LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

CHINA

LEGISLATION

Territorial claims

Law on the Territorial Sea and the Contiguous Zone of 25 February 1992¹

Article 1 This law is enacted for the People's Republic of China to exercise its sovereignty over its territorial sea and the control over its contiguous zone, and to safeguard its national security and its maritime rights and interest.

Article 2 The territorial sea of the People's Republic of China is the sea belt adjacent to the land territory and the internal waters of the People's Republic of China.

The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China.

The waters on the landward side of the baselines of the territorial sea of the People's Republic of China constitute the internal waters of the People's Republic of China.

* Edited by Ko Swan Sik, General Editor.

1. Adopted at the 24th Meeting of the Standing Committee of the Seventh National People's Congress, promulgated by Order of the President No. 55, 25 Feb. 1992.

Translated and published by the Legislative Affairs Commission of the Standing Committee of the National People's Congress, with following note by the translator: 'In case of discrepancy between the English translation and the original Chinese text, the Chinese text shall prevail.'

Article 3 The breadth of the territorial sea of the People's Republic of China is twelve nautical miles, measured from the baselines of the territorial sea.

The method of straight baselines composed of all the straight lines joining the adjacent base points shall be employed in drawing the baselines of the territorial sea of the People's Republic of China.

The outer limit of the territorial sea of the People's Republic of China is the line every point of which is at a distance equal to twelve nautical miles from the nearest point of the baseline of the territorial sea.

Article 4 The contiguous zone of the People's Republic of China is the sea belt adjacent to and beyond the territorial sea. The breadth of the contiguous zone is twelve nautical miles.

The outer limit of the contiguous zone of the People's Republic of China is the line every point of which is at a distance equal to twenty four nautical miles from the nearest point of the baseline of the territorial sea.

Article 5 The sovereignty of the People's Republic of China over its territorial sea extends to the air space over the territorial sea as well as to the bed and subsoil of the territorial sea.

Article 6 Foreign ships for non-military purposes shall enjoy the right of innocent passage through the territorial sea of the People's Republic of China in accordance with the law.

Foreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China.

Article 7 Foreign submarines and other underwater vehicles, when passing through the territorial sea of the People's Republic of China, shall navigate on the surface and show their flag.

Article 8 Foreign ships passing through the territorial sea of the People's Republic of China must comply with the laws and regulations of the People's Republic of China and shall not be prejudicial to the peace, security and good order of the People's Republic of China.

Foreign nuclear-powered ships and ships carrying nuclear, noxious or other dangerous substances, when passing through the territorial sea of the People's Republic of China, must carry relevant documents and take special precautionary measures.

The Government of the People's Republic of China shall have the right to take all necessary measures to prevent and stop non-innocent passage through its territorial sea.

Cases of foreign ships violating the laws or regulations of the People's Republic of China shall be handled by the relevant organs of the People's Republic of China in accordance with the law.

Article 9 The Government of the People's Republic of China may, for maintaining the safety of navigation or for other special needs, request foreign

ships passing through the territorial sea of the People's Republic of China to use the designated sea lanes or to navigate according to the prescribed traffic separation schemes. The specific regulations to this effect shall be promulgated by the Government of the People's Republic of China or its competent authorities concerned.

Article 10 In the case of violation of the laws or regulations of the People's Republic of China by a foreign ship for military purposes or a foreign government ship for non-commercial purposes when passing through the territorial sea of the People's Republic of China, the competent authorities of the People's Republic of China shall have the right to order it to leave the territorial sea immediately and the flag state shall bear international responsibility for any loss or damage thus caused.

Article 11 All international organizations, foreign organizations or individuals shall obtain approval from the Government of the People's Republic of China for carrying out scientific research, marine operations or other activities in the territorial sea of the People's Republic of China, and shall comply with the laws and regulations of the People's Republic of China.

All illegal entries into the territorial sea of the People's Republic of China for carrying out scientific research, marine operations or other activities in contravention of the provisions of the preceding paragraph of this Article, shall be dealt with by the relevant organs of the People's Republic of China in accordance with the law.

Article 12 No aircraft of a foreign state may enter the air space over the territorial sea of the People's Republic of China unless there is a relevant protocol or agreement between the Government of that state and the Government of the People's Republic of China, or approval or acceptance by the Government of the People's Republic of China or the competent authorities authorized by it.

Article 13 The People's Republic of China has the right to exercise control in the contiguous zone to prevent and impose penalties for activities infringing the laws or regulations concerning security, the customs, finance, sanitation or entry and exit control within its land territory, internal waters of territorial sea.

Article 14 The competent authorities concerned of the People's Republic of China may, when they have good reasons to believe that a foreign ship has violated the laws or regulations of the People's Republic of China, exercise the right of hot pursuit against the foreign ship.

Such pursuit shall be commenced when the foreign ship or one of its boats or other craft engaged in activities by using the ship pursued as a mother ship is within the internal waters, the territorial sea or the contiguous zone of the People's Republic of China.

If the foreign ship is within the contiguous zone of the People's Republic of China, the pursuit may be undertaken only when there has been a violation of

the rights as provided for in the relevant laws or regulations listed in Article 13 of this Law.

The pursuit, if not interrupted, may be continued outside the territorial sea or the contiguous zone until the ship pursued enters the territorial sea of its own country or of a third State.

The right of hot pursuit provided for in this Article shall be exercised by ships or aircraft of the People's Republic of China for military purposes, or by ships or aircraft on government service authorized by the Government of the People's Republic of China.

Article 15 The baselines of the territorial sea of the People's Republic of China shall be promulgated by the Government of the People's Republic of China.

Article 16 The Government of the People's Republic of China shall formulate the relevant regulations in accordance with this Law.

Article 17 This Law shall come into force on the date of promulgation.

INDONESIA

LEGISLATION

Entry into and departure from the country; status of aliens

*Immigration Act (Act No.9/1992 of 31 March 1992)*¹

General features

The Act is the result of an overall-revision of existing pre- and post-independence regulations on a range of related subjects and substitutes these scattered pieces of legislation. It essentially contains rules on entry into and departure from the country, the legal status and supervision of aliens staying in the country, and the determination of the different categories of Indonesian travel documents. The Act also contains provisions on penal and administrative sanctions against violation of the law and consists of 11 chapters and 68 articles.

The 11 chapters deal with: (I) General provisions (Arts. 1-2), (II) Entry into and departure from Indonesian territory (Arts. 3-10), (III) Prevention of departure and preclusion to enter (Arts. 11-23), (IV) Presence of aliens in Indonesian territory (Arts. 24-28), (V) Travel documents (Arts. 29-37), (VI) Supervision of aliens and immigration measures (Arts. 38-46),

1. The Act is to be officially published in the *Lembaran Negara* [State Gazette] 1992 No. 33. Indonesian text of the Act taken from *Business News* (Jakarta) No. 5270 (12 June 1992), courtesy of Kartini Muljadi & Associates, Jakarta. Summarized by Ko Swan Sik, General Editor.

(VII)Investigation (Art. 47), (VIII)Penal provisions (Arts. 48-62), (IX) Transitional provisions (Arts. 63-64), (X)Miscellaneous provisions (Arts. 65-66), (XI)Final provisions (Arts. 67-68).

Entry into and departure from the country

The general rule applicable to nationals is: 'Every Indonesian national is entitled to leave or to enter Indonesian territory.' (Art. 2) However, the exercise of this right is subject to a number of conditions which are elaborated in Articles 3-23 and which also cover the requirements for the entry and departure of aliens.

The main condition for entry is the possession of a travel document (Art. 3) and, in the case of aliens, the additional requirements of a visa (Art. 6)² and an entry permit. (Art. 4 para. 2)³ Under Article 6 para. 2 a visa shall be granted provided 'the alien's presence in the country and his purposes will be beneficial [to the country] and will not disturb national order and security.' But even where the visa requirement is met an entry permit may be denied in several cases, like those of mental illness or contagious diseases endangering public health. (Art. 8)⁴ Departure from the country is subject to the issuance of an exit permit in all cases of nationals as well as aliens. (Art. 4 para. 1)

These general rules on entry and departure are complemented by provisions on the possibility of 'preventing' the departure and of 'precluding' the entry of persons for specific reasons (Chapter III, Arts. 11-23). Where a prevention or preclusion measure is in force entry into the country, or departure from the country as the case may be, shall be denied. (Art. 22) Both measures may be taken in respect of aliens as well as nationals. The scope of preventing the departure and of precluding the entry of persons differs according to the underlying reasons and the corresponding competent officials. (Arts. 11 and 13; Arts. 15, 16, 20 and 21) The period of application of a decision to prevent or to preclude runs from 6 months (in the case of prevention) and 1 year (in the case of preclusion) to a discretionary period in cases falling under the jurisdiction of the Supreme Public Prosecutor. (Arts. 13 and 20)

The Act does not distinguish between nationals and aliens so far as the prevention to depart from the country is concerned. Neither does it specify in detail the grounds on which a relevant decision may be taken. In attributing authority to take such a decision the Act (Arts. 11) merely refers to 'immigration matters', 'matters concerning state receivables', the 'maintenance and enforcement of the security and defence of the state' and matters falling within the jurisdiction of the Supreme Public Prosecutor.

With respect to preclusion to enter, however, the Act does distinguish between nationals (Art. 18) and aliens (Art. 17). An alien may be precluded from entering the country:

2. Unless the alien belongs to a category exempted from this requirement, Art. 7.

3. A visa is defined in Art. 1 item 7 as a 'written permit issued by a competent official of an Indonesian representative mission... and containing approval for an alien to travel to and to enter Indonesian territory', while an entry permit refers to the permit issued by the immigration officer at the place of entry. (Art. 1 item 8).

4. Other cases are the non-possession of a re-entry permit for another country and fraud).

- (a) if the person is known to be or is suspected of being involved in activities of an international crime syndicate;
- (b) if the person has, in his/her or another country, taken a hostile attitude against the government of Indonesia or committed acts tarnishing the good standing of the Indonesian nation and the Indonesian state;
- (c) if the person is suspected of having committed acts in violation of security and public order, good morals, religion and traditional customs of Indonesian society;
- (d) at the request of another state, in case of a person who is avoiding [prosecution or trial] or the execution of a penal sentence in that country on grounds of having committed a crime which is also subject to penal sanction in Indonesia;
- (e) if the person has ever been expelled or deported from Indonesia;
- (f) on other grounds relating to immigration as determined by Government Regulations.

In contradistinction to aliens Indonesian nationals may only be precluded to enter the country:

- (a) if the person, having left Indonesia long ago, or having settled in or having become a resident of another state, has committed a hostile act or has taken a hostile attitude towards the Indonesian state or the government of the Republic of Indonesia;
- (b) if the person's entry into Indonesian territory may disturb development, cause dissension in the Indonesian nation, or disturb national stability; or
- (c) if the person's entry into Indonesia may endanger his (or: her) safety or the safety of his/her family.

The presence of aliens in Indonesian territory and their supervision

The Act (Arts. 24-28) distinguishes 4 categories of legally recognized presence of aliens in Indonesia, based on a (1) transit permit, (2) visitor's permit, (3) limited residence permit, or (4) permanent residence permit, respectively. For their elaboration the Act refers to implementing Government Regulations.

The main obligations of aliens on Indonesian territory for purposes of supervision are listed in Article 39 of the Act. These obligations are:

- (a) providing all information required pertaining to their identity or that of their family, and changes in their civil status, nationality and place of residence;
- (b) showing their travel or immigration documents whenever required for supervision purposes;
- (c) registering in case of staying in the country for more than 90 days.

Penal and administrative sanctions

Chapter VIII of the Act contains penal provisions applicable in case of violation of the various obligations included in the Act. Apart from penal sanctions, however, the Act introduces the possibility of an 'immigration measure' which is defined as 'an administrative measure on immigration matters not subject to the jurisdiction of the [common] courts.' (Art. 1 item 14)

According to Article 42 aliens on Indonesian territory who conduct activities which endanger or which could reasonably be suspected to endanger security and public order, or who do not respect or adhere to the law in force may be subjected to immigration measures. These measures may consist of:

- (a) a restriction, alteration or cancellation of the permit to stay;
- (b) a prohibition to stay in one or more areas of Indonesian territory;
- (c) a compulsory abode within a specific area of Indonesian territory;
- (d) expulsion or deportation from Indonesian territory or exclusion of entry into Indonesian territory.

Special circumstances

Reference is made in the Act to two cases of special circumstances justifying special regulation. Article 65 recognizes the possibility of a special immigration regime for border traffic under international border-crossing agreements concluded with neighbouring countries. A special regime is also acknowledged for 'aliens who come and stay in Indonesia for the exercise of their diplomatic or other official functions.' The Act (Art. 66) refers this special case to regulation by Government Regulation.

MALAYSIA

INTERNATIONAL STATEMENTS

New World Order; democracy within states and in international relations; the U.N. and its democratization; the poor and the powerful in international relations.

*Statement by the Prime Minister at the plenary of the forty-sixth session of the United Nations General Assembly, 24 September 1991 (excerpts)*¹

'...

The world has witnessed in the last two years more revolutionary changes than in the preceding hundred years.

... The world is ripe for 'a new world order' but it is hoped that this new world order will not be one that is imposed upon the world by any particular beneficiary of the current revolution. All members of this august body called the United Nations should participate in the shaping of the New World Order if we are to avoid a return of a new colonial era.

When the United Nations was formed after the Second World War, the allied

1. Text from 24 *Foreign Affairs Malaysia* (1991) No. 3, p. 59 et seq. (courtesy Malaysian Embassy, The Hague).

victors assumed the right to create a world order in which each of the five major powers could veto anything that does not serve them. But then the five fell out and the East-West conflict divided the world into two antagonistic camps. The Cold War that followed not only retarded modern civilisation but converted poor countries into pawns and proxies, devastating their territories and economies with confrontations and wars. That they were not fighting their own battles is clear from the outbreak of peace in every continent as soon as the East-West confrontation ended.

With these experiences still fresh in our minds how can we be assured that a new world order formulated by any one country or group of countries will be good for everyone? We are already feeling heavy hands forcing us to do this and not that. In East Asia we are told that we may not call ourselves East Asians as Europeans call themselves Europeans and Americans call themselves Americans. We are told that we must call ourselves Pacific people and align ourselves with people who are only partly Pacific, but more American, Atlantic and European. We may not have an identity that is not permitted, nor may we work together on the basis of that identity. Is this a foretaste of the new world order that we must submit to?

Democracy, and only democracy is legitimate and permissible now. No one really disputes this.

...

But is there only one form of democracy or only one high priest to interpret it?

We see differences in the practice of democracy even among those who are preaching democracy to us. Can only the preachers have the right to interpret democracy and to practise it as they deem fit and to force their interpretations on others? Cannot the converts too interpret the details, if not the basics? If democracy means to carry guns, to flaunt homosexuality, to disregard the institution of marriage, to disrupt and damage the well-being of the community in the name of individual rights, to destroy a particular faith, to have privileged institutions which are sacrosanct even if they indulge in lies and instigations which undermine society, the economy and international relations; to permit foreigners to break national laws; if these are the essential details, cannot the new converts opt to reject them? We, the converts will accept the basics but what is the meaning of democracy if we have no right of choice at all, or if democracy means our people are consistently subjected to instability and disruptions and economic weaknesses which make us subject to manipulation by the powerful democracies of the world? Hegemony by democratic powers is no less oppressive than hegemony by totalitarian states.

...

If democracy is to be the only acceptable system of government within states, shouldn't there be also democracy between the states of the world? In the UN we are equal, but five are more equal than the rest of the 166. Seven countries

on their own lay down the laws which affect adversely the economies of others. A few nations on their own have taken it upon themselves to determine the new world order. Powerful trade blocs demand voluntary restraints and impose laws and rules extra-territorially. Clearly the states of the world are not equal; not in the UN, not anywhere. If democracy is such an equitable concept why must we accept inequality between nations?

...

When the UN was formed in 1945 the victors of World War II arrogated to themselves the right to dictate the roles and the distribution of power between nations. Many things have happened since then. The victors of 1945 are no longer the powerful major players in world affairs. New powerful nations have emerged while some major powers have changed structurally. And new ideas about rights and wrongs and democracy have crystallised. Are we going to be shackled forever to the results of World War II?

...

We need weapons only to fight criminals. If a nation is subjected to armed uprising then the UN should take part in putting it down. Democratic governments should only be brought down by democratic process. Anything that goes beyond democratic processes should merit UN intervention if a request is made. We cannot preside over the disintegration of nations into ethnic communities, particularly if military action had no role on the initial consolidation of a nation.

...

Today individuals in some developed countries consider it their right to tell us how to rule our country. If we don't heed them, then they consider it their right to destroy our economy, impoverish our people and even overthrow our governments. These people latch on to various causes such as human rights and the environment in order to reimpose colonial rule on us. They are helped by the Western media which also consider it their duty to tell us how to run our country. All these combine to make independence almost meaningless. Our only hope lies in the democratisation of the UN, especially as the option to defect to the other side is no longer available to us. We want to remain independent but we also want to conform to international norms as determined not by some NGOs or the so-called advanced democracies, but by all the nations of the world. If we default then it is the UN and not some Robin Hoods which should chastise us.

...

To be heard the poor must band together not to form impoverished trade

blocs but to lend weight to their arguments. And so the East Asia Economic Group or EAEG was proposed, not as a trade bloc, but as a forum for the nations of East Asia to confer with each other in order to reach agreement on a common stand for a common problem caused by the restrictive trade practices of the rich.

We are perplexed to find that this objective merely to have a voice in international affairs is being opposed openly and covertly by the very country which preaches free trade. It is even more surprising that there should be such opposition when NAFTA itself is being formed on the principle of the right of free association of independent countries. Can it be that what is right and proper for the rich and the powerful is not right or proper for the poor?

...'

PAKISTAN

JUDICIAL DECISIONS

Requirement of law sufficiently met in the case of the British-US Extradition Treaty of 22 December 1931 even if not published in the official Gazette (of Pakistan).

Supreme Court, 4 May 1989
PLD 1989 Supreme Court 519*

MUHAMMAD AZIM MALIK— Petitioner. GOVERNMENT OF PAKISTAN and others— Respondents

Civil Petition for Leave to Appeal No.198-R of 1989 (From the judgment of Lahore High Court, Rawalpindi Bench, dated 30-4-1989 passed in Writ Petition No.167 of 1989)

...

JUDGMENT

SHAFIUR RAHMAN, J.—The petitioner, a brother of the fugitive offender Muhammad Saleem Malik detained under a Substituted Warrant of Custody and Removal made out under section 11 of the Extradition Act, 1972 (hereinafter referred to as the Act) seeks leave to appeal against the judgment of the Lahore High Court, Rawalpindi Bench, dated 30-4-1989 whereby his

* Courtesy Mr. Jamshed A. Hamid, Islamabad.

petition under section 12 of the Act** and under section 491, Cr.P.C. read with Article 199 of the Constitution was summarily dismissed.

...

4. Mr Fazle Ghani Khan, Advocate, the learned counsel for the petitioner contended before us that

...

(ii) There existed no extradition treaty between the United States of America and Pakistan to sustain the extradition proceedings at all. ... This ground was expressed [in two earlier petitions, *Ed.*] in the following words:

'That a legally valid Extradition Treaty does not exist between Pakistan and United States. The present document has been validated on 14th August, 1947 by Earl Mountbatten, the then Governor-General of India by way of an order called the Indian Independence (International Arrangements) Order, 1947. This can have no legal effect in Pakistan as on 14 August, 1947 Pakistan had come into existence and only the Governor-General of Pakistan could issue such an order.'

...

8. As regards the existence of the Extradition Treaty, we find on the record the Extradition Treaty itself which is dated 22nd of December, 1931 and it had been ratified by the Government of the United States and Great Britain and in the 'United States Code Annotated, Title 18, Cumulative Annual Pocket Part for Use in 1983' are listed bilateral treaties of extradition between the United States and the other Governments and the following entries exist in respect of Pakistan:-

'Country	Date Signed	Entered into force	Citation
xxxx	xxxx	xxxx	xxxx
Pakistan	Dec. 22, 1931	March 9, 1942	47 Stat. 2122
xxxx	xxxx	xxxx	xxxx'

** [footnote inserted by the Editor] Section 12 of the Act is in the following words:-

'12. *Discharge of person apprehended if not surrendered within two months.*— If a fugitive offender who, in pursuance of this Act, has been taken into custody to await his surrender is not conveyed out of Pakistan within two months after such committal, the High Court, upon application made to it by or on behalf of the fugitive offender and upon proof that reasonable notice of the intention to make such application has been given to the Federal Government, may order such prisoner to be discharged unless sufficient cause is shown to the contrary.'

9. Section 3 of the Act requires as hereunder:-

'3. Treaty State.—(1) As soon as may be after the commencement of this Act, the Federal Government shall publish in the official Gazette a list of the foreign States with which an extradition treaty is in operation, specifying in respect of each such State the Offences persons accused of which are, under the treaty, to be returned to or from that State.

(2) Whenever there is concluded an extradition treaty between Pakistan and a foreign State, the Federal Government may, by notification in the official Gazette, declare such State to be a treaty State for the purposes of this Act.

(3) A declaration under subsection (2) in relation to a foreign State shall specify the offences persons accused of which are, under the extradition treaty with that State, to be returned to or from that State and may provide that this Act shall apply in relation to that State with such modification as may be set out therein; and the provisions of this Act shall have effect accordingly.'

There is no material placed on the record by the Government to indicate that the treaty has been notified in the Gazette as required by subsection (1) of section 3 of the Act. However, a copy of the treaty being on the record with all the necessary particulars about ratification being available and it also being formally incorporated in the United States Code Annotated, the requirement of law is sufficiently met and even if there be non-publication of it in the Gazette of our country, the existence and the efficacy of the treaty as such, would not in any manner get impaired.

...'

SINGAPORE

JUDICIAL DECISIONS

Whether Australia a 'foreign state' or 'declared Commonwealth country'

Court of Appeal – Civil Appeal No 45 of 1989 (30 April 1992)

[1992]2 SLR 280, reported by Mathavan Devadas*

ATTORNEY GENERAL V. ELITE WOOD PRODUCTS (AUSTRALIA) PTY LTD & ANOR

In April 1988, a request to take the evidence of certain persons with addresses in Singapore for use in criminal proceedings in New South Wales was received by the Ministry of Foreign Affairs from its counterpart in Australia. On 23 May 1988, the Minister for Law issued a notice under s 43 of the Extradition Act

* Courtesy Mr. Foo Kim Boon, Singapore.

(Cap 103) ('the Act')* authorizing the senior district judge 'or such other district judge or magistrate as you may nominate' to take the evidence as requested. A district judge was nominated. The respondents, who were defendants in the New South Wales criminal proceedings, challenged the authorization of the Minister for Law and applied by originating motion to have it quashed. The High Court allowed the application (see [1989] 3 MLJ 408). The Attorney General appealed. The issues raised on appeal were: (1) whether the Minister had power to make the authorization under s 43(1) of the Act; and (2) if he did, whether he exceeded his power by reason of delegating the exercise of it to the senior district judge. In relation to the first issue, the court had to consider the question whether Australia is a 'foreign state' for the purpose of s 43(1) of the Act.

Held, dismissing the appeal:

(1) Australia, having been declared a Commonwealth country to which Pt IV of the Act applies, is incapable of being considered a 'foreign state' for the purpose of s 43, any more than it could be considered a foreign state for the purpose of any other provisions of the Act. There is no basis for the suggestion that 'foreign state' in any part of the Act could mean simply any sovereign state outside Singapore, whether Commonwealth or foreign.

(2) The cognition of the status of a country as a Commonwealth country on the intra-Commonwealth level, and in our municipal law for general legislative purposes, must imply with it a degree of permanency, stability and consistency. It would be inconvenient to treat a country as a Commonwealth country for the purpose of one Act and as a foreign state for the purpose of another. This would only lead to unpredictability and incoherence in the law.

(3) The question of the status of a country as a Commonwealth country or otherwise is a matter for the executive. The Minister for Law, acting under s 18 of the Act, declared by gazette notification that Australia is a Commonwealth country for the purpose of Pt IV of the Act. This is evidence, good enough for the courts, that Australia is recognized by the executive as a Commonwealth country, as opposed to a 'foreign state'.

(4) Section 43 does not apply to a Commonwealth country and therefore does not apply to Australia. There is no provision in the Act for the taking of evidence for use in criminal proceedings pending in a Commonwealth country.

* [footnote inserted by the Editor] Section 43 (1) of the Act provides as follows:

The minister may, by notice in writing, authorise a Magistrate to take evidence for the purposes of a criminal matter pending in a court or tribunal of a foreign State other than a matter relating to an offence that is, by its nature or by reason of the circumstances in which it is alleged to have been committed, an offence of a political character.

...

Warren LH Khoo J (delivering the judgment of the court):

...

The short point that we have to consider in relation to the first issue is whether Australia is a 'foreign state' for the purpose of s 43(1) of the Act. This is primarily a matter of construction of the Act as a whole and of this particular provision in the context of the Act.

The scheme of the Extradition Act

The Act, which came into force on 1 August 1968, principally deals with the extradition of fugitive offenders. It is divided into five parts. Part I deals with definitions and general matters. Parts II and III deal with extradition to and from foreign states. Part IV deals with extradition to and from declared Commonwealth countries. Part V deals with extradition to and from Malaysia. Part VI provides for miscellaneous matters. It is in Pt VI that s 43 is found.

Definitions

Section 2 provides that unless the context otherwise requires:

- 'foreign State' means a foreign State between which and Singapore an extradition treaty is in force;
- 'extradition treaty' means a treaty or agreement made by Singapore with a foreign State relating to the extradition of fugitives, and includes any treaty or agreement relating to the extradition of fugitives made before 9th August 1965 which extends to, and is binding on, Singapore;
- 'declared Commonwealth country' means a country declared to be a Commonwealth country in relation to which Part IV applies.

It is accepted that Australia is a declared Commonwealth country for the purpose of Pt IV relating to the extradition of fugitives to and from declared Commonwealth countries. It is contended for the appellant that, nevertheless, Australia is a 'foreign state' for the purpose of the evidence-taking provisions of Pt VI.

Appellant's arguments

The argument for the appellant consists of two alternative parts. Firstly, state counsel says that the words 'foreign State' in s 43(1) should be given what he calls its natural meaning, and that means any sovereign state other than Singapore. Alternatively, referring to the definition of 'foreign State' in s 2, he says that if any state has an extradition treaty in force with Singapore, it is a 'foreign State'.

...

First part of appellant's argument

In regard to the first part of the argument, state counsel makes the following submissions. Firstly, state counsel says that the definition of 'foreign State' in s 2 is in terms subject to context. Counsel analyses the provisions of the Act governing the extradition to and from 'foreign States' on the one hand, and to and from 'declared Commonwealth countries' on the other. He says that extradition to a foreign state is based on an antecedent bilateral arrangement with the state concerned, whereas extradition to a declared Commonwealth country is based on the less stringent requirements of the Commonwealth scheme for the rendition of fugitive offenders agreed by Law Ministers of the Commonwealth at their meeting in London in 1966 ('the Commonwealth scheme'). It is absurd, he says, to interpret s 43 in such a way that assistance is given to non-Commonwealth countries, with respect to which the requirements for extradition are more stringent, while being denied to Commonwealth countries. This, he says, could not have been the intention of Parliament when enacting s 43.

Secondly, state counsel says that it is significant that s 43 is found in Pt VI of the Act, and not Pt II, which deals with extradition to foreign states. If the intention was that its provisions were to apply exclusively to 'foreign states' covered by the provisions of Pt II, the section should properly have been enacted as a provision in that part of the Act.

Thirdly, state counsel says that the Act is a consolidating Act, derived from separate sets of enactments.

... He submits that different meanings may properly be attributed to the same words 'foreign State' in different parts of the Act because of their different origins.

...

State counsel submits that the words 'foreign State' in s 43 should be given a wider meaning than the same words in those parts of the Act dealing with extradition. In the Imperial legislation from which s 43 is derived, 'foreign states' referred to states other than 'British possessions'. Substituting Singapore for 'British possessions', counsel says it follows that 'foreign State' in s 43 must mean any sovereign state other than Singapore.

Second part of appellant's argument

The second alternative part of the argument of state counsel is this. Section 2 defines a 'foreign State' as a foreign state with which Singapore has an extradition treaty in force. State counsel submits that if a state has an extradition treaty in force with Singapore, it is by definition a 'foreign State'. Granted that Australia is a declared Commonwealth country, that does not, he says, prevent it from being a foreign state for the purpose of s 43 if, as he

contends is the case, the extradition arrangements between Singapore and Australia in pursuance of the Commonwealth scheme amount to an 'extradition treaty' within the meaning of that term in the Act.

...

Our views

We are of the view that Australia, having been declared a Commonwealth country to which Pt IV of the Act (relating to extradition to and from Commonwealth countries) applies, is incapable of being considered a 'foreign state' for the purpose of s 43, any more than it could be considered a foreign state for the purpose of any other provisions of the Act. Consistent with the simplicity of the structure of the Act, our reasons are short and simple ones. They are as follows.

Firstly, the Act has evolved from certain Imperial statutes made applicable to Singapore when Singapore was a colony. It is a modern adaptation of the regime provided by these Imperial statutes for extradition and return of fugitive offenders and, incidentally, taking of evidence for use in criminal proceedings pending overseas...

In the vocabulary of the draftsmen of the Imperial statutes, a clear distinction was made between 'foreign states' on the one hand and 'British possessions' and 'Her Majesty's dominions' on the other. That structural distinction is retained in the Act, although modern terminology is now used. The term 'foreign State' is used throughout the Act, including in sections within Pt VI immediately preceding s 43, in contradistinction to a 'declared Commonwealth country', just as it was used in contradistinction to 'British possessions' and 'Her Majesty's dominions' by draftsmen of the Imperial statutes. There is no basis, in our view, for the suggestion that 'foreign state' in any part of the Act could mean simply any sovereign state outside Singapore, whether Commonwealth or foreign, any more than a 'foreign state' under the Imperial statutes could have meant any country outside any one of the component parts of 'Her Majesty's dominions' as opposed to the dominions as a whole. It is, of course, conceivable that in an Act where the expression 'foreign state' is used in contradistinction to Singapore, a 'foreign state' may well mean any sovereign state outside Singapore. However, where, as in this Act, the expression is used throughout in contrast to a Commonwealth country, we can see no room for such a suggestion.

Secondly, the dichotomy between foreign states and Commonwealth countries is found not only in the Act but also in other legislation, particularly those providing for judicial co-operation. See, for example, the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265).

... The Interpretation Act (Cap 1) defines a Commonwealth country simply as 'any country recognised by the President as a Commonwealth country'. The recognition of the status of a country as a Commonwealth country on the intra-Commonwealth level, and in our municipal law for general legislative purposes,

must imply with it a degree of permanency, stability and consistency.

...

Thirdly, as the definition in the Interpretation Act shows, the question of the status of a country as a Commonwealth country or otherwise is a matter for the executive; it is rarely, if ever, necessary for the courts to be concerned with the question whether a particular country is a Commonwealth country or a foreign state where such a distinction is material. In the case of the Act, the Minister for Law, acting under s 18 of the Act, declared by gazette notification that Australia is a Commonwealth country for the purpose of Pt IV of the Act. This is evidence, good enough for the courts, that Australia is recognized by the executive as a Commonwealth country, as opposed to a 'foreign state'. In regard to such questions, the view of the executive must be what matters.

Our conclusion, therefore, is that s 43 does not apply to a Commonwealth country and therefore does not apply to Australia, which is a Commonwealth country. It is our view that there is no provision in the Act for the taking of evidence for use in criminal proceedings pending in a Commonwealth country. That appears to be still governed by the Evidence by Commission Act of 1885...

...

In these circumstances, we are not prepared to say that the learned judge was wrong in coming to the decision he did. Indeed, on the wording of the section, we think he was right.

We therefore dismiss the appeal with costs.

Appeal dismissed.