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

INDIA

JUDICIAL DECISIONS**

Sovereign immunity; Shipping line as department of the Government of the German Democratic Republic “exercising the rights of a legal entity”; Absence of consent of Government of India to sue pursuant to section 86(2)(b) of the Indian Civil Procedure Code of 1908; *Held*, consent of the Central Government a mandatory condition precedent.

Supreme Court, 25 November 1993

AIR 1994 S.C. 516

M.M. PUNCHHI and N.P. SINGH, JJ.

VEB. DEUTFRACHT SEEREEDEREI ROSTOCK (D.S.R. LINES) - Appellant v.
NEW CENTRAL JUTE MILLS CO.LTD. & ANOTHER - Respondents

The case came before the Supreme Court of India, in the form of Civil Appeal No. 4208 of 1983 on a decision by the Calcutta High Court.

The plaintiff-respondent filed a suit for a decree for Rs. 240,000 claiming that the defendant-appellant (D.S.R. Lines) sold them damaged goods. D.S.R. Lines was a company “incorporated under the appropriate laws of . . . West [sic] Germany” and was “carrying on its business in West [sic] Germany as also at Calcutta”.

The defendant took objection and argued that it was a department and/or agent and/or instrumentality of the Government of the German Democratic

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Republic which was recognized as a sovereign foreign state so that the suit could not be entertained against the defendant without prior consent of the central government of India as required by S. 86 of the 1908 Code of Civil Procedure.

A single Judge of the Calcutta High Court by order of 3 February 1982 dismissed the case for want of written consent of the central government. On appeal to the Division Bench, the High Court reversed the order of the trial judge, and ordered that the question whether the consent of the Central Government was required be dealt with at the trial of the case. It was this order of the High Court that came in for appeal before the Supreme Court.

There was evidence, in the case, of the Consul General of the German Democratic Republic certifying that DSR Lines constituted a department of the Government of the GDR, "exercising the rights of a legal entity". Besides, Article 12 of the GDR Constitution prohibited private ownership in, *inter alia*, 'ocean shipping' and 'larger industrial enterprises' which were 'nationally-owned property'.

SINGH, J.:

. . .

"5. One of the principles of International Law is that every sovereign State respects the independence of every other foreign State. This absolute independence and the international comity underlines the relationship between sovereign States. The object of S. 86 of the Code is to give effect to the principles of International Law. But, in India it is only a qualified privilege because a suit can be brought with the consent of the Central Government in certain circumstances. Just as an independent Sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide rights and liabilities of foreign States to sue and be sued in its Courts. It can be said that the effect of S. 86 thus is to modify the extent of the doctrine of immunity recognised by the International Law. If a suit is filed in Indian Courts with the consent of the Central Government as required by S. 86, it shall not be open to any foreign State to rely on the doctrine of immunity. Sub-Sec. (1) of S. 86 says in clear and unambiguous terms that no foreign State may be sued in any Court, except with the consent of the Central Government certified in writing by the Secretary to that Government.

. . .

"[T]he Central Government has to accede to the said request [to sue] or refuse the same after taking into consideration all the facts and circumstances of the case. . . .

“[W]henever a relief is sought against a foreign State, the Court before which such claim is lodged has to examine whether the person concerned had got the consent of the Central Government in terms of S. 86 of the Code.

...

“11. . . . While considering the question of grant or refusal of such consent, the Central Government is expected to examine that question objectively. Once the Central Government is satisfied that a cause of action has accrued to the applicant against any foreign company or corporation, which shall be deemed to be a foreign State, such consent should be given. The immunity and protection extended to the foreign State on the basis of International Law should not be stretched to a limit, so that a foreign company and corporation, trading within the local limits of the jurisdiction of the Court concerned, may take a plea of S. 86, although *prima facie* it appears that such company or corporation is liable to be sued for any act or omission on their part or for any breach of the terms of the contract entered on their behalf. It is neither the purpose nor the scope of S. 86 to protect such foreign traders, who have committed breach of the terms of the contract, causing loss and injury to the plaintiff. But, if it appears to the Central Government that any attempt on the part of the plaintiff to sue a foreign State, including any company or corporation, is just to harass or to drag them in a frivolous litigation, then certainly the Central Government shall be justified in rejecting any such application for consent, because such motivated action on the part of the plaintiff may strain the relations of this country with the foreign State”.

Accordingly the appeal was allowed and the suit dismissed.

*Comment**

The sovereign immunity law of India has remained as archaic as the Indian Civil Procedure Code itself, enacted as it was by the British Parliament in 1908.¹ Section 86 of the Code in fact deals with two aspects of the sovereign immunity law of India: One, the substantive question of sovereign immunity of foreign governments, and two, the mandatory procedural condition precedent of the Central Government's consent for initiation of a suit against a foreign sovereign. The Indian courts have been taking an absolutist view of sovereign immunity of foreign governments, both substantively as well as procedurally. In fact much can be said in favour of the view adopted by the Division Bench of the Calcutta High Court which held that the question whether the pre-requisite of the Central Government's consent was applicable in relation to this case, should be examined by the trial court

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¹ Cf. K.I. VIBHUTE, 'Transnational trade transactions of a foreign state and sovereign immunity in India: an appraisal', 3 ASYIL 47.

itself. Apparently, this view must have been inspired by the fact that the DSR Lines had a place of business in India, at Calcutta itself.

The Supreme Court in this case relied on/endorsed its own earlier judgment in *Mirza Ali Akbar Kashami v. VAR* (AIR 1966 SC 230), another Indian case. *Royal Nepal Airline Corporation v. Monorama Meher Singh Legha* (AIR 1966 Calcutta 319), and two English cases (*Baccus S.R.L. v. Servicio Nacional Del Trigo* [1957] 1 QB 438 and *Krajina v. The Tass Agency* [1949] 2 AllER 274). These English cases are not only 'ancient' in view of the subsequent developments in the law on sovereign immunity law,² but also out of place in respect of the special procedural requirement of the Central Government's consent in Indian law.

The Supreme Court decision in this case is remarkable in other respects, too. First, the appellant-defendants had a place of business in Calcutta. The Supreme Court did not consider to what extent this factor obviated the need for compliance with the prerequisite of the Central Government's consent. Second, at the time of preferring the appeal, i.e. in 1983, the GDR still existed. But by the time the Supreme Court delivered its judgement, the GDR had ceased to exist. Would Article 12 of the GDR constitution still be relevant? Would the 1981 certificate by the Consul-General still remain conclusive proof of the 'sovereign' status of the appellant?

Finally, there is the basic question of the contemporary relevance of the absolute immunity doctrine. This has ramifications both for international law and Indian law. As for international law, the trend is clearly towards a restrictive theory and a distinction between commercial and sovereign acts, to be determined in terms of the nature of the acts. The role of the courts is crucial in this exercise, if the experience of the British, American, Canadian, Australian and European legislation and judicial practice on the matter is any indication.

As for the Indian law, it was high time for the Supreme Court to say, and it did not say, that Section 86 of the 1908 Act is archaic, stood in the way of equality before the law (Article 14 of the Constitution), unreasonably restricted the freedom of trade and profession under Article 19 and violated the universally shared basic principles of the law of contracts. If the state has entered the 'non-sovereign' field of commerce, it must not be placed in a privileged position vis-à-vis the individual and the law should not close the avenues of enforcement of the individual's rights, should the state be the defaulting party in commercial transactions. Also, it is difficult to understand why the Central Government be given a deciding role in preventing a court in exercising its powers of dispensation of justice.

Evidently, it is high time that the Indian Parliament thinks in terms of an Indian Foreign States Immunities Act, on the basis of an Indian perception of the role of the state in the economic development of the country.

Enforcement of foreign arbitral awards; Enforceability under the Convention on the Recognition and the Enforcement of Foreign Arbitral Awards, Nw York 1958 and the Foreign Awards (Recognition and Enforce-

² See, for instance, *The Philippine Admiral* [1977] A.C. 373; *Trendtex Trading v. Central Bank of Nigeria* [1977] QB 529 (CA); *I Congreso de Partido* [1983] 1 A.C. 244 (House of Lords).

ment) Act 1961; Not enforceable on grounds that the award was against public policy; Concept of public policy.

RENUSAGAR POWER COMPANY LTD. - Appellant v. GENERAL ELECTRIC COMPANY – Respondent

Supreme Court

AIR 1994 S.C. 860

M.N. VENKATACHALIAH, C.J.I., S.C. AGRAWAL and Dr. A.S. ANAND, JJ.

The case came up before the Supreme Court of India through Civil Appeals Nos. 71 and 71-A of 1990 with 379 of 1992, D/-7-10-1993, from a decision of the Bombay High Court.

Renusagar Power Co. Ltd., a company incorporated under the India Companies Act, 1956 (Appellant) and General Electric Company, a company incorporated under the laws of the State of New York in the USA (Respondent) were parties to a contract, dated 24 August 1964, for the supply by General Electric to Renusagar of the equipment and power services for setting up a thermal power plant.

The contract contained an arbitration clause which provided that any disagreement arising out of or related to the contract which the parties are unable to resolve by sincere negotiation shall be finally settled in accordance with the Arbitration Rules of the International Chamber of Commerce.

Arbitration took place at the request of Respondent and an award was made on 16 September 1986, upholding the claim of Respondent. On 15 October 1986 Respondent instituted proceedings for enforcement of the award before the Bombay High Court.

In his judgment of 21 October 1988 the single Judge held that the award was enforceable under the provisions of the Foreign Awards (Recognition and Enforcement) Act and on that basis passed a decree in terms of the award. On appeal the Division Bench of the High Court upheld the order by judgment of 12 October 1989 (1990 (1) Bom CR 561), rejecting the argument according to which the award was unenforceable because, *inter alia*, its enforcement would be contrary to public policy under sec.7(1)(b)(ii) of the Foreign Awards Act. Renusagar went on appeal before the Supreme Court.

The Court, with Judge AGRAWAL delivering the judgment, referred to the background against which the Foreign Awards Act, 1961 was enacted. The principal issue in the case was defined as follows:

“22. Arbitration is a well recognised mode for resolving disputes arising out of commercial transactions. This is equally true for international commercial transactions. With the growth of international commerce there was an increase in disputes arising out of such transactions being adjudicated through arbitration. One of the problems faced in such arbitrations related to recognition and enforcement of an arbitral award made in one country by the Courts of other countries”

The Court proceeded by outlining the purposes of the Geneva Protocol of 1923 and the subsequent Geneva Convention of 1927, and those of the New York Convention of 1958. The Foreign Awards Act was outlined as follows:

“23. . . . The Foreign Awards Act has been enacted to give effect to the New York Convention and for purposes connected therewith. In the Statement of Objects and Reasons, reference has been made to the defects in the Geneva Convention of 1927 which “hampered the speedy settlement of disputes through arbitration and hence no longer met the requirements of international trade” and which led to the adoption of the New York Convention. Section 2 of the Act defines the expression ‘foreign award’. S. 3 makes provision for stay of proceedings in respect of matters to be referred to arbitration. Section 4 deals with effect of foreign awards. Sub-sec.(1) of S. 4 provides that a foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. Sub-sec.(2) prescribes that any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made and may be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India. Section 5 makes provision for filing of foreign awards in Court. In sub-sec.(1) it is laid down that any person interested in a foreign award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in Court. Sub-sec.(2) requires that such an application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. Sub-sec.(3) requires the court to give notice to the parties to the arbitration other than the applicant requiring them to show cause, within a time specified, why the award should not be filed. Section 6 deals with enforcement of foreign awards. Sub-sec.(1) lays down that where the Court is satisfied that the foreign award is enforceable under the Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Sub-sec.(2) provides that upon the judgment so pronounced a decree shall follow, no appeal shall lie from such decree except insofar as the decree is in excess of or not in accordance with the

award. Section 7 contains the conditions for enforcement of foreign awards and prescribes the circumstances under which foreign awards will not be enforced. Section 8 requires the production of the original award or a duly authenticated copy thereof as well as [the] original agreement for arbitration or a duly certified copy thereof and the production of evidence to prove that the award is a foreign award. Section 9 is a saving clause which excludes the applicability of the Act to matters specified therein. S. 10 provides for repeal of the Arbitration (Protocol and Convention) Act, 1937, in relation to foreign awards to which the Act applies. Section 11 provides for rule making power of the High Court. . .”

The judgment continued:

“24. In the present case, we are concerned with conditions of enforcement laid down in S. 7, which provides as follows -

“7. Conditions for Enforcement of Foreign Awards. - (1) A foreign award may not be enforced under this Act -

(a) if the party against whom it is sought to enforce the award proves to the Court dealing with the case that -

(i) the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under the law of the country where the award was made; or

(ii) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement:

Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or

(b) if the Country dealing with the case is satisfied that –

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law in India; or

(ii) the enforcement of the award will be contrary to the public policy;

(2) If the Court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the Court may, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to furnish suitable security.”

After hearing the contentions of both the parties, the Court framed, *inter alia*, the following issues:

“30. . . .

- (i) What is the scope of enquiry in proceedings for enforcement of a foreign award under S. 5 read with S. 7 of the Foreign Awards Act?
- (ii) Were Renusagar unable to present their case before the Arbitral Tribunal and consequently can the award not be enforced in view of Section 7(1)(a)(ii) of the Foreign Awards Act?
- (iii) Does Section 7(1)(b)(ii) of the Foreign Awards Act preclude the enforcement of the award of the Arbitral Tribunal for the reason that the said award is contrary to the public policy of the State of New York?
- (iv) What is meant by ‘public policy’ in Section 7(1)(b) (ii) of the Foreign Awards Act?
- (v) Is the award of the Arbitral Tribunal enforceable as contrary to public policy of India on the ground that:
 - (a) it involves contravention of the provisions of the Foreign Exchange Regulation Act [FERA], 1973;

. . . .

(d) it would lead to unjust enrichment for General Electric.”

As regards issue (i) the Court raised the question whether in enforcement proceedings it is permissible to impeach the award on merits. After having surveyed the answers under the common law, under the 1927 Convention and under the 1958 New York Convention, the Court held:

“37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the Court in which award is sought to be enforced is limited to grounds mentioned in S. 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.”

As regards issue (ii), the Court held:

“40. We are, therefore, of the opinion that the enforcement of the arbitral award is not barred by S. 7(1)(a)(ii) of the Foreign Awards Act on the ground that Renusagar was unable to present its case before the Arbitral Tribunal.

As regards, issue (iii), the Court observed:

“41. . . . We find it difficult to accept this contention. It cannot be held that by not using the words ‘Public policy of India’ and only using the words ‘public policy’ in S. 7 (1)(b)(ii) of the Foreign Awards Act, Parliament intended to deviate from the provisions of the New York Convention contained in Art. V(2)(b) which uses the words ‘public policy of that country’ implying public policy of the country where recognition and enforcement is sought. That Parliament did not intend to deviate from the terms of the New York Convention is borne out by the amendment which was introduced in the Act by Act 47 of 1973 after the decision of this Court in the Tractor-export case (*supra*) whereby S. 3 was substituted to bring it in accord with the provisions of the New York Convention. The Foreign Awards Act has been enacted to give effect to the New York Convention which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes through arbitration. The Foreign Awards Act is, therefore, intended to reduce the time taken in recognition and enforcement of foreign arbitral awards. The New York Convention seeks to achieve this objective by dispensing with the requirement of the leave to enforce the award by the courts where the award is made and thereby avoid the problem of ‘double exequatur’. It also restricts the scope of enquiry before the court enforcing the award by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon. Enlarging the field of enquiry to include public policy of the courts whose law

governs the contract or of the country of place of arbitration, would run counter to the expressed intent of the legislation.”

The Court further held,

“45. We are, therefore, of the view that the words ‘public policy’ used in S. 7(1)(b)(ii) of the Foreign Awards Act refer to the public policy of India and the recognition and enforcement of the award of the Arbitral Tribunal cannot be questioned on the ground that it is contrary to the public policy of the State of New York.”

With regard to ‘public policy’ (issue iv) the Court said:

“46. . . . this Court has laid down -

“Public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time.” (See *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly* (1986) 2 SCR 278 at p. 372 (AIR 1986 SC 1571 at p. 1612).

. . .

48. . . . There are two conflicting positions which are referred to as the ‘narrow view’ and the ‘broad view’. According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this area. (See *CHITTY on Contracts*, 26th Ed. Vol. I, para 1133, pp. 685-686). Similar is the trend of the decision in India. In *Gherulai Parakh v. Mahadeodas Maiya*, 1959 Suppl(2) SCR 392 (AIR 1959 SC781) this Court favoured the narrow view when it said:

“. . . though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days” (p. 440) (of SCR): (at p. 795 of AIR).

49. In later decisions this Court has, however, leaned towards the broad view. (See *Murlidhar Agarwal v. State of U.P.* (1975) 1 SCR 575 at p. 584 (AIR 1974 SC 1924 at p. 1930); *Central Inland Water Transport Corporation v. Brojo Nath Ganguly* (supra) (1986)2 SCR 278 at p. 373 (AIR 1986 SC 1571

at p. 1612); *Rattanchand Hira Chand v. Askar Nawaz Jung* (1991)2 SCC 67 at pp. 76-77 (1991 AIR SCW 496 at p. 502-03).

. . .

61. In France, a distinction is made between international public policy ('ordre public international') and the national public policy. Under the new French Code of Civil Procedure, an international arbitral award can be set aside if the recognition or execution is contrary to international public policy. In doing so it recognises the existence of two levels of public policy - the national level, which may be concerned with purely domestic considerations, and the international level, which is less restrictive in its approach. . . .

. . .

63. In view of the absence of a workable definition of 'international public policy' we find it difficult to construe the expression 'public policy' in Article V(2)(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the Court in which the foreign award is sought to be enforced. Consequently, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the Courts in India. This raises the question whether the narrower concept of public policy as applicable in the field of public (*sic*) international law should be applied or the wider concept of public policy as applicable in the field of municipal law."

The Court further observed:

"65. This would imply that the defence of public policy which is permissible under S. 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in S. 7(1) of the Protocol and Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression 'public policy' covers the field not covered by the words 'and the law of India' which follow the said expression,

contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. . . . Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression ‘public policy’ in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”

With regard to issue (v)(a), the Court held,

“84. . . . We are, therefore, unable to hold that the enforcement of the award would involve violation of any of the provisions of FERA and for that reason it would be contrary to public policy of India so as to render the award unenforceable in view of section 7(1)(b)(ii) of the Act.”

With regard to issue (v)(d) the Court observed:

“99. In Indian law the principle of unjust enrichment finds recognition in the Indian Contract Act, 1872 (Ss.70 and 72).

100. We do not consider it necessary to go into the question whether the principle of unjust enrichment is a part of the public policy of India since we are of the opinion that even if it be assumed that unjust enrichment is contrary to public policy of India, Renusagar cannot succeed because the unjust enrichment must relate to the enforcement of the award and not to its merits in view of the limited scope of enquiry in proceedings for the enforcement of a foreign award under the Foreign Awards Act. The objections raised by Renu-sagar based on unjust enrichment do not relate to the enforcement of the award”

The appeal was dismissed and the decree passed by the Division Bench of the Bombay High Court was affirmed.

Comments*

India is a party to both the 1927 and 1958 Conventions and has enacted enabling legislation, namely the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

One of the principal grounds for setting aside a foreign arbitral award is 'public policy'. There is no uniform guideline to decide what constitutes public policy. The New York Convention provides that state parties and courts are free to determine and interpret the meaning of their own public policy. Courts of state parties have refused to recognize an existing principle of 'international public policy', though France has enacted legislation incorporating the above, *vide* the French Commercial Code, 1980 and 1981.

As regards the scope of Section 7 of the Foreign Awards Act, the view of the Supreme Court is supported by writings of scholars and the *travaux préparatoires* of the New York Convention. The Court held that an award can be set aside on grounds of public policy if such award is contrary to (a) the fundamental principles of law, (b) the interests of India, and (c) justice and morality. In an earlier case, *C.O.S.I.D. v. Steel Authority of India Ltd.* (AIR 1986 Delhi High Court 8-23) the SAIL, a government company, could not discharge its contractual obligations towards COSID, a foreign company, due to an order issued by the Ministry of Iron and Steel. The Delhi Court held that the Ministry order was in the economic interest of India and the application of COSID to enforce the award was, therefore, set aside.

The new Indian Arbitration and Conciliation Act, 1995, that has come into effect on 25 January 1996, has explicitly stipulated in section 48(2)(b) that the words 'public policy' in the Foreign Awards Act, 1961, will now be read 'public policy of India'. One can say with a certain amount of conviction that the *Renusagar* case has influenced this change.

JAPAN

JUDICIAL DECISIONS**

Compensation for Japanese prisoners of war detained in the USSR after World War II; Non-retroactivity of Articles 66 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949; The non-customary character of the rule of "Compensation by the Power on which the prisoner depends"; Municipal applicability of international law; No

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legal obligation for the State of Japan to settle credit balances due to the repatriated prisoners of war

Tokyo High Court, 5 March 1993

Hanrei Jiho [Judicial Reports] No. 1446, 1993, p. 40³

X ET AL. v. STATE OF JAPAN

At the closing stage of World War II, the Soviet Union declared war against Japan on 8 August 1945 and invaded and occupied Manchuria, Kwantung Province, the northern part of Korea, South Sakhalin and the Kuril Islands. As a result, about 700,000 officers and men of the Japanese Army surrendered to the Soviet Army. They were detained as prisoners of war and transferred to some two thousand Soviet camps in, *inter alia*, Siberia, Central Asia, European Russia, the Far North and Outer Mongolia.

These Japanese POWs were compelled to forced labour, mostly outdoors, such as building of concentration camps, deforestation for railways, construction of houses, factories, bridges, dams, power plants and canals, coal mining, cargo handling in harbours, farm work, etc. About 60,000 POWs died of starvation because of the bad food situation, heavy labour conditions, infectious diseases, or severe weather conditions. Among those who survived and were repatriated (not until 1958 was their repatriation practically completed) many suffered from mental and physical injuries and disabilities.

In April 1981, sixty-one ex-POWs and a widow of one of the ex-POWs brought a case before the Tokyo District Court. They sued the State of Japan for settlement of the credit balances resulting from the forced labour during the detention in the USSR, and for compensation for the injuries and disabilities caused by the forced labour as well as for all other damage suffered during the detention and imputable to the Detaining Power.

The Tokyo District Court in its judgment of 18 April 1989⁴ dismissed all claims of the plaintiffs. The judgment was based on, *inter alia*, two considerations of international law:

First, the claims were filed under Articles 66 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter:

³ Cf. English translation in 37 JAIL (1994) 129.

⁴ *Hanrei Jiho* No. 1329, 1990, p. 36.

Third Geneva Convention)⁵ and were directed against the State of Japan as “the Power on which the prisoner of war depends”. The Court held the Convention to be inapplicable because most of the plaintiffs had lost their POW-status by repatriation before the Convention had entered into force between Japan and the USSR⁶ and because the provisions of the Convention could not be applied retroactively to the results of World War II.

Secondly, the claims were based, *inter alia*, on the so-called “Rule of compensation by the state on which the POW depends”. This rule, which is contained

⁵ The relevant provisions read as follows, in part:

Art. 58: “. . . [T]he Detaining Power may determine the maximum amount of money . . . that prisoners may have in their possession. Any amount in excess . . . shall be placed to their account”

Art. 64: “The Detaining Power shall hold an account for each prisoner of war, showing at least the following: (1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source; . . . (2) The payments made to the prisoner in cash, or in any other similar form; the payments made on his behalf and at his request; . . .”

Art. 66: “On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement . . . showing the credit balance then due to him. The Detaining Power shall also send . . . to the Government upon which the prisoner of war depends, lists giving all appropriate particulars of all prisoners of war whose captivity has been terminated . . . and showing the amount of their credit balances.

. . .

Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict.

The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity”.

Art. 68: “Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability,”

Any claim by a prisoner of war for compensation in respect of personal effects, monies or valuables impounded by the Detaining Power . . . shall likewise be referred to the Power on which he depends The Detaining Power will, in all cases, provide the prisoner of war with a statement . . . showing all available information A copy of this statement will be forwarded to the Power on which he depends”

⁶ Japan acceded to the Convention on 21 April 1953 and the USSR ratified it on 10 May 1954 (the judgment erroneously mentions 10 November 1954, the date of entry into force of the Convention, as the date of “accession by the USSR”). Two of the 62 plaintiffs returned home in 1956, after the entry into force of the Convention between the two states. One of these two had been handed over as a suspected war criminal to the People’s Republic of China in 1950 and was imprisoned there until repatriation and the other had been convicted of espionage in the USSR in 1949 and had served in Soviet prison before being returned home. The Court held that the Convention was not applicable to this person because of the Soviet reservation to Art. 85 of the Convention (“Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention”).

in Articles 66 and 68 of the Convention, was allegedly already established as a rule of international customary law at a time not later than the termination of hostilities of World War II. However, the Court denied the rule to be so established in the absence of evidence of general practice and *opinio juris* among the belligerents in World War II, these being the requisites for the existence of international customary law.

The Court also examined, and dismissed, the claims under Article 29, paragraph 3 of the Constitution of Japan (which contains the principle of just compensation in case of taking of private property for public purposes), Article 1 of the State Tort Liability Act and the tort law of the Civil Code. The plaintiffs had alleged that under these provisions the State of Japan was liable for damage caused by its unlawful exercise of public authority, such as its waiver of the plaintiffs' rights to claim from the USSR, under paragraph 6 of the Japan-USSR Joint Declaration of 1956.

The Tokyo High Court found, basically on the same grounds as the Court below, that all the original claims of the appellants as well as a new claim submitted before the High Court were groundless, and, consequently, dismissed the appeal. The grounds for the judgment, so far as relevant to international law, were as follows:

(1) *On the applicability of Articles 66 and 68 of the Third Geneva Convention*

Unlike the appellants' contention the Convention was not included for the purpose of (post-war) management of matters stemming from the past war but was adopted by states which recognized the defects and inadequacies of the existing law relating to prisoners of war and which strived for its improvement. Besides there is insufficient evidence in the drafting history of the Convention for the view that the Convention was intended to apply retroactively to the facts of World War II. Neither can this applicability be achieved by appellants' reference to Article 141⁷ of the Convention.

It was contended by the appellants that the termination of the status of POW by release or repatriation does not imply the lapse of either the person's rights resulting from his detention as a POW or the rights and obligations of

⁷ "The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation . . ."

the Powers concerned, i.e. the Detaining Power and the Power on which he depends, relating to his detention. The Court held:

“But the question as to what rights and obligations the POWs actually acquired during their detention which commenced before the Convention of 1949 entered into force between Japan and the USSR, how their acquired rights and obligations must be settled, or how their legal status is affected by their release or repatriation, shall, in principle, be determined solely according to the provisions of the treaties or other laws that were in force at the time of their detention and the termination of the status of POWs. Therefore, unless explicitly otherwise provided, the above questions cannot be settled by provisions of treaties or other laws that came into existence later.”

One of the appellants was released from a Soviet prison and returned to Japan in November 1956, that is after the 1949 Geneva Convention had entered into force between Japan and the USSR. The appellants argued that, consequently, the Convention in any case applied to this one person. However, the Court held that, while it was established that the person concerned served as a prisoner convicted of espionage⁸ under Article 58 of the Russian Penal Code, at least from 1950 until his return home in 1956,

“the Convention is, by its nature, applicable only to those who have the status of POW and only in respect of their detention as POWs. Consequently, with a view to securing an unequivocal administration of the provisions of the Convention there is no reason, unless explicitly otherwise provided, to apply the Convention retroactively to a person who had, at one time, been excluded from the application of the Convention because of his conviction for war crimes or other crimes mentioned in the [Soviet] reservation to Article 85 of the Convention, despite the fact that [according to the appellants] the conviction was later reviewed and quashed [in the USSR in 1991].”

(2) On the question of whether Articles 66 and 68 of the Third Geneva Convention are in fact codified rules of customary international law

As to the so-called “Rule of compensation by the State on which the POW depends”, the Court held, taking the drafting process into account:

⁸ See *supra*, n. 4.

“It is difficult to establish, as the appellants allege, that the rule of compensation by the state on which the POW depends had already become a general practice among those states which participated in the conference of experts, the diplomatic conference and other conferences⁹ or, had already been effected by these states with *opinio juris sive necessitatis* when the conferences were convened.”

The Court described the outcome of the development of international law relating to the protection of POWs, especially since the 19th century and under the impact of the idea of human rights, as follows:

“Of course the concrete contents of proper treatment, rights and interests to which POWs are entitled have been gradually expanded and reinforced in keeping with historical developments, and it is generally recognized today that at least certain principles bearing on the fundamental human rights of POWs have become rules of international customary law which detaining Powers are obliged to observe, such as, for example, the principles that POWs are not in the power of the individuals or military units who have captured them, but of the enemy Power; that reprisals against POWs are prohibited; that during the detention POWs must be protected and respected as human beings; that detaining Powers must provide POWs with clothings, food, etc.; that no POWs may be employed for labour of an improper nature, such as unhealthy and dangerous labour; and that the hygiene at POW camps is to be ensured. However, in view of a general survey of the municipal law systems of major countries including Japan on the matter of compensation to POWs of their own nationality, it can hardly be acknowledged that the alleged rule of compensation by the state on which the POW depends satisfied the requirements of general practice and *opinio juris* and had been established as a rule of international customary law at the time when the appellants were detained in Siberia.”

(3) On the question of the domestic applicability of the relevant rules of international law

“The domestic applicability of the relevant rules of international law, that is to say, the question of whether such rules are directly applicable to the

⁹ Respectively, the Preliminary Conference in 1946, the Conference of Government Experts in 1947, the 17th International Red Cross Conference in 1948, and the Diplomatic Conference in 1949.

appellants without any national legislation, must be examined. It is well-accepted in Japan that duly promulgated treaties and international customary law are recognized to have domestic effect without any special legislative acts. But when the content of a rule established by a treaty is not clear and precise, or when a rule of international customary law which deals with rights and interests of individual nationals does not specify in detail the substantive conditions for the coming into existence, duration, extinction, etc. of these rights, the procedural conditions for their exercise, and their coordination with the existing municipal law, we cannot but deny the domestic applicability of the rule in question.

Therefore, even if it could be acknowledged that Articles 66 en 68 of the Third Geneva Convention of 1949 were applicable to the appellants, or that international customary law to the same effect had been established, yet the appellants may not be admitted to claim for compensation directly on the basis of these Articles or the international customary law to the same effect, as these Articles are not clear nor precise in respect of the scope of entitled persons, nor in respect of the content, method, duration, etc. of the compensation, and, moreover, do not define the interconnection with the domestic systems of pensions, allowances, accident compensation, and so on, which were introduced in many countries since before World War II on behalf of soldiers of their own nationality.”

(4) On the new claim of the alleged illegality of the delay in the payment of credit balances

According to the appellants, several memoranda of the General Headquarters of the Supreme Commander of the Allied Powers (GHQ-SCAP) of 8 February, 16 March and 7 May 1946, which the Japanese government was obliged to implement, permitted the Japanese government, as part of the occupation policy and by way of exception to the general prohibitions, to pay the total amounts of earnings of repatriated Japanese POWs during their detention. Referring to these memoranda and the practice of the Japanese government in liquidating credit balances on the basis of these memoranda, the appellants contended that the appellee was under an obligation to settle the credit balances even with those repatriated POWs who possessed no sufficient documents to prove these balances. With regard to this contention the Court found as follows:

“For several years after the War, the Allied Powers restricted the import of currency and other valuables into Japan . . . for the purpose of reconstruction of the Japanese economy which was in disorder because of the long war.

However, the liquidation of the credit balances of ex-POWs was permitted under certain restrictions, *i.c.* on condition that they possessed certificates of their earnings as POWs. Japan, which was under occupation and in a position of faithfully implementing the occupation policy of the Allied Powers, took the necessary measures and made the payments instead of the detaining Powers, provided that the relevant documents were presented. Therefore, it is difficult to acknowledge the appellants' contention to the effect that Japan settled the credit balances due to Japanese POWs during their detention by way of fulfilling an obligation under international law.

. . .

[I]t is evident that the Soviet authorities neither issued nor presented any documents to prove the earnings of the POWs detained in Siberia, despite the request of the Japanese government to the GHQ-SCAP . . . [T]here is no sufficient proof that Japan has recognized a legal responsibility for settling the credit balances of the Japanese POWs in World War II, or has enacted a law accepting such responsibility. Therefore, at all events, the claim of the appellants which is premised on the assumption that the appellee was under a legal obligation to settle credit balances with the ex-POWs detained in Siberia, including the appellants, cannot be admitted."

The appellants appealed to the Supreme Court.

MALAYSIA

LEGISLATION*

Shipping

Merchant Shipping (Amendment) Act 1994 (Act A 895)

The Merchant Shipping (Amendment) Act 1994 (Act A 895) amends the Merchant Shipping Ordinance 1952. Act A 895 has three main objectives:

- (i) to provide for the registration of small merchant ships;
- (ii) to streamline the provisions of the 1952 Ordinance relating to licensing of shipping within Malaysia; and

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- (iii) to provide for more effective control of shipping activities within Malaysian waters.

To provide for more effective control of shipping activities within Malaysian waters, section 16 of Act A 895 introduces a new Part XIII A, headed 'Control of Shipping', which shall apply also to Sabah and Sarawak. *Inter alia*, the amendment requires any ship involved in the activities listed to notify the Director of Marine. These activities are:

- (a) dredging;
- (b) mining, including exploration and exploitation;
- (c) cable and pipe laying;
- (d) marine construction, including the construction of jetties and wharves;
- (e) dumping of any material;
- (f) sports, leisure or recreational activity;
- (g) survey;
- (h) cleaning, including cleaning of cargo tanks;
- (i) transportation, discharging or loading of wastes; or
- (j) pilotage (new section 491 B(1)).

The Director of Marine, upon receiving the notification, may impose such terms and conditions as he thinks fit (new section 491 B(3)). Further, the Director of Marine is empowered, where he has reason to believe that an offence has been committed under this Part, to:

- (a) stop and board any ship to make any enquiry and examination;
- (b) inspect any permit or any other document required under the 1952 Ordinance or any international rules;
- (c) detain any ship including any equipment on board; and
- (d) arrest any person who has committed an offence under this Part (new section 491C(1)).

Apart from the above, other amendments which are significant are sections 2(b), 17 and 18 of Act A 895. Section 2(b) replaces the definition of the Load Line Convention (*viz.* International Load Line Convention 1930) in the 1952 Ordinance with a new one. The new definition refers to the International Convention on Load Lines of 1966 and to any amendment thereof applicable to Malaysia. Section 17 amends section 504 of the 1952 Ordinance by increasing fifty-fold each of the fines imposed thereunder.¹⁰ Section 18

¹⁰ The maximum fine of 1000 dollars imposable under subsection (2) of section 504 on the master of a ship and owner or any other person liable, if the ship after detention or ordered to be detained proceeds to sea before being released by the competent authority, is increased to 50,000 ringgit; the maximum fine of 100 dollars per day imposable under subsection (4) of section 504 on the master and owner of a ship that proceeds to sea taking on board any officer authorized to detain the ship has been increased to 5,000 ringgit per day; and the maximum fine of 500 dollars

introduces a new section 512A which empowers the Director of Marine to compound any offence committed under the 1952 Ordinance.

Act A 895 received the Royal Assent on 24 June 1994 and was published in the Gazette on 7 July 1994.

Marine pollution

Merchant Shipping (Oil Pollution) Act 1994 (Act 515)

The Merchant Shipping (Oil Pollution) Act 1994 (Act 515) was promulgated to enable Malaysia to accede to, and implement, two International Maritime Organization (IMO) conventions governing compensation for damage, caused by oil spills from ships,¹¹ viz. the International Convention on Civil Liability for Oil Pollution Damage, 1969 (Civil Liability Convention)¹² and its supplementary convention, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention).¹³

Act 515 comprises 6 parts, 29 sections and 2 schedules. The 6 parts cover:

- (i) Preliminary provisions (section 1 - 2);
- (ii) Civil Liability for Oil Pollution (section 3 - 14);
- (iii) The International Oil Pollution Compensation Fund (sections 15 - 22);
- (iv) Jurisdiction and effect of judgments (sections 23 - 24);
- (v) Enforcement (sections 25 - 27); and
- (vi) Miscellaneous (sections 28 - 29).

Part II implements the Civil Liability Convention. *Section 3* imposes strict liability on the owner of a ship for pollution damage in any area of Malaysia or any other Liability Convention country caused by oil which has been discharged or has escaped from his ship. No liability shall attach to the shipowner if he can bring himself within one of the three defences provided in *section 4*:

imposable under subsection (6) of section 504 on any person who opposes or obstructs any officer authorized to detain the ship has been increased to 25,000 ringgit.

¹¹ Malaysia acceded to both conventions on 6 January 1995.

¹² Governs the liability of shipowners for oil pollution damage and establishes a comprehensive compensation scheme for pollution damage caused by oil spills from ships.

¹³ Provides payment of additional compensation to victims of oil pollution when the compensation provided under the Civil Liability Convention is inadequate.

- (a) the discharge or escape resulted from an act of war, hostilities or a natural phenomenon of an exceptional character;
- (b) the discharge or escape was wholly caused by an act or omission of a third party; or
- (c) the discharge or escape was wholly caused by the negligence or wrongful act of a government or other authority responsible for the maintenance of lights or other navigational aids.

According to *section 5* liability is imposed only on the shipowner and no claim may be made against his servant or agent. The shipowner may limit that liability provided the incident leading to the pollution damage is not due to his actual fault or privity.

Under *section 6*, if he limits his liability the aggregate of his liabilities shall not exceed one hundred and thirty-three special drawing rights for each ton of the ship's damage, provided that this aggregate amount shall not in any event exceed fourteen million special drawing rights.¹⁴

The shipowner may, under *section 7*, apply to the Court for the limitation of the liability to an amount determined in accordance with *section 6*. The Court shall, after determining such limit and directing payment or deposit of a bank guarantee or security into Court of that amount, determine also the amounts due to the persons making claims in the proceedings and direct the distribution of the amount paid into Court among such persons in proportion to their established claims. *Section 7* also enables the right of subrogation to be exercised with regard to the amount paid into Court by the shipowner or any other person who has paid compensation in any claim for pollution damage. The right of subrogation may also be exercised by a shipowner who has voluntarily made any reasonable sacrifices or incurred any reasonable expenses to prevent or minimize the pollution damage.

Section 8 empowers the Court to order the release from arrest of any ship or other property which may have been given as security for any claim arising from a liability under *section 3*, provided the shipowner or any other person liable has paid the limitation amount into Court.

Limitation of time for compensation claims is prescribed by *section 10*. No claim shall be considered unless the action is commenced within 3 years from the date of the pollution damage or 6 years from the date of the incident causing the pollution damage, and where the incident consists of a series of occurrences, the 6 year period shall run from the date of the first occurrence.

Section 11 imposes on the owner of a ship carrying more than 2000 tons

¹⁴ The power to convert the special drawing rights into Ringgit Malaysia is given to the Minister of Transport: *section 29(2)(e)*.

of oil compulsory insurance which shall be evidenced by a certificate issued by the Director of Marine in the case of a ship registered in Malaysia or a non-Liability Convention country or in the case of a ship registered in a Liability Convention country, by the government of that country.

Under *section 13*, an action may be instituted against the insurer. In such proceedings, the insurer may invoke the defences available to the shipowner and also limit his liability to the same extent as the shipowner.

Section 14 provides that the Act shall not apply to warships and government ships used for non-commercial purposes.

Part III implements the Fund Convention. *Section 16* confers on the International Oil Pollution Compensation Fund (the Fund) legal personality and capacity to be a party in legal proceedings before a Court in Malaysia.

Under *section 17* a person or importer who in any year receives more than 150,000 tons of oil has an obligation to contribute to the Fund. Such contribution shall be as determined by the Assembly of the Fund under Articles 11 and 12 of the Fund Convention.

Section 18 empowers the Director of Marine to obtain information from persons engaged in producing, treating, distributing or transporting oil for the purpose of transmitting to the Fund the names and addresses of persons liable to contribute.

The key provision in this Part is *section 19*. It stipulates that save as provided under subsection (4) the Fund shall pay additional compensation for pollution damage in Malaysia to any person suffering such damage who has been unable to obtain adequate compensation under the Civil Liability Convention. Subsection (4) exempts the Fund from liability if:

- (a) it can prove that the pollution damage resulted from war, hostilities or insurrection or was caused by oil which was discharged or which escaped from a warship or other government ship used for non-commercial service; or
- (b) the claimant cannot prove that the pollution damage resulted from an incident involving one or more ships.

Section 20 provides for the indemnification of the shipowner and his guarantor by the Fund where the pollution damage is caused by a ship registered in or flying the flag of a Fund Convention country. The section also sets out the extent of such indemnification as well as the circumstances in which the Fund is relieved from its obligation to indemnify the shipowner.

The limitation period for compensation claims against the Fund is spelt out in *section 21*. Claims are extinguished unless an action is commenced or a third party notice of an action is commenced or a third party notice of an

action to enforce a claim against the shipowner or his guarantor is given to the Fund within 3 years from the date of the pollution damage or unless an action is commenced within 6 years from the date of the incident which caused the pollution damage.

Section 22 deals with subrogation and the rights of recourse of the Fund against the shipowner or his guarantor as well as of a public authority in Malaysia against the Fund.

Part IV which covers jurisdiction and effect of judgments contains two sections. *Section 23* extends the admiralty jurisdiction of the High Court under paragraph 24(b)(sic)¹⁵ of the Courts of Judicature Act 1964 to any claims arising under Act 515. Subsection (2) of section 23 makes it clear, however, that the jurisdiction of the Court covers only claims in relation to pollution damage occurring in any area of Malaysia.

Section 24 deals with enforcement of judgements by a Court in a Liability Convention country. It essentially extends Part II of the Reciprocal Enforcement of Judgements Act 1958 to any such judgement.

THE PHILIPPINES

JUDICIAL DECISIONS*

Foreign Corporations

HB Zachary Company International v. Court of Appeal
G.R. No. 106989, 10 May 1994, 232 SCRA 328

The Supreme Court ruled that the enforcement of the writ of preliminary attachment against a foreign corporation although simultaneous with the service of the summons and a copy of the complaint, did not bind the company because the service of the summons was not validly made.

The Supreme Court stated that when a foreign corporation has designated a person to receive service of summons pursuant to the Corporation Code, that

¹⁵ This should have been phrased paragraph (b) of section 24.

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designation is exclusive and service of summons on any other person is inefficacious. However, the writ of preliminary attachment may be validly served anew.

George Grotjahn GmbH & Co. v. Isnani

G.R. No. 109272, 10 August 1994, 235 SCRA 216

The Supreme Court held that a multinational company organized and existing under the laws of the Federal Republic of Germany has capacity to sue in the Philippines if that foreign corporation is doing business in the Philippines. 'Doing business' including appointing representatives or distribu-

tors who are domiciled in the Philippines, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.

The Supreme Court stated that there is no general rule or governing principle as to what constitutes 'doing' or 'engaging in' or 'transacting' business in the Philippines. Each case must be judged in the light of its peculiar circumstances.

In this case, the multinational company does not engage in commercial dealings or activities in the country because it is precluded from doing so by Philippine law. Nonetheless, it has been continuously acting as a supervision, communications and coordination center for its home office's affiliates in Singapore, and in the process has named its local agent and has employed Philippine nationals. From this uninterrupted performance of acts pursuant to its primary purposes and functions as a regional/area headquarters for its home office, it is clear that the multinational company is doing business in the country.

The domestic corporation is estopped from assailing the personality of the multinational company because the doctrine of estoppel to deny corporate existence applies to foreign as well as to domestic corporations. Thus, one who has dealt with a corporation of foreign origin as a corporate entity is estopped to deny its corporate existence and capacity.

Application of Philippine Labour Law on Overseas Contracts

Klaveness Maritime Agency Inc. v. PALMOS

G.R. No. 102310-12, 20 May 1994, 232 SCRA 448

The Supreme Court held that the Labor Code does not require a formal trial-type proceeding before an erring employee may be dismissed especially in the case of a vessel on the ocean or in a foreign port. The minimum requirement of due process in termination proceedings - which must be complied with even in respect of seamen on board a vessel - consists of notice to the employees intended to be dismissed and the grant to them of an opportunity to present their own side of the alleged offence or misconduct which led to the management decision to terminate.

Inter-Orient Maritime Enterprises Inc. v. NLRC

G.R. No. 115286, 11 August 1994, 235 SCRA 268

The Supreme Court ruled that a company's management prerogative cannot be exercised at the cost of loss of the captain's right under his contract and under Philippine law.

Succession

VDA. de Perez v. Tolete

G.R. No. 76714, 2 June 1994, 232 SCRA 722

The Supreme Court ruled that the respective wills of the spouses, both foreign citizens, admitted to probate in a foreign country, will only be effective in this country upon compliance with the following provision of the Civil Code of the Philippines:

"Art. 816. The will of an alien who is abroad produces effect in the Philippines if made with the formalities prescribed by the law of the place in which he resides, or according to the formalities observed in this country, or in conformity with those which this Code prescribes."

Thus, the proof that both wills conform with the formalities prescribed by New York laws or by Philippine laws is imperative.

The evidence necessary for the reprobate or allowance of wills which have been probated outside of the Philippines are as follows: (1) The due execution of the will in accordance with the foreign law; (2) The testator has his domicile in the foreign country and not in the Philippines; (3) The will has been admitted to probate in such country; (4) The fact that the foreign tribunal is a probate court, and (5) The laws of a foreign country on procedure and allowance of wills. Except for the first and the last requirements, the petitioner submitted all the needed evidence.

The necessity of presenting evidence on the foreign laws upon which the probate in the foreign country is based is impelled by the fact that the courts cannot take judicial notice of them.

Citizenship

Republic v. De La Rosa

G.R. No. 104654, 6 June 1994, 232 SCRA 785

The Supreme Court held that FRIVALDO, having opted to reacquire Philippine citizenship through naturalization under the Revised Naturalization Law, is bound to follow the procedure prescribed by the said law. It is not for an applicant to decide for himself and to select the requirements which he believes, even sincerely, are applicable to his case and discard those which he believes are inconvenient or merely of nuisance value. The law does not distinguish between an applicant who was formerly a Filipino citizen and one who was never such a citizen. It does not provide a special procedure for the reacquisition of Philippine citizenship by former Filipino citizens.

Adoption by Aliens

Republic v. Toledano

G.R. No. 94147, 8 June 1994, 233 SCRA 9

The Supreme Court, applying Art. 184 and 185 of the Family Code, held that both foreign spouses are disqualified to adopt under Philippine law even if one of the spouses was formerly a Filipino citizen.

There can be no questions that the alien spouse is not qualified to adopt under any of the exceptional cases in the provision. In the first place, he is not

a former Filipino citizen but a natural born citizen of the United States of America. In the second place, the adopted is neither his relative by consanguinity nor the legitimate child of his spouse. In the third place, when the spouses jointly filed the petition to adopt, his spouse was no longer a Filipino citizen but naturalized American.

The other spouse may appear to qualify because she was a former Filipino citizen seeking to adopt her younger brother. But the petition cannot be granted in her favour alone without violating the Family Code which mandates a joint adoption by the husband and wife. This is in consonance with the concept of joint parental authority over the child which is the ideal situation.

Human Rights

Brigido Simon v. Commission on Human Rights

G.R. No. 100150, 5 January 1994, 229 SCRA 117

The Supreme Court held that although the Universal Declaration of Human Rights, or more specifically, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, suggest that the scope of human rights can be understood to include those that relate to an individual's social, economic, cultural, political and civil relations, which seems to closely identify the term with the universally accepted traits and attributes of an individual, along with what is generally considered to be his inherent and inalienable rights encompassing almost all aspects of life, the 1987 Constitutional Convention delegates envisioned a Commission on Human Rights that would focus its attention to the more severe cases of human right violations such as political and civil rights violations.

The Supreme Court further held that the demolition of stalls, sari-sari stores and carinderias does not fall within the compartment of 'human rights' violations involving civil and political rights as intended by the present Constitution. As the Commission can only exercise the power of investigation on matters within said definition of human rights, the 'order to desist' and the consequent order of contempt is not investigational in character but prescinds from an adjudicative power that the Commission does not have.

Ordonez v. Director of Prisons

G.R. No. 115576, 4 August 1994, 235 SCRA 152

The Supreme Court declared that there is absolutely no question that the prisoners' plea for immediate release should be heeded.

In this case, the prisoners were among the civilians tried under military commissions during Martial Law and were sentenced to death but the sentence was commuted to reclusion perpetual under the 1987 Constitution. Their convictions were nullified when the Supreme Court ruled in *Olague v. Military Commission No. 34* that the military tribunals had no jurisdiction over civilians. But they still remained under detention, in spite of the Supreme Court directive in *Cruz v. Ponce Enrile* that the Department of Justice should file information in civil courts within 180 days, because no information was filed against them for lack of records.

The prisoners wrote to the UN Human Rights Committee (UNHRC), complaining that their continued detention violated their rights under Articles 6,7,9,10,14 & 26 of the International Covenant on Civil and Political Rights. The UNHRC declared the communication as admissible and requested the Philippine Government to submit written explanation of the complaint within six months from the date of transmittal. The Philippine Commission on Human Rights wrote to the Secretary of Justice for the release of the complainants unless criminal charges had already been filed against them.

The Supreme Court found that the government failed to show that the complainants' continued detention is supported by a valid conviction or by the pendency of charges against them or by any legitimate cause whatsoever. If no information can be filed against them because the records were lost, it is not the prisoners who should be made to suffer. In the eyes of the law, the prisoners are not guilty nor appear to be guilty of any crime for which they may be validly held. Hence, they are entitled to be set free.

Contracts

Lufthansa German Airlines v. Court of Appeal

G.R. No. 83612, 24 November 1994, 238 SCRA 290

The Supreme Court ruled that the airline company which issued a confirmed ticket to a passenger covering a five-leg trip aboard different airlines is liable for damages occasioned by the bumping-off of said passenger by one of the airlines contracted to carry him to a particular destination of the five-leg trip.

In the very nature of their contract, the airline company is clearly the principal in the contract of carriage with the passenger and remains to be so, regardless of those instances when actual carriage was to be performed by various carriers. The issuance of a confirmed ticket in favour of the passenger covering his entire five-leg trip aboard successive carriers attests to this. It is also proof that the airline company, in effect, guaranteed that the successive carriers, such as Air Kenya, would honour his ticket, assure him of a space therein and transport him to a particular segment of his trip.

The Court also ruled that Section 2 of Article 30 of the Warsaw Convention does not apply because that article presupposes the occurrence of either an accident or a delay, neither of which took place. Nor can the Court take heed of jurisprudence in the US where the term 'delay' was interpreted to include 'bumping-off' or failure to carry a passenger with a confirmed reservation.

These decisions in the US are not controlling in this jurisdiction. It is not prepared, absent reasons of a compelling nature, to entertain an extended meaning of the term 'delay', which in the *KLM v. CA* case was given its ordinary meaning.

Contracts; Applicability of Foreign Law

Cadalin v. Poea

G.R. No. 104776, 5 December 1994, 238 SCRA 721

A foreign law provides that a claim arising out of a contract of employment shall not be actionable after the lapse of one year from the date of the expiry of the contract.

The Supreme Court stated that as a general rule, a foreign procedural law will not be applied in the forum. Procedural matters, such as service of process, joinder of actions, period and requisites for appeal and so forth, are governed by the laws of the forum. This is true even if the action is based upon a foreign substantive law.

A law on prescription of actions is *sui generis* in Conflict of Laws in the sense that it may be viewed either as procedural or substantive, depending on the characterization given by such a law.

However, the characterization of a statute into a substantive law becomes irrelevant when the country of the forum has a 'Borrowing Statute'. Said statute has the practical effect of treating the foreign statute of limitation as one of substance. A borrowing statute directs the state of the forum to apply the foreign statute of limitations to the pending claims based on a foreign law.

While there are several kinds of borrowing statutes, one form provides that an action barred by the laws of the place where it accrued will not be enforced in the forum even though the local statute has not run against it. Section 48 of our Code of Civil Procedure is of this kind. It has not been repealed or amended by the Civil Code. There is no inconsistency or contradiction between the provisions of both laws.

In the light of the 1987 Constitution, however, Section 48 cannot be enforced *ex proprio vigore* insofar as it ordains the application in this jurisdiction of a foreign law. The courts of the forum will not enforce any foreign claim obnoxious to the forum's public policy. To enforce the one-year prescriptive period of the foreign law would contravene the public policy on the protection of labor.

As to the question on whether the employees are entitled to the benefits provided for by foreign law or not, the provisions on their contracts of employment are instructive. The contracts, prepared by the employers themselves, provided that the laws of the host country became applicable to said contracts if they offer terms and conditions more favourable than those stipulated therein.

Any ambiguity in the contracts should be interpreted against the employers as Art. 1377 of the Civil Code provides that the interpretation of obscure words or stipulations in a contract shall not favour the party who caused such obscurity. Thus, the Supreme Court read the contracts as adopting the provisions of the foreign law as part and parcel thereof.

The parties to a contract may select the law by which it is governed. In such a case, the foreign law is adopted as a system to regulate the relations of the parties, including questions of their capacity to enter into the contract, the formalities to be observed by them, matters of performance, and so forth.

Instead of adopting the entire mass of the foreign law, the parties may just agree that specific provisions of a foreign statute shall be deemed incorporated into their contract "as a set of terms". By such reference to the provisions of

the foreign law, the contract does not become a foreign contract to be governed by the foreign law. The said law does not operate as a statute but as a set of contractual terms deemed written in the contract.

A basic policy of contract is to protect the expectation of the parties. It is protected by giving effect to the parties' own choice of the applicable law. The choice of law must, however, bear some relationship to the parties or their transaction. There is no question that the contracts to be enforced by claimants have a direct connection with the Bahrain law because the services were rendered in that country.

Extradition

Wright v. CA

G.R. No. 113213, 15 August 1994, 235 SCRA 341

In this case, the Supreme Court denied the petition of an Australian citizen sought by his government for indictable crimes in his country. The Australian citizen contends that the Philippine-Australian treaty is a violation of Section 21, Article VII of the 1987 Constitution, for being an *ex post facto* law and that there was no proof of his being prosecuted in Australia.

The Supreme Court characterized extradition as an intrusion into the territorial integrity of the host State and a delimitation of the sovereign power within its territory. As such, it does not impose an obligation to extradite on the requested State until the latter has made its own determination of the validity of the requesting State's demand in accordance with the requested State's own interest.

Since the principles of international law recognize no right of extradition apart from that arising from a treaty, States enter into such treaties for the purpose of bringing fugitives of justice within the ambit of their laws, under conventions recognizing the right of nations to mutually agree to surrender individuals within their jurisdiction and control, and for the purpose of enforcing their respective municipal laws.

The phrase "wanted for prosecution" in the treaty merely requires "a warrant for the arrest or a copy of the warrant for the arrest of the person sought to be extradited" which was complied with.

As to the treaty being an *ex post facto* law, the Supreme Court held that as conceived under the Constitution, *ex post facto* laws are:

- (1) statutes that make an act punishable as a crime when such act was not an offense when committed;
- (2) laws which, while not creating new offenses, aggravate the seriousness of a crime;
- (3) statutes which prescribe greater punishment for a crime already committed; or
- (4) laws which alter rules of evidence so as to make it substantially easier to convict a defendant.

Applying the constitutional principle, the Court held that the prohibition applies only to criminal legislation which affects the substantial rights of the accused. The extradition treaty is neither a piece of criminal legislation nor a criminal procedural statute. It merely provides for the extradition of persons wanted for prosecution of an offense or a crime which was already committed or consummated at the time the treaty was ratified.

Land Acquisition

Republic v. CA

G.R. No. 108998, 24 August 1994, 235 SCRA 567

The law provides that a natural-born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of a private land up to a maximum area of 1,000 sq.m., if urban, or one hectare in case of rural land, to be used by him as his residence. For the purpose of transfer and/or acquisition of a parcel of residential land, it is not significant whether such persons are no longer Filipino citizens at the time they purchased or registered the parcels of land in question. What is important is that they were formerly natural-born citizens of the Philippines, and as transferees of a private land, they could apply for registration in accordance with the mandate of Section 8, Article XII of the Constitution.

The Supreme Court held that there could be no legal impediment for the registration of the land in view of what the Constitution ordains, because even if the persons concerned were already foreign citizens at the time they applied for registration of the properties in question, said properties were already private lands. The land was already private in character since the foreign

citizen's predecessor in interest had been in open, continuous and exclusive possession and occupation thereof under claim of ownership.

SINGAPORE

LEGISLATION*

International commercial arbitration

International Arbitration Act, No.23 of 1994

This Act implements the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration on an 'opt-out' basis so that its provisions will apply to international arbitrations unless parties expressly exclude it. The UNCITRAL Model Law set out in the First Schedule of the Act establishes a procedural framework for the conduct of international commercial arbitrations. It regulates such matters as the composition and jurisdiction of the arbitral tribunal, conduct of the arbitral proceedings, the making of the award and setting aside the award.

Apart from implementing the Model Law, the Act also introduces additional provisions which will facilitate the conduct of international arbitration proceedings.

The Act also provides for certain matters relating to the conduct of conciliation proceedings and consolidates all provisions on international commercial arbitrations by replacing and re-enacting the Arbitration (Foreign Awards) Act in Part III of the Act. That Act gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (set out in the Second Schedule).

International sale of goods

The Sale of Goods (United Nations Convention) Act, No. 14 of 1995

Singapore ratified the United Nations Convention on Contracts for the International Sale of Goods, 1980, also known as the Vienna Sales Convention,

* Contributed by SOH TZE BIAN, Attorney General's Chambers, Singapore.

on 16 February 1995. The Convention, which came into force on 1 January 1988, will take effect in Singapore on 1 March 1996.

The Convention is a significant international instrument which provides uniform rules to govern contracts for the international commercial sale of goods. It provides a common law for sales contracts among countries with very different legal systems, and in many respects reflects existing Singapore law.

The Act gives effect in Singapore to the above Convention and provides that the Convention, except for Article 1(1)(b), shall have the force of law in Singapore and is therefore part of the laws of Singapore. If the reservation made under Article 95 of the Convention which excludes the application of Article 1(1)(b) is subsequently withdrawn, clause 3(3) provides that the Minister may by orders delete clause 3(2) so that Article 1(1)(b) will apply. However, Article 1(1)(b) will not apply to any proposal for concluding the contract made or any contract concluded before the date on which the withdrawal of the reservation takes effect under Article 97(4) of the Convention.

The Act provides that the Convention shall prevail over any other law in Singapore to the extent of any inconsistency and allows the Minister by Gazette notification to declare the countries which are bound by the Convention and the reservations and declarations, if any, made by such countries. The Minister may also declare any denunciation made by a specified country. The Minister may in relation to a specified country issue a certificate in relation to the above matters which will be evidence of the facts contained in the certificate.

SRI LANKA

LEGISLATION*

Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22, 1994

The Act gives effect to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment of 1984. Under the Act any

* Contributed by CHARIKA MARASINGHE, University of Colombo.

person who tortures any other person shall be guilty of an offence. Further, any person who attempts to commit, aids and abets in committing, or conspires to commit torture shall also be guilty of an offence under the Act.

Torture has been interpreted in the Act to mean “any act which causes severe pain, whether physical or mental, to any other person, being an act which is-

- (a) done for any of the following purpose, that is to say-
 - (i) obtaining from such other person or a third person, any information or confession; or
 - (ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or
 - (iii) intimidating or co-ercing such other person or a third person;
- (b) done for a reason based on discrimination, and being in every case, an act which is done by or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity”.

A person guilty of an offence under this Act shall, on conviction after trial by the High Court, be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees. Acts done during state of war, internal political instability or any public emergency or on an order of a superior officer or a public authority shall not be a defence to an offence under the Act.

The High Court of Sri Lanka shall have the jurisdiction to hear and try an offence under this Act committed in any place outside the territory of Sri Lanka by any person, in any case where-

- (a) the offender, whether he is a citizen of Sri Lanka or not, is in Sri Lanka or on board a ship or aircraft registered in Sri Lanka;
- (b) the person alleged to have committed the offence is a citizen of Sri Lanka; or
- (c) the person in relation to whom the offence is alleged to have been committed is a citizen of Sri Lanka.

Where a person who is not a citizen of Sri Lanka is arrested for an offence under this Act, he shall be entitled to communicate, without delay with the nearest appropriate representative of the State of which he is a national or, if he is a stateless person, the nearest appropriate representative of the State where he usually resides.

Where a person is arrested for an offence under the Act, the Minister in charge of foreign affairs shall inform the relevant authorities in any other state having jurisdiction over that offence, of the measures which the Government of Sri Lanka has taken, or proposes to take, for the prosecution or extradition of that person for that offence.

The Act also provides for the extradition of any person accused or convicted of the offence of torture. Under the Act the Government of Sri Lanka has an obligation to afford such assistance (including the supply of any relevant evidence at its disposal) to the relevant authorities of any State as may be necessary in connection with criminal proceedings instituted in that State against any person, in respect of the offence of torture.

THAILAND

JUDICIAL DECISIONS*

Extradition of nationals; 1983 Thai-US Extradition Treaty

The US Government had requested the extradition of Mr. THANONG SIRIPRECHAPONG, then an elected Member of Parliament, to stand trial in San Francisco, on the offence of narcotic drug trafficking, which involved the importation into the USA of multiple container-loads of marijuana over a ten-year period between 1977-1987.

On 10 January 1995, the Thai Cabinet resolved to extradite Mr. SIRIPRECHAPONG and to request the Criminal Court to determine whether a Thai national is extraditable under the Thailand - US Extradition Treaty of 1983 and the Extradition Act, Buddhist Era 2472 (1929).

Article 8(1) of the 1983 Treaty provides:

“Neither Contracting Party shall be bound to extradite its own nationals.

In a case in which the United States of America is the Requested State, the Executive Authority shall have the power to extradite its nationals if, in its discretion, it is deemed proper to do so.

In a case in which Thailand is the Requested State, the competent authority may extradite its nationals if not prevented from doing so.”

The relevant provisions of the 1929 Extradition Act are as follows:

“*Section 3.* This Act shall be applicable to all extradition proceedings in Siam [as Thailand was then called] so far as it is not inconsistent with the terms of any Treaty, Convention or Agreement with a foreign State, or any Royal Proclamation issued in connection therewith.”

* Contributed by KRIANGSAK KITTICHAISAREE, Royal Thai Embassy, Washington D.C.

“Section 13. The court may not hear evidence or defence raised by the defendant, except in case of the following:

. . .

(4) the defendant’s nationality.”

“Section 16. Whenever the court has determined that the defendant is a Siamese subject . . . the court shall report to and consult the Minister of Justice before making an order to acquit the defendant.”

Mr. SIRIPRECHAPONG argued, *inter alia*, that, as a Thai national, he could not be extradited to the USA without violating the relevant provisions of the Extradition Act, and/or the Extradition Treaty.

The position of the US Government is that the Extradition Treaty does not bar the extradition of nationals, and there is no Thai constitutional or statutory bar to such extradition.

It has been noted that in concluding 27 extradition treaties with 7 foreign countries, Thailand had consistently denied extradition of Thai nationals (as, for example, Article 1 of the Thai-Belgian Extradition Treaty). Nevertheless, the extradition treaty between Thailand and the United Kingdom and that between Thailand and the USA are exceptions in that they leave some room for interpretation that a Thai national may be extradited provided that there is nothing to prevent it. The above-cited proviso of Article 8(1) of the Thai-US Treaty has its identical counterpart in the Thai-UK Treaty, and is borne out by the practice in the UK and the USA which permit extradition of their own nationals. It has also been argued that the common law countries, such as the USA and the UK, strictly adhere to the territorial principle of jurisdiction, whereas countries like Thailand also consider the principle of personal jurisdiction as a crucial factor in exercising jurisdiction.

The crux of the question in Mr. SIRIPRECHAPONG’s case was whether anything in Thai law would prevent extradition of Thai nationals. The Criminal Court (President MANITYA JITTJANTARAKLUB, Judges SAMAKKI MANEERATANA and JAMRAS SRITHAWACHPONGSE) on 17 July 1995 ruled:

“Pursuant to Article 8(1) of the Extradition Treaty, the Executive Authority of the USA has the power to extradite US nationals if, in its discretion, it is deemed proper to do so. Therefore, the discretion of the US Executive Authority is the sole condition on the US side regarding extradition of US nationals. On the Thai side, the competent authority may extradite Thai nationals if not prevented from doing so. Applying this provision to the present case, the Court has two findings. First, since the Thai Cabinet has resolved to extradite the defendant, there is nothing to prevent his extradition. Secondly, there

should be equality of treatment and reciprocity. If the USA considers its nationals extraditable, Thailand should also treat its nationals as extraditable, so that reciprocity can be ensured.”

The defendant lodged an appeal on 31 July 1995. The Appeal is now pending in the Court of Appeal, which, by virtue of Section 17 of the Extradition Act, is the court of final judgment in extradition cases.

VIETNAM

DECLARATIONS

Sovereignty and jurisdiction over sea and seabed areas; territorial disputes

*Declaration made upon ratification of the United Nations Convention of the Law of the Sea*²⁰

The National Assembly reaffirms the sovereignty of the Socialist Republic of Vietnam over its internal waters and territorial sea, the sovereign rights and jurisdiction in the contiguous zone, the exclusive economic zone and the continental shelf of Vietnam, based on the provisions of the Convention and principles of international law, and calls on other countries to respect the above-mentioned rights of Vietnam.

The National Assembly reiterates Vietnam's sovereignty over the Hoang Sa and Truong Sa archipelagoes and its positions to settle those disputes relating to territorial claims as well as other disputes in the Eastern Sea through peaceful negotiations in the spirit of equality, mutual respect and understanding, and with due respect for international law, particularly the 1982 United Nations Convention on the Law of the Sea, and for the sovereignty rights and jurisdiction of the coastal States over their respective continental shelves and exclusive economic zones; the concerned parties should, while exerting active efforts to promote negotiations for a fundamental and long-term solution, maintain stability on the basis of the status quo and refrain from any act that may further complicate the situation and from the use of force or threat of force.

²⁰ Law of the Sea Bulletin No. 28 (1995) p. 5.

The National Assembly emphasizes that it is necessary to [differentiate] between the settlement of the dispute over the Hoang Sa and Truong Sa archipelagoes and the defence of the continental shelf and maritime zones falling under Vietnam's sovereignty, rights and jurisdiction, based on the principles and standards specified in the 1982 United Nations Convention on the Law of the Sea.

The National Assembly [authorizes] the National Assembly's Standing Committee and the Government to review all relevant national legislation to consider necessary amendments in conformity with the 1982 United Nations Convention on the Law of the Sea, and to safeguard the interests of Vietnam.

The National Assembly authorizes the Government to undertake effective measures for the management and defence of the continental shelf and maritime zones of Vietnam.

PRACTICE OF ASIAN STATES AT THE TIME OF ENTRY INTO FORCE OF THE UN CONVENTION ON THE LAW OF THE SEA*

Territorial sea

Breadth of the territorial sea

All the coastal States in the subregion, except Singapore and the Philippines, have established the breadth of their territorial seas at 12 miles. Singapore, being surrounded by a narrow band of waters, had claimed only three miles. The Philippines never clearly defined its territorial sea.²¹

Drawing of baselines

Most of the States in the subregion use straight baselines, generally in conformity with Article 7 of the 1982 Convention. However, a straight base-

* From: *The Law of the Sea, Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea* (UN, New York 1994), with permission from the UN.

²¹ See *The Law of the Sea: National Claims to Maritime Jurisdiction* (United Nations publication, Sales No. E.91.V.15).

line adopted by Myanmar is 222 miles in length and has the effect of closing the Gulf of Martaban (approximately 49,000 square kilometres) as internal waters, against which the United States protested in 1982.²² Some of the baselines established by Vietnam in the Statement of the Government on 12 November 1982 on the territorial sea baseline,²³ have also been protested by France, Singapore and Thailand as not in conformity with the well-established rules of international law as reflected in Article 7 of the Convention.²⁴ Vietnam reportedly justified the baselines by referring to paragraph 5 of Article 7, which allows the coastal State to take account of “economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage”.²⁵

Although the Democratic People’s Republic of Korea has not proclaimed any straight baseline, the presumed straight line which forms the basis for measuring its ‘military’ or ‘security’ zone of 50 miles and the economic zone in the Sea of Japan (East Sea) does not follow the general direction of the coast, except in a most gross fashion.²⁶ In a communication dated 4 January 1990 addressed to the United Nations, the United States stated that “as recognized in customary international law and as reflected in the 1982 United Nations Convention on the Law of the Sea”, straight baselines might only be employed in localities where the coastline was deeply indented and cut into, or where there was a fringe of islands along the immediate vicinity of the coast, and that the coastline of the Democratic People’s Republic of Korea in question was neither deeply cut into, nor fringed with many islands.²⁷

²² United States Department of State, *Limits in the Seas No. 112* (United States Responses to Excessive National Maritime Claims) (1992) 20-22.

²³ *The Law of the Sea. Baselines: National Legislation with illustrative maps* (United Nations publication, Sales No. E.89.V.10) 384.

²⁴ See Note dated 5 December 1983 from the Permanent Mission of France addressed to the Secretary-General of the United Nations, *Law of the Sea Bulletin*, No. 3 (1984) 16; Statement by Thailand dated 22 November 1985, *The Law of the Sea: Current Developments in State Practice* (United Nations publication, Sales No. E.87.V.3) 147; and Note dated 5 December 1986 from the Permanent Mission of Singapore addressed to the Secretary-General of the United Nations, *The Law of the Sea: Current Developments in State Practice No II* (United Nations publication, Sales No. E.89.V.7) 84.

²⁵ M. VALENCIA, ‘Vietnam: Fisheries and navigational policies and issues’, 21 ODIL (1990) 432.

²⁶ C. PARK, ‘The 50-mile military boundary zone of North Korea’, 72 AJIL (1978) 866. See also J.G. KIM, ‘Reflections on the attitude of North Korea toward the law of the sea treaty (UNCLOS III)’, in C. PARK and J.K. PARK, eds., *The Law of the Sea: Problems from the East Asian Perspective* (1987) 217.

²⁷ *The Law of the Sea: Current Developments in State Practice No. III* (United Nations publication, Sales No. 92.V.13) 145.

Right of innocent passage

With regard to the regime of innocent passage through the territorial sea, several States require prior authorization by, or notification to, their authorities for the passage of foreign warships. These are Bangladesh, China, Democratic People's Republic of Korea, India, Maldives, Myanmar, Pakistan, Republic of Korea, Sri Lanka and Vietnam.²⁸ The laws of Bangladesh, China, Myanmar and Pakistan²⁹ specifically require foreign warships to obtain prior 'permission' or 'authorization', and the laws of Maldives and Sri Lanka³⁰ require the 'consent' of the Government. The laws of India and the Republic of Korea³¹ refer only to prior 'notice' to be given to the authorities.

In a statement circulated in February 1993, the Ministry of Foreign Affairs of Thailand confirmed its position that all foreign ships, including warships and fishing vessels, could exercise the right of innocent passage in the territorial sea "without having to give prior notification to, or obtain prior permission, approval or consent from the coastal State concerned", and that any laws and regulations which tended to restrict such right were contrary to the rules of customary international law and were "incompatible with the obligations assumed by the States concerned when they signed the 1982 Convention".³²

With respect to the passage of certain other types of vessels, the 1976 Pakistani law requires "foreign super-tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or

²⁸ 59 BYIL (1988) 519-521.

²⁹ Territorial Waters and Maritime Zones Act, 1974 of Bangladesh, sect. 3(7), *National Legislation and Treaties Relating to the Law of the Sea* (ST/LEG/SER.B/19) (United Nations publication, Sales No. E/F.80.V.3) 4; Law on the Territorial Sea and the Contiguous Zone of 25 February 1992 of China, Art. 6, *Law of the Sea Bulletin*, No. 21 (1992) 24; Territorial Sea and Maritime Zones Law, 1977 of Myanmar, sect. 9 (a), *National Legislation and Treaties Relating to the Law of the Sea*, op. cit. p. 8; Territorial Waters and Maritime Zones Act, 1976 of Pakistan, sect. 3 (2), *ibid.*, p. 86.

³⁰ Maritime Zones Law No. 22 of 1976 of Sri Lanka. sect. 3(1), *ibid.*, p. 120; Law No. 32/76 of 5 December 1976 Relating to the Navigation and Passage by Foreign Ships and Aircrafts through the Airspace, Territorial Waters and the Economic Zone of the Republic of Maldives, sect. 1, R.W. SMITH, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (1986) 278.

³¹ Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 of India, sect. 4(2), *ibid.*, p. 47; Territorial Sea Law, 1977 of the Republic of Korea, art. 5(1), *ibid.*, p. 95.

³² Document A/48/90.

materials” to give prior notice to the Government before entering and passing through its territorial sea.³³

In 1986, in an effort to interdict maritime activities of armed anti-government groups, Sri Lanka issued a Notice to Mariners which purported to require that with certain exceptions all vessels must obtain permission before entering its territorial sea. The United States protested the Sri Lanka measure by stating that, although the United States recognized the right of Sri Lanka, “under customary international law as reflected in Article 25 of the 1982 Convention on the Law of the Sea”, to prevent passage which was not innocent and to suspend temporarily innocent passage of foreign ships if such suspension was “essential to its security”, the Notice was not in accordance with that right because the suspension was overly broad and the duration of the suspension was not indicated as being temporary.³⁴

Contiguous zone and special zones

Several States, including Cambodia, China, India, Myanmar, Pakistan, Sri Lanka and Vietnam, have established contiguous zones with the outer limit of 24 miles from the baseline, in conformity with the Convention. Bangladesh’s contiguous zone extends to a line of six miles from the territorial sea, i.e., 18 miles from the baseline.

Although the Convention allows the coastal State to exercise in the contiguous zone the control necessary for “customs, fiscal, immigration or sanitary” matters, the legislation of all the States mentioned above includes the protection or safeguarding of their security as an additional element.³⁵

In a decree of 17 March 1980, Vietnam claimed that military vessels must have its permission and must give notice before entering its contiguous zone, and the United States protested the claim as “contrary to international law”.³⁶ In addition to the contiguous zone, China proclaimed in 1950 three

³³ Territorial Waters and Maritime Zones Act, 1976, loc. cit., sect. 3(3).

³⁴ Loc. cit. n. 2, p. 50.

³⁵ Bangladesh: Territorial Waters and Maritime Zones Act, 1974, loc. cit., sect. 4(2)(a); China: Law on the Territorial Sea and the Contiguous Zone, 1992, loc. cit., Art. 13; India: Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, loc. cit., sect. 5(4)(a); Myanmar: Territorial Sea and Maritime Zones Law, 1977, loc. cit., sect. 11; Pakistan: Territorial Waters and Maritime Zones Act, 1976, loc. cit., sect. 4(2)(a); Sri Lanka: Maritime Zones Law, 1976, loc. cit., sect. 4(2)(a); Vietnam: Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, and the Continental Shelf, 1977, para. 2, SMITH, op. cit., p. 481.

³⁶ Loc. cit. n. 2, p. 35.

maritime security zones off parts of its coast including the high seas portions: (1) a “military warning (alert) zone” lying west of a line from the Yalu River estuary to a point off the eastern end of the Shandong Peninsula; (2) a “military navigation zone” off Shanghai; and (3) the “military operation zone” north of the Taiwan Province. Among the three, the claim to the second zone appears to have been superseded in 1958, when the territorial sea was extended to 12 miles. China however, reconfirmed the two remaining zones when it was negotiating with Japan a fisheries agreement which was signed in 1975. In the exchange of letters concerning the scope of the agreement, Japan reserved its position of not recognizing the Chinese claims to those special zones, though it agreed to refrain from fishing in those areas.³⁷

The Democratic People’s Republic of Korea also proclaimed in 1977 a military zone within its exclusive economic zone up to 50 miles from the baseline. The purpose of the zone was to “reliably safeguard the exclusive economic zone” and to defend militarily the national interests and sovereignty of the country. In this zone, including the air space, acts of foreigners, foreign military vessels and planes are prohibited, and civilian ships and planes are allowed only with prior agreement of the authorities.³⁸ On 4 January 1990, the United States protested this proclamation, recalling that:

“customary international law, as reflected in the 1982 United Nations Convention on the Law of the Sea, does not recognize the right of coastal States to assert powers or rights for security purposes in peacetime which would restrict the exercise of the high seas freedoms of navigation and overflight beyond the territorial sea.”³⁹

Straits used for international navigation

The most important straits used for international navigation in the subregion are the Malacca/Singapore Straits between Indonesia, Malaysia and Singapore. In 1976, these States established a Council on Safety of Navigation and Control of Marine Pollution, which adopted an Agreement on Safety of

³⁷ C. PARK, ‘People’s Republic of China and the law of the sea’, in C. PARK and J.K. PARK, eds., op. cit. n. 26, pp. 256-257. See also B.D. LARKIN, ‘East Asian ocean security zone’, 2 *Ocean Yearbook* (1980) 288; ZHINGUO GAO, ‘China and the Law of the Sea Convention’, 15 *Marine Policy* (1991) 203. For the text of the China-Japan Agreement, see 1103 UNTS 3.

³⁸ J.G. KIM, ‘North Korea and the law of the sea’, in C. PARK and J.K. PARK, eds., op. cit. n. 26, p. 218.

³⁹ *The Law of the Sea: Current Developments in State Practice No. III*, op. cit., p. 145.

Navigation in the Malacca/Singapore Straits and submitted it to the International Maritime Organization (IMO) for consideration. In 1977, IMO adopted the traffic separation scheme and other navigational requirements proposed by the Agreement. Malaysia has subsequently enacted special legislation incorporating the relevant IMO decisions.⁴⁰ Two such traffic separation schemes are currently in operation in the Straits.

During the Third United Nations Conference on the Law of the Sea, the three States bordering the Malacca/Singapore Straits came to an understanding with major users of those Straits regarding the purpose and meaning of Article 233 of the Convention, which deals with safeguards with respect to coastal States' measures to protect the marine environment in straits used for international navigation. In the statement recording such 'common understanding' presented to the President of the Conference by the representative of Malaysia on 29 April 1982, these States and major users confirmed that the enforcement measures which strait States might take "shall not constitute denying, hampering, impairing or suspending the right of transit passage".⁴¹

With respect to the Straits of Sunda and Lombok of Indonesia, upon learning that Indonesia might have ordered its Navy to close them for exercises, the United States expressed its concern to Government officials because interference with the right of transit passage would "violate international law as reflected in the 1982 Law of the Sea Convention".⁴² Similar protests were also made by Australia, Japan and the 12 Member States of the European Community, which considered those straits as qualifying for transit passage.⁴³

The above-mentioned statement by Thailand also referred to the "right of transit passage in the straits used for international navigation", declaring that any laws and regulations which tended to restrict such right were contrary to the rules of customary international law and were incompatible with the obligations assumed by the States concerned when they signed the Convention.⁴⁴

⁴⁰ H. YUSOF, *The UN Convention on the Law of the Sea in Southeast Asia: Problems of Implementation*, SEAPOL Studies No. 3 (1986), p. 24.

⁴¹ *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. 16 (United Nations publication, Sales No. E.84.V.2) 250, document A/CONF.62/L.145. The contents of the statement were formally confirmed by Australia, France, the Federal Republic of Germany, Indonesia, Japan, Singapore, United Kingdom and the United States. See *ibid.*, documents A/CONF.62/L.145/Add.1-8.

⁴² 83 AJIL (1989) 359-360.

⁴³ T. TREVES, 'Codification du droit international et pratique des Etats dans le droit de la mer', 223 RdC (1990-IV) 134.

⁴⁴ See n. 32 *supra*.

Archipelagic waters

Two States in the subregion, i.e., Indonesia and the Philippines, have proclaimed the status of archipelagic States, with accompanying claims to archipelagic waters and other elements provided for in Part IV of the Convention. The Maldives has claimed a special form of 'archipelagic enclosure'.

Indonesia proclaimed its status as an archipelagic State by the Djuanda Declaration of 13 December 1957. The archipelagic State concept was then elaborated by Act No. 4 of 18 February 1960 concerning Indonesian Waters.⁴⁵ The baselines consist of straight lines with 195 turning points, including five segments longer than 100 miles and two of these measure 124 miles. The ratio of land to water within the archipelago is 1:1.2. These elements are in conformity with the requirements stipulated in Article 47(1) to (3) of the Convention, which were actually heavily influenced by the Indonesian system adopted some two decades earlier.⁴⁶

Article 47(6) of the Convention deals with the situation where a part of the archipelagic waters lies between two parts of an immediately adjacent neighbouring State. This is the case of the maritime area between West and East Malaysia, which has become part of the Indonesian archipelagic waters.⁴⁷ Indonesia and Malaysia agreed on the original text of that paragraph in 1976 and, as an elaboration of that agreement, the two States concluded on 25 February 1982 a Treaty relating to the legal regime of the archipelagic state and the rights of Malaysia in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of the Republic of Indonesia lying between East and West Malaysia.⁴⁸ This Treaty confirms in Article 2(2) the continued respect by Indonesia of existing rights and other legitimate interests which Malaysia had traditionally exercised in the archipelagic waters and in the airspace lying between East and West Malaysia.

In an exchange of notes with Indonesia in 1988, the United States said that it:

“recognizes the archipelagic States principles as applied by Indonesia on the understanding that they are applied in accordance with the

⁴⁵ Text in *The Law of the Sea: Practice of Archipelagic States* (United Nations publication, Sales No. E.92.V.3) 45.

⁴⁶ J.R.V. PRESCOTT, *The Maritime Political Boundaries of the World* (1985) 211.

⁴⁷ N. WISNOMOERTI, 'Indonesia and the law of the sea', in C. PARK and J.K. PARK, eds., op. cit. n. 26, p. 398.

⁴⁸ Text in *The Law of the Sea: Practice of Archipelagic States*, op. cit. n. 45, p. 144.

provisions of Part IV of the 1982 United Nations Convention on the Law of the Sea and that Indonesia respects international rights and obligations pertaining to transit of the Indonesian archipelagic waters in accordance with international law as reflected in that Part.”⁴⁹

The Philippines confirmed, in a note of 12 December 1955 to the Secretary-General,⁵⁰ its claims to all waters surrounded by the islands belonging to the country as “necessary appurtenances of its land territory” subject to its exclusive sovereignty. Subsequently, Republic Act No. 3046 of 17 June 1961,⁵¹ as amended by Republic Act No. 5446 of 18 September 1968,⁵² defined the baselines, stating that all waters within the baselines were considered “inland or internal waters” of the Philippines. According to the Declaration made by the Philippines at the time of both its signature and ratification of the Convention, its Constitution considers the concept of archipelagic waters under the Convention as similar to that of internal waters 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”. The Philippine Declaration further states that the Convention shall not be construed as amending any of its pertinent laws and decrees.⁵³ This Declaration was objected to by several States as incompatible with Article 310, and as containing reservations prohibited under Article 309 of the Convention.⁵⁴ In its declaration concerning one of such objections, received by the Secretary-General on 26 October 1988, the Philippines clarified that the Declaration concerned was made in conformity with Article 310 and that it intended to harmonize its domestic legislation with the provisions of the Convention, adding that the necessary steps were being taken to enact legislation dealing with sea lanes passage and the exercise of its sovereign rights over archipelagic waters, in accordance with the Convention.⁵⁵

Maldives had promulgated an ‘archipelagic enclosure’ which, although following the general configuration of the island chain, does not relate directly

⁴⁹ 83 AJIL (1989) 561.

⁵⁰ United Nations Legislative Series, *Laws and Regulations on the Regime of the Territorial Sea* (United Nations publication, Sales No. 1957.V.2), p. 39.

⁵¹ Text in *The Law of the Sea: Practice of Archipelagic States*, op. cit. n. 25, p. 75.

⁵² Ibid., p. 76.

⁵³ Declaration of the Philippines upon signature and ratification of the Convention, paras. 5 and 7, *The Law of the Sea: Status of the United Nations Convention on the Law of the Sea* (United Nations publication, Sales No. E.85.V.5), 22 and 37; 4 AsYIL 286.

⁵⁴ One of such protests, that of the United States, is reproduced in United States Department of State, op. cit. n. 22, p. 76.

⁵⁵ *The Law of the Sea: Current Developments in State Practice No. II*, op. cit., p. 96.

to land points. The exact status of the waters within the rectangular enclosure is not clear, but it appears that some form of integration of these waters on the broad lines of the archipelagic concept is intended.⁵⁶

Exclusive economic zone and exclusive fishery zone

All the coastal States in the subregion, except China, the Republic of Korea and Singapore, have proclaimed either an exclusive economic zone or exclusive fishery zone extending up to 200 miles from the baseline. Only Japan has proclaimed an exclusive fishery zone. The outer limit of the exclusive economic zone of Maldives is defined by reference to coordinates.

Relevant national legislation in the subregion generally follows the provisions of the Convention. Some discrepancies, however, are found with respect to coastal States' jurisdiction regarding artificial islands and installations, fisheries conducted by foreign vessels, and the possible designation of special areas.

While the Convention confers on the coastal State the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures within its exclusive economic zone, the "installations and structures" in question are limited to only those constructed "for the purposes provided for in Article 56 and other economic purposes" and those which "may interfere with the exercise of the rights of the coastal State in the zone" (Article 60(1)). The laws of India,⁵⁷ Indonesia,⁵⁸ Myanmar,⁵⁹ Pakistan,⁶⁰ Philippines,⁶¹ and Sri Lanka,⁶² most of which were adopted in the latter half of the 1970s, do not make distinction among artificial islands, installations and structures according to their use, treating all of them (and 'devices' in some of those laws) used for any purpose as subject to their exclusive jurisdiction.

⁵⁶ H.W. JAYEWARDENE, *The Regime of Islands in International Law* (1990), p. 172.

⁵⁷ Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, sect. 7(4)(b), loc. cit.

⁵⁸ Act No. 5 of 18 October 1983 on the Indonesian Exclusive Economic Zone, Art. 6, *The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone* (United Nations publication, Sales No. E.85.V.10) 152.

⁵⁹ Territorial Sea and Maritime Zones Law of Myanmar, 1977, sect. 18 (b), loc. cit., p. 10.

⁶⁰ Territorial Waters and Maritime Zones Act, 1976, sect. 6(2)(b), loc. cit., p. 89.

⁶¹ Presidential Decree No. 1599 of 11 June 1978 Establishing An Exclusive Economic Zone and for Other Purposes, sec. 2(b), *The law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone*, op. cit., p. 245.

⁶² Maritime Zones Law No. 22 of 1 September 1976, sect. 5(3)(c), loc. cit., p. 121.

With respect to fisheries, a unique arrangement is made in the 1977 Japanese law to exempt nationals of China and the Republic of Korea from the application of the regulatory measures on fishing by foreigners within its fishing zone.⁶³ The law also excluded from the application of the fishing zone "the East China Sea, a part of the Pacific adjacent to the East China Sea, the Yellow Sea and the western part of the Japan Sea", as the areas of interest for China and the Republic of Korea.⁶⁴

National legislation of the States in the subregion does not generally provide for the determination of the allowable catch, the promotion of the optimum utilization of the living resources and the access by other States to the surplus of the allowable catch, as set out in Articles 61 and 62 of the Convention. One exception may be the Indonesian Law, which permits fishing by foreign fishermen provided that the catch in question is in excess of Indonesia's capacity to harvest the allowable catch.⁶⁵

Despite the prohibition of imprisonment or other form of corporal punishment for violations of fisheries laws and regulations by the Convention (Article 73(3), the Philippines' 1978 Decree provides for the possibility of ordering imprisonment ranging from six months to ten years.⁶⁶

Although no imprisonment is envisaged in the laws of some other States, it has been pointed out that the fines they impose are so high as compared with the income of arrested fishermen that such fishermen are often imprisoned in default of payment.⁶⁷

Another problem regarding fisheries is the recent requirement of Malaysia for Thai fishing vessels passing the Malaysian exclusive economic zone to the high seas to notify its authorities, which Thailand has refused to accept because of its non-conformity with the regime of exclusive economic zone.⁶⁸ The 1993 statement by the Thai Foreign Ministry mentioned above also refers to the freedom of navigation in the exclusive economic zone of another State as part of customary international law codified by the 1982 Convention, and

⁶³ Enforcement Order of 17 June 1977 of Law No. 31 of 2 May 1977 on Provisional Measures relating to the Fishing Zone, as amended in 1977, Art. 6, *The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone*, op. cit., p. 169.

⁶⁴ Ibid. See also 28 JAIL (1985) 109-110.

⁶⁵ Act No. 5 of 18 October 1983 on the Indonesian Exclusive Economic Zone, Art. 5(3), loc. cit.

⁶⁶ Presidential Decree No. 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for Other Purposes, sect. 5(b), loc. cit., p. 246.

⁶⁷ R.S.K. LIM, 'EEZ legislation of ASEAN States', 40 ICLQ (1991) 182.

⁶⁸ P. TANGSUBKUL, "A review of disputed maritime areas in Southeast Asia", in P. FABBRI, ed., *Ocean Management in Global Change* (1992) 268.

declares that Thailand does not consider herself bound by the laws and regulations which tend to restrict such freedom.⁶⁹

With respect to the designation of special areas, the laws of India and Pakistan have similar provisions, enabling the Government to declare any area of the exclusive economic zone to be a 'designated area', where it may make such provisions as it deems necessary with respect to resource exploitation, the protection of artificial islands and installations, the protection of the environment, customs and fiscal matters and the regulation of navigation.⁷⁰ Indeed, both countries go even further in applying their legislation to the exclusive economic zone: in almost identical provisions, the above-mentioned laws enable the Government to extend any law in force to the exclusive economic zone or any part thereof and to "make such provisions as it may consider necessary for facilitating the enforcement" of such law, and any law so extended is considered to have effect as if the exclusive economic zone or the part thereof to which it has been extended formed "part of the territory of" the State.⁷¹

Continental shelf

While some States, such as Cambodia, Indonesia, Malaysia, the Philippines and Thailand, have proclaimed their rights over the continental shelf on the basis of the rules codified in the 1958 Geneva Convention on the Continental Shelf, some others, e.g., Bangladesh, India, Myanmar, Pakistan, Sri Lanka and Vietnam, have followed the 1982 Convention in defining the limit of their continental shelf as the outer limit of the continental margin.⁷²

The 1958 Convention (Article 5(1)) and the 1982 Convention (Article 78(2)) provide that the exercise of the coastal States' rights over the continental shelf must not result in any unjustifiable interference with navigation. The 1976 Act of India empowers the Government to declare any area of the continental shelf and its superjacent waters to be a 'designated area' for various

⁶⁹ See n. 32 *supra*.

⁷⁰ The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, of India, sect. 7(6), loc. cit., p. 51; Territorial Waters and Maritime Zones Act of 1976, of Pakistan, sect. 6(4), loc. cit., p. 89.

⁷¹ Section 7 of the Indian law, loc. cit., pp. 51-52; and section 6(5) of the Pakistani law, loc. cit., p. 90.

⁷² See *The Law of the Sea: National Claims to Maritime Jurisdiction*, op. cit. For the text of the relevant legislation of most of these States, see *The Law of the Sea: National Legislation on the Continental Shelf* (United Nations publication, Sales No. E.89.V.5).

regulatory purposes. According to the 'Explanation' attached to that provision, such regulation may include those on the "entry into and passage through the designated area of foreign ships by the establishment of fairways, sea lanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India".⁷³

In an Act adopted several months later, Pakistan incorporated almost identical wording as the Indian 'Explanation' into the text of the law itself.⁷⁴

The United States protested both of these laws as contrary to international law.⁷⁵

Delimitation of maritime boundaries

A number of agreements have been concluded between neighbouring States in the subregion, particularly in Southeast Asia and the Andaman Sea on the delimitation of their maritime boundaries. Most of the agreements deal only with the continental shelf. Only a few establish single boundary lines for both the continental shelf and the exclusive economic zone.

Many boundaries are not agreed upon presumably owing, to a great extent, to the existence of disputes regarding sovereignty over one or a group of islands or reefs claimed by more than one State, or to the political relationship between the States involved. Such cases are found particularly in the Sea of Okhotsk, Sea of Japan, Yellow Sea, East China Sea, South China Sea, Gulf of Tonkin, and Gulf of Thailand.

Particular mention should be made of three agreements creating joint development areas for oil and gas without defining boundaries in certain bordering areas with overlapping claims. These are: the 1974 agreement between Japan and the Republic of Korea on the continental shelf in the East China Sea,⁷⁶ the 1979 and 1990 agreements between Malaysia and Thailand concerning the Joint Authority for the exploitation of the continental shelf

⁷³ Act No. 80 of 25 August 1976, *ibid.*, p. 130.

⁷⁴ Act of 22 December 1976, *ibid.*, p. 190.

⁷⁵ United States Department of State, *op. cit.*, pp. 41-42.

⁷⁶ Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, 30 January 1974. Text in *The Law of the Sea: Maritime Boundary Agreements (1970-1984)* (United Nations publication, Sales No. E.87.V.12) 283.

resources in the Gulf of Thailand,⁷⁷ and the 1989 treaty between Australia and Indonesia on the Zone of Cooperation in the 'Timor Gap'.⁷⁸ The latter three instruments are the first joint development agreements providing in detail for the exploitation of oil and gas by a joint authority and a system of production sharing.

High seas

In the Northwestern Pacific, Japan and the USSR (now the Russian Federation) have long been cooperating in the conservation and management of living resources through bilateral agreements. Particularly with respect to the high seas, the two Governments concluded in 1985 an agreement on cooperation in fisheries which refers specifically to the adoption of the United Nations Convention on the Law of the Sea.⁷⁹ Under the agreement, fisheries for anadromous stocks were prohibited on the high seas except in cases where the prohibition would result in economic dislocation for the fishermen from the State other than the State of origin of such stocks. Subsequently, the Soviet Government announced a total ban on the harvesting of USSR-origin salmon on the high seas by 1992.

The prohibition of harvesting anadromous stocks on the high seas was confirmed by all the States concerned in the North Pacific area, i.e., Canada, Japan, Russia and the United States, with the adoption in February 1992 of a new Convention for the conservation of anadromous stocks,⁸⁰ as discussed below under "Regional and subregional cooperation".

A sharp rise in recent years in distant-water fishing vessels in the Sea of Okhotsk, particularly in the high seas enclave, has caused alarm in Russia and led various unions of Far Eastern fishermen to demand the Russian Govern-

⁷⁷ Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of the Joint Authority for the Exploitation of the Resources of the Seabed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, 21 February 1979, 6 *International Journal of Estuarine and Coastal Law* (1991) 61; Agreement between the Government of Malaysia and the Government of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, 30 May 1990, *ibid.*, p. 64.

⁷⁸ Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in the Area between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, 29 *ILM* (1990) 569.

⁷⁹ English text in 28 *JAIL* (1985) 297.

⁸⁰ Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, done at Moscow, 11 February 1992. Text in *Law of the Sea Bulletin* No. 22 (1993) 21.

ment accord to the Whole Sea of Okhotsk a status of internal waters. The problem of over-fishing has since been taken up by an international conference, as discussed also below under "Regional and subregional cooperation".

In addition to the special zones which had been created outside its territorial sea, affecting fishing activities by foreign vessels, China set up in 1981 two further Special Fishery Protection Zones, expanding its fishery rights claim further eastward in the East China and Yellow Seas.⁸¹

Land-locked states

Since the adoption of the Convention in 1982, the number of land-locked States in Central Asia increased as a result of the dissolution of the former Soviet Union. Those new States, i.e., Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, will look for access to the seas, just as the other land-locked States of the subregion – Afghanistan, Bhutan, Laos, Mongolia and Nepal – have done in the past.

With the Convention in force, Part X will have its full effect, particularly in relation to the question of access to and from the sea, freedom of transit and the use of port facilities. India and Nepal adopted a transit agreement on 25 March 1978. Under the Convention, landlocked States will also enjoy the right to participate, on an equitable basis, in the exploitation of an appropriate portion of the surplus of the living resources of the exclusive economic zone of coastal States in the same subregion or region, taking into account the relevant economic and geographical circumstances of all States concerned (Article 69).

Protection and preservation of the marine environment

Prior to the adoption of the Convention on the Law of the Sea several States, including Bangladesh, India, Myanmar, Pakistan, Philippines, Sri Lanka and Vietnam, had already claimed jurisdiction for the control of marine pollution within their 200-mile zones.

⁸¹ C. PARK, *op. cit.*, *supra* n. 26, p. 260.

China adopted a special law, the Marine Environment Protection Law⁸² in 1982, applicable to pollution damage to the marine environment by various sources in its internal waters and territorial sea, as well as to all other areas under its jurisdiction. The law applies moreover to the discharge of harmful substances and the dumping of wastes which are conducted outside the areas of national jurisdiction that cause pollution damage to the areas within its jurisdiction.

Indonesia's 1983 Act follows Article 56 of the Convention and provided for 'jurisdiction' with respect to the protection and conservation of the marine environment. It further imposes on those who are conducting any activity within its exclusive economic zone "the duty to take steps towards preventing, minimizing, controlling and surmounting the pollution of the environment".⁸³

Marine scientific research

Several States in the subregion have enacted legislation concerning scientific research activities for both the exclusive economic zone and the continental shelf. The legislation adopted during the 1970s generally claimed 'exclusive jurisdiction' over the conduct of marine scientific research in the exclusive economic zone and on the continental shelf. This is the case of, e.g., India,⁸⁴ Myanmar,⁸⁵ Pakistan,⁸⁶ Philippines,⁸⁷ Sri Lanka,⁸⁸ and Vietnam.⁸⁹

⁸² *Effective* as of 1 March 1983. English text in: Legislative Affairs Commission of the Standing Committee of the National People's Congress, *The Laws of the People's Republic of China 1979-1982* (1987) 298, and reproduced in J. GREENFIELD, *China's Practice in the Law of the Sea* (1992) 250.

⁸³ Act No. 5 of 18 October 1983 on the Indonesian Exclusive Economic Zone, Art. 8, loc. cit., p. 152.

⁸⁴ The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, sect. 6 and 7, loc. cit., pp. 49-50.

⁸⁵ Territorial Sea and Maritime Zone Law of Myanmar, 1977, sects. 14 and 18, loc. cit., pp. 9 and 10.

⁸⁶ Territorial Waters and Maritime Zones Act, 1976, sects. 5 and 6, loc. cit., pp. 87-88.

⁸⁷ Presidential Decree of 1978 Establishing an Exclusive Economic Zone and for Other Purposes, sect. 2(b), loc. cit., p. 245.

⁸⁸ Maritime Zones Law, 1976, sects. 5 and 6, loc. cit., pp. 121-122.

⁸⁹ Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, 1977, para. 3, loc. cit., p. 336.

Subsequent legislation, as that of Thailand (1981),⁹⁰ Indonesia (1983),⁹¹ and Malaysia (1984),⁹² follow the wording of the 1982 Convention and refer to 'jurisdiction' with regard to marine scientific research. While the Malaysian law contains no provision regarding implied consent as provided for in Article 252 of the Convention, the Indonesian law has established a procedure for implied consent on the basis of that article.

The 1976 law of Maldives⁹³ requires the assent of the Government for conducting scientific research in its exclusive economic zone, and the 1988 regulations⁹⁴ contain detailed rules and procedures, including the suspension or termination of the research activities "in accordance with Article 253" of the Convention.

Japan has issued provisional procedures for a request to conduct research in the territorial sea, on the continental shelf and in the fishing zone of Japan.⁹⁵ The Government is to approve those research projects which are submitted in accordance with the procedures on conditions of reciprocity and certain other requirements.

International seabed area

Three Asian States – China, India and Japan – applied for registration as pioneer investors in accordance with resolution II of the Third United Nations Conference on the Law of the Sea, governing preparatory investment in pioneer activities relating to polymetallic nodules, and the relevant understandings adopted by the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. On 17 August and 17 December 1987, the Preparatory Commission approved the applications of India and Japan, respectively, and registered the Government

⁹⁰ Royal Proclamation of 23 February 1981, para. 2, *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction* (United Nations publication, Sales No. E.89.V.9) 249.

⁹¹ Act on the Indonesian Exclusive Economic Zone, 1983, Art. 4, loc. cit., p. 151.

⁹² Exclusive Economic Zone Act, 1984, sect. 4, *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction*, op. cit., p. 158.

⁹³ Law No. 30/76 relating to the Exclusive Economic Zone of the Republic of Maldives, 1976, sect. 2, *ibid.*, p. 161.

⁹⁴ Regulations for Marine Scientific Research in the Maritime Zones of the Republic of Maldives, 1988, *ibid.*

⁹⁵ Text transmitted to the [UN] Secretariat from the Government of Japan by note of 28 July 1988, *ibid.*, p. 143.

of India and the Deep Ocean Resources Development Co. (DORD) of Japan as pioneer investors.⁹⁶ The application of China for registration of the China Ocean Resources Research and Development Association (COMRA) as pioneer investor was approved on 5 March 1991.⁹⁷ In addition, the Republic of Korea has been engaged in exploratory activities in the international seabed area since the mid-1980s and submitted for registration as a pioneer investor in January 1994.

Regional and subregional cooperation

Regional cooperation takes several different forms and cover different subjects. Some of the cooperative groups deal with several sectors of ocean affairs, others deal with one or a few sectors only. In addition, some of the political or economic and social institutions of a more general nature have also been engaged in cooperative activities involving certain marine sectors. In varying degrees, the Convention on the Law of the Sea has played a role in their initiation, launching of new programmes and guiding their activities.

The most comprehensive endeavour, comprising the whole Indian Ocean region, is the Indian Ocean Maritime Affairs Cooperation (IOMAC), which started its activities initially as a conference in 1987 aimed at facilitating implementation of the 1982 Convention's regime. The Conference turned itself into a permanent organization in 1990. The mandate of IOMAC includes marine science, ocean services and marine technology, living and non-living resources, ocean law, policy and management, marine transport and communications, marine environment, and "other fields relevant to cooperation in marine affairs".⁹⁸

Another forum for cooperation in multi-sectoral issues is the Association of South-East Asian Nations (ASEAN). It has been giving particular emphasis to various aspects of environmental protection through, *inter alia*, its Committee on Environment and the Committee's Experts Group on Environment. ASEAN has adopted an Oil Spill Regional Action Plan, with a contingency plan regarding offshore installations and coastal refineries. Subregional stockpiles of pollution fighting equipment are also arranged, e.g. in the

⁹⁶ For a background leading up to the registration of the first group of pioneer investors, see TREVES, *op. cit.* n. 43, p. 236.

⁹⁷ For relevant information regarding the registration of these three and other pioneer investors, see *Law of the Sea Bulletin*, Special Issue III (1991).

⁹⁸ Agreement on the Organization for Indian Ocean Marine Affairs Cooperation, 7 September 1990, art. 4 (2), *Law of the Sea Bulletin*, No. 16 (December 1990), p. 59; 1 AsYIL 379.

Celebes Sea area and the Malacca/Singapore Straits. ASEAN has also been active in promoting collaboration in the field of shipping and port management, mainly through its Committee on Transportation and Communication (COTAC).

The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) has been focusing a great deal of attention to marine related activities, in particular those which are derived from, or required by, the legal regime embodied in the Convention. It has thus implemented a series of co-operative projects for the development of non-living marine resources and the protection and preservation of the marine environment. The ESCAP secretariat has also been playing catalytic roles in organizing seminars and workshops in those areas as well as in other fields related to the Convention.

As for cooperation in specific sectors, particular mention should be made of fisheries and environmental protection. In the sector of fisheries, subregional cooperation has been prominent in such areas as the Bering Sea, the Sea of Okhotsk and the Indian Ocean.

In the Bering Sea and the Sea of Okhotsk, the establishment of exclusive economic zones or exclusive fishery zones by the coastal States, together with the elaboration of a special regime on anadromous stocks by the Third United Nations Conference on the Law of the Sea, radically altered the pattern of cooperation in the conservation and management of living resources. The salmon harvesting on the high seas had thus been drastically reduced annually until 1991 and, as mentioned before, its total ban was agreed upon in 1992 by the four countries concerned with the adoption of the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean.⁹⁹

Another example of subregional cooperation is the pollock fishery by fishermen from China, Japan, Poland, the Republic of Korea, Russia and the United States in the Central Bering high seas (the so-called 'Donut Hole'). The fishery started in the early 1980s and the total catch had reached a dramatic scale of 1.4 million metric tons in 1989, before it began to decline in 1990.¹⁰⁰ The States concerned, after two years of talks, have recently reached an agreement on a two-year voluntary suspension of fishing in 1993-1994 in the area.

⁹⁹ For a background, see W.T. BURKE, 'Anadromous species and the new international law of the sea', 22 ODIL (1991) 95; A.A. SAGUIRIAN, 'Russia and some pending law of the sea issues in the Pacific: Controversies over high seas fisheries and delimitation of marine spaces', 23 ODIL (1992), p. 1.

¹⁰⁰ See L. MIOVSKI, 'Solutions in the Convention on the Law of the Sea to the problem of overfishing in the Central Bering Sea: Analysis of the Convention, highlighting the provisions concerning fisheries and enclosed and semi-enclosed seas', 26 *San Diego Law Review* (1989) 525.

With respect to the Sea of Okhotsk, the States concerned with fisheries in the high seas enclave therein, e.g., China, Japan, Poland, the Republic of Korea and the Russian Federation, held a conference in May-June 1993 to discuss problems pertaining to the utilization and conservation of pollock resources. They established an ad hoc committee to gather scientific data and, pending the result of its work, the participants recognized the desirability of taking, "on a voluntary basis", interim measures for conserving pollock resources.

In the Indian Ocean, cooperation particularly in fisheries research and data collection has been pursued through the Indian Ocean Fishery Commission (IOFC), established by FAO. IOFC's detailed study on the conservation and management of Indian Ocean Tuna led to the adoption in November 1993 of an agreement to establish the Indian Ocean Tuna Commission. The Commission would comprise the Indian Ocean States and the countries harvesting tuna in the Indian Ocean and the adjacent seas.

With respect to the protection and preservation of the marine environment, UNEP has designated three areas under its Regional Seas Programme, i.e., the East Asian Seas covering Indonesia, Malaysia, Philippines, Singapore and Thailand; the South Asian Seas, covering Bangladesh, India, Maldives, Pakistan and Sri Lanka; and the North-West Pacific covering China, the Democratic People's Republic of Korea, Japan, the Republic of Korea and the Russian Federation. An Action Plan was adopted for the East Asian Seas in 1981, but the initial momentum generated by the Plan has gradually decreased in recent years due to various obstacles.¹⁰¹ The South Asian Seas countries have prepared a draft action plan and its legal and institutional framework, but they have not yet reached a consensus. With regard to the North-West Pacific, UNEP convened the first meeting of experts and national focal points in 1991 with a view to developing an action plan. A second meeting was held in October 1992, with all the above-mentioned States participating for the first time.¹⁰²

¹⁰¹ UNEP, Seventh Interagency Consultation on Oceans and Coastal Areas Programme, Paris, 17-20 December 1990, *Report of the Consultation* (UNEP/IAMRS, 7/5), Annex IV, para. 3.8.1.

¹⁰² See the Report of the Second Meeting of Experts and National Focal Points on the Development of the North-West Pacific Action Plan, Beijing, 26-30 October 1992. UNEP (OCA)/NOWP. WG2/5.