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## The Implementation of International Economic Agreements Within Municipal Legal Systems and Its Implications

Palitha T.B. Kohona

*Department of Foreign Affairs and Trade of Australia*

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*Professor A. Peter Mutharika, one of Professor Dorsey's colleagues at Washington University School of Law, is the founder and first President of the International Third World Legal Studies Association (ITWLSA). ITWLSA has been particularly sensitive to the need to base national development upon authentic cultural values. However, Third World states must face the realities of a world economy. Professor Kohona of the Legal and Consular Division of the Department of Foreign Affairs and Trades of Australia is one of ITWLSA's most active members. Professor Kohona theorizes that Third World state are increasingly bound by rules of international law arising out of economic treaties. These rules significantly restrict the economic sovereignty of Third World States.*

## **THE IMPLEMENTATION OF INTERNATIONAL ECONOMIC AGREEMENTS WITHIN MUNICIPAL LEGAL SYSTEMS AND ITS IMPLICATIONS**

**PALITHA T.B. KOHONA\***

### **I. BACKGROUND**

#### *A. The Increased Regulation of International Economic Relations*

Julius Stone stated in 1954 that, "one modern year's international legislation, that is State agreed regulation of new problems by multilateral instruments, exceeds that of a whole century of old."<sup>1</sup>

This statement is more relevant today as the international community concludes an ever increasing number of agreements, both bilateral and multilateral, with a view to regulating various aspects of international relations through commonly accepted norms. This statement is particularly pertinent in the area of international economic relations.

Many factors have contributed to encouraging the perceived need for the international regulation of aspects of economic relations among

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\* LL.B (Hons) (Sri Lanka); LL.M. (A.N.U.); Ph.D. (Cantab); Presently attached to the Legal and Consular Division of the Department of Foreign Affairs and Trade of Australia. The views expressed in this paper should not be attributed to the Department of Foreign Affairs and Trade.

1. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 23 (1954).

countries.<sup>2</sup> Some of the major contributory factors include: the increasing frequency and intensity of contact and interaction among peoples that modern inventions and technology made possible, the rapid diffusion and unification of material culture, the rising unity of demand among peoples everywhere for wider participation in the production and sharing of all values, the very expanding economic relations among countries and the repeated economic crises, the increasing recognition by peoples of their interdependence and common interests, and the growing understanding of the increasing role of law in sharing demanded values and material benefits.

### *B. Methods of Regulation and the Resulting Legal Regimes*

The most significant method of regulation of international economic relations has been through the conclusion of multilateral agreements. In addition, a variety of international institutions have been established for this purpose. These institutions have been given an extensive range of functions for achieving their objectives, including legislative, executive and even judicial functions. Consequently, they are becoming an important source of international law, as the regulatory measures established in the pursuit of their goals increase in number. In addition, the activities of the above institutions, at times, influence the slowly developing rules of international custom relating to international economic relations.<sup>3</sup>

The 1960s and 1970s witnessed a massive growth in the number of such international norms relating to economic relations. This growth may have reflected the prevailing mood that supported international joint action to deal with various economic problems. The enthusiasm for such international regulatory norms has diminished somewhat in the 1980s due to changed political and social perspectives. Nevertheless, today an enormous web of international economic norms and a variety of international economic regimes exist, which are expanding continuously. These regimes cover *inter alia*, civil aviation, shipping, road transportation, labor relations, exchange transactions, credit facilities, tariffs, agriculture,

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2. See *Koowarta v. Bjelke-Petersen* 56 A.L.J.R. 625, 636 (1982); Akinsanya & Davies, *Third World Quest for a New International Economic Order: An Overview*, 33 I.C.L.Q. 208 (1984).

3. See *North Sea Continental Shelf Cases*, I.C.J. Rep. 41 (1969); SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 22 (2d ed. 1984); Wigdor, *Canada and the New International Economic Order: Some Legal Implications*, XX CAN. Y. INT'L. L.L. 161, 191 (1982); see also Sorensen, *Autonomous Legal Orders: Some Considerations Relating to Systems Analysis of International Organisations in the World Order*, 32 I.C.L.Q. 559 (1982).

the exploitation of the resources of the sea, production and sale of commodities, trade marks, intellectual property, trade competition, bills of exchange and the resolution of disputes relating to economic relations.<sup>4</sup>

### C. *Effects of this Development on Individual States*

A significant aspect of the expansion of international economic regimes has been the slow decline of the sovereign powers of nation states over economic matters. Countries that in the past have been jealously protective of their sovereign powers over their economies and their economic relations with each other, have cautiously, but deliberately moved in the direction of voluntarily restricting some of these powers or even surrendering them in the interest of the common good.

A related development has been the acquisition by individual states of an increased role in molding the expanding web of international regulatory norms. Thus, while states are slowly losing their powers of control over their own economies, they are also beginning to play an increasing role in the evolving international power systems, particularly those relating to economic matters.

### D. *The Obligation to Implement International Norms*

Normally, a state would enter into an international agreement voluntarily, following detailed negotiations, and after working out various compromises and trade-offs. Once a particular compact has been agreed to internationally, international law requires the state to take all necessary measures to give due effect to the provisions of such a compact. Article 26 of the *Vienna Convention on the Law of Treaties*<sup>5</sup> obliges parties to treaties to perform their commitments in good faith. Article 13 of the *United Nations Declaration on the Rights and Duties of States* states "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."<sup>6</sup> Some international agreements contain specific pro-

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4. Morgenstern, *International Legislation at the Crossroads*, 49 B.Y.B.I.L. 101 (1978); KOHONA, *THE REGULATION OF INTERNATIONAL ECONOMIC RELATIONS THROUGH LAW*, Ch. 3 (1985); McRae and Thomas, *The GATT and the Multilateral Treaty Making: The Tokyo Round*, 77 AM. J. INT'L L. 51 (1983).

5. Aust. T.S. 1974, No.2.

6. See also *Exchange of Greek and Turkish Populations* P.C.I.J. Series B No. 10, 20 (1925).

visions requiring the parties to give effect to them within their domestic jurisdictions.

In addition to the legal obligation, there could be practical imperatives compelling a state to comply with its international treaty obligations. Considering that a state would enter into a treaty only after carefully balancing benefits and concessions, non-compliance with its obligations could result in the other parties denying the benefits under the treaty to that party if the party did not comply with its requirements in good faith. Therefore there are both legal and practical reasons for a state to comply with its international commitments.

The obligation to comply with international economic norms would relate not only to the original agreements themselves, but to the subsequent norms of conduct that are adopted by the organizations established under them. It has been said that:

unless otherwise provided in the treaty itself, a state can not justify its failure to perform its obligations under a treaty because of any provision or omissions of its municipal law, or because of any special features of its governmental organization or its constitutional system.<sup>7</sup>

#### *E. Implementation with Domestic Jurisdictions*

A state which accepts an international economic commitment would be required to give effect to it both internationally and within its domestic jurisdiction. Due to their very nature, international economic norms are required to be implemented in detail within domestic jurisdictions if they are to be fully effective. For example, an agreement like the *International Coffee Agreement* which requires its parties, *inter alia*, to regulate the production and marketing of coffee would be rendered ineffective unless carefully implemented within the domestic jurisdictions of the coffee producing countries. This requirement involves the enactment of detailed laws relating to the production and disposal of coffee — thus, inevitably affecting the lives and livelihood of hundreds and thousands of individual persons and juridical personalities as well as various domestic laws, regulations, customs and practices.

#### *F. Effects of the Growth of International Economic Norms*

This paper will briefly examine the slow decline of the powers of the

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7. Harvard Research Draft Convention on the Law of Treaties, 29 AM. J. INT'L L. (Supp.) 1029 (1935); see also Vienna Convention on the Law of Treaties, Art. 27 (1969).

individual states in relation to economic matters and the corresponding growth of international economic norms, and the effects of the role played by individual states in the evolving international power systems. It will be seen that the growing web of international economic norms is influenced by, and at the same time reflects, the aims and aspirations of the principal participants of the world power processes, namely, the states themselves, individuals, political parties, trade unions and other pressure groups. Furthermore, it will be seen that due to the necessity to implement international economic norms within domestic jurisdictions to make them fully effective, there is an increasing interdependence between the effectiveness of international economic norms internationally, and their implementation within municipal jurisdictions. In most cases this interdependence is so proximate that failure to implement an international economic norm within the municipal legal system of a relevant state could render such a norm ineffective internationally in relation to that state, and in some cases, as all states parties as well. The implications of this for both domestic law and international law is significant.

## II. THE CONCEPT OF STATE SOVEREIGNTY IN RELATION TO ECONOMIC MATTERS

Historically, the growth of the powers of the nation state also resulted in the evolution of the concept of unlimited sovereignty. This idea, first developed to justify and explain unlimited internal freedom of action of the nation state, was later extended to justify unlimited external freedom of action.<sup>8</sup> In relation to economic matters, it meant that the state could enjoy an unfettered freedom of action, both internally and externally. Thomas Jefferson observed that, "every [state] may govern itself according to whatever form it pleases, and change these forms at its own will."<sup>9</sup> More recently, the United Nations resolved that, "Every state has the right . . . to exercise freely, without dictation by any other state, all its legal powers, including the choice of its own form of government."<sup>10</sup> Even historically, however, there were certain limitations on this abso-

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8. See *Report of the Study Group on the Peaceful Settlement of International Disputes*, David Davis Memorial Institute of International Studies 55 (1966).

9. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 177-78 (1940).

10. Art. 1, Annex to UN Gen. Ass. Res. No. 375 (IV), UN Gen. Ass. Off. Rec. 4th Sess. Resolutions, at 67 (1949).

lute freedom of economic action which states claimed.<sup>11</sup>

The idea of sovereignty of the state in relation to economic matters was closely associated with its economic well-being, and hence it was only natural that this concept should have been tenaciously adhered to. A state's ability to control its own currency in a manner that it saw fit was considered to be an essential element of the state's economic sovereignty. The Permanent Court of International Justice Cases (PCIJ) observed that: "It is indeed a generally accepted principle that a State is entitled to regulate its own currency."<sup>12</sup>

Municipal courts readily upheld this position. In the past, an English Court has granted an injunction to prevent the printing of counterfeit currency in England for the purpose of circulation in the Austro-Hungarian Empire. Lord Justice Knight-Bruce stated:

. . . . the preparation here<sup>13</sup> without and against the plaintiff's consent of such documents as these, with the intention of issuing and using them in Hungary without and against his consent, was and is by the law of England, was and is by the law of nations, wrongful . . . . when I use the term 'wrongful' I mean civilly 'unlawful' as regards rights of property, that is to say, the public revenues, the fiscal resources, the pecuniary means of the realm of Hungary. . . .<sup>14</sup>

Lord Justice Turnour observed:

I think it is an injury not to the political but to the private rights of the plaintiff's subjects . . . . that the effect of this introduction (of spurious notes into Hungary) will be to disturb the circulation of currency in the Kingdom cannot, in my opinion, be doubted; and what will be the effect of the disturbance? Surely to endanger, to prejudice and to deteriorate the value of the existing circulating medium, and thus to affect directly all the holders of Austrian bank notes and indirectly if not directly all the holders of property in the State.<sup>15</sup>

It is interesting to note that any interference in the right of Hungary to control its own currency was considered to be an infringement against the rights, not only of the State of Hungary, but also of the subjects of the

11. The right of the Spaniards and the Portuguese to occupy and exploit newly discovered territories was divided between the two nations by a line drawn through the Azores by Papal Order.

There were also international compacts which imposed limitations on the economic activities of states. See WILD, SANCTIONS AND TREATY ENFORCEMENT, 180 *et seq* (1934).

12. *Serbian and Brazilian Loans Cases*, Series A, Nos. 20 and 21, 44 (1929).

13. The reference is to Britain.

14. *Emperor of Austria v. Day and Kossuth* 3 de G.F. and J. 217 at 247 (1861).

15. *Id.* at 243.

State.<sup>16</sup>

The economic sovereignty of the state permitted it to regulate to its own advantage, and to the exclusion of other states, all other aspects of economic activity.

As observed by Muir:

That the regulation of foreign trade is normally a right within the sovereign prerogatives of an independent country is too well established to permit disagreement in the context of existing international law. Individual nations have historically regulated imports by imposing tariffs, inspections, quantitative and qualitative restrictions, and numerous other conditions and barriers on international trade. They have frequently regulated exports as well, including, recently, complete cut-offs were deemed necessary to retain adequate domestic supply without inflation.<sup>17</sup>

The extent to which and the jealousy with which states protected their economic sovereignty is illustrated by the attitude of Britain, (which was certainly not in a strong bargaining position due to its war ravaged economy) at the Bretton Woods Conference, and at the subsequent negotiations with the United States to obtain assistance to resuscitate its economy.<sup>18</sup>

A majority of the Directors of the Bank of England are opposed to the Bretton Woods program . . . . It is argued by those in opposition that if the plan is adopted financial control will leave London and Sterling exchange will be replaced by Dollar exchange. Right Wing Conservatives such as Amery . . . . who represents Imperial thinking in the Cabinet are disturbed by this argument.<sup>19</sup>

In brief, it may be said that the concept of state sovereignty in relation to economic matters, as it prevailed, was extensive, and states tended to cling on to it even in the worst of times.

### III. THE CHANGING CONCEPT OF ECONOMIC SOVEREIGNTY

Slowly it became apparent that the individualist and "beggar they neighbor" policies of the past were, in the long run, detrimental to the interests of the world community at large. Over a period of time, a grow-

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16. In 1920, 20 states ratified the *Convention for the Suppression of Counterfeiting Currency*. Significantly, the U.S.A., U.K., and France were not party to this.

17. Muir, *The Boycott in International Law* 9 J.I.L. & E. 187, 192 (1974). Muir's views may be said to reflect the traditional concept of the State's economic sovereignty.

18. See GARDENER, *STERLING-DOLLAR DIPLOMACY* (1956).

19. The telegram from Ambassador Winnant to the Secretary of State (April 12, 1944) (White Papers).



ing tendency developed among states to embark on cooperative ventures in economic matters, to attain common economic objectives. This tendency is evidenced by the numerous multilateral economic agreements concluded and the resulting international economic regimes. A necessary casualty of this development was the concept that the state possessed an unbridled power over its own economy, a concept which has undergone modification to suit the requirements of an altered environment.

It has been observed that:

While the pretension of national sovereignty continues to be jealously preserved and loudly proclaimed by statesmen at every national and international platform its reality is subtly melting away under the inexorable pressures of guarding its very existence.<sup>20</sup>

Though this reference is to the surrender of some aspects of sovereignty, as a consequence of entering into military arrangements, it is equally applicable to situations where states enter into international agreements of an economic nature.<sup>21</sup> With every new international economic norm of conduct that is adopted, some further aspect of international economic activity begins to be regulated internationally, and the individual state's powers of control over economic matters is reduced to some extent.

#### *A. Restrictions on the Economic Sovereignty of States*

Fawcett, writing on the International Monetary Fund (IMF), says that states now recognize that curtailing their power to impose trade restrictions benefits trade. He also suggests that a duty not to cause economic harm to other states has come to be recognized at the same time.<sup>22</sup>

The prohibition of unfair competition can be regarded as a general principle of law to be found in the municipal law of many countries. It has also had international recognition in the 'open door' system of the General Act of Berlin, 1885, and in the mandates and trusteeship agreements, and has now been embodied in the E.E.C. Treaty as a central feature. Further it has had

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20. Ahoja-Patel, *Economic Cooperation in Africa* 3 J.W.T.L. 251, 256 (1969). A resurgence of economic nationalism in recent times has been caused by the downturn of the international economy and its impact on national economies. See recent amendments to the *Trade Act 1974*, 88 Stat. 1978, 19 U.S.C.; § 2101 (1982).

21. It could be suggested that states agree to surrender a part of their sovereignty because they have the prospect of becoming part of an international power system in the process.

22. It is difficult to assert categorically that an international rule of law to this effect has come to be recognized. Fawcett, *The International Monetary Fund and International Law*, 40 B.Y.B.I.L., 32, 57 (1964).

a particular application in the field of state trading. But the concepts of unfair competition and discrimination are not always distinguished, for while a State may create conditions of major trade competition in favor of its own agencies, this may not necessarily discriminate against other states or their nationals, since the basis and aim of major competition and discrimination may be different.<sup>23</sup>

It is noted that under the provisions of the General Agreement on Tariffs and Trade (GATT) contracting parties have agreed to the common objective of substantially reducing barriers to trade through a process of consultation and negotiation.<sup>24</sup> The IMF Agreement takes away the absolute regulatory power which states possessed in relation to their own currencies.<sup>25</sup>

### *B. Restrictions on Discrimination*

Some multilateral trade agreements have sought to eliminate discriminatory trade practices among member parties, in order to liberalize international trade. For example, Article 6(1)(a) of the *Convention Establishing the [European Free Trade Association] EFTA* states:

Member States shall not:

- (a) apply directly or indirectly to imported goods any fiscal charge in excess of those applied directly or indirectly to like domestic goods, nor apply such charges so as to afford effective protection to like domestic goods.

Similarly, Article 13 paragraph 1(a) states:

Member States shall not maintain or introduce:

- (a) the forms of aid to exports of goods to other Member States which are described in Annex C.

Paragraph 1(b) states:

Member States shall not maintain or introduce:

- (b) any other form of aid, the main purpose or effect of which is to frustrate the benefits expected from the removal or absence of duties and quantitative restrictions on trade between Member States.

The Montevideo Treaty and the Caribbean Community (CARICOM) Treaty contain similar provisions.<sup>26</sup> Such treaties have the effect of curbing the unrestricted right of the individual state to encourage the growth and assist and protect local industries and to foster exports through dis-

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23. *Id.* at 57.

24. *See* Preamble, The GATT.

25. This is the objective of the IMF Agreement.

26. Montevideo Treaty, art. 17, arts. 21 and 22, and the Treaty establishing the CARICOM.

criminatory laws and policies. Commodity agreements also impose stringent regulatory measures on their member states' unlimited right to produce and market commodities.<sup>27</sup>

### C. *Requirement to Consult on Economic Matters*

Under some international economic agreements, states have voluntarily agreed to act in consultation with each other on specified economic matters. Under the GATT, contracting parties are required to consult each other extensively on matters relating to tariffs and other trade restrictions. The General Treaty of Central American Economic Integration (GTCAEI) also states:

In the event of monopolies being created or the regime governing existing ones being modified, consultations shall take place among the Parties with the aim of Providing special rules for Central American trade in the corresponding articles.<sup>28</sup>

With the acceptance of the need to consult each other on specified matters, parties to such agreements forego the right which they enjoyed previously to act unilaterally (and at times, selfishly). This restriction would also ensure, to an extent, that any action an individual state might take would reflect, to some extent, the needs of all interested parties.<sup>29</sup>

### D. *Requirement to Take Positive Action Within Municipal Jurisdictions*

In addition to agreeing to restrict or forego their right to take unilateral action internationally regarding the matters covered by international economic agreements, states could also agree to institute positive legislative and executive measures within their own municipal jurisdictions to give effect to such agreements. For example, Article 46 of the *International Sugar Agreement* (1977) states:

1. Members undertake to adopt such measures as are necessary to enable them to fulfill their obligations under this Agreement and fully to co-operate with one another in securing the attainment of the objectives of this Agreement.

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27. These regulatory measures cover the right to produce, stockpile, market, etc.

28. GTCAEI, art. VIII.

29. In the Peace Corp's Agreements, the U.S.A. and the beneficiary states agree to "fully inform, consult and cooperate with the representatives of the Government of the United States with respect to all matters concerning Peace Corps volunteers." See also, *International Olive-Oil Agreement*, art. 14 (1963). However, it is noted that there has been a resurgence of self-interested economic actions by states in recent times.

2. Importing Members undertake to ensure that, except as provided for in Article 38, and in respect of sugar *en admission temporaire*, their total exports of sugar not exceed their total imports of sugar in the same quota year.<sup>30</sup>

Under Article 35(1) of the *International Cocoa Agreement* (1975):

Members shall adopt the measures required to ensure full compliance with the obligations undertaken by them in this Agreement in respect of export quotas. The Council may call upon members to adopt additional measures, if necessary, for the effective implementation of the export quota system, including the making of regulations by exporting members providing for the registration of all their cocoa to be exported within the limit of the export quota in effect.

Such an obligation may relate to the area directly within the legislative competence of the central government. Under Article 5 of the *Treaty Establishing the CARICOM*:<sup>31</sup> “. . . [Member States] shall facilitate the achievement of the objectives of the Common Market. They shall abstain from any measures which could jeopardize the attainment of the objectives of the Common Market.” This provision casts a positive obligation on member states to take steps to attain the objectives of the Common Market which would include the enactment of appropriate legislation and administrative regulations. This provision also casts a negative obligation not to take any measures that would hinder the attainment of the objectives of the Common Market.

The Convention Establishing the European Free Trade Association (EFTA)<sup>32</sup> acknowledges the problems that may arise in connection with the above requirements in federal states, and the EFTA contains a much less stringent provision. Paragraph 4 of Article 14 of the EFTA states:

Where member-states do not have the necessary legal powers to control the activities of regional or local government authorities or enterprises under their control in these matters, they shall nevertheless endeavor to ensure that those authorities or enterprises comply with the provisions of the Article.

Similarly, under Article XXIV(12) of the GATT:

Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within this territory.

Provisions of this type take into account the limits of the powers of cen-

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30. See also *International Olive-Oil Agreement*, art. 14 (1963).

31. See also The Annex to the CARICOM Treaty, art. 4.

32. EFTA Agreement, art. 14, para 4.

tral governments in federal states.<sup>33</sup>

The obligation, incurred under an international agreement to bring a state party's internal laws into line with the provisions of the agreement, may require the modification and even the repeal of already existing municipal laws. Article 42 of the Annex to the CARICOM Treaty states that:

Member States recognize the desirability to harmonize as soon as practicable such provisions as imposed by law or administrative practices as effect the establishment and operation of the Common Market in the following areas: — (a list of the areas follows).

Necessary directives for this purpose may issue from the international institutions established under an international economic agreement. Article 100 of the European Economic Communities (EEC) Treaty states that:

The Council shall, acting unanimously on a proposal from the Commission issue directives for the approximation of such provisions laid down by law, regulation or administrative action in member States as directly affect the establishment or functioning of the common market.

State parties to an international economic agreement may be required to take similar steps, not only in respect to the initial agreement itself, but also in relation to any norms of conduct subsequently adopted under it.

By resolution Number 90 adopted at the Organization of Petroleum Exporting Countries (OPEC) XVI Conference of June, 1968, member states were requested to take steps to acquire a greater control over the petroleum industry. Most member states of OPEC complied with this request.<sup>34</sup>

#### *E. Procedures for the Adoption of International Economic Norms Within Municipal Jurisdictions*

An international economic agreement might not only require that its provisions be introduced into the respective municipal legal systems of party states, but also lay down detailed procedures for that purpose. For example, under Article 54(1) of the International Civil Aviation Organi-

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33. See GATT Panel Report on the responsibility under the GATT of the Canadian government for taxation measures adopted by the Province of Ontario. L/5863, Sept. 17, 1985.

34. See Evans, *Economic Policy and the Free Movement of Goods in EEC Law*, 32 I.C.L.Q. 577 (1983); OPEC Res. No. XVI-op. For the purpose, Malaysia set up Petronas under the Petroleum Development Act 1974, Kuwait took over the Kuwaiti National Petroleum Company by Law No. 8 of May 19, 1975, and Iraq established the Iraqi National Oil Company under art. XI of Law No. 123 of 1967.

zation (ICAO), the Council is authorized to adopt "international standards" and "recommended practices," contained in annexes to the constitution, which are part of the constitutional law of the organization. Members are obliged to conform with the "international standards" while they are only required to endeavor to apply the "recommended practices." Members are also expected to introduce suitable alterations to their internal laws to comply with "international standards." Where they do not do so they are bound to inform the council of this, and other member states regain their discretion whether to abide by the "international standards" in relation to the defaulting state.

Under the Constitution of the International Labour Organisation (ILO) conventions are adopted by a majority of two thirds of the votes cast by the delegates present. Conventions come into force after a certain number of ratifications have been received. The ILO constitution places a positive obligation on member states to present a duly adopted convention to their appropriate municipal authorities for the purpose of being given effect within their respective municipal legal systems.<sup>35</sup>

#### *F. Limitations Imposed on the Legislative Powers of States*

Internationally agreed economic norms could operate as a restriction on the legislative powers of a state. The Regulations of the Council and Commission of the European Community have this effect. In 1967 the Court of Justice of the European Communities (ECJ) observed that:

Regulation No. 22, which established the levy system is, according to Article 189, binding in all its parts and directly applicable in all 'Member States'. Such system, therefore, is applicable in all the Member States and is equally binding within the framework of the Community legal order which they established and which was, pursuant to the Treaty, incorporated into their legal systems. Thus, the Member States conferred upon the Community institutions the power to issue levy measures such as those provided in Regulation No. 22, thereby limiting their sovereign rights accordingly.<sup>36</sup>

The EEC Treaty has created its own legal order, having its own institutions, its own personality and its own capacity in law and it has been said that the rights created by the Treaty cannot be contradicted by do-

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35. ALEXANDROWICZ, *LAW MAKING FUNCTIONS OF U.N. SPECIALISED AGENCIES* 25 (1973).

36. *Neumann v. Hauptzollamt Hof/Saale*, 17/67, Dec. 13, 1967, 13 Rec. 571; see discussion in Steiner, *Direct Applicability of EEC Law — A Chameleon Concept*, 98 L.Q.R. 229 (1982).

mestic law.<sup>37</sup> "No municipal laws, of whatever nature they may be, may prevail over Community law . . . ."<sup>38</sup>

It is generally accepted that in the areas that the Council and the Commission have been empowered to exercise legislative power under the EEC Treaty, the member-states have surrendered their own legislative powers to the Community:

Once, in relation to a particular subject, the conditions contained in a provision of the EEC Treaty conferring legislative power upon the institutions of the Community are satisfied, the Governments of the Member States no longer have the power to regulate the subject between themselves by means of an agreement under international law (treaty, convention, protocol, act, declaration, etc.). From that time on, the Community institutions have exclusive competence to legislate on the subject in question.<sup>39</sup>

### G. *Limitations on the Powers of Municipal Courts*

It is also conceivable that states entering into an international agreement would even consent to limit the competence of their own judicial organs. Under Article IX (paragraphs 3, 4 and 6) of the IMF Agreement, the assets of the Fund are immune from judicial process, attachment or execution or other forms of restrictions or controls. This Article is required to be given the force of law in all member states. Article 177 of the EEC Treaty states that:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or Tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where such a question is raised in a pending case before a court or tribunal of a Member State, against whose decisions there is no judicial remedy

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37. *Costa v. ENEL*, 1964 CMLR 425, 455 *et seq*; See Steiner *supra* note 36.

38. *Simmenthal Case*, 106/77 (1978 ECR 629).

39. Schwartz, *Article 235 and Law-Making Powers in the European Community*, 27 I.C.L.Q. 614, 615; See Pergola and Duca, *Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598 (1985).

under national law, that court or tribunal shall bring the matter before the Court of Justice.

This provision is being resorted to with increasing regularity.

#### *H. Limitations on Relations with Other States*

An international agreement could also impose limits on a signatory state's rights to enter into other international arrangements.

The GTCAEI states:

The signatory states agree not to sign unilaterally with non-Central American Countries, new treaties affecting the principles of Central American Economic Integration. They shall also agree to maintain the Central American exception clause in any trade agreements they may conclude on the basis of most-favored-nation treatment with countries other than the Contracting Parties.<sup>40</sup>

Thus it is clear that due to the expansion of the international economic regimes, the economic sovereignty of states parties' has suffered considerable erosion. States have agreed to curtail their freedom of action relating to a wide array of economic activities including the regulation of currencies, the restriction of imports, encouragement of exports, assistance of production and the fostering of their own labor forces. These limitations affect their right to adopt legislative and administrative measures, expect them to adopt new measures where necessary, require them to act in consultation with each other, bind them to restrict the competence of their courts, or even curtail their right to enter freely into relations with other states. It is clear that with every new international economic norm adopted, this process will advance further.

### IV. INTRODUCTION OF INTERNATIONAL ECONOMIC NORMS TO MUNICIPAL LEGAL SYSTEMS

#### *A. Some General Comments*

Due to the widespread impact that international economic norms have on domestic laws, regulations, customs, practices and institutions of individual states, it is imperative that the will of the legislative organs of states (and through them the will of individual members of society) play some role<sup>41</sup> in the acceptance and implementation within these states of

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40. GTCAEI, Art. XXV. *See also* Schwartz, *supra* note 39.

41. In democracies the will of the individual is expressed for this purpose usually through his representatives.



such norms of conduct. After all, it is the latter's lives and livelihood that will eventually be affected, and it will be the legislative, executive and judicial organs of the state that will be responsible for ensuring their due internal implementation. These factors may be acknowledged to a greater or lesser extent by the draftsmen of international agreements and national constitutions.

Most international economic agreements provide for their acceptance and ratification to be subject to the constitutional and legal requirements of the signatory states. Adherence to these requirements could be the means for introducing such agreements, as well as subsequent norms of conduct adopted under them, into the municipal legal systems of these states. In other cases specific legislation may be required for this purpose.

National constitutions also might stipulate specific procedures for the acceptance and ratification of international agreements, and some might even specifically refer to economic agreements. This could ensure that unless the stipulated constitutional and other legal requirements were complied with, any international norm to which a state became a party would not have legal effect within that state.<sup>42</sup>

The frequency with which provisions of the above nature find their way into contemporary international agreements might reflect an evolving state practice. If state practice could be said to result in the development of the rules of international law, one is tempted to suggest that this is illustrative of a nascent rule of international law — a rule which requires that international economic norms be accepted and ratified by states in accordance with their constitutional and legal requirements to be effective in relation to such states.

It is important to remember, however, that some treaties make no reference to the need for them to be accepted and ratified in accordance with the constitutional and other requirements of states. Yet, these treaties continue to be concluded.

It is conceivable that a situation could arise where a country ratifies an international agreement, but the legislature of that country refuses to endorse the international act of its executive, and fails to take measures to implement it within the domestic jurisdiction. The diplomatic embarrassment and the other consequences that could result from a situation of

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42. It is emphasized that unless an international economic norm is given effect in the municipal legal systems, it might very well become ineffective internationally as well.

this nature may be avoided. The problem is circumvented if states become party to international agreements on the basis of existing legislative approval, or through signing on an *ad referendum* basis.

It appears possible for a state to adopt one of the following measures to safeguard itself, and ensure the agreement's success domestically and internationally:

- (i) To specifically make international law part of the municipal law of the State.
- (ii) To obtain the requisite legislative approval prior to the executive binding itself internationally.
- (iii) To make the final effectiveness of its signature subject to legislative approval.

## V. PROVISIONS IN INTERNATIONAL ECONOMIC AGREEMENTS ON THEIR ACCEPTANCE AND RATIFICATION

The provisions of international economic agreements which require their acceptance and ratification by states to be in accordance with the constitutional and legal requirements of those states will also generally apply to subsequent norms adopted under such agreements. Even states that do not have such constitutional requirements to satisfy might accept and ratify international economic accords after obtaining the approval of their respective legislatures for the practical purpose of giving effect to them within their municipal jurisdictions. For example, Britain enacted the *European Communities Act of 1872*, in order to give effect to its obligations arising from joining the EEC.

### A. *Specific Treaty Provisions*

Treaty provisions on this point could be explicit. Article II of the Agreement establishing the *Asian Coconut Community* states that: "This Agreement shall be subject to ratification or acceptance by signatory governments in accordance with their respective constitutional procedures." The Organization for Economic Cooperation and Development (OECD) Convention states in Article 14(a) that: "This Convention shall be ratified or accepted by the Signatories in accordance with their respective Constitutional requirements." A similar provision is contained in the Treaty Establishing the CARICOM. Article 23 requires that:

This Treaty and any amendments thereto shall be subject to ratification by the Contracting States in accordance with their respective constitutional

procedures. Instruments of ratification shall be deposited with the Secretariat which shall transmit certified copies to the Government of each member State.

Article 247 of the EEC Treaty stipulates that: "This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements."<sup>43</sup>

The GTCAEI employs a slightly different terminology. Article XXX states that: "The Treaty shall be submitted for ratification by each State, in conformity with its constitutional or legal procedures." This provision would thus make it mandatory for States wishing to be parties to the Agreement to comply with the requirements of any other legal procedures, in the event that no specific Constitutional provisions exist, as a condition to ratification.

Some agreements have gone to the extent of stipulating a similar requirement for the purpose of accepting and ratifying amendments as well. Article 96 of the European Coal and Steel Community (ECSC)<sup>44</sup> states that: "Such amendments shall enter into after being ratified by all the Member States in accordance with their respective Constitutional requirements."

The protocol amending the Montevideo Treaty (1969) in Article 10 states that:

The present protocol shall be called the Protocol of Caracas' and shall enter into force as soon as all the Contracting Parties ratify it in accordance with their legal procedures and deposit in the Secretariat of the Association the respective instruments.

Thus, for an amendment or a protocol attached to an international economic agreement to enter into force, it may be necessary for it to be ratified in the same way as the original agreement. Likewise, a treaty of an economic nature might require that any subsequent norms of conduct adopted under it be ratified in accordance with the respective constitutional and legal procedures of party states.

Article 31 of the Treaty establishing the CARICOM provides that:

2. Decisions taken under this Treaty requiring such action shall be subject to the relevant constitutional procedures of the respective Member States.
3. Where necessary, Member States undertake to take steps as expedi-

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43. See also ECSC Treaty, Art. 99.

44. See also EEC Treaty, Art. 236.

tiously as possible to give full effect in law to all decisions of the organs and institutions of the Community which are binding on them.

The *Treaty Establishing the Benelux Economic Union* goes further when it states in Article 19, paragraph (b) that:

In carrying out its appointed tasks the Committee of Ministers (b) may draft conventions to be submitted to the High Contracting Parties in order that they may become operative in accordance with the rules of the Constitution of each High Contracting Party.

The ILO has recognized the need to implement the conventions and recommendations it sponsors within the municipal legal systems of member states. It requires that members present the conventions and recommendations to their respective legislative organs within a specified time limit for adoption.<sup>45</sup>

Thus, a large number of international economic agreements have acknowledged the need, not only for the agreements themselves, but also for amendments to be duly accepted and ratified in accordance with the constitutional and legal requirements of party states. In the case of the Benelux Economic Union, the CARICOM, the EFTA, the EEC, the ILO and the ICAO there is a positive obligation on member states to do so even in the case of subsequently adopted norms of conduct. This is a practical approach to adopt, as the acceptance and ratification of international economic norms in accordance with the domestic constitutional and legal procedures of the states concerned may have the result of giving effect to them within their domestic jurisdictions. Even if this by itself does not have such an effect, it would be a useful step in the process of doing so.

## VI. PROVISIONS IN NATIONAL CONSTITUTIONS RELATING TO THE ACCEPTANCE OF INTERNATIONAL AGREEMENTS

Just as treaties contain provisions relating to the need for their acceptance and ratification in accordance with the constitutional and legal requirements of party states, numerous national constitutions also contain specific provisions on their acceptance and ratification.

The task of negotiating and settling the texts of international agreements is performed by the executive arm of government. Though the final act necessary to bring an international agreement into force is performed by the executive as well, it may be subject to the approval of the

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45. See, ALEXANDEROWICZ, *supra* note 35.

legislative arm of government. This act of approval, in most cases, will also grant legal effect to an international agreement within the legal system of a state party. (In some cases additional legislative or administrative measures may be necessary for this purpose.) The intervention of the legislature of a state in this process will also ensure a degree of popular support for the agreement concerned — a factor which will assist in its due implementation within the relevant municipal legal system.

It has been stated in England that when the Crown in the exercise of its prerogative powers concludes a treaty, the subject gains no personal rights under that treaty enforceable in the courts, unless the treaty has become part of the municipal law of the country.<sup>46</sup>

The reason of the matter is to be found in the fact that in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive, to make or alter municipal laws.<sup>47</sup>

S.A. de Smith states in his *Judicial Review of Administrative Action*:<sup>48</sup>

Again, neither a declaration nor any other judicial remedy is obtainable for the purpose of . . . securing performance of an international obligation undertaken by the Crown unless the obligation has been incorporated into the municipal law by statute.

The manner in which the approval of the legislature is obtained, for the acceptance and ratification of international accords and for conferring the status of law within the municipal jurisdictions of states, varies from constitution to constitution.

#### A. *United Arab Republic*

The Constitution of the United Arab Republic (UAR) (1964) provided in Article 125 that:

He (the President) concludes treaties and communicates them to the National Assembly with suitable comments which have force of law after their conclusion, ratification and publication. Peace treaties, commercial pacts and maritime treaties, those involving modification in the territory or connected with sovereignty and those involving charges not provided for in the Budget require approval by the National Assembly before they come into

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46. *Rustomjee v. R.* (1876) 1 QBD 487; *Civilian War Claimants Association Ltd v. R.* AC 14 (1932); *Chow Hung Ching v. R.* 77 CLR 449 (1948); *Bradley v. Commonwealth* 128 CLR 557 (1973); *Blackburn v. Attorney-General* 1 WLR 1037 (1971); *Laker Airways Ltd v. Department of Trade* 1 QBD 643 (1977).

47. See MANN, *STUDIES IN INTERNATIONAL LAW* 328 (1973).

48. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 499 (4th Ed. 1980).

force.<sup>49</sup>

The second passage refers to the need to obtain the approval of the National Assembly before the types of treaties that are mentioned therein come into force. It appears that this reference here is simply to such treaties coming into force in the municipal law of the country. It is noted that under the Constitution of 1964, agreements of an economic nature are specifically required to be approved by the National Assembly in order to become effective within the UAR.

It is difficult to see the purpose of an international economic agreement concluded by the UAR, if it cannot be given effect within the country itself. The international and internal effects of such agreements are intimately linked to each other.

### *B. Algeria*

A different approach is adopted by the Constitution of Algeria. Article 42 of the Algerian Constitution of 1963 states that the President is empowered, after consultation with the National Assembly, to ratify and put into operation treaties, conventions and international agreements.<sup>50</sup> Here too, the power to enter into international agreements is conferred on the executive i.e., the President. But he is required to consult the legislature before ratifying and putting them into operation. In reality, however, consultation with the legislature amounts to obtaining its approval.

### *C. France*

The position in France on this question is more stringent. Under Article 52 of the Constitution of 1958 the President is empowered to negotiate and ratify, and is entitled to be informed of all negotiations leading to the conclusion of international agreements not subject to ratification. This all-encompassing power of the President is curtailed by Article 53, which states that:

Peace treaties, commercial treaties, treaties or agreements relating to international organizations, those that imply a commitment for the finances of the State, those that modify provisions of a legislative nature, those relating to the status of persons, those that call for the cession, exchange or addition of territory may be ratified or approved only by a law.

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49. HOLLOWAY, *MODERN TRENDS IN TREATY LAW* 199 (1967).

50. *Id.* at 208.

It is provided that the above shall become effective only after they have been ratified and approved in the stated manner. In fact, French Courts have tended to recognize only those treaties which have been published in the form of a presidential decree.<sup>51</sup>

Article 11 of the Constitution states that:

The President of the Republic, upon proposition by the government during parliamentary session or upon proposition by the two Assemblies published in the Official Journal, may submit to referendum any Bill on the organization of public powers, on the approval of an agreement with the Community or providing for authorization to ratify a treaty which, without being contrary to the Constitution, might affect the functioning of (existing) institutions.

It is apparent that, although the French Constitution confers the power of concluding treaties on the executive arm of government, it also reserves a considerable role for the legislature.

The discretion that Article 11 confers on the President may in fact be no discretion at all. When one considers the whole democratic process, with the need to consult the electorate at regular intervals, particularly on matters that closely affect the electorate (and due to the impact that an international economic norm could have on it) it might even be possible to suggest that a norm ratified contrary to the above provisions, in addition to lacking any effectiveness within the country, might be rendered ineffective internationally, at least in relation to France. For example, if the French government is unable to implement a Decision of the Council of the EEC within the country, not only will the Council be largely incapable of effectively enforcing that Decision in the case of France, the Decision itself might become internationally ineffective.

#### *D. Belgium*

The Belgium Constitution also deals with this matter. Article 68 states that: "The King makes peace treaties, treaties of alliance and commerce." The King is required to inform the Chambers and submit all relevant communications to them as soon as the interests and the security of the State permit him to do so. Treaties of commerce and those involving the national finances or those imposing financial burdens upon Belgian citizens require the consent of the Chambers to become effective.

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51. See *Veuve Ultimas Ben Mohammed v. Sanchis et la Zurich*, ANNUAL DIGEST, 347 (1931-32); Bial, *Some Recent French Decisions on the Relationship Between Treaties and Municipal Law*, 49 AM. J. INT'L. L. 347 (1955).

The need to obtain the consent of the legislature in the case of the latter type of agreement is enshrined in the Belgian Constitution. The actual position of Belgium has been explained in an official memo of the Belgian Government to the United Nations in the following words:

It follows from the (above) provisions that the conclusion of international conventions is a prerogative of the executive power by the King under the responsibility of a minister.

When the consent of the Chambers is required for the convention to become effective, the ratification by the Head of State does not generally intervene until after that consent has been obtained, merely to avoid deadlock. (However, such approval) is not necessary in international law, and in certain urgent cases, treaties have been ratified before their approval by the Chambers.<sup>52</sup>

Though Article 68 gives rise to some doubt, the actual practice of the State of Belgium indicates that legislative approval of a treaty concluded by Belgium is obtained as a means of ensuring compliance with municipal law requirements. This has repercussions, however, on its international effectiveness.

#### *E. United States*

The position in the United States is governed by Article 6 Clause 2 of the Constitution which empowers the President to make treaties by and with the advice of the Senate provided that two-thirds of the Senators present concur. American Courts have tended to define the term "treaty" with reference to U.S. domestic law.<sup>53</sup> The lack of Senate approval may not affect the international validity of a "treaty" but would affect its validity with the country.<sup>54</sup> Article 6 Clause 2 of the Constitution also makes treaties part of the law of the State.

This Constitution, and the laws of the United States which shall be made in pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Administration will not attempt to ratify a "treaty" that has not

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52. U.N. Compilation, P. 14 at 15-16; see *Institute National des Appellations d'Origine des Vins et Eaux-de-Vie v. Mettes N.J.*, 424 (1958): 584 I.L.R. (1957).

53. See Mathews, *The Constitutional Power of the President to Conclude International Agreements* 64 Y.L.J. 345 *et seq.* (1955); U.N. Compilation, at 125 *et seq.*

54. See HOLLOWAY, *supra* note 49, at 219 *et seq.*; Glennon, *The Senate Role in Treaty Ratification* 77 AM. J. INT'L.L. 257 (1983).



been approved by the Senate. Marshall C.J. stated in the celebrated case of *Foster v. Neilson* that:

A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently to be regarded in Courts of Justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract - when either of the parties engages to perform a particular act - the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the Court.<sup>55</sup>

The Supreme Court of California has stated with regard to the United Nations Charter that:

The provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justifiable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations.<sup>56</sup>

The United States constitutional model in this respect has been followed in Article 22 of the 1949 Constitution of Argentina, in Article 7 of the 1946 Constitution of Korea, in Article 133 of the 1917 Constitution of Mexico and Article 26 of the 1940 Constitution of Paraguay.

The United States had to abandon the International Trade Organization (ITO) Charter (thus ensuring that it would not come into effect) as there appeared to be no possibility of obtaining the consent of the Senate.<sup>57</sup> In the case of the United States, the requirements for ensuring legal validity of a treaty within the country appear to be so closely intertwined with the requirements for granting international effectiveness to it. Thus it might be possible to suggest that the two are interdependent.

The administration has to an extent circumvented the need for Senate approval for international agreements by developing the practice of concluding executive agreements. Executive agreements are binding under international law (i.e., they are of treaty status) but are not required to be

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55. 27 U.S. (2 Pet) 253, 314 (1892).

56. *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

57. GARDNER, *STERLING-DOLLAR DIPLOMACY* 378 (1956).

submitted for the approval of the Senate. They are said to gain their validity under the Constitutional provisions which authorize the President to conduct foreign relations.<sup>58</sup>

However, legislative control over executive agreements has been extended to some extent through the provisions of the *Case-Zablocki Act*.<sup>59</sup> This Act, while authorizing the promulgation of implementing regulations requires the Secretary of State to transmit the texts of all international agreements, other than treaties, to the Congress no later than 60 days after their entry into force. The Act also provides that no international agreement may be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.

The type of agreement that is required to be transmitted to the Congress under the *Case-Zablocki Act* would have the following characteristics:

The Parties to such agreements must be states, state agencies or intergovernmental organizations; they must intend such agreements to be legally binding and not merely of political or personal effect; such agreements should be intended to be governed by international law; and they should not deal with minor or trivial matters.

Most international agreements of a commercial or economic nature would require transmission to the Congress under the *Case-Zablocki Act*. Although unlike "Treaties", executive agreements do not require the approval of Congress prior to their conclusion. The requirement to transmit them to Congress, and the powers of Congress relating to their implementation within the country would translate into a form of effective legislative control.

#### F. *United Kingdom*

In the United Kingdom, the Crown, by virtue of the royal Prerogative, issues Full Powers for the negotiation and signature of treaties and ultimately ratifies them where necessary. Lord McNair states that:

Accordingly, if the Crown enters into a treaty which is likely to come into question in a Court of Law or to require for its enforcement the assistance of a Court of Law, and the application and enforcement of that treaty in-

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58. *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304 (1936); Jackson, *U.S. Law and Implementation of the Tokyo Round Negotiation*, in JACKSON, LOUIS & MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 140-41 (1984).

59. 1 U.S.C. 112(b); see also 46 Fed. Reg. 35917 (July 13, 1981).

volves any modification of or addition to the rules of law administered by an English Court (which include the rules of international law as understood and ascertained by English Courts), the Crown must induce Parliament to pass the necessary legislation, for it is only Parliament that can change the law binding upon a treaty which merely creates a particular obligation between the parties, or upon a treaty which purports to create new rules of international law binding upon a number of parties.<sup>60</sup>

It is not only treaties that are required to be introduced into the municipal law of Britain through the intervention of the legislature, but subsequent norms of conduct adopted by international organizations of which Britain is a member.<sup>61</sup> Lord Denning has stated: "In my opinion, the rules of international law only become part of law insofar as they are accepted and adopted by us."<sup>62</sup>

In Britain there is no stated requirement that international norms of conduct, to which the U.K. has become a party, be accepted or ratified in accordance with any constitutional and legal requirements. However, the practical situation resulting from the need to enforce such norms with the assistance of the administrative and judicial organs makes it necessary for them to be introduced into the domestic legal system with the assistance of the legislature. It appears that a large number of economic and commercial agreements concluded by the U.K. would require the assistance of Parliament if they are to be given full effect.

### G. Australia

The position in Australia is generally similar to the position in Britain. In the course of his judgement in *Koowarta v. Bjelke-Petersen* Mason J. stated that:

It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia. In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress (*Foster v. Neilson* (1829), 2 Pet. 253 at p. 314; 27 U.S. 164, at p. 202). As Barwick C.J. and Gibbs J. observed in *Bradley* (at pp. 582-583), the approval by the Commonwealth Parliament

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60. McNair, *The Method Whereby International Law Is Made to Prevail in Municipal Courts on an Issue of International Law* 20 TR. GROTIUS SOC. 11, 19 (1945).

61. MCNAIR, *LAW OF TREATIES* CH. IV (1961).

62. *R. v. Secretary of State, ex parte Thakrar*, Q.B.D. 684 at 701 (1974); 1 ALL E.R. 415 (1974).

of the *Charter of the United Nations Act 1945 (Cth)* did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law whether by Commonwealth or State statute.<sup>63</sup>

In Australia the Constitution empowers the legislature "to make laws for the peace, order and good government of the Commonwealth with respect to . . . external affairs."<sup>64</sup> In the exercise of this power, Parliament could legislate to give domestic law effect to an international agreement concluded by Australia.<sup>65</sup> It is the usual practice in Australia to have the necessary domestic legislation in place, prior to entering into any international agreement. Since the commitment made by Prime Minister Menzies in 1961, it has been the Australian practice to lay on the table of both Houses, the texts of treaties already signed and treaties to which Australia was contemplating accession, or treaties that Australia was considering ratifying.

#### H. Canada

In Canada, the executive has the power to conclude treaties without formally seeking the approval of the Parliament. However, as a matter of practice Parliamentary approval is sought prior to entering into certain important agreements. Gotlieb suggests that in practice, Parliamentary approval is sought for four types of agreements: i.e.,

- i. agreements imposing military or economic sanctions;
- ii. agreements involving large expenditures of public funds or important financial or economic implications;
- iii. agreements of political significance; and
- iv. agreements which affect private rights within Canada.<sup>66</sup>

Most Treaties are tabled in Parliament by way of notification. Parliamentary approval of the conclusion of a treaty, however, does not result in the introduction of the provisions of such a treaty into the domestic law of Canada. This would require specific implementing legislation. Due to the division of powers under the Canadian Constitution between the federal and provincial governments and the effect of judicial interpre-

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63. 56 A.L.J.R. 625, 648 (1982).

64. Australian Constitution, Art. 51 (xxix).

65. *The Commonwealth and Another v. The State of Tasmania and Another* 57 A.L.J.R. 450 (1983); Byrns and Charlesworth, *Federalism and International Legal Order: Recent Developments in Australia* 79 AM. J. INT'L. L. 622 (1985).

66. GOTLIEB, CANADIAN TREATY-MAKING 16-17 (1968).

tations,<sup>67</sup> the Canadian government either obtains the prior concurrence of the provinces, or ensures the incorporation of an appropriate "federal-states clause" before concluding international agreements.<sup>68</sup> Most international agreements affecting economic matters to which Canada is a party require to be given effect by both federal and provincial legislation or by provincial legislation alone.<sup>69</sup>

### I. Japan

In Japan the executive has the power to conclude treaties. Under Article 73 of the Constitution:

The Cabinet, in addition to other general administrative responsibilities, shall perform the following functions: . . . conclude treaties. However, it shall obtain the prior or, depending on circumstances, subsequent approval of the Diet. . .

In Japanese practice "treaties," which relate to the legislative power of the Diet, which impose financial obligations on Japan (except those previously authorized by the Diet in the budget or in other laws), and which are politically important, are required to be submitted to the Diet for approval.

The practice of concluding international agreements, called "executive agreements" has developed where the content of such compacts are authorized by the budget or existing laws. Executive agreements are of treaty status but are not referred to as treaties. These need not be approved by the Diet.

### J. India

The Indian Constitution states that: ". . .all executive action of the Government of India shall be expressly taken in the name of the President."<sup>70</sup>

It would appear from the above that national constitutional provisions which require legislative approval to be obtained prior to the acceptance and/or ratification of treaties are common. Even countries (e.g. Britain) that have no such legal requirements appear to do so in practice, in the

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67. Laskin, Comment (1056) 34 CAN. BAR REV. 215; Legault, *Canadian Practice in International Law During 1982 at the Department of External Affairs* 21 CAN. BAR REV. 302, 309 (1983); *McDonald v. Yapor* 139 D.L.R. (3d) 417 (S.C.C.) (1983).

68. See, Legault, *supra* note 67.

69. HOGG, CONSTITUTIONAL LAW OF CANADA 440 (2d. ed. 1985).

70. Indian Constitution, Art. 77(1).

case of major international economic agreements. In some countries it might be necessary to take additional measures in order to give specific effect to international norms within their municipal jurisdictions. This is particularly important in the case of international economic norms as they are required to be implemented within municipal jurisdictions if they are to have full effect.

International economic agreements affect not only inter-state relations, but they also affect intimately the lives of individuals within the state, its municipal legal system and sovereign powers of the state.<sup>71</sup> For example, the impact of commodity agreements, which are extremely comprehensive in the manner in which they regulate the commodity trade, is felt by a large number of persons in the states which are party to them. These persons include small producers, large combines, traders, middlemen, retailers, wholesalers, exporters, persons providing various services and the organs of the state. Consequently, legislative approval becomes essential for them to be given effect within municipal legal systems. Unless they are given effect internally, they might be rendered ineffective internationally as well. For example, if Brazil does not give effect to the *International Coffee Agreement* and Brazilian producers and exporters do not adhere to its regulatory regime, not only will the Coffee Council find it difficult to enforce the provisions of the Agreement with regard to Brazil, the Agreement itself might become ineffective internationally. This illustrates the proximity of the relationship between the international effectiveness of an international economic norm and its municipal law effectiveness. Given this background, it would be unproductive for a state to accept or ratify an international economic agreement without first obtaining the approval of its own legislative organ, or having the assurance of getting that approval later. This act of approval, by itself, could confer legal effectiveness to an international norm within the mu-

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71. "The Joint Committee doubts if the general public or even parliamentarians appreciate the extent to which Community law which governs activities in the field of trade, industry, transport, agriculture and services is continuously being incorporated into our legal system either directly or through the agency of statutory instruments made by Ministers." Fifty-fifth Report of the First Joint Committee of the Irish Parliament. Prl. 6169 at 9; see Seidle-Hohenveldern, *Transformation or Adoption of International Law into Municipal Law* 12 INT'L & COMP. L.Q. 88, 105 (1963); see also Seidle-Hohenveldern 49 AM. J. INT'L.L. 451, 465 (1955); see also Sorensen, *Autonomous Legal Orders: Some Considerations Relating to System Analysis of International Organisations in the World Legal Order* 32 INT'L & COMP. L.Q. 559 (1982); Evans, *Freedom of Trade Under the Common Law and European Community Law: The Case of the Football Bans* 102 L.Q.R. 510, 546 (1986).

nicipal jurisdiction of a state or the legislature will have to enact specific legislation for that purpose.

## VII. CONCLUSIONS

The steady growth of a web of international economic norms, designed to regulate various common aspects of international economic relations, has caused a gradual decline of the powers of sovereign states in certain areas — particularly in relation to economic matters. This has wide implications for states, both internationally and domestically.

On the one hand, along with the reduction of the states' powers in an individual sense, their ability to participate in and influence the international economic regulatory systems has been increasing. (Of course, the ability to influence international power systems would depend to a large extent on the economic might of each state).

On the other hand, a parallel and necessary development has been the increasingly proximate relationship that has evolved between the implementation of international economic norms internationally, and their implementation within municipal legal systems. Due to the extensive impact such norms are intended to have, they must be meticulously implemented both internationally and within individual states. As implementation within domestic jurisdictions is accomplished through the medium of the internal administrative and judicial organs, and because they would only enforce norms that are acceptable to their own municipal legal systems, international economic norms must be duly introduced to the municipal legal systems of these states in accordance with their preordained constitutional and legal requirements. Where no such requirements exist, they may have to be given effect by the adoption of other legislative and administrative measures. The role of the national legislatures in this respect appears to be increasingly acknowledged in international economic agreements and national constitutions that require such agreements to be accepted and ratified (and/or given effect to) in accordance with the constitutional and legal procedures of party states. (Thus ensuring legislative endorsement for the international acts of the respective executives.) In most cases, unless such international economic norms are duly implemented within the municipal jurisdictions of relevant states, they would become ineffective.

One is tempted to suggest that this interdependence between the effectiveness of international economic norms within domestic jurisdictions and in the international sphere should now be acknowledged by interna-

tional law. Accordingly, only an international economic norm that has been accepted (or ratified) in accordance with a state's domestic constitutional or legal requirements, or in relation to which domestic measures of implementation have been taken in accordance with the law, should be deemed to be binding on that state at international law.

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