SOME REMARKS ON BIMST-EC: A NEW INTERNATIONAL-LEGAL INSTRUMENT FOR CO-OPERATION IN ASIA

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On 6 June 1997, a new sub-regional economic co-operation group called BIST-EC (consisting of Bangladesh, India, Sri-Lanka, Thailand), linking South-East Asia and South Asia for the first time, was officially inaugurated in Bangkok.¹ Myanmar attended the meeting as an observer and became a member in December that year, after which the grouping's name was changed to BIMST-EC.

The grouping has been restricted to the five countries as they together constitute a contiguous geographical sub-region around the Bay of Bengal. In their Joint Statement of 22 December 1997 the member states agreed that the geographical limitation focused on the Bay of Bengal rim would be one of the key criteria for full membership. Observers and guests would be invited to attend appropriate meetings and participate in various BIMST-EC activities, and criteria for such participation will be drawn up.² Some countries from the Asia-Pacific region have already shown their interest. Nepal has sent an official request to become a member while Bhutan, Indonesia, Malaysia and Pakistan have expressed interest in the organization. Although the said Joint Statement set a moratorium on new membership for five years in order to allow for a requisite period of consolidation, permitting the expeditious implementation of the Co-operative Work Programme, the member countries agreed to consider inviting certain countries from the region, as well as international organizations, to participate in BIMST-EC work.

In 1994 Thailand for the first time introduced the idea of establishing an organization grouping countries around the Bay of Bengal. The response from other countries was not enthusiastic, mainly because of prevailing political tensions in the region. As a result, India and Sri Lanka were the only countries which joined Thailand in preparing the organization's terms of reference. In the

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¹ See the Declaration on the Establishment of the Bangladesh-India-Sri Lanka-Thailand Economic Co-operation (BIST-EC), Bangkok, 6 June 1997, later referred to as the BIST-EC Declaration. Text by courtesy from the Department of Information of the Thai Ministry of Foreign Affairs, reproduced *infra* at 532.

² Joint Statement of the BIMST-EC Ministerial Meeting, Bangkok, 22 Dec. 1997, text released by the BIST-EC Working Group.

meantime a water-sharing agreement has been concluded between India and Bangladesh and Myanmar has become an ASEAN member. These events changed the political landscape in the region and eventually led to the establishment of BIMST-EC.

Studies to identify sectors for mutually beneficial economic co-operation have been commissioned and actual projects have been identified for implementation. The Joint Statement of the BIMST-EC Ministerial Meeting of 22 December 1997 reflects the member countries' determination to move the organization into an operational phase of these projects.³ Based on a study prepared by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the BIMST-EC countries agreed to establish a forum with the participation of public and private sector representatives to pursue closer economic co-operation.⁴

The establishment of BIMST-EC affirms a very clear trend during the last thirty years in this part of the Asia-Pacific region, of creating sub-regional institutions in order to overcome protectionism, declining terms of trade and small domestic markets. Mention may be made of the Association of South-East Asian Nations (ASEAN), the ASEAN Free Trade Area (AFTA), and the South Asian Association for Economic Co-operation (SAARC).

Though such institutions, especially those under SAARC auspices, seem not to be very successful so far, developments of the past few years have stimulated the process. All the institutions in question have survived so far, despite the not quite favourable original prospects for successful co-operation between the states concerned, due, *inter alia*, to the fact that in their external economic relations the member states were mainly oriented toward third countries. As to the BIMST-EC, it may be assumed that the new grouping springs from an idea that must have been in the minds of the politicians in the two sub-regions for quite a long time, i.e. to link the potential economies of South Asia with the relatively developed economies of South-East Asia. Such a linkage makes the economies concerned more complementary, might bring ASEAN and SAARC closer to each other, and deepen bilateral economic relations among the member states.

BIMST-EC is based on the idea of co-operation, which is a key-word for many economic institutions operating in the Asia-Pacific region. The concept of co-operation is not sharply defined in the theory of international relations and its normative system. A review of various Asian instruments pertaining to co-operation would demonstrate that the notion refers to a broader concept that can denote any form of agreement aimed at enhancing the common interests of the parties involved.⁵ A similar conclusion may be drawn from the BIST-EC Declaration which enriches the concept of co-operation by adding the bonds of

³ *Bangkok Post*, 7 July 1997 and 31 December 1997.

⁴ *BIST-EC Development Programme Overview and Sectoral Co-operation* (UN ESCAP, 1997).

⁵ M.M.KENIG-WITKOWSKA, *International law and development. Some Asian perspectives* (Bangkok, 1996) *passim*.

friendship to the common interests and the matters of common concern. Furthermore, the Declaration to some extent also refers to the notion of collective self-reliance by stating that the countries concerned share a primary responsibility for the strengthening of the economic and social stability of their sub-region and for ensuring peaceful and progressive national development. The Declaration also points out that the sub-region to which the BIMST-EC activities refer is bound by ties of history and culture, which will foster a greater understanding for meaningful co-operation.

The BIST-EC Declaration is a short document of a general character giving much more attention to form rather than to 'technical' organizational issues. As such it may hold the risk of becoming an organism under permanent construction, similar to ASEAN.

The Declaration contains four paragraphs preceded by a kind of preamble. In the first, very short, paragraph, the parties declare the establishment of the Bangladesh-India-Sri-Lanka-Thailand Economic Co-operation, henceforth to be known as the BIST-EC. It is interesting to notice that the above phrase nothing was said about the operational or institutional side of the grouping nor about the character of the venture.

The second, and longest, paragraph defines the aims and purposes of the organization, as follows: (1) to create an enabling environment for rapid economic development through identification and implementation of specific co-operation projects in the sectors of trade, investment and industry, technology, human resource development, tourism, agriculture, energy, infrastructure and transportation; (2) to accelerate the economic growth and social progress in the sub-region through joint endeavours in a spirit of quality and partnership; (3) to promote active collaboration and mutual assistance on matters of common interest in the economic, social, technical and scientific fields; (4) to provide assistance to each other in the form of training and research facilities in the educational, professional and technical spheres; (5) to co-operate more effectively in joint efforts that are supportive of and complementary to national development plans of member states, which result in tangible benefits to the people in raising their living standards, including through generating employment and improving transportation and communication infrastructure; (6) to maintain close and beneficial co-operation with existing international and regional organizations with similar aims and purposes; (7) to co-operate in projects that can be dealt with most productively on a sub-regional basis among the members states and that make best use of available synergies.

The above aims comprise a vast spectrum of possible domains of co-operation which may look trivial compared to other such instruments, such as the ASEAN Declaration of 1967 or the SAARC Charter. On the other hand, the emphasis laid by the BIST-EC Declaration on specific fields of sub-regional collaboration is certainly remarkable.

Although the aim to maintain close and beneficial co-operation with existing international and regional organizations with similar aims and purposes can be found in other, similar, documents, their inclusion in the BIST-EC Declara-

tion gives a special meaning to that co-operation. The conclusion suggests itself that BIMST-EC has been considered by its creators as a bridge between the two already existing organizations — a missing element in the South — South-East Asia collaboration.

The principles of BIMST-EC closely resemble those of SAARC, if not to say that the Declaration has copied the SAARC Charter⁶ in this respect. The third paragraph of the BIST-EC Declaration states that in all its activities BIMST-EC will observe the following principles: (1) sovereign equality; (2) territorial integrity; (3) political independence; (4) non-interference in internal affairs; (5) peaceful co-existence; (6) mutual benefit. As to co-operation within the group, BIMST-EC will constitute a supplement to, rather than a substitute for bilateral, regional or multilateral co-operation involving the member states. One may assume that by these words, the BIMST-EC member states meant to express their adherence to the principle *pacta sunt servanda*, even if they did not formulate it *expressis verbis*.

The BIMST-EC principles should be perceived in the light of the document as a whole, including its preamble by which they acquire a special accent. In this context reference may be made to the invocation of ideals of peace, freedom and economic well-being, which refer to classic principles of universal international law and can be looked at as the consequence or concretization of these latter principles. Besides, the BIST-EC Declaration contains principles that seem to be a kind of a novelty, such as the principle of political independence and the principle of mutual benefit. While the political and socio-economic motives for their inclusion may be clear enough, the legal motivation as well as their legal purport may raise some doubts, especially in the case of the principle of mutual benefit. The inclusion of these principles in the Declaration is to be appreciated as an instance of participation by the member states in the process of progressive development of principles of international law. The future practice of states on the matter will demonstrate to what extent the BIMST-EC states have contributed to that development.

The institutional mechanisms for BIMST-EC have been established in the last, fourth, paragraph of the Declaration, as follows: (a) the Annual Ministerial Meeting, to be hosted by member states on the basis of alphabetical rotation; (b) the Senior Officials Meeting, to be held on a regular basis as well as whenever required; (c) the Working Group, under the chairmanship of Thailand and having as its members the ambassadors of the other member states accredited to Thailand, or their deputies, to carry on the work in between the Annual Ministerial Meetings; (d) the specialized task forces and other mechanisms as may be deemed necessary by the Senior Officials, to be coordinated by the member states as appropriate.

Noticeably the mechanisms for the implementation of the objectives of BIMST-EC are quite limited in scope, with neither functions nor competencies being determined in the Declaration. Nor is anything said about the decision-

⁶ Text in 3 AsYIL 473.

making process. However, it is to be expected that, as is the case with other Asian institutions, the consensus model will be adopted.

Furthermore, nothing has been mentioned in the BIST-EC Declaration about the technical/secretarial support to its activities, which appears to be necessary if co-operation is to work. There are quite many ways of solving this problem which is known from the theory as well as the practice of international institutions. As far as BIMST-EC is concerned, one can only try to guess which pattern, if any, will be followed, having in mind the Asian experience. Would it be the ASEAN's or the SAARC's or some other? It may be expected that in the near future the fourth paragraph of the Declaration will be followed by successive regulations, enabling BIMST-EC to pursue its activities.

The BIMST-EC structure resembles the early stage of the ASEAN structure, as laid down in its Declaration of 1967, and also the SAARC pattern. It continues the loose model of an international instrument which has adopted co-operation as its *raison d'être*. As the history of ASEAN and SAARC shows, however, this kind of structure has not always been effective, and substantial corrections may subsequently be required.⁷ It also shows that professional support from technical services at the national level would improve the efficiency of the organization. One can learn from the theory and practice of international institutions, that a horizontal structure of institutional mechanisms without clearly divided competencies usually leads to overlaps and confusion in the functioning of the institution.

An interesting legal question that arises in respect of the character of the BIST-EC Declaration is, whether the Declaration is a treaty according to international law. Under the Vienna Convention on the Law of Treaties of 1969, a treaty is an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Consequently, the BIST-EC Declaration should not give rise to any doubt. However, when it comes to analyzing the BIST-EC Declaration against the backdrop of the ASEAN Declaration of 1967 and its further evolution, the answer may not be so clear-cut.

The opinions on whether the ASEAN Declaration of 1967 is to be considered an international treaty, are divided. The lack of a ratification procedure and the fact that the Declaration has not been registered with the United Nations Secretariat, has resulted in the view that the ASEAN Declaration does not enjoy sufficient 'weight' to be classified as a treaty. Especially in light of, and compared with, the later Treaty of Amity and Co-operation of 1976, which has provided a more solid legal foundation to ASEAN and which has been registered with the UN Secretariat. Others are of the opinion that the 1967 ASEAN Declaration can certainly be considered as an international treaty since the ASEAN countries refer to that Declaration as a treaty with binding force.⁸

⁷ Op.cit.n.5 at 38-48.

⁸ H.H.INDORF, *ASEAN: Problems and Prospects*, ISEAS, Occasional Paper No.38 (Singapore,

In the case of the BIST-EC Declaration there is no relevant information about the member states' opinion as to the legal validity of the Declaration. The lack of a requirement of ratification does not necessarily mean that we do not deal with a treaty within the meaning of international law, neither does its name or the fact that it has not been registered with the UN Secretariat. As long as the member states consider the Declaration legally binding and the foundation of their co-operation, and if there are no signs of a different practice, nothing seems to prevent the BIST-EC Declaration from being considered a treaty.

The founding instruments of ASEAN, SAARC and BIMST-EC show quite close similarities between them and reveal the role of the 1967 ASEAN Declaration as an example for the other instruments. This, however, may only be proved by subsequent practice. In the meantime it can not be said that we are witnessing just another instrument similar to the already existing ones dealing with co-operation in Asia. On the other contrary, we are undoubtedly witnessing another Asian contribution to the progressive development of international law, marked by particular, regional Asian, characteristics.

In the Joint Statement, which was released at the conclusion of the special Ministerial Meeting in December 1997 and which contains the Co-operative Work Programme, the member states of BIMST-EC reaffirmed the aims and principles contained in the Bangkok Declaration on the Establishment of BIST-EC. They underlined the importance of Asian solidarity, and enhanced South-South co-operation and coordination among developing countries in the face of challenges that are being posed by the globalization of the international trading and financial system. It was also stated that BIMST-EC had the potential to be a key building block in the architecture of peace, stability and economic well-being in Asia. Once again the member states of BIMST-EC reaffirmed their intention to work closely together in order to strengthen various infrastructural linkages between them, especially in the transport and communication sectors, that would reinforce complementarities arising from the BIMST-EC focus on the Bay of Bengal rim. They also decided to enhance intra-regional energy co-operation through an action plan for the development and utilization of natural gas, wind, solar and water resources. A Working Group on Tourism was established to develop an action plan for co-operation in the tourism sector. Further, the member states agreed on the promotion of co-operation in fisheries through the conduct, in co-ordination with FAO, of a comprehensive study on marine resources and their processing and marketing.

Whether BIMST-EC will be able to achieve the goals contained in the Bangkok Declaration depends mainly on the political will of its members and their economic potential. Finally, although BIMST-EC is an example of South-South co-operation, it will certainly need the participation of the wider international community to expedite many of its large projects.