TREATY PROTECTION AGAINST ECONOMIC SANCTIONS

BY

Hans VAN HOUTTE

CHARGÉ DE COURS
À LA KATHOLIEKE UNIVERSITEIT LEUVEN

Treaty provisions have often been invoked as protection against economic sanctions. Part I of this paper describes the different ways in which treaty provisions directly or indirectly protect against economic sanctions. Treaty provisions, however, in practive can never grant full protection against economic sanctions. Part II analyses the extent to which international law limits this treaty protection.

For practical reasons, this paper will focus more on bilateral treaties than on multilateral treaties. State practice has proven that bilateral treaties are indeed very important as protection against economic sanctions. Moreover, the wide variety of protection contained in bilateral treaties may also be found in multilateral treaties. Multilateral treaties, however, may offer additional protection against economic sanctions when they create institutions which effectively can prevent states from taking sanctions. Professor D. Carreau's paper examines the specific modalities of protection granted under the most important multilateral treaties, *i.e.* the I.M.F., G.A.T.T. and O.C.D.E. treaties.

Furthermore, this paper only considers treaties between states. It does not discuss the protection, investment and concession agreements between a state and a foreign company grant. Although these agreements may be governed by international law, they are not treaties between states. Moreover, their protection differs substantially from the protection treaties between states grant.

I. — TREATY CLAUSES FORBIDDING ECONOMIC MEASURES

A. — *Express Interdiction of Economic Sanctions.*

Bilateral treaties can expressly prohibit recourse to economic sanctions. From its very beginning, the Soviet Union has consistently used such measures to protect itself against boycott by other nations. The Brest-

Litovsk Treaty, the peace treaty Lenin negotiated with Germany immediately after the Bolshevik revolution, forbade Germany to impose economic sanctions on Russia (1). Non-agression and neutrality treaties prevented the Soviet Union's neighbours from participation in collective boycott actions against the Soviet Union (2). Moreover, in the early thirties, France and Italy were willing to undertake a firm treaty commitment that they would never exclude the Soviet Union from all their external trade (3). It has been claimed that the Soviet Union and other European countries are at present protected against economic sanctions by a network of bilateral treaties (4). Their treaties with West European countries, however, no longer explicitly exclude economic sanctions but contain instead lesser restraints. The present Treaty of Friendship between the Soviet Union and Afghanistan, well known as the Soviet justification for « military assistance » to Afghanistan, however, expressly forbids each part « to take part in actions or measure directed against the other high contracting party » (5). The clause still directly excludes any economic sanction.

Multilateral treaties also may prohibit economic sanctioning. The Charter of the Organisation of American States (OAS) for instance is quite explicit on this point. Article 18 prohibits « any ... form of interference or attempted threat ... against the political, economic and cultural elements (of a Member State) ». Article 19 even more specifically forbids the pursuit of national interests by imposing economic measures :

> « No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind » (6).

(1) Treaty of Brest-Litovsk of 3 March 1918, Annex 2, nr. 9. See MARTENS, *Nouveau Recueil Général*, 3e série, vol. 10, pp. 773 at 780.

(2) See e.g. treaties with *Afghanistan* of August 31, 1926, art. 2, par. 2 and of June 24, 1931 (BRUNS, *Politische Verträge*, vol. 1, Berlin, 1936, at p. 195 and p. 198); with *Estland* of May 4, 1932, art. 2 (BRUNS, *o.c.*, p. 314); with *France* of November 29, 1934, art. 4 (BRUNS, *o.c.*, 330); with *Germany* of April 24, 1926, art. 3 (BRUNS, *o.c.*, at pp. 180 ss; *RGBl*, 1926, II, pp. 359 ss.); with *Italy* of September 2, 1931, art. 3 (BRUNS, *o.c.*, p. 357); with *Letland* of February 5, 1932, art. 2 (BRUNS, *o.c.*, p. 310); with *Lithuania* of September 28, 1926, art. 4 (BRUNS, *o.c.*, p. 204); with *Persia* of October 1, 1927, art. 3, par. 2 (BRUNS, *o.c.*, p. 217); with *Turkey* of December 17, 1925, art. 2, par. 1 and Protocol nr. 2 (BRUNS, *o.c.*, pp. 168-169); cfr. DICKE, *Die Intervention mit wirtschaftlichen Mitteln im Völkerrecht*, Baden-Baden, 1978, at pp. 212-213; LINDEMEYER, *Schiffsembargo und Handelsembargo*, Baden-Baden, 1975, at pp. 494-496. Turkey and Persia have included similar clauses in their treaties with neighbouring countries (LINDEMEYER, *o.c.*, p. 496).

(3) Soviet-French non-agression treaty of November 29, 1934, art. 4 and Soviet-Italian treaty on amity, non-agression and neutrality of September 2, 1933, art. 3, BRUNS, *o.c.*, pp. 330 and 358, cited by LINDEMEYER, *o.c.*, at p. 495.

(4) See comments by ZIEGER in KEWENIG and HEINI, Die Anwendung wirtschaftlicher Zwangmassnahmen im Völkerrecht und im internationalen Privatrechts, 22 *Ber. Deutsche Gesellschaft Völkerr.*, Heidelberg, 1982, at p. 62.

(5) Treaty of Friendship December 5, 1978, art. 6.

(6) OAS Charter Bogota April 30, 1948 and amended Buenos Aires February 27, 1967, 119 *U.N.T.S.*, 3; 2 *U.S.T.*, p. 2394 and 21 *U.S.T.*, p. 607. Before the amendment the present articles 18 and 19 were articles 15 and 16.

For example, the US 1960 import embargo of Cuban sugar was generally regarded as a violation of the OAS ban on economic measures (7). The U.N. Charter does not contain provisions similar to Articles 18 and 19 of the OAS Charter. Article 2 (4) of the U.N. Charter, which forbids the threat or use of force, was not meant to exclude economic force (8). However the OAS provision on economic coercion has been adopted in the U.N. Resolution on Friendly Relations (9) and has now become a generally accepted U.N. standard.

B. — *Dispute Settlement Provisions.*

Economic sanctions are often taken as countermeasures when a contracting party fails to respect treaty obligations. Under general international law such countermeasures are legitimate as long as they are proportionate. The treaty, however, may provide that the parties have to settle any dispute by negotiation or by submission to judicial or arbitral settlement procedures. If such a settlement provision is broad and vague it does not prevent countermeasures. Articles 2 (3) and 33 of the U.N. Charter and articles 23 and 24 of the OAS Charter, which merely urge states to solve any disputes « by negotiation, enquiry, mediation, conciliation, arbitration or judicial settlement », definitely are too vague to forbid economic countermeasures (11).

A negotiation clause would, however, not bar countermeasures. The taking and lifting of economic measures in fact are normal strategies during negotiations. A recent arbitration award stated clearly that negotiation clauses do not preclude the taking of countermeasures. The case concerned a US-French dispute concerning the bilateral Air Service Agreement. The French authorities refused to allow PanAm passengers to disembark in Paris. The arbitrators had to decide whether the United States was entitled to suspend French flights to the United States as a countermeasure. Article X of the agreement required, however, that the Parties would negotiate all their disputes concerning the treaty. Did the

(7) See LINDEMEYER, *o.c.*, 514-517; THOMAS-THOMAS, *The Organization of American States*, Dallas, 1963, at pp. 157-168.

(8) See SEIDL-HOHENVELDERN, *The United Nations and Economic Coercion.*

(9) Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, October 24, 1970, *U.N.G.A.*, Res. 2625 (XXV); 25 *U.N. GAOR Supp.* (N° 28), p. 121; 9 *I.L.M.* (1970), p. 1292.

(10) See KAUSCH, Boycott, in *Encyclopedia of Public International Law*, vol. 3, 1982, p. 76. The U.S. boycott of Cuban sugar imports however was deemed by some in violation of the broad settlement provision of the OAS-Charter because the U.S. did not submit the dispute to « the peaceful procedures set forth in this Charter », such as « negotiation, good offices, investigation and conciliation, judicial settlement, arbitration » (art. 24) (at present art. 23). (THOMAS-THOMAS, *o.c.*, at p. 367, cited by LINDEMEYER, *o.c.*, at p. 518).

(11) See MALENCZUK, Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft articles on State Responsibility, *ZaöRV*, 1983, pp. 705 at 737.

negotiation clause preclude countermeasures? The arbitrators, Ehrlich, Reuter, and Riphagen, decided :

> « The Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations, especially where such countermeasures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute » (12).

The fact that two of the three arbitrators, *i.e.* Reuter and Riphagen, are members of the International Law Commission gives additional weight to this statement.

The impact of judicial or arbitral settlement clauses on the right to take countermeasures depends on the individual circumstances. The arbitrators in the US-French dispute were cautious. In their view, settlement provisions *per se* do not preclude countermeasures :

> « Many jurists have felt that while arbitral or judicial proceedings were in progress, recourse to countermeasures ... was prohibited. Such an assertion deserves sympathy but requires further elaboration » (13).

The arbitrators deemed it necessary to distinguish the period in which a case is not yet before a tribunal from the period in which the case is « *sub judice* ». When a case is not yet brought before a tribunal, the situation is analoguous to negotiations :

> « So long as a dispute has not been brought before the Tribunal ... the period of negotiation is not over and the rules mentioned above remain applicable. This may be a regrettable solution, as the Parties in principle did agree to resort to arbitration or judicial settlement but it must be conceded that under present day international law States have not renounced this right to take countermeasures in such situations. In fact, however, this solution may be preferable as it facilitates States' acceptance of arbitration or judicial settlement procedures » (14).

When the dispute is actually brought before a tribunal, however, in the arbitrators' eyes states cannot initiate or maintain countermeasures whenever the tribunal has « the necessary means » to end the breach of treaty. Countermeasures become indeed superfluous whenever the tribunal can protect the offended party (*e.g.* by interim orders) as well as the latter's countermeasure can (15). The arbitrators further admitted that the necessity of countermeasures similarly disappears when the dispute has to be settled in an institutional framework « ensuring some degree of enforcement of obligations » (16). Their view was confirmed by the EC Court of Justice. This court recently held that EC Member States could not take counter-

(12) Case Concerning the Air Service Agreement of March 27, 1946, Award December 9, 1978, 54 *I.L.R.*, pp. 304 at 340.

(13) 54 *I.L.R.*, at p. 340.

(14) 54 *I.L.R.*, at p. 340.

(15) 54 *I.L.R.*, at pp. 340-341. See also I.C.J., Diplomatic and consular staff (judgment), *I.C.J. Rep.*, 1980, p. 3 at p. 43, nr. 93.

(16) 54 *I.L.R.*, at p. 340.

measures against other Member States which violated Community law but that they could only install the proper administrative and judicial proceedings provided by the EC (17).

It could even be argued that countermeasures are excluded whenever a dispute is actually brought before an arbitrator or judge, regardless of whether effective protection can be granted. Indeed, good faith would prevent a party, involved in arbitration procedures, from escalating the dispute by taking countermeasures (18).

C. — *Guaranteed Sales.*

Treaties sometimes oblige a state to supply specific quantities of goods. For instance, multilateral wheat agreements have required states to sell or purchase specific quantities of wheat (19). At present, the Lomé Convention obliges the EC countries to purchase, and thirteen African and Caribbean States to supply specific quantities of cane sugar (20). Moreover, many bilateral agreements oblige states to supply or purchase raw materials, oil, grain and other commodities. Furthermore, states frequently conclude treaty guarantees that their private firms will perform their contract with a foreign state.

These treaties generally do not come into public eye. They are often concluded by an exchange of letters and are not discussed in Parliament (21). Nevertheless they can grant efficient protection against economic sanctions. For example, the delivery of 8 million tons of grain and corn, formally guaranteed under the US-USSR Grains Agreement, was not affected by the 1980 US grain embargo against the Soviet Union (22). Similarly, Australia, which followed the US in the 1980 grain embargo, did not stop supplies to the Soviet Union, guaranteed by treaty (23). For the same reasons the

(17) Court of Justice (Comm. v. France) case 232/78, *E.C.R.*, 1979, pp. 2729, 2739.

(18) WENGLER, *Völkerrecht*, vol. 1, Berlin, 1964, at p. 519; See also PARTSCH, Repressalie in STRUPP-SCHLOCHAUER, *Wörterbuch des Völkerrechts*, Berlin, 1960, deel III, at p. 104.

(19) This obligation, existing under the 1949, 1953 and 1956 agreement became less strict under the 1959 agreement, which only obliged exporting countries to sell when a maximum price was reached, and importing countries to purchase from exporting countries part of their yearly consumption. At the end of the 1960's any obligation to supply or to purchase completely had disappeared from the wheat agreements. See EISEMANN, *L'organisation internationale du Commerce des Produits de Base*, Paris, 1982, at pp. 185-205.

(20) See Protocol nr. 7 to the Lomé II Convention, *O.J.*, 1980 L 347.

(21) See *e.g.* French-Soviet exchange of letters of October 15, 1982 on the sale of French agricultural products, which became public through the Parliamentary question of Brian Hord, *O.J.*, 1983 C 100 at p. 26.

(22) Treaty October 20, 1975, *U.S.T.*, 2971, T.I.A.S., nr. 8206. In fact the Agreement provided for the delivery of 6 million ton and, if the U.S.S.R. so requested, of an additional 2 million ton; See MOYER, and MABRY, Export Controls as Instruments of Foreign Policy : The History, Legal Issues and Policy Lessons of three recent cases, 15 *Law and Policy in International Business*, 1983, 1-171, at pp. 31-32; PETERSMANN, Internationale Wirtschaftssanktionen als Problem des Völkerrechts und des Europarecht, 80 *Z. Vgl. R. Wiss.* (1981), pp. 1-28 at p. 15.

(23) MOYER and MABRY, *art. cit.*, at p. 44; *Eur. Parliament Doc.* (N° 1-83/82), 22 (1982), at p. 24.

German Federal Republic refused to comply with an American request for boycott of the USSR and prohibited its enterprises from suspending exports guaranteed under the German-Soviet Treaty of Commerce (24).

However, one should not easily conclude that supplies are guaranteed by treaty and cannot be affected by boycott. First, only transactions to which states have commited themselves clearly and without reservations are shielded from economic measures. Sales in excess of the guaranteed quota are not protected. For instance, in 1963 the German Federal Republic refused to supply the Soviet Union tubes for a pipeline because the quantities, guaranteed under a German-Soviet agreement, were already supplied and no obligation existed with regard to additional quantities (25). In 1980, the United States similarly refused all grain supply not covered by the Grains Agreement (26). Moreover, treaties which only vaguely oblige to supply but do not guarantee specific transactions do not bar boycotts. The United States in 1977-1978 refused to supply nuclear fissionable material to be used for civil purposes. It has been argued that this refusal violated Article IV of the Non-Proliferation Treaty which obliged all states « to cooperate ... to the further development of the applications of nuclear energy for peaceful purposes » (27). However such a vague principle cannot be turned into an absolute duty to supply. Similarly, commodity agreements recently negotiated in U.N.C.T.A.D. contain under the heading « Assurance of supplies and access to markets » a provision that :

> « Exporting members shall endeavour within the limits of the constraints of their development, to pursue sales and export policies ... which will not artificially restrict offer for sale ... and which will insure to exporters the regular access to their markets ... » (28).

Also this provision, intended to prevent price manipulation, is too vague to guarantee supply against economic sanctions.

D. — *Protected Commerce and Property.*

Treaties on Friendship, Navigation and Commerce (F.N.C.) can protect against economic sanctions.

Some provisions in F.N.C.-treaties grant direct protection. Many — mainly 19th Century — F.N.C.-treaties forbid the contracting parties from hindering commerce between both states by any import, export or transit interdiction. Such a provision apparently excludes trade boycotts (29).

(24) See German-Soviet Treaty of Commerce May 6, 1978, art. 5, *Deutscher Bundestag Drucksache*, 8/2143 of September 27, 1978; PETERSMANN, *art. cit.*, p. 15.

(25) See Note from the German Federal Republic to the U.S.S.R. of April 11, 1963, *Archiv der Gegenwart*, 1963, 10519. See however the criticism of LINDEMEYER, *o.c.*, p. 512.

(26) See WALCZAK, « Legal aspects of the U.S.S.R. grain embargo, *Denver J.I.L.*, 1981, pp. 279-297 at 282-284. Also JOHNSON and QUINTIN, « U.S. reliability for graindeliveries : the treaty option », *J.W.T.L.*, 1983, pp. 397-406.

(27) Comment VITZHUM in KEWENIG and HEINI, *o.c.*, p. 57.

(28) See e.g. International Cocoa Agreement 1980, art. 46, *O.J.*, 1981, L 313, 2 at 18.

(29) PETERSMANN, *art. cit.*, p. 14.

More recent F.N.C. — and investment — treaties exclude expropriation except for public purpose and generally with something tantamount to adequate, prompt and effective compensation. Such provisions forbid uncompensated expropriations as economic sanction.

At present, American citizens and firms, whose property was taken by Iran in the aftermath of the American hostage-crisis, sometimes invoke Art. IV of the Treaty of Amity (1955) between Iran and the United States. Their argument is that the expropriation violates the treaty which states that expropriations are only possible if for a public purpose and with adequate, prompt and effective compensation. For claims concerning exchange restrictions, they argue that Iran cannot justify these restrictions under Art. VII of the treaty (30). An American court had already ruled that the Treaty of Amity forbade Iran to expropriate (31). Moreover the U.S. Department of State confirmed that :

> « ... the repudiation of numerous contracts with American firms without legal justification, massive expropriation of American property in Iran without compensation, the imposition of currency restrictions to prevent repatriation of American earnings, and the announced intention (finally implemented) of ceasing all oil exports to the United States ... repeatedly and flagrantly violated numerous provisions of the Treaty of Amity » (32).

The Iranian and third country arbitrators of the Mixed Claims Tribunal in The Hague apparently ignore the impact of the Treaty of Amity on Iranian expropriations and exchange restrictions. The American arbitrator Mosk however has held several times that the Iranian expropriations or exchange restrictions indeed violated the Treaty of Amity and that Iran consequently was not entitled to take these economic measures (33).

« Most-favoured-nation » and « non-discrimination » clauses grant indirect

(30) See e.g. award 19-98-2 (Harza Engineering Co. v. Iran), *Iran-U.S. Claims Tribunal Reports*, vol. 1, p. 499 at p. 501 ; Award 10-43-FT (Oil field of Texas v. Iran), Concurring opinion Mosk, *Iran-U.S. Claims Tribunal Reports*, vol. 1, pp. 347 at 365 ; Award 25-71-1 (Grimm v. Iran), dissenting opinion Holtzmann, *Iran-U.S. Claims Tribunal Reports*, vol. 2, at p. 84. See also : Memorandum February 15, 1984 on the Application of International Law to Iranian Foreign Exchange Regulations, *U.S. Congressional Record*, vol. 130, nº 19, pp. 1679-1688, XXIII, *I.L.M.*, 1984, p. 1182.

(31) American Intern. Group v. Islamic Republic of Iran, 483 F. Supp. 522 (*D.D.C.*, 1980) remanded on other grounds 657 F. 2d 430 D.C. Cir 1981.

(32) Memorandum of the Department of State Legal Adviser on the application of the treaty of amity to expropriations in Iran, October 13, 1983, XXII, *I.L.M.*, 1983, p. 1406 at p. 1407.

(33) See concurring opinion Mosk in award 93-2-3 (*American International Group* [expropriation]) (unpublished) and in award 50-40-3 (Pomeroy v. Iran), *Iran-U.S. Claims Tribunal Reports*, vol. 1, p. 386 at p. 388 (government termination of contracts) ; dissenting opinion Mosk in award 122-38-3 (Schering Co. v. Iran - exchange restrictions - unpublished) concurring opinion Aldrich in award 47-156-2 (I.T.T. Industries v. Iran, *Iran-U.S. Claims Tribunal Reports*, vol. 2, at p. 349) who does not address the issue in the circumstances of that case. See also award 46-57-2 (Kimberly-Clark Co. v. Bank Markaz) (unpublished p. 12) which decided that exchange controls were irrelevant as a result of the Declarations of Security Account in U.S. $.

protection. When a treaty gives a state the treatment of a most-favoured-nation, no economic sanctions should be taken against this state unless it is taken against all other states. Similarly, a non-discrimination clause precludes selective economic sanctions. It forbids import or export restrictions towards the other contracting party, which are not at the same time applied to all other states. For instance, the Benelux-Soviet Treaty of Commerce of July 14, 1971 forbids import or export restrictions to or from the other contracting state « which are not applied in an analogous way to all other states » (34). This provision prevents a boycott action against the Soviet Union. However, it has been argued that such clause would not prevent a boycott of *all* countries, which for instance have invaded foreign territory (35). In that event the boycott allegedly automatically applies to all states without discrimination who fall under a given criterion. This interpretation denies, however, the essence of a general non-discrimination clause by discriminating on the basis of additional criteria.

Most-favoured-nation and non-discrimination clauses have already been invoked against the German 1962 pipeline boycott and the 1973 Arab oil boycott (36). The protection they may grant depends however on the terms of the provision. A most-favoured-nation treatment « in respect of import, export and other duties and charges affecting commerce » does not cover most-favoured-nation treatment as to quantitative restrictions on export or import (37). Similarly Art. 1 of the commercial agreement between the European Communities and Argentina, which granted a most-favoured-nation treatment only in custom matters could not forbid the E.C. general trade boycott of Argentina during the Falkland crisis (38). The European Communities have included a very broad most-favoured-nation clause in their cooperation agreements with seven Arab countries. In this way the Communities intend to protect themselves against Arab boycott because of their attitude towards Israel. The provision, identical in all seven treaties, permits the contracting parties to restrict import-

(34) See Traité de Commerce entre le Benelux et l'U.R.S.S. of July 14, 1971, art. 6 (*Monit.*, 1973, p. 5988) still in force by EC permission, *O.J.*, 1983, L 340 at 13.

(35) See KLOTS, « Neutrality laws and exceptions to commercial treaties, *Proc. A.S.I.L.*, 1936, p. 139 at p. 140.

(36) — *German boycott* : German-Soviet Treaty of Commerce of April 25, 1958, art. 3, par. 1 (LINDEMEYER, *o.c.*, p. 513).

— *Arab Oil boycott* : Treaty of Commerce between the United States and the Sultanats Muscat & Oman of December 20, 1958, art. 8 (380 *U.N.T.S.*, p. 181) (DAFRAY MUIR, « The Boycott in International Law », in *Economic Coercion and the New International Economic Order* [ed. R. Lillich]) 1976, pp. 19-38, p. 34. See also PETERSMANN, *art. cit.*, p. 15.

(37) See U.S.-Saudi Arabia Provisional Agreement in regard to Diplomatic and Consular Representation, Judicial Protection, Commerce and Navigation, art. 3 (142 *L.N.T.S.*, 329) and SHIHATA, « Destination Embargo of Arab Oil : its legality under international law », *A.J.I.L.*, 1974, p. 591 at p. 624. See also SCHWARZENBERGER, « The Most-Favoured-Nation Standard in British State Practice », 22 *B.Y.I.L.*, p. 96 at p. 108.

(38) *O.J.*, 1971, L 249, 19.

or export when justified on grounds of public morality, public policy or public security, but reads further « such prohibitions or restrictions must not however, constitute a mean of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties » (39). For the European Parliament this clause undoubtedly forbids boycott (40). Such conclusions appear too far-reaching. Only « arbitrary discrimination » is forbidden. As trade with Israel is contrary to fundamental Arab political values, a boycott in response cannot be considered « arbitrary ».

Treaties of commerce sometimes contain provisions granting « freedom of commerce » to the other party's citizens. Such clauses were especially popular in the 19th century when many treaties of commerce, some of them still applicable, were drafted. However, a generally formulated « freedom of commerce » clause does not prevent boycott or other economic sanctions. A treaty can limit a state's sovereign right to refuse trade only if it does so in an unambiguous way. The vague « freedom of commerce » a treaty grants citizens does not prevent the state to regulate and, if necessary, even forbid trade. As freedom of commerce exists only within the confines the state puts on trade, it cannot be affected by a state's boycott order (41).

II. — LIMITATIONS ON TREATY PROVISIONS

Treaty clauses forbidding economic measures, however well-drafted, cannot offer absolute protection against economic sanctions. Their impact is often limited by other provisions of the treaty itself, by the law of treaties, or by international law in general.

A. — *Treaty Clause on National Security.*

The treaties, described in part I, generally contain escape clauses, allowing contracting parties to derogate from their treaty obligations. The clauses specify the conditions for escape. Escape clauses based upon public health, public order and national security have become standard features in commercial treaties. The escapes they offer may be so broad that they even undermine the main obligations that the treaty imposes (42).

(39) Cooperation agreement with Algeria of April 26, 1976, art. 33 (*O.J.*, 1978 L 263, 1); with Egypt of January 18, 1977, art 32 (*O J*, 1978 L 266, 1); with Jordany of January 18, 1977, art. 29 (*O.J.*, 1978 L 268, 1); with Libanon of May 3, 1977, art. 30 (*O.J.*, 1978 L 267); with Marocco of April 27, 1976, art. 35 (*O.J.*, 1978 L 264, 1); with Syria of January 18, 1977, art. 30 (*O.J.*, 1978 L 269); with Tunisia of April 25, 1978, art. 34 (*O.J.*, 1978 L 265, 1).

(40) « Appliquée textuellement cette clause interdit aux parties de mettre en œuvre un boycottage » (*Parlement européen, doc. de séance* 1982-1983, doc. 1-83/82 at p. 14).

(41) Erler, « Handelsperren », *Wörterbuch des Völkerrechts*, Berlin 1960, vol. I, p. 764 at p. 765; Hyde and Wehle, « The Boycott in Foreign Affairs », *A.J.I.L.*, 1933, p. 1 at p. 4; Klots, « Neutrality laws and exceptions to commercial treaties », *Proc. A.S.I.L.*, 1936, p. 138 at pp. 139-140 and Lindemeyer, *o.c.*, p. 479.

(42) Kewenig and Heini, *o.c.*, at pp. 20-21.

The effectiveness of treaty protection against economic measures is often limited by escape provisions as to national security. For instance, Art. 5, par. 1 of the Benelux-Soviet Treaty of Commerce forbids export or import restrictions which are not applied to all other states. However, paragraph 2 of the same article says that this general interdiction does not apply to restrictions and prohibitions « related to ... the security of the State » (43). National security can be an important escape. It already has been mentioned that the U.S. State Legal Adviser has drafted a memorandum on the application of the U.S.-Iran Treaty of Amity to economic measures both countries have taken. It is significant that this memerandum considers the embargo on Iranian oil imports, the blocking of official Iranian assets, and the financial restrictions of American travellers to Iran

> « justified under article XX (1) (d) of the Treaty, which provides that the Treaty shall not preclude the application of measures necessary to protect (a party's) essential security interests » (44).

« National security », however attractive as escape from treaty obligations, raises many questions as to its scope. « National security » surely blocks export of arms and munition to be used in an actual war against the exporting state. However, can it also stop exports which would give the other state a mere strategic overweight and increase the risk of war? The Cocom-embargo on export of strategic items from Nato-members to East European countries is inspired by such considerations. It is, however, often difficult to assess the strategic impact of exported goods. In 1962 the German Federal Republic blocked export to the U.S.S.R. of tubes for an oil and gas pipeline which allegedly would supply twenty Soviet divisions in the G.D.R. because to supply the tubes would cause a threat to its « basic security » (45). Twenty years later similar strategic considerations inspired the boycott of the Siberian gasline, although its military impact was less obvious. But how far can the concept of « national security » be stretched? Would « national security » justify an export embargo of goods for non-military use because their supply allows local industry to produce strategic equipment? And is it necessary for the embargo to have a clear, although indirect, strategic impact (46)? Or may « national security » also be used to prevent economic strength which may become a threat to the country's own economy? Moreover, is one's « national security » at stake when another state acts against a third state at a more or less distant spot of the world? Was the United States, for instance, correct when it invoked

(43) See note 34.

(44) Memorandum 13 October 1983, XXII *I.L.M.*, 1983, p. 1406 at p. 1409, note 34.

(45) German note, *Archiv der Gegenwart*, April 11, 1963, p. 10519.

(46) The Soviet protest against the FGR-Boycott argued that a reasonable link should exist between « national security » and embargoed goods. Otherwise « national security even could justify non-delivery of irrelevant knick-knacks » (Soviet note of April 6, 1963, *Archiv der Gegenwart*, April 11, 1963, at p. 10519).

« national security » to justify a grain embargo against the Soviet Union because of its invasion of Afghanistan (47)?

« National security » should be interpreted reasonably. The Arab Emirate Muscat and Oman, although not member of O.A.P.E.C., joined the 1973 O.A.P.E.C. Oil Boycott of the United States to avoid reprimand orchestrated by their Arab neighbours. It thus set aside the non-discrimination provision imposed by its treaty with the United States (48). It has been alleged that

> « such a provision, which admittedly would preclude Muscat and Oman under normal conditions from implementing discriminatory embargo measures on oil shipments to the United States, is restricted, however, by the text of art. 11 (d) of the same Agreement. According to this latter article the agreement does not preclude the application of measures 'necessary to ... protect essential security interests'. The internal security interest of that country would certainly have been further impaired had it deviated from the collective Arab stand adopted during the war crisis » (49).

This Procrustean interpretation is inacceptable (50). Muscat and Oman may only rely on the « national security » escape when the dangers of subversion and revolution clearly outweigh the respect for treaty commitments. Vague allegations do not suffice.

Of course a party may try to clarify « national security » in the agreement or in an interpretative declaration. Clarification in the agreement, however, risks opposition and rejection by the other state. A unilateral interpretative declaration may be accepted more easily. For example, cooperation agreements between the European Communities and Arab countries, containing non-discrimination clauses, allow import and export restrictions to protect « public security » (51). In notes to the European Communities, the Arab countries have specified that they thus were entitled to maintain « laws and regulations in so far as they remain necessary for the protection of (their) essential security interests ». The European Parliament has declared that these unilateral declarations cannot make the non-discrimination clause less obligatory (52). However, these declaratory notes undoubtedly influence the interpretation and scope of the term « public security ».

The object and purpose of the treaty and factual circumstances also help to define the scope of a national security escape. If the treaty concerns

(47) Moyer and Mabry, *art. cit.*, p. 30. Although the United States invoked « national security » to justify the boycott, it in fact honored the deliveries, guaranteed under the Grains Agreement. It did not rely on art. II, allowing « non-discretionary » export regulations. The United States thus apparently did not consider « national security » a non-discretionary reason valid enough to justify the embargo.

(48) Treaty on Amity, Economic Relations and Consular Rights between the Sultanat of Muscat and Oman and the United States, art. 8 of December 20, 1958 (380 *U.N.T.S.*, p. 181).

(49) Shihata, *art. cit.*, p. 625.

(50) See also Paust and Blaustein, « The Arab Oil Weapon — a Threat to International Peace », *A.J.I.L.*, 1974, p. 410 at p. 425.

(51) See note 39.

(52) *Parl. Eur. Doc. de séance*, 1982-1983, doc. 1-83/82, pp. 14-15.

supply of specified goods, the escape has to be interpreted narrowly. The contracting parties could have examined the security-impact of their specific commitments during the agreement-negotiations. The more specific and short term the obligations, the more strictly national security has to be interpreted. Only unforeseen circumstances, occurring after signing of an agreement, should be taken into account. It thus has been argued that the German Republic wrongfully invoked national security interests to refuse delivery of pipe-line tubes to the U.S.S.R. which might then be used by Soviet divisions in the G.D.R. The G.F.R., aware of the presence of these divisions, should have considered the security risks of the supply when signing the agreement (53). Furthermore political tension between contracting parties during negotiations enlarges the scope of the security escape. The national security-clause of the German-Soviet treaty of Commerce, which was negotiated in 1958 after ten years of cold war, for example, apparently was intended to offer very large escape-possibilities (54).

It is crucial to know who can determine when national security offers escape from treaty obligations. Of course, in the first instance, the state, invoking the security-escape has to justify that the performance of the treaty would endanger its national security. However, it is a fact that national security interests of Nato-countries to embargo export to communist countries are defined on Nato level. These definitions are open for but limited discussion (55). Legally, however, each Nato-country has to take full responsibility when it invokes a national security escape and cannot hide behind Nato decisions. A Nato decision of November 21, 1962, for instance, requested Nato members to stop delivery of tubes for a Soviet pipeline in spite of treaty obligations. Only the German Federal Republic set aside its treaty commitments and imposed an embargo. Great Britain and Italy refused to apply the national security escape (56). Similarly, Nato requested its members to suspend Polish Landing rights in spite of treaty commitments to the contrary because martial law was installed in Poland. Of all Nato members only the U.S., however, suspended landing rights (57).

A state invoking a national security escape cannot freely interprete these terms. The escape may not arbitrarily be invoked whenever a state does not feel like honoring the treaty. In the Nuclear Test case the International Court of Justice denied France full discretion to determine whether nuclear weapon development fell within the concept of « national defence », France having excluded the Court's jurisdiction on matters of « national defence ». The Court decided « that if this reservation is to be regarded

(53) LINDEMEYER, *o.c.*, p. 512.
(54) LINDEMEYER, *o.c.*, p. 511.
(55) See PETERSMANN, *art. cit.*, p. 15.
(56) LINDEMEYER, *o.c.*, pp. 276-281.
(57) See *New York Times*, January 12, 1982 at A 8, col. 4 and March 27, 1982 at 4, col. 6. This suspension is lifted at present (*International Herald Tribune*, July 27, 1984 at p. 2).

as a self-judging reservation, it is invalid » (58). Similarly a security escape clause would be invalid when the invoking state has full discretion to interprete its terms and determine its scope. A minimum of objectivity is required (59).

Undoubtedly a « national security » escape clause is delicate to apply. The problems it entails may explain why the U.S. State Legal Adviser devoted only a footnote of his memorandum to the « national security » justification of U.S. economic measures against Iran (60).

B. — *Customary Right of Self-Preservation.*

National security provisions are such a common feature in commercial treaties that they sometimes have been considered to be customary law, also applicable to treaties not containing such clauses (61). This conclusion probably goes too far. The fact that most treaties contain national security provisions could, on the contrary, as well be considered evidence that no customary national security escape exists. However, it has been recognized that a state has a fundamental right to preserve its very existence and that it is entitled to ignore treaty obligations imperiling this existence (62). At present the self-preservation principle is still applicable. In fact, the customary and overriding right of self-preservation has even invoked to justify the Arab 1972-1973 oil boycott in spite of treaty commitments. In that case however, the existence of the boycotting states was not a stake (63). Self-preservation only justifies economic sanctions in spite of

(58) I.C.J., Order of June 22, 1973, Nuclear Test Cases (Australia/France), *C.I.J. Rep.*, 1973, p. 99 at p. 102, nr. 16.

(59) However, it appears too far-reaching to accept, as somme « legal realists » of the McDougal School argued (Paust and Blaustein, *art. cit.*, p. 425) that national security has to cede for « fundamental community policies » such as the « stability of world trade patterns ».

(60) See note 44.

(61) Kewenig and Heini, *o.c.* at p. 20. However, in its oral presentation, Kewenig appears to have conceded that a customary « national security » escape would not be applicable to specific supply-agreements (Zieger in Kewenig and Heini, *o.c.*, p. 62). Also Shihata, *art. cit.*, p. 624 (who incorrectly invokes Schwarzenberger, « The most favored nation standard in British state practice », 22 *B.Y.I.L.*, 1945, p. 96 at p. 110).

(62) The International Law Commission. Draft on State Responsibility, art. 33*b*. *I.L.C.*, 1980, vol. II, 2d part, p. 33 ; Bowett, « Economic coercion and reprisals by states », in *Economic Coercion and the New International Order*, 1976 (Lillich ed.), p. 5 at pp. 5-14 (also published in 13 *Virg. J. Int'l L.*, 1972).

It has been argued that the U.N. Charter confirms that treaty commitment can be set aside whenever a state's right of self-preservation is at stake (see note 63). In fact, however, the U.N. Charter only confirms a state's right of self-defence against an armed attack (art. 51), which is much stricter than a general right of self-preservation. Moreover, the U.N. Charter art. 103 merely states that U.N. Charter *obligations* — and not rights — shall prevail upon conflicting treaty obligations.

(63) See J. Boorman, « The Arab Oil Weapon and the ensuring legal issues », in *Economic Coercion in International Law*, Ed. Lillich, 1976, pp. 255-281 at p. 268, who alleged that Saudi Arabia was excused from oil supply to the U.S.A. in spite of Treaty commitments because otherwise its political independence and territorial integrity would be endangered (without specifying whether by Israel or by Arab neighbours) ; Shihata, *art. cit.*, p. 624.

treaty commitments when the bare existence of the state is threatened and economic sanctions effectively are able to protect this existence.

C. — « *Exceptio non adimpleti contractus* ».

A contracting party sometimes considers itself entitled to ignore treaty obligations when the other contracting party has failed to comply. The argument that a state is excused from performance when its treaty partner already has breached the treaty is known as the « *exceptio non adimpleti contractus* ». East European states for instance refused to supply Yugoslavia, because the latter alledgedly did not honor its part of a treaty (64). The Federal Republic of Germany carried out its 1962 embargo against the U.S.S.R. in spite of treaty commitments because the Soviet Union itself allegedly had not respected essential treaty provisions, such as an increased import of consumer products (65). Similarly Arab countries did not consider their treaties with the U.S.A. as an obstacle for the 1973 oil boycott, claiming the U.S.A. allegedly had violated these treaties in the past (66). Recently the U.S. State Legal Adviser too relied on the « *exceptio non adimpleti contractus* » to justify economic measures against Iran in spite of the Treaty of Amity :

He argued :

> « International Law long has recognized that, where a party to a bilateral Treaty has breached its obligations thereunder, the other party may withhold lawfully its performance of the Treaty in a manner reasonably related to the breach. Such withholding of performance by the aggrieved party does not violate the Treaty but on the contrary, is actually a means of enforcing it. As the foregoing discussion demonstrates, each of the U.S. countermeasures was a reasonable response to Iran's prior breaches of the Treaty and, therefore, was justified under the law of treaties (67) ».

The « *exceptio* » was recognized by the American arbitrator of the Mixed Claims Tribunal (68).

The « *exceptio non adimpleti contractus* » often risks becoming a post factum and vague justification by a State of actions already taken. International law, as reflected by the Vienna Convention on the Law of Treaties (art. 60), however, imposes rather strict standards on the « *exceptio* ». The breach has to be « material », *i.e.* consisting of « the violation of a provision essential to the accomplishment of the object or purpose of the treaty ». Many instances, where the « *exceptio* » has been invoked, would fail under

(64) LINDEMEYER, *o.c.*, p. 282.

(65) Note of April 11, 1963, *Archiv der Gegenwart*, 1963, p. 10519. See however LINDEMEYER, *o.c.*, p. 514.

(66) DICKE, *o.c.*, p. 230.

(67) XXIII, *I.L.M.* (1983), p. 1406 at p. 1407.

(68) Award 37-172-1 *Queens Office Tower Associates v. Iran National Airlines Co.*, Dissenting Opinion Holtzmann, *Iran-U.S. Claims Tribunal Reports*, vol. 2, p. 247 at p. 257.

this criterion. Moreover, the Vienna Convention does not leave it to the party to allege material breach but provides an examination of this allegation by the other side and eventually by a third party (art. 65). The Vienna Convention thus clearly reflects the present tendency to make the « *exceptio non adimpleti contractus* » more objective. The « *exceptio* » should only be invoked when the other party has violated objectively essential treaty obligations.

D. — *Reprisals.*

Sanctioning states sometimes qualify their economic sanctions as « reprisals ». A state's right of reprisals, however, is limited. Reprisals for instance are very different from the « *exceptio non adimpleti contractus* ». The « *exceptio* », part of the law of treaties, requires a substantial breach of an essential treaty obligation by the other party, regardless whether this breach was wrongful or not. Reprisals, on the other hand, are part of the law of international responsibility, and presuppose a wrongful act or omission from the other state, non necessarily a breach of treaty. The « *exceptio* » justifies either suspension or termination of the treaty ; reprisals but result in the suspension of treaty obligations until the sanctioned state has repaired the wrong. Moreover, reprisals have to be proportional to the prior delict. The United States, for instance, allegedly did not choose to suspend its grains, air and shipping agreements with the Soviet Union as a reprisal for the invasion of Afghanistan because « even the lawlessness of the Soviet invasion did not justify breaching that commitment » (69). In the case of the American hostage crisis, however, the United States considered Iran's violation of international law flagrant enough to justify sanctions, contrary to the U.S.-Iran Treaty of Amity. The International Court of Justice recognized the legitimate character of these reprisals because « they were measures taken in response to what the United States believed to be grave and manifest violations of international law » (70).

In principle only the state suffering a breach of treaty or other wrong can take reprisals. However, reprisals may also be invoked by states which were not the direct victims, but which, as mere members of the international community or parties to a multilateral treaty, suffered from a grave offence against a third state (71). It is, however, difficult to define the « hard core » of law whose violations are so shocking that they justify

(69) Moyer and Mabry, *art. cit.*, p. 32 ; See also Petersmann, *art. cit.*, p. 15.

(70) Diplomatic and Consular Staff, *I.C.J. Rep.*, 1980, p. 3 at pp. 28-29. See however the dissenting opinion of Judge Morozov at p. 53 and less explicitly of Judge Tarazi at p. 65. Also R. Carswell, « Economic Sanctions and the Iran Experience », *Foreign Affairs*, winter 1981, pp. 247-265 and Leben, *art. cit.*, at pp. 26-27.

(71) See Kewenig and Heini, *o.c.* at p. 34 ; Malanczuk, *art. cit.*, p. 721 at p. 725-726 and 737.

reprisals from third states. It has been argued that violations of certain rules of diplomatic and consular law and of territorial integrity as well as some basic rules on human rights would justify reprisals from third states (72). In fact the European Communities boycott of Iran because of the American hostages and of Argentina because of the Falklands thus was justified. The U.S. boycott of Poland and the U.S.S.R. because of the Polish martial law declaration and the Soviet pressure on Poland were inspired by similar motives. The soundness of this justification had to be examined in an arbitration concerning the American suspension of Polish landing rights, guaranteed under the U.S.-Polish aviation treaty. Unfortunately, however, the arbitral procedure was suspended and, recently, the sanction has been lifted (73). No award yet determines to which extent third states are entitled to reprisals in spite of treaty obligations.

E. — « Rebus sic stantibus ».

It has been argued that commercial treaties only bind when relations are amicable and trade and commerce prosper but that they are suspended when hostility replaces friendship (74). For example, Iran alleged before the International Court of Justice as well as before the Iran-U.S. Claims Tribunal that the Iran-U.S. Treaty of Amity was suspended because the U.S. had discontinued diplomatic relations and had invaded Iranian soil in its rescue attempt (75). This argument is based upon the doctrine of « *rebus sic stantibus* » *i.e.* that a treaty concluded in specific circumstances is suspended or terminated when these circumstances change in a fundamental way (76). The argument is moreover supported by Judge Nereno Quintana's opinion in the *Right of Passage case*. When considering Portugals' principal title, a 1779 treaty of friendship with an Indian ruler, the judge wrote

> « The friendship promised by the Portugese in 1779 had given way to a cold war between India and Portugal ... As the result of circumstances the mutual rights and obligations under the Treaty were extinguished. There could be no better application than this of the rule recalled by Emerich de Vattel in his well known treatise : *Omnis conventio intelligitur rebus sic stantibus*. The Treaty was no more » (77).

(72) BROWNLIE, *Principles of Public International Law* (3 ed. 1979) at pp. 512-515; KEWENIG and HEINI, *o.c.* at p. 34. See however contra SIMMA, in KEWENIG and HEINI, *o.c.*, at pp. 67-68.

(73) MOYER and MABRY, *art. cit.*, at pp. 66-67. For the suspension : see MALAMUT, « Aviation : Suspension of Landing Rights of Polish Airlines in the United States », *Harv. I.L.J.*, 1983, p. 190 at p. 195. For the lifting of the sanction, see *International Herald Tribune*, July 27, 1984, at p. 2.

(74) See BOORMAN, *art. cit.*, p. 268 with regard to the F.N.C. treaties between the U.S. and Iraq, Oman and Muscat.

(75) See Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran). *I.C.J. Rep.*, 1980, p. 3 at p. 28.

(76) Vienna Convention in the Law of Treaties, art. 62.

(77) *Right of passage,* Dissenting Opinion Judge Moreno Quintana, *I.C.J. Rep.*, 1960, p. 88 at p. 93.

However, this was a dissenting opinion ; the other judges did not question the Treaty of Friendship. Similarly, all but two members of the International Court of Justice agreed that the Iran-U.S. Treaty of Amity had remained in force in spite of hostilities between the two countries. In fact they considered the continued applicability of an F.N.C. treaty to be especially important when relations become tense:

> « The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance ... » (78).

Termination or withdrawal of a treaty is only possible when the circumstances that were an essential basis for the consent have fundamentally and unforeseenably changed. However, the fundamental and unforeseen character of the change must be interpreted quite strictly. F.N.C. and other treaties cannot be nullified merely because friendly relations have degenerated or because state interests have changed. Otherwise treaty obligations would loose all their meaning (79). « *Rebus sic stantibus* » thus seldom undermines treaty protection against economic sanctions.

A state not wanting to maintain a treaty can always denounce or withdraw from the treaty upon proper notice. The more feasible the termination procedure, the harder to rely on « unforeseen circumstances » (80). In fact many commercial treaties have been entered into for short periods and regularly require prolongation or renegotiation (81). A state than simply can refuse renewal. This happens very infrequently. The E.C.-Argentina commercial agreement, for instance, had to be renewed from year to year. Although the E.C. could have refused renewal following the Falkland invasion, the treaty was maintained.

F. — *Maintenance of international peace and security.*

The Security Council can impose economic sanctions upon a state which endangers international peace and security under article 39 of the U.N.

(78) *I.C.J.Rep.*, 1980, at p. 28.

(79) H. KÖCK, « Altes und Neues zur *Clausula rebus sic stantibus* », *Völkerrecht und Rechtsphilosophie, Feststrift S. Verosta*, Berlin 1980, p. 79 at p. 93 and pp. 98-99. Moreover BEIRLAEN, « Kritische beschouwingen omtrent '*rebus sic stantibus*' en '*ius cogens*' in het licht van het Verdrag van Wenen betreffende het Verdragsrecht », *Tijdschrift voor bestuurswetenschappen en Publiekrecht*, 1982, p. 39 at pp. 41 ss ; HARASZTI, « Treaties and the Fundamental Change of Circumstances », 146 *R.C.A.D.I.*, 1975, III, 1 at pp. 38-45.

(80) *E.g.* from U.S. side it has been correctly argued that the U.S.-Iran conflict had not suddenly terminated the U.S.-Iran Treaty of Amity, but that the Treaty had to be terminated upon one year's notice as the treaty itself provided (*Iran-U.S. Claims Tribunal*, award 47-156-2, *I.T.T. industries v. Iran* concurring opinion Aldrich ; award 93-2-3, *American International Group Inc. et al. v. Iran*, concurring opinion Mosk ; award 122-38-3, *Schering Co. v. Bank Markazi*, dissenting opinion Mosk).

(81) SCHWARZENBERGER, *art. cit.*, p. 115.

Charter. Member States have the obligation to carry out these sanctions. This obligation prevails over previous treaty commitments towards the sanctioned state (82). Disregard of the treaty in carrying out this obligation is not considered a breach of treaty (83). Thus no treaty can protect against economic sanctions ordered by the Security Council under art. 39 of the U.N. Charter.

Article 39, however, gives the Security Council alternative choices : it may either dictate or merely recommend sanctions. When the Security Council recommends — instead of obliges — Member States to impose economic sanctions against a country, these recommendations will not prevail over treaty obligations (84).

Generally Assembly resolutions for economic sanctions similarly appear not to affect treaty obligations. Generally they are considered mere recommandations without binding force (85). Kewenig, the German rapporteur on economic sanctions and international law at the Conference of the German Society of International Law, confirms this view :

> « Recommendations of the U.N. General Assembly calling on all Member States to apply economic means of coercion against a certain state do not provide an independent justification in international law ... as long as these measures contradict existing obligations of a contractual nature » (86).

Unfortunately the International Law Commission (I.L.C.) has avoided to take a stand on this issue.

Professor Ago, the I.L.C. rapporteur on state responsibility, did not distinguish Security Council binding decisions from General Assembly or Security Council recommendations when he stated that « a decision of an international body such as the United Nations » would justify « the severance by a State of economic relations with another State to which the first State is bound by an economic or trade cooperation treaty » (87). Another I.L.C. member, Schwebel, suggested to make a distinction between recommendations and binding Security Council resolutions (88). For Professor Ago, no distinction had to be made. In his opinion « It was sufficient that a measure was carried out in implementation of a decision of a competent international organization, even if the measure was not obligatory and had simply been recommended » (89). The I.L.C., however, decided that this problem was outside its purview.

(82) See U.N. Charter art. 25 and 103 ; Vienna Convention on the law of Treaties, art. 30.
(83) MALANCZUK, *art. cit.*, at p. 748, p. 750.
(84) See e.g. MALANCZUK, *art. cit.*, at p. 751 ; VERDROSS and SIMMA, *Völkerrecht*, at p. 144.
(85) See *e.g.* VERDROSS and SIMMA, *o.c.*, at p. 145.
(86) KEWENIG and HEINI, *o.c.*, at p. 34. See also his more outspoken position in the discussion at pp. 64-65. For General Assembly resolutions imposing economic sanctions, see LEBEN, *art. cit.*, at pp. 32-33.
(87) *Yb.I.L.C.*, 1979, vol. II, part. 2, at p. 119, § 14.
(88) *Yb.I.L.C.*, 1979, vol. I, at p. 57, §§ 26-27.
(89) *Idem*, at p. 63, § 80.

However, when the Security Council, the U.N. organ primarily responsible for « international peace and security », qualifies a situation as a « threat to international peace and security » its authorative qualification sometimes can have an impact on treaty commitments. This will be the case when the treaty expressly allows each party to take all measures « necessary ... for the maintenance or restoration of international peace and security » (90). The Security Council then only determines if the escape clause in the treaty is applicable. General Assembly resolutions qualifying a situation as « a threat for international peace and security » probably could have a similar impact, although the General Assembly has only secondary responsibility with regard to peace and security. States should however not have the discretionary power to avoid treaty commitments by invoking the « international peace and security » escape provision of their treaty. The presence of a « threat to international peace and security » should be determined by the Security Council or the General Assembly. Indeed, this phrase is borrowed from the U.N. Charter and has to be interpreted by the appropriate U.N. organs.

Moreover the « international peace and security » escape can only work when the treaty contains such a provision or when the Security Council has ordered economic sanctions. Consequently one could question whether Saudi Arabia's suspension of oil supply to the United States in the absence of an escape provision or Security Council order was justified under the allegation that it was aimed.

> « to secure an objective of the highest international order : the restoration to the lawful sovereigns of illegally occupied territories and the restoration of the rights of peoples deprived of self-determination » (91).

Although the Security Council recognized that Israel's occupation of foreign territory endangered international peace and security this recognition was not accompanied by obligatory sanctions and consequently could not allow Saudi Arabia to retract its treaty commitments (92). Similarly, although the General Assembly did condemn the Soviet invasion of Afghanistan as a threat to international peace and security, it did and could not impose any sanction (93). This may help to explain why the U.S.A. did not suspend its treaty obligation with the Soviet Union, and continued to respect the Grains agreement.

(90) *E.g.* Treaty of Amity, Economic Relations and Consular Rights between the U.S. and the Sultanats Muscat and Oman, December 20, 1958, (1960) art. XI, 1 d (380 *U.N.T.S.*, p. 181) ; See also LEBEN, *art. cit.*, p. 29 and SHIHATA, *art. cit.*, p. 625.

(91) See SHIHATA, *art. cit.*, p. 624.

(92) (See e.g. Security Council Resolution 242 (XXII), *S.C.O.R.* 22nd Yr. Resolution and Decisions, 1967 at p. 8.

(93) *E.g.* GA Res. ES-6/2 and GA Res. 36/34 (1982).

CONCLUSION

Treaties are frequently invoked against sanctions. They often have prevented states from imposing sanctions. In only very few instances, however, has it been recognized that sanctions had violated treaty commitments. In 1955, the Soviet Union, for instance, paid $ 90 million to Yugoslavia because its boycott had violated treaty commitments towards Yugoslavia (94). But not many such cases are known. The U.S.-Polish arbitration on sanctions under the air agreement is suspended. Most recently, the U.S.-Iran Treaty has been invoked a few times before the Iran-U.S. Claims Tribunal. But this Tribunal until now always has decided on grounds other than the Treaty of Amity (95). As it once stated : « The Tribunal need not deal with the issues concerning the validity of the Treaty of Amity and its relevance with regard to the present dispute » (96).

There are many reasons why treaty provisions against economic sanctions are rather seldom applied. Some treaty provisions, *e.g.* with regard to expropriation, are considered as a mere confirmation of customary international law and consequently lose argumentary value (97). Others become ineffective because of escape clauses, « *exceptio non adimpleti contractus* » and reprisals. Moreover, reliance on them sometimes may seem politically inappropriate. The Iranian arbitrators of the Iran-U.S. Claims Tribunal apparently avoid recognition of the Treaty of Amity, the symbol of the alliance between the former Shah and the United States. The third country arbitrators are willing to take the same course. Only the American arbitrators sometimes discuss the Treaty. Once, the American arbitrator Aldrich could not « refrain in good conscience » from expressing his views on the applicability of the Treaty in a special concurring opinion where he alleged that Iran only had settled the case to avoid the treaty being discussed (98). The vehement reaction of the Iranian arbitrator against Aldrich's opinion proves that his allegation could have been correct (99). The practice of the Iran-U.S. Claims Tribunal evidences that the protection treaties actually give, is limited not only by legal rules but also by political considerations.

(94) LINDEMAYER, *o.c.*, p. 283.

(95) See *e.g.* award 122-38-3 *Schering v. Bank Markazi*, pp. 10-12 (unpublished); award 93-2-3 (*American Life Ins. v. Iran and Central Insurance of Iran*), pp. 10, 12, 21 (unpublished).

(96) Award 93-2-3 (*American International Group Inc. and American Life Ins. Co. v. Iran and Central Insurance of Iran*) (unpublished).

(97) See note 96. Concurring opinion Mosk at p. 9.

(98) Award 47-196-2 *I.T.T.Industries v. Iran and the Organisation of Nationalised Industries*), concurring opinion Aldrich, *U.S.-Iran Claims Tribunal Reports*, vol. 2, p. 348 at p. 349.

(99) Note by Dr. Shafie Shafeiei regarding the « concurring opinion » of George H. Aldrich », *idem*, at p. 356.

Discussion des rapports de MM. Carreau et Van Houtte sous la présidence de M. Rigaux

Mr. LAUWAARS refers to Article 103 U.N. Charter and asks whether obligations under the Charter can result only from binding decisions of the Security Council or from firm bilateral treaty commitments. He enquires whether such obligations can also arise under the Charter itself, *e.g.* in the field of human rights, under Article 55 U.N. Charter.

The RAPPORTEUR Mr. VAN HOUTTE replies that the U.N. Charter often is too vague to prevail over firm bilateral treaty commitments. A human rights exception to such commitments, based on the U.N. Charter and/or U.N. General Assembly resolutions, could only be enforced on *ius cogens* grounds of general international law. Such an enforcement would not rely directly on the legal authority of the U.N. Charter nor of U.N. General Assembly resolutions. The U.N. resolution concerning Namibia illustrates the point. This resolution supersedes precise treaty commitments only to the extent that it is considered to be an expression of *ius cogens*.

Mr. KUYPER mentions the uneasy relationship between coercitive measures, taken unilaterally by one State against another, and dispute settlement provisions which are binding on these States through a bilateral treaty. If a dispute settlement provision is regarded as a « best efforts » clause, then a summons to the other party and the exhaustion of friendly remedies probably will do, in order to comply with such a provision. Should the result be unsatisfactory, coercitive measures would then be authorized in spite of the dispute settlement provision. On the other hand, if dispute settlement provisions are interpreted to contain the only available means of reaction by the contracting States against each other, they would always deprive coercitive measures of the legitimacy they could otherwise enjoy.

The RAPPORTEUR Mr. VAN HOUTTE observes that only a realistic view on dispute settlement provisions can help to solve this problem. Dispute settlement provisions aim at avoiding the necessity of reprisals, they don't forbid reprisals in all circumstances. At the most, on could say that they exclude « arbitrary » reprisals. But, it seems very difficult to judge about the arbitrariness of coercitive measures. The example of the bilateral treaties between some Arab States and the European Communities confirms this finding. Despite the dispute settlement provisions included in these treaties, the Arab States don't consider that a boycott of European companies trading with Irsael is arbitrary. In the Arab view, an economic black list of firms supporting indirectly the Sionist enemy, relies on an objective criterion.

Mr. LAUWAARS further asks whether the terminology of coercitive measures ought not to be refined. He argues that economic sanctions are very different from economic conditions imposed by States or international organisations, when they give financial aid. If this distinction were not

to be firmly drawn, the European Communities would impose « economic sanctions » on the Member States or their interests almost daily. Such a definition is manifestly too wide.

M. CARREAU entend rappeler la distinction entre les notions de pression et de sanction économiques. Les présents travaux ont bien les moyens de pression pour objet, et la conditionnalité de l'aide en relève. On peut en dire de même de plusieurs interventions de Communautés européennes auprès des Etats membres. Ainsi, les discussions auxquelles ont donné lieu en France les négociations entamées en 1983 avec les institutions européennes en vue de l'obtention de crédits ont montré que les conditions dictées prennaient plutôt figure de moyens de pression que de sanctions. Il reste que la force de certaines pressions les place parfois à la limite de la légalité et au seuil d'une intervention dans les affaires intérieures. On pourrait citer à cet égard l'insistance dont a fait preuve le Fonds monétaire international en vue de réformer l'administration italienne ou de faire vendre des participations détenues par le Gouvernement du Royaume-Uni dans British Petroleum.

M. VAN HECKE ne saurait partager l'opinion de M. Carreau, selon lequel la conditionnalité de l'aide du Fonds monétaire international pourrait être illicite comme contraire au principe de non-intervention dans les affaires intérieures. En effet, la règle n'a rien d'inhabituel dans les relations privées : un banquier consentant un prêt à un client n'engagerait-il pas sa responsabilité s'il n'opérait pas les vérifications nécessaires auprès du candidat emprunteur?

M. CARREAU n'admet qu'en partie l'analogie. N'est-il point vrai que, si le banquier pousse son intervention au point d'exercer un véritable contrôle sur l'entreprise en lui imposant un plan, en plaçant des employés, le droit français lui étend la faillite éventuelle de l'emprunteur en tant que dirigeant de fait? Le Fonds monétaire international a la main parfois assez lourde ; il effectue une réelle intervention lorsqu'il introduit ses propres fonctionnaires dans l'administration du pays emprunteur, ce qui est critiqué par les pays du tiers-monde. Mais on admettra aussi que le Fonds accorde de la sorte aux Etats un moyen d'action pacifique permettant d'éviter d'autres interventions plus « musclées ». De plus, on peut se demander si la conditionnalité n'est pas de l'essence même d'un institution de ce genre.

Pour M. RIGAUX, toute analogie avec le secteur privé est quelque peu abusive car, à la différence du particulier, l'Etat est souverain : une atteinte à cette souveraineté par le Fonds monétaire international doit être considérée comme un acte illicite.

M. SALMON partage cette opinion. Le nœud du problème réside dans des divergences fondamentales, pour ainsi dire philosophiques, entre le libéralisme économique qui sous-tend le fonctionnement du Fonds et les régimes

politiques, économiques et sociaux résolument différents choisis par un certain nombre d'Etats. Or, les Etats ont le droit de choisir leur propre système politique, économique et social comme corollaire aux principes du droit des peuples à disposer d'eux-mêmes et de non-intervention. Aussi appartient-il au Fonds de s'adapter à ces nouveaux modèles plutôt que l'inverse.

M. SEIDL-HOHENVELDERN se demande toutefois s'il existe bien un droit au crédit du Fonds monétaire international. De plus, doit-on parler de conditions imposées par les fonctionnaires du Fonds ou plutôt de conseils dispensés par eux?