



In the spotlight

Palitha T.B. Kohona, Chief of the Treaty Section of the Office of Legal Affairs at the United Nations

Q: *The provisions on entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) as set out in Article XIV are quite complex.*

What role does the United Nations play in the CTBT's journey towards entry into force?

A: The CTBT has been described as a milestone in humanity's progress towards nuclear disarmament. Given the emphasis in the Charter of the United Nations on the maintenance of international peace and security, and the ongoing efforts of the United Nations with regard to disarmament, the CTBT is indeed a major achievement for the international community. The goal of disarmament was a key element in the Secretary-General's Millennium Report. The nations of the world resoundingly affirmed this goal in the Millennium Declaration, stating that they "seek to eliminate the dangers posed by weapons of mass destruction". They also committed themselves to further strengthen the international rule of law, which was further reaffirmed at the Millennium Summit Treaty Event, where the CTBT was one of the treaties highlighted for special attention. Given the success of that event, such special treaty events are now organised during each General Assembly. Our objective is to encourage the widest participation in the treaties deposited with the Secretary-General, including the CTBT, facilitating its early entry into force.

Article XIV of the Treaty requires the depositary to convene a conference at the request of a majority of ratifying States, if the Treaty had not entered into force three years from its opening for signature. This process is required to be repeated at subsequent anniversaries. Three conferences have been held so far and have been useful in encouraging

participation in the CTBT. Other opportunities have also been used by the United Nations to encourage wider participation in the CTBT with a view to facilitating its entry into force.

Q: *In general a treaty does not have any binding legal effect prior to its definitive entry into force.*

Are there any legal obligations on States which have signed the CTBT, pending its entry into force? In your opinion, does the CTBT reflect any possible rule of customary international law?

A: Under Article 18 of the 1969 Vienna Convention on the Law of Treaties, there is a clear obligation on the part of a signatory State to refrain from any acts which would defeat the object and purpose of a treaty that it has signed.

into force in accordance with Article XIV, twelve have not done so yet. Three have not even signed. Of those who have not become party, some are acknowledged nuclear powers. Others may be nuclear powers. Nuclear tests have been conducted by certain States since the text of the CTBT was opened for signature. However, it is also to be noted that many resolutions have been adopted (beginning with Resolution 1653(XVI) of 24 November 1961) on this subject. It is noted that the resolutions themselves have attracted some negative votes and abstentions. It may be the case that there needs to be wider acceptance by the international community for the provisions of the CTBT to acquire the status of customary international law.

The Preparatory Commission for the CTBTO is recognized as an international organization in its own right. It has concluded international

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The question of whether some provisions of the CTBT reflect customary international law could very well be the subject of an essay on its own. But one does note that to date it has attracted 115 parties and 172 signatories (2 July 2004). Today the membership of the United Nations stands at 191. Of the critical 44 States which are required to become party for the Treaty to enter

agreements not only with States but also with international organizations.

Q: *Can you explain the Preparatory Commission's unique position as an international organization?*

A: The Preparatory Commission for the CTBTO was established by resolution adopted by the States Signatories of the CTBT on 19 November



1996 and since then it has gradually acquired many of the characteristics of an international organization. It is unusual for an international organization to be established in this manner. Normally an international organization is established by treaty among States and the treaty would elaborate its powers and functions. Sometimes, other international organizations may participate in the process of creating an international organization. The above resolution went some way in meeting this need and it states in its Article 7 that the Commission shall have standing as an international organization, authority to negotiate and enter into agreements and such other legal capacity as necessary for the exercise of its functions and the fulfilment of its purposes. The Preparatory Commission will cease to exist following the entry into force of the CTBT and the CTBTO will be established.

The role of the Commission as an international organization has been gradually accepted by the international community. The Commission has concluded a number of bilateral treaties with States, 15 of which have been registered with the Secretariat of the United Nations pursuant to Article 102 of the Charter. It has also put in place around 150 arrangements with States through exchanges of letters. These have been critical in consolidating its verification regime. The Commission concluded a relationship agreement with the United Nations on 26 May 2000. Agreements have been concluded with the United Nations Development Programme (UNDP) and the World Meteorological Organization (WMO). These agreements have also been registered. The Preparatory Commission exercises a range of functions under

the above resolution and these are likely to continue for some time.

Q: *Article IV of the CTBT provides for the establishment of a global verification regime to detect and identify nuclear test explosions. Both the construction and provisional operation of the International Monitoring System (IMS) is carried out prior to the entry into force of the Treaty.*

Legally, how can the provisional operation of the IMS take place before entry into force?

A: Given the urgency felt by the international community to consolidate the goals of the CTBT, innovative mechanisms had to be devised by the international community to realize this objective. The resolution which established the Preparatory Commission as an international organization required it to undertake all necessary preparations to ensure the operationalization of the Treaty's verification regime at the time that it enters into force. The Commission is also required to supervise and co-ordinate, in fulfilling the requirements of the Treaty and its Protocol, the development, preparation, technical testing and, pending their formal commissioning, provisional operation as necessary of the International Data Centre and the International Monitoring System, together with appropriate support of the System by certified laboratory facilities and by respective means of communication.

It may also be argued on the basis of general principles of international law that the Commission, having been established as an international organization and having been recognised as such by the international community, possesses as "an international organization,

the capacity to undertake acts indispensable for the fulfilment of its purposes." The bilateral agreements and the exchanges of letters have been employed to provide the basis for the provisional operation of the IMS. ■

Biographical note



Palitha T.B. Kohona has been the Chief of the Treaty Section of the Office of Legal Affairs at the United Nations in New York since 1995.

He holds several degrees, including a Master of Law from the Australian National University and a Ph.D. in International Economic Law from Cambridge University, United Kingdom.

Mr Kohona joined the Department of Foreign Affairs and Trade of Australia in 1983. Posted to Geneva in 1989, inter alia, he chaired the negotiating group that developed the compliance mechanism under the Montreal Protocol. Back in Australia in 1992, he became the Head of the Trade and Investment Section.

Mr Kohona has published a number of papers on international legal issues. The most recent publications are 'The role of non-state entities in the making and implementation of international norms' and 'The international rule of law and the United Nations'. ■