LEGAL MATERIALS
STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW

JAPAN

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Extradition; Hijacking

The “Chang Chên Hai Incident”

On 16 December 1989, a Chinese national, CHANH CHÊN HAI, hijacked an airplane of China Airlines during its flight from Beijing via Shanghai to New York. The airplane landed at Fukuoka in Japan, where the hijacker asked for political asylum, arguing that he had participated in a political movement and was involved in the Tienanmen incident in 1989, but the Japanese police detained him. On 23 December the Chinese Government issued a warrant for his arrest and on 22 February 1990 it requested his extradition. In accordance with the Law on Extradition of Criminal Offenders [Tobohanzinin Hikiwatashi Ho], the Tokyo High Public Prosecutor’s Office submitted the case to the Tokyo High Court. Article 2 of the Extradition Law stipulates that a criminal offender shall not be extradited:
(a) when the offence for which extradition is requested is a political crime;
(b) when the purpose of the request is regarded to be the trial or the execution of a sentence concerning a political crime. Government, arguing that X should be regarded as a refugee.

On 3 April 1990, the Chinese Government announced, in a note verbale, that it did not recognize the political purpose of the act and that it would not prosecute the person for other crimes committed before the hijacking.

On 20 April 1990, the Tokyo High Court rendered its decision according to which the requested person could be extradited, considering that the hijacking could not be regarded as a political crime within the meaning of the Extradition Law and that the person would not be punished for other offences than the hijacking.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, 159–182.
On 23 April 1990, the Minister of Justice ordered the extradition and on 28 April the person was handed over to officials of the Chinese Government.

MALAYSIA

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Legislation

Malaysia-Thailand Joint Authority Act 1990 (Act 440 (1990))

The Act is divided into thirteen parts. The preamble states that the Act was made pursuant to the memorandum of understanding of 21 February 1979 between Malaysia and Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-bed in a Defined Area of the Continental Shelf of the Two Countries, and also pursuant to the Agreement of 30 May 1990 on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority.

Part II deals with the Malaysia-Thailand Joint Authority.

Section 3(2) states that '[t]he Joint Authority shall have a juristic personality and shall be domiciled in Malaysia and the Kingdom of Thailand'. Section 3(3) further states that '[t]he Joint Authority shall be a body corporate' and could (among others) 'enter into contracts, and may acquire, purchase, take, hold and enjoy any movable and immovable property of every description, excluding land'. Section 3(5) states that '[t]he Joint Authority is vested with and assumes the exclusive rights, powers, liberties and privileges of exploring and exploiting the natural resources, in particular petroleum, in the Joint Development Area'.

Concurrent with the conferral of privileges in Section 5 is the provision in Section 7 that the Joint Authority 'shall pay to each of the Governments royalty in the amount of five per centum of gross production of petroleum, in the manner and at such times as may be prescribed by regulations'.

Section 13 of the Act states that liability of the Joint Authority shall not be construed as creating any responsibility whatsoever for the Government of Malaysia or the Government of Thailand.

1. The Joint Development Area is defined in Part III, Section 6 of the Act and is demarcated by straight lines joining certain 'coordinated points' stated in Section 6 and forming relevant part of British Admiralty Chart – No. 2414, Edition 1967 a reproduction of which was attached in the Schedule.
Section 14(1) concerns the general prohibition on exploration or exploitation of natural resources without contract. Indeed the prohibition on exploration or exploitation of natural resources without contract is reinforced by Part XII of the Act and specifically by Section 20 which states, amongst others, that any person contravening Section 14(1) ‘shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both...’ Section 14(2) states prior approval is required from the Governments (of Malaysia and Thailand) before a contract is entered into between the Joint Authority and other persons (granting them the right) to explore and exploit natural resources, including petroleum in the Joint Development area under Section 14(1).

Section 14(3) [in conjunction with Section 14(4)] states in detail the terms and conditions to be adhered to in the contract referred to in Subsection (1) and ‘for the purpose of the exploration and exploitation of petroleum’ in ‘a production sharing contract’. One interesting provision of Section 14(3) is Section 14(3)(h) which, in effect, states that any disputes or differences arising out of or in connection with the contract shall be settled by an arbitration panel of three arbitrators – one arbitrator appointed by each party and the third to be jointly appointed by both parties. If parties are unable to concur on a third arbitrator within a specified period, the third arbitrator shall be appointed upon application to the United Nations Commission of International Trade Law (UNCITRAL). The arbitration proceedings shall be conducted according to the UNCITRAL Rules.

Part X of the Act deals with ‘Jurisdiction’. Section 18(2)(a) stipulates the area where the exercise of civil and criminal jurisdiction of Malaysia shall extend and Section 18(2)(b) stipulates the area where Thailand exercises civil and criminal jurisdiction. Section 18(4) expresses the contingent nature of the consent by Malaysia to Thailand’s exercise of jurisdiction under Section 18(2)(b). It is contingent upon a ‘reciprocal recognition’ by Thailand or Malaysia exercising ‘its rights’ (civil and criminal jurisdiction) under Section 18(2)(a).

Section 18(5) states the ‘[a]ny jurisdiction that may be vested in Malaysia or the Kingdom of Thailand under this section in respect of the Joint Development Area shall only be over matters and to the extent provided for in any law relating to the continental shelf and as recognized under international law’.

It is submitted in this context that the relevant – conventional as well as customary – international law would be, among others, the pertinent provisions of the Geneva Convention on the Continental Shelf 1958 and

2. 499 UNTS 311.
possibly also the relevant provisions of the 1982 Law of the Sea Convention. The provisions of both Article 8 of the Geneva Convention and Article 77 of the 1982 Convention, in effect, state that the coastal state exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. Part II of the Act, and especially Section 5, puts into effect these sovereign rights of Malaysia and Thailand in exercising their authority over their joint continental shelf areas.

No date was specified in Act 440 (1990) as to its entry into force. Date of Royal Assent was 22 August 1990 and the date of publication in the Gazette was 30 August 1990.

Judicial decisions

Application of the doctrine of sovereign immunity in Malaysia

**Commonwealth of Australia v. Midford (Malaysia) Sdn. Bhd. & Anor.**

In this case officers from the Australian Customs Service [the appellant] with the assistance of an officer of the Royal Customs, Malaysia had seized certain documents and files and copies of documents belonging to the respondent [Midford (Malaysia)]. The respondents applied for an order that the documents seized be returned to them and that the Commonwealth of Australia and their servants/agents be restrained from conducting any further illegal searches or seizures on the premises of the respondents. The High Court made the orders, holding that the Commonwealth of Australia was not entitled to pure absolute immunity from the jurisdiction of the Malaysian courts.

3. It is realized that though both Malaysia and Thailand have signed the 1982 Law of the Sea Convention, it has (as of 1991) not yet come into force. Inasmuch as at least some provisions of the 1982 Law of Sea Convention can be said to 'reflect' customary international law since it 'crystallises' established or emergent state practice it could, at the theoretical level in any case, provide a useful frame of reference in analysing issues dealing with the international law of the sea.

4. Since Act 440 (1990) is partly based on the Memorandum of Understanding between Malaysia and Thailand concerning the continental shelf of the two countries in the Gulf of Thailand, it can be said that Act 440 (1990) puts into effect the joint exercise of authority over the resources of the continental shelf of Malaysia and Thailand with the establishment of the Joint Authority and the joint development areas.

5. [1990] 1 MLJ 475 et seq.
The Commonwealth of Australia made an application to the Supreme Court that it be granted leave to appear in this action under protest, without prejudice to an application by it to set aside the original application [by the respondents] and all its subsequent proceedings on the grounds, inter alia, that the Commonwealth of Australia is not subject to the jurisdiction of the Court by reason of the fact that it is a foreign state recognized by the Supreme Head of State of Malaysia.

The issues that arose in this case, as far as the doctrine and practice of the international law of sovereign immunity as it applies in Malaysia is concerned, can be classified as follows:

1. Whether the ‘absolute’ or ‘restrictive’ version of sovereign immunity applies in Malaysia.

2. If the restrictive theory of sovereign immunity applies in Malaysia, whether the actions of the two Australian customs officers (acting on behalf of the Commonwealth of Australia) can be considered as falling within the ambit of *acta jure gestionis* (act of a trading or commercial nature);

3. Whether Section 3 of the Civil Law Act 1956 requires that Malaysian courts follow ‘the law of England [as of] 7 April 1956 [the date in which the Civil Law Act came into force in Malaysia]’ or whether the Malaysian courts should take into consideration developments of the common law in England since 1956 concerning the subject of sovereign immunity; and

4. The legal status and conclusiveness of the certificate issued by *Wisma Putra* [the Ministry of Foreign Affairs] stating that the *Yang di P ertuan Agong* has recognized the Commonwealth of Australia as a foreign state.

On the first issue the Supreme Court, in a judgment delivered by GUNN CHIT TUAN SCJ, held that the restrictive doctrine of sovereign immunity as developed in the common law after 1956 should apply in Malaysia.

However, his Lordship held on the second issue that ‘the actions of the two Australian customs officers considered in the whole context of this case could not be classified as “trading and commercial”... and... that the exercise of functions of the customs arm of the Australian Government in the peculiar circumstances of this case could not be classed as *acta jure gestionis*, i.e., commercial in accordance with accepted international standards.’

Therefore, the court held that the action of the Commonwealth of

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Australia in this case is acta jure imperii.\(^7\) Since even under the restrictive theory of sovereign immunity acts in exercise of sovereign authority of a foreign state (as opposed to acts of a commercial nature) are entitled to full sovereign immunity, it follows that the appeal by the Commonwealth of Australia succeeds.

The third issue of whether Section 3 of the Civil Law Act 1956 would 'pre-empt' the Malaysian courts from taking into account the developments in the common law in the area of sovereign immunity was categorically answered in the negative by the C.:\(^8\):

'Section 3 of the Civil Law Act 1956 only requires any court in West Malaysia to apply the common law and rules of equity as administered in England on 7 April 1956. That does not mean that the common law and rules of equity as applies in this country must remain static and not develop.'\(^8\)

Indeed the finding by his Lordship that the Malaysian courts can and should\(^9\) take into consideration post-1956 developments in the common law in England (and hence decisions of English courts indicating a 'swing' towards the restrictive theory of sovereign immunity) would appear to be the main rationale for the decision of the court that the restrictive theory of sovereign immunity applies in Malaysia. It is quite evident that in 1990 the general international law practice of many nations, including that of the United Kingdom, leans towards the application of the doctrine of restrictive sovereign immunity.\(^10\) Even counsel for the appellant acknowledged this fact when he cited in detail cases such as The 'I Congress Del Partido' which subscribed to the restrictive theory. However, the contention of appellant's counsel was that because of Section 3 of the Civil Law Act

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7. *Acta jure imperii* is explained, in the judgment, by his Lordship as 'state like activities of foreign nations or individual sovereigns' (*ibid* p. 477) and 'acts in exercise of the sovereign authority' (at p. 478). His Lordship did not further elaborate the holding that the two customs officers' action is *acta jure imperii* but would appear to have accepted the submission of counsel for the appellant that the 'discharge of functions by the customs arm of a particular government is well-recognized incident of the governance of states in general' (p. 477).


9. Indeed at one point the court specifically states that 'when the judgment in [subscribing to the restrictive theory of sovereign immunity] was delivered by the Privy Council in November 1975 it was *binding authority* in so far as our courts are concerned' (*ibid* at p. 480). (Emphasis added.)

10. See for example, the following excerpt from the judgment: 'Since the Second World War, several European countries such as Italy, Belgium, Austria, West Germany and also the United States of America broke with the absolute immunity and accepted the restrictive theory. In recent times, the beginning to the end of the absolute doctrine of immunity in the United Kingdom law came in November 1975 when the Privy Council gave judgment in *The Philippines Admiral...* (*ibid* at p. 478, footnote omitted).
1956, the law applicable in Malaysia (in 1990) was 'the law in England on sovereign immunity' as declared in cases such as the *The Parlement Belge*.

The court rejected this submission.

The court also rejected, in the context of this case, the contention of appellant's counsel that for the Malaysian courts to apply the restrictive sovereign immunity an Act of Parliament [to that effect] would have to be passed. However, it was stated that 'the common law position of this country (applying the restrictive view of sovereign immunity) could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country'.

The final issue that could be extrapolated is the conclusiveness of the certificate of recognition (of the Commonwealth of Australia by the *Yang di Pertuan Agong*) provided by the Malaysian Ministry of Foreign Affairs (*Wisma Putra*). Appellant's counsel contended that the 'certificate would be... conclusive evidence of the status of the Commonwealth of Australia as a sovereign state' – a point which was not in dispute. The 'issue' – if there is one – and as contended by respondent's counsel – is whether the certificate by *Wisma Putra* stating that the Commonwealth of Australia is a sovereign state would necessarily entail that all its (the Commonwealth of Australia and its agents) actions would always be covered by sovereign immunity. In other words, once *Wisma Putra* has issued the certificate of recognition of a foreign country, should the Malaysian courts automatically disqualify themselves from delving any further into the (arguably additional) issue of sovereign immunity notwithstanding the fact that the certificate does not specifically state that the foreign country recognized by Malaysia is entitled to sovereign immunity?

The issue was addressed by respondent's counsel who contended that whenever the Ministry of Foreign Affairs leaves the question of immunity open, it falls upon the courts of the country to decide whether a foreign state has any sovereign immunity and the type and extent of such immunity. The Supreme Court appeared to have rejected the submission of respondent's counsel that the mere production of a certificate of recognition of a foreign country – without the certificate specially mentioning that *all* its actions and that of its agents are entitled to full immunity – would not automatically disqualify the courts from considering such issues.

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11. *Ibid* at p. 476 (footnote omitted). The 'Parlement Belge' (1880) 5PD 197 ruled that the doctrine of absolute sovereign immunity applies in Britain.
In applying the doctrine of sovereign immunity, our courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang di Pertuan Agung has recognized the Commonwealth of Australia as a foreign state.¹³

It is submitted, with respect, that there is considerable merit in the submission of respondent's counsel relating to the role of the courts in determining whether to accord sovereign immunity or not—and to what extent—for acts attributable to a foreign country recognized by Malaysia. This would be so especially when the certificate issued by Wisma Putra does not specifically state whether the recognized foreign country(ies) are entitled to sovereign immunity.

Note: Midford and Village Holding cases compared

The Midford case can be instructively compared with relevant portions of the decision in Village Holdings Sdn. Bhd. v. Her Majesty The Queen in Right of Canada,¹⁴ a Supreme Court decision of 1987, to discern whether a different approach was taken—and a different decision arrived at—by the nation's highest court on the issue of sovereign immunity in Malaysia. Needless to say there are different facts and backgrounds to each case. Certain aspects of both cases, however, generally deal with the doctrine of sovereign immunity in Malaysia and more particularly on the issue of whether the absolute or restrictive doctrine of sovereign immunity applies in Malaysia.

To briefly outline the main factual differences between the two cases: Midford deals with the actions and status (vis-à-vis the doctrine of sovereign immunity) of two custom officers who are (agents) of the Commonwealth of Australia whereas Village Holdings deals with (as far as the issue of sovereign immunity is concerned) the transactions relating to the land building of the Canadian High Commission in Kuala Lumpur the property of which 'was owned by Her Majesty the Queen herself'.¹⁵

Yet despite this and other factual differences the court in both cases dealt with the issue of whether by virtue of Section 3 of the Civil Law Act 1956, Malaysia subscribes to the absolute or restrictive doctrine of sov-

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¹³ Ibid at p. 480.
¹⁴ [1988] 2 MLJ 656 et seq.
¹⁵ Ibid at p. 656. Also compare the statement made by SHANKAR J, in Village Holdings that 'there is an important distinction to be drawn between the immunity accorded to a sovereign and a sovereign's diplomats'.
ereign immunity. Secondly, both courts considered whether the actions on which sovereign immunity was claimed in each case were 'governmental acts' or 'commercial acts' without letting the determination on this point 'prejudge' the paramount issue of the applicability of the absolute or restrictive doctrine of sovereign immunity.

On the primary issue of whether the absolute or restrictive doctrine of sovereign immunity applies in Malaysia the Village Holdings court and Midford court could hardly have held more different views. In Village Holdings, SHANKAR (OCJ) categorically ruled that:

'So far as a foreign sovereign is concerned, I hold that Section 3 of our Civil Law Act 1956 leaves no room for any doubt that we in Malaysia continue to adhere to a pure absolute doctrine of state immunity when it comes to the question of impleading a foreign sovereign who declines to submit'.

The decision of the court in Midford was also very clear:

'The restrictive doctrine of sovereign immunity as developed in the common law after 1956 should apply in Malaysia'.

It also follows that the approach of the court in the two cases in discerning the impact of Section 3 of the Civil Law Act as it relates to the application of the absolute or restrictive doctrine of sovereign immunity in Malaysia is also different. Whereas the Village Holdings court, taking a restrictive and literal view of Section 3 of the Civil Law Act in ruling that '[t]he common law of England on 7 April 1956 was that the immunity from legal process accorded to a foreign sovereign was absolute', the Midford court takes an

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16. See, for example, Midford case, loc. cit. pp.476, 479 par tim and especially at p. 480. In Village Holdings this issue was considered in loc. cit. pp. 661–663 par tim and especially at 664.
17. In the Village Holdings case, since a prior determination was made by SHANKAR J, that the absolute doctrine of sovereign immunity applies in Malaysia, the 'secondary' question becomes moot. His Lordship, however, strongly indicates that even if such an issue was considered, he would have held that 'a one-off transaction where a sovereign mission is disposing mission property which it holds in another jurisdiction...was a governmental transaction and that even if the restrictive theory of immunity applied the defendant [Her Majesty the Queen in Right of Canada] would have been immune anyway'.
19. Midford case loc. cit. p.475. See also p. 484.
expanded and liberal view when it states that (the application of Section 3 of the Civil Law Act in Malaysia) "does not mean that the common law and rules of equity as applied in this country must remain static and do not develop." 21

Hence, in conclusion, one could state that on the subject of sovereign immunity divergent viewpoints were enunciated by the Supreme Court of Malaysia in the Village Holdings and Midford cases which were respectively decided in 1987 and 1990. With respect, it is submitted, that in the Midford case the court takes a more realistic approach reflecting modern practices and trends on the subject of sovereign immunity. It is further submitted that the later (in time) decision of Midford should supersede any inconsistent pronouncements on the subject of sovereign immunity in earlier cases and that in the absence of any amending legislation Malaysian courts should follow the exposition of the law concerning sovereign immunity as laid down by the Supreme Court in the Midford case.

THE PHILIPPINES

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Decisions of courts and tribunals

State Immunity

U.S. v. Guinto (G.R. Nos. 76607, 79470, 80018, 80258, 26 February 1990, 182 SCRA 644, J. CRUZ)

In this consolidation of four related suits, the Supreme Court ruled that the doctrine of state immunity is not absolute. The doctrine does not provide that a state may not be sued under any circumstances; on the contrary, the rule says that the state may not be sued without its consent, which clearly imports that it may be sued if it consents.

As a general rule, the consent of the state to be sued may be manifested expressly or implied. Express consent may be embodied in a general law or a special law. Implied consent to be sued is given when the state enters into a contract or commences litigation against a private property.

However, these rules are subject to qualifications. Firstly, express consent is effected only by the will of the legislature through a duly enacted statute. In the case of the United States of America, the customary rule of international law on state immunity is expressed with more specificity in the R.P. [Republic of the Philippines] – U.S. Bases Treaty. Secondly, not all contracts entered into by the government will operate as a waiver of its non-suability. The court ruled that:

'... distinction must be made between...sovereign and proprietary acts. The rule is that state immunity now extends only to sovereign and governmental acts and not to private, commercial and proprietary acts.'

No plea of immunity, therefore, can be availed of by U.S. Air Force officers in relation to the bidding of contracts for the operation of barbershops inside the U.S. Armed Forces nor are the facilities demandable as a matter of right by American servicemen. The same ruling holds true for club restaurants in John Hay Air Station. However, the plea of state immunity is available to U.S. Air Force officials in a suit related with the exercise of their official functions. The court ruled that a buy-bust operation undertaken by U.S. servicemen charged with the prevention of the distribution, possession and use of prohibited drugs is an exercise of their official functions. Hence,

'for discharging their duties as agents of the United States, the petitioners cannot be directly impleaded for acts imputable to their principal which has not given its consent to be sued.'

Immunity of international organizations

In two cases consolidated for decision, the Supreme Court's Second Division ruled that the grant of diplomatic immunity by the executive branch is conclusive upon the judicial branch. The court relied on a previous case where it stated the following:

'[A] categorical recognition made by the Executive Branch of the Government that certain entities should enjoy immunities accorded to international organizations is a determination that has been held to be a political question conclusive upon the courts in order not to embarrass a political department of Government. [World Health Organization and Dr. Leonce Versuyft v. Hon. Benjamin Aquino, et al., L–35131, 29 November 1972, 48 SCRA 242].

The raison d'être for these immunities according to the court is "the assurance of unimpeded performance of their functions by the agencies concerned."
The two cases are discussed further below.

1. *International Catholic Migration Commission (ICMC) v. Pura Calleja* (G.R. No. 85750, 28 September 1990)

   The Philippine Supreme Court ruled that the grant of diplomatic privileges and immunities to the International Catholic Migration Commission (ICMC), a non-profit agency engaged in international humanitarian and voluntary work “extends to immunity from the application of Philippine labor laws” requiring the conduct of certification election for the purpose of establishing a labor union in the ICMC.

   Article II of the Memorandum of Agreement between the Philippine Government and ICMC provides that the ICMC shall have a status “similar to that of a specialized agency”.

   The Convention on the Privileges and Immunities of Specialized Agencies adopted by the U.N. General Assembly on 21 November 1947 and concurred in by the Philippine Senate through Resolution No. 19, on 17 May 1949 provides that specialized agencies shall “enjoy immunity from every form of legal process.” [Article II, Section 4]. According to the Supreme Court:

   “The grant of immunity from local jurisdiction to ICMC is clearly necessitated by their international character and respective purposes. The objective is to avoid the danger of partiality and interference by the host country in their internal workings. The exercise of jurisdiction by the Department of Labor in these instances, therefore, would defeat the very purpose of immunity which is to shield the affairs of international organizations, in accordance with international practice, from political pressure or control by the host country to the prejudice of member states of the organization, and to ensure the unhampered performance of their functions.

   ‘A certification election cannot be viewed as an independent or isolated process. It could trigger off a series of events in the collective bargaining process together with related incidents and/or concerted activities which could inevitably involve ICMC in the “legal process”, which includes “any penal, civil and administrative proceedings.”’

   Nonetheless, the diplomatic immunity granted to ICMC does not deprive laborers of their basic rights guaranteed under the Constitution since the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations mandates that “each specialized agency shall make provision for appropriate modes of settlement of ... disputes arising out of contracts or other disputes of private character to which the specialized agency is a party.”
2. Kapisanan Ng Manggagawa AT Tac Sa IRRI v. Secretary of Labor and Employment (G.R No. 89331, 28 September 1990)

The Supreme Court ruled that the International Rice Research Institute (IRRI), an autonomous, philanthropic, tax-free, non-profit, non-stock organization designed to conduct research on rice and its production, management, distribution and utilization, and granted the status, prerogatives, privileges and immunities of an international organization by virtue of Presidential Decree No. 1620, enjoys diplomatic immunity which includes exemption from the coverage of Philippine labor laws requiring the conduct of certification election.

The grant of immunity to the IRRI is explicit under Presidential Decree No. 1620:

'Article 3. Immunity from Legal Process. – The Institute shall enjoy immunity from any penal, civil and administrative proceedings, except insofar as that immunity has been expressly waived by the Director-General of the Institute or his authorized representatives.' [Underscoring supplied]

Nonetheless, the Council of IRRI Employees and Management (CIEM) was formed "for purposes of maintaining mutual and beneficial cooperation between IRRI and its employees." Therefore, the employees of IRRI are not without remedy in cases of disputes with the management.

Choice-of-law and choice-of-venue not absolute

Pakistan International Airlines Corp. v. Ople (G.R. No. 61594, 28 September 1990)

The Supreme Court ruled that the principle of party autonomy in contracts is not absolute. The rule in Article 1306 of the Civil Code is that the contracting parties may establish such stipulations as they deem convenient "provided, they are not contrary to law, morals, good customs, public order and public policy." Accordingly, parties may not contract away applicable provisions of law, especially peremptory provisions, dealing with matters heavily impressed with public interest.

Under Philippine law, the parties cannot stipulate, in contracts of labor and employment, that the respondent employees could be terminated at the will of the employer.

The Supreme Court ruled that, in the present case, the employer cannot take refuge in choice-of-law and choice-of-venue provisions which specify foreign law and foreign venues. These provisions cannot be invoked to prevent the application of Philippine labor laws and regulations to the
employer-employee relationship existing between an employer which is a resident foreign corporation doing business in the Philippines and its employees who are citizens and residents of the Philippines. The relationship is much affected with public interest and the otherwise applicable Philippine laws cannot be rendered illusory by the parties agreeing upon some other law to govern their relationship.

Moreover, the specific circumstances present in this employer-employee relationship point to the Philippine courts and administrative agencies as the proper forum for the resolution of contractual disputes between the parties. Under these circumstances, the choice-of-venue provision in the agreements cannot be given effect so as to oust Philippine agencies and courts of the jurisdiction vested upon them by Philippine law.

In any event, the failure to plead and prove the contents of the foreign law on the matter results in the application of the presumption that the applicable provisions of the Pakistan law are the same as the applicable provisions of Philippine law.

### Citizenship: Acquisition and loss; rights and duties

**Frivaldo v. COMELEC** (G.R. No. 87193, 23 June 1989, 174 SCRA 244, J. Cruz)

The Philippine Constitution provides that all public officials and employees owe the State and the Constitution “allegiance at all times”. Under the Local Government Code, a candidate for local elective office must be, *inter alia*, “a citizen of the Philippines and a qualified voter of the constituency where he is running”. Accordingly, a Filipino citizen who acquires U.S. citizenship by naturalization and who is consequently deemed to have renounced his Philippine citizenship, is therefore not qualified to run for the office of provincial governor.

His having taken part in Philippine elections does not result in the forfeiture of his U.S. citizenship because such forfeiture is a matter between him and that foreign state.

Assuming that forfeiture of foreign citizenship results from a person’s having taken part in Philippine elections, such loss of citizenship does not automatically result in the reacquisition of Philippine citizenship. Under Commonwealth Act No. 63, as amended, Philippine citizenship may be reacquired only by three methods: by direct act of Congress, by naturalization or by repatriation. The petitioner’s case does not fall in any of these methods.
Labo v. COMELEC (G.R. No. 86564, 1 August 1989, 176 SCRA 1)

The Supreme Court held that a Filipino citizen who lost his citizenship by seeking naturalization in another country, by taking an oath of allegiance to a foreign state and by expressly renouncing his Philippine citizenship is disqualified from running for public office unless he reacquires his Philippine citizenship by a direct act of Congress, by naturalization or by repatriation under Commonwealth Act No. 63.

The fact that the marriage which served as the basis for his naturalization in another state was subsequently annulled does not automatically restore his Filipino citizenship. Neither does his election into public office automatically restore his citizenship.

'The electorate had no power to permit a foreigner owing his total allegiance to (a foreign state), or at least a stateless individual owing no allegiance to the Republic of the Philippines, to preside over them as an elected local official.'

Balanquit v. Jose Ong Chuan Jr. (House of Representatives Electoral Tribunal Case Nos. 13 and 15, 6 November 1989)

The House Electoral Tribunal ruled that a person born of a Filipino mother and alien father and thus entitled to elect Filipino citizenship upon reaching the age of majority under the 1935 Constitution but failed to make such election since his father was naturalized while the child was a minor should still be considered a natural-born Filipino citizen. The Court stated:

'... one's failure to comply with the formal requirements of electing Philippine citizenship is NOT NECESSARILY FATAL to one's acquisition of Filipino citizenship through election.

Where a person, born to a Filipino mother and alien father, had exercised the right of suffrage when he came of age, the same constitutes a positive act of election of Philippine citizenship. (In Re: Florencio Mallare 59 SCRA 45). The acts of the petitioner in registering as a voter, participating in elections, and campaigning for certain candidates were held by the Supreme Court as SUFFICIENT TO SHOW HIS PREFERENCE FOR PHILIPPINE CITIZENSHIP...'

Moreover, when his father was naturalized while he was still a minor, the Revised Naturalization Act under Section 15 extended its benefits of Filipino citizenship to his minor children residing in the country. Therefore, JOSE ONG CHUAN Jr. "may even be declared a natural-born citizen of the Philippines under the first sentence of Section 2 Article IV of the 1987 Constitution." Accordingly, he possessed the qualification of being a natural-born Filipino citizen at the time he ran for a seat in the House of Representatives.
Three Justices of the Supreme Court and a Member of the House of Representatives who are all members of the House Electoral Tribunal dissented from the majority opinion and challenged the proposition that election of Philippine citizenship need not be by affirmative act.

'The Constitution requires the positive act of election as a condition for acquiring Philippine citizenship. It does not say that the child born of a Philippine mother is deemed possessed of Philippine citizenship unless he rejects it upon attaining the majority age. What it says is that he will acquire Philippine citizenship only if he elects it upon attaining majority age. Moreover, judicial doctrine requires that he make the election within a reasonable time or he forfeits the right forever.' [CRUZ, J., dissenting]

They also questioned the wisdom of validating "derivative" naturalization on JOSE ONG CHUAN Jr.

'...[It becomes readily apparent that the naturalization proceedings initiated by [Jose Ong Chuan, protestee's father] were fatally defective and hence not effective to confer Philippine citizenship upon Ong Chuan nor upon his then minor son, [Jose Ong Chuan Jr., protestee herein]. Protestee Ong Chuan Jr, is not a Philippine citizen at all, let alone a natural-born Philippine citizen.' [Rep. CERILLES, dissenting opinion].

Under Article VI Section 17 of the Philippine Constitution, "[t]he Senate and the House of Representatives shall each have an Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns, and qualifications of their respective Members." The House of Representatives Electoral Tribunal is composed of three Justices of the Supreme Court and six Members of the House of Representatives chosen on the basis of proportional representation from the political parties.

In the exercise of this constitutional authority, the House Electoral Tribunal resolved two quo warranto election contests involving disqualification from holding office for lack of a natural-born citizenship as required under Article VI Section 6 of the Constitution.

Aznar v. COMELEC (G.R. No. 83820, 25 May 1990)

The Supreme Court ruled that the loss of Philippine citizenship cannot be presumed. It is incumbent upon anybody assailing a person's Philippine citizenship to prove otherwise. Therefore, a person who was born of a Filipino father, and who vehemently denies having taken the oath of allegiance to a foreign state, holds a valid and subsisting Filipino passport and has participated in the electoral process in the Philippines since 1963 both as a voter and as a candidate for election, enjoys the presumption that he is a citizen of the Philippines. According to the Court, that person's act
of registering as an alien in the Philippines did not constitute renunciation of his Filipino citizenship.

'The fact that (a Filipino citizen) has a certificate which states that he is (a citizen of another state) does not mean that he is not still a Filipino.

...When we consider that the renunciation needed to lose Philippine citizenship must be "express", it stands to reason that there can be no such loss of Philippine citizenship when there is no renunciation, either "express" or "implied".

Parenthetically, the statement in the 1987 Constitution that "dual allegiance of citizens is inimical to the national interest and shall be dealt with by law" (Article VI Section 5) has no retroactive effect.'

Three members of the Court dissented, pointing out, among other things, that renunciation of Philippine citizenship may be made even without applying for naturalization in a foreign state, and that applying with the Philippine Government for registration as an alien right here in the Philippines is an express and unequivocal renunciation of Philippine citizenship.

**Opinions of the Secretary of Justice**

**Relations with Taiwan**

**Opinion No. 112 Series 1989 – Certificate of legal capacity to contract marriage for Taiwanese nationals**

Article 21 of Executive Order No. 209 (The Family Code of the Philippines) requires citizens of a foreign country applying for a marriage license to submit a certificate of legal capacity to contract marriage issued by their respective diplomatic or consular officials.

In view of the absence of diplomatic relations between the Republic of the Philippines and Taiwan, the latter has no diplomatic or consular office in the Philippines. Taiwan extends assistance to its nationals in the Philippines through the Pacific Economic and Cultural Center.

The Secretary of Justice, however, held that a certificate of legal capacity to contract marriage issued by the Pacific Economic and Cultural Center would be sufficient compliance with the requirements of the Family Code.

**Citizenship**

**Opinion No. 34 Series 1990 – Citizenship of Filipino children adopted by aliens**

The Secretary of Justice has ruled on several occasions that in the Philippines, adoption does not operate to change the nationality of the...
adopted child. A Filipino child adopted by an alien retains his Filipino citizenship. [Opinions of the Secretary of Justice No. 4, S. 1961; No. 269, S. 1954; No. 334, S. 1951; No. 102, S. 1941 and No. 332, S. 1940]

Treaty-making power

Opinion No. 84 Series 1990 – Senate concurrence to an agreement between the Department of Tourism of the Republic of the Philippines and the National Tourism Administration of the People’s Republic of China

A query was posed on whether the Department of Tourism of the Republic of the Philippines and the National Tourism Administration of the People’s Republic of China could upgrade an existing tourism cooperation agreement without Senate concurrence as required under Article VII, Section 21 of the Philippine Constitution.

The Secretary considered the agreement as a mere executive agreement not requiring Senate concurrence inasmuch as the phrase “international agreement” contemplates agreements of a permanent nature [Secretary of Justice Opinion No. 70 and 71 Series 1987]. The Secretary noted the distinction made by the Supreme Court between a treaty and an executive agreement, to wit:

‘International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.’ [Commissioner of Customs v. Eastern Sea Trading, 3 SCRA 356].

The upgraded agreement between the Republic of the Philippines and the People’s Republic of China does not contain political issues or constitute deviations from existing national policies. A comparison between the upgraded version and the original agreement shows little difference in substance and the upgrading was more on the form. Clearly, such change does not alter the original character of the Memorandum of Understanding as an executive agreement.

Choice of law

Opinion No. 166 Series 1990 – Philippine Airlines/ J.P. Morgan letter of agreement

The Philippine Airlines (PAL), a government owned and controlled corporation sought the opinion of the Secretary of Justice on a proposed
Letter of Agreement it intends to conclude with J.P. MORGAN, a foreign corporation based in New York, on the former’s privatization program.

The Secretary of Justice ruled that the stipulation of New York law as the governing law of the agreement was not legally objectionable since it is not contrary to law, morals, good customs, public order, or public policy [Article 1306, Civil Code] or the mandatory or prohibitory laws of the Philippines [Article 5, Id.].

Moreover, the Secretary of Justice cited a Philippine Supreme Court decision which held that matters bearing upon the execution, interpretation, and validity of contracts are governed by the law of the place where the contract is made and matters connected with its performance are governed by the law prevailing at the place of its performance [Insular v. Frank, 13 Phil. 236]. “Since it appears that PAL’s preferred investors for its privatization program are foreign companies, that the place of execution or performance of the agreement is outside the Philippines and that the payment of the obligations thereunder is denominated in U.S. dollars”, the foregoing principle should govern such agreement.

*Clausula rebus sic stantibus*

Opinion No. 196 Series 1990 – Effect of the unification of Germany on the trade agreement between the German Democratic Republic and the Republic of the Philippines

As a result of the German unification in 1990, the German Democratic Republic (GDR) proposed the termination of a 1977 trade agreement with the Republic of the Philippines. The Foreign Affairs Ministry of the GDR invoked Article 62 of the Vienna Convention on the Law of Treaties on fundamental change of circumstances as a ground for termination.

The Secretary conceded to the application of Article 62. The abolition of the German Democratic Republic constituted a fundamental change of circumstances within the Article’s contemplation. Moreover, the subject trade agreement contained the following clause:

‘Article 15: The present Agreement shall enter into force on the date of the exchange of notes confirming that it has been ratified or approved in conformity with the respective laws of the Contracting Parties. It shall remain in force for one year and shall be automatically renewed for periods of one year, unless either Contracting Party expresses its intention in writing to terminate this Agreement three months before the expiry of its validity.’

It is clear from the aforequoted provision that either the Philippines or the German Democratic Republic has the option to terminate the trade agreement not later than three months before its expiration. Since said
agreement is valid until 27 December 1990, the same can be declared terminated three months prior thereto or as of 27 October 1990.

Treaties

Extradition treaties entered into by the Philippines

Extradition treaty – Republic of the Philippines and Australia

The Senate of the Republic of the Philippines expressed its concurrence to the ratification of an extradition treaty between the Philippines and Australia through Resolution No. 133 on 10 September 1990. The treaty was signed in Manila on 7 March 1988.

The treaty adopts the “non-list double criminality” principle, thus bringing within its coverage of extraditable offenses all crimes punishable in both Contracting States by imprisonment for a period of at least one (1) year.

Excluded from the treaty’s scope are political offenses; offenses against military law which is not an offense under ordinary law; and all prescribed penalties or offenses for which final judgment has been passed by the Requesting State.

The Requested State has the option to refuse extradition if (a) the person whose extradition is requested is a national of the Requested State; (b) the courts of the Requested State are competent and will prosecute the offense; c) the offense for which extradition is requested is punishable by death or a punishment of the kind referred to in Article VII of the International Covenant on Civil and Political Rights.

The treaty provides for provisional arrests “in case[s] of urgency” by means of the facilities of INTERPOL or by other means. [Article 9].

In cases of conflicting requests for extradition from two or more States, the Requested State is given the power to determine to which of the Requesting States the offender is to be extradited. The treaty provides for the procedure in processing these requests for extradition which takes into consideration the laws of the Requested State.

Extradition treaty – Republic of the Philippines and Canada

The Senate of the Republic of the Philippines expressed its concurrence to the ratification of an extradition treaty between the Philippines and Canada through Resolution No. 114 on 10 September 1990. The treaty was signed on 7 November 1989 in Ottawa, Canada.

The treaty was “spurred by the desire of the Philippine Government to facilitate the return of Filipino criminal offenders in Canada.” [Senate Resolution No. 114].
The treaty adopts the "non-list dual criminality" principle in defining extraditable offenses.

Excluded from the treaty's scope are political offenses; offenses against military law which are not offenses under ordinary law; and all prescribed penalties or offenses for which final judgment has been passed by the Requesting State. But, the treaty applies to "any request presented after its entry into force, even if the offense for which extradition is requested, was committed before that date." [Article 23].

The treaty also provides that extradition may be refused if it would be "unjust or incompatible with humanitarian considerations." [Article 4].

The treaty provides for mutual legal assistance in extradition and mandates that the procedure in processing requests for extradition must take into account the laws of the Requested State. Properties found in the Requested State that has been acquired as a result of the extraditable offense or which may be required as evidence are to be surrendered to the Requesting State upon request.

SINGAPORE

Contributed by Foo Kim Boon, Attorney General's Chambers, Singapore.

Investment and cooperation agreements in the framework of the Indonesian-Malaysia-Singapore growth triangle

The idea of a "growth triangle" between Singapore, Malaysia and Indonesia was first publicly mooted by Mr Goh Chok Tong (now Prime Minister of Singapore) in December 1989. The concept entails that Singapore would contribute its capital and management expertise, while the Malaysian State of Johore to her north and the Indonesian Riau Islands of Batam and Bintan to her south would contribute the land and labour. A synergistic association is envisaged; all three countries in the "growth triangle" (Fig. 1) would be able to develop economically at a faster pace.22 The following two agreements were concluded in 1990 between Singapore and Indonesia.

I. On 28 August 1990 Singapore and Indonesia signed the Agreement for the Promotion and Protection of Investments (hereinafter the "Investment

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22. See Singapore Government Press Releases No. 06/Jun 08-2/90/06/05 and No. 34/Jun, 05-1/90/06/13; also in 32 Malaya Law Review (1990) at pp. 374 to 378.
Protection Agreement” at Batam, Indonesia. As is clear from the preamble, its intention is to create favourable conditions for greater economic cooperation and investments by the nationals and companies of both countries. The Agreement is set within the framework of four other agreements, namely:

(1) the Basic Agreement on Economic and Technical Cooperation between Singapore and Indonesia of 29 August 1974;

(2) the Agreement between Indonesia and Singapore on Economic Cooperation in the framework of the development of Batam, signed on 31 October 1980 (hereinafter “the Batam Agreement”);

24. By Article 6, the ‘Basic Agreement’ shall “definitely come into force” after an exchange of diplomatic notes.
(3) the agreement between Indonesia and Singapore on Economic Co-operation in the framework of the Development of Riau Province, of 28 August 1990 (hereinafter “the Riau Agreement”);\(^{25}\)

(4) the Agreement among the ASEAN Member States for the Promotion and Protection of Investment, of 15 December 1987 (hereinafter “the Asean Agreement”).\(^{26}\)

A key difference between the Investment Protection Agreement and the ASEAN Agreement exists in the definition accorded to “companies” in both agreements. Under Article I(2) of the ASEAN Agreement, a company shall mean “a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated.” (emphasis added). This definition is expanded somewhat in the Investment Protection Agreement. Its Article I states that the term “companies” in the ASEAN Agreement shall mean:

(i) in respect of the Republic of Indonesia, any company, with a limited liability incorporated in the territory of the Republic of Indonesia, cooperatives or any juridical person constituted in accordance with its legislation;
(ii) in respect of the Republic of Singapore, corporations, cooperative societies, firms or associations incorporated or registered under the law in force in Singapore or any juridical person constituted in accordance with its legislation in their respective country.

Foreign companies which are *registered* in Singapore or in Indonesia would thus be granted protection, notwithstanding their effective seat of management is somewhere else. Many multi-national corporations based in Singapore (who are potential investors), will find this an incentive to invest in Indonesia, and *vice versa*.

Another difference is that under the Investment Protection Agreement projects undertaken in Batam and Riau Province by Singapore companies under the auspices of the bilateral cooperation agreements will be given automatic protection under the ASEAN Agreement without the need to obtain specific approval under Indonesia’s Foreign Capital Law 1967 (as subsequently amended). Such approval is required by Article II(1) of the ASEAN Agreement:

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“This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought in the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purpose of the Agreement.” “Nationals” shall be “as defined in the respective Constitutions and laws of each of the Contracting Parties.” (Article II(1) of the ASEAN Agreement).

II. On the same date, 28 August 1990, the two states concluded a second agreement, on Economic Cooperation in the Framework of the Development of Riau Province.27 This Riau Agreement covers various areas, like Trade of Goods and Services (Article 2); Tourism and Resort Development (Article 3); Investments (Article 4); Water (Article 5); Infra Structure and Spatial Development (Article 6); and Industry (Article 7). The Agreement will remain in force for a period of 10 years and shall thereafter be in force until terminated by either party by giving not less than six months notice in writing to the other party. The first project to be launched under the framework of the Riau Agreement is a S$ 3.5 billion (approx. US$ 2.03 billion) mega-beach resort of 10,000 hectares being built on Bintan Island under joint venture by consortiums of both countries.

27. See supra, n. 25.