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

IRAN

LEGISLATION

Marine areas

*Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993*¹

*Introductory note*²

On 20 April 1993 the Iranian Parliament (the *Majlis*) adopted the present Act, by which Iran joined the bulk of coastal states claiming an exclusive economic zone.

Iran has not ratified the 1982 Law of the Sea Convention, nor is Iran a party to the 1958 Geneva Conventions on the law of the sea. The claim to maritime areas is, therefore, based on customary law for its validity.

Iran has a number of earlier laws on its maritime areas, including an exclusive fishing zone. Initially, an Act of July 1933 established a six-mile territorial sea and a six-mile contiguous zone. In 1959 this Act was amended and the breadth of the territorial sea was extended to twelve miles. Meanwhile,

* Edited by Ko Swan Sik, General Editor.

¹ Official Gazette No. 14044 of 26 May 1993. English translation transmitted by the Permanent Mission of Iran to the United Nations in *note verbale* No. 152, dated 6 July 1993. Reproduced in *Law of the Sea Bulletin* No. 24 - December 1993. In a protest-note of 11 January 1994 (reproduced in *Law of the Sea Bulletin* No. 25 - June 1994 p. 101) the United States of America presented its view that certain provisions of the present Act and the Iranian Decree-Law No. 2/250-67 of 31 Tir 1352 [22 July 1973] (referred to in Art. 3 of the present Act) are inconsistent with international law and reserved its rights and the rights of its nationals in that regard. In *note verbale* No. 224 of 24 May 1994 (reproduced in *Law of the Sea Bulletin* No. 26 - October 1994 p. 35) the Islamic Republic of Iran commented on the US viewpoints.

² Contributed by JAMAL SEIFI, Faculty of Law, Shahid Beheshti (National) University of Iran, Tehran.

a statute of 1955³ had declared Iran's exclusive right to the exploitation of the continental shelf resources of the Persian Gulf and the Sea of Oman, and accordingly most parts of Iran's continental shelf have been delimited through bilateral agreements with Saudi Arabia, Bahrain, Qatar and Oman.⁴ Thereupon an exclusive fishing zone in the superjacent waters of its continental shelf was established in 1973. The significance of the present Act, therefore, lies in the claim to an exclusive economic zone. The Act is also important from the point of view of the consolidation of all the laws on the country's maritime zones and by defining Iran's attitude to such issues as the right of innocent passage.

From its title and the provision of its Article 1 it can be deduced that the Act has no application in the maritime areas of Iran in the Caspian Sea, a closed sea which has acquired increased importance in view of the new littoral states that have emerged from the collapse of the Soviet empire.

In the Articles 5 to 11 the Iranian law has, for the first time, regulated the exercise of and the limitations to the right of innocent passage by foreign vessels. The provisions are mostly in line with the 1982 Convention. Compare, for example, Article 6 of the Act with Article 19 of the Convention. Yet there are two significant points.

First, Article 9 reflects a long held Iranian position that the passage of foreign warships through Iranian territorial waters is subject to the prior permission of the coastal state. Accordingly the By-law of 1933 'Relating to the Passage and Stoppage of Foreign Warships through Iranian Waters and in Iranian Ports' already stipulated the requirement of authorization.

Another interesting point in relation to the right of innocent passage is that the Act does not prescribe any separate treatment for the right of passage through the Strait of Hormuz, thus giving rise to the presumption that in the Iranian view the right of passage through international straits is subject to the normal regime of innocent passage through the territorial sea.

Articles 14 to 20 of the Act are devoted to the regulation of the Iranian EEZ in the Persian Gulf and the Sea of Oman. The concept of exclusive economic zone did not form part of international customary law before the commencement of negotiations at UNCLOS III. However, the provisions on the EEZ regime in the 1982 Convention obviously contributed to the general acceptability of the regime and the number of states now claiming an EEZ

³ Act of 18 June 1955 on the Exploration and Exploitation of the Natural Resources of the Continental Shelf of Iran, UN Legislative Series ST/LEG/SER.B/16 at 15.

⁴ Iran-Saudi Arabia, 24 October 1960, UN Legislative Series ST/LEG/SER.B/18 at 403; Iran-Qatar, 20 September 1969, UN Legislative Series ST/LEG/SER.B/16 at 416; Iran-Bahrain, 17 June 1971, *ibid.* at 428; Iran-United Arab Emirates, 15 March 1975, *New Directions on the Law of the Sea*, Vol.5 p. 242; Iran-Oman, 28 May 1975, *ibid.* at 235.

leaves little doubt that the concept is now indeed part of that law. In 1985 the International Court of Justice affirmed in the *Libya/Malta Continental Shelf Case* that “the institution of the exclusive economic zone [. . .] is shown by the practice of States to have become part of customary law”.

Interestingly, the Act has not established an outer limit of the Iranian EEZ. This is largely because the geographical areas to which the Act applies are far narrower than the generally accepted 200-mile limit and, in most cases, the Iranian EEZ will have to be delimited from the maritime zones falling under the jurisdiction of the other littoral states. Article 19 is to be understood from this perspective.

Finally, it should be noted that the Act does not provide detailed provisions on the enforcement of Iran’s regulations in the EEZ and has confined itself in Article 20 to a general claim of exercise of criminal and civil jurisdiction.

Text of the Act

PART I **Territorial sea**

Article 1 *Sovereignty*

The sovereignty of the Islamic Republic of Iran extends, beyond its land territory, internal waters and its islands in the Persian Gulf, the Strait of Hormuz and the Oman Sea, to a belt of sea, adjacent to the baseline, described as the territorial sea.

This sovereignty extends to the airspace over the territorial sea as well as to its bed and subsoil.

Article 2 *Outer limit*

The breadth of the territorial sea is 12 nautical miles, measured from the baseline. Each nautical mile is equal to 1,852 metres.

The islands belonging to Iran, whether situated within or outside its territorial sea, have, in accordance with this Act, their own territorial sea.

Article 3 *Baseline*

In the Persian Gulf and the Oman Sea, the baseline from which the breadth of the territorial sea is measured is that one determined in Decree No. 2/250-67 dated 31 Tir

1352 [22 July 1973] of the Council of Ministers⁵; in other areas and islands, the low-water line along the coast constitutes the baseline.

Waters on the landward side of the baseline of the territorial sea, and waters between islands belonging to Iran, where the distance of such islands does not exceed 24 nautical miles, form part of the internal waters and are under the sovereignty of the Islamic Republic of Iran.

Article 4 *Delimitation*

Wherever the territorial sea of Iran overlaps the territorial seas of the States with opposite or adjacent coasts, the dividing line between the territorial seas of Iran and those states shall be, unless otherwise agreed between the two parties, the median line every point of which is equidistant from the nearest point on the baseline of both States.

Article 5 *Innocent passage*

The passage of foreign vessels, except as provided for in Article 9, is subject to the principle of innocent passage so long as it is not prejudicial to the good order, peace and security of the Islamic Republic of Iran.

Passage, except as in cases of *force majeure*, shall be continuous and expeditious.

Article 6 *Requirements of innocent passage*

Passage of foreign vessels, in cases when they are engaged in any of the following activities, shall not be considered innocent and shall be subject to relevant civil and criminal laws and regulations:

- (a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the Islamic Republic of Iran, or in any other manner in violation of the principles of international law;
- (b) Any exercise or practice with weapons of any kind;
- (c) Any act aimed at collecting information prejudicial to the national security, defence or economic interests of the Islamic Republic of Iran;
- (d) Any act of propaganda aimed at affecting the national security, defence or economic interests of the Islamic Republic of Iran;
- (e) The launching, landing or transferring on board of any aircraft or helicopter, or any military devices or personnel to another vessel or to the coast;

⁵ [Ed. note]: Not reproduced. English translation in UN legislative Series ST/LEG/SER.B/19 at 55.

- (f) The loading or unloading of any commodity, currency or person contrary to the laws and regulations of the Islamic Republic of Iran;
- (g) Any act of pollution of the marine environment contrary to the rules and regulations of the Islamic Republic of Iran;
- (h) Any act of fishing or exploitation of the marine resources;
- (i) The carrying out of any scientific research and cartographic and seismic surveys or sampling activities;
- (j) Interfering with any systems of communication or any other facilities or installations of the Islamic Republic of Iran;
- (k) Any other activity not having a direct bearing on passage.

Article 7

Supplementary laws and regulations

The Government of the Islamic Republic of Iran shall adopt such other regulations as are necessary for the protection of its national interests and the proper conduct of innocent passage.

Article 8

Suspension of innocent passage

The Government of the Islamic Republic of Iran, inspired by its high national interests and to defend its security, may suspend the innocent passage in parts of its territorial sea.

Article 9

Exceptions to innocent passage

Passage of warships, submarines, nuclear-powered ships and vessels or any other floating objects or vessels carrying nuclear or other dangerous or noxious substances harmful to the environment, through the territorial sea is subject to the prior authorization of the relevant authorities of the Islamic Republic of Iran. Submarines are required to navigate on the surface and to show their flag.

Article 10

Criminal jurisdiction

In the following cases, the investigation, prosecution and punishment in connection with any crimes committed on board the ships passing through the territorial sea is within the jurisdiction of the judicial authorities of the Islamic Republic of Iran:

- (a) If the consequences of the crime extend to the Islamic Republic of Iran;
- (b) If the crime is of a kind to disturb the peace and order of the country or the public order of the territorial sea;

- (c) If the master of the ship or a diplomatic agent or consular officer of the flag State asks for the assistance and investigation;
- (d) If such investigation and prosecution is essential for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Article 11
Civil jurisdiction

The competent authorities of the Islamic Republic of Iran may stop, divert or detain a ship and its crew for the enforcement of attachment orders or court judgements if:

- (a) The ship is passing through the territorial sea after leaving the internal waters of Iran;
- (b) The ship is lying in the territorial sea of Iran;
- (c) The ship is passing through the territorial sea, provided that the origin of the attachment order or court judgement rests in the obligations or requirements arising from the civil liability of the ship itself.

PART II
Contiguous zone

Article 12
Definition

The contiguous zone is an area adjacent to the territorial sea, the outer limit of which is 24 nautical miles from the baseline.

Article 13
Civil and criminal jurisdiction

The Government of the Islamic Republic of Iran may adopt measures necessary to prevent the infringement of laws and regulations in the contiguous zone, including security, customs, maritime, fiscal, immigration, sanitary and environmental laws and regulations and [for the] investigation and punishment of offenders.

PART III
Exclusive economic zone and continental shelf

Article 14
Sovereign rights and jurisdiction in the exclusive economic zone

Beyond its territorial sea, which is called the exclusive economic zone, the Islamic Republic of Iran exercises its sovereign rights and jurisdiction with regard to:

- (a) Exploration, exploitation, conservation and management of all natural resources, whether living or non-living, of the seabed and subsoil thereof and its superjacent waters, and with regard to other economic activities for the production of energy from water, currents and winds. These rights are exclusive;
- (b) Adoption and enforcement of appropriate laws and regulations, especially for the following activities:
 - (i) The establishment and use of artificial islands and other installations and structures, laying of submarine cables and pipelines and the establishment of relevant security and safety zones;
 - (ii) Any kind of research;
 - (iii) The protection and preservation of the marine environment;
- (c) Such sovereign rights as granted by regional or international treaties.

Article 15

Sovereign rights and jurisdiction in the continental shelf

The provisions of article 14 shall apply *mutatis mutandis* to the sovereign rights and jurisdiction of the Islamic Republic of Iran in its continental shelf, which comprises the seabed and subsoil of the marine areas that extend beyond the territorial sea throughout the natural prolongation of the land territory.

Article 16

Prohibited activities

Foreign military activities and practices, collection of information and any other activity inconsistent with the rights and interests of the Islamic Republic of Iran in the exclusive economic zone and the continental shelf, are prohibited.

Article 17

Scientific activities, exploration and research

Any activity to recover drowned objects and scientific research and exploration in the exclusive economic zone and the continental shelf is subject to the permission of the relevant authorities of the Islamic Republic of Iran.

Article 18

Preservation of the environment and natural resources

The Government of the Islamic Republic of Iran shall take appropriate measures for the protection and preservation of the marine environment and proper exploitation of living and other resources of the exclusive economic zone and the continental shelf.

Article 19
Delimitation

The limits of the exclusive economic zone and the continental shelf of the Islamic Republic of Iran, unless otherwise determined in accordance with bilateral agreements, shall be a line every point of which is equidistant from the nearest point on the baselines of two States.

Article 20
Civil and criminal jurisdiction

The Islamic Republic of Iran shall exercise its criminal and civil jurisdiction against offenders of the laws and regulations in the exclusive economic zone and continental shelf and shall, as appropriate, investigate or detain them.

Article 21
Right of hot pursuit

The Government of the Islamic Republic of Iran reserves its right of hot pursuit against offenders of laws and regulations relating to its internal waters, territorial sea, contiguous zone, exclusive economic zone and the continental shelf, in such areas and the high seas.

PART IV
Final provisions

Article 22
Executive regulations

The Council of Ministers shall specify the mandates and responsibilities [powers and duties] of different ministries and organizations charged with the enforcement of this Act.

The said ministries and organizations shall, within one year after the approval of this Act, prepare the necessary regulations and have them approved by the Council of Ministers.

Pending the adoption of new executive regulations, the existing rules and regulations shall remain in force.

Article 23

All laws and regulations contrary to the present Act, upon its ratification, are hereby abrogated.

The above Act, comprising 23 articles, was ratified at the plenary meeting of Tuesday, the Thirty-First day of Farvardin, One Thousand Three Hundred and Seventy-Two [20 April 1993], of the Islamic Consultative Assembly and was approved by the Council of Guardians on Ordibehesht 12, 1372 [2 May 1993].

JAPAN

JUDICIAL DECISIONS*

Fishing operation by Japanese corporation in coastal waters of Northern Territories, occupied by the former Soviet Union without fishing permit from the Japanese authorities; Scope of application of the Japanese Fishery Regulations

Kushiro District Court, 15 February 1991

Hanrei Jiho [Judicial Reports] No. 1383, 1991, p. 173

STATE OF JAPAN V. X

Defendant X was president of a Japanese company, Utari Kyodo Corporation, which engaged in the catching, processing and sale of marine products. In 1989 Utari Kyodo and a number of Soviet companies entered into a joint venture, founding the Aniwa Corporation under Soviet Law. Utari Kyodo and Aniwa then concluded a contract committing themselves to engage jointly in the catching and processing of certain kinds of crabs in an area claimed by the Soviet Union as its exclusive economic zone.

Catching activities were carried out in waters around Shikotan Island, one of the four islands north of Hokkaido which are known in Japan as the 'Four Northern Islands of Japan' and which have been under Soviet – later, Russian – occupation since the end of the Second World War and which are being claimed back by Japan since the 1960s. The fishing boat used for the activities was registered in Japan and held a fishing permit from the Soviet Department of Fisheries.

The defendant in the present case was charged with violation of the Hokkaido Rules for the Regulation of Ocean Fisheries [Rules 1964 No. 132].

* Contributed by TANAKA NORIO, Ryukoku University, Kyoto; member of the Study Group on Decisions of Japanese Courts relating to International Law.

Under these Rules a fishing licence from the Governor of Hokkaido is required for engaging in certain kinds of fisheries, including crab-fishing, in the offshore waters of Hokkaido, without defining the precise scope of the waters concerned. However, according to a 1971 Supreme Court decision (22 April 1971, *Keishu* [Supreme Court Reports: Criminal Cases] Vol.25 (1971) 451), the Rules were deemed applicable not only to the fisheries in the territorial sea of Japan, but also, on the basis of personal jurisdiction, to acts committed by Japanese on the high seas as well as in foreign territorial waters.

X asserted that the Hokkaido Rules, being Japanese domestic law, were not applicable to the fishing activities in the present case, arguing that the activities were carried out by Aniwa which was a legal person under Russian municipal law, and therefore the Hokkaido Rules, being Japanese domestic law, were not applicable. Under a verbal contract between Utari Kyodo and Aniwa the latter would charter the boat while Utari Kyodo would supply the captain and the crew.

The Court, however, on the basis of a detailed investigation of the substance of the fishing activities found that all the activities took place in accordance with the captain's judgement and under the command of the captain who was an employee of Utari Kyodo and who received directions from X. The Court also rejected the alleged existence of a contract between Utari Kyodo and Aniwa permitting Aniwa to charter the boat as there was no evidence confirming the payment of the charter-party by Aniwa. Therefore, the activities were deemed to be carried out by Utari Kyodo itself and governed by the Hokkaido Rules. The Court then held, in conformity with the 1971 Supreme Court decision, that, even though the activities were not carried out in Japanese territorial waters nor on the high seas, the area concerned is included within the scope of Article 5 of the Hokkaido Rules so that a fishing licence under these Rules was required.

Sapporo High Court, 16 April 1992

Hanrei Taimuzu [Law Times Reports] No. 801, 1993, p. 251

X V. STATE OF JAPAN

X appealed to the High Court against the above sentence on two grounds, arguing that the lower court had (1) erroneously taken the fishing activity to be the activity of Utari Kyodo instead of Aniwa's, and (2) wrongfully applied Japanese municipal law, i.e. the Hokkaido Rules, to fishing activities carried out in the exclusive economic zone of the Soviet Union and, consequently, within the latter's jurisdiction.

The High Court dismissed the appeal. First, following the court below, it rejected X's assertion that the fishing activities in the present case were carried out by Aniwa. It found, on the contrary, that the activities were carried out as a business of Utari Kyodo in the pursuit of its earnings. Secondly, it emphatically emphasized, as the first Japanese court to do so, and not by way of *obiter dictum*, that the 'Four Northern Islands of Japan' including Shikotan Island are Japanese territory, the sea area within 12 nautical miles from these islands being Japanese territorial sea and the area within 200 nautical miles being the fishery zone of Japan. The Court, did not, however, offer a detailed reasoning, nor did it refer to Article 2 paragraph (c) of the Japanese Peace Treaty of 1951 which stipulated the abandonment of territorial title to the islands by Japan. The Court simply referred to the fact that neither the Territorial Sea Act of 1977, proclaiming 12 nautical miles as the breadth of the territorial sea of Japan, nor the Fishery zone (Temporary Measures) Act of the same year, makes specific mention of the Four Northern Islands and that this may be taken as evidence that from the Japanese perspective the islands are part of the territory of Japan.

The Court thus held that the Hokkaido Rules were doubtlessly applicable to fishing in the territorial sea and the fishery zone of Japan irrespective of the Soviet occupation of the 'Four Northern Islands of Japan'. The Court also concluded that, to the extent that in the present case Japanese nationals had engaged in crab-fishing in an area constituting part of the exclusive economic zone of the Soviet Union without a license under the Hokkaido Rules, they would still be subject to these Rules on the basis of personal jurisdiction.

Competence of Consul under the Soviet-Japanese Treaty on Consular Relations and under general international law; Legal effect of interdiction declared by the Soviet consul in Japan.

Tokyo District Court, 20 December 1991

Hanrei Taimuzu [Law Times Reports] No. 792, 1992, p. 207

SOVIET UNION V. Y

A Soviet national, X, who had been resident in Japan since 1923, died there in 1984. X was not married and had no children. Under a first will X had bequeathed his whole property to the Soviet Union. Under a later will, however, his whole property, including his bank accounts, was bequeathed to Y, a Japanese national. This second will was expressed as *testamentum publi-*

*cum*⁶ as X had been declared interdicted by the Soviet consul in Tokyo from managing his property.

Immediately after X's death, the executor of his second will claimed the disbursement of X's bank accounts to which the bank refused to comply on the ground of invalidity of the second will as a result of the consul's interdiction. On a suit brought by the executor, in which case the Soviet Union intervened as an interested party, the Tokyo District Court held in its decision of 25 April 1988⁷ that the Soviet consul lacked competence to declare an interdiction under the Soviet-Japanese Consular Treaty of 1967⁸ in the absence of any provision on the subject in the Treaty, while under general international law the consular competence is limited to whatever is recognized by the receiving state. Consequently the second will which was expressed in accordance with the procedures set forth in Japanese law for a *testamentum publicum* remained valid.

Not being satisfied with the decision, the Soviet Union brought an action in the present case claiming the transfer of the whole property of X in conformity with the first will. In 1991, the Tokyo District Court dismissed the Soviet claim on the same grounds as those of 1988.

The Court emphasized that, first, the interdiction declared by the Consul was a kind of exercise of state authority and that the exercise of such competence by a foreign consul within the territory of the receiving state is only exceptionally recognized with the consent of the receiving state. Secondly, it was not necessary for the Court to consider the Vienna Convention on Consular Relations since the Soviet Union was not a party to the Convention, and consequently the important question in the present case was whether the competence was in fact conferred upon the Soviet consul under the Soviet-Japanese Treaty. Thirdly, the Treaty did not contain any provision which explicitly stipulated such competence for the consul. Article 29(1) of the Treaty provides that the consul may perform 'other functions not contrary to the laws and regulations of the receiving state', but it was not appropriate to interpret this provision in such a way as to regard the competence to declare interdiction as one of these 'other functions'. Such competence should be recognized explicitly on account of the nature of interdiction as performance of state authority in a foreign state.

⁶ This is a will in the form of an official instrument drawn up by a notary public and provided in Art.969 of the Japanese Civil Code [Law 1896 No. 89].

⁷ *Hanrei Jiho* No. 1274, 1988, p. 30.

⁸ *Horei Zensho* [Compilation of the Laws and Regulations of Japan] No. 8, 1967, p. 118.

For the aforementioned reasons the Court held, as in 1988, that the interdiction declared by the Soviet consul had no effect, and that X's second will, which was expressed legitimately in accordance with the procedures set forth in the Japanese civil law for a *testamentum publicum*, remained valid.

MALAYSIA

JUDICIAL DECISIONS*

Extradition; Extraterritorial offences; Whether punishable under the laws of Malaysia

High Court, Malaya, at Kuala Lumpur, 19 January 1993
[1993] 2 MLJ 34

MOKHTAR SIDIN, J.

PUBLIC PROSECUTOR V. LIN CHIEN PANG

Public Prosecutor v. Lien Chien Pang is one of the first few cases decided under the new Extradition Act of Malaysia⁹ ('the Act') which is relevant to the practice of Malaysia in international law.

The case arose out of a request by the United States government for the extradition of one LIN CHIEN PANG (the respondent) for two offences: (1) conspiracy to import more than 1 kg. of heroin into the United States between May 1991 and March 1992; and (2) aiding and abetting the importation of more than 1 kg. of heroin into the United States on or about 13 January 1992.

The evidence against the respondent consisted entirely of an affidavit by one LI YONG LING (the deponent). According to the affidavit, the deponent had met the respondent several times in Bangkok and it was through the respondent that the deponent met one SHIAO WU with whom the deponent had

* Selected by WAN ARFAH HAMZAH, University of Malaya, Kuala Lumpur.

⁹ Extradition Act 1992 (Act 479) which came into force on 10 February 1992. This Act replaces and supersedes two statutes previously existing governing extradition, viz. Extradition Ordinance 1958 and Commonwealth Fugitive Criminals Act 1967. It is a comprehensive Act which not only incorporates but also revises and re-arranges the provisions of the pre-existing legislation. It also contains new provisions to bring it in line with new developments in international practice, in particular, the Commonwealth Extradition Scheme and international conventions on narcotic drugs and psychotropic substances to which Malaysia is a party.

some discussions in Bangkok and Hong Kong about exporting heroin to the United States. It was SHIAO WU who informed the deponent of the shipment details of the heroin. The deponent passed on these details to one AH NAM who, unknown to the deponent, was a government informer. The heroin was seized when the shipment arrived in the United States and the deponent was eventually arrested. It was after his arrest that the deponent cooperated with the authorities and informed them that the respondent was his boss. At the instigation of and under supervision by the authorities, the deponent telephoned the respondent and the telephone conversations were taped. The conversations mentioned money to be paid and also heroin.

On these facts, the judge of the Sessions Court held that a *prima facie* case was not made out in support of the requisition by the United States government and ordered the respondent to be discharged under section 19(4) of the Act. The learned Judge held that the respondent fell outside the Act because the alleged offences were extraterritorial, it being an accepted fact that the respondent had not once set foot in the United States either before, during or after the commission of the alleged offences. As the Dangerous Drugs Act of Malaysia had no extraterritorial effect, the alleged offences were not punishable under the laws of Malaysia and did not come within the definition of extradition offences as set out in the proviso to section 6(2) of the Extradition Act 1992.

The Public Prosecutor applied under section 37 of the Act for a review of the decision of the Sessions Court Judge, in particular, the findings of the said Judge on two questions of laws:

- (1) Are the offences alleged against the fugitive criminal extraterritorial offences?
- (2) If so, are they punishable under the laws of Malaysia if they took place in corresponding circumstances outside Malaysia?

The High Court Judge before whom the application for review came, held it important to consider, first of all, whether the alleged offences in respect of which the request for extradition was made were offences in Malaysia, before proceeding to consider the particular questions posed by the Public Prosecutor in the application. The Judge, therefore, considered whether there was, in fact, a conspiracy and aiding and abetting on the part of the respondent. Examining the evidence in the light of Malaysian law, the learned Judge came to the conclusion that there was no evidence (other than the uncorroborated evidence of an accomplice) of conspiracy, aiding or abetting on the part of the respondent. Thus, in the opinion of the learned Judge, the Sessions Court Judge had erred in law in holding that there was evidence of conspiracy, aiding or abetting because that finding was against the weight of the evidence.

On the question whether the alleged offences, assuming there was in fact evidence of conspiracy, aiding or abetting, were extraterritorial, the High Court Judge affirmed the finding of the Sessions Court. The High Court Judge dismissed the argument of the applicant that since the heroin was imported into the United States pursuant to the conspiracy, aiding and/or abetment by the respondent, the respondent had committed the offences in the United States, by holding that there was no evidence of any connection between the imported heroin and the respondent.

The High Court Judge also affirmed the conclusion reached by the Sessions Court Judge on the second question posed by the Public Prosecutor. He affirmed that the alleged offences were not punishable under the laws of Malaysia if they took place in corresponding circumstances outside Malaysia and that the Sessions Court Judge was correct to refuse ordering the extradition of the respondent.

PAKISTAN

JUDICIAL DECISIONS*

Conflict of laws; Arbitration clause in a contract executed in Pakistan; Jurisdiction of courts in Pakistan to entertain proceedings in respect of arbitration conducted and award rendered by the arbitrator in a foreign country; Principles of private international law are subject to the municipal laws of Pakistan; Courts of Pakistan are bound to decide the question of jurisdiction in accordance with the law operating in Pakistan; Jurisdiction vested in the courts cannot be taken away even by express agreement of the parties.

High Court, Lahore, 29 June 1994

PLD 1994 Lahore 525

MALIK MUHAMMAD QAYYUM, J.

MESSRS. RUPALI POLYESTER LTD. – Petitioners v. DR. NAEL G. BUNNI AND OTHERS – Respondents

* Contributed by JAMSHED HAMID, Islamabad.

JUDGMENT

This Judgment shall dispose of C.R. No. 34/94 and C.R. No. 83/94 in which an important question of law as to the jurisdiction of the Courts in Pakistan to entertain proceedings in respect of arbitrations conducted and awards rendered by the Arbitrators in a foreign country, falls for decision.

2. [. . .] Messrs. Rupali Polyester Ltd. (the petitioner) is a Company incorporated under the Companies Ordinance, 1984, in Pakistan, having its registered office at I.I. Chundrigar Road, Karachi. Respondent No. 1, Dr. Nael G. Bunni, is the Chairman of the Arbitral Tribunal having been appointed as such by the International Court of Arbitration of [the] International Chamber of Commerce at its Session held in November, 1991. Respondent No. 2, Rt. Hon. Sir Michael Kerr, is a Member of the Tribunal appointed by the petitioner and respondent No. 3, Professor John Uff, Q.C. is the Arbitrator nominated by respondents Nos. 4 and 5. Respondent No. 4, Mitsui & Company is a Corporation incorporated under the Laws of Germany while respondent No. 5, Hitachi Ltd., is a Company incorporated and registered in Japan.

3. On 20-5-1985, an agreement/contract was entered into between the petitioner, and respondents Nos. 4 and 5 whereunder these respondents undertook to supply to the petitioner plant, equipment, material, engineering-know-how, and supervisory services for erection, construction, installation and commissioning of a plant for production of ordinary chips of Polyester for filament yarn for apparel use with a daily production capacity of 80 metric tons against the price of Japanese Yen 2,262,500,000. It is a common ground between the parties that this agreement was executed in Pakistan and also that all the works thereunder were to be performed in District Sheikhpura.

4. Two clauses of the said contract which are relevant for the purpose of the present dispute are contained in Articles 16.7 and 13 which read as under:

. . .

“16.7

CONTRACT shall be governed and construed by the Pakistan Law.”

“Article 13.

- 13.1 In case any dispute, controversy or difference arises out of or in connection with contract, the parties shall firstly endeavour to settle such dispute, controversy or difference amicably.
- 13.2 If both parties fail to reach such amicable settlement, all disputes, controversies or differences shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three Arbitrators appointed in accordance with the Rules. The arbitration shall be conducted in English language. If the defendant in such dispute is Buyer, the arbitration shall take place in Karachi and in case that the defendant is Seller, the arbitration shall take place in London.
- 13.3 The awards thereof shall be final and binding upon both parties hereto."

5. Unfortunately disputes and differences arose between the parties. It was claimed by the petitioner that the plant and equipment supplied by respondents Nos. 4 and 5 was defective, not of the requisite standard and not in conformity with the specifications. It was further alleged that due to the wrongful and wilful acts and neglect of the respondents, the petitioner had suffered huge losses which were continuing. After having made efforts to settle these disputes amicably as required by the Contract, the petitioner invoked clause 13 of the Contract and asked for arbitration. Dr Nael G. Bunni, respondent No. 1, herein was appointed as Chairman, while respondent No. 2, Rt. Hon. Sir Michael Kerr and respondent No. 3, Professor John Uff were nominated as Arbitrators by the petitioner and respondents Nos. 4 and 5 respectively. The Arbitrators commenced proceedings at London and drew up Terms of Reference on 10-5-1991. Two partial awards, one on 28-5-1993 and the other on 13-7-1993 were delivered by the Arbitrators holding that the petitioner was not entitled to consequential damages arising out of breaches of the contract.

6. On 2nd August, 1993, the petitioner filed an application under section 14 and 17 of the Arbitration Act, 1940 in the Court of [the] Senior Civil Judge, Sheikhpura impleading the three Arbitrators and contractors as parties. In this application, it was prayed that Arbitrators be directed to file the two partial awards in Court so as to enable the petitioner to challenge their validity under the Arbitration Act, 1940. On 6th December, 1993, another application under sections 5, 11 and 12 of the Arbitration Act, 1940 was moved by the petitioner seeking removal of the Arbitrators on the ground of their misconduct.

7. These applications were resisted by respondents Nos. 4 and 5 who in their reply raised a preliminary objection as to the jurisdiction of the Courts in Pakistan to entertain the applications in respect of the arbitration proceedings conducted at London and awards rendered there. Respondents Nos. 1 to 3 did not appear before the Court but placed their point of view in writing.

8. The learned Senior Civil Judge, Sheikhupura, who was seized of the matter, treated the issue as to jurisdiction as a preliminary issue and after hearing the parties upheld the objection of respondents Nos. 4 and 5 and decided that he had no jurisdiction to entertain the application under sections 14 and 17 and sections 5, 11 and 12 of [the] Arbitration Act, 1940 filed by the petitioner. Resultantly, both the applications were dismissed on 22-12-1993. The reasons which prevailed with the trial Court for coming to this conclusion were: firstly, that in the contract dated 20-5-1985, the venue of arbitration was chosen by the parties to be London and as such they are deemed to have accepted the jurisdiction of English Courts over the arbitration proceedings; secondly, that the provisions of [the] Arbitration Act, 1940 and the Code of Civil Procedure were not applicable and, lastly, that the awards were foreign awards within the meaning of [the] Arbitration (Protocol and Convention) Act, 1937.

9. Mr. S.M. Zafar, the learned counsel for the petitioner at the very outset contended that even though the arbitration proceedings were held in London and the awards were also made there but the awards in question were in law domestic awards and could be challenged before the Civil Courts in Pakistan. It was explained by the learned counsel that the classification of the awards as 'foreign' or 'domestic' does not depend upon the place at which the same were delivered but, on the other hand, the determining factor would be the law applicable. He pointed out that in the contract itself the parties had expressly chosen the law applicable to be the law of Pakistan, vide Article 16.7, and as [a result the] Arbitration Agreement was governed by Pakistani Law and, therefore, notwithstanding any other consideration, the awards were domestic awards even though made in London. On these premises it was argued that the awards and the arbitration in question would fall outside the purview of the Arbitration (Protocol and Convention) Act, 1937 and would have to be dealt with under the Arbitration Act, 1940. The learned counsel referred to the definition of 'Foreign Award' as given in Act VI of 1937 and also to the exclusion clause contained in section 9(b) thereof which provides that nothing in that Act shall apply to arbitration governed by the law of Pakistan.

10. Referring to Arbitration Act, 1940, the learned counsel submitted that as per section 47 of the Act itself, it applies to all arbitrations and not necessarily

only to those held in Pakistan. He explained that an application for filing or setting aside the awards can be made in the Court as defined by section 2(c) of the Arbitration Act, 1940 which would be the Court within the local limits of which [the] subject-matter to which [the] award relates is situated or located.

. . .

16. The argument raised by Mr. S.M. Zafar, the learned counsel for the petitioner, that the Courts of a particular country are bound to decide a cause in accordance with its municipal laws, is unexceptionable. The Courts in Pakistan cannot refuse to give effect to its domestic law merely on the ground that it comes into conflict with the law of another country or the principles of conflict of laws/private international law. . . .

17. While on this subject, it may be stated that each country has its own rules of private international law and such rules are subject to its domestic laws. The principles of conflict of laws cannot claim any precedence over the Municipal Law of a country. Therefore, even though the principles of Private International Law of England are entitled to great respect but these principles cannot be pressed into service to take away the jurisdiction vesting in a Court of this country by its own laws. . . .

. . .

22. [T]he principles of Private International Law are applied by the Courts of a country as a part of its domestic law and, therefore, differ from country to country. These principles cannot claim primacy or ascendancy over the domestic law of a particular country but have to be applied subject to its Municipal Laws. Consequently, if the Courts in Pakistan have jurisdiction to entertain a cause, they cannot refuse to do so, merely on the ground that under the principles of Private International Law such a matter was triable by another Court. In somewhat similar circumstances, it was observed by the Patna High Court in *Suresh Narain Sinha v. Akhuari Balbhadra Prasad* (AIR 1957 Patna 256) that:

“It was true that according to the principles of International Law a Court has no jurisdiction to entertain a suit against a foreigner who did not permanently or temporarily reside within its jurisdiction and who had not submitted to its jurisdiction. But if the legislature confirms jurisdiction upon the Court situated in a particular territory to entertain suits against [a] foreigner, where cause of action, wholly or partly arises within its jurisdiction, thus such a Court

undoubtedly has jurisdiction, if the conditions provided by the law to which it is subject exist.”

23. At this stage, it may also be noticed that it is an acceptable principle that if the jurisdiction vests in Pakistani Courts, it cannot even be taken away by the consent of the parties and [. . .] such an agreement would be void being against public policy under section 28 of the Contract Act. The leading judgment on this point is that of the Supreme Court of Pakistan in *N.A. Chowdhury v. M/s. Mitsui O.S.K. Lines Ltd. and 3 others*, PLD 1970 SC 373.

24. This principle was followed by the Supreme Court itself in *M/s. Uzin Export and Import Enterprises for Foreign Trade v. M/s. Iftikhar & Company Limited* (1993 SCMR 866). Reference may also be made to the judgment of this Court in *Abdul Majid v. Ch. Bahawal Bakhsh and another* (AIR 1950 Lah. 174) and that of [the] Patna High Court in *Rambilas Matho and others v. Babu Durga Bijal Prasad Singh and others* (AIR 1965 Patna 239). . . .

. . .

26. It is also to be stated that the arbitration agreement between the parties does not have the effect of depriving a Court of its jurisdiction which it otherwise possesses. In *M/s. Uzin Export and Import Enterprises for Foreign Trade v. M/s. M. Iftikhar & Company Ltd.* (1993 SCMR 866), it was observed that “in this case in the contract there was provision for arbitration of [the] International Chamber of Commerce in Paris. This provision does not oust the jurisdiction of Courts in this country and this clause is to be treated at par with provision for arbitration within the country”.

27. The principles which emerge from the above discussion are:

- (i) that the principles of Private International Law are subject to the Municipal Laws of Pakistan,
- (ii) that the Courts of Pakistan are bound to decide the question of jurisdiction in accordance with the law operating in Pakistan,
- (iii) that jurisdiction vested in the Courts cannot be taken away even by express agreement of the parties and, lastly,
- (iv) that the arbitration agreement even where Rules of [the] International Chamber of Commerce apply do not have the effect of depriving the Courts of their jurisdiction.

28. Keeping in view the above principles, the case may now be examined with reference to the Municipal Laws of Pakistan. On the subject of arbitration,

there are two laws which operate in this country, namely, the Arbitration Act, 1940 and the Arbitration (Protocol and Convention) Act, 1937. The latter Act [. . .] was promulgated on 4-3-1937 to give effect to the Geneva Convention on Arbitration and provides for enforcement of 'Foreign Awards' as defined in section 2 thereof. It makes provisions in section 4 for the effect of foreign awards, in section 5 for filing of foreign awards and [in] section 6 for enforcement of foreign awards. Subsection (1) of section 7 enumerates the conditions for enforcement of foreign awards, while subsection (2) of section 7 provides circumstances in which the Court may refuse to enforce the award. Another important provision in this regard is in section 9 which ordains that the Arbitration (Protocol and Convention) Act, 1937 shall not be applicable to an award made on an arbitration agreement governed by the law of Pakistan.

. . .

. . .

30. It will be remembered that [the] arbitration agreement in the present case is not contained in an independent or separate document, but in Article 13 which is a part of and is embedded in [the] main contract executed between the parties. The contract itself specifically provides in Article 16.7 that it shall be governed and construed by the laws of Pakistan. That being so, the arbitration agreement which is a part of the same contract is also governed by the law of Pakistan. It is a well-established principle, and indeed has not been disputed by the learned counsel for respondents Nos. 4 and 5, that it is open for the parties to the international agreement to make a choice of law which would apply to the contract, and autonomy of the parties in this behalf is respected by the Courts and there is, therefore, no reason to hold that clause 13 would not be governed by Pakistani law.

31. Both the learned counsel are agreed that in a contract having [an] international element, there are four potential laws which may apply. Those are, (a) [the] proper law of [the] contract, (b) [the] proper law of [the] arbitration agreement, (c) [the] proper law of reference and (d) [the] curial or procedural law. See *Mustill and Boyd's Commercial Arbitration*, 2nd Edn., pages 61 and 62, and *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission* ((1994), 1 Lloyd's Law Rep.45 at pages 56 and 57).

. . .

33. More important question, however, is as to what would be the proper law of the arbitration agreement. The answer to this question depends on the

applicability of the Arbitration (Protocol and Convention) Act, 1937, as section 9(b) provides that the Act shall not apply to awards made on the arbitration agreements governed by the law of Pakistan.

34. The principle which is deducible from the various textbooks and the decisions of the Courts is that [the] proper law of [the] arbitration agreement is the law expressly chosen by the parties. If, however, no express choice of proper law of [the] arbitration agreement is made, it will be the same as [the] proper law of [the] contract if [the] arbitration agreement is embedded and contained in the main contract itself, especially when the parties have, as in the present case, expressly given their choice about [the] law applicable to the contract.

35. In *National Thermal Power Corporation v. Singer* (1992) 2 Comp. LJ 256, the principles for determination of the proper law of the arbitration agreement have been enunciated by the Indian Supreme Court. . . .

. . .

45. Examined in the light of the above principles, there cannot be any doubt that the proper law of [the] arbitration agreement in the present case is the law of Pakistan which has been expressly chosen by the parties to be the proper law of the contract in Article 16.7. The word 'contract' used in that Article would obviously include all the clauses including Article 13 which embodies in itself the arbitration agreement between the parties. . . .

46. However, even if it be assumed that there is no express choice of law regarding [the] proper law of [the] arbitration agreement, yet on the principle cited above, [the] proper law of [the] arbitration would be the same as the proper law of [the] contract, more so, when the arbitration agreement is contained and embedded in the same contract. . . .

. . .

48. The next question which, therefore, arises, is as to whether the Arbitration Act, 1940 is applicable to the awards in question and the arbitration proceedings being conducted by the Arbitrators. The Act, according to its preamble, was framed with a view to consolidating and amending the law relating to Arbitration. The arbitration agreement has been defined in section 2(a) as meaning a written instrument to submit present or future differences to arbitration. 'Award', according to section 2(b) means an arbitration award.

Section 2(c) defines 'Court' as a Civil Court having jurisdiction to decide the question forming the subject matter of the reference if the same had been the subject matter of a suit but it does not include a Small Causes Court. Section 5 of the Act empowers the Court to revoke the authority of the Arbitrator while under sections 9 and 10, power is vested in it to appoint Arbitrators in certain cases. The Court is authorised by section 11 to remove the Arbitrator or Umpire in the circumstances mentioned therein. Section 12 provides, where the Arbitrator is removed or the authority revoked, the Court can fill in the vacancy. Section 14 of the Arbitration Act requires the Arbitrators or the Umpire, as the case may be, to make the award and, if so called upon by the parties or the Court, to file the same in the Court. Section 15 authorises the Court to modify the award, by section 16 to remit the award or by section 17 to make a rule of the Court and pronounce a decree in terms of the award. After the award has been filed, it can be set aside by the Court under section 30 of the Arbitration Act on the grounds mentioned therein. Section 31 defines the jurisdiction of the Court where the award can be filed. It is further provided that all questions regarding validity, effect or existence of an award or an arbitration agreement between the parties shall be decided by the Court in which the award under the agreement has been, or may be, filed and by no other Court. Section 32 bars the filing of a suit to challenge the validity of the award or the arbitration agreement while section 33 vests a right in a party to [the] arbitration agreement to apply to [the] Court for a decision on the question of existence or validity of an arbitration agreement or an award or its effect.

49. Other important provisions which deserve notice in the context of the present controversy, are sections 46 and 47 of the Arbitration Act, 1940. These two sections read as under:

"46. Application of Act to statutory arbitrations. The provisions of this Act except subsection (1) of section 6 and sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules may thereunder.

47. Act to apply to all arbitrations. Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.”

50. From a reading of the Arbitration Act, 1940 as a whole, especially sections 46 and 47, it is obvious that it applies to all arbitrations except as otherwise provided by any law. There is nothing in this Act which restricts or confines its applicability only to awards rendered in Pakistan or made in proceedings conducted here. The Act applies to all awards irrespective of the place where the same has been made or delivered. All awards are liable to be filed in the Court having jurisdiction over the subject-matter of reference, which in the present case, was Sheikhpura.

51. It may also be stated at this stage that the legal error into which the trial Court fell was that while holding that Courts in Pakistan have no jurisdiction, it treated the two awards as ‘foreign’ and not ‘domestic’ awards on the ground that the awards were made in proceedings for arbitration held in London. Unfortunately, the trial Court failed to appreciate that the answer to the question as to whether a particular award is domestic or foreign award does not depend upon the venue of arbitration but upon the law applicable to it. If the arbitration agreement is governed by [the] laws of Pakistan, then notwithstanding the awards have been made abroad, the awards shall be deemed to be domestic awards and shall as such be governed by [the] domestic law of Pakistan.

. . .

56. It would thus appear from the above that the English Courts as well as the Indian Supreme Court have come to the same conclusion that the basis for holding an award to be ‘domestic’ or ‘foreign’ is the governing law of the arbitration agreement.

57. Another reason as to why the jurisdiction of the Courts in Pakistan does not stand excluded is that the contract in question has the closest connection with Pakistan. To use the words by the Indian Supreme Court in *Singer’s* case (*supra*), it is redolent of Pakistan. It is a common ground between the parties that the agreement was executed in Pakistan, all works thereunder were to be performed by the respondents in Pakistan, the breach, if any, was also committed in Pakistan. Consequently, the cause of action also arose wholly in Pakistan. . . .

58. As observed earlier, the fact that the contract has the closest relation with Pakistan cannot be disputed or denied. Consequently the dispute raised in the two applications before the trial Court was clearly amenable to the jurisdiction of Pakistani Courts. Another important factor to be noticed in this regard is that as the contract involved payment of consideration in foreign exchange, it was subject to the approval of the Government of Pakistan as was provided in Article 15.1 of the Contract, which was in fact in the nature of a condition precedent to [the] contract becoming effective. On 19th May, 1985, the Government of Pakistan approved the contract with certain conditions mentioned in its letter bearing No. IBP/CH/R-Polyester/Con.II/84, one of which was that the agreement and arbitration should be made subject to the laws of Pakistan. . . . The arbitration contained in the contract having been made subject to the law of Pakistan, it cannot be contended that the laws of Pakistan stood excluded as regards arbitration proceedings.

59. It may also be mentioned that the award rendered by an arbitrator is lifeless and is not capable of being executed till such time the life is infused in it by the Court by passing a decree in accordance with the same. (See *Oil and Natural Gas Commission v. The Western Companies of North America* ((1987) 1 Arbitration Law Report 60) and *Rambilas Matho and others v. Babu Durga Bijal Prasad Singh and others* (AIR 1965 Patna 239)). Similarly, it is also well settled that the arbitration agreement between the parties does not have the effect of depriving a Court of its jurisdiction. (Also see *M.A. Chowdhury v. M/s. Mitsui O.S.K. Lines Ltd. and 3 others* PLD 1970 SC 373). Again in *M/s. Uzin Export and Import Enterprises for Foreign Trade v. M/s. M. Iftikhar & Company Ltd.* (1993 SCMR 866), it was observed that even if [the] I.C.C. Arbitration Rules are chosen by the parties to apply to arbitration, it does not take away the jurisdiction of the Pakistani Courts. It was further observed that Pakistani Courts have jurisdiction under the Arbitration Act, 1940 to deal with the matter if they have jurisdiction over the subject-matter forming reference. Consequently, even if the plea of Mr. Khalid Anwar that the parties had agreed to exclude the jurisdiction of Pakistani Courts by choosing the seat of arbitration to be London is accepted, yet this exclusion has no validity in law and cannot be given effect to.

60. The case can also be examined from another angle. As the subject-matter of the dispute between the parties, namely the plant and equipment, was located at Sheikhupura, according to section 2(c) of the Arbitration Act, 1940, any proceedings under the Arbitration Act could be brought before the Civil Court which would be competent to try a suit in respect of the subject-matter. Under section 20 of the C.P.C. a suit can be filed in a Civil Court within the

local limits of which [the] cause of action partly or wholly arises. In matters of contract, it cannot be disputed that the place where the agreement is entered into or is to be performed or is broken are the places where [the] cause of action wholly or partly arises. That being so, no valid objection can be taken to the jurisdiction of the Courts at Sheikhpura where the petitioner has filed two applications under the Arbitration Act, 1940. . . .

61. The contention [. . .] that as the respondents do not reside and are not located in Pakistan, the two applications in question could not be filed at Sheikhpura, has no force. It is well settled that the jurisdiction of the Courts is not dependent upon the residence of the defendants but also upon other considerations, like accrual of cause of action or part thereof. The residence of the respondents or the possession of nationality other than that of Pakistan is not of much consequence in this behalf.

. . .

63. It follows from the above discussion that under the Municipal Law of Pakistan, the two applications filed by the petitioner were competent and the learned Civil Judge, Sheikhpura was not correct in refusing to entertain the same. If the arbitration agreement is governed by the law of Pakistan, as indeed it is, the applicability of Arbitration Act, 1940 or any provision contained therein cannot be doubted. On no principle can it be held that though according to the laws of Pakistan, Pakistani Courts have jurisdiction in the matter but by virtue of Private International Law, even if it be to the contrary, this jurisdiction stands ousted. It may also be mentioned that the question as to whether the Courts of a particular country have or have no jurisdiction in the matter can only be decided by that Court and it is neither appropriate nor proper . . . [for] the Courts of any other country to hold that it has jurisdiction over the matter to the exclusion of that country, for in such an event there is nothing in law which stops the Courts of the other country from ruling to the contrary.

64. Although the findings recorded above [are] sufficient in themselves for the acceptance of these petitions but as Mr. Khalid Anwar [advocate for respondents Nos. 4 and 5] has argued with great vehemence that under the principles of Private International Law/Conflict of Laws English Courts alone have jurisdiction in the matter, this aspect may also be examined. In support of this submission, the main reason advanced was that as the seat/situs of arbitration was chosen by the parties to be London, the procedural law/curial law is deemed to be [the] *lex arbitri* or *lex fori*, i.e. the law of England under which

the English Courts alone have jurisdiction in respect of proceedings for arbitration conducted in that country.

65. The first thing to be noticed in this behalf is that though the principle pressed into service by the learned counsel as will be presently seen is to some extent, but not invariably, supported by the English Law [. . .] it has no universal application and is not accepted by many other countries like those in continental Europe where the modern trend appears to be to delocalise the arbitration. (See Dicey and Morris, *Conflict of Laws*, Vol. 1 (11th Edn., page 541).

66. Secondly, if this principle is applied with rigidity, it can lead to anomalous results. For example under the Belgian Law, the Courts of the country disown any jurisdiction over the arbitration or proceedings which is not between [. . .] parties [at least] one of whom is a national of that country. [. . .] If the contention of Mr. Khalid Anwar is accepted, then, in such a case, the aggrieved person would be left with no remedy.

67. Having heard the learned counsel for the parties, considered their arguments and examined the various textbooks and the precedents cited by them, I am of the view that the correct principle is that which has been expressed by the Indian Supreme Court in *National Thermal Power Corporation v. Singer Company and others* ((1992) 2 Comp. L.J. 256 (SC)), wherein it has been ruled that the control over the arbitration vests in the Courts of the country where seat of arbitration is located as also in the country with which the contract/agreement has the closest connection.

. . .

84. There is thus no warrant for [the] assumption that either under the laws of Pakistan or under its Private International Law or even under the English Private International Law the Courts of the country where the arbitration proceedings are held alone have the exclusive jurisdiction in respect thereto.

. . .

88. While on this subject, it is to be noted that the reason given as to why the curial law has in certain cases been held to be the law of the seat of arbitration is that in the absence of any choice of the parties, that law should be applied as it has [the] closest connection with the arbitration proceedings. This theory may hold good in cases where there is an unequivocal and invariable choice of seat of arbitration are contemplated. In this case, under clause 13 of the Contract, arbitration can take place either at Karachi or London depending

upon the fact as to who was the claimant. There are, as such, two seats of arbitration to be chosen by the parties. While Karachi has the closest connection with the contract as the contract was executed in Pakistan and the works were also performed here, London has no connection whatsoever with the subject-matter of reference. Consequently, even if the principle advocated by Mr. Khalid Anwar is applied, still the jurisdiction of Pakistani Courts cannot be ousted. In the present case, apart from contesting the claim of the petitioner, the respondents [. . .] have made a counter-claim before the Arbitrators. Supposing instead of filing the counter-claim, they had separately invoked the arbitration clause by filing a claim, in that event the seat of arbitration had to be Karachi. This brings clearly into [light] the infirmity of the plea of exclusive jurisdiction of the English Courts and I find myself unable to hold that the English Courts had exclusive jurisdiction in the matter of procedure on account of curial law being English law. Indeed as already observed in many countries of the world, especially of Europe, the seat of arbitration has no relevance to the determination of [the] procedure for arbitration. The discussion at page 81 of *Law and Practice of International Commercial Arbitration*, by Redfern and Hunter (2nd Edn.) is relevant and instructive.

89. This, however, does not conclude the controversy as the next question which arises is that even if it be held that in matter of procedure, the Courts of the country where [the] seat of arbitration is located have exclusive jurisdiction, the next question which would then arise is as to whether [the] right to challenge an award can be said to be a matter merely of procedure or does it affect the substantive right of the parties.

90. Having heard the learned counsel for the parties, to me it appears that at least so far as the laws of Pakistan are concerned, the right to challenge an award cannot be considered to be a matter of procedure but is one of substance. This right has been granted by sections 30 and 33 of the Arbitration Act, 1940 and is more akin to the right of appeal and review which have throughout been held to be substantial rights and not matters of procedure. In the *Province of Punjab v. Nadeem & Company* (PLD 1976 Lah. 1273) it was observed by this Court that it would not be correct to say that section 33 of Arbitration Act, 1940 is [. . .] procedural in nature. It may also be mentioned that the Arbitration Act, 1940 applies as a whole to Pakistan and there is no distinction as regards the applicability of substantial and procedural provisions.

. . .

93. It follows from the above discussion that even if it be held that English Courts have jurisdiction in respect of procedural matters, yet the jurisdiction of the Pakistani Courts over substantive matters which affects the rights of the parties [. . .], not being matters of procedure, would be governed by the law of Pakistan which is the law chosen by the parties to be the law . . . [by] which the Contract is governed and also for the reason that the agreement has [the] closest connection with Pakistan.

94. At this stage, the prejudice which is likely to be caused to the petitioner in case it is held that it is only the English Courts which have jurisdiction in the matter and not the Courts of Pakistan may be pointed out. . . .

. . .

98. As observed earlier in the case of contract involving foreign element, four potential laws which may apply are (i) proper law of contract, (ii) proper law of arbitration agreement, (iii) procedural/curial law and (iv) proper law of reference. While detailed discussion as regards the first three laws have been made above, not much has been said about the proper law of reference for the reason that it is a common ground between the parties that [the] proper law of reference is invariably the same as the proper law of arbitration agreement. . . . This law is, therefore, of not much relevance in the present case.

. . .

103. In conclusion, therefore, it is held that as in the present case, the cause of action had arisen in Sheikhpura; the proceedings under the Arbitration Act could validly be commenced before that Court in view of section 2 (c), sections 30, 33, 41 and 47 of the Arbitration Act read with section 20 of the Code of Civil Procedure; that the jurisdiction of the Courts in Pakistan could only be taken away by another Statute of that country and not by any principles of any other law, that the awards were domestic awards made on [an] arbitration agreement governed by Pakistani law and, therefore, the Arbitration (Protocol and Convention) Act, 1937 was not applicable; that the awards were domestic in nature for the same reason; that even under the principles of private International Law that jurisdiction of the Courts in Pakistan do not stand excluded, the trial Court was, therefore, not correct in holding that it has no jurisdiction to proceed with the two applications filed by the petitioner. [. . .]

THE PHILIPPINES

JUDICIAL DECISIONS*

Diplomatic immunity

Southeast Asian Fisheries Development Center v. Acosta
G.R. Nos. 97468-70, 2 September 1993, 226 SCRA 49

Two cases for wrongful termination of employment or dismissal were filed before the National Labour Relations Commission (NLRC) against the Southeast Asian Fisheries Development Center (SEAFDEC). SEAFDEC, contending to be an international inter-governmental organization composed of various Southeast Asian countries, moved to dismiss the cases on ground of lack of jurisdiction of the NLRC.

The Supreme Court ruled that, beyond question, SEAFDEC is an international agency enjoying diplomatic immunity. The Court reiterated its decision in *Southeast Asian Fisheries Development Center Aquaculture Department v. NLRC* (G.R. No. 86773 [1992]) that SEAFDEC is beyond the jurisdiction of the NLRC. Being an intergovernmental organization, established by the Governments of Burma (as it then was), Cambodia, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, Thailand and (South) Vietnam, SEAFDEC enjoys functional independence and freedom from control of the State in whose territory its office is located.

The Court recognized the personality of permanent international commissions and administrative bodies that have been created by the agreement of a considerable number of States for a variety of international purposes, economic or social and mainly non-political. In so far as they are autonomous and beyond the control of any one State, they have a distinct juridical personality independent of the municipal law of the State where they are situated. As such, they must be deemed to possess a species of international personality of their own.

The Court also cited Opinion No. 139 of the Minister of Justice, Series 1984:

* The summaries of judicial decisions and of the opinions of the Department of Justice have been selected and prepared by LEONOR DICDICAN, Institute of International Legal Studies, University of the Philippines Law Center, under the supervision of R.P.M. LOTILLA, Director of the Institute.

“One of the basic immunities of an international organization is immunity from local jurisdiction, i.e. that it is immune from the legal writs and processes issued by the tribunals of the country where it is founded. The obvious reason for this is that the subjection of such organization to the authority of the local courts would afford a convenient medium through which the host government may interfere in their operations or even influence or control its policies and decisions of the organization; besides, such subjection to local jurisdiction would impair the capacity of such body to discharge its responsibilities impartially on behalf of its member-states.”

State immunity; Act of State

US v. Reyes

G.R. No. 79253, 1 March 1993, 219 SCRA 192

A complaint for damages was filed against the Activity Exchange manager of the US Navy Exchange (NEX) at the Joint United States Military Assistance Group (JUSMAG) headquarters in Quezon City, Philippines, for discriminatory and oppressive acts committed by said manager outside the scope of her authority. The Supreme Court ruled that the case constituted an exception to the doctrine of state immunity.

The rule that a State may not be sued without its consent is one of the generally accepted principles of international law that has been adopted as part of Philippine law. In the case of *Shauf v. Court of Appeals* (191 SCRA 713 [1990]), the Supreme Court laid down the following:

“While the doctrine appears to prohibit only suits against the State without its consent, it is also applicable to complaints filed against officials of the State for acts allegedly performed by them in discharge of their duties. The rule is that if the judgment against such officials will require the State itself to perform an affirmative act to satisfy the same, such as the appropriation of the amount needed to pay the damages awarded against them, the suit must be regarded as against the state itself although it has not been formally impleaded.

. . .

It is a different matter where the public official is made to account in his capacity as such for acts contrary to law and injurious to the rights of plaintiff. As was clearly set forth by Justice ZALDIVAR in *Director of the Bureau of Telecommunications, et al. v. Aligaen, etc., et al.* (33 SCRA 368 [1970]) ‘Inasmuch as the State authorizes only legal acts by its officers, unauthorized acts of government officials or officers are not acts of the State, and an action against the officials or officers by one whose rights have been invaded or

violated by such acts, for the protection of his rights, is not a suit against the State within the rule of immunity of the State from suit . . .’ The rationale for this ruling is that the doctrine of state immunity cannot be used as an instrument for perpetrating an injustice.”

Therefore, the doctrine of immunity from suit will not apply and may not be invoked where the public official is being sued in his private and personal capacity as an ordinary citizen. A public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice and in bad faith, or beyond the scope of his authority or jurisdiction. The agents and officials of the United States Armed Forces stationed in the Philippines are no exception to the rule.

The defendant in this case is therefore not immune from civil liability for personal and private acts done beyond the scope and even beyond the place of official functions. Further, even if she is presumed to enjoy diplomatic immunity, which she did not in fact have, Article 31(c) of the Vienna Convention on Diplomatic Relations admits of exceptions. Thus, a diplomatic agent does not enjoy immunity from a receiving state’s jurisdiction in actions relating to any professional or commercial activity exercised outside his official functions.

Municipal law and international law

Cathay Pacific Airways, Ltd. v. Court of Appeals
G.R. No. 60501, 5 March 1993, 219 SCRA 520

A Filipino was a first class passenger of petitioner Cathay on its flight from Manila to Hongkong and onward from Hongkong to Jakarta. Upon his arrival in Jakarta, he discovered that his luggage was missing. He then filed a complaint in a Philippine court for breach of contract of carriage.

Cathay contended that the extent of its liability for breach of contract should be limited absolutely to that set forth in the Warsaw Convention.

The Supreme Court negated Cathay’s contention. Although the Warsaw Convention has the force and effect of law in the Philippines, being a treaty commitment assumed by the government, said convention does not operate as an exclusive enumeration of the instances for declaring a carrier liable for breach of contract of carriage or as an absolute limit to the extent of that liability. The Warsaw Convention declares the carrier liable for damages in certain cases and under certain limitations. However, it does not preclude the operation of the Civil Code and other pertinent laws of the Philippines. It does

not regulate, much less exempt the carrier from liability for damages for violating the rights of its passengers under the contract of carriage, especially if wilful misconduct on the part of the carrier's employee is established, as in this case.

Philip Morris, Inc. v. Court of Appeals

G.R. No. 91332, 16 July 1993, 224 SCRA 576

Philip Morris, Inc., Benson & Hedges, Inc. and Fabriques of Tabac Reunies, Inc. are all foreign corporations not doing business in the Philippines. Philip Morris, *et al.* commenced a suit against Fortune Tobacco Corporation, a corporation created and organized under Philippine laws, for infringement of registered marks. They alleged that such trademarks which have been registered in their respective countries of origin, as well as in other countries of the world, were used by Fortune in the manufacture, advertisement and sale of its own cigarettes, without authority from Philip Morris, *et al.* and with knowledge of the popularity of the said trademarks.

Section 21-A of the Trademark Law of the Philippines provides that any foreign corporation or person to which a trade mark or trade-name has been registered or assigned under this Law may bring an action for infringement, unfair competition, or false designation of origin and false description, whether or not it has been licensed to do business in the Philippines. In the case of *La Chemise Lacoste S.A. v. Fernandez* (129 SCRA 373 [1984]), the Supreme Court declared that a foreign corporation not doing business in the Philippines has a right to sue before Philippine courts, provided that qualifying circumstances necessary for the assertion of such right have been first affirmatively pleaded. A foreign corporation should not simply allege its alien origin but must additionally allege its personality to sue under Philippine law.

It was contended by Philip Morris, Inc., Benson and Hedges (Canada), Inc. and Fabriques of Tabac Reunies, S.A. that actual use of their trademarks in Philippine commercial dealings is not an indispensable element under the Paris Convention.

Article 2 of the Paris Convention of 1965, to which the Philippines is a signatory provides that :

“(2) [. . .] no condition as to the possession of a domicile or establishment in the country where protection is claimed may be required of persons entitled to the benefits of the Union for the enjoyment of any industrial property rights.”

Nonetheless, Sections 2 and 2-A of the Trademark Law of the Philippines require the actual commercial use of the trademark in the local forum :

“Section 2. What are registrable [. . .] Trademarks, tradenames and service marks owned by persons, corporations, partnerships or associations domiciled in the Philippines and by persons, corporations, partnerships or associations domiciled in any foreign country may be registered in accordance with the provisions of this Act; Provided, that said trademarks, tradenames, or service marks are actually used in commerce and services not less than two months in the Philippines before the time the applications for registration are filed; And provided further, that the country of which the applicant for registration is a citizen grants by law substantially similar privileges to citizens of the Philippines, and such fact is officially certified, with a certified true copy of the foreign law translated into the English language, by the government of the foreign country to the government of the Republic of the Philippines.

Section 2-A. Ownership of trademarks, tradenames and service marks; how acquired - Anyone who lawfully produces or deals in merchandise of any kind, who engages in any lawful business, or who renders any lawful service in commerce, by actual use thereof in manufacture or trade, in business, and in the service rendered, may appropriate to his exclusive use a trademark, a tradename, or a service mark not so appropriated by another, to distinguish his merchandise, business or service from the merchandise, business, or service of others. The ownership or possession of a trademark, tradename, service mark, heretofore or hereafter appropriated, as in this section provided, shall be recognized and protected in the same manner and to the same extent as are other property rights known to the law.’

The Supreme Court ruled that, although in this case a foreign corporation may have the personality to file a suit for infringement of its trademark, it may not necessarily be entitled to protection due to absence of actual use of the emblem in the local market which is required by Philippine law.

“Following universal acquiescence and comity, our municipal law on trademark regarding the requirement of actual use in the Philippines must subordinate an international agreement inasmuch as the apparent clash is being decided by a municipal tribunal. Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of the international law over national law in the municipal law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given standing equal, not superior to national legislative enactments.”

Therefore, the issue of whether or not an infringement suit filed by a foreign corporation not engaged in business in the Philippines will prosper, depends on compliance by the corporation with the requirements of the Trademark Law of the Philippines.

Foreign law: proof; Applicability of *lex loci contractus*

Zalamea v. Court of Appeals

G.R. No. 104235, 18 November 1993, 228 SCRA 23

Due to Trans World Airlines, Inc.'s refusal to accommodate them in a flight from New York to Los Angeles despite possession of confirmed tickets, petitioners filed an action for damages before a Philippine court based on breach of contract of carriage characterized by bad faith. Trans World Airlines contended that there was no bad faith nor fraud because, under the Code of Federal Regulations issued by the Civil Aeronautics Board of the United States of America, it is allowed to overbook flights.

The Supreme Court ruled in favour of the passengers on the ground that there was in fact bad faith on the part of the airline. The US law or regulation allegedly authorizing overbooking was not proved by the airline. Under Philippine law, foreign laws do not prove themselves nor can the courts take judicial notice of them. Like any other fact, they must be alleged and proved. Written law may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has custody. The certificate must be made by a secretary of an embassy or legation, consul general, consul, vice-consul, or consular agent or by an officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his office.

Even if the claimed US Code of Federal Regulations does exist, it is not applicable to this case. Based on the principle of *lex loci contractus*, the law of the place where the airline ticket was issued should be applied by the court where the passengers are residents and nationals of the forum and the ticket is issued in such State by the defendant airline. Since the tickets were sold and issued in the Philippines, Philippine law and not American law is the law applicable in this case.

Jurisdiction over contracts with foreign elements*Philippine-Singapore Ports Corporation v. National Labour Relations Commission*

G.R. No. 67035, 29 January 1993, 218 SCRA 77

The Philippine-Singapore Ports Corporation (PSPC), organized and existing under Philippine laws, entered into a contract of employment with a Filipino, employing the latter as a winchman/signalman at the Commercial Islamic Port of Jeddah, Saudi Arabia. A year later, the Filipino worker was sent back to the Philippines for medical treatment. He was later advised to resign from the company, whereupon he filed a case for illegal dismissal with the Ministry of Labor in the Philippines. PSPC moved to dismiss the case on the ground that the Ministry of Labor had no jurisdiction over the case as the case concerned the overseas employment of a Filipino worker.

The Supreme Court ruled that the Ministry of Labor had jurisdiction over the case. 'Overseas employment' is defined by Article 13(h) of the Labor Code of the Philippines as 'employment of a worker outside the Philippines'. The definition makes no distinction regarding the nationality of the employer. Therefore, Filipino employers who deploy their employees abroad should be deemed covered by the definition.

Puromines, Inc. v. Court of Appeals

G.R. No. 91228, 22 March 1993, 220 SCRA 287

Puromines, Inc. and Makati Agro Trading, Inc. entered into a contract with Philipp Brothers Oceanic, Inc. for the sale of urea in bulk. The sales contract provided for an arbitration clause, according to which any disputes arising from the contract shall be settled by arbitration in London.

When the shipment reached Manila, it was in bad order and condition. Petitioner filed a complaint for breach of contract of carriage against the shipper and against Philipp Brothers. The respondents moved to dismiss the case on the ground that it was prematurely filed and that petitioner should first comply with the arbitration clause in the sales contract.

The Supreme Court upheld the arbitration clause on the ground that the parties are obligated to respect the arbitration provisions in the sales contract. Petitioner being a signatory and party to the sales contract cannot escape from his obligation under the arbitration clause. The rule is that unless the agreement is such as to absolutely close the doors of the courts against the parties, which would be a void agreement, the courts look with favour upon

such amicable agreements and will only interfere with great reluctance to anticipate or nullify the action of the arbitrator.

Foreign corporations

Citibank, N.A. v. Chua

G.R. No. 102300, 17 March 1993, 220 SCRA 75

Petitioner is a foreign commercial banking corporation duly licensed to do business in the Philippines. It entered into a restructuring agreement with private respondents in this case. Private respondents sued the bank for specific performance for failure of the bank to comply with such agreement.

During the pre-trial conference, Citibank was declared in default for failing to present a special power of attorney executed by its board of directors, as required by Philippine law. Citibank appealed on the ground that under its by-laws, no board resolution was necessary for its legal counsel to act as the bank's attorney-in-fact because its by-laws grant to its Executing Officer and Secretary Pro-Tem the power to delegate to a Citibank officer, the authority to represent and defend the bank and its interests.

Section 125 of the Corporation Code of the Philippines requires that a foreign corporation applying for a license to transact business in the Philippines must submit to the Securities and Exchange Commission (SEC), among other documents, a copy of its articles of incorporation and by-laws. Unless these documents are submitted, the application cannot be acted upon by the SEC. Section 126 of the same Code provides that if the SEC is satisfied that the applicant has complied with all the requirements, it shall then issue a license to the applicant to transact business in the Philippines.

Since the SEC grants a license only when the foreign corporation has complied with all the requirement of law, it follows that when it issues such license, it is satisfied that the applicant's by-laws, among other documents, meet the legal requirements under Philippine law. This is, in effect, an approval of the foreign corporation's by-laws. Citibank's by-laws, although originating from a foreign jurisdiction, are therefore valid and effective in the Philippines.

Citizenship: loss; proof

Surban v. Court of Appeals

G.R. No. 98457, 1 March 1993, 219 SCRA 309

The spouses SURBAN emigrated to Guam and resided there permanently. A house and lot situated in the Philippines was sold to the couple. Thereafter, an action for quieting of title and damages was filed against the couple with respect to the property sold to them. It was alleged that the couple were American citizens at the time they acquired the property. Under the Philippine Constitution, save in cases of hereditary succession, no private lands may be conveyed or transferred to citizens of other states.

The Supreme Court held that there was no proof that the couple were no longer Filipino citizens when they acquired the property. In any case, the determination that a person has ceased to be a Filipino is so momentous and far-reaching that it should not be left to summary proceedings. Neither may it be raised as a collateral issue in a complaint for quieting of title and damages, where it cannot be properly ventilated.

Residence (in the country): loss

Romualdez v. Regional Trial Court, Branch 7, Tacloban City
G.R. No. 104960, 14 September 1993, 226 SCRA 408

Petitioner, a natural born Filipino citizen, is the nephew of the former First Lady of the Philippines, IMELDA ROMUALDEZ MARCOS. After the 1986 'EDSA's People Power Revolution', petitioner together with some relatives of the deposed President FERDINAND E. MARCOS and his wife, left the Philippines and sought 'asylum' in the United States which the United States government granted. In 1991, he received a letter from the US Immigration and Naturalization Service informing him that he should depart from the US at his own expense or risk being deported. He then departed for the Philippines. In 1992, he registered as a voter for the scheduled national and local elections. His registration was questioned on the ground that he was in fact a resident of Massachusetts, USA and that he failed to comply with the minimum residence requirement for voters. ROMUALDEZ contended that he remained a resident of the Philippines even if he had been absent from 1986 to 1991, since he never abandoned his residence.

In election cases, the Supreme Court has treated domicile and residence as synonymous terms. 'Residence' is synonymous with 'domicile' and refers not only to an intention to reside in a fixed place but also to personal presence in that place, coupled with conduct indicative of such intention. It denotes a fixed permanent residence to which, when absent for business or pleasure, one intends to return. Residence, once acquired, may, however, be lost by acquiring a new domicile under the following conditions: (1) residence or

bodily presence in the new locality, (2) an intention to remain there or *animus manendi*, and (3) an intention to abandon the old domicile or *animus non revertendi*.

Petitioner's sudden departure from the country cannot be described as a voluntary abandonment of residence. He left the country because of a serious concern for his safety and welfare under the conditions then prevailing.

The Court also emphasized that the right to vote is a most precious political right, as well as a duty of every citizen, enabling and requiring him to participate in government to ensure that the government derives its powers from the governed.

Environmental protection: right to a balanced and healthful ecology; Class suit in behalf of present and future generations

Oposa v. Factoran, Jr.

G.R. No. 101083, 30 July 1993, 224 SCRA 408

This case raised the novel issue of whether petitioners had a cause of action to 'prevent the misappropriation or impairment' of Philippine rain forests and 'arrest the unabated hemorrhage of the country's vital life-support systems and continued rape of Mother Earth'.

Petitioners, all minors duly represented and joined by their parents, filed a taxpayers' class suit against the Secretary of the Department of Environment and Natural Resources (DENR) alleging that as citizens and taxpayers, they were entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rain forests. Petitioners claimed that they represented their generation as well as generations yet unborn. They asserted such right based on the Constitution of the Philippines, which provides that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature". (Article II, Section 16, Philippine Constitution).

The Supreme Court upheld petitioners' personality to file a class suit for themselves, others of their generation and those of succeeding generations (*locus standi*):

"Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right considers the 'rhythm and harmony of nature'. Nature means the created world in its entirety. Such rhythm and harmony indispensably include, *inter alia*, the

judicial disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. . . . [T]he minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come."

The complaint focused on the people's constitutional right to a balanced and healthful ecology. The Supreme Court declared that such a right concerns nothing less than self-preservation and self-perpetuation, the advancement of which may even be said to predate all governments and constitutions. Thus, the state has a solemn obligation to preserve and protect the environment, otherwise, the day would not be too far when all else would be lost not only for the present generation, but also for generations to come.

The said right necessarily requires the judicious management and conservation of the country's forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted.

International adoption: capacity to adopt

Republic v. Court of Appeals

G.R. No. 100835, 26 October 1993, 227 SCRA 401

A natural born citizen of the United States of America and his wife, a former Filipino citizen who was naturalized as an American citizen, sought to adopt the minor niece and nephews of the wife, who were Filipino citizens. The Supreme Court held that the American citizen was not qualified to adopt under Philippine law. The Family Code of the Philippines, Executive Order No. 209, provides for the following:

"Article 184: The following persons may not adopt:

. . .

(3) An alien, except:

(a) A former Filipino citizen who seeks to adopt a relative by consanguinity;

(b) One who seeks to adopt the legitimate child of his or her Filipino spouse;

or

(c) One who is married to a Filipino citizen and seeks to adopt jointly with his or her spouse a relative by consanguinity of the latter.

Aliens not included in the foregoing exceptions may adopt Filipino children in accordance with the rules on inter-country adoption as may be provided by law.”

While the alien husband could not adopt, the wife, being a former Filipino citizen, was qualified to adopt. However, under the Family Code, a husband and a wife must jointly adopt except when one spouse seeks to adopt his own illegitimate child or when one spouse seeks to adopt the legitimate child of the other. Therefore, the wife could adopt without the participation of her husband.

OPINIONS OF THE DEPARTMENT OF JUSTICE

Treaties and executive agreements

Opinion No. 1, Series 1993 - Constitutional feasibility of holding in the Philippines a joint military exercise between the Armed Forces of the Philippines and Singapore

The AFP [Armed Forces of the Philippines] proposed the conduct of a combined exercise between military forces of the two countries; the exercise would involve battalion-size units and be held at Fort Magsaysay for two weeks. The suggested activity was conceived to enhance security cooperation between ASEAN member states.

The Secretary of Justice opined that the planned military exercise is allowed under Article XVIII, Sec. 25 of the Constitution¹⁰ since it would not require the stationing of foreign troops in the Philippines. The activity need not be covered . . . [by] a treaty and . . . if at all, would merely require a prior Executive Agreement between the governments of the Philippines and Singapore.

The Constitution sought to prevent only the establishment of foreign military bases and facilities and the stationing of foreign troops similar to those

¹⁰ Section 25, Article XVIII of the 1987 Constitution provides that:

“After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, *foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate, and when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State*”. (Emphasis added)

introduced in the country by the United States bases. The transient entry of foreign military units and their temporary stay in the country do not fall within the prohibition against foreign military bases.

The Philippines adheres to the policy of peace, equity, justice, freedom, cooperation, and amity with all nations. The joint military exercise implements a commitment of the Philippine Government towards its co-ASEAN members aimed at enhancing security within the region and supporting cooperative efforts in this regard. Any agreement therefore entered into between the governments of the two nations need not be in the form of a treaty and does not require ratification by the Senate.

Opinion No. 95, Series 1993 - Constitutionality of a proposal for the AFP to host a regional Defense Resources Management Course to be conducted by a mobile education team composed of US military personnel

The aforesaid proposal will be funded under the US 'IMET Program'. It will require the presence of US military men who will serve as instructors, as well as the participation of some soldiers from other East Asian countries and from the AFP. The conduct of the course locally will enable the AFP to train more personnel at minimum costs, while providing it with an opportunity to establish and maintain goodwill with the armed forces of other Asian countries and the USA.

. . .

[. . .] [T]here were misgivings about the legality [constitutionality] of the subject proposal since it will require the presence of foreign military personnel in the country, namely, the American instructors and the other East Asian participants.

The Department of Justice opined that there is no violation of [Section 25, Article XVIII of] the Constitution. It affirmed a previous opinion [*see supra*] where it declared that what is [. . .] prohibited is the presence of alien military units with some degree of permanency and magnitude.

The subject proposal does not fall within the ambit of the constitutional injunction, because it merely calls for the provisional stay of a few US military servicemen who will serve as course instructors, and about twenty soldiers from other East Asian countries as participants.

State succession with respect to treaties

Opinion No. 23, Series 1993 - Effect of the unification of two Germanies upon the international treaties and agreements between the Philippines and the former German Democratic Republic

The Office of the Legal Advisor of the Department of Foreign Affairs rendered an opinion that a state which acquires authority over land and people from another State succeeds to the rights and obligations of [that] State. The Embassy of the Federal Republic of Germany in a diplomatic note expressed its opinion that the RP-GDR agreements expired upon the establishment of German unity on 3 October 1990 but that for *bona fide* reasons, it is ready to honour the commitments for scholarships already assumed by the GDR.

There is therefore concurrence of the two positions: that RP-GDR agreements expired on 3 October 1990 but that rights that have accrued from said agreements should be respected by the FRG.

Under international law, in cases of universal succession of states, rights which have become vested in the territory of the extinct state, together with obligations created by treaties or contracts which are already executed in whole or in fact, pass by succession to the succeeding state.

As far as Germany is concerned, the German Unification Treaty of 31 August 1990 provides that international treaties concluded by GDR shall be discussed with contracting parties in terms of protection of *bona fide* rights and interests of the State concerned.

Rights of Citizens

Opinion No. 96, Series 1993 - Right to Return to the Country

Mrs. HELMA VER TUASON and her husband, REYNALDO TUASON requested for permission to be allowed to return to the Philippines after they had left the country in February, 1986, on the ground that no charges had been filed against her.

In the case of *Marcos v. Manglapus* (177 SCRA 668), the Supreme Court held that

“the right to return to one’s own country is not among the rights specifically guaranteed in the Bill of Rights, which treats only of the liberty of abode and

the right to travel, but [. . .] that the right to return may be considered as a generally accepted principle of international law and, under our Constitution, is part of the law of the land (Art. II, Sec. 2 of the Constitution). However, it is distinct and separate from the right to travel and enjoys a different protection under the International Covenant of Civil and Political Rights, i.e. against being arbitrarily deprived thereof [Art. 12(4)]”.

In the aforecited case, the issue resolved by the Supreme Court is whether or not the President has legal authority to bar the MARCOSES from returning to the Philippines. The Court upheld the Presidential ban on the return of the former President MARCOS on the ground that the then President AQUINO had the power to promote and protect the general welfare. The court explained thus:

“ . . . [T]he request or demand of the Marcoses to be allowed to return to the Philippines cannot be considered in the light solely of the constitutional provisions guaranteeing liberty of abode and the right to travel. . . . It must be treated as a matter that is appropriately addressed to those residual unstated powers of the President which are implicit in and correlative to the paramount duty residing in that office to safeguard and protect general welfare. In that context, such request or demand should submit to the exercise of a broader discretion on the part of the President to determine whether it must be granted or denied.”

Said decision is not applicable to the TUASON spouses. The couple are not similarly situated with the former President MARCOS who was forced out of office after causing twenty years of political, economic and social havoc in the country. Therefore, where a Philippine citizen’s return to the Philippines will not pose a threat to national security, public order or general safety, there would be no legal basis to bar them from doing so. Under international law, a citizen cannot be arbitrarily deprived of the right to enter his own country. The Universal Declaration of Human Rights [Article 13(2)] provides that

“(e)veryone has the right to leave any country, including his own, and to return to his country” while the International Covenant on Civil and Political Rights [Article 12(4)] clearly declares that “[n]o one shall be arbitrarily deprived of the right to enter his own country”.

Recognition and enforcement of foreign court decisions; change of name under foreign law***Opinion No. 133, Series 1993 - Legal Efficacy of the change of name of a Filipino residing in another state, pursuant to a Court order of said state***

The guardian of a Filipino minor residing in California, USA, petitioned for a change of said minor's name before a California superior court. A judgment was rendered by the Superior Court of the State of California for the City and County of San Francisco, granting the petitioner to change his name. Said Filipino minor then applied for the renewal of his passport under his new name.

Under Philippine law, the real name of a person is that found in the civil register and such name may be changed only by means of appropriate proceedings filed under Act No. 1386 in relation with Rule 103 of the Rules of Court. Hence, a passport may normally be issued in the instant case only in the name of the person which appears in the civil register. But since there appears to have been issued a foreign judgment directing the change of name of the Filipino minor, the question to be resolved in this case is whether or not this decree may be enforced in the Philippines.

In its Opinion No. 190 series 1971, [the Secretary of Justice] opined that a foreign court decision authorizing the change of name of a person born in the Philippines may be complied with in this jurisdiction on the ground of comity. Said opinion reads in part:

“Considering that in the present case, it is a foreign judgment that decrees the change of name and in the light of the familiar principle in Private International Law against the extension of a foreign judgment if unwarranted by the law or the fundamental policy of the forum, I believe that a new birth certificate may not be issued in this case; nonetheless, on the ground of comity, upon the presentation of a duly authenticated copy of the decision of the court of Hawaii, the local civil registrar may record the said change of name by making the necessary marginal annotations in the proper registry.”

Moreover, in its Opinions No. 4-A, series 1987, and No. 52, series 1973, this Department has stated that the decision of a foreign court affecting a Filipino spouse may be recognized in [the Philippines] provided that the following conditions are complied with:

1. The foreign judgment must be proved in accordance with Philippine law.

2. The American court which pronounced judgment must have jurisdiction to do so, there must have been notice to the parties, and there must have been no collusion, fraud, or clear mistake of law or fact.
3. Pursuant to the recognized international law rule that in order that a foreign judgment may be entitled to acceptance in the court of the forum, it (the judgment) must not contravene a sound and established public policy of the forum.
4. The judgment must be final and conclusive in the state where it was rendered.

Based upon the above mentioned precedents, it is believed that in this case, the decision of the American court granting the change of name should be accorded recognition in this jurisdiction after it is established that the conditions above enumerated have been met.

Effect of divorce abroad; irrelevance of former citizenship of the foreign spouse

Opinion No. 134, Series 1993 - Foreign divorce obtained by an alien spouse, who was a former Filipino citizen; Effect on the Filipino spouse

The Department is of the view that said Filipino spouse may legally remarry based on Article 26 of the Family Code of the Philippines (Executive Order No. 209, as amended), which reads as follows:

“ . . . Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall likewise have capacity to remarry under Philippine law.”

In Opinion No. 10, series 1989, the Department ruled that:

“Divorce, as a general rule, is not recognized in the Philippines. However, in the situation contemplated in Article 26 of the Family Code, *supra*, and only in that instance, the effect of divorce, which is the severance of the marriage ties, is allowed to benefit the Filipino spouse who is thereby given capacity to remarry under Philippine law.

It is said that the idea of inclusion of the second paragraph of Article 26 is to avoid the absurd situation of a Filipino being still legally married to his or her alien spouse, although the latter is no longer married to the Filipino spouse because he or she has obtained a divorce abroad which is recognized by his

or her national law. It will, likewise, solve the problem of many Filipino women who, under the Civil Code, are still considered married to their alien husbands even after the latter have already validly divorced them under their (the husband's) national law and perhaps have already remarried."

It is believed that the above ruling equally applies to the instant case. The aforementioned Article 26 merely states 'alien spouse' without taking into consideration his nationality at the time of marriage. Therefore, the fact that the spouse who obtained the foreign divorce was a former Filipino citizen is not controlling. What is important is that the divorce was obtained by the spouse who is not a citizen of the Philippines, in order that the second paragraph of Article 26 of the Family Code can apply.

Irrelevance of nationality for applicability of family code article 34

Opinion No. 150, Series 1993 - Applicability of Article 34 of the Family Code of the Philippines (Executive Order No. 209 as amended)

Article 34 provides that:

"No license shall be necessary for the marriage of a man and a woman who have lived together as husband and wife for at least five years and without any legal impediment to marry each other. The contracting parties shall state the foregoing facts in an affidavit before any person authorized by law to administer oaths. The solemnizing officer shall also state under oath that he ascertained the qualifications of the contracting parties and found no legal impediment to the marriage."

In this case, a Regional Trial Court Judge officiated 'a marriage under Article 34 of the Family Code' between a Chinese national and a Filipino citizen. The Chinese national, however, failed to secure a certificate of legal capacity to contract marriage from his Embassy as required under Article 21 of the said Code as well as to apply for a marriage license. The issue here is whether or not the foregoing provision of the Family Code can also be availed of by aliens.

It is apparent from the above quoted provision of law that there is no mention of the nationalities of the persons to whom it is applicable. A well-known doctrine in statutory construction states: *ubi lex non distinguit nec nos distinguere debemos*. Under this legal principle, there should be no distinction in the application of a statute where none is indicated. Equally pertinent is the rule that when the law is clear and unequivocal, it is not

susceptible to interpretation; the statute must be taken to mean exactly what it says.

The reason behind Article 34 of the Family Code is to encourage a man and woman living together to legitimize their cohabitation since under normal circumstances, such couples are discouraged from marrying each other owing to the publicity attending the application for, and issuance of, a marriage license. There is no cogent reason for denying non-Philippine citizens the salutary objective of Article 34 in facilitating the ratification of marital cohabitation. The law's interest in putting in order the social relationship among its citizens should likewise extend to foreigners who reside within its jurisdictional limits. Article 34 of the Family Code can be availed of by both Filipino citizens and aliens.

DECLARATIONS

Impact of the United Nations Convention on the Law of the Sea, 1982 on the rights and the law of the Philippines.

Declaration made upon ratification of the United Nations Convention on the Law of the Sea¹¹

1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;
2. Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of 10 December 1898, and the Treaty of Washington between the United states of America and Great Britain of 2 January 1930;
3. Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defence Treaty Between the Philippines and the United States of America of 30 August 1951 and its related interpretative instruments; nor those under any other pertinent bilateral or multilateral treaty or agreement to which the Philippines is a party;

¹¹ Law of the Sea Bulletin No. 25, June 1994.

4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the water appurtenant thereto;
5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamation of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippines Constitution;
6. The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic State over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence and security;
7. The concept of archipelagic waters is similar to the concept to internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation;
8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty.

A CONCISE DIGEST OF PHILIPPINE DECISIONS, OPINIONS AND PRACTICES ON MATTERS OF INTERNATIONAL LAW
(contributed by JORGE R. COQUIA¹²)

1. INTRODUCTION

The Constitution of the Philippines states that the Philippines “recognizes the generally accepted principles of international law as part of the law of the land.”¹³ To

¹² Retired Associate Justice of the Court of Appeals and Legal Adviser of the Department of Foreign Affairs of the Philippines.

¹³ Art. II, par. 2 Philippine Constitution (1986).

what extent has this provision been complied with by the courts and government agencies of the Philippines concerned with the application of international law?

Only recently, the Philippine Supreme Court made a rather disquieting statement in deciding a case involving a law on trademark, saying

“withal the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given standing equal, not superior, to national legislative enactments.”¹⁴

It is generally recognized that international law unquestionably takes priority over national law. It is to be assumed that a treaty, duly signed and ratified, is in accord with the national constitution. Otherwise the state will be guilty of bad faith in ratifying it. A treaty duly signed and ratified becomes automatically part of the ‘law of the land’. Taking priority over all laws antecedent to its adoption, it is the duty of the national courts to enforce the provision of the treaty in cases calling for their application. Legislation passed or administrative determination subsequent to the adoption of the treaty in violation of its provisions is invalid and should be declared so by the appropriate agency of the government.¹⁵ In like manner, in doubtful cases where the national legislative enactment or administrative ruling is open to different interpretations the courts of the state should give the benefit of the doubt to the provisions of the treaty. Where a municipal legislation contradicts a rule of customary international law or some provision of a treaty, or where a new rule of international law collides with the pre-existing municipal law, the state may not alter unilaterally the rules of international law by which it is bound. It follows that any municipal law incompatible with international law is invalid. Courts of most states seek to avoid conflicts by interpreting municipal law so as not to contradict international law on the basis that the state is not presumed to intend to fail in the discharge of its international obligations.¹⁶

2. IMMUNITIES

2.1. Sovereign Immunity

Shortly after the Philippines became an independent state, the Philippine Supreme Court ruled that the Hague Rules of War are based on accepted principles of international law and have force in the Philippines regardless of the fact that the Philippines was not a signatory of said Convention.¹⁷ Subsequently, in a number of cases involving suits filed against US Armed Forces officials in their official capacity,

¹⁴ *Philip Morris v. C.A. and Fortune Tobacco*, 224 SCRA 576 (1993).

¹⁵ C. FENWICK, *International Law* (4th Edn., 1965) p. 117.

¹⁶ M. SORESENSEN, *Manual of Public International Law* (1968), p. 168.

¹⁷ *Kuroda v. Jalandoni*, 93 Phil. 171 (1949).

the Court applied the general principle of immunity of a foreign state from local jurisdiction.¹⁸

In *US v. Ruiz*,¹⁹ the Supreme Court, in 1985, dismissed a petition for *certiorari* filed against the Commanding General of the US Naval Forces in Subic Bay concerning a contract for the improvement of marine and naval installations. The Court said:

“The traditional rule of immunity exempts a State from being sued in the courts of another State without its consent or waiver. This rule is a necessary consequence of the principles of independence and equality of States. However, the rules of international law are not petrified; they are constantly developing and evolving. And because the activities of states have multiplied, it has been necessary to distinguish them – between sovereign and governmental acts (*jure imperii*) and private, commercial and proprietary acts (*jure gestionis*). The result is that State immunity now extends only to acts *jure imperii*. The restrictive application of State immunity is now the rule in the United States, the United Kingdom and other states in Western Europe.

The restrictive application of State immunity is proper only when the proceedings arise out of commercial transactions of the foreign sovereign, its commercial activities or economic affairs. Stated differently, a State may be said to have descended to the level of an individual and can thus be deemed to have tacitly given its consent to be sued only when it enters into business contracts. It does not apply where the contract relates to the exercise of its sovereign functions. In this case the projects are an integral part of the naval base which is devoted to the defense of both the United States and the Philippines, indisputably a function of the government of the highest order; they are not utilized for nor dedicated to commercial or business purposes.”²⁰

In 1990, the Supreme Court also reiterated the traditional rule of foreign state immunity of suit in two cases.

In *US v. Ceballos*,²¹ a barracks boy was arrested by US Air Force officers on accusation of ‘buy bust’ operations for distribution, possession and use of prohibited drugs. The complaint filed by CEBALLOS questioning his discharge from the service against US Air Force officers was dismissed by the Supreme Court on the ground that they were in the discharge of their duties as agents of the United States Government. They could not be impleaded for acts imputable to their principal which had not given its consent to be sued.

Similarly, in *US v. Alarcon*,²² a complaint for damages was filed against US Armed Forces for alleged injuries suffered when dogs were unleashed on complainants

¹⁸ *Syquia v. Almeda Lopez*, 84 Phil. 312 (1949); *Raquiza v. Radford*, 75 Phil. 50 (1945); *Johnson v. Turner*, 94 Phil. 807 (1954); *Baer v. Tizon*, 57 SCRA 1 (1974); *Miquiabas v. Commanding General*, 80 Phil. 282 (1948); *Marvel Bldg. v. War Damage Commission*, 85 Phil. 27 (1949); *Parreño v. McGrannery*, 92 Phil. 79 (1953).

¹⁹ 136 SCRA 487 (1985).

²⁰ Citing J. COQUIA and M.D. SANTIAGO, *Public International Law* (1984) p. 207.

²¹ *US v. Ceballos* and *US v. Alarcon*, 182 SCRA 544 (1990). See also *Garcia v. Mathis*, 100 SCRA 250; *Sanders v. Veridiano*, 162 SCRA 88 (1988).

²² G.R. No. 80258, 182 SCRA 644 (1990).

allegedly committing theft within the US military base. The US military commander invoked immunity from suit which was sustained by the Supreme Court.

2.2. Restrictive Immunity

The principle of state immunity from suit is not altogether absolute. Following the ruling in the early British case concerning the *Parlement Belge*²³ the Philippine Supreme Court in two cases held that foreign state officials may be sued in their private capacity for non-governmental or proprietary activities or for malicious acts.²⁴

In *US v. Guinto*,²⁵ the Supreme Court ruled that contracts bidden out for barbering services in the US Air Force base were not governmental in nature. Hence the suit filed by one of the bidders against the US Air Force Commander was given due course by the Court. The barber establishments provided only for the grooming needs of their customers and offered not only the basic haircut and shave, but also amenities such as shampoo, massage, manicure, all for a fee. The US Air Force officials could not, therefore, plead immunity from suit as the contracts were decidedly commercial in nature.

In *US v. Rodrigo*,²⁶ the restrictive immunity from suit was likewise applied. The transaction involved restaurant services within the Camp John Hay Air Station which was opened not only to US servicemen but also to the public and tourists. It was a business enterprise, hence, the US Air Force officials who were sued by the restaurant cook could not invoke immunity from suit.

Likewise, an official of a foreign state may not invoke immunity of local jurisdiction if he was sued for damages due to malicious or tortuous acts which are beyond the scope of an official duty.²⁷

3. PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

Reiterating its 1972 ruling in *World Health Organization and Dr. Leonce Verstuft v. Hon. Benjamin Aquino*²⁸ that an official of the World Health Organization is immune from the application of local law, the Philippine Supreme Court in 1990 held in two consolidated cases that recognized international organizations are exempted from the application of the Philippine labor law.

As an aftermath of the Vietnam war, the international community was concerned with the plight of Vietnamese refugees fleeing from Communist rule in South Vietnam.

²³ L.R. 5 P.D. 197 (1880), cited in FENWICK, op. cit. p. 30.

²⁴ *Shauff v. Court of Appeals*, 191 SCRA 713 (1990).

²⁵ G.R. No. 76607, 182 SCRA 644 (1990); 1 AsYIL (1991) 168.

²⁶ G.R. No. 79470, 182 SCRA 644 (1990).

²⁷ *Shauff v. Court of Appeals*, 191 SCRA 713 (1990).

²⁸ 48 SCRA 242 (1972).

In response to this crisis an agreement was forged on 22 February 1981 between the Philippine Government and the United Nations High Commissioner for Refugees²⁹ whereby an operating center processing Indo-Chinese refugees for eventual resettlement to other countries was established in the Philippines. The International Catholic Migration Commission (ICMC), a non-profit international humanitarian agency incorporated in New York, was accredited by the Philippine Government to operate the refugee center in the Philippines. As a consultative agency of category II in the UN, the ICMC was granted status as a specialized agency with corresponding diplomatic privileges by the Philippine Government.

In view of a certification of election of an employees union of the ICMC, issued by the Director of Bureau of Labor Relations of the Philippine Government, the ICMC filed a petition for *certiorari* with the Philippine Supreme Court invoking its status as a recognized agency with corresponding diplomatic privileges and immunities. The Department of Foreign Affairs through its Legal Adviser intervened in the case asserting the diplomatic immunity of the ICMC over the apparition of the Solicitor General who appeared for the Secretary of Labor. The Supreme Court sustained the intervention of the legal adviser of the Department of Foreign Affairs.³⁰ The Supreme Court reiterated the principle in a previous decision,³¹ and ruled that a categorical recognition by the Executive Branch of diplomatic immunity is essentially a political question which is conclusive on courts.

A similar ruling was rendered in a case involving the International Rice Research Institute, Inc., a Ford and Rockefeller Foundation-supported international organization, with the principal objective of conducting research on rice production. The Supreme Court ruled that an application of the Philippine Labor Law on the employees and laborers violated the immunities and privileges of IRRI as a recognized international organization.³²

4. SOVEREIGNTY AND TERRITORIAL INTEGRITY

The struggle for independence, sovereignty and territorial integrity of the country since the 16th century by the Philippines was realized only in 1992. The Philippines was a colony of Spain since its 'discovery' in 1521 until its sovereignty was transferred to the United States under the Treaty of Paris of 1898. While US sovereignty was withdrawn on 4 July 1946, US military presence prevailed in the country by virtue of the US-PI Military Bases Agreement on 14 March 1947 for a period of 99 years. The MENDEZ-BLAIR Agreement in 1966 reduced the period to 25 years from 16 September

²⁹ Unpublished, deposited at the Philippine Department of Foreign Affairs.

³⁰ *International Catholic Migration Commission v. Pura Calleja, et al.*, 190 SCRA 130 (1990).

³¹ *World Health Organization and Dr. Leonce Verstuft v. Hon. Benjamin Aquino*, 48 SCRA 242 (1972).

³² 190 SCRA 130 (1990).

1966. It was on this basis that Article XVIII Section 25 in the Transitory Provisions of the 1987 Philippine Constitution provided that after the 25th year which was on 16 September 1991

“no foreign military bases, troops or facilities shall be allowed in the Philippines, except under a treaty concurred in by the Senate and when Congress so requires by a majority of the votes cast by the people in a national referendum held for that purpose and recognized as a treaty by the other contracting State.”

This provision gave an opportunity for the Philippines to assert its sovereignty, independence and territorial integrity and eliminate foreign intervention, and for the Philippine Senate to reject a proposed treaty to extend the US-R.P. military bases agreement.

As a measure of avoiding interference with its domestic affairs and to maintain its sovereignty and territorial integrity Article II Section 7 of the Philippine Constitution provides that the state:

“shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.”

Related to the maintenance of sovereignty and independence, Section 8 of Article II of the Constitution also provides that “consistent with national interest, the Philippines adopts a policy of freedom from nuclear weapons in its territory”.

In reply to a query of the Office of the President, the Secretary of Justice in his letter to the President, dated 7 July 1988, gave his opinion to the effect that the phrase “consistent with the national interest meant that the President in his or her discretion may negotiate a modification or extension of the military bases agreement regardless of the provisions pertaining to nuclear weapons”.³³

5. LIMITATIONS ON DIPLOMATIC IMMUNITIES AND PRIVILEGES

The Director-General of the International Rice Research Institute (IRRI) was requested by the Department of Foreign Affairs to waive the diplomatic immunity of one of its officials who violated a local law in order that the criminal case filed against

³³ Text reproduced in *World Bulletin* (1988) No. 3-4 p.53. Professor MERLIN MAGALLONA of the University of the Philippines College of Law contended that if the provision (Art. II Section 8) should be meaningful at all in the life of the Filipinos as a nation, this Constitutional policy can only be interpreted in one sense, namely: it is consistent with the national interest that the Philippines adopts and pursues the policy of freedom from nuclear weapon in its territory. MERLIN M. MAGALLONA, “National Interest on Nuclear Weapons - Rejoinder to the Secretary of Justice opinion”, *World Bulletin* (1988) No. 3-4 p. 53.

him may be properly litigated. This is in consonance with Article 10 para. 2 of Presidential Decree No. 1620³⁴ which provides that the Director-General of the Institute shall have the right and duty to waive the immunity of any official whenever in his opinion, the immunity would impede the normal course of justice and can be waived without prejudice to the interest of the Institute.

A similar opinion was applied to a Netherlands diplomatic representative who had failed to pay the rentals for a residence, leased to him by a Filipino citizen, and had left the country. It was the opinion of the Legal Adviser of the Department of Foreign Affairs that the diplomat should be made to pay a just obligation.³⁵

In view of the refusal of two agents of the United States Embassy in Manila to appear and testify before a fact finding body created by the President in connection with the killing of some local police officials in Makati on 10 July 1990, the Senate proposed a resolution to conduct an immediate review of the coverage of diplomatic privileges and immunities as provided for in the Vienna Convention on Diplomatic Relations.

The two US agents, who were registered with the Office of Protocol of the Department of Foreign Affairs with diplomatic visas, refused to testify in the investigation.

The legal adviser of the Department of Foreign Affairs stated in an opinion that the *rationale* behind the immunities and privileges granted to diplomatic agents, is to enable them to exercise their functions without impediment from local authorities.³⁶ These immunities and privileges are recognized not for the benefit of any individual but for the efficient performance of their missions or functions.

The personal inviolability of diplomatic agents, however, presupposes that they act and behave in such a manner as to harmonize with the internal order of the receiving state. They are, therefore, expected to voluntarily comply with the commands and injunctions of the municipal law which do not restrict them in the effective exercise of their functions. If the diplomatic agents violate the law and disturb the internal order of the State, the latter has the right to request their recall.³⁷

6. PERSONA NON-GRATA

International law and practice demands that diplomatic officials should not interfere in the political affairs of the host state. A recent type of prohibition, as far as diplomatic activities are concerned, are acts of assisting or participating in terrorist activities in the host country.

³⁴ Text in 66 *Philippine Presidential Decrees and other Vital Documents* 59.

³⁵ Opinion dated 2 June 1989.

³⁶ In order to assure due respect to diplomatic representatives, a public statute (Republic Act No. 75(1946) was enacted, severely penalizing any person who assaults, strikes, imprisons or in any other manner does violence to the person of an ambassador or public minister.

³⁷ Opinion dated 16 June 1990.

For the first time in the history of the Philippines, the Department of Foreign Affairs declared as *persona non grata* a diplomatic official (Iraqi) who was involved in a bombing incident in a public place during the Persian Gulf crisis. The diplomatic official was asked to leave the country. Although the law and practice in diplomatic relations do not require the receiving state to state the reason for the recall of a diplomatic officer, the Philippine government nevertheless stated its reasons in a diplomatic note.³⁸

7. ASSISTANCE IN CRIMINAL MATTERS

The Philippines is gradually adhering to the growing development of mutual cooperation and assistance among states in the enforcement of their laws even outside their territorial boundaries.

Up to 1988, the Philippines had only one extradition treaty, which was with Indonesia,³⁹ when it concluded one with Australia.⁴⁰ Later extradition treaties were entered into with Canada,⁴¹ Switzerland,⁴² Micronesia,⁴³ and South Korea⁴⁴. A treaty with the United States is being negotiated.

The treaties follow the type of extradition of the 'no list' or double criminality approach. It is an improvement on the traditional listing of crimes which is inflexible and may give rise to difficulties where offences are called under different names in different countries. Under the 'no list' type of treaty, extradition can be resorted to for any offence punishable under the laws of both states for a period of at least one year or more, except political crimes.

The Philippines also concluded a separate agreement on mutual assistance in criminal matters with Australia. Both states agreed to cooperate in the investigation, prosecution and suppression of crimes. Criminal matters will include violations of revenue laws, foreign exchange control, corruption, unlawfully acquired property, bribery, fraud, forfeiture of criminally acquired property. The assistance shall consist of taking evidence, production of documents, identification of persons, execution of requests for search and seizure, measures for the forfeiture of the proceeds of the

³⁸ Diplomatic Note No. 910424 sent to the Embassy of Iraq on declaring as *persona non grata* Mr. SABAH S. SAID, on 31 January 1991.

³⁹ Entered into force 23 Oct. 1976. Text in 1031 UNTS 225, 7 PhTS No. 667, LN 1976 No. 38, 5 Phil.YIL(1976) 177.

⁴⁰ Entered into force 18 Jan. 1991.

⁴¹ Entered into force 12 Nov. 1990.

⁴² 19 October 1989, ratification pending.

⁴³ Entered into force 6 Sept. 1990.

⁴⁴ 25 May 1993, ratification pending.

crime, making persons available to assist in the investigations and service of documents.⁴⁵

8. RATIFICATION OF INTERNATIONAL AGREEMENTS

The treaty-making power of the President as now provided in the 1987 Philippine Constitution will likely cause disputes between the President and the Philippine Senate. Article VII, Section 21 of the Constitution reads:

“No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate.”

Shortly after the present (1987) Constitution took effect, a dispute arose when the last amendment to the US-RP Military Bases Agreement, popularly known as the ‘MANGLAPUS-SHULTZ’ agreement, was concluded. Some members of the Philippine Senate demanded a Senate ratification of what they considered to be an international agreement. An *Ad Hoc* Committee created by Senate President JOVITO R. SALONGA, however, rendered an opinion that the President may not be compelled to submit said agreement for Senate ratification since she considered it to be an executive agreement.⁴⁶

The issue was raised for the first time in 1959 in the case *USAFE Veterans v. Treasurer of the Philippines, et al.*⁴⁷ involving the ROMULO-SNYDER Loan Agreement entered into in 1950 between the Philippines and the United States. The Supreme Court ruled that the ROMULO-SNYDER Loan Agreement, negotiated and signed by then Foreign Affairs Secretary CARLOS P. ROMULO, was an executive agreement, hence, it did not need the concurrence of the Philippine Senate to be valid and effective. A similar ruling was rendered in *Commissioner of Customs v. Eastern Trading*⁴⁸ where the Supreme Court also distinguished between a treaty and an executive agreement.

The issue likely to be raised under the present Constitution is, whether the sweeping phrase ‘treaty or international agreement’ will legally obligate the executive branch of the Government to submit all international agreements for concurrence by the Senate.

When is an international agreement deemed to be an executive agreement? Who will determine whether said document is a treaty or an executive agreement?

Executive agreements are the result of a unique American practice in establishing relations with other states. It is a binding international obligation made by the executive

⁴⁵ Text in 8 *Foreign Relations Journal* (1993) 100. The treaty was ratified by the Philippine Senate in September 1993.

⁴⁶ The committee was composed of former Chief Justice PEDRO YAP, former Supreme Court Justice VICENTE ABAD SANTOS and Ateneo University President JOAQUIN BERNAS, S.J.

⁴⁷ 105 Phil. 1039 (1959).

⁴⁸ 3 SCRA 351 (1961).

branch on the basis of prior congressional authorization or even without such authorization but within the powers generally recognized as vested in the President.

International agreements embodying adjustments or details carrying out well-established national policies and traditions, amendments to existing treaties, those involving arrangements to existing treaties and those involving arrangements of a more or less temporary nature, usually take the form of executive agreements.

A circular of the US State Department provides that Executive Agreements shall not be used when the subject matter should be covered by a treaty (Memorandum from the Senate Legislative Counsel and the Legal Adviser of the State Department, 14 ILM (1975) 1588). The Executive Agreement shall be used only for agreements which fall into one or more of the following categories:

1. Agreements which are made pursuant to or in accordance with existing legislation or a treaty;
2. Agreements which are made subject to Congressional approval or implementation; or
3. Agreements which are made under and in accordance with the President's Constitutional Power.

(Department of State Circular No. 175, 13 Dec.1955, 50 AJIL(1956) 785).

When there is any serious question as to whether an international agreement should be made in the form of a treaty or in the form of an executive agreement, the US State Department circular provides that the matter shall be brought to the attention of the Secretary of State by a memorandum prepared by the officer responsible for the intended negotiations.

Following the US State Department practice the Legal Adviser of the Philippine Department of Foreign Affairs recommended the issuance by the Office of the President of Memorandum Circular No. 89 dated 19 December 1988, providing for guidelines on when an international agreement is a treaty which should be submitted to the Philippine Senate for concurrence in accordance with Constitution. The pertinent provision of the Circular reads:

"In case of dispute as to whether an international agreement should be submitted to the Philippine Senate for its concurrence the matter should be referred to the legal Adviser of the Department of Foreign Affairs for comment. The Senate officials may also give their comment after consultations with the Secretary of the Department of Foreign Affairs for recommendation to the President."⁴⁹

9. POLITICAL ASYLUM

In reply to the request of a Filipino national, who had become a naturalized citizen of the United States, for political asylum in the Philippines on the ground of alleged

⁴⁹ Text in 2 *The Diplomatic Review* (1990)3.

threats to his life in the US, the Foreign Affairs Legal Adviser ruled that political asylum is not a right possessed by an alien.⁵⁰

While the Constitution of a number of states expressly grants the right of asylum to persons persecuted for political reasons, it cannot yet be said that such a right has become a general principle of international law. At present asylum is just a privilege granted by a state to allow an alien escape from the persecution of his country for political reasons. Such an alien enjoys the hospitality of the state but it is the right of the state to place him under surveillance or even intern him if necessary.

It was found that the petitioner's reason for seeking refuge in the Philippines was due to his fear of the threats to his life by private individuals in connection with transactions, and not due to political reasons. While the Universal Declaration of Human Rights guarantees individuals the right to seek and enjoy in other countries asylum from persecution, this right may be invoked only in the case of persecutions genuinely arising from political crimes or acts contrary to the principles of the United Nations.⁵¹

A similar request was made by a US national married to a Filipino woman, seeking asylum in the Philippines on alleged political persecution in his home country. The Foreign Affairs Legal Adviser said in his ruling that if the alien is being politically persecuted in his home country, he may apply for a visa under section 47(b) of the Philippine Immigration Act of 1940, as amended, which authorizes the President

“for humanitarian reasons, and when not opposed to the public interest, to admit aliens who are refugees for religious, political, or racial reasons. Such application must be submitted to the Department of Justice, the competent government agency to evaluate and approve said application.”⁵²

10. ADMISSION OF ALIENS

A query arose as to whether crewmen of a Russian vessel which had entered into an agreement with local nationals to engage in canning of fish caught in Philippine territorial waters, should secure visas. It was contended that since the crewmen of the Russian vessel would not disembark from their vessel, they need not secure visas to enter into the territorial waters.

It was the opinion of the Legal Adviser that since the Russian vessel was entering Philippine territorial waters, entry visas for the crew were required. The opinion recalled that the territory of the Philippines as provided for in Article I of the Philippine Constitution comprises the Philippine archipelago, with all the islands and waters embodied therein, that the territorial sea of the Philippines as now provided for in the UN Convention on the Law of the Sea is 12 nautical miles measured from the

⁵⁰ Opinion dated 21 January 1990.

⁵¹ Opinion dated 23 February 1990.

⁵² Opinion rendered on 25 January 1991.

archipelagic baselines, and that the contiguous zone of 24 miles from the baselines is also within the jurisdiction of the Philippines for violations of immigration, customs, revenue and health laws.

The policy of the Philippines as to fishing and exploitation of marine resources is more specific and the fishing and securing of marine wealth exclusively to Filipino citizens. This is provided for in Article XII, Section 2, paragraph 2 of the 1987 Philippine Constitution.⁵³

11. RESTRICTION ON TRAVEL OF CITIZENS; THE RIGHT TO RETURN TO ONE'S OWN COUNTRY

The issue on whether the state may prohibit or restrict travel abroad of its citizens arose when the late President MARCOS, his family and a number of his supporters who were in Hawaii, requested travel documents to return to the Philippines or go to other countries.

Four documents, namely, the United Nations Charter, the Universal Declaration of Human Rights, the Philippine Constitution and the International Covenant on Civil and Political Rights were cited by the legal Adviser of the Department of Foreign Affairs in his opinion.

Article III of the Philippine Constitution provides, *inter alia*:

"Section 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of *national security, public safety, or public health*, as may be provided by law." (emphasis added)

Article 13 of the Universal Declaration of Human Rights guarantees the right of the individual to leave his country and to return to it. Although Article 12 of the Covenant on Civil and Political Rights guarantees the right to travel, said right may be restricted on grounds of national security, public safety, public health or morals. The protection of human rights used to be only of domestic concern and regulated by municipal law. Due to worldwide violation of human rights during World War II, the rights became an international concern and are now the subject matter of international law. The statement in the preamble of the Charter of the United Nations is not only an academic proclamation. It derives from a concrete experience and the conviction that respect for human rights is a basic requirement for international peace.

The determination of the need of protection of national security or public order is lodged with the Executive. The Covenant on Civil and Political Rights [Article 4] allows a state to limit or suspend the enjoyment of certain rights in cases of officially proclaimed public emergency which threaten the life of the nation. Such limitations or

⁵³ Opinion dated 1 March 1989.

suspensions are permitted only “to the extent strictly required by the exigencies of the situation” and may never involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁵⁴

The opinion of the Legal Adviser was sustained in a decision of the Supreme Court. In a petition filed by the late President FERDINAND MARCOS and his family praying that they be issued passports so they could return to the Philippines, the Supreme Court ruled that the right to return to one’s country is not among the rights specifically guaranteed in the Bill of Rights of the Philippine Constitution. The liberty of abode and the right to return may be considered as a generally accepted principle of international law. According to the Court,

“the constitutional guarantees they invoke are neither absolute nor inflexible. For the exercise of even the preferred freedoms of speech and of expression, although couched in absolute terms, admits of limits and must be adjusted to the requirements of equally important public interests.”

The President in the exercise of her powers as Commander-in-Chief, to keep the peace and maintain public order and security, had decided against the return of the MARCOSES. The Supreme Court found that the President had not acted arbitrarily and whimsically in determining that the return of the MARCOSES posed a threat to national interest and welfare, and in prohibiting their return.⁵⁵

Article III, Section 6 of the Philippine Constitution is now implemented by Chapter XIII, Section 50 of the Administrative Code which provides that the Secretary of the Department of Foreign Affairs shall have the authority to withhold the issuance or order the cancellation or restriction of passports upon lawful order of the court of when he deems it necessary in the interest of national security, public safety or public health, or in cases when a passport was secured through misrepresentation or fraud.

⁵⁴ Opinion dated 2 March 1989.

⁵⁵ *Marcos et al. v. Manglapus et al.*, 177 SCRA 668 (1989). This ruling was reiterated in *Silverio v. Court of Appeals*, 195 SCRA 760 (1991).

THAILAND

ANNOUNCEMENTS

Baselines

Announcements of the Office of the Prime Minister concerning the Straight Baselines and Internal Waters of Thailand of 11 June 1970, 17 August 1992 and 18 February 1993

The Announcement of 11 June 1970 proclaimed the straight baselines and internal waters of Thailand in 3 areas and was published in the Official Gazette, Special Vol. 87, Chapter 52 of 12 June 1970.⁵⁶

The Announcement of 17 August 1992 proclaimed the same items for another area, the details of which appeared in an annexed map. It was published in Official Gazette Vol.109, Chapter 89 of 19 August 1992.⁵⁷

The Announcement of 18 February 1993, Official Gazette Vol.110, chapter 18, 18 February 1993⁵⁸ repealed and substituted the Announcement of 11 June 1970 in order to rectify certain errors in the latter Announcement regarding geographical coordinates and to bring the latter Announcement in accordance with the change of the name of an island.

⁵⁶ Text in *The Law of the Sea, Baselines: National legislation with Illustrative maps* (UN publ. Sales No. E.89.V.10 p. 306).

⁵⁷ Text in *Law of the Sea Bulletin* No. 25, June 1994.

⁵⁸ Text in *Law of the Sea Bulletin* No. 23, June 1993, p. 29.