor", (1977) 1 *Marine Mining* 1 – 71; J.Z. Fraser, "Manganese Nodule Reserves: An Updated Estimate", (1977) *ibid.* 103 – 123; Carl Q. Christol, "An International Seabed Authority", in Don Walsh (ed.), *The Law of the Sea Issues in Ocean Resource Management* (1977), p. 172 at pp. 185, 187; James B. Marsh, "A Model of Deepsea Mining", [1983] 14 *L. Sea Inst. Proc.* 210 at 236; V.E. McKelvey and Frank F.H. Wang, *World Subsea Mineral Resources* : A Discussion To Accompany Miscellaneous Geologic Investigations, Map I.– 632, and pp. 11 – 13 (Manganese – Oxide Nodules), by Dept. of the Interior, U.S. Geological Survey.
For the economic feasibility of a mine site see: William C. Brewer, Jr., "The Prospect for Deep Seabed Mining in a Divided World", (1985) 14 *Ocean Devel. & Int'l L.* 363 at 365 – 366; Eckert, *op. cit.*, pp. 230 – 231; J.B. Marsh, *loc. cit.*, at 210 *et sequel;* Eoin H. Macdonald, in Chia and MacAndrews (eds.), *Southeast Asian Seas : Frontiers for Development* (1981), p. 51 at pp. 68 – 69.

seabed-mining project in the early 1980's put the overall costs at between US$ 250 and 970 million.[15] Nonetheless, there is a widely held belief that the nodules will be produced in enough quantities to satisfy all demands. Their value has been estimated to be in the vicinity of US$ 3 trillion, hence being worth the exploitation.[16] At present, only seven major international consortia, together with the U.S.S.R., India and China have been engaged in the development of deep seabed nodules.[17] To regulate the deep seabed mining under the Convention, the Authority will need staggeringly high administrative costs of approximately US$ 600 million.[18]

(B) The Stakes of, and Potential Effects on, the Southeast Asian States : A case study of a group of Third World States

There exist no known nodule deposits in the Southeast Asian seas[19] although there are indications that manganese nodules are to be found on the Indonesian island

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15. U.N. Secretary General, "Report on the Potential Financial Implications for States Parties to the Future Convention on the Law of the Sea", [*Doc. A/CONF. 62/L. 65* (18 Feb. 1981)], UNCLOS III, *O.R.*, vol. XV, pp. 118 – 119.
Cf. J.D. Nyhart and M.T. Ilou, "Ocean Transportation Considerations in Deep Ocean Mining : Cost Analysis from the M.I.T. Deep Ocean Mining Model [in *A Pioneer Deep Ocean Mining Venture*, M.I.T. Sea Grant Program, MITSG 83 – 14 July 1981]", [1984] 17 *L. Sea Inst. Proc.* 371 at 381 – 412; Denis Tytgat, "Aspects économiques, financiers et techniques de l'exploitation des ressources des grands fonds marins", (1983) 39 *Annuaire suisse de droit international* 133 at 138 – 139: Eckert, *op. cit.*, p. 236; *Seabed Mineral Series, vol. 6 :* "Financial Analysis of a Manganese Nodule Mining Venture : A Balance Sheet", (1983-84). An unofficial estimate in the PrepCom of the overall costs in 1988 was around U.S.$ 2,000-2,500 million per project.

16. J.M. Murphy, *ante*, note 14; and cf. Nina W. Cornell, "Manganese Nodule Mining and Economic Rent", (1974) 14 *Natural Resources J.* 519 at 524 – 529; Tytgat, *loc. cit.*, at 143; M.A. Dubs, (1983) 46 *L. & Contemporary Problems* at 81 – 82.

17. Dept. of Int'l Eco. and Soc. Affairs, U.N. : *Sea – Bed Mineral Resource Development : Recent Activities of the International Consortia*, (1980), *U.N. Doc. ST/ESA/107*, p. 5 *et sequel; ibid., Sea – Bed Mineral Resource Development* (1982), *Doc. ST/ESA/107/Add.1*, pp. 3 – 11. The nationalities of the consortia are the U.S., the U.K., Canadian, Japanese, Belgian, Italian, and West German. In 1987, the Eastern Socialist States together with Cuba and Vietnam formed a consortium, Interoceanmetal, with a view to applying for registration for deep seabed mining in the future.
See also *Seabed Mineral Series, vol. 9 :* "Review of Activities of International Consortia and Other Public and Private Entities", (1984).

18. U.N. Secretary General's Report, *ante*, note 15, at pp. 113 – 114. At UNCLOS III, the scale of assessment for the apportionment of the expenses of the U.N. was used to illustrate the potential financial contributions by States Parties to the forthcoming Law of the Sea Convention. (UNCLOS III, *O.R.*, vol. XV, pp. 116 – 117). It has been pointed out, however, that not all States participating in UNCLOS III will be likely to become parties to the Convention. Hence, the U.N. scale of contributions may not be applicable. (E.L. Evriviades, *loc. cit.*, at 229).

19. *Per* Arturo Tolentino, *The Bangkok Symposium – Dec. 1981*, p. 185; E.H. Macdonald, *ante*, note 14; U.N. Economic Commission for Asia and the Far East (ECAFE), "Polymetallic Nodules on the Ocean Floor", in *Report of the 9th Session of CCOP* [1973], *Doc. E/CN. 11/L. 348* (for a general account of the topic); *Rep. of the 10th Sess. of CCOP* (1973), *Doc. E/CN. 11/L. 383*, pp. 186 – 187. Nevertheless, the COOP has been continuing to monitor prospecting and exploitation of manganese nodules and marine phosphorite and keeping Member States informed of relevant developments, (*per* A. Johannas of UNDP/CCOP, *The Bangkok Symposium – Dec. 1981*, p.99).

of Timor.[20] Nevertheless, deep seabed mining is of interest to the Southeast Asian States in at least four respects. Firstly, ocean mining production is likely to affect the land-based production of manganese, copper and nickel in some of these States. Secondly, the revenue arising from the deep seabed mining under the 1982 Convention will accrue to these States which include one land-locked and one geographically disadvantaged State. Thirdly, some of these States or regional organizations might be interested in exploiting the deep seabed minerals themselves. Finally, the new pattern of evolution of international law towards international equity may be of long-term benefits to these States which, with the sole exception of Thailand, used to be under foreign colonialism and exploitation.

Third World land-based resources, such as copper and nickel, have been made available to fulfil the growing mineral demand of the industrialized world. However, the higher ore grades and lower labour costs associated with Third World conditions, coupled with the virtual monopoly by a handful of giant multinational corporations, have engendered lower production costs incurred by, and above average profits accruing to, these corporations at the detriment of the host States.[21] The economic question perceived by deep seabed mining consortia is one of the cost competitiveness of seabed minerals as compared to their land-based counterparts.[22] Hence, seabed mining production, restrained only by market forces, would be likely to swamp land-based output and depress prices significantly.[23] Price stabilization and/or compensation arrangements were, therefore, demanded by land-based producers.[24] These proposed

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20. Molengraaff, (1922) 23 *Proc. Acad. Sci. Amst.* at 997; M.G. Audley – Charles, "Cretaceous Deep – Sea Manganese Nodules on Timor : Implications for Tectonics and Olistostrome Development", *Nature Physical Science*, vol. 240 (Dec. 11, 1972), p. 137; Anonymous, "Manganese Nodules in Indonesia", *Nature*, No. 240 (8 Dec. 1972), p. 328. It has led to some speculation that manganese nodules may be found in the deeper portions of the South China, Sulu and Celebes Seas. [See : Lewis M. Alexander, *Marine Regionalism in the Southeast Asian Seas*, (Research Report No. 11, July, 1982, East – West Environment and Policy Institute, Honolulu, Hawaii), p.22].

21. See : Michael Tanzer, *The Race for Resources : Continuing Struggles over Minerals and Fuels* (1980), pp. 22 – 25, 42, 44, 46 – 47, 124 – 133 and 153 – 165.

22. Marne A. Dubs, *ante*, note 16.

23. J.B. Marsh, *ante*, note 14, p.212; Jon Van Dyke and C. Yuen, " 'Common Heritage' v. 'Freedom of the High Seas' : Which Governs the Seabed?", (1982) 19 *San Diego L. Rev.* 493 at 531 – 532; U.N. Secretary General, "Report on the Economic Implications of Sea – Bed Mining in the International Area", *U.N. Doc. A/CONF. 62/37* (18 Feb. 1975), UNCLOS III, *O.R.*, vol. IV, pp. 121 – 128, esp. at p. 123, Figure 1.

24. See, e.g., Tanzania's Draft Statute for an International Seabed Authority, *U.N. Doc. A/AC. 138/33* (24 March 1971), Article 35; the Lusaka Statement on the Seabed by Non – Aligned Countries, 10 Sept. 1970 *(NAC/CONF. 3/RES. 11)*, para. 5; UNCLOS III, *O.R.*, vol. II, pp.27 – 30 (*per* Mr. Arsenis of UNCTAD); *ibid.*, p.46 (*per* Mr. Stavropoulos, Special Representative of the U.N. Secretary General); U.N. Secretary General's Report, *ante*, note 23, at p. 126 (Figure 3); Note by the Chairman of the First Committee, *Doc. A/CONF. 62/C. 1/L. 2*, 26 July 1974, UNCLOS III, *O.R.*, vol. III, pp. 151 – 157; *ibid.*, vol. II, p. 61 (*per* Mr. Thomas of Trinidad and Tobago).
Cf. Giulio Pontecorvo, "Reflections on the Economic of the Common Heritage of Mankind : The Organization of the Deep – Sea Mining Industry and the Expected Benefits from Resource Exploitation", (1974) 2 *Ocean Devel. & Int'l L.* 203 at 213 – 216; Tommy T.B. Koh, "The International Seabed and [UNCLOS III]: Some New International Economic Order Issues", in Kamal Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980), p. 160 at pp. 160 – 161.

arrangements are not novel. They have been used, for instance, by the U.S.A.,[25] UNCTAD[26] and the E.E.C.[27]

According to the U.N., the potential impact of deep seabed mining on the market for cobalt, nickel and manganese could be significant, while the impact on the copper market should be minimal due to the relatively dispersed production of the world's land-based copper.[28] The Philippines would be substantially affected by the deep sea production of copper, and would also be affected to some degree by the deep sea production of manganese and nickel. Indonesia would be substantially affected by the deep sea production of nickel.[29] This is despite the fact that land-based production of these metals in the two States accounts for a relatively modest percentage of the overall world production of the metals in question.[30]

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25. See, e.g., the U.S. adjustment assistance programme, designed to provide assistance to firms, communities and workers who have been adversely affected by import competition. See : the *Trade Acts* of 1962, 1974 and 1979.
The Trade Act of 1974 applies to all import – induced injuries, and the burden of proof has been eased. (Public Law 93 – 618, approved Jan. 3, 1975, 19 *U.S.C.* §§ 2101 – 2487, 88 Stat. 1978).

26. See UNCTAD's various commodities arrangements. See also its Integrated Commodities Programme, aiming at comprehensive handling of commodities problems based on common standards, objectives and techniques; namely, a multi – commodity international buffer stock of at least 18 commodities to be financed by a 'Common Fund'. The idea was part of the Manila Declaration and Programme of Action of the Group of 77 propounded at the 4th Session of UNCTAD in 1976. [(1976) 15 *I.L.M.* 421].

27. The E.E.C. and African together with Asian States worked out a scheme for export earning stabilization (STABEX) at the Lomé Convention. It calls for non – discriminatory grants and loans to countries that suffer a given percentage shortfall of export earnings (from trend) of certain designated commodities. The consumer States benefit from STABEX by providing an incentive for these exporting States to continue production for export.
See also : A.M. Post, *op. cit.*, pp. 202 – 207; John Ravenhill, "What is to be done for Third World commodity exporters? : An Evaluation of STABEX Scheme", (1984) 38(3) *Int'l Org.* 537 at 541, 558 *et sequel*, esp. at 572 – 574.

28. Dept. of Int'l Eco. and Soc. Affairs, U.N. (1980), *ante*, note 17, at pp. 3 – 4.
However, copper is the most valuable non – ferrous metal; while nickel is the second most important ferrous metal. (M. Tanzer, *op. cit.*, pp. 18, 153).

29. Chile, "Working Paper on the economic implications for the developing countries of the exploration of the sea – bed beyond the limits of national jurisdiction", *Doc. A/CONF. 62/C. 1/LL. 11* (26 Aug. 1974), UNCLOS III, *O.R.*, vol. III, p. 177 at pp. 178 – 179, 180 – 181. Between 1977 and 1981, Indonesia's annual production of nickel ore rose from 1.3 million metric tons to 1.55 million metric tons; while its copper concentrate and manganese ore production remained static at 190,000 metric tons and 6,000 metric tons respectively. [*Statistical Yearbook of Indonesia : 1982*, (Central Bureau of Statistics, Indonesia, Feb. 1983), Table VI.3.I, p. 340. For export of copper by country of destination see : *ibid.*, Table VII.2.21, p.405]. Indonesia is a member of the Intergovernmental Council of Copper Exporting Countries (CIPEC).
The mineral ore reserves of the Philippines in 1980 and 1981 were as follows :

Year	1980	1981 (in '000 tonnes)
Total	33,601,130	34,650,919
Metallic	9,592,459	10,248,615
Copper	4,313,253	4,333,813
Manganese	7,535	7,535
Nickel	1,708,854	1,751,007

(*1983 Philippine Statistical Yearbook*, National Eco. and Development Authority, Manila, June 1983, Table 4.12, at p.277).

30. Cf. Dept. of Int'l Eco. and Social Affairs, U.N., *ante*, note 28; U.S.A., "Working Paper on the Economic Effects of Deep Sea – Bed Exploitation", *Doc. A/CONF. 62/C. 1/L.5* (8 Aug. 1974), UNCLOS III, *O.R.*, vol. III, pp. 165 – 167; Mario C. Manansala, "The International Seabed in the Law of the Sea : Some Views from Developing Countries", [1983] 14 *L. Sea Inst. Proc.* 150 at 156 – 160; The Times, *Concise Atlas of the World* (1980), p.16.

Manganese ore of metallurgical grade is also mined in Thailand.[31] The first copper project was completed by Burma in 1983, with the estimated ore reserves of 117 million tons and the projected annual production of 2.4 million tons of ore and approximately 60,000 tons of refined copper. The project was estimated to be worth 800 million Kyat.[32] Malaysia is a potential producer of copper.[33] Indonesia also has nickel and copper development plan in its Fourth Five-Year Development Plan of 1984/85-1988/89.[34]

One view alleges that limiting production from the deep seabed resulting in high prices of raw materials would harm the consumers who would be deprived of low-priced finished products, and that those in the developing countries would be affected the most.[35] To this 'consumer' argument, the U.N. Secretary General poignantly riposted:

> However, savings from lower prices of raw materials, which do not represent a large proportion of costs, tend to be absorbed by manufacturers in the form of higher profits or wages, and are seldom passed on in the form of lower prices to consumers. Moreover, the minerals in point are not important inputs into wage goods — major items of consumer expenditure — for which declines in prices would have important real income effects.[36]

Further, the developing countries produce far more of these metals than they consume. This is particularly the case of nickel and cobalt which are used in high technology. Most land-based production of nickel is also likely to expand in these countries.[37] Reduction or even fluctuations in prices of such metals have caused

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31. The production rose from 20,497 metric tons in 1975 to 72,137 metric tons two years later. In 1980, the production stood at 51,583 metric tons. [*Statistical Yearbook : Thailand*, No. 32 (1976 – 1980), National Statistical Office, Thailand, Table 120 at p.295]. However, it plunged to 1,906 metric tons, 2,577 metric tons and 3 metric tons in 1983, 1984 and 1985 (up to August), respectively. None of the production has been exported. [*Mineral Resources Gazette* (by the Dept. of Mineral Resources, Ministry of Industry), vol. 30, No. 7, Aug. 1985, p.68.]

32. *Southeast Asian Affairs 1984*, p.105.

33. UNCLOS III, *O.R.*, vol. XIV, p.78, para. 44 (*per* Mr. Yatim of Malaysia).

34. *Indonesia Develops : REPELITA IV : 4th Five – Year Development Plan 1984/85 – 1988/89*, (Dept. of Information, Rep. of Indonesia), p.64 and cf. p.22 (development budget for the mining sector accounts for 2,497.1 billion Rp. during this Plan).

35. See, e.g., U.S.A. Working Paper, *ante*, note 30, at pp.165 – 169; Per Magnus Wijkman, "UNCLOS and the Redistribution of Ocean Wealth", (1982) 16 *J. World Trade L.* 27 at 40 – 41.
This concern was also raised by the representative of Singapore to UNCLOS III. (UNCLOS III, *O.R.*, vol. II, p.48, para, 42; *per* Mr. Chao).

36. U.N. Secretary General's Report, *ante*, note 23, at p.124. Indeed, with the exception of Cuba, Third World producers of nickel, including the Philippines and Indonesia, are dominated by multinational corporations whose interests are not necessarily conducive to those of the host States. (*South*, March 1985, p.76. See also : M. Tanzer, *ante*, note 21, at pp.243, 247 – 250).

37. Van Dyke and Yuen, *ante*, note 23. Cf. Tytgat, *ante*, note 15, at 143.

devastating effects on land-based producers and their employees.[38]

The 1982 Law of the Sea Convention incorporates production policies to, *inter alia*, stabilize the prices of land-based commodities involved. Deep seabed nodule production ceilings together with a system of compensation or other measures of economic adjustment assistance are to be utilized to assist the adversely affected developing countries.[39] Since nickel is considered to be the mainstay of the deepsea nodule industry, it serves as the basis to set production ceilings for the seabed nodules.[40]

The Philippines made it plain that it was not satisfied with these policies which it considered inadequate. However, it had to yield in face of the consensus rule of the Conference.[41] With regard to Malaysia and Thailand, they seem to consider the system under the 1982 Convention more satisfactory than the buffer stock and the common Fund for commodities as propounded by UNCTAD.[42] In any case, the Preparatory Commission has been working to formulate the criteria which would placate all potential adversely affected developing land-based producers.[43]

All Southeast Asian States, be they land-based producers or consumers of the metals concerned, stand to gain from "the equitable sharing of financial and other economic benefits derived from activities" in the deep seabed on a non-discriminatory

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38. See, e.g., the effect of a recession on the Philippine producers. Marinduque, a producer of nickel metal and sulphides with copper concentrates with gold and cobalt as by-products, was 10.5 billion pesos in debt in 1983. The Philippine Government had the biggest loan exposure to the company, and was trying to keep it afloat. None of the mines closed down during the 1981 recession has been reopened. (*FEER*, 1 Sept. 1983, pp.101-102).
In 1981, the Philippines' export earnings from commodities accounted for 75% of its total export earnings, as compared to Malaysia's 71%. [Overseas Development Institute (ODI), *Briefing Paper No. 1*, July 1982, p.1, as quoted in J. Ravenhill, *ante*, note 27, at 537]. Indonesia has to temporarily postpone the existing land explorations for nicked due to the decline in the price of nickel and the large amount of capital investments involved. [*Indonesia Develops : Repelita IV, ante*, note 34, p.64].

39. The 1982 Convention, Article 151.
See further : U.N. Secretary General, "Report on the Effects of the Production Limitation Formula Under Certain Specified Assumptions", *Doc. A/CONF.62/L.66* of 24 Feb. 1981, UNCLOS III, *O.R.*, vol. XV, pp.119-145, esp. at pp.132-145; Tytgat, *ante*, note 15, at 151; A.M. Post, *op. cit.*, pp.199-200, 207.

40. U.N. Secretary General, "Report on the Economic Implications of Sea-Bed Mineral Development in the International Area", *Doc. A/CONF.62/25* of 22 May 1974, UNCLOS III, *O.R.*, vol. III, pp.4-40.

41. The dissatisfaction centred around the 3% floor [Article 151(4) (ii) of the 1982 Convention] which was considered by the Philippines as too high. (UNCLOS III, *O.R.*, vol. IX, p.37, para. 70; *ibid.*, vol. XIV, p.98, para. 99 and p.59, para. 117, *per* Mr. Santos of the Philippines).
Malaysia shared the same view. (*Ibid.*, vol. XIV, p.78, para. 44, *per* Mr. Yatim of Malaysia).
Despite any misgiving, on 8 May 1984, the Philippines became the 10th State to ratify the 1982 Convention.

42. Both Thailand and Malaysia support the idea that contribution to the buffer stock should come from both the producer and consumer States through equal contributions or the financial resources from the U.N. The Common Fund agreement was to finance the buffer stock and was initially planned to become operative on 31 March 1982. Malaysia had not ratified the agreement by that date, whereas Thailand had not even signed it. See : Emiko Atimono, *Law and Diplomacy in Commodity Economics* [1981], pp.152-153, 220-221; J. Ravenhill, *ante*, note 27, at 538.
For the allocation of votes in the Common Fund see Schedule D of UNCTAD's *Agreement Establishing The Common Fund for Commodities*, adopted on 27 June 1980, and open for signature on 1 Oct. 1980.

43. The issue is under Special Commission One (SC.1) of the Preparatory Commission. It is chaired by Ambassador Hasjim Djalal of Indonesia. See : Lee Kimball, "Conference Report : short-term dilemmas and long-term prospects at PrepCom.", (1985) 9 *Marine Policy* 73 at 75.

basis, in accordance with the criteria to be formulated by the Authority.[44] This is encouraging in view of the fact that the known resources within the national jurisdiction are increasingly depleted.[45]

Moreover, there is a prospect of the deep seabed mining technology being transferred by or through the Authority to developing States.[46] With the assistance of regional organizations like ESCAP and the CCOP,[47] and the investment capacity of relatively wealthy States like Brunei and Singapore, the possibility of a Southeast Asian State becoming a licensed operator of deep seabed mining under the 1982 Convention cannot be ruled out.[48]

Above all, by supporting the principle of the CHM, the establishment of the Authority and the provisions of the 1982 Convention,[49] the Southeast Asian States are on course to advance the New International Economic Order based on equity and justice through the evolutionary international law. If the deep seabed mining provisions are successfully implemented, the international economic relations and, more indirectly, the process of development of international law, will never be the same again. To the legal regime of deep seabed mining we now turn.

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44. The 1982 Law of the Sea Convention, Articles 140 and 160(2) (f) (i). See also M.L. Pirapongse Kasemsri, *Ramkhamheng Symposium 1977*, p.52; UNCLOS III, *O.R.*, vol. I, p.127, para. 3 (*per* Mr. Suryadhay of Laos).

45. This is because non – living resources are exhaustible.

46. The 1982 Convention, Article 144. This provision largely echoes the draft articles on the development and transfer of technology submitted by the Rep. of Vietnam and 28 other developing States on 22 Aug. 1974 [*Doc. A/CONF.62/C. 3/L.12*, Article 4(2) (a); UNCLOS III, *O.R.*, vol. III, p.253].

47. Cf. Shah A.M.S. Kibria, Executive Secretary of UN/ESCAP, *The Bangkok Symposium – Dec. 1981*, pp.15 – 16.

48. See also *FEER*, 29 March 1984, pp.71 – 72 : "Treasures of the East : the focus of international interest in a potential deep – sea minerals bonanza is rapidly shifting to Asia".

49. See : UNCLOS III, *O.R.*, vol. II, pp.22 – 26, 38 (*per* M.L. Pirapongse Kasemsri of Thailand; Mr. Soriano of the Philippines, Mr. U Myo Htun Lynn of Burma, and Miss Nguyen Thi Ngoc Lan of the Rep. of Vietnam).
All Southeast Asian States are members of the Group of 77, a major driving force from the developing States in international economic fora.
Cf. also M.L. Kasemsri, *ante*, note 44, pp.52 – 54, 55, 67.

III THE LAW GOVERNING DEEP SEABED MINING

(A) THEORY : The Common Heritage of Mankind

(i) 'Law' or 'Politics'?

The concept of the Common Heritage of Mankind (CHM) which underpins the deep seabed mining regime under the 1982 Law of Sea Convention was enunciated by André Bello in 1882, A.G. de Lapradelle in 1898[50] and was subsequently, though rather sporadically, revived in the course of the present century.[51] Prior to the final conclusion of UNCLOS III, the exact meaning of the CHM was a controversial moot point.[52] It was regarded by the positivists as containing mere political or moral persuasion/aspiration, but without any elaborated or precise legal content.[53] On the other hand, there was no shortage of jurists who endeavoured to draw analogies from the Roman, domestic and conventional law to give the legal content to the CHM through "the generally recognized principles of law of civilized nations".[54] Even if the latter was correct, opinions diverged as to how to implement the concept in the technologically advanced era.[55]

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50. André Bello, *Principios de Derecho Internacional* (1882), p.35; A.G. de Lapradelle, "Le droit de l'état sur la mer territoriale", (1898) 5 *R.G.D.I.P.* at 283, 309 – 347 [cited by Bernardo Zuleta, "The Law of the Sea After Montego Bay", (1983) 20 *San Diego L. Rev.* 475 at 481. According to Zuleta, most European jurists opposed this concept because it was not in the interest of the maritime power]; and also A.G. de Lapradelle, in *the Report of the 44th Conference of the Int'l L. Assoc.* (Copenhagen, 1950), p.91.

51. See *ante*, note 4.

52. After an extensive survey, Alexandre – Charles Kiss concludes that the CHM is «la matérialisation de l'intérêt commun de l'humanité dans des espaces, biens et êtres vivants determinés. Il constitute l'aboutissement d'une solidarité de plus en plus fréquente entre tous les Etats du monde, par ailleurs jaloux de leur souveraineté». A – C. Kiss, "La Notion de Patrimoine Commun de l'Humanité", (1982 – II) 175 *Hague Recueil* 99 at 243.
See also : R – J, Dupuy [ed. 1982], pp.4 – 5 (*per* Manfred Lachs), pp.61 – 62. (*per* Shigeru Oda), pp.182 – 184 (*per* M. Bennouna, R – J. Dupuy, A.El – Erian, R. Herra Caceres and F. Abi – Saab), pp.185 – 188 (*per* O. Schachter, Arvid Pardo, R – J. Dupuy and A. de Marffy), p.375 (*per* B. Zuleta) and p.430 (*per* R – J. Dupuy).

53. See, e.g., Timothy Baland, (1973) 7 *Cornell J. Int'l L.* 72 at 76; Stephen Gorove, "The Concept of 'Common Heritage of Mankind' : A Political, Moral or Legal Innovation", (1972), 9 *San Diego L. Rev.* 390; T.G. Kronmiller, *op. cit.*, p.49; L.F.E. Goldie, "A General International Law Doctrine for Seabed Regimes", (1973) 7 *Int'l Lawyer* 796 at 819; Brad Shingleton, "UNCLOS III and the Struggle for Law : The Elusive Customary Law of Seabed Mining", (1983) 13 *Ocean Devel. & Int'l L.* 33 at 52 – 54.
Cf. R.P. Anand, *ante*, note 1, pp.205 – 212, esp. at p.211.

54. E.g., A – C. Kiss, *loc. cit.*; R.P. Arnold, "The Common Heritage of Mankind as a Legal Concept", (1975) 9 *Int'l Lawyer* 153 – 158; A.M. Post, *op. cit.*, pp.88 – 94, 95 – 103; *U.N. Doc. A/AC.1318/S.C.1/SR.15*, at 51 (1969), and *ibid.*, *SR.14*, at 25 – 28 [C.C. Joyner, "Towards a Legal Regime for the International Seabed : The Soviet Union's Evolving Perspective", (1975) 15 *Va. J. Int'l L.* 871 at 875, 878 – 879]; A. El – Erian, *ante*, note 52; Maarten Bos, "La Liberté de la Haute Mer : Quelques Problèmes d'Actualité", (1965) 12 *Netherlands Int'l L. Rev.* 337 at 338 – 343, esp. at 341.
Cf. Article 38(1) (c) of the Statute of the International Court of Justice : the Court shall apply, *inter alia*, 'the general principles of law recognized by civilized nations' to decide disputes in accordance with international law.

55. Cf. e.g., D.W. Bowett, "Deep Sea – Bed Resources : A Major Challenge", [1972B] 31 *Cam. L.J.* 50 at 57; G. Goddard, "The Land Under the Sea", (1957) 6 *Indian Y.B. Int'l Affairs* 81 at 102 – 103; Kronmiller, *op. cit.*, pp.1,298; B. Shingleton, *ante*, note 53, at 37, 52 – 54; UNCLOS III, *O.R.*, vol. IX, pp.103 – 108.

Part XI of the 1982 Convention has stipulated the precise legal content and consequences of the CHM concept, and it will at least bind the States Parties to the Convention.[56] However, those opposing this conventional regime may strive to devalue the force of the CHM principle by disparaging it as having a mere moral or political, but not legal, force, and by suggesting that the establishment of the Authority to achieve the CHM principle is superfluous. Thus, these opponents may resort to a traditional legal regime, such as the freedom of the seas, as the alternative,[56a] in virtual disregard of the consequences envisaged by the CHM as emanating from UNCLOS III.[57] In other words, by tarnishing a principle or concept as 'political' or merely 'moral', these opponents of the 1982 Convention consider themselves free to operate deep seabed mining under what *they* recognize as the extant 'legal' regime. Is this line of argument valid or convincing?

According to Brierly, if international law were based upon international morality only, how could we distinguish those admittedly moral standards which we apply in forming our judgments on the conduct of States from those which have legal force?[58] However, while morality is not law, legal rules do reflect moral or political considerations. 'National interest' and moral ideas are shaped into law through the process of legal decision-making and formulation.[59] In the case of customary law, the notion that governments' act follows legal conviction *(opinio juris)*, hence, giving assent or acquies-

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56. Cf. R-J. Dupuy, "The Notion of Common Heritage of Mankind Applied to the Seabed", in C.L. Rozakis and C.A. Stephanou (eds.), *The New Law of the Sea* [1983], pp.199-208.

56a. Julio Faundez, in K. Hossain (ed.), *ante*, note 24, p.174 at p.178; and cf. R.W.M. Dias, "Law at the end of its tether", [1972B] 31 *Cam. L.J.* 293 at 317.

57. See, e.g., the self-congratulatory statement of John M. Murphy, Chairman of the U.S. House of Representative's Committee on Merchant Marine and Fisheries, and John B. Breaux, Chairman of the Oceanography Sub-Committee of the said House, in their foreword to T.G. Kronmiller's book *(op. cit.)*.
Both Congressmen are ardent opponents of the internationalization of the deep seabed resources. Kronmiller's thesis, submitting that the freedom of the sea should prevail in the absence of the universally agreed law of the sea treaty on deep seabed mining, was "relied to a very great degree" in framing the U.S. legislation to unilaterally authorize deep seabed development by U.S. nationals. According to Murphy and Breaux, Kronmiller's book "is, by far, the most exhaustive and sophisticated analysis to emerge to date on the subject...It is an *objective*, academic approach to a highly politicalized, but fundamentally legal issue...". In another paragraph, they add that this book "will be attacked, there is no doubt of that. These challenges will be, by and large, *political in nature, although they may be couched in legal terms*". However, in between these two paragraphs, the two U.S. Congressmen forcefully emphasize : "...It is time for the U.S. to secure for itself the capability to develop this source of supply of the vital metals,... which is *free of foreign political constraints...*" (Kronmiller, *op. cit.*, pp.xvii-xviii, emphasis added).
The present author shares the criticisms of Patricia W. Birnie's as regards Kronmiller's work and reasoning. Birnie considers the book as "already out of date" by 1980 (it was completed in Jan. 1979), distorting the legal significance of the debates in the Seabed and UNCLOS III committees, not original and, above all, biased. [P.W. Birnie, "Book Review : 'The Lawfulness of Deep Seabed Mining' by Theodore G. Kronmiller", (1980) 6 *Ocean Management* 321-323].

58. J.L. Brierly, *The Law of Nations* (6th ed., Waldock, 1963), pp.70-71.

59. See, e.g., Laurence Juda, *Ocean Space Rights : Developing United States Policy* (1975), pp.5-7
According to Dias, "...the total separation of law from values can have a baneful effect, since a purely formal concept, indifferent to the conditions essential to social and legal continuity is quite inadequate to cope with the problems that arise...". (*Ante*, note 56a, at 318).
See also Chayes, Ehrlich and Lowenfeld, *International Legal Process*, vol. I (1968), pp.xii-xv.

cence to a legal rule, without any motive of power and gain,[60] is incapable of bearing scrutiny. Even in this case, "the issue of what in fact happens can never be kept clearly separate from the question of what ought to be done. There is a point at which deviations from the rule remake the rule itself" [61] More specifically, the methodology of the doctrine of *opinio juris* "has now collapsed with the doctrine that prompted it. Governments in the matter of the Law of the Sea no longer act by reference to what they think the law is: they set out deliberately to break with the traditional rules in order to bring about the changes which they seek".[62]

In his Individual Opinion in the *Anglo-Norwegian Fisheries Case,* Judge Alvarez stated that the law suitable for the present era of interdependence of States is the international law of social interdependence. Among its many characteristics,

> [i]t is not exclusively juridical; it has also aspects which are political, economic, social, psychological, etc. It follows that the traditional distinction between *legal* and *political* questions, and between the domain of law and the domain of politics is considerably modified at the present time.
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This is certainly the case of the modern law of the sea.[64] The process of recon-

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60. See, e.g., Brierly, *op. cit.*, pp.71 – 76; and Brierly, *The Outlook for International Law* (1944), p.5 : "The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under obligation to observe it...".

61. Roberto Mangabeira Unger, *Law in Modern Society* (1976), p.49, and also pp.49 – 52.

62. O'Connell, vol. I, p.ix, citing instance of the phenomenon of the 200 n.m. Exclusive Economic Zone and UNCLOS III (*ibid.*, pp.ix – xii). According to Ann L. Hollick, in the development of national and international ocean policy over the past decades, technological innovation has been a driving force behind the claims over maritime space and rights. These claims "were all based on *expectation*, not prevailing use". (*Ante*, note 13, pp.372 – 373. Emphasis added.)

63. I.C.J. Reports 1951, p.116 at p.149, and cf. at p.146, (Emphasis original).
In that case, the International Court of Justice ruled, *inter alia*, "...there is one consideration not to be overlooked...that of certain *economic interests* peculiar to a region, the reality and importance of which are clearly evidenced by long usage". (*Ibid.*, at p.133, and cf. also at p.128. Emphasis added.)
This was despite the dissent from Judge McNair, who opined : "...the manipulation of the limits of territorial waters for the purpose of protection of economic and other social interests has no justification in law; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard". (*Ibid.*, at p.169.) Judge Alvarez's statement may draw support from Myres S. McDougal and Michael Reisman, "International Law in Policy – Oriented Perspectives", in R. St.J. MacDonald and D.M. Johnston (eds.), *The Structure and Process of International Law : Essays in Legal Philosophy Doctrine and Theory* (1983), p.103 at pp.106 – 128; D.M. Johnston, "The Heritage of Political Thought in International Law", *ibid.*, p.177 at pp.189 – 205; Arvid Pardo and C.Q. Christol, "The Common Interest : Tension Between the Whole and the Parts", *ibid.*, pp.643 – 660; Wang Tieya, "The Third World and International Law", *ibid.*, p.955 at pp.955 – 956.

64. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, (Canada/USA), the Chamber of the International Court of Justice conceded that 'human and economic geography' may be relevant to assessment of the equitable character of a provisionally established delimitation line. (ICJ Reports 1984, p.246 at p.340, para. 232, See also Separate Opinion (paras. 24 – 27) of Judge *ad hoc* Valticos in *the Case concerning the Continental Shelf* (Libya/Malta), ICJ Judgment of 3 June 1985. Also R.P. Anand, *Origin and Development of the Law of the Sea* (1983), chap. 5.
According to Roy D. Jackson, Jr., "...A fundamentally practical fact is that the law of the sea has always been strongly influenced, perhaps determined, by economic considerations, not abstract legal concepts". (R.D. Jackson, Jr. in D. Walsh (ed.), *ante*, note 14, p.226 at p.237).
See also L. Juda, *ante*, note 59, pp.142, 148 – 149; and Eckert, *op. cit.*, pp.320 – 321, 328 – 329, 339 for the development of the law of the sea policy by the U.S. governments.

ciliation of conflicting legal claims entitled to protection by law may be necessary and may be accomplished by "a consideration of the larger needs of the international community" [65] According to Arvid Pardo, the CHM principle serves such a reconciliatory function in the general interest and well-being of the interdependent international community.[66]

Can such a principle be enforceable in a judicial forum? The answer to this question, in turn, depends upon the justification for or competence of a judicial body to sanction a principle which has moral, political or economic undertones. Judges are supposed to be objective and impersonal in their interpretation of the law. Yet, in almost every judicial system, judges are appointed by the political or administrative branch. The U.S. Supreme Court judges are a remarkable example. The President of the U.S.A. appoints judges of the Supreme Court,[67] who are to hold their office in individual capacity.[68] It is well known that various U.S. Presidents not infrequently sought to appoint judges who shared the political or moral opinions prevailing in the Administrative Branch of the day.[69] Nevertheless, nobody seriously disputes that the judgments of these 'politically' appointed judges are 'not law'. The reason is simple. So long as judges are appointed in accordance with the pre-ordained formula and perform their functions within the pre-established judicial competence, there is no reason to consider why the pronounced judgments under the system designed to provide answers to legal questions should not be 'law'. In fact, there is almost always a 'margin of appreciation' or 'measure of discretion' for judges to interpret the law which is vague, undeveloped or semantic, such as the legal meaning of 'fairness'. In these cases, value judgment of each judge plays a very prominent, but legitimate, role in the overall process which is supposedly impartial, objective and purely judicial.[70] This has enabled the U.S. Supreme Court to

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65. See Hersch Lauterpacht, *The Function of Law in the International Community* (1933), pp.110 – 111.
See also Judge Alvarez : the law of social interdependence "is concerned not only with the delimitation of rights of States but also with harmonizing the general interest", and "it lays down, besides rights, obligations towards international community;...". (*Ante*, note 63, at p.149).

66. A. Pardo and C.Q. Christol, *ante*, note 63 at pp.651, 657 – 659; A. Pardo, "The Emerging Law of the Sea", in D. Walsh (eds.), *ante*, note 14, p.33 at p.62.

67. Constitution of the U.S.A., Article II, section 2.

68. Cf. *ibid.*, Article III.

69. For instance, President Franklin D. Roosevelt's appointment of Supreme Court judges to further his 'New Deal' policy. Presidents Richard M. Nixon, and Ronald Reagan adopted a similar approach. [See Lawrence H. Tribe, *God Save This Honorable Court : How the Choice of Supreme Court Justices Shapes Our History* (1985); R. Dworkin, *Taking Rights Seriously* (1981), p.131; *The International Herald Tribune*, 26 March 1985, p.1 : "Reagan Recasting Federal Judiciary : Trend Is Towards Conservative Majority Among U.S. Judges"].

70. See, e.g., Joint Separate Opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga in *The Case Concerning the Continental Shelf (Libya/Malta)*, ICJ Judgment of 3 June 1985, at para. 37 of the Joint Sep. Op. Also R. Dworkin, *op. cit.*, chap.5; David Lyons, "The Legal and the Moral", *The Times Literary Supplement*, May 18, 1984, p.539; cf. Roberto M. Unger, "The Critical Legal Studies Movement", (1983) 96 *Harvard L. Rev.* 563 at 564 – 564, *652*.
Many judgments of the European Court and Commission of Human Rights are illuminating as regards the issue of 'margin of appreciation'. *See, e.g., Tyrer Case*, (1978) 21 *Annual Y.B. of Human Rights* 612 [*re* : the meaning of 'degrading treatment'; and see Graham Zellick, "Corporal Punishment in the Isle of Man", (1978) *27 Int'l & Comp. L.Q.* 665]; *X v. U.K.*, [1981] 3 *European Human Rights Rep.* 63, and *Dudgeon v. U.K., ibid.*, 60 *(re* : homosexuals' rights to privacy); *Silver and others v. U.K., ibid.*, 475 (*re* : freedom of expression, correspondence and censorship); and the *Sunday Times Case*, (1979) *2 ibid.*, 245. See further : Francis G. Jacobs, *The European Convention on Human Rights* (1975), pp. 205 – 209.

hand down landmark judgments in politically or morally controversial cases such as the celebrated *Brown v. the Board of Education for Topeka County,*[70a] which has generally put an end to racial segregation in the U.S. education, and has led to the segregation of public facilities being declared unconstitutional in subsequent cases. Even when there is a binding presedent *(stare decicis),* there is no quarantee that every judge will interpret it in the same way. Political, moral or economic considerations may tip a balance one way or the other.[71]

Mutatis mutandis, judicial fora applying or interpreting international law which is not generally as elaborated as municipal law, *a fortiori,* have no less margin of appreciation.[72] The role of "equity" used by international tribunals in the cases of delimitation of the continental shelf and the exclusive economic zone bears this testimony. Moreover, the history of the International Court of Justice and its predecessor refutes the notion that judges do not make law but always apply that which is law already.[73] Such a notion is unrealistic since it fails to grasp the creative judicial role of these judges within the pre-ordained limit of their competence.[74] According to Judge Sir Hersch Lauterpacht, there are five ways in which the International Court of Justice can be creative: through the application of the general principles of law; through reliance on new principles and

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70a. 347 *U.S.* 489 - 91 (1952). The U.S. Supreme Court in that case finally discarded the 'separate but equal' doctrine emanating from the decision of its predecessor in *Plessy v. Ferguson* [163 *U.S.* 537 (1893)]. The 1952 Court concluded that in the field of public education, the 'separate but equal' doctrine had no place due to the inherent inequality of separate educational facilities. The Court did not expressly overrule *Plessy,* though.
For the cases concerning the unconstitutionality of racial segregation in public facilities see, e.g., *Taylor v. Louisiana,* 370 *U.S.* 154 (1962); *Wright v. Georgia,* 373 *U.S.* 284 (1963); *Peterson v. Greenville,* 373 *U.S.* 244 (1963); and *Watson v. Memphis,* 373 *U.S.* 526 (1963).

71. See David Kairys, *The Politics of Law : A Progressive Critique,* chap. 1 ("Legal Reasoning"). Cf. R. Dworkin, *op. cit.,* pp.vii – ix, 4, 40, 51 – 60, 67 – 68, 76 – 77, 87, 98, 100 – 105.
In the renowned English tort case of *Spartan Steel and Alloys, Ltd. v. Martin & Co. (Contractors), Ltd.* [1972] 3 All E.R. 557 (Court of Appeal), Lord Denning, M.R. succinctly points out : "At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of *duty,* they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the *damages* recoverable saying that they are, or are not, too remote, they do it as a matter of policy so as to limit the liability of the defendant". (Emphasis original.)

72. Like judges in the other systems, judges of the International Court of Justice are chosen by political organs (in this case the U.N. General Assembly and the Security Council – see the Statute of the International Court of Justice, Articles 4 – 15) to serve in their 'independent' capacity. (*Ibid.,* Articles 2, 16 – 20.)
See also I. Brownlie, 3rd ed., pp.713 – 716.

73. For a support of such a notion see : Oppenheim, *International Law : A Treatise* (8th ed. by H. Lauterpacht) (1955), pp. 7 – 8, 10, 13; but see Judge Sir Robert Jennings, "Gerald Gray Fitzmaurice", (1984)55 *British Y.B. Int'l L.* 1 at 34 – 36.

74. D.W. Greig, *International Law,* (2nd ed., 1976), pp.7, 43 – 45, and the authorities cited therein; Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), pp.75 – 77, 79 – 80, 84, 149, 155 – 157, 173 – 185, 396.
According to Judge Lauterpacht, "...In legal history, courts (as distinguished from formal legislation) have been mainly [but cautiously] responsible for the infusion of moral into law..." (*Ibid.,* p.172). And see a lengthy analysis of the meaning of equality by Judge Tanaka in the *South West Africa cases,* I.C.J. Reports 1966, at pp.304 – 310.
See also the choices open to the Court in deciding disputes in accordance with international law (Statute of the International Court of Justice, Article 38(1)).

inference from parallel developments in other spheres of international law; through the assumption that there was no generally accepted rule of law on the subject; through the flexibility of international law; and through the attempt to regulate the interests involved in the dispute before it.[75] *The Anglo-Norwegian Fisheries Case,* for instance, has eventually given birth to the archipelagic State doctrine. Under the jurisprudence of the said Court, if a dispute concerns what the Court itself perceives as a 'legal question', it may decide it despite any political or other ramifications, motives or implications.[76]

When confronted with novel situations in the course of their judicial activity, international tribunals may proceed, *inter alia,* by reconciling conflicting legal claims entitled to protection by law and may accomplish the task by taking into account the larger needs of the international community.[77] How is this relevant to the CHM principle? The following statement of Judge Sir Robert Jennings is illuminating.

> Consider the typical case where State X lays claim to a parcel of territory over which State Y is in fact exercising territorial sovereignty. This may be a *claim* that the *title* to exercise territorial sovereignty in the disputed land is presently vested in law in State X. This is *a purely legal claim.* Or it may be claimed that, although the legal title to territorial sovereignty is admittedly presently vested in Y., there are good reasons why the legal position *ought to* be changed in favour of X. This is *a political claim*...[78]

Consequently, a claim that the title to the deep seabed *is* presently vested in mankind is "a purely legal claim" As the 1970 Declaration of Principles, which denies States' title to the deep seabed, has been generally, or almost universally, accepted,[79]

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75. H. Lauterpacht (1958), *op. cit.*, pp.156 – 157, and chapters 9 – 13. In the *South West Africa case*, Judge Tanaka opines : "Undoubtedly a court of law declares what is the law, but does not legislate. In reality, however, where the border – line can be drawn is a very delicate and difficult matter. Of course, judges declare the law, but they do not function automatically. We cannot deny the possibility of some degree of creative element in their judicial activities. What is not permitted is to establish law independent of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the *raison d'être* of a legal system, legal institution or norm". (I.C.J. Reports 1966, p.6 at p.277, dissenting on other points.)

76. In the Advisory Opinion on *Conditions of Admission of a State to Membership in the U.N. (Article 4 of the Charter),* I.C.J. Reports 1948, p.57 at p.61, the International Court of Justice held :

> "The Court cannot attribute a political character to a request which, framed in abstract terms, invite it to undertake an essentially judicial task...It is not concerned with the motives which may have inspired this request,...It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it...".

See also : Advisory Opinion on *Certain Expenses of the U.N. (Article 17(2) of the Charter),* I.C.J. Reports 1962, p.151; *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa),* Preliminary Objections, I.C.J. Reports 1962, p.319, (and cf. Judge Spender's dissenting opinion at pp.466 – 467); and *Case Concerning Military and Para – military Activities in and against Nicaragua (Nicaragua v. U.S.A.),* (Jurisdiction), I.C.J. Judgment of 26 Nov. 1984, ruling, *inter alia,* that there was nothing to compel the Court to decline to take cognizance of one [i.e., legal] aspect of a dispute merely because it had other [i.e., political] aspects. (Para. 105 of the Judgment, citing the *U.S. Diplomatic and Consular Staff in Tehran case,* I.C.J. Reports 1980, at p.19, para. 36 and at p.20, para.37).
See also I. Brownlie, 3rd ed., pp.730, 731 – 732.

77. *Per* Judge Alvarez, and H. Lauterpacht, *ante,* note 65.

78. Robert Y. Jennings, *The Acquisition of Territory in International Law* (1963), p.71. Emphasis added. See also Jennings, (1984)55 *British Y.B. Int'l L.* 1 at 18; and cf. also R – J. Dupuy in R – J. Dupuy (ed.), *The Settlement of Disputes on the New Natural Resources,* [1983], pp.318 – 319.

79. See *ante,* note 6.

the "political claim" mentioned above does not arise. However, where there is unsettled state of law governing deep seabed mining,[80] international tribunals may justifiably consider the CHM principle parallel to that embodied in the 1982 Convention as determinative, whatever its moral or political undertone. They may draw support from the following view of Judge Sir Gerald Fitzmaurice:

> By a principle, or a general principle, as opposed to a rule, even a general rule, of law is meant chiefly *something which* is not itself a rule, but which *underlines a rule*, and explains or provides the reason for it. A rule answers the question: 'what', a principle in effect answers the question: 'why'. In the event of any dispute as to what the correct rule is, the solution will often depend on what principle is regarded as underlying the rule.[80a]

Thus, international tribunals may decide 'why' the benefits of the deep seabed minerals should go to mankind as a whole, and not to few industrialized States and their multinational corporations.

(ii) The Legal Status of the Deep Seabed and its Resources

Prior to the evolution of the continental shelf and the exclusive economic zone doctrines, the seabed beyond the territorial sea limit was susceptible of exclusive ownership by the coastal State arising from its long and undisputed occupation of sedentary fisheries lying on the surface of the seabed.[81] However, this area was generally shallow and not extensive. The act of occupation of sedentary fisheries dated back as far as the *mare clausum* era between the fifteenth and seventeenth centuries when the high seas themselves were susceptible of occupation, hence, title to exclusivity. Since only the littoral States were in the position to establish an effective regulation and supervision of activities of the seabed adjacent to their respective coast, 'adjacency', 'contiguity', or 'proximity' to the coast of a State played a vital role.[82]

As late as 1955, it was still impossible to exploit mineral resources beyond the depth of 30-40 metres.[83] The exploitation of seabed minerals through driving mines and piercing tunnels from the coasts was necessarily in the vicinity of the coast. Exclusive

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80. See Louis Henkin, "International Law and 'the interests' : the Law of the Seabed", (1969) 63 *A.J.I.L.* 504 at 504 – 505.

80a. "The General Principles of International Law Considered from the Standpoint of the Rule of Law", (1957 – II) *Hague Recueil* at 7 (emphasis added), quoted in Maarten Bos, *ante*, note 54, at 350.

81. Sir Cecil J.B. Hurst, "Whose Is the Bed of the Sea? : Sedentary Fisheries Outside the Three – Mile Limit", (1923 – 24) 4 *British Y.B. Int'l L.* 34; O'Connell, vol. I, pp.449 – 456.

82. D.H.N. Johnson, "Acquisitive Prescription in International Law", (1950) 27 *British Y.B. Int'l L.* 332 at 352 – 353; and see G. Goddard, "The Land Under the Sea", (1957) 6 *Indian Y.B. Int'l Affairs* 81 at 86 – 88, O'Connell. vol. I, pp.456 – 457; H. Lauterpacht "Sovereignty over Submarine Areas", (1950) 27 *British Y.B. Int'l L.* 376 at 414 – 431; D.W. Arrow, "The Customary Norm Process and the Deep Seabed", (1981 – 82) 9 – 10 *Ocean Devel. & Int'l L.* 1 at 12 – 15.

83. George Scelle, "Plateau continental et droit international", (1955) 58 *R.G.D.I.P.* 5 at 10. See also H. Lauterpacht, *ante*, note 82, at 411.

rights over mineral deposits on the seabed outside the territorial sea was not recognized.[84] Therefore, the case of sedentary fisheries was unique.

With the emergence of the continental shelf doctrine, however, the sovereign rights of a State over the continental shelf adjacent to its coast came to be regarded as being *ipso jure* and *ipso facto,* independent of any act of occupation.[85] Yet, the condition of 'natural prolongation of land territory' of the coastal State ensures that the deep seabed is not subject to the exclusive rights of the coastal State.[86] In order to pre-empt excessive claims, the 1982 Law of the Sea Convention has set the maximum outer limit of the continental shelf as measured from the baselines at 200 n.m., or 350 n.m. where there is a continental margin.[87] Nevertheless, throughout the legal history of the regime of the seabed and its subsoil, there has never been international recognition of exclusive rights over those areas which are not adjacent to the coast *and* which are beyond the outer limit of national jurisdiction as measured from the baselines along the coast of a State or an island. This has been attested by the rejection by the United States of the claim to such an area by Deepsea Ventures, Inc. in 1974.[88]

However, some authors rely on the instance of sedentary fisheries as signifying an exclusive right to take the harvest of the seabed rather than to the seabed itself.[89] In

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84. E.g., in 1918, a U.S. citizen sought a lease from the U.S. State Department over an oil deposit about 40 miles off the U.S. coast. It was refused on the ground that the area was beyond the territorial waters of the U.S.A. However, the Secretary of State opined that if an artificial island had been erected for the purpose of exploiting the oil deposit and the U.S.A. able to control the island, steps would have been taken to protect the rights of its inhabitants. (G. Goddard, *ante*, note 82, at 81 and see also at 82 – 85). Cf. Oppenheim, *ante*, note 73, pp.555 – 556 (distinguished by Hirst, *ante*, note 81, at 42). Oppenheim's distinction between the occupation of seabed and that of subsoil was disputed by Scelle (*ante*, note 83, at 18), and by D.H.N. Johnson ["The Legal Status of the Sea – Bed and Subsoil", (1955 – 56) 16 *Z.a.ö.R.u.V.* 451 at 462 – 463].

85. *The North Sea Continental Shelf Cases*, I.C.J. Reports 1969, p.3 at p.31, para.43.
Also : Article 1 of the 1958 Geneva Convention on the Continental Shelf : the term 'continental shelf' is used as referring to the sea – bed and subsoil of the submarine areas 'adjacent to the coast' of a State or islands.
Cf. H. Lauterpacht, *ante*, note 82, at 376 – 377, 386; Richard Young, "The Legal Regime of the Deep – Sea Floor", (1968) 62 *A.J.I.L.* 641 at 645 – 647; J.H.W. Verzijl, *International Law in Historic Perspective*, vol. IV (1971), pp.277 – 278.

86. The International Court of Justice Stated : "...it is evident that by no stretch of imagination can a point on the continental shelf situated say a 100 miles, or even much less, from a given coast, be regarded as 'adjacent' to it". (I.C.J. Reports 1969, p.3 at p.30). See also L.F.E. Goldie, "A Lexicographical Controversy : The Word "Adjacent' in Article 1 of the Continental Shelf Convention", (1972), 66 *A.J.I.L.* 829 at 830 – 834; L. Henkin, *ante*, note 80, at 506 – 508; Van Dyke and Yuen, *ante*, note 23, at 514 – 519; Kronmiller, *op. cit.*, pp.108 – 129; O'Connell, vol. I, pp.492 – 495.

87. The 1982 Convention, Article 76. See also O'Connell, vol. I, pp.495 – 498.

88. On 15 November 1974, this U.S. company filed the claim with the U.S. Secretary of State for exclusive mining rights on the eastern Pacific Ocean about 1,300 kilometres off the coasts of Mexico. The seabed area in question was 60,000 $k.m.^2$, to be reduced by half upon the expiration of 15 years from the date of notice or commencement of commercial production, whichever was earlier.
For the text of the claim see : Churchill, Nordquist and Lay (eds.), *New Directions in the Law of the Sea*, (Documents), vol. v (1977), pp.376 – 389.
The U.S. State Department rejected this claim. (*Ibid.*, p.390, and cf. also *ante*, note 84).
It was also rejected by Canada (ibid., p.39), the U.K. (*ibid.*, pp.391 – 392), and Australia (*ibid.*, p.392). (Also in (1975) 14 *I.L.M.* 69 at 795 – 6).
See also : Gonzalo Biggs, "Deepsea's Adventures : Grotius Revisited", (1975) 9 *Int'l Lawyer 271; H. Gary Knight, "A Reply to 'Deepsea's Adventures : Grotius Revisited' ", ibid.*, 751 : G. Biggs, "Deepsea's Adventures : Grotius Revisited : Á Rejoinder", (1976) *ibid.*, 309.

89. I. Brownlie, 2nd ed., p.230, also cited in Arrow, *ante*, note 82, at 17.

the opinion of Grotius, masterless or common things, such as swimming fish, which may be reduced to possession are susceptible of private ownership.[90] The taking by the HMS *Challenger* of the first deep seabed nodules in 1874 was not questioned as to its legality. By way of analogy to swimming fish, the title to the deep seabed nodules could arguably be based in their possessors or 'captors'.[91] In addition, some of these authors regard this first taking of the nodules as a symbolic act similar to that giving rise to a title in the acquisition of an unpopulated land territory: exclusive rights are thereby 'acquired' over all the seabed nodules as against other claimants.[92] These arguments are unsound. First of all, swimming fish and sedentary fisheries are renewable resources, hence, inexhaustible; whereas nodules are non-renewable resources, hence, exhaustible. Secondly, sedentary fisheries predated the freedom of the sea doctrine, and the rights of the coastal States were based on physical continguity and historic usage but never on the priority of discoveries. The acquisition of exclusive resource rights involved the actual assertion of exclusive rights and their recognition or acquiescence by other States. The list of these exclusive rights has never included deep seabed nodules.[93] The analogy between the acquisition of title involving land territory and that involving deep seabed nodules is fraught with difficulties. There can be no 'sovereign' on the deep seabed which is incapable of being inhabited. Moreover, disputes over land territory are restricted to claims by two or more States or a group of States, whereas the title to deep seabed nodules involves the international community as a whole. Similarly, the possibility of claims of titles over outer space or celestial bodies has been steadfastly denied by the international community.[94] Indeed, no argument has ever been seriously raised that the collecting of samples of rocks from the moon by the U.S.

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90. *Mare Liberum* (1608) (*Freedom of the Seas*, McGoffin trans., 1916, p.29).

91. L.F.E. Goldie, *ante*, note 53, at 796-797; Arrow, *ante*, note 82, at 16-21; Kronmiller, *op. cit.*, pp.3-5, 107.
For a discussion on the *res nullius* and *res communis* doctrines as regards the high seas, see O'Connell, vol. II, pp. 792-794; D.H.N. Johnson, *ante*, note 82, at 349-351; Verzijl, *ante*, note 85, p.8.

92. Goldie, *ante*, note 53, at 799 *et sequel*; Kronmiller, *op. cit.*, pp. 134-206.

93. Shigeru Oda, "A Reconsideration of the Continental Shelf Doctrine", (1957) 32 *Tulane L. Rev.* 21; Steven J. Burton, "Freedom of the Seas : International Law Applicable to Deep Seabed Mining", (1977) 29 *Stanford L. Rev.* 1135 at 1151-1156; E.D. Brown, "Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict", (1983) 20 *San Diego L. Rev.* 521 at 526-532, thus effectively refuting the force of Kronmiller's argument to the contrary which relies on Brown's earlier statement. [See Kronmiller, *op. cit.*, pp. 192-193, quoting at length E.D. Brown, *The Legal Regime of Hydrospace* (1973), p. 85]. Cf. also H. Lauterpacht, *ante*, note 82, at 401-402, 411, and *ante*, note 82; G. Biggs (1980), *infra*, note 95.

94. *Agreement Governing the Activities in the Moon and Other Celestial Bodies*, U.N./G.A. Reso. 34/68, *U.N. Doc. A/34/664 (1979)* [(1979) 18 *I.L.M.* 1434], e.g., Article 11(2), (3). It entered into force on 11 July 1984, following the deposit with the U.N. Secretary-General of the fifth instrument of ratification by Austria. The agreement was signed by Austria, Chile, France, Guatemala, India, Morocco, the Netherlands, Peru, the Philippines, Romania and Uruguay. As at 1984, Chile, the Philippines, Uruguay, the Netherlands and Austria have ratified it.
Cf. the *1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, which entered into force on 10 Oct. 1967. As at 1984, 85 States are bound by it. The 1967 Treaty stipulated, *inter alia*, that the exploration and use are to be for the benefits of all mankind. By virtue of Article 2 : the said entities are "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." [See also C.Q. Christol, "The Moon Treaty Enters into Force", (1985) 79 *A.J.I.L.* 163-168].

spacecraft *Apollo 11* on 20 July 1969 was a symbolic act which would give a title to the U.S.A. over the resources or territory on the moon. This reveals that the rule governing the acquisition of unpopulated land territory does not necessarily apply to other cases. Above all, the continental shelf doctrine and the 1970 Declaration of Principles have tolled the death knell for the myth that a title to the seabed is dependent upon the doctrines of occupation or prescription used in acquiring exclusive rights over land territory.[95]

Contrariwise, the trend towards the internationalization of the deep seabed minerals has gained momentum since 1967, when the exploitation of these resources was no longer seen to lie somewhere in a hazy distance. Opinions of jurists shifted away from the traditionally individualistic view of States being the exclusive owners of their respective marine resources. Ownership by the international community as a trustee for mankind as a whole has become a legal possibility, and may have even already been accepted as a legal fact.[96] Does this mean that deep seabed mining is a freedom of the high seas open to all subject to the principle of reasonable use?[97]

The proponents of the freedom of the sea principle conceded that deep seabed mining is a novel use of the high seas, and that this activity may have adverse effects upon other more established uses. However, it is argued, deep seabed mining is within the ambit of the freedom of the high seas under customary law and the 1958 Geneva Conventions.[98]

The preamble of the 1958 Geneva Convention of the High Seas states that the Convention is desirous of codifying the rules of international law relating to the high seas,

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95. Cf. Van Dyke and Yuen, *ante*, note 23, at 518-519, and see also at 541-543; Burton, *ante*, note 93, at 1156-1160; B. Shingleton, *ante*, note 53, at 38-40; G. Biggs (1976), *ante*, note 88, at 314; O'Connell, vol. I, pp. 457-8.
Also: G. Biggs: "Just as there was no aviation law prior to the development of cosmonautics, there was no law until very recently for the exploitation of the deep seabed.." [(1980) 8 *Ocean Devel. & Int'l L.* 223 at 225].

96. Cf. UNCLOS III, *O.R.*, vol. II, p.22, para. 59 *(per* M.L. Pirapongse Kasemsri of Thailand); Verzijl, *ante*, note 85, p.7; Gonzalo Biggs, "Deep Seabed Mining and Unilateral Legislation", (1980) 8 *Ocean Devel. & Int'l L.* 223 at 235; A-C. Kiss, *ante*, note 52, at 122-134; C.W. Pinto in R-J. Dupuy [ed. 1982], p.27; B. Zuleta, *ibid.*, p.374; G. Biggs (1976), *ante*, note 88, at 311-313; R.P. Arnold, *ante*, note 54, at 155-158; and cf. R-J. Dupuy, *The Law of the Sea : Current Problems* (1974), pp.43-44.
In O'Connell's opinion, "..the thrust in the direction of community interest in the Law of the Sea, exemplified in the tendentious characterization of the seabed of the high seas as *res communis* in conjunction with the affirmation that it is the 'common heritage of mankind', is intended to have the subtle effect of metamorphosing *res communis* into something akin to *res condominata*". (O'Connell, vol. II, p. 794).

97. For those opinions that it is: see, e.g., the earlier opinions of the U.S.S.R. [C.C. Joyner, *ante*, note 54, at 874-879; M.I. Lazarev, "Scientific-Technological Progress and the Search for Legal Regulation of Possible Seabed Uses", (1975-76) 3 *Ocean Devel. & Int'l L.* 75 at 76-69, 84-85]; Stefan A. Riesenfeld, (1983) 46 *L. & Contemporary Problems* at 13; B. Shingleton, *ante*, note 53, at 41; E.U. Peterman, "Legal Problems of the German Interim Legislation for Deep-Sea-Bed Mining", (1981) 41 *ZaöRuV* 267 at 268-281, (and at 325-326); Kronmiller, *op. cit.*, pp.xi-xii.
For discussion of 'reasonable use' and the high seas see: O'Connell, vol. I, pp. 57-58; *ibid.*, vol. II, pp. 794-799.
E.D. Brown considers deep seabed mining activities as a claim to "a *usufruct* rather than to the seabed itself and would be for a limited period of time.."; hence, permissible insofar as they are a reasonable use of the high seas. (E.D. Brown (1983), *ante*, note 93, at 535); and see also C.E. Maw, (1983) 46 *L. & Contemporary Problems* at 57.

98. Kronmiller, *op. cit.*, pp.8-10; P.W. Birnie, one of Kronmiller's critics, concurs with Kronmiller on one point: novelty does not preclude the lawfulness of deep seabed mining and that there is no hierarchy of uses since all the competing interests must be balanced, presumably under the principle of reasonable use. (P.W. Birnie, *ante*, note 57, at 322).

and that UNCLOS I adopted the provisions of the Convention as 'generally declaratory of established principles of international law'. Pursuant to Article 2 of this Convention,

> ...Freedom of the high seas is exercised *under the conditions laid down by [this Convention] and by the other rules of international law.* It comprises, *inter alia,* both for coastal and non-coastal States:
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.
> These freedoms, and others *which are recognized by the general principles of international law,* shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas. (Emphasis added.)

As was revealed by the legislative history of this Article, only the exploitation of the seabed and subsoil resources of the continental shelf was under the contemplation of the International Law Commission. True, International Law Commissioner George Scelle opined:

> [There] were other freedoms covered by Article 2, such as the right to scientific research and the exploitation of the resources of the seabed.[99]

He subsequently remarked, however,

> The Commission, in its draft articles on the continental shelf, had granted to the coastal State the right to *exploit the mineral wealth of the soil and subsoil of the high seas wherever the depth of the sea did not extend to 200 metres.* It would be the height of absurdity if the coastal State, which might well not have a continental shelf, was not allowed to extract mineral wealth from the high seas themselves....as distinct from exploiting their living resources.[100]

As a result of the misgivings about the hazard of a geographical phenomenon and natural configuration, the 'exploitability test' was added to the criteria of the continental shelf.[101] The said exploitation of mineral wealth and living resources (that is, sedentary fisheries) of the high seas was in fact the exploitation of the 'continental shelf' resources lying under the high seas. At that time, it was impossible to exploit the deep seabed minerals lying beyond the depth of 30-40 metres. This was made abundantly clear by Scelle himself in an article written in that year.[102] This view was reinforced by the Commission and by François, Rapporteur on the Regimes of the High Seas and the Territorial Sea, to the effect that deep seabed outside the continental shelf had "not yet assumed sufficient practical importance to justify special regulation" [103] When recommending the

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99. (1955) 1 *Y.B. Int'l L. Comm'n* at 222. The Commentary of the Commission followed this opinion. [(1955) 2 *ibid.*, at 21-22].

100. *Ibid.*, at 263. Emphasis added.

101. U.N./G.A., 5th Sess., 1950, Suppl. No. 12 (A/1316), p.22 and see *A/CN. 4/17,* p.40, cited by H. Lauterpacht, *ante,* note 82, at 386.

102. George Scelle, *ante,* note 83, at 10, 18, 51-53.

103. (1956) 2 *Y.B. Int'l L. Comm'n* at 278.

Commission to accept the Netherlands' proposal to regulate against pollution of the seas resulting from the exploration and exploitation of 'submarine areas',[104] François added that this provision "did not relate to the continental shelf only".[105] In view of his earlier statement, however, he seemed to have in mind the regulation against the widespread effect of the exploitation of the continental shelf on the superjacent waters, the high seas, and the coast, rather than the possibility of deep seabed exploitation. This is clarified by the final form of the proposed draft. Article 24 of the 1958 High Seas Convention stipulates:

> Every State shall draw up regulations *to prevent pollution of the seas* by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and subsoil, taking account of existing treaty provisions on the subjects. (Emphasis added.)

Moreover, no treaty existed to provide for the regulation against pollution arising from deep seabed mining which was then not possible.

According to another line of argument, the list of the freedom of the high seas is not restrictive. The words *'inter alia'* and 'these freedoms, and others which are recognized by the general principles of international law' are raised in support of argument.[106] Notwithstanding, in its report to the U.N. General Assembly in 1956, the Commission propounded :

> *Any freedom* that is to be exercised in the interests of all entitled to enjoy it *must be regulated.*[107]

However,

> The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of the continental shelf - a case dealt with separately in section III - *such exploitation had not yet assumed sufficient practical importance to justify special regulations.*[108]

Bearing in mind the stipulation under Article 2 of the 1958 High Seas Convention that the exercise of the freedoms of the high seas are subject to the conditions laid down therein 'and by the other rules of international law', it transpires that even if deep seabed mining were a freedom of the seas it would be subject to conventional provisions and 'the other rules of international law'. George Scelle had in mind the law which would

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104. *U.N. Doc. A/CN. 4/97/Add. 1* (1956), Article 23a: "All States shall draw up regulations to prevent water pollution by oil, resulting from exploitation of submarine areas"

105. (1956) 1 *Y.B. Int'l L. Comm'n* at 63.

106. See, e.g., Kronmiller, *op. cit.*, pp. 409-448, and pp.330-339; Burton, *ante*, note 93, at 1170-1174; B. Shigleton, *ante*, note 53, at 46-47; and *ante*, note 99.
See also Shigeru Oda, in R-J. Dupuy [ed. 1982], at pp. 51-52.

107. (1956) 2 *Y.B. Int'l L. Comm'n*, Report to the General Assembly, Doc. A/3159, p.278, also in *U.N./G.A. O.R.* Suppl. No. 9 (1956), p.24. (Paragraph 5, emphasis added.)

108. *Ibid.*, Paragraph 2. (Emphasis added.)

benefit all the international community and not those privileged few States. He even cited Professor Albert de Lapradelle's view which would confer the benefits arising from the usage of public domain to the international community.[109] It is no coincidence that both Scelle and de Lapradelle have subsequently been regarded as two of the postulators of the CHM principle prior to 1967.[110] Therefore, had the deep seabed assumed 'sufficient practical importance' by the time of UNCLOS I, the 'special regulation' chosen for it might haven been akin to the 'CHM' principle as incorporated into the 1982 Law of the Sea Convention.[111]

In any case, Article 1 of the 1958 High Seas Convention defines the 'high seas' as connoting 'all parts of the sea that are not included in the territorial sea or in the internal water of a State'. Some clarification may be derived from the following Comment of the International Law Commission.

> *The waters of the sea belong either to the high seas or to the territorial waters.* In the part of the present report dealing with the territorial sea, the Commission has attempted to define the limits of the territorial sea and indicated the baselines from which it should be measured. *Waters within these baselines constitute internal waters. Article 1 and the articles contained in the chapter on the territorial sea thus furnish a definition of the high seas.*[112]

In other words, the definition of the high seas includes only the waters.[113] Besides, a number of jurists share the following view of Bernardo Zuleta:

> When Grotius published his dissertation on the freedom of the high seas; [H. Grotius, *Mare Liberum* (1608)], his purpose was not to examine questions pertaining to the exploitation of coastal fisheries or to the extraction of minerals from the seabed. He was only trying to give legal arguments to reaffirm the right

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109. G. Scelle, *ante*, note 83, at 54-57, and see at 51 *et sequel;* (1953) 1 *Y.B. Int'l L. Comm'n* at 84.
In 1898, de Lapradelle wrote: «Au fond, nous dirons volontiers que la mer est susceptible de former la propriété d'une personne morale qui serait la société internationale des Etats». [(1898) 5 *R.G.D.I.P.* 264 at 283 and see also at 278-284, 309].
In 1950, de Lapradelle advocated the internationalization of the seabed, with all matters concerning the exploration and exploitation of the seabed resources beyond the territorial sea being entrusted to the U.N. [Int'l L. Assoc. *Report of the 44th Conference*, Copenhagen, (1950), p.91].

110. See *ante*, note 50. According to R-J. Dupuy, after the writing of de Lapradelle in 1898, Professor George Scelle wrote in 1957 [1955?] an article on the continental shelf "in which he argued that [the CHM] should already be considered as international reality" (in R-J. Dupuy [ed. 1982], p.188). In that article, Scelle proposed the establishment of a supranational agency whose functions would encompass assigning concessions for the exploitation of the resources of the continental shelf. (G.F. Kalinkin, (1975-76) 3 *Ocean Devel. & Int'l L.* 127 at 132-133], see also G. Scelle (1953), *ante*, note 109.

111. Van Dyke and Yuen, *ante*, note 23, at 501-506, esp. at 505-506. See also R-J. Dupuy, *ante*, note 110.

112. *U.N./G.A. O.R.*, vol. 10, Suppl. No. 9, p.3, quoted by Van Dyke and Yuen, *ante*, note 23, at 507. Emphasis added.

113. Van Dyke and Yuen *(ibid.)* rightly point out : "When the I.L.C. wanted to declare that the seabed of a region was subject to the same regime as the waters of the region, it did so in explicit terms. For example, the I.L.C.'s Commentary to the Draft Convention on the Territorial Sea declares: 'The sovereignty of a coastal State extends also to the air space over the territorial sea as well as to its bed and subsoil' ([1955] 2 *Y.B. Int'l L. Comm'n* 35, *U.N. Doc. A/CN.4/SER.A)".
As Ambassador J. Alan Beesley of Canada points out, UNCLOS I made a very clear distinction between the regimes of the continental shelf and the superjacent waters. Hence, no analogy can be drawn to the effect that because the high seas regime applies to the waters beyond the continental shelf, it therefore applies to the seabed, particularly in the case of an exclusive appropriation over a long period of time. ([1984] 17 *L. Sea Inst. Proc.* 104 at 105).

of the Dutch to take part in the East Indian trade and in order to make his point, he elaborated at some length on the impossibility of applying the doctrine of acquisition by prescription to the sea with regard to navigation and trade. In passing, he noted that forests and rivers could be easily exhausted or depleted while the sea could not be emptied by the same means. Had he been faced with the fact that fisheries or mineral resources of the seabed can, in fact, be depleted or that the marine environment can suffer damage from over-exploitation or from the use of noxious substance; it is highly possible that he would have suggested that man treat the environment with the same care and diligence that a prudent father is called upon to exercise with regard to the preservation and sharing of the family heritage.[114]

Today, the exclusive fisheries, or economic, zone has already provided partial resolve to the problem of depletion of marine fisheries. None of the generally recognized freedoms of the high seas involve the exclusive use of non-renewable resources of the seabed beyond the continental shelf limit. The laying of submarine cables and pipelines, for instance, can cross each other without any interference with the similar rights of others.[115] In contrast, deep seabed mining is site-specific and in need of a legally secure exclusive right to a mine site.[115a] Hence, this exclusive mining right must receive the consent of all States interested in the same site.[116] Without international regulation, a scramble for, or 'poaching' of, the few attractive mine sites would certainly ensue, thus giving rise to internecine disputes detrimental to the deep seabed mineral development and to world peace.



114. Bernardo Zuleta, "The Law of the Sea After Montego Bay", (1983) 20 *San Diego L. Rev.* 475 at 483, fn. 39.
Similar views are expressed by Maarten Bos, *ante*, note 54, at 342-343; Oscar Schachter, *Sharing the World's Resources* (1977), pp.39, 51-52, 142; G. Biggs (1980), *ante*, note 96, at 228-231; Herbert W. Briggs, "Jurisdiction over the Sea Bed and Subsoil beyond Territorial Waters", (1951) 45 *A.J.I.L.* 338 at 338; Van Dyke and Yuen, *ante*, note 23, at 508-510, 512-513.
See also R.P. Anand, *ante*, note 64, *passim;* O'Connell, vol. I, chap. 1.

115. For discussion on the military uses of the seabed of the high seas see O'Connell, vol. II, pp.824-830.

115a. Peter Brueker, [1984] 17 *L. Sea Inst. Proc.* 181 at 181; Kronmiller, *op. cit.*, p. 508; Mohamed Bennouna, "Les droits de l'exploitation des ressources minerales des oceans", (1980) 84 *R.G.D.I.P.* at 125.

116. This fact is conceded by Kronmiller *(ibid.)*, who proposes a regime of reciprocating State arrangement as a solution. However, as Van Dyke and Yuen rightly point out,

> "For Nation A to claim exclusive rights to an entire site, it would have to argue that because it (or its citizens) must have exclusive rights to receive an adequate return on the large sums invested on seabed mining at a particular site, any exploitation of any part of the site by Nation B is an 'unreasonable' interference. This argument cannot be accepted, because it could just as easily apply to a particular high seas fisheries or to a particular trade route on the high seas. A nation connot claim exclusive rights to a stock of fish on the high seas simply because it has made major investments in fishing equipment that it cannot recoup without having exclusive use of the fishery. Nor can a country develop a new trading route on the high seas and claim the exclusive right to use such a route because it needs a monopoly to make a profit. Nations do not have a high seas duty to ensure that the operations of others are profitable" *(Ante*, note 23, at 541).

Cf. D.W. Bowett, writing in 1972, predicted: "[the future agreements/convention] will result not from altruism by States but from the relentless pressure on resources which will demand that a regime be formulated which will allow mankind to benefit from the wealth in and below the oceans". *(Ante*, note 55, at 66).

(iii) The Freedom of the Seas : Rights Without Remedies

The CHM principle is assailed by one of the more determinded opponents of the deep seabed mining regime under the 1982 Convention as representing only

> theoretical nonsense that jeopardizes one of the great foundations of international peace and prosperity - freedom of the high seas.[117]

It will be argued herein that the reverse is the case: the principles of the freedom of the high seas are, in many respects, merely the outworn shibboleths of the past which have outlived their value.

The overseas discoveries of the fifteenth and sixteenth centuries led to a 'colonial' system of international economic, political and legal relations based on the supremacy of Europe and on the subjugation of non-white peoples.[118] From the standpoint of the developing States, international rules were established not merely without the consent of or deference to small States, but against them, and were based almost entirely on the unequal relations between great Powers and small States. In traditional international law, an unbridled positivism reigned supreme, whose sole criterion was the practices of States, and up to the end of WWII that meant the practice of the great Powers. This assumption really implicated another; that is, the standard of right and duty which the European States had hitherto prescribed for themselves was the universally just or appropriate standard, and that certain principles governing the nature of their society provided the only sound base for economic and legal relations among States, whatever their characteristics.[119]

The relationship of domination and, consequently, the policy of 'he takes who can' have paralysed the States which are their victims, leaving these States in the whirlpool of underdevelopment. On this globe as judged by the levels of economic and political development, there are not one but at least three 'worlds'. The wide gap between the richer world and its poorer counterpart has given rise to conflict and con-

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117. Robert A. Goldwin, "Common Sense v. 'The Common Heritage' ", in B.H. Oxman, D.D. Caron and Charles L.O. Budari (eds.), *Law of the Sea: U.S. Policy Dilemma* (1983), at p. 63.

118. Mohamed Bedjaoui, *Towards a New International Economic Order* (1979), p.1 and passim; John Maynard Keynes, *The Applied Theory of Money* (1930), pp.156-157; K. Griffin, *Underdevelopment in Spanish America* (1969).
See, e.g., the cases concerning the acquisition of title to territory such as the *Island of Palmas Case, (The Netherlands v. U.S.A.)*, (1928) 2 *R.I.A.A.* 829.

119. See : the opinions of Mr. Padilla Nervo and Mr. Pal in a general debate in the I.L.C. in 1957 on State responsibility, (1957) 1 *Y.B. Int'l L. Comm'n* at 155 *et sequel*; Fischer Williams, "International Law and the Property of Aliens", (1928) 9 *British Y.B. Int'l L.* 1; Norman Girvan, "The Question of Compensation : A Third World Perspective", (1972) 5 *Vanderbilt J. Trans. L.* at 340; R.P. Anand, "The Development of a Universal International Law", in Lepawsky, Buehring and Lasswell (eds.), *The Search for World Order* (1971), at p.159 *et sequel*; Louis Henkin, *How Nations Behave* (1968), at p.116 *et sequel*, and pp.247-249; Farooq Hassan, "Panel Discussion on the Legal Response to the Afghan/Iranian Crisis", (1980) *Am. Soc. Int'l L. Proc.* 248 at 257-258, 263; R.A. Falk, *Human Rights and Sovereign States* (1981), pp.218-224, D.W. Greig, *ante*, note 74, p.2; A.J.P. Taylor, *Europe : Grandeur and Decline* (Penguin Books Ltd., Pelican), at p.140 (*re* : The 'Second International' of Socialism); Dominique Rosenberg, *Le principe de souveraineté des états sur leurs ressources naturelles* (1983). (Bibliothèque de Droit International, Paris, Tome 93), pp.33-86. (Première Partie : Le Droit international classique : droit du pillage des ressources naturelles).

frontation, which usually emanate from misunderstanding, confusion and suspicion of the peoples in each world about their respective roles, purposes and obligations.[120] Most of the poorer world is heavily dependent on export, but its economic status is merely one of subsistence economy whose salvation requires a radical and efficacious transformation of human consciousness and wills in the richer world.[121] As Professor Robert A. Tucker cogently points out, the history of the traditional international system is one of 'inequality *par excellence*' owing to the great variety of the level of natural endowments which are the sources of power and wealth of each nation. These natural endowments are basic and they always exist. They are, for example, the "physical extent, population, natural resources and geographical positions".[122] Elucidating further the phenomenon of the traditional pattern of international relationship, the learned author trenchantly argues :

> The mercantile system...was designed to preserve and increase inequality within the core of European periphery. The liberal system promised in theory to apply universally. In practice, however, its assumption extended only to those people at approximately the same level of development, that is, the peoples sharing Western civilization. Between them and the backward peoples liberalism's original promise was displaced by manifest relations of inequality...What was instead demonstrated was that among unequals in socio-economic development an unimpeded right to trade—and to invest capital—would have comparable effects to the unimpeded right to self-help among collectives of unequal natural endowments. Rather than to reduce existing inequalities of wealth, these effects would operate, as indeed they did, to increase between the backward and developed regions.
>
> .....
>
> The only equality this society has known has been a rough and precarious equality of the strong.[123]

Hence, the unfairness resulting from *unequal conditions* in the traditional market system of free trade *(laissez-faire)* in which the developing States are compelled to participate has led to a *de facto,* and often *de jure,* denial of equality and opportunity of

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120. Cf. Gunnar Myrdal, *An International Economy* (1956), at p.222; Ragner Nurkse, "International Trade Theory and Development Policy", in H.S. Ellis (ed.), *Economic Development for Latin America* (1961), at pp.234-235; Gerald M. Meier, *The International Economics of Development : Theory and Policy,* chap. 1.

121. Cf. Simon Kuznets, "Economic Growth of Small Nations", in E.A.G. Robinson (ed.), *The Economic Consequence of the Size of Nations* (1960), at pp.18-20; W.A. Lewis, *The Theory of Economic Growth* (1955), at p.342; M. Tanzer, *ante,* note 21, at p.247; C. Clyde Ferguson, Jr., "The Politics of the New International Economic Order", (1977) 32 *Proc. of Acad. Poli. Sci.* 142.

122. Robert W. Tucker, *The Inequality of Nations* (1977), at p.3.

123. *Ibid.*, at pp.14-15. See also the declaration by Foreign Minister Adelaziz Bouteflika of Algeria, U.N./G.A., 7th Special Sess. on Development and International Economic Cooperation (2 Sept. 1975); Burns H. Weston, "International Law and the Deprivation of Foreign Wealth : A Framework for Future Enquiry", in R.A. Falk and C.E. Black (eds.), *The Future of the International Legal Order,* vol. II (1970), pp.36-182; Para. 6 of ESCAP's 'New Delhi Declaration on Regional Contribution to the Establishment of a New International Economic Order", *ESCAP Reso. 154(xxxi),* 31st Sess., 6 March 1975.

these States as compared to their more developed counterparts. Therefore, equality of opportunity for all States is a most significant goal of the poorer world.[124]

Rules which have the social function of preserving peace and order in the community are the product of the normative, systematic interaction of the members of that community. In the traditional pattern of inter-State relationship, rules of international law heavily favour powerful States; thus reflecting the fundamental disequilibrium of the international relations in existence at the time of formation or formulation of the norms.[125] Worse still, according to a formal principle, when a State is admitted into the international community it must *ipso facto* accept that community's norms and institutions. Rules which have already attained the status of 'customary international law' are presumed to be binding on all States whether or not all of them ever took part in their formulation.[126]

Max Huber authoritatively stated in the *Island of Palmas* case :

> International law, like law in general, has the object of assuring the co-existence of different interests which are worthy of legal protection... [127]

Nonetheless, in term of State equality, there is an alleged distinction between equal protection of the law or equality before the law, and equal capacity for rights and obligations.[127a] The former connotes the 'rule of law' which postulates that the law applies to all without any discrimination. The latter seems to have its genesis in the domestic law principles determining the different capacities of various individuals or subjects in a particular society. For instance, in general infants cannot have the capacity to enjoy rights or to assume legal obligations in the same way as adults. Transposed into the international sphere where all sovereign States are presumed to be equal,[128]

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124. Tucker, *op. cit.*, at pp. 67, 70-71; "Proposals for a New International Economic Order", Report of the Third World Forum at Mexico City, 21-24 Aug. 1975, at p.3; Inamul Haq, "The Problem of Global Economic Inequality : Legal Structures and Some Thoughts on the Next Forty Years", (1979) 9 *Ga. J. Int'l & Comp. L.* 507 at 508-509; Abdulqawi Yusuf, *Legal Aspects of Trade Preferences for Developing States : A Study in influence of development needs on the evolution of international law* (1982, Martinus Nijhoff), esp. Part I ("Equality of Treatment, Unequal Development and International Law").

125. Thomas M. Franck and Evan Chesler, "At Arms' Length : The Coming Law of Collective Bargaining in International Relations Between Equilibriated States", (1974-75) 15 *Va. J. Int'l L.* 579 at 583, 589-590; and see references, *ante*, note 119; D.W. Greig, *ante*, note 74, p.32.

126. Oppenheim, *ante*, note 73, pp.4-8, 16-18. This is despite the fact that international law is "essentially a product of Christian civilization" and morality. (*Ibid.*, pp.23, 50 and cf. pp.11-12).

127. *Island of Palmas Case, (The Netherlands v. U.S.A.)*, (1928) Permanent Court of Arbitration, Max Huber as Sole Arbitrator, 2 *R.I.A.A.* 829 at 870.

127a. Oppenheim, *ante*, note 73, pp.22-23. For a further discussion see : Herbert Weinschel, "The Doctrine of the Equality of States and Its Recent Modifications", (1951) 45 *A.J.I.L.* 417, esp. at 417-419, 421-422; D.M. Johnston, "The Foundations of Justice in International Law", in R.St.J. MacDonald, D.M. Johnston and G.L. Morris (eds.), *The International Law and Policy of Human Welfare* (1978), chap. 3, at pp.120-125; P.J. Baker, "The Doctrine of Legal Equality of States", (1923-24) 4 *British Y.B. Int'l L.* 1 at 2-4, 6-7, 9, 13-20.

128. See, e.g., Article 2(1) of the U.N. Charter : "The Organization is based on the principle of the sovereign equality of all Members".

this distinction is self-contradictory and untenable. What is more, in the unequal world, it would be tantamount to a legal subterfuge to entrap the poor or less technologically advanced States perpetually in the *status quo*.[129] Hence, as the Permanent Court of International Justice held in 1935, while *equality in law* precludes discrimination of any kind, need for *equality in fact* may require different treatment in order to attain a result which establishes an equilibrium between different situations. In other words, inequality may in fact be imposed by the law which is, in principle, aimed to achieve equality through non-discrimination.[130]

In these circumstances, an overwhelming number of developing States frequently adopt a negative attitude towards international law. For them, international law as initially conceived was the law of the powerful, opportunist and colonial Christian Western States. It seems to have survived to the present era with some modifications. However, it has not been transformed to accommodate the new or newly independent States.[131]

Ambassador Hasjim Djalal of Indonesia rightly observes that numerous rules of customary international law are generally acceptable whatever their origins. However,

> ...the rules of customary international law which the developing countries did not participate in creating must be looked into case by case in order to determine whether their contents had in the past been used to subjugate or work to the

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129. See also : Sir Shridath S. Ramphal in his foreword to Oswaldo de Rivero B., *New Economic Order and International Development Law* (1980), at pp.vii-viii: "...These dogmas, which more or less extrapolated into global economic relations... largely ignored the economic inequalities between the North and the South and instead sustained assumptions which were as false as they were cruel...". Contrary to the view of some authors [e.g., S. Zamora, (1980) 74 *A.J.I.L.* 566 at 608], the extant structure has impeded the opportunities or ability of the developing States to attain economic wealth and power.
Even in Western society, not every right has a remedy. Even if one may have a 'right', one's remedy may, for a variety of reason, be unenforceable. The 'act of State' doctrine, for instance, has prevented enforcement of contractual rights or a right to damages. See : *Banco Nacional de Cuba v. Sabbatino*, 376 *U.S.* 398 (1964); Chayes *et al.*, *ante*, note 59, pp.851-855 (for the cases under U.S. domestic law in support of the present contention), also I. Brownlie, 3rd ed., pp. 523-524 and *Sardino v. Federal Reserve Bank of New York*, 361 F.2d. 106 (2nd Cir. 1966), at 112-113, *cert.* denied 385 *U.S.* 898 (1966) (*per* Friendly J.), for the lawful discrimination of subjects under the law.
Cf. R.M. Unger, *ante*, note 70, at 602 *sequel*; Duncan Kennedy, "The Structure of Blackstone's Commentaries", (1979) 28 *Buffalo L. Rev.* 205 at 294 *et sequel*.

130. *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, P.C.I.J., Publ., Series A/B, No.64. See also Judges Mbaye and Lachs of the I.C.J. in Dupuy(ed.), *ante*, note 78, at p.319.
However, this aspect of sovereign equality does not mean that every State is to be given equal physical attributes, such as the area of the continental shelf. In this connection, see : *Continental Shelf (Libya/Malta)*, I.C.J. Judgment of 3 June 1985.

131. See, generally, Franck and Chesler, *ante*, note 125, at 591; G. Scelle, *ante*, note 83, at 56-57; John A. Perkins, *The Prudent Peace : Law as Foreign Policy* (1981), pp.xi-xvi; C. Clyde Ferguson, Jr., "Redressing Global Injustices : The Role of Law", (1981) 33 *Rutgers L. Rev.* 410 at 414; M. Bedjaoui, *ante*, note 118; Okon Udokang, *Succession of New States to International Treaties* (1972), pp.30-33, 61, 63, 69; O. Schachter, *ante*, note 114, p.17; Chayes *et al*, *ante*, note 59, pp.viii-xii; T.M. Shaw, "The Elusiveness of Development and Welfare : Inequalities in the Third World", in MacDonald *et al* (eds.), *ante*, note 127a, p.81 at pp.83, 85, 101; D.M. Johnston, *ibid.*, at p.111 *et sequel;* L. Sabourin, *ibid.*, at p.410-411; W. Friedmann, *The Changing Structure of International Law* (1964), p.5.
Cf. P. Buirette-Maurau, *La Participation du tiers-monde à l'élaboration du droit international* (1983) (Bibliothèque de Droit International, Paris, Tome 90).

detriment of the present developing countries or not. If they did, they must be adapted to the present situation.[132]

According to Sir Hersch Lauterpacht,

> The problem of adjusting the functioning of the law to the perpetual antimony of change and stability, and of justice and security, is not one peculiar to international law. It is a general legal phenomenon common to every political society. It is one of the central problems of legal philosophy. Experience teaches that in this struggle the element of change is not always victorious, for the simple reason that stability and security are in themselves a powerful element of justice. There is, as Montesquieu already pointed out, a limit to the possible sacrifice of security to progress. The same experience teaches that there is ultimately no more effective challenge to the maintenance of law than an immutability imperious to the needs of life and progress. [133]

The 'needs of life and progress' as perceived by the poorer States are the equality in law and in fact. Put in another way, there has to be equality among all the *peoples* wherever they are.[134] UNCLOS III and the CHM principle have this vision in mind as regards the law of the sea.[135] For good reason, the freedom of the sea concept has been discarded by the developing States as inappropriate to deep seabed mining. It was formed and has been put forward by the maritime States to futher their economic and political interests.[136] Its underlying *laissez-faire* principle ensures that, "between the

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132. Hasjim Djalal, [1982] 13 *L. Sea Inst. Proc.* at 511. See also Wang Tieya, *ante*, note 63, at pp.959-969, and cf. T. Schweisfurth, "The Role of Political Resolution in International Law", in MacDonald and Johnston (eds.), *ante*, note 63, pp. 913-953.

133. *The Function of Law in the International Community* (1933), p.248.
Cf. Justice Holmes : "The life of law has not been logic, it has been experience. The felt necessities of the time...The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics". [*The Common Law* (1881), p.1]
Cf. also the rationale behind the 'inter-temporal' law doctrine used in, e.g., *the Island of Palmas case*, (1928) 2 *R.I.A.A.* 829; *the Minquiers and Ecrehos Case (France v. U.K.)*, I.C.J. Reports 1953, p.47; *the Western Sahara Case*, Advisory Opinion, I.C.J. Reports 1975, p.12; see R.Y. Jennings, *ante*, note 78, pp.28-30, 31-35, 39-40; Sir Gerald Fitzmaurice, (1953) 30 *British Y.B. Int'l L.* 1 at 5-8; T.O. Elias, *The International Court of Justice and Some Contemporary Problems* (1983), chap. 6, at pp.119-124, 128-129, 130-138, 141-145
Judge Elias summarizes : "...The inter-temporal law seems to have been designed to govern a situation in which the need for stability in international relations of States is to be preserved while at the same time due recognition is given to necessity for change in the evolution of those relations and of the law regulating them..." (*Ibid.*, at p.145).

134. See, I. Haq, *ante*, note 124, at 508-510, 512; de Rivero B., *ante*, note 129, pp.xvi, 4; F.V. García-Amador, "Current Attempts to Revise International Law : A Comparative Analysis", (1983) 77 *A.J.I.L.* 286, esp. at 289-295; C.W. Pinto, in R-J. Dupuy [ed. 1982], at pp.22-24.

135. H. Djalal, *ante*, note 132, at 511-512; also President Carlos Andrés Pérez of Venezuela, UNCLOS III, *O.R.*, vol. I, p.37; *ibid.*, p.147, paras. 57-58 (*per* Mr. Panupong of Thailand); *ibid.*, p.162, para. 54, (*per* Mr. Lim of Khmer Rep.); *ibid.*, p.192, para. 16 (*per* Mr. Abad Santos of the Philippines); *ibid.*, vol. II, p.151, para. 30 (*per* Mr. Chao of Singapore); *ibid.*, p.180, paras. 128-131, 134 (*per* Mr. Suryadhay of Laos). Cf. also Van Dyke and Yuen, *ante*, note 23, at 530-534; M.L. Pirapongse Kasemsri, *Ramkhamheng Symposium - 1977*, pp.67-68; Judge Kéba Mbaye of the I.C.J. in Dupuy(ed.), *ante*, note 78, at pp.160-161.

136. See Hugo de Groot (Grotius), *De jure praedae commentarius* (1604), esp. chap. 12 : "Mare Liberum", which appeared separately in 1608 [also trans. by Ralph Van Demen Magoffin, *The Freedom of the Seas*]. For the opinions of modern writers see, e.g., I. Brownlie, 2nd ed., pp.233-234; *Id.*, (1979-I) 162 *Hague Recueil* 245 at 253; Ludwik Gelberg, "The Freedom of the Seas : Common Heritage of Mankind", in R-J. Dupuy [ed., 1982], p.329 at pp.329-333, O'Connell, vol. I, chap. 1, pp.1-20; R.P. Anand, *ante*, note 64, chapters 2, 5, 8.

strong and the weak, it is the freedom which oppresses and law which protects"[137] Put differently, it serves "the voracious interests of maritime nations whose capabilities to exploit the oceans economically, politically and militarily were unmatched".[138]

One proponent of deep seabed mining under the regime of the freedom of the sea argues :

> ...The technology to mine deep seabed minerals is not so sophisticated that it cannot be developed or acquired by any developing country wishing to participate in mining activities. Likewise, there are nodules of sufficient value in so many areas of the world ocean that the lead taken by mining companies in the industrial nations need not prohibit later entry by the developing countries. [139]

This statement evinces a flagrant ignorance of the deep seabed mining industry. Only a few multinational consortia and States have been able to pursue the deep seabed mining ventures in competition for the few attractive sites worthy of commercial exploitation.[140] Thus, the freedom of the sea is inadequate in this matter.[141]

The New International Economic Order (NIEO) advocated by the developing States has in mind the redefinition of certain norms in order to achieve the realization of their 'rights' or 'entitlements' presumed to exist in law, but which are hollow in fact. The emphasis is on equity and distributive justice to elevate the 'capacity' of States to enjoy equal rights.[142] This is not over-ambitious in view of "a widely felt necessity on the part of government elites to respond to tensions and grievances which threaten the equilibrium and stability of the international order".[143] UNCLOS III was conceived by the developing States as a vital forum to realize the NIEO,[144] particularly as regards the

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137. UNCLOS III, *O.R.*, vol. I, p.106 (*per* Raharijaona of Madagascar).

138. Ambassador E.L. Evriviades of Cyprus, (1982) 11 *Ocean Devel. & Int'l L.* 201 at 206. See also the opinions of the representatives of Tanzania (UNCLOS III, *O.R.*, vol. I, p.20), and Peru (*ibid.*, at p.157); A-C. Kiss, *ante*, note 52 at 113-118; Jean-Pierre Lévy, "La Conference sur le droit de la mer : un atelier international experimental", (1980) 82 *R.G.D.I.P.* 7 at 9.
Arvid Pardo presages the demise of the principle of freedom of the high seas on the 19th century model : "For this principle is inappropriate, as Grotius himself would have recognized, where ocean space can be physically controlled and occupied..." (*South*, May 1984), p.73 at p.74).

139. H. Gary Knight, *ante*, note 88, at 752; and similarly G. Pontecorvo, *ante*, note 24, at 211.

140. See *ante*, notes 14-18.

141. See also H.W. Briggs, *ante*, note 114 : the inadequacy of the rule of the freedom of the sea "is seen when it is used to justify acts imperiling the conservation of limited resources such as fisheries or the disciplined exploitation of submarine resources of untold value".

142. C.C. Ferguson, Jr., *ante*, note 131, at 414-418; R.W. Tucker, *op. cit.*, pp.71, 167-168; Sakti Mukherjee and Indrani Mukherjee, *Major Issues in International Law* (1981), *passim;* Fred Hirsch, "Is there a new international economic order?", (1976) 30(3) *Int'l Org.* 521, esp. at 528-531; I. Brownlie, (1979-I), *loc. cit.*, at 272-274, 282-286, 287-288.
Cf. R.M. Unger, *ante*, note 70, at 583 *et sequel;* D.M. Johnston, *ante*, note 127a, at pp.112-118, 131; Schachter, *ante*, note 114, pp.4, 6, 14-16, 17-21.

143. Schachter, *ibid.*, at p.16.

144. Elizabeth Mann Borgese, "The New International Economic Order and the Law of the Sea", in D. Walsh (ed.), *ante*, note 14, chap. 4, esp. at pp.82-85.
Cf. R-J. Dupuy [ed. 1982], pp.13-14; UNCLOS II, *O.R.*, vol. II, p.272, para. 78 (*per* Mr. Suryadhay of Laos).

deep seabed mining issue.[145]

The Southeast Asian States joined forces with other developing States in advocating their effective and meaningful representation in a strong international authority which would be the trustee of mankind, entrusted to regulate deep seabed mining and to distribute equitably the benefits among all States.[146] The charge that any regulation of deep seabed mining would be economically inefficient and politically unnecessary is, in effect, an exorbitant "plea to treat seabed mining as a foreign investment venture in which one of the parties-the host State-has been eliminated". At any rate, the argument is untenable since such a venture would still have been subject to some kind of regulation, at least in the form of the national law of the investors themselves.[147]

Moreover, it must be conceded,

> Economic efficiency is not ...a criterion that every one is obliged to accept as a matter of logic. Most of us as individuals attach different weights to the goal of efficiency just as we adopt different notions of distributional fairness. But almost everyone will attach *some* value to reducing pure waste... .[148]

A substantial proportion of economic rent in the profits is believed to be possible in the case of deep seabed mining. It occurs because of both the scarcity of suitable mine sites and the barriers to entry into the industry. If the Authority were to put up fewer sites for competitive bidding each year than there are potential miners, most of the economic rent due to the shortage of sites would accrue to it, not the companies. In addition, the best sites would be allocated to the most efficient companies, thus avoiding, or reducing, pure waste and inefficient operations.[149]

As early as 1966, President Johnson of the U.S.A., the nation which has always been the bastion of the *laissez-faire* principle, announced :

> Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.[150]

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145. E.g., UNCLOS III, *O.R.*, vol. I, p.11 *et sequel, passim.*

146. *Ibid.*, vol. II, p.23, paras. 71-72 (*per* M.L. Kasemsri of Thailand); *ibid.*, p.25, para. 14 (*per* Mr. Soriano of the Philippines); *Ibid.*, p.26 (*per* Mr. U Myo Htun Lynn of Burma); *ibid.*, p.38, para. 22 (*per* Miss Nguyen Thi Ngoc Lan of the Rep. of Vietnam).
The Philippines, for instance, was disenchanted with Article 161(7) (a) of the Draft Convention on the Law of the Sea as it then stood which would, in effect, permit veto power in the Authority, contrary to "the principle of sovereign equality of States enshrined in the U.N. Charter" (*Ibid.*, vol. XIV, p.59, para. 117, *per* Mr. Santos. Now see : the 1982 Convention, Article 159(6)-(10), and Article 161(7)-(8)). Cf. also the representative of Trinidad and Tobago (*ibid.*, vol. II, p.12).

147. Julio Faundez, *ante*, note 56a, at pp.178-179.

148. Ross D. Eckert, *The Enclosure of Ocean Resources* (1979), p.49, and cf. also pp.57-58. Emphasis original.

149. Nina W. Cornell, *ante*, note 16, at 530-531.
'Economic rent' is defined as the total value of an output in excess of its total costs by more than a normal profit, (*Ibid.*, at 519).

150. *Weekly Compilation of Presidential Documents* (1966), vol. 2, pp. 930-1.
See also Edward Wenk, Jr., *The Politics of the Oceans* (1972), pp.149-154, 157, 230-231.

It consequently became a moot point among the members of the U.S. Congress and Administration whether, and to what extent, the U.N. should play any role in the equitable and efficient harvest of these ocean resources.[151]

In 1970, after decrying the inadequacy of the extant law of the sea, President Nixon echoed the view of President Johnson's, his predecessor. The U.S.A. proposed a draft universal treaty to renounce all national claims over the natural resources of the seabed beyond the depth of 200 metres from the coast, and to regard these resources as the common heritage of mankind. Between the 200-metre mark and an undetermined outer limit beyond the base of the continental slope would be the 'International Trusteeship Area' (ITA), wherein the coastal State would license mineral exploration and exploitation with approximately one-half or two-thirds of the accruing revenues to be given to the International Seabed Resource Authority (ISRA), which would also be in charge of licensing for the remainder of the international seabed area. The revenues were to be used for the benefits of all mankind, particularly those in the developing States.[152] However, the U.S.A. opposed the U.N. General Assembly's 'Moratorium Resolution' because, *inter alia*, it would limit the rights of the coastal State to grant leases and licences.[153] The ensuing domestic opposition, particularly from the petroleum industry, condemened the 'give away' of the U.S. offshore inherent rights and entitlements and the potential inefficient and wasteful exploitation by the international authority.[154] The reaction from the developing States was no less favourable. The proposal was perceived as bestowing upon the coastal State the largest concentration of the known ocean resources, yet the revenues accruing to the international community would be relatively small.[155] Similar opinions were gleaned as regards similar British and French proposals in that year.[156] In any case, by 1971 the prospect of UNCLOS III had stolen the limelight.

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151. L. Juda, *ante*, note 59, pp.84-87, 94-95; A.L. Hollick, *ante*, note 13, pp.187-188; Wenk, Jr., *op. cit.*, pp.266, 271, 276. The idea to entrust agencies of the international community with the exploitation of the natural resources of the then crystallizing continental shelf regime had been proposed and aborted in the I.L.C. in 1951. In the opinion of the Commission at that time it would be destined to "meet with insurmountable practical difficulties and it would not ensure the effective exploitation of the natural resources which is necessary to meet the needs of mankind. Continental shelves exist in many parts of the world; exploitation will have to be taken in very diverse conditions, and it seems impracticable *at present* to rely upon an international agency to conduct the exploitation". [(1951) 2 *Y.B. Int'l L. Comm'n*, at p.142, emphasis added].

152. Statement of President Nixon of 23 May 1970 on U.S. Policy for the Seabed, (1970) 9 *I.L.M.* 807-809; John R. Stevenson (Legal Adviser, Dept. of State), "Summary of Provisions of Draft 'U.N. Convention on the International Seabed Area' : Explanatory Memorandum of 3 Aug. 1970", in Lay, Churchill and Nordquist (eds.), *New Directions in the Law of the Sea*, vol. II (1973), pp.753-768.
See also : F.M. Auburn, "The International Seabed Area", (1971) 20 *Int'l & Comp. L.Q.* 173 at 178-179, 185, 187-192; R.Y. Jennings, "The U.S. Draft Treaty on the International Seabed Area : Basic Principles", *ibid.*, 433 at 445-446; R.Y. Jennings, "A Changing International Law of the Sea", [1972B] 31 *Cam. L.J.* 32 at 46-47.

153. L. Juda, *ante*, note 59, at 102-105.

154. See, e.g., National Petroleum Council (U.S.A.), *Petroleum Resources under the Ocean Floor*, Suppl. Report of March 1971; L. Juda, *ante*, note 59, pp.114-116; Eckert, *op. cit.*, pp.246-248; Robert B. Krueger, "An Evaluation of U.S. Ocean Policy", (1971) 17 *McGill L.J.* 648; R.B. Krueger, "Where Are We on the Law of the Sea?", in D. Walsh (ed.), *ante*, note 14, p.77 at p.78.

155. L. Juda, *ante*, note 59, pp.119-121, and accompanying references.

156. See O'Connell, vol. I, pp.462-463; E.M. Borgese, *ante*, note 144, at 18-19 for these proposals.

The foregoing account serves to illustrate the acceptability of international regulation of the deep seabed mining, and the idea of preferential treatment accorded to the less developed States, even among the ardent supporters of the *laissez-faire* concept. Noteworthy in this connection are the initiatives originating from the U.S.A. which include, for instance, the parallel system of exploitation coupled with the indications that finance and technology for the operating organ of the Authority would come from the developed States.[157]

While the absence of international agreement or regulation of deep seabed mining is recognized to be most likely to sow the seeds of international conflict, it is trite that in a world of interdependence the gap between the developed and less developed world needs narrowing so as to quell smouldering international discontent and turmoil. The bastion of *laissez-faire* also takes cognizance of this reality.[158] Most eminent of all, the General Agreement on Tariffs and Trades (GATT) concededly accords preferential treatment to the less developed States despite its non-discriminatory 'most-favoured-nation' or across the board principle of treatment.[159] Use of bilateral aid is prone to abuse by the donor.[160] In such a case, the relationship of subjugation and domination is likely

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157. See Secretary of State Henry Kissinger, (1976) 75 *Dept. of State Bulletin* 395; E.L. Evriviades, *ante*, note 1, at 217-220; Van Dyke and Yuen, *ante*, note 23, at 526-530, and 530-534; Douglas Yarn, "The Transfer of Technology and UNCLOS III", (1984) 14 *Ga. J. Int'l & Comp. L.* 121 at 131-132.
The industrialized States were also in favour of subsidization of deepsea mining industry : a notion contrary to free market forces. [*per* Ambassador John S. Bailey of Australia, (1983) 46 *L. & Contemporary Problems* at 87-88].

158. E.g., Secretary of State George Shultz, "Restoring Prosperity to the World Economy", U.S. Dept. of State, *Current Policy No. 451*, Feb. 15, 1983; Secretary Shultz, "Foreign Aid and U.S. National Interests", *ibid., Current Policy No. 457*, Feb. 24, 1983; Ferguson, Jr., *ante*, note 121 at 144-148, 149-150, 153-154; Tom J. Farer, "The U.S. and the Third World : A Basis for Accommodation", *Foreign Affairs*, Oct. 1975, pp.79-97, esp. at 96; Richard E. Feinberg, "The Intemporate Zone : The Third World Challange to U.S. Foreign Policy", [unpublished paper, a copy of which was made available to the author through the late Prof. C. Clyde Ferguson, Jr. of Harvard Law School]; Richard M. Nixon, *The Real War* (1980), pp.6, 36-37, 202.

159. GATT, Article XVIII and Part IV, and also Articles II, and XXV. See John H. Jackson, *Legal Problems of International Economic Relations*, (Cases, Materials and Text : American Casebook Series) (1977), chap. 17 : "Trade Preferences for Developing Countries"; Thomas R. Graham, "The U.S. Generalized System of Preferences for Developing Countries : International Innovation and the Art of the Possible", (1978) 72 *A.J.I.L.* 513.
Cf. also de Rivero B., *ante*, note 129, at pp.5-8, 9-14, 15, 19, 23-33, 34-41, 44-61, 113-121, 125, 130-135; O. Schachter, ante, note 114, pp.8-10, 17-21, 22-23, 33; Udokang, *ante*, note 131, at p.61; F.V. García-Amador, *ante*, note 134, at 294; I. Brownlie, (1979-I) 162 *Hague Recueil* 245 at 275, 301-304, 304-305; I. Haq, *ante*, note 124, at 517-518; R. Dworkin, *ante*, note 69, chap. 9 : "Reverse Discrimination", esp. at p.232; A. Yusuf, *ante*, note 124, at pp.30-41. Also : Para. 7 of the Draft International Code on the Transfer of Technology, U.N. Conference on an International Code of Conduct on the Transfer of Technology (*TD/Code TOT/47*, 20 June 1985) : "*Recognizing* the need for developed countries to grant special treatment to the developing countries in the field of the transfer of technology"

160. See C. Clyde Ferguson, Jr., "Texts and Selected Documents on the New International Economic Order", Unit Two (1979), Harvard Law School, pp.3, 4-6, 10-17; Charles R. Franck, Jr. and Mary Baird, "Foreign aid : its speckled past and future prospects", (1975) 29 *Int'l Org.* 133; Richard M. Nixon, *ante*, note 158, pp.212-215, 226-228.
Cf. C. Fred Bergsten, "The Threat from the Third World", (1972-73) 11 *Foreign Policy* 102 at 103.
Robert Ramsay raises the question : why should the people in the developed countries subsidize the rich people (the 'economic quisling') in the poor countries through foreign aid and assistance? ["UNCTAD's failures : the rich get richer", (1984) 38(2) *Int'l Org.* 387 at 393-397]. My reply would be : it seems that the rich people in the rich countries have a vested interest in maintaining the *status quo* of the rich people in the poor countries. Moreover, in any case, the rich countries including their rich people cannot be entitled to claim to be leaders of the economic model for the poor countries so long as the poor people in the rich countries are still suffering.

to be pervasive, entrapping the less developed States in a vicious circle with entrenched unequal capacity to enjoy or enforce rights under the traditional doctrine of sovereign equality.[161] In all, the international regulation of the deep seabed mining by an international authority which is also entrusted with the task of equitable distribution of benefits deriving therefrom is the most plausible alternative.[162] Arvid Pardo poignantly summarizes in 1984 :

> ...[I]nternational acknowledgment that the seabed and its mineral resources enjoy a special legal status as a *CHM* could mark *a revolution* not merely in the Law of the Sea, but also in international relations, *by changing the structural relationship between rich and poor countries and the traditional concepts of economic aid.* [163]

(B) DOCTRINE : The CHM under the 1982 Law of the Sea Convention

(i) Substance

Article 136 of the 1982 Law of the Sea Convention stipulates :

> The [deep seabed] and its resources *are* the common heritage of mankind. (Emphasis added.)

Pursuant to Article 137, the 'Area' and its resources are not subject to national claim, exercise of sovereignty or sovereign rights, or appropriation by any State or national or judicial person. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the International Seabed Authority (the 'Authority') shall act in accordance with Part XI of the 1982 Convention.[164] The Authority is to carry out the activities in the Area and to provide for the equitable sharing of financial and other economic benefits deriving therefrom, taking into particular account the interests and needs

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161. See further : Altaf Gauhar (ed.), *The Rich and the Poor : Development, Negotiations and Cooperation : An Assessment* (1983); A. Gauhar (ed.), *Talking About Development* (1983), pp.5-6 (*per* Willy Brandt), pp.25, 29, 52-58, 60 (*per* Sir Sridath S. Ramphal), pp.71-82 (*per* Germani Corea), pp.127-130 (*per* Michael Manley), pp.274-276 (*per* Olof Palme).

162. See, e.g., UNCLOS III, *O.R.*, vol. II, pp.27-30 (*per* Mr. Arsenis of UNCTAD); *ibid.*, p.46 (*per* Mr. Stavropoulos, Special Representative of the U.N. Secretary General); and cf. *ibid.*, p.255, para. 35 (*per* Mr. Panupong of Thailand).

163. *South*, May 1984, p.73. Emphasis added.
Cf. also Edward A. Laing, "International Economic Law and Public Order in the Age of Equality", (1980) 12 *L. & Policy in Int'l Business* 727-781.
For elucidating treatments of the legal concept of 'equity' see : Bin Cheng, "Justice and Equity in International Law", (1955) 8 *Current Leg. Prob.* 185; Tomas Rothpfeffer, (1972) 42 *Nordisk Tidsskrift for International Ret.* 81 at 81-92; M.W. Janis, "Equity and International Law : The Comment in the Tentative Draft", (1982) *Tulane L. Rev.* 80.

164. The wording 'mankind as a whole' was proposed by the Drafting Committee to replace 'the international community as a whole'. [*U.N. Doc. A/CONF.62/L.57/Rev. 1* : Report of the Chairman of the Drafting Committee, UNCLOS III, *O.R.*, vol. XIV, p.115].
Further, Article 138 of the 1982 Convention provides : "The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part, the principles embodied in the Charter of the U.N. and other rules of international law in the interests of maintaining peace and security and promoting international co-operation and mutual understanding"
See also : Anatoli L. Kolodkin, [1984] 17 *L. Sea Inst. Proc.* at 101. For a detailed treatment see : Wolfgang Hauser, *The Legal Regime for Deep Seabed Mining Under the Law of the Sea Convention*, (Trans. by Frances Bunce Dielmann) (1983, Kluwer-Deventer, The Netherlands).

of developing States and of peoples who have not attained full independence or other self-governing status.[165]

The development of the resources of the Area is dealt with under section 3 of Part XI of the Convention. The system of exploration and exploitation as elaborated in Annex III of the Convention involves the so-called 'parallel system'. When a State or one of its entities finds a promising site, it must submit a plan of work to the Authority for approval. Such a site must be sufficiently large to accommodate the operations, or must be adjacent to another site suitable for a single operator. The Authority thereupon chooses one of these sites as 'the reserved area' for its operating arm called the 'Enterprise', and grants a licence for the State or its entity to exploit the other. In addition, the effective participation of developing States in activities in the Area shall be promoted.[166]

Production policies regarding the resources of the Area are enunciated in Article 151 of the Convention. The objectives of these policies are to provide adequate world supply of these resources, the revenues accruing to the developing States corresponding to their economic needs, and the alleviation of adverse affects on land-based producers through the establishment of production ceilings, and compensation schemes.[167]

Article 13 of Annex III of the Convention deals in length with financial terms of contracts between the Authority and the entities which possess the nationality of States Parties to the convention or are effectively controlled by them or their nationals and sponsored by such States Parties. Besides the revenues from this source, the Authority also receives payments from the Enterprise.[168]

(ii) Procedure

The realization of these substantive goals naturally depends upon the efficacy of the mechanisms to implement them.

Section 4 of Part XI of the Convention elaborates the composition, power and functions of the Authority. It is responsible for the granting of licences, exploration and exploitation of the deep seabed resources, with the Enterprise as its operating commercial arm. In principle, States Parties or qualified private enterprises may be granted

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165. The 1982 Convention, Articles 140 and 274. See also Articles 141-143.

166. *Ibid.*, Article 148.

167. See also : U.N. Secretary General, "Report on the Economic Implications of Sea-Bed Mining in the International Area", *U.N. Doc. A/CONF.62/37* of 18 Feb. 1975, UNCLOS II, *O.R.*, vol. IV, pp.121-128, esp. figure 1, at p.123, and figure 3 at p.126; U.N. Secretary General, "Report on effects of the production limitation formula under certain specified assumptions", *U.N. Doc. A/CONF.62/L.66* of 24 Feb. 1981, *ibid.*, vol. XV, pp.119-145, esp. Table 4, pp.132-145.
Cf. A.M. Post, *ante*, note 2, chap. 14.

168. Annex IV, Article 10. For the finances of the Enterprise, see Article 11, Annex IV.
See further E.M. Borgese, *ante*, note 144, at 22-27 and cf. 38-43. As Ambassador John S. Bailey of Australia points out, payments to the Authority under the Convention "are favourably comparable with payments made to developing countries by investors in land-based mining operations..." [(1983) 46 *L. & Contemporary Problems* at 75-76, and at 87, refuting the contrary argument by M.A. Dubs, *ibid.*, at 83].

licences by the Authority to explore the resources in one single block per explorer as divided up by the Authority. The licensees then report the data back to the Authority who will devise a 'plan of work'. Each block will be divided into two parts : one for the exploitation by the licensees concerned in return for revenues payable to the Authority; the other reserved for the Enterprise. The accruing revenues will be distributed equitably among the developing States.[169]

The Authority is composed of the Assembly, the Council and the Secretariat. The Assembly, the 'supreme organ of the Authority', is represented by all States Parties and is entrusted to establish general policies of the Authority.[170] The 36-member Council is the executive organ of the Authority whose members are elected by the Assembly for a four-year term of office with the right of re-election. The ratio of representation in the Council is as follows : four from States Parties with the largest investment in the deep seabed mining, including one from Eastern Europe; four from States Parties consuming or importing more than two per cent of the world totals of commodities of categories found in the deep seabed, including one from Eastern Europe as well as the largest consumer; four from States Parties which are major exporters of categories of minerals found in the Area, including at least two developing States whose exports of such minerals have a substantial bearing upon their economies; six from among developing States Parties, representing special interests owing to, *inter alia*, their having large populations, or being land-locked or geographically disadvantaged, or potential producers of such minerals, or least developed States; and eighteen members elected on the basis of geographical distribution, with at least one from each region. The decisions on questions of substance are to be taken by a two-thirds or three-quarters majority, as the case may be, with the requirement of consensus in certain important decisions.[171]

The administration of the Authority is under the civil servants of the Secretariat, headed by the Secretary General of the Authority.[172]

The commercial arm of the Authority, the Enterprise, comprises a Governing Board whose 15 members are elected by the Assembly with due regard to the principle of equitable geographical distribution and "the highest competence, with qualifications in relevant fields, so as to ensure the viability and success of the Enterprise"

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169. The 1982 Convention, Articles, 156-158, and Articles 150-153. See also E.L. Evriviades, *ante*, note 1, at 222, 225-227, 232-237; Post, *ante*, note 2, pp.186, 187.

170. The 1982 Convention, Articles 159-160.

171. *Ibid.*, Articles 161-162. Also Articles 163-165, re : the subsidiary organs of the Council.
Also E.D. Brown, "Seabed Mining : From UNCLOS to Prep Com.", (1984) 8 *Marine Policy* 151 at 155-156.
Cf. Stephen Zamora, "Voting in International Economic Organizations", (1980) 74 *A.J.I.L.* 566 at 581-582, 589-592; UNCTAD, Agreement Establishing the Common Fund for Commodities, Schedule D : "Allocation of Votes", *U.N. Doc. TD/IPC/CONF/L.15* of 26 June 1980, and *Corr. 1* of 27 June 1980; Kathryn E. Yost, "The ISA Decision-Making Process : Does it give a proportionate voice to the participant's interests in deepsea mining?", (1983) 20 *San Diego L. Rev.* 659 at 674 and 674-677.

172. The 1982 Convention, Articles 166-169.
See W.B. Jones, "The International Seabed Authority Without U.S. Participation", (1983) 12 *Ocean Devel. & Int'l L.* 151 at 157, 164-165, 170-171.

They are to serve for four years, in their personal capacity, and may be re-elected. The Enterprise is to act under the 'Resource Policy' formulated by the Council which is, in turn, under the constitutional control of the Assembly.[173]

Disputes involving the deep seabed resources fall within the jurisdiction of the Seabed Dispute Chambers (SBDC), whose members are selected by the Assembly and the Council. Not only States but also individuals and the Authority may have the legal standing *(locus standi)* to bring claims.[174] While the International Court of Justice is constrained to apply international law as specified in Article 38(1) of its statute, the SBDC will be able to apply the principles of 'emerging' law, thus expediting the development of established and 'generally recognized' law.[175] The Parties may choose some other judicial forum, however.[175a]

The funds of the Enterprise are to come from the Authority, voluntary contributions made by States Parties, loans, income from its operations, and any other available sources.[176] At its inception, the Enterprise is not able to borrow from the World Bank insofar as it is not able to fulfil the requisite conditions demanded by the Bank. The stance of the OPEC countries is by no means clear. Moreover, commercial loans from private banks depend upon the 'feasibility' of the credit of the Enterprise; that is, whether it will be sufficiently profitable to pay back the loans and interests, and whether, before the time of the loans, it has been operating efficiently. However, how could the Enterprise operate efficiently without the transfer of technology and manpower from States Parties?[177] With this in mind, Article 5, Annex III of the Convention formulates a system of transfer of deep seabed mining technology to the Enterprise.[178] Subject to all legitimate interests, the Authority is to ensure that this kind of technology is available to the developing States so that they will be able to participate in deep seabed mining development.[179]

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173. The 1982 Convention, Annex IV.
See also Jones (1983), *loc. cit.*, at 165; M.L. Pirapongse Kasemsri, *Ramkhamheng Symposium-1977*, pp.46-47, and p.54, 65-68.

174. The 1982 Convention, Part XI, Section 5.
See, W.B. Jones (1983), *loc. cit.*, at 160, 167-168; E.L. Evriviades, *ante*, note 1, at 237-239; and cf. Louis B. Sohn, "The Role of Arbitration in Recent International Multilateral Treaties", (1983) 23 *Va. J. Int'l L.* 171 at 184-188; Lucius C. Caflisch, "The Settlement of Disputes Relating to Activities in the International Seabed Area", in Rozakis and Stephanou [eds. 1983], *ante*, note 56, pp.303-344.

175. Cf. H. Lauterpacht (1933), *ante*, note 65, pp.373-374; H. Lauterpacht (1958), *ante*, note 74, pp.319-329; Charles de Visscher, *Theory and Reality in Public International Law* (trans. P.E. Corbett, 1957), pp.336-8.

175a. The 1982 Convention, Article 188. See also L.C. Caflisch, *loc. cit.*, at 308-310.

176. The 1982 Convention, Annex IV, Article 11. See also A.M. Post, *ante*, note 2, chap. 15, esp. at pp.224-228.

177. M.L. Pirapongse Kasemsri, *ante*, note 173, at p.47.

178. See also : Articles 6(3), 13(1) (d) of Annex III of the 1982 Convention, and Resolution II, paragraphs 8(a) and 12(a) (iii).

179. The 1982 Convention, Articles 144, 273 and 274.
See the controversy clouding these provisions : Tommy T.B. Koh, in K. Hossain (ed.), *ante*, note 24, p.160 at p.162; Julio Faundez, *ibid.*, p.174 at pp.184-185; Jon Van Dyke and David L. Teichmann, "Transfer of Seabed Mining Technology : A Stumbling Block to U.S. Ratification of the Law of the Sea Convention?", (1984) 13 *Ocean Devel. & Int'l L.* 427 at 430-445; D. Yarn, *ante*, note 157, at 129-136, 139, 141, 142-5, 146-150. Cf. the tentative draft of joint venture contract in G. Jaenicke, E. Schenze and W. Hauser. *A Joint Venture Agreement For Seabed Mining.* (1981).

Preparatory investment in pioneer activities relating to deep seabed nodules is protected under Resolution II, annexed to the 1982 Convention. The Preparatory Commission is to make arrangements enabling the Authority to be set up and operate, and, pending that eventuality, to undertake the functions under Resolution II.[180] States Parties and/or international organizations concerned have the responsibility to ensure compliance with Part XI of the Convention, and to account for liability for any damage caused by failure to do so.[181] To keep pace with reality, the provisions of the Convention concerning deep seabed mining are subject to a periodic review every five years from the entry into force of the Convention.[182] Amendments of these provisions are also possible.[183]

(c) Policy Orientation

(i) Unilateral National Legislation

In 1980, the U.S.A. enacted the Deep Seabed Hard Mineral Resources Act, establishing a system of interim exploration and exploitation of the deep seabed by U.S. nationals.[184] Similar measures were subsequently adopted by the Federal Republic of Germany (FRG),[185] the U.K.,[186] France[187] and, in 1982, Japan. These national laws stipulate a provision for imposing and levying fees on licensees based on the value of recovered minerals. The revenues are to be used to establish a trust fund to be transferred to the established International Seabed Authority if and when the 1982 Convention enters into force for these respective States. Otherwise the fund will be disposed of in the form of foreign aid through the specified channels. These national legislative measures also provide for reciprocal recognition of licences among reciprocating States and legislation. No commercial recovery was permitted until 1 January 1988.[188]

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180. See *ante*, note 13. See also Lee Kimball (1985), *ante*, note 43, esp. at 75-77.

181. The 1982 Convention, Article 139.

182. *Ibid.*, Articles 154 and 155.

183. *Ibid.*, Articles 155(4) (5); and 314.

184. *Deep Seabed Hard Mineral Resources Act,* (Public L. No.96-283, June 20, 1980, 94 *Stat.* 553, 30 *U.S.C.* §1401-1605) [(1980) 19 *I.L.M.* 1003].
See L. Juda, *ante*, note 59, pp.130-134, 142-143; Goldie (1973), *ante*, note 53, at 822-824; Van Dyke and Yuen, *ante*, note 23, at fn.21-22. Cf. John G. Laylin, (1971) 5 *Int'l Lawyer* 442 at 447-451.

185. *Act on Interim Regulation of Deep Seabed Mining,* (1981) 20 *I.L.M.* 393
See E.U. Petermann, *ante*, note 97 at 267 *et sequel.*

186. *Deep Sea Mining (Temporary Provisions) Act* of 1981, c.53, (1981) 20 *I.L.M.*
See Geoffrey Marston, "United Kingdom : Legislation on Deep Sea Mining", (1982) 16 *J. World Trade L.* 86.

187. *Law No. 81-1135 of 23 Dec. 1981 (Journal Officiel du 23 déc. 1981).* See Guy de Lacharrière, "La loi française sur l'exploration et l'exploitation des ressources minerales des grands fonds marins", (1981) *27 A.F.D.I. 665;* Dennis G. Touret, "The French Deep-Sea Mining Legislation of 1981", (1983) 13 *Ocean Devel. & Int'l L.* 115.

188. *Ante*, notes 184-187. For useful summaries and comparisons of these enactments see : Richard Todd Luoma, "A Comparative Study of National Legislation Concerning the Deep Sea Mining of Manganese Nodules", (1983) 14 *J. Maritime L. & Commerce* 243; James H. Breen, "The 1982 Dispute Resolving Agreement : The First Step Towards Unilateral Mining Outside the Law of the Sea Convention", (1984) 14 *Ocean Devel. & Int'l L.* 201 at 211-213.

The driving forces behind these enactments were mainly the deadlock at UNCLOS III negotiations concerning the deep seabed mining regime, the desire to develop the deep seabed resources as expeditiously as possible, and the reluctance among these forefront industrialized States to lose ground to one another in the competition for attractive mine sites.[189]

When confronted with the condemnation from the developing States at UNCLOS III, the U.S.A. shielded itself behind the excuse that deep seabed mining is under the freedom of the high seas until a new regime is founded.[190] In the opinion of France, only a treaty would bind States to develop the deep seabed resources in a particular way.[191] The F.R.G. shared the views of the U.S.A. and France;[192] while the U.K. stated that in the interests for all consumers, progress towards deep seabed mining should not be delayed by UNCLOS III.[193] In Japan's opinion, such a legislation would not be contrary to the CHM principle.[193a] A handful of other industrialized States which had an interest or potential in the deep seabed mining evinced their support.[194] In contradistinction, the developing States were unequivocally against these unilateral enactments which were perceived as a thinly veiled attempt to render the CHM principle nugatory.[195] More specifically, besides effectively restricting these activities exclusively to the few industrialized States, the revenues which would accrue from these provisions are by no means munificient : at approximately 0:75 per cent of the values of specified, individual minerals actually recovered or 3.75 per cent of the value of the extracted resources alto-

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189. See the authors cited *ante*, notes 184-187. This was especially true in the case of the French legislation (de Lacharrière, *loc. cit.*, at 669).
Cf. also Paul Peter, in R-J, Dupuy [ed. 1982], pp.103-106.

190. UNCLOS III, *O.R.*, vol. IX, pp.104-105, *per* Mr. Richardson.

191. *Ibid.*, p.106, *per* Mr. de Lacharrière.

192. *Ibid.*, *per* Mr. Wolff.

193. *Ibid.*, at p.108, *per* Mr. Arculus.

193a. *Ibid.*, at p.107, *per* Mr. Nakagawa.

194. *Ibid.*, at p.107 *per* the representatives of Italy (Mr. Varvesi), Belgium (Mr. Nolard), and the Netherlands (Mr. Bos). Se also E.D. Brown, *ante*, note 93, at 555-559.
For the stakes of these States in the deep seabed mining ventures see U.N. Dept of Int'l Eco. & Soc. Aff. (1982), *ante*, note 17, at pp.3-8. However, Canada, one of the States whose nationals were engaged in deep seabed mining development, did not support the views of these States. [UNCLOS III, *O.R.*, vol. IX, p.106. See further, W.C. Brewer, Jr., (1985) 14 *Ocean Devel. & Int'l L.* 363 at 373-376].

195. UNCLOS III, *O.R.*, vol. IX, pp.103-104, *per* Mr. Nandan, Chairman of the Group of 77, Mr. Ke Tsai-Shu of China, and Mr. Chao of Singapore (*Ibid.*, at p.108).
Also : UNCTAD Resolution 108(V), adopted by the vote of 107:9, with 13 abstentions, 170th Meeting, 1 June 1979. (*Doc. A/CONF. 62/79;* 26 July 1979), UNCLOS III, *O.R.*, vol. XII. (*NB :* the U.S.A., France, the F.R.G., Italy, Belgium, Japan, Luxembourg, the Netherlands and the U.K. voted against it, while the abstaining States included Australia, Canada, New Zealand, Norway and Sweden); Letter dated 28 July 1980 from the Chairman of the Group of 77 to the President of the Conference, *Doc. A/CONF. 62/100, ibid.*, vol. XIV, p.107; for the reply from the U.S.A. see Letter dated 30 July 1980, *Doc. A/CONF. 62/103, ibid.*, p.109.
Cf. G. Biggs, *ante*, note 95, at 246-247, 251; Roy S. Lee, (1983) 12 *Ocean Devel. & Int'l L.* 247 at 256-257.

gether.[196] Indeed, U.S. Ambassador James L. Malone went so far as to denounce the CHM as being based on

> the *false assumption* that every nation has an undivided property interest in the deep seabed, and therefore, each is automatically entitled to its proportionate share of the fruits from those whose efforts produce wealth from what would otherwise be economically valueless... .[197]

After propagating the value of the U.S.A.'s 'free market and democratic principles', Malone argues that the flag State approach coupled with 'market force' as enunciated in the U.S. legislation

> will be a *minimalist one,* which will provide access to and encourage the production of seabed minerals *without costly and unnecessary policy, legal, and economic restraints.*[198]

As examined above, the arguments underlying this excuse are not well-founded, and in fact, deviate from the earlier U.S. positions. The lawfulness of the acts of the U.S.A. and other non-States Parties to the 1982 Convention will be dealt with in the next section. At this point, the legality of the national legislation of these States will be examined.

Apart from France and Japan, the U.S.S.R. is the other signatories of the 1982 Convention which enacted the deep seabed mining legislation even prior to the adoption of the Convention on 30 April 1982.[199] Notwithstanding, it has been the position of the U.S.S.R. to further the cause of the CHM as interpreted by the developing States.[200] The Soviet Act, according to its prologue, is to "protect its interests in respect of the prospecting for and the development of [deep seabed] resources" in view of the fact that other States have unilaterally enacted similar legislation. Moreover, an applicant for a licence under the Soviet law must indentify two promising areas of the deep seabed for nodule mining, with one of them to be reserved for the Enterprise.[201] In addition, 'part of the proceeds' are to be set aside in a special fund, the amount of which is to be determined by the Council of Ministers at some later date, which 'may' be transferred to the Authority.[202] At the time of its enactment, the U.S.S.R. seemed uncertain about the

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196. The U.S. Act, Title IV, §402; the F.R.G. Act, s.12(2); the U.K. Act, s.9(1) (a) and (b); the French Act, Article 12. And see : Van Dyke and Yuen, *ante,* note 23, at 532-534; Patterson F. Willsey, "The Deep Seabed Hard Mineral Resources Act and the Third U.N. Conference on the Law of the Sea : Can the Conference Meet the Mandate Embodied in the Act?", (1979-81) 18 *San Diego L. Rev.* at 532.

197. (1983) 46 *L. & Contemporary Problems* 29 at 32. Emphasis added.

198. *Ibid.,* Emphasis added.

199. The Act on Temporary Measures for the Regulation of the Activities of Soviet Enterprises in the Prospecting for and the Development of Mineral Resources of the Sea-Bed Beyond the Limits of the Continental Shelf, Presidium of the Supreme Soviet, Decree on the Law of the Sea, 18 April 1982, reproduced in *Daily Report,* Soviet Union, *FBIS-SOV-82-075,* 19 April 1982. (R.T. Luoma, *ante,* note 188, at 264-266).

200. See, e.g., UNCLOS III, *O.R.,* vol. IX, p.105, *per* Mr. Kozyrev of the U.S.S.R.
The U.S.S.R. was against the 'flag State' concept as 'an abusive excess of jurisdiction' since sovereignty would have to be extended downward from the vessel, through the water column to the deep seabed. (C.C. Joyner, *ante,* note 54, at 877).

201. The Soviet Act, Article 4.

202. *Ibid.,* Article 18.

forth-coming reception by States of the Convention.[203] It may be presumed, therefore, that the U.S.S.R. has now generally accepted the stance of the other signatories of the Convention.

However, in the same vein as the French and Japanese law, the Soviet law also permits reciprocal recognition of mining claims among States with similar reciprocating legislation.[204] With regard to France and Japan, their legislation as it stands might make a mockery of the CHM principle despite their signing of the Convention.

Article 300 of the 1982 Convention reiterates the well-established principle of the law of treaties :

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.[205]

By virtue of Article 311 (3) of the Convention,

> Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incomparable with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Above all, States Parties agree that they shall not be party to any agreement in derogation of the CHM.[206] More specifically,

> No State or natural or juridical person shall claim, acquire or exercise *rights* with respect to the minerals recovered from the Area except in accordance with [Part XI of the 1982 Convention]. Otherwise, *no such claim, acquisition or exercise of such rights shall be recognized.*[207]

By setting the relatively very low level of revenues deriving from deep seabed mining, and/or by recognizing the exercise of rights outside the Convention, the national legislation of France, Japan and the U.S.S.R. is in flagrant violation of

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203. The U.S.S.R. abstained from voting on the adoption of the Law of the Sea Convention on 30 April 1982, but signed the Convention on 10 December 1982. It has yet to ratify the Convention.

204. The Soviet Act, Article 3; the French Act, Article 13.

205. According to Article 31 (1) of the Vienna Convention on the Law of Treaties: "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" [The Vienna Convention on the Law of Treaties, 1969, (1969) 8 *I.L.M.* 679, in force 1980].
Since 1969, the Vienna Convention has been 'the most authoritative source' in the international law of treaties. [T.O. Elias, *The Modern Law of Treaties* (1974), at p.5].

206. The 1982 Convention, Article 311 (6).

207. *Ibid.*, Article 137 (3). [Emphasis added]. See also Article 138.

the provisions of the Convention, which would entail upon these States responsibility and liability for damage.[208]

Once a treaty is in force, it is binding upon the parties to it and must be performed by them in good faith.[209] Even prior to that eventuality, a State is under an obligation not to defeat the object and purpose of a treaty which it has signed or has expressed consent to be bound by it, pending the entry into force of the treaty in a foreseeable future.[210] The unilateral legislation is clearly repugnant to the CHM as envisaged by the other States Parties to the 1982 Convention and will, therefore, defeat the object and purpose of this Convention.[211]

(ii) Mining Outside the Framework of the 1982 Convention under the Alleged 'Existing' Law or Legal Vacuum

Between the late 1970's and the conclusion of UNCLOS III, international deep sea mining consortia slowed down their research and technology development. The issue of technical capability has been solved, with the only remaining concern being economic and operational feasibility.[212] In contrast, the U.S.S.R., India and China, which adopted the position advocated by the developing States, have been active in deep seabed mining development. India's main area of focus is in the Indian Ocean; whereas those of China and the U.S.S.R. lie in the Pacific Ocean,[213] overlapping the area of interest of, *inter alios*, the U.S.A. and France.

In furtherance of the objective of unilateral national legislation the U.S.A. initiated the Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed in 1982 to establish a uniform licence application procedure, the criteria and procedures for resolving overlaps and co-ordination among reciprocating

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208. *Ibid.*, Article 139.

209. The Vienna Convention on the Law of Treaties, Article 26.
For discussion on the meaning of 'good faith' see: Michel Virally, "Review Essay: Good Faith in Public International Law", (1983) 77 *A.J.I.L.* 130.

210. The Vienna Convention on the Law of Treaties, Article 18.
See: John King Gamble, Jr. and Maria Frankowska, "The Significance of Signature to the 1982 Montego Bay Convention on the Law of the Sea", (1984) 14 *Ocean Devel. & Int'l L.* 121 at 123-128; Paul V. McDade, "The Interim Obligation between Signature and Ratification of a Treaty: Issues Raised by Recent Actions of Signatories to the Law of the Sea Convention with Respect to the Mining of the Seabed", (1985) 32 *Netherlands Int'l L. Rev.* 5 at 9-28.

211. McDade, *ibid.*, at 28 *et sequel;* Gamble, Jr. and Frankowska, *ibid.*, at 134, 152; and cf. Eckert, *op. cit.*, p.346.
For the legal obligations arising from official declaration of intent by a State or its qualified agents see: *Legal Status of Eastern Greenland (Denmark v. Norway),* (1933) P.C.I.J. Reports, Series A/B, No. 53 (*re:* the declaration of 22 July 1919 by the Norwegian Foreign Minister); *Nuclear Test Cases (Australia v. France; New Zealand v. France),* I.C.J. Reports 1974, pp. 253, 475, paras. 34 *et sequel; Nicaragua v. U.S.A. Case* (1984), *ante,* note 76, (*re:* Article XXXIV of the Treaty of Friendship, Commerce and Navigation between the U.S.A. and Nicaragua).

212. U.N. Dept. of Eco. & Soc. Aff. (1980), *ante,* note 17, pp.13-16.

213. *Ibid.*, (1982), pp.9-11.

States.[214] It was followed by a more permanent agreement in the form of a Provisional Understanding Regarding Deep Seabed Matters of 3 August 1984, which was signed by the U.S.A., Belgium, France, the F.R.G., Italy, Japan, the Netherlands and the U.K.,[215] and entered into force on 2 September 1984. Noteworthy in this connection is the fact that France, Japan and the Netherlands had signed the 1982 Law of the Sea Convention. These three States insisted that the agreement was simply designed to settle overlapping claims as required by the 1982 Convention and in no way called into question their support for the Convention.[216] However, in the following month, France resigned from the Understanding of 3 August 1984 in order to reach a separate agreement with the U.S.S.R., Japan and India,[217] which were the fellow potential pioneer investing States identified in Resolution II of UNCLOS III to submit applications for registration of mine sites by the Preparatory Commission.[218] Hence, a severe blow was dealt to the hope for uniform practice of developed States with deep seabed mining technology to establish new customary international law in their favour.[219] Furthermore, the overwhelming majority of States are not members to these 'mini-treaties' and therefore, are not bound by them. As such, there can be no efficacious alternative deep seabed mining regime outside the 1982 Convention.[220]

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214. Text in (1982) 21 *I.L.M.* 950-962; (1983) 20 *San Diego L. Rev.* 514-519; *U.S. Dept. of State Bulletin*, vol. 82, No. 2068, Nov. 1982, p.66.
For background of this agreement see: David L. Larson, "The Reagan Administration and the Law of the Sea", (1982) 11 *Ocean Devel. & Int'l L.* 297 at 315-318 and *passim;* James L. Malone, "The United States and the Law of the Sea", (1982) 11 *Ocean Devel. & Int'l L.* 297 at 315-318 and *passim;* James L. Malone, "The United States and the Law of the Sea", (1984) 24 *Va. J. Int'l L.* 785 at 801-802, 806; David L. Larson, "The Reagan Rejection of the U.N. Convention", (1985) 14 *Ocean Devel. & Int'l L.* 337 at 340-349.

215. *Dept. of State Press Release No. 177,* Aug. 7, 1984; (1984) 23 *I.L.M.* 1354-1365.

216. *The International Herald Tribune,* Aug. 20, 1984, p.5; Lee Kimball, *ante,* note 43, at 74-75. These States seem to refer to Article 5(a)-(c) of Resolution II of UNCLOS III, which requires the (prospective) "certifying States" (i.e., States which have signed the 1982 Law of the Sea Convention), including all potential claimants to resolve their conflicts over the site(s) for deep seabed mining. However, it means that the States concerned are about to submit their applications to the PrepCom; hence, the need to settle the overlapping claims. In other words, the 1982 Convention and Resolution II do not authorize the States Parties to settle the overlapping claims with those States which indicate their unwillingness to sign the 1982 Convention. The claims of the non-signatories are simply not recognized. (See, e.g., Article 137 of the 1982 Convention). Belgium and Italy signed the 1982 Law of the Sea Convention on 5 Dec. and 7 Dec. 1984, respectively. But to date, there is no evidence that they have abandonned the 1984 Provisional Understanding.

217. *The International Herald Tribune,* Sept. 7, 1984, p.2; also Lee Kimball, (1985) *loc. cit.,* at 73-74. See the prediction by Elliot L. Richardson, "The U.S. Posture Toward the Law of the Sea Convention: Awkward but not Irreparable", (1983), 20 *San Diego L. Rev.* 505 at 508.

218. Resolution II, Paragraph 1 (a) (i).

219. Such a false hope was harboured by, e.g. James H. Breen, *ante,* note 188, at 214-221; E.D. Brown, *ante,* note 93, at 555-559; Ann L. Hollick, *ante,* note 13, p.388. Cf. also J.M. Broadus and Porter Hoagland III, "Conflict Resolution in the Assignment of Area Entitlements for Seabed Mining", (1984) 21 *San Diego L. Rev.* 541-576.

220. Burton, *ante,* note 93, at 1143-1145, 1176-1178; E.L. Richardson, *ante,* note 217, at 508-512, and cf. Breen, *loc. cit.,* at 215; E.D. Brown, "Deep-Sea Mining: The Consequences of Failure to Agree at UNCLOS III", in Rozakis and Stephanou [eds. 1983], *ante,* note 56, pp.209-257.

The illegality of the recognition by States signatories to the 1982 Convention as regards the claims by non-signatories to the Convention has already been dealt with in the preceding section. States signatories to the Convention which are also parties to these 'mini-treaties' are cast on the horns of a considerable dilemma. Insofar as these States consider the 'mini-treaties' not incompatible with the 1982 Convention, the provisions of the latter prevail.[221] However, as the other States Parties to the 1982 Convention which are not also parties to the 'mini-treaties' regard the 'mini-treaties' as abrogating or incompatible with the 1982 Convention, these States may terminate or suspend the operation of the 1982 Convention in relation to the States Parties to the 'mini-treaties'.[222]

Pursuant to Article 34 of the Vienna Convention on the Law of Treaties, "a treaty does not create either obligations or rights for a third State without its consent" [223] However, a rule in a treaty may become binding on non-parties if it becomes part of international custom, recognized as such.[224] The view that treaties may create 'objective regimes' binding on all States is disputable.[225] Such treaties may crystallize into custom, whether local or general, or may simply create rights and obligations for third States and are accepted by the latter. Trusteeship agreements are considered to fall into this category of creating status *in rem* or an objective regime as regards the non-self-governing territories designated by the U.N. as trust territories.[226] Arguably, the deep seabed area is under a trusteeship agreement for the benefits of mankind, thus, partaking of the characteristics of an 'objective regime'.[227] It seems more plausible to resort to the following ruling of the Permanent Court of International Justice in the *Case Concerning Certain German Interests in Polish Upper Silesia:*

> A treaty only creates law as between the States which are parties to it; in case of doubt no rights can be deduced from it in favour of third States.[228]

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221. The Vienna Convention on the Law of Treaties, *ante*, note 205, Article 30(2) (3).

222. *Ibid.*, Articles 60 and 30(4) (5). See also Elias, *ante*, note 205, chap. VII: "Termination and Suspension of the Operation of Treaties".

223. See also Article 35 of the Vienna Convention: obligations for third States must be expressly accepted by these States in writing.
See Oppenheim, *ante*, note 73, pp.926-929; C.L. Rozakis, "Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law", (1975) 35 *ZaöRu V.* 1 at 1-7, 11, 18-20, 24-25.

224. The Vienna Convention, Article 38. Also D.W. Greig, *ante*, note 74, p.17; Rozakis, *loc. cit.*, at 25-39; Nguyen Quoc Dihn, P. Dailler and A. Pellet, *Droit international public* (2nd ed. 1980), pp.235-238.

225. See I. Brownlie, 3rd ed., pp.619-622, 278-9, 373-5, but pp.630-2; Greig, *op. cit.*, pp.7-9, 11-15; Rozakis, *loc. cit.*, at 7-8.

226. See U.N. Charter, Chap. XII; also Clive Parry, "The Legal Nature of the Trusteeship Agreements", (1950) 27 *British Y.B. Int'l L.* 164, esp. at 183-185; Greig, *op. cit.*, p.15.

227. Cf. A-C. Kiss, *ante*, note 52, at 233-238.
But see: R.Y. Jennings (1971), *ante*, note 152, at 433-434, 436, 440-444, 450.

228. (1926) P.C.I.J. Series A, No. 7 at p.29.

Put differently, the treaty must intend to confer rights on the third States.[229] These States exercising such rights must comply with the conditions for their exercise provided in the treaty or established in conformity with the treaty.[230] The developing States insist that the 1982 Law of the Sea Convention is a 'package deal' resulting from unremitting efforts for multifarious compromises at UNCLOS III. Part XI of the Convention which governs deep seabed mining confers rights and obligations on the States Parties only. Third parties intending to enjoy these rights must accept the concomitant obligations. Since numerous aspects of the regimes such as transit passage through straits and archipelagic waters, marine scientific research, rights over the continental shelf and in the exclusive economic zone are creatures of the 1982 Convention which is not a codifying convention, they may be denied to non-parties which violate the conditions of Part XI of the Convention.[231]

The nub of the matter is whether Part XI of the 1982 Convention creates a customary norm.[232] In order to generate such a norm, the conventional rule in question must be of "a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[233]

As the International Court of Justice ruled in 1969,[234]

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, *State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform* in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved [i.e., *opinio juris sive necessitatis*].[235]

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229. The 1969 Vienna Convention, Article 36(1). See also the *Free Zones Case*, (1932) P.C.I.J. Series A/B, No. 46 at 147-148.

230. The 1969 Vienna Convention, Article 36(2).

231. B. Zuleta, *ante*, note 1, at pp.xix, xxvi; Tommy T.B. Koh, *ibid.*, at pp.xxxiv-xxxv, xxxvi.
Also: Preamble to the 1982 Convention; Louis B. Sohn, "Talk on the Law of the Sea Treaty", held at Harvard Law School, Mon. 22 Nov. 1982; Philip Allott, "Power Sharing in the Law of the Sea", (1983) 77 *A.J.I.L.* 1 at 1-13, 28-30; B. Zuleta (1983), *ante* note 114, at 478-481. Cf. Luke T. Lee, "The Law of the Sea Convention and Third States", (1983) 77 *A.J.I.L.*, 541, esp. at 566-567.

232. See Anthony d'Amato, "An Alternative to the Law of the Sea Convention", (1983) 77 *A.J.I.L.* 281. My examination here reveals that D'Amato's speculation will be proved erroneous.

233. *The North Sea Continental Shelf Cases*, I.C.J. Reports 1969, p.3 at p.41, para. 72.

234. *Ibid.*, at p.43, para. 74. Emphasis added.

235. *Ibid.*, at pp.43-44, paras. 77-78, citing the *Lotus Case*, P.C.I.J. Series A, No. 10, 1927, at p.28.
See I. Brownlie, 3rd ed., pp.4-12, 12-15, 695-8; Greig, *ante*, note 74, pp.17-21, 24-26; Charles Rousseau, *Droit international public* (9th ed. 1979), chap. II, esp. at pp.78-84; Sir Hersch Lauterpacht, *ante*, note 74, pp.377-387; O'Connell, vol.I, pp.31-38, 46-49.

Although most resolutions of the U.N. General Assembly, strictly speaking, have no legally binding force, they are not without great significance.[236] If a particular rule encapsulated in a resolution is unanimously adopted or subsequently abided by, it may become legally binding customary international law through State practice and acquiescence.[237] Even if the rule is not unanimously adopted, it may have some normative evidentiary value of *opinio juris*.[238] The 1970 Declaration of Principles was adopted by the U.N. General Assembly Resolution 2749 (XXV) without dissent, endorsing the CHM principle. Moreover,

> In U.N. practice, a 'declaration' is a formal and solemn instrument, suitable for rare occasions where principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights. A recommendation is less formal...[239]

The universal acceptance of the CHM principle, at least in the abstract, is beyond dispute. Noteworthy in this connection are the following facts. Besides proscribing the appropriation of the deep seabed area or its resources, and prescribing that these resources are to be exploited for the benefit of mankind as a whole, the Declaration goes on to stipulate:

> 9. On the basis of the principles of this Declaration, *an international regime* applying to the area and its resources *and including* appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon...(Emphasis added).

Such a treaty which is universal in the sense of being open to all has been agreed upon and signed by more than 150 States, representing the overwhelming majority of States in the world. *Opinio juris* can also be gleaned from coastal States' universal self-restraint not to extend their exclusive coastal State jurisdiction beyond the agreed outer limit or to assert themselves as trustees for mankind, for fear of jeopardizing the principles and solemn undertaking under the 1970 Declaration, which includes the 'generally agreed' deep seabed mining regime now appearing

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236. *Per* Judge Sir Hersch Lauterpacht, Separate Opinion, *South West Africa-Voting Procedure,* Advisory Opinion, I.C.J. Reports 1955, p.67 at pp.120, 122; T.O. Elias, "Modern Sources of International Law", in Friedmann, Henkin and Lissitzyn (eds.), *Transnational Law in a Changing Society* (1972), p.34 at p.60 and cf. p.67; Samuel Bleider, "The Legal Significance of Re-citation of General Assembly Resolutions", (1969) 63 *A.J.I.L.* 444, esp. at 477.

237. Oscar Schachter, "The Relation of Law, Politics, and Action in the United Nations", (1963) 109 *Hague Recueil* 165 at 181-184; Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963), pp.1-10; the debate in the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, *A/AC. 105/C.2/SR.17,* at 9 (U.K. view), 10-11 (U.S. view), and 7 (Italian view); and the debate in the First Committee of the General Assembly on the same topic, *A/C.1/SR.1342,* para. 17 (U.S.S.R. view).

238. I. Brownlie, 3rd ed., p.2; D.H.N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", (1955-56) 32 *British Y.B. Int'l L.* 97.

239. The memorandum of the U.N. Secretary General to the Commission on Human Rights, *U.N. Doc. E/CN.4/L.610,* April 2, 1962.

under Part XI of the 1982 Convention.[240]

With regard to the requirement concerning 'specially affected' States, the International Court of Justice elaborates as follows.

> ...[E]ven without the passage of any considerable period *of time, a very wide spread and representative participation in the convention* might suffice of itself, provided it included that of States whose interests were specially affected...[241]

In relation to deep seabed mining, 'specially affected' States are land-based producers of the minerals found in the deep seabed nodules. Almost all of them are signatories to the 1982 Convention. Arguably the industrialized States do not bear the brunt of the adverse effects deriving from deep seabed mining. In view of their investment, however, these latter States are also 'specially affected'. The U.S.S.R., France, Japan and India are the four States explicitly identified as such by Resolution II of UNCLOS III. All of them, and Canada, are signatories to the Convention. Apart from these *States,* there are merely seven international *consortia* engaged in deep seabed mining development. On the whole, the afore-mentioned four States 'represent' the industrialized States in this category in the process of customary norm creation.[242]

The international Court of Justice did rule in 1969 that the low number of ratifications and accessions to a treaty may negate any implied positive acceptance of its principles.[243] This ruling is inapplicable to the principles which have been overwhelmingly accepted by States. For instance, international tribunals, including the said Court, applied provisions of the Vienna Convention on the Law of Treaties long before its entry into force in 1980, and even in regard to States which had not ratified it or evinced any intention to do so.[244] Therefore, U.N. Secretary General Javier Pérez de Cuéllar is right to point out that:

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240. The author disagrees with E.D. Brown [(1983), *ante,* note 93, at 554, 560], who opines that the practice of the Group of 77 is not evidence of any creation of generally applicable rules of international law *(opinio juris generalis).*
The self-restraint by the coastal State Members of this group not to extend their national jurisdiction up to, say, 500 n.m. from the coast suffices as evidence that they feel bound by the legal obligations emanating from the 1970 Declaration. Otherwise, there might have been no high seas or 'the seabed beyond the limits of national jurisdiction' left by the early 1980's. See also Van Dyke and Yuen, *ante,* note 23, at 535-537.

241. I.C.J. Reports 1969, p.3 at p.42, para. 73. Emphasis added.

242. Cf. e.g., Judge Jiménez de Aréchaga, the then President of the International Court of Justice, opined in 1978 that the 1970 Declaration crystallized a *general consensus;* hence, no State may legally claim exclusive deep seabed mining rights. [(1978-I) 159 *Hague Recueil* at 32-33, 228-230].
See further: Maarten Bos, "The Identification of Custom in International Law", (1982) 25 *German Y.B. Int'l L.* 9; Bin Cheng, "Custom: The Future of General Practice in a Divided World", in MacDonald and Johnston (eds.), *ante,* note 63, pp.513-554, esp. at pp.513-521, 529-533, 549-550.

243. I.C.J. Reports 1969, p.3 at p.42, para. 73.

244. Prosper Weil, "Towards Relative Normativity in International Law?", (1983) 77 *A.J.I.L.* 413 at 439-440, citing; *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* Advisory Opinion, I.C.J. Reports 1971, p.16, at p.47; *Fisheries Jurisdiction (U.K. v. Iceland) (Jurisdiction),* I.C.J. Reports 1973, p.3 at p.14; *Aegean Sea Continental Shelf (Greece v. Turkey),* I.C.J. Reports 1978, p.3 at p.39; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* I.C.J. Reports 1980, at pp.92, 95 and cf. awards in *Beagle Channel,* (1978) 17 *I.L.M.* 645, para. 7; *German External Debts,* (1980) 19 *I.L.M.* 1370, para. 16.
See also Elias, *ante,* note 205.

> ...In order to affirm that international law is now irrevocably transformed, so far as the seas are concerned, we need not wait for the process of ratification of the Convention to begin.[245]

The 'package deal' nature and the absence of the faculty of making reservations ensure that all the provisions of the Convention form an integral whole. If the other equally new concepts such as the exclusive economic zone, transit passage, and the 200 n.m. continental shelf are considered customary international law, so must the deep seabed mining regime under Part XI of the Convention.[246]

Some authors contend that if there is a legal vacuum as regards the deep seabed mining regime because no rule of international law regulates it, then the absence of any prohibitive rule will permit deep seabed mining under the freedom of the seas.[247] The *Lotus* and *Anglo-Norwegian Fisheries* cases have been frequently cited in support of this contention. In the former case, decided in 1927, the Permanent Court of International Justice stated, *inter alia*,

> *International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will* as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon independence of States cannot therefore be presumed.* Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law...Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [*international*

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245. "International Law is Irrevocably Transformed", in the Official Text of the 1982 Convention, *ante*, note 1, at p.xxix, and cf. also at p.xxx.
See also Gamble, Jr. and Frankowska, *ante*, note 210, at 154-156; the same authors, "The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning", (1984) 21 *San Diego L. Rev.* 491-511, at 510: "...the deep seabed mining regime of the Convention, not yet a customary rule, may nevertheless *stop* a customary right to exploit seabed resources outside the Convention. In essence, the Convention cannot force a State to play new rules, but may be able to outlaw the old game".

246. See Tommy T.B. Koh, *ante*, note 231, at p.xxxvi; the 1982 Convention, Articles 309-311; Ambassador J. Alan Beesley of Canada, [1984] 17 *L. Sea Inst. Proc.* at 104-105.
For an importance of the faculty of making reservations in relation to customary law see: I.C.J. Reports 1969, p.3 at p.38, paras. 63-68, p.41, para. 72; O'Connell, vol. I, pp.44-46.

247. E.g., Arrow, *ante*, note 82, at 9-11; Brown (1983), *ante*, note 93, at 536; Shingleton, *ante*, note 53, at 44.

> *law*] *leaves them* in this respect *a wide measure of discretion which is only limited in certain cases by prohibitive rules*...[248]

The emphasized words have been subsequently interpreted or chosen to denote: "international law permits what it does not (specifically) prohibit", or "a State is free to do what it likes unless it is (specifically) prohibited by international law". As the above lengthy quotation shows, such an interpretation is flagrantly out of context.

Judge Loder, First President of the Court, elaborated the foregoing statement of the Court as follows.

> The family of nations consists of a collection of different sovereign and independent States. The fundamental consequence of their independence is that no municipal law, in the particular case under consideration no criminal law, can apply or have binding effect outside the national territory...[249]

However, the Permanent Court was equally divided in the *Lotus* case as to whether there was a rule of international law in regard to collision at sea cases to the effect that criminal proceedings were exclusively within the jurisdiction of the State whose flag was flown. Judge President Huber made the casting vote in favour of the view that there was no such rule.[250] Six of the twelve judges dissented: five of them on the ground that since sovereignty of States was restricted to its own territorial scope, collision on the high seas which was subject to the doctrine of the freedom of the seas had to fall exclusively within the jurisdiction of the flag State.[250a] Judge Moore, the other dissentient dissented only on the ground of the connection of the criminal proceedings in that case with Article 6 of the Turkish Penal Code. The *Lotus* judgment thus lacks a convincing or solid judicial support. Hence, the pronouncement of the Court beyond the issue at hand is mere *obiter* and must be treated with extreme caution.

The six judges voting for the judgment of the Court attached no individual or separate opinions. The six dissentients exercised their rights to do so, however. Judges Loder, Nyholm and Altamira were explicitly disenchanted with any implication of the statements in the judgment to the effect that international law allows everything which is not prohibited.[250b] As former President Loder pointed out:

> It seems to me that the contention is at variance with the spirit of international law. This law is for the most part unwritten and lacks sanctions; it rests on a general consensus of opinion; on the acceptance by civilized States, members of the great community of nations, of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither

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248. *The Lotus Case (France v. Turkey)*, (1927) P.C.I.J. Reports, Series A, No.10, at pp.18-19 (Emphasis added).

249. *Ibid.*, p.35. Dissenting Opinion of Judge Loder.

250. *Ibid.*, p.31. The other judges voting for the Court's judgment were Judges de Bustamante, Oda, Anzilotti, Pessôa, and National Judge Feizi-Daim of Turkey.

250a. Former President Loder; Vice-President Weiss; and Judges Lord Finley, Nyholm and Altimira.

250b. *Ibid.*, at pp.34-35, 59-61, 104-107, respectively.

committed to writing nor confirmed by conventions. This body of rules is called international law.
These rules may be gradually modified, altered or extended, in accordance with the views of a considerable majority of these States, as this *consensus* of opinion develops, but it seems to me incorrect to say that the municipal law of a minority of States suffices to abrogate or change them.[251]

In the *Anglo-Norwegian Fisheries* case, the decision of the International Court of Justice has been interpreted in some quarters to mean that Norway's claim to draw straight baselines connecting the outer limits of its deeply indented coast was permissible insofar as no rule of international law prohibited it. Nonetheless, one oft-cited paragraph of this judgment negates such a contention.

> *It does not at all follow that, in the absence of rules having the technically precise character* alleged by the U.K. Government, the delimitation undertaken by the Norwegian Government in 1935 *is not subject to certain principles* which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the view of the coastal States as expressed in its municipal law. *Although* it is true that the act of delimitation is necessarily a unilateral act, because *only the coastal State is competent to undertake it, the validity* of the delimitation with regard to other States *depends upon international law.*[252]

In effect, this judgment largely echoes the view of Judge Loder in the *Lotus* case. This is made abundantly clear by the Individual Opinion of Judge Alvarez (concurring) in the *Anglo-Norwegian Fisheries Case :*

> It is..necessary to pay special attention to [a] principle which has been much spoken of : the rights of States to do everything which is not expressly forbidden by international law. This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day : the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors previously indicated, which make up what is called the new international law: the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of the international society and lastly the prohibition of *abus de droit.*[252a]

In view of his enunciation of the 'inter-temporal law' doctrine in the *Island of Palmas Arbitration* to the effect that law must accommodate or recognize the change in the

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251. *Ibid.*, pp.34-35 (emphasis added). This view was supported by J.L. Brierly, (1928) 44 *L.Q.R.* 154 at 155-156.
See also C. Wilfred Jenks, *The Prospect of International Adjudication* (1964), pp.240-251, 263; Van Dyke and Yuen, *ante*, note 23, at 519-521; H. Lauterpacht, *ante*, note 74, pp.359-361.
G. Biggs succinctly summarizes: "...the failure to clearly state [a particular] principle cannot be transformed into a maxim that can then, by omission, constitute a rule of international law". [(1975), *ante*, note 88, at 278].

252. *Anglo-Norwegian Fisheries Case (U.K. v. Norway)*, I.C.J. Reports 1951, p.116 at p.132 (emphasis added); and see H. Lauterpacht, *ante*, note 74, pp.362-366.
See also the *North Sea Continental Shelf Cases*, I.C.J. Reports, 1969, p.3 at p.46.

252a. I.C.J. Reports 1951, p.116 at p.152, para. 10. See also Judge Jennings, *ante*, note 73, at 7-8.

international relations it seek to regulate,[252b] Judge Huber, President of the International Court of Justice in the *Lotus* case, would probably have expressed the same view as Judges Loder and Alvarez on this point.

The hub of the *Anglo-Norwegian Fisheries* case centred around the acquiescence by the international community and around estoppel operative against the U.K., the other party to the dispute. The above passage of the judgment implies further that the validity of action even of the only States technically competent to undertake deep seabed mining activities "depends upon international law". There is no acquiescence from the 'considerable majority' of the States to allow deep seabed mining outside the 1982 Convention. When confronted with this legal issue, international tribunals will be most likely to reckon with the dynamic developments in international law in the recent decades[253] in favour of deep seabed mining under the internationally established authority for the benefits of mankind as a whole.

Apart from the initiation by the Authority of legal action before international tribunals,[254] States Parties to the Convention may enforce their rights by various means. They may refuse to recognize the exclusive rights over a mine site, thus undermining the security of tenure and investment outside the Convention.[255] The myriad of new rights

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252b. See, *ante*, note 133.

253. Cf. Sir Hersch Lauterpacht, *ante*, note 74, chaps. 10, 11 and pp.397-9; *The Fisheries Jurisdiction Case (Merits) (U.K. v. Iceland)*, I.C.J. Reports 1974, p.3 at para. 52 *et sequel (re:* 'preferential rights' of the coastal State over the fisheries off its coast); *The Case Concerning Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada/U.S.A.)*, I.C.J. Reports 1984, p.246 (*re:* the continental shelf and the fisheries zones delimitation by a single maritime boundary).

254. For the issue of jurisdiction of the International Court of Justice in this matter see: Ronald Scott Moss, "Insuring Unilaterally Licensed Deep Seabed Mining Operations Against Adverse Ruling by the ICJ: An Assessment of the Risk", (1984) 14 *Ocean Devel. & Int'l L.* 161 at 163-180; Louis B. Sohn, (1983) 46 *L. & Contemporary Problems* at 209-210. *Contra:* H. Lauterpacht, *ante* note 74, chapters 12, 16; J.A. Perkins, *ante*, note 131, pp.137-146; Waldock, "The legal effect of the formula 'matters essentially within the domestic jurisdiction of the "X" State as determined by the "X" State'," (1954) 31 *British Y.B. Int'l L.* 131; Waldock, "The Optional Clause System Today", (1955-56) 32 *ibid.*, 283; see also *ante*, note 76; the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.) (Jurisdiction)*, I.C.J. Judgment of 26 Nov. 1984.

For the issue of 'interim protection', see Judge Sir Hersch Lauterpacht, *ante*, note 74, pp.110-112, 252-256. The *locus standi* of the International Seabed Authority will be similar to that of the U.N. (See *The Reparation for Injuries Suffered in the Service of the U.N. Case*, Advisory Opinion, I.C.J. Reports 149, p.174).

255. Conflict in mine site claims is not unusual among States Parties. (See: *The Guardian* (London), 20 Dec. 1984, p.6). If there are States Parties and non-States Parties involved, the matter will be extremely delicate as long as all eyes are riveted on the attractive sites. Cf. the registration as 'pioneer investors' and claims to mine sites: Lee Kimball, *ante*, note 13, at 364-365. See also William C. Brewer, Jr., "The Prospect for Deep Seabed Mining in a Divided World", (1985) 14 *Ocean Devel. & Int'l L.* 363 at 363, 366-369, 370, 375-376; Moss, *ante, note* 254, at 180-185; Van Dyke and Yuen, *ante*, note 23, at 538-549, 550-551; M.A. Dubs, (1983) 46 *L. & Contemporary Problems* at 83, 85; J.I. Charney, *ibid.*, at 50-52; C.E. Maw, *ibid.*, at 57; and cf. Eckert, *op. cit.*, pp.238-244, 245-246, 249-252.

accorded by the Convention may be denied to non-States Parties.[256] Land-based producers which are adversely affected by deep seabed mining may resort to the penal measure of impounding within their jurisdiction the assets of the international consortia concerned.[257] Worse still, some coastal States may extend their national jurisdiction to cover the mine sites whatever their distance from the coast, claiming that there is no existing rule of international law which prohibits such an extension.[258] Economic coercion by the few industrialized States against the States Parties will be at the high cost of international isolation of the former States.[259] On the whole, mining outside the 1982 Convention will only lead to international conflicts.

(iii) 'Persistent Objectors' Against 'Emerging' International Customary Law?

There are allegedly some authorities for the proposition that a state which maintains an explicit and unmistakeable posture of refusal or active non-cooperation can avoid

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256. Cf. Jesper Grolin, "The Future of the Law of the Sea: Consequences of a Non-Treaty or Non-Universal Treaty Situation", (1983) 13 *Ocean Devel. & Int'l L.* 1 at 2-12, 13, 17-25; A. Pardo in Oxman, Caron and Budari (eds.), *ante,* note 117.

257 Although retaliatory taking of private property by a State may be a violation of international law as B.H. Oxman points out [(1983) 46 *L. & Contemporary Problems* at 78], a measure to enforce the law, rights or entitlements is not. [A.A. Akinsanya, *The Expropriation of Multinational Property in the Third World* (1980), pp.68, 223-224]. In certain legal systems, such as in English law, a court will not aid the enforcement of a foreign penal law since the imposition of such a law reflects the exercise by a State of its sovereign power, hence, having effect only within its territory. [See: Cheshire and North, *Private International Law* (10th ed. 1979), pp.135-137, and cf. pp.137-145].
Cf. Anthony D'Amato, "The Concept of Human Rights in International Law", (1982) 82 *Columbia L. Rev.* 1110 at 1118, 1122, where the author opines that "a retaliatory deprivation of one or more of the violator's entitlements is the only truly universal mechanism allowed by the international legal system to secure implementation and compliance..."; and R.B. Lillich, *infra,* note 259.

258. See A. Pardo, *South* (May 1984), p.74, citing the examples of *mare clausum* in the 15th century.
Cf. At the adoption of the 1982 Convention, Ecuador, for instance, espoused the concept of 200 n.m. territorial sea, whereas Albania favoured the 15 n.m. territorial sea limit. (*Ante,* note 8, at p.7). Both States, therefore, abstained from voting to adopt the Convention.

259. For the legal validity of such a measure see: I. Brownlie, (1979-I) 162 *Hague Recueil* 245 at 305-308; Richard B. Lillich, "Economic Coercion and the International Legal Order", in J.J. Paust and A.P. Blaustein (eds.), *The Arab Oil Weapon* (1977), p.151 at pp.159-160; Tom J. Farer, "Political and Economic Coercion in Contemporary International Law", (1985) 79 *A.J.I.L.* 405-413.
See also E.L. Richardson, *ante,* note 217, at 511; and C. Fred Bergsten, *ante,* note 160, at 115-116, for the view that U.S. isolation is detrimental to U.S. interests; and cf. Franck and Chesler, *ante,* note 125, at 606-607; Perkins, *ante,* note 131, pp.159-164.
NB: Ss.106(a) (2) (B) and 105(a) of the U.S. Act empower the Administrator to suspend or modify particular activities under a licence or permit if the President deems it necessary to avoid a situation which may reasonably be expected to engender a breach of international peace or armed conflicts.
Cf. S.5(1) (iii) of the German Act: the likely material impairment of the foreign relations of the FRG will lead to denial of an application for a licence.

being bound by a new or 'emerging' rule of general customary international law. The rationale for this ability to 'opt out' is based upon the volitional nature of international law. If the affected States persistently object to the new custom, the custom will not be applicable to them and may eventually yield to their deviant position which has crystallized into general customary law.[260]

The authorities frequently cited are the *Asylum* case and the *Anglo-Norwegian Fisheries* case. In the latter, the International Court of Justice held, *inter alia,*

> ..In any event, the ten-mile rule [for bays] would appear to be inapplicable as against Norway in as much as she has always opposed any attempt to apply it to the Norwegian coast.[261]

In the former case, the ruling of the same Court is interpreted to the effect that a regional or local custom cannot be invoked against a State which has repudiated it.[262]

An international posture is usually tailor-made to suit domestic interests.[263] The grounds for the U.S. objection to Part XI of the 1982 Convention are ideological, economic and political. The U.S.A. demands unhampered deep seabed mineral resource development to meet national and world demand; assured national access to these resources to enhance the U.S. security of supply; a powerful decision-making role in the deep seabed regime; and the requirement of approval of the participating States including, in the case of the U.S.A., the advice and consent of the Senate of any subsequent amendments to the provisions of Part XI. It also dreads the mandatory transfer of private technology, the funding for national liberation movements, and any 'undesirable pre-

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260. R.Y. Jennings (1971), *ante,* note 152, at 440; Weil, *ante,* note 244, at 433-434; Kronmiller, *op. cit.,* pp.7-8; J. Grolin, *ante,* note 256, at 2.

261. I.C.J. Reports 1951, p.116 at p.131.

262. I.C.J. Reports 1950, p.266 at p.277:
"...even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum".

263. Cf. Juda, *ante,* note 59, pp.142, 148-149; C.C. Ferguson, Jr., *ante,* note 121, at 149; Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (1971), pp.4-7, 10 *et seq,* 13, 36-38, 67-68, 89-95, 144-146, 173-180, 251. Cf. also: the Marine Resources and Engineering Development Act of 1966 (Public L. No. 89-454). By virtue of s.2(a): "It is hereby declared to be the policy of the U.S. to develop, encourage, and maintain a coordinated, comprehensive, and long-range national program in marine science *for the benefit of mankind...*". (Emphasis added). However, this must be so conducted as to contribute to the objectives of, *inter alia,* the "preservation of the role of the U.S. as a leader in marine science and resource development" and "the cooperation by the U.S. with other nations and groups of nations and international organizations in marine science activities *when such cooperation is in the national interest*" S.2(b) (4) and (8). [Emphasis added].

cedents' for international organizations.[264] The soundness of these concerns or rationales is disputable.[265]

The U.S.A. also urged the F.R.G. not to sign the Convention. In a badly split decision, the F.R.G. cabinet followed the U.S.A.'s posture.[266] The U.K., in turn, followed the F.R.G.[267] despite strong opposition from the U.K. shipping industry whose interest lies in the navigational rights accorded under the Convention.[268]

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264. President Ronald Reagan's announcement of 29 Jan. 1982, White House Press Release, 18 *Weekly Comp. Pres. Doc.* 94 (Jan. 29, 1982).
See also *House Hearings*, Aug. 12, 1982 (*H.381-5*, pp.110-160), Oct. 22, 1981 (*H.561-2*, pp.5-71); J.L. Malone, *ante*, note 214, at 785-799; J.L. Malone, (1983) 46 *L. & Contemporary Problems* at 31; John Breaux, [1984] 17 *L. Sea Inst. Proc.* at 12-13; D.L. Larson (1982), *ante*, note 214, at 299-307, 312-313.
Cf. D.L. Larson (1985), *ante*, note 214, at 338-344, 351-358; Paul Peters in R-J. Dupuy [ed. 1982], pp.107-108; M. Tanzer, *ante*, note 21, pp.196-197, 200; Eckert, *op. cit.*, pp.227, 229, 234, 320-321, 328-329, 339; E. Atimomo, *ante*, note 4, pp.318-320; Breen, *ante*, note 188, at 205; Brewer, Jr., *ante*, note 255, at 366, 371-374; D. Tytgat, *ante*, note 15, at 143; U.S. Working Paper, *ante*, note 30, at pp.164-169, and cf. also pp.169-172 (*Doc. A/CONF. 62/C.1/L.6* of 13 Aug. 1974, U.S.A.: draft appendix to the Law of the Sea Treaty concerning mineral resource development in the international sea-bed area); D. Yarn, *ante*, note 157, at 129-132, 135-136, 143-147, 149, 151-153; Tom J. Farer, "The U.S. and the Third World: A Basis for Accommodation", *Foreign Affairs*, Oct. 1975, p.79 at pp.89-92; Robert K. Olson, *United States Foreign Policy and the New International Economic Order: Negotiating Global Problems 1974-1981* (1981); Ferguson, Jr., *ante*, note 121, at 142-143, 152, 155-158; Ferguson, Jr., *ante*, note 131, at 410, 413, 421-422; H.G. Knight, *ante* note 88, at 753; and cf. the struggle of the International Coffee Agreement through Congress (Chayes *et al*, *ante*, note 59, pp.588-594); William Safire, "U.S. Declaration of Independence on Third World", *The International Herald Tribune*, Feb. 5, 1985.
The practices relating to transfer of technology transactions, including, *inter alia*, practices to be avoided and the issue of confidentiality, were the outstanding issues at the U.N. Conference on an International Code of Conduct on the Transfer of Technology [See Draft Code, *TD/Code TOT/47*, 20 June 1985].

265. See, e.g., Clifton E. Curtis, "Sign the Sea-Law Treaty", *The New York Times*, Feb. 21, 1983; K.E. Yost, *ante*, note 171, at 677-678; E.L. Richardson, [1984] 17 *L. Sea Inst. Proc.* at 13 (*re:* the possible exclusion of liberation movements from benefiting; Van Dyke and Teichmann, *ante*, note 179; and cf. Julio Faundez, *ante*, note 56a, at pp.184-186; *ante*, note 259).
Even if the 1982 Law of the Sea Convention fails to receive the requisite two-thirds majority of the Senate for it to be ratified and to become law of the U.S.A, the Convention may be adopted as an 'executive agreement' instead of a treaty. This has been the case of the Second Strategic Arms Limitation Treaty (SALT II). See : Armer R. Vartian, "Approval of SALT Agreement by Joint Resolution of Congress", (1980) 21 *Harv. Int'l L.J.* 421. The blurring distinction between an 'executive agreement' and a 'treaty' in practice is successfully exploited in the case of SALT II, which has been adhered to by successive U.S. Administrations since its signing on 18 June 1979. For detailed discussion see : Chayes *et al*, *ante*, note 59, pp.344-367, and also pp.585-597; the U.S. Dept of State revised Circulars No.175 of 1969 (*Foreign Affairs Manual*, June 6, 1969, chap. 700), and of 1974 (*ibid.*, Oct. 25, 1974, chap. 700); Steiner and Vagts, *Transnational Legal Problems* (1976), pp.604-609.

266. "Kohl Cabinet Said to Oppose Sea Pact", *The International Herald Tribune*, 26 Nov. 1984, p.4.
Of the 12 Member States of the European Economic Community (E.E.C.) only the U.K. and the Federal Republic of Germany have not signed the Convention although both have participated in the PrepCom. Iceland has already ratified the Convention. With the approval of the majority of its Member States and of the Council of Ministers, the E.E.C. has signed the Convention as an entity.

267. "Thatcher ignores Sea Law deadline", *The Guardian*, Dec. 8, 1984; p.5. Cf. "Satisfactory regime for deep seabed mining needed", *The Times*, 16 Feb. 1984, p.4; Colin Hughes, "Will Britain Catch the Tide?", *ibid.*, 3 Dec. 1984, p.12; Prof. D.R. Denman, "Letters to the Editor", *ibid.*, 10 Dec. 1984, p.11. For Parliamentary debates on this issue see : (1984) 55 *British Y.B. Int'l L.* at 557-563.

268. See, e.g., Michael Ranken, Director of the British Maritime League, "Letters to the Editor", *The Times*, 5 Dec. 1983 and 12 Nov. 1984; R.W. Tookey, President of the General Council of British Shipping, *ibid.*, 16 Nov. 1983; Peter Farr, *ibid.*
See also David Ennals, Chairman of the U.N. Association of Great Britain and Northern Ireland, *ibid.*, 6 Dec. 1984, p.17.

One extensive study of the U.S. foreign policy relating to the law of the sea reveals that even at its politically strongest in the 1950's, the U.S.A. was not always capable of determining the international law of the sea. The multiplicity of domestic interests vitiated any coherent policies or attempt to enforce the U.S. view. In the absence of any executive branch enforcement policy, preventive legislation was passed by Congress with the usual result of exacerbating relations with other States and of retaliation. Consequently, the "U.S. protests carried little weight".[269] By being absent from the norm-formulating stage of the deep seabed mining regime under the 1982 Convention, the 'protestors' are also unable to influence the course of the deliberation in their favour.[270] Even staunch alies of the West may have to incline towards the united position of the developing countries as regards deep seabed iming.[271]

These objectors have failed to grasp the reality in international life. Past or contemporary doctrine reflects a particular vision of society.[272] The rule that one or a few States could veto the emerging international custom originates from the era in which the few Great 'Christian' Powers were upheld as the paragons of civilization which was enforceable by their might. One cognate doctrine was that sovereign States were equally subject to international law although they might not have the same 'capacity' under it. Only with their consent could customary law be universally binding or applicable to the few powerful States which had the realistic capacity or power of persistent objection to its emergence.[273] At present, there are more than 150 States, the majority of which are relatively new or newly independent States, which had no opportunity to express or withdraw their consent as regards the traditional rules of international law which are inimical to their interests. Discontent has been simmering. R.W.M. Dias trenchantly points out that one cause of discontent is rooted:

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269. A.L. Hollick, *ante*, note 13, pp.373-374.
Cf. William Pfaff, "UNESCO Reflects a Real World", *The International Herald Tribune*, Dec. 27, 1984, p.4; Steven S. Volk, "Americas : Contempt for the Court Is an Old Story", *ibid.*, Feb. 1985, p.4.

270. William B. Jones (U.S. Ambassador to UNESCO, 1973-77), "The International Seabed Authority Without U.S. Participation", (1983), 12 *Ocean Devel. & Int'l L.* 151; E.L. Richardson, *ante*, note 217, at 511-512; and cf. J.I. Charney, (1983) 46 *L. & Contemporary Problems*, 37 at 50-52.
Cf. Leigh R. Ratiner in Oxman, Caron and Budari (eds.), *ante*, note 117.

271. E.g., M.L. Pirapongse Kasemsri, *Ramkhamheng Symposium-1977*, p.33 at pp.55, 67.

272. Cf. Duncan Kennedy, *ante*, note 129, at 205 *et sequel;* R.M. Unger, *ibid.*, at 585 *et sequel;* Kelman, "Interpretative Construction in the Substantive Criminal Law", (1981) 33 *Stanford L. Rev.* 591; R.M. Unger, *ante*, note 61, *passim;* J.L. Brierly, *ante*, note 58, at pp.41-42.
Also Ted L. Stein, "The Approach of the Different Drummer : The Principle of the Persistent Objector in International Law", (1985) 26 *Harv. Int'l L.J.* 457-482, esp. at 468-470, which criticizes the view of P. Weil [in (1983) 77 *A.J.I.L.* 413].

273. See : Brierly, *ibid.*; Oppenheim, *ante*, note 73, at pp.4-5, 10-12, 16-17, 18, 22-23, 48, 50, 51, 263-267, 275, 289, 929; and works cited *ante*, note 127a.
S. Zamora, *ante*, note 129, at 571-573, 608; D.W. Greig, *ante*, note 74, pp.2-4, 8-9, 29-30.
Cf. R.P. Anand, *ante*; note 64, pp.135, 209; M. Bedjaoui, *ante*, note 118.

> in the fact that the values of a minority happen to be so opposed to those of the rest of society that the mere existence of society builds up in them a sense of oppression. Normally, the solution of differences in values and opinions is democracy...But to an uncompromising minority,...even democracy takes the appearance of a monolith of power. Worse: any action taken against them in accordance with the laws of society tends to be condemned as 'political'. So far as any group exhibits social sense and preaches responsibility among other things, it will have to persuade sufficient [States] in order to become a majority...[274]

In his authoritative opinion, Judge Alvarez states:

> By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in relations with other States. Sovereignty confers rights upon States and imposes obligations on them.
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> .....
>
> This notion has evolved and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist regime, according to which States were only bound by the rules which they had accepted. To-day, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an *institution*, an *international social function* of a psychological character, which has to be exercised in accordance with the new international law.[275]

The pronouncement has been assailed as an aberration from the strict adherence to the recognized procedural requirements for the creation of new customary international norms, thus blurring the distinction between law, morality, politics and equity.[276] However, the ensuing scrutiny of the cases cited as settling these 'procedural requirements' will reveal otherwise. Most importantly, these cases have received tendentious interpretation in favour of States wishing to insulate themselves from any erosion of their domination or power. A correct interpretation is in order.[277]

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274. Dias, *ante*, note 56a, at 317, and see also at 317-319. (The original word in [ ] is 'people').
See also de Rivero B., *ante*, note 129, p.4; García-Amador, *ante* note 134, at 289-293 and authorities cited therein; Franck and Chesler, *ante*, note 125, at 586-588, 590-591; R.W. Tucker, *ante*, note 122, *passim;* G. Tunkin, "Co-existence and International Law", (1958-III) 95 *Hague Recueil* 1 at 51 *et sequel.*
Cf. Louis Henkin, *How Nations Behave* (2nd ed. 1979), pp.121-127; O. Udokang, *ante*, note 131, pp.2-11, 14-17, 18-20, 30-33, 38, 69, 100, 121-122, 156, 158, 162.

275. Separate Opinion, the *Corfu Channel Case (U.K. v. Albania)*, I.C.J. Reports 1949, p.4 at p.43 (emphasis original); and see also his Individual Opinion in the *Anglo-Norwegian Fisheries Case*, I.C.J. Reports 1951, p.116 at pp.149-150.
Cf. T.O. Elias, *ante*, note 236, at pp.47-52, 67-69.

276. Arrow, *ante*, note 82, at 5-6, and see also at 2-11, 39.
See also P. Weil, *ante*, note 244, at 413-421, 431-433.
But see *ante*, Section III(A) (i) of this work; and D. Lyons, *ante* 70, at p.540, criticizing H.L.A. Hart's incongruent distinction between law and moral principles/concepts. (The distinction was cited with approval by Arrow, *loc. cit.*, at 7).

277. Cf. Udokang, *ante*, note 131, at pp.104-105.

In the *Asylum* case, the International Court of Justice held,

> A party which relies on *a regional or local custom* must prove that the custom is established in such a manner that it has become *binding on the other party* in accordance with a *constant and uniform usage practised by the States in question*.[278]

However, in that case,

> the facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum...that it is not possible to discern in all this any constant and uniform usage accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence [for the purposes of the said asylum]. .., *But even if* it could be supposed that *such a custom existed between certain Latin American States only, it could not be invoked against Peru* [another Latin American State] which, far from having its attitude adhered to it, has, on the contrary, repudiated it.....[279]

Put differently, since 'a regional or local custom' must be constantly and universally practised by all the States in the region or locality, there can be no such a custom if one of the States in the region does not accept it as such.[280] As the said Court elaborated in a subsequent case, this is because a local or regional custom is based upon long continued practice by the two or more States concerned which has been accepted by them as regulating their relations, thus forming the basis of mutual rights and obligations between them.[281] Since this type of custom creates rights and obligations *inter se*, once it is proved to exist, it is unnecessary to consider how far it is supported by general international custom.[282] Hence, the 'precedent' in the *Asylum* case does not lay down any rule relating to the persistent objector to general international custom.

Professor D.P. O'Connell cogently distinguishes between a protest aiming at "reserving existing rights from invasion and so prevent an historic claim from maturing" and the one aiming at denying the claimant State "the benefit of the element of general consent of nations, to inhibit custom". In this latter case,

> [t]he withholding of consent by one State has never been decisive in the translation of *lex ferenda* into *lex lata*, for State practice is not a matter of counting heads but of juristic evaluation of the factors that tend to legitimize action by individual States...in a contest about an alleged rule of customary law, or a change in the content of that rule.

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278. I.C.J. Reports 1951, p.266 at p.276. Emphasis added.

279. *Ibid.*, at p.277 Emphasis added.

280. Cf. M. Bos, *ante*, note 242, at 48; C.W. Jenks, *ante*, note 251, pp.225, 237, 238; H. Lauterpacht, *ante*, note 74, pp.374-377.

281. *Right of Passage Case (Portugal v. India)*, I.C.J. Reports 1960, p.6, at p.42.

282. *Ibid.*, at pp.41-42.

In the former case, however, "protest, as a withholding of acquiescence, plays a more significant role" [283] In the *Anglo-Norwegian Fisheries* case, Norway successfully proved the acquiescence by the other States to its drawing of the straight baselines to enclose its deeply indented coastline. Thus, the ten-mile rule for bays was inapplicable to Norway, which had drawn these straight baselines without adherence to such a rule but which had been acquiesced in by the international community in general.[284]

The pronouncement of Former President Loder in the *Lotus* case[285] and the myriad of cases decided by international tribunals vitiate the argument that 'sovereignty' of States is unlimited.[286] The consensus of a 'considerable' or 'overwhelming' majority of affected States creates a general customary rule which is, after all, based upon *opinio juris*, or the belief that a rule of law or obligation exists, and not upon *voluntas*, or the will of every State.[287] In any case, a 'State' is merely a collection of interests and entitlements recognized by the other members of the international community.[288] The U.K., one of the non-signatories of the 1982 Convention, even conceded as early as in 1951 that the right of a State to dissent from a customary rule is not absolute since account must be taken of the rights of international community in general.[289]

Paragraph 9 of the 1970 Declaration of Principles[290] stipulates:

> On the basis of the principles of this Declaration, an international regime...shall be established by an international treaty of a *universal character, generally agreed upon*. (Emphasis added).

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283. O'Connell, vol. I, p.39.

284. Cf. *Ibid.*, pp.39-44; Sir Gerald Fitzmaurice, (1953) 30 *British Y.B. Int'l L.* 1 at 27-33; R.Y. Jennings (1963); *ante*, note 78, at pp.39-40.
NB : The U.K. counsel had conceded : "...a State may acquire an exceptional position with regard to some general rule of customary law by some process which is analogous to that of acquiring an historic title". [*Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Pleadings, vol. II, at p.429].

285. *Ante*, note 251.

286. E.g., the cases cited in H. Lauterpacht, *ante*, note 74, pp.300, 304, 323-324, 303-333.
Even a traditional international lawyer like Oppenheim concedes : "Independence is not unlimited liberty for a State to do what it likes without any restriction whatsoever... Independence is a question of degree and it is also a question of degree whether the independence of s State is destroyed or not by certain restrictions...". (Oppenheim, *ante*, note 73, p.289).
Cf. Arthur Larson, Wilfred Jenks and others, *Sovereignty Within The Law* (1965), pp.3-4, 6, 11-18, 21-28, 47-267, 268-296, 333-347, 375-430, 461-471; Luzius Wildhaber, in MacDonald and Johnston (eds. 1983), *ante*, note 63, at pp.437-438, 440-444; Perkins, *ante*, note 131, at pp.63-64.

287. See *ante*, notes 234, 235; M. Bos, *ante*, note 242, at 10-52; H.L.A. Hart, *The Concept of Law* (1972), pp.208-221; M. Bos, in MacDonald and Johnston (eds. 1983), *ante*, note 63, at pp.55-58, 73, 76-77; Vratislav Pechota, *ibid.*, at pp.453-477; Bin Cheng, *ibid.*, at pp.545-550; T. Schweisfurth, *ibid.*, at pp.925-929, 959-969; Jennings, *ante*, note 73, at 6-7.

288. A. D'Amato, *ante*, note 257, at 1112-1122, 1125, 1151.
Cf. the *Reparation for Injuries Suffered in the Service of the U.N. Case*, Advisory Opinion, I.C.J. Reports 1949, p.174, esp. at p.185.

289. *The Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Pleadings, vol. II, at pp.428-429.

290. *Ante*, note 6.

The U.K. delegate elucidated this paragraph as

> yet another expression of the idea contained in the U.K. Working Paper on the regime, namely, that the regime should command the acceptance of the *great majority* in order to ensure its effectiveness.[291]

Instead of the imposition of the view of the majority of States upon the minority, UNCLOS III strove to achieve consensus in all matters, with voting as the last resort. This has enabled the 1982 Convention to embody the 'generally' or 'universally' accepted sets of rules without the abuse of the majority rule or of a *de facto* veto power.[292] On the whole, the overwhelming majority of States which are parties to the 1982 Convention are correct in pronouncing that the customary norm of deep seabed mining under the Convention cannot legitimately be objected to or opposed even at its emergent stage.[293] Does this signify that the CHM principle as enshrined in Part XI of the 1982 Convention is part of *jus cogens?*

(iv) *Jus Cogens?*

Pursuant to Article 53 of the 1969 Vienna Convention on the Law of Treaties,[294] a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law *(jus cogens)*, defined therein as:

> a norm accepted or recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept of *jus cogens* is relatively recent.[295] It has its root in the notion of public policy or *ordre public* in municipal law with Roman law influence.[296]

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291. *U.N. Doc. A/C.1/PV.1799* and *1800.*

292. Erik Suy, "Innovation in International Law-Making Process", in MacDonald, Johnston and Morris (eds. 1978), *ante*, note 127a, p.187 at pp.187-188, 194; D.M. Johnston, *ibid.*, p.111 at pp.131-132; P. Allott, *ante*, note 231, at 1-4, 24-27. Cf. Louis Henkin, *ante*, note 274 at p.127.
This view is more plausible than Bruno Simma's view of consensus as a means "to compel basic agreement which is in reality lacking. Failure is thus built into the treaty...". [B. Simma, "Consent : Strains in the Treaty System", in MacDonald and Johnston (eds. 1983), *ante*, note 63, p.485 at p.488, and cf. pp.485, 487].

293. See, e.g., UNCLOS III, *O.R.*, vol. I, p.52, para. 51 (*per* Mr. Chao of Singapore); *ibid.*, p.148, para. 72, but p.188, para. 75 (*per* Mr. Panupong of Thailand); "Sea Law Signed By 117 Nations; U.S. Opposes It", *The New York Times*, Dec. 11, 1982, p.1 (*per* Satya Nandan : 'The world is ready to show we can do without the overbearing attitudes of the superpowers...').

294. *Ante*, note 205.

295. International Law Commission's Commentary, (1966) 2 *Y.B. Int'l L. Comm'n* at 247; T.O. Elias, *ante*, note 205, at p.117.

296. Elias, *ibid.*; A. Gómez Robledo, "Le *jus cogens* international : sa genèse, sa nature, ses fonctions", (1981-III) 172 *Hague Recueil* 9 at 18-20; Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties : A Critical Appraisal* (1974), p.6; L.A. Alexidze, "Legal Nature of *Jus Cogens* in Contemporary International Law", (1981-III) 172 *Hague Recueil* 219 at 233-242, 243-258.
Cf. Ronald Dworkin, *ante*, note 69, chapters 7, 8.

On the international plane, this concept only appeared in the work of publicists[297] and in the dissenting opinion of Judge Schücking in the *Oscar Chinn* case.[298] Examples of *jus cogens* suggested in the International Law Commission included the prohibition of an unlawful use of force contrary to the principles of the U.N. Charter, slave trade, piracy, and violation of human rights. Notwithstanding, the Commission declined to include any example of the rule of *jus cogens*, leaving "the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals" [299]

At the Vienna Conference in 1969, the concept received support from, *inter alios*, delegates of the F.R.G. and Italy.[300] Moreover, it seems to be echoed in the judgment of twelve judges of the International Court of Justice in the *Barcelona Traction Case (Second Phase)*, which distinguished between inter-State obligations on the one hand, and obligations 'towards the international community as a whole' on the other. The latter

> derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[301]

Any act contrary to *jus cogens* is illegal, and its legal effect is null and void.[302] In the case of treaties, the parties are obligated to bring their position into conformity with the rule of *jus cogens*.[303]

However, there is no sufficient criteria to identify *jus cogens*. Generally, or even universally, accepted rules may be customary law, but they are not necessarily

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297. C.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976), pp.3, 7-9; see the authorities cited in Robledo, *loc. cit.*, at 77-86, L.A. Alexidze, *loc. cit.*, at 228-233, 243-258.

298. (1934), P.C.I.J. Series A/B No.63 at pp.149-150.
In the *North Sea Continental Shelf Cases*, the International Court of Justice avoided "attempting to enter into, still less pronounce upon any question of *jus cogens*..." (I.C.J. Reports 1969, p.3 at p.41, para. 72).

299. *Ante*, note 295, pp.247-248.

300. *Per* Mr. Groepper of the F.R.G. and Mr. Maresca of Italy. [Quoted in Charles de Visscher, "Positivisme et «Jus Cogens»" (1971) 75 *R.G.D.I.P.* 5 at 6-7, and 10 respectively].
See also Elias, *ante*, note 205, at pp.178-187.

301. I.C.J. Reports 1970, p.3 at p.32.

302. Cf. Robledo, *loc. cit.*, at 134-162; I. Brownlie, 3rd ed., pp.82-83, 512-515, 515-517; Geneva Convention on the High Seas of 1958, Articles 13-22; the 1982 Law of the Sea Convention, Articles 99-109; O'Connell, vol. II, pp.966-983.

303. Article 71, the Vienna Convention of 1969.
See Elias, *ante*, note 205, pp.201-204; cf. J. Sztucki, *op. cit.*, pp.66-71, 174-194; Rozakis (1976), *op.cit.*, pp.11-29, 95-148.

jus cogens. The question of how an ordinary norm graduates to be a 'peremptory' norm has yet to be satisfactorily answered.[304]

At UNCLOS III, an informal proposal was submitted by Chile to have the general provision under Article 136 that "The Area and its resources are the CHM" considered part of *jus cogens*.[305] In the words of the President of the Conference,

> [t]he majority of delegations strongly supported the proposal but although most delegations found the concept unexceptionable, yet the proposal itself was not entirely acceptable to some [Eastern and Western European States]...[306]

Eventually, a consensus was reached to accept a compromise formulation now embodied in paragraph 6 of Article 311 of the 1982 Convention:

> States Parties agree that there shall be no amendments to the basic principles relating to the CHM set forth in article 136 and that they shall not be party to any agreement in derogation thereof.[307]

Thus, without alluding to the question whether the CHM is part of *jus cogens*, UNCLOS III has, through the obligations imposed upon the overwhelming number of States which are parties to the 1982 Convention, effectively ensured that the CHM has the legal effect parallel to *jus cogens*.[308]

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304. Alexidze, *loc. cit.*, at 227; Rozakis (1976), op. cit., pp. x, 44-84, 194; Robledo, *loc. cit.*, at 167-185, 208; P. Weil, *ante*, note 244, at 421-429; de Visscher, *ante*, note 300, at 7-8; Sztucki, *op. cit.*, pp.13-22, 26-39, 54-64, 73-76, 84, 88, 89, 93, 97-163; Michel Virally, *Réfléxions sur le jus cogens*, p.17.
Cf. the criteria suggested by Alexidze, *loc. cit.*, at 259-264; R.E. Dalton, "The Treaty on Treaties", (1970) 64 *A.J.I.L.* 495 at 537-538; Rozakis (1976), *op. cit.*, pp.85-93 (*re* : the modification of *jus cogens* norms), 150-184 (*re* : the settlement of disputes).
Cf. also the rule of 'recognition' propounded by H.L.A. Hart, *ante*, note 287, pp.227-231.

305. *U.N. Doc. GP/9* dated 5 Aug. 1980, originally appearing in *U.N. Doc. FC/14* dated 20 Aug. 1979.

306. Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, *U.N. Doc. A/CONF.62/L.58* of 22 Aug. 1980, UNCLOS III, *O.R.*, vol. XIV, p.128 at p.129.

307. According to the President, this formulation was "subject to the expression by certain delegations of reservations which did not amount to objection to its acceptance by consensus". *(Ibid.)*.

308. See *ante*, Section III (C) (i), (ii) and (iii).

IV THE PREPCOM AS THE NEW BATTLEGROUND

The legal effect of the CHM in relation to the deep seabed has been well understood even by the opposing States themselves. This is evidenced by the efforts they have been focusing on the deliberations in the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea (the PrepCom) established under Resolution I of UNCLOS III to make arrangements enabling the Authority and the Tribunal to be set up and operate. Realizing that deep seabed mining outside the Convention is impractical, the potential mining States have concentrated on formulating rules and conditions which would be favourable to them. They are struggling to control the finance and decision-making power of the Authority, the Council, and the Enterprise; are drafting financial terms of mining contracts to suit their interest, whilst preventing deep seabed mining technology from being effectively transferred to the Third World States through the Enterprise and the Authority. In addition, they have been attempting to avoid too much financial burden in relation to the compensation of the potentially adversely affected developing land-based producers. Any potentially negative impacts on the interests of the Third World are resisted by the Group of 77, who desires to see the expeditious realization of the true meaning of the CHM principle underpinning the deep seabed mining regime.

In all, it must be acknowledged that all States accept, in effect, the legitimacy of the regime under the 1982 Convention. The Third World is fighting on the footing of sovereign equality with the First World to make the future regime compatible with the CHM principle. Any outcome out of the PrepCom battleground would certainly be more just than a rule formulated by merely one side which happens to be the most influential group of States. Even the U.S.A. now shares this perception. Negotiations between a State company of the Soviet Union and OMCO, an American consortium, have been going on recently with a view to settling overlapping claims in the Pacific. However, this does not signify any recognition or endorsement of the U.S. claim to mine sites outside the framework of the 1982 Convention. It merely paves the way to future settlement of all overlapping claims when the U.S.A., under a new Administration, finally accedes to the Convention.

V. PRECEDENTS FOR THE FUTURE?

Part XI of the 1982 Law of the Sea Convention has brought to fruition the basic principles of the New International Economic Order. Such principles encompass sovereign equality of all States, international co-operation, effective participation of all States in resolving the world economic problems, special consideration to developing States' economic and political development, regulation and supervision of the activities of multinational corporations, transfer of technology for the benefit of the developing States, and full permanent sovereignty of every State over its own destiny.[309] The potential reverberating implications of these provisions for the future has caused disquiet in certain quarters.[310] This fear would have been justifiable only if UNCLOS III had involved a radical process of international law revision in disregard of all legitimate interests.[311] On the contrary, UNCLOS III, which was a legislative conference in the true sense, heeded the aspirations of all States. Concessions were made by the developing States as much as by their more developed counterparts in the spirit of compromise in order to achieve consensus for the 'package deal' for the new ocean regime.[312] It may be argued, therefore, that Part XI was "the result of the *quid pro quo* of these negotiations and stands as no generalizable precedent to be used in other settings" Moreover, the deep seabed mining regime:

> may actually function in a way comparable to a private enterprise system subject to normal government regulations. Consequently, it does not appear that this constitutes a substantial precedent that is adverse to [the interests of the industrialized States such as the U.S.A.].[313]

At any rate, the developing States merely demand that the rules of customary international law which they had no opportunity to participate in formulating be looked into case by case to determine whether the contents have been used against their interests.[314] After UNCLOS III, the developed States may shun the UNCLOS III type of conference by resorting to it only to legitimize the extant regime

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309. See : *U.N./G.A. Reso. 3201(S-VI)* of 1 May 1974 [(1974) 13 *I.L.M.* 715]; *U.N./G.A. Reso. 3202(S-VI)* of 1 May 1974 (*ibid.*, 720); *U.N./G.A. Reso. 3281(XXIX)* of 12 Dec. 1974 [(1975) 14 *ibid.*, 251].

310. E.g., U.S. Congressman John Breuax, [1984] 17 *L. Sea Inst. Proc.* at 12-13; U.S. Ambassador James L. Malone, (1983) 46 *L. & Contemporary Problems* 29 at 31-32 and (1984), 24 *Va. J. Int'l L.* 785 at 785-786, 798; Prof. D.R. Denman, *ante*, note 267.

311. Cf. García-Amador, *ante*, note 134, at 295.

312. U.N. Secretary General Javier Pérez de Cuéllar, *ante*, note 245, pp.xxx-xxxi; Evriviades, *ante*, note 1, at 202-203, 221; P. Allott, *ante*, note 231, at 5-6, 8-10; UNCLOS III, *O.R.*, vol. I, p.148, para. 72 (*per* Mr. Panupong of Thailand); Gamble, Jr. and Frankowska, *ante*, note 210, at 153.
Cf. Karl Zemanek, "Majority Rule and Consensus Technique in Law-Making Diplomacy", in MacDonald and Johnston (eds. 1982), *ante*, note 63, pp.857-887; E. Suy, *ante*, note 292, at p.194; A.L. Hollick, *ante*, note 13; pp.249-250.

313. J.I. Charney, (1983) 46 *L. & Contemporary Problems* 37 at 53, echoing the view of Elliot L. Richardson's, *Hearings*, 97th Cong., 2nd Sess., at pp.89-94, and Leigh R. Ratiner, *ibid.*, at pp.224-228.

314. *Ante*, note 132.

or to deal with issues which cannot be managed by unilateral and co-operative action.[315] It is a truism that the other regimes related to the CHM principle have not achieved the same stature or efficacy as the deep seabed area.[316] Noteworthy in this connection are the regimes governing Antarctica, outer space, the moon and other celestial bodies.

In the case of Antarctica, it has been subject to territorial claims of sovereignty since the beginning of the twentieth century.[317] Arguably, as a *terra nullius*, it cannot be equated with, or follow the example of, the deep seabed regime under the 1982 Law of the Sea Convention.[318] Conflicts of claims are frozen by the Antarctica Treaty of 1 December 1959, which is signed by all the exploring States.[319] Malaysia, an 'outsider', has attempted since 1983 to have Antarctica made accessible to all nations on the basis of the CHM principle parallel to that of the deep seabed regime.[320] Resistance on the part of vested interests abounds.[321] Nonetheless, the matter often recurs on the U.N. General Assembly agenda.[322]

Unlike the Antarctica Treaty, the treaties governing outer space, the moon and other celestial bodies expressly mention that they are the province of all mankind,

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315. Hollick, *ante*, note 13, at p.381.

316. Cf. A-C. Kiss, *ante*, note 52, pp.135-193, 225-229.

317. See, e.g., Auburn, *The Ross Dependency* (1972); Hackworth, *Digest of International Law*, vol. I (1940), p.457; Julian Amery, M.P. "Letters to the Editor", *The Times* (London), 16 Dec. 1983; Peter Wilsher and Parin Janmohamed, "The New Continents : the polar regions", *The Sunday Times Magazine* (London), Dec. 8, 1985; p.44 at pp.46-53.

318. Roland Rich, "A Mineral Regime for Antarctica", (1982) 31 *Int'l & Comp. L.Q.* 709 at 713-714, 716-725; R.Y. Jennings, [1972B], *ante*, note 152 at 40.

319. Article IV. [402 *U.N. Treaty Series* 71; (1960) 54 *A.J.I.L.* 476; (1960) 9 *Int'l & Comp. L.Q.* 475]
See I. Brownlie, 3rd ed., pp.265-6; R. Rich, *loc. cit.*, at 714-715; Bill Johnstone, "Science Report : Antarctic's future in balance", *The Times* (London), 10 Jan. 1985, p.12; Kurt Michael Shusterich, "The Antarctica Treaty System : History, Substance and Speculation", (1984) 39 *Int'l J.* 800-827; Gillian Triggs, "The Antarctica Treaty Regimes : A Workable Compromise or a 'Purgatory of Ambiguity' ", (1985) 17 *Case Western Reserve J. Int'l L.* 195-228.

320. See Statement of Malaysia's Permanent Representative to the U.N., New York, on 28 November 1984. (*Foreign Affairs Malaysia*, Dec. 1984, vol. 17, No. 4, pp.409-419. *Infra*, Appendix).

321. See : *Antarctica Resources Policy : Scientific, Legal and Political Issues*, Proceedings of a Conference held by the Chilean Institute of Int'l Studies, 1982, [ed. by Francisco Orrego Vicuna, Cambridge Univ. Press, 1983]; Anthony Tucker, *The Guardian* (London), 10 Nov. 1983, p.8; Sir Donald Logan, "Letters to the Editor", *The Times* (London), 23 Feb. 1984; Lee Kimball, *Antarctic Issues Today*, (The Int'l Conference on East Asia and the Law of the Sea, Seoul, July 3-6, 1984); Philip W. Quigg, *A Pole Apart : The Emerging Issues of Antarctica*, (New York : McGraw-Hill, 1983, xiv, 299p); Lewis M. Alexander and Lynne Carter Hanson (eds.), *Antarctic Politics and Marine Resources : Critical Choices for the 1980's*, (Kingston, R.I.; Proceedings of the 8th Annual Conference, Center for Ocean Management Studies, Univ. of Rhode Islands, June 17-20, 1984, 262 p.).

322. *The New Straits Times (Kuala Lumpur)*, excerpted in *The International Herald Tribune*, Jan. 4, 1985, p.4.
In April 1985, Dep. Foreign Minister Abdul Kadir Sheikh Fadzir told the Malaysian Parliament that "Malaysia is involved in the Antarctica issue to bring about a fairer and more responsible system for the international community...and that Malaysia would continue to work to achieve that goal" (*Malaysian Digest*, 15 April 1985 : 'Antarctica : Towards fairer system').
Cf. also M.J. Peterson, "Antarctic Implications of the New Law of the Sea", (1986) 16 *Ocean Devel. & Int'l L.* 137-181, sep. at 161 *et sequel*. Peterson argues that as long as the Antarctic Treaty participants remain united they will determine Antarctica's future because Third World coalition lacks the power to dislodge them to pave the way for the realization of the Common Heritage of Mankind principle.

and that their exploration and use shall be carried out for the benefit of mankind and in the interests of all countries.[323] Nevertheless, the prospects for their enjoyment still seem to lie at too remote a distance to warrant the seriousness accorded to deep seabed mining.

323. *Ante*, note 94. See also I. Brownlie, 3rd ed., pp.266-270.

VI. CONCLUSIONS

On 17 August 1987 India, a Third World State, was registered by the PrepCom as the first pioneer investor in deep seabed mining. The occasion happily coincided with the twentieth anniversary of the Maltese proposal to have the deep seabed issue put on the agenda of the 1967 annual session of the United Nations General Assembly. By the end of 1987, France, Japan, and the U.S.S.R. had been registered as the remaining pioneer investing States.[324] The date of 1 January 1988, which has been set by the unilateral legislation on deep seabed mining to permit mining outside the 1982 Convention, has thus become inoperative as no miner would risk mining the same sites to be mined by the miners registered by the PrepCom.

While the other regimes related to the CHM principle may have failed to capitalize on the precedent created by UNCLOS III, the precedent does exist. It serves to reverse the traditional infrastructure of international law by manifesting that sovereign States can be equal in law and in fact; that the role of consent with regard to international law must be reconsidered in a new light; and that in the interdependent world enforcement is effective even if weaker States are the enforcers, provided that they join forces to protect their rights vis-à-vis the relatively stronger States. There is now a basic tenet of international life: right makes might, and not vice versa. The deep seabed mining precedent should be wisely utilized to structure a more egalitarian international community. If there is virtually universal assertion of wills by States, there is always a means to accomplish this noble and commendable goal.

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324. UN, Office for Ocean Affairs and the Law of the Sea, *Law of The Sea Bulletin*, Special Issue II (April 1988).

Appendix
Antarctica : The Malaysian View

Appendix

Antarctica: The Malaysian View

(Statement by Malaysia's Permanent Representative to the U.N., New York, Ambassador Tan Sri Zain Azraai. *Foreign Affairs Malaysia,* Dec. 1984, vol.17, No.4, pp.409-419)

The Ambassador opened his statement: "We believe it to be indisputable that Mankind as a whole has a legitimate interest in Antarctica in how it is governed and managed". Antarctica occupies one-tenth of the globe's surface. Its location, vastness, fragile ecosystem, rich marine and possible mineral resources are of great significance for international peace and security, economy, environment, scientific research, meteorology, telecommunication, and so forth.

Hence, Malaysia is in favour of a regime which best serves the interests of the international community.

The current regime of the Antarctica Treaty System has "certain deficiencies"; that is, on the issue of mineral exploitation and the equitable sharing of the benefits of any exploitation. Moreover, "trustees cannot be self-appointed". The parties to the Treaty argue that they have 'special responsibility' owing to the expenditure they have spent on Antarctica. However, this 'special responsibility' has been generally translated into exclusive right to make decisions on all matters affecting Antarctica.

Malaysia proposes the creation of a United Nations Committee on Antarctica in the belief that a small committee would lead to mutual understanding and detailed discussion among all concerned. The international community wants to be actively involved in the Antarctica issue. In 1959, when the U.N. had only 82 Member States, environmental issues of Antarctica were then the paramount concern. The paramount issue now is that of mineral resources of Antarctica. However, the discussion in the proposed Committee on Antarctica would not necessarily entail the abandonment of the Treaty itself: something which would be difficult to accomplish in view of power *politik* reality.

The Ambassador drew attention to Evan Luard's article: "Who Owns Antarctica" (*Foreign Affairs,* Summer 1984, at p.1187). He quoted Luard's arguments which run as follows:

> 'A mineral regime inevitably raises the fundamental question of ownership of the area and its resources. The claims previously put forward by the seven claimant countries could hardly be used as a basis for asserting rights. Those claims have been explicitly placed in abeyance by the Treaty powers..and are rejected by some outside powers...They are in some cases in conflict with each other. They do not cover the entire continent. The high seas, beneath which many of the most valuable resources are believed to lie, are excluded from the jurisdiction of the Treaty; and it is not self-evident that a continent which is itself under no accepted sovereignty can, in effect, create its own exclusive economic zone (above all for that part which has been claimed)'.

Luard's questioning of the legal regime to exploit the Antarctica resources was also quoted.

(For an opposing argument see *per* the U.K. Representative, Dr. J.A. Heap, 29 Nov. 1984, 1st Committee of the U.N. General Assembly. Also in (1984) 55 *British Y.B.Int'l L.*, at 542-548).

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STUDY PAPER

BRIEF ENCOUNTER

SINO - THAI RAPPROCHEMENT AFTER BANDUNG 1955 - 1957

Dr. Anuson Chinvanno

INTERNATIONAL STUDIES CENTRE

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Dr. Anuson joined the Ministry of Foreign Affairs in August 1988 and was first assigned to Southeast Asia Division, Department of Political Affairs, where he worked as Vietnamese and later Malaysian Desk Officer. In January 1990, he moved to Policy and Planning Division. Between August and December 1990, Dr. Anuson was attached to the Office of the Secretary to the Minister, working for Dr. Subin Pinkayan, the then Minister of Foreign Affairs. He is now back with the Department of Political Affairs.

Dr. Anuson's doctoral thesis, " Thailand's Policies Towards the People's Republic of China, 1949 - 1957 ", is being revised and will be published by Macmillan as part of the St. Antony's/Macmillan Series in 1991/92.

" BRIEF ENCOUNTER " : SINO - THAI RAPPROCHEMENT AFTER BANDUNG, 1955 - 1957

BY

DR. ANUSON CHINVANNO

STUDY PAPER
INTERNATIONAL STUDIES CENTRE
INSTITUTE OF FOREIGN AFFAIRS

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FOREWORD

The ISC Study Paper " Brief Encounter : Sino - Thai Rapprochement after Bandung, 1955 - 1957 " was one of the projects under the ISC programme of 1990 to commemorate the 15th Anniversary of the establishment of diplomatic relations between Thailand and the People's Republic of China.

In retrospects, the development of relations between Thailand and the People's Republic of China can be traced back to the year 1955. The historic meeting between Prince Wan Waithayakon, the Thai Foreign Minister and Chou En-lai, the Chinese Premier and Foreign Minister at the Asian - African Conference held in Bandung, Indonesia, on 18 - 24 April 1955, marked the initial step towards the rapprochement which eventually led to the establishment of diplomatic relations twenty years later. During the 1955 - 1957 period, there took place a series of unofficial contacts with the People's Republic of China, either overtly or covertly, by members of the Thai Parliament, journalists, trade union leaders and businessmen. This rapprochement period did not last very long and came to an end with the fall of Prime Minister P. Pibulsonggram, who implicitly approved these contacts, thus bringing to a close one fascinating chapter in the Sino - Thai relations.

I wish to express my sincere thanks to Dr. Anuson Chinvanno who kindly responded to the request of ISC to undertake the study of the early period of Thailand's relations with the People's Republic of China. In spite of the limited materials available, the author is to be commended for his efforts in reconstructing the sequence of events during this period thus contributing to a comprehension of the mood, the motive and the relevant factors which brought about the beginning and the end of this overture, aptly named " the Brief Encounter. "

Phan Wannamethee
Director of the International Studies Centre

PREFACE

The year 1990 is the 35th Anniversary of the Asian - African Conference held in Bandung as well as the 15th Anniversary of the establishment of diplomatic relations between Thailand and the People's Republic of China. So it seemed appropriate, when Ambassador Phan Wannamethee, Director of the International Studies Centre (ISC) of the Ministry of Foreign Affairs, asked me to write a study paper for the ISC, to choose this topic which in many respects is connected with the above - mentioned momentus events in the modern history of Sino - Thai relations.

This paper is an amended and expanded version of Chapter VII of my doctoral dissertation titled, " Thailand's Policies Towards the People's Republic of China, 1949 - 1957 ", submitted to the University of Oxford in July 1988. The research for this paper was mostly conducted between 1985 - 1988 while I was at Oxford. In this connection, I wish to extend my thanks to Professor J.A.A. Stockwin of St. Antony's College, my Oxford supervisor, for his analytical observations and valuable suggestions; to Miss Sally Marks, of the United States National Archives; Khun Suwanna Chaichindasut, of the Ministry of Foreign Affairs' Library and Archives Division; and the staff of the British Public Record Office, for without their assistance the research work could not have been accomplished. Much gratitude is also owed to Ambassador Tej Bunnag who kindly undertook to read and provided useful comments on the manuscript. Moreover, I am most indebted to the Royal Thai Government for its scholarship which facilitated my education in Britain.

Since this paper is based on the materials available to me at the time of writing, I therefore do not claim that it is the authoritative or the comprehensive account of the subject. Instead, it is my hope that further research

into this fascinating period in the history of Thai foreign affairs will be undertaken. Finally, the views expressed herein and any shortcomings contained in this work are mine alone and cannot be attributed in any way to the International Studies Centre or the Ministry of Foreign Affairs.

ANUSON CHINVANNO

I

INTRODUCTION

The meeting between Prince Wan Waithayakon, the Thai Foreign Minister, and Chou En - lai, the Chinese Premier and Foreign Minister, at the Bandung Conference in April 1955 was undoubtedly a historic landmark in the history of Thailand's relations with People's Republic of China (PRC). This was because mutual hostility had existed in varying degrees since the establishment of the PRC on 1 October 1949. There were many factors, both internal and external, which shaped Thailand's policy towards the PRC. The obstacles to better relationship were differences in perception, ideology and national interests, which were intensified by the lack of understanding of each other's motivations and historical experiences. The perception of threat from China clearly was a crucial factor in Thailand's decision to seek an alliance with the United States, an effort which culminated in Thailand joining the Southeast Asia Treaty Organization (SEATO) in September 1954.

Thai government leaders, at that time, perceived the PRC to be expansionist and to have aggressive intentions towards Thailand. This perceived threat was very much influenced by external factors. Developments in regional politics, starting with the Chinese Communists' victory over the Nationalist forces and the establishment of a Communist regime in China, the Chinese involvement in the Korean War, the " liberation " of Tibet, the aid given to the Viet Minh movement against the French in Indochina, and the establishment of a Tai Autonomous Region in Yunnan Province in 1953, were viewed by Thai leaders as signs of danger from the PRC. Although there was little evidence to show that the Communist Chinese had been directly attempting to overthrow the Thai government during the 1950's, the salient point is that the Thai government leaders believed that they had been. They thought that the

Chinese invasion of Thailand was not just a possibility but a probability. It was just a matter of time.

While Thai leaders were concerned with direct Chinese aggression, they also regarded China's interference in Thai domestic affairs as being serious, for internally there was still the overseas Chinese problem. Apart from domestic considerations, they felt that the overseas Chinese were not an asset to them internationally, since both the Nationalists and the Communists tried to intervene on their behalf. The Thai concern was aroused by a series of events connected with Chinese politics which tended to politicize the local Chinese community, and which involved Nationalist and Communist competition for control over the Chinese community. These attempts at intervention were seen as meddling in Thai internal affairs and therefore unacceptable. Furthermore, they feared that communism would spread to Thailand through local overseas Chinese. So the Communist victory in China added a new dimension: not only were the Chinese a source of conflict within the country, but as carriers of Communist ideology, they also threatened the country with subversion. Therefore, the domestic tactic of crying " Chinese menace " made sense of the Thai government's international tactic of crying " Communist menace " for the Thai government believed the two to be inseparable.

Having perceived that the PRC was a threat to Thailand's security in terms both as a direct military threat and as an external source of interference in Thai internal affairs, the Thai government responded to this threat in two ways. To meet the external threat, an alliance with the United States, which had emerged from the Pacific War as the strongest power in the region, was actively sought. Non - recognition of the PRC and the continuation of relationship with the weaker Nationalists, together with internal measures aiming at controlling the local Chinese community and forcing a more rapid assimilation, were policies designed to prevent any effective intervention by either of the two Chinese regimes.

Convinced that the rise to power of Communist China was a genuine threat to the security and independence of Thailand, Thai leaders believed that it could best be met by a solid alliance with the strongest potential enemy of the PRC, namely the United States. This policy has also to be seen in the context of two lessons the Thai leaders drew from the Second World War. They are: firstly, the importance of making sure that Thailand was not " left once more at the mercy of an overpowering enemy, defenceless and without allies "; and secondly, the friendliness extended to Thailand by the United States

during the War and the role played by the United States as Thailand's " protector ", saving it from the demands of Britain and France at the end of the War. Therefore, as the United States continued to play a role in political development in Thailand and Southeast Asia, the Thai government under Field Marshal Pibul Songgram decided to seek a security guarantee from the United States. This policy was undoubtedly motivated by the following factors: firstly, the US was the only nation powerful enough to grant Thailand's security guarantee; secondly, the US had assumed the leadership of the Free World and had been prepared to take concrete action against further Communist expansion; thirdly, the US, the richest and most technologically - advanced country in the world, would be able to supply Thailand's economic, technical and military aid it needed to stabilize its economy and modernize its armed forces; and fourthly, military cooperation with the US would strengthen Thailand's military government *vis-a-vis* opposition groups.

The policy of alliance with the United States therefore became the main thrust of the post-war foreign policy pursued by the Thai government under the leadership of Pibul. This particular policy was also likely to have been heavily influenced by Pibul's pre-war and war-time experiences. It was clearly illustrated by Prince Wan's statement attributing Thailand's decision to join SEATO, a multilateral alliance, to the fact that:

> *for the preservation of peace and security Thailand has tried many policies in the past, such as those of neutrality and of non - aggression treaties but found that they did not work, nor can any reason be seen why they should work now.*[1]

This policy was adhered to by subsequent Thai governments under Field Marshals Sarit Thanarat and Thanom Kittikachorn, during whose period in office Thailand became closely involved in the Indochinese conflicts.

However, there was a brief period of relaxation of tension during 1955 - 1957. Following the Bandung Conference which was held in April 1955, the hostility and tension between Thailand and the PRC was reduced. Secret missions were in fact sent by Thai government leaders to China to contact the Communist Chinese regime, with a view of improving bilateral relationship between the two countries. They were followed by several open visits to the

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[1] *United States National Archives, Department of State Files* (henceforth cited as *USNA, DS*), Bureau of Far Eastern Affairs: Files Relating to Southeast Asia and the Geneva Conference 1954 (henceforth cited as *FE/SEA-GC*), Box 10 Manila Conference (I) : Text of Statements - Opening Ceremonies of the Manila Conference of 1954, 6 September 1954.

People's Republic of China by Thai politicians, journalists, and cultural groups.

How could the relaxation of tension and subsequent developments have come about? A combination of factors accounted for this turn of events. The general lessening of world tension together with domestic political developments, in many respects, played the crucial role. Furthermore, the change of attitude on the part of Thai leaders and the softening ideological stance of the Chinese contributed substantially to the improvement in the overall atmosphere which led to the relaxation of tension. Comprehension of these factors is the key to the understanding of Thai policies towards the People's Republic of China in the last few years of the Pibul Government.

II

NEW CHINESE FOREIGN POLICY APPROACH

Following the establishment of the People's Republic of China in October 1949, in the field of foreign policy, the Chinese Communist Party displayed abroad a militant attitude, typical of most newly successful revolutionary governments, encouraging movements of national liberation. Its primary concern was to check United States influence in Asia. China's official foreign policy during these early years of the People's Republic was marked by, in Mao Tse - tung's phrase, " leaning to one side " - an alignment with the Soviet Union.

The PRC's preoccupation with " imperialism " resulted as much from its lively memory of the humiliations and " semi-colonial " status inflicted on China in the nineteenth and early twentieth centuries by the imperialist powers as from the Communist ideological line at the time. China's Communist leaders therefore tended to see the world as divided sharply into friends and foes, with little room for neutrals. A neutralist position was condemned since it objectively served imperialist interests. As a result, the Chinese leaders encouraged Communist rebellions throughout Asia.

Apart from ideological considerations, there is no doubt that the PRC's attempt to check American influence in Asia stemmed from its desire to remove the barrier to its own quest for status and influence. It is reasonably clear that Peking aspired to some sort of sphere of influence in Asia. There was an immense felt need for prestige, resulting from the pride in China's size, population, potential power, and traditional cultural brilliance. China must be restored to its pre - eminent place in the world, and its humiliation in modern times must be wiped out. The possession of a sphere of influence in its own vicinity could be thought of as a logical attribute of a great power. However, the results of its revolutionary or " hard " policy were not encouraging. Most

of the Communist revolts were suppressed and the Cold War reinforced the Western powers in their determination to resist Communist efforts in Asia as well as in Europe.

The key factor of Sino - Thai hostility and mutual suspicion during this period up to 1954 appears to be the perception on both sides of the other's intentions. As stated above, China's Communist rulers needed to consolidate their revolutionary victory by rooting out all vestiges of Western influence at home and emphasizing revolutionary objectives in their foreign relations. In this period the revolutionary component in the PRC's policy was overt and intense. The PRC's foreign policy, therefore, appeared to the smaller nations of Southeast Asia as expansionist. Coupled with the large Chinese minorities within their boundaries, it appeared to be a threat to their security.

To Thai leaders, the manifestation of this threat was in the forms of the Chinese involvement in the Korean War, the " liberation " of Tibet, the aid given to the Viet Minh movement against the French in Indochina, and the establishment of a Tai Autonomous Region in Yunnan Province in 1953. Furthermore, Thai leaders were also concerned with China's interference in Thai domestic affairs, for internally there was still the overseas Chinese problem. The Thai concern was aroused by a series of events connected with Chinese politics which tended to politicize the local Chinese community, and which involved Nationalist and Communist competition for control over the Chinese community. These attempts at intervention were seen as meddling in Thai internal affairs and therefore unacceptable. Furthermore, they feared that communism would spread to Thailand through local overseas Chinese. So the Communist victory in China added a new dimension: not only were the Chinese a source of conflict within the country, but as carriers of Communist ideology, they also threatened the country with subversion. They thus felt that there was no alternative but to seek protection from the opposing camp, i.e. the United States. This Thai policy, in turn, was taken by China, just recovering from years of humiliation at Western and Japanese hands, as a hostile gesture. Fearful of American attempts at encirclement, the PRC saw Thailand as a willing accomplice of America and directed its propaganda campaign against Thailand. Admonitions concealed in Marxist - Leninist rhetoric were interpreted in Bangkok as threats and only had the effect of increasing Thai fears of Chinese aggression, driving Thailand more towards the anti - PRC side.

A general reappraisal by the PRC of its policies towards Asian coun-

tries, particularly the newly independent countries, is believed to have already taken place in 1951. Michael Yahuda argued that the realization that countries like India and Burma were not simply still under the control of their former colonial masters and that their neutralism was not without content meant that the thinking about China's pattern of revolution as being the model for Asian countries seeking liberation, which at this stage was regarded by Chinese leaders as the only true form of independence, needed to be reconsidered. Moreover, this caused China's leaders to think again about the whole nature of the post - war world.[2] It was not until 1954, however, that this dimension of Communist China's foreign policy became fully developed - culminating in the announcement by Chou En - lai and Pandit Nehru in April 1954 of the famous " Five Principles of Peaceful Co - existence ", which were : (1) mutual respect for each other's territorial integrity and sovereignty; (2) non - aggression; (3) non - interference in each other's internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence.

Apparently, the strategic doctrine of " two camps ", set forth by the Cominform in 1947, whereby any government, nation, or group not under Communist control was by definition under imperialist control, was revised to open a middle way for neutralism or non - alignment. The revolutionary policy of national liberation by armed uprising was abandoned in 1951 - 52 in favour of peace movements. Implementation of this new policy reached its high point in the Peace Conference for Asia and the Pacific Regions held in Peking in October 1952. It is clear from statements made by the Chinese delegates to the Conference that the emphasis in the PRC's foreign policy had swung away from national liberation to prevention of United States military preparation and collective security measures in the Pacific.[3]

Under the new strategy the concept of peace apparently underwent a transformation from a tactical device of attacking imperialism at a popular level to a strategy of detaching certain states from the imperialist camp. Although this revision did not necessitate a change in the view of history's inevitable course towards a socialist world, the strategy for the socialist camp became more subtle. The process by which nations move from one side to the other became phased, involving the reduction of US influence in the first phase,

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[2] Michael B. Yahuda, *China's Role in World Affairs,* (London, Croom Helm Ltd., 1978), p. 40.

[3] David A. Wilson, " China, Thailand, and the Spirit of Bandung (Part I) ", *China Quarterly,* No. 30, April - June 1967, p. 157.

the effecting of Communist control as a final phase, and an intervening phase of neutralism. By separating the objective of ultimate Communist control from that of the reduction of imperialist influence, it became possible to postpone the revolutionary objective into the distant future, thus opening the possibility of a policy of peaceful co - existence. David Wilson argued that this strategic reformulation on the part of the PRC allowed a trend towards greater flexibility which in regard to Thailand opened up potentialities which had been beyond the grasp of the previous implacable policies. He concluded :

> *This amounts to the reappearance in communist thinking of the idea of a bourgeois nationalist - led stage of anti - imperialist revolution and abandonment of strict adherence to the Maoist thesis. The ideological framework for foreign relations thereby became more practical in regard to Thailand. The possibility of any communist - led overthrow of the Thai government must be considered to have been slight. In comparison the possibility of the development of a group to express more modest demands of opposition to pro-American government policies or adoption of neutralism was certainly greater.* [4]

The new policy which minimized " armed struggle " while emphasizing " good neighbourliness " was a result of many international developments. The Korean War and the crises in Indochina and the Taiwan Strait had created military risks that Peking could not accept. Instead of weakening Japan's and the United States' position, the result was a strengthening of US military forces in East Asia, the Japanese Peace Treaty, the beginnings of a rapprochement of Japan with the rest of Asia, the ANZUS Pact, the US - Philippines Treaty, and a general broadening and stiffening of the US commitments to the Pacific region. The PRC thus began to feel that it needed the sympathy and political support of the neutrals. These events demonstrated to Peking that, its revolutionary objectives being largely unattainable in the short run, its national interests could best be served for the time being by maximizing its influence in Asia through the " application of the carrot rather than the stick ".[5] Furthermore, it can also be explained by the demand of domestic developments. Economically, 1953 was the first year of the First Five - Year Plan, which marked the beginning of " national construction ". A more peaceful international environment was therefore necessary so that resources needed to achieve a successful implementation of the Plan could be expended. This was clearly spelled out in Chou En - lai's address on the occasion of the PRC's Fifth

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[4] *Ibid.*, p. 159.

[5] Harold C. Hinton, *China's Turbulent Quest,* (Bloomington, Indiana University Press, 1972), p. 74.

Anniversary on 1 October 1954.[6] Moreover, Michael Yahuda attributed the new Chinese foreign policy approach to Chinese self - confidence which had begun to emerge in 1952 and 1953. Now, " externally China developed an independent and active role in world affairs while internally Mao Tse - tung fashioned a distinctively Chinese pattern of socialist development which began to diverge sharply from the Soviet model ".[7]

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[6] See the Supplement of *People's China*, No. 20 (1954).
[7] Yahuda, *China's Role in World Affairs*, p. 64.

III

THE BANDUNG CONFERENCE AND OTHER INTERNATIONAL POLITICAL DEVELOPMENTS

In the second half of 1954, increasingly in 1955, and until late in 1956, international tensions seemed to be slackening. The 1954 Geneva Conference had reflected the urge on both sides of the Cold War for some degree of detente. In this world of reduced tension and greater flexibility, the " non - aligned " seemed likely to play a greater role in providing alternatives to the two blocs. The Bandung Conference asserted that the search for peaceful co - existence led along more promising paths than the effort to establish positions of strength.[8] The Final Communique of the Conference declared:

> *The Asian - African Conference gave anxious thought to the question of world peace and cooperation. ..... Freedom and peace are interdependent. The right of self - determination must be enjoyed by all peoples. ..... Indeed, all nations, should have the right freely to choose their own political and economic systems and their own way of life in conformity with the purposes and principles of the Charter of the United Nations.*
>
> *Free from mistrust and fear, and with confidence and goodwill towards each other, nations should practice tolerance and live together in peace with one another as good neighbours. ..... The Asian - African Conference declared that friendly cooperation would effectively contribute to the maintenance and promotion of international peace and security, while cooperation in the economic, social and cultural fields would help bring about the common prosperity and well - being of all.*[9]

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[8] Evelyn Colbert, *Southeast Asia in International Politics 1941 - 1956,* (Ithaca, Cornell University Press, 1977), p. 311.

[9] *Thai Ministry of Foreign Affairs, Library and Archives Division* (henceforth cited as *TMFA, L&A*), File (Miscellaneous) Pol. 3/2497 - 98/4 The Final Communique of the Asian - African Conference (Paragraph F).

The Asian - African Conference held in Bandung, Indonesia, on 18 - 24 April 1955 presented a rare occasion for diplomatic contact between the PRC and Thailand. The Indonesian government first approached the Thai government in August 1954 to send a delegation to a conference among Asian and African countries.[10] Although Prime Minister Pibul Songgram had decided in September not to participate in the proposed conference,[11] no official response was given to the Indonesian government. However, the Indonesian Minister in Bangkok was twice informed unofficially of the Thai government's decision when he called on the Director - General of the Department of Asian and African Affairs on 9 October and the Acting Foreign Minister on 7 December.[12] So when the Indonesian Foreign Minister met the Thai Minister to Jakarta on 27 December, he expressed the Indonesian government's hope that the Thai government would still be able to participate in the Conference.[13]

At the Bogor Conference, 28 - 29 December 1954, the Prime Ministers of Burma, Ceylon, India, Indonesia, and Pakistan agreed to hold an Asian - African Conference under their joint sponsorship in April 1955, the purposes of which were to promote goodwill and cooperation among the nations of Asia and Africa; to consider economic, social, and cultural problems and relations of the countries represented; to consider problems of special interest to Asian and African peoples such as racialism and colonialism; and to view the position of Asia and Africa and their peoples in the world of today and the contribution they could make to the promotion of world peace and cooperation.[14] Apart from the five host nations, twenty - five countries were invited. Because of the differing political persuasions of the countries invited, ranging from Communist states like the PRC and North Vietnam to " neutralist " states like India, Indonesia and Burma to states more or less friendly towards the West such

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[10] *TMFA, L&A* File (Miscellaneous) Pol. 3/2497 - 98/1 Memorandum of Conversation between Director - General, Asia & Africa Department (Luang Dhitkar Bhakdi) and the Indonesian Minister to Thailand, 9 August 1954.

[11] *TMFA, L&A* File (Miscellaneous) Pol. 3/2497 - 98/1 Cabinet Secretary (Pun Chatikawanit) to Minister of Foreign Affairs (Prince Wan Waithayakon) No. 2585/2497, 15 September 1954.

[12] *TMFA, L&A* File (Miscellaneous) Pol. 3/2497 - 98/1 Memorandum of Conversation between Acting Foreign Minister (Warakan Bancha) and the Indonesian Minister to Thailand, 7 December 1954; and Memorandum on the Invitation to the Asian - African Conference prepared by the Department of Asian and African Affairs, 29 December 1954.

[13] *TMFA, L&A* File (Miscellaneous) Pol.3/2497 - 98/1 Thai Minister to Indonesia (Ratanadib) to Ministry of Foreign Affairs (M.F.A.) No. 59/2497, 27 December 1954.

[14] *TMFA, L&A* File (Miscellaneous) Pol.3/2497 - 98/2 Joint Communique of the Bogor Conference (December 29, 1954): Statements by Prime Ministers of Burma, Ceylon, India, Indonesia and Pakistan.

as Liberia, Ethiopia, Lebanon to allies of the Western powers like Turkey in NATO, and Pakistan, Thailand and the Philippines in SEATO, the conference sponsors pointed out that " acceptance of the invitation by any one country would in no way involve or even imply any change in its view of the status of any other country ".[15] On their way home, Nehru, U Nu, and Mohammed Ali of Pakistan, stopped over in Bangkok and they all tried to persuade the Thai government to send a delegation to the Conference.[16]

The Thai government therefore reconsidered its position and began to consult its major allies. US Ambassador Peurifoy told Prince Wan on 27 January that the US government considered it important for Thailand to participate in the Asian - African Conference so that it could add another voice to " the voice of the Free World " which would be represented at the Conference by Pakistan, which was one of the sponsors, Turkey and Japan.[17] Secretary of State Dulles also told the British Ambassador in Washington on 28 January that " we should endeavour to get our friends to send strong delegations " [18] The Thai government therefore decided at the beginning of February to send a delegation, headed by Prince Wan, the Foreign Minister, to the Bandung Conference.[19] This matter was also discussed at the SEATO Council meeting in Bangkok at the end of February. The Council noted that the three Asian members; Pakistan, the Philippines, and Thailand, would be attending the Conference.[20]

At the Conference, Prince Wan defended Thailand's membership of SEATO and called upon the Communist nations to live up to both the spirit and the letter of the so - called " peaceful coexistence ". He asked for clarification of this concept, particularly in the light of the PRC's support of a group of " Thai - speaking Chinese and persons of Thai race in Yunnan " for

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15 *Ibid.*

See also *TMFA, L&A* File 3.2.2/1 Letter of Invitation (No. 28/VIII) from the Prime Minister of Indonesia, 15 January 1955.

16 *British Public Record Office* (henceforth cited as *BPRO*), FO371/116976 D2231/50 British Charge d'Affaires (Whitteridge) to Tahourdin, 8 January 1955.

17 *TMFA, L&A* File (Miscellaneous) Pol.3/2497 - 98/1 Memorandum of Conversation between Prince Wan and US Ambassador (Peurifoy), 29 January 1955.

18 *BPRO* FO371/116976 D2231/79 Makins to Foreign Office (F.O.) No. 275, 29 January 1955.

19 *TMFA, L&A* File (Miscellaneous) Pol.3/2497 - 98/2 Pun Chatikawanit to Wan Waithayakon No. 479/2498, 3 February 1955.

20 *TMFA, L&A* File 3.3.1/2 SEATO Documents (MP (C) (55) D - 6/Final Text): Resolution adopted by the Meeting at Bangkok regarding the Conference to be held at Bandung.

the purpose of subversion in Thailand. He also demanded to know for certain the Chinese attitude in regard to the Chinese community in Thailand and the problem of dual nationality.

> *The principles themselves can be understood except as regards the last principle of peaceful coexistence. What exactly does this mean? Does it mean " live and also let live ", which is the right principle? Does it imply the practice of tolerance as is explicitly stated in the Charter of the United Nations?*
>
> *These doubts in my mind must first be cleared up, for it is a fact, of which in all responsibility I have to take account, that Pridi Banomyong (**sic.**), a Thai politician, is being openly allowed or even supported to organise the training of Thai - speaking Chinese and persons of Thai race in Yunnan for the purpose of infiltration into Thailand and subversion in Thailand. I have also to know for certain the attitude adopted by the People's Republic of China in regard to the so - called persons of dual nationality in Thailand or, in other words, to the Chinese community of 3,000,000 in Thailand out of a population of 18,000,000. In view of this situation as well as of the invasion of Laos by Vietminh forces in 1953 and also in 1954, Thailand has had clearly to face a threat of infiltration and subversion, if not of aggression itself.*
>
> *Truly in self - defense, therefore, and not for any aggressive or even provocative purpose whatsoever, Thailand has had to join with seven other powers in concluding a collective defense treaty under Article 51 of the Charter of the United Nations, known as the Manila Pact.*[21]

In his reply, Chou En - lai met each specific charge with a specific answer or proposal. He stated that the Chinese government was ready to solve the problem of dual nationality of overseas Chinese with the governments of all countries concerned. He also stated that the Tai Autonomous People's Government in Yunnan[22] had no significance outside China.

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[21] *TMFA, L&A* File 3.2.1/2 Collection of Opening Addresses - Asian - African Conference: Address by Prince Wan Waithayakon, Representative of Thailand.

[22] On 31 January 1953 the PRC announced the establishment of the Tai Nationality Autonomous Area (Hsi - shuang pan - na tai - tsu tzu - chih - ch'u) for the Tai - speaking people in the southernmost part of Yunnan. This area, known in Thailand as Sibsongpanna, was formerly a semi - independent state whose people were referred to as Tai Lu. The area in question, lying between 21 - 23 degrees North and 99 - 102 degrees East, is only about 150 kilometres from Thailand northern border. It consisted of parts of Cheli, Fuhai, Nanch'iao, Chenyueh, Szumao, Ningchiang and Liushun hsien (county), totalling some 25,000 sq. kilometres, with a population of about 200,000, 52% of whom were Tais, 18% Ainis and the rest being made up of Chinese, P'umans, Yulos, Lohos, etc. - 47 nationalities in all.

See *BBC/Summary of World Broadcast,* Part V, No. 223, 10 February 1953, " Tai Autonomous Region in Yunnan "; *BPRO* FO371/105341 FC1823/6 Lamb to F.O. No.207, 23 May 1953; and George Moseley, *Policy Toward Ethnic Minorities on the Southern Frontier of the People's Republic of China,* D.Phil. thesis, (University of Oxford, 1970).

Thirdly, I would like to talk about the question of the so - called subversive activities. ..... We are glad against outside interference; how could we want to interfere in the internal affairs of others? Some people say: There are more than ten million overseas Chinese whose dual nationality might be taken advantage of to carry out subversion. But the problem of dual nationality is something left behind by old China. ..... The people's government of New China, however, is ready to solve the problem of dual nationality of overseas Chinese with the Governments of the countries concerned. Some other people say that the autonomous region of Thai people in China is a threat to others. There are in China more than forty million national minorities of scores of nationalities. The Thai people and the Chuang people, who are of the same stock as the Thai people, number almost ten million. Since they do exist, we must grant them the right of autonomy. ..... Every national minority in China has its autonomous region. The national minorities in China exercise their right of autonomy within China, how could that be said as being a threat to our neighbours?[23]

Prince Wan also met Chou En - lai on 23 April at a luncheon hosted by the Indonesian Prime Minister Ali Sastroamidjojo, at which the Burmese, Ceylonese, and Pakistani Prime Ministers, and the Philippine Foreign Minister, were present. During the meeting, the Chinese Premier categorically stated that former Prime Minister Pridi was in Peking and not in Yunnan and that the Chinese granted Pridi a political refugee status only on humanitarian grounds. Chou said that Pridi would not be allowed to broadcast again because he felt that " one person should not be allowed to obstruct any chance of an improvement in relations between the two countries ".[24] Chou again assured Prince Wan that the Tai Autonomous Area was not being built up as a centre of subversion and infiltration of Thailand. He then invited Prince Wan to visit the area in order to satisfy himself about the situation there. On the question of overseas Chinese in Thailand, Chou offered Prince Wan an agreement similar to that concluded with Indonesia under which persons of the Chinese race who had dual nationality would be permitted to abandon it by making a free choice between the two countries. Prince Wan replied that he would have to wait and study carefully the text of the Sino - Indonesian agreement

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[23] *TMFA, L&A* File 3.2.1/2 Collection of Opening Addresses - Asian - African Conference: Supplementary Address by Chou En - lai, Representative of the People's Republic of China.

[24] The " broadcast " refers to Pridi's article " The Geneva Conference and the Future of Thailand ", Published in the *Jen Min Jih Pao* (People's Daily) on 29 July 1954 and broadcast on Radio Peking on 30 July, which attacked the efforts of the US and Thai governments to set up a military alliance and called upon the Thai people to " wage a struggle against the American imperialists and their puppets in the Thai Government ".

and declined Chou's invitation to visit China.[25]

There can be no question that China came to the Conference prepared to be extraordinarily reasonable and conciliatory. Chou En - lai stated in his speech that the Chinese delegation came to the Conference " to seek unity and not to quarrel " and " to seek common ground, not to create divergence ".[26] Carlos P. Romulo, the Philippine Foreign Minister, observed:

> *At Bandung, Premier Chou En - Lai comported himself as one who had taken a leaf from Dale Carnegie's tome on* ***How to Win Friends and Influence People.*** *At Geneva, where he was dealing with Westerners, he chose to be seen as arrogant, stern, and aloof. At the Asian - African Conference, he was affable of manner, moderate of speech. The reason for the remarkable change in his deportment was not far to seek. He was dealing with fellow Asians and with Africans at Bandung, and he not only felt at home, but he wanted to appear humble and win his fellow Asians by his affability and congeniality. Moreover, the unshakable will to freedom and opposition to aggression manifested by the non - Communist delegations could not have left him unimpressed.*[27]

Despite a genuine and not entirely unfounded fear of China as a threat to national independence which existed among certain Asian countries, there is no reason to think this conciliation in any way superficial; it was in fact necessarily linked with China's search for common ground upon which to build Asian solidarity and " zones of peace ", in accordance with the Five Principles.[28] Prince Wan was reported to have said on his return that he had been pleasantly surprised by Chou En - lai's " conciliatory attitude ".[29] In fact, in the week that followed the Conference the Thai press began to speculate on the Foreign Minister's response to the invitation to visit China and on the possibility of imminent change in Thailand's international position and its policy towards the PRC. Pibul, who was in the United States at the start of his world tour, instructed Prince Wan from Los Angeles at the beginning of May

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[25] *TMFA, L&A* File (Miscellaneous) Pol.3/2497 - 98/6 Memorandum of Conversation between Wan Waithayakon and the Chinese Charge d'Affaires (Patrick Pichi Sun), 1 May 1955.

[26] *TMFA, L&A* File 3.2.1/2 Collection of Opening Addresses - Asian - African Conference: Supplementary Address by Chou En - lai, Representative of the People's Republic of China.

[27] Carlos P. Romulo, *The Meaning of Bandung,* (Chapel Hill, The University of North Carolina Press, 1956), p. 11.

[28] David A. Wilson, " China, Thailand and the Spirit of Bandung (Part II) ", *China Quarterly,* No. 31, July - September 1967, p. 96.

[29] *The New York Times,* 15 May 1955.

to decline the invitation.[30] Prince Wan had to deny publicly that the government had any intention of recognizing the PRC. He told both the American and the Nationalist Chinese Charges d'Affaires that Chou En - lai never raised " at any time, in any form " the question of recognition.[31]

The spring of 1955, however, saw Thailand caught in the beginning of the general thaw in East - West relations, yet still uncertain as to the PRC's future course of action towards those countries which refused to join the neutral bloc. The Chinese attempts to create an atmosphere in which a US - centred defence alliance would no longer be necessary, and in which the Asian nations could be moved towards a policy of neutralization, seemed well on its way to reality. The Bandung Conference seemed to have the effect of making the danger of Communist Chinese power seem less imminent. Thailand's dilemma was that its SEATO policy was based to a large extent on an anti - Chinese attitude, and a commitment to the American position, as pointed out by George Modelski:

> *The key issue in SEATO consultation has been and will remain the policy towards Communist China and towards the Communist system as a whole - if so sweeping a conception is possible. Thailand has, on the whole, been committed to a firmly anti - Chinese policy. ..... But the viability of Thailand's stand depends vitally on the United States position. If that position were suddenly reversed and accommodation reached with China, Thailand would be left out on a limb.*[32]

By the summer of 1955 the Thai government began to fear that it might indeed be left out on a limb because not only had the PRC scored a significant diplomatic triumph at Bandung by appearing to have only peaceful intentions towards its Asian neighbours, but the United States had also begun in August 1955 informal discussions with representatives of the PRC at ambassadorial level on matters such as their disputes in Asia and the release of American prisoners. The talks which took place in Geneva were believed to portend a rapprochement between the PRC and the United States. Thailand also followed with considerable interest the international developments associated with the summit of the American, British, French, and Soviet heads of govern-

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[30] *USNA, DS* 692.93/5 - 255 State Department (S.D.) to US Embassy, Bangkok No. 3161, 2 May 1955.

[31] *TMFA, L&A* File (Miscellaneous) Pol.3/2497 - 98/6 Memorandum of Conversation between Wan Waithayakon and Patrick Pichi Sun, 1 May 1955; and *USNA, DS* 692.93/4 - 455 Anschuetz to S.D. No. 2742, 4 May 1955.

[32] George Modelski (ed.), *SEATO: Six Studies,* (Melbourne, F.W. Cheshire, 1962), p. 110.

ment held in Geneva in June. The summit was followed by conciliatory gestures from the Soviet Union such as the Austrian State Treaty and the evacuation of the Porkkala naval base in Finland. Thailand did not want to find itself alone or almost alone in Southeast Asia if the " summit " atmosphere proved permanent.[33] The American Charge d'Affaires reported to the State Department that because the Thai government interpreted the Geneva negotiations as evidence of US willingness to seek some sort of accommodation with the Communist bloc, it feared that the maintenance of its uncompromising position *vis-a-vis* the PRC would leave it isolated.[34] Many educated Thai people began to view the Thai government's firm anti - Communist and anti - Chinese stand as becoming irrelevant and not viable in the context of changing world politics. Their views were later aired and discussed publicly due to the emergence of a new political situation in Thailand.

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[33] Russell H. Fifield, *The Diplomacy of Southeast Asia, 1945 - 1958,* (New York, Harper & Brothers, 1958), p. 272.

[34] *USNA, DS* 692.93/11 - 2555 Anschuetz to S.D. No. 1473, 25 November 1955.

IV

DOMESTIC POLITICAL LIBERALIZATION

In late June 1955 Prime Minister Pibul Songgram returned from a world tour, a major part of which was spent in the United States. He appeared so full of enthusiasms for democracy and freedom which he saw in the West that he decided to launch a programme of domestic political liberalization. On his return Pibul declared that he would himself stand for election. Political parties, which had been outlawed for some years, were legalized in September 1955. Press censorship was lifted and in order to encourage the press, Pibul set up a weekly cabinet press conference at which government officials were required to be present to answer questions. Public political discussion was also encouraged by the introduction of " Hyde Park " -style soapbox public meetings on the Pramane Grounds in the centre of Bangkok. A general election was scheduled for February 1957.

The launch of the liberalization programme was so startling that many people were highly sceptical of the sincerity of Pibul's intention at the time and the debate among Thai and Western scholars on the motives behind his programme of domestic political liberalization of 1955 - 57 continues to this day. History will probably need more time before it can pass any definitive judgement on this paradoxical man. Up till now, many have sought to explain Pibul's actions in terms of power politics. They, presumably, found it difficult to believe that an experienced politician like Pibul could have been drastically influenced and changed by what he had seen and heard during one trip abroad. Thak Chaloemtiarana believed it to be just a " blatant effort to keep himself in power ", for he argued that Pibul's actions after 1955 indicated that he was aware that his authoritarian regime was slowly working in the favour of Police General Phao Sriyanond and General Sarit Thanarat, and

thus he began to look for new ways to " bolster his own position ". Democracy and representative government were seen as the solution to maintaining the political stability of his regime while strengthening his own position *vis-a-vis* Phao and Sarit.[35] David Wyatt was of the same view for he argued that Pibul wanted to gain popular support to counter Sarit's control of the army and Phao's of the police.[36] Frank C. Darling stated :

> *A more important purpose behind Phibun's reforms was his intense desire to strengthen his own position within the triumvirate regime. ... He undoubtedly felt that the best way to maintain a balance of power between Phao and Sarit and extend his personal influence was to obtain a wider base of popular support.* [37]

Pierre Fistie explained the liberalization period largely as an attempt by Pibul to strengthen his pro - American policy by presenting a bogus impression of a democratizing Thailand.[38]

The US Embassy, at that time, certainly saw the liberalization programme as part of Pibul's moves to accomplish his principal objective of " checking the efforts of General Phao Sriyanond to increase his political, economic and military power and then to reduce Phao's strength in order to redress the balance of political forces within the ruling faction ".[39] In fact, Darling claimed that the invitation for Pibul to visit the United States was initiated by the Americans - particularly Ambassador Peurifoy who opposed the growing influence of Phao - to enhance Pibul's international stature, and was prompted by their desire to maintain his leading role within the so - called triumvirate regime.[40] Although Thak questioned Darling's view on the question of American influence, he nevertheless concurred with this particular argument, for he thought that Pibul had taken his cue from the invitation to compensate for his domestic weakness within the triumvirate.[41] Gordon Whitteridge, the

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[35] Thak Chaloemtiarana, *Thailand: The Politics of Despotic Paternalism,* (Bangkok, Social Science Association of Thailand Press, 1979), pp. 102 - 103.

[36] David K. Wyatt, *Thailand: A Short History,* (New Haven, Conn., Yale University Press, 1984), p. 273.

[37] Frank C. Darling, *Thailand and the United States,* (Washington D.C., Public Affairs Press, 1965), p. 145.

[38] Pierre Fistie, *L'Evolution de la Thailande Contemporaine,* (Librairie Armand Colin, Paris, 1967), pp. 230 - 239.

[39] *USNA, DS* 792.00/8 - 2455 Magill to S.D. No. 103, 24 August 1955.

[40] Darling, *Thailand and the United States,* p. 138.

[41] Thak, *Thailand,* p. 139.

British Charge d'Affaires, while noting that the liberalization measures were introduced to check Phao's ambitions, thought it probable that Pibul had been shaken to discover in the United States the " notoriety " Thailand had acquired for corruption in high places, which added pressure on Thai leaders to improve their records.[42]

Kamol Somvichian, on the other hand, did not question the sincerity of Pibul's intentions:

> *Since his return from Britain and the United States, Phibun appeared genuinely impressed by the virtues of a practical democracy. Judging from his past records, Phibun was a nationalist and an outstanding modernizer. In spite of his occasional unsophisticated methods,* **Phibun's sincerity was hardly questionable.** *A patriot, he wanted his country to enter into the same rank as other progressive nations.* **(emphasis added)**[43]

Nigel Brailey also holds a rather charitable view of Pibul as he argued:

> *There are very idealistic and very Thai explanations (for the liberalization programme). In 1955, Phibun was in his fifty - eighth year, and having dominated the Thai scene so long, could not expect to continue much longer, even leaving aside the ambitions of his two militarist lieutenants, Phao and Sarit. What better than to cap twenty - five years in Thai politics with an electoral victory achieved in fairly free conditions to renew the populist beliefs of his youth? 1957 would also be his own sixtieth year, and the 2500th anniversary of the birth of the Gautama Buddha, thus the half - way stage to the coming of the Mettaya Buddha's Golden Age which had held so much meaning even for the radicalized Dr. Pridi.*[44]

It is possible, as Brailey further argued, that suspicions and doubts about Pibul's motives were mostly aroused by the circumstances and timing of Pibul's programme and also by Pibul's apparent reliance on Phao during the liberalization process.[45] Nevertheless, it must be noted that Pibul, even if he had given some thought to these romantic notions, being an experienced and realistic politician, would be more concerned with the political reality of the time.

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[42] *BPRO* FO371/123643 DS1015/3 Whitteridge to Selwyn Lloyd No. 116, 31 December 1955.

[43] Kamol Somvichian, *The Thai Military in Politics: An Analytical Study*, Ph.D. thesis, (University of London, 1969), p. 199.

[44] Nigel J. Brailey, *Thailand and the Fall of Singapore: A Frustrated Asian Revolution*, (Boulder, Colo., Westview Press, 1986), p. 190.

[45] *Ibid.*, pp. 190 - 191.

The people who subscribe to the power politics theory no doubt derived their conclusion from what they believed to be the contemporary nature of the Thai domestic political situation - the struggle for supreme power among the so - called ruling " triumvirate ". When Pibul returned to political leadership in 1948, he was no longer in command of the army, and more importantly, neither did he dominate the **Khana Ratthaprahan,** the Coup Group, which was led by Field Marshal Phin Choonhavan. The fact that Pibul was able to maintain his position as prime minister from 1948 to 1957 gives testimony to his ability to play one faction against another as well as his success in seeking support from outside the Coup Group itself. According to Thak, Thai politics from 1948 to 1957 can be said to have been marked by the attempts of the younger coup leaders to consolidate their political positions, Pibul's search for an alternative power base, and emerging signs of a struggle for political supremacy within the Coup Group.[46] The early 1950s saw the maturing of two personalities who had emerged from the 1947 Coup Group: Phao Sriyanond and Sarit Thanarat, and from 1952 the Thai government was increasingly dominated by these two generals with Pibul in a mediating role. In the relative calm of the domestic political scene following the coup in 1951, Phao and Sarit had the opportunity to build up their political prestige and power. While Phao controlled the police force and ran Pibul's post - 1951 political machinery, Sarit gathered supporters within the army. Pibul, realizing that he had no strong committed internal backing, turned to foreign policy in order to make himself unexpendable.[47] The " triumvirate " regime worked well as long as the three military leaders, in spite of personal rivalry, were united in their desire to maintain themselves in power and to suppress any opposition to their expanding authority. By 1955, however, both Phao and Sarit were becoming extremely powerful political figures because of the rapid expansion of American aid to the military and the police forces. Moreover, they had received much prestige from their missions to the United States during 1954 where they had obtained additional military and economic assistance.[48] Pibul might have felt that the best way to maintain a balance of power between Phao and Sarit and extend his personal influence was to obtain a wider base of popular support. As long as Pibul's position was

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[46] Thak, *Thailand,* p. 56.
[47] *Ibid.*, pp. 78 - 79.
[48] Darling, *Thailand and the United States,* p. 141.

secured, the " triumvirate " survived, but as Pibul weakened, opportunities for the other two men to act alone became increasingly possible. Thak concluded that the coup by Sarit in September 1957 was the logical outcome of this process.[49]

[49] Thak, *Thailand*, p. 107.

V

" LIMITED RAPPROCHEMENT " WITH THE PEOPLE'S REPUBLIC OF CHINA

One development resulting from the liberalization process was the apparent relaxation of Thailand's attitude towards Communist China. By 1955, signs of a somewhat more accommodating attitude had appeared, principally in the local press - both Thai and Chinese - and, to a more limited extent, among the Thai government leaders as well. Following the lifting of press censorship in September, some sectors of the press began to advocate greater contact with the PRC by pointing out advantages to be gained by trade with the PRC. They criticized US military and economic aid, and campaigned for a policy of neutrality for Thailand.

Among others, **Siam Nikorn** in its editorial on 30 December 1955 argued that increased military aid would mean increased expenditure for the Thai government, expenditure which had to be provided by cutting down on projects for " national rehabilitation ". In an article in the **Bangkok Tribune** on 8 January 1956, Plang Phloyphrom suggested that the Thai government follow Burma's neutralist policy. And to quote from the article " Thailand Must Sell to the World " in the **Bangkok Tribune** on 11 January 1956:

> *The Thai people are being overwhelmed by wonder, why their country which is enjoying complete independence, cannot possibly do what she likes in order to remove her people from the yoke of poverty, especially in the matter of earning more profit in trade and commerce to be carried on with countries which like to do some trade with her at the present moment.*[50]

The State Department was concerned that articles and editorials of this nature

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[50] *The Bangkok Tribune*, 11 January 1956.

appeared not only in the leftist press, but in newspapers known to be at least partially owned by prominent government leaders, although all of them denied having any control over these newspapers.[51]

This neutralistic, anti - American theme was to dominate the campaign in the run - up to the general election in February 1957. It is possible that certain aspects of the publicity given to " anti - Americanism " and " neutralism " was designed by Pibul to bring tactical pressure on the Americans for more aid.[52] There was also another cynical if intriguing theory, considered by both the British and the Americans, that the Thai government's moves towards " neutralist " position and " democratic practices " might be a desire to prove to the United States and the outside world that a greater degree of democracy in Thailand would prove dangerous due to the lack of political education of the Thai people and thereby diminish Western criticisms.[53] On the other hand, Nigel Brailey argued that the neutralistic, anti - American theme of the campaign deserved rather more respect than it commanded from foreign observers at the time because the Thai were earnestly debating whether to abandon their American alliance and instead join the non - aligned movement then so dominant in, and dominated by, Asia.[54]

Within this new political atmosphere, a shift took place in the Thai government's treatment of the Chinese community. Since the mass arrests of local Chinese and leftist elements in November 1952[55] the Thai government had been in favour of the pro - Nationalist (KMT) faction. Now, however, police actions and other government measures indicated that the pro - Nationalist

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[51] *USNA, DS* R & A Reports - Thailand: OIR Report No. 7374, 10 December 1956, " Current Political Situation in Thailand ", p. 2.

[52] *BPRO* FO371/123643 DS1015/7 British Ambassador (Berkeley Gage) to Tomlinson, 28 January 1956; and *USNA, DS* 792.5 - MSP/1 - 1156 Magill to S.D. No. 374, 11 January 1956.

[53] *BPRO* FO371/123643 DS1015/11 Gage to Allen, 24 February 1956; and *USNA, DS* R & A Reports - Thailand: OIR Report No. 7374, p. 3.

[54] Brailey, *Thailand and the Fall of Singapore*, pp. 195 - 196.

[55] On 10 November 1952, General Phao Sriyanond, the Director-General of the Police Department, ordered a series of mass raids and arrests which started a three - month roundup of leftists. The police claimed the existence of a Communist plot to overthrow the government, involving not only many political opponents of the government but also the PRC government and thousands of local Chinese. Between 10 November 1952 and 24 January 1953, when the last major raids occurred in Bangkok, numerous Chinese firms, Chinese associations, and schools were raided. The pro-Communist newspaper *Ch'uan Min Pao* was closed on 23 December and its evening sister paper, the *Nan Ch'en Pao*, was closed on 26 January. Chinese bookstores were searched and large quantity of books and other materials confiscated. In all, approximately 600 Chinese were questioned and/or arrested.

element had lost its official patronage. William Skinner noted that in late 1954 and early 1955 deportation orders were cancelled and many Chinese were released from confinement, and the police sponsored a plan to allow the operation of Chinese middle schools. Moreover, at a press conference on 15 July 1955, Pibul announced that his government planned to give to the Chinese rights as nearly equal to those of Thai nationals as possible and to reduce the alien registration fee.[56] The fee was indeed reduced from 400 to 200 baht in January 1956.[57] Furthermore, the pro - government **Bangkok Tribune** startled many people by identifying the Chinese in Thailand as " a minority which has made an exceptional contribution to the commercial progress of the nation ", and stating, " it is a compliment to our land that they choose to cast their lot and spend their talents here ".[58]

The most significant development in Sino - Thai relations during 1955 - 1957 concerned actual contacts, secret and public, with the People's Republic of China, with several groups of prominent Thai citizens visiting that country. The first, and therefore the most notable, group to openly visit the PRC was the 12-man delegation of MPs, journalists, and businessmen, led by Thep Chotinuchit, leader of the Sethakorn (Economist) Party, which went to the PRC as guests of the People's Institute of Foreign Affairs between 16 January and 21 February 1956. They were arrested on their return to Bangkok on charges of violating the 1952 Prevention of Communist Activities Act. Some were released immediately, but charges were brought against Thep, who was later released on bail to participate in the 1957 election campaign. His trial was postponed several times and was eventually dropped since he was re - elected to the Assembly.[59]

What is interesting is the fact that Thep's visit to the PRC followed almost immediately a secret mission which had been sent to Peking by Thai government leaders in December 1955. The British authorities in Hong Kong and the US Embassy in Bangkok reported that two National Assemblymen, Ambhorn Suvanabul and Sa-ing Marangkul, secretly went to mainland China

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[56] G. William Skinner, *Chinese Society in Thailand: An Analytical History,* (Ithaca, N.Y., Cornell University Press, 1957), pp. 377 - 378.

[57] *Royal Gazette,* Vol. 73, Part 5, Page 1, 12 January 1956. (B.E. 2499).

[58] Skinner, *Chinese Society in Thailand,* p. 379.

[59] *USNA, DS* R & A Reports - Thailand: OIR Report No. 7374, p. 2; see also OIR Report No. 7503, 13 May 1957, " Probable Developments in Thailand ".

in December 1955 and that they went with the knowledge and consent of Field Marshal Phin and General Phao. This conclusion was based on the fact that both Assemblymen were known to be proteges of Phao and that Luen Buasuwan, the Phin - Phao group's principal financial agent, told a US Embassy officer that he had financed this particular trip. The US Embassy report thus concluded that Luen's relationship with Phao and Phin was so close as to preclude the possibility that Luen would have undertaken such a major step without at least the tacit consent of Phao and/or Phin. Although the US Embassy believed that Pibul was aware of their " manoeuvres ", it did not know whether the Prime Minister refrained from calling a halt to these manoeuvres because he was powerless to do so, or because he had given them tacit approval.[60]

It now appears that Pibul had indeed given more than tacit approval. If the Phin - Phao group had Luen as its front man, Pibul had Sang Pathanothai. Sang, whose association with Pibul went back to pre-war time and who had been Pibul's cellmate for many months during the eventually aborted war crime trials, was regarded as a trusted confidant of Pibul's. In September 1955, Sang asked his old friend Aree Pirom, a Chinese Thai who used to work with Sang at the Public Relations Department, to undertake a secret mission to mainland China.[61] Sang told Aree that Luen had already attempted to contact the Chinese but they had refused to deal with Luen alone. Apparently, the Chinese wished to deal with a group that also had representatives of Pibul. Sang went on to say that Pibul's " inner circle " decided to send someone to contact the Chinese. They selected Aree for the purpose because he was well - known within the overseas Chinese community in Thailand. More importantly, many of his friends and associates, who had returned or had been deported to the PRC, had become senior officials in the PRC government.[62] After Aree had agreed to go, Sang introduced him to Karuna Kut-

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[60] *BPRO* FO371/123645 DS10310/3 Confidential Report: " Thai Nationals Visiting China ", 22 February 1956 and *USNA, DS* 792.00/5 - 2356 US Ambassador (Bishop) to S.D., 23 May 1956; also 792.00/4 - 1756 Magill to S.D. No. 562, 17 April 1956.

[61] The account of this secret mission is based on: Aree Pirom, *Buanglang kan sathapana samphanthaphap yukmai thai jin* (Background to the Establishment of Sino - Thai Relations in the Modern Period), (Bangkok, Mitnara Press, 1981); Wanwai Pathanothai, *Chou En - lai: phu pluk maitree thai jin* (Chou En - lai: Sponsor of Sino - Thai Friendship), (Bangkok, 1979); Sang Pathanothai, *Rampung tung phichai* (" In Memory of Brother Aree ") in the Cremation Booklet of Aree Pirom, (Bangkok, 1986); and *The Bangkok Post,* 3 August 1975, " Secret Mission to Peking: Theh Chongkhadikij in Conversation with Karuna Kutsalasai "

[62] Aree, *Buanglang,* p. 10.

salasai, a trusted friend of Sang, who would accompany him on the trip. They then had a meeting with Luen, who told them that he would get them passports and provide fund for the journey.[63]

At the beginning of December 1955, Aree, carrying a secret letter of introduction, travelled with Karuna to Hong Kong where they made the initial contact. They then went to Macau. Aree travelled ahead to Kwangchou (Canton) to try to make further contact with the Chinese authorities while Karuna had to wait in Macau. The breakthrough came when Aree, through a friend who had returned from Thailand several years previously, successfully contacted the Mayor of Swatow, also a returnee from Thailand. The Mayor, who happened to be attending a conference in Kwangchou, got in touch with the State Council's Office of Overseas Chinese Affairs in Peking. A few days later a senior official from the Office of Overseas Chinese Affairs came to see Aree in Kwangchou. The official was yet another returnee from Thailand. He had been active in the leftist circle in the Chinese community in Bangkok and was one of the founding editors of the **Ch'uan Min Pao** newspaper.[64] Karuna was then fetched from Macau and they were joined by Ambhorn and Sa-ing.[65] All four left Kwangchou for Peking on 7 December, travelling as guests of the People's Institute of Foreign Affairs.[66]

According to Aree, the first evening in Peking he was asked to attend a meeting with several Chinese leaders - P'eng Chen, the Mayor of Peking, among them - to explain the purpose of his mission. Aree said that they were sent to find out more about China and Chinese policy generally, and specifically to inform the Chinese authorities that Sang and Luen would be travelling with Pibul's party on his forthcoming trip to Burma. They were charged with contacting the Chinese Ambassador in Rangoon in order to discuss not only the problems affecting Sino - Thai relations, but also the principles on which future relations would be based.[67] The talks between Sang, Luen and Yao Chong - ming, the Chinese Ambassador to Burma, took place on 16 and 17

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63 *Ibid.*, pp. 12 - 13.

64 *Ibid.*, pp. 32 - 38.

65 Although both the American and the British authorities reported the movements of Ambhorn and Sa-ing, Aree and Karuna were not mentioned. This is perhaps because they were private citizens, unlike the former two who were MPs, and therefore not given any attention by the British authorities in Hong Kong.

66 See Karuna's account in *The Bangkok Post*, 3 August 1975.

67 Aree, *Buanglang*, pp. 54 - 59.

December 1955. They signed a joint statement, which for obvious reasons was not released, in which both parties agreed " to adopt, timely and gradually, suitable measures to increase mutual exchange and establish contacts in the spheres of trade and culture in order to normalize their relations in the long run ". They also agreed to maintain regular contacts " for the purpose of exchange of views and negotiation on problems between the two countries ".[68] Aree and the others in Peking were informed of the " successful " talks in Rangoon on 19 December. They were then invited to dinner with Chou En - lai and other Chinese leaders the following day. On 21 December, they were received by Mao Tse - tung in the afternoon and entertained at a private dinner with Chou En - lai in the evening.[69] The group left Peking on 23 December for Hong Kong, from where they split into two groups and made their separate ways back to Bangkok. According to Aree, he and Karuna travelled via Singapore and Rangoon, and arrived back in Bangkok on 27 December.[70] As for Sa-ing and Ambhorn, the British reported that they had arrived in Hong Kong on 1 December 1955, went to Macau, re-entered Hong Kong without a valid visa, and did not leave Hong Kong until 11 February 1956.[71] The US Embassy in Bangkok also reported that Ambhorn and Saing returned to Thailand on 11 February and that they were taken into custody by the police on 5 March, but were shortly released.[72]

By this time and with these new developments, it is likely that Pibul increasingly found himself in a very difficult position of trying to maintain his old public policy and privately pursuing a different course of action. He continued to praise the United States and SEATO, although less warmly than in the past. Now, not only did he find himself trapped by his own anti-Communist pro-Western policy and rhetoric, but he also was subject to strong American pressure to maintain the *status quo*. There were growing concerns in the United States government that the Thai government might change its basic foreign policy direction because domestic pressure for Thailand to adopt

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68 Wanwai, *Chou En - lai*, p. 14.
69 Aree, *Buanglang*, pp. 110, 117, and 129.
70 *Ibid.*, pp. 139 - 140.
71 *BPRO* FO371/123645 DS10310/3 " Thai Nationals Visiting China "
72 *USNA, DS* 792.00/5 - 2356 Bishop to S.D., 23 May 1956.

a more neutralist policy was growing.[73] While the US Embassy tried to reassure its government that there had yet been no fundamental change in Thai foreign policy, it was nevertheless irritated by the local press criticisms of the US aid programme.[74]

Pibul had to personally reassure Secretary of State Dulles in March 1956 that no change in Thai foreign policy was contemplated. But he also told Dulles that there was a great deal of pressure in Thailand to trade with the PRC.[75] Many people increasingly felt that the United States took Thailand for granted. As a leading rice exporter, Thailand greatly resented the US surplus disposal programme, which it considered simply a dumping of American surplus rice in its export markets. There was also the suspicion that the United States was forcing down the prices not only of Thai rice but also of tin and rubber.[76] Thus, many Thai and Chinese businessmen and the media began to maintain that access to Communist China's markets would be a remedy for Thailand's present or anticipated economic difficulties. The Americans thought these difficulties were exaggerated.[77]

Despite the pressure from the United States, Pibul announced on 21 June 1956 that the Thai government would lift its embargo on trade of non - strategic goods with the PRC. Pibul told the Americans that he had agreed to the relaxation of the embargo in response to pressure from local business interests, but the Americans complained that both he and Phao had done nothing to discourage these developments.[78] They suspected that Phin and Phao had been trying to negotiate, through Luen Buasuwan and by sending Ambhorn and Sa-ing to China, a " personally profitable " rice deal at premium prices with the Chinese.[79] In fact, according to Karuna, the secret mission

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[73] *USNA, DS* 792.00/8 - 156 State Department to US Embassy, Bangkok No. 345, 1 August 1956; 792.00/8 - 456 Bishop to S.D. No. 81, 4 August 1956; and 792.00/8 - 456 Memorandum from Young to Robertson, 20 August 1956.

[74] See *USNA, DA* 792.5 - MSP/1 - 1156 Magill to S.D. No. 374, 11 January 1956; 792.5 - MSP/1 - 2356 Memorandum from Foster to Young, 23 January 1956; 692.93/11 - 2555 Anschuetz to S.D. No. 1473, 25 November 1955; 692.93/12 - 155 Anschuetz to S.D. No. 1562, 1 December 1955; and 692.93/12 - 1555 Anschuetz to S.D. No. 1703, 15 December 1955.

[75] *USNA, DS* 792.00/3 - 1456 Memorandum of Conversation between Pibul, Prince Wan, Rak Panyarachun, Dulles, Robertson, and Bishop, 14 March 1956.

[76] Fifield, *The Diplomacy of Southeast Asia*, p. 273.

[77] *USNA, DS* 792.00/5 - 2356 Bishop to S.D., 23 May 1956.

[78] *USNA, DS* R & A Report - Thailand: OIR Report No. 7374, p. 3.

[79] *USNA, DS* 792.00/5 - 2356 Bishop to S.D., 23 May 1956.

were told to raise with the Chinese authorities some trade issues, particularly possible deals on rice and tobacco.[80] What is certain is that Sang asked Aree to undertake another secret trip to Peking that June to sell tobacco to the Chinese because " the government party needed money for the forthcoming elections ". Aree was accompanied by Uthai Tungkapalin, an expert from the Government Tobacco Monopoly, and Prasert Siripiphat, a representative of the Bangkok Bank, who was said to be a confidant of Phra Bariphan Yutthakit, the Minister of Finance. They were received by Liao Ch'eng - chi, Vice - Minister for Overseas Chinese Affairs, and had dinner with Chou En - lai. The Chinese Ministry of Foreign Trade agreed to buy tobacco worth 156 million baht from Thailand. Payment would be made through a branch of the Bangkok Bank in London.[81] In January 1957, just before the general election, another secret trade mission led by Phraya Mahaisawan, a former Minister of Commerce, went to Peking to persuade the Chinese Ministry of Foreign Trade to buy rice from Thailand. At first they could not agree on prices, but after an intervention from Chou En - lai, the Chinese agreed to a deal as a " gesture of friendship ", and in September 1957, just before Pibul's resignation as premier, yet another delegation - this time of two naval officers, Rear Admiral Luang Chiankolakan, Director of the Navy's Welfare Department, and Captain Sawaeng Bunyang - secretly visited the PRC. They were shown round a naval base in Shanghai, and invited to the National Day celebration in Peking on 1 October.[82]

Apart from these secret missions, there were many other groups which openly visited the PRC following the delegation led by Thep Chotinuchit in February 1956. In September 1956, four Thai monks, who were studying at Nalanda Pali Institute in India, travelled with other monks to Peking at the invitation of the Chinese Buddhist Association to attend the " Buddha Jayanti " celebrations.[83] In April 1957, a basketball team toured several Chinese cities. In May, a trade union delegation was invited to Peking on the occasion of the International Labour Day. A culture troupe gave 5 performances in Peking

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[80] See Karuna's account in *The Bangkok Post*, 3 August 1975.

[81] Aree, *Buanglang*, pp. 178 - 188.

[82] Wanwai, *Chou En - lai*, pp. 31 - 34.

[83] *TMFA, L & A* File 10.36.23/3 Thai Embassy, New Delhi to M.F.A. No. 58/2499, 10 September 1956; Thai Ambassador to Delhi (Bahiddha) to Wan Waithayakon No. 1610/2499, 15 September 1956; Thai Military Attache, Rangoon to Director, Army Intelligence Department No. 76/99, 20 October 1956; and Thai Embassy, Rangoon to M.F.A. No. 1297/2499, 29 October 1956.

before touring many other cities between May and July, and a group of Thai students went to Peking in September as guests of the Chinese Youth League before making a tour of Yunnan and the Tai Autonomous Area. On arrival back in Thailand, these groups were detained, interrogated by the police, and then released. The coup against Pibul, led by Sarit, on 16 September 1957 did not immediately stop more people travelling to China: a group of journalists in November 1957; three trade union leaders in May 1958; a delegation of five MPs and a group of writers in August; and another group of MPs in October.[84] It was Sarit's second coup on 20 October 1958 which finally put an end to these travels and any chance of a further improvement in Sino - Thai relations.

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[84] See Wanwai, *Chou En - lai*, pp. 34 - 89.

CONCLUSION

If there were signs that Pibul had had doubts for some time before his fall in September 1957 regarding the value of SEATO and the American alliance, they had not been expressed too clearly. Despite incipient moves in the direction of neutralism, the Thai government did not initiate any overt changes in its policy towards the United States. It continued to cooperate with the various US programmes being carried out in Thailand and to participate actively in SEATO affairs, such as the Operations " Firm Link ", " Albatross " and " Teamwork ".

It is now clear, however, that Pibul was engaged in a double policy of maintaining publicly the government's anti - Communist policy, while privately pursuing a better understanding with the PRC. The clandestine contact with the PRC was made through intermediaries, such as Sang, so that Pibul could deny his involvement. But since Sang was so close to Pibul, it is difficult to believe that it was initiated by Sang alone and carried out without Pibul's knowledge. Many of these contacts were also initiated by other leading members of the 1947 Coup Group, such as Phin and Phao. The Americans certainly knew about these secret contacts because the US Embassy in Bangkok reported in May 1957 that Thai leaders were making covert contacts with the PRC and carrying out trade deal feelers. It was also noted in the same report that:

> *Unfortunately, the covert nature of the (Thai) Government's relation to these developments, adopted from fear of embarrassment vis - a - vis the United States, had caused mutual confidence between the Thai and U.S. Governments to suffer. Prime Minister Phibun personally has succeeded thus far in demonstrating an ostensible aloofness from and disapproval of accommodation tactics, but it is difficult to believe*

that he is not generally in accord with them and there is some good evidence indicating that he is.[85]

Although it is quite difficult to accurately evaluate Pibul's foreign policy aims in 1955 - 1957, we can see that they were strongly influenced by international political developments. As a small nation, Thailand's foreign policy has usually reflected to a substantial extent the changes in world politics and the trends in the international balance of power. Donald E. Nuechterlein, for example, argued that Pibul had decided to shift his position in order to give Thai foreign policy more flexibility, so that Thailand could adjust its policy to meet new situations in 1955 - 56. Hence, a double policy of maintaining an official policy towards the SEATO alliance partner, i.e. the United States, while quietly seeking alternative arrangements with the opposing camp, in this case Communist China, was pursued.[86] Evelyn Colbert listed internal political conflict, disappointment at the limited SEATO commitment, restiveness over the growing size and influence of the American presence, and fear that Thailand had gone too far in tying itself to the United States, especially since it appeared to the Thai that the United States might soon achieve a rapprochement with Peking, as the important factors accounting for the shift in Thailand's foreign policy.[87]

What about the influence of the " Spirit of Bandung "? This author is inclined to agree with Colbert that while the Bandung Conference seemed to have had the most marked repercussions in Thailand, the effects were temporary and only on the fringes of foreign policy.[88] The one tangible effect seems to be that the reasonable and conciliatory tone adopted by Peking helped alleviate Thailand's fear of the PRC.

This author is further inclined to agree with the assessment of several senior State Department's officials that the key to understand the shift in Thailand's foreign policy during this period was the growing doubt among Thai leaders of the firmness of US policy towards China. It is interesting to note that Walter Robertson, the Assistant Secretary of State for Far Eastern Affairs, did suggest to Dulles in July 1957 that the chances of " slowing Thailand's

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[85] *USNA, DS* 792.00/5 - 2957 Memorandum from Magill to Young, 29 May 1957.

[86] Donald E. Nuechterlein, *Thailand and the Struggle for Southeast Asia,* (Ithaca, N.Y., Cornell University Press, 1965), pp. 125 - 126.

[87] Colbert, *Southeast Asia in International Politics,* pp. 328 - 329.

[88] Ibid., pp. 328 - 329.

movement toward a more neutralist position " would be considerably improved if the Thai government could be convinced that the United States was making no change in its China policy, particularly on the issue of trade embargo and the ban on travel to the PRC.[89] In fact, Kenneth Young, Director of the Office of Southeast Asian Affairs, had earlier recommended to Robertson in June 1957 quite a drastic measure. He suggested that the Geneva talks which the Thai regarded as an indication of softening US policy towards the PRC be abandoned, in order to " reassure the Thai and other nations whose policy may depend to a considerable extent upon their estimate of the firmness of the US position *vis-a-vis* Communist China. " Robertson disapproved of this recommendation and noted that Dulles decided the talks should continue.[90] Max Bishop, the US Ambassador to Thailand, argued that the relaxation of East - West tensions led many people in the Thai government to conclude that the growing prestige of Communist China required some kind of adjustment by Thailand in order to avoid being left in a position of " splendid isolation ".[91]

Whatever the real reasons, from the Thai leaders' point of view, there were advantages from this type of diplomatic strategy. Although they knew that their best interests lay in a " pro - US " policy, they thought that they had nothing to lose by a slight shift towards neutrality, which they presumably viewed as a hedge against US withdrawal from the area. Moreover, by showing more independence, they hoped that Thailand's relations with Asian nations outside SEATO could be improved.

This author has argued that the shift in Thailand's foreign policy was caused mainly by international factors. This is because, due to the undemonstrative nature of Thai politics, the impact of domestic affairs on foreign policy is generally considered to have been an indirect one, while the impact of the external environment is much more significant. However, this is not to say that domestic politics had played no role. There is a case to be made for Brailey's argument which put this development in terms of domestic politics. He explained:

> *(By 1957) His ultimate concern had become simply victory in the February election, on which he had staked so much. After that, almost any adjustment in foreign*

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[89] *USNA, DS* 792.00/7 - 357 Memorandum from Robertson to Dulles, 3 July 1957.

[90] *USNA, DS* 792.00/6 - 657 Memorandum from Young to Robertson, 6 June 1957.

[91] *USNA, DS* 792.00/5 - 2356 Bishop to S.D., 23 May 1956; 792.00/9 - 357 Memorandum from Kocher to Robertson, 3 September 1957; and R & A Reports - Thailand: OIR Report No. 7503.

policy, if necessary, would have been possible. But in the run - up to the election, he was saddled with the pro - American policy of which, under different circumstances, he had been the chief architect. On the one hand, this policy still commanded the support of the main body of the Thai military for the sake of the American aid it brought with it, although the same aid was suspected of being under review by the United States itself. On the other, the policy ran quite counter to the mood of the resurrected Thai electorate, at least in Bangkok. A radical revision of the policy would most likely have prompted an immediate pre - emptive army coup against the government. It is these contrary pressures that must explain the government's inconsistencies.[92]

Whatever was the real impetus, domestic or external, for the shift in Thai foreign policy; whether this shift was more cosmetic than real; or whether it was merely temporary and could not prove permanent, Thai foreign policy undoubtedly went through a period of reassessment between 1955 - 57. With regards to Thailand's relations with the People's Republic of China, there was a clear sign that hostility and tension, which had existed between the two countries right up to the establishment of SEATO in 1954, became less intense. This process clearly showed that the common view that Thailand's hostility towards the PRC resulted from Thailand having joined a military alliance such as SEATO was rather simplistic, if not incorrect. In fact, Thailand's Western allies often expressed concern over what they saw as Thailand's move towards neutralism.

So what brought this " brief encounter " or Sino - Thai rapprochement, to an end? The direct answer to this question is the second coup by Sarit in October 1958 by which the Thai government swung to a strong domestic and foreign anti - Communist and anti - neutralist position. This development must have been puzzling to the Chinese. The situation which followed the first coup which toppled the Pibul government in September 1957 did not indicate this outcome. Sarit's newspapers had been vociferous supporters of the neutralist campaign and some of his prominent supporters had made neutralist statements during the parliamentary debates before the coup. Moreover, the foreign policy of the caretaker government of Pote Sarasin and of the government of General Thanom Kittikachorn, elected in December 1957, was virtually the same as that of Pibul. Domestic policy on political activities was also very much the same, allowing political parties full freedom, the same

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[92] Brailey, *Thailand and the Fall of Singapore*, p. 197.

lack of press restraint and continued public political discussion.[93] Furthermore, as noted above, people - to - people contact with the PRC continued.

However, political instibility continued following the September 1957 coup. This was the pretext for Marshal Sarit's second coup in October 1958. The 1952 Constitution was abrogated, the Assembly dissolved, political parties banned, trade unions forbidden, the press controlled, " leftists " arrested, and the country ruled by decree under martial law. In - dept study of Thai politics of this period is still needed. Several unanswered questions will therefore have to await future research.

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[93] Wilson, " China, Thailand and the Spirit of Bandung (Part II) ", p. 101.

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APPENDIX I

The Final Communique of the Asian - African Conference

The Asian - African Conference, convened by the Governments of Burma, Ceylon, India, Indonesia and Pakistan, met in Bandung from the 18th to 24th of April, 1955.

In addition to the sponsoring countries, the following twenty - four countries participated in the conference:

Afghanistan, Cambodia, the People's Republic of China, Egypt, Ethiopia, the Gold Coast, Iran, Iraq, Japan, Jordan, Laos, Lebanon, Liberia, Libya, Nepal, the Philippines, Saudi Arabia, the Sudan, Syria, Thailand, Turkey, the Democratic Republic of (North) Vietnam, the State of Vietnam and Yemen.

The Asian - African Conference considered the position of Asia and Africa and discussed ways and means by which their peoples could achieve the fullest economic, cultural and political cooperation.

A. Economic Cooperation

1. The Asian - African Conference recognized the urgency of promoting economic development in the Asian - African region. There was general desire for economic cooperation among the participating countries on the basis of mutual interest and respect for national sovereignty.

The proposals with regard to economic cooperation within the participating countries do not preclude either the desirability or the need for cooperation with countries outside the region, including the investment of foreign capital.

It was further recognized that assistance being received by certain participating countries from outside the region through international or under bilateral arrangements had made a valuable contribution to the implementation of their development programs.

2. The participating countries agreed to provide technical assistance to one another to the maximum extent practicable, in the form of:

Expert, trainees, pilot projects and equipment for demonstration purposes, exchange of know - how, and establishment of national and, where possible, regional training and research institutes for imparting technical knowledge and skills in cooperation with the existing international agencies.

3. The Asian - African Conference recommended:

The early establishment of a special United Nations fund for economic development;

The allocation by the International Bank for Reconstruction and Development of a greater part of its resources to Asian - African countries;

The early establishment of an international finance corporation, which should include in its activities the undertaking of equity investment; and

Encouragement of the promotion of joint ventures among Asian - African countries in so far as this will promote their common interest.

4. The Asian - African Conference recognized the vital need for stabilizing commodity trade in the region.

The principle of enlarging the scope of multilateral trade and payments was accepted. However, it was recognized that some countries would have to take recourse to bilateral trade arrangements in view of their prevailing economic conditions.

5. The Asian - African Conference recommended that collective action be taken by participating countries for stabilizing international prices of and demand for primary commodities through bilateral and multilateral arrangements, and that as far as practicable and desirable they should adopt a unified approach on the subject in the United Nations Permanent Advisory Commission on International Commodity Trade and other international forums.

6. The Asian - African Conference further recommended:

Asian - African countries should diversify their export trade by processing their raw materials whenever economically feasible before export; intra-regional trade fairs should be promoted and encouragement be given to the exchange of trade delegations and groups of businessmen; exchange of information and of samples should be encouraged with a view to promoting intra - regional trade; and normal facilities should be provided for the transit trade of landlocked countries.

7. The Asian - African Conference attached considerable importance to shipping and expressed concern that shipping lines reviewed from time to

time their freight rates, which are often to the detriment of participating countries. It recommended a study of this problem and collective action thereafter to induce the shipping lines to adopt a more reasonable attitude. It was further suggested that a study of railway freight of transit trade may be made.

8. The Asian - African Conference agreed that encouragement should be given to the establishment of national and regional banks and insurance companies.

9. The Asian - African Conference felt that exchange of information on matters relating to oil, such as remittance of profits and taxation, might eventually lead to the formulation of a common policy.

10. The Asian - African Conference emphasized the particular significance of the development of nuclear energy for peaceful purposes for Asian - African countries.

The Conference welcomed the initiative of the powers principally concerned in offering to make available information regarding the use of atomic energy for peaceful purposes; urged the speedy establishment of an international atomic energy agency which should provide for adequate representation of the Asian - African countries on the executive authority of the agency; and recommended that Asian and African governments take full advantage of the training and other facilities in the peaceful uses of atomic energy offered by the countries sponsoring such programs.

11. The Asian - African Conference agreed to the appointment of liaison officers in participating countries, to be nominated by their respective national governments, for the exchange of information and ideas on matters of mutual interest.

It recommended that fuller use should be made of the existing international organizations, and participating countries who were not members of such international organizations, but were eligible, should secure membership.

12. The Asian - African Conference recommended that there should be prior consultation of participating countries in international forums with a view, as far as possible, to furthering their mutual economic interest. It is, however, not intended to form a regional bloc.

B. Cultural Cooperation

1. The Asian - African Conference was convinced that among the most powerful means of promoting understanding among nations is the development of cultural cooperation. Asia and Africa have been the cradle of great

religions and civilizations, which have enriched other cultures and civilizations while themselves being enriched in the process.

Thus the cultures of Asia and Africa are based on spiritual and universal foundations. Unfortunately, cultural contacts among Asian and African countries were interrupted during the past centuries.

The peoples of Asia and Africa are now animated by a keen and sincere desire to renew their old cultural contacts and develop new ones in the context of the modern world. All participating governments at the Asian - African Conference reiterated their determination to work for closer cultural cooperation.

2. The Asian - African Conference took note of the fact that the existence of colonialism in many parts of Asia and Africa, in whatever form it may be, not only prevents cultural cooperation but also suppresses the national cultures of the peoples.

Some colonial powers have denied their dependent peoples basic rights in the sphere of education and culture, which hampers the development of their personality and also prevents cultural intercourse with other Asian and African peoples.

This is particularly true in the case of Tunisia, Algeria and Morocco, where the basic right of the people to study their own language and culture has been suppressed.

Similar discrimination has been practiced against Asian and colored peoples in some parts of the Continent of Africa.

The Conference felt that these policies amount to a denial of the fundamental rights of man, impede cultural advancement in this region and also hamper cultural cooperation on the wider international plane. The Conference condemned such a denial of fundamental rights in the sphere of education and culture in some parts of Asia and Africa by this and other forms of cultural suppression. In particular, the Conference condemned racialism as a means of cultural suppression.

3. It was not from any sense of exclusiveness or rivalry with other groups of nations and other civilizations and cultures that the Conference viewed the development of cultural cooperation among Asian and African countries.

True to the age - old tradition of tolerance and universality, the Conference believed that Asian and African cultural cooperation should be developed in the larger context of world cooperation. Side by side with the development of Asian - African cultural cooperation, the countries of Asia and Africa desire to develop cultural contacts with others. This would enrich their own culture

and would also help in the promotion of world peace and understanding.

4. There are many countries in Asia and Africa which have not yet been able to develop their educational, scientific and technical institutions. The Conference recommended that countries in Asia and Africa which are more fortunately placed in this respect should give facilities for the admission of students and trainees from such countries to their institutions. Such facilities should also be made available to the Asian and African people in Africa, to whom opportunities for acquiring higher education are at present denied.

5. The Asian - African Conference felt that the promotion of cultural cooperation among countries of Asia and Africa should be directed towards :

First, the acquisition of knowledge of each other's country; Second, mutual cultural exchange; and Third, exchange of information.

6. The Asian - African Conference was of the opinion that at this stage the best results in cultural cooperation would be achieved by pursuing bilateral arrangements to implement its recommendations and by each country taking action on its own wherever possible and feasible.

C. Human Rights and Self - Determination

1. The Asian - African Conference declared its full support of the fundamental principles of human rights as a common standard of achievement for all peoples and all nations. The Conference declared its full support of the principle of self - determination of peoples and nations as set forth in the Charter of the United Nations and took note of the United Nations resolutions on the right of peoples and nations to self - determination, which is a prerequisite of the full enjoyment of all fundamental human rights.

2. The Asian - African Conference deplored the policies and practices of racial segregation and discrimination which form the basis of government and human relations in large regions of Africa and in other parts of the world. Such conduct is not only a gross violation of human rights, but also a denial of the fundamental value of civilization and the dignity of man.

The Conference extended its warm sympathy and support for the courageous stand taken by the victims of racial discrimination and especially by the peoples of African and Indian and Pakistani origin in South Africa; applauded all those who sustained their cause; reaffirmed the determination of Asian - African peoples to eradicate every trace of racialism that might exist in their own countries; and pledged to use its full moral influence to guard against the danger of falling victims to the same evil in their struggle to eradicate it.

D. Problems of Dependent People

1. The Asian - African Conference discussed the problems of dependent peoples and colonialism and the evils arising from subjection of peoples to alien subjugation, domination and exploitation. The Conference agreed :

First, in declaring that colonialism in all its manifestations is an evil which should speedily be brought to an end;

Second, in affirming that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation;

Third, in declaring its support of the cause of freedom and independence for all such peoples; and

Fourth, in calling upon the powers concerned to grant freedom and independence to such peoples.

2. In view of the unsettled situation in North Africa and of the persisting denial to the peoples of North Africa of their right to self - determination, the Asian - African Conference declared its support of the rights of the people of Algeria, Morocco and Tunisia to self - determination and independence and urged the French Government to bring about a peaceful settlement of the issue without delay.

E. Other Problems

1. In view of the existing tension in the Middle East caused by the situation in Palestine and of the danger of that tension to world peace, the Asian - African Conference declared its support of the rights of the Arab people of Palestine, and called for the implementation of the United Nations resolutions on Palestine and of the peaceful settlement of the Palestine question.

2. The Asian - African Conference, in the context of its expressed attitude on the abolition of colonialism, supported the position of Indonesia in the case of West Irian, based on the relevant agreements between Indonesia and the Netherlands. The Asian - African Conference urged the Netherlands Government to reopen negotiations as soon as possible to implement their obligations under the above - mentioned agreements and expressed the earnest hope that the United Nations could assist the parties concerned in finding a peaceful solution to the dispute.

3. The Asian - African Conference supported the position of Yemen in the case of Aden and the southern parts of Yemen known as the protec-

torates, and urged the parties concerned to arrive at a peaceful settlement of the dispute.

F. Promotion of World Peace and Cooperation

1. The Asian - African Conference, taking note of the fact that several states have still not been admitted to the United Nations, considered that, for effective cooperation for world peace, membership in the United Nations should be universal, called on the Security Council to support the admission of all states which are qualified for membership in terms of the Charter.

In the opinion of the Asian - African Conference the following among the participating countries which were represented in it - Cambodia, Ceylon, Japan, Jordan, Laos, Libya, Nepal and a unified Vietnam - were so qualified.

The Conference considered that the representation of the countries of the Asian - African region on the Security Council in relation to the principle of equitable geographical distribution was inadequate. It expressed the view that, as regards the distribution of the non - permanent seats, the Asian - African countries which, under the arrangement arrived at in London in 1946, are precluded from being elected, should be enabled to serve on the Security Council so that they might make a more effective contribution to the maintenance of international peace and security.

2. The Asian - African Conference having considered the dangerous situation of international tension existing and the risks confronting the whole human race from the outbreak of global war in which the destructive power of all types of armaments, including nuclear and thermonuclear weapons, would be employed, invited the attention of all nations to the terrible consequences that would follow if such a war were to break out.

The Conference considered that disarmament and the prohibition of production, experimentation and use of nuclear and thermonuclear weapons of war are imperative to save mankind and civilization from the fear and prospect of wholesale destruction. It considered that the nations of Asia and Africa assembled here have a duty toward humanity and civilization to proclaim their support for the prohibition of these weapons and to appeal to nations principally concerned and to world opinion to bring about such disarmament and prohibition.

The Conference considered that effective international control should be established and maintained to implement such prohibition and that speedy and determined efforts should be made to this end. Pending the total prohibition of the manufacture of nuclear and thermonuclear weapons, this Conference

appealed to all powers concerned to reach agreements to suspend experiments with such weapons.

The Conference declared that universal disarmament is an absolute necessity for the preservation of peace and requested the United Nations to continue its efforts and appealed to all concerned speedily to bring about the regulation, limitation, control and reduction of all armed forces and armaments, including the prohibition of the production, experimentation, and use of all weapons of mass destruction, and to establish effective international control to this end.

3. The Asian - African Conference gave anxious thought to the question of world peace and cooperation. It viewed with deep concern the present state of international tension with its danger of an atomic world war.

The problem of peace is correlative with the problem of international security. In this connection all states should cooperate especially through the United Nations in bringing about the reduction of armaments and the elimination of nuclear weapons under effective international control. In this way international peace can be promoted and nuclear energy may be used exclusively for peaceful purposes. This would help answer the needs, particularly of Asia and Africa, for what they urgently require are social progress and better standards of life in larger freedom.

Freedom and peace are interdependent. The right of self - determination must be enjoyed by all peoples in freedom, and independence must be granted with the least possible delay to those who are still dependent peoples. Indeed all nations should have the right freely to choose their own political and economic systems and their own way of life in conformity with the purposes and principles of the Charter of the United Nations.

Free from distrust and fear and with confidence and goodwill toward each other, nations should practice tolerance and live together in peace with one another as good neighbors and develop friendly cooperation on the basis of the following principles :

1. Respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations.

2. Respect for the sovereignty and territorial integrity of all nations.

3. Recognition of the equality of all races and of the equality of all nations, large and small.

4. Abstention from intervention or interference in the internal affairs of another country.

5. Respect for the right of each nation to defend itself singly or collectively in conformity with the Charter of the United Nations.

6. a. Abstention from the use of arrangements of collective defense to serve the particular interests of any of the big powers. b. Abstention by any country from exerting pressures on other countries.

7. Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country.

8. Settlement of all international disputes by peaceful means such as negotiation, conciliation, arbitration, or judicial settlement, as well as other peaceful means of the parties' own choice in conformity with the Charter of the United Nations.

9. Promotion of mutual interest and cooperation.

10. Respect for justice and international obligations.

The Asian - African Conference declares its conviction that friendly cooperation in accordance with these principles would effectively contribute to the maintenance and promotion of international peace and security, while cooperation in the economic, social and cultural field would help bring about the common prosperity and well - being of all.

The Asian - African Conference recommended that the five sponsoring countries consider the convening of the next meeting of the Conference in consultation with the participating countries.

Bandung, 24 April, 1955.

APPENDIX II

Address
by
Prince Wan Waithayakon
Representative of Thailand

On behalf of the Delegation of Thailand, I gladly associate myself with the other delegations in paying a warm tribute to the generous hospitality and cordial welcome so kindly extended to us by the Government of Indonesia.

I want to pay a warm tribute, too, to you, Mr. President, for your high qualities of statesmanship which I have had occasion personally to appreciate, your wisdom, your composure, your goodwill and your gift of spreading goodwill around you.

I myself am a firm believer in goodwill as a factor in bringing about good understanding and friendly relations among nations; and so I am keenly appreciative of the happy thought which you, Mr. President, together with the other four sponsors, had in arranging for this historic conference of as many as 29 independent nations of Asia and Africa representing half the population of the world.

The first of the four purposes of the Conference is " to promote goodwill and cooperation among the nations of Asia and Africa, to explore and advance their mutual as well as common interests and to establish and further friendliness and neighbourly relations ".

My Government, fully conscious of the responsibilities of Thailand as an Asian nation, is in complete accord with this first purpose, and has readily accepted the invitation of the sponsors to attend the Conference. My Delegation has come with a genuine desire to get together with the representatives of other nations of Asia and Africa in order to become better acquainted with them, to exchange views with them freely and frankly on questions of common concern, and to help bring about the greatest possible measure of agreement in the interest of world peace and of the security, freedom and economic and social well - being of the peoples of Asia and Africa.

We have come here to contribute to the success of the Conference, and our contribution will constitute a modest voice of Asia which, together with other voices of Asia and Africa, will, we hope, blend into a harmony which will be conducive to fruitful results.

I have just mentioned the economic and social well - being of the peoples of Asia and Africa; and indeed the second purpose of the Conference is " to consider social, economic and cultural problems and relations of the countries represented ".

Cultural cooperation should certainly be promoted, not only because there have been age-long strong ties of traditional culture among Asian nations as among nations of South, Southeast and East Asia but there have also been close cultural ties with countries of Islam. It is sometimes forgotten that, out of a population of 18,000,000, Thailand has more than 3,000,000 Mohammedan nationals and that, under our Constitution, the King, though a Buddhist, is Upholder of Religion and, in fact, mosques as well as temples receive Royal support.

At this Conference of Asian and African delegates, I need not dwell on the fundamental importance of moral and spiritual values, for that is admittedly the common characteristic of our traditional culture. The sense of moral and spiritual values in life is ingrained into our nature: it is part of ourselves, it is our essential way of life. Even people of the West admit this, for do they not say Ex Oriente Lux, Ex Occidente Lex: Out of the East Light, Out of the West Law?

For two years I had been negotiating with Japan for the settlement of an outstanding wartime debt on a legal basis with, unfortunately, no result. But before I came here I went to Tokyo for a fortnight and made a moral appeal to the Japanese Government, who understood me very well and, as a result, we came to a settlement.

The sublime importance of Faith or the Spirit in the life of man should be cherished and upheld by Asia and Africa. Righteousness or the moral law shall prevail, because Buddhism, Islam and Christianity all teach the same lesson - the dignity and worth of man, faith in fundamental human rights, and respect for fundamental freedoms for all without distinction as to creed, colour or race. Racial discrimination is inadmissible and should be eradicated.

Besides the enjoyment of human rights and fundamental freedoms, man has material needs to satisfy. I could not understand why, during the French Revolution, the French people cried out for " Bread and the Constitu-

tion ", until my own people, a few years ago, cried out for Rice and the Constitution. Economic well - being is the most pressing need of Asia and Africa, and there is an imperative necessity to raise the standards of life of the Asian and African peoples, if only to protect them from the threat of hunger, starvation and famine.

Economic cooperation, therefore, is wholeheartedly to be welcomed at this Conference and closer economic ties among the nations of Asia and Africa should certainly be developed and, of course, developed on the basis of complete equality, freedom and mutual benefit, which is the right principle of economic cooperation for all the nations of the world. For it must not be forgotten that, in order to achieve economic prosperity, a nation or a group of nations cannot isolate itself from the rest of the world: interdependence is an acknowledged principle in economic relations and economic development.

Thus, while supporting the strengthening of economic cooperation among Asian and African nations, my Delegation considers that it is necessary and appropriate that there should, at the same time, continue to be economic co-operation with the rest of the world whether through an international organisation or individually with the nations concerned.

The reason is simple. In order to raise the living standards of the peoples of Asia and Africa, a short cut to some form of industrialisation is necessary and this can be done only with the cooperation and assistance of Europe and America where industrialisation has, in point of fact, been developed to an advanced stage, even to a stage at which the possibility of the use of nuclear energy for peace instead of for war purposes is within sight. Of course, such cooperation and assistance are subject to the principle of equality, freedom and mutual benefit.

I now come to the third purpose of the Conference, namely , to consider problems of special interest to Asian and African peoples, e.g. problems affecting national sovereignty and of racialism and colonialism.

I have already stated the position of my Delegation in regard to racial discrimination, to which we are resolutely opposed.

On the question of national sovereignty and of colonialism, the Thai Delegation upholds the principle of self - determination and of self - government and independence for all peoples of Asia and Africa. My Government gladly signed the Pacific Charter, which was due to the happy initiative of President Magsaysay of the Philippines and is calculated to assure to all peoples the progressive attainment of full freedom and independence as rapidly as possible.

My Government are happy that the States in Indochina have regained their independence and our best wishes go to Laos, Cambodia and the State of Vietnam. We are glad, too, that, with the approaching elections, Malaya is well on the way to self - government, which is to be welcomed as a prelude to independence.

Finally, I come to the fourth purpose of the Conference which is " to view the position of Asia and Africa and their peoples in the world of today and the contribution they can make to the promotion of world peace and cooperation ".

Thailand's love of peace and freedom is well known in the history of international relations and my country has always attached fundamental value to international cooperation. In order to get rid of extraterritoriality, Thailand had recourse to diplomatic negotiations for the revision of unequal treaties which took a great deal of time and patience but the successful adoption of that peaceful method of settling the problem has definitely strengthened Thailand's international position. Thailand, therefore, is strongly in favour of the pacific settlement of disputes and of all measures for the promotion of world peace and cooperation.

What then is the attitude of Thailand towards the five principles of respect for sovereignty and territorial integrity, non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence.

These principles, except perhaps that of peaceful coexistence, are not new in international law. I would myself prefer them to be formulated in greater detail. But the principles themselves can be understood except as regards the last principle of peaceful coexistence. What exactly does this mean? Does it mean " live and also let live ", which is the right principle? Does it imply the practice of tolerance as is explicitly stated in the Charter of the United Nations? For the Charter says: " to practice tolerance and live together in peace with one another as good neighbours ".

These doubts in my mind must first be cleared up, for it is a fact, of which in all responsibility I have to take account, that Pridi Banomyong, a Thai politician, is being openly allowed or even supported to organise the training of Thai - speaking Chinese and persons of Thai race in Yunnan for the purpose of infiltration into Thailand and subversion in Thailand. I have also to know for certain the attitude adopted by the People's Republic of China in regard to the so-called persons of dual nationality in Thailand or, in other

words, to the Chinese community of 3,000,000 in Thailand out of a population of 18,000,000. I might also mention the presence of 50,000 Vietnamese refugees in Northeast Thailand on the border of the Mekhong, the vast majority of whom choose to be repatriated to Vietminh territory.

In view of this situation as well as of the invasion of Laos by Vietminh forces in 1953 and also in 1954, Thailand has had clearly to face a threat of infiltration and subversion, if not of aggression itself.

Truly in self - defense, therefore, and not for any aggressive or even provocative purpose whatsoever, Thailand has had to join with seven other powers in concluding a collective defence treaty under Article 51 of the Charter of the United Nations, known as the Manila Pact.

The first Council meeting under that Pact has sent cordial greetings to this Conference, while expressing the hope that out of this Conference would come increased assurance that the free nations would remain free and that all peoples would come increasingly to enjoy, in peace, the blessings of liberty. The message also upholds the principle of self - determination of peoples and of self - government and independence for them. The Manila Pact powers entertain nothing but goodwill for this Conference.

My Asian and African friends and colleagues will, no doubt, ask me how I justify the attitude of my Government from the point of view of Righteousness or the Moral Law which, as I have stated above, I hold supreme. I can only recount to them the following conversation between the Army General Sinha and Buddha :

Sinha said: " I am a soldier, O Blessed One, and am appointed by the King to wage his wars. Does the Tathagat (Buddha) declare that it is wrong to go to war for the protection of our homes, our wives, our children, and our property? Does the Tathagat teach the doctrine of a complete self - surrender so that I should suffer the evil - doer to do what he pleases, and yield submissively to him who threatens to take by violence what is my own? Does the Tathagat maintain that all strife, including such warfare as is waged for a righteous cause, should be forbidden?

Buddha replied: " The Tathagat teaches that all warfare in which man tries to slay his brother is lamentable, but he does not teach that those who go to war in a righteous cause, after having exhausted all means to preserve the peace, are blame - worthy. He must be blamed who is the cause of war. The Tathagat teaches a complete surrender of self, but he does not teach a surrender to those powers that are evil, be they men, gods or the elements

APPENDIX III

Supplementary Address
by
Chou En - lai
Representative of the People's Republic of China

Mr. Chairman, fellow delegates :

My main speech has been memeographed and is being distributed to you. After listening to the speeches delivered by the heads of many delegations, I would like to make some supplementary remarks.

The Chinese Delegation has some here to seek unity and not to quarrel. We Communist do not hide the fact that we believe in communism and that we consider socialist system a good system. There is no need at this Conference to publicize one's ideology and the political system of one's country, although differences do exist among us.

The Chinese Delegation has come here to seek common ground, not to create divergence. Is there any basis for seeking common ground among us? Yes, there is. The overwhelming majority of the Asian and African countries and peoples have suffered and are still suffering from the calamities of colonialism. This is the acknowledged by all of us. If we seek common ground in doing away with the sufferings and calamities under colonialism, it will be very easy for us to have mutual understanding and respect, mutual sympathy and support, instead of mutual suspicion and fear, mutual exclusion and antagonism. That is why we agree to the four purposes of the Asian - African Conference declared by the Prime Ministers of the five countries at the Bogor Conference and do not make any other proposal.

As for the tension created solely by the United States in the area of Taiwan, we could have submitted for deliberation by the Conference an item such as the proposal made by the Soviet Union for seeking a settlement through an international conference. The will of the Chinese people to liberate their own territory Taiwan and the coastal islands is a just one. It is entirely a matter of our internal affairs and the exercise of our sovereignty. This just

demand of ours has won the support of many countries. Again, we could have submitted for deliberation by the Conference the question of recognizing and restoring the legitimate status of the People's Republic of China in the United Nations. The Bogor Conference held by the Prime Ministers of the five Colombo Powers last year supported the restoration of the legitimate status of the People's Republic of China in the United Nations. And so did other countries of Asia and Africa. Besides, we could have also made criticisms here as regards the unfair treatment of China by the United Nations. But we did not do all this, because otherwise our Conference would be dragged into disputes about all these problems without any solution.

In our Conference we should seek common ground among us, while keeping our differences. As to our common ground, the Conference should affirm all our common desires and demands. This is our main task here. As to our differences, none of us is asked to give up his own views, because difference in view-points is an objective reality. But we should not let our differences hinder us from achieving agreement as far as our main task is concerned. On the basis of our common points, we should try to understand and appreciate the different views that we hold.

Now first of all I would like to talk about the question of different ideologies and social systems. We have to admit that among our Asian and African countries, we do have different ideologies and different social systems. But this does not prevent us from seeking common ground and being united. Many independent countries have appeared since the Second World War. One group of them are countries led by the Communist Parties; another group of them are countries led by nationalists. There are not many countries in the first group. But what some people dislike is the fact that the 600 million Chinese people have chosen a political system which is socialist in nature and led by the Chinese Communist Party and that the Chinese people are no longer under the rule of the imperialists. The countries in the second group are greater in number, such as India, Burma, Indonesia and many other countries in Asia and Africa. Both of these groups of countries have become independent from the colonial rule and are still continuing their struggle for complete independence. Is there any reason why we cannot understand and respect each other and give support and sympathy to each other? There is every reason to make the five principles the basis for establishing friendly co-operation and good neighbourly relations among us. We Asian and African countries, China included, are all backward economically and culturally. Inas-

much as our Asian - African Conference does not exclude anybody, why couldn't we ourselves understand each other and enter into friendly cooperation?

Secondly, I would like to talk about the question as to whether there is freedom of religious belief. Freedom of religious belief is a principle recognized by all modern nations. We Communists are atheists, but we respect all those who have religious belief. We hope that those with religious belief will also respect those without. China is a country where there is freedom of religious belief. There are, in China, not only seven million Communists, but also tens of millions of Moslems and Buddhists and millions of Protestants and Catholics. Here in the Chinese Delegation, there is a pious Eamam of the Islamic faith. Such a situation is no obstacle to the internal unity of China. Why should it be impossible in the community of Asian and African countries to unite those with religious belief and those without? The days of instigating religious strife should have passed, because those who profit from instigating such strife are not those among us.

Thirdly, I would like to talk about the question of the so-called subversive activities. The struggle of the Chinese people against colonialism lasted for more than a hundred years. The national and democratic revolutionary struggles led by the Chinese Communist Party finally achieved success only after a strenuous and difficult course of thirty years. It is impossible to relate all the sufferings of the Chinese people under the rule of imperialism, feudalism and Chiang Kai - shek. At last, the Chinese people have chosen their state system and the present government. It is by the efforts of the Chinese people that the Chinese revolution had won its victory. It is certainly not imported from without. This point cannot be denied even by those who do not like the victory of the Chinese revolution. As a Chinese proverb says: " Do not do unto others what you yourself do not desire ". We are glad against outside interference; how could we want to interfere in the internal affairs of others? Some people say: There are more than ten million overseas Chinese whose dual nationality might be taken advantage of to carry out subversion. But the problem of dual nationality is something left behind by old China. Up to date, Chiang Kai - shek is still using some very few overseas Chinese to carry out subversive activities against the countries where they are residing. The people's government of new China, however, is ready to solve the problem of dual nationality of overseas Chinese with the Governments of the countries concerned. Some other people say that the autonomous region of Thai people in China is a threat to others. There are in China more than forty million

national minorities of scores of nationalities. The Thai people and the Chuang people, who are of the same stock as the Thai people, number almost ten million. Since they do exist, we must grant them the right of autonomy. Just as there is an autonomous state for Shan people in Burma, every national minority in China has its autonomous region. The national minorities in China exercise their right of autonomy within China, how could that be said as being a threat to our neighbours? On the basis of the strict adherence to the five principles, we are prepared now to establish normal relations with all the Asian and African countries, with all the countries in the world, and first of all, with our neighbouring countries. The problem at present is not that we are carrying out subversive activities against the governments of other countries, but that there are people who are establishing bases around China in order to carry out subversive activities against the Chinese Government. For instance, on the border between China and Burma, there are in fact remnant armed elements of the Chiang Kai - shek clique who are carrying out destructive activities against both China and Burma. Because of the friendly relations between China and Burma, and because we have always respected the sovereignty of Burma, we have confidence in the Government of Burma for the solution of this problem.

The Chinese people have chosen and support their own Government. There is freedom of religious belief in China. China has no intention whatsoever to subvert the governments of its neighbouring countries. On the contrary, it is China that is suffering from the subversive activities which are openly carried out without any disguise by the United States of America. Those who do not believe in this may come to China or send someone there to see for themselves. We take cognizance of the fact that there are doubts in the mind of those who do not yet know the truth. There is a saying in China: " Better seeing once than hearing a hundred times ". We welcome the delegates of all the participating countries in this Conference to visit China at any time they like. We have no bamboo curtain, but some people are spreading a smokescreen between us.

The 1,600 million people of Asia and Africa wish our Conference success. All the countries and peoples of the world who desire peace are looking forward to the contribution which the Conference will make towards the extension of the area of peace and the establishment of collective peace. Let us, the Asian and African countries, be united and do our utmost to make the Asian - African Conference a success.

INTERNATIONAL STUDIES CENTRE (ISC)
INSTITUTE OF FOREIGN AFFAIRS

Established in 1969, the Institute of Foreign Affairs is dedicated to providing in – service training mainly for Thailand's foreign service officers as well as other government officials in order that they may be able to carry out their duties with professional efficiency.

The Institute has since extended its activities to include research and studies on wide – ranging international issues, to foster better appreciation and understanding of international affairs as well as facilitate interchange on foreign policy issues. In order to serve this purpose more effectively, a new body, the International Studies Centre, was formed in April 1987 to undertake the Institute's sphere of activities relating to research, studies and conferences.

Under the present organizational structure, the Centre's policy is guided by a Policy Council under the chairmanship of H.E. Dr. Thanat Khoman, former Foreign Minister and Deputy Prime Minister. The Centre is administered by a Board of Directors of the Institute of Foreign Affairs headed by the Minister of Foreign Affairs. The management of the Centre is vested in the Director of the Centre who is appointed by the Chairman of the Board of Directors.

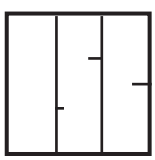
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- provide a forum where national and international statesmen, prominent diplomats, government and business leaders and distinguished scholars are invited to give lectures on various aspects of international affairs:
- organize national and international conferences in which interested persons both from the public and private sectors may participate;
- carry out research on different issues that would be beneficial to the formulation of Thai foreign policy;
- cooperate with other similar organizations and institutes, both in Thailand and abroad, in promoting the study and research of international affairs;
- publish results of the Centre's studies and other materials for dissemination.



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STUDY PAPER

EASTERN EUROPE :
AN EMERGING OPPORTUNITY

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Chitriya Pinthong, currently Minister Counsellor, Department of Economic Affairs, Ministry of Foreign Affairs of Thailand, won a government scholarship in 1970 to study economics in England. She obtained a B.Sc. in Economics from University of Bath in 1975 and a D.Phil in Economics from University of York in 1980. She joined the Ministry of Foreign Affairs of Thailand in 1980 and had served in the Department of Economic Affairs, as well as the Europe Division in the Political Affairs Department and the Office of the Secretary to the Minister.

EASTERN EUROPE: AN EMERGING OPPORTUNITY

BOONLERT WONGPIBUL
CHITRIYA PINTHONG

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FOREWORD

This publication is part of an effort by the Department of Economic Affairs to strengthen its role and capabilities. The Ministry of Foreign Affairs perceives the importance of having the scope of its work and functions diversified and able to respond to the need of the Ministry to keep up with the rapid changes in the international economic arena, and the increasing role Thailand plays and is thrust upon to play as an economic actor in the world scene.

It is gratifying that the Ministry agrees to support a small project, initiated by the Economic Information Division, Department of Economic Affairs, to send 2 economists from the Department on a fact finding trip to study first hand the economic changes undergoing in Poland, Czechoslovakia, and Hungary and to learn about steps taken there in order to integrate into the world economic system, as well as any consequences and implications on future economic relations between these countries and Thailand.

The two officials have concluded their finding and sent their report to the Ministry. Part of the report is reproduced here in this publication, in order that the information and views gathered be made available for use by the interested public. It is my hope that the publication will at least add in a small way to the wealth of information available regarding Eastern Europe, particularly from the Thai perspective. The

credit, if this publication is of any use, should belong to the Ministry of Foreign Affairs and those involved in making this project successful, and the International Studies Centre which supports the publishing of this book. The authors should also be commended for their efforts and hard work put into this project. I wish also to thank the various Thai embassies in those countries they visited: Poland, Czechoslovakia, Hungary and the United Kingdom. They had also contributed to the groundwork for the success of the project.



Sawanit Kongsiri

Director General

Department of Economic Affairs

PREFACE

The Department of Economic Affairs, Ministry of Foreign Affairs on 21 September 1991 sent two officials on a mission to 3 Eastern European countries: Poland, Czechoslovakia, and Hungary. The two officials, Chitriya Pinthong and Boonlert Wongpibul, spent around two weeks in Warsaw, Prague and Budapest and finally rounded up the trip in London. The purpose of the mission was to find out first hand the economic changes undergoing now in the three Eastern European countries and how they adapt to these changes, as well as how they would eventually integrate themselves into the world economy, and finally prospects and implications of these changes towards their economic relations with Thailand. Most of the trip was spent on observations, and interviews with officials, academics, journalists, bankers, international civil servants, private businessmen and diplomats. In London, they had the oportunities to discuss and exchange views with academics, government officials, journalists, and some officials at the Bank of England as well as the European Bank of Reconstruction and Development.

The finding from the mission, excluding the recommendation submitted to the Ministry of Foreign Affairs, was published in a book form by the International Studies Centre. The views expressed here are the authors' and not necessary those of the Ministry's, nor the Centre's.

The authors wish to acknowledge with thanks and appreciation the kind cooperation and assistance from the Thai embassies in Warsaw, Prague, Budapest and London; the time spent by those we interviewed in the four cities; the assistance rendered by the embassies of the three Eastern European countries in Bangkok. Finally, special thanks for the Ministry of Foreign Affairs and its high level officials who supported the mission and made it all possible. Special thanks should also go to Ambassador Phan Wannamethee, Director of the International Studies Centre, who supports the publishing of the finding.

Bangkok

October 1991

INTRODUCTION

INTRODUCTION

The winds of change that swept the Soviet Union and EasternEurope during the past few years have transformed the map of Europe to a degree unexpected and unpredicted by the best experts or optimists. Dramatic and drastic are the words aptly described these changes. The unification of Germany was but one consequence. Elsewhere in Eastern Europe changes are undergoing rapidly, and almost daily economic changes occur for better or for worse. We visited the three Eastern European countries for the first time on 22 September 1991, stopping first in Warsaw, then Prague and then Budapest. The three countries we visited encompass area of over five hundred thousand square km., slightly smaller than France, with the population of nearly 60 million. The region lies in central Europe, straddled between prosperous Western Europe and the Soviet Union. The three countries seem to be the most promising among othres and likely to benefit most from the changes. They have also been quick to undertake reforms and go through painful process of adjustments neccessary to transform from 40 years of centrally planned economy into the market system.

As we observed during our trip, the process of reform was painful and came amidst much social costs to the population. There is never any doubt that much hard work and sacrifice, efforts and patience would be required before any positive results could be imminent. During the process, many people in the three countries we met and talked to believed that the West

could and should give a helping hand. By this they did not always concur or mean the same thing. But to many, what it meant was clear that the need they wanted most was not grant aid, but technology, investment and market access. Some countries among the three have been more lucky or successful than the rest in all these aspects, while others were left tailing behind for some reasons we will elaborate further. What still puzzled the people in the three countries most, however, was the slow and cautious attitude of the West in playing the role of giving the helping hand. Arguments are still going on furiously on the question of market access, particularly on agricultural products, textile and steel.

Nevertheless, we have the impression that the reforms in these countries are genuine and the governments are serious and committed to the process of reform. The governments in power seem also to be committed to parliamentary democracy; the intention to abolish the state management of the economy; and the desire to integrate with Europe.

The slow process of reform and restructure of the economies in these three countries face different problems and obstacles due to their fundamental economic differences. Thus the degree of success achieved so far varies. But what is common in all three countries seems to be the pain and social costs of economic reforms. Unemployment, the term unheard of in the socialist economy since it has always been officially zero, began to take toll. Bankruptcy is another new economic jargon

people learn with great pain. When unemployment hits the people in the three countries, it is difficult for them since this could mean the whole of their livelihood, which had once been formerly provided by the state-run factory, suddenly vanished with their employment. The economies of the three countries which were once intricately linked with one another and the Soviet Union are now in deep recession, partly due to the collapse of the Soviet economy and the real prices charged when trading with one another. It is estimated that their GDP per capita might not return to 1989 level until 1996. In some certain villages where the entire population's employment depends on a few factories, the closure of one or two factories implies near total unemployment in the villages. The social and economic situation there would be chronic.

Apart from the fluid situation in the Soviet Union which no doubt will have a direct effect on the current situtation in the three Eastern European countries, the domestic problems are no less complicated. The speed of the reform can go as far as the people can bear. Pains have to be absorbed. Should popular resistance arise the process would have to slow down. The tasks are not easy, and indeed unprecedented. Never has it happened before in history that a tight centrally planned economy is to be transformed into a capitalist one. To do this the country will certainly need to draw up a series of legislation to govern property and private ownership, and to mobilize its existing capital and labour from the previously inefficient sectors to new ones at an unprecedented scale and

speed. There is no simple solution to this, particularly when most enterprises have been operated with top-heavy bureaucracy for over several decades, and more often than not have been producing inefficiently the products that hardly anybody requires. All of these tasks are to be carried out during the period of transition while price signals and market responses are still unclear, and the financial system and capital market are yet to be developed to support the new economic structure. At the macro level, all three countries suffer from external debt and, except Czechoslovakia, inflation. In general, the people also lack the basic knowledge of the operation of the market economy.

Eastern Europe under reform offers some opportunities for business even with some shortcomings described above. We believe that it could offer prospects for trade and investment to a degree. The three countries we visited are committed to reforms and to democracy with no turning back, but more important is the fact that they all started from a certain level of economic achievement. The basic economy prior to the communist period was very promising. They were at the time among the advanced countries of Europe. Basic steel and other industries of notable importance were already in existence in all three countries, together with a substantial agricultural

sector which produced sufficient food for the population. These countries also have people with good skills and education, though lacking in modern managerial skills and technique, but

that can be overcome in the medium term. Another important factor lies in the fact that wages in these countries are still very low. Though there have been tremendous pressures for wage increases, they are still much lower than that of Western Europe.

The three countries are now undertaking enormous privatization programmes to do away state-run enterprises and monopoly, which have been part of the system for the past 4 decades. This leads of course to offers by governments of various schemes to attract foreign investment, very often in the forms of tax benefits.

The geograpical location of Eastern Europe is of notable importance. Politically, precisely because of the location they were drawn into the Soviet orbit and thus communism and suffered the consequences of the Cold War. On the other hand, with the location too they can most likely benefit economically. Being next to the European Community and the Soviet Union implies a prosperous market of 300 million to the West, if access is not a question, and another big market of over 200 million to the North and Northeast. Proximity to the Soviet Union also means that they could benefit from the enormous amount of aid the West is expected to pour into that country, (some have mentioned the sum of $10-15 billion, while others argue that the sum could be considerably less). There have been talks about triangular assistance: the West purchases goods, particularly food, from Eastern Europe to assist the Soviet Union.

Quite a number of people we interviewed showed some hopeful signs about the state of the countries' economies. They were very optimistic, or rather over optimistic. In certain cases, talks about achieving the standard of living equal to that of Austria's in five years were frequently mentioned in Czechoslovakia and Hungary. A few others believed that many, if not all of the countries' economic problems, would be solved or alleviated once they joined the EC.

The three countries have varying strengths and weaknesses. Hungary seems to be more advanced in its economic reforms, having had the advantage of earlier starts, and existing small private sector. It also possesses better economic structure and the legal framework to support the new capitalist system. The Hungarians are able to understand the basics with relative ease, compared to those in other Eastern European countries. Czechoslovakia, on the other hand, has the population with great engineering skills, and relatively well managed and efficient enterprises. The country, similar to Hungary, has beautiful and scenic landscape with great potential for tourist industry. The strong industrial base in Czechoslovakia has always been the topic its people mention with pride. First it

served as the industrial base for the Hapsburg empire, and later for the Soviet led COMECON. Before World War II, Czechoslovakia boasted the country as the fifth most industrialized country in the world. If there were such thing as a G 7 meeting at the time, Czechoslovakia would have been included. Poland, as the biggest

country of the three, offers a great potential for trade with its 38 million population, and beyond, lying next to Germany, the Baltic states and the Soviet Union. Poland is also the only country of the three without serious nationalistic and ethnic problems.

POLAND

POLAND

Poland is far bigger than Czechoslovakia and Hungary. With population of over 38 million, its sheer size alone constitutes a promising market. It also has the advantage of having Germany and the Soviet Union on both sides of its borders, and thus could serve as a staging half way point to the vast Soviet market for any exports from the West. Poland claims no domestic nationalist and ethnic problems, unlike other Eastern European countries. Poland comprises mainly homogenous ethnic Poles, except for some German minorities. Another advantage Poland has is its overseas population. Some are quite affluent, and now ready to return and invest in the native land. This is cruical in terms of drawing scarce foreign capital.

The problems Poland has are mainly domestic. Economic crisis and hardship, together with the government's effort to undergo drastic reforms by shock treatment led to a number of strikes. The scene of workers stoppages is not uncommon in Poland, and this helps turn away foreign investment to a certain extent. Capital inflow has been very slow in Poland, since the beginning of 1991 it may have attracted roughly $100 million, while Hungary has managed about $1 billion during the same period. The fact that the country is about to hold an election by the end of October does not help. Investors tend to wait for dust to settle after the election. Nevertheless, no matter who wins the election, it is clear that there could be no turning

back. The government and the people are committed to reform and to the market economy, as well as attempting to join the EC.

Poland's economic situtation in 1989 was in a critical stage, inflation was running at 20-30 percent a month, together with huge government deficit at around 8 percent of GDP. Unemployment which was officially zero during the Communist regime stood at close to a million mark, and still rising. By 1990 the government launched an ambitious programme supported by the IMF standby credit aiming at combating inflation and stabilizing the exchange rate. The government undertook steps to free prices, phase out many direct and indirect subsidies to enterprises, freeze wage increases, end rationing and apply strict fiscal and monetary policies. The consequence of these attempts to bring about broad macroeconomic equilibrium is a deep economic recession. GDP contracted by 12 percent in 1990. 1991 did not prove to be easier, industrial sales in the first half of 1991 were almost 10 percent lower than in the same 1990 period. The economic recession tends to be deep and persistent. At the end of 1990 there were over 1 million Poles unemployed, 8.3 percent of the workforce (excluding private agriculture). Positive consequence of the stabilization programme, however, showed on the external side of the economy. For the first time since 1971, the current account balance in convertible currencies was positive in 1990. Polish exports had fallen while imports fell even sharper.

Poland's economic relations with the external world during the past decade had been marred by the issues of debt and debt rescheduling. Its current debt now stands at about $46 billion, $ 32 billion of which was owed to the Western governments and had been reduced by 50 percent to $16 billion by the Paris Club in April 1991 as part of the deal for Poland to agree on a three year adjustment programme with the IMF. The other $14 billion was owed to private banks.

Certain Western economic interests have recently shown up in Poland, either because the confidence was already there or to test the waters. Fiat, and General Motors, in the car industry, Philips in the electronic industry and Pepsico in the beverage industry. Thailand's economic interests could be identified in the areas of textiles. The amount of exports might not be easy to quantify, but Thai textile is visible everywhere in Warsaw, mainly traded by small traders or new entrepreneurs. The market for Thai textile is not only limited to the Poles, but is believed to extend beyond the Polish borders via Poland to the Baltic states. In form of joint ventures for any future textile factory to be established in Poland, the Poles pointed to the opportunities of exporting to the Soviet Union as well as the EC where Polish quota has yet to be filled up. Other areas of manufactured products with some promise coud be beer, some small machinery, and consumer products. Agricultural products such as rice could also attract some possibility of exporting in big amount. Investment in the area of tourism where hard currencies could be quickly and

directly collected is also very promising, for there still exist very limited number of up to international standard hotels in Poland. However, competition in the area could be tough.

CZECHOSLOVAKIA

CZECHOSLOVAKIA

Reforms had been attempted in Czechoslovakia even before the revolution of November 1989, but not very successful. Immediately after the revolution, the government declared its priorities. Central planning was removed and the government stepped up the speed for privatization. Prior to the November revolution only less than 1 percent of the economic ownership was in private hands. The government also undertook steps to remove price control, except for a few items, including foodstuff. Then internal convertibility was allowed, which means that every company could possess foreign exchange for foreign . trade, though there is still limit to full convertibility for ordinary citizens in terms of foreign capital investment. Monopoly on foreign trade has also been lifted. Currently, the government imposes a 20 percent customs surcharge to restrain imports, but this is expected to be lowered to 18 percent and then 15 percent and further before being removed altogether.

The collapse of the Soviet market produced a major blowtoCzechoslovakeconomy. Formerly over half of its exports went to the Soviet Union and East Germany. Currently, only 19 percent goes to the Soviet Union. Czechoslovakia has been trying hard to switch its exports to other market, but is still hopefulthatoneday the Soviet market will recover and trade will resume. Excellent contacts between Czechoslovakia and the Soviet Union even at the republic level have been cited as advantages.

Currently, the economy is still in recession, with GDP declilned 10 percent. Unemployment is now at 4 percent, but expected to reach 10 percent before improving. Immediately after the lifting of price control inflation soared. It was anticipated to jump to 30 percent a year, but reached 50 percent. However, within 8 months inflation was brought down to less than 1 percent per month. Foreign debt, which stood at $8 billion at the beginning of this year and is expected to reach $12 billion by the end of the year, turned out to be $8.6 billion by the middle of this year, which is a surprise.

On privatization, the government is undertaking an ambitious and unprecedented programme, whereby privatization is done by giving away voucher to every citizen above 18 years of age at a nominal administrative cost. The voucher is to be exchanged for shares of state enterprises if and when the enterprises are to be up for auction.

Czechoslovakia claimed to start itsroadtowardsmarket economy in a better shape than Poland and Hungary. The country is highly industrialized and posseses great economic discipline. The consequences are more efficient enterprises, and low level of indebtedness to start with. Inflation rate in the country is very low by any standard due to great monetary and fiscal discipline. Standard of living of the population remains high, though wages are still verylow, and thus makes industry very competitive.

Western presence is clearly visible in Czechoslovakia, a country where 15 million tourists pass through annually. Hotel shortages have been common in the country since the revolution. Tourist industry thus offers great potentials for foreign investment. Automobile industry in Czechoslovakia is another area of Western interest, given the small number of passenger cars, only 173 per thousand population, there is plenty of room for further expansion. Skoda, Czechoslovakia's biggest car manufacturer entered into negotiations with a few foreign firms and sealed the deal with Volkswagen.

Possible areas of interest for Thailand in terms of trade and entering into joint ventures and investment in Czechoslovakia are service and tourist industries: hotels and restaurants, where demand seems to exceed supply and is likely to expand further as incomes rise; textile industry which has similar potentials to Poland. However, the thought of using Eastern Europe to serve as a base to export textile products into the EC seems a little too optimistic, if not farfetched. History of our trade negotiations with the EC indicates too clearly for itself. But the Soviet market remains wide open and offers some potentials. Czechoslovak government is in the process of speeding up legislation on private property ownership and privatization process. Soon when the dust begins to settle investment is very likely to flock in.

HUNGARY

HUNGARY

Hungary began the reform process sooner than Poland, and Czechoslovakia. As a consequence it has a headstart. The people seem to grasp the basic tools of capitalism faster, and over 10 percent of the economy has already been in the private hands since the 1980s. The economy currently suffers a recession like elsewhere in Eastern Europe, partly due to the painful process of reforms and a major part from the collapse of its traditional market, the Soviet Union. Though officially, the forecasts were given that the GDP contracted by 3-4 percent, Hungary boasted a boom instead in the private sector, as indicated by an expansion in electricity consumption. Inflation is still a problem in Hungary, currently at 30 percent, and is expected to fall to 20 percent next year. There has been no evidence of wage and price spiral, which is a good sign. Interest rates are very high, at 25 percent. Nevertheless, loans are still being granted by the banks for business which is also an encouraging sign for the economy.

The country is currently in debt of around $21-22 billion, which implies that $1-1.5 billion is required annually to service the debt. The government has always tried its best to service and pay for the debt punctually. It has always maintained that all obligations will be honoured. The strategy that helps create confidence and thus capital inflows.

The collapse of the CMEA is a major blow to the Hungarian economy, since it has always been a major market for Hungarian exports. The Soviet Union has always been the market for Hungary's Ikarus Bus Company, and the bankruptcy of the company will certainly be a shock to both trading partners. Currently, the Soviet Union is undertaking some steps to form a joint venture to save the company. On the whole, Hungary has done well to switch its trade to the West. This year Austria has overtaken the Soviet Union as Hungary's main trading partner in dollar terms. An agreement with the EC, if that could be reached, on agricultural exports to the EC, would help to boost output.

Unemployment is still another problem haunting the government. It is around 160,000 currently, or 3.5 percent of the workforce. But that could reach 400,000 or 8 percent of the workforce as more closures are expected in 1991 and 1992. The figure is not very encouraging when labour discontent is rampant in the country.

On the whole, Hungary's investment climate still remains very attractive. The country is getting better as time goes by. The improvement in the investment climate may be due to the entrepreneurial skills Hungarians possess, the fact that the revolution in Hungary is completely peaceful, the government remains relatively stable, and every branch of government is undertaking its responsibilities in the process of reforms to transform the country to a market economy. Hungary, with its strong agriculture sector and its strategic location next to the

Soviet Union, is expecting some Western aid to go through the country on its way to the Soviet Union. Food could be purchased in Hungary for the Soviets. It also expects that similarly, EC aid to Albania would be spent in Hungary.

The Hungarian government, however, remains concerned and very cautious with the situation in Yugoslavia. It is aware that the situation could be a destabilizing factor for the region, further complicate its bilateral relations with Yugoslavia, especially on the question of the borders, and most important of all it could reduce foreign confidence and investment in the country. Apart from Yugoslavia, the Soviet Union remains a major factor. The political development in the Soviet Union will certainly have repercussions on the domestic scene in Hungary, as elsewhere in Eastern Europe. The recovery of the Soviet economy will also be of no less importance. Hungary expects to resume trade and economic intreractions with the Soviet Union. Move is gradually now underway towards the newly declared independent republics in order to establish contacts.

Areas of economic interests for Thailand could be in the traditional exports of rice and textiles. In terms of investment, the areas of interest include hotels and restaurants, fashion products, handicraft, and jewellery. The amount of investment required for a good Thai restaurant, yet to be established, is still low, around $100,000. These areas of investment could be identified as quick and direct foreign exchange earners, given the amount of over 10 million tourists

in Hungary each year, and the fact that the country still possesses great potentials for tourist industry. Since it lies in the centre of Europe, with numerous historic places and scenic landscape. Above all prices are still relatively cheap compared to other destinations in Europe.

Efforts are now being made to form a Hungarian-Thai Association in Budapest. It has also been confided to the authors that Hungary could best serve as the Thai central staging point for Eastern Europe, in terms of trade and investment. This remains to be seen. But Hungary certainly is a country with great potentials, and undergoing rapid changes. We expect that any investment in the areas mentioned above, if done, need to be fast. Prices certainly will alter pretty quickly under current circumstances.

CONCLUSIONS

AND

OBSERVATIONS

CONCLUSIONS AND OBSERVATIONS

With the limited time we spent on this studying tour of the region, we cannot claim to master all the details and understand all or even major parts of the complex problems of the reform process now undergoing in these countries. But anyhow from our observation, it is quite clear in our mind that the reform is genuine, and the people of these countries are committed to the reform and have no desire to turn back. Once freedom and opportunities have been provided and the people have enjoyed the taste, it is difficult to perceive that any attempt to rob them of these basic qualities of life could be tolerated. The failed coup in the Soviet Union served as a good example. The question now is not whether the process could be reversible, but rather how many problems they have to face along the road of reform.

The reform process has no doubt been painful to the people and at the same time great social costs have to be borne. It will be interesting to observe again, with some time lapse the consequences of reform on the distribution of income, and the success in poverty eradication in these countries. No doubt, capitalist system brings varying opportunities to different people, and the benefit derived and reaped by the mass population will again differ. However, it is still the basic responsibilities of the government in power to oversee that the system provide free and fair opportunities to the majority of the people to at least a certain degree. The social costs borne

by the people should be at best alleviated by the government, by intervention, incentives or taxation, as appropriate. The basic need such as infrastructure, health, and education is still the responsibility of the government. No price signals can dictate the proper time for the government's action, or inaction on these matters. No market indication is required before the government can move on these basic necessities of society.

Eastern Europe may not be the brightest spot of the world in terms of economic opportunities currently, or even the next decade. But there is ample evidence that it is an area with potentials. Its future will depend very much on the evolution of events in the Soviet Union, and unfortunately that is beyond these countries' control. The unravelling of event in Yugoslavia will affect the development in these countries too. The flare up of ethnic tensions in the region will not be beneficial to the three countries, where in at least two countries problems of ethnic minorities still persist. The collapse of the Soviet market and the CMEA help aggravate their economic problems and drive them deeper into recession. By the same token, a revival in the economic situation in the Soviet Union, or the effect of Western aid pouring into the country could help prop up the economies of Eastern Europe.

We believe that the Soviet economy cannot stay gloomy for long. It will soon revive, most likely with external help. When that time comes it could pull along the Eastern European economies, which on their own already possess great

potentials. Poland, Czechoslovakia and Hungary are the countries that have surged ahead other communist European countries in the transformation of the economy and are most likely to gather the benefit of earlier integration into the world economy and trading system than the rest of Eastern Europe.

Currently, all three countries are in deep recession. But things are not all that gloomy. The three comprises quite a big market where domestic demand can generate growth. They also have the advantage of being situated between prosperous Western Europe and the Soviet Union, both of which can be their market for agricultural products and manufactured goods, once transform is advanced further. They also have good human skills, and well educated population. They also possess advanced industries that have been more or less long well established. The urgent need for them is to speed up the process of privatization, and improve on the efficiency of production and management of public enterprises. Basic legislations on property rights and ownership necessary for a capitalist society are also needed to be finished urgently.

As far as doing business with these countries is concerned, there seem to be some potentials. For Thailand, the easiest way is probably to play a part of suppliers for some food or consumer products that are required by international organizations or Western countries as part of aid to the countries in the region. To sell products directly to these countries is also possible, there are various areas that

Thailand still maintains comparative advantage, such as food products and textile. The difficulty of direct sales probably lies on the limit of foreign exchange in these countries. A possible solution, though not very easy, is to make some arrangement for barter. Another possibility freguently mentioned in the last few chapters is to invest directly on business that could right away earn foreign exchange, namely hotel and restaurant business. Since they are naturally for tourists, direct and quick foreign exchange could be earned. More important is the fact that in all three countries service industry in this area is still scarce, while demand is overwhelming. Direct investment by setting up new factories, purchasing old private enterprises, or entering into joint venture with any other partner in some sectors, such as textile and beginning production for the local market, as well as setting an eye for exports to the neighbouring countries is another possibility. But the degree of risk varies from industry to industry.

On the whole, the economies of the three Eastern European countries are still promising and offer some, though limited, opportunities for Thailand to conduct business with. They might not be a prime market in the short term. They might not offer much of excitement to Thai businessmen as the market in Indochina which, given the geographical proximity to Thailand, draws some positive advantages. Nevertheless, Eastern Europe and the Soviet Union could serve as potential markets for Thailand when we are in the urgent need to expand new horizon and new

market for our products, particularly at the time when our traditional markets begin to offer limited scope for further expansion.

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Annex I:

Basic Conditions for Foreign Investment in the Czechoslovak Economy

BASIC CONDITIONS FOR FOREIGN INVESTMENT IN THE CZECHOSLOVAK ECONOMY

Investment Guide for Foreign Entrepreneurs in the Czech and Slovak Federal Republic

Federal Agency for Foreign Investment
Prague, July 1991

FAFI

Investment Guide for Foreign Entrepreneurs in the Czech and Slovak Federal Republic.

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INTRODUCTION

Both the Federal and the republics' governments consider foreign direct investment (FDI) to be a significant instrument of accelerating the transition from a centrally planned economy to a free market economy. The governments are well aware that the improvement of conditions and the definition of the framework for FDI is a crucial task. Thus the Federal Agency for Foreign Investment attached to the Federal Ministry of Economy has decided to publish the present guide.

The radical economic reform which was prepared during 1990 and has been implemented since January 1, 1991 has been shaped by an overall acceleration of price and foreign trade liberalization as well as by the introduction of the internal convertibility of the Czechoslovak currency. This policy has brought about strong inflationary pressures which have been countered by an overall macroeconomic restriction in monetary and fiscal areas. The beginning period of economic reform was marked by a relatively sizeable decline of domestic aggregate demand. This decline was accompanied by a large fall in external demand, especially in the markets of the USSR and the other countries of the former CMEA (Comecon). These circumstances have led to an economic decline and a rise in unemployment which were expected, although in a smaller degree. A gradual but quickened transition to renewed economic growth is needed, and, in this respect, an important role can be played by direct foreign investments.

Czechoslovakia's relative isolation from the world market in the last forty years has resulted in a considerable lagging behind in the competitiveness of Czechoslovak goods and services (mainly because of lower quality), primarily in the areas of modern technology, managerial skills, banking and financial services, and marketing. Foreign investment can help cure these deficits through the transfer of technology and managerial know-how, enabling Czechoslovak goods and services to become more competitive in the world markets. Joint ventures with foreign capital participation and fully foreign-owned companies can provide the risk capital needed to start these improvements and facilitate Czechoslovakia's entry into world markets. Foreign investment can remedy at least partially the general lack of capital in domestic privatization and also increase the supply of foreign currency. At the same time, it will result in higher demands on the labour market to which the domestic enterprises will have to adapt.

From the systemic viewpoint, the course of the reform has so far been successful. Following the first inflation shock in the beginning of the year, inflation dropped down to an acceptable rate. While the production decline was higher than expected, the trend towards stabilization is now manifest. All conditions stipulated by the International Monetary Fund for granting credits have been met. The government has embarked on an extensive privatization process based on the so called large-scale privatization act which specifies the conditions for the transfer of state-owned enterprises to the private sector. It is expected to make use both of standard methods (with the FDI being of great importance among them) and non-standard methods, above all, voucher privatization in which only Czechoslovak citizens may participate. The restitution act was also adopted to satisfy the claims of former owners.

The following information deals mainly with the conditions governing the establishment of enterprises with foreign capital participation, including "greenfield" investment. Information concerning foreign privatization (i.e. the sale of Czech and Slovak enterprises to foreign entities), especially the rules for the competition of tenders, etc. will be covered in other publications by the Agency.

In the area of foreign investment, the government has considerably eased administrative procedures and has established agencies for foreign investments on the federal as well as on the Czech Republic and Slovak Republic level in order to facilitate the entry of foreign investors into the Czechoslovak market.

The government is currently preparing reforms of the tax system. The new tax system is to enter into force on January 1, 1993. It will signify, inter alia, the transition from the turnover tax to the value added tax. A reform of investment incentives and the finance sector is under consideration. The second part of the act on land (concerning the transformation of cooperative farms) is being discussed in the Parliament. Its adoption will give foreign investors increased access to the use of immovables.

The government expects a greater flow of foreign investments after the restitution claims are solved and the large-scale privatization launched. It is often politically more feasible to orient the privatization process towards the interests of a Czechoslovak entity which may later sell its share (enterprise) to or form a joint venture with a foreign investor. The government will also support the direct sale of enterprises to foreign investors although there will be certain political limitations in this respect. The former procedure is easier.

The government will, under the principle of "what is not forbidden is allowed", define clearly the areas where foreign investment is not allowed and where permission will be required. The activities not on the list will be permitted automatically, which will make the system transparent, operationally simple, and liberal.

Even though the reform process has only been in effect since January, the foreign business community has already demonstrated major interest in the Czechoslovak market. The number of joint ventures and their average size have increased dramatically over the last year.

The present Investment Guide describes the situation existing in July 1991. It will be continuously updated to reflect the actual state of affairs.

A. LEGAL FORMS OF FOREIGN INVESTMENT

According to Act 173/1988 Coll., as amended by Act 112/1990 Coll., on enterprises with foreign property participation, a foreign investor may invest in the Czech and Slovak Federal Republic by:

1. establishing his/her own enterprise;
2. establishing a joint venture; and
3. investing in an existing enterprise.

The new enterprise or the existing enterprise in which the foreign partner intends to invest may assume one of the following legal forms:
1. a joint-stock company, Act 104/1990 Coll.;
2. an association, Act 101/1963 Coll.;
3. a commercial company, Act 103/1990 Coll. i.e.:
- Company with Limited Liability,
- Unlimited Partnership,
- Limited Partnership, and
- Limited Partnership with stock,
4. a cooperative.

All of these companies are deemed legal entities. At present, the most practical forms for foreign investors are the Joint-Stock company and the Company with Limited Liability.

B. NEW PROCEDURES IN ACCOMPLISHING FOREIGN INVESTMENT

Until the end of March 1991, the crucial piece of legislation concerning foreign investments, i.e. founding enterprises, was Act 173/1988 Coll., in the wording of Act 112/1990 Coll. Under that Act, an enterprise with foreign property participation (the term employed by the Act and other acts) could be established only on the basis of an approval granted by the Federal Ministry of Finance (or by the Czechoslovak State Bank in the banking sector). However, the situation has changed significantly since the adoption of Act 92/1991 Coll., on the transfer of state-owned property to other persons (Large-Scale Privatization Act), and the Decree of the Government of the Czech and Slovak Federal Republic 132/1991 Coll., dated March 21, 1991.

A foreign property participation enterprise may now be founded without approval provided that:
1. the enterprise in question is being founded or its business is being undertaken solely by a foreign participant; or
2. apart from a foreign participant, the Czechoslovak partner in the enterprise is a natural person or a Czechoslovak commercial company in which the partners are solely Czechoslovak natural persons or foreign persons; or
3. the Czechoslovak partner is a cooperative founded after July 1, 1988.

A licensed approval is still required for enterprises in the banking sector. Enterprises are restricted from participating in sectors important for ensuring the defence and security of the state. The number of sectors on the list of prohibited sectors is therefore limited at present. The government's intention is keep this "negative list" as short as possible.

When a foreign property participation enterprise is to be established with a state enterprise, the enterprise must have approval of its privatization project from the appropriate ministry, the Czechoslovak State Bank or, through an exemption, from a respective government. (Act 92/1991 Coll.).

The following basic steps are needed to establish a foreign property participation enterprise. The enterprise must:
1. acquire a foundation license (in the banking sector), a decision approving the privatization project (involving the establishment of joint ventures with state enterprises);
2. acquire a license under special regulations, required by the nature of business activities. For example, enterprises wishing to engage in foreign trade must obtain, in some cases, an additional license for foreign trade activities; and must be enrolled in the company register.
3. Other specific steps are described below.

C. CHARACTERISTIC FEATURES OF THE DIFFERENT ORGANIZATIONAL AND LEGAL FORMS OF FOREIGN INVESTMENTS

1. Joint-Stock Company

The laws pertaining to joint-stock companies are included in Act 104/1990 Coll. A joint-stock company does not need permission from the State for establishment, and the State does not supervise the company. A joint-stock company is a legal entity for entrepreneurial activities, whose basic capital is divided into a certain number of shares of pre-determined nominal value. A joint-stock company may have a single founder (a juridical person only) who can provide all the capital.

The joint-stock capital must be greater than CSK 100,000, with CSK 1,000 as the minimum value for shares. The type of shares include preference shares (up to 1/2 the joint-stock capital), interest shares (earning interest on the nominal value of the shares), and employee shares. These may be either registered (transferable by endorsement) or bearer shares (transferable by delivery).

a. Foundation

In order to establish a joint-stock company, the enterprise must have a founding contract (or founding plan in the case of a single founder). Also, the enterprise must:
- subscribe the basic capital (at least CSK 100,000, with a minimum compulsory payment of 30 percent of the value and at least CSK 50,000);
- convene a founding general shareholders' meeting (except in the case of a so-called single-act foundation);
- obtain an assessment of any non-monetary contributions from a sworn expert;
- prepare statutes of a prescribed minimum content; and
- have the company registered in the Company Register.

b. Company Bodies

Similar to joint-stock companies in other countries, the company is managed by shareholders' meetings and a Board of Directors (and also a Supervisory Board.) The company is also required to have at least one auditor.

c. Reserve fund

After foundation, the joint-stock company is required to create a reserve fund, whose size and creation are stipulated in the company statutes. The minimum value is 10 percent of the joint-stock capital, with a minimum annual allocation of 5 percent of the net profit.

d. Dissolution

The joint-stock company may be abolished after a resolution of a shareholders' meeting, achievement of the company objectives, or expiration of the time period of the company's establishment. The company is officially dissolved after the final step of deleting its name from the Company Register.

2. **Association**

Upon entering into an association agreement, two or more persons join activities or property assets to achieve a certain economic objective. An association is established by signing the agreement and by registering in the Company Register.

3. **Commercial Companies**

Natural and juridical persons may establish a commercial company, and a company may be founded by one member if so permitted by Act 103/1990 Coll. The foundation of the company requires a written company contract signed by all the members and the registration of the company in the Company Register.

The most frequent form of a commercial company with foreign property participation is the Limited Liability Company. The following characteristics apply to the requirements and forms for a Limited Liability Company.

As with other commercial companies, a company (foundation) contract is required for foundation. A company may be founded by a single person. A Limited Liability company is founded by a partnership deed on conducting entrepreneurial activities under a chosen commercial name with limited liability of the partners for the pre-determined property deposit. The foundation capital (the net property value at the time of establishment) must be at least CSK 100,000, with a minimum deposit of CSK 20,000 per participant. The partners guarantee the creditors of the company by using only the property of the company as security.

The company contract must include:

- the commercial name and headquarters of the company;
- the object of activities;
- the foundation capital;
- the deposit of each participant.

The contract also includes:

a) bodies of the company, the method of their constitution and the scope of their authority (unlike joint-stock companies, the selection of the bodies is left to the discretion of the enterprise);

b) the duties and rights of partners and the consequences of their infringement;

c) the method of abolishing the partnership and its consequences;

d) the method of winding up the company without a legal successor; and

e) the method of increasing or decreasing the foundation capital.

Commercial companies may be abolished by a declaration of bankruptcy, an agreement of the partners, a lapsing of time (unless the partners continue in silence), other cases stipulated by the Act, or a court ruling. As with joint-stock companies, the name must then be deleted from the Company Register.

D. FINANCIAL MANAGEMENT

1. **Taxes**

An enterprise with foreign property participation is subject to corporate income tax, wage levies, and turnover tax. Its individual partners are subject to the dividend tax.

a. Corporate income tax

There are three corporate income tax rates. When taxable income does not exceed CSK 200,000, the enterprise pays a 20 percent tax. If its income is higher, and the share of the foreign partner(s) in the foundation capital is greater than 30 percent, a 40 percent rate applies. If the foreign partner's share is less than 30 percent, the enterprise pays 55 percent tax from the amount which is over CSK 200,000 (200,000 representing the basis for the taxation).

The republic (Czech or Slovak) Ministries of Finance are authorized to grant tax reliefs to newly established enterprises, either full or partial, upon request. A tax relief may be granted for a period not to exceed 2 years from the beginning of operations.

b. Wage levies

The levy is imposed on the volume of wages the enterprise pays its employees in a current year. Generally the rate is 50 percent. Enterprises in the service sectors are subject to a 20 percent taxation. The rate is reduced if the enterprise involved employs handicapped people. The tax is included in the enterprise's costs, i.e. it is deductible from the tax base of the income tax. The republic Ministries of Finance may also grant reductions.

c. Turnover tax

The turnover tax is similar to the value-added tax, yet is structured in a different way. The enterprise pays the tax on sales of goods of its own manufacture or purchase, as well as on sales of imported goods. The tax does not apply to sales of goods abroad. The taxable turnover is based on the selling price of the goods involved. Goods have been divided into four categories since January 1, 1991, with corresponding tax rates of 0, 11, 20 and 29 percent. Products not falling under any of the four categories are taxed according to special rates. It concerns mostly products where, in developed market economies, consumer tax is imposed (e.g. alcoholic beverages, cigarettes, petrol).

The division of goods into four categories is a measure for the interim phase between the previous, administratively demanding turnover tax system and the value-added tax system, which should replace the turnover tax as of January 1, 1993. The lower-taxed categories include products the state wants to give preferential treatment, and the higher-taxed categories include goods whose rates were even higher in the past (this is a step-by-step tax reduction).

d. Dividend tax

Foreign partners pay a 25 percent dividend tax. Bilateral double taxation prevention agreements that Czechoslovakia has entered into, stipulate lower rates (0, 5, 10, and 15 percent). For Czechoslovak partners if these are juristic persons dividends are included in their profits, which are in turn subject to the profit tax (55 percent).

2. Depreciation of Fixed Assets

Enterprises with foreign property participation over 30 percent are entitled to apply higher depreciation rates on their fixed assets provided the assets have been purchased after January 1, 1991. For buildings as fixed assets, 30 percent of their purchase costs in the first 5 years and 20 percent in the next five years are evenly depreciated, and the balance is depreciated at relevant annual rates. With machinery, 50 percent can be depreciated at a uniform rate during the first three years, the balance being depreciated at relevant annual rates.

E. FOREIGN EXCHANGE MANAGEMENT

1. Internal Convertibility

In January 1, 1991, the Foreign Exchange Act (528/1990 Coll.) introduced the so-called "internal convertibility" in Czechoslovakia. The Act provides for the equal and unlimited access of entrepreneurs to convertible currencies, (juristic persons and natural persons enrolled in the company register, can, for the payment of imports from abroad, purchase foreign currency for CSK in Czechoslovak foreign exchange financial institutions); on the other hand, the enterprise is bound to offer to a bank all foreign currencies earned. This means that while companies are bound to offer all convertible currencies to Czechoslovak banks (except those which represent deposits to the foundation capital of enterprises with foreign participation and those on foreign currency accounts), they have a guaranteed access to convertible currencies for current account transactions. These transactions include the import of goods and services, royalties, interest payments, and dividend remittances.

2. Transfers of Profits and Capital

Transfers of profits and capital are based on bilateral investment promotion and protection agreements, and on the Foreign Exchange Act mentioned above.

According to Act 528/1990 Coll., and upon request by a juristic person, the bank is obliged to sell a foreign investor, for CSK, foreign exchange resources representing the foreign exchange equivalent of the revenue from investment. The term "revenue from investment" denotes financial sums yielded by domestic investments, especially business profits, interest, capital increments, revenues from securities and fees for intellectual property rights. A foreign exchange nonresident is allowed to transfer or export abroad without a foreign exchange license, foreign payment documents, foreign securities, or foreign currency deposit books.

F. PROTECTION OF INVESTMENTS

Investments are protected against expropriation by the Constitution, the above Act on Enterprises with Foreign Property Participation, and bilateral agreements dealing with the promotion and protection of investments. According to these documents, expropriation may be accomplished or ownership rights curtailed only in compliance with relevant laws that provide for compensation. The compensation paid to a foreign investor in such cases will be freely transferable abroad and in the foreign currency in which the foreign partner has contributed his share to the basic capital of the enterprise.

The countries involved in bilateral agreements on the promotion and protection of investments with Czechoslovakia are listed in Appendix 2, and the agreements with Belgium and Austria have already been ratified. Furthermore, the Federal Government is willing to prepare favourable conditions for other foreign investors even prior to the ratification of the agreements concerned.

G. DISPUTE SETTLEMENT

Disputes between entrepreneurs are settled before the so-called Economic Arbitration Court. The powers of this body are similar to those of a court, but do not extend beyond the economic sphere. In 1992, according to current plans, a new Commercial Code will become effective, under which Commercial Courts would be established. Partners in a joint venture may include, in their founding agreement, a clause providing for the settlement of disputes which may favor either a Czechoslovak or a foreign court.

Investors' disputes over the interpretation or application of investment promotion and protection agreements may be solved by an accord. If such a solution fails, any party may submit the matter to a Court of Arbitration (the disputes are handled in accordance with the Arbitration Rules of the UN Commission of International Law, UNCITRAL), or to the International Center for Settling Investment Disputes in Washington, D.C.

H. REAL ESTATE (Buildings, land)

1. Ownership Rights

A foreign entity, i.e. a juristic person of foreign residence or a natural person with a foreign domicile, may only acquire ownership rights to real estate through inheritance or a special legal act. Currently, these acts are the Small-Scale Privatization Act (427/1990 Coll.), which permits foreign entities to acquire ownership rights to business facilities in the second round of auctions (i.e. to business facilities that have not been sold in the first round of auctions), and the Large-Scale Privatization Act (92/1991 Coll.), which enables foreigners to acquire ownership rights to existing state-owned enterprises.

2. Leasing

Although ownership rights of foreign entities are currently restricted, they may rent or lease real estates. The arrangement is made on the basis of a leasing agreement in which the parties involved agree on the price. One of the restrictions is that an approval from the Ministry of Agriculture is required when agricultural land is to be used for purposes other than agricultural production. The first part of a Land Act concerning restitution has already been passed in the Parliament, and the successful adoption of the second part of the Act will open the door for the transfer of land to the private sector.

I. PRIVATIZATION

The privatization of the economy is one of the most important measures of the economic reform and will be implemented under the mandate of two Acts: the Small-Scale Privatization Act (427/1990 Coll., on transfers of state-owned property to other juristic or natural persons) and the Large-Scale Privatization Act (92/1991 Coll. on conditions and terms governing the transfer of the state-owned property to other persons) under which the large-scale privatization will take place.

1. Small-Scale Privatization

The process of small-scale privatization involves selling or leasing small business facilities (such as restaurants, shops and hotels, municipally-operated workshops, etc.) to natural persons. The sale and leasing take place at public auctions, which have already begun. Foreign investors are allowed to participate only in the second round of auctions.

2. Large-Scale Privatization

The process of large-scale privatization will involve transferring the property of state enterprises to other entities (Czechoslovak or foreign juristic or natural persons). The large-scale privatization scheme will include manufacturing enterprises of centrally controlled industrial sectors, foreign trade corporations, state financial institutions, state insurance companies, etc. The privatization process will employ both standard and non-standard methods. The standard methods may include auctions (usually controlled) or negotiated sales.

The non-standard methods include the so-called voucher scheme. Vouchers will be issued by the Federal Ministry of Finance and will be available for a nominal sum (probably CSK 1000) to all Czechoslovak permanent residents over 18 years of age. Voucher holders may then exchange their vouchers for shares of state-owned enterprises.

In large-scale privatization, the enterprise must offer a privatization project for approval to the relevant ministry and to the Czech (Slovak) Ministry of National Property Administration and Privatization. The privatization project of an enterprise defines the privatization plan of a given enterprise. The privatization project is normally prepared by the enterprise to be privatized, but may also be prepared by the ministry, the foreign partner, or other bodies. The project must include the following information:

a. the enterprise's name, and specification of the property for privatization;
b. information on how the state acquired the property to be privatized;
c. identification of the property unusable for business purposes (i.e. uncollectible claims, unusable fixed assets and stocks);
d. valuation of the property to be privatized;
e. manner of transferring the property to be privatized, including the settlement of claims of entitled persons;
f. when establishing a commercial company, the definition of its legal form;
g. when establishing a joint-stock company, the distribution of stock shares and their value or type, as well as the information whether and how investment vouchers will be used;
h. if local property is to be sold, the location and method of sale, pricing, and terms of payment;
i. in some cases, the proportion of the privatization process proceeds to be handed over to the National Property Funds of the republics;
j. the manner of transfer of intellectual property rights, which must be discussed in advance with the Federal Bureau of Inventions, if those are the property of the privatized enterprise; and
k. the privatization project time schedule.

The privatization project of the enterprise may also contain recommendations concerning the object of business activities, information on potential buyers or investors, information on the existing and anticipated market position of the enterprise, and information on the number and qualification structure of the enterprise's work force.

J. BUSINESS AGENCIES

A foreign entity may operate in the territory of the Czech and Slovak Federal Republic not only by investing according to section B, but also by establishing a business agency. The agency can promote its own products and services, but cannot enter into agreements and contracts with Czechoslovak entities. However, if holding a relevant license, the agency may also perform other economic activities and may establish subsidiaries. The agency may be established after registering at the Federal Ministry of Foreign Trade or another ministry relevant to the sphere of business (Federal Ministry of Transportation, Czechoslovak State Bank, republic Ministries of the Interior and Finance, etc.).

1. Application for the Registration, Establishment and Operation of an Agency

The application submitted by a foreign applicant must present the following prerequisites:

a. the business and/or personal name and place of residence;
b. object of business;
c. names of persons acting as statutory bodies of the foreign entity;
d. subject matter and scope of activities pursued in the Czech and Slovak Federal Republic through the agency;
e. the period of duration of the agency;
f. the address of the agency, including the addresses of subsidiaries in Czechoslovakia if known at the time of application;
g. the name of the executive manager of the agency, if known at the time of application;
h. the number of foreign natural persons to be employed at the agency;
i. the number of Czechoslovak natural persons with permanent residence in the Czech and Slovak Federal Republic to be employed at the agency; and
j. if the foreign person does not submit the application directly, the name of the Czechoslovak person licensed to render services and authorized to receive notifications concerning the processing the application, changes of registration, the prolongation, etc.;

The foreign person must also enclose the following documents with the application:

a. an excerpt from the Company Register or a similar officially verified document confirming the legal status of the foreign person;

b. a copy of the agreement on renting or leasing the premises, including the addresses of the headquarters and subsidiaries if available at the time of application; and

c. the authorization of the above-mentioned (1.j) Czechoslovak liaison.

Two copies of the registration application, including its appendices, must be submitted in the Czech or Slovak language to the relevant authority. If the documents accompanying the application are not in Czech or Slovak, it is necessary to have them translated by a Czechoslovak sworn interpreter.

The registration application is processed within 30 days, and the administrative fee is CSK 10,000.

Upon receipt of the registration certificate, the foreign person must inform the authority within 30 days of:

a. the address(es) of the headquarters and subsidiaries in the Czech and Slovak Federal Republic, if not already given in the application; and

b. the name of the executive manager of the agency, if not already given in the application.

In addition, the following documents must be enclosed:

a. a copy of the agreement on renting or leasing the premises;

b. a certified copy of the letter of appointment of the executive manager of the agency, signed by the statutory representative of the foreign person;

c. a certificate from a Czechoslovak banking institution, confirming that a foreign currency account has been opened to cover all costs and expenses associated with the agency's operation in Czechoslovakia, or a certificate confirming that a Czechoslovak currency account has been opened for the same purpose; and

d. a certificate confirming that the agency has been registered at a Czechoslovak tax and revenue authority.

K. FOREIGN TRADE

Foreign trade (exports, imports) is governed by Act 42/1980 Coll., on economic relations with foreign countries, and its amendments and implementing regulations. The most important implementing regulation is Decree 27/1991 Coll., issued by the Federal Ministry of Foreign Trade. The Decree represents a significant liberalization of foreign trade transactions. Czechoslovak persons (including enterprises with foreign capital participation) may in principle import and export goods without limitation. A license is required for a small range of products listed in Decree 256/1990 Coll. and for mediating employment of Czechoslovak natural persons abroad or foreign natural persons in Czechoslovakia. A fee of CSK 4,000 is required for the license. Special registration is required for overseas shipping.

L. CUSTOMS DUTIES AND NON-TARIFF PROTECTIVE MEASURES

1. Customs duties

As one of the founding members of the GATT, the Czech and Slovak Federal Republic uses import duties based on a valid and internationally negotiated List of Tariffs. The average customs duty is 4.5 percent, with actual duties ranging from 0 to 70 percent.

Material investments of foreign investors are subject to an import duty. An amendment to the Customs Act (5/1991 Coll.) enables these investments or other imports of goods to be exempted from duty when the company concerned applies for the establishment of the so-called free customs zone. Such zones are established upon request by the Federal Ministry of Foreign Trade. (Other possibillities of obtaining a complete or temporany exemption from customs duties are listed in Decree 43/1991 Coll.)

2. Import surcharges

Decree 569/1990 Coll., issued by the Federal Ministry of Finance, has introduced an import surcharge of 20 percent on imported consumer goods and food products. It is paid together with the import duty. This surcharge is temporary - the rates were reduced to 18 percent in April 1991, and to 15 percent in June 1991.

3. Free Customs Zones

Joint ventures may, after establishing the enterprise and obtaining a license for foreign trade activities, obtain a license for the establishment of a free customs zone (either a commercial or industrial free customs zone). Goods may be imported into the free customs zone without depositing a customs duty. The goods may then be re-exported. The company must pay an import duty only if the goods will be circulated in the Czechoslovak economy.

4. Export licenses

Non-tariff protection measures concerning exports are represented by export licenses. Lists of items which require export licenses can be found in the appendices to Decree 8/1991 Coll., issued by the Federal Ministry of Foreign Trade. The application for the export license is to be submitted after the the contract with a foreign customer has been signed. The license is issued by the Federal Ministry of Foreign Trade within 20 days from the delivery of the application.

An administrative fee of 0.2 percent of the value of the goods to be exported must be paid.

M. PRICES

Since January 1, 1991, most prices have been liberalized, and now prices are generally set by an agreement between the seller and the buyer. Act 526/1990 Coll. anticipates that some prices will continue to be regulated to a certain degree and for a certain period of time. The government hopes that all existing price controls will be eliminated soon, although in a few extreme cases the controls will be lifted gradually. At present, price controls cover some 10 to 15 percent of total transactions.

The following price controls apply (in selected cases):
a) maximum, fixed or minimum prices;
b) specific conditions for price control
- the maximum price increase of a given type of goods over a given period of time;
- the maximum proportion by which increased prices of given inputs may be reflected in the price of a given type of goods over a given period of time;
- compulsory pricing or costing procedures;
c) conditions for price control timing
- the minimum time lead for announcing a price increase;
- the minimum period of time after which a price increase may be implemented;
- a time-limited ban on repeated price increases; and
d) a price moratorium (for a period not exceeding 6 months).

N. CREDITS

Enterprises established in accordance with section B may accept credits from both Czechoslovak and foreign banks.

1. Accepting credits from Czechoslovak banks

Entrepreneurs can choose from short-term (up to one year), medium-term (3 to 4 years), or long-term (up to 10 years) credits offered by the banks. Current interest rates (July 1991) range from 12 percent (on deposits) to 19.5 percent (on credits).

2. Accepting credits from abroad

This form of financing is possible upon application and approval of the Czechoslovak State Bank. For financial credits not exceeding the value of CSK 50 million equivalent (at a valid exchange rate), the approval procedure of the Czechoslovak State Bank has been simplified and the Bank now issues a foreign exchange license upon a request containing the following information:
- the sum and currency of the credit;
- the anticipated drawing and payback schedule;
- the interest rate and its nature (fixed, variable), other costs and credit-related fees;
- the name of the entity granting the credit;
- the name of the entity (i.e. the Czechoslovak Commercial Bank) guaranteeing the credit payback; and
- the purpose(s) of the credit and the method to be used for credit drawing and repayment.

For financial credits over CSK 50 million, the Czechoslovak State Bank takes other factors into account, namely:
- the time schedule of drawings and repayments of major credits in individual years, with respect to the overall development of the Czechoslovak balance of payments; and
- advantages of the credit with respect to the interest rate and other credit costs.

If a foreign creditor requires a credit-payback guarantee of a Czechoslovak bank, the guarantee can be provided only by one of the Czechoslovak commercial banks upon request from the borrower. (The Czechoslovak State Bank does not grant such guarantees). When providing the guarantees, the Czechoslovak commercial banks are obliged to follow the foreign exchange liquidity rules set forth by the Czechoslovak State Bank.

When considering applications for the acceptance of foreign exchange credit lines from abroad, the Czechoslovak State Bank examines the identity of the lender, especially if the latter is not a registered banking institution. In this respect, it requires the borrower to submit apropriate verified information on the lender and the source of credit funds.

O. CAPITAL MARKET

The capital market is only beginning to develop its legislative, institutional, and technical framework. Steps are being taken to train professionals to operate stock exchanges, which will be located in Prague and Bratislava. The following relevant legal acts are available so far: the joint-stock company act, and the new debenture bonds act, which stipulates terms and conditions of issuing state, municipal, bank, corporate and mortgage bonds. A Commercial Code and a stock exchange act are under preparation.

At present, potential tradeable securities include part of the stock of several foreign trade corporations, shares of newly founded companies, and approximately 10 issues of freely marketable bank and corporate bonds.

An experiment is being launched whereby a secondary market of securities was introduced on July 15, 1991. The latter permits trading in securities at auctions and at a uniform market rate resulting from supply and demand relations and trends. Banks and savings banks will also participate in transactions on the market.

P. LABOR AND WAGE LEGISLATION

1. Labor legislation

Labor relations are governed by the Labor Code (65/1965 Coll.), and the latest amendment is Act 3/1991 Coll. Employment is founded on a contract, which may be concluded for a definite or an indefinite period of time. The contract may also specify a trial period (not longer than 3 months). The employer terminates the employment contract by an agreement with the employee concerned or by giving a notice two months in advance. The notice must be discussed beforehand with the relevant trade union body.

The weekly working hours are from 40 to 42.5 hours (maximum 43), with three to four weeks of paid vacation, exceptionally 5 weeks. Overtime work (in excess of 8 hours/week or 150 hours/year) requires approval from the relevant central body. The government of the Czech and Slovak Federal Republic may stipulate, for foreign property participation enterprises, conditions different from those of the Labor Code.

2. Wage legislation

Wages are governed by relevant wage regulations (Decree of the Federal Ministry of Labor and Social Affairs 269/1990 Coll. on a simplified system of wages of blue and white-collar employees). There are 21 wage classes: the basic wage of the highest class is CSK 7,700 a month. The basic wage is supplemented

by a personal allowance which ranges from CSK 300 to CSK 2,200, depending on the wage class. Furthermore various rewards, bonuses and extras (for overtime work, work on holidays, night work etc.) can be paid.

The wage is taxed. Health care allowances, social security allowances, per diems, etc. are not taxed. The tax rate is progressive and the basic rate is maximum 20 percent of that part of the wage which exceeds CSK 2400 mothly. For tax-payers with less than two dependants, the basic rate is increased by up to 60 percent depending on tax-payers sex and age. Conversely, for tax-payers with more than two dependants, the tax is reduced by up to 70 percent.

If labor costs exceed given limits and a given growth in the wage fund as compared with the previous year, the company must pay a regulating levy to the state budget. The average monthly wage in 1990 was CSK 3,380, approximately USD 120. Currently, the minimum wage determined by federal government, is CSK 2,000.

3. Employment of foreigners

A foreign property participation enterprise may employ foreigners, if these have an employment permission. An employment candidate must have permission from the relevant Labor Office and a residential permit issued by the relevant Foreign and Passport authority.

Q. SOCIAL SECURITY

The social security system includes basic health care, sickness insurance, a pension scheme, and social care. Social security costs are covered from resources acquired by the wage levy, the income tax, and state subsidies and contribution. Currently, a new concept of the social security system is being prepared.

APPENDIX I.

LIST OF THE MOST IMPORTANT LEGAL ACTS

Act 173/1988 Coll., as amended by Act 112/1990 Coll., on enterprises with foreign property participation.

Act 104/1990 Coll., on joint-stock companies.

Act 109/1964 Coll., (Economic Code), as amended by subsequent legal acts, especially Act 103/1990 Coll.

Act 121/1962 Coll., on economic arbitration, as amended by subsequent legislation, especially Act 106/1990 Coll.

Act 528/1990 Coll. (Foreign Exchange Act).

Act 526/1990 Coll. (Price Act).

Act 44/1974 Coll. (Customs Act), as amended by subsequent legal acts, especially Act 5/1991 Coll.

Act 42/1980 Coll., on foreign relations with foreign countries, as amended by subsequent legal acts, especially Act 113/1990 Coll., whose implementing regulations are as follows:

Decree of the Government of the Czech and Slovak Federal Republic 256/1990 Coll.,

Decrees of the Federal Ministry of Foreign Trade 533/1990, 8/1991 and of January 17, 1991.

Act 157/1989 Coll., on the corporate income tax, in the wording of Act 108/1990 Coll.

Act 73/1952 Coll., on the turnover tax, in the wording of Act 107/1990 Coll.

Act 403/1990 Coll., on mitigating the consequences of some property injuries (Small Restitution Act).

Act 427/1990 Coll., on transfers of state-owned property to other juristic or natural persons (Small-Scale Privatization Act).

Act 87/1991 Coll. on extrajudicial rehabilitations (Large Restitution Act).

Act 92/1991 Coll. on conditions and terms governing the transfer of state-owned property to other persons (Large-Scale Privatization Act).

Act 63/1991 Coll. - Antimonopoly Act

Decree of the Government of the Czech and Slovak Federal Republic 132/1991 Coll., stipulating conditions under which a foreign property participation enterprises may be established without an approval.

APPENDIX II

ADDRESSES OF SELECTED FEDERAL AND REPUBLIC BODIES

1. Federal Bodies (Czechoslovakia, Prague phone numbers: 42 2 . . .)
Federal Agency for Foreign Investment
Federal Ministry of Economy
nábř. kapt. Jaroše 1000
170 32 Praha 7, Phone: 389 28 23, Fax: 37 60 63

Federal Ministry of Economy
nábř. kapt. Jaroše 1000
170 32 Praha 7, Phone: 389 11 11

Federal Ministry of Finance
Letenská 15
118 10 Praha 1, Phone: 514 11 11

Federal Ministry of Foreign Trade
Politických vězňů 20.
112 49 Praha 1, Phone: 2126 11 11

Federal Ministry of Transportation
nábř. L. Svobody 12
125 02 Praha 1, Phone: 2891

Czechoslovak State Bank
Na Příkopě 28
110 03 Praha 1, Phone: 2112

2. Czech Republic Bodies

Agency for Foreign Investment and Cooperation
Ministry for Economic Policy and Development of the CR
Vršovická 65
101 60 Praha 10, Phone: 712 11 11

Ministry of National Property Administration and Privatization of the Czech Republic
Senovážné nám. 32
110 00 Praha 1, Phone: 236 20 65-082

Ministry of Finance of the Czech Republic
Letenská 15
118 10 Praha 1, Phone: 514 11 11

Ministry of the Interior of the Czech Republic
Strojnická 27
170 89 Praha 7, Phone: 335 11 11

3. Slovak Republic Bodies (Czechoslovakia, Bratislava phone numbers: 42 7 . . .)
Slovak Government Agency for Foreign Investment
Tomášikova 32
821 01 Bratislava, Phone: 22 45 75

Ministry of Finance of the Slovak Republic
Štefanovičova 5
813 08 Bratislava, Phone: 49 69 51

Ministry of National Property Administration and Privatization of the Slovak Republic
Drieňova 27
811 05 Bratislava, Phone: 23 43 32

Ministry of the Interior of the Slovak Republic
Martanovičova 2
812 72 Bratislava, Phone: 206 11 11

APPENDIX III

LIST OF THE INVESTMENT PROMOTION AND PROTECTION AGREEMENTS TO WHICH THE CZECH SLOVAK FEDERAL REPUBLIC IS A PARTY

No.	Country	No.	Country
1	Economic Union of Belgium and Luxembourg	9	Sweden
2	Italy	10	Canada
3	France	11	Spain
4	Federal Republic of Germany	12	Denmark
5	Switzerland	13	Norway
6	Austria	14	Netherlands
7	United Kingdom	15	Greece
8	Finland	16	Australi

APPENDIX IV

LIST OF THE BILATERAL DOUBLE TAXATION PREVENTION AGREEMENTS TO WHICH THE CZECH AND SLOVAK FEDERAL REPUBLIC IS A PARTY

No.	Country	Date	Legal Act/Coll.
1	Netherlands	5. 11. 1974	138/1974
2	France	25. 1. 1975	73/1975
3	Finland	24. 7. 1976	134/1976
4	Belgium	17. 12. 1977	24/1978
5	Japan	25. 11. 1978	46/1979
6	Austria	12. 2. 1979	48/1979
7	Sri Lanka	19. 6. 1979	132/1979
8	Norway	28. 12. 1979	35/1980
9	Sweden	8. 10. 1980	9/1981
10	Cyprus	30. 12. 1980	30/1981
11	Spain	5. 6. 1981	23/1982
12	Denmark	27. 12. 1982	53/1983
13	Germany (FRG)	17. 11. 1983	18/1984
14	Yugoslavia	17. 4. 1983	99/1983
15	Italy	26. 6. 1984	17/1985
16	India	13. 3. 1987	77/1987
17	People's Republic of China	23. 12. 1988	41/1988
18	Greece	23. 5. 1989	98/1989
19	Brazil	14. 11. 1990	200/1991
20	Nigeri		

APPENDIX V

THE FEDERAL AGENCY FOR FOREIGN INVESTMENT

1. Introduction

The Federal Agency for Foreign Investment was created in October 1990 with a simple but powerful objective - to promote a rapid inflow of foreign investment into Czechoslovakia. We see foreign investment as a vital condition for an effective transformation from a centrally planned to a market economy. The Agency will cooperate in its goal with analogous formations established on the level of individual republics.

The activity of the Agency is founded on the principles of liberal philosophy in economic management. This philosophy calls for removal of impediments to the entry of foreign investment and emphasizes the need for free access of foreign investors to broad areas of economic activity, under the rule of "what is not forbidden is allowed". The Agency will try in the spirit of these principles to create the most favourable conditions for the inflow of foreign investment.

The Agency is striving to become a "one-stop-shop". We hope to create an institution which will be able to provide investors with all the necessary information for their activities in Czechoslovakia.

2.Scope of activities

The Agency has developed, within a short period of time, a relatively wide scope of activities. These activities include information, advisory, monitoring, and initiation services, as well as analytical activites and policy development.

a. Information and advisory services

The information and advisory services focus primarily on the provision of macroeconomic and financial data, information on structural and regional policies, economic parameters, legislative, and organizational information on business and investment possibilities in Czechoslovakia and on Czechoslovak producers and their business plans. A crucial part of the Agency's work is the dissemination of information domestically and abroad about the condition for the entry of foreign investment into Czechoslovakia, the objective and principles of the Government's policy, the instruments for enforcement, and national priorities. The Agency will strive to present clear a image of the country, describing the economic conditions for foreign investment and stressing the country's comparative advantages. At present, this wide scope of activities is performed primarily through the Agency's headquarters in Prague, but we anticipate an expansion of the Agency's activities abroad, reaching out to foreign investors.

The advisory services can be provided in different areas. The Agency's close affiliation with the Federal Ministry of Economy gives it a unique position in familiarizing foreign companies with policies of the Federal Government. It also makes it particularly well-placed for identifying the most suitable counterparts for foreign investors in the Government administration - both federal and national- and also for analyzing the country-wide implication of economic policy and institutional changes.

b. Monitoring function

The monitoring function involves monitoring investment enquires as well as follow-up actions. The Agency is building a data base of investment enquires from both domestic and foreign enterprises. The Agency is also planning to link up with other information networks - both domestic and foreign - to widen the scope of information which can be offered to domestic and foreign companies.

c. Initiation function

The initiation function of the Agency consists of identifying opportunities in Czechoslovakia and contacting potential foreign investors, although the bulk of these activities will take place in the national agencies for investment promotion and between companies themselves. The Federal Agency plans to play this role in the areas of Federal mandate and, in cooperation with the national agencies, on the level of the republics.

d. Analytical function

The analytical function of the Agency handles the evaluation of factors influencing the inflow of foreign investment to Czechoslovakia. The Agency also follows and evaluates changes on the world market and how they may impinge upon the investment of foreign capital. This information is juxtaposed against Czechoslovak objectives and priorities in the area of foreign investment. This information can provide a basis in the future for marketing studies in support of foreign investment by identifying new investment possibilities in Czechoslovakia.

e. Policy development

The policy function of the Agency consists of identifying policy and institutional constraints (barriers) to the entry of foreign investment and making recommendations to the Government for changes. The Agency is not a policy-making institution, but rather provides the Government with important feedback.

3. Organizational structure

At present, the Agency is an independent department in the section of foreign relations in the Federal Ministry of the Economy. Expenditures on the Agency's activities are, therefore, financed from the budget of the Ministry.

The Agency has a President, Dr. Zdeněk Drábek, who is assisted by an Executive Director. The Agency is staffed with experienced and qualified professionals whose work is divided by geographical areas.

The Agency has a legal advisor familiar with Czechoslovak law on foreign investment, a professional responsible for liaison with Czechoslovak companies, and a data processing unit for the Agency's monitoring function.

4. Location

The Federal Agency for Foreign Investment is located at:

the Federal Ministry of Economy,
nábř. kapt. Jaroše 1000
170 32 Praha 7
phone: 42-2-389 28 23
fax:42-2-37 60 63.

Annex II:

Privatization and Foreign Investment in Hungary

STATE PROPERTY AGENCY

PRIVATIZATION AND FOREIGN INVESTMENT IN HUNGARY

H-1339 BUDAPEST, P.O. Box 708

ÁLLAMI VAGYONÜGYNÖKSÉG

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II. Main Elements of Privatization and Foreign Investments as Regulated and Practiced in Hungary 5

III. Accomplishment Data and Experiences 9

IV. Whom to Contact and Other Practical Information on Setting up and Operating a Company in Hungary 10

PRIVATIZATION AND FOREIGN INVESTMENT IN HUNGARY

I. Strategy and General Issues

1. In 1990 a peaceful revolution took place in Hungary. The people of the country determined the composition of Parliament in free elections, and on May 23, 1990, the coalition government of three parties, the Hungarian Democratic Forum, the Independent Smallholders' Party and the Christian Democratic People's Party, became the first accountable government of the new Hungarian Republic.

In the principles underlying its Programme of National Renewal, the Government stated that standing for freedom, for the people, and for economic transformation, it wished to be a European government. The Government considers it important to be a country of citizens growing according to their capacities, qualifications and readiness for enterprise.

Although it will take time, a real **market economy** should be created because:

- the values of political pluralism are most in harmony with autonomous, decentralized economic decision making;
- a market economy promotes such values as entrepreneurship, tolerance, and willingness to compromise;
- experience suggests that market economies reach high levels of economic efficiency and reconcile divergent social interests;
- it will create a better foundation for establishing an effective social safety net; and
- only by having an economy based on principles acceptable to the European Community can Hungary hope to become integrated into the Europe with which it is historically linked.

2. A social market economy and private property are fundamental principles declared by the new Constitution. In order to create a real market economy the overwhelming proportion of **state property rights have to be transferred to the private sector.** Therefore the government's objective is that as a result of privatization the share of private property should be increased so that approximately 90 per cent share of the state owned enterprises in the sphere of industry, trade, banking and other economic activities should be reduced to about 30-40 per cent in a few years.

It is expected that in gradually approaching the above proportions, the property of the nation will be operated by owners with actual interests in increasing profits and the value of the assets, with these motivations becoming decisive in the national economy. Through this the economy's **efficiency should** improve. As a result private ownership will gradually gain momentum and the property rights of municipalities and institutions will be strengthened.

3. In order to reach the above aims Hungary has had **to create a proper environment** – to attract direct foreign investments and to harness its impulses and channel them towards positive actions. Hungary is attractive to foreigners because its good geopolitical position offers access to the huge Eastern market, it has fairly well trained labour, with relatively low labour costs and it has traditions in international East-West deals. The reform of the banking system – especially when more thoroughly implemented, with more and more domestic and foreign commercial banks – also makes Hungary attractive. Due to the changes in the price system, only approximately 16 per cent of products and services have fixed prices, a figure similar to western countries. In 1989 the rigid state wage regulation was ended. The government has also expanded the liberalization of imports to the point where about 90 percent do not require licences. The Hungarian currency, the Forint, is already convertible in the business sector; for the civil population, full convertibility of course will necessarily take longer, although substantial elements of it are already in operation (e.g. all Hungarians may deposit their hard currencies with Hungarian banks without the requirement to declare the origin of the money and they are absolutely free to dispose of these deposits).

Hungary is part of the major international regulatory schemes regarding international trade and finance in general, and privatization (foreign investment) in particular.

Hungary participates in multilateral (GATT, IMF, WB, EBRD, MIGA, Washington Convention) organizations and conventions of intergovernmental cooperation.

Multilateral agreements on international commercial transactions (as prepared by UN, UNCITRAL, UNIDROIT; the Hague Conference, etc.) and bilateral agreements with the EC, EFTA and with Western countries on trade, economic cooperation, protection of investments, avoidance of double taxation etc. also help the country to integrate into the world economy.

4. To make its economy transparent for international and domestic investors Hungary has created stable legal rules and an institutional system.

The privatization process has followed this strategy so far, based on fundamental laws, including;

- Company Law (No. VI. 1988.)
- Transformation Law (No. XIII. 1989.)*
- Law on State Property Agency (No. VII. 1990.)*
- Law on Protection of State assets (No. VIII. 1990.)
- Law on privatization of state enterprises dealing with retail trade, catering trade and consumer services (No. LXXIV. 1990.),
- Asset Policy Guidelines (decree No. 20. 1990 of the Hungarian Parliament) aimed at a definite regulation and stabilization of the ownership relations.

The legal framework of privatization and a market economy are also supported by the following laws: Law on State Enterprises (No. VI. 1977.)*; the Law on Insolvency; (No. 11. 1986.)*; the Law on Competition (No. LXXXVI. 1990.); the Law on Stock Exchange (No. VI. 1990.); the Law on Entrepreneurship (No. V. 1990.); the Law on Foreign Investments (No. XXIV. 1988.)*.

* as subsequently modified

II. Main Elements of Privatization and Foreign Investments as Regulated and Practiced in Hungary

a.) Foreign Investments

1. No doubt, foreign investment and privatization are vital elements of the government strategy for economic development. **The government encourages purchases by foreigners,** granting them advantages in the course of the privatization. Owing to limited domestic demand, purchases by foreigners will dominate the initial stage of privatization. Foreign capital may promote the modernization of factories, plants, means of production and business instruments which are in a poor technical state, encourage technological development and the reform of management techniques. Two very important elements of this process are the financial stabilization of some of our enterprises and to open new markets.

To facilitate the privatization process by creating an attractive environment in which the private sector can prosper and render the country attractive to foreign investment the government – as indicated above (I/3-4) – laid the foundations for a supportive financial, trade, and legal framework.

2. To grant more security and other economic advantages for foreign investors the Hungarian Parliament adopted an **Act on Foreign Investments** in Hungary (Law No. XXIV. of 1988 with subsequent modifications), providing them several privileges and advantages.

Foreigners may establish joint ventures in Hungary on the basis of the Company Law (the modern market economy-based Company Law of 1988 with subsequent modifications), and on the basis of the previously mentioned Act on Foreign Investments.

3. The most important principles laid down in these laws on foreign investments are those summarized hereafter. Any company can pursue any activity which is not a state monopoly. Foreign trade is no longer a state monopoly in Hungary. A joint venture needs permission for an activity only in cases where Hungarian state owned enterprises, cooperatives or commercial companies need it, as well. The list of activities that require permission is very limited.

A commercial company is to be registered at the Court of Registration. This registration gives a company full legal capacity. The registration must also be published in the Bulletin of Companies.

Publicity is also an important principle of the new code: there are several decisions of a company that require publication in the Bulletin of Companies.

Acts have been adopted on securities, on the Hungarian Stock Exchange and on the Hungarian Stock Exchange Council (e.g. Law No. VI. of 1990). These provide the necessary legal guarantees for the sale of shares. The Hungarian Stock Exchange was established last summer and it's activity is developing continuously.

Foreigners can freely establish a joint venture in Hungary with a majority in capital.

The Act on Foreign Investments in Hungary gives several advantages to these companies.

- Non-cash contributions to the company's capital which are regarded as a means of production can cross the Hungarian border duty-free.
- Cash contributions to the capital paid in a convertible currency by a foreign member can be kept in convertible currency by the company. The company can buy means of production, spare parts and equipment freely from abroad in the value of the cash in convertible currency. Additionally a duty-free import is granted for these products.
- Joint ventures may acquire ownership of real estate and other rights in them for their economic activity.
- Hungary grants several tax advantages for joint ventures. These can be tax allowances from 40 per cent to 60 per cent depending on the amount and share of foreign capital or an absolute tax exemption in the case of certain activities, for up to 5 years, and tax allowances for another five years.

Foreign partners are entitled to freely transfer their dividend abroad in convertible currency. This is the rule for the sale of a membership right by a foreigner. These guarantees are laid down not only in our Act on Foreign Investments in Hungary, but also in the international agreements on the protection of foreign investments that Hungary has concluded.

Detailed information on how to find a partner and contact is in chapter IV.

b.) Privatization

4. The main **principles of the privatization strategy**, based on laws listed above (I/4.), are the following:

- The transfer of property rights has to be carried out by a **market-oriented** privatization process (not in one step) and **not** through reprivatization or through redistribution of state property. The issue of land is now being decided; a law on land ownership should give back land to the rural stratum engaged in agricultural activities and farming quite soon.
  Instead of reprivatization (restoring property in kind) the government proposed partial compensation in the form of securities, which can be used for buying new properties. This is currently being discussed in Parliament and aims for a definite regulation and stabilization of the ownership relations in the country.
- The privatization process should conform to the characteristics of the market such as real domestic and foreign demand and purchasing power. But in certain cases state intervention is needed, e.g. the liquidating of monopolies, or protecting the national interest in strategic situations.
- The application of different privatization methods should promote a wide circle of investors (e.g. employees).
- From an organizational viewpoint, the execution of the government's property policy, the organization and monitoring of the process of privatization and the selling of state owned enterprises and companies are the tasks of the State Property Agency (SPA).

5. The **State Property Agency** is the privatization organization of Hungary set up by Law No. VII. of 1990. It is controlled by the Board of Directors appointed by the Prime Minister. The General Manager is appointed by the Government. The about 120 persons of the staff are working in the framework of directorates.

6. The **number of state enterprises** to be privatized is close to 2200 and the book value of their assets is beyond HUF 2000 billion. Sixty-three percent of these enterprises were founded by ministries and 37 per cent by municipalities. Thirty-two per cent of them are state-administered and 56 per cent are self-managed. The remaining enterprises are in company forms and 100 per cent owned by the state. Since the March 1990 creation of the State Property Agency, 8-9 per cent of all enterprises have been privatized fully or partially with the coordinating and controlling role of the SPA.

7. The **channels of privatization** controlled and/or used by the SPA are the following:

- transformation and privatization of state-owned (state-administered or self-administered) enterprises initiated by the enterprises (quick, simplified procedures)
- centrally (SPA) initiated selling and privatization of state property (growing number of active programs)
- selling of state property initiated by potential (domestic and foreign-, private and legal entities) investors (begun in January 1991.)
- privatization of state enterprises dealing with retail trade, catering trade and consumer services.

The forms can be: public offering, private placement, Employee Share Ownership programs and so on.

8. Achieving these tasks according to the law, the **basic rules to be followed** by the SPA are the following:

- In the process of privatization the SPA should regard as the primary goal, the **most efficient possible future operation** of state property;
- The SPA should take care of the fulfillment of the requirements for publicity, transparency, tendering (where appropriate), real property evaluations;
- The SPA should publish continuously the privatization achievements, the applied methods, as well as criteria to be enforced during the carrying out of privatization;
- Within the legal framework the SPA should ensure the smoothest and quickest possible realization of the privatization plans initiated by enterprises in order to accelerate privatization;
- During the process of privatization the SPA should strive to harmonize the opinions of the ministries, employees and company managers, before making decisions;
- The SPA should initiate the privatization of larger companies important from the viewpont of the national economy. In the case of small and medium companies, privatization initiated by the companies should be decisive.

- To implement the privatization goals set by the law, in cooperation with the ministries and other agencies, the SPA should develop an overall long-term strategy as to what extent and in what timing privatization could be pursued most efficiently.

9. It is also planned, as called for by the law on the SPA, **"to privatize" privatization**. In order to cope with the task, i.e. the huge volume of enterprises to be privatized, the SPA intends to contract out with banks, consulting firms, funds, etc. to allocate certain tasks, while certain elements of the ownership rights continue to be controlled by the SPA in the future.

10. In the framework of the active privatization programs, the **First Privatization Program**, involving 20 companies, was launched in Sept 1990. Consultancy firms have been selected from over 250 investment banks and firms from all over the world who prepared proposals. Preparations for privatization have begun.

11. As to the **future plans** concerning the above mentioned channels:

a.) In the framework of active privatization programs, the **Second Privatization Program** has already been launched. The objective of the SPP is to implement the privatization of the enterprises which have already been transformed into economic associations. In addition, programs are intended to privatize **historical vineyards, to decentralize the construction enterprises,** to utilize **castles in the countryside** and to **decentralize monopolies**. Altogether the privatization of 100 enterprises will begin in this way during 1991.

b.) The privatizations initiated by enterprises can hardly be estimated. Provided that the conditions for privatization (e.g. great international interest, stable economy) will not change, and the impetus remains the same, presumably **200 enterprises are to be privatized** in this way during 1991.

c.) Taking into account the interest, it is estimated, that about **100 enterprises** will be privatized on the basis of the **initiation of potential investors.**

In a, b and c, **altogether 400 enterprises** will be privatized in 1991. Presuming that the average book value of their assets is about HUF 1 billion, this means at least HUF 400 billion or about 20 per cent of the book value of state assets. A similar performance can be estimated for 1992.

12. Proceeds from privatization are to be used primarily to service the state debt. To transfer shares in already transformed enterprises to local self-governments, to the Social Security Fund, and to foundations and associations that benefit the public is also part of government policy. Part of the privatization proceeds will be needed to improve the administration and promotion of privatization itself.

13. According to the Law on the State Property Agency, the **state property that belongs to the SPA**, which consists of ownership portions (shares, business-portions) of economic associations not acquired by Hungarian or foreign investors can be managed by the SPA only on an exceptional and transitional basis. It must either be privatized soon or entrusted contractually for proper management to private property managing agencies (banks and other independent market organizations). The sum of this state property for the time being is over HUF 80 billion, involving the assets to be sold by the enterprises. The utilization of this property has already started.

III. Accomplishment Data and Experiences

1. Foreign capital seems to have great trust in Hungary as evidenced by the fact that by the end of 1990 the number of joint ventures with foreign participation exceeded 5,000. Expressed in US dollars, the foreign capital involved is about $ 1 billion.

The outstanding position of Hungary is also characterized by the fact that more than half of the foreign capital invested into Central and Eastern Europe has been focussed on Hungary. The list of firms with investments in Hungary is impressive including: General Electric, Ford, General Motors (US), Siemens (Germany), Suzuki (Japan), Electrolux, Ericson (Sweden), Ansaldo (Italy), Girozentrale, Creditanstalt-Bankverein (Austria), Banque Nationale de Paris, Credit Lyonnais Bank (France), Nomura (Japan), Credit Suisse First Boston (Swiss-American).

2. In the privatization process since March 1, 1990 sixty-six transformations have been started with the assistance of the SPA. This affects state property with a combined book value of HUF 71,3 billion, revalued at HUF 103,7 billion. In the 28 approved transformation cases the revalued amount of the property was HUF 44,8 billion; a further 29 cases are in process.

Some of the best-known international companies, involved in the deals of the SPA are the following:

Hungarian Company	Foreign Company	Country
Chinoin	Sanofi	France
Sárvári and Kaposvári Sugar Factories	Agrana	Austria
Szerencsi and Szolnoki Sugar Factories	Beghin-Say	France
Compack	Sara-Lee	U.S.
Pécsi Dohánygyár	B.A.T. Industries	Great Britain
Petőfi Nyomda	Cohfin	Italian-French

IV. Whom to Contact, and Other Practical Information on Setting up and Operating a Company in Hungary

1. Finding a Partner. The best of course, one is your traditional trading partner. There are a number of additional agencies, who are willing to assist you in your investment efforts.

- The Agency for Investment and Trade Promotion (1055 Budapest, Honvéd utca 13-15. Tel: 1530-000/1330);
- The Hungarian Chamber of Commerce (1055 Budapest, Kossuth L. tér 6-8. Tel: 153-3333, Fax: 153-1285) and
- The Hungarian InvestCenter-Tradeinform (1051 Budapest, Dorottya utca 4. Tel: 118-5044/221, Fax: 118-3732)

all publish listings of Hungarian firms seeking foreign partners.

The Hungarian Chamber of Commerce will suggest possible partners from among its 2,000 members to interested investors.

The following firms will provide information on Hungarian companies: Firm Information Bureau (1519 Budapest, P.O. Box 324, Fax: 161-2605), Hunginfo (1016 Budapest, Krisztina krt 99. Tel: 156-8281, Fax: 175-0401).

2. Similar to Western company law regulations, these officers of Hungarian business organizations are *qualified to negotiate* mergers with foreign firms. They are:

Limited or unlimited partnership:	Authorized Partner
Joint company:	Director
Limited liability company:	Authorized Manager
Shareholding company:	Authorized Board Member
State enterprise:	Director or State Property Agency (SPA)*

3. When it comes to the **forming and operating of a company in Hungary**, the additional information below might be useful.

a.) Articles of Association:

To form a company in Hungary the founders must draw up Articles of Association.

To be allowed to register, a company must have at least HUF one million in total capital, in the case of a Limited Liability Company and HUF 10 million for a Company Limited by Shares. HUF 500,000 or 30 percent, whichever is larger, of this amount must be on deposit in a Hungarian bank, before submission to the Registration Court. Certification of this deposit must be provided as part of the registration application. The Articles of Association must be endorsed by an attorney of law or by a legal counsel.

A company is required by law to file for registration with the Registration Court within 30 days of its foundation.

To register, all business organizations must complete an application form (Cégjegyzék Nyomtatványcsomag) available at the Registration Court. The standard practice is to engage a lawyer to complete the form and present it to the Court. There is no facility at the Court to help a company to register. The registration fee is 2 percent of the equity.

* If the enterprise falls under the jurisdiction of the State Property Agency, only the SPA may negotiate mergers. Over a certain amount of money, the SPA must approve all transactions involving state enterprises.

The Registration Court verifies that all of the business organization's documents pertaining to its organization and operation are in accordance with Hungarian law. If all of the required documentation is in order, the company will be registered.

A company is allowed to commence operations once its Articles of Association are signed. After filing with the Registration Court, it is possible to dispose of the bank deposit. However, until the company is registered, its members are treated as private individuals under the law. Registration, when it occurs, is retroactively applied to the company's activities.

In Budapest, the Registration Court is located at: 1064 Budapest, Rózsa Ferenc utca 79.

b.) Taxation Registration:

After registering with the Court, joint-ventures must register with the State Taxation Office (APEH, 1096 Budapest, Hámán Kató u. 3-5.).

c.) Repatriation of Profits:

Profits, as well as assets remaining after liquidation are freely convertible into hard currency without a foreign exchange license if the following conditions are met:

- the company has sufficient funds to finance the transfer;
- the foreign investor has requested the transfer; and
- the transfer is made in the currency of the initial investment.

Profits are repatriated at the official exchange rate at the time of the transfer. A fixed rate, however, can be negotiated, in advance, on a semi-permanent basis.

Minister of Finance Decree No. 79/1988 permits non-Hungarian employees of Hungarian firms with foreign participation to repatriate 50 percent of their taxable income without a foreign exchange license, if it is into the currency of the country where they have their permanent residence.

d.) Employment:

Special authorization is no longer required for economic associations with foreign participation to employ Hungarian citizens. A non-Hungarian employee, however, must have a work permit, issued by the labor department of the appropriate county council, and a residence permit, which is issued by:

Office of Foreigners' Affairs (KEOKH)
1061 Budapest, Andrássy út 12. (formerly Népköztársaság útja 12).
Tel: 118-0800

March 1991



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INTERNATIONAL STUDIES CENTRE (ISC)
INSTITUTE OF FOREIGN AFFAIRS

Established in 1969, the Institute of Foreign Affairs is dedicated to providing in – service training mainly for Thalland's forelgn service officers as well as other goverment officials in order that they may be able to carry out their duties with professional efficiency.

The Institute has since extended its activities to include research and studies on wide – ranging intemational issues, to foster better appreciation and understanding of international affairs as well as facliate interchange on foreign policy issues. In order to serve this purpose more effectively, a new body, the International Studies Centre, was formed in April 1987 to undertake the Institute's sphere of activities relating to research, studies and conferences.

Under the present organizational structure, the Centre's policy is guided by a Policy Council under the chairmanship of H.E. Dr. Thanat Khoman, former Foreign Minister and Deputy Prime Minister. The Centre is administered by a Board of Directors of the Institute of Foreign Affairs headed by the Minister of Foreign Affairs. The management of the Centre is vested in the Director of the Centre who is appointed by the Chairman of the Board of Directors.

The Centre's major objectives are to encourage studies and analyses of relevant policies and issues in various aspects of international affairs, Including;

- Foreign Policy
- International Law
- International Economics and
- International and regional organizations.

The Centre aims to create opportunities for policy and issue related discussion for the benefit of the formulation and conduct of foreign policy. Another objective of the Centre is to promote public awareness and understanding of major foreign policy issues.

In order to fulfil its objectives, the Centte has set out to undertake the following activities:

- provide a forum where national and international statesmen, prominent diplomats, government and business leaders and distinguished scholars are invited to give lectures on various aspects of interational affairs;
- organize national and international conferences in which interested persons both from the public and private sectors may participate;
- carry out research on different issues that would be beneticial to the formulation of Thai foreign policy;
- cooperate with other similar organizations and institutes, both in Thailand and abroad, in promoting the study and research of international affairs;
- publish results of the Centre's studies and other materials for dissemination.

เอกสารศึกษา

นโยบายต่างประเทศของไทย ในทศวรรษที่ 1980 : การย้อนพินิจ

ดร. จุลชีพ ชินวรรโณ

ศูนย์ศึกษาการต่างประเทศ
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วังสราญรมย์ กรุงเทพฯ ประเทศไทย

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ราคา เล่มละ 20.- บาท

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คำนำ

กล่าวโดยทั่วไป การดำเนินนโยบายต่างประเทศมีลักษณะเป็นการต่อเนื่อง ยากที่จะแบ่งช่วงระยะเวลาได้อย่างชัดเจน แต่สำหรับนโยบายต่างประเทศของไทยในช่วง 10 ปี จาก ค.ศ. 1980 ถึง 1990 นั้น มีลักษณะพิเศษที่สามารถนำมาแยกศึกษาได้ทั้งช่วงเวลาอย่างแจ่มชัด เพราะในช่วง 10 ปีนี้ กระทรวงการต่างประเทศ ซึ่งเป็นผู้รับผิดชอบในการดำเนินนโยบายต่างประเทศ อยู่ภายใต้การนำของพลอากาศเอกสิทธิ เศวตศิลา รัฐมนตรีว่าการกระทรวงการต่างประเทศ ซึ่งดำรงตำแหน่งติดต่อกันตลอด 10 ปี ตั้งแต่เริ่มเข้ารับตำแหน่งเมื่อปี 1980 จนพ้นตำแหน่งเมื่อเดือนสิงหาคม 1990 ทศวรรษ 1980 จึงอาจกล่าวได้ว่า เป็นทศวรรษของการดำเนินนโยบายต่างประเทศภายใต้ พลอากาศเอกสิทธิ เศวตศิลา

เอกสารศึกษาเรื่อง "นโยบายต่างประเทศของไทยในทศวรรษที่ 1980 : การย้อนพินิจ" นี้ รศ.ดร. จุลชีพ ชินวรรโณ ผู้เขียน ได้ประมวลและวิเคราะห์การดำเนินนโยบายต่างประเทศของไทยในช่วง 10 ปี จาก ค.ศ. 1980-1990 โดยพิจารณาทั้งสถานการณ์จากการเมืองภายใน และการเมืองภายนอก ซึ่งเป็นปัจจัยสำคัญในการกำหนดนโยบายต่างประเทศ และได้จำดับเหตุการณ์ออกเป็น 3 ช่วงเวลาคือ ช่วง 5 ปีแรก ระหว่าง ค.ศ. 1980 ถึง 1984 ซึ่งเป็นช่วงที่ประเทศไทยกำลังเผชิญภัยทั้งภายในและภายนอก ภัยจากภายในคือ การก่อการร้ายของพรรคคอมมิสนิสต์ ส่วนภัยจากภายนอก คือ การคุกคามของเวียดนามตามแนวพรมแดนไทยกับกัมพูชา ในช่วงนี้ การกำหนดและดำเนินการนโยบายต่างประเทศจึงเน้นที่ความมั่นคงของชาติ เพื่อรักษาอธิปไตยของชาติจากการขยายอิทธิพลของเวียดนาม โดยการสนับสนุนจากสหภาพโซเวียต ซึ่งกระทรวงการต่างประเทศได้มีบทบาทอย่างโดดเด่นในช่วงนั้น ช่วงที่สองระหว่าง ค.ศ. 1985-1988 นโยบายต่างประเทศยังคงเน้นเรื่องความมั่นคง แต่เสริมมิติทางเศรษฐกิจมากขึ้น โดยการนำหลักการ "การทูตนำการค้า" ส่วนช่วงที่สาม ระหว่าง ค.ศ. 1988 ถึงปัจจุบันเป็นช่วงที่มีลักษณะพิเศษประการหนึ่ง หลังจากการเปลี่ยนนายกรัฐมนตรี จาก พลเอกเปรม ติณสูลานนท์ เป็น พลเอกชาติชาย ชุนหะวัณ คือปัจจัยการเมืองภายในประเทศ ซึ่งมีผลกระทบต่อการดำเนินนโยบายต่างประเทศอย่างมาก ในเมื่อนายกรัฐมนตรี

และคณะที่ปรึกษา ได้เข้ามีบทบาทในการกำหนดและดำเนินการต่างประเทศเสียเอง มีวิธีการและมาตรการต่างแบบ ต่างแนว จากกระทรวงการต่างประเทศ ซึ่งยังผลให้มีปัญหาในเรื่องเอกภาพและการสับสนในการกำหนดและดำเนินนโยบายต่างประเทศเกิดขึ้น ทั้งนี้นับว่าเป็นปรากฏการณ์ใหม่และค่อนข้างพิศดารในประวัติศาสตร์การทูตของไทย ซึ่งหวังว่าวันหนึ่งนักวิชาการคงจะได้ทำการศึกษาปรากฏการณ์ในช่วงนี้อย่างละเอียดลึกซึ้ง เพื่อเป็นบทเรียนสำหรับอนุชนรุ่นหลัง

กิจกรรมหลักประการหนึ่งของศูนย์ศึกษาการต่างประเทศ คือ การศึกษาเรื่องนโยบายต่างประเทศ ในการนี้ ศูนย์ฯ ได้จัดให้มีการประชุมโต๊ะกลม ประกอบด้วยนักวิชาการและข้าราชการผู้ปฏิบัติงานด้านนโยบายต่างประเทศ ในเรื่อง "นโยบายต่างประเทศของไทยจากทศวรรษที่ผ่านมาสู่อนาคต" เมื่อวันที่ 23-24 มิถุนายน 2533 รศ.ดร. จุลชีพ ชินวรรโณ เป็นนักวิชาการผู้หนึ่งซึ่งศูนย์ฯ ได้ขอให้เป็นผู้บรรยายสรุปในเรื่อง "นโยบายต่างประเทศของไทยในทศวรรษที่ 1980 : การย้อนพินิจ" เพื่อเป็นพื้นฐานในการอภิปรายของที่ประชุมโต๊ะกลมนี้ หลังจากนั้น ศูนย์ศึกษาการต่างประเทศได้ขอร้องให้ รศ.ดร. จุลชีพ ชินวรรโณ เรียบเรียงการบรรยายสรุปดังกล่าวเป็นรูปเล่ม เพื่อเป็นเอกสารศึกษาของศูนย์ฯ ต่อไป

รศ.ดร. จุลชีพ ชินวรรโณ เป็นนักวิชการ ผู้ทรงคุณวุฒิทางด้านการศึกษานโยบายต่างประเทศของไทย ดังที่ปรากฏผลงานในหนังสือและเอกสารหลายเล่มที่ท่านได้เขียนไว้เกี่ยวกับนโยบายต่างประเทศของไทย ศูนย์ศึกษาการต่างประเทศจึงใคร่ขอขอบคุณ รศ.ดร. จุลชีพ ชินวรรโณ เป็นอย่างยิ่ง ที่ได้กรุณาเขียนเอกสารศึกษาฉบับนี้ และหวังว่าจะเป็นประโยชน์แก่ผู้สนใจในการต่างประเทศของไทยโดยทั่วไป อย่างไรก็ดี ข้อคิดเห็นในเอกสารนี้เป็นของผู้เขียนแต่ผู้เดียว มิได้เป็นการสะท้อนความเห็นของศูนย์ศึกษาการต่างประเทศแต่ประการใด

แผน วรรณเมธี

(นายแผน วรรณเมธี)
ผู้อำนวยการศูนย์ศึกษาการต่างประเทศ

คำชี้แจง

ในทศวรรษที่ 1980 ประเทศไทยได้ดำเนินนโยบายต่างประเทศอย่างน่าสนใจ และค่อนข้างประสบความสำเร็จในการรักษาผลประโยชน์แห่งชาติ ในฐานะที่มีอาชีพเป็นอาจารย์ จึงได้ติดตามวิเคราะห์การดำเนินนโยบายต่างประเทศของประเทศไทยมาตลอด 10 ปีที่ผ่านมา เพื่อใช้ในการสอนแก่นักศึกษาทั้งระดับปริญญาตรี และปริญญาโท ของคณะรัฐศาสตร์ มหาวิทยาลัยธรรมศาสตร์

เมื่อได้รับการทาบทามจากท่านผู้อำนวยการศูนย์ศึกษาการต่างประเทศและอดีตปลัดกระทรวงต่างประเทศ คุณแผน วรรณเมธี ให้วิเคราะห์สรุปในหัวข้อ "นโยบายต่างประเทศของไทยในทศวรรษที่ 1980 : การย้อนพินิจ" ในการประชุมโต๊ะกลมของศูนย์ศึกษาการต่างประเทศเรื่อง "นโยบายต่างประเทศของไทยจากทศวรรษที่ผ่านมาสู่อนาคต" จึงรู้สึกเป็นเกียรติยิ่งและตอบรับด้วยความยินดี ในการประชุมโต๊ะกลมครั้งนี้ ผู้เข้าร่วมประชุมล้วนเป็นผู้ทรงคุณวุฒิ ทั้งที่เป็นนักวิชาการ อาจารย์จากหลายมหาวิทยาลัย และข้าราชการระดับสูงของกระทรวงต่างประเทศ ทำให้สามารถตรวจสอบได้ว่า การวิเคราะห์นั้นถูกต้องใกล้เคียงกับที่กระทรวงต่างประเทศปฏิบัติไปเพียงใด ต่อมาก็ได้รับการขอร้องให้เพิ่มเติมตัวเลขและขยายความการวิเคราะห์ในบางตอน เพื่อจะได้นำไปจัดพิมพ์ต่อไป

เนื่องจากผู้เขียนมีเวลาค่อนข้างจำกัด จึงพยายามรวบรวมตัวเลขและข้อมูลเท่าที่จะทำได้ นอกจากนั้น ผู้เขียนยังได้ตัดสินใจใช้ "คริสตศักราช" (ค.ศ.) แทน "พุทธศักราช" (พ.ศ.) เพื่อความสะดวกในการนำเสนอ อย่างไรก็ดี งานเขียนนี้อาจมีความผิดพลาดบกพร่องอยู่บ้าง ไม่มากก็น้อย ผู้เขียนขอน้อมรับความผิดพลาดใด ๆ ที่อาจมีขึ้นแต่เพียงผู้เดียว

ผู้เขียนหวังว่า **นโยบายต่างประเทศของไทยในทศวรรษที่ 1980 : การย้อนพินิจ** เล่มนี้คงเป็นประโยชน์และมีส่วนช่วยให้นักศึกษาและผู้สนใจอื่น ๆ ได้เข้าใจนโยบายต่างประเทศของไทยในช่วงทศวรรษที่ 1980 บ้างพอควร

สุดท้ายนี้ ผู้เขียนขอขอบพระคุณ คุณแผน วรรณเมธี ผู้อำนวยการ ศูนย์ศึกษาการต่างประเทศ ที่กรุณาสนับสนุนการจัดพิมพ์เป็นรูปเล่มหนังสือ

รองศาสตราจารย์ ดร. จุลชีพ ชินวรรโณ
คณะรัฐศาสตร์ มหาวิทยาลัยธรรมศาสตร์
1 ธันวาคม 1990

นโยบายต่างประเทศของไทยในทศวรรษที่ 1980
การย้อนพินิจ

รศ. ดร. จุลชีพ ชินวรรโณ
คณะรัฐศาสตร์ มหาวิทยาลัยธรรมศาสตร์

เมื่อเริ่มทศวรรษที่ 1980 ประเทศไทยอยู่ในสภาวะที่ค่อนข้างคับขัน ทั้งทางการเมืองและเศรษฐกิจ ทั้งภายในและจากภายนอกประเทศ สำหรับทางด้านการเมืองภายใน ประเทศไทยใน ค.ศ. 1980 กำลังอยู่ในระหว่างการพัฒนาประชาธิปไตย การแบ่งสรรอำนาจและบทบาททางการเมืองระหว่างสถาบันข้าราชการ สถาบันทหาร สถาบันรัฐสภา และพรรคการเมืองยังไม่สู้ลงตัว อีกทั้งการมีส่วนร่วมทางการเมืองของประชาชนโดยผ่านพรรคการเมืองก็ยังไม่ขยายตัวมาก ยิ่งไปกว่านั้นประเทศไทยก็เพิ่งมีการเปลี่ยนผู้นำจาก พลเอก เกรียงศักดิ์ ชมะนันท์ มาเป็น พลเอก เปรม ติณสูลานนท์ ซึ่งขึ้นดำรงตำแหน่งนายกรัฐมนตรีในเดือนมีนาคม ค.ศ. 1980

เศรษฐกิจของประเทศในปี ค.ศ. 1980 นี้ก็เต็มไปด้วยปัญหาโดยเฉพาะอย่างยิ่งปัญหาเงินเฟ้อ อันสืบเนื่องมาจากราคาน้ำมันเพิ่มสูงขึ้น โครงสร้างทางเศรษฐกิจเปราะบาง เพราะพึ่งรายได้จากการส่งสินค้าออกเพียงไม่กี่ชนิด ซึ่งส่วนใหญ่แล้วเป็นสินค้าเกษตรกรรม ในด้านความมั่นคงภายใน รัฐบาลไทยก็กำลังเผชิญกับปัญหาการก่อการร้ายของผู้ก่อการร้ายคอมมิวนิสต์ซึ่งได้รับการสนับสนุนจากภายนอก

ทางด้านต่างประเทศ ประเทศไทยกำลังเผชิญกับภัยคุกคามความมั่นคง จากการที่เวียดนามได้รุกรานและยึดครองกัมพูชา ซึ่งมีพรมแดนติดต่อกับไทย และได้จัดตั้งระบอบเฮงสัมรินที่พนมเปญ และคงทหารไว้ในกัมพูชาตั้งแต่เดือนมกราคม ค.ศ. 1979 อีกทั้งสหรัฐอเมริกาซึ่งเคยเป็นมิตรประเทศที่ใกล้ชิดที่สุดของไทย ก็ได้ถอนทหารและลดบทบาทในเอเชียตะวันออกเฉียงใต้ ในขณะเดียวกัน สาธารณรัฐประชาชนจีนและสหภาพโซเวียตก็กำลังแข่งขันเพื่อขยายอิทธิพลในภูมิภาคนี้ ประเทศไทยจำต้องดำเนินนโยบายต่างประเทศอย่างสุขุมรอบคอบเพื่อความอยู่รอดปลอดภัยของประเทศชาติ

เมื่อย้อนพินิจไป นับตั้งแต่ปี ค.ศ. 1980 จนถึงปัจจุบัน นับเป็นเวลา 10 ปี แล้ว แม้ว่าประเทศไทยจะเผชิญกับวิกฤตการณ์หลายครั้ง แต่ก็สามารถดำเนินนโยบายต่างประเทศอย่างชาญฉลาด ประดุจนักมวยไทยที่เผชิญกับคู่ต่อสู้ที่ใหญ่กว่า แต่ก็สามารถ "เต้นฉาก" หลบหมัดของคู่ต่อสู้ได้ทุกครั้ง อีกทั้ง "แย็ป" เก็บคะแนนตลอดเวลา จนอาจกล่าวได้ว่า นโยบายต่างประเทศของไทยในช่วงทศวรรษที่ 1980 ภายใต้การนำของ พล อ.อ.สิทธิ เศวตศิลา ผู้ซึ่งดำรงตำแหน่งรัฐมนตรีต่างประเทศไทยตั้งแต่เดือนมีนาคม ค.ศ. 1980 จนถึงปัจจุบัน* ประสบความสำเร็จค่อนข้างมาก

โดยทั่วๆ ไป นโยบายต่างประเทศของไทยในทศวรรษที่ 1980 มีลักษณะที่แตกต่างจากในทศวรรษก่อนๆ มาก ดังจะเห็นว่า นโยบายต่างประเทศของไทยในอดีตช่วงหลังสงครามโลกครั้งที่สอง มักจะเน้นความสัมพันธ์กับมหาอำนาจเท่านั้น โดยมักจะผูกพันกับประเทศมหาอำนาจเพียงประเทศเดียว เช่น การเป็นพันธมิตรกับสหรัฐอเมริกา[1] เพื่อต่อต้านภัยจากคอมมิวนิสต์ในทศวรรษที่ 1950 และ 1960 หรือพยายามปรับท่าทีในความสัมพันธ์กับมหาอำนาจทั้งสาม คือ สหรัฐอเมริกา สาธารณรัฐประชาชนจีน และสหภาพโซเวียต ให้มีระยะห่างเท่าๆ กัน (equi-distant) โดยไม่สู้จะให้ความสำคัญกับประเทศอื่นๆ ในภูมิภาคอื่นๆ หรือความสัมพันธ์ด้านอื่นๆ ส่วนในทศวรรษที่ 1980 นี้ นโยบายต่างประเทศของไทยเปลี่ยนแปลงไปซับซ้อนขึ้น มีลักษณะ **"รอบด้าน"** (omni-directions) นั่นคือ ประเทศไทยดำเนินนโยบายต่างประเทศโดยให้ความสำคัญกับประเทศมหาอำนาจและประเทศที่กำลังพัฒนาในภูมิภาคต่างๆ รอบโลก และการดำเนินความสัมพันธ์กับประเทศเหล่านั้น ก็ขยายออกไปทุกๆ ด้าน รวมทั้งทางด้านเศรษฐกิจและวัฒนธรรม นอกเหนือจากด้านความมั่นคงและการทูต

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* บทความนี้ได้นำเสนอในการประชุมโต๊ะกลม เมื่อ 23 มิถุนายน ค.ศ. 1990 (พ.ศ. 2533) ต่อมาเมื่อมีการปรับรัฐบาลของนายกรัฐมนตรี พล อ.ชาติชาย ชุณหะวัณ ในวันที่ 27 สิงหาคม 1990 พล อ.อ.สิทธิ เศวตศิลา และ ร.ต. ประพาส ลิมปะพันธ์ ก็พ้นจากตำแหน่งรัฐมนตรีว่าการและรัฐมนตรีช่วยว่าการกระทรวงต่างประเทศ

1) จุลชีพ ชินวรรโณ "นโยบายต่างประเทศของไทย : ภูมิหลังและแนวโน้ม" ใน <u>เอเชียปริทัศน์</u> ปีที่ 1 ฉบับที่ 3 (เม.ย.-มิ.ย. 1980) หน้า 21-42

นโยบายต่างประเทศของไทยระหว่าง ค.ศ. 1980-1989 หรือในทศวรรษที่ 1980 นี้อาจแบ่งออกได้เป็น 3 ช่วงใหญ่ๆ ดังนี้คือ ช่วงแรกระหว่าง คศ. 1980-1984 ช่วงที่สองระหว่าง คศ. 1985-1988 และช่วงสุดท้ายระหว่าง คศ. 1988-ปัจจุบัน

1. <u>ช่วงแรกระหว่าง ค.ศ. 1980-1984</u> ประเทศไทยในช่วง 5 ปีแรกนี้อยู่ในสภาวะที่คับขันและล่อแหลม เพราะต้องเผชิญกับภัยทั้งภายในและภายนอก ภัยจากภายในคือการก่อการร้ายของพรรคคอมมิวนิสต์ ส่วนภัยจากภายนอกคือ การคุกคามของเวียดนามตามแนวพรมแดนไทยกับกัมพูชา ทั้งนี้เพราะเวียดนามได้รุกรานและยึดครองกัมพูชา อีกทั้งได้ครอบงำลาว ซึ่งทั้งสองประเทศนี้มีพรมแดนติดต่อกับไทย นโยบายต่างประเทศของไทยในช่วงนี้จึงเน้นที่ **"ความมั่นคง"** (security-oriented) และดำเนินไปในลักษณะ **"รอบด้าน"** (omni-directions) เพื่อแสวงหามิตรประเทศในการต่อต้านการขยายอิทธิพลของเวียดนามซึ่งได้รับการสนับสนุนจากสหภาพโซเวียต

ปัจจัยภายนอกที่สำคัญที่มีอิทธิพลต่อนโยบายต่างประเทศของไทยในช่วงนี้ คือ

1. <u>การที่เวียดนามล่วงล้ำพรมแดนของไทยที่โนนหมากมุ่น</u> หลังจากที่เวียดนามได้ยึดครองกัมพูชาตั้งแต่เดือนมกราคม ค.ศ. 1979 เวียดนามได้พยายามกวาดล้างกองกำลังต่อต้านของรัฐบาลกัมพูชาประชาธิปไตยที่เวียดนามได้โค่นล้มไป ต่อมาในระหว่างวันที่ 23-24 มิถุนายน ค.ศ. 1980 เวียดนามได้ส่งทหารล่วงล้ำพรมแดนไทยและปะทะกับทหารไทยที่บริเวณบ้านโนนหมากมุ่น อ.ตาพระยา จ.ปราจีนบุรี[2] การปะทะกันอย่างรุนแรงที่โนนหมากมุ่นนี้ ทำให้ทหารไทยเสียชีวิตหลายสิบคน และส่งผลให้ผู้นำไทย[3] โดยเฉพาะอย่างยิ่งนายกรัฐมนตรี พล อ. เปรม ติณสูลานนท์ และรัฐมนตรีต่างประเทศ พล อ.อ.สิทธิ เศวตศิลา มองเวียดนามว่า เป็นภัยคุกคามมั่นคงของไทย และหวาดระแวงว่าเวียดนามจะรุกรานประเทศไทย ตราบใดที่เวียดนามยังคงยึดครองและมีทหารอยู่ในกัมพูชา ตราบนั้นประเทศไทยก็ยังคงถูกคุกคามและไม่มั่นคงปลอดภัย

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2. จุลชีพ ชินวรรโณ "วิกฤตการณ์ชายแดนไทย-กัมพูชา กรณีโนนหมากมุ่น" ใน จุลชีพ ชินวรรโณ <u>ชนวนสงคราม ไทย จีน อินโดจีน</u> (กรุงเทพ : สำนักพิมพ์ดอกหญ้า 2529) หน้า 113-128

3. Kamol Tongthammachart et al. <u>The Thai Elite's National Security Perceptions : Implications for Southeast Asia</u> (Bangkok : Chulalongkorn University, 1983) pp.50-57

2. การขยายอิทธิพลของสหภาพโซเวียตในเอเชียตะวันออกเฉียงใต้ สหภาพโซเวียตได้ให้การสนับสนุนแก่เวียดนามทั้งทางการเมืองเศรษฐกิจและการทหาร โดยแลกเปลี่ยนกับการใช้ฐานทัพเวียดนามที่อ่าวคัมรานห์และดานัง[4] แสนยานุภาพของสหภาพโซเวียตในย่านนี้ได้เพิ่มมากขึ้นอย่างเห็นได้ชัดในทศวรรษที่ 1980 สหภาพโซเวียตได้ส่งเครื่องบินลาดตระเวนสอดแนม TU-95 มาปฏิบัติการที่ฐานทัพดานังในปี 1980 และอีก 4 ปีต่อมาโซเวียตได้ส่งเครื่องบินรบมาประจำที่ดานังเพิ่มขึ้น ทั้งแบบ TU-95 ที่เพิ่มขึ้นเป็น 16 ลำ แบบ TU-142 ประมาณ 8 ลำ เครื่องบินทิ้งระเบิด TU-16 จำนวน 16 ลำ และเครื่องบินประจัญบานแบบ MIG-23 อีกจำนวนหนึ่ง[5] นอกจากนั้น เรือดำน้ำและเรือรบโซเวียตได้มาจอดแวะพักที่ฐานทัพเรือที่อ่าวคัมรานห์อยู่เสมอ

เป้าหมายของการขยายแสนยานุภาพของสหภาพโซเวียตในเอเชียตะวันออกเฉียงใต้ คงเพื่อสะกัดกั้นอิทธิพลของสาธารณรัฐประชาชนจีน และพยายามลดอิทธิพลของสหรัฐอเมริกาในภูมิภาคนี้ นอกจากนั้นยังคงต้องการที่จะควบคุมเส้นทางเดินเรือในทะเลจีนตอนใต้และช่องแคบมะลากา[6] การขยายแสนยานุภาพและอิทธิพลของสหภาพโซเวียตในบริเวณนี้ได้ส่งผลกระทบต่อความมั่นคงของไทย ดังจะเห็นได้จากการที่กองเรือเฉพาะกิจของสหภาพโซเวียตอันประกอบด้วย เรือบรรทุกเครื่องบิน Minsk เรือยกพลขึ้นบก Ivan Rogov และเรือโจมตีอีกจำนวนหนึ่งได้แล่นเข้ามาใกล้บริเวณขุดเจาะน้ำมันและแก๊สธรรมชาติในอ่าวไทย ยิ่งไปกว่านั้นสหภาพโซเวียตยังพยายามแทรกแซงไทยโดยการจารกรรม เช่น

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4. Thomas P. Thornton, "The USSR and Asia in 1983 " Asian Survey XXIV : 1 (Jan 1984)

5. Thai Quang Trung "The Moscow-Hanoi AXIS and the Soviet Military Build-up in Southeast Asia" in Indochina Report no 8, October 1986 (Singapore : Information and Resource Center, 1986) pp. 22-23

6. F.A. Mediansky "Soviet Strategic Interests in Southeast Asia," in South East Asian Affairs 1984 (Singapore : Institute of Southeast Asian Studies, 1984), pp. 34-35

กรณีการจับกุมนายวิคเตอร์ บารีเชฟ[7] จารชนจากหน่วยสืบราชการลับของโซเวียต (GRU) ในคราบของนักการทูตในเดือนพฤษภาคม คศ. 1983 ได้ตอกย้ำความหวาดระแวงของผู้นำไทยต่อการขยายแสนยานุภาพและอิทธิพลของสหภาพโซเวียต

3. <u>การกดดันเวียดนามของจีน</u> ความไม่พอใจของจีนที่เวียดนามไปใกล้ชิดกับสหภาพโซเวียตและรุกรานกัมพูชา ทำให้จีนทำสงคราม "สั่งสอน" เวียดนาม[8] ในเดือนกุมภาพันธ์ ค.ศ. 1979 สร้างความเสียหายแก่เวียดนามเป็นอันมาก แม้ว่าจีนจะได้ถอนทหารออกไปจากดินแดนเวียดนามแล้ว แต่ยังคงกำลังทหารหลายแสนคนตามแนวชายแดนจีน-เวียดนาม ทำให้เวียดนามไม่กล้าถอนทหารออกจากบริเวณนี้ การทำสงครามสั่งสอนของจีนทำให้ผู้นำไทยเห็นว่า จีนเป็นชาติเดียวที่กล้าใช้กำลังทหารปฏิบัติการกับเวียดนามซึ่งมีโซเวียตสนับสนุนอยู่ อีกทั้งการที่จีนยังคงกดดันทางทหารตามแนวชายแดน ทำให้เวียดนามพะว้าพะวังไม่อาจทุ่มกำลังเข้ามาในกัมพูชา ซึ่งอาจส่งผลกระทบต่อความมั่นคงของไทย

ส่วนปัจจัยภายในที่มีอิทธิพลต่อนโยบายต่างประเทศของไทยในช่วงนี้ประกอบด้วย

1. <u>การเปลี่ยนผู้นำรัฐบาล</u> เมื่อ พล.อ. เกรียงศักดิ์ ชมะนันท์ ลาออกจากตำแหน่งนายกรัฐมนตรี พล.อ. เปรม ติณสูลานนท์ ผู้บัญชาการกองทัพบกและรัฐมนตรีช่วยว่าการกระทรวงมหาดไทย ได้ขึ้นดำรงตำแหน่งนายกรัฐมนตรีและจัดตั้งรัฐบาลขึ้นบริหารประเทศในเดือนมีนาคม ค.ศ. 1980 โดยมี พล.อ.อ. สิทธิ เศวตศิลา เป็นรัฐมนตรีต่างประเทศ พล.อ.เปรม ติณสูลานนท์ เป็นนายทหารอาชีพที่ทำงานหนักและซื่อสัตย์สุจริต แต่ไม่สู้มีประสบการณ์ด้านการระหว่างประเทศ จึงมอบหมายงานด้านต่างประเทศให้กับรัฐมนตรีต่างประเทศ พล.อ.อ. สิทธิ เศวตศิลา

2. <u>การฟื้นฟูบทบาทของกระทรวงต่างประเทศ</u> ในสมัยอดีตนายกรัฐมนตรี พล.อ.เกรียงศักดิ์ ชมะนันท์ กระทรวงต่างประเทศไม่สู้มีบทบาทในการกำหนดนโยบาย

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7. Chulacheeb Chinwanno, "Thailand in 1983 : The Parliamentary System Survives," in <u>Southeast Asian Affairs 1984</u> (Singapore : Institute of Southeast Asian Studies, 1984), p. 324

8. จุลชีพ ชินวรรโณ "ความสัมพันธ์ระหว่างจีนกับเวียดนาม : เมื่อสหายกลายเป็นศัตรู" ใน<u>วารสารธรรมศาสตร์</u> ปีที่ 8 ฉบับที่ 4 (เมย.- มิย. 1979) หน้า 2-15

ต่างประเทศนัก แต่เมื่อกระทรวงต่างประเทศมาอยู่ใต้การนำของพล.อ.อ. สิทธิ เศวตศิลา บทบาทของกระทรวงต่างประเทศได้รับการฟื้นฟู และกลายเป็นองค์กรที่สำคัญยิ่งในการกำหนด การดำเนินและการประสานนโยบายต่างประเทศกับหน่วยงานรัฐบาลอื่นๆให้มีเอกภาพ พล.อ.อ. สิทธิ เศวตศิลา เคยดำรงตำแหน่งเลขาธิการสภาความมั่นคงแห่งชาติ และมีประสบการณ์ด้านการข่าวมาช้านาน อีกทั้งได้รับความไว้วางใจจากนายกรัฐมนตรี พล.อ.เปรม ติณสูลานนท์ จึงทำให้กระทรวงต่างประเทศมีบทบาทโดดเด่นในการกำหนดนโยบายต่างประเทศที่ค่อนข้างเน้นเรื่องความมั่นคงในช่วงนี้

ภัยคุกคามความมั่นคงทางด้านชายแดนด้านตะวันออกได้กลายเป็นปัญหาสำคัญในช่วงแรกของทศวรรษที่ 1980 นี้ และผู้นำไทยได้ตัดสินใจใช้เครื่องมือทางการทูตเพื่อแก้ไขสถานการณ์ที่คับขัน พล.อ.อ. สิทธิ เศวตศิลา และกระทรวงต่างประเทศได้กำหนดยุทธศาสตร์ในการต่อต้านเวียดนามโดยร่วมกับองค์การอาเซียนในการระดมสรรพกำลังเพื่อเรียกร้องและกดดันเวียดนามให้ถอนทหารออกไปจากกัมพูชา[9] ประเทศไทยและประเทศสมาชิกของอาเซียนได้สร้าง "แนวร่วม" กับประเทศมหาอำนาจต่างๆ เช่น สหรัฐอเมริกา สาธารณรัฐประชาชนจีน ญี่ปุ่น ยุโรปตะวันตก และนานาประเทศที่รักเสรีภาพและเอกราชในองค์การสหประชาชาติ[10] เพื่อสะกัดกั้นการขยายอิทธิพลของเวียดนาม ซึ่งได้รับการสนับสนุนจากสหภาพโซเวียตและประเทศคอมมิวนิสต์ในยุโรปตะวันออก

กระทรวงต่างประเทศไทยได้จัดพิมพ์สมุดปกขาว The Vietnamese Acts of Aggression Against Thailand's Sovereignty and Territorial Integrity ในปี คศ. 1980 เพื่อชี้แจงเหตุการณ์และแสดงหลักฐานของการล่วงล้ำอธิปไตยของไทย

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9. จุลชีพ ชินวรรโณ "อาเซียนกับความขัดแย้งในอินโดจีน" และ "ชนวนสงคราม : บทนำว่าด้วยความพยายามของไทยและอาเซียนในการถอดชนวนสงคราม" ในจุลชีพ ชินวรรโณ ชนวนสงคราม : ไทย จีน อินโดจีน (กรุงเทพ : สำนักพิมพ์ดอกหญ้า, 1986) หน้า 17-40 และ 28-43

10. Muthiah Alagappa, The National Security of Developing States : Lessons from Thailand, (Dover, Mass : Auburn House Publishing Co., 1987), pp. 94-115

โดยกำลังทหารเวียดนาม ยิ่งไปกว่านั้นนักการทูตของไทยยังได้เดินทางไปทุกมุมโลกไม่ว่าจะเป็นประเทศในอาฟริกาหรือลาตินอเมริกา เพื่อแสวงหาความสนับสนุนและสร้างมติโลกเกี่ยวกับการแก้ไขปัญหากัมพูชา อีกทั้งเพื่อขยายและกระชับความสัมพันธ์กับประเทศต่างๆ "รอบโลกและรอบด้าน"

ความสำเร็จในระดับหนึ่งของกระทรวงต่างประเทศภายใต้การนำของ พล.อ.อ. สิทธิ เศวตศิลา เห็นได้จากญัตติของอาเซียนเกี่ยวกับปัญหากัมพูชา ที่เสนอต่อสมัชชาทั่วไป สหประชาชาติ โดยประเทศไทยและอาเซียนได้เรียกร้องให้มีการถอนทหารต่างชาติออกจากัมพูชาและให้มีการเลือกตั้งโดยเสรีในกัมพูชา รวมทั้งให้มีการแก้ไขปัญหาทางการเมือง (Political Solution) ญัตตินี้ได้รับคะแนนเสียงข้างมากในสมัชชาทั่วไป และประเทศที่สนับสนุนก็เพิ่มมากขึ้นทุกปี อันเป็นผลมาจากการดำเนินนโยบายต่างประเทศแบบ "รอบด้าน" หรือ "รอบทิศทาง"

ตารางที่ 1

มติของสมัชชาสหประชาชาติเกี่ยวกับญัตติของอาเซียนที่ให้เวียดนามถอนทหารออกจากกัมพูชา

คศ.	เห็นชอบ	คัดค้าน	ไม่ออกเสียง	ไม่เข้าประชุม
1979	91	21	29	9
1980	97	23	22	11
1981	100	25	19	12
1982	105	23	20	9
1983	105	23	11	9
1984	110	22	18	19
1985	114	21	16	8

แหล่งที่มา : Documents on the Kampuchean Problems (Ministry of Foreign Affairs, Bangkok 1985).

นอกจากนี้ประเทศไทยและกลุ่มสมาชิกอาเซียนยังให้การสนับสนุนแก่รัฐบาลกัมพูชาประชาธิปไตยที่ถูกเวียดนามโค่นล้ม และช่วยเหลือให้มีการจัดตั้ง**รัฐบาลผสมเขมร 3 ฝ่าย** กัมพูชาประชาธิปไตย (CGDK) ซึ่งประกอบด้วย เขมรมูลินาคะของเจ้าสีหนุ เขมรเสรี (KPNLF) ของนายซอนซานน์ และเขมรแดง เพื่อขยายฐานการสนับสนุนทั้งภายในกัมพูชาและในเวทีระหว่างประเทศ และพยายามป้องกันมิให้มีการรับรองระบอบเฮงสัมรินที่เวียดนามจัดตั้งที่พนมเปญ โดยรณรงค์ให้นานาชาติยอมรับรัฐบาลผสมเขมร 3 ฝ่ายกัมพูชาประชาธิปไตยเป็นผู้แทนที่ชอบธรรมของกัมพูชาในองค์การสหประชาชาติ

ตารางที่ 2

มติของสหประชาชาติเกี่ยวกับ สมาชิกภาพของกัมพูชาประชาธิปไตย

คศ.	เห็นชอบ	คัดค้าน	ไม่ออกเสียง	ไม่เข้าประชุม
1979	71	35	34	11
1980	74	35	32	12
1981	79	36	30	10
1982	90	29	26	12
1983	*	-	-	-
1984	*	-	-	-

หมายเหตุ * เห็นชอบโดยไม่ต้องมีการลงคะแนน

แหล่งที่มา : Documents on the Kampuchean Problems (Ministry of Foreign Affairs, Bangkok, 1985

ประเทศไทยและอาเซียนได้จัด**การประชุมนานาชาติว่าด้วยกัมพูชา** (ICK หรือ International Conference on Kampuchea) ขึ้นระหว่าง 13-17 กรกฎาคม คศ. 1981 และมีประเทศต่างๆ เข้าร่วมประชุมคือ 79 ประเทศ เพื่อหาแนวทางในการแก้ไขปัญหากัมพูชา

อย่างไรก็ดีความพยายามของไทยในการต่อต้านการยึดครองกัมพูชาของเวียดนาม โดยร่วมมือกับมิตรประเทศต่างๆ ในการกดดันให้เวียดนามถอนทหารออกไปจากกัมพูชา แม้ว่าจะไม่ปรากฏผลสำเร็จที่ชัดเจนในช่วงนั้น แต่ก็ทำให้เวียดนามถูกโดดเดี่ยวทางการเมืองและถูกปิดล้อมทางเศรษฐกิจ ส่งผลให้เวียดนามต้องเผชิญกับวิกฤตการณ์ทางเศรษฐกิจภายใน

ในขณะเดียวกัน ประเทศไทยก็ได้รับความเห็นใจจากนานาชาติในฐานะ **"ประเทศด่านหน้า"** (Front-line State) และได้รับความช่วยเหลือจากประเทศต่างๆ รวมทั้ง**สาธารณรัฐประชาชนจีน**ซึ่งมีผลประโยชน์ที่สอดคล้องกับไทย ในการต่อต้านการขยายอิทธิพลของเวียดนาม[11] ไทยกับจีนได้ทวีความใกล้ชิดกันมากขึ้น อีกทั้งจีนได้ช่วยเหลือไทยทางอ้อมโดยกดดันทางทหารต่อเวียดนามตามแนวชายแดนจีน-เวียดนาม ผู้นำไทยทั้งภาครัฐบาลและฝ่ายทหาร เช่น พล.อ. เปรม ติณสูลานนท์ นายกรัฐมนตรี พล.อ. เสริม ณ นคร พล.อ. อาทิตย์ กำลังเอก ผู้บัญชาการทหารสูงสุด ได้เดินทางไปเยือนจีน ผู้นำจีนหลายคนก็ได้เดินทางมาเยือนไทยหลายครั้ง ความใกล้ชิดและผลประโยชน์ที่สอดคล้องกันทำให้จีนลดการให้ความช่วยเหลือแก่พรรคคอมมิวนิสต์ประเทศไทย[12] เปิดโอกาสให้ไทยสามารถปราบปรามพรรคคอมมิวนิสต์ไทยจนยากจะฟื้นตัวอีก

ส่วน**สหรัฐอเมริกา**กับไทยก็หันกลับมามีความใกล้ชิดกันยิ่งขึ้น และสหรัฐอเมริกาก็ให้ความช่วยเหลือกับไทยทางด้านอาวุธยุทโธปกรณ์ต่างๆ โดยจัดส่งอาวุธมาให้ไทยอย่างเร็วโดยทางอากาศ (Airlift) เพียงไม่กี่วัน หลังจากเหตุการณ์กรณี "โนนหมากหมุ่น" และในปี คศ. 1982 สหรัฐอเมริกากับไทยก็เริ่มมีการซ้อมรบร่วมกันทุกปีภายใต้รหัส Cobra Gold อีกทั้งยังยอมขายเครื่องบิน F-16 ที่มีอานุภาพสูงให้กับไทยเป็นชาติแรกในอาเซียน[13] ยิ่งไปกว่านั้น ยังเพิ่มความช่วยเหลือทางทหารให้ไทยจากเพียง 48 ล้านเหรียญดอลล่าร์ ในปี 1980 เป็น 107 ล้านเหรียญดอลล่าร์ ในปี คศ. 1985

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11. จุลชีพ ชินวรรโณ สัมพันธ์ไมตรีไทย-จีน : ทศวรรษแห่งมิตรภาพ 2518-2528 (กรุงเทพ : สถาบันเอเชียตะวันออกศึกษา, 1985) หน้า 36-40.

12. Saiyud Kerdphol, The Struggle for Thailand : Counter-Insurgency 1965-1985 (Bangkok : S.Research Center Co., 1987), pp. 166-167.

13. ดูนานาทัศนะเกี่ยวกับการซ่อมเครื่องบิน F-16 ของไทย สุรชาติ บำรุงสุข (บก.) เอฟ-16 กับการเมืองไทย, (กรุงเทพ : สำนักพิมพ์ดอกหญ้า, 1985)

ตารางที่ 3

ความช่วยเหลือทางทหารของสหรัฐอเมริกาต่อประเทศไทย

ล้านเหรียญสหรัฐ

YEAR	FMS	ESF	MAP	IMET	Total
1979	30.0	-	1.43	0.86	32.29
1980	36.0	2.0	11.60	0.79	48.39
1981	53.4	2.0	0.35	0.79	54.54
1982	74.7	5.0	4.60	1.42	85.72
1983	76.0	5.0	14.60	1.74	97.64
1984	94.0	5.0	5.12	2.23	106.35
1985	95.0	5.0	5.00	2.30	107.30

หมายเหตุ FMS = Foreign Military Sales

ESF = Economic Support Fund

MAP = Military Assistant Program

IMET = International Military Education and Training

แหล่งที่มา : Foreign Military Sales and Others : Facts as of Sept 30, 1985 published by DATA Management Division, Comptroller, DSAA

ญี่ปุ่นก็เป็นอีกประเทศหนึ่งที่ทวีความใกล้ชิดกับประเทศไทย และให้การสนับสนุนแก่ไทยทางด้านการเมืองและการทูต ส่วนทางด้านเศรษฐกิจนั้น ญี่ปุ่นได้ให้ความช่วยเหลือทางเศรษฐกิจแก่ไทยเพิ่มมากขึ้น โดยเฉพาะอย่างยิ่ง เงินให้เปล่าและเงินกู้ เงินให้เปล่าได้เพิ่มขึ้นอย่างมากจาก 43 ล้านเหรียญในปี ค.ศ. 1979 เป็น 117 ล้านเหรียญในปี 1985 ส่วนเงินกู้เพิ่มจาก 136 ล้านเหรียญในปี 1979 เป็น 146 ล้านเหรียญในปี ค.ศ. 1985

ตารางที่ 4

ความช่วยเหลือเพื่อการพัฒนาอย่างเป็นทางการของญี่ปุ่นที่ให้กับไทย (ODA)

ล้านเหรียญสหรัฐ

ปี	เงินให้เปล่า	เงินกู้	รวม	% ของทั้งหมด
1978	26.1	77.6	103.7	6.8
1979	43.0	136.9	179.9	9.4
1980	70.2	119.8	190.0	9.7
1981	82.6	131.9	214.5	9.1
1982	61.2	109.1	170.3	7.2
1983	89.3	158.8	248.1	10.2
1984	90.4	141.6	232.0	9.6
1985	117.2	146.9	264.1	10.3

แหล่งที่มา : Gaimusho, Waga gaiko no Kinkyo, various issues;
Tsusansho, Keizai Kyorysku no genjo to mondaiten, various issues.

จะเห็นได้ว่า นโยบายต่างประเทศของไทยในช่วงนี้ ช่วยกระชับความสัมพันธ์กับประเทศต่างๆ ให้ใกล้ชิดยิ่งขึ้น และทำให้ไทยได้ประโยชน์ในหลายๆ ด้าน อย่างไรก็ดี นอกเหนือจากวิกฤตการณ์ที่โนนหมากมุ่น ชายแดนไทย-กัมพูชาแล้ว ประเทศไทยก็ได้เผชิญกับ**วิกฤตการณ์ 3 หมู่บ้าน** ที่ชายแดนไทย-ลาว ในปี ค.ศ. 1984

ประเทศไทยและประเทศลาวเป็นเพื่อนบ้านที่มีอุดมการณ์และระบบการเมืองเศรษฐกิจแตกต่างกัน แต่มีพรมแดนติดต่อกันถึง 1,750 กม. โดยเป็นร่องน้ำลึกในแม่น้ำโขง

ยาว 1,100 กม. และเป็นสันปันน้ำของเทือกเขาสูงหลายเทือกกว่า 650 กม.[14] ในอดีตที่ผ่านมานับตั้งแต่ลาวเปลี่ยนการปกครองเป็นคอมมิวนิสต์ ในวันที่ 2 ธันวาคม 1975 ไทยกับลาวมักมีปัญหาขัดแย้งเกี่ยวกับ พรมแดนในแม่น้ำโขง[15] จนถึงปี ค.ศ. 1982 เมื่อผู้ก่อการร้ายคอมมิวนิสต์ไทยพ่ายแพ้และยอมมอบตัว ทำให้หน่วยราชการสามารถเข้าไปถึงแนวชายแดนไทย-ลาว ซึ่งเดิมเป็นเขต "สีแดง" อยู่ภายใต้อิทธิพลของผู้ก่อการร้าย ทางการพยายามตัดถนนยุทธศาสตร์ และจัดตั้งหมู่บ้านยุทธศาสตร์ขึ้นในบริเวณ เพื่อความมั่นคงตามแนวชายแดน ทำให้เกิดปะทะกับทหารของลาว เนื่องจากพรมแดนไม่ชัดเจน

หมู่บ้าน 3 แห่ง ที่เป็นปัญหาระหว่างไทยกับลาว มีชื่อเรียกว่า บ้านกลาง บ้านใหม่ และบ้านสว่าง พื้นที่ราว 19 ตาราง กม. และมีประชากรประมาณ 1,000 คน ทั้ง 3 หมู่บ้านตั้งอยู่บนที่ราบในหุบเขาระหว่างเขา 3 ลูก คือ ภูหลักหมื่น ภูกิ่งนกแซว และภูฮั้ง การพิพาทระหว่างไทยกับลาวในบริเวณนี้เกิดขึ้น เมื่อลาวลอบซุ่มโจมตีคนงานบริษัทสร้างทางใกล้ 3 หมู่บ้าน ในเดือนพฤษภาคม ค.ศ.1984 ต่อมาฝ่ายทหารไทยได้ส่งกำลังไปคุ้มครองคนงานสร้างทางและเกิดปะทะกับทหารลาว และในวันที่ 6 มิถุนายน ค.ศ. 1984 พล.อ.อาทิตย์ กำลังเอก ผู้บัญชาการทหารบกได้ส่งกำลังทหารประมาณ 1,500 คน เข้าขับไล่ทหารลาว แล้วตั้งมั่นในหมู่บ้านทั้งสามโดยคิดว่าเป็นดินแดนของไทยแน่นอน ในวันที่ 9 มิถุนายน รัฐบาลลาวได้ยื่นบันทึกช่วยจำแก่เอกอัครราชทูตไทยในเวียงจันทน์ และออกแถลงการณ์ในวันที่ 13 มิถุนายน กล่าวหาว่าไทยล่วงละเมิดพรมแดนลาว อีกทั้งอ้างว่า ทั้งสามหมู่บ้านอยู่ในดินแดนลาว[17] โดยขึ้นอยู่กับตาแสง (ตำบล) เมืองทุ่ง เมือง (อำเภอ) ปากลาย

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14. ดร. สมบูรณ์ เสงี่ยมบุตร "ปัญหาเขตแดนไทยกับประเทศเพื่อนบ้าน" ใน <u>จิตวิทยาความมั่นคง</u> (กรุงเทพ : สถาบันจิตวิทยาความมั่นคง 1983) หน้า. 275

15. ดูรายละเอียดใน สุรชัย ศิริไกร <u>สาเหตุการกระทบกระทั่งตามพรมแดนไทย-ลาว : 1975-1981</u> (กรุงเทพ : สถาบันเอเชีย จุฬาฯ, 1984)

16. Sarasin Viraphol, "Reflection on Thai-Laos Relations" in <u>Asian Survey</u> December 1985.

17. ดูท่าทีของลาวใน มิตรสัมพันธ์ <u>พี่น้องไทย-ลาว : สภาพความเป็นมาของความสัมพันธ์</u> (กทม : สำนักพิมพ์มนตรีศาสตร์ 1984) และ Pheuiphanh Ngaosyvathn, "Thai-Laos Relations : A Laos View" in <u>Asian Survey</u> December 1985.

แขวง (จังหวัด) ไชยบุรี ตามหลักฐานที่ปรากฏในแผนที่ต่อท้ายสนธิสัญญาระหว่างฝรั่งเศสกับสยาม ฉบับ ค.ศ. 1904 และ ค.ศ.1907 ส่วนฝ่ายกองทัพบกของไทยอ้างหลักฐานจากแผนที่ซึ่งเป็นภาพถ่ายทางอากาศ จัดทำร่วมกันกับสหรัฐอเมริกา เมื่อ ปี ค.ศ. 1978 ว่าหมู่บ้านทั้งสามอยู่ในเขตไทย ใกล้บ้านบ่อเบี้ย ต.ม่วงเจ็ดต้น กิ่งอ.โคกสูง จังหวัดอุตรดิตถ์

อย่างไรก็ดี ภายหลังกรณีพิพาทกระทรวงต่างประเทศได้พิจารณาแผนที่ต่างๆ โดยละเอียด เห็นว่าอาจเกิดความเข้าใจผิดเกี่ยวกับพรมแดนอันไม่แน่นอนได้ จึงพยายามแก้ไขข้อพิพาทโดยสันติวิธี โดยเปิดการเจรจากับทางฝ่ายลาว[18] การเจรจารอบแรกมีที่กรุงเทพ ระหว่าง 21-23 กรกฎาคม ค.ศ. 1984 ระหว่างท้าวสุบัน สะลิดทะลาด รัฐมนตรีช่วยว่าการต่างประเทศลาว และนายอาสา สารสิน ปลัดกระทรวงต่างประเทศของไทย แต่ไม่อาจตกลงได้ ส่วนการเจรจารอบสอบ ระหว่าง 6-15 สิงหาคม ก็ไม่มีอะไรคืบหน้า เพราะลาวยืนยันว่าหมู่บ้านทั้งสาม เป็นของลาวอย่างแน่นอน และเรียกร้องให้ไทยถอนทหารออกโดยเร็วและชดใช้ค่าเสียหายด้วย ฝ่ายไทยเสนอให้มีการส่งคณะสำรวจร่วมทั้งสองฝ่ายเข้าไปในพื้นที่ เพื่อสำรวจหาแนวสันปันน้ำที่แน่นอน จะได้พิสูจน์ได้อย่างเด่นชัดว่าพื้นที่เป็นของใคร[19] เพราะทั้งสองฝ่ายไม่ยอมรับแผนที่ของอีกฝ่ายหนึ่ง แต่ทางการลาวปฏิเสธข้อเสนอของฝ่ายไทยโดยสิ้นเชิง

ความล้มเหลวในการเจรจาทำให้เกิดการปะทะกันที่บริเวณสามหมู่บ้านอีก ซึ่งส่งผลให้ทั้งสองฝ่ายยื่นหนังสือประท้วงต่อองค์การสหประชาชาติ ต่อมาในปี 1984 ลาวได้ออก<u>สมุดปกขาวว่าด้วยความเป็นจริงแห่งความสัมพันธ์ไทย-ลาว</u> ซึ่งมีข้อความประณามและโจมตีไทยอย่างรุนแรง กระทรวงการต่างประเทศของไทยจึงจัดพิมพ์สมุดปกเหลือง <u>วิวัฒนาการความสัมพันธ์ไทย-ลาว</u> ตอบโต้ข้อกล่าวหาของลาวและชี้แจงข้อเท็จจริง

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18. ดูคมสัน เศวตมาลย์ <u>การแก้ไขข้อพิพาทโดยสันติวิธี : ศึกษากรณีพิพาทขายแดนไทย กรณีหมู่บ้านกลาง หมู่บ้านใหม่ หมู่บ้านสว่าง</u> (สารนิพนธ์หลักสูตรรัฐศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 1988)

19. ขจัดภัย บุรุษพัฒน์ <u>ไทยกับเพื่อนบ้านในอินโดจีน</u> (กรุงเทพ : แพร่พิทยา, 1988) หน้า 91-100.

ในวันที่ 2 ตุลาคม ค.ศ. 1984 พล.อ.อ. สิทธิ เศวตศิลา รัฐมนตรีต่างประเทศของไทยก็ได้ประกาศในที่ประชุมสมัชชาใหญ่สหประชาชาติว่า ไทยตัดสินใจที่จะเคลื่อนย้ายกำลังทหารออกจากเขตพิพาท 3 หมู่บ้าน แต่ฝ่ายลาวไม่เชื่อ และกล่าวโจมตีไทย ต่อมาในวันที่ 6 ธันวาคม ค.ศ. 1984 ลาวได้ยื่นหนังสือต่อเลขาธิการสหประชาชาติ กล่าวหาไทย ทำให้ไทยต้องยื่นหนังสือตอบโต้ในวันที่ 10 ธันวาคม และยืนยันว่าไทยได้ถอนทหารออกจาก 3 หมู่บ้านตั้งแต่วันที่ 13 ตุลาคม ต่อมาลาวได้พยายามรื้อฟื้นเพื่อขอเปิดการเจรจา แต่ฝ่ายไทยได้ปฏิเสธโดยให้เหตุผลว่า บรรยากาศยังไม่เหมาะสม[20] ความสัมพันธ์ระหว่างไทย-ลาวค่อนข้างตึงเครียด โดยเฉพาะอย่างยิ่งตามแนวชายแดน

ปัญหาชายแดนระหว่างไทยกับลาวนี้ทำให้ พล. อ.อ. สิทธิ เศวตศิลา รัฐมนตรีต่างประเทศเสนอแต่งตั้ง พลตรี จรัล กุลละวณิชย์ ซึ่งเคยประสานงานติดต่ออย่างไม่เป็นทางการระหว่างกระทรวงกลาโหมกับกระทรวงต่างประเทศ ให้มีตำแหน่งอย่างเป็นทางการคือ "ผู้ประสานภาระกิจทางการทหารและการเมืองระหว่างประทศของกระทรวงกลาโหมประจำกระทรวงการต่างประเทศ" ในปี ค.ศ. 1984 นี้ เพื่อให้การประสานงานกับฝ่ายทหารเป็นไปอย่างทันท่วงที

อย่างไรก็ดี แม้ว่าจะต้องเผชิญกับวิกฤตการกับประเทศเพื่อนบ้าน การดำเนินนโยบายต่างประเทศที่เน้นปัญหาความมั่นคงและดำเนินไปในลักษณะรอบด้าน ในช่วงนี้ของ พล.อ.อ.สิทธิ เศวตศิลา รัฐมนตรีต่างประเทศ ทำให้ประเทศไทยมั่นคงขึ้น อีกมีมิตรประเทศเป็นจำนวนมากที่เห็นใจและให้ความช่วยเหลือแก่ไทยในด้านต่างๆ

2. <u>ช่วงที่สองระหว่าง ค.ศ. 1985-1988</u> ในช่วงนั้นโยบายต่างประเทศของไทยยังคงเน้นเรื่องความมั่นคง แต่เสริมมิติทางเศรษฐกิจมากขึ้น ในลักษณะ "ความมั่นคงนำหน้า ตามมาด้วยความมั่งคั่งทางเศรษฐกิจ" (Security First, Economic Prosperity Second) เพราะปัญหากัมพูชายังมิได้รับการแก้ไข อีกทั้งการปะทะกันตามแนวชายแดนไทย-กัมพูชา ยังคงดำเนินอยู่ทุกฤดูแล้ง เนื่องจากเวียดนามพยายามกวาดล้าง

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20. สมพงศ์ ชูมาก "ปัญหาชายแดน : การหลีกเลี่ยงและการระงับข้อพิพาท" ใน <u>ปัญหาพรมแดนไทย</u> (กรุงเทพ : ศูนย์ศึกษาการต่างประเทศ, 1990) หน้า 85-89

กองกำลังเขมร 3 ฝ่าย กัมพูชาประชาธิปไตย แต่ในขณะเดียวกัน ประเทศไทยก็เผชิญกับปัญหาและแรงกดดันทางเศรษฐกิจ โดยเฉพาะอย่างยิ่งจากสหรัฐอเมริกาไทยจึงจำเป็นต้องใช้หลัก **"การทูตนำการค้า"** มาใช้ในช่วงนี้เพื่อเปิดประตูการค้าและแสวงหาตลาดในดินแดนต่างๆ ทั่วโลก

ปัจจัยภายนอกที่สำคัญที่มีอิทธิพลต่อนโยบายต่างประเทศของไทย ในช่วงนี้มีหลายปัจจัย ที่สำคัญคือ

1.<u>การที่เวียดนามกวาดล้างกลุ่มเขมรต่อต้านตามแนวชายแดนไทย-กัมพูชา</u> สถานการณ์บริเวณชายแดนด้านตะวันออกของไทยในช่วงนี้ทวีความตึงเครียด เพราะเวียดนามไม่ยอมถอนทหารออกจากกัมพูชา ยิ่งไปกว่านั้นยังดำเนินการกวาดล้างกองกำลังเขมรสามฝ่ายที่ต่อต้านเวียดนามในช่วงฤดูแล้งของทุกปี อีกทั้งยังส่งกำลังเข้าโจมตีค่ายเขมรลี้ภัยที่ชายแดนไทย บริเวณอัมปิล และหนองจัน บางครั้งก็บุกเข้ามาในเขตแดนของไทยโดยเฉพาะอย่างยิ่งที่บริเวณช่องบก จังหวัดอุบลราชธานี ทำให้คนไทยตามแนวชายแดนถูกกระสุนเสียชีวิต บ้านช่องเสียหาย การปะทะกันอย่างรุนแรงนี้ทำบริเวณชายแดนไทยไม่ปลอดภัย ยิ่งไปกว่านั้นชาวเขมรจำนวนมากยังหลบหนีภัยสงครามเข้ามาในเขตแดนของไทย เป็นภาระในการดูแลแก่รัฐบาลไทย

2.<u>การกีดกันทางการค้าโดยเฉพาะอย่างยิ่งจากสหรัฐอเมริกา</u> แม้ว่าไทยกับสหรัฐจะเป็นพันธมิตรมาช้านาน และมีผลประโยชน์ร่วมกัน ทางด้านการเมืองและความมั่นคง รวมทั้งการต่อต้านการขยายอิทธิพลของเวียดนาม แต่ความสัมพันธ์ทางเศรษฐกิจระหว่างไทยกับสหรัฐอเมริกา เริ่มมีปัญหาและตึงเครียด ทั้งนี้เพราะไทยเริ่มได้เปรียบดุลการค้ากับสหรัฐตั้งแต่ ค.ศ. 1985 และการได้เปรียบดุลการค้านี้ได้เพิ่มมากขึ้น หลังจากที่ได้เสียเปรียบดุลการค้ากับสหรัฐอเมริกามาเป็นเวลาอันยาวนาน ทั้งนี้เพราะไทยเราได้ขยายตลาดและส่งสินค้าไปยังสหรัฐอเมริกามากขึ้น อีกทั้งสินค้าที่ไทยส่งไปขายก็มีคุณภาพดีและราคาถูก ทำให้สหรัฐอเมริกาเริ่มใช้มาตรการต่างๆ ต่อไทยทั้งทางเศรษฐกิจและกฎหมาย เพื่อกีดกันสินค้าไทย อีกทั้งเรียกร้องให้ไทยให้การคุ้มครองต่อ "สิทธิทรัพย์สินทางปัญญา" (Intellectual Property Right) รวมทั้งเรื่องลิขสิทธิระหว่างประเทศ[21]

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21. ไชยยศ เหมะรัชตะ "ลิขสิทธิระหว่างประเทศ" ใน <u>จิตวิทยาความมั่นคง 2531</u> (กรุงเทพ : สถาบันจิตวิทยาความมั่นคง, 1988) หน้า 251-272

3. การเปลี่ยนผู้นำและนโยบายของสหภาพโซเวียต เมื่อนายมิคาอิล กอร์บาชอฟขึ้นมาเป็นผู้นำของสหภาพโซเวียตโดยดำรงตำแหน่งเลขาธิการพรรคคอมมิวนิสต์ ในค.ศ. 1985 กอร์บาชอฟตระหนักถึงความร้ายแรงของปัญหาเศรษฐกิจที่สหภาพโซเวียตกำลังเผชิญอยู่ โดยเฉพาะอย่างยิ่งความตกต่ำของผลผลิตในภาคเกษตรกรรม และความไร้ประสิทธิภาพในภาคอุตสาหกรรม ถ้าไม่รีบแก้ไขปัญหานี้สหภาพโซเวียตก็จะเผชิญกับวิกฤตการณ์ทางเศรษฐกิจที่จะกระทบกระเทือนต่อฐานะมหาอำนาจของสหภาพโซเวียต ดังนั้นนายกอร์บาชอฟจึงตัดสินใจปฏิรูประบบเศรษฐกิจของโซเวียต[22] โดยใช้นโยบาย "เปเรสตรอยกา" (Perestroika) หรือ "ปฏิรูป" และใช้นโยบาย "กลาสนอสท์" (Glasnost) หรือ "เปิดกว้าง" เพื่อเปิดประเทศและระบบการเมืองให้ประชาชนมีส่วนร่วมทางการเมืองมากขึ้น อีกทั้งยังได้ไปกล่าวสุนทรพจน์เกี่ยวกับนโยบายต่างประเทศของโซเวียตที่**วลาดิวอสตอก** เมื่อ 28 กรกฎาคม ค.ศ. 1986 ซึ่งมีสาระสำคัญว่า สหภาพโซเวียตต้องการอยู่ร่วมโดยสันติกับประเทศต่างๆ ในเอเชียแปซิฟิค และต้องการมีบทบาทสร้างสรรค์ในการแก้ไขปัญหาความขัดแย้งต่างๆ ในภูมิภาคนี้ การปรับเปลี่ยนท่าทีของสหภาพโซเวียตนี้ทำให้ผู้นำของประเทศไทยมองสหภาพ-โซเวียตโดยสายตาเป็นมิตรมากขึ้น

ส่วนปัจจัยภายในที่มีอิทธิพลต่อนโยบายต่างประเทศของไทยในช่วงนี้ที่สำคัญมี 2 ปัจจัยดังนี้คือ

1. การร่วมมือระหว่างภาครัฐบาลกับเอกชนทางด้านเศรษฐกิจ ในอดีตนั้น นักธุรกิจมักเข้าไปผูกสัมพันธ์กับนักการเมืองหรือข้าราชการ โดยอาศัยความสัมพันธ์ส่วนตัวเพื่อหาผลประโยชน์ทางเศรษฐกิจบางประการที่อาจไม่ถูกต้องตามกฎหมาย นายกรัฐมนตรี พล อ. เปรม ติณสูลานนท์ ไม่เห็นด้วยกับวิธีการดังกล่าว แต่ก็เห็นความจำเป็นและความสำคัญของภาคเอกชน ตลอดจนนักธุรกิจต่างๆ ในการมีส่วนร่วมทางด้านนโยบายเพื่อพัฒนาเศรษฐกิจ ดังนั้นจึงได้จัดตั้ง **"คณะกรรมการภาครัฐร่วมเอกชน"** (กรอ.) ซึ่งประกอบด้วยผู้แทนจากองค์กรต่างๆ ของนักธุรกิจภาคเอกชน เช่น สภาอุตสาหกรรมแห่งประเทศไทย สภาหอการค้าแห่งประเทศไทย สมาคมธนาคารแห่งประเทศไทย เป็นต้น เพื่อเป็นกลไกในการประสาน

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22. ดู ประทุมพร วัชรเสถียร กลาสนอสท์-เปเรสตรอยกา : กอร์บาชอฟปฏิรูป (กรุงเทพ : โรงพิมพ์จุฬาลงกรณ์มหาวิทยาลัย, 1989)

นโยบายของรัฐทางด้านเศรษฐกิจ ตลอดจนเพื่อให้นักธุรกิจเอกชนมีช่องทางในการเสนอข้อคิดต่างๆ เกี่ยวกับระเบียบ กฎเกณฑ์และนโยบายต่างๆ ของรัฐ ทำให้มีความเข้าใจกันและเกิดความร่วมมือกันมากขึ้นระหว่างหน่วยงานของรัฐบาลกับนักธุรกิจเอกชนต่างๆ

2.<u>การปรับโครงสร้างทางเศรษฐกิจของไทยเพื่อการส่งออก</u> การพัฒนาเศรษฐกิจของไทยแต่เดิมเป็น การพัฒนาอุตสาหกรรมเพื่อทดแทนการนำเข้า (Import-substituted) แต่ในทศวรรษที่ 1980 นี้ ไทยได้ปรับยุทธศาสตร์การพัฒนาอุตสาหกรรมโดยเน้นการส่งออก (Export-oriented) แต่วิกฤติการณ์น้ำมันในช่วงต้นทศวรรษที่ 1980 ทำให้การปรับโครงสร้างอุตสาหกรรมเป็นไปอย่างช้าๆ และเพิ่งปรากฏผลในช่วงนี้ มีการพัฒนาในรูปแบบเกษตร-อุตสาหกรรมมากขึ้น อีกทั้งสินค้าอุตสาหกรรมหลายชนิดของไทยก็ได้ปรับปรุงจนได้มาตรฐาน ไม่ว่าจะเป็นเสื้อผ้า อัญมณี เฟอร์นิเจอร์ และการประกอบรถยนต์ การหาตลาดใหม่ๆ สำหรับสินค้าไทยนอกเหนือจากตลาดญี่ปุ่น สหรัฐอเมริกา และยุโรปตะวันตกจึงเป็นเรื่องสำคัญและจำเป็นมากในช่วงนี้

พล.อ.อ.สิทธิ เศวตศิลารัฐมนตรีต่างประเทศไทย ได้กล่าวว่า "นโยบายต่างประเทศของไทยมีส่วนผูกพันอย่างเหนียวแน่นกับความกินดีอยู่ดีและเศรษฐกิจของประเทศเป็นพิเศษ... ประเทศไทยได้เข้าไปสู่มิติใหม่ในความสัมพันธ์ต่างประเทศ... การดำเนินการทางการทูตได้ถูกนามาปูทางไปสู่การเชื่อมโยงทางเศรษฐกิจและความสัมพันธ์ทางการค้ามากขึ้น การใช้การทูตนำการค้า... ก็นับว่าได้ผลเป็นที่น่าพอใจ" [23]

ในการนำหลัก <u>"การทูตนำการค้า"</u> ไปปฏิบัติในช่วงนี้นั้น พล.อ.อ.สิทธิ เศวตศิลาได้ตั้ง "คณะกรรมการที่ปรึกษาทางเศรษฐกิจ" ขึ้นซึ่งประกอบไปด้วยสมาชิกทั้งหมดประมาณ 14 คน เป็นนักธุรกิจชั้นนำจากภาคเอกชนที่มีการติดต่อค้าขายและลงทุนกับต่างประเทศ นอกจากนั้นกระทรวงการต่างประเทศยังได้ริเริ่มให้มีการจัดตั้ง "คณะกรรมการประสานหน่วยงานของรัฐในต่างประเทศ"โดยมีรัฐมนตรีต่างประเทศเป็นประธานและมีเป้าหมายเพื่อให้หน่วยงานของรัฐในต่างประเทศเช่น สถานเอกอัครราชทูต สถานกงศุล ประสานงานด้านเศรษฐกิจอย่างมีเอกภาพ โดยทำงานร่วมกันเป็นทีมในการเปิดตลาดต่างประเทศ เอกอัครราชทูตทุกคนได้รับมอบหมายให้เพิ่มบทบาททางเศรษฐกิจ ไม่เพียงแต่กระชับความสัมพันธ์ทางการเมืองเท่านั้น ยังต้อง

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23 พล อ.อ. สิทธิ เศวตศิลา "นโยบายต่างประเทศของไทยในสถานการณ์ปัจจุบัน" ใน <u>จิตวิทยาความมั่นคง</u> (กรุงเทพฯ : สถาบันจิตวิทยาความมั่นคง, 1988) หน้า 284-285.

พยายามหาตลาดเพื่อขายสินค้าไทย ชักชวนให้นักธุรกิจเข้ามาลงทุนในประเทศไทย ตลอดจนประชาสัมพันธ์ให้ชาวต่างชาติเข้ามาท่องเที่ยวในประเทศไทยมากขึ้น

ในด้านความสัมพันธ์กับ**สหรัฐอเมริกา** ประเทศไทยในช่วงนี้ยังคงมีผลประโยชน์ทางด้านความมั่นคงที่สอดคล้องกับสหรัฐอเมริกาเกี่ยวกับการแก้ไขปัญหากัมพูชา ไทยกับสหรัฐฯ ยังคงซ้อมรบร่วมกันทุกปีภายใต้ระหัส Cobra Gold อีกทั้งไทยก็เพิ่งได้รับเครื่องบิน F-16 ชุดแรกที่ได้สั่งซื้อไปและนำเข้าประจำการในปี คศ. 1988 นี้ นอกจากนั้นไทยยังเปิดการเจรจากับสหรัฐอเมริกาเกี่ยวกับคลังอาวุธสำรอง (War Reserve Stockpile) [24]

ในขณะเดียวกัน ความสัมพันธ์ทางเศรษฐกิจระหว่างไทยกับสหรัฐฯ ในช่วงนี้ไม่สู้ดีนัก ทั้งนี้เพราะสหรัฐอเมริกาได้เริ่มกดดันไทยทางด้านเศรษฐกิจ โดยเฉพาะอย่างยิ่งการกดดันนี้ได้มีขึ้นในช่วงที่ไทยเริ่มได้เปรียบดุลการค้ากับสหรัฐฯ แม้ว่าการได้เปรียบดุลการค้านี้จะมีมูลค่าเพียงเล็กน้อยเมื่อเทียบกับประเทศอื่นๆ เช่น ญี่ปุ่น, ไต้หวัน หรือเกาหลีใต้ที่ได้เปรียบดุลการค้ากับสหรัฐอเมริกาอย่างมาก อย่างไรก็ดีทั้งสหรัฐอเมริกาและญี่ปุ่นเป็นคู่ค้าที่สำคัญของไทย และไทยเพิ่งได้เปรียบดุลการค้ากับสหรัฐอเมริกาในปี คศ. 1985 นี้เอง

ตารางที่ 5

การค้าระหว่างประเทศไทยกับสหรัฐอเมริกาและญี่ปุ่น (ล้านบาท)

ปี	สหรัฐอเมริกา			ญี่ปุ่น		
	สินค้าออก	สินค้าเข้า	ดุลการค้า	สินค้าออก	สินค้าเข้า	ดุลการค้า
1984	30,102	32,679	-2,577	22,787	64,757	-41,970
1985	38,016	28,434	+9,582	25,828	66,053	-40,225
1986	42,219	34,518	+7,701	33,134	66,587	-33,453
1987	55,727	41,611	+14,116	44,590	63,656	-19,066
1988	79,598	67,485	+12,113	63,480	86,864	-23,384

แหล่งที่มา : กรมศุลกากร

24 ดู สุรชาติ บำรุงสุข (บก) นานาทัศนะว่าด้วยคลังอาวุธสำรอง (กรุงเทพ : สถาบันศึกษาความมั่นคงและนานาชาติ จุฬาฯ 1987)

ในช่วงนี้ สหรัฐอเมริกาได้พยายามกดดันไทยในหลายๆ เรื่องโดยใช้มาตรการทางกฎหมายและเศรษฐกิจ เช่น รัฐสภาสหรัฐฯ ได้พยายามผ่านร่างกฎหมายสิ่งทอ (Jenkins Bill) เพื่อจำกัดโควต้าสินค้าสิ่งทอจากประเทศต่างๆ ที่ส่งไปขายในสหรัฐฯ รวมทั้งจากประเทศไทย แต่ประธานาธิบดีเรแกนไม่เห็นด้วย จึงไม่ลงนามและไม่ผ่านรัฐสภาในที่สุด แต่ต่อมารัฐสภาสหรัฐฯ ก็ได้ผ่านกฎหมายอีกฉบับหนึ่งที่จะสนับสนุนทางการเงินช่วยเหลือแก่ผู้ส่งออกสินค้าเกษตรรวมทั้งข้าวด้วย (Farm Acts) ซึ่งส่งผลให้ข้าวจากสหรัฐอเมริกามาแย่งตลาดข้าวของไทย เป็นต้น ยิ่งไปกว่านั้น สหรัฐอเมริกายังขู่ที่จะตัดสิทธิพิเศษทางศุลกากร (GSP) ที่ไทยได้รับ หากไทยไม่ยอมให้การคุ้มครองต่อ"สิทธิทรัพย์สินทางปัญญา" (Intellectual Property Right) ซึ่งสหรัฐอเมริกาต้องการรวมทั้งลิขสิทธิการตีพิมพ์วรรณกรรม เทปเพลง สิทธิบัตรยา และคอมพิวเตอร์ซอฟท์แวร์ด้วย [25]

กระทรวงต่างประเทศได้พยายามปกป้องผลประโยชน์ของไทยโดยว่าจ้างบริษัททนายความของสหรัฐอเมริกาให้ทำหน้าที่ lobbyist และเป็นหูเป็นตาในรัฐสภาของสหรัฐให้แก่ทางการไทย ยิ่งไปกว่านั้นทางกระทรวงการต่างประเทศของไทยได้ต้อนรับ สส., แซม กิบบอนส์ (Sam Gibbons) Chairman of the House Ways and Means Subcommittee on Trade อย่างดีเยี่ยม เมื่อมาเยือนไทยในเดือนสิงหาคม คศ. 1985 เพื่อสร้างความประทับใจและสร้าง "แนวร่วม" ของไทยในรัฐสภาของสหรัฐฯ

ส่วนความสัมพันธ์ระหว่างไทยกับญี่ปุ่น ในช่วงนี้ ไม่ค่อยมีปัญหาทางด้านการเมือง เพราะญี่ปุ่นยังคงสนับสนุนท่าทีของไทยและอาเซียนในการแก้ไขปัญหากัมพูชา แต่ในด้านเศรษฐกิจประเทศไทยไม่ค่อยพอใจญี่ปุ่นที่ญี่ปุ่นไม่ค่อยซื้อสินค้าไทย ทำให้ไทยขาดดุลการค้ากับญี่ปุ่นมาก (ดูตารางที่ 5) ประเทศไทยได้จัดทำ "สมุดปกขาว" [26] ขึ้น เพื่อเป็นกรอบในการเจรจา

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25 คนึง ฦาไชย "กฎหมายลิขสิทธิของไทยกับสหรัฐฯ" ในสราญรมย์ 2531 (กรุงเทพ : กระทรวงการต่างประเทศ 1988) หน้า 30-40 และ กรมสารนิเทศ กระทรวงต่างประเทศ "การแก้ไขพระราชบัญญัติลิขสิทธิ" ใน จิตวิทยาความมั่นคง 2531 (กรุงเทพ : สถาบันจิตวิทยาความมั่นคง 1988) หน้า 273-279

26 ดู เอกสารสัมมนา ปัญหาความสัมพันธ์ไทย-ญี่ปุ่น : การเจรจาสมุดปกขาว (กรุงเทพ : คณะรัฐศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 1986)

แก้ไขปัญหาความสัมพันธ์ทางเศรษฐกิจระหว่างไทยกับญี่ปุ่น โดยเรียกร้องให้ญี่ปุ่นเปิดตลาดให้กับสินค้าไทยมากขึ้น อีกทั้งเรียกร้องให้ญี่ปุ่นมาลงทุนในประเทศไทย และถ่ายทอดเทคโนโลยีแก่ไทย การลงทุนของญี่ปุ่นในช่วงระหว่างคศ. 1985-1988 โดยเฉพาะอย่างยิ่งในคศ. 1988 ได้เพิ่มขึ้นอย่างมาก อันเป็นผลมาจากการที่ค่าเงินเยนของญี่ปุ่นสูงขึ้น ทำให้บริษัทญี่ปุ่นต้องขยายฐานการผลิตมาลงทุนผลิตในประเทศไทย (ดูตารางที่ 6 และ 7) ซึ่งจะทำให้ต้นทุนถูกลง

ตารางที่ 6

Foreign Investment Application Approved

(Million Baht)

	Year 1986		Year 1987		Year 1988	
	Project	Amount	Project	Amount	Project	Amount
Total Investment	295	34,610	625	67,289	1,454	200,894
Foreign Investment	154	25,047	385	50,064	888	156,419
Japan	35	6,593	136	24,363	265	77,019
Taiwan	18	939	102	7,700	300	21,498
U.S.A.	20	1,067	34	4,431	106	17,028
Hongkong	18	1,178	32	3,144	86	11,416
Singpapore	8	250	17	1,633	59	6,924
Malaysia	11	462	7	281	25	2,475
Korea	2	23	7	333	36	2,758
Australia	4	297	12	984	19	1,325
Europe	35	6,185	51	6,901	110	26,257

Source : Board of Investment of Thailand (BOI)

ตารางที่ 7

Net Inflow of Direct Investment in Thailand Classified by Countries

Million Baht

	1983	1984	1985	1986	1987	1988
Japan	2,431.9	2,588.1	1,534.0	3,049.0	3,268.7	14,591.3
U.S.A	1,265.8	3,733.2	2,387.5	1,293.7	1,815.7	3,178.6
Taiwan	28.3	45.0	170.6	132.6	687.3	3,161.4
Hongkong	870.9	351.8	649.0	955.7	796.2	3,053.9
Singapore	556.1	1,121.3	(1,121.9)	403.1	535.3	1,520.7
U.K.	793.4	257.4	121.6	251.7	328.9	884.9
W.Germany	236.9	18.3	166.3	160.3	448.1	621.4
Total	8,224.8	9,638.0	4,402.2	6,908.1	9,043.7	28,243.8

Source : Bank of Thailand (July 1989)

ส่วนความสัมพันธ์ระหว่างไทยกับ**สาธารณรัฐประชาชนจีน** ได้ทวีความใกล้ชิดและขยายตัวมากขึ้น จากความร่วมมือทางด้านการเมืองและเศรษฐกิจ ไปสู่ความร่วมมือทางด้านความมั่นคงและการทหาร ในช่วง คศ. 1985-1988 นี้ ผลประโยชน์ที่สอดคล้องกันในการสนับสนุนรัฐบาลผสมเขมร 3 ฝ่ายกัมพูชาประชาธิปไตย และในการต่อต้านการขยายอิทธิพลของเวียดนาม ได้นำไปสู่ความเข้าใจกันและความไว้วางใจซึ่งกันและกัน ซึ่งเป็นพื้นฐานสำคัญของความร่วมมือทางทหารระหว่างไทยกับจีน [27]

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27 ดู จุลชีพ ชินวรรโณ "ความร่วมมือทางทหาร : มิติใหม่ในความสัมพันธ์ไทย-จีน" ในเอเชียปริทัศน์ ปีที่ 8 ฉบับที่ 2 (พฤษภาคม-สิงหาคม 1987) หน้า 7-19

ในปีคศ. 1985 จีนได้มอบปืนใหญ่ขนาด 130 มม. ประมาณ 36 กระบอก ให้กับกองทัพบกไทย เพื่อเอาใช้ปฏิบัติการตามแนวพรมแดนไทย-กัมพูชา [28] อีกสองปีต่อมาในคศ. 1987 กองทัพบกไทยได้สั่งซื้ออาวุธจากจีนเป็นครั้งแรก ซึ่งจีนขายให้ในราคา "มิตรภาพ" คือรถถัง T-69-II ติดปืนขนาด 100 มม. จำนวน 50-60 คัน รถสายพานลำเลียงพลหุ้มเกราะ (APC) ประมาณ 400 คัน [29] การซื้ออาวุธจากจีนครั้งที่ 2 ได้มีขึ้นในปีคศ. 1988 เป็นรถถัง T-69-II อีก 30 คัน ยานลำเลียงพลหุ้มเกราะประมาณ 400 คัน ปืนต่อสู้อากาศยานกระบอกคู่ขนาด 37 มม. พร้อมระบบควบคุมการยิงด้วยคอมพิวเตอร์จำนวน 6 ฐานยิง ส่วนกองทัพอากาศได้สั่งซื้อปืนต่อสู้อากาศยานขนาด 37.มม. จำนวน 30 กระบอกจากจีน พร้อมระบบเรดาร์ควบคุมการยิง 5 ชุด กองทัพเรือในปีคศ. 1988 ได้สั่งต่อเรือฟรีเกตรุ่นเจียงหู (Jianghu) จำนวน 4 ลำ และได้สั่งต่อเพิ่มอีก 2 ลำ นอกจากนั้นจีนยังได้เสนอขายเครื่องบินประจัญบานแบบ F8 (ซึ่งจีนเลียนแบบจาก MIG-21) และเรือดำน้ำ แต่ทางฝ่ายไทยยังศึกษารายละเอียดอยู่ เพราะอาวุธของจีนนั้นแม้ว่าจะมีราคาถูกแต่ไม่ค่อยได้มาตรฐานสากล

นโยบายต่างประเทศของไทยต่อ**สหภาพโซเวียต**และประเทศคอมมิวนิสต์ในยุโรปตะวันออกในช่วงนี้ค่อนข้างยืดหยุ่นมากขึ้น พล.อ.อ.สิทธิ เศวตศิลา รัฐมนตรีกระทรวงต่างประเทศได้พาคณะนักธุรกิจไปเยือนประเทศในยุโรปตะวันออกหลายประเทศ เพื่อหาลู่ทางในการค้าและเพื่อเปิดตลาดใหม่ๆ ในช่วงนี้เจ้าหน้าที่ระดับสูงของสหภาพโซเวียตหลายคนได้เดินทางมาเยือนประเทศไทยเช่น นายอาคิล ซาลมินอฟ (Akil Salminov) รองประธานสภาอภิมุขโซเวียต (Supreme Soviet Presidium) และรัฐมนตรีกระทรวงเศรษฐกิจอิวานโนวิช (V.G. Ivanovitch) ได้เดินทางมาเยือนประเทศไทยในปี คศ. 1985 อีกทั้งไทยยังยอมให้สถานทูตโซเวียตจัดงานนิทรรศการการค้าและอุตสาหกรรมในเดือนตุลาคมคศ. 1986 ต่อมาในวันที่ 2 มีนาคม 1987 รัฐมนตรีต่างประเทศโซเวียต นายเอดูอาร์ด เชวาร์ดนาดเซ ได้แวะพักที่กรุงเทพฯ และได้พบปะสนทนากับรัฐมนตรีต่างประเทศของไทย[30]

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28 The Nations, 19 November 1985, pp.1-2

29 Bangkok Post 7 March 1987, p.1

30 อเลกซานเดอร์ อ.คาร์ตซาวา 90 ปี ความสัมพันธ์ทางการทูตรัสเซีย-ไทย, (กรุงเทพ : บริษัทบพิธการพิมพ์, 1988) หน้า 122

ในระหว่างวันที่ 10-14 พฤษภาคม คศ. 1987 พล.อ.อ.สิทธิ เศวตศิลา รัฐมนตรีต่างประเทศไทยและคณะได้เดินทางไปเยือนสหภาพโซเวียตอย่างเป็นทางการ นับเป็นครั้งแรกในทศวรรษที่ 1980 ที่รัฐมนตรีต่างประเทศของไทยเดินทางไปเยือนสหภาพโซเวียตอย่างเป็นทางการ ได้มีการลงนามในพิธีสารจัดตั้ง"คณะกรรมาธิการการค้าร่วมระหว่างไทยกับโซเวียต" ขึ้นในวันที่ 12 พฤษภาคม เพื่อเป็นกลไกในการขยายความร่วมมือทางด้านเศรษฐกิจและการค้า

อีก 1 ปีต่อมา ในระหว่างวันที่ 16-22 พฤษภาคม คศ. 1988 พล.อ. เปรม ติณสูลานนท์ นายกรัฐมนตรีได้เดินทางไปเยือนสหภาพโซเวียตอย่างเป็นทางการ นับเป็นนายก-รัฐมนตรีคนที่ 2 ของไทยที่ได้เดินทางไปเยือนสหภาพโซเวียต (พล.อ. เกรียงศักดิ์ ชมะนันท์ เป็นนายกรัฐมนตรีของไทยคนแรกที่เดินทางไปเยือนมอสโคว เมื่อ 21-27 มีนาคม 1979) และได้มีการลงนามใน "ความตกลงว่าด้วยความร่วมมือทางวิทยาศาสตร์และวิชาการระหว่างสหภาพโซเวียตและประเทศไทย" การค้าระหว่างไทยกับสหภาพโซเวียตในช่วงนี้ก็ขยายตัวมากขึ้นเช่น ในปี คศ. 1985 การค้าระหว่างไทยกับโซเวียตมีมูลค่าเพียง 67.9 ล้านรูเบิล และเพิ่มเป็น 90.9 ล้านรูเบิลใน คศ. 1986 โดยไทยเป็นฝ่ายได้เปรียบดุลการค้า สินค้าที่ไทยส่งไปขายโซเวียตมักเป็นสินค้าการเกษตรเช่น อาหารจำพวกแป้ง น้ำตาลดิบ มันสำปะหลัง ส่วนสินค้าของโซเวียที่ส่งมาขายไทยมักเป็นเครื่องจักรกลและอุปกรณ์ การเยือนสหภาพโซเวียตของ พล.อ. เปรม ติณสูลานนท์ ทำให้ความสัมพันธ์ระหว่างไทย-โซเวียตดีขึ้น

ส่วนความสัมพันธ์กับประเทศเพื่อนบ้านในช่วงนี้เช่น ลาว เวียดนาม และกัมพูชายังคงมีความตึงเครียดโดยเฉพาะอย่างยิ่งกับลาวใน<u>วิกฤตการณ์บ้านร่มเกล้า</u>บ้านร่มเกล้าเป็นหมู่บ้านเล็กๆ อยู่ที่รอยต่อของชายแดนไทยกับลาวในอำเภอชาติตระการ จ.พิษณุโลกและไม่ไกลจากเมือง(อำเภอ)บ่อแตน แขวงไชยบุรีของลาว บริเวณนี้เดิมเป็นเขต "แดง" ภายใต้อิทธิพลของผู้ก่อการร้ายพรรคคอมมิวนิสต์ที่มีความสัมพันธ์ใกล้ชิดกับพรรคคอมมิวนิสต์ของลาว ต่อมาเมื่อรัฐบาลไทยปรามปรามผู้ก่อการร้ายด้วยยุทธศาสตร์ "การเมืองนำการทหาร"และใช้แนวปฏิบัติตามคำสั่งที่ 66/2523 และ 65/2525 ทำให้ผู้ก่อการร้ายวางอาวุธและมอบตัวกลายเป็น "ผู้ร่วมพัฒนาชาติไทย" ทางกองทัพภาคที่ 3 จึงเข้าไปจัดตั้ง"หมู่บ้านร่มเกล้า"เป็นหมู่บ้านยุทธศาสตร์ในช่วงกลางทศวรรษที่ 1980 ให้ผู้ร่วมพัฒนาชาติไทยพำนักอาศัย บริเวณนี้ส่วนใหญ่เป็นเทือกเขาสูงเช่น ภูเมี่ยง ภูสอยดาว สลับกับเนินเขาสูงชันเช่น เนิน 1428 เนิน 1370 และเนิน 1146 เป็นต้น โดยมีแม่น้ำเหืองปาหมัน และแม่น้ำเหืองงาเป็นแหล่งน้ำที่สำคัญ การเดินทางเต็มไปด้วยความลำบากและทางทหารมีดำริที่จะตัดถนนเข้าสู่หมู่บ้านร่มเกล้า เพื่อพัฒนาพื้นที่บริเวณนี้

ปัญหาความขัดแย้งระหว่างไทยกับลาวเกี่ยวกับ "บ้านร่มเกล้า" เริ่มขึ้นในวันที่ 31 พฤษภาคม คศ. 1987 เมื่อลาวส่งกำลังทหารเข้ามาทำลายรถแทรกเตอร์และรถบรรทุกของบริษัททำไม้ของเอกชนที่ได้รับสัมปะทานให้ตัดไม้ใกล้บ้านร่มเกล้า ลาวอ้างว่าเอกชนของไทยไปลักลอบตัดไม้ในเขตลาว ส่วนฝ่ายไทยก็กล่าวหาว่าทหารลาวเรียกค่าคุ้มครองจากบริษัททำไม้เมื่อไม่ได้ก็ลอบทำร้าย *

กรณีพิพาทได้ขยายตัวจากระดับท้องถิ่นสู่ระดับชาติ เมื่อมีการปะทะกันในเดือนมิถุนายนและกรกฎาคม คศ. 1987 ระหว่างทหารลาวกับกองกำลังทหารพรานของไทยที่มีฐานปฏิบัติการอยู่ใกล้บ้านร่มเกล้า ยิ่งไปกว่านั้นลาวได้ลอบส่งกำลังไปยึดที่มั่นที่เป็นชัยภูมิสำคัญๆ รวมทั้งเนิน 1428 และเนินอื่นๆ ที่ใกล้เคียง ลาวได้อ้างว่าพื้นที่บริเวณบ้านร่มเกล้าเป็นของลาวโดยใช้แผนที่ภาพถ่ายทางอากาศที่ไทยจัดทำขึ้นกับสหรัฐฯ เพื่อใช้ภายในประเทศเมื่อ คศ. 1960 (ต่อมาไทยได้ยกเลิก เพราะมีข้อผิดพลาดหลายแห่ง) และแผนที่ราชการของลาวที่จัดทำโดยสหภาพโซเวียตใน คศ. 1974

ในเดือนตุลาคมการปะทะกันทางทหารได้ทวีความรุนแรงขึ้น กองทัพบกได้ประสานงานกับกระทรวงต่างประเทศอย่างใกล้ชิด อีกทั้ง ยังตรวจสอบแผนที่และสนธิสัญญาต่างๆ โดยเฉพาะอย่างยิ่ง แผนที่และพิธีสาส์นประกอบท้ายสนธิสัญญาสยาม-ฝรั่งเศส คศ. 1904 และ 1907 ซึ่งระบุไว้ชัดเจนว่าแนวพรมแดนระหว่างไทยกับลาวในบริเวณนี้คือ แม่น้ำเหืองงา ซึ่งมีแหล่งที่มาจากภูเมี่ยง ไม่ใช่แม่น้ำเหืองปาหมัน ซึ่งลาวอ้างไว้ ดังนั้นในวันที่ 3 พฤศจิกายน กองทัพภาคที่ 3 จึงตัดสินใจใช้ "ยุทธการสอยดาว" เพื่อผลักดันทหารลาวออกจากเนินต่างๆ ในเขตแดนไทย การปะทะดำเนินไปอย่างรุนแรงตลอดเดือนธันวาคม และมกราคม คศ. 1988 มีการใช้เครื่องบิน F-5E และ OV-10 เข้าปฏิบัติการทิ้งระเบิด แต่ทหารลาวได้สร้างที่กำบังอย่างดีบนเนิน 1428 และอาศัยชัยภูมิสูงชันที่ได้เปรียบ จึงยังคงยึดเนินที่มั่นอย่างเหนียวแน่น

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* เนื่องจากข้อจำกัดเกี่ยวกับเนื้อที่จึงไม่อาจวิเคราะห์เกี่ยวกับสาเหตุของความขัดแย้งไทย-ลาวในกรณี "บ้านร่มเกล้า คศ. 1987" และ "สามหมู่บ้าน คศ. 1984 " ได้อย่างละเอียดในที่นี้ กรุณาคอยอ่านรายละเอียดใน จุลชีพ ชินวรรโณ <u>ความสัมพันธ์ไทย-ลาว : พัวพันม่วนซื่น?</u> (อยู่ในระหว่างการจัดพิมพ์)

ความสูญเสียของฝ่ายลาวและไทยได้เพิ่มมากขึ้น จนในที่สุดทั้งสองประเทศเห็นว่า ควรมีการหยุดยิง และเจรจาเพื่อแก้ไขข้อพิพาท พล.อ. เกรียงศักดิ์ ชมะนันท์ อดีตนายกรัฐมนตรี และนายวงศ์ พลนิกรได้มีบทบาทสำคัญในการ "ข้ามแม่น้ำโขง" เพื่อหาทางแก้ไขความขัดแย้งนี้ [31] ในวันที่ 11 กุมภาพันธ์ คศ. 1931 นายไกสอน พมวิหาน นายกรัฐมนตรีสาธารณรัฐประชาธิปไตยประชาชนลาวได้ส่งสารมายังพลเอกเปรม ติณสูลานนท์ เสนอให้มีการเจรจากันระหว่างคณะนายทหารทั้งสองฝ่ายเพื่อหยุดยิง วันรุ่งขึ้น พล.อ. เปรม ติณสูลานนท์ นายกรัฐมนตรีไทยได้ตอบตกลงให้มีการเจรจากันที่กรุงเทพ

ในวันที่ 16 กุมภาพันธ์ คศ. 1988 พล.อ. สีสะหวาด แก้วบุนพัน หัวหน้าเสนาธิการทหารสูงสุดของลาวพร้อมคณะได้เดินทางมาถึงกรุงเทพ และเข้าเจรจากับ พล.อ. ชวลิต ยงใจยุทธ ผบ.ทบ. และรักษาราชการผบ.สูงสุด ทั้งสองฝ่ายตกลงกันว่าจะหยุดยิงตั้งแต่เวลา 8.00 น.ของวันที่ 19 กุมภาพันธ์ และจะแยกกำลังทหารของสองฝ่ายออกจากแนวปะทะ 3 กม.ภายใน 48 ชั่วโมง และจัดตั้งคณะเจ้าหน้าที่ร่วม 2 ฝ่ายเพื่อดูแลให้เป็นไปตามข้อตกลง ต่อมาในวันที่ 23 กุมภาพันธ์ พล.อ. ชวลิต ยงใจยุทธ และคณะได้เดินทางไปเยือนเวียงจันทน์ พร้อมกับมอบข้าวสารให้ลาวจำนวนหนึ่ง และทางลาวได้มอบตัวนักบิน OV-10 สองคนที่ถูกลาวยิงตกกลับคืนมา

การเจรจาทางการทูตเพื่อแก้ไขกรณีพิพาท ได้เริ่มขึ้นในวันที่ 3 มีนาคม โดยมีพลจัตวาทองไหล กมมะสิดเป็นหัวหน้าคณะของลาว ฝ่ายไทยมี มรว. เกษมสโมสร เกษมศรีปลัดกระทรวงต่างประเทศเป็นหัวหน้าคณะ ทั้งสองฝ่ายตกลงที่จะให้มีการเจรจาเพื่อแก้ไขปัญหาอย่างสันติวิธี และที่ประชุมได้พิจารณาข้อเสนอของฝ่ายไทยที่ให้ใช้สนธิสัญญาสยาม-ฝรั่งเศส คศ. 1907 และแผนที่ที่เกี่ยวข้องเป็นพื้นฐาน ฝ่ายลาวรับเรื่องไปเสนอให้รัฐบาลของตน ต่อมาการเจรจารอบ 2 ได้มีขึ้นที่เวียงจันทร์ระหว่าง 17-18 มีนาคม 1988 แต่ไม่คืบหน้าไปเพราะลาวไม่ต้องการให้ใช้แผนที่และสนธิสัญญาดังที่ฝ่ายไทยเสนอ ความสัมพันธ์ไทย-ลาวในช่วงนี้ค่อนข้างตึงเครียด

ส่วนความพยายามของไทยในการแก้ไข<u>ปัญหากัมพูชา</u>นั้น ไทยและอาเซียนในช่วงนี้เห็นพ้องต้องกันว่าน่าจะจัดให้มีการเจรจาอย่างไม่เป็นทางการระหว่างเขมรสี่ฝ่ายคือ เขมรโมลินาคะของเจ้าสีหนุ เขมรเสรีของซอนซานน์ และเขมรแดง กับระบอบเฮงสัมริน-ฮุนเซ็นที่พนมเปญ เพื่อ

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31 ดู วงศ์ พลนิกร <u>ผู้ข้ามโขงยามรุ่งอรุณ : บันทึกเบื้องหลังการยุติสงครามไทย-ลาว</u> (กรุงเทพฯ : ห.จ.ก. ประสารการพิมพ์, 1988)

จะนำไปสู่การตกลงทางการเมืองและการแก้ไขปัญหาอย่างสันติ อินโดนีเซียได้ยอมรับเป็นเจ้าภาพจัดประชุม JIM-1 (Jakarta Informal Meeting) ขึ้นที่โบกอร์ อินโดนีเซียระหว่าง 25-28 กรกฎาคม คศ. 1988 โดยมีเขมรทั้งสี่ฝ่าย ลาว เวียดนาม และอาเซียนทั้ง 6 ประเทศเข้าร่วมประชุมด้วย แต่การประชุมไม่อาจตกลงกันได้ในปัญหาหลักๆ ก็คือ ปัญหาการแบ่งสรรอำนาจระหว่างเขมรสี่ฝ่าย บทบาทขององค์การสหประชาชาติในการตรวจสอบการถอนทหารของเวียดนามและการจัดการเลือกตั้งในกัมพูชา ความล้มเหลวในการเจรจาที่อินโดนีเซียนี้ ทำให้การสู้รบในกัมพูชายืดเยื้อต่อไป

ในช่วงปี คศ. 1988 นี้ กระทรวงต่างประเทศและ พล.อ.อ. สิทธิ เศวตศิลา ได้ถูกนักวิชาการบางคนวิพากษ์วิจารณ์ว่า มีท่าทีที่แข็งกร้าวเกินไปและไม่ยอมยืดหยุ่นให้ฝ่ายตรงกันข้าม ไม่ว่าจะเป็นลาว หรือเวียดนาม ในขณะเดียวกันนักวิชาการอีกหลายคนก็เห็นพ้องกับท่าทีที่ยืนหยัดของไทยและอาเซียนในการแก้ไขปัญหากัมพูชาว่า ไม่จำเป็นต้องยืดหยุ่นเพราะไทยและอาเซียนมิได้เป็นผู้สร้าง "ปัญหากัมพูชา" อีกฝ่ายหนึ่งน่าจะต้องประนีประนอมหรือยืดหยุ่นต่างหาก

อย่างไรก็ดี การดำเนินนโยบายของไทยในช่วงนี้ต่อเนื่องจากช่วงแรก จึงมีเอกภาพและมีประสิทธิภาพ เพราะอยู่ภายใต้การกำหนดและการดำเนินงานของกระทรวงการต่างประเทศ ซึ่งมีพล.อ.อ. สิทธิ เศวตศิลาเป็นรัฐมนตรี ในช่วงนี้กระทรวงต่างประเทศมีบทบาทที่โดดเด่นในการประสานงานกับหน่วยงานอื่นๆ ภายในประเทศ และกับประเทศในอาเซียนจนได้รับการยอมรับจากนานาชาติ ดังจะเห็นจากการที่ประเทศไทยได้เข้าเป็นสมาชิกประเภทหมุนเวียนของคณะมนตรีความมั่นคงแห่งสหประชาชาติ

3.<u>ช่วงที่สามระหว่างคศ. 1988 จนถึงปัจจุบัน</u> นโยบายต่างประเทศของไทยในช่วงนี้ค่อนข้างแตกต่างไปจากช่วงที่แล้ว ทั้งนี้เพราะได้มีการเปลี่ยนแปลงผู้นำรัฐบาลจาก พล.อ. เปรมติณสูลานนท์มาเป็น พลตรี ชาติชาย ชุณหะวัณ (ต่อมาได้เป็นพลเอก) หัวหน้าพรรคชาติไทย พล.อ.ชาติชาย ชุณหะวัณได้ประกาศนโยบายที่จะเปลี่ยนอินโดจีน<u>"จากสนามรบเป็นตลาดการค้า"</u> ทันทีได้เข้ารับตำแหน่งนายกรัฐมนตรี แม้ว่าพล.อ.อ.สิทธิ เศวตศิลา ยังคงร่วมรัฐบาลใหม่ในตำแหน่งรัฐมนตรีกระทรวงต่างประเทศ

ความแตกต่างในการดำเนินนโยบายต่างประเทศ โดยเฉพาะอย่างยิ่งการแก้ไขปัญหากัมพูชานำไปสู่ "การต่อสู้สองแนวทาง" (The Struggle Between The Two Lines) ระหว่างแนวทางของพล.อ. ชาติชาย ชุณหะวัณ และคณะที่ปรึกษาที่บ้านพิษณุโลกที่ต้องการ

ติดต่อกับระบอบการปกครองของเฮงสัมริน-ฮุนเซ็น ที่พนมเปญอย่างเปิดเผย กับแนวทางของกระทรวงการต่างประเทศที่ไม่ยอมรับระบอบการปกครองฮุนเซ็น แต่ต้องการกดดันให้ฮุนเซ็นและเวียดนามยอมประนีประนอมตามข้อเสนอของอาเซียนในการแก้ไขปัญหากัมพูชา ความแตกต่างทางด้านนโยบายในการแก้ไขปัญหากัมพูชานี้ นำไปสู่ความสับสนในการดำเนินนโยบาย และสร้างความประหลาดใจให้กับประเทศเพื่อนบ้านในอาเซียนที่เคยสนับสนุนไทยมาโดยตลอด

ปัจจัยภายในและปัจจัยภายนอกที่สำคัญที่มีอิทธิพลต่อนโยบายต่างประเทศของไทยในช่วงที่สามนี้มีหลายปัจจัย <u>ปัจจัยภายในที่สำคัญคือ</u>

<u>1.การเปลี่ยนนายกรัฐมนตรีมาเป็นพล.อ. ชาติชาย ชุณหะวัณ</u> ภายหลังการยุบสภาอันเป็นผลมาจากปัญหากฎหมายลิขสิทธิ์และการเลือกตั้งที่ติดตามมา พล.อ. เปรม ติณสูลานนท์ ได้ประกาศไม่รับตำแหน่งนายกรัฐมนตรีอีกต่อไป ส่งผลให้พล.อ. ชาติชาย ชุณหะวัณ หัวหน้าพรรคชาติไทย ซึ่งเป็นพรรคที่ได้คะแนนเสียงมากที่สุด ขึ้นดำรงตำแหน่งนายกรัฐมนตรีในเดือนสิงหาคม ค.ศ. 1988 และจัดตั้งรัฐบาลผสมประกอบด้วย พรรคชาติไทย พรรคกิจสังคม พรรคประชาธิปัตย์ และพรรคเล็กๆ อีกสองพรรค นายกรัฐมนตรีคนใหม่ พล.อ. ชาติชาย ชุณหะวัณ เป็นผู้นำที่มีบุคลิก และสไตล์แตกต่างจากพล.อ.เปรม ติณสูลานนท์ ที่เป็นนายทหารอาชีพ เพราะพล.อ. ชาติชาย ชุณหะวัณ เป็นนักการเมือง นักธุรกิจ อีกทั้งมีประสบการณ์ด้านต่างประเทศมากจึงให้ความสนใจและต้องการมีบทบาททางด้านต่างประเทศ ทั้งๆ ที่ พล.อ.อ.สิทธิ เศวตศิลา หัวหน้าพรรคกิจสังคมยังคงดำรงตำแหน่งรัฐมนตรีต่างประเทศต่อไปในรัฐบาลใหม่นี้

<u>2.บทบาทของคณะที่ปรึกษานายกรัฐมนตรีที่บ้านพิษณุโลก</u> นายกรัฐมนตรีคนใหม่ พล.อ ชาติชาย ชุณหะวัณได้แต่งตั้งคณะที่ปรึกษาซึ่งประกอบไปด้วยนักวิชาการ "หนุ่มไฟแรง" จากมหาวิทยาลัย มีดร.ชวนชัย อัชนันท์ ดร.บวรศักดิ์ อุวรรณโณ ดร.สุรเกียรติ เสถียรไทย มรว.สุขุมพันธ์ บริพัตร ดร. ณรงค์ชัย อัครเศรณี โดยมีนายพันศักดิ์ วิญญรัตน์ เป็นประธาน และมีนายไกรศักดิ์ ชุณหะวัณ บุตรชายนายกรัฐมนตรีเป็นผู้ประสานงาน ที่ปรึกษาที่มีบทบาทสูงในด้านต่างประเทศคือ นายไกรศักดิ์ ชุณหะวัณ นายพันศักดิ์ วิญญรัตน์ และ มรว.สุขุมพันธ์ บริพัตร ซึ่งเคยวิพากษ์วิจารณ์นโยบายต่างประเทศของกระทรวงต่างประเทศ อีกทั้งยังมีแนวคิดในการแก้ไขปัญหากัมพูชาที่แตกต่างจากกระทรวงการต่างประเทศ

<u>3.การขยายตัวทางเศรษฐกิจของไทยอย่างน่ามหัศจรรย์</u> เศรษฐกิจของไทยระหว่าง ค.ศ. 1988 และ 1989 ได้เติบโตและขยายตัวอย่างมาก อัตราการเติบโตทางเศรษฐกิจ

ในปี 1988 เพิ่มขึ้นถึง 12% และในปี 1989 เพิ่มขึ้น 10.5% อัตราเงินเฟ้อในช่วง 2 ปีนี้ค่อนข้างต่ำไม่เกิน 5% การค้าขายระหว่างประเทศได้เพิ่มสูงเพราะสินค้าของไทยมีคุณภาพดี การลงทุนจากต่างประเทศ โดยเฉพาะอย่างยิ่งจากญี่ปุ่นเพิ่มขึ้นอย่างมโหฬาร จนทำให้มีการพูดว่าประเทศไทยกำลังก้าวไปสู่ความเป็น "ประเทศอุตสาหกรรมใหม่" (NICs) ความสำเร็จทางเศรษฐกิจของไทยในช่วงนี้ทำให้ผู้นำไทยโดยเฉพาะอย่างยิ่งนายกรัฐมนตรีคนใหม่มองบทบาทของไทยในเชิง "รุก" มากขึ้น ทั้งทางด้านเศรษฐกิจและการต่างประเทศ

ปัจจัยภายนอก ที่มีอิทธิพลต่อนโยบายต่างประเทศในช่วงนี้ มีดังต่อไปนี้

1. การประชุมสุดยอดระหว่างสหภาพโซเวียตกับจีน สหภาพโซเวียตและจีนได้มีการเจรจาเพื่อปรับความสัมพันธ์ระหว่างพรรคมาตั้งแต่ต้นทศวรรษ 1980 แต่ไม่ค่อยคืบหน้านัก เพราะจีนตั้งเงื่อนไข 3 ข้อ ก) ให้สหภาพโซเวียตถอนทหารที่ประชิดพรมแดนจีน-โซเวียตออกไป ข) ให้โซเวียตถอนทหารออกไปจากอัฟกานิสถาน ค) ให้โซเวียตยุติความช่วยเหลือแก่เวียดนามในการยึดครองกัมพูชา เมื่อนายกอร์บาชอฟขึ้นมาเป็นผู้นำโซเวียตในปี 1985 การเจรจาระหว่างประเทศทั้งสองได้คืบหน้าขึ้น อีกทั้งโซเวียตได้ยอมลดกำลังทหารที่ประชิดพรมแดนจีนลง และถอนทหารออกจากอัฟกานิสถานในเดือนกุมภาพันธ์ ค.ศ. 1989 อีกทั้งกดดันให้เวียดนามถอนทหารจากกัมพูชาภายในกันยายน 1989 ทำให้ผู้นำจีนยอมให้มีการประชุมสุดยอดระหว่างจีน-โซเวียตขึ้น ระหว่าง 15-17 พฤษภาคม คศ. 1989 ที่ปักกิ่ง การประชุมสุดยอดระหว่างเติ้งเสี่ยวผิงและนายกอร์บาชอฟ ส่งผลให้บรรยายกาศทางการเมืองในเอเชียลดความตึงเครียดลง

2. การถอนทหารเวียดนามออกจากกัมพูชา เวียดนามได้ยึดครองกัมพูชามาตั้งแต่ปี ค.ศ. 1979 จนถึงปี 1989 เป็นเวลา 11 ปี ในที่สุดเวียดนามก็ถูกกดดันให้ถอนทหารออกจากกัมพูชา ภายในเดือนกันยายน ปี 1989 แม้ดูเหมือนว่าเวียดนามจะได้ถอนทหารส่วนใหญ่ออกจากกัมพูชาแล้ว แต่ไม่มีผู้ใดทราบว่ายังมีทหารเวียดนามที่ไม่สวมเครื่องแบบเหลืออีกเท่าใด คาดว่าอาจมีทหารเวียดนามประมาณ 5,000-10,000 คน แฝงตัวอยู่ในรูปที่ปรึกษาของกองทัพเขมรเขงสัมริน การถอนทหารเวียดนามออกจากกัมพูชาทำให้ความกดดันทางทหารตามแนวชายแดนไทย-กัมพูชาลดลง

3. ความขัดแย้งระหว่างจีนกับสหรัฐอเมริกา อันสืบเนื่องมาจากเหตุการณ์"เทียนอันเหมิน" การชุมนุมเรียกร้องประชาธิปไตยของนักศึกษาและปัญญาชนจีน ที่จตุรัสเทียนอันเหมิน ระหว่างเดือนเมษายน-พฤษภาคม 1989 และการที่รัฐบาลจีนใช้กำลังทหารเข้าปราบปรามการชุมนุม

ของนักศึกษาจีนอย่างรุนแรงในวันที่ 4 มิถุนายน [32] ทำให้นักศึกษาและประชาชนเสียชีวิตจำนวนมาก ทำให้ภาพพจน์ของจีนเสียหาย ประเทศตะวันตกหลายประเทศรวมทั้งสหรัฐอเมริกาได้ประณามการกระทำของจีน ปัญญาชนคนสำคัญของจีน นายฟางลี่จือ และภรรยา ได้ขอลี้ภัยทางการเมืองในสถานทูตสหรัฐอเมริกาที่ปักกิ่ง ทำให้จีนไม่พอใจและทำให้ความสัมพันธ์ระหว่างสหรัฐอเมริกาและจีนเย็นชาลงอย่างมาก เหตุการณ์ที่เทียนอันเหมินได้ส่งผลกระทบที่สำคัญต่อภาพพจน์และบทบาทของจีนในเวทีระหว่างประเทศ

นโยบายต่างประเทศของไทยในช่วงนี้ค่อนข้างเน้นเรื่อง **"เศรษฐกิจ"** มากกว่าเรื่องอื่นๆ อาจจะเป็นเพราะนายกรัฐมนตรีคนใหม่เป็นนักการเมืองที่มีประสบการณ์ทางธุรกิจ อีกทั้งแรงกดดันทางเศรษฐกิจภายในที่ต้องการแสวงหาวัตถุดิบ และตลาดสินค้าใหม่ๆ อีกทั้งพรรคชาติไทยที่เป็นแกนในการจัดตั้งรัฐบาลผสม ก็มีโยงใยผูกพันกับธุรกิจหลายชนิด การเน้นเรื่องเศรษฐกิจ หรือ "ธุรกิจ" จึงปรากฏอย่างชัดเจนจากนโยบายของนายกรัฐมนตรีพล.อ.ชาติชาย ชุณหะวัณ ที่จะเปลี่ยนอินโดจีนจาก **"สนามรบเป็นสนามการค้า"** โดยสนับสนุนให้มีการค้าขายกับประเทศในอินโดจีน [33] ไม่ว่าลาว เวียดนาม หรือระบอบเขมรสัมรินในพนมเปญ จนดูเหมือนว่า "ธุรกิจนำหน้าการทูต" กระทรวงต่างประเทศไม่เห็นด้วยกับการค้าขายกับระบอบเขมรสัมริน เพราะเกรงว่า จะกระทบกระเทือนต่อความพยายามในการแก้ไขปัญหากัมพูชาทางการเมืองแบบเบ็ดเสร็จ (Comprehensive Political Solution) ตามแนวทางของอาเซียน

การเน้นเรื่องเศรษฐกิจยังปรากฏชัดเมื่อมีการแต่งตั้ง **"คณะกรรมการนโยบายความสัมพันธ์ทางเศรษฐกิจระหว่างประเทศ" (กนศ.)** เมื่อวันที่ 19 ตุลาคม ค.ศ. 1988 โดยมีรองนายกรัฐมนตรี พงส์ สารสิน เป็นประธาน และประกอบด้วยคณะอนุกรรมการ 6 ชุด ซึ่งทำหน้าที่กลั่นกรองนโยบายด้านการค้ากับต่างประเทศ คือ

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32. จุลชีพ ชินวรรโณ "แผ่นดินเดือดแดนมังกร : วิเคราะห์การปราบปรามการชุมนุมเรียกร้องประชาธิปไตย ณ จัตุรัสเทียนอันเหมิน คศ. 1988" ในวารสารธรรมศาสตร์ ปีที่ 16 ฉบับที่ 3 (กรกฎาคม 1988) หน้า 63-81

33. The Nation September 9, 1988, pp. 1-2

1. คณะอนุกรรมการความสัมพันธ์เศรษฐกิจระหว่างไทยกับสหรัฐฯ
2. คณะอนุกรรมการปรับโครงสร้างความสัมพันธ์ทางเศรษฐกิจไทยกับญี่ปุ่น
3. คณะอนุกรรมการความสัมพันธ์ทางการค้าระหว่างไทยกับประชาคมยุโรป
4. คณะอนุกรรมการว่าด้วยการค้าและการพัฒนาของสหประชาชาติ (UNCTAD)
5. คณะอนุกรรมการเกี่ยวกับข้อตกลงทั่วไปว่าด้วยภาษีศุลกากรและการค้า
6. คณะอนุกรรมการการค้าระหว่างประเทศไทยกับประเทศอื่นๆ

การดำเนินนโยบายต่างประเทศของไทยในการแก้ไข**ปัญหากัมพูชา** ในช่วงนี้ได้สะท้อนความแตกต่างของแนวคิดและวิธีการระหว่างนายกรัฐมนตรี พล.อ.ชาติชาย ชุณหะวัณ และคณะที่ปรึกษา กับรัฐมนตรีต่างประเทศ พล.อ.อ. สิทธิ เศวตศิลาและกระทรวงต่างประเทศ คณะที่ปรึกษานายกรัฐมนตรีเห็นว่า ท่าทีของกระทรวงต่างประเทศเกี่ยวกับกัมพูชาค่อนข้างแข็งกร้าวเกินไป เพราะกระทรวงต่างประเทศยังคงยึดมั่นในมติของอาเซียนและขององค์การสหประชาชาติที่จะให้มีการแก้ไขปัญหากัมพูชาทางการเมืองอย่างสมบูรณ์แบบ(Comprehensive Political Settlement) โดยเวียดนามจะต้องถอนทหารออกไปจากกัมพูชาให้หมด และให้มีการเลือกตั้งในกัมพูชาภายใต้การดูแลของสหประชาชาติ เพื่อให้รัฐบาลกัมพูชาเป็นรัฐบาลที่มีอิสระและเป็นกลาง คณะที่ปรึกษาต้องการที่จะให้ไทยมีท่าทีที่ยืดหยุ่นมากกว่านี้ และต้องการปรับวิธีการแก้ไขเป็นแบบทีละขั้น (Step by Step) ซึ่งอาจจะนำไปสู่การยุติสงครามและการแก้ไขปัญหากัมพูชาโดยเร็ว

พล.อ.ชาติชาย ชุณหะวัณ ได้แสดงทัศนะหลังการปาฐกถาเรื่อง "Thailand and The World in 1990's ที่สโมสรผู้สื่อข่าวต่างประเทศเมื่อวันที่ 22 ธันวาคม คศ. 1988 ว่า "ยินดีต้อนรับฮุนเซนจากพนมเปญ ถ้าหากว่าฮุนเซนจะเดินทางมาประเทศไทย" [34] ต่อมาคณะที่ปรึกษานายกรัฐมนตรีได้มีบทบาทสำคัญในการ "จัดการ" การเดินทางมาประเทศไทยของฮุนเซน โดยกระทรวงต่างประเทศมิได้มีส่วนเกี่ยวข้องเลย ฮุนเซนพร้อมด้วยภรรยาและคณะอีก 22 คนประกอบด้วย รัฐมนตรีกลาโหมเตียบัน รัฐมนตรีช่วยว่าการเศรษฐกิจกงชมโอม

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34. The Nation December 23, 1988, p. 1

รัฐมนตรีช่วยว่าการต่างประเทศคนที่ 1 ดิ๊ก มนตี รัฐมนตรีช่วยว่าการต่างประเทศคนที่ 2 ชกอาน และเจ้าหน้าที่เขมรได้เดินทางมาถึงสนามบินดอนเมืองจากเวียงจันทน์ในวันที่ 25 มกราคม 1989 โดยมีนายอนุวรรตน์ วัฒนพงศ์ศิริ สส.พรรคชาติไทยและรัฐมนตรีประจำสำนักนายกรัฐมนตรี ไปต้อนรับ [35] ฮุนเซนได้พบปะเจรจากับนายกรัฐมนตรีและเดินทางกลับในวันรุ่งขึ้น

แม้พล.อ.ชาติชาย ชุณหะวัณ จะแถลงว่า การต้อนรับนายฮุนเซนครั้งนี้เป็นไปอย่างไม่เป็นทางการ และมิได้เป็นการรับรองระบอบปกครองของนายฮุนเซน แต่การที่นายกรัฐมนตรีไปพบปะเจรจากับฮุนเซนโดยเปิดเผย ก็เท่ากับเป็นการเพิ่มความชอบธรรมให้กับฮุนเซน และดูเหมือนว่าจะมิได้มีมรรคผลอะไรเกิดขึ้น ยิ่งไปกว่านั้นอาจทำให้ฮุนเซน "ได้ใจ" และมีท่าทีที่แข็งกร้าวไม่ยอมประนีประนอม ซึ่งอาจเป็นปัจจัยหนึ่งที่ทำให้เกิดความล้มเหลวในการประชุมเขมร 4 ฝ่ายที่จาการ์ตาครั้งที่ 2 หรือ JIM-2 (Jakarta Informal Meeting II) ระหว่าง 19-21 กุมภาพันธ์ คศ. 1989

กระทรวงต่างประเทศได้จัดให้นายกรัฐมนตรีพบปะกับผู้แทนเขมร 3 ฝ่าย คือ เจ้ารณฤทธิ นายซอนซานน์ และเคียว สัมพันเพื่อปรึกษาหารือ จะได้ไม่ดูว่าไทยกำลังเอนเอียงไปยังพนมเปญ "มากเกินไป" ต่อมามหาอำนาจ 5 ชาติที่เป็นสมาชิกคณะมนตรีความมั่นคง สหประชาชาติได้จัดประชุมนานาชาติเกี่ยวกับปัญหากัมพูชาที่ปารีสในเดือนกรกฎาคม-สิงหาคม คศ. 1989 และมีนานาชาติเข้าประชุม 19 ประเทศ แต่ก็ไม่อาจตกลงกันได้ ต่อมาอินโดนีเซียได้จัดประชุม JIM 3 ระหว่าง 26-28 กุมภาพันธ์ คศ. 1990 แต่ก็ไม่มีอะไรคืบหน้านัก

คงจะต้องมีการถกเถียงกันว่า แนวทางของนายกรัฐมนตรี พล.อ.ชาติชาย ชุณหะวัณ ในการเชิญฮุนเซนมาเยือนไทย เป็นแนวนโยบายที่เหมาะสมกับเวลาและสถานการณ์ต่างๆ เพียงใด และมีส่วนทำให้ระบอบฮุนเซนและเวียดนามมีท่าทีแข็งกร้าว ไม่ยอมประนีประนอม และทำให้ปัญหากัมพูชาต้องยืดเยื้อจนถึงทุกวันนี้หรือไม่

ความสัมพันธ์ระหว่างไทยกับลาวในช่วงนี้ค่อนข้างดีขึ้น พล.อ.ชาติชาย ชุณหะวัณ นายกรัฐมนตรีได้เดินทางไปเยือนลาวอย่างเป็นทางการระหว่าง 24-25 พฤศจิกายน 1988 และทั้งสองฝ่ายมีการออกแถลงการณ์ร่วมที่ยืนยันในมิตรภาพและไมตรีจิตระหว่างกัน การค้าขายระหว่างไทยกับลาวได้เพิ่มมากขึ้นจาก 818.7 ล้านบาท และ 1197.7 ล้านบาท

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35. Bangkok Post January 26, 1989, p. 1

ในคศ. 1986 และ 1987 ตามลำดับ มาเป็น 1866.1 ล้านบาท ในคศ. 1988 และ 2922.8 ล้านบาท ในคศ.1989 จะเห็นได้ว่าการค้าระหว่างไทยกับลาวระหว่าง คศ. 1987-1989 เพิ่มขึ้นเฉลี่ยร้อยละ 57 ต่อปี โดยไทยเป็นฝ่ายได้เปรียบดุลการค้า

ส่วนความสัมพันธ์ระหว่างไทยกับ**เวียดนาม**ก็ดีขึ้น โดยเฉพาะอย่างยิ่งหลังจากที่เวียดนามได้ถอนทหารออกจากกัมพูชาในเดือนกันยายน คศ. 1988 ต่อมาในระหว่างวันที่ 9-12 มกราคม คศ. 1989 รัฐมนตรีต่างประเทศ พล.อ.อ.สิทธิ เศวตศิลา ได้เดินทางไปเยือนเวียดนามพร้อมด้วยคณะนักธุรกิจ เพื่อปรับปรุงความสัมพันธ์และหาทางขยายการค้าและการลงทุน การค้าระหว่างไทยกับเวียดนามได้เพิ่มขึ้นจาก 463.3 ล้านบาท ในปีคศ. 1988 เป็น 1591.8 ล้านบาท ในปีคศ. 1989 และไทยเริ่มขาดดุลการค้ากับเวียดนามในปีคศ. 1989 เป็นมูลค่า 765.4 ล้านบาท สินค้าที่ไทยนำเข้าจากเวียดนามมักเป็นเศษเหล็ก หนังโค-กระบือ และวัตถุดิบต่างๆ ส่วนสินค้าที่ไทยส่งออกไปขายเวียดนามมักเป็นสินค้าอุตสาหกรรมเบา สินค้าอุปโภค บริโภค และวัสดุก่อสร้าง

ตารางที่ 8

การค้าทวิภาคีและดุลการค้าระหว่างประเทศไทยกับลาว กัมพูชาและเวียดนาม

(ล้านบาท)

ปี	ลาว		เวียดนาม		กัมพูชา	
	การค้า	ดุลการค้า	การค้า	ดุลการค้า	การค้า	ดุลการค้า
1986	818.7	+751.5	119.0	+28.4	--	--
1987	1,197.7	+893.1	186.1	+36.9	0.2	+0.2
1988	1,866.1	+730.3	463.3	+0.1	14.4	+13.4
1989	2,922.8	+350.8	1,591.8	-765.4	3.9	+0.9

แหล่งที่มา : กระทรวงพาณิชย์

ส่วนนโยบายต่างประเทศของไทยต่อประเทศมหาอำนาจในช่วงนั้นั้น พล.อ.ชาติชาย ชุณหะวัณได้พยายามแสดงออกว่า ไทยมีนโยบายที่เป็นอิสระ และคำนึงถึงประโยชน์ของชาติเป็นสำคัญ โดยไม่ยอมสยบต่อแรงกดดันจากมหาอำนาจ ท่าทีทีปรากฏของนายกรัฐมนตรีมักจะมีลักษณะ "แข็งแกร่ง" และ"ยืนหยัด" โดยเฉพาะอย่างยิ่งในความสัมพันธ์กับสหรัฐอเมริกา ซึ่งในช่วงนี้เต็มไปด้วยปัญหาเกี่ยวกับเศรษฐกิจการค้า แม้ว่าไทยจะได้ยอมลดภาษีศุลกากรสินค้าขาเข้าของสหรัฐฯ เช่น ลดภาษีข้าวสาลีจาก 2.30 บาท/กก. เหลือเพียง 1.80 บาท/กก. ลดภาษีแอปเปิ้ลจากร้อยละ 60 เหลือเพียง 30 ก็ตาม แต่สหรัฐอเมริกายังกดดันไทยให้แก้ไขพระราชบัญญัติลิขสิทธิ เพื่อให้การคุ้มครองทรัพย์สินทางปัญญาของสหรัฐฯ โดยต้องรวมคอมพิวเตอร์ซอฟแวร์และสิทธิบัตรยาด้วย แต่ พล.อ.ชาติชาย ชุณหะวัณ ไม่เห็นด้วย ต่อมารัฐสภาสหรัฐอเมริกาได้ผ่านกฎหมายการค้าฉบับครอบจักรวาล (Omnibus Trade Bill) ซึ่งมีมาตรการ 301 ที่ให้อำนาจประธานาธิบดีในการตอบโต้ประเทศต่างๆ ที่ไม่คุ้มครองทรัพย์สินทางปัญญาของสหรัฐฯ หรือไม่เปิดตลาดให้สินค้าสหรัฐฯ โดยอาจตัดสิทธิพิเศษทางศุลกากร (GSP) หรือจำกัดโควต้าหรือเพิ่มภาษีแก่สินค้าที่ประเทศนี้ส่งมาขายในสหรัฐฯ

นายกรัฐมนตรี พล.อ.ชาติชาย ชุณหะวัณ ได้มีโอกาสพบปะสนทนากับประธานาธิบดีจอร์จ บุช แห่งสหรัฐอเมริกาที่โตเกียว ในระหว่างงานพิธีพระบรมศพสมเด็จพระจักรพรรดิฮิโรฮิโตแห่งญี่ปุ่นเมื่อวันที่ 23 กุมภาพันธ์ คศ.1989 และผู้นำไทยได้ยื่น Aide-Memoire ให้ผู้นำสหรัฐฯ พิจารณาในการแก้ไขปัญหาระหว่างไทยกับสหรัฐฯ ทางด้านเศรษฐกิจการค้า แต่ดูเหมือนสหรัฐอเมริกาไม่กระตือรือร้นในการสนองตอบต่อข้อเสนอของไทย

ส่วนความสัมพันธ์ระหว่างไทยกับ**ญี่ปุ่น**ในช่วงนี้ค่อนข้างราบรื่น บริษัทของญี่ปุ่นจำนวนมากได้มาลงทุนในประเทศไทย ทำให้เศรษฐกิจของไทยขยายตัวอย่างรวดเร็ว แต่การค้าระหว่างไทยกับญี่ปุ่นยังคงขาดดุลต่อไป เพราะไทยสั่งซื้อสินค้าประเภททุนและเครื่องจักรเข้ามามาก แม้ว่าไทยจะสามารถส่งสินค้าออกไปขายในญี่ปุ่นได้เพิ่มมากขึ้นก็ตาม พล.อ.ชาติชาย ชุณหะวัณ ได้เดินทางไปญี่ปุ่นเพื่อเข้าร่วมในพิธีพระบรมศพของสมเด็จพระจักรพรรดิในเดือนกุมภาพันธ์ คศ. 1989 และต่อมาในเดือนมิถุนายนปีเดียวกัน นายทาเกชิตะนายกรัฐมนตรีของญี่ปุ่นได้เดินทางมาเยือนไทยเพื่อตอบแทนและกระชับความสัมพันธ์ให้แน่นแฟ้นยิ่งขึ้น

ส่วนความสัมพันธ์ระหว่างไทยกับ**จีน**ในช่วงนี้ ยังคงใกล้ชิดกันแต่ไม่สนิทสนมเหมือนในช่วง 8 ปีที่ผ่านมา เพราะทางจีน "ไม่ค่อยพอใจ" นักต่อแนวทางการแก้ไขปัญหากัมพูชาของ พล.อ.ชาติชาย ชุณหะวัณ โดยเฉพาะอย่างยิ่งภายหลังการเดินทางมาเยือนไทยของนายฮุนเซน

อย่างไรก็ดี นายหลี่เผิง นายกรัฐมนตรีสาธารณรัฐประชาชนจีนได้เดินทางมาเยือนไทยระหว่าง 11-14 พฤศจิกายน คศ. 1988 นับเป็นการเดินทางเยือนต่างประเทศครั้งแรกในฐานะนายกรัฐมนตรีจีน ซึ่งแสดงให้เห็นว่าจีนยังคงให้ความสำคัญต่อไทยและมีความสัมพันธ์ใกล้ชิดกัน

ต่อมาในเดือนมีนาคม คศ.1989 นายกรัฐมนตรี พล.อ.ชาติชาย ชุณหะวัณ ได้เดินทางไปเยือนจีนครั้งแรก และในเดือนตุลาคมปีเดียวกัน ก็เดินทางไปเยือนจีนอีกเป็นครั้งที่ 2 เพื่ออธิบายให้จีนทราบถึงแนวทางของไทยในการแก้ไขปัญหากัมพูชา ซึ่งจีนก็ "รับฟัง" อย่างอดทน!

ในช่วงนี้ นายกรัฐมนตรี พล.อ.ชาติชาย ชุณหะวัณ ยังได้เดินทางไปเยือนอินเดียเพื่อกระชับความสัมพันธ์กับอินเดีย นับเป็นนายกรัฐมนตรีไทยคนแรกที่เดินทางไปอินเดีย รัฐมนตรีช่วยว่าการต่างประเทศ ร.ต.ประพาส ลิมปะพันธ์ ได้เดินทางไปเยือนประเทศต่างๆ ในตะวันออกกลาง และอาฟริกา เพื่อดูแลคนงานไทยในตะวันออกกลาง อีกทั้งขยายตลาดการค้าของไทยในตะวันออกกลางและอาฟริกา

นโยบายต่างประเทศของไทยในช่วงท้ายของทศวรรษ 1980 หรือระหว่างคศ.1988 จนถึงปัจจุบันนี้เน้นเรื่องเศรษฐกิจมากกว่าด้านอื่นๆ ซึ่งสอดคล้องกับการเปลี่ยนแปลงของสภาพการเมืองระหว่างประเทศ โดยเฉพาะอย่างยิ่งความสัมพันธ์ระหว่างประเทศมหาอำนาจและการคลี่คลายของสถานการณ์ในเอเชียตะวันออกเฉียงใต้ อย่างไรก็ดีความแตกต่างในด้านนโยบายและแนวคิดระหว่างคณะที่ปรึกษานายกรัฐมนตรีและกระทรวงการต่างประเทศได้ส่งผลให้การดำเนินนโยบายของไทยต่อปัญหากัมพูชาค่อนข้างสับสนและไม่มีเอกภาพ นอกเหนือจากนโยบายเปลี่ยน"สนามรบไปเป็นสนามการค้า"ของนายกรัฐมนตรี พล.อ.ชาติชาย ชุณหะวัณ แล้ว ผู้นำของฝ่ายทหารเช่น พล.อ.ชวลิต ยงใจยุทธ ก็ได้เสนอแนวคิดเกี่ยวกับนโยบายของไทยต่อประเทศเพื่อนบ้านคือ แนวคิด"สุวรรณภูมิ" ซึ่งต้องการให้ไทยเป็นผู้นำในด้านเศรษฐกิจใน"สุวรรณภูมิ" หรือเอเชียตะวันออกเฉียงใต้ โดยเฉพาะอย่างยิ่งพม่าและอินโดจีนทั้งสามประเทศ ความหลากหลายและความสับสนเกี่ยวกับนโยบายของไทยต่อประเทศเพื่อนบ้านในอินโดจีนนี้ ได้ส่งผลให้ความสัมพันธ์ระหว่างไทยกับอาเซียน ซึ่งเดิมใกล้ชิด ได้เริ่มคลายความใกล้ชิดลง เพราะความงุนงงและความไม่แน่ใจในการเปลี่ยนท่าทีของไทยโดยเฉพาะอย่างยิ่งต่อปัญหากัมพูชา

สรุปและแนวโน้ม

เมื่อย้อนพินิจนโยบายต่างประเทศของไทยในช่วงทศวรรษที่ 1980 หรือ 10 ปีที่ผ่านมา อาจกล่าวได้ว่า นโยบายต่างประทศของไทย แบบ **"รอบด้าน"** (omni-directions) ที่เน้นเรื่องมั่นคงในระยะแรก และปรับเพิ่มมิติของเศรษฐกิจในเวลาต่อมา ได้ประสบความสำเร็จอย่างดี ประเทศไทยในปัจจุบันมีสถานภาพที่มั่นคงมากขึ้น เศรษฐกิจมั่งคั่งและขยายตัว อีกทั้งยังได้รับการยอมรับนับถือจากประเทศต่าง ๆ ทั้งในระดับภูมิภาคและระดับโลก แม้ว่านโยบายในตอนปลายทศวรรษที่ 1980 จนถึงปัจจุบันจะมีความสับสนและไร้เอกภาพอยู่บ้าง

ในปัจจุบันนี้การกำหนดนโยบายต่างเทศของไทยดูยังไม่เป็นระบบเท่าที่ควรและยังไม่มีการประสานความคิดให้เป็นอันหนึ่งอันเดียวกันระหว่างฝ่ายต่างๆ อันเป็นผลมาจากปัญหา "การเมืองภายใน" ในด้านการดำเนินนโยบายต่างประเทศก็เช่นกัน มักไม่ค่อยมีเอกภาพ บางทีก็มีความสับสน ไม่รู้ว่าใครบ้างกำลังทำอะไรอยู่และทำอย่างไร จังหวะตลอดจนเครื่องมือที่ใช้ก็ไม่ค่อยเหมาะสม น่าจะมีการประสานการดำเนินนโยบายให้มีเอกภาพมากกว่านี้ เพื่อที่ว่าประเทศชาติและส่วนรวมจะได้ประโยชน์เต็มที่

สำหรับในอนาคตโดยเฉพาะในทศวรรษที่ 1990 นี้ นโยบายต่างประเทศของไทยจะต้องสามารถปรับตัวให้ยืดหยุ่นแต่ไม่ยืดยาด คล่องตัวแต่ไม่ไร้หลักการ และจะต้องปรับเปลี่ยนให้ทันกับเหตุการณ์แต่ไม่ใช่ถูกเหตุการณ์พาไปจน "เข้ารกเข้าพง" ผู้เกี่ยวข้องกับการกำหนดนโยบายจะต้องติดตาม และวิเคราะห์การเปลี่ยนแปลงในสภาพแวดล้อมทั้งภายในประเทศและนอกประเทศอย่างมีเหตุผลเท่าที่ทำได้และมี "อคติ" น้อยที่สุด

นอกจากนั้น กระทรวงต่างประเทศซึ่งในช่วงต้นทศวรรษที่ 1980 ที่ผ่านมา เคยเป็นหน่วยงานที่มีบทบาทสูงในการกำหนดและดำเนินนโยบายต่างประเทศของไทย คงต้องมีการปรับตัวเองสำหรับอนาคตในด้านโครงสร้างภายในทั้งในระยะสั้นและระยะยาว อีกทั้งจะต้องประสานงานกับหน่วยงานอื่นๆ เพิ่มมากขึ้น โดยมีกลไกที่ชัดเจนและเป็นระบบ เพราะในอนาคตทั้งนักการเมือง ส.ส.และรัฐสภาคงจะเข้ามามีส่วนร่วมในการกำหนดนโยบายต่างประเทศมากขึ้น ในด้านการดำเนินนโยบายต่างประเทศ กระทรวงการต่าง-ประเทศคงจะไม่สามารถผูกขาดการดำเนินนโยบายเหมือนในอดีต แต่อาจต้องปรับมาทำงานด้านการประสานนโยบายกับกระทรวงทบวงกรมอื่นๆ เช่น กระทรวงพาณิชย์ กระทรวงอุตสาหกรรม กระทรวงกลาโหม กระทรวงมหาดไทย และองค์กรเอกชน และบริษัทอุตสาหกรรมขนาดใหญ่ต่างๆ ภายใต้กลไกที่เป็นทางการและมีการแบ่งงานกันทำที่

ชัดเจนและเอื้อต่อกัน เพื่อให้การดำเนินนโยบายต่างประเทศซึ่งในอนาคตคงจะมีเรื่องเศรษฐกิจอยู่มาก ดำเนินไปในทิศทางเดียวกันอย่างต่อเนื่อง มีเอกภาพและมีประสิทธิภาพสูงสุด กระทรวงต่างประเทศจะต้องสร้าง "แนวร่วม" กับกลุ่มอาชีพต่างๆ โดยให้ความรู้ตลอดจนข่าวสารข้อมูลต่างๆ แก่นักธุรกิจ นักหนังสือพิมพ์ และนักวิชาการ เพราะการดำเนินนโยบายเศรษฐกิจ-การเมืองต่างประเทศในอนาคตจะมีความซับซ้อน และมีเรื่องเทคนิคต่างๆ มากขึ้น และจะต้องได้รับการสนับสนุนทางด้านงบประมาณและกำลังคนจากรัฐบาลมากขึ้นด้วย

ยิ่งไปกว่านั้น เจ้าหน้าที่กระทรวงต่างประเทศเองจะต้อง "ปรับทัศนคติ" และท่วงท่านองในการทำงาน ต้องออกมาสู่สาธารณชนมากขึ้น ต้องประชาสัมพันธ์มากขึ้นและต้องประสานงานให้ดีขึ้น นักการทูตของกระทรวงในต่างประเทศต้องติดต่อกับเจ้าหน้าที่ของรัฐบาลต่างประเทศทุกระดับทั้งในวงกว้างและลึก อีกทั้งต้องติดต่อกับบุคคลสำคัญและมีชื่อเสียงในวงการต่างๆอีกด้วย ไม่ว่าจะเป็นนักธุรกิจ นักวิชาการ นักการเมืองท้องถิ่น รวมทั้งนักแสดง ศิลปินด้วย ไม่ใช่ติดต่อเฉพาะเจ้าหน้าที่กระทรวงการต่างประเทศและรัฐบาลหรือประมุขของประเทศเท่านั้น แต่จะต้องเจาะลึกไปถึงรัฐสภา (ถ้ามี) ฝ่ายค้าน นักการเมือง และที่ปรึกษาตลอดจนเจ้าหน้าที่สำคัญ (key persons and staff) ของนักการเมือง นักการทูตจะต้องรู้จักนำเอา "วัฒนธรรม" และความสัมพันธ์ระหว่างประชาชนกับประชาชนมาใช้ในการกระชับความสัมพันธ์กับประเทศต่างๆ

ในด้านการดำเนินนโยบายต่างประเทศ ในทศวรรษที่ 1990 นี้ ประเทศไทยในอนาคตจะต้องขยายความสัมพันธ์กับประเทศต่างๆ ทุกประเทศ แม้ว่ามหาอำนาจจะมิได้มีอำนาจหรือบทบาทสูงดังในอดีต แต่มหาอำนาจก็ยังมีความสำคัญสูงต่อประเทศไทย โดยเฉพาะอย่างยิ่งทางด้านเศรษฐกิจ และการถ่ายทอดเทคโนโลยี **สหรัฐอเมริกา**ยังคงเป็นคู่ค้าที่สำคัญและยังเป็นพันธมิตรที่ใกล้ชิดแม้จะมีปัญหาอยู่บ้าง ก็น่าจะเจรจาทำความเข้าใจกันได้ บนพื้นฐานที่เท่าเทียมกันในฐานะมิตรสนิทมาช้านาน

ส่วน**สหภาพโซเวียต**ก็คงจะทวีความสำคัญเพิ่มขึ้นในฐานะคู่ค้าของไทย ส่วน**จีน**นั้นก็ยังคงความสำคัญต่อไทยต่อไป ไม่ว่าจะเป็นทางด้านการเมืองและเศรษฐกิจ จีนเป็นประเทศใหญ่และอยู่ไม่ไกลจากประเทศไทยนัก อีกทั้งตลอด 15 ปีที่ผ่านมา ไทยกับจีนก็มีความสัมพันธ์ที่ใกล้ชิดสนิทสนม และไทยก็ได้ประโยชน์หลายอย่างจากความสัมพันธ์อันดีกับจีน ในทศวรรษที่

1990 ความสัมพันธ์ไทย-จีนจะยังคงเติบโตต่อไป โดยน่าจะให้ความสำคัญด้านการค้าขายและการลงทุนมากขึ้น ส่วนญี่ปุ่นนั้นความสัมพันธ์ทางด้านการเมืองไม่ค่อยมีปัญหา ทางด้านเศรษฐกิจโดยคงต้องพยายามเจาะตลาดญี่ปุ่นมากขึ้น ขอความเห็นใจให้ญี่ปุ่นช่วยลดระเบียบและกฎเกณฑ์การส่งสินค้าเข้าตลาดญี่ปุ่น และพยายามลดการขาดดุลการค้ากับญี่ปุ่น อีกทั้งเรียกร้องให้บริษัทญี่ปุ่นถ่ายทอดเทคโนโลยีทันสมัยแก่ไทยมากขึ้น

ความเปลี่ยนแปลงในยุโรปตะวันออกคงจะเปิดโอกาสให้ไทยค้าขายกับประเทศเหล่านี้มากขึ้น และในอนาคตคงจะมีการติดต่อในลักษณะทวิภาคีมากขึ้น ส่วนในยุโรปตะวันตกที่จะมีการรวมตัวเป็นตลาดเดียว (Single Market) ในปี ค.ศ. 1992 ตลอดจนความร่วมมือระหว่างยุโรปตะวันตกกับตะวันออก หรือการรวมเยอรมัน คงจะมีผลกระทบกับไทยบ้าง ไทยจะต้องปรับตัวให้ทันและพยายามดึงประโยชน์จากการรวมตัวของยุโรปตะวันตกมาให้เกิดประโยชน์กับไทยให้มาก และลดผลกระทบลง เอกชนจะต้องมีบทบาทต่อการขยายความสัมพันธ์ทางการค้ากับยุโรปมากขึ้นโดยประสานกับกระทรวงต่างประเทศ

ในทศวรรษที่ 1990 นี้ ประเทศไทยต้องให้ความสำคัญกับประเทศในภูมิภาคอื่นๆ ด้วย ไม่ว่าจะเป็นออสเตรเลีย นิวซีแลนด์ ในแปซิฟิค หรือแคนนาดาในอเมริกาเหนือหรือประเทศเล็กๆ เช่น เนปาล ลังกาในเอเชียใต้ ตลอดจนประเทศในอัฟริกาตะวันออกกลางและลาตินอเมริกา หรือแม้แต่ประเทศหมู่เกาะเล็กๆ น้อยๆ ในแปซิฟิค เพราะประเทศเหล่านี้จะเป็นตลาดรองรับสินค้าทั้งเกษตรกรรมและอุตสาหกรรมของไทย

ในด้านนโยบายต่อประเทศเพื่อนบ้านในเอเชียตะวันออกเฉียงใต้ ประเทศไทยในอนาคตคงจะดำเนินนโยบาย "เปลี่ยนสนามรบเป็นสนามการค้า" ต่ออินโดจีนต่อไป โดยกระชับความสัมพันธ์กับลาวให้ใกล้ชิดยิ่งขึ้น การติดต่อค้าขายหรือลงทุนกับลาวจะต้องดำเนินไปอย่างสุจริตยุติธรรมโดยมีผลประโยชน์ร่วมกัน ส่วนความสัมพันธ์กับเวียดนามคงจะเปลี่ยนจากการเผชิญหน้ากันมาเป็นการอยู่ร่วมกันกันโดยสันติ และอาจปรับไปสู่การร่วมมือกันเพื่อสร้างสันติภาพอันถาวรในเอเชียตะวันออกเฉียงใต้ ส่วนกัมพูชานั้นคงต้องใช้เวลาในการแก้ไขความขัดแย้งภายในระหว่างเขมรกลุ่มต่างๆ ไทยไม่จำเป็นต้อง "ร้อนรน" และไม่ควร "รีบร้อน" ควรปล่อยให้เงื่อนไขสุกงอมเพื่อนำไปสู่การแก้ไขปัญหากัมพูชาอย่างสมบูรณ์

ส่วนความสัมพันธ์กับพม่านั้นเป็นเรื่อง "ละเอียดอ่อน" เพราะปัญหาการเมืองภายในของพม่าทั้งเรื่องประชาธิปไตยและสิทธิมนุษยชน การผูกความสัมพันธ์ไว้กับบุคคลเพียงคนเดียวหรือกลุ่มเดียว เช่น ทหาร จะไม่สร้างความสัมพันธ์ที่ลึกซึ้งและมั่นคงได้ โดยเฉพาะ

อย่างยิ่งการเลือกตั้งในพม่าที่กำลังมีขึ้น ในขณะที่ไทยให้ความสัมพันธ์กับพม่าและอินโดจีนมากขึ้น ไทยเราก็ไม่ควรละเลยเพื่อนเก่าอาเซียนที่เคยกอดคอกันมาในช่วง 20 กว่าปี โดยเฉพาะอย่างยิ่งในช่วงคับขันทศวรรษ 1980 ที่ผ่านมา อาเซียนได้พิสูจน์ความเป็นมิตรแม้ว่าจะมีความเห็นไม่เหมือนกันในทุกๆ เรื่องก็ตาม ไทยจะต้องคำนึงถึงความรู้สึกของอาเซียนและควรจะแจ้งแนวนโยบายใหม่ๆ ให้เพื่อนฝูงทราบก่อนประกาศออกไป ประเทศไทยจะต้องกระชับความสัมพันธ์และความร่วมมือกับอาซียนมากขึ้น แม้ว่าไทยจะมองไปที่อินโดจีนหรือภาคพื้นเอเชีย-แปซิฟิคก็ตาม ไทยเราสามารถเป็น "สะพาน" ให้อาเซียนกับอินโดจีน แต่อาเซียนก็มีความสำคัญไม่ยิ่งหย่อนไปกว่าอินโดจีนต่อความมั่นคงปลอดภัยและความมั่งคั่งไพบูลย์ของประเทศไทยและภูมิภาคเอเชียอาคเนย์

นโยบายต่างประเทศของไทยในทศวรรษ 1990 จะต้องมีทิศทางที่ชัดเจนและมีเอกภาพมากกว่าที่เป็นอยู่ในช่วง 1-2 ปีที่ผ่านมา ต้องยืดหยุ่นแต่ไม่ใช่โอนเอนไร้หลักการ ต้องหนักแน่นแต่ไม่ใช้หนักอึ้งจนไม่อาจขยับปรับใดๆ แต่ในขณะเดียวกันก็ต้อง "ทัน" กับสถานการณ์ โดยไม่ "ล้ำหน้า" หรือ"ล้าหลัง" สถานการณ์ ทั้งนี้เพื่อรักษาผลประโยชน์แห่งชาติ และเพื่อให้ประเทศไทยก้าวหน้าต่อไปสู่ความมั่งคงทางการเมือง และความมั่งคั่งทางเศรษฐกิจ อย่างมีศักดิ์ศรี

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ร.๓๗๐ นโยบายต่างประเทศของสาธารณรัฐประชาชนจีน

ระดับปริญญาโท :

ร.๖๔๑ สัมมนาความสัมพันธ์ระหว่างไทยกับต่างประเทศ

ร.๖๕๗ สัมมนานโยบายต่างประเทศของจีน

ร.๗๔๑,๗๔๒ สำรวจวิชาทางการระหว่างประเทศและการทูต I,II

งานบริการวิชาการ ผู้บรรยายพิเศษ **วิทยาลัยป้องกันราชอาณาจักร** (วปอ.) ตั้งแต่ พ.ศ.๒๕๒๗ จนถึงปัจจุบัน และบรรยายพิเศษ วิทยาลัยกองทัพบก, วิทยาลัยกองทัพเรือ, โรงเรียนเสนาธิการทหารอากาศ และสถาบันจิตวิทยาความมั่นคง

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