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Book Review. Asian African Legal Consultative Committee, Report of the Ninth Session Held in New Delhi from 18th to 29th, December, 1967

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REPORT OF THE NINTH SESSION HELD IN NEW DELHI FROM 18TH TO 29TH DECEMBER, 1967. Asian African Legal Consultative Committee. New Delhi: The Secretariat of the Committee. Pp. iii, 291.

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The Asian-African Legal Consultative Committee was established in 1956, first as an exclusively Asian grouping, then as an Afro-Asian one. As of early 1968, thirteen nations, four African and nine Asian, were members—Ghana, India, Indonesia, Japan, Pakistan, and the United Arab Republic among them. The Committee's legal (and political) character is ambiguous: it is composed of "legal experts," appointed by the member states, but it is not clear whether, or when, the delegates are speaking for themselves or for their governments.[1] The Committee meets annually (skipping a year now and then) to discuss topics under consideration by the International Law Commission (with which it keeps close contact), legal problems referred to it by member countries, and other "legal matters of common concern."

There has been considerable debate, in recent years, concerning the (actual or potential) impact of the emergence of a great number of new states on the international legal order. The question has been raised whether the new states hold a view of international law differing from that held by Western European and North American nations. The creation of the Asian-African Legal Consultative Committee may be understood as implying an affirmative answer; its work therefore provides a convenient opportunity for case study. Accordingly, this review of the report of the Committee's Ninth Session (1967)[2] will focus on the extent to which its contents may reflect a view of international law peculiar to Afro-Asian nations. Such an inquiry may be seen as an exercise in comparative international law; it is, accordingly, particularly appropriate to this Journal.

A paradigm of the case for a different point of view can be found in a brief discussion concerning the law of international rivers, a topic suggested by the delegates of Iraq and Pakistan and approved by the Committee for consideration at its next session.[3] The Pakistani dele-

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1. For an excellent brief description and assessment of the Committee, see B. Boutros-Ghali with S. Dreyfus, *Le Mouvement Afro-asiatique* (1969) at pp. 99-105. See also, R.R. Wilson, "A Decade of Legal Consultation: Asian-African Collaboration," 61 *Am. J. Int'l. L.* 1011 (1967); and reviews of Committee reports by J. H. Spencer, 56 *id.* 575 (1962); 63 *id.* 367 (1969).

2. A preliminary note on style of citation is necessary. The report under review consists of a single volume of nearly 800 pages in which three separate booklets are bound together. Since each booklet retains its own pagination, it must be separately identified for proper reference. The first book, which includes general and preliminary material and the materials on the law of treaties and international rivers, will be cited hereinafter as *Report-I*; the second, containing the materials on the South West Africa cases, will be cited as *Report-II*; the third, with the materials on relief against double taxation and fiscal evasion, will be cited as *Report-III*.

3. *Report-I* 49-59.

gate cited several reasons why the subject deserved study by the Committee: In the first place, "the major international rivers of the world are situated in these two continents" and "the principal water disputes of the world are increasingly to be found in Asian and African countries, situated as they are in arid areas of chronic water shortage." Afro-Asian nations, therefore, have an immediate interest in the establishment of definite international legal rules on the subject. In the second place, he argued, international law in this area, as developed in the past and as elaborated at present by the Western European and North American countries, is unresponsive to current urgent needs of the Afro-Asian countries, for two reasons. First, technological developments have made possible massive changes in the natural regime of rivers on a scale not envisaged in traditional international law. Second, and more important, the "European international legal practice in the matter of rivers was largely based upon the needs of navigation and latterly of the exploitation of water for the generation of power and other industrial uses. Agricultural use—especially use for food production through irrigation—does not figure large in the European experience."[4]

This line of argument suggests that there are two limbs to any inquiry on the new states' concern with, and potential impact on, particular areas of international law. First, is the specific branch or dispute of particular interest to the third world? Second, does the third world's interest import new elements (policies, interests, procedural problems) into the law? It is instructive to ask these questions with reference to the other topics studied at the ninth session of the Asian-African Legal Consultative Committee.

The discussion of the International Law Commission's draft convention on the law of treaties[5] is relatively brief and rather inconclusive on the question of an Afro-Asian viewpoint. There is no express reference to any special problems or interests of the Committee or its members and the outside observer is left to draw his own conclusions. At one point, a clearly third-world-oriented stand was taken, but without any discussion of reasons, when the Committee proposed that "economic or political pressure" be added to the article invalidating treaties procured by use or threat of force.[6] The Committee's plea for freedom of participation in general multilateral treaties may also be seen as corresponding to the interests of states which are mostly latecomers on the international scene and which do not generally take the initiative in proposing, negotiating and concluding general multilateral treaties. On the other hand, the decision of a majority of the Committee to support the ILC formulation of the articles on treaty interpretation bears no obvious relationship to a critical perception of third world interests.

4. *Report-I* 55.
5. Id. 27-47.
6. Id. 46 (majority position). The question was debated at length at the Vienna Conference and a related Declaration was annexed to its Final Act. See 8 *Int'l. Legal Materials* 728, at 733 (1969).

The first major topic discussed at the Committee's ninth session—the World Court's 1966 decision on the South West Africa case—is of obvious interest to Afro-Asian countries. However, although the factual issues are clearly more important to them and their support of the legal principles involved is more intense, formal support for these principles, with varying intensity, is shared by most Western nations and by the socialist countries as well.

The main document presented to the Committee was a 350-page report prepared by the Committee's Secretariat,[7] analyzing the legal issues in great detail and with a wealth of quotations from the opinions of the Court and of the dissenting judges. The report employs a highly traditionalist approach and at no point makes any express claim to a distinctive Afro-Asian conception of international law, with the possible exception of its final recommendation that more judges of Afro-Asian origin should sit on the Court.[8] The report finds that the majority judgment in the South West Africa case "upheld technicality rather than spirit of law," adopted a "highly technical and artificial reasoning," and exhibited an "attitude of judicial conservatism," and then goes on to assert: "The problem, in relation to the future of adjudication by the International Court, is essentially that of representation on the Court of the Judges, inasmuch as in 1966 majority of the Judges stuck to the concepts of traditional international law, as evolved by the so-called 'civilized nations.'" Pointing out further that, as of 1966, Afro-Asian nations and legal systems were underrepresented on the Court, the report stresses the need for a greater proportion of judges from these nations. But there is no attempt otherwise to defend the claim or to describe the specific judicial temper of Afro-Asian judges. That they might have voted "on the right side" in the South West Africa case is quite probable; that they would have changed the complexion of the Court, and would have made it to rely less on "technicalities" and be less "artificial" in its reasoning, is by no means self-evident; concern for technicalities and for narrow legalistic considerations transcends national, racial or cultural barriers. One may agree with both the criticism of the Court and the poposal for its "reconstitution," and still regret that the Committee missed a chance candidly to explain in what way the two are related, if they are, and to make explicit the policy grounds for its stand.

In the debate within the Committee, the Secretariat's proposal for more Asian and African judges was supported, but few additional arguments were adduced in its defense. The delegate of Ceylon placed the whole question in correct perspective when he pointed out that the "dismay" expressed at the World Court's decision was not limited to Africans and that "white opponents of apartheid" as well as "those who had hoped for a judicial role in the supervision of the Mandate" were equally disappointed. He went on to say: "If a large number of Western observers see the Judgment as an attempt to dodge in-

7. *Report-II* 19-367.
8. Id. 334-338.

convenient questions, an even larger number of Africans and Asians must see it as a denial by white men of the use of the legal process to the coloured nations."[9] The Committee's realistic final consensus was that judicial avenues had been exhausted and only political methods remained to be explored.

The second main topic studied, that of "relief against double taxation and fiscal evasion," is of particular interest on a number of grounds. It is a relatively new area of the law. As a result, policy questions remain close to the surface; they are more obvious and thereby more subject to debate than in the "established" fields. Significant developments have occurred recently in the positions of experts and of national and international officials on this topic. It is now widely acknowledged that the models of bilateral tax agreements elaborated since the First World War, chiefly by the developed countries, and the principles which these models embody, are not necessarily appropriate for agreements between a developed and a less developed country.[10] The reason is simple, when broadly stated, although its application to concrete situations is exceedingly complex. In the words of the OECD Fiscal Committee:

> The existing pattern of income tax conventions has evolved . . . out of the economic relations between countries at substantially the same level of economic development. The specific treaty provisions are based on the underlying assumption that the flows of capital and trade, and hence of income, between the treaty partners, while not necessarily equal are of substantial magnitude in both directions. In relations between capital exporting and developing countries, however, there tends to be one-sidedness to the income flows, and for this reason the traditional tax conventions have not commended themselves to developing countries.[11]

The Asian-African Legal Consultative Committee dealt with this topic at several sessions, starting as far back as 1961; at its ninth session it adopted a final report embodying certain "general principles recommended for adoption in international agreements."[12] The materials on which the final report was based included memoranda and a collection of documents by the Committee Secretariat, reports by special sub-committees appointed over the years, and related comments by member governments. There is unfortunately considerable confusion concerning the basic purpose of the exercise: are the principles involved recommended for inclusion in tax agreements between states

9. Id. 409.

10. See, Organization for Economic Co-operation and Development, *Fiscal Incentives for Private Investment in Developing Countries: report of the Fiscal Committee* (1965) at pp. 57-64, 69; United Nations, *Foreign Investment in Developing Countries* (1968) at pp. 21-23; and especially, United Nations, *Tax Treaties between Developed and Developing Countries* (1969), hereinafter cited as *U.N. Tax Treaties*. And cf., U.N. Economic and Social Council Resolution 1273 (XLIII), 4 August 1967, on tax treaties between developed and developing countries.

11. OECD, op. cit. note 10, at 57.

12. *Report-III* 98-107.

members of the Committee—and in that case, since Japan is the only developed country among the members, these would be agreements where typically both parties would be less developed—or are they recommended for inclusion in agreements where the other party would be a non-member, and presumably, in many cases, a developed country? There are certain, not very clear, indications that the former alternative was envisaged.[13] This may explain why in none of the successive reports is there any extended and consistent attempt to examine the particular case of tax agreements between developed and developing countries.

Study of the "general principles" adopted brings out a few instances where the Committee departed from the model in use among developed countries,[14] in apparent reflection of the special concerns and interests of its members. An easily identifiable case is that of "tax sparing," that is, the provision found in several tax treaties between developed[15] and developing countries, according to which the country of origin of the investor (usually, a developed country) agrees to treat as a tax credit the taxes that the investor would have paid to the host country, but for the grant of special exemptions, intended as investment incentives. The Committee comes out in favor of this practice, but it provides no serious discussion of its pros and cons.

Another case, less easy to assess, relates to the definition of "permanent establishment." This concept, basic to the tax treaty pattern in use, reflects the principle that a state should not tax incidental and irregular transactions by residents of another country. Accordingly, tax treaties usually require that only income arising out of relatively regular and permanent course of business should be taxed by the host country.[16] It is evident that the narrower the definition of what constitutes "permanent establishment," the less revenue will the host country collect from transactions by foreign firms. A comparison of the definition suggested by the Asian-African Legal Consultative Committee[17] and that found in the OECD Model Draft Convention brings out a few differences. The Committee includes a "permanent sales exhibition" in the definition, while the OECD model excludes it; the Committee's definition omits a minimum time requirement for considering a construction site as permanent establishment; the conditions under which use of an agent constitutes permanent establishment are broader in the Committee text. Regardless of the precise practical effect of such changes, what is significant is that the Com-

13. For instance, the possibility of drafting a model multilateral convention is said to have been considered; id. 99. (The earlier subcommittee report mentioned, however, may have been referring merely to model bilateral agreements; id. 79-80; and cf. id. 81). See also id. 88, where equality in the level of development seems to be assumed.

14. OECD, *Draft Double Taxation Convention on Income and Capital, Report of the Fiscal Committee* (1963).

15. Among others, France, the Federal Republic of Germany, Japan, Sweden, and the United Kingdom. United States policy, after some wavering, has been firmly set against this method. See, *UN Tax Treaties* 41-43.

16. For a brief explication of the concept, see *UN Tax Treaties* 52-58.

17. *Report-III* 102-103. (No detailed commentary is included.)

mittee's definition broadens the concept, thus bringing into the tax jurisdiction of the host country a greater number of transactions.[18]

Despite these differences, and other less important ones, the "general principles" suggested by the Committee cannot be seen as a systematic attempt to formulate a third-world position. To begin with, the principles often fail to assume possible positions favoring the less developed countries. With respect to income from shipping, for instance, the Committee accepts (with a reluctant and obscure reservation) the OECD model's solution of allocating all income to the country of registration (or management) of the shipping company. Since more ships from developed countries operate in the less developed ones than the reverse, the latter are bound to lose income from such a leonine "mutual" foregoing of benefits.[19] More important, and regardless of positions on specific issues, the Committee report, along with the earlier sub-committee reports and government memoranda, fails to articulate a position differentiating in principle or in detail the case of tax treaties between developed countries from that of treaties between developed and developing countries. It must be admitted, in mitigation, that it is only since 1965 that this distinction has been clearly articulated within international organizations and in the developed countries.

The conclusion of this review must needs be limited in scope, "proved" one way or another. In a small number of cases, the position taken by the Asian-African Legal Consultative Committee appears to reflect particular interests of its members, as representative parts of the third world; still, in most instances, the Committee does not appear acutely interested in discerning, studying, and formulating a distinct position on international law. It prefers to found its argumentation on traditional international law concepts and approaches and to rely on technical legal arguments, of uneven cogency and persuasiveness. The reports and studies of or to the Committee, often quite competent technically, make generally little attempt to evaluate principles or rules in terms of policy objectives, whether Afro-Asian or more inclusive. Repeated complaints, in these studies, of lack of data and of failure of member governments to respond to requests for information or comment should be seen as a manifestation of the Committee's basic structural defects which have prevented it from achieving the position and importance that it could have.[20]

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18. The Committee's definition was partially incorporated in later proposals presented to a UN *ad hoc* Group of Experts. See, *UN Tax Treaties* 28-29, and cf. id. 11-13.

19. See, *UN Tax Treaties* 64-65; and cf. id. 15.

20. See Boutros-Ghali, op. cit. note 1, at 103-105.