STATE PRACTICE

State Practice of Asian States in the Field of International Law

EDITORIAL NOTE

The Editorial Board has decided to reorganize the format of this section from Volume 16 (2010) onwards. Since the Yearbook's inception, state practice has always been reported and written up as country reports. While this format has served us well in the intervening years, we felt that it would make a lot more sense if we reported state practice *thematically*, rather than geographically. This way, readers will have an opportunity to zoom in on a particular topic of interest and get a quick overview of developments within the region. Of course, this reorganization cannot address our lack of coverage in some Asian states. We aim to improve on this in forthcoming volumes and thank the contributors to this section for their tireless and conscientious work.

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Aliens

INDIA

**STATEMENT BY INDIA ON AGENDA ITEM 81 – REPORT OF THE
INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-
THIRD SESSION – CHAPTERS I-V – SIXTH COMMITTEE OF THE
66TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY ON
OCTOBER 24, 2011**

India supported the general approach taken by the Special Rapporteur in the topic of “Expulsion of Aliens” which provided for the right of a state to expel and the rights and remedies available to the person subject of expulsion, including the legal consequences of unlawful expulsion. Regarding the provision concerning extradition and expulsion, India noted that the legal basis and laws governing the process and the procedure involved were altogether different and one could not be used as an alternate for the other from the legal and technical stand point.

Courts and Tribunals

INDIA

**FOREIGN JUDGMENTS OR DECREES – RECOGNITION – PRINCIPLE
OF COMITY – MEANING OF ‘ORDINARILY RESIDES’ – APPLICATION
OF THE RULES OF PRIVATE INTERNATIONAL LAW**

***Ruchi Majoo v. Sanjeev Majoo* [Civil Appeal No. 4435 of 2011, Criminal Appeal No. 1184 of 2011, May 13, 2011]**

Facts

This case was within realm of private international law concerning legal proceedings between the parties in the United States (US) and India for the custody of their only child. The child was the US citizen by birth. The parents of the child were also American citizens of Indian origin. These legal proceedings included an action filed by the father (respondent in the present case) before the American Court seeking divorce from his wife (appellant in the present case). The order passed by the American Court eventually led to the issue of a red corner notice based on allegations of

child abduction leveled against the mother. The mother had been living with the child in India at that time. The mother approached a District Court in Delhi, India to keep the interim custody of the child under the relevant provisions of the Guardians and Wards Act. Aggrieved by this order of the District court father filed a petition under Article 227 of the Constitution of India before the High Court of Delhi. The High Court allowed this plea of the father and set aside the order of the District Court in Delhi and dismissed the custody case filed by the mother primarily on the ground that the Court in Delhi had no jurisdiction to entertain the same as the minor was not ordinarily residing in Delhi – a condition precedent for the Delhi Court to exercise jurisdiction. The High Court further held that all issues relating to the custody of the child ought to be agitated and decided by the Court in America not only because that Court had already passed on order to that effect in favour of the father, but also because all the three parties, namely, the parents of the minor and the minor himself were American citizens. The High Court decision, as noted by the Supreme Court, was based on the principle of comity of courts and certain decisions taken by it i.e., the Supreme Court. The Supreme Court pointed out that the following three questions needed determination. These were: (i) Whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same, (ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of Courts and (iii) Whether the order granting interim custody to the mother of the minor calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

Judgment

After outlining the facts and circumstances in detail, the Court referred to the Section 9(1) of the Guardians and Wards Act, 1890 which made reference to the jurisdiction of the District Court to entertain a claim for grant of custody of a minor if the minor “ordinarily resides” within the jurisdiction of that court. According to the court “The expression used is “Where the minor ordinarily resides.” Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never

be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer. We may before doing so examine the true purpose of the expression 'ordinarily resident' appearing in Section 9(1) (*supra*). This expression has been used in different contexts and statutes and has often come up for interpretation." The Court after examining the facts and various cases decided by it on the phrase "ordinarily resides" held that the High Court was not justified in dismissing the petition with regard to the custody of the minor child granted by the District Court.

On the issue of exercising of jurisdiction on the basis of the principle of comity of courts, the Court noted that:

Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, Courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Criminal Procedure 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its *Parens Patriae* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the court has settled the approach to be adopted in such matters. The plentitude of pronouncements also leaves cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case.

The Court, after referring to its own jurisprudence on the principle of comity of courts, concluded,

What needs to be examined is whether the High Court was right in relying upon the principle of comity of courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that ‘comity of courts’ principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication.

MALAYSIA

FOREIGN JUDGMENTS OR DECREES – RECOGNITION – CONFLICT OF LAWS – FOREIGN JURISDICTION – DOMICILE OF CHOICE AND ORIGIN – CHANGE OF DOMICILE

Gurcharan Singh a/l Karnal Singh v. Mninder Kaur a/p Piara Singh
[2010] 6 MLJ 405

The issue of whether and when a Malaysian court would recognize a foreign decree of divorce was extensively discussed in this case.

Facts

The parties were married under Malaysia’s Law Reform (Marriage and Divorce) Act 1976 [LRA 1976] at the Registry of Civil Marriages in Seremban, Negeri Sembilan. They had two children together. The husband claimed that the wife and children had deserted him, after which he left for the United States to be with his other family members, including siblings, nephews, and nieces. The husband then obtained a decree from the Superior Court of Arizona dissolving the marriage. The Superior Court took jurisdiction on the basis that the husband is a permanent resident of the USA, having resided in the state of Arizona for at least 90 days prior to the filing of the said petition for dissolution of marriage. He then filed a petition seeking a declaration that the Arizona court’s decree of dissolution was valid.

Judgment

[The High Court of Kuala Lumpur dismissed the husband's petition. It declined to recognize the decree of dissolution of marriage granted by the Superior Court of Arizona, and its registration under the LRA 1976.]

The law applicable for this court to declare a foreign decree as valid is found in s 107 of the LRA 1976. Section 107 provides:

Maintenance of register of divorces and annulments

....

(3) Where a marriage which is solemnized in Malaysia is dissolved or annulled by a decree of a court of competent jurisdiction outside Malaysia, either of the parties may apply to the Registrar-General for the registration of such decree and the Registrar-General, on being satisfied that the decree is one which should be recognized as valid for the purposes of the law of Malaysia, shall register that decree.

It is an established practice that registrar general will require a party to obtain a court order declaring the foreign decree as valid before the registrar general will register the foreign decree. In this premise, Malaysian courts have full discretion and power whether to recognise or not recognise the foreign decree concerned.

As far as recognition is concerned, it must be noted that Malaysia do [sic] not have any specific section in LRA 1976 or any legislation on recognition of foreign divorce. Therefore the Malaysian Court should refer to the common law position [as per section 3 of the Civil Law Act 1956]. ...

In deciding whether to declare the decree of dissolution of a marriage dated November 3, 2008 as valid or invalid, this court is guided by the case of *Le Mesurier v Le Mesurier and others* [1895–99] All ER Rep 836, where Lord Watson delivering the decision of the board held that according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve a marriage. In that case the court stated:

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve the marriage. They concur without reservation, in the view expressed by Lord

Penzance in *Wilson v Wilson*, which were obviously meant to refer, not to question arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce (see (1872) LR 2 P & D at p 442):

It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties on all cases referring their matrimonial differences to the courts of the country in which they are domicile. Different communities have different views and laws respecting moral obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be a man and wife in one country, and stranger in another.

Based on the decision aforesaid, the law on the recognition of foreign decrees of divorce by the English court is that a divorce granted by a court of another country would not be recognised as valid in England unless the parties were domiciled in that country.

....

Clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities. This principle was established by Sir Jocelyn Simon P in the case of *Henderson v Henderson* [1965] 1 All ER 179:

In order to help resolve such difficulties the law has evolved further rules. First, clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.

The petitioner has stated in his affidavit that he left Malaysia to settle down in the USA and therefore he had acquired a domicile of choice in the USA. Case authorities has held that the oath of a person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for this court is whether upon a review of all the circumstances it

gives credit to his evidence. In this regard, the court in the case of *Joseph Wong Phui Lun v Yeoh Loon Goit* [1978] 1 MLJ 236 held that:

The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for the court is whether upon a review of all the circumstances it gives credit to his evidence.

Reverting back to this present case, this court is unable to find any clear evidence in support of the fact that the petitioner has abandoned his Malaysian domicile. It is this court's finding that the petitioner in his affidavit has not confirmed or affirmed that he has given up his Malaysian citizenship, or that he intends to reside permanently in the USA, or that he has secured investment, employment or a residence there. Upon a review of all the circumstances, it is clear that the petitioner has failed to rebut the presumption that he continues to retain his Malaysian domicile or that he has displaced his domicile of origin (Malaysia) in favour of his domicile of choice (USA).

....

It must be noted, a Malaysian court in applying the common law position would only recognise a foreign decree of divorce (which purports to dissolve a Malaysian marriage) if it was granted by the court of the parties' domicile or if was granted by a foreign court which assumed jurisdiction on the same grounds as the Malaysian court would have assumed jurisdiction.

The Malaysian court will assume jurisdiction if the marriage was registered in Malaysia and the parties are domiciled in Malaysia at the time of the commencement of the proceedings [section 48, LRA 1976] or where the wife has been resident here in Malaysia for at least two years immediately preceding the commencement of filing for divorce in the case where the husband has deserted her (s 49).

Criminal Law

CHINA

INTERNATIONAL CRIMINAL COURT – STATUTE OF ROME – INVITATION OF SUDANESE PRESIDENT

On June 21, 2011, Foreign Ministry Spokesperson Hong Lei made remarks on his regular press conference with regard to the criticism of some human

rights organizations on China's invitation of Sudanese President Bashir to visit China:

China is not a party to the Rome Statute and has reservations about the International Criminal Court's prosecution of President Bashir. Over recent years, President Bashir has been accorded a warm and friendly reception by the relevant countries on his many trips overseas. It is above criticism that we invite the head of state of a country having normal diplomatic relations with China.

**INTERNATIONAL TRIBUNALS – UNITED NATIONS
INTERNATIONAL CRIMINAL TRIBUNAL FOR
THE FORMER YUGOSLAVIA**

On December 20, 2011, Judge Liu Daqun of the UN ICTY was elected as Judge of the Mechanism for International Criminal Tribunals by the 66th UN General Assembly for a term of office of four years.

PHILIPPINES

**INTERNATIONAL CRIMINAL COURT – ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT – ACCESSION**

Philippine Senate Resolution No. 57, August 23, 2011

The Philippines became the 117th State Party to the Rome Statute of the International Criminal Court. The Statute consists of 128 articles and provides for the establishment of the International Criminal Court.

The Senate Resolution states that the permanent institution has the power to exercise jurisdiction over persons for the most serious crimes of international concerns, and it is complementary to national criminal jurisdiction. Aside from this, the Court is the first permanent institution with the power to exercise jurisdiction over persons relative to the most serious crimes of international concern, i.e., genocide, crimes against humanity, war crimes, and crimes of aggression. The Statute adopts the principle of complementarity, the general principles of criminal law (for example, *nullum crimen sine lege*).

The Resolution notes that the ratification signifies the Philippines' commitment to human rights. It is the State's contribution to an effective criminal justice system. It complements domestic law Republic Act No. 9851 or the "Philippine Act on Crimes Against International Humanitar-

ian Law, Genocide, and Other Crimes Against Humanity,” which enables the State to prosecute international crimes on its own and strengthens human rights enforcement.

Diplomatic and Consular

CHINA

RECOGNITION – REPUBLIC OF SOUTH SUDAN

On July 9, 2011, Foreign Ministry Spokesperson Hong Lei made remarks on the Chinese Government’s Recognition of the Republic of South Sudan and the Establishment of China-South Sudan Diplomatic Ties as follows:

July 9 marks the founding of the Republic of South Sudan. Upon this day, the Government of the People’s Republic of China declared its recognition of the Republic of South Sudan as well as the establishment of ambassadorial diplomatic relations between the two countries. China stands ready to develop friendly cooperative relations across the board with South Sudan on the basis of the Five Principles of Peaceful Co-existence.

On the same day, Jiang Weixin, President Hu Jintao’s special envoy and Minister of Housing and Urban-Rural Construction, led a delegation to attend the independence celebration of the Republic of South Sudan at the invitation of President Salva Kiir. Jiang Weixin, representing the Chinese government, signed a diplomatic communiqué with Foreign Minister Deng Alor Kuol of South Sudan. He, together with South Sudan’s Parliamentary Speaker, James Wani Igga, unveiled the board of China’s Embassy in the Republic of South Sudan.

RECOGNITION - LIBYAN NATIONAL TRANSITIONAL COUNCIL

On September 12, 2011, Foreign Ministry Spokesperson, Ma Zhaoxu made remarks on China’s recognition of the Libyan National Transitional Council.

On September 12, China notified the Libyan National Transitional Council (NTC) of China’s decision to recognize it. China stated that the Chinese side respects the choice of the Libyan people, values the important status and role of the NTC, and has maintained close contact with it. China recognizes the NTC as the ruling authority of Libya and the representative

of the Libyan people and would like to work with it to push for the smooth transition and development of China-Libya relations. China hopes that the previously signed treaties and agreements between the two sides will remain valid and be earnestly implemented.

The NTC said that the Libyan people and the NTC are pleased with China's recognition and has long been looking forward to it. Attaching great importance to China's status and role, the NTC will honor faithfully all treaties and agreements signed between the two sides, stick to the one-China policy, welcome China's participation in Libya's reconstruction and jointly advance with China the stable and sustained development of bilateral relations.

Singapore

DIPLOMATIC IMMUNITY – STATEMENT ON BOMBING OF UNITED KINGDOM'S EMBASSY IN TEHRAN ON 29 NOVEMBER 2011

The Ministry of Foreign Affairs Spokesman's Comments in response to media queries on the attacks against the United Kingdom's Embassy in Tehran, Iran on 29 November 2011

This is unacceptable behaviour for any state that desires an honourable place in the community of nations. The international obligations for all states as set out in the Vienna Convention on Diplomatic Relations on the protection of diplomatic property and personnel are clear. To flout them undermines the very foundations of international relations and thus threatens all of us, particularly small states for whom the rule of international law is a vital national interest. Singapore condemns the attacks against the United Kingdom's Embassy in Tehran, Iran on 29 November 2011. We strongly urge Iran, a country with an ancient and proud civilization, to live up to its own traditions, respect international law, restore order and prevent repeat of the attacks against diplomatic missions in Tehran in compliance with its international obligations.

Environmental Law

INDIA

CONSERVATION – LAW OF TRANSBOUNDARY AQUIFERS

Statement by India on The Law Of Transboundary Aquifers, Sixth Committee of UNGA 66th Session, October 18, 2011

Referring to the resolution 63/124 of the UN General Assembly which encouraged States to make appropriate bilateral or regional arrangements for the proper management of their trans-boundary aquifers taking into account the draft articles on the subject, India noted the importance of the aquifers as life-supporting groundwater resources for mankind. India noted that the draft articles on Transboundary Aquifers sought to balance the equitable and reasonable utilization of aquifer systems with the obligation to prevent causing significant harm to other aquifer States and in cases where harm had been caused, to take measures to eliminate or mitigate such harm. India also noted that draft articles contained a number of useful provisions such as the factors relevant to equitable and reasonable utilization, the obligation to cooperate, regular exchange of data as well as the obligation of protection, preservation and management of aquifer system.

India, referring to debates within the Sixth Committee and the ILC, pointed out that there was lack of adequate scientific knowledge in the field of management and protection of aquifers and that there was further need to study these aspects before coming to a firm conclusion on the nature of the outcome of the draft articles. India also pointed out that considering the complex nature of the subject, and the lack of State practice, it would be necessary that States were provided with further scientific and technical assistance in understanding the issues.

JAPAN

NATURAL DISASTER – GREAT EAST JAPAN EARTHQUAKE – RECONSTRUCTION

Basic Act on Reconstruction in Response to the Great East Japan Earthquake (Law No. 76 of June 24, 2011)

The Basic Act on Reconstruction in Response to the Great East Japan Earthquake (Law 76) was enacted on June 24, 2011. The purpose of the Act is to promote a “smooth and prompt reconstruction from the Great East Japan Earthquake and revitalization of a vibrant Japan,” on the basis that “the Great East Japan Earthquake was an unprecedented national crisis due to its extensive damage affecting vast area and its characteristics as a compound disaster consisting of an earthquake, tsunami, and nuclear accident.” To achieve this purpose, the Act identifies several approaches including: securing “financial resources for the reconstruction”; creating the “System of Special Zone for Reconstruction”; “deciding on other fundamental issues to create an economy and society where current and future generations can lead safe and prosperous lives; and deciding on the basic guidelines regarding the establishment of the Reconstruction Headquarters in response to the Great East Japan Earthquake and the Reconstruction Agency,” an administrative organ that will replace the temporary Reconstruction Headquarters. In order to implement and realize the purpose of this Act, the Act on the Establishment of the Reconstruction Agency was subsequently enacted as described below.

**NATURAL DISASTER – GREAT EAST JAPAN EARTHQUAKE –
RECONSTRUCTION AGENCY**

The Act on the Establishment of the Reconstruction Agency (Law No. 125 of December 9, 2011)

The Act on the Establishment of Reconstruction Agency (Law No. 125) was enacted on December 16, 2011. According to the Basic Act on Reconstruction in response to the Great East Japan Earthquake (Law No. 76), the Reconstruction Agency is expected to function as a “headquarters” for the purpose of long-term recovery from such enormous disasters. Practically, the Agency’s main role is “to accelerate structural reconstruction and revitalization in the affected areas, by supporting the implementation of government policies and managing the coordination of reconstruction strategy and initiatives between various branches of government at a national level and with local municipalities.”

One of the most important functions of the Agency is to promptly coordinate various issues necessary for recovery policies beyond the competence of other existing ministries. This means that the Minister of

the Reconstruction Agency has a rather strong and unique competence; the Agency may request other ministries to submit relevant documents if necessary, make recommendations to the other ministries to take action, and receive reports related to measures taken by relevant ministries based on requests by the Agency. The Agency may even offer an opinion for the Prime Minister to take action on the Cabinet Act, concerning the relevant necessary measures to be recommended based on article 8.5. This is presumed or expected to act as a “safeguard” if the relevant ministries do not take any measures despite receiving requests or recommendations from the Agency.

MALAYSIA

CONSERVATION – LEGISLATION – PROHIBITION OF CRUELTY TO WILDLIFE – SALE OF PROTECTED WILDLIFE – LICENSING AND PERMIT

Wildlife Conservation Act

In 2010, the Malaysian parliament passed a new Wildlife Conservation Act to introduce licensing/permit requirements to hunt, take, keep, deal, carry on a taxidermy business, import and export any protected wildlife, and to collect bird's nest in Malaysia. It also prohibits cruelty to wildlife, including captive wildlife, and establishes basic conditions for zoo management. In 2011, a man who attempted to sell two ivory statues online became the first person to be charged under the Act. Under section 68 of the Act, which makes it an offence to hunt, take, or keep any part or derivative of a totally protected wildlife, the man faces upon conviction a fine not exceeding RM100,000 and/or a jail term of less than three years. The new tougher laws were welcomed as important step in wildlife conservation efforts in Malaysia, although concerns about effective enforcement remain.

PHILIPPINES

POLLUTION – ASEAN AGREEMENT ON TRANSBOUNDARY HAZE POLLUTION – HANOI PLAN OF ACTION

Agreements Concurred by the Philippine Senate in 2010

In 2010, the Senate of the Philippines concurred with three important agreements that involve international law.

Philippine Senate Resolution No. 218, February 1, 2010

The ASEAN Agreement on Transboundary Haze Pollution was signed on June 10, 2002 in Kuala Lumpur, Malaysia. In essence, the Agreement aims to prevent and monitor transboundary haze pollution as a result of land and/or forest fires through national efforts and regional and international cooperation. The Agreement contains principles that guide states parties in its implementation, and obligations in preventing and monitoring haze pollution, including mutual assistance.

An ASEAN Center is envisaged to facilitate cooperation and coordination in managing the impact of haze pollution arising from fires. The resolution states that in ratifying the Agreement, the Philippines reaffirms its commitment to the 1990 Kuala Lumpur Accord on Environment, the 1995 ASEAN Cooperation Plan on Transboundary Pollution, and the Hanoi Plan of Action.

NATURAL DISASTER – RISK REDUCTION AND MANAGEMENT – INTERNATIONAL HUMANITARIAN ASSISTANCE – ACCEPTANCE OF INTERNATIONAL NORMS OR PRINCIPLES

An Act Strengthening the Philippine Disaster Risk Reduction and Management System, Providing for the National Disaster Risk Reduction and Management Framework and Institutionalizing the National Disaster Risk Reduction and Management Plan, Appropriating Funds therefor and for Other Purposes

The President of the Philippines approved Republic Act No. 10121, otherwise known as the Philippine Disaster Risk Reduction and Management Act (PDRRM) Act of 2010, on May 27, 2010. The PDRRM Act of 2010 contains substantive provisions that modify the approach of the state to disasters and contributes to several major paradigm shifts in Philippine disaster management. It is the solidification of external commitments, grounded on soft law and speech acts, of the Philippines to reform its main disaster law. These include the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, which was adopted in the course of the World Conference on Disaster Reduction and endorsed by the UN General Assembly.

The PDRRM Act of 2010 provides for the development of policies and plans, and the implementation of actions and measures pertaining to all

aspects of disaster risk reduction and management. The law declares the policies of the State on disaster risk reduction. Several policies are notable, such as the adherence to and adoption of universal or internationally accepted norms or principles in humanitarian assistance and disaster risk reduction; explicit mention of 'disaster risk reduction and management' as an approach, including the desire to develop, promote and implement a plan at all levels of government; and mainstreaming disaster risk reduction and climate change in development and peace processes.

Further, the law defines certain terms which are intrinsically or necessarily connected to disaster risk reduction as manifested in the Hyogo Framework. The definition of disaster is not limited or equated to the traditional notion of environmental or natural disasters. Climate change and sustainable development are defined; so is the concept of 'vulnerable and marginalized groups.'

Primordially, the law designates actors responsible for disaster risk reduction and management, and provides for their powers and functions. Mainly, it abolishes the National Disaster Coordinating Council and constitutes the National Disaster Risk Reduction Management Council (NDRRMC). The NDRRMC becomes the highest policy-making body on disasters, advising the President on the status of disaster preparedness, prevention, mitigation, response and rehabilitation. Also, the law tasks the Office of Civil Defense with the primary mission of administering a comprehensive national civil defense and disaster risk reduction and management program, thus expanding its role as an agency within government. The NDRRMC has regional and local counterparts.

Lastly, the law sets up a mechanism for international humanitarian assistance. The integration of this provision in the legal system is crucial in light of several recent relevant regional and international initiatives to address disasters. For instance, the ASEAN has affirmed adherence to the Hyogo Framework through the Agreement on Disaster Management and Emergency Response which the Philippines ratified in September 2009.

This law penalizes certain acts, provides penalties for violations of the law, resolves funding issues for the implementation of the law, and incorporates a mechanism on monitoring and evaluation.

**MARINE ENVIRONMENT AND RESOURCES – MARITIME
JURISDICTION AND BOUNDARY**

An Act Establishing the Philippines Coast Guard as an Armed and Uniformed Service Attached to the Department of Transportation and Communications, Thereby Repealing Republic Act No. 5173, as Amended, and for Other Purposes

Signed into law on February 12, 2010, the Philippines Coast Guard Law of 2009 establishes the Philippine Coast Guard (PCG) as an armed and uniformed service attached to the Department of Transportation and Communications. However, in times of war, as declared by Congress, the PCG or parts thereof shall be attached to the Department of National Defense.

The PCG's powers and functions include the enforcement of regulations in accordance with all relevant maritime international conventions, treaties or instruments and national laws for the promotion of safety of life property at sea within the maritime jurisdiction of the Philippines, and the conduct of port state control implementation. It may also detain, stop or prevent a ship or vessel which does not comply with safety standards, rules and regulations from sailing or leaving port.

Aside from the power to issue permits for the salvage of vessels, it could render aid to persons and vessels in distress and conduct search and rescue in marine accidents within the maritime jurisdiction of the Philippines, including the high seas, in accordance with applicable international conventions. The PCG now enforces laws and rules for the protection of marine environment and resources from offshore sources or pollution within the maritime jurisdiction of the Philippines.

Extradition

INDIA

**PERSONS SUBJECT TO EXTRADITION – ‘OBLIGATION TO
EXTRADITE OR PROSECUTE’**

Statement on Report of the International Law Commission on its Sixty-Third Session, Chapters I-V, Sixth Committee, UNGA 66th Session, October 24, 2011

Regarding the topic “the obligation to extradite or prosecute” while appreciating the work of the Special Rapporteur on the topic, India noted that under its extradition laws it clearly incorporated the principle of either extradite or prosecute. It also noted that in all its bilateral extradition treaties this principle was included.

Hijacking

CHINA

LAW ENFORCEMENT – COOPERATION ALONG THE MEKONG RIVER AMONG CHINA, LAOS, MYANMAR AND THAILAND

On October 5, 2011, Chinese cargo ships were hijacked and 13 Chinese crewmen were killed on the Mekong River. On October 13, 2011, Foreign Ministry Spokesperson Liu Weimin at the Regular Press Conference introduced the fact that in the summon of the diplomatic envoys of Thailand, Laos and Myanmar to China to lodge representations on the incident of Chinese crewmen being attacked on the Mekong River, Chinese vice Foreign Minister Song Tao urged the three countries to provide active assistance in the following areas:

First, step up investigation to find out the truth as soon as possible and inform China in a timely fashion, hunt down and punish the culprits in accordance with law. Second, provide assistance and protection for Chinese vessels and crew stranded in Chiang Saen Port, Thailand on their way home so as to ensure their safety, facilitate and assist the Chinese patrol ship's escort. Third, take effective measures to enhance protection of Chinese vessels and crewmen plying on the Mekong River so as to prevent recurrence of similar crimes. China will discuss with other related parties ways of enhancing the safety of the Mekong waterway and expects active support and coordination to jointly safeguard the safety of this important international waterway.

On October 31, 2011, China, Laos, Myanmar and Thailand made the Joint Statement on Law Enforcement Cooperation along the Mekong River. In the joint statement, the four States agree to take further strong measures and enhance the extent of joint investigation so as to thoroughly find the truth of the October 5 case and bring the perpetrators to justice as soon as possible; and agree to formally establish a law enforcement cooperation

mechanism for the Mekong River basin among China, Laos, Myanmar and Thailand in order to deal with the new situations of security in Mekong River basin.

On November 26, 2011, the four States adopted a Joint Statement of Ministerial Meeting on Cooperation in Patrol and Law Enforcement along the Mekong River. The full text reads as follows:

To implement the Joint Statement on Law Enforcement Cooperation along the Mekong River among the People's Republic of China, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of Thailand adopted on October 31, 2011, the law enforcement and security authorities of the People's Republic of China, the Lao People's Democratic Republic, the Republic of the Union of Myanmar and the Kingdom of Thailand held the Ministerial Meeting on Cooperation in Patrol and Law Enforcement along the Mekong River on November 25 and 26, 2011 in Beijing, China. H.E. Meng Hongwei, Vice Minister of Public Security of China, H.E. Bouasieng Champaphan, Deputy Chief of General Staff of Lao People's Army, H.E. Police Brigadier General Zaw Win, Deputy Chief of Myanmar Police Force and H.E. Wichean Potephosree, Secretary General of the National Security Council of Thailand attended the Meeting with their delegations. The Meeting was held in an atmosphere of mutual understanding and trust.

The Participants shared the view that the law enforcement and security authorities of China, Laos, Myanmar and Thailand have the common responsibility to safeguard peace and stability along the Mekong River within their own jurisdiction and on the basis of mutual respect for sovereignty, equality, and mutual benefits, and therefore should strengthen and grow friendly relations, deepen cooperation, solidify unity, pursue friendly consultation and enhance strategic partnership and mutual trust.

The Participants noted that each side shall enhance domestic law enforcement in its own territory water, and find an effective solution towards the serious security challenges along the Mekong River which necessitates innovative mechanisms and models for cooperation to concentrate efforts of the four countries.

To solidify and strengthen practical cooperation among the law enforcement and security authorities of the four countries, combat transnational crime and safeguard international shipping security along the Mekong River and in accordance with the spirit of solidarity, friendship

and cooperation, the Participants agreed to conduct cooperation in patrol and law enforcement along the Mekong River as early as possible, in accordance with the Joint Statement on Law Enforcement Cooperation along the Mekong River among the four countries adopted on October 31, 2011, and reached consensus on the following matters:

- I. The Participants agreed to further strengthen the cooperation on international shipping security and transnational crime, in particular, on drug trafficking and human trafficking along the Mekong River on the basis of equality and mutual benefit, and to resolve problems and differences through consultations.
- II. The Participants agreed on cooperation in law enforcement along the Mekong River to maintain and guarantee security and stability, and promote economic and social development and friendly people-to-people exchanges along the River from mid December 2011.
- III. The Participants agreed to hold the ceremony of the inaugural voyage for cooperation in patrol and law enforcement at China's Guanlei dock before December 15, 2011.
- IV. The Participants agreed to establish a combined operation center for cooperation in patrol and law enforcement at China's Guanlei dock. The four countries will send officers and liaison officers to coordinate, share intelligence and information subject to its own jurisdiction and domestic laws, and jointly consult and coordinate matters relating to vessels and personnel for cooperation in patrol and law enforcement.
- V. The Participants agreed that the Chinese side will send expert teams to Laos and Myanmar to assist law enforcement vessel driving and extend ship operating training upon request.
- VI. The Participants from Laos and Myanmar agreed to ensure the security of the vessels, personnel of cooperation in patrol and law enforcement and liaison teams and facilitate the provision of logistic support for them.

The Participants from Thailand agreed to provide above assistance as requested and as necessary on a case by case basis, in accordance with relevant domestic laws.

- VII. The Participants agreed to organize cooperative cooperation to eradicate transnational crimes endangering the security along the Mekong River, after the four countries reach consensus.

- VIII. The Participants agreed, in principle, to establish a working team on safeguarding the security along the Mekong River to further carry out field study on major crimes, and consult and formulate suggestions for improving security condition along the river which could be handed over to law enforcement and security authorities of the four countries for approval and implementation.
- IX. The Participants agreed to develop ways and means to foster social economy development along the Mekong River with a view to promote sustainable development and well-beings of the peoples along the Mekong River.
- X. The Participants agreed to take efforts under the coordination of the combined operation center, to improve cooperation mechanism and facilitate the consultations on the early signing of the Agreement on Law Enforcement Cooperation along the Mekong River on the ground of practice.
- XI. With a view to bringing to fruition this Joint Statement, the Participants from Thailand shall strive to complete its internal procedures.

This Joint Statement was adopted in Beijing on November 26, 2011.

Human Rights

BANGLADESH

TREATIES AND CONVENTIONS – CONVENTION ON THE RIGHTS OF THE CHILD – RIGHTS OF CHILD DOMESTIC WORKERS

***Bangladesh National Women Lawyers Association v. The Cabinet Division, represented by the Cabinet Secretary, Bangladesh Secretariat, Dhaka and others*, [40 CLC (HCD) 2011; Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction) (February 9 and 15, 2011)]**

The Bangladesh National Women Lawyers Association (BNWLA), a women lawyers' association that works with women's empowerment and children's rights filed a writ petition under Article 102 of the Constitution of Bangladesh drawing the Court's attention to an incident of physical violence against a child domestic worker as reported in the daily national

newspaper on May 3, 2010. The report stated that the lady of the house tied up the child, pushed her to the floor and inserted the handle of a hot stirrer/paddle into her anus for breaking a flower vase. The report also gave details of how the girl was routinely tortured on the slightest of pretexts. The girl was admitted to the hospital on the third day following the incident when her condition turned critical. The lady of the house was arrested when the doctors informed the police.

A Rule Nisi was issued upon the concerned respondents from the government asking them to report within 24 hours what actions they have taken in lieu of the newspaper report and why the victim should not be sent for immediate treatment to the nearest One Stop Crisis Centre at the Dhaka Medical College Hospital. The Court further asked why the respondents from the government should not be directed to monitor the employment of children as domestic workers.

While recognising that poverty was an overriding factor that compelled poor parents from rural areas to send children of all ages to work as household help in towns and cities, the Court expressed concern over the horrendous treatment children were subjected to by their employers that often led to “injury, death and sometimes suicide, not to mention the often invisible mental and psychological harm” and reiterated Bangladesh’s obligation under the International Labour Organisation (ILO) Convention No.182 on Worst Forms of Child Labour which it has ratified. The significance of having a universal age threshold for defining children was also underscored as the Court observed:

So far as the recent actions taken by the government in connection with children are concerned, we note with appreciation that the new Children Policy of 2011 defines a child as anyone up to the age of 18. At long last the definition of a child has come in line with the definition as recognised internationally.

The Court came up with a set of comprehensive directives for the Government which included necessary steps for prohibiting employment of children below the age of 12 years, amending the definition of “worker” in the labour law to include domestic workers, ensuring basic education for children under the age of 12 years and vocational training for domestic workers between 13-18 years of age, monitoring violence against domestic workers and effectively prosecuting the perpetrators, preventing child trafficking, registering domestic workers with local government units,

and strengthening the legal framework to ensure that domestic workers are accorded workplace rights and benefits.

**TREATIES AND CONVENTIONS – INTERNATIONAL CONVENTION
ON THE PROTECTION OF RIGHTS OF ALL MIGRANT WORKERS AND
MEMBERS OF THEIR FAMILIES – RATIFICATION**

Instrument of Ratification

WHEREAS the ‘International Convention on the Protection of Rights of all Migrant Workers and Members of their Families’ was adopted by the United Nations on 18 December 1990 which came into force on 01 July 2003.

AND WHEREAS said ‘International Convention on the Protection of Rights of all Migrant Workers and Members of their Families’ has been signed on behalf of the Government of People’s Republic of Bangladesh on the 07 October 1998,

NOW THEREFORE I, DR. DIPU MONI, MP, Minister of Foreign Affairs, declare that the Government of People’s Republic of Bangladesh, having considered the provisions as stated in Article 86 of the said Convention ratifies the same and undertakes faithfully to perform and carry out the stipulations contained therein.

IN WITNESS THEREOF I have signed this instrument of ratification at Dhaka on the Twenty Third day of August in the year Two Thousand Eleven of the Christian Era.”

MALAYSIA

**TREATIES AND CONVENTIONS – CEDAW – CONSTITUTIONAL
GUARANTEE OF GENDER EQUALITY –STATUS AND APPLICABILITY
OF INTERNATIONAL LAW IN INTERPRETATION OF THE
CONSTITUTION – GENDER DISCRIMINATION IN EMPLOYMENT –
PERMANENT MISSION OF MALAYSIA TO THE UNITED NATIONS**

***Noorfadilla bt Ahmad Saikin v. Chayed bin Basirun & Or* [2011] 1 MLJ 832**

This case addressed the issue of the legal status of CEDAW under Malaysia’s domestic law. The High Court accepted that CEDAW could have direct effect insofar as it influences constitutional interpretation.

Facts

The applicant challenged the validity of a decision made by a local education office to cancel her appointment as a relief teacher. The applicant had applied for and obtained employment as a relief teacher. After receiving her placement memo informing her of her posting, she was asked to attend a briefing on the terms of her service of employment. At this briefing, the applicant was asked whether she was pregnant. When she informed the education officer that she was three months pregnant, her placement memo was withdrawn. The applicant sought a declaration that the Ministry's refusal to employ women as relief teachers on the basis of their pregnancy, as well as their revocation of her appointment was unconstitutional for violating article 8(2) of the Federal Constitution. Article 8(2) prohibits gender discrimination in the appointment of any office or employment by a public authority. The Ministry of Education and the local district education office claimed that they were entitled under an official circular dated February 27, 2007 not to employ any pregnant woman as a relief teacher. The Ministry claimed that the purpose of employing relief teachers is to help overcome the shortage of teachers and not to add to the problem. It argued that it is justified in not hiring pregnant relief teachers because "(a) the period between the time of delivery to full health is too long (2 months); (b) a pregnant woman [as a relief teacher] may not frequently be able to attend to her job due to various health reasons; (c) when she gives birth she needs to be replaced by [a] new teacher who will require further briefings; and (d) a [relief teacher] post cannot be filled with 'replacement' teachers."

Judgment

[The High Court decided in the applicant's favor, declaring that the withdrawal of her appointment on the basis of her pregnancy was unconstitutional. It also opined that in interpreting the prohibited scope of gender discrimination under article 8(2) it was appropriate to take into account Malaysia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The government appealed to the Court of Appeal but the appeal was subsequently withdrawn.]

[A]rt 8(2) of the Federal Constitution provides, *inter alia*, that there shall be no discrimination on the ground only of gender in the appointment of any office or employment under a public authority. The word 'gender' was

added to art 8(2) by the Constitution (Amendment) (No 2) Act 2001 (Act A 1130), which came into force on September 28, 2001; to comply with Malaysia's obligation under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This is clearly illustrated in the Minister's speech in the Hansard for second and third Reading of the Bill to amend the Constitution on August 1, 2001...

... It is to reflect the view that women are not [to be] discriminated. Article 1 of CEDAW defines 'discrimination against women' as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

Further, article 11(1)(b) of CEDAW provides that state parties shall take all appropriate measure to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to the same employment opportunity, including the application of the same criteria for selection in matters of employment. In article 11(2)(a) of CEDAW, it provides that State parties shall take appropriate measure to prohibit, subject to the imposition of sanctions, dismissal on the grounds, *inter alia*, of pregnancy.

... CEDAW is not a mere declaration. It is a convention. Hence, following the decision of the Federal Court in [Mohd Ezam Mohd Noor v Ketua Polis Negara and other appeal [2002] 4 MLJ 449], it has the force of law and binding on members states, including Malaysia. More so that Malaysia has pledged its continued commitments to ensure that Malaysian practices are compatible with the provision and principles of CEDAW as evidenced in the letter from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated March 9, 2010.

.... To me, in interpreting art 8(2) of the Federal Constitution, it is the court's duty to take into account the government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under art 8(2) of the Federal Constitution.

**TREATIES AND CONVENTIONS – UN CONVENTION AGAINST
TRANSNATIONAL ORGANIZED CRIME – APPLICATION OF
INTERNATIONAL LAW IN IMPLEMENTING NATIONAL LAW –
COMPLIANCE WITH INTERNATIONAL STANDARDS**

Anti-Trafficking in Persons And Anti-Smuggling Migrants (Amendment) Act of 2010 (Act 670)

Malaysia ratified the United Nations Convention against Transnational Organized Crime (UNTOC) in 2004, and in 2009, its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (UNTOC Trafficking Protocol). This Protocol has been one of the main sources of reference for Malaysia's Anti-Trafficking in Persons Act 2007 ("Anti-Trafficking Act"). Although it did not also sign the UNTOC Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Malaysia's National Plan on Trafficking in Persons 2010 use that Protocol as another source of reference in implementing its anti-trafficking in persons laws.

In 2010, the Anti-Trafficking Act was amended and renamed the Anti-Trafficking in Persons And Anti-Smuggling of Migrants Act, thus emphasising a distinction between trafficking and people smuggling. The Amendment to the Anti-Trafficking in Persons Act, DR 22/2010 also revised the definition of trafficking to include all actions involved in acquiring or maintaining the labour or services of a person through coercion. Enforcement and prosecution of offenders, and protection of victims remain serious issues. Since it was placed on Tier 3 of the US State Department's Trafficking in Persons Report (TIP Report) in 2009, Malaysia has stepped up efforts to keep itself at the Tier 2 Watch List in the last four years of the TIP Reports (2010-2013). Tier 2 Watch List countries are those whose governments do not fully comply with the United States' Trafficking Victims Protection Act's minimum standards, but are making significant efforts to bring themselves into compliance with those standards. These countries are on the Watch List (as opposed to being on Tier 2) because a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or c) the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps

over the next year. Tier 3 countries are those whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.

**PRIVACY – PERSONAL DATA PROTECTION ACT –
USE OF PERSONAL DATA – STATE SOVEREIGNTY**

Ministry Of Finance, Economic Report 2013/2014 (October 25, 2013)

In 2010, Malaysia passed the Personal Data Protection Act (PDPA) to regulate the processing of personal data in commercial transactions, and to protect the interests of data subjects. The PDPA makes it an offence for data users to reveal person data to third parties without the consent of the data owner. Data owners are to be informed by written notice if their personal data is being processed. According to the Ministry of Finance's Economic Report 2013/2014, federal and state governments are excluded in order for them to continue to use basic personal data for legal administrative purposes. Personal data processed entirely outside Malaysia are also excluded from the ambit of the PDPA. The Economic Report also stated that the PDPA represents recognition of information privacy as one of the fundamental human rights and protection of invaluable data that has the potential of being commoditized. PDPA policies are also aimed at enhancing regional cooperation.

**TREATIES AND CONVENTIONS – MALAYSIA-AUSTRALIA REFUGEE
SWAP – ASYLUM SEEKERS**

Agreement Between Malaysia and Australia Relating to Transfer and Resettlement of Refugees and Asylum Seekers, 2011

In 2011, Malaysia signed an agreement with Australia on the transfer and resettlement of refugees and asylum seekers. Under the arrangement, Australia would send 800 unprocessed asylum seekers who land on its shores to Malaysia for processing by the United Nations. In turn, Australia would accept 4,000 United Nations-certified refugees from Malaysia. Australia had hoped that immediate rerouting to Malaysia would deter asylum seekers from trying to come to Australia by boat as they would not be processed in Australia. The agreement is currently in abeyance and largely abandoned after the Australian High Court struck it down on the basis that Malaysia was not an appropriate country to which to send

asylum seekers since it is not party to the 1951 United Nations Convention Relating to the Status of Refugees.

PHILIPPINES

LABOUR RIGHTS – NIGHT WORKERS – LABOUR CODE

An Act Allowing the Employment of Night Workers, Thereby Repealing Articles 130 and 131 of Presidential Decree Number Four Hundred Forty-Two, as Amended, otherwise known as the Labor Code of the Philippines

On June 21, 2011, Philippine President Benigno Simeon C. Aquino III signed Republic Act No. 10151 into law. It repealed Article 130 of the Labor Code which prohibited the employment of women for night work (Art. 1) and Article 131 of the said Code (Art. 2). Previously, Article 130 of the Labor Code prohibited the employment of women in industrial undertakings between 10 p.m. to 6 a.m. of the following day, and in commercial or non-industrial undertakings between 12 midnight to 6 a.m. In agriculture, a woman was not allowed to work at night time, unless she has had a period of rest of at least 9 consecutive hours. Article 131 provided certain exceptions to the general prohibition, such as emergencies, situations in which the woman worker holds a managerial or technical position, or the nature of the work requires a woman's manual skill and dexterity.

Historically, the night work provisions were adopted in light of International Labor Organization ("ILO") Convention No. 89 of 1934 or the Women Night Work Convention. The Philippines is a State Party to Convention No. 89. The repeal implements the obligations of the Philippines under the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW") as the provisions were largely seen as discriminatory against women. Notably, the Philippines is a signatory to the new ILO Night Work Convention No. 171 of 1990, which provides equal work opportunity for men and women, and takes into account health and safety concerns. However, it has not yet ratified the said treaty.

Apart from repealing the night work provisions, Republic Act No. 10151 introduced novel provisions (Sec. 4), such as the limitation of night work to eight hours a day; rights to undergo health assessment without charge, suitable first aid facilities, sleeping quarters, transfers for night workers who are certified to be unfit for night work due to health reasons

and protection for those who are certified to be temporarily unfit for night work, and social services. Significantly, the law requires the employer to take measures to ensure that an alternative to night work is available to pregnant woman before and after childbirth for a period of at least 16 weeks, and for additional periods as necessary. The Act includes a penal clause for any violation of its provisions and rules and regulations issued pursuant to it (Sec. 8).

**MINORITY RIGHTS – DISCRIMINATION OF LESBIANS GAYS,
BISEXUALS AND TRANSGENDERS IN PARTY-LIST ACCREDITATION**

***Ang Ladlad v. Commission on Elections* [GR No. 190582. April 8, 2010]**

The Commission on Elections (Comelec) refused to accredit Ang Ladlad as a party-list organization under the Party-List System Act. Ang Ladlad is an organization of men and women who identify themselves as lesbians, gays, bisexuals or transgender (LGBT) individuals. It first applied for registration with the Comelec in 2006, but it was denied on the ground that it had no substantial membership base. An application for registration was once again filed in 2009.

Ang Ladlad argued before the Comelec that the LGBT community is a marginalized and underrepresented sector which is particularly disadvantaged because of sexual orientation and gender identity; that the community has been a victim of exclusions, discrimination, and violence; that because of negative societal attitudes, LGBTs are constrained to hide their sexual orientation; and that Ang Ladlad complied with the eight-point guidelines enunciated by the Supreme Court in jurisprudence for party-list accreditation.

The Comelec dismissed the petition for accreditation on moral grounds, citing that the 'definition of the LGBT sector' made it clear that Ang Ladlad tolerates immorality that offends religious beliefs. It referred, *inter alia*, to the Holy Bible and the Koran, while quoting several domestic civil and penal laws relating to decency, immorality and good customs. Further, it stated that the accreditation would expose the youth to an environment that does not conform to the teachings of faith.

Ang Ladlad sought the reconsideration of the resolution. In upholding the resolution, the Comelec noted that the party-list system is a tool for the realization of aspirations of marginalized individuals whose interests

are also the nation's. Hence, until the time comes when Ladlad is able to justify that having mixed sexual orientations and transgender identities is beneficial to the nation, its application for accreditation would not be approved. The Comelec added that the principle of equal protection is not violated as members of Ang Ladlad remain either male or female who are protected by the same Bill of Rights that applies to all citizens alike. Likewise, the Philippines cannot ignore its more than 500 years of Muslim and Christian upbringing, such that some moral precepts espoused by said religions are now part of society.

Before the Supreme Court, Ang Ladlad contended that the resolution justified Ang Ladlad's exclusion by using religious dogma; and this violated the constitutional guarantees against the establishment of religion. It also contravened the constitutional rights to privacy, freedom of speech and assembly, and equal protection of laws, as well as constituted violations of the Philippines' international obligations against discrimination based on sexual orientation.

The Supreme Court ruled in favor of Ang Ladlad and ordered the Comelec to grant the application for party-list accreditation. The Court stated that the party-list satisfied the exacting standards of the law. Foremost, the LGBT sector has experienced past subordination or discrimination; possesses an immutable or distinguishing characteristic, attribute, or experience that defines it as a discrete group; and is at present politically and/or economically powerless.

**TREATIES AND CONVENANTS – TREATY OF PEACE BETWEEN JAPAN
AND THE PHILIPPINES – CLAIMS FOR MONETARY REPARATION
AGAINST JAPAN**

***Isabelita C. Vinuya, et al v. Executive Secretary Alberto G. Romulo* [GR No. 162230. April 28, 2010]**

MALAYA LOLAS is a non-stock, non-profit organization registered with the Securities and Exchange Commission (SEC) of the Philippines. Primarily, the aim of the organization is to provide aid to the victims of rape by Japanese military forces in the Philippines during the Second World War. Members of the organization claim to be "comfort women" to the Japanese forces and suffered greatly because of that.

In 1998, the organization approached the executive branch of government through the Department of Justice, Department of Foreign Affairs,

and Office of the Solicitor General, to request assistance in filing a claim against Japanese officials and military officers responsible for the establishment of “comfort women” stations in the country. The officials of the executive branch of government declined the request since the individual claims had been allegedly satisfied by Japan’s compliance with the San Francisco Peace Treaty of 1951 and the Reparations Agreement of 1956 between Japan and the Philippines.

MALAYA LOLAS filed a petition before the Supreme Court to compel the executive officials to espouse their claims for official apology and other forms of reparations against Japan before the International Court of Justice and other international tribunals.

MALAYA LOLAS argued that the general waiver of claims executed by the Philippine government in relation to the Treaty of Peace between Japan and the Philippines is void. The “comfort women” system constitutes a crime against humanity, sexual slavery, and torture. It is also prohibited by *jus cogens* norms from which derogations are not permitted. The waiver amounts to a breach of the government’s obligation and fosters an environment of impunity. Government’s acceptance of the apologies made by Japan and the funds from the Asian Women’s Fund is contrary to international law.

According to the Supreme Court, stripped down to its essentials, the issue in the case is whether the executive branch of government committed grave abuse of discretion in not espousing MALAYA LOLAS’s claims for official apology and other forms of reparations against Japan. The Supreme Court held that there was no such abuse on the part of the government.

First, from a domestic law perspective, the executive has the exclusive prerogative to determine whether to espouse petitioners’ claims against Japan. The matter is a political question and a foreign relations matter, the authority for which is demonstrably committed by the Philippine Constitution not to the courts but to the political branches of government. The Executive Department has already decided that it was to the best interest of the country to waive all the claims of its nationals for reparations against Japan in the Treaty of Peace of 1951. The wisdom of such decision is not for the courts to question.

Second, the Philippines is not under any international obligation to espouse the claim. Under international law, the only means available for individuals to bring a claim within the international legal system has been

when the individual is able to persuade a government to bring a claim on the individual's behalf. In the eyes of the international tribunal, the State is the claimant. The State is the sole judge to decide whether its protection in favor of MALAYA LOLAS will be granted, to what extent, and when it will cease. At present, there is no sufficient evidence to establish a general international obligation for States to exercise diplomatic protection of their own nationals abroad. Neither state practice nor *opinio juris* has evolved in such a direction.

The Court agreed that rape, sexual slavery, torture, and sexual violence are morally reprehensible as well as legally prohibited under contemporary international law. However, these proscriptions do not automatically imply that the Philippines is under a non-derogable obligation to prosecute international crimes, particularly since petitioners do not demand the imputation of individual criminal liability, but seek to recover monetary reparations from Japan. Absent the consent of states, an applicable treaty regime, or a directive by the Security Council, there is no non-derogable duty to institute proceedings against Japan.

Further, the Court opined that precisely because of states' reluctance to directly prosecute claims against another state, recent developments support the modern trend to empower individuals to directly participate in suits against perpetrators of international crimes. Notwithstanding General Assembly resolutions calling for the prosecution of crimes against humanity and the strong policy arguments for it, the practice of states does not yet support the present existence of an obligation to prosecute international crimes. A customary duty of prosecution would be ideal, but there is not enough evidence to reasonably assert its existence. It is in the practice of granting amnesties, immunity, selective prosecution, or *de facto* impunity to those who commit crimes against humanity, that state practice in this area is widespread.

Finally, the Court stated that even if it sidesteps the question of whether *jus cogens* norms existed in 1951, MALAYA LOLAS has not deigned to show that the crimes committed by the Japanese army violated *jus cogens* prohibitions at the time the Treaty of Peace was signed, or that the duty to prosecute perpetrators of international crimes is an *erga omnes* obligation or has attained the status of *jus cogens*.

**TREATIES AND CONVENTIONS – CEDAW AND CRC – WOMEN’S
RIGHTS – CHILDREN’S RIGHTS – BEST INTEREST OF THE CHILD –
HEALTH AND NUTRITION – BREASTFEEDING POLICIES**

An Act Expanding the Promotion of Breastfeeding, Amending for the Purpose Republic Act No. 7600, otherwise known as “An Act Providing Incentives to All Government and Private Health Institutions with Rooming-In and Breastfeeding Practices and for Other Purposes”

This law is widely known as the Expanded Breastfeeding Promotion Act of 2009, signed into law on March 16, 2010. It amends the salient points of an earlier law on the same subject matter. For instance, it prescribes the provision of facilities for breast milk collection and storage for health institutions; the establishment of lactation stations and lactation periods; and a system of incentives and penalties. A list of ‘mother-baby-friendly’ establishments available to the public is mandated to be kept by the Department of Health.

Some of these points which are relevant to state practice are outlined here:

One, the law declares as policy that the State shall protect working women consistent with international treaties and conventions to which the Philippines is a signatory such as (1) the Convention on the Elimination of all forms of Discrimination against Women, which emphasizes provision of necessary supporting social services to enable parents to combine family obligations with work responsibilities; (2) the Beijing Platform for Action and Strategic Objective, which promotes harmonization of work and family responsibilities for women and men; and (3) the Convention on the Rights of the Child, which recognizes a child’s inherent right to life and the State’s obligations to ensure the child’s survival and development.

Two, in defining lactation management as the general care of a mother-infant nursing couple during the mother’s prenatal, immediate postpartum and postnatal periods, the law mentions the monitoring of breastfeeding mothers by health workers and breastfeeding peer counselors for service patients to ensure compliance with the government’s Department of Health, the World Health Organization (WHO) and the United Nations Children’s Fund (UNICEF) on the implementation of breastfeeding policies, the physiology of lactation, the establishment and maintenance of lactation, the proper care of the breasts and nipples, and such other matters that would contribute to successful breastfeeding.

**MIGRANT WORKERS – OVERSEAS WORKERS – PUBLIC WELFARE –
CLARIFICATION OF CONCEPT OF “ILLEGAL RECRUITMENT”**

An Act Amending Republic Act No. 8042, otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995, as Amended, Further Improving the Standard of Protection and Promotion of the Welfare of Migrant Workers, Their Families and Overseas Filipinos in Distress, and for Other Purposes

This Act, which amends the Migrant Workers and Overseas Filipinos Act of 1995, lapsed into law on March 8, 2010. The following policies guide the amendatory provisions found in first section of the law:

In the pursuit of an independent foreign policy and while considering national sovereignty, territorial integrity, national interest and the right to self-determination paramount in its relations with other states, the State shall, at all times, uphold the dignity of its citizens whether in country or overseas, in general, and Filipino migrant workers, in particular, continuously monitor international conventions, adopt/be signatory to and ratify those that guarantee protection to our migrant workers, and endeavor to enter into bilateral agreements with countries hosting overseas Filipino workers.

Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty. In this regard, it is imperative that an effective mechanism be instituted to ensure that the rights and interest of distressed overseas Filipinos, in general, and Filipino migrant workers, in particular, whether regular/documented or irregular/undocumented, are adequately protected and safeguarded.

The State recognizes that the most effective tool for empowerment is the possession of skills by migrant workers. The government shall provide them free and accessible skills development and enhancement programs. Pursuant to this and as soon as practicable, the government shall deploy and/or allow the deployment only of skilled Filipino workers.

The State recognizes non-governmental organizations, trade unions, workers associations, stakeholders and their similar entities duly recognized as legitimate, are partners of the State in the protection of Filipino migrant workers and in the promotion of their welfare. The State shall cooperate with them in a spirit of trust

and mutual respect. The significant contribution of recruitment and manning agencies shall form part of this partnership.

The law articulates a more inclusive new definition of who is considered an overseas Filipino worker, which makes no reference to the regularity or irregularity of presence in a foreign state. The deployment of overseas Filipino workers is allowed only in countries where the rights of Filipino migrant workers are protected. However, in pursuit of the national interest or when public welfare so requires, the governing board of the government's Philippine Overseas Employment Administration, after consultation with the Department of Foreign Affairs, may, at any time, terminate or impose a ban on the deployment of migrant workers.

Additionally, the law clarifies the concept of illegal recruitment and provides stiffer penalties therefor. Jurisdiction as to money claims is recalibrated and a system for free legal assistance to victims is established. Likewise, upon discovery or being informed of the presence of migrant workers whose ages fall below the minimum age requirement for overseas deployment, the law states that the responsible officers in the foreign service should without delay repatriate said workers and advise the Department of Foreign Affairs through the fastest means of communication available of such discovery and other relevant information. There are other important provisions in the law, including those on insurance, the creation of an assistance fund, and the role of the different government agencies in migrant protection.

SRI LANKA

RIGHTS OF ELDERLY – UNITED NATIONS PRINCIPLES FOR OLDER PERSONS – PROTECTION – LEGISLATIVE AMENDMENT

Protection of the Rights of Elders (Amendment) Act No 05 of 2011

The Amendment introduced three clauses to the Preamble of the principal Act of which one notes that Sri Lanka has ratified the United Nations Principles for Older Persons, G.A. Res.46/91, U.N (Dec. 1991). That clause notes that the state has a responsibility to assist elders to live a fulfilling life. Among other things, this Amendment introduces the issuance of 'Elder's Identity Cards', the establishment of 'Elders Committees' at the lowest level of administrative divisions. It included prohibitions on dis-

crimination on the basis of age in accessing any building or any facility, benefit or advantage.

**TREATIES AND CONVENTIONS – ICCPR – PREVENTION OF
TERRORISM ACT – RIGHT TO BE FREE FROM TORTURE – RIGHT TO
EQUALITY – ARBITRARY ARREST AND DETENTION**

***Centre for Policy Alternatives v. Gotabaya Rajapaksa SC*, [2011] S.C.R 453 (Sri Lanka)**

A non-governmental Organization whose mandate included advocacy and litigation for human rights, filed a petition before the Supreme Court claiming that the new regulations introduced to the Prevention of Terrorism Act led to the infringement and imminent infringement of several fundamental rights including the right to be free from torture, the right to equality and the right to be free from arbitrary arrest and detention. The petitioner also claimed that the regulations were beyond the scope of the PTA and that it amounted to an unlawful derogation from human rights in violation of Sri Lanka's obligations under the International Covenant on Civil and Political Rights.

The Supreme Court dismissed the petition at 'the leave to proceed' stage stating that the Court saw no basis on which 'leave to proceed' with the application could be granted.

**TORTURE AND ILL-TREATMENT – ENFORCED DISAPPEARANCES
– REFUGEES – ANTI-TERRORISM MEASURES – PREVENTION OF
TERRORISM ACT**

Concluding Observations – Committee Against Torture

The Committee against Torture considered the joint third and fourth periodic reports submitted by Sri Lanka at its Forty Seventh Session in 2011. The following observations were made by the Committee.

Allegations of widespread use of torture and ill-treatment: The Committee raised concerns about the continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment of suspects in police custody; especially to extract confessions or information to be used in criminal proceedings. The Committee noted that torture and ill-treatment perpetrated by State actors, both the military and the police, have continued in many parts of the country after the conflict ended

in May 2009 and is still occurring in 2011, in contravention of Articles 2, 4, 11 and 15 of the Convention.

Enforced disappearances: While welcoming the State party's Supreme Court judgment in *Kanapathipillai Machchavallavan v. Officer in Charge, Army Camp Plantain Point, Trincomalee and Three Others*, [2005] S.C.R. 341 (Sri Lanka), according to which enforced disappearance could constitute a violation of the freedom from punishment except according to law, Constitution, art. 13(4), the Committee noted with concern that enforced disappearance is not a separate offence under Sri Lankan criminal law and that such acts are charged under other crimes in the Penal Code, including kidnapping, abduction and wrongful confinement.

Anti-terrorism measures: While noting the State party's decision to lift the long-standing state of emergency on August 31, 2011, the Committee expressed concern over the new regulations decreed under the Prevention of Terrorism Act No. 48 of 1979 (PTA) which restrict legal safeguards for persons suspected or charged with a terrorist or related crime.

The Committee noted that the President continued to invoke Section 12 of the Public Security Ordinance (Chapter 40) to allow the armed forces to retain policing powers in all 25 districts (Presidential Order of August 6, 2011). It was noted that with the lapsing of the state of emergency, the limited safeguards contained in Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, which applied when arrests were made by armed forces, were apparently are no longer in effect under the new PTA regulations (e.g. a person arrested by a member of the armed forces had to be handed over to the police within 24 hours) in contravention of Articles 2 and 16 of the Convention.

Coerced Confessions: The Committee expressed its concern about the fact that the PTA allows all confessions obtained by police at or above the rank of Assistant Superintendent of Police (ASP) to be admissible (sect. 16) placing the burden of proof on the accused that a confession was obtained under duress (sect. 17(2)). The Committee was also concerned at reports that in most cases filed under the PTA the sole evidence relied upon were confessions obtained by an ASP or an officer above that rank, in contravention of Articles 2, 11, 15 and 16 of the Convention.

Human Rights Commission of Sri Lanka (HRCSL): The Committee noted with concern that the new appointment process to public office set out by the 18th Amendment to the Sri Lankan Constitution (September 2010),

which ends Parliament's role in approving appointments, undermines the independence of the HRCSL. The Committee was also concerned about the difficulties the HRCSL has had in carrying out its function owing in part to the lack of cooperation from other State party institutions, limited human and financial resources, which has reduced its ability to investigate specific incidents and make recommendations for redress, and failure to publish the reports of its investigations.

Witness and victim protection: The Committee reiterated its concern at the absence of an effective mechanism to ensure the protection of and assistance to witnesses and victims of human rights violations and abuses, which has a negative impact on the willingness and ability of witnesses and victims to participate in investigations or to testify in proceedings.

Refugees, non-refoulement: The Committee noted with concern the absence of domestic legislation or national policy that guarantees the protection of refugees and asylum-seekers in the State party and persons who require international protection.

**DISCRIMINATION – VIOLENCE AGAINST WOMEN – TRAFFICKING
AND EXPLOITATION OF WOMEN –
PREVENTION OF DOMESTIC VIOLENCE ACT**

Concluding Observations - Committee on the Elimination of Discrimination against Women

The Committee considered the combined fifth, sixth and seventh periodic reports of Sri Lanka in 2011 and made the following recommendations.

Prohibition of discrimination against women: The Committee was concerned that legislation in the State party does not prohibit discrimination against women in line with Article 1 of the Convention covering both direct and indirect discrimination, or extending to acts of both public and private actors in accordance with Article 2. In this regard, the Committee observed that the Women's Rights Bill being elaborated by the State party is not in line with the Convention.

Discriminatory laws: While noting that there is an ongoing reform of the Muslim Personal Law, the Committee raised its concern about the persistence of discriminatory provisions in the law, including in the Penal Code, the Land Development Ordinance which gives preference to male heirs over females, the general personal laws, the Muslim Personal Law, the Kandyan Law and the Tesawalamai Law. The Committee was also

concerned about the plurality of legal systems composed of the general, customary and religious laws and the lack of choice for women between the different legal systems.

Violence against women: The Committee was concerned that, despite the adoption of the Prevention of Domestic Violence Act, significant delays took place before cases were processed under this Act. The Committee was further concerned that marital rape is recognized only if a judge has previously acknowledged the separation of the spouses. The Committee was concerned that the criminalization of same sex relationship results in women being completely excluded from legal protection.

Trafficking and exploitation of prostitution: The Committee commended the efforts undertaken by the State party to combat trafficking, including the introduction of a new definition of the offence of trafficking in persons in the Penal Code, the organization of awareness-raising activities and the establishment of an Anti-Human Trafficking Task Force.

The Committee was, however, concerned at the low number of convictions and punishment of those convicted of trafficking and at the lack of protective measures and safe homes for victims of trafficking. It was also concerned that the State party has not ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

Employment: The Committee expressed its concern at the lack of protection of women working in the informal sector and the lack of specific law on sexual harassment. It was further concerned that, despite the State party's ratification of the ILO Convention No. 100 on Equal Remuneration, the principle of equal remuneration for men and women for work of equal value has not been reflected in national legislation.

Abortion: The Committee was also concerned that abortion is a punishable offence under the law, unless the purpose is to save the life of the mother. It noted that about 10 percent of maternal mortality is reported as the direct result of clandestine abortion.

Marriage and family relations: The Committee raised its concern about the preservation of a combination of general, customary and religious marital laws that contain discriminatory elements against women. The Committee was concerned that polygamy is not prohibited, that there is no minimum age of marriage recognized under Muslim personal law,

and that Tamil women need their husband's consent to appear in court or undertake any transaction under the Tesawalamai law. The Committee was further concerned about the lack of progress in recognizing no-fault divorce and women's economic rights upon divorce.

ABUSES – NATIONAL RECONCILIATION – RECOMMENDATIONS

Recommendations of the Lessons Learnt and Reconciliation Commission

The Lessons Learnt and Reconciliation Commission (LLRC) was appointed by the Sri Lankan President in May 2010. The commission was mandated to investigate inter alia the facts and circumstances which led to the failure of the ceasefire agreement of February 27, 2002 and the sequence of events thereafter up to May 2009, whether any person, group or institution bear responsibility in this regard, the lessons that should be learnt from those events and the institutional, administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future, and to promote further national unity and reconciliation among all communities. After an 18 month inquiry, the commission submitted its report to the President on November 15, 2011. The report was made public on December 16, 2011, after being tabled in parliament.

The framework of reference of the Commission was Sri Lanka's international and Constitutional obligations in the sphere of human rights.

Allegations concerning missing persons, disappearances and abductions:

The Commission stated that Government is duty bound to direct the law enforcement authorities to take immediate steps to ensure that the widespread allegations concerning missing persons are properly investigated into and perpetrators brought to justice. The Commission emphasized that it is the responsibility of the State to ensure the security and safety of any person who is taken into custody by governmental authorities through surrender or an arrest.

The Commission remarked that the issuance of death certificates and monetary recompense where necessary should be addressed as a matter of priority, taking into account applicable international standards. In this regard, the Commission noted the recent amendment to the Registration of Deaths Act, which provides for the next of kin to apply for a Certificate of Death in respect for a person who

is reported missing and not been heard of for a period exceeding one year by those who would naturally have heard of him/her, and his/her disappearance is attributable to any terrorist or subversive activity or civil commotion which has taken place in Sri Lanka.

The Commission recommended that a Special Commissioner of Investigation be appointed to investigate alleged disappearances and provide material to the Attorney General to initiate criminal proceedings as appropriate.

Treatment of Detainees: The Commission stressed that the next of kin of the detainees have the fundamental right to know the whereabouts of their family members who are in detention. Therefore there was a need for a centralized comprehensive database containing a list of detainees, which should be made available to the next of kin with names, place of detention as well as record of transfers so that families have access to such information.

It was further observed that all places of detention should be those, which are formally designated as authorized places of detention and no person should be detained in any place other than such authorized places of detention. Strict legal provisions should be followed by the law enforcement authorities in taking persons into custody, such as issuing of a formal receipt of arrest and providing details of the place of detention.

Illegal armed groups: The Commission was of the view that proper investigations should be conducted in respect of the allegations against the illegal armed groups with a view to ascertain the truth and the institution of criminal proceedings against offenders in cases where sufficient evidence can be found.

Conscription of Children: The Commission report emphasized that rehabilitation of the ex - child combatants should be the utmost priority of the Government in the immediate post-conflict phase. The Commission was pleased to note the rehabilitation programme of the Government, which has resulted in the rehabilitation, and reintegration of hundreds of former child combatants, and in particular the approach of the community based correctional programme of the Commissioner General of Childcare and Probation. The Commission recommends that the same community based approach be adopted for the rehabilitation of the former child combatants in cooperation with NGOs and civil society organizations.

It was further stated that in instances where there is *prima facie* evidence of conscription of children as combatants, any such alleged cases

should be investigated and offenders must be brought to justice. In this regard, the complaints of alleged recruitment of children by illegal armed groups/groups affiliated with the LTTE or any political party should be investigated with a view to prosecuting the offenders to ensure that the practice would not occur in the future.

The Commission called for the full implementation of the Action Plan between the TMVP (The former Eastern wing of the LTTE), Commissioner General of Rehabilitation, and the UNICEF with immediate effect so that the practice of child recruitment by the TMVP ceases, children recruited are released and reintegrated with their families and communities after rehabilitation

Disabled persons: The Commission recommended that necessary national legislation be put in place to realize the rights of persons with disabilities in line with the UN Convention on Rights of Persons with Disabilities. Such action would have a positive impact, including obtaining international assistance, on matters affecting a large number of disabled persons, especially in the conflict affected areas.

Internally displaced persons: The Commission highlighted the need to respect a person's freedom of movement to re-settle in their places of origin, in accordance with internationally accepted principles governing voluntary return.

It was also recommended that a formal bilateral consultation process, take place between Sri Lanka and India to enable the displaced persons to take considered decisions with regard to their return to Sri Lanka

Muslim community in the North and East: The Commission took heed of the long standing IDP issue of the Muslims from the North and particularly the East of the Country as a result of the ethnic conflict. Durable solutions needed to be found to address the plight of the Muslim Community.

The Commission recommended that a special committee be appointed to examine durable solutions and to formulate a comprehensive State policy on the issue, after having extensive consultations with the IDPs and the host communities.

Freedom of expression and the right to information: The Commission stressed that Freedom of expression and right to information, which are universally regarded as basic human rights play a pivotal role in any reconciliation process. It was therefore essential that media freedom be

enhanced in keeping with democratic principles and relevant fundamental rights obligations, since any restrictions placed on media freedom would only contribute to an environment of distrust and fear within and among ethnic groups.

This would only prevent a constructive exchange of information and opinion placing severe constraints on the ongoing reconciliation process.

The Commission strongly recommended that:

- a. All steps should be taken to prevent harassment and attacks on media personnel and institutions.
- b. Action must be taken to impose deterrent punishment on such offences, and also priority should be given to the investigation, prosecution and disposal of such cases to build up public confidence in the criminal justice system.
- c. Past incidents of such illegal action should be properly investigated. The Commission observed with concern that a number of journalists and media institutions had been attacked in the recent past.
- d. The Government should ensure the freedom of movement of media personnel in the North and East, as it would help in the exchange of information contributing to the process of reconciliation.
- e. Legislation be enacted to ensure the right to information.

Freedom of religion, association and movement: The report contended that any credible and sustainable process of reconciliation requires the creation of an environment, which respects, promotes and protects people's right to freely engage in observing their religion, and other freedoms such as freedom of association and movement.

The commission observed that the Government should take immediate steps to remove any remaining restrictions on visiting places of worship with the only exception being made in respect of the restrictions necessitated by mine clearance activities. This should also include access to places of religious worship within the High Security Zones.

Follow up action on the Reports of Past Commissions of Inquiry Observations and Recommendations: The Commission made particular reference to the implementation of the recommendations of the Report of the Presidential Commission of Inquiry Appointed to Investigate and Inquire into Alleged Serious Violations of Human Rights Arising Since August 2005, particularly those relating to further investigation and pros-

ecution of offenders involved in the incidents of the death of 5 students in Trincomalee in January 2006 and 17 aid workers of the ACF in August 2006. Such action would send a strong signal in ensuring respect for the Rule of Law, which in turn tends to contribute to the healing process.

**TREATIES AND CONVENTIONS – ICCPR – VIOLATION –
INTIMIDATION, ASSAULT AND ALLEGED MURDER BY POLICE –
HUMAN RIGHTS COMMITTEE**

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (103rd session) concerning Communication No. 1862/2009

The alleged victims were Annakkarage Suranjini Sadamali Pathmini Peiris (the author, represented by counsel, Asian Legal Resource Centre Ltd.), her deceased husband Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando and their two minor children, Siyaguana Kosgodage Kalpani Danushi Fernando (born in 1992) and Siyagana Kosgodage Sinesh Antony Fernando (born in 1997).

The author claimed that she and her family were the victims of violations of Article 6, read in conjunction with Article 2, paragraph 3; article 7, read in conjunction with Article 2, paragraph 3; Article 9, paragraph 1, read in conjunction with Article 2, paragraph 3; Article 17 and Article 23, paragraph 1, of the International Covenant on Civil and Political Rights by the Democratic People's Republic of Sri Lanka, through a series of acts of intimidation including assault and allegedly, murder, by Police officers.

The Committee regretted the State party's failure to provide any information with regard to admissibility or the substance of the author's claims recalling the obligation under Article 4, paragraph 2, of the Optional Protocol obliging States parties to examine in good faith all allegations brought against them, and to make available to the Committee all information at their disposal. The Committee further noted with regret that the State party has failed to respond to its request, made pursuant to rule 92 of its rules of procedure, to take measures to ensure the protection of the author and her family while her case is under consideration by the Committee.

In the absence of any submission by Sri Lanka on the admissibility of the communication, and noting the author's statement that domestic remedies have proven to be ineffective, the Committee declared the communication admissible.

Due in particular to the failure of the State party to challenge the evidence of assault, intimidation and murder by agents of the state submitted by the author and the lack of cooperation in the investigation of the said allegations, the Committee was of the view that the facts as found by the Committee reveal violations by Sri Lanka of Article 6, read alone and in conjunction with Article 23, paragraph 1, vis-à-vis the author's husband; Article 2, paragraph 3, read in conjunction with Article 6 and Article 7, vis-à-vis the author herself, her husband, and their two children; Article 7, read alone and in conjunction with Article 23, paragraph 1, vis-à-vis the author, her husband and their two children; Article 9, paragraph 1, vis-à-vis the author, her husband and their two children; and Article 17, read alone and in conjunction with Article 23, paragraph 1, of the Covenant vis-à-vis the author, her husband and their two children.

The Committee noted that in accordance with Article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which includes ensuring that perpetrators are brought to justice, that the author and her two children can return to their domicile in safety, and ensure reparation, including payment of adequate compensation and an apology to the family. The State party should also take measures to ensure that such violations do not recur in the future.

Humanitarian law

PHILIPPINES

COMMAND RESPONSIBILITY – AMPARO

Lt. Col. Rogelio Boac, et al. v. Erlinda T. Cadapan and Concepcion E. Empeño [GR Nos. 184461-62. May 31, 2011]

Erlinda T. Cadapan and Concepcion E. Empeño v. Gen. Hermogenes Esperon, et al. [GR No. 184495. May 31, 2011]

Erlinda T. Cadapan and Concepcion E. Empeño v. Gloria Macapagal-Arroyo, et al. [GR No. 187109. May 31, 2011]

In these consolidated habeas corpus and amparo cases on appeal, the Court ordered military officials to immediately release University of the Philippines students Sherlyn Cadapan and Karen Empeño as well as

farmer Manuel Merino from detention. Relative to international law, the Court discussed the concept of command responsibility and its application insofar as amparo (enforced disappearance) cases are concerned. The issue is whether a military commander may be held liable for the acts of subordinates in an amparo proceeding.

Citing jurisprudence, the Court noted that the evolution of the command responsibility doctrine finds its context in the development of laws of war and armed combats. "Command responsibility," in its simplest terms, means the responsibility of commanders for crimes committed by subordinate members of the armed forces or other persons subject to their control in international wars or domestic conflict. It is a form of criminal complicity. The Hague Conventions of 1907 adopted the doctrine. Then, it was an omission mode of individual criminal liability. As a general rule, the doctrine of command responsibility does not apply in amparo cases to determine criminal liability. However, command responsibility may be loosely applied in amparo cases in order to identify those accountable individuals that have the power to effectively implement whatever processes an amparo court would issue. In such application, the amparo court does not impute criminal responsibility but merely pinpoint the superiors it considers to be in the best position to protect the rights of the aggrieved party.

The Court noted that such identification of the responsible and accountable superiors may well be a preliminary determination of criminal liability which, of course, is still subject to further investigation by the appropriate government agency. Republic Act No. 9851 includes command responsibility as a form of criminal complicity in crimes against international humanitarian law, genocide and other crimes. Thus, the Court ruled that the appellate court erred when it did not specifically name the respondents that it found to be responsible for the abduction and continued detention of Sherlyn, Karen and Merino. It appeared from the records that the responsible and accountable individuals are Lt. Col. Anotado, Lt. Mirabelle, Gen. Palparan, Lt. Col. Boac, Arnel Enriquez and Donald Caigas. Therefore, they should be made to comply with the decision of the appellate court to immediately release the detained persons.

COMMAND RESPONSIBILITY – AMPARO – IMMUNITY FROM SUIT

In the Matter of the Petition for the Writ of the Petition for the Writ of Amparo and Habeas Data in Favor of Noriel H. Rodriguez, Noriel H. Rodriguez v. Gloria Macapagal-Arroyo, et al. [GR No. 191805. November 15, 2011]

In the Matter of the Petition for the Writ of the Petition for the Writ of Amparo and Habeas Data in Favor of Noriel H. Rodriguez, Police Dir. Gen. Jesus A. Versoza v. Noriel H. Rodriguez, et al. [GR No. 193160. November 15, 2011]

Noriel Rodriguez is a member of a peasant organization affiliated with the Kilusang Magbubukid ng Pilipinas (“KMP”). He claimed that the military, under “Oplan Bantay Laya,” made members of KMP targets of extrajudicial killings and enforced disappearances. Rodriguez was abducted and tortured by the military. He was forced to confess membership with the communist group New People’s Army. After his release, he filed a Petition for the Writ of Amparo and Petition for the Writ of Habeas Data with Prayers for Protection Orders, Inspection of Place, and Production of Documents and Personal Properties. Former President Gloria Macapagal-Arroyo is among the accused in the case. The Court of Appeals issued the writs. However, the President was dropped as a party, arguing that she may not be sued during her actual incumbency.

Related to international law, the Court ruled that a non-sitting President does not enjoy immunity from suit, even for acts committed during the latter’s tenure. Courts should look with disfavor upon the presidential privilege of immunity, especially when it impedes the search for truth or impairs the vindication of a right. The Court recapitulated relevant doctrines of command responsibility. It stressed that although originally used for ascertaining criminal complicity, the command responsibility doctrine has also found application in civil cases for human rights abuses. For instance, in the United States, responsibility was used in *Ford v. Garcia* and *Romagoza v. Garcia* – civil actions filed under the Alien Tort Claims Act and the Torture Victim Protection Act. The application of this doctrine has been liberally extended even to cases not criminal in nature. Command responsibility may likewise find application in proceedings seeking the privilege of the writ of amparo. It cited jurisprudence stating that the command responsibility doctrine now constitutes a principle of international

law or customary international law in accordance with the incorporation clause of the Constitution.

The Court ruled that the president, as commander-in-chief of the military, can be held responsible or accountable for extrajudicial killings and enforced disappearances. In order to hold someone liable under the doctrine of command responsibility, the following elements must be present: (a) the existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime as his subordinate; (b) the superior knew or had reason to know that the crime was about to be or had been committed; and (c) the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof. As commander-in-chief of all the armed forces, the President necessarily possesses control over the military that qualifies him as a superior within the purview of the command responsibility doctrine. The President also has the power to effectively command and discipline the military. The Court stated that, on the issue of knowledge, although international tribunals apply a strict standard of knowledge, i.e., actual knowledge, such may nonetheless be established through circumstantial evidence. A more liberal view is adopted in the Philippines, and superiors may be charged with constructive knowledge.

However, the Court ruled that Rodriguez was not able to prove through substantial evidence that former President Arroyo is responsible or accountable for his abduction. He anchors his argument on a general allegation that on the basis of the "Melo Commission" and the "Alston Report," that the President already had knowledge of and information on, and should have known that a climate of enforced disappearances had been perpetrated. The Court reasoned that it does not automatically impute responsibility to former President Arroyo for each and every count of forcible disappearance, although the Alston Report states that there is a policy allowing enforced disappearances and pins the blame on the President. Aside from general averments, there is no piece of evidence that could establish former President Arroyo's responsibility or accountability for Rodriguez's abduction. There was also no clear attempt to show that she should have known about the violation of his right to life, liberty or security, or that she had failed to investigate, punish or prevent it.

**GENEVA CONVENTIONS OF 1949 – APPLICABILITY OF
INTERNATIONAL LAW – ICRC – PRIVILEGES OF PHILIPPINE RED
CROSS – RESERVATION OF RED GREEK CROSS SYMBOL**

An Act Recognizing the Philippine National Red Cross as an Independent, Autonomous, Nongovernmental Organization Auxiliary to the Authorities of the Republic of the Philippines in the Humanitarian Field, to be known as the Philippine Red Cross

The Philippine Red Cross Act of 2009 declares the principle and policy that the Philippines shall at all times act in conformity with the Geneva Conventions of 1949 and their additional protocols, and the Statutes of the International Red Cross and Red Crescent Movement. It should also establish and promote the development of a duly recognized independent and autonomous nongovernmental Red Cross Society, which shall provide humanitarian relief and assistance in times of peace and armed conflict. Remarkably, the law declares that the State shall at all times respect the adherence by the Red Cross Society to the fundamental principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.

The law recognizes the Philippine Red Cross as the “voluntary, independent and autonomous nongovernmental society auxiliary to the authorities of the Republic of the Philippines in the humanitarian field, to assist said authorities in discharging the obligations set forth in the Geneva Conventions and the Statutes of the International Red Cross and Red Crescent Movement.” There should only be one national society of the Red Cross in the Philippines pursuant to the principle of unity. A central body directs the society, and the society should perform the duties inherent upon such status over the entire Philippine territory.

Under the law, the following are the purposes of the Philippine Red Cross:

- (a) To cooperate with public authorities in the prevention of disease, the promotion of health and the mitigation of human suffering by their own programs in such fields as education, health and social welfare, for the benefit of the community;
- (b) To organize, in liaison with public authorities, emergency relief operations and other services to assist the sick and wounded of armed forces in time of armed conflict, in accordance with the

spirit of and under the conditions prescribed by the Geneva Conventions to which the Republic of the Philippines proclaimed its adherence;

- (c) For the purposes mentioned in the preceding paragraphs, to perform all duties devolving upon the Philippine Red Cross as a result of the adherence of the Republic of the Philippines to the said Convention;
- (d) To act in matters of voluntary relief and of communication between the people of the Republic of the Philippines and their Armed Forces, in time of peace and in time of armed conflict, and to act in such matters between similar national societies of other countries and the Governments and people and the Armed Forces of the Republic of the Philippines;
- (e) To establish and maintain a system of national and international relief in time of peace and in time of armed conflict and apply the same in meeting emergency needs caused by typhoons, floods, fires, earthquakes, and other natural or man-made disasters, and to devise and carry on measures for alleviating the suffering caused by such disasters;
- (f) To devise and promote such other services in time of peace and in time of armed conflict as may be found desirable in improving the health, safety and welfare of the Filipino people, and of all peoples in general; and
- (g) To devise such means as to make every citizen and/or resident of the Philippines a member of the Philippine Red Cross.

In order to fully realize its mandate under the Geneva Conventions, the Statutes of the International Red Cross and Red Crescent Movement, and the Philippine Red Cross Act of 2009, the latter gives the Philippine Red Cross certain privileges such as the capacity to enter into agreements with public authorities, owning and holding real and personal properties, and some levels of tax exemption. Membership is open to the entire population in the Philippines regardless of citizenship.

Additionally, the law exclusively reserves the use of the name “Red Cross” and the emblem of the Red Greek Cross on a white ground to the Philippine Red Cross. Medical services of the Armed Forces of the Philippines and such other medical facilities, or other institutions as may be authorized by the Philippine Red Cross, as provided under Article 44 of the Geneva Conventions, may also use the Red Greek Cross as an emblem.

It is unlawful for any other person or entity to use the words “Red Cross” or “Geneva Cross” or to use the emblem of the Red Greek Cross on a white ground or any designation, sign or insignia constituting an imitation thereof for any purpose whatsoever. Likewise, it is unlawful for any person to solicit, collect or receive money, materials or property of any kind by falsely representing himself or herself to be a member, agent or representative of the Philippine Red Cross. The law is also penal in nature since the violation of any of its provisions makes one liable for imprisonment and/or fine.

SRI LANKA

VIOLATIONS – ACCOUNTABILITY – KILLING OF CIVILIANS – LAST STAGES OF CIVIL WAR

Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka (March 2011)

In June 2010, a panel of experts (Marzuki Darusman, Steven Ratner and Yasmin Sooka) was appointed by the UN Secretary General to ‘advise...regarding the modalities, applicable international standards and comparative experience relevant to the accountability process...during the final stages of the armed conflict in Sri Lanka.’ Applying the rules of international humanitarian law and international human rights law, the Panel considered allegations regarding violations of those rules by parties to the conflict.

The Panel issued its report in March 2011 in which it concluded in that from September 2008 to May 2009, several of the allegations regarding violations of IHL and IHRL by both the Government of Sri Lanka (GoSL) and the Liberation Tigers of Tamil Ealam (LTTE) were credible.

The Panel identified the following credible allegations against the LTTE: use of civilians ‘as a buffer’; the killing of civilians who were attempting to escape from LTTE control; the use of military equipment in the proximity of civilians’; forcible recruitment of child soldiers; forced labour; and the killing of civilians through suicide attacks.

The following allegations against the GoSL were concluded to be credible by the Panel: killing of civilians through ‘widespread shelling’; the shelling of hospitals and other humanitarian objects; the ‘denial of humanitarian assistance’; violations of the human rights of victims and

survivors of the conflict; violations of human rights ‘outside the conflict zone.’

Accordingly, the Panel recommended that:

- 1) The Government should carry out investigations into the alleged violations of IHRL and IHL by both parties to the conflict.
- 2) The UN Secretary-General should institute an international mechanism to monitor the investigations by the GoSL, if any, to advise the UN SG through its independent investigations and to ensure that relevant information is preserved.
- 3) Several ‘immediate measures’ were recommended to the GoSL including, provision of death certificates for those dead and missing due to the conflict, provision of psychosocial support to survivors, the resettlement of internally displaced persons (IDPs) and the repeal of Emergency Regulations.
- 4) The GoSL should adopt measures to ensure full accountability for the war including an examination of the causes of the conflict, a formal and public acknowledgement of the role of the GoSL in the conflict and the establishment of a reparations programme.
- 5) The UN Human Rights Council should reconsider its previous resolution (A/HRC/S-11/Rev 2) in light of the Panel report and that the UN SG should review the actions of the UN during and in the aftermath of the war in Sri Lanka.

International Economic Law

INDIA

‘MOST-FAVOURED NATION’ – MEANING AND IMPLICATIONS

Statement on Report of the International Law Commission on the Work of its Sixty-Third Session, Chapters I-V, Sixth Committee, UNGA, 66th Session, October 24, 2011

On the topic of “Most-Favoured Nation Clause,” while commending the work, India felt it would be important to study the different formulations of MFN clauses that could be included in the investment treaties and precise implications of their inclusion.

PHILIPPINES

PROMOTION OF INTERNATIONAL TRADE – UNIVERSAL SYSTEM OF SIMPLIFIED AND HARMONIZED CUSTOMS PROCEDURES – REVISED KYOTO CONVENTION

In 2010, the Senate of the Philippines has concurred with the ratification of the International Convention in the Simplification and Harmonization of Customs Procedures.

TRADE PROMOTION THROUGH CUSTOMS PROCEDURES – INTERNATIONAL CONVENTION IN THE SIMPLIFICATION AND HARMONIZATION OF CUSTOMS PROCEDURES (AS AMENDED)

Philippine Senate Resolution No. 220, February 1, 2010

The Philippine Senate concurred with the ratification of the International Convention in the Simplification and Harmonization of Customs Procedures (Kyoto Convention) which was adopted in Kyoto on May 18, 1973 and entered into force on September 25, 1974. The resolution notes that in the 94th Session of the World Customs Organization last June 1999, some 114 customs administrations including the Philippines, adopted the treaty (as amended), otherwise known as the Revised Kyoto Convention, which entered into force on February 3, 2006. The Revised Kyoto Convention aims, among others, to promote international trade by establishing a universal system of simplified and harmonized customs procedures.

In a revised instrument of accession dated March 16, 2009, the President of the Philippines accepted, acceded to and agreed to the body of the treaty, as amended, and its general and specific annexes. Reservations were registered on the recommended practices in several specific annexes on the arrival of goods in customs territory, importation, processing, temporary admission, and special procedures.

TREATIES AND CONVENTIONS – INTELLECTUAL PROPERTY – PHILIPPINE TRANSFER OF TECHNOLOGY ACT OF 2009 – APPLICABILITY OF INTERNATIONAL LAW IN DOMESTIC LEGISLATION

An Act Providing the Framework and Support System for the Ownership, Management, Use, and Commercialization of Intellectual Property

Generated from Research and Development Funded by Government and for Other Purposes

Signed into law by the President of the Philippines on March 23, 2010, the Philippine Transfer of Technology Act of 2009 mainly aims to promote and facilitate the transfer, dissemination, and effective use, management, and commercialization of intellectual property, technology and knowledge resulting from research and development funded by the government for the benefit of national economy and taxpayers. Relevant to international law, in defining what is a “research and development institute or institution” within the coverage of the law, the Act states that this term does not include those covered by international bilateral or multilateral agreements.

TAXATION – COMPLIANCE WITH INTERNATIONAL STANDARDS – CONFIDENTIALITY UNDER THE RULE

An Act to Allow the Exchange of Information by the Bureau of Internal Revenue of Tax Matters Pursuant to Internationally-Agreed Tax Standards, Amending Sections 6(F), 71 and 270 of the National Internal Revenue Code of 1997, as amended, and for Other Purposes

The Exchange of Information on Tax Matters Act of 2009 was signed into law on March 8, 2010. It declares the policy to promote and pursue a tax environment that contributes in sustaining a favorable international investment climate and instills confidence in the adequacy and capacity of the country’s tax administration to comply with its commitments under existing international conventions or agreements on tax matters.

Pursuant to this, the law requires the government to comply with or commit to the internationally-agreed tax standards required for the exchange of tax information with its tax treaty partners to help combat international tax evasion and avoidance, and to help address tax concerns that affect international trade and investment. Further, it should adopt measures and procedures to enhance cooperation with other countries in the efficient collection of taxes, consistent with the international understanding to ensure the payment of taxes due the respective taxing jurisdictions of the treaty partners. The Commissioner of Internal Revenue was given authority to inquire into bank deposit accounts and related information held by financial institutions. Importantly, for our purposes, the Commissioner may inquire into those relating to a specific taxpayer or taxpayers

subject of a request for the supply of tax information from a foreign tax authority pursuant to an international convention or agreement on tax matters to which the Philippines is a signatory or a party of. The exchange of information shall be done in a secure manner to ensure confidentiality under rules and regulations as may be promulgated by the Secretary of Finance, upon the recommendation of the Commissioner.

The information received by a foreign tax authority pursuant to an international convention or agreement should be treated as absolutely confidential. It should be disclosed only to persons or authorities involved in the assessment or collection of taxes, enforcement or prosecution in respect of taxes, or the determination of appeals in relation to taxes covered by such conventions or agreements. The concerned taxpayer should be duly notified in writing of the request for exchange of information.

INTELLECTUAL PROPERTY – LEGISLATION – INTELLECTUAL PROPERTY CODE – ANTI-CAMCORDING ACT OF 2010

An Act to Prohibit and Penalize the Unauthorized Use, Possession and/or Control of Audiovisual Recording Devices for the Unauthorized Recording of Cinematographic Films and Other Audiovisual Works and/or their Soundtracks in an Exhibition Facility, Providing Penalties therefor and for Other Purposes

The President approved the Anti-Camcording Act of 2010 on May 13, 2010. The law defines and penalizes acts constituting the unauthorized possession, use and/or control of audiovisual recording devices. It refers to treaty law in defining terms. For instance, copyright owner means anyone who has the exclusive rights comprised in a copyright as provided under the Intellectual Property Code of the Philippines and related international treaties, conventions or agreements to which the Republic of the Philippines is a party.

Singapore

FREE TRADE AGREEMENT – SINGAPORE AND AUSTRALIA – AMENDMENTS FOLLOWING SECOND REVIEW

Singapore signed a Free Trade Agreement with Australia on 17 February 2003. It came into force on 28 July 2003. The first review of the Agreement

took place in March 2009 and after a second review, several amendments were made to the agreement to give Singapore investors and companies in greater certainty in their investments and protection of their intellectual property rights.

Jurisdiction

CHINA

IMMUNITY – ACT OF STATE

***Democratic Republic of Congo v. FG Hemisphere Associates LLC* [FACV Nos. 5, 6 & 7 (2010)]**

On June 8, 2011, the Hong Kong Court of Final Appeal made first use of the procedure in Article 158(3) of the Basic Law of Hong Kong Special Administrative Region to refer Basic Law provisions to the Standing Committee of the National People's Congress for interpretation in its decision in *Democratic Republic of Congo v. FG Hemisphere Associates LLC* (the Congo case, Final Appeal Nos. 5, 6 & 7 of 2010 (civil), on appeal from CACV Nos. 373 of 2008 and 43 of 2009).

Facts

In the 1980s, Energoinvest DD (“Energoinvest”), a company headquartered in Sarajevo, in what was then Yugoslavia, was engaged in constructing a hydro-electric facility and high-tension electric transmission lines in the Congo. In order to finance the project, the Congo had entered into credit agreements with Energoinvest. Under these agreements, credit was extended by Energoinvest to the Congo and a Congolese state-owned electricity company, Société Nationale Electricité (“SND’E”). Despite revision and rescheduling, the Congo and SND’E defaulted on their repayment obligations. Each credit agreement contained an International Chamber of Commerce (“ICC”) arbitration clause. In 2001, Energoinvest referred its claims against the Congo and SND’E to arbitration. In the result, each arbitral tribunal made a substantial award of principal and interest in favour of Energoinvest against the Congo and SND’E jointly and severally.

On November 16, 2004 the entire benefit of the principal and interest payable by the Congo and SND’E under the two awards was assigned by

Energoinvest to FG Hemisphere Associates LLC ("FG"). FG is an American company formed under the laws of Delaware and managed by a New York company which invests in emerging markets including by acquiring and recovering distressed debts, particularly those of defaulting states. The benefit of the awards constitute FG's sole asset of any substance. So far FG has managed to recover only US \$3,336,757.75 under the awards. Such recovery was through enforcement proceedings in Belgium, Bermuda and South Africa. In FG's printed case dated November 8, 2010, it is said that as at the 1st of that month, the Congo was indebted to it in the sum of US \$125,924,407.72 by way of principal and interest under the awards as unsatisfied. It is also said that interest on that indebtedness is currently accruing at the rate of approximately US \$30,000.00 per day.

On April 22, 2008, China Railway Group Ltd. and its subsidiaries, had entered into a joint venture agreement with the Congo. Under the joint venture agreement, which would come into effect upon the satisfaction of certain conditions precedent, the Congo would be paid US \$221 million by the CR subsidiaries as part of the entry fees for a mining project in the Congo. Having learned of the April 22, 2008 announcement to the Stock Exchange, FG made an application to the High Court for equitable execution to receive the entry fees towards satisfaction of sums due under the awards. The case then went through procedures of the High Court, the Court of Appeal and Court of Final Appeal.

(2) The Full Text of the Standing Committee's Interpretation

The Standing Committee of the Eleventh National People's Congress examined at its Twenty-second Session the motion regarding the request for examination of The Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress submitted by the Council of Chairmen. The motion of the Council of Chairmen was submitted upon the report by the Court of Final Appeal of the Hong Kong Special Administrative Region requesting the Standing Committee of the National People's Congress to interpret the relevant provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, in accordance with the provisions of Paragraph 3, Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

The Court of Final Appeal of the Hong Kong Special Administrative Region needs to ascertain, in adjudicating a case involving the Democratic Republic of the Congo, whether the Hong Kong Special Administrative Region should apply the rules or policies on state immunity as determined by the Central People's Government. For this purpose, in accordance with the provisions of Paragraph 3, Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Court of Final Appeal of the Hong Kong Special Administrative Region, seeks an interpretation from the Standing Committee of the National People's Congress on the following questions: "(1) whether on the true interpretation of Paragraph 1, Article 13, the Central People's Government has the power to determine the rule or policy of the People's Republic of China on state immunity; (2) if so, whether, on the true interpretation of Paragraph 1, Article 13 and Article 19, the Hong Kong Special Administrative Region (HKSAR), including the courts of the HKSAR, is bound to apply or give effect to the rule or policy on state immunity determined by the Central People's Government under Paragraph 1, Article 13; or on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the Central People's Government under Paragraph 1, Article 13 and to adopt a different rule; (3) whether the determination by the Central People's Government as to the rule or policy on state immunity falls within 'acts of state such as defence and foreign affairs' in the first sentence of Paragraph 3, Article 19 of the Basic Law; and (4) whether, upon the establishment of the HKSAR, the effect of Paragraph 1, Article 13, Article 19 and the status of Hong Kong as a Special Administrative Region of the People's Republic of China upon the common law on state immunity previously in force in Hong Kong (that is, before July 1, 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the Central People's Government pursuant to Paragraph 1, Article 13, was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the Central People's Government, in accordance with Articles 8 and 160 of the Basic Law and the Decision of the Standing Committee of the National People's Congress dated February 23, 1997 made pursuant to Article 160." The above request for interpretation by the Court of Final Appeal of the Hong Kong

Special Administrative Region complies with the provisions of Paragraph 3, Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

In accordance with Subparagraph (4), Article 67 of the Constitution of the People's Republic of China and Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, and after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress, the Standing Committee of the National People's Congress, in relation to the request for interpretation by the Court of Final Appeal of the Hong Kong Special Administrative Region, hereby makes the following interpretation of the provisions of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and related issues:

1. On question (1) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to Subparagraph (9), Article 89 of the Constitution of the People's Republic of China, the State Council as the Central People's Government exercises the function and power to conduct the foreign affairs of the State; as the rules or policies on state immunity fall within diplomatic affairs in the realm of the foreign affairs of the state, the Central People's Government has the power to determine the rules or policies of the People's Republic of China on state immunity to be given effect to uniformly in the territory of the People's Republic of China. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China that "[t]he Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region", the conduct of the foreign affairs relating to the Hong Kong Special Administrative Region falls within the power of the Central People's Government. The Central People's Government has the power to determine the rules or policies on state immunity to be applied in the Hong Kong Special Administrative Region.
2. On question (2) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. Ac-

According to the provisions of Paragraph 1, Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 1 of this Interpretation, the Central People's Government has the power to determine the rules or policies on state immunity to be applied in the Hong Kong Special Administrative Region. According to the provisions of Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 3 of this Interpretation, the courts of the Hong Kong Special Administrative Region have no jurisdiction over the act of the Central People's Government in determining the rules or policies on state immunity. Therefore, when questions of immunity from jurisdiction and immunity from execution of foreign states and their properties arise in the adjudication of cases, the courts of the Hong Kong Special Administrative Region must apply and give effect to the rules or policies on state immunity determined by the Central People's Government as being applicable to the Hong Kong Special Administrative Region. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Hong Kong Special Administrative Region, including the courts of the Hong Kong Special Administrative Region, is under a duty to apply or give effect to the rules or policies on state immunity that the Central People's Government has determined, and must not depart from the abovementioned rules or policies nor adopt a rule that is inconsistent with the abovementioned rules or policies.

3. On question (3) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. State immunity concerns whether the courts of a state have jurisdiction over foreign states and their properties and whether foreign states and their properties enjoy immunity in the courts of a state. It directly relates to the state's foreign relations and international rights and obligations. Therefore, the determination as to the rules or policies on state immunity is an act of state involving foreign affairs. Based on the above, "acts of state such as defence and foreign affairs" as stipulated in Paragraph 3, Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China includes the act of determina-

tion by the Central People's Government as to the rules or policies on state immunity.

4. On question (4) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to the provisions of Articles 8 and 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the laws previously in force in Hong Kong shall be maintained only if there is no contravention of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. In accordance with the provisions of Paragraph 4 of the Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, such of the laws previously in force in Hong Kong which have been adopted as the laws of the Hong Kong Special Administrative Region shall, as from July 1, 1997, be applied subject to such modifications, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law. The Hong Kong Special Administrative Region, as a local administrative region of the People's Republic of China that enjoys a high degree of autonomy and comes directly under the Central People's Government, must give effect to the rules or policies on state immunity as determined by the Central People's Government. The laws previously in force in Hong Kong relating to the rules on state immunity may continue to be applied after July 1, 1997 only if they comply with the above requirements. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, such of the laws previously in force in Hong Kong concerning the rules on state immunity which have been adopted as the laws of the Hong Kong Special Administrative Region according to the Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic

of China, when applied as from July 1, 1997, must be subject to such modifications, adaptations, limitations or exceptions as are necessary so as to be consistent with the rules or policies on state immunity that the Central People's Government has determined.

The Interpretation is hereby announced.

INDIA

EXTRA-TERRITORIALITY – LIMITS ON PARLIAMENT IN APPLYING EXTRA-TERRITORIAL LAWS – INDIAN CONSTITUTION

Gvk Industries Limited And Another v. The Income-Tax Officer And Another [Civil Appeal No. 7796 Of 1997, March 1, 2011]

Facts

The factual matrix of the case related to the applicability of certain provisions of the Indian Income-Tax Act to foreign companies. Appellant, an Indian company, in the present case withheld a certain portion of the amount to be paid to a foreign company as per the provisions of the Income-Tax Act. The Court was dealing with two substantive issues in this case. These were: (1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians? (2) Does the Parliament have the powers to legislate “for” any territory, other than the territory of India or any part of it?

The Court, referring to an earlier case, noted that: The issue under consideration in ECIL was whether Section 9(1) (vii)(b) of the Income-Tax Act (1961) was unconstitutional on the ground that it constitutes a law with respect to objects or provocations outside the territory of India, thereby being ultra vires the powers granted by Clause (1) of Article 245. In drawing the distinction as described above, the decision in ECIL considered two analytically separable, albeit related, issues. They relate to the potential conflict between the fact that, in the international context, the “principle of Sovereignty of States” (i.e., nation-states) would normally be “that the

laws made by one State can have no operation in another State” (i.e., they may not be enforceable), and the prohibition in Clause (2) of Article 245 that laws made by the Parliament may not be invalidated on the ground that they may need to be or are being operated extra-territorially.

Judgment

After examining the scope and application of Article 245 of the Indian Constitution, the Court referred to its application under international law. It noted that “within international law the principles of strict territorial jurisdiction has been relaxed in light of greater interdependencies and acknowledgement of the necessity of taking cognizance and acting upon extra-territorial aspects or causes, by principles such as subjective territorial principle, objective territorial principle, the effects doctrine that the United States uses, active personality principle, protective principle etc.” According to the Court, “To claim the power to legislate with respect to extra-territorial aspects or causes, that have no nexus with the territory for which the national legislature is responsible for, would be to claim dominion over such a foreign territory, and negation of the principle of self-determination of the people who are nationals of such foreign territory, peaceful co-existence of nations, and co-equal sovereignty of nation-states. Such claims have, and invariably lead to, shattering of international peace, and consequently detrimental to the interests, welfare and security of the very nation-state, and its people, that the national legislature is charged with the responsibility for.”

The Court stated that it would derive interpretational support for its conclusion that Parliament might not legislate for territories beyond India from Article 51, a Directive Principle of State Policy, though not enforceable, nevertheless fundamental in the governance of the country. According to the Court to enact legislation with respect to extra-territorial aspects or causes, without any nexus to India would in many measures be an abdication of the responsibility that had been cast upon Parliament. The Court further observed:

International peace and security has been recognised as being vital for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in Article 51. It is one matter to say that because certain extra-territorial aspects or causes have an impact on or

nexus with India, Parliament may enact laws with respect to such aspects or causes. That is clearly a role that has been set forth in the Constitution, and a power that the people of India can claim. How those laws are to be effectuated, and with what degree of force or diplomacy, may very well lie in the domain of pragmatic, and indeed ethical, statecraft that may, though not necessarily always, be left to the discretion of the Executive by Parliament. Nevertheless, that position is very different from claiming that India has the power to interfere in matters that have no nexus with India at all. To claim such powers, would be to make such powers available. Invariably available powers are used, and in this case with a direct impact on the moral force of India, and its interests, welfare and security, by shattering the very concepts that under-gird peace between nations. By recognizing international peace to be *sine qua non* for India's welfare and security, the framers have charged the State, and all of its organs, with responsibility to endeavour to achieve the goals set forth in Article 51. To claim the power to legislate for some other territories, even though aspects or causes arising, occurring or existing there have no connection, to India would be to demolish the very basis on which international peace and security can be premised.

The Court, besides examining Article 245 in greater detail, also outlined the scope and application of Articles 246 and 260. The Court noted that Article 260 provided the source for extra-territorial application of laws. It noted the following on Article 260 :

Nevertheless, the fact even in the sole instance, in the Constitution, where it is conceived that India may exercise full jurisdiction – i.e., executive, legislative and judicial – over a foreign territory, that such a jurisdiction can be exercised only upon an agreement with the foreign government (thereby comporting with international laws and principles such as “comity of nations” and respect for “territorial sovereignty” of other nation-states), and the manner of entering into such agreements, and the manner of effectuating such an agreement has to be in conformity with a law specifically enacted by the Parliament (whereby the control of the people of India over the actions of the Government of India, even extra-territorially is retained), implies that it is only “for” India that Parliament may make laws. The Parliament still remains ours, and exclusively ours. Though the Government of India, pursuant to Article 260, acts on behalf of a foreign territory, there is always the Parliament to make sure that

the Government of India does not act in a manner that is contrary to the interests of, welfare of, well-being of, or the security of India.

On the question of 'territory' the Court sought to link Articles 1 and 2 of the Constitution with Article 245. The Court noted that Article 1 (3) (c) provided that territories that were not part of India could be acquired. Referring also to the advisory opinion in *Re Berubari Union and Exchange of Enclaves* (AIR 1960 SC 845), the Court stated that such acquired territory automatically became a part of India. The Court stated, thus:

It was held in *Berubari*, that the mode of acquisition of such territory, and the specific time when such acquired territory becomes a part of the territory of India, are determined in accordance with international law. It is only upon such acquired territory becoming a part of the territory of India would the Parliament have the power, under Article 2, to admit such acquired territory in the Union or establish a new state. The crucial aspect is that it is only when the foreign territory becomes a part of the territory of India, by acquisition in terms of relevant international laws, is the Parliament empowered to make laws for such a hitherto foreign territory.

The Court further clarified that Parliament "may make laws for the whole or any part of the territory of India" has to be understood as meaning that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional schema it is clear that the Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India.

The Court answered the two questions that it set in the beginning (1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians? According to the Court answer to the above would be in the affirmative. The Court further noted that "However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians." (2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India

or any part of it? According to the Court the answer to the above would be no and it was obvious that Parliament was empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that had an impact on or nexus with India.

Statement on Report of the International Law Commission on the Work of its Sixty-Third Session, Chapters I-Vm Sixth Committee, UNGA 66th Session, October 24, 2011

Commending the work of the Special Rapporteur on the topic “Immunity of State officials from foreign criminal jurisdiction,” India pointed out that the questions concerning the timing of consideration of immunity, its invocation and waiver deserved appreciation in particular.

India agreed in principle with the view of the Special Rapporteur that the immunity of a State official from foreign criminal jurisdiction was a generally accepted norm and that any exceptions to that needed to be proved or established. India also agreed with the Special Rapporteur that the timing for raising immunity in criminal proceedings should be considered either at the initial stage or at the pre-trial stage of the court proceedings.

On the topic of “Most-Favoured Nation Clause,” while commending the work, India felt it would be important to study the different formulations of MFN clauses that could be included in the investment treaties and precise implications of their inclusion.

Regarding the topic “The Obligation to extradite or prosecute” while appreciating the work of the Special Rapporteur on the topic, India noted that under its extradition laws it clearly incorporated the principle of either extradite or prosecute. It also noted that in all its bilateral extradition treaties this principle was included.

Law of the Sea

CHINA

TERRITORIAL BOUNDARY – DISPUTE – DIAOYU ISLAND AND ITS AFFILIATED ISLANDS

On March 31, 2011, Foreign Ministry Spokesperson Jiang Yu made remarks on the issue of Diaoyu Islands regarding social studies textbooks published by seven publishing houses describing the Diaoyu Islands as Japanese territory.

The Diaoyu Island and its affiliated islands have been China's inherent territory since ancient times. China has indisputable sovereignty over them. Any attempt to change that fact by word or deed is futile. China's Foreign Ministry has lodged solemn representations with Japan.

TERRITORIAL BOUNDARY – DISPUTE – NANSHA ISLANDS

On May 10, 2011, Foreign Ministry Spokesperson Jiang Yu made remarks on Vietnam holding so-called "National Assembly Deputies" elections on China's Nansha Islands:

China has indisputable sovereignty over the Nansha Islands and their adjacent waters. Any unilateral action taken by any country on the Nansha Islands is an infringement on China's territorial sovereignty, thus illegal, invalid and not in line with the spirit of the Declaration on the Conduct of Parties in the South China Sea.

On June 9, 2011, Foreign Ministry Spokesperson Hong Lei made remarks on Vietnamese Ships chasing away Chinese fishing boats in the waters off the Nansha Islands:

The Vietnamese remarks do not tally with the facts. As is known to all, China has indisputable sovereignty over the Nansha Islands and the adjacent waters. Chinese fishing boats have been operating in the waters off Wan'an Bank for generations. While conducting normal operation in the above waters on the morning of June 9, the Chinese fishing boats were illegally chased away by armed Vietnamese ships. Amid the chase, the fishing net of one of the Chinese fishing boats tangled with the cables of a Vietnamese oil and gas exploration vessel which was operating illegally in the same waters. Regardless of the safety of the Chinese fishermen,

the Vietnamese vessel dragged the Chinese fishing boat for more than one hour, with the latter's tail facing the front. The Chinese fishermen were forced to take the initiative to cut off the fishing net so as to separate the two vessels. The behaviour of the Vietnamese vessel seriously endangered the Chinese fishermen's lives. It needs to be pointed out that Vietnam grossly infringed China's sovereignty as well as maritime rights and interests by exploring oil and gas illegally in the Wan'an Bank waters and chasing away Chinese fishing boats. China urges Vietnam to stop all actions that violate China's sovereignty, endanger Chinese fishermen's life and property safety, and complicate and expand disputes. China hopes that the Vietnamese side makes due efforts to safeguard peace and stability of the South China Sea.

TERRITORIAL BOUNDARY – DISPUTE – SOUTH CHINA SEA

On March 24, 2011, Foreign Ministry Spokesperson Jiang Yu made remarks at the Regular Press Conference with regard to the report that a Philippine company recently completed oil exploration of disputed waters between China and the Philippines:

China owns indisputable sovereignty over the Nansha Islands and their adjacent waters. Oil and gas exploration activities by any country or company in the waters under China's jurisdiction without permission of the Chinese Government constitutes violation of China's sovereignty, rights and interests, and thus are illegal and invalid. China's position is consistent and clear-cut. We hope the relevant countries will earnestly follow the spirit of the Declaration on the Conduct of Parties in the South China Sea and avoid taking any actions that can complicate the dispute.

TREATIES AND CONVENTIONS – CHINA-VIETNAM AGREEMENT ON BASIC PRINCIPLES GUIDING SETTLEMENT OF SEA ISSUES

On October 11, 2011, China and Vietnam signed an Agreement on basic principles guiding the settlement of sea-related issues in Beijing. The following is the full text of the agreement.

The delegation of the Government of the Socialist Republic of Vietnam and the delegation of the Government of the People's Republic of China agree that the satisfactory settlement of sea-related issues between Vietnam and China is suitable for the basic interests and common aspirations of the two countries' people and helpful for regional peace, stability, co-

operation and development. The two sides agree, on the basis of common perceptions of the Vietnamese and Chinese leaders reached on sea-related issues and “The 1993 Agreement on Basic Principles for the Settlement of Border Territory Issues between the Socialist Republic of Vietnam and the People’s Republic of China,” to solve sea-related issues pursuant to the following principles:

1. Taking the general situation of the two countries’ relationship as the key, originating from a strategic and overall attitude under the guidance of the motto, “Friendly neighbourliness, comprehensive co-operation, long-term stability and looking towards the future” and the spirit of “Good neighbours, good friends, good comrades and good partners,” and persistently pursuing friendly talks and negotiations to properly settle sea-related issues, thus making the East Sea a territory of peace, friendship and co-operation and contributing to the development of the Vietnam-China comprehensive strategic cooperative partnership, as well as to regional peace and stability.
2. In the spirit of fully respecting legal evidence regarding other relevant factors such as history, and at the same time taking into account each other’s reasonable concerns with a constructive attitude and an attempt to expand common perceptions, narrow differences and continuously accelerate negotiations. Based on a legal regime and principles defined by international law, including the 1982 UN Convention on the Law of the Sea, making efforts to seek basic and long-term solutions acceptable to both sides for sea-related disputes.
3. In negotiations on sea-related issues, the two sides seriously abide by agreements and common perceptions reached by their high-ranking leaders and seriously implement the principles and spirit of the “Declaration on the Conduct of Parties in the East Sea.”

For sea-related disputes between Vietnam and China, the two sides shall solve them through friendly talks and negotiations. Disputes relating to other countries shall be settled through negotiations with other concerned parties.
4. In the process of seeking basic and long-term solutions for sea-related issues, in the spirit of mutual respect, equal and mutually beneficial treatment, the two sides actively discuss transitional and temporary measures that do not affect the stances and policies of the two sides, including studies and discussions on cooperation

for mutual development based on principles described in Article 2 of this Agreement.

5. Addressing sea-related issues in succession and progress with easy issues first and difficult issues later. Firmly speeding up the demarcation of territorial waters off the Tonkin Gulf and actively discussing co-operation for mutual development on these waters. Actively boosting co-operation in less sensitive fields, such as sea-related environment protection, sea-related science research, search and rescue at sea, and prevention and minimisation of damage caused by natural disasters. Attempting to enhance mutual trust to facilitate the settlement of more difficult issues.
6. The two sides in turn conduct periodical meetings between heads of government-level border negotiation delegations twice a year and extraordinary meetings if necessary. The two sides agree to set up a hotline mechanism between the government-level delegations to exchange and properly deal with sea-related issues in a timely manner.

JAPAN

TERRITORIAL SEA – CONTIGUOUS ZONE – SENKAKU ISLANDS – INCURSION BY CHINESE VESSELS

Chinese fishery patrol boats navigated near the Senkaku Islands at least nine times on January 27, March 5, March 9-12, July 3, July 30, August 24, September 26-27, and October 24 of 2011. During one of the aforementioned incidents, on August 24, 2011, two Chinese fishery patrol boats intruded into Japanese territorial waters surrounding the Senkaku Islands and were ordered to leave the territorial waters by Japanese coastguard vessels.

It was reported that around 6:16 a.m. on August 24, 2011, two Chinese fishery patrol boats, the Gyosei 201 and Gyosei 31001, were spotted off Kubajima Island, one of the islands of Senkaku. A Japanese coast guard patrol vessel warned the two vessels not to trespass Japanese waters. However, the two boats intruded into Japanese territorial waters for a brief period of time around 6:40 a.m., at which point the Japanese coast guard vessel ordered the boats to leave. The two Chinese vessels sailed out and navigated within the Japanese contiguous zone along the outer edge of the territorial waters and then sailed westward. At approximately 8:15 a.m., the two Chinese boats crossed the geographical median line between China and Japan.

The Japanese Government's position is that "the Senkaku Islands are an inherent part of the territory of Japan in light of historical facts and based upon international law. Indeed, the Senkaku Islands are under the valid control of Japan," and thus, Japan cannot permit "any attempts by China to change the status quo through force or coercion."

A leisure fishing boat from Taiwan, Daihatsu 268, was found by a Japanese coast guard patrol airplane in the region west of Uotsuri Island of the Senkaku Islands on the morning of June 29, 2011 at approximately 6:43 a.m. The Taiwanese boat was sailing inside the Japanese contiguous zone of Uotsuri Island. The Japanese coast guard vessel warned the Taiwanese boat not to intrude into Japanese waters. The boat navigated and stopped several times inside the Japanese contiguous zone, but eventually left the zone at approximately 11:07 a.m. and sailed towards Taiwan.

PHILIPPINES

TERRITORIAL BOUNDARY – BASELINES – REGIME OF ISLANDS

***Professor Merlin M. Magallona, et al. v. Honorable Eduardo Ermita, in his capacity as Executive Secretary, et al.* [GR No. 187167. August 16, 2011]**

This case involves the constitutionality of Republic Act No. 9255 or "An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes." The law adjusted the country's archipelagic baselines and classified the baseline regime of nearby territories.

The Court recalled the antecedents to the passage of the law. In 1961, Republic Act No. 3046 demarcated the maritime baselines of the Philippines as an archipelagic State. This law has followed the framing of the Convention on the Territorial Sea and the Contiguous Zone in 1958 ("UNCLOS I"). In 1968, Republic Act No. 5446 corrected typographical errors and reserved the drawing of baselines around Sabah in North Borneo. In 2009, Republic Act No. 9522 amended Republic Act No. 3046. The Court stated that the change was prompted by the need to make Republic Act No. 3046 compliant with the terms of the United Nations Convention on the Law of the Sea ("UNCLOS III"), which the Philippines ratified on February 27, 1984.

In sum, the Court states that Republic Act No. 9255 “shortened one baseline, optimized the location of some basepoints around the Philippine archipelago and classified adjacent territories, namely, the Kalayaan Island Group (“KIG”) and the Scarborough Shoal, as ‘regimes of islands’ whose islands generate their own applicable maritime zones.” The petitioners assail the law for reducing Philippine maritime territory (including the reach of Philippine sovereign power), and opening the country’s waters landward of the baselines to maritime passage by all vessels and aircrafts. The first one violates the description of the national territory in Article 1 of the Philippine Constitution, embodying the terms of the Treaty of Paris and ancillary treaties. The second one is said to undermine Philippine sovereignty and national security, to contravene the country’s nuclear-free policy, and to damage marine resources, in violation of relevant constitutional provisions. Additionally, it was contended that the treatment of the KIG as “regime of islands” causes the loss of a large maritime area and prejudices the livelihood of subsistence fishermen. The law fails to refer to the Treaty of Paris or Sabah and uses UNCLOS III’s framework of regime of islands to determine the maritime zones of the KIG and the Scarborough Shoal.

The Philippine Government defended the law as the State’s compliance with the terms of UNCLOS III, preserving Philippine territory over the KIG or Scarborough Shoal. Also, it does not undermine the country’s security, environment and economic interests or relinquish Philippine claim over Sabah. That what Spain ceded to the United States under the Treaty of Paris were the islands and all the waters found within the boundaries of the rectangular area drawn under the Treaty of Paris, was questioned as to normative force.

With regard to threshold issues, the Court held, among others, that the petitioners possess locus standi to bring this suit as citizens. On the merits, it found no basis to declare the law unconstitutional. First, the law is not unconstitutional. It is a statutory tool to demarcate the country’s maritime zones and continental shelf under UNCLOS III, and it does not delineate Philippine territory. The Court rationed that UNCLOS III has nothing to do with the acquisition (or loss) of territory since it is a multilateral treaty regulating, among others, sea-use rights over maritime zones (i.e., the territorial waters, contiguous zone, exclusive economic zone), and continental shelves. The law is a baseline law enacted by UNCLOS III States parties to mark-out specific basepoints along their coasts from which baselines are

drawn, either straight or contoured, to serve as geographic starting points to measure the breadth of the maritime zones and continental shelf. For this purpose, Article 48 of UNCLOS III was cited. The law gives notice to the rest of the international community of the scope of the maritime space and submarine areas within which States parties exercise treaty-based rights. The baselines of the Philippines would still have to be drawn in accordance with the law as this is the only way to draw the baselines in conformity with UNCLOS III. It cannot be drawn from the boundaries or other portions of the rectangular area delineated in the Treaty of Paris. The Court states:

UNCLOS III and its ancillary baselines laws play no role in the acquisition, enlargement or, as petitioners claim, diminution of territory. Under traditional international law typology, States acquire (or conversely, lose) territory through occupation, accretion, cession and prescription, not by executing multilateral treaties on the regulations of sea-use rights or enacting statutes to comply with the treaty's terms to delimit maritime zones and continental shelves. Territorial claims to land features are outside UNCLOS III, and are instead governed by the rules on general international law.

Second, the law's use of the framework of regime of islands to determine the maritime zones of the KIG and the Scarborough Shoal is not inconsistent with the Philippine claim of sovereignty over these areas. The Court compared the configuration of the baselines drawn under Republic Act Nos. 3046 and 9255 and the extent of maritime space encompassed by each law, coupled with a reading of the text of the baseline law and its congressional deliberations, vis-à-vis the Philippines' obligations under UNCLOS III. It concluded that a comparison belies an alleged loss of about 15,000 square nautical miles of territorial waters. The configuration shows that the amendatory law merely followed the basepoints mapped by the former one, except for at least nine basepoints that the later one skipped to optimize the location of basepoints, and adjusted the length of one baseline to comply with UNCLOS III's limit on the maximum length of baselines. Under both laws, the KIG and the Scarborough Shoal lie outside of the baselines drawn around the Philippine archipelago. The new baseline law increased the Philippines' total maritime space (covering the internal waters, territorial sea, and exclusive economic zone) by 145,216 square nautical miles.

Fundamentally, Section 2 of the new baseline law commits to text the Philippines' continued claim of sovereignty and jurisdiction over the

KIG and the Scarborough Shoal. That the KIG and the shoal lie outside the Philippine territory, because the baselines do not enclose the KIG, is incorrect. The Court stated that the Philippines would have committed a breach of two provisions of UNCLOS III if it included the KIG. Article 47(3) requires that the drawing of baselines shall not depart to any appreciable extent from the general configuration of the archipelago. Under Article 47(2), the length of the baselines shall not exceed 100 nautical miles, except save for three per cent of the total number of baselines which can reach up to 125 nautical miles. Including the KIG inside would mean appreciably departing from the general configuration of the Philippine archipelago. For the length of one baseline that Republic Act No. 3046 drew exceeded UNCLOS III's limits, there was a need to shorten the baseline, and optimize the location of basepoints using current maps.

Third, the statutory claim over Sabah under Republic Act No. 5446 is retained. Section 2 of Republic Act No. 5446, which Republic Act No. 9522 did not repeal, keeps open the door for drawing the baselines of Sabah.

Fourth, UNCLOS III and Republic Act No. 9522 are not incompatible with the Philippine Constitution's delineation of internal waters. The law does not unconstitutionally "converts" internal waters into archipelagic waters, therefore subjecting these waters to the right of innocent and sea lanes passage under UNCLOS III, including overflight. According to the Court, whether referred to as Philippine "internal waters" under Article I of the Constitution or as "archipelagic waters" under Article 49(1) of UNCLOS III, the Philippines exercises sovereignty over the body of water lying landward of the baselines, including the air space over it and the submarine areas underneath. Article 49 of UNCLOS III was cited as basis for this conclusion.

The following pronouncements of the Court are worth mentioning:

The fact of sovereignty, however, does not preclude the operation of municipal and international law norms subjecting the territorial sea or archipelagic waters to necessary, if not marginal, burdens in the interest of maintaining unimpeded, expeditious international navigation, consistent with the international law principle of freedom of navigation. Thus, domestically, the political branches of the Philippine government, in the competent discharge of their constitutional powers, may pass legislation designating routes within the archipelagic waters to regulate innocent and sea lanes

passage. Indeed, bills drawing nautical highways for sea lanes passage are now pending in Congress.

In the absence of municipal legislation, international law norms, now codified in UNCLOS III, operate to grant innocent passage rights over the territorial sea or archipelagic waters, subject to the treaty's limitations and conditions for their exercise. Significantly, the right of innocent passage is a customary international law, thus automatically incorporated in the corpus of Philippine law. No modern State can validly invoke its sovereignty to absolutely forbid innocent passage that is exercised in accordance with customary international law without risking retaliatory measures from the international community.

The fact that for archipelagic States, their archipelagic waters are subject to both the right of innocent passage and sea lanes passage does not place them in lesser footing vis-à-vis continental coastal States which are subject, in their territorial sea, to the right of innocent passage and the right of transit passage through international straits.

Based on the permissive text of UNCLOS III, the Philippine Congress was not bound to pass the new baseline law. However, the prerogative of choosing this option belongs to Congress, not to the Court. Without an UNCLOS III compliant baselines law, an archipelagic State like the Philippines will find itself devoid of internationally acceptable baselines from where the breadth of its maritime zones and continental shelf is measured. The Court regards this as an open invitation to the seafaring powers to freely enter and exploit the resources in the waters and submarine areas around our archipelago; and it weakens the country's case in any international dispute over Philippine maritime space.

Municipal Law

MALAYSIA

STATUS OF INTERNATIONAL LAW – CEDAW – UDHR – APPLICABILITY OF NORMS OF INTERNATIONAL LAW

***SIS Forum (Malaysia) v. Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2 MLJ 378. January 25, 2010]**

In this case the High Court affirmed a strict dualist approach according to which international law is not part of domestic law until directly incor-

porated by the legislature. This was followed in the 2011 case of *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri Malaysia & Anor* and other applications [2012] 9 MLJ 550.

Facts

This case concerned a challenge to the decision by the Minister of Home Affairs to ban a book published by the Sisters in Islam (SIS) Forum entitled *Muslim Women and the Challenges of Islamic Extremism*. The book was a compilation of essays from an international meeting entitled ‘International Roundtable on Muslim Women and the Challenge of Religious Extremism: Building Bridges between Southeast Asia and the Middle East’. It was published and made available for sale in Malaysia and elsewhere in 2005. The book was in circulation in Malaysia for over two years before it was banned by the Minister by issuing an order under s 7(1) of the Printing Presses and Publications Act 1984 on the grounds of being “prejudicial to public order.” In a subsequent letter communicating the ban it was stated that the book was banned because the Department of Islamic Development (Jabatan Kemajuan Islam Malaysia) had determined that the book has the tendency to confuse Muslims, particularly Muslim women.

An argument made by the applicants was that they had a legitimate expectation that “they will not be discriminated against on the basis of gender or religion, and that their freedom of expression will only be curtailed by the Malaysian government in accordance with international human rights norms.” Reference was made to Malaysia’s ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its affirmation of the Universal Declaration of Human Rights (UDHR).

Judgment

[The High Court invalidated the Minister’s decision, opining that even if the book had a tendency to confuse Muslims, this did not amount to being prejudicial to ‘public order’. It however determined the case solely on the basis of domestic law, and rejected the arguments made on the basis of international law.]

[I]n relation to the applicability of international norms and the approach as exemplified in the Australian case of *[Ministry for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273]*, the position adopted by the

Malaysian courts has been not to directly accept norms of international law unless they are incorporated as part of our municipal law: See *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, for example. I do not believe this position has changed even with the passing of s 4(4) of the Human Rights Commission Act 1999, and its exhortation that ‘regard’ shall be had to the Universal Declaration of Human Rights ‘to the extent that it is not inconsistent with the Federal Constitution’.

PHILIPPINES

INTERNATIONAL STANDARDS OF ROAD SAFETY – UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE PROTOCOLS – MANDATORY USE OF HELMETS

An Act Mandating All Motorcycle Riders to Wear Standard Protective Motorcycle Helmets While Driving and Providing Penalties Therefor

The Motorcycle Helmet Act of 2009 was signed into law on March 23, 2010. It provides the mandatory use of motorcycle helmets by all riders at all times while driving, whether long or short distances, in any type of road and highway. The government’s Department of Trade and Industry should issue guidelines which include specifications on standard protective motorcycle helmets. In its implementation, the law mandates that the department should utilize the United Nations Economic Commission for Europe (UNECE) Protocols with regard to standards applicable to the approval or disapproval of helmets that will be sold in the Philippines.

SINGAPORE

INTERPRETATION OF MUNICIPAL LAW – USE OF INTERNATIONAL LAW – INTERPRETATION ACT

***The Sahand* and other applications** [2011] 2 SLR 1093; [2011] SGHC 27

In this case, the High Court of Singapore had occasion to consider the relationship between international law and municipal law.

Facts

The defendants are wholly-owned subsidiaries of the Islamic Republic of Iran Shipping Lines (“IRISL”) and owners of a number vessels including

the *Sahand*. They took a syndicate from the plaintiff, Société Générale, and The Export-Import Bank of Korea (“KEXIM”) for the construction of the Vessels. The defendants defaulted and the plaintiffs arrested the Vessels in Singapore waters in September 2010. Subsequently, the plaintiffs obtained an order to sell the vessels.

The defendants applied to postpone the sale but this was denied on the grounds that there were no reasons to suppose that the defendants would be able to overcome the difficulties created by the European Union and United Nation sanctions against Iran.

In the course of the application, the court asked the parties as well as the Attorney-General to make written submissions on the relevance and impact of the United Nations Security Council Resolutions 1737, 1747, 1803 and 1929 (“the Iran Resolutions”) and the relevant implementing legislation, viz, the Monetary Authority of Singapore (Sanctions and Freezing of Assets of Persons - Iran) Regulations 2007 (S 104/2007) (“the MAS Regulations”) and the United Nations (Sanctions - Iran) Regulations 2007 (S 105/2007) (“the UN Regulations”). After consideration, the court was concerned that the Vessels, which were arrested and held by the Sheriff in Singapore waters, might be subject to the assets freeze.

Quentin Loh J:

...

23 Given the way which the facts of the case turned out, it is not necessary for me to, and I will not, express a concluded view on all the legal issues on which I invited submissions. But given the general importance of the issues, and in deference to counsel’s extensive submissions which were made at my direction, I will refer to them appropriately in these grounds.

THE SECURITY COUNCIL RESOLUTIONS: OVERVIEW

24 The sanctions under consideration arise from the international community’s concern over the nuclear activities of Iran. On 27 December 2006, the Security Council adopted Resolution 1737. In the preamble of Resolution 1737, the Security Council expressed, among other things, its concern with Iran’s nuclear programme. Against this background, the Security Council acted to impose a number of sanctions against Iran pursuant to Art 41 of ch VII of the UN Charter, which provides that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Security Council also established a committee (“the Sanctions Committee”) to perform certain specified functions relating to the measures taken.

25 The measures taken in Resolution 1737 were expanded in three further resolutions of the Security Council: Resolution 1747, adopted on 24 March 2007; Resolution 1803, adopted on 3 March 2008; and Resolution 1929, adopted on 9 June 2010. For convenience, I will refer to the four resolutions - Resolutions 1737, 1747, 1803 and 1929 - collectively as the “Iran Resolutions”.

26 As a Member of the United Nations, Singapore acted to implement the Iran Resolutions. Of the various measures taken by Singapore, two pieces of subsidiary legislation are relevant for present purposes. The first is the Monetary Authority of Singapore (Sanctions and Freezing of Assets of Persons - Iran) Regulations 2007 (S 104/2007) (“the MAS Regulations”), made by the Managing Director of the Monetary Authority of Singapore (“MAS”) pursuant to s 27A(1)(b) of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed) (“the MAS Act”), which confers upon MAS power to make such regulations concerning financial institutions as MAS considers necessary to discharge or facilitate the discharge of any obligation binding on Singapore by virtue of a decision of the Security Council. The second is the United Nations (Sanctions - Iran) Regulations 2007 (S 105/2007) (“the UN Regulations”) made by the Minister of Law pursuant to s 2(1) of the United Nations Act (Cap 339, 2002 Rev Ed) (“the UN Act”), which empowers the Minister to make regulations to give effect to Art 41 of the UN Charter.

27 The UN Regulations were made on 28 February 2007, and the MAS Regulations on 1 March 2007 - just over two months after the adoption of

Resolution 1737. Both regulations were later updated to reflect the rest of the Iran Resolutions as they were adopted.

28 Other implementing measures were taken under the Immigration Act (Cap 133, 2008 Rev Ed), the Merchant Shipping Act (Cap 179, 1996 Rev Ed), the Regulation of Imports and Exports Act (Cap 272A, 1996 Rev Ed), and the Strategic Goods (Control) Act (Cap 300, 2003 Rev Ed) (see, in this regard, Singapore's reports to the Sanctions Committee of 6 March 2007 (UN Doc No S/AC 50/2007/45), and of 27 August 2010 (UN Doc No S/AC 50/2010/28)).

29 I should also record here the unequivocal submission by Mr Shawn Ho for the Attorney-General that Singapore will strive to give full effect to the Iran Resolutions.

INTERNATIONAL LAW AND DOMESTIC LAW

30 Before considering the relevant implementing legislation, it would be necessary for me to consider three aspects of the relationship, in Singapore, between international law and domestic or municipal law.

31 The first aspect relates to whether international law can, of itself, be an independent source of rights and obligations, and powers and duties, in Singapore. In this regard, the Court of Appeal has recently affirmed that a rule of customary international law is not self-executing in the sense that it cannot become part of domestic law until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court: *Yong Vui Kong v PP* [2010] 3 SLR 489 at [91]. However, the position with regard to treaty obligations, such as Singapore's obligation under the UN Charter to implement the Iran Resolutions, has not been subject to judicial consideration in Singapore. Mr Ho for the Attorney-General submitted, in the context of funds paid into court, that:

[b]oth the court and the executive need to take into consideration and give effect to Singapore's domestic legislation and international obligations. If the funds are required to be frozen under the UNSC Resolutions, the Court may direct that these funds be frozen.

32 The position in the United Kingdom ("UK") is stated by Lord Oliver of Aylmerton in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500 as follows:

[A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

The English position appears to be founded on a constitutional objection against the Crown being able, through its treaty-making prerogative, to affect domestic law without the authority of Parliament: see *The Parlement Belge* (1879) 4 PD 129 at 154-155.

33 While our constitutional arrangements are not identical to those of the UK, the principle underlying the English position is equally applicable here. By virtue of Art 38 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), the legislative power of Singapore is vested in the Legislature. It would be contrary to Art 38 to hold that treaties concluded by the Executive on behalf of Singapore are directly incorporated into Singapore law, because this would, in effect, confer upon the Executive the power to legislate through its power to make treaties. Accordingly, in order for a treaty to be implemented in Singapore law, its provisions must be enacted by the Legislature or by the Executive pursuant to authority delegated by the Legislature. In so far as a treaty is not implemented by primary or subsidiary legislation, it does not create independent rights, obligations, powers, or duties. I must therefore reject Mr Ho's submission, in so far as he meant to say that the court can directly give effect to Singapore's treaty obligations without them being implemented through legislation, as being inconsistent with the Constitution. That said, I should state unequivocally that the courts will always strive to give effect to Singapore's international obligations within the strictures of our Constitution and laws.

34 The second aspect is the use of international law in interpreting primary and subsidiary legislation. The English courts apply a rebuttable

presumption that Parliament intends to legislate consistently with international law and specifically treaty obligations. In Singapore, s 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) permits consideration to be given to extrinsic materials in interpreting a provision of a written law, if such materials are capable of assisting in the ascertainment of the meaning of the provision. This is wide enough to encompass international law in appropriate cases, such as the present, where the MAS Regulations and the UN Regulations were expressly made to give effect to Singapore's international obligations. Further, s 9A(3)(e) specifically permits reference to any treaty or other international agreement that is referred to in the written law. The Singapore position does not appear to be precisely the same as the English position, but for present purposes it is not necessary to examine this further.

35 The third aspect is the consideration by the Executive of Singapore's international obligations when exercising discretionary powers conferred by law. For present purposes, I am content to confine myself to the truism that such consideration is permissible if it is not *ultra vires* the empowering law or the Constitution.

IMPLEMENTING THE ASSETS FREEZE IMPOSED BY THE IRAN RESOLUTIONS

36 I now turn to consider the assets freeze imposed by the Iran Resolutions and how it has been implemented in Singapore.

37 The framework for the assets freeze is found in operative paras 12-15 of Resolution 1737, where the Security Council:

12. Decide[d] that all States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated in the Annex, as well as those of additional persons or entities designated by the Security Council or by the Committee as being engaged in, directly associated with or providing support for Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems, or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means, and that the measures in this paragraph shall cease to apply in respect of such persons or entities if, and at such time as, the Security Council or the Committee removes them from the Annex, and decide[d] further that all States

shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of these persons and entities;

13. Decide[d] that the measures imposed by paragraph 12 above do not apply to funds, other financial assets or economic resources that have been determined by relevant States:

(a) to be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant States to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) to be necessary for extraordinary expenses, provided that such determination has been notified by the relevant States to the Committee and has been approved by the Committee;

(c) to be the subject of a judicial, administrative or arbitral lien or judgement, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgement provided that the lien or judgement was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraphs 10 and 12 above, and has been notified by the relevant States to the Committee;

(d) to be necessary for activities directly related to the items specified in subparagraphs 3 (b) (i) and (ii) and have been notified by the relevant States to the Committee;

14. Decide[d] that States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 12 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this

resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

15. Decide[d] that the measures in paragraph 12 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that:

(a) the contract is not related to any of the prohibited items, materials, equipment, goods, technologies, assistance, training, financial assistance, investment, brokering or services referred to in paragraphs 3, 4 and 6 above;

(b) the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 12 above; and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, ten working days prior to such authorization;

...

[emphasis in original]

Under this scheme, operative para 12 imposes the obligation on Member States to implement the assets freeze, while operative paras 13-15 set out permissible derogations thereto. The “extraordinary expenses” referred to in operative para 13(b) is not defined. The “activities” referred to in operative para 13(d) relate to nuclear activities which are not likely to be relevant in Singapore’s context.

38 Using the framework established by operative paras 12-15, subsequent resolutions expanded the assets freeze to other designated persons: see operative para 4 of Resolution 1747; operative para 7 of Resolution 1803; and operative paras 11, 12 and 19 of Resolution 1929.

THE UN REGULATIONS AND PRIVATE PERSONS

39 The UN Regulations applies to persons in Singapore and citizens of Singapore, with the exception of financial institutions subject to the directions of MAS under s 27A of the MAS Act: see s 2(2) of the UN Act. Its stated object is to assist in giving effect to the Iran Resolutions: reg 2. By virtue of s 5(1) of the UN Act, violations of the UN Regulations are

punishable by a fine not exceeding \$100,000 or to imprisonment for a term not exceeding five years or to both.

40 Operative para 12 of Resolution 1737 appears to be implemented through regs 8 and 9 of the UN Regulations, which provide as follows:

Prohibition against dealing with property of designated person

8. No person in Singapore and no citizen of Singapore outside Singapore shall deal, directly or indirectly, in any property (including funds derived or generated from such property) that is owned or controlled, directly or indirectly, by or on behalf of -

- (a) a designated person;
- (b) any entity or individual who acts on behalf of or under the direction of a designated person; or
- (c) any entity owned or controlled by a designated person.

Prohibition against provision of funds, financial assets and economic resources to or for benefit of designated person, etc.

9. No person in Singapore and no citizen of Singapore outside Singapore shall make available any funds or other financial assets or economic resources, directly or indirectly, to or for the benefit of -

- (a) a designated person;
- (b) any entity or individual who acts on behalf of or under the direction of a designated person; or
- (c) any entity owned or controlled by a designated person.

Under s 2(1) of the Interpretation Act, a “person” to whom the UN Regulations apply would include any company or association or body of persons, corporate or unincorporate.

41 Operative paras 13-15 of Resolution 1737 are not individually implemented in the UN Regulations. However, they can be given effect to via the general power of exemption in reg 14:

Exemption

14. The Minister or a person designated by the Minister may, if he considers that it is appropriate to do so in the circumstances of the case and that it is consistent with the intention of the Security Council of the United Nations under Resolution 1737 (2006), 1747

(2007) or 1803 (2008), by notice in writing exempt, subject to such conditions as he may specify -

- (a) any person or class of persons; or
- (b) any activity or class of activities,

from any or all of the provisions of these Regulations.

Significantly, the exceptions in reg 14 are conditional only upon the Minister's consideration and notice in writing. Therefore, as far as the domestic sphere is concerned, such consideration and notice would be sufficient. Here, I would stress that the determination is to be made by the Minister or the person he designates and not the court. As for the international sphere, Singapore may need to take further action, such as notifying the Sanctions Committee and/or seeking its approval, but that is outside the purview of the court.

THE MAS REGULATIONS AND FINANCIAL INSTITUTIONS

42 The MAS Regulations apply to all financial institutions in Singapore: reg 3. Its stated object is to assist in giving effect to the Iran Resolutions: reg 2. By virtue of s 27A(5)(b) of the MAS Act, any financial institution which contravenes the MAS Regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1m.

43 In the MAS Regulations, operative para 12 is implemented in regs 5(1) and 5(2), which provide as follows:

Assets of certain persons to be frozen

5.—(1) Subject to paragraph (3), any financial institution that, on or after 7th March 2007, has in its possession, custody or control in Singapore, any funds, financial assets or economic resources owned or controlled, directly or indirectly, by any designated person shall -

- (a) immediately freeze all such funds, financial assets or economic resources, as the case may be; and
- (b) ensure that such funds, financial assets or economic resources are not made available, whether directly or indirectly, to or for the benefit of the designated person.

(2) For the purposes of paragraph (1), any funds, financial assets or economic resources that are held by -

- (a) any entity owned or controlled, directly or indirectly, by any designated person; or
- (b) any individual or entity who acts on behalf of or under the direction of any designated person,

shall be treated as funds, financial assets or economic resources owned or controlled by the designated person.

44 Operative para 13 is implemented in reg 5(3) of the MAS Regulations:

- (3) The requirement in paragraph (1) shall not apply to any funds, financial assets or economic resources that have been determined by the Authority -
  - (a) to be necessary -
    - (i) for the payment of basic expenses, including any payment for foodstuff, rent, the discharge of a mortgage, medicine, medical treatment, taxes, insurance premiums and public utility charges; or
    - (ii) exclusively for -
      - (A) the payment of reasonable professional fees and the reimbursement of any expenses in connection with the provision of legal services; or
      - (B) the payment of fees or service charges imposed for the routine holding or maintenance of frozen funds, financial assets or economic resources;
  - (b) to be necessary for the payment of any extraordinary expenses;
  - (c) to be the subject of any judicial, administrative or arbitral lien or judgment, in which case the funds, financial assets or economic resources may be used to satisfy such lien or judgment, provided that the lien or judgment -
    - (i) arose or was entered before 23rd December 2006; and
    - (ii) is not for the benefit of a designated person; or
  - (d) to be necessary for any activity directly related to a non-prohibited item.

Once again, I would note that the exceptions in reg 5(3) are conditional only upon the relevant determination of the MAS, which would be sufficient in the domestic sphere.

45 As for operative paras 14 and 15, I observed that they have not been expressly enacted in the MAS Regulations, which unlike the UN Regulations do not provide for a general power of exemption. I therefore invited submissions on this point. From Mr Ho's submissions, it does not appear that this was a deliberate attempt to disallow the exceptions permitted under those operative paragraphs. Rather, Mr Ho submitted that operative para 14 is merely "clarificatory" in nature and need not be enacted.

46 As for operative para 15, Mr Ho submitted that it had been enacted via reg 14 of the UN Regulations. I confess some difficulty in following this submission, since reg 14 of UN Regulations only empowers the Minister to make exemptions from the provisions of the UN Regulations, and not the provisions of the MAS Regulations. The position under the MAS Regulations can be contrasted to the UK position under the Iran (Financial Sanctions) Order 2007 (SI 2007 No 281) (UK) ("the UK Order"), made pursuant to s 1 of the United Nations Act 1946 (c 45) (UK). Under Art 8(1) of the UK Order, a person may credit a frozen account with interest or earnings, as well as payments due under prior contracts, agreements or obligations. Under Art 10, the UK Treasury is empowered to grant exempting licenses. This power extends to exempting payments under prior contracts in accordance with operative para 15 of Resolution 1737: see the Bank of England's press release of 24 March 2007 entitled "Financial Sanctions: Iran" <http://www.hm-treasury.gov.uk/fin_sanctions_iran.htm> (accessed 5 January 2011). Putting Mr Ho's submissions to one side, I think that the court may be able to give indirect effect to operative para 15 in the present state of the law by applying the common law principle, described by Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 724 and approved by Lord Nicholls of Birkenhead in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at [19], "that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears". While Staughton LJ's dictum was made with reference to statutes enacted by Parliament, I should think that the presumption applies equally to subsidiary legislation such as the MAS Regulations. However,

the presumption cannot be applied inconsistently with the object of the MAS Regulations, which as mentioned is to assist in giving effect to the Iran Resolutions. This would be the case if the presumption is applied in its full force, since operative para 15 does not permit all payments under existing contracts, but only those payments which met the criteria stated therein. The presumption can therefore only apply to the extent that the stated criteria have been met. In this way, indirect effect can be given to operative para 15.

47 In any event, whatever the true position is under the present state of the law - and the facts do not require me to reach a concluded view - it would certainly be helpful, from a judicial perspective as well as for those who have to comply with the law, if operative paras 14 and 15 were expressly enacted.

ASSETS IN THE CUSTODY OF THE COURT OR ITS OFFICERS

48 As mentioned, I was concerned on the facts with applicability of the assets freeze to Vessels, which while they were arrested were assets in the custody of the Sheriff, an officer of the court. More generally, the treatment of assets in the custody of the court and its officers is an important issue given that the court, in the ordinary course of its business, has to deal with all manner of parties and their assets. In this regard, it appears that assets in the custody of the court or its officers are not explicitly covered by the MAS and UN Regulations, which concern assets in the custody of financial institutions and other private entities. Similarly, there is no explicit power for the court to direct the freezing of any assets in its custody. However, if it comes to the attention of the court that assets in its custody are owned or controlled by sanctioned entities, it may well be that those assets would be subject to a *de facto* freeze. This is because: (a) if the assets were ordered to be released, the recipient of such assets, or his agent in Singapore, would have to act to freeze the assets in accordance with the MAS or UN Regulations; and (b) if there was a risk that the recipient or his agent would not comply with the MAS or UN Regulations, the court will pre-empt this possible illegality by not releasing the assets in the first place. Further, in the case of funds paid into court, which are deposited with the Accountant-General's bank accounts, the court can direct the financial institutions administering those accounts to comply with their obligations under the MAS Regulations. In these ways, a *de facto* freeze

could be achieved. Of course, all this depends on the issue of sanctions and the identity of sanctioned entities being brought to the attention of the court. This is perhaps unlikely in ordinary civil litigation, since it is not in the interest of parties to point out to the court that the assets over which they are litigating may be frozen and put out of their reach. In this case, the issue of sanctions was only brought to the fore because they were clearly hampering the defendants' ability to make payment or provide security. Of course, if the authorities come to know that assets in the custody of the court should be frozen, I have no doubt that they will bring this to the attention of the court.

49 On the facts, two preliminary issues arose in relation to the possible application of the assets freeze to the Vessels. First, are the defendants, who own the Vessels, entities which are caught under the assets freeze? Secondly, assuming an affirmative answer to the first issue, how does the assets freeze affect the Vessels? I dealt with these two issues as follows.

ARE THE DEFENDANTS ENTITIES CAUGHT UNDER THE ASSETS FREEZE?

50 The answer to this question depended in large part on the more general question of which Iranian shipping entities are subject to the assets freeze imposed in operative para 12 of Resolution 1737.

51 The first three of the Iran Resolutions did not designate commercial entities as being subject to the assets freeze. This changed with the adoption of Resolution 1929, which amongst other things designated certain Iranian shipping entities as being subject to the assets freeze. This was done in operative para 19 of Resolution 1929, where the Security Council:

19. Decide[d] that the measures specified in paragraphs 12, 13, 14 and 15 of resolution 1737 (2006) shall also apply to the entities of the Islamic Republic of Iran Shipping Lines (IRISL) as specified in Annex III and to any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means, or determined by the Council or the Committee to have assisted them in evading the sanctions of, or in violating the provisions of, resolutions 1737 (2006), 1747 (2007), 1803 (2008) or this resolution[.] [emphasis in original]

Operative para 19 is very precisely worded. It refers to the entities of the IRISL specified in Annex III of Resolution 1929, ie, Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran. It does not

refer to Iranian shipping entities in general, or to IRISL, or to IRISL entities generally. On its face, therefore, operative para 19 only imposes the assets freeze on the three Annex III entities, as well as “any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means”. This was the position taken by the defendants and the Attorney-General.

52 This view is confirmed by a perusal of the consolidated list, published by the Sanctions Committee on 19 August 2010, of the individuals and entities subject to the travel ban and assets freeze as a result of the Iran Resolutions. The three Annex III entities, ie, Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran, are the only shipping entities appearing on the consolidated list, which remains current at the time of these grounds.

53 Furthermore, general confirmation can also be found in operative para 18 of Resolution 1929, where the Security Council:

18. Decide[d] that all States shall prohibit the provision by their nationals or from their territory of bunkering services, such as provision of fuel or supplies, or other servicing of vessels, to Iranian-owned or -contracted vessels, including chartered vessels, if they have information that provides reasonable grounds to believe they are carrying items the supply, sale, transfer, or export of which is prohibited by paragraphs 3, 4 or 7 of resolution 1737 (2006), paragraph 5 of resolution 1747 (2007), paragraph 8 of resolution 1803 (2008) or paragraphs 8 or 9 of this resolution, unless provision of such services is necessary for humanitarian purposes or until such time as the cargo has been inspected, and seized and disposed of if necessary, and underline[d] that this paragraph is not intended to affect legal economic activities[.] [emphasis in original]

Operative para 18, by prohibiting the provision of bunkering services, etc, to Iranian owned or contracted vessels if there are reasonable grounds to believe that they are carrying prohibited items, clearly implies that such services may be provided to Iranian owned or contracted vessels if there are no such grounds. This regime would be redundant if all Iranian owned or contracted vessels were captured under assets freeze. Such a wide approach would also be inconsistent with the last clause of operative para 18, which underlined that the paragraph is not intended to affect “legal economic activities”, which in context must mean legal shipping activities.

54 Mr Kwek submitted that IRISL itself is a designated entity under operative para 19 of Resolution 1737. His reason for taking this position was that it would be a stretch to read operative para 19 as excluding IRISL itself, because there would otherwise be no necessity to specifically state the name of IRISL in operative para 19 and in the heading to Annex III. Further, Mr Kwek referred to European Union legislation implementing the Iran Resolutions as well as the Union's own measures, recently consolidated in Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [2010] OJ L 281/1 ("the EU Regulation"). The relevant provisions are Arts 16(1) and 16(2), which provide in material part as follows:

Article 16

1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VII shall be frozen. Annex VII shall include the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraph 11, 12 or 19 of UNSCR 1929 (2010).
2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered by Annex VII ...

Mr Kwek pointed out that IRISL is listed in Annex VIII.

55 I was unable, with respect, to agree with Mr Kwek's submission. Admittedly, it is not apparent why operative para 19 only designated three IRISL entities and not IRISL itself. But on the other hand it seems clear that this was precisely the intended effect. If IRISL was itself targeted, it would be redundant to specifically mention the three Annex III entities, which appear to be controlled by IRISL. Also, treating IRISL itself as designated by operative para 19 would be inconsistent with the consolidated list issued by the Sanctions Committee which I have just referred to. Mr Kwek's position was also contrary to the EU Regulation, which he relies on - if IRISL needs to be listed in Annex VIII pursuant to Art 16(2), it cannot logically be designated under operative para 19 of Resolution 1929, which is already provided for in Art 16(1).

56 It is therefore clear to me that the only Iranian shipping entities which are designated persons within the meaning of the MAS Regulations are Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran, ie, the three entities specified in Annex III of Resolution 1929. Other IRISL entities, including IRISL itself, are not designated persons. Likewise for Iranian shipping entities in general. The definitions of “designated person” and “UN List” in the MAS Regulations and UN Regulations (see reg 4 of both subsidiary legislation) should be interpreted accordingly.

57 However, the assets freeze does not stop at the designated IRISL entities only (or designated persons in general). As indicated in operative para 19 of Resolution 1929, and reflected in reg 5(2) of the MAS Regulations and regs 8(b) and 8(c) and 9(b) and 9(c) of the UN Regulations, the obligation extends to “any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means”. Whether a person or entity falls under this description would have to be determined on the facts of each case. The exercise would be difficult, not least because the position of the three designated entities within the IRISL group is unclear. But the precisely targeted nature of the UN sanctions requires that the exercise be undertaken in every case.

58 On the facts, and as mentioned, I noticed that the defendants had some links which concerned me. Specifically, I noticed that the defendants were wholly owned IRISL subsidiaries, and that IRISL and IRISL Europe GmbH were listed as guarantors under the Loan Agreement. I also noticed that Mr Mehrzad Soleymanifar, who affirmed the affidavit evidence on behalf of the defendants, was a director of Asia Marine Network Pte Ltd, which had been listed in the EU Regulation as an entity acting on behalf of IRISL in Singapore (see Annex VIII of the EU Regulation). Of course, these links to IRISL do not ipso facto mean that the defendants were linked to the three IRISL entities designated in Annex III of Resolution 1929. But I was sufficiently concerned about the possibility of Singapore’s international obligations being engaged that I directed the parties, as well as the MAS and the Ministry of Foreign Affairs (through responsible officers), to file affidavits to indicate whether any of the defendants are designated persons within the meaning of the MAS Regulations, or owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. I framed my question with

reference to the MAS Regulations because that was the main domestic legislation raised in argument before me during the December hearings. The scope of argument has clearly widened since then, but the affidavits would be relevant for the Iran Resolutions generally, since the definition of designated person in the MAS Regulations is made with reference to the UN List, which is in turn defined with reference to the Iran Resolutions (see reg 4 of the MAS Resolutions).

59 It is clear that the defendants are not designated IRISL entities under operative para 19 and Annex III of Resolution 1929. The main question is whether they are controlled, etc, by any designated person.

60 MAS's affidavit in answer to my questions was made by Ms Denise Wong Jin Hua, a Deputy General Counsel with MAS. The Ministry of Foreign Affairs' affidavit was made through Ms Long Li Shen, Lynette. Her designation was not indicated in her affidavit but the Government's directory, available publicly online, stated her to be the Deputy Director of the Counter Proliferation and International Security Branch of the International Organisations Directorate in the Ministry. Both Ms Wong's and Ms Long's affidavits stated that they have no personal knowledge that the defendants are designated persons on the UN List as defined in the MAS Regulations, or owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. I record the court's appreciation to both officers for attending to the matter so quickly.

61 The defendants affirmed two affidavits in response to my questions. Both were made by Mr Soleymanifar. The first affidavit did not answer my question on the defendants' links to designated persons. The second affidavit, which was expressed to be in response to Ms Wong's affidavit, confirmed that the defendants are not owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. The plaintiff's affidavit was sworn by Mr Kwek. It was founded on the plaintiff's position that IRISL was a designated person, and stated that among other things that the defendants were subsidiaries of IRISL. But, as I have said, it is only the IRISL entities listed in Annex III of Resolution 1929 which are designated by operative para 19 of the same resolution, and not IRISL itself. Links to IRISL itself are, by themselves, neither here nor there.

62 In the circumstances, there was no evidence before the court that the defendants (or any of them) were controlled, etc, by any designated person. The assets freeze imposed by the Iran Resolutions would therefore not apply to assets owned by the defendants, specifically the Vessels in the custody of the Sheriff. Consequently, there can be no question of applying the implementing legislation, whether directly or indirectly, to the defendants.

THE EXTENT OF THE ASSETS FREEZE

63 My finding that the defendants were not entities caught under the assets freeze sufficiently disposed of any further issues in relation to the assets freeze. However, I considered, for completeness, the possible treatment of the Vessels had the defendants been found to be entities caught under the assets freeze.

64 In this regard, it should be recalled that operative para 12 of Resolution 1737, which imposes the assets freeze, is widely worded:

States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated ... or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means ...

65 Mr Ho submitted that the assets freeze does not extend to what he called “property in rem”, such as vessels. I find that difficult to accept. *Prima facie*, a ship, as Mr Kwek acknowledged, would seem to be an economic resource in the ordinary signification of the term - and indeed a most valuable economic resource - that would have to be frozen.

66 However, the true scope of operative para 12 of Resolution 1737 must be determined not just with reference to its wording, which is no doubt important, but also with reference to the relevant practice of States in implementing the obligation imposed by it: see Art 31 (especially Art 31(3) (b)) of the Vienna Convention on the Law of Treaties (23 May 1969), UNTS vol 1155, p 331 (entered into force 27 January 1980); see also Sir Michael C Wood, “The Interpretation of Security Council Resolutions”, (1998) 2 *Max Planck YB UN Law* 73 at pp 94-95.

67 In this regard, it is instructive to refer again to Arts 16(1) and 16(2) of the EU Regulation, which I set out in full below:

Article 16

1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VII shall be frozen. Annex VII shall include the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraph 11, 12 or 19 of UNSCR 1929 (2010).

2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered by Annex VII, who, in accordance with Article 20(1)(b) of Council Decision 2010/413/CFSP, have been identified as:

(a) being engaged in, directly associated with, or providing support for Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems by Iran, including through involvement in the procurement of prohibited goods and technology, or being owned or controlled by such a person, entity or body, including through illicit means, or acting on their behalf or at their direction;

(b) being a natural or legal person, entity or body that has assisted a listed person, entity or body to evade or violate the provisions of this Regulation, Council Decision 2010/413/CFSP or UNSCR 1737 (2006), UNSCR 1747 (2007), UNSCR 1803 (2008) and UNSCR 1929 (2010);

(c) being a senior member of the Islamic Revolutionary Guard Corps or a legal person, entity or body owned or controlled by the Islamic Revolutionary Guard Corps or by one of more of its senior members;

(d) being a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines (IRISL).

It shall be prohibited, pursuant to the obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL, to load and unload cargoes on and from vessels owned or chartered by IRISL or by such entities in ports of Member States. That prohibition shall not prevent the execution of a contract concluded before the entry into force of this Regulation.

The obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL shall not require the impounding or detention of vessels owned by such entities or the cargoes carried by them insofar as such cargoes belong to third parties, nor does it require the detention of the crew contracted by them.

As can be seen, Arts 16(1) and 16(2) of the EU Regulation impose identically-worded obligations to freeze all funds and economic resources owned or controlled by persons designated by the Security Council and the European Union respectively. In this regard, the three IRISL entities designated in Annex III of Resolution 1929 are listed in Annex VII pursuant to Art 16(1); IRISL itself (including all its branches and subsidiaries), as well as 23 other IRISL entities are listed in Annex VIII pursuant to Art 16(2).

68 It will also be noticed that Art 16(2)(d) goes on to provide, among other things, that the obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL shall not require the impounding or detention of vessels owned by such entities. At first sight, this appears to be a substantive exception which pertains only to IRISL entities designated by the European Union pursuant to Art 16(2) (d) and which has nothing to do with Art 16(1). If this is indeed the case, then, Art 16(1), which imposes a freezing obligation identically worded with Art 16(2), and which is not subject to any exception, must be understood as requiring the impoundment or detention of a vessel owned by an entity covered by it. It would further follow that an IRISL entity falling under Art 16(1) could avoid having its vessel impounded or detained by the simple expedient of transferring the vessel to an IRISL entity falling under Art 16(2). This would substantially undermine Art 16(1), and in turn the freezing obligation imposed by the Iran Resolutions. It is extremely doubtful that the EU Regulation, which was evidently enacted in a robust spirit to implement the Iran Resolutions and to expand upon them, intended such a result. This is especially so given that operative para 20 of Resolution 1929 distinctly raised the possibility of transfers of IRISL-owned vessels to other companies to evade the UN sanctions. It is more likely that the proviso in Art 16(2)(d) was not a substantive exception as such, but was inserted for the avoidance of doubt, to reflect the European Union's understanding that the obligation to freeze the economic resources of IRISL entities, whether designated by the Security Council or the European Union, did not extend to the impoundment or detention of vessels owned by them.

69 Support for this proposition can be found in the notice issued on 27 October 2010 by the UK Treasury in relation to the EU Regulation. The relevant part of the notice reads as follows:

Section I

FREEZING OF FUNDS AND ECONOMIC RESOURCES (Chapter IV - Articles 16-20)

7. Articles 16-20 of the Regulation replicate the previous asset freezing measures.

8. Article 16(2)(d) clarifies the effect of the asset freezing measures on the Islamic Republic of Iran Shipping Line (IRISL), and of designated entities owned or controlled by IRISL. It is prohibited to load and unload cargoes on and from vessels owned or chartered by IRISL or by such entities in ports of Member States. However, the asset freeze imposed on IRISL does not require the impounding or detention of vessels owned by such entities or the cargoes carried by them if the cargoes belong to third parties, nor does it require the detention of the crew contracted by them.

[emphasis added in italics]

It is evident that the issue of impounding or detaining vessels was considered by the drafter of the Treasury notice. In the circumstances, it would seem natural for the notice to state that IRISL entities covered under Art 16(1) remain liable to have their vessels impounded or detained, if indeed this was required. However, there is nothing to that effect.

70 In the circumstances, it seems clear, from its implementation efforts, that the European Union did not understand the assets freeze imposed by the Security Council to require the impoundment or detention of vessels owned by designated IRISL entities. This understanding is vital to the interpretation of the scope of the assets freeze imposed by operative para 19 of Resolution 1929 read with operative para 12 of Resolution 1737. This is not just because the membership of the European Union includes two permanent and veto-wielding members of the Security Council, ie, France and the UK, but also because the European Union as a whole has taken a very robust attitude in implementing UN sanctions against Iran, as well as adding further measures of its own. In this regard, I should add that, while the United States would also fall within this description, I could not derive much interpretive assistance from her domestic legislation because,

judging from the United States' report to the Sanctions Committee dated 25 August 2010 (UN Doc No S/AC 50/2010/7), the United States' legislation made pursuant to her own foreign policy had completely anticipated operative para 19 of Resolution 1929. The relevant part of the United States' report reads as follows:

Paragraph 19

Under the authorities of Executive Order 13382 and the International Emergency Economic Powers Act, the United States designated IRISL and 17 other entities controlled by or acting or purporting to act on behalf of IRISL on 10 September 2008. Other IRISL-related entities have been designated subsequently under Executive Order 13382. All three entities included in annex III of resolution 1929 (2010) were so designated on 10 September 2008, prior to the adoption of the resolution. Individuals and entities that are designated under Executive Order 13382 are denied access to the United States financial and commercial systems, and United States persons, including United States citizens, permanent resident aliens, United States companies (wherever located), and any person or company in the United States, are prohibited from engaging in transactions with them. This national authority also allows the United States to implement effectively the provisions set forth in operative paragraph 19 of the resolution. In addition to IRISL itself, the following IRISL-related entities have been designated under Executive Order 13382:

Valfajr 8th Shipping Line Co. SSK
Khazar Sea Shipping Lines
Irinivestship, Ltd.
Iran o Hind Shipping Company
Shipping Computer Services Company
Iran o Misr Shipping Company
IRISL Marine Services & Engineering Company
IRITAL Shipping SRL Company
South Shipping Line Iran
IRISL Multimodal Transport Co.
Oasis Freight Agencies
IRISL Europe GmbH
IRISL Benelux NV
IRISL (UK) Ltd.
IRISL China Shipping Co., Ltd.
Asia Marine Network PTE. Ltd.
CISCO Shipping Co. Ltd.

IRISL (Malta) Limited
Hafiz Darya Shipping (HDS) Lines
Safirán Payan Darya Shipping
Seibow Ltd.
Seibow Logistics Ltd.
Soroush Sarzamin Asatir Ship Management Co.

In addition to these designations, the United States has listed the names and International Maritime Organization (IMO) numbers of more than 90 IRISL-related vessels as a 'blocked vessel'.

In accordance with domestic law and international legal frameworks, the United States cooperates closely with partner States to scrutinize the activities of the Islamic Republic of Iran Shipping Lines and other Iranian shipping-related companies that pass through airports, seaports, and other international borders, and takes steps to prevent transfers of items prohibited by this and by previous Iran-related resolutions, the United States cooperates closely with partner States to scrutinize the activities of IRISL as well as Iranian cargo shipping companies.

As can be seen, the United States had already designated Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran pursuant to Executive Order 13382 and the International Emergency Economic Powers Act on 10 September 2008, with the attendant consequences described in the United States' report, almost two years before Resolution 1929 was adopted.

71 I also noted the parties' submissions that there has been no known case of ships being impounded or detained, in Singapore or elsewhere, pursuant to the Iran Resolutions. This is not what I would expect, some six months after the adoption of Resolution 1929, if there had been an obligation on Member States to impound or detain Iranian shipping, or any part thereof.

72 Therefore, it seemed to me that the assets freeze imposed by operative para 19 of Resolution 1929 read with operative para 12 of Resolution 1737 does not require the impounding or detention of vessels owned or controlled by the designated IRISL entities. Accordingly, even if I was wrong and the defendants were in fact entities caught under the assets freeze, the Vessels, which were the defendants' only assets in Singapore, would not need to be impounded or detained under the Iran Resolutions. Consequently, there can be no question of applying the implementing legislation, whether directly or indirectly, to the Vessels.

THE ADMIRALTY ASPECT

73 I was therefore of the view that the assets freeze imposed by the Iran Resolutions was inapplicable on the facts because: (a) the defendants were not entities caught under the assets freeze; and (b) the assets freeze would not require the detention or impoundment of the Vessels, which were the defendants' only assets in Singapore. In the light of this, the applications fell to be disposed of as normal admiralty matters, albeit with rather exceptional facts. In this, my sole concern was whether the defendants had paid the sums claimed from them or provided sufficient security for the claims, such that the Vessels could be released. It is important to note here that the relevant fund transfers occurred in Europe, outside of Singapore. There was therefore no question of a Singapore court freezing the funds - that was up to the relevant European authorities. To reiterate, my only concern was whether the plaintiff's claims had been met or security provided for them.

74 In this regard, the defendants had made three transfers of funds to Société Générale in Paris:

- (a) €4,754,463.91 on 10 September 2010;
- (b) €49,228.35 on 15 September 2010; and
- (c) €155m on 14 December 2010.

The last transfer was made by Bank Tejarat on behalf of IRISL and the defendants.

75 All three transfers were caught by Art 16(2) of the EU Regulation (or its materially identical predecessor) relating to entities designated by the European Union on top on those designated under the Iran Resolutions. Therefore, the necessary authorisations under Art 18 of the EU Regulation, which related to existing contracts such as the Loan Agreement and its related contracts, had to be obtained before the funds could be applied towards payment. Otherwise, the funds would remain frozen and could not be considered valid payments or tenders of payment at law. They would also not comply with the Loan Agreement, of which cll 16.12.1 and 16.12.2 provided:

16.12.1 The Agent may at any time at the request of any Lender require evidence satisfactory to the Agent that any payment under this Agreement is legally compliant and until such evidence has been provided to the Agent neither the Agent nor the Lenders (each a beneficiary) shall be obliged to accept any such payment but each

beneficiary shall be entitled to place such payment into a suspense account and such payment shall not be an effective discharge of the liabilities of the Borrowers under this Agreement.

16.12.2 For the purposes of this Clause legally compliant means that the payment of any funds under this Agreement and their source (whether direct or indirect) and their receipt and handling is or will be in the opinion of the Agent in all respects in accordance with any law and regulatory requirements of any relevant jurisdiction and [sic], and the receipt of such funds by any beneficiary will not or is not reasonably likely in the opinion of the Agent to impose on any beneficiary any obligation to make a report to any authority or to repay such funds.

[emphasis in original]

76 The relevant evidence in relation to the authorisations is set out by the plaintiff's English solicitors, SNR Denton UK LLP, in their letter of 4 January 2011, which was annexed to Mr Kwek's affidavit of 4 January 2011. Since it was not challenged or contradicted, I accepted its contents as correct for present purposes. Based on the letter, the parties had to obtain the following authorisations:

- (a) Société Générale, a French entity, needed the authorisation of the Direction générale du Trésor for it to receive the funds for its own benefit as well as on behalf of the plaintiff and KEXIM.
- (b) The plaintiff, also a French entity, similarly needed the authorisation of the Direction générale du Trésor for it to receive its share of the funds from Société Générale.
- (c) KEXIM, a Korean entity, also needed the authorisation of the Direction générale du Trésor for it to receive its share of the funds from Société Générale. However, because it was a Korean entity, KEXIM needed to obtain the authorisation of the Central Bank of Korea, a translated version of which was required to be submitted in support of the application for the Direction générale du Trésor's authorisation.

The position in relation to the authorisations was as follows:

- (a) Société Générale made an application on 12 August 2010 to the Direction générale du Trésor and was granted a license on 7 October 2010: (i) to receive funds transferred in payment of the sums due from the defendants under the Loan

Agreement and related contracts; and (ii) to pay to itself the portion due to it out of the funds transferred.

- (b) In respect of the first two transfers of €4,754,463.91 and €49,228.35 made on 10 and 15 September 2010 respectively:
  - (i) The plaintiff applied on 19 October 2010 to the Direction générale du Trésor for authorisation to receive its portion of the funds and on 21 October 2010 such authorisation was granted.
  - (ii) KEXIM applied on 27 October 2010 to the Central Bank of Korea for authorisation to receive its portion of the funds and on 2 November 2010 such authorisation was granted. Further to this, Société Générale as Agent applied on 5 November 2010 to the Direction générale du Trésor for authorisation to pay KEXIM its portion of the funds and on 31 December 2010 such authorisation was granted.
- (c) In respect of the third transfer of €155m made on 14 December 2010:
  - (i) The plaintiff applied on 15 December 2010 to the Direction générale du Trésor for authorisation to receive its portion of the funds and on 27 December 2010 such authorisation was granted.
  - (ii) KEXIM applied on 17 December 2010 to the Central Bank of Korea for authorisation to receive its portion of the funds and on 22 December 2010 such authorisation was granted. Further to this, Société Générale as Agent applied on 3 January 2011 to the Direction générale du Trésor for authorisation to pay KEXIM its portion of the funds. The application was pending when I heard parties on 5 January 2011.

77 In summary, the repayment position when I heard the parties on 5 January 2011 was that Société Générale and the plaintiff had been fully paid the sums owed to them, having received the requisite authorisations from the Direction générale du Trésor, while KEXIM was only awaiting the Direction générale du Trésor's authorisation for it to receive its portion of the €155m received on 14 December 2010.

78 Contrary to what I was told by counsel on 13 December 2010 when I heard the applications to postpone the sale of the Vessels, apart from the initial wait of eight weeks before the 7 October 2010 license was granted to Société Générale, the Direction générale du Trésor only took a matter of two to 12 days to grant the various authorisations to the plaintiff. In the case of KEXIM's first application on 5 November 2010, there was a similar eight-week wait before authorisation was given on 31 December 2010. However, in fairness to counsel, a not insignificant portion of these authorisations came after the hearings in mid-December 2010 and I suspect that those instructing them had not forwarded the relevant facts and details until they were asked for by me.

79 As mentioned, the final obstacle to KEXIM receiving full payment was the Direction générale du Trésor's authorisation in respect of the €155m transfer. Once the authorisation was given, KEXIM would receive payment in full. In this connection, both Mr Tan and Mr Kwek accepted that there was no reason why such authorisation would not be forthcoming in light of the history set out above. Mr Kwek also submitted, quite candidly, that the €155m was sufficient security for the sums claimed by the plaintiff in the interim. According to him, Société Générale would certainly not repatriate the funds back to IRISL or Bank Tejarat no matter what happened.

80 In these rather unique circumstances, I rescinded the orders to sell the Vessels and ordered them to be released.

Sovereignty

INDIA

SOVEREIGN IMMUNITY – RESTRICTIVE AND ABSOLUTE IMMUNITY – APPLICABILITY OF CONSUMER PROTECTION LAWS TO FOREIGN STATE ENTITIES – SECTION 86 OF THE INDIAN CIVIL PROCEDURE CODE

***Ethiopian Airlines v. Ganesh Narain Saboo* [Civil Appeal No. 7034 of 2004, August 9, 2011]**

Facts

The Reactive Dyes consignment of the respondent booked in Bombay on the appellant airlines was not delivered in time at the Dar Es Salaam, Tanzania. According to the respondent on account of this gross delay in arrival of the consignment at the designated destination it deteriorated. The respondent took the matter to the State Dispute Redressal Forum for appropriate relief. The appellant had raised several preliminary objections regarding the maintainability of the complaint which included prior permission to be taken from the Central Government before suing a foreign State entity under Section 86 of the Indian Civil Procedure Code. Further, the appellant contended that a foreign State or its instrumentality can legitimately claim sovereign immunity from being proceeded against under the provisions of the Consumer Protection Act in respect of civil claim. It was further submitted that in India presumption was that sovereign immunity was absolute, but that a foreign sovereign could still be sued in India under certain circumstances with the permission of the Government of India. These circumstances as outlined in the Section 86 of the Indian Civil Procedure Code were: (a) the foreign State itself had instituted a suit in the Court against the person desiring to sue it; or (b) the foreign State traded within the legal limits of the jurisdiction of the Court; or (c) the foreign State was in possession of immovable property situated within those limits and was to be sued with reference to such property or for money charged thereon or; (d) the foreign State had expressly or impliedly waived the privilege of immunity

Judgment

The Court noted the submissions made by the appellant outlining the scheme of section 86 of the Indian Civil Procedure Code (CPC) with regard to the doctrine of immunity and reiterated the legal position that “...no foreign State may be sued in any court in India, except with the consent of the Central Government which has to be certified in writing by the Secretary to that Government.” The Court also referred to the submission made by the appellant based on several earlier decisions of the Court that “...when interpreting Section 86 CPC, it should always be kept in view that the said Section gives effect to the principles of international law.”

Besides Section 86 CPC, the Court also had to examine the applicability of Consumer Protection Act to a foreign State entity and as to whether it would have the overriding effect over the provisions of CPC. The provisions of the Carriage by Air Act, 1972 which was enacted to give effect to Convention for Unification of Rules relating to International Carriage by Air signed at Warsaw in 1929 as amended by the Hague Protocol of 1955 and the Montreal Convention of 1999 were also invoked in the present case.

According to the Court the central question which required adjudication was whether the appellant Ethiopian Airlines was entitled to sovereign immunity in the present case. The other issue related to the nature of adjudication and to determine whether the proceedings before the Consumer forum were suits. The Court pointed out that “Section 86 of the CPC is inapplicable because the legislative intent is deemed to exclude older and more general statute by more recent and special statutes: the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. And under these Acts, Ethiopian Airlines is not entitled to sovereign immunity in a suit like that at issue here. Thus, consent of the Central Government is not required to subject Ethiopian Airlines to suit in an Indian court, let alone in a consumer redressal forum.”

The Court concluded that the Ethiopian Airlines was not entitled to sovereign immunity with respect to a commercial transaction. The Court also noted that this was also consonant with the holdings of other countries courts and with the growing International Law principle of restrictive immunity. It held Airlines accountable for the contractual and commercial activities and obligations that it undertook in India.

Statement on Report of the International Law Commission On The Work of its Sixty-Third Session, Chapters I-V, Sixth Committee, UNGA 66th Session, October 24, 2011.

Commending the work on the topic “Protection of persons in the event of disasters,” India supported in principle the provision under draft article 10 recognizing the duty of the affected State to seek assistance from the other States and relevant international organizations including the NGOs. While noting the draft articles on the subject, India stressed that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the UN Charter while providing the assistance within the territory of the affected State.

Territory

MALAYSIA

LAND EXCHANGE – MALAYSIAN-SINGAPORE LAND SWAP – JOINT DEVELOPMENT BY SOVEREIGN WEALTH FUND

Agreement Between Malaysia and Singapore Concerning Swapping Land Parcels to Finalize the Malaysia-Singapore Points of Agreement of 1990, May 24, 2010

In 2010, Malaysia and Singapore finalized an agreement to swap land parcels in Singapore as part of the Malaysia–Singapore Points of Agreement of 1990. Under this 1990 Agreement, Malaysia was to surrender control of railway land that runs through Singapore and shift its railway terminal from Singapore’s central business district to an area close to the Woodlands Checkpoint (one of two entry ways by land to Malaysia). In exchange, the returned properties at the station and three other land parcels would be jointly developed under a joint venture company between Malaysia’s and Singapore’s respective sovereign wealth funds/companies. This agreement concluded a two decade impasse between the two countries.

Terrorism

CHINA

DOMESTIC MEASURES – DECISION CONCERNING STRENGTHENING ANTI-TERRORISM EFFORTS

On October 29, 2011, the 23rd meeting of the Standing Committee of the 11th National People's Congress adopted the Decision on Issues concerning Strengthening Anti-Terrorism Work. The full text reads as follows:

To strengthen anti-terrorism work, protect the national security and the life and property safety of the people, and maintain the social order, the following decision is made on issues concerning anti-terrorism work:

- I. The state fights against all forms of terrorism, resolutely bans terrorist organizations, and rigorously prevents and severely punishes terrorist activities.
- II. Terrorist activities are activities conducted by violence, destruction, intimidation and other means to create social panic, endanger public security or threaten state organs or international organizations and causing or attempting to cause casualties, grave property loss, damage to public facilities, disruption of social order and other severe social harm, as well as activities to assist the above activities by instigation, financing or any other means. Terrorist organizations are criminal groups formed for conducting terrorist activities. Terrorists are individuals who organize, plan or conduct terrorist activities and the members of terrorist organizations.
- III. The leading office for national anti-terrorism work shall uniformly lead and command anti-terrorism work across this country. Public security organs, national security organs, people's procuratorates, people's courts, justice administrative organs, and other relevant state organs shall perform their respective duties and closely cooperate with each other to ensure the sound performance of anti-terrorism work. The People's Liberation Army, the Chinese People's Armed Police Force and militia organizations shall prevent and combat terrorist activities in accordance with laws, administrative regulations, military regulations and orders of the State Council and the Central Military Commission.
- IV. The list of terrorist organizations and terrorists shall be determined and adjusted by the leading office for national anti-terrorism work

pursuant to Article 2 of this Decision. The list of terrorist organizations and terrorists shall be announced by the public security department of the State Council.

- V. When announcing the list of terrorist organizations and terrorists, the public security department of the State Council shall also decide to freeze the funds or other assets related to the terrorist organizations and terrorists. Financial institutions and designated non-financial institutions shall immediately freeze the funds or other assets related to terrorist organizations and terrorists announced by the public security department of the State Council, and report to the public security department, the national security department and the anti-money laundering administrative department of the State Council in a timely manner according to the relevant provisions.
- VI. The People's Republic of China conducts international anti-terrorism cooperation in accordance with international treaties concluded or acceded to or under the principles of equality and reciprocity.
- VII. The specific measures for determining the list of terrorist organizations and terrorists shall be formulated by the State Council. The specific measures for freezing assets related to terrorist activities shall be formulated by the anti-money laundering administrative department of the State Council jointly with the public security department and the national security department of the State Council.

VIII. This Decision shall come into force on the date of issuance.

INDIA

INTERNATIONAL COOPERATION – MEASURES TAKEN

Statement on Measure To Eliminate International Terrorism, Sixth Committee, UNGA 66th Session, October 3, 2011

India, while thanking the Secretary General of the United Nations for his annual report on "Measures to Eliminate International Terrorism," noted that it gave an account of the measures taken at the national and international levels to combat terrorism and international legal instruments adopted for this purpose. India also pointed out that terrorism is a scourge that undermined peace, democracy and freedom endangering the

very foundations of the continued existence of democratic societies. Referring to the nature of terrorism, it noted that it has become truly globalized with “global logistical supply chains and transnational financial support systems: terrorists use the latest and most sophisticated technologies to their advantage and have command and control mechanisms in place that enable them to operate across continents on a real time basis. All these complexities have posed enormous challenge in countering terrorism.”

India noting that terrorism was a global problem that required global solutions, pointed out that the international community had invested considerable time and resources in developing a normative framework for countering terrorism. Referring to the Declaration on Measures to Eliminate International Terrorism adopted by UNGA Resolution 49/60 that condemned international terrorism in all its forms and manifestations and also to the general framework of 12 international conventions and five protocols on international terrorism, India noted that so far United Nations had adopted a sectoral approach in these international instruments. It also noted that it was party to 13 international conventions and protocols and was fully committed to its obligations under these conventions.

Referring to its national laws, India pointed out that it had taken several steps to strengthen international cooperation in combating terrorism. While referring to its efforts towards strengthening of strategic and operational framework to combat terrorism effectively, India informed that it had also amended and strengthened its domestic legislation entitled Unlawful Activities (Prevention) Act, 1967 integrating the sanctions regime of the Al Quada Sanctions Committee established pursuant to resolutions 1267 and 1989. It further noted that its amended domestic law incorporated provisions dealing with all aspects of terrorism including conspiracy and incitement to terrorism. The enactment, India further noted, criminalized raising of funds for terrorist activities, holding proceeds of terrorism, harbouring of terrorists, unauthorized possession or use of any bomb, dynamite or hazardous explosive substances or other lethal weapons. The Weapons of Mass Destruction (Prevention) Act, 2005, India pointed out, provided detailed measures preventing the falling of weapons of mass destruction or dual use materials in the hands of terrorists and non-state actors.

To enhance international cooperation for the investigation, prosecution and extradition of persons involved in terrorism, organized crime,

money laundering, terrorist financing and illicit drug trafficking, India pointed out that it had concluded forty bilateral treaties on extradition and mutual legal assistance in criminal matters. India also pointed out that in the absence of a bilateral treaty it could also cooperate under the relevant international conventions and on the basis of reciprocity.

According to India though “lot has been accomplished but more remains to be done.” While supporting the work of the United Nations in this field it sought the international community to focus further on strengthening anti terrorism legal framework and to implement the Global Counter Terrorism Strategy in an integrated manner. It strongly urged all States to conclude the consideration of the Comprehensive Convention on International Terrorism (CCIT) by the Sixth Committee.

SRI LANKA

DOMESTIC MEASURES – AMENDMENT OF SUPPRESSION OF FINANCING OF TERRORISM

Convention on the Suppression of Terrorist Financing (Amendment) Act No 41 of 2011

This Amendment primarily gives effect to the obligation of parties to the Convention for the Suppression of the Financing of Terrorism, A/RES/54/109 (1999) to provide for the detection and freeing of funds used for acts of terrorism. The Amendment extends the offence of financing a terrorist act to include the financing of terrorist, terrorists and a terrorist organization.

A police officer not below the rank of an Assistant Superintendent of Police has the authority to issue a freezing order on funds and property. Such an order may be valid for seven days and can be extended for a maximum of two years (three months at a time) by a judge of the High Court. Within seven days of making the order, the police officer is required to confirm the order by application to the High Court. The violation of a freezing order is punishable before the High Court with a fine of up to One Hundred Thousand Rupees or one and a half times the value of the funds dealt with in contravention of the freezing order.

The Amendment introduces definitions for several terms including, ‘finance business’, ‘funds or property’, ‘material support or resources’ and ‘terrorist act.’

DETENTION – EMERGENCY REGULATIONS – ADMISSIBILITY OF CONFESSIONS BY A POLICE OFFICER

Subsequent to the lifting of the state of emergency new regulations were introduced under the Prevention of Terrorism Act of 1979 (as amended). Four sets of regulations were introduced:

- 1) Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Ealam) Regulation No 1 of 1022, Gazette Extraordinary No 1721/2 of August 29th 2011;
- 2) Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organization) Regulation No 2 of 2011, Gazette Extraordinary No 1721/2 of August 29th 2011;
- 3) Prevention of Terrorism (Extension of Application) Regulation No 3 of 2011, Gazette Extraordinary No 1721/3 of August 29th 2011;
- 4) Prevention of Terrorism (Detainees and Remandees) Regulations No 4 of 2011, Gazette Extraordinary No 1721/4 of 29th August 2011.

These regulations provided, among other things for continued detention of persons detained under the former Emergency regulations, to be detained under the Prevention of Terrorism Act where no decision is made to release them and the admissibility of confessions made by an accused to a police officer not below the rank of Assistant Superintendent.

Treaties

PHILIPPINES

RATIFICATION – ROME STATUTE – CUSTOMARY INTERNATIONAL

Bayan Muna v. Alberto Romulo, in his capacity as Executive Secretary, and Blas F. Ople, in his capacity as Secretary of Foreign Affairs [GR No. 159618. February 1, 2011]

On December 28, 2000, the Philippines signed the Rome Statute which, by its terms, is “subject to ratification, acceptance or approval” by the signatory states. As of the filing of this petition before the Supreme Court, the Philippines has not completed the ratification, approval and concurrence process. On May 9, 2003, then Ambassador Francis J. Ricciardone sent

US Embassy Note No. 0470 to the Department of Foreign Affairs (“DFA”) proposing the terms of a non-surrender bilateral agreement between the United States and the Philippines. In Exchange of Notes No. BFO-028-03 dated May 13, 2003, the Philippines, represented by then DFA Secretary Ople, agreed with and accepted the US proposals.

According to the Supreme Court, in essence, the Agreement aims to protect what it refers to and defines as “persons” of the Philippines and the United States from frivolous and harassment suits that might be brought against them in international tribunals. The Court states that it is reflective of the increasing pace of the strategic security and defense partnership between the two countries, and similar agreements were effected by and between the United States and 33 other countries as of May 2, 2003. Ambassador Ricciardone maintains that the exchange of diplomatic notes constitutes a legally binding agreement under international law; and that, under US law, the said agreement does not require the advice and consent of the United States Senate.

The Agreement provides in part that:

1. For purposes of this Agreement, “persons” are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
2. Persons of one Party present in the territory of the other shall not, absent the express consent of the first Party, be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council, or
  - (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to any international tribunal, unless such tribunal has been established by the UN Security Council.
3. When the [US] extradites, surrenders, or otherwise transfers a person of the Philippines to a third country, the [US] will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the Republic of the Philippines [(“GRP”)].
4. When the [GRP] extradites, surrenders, or otherwise transfers a person of the [USA] to a third country, the [GRP] will not agree

to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the [US].

5. This Agreement shall remain in force until one year after the date on which one party notifies the other of its intent to terminate the Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

Firstly, Bayan Muna, a duly registered party-list group established to represent the marginalized sectors of society, imputes grave abuse of discretion in the conclusion and ratification of the Agreement. It prays for the declaration of the Agreement as unconstitutional, or at the very least, without force and effect. Secondly, it argues that the Agreement, which was not submitted to the Philippine Senate for concurrence, contravenes and undermines the Rome Statute and other treaties. On the other hand, the Philippine Government questions Bayan Muna's standing to maintain the suit. Also, the Agreement does not require Senate concurrence for efficacy since it is in the nature of an executive agreement. Most importantly, the agreement is constitutional.

Preliminarily, the Court ruled that Bayan Muna complied with the qualifying conditions or specific requirements exacted under the locus standi rule. What the Court said is noteworthy: "As citizens, their interest in the subject matter of the petition is direct and personal. At the very least, their assertions questioning the Agreement are made of a public right, i.e., to ascertain that the Agreement did not go against established national policies, practices, and obligations bearing on the State's obligation to the community of nations."

On the initial challenge against the form of the Agreement, using the doctrine of incorporation (as expressed in Section 2, Article II of the Philippine Constitution, wherein the Philippines adopts the generally accepted principles of international law and international jurisprudence as part of the law of the land), the Court stated that an exchange of notes falls "into the category of inter-governmental agreements" which is an internationally accepted form of international agreement. The Court quotes the United Nations Treaty Collections' (Treaty Reference Guide) definition of an "exchange of notes." From another perspective, the terms "exchange

of notes” and “executive agreements” are used interchangeably. Exchange of notes is a form of executive agreement that becomes binding through executive action. Executive agreements concluded by the President take the form of exchange of notes or more formal documents (e.g., agreements or protocols). In *The Constitutionality of Trade Agreement Acts*, former United States High Commissioner to the Philippines Francis B. Sayre has observed the difficulty in ascertaining where ordinary correspondence ends and agreements begin. Therefore, the exchange of notes, viewed as the Non-Surrender Agreement itself or an integral instrument of acceptance or consent to be bound, is a recognized mode of concluding a legally binding international written contract between nations.

On the need for Senate concurrence of the exchange of notes to be effective, the Court first quoted the definition of treaty under the Vienna Convention on the Law of Treaties. International agreements may be in the form of treaties (require legislative concurrence after executive ratification) or executive agreements (similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters). The Court reasoned that under international law, there is no difference between treaties and executive agreements in terms of binding effect as long as the negotiating functionaries have remained within their powers. Under Philippine domestic law, neither violates the Constitution. However, one is distinct from another for accepted reasons apart from the concurrence-requirement aspect. According to United States constitutional scholars, said the Court, “a treaty has greater ‘dignity’ than an executive agreement, because its constitutional efficacy is beyond doubt, a treaty having behind it the authority of the President, the Senate, and the people; a ratified treaty, unlike an executive agreement, takes precedence over any prior statutory enactment.”

To this, Bayan Muna asserts that the Agreement partakes the nature of a treaty. Therefore, it must be concurred in by the Philippine Senate. Citing domestic jurisprudence, it mainly argues that the subject of the Agreement does not fall under any of the subject-categories recognized as covered by executive agreements (e.g., commercial/consular relations, most-favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and settlement of claims). Furthermore, an executive agreement through an exchange of notes cannot be used to amend a treaty.

The Court brushed aside the contentions of Bayan Muna on this point. It stated that the categorization of subject matters that may be covered by executive agreements mentioned is not cast in stone since there are no hard and fast rules on the propriety of entering, on a given subject, into a treaty or an executive agreement as an instrument of international relations. The parties' intent and desire to craft an international agreement in the form they wish to further their interests are a primary consideration. Form takes a back seat to effectiveness and the binding effect of the enforcement of a treaty or executive agreement, as the parties in either labor under the *pacta sunt servanda* principle. Moreover, the Court also used the dynamic nature of international law to justify this conclusion. Almost half a century has elapsed since the Court rendered a decision which defined the matters covered by executive agreement. The conduct of foreign affairs has become more complex and the domain of international law wider. One type of executive agreement is a treaty-authorized or a treaty-implementing executive agreement, which cover the same matters subject of the underlying treaty. As a general proposition, the Constitution does not classify any subject (like that involving political issues) to be in the form of, and ratified as, a treaty. What the Constitution merely prescribes is that treaties need the concurrence of the Senate to complete the ratification process.

On whether the Agreement undermines the Rome Statute since it unduly restricts the International Criminal Court's jurisdiction and infringes upon the effectivity of the Statute, the Court held that the Agreement does not contravene or undermine, nor does it differ from, the Statute. On December 28, 2000, the Philippines became a signatory to the Statute. The Agreement and the Statute complement each other. The principle of complementarity underpins the creation of the International Criminal Court ("ICC"). Under Article 1 of the Statute, the jurisdiction of the ICC is to be complementary to national criminal jurisdictions of signatory states. The sixth preambular paragraph of the Statute declares it a duty of every State to exercise criminal jurisdiction over those responsible for international crimes. Thus, primary jurisdiction over the so-called international crimes rests, at the first instance, with the state where the crime was committed, and only secondarily, with the ICC in appropriate situations contemplated under Article 17, paragraph 1 of the Statute. The principle of *ne bis in idem* under Article 20, paragraph 3 of Statute, supports the primacy of the jurisdiction of a state. No person who has been tried by another court

for conduct constituting crimes within its jurisdiction shall be tried by the ICC for the same conduct. There is hence no jurisdictional conflict. The complementary jurisdiction of the ICC comes into play only when the signatory states are unwilling or unable to prosecute. That the Philippines violated its duty required by imperatives of good faith and breached its commitment under the Vienna Convention to refrain from performing any act tending to impair the value of a treaty (e.g., the Rome Statute), by entering into the Agreement, was rejected. Article 98(2) of the Statute contains a proviso that enjoins the ICC from seeking the surrender of an erring person, should the process require the requested state to perform an act that would violate an international agreement that it has entered into.

The Court also rationed the difference between a State-Party and a signatory to a treaty inasmuch as the Philippines is only a signatory to the Rome Statute and not a State-Party for lack of ratification by the Philippine Senate. Under the Vienna Convention on the Law of Treaties, a signatory state is only obliged to refrain from acts which would defeat the object and purpose of a treaty; a State-Party is legally obliged to follow all the provisions of a treaty in good faith. Bayan Muna's argument that State-Parties with non-surrender agreements are prevented from meeting their obligations under the Rome Statute, specifically Articles 27, 86, 89 and 90, must fail. Articles 27, 86, 89 and 90 are only binding upon State-Parties (not signatories).

To note, Bayan Muna has alleged that the Agreement was constituted solely for the purpose of providing individuals or groups with immunity from ICC's jurisdiction. The grant of immunity through non-surrender agreements does not legitimately fall within the scope of Article 98 of the Statute. Because the overall object and purpose of the Rome Statute is to ensure that those responsible for the worst possible crimes are brought to justice, primarily by States, but as a last resort, by the ICC, any agreement that precludes the ICC from exercising the complementary function of acting when a State is unable to or unwilling to do so, defeats the object and purpose of the Statute.

On Bayan Muna's contention that the Philippines, through the Agreement, abdicated its sovereignty by bargaining away its right to seek recourse through the Rome Statute for erring Americans who committed international crimes in the country, the Court reasoned that the Agreement is a form of affirmance and confirmance of the Philippines' criminal jurisdic-

tion. National criminal jurisdiction being primary, it is the responsibility and within Philippine prerogative either to prosecute criminal offenses equally covered by the Statute or to accede to the jurisdiction of the ICC. As to “persons” of the United States whom the Philippines refuses to prosecute, the Philippines would accord discretion to the United States to exercise either its national criminal jurisdiction over the “person” concerned or to give its consent to the referral of the matter to the ICC. The United States must extend the same privilege to the Philippines with respect to “persons” of the Philippines committing high crimes in the United States. One State can agree to waive jurisdiction, to the extent agreed upon, to subjects of another due to recognition of the principle of extraterritorial immunity. According to the Court, almost every time a State enters into an international agreement, it voluntarily sheds off part of its sovereignty, and by their nature, treaties and international agreements actually have a limiting effect on the otherwise encompassing and absolute nature of sovereignty.

On the argument that the Agreement is immoral and at variance with principles of international law, the Court disposed the same by stating that the immoral aspect proceeds from the fact that the Agreement, as Bayan Muna puts it, “leaves criminals immune from responsibility for unimaginable atrocities that deeply shock the conscience of humanity.” It precludes the Philippines from delivering an American criminal to the ICC. The Court called the argument as a kind of recycling of a position discussed above. The Agreement is an assertion of Philippine primary jurisdiction. It is mistaken to state that the Agreement would allow Filipinos and Americans committing high crimes of international concern to escape criminal trial and punishment. Persons who may have committed acts penalized under the Statute could be prosecuted and punished in the Philippines or in the United States; or with the consent of the Philippines or the United States, before the ICC, assuming both States are parties to the Statute. What the Agreement contextually prohibits is the surrender by either party of individuals to international tribunals, e.g., the ICC, without the consent of the other party, which may desire to prosecute the crime under its existing laws.

On the allegation that the Agreement contravenes Republic Act No. 9851 or the “Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity,” the Court ruled that Bayan Muna makes much of Section 17 of the Act as requiring the Philip-

piners to surrender to the proper international tribunal those persons accused of crimes sanctioned under said law if it does not exercise its primary jurisdiction to prosecute such persons. The law provides discretion to the Philippines on whether to surrender or not a person accused of the crimes under Republic Act No. 9851. The provision uses the word “may” which denotes discretion, and cannot be construed as having mandatory effect.

Moreover, assuming that the surrender of a person is mandatorily required when the Philippines does not exercise its primary jurisdiction in cases where “another court or international tribunal is already conducting the investigation or undertaking the prosecution of such crime,” the tenor of the Agreement is not repugnant to the domestic law. The surrender may be made to another State pursuant to the applicable extradition laws and treaties. The Agreement can already be considered a treaty since an executive agreement is a ‘treaty’ within the meaning of that word in international law and constitutes enforceable domestic law. Also, the Philippines and the United States has an extradition treaty. The extradition treaty is application to Republic Act No. 9851 since the Philippines has criminalized under the said law the acts defined in the Rome Statute as war crimes, genocide and other crimes against humanity. The United States has also enacted legislation punishing the high crimes mentioned. Bayan Muna uses a report by Victoria K. Holt and Elisabeth W. Dallas, entitled “On Trial: The US Military and the International Criminal Court,” as its basis. The Court pointed out that the report may not have any weight or value under international law since it is not among the list of sources of international law under Article 38 of the Statute of the International Court of Justice. It cannot even be considered as the “teachings of highly qualified publicists” because a highly qualified publicist is a scholar of public international law and the term usually refers to legal scholars or “academic writers.” The authors of the report were not shown to be highly qualified publicists.

Assuming that the report bears weight, the perceived gaps in the definitions of the crimes are non-existent. The cited report even admits this. Be that as it may, despite the lack of actual domestic legislation, the United States notably follows the doctrine of incorporation. The Court cites United States jurisprudence. For instance, *The Paquete Habana* case already held international law as part of the law of the United States. A person can be tried in the US for an international crime despite the lack of domestic legislation. The Court opines that this rule finds an even stronger hold in the

case of genocide, war crimes and crimes against humanity for they have attained the status of customary international law. Some have stated that these crimes have attained the status of *jus cogens*. *Jus cogens* crimes are related to the concept of universal jurisdiction. Even with the current lack of domestic legislation on the part of the United States, it has the doctrine of incorporation and universal jurisdiction to try these *jus cogens* crimes.

On the other hand, the ICC, as an international tribunal, is not declaratory of customary international law. The first element of customary international law (State practice) does not obtain because the limited number of parties to the Statute casts doubt on whether or not the perceived principles contained in the Statute have attained the status of customary law and should be deemed as obligatory international law. It argues against the urgency of establishing international criminal courts envisioned in the Statute. The Philippines does not even feel bound by the Statute as the treaty has not been transmitted to the Senate for the ratification process. There is no consensus and practice among States that the prosecution of internationally recognized crimes of genocide, etc., should be handled by a particular international criminal court. The Statute itself rejects the concept of universal jurisdiction over the crimes enumerated therein as evidenced by it requiring State consent.

In addition, an act of the executive branch with a foreign government must be afforded great respect. The President's power to enter into executive agreements has long been recognized. Absent any clear contravention of the law, courts should exercise utmost caution in declaring any executive agreement invalid.

CONCLUSION – AGREEMENTS CONCURRED

In 2011, the Senate of the Philippines has concurred with two important agreements that involve technical cooperation between the Philippines and Japan, and the Rome Statute.

CONCLUSION – AGREEMENT ON TECHNICAL COOPERATION – PHILIPPINES AND JAPAN

Philippine Senate Resolution No. 36, March 14, 2011

On April 4, 2006, the Agreement on Technical Cooperation between the Government of the Republic of the Philippines and the Government of

Japan was signed in Tokyo, Japan. It was the States' desire to strengthen relations through the cooperation agreement which involves the development of human resources for economic progress and stability.

According to the Senate resolution, the Agreement provides, among others, (1) for forms of technical cooperation that would be carried out by the Japan International Cooperation Agency (e.g., technical training to Philippine nationals in Japan, dispatching experts to the Philippines, dispatching missions to the Philippines to conduct surveys of economic and social development projects of the Philippine Government); (2) exemption of experts, members of the mission, senior volunteers and their families from certain taxes, fiscal charges, fees and other privileges, exemptions, and benefits as are no less favorable than those accorded to those persons of any third country or international organization performing a similar mission in the Philippines; (3) suitable office and other necessary facilities; provision of local staff and Philippine counterparts to experts, members of the mission, and senior volunteers; (4) that the Philippines is to bear claims against the experts, members of the mission, senior volunteers, and the Japanese Overseas Cooperation Volunteers resulting from or occurring in the course of the performance of duties, except those which arise from gross negligence or wilful misconduct.

United Nations

CHINA

INTERNATIONAL CODE OF CONDUCT FOR INFORMATION SECURITY – REQUEST TO UN SECRETARY-GENERAL TO DISSEMINATE

On September 12, 2011, the permanent representatives of China, Russia, Tajikistan and Uzbekistan to the United Nations submitted a letter jointly to the United Nations Secretary-General Ban Ki-moon, asking him to distribute the International Code of Conduct for Information Security drafted by their countries as a formal document of the 66th session the General Assembly and called upon countries to further discuss the document within the framework of the United Nations so as to reach consensus on the international norms and rules standardizing the behavior of countries concerning information and cyberspace at an early date.

The International Code of Conduct for Information Security raises a series of basic principles of maintaining information and network security which cover the political, military, economic, social, cultural, technical and other aspects. The principles stipulate that countries shall not use such information and telecom technologies as the network to conduct hostile behaviors and acts of aggression or to threaten international peace and security and stress that countries have the rights and obligations to protect their information and cyberspace as well as key information and network infrastructure from threats, interference and sabotage attacks. They advocate establishing a multilateral, transparent and democratic international Internet governance mechanism, fully respecting the rights and freedom of information and cyberspace with the premise of observing laws, helping developing countries develop the information and network technologies and cooperating on fighting cyber crimes.

In recent years, information and network security have drawn wide attention from the international community. There are rising calls to formulate international rules to standardize information and cyberspace behavior. It is understood that the draft submitted by China, Russia, Tajikistan, Uzbekistan and Uzbekistan is the first relatively comprehensive and systematic document in the world proposing the international rules on information and network security.

INDIA

MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY – ROLE OF THE UN

Statement on Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, Sixth Committee, UNGA 66th Session, October 6, 2011

India made remarks on the work of the Special Committee with specific focus on the maintenance of international peace and security; impact and application of sanctions; peaceful settlement of disputes and on the overall thrust of some of the proposals under consideration.

On the issue of impact of application of sanctions in the context of maintenance of international peace and security, India pointed out that Security Council, which mandated sanctions, had the nodal responsibility for finding solution to the problems of third States affected by the Sanc-

tions. It also pointed out that Article 50 of the UN Charter conferred the right on third States confronted with special economic problems, because of Security Council sanctions, to consult the Security Council for solution to those problems. India also reiterated its position along with other NAM countries that the Security Council was obliged to directly focus upon the effects on third States of any sanction under Chapter VII of the UN Charter.

India also noted with happiness the shift of the Security Council from general sanctions against States to targeted sanctions against individuals and entities, especially in the global fight against terrorism. India considered that the proper implementation of targeted financial sanctions, focused arms embargoes and travel sanctions will minimize the economic and social and humanitarian impact in targeted as well as non-targeted States.

India, while thanking the Secretary General for his report A/66/213 of July 29, 2011, entitled "Implementation of the provisions of the UN Charter related to assistance to third States affected by the application of sanctions," submitted pursuant to resolution 65/31 of the UN General Assembly, noted with appreciation the information provided in the report that the shift from comprehensive to targeted sanctions had reduced the incidence of unintended harm to third States and that no official appeals had been received to monitor or evaluate special economic problems since 2003. India also considered that it was important to ensure that sanctions were issued in accordance with the provisions of the UN Charter and did not violate the principles of international law.

India supported, in principle, the proposal for an advisory opinion of the International Court of Justice (ICJ) on the use of force by a state or a group of states without the express sanction of the Security Council. According to India such an advisory opinion would help clarify the legal principles governing the right to use force under the Charter.

India also supported, in principle, the new topic being suggested for a study of the functional relationship between the different organs of the United Nations. Referring to the Outcome of the World Summit, 2005 which reaffirmed the commitment to strengthen the United Nations, India noted that the Summit highlighted the role of the General Assembly as the chief deliberative, policy-making and representative organ of the UN. India also noted that the Summit called for the strengthening of relationship between General Assembly and other principal organs of the UN and had stressed for the early reforms of the Security Council to make it more

broadly representative. India also pointed out that it attached significance to the reforms of the United Nations, including the revitalization of the General Assembly and democratization and expansion of the Security Council in both permanent and non-permanent category of membership. India also reiterated its position on peaceful settlement of disputes which it noted was a “fundamental principle under article 2, paragraph 3 of the UN Charter.” Referring to Article 33 of the Charter it noted that this provision further strengthened this duty and provided the means which the parties to a dispute could choose freely, including arbitration, enquiry, mediation and judicial settlement.

SINGAPORE

CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL – LOCAL SUPPORTING LEGISLATION

On 26 March 1996, Singapore acceded to the Convention on the Safety of United Nations and Associated Personnel without reservation. Local legislative effect was given to the Convention in 2011 by the passage of the United Nations Personnel Act (Cap 339A), which came into force on 31 May 2012.

Speech by Senior Minister of State for Foreign Affairs Zainul Abidin Rasheed on the Second Reading of the United Nations Personnel Bill in Parliament, March 10, 2011

Mr Speaker, Sir, I beg to move, that the Bill be now read a second time.

INTRODUCTION

2 Sir, this Bill, when passed, will give effect to the Convention on the Safety of United Nations and Associated Personnel, as well as the Optional Protocol to the Convention. Drafted in response to the growing number of casualties and fatalities resulting from deliberate attacks on UN workers engaged in peacekeeping operations, the Convention aims to ensure that perpetrators of such attacks are brought to justice. In recognition of the risks that UN and associated personnel also face in non-peacekeeping missions, the Optional Protocol expands the scope of protection of the Convention to UN non-peacekeeping missions such as humanitarian

relief operations, and delivery of political or development assistance in peacebuilding.

3 Although Singapore does not host any UN operations, it is our duty as a responsible member of the international community to put in place measures to protect those who carry out the important work undertaken by the UN in its various missions around the world. Singapore has deployed personnel from the Singapore Armed Forces, Singapore Police Force and Singapore Civil Defence Force to various UN missions. To date, more than 1,500 of our SAF personnel and over 475 SPF officers have participated in UN operations in countries as diverse as Namibia, Cambodia, Nepal and Timor-Leste. [Five photographs shown to depict the SAF/SPF in UN operations and Mercy Relief in humanitarian emergency projects, in collaboration with the UN.]

4 Apart from peacekeeping missions, our uniformed personnel have also participated in various UN humanitarian assistance operations. For instance, about 20 of our SCDF officers have been deployed to assist in UN Disaster Assessment and Coordination (UNDAC) missions and Asia-Pacific Humanitarian Partnership teams to provide emergency humanitarian aid in places like New Zealand following the recent earthquake in Christchurch, Indonesia, Myanmar, Papua New Guinea, Pakistan and the Philippines. SAF personnel were also deployed under the ambit of UNDAC to assist in humanitarian efforts in Pakistan in August last year after monsoon rains triggered the worst floods in more than 80 years of the country's history. They were similarly involved in humanitarian aid operations in the Philippines following Typhoon Lupit in October 2009, and in Thailand in the aftermath of the 2004 tsunami. Apart from our uniformed personnel, Singaporean civilians are also increasingly involved in humanitarian relief work abroad, which may include UN operations. It is therefore in Singapore's interest to ensure that Singaporeans, whether uniformed personnel or civilians, engaged in present and future UN operations are afforded the protection and recourse they deserve.

5 The provisions of our Penal Code by and large address our obligations under the Convention on the Safety of United Nations and Associated Personnel if such offences were to be committed in Singapore. Many of the Convention's provisions and obligations are similar to those found in the Convention on the Prevention and Punishment of Crimes against Interna-

tionally Protected Persons, including Diplomatic Agents which Singapore become party to in 2008. Thus, the UN Personnel Bill, while covering a different group of individuals, is closely modelled on the Internationally Protected Persons Act (IPP Act) that was passed in 2008. The present UN Personnel Bill extends Singapore's jurisdiction to deal with specific crimes against UN workers outside Singapore. The Bill also provides for mutual legal assistance and extradition procedures in relation to individuals accused of offences under the Convention.

...

CONCLUSION

16 As a responsible member of the UN, Singapore's implementation of the United Nations Personnel Bill and adoption of the Optional Protocol would demonstrate our clear commitment to the protection of UN workers. It ensures that perpetrators of crimes against UN and associated personnel will not find a safe haven in Singapore.

17 Sir, I beg to move.

War and Armed Conflict

CHINA

TREATIES AND CONVENTIONS – PROTOCOL TO SOUTHEAST ASIA NUCLEAR-WEAPON-FREE ZONE TREATY

On November 20, 2011, Foreign Ministry Spokesperson Liu Weimin made remarks with regard to the five nuclear states coming to an agreement with ASEAN on the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone Treaty:

The five nuclear states held consultation with ASEAN on issues concerning the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone Treaty in Bali, Indonesia from November 12 to 14. Thanks to their concerted efforts, the parties have reached an agreement on resolving all the outstanding issues of the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone Treaty. According to relevant provisions of the Protocol, the five nuclear states, namely China, the US, Russia, the UK and France should assume the obligation

of not using or threatening to use nuclear weapons against the signatories to the Treaty upon signing and ratifying the Protocol.

China attaches great importance to developing with ASEAN the strategic partnership for peace and prosperity and actively supports the establishment of the Southeast Asia nuclear-weapon-free zone. As early as the 1990s, China stated clearly that it will take the lead in signing the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone Treaty once it is open to signing. China will work together with all relevant parties to put the Protocol into force at an early date.

INDIA

Statement on Report of the International Law Commission on the Work of its Sixty-Third Session, Chapters I-V, Sixth Committee, UNGA 66th Session, October 24, 2011

While commending the work of the Special Rapporteur on the topic “Effects of armed conflicts on treaties,” India supported the general proposition of draft articles that the treaties were not automatically terminated or suspended as a result of an armed conflict. India pointed out that the termination, withdrawal or suspension of a treaty in the event of an armed conflict would be determined in accordance with the law on treaties, taking into account all relevant factors including the nature of the treaty, its subject-matter, object and purpose, and the characteristics of the armed conflict. While referring to the structure and content of the draft articles, India noted that the indicative list of treaties listed out in the annex were different in nature and scope. According to India some were permanent in character such as treaties establishing land and maritime boundaries. These permanent treaties, India pointed out, should be listed out differently from other treaties whose continued existence would depend on the intention of parties. However, India stated that it took note of the statement by the Chairman of the International Law Commission that list of treaties in the annex were neither definitive nor exhaustive.

India also took the view that the scope of the topic should be limited to treaties concluded between States and should not include treaties concluded between international organizations. Further, India pointed out that the definition of ‘armed conflict’ should be limited to armed conflicts between States and should not include internal conflicts, as treaties were

entered into between States, and that internal conflicts did not directly affect treaty relationships.

PHILIPPINES

NUCLEAR WEAPONS – PROTOCOL ADDITIONAL TO THE AGREEMENT BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY FOR THE APPLICATION OF SAFEGUARDS IN CONNECTION WITH THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

Philippine Senate Resolution No. 219

The Protocol Additional to the Agreement Between the Republic of the Philippines and the International Atomic Energy Agency (IAEA) was signed on September 30, 1997 in Vienna. Under the protocol, the IAEA has the right to access specific information regarding the utilization and application of nuclear materials and facilities.

The resolution describes the protocol as an enhanced safeguard system designed to aid the IAEA in detecting nuclear material and to give the agency the ability to provide credible assurance that states parties to the Non-Proliferation Treaty would honor undertakings not to use nuclear material and facilities for nuclear weapons purposes.