LEGAL MATERIALS

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

INDIA

JUDICIAL DECISIONS¹

Reservations and State practice under Article 36 (2) of the Statute of the International Court of Justice (ICJ) – Commonwealth Reservation and Multilateral Convention Reservation – General Act 1928 – Succession to Treaties

Case concerning the aerial incident of 10 August 1999 International Court of Justice, 21 June 2000

(PAKISTAN V. INDIA)

The case concerning the Aerial Incident of 10 August 1999 between Pakistan and India was decided by the ICJ on 21 June 2000.² The Court by fourteen votes to two found that it had no jurisdiction to entertain the Application filed by Pakistan on 21 September 1999. Before proceeding on the merits, the Court, in consultation with the parties, decided to determine separately the question of jurisdiction.³

India's Preliminary Objections to Assumption of Jurisdiction:

India raised preliminary objections to the assumption of jurisdiction by the Court on the basis of Pakistan's application. These objections related to what is known

* Edited by B.S. Chimni, General Editor. The materials reflect state practice for the years 1999 (latter half) and 2000. The footnotes of contributors have been retained in their original format.

¹ Contributed by V.G. Hegde, Senior Legal Officer with the Ministry of External Affairs, India.

² For the full text of the judgment, see Mimeographed version, ICJ Judgement, General List No. 119; also see *Indian Journal of International Law*, vol. 40, no.2, April-June, 2000, pp. 271-371.

³ The scope of this write-up is limited to highlighting the arguments and views of India concerning three jurisdictional aspects, namely, (a) General Act of 1928; (b) Commonwealth Reservation; and (c) Multilateral Convention Reservation.

as “Commonwealth reservation”⁴ and “Multilateral Convention reservation”.⁵ India contended:

- (i) That Pakistan’s Application did not refer to any treaty or convention in force between India and Pakistan, which confers jurisdiction upon the Court under Article 36 (1).
- (ii) That Pakistan’s Application fails to take into consideration the reservations to the Declaration of India dated 15 September 1974 filed under Article 36 (2) of its Statute. In particular, Pakistan, being a Commonwealth country, is not entitled to invoke the jurisdiction of the Court as sub-paragraph 2 of paragraph 1 of that Declaration excludes all disputes involving India from the jurisdiction of this Court in respect of any State which ‘is or has been a Member of the Commonwealth of Nations’.
- (iii) The Government of India also submits that sub-paragraph 7 of paragraph 1 of its Declaration of 15 September 1974 bars Pakistan from invoking the jurisdiction of this Court against India concerning any dispute arising from the interpretation or application of a multilateral treaty, unless at the same time all the parties to such a treaty are also joined as parties to the case before the Court. The reference to the UN Charter, which is a multilateral treaty, in the Application of Pakistan as a basis for its claim would clearly fall within the ambit of this reservation. India further asserts that it has not provided any consent or concluded with Pakistan any special agreement that waives this requirement.

India’s Position on the General Act of 1928:

Pakistan cited Article 17 of the General Act of 1928⁶ as the basis of the Court’s jurisdiction,⁷ which, it argued, provided for the submission of disputes to the Permanent Court of International Justice (PCIJ). In reply India contended that

(t)he General Act of 1928 is no longer in force and that, even if it were, it could not be effectively invoked as a basis for the Court’s jurisdiction.

India argued that the numerous provisions of the General Act referred to organs of the League of Nations or to the Permanent Court of International Justice; that, in

⁴ This reservation excludes “...disputes with the government of any State which is or has been a Member of the Commonwealth of Nations”. See *Year Book of the International Court of Justice*, 1992-1993, pp. 87-88.

⁵ *Ibid*; The Multilateral Convention Reservation states “...disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction”.

⁶ On 21 May 1931 British India acceded to this General Act. According to Pakistan, subsequently both India and Pakistan became parties to the General Act as successor States.

⁷ Article 17 provides: “All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal. It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice”.

consequence of the demise of those institutions, the General Act has “lost its original efficacy” India also pointed out that the UN General Assembly adopted a new General Act in 1949; that “those parties to the old General Act which have not ratified the new act” cannot rely on the old Act except “in so far as it might still be operative”, that is, in so far ... as the amended provisions are not involved”; that Article 17 is among those amended in 1949 and that, as a result, Pakistan cannot invoke it today.

(a) ‘Succession’ or ‘Continuity’?

India argued that the General Act was an agreement of a political character, which by its nature, was not transmissible. India also argued that it made no notification of succession as provided for in the case of newly independent States by Articles 17 and 22 of the Vienna Convention of 1978 on Succession of States in respect of Treaties.⁸ According to India, this Convention was a codified customary law. Above all, the clear and conclusive communication of 18 September 1974 by India to the Secretary-General of the United Nations that it “... never regarded ... as bound by the General Act of 1928 since her Independence in 1947 whether by succession or otherwise”, should be treated as enough proof of its intentions.⁹

On the question of succession to the General Act of 1928, Pakistan had argued that “there was no succession. There was continuity”. According to Pakistan “the communication of 18 September 1974 was a subjective statement, which had no objective validity. Pakistan, for its part ... acceded to the General Act in 1947 by automatic succession by virtue of international customary law”. Pakistan referred to the provisions of Indian Independence (International Arrangements) Order issued by the Governor General of India on 14 August 1947.

India disputed the above interpretation of the Indian Independence (International Arrangements) Order. It referred to Article 4, which stated: ... membership of all international organizations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India”. The same article also provided that “... the Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organizations as it chooses to join”.

India accordingly argued that Pakistan could not have succeeded under the Order and agreement of 14 August 1947 to the rights and obligations acquired by British India by virtue of her membership of the League of Nations. In support of this argument India referred to an interpretation provided by the Supreme Court of Pakistan on 6 June 1961 referring to the provisions of the Schedule to the Order of 1947.¹⁰

⁸ India is not a party to this Convention. Article 17 (in Section 2 dealing with Multilateral Treaties) concerns “Participation in treaties in force at the date of the succession of States”. Article 22 provides for “Consent to be bound by part of a treaty and choice between differing provisions”.

⁹ It may be noted that this 18 September 1974 communication by India was in response to 30 May 1974 notification by Pakistan addressed to the UN Secretary-General stating that it “...continues to bound by the accession of British India of the General Act of 1928”. Pakistan also added that it did not affirm the reservations made by British India.

¹⁰ The Supreme Court of Pakistan had held that “... Pakistan ... did not automatically become a member of the United Nations nor did she succeed to the rights and obligations which attached to India by reason of her membership of the League of Nations at Geneva or the United Nations”.

In order to show that its succession to treaties was express with particular reference to the General Act of 1928, India also referred to the report of Expert Committee No. IX on Foreign Relations, which in 1947 had been instructed, in connection with the preparation of the Order of 1947, “to examine and make recommendations on the effect of partition” on *inter alia*, “the existing treaties and engagements between [British] India and other countries and tribes”. India referred in particular to Annexure V to the said report, which contained a list of those treaties and engagements. The General Act of 1928 did not appear on that list.

(b) Position under the Simla Accord of 2 July 1972:

In support of its argument invoking Court’s jurisdiction Pakistan further referred to the Agreement signed between India and Pakistan on 2 July 1972 in which both the countries declared themselves “resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them”. Pakistan sought to link this provision to the General Act of 1928 and argued that it created mutually binding obligations between them to resolve the disputes by “peaceful means”.

India while interpreting its view on this aspect of the Simla Accord argued that the Accord:

[...] is no more than an arrangement between India and Pakistan to first enter into negotiations in case of any difference, and following such negotiations, to refer the matter to any other method of settlement to the extent that there is any further and specific agreement between the parties.¹¹

On ‘Extra-Statutory’ Reservations:

As regards the Commonwealth Declaration made by India, Pakistan went on to argue that it “...was maintained by India only as a bar to actions by Pakistan...This discrimination against Pakistan in India’s acceptance of the optional clause really amounted to an abuse of right”.¹² India rejecting Pakistan’s line of reasoning pointed out that

The issue before Supreme Court of Pakistan was concerning the 1927 Convention for the Execution of Foreign Arbitral Awards, which had been ratified by British India in 1937. India argued that “This reasoning was transposable in all respects to the General Act of 1928”.

¹¹ The Court, in the final analysis, regarded the provision of the Simla Accord as “an obligation, generally, on the two States to settle their differences by peaceful means, to be mutually agreed by them”. The Court further pointed out that “The said provision in no way modifies the specific rules governing recourse to any such means, including judicial settlement. Thus, the Court cannot interpret that obligation as precluding India from relying, in the present case, on the Commonwealth reservation contained in its declaration”. Pakistan had also relied on Article 1 of the Simla Accord, which provides that both India and Pakistan agree “(i) That the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries”.

¹² The Court, however, did not accept Pakistan’s argument that India’s reservation was a discriminatory act constituting an abuse of right, because the only purpose of this reservation was to prevent

“None of the commentators on the jurisdiction of the Court...have suggested that the reservation is invalid on this, or any other ground. Article 36 (3) was envisaged from the beginning as allowing a choice of partners [in regard to which a government was prepared to accept the jurisdiction of the Court]...”

India also questioned the correctness of the theory of “extra-statutory”¹³ reservations put forward by Pakistan pointing out “any State against which the reservation was invoked could escape from it by merely stating that it was extra-statutory in character”. India also rejected Pakistan’s alternative argument that was based on estoppel, saying that in any event no estoppel relating to the Court’s jurisdiction could arise in relation to the Simla Accord, as it “does not contain a compromissory clause”.¹⁴

India further argued that “Even if, as Pakistan now contends, the claims are based upon customary international law, the multilateral convention reservation of India will apply wherever there is a reliance upon causes of action which, in the final analysis, are based upon the United Nations Charter”.

Decision of the Court:

Referring to the Simla Accord of 2 July 1972 and the Lahore Declaration of 21 February 1999 the Court “reminds the Parties of their obligation to settle their disputes by peaceful means” and in particular the present dispute.¹⁵ With reference to the General Act of 1928 the Court held that “... India considered that it had never been party to the General Act of 1928 as an independent State; hence it could not have been expected formally to denounce the Act. Even if, *arguendo*, the General Act was binding on India, the communication of 18 September 1974 is to be considered in the circumstances of the present case as having served the same legal ends as the notification of denunciation provided for in Article 45 of the Act”.

Pakistan from bringing an action against India before the Court. As to the argument that the Commonwealth declaration made by India was obsolete, the Court at the outset recalled that any declaration “must be interpreted as it stands, having regard to the words actually used ... and that a reservation must be given effect “as it stands”. It was also noted that the four declarations, whereby since its independence in 1947 India had accepted the compulsory jurisdiction of the Court, had all contained a Commonwealth reservation. In its most recent form, that of 18 September 1974, the reservation was amended so as to cover “disputes with the government of any State which is or has been a Member of the Commonwealth of Nations”.

¹³ Pakistan had argued that the reservation in question was in excess of the conditions permitted under Article 36 (3) of the Statute under which ...the permissible conditions [to which a declaration may be made subject] have been exhaustively set out [...] as (i) on condition of reciprocity on the part of several or certain states or (ii) for a certain time”. This reservation was accordingly “illicit”...Pakistan contended ...citing Article 1 of the Simla Accord that, even if the reservation were to be regarded as valid India would in any case be prevented by the operation of estoppel from invoking it against Pakistan.

¹⁴ The Court did not accept the Pakistan’s argument that a reservation such as India’s Commonwealth reservations as “extra-statutory”.

¹⁵ According to the Court –

“This provision represents an obligation entered into by the two States to respect the principles and purposes of the Charter in their mutual relations. It does not as such entail any obligation on India and Pakistan to submit their dispute to the Court”.

Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) – Beijing Declaration – International Covenant on Economic, Social and Cultural Rights

APPAREL EXPORT PROMOTION COUNCIL V. A.K. CHOPRA¹⁶

**Supreme Court of India. Decision by Dr. A.S. Anand, Chief Justice of India, and Justice V.N. Khare.
AIR 1999 Supreme Court 625**

Facts

The respondent, Chairman of the Apparel Export Promotion Council, a government agency, allegedly misbehaved with a woman employee. Upon a written complaint by the employee, the Chairman was placed under suspension pending enquiry. The Enquiry Officer after considering the documentary and oral evidence and the circumstances of the case arrived at the conclusion that the respondent had acted against moral sanctions and that his acts against the woman employee did not withstand the tests of decency and modesty. He, therefore, held the charges levelled against the Chairman as proven. Upon this report of the Enquiry Officer the Chairman was removed from service. The matter went to the High Court which, disallowing the report of the Enquiry Officer, reinstated the Chairman. Aggrieved by the judgment of the High Court the Employer-Appellant, i.e., Apparel Export Promotion Council, filed an appeal to the Supreme Court.

State Practice and Implementation:

The Supreme Court, considering the definition of “sexual harassment” referred to CEDAW and Beijing Declaration, It also referred to the International Covenant on Economic, Social and Cultural Rights. The Court stated:

“There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty – the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of ‘gender discrimination against woman’. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facts of gender equality, including prevention of sexual harassment and abuse and the Courts are under constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of All forms of Discrimination Against Women, 1979 (“CEDAW”) and the Beijing Declaration which directs all State Parties to take appropriate measures to prevent discrimination of all forms

¹⁶ AIR 1999 Supreme Court 625.

against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognizes her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work, which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender-sensitise its laws and the courts are under an obligation to see that the message of international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, Court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norm for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law” (emphasis added).¹⁷

The Court further added:

In cases involving violation of human rights, the Court must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, High Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case.

Precautionary Principle – Principle of Intergenerational Equity

A.P. POLLUTION CONTROL BOARD V. M.V. NAIDU¹⁸

Supreme Court of India. Decision by Justice S.B. Majmudar and Justice M. Jagannadha Rao

Facts:

The Andhra Pradesh (A.P) State Pollution Control Board and the Society for Preservation of Environment and Quality of Life (‘SPEQL’) an NGO filed an appeal (altogether there were five petitions) in the Supreme Court against the order of the A.P. High Court directing the A.P. Pollution Control Board to grant consent for the setting up of an industry for production of castor oil derivatives which the State Pollution

¹⁷ The Court surveyed available case law on the subject – *Prem Sankar v. Delhi administration*, AIR 1980 SC 1535; *Mackinnon Mackenzie and Co. v. Audrey D Costa* (1987) 2 SCC 469 – AIR 1987 SC 1281; *Sheela Bares v. Secretary Children’s Aid Society*, AIR 1987 SC 656; *Vishaka v. State of Rajasthan* AIR 1997 Supreme Court Weekly (SCW) 3043; *People’s Union for Civil Liberties s. Union of India* 1997 AIR SCW 1234; and *D.K.. Basu v. State of West Bengal* 1997 AIR SCW 233.

¹⁸ AIR 1999 Supreme Court 812.

Control Board had categorized as environmentally unsound. The Court noted that the cases involved the

... correctness of opinions on technological aspects expressed by the Pollution Control Boards or other bodies whose opinions are placed before the Courts. The basic dilemma before the Court was "... in adjudicating upon the correctness of the technological and scientific opinions presented to the Courts or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies."¹⁹

State Practice & Implementation:

The Court, in para 31, traced the evolution of the Precautionary Principle. It stated:

A basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier the concept was based on the 'assimilative capacity' rule as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle assumed that science could provide policy-makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. But in the 11th Principle of the U.N. General Assembly Resolution on World Charter for Nature, 1982, the emphasis shifted to the 'precautionary principle', and this was reiterated in the Rio Conference of 1992 in its Principle 15 ...²⁰

Having considered the evolution of 'precautionary principle' as the established norm under international law, the Court referred to:

The duty of the present generation towards posterity: Principle of Intergenerational Equity: Rights of the Future.

¹⁹ The Court cited the views of various eminent authorities and scholars; it also made particular reference to its own decision in the *Vellore Case* (1996 AIR SCW 3399) in which it held that "precautionary principle and Polluter Pays Principle are part of the environmental law of the country. The Court had further observed that these principles "... are accepted as part of the Customary International Law and hence there should be no difficulty in accepting them as part of our domestic law".

²⁰ The Court quotes Principle 15 of the Rio Conference of 1992. The Court also refers and quotes the article written by Barto in the *Harvard Environmental Law Review* (1988) vol.22, p.509. Also extensively refers to the First Report of the Special Rapporteur of the International Law Commission on the subject of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law.

The Court also noted that:

“The principle of Inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in Principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations”²¹

Having considered in detail the application of the concepts of ‘precautionary principle’ and ‘inter-generational equity’ the Court framed the issues as

- (a) Is the respondent industry a hazardous one and what is its pollution potentiality, taking into account, the nature of the product, the effluents and its location?
- (b) Whether the operation of the industry is likely to affect the sensitive catchment area resulting in pollution of Himayat Sagar and Osman Sagar lakes supplying drinking water to the twin cities of Hyderabad and Secunderabad?

The Court eventually referred the matter for scientific and technical investigations and opinion under the National Environmental Appellate Authority Act, 1997 to the National Environmental Appellate Authority.

Universal Declaration of Human Rights

CHAIRMAN, RAILWAY BOARD AND OTHERS V. MRS CHANDRIMA DAS AND OTHERS²²

Supreme Court of India. Decision by Justice S. Saghir Ahmad and Justice R.P. Sethi

Facts

The case involved issues relating to the violation of right to life and the right of a foreign national to be treated with dignity. The violation took place within State premises and was committed by railway employees. The High Court of West Bengal held that the State must pay compensation, as it was vicariously liable for an act of tort of its employees. It was argued before the Supreme Court “... that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution”.

State Practice & Implementation:

The Court, while disagreeing with the above contention, inter alia stated:

This argument must [...] fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948

²¹ The Court quoted Principle 1 and 2 of the 1972 Stockholm Declaration.

²² AIR 2000 SC 988; Reproduced from Indian Journal of International Law, vol. 40, no.3, July-September 2000 pp. 563-76.

which has the international recognition as the “Moral Code of Conduct” having been adopted by the General Assembly of the United Nations.

The Court, in support of its above views, quoted (in para 20) the preambular provisions of the 1948 Universal Human Rights Declaration. In para 21 of its judgement the Court quoted various articles of the Declaration, in particular Articles 1, 2, 3, 5, 7, and 9.

The Court also referred to the General Assembly Resolution on Declaration on the Elimination of Violence against Women dated 20 December 1993. In para 22 of its judgement the Court reproduced Article 1 of this Declaration – which *inter alia* refers to “violence against women” – “means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

The Court further (in para 24) stated:

The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence”.²³

While referring to the domestic application of international human rights and norms, the Court stated:

“The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the question of domestic application of international and regional human rights especially in relation to women, was considered. The Zimbabwe Declaration 1994, *inter alia*, stated:

²³ In support of this view the Court referred to Lord Diplock in *Salomon v. Commissioners of Customs and Excise* [1996] 3 All ER 871 pointing out that “there is a, *prima facie*, presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations”. The Court also referred to Lord Bridge in *Brind v. Secretary of State for the Home Department* [1991] 1 All ER 720 pointing out that it was well settled that “in construing any provisions in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conform to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it”.

“Judges and Lawyers have [the] duty to familiarize themselves with the growing international jurisprudence of human rights particularly with the expanding material on the protection and promotion of the human rights of women”.²⁴

INDONESIA*

LEGISLATION ON INTERNATIONAL LAW MATTERS

Conduct of foreign relations

Act on Foreign Relations (Act No.37/1999 of 28 July 1999)¹

The preamble of the Act refers to the ratification by Indonesia, in 1982, of the 1961, 1963 and 1969 Vienna Conventions on diplomatic and consular relations and on special missions. The increase of the international relations and the need of fulfilling the principles of Indonesia's independent and active foreign policy are referred to as underlying the wish to regulate the conduct of foreign relations comprehensively and in an integrated manner in one law. The substantive part of the Act is sub-divided in ten chapters: (1) Articles 1-4: “General provisions”, (2) Articles 5-12: “The conduct of foreign relations and the implementation of foreign policy”, (3) Articles 13-15: “The conclusion and ratification of international agreements”, (4) Articles 16-17: “Immunities, privileges and exemptions from legal obligations”, (5) Articles 18-24: “The protection of Indonesian nationals”, (6) Articles 25-27: “The granting of asylum and the issue of refugees”, (7) Articles 28-34: “Instruments for international relations”, (8) Articles 35-38: “The issuance and acceptance of letters of credence”, (9) Article 39: “Transitory provisions”, (10) Article 40: “Final provision”.

In its Chapter II the Act prescribes the foreign relations (of Indonesia) to be in accordance with, *inter alia*, international law and custom (Art.5) and declares this prescription applicable to all performers of international relations, “governmental as well as non-governmental”. The same chapter determines the distribution of competence in the field of foreign relations, including the dispatch (abroad) of forces and peace-keeping missions. Chapter III essentially affirms the coordinating role of the foreign minister in matters of treaty making, and explicitly refers to a separate law on the conclusion and ratification of international agreements. Chapter IV distinguishes between, on the one side, the usual immunities, privileges and exemptions which are to be granted in accordance with municipal and international law and

²⁴ The Court pointed out that (in para 27 of its judgment) that “this situation may not really arise in our country”. It further noted that: “Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons.”

* Contributed by Hikmahanto Juwana, University of Indonesia.

¹ *Lembaran Negara* [State Gazette] 1999 No.156.

international custom and, on the other side, special exemptions granted under municipal law to other persons. Chapter V mainly deals with the obligations of the (Indonesian) state towards its nationals abroad, but still refers to “international law and custom” as the States’ standard. In matters of granting asylum to aliens the law in its Chapter VI refers to “accordance with national law with due attention to international law, custom and practice” (Art.26). Chapter VII deals with the various agents entrusted with the conduct of foreign relations, including the foreign minister and the diplomatic service, referring to ministerial decrees for further regulation.

Human rights

Act on Human Rights (Act No.39/1999 of 23 September 1999)²

The Act acknowledges, in its preamble, the universal and permanent character of fundamental human rights, and the fact that persons have, besides, fundamental duties toward each other as well as toward the society as a whole in social life, in their life as a nation, and within a state. The preamble also acknowledges that as a member of the United Nations Indonesia has the moral and legal responsibility to honour and observe the Universal Declaration of Human Rights and the various other international instruments on fundamental human rights that have been acceded to by the Republic of Indonesia.

In providing definitions of various terms for the purpose of the Act, the notion of “fundamental human duty” is defined as a “set of obligations the fulfilment of which is essential for the fulfilment and maintenance of the fundamental rights.”

The Act is divided in the following chapters: I. General Provision (Art.1); II. Basic principles (Arts.2-8); III. Fundamental human rights and freedoms (Arts.9-66, sub-divided into 10 Parts: the right to life, the right to a family and descendants, the right to develop one’s personality, the right to justice, the right to personal freedom, the right to security, the right to welfare, the right to participate in government, the rights of women, the rights of a child); IV. Fundamental human duties (Arts.67-70); V. Governmental obligations and responsibilities (Arts.71-72); V. Restrictions and prohibitions (Arts.73-74); VII. The National Commission on Human Rights (Arts.75-99); VIII. Participation from society (Arts.100-103); IX. The Court for fundamental human rights (Art.104); X. Transitional matters (Art.105); XI. Final provision (Art.106).

Under the basic principles of Chapter II of the Act, Article 3 declares, *inter alia*, that “Every person has the right to recognition, guarantee, protection and just treatment under the law and to be granted legal certainty and equal treatment before the law” and “Every person is entitled to protection of his fundamental human rights and freedoms, without discrimination.”

Moreover, Article 7 declares that: “Every person has the right to have resort to all national legal remedies and international fora for any breach of a fundamental human right that is protected by Indonesian and international law.” Correspondingly Article 7 paragraph 2 determines that “Norms of international law relating to fundamental human rights which are recognized by the Republic of Indonesia become

² *Lembaran Negara* [State Gazette] 1999 No.165.

national law". Accordingly, Article 67 prescribes that "Every person within the territory of the Republic of Indonesia has the duty to abide by the written and unwritten laws and the international laws on fundamental human rights that are recognized by the Republic of Indonesia".

With regard to restrictions and prohibitions Article 73 establishes that "The rights and duties in question can only be restricted by and on the basis of the law, and solely for the purpose of safeguarding the acknowledgement and respect of the fundamental rights and freedoms of other persons, and of good morals, public order and the nation's interest".

The Act refers to a National Commission on Human Rights in accordance with its prescriptions. As a consequence it declares the existing, identically named, Commission that was established in 1993 under Presidential Decree, to be henceforth the Commission within the meaning of the Act. (Art.105).

Treaties; conclusion, ratification

Act on International Agreements (Act No.24/2000 of 23 October 2000)³

The preamble of the Act refers, *inter alia*, to the brevity of the constitutional provision [Art.11] on the conclusion and ratification of treaties which necessitates elaboration in further legislation, and to the fact that a 1960 letter of the President to Parliament on the matter which has thus far served as a guide for the conclusion and ratification, is no more in conformity with the (current) spirit of reformation. [It does not refer to the 1969 Vienna Convention on the Law of Treaties, to which Indonesia is not a party]

Apart from the usual chapters on the use of terms (Ch.1), on transitional matters (Ch.7), and on its entry into force (Ch.8) the Act deals with the procedures on the conclusion of treaties (Ch.2), their ratification (Ch.3), their application and amendment (Ch.4), their deposit (Ch.5), and their termination (Ch.6).

Under Article 9 ratification is prescribed if so required by the international agreement in question. It "is performed by way of" act of parliament [which is a joint action of parliament and the President] or by Presidential decree. Article 10 determines that the former format applies for international agreements dealing with the following items: "issues of state polity, peace, defence and security"; "changes in the territory or borders of the Indonesian state"; "the sovereignty or the sovereign rights of the state"; "fundamental human rights and environmental matters"; "the creation of new legal rules"; "foreign financial loans and/or aid". According to Article 14 the "instruments of ratification" bear the signature of the minister responsible for external affairs and foreign policy.

In the chapter on the termination of international agreements Article 18 enumerates the usual familiar grounds for termination, but also mentions the following ground: "the presence of facts which are harmful to the national interests". The official explanatory memorandum⁴ on the Act elucidates that the term "national interests" "is to be interpreted as public interest, the protection of the Republic of

³ *Lembaran Negara* [State Gazette] 2000 No.185.

⁴ *Tambahan Lembaran Negara* [Annex to the State Gazette] No.4012.

Indonesia as a legal subject, and the sovereign jurisdiction of the Republic of Indonesia”.

On the matter of state succession Article 20 states that: “International agreements are not terminated as a result of state succession as long as the successor state declares itself bound by that agreement”.

Adjudication of international crimes

Act on the Court for Fundamental Human Rights (Act No.26/2000 of 6 November 2000)⁵

The preamble of the Act states that in order to participate in maintaining world peace and assuring the observance of fundamental human rights it was considered necessary to expeditiously set up a Court for Fundamental Human Rights [CHR] to deal with serious violations of fundamental human rights.

The Act is divided into ten chapters: I. General provision (Art.1); II. The status and location of CHRs (Arts.2-3); III. Jurisdiction (Arts.4-9); IV. Law of procedure (Arts.10-33); V. Protection of victims and witnesses (Art.34); VI. Compensation, restitution and rehabilitation (Art.35); VII. Penalties (Arts.36-42); VIII. Ad hoc Court for Fundamental Human Rights (Arts.43-44); IX. Transitional matters (Art.45); X. Final provisions (Arts.46-51).

The CHR has jurisdiction over serious violations of fundamental human rights committed in Indonesia and those committed outside Indonesia by an Indonesian national (Arts.4 and 5), and explicitly abolishes the statute of limitation for these offences (Art.46). It carries out its functions, in the first instance as well as in appeal cases and at the cassation level, in panels of five judges, consisting of two professional judges and three ad hoc judges (Arts.27, 28, 32, 33).

In accordance with the general principle of *nullum crimen sine lege* the Act applies only to acts committed after its entry into force. However, it opens the door to include acts which have taken place before that time by introducing the possibility of an “Ad hoc Court for Fundamental Human Rights” for these cases, which may be set up by presidential decree at the proposal of Parliament. Besides, the Act leaves the possibility of having these early cases dealt with by a (not yet established) Truth and Reconciliation Commission.

Article 7 defines the notion of “serious violation of fundamental human rights” as consisting of the crime of genocide and that against humanity. As to the issue of liability for the acts of subordinates, Article 42, containing the relevant prescription, is practically taken over from Article 28 of the ICC Statute, although the Indonesian text may, in the absence of an explicit reference to the ICC provision, give rise to interpretations different from that of the ICC text.

In the case of crimes of genocide the Act establishes the death penalty and a prison sentence of twenty-five years as the maximum penalties, and a prison sentence of ten years as the minimum penalty (Art.36). The same applies to most crimes

⁵ Lembaran Negara [State Gazette] 2000 No.208. The Act replaced the provisional “Government Regulation in lieu of an Act” No.1/1999 (Lembaran Negara 1999 No.191) on the same subject.

against humanity, with lower maximum and minimum sentences for less serious crimes against humanity (Arts.37-40).

IRAN*

NATIONAL LAWS ON MATTERS OF INTERNATIONAL LAW

Law on Jurisdiction of Iranian Judiciary to Hear Civil Suits against Foreign States

The Single Act on the Jurisdiction of the Iranian Judiciary to Hear Civil Suits against Foreign States (hereafter the Act) was enacted by the Iranian Parliament (the Majlis) on 9 November 1999.¹ The Implementing By-Law (hereafter the By-Law) of the Single Act was approved by the Council of Ministers on 15 May 2000, which designated Tehran's Courts of Justice as competent to hear the proceedings instituted under the Act.²

Cause of Action

Pursuant to the Act Iranian nationals may bring civil action against foreign States for the following two causes:

- (1) Damage arising from any act or conduct of a foreign State which is contrary to international law, including intervention in the internal affairs of Iran resulting in death, physical, mental or financial injury to the individual;
- (2) Damage arising from any act or conduct of individuals or terrorist groups supported by a foreign State or through permission to stay, to transit through or operate within the territory of the foreign State, resulting in death or physical, mental or financial injury to Iranian nationals.

Scope of Application

The application of the Act is limited to two sets of foreign States:

- (1) States who have violated sovereign immunity of Iran or immunity of its officials (presumably by exercising jurisdiction over claims against Iran or its officials);
- (2) States who have assisted in the execution of judgments that are made in violation of sovereign immunity of Iran or immunity of its officials.

* Contributed by Jamal Seifi, Faculty of Law, Shahid Beheshti (National) University of Iran, Tehran, and G. Zamani, Faculty of Law, Allameh Tabatabai University, Tehran.

¹ Iranian Official Gazette No. 15950 dated 27 December 1999.

² Iranian Official Gazette No. 16095 dated 21 May 2000.

States falling within one of the above categories will be determined by the Ministry of Foreign Affairs and communicated to the judiciary.

The Act is retroactive and includes claims originating prior to the date of its enactment.

As stated, the scope of application of the Act is limited to those States who have violated the sovereign immunity of Iran or the immunity of its officials. As such, the Act has the character of a counter-measure and does not claim a new exception to sovereign immunity unless as a matter of counter-measure. In the same direction, Article 6 of the By-Law provides that the Government of Iran will pursue all international avenues, including resort to international institutions necessary for protection of its immunity.

This legislation is made in response to the terrorism exception amendment (1997)³ to the United States Foreign Sovereign Immunities Act (1976). Subsequent to the terrorism exception amendment civil proceedings were instituted by private individuals in United States Courts against Iran in several cases for injuries sustained by American nationals in the course of violent incidents taking place in Lebanon, Israel and other countries of the Middle East. In several cases rulings were made by United States courts against Iran awarding huge sums of money in favour of the Claimants. For instance, the first of this series of cases, *Flatow v. The Islamic Republic of Iran* (999 F. Supp. 1 (D.D.C. 1998) related to an incident in which Stephen Flatow's daughter was killed when a tourist bus was bombed in Gaza, apparently by the Palestinian Group Islamic Jihad. It was claimed that the Group was being funded by Iran and thus it should be held responsible for the Group's actions. The court entered a default judgment against Iran, finding Iran and the co-defendants jointly and severally liable for compensatory damages, loss of accretions, solatium and \$225 million in punitive damages.

JAPAN*

JUDICIAL DECISIONS

Nanjing Massacre by Army Unit 731 – the Hague Convention and the Hague Regulations on Land Warfare – Article 3 of the Hague Convention and the individual's right to claim compensation

Tokyo District Court, Judgment, 22 September 1999

Hanrei Taimuzu [Law Times Reports] No.1028, at 92

A *ET AL.* V. STATE OF JAPAN

³ Section 1605(7).

* Contributed by IGARASHI Masahiro, Kanazawa University, Kanazawa, member of the Study Group on Decisions of Japanese Courts Relating to International Law.

As to the facts, the court noted that “there are various arguments as to the truth of the Nanjing Massacre and Army Unit 731, including opinions that deny their very existence, or definitely downgrade them”. In past lawsuits regarding the contents of a history book, “the defendant, the State of Japan, did not argue whether the fact itself was suitable for trial, but argued only the details,” and held that while it cannot strictly confirm the details and scale of the Nanjing Massacre, it is almost certain that an act that can collectively be called the Nanjing Massacre did indeed take place. The court also held, regarding Unit 731, that without any doubt the Unit had existed and carried out experiments on human bodies, and so on.

The court recognized, on the one hand, that the Hague Convention and Regulations on Land Warfare laid down the contents which had already become established as customary international law, when the incidents of this case occurred. But, on the other hand, it held that Article 3 did not provide for the individual’s right to claim compensation, in the light of the interpretation of the said Article, its *travaux préparatoires* and the subsequent State practice in this matter.

State responsibility – Claims for compensation for damage based on international law – gross violations of human rights – *jus cogens* – Reports submitted by van Boven and Coomaraswamy to the Commission on Human Rights and its Sub-Commission – the International Convention on Slave Trade and the customary international law to the same effect – Articles 14 and 15 of the Forced Labour Convention – crimes against humanity – war crimes and the customary international law to the same effect – the International Convention for the Suppression of the Traffic in Women and Children – the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity – Article 38(b) of the Statute of the International Court of Justice – the Cairo Declaration (1943) – the Potsdam Declaration (1945) and the Treaty of Peace with Japan (1952) – omission of domestic legislation

Tokyo District Court, Judgment, 1 October 1999, (unreported)

SO SHINTO V. STATE OF JAPAN

As to the “facts regarding the presumption of the judgment which are determined as undisputed facts (between the parties concerned)”, the court found that comfort stations had been established in 1932 when the so-called Shanghai Incident occurred, until the end of the war, at the request of the military authorities in those days. Moreover, as to the “facts determined with respect to the plaintiff”, the court found that, in about 1938, the plaintiff was asked to go to work at the front by a middle-aged Korean woman, who appeared before the plaintiff and said that she was an acquaintance of her mother, and said, “You will gain financially, if you will go to work at the front for her country”, and the plaintiff, who was tempted by the offer, accepted it, because she was unaware that it involved prostitution. After that, she “was forced to keep company with soldiers almost every day” at the various comfort stations in China, and “was forced to engage in prostitution with soldiers as a comfort woman at various comfort stations until the end of the Second World War in 1945”.

The court, first, examined the general principles of international law as to a right to claims of compensation for damage based on international law, and held:

“International law governs the relationship between States, and, therefore, if a State violates international law by infringing on the right or rights of a national of another State, it is in principle the State of which the victim is a national that is entitled to pursue the responsibility for the infringement. Today, however, in view of the fact that some, if exceptional, treaties have express provisions directly granting rights to individuals, it can no more be concluded that individuals are unqualified directly to claim reparation for the damage caused by the wrong-doing State on the ground that international law does not inherently provide for the rights and duties of individuals. But such treaties are exceptional, and it would be safe to say that, in order for individuals to be permitted to go to court, there must be a special norm of international law which not only provides for their rights and duties but also enables them to pursue the responsibility of the delictual State by claiming, in their own name, their rights under international law, instead of relying on the diplomatic protection of the State of which they are nationals”.

As to the claims for apology and compensation for damage based on customary international law, the plaintiff contended that, under customary international law, it has been established that a State, which has committed gross violations of human rights or acted against *jus cogens*, has a duty directly to repair damage to individual victims, who are entitled directly to demand an apology and compensation for the damage from the offending State in pursuing reparation of the damage.

The court held that in general, as Article 38(1)(b) of the Statute of the International Court of Justice provides, it is necessary for the establishment of customary international law that there should be both State practice (a general practice) and *opinio juris*. In this connection, since no piece of the evidence brought before the court proved that there had been a case in which individuals against whom a State committed a gross violation of human rights or acted in violation of *jus cogens* could directly seek a discharge of the obligation by the wrong-doing State of compensation for the damage, without relying on the diplomatic protection of the State of which they were nationals, it cannot be established that such international practice (a general practice) and *opinio juris* or legal conviction of States had existed at the time when this incident occurred.

Although the plaintiff referred to the Report submitted by Van Boven, it should be noted that the Report does not mention any concrete case in which a State has directly repaired the damage inflicted on an individual of another State. Its concluding chapter presents no more than a set of recommendations on fundamental principles and proposed guidelines. As regards the Report submitted by Coomaraswamy, so long as the legal responsibility of the defendant as seen from the point of view of the individual's right to claim compensation is concerned, all it does is to refer to the view of the Van Boven Report. No concrete case addressing direct compensation for the individual is quoted there, nor are there are facts to establish customary international law to that effect. Consequently, there is no point in rendering judgement on the other remaining points.

With respect to the claim of compensation for damage based on the Forced Labour Convention, the plaintiff contends that, in so far as Articles 14 and 15 of the Convention make it an obligation to pay compensation for industrial accidents to a person who was forced to labour, the Convention should be understood as granting those individual victims who were illegally forced to labour the right to file claim for payment against the offending State. In this regard, it is one thing that

treaties generally come to have domestic force in Japan by *Kofu* (promulgation) as a matter of course (Articles 7(1), 98(2) of the Constitution of Japan), and quite another is whether the court is able to settle legal disputes between individuals and a State by directly applying treaties as domestic law. Since a treaty is a form of international law that governs inherently the rights and duties between States, it needs, in principle, to be supplemented with such a domestic measure as legislation, in order for it to be applied as the criteria for judgement by the court to the rights and duties between individuals and a State or between individuals. Although some provisions of a treaty can have direct applicability as domestic law as such, the question as to which provisions are directly applicable as domestic law as such should be judged concretely, in taking into consideration the purpose, contents, and terms of each provisions of the treaty concerned, as well as the relevant provisions of domestic law, and so on. In addition, both the subjective requirement that the State desire to make the relevant treaty directly applicable as a domestic law and the objective requirement that the treaty be so clear, definitive and specific as to be directly applicable as a domestic law should be met. However, neither of these requirements is met in the Forced Labour Convention by the evidence presented before the court.

As to the claim for compensation based on the Cairo Declaration (1943), the Potsdam Declaration (1945) and the Treaty of Peace with Japan (1951), the plaintiff contends that the provisions of these instruments have imposed an obligation on the defendant to repair the damage which Korean people sustained from being placed under slave-like conditions as a result of wrongful acts of the defendant under their colonial rule. However, the Cairo Declaration should be interpreted as providing for an expression of the basic guidelines of the three States issuing it (the United States, Great Britain and China) regarding mainly the treatment of the areas that were then Japanese territory among the conditions of peace with Japan, and therefore, paragraph 8 of the Potsdam Declaration¹ which followed the Cairo Declaration should be interpreted as only requiring Japan to grant independence to Korea, and so on. Furthermore, the Treaty of Peace with Japan, which followed the Potsdam Declaration, should be interpreted in the same way as the Potsdam Declaration.

As to claims for apology and compensation for damage based on the State Redress Law by reason of defamation, violation of the duty to punish and omission of legislation, the plaintiff seems to contend that if an act of a State comes under a gross violation of human rights and violates *jus cogens*, the State concerned has an obligation to repair the damage which occurred under customary international law, and therefore that the obligation to enact legislation for compensation arises under the said customary international law. But the court held that no customary international law can be found to support such arguments.²

¹ Paragraph 8 of the Potsdam Declaration provides that "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."

² Tokyo High Court dismissed the appeal on 6 December 2000, and the Supreme Court again dismissed the final appeal on March 28, 2003.

MALAYSIA*

JUDICIAL DECISIONS

Staying of Foreign Proceedings

BSNC LEASING SDN BHD V. SABAH SHIPYARD SDN BHD & 2 OTHERS (AND ANOTHER APPEAL)¹

When faced with a request to stay the court proceedings in a foreign country, the Malaysian court relies on common law principles. It does not actually order a foreign court from stopping its proceedings but instead places an injunction on the plaintiff of the foreign proceedings, forcing him to stop his action overseas. This type of action, known as anti-suit injunctions, requires that the plaintiff of the foreign proceedings be under the jurisdiction of the Malaysian courts. There are three situations where an anti-suit injunction may be requested:

- a. "Single forum cases", where the case is being heard in a foreign country which has exclusive jurisdiction. The only connection to Malaysia is that the defendant is amenable to its own jurisdiction.
- b. "Forum selection cases", where the parties have chosen a foreign forum (normally through a choice of forum clause in a contract), but one of the parties wants to have the case heard in Malaysia, therefore requests the court to stop the foreign proceedings by way of injunction.
- c. "Alternative forum cases", where two or more courts have jurisdiction over the case but one of the parties would rather have it heard in Malaysia.

Due to the sensitivities such cases provoke, courts are very cautious when faced with a request for an anti-suit injunction. The rules are strict. These were discussed in great detail in the present case.

Its facts are as follows. Sabah Shipyards (S.S) was a company that built power barges. These are large boats used for providing electrical energy. In order for these barges to work they require energy producing turbines on board. S.S bought one such turbine from Wing Teik Holdings Bhd (Wing Teik). S.S could not pay the full amount therefore they entered into a hire purchase agreement with BSNC Leasing (BSNC). According to the hire purchase agreement, BSNC would cover slightly over half of the cost of the turbine. The turbine was duly handed to S.S and was placed upon a barge called Victoria II.

Due to the economic downturn of 1997, S.S faced financial difficulties and could not keep up its payments to BSNC. Realising that it was in dire straits, S.S moved the court for various orders under S 176(10) of the Companies Act 1965² restraining

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¹ [2000] 1AMR 1141.

² Laws of Malaysia Act 165.

any legal proceedings against itself.³ BSNC tried to intervene in the proceedings so that it could repossess the turbine under the hire purchase agreement. BSNC failed and the hire purchase agreement was held to be void by the High Court.

BSNC appealed against this decision. Meanwhile, Victoria II, along with the disputed turbine, was sold by S.S to Starweaver Ltd who then leased the barge to an Ecuadorian company. Upon discovering this, BSNC commenced proceedings in Ecuadorian courts and obtained an order for the arrest of the barge. S.S then tried to obtain an order from the Malaysian courts for an injunction restraining BSNC from prosecuting the Ecuadorian proceedings (in other words, it applied for an anti-suit injunction). S.S failed at the high court, but proceeded to appeal to the Court of Appeal.

The fundamental issue facing the Court of Appeal was whether the Malaysian court should interfere in the jurisdiction of Ecuador and stop the proceedings by placing an injunction on BSNC.⁴ This is an “alternative forum case” as both Malaysia and Ecuador had jurisdiction to judge the matter.

It was held by Gopal Sri Ram JCA⁵ that the authority for the Malaysian courts to grant an anti-suit injunction is provided for by the Specific Relief Act 1950.⁶ The relevant sections are S 52(3)(e) and 54 (a). This statute is based on the Specific Relief Act 1877 of India. Therefore, the court believed that looking at Indian cases would help to determine the principles to be used when deciding to grant an anti-suit injunction.

In the case of *Naik v. Balvant*⁷ it was held that an injunction would be granted to stop a foreign proceeding if that foreign proceeding is oppressive and vexatious to the person applying for the injunction. “Oppressive and vexatious” is not defined as it is prudent to let each case be judged on its own merits. On a general note however, it can be said that the foreign proceeding is “oppressive and vexatious” if the plaintiff in the foreign suit is able to obtain some sort of unfair juridical advantage.

This principle was also used in the case of *SNI Aerospatial v. Lee Kui Jak & Anor*⁸ that confirms the “oppressive and vexatious” test. The Privy Council in that case added that any court facing a request for an anti-suit injunction should also see if by stopping the foreign proceedings they would in some way be unjustly depriving the plaintiff of those proceedings of some sort of juridical advantage.

³ The section reads: “Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangements has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceeding against the company except by leave of the Court and subject to such terms as the Court imposes”.

⁴ There is another issue in this case and that is whether property had actually passed to BSNC, but for the purposes of the Conflict of Law survey, that issue is irrelevant.

⁵ The other two judges on the bench, Mokhtar Sidin JCA and Haidar Mohd. Noor JCA, both agreed with his lordship’s decision.

⁶ Laws of Malaysia Act 137, revised 1974.

⁷ AIR 1927 Bom 135.

⁸ [1987] 3 All ER 510.

Another case that supports this principle is *Airbus Industrie GIE v. Patel & Ors*⁹ in which it was held that an injunction would be granted to meet the ends of justice. For example if it is done in order to stop an unconscionable foreign action. Furthermore, if the Malaysian court is the natural forum for the case,¹⁰ this is even stronger justification to grant the anti-suit injunction.

Applying these principles to the facts at hand, the learned judge held that;

[T]here was here, at the time when the anti-suit injunction was sought, a judgment in Sabah Shipyard's favour upon the very issue which was pivotal to the possessory action in the Ecuadorian court. Absent that issue, the Ecuadorian proceedings were without a foundation. Accordingly, the continued arrest of the "Victoria II" and the prosecution of the action before the latter tribunal negate the judgment of the High Court at Kuala Lumpur and render the declarations granted thereunder a mere *brutum fulmen*.¹¹ To use the language of the authorities, the Ecuadorian proceedings were vexatious and oppressive.¹²

In other words, the foreign suit was started by BSNC as a way to get around an unfavorable decision in the Kuala Lumpur High Court. It was an unconscionable action, which is therefore oppressive and vexatious. Furthermore, Malaysia was the natural forum in which to settle the dispute because:

- a. The original contract for the sale of the turbine was made here.
- b. The hire purchase agreement was made here.
- c. All the companies involved in the original dispute are Malaysian.
- d. The original dispute over ownership arose in Malaysia and was settled in a Malaysian court.

Therefore, the Court of Appeal held in favour of S.S and granted a mandatory injunction directing BSNC to vacate the order of arrest of Victoria II and to discontinue all Ecuadorian proceedings.

⁹ [1998] 2 All ER 241.

¹⁰ It should be stated here that Gopal Sri Ram JCA provided *obiter dictum* a clarification on how to determine if a court is the natural forum for a case. Basically he was confirming the *forum non-convenience* test as established in *Spiliada Maritime Corp v. Consulex Ltd* [1986] 3 All ER 843. The test states that a court is the natural forum if the dispute has a real and substantial connection to the courts; that all or most of the important witnesses are to be found within the court's jurisdiction; that the plaintiff will enjoy a personal or juridical advantage by having the dispute tried by the Malaysian courts.

¹¹ An empty threat.

¹² *Supra* note 41, p. 1170.

Jurisdiction and the Place of Tort

TAN SRI ABDUL RAHIM BIN DATUK THAMBY CHIK V. JOHN MARCOM (NO.2)¹³

In this case the defendant had written an article published in *Time* magazine that the plaintiff claims was defamatory. The defendant was served with a writ whilst temporarily in Malaysia. The defendant's defence was based on the Malaysian Court's lacking the jurisdiction to hear the case.

His argument was based on two grounds: firstly, that the mere service of a writ did not constitute jurisdiction for the Malaysian court; and secondly, since the article was written in Jakarta and then sent for publication in Hong Kong, the Malaysian court did not have jurisdiction by virtue of section 23 (1)(a)¹⁴ of the Courts of Judicature Act 1964¹⁵ as the cause of action did not arise in the country.

The judge held against the defendant on both counts. Regarding the first line of defence, it was held that the common law principle that the serving of a writ within jurisdiction was akin to submission and therefore sufficient to provide the court with the necessary jurisdiction to hear the case, as reiterated by the case of *HRH Maharane Seethadevi Gaekwar of Baroda v. Wildenstein*,¹⁶ was applicable in Malaysia. This is by virtue of section 23(2) of the Courts of Judicature Act, which states that the High Court of Malaysia would have the jurisdiction vested in it immediately prior to independence on August 31, 1957. Since this common law principle was in existence at the time, it can be said that the Malaysian court was free to use it to establish jurisdiction.

With regard to the second line of defence it was held that defamation occurs where the publication is read or heard; it is therefore irrelevant to say that the article was written outside of Malaysia when its effect was felt within the country. Therefore, the tort was deemed to have arisen in Malaysia thus providing the court with jurisdiction as per section 23 (1)(a) of the Courts of Judicature Act.

This judgment is in line with established English cases such as *Church of Scientology of California v. Commissioner of the Metropolitan Police*.¹⁷

Diplomatic Immunity for UN Special Rapporteur

INSAS BHD AND ANOTHER V. DATO' PARAM CUMARASWAMY¹⁸

In this case the issue of diplomatic immunity from prosecution was raised. This was a defamation case in which the defendant was supposed to have defamed the plaintiffs in an interview given to the magazine *International Commercial Litigation*. In this

¹³ [2000] 5 MLJ.

¹⁴ Section 23 (1)(a) reads: "Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where ... the cause of action arose within the local jurisdiction of the Court".

¹⁵ Laws of Malaysia Act 91 revised 1972.

¹⁶ [1972] 2QB 283.

¹⁷ (1976) 120 SJ 690.

¹⁸ [2000] 4 CLJ 709.

interview Dato' Param Cumarasamy had made statements which suggested that there were wealthy businessmen in Malaysia who were able to influence and manipulate the justice system. The plaintiffs claim that this article implied that they were involved in the corrupting of Dato' V.K. Lingam, a Malaysian judge.

When the plaintiffs commenced proceeding for defamation before a Senior Assistant Registrar, the defendant had entered a conditional appearance. He made an application for the writ of summons either to be set aside or to be struck out. The Senior Assistant Registrar rejected this application and insisted that the defendant put forward his defence.

Dato' Param Cumarasamy's primary defence was that at the time of the interview, he was acting in his role as the United Nations Special Rapporteur. He was appointed to that role during the 15th Session of the Commission of Human Rights by resolution 1994/41. This appointment was made in the light of the Commission's noticing the increasing weakening of the independence of the judiciary, lawyers and court officials in Malaysia, and how this weakening corresponded with an increase in human rights violations.

His task was to investigate any substantial allegations made against the Malaysian judiciary; to identify and record not only the attacks made on judicial independence but also any improvements in the situation (along with concrete suggestions if requested); and finally to study for the purpose of making proposals, important and topical questions of principle with a view of protecting and enhancing the independence of the judiciary and the legal fraternity.

With this appointment he now had diplomatic immunity as stated by s 22(b) article VI of the Convention on the Privileges and Immunities of the United Nations 1946 (the convention). This Convention was ratified by Malaysia in 1957. The Convention clearly states that a person who is an expert appointed by the United Nations to conduct a mission, is totally immune from any legal proceedings for acts done in his capacity as a U.N. official. This immunity for acts done during that time is to extend even after his appointment has ended.

It was held by R.K. Nathan J that this case could be decided based on the decision of the earlier case of *Dato Param Cumaramaswamy v. MBF Capital Bhd & Anor* (the MBF case).¹⁹ This was also a defamation case and Dato' Param Cumaraswamy had used the same defence. In the MBF case, the defendant had obtained a letter from the United Nations Secretary-General, Mr. Kofi Annan, confirming that he was indeed a United Nations Special Rapporteur and as such had immunity under the Convention. The Malaysian government was asked to respect that immunity.

The Court of Appeal had decided, however, that they had the authority and should be the ones to decide the matter of immunity. Meanwhile, the Malaysian government and the United Nations agreed to refer the matter of immunity to the International Court of Justice (ICJ). The Malaysian government had agreed to comply with the decision of the ICJ. Due to this the Court of Appeal postponed a motion by the

¹⁹ [1997] 3 MLJ 824.

plaintiffs to tax their costs on the defendant, until after the ICJ had made their decision.

The ICJ decided in favour of Dato' Param Cumaraswamy²⁰ holding that immunity was a preliminary issue to be decided upon before any hearing can continue. Furthermore, the defendant did indeed have immunity and that all actions against him should be stopped.²¹

R.K. Nathan J reluctantly held that the Malaysian court was bound by the ICJ's decision and therefore the plaintiff's failed in their defamation suit on the grounds that the defendant had immunity. The judge stated that he thought that the ICJ was overstepping its jurisdiction for, having determined that immunity is a preliminary issue, it should then have left the decision in the hands of the Malaysian courts. With all due respect to the learned judge, it is submitted that surely the ICJ was acting in accordance with its ambit because the advisory opinion asked of it was not simply about whether immunity is a preliminary issue or not, but was on the broader question as to whether the defendant had immunity.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Enforcement of Foreign Judgments²²

When enforcing judgments from other jurisdictions, the Malaysian Courts have two sources of rules. These are the common law and the Reciprocal Enforcement of Judgments Act 1958.²³ The Act lays down the procedure through which foreign judgments can be enforced in the country. This is done through a process of registering the foreign judgment as determined by Part II of the Act. The Act is applicable only to the judgments of the high courts of nations listed in the First Schedule. In the year 2000 The Reciprocal Enforcement of Judgments (Extension of Part II) Order 2000²⁴ was passed. This subsidiary legislation has extended this list of foreign nations to include Brunei Darussalam. Therefore, the judgments of the High Court of Brunei Darussalam can now be enforced in Malaysian courts, using the rules set out by the Reciprocal Enforcement of Judgments Act 1958.

²⁰ This ICJ decision entitled "Difference Relating to Immunity from Legal Processes of a Special Rapporteur of the Commission on Human Rights" can be found on the ICJ website at <http://www.icj-cij.org/icjwww/idocket/inuma/inumaframe.htm>

²¹ The ICJ also decided that the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that Dato' Param Cumaraswamy was entitled to immunity from legal process; That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*; That Dato' Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs; That the Government of Malaysia has the obligation to communicate this advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected.

²² See also Sharom A "Conflicts of Law" chapter in *Survey of Malaysian Law 2000*, ed. Ahmad S, University of Malaya Press, 2000, Kuala Lumpur, at page 169.

²³ Laws of Malaysia Act 99.

²⁴ P.U. (a) 122, made 27 March 2000.

OTHER RELEVANT STATE PRACTICE

Human Rights Commission of Malaysia

On 9 September 1999 the Human Rights Commission of Malaysia was formed. This was done by an act of Parliament entitled Human Rights Commission of Malaysia Act 1999.²⁵ This Act was seen to be an important step towards the further recognition of human rights in the country. In the context of international law, the Human Rights Commission has the potential in aiding the government of the country to comply with their international obligations. Malaysia is party to the Convention for the Rights of the Child 1989 (CRC)²⁶ and the Convention Against All Forms of Discrimination Against Women 1979 (CEDAW).²⁷ Furthermore, the Act acknowledges the principles of the Universal Declaration of Human Rights 1948 (UDHR)²⁸ as being the foundation upon which the Commission is to carry out its functions (section 4(4)).²⁹

The functions of Human Rights Commission are listed in section 4 as:

- a. To promote awareness of and provide education in relation to human rights
- b. To advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken
- c. To recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights
- d. To inquire into complaints regarding infringements of human rights

The Commission is a body corporate with a maximum of twenty members. The members are to be selected by the King upon the recommendation of the Prime Minister. The King shall select the Chairman and the members shall vote the Vice Chairman.³⁰ Currently there are thirteen members.³¹

According to section 12 the Commission has the power to conduct inquiries on its own motion or based on a complaint made by individuals or groups. This power of inquiry is limited by the principles of sub judice. In relation to the power to conduct inquiries the Commission has the power:

²⁵ Laws of Malaysia Act 597.

²⁶ 28 ILM 1448 (1989).

²⁷ 19 ILM 33 (1980).

²⁸ G.A. Res. 217A (III), UN Doc. A/810 at 71 (1948).

²⁹ However, there is a proviso, in that the UDHR is to be regarded "to the extent that it is not inconsistent with the Federal Constitution".

³⁰ Section 5.

³¹ The method of selecting the members of the Commission raises some doubt as to the impartiality and independence of the body seeing as how they are ultimately the choice of the executive. To a certain extent this concern has been proven correct with the appointment of the second Chairman of the Commission, Abu Talib Othman. He was the Malaysian Attorney General during the infamous mass detentions without trial in 1987 known also as "Operation Lalang". For a critical examination of this episode in Malaysian history, see CARPA (Committee Against Repression in the Pacific and Asia) *Tangled Web: Dissent, Deterrence and the 27 October 1987 Crackdown in Malaysia*, 1988, Haymarket.

- a. To procure and receive all such evidence and to examine individuals as witnesses
- b. To require that the evidence of any witness be given on oath or affirmation, as if he were giving evidence in a court of law,
- c. To summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness
- d. To admit notwithstanding any of the provisions of the Evidence Act 1950, any evidence, whether written or oral, which may be inadmissible in civil or criminal proceedings
- e. To admit or exclude the public from such inquiry or any part thereof

The Commission has been fairly active in this regard having conducted several inquiries. Amongst its most celebrated finding have been regarding the right to assembly where they proposed dramatic changes to the practice of the police with regard to the granting of permission for public assemblies and the policing of such assemblies. The Commission has also suggested to the government to ratify the International Covenant on Economic Social and Cultural Rights 1966 (CESCR),³² the International Covenant on Civil and Political Rights 1966 (CCPR),³³ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT)³⁴ and to remove all reservations made in CEDAW.³⁵

NEPAL*

JUDICIAL DECISIONS

Citizenship – Jus soli and Jus sanguinis tests – CEDAW

JAVIR YASIN V. HMG MINISTRY OF HOME AND OTHERS

Writ Petition No. 3503 of 1998 decided by Division Bench of the Supreme Court of Nepal on 11 November 2000.

The petitioner Javier Yasin was denied citizenship by the District Administration Office, Kathmandu on the ground that his father was not a Nepalese citizen and he was not eligible to acquire citizenship from his mother, who is a Nepalese citizen. Javier Yasin's father was a citizen of Saudi Arabia and had married a Nepalese woman in Kathmandu. Their marriage was registered in Kathmandu District Office. Javier was born in Kathmandu, had had his birth registered before the Kathmandu Muni-

³² 6 ILM 360 (1967).

³³ 6 ILM 368 (1967).

³⁴ 23 ILM 1027 (1984).

³⁵ See *SUHAKAM Annual Report 2001* at www.suhakam.org.my

* Contributed by Surendra Bhandari.

ciality, and had obtained a birth certificate. He was educated in Nepal, and had land and a house in the name of his mother. His father had died in his childhood and he was reared by his mother. When he was denied citizenship by the Kathmandu District Administration Office he turned to the Supreme Court of Nepal for issuance of an order of mandamus and certiorari to grant him citizenship on the ground of *jus soli* and *jus sanguinis* as his mother is a Nepalese citizen. Javir Yasin grounded his petition on the equal protection clause of the Constitution of the Kingdom of Nepal 1990 and Article 9 (1) and (2) of the Convention on Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) to which Nepal had become a party on 22 April 1991.

There were the following legal questions to be decided by the court:

- i. Whether a person is eligible to acquire Nepalese citizenship under the Constitution of the Kingdom of Nepal 1990 and Citizenship Act 1964 on the condition that his/her father is not a Nepalese citizen but the mother is a Nepalese citizen,
- ii. Whether one can acquire Nepalese citizenship based on *jus soli*, and
- iii. Whether Nepal needs to give effect to the international laws relating to nationality, especially CEDAW Article 9.¹

The Supreme Court of Nepal decided that to acquire citizenship of Nepal on the ground of *jus sanguinis* requires the father to be a citizen of Nepal; the father of the writ petitioner was not a Nepalese citizen. Therefore, the writ petitioner was not eligible to acquire Nepalese citizenship. The Supreme Court of Nepal did not interpret the relationship between Article 9 of the CEDAW convention and laws of Nepal relating to citizenship.

Equality before the law – Universal Declaration of Human Rights – CEDAW

REENA BAJRACHARY V. HMG SECRETARIAT, COUNCIL OF MINISTERS AND OTHER

Writ Petition No. 2812 of 1997, decided on 8 June 2000 by Special Bench of the Supreme Court of Nepal

Royal Nepal Airline (RNA) Service Rules, 1974 amended in 1996 discriminated in service conditions between crew members. All crew members were allowed to retire at the age of 55 except air hostesses, who were retired at the age of 30 or at the date of completion of 10 years of service. The writ petitioner, an air hostess, challenged the discriminatory provision of the RNA Service Rules on the ground

¹ See *UN Convention on Elimination of All Forms of Discrimination against Women*, (1979). Article 9.1 of the convention prescribes that, "States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband." Similarly, Article 9.2 prescribes, "States Parties shall grant women equal rights with men with respect to the nationality of their children."

that it violated Article 11 of the Constitution of the Kingdom of Nepal,² Article 2, 7, and 23 of the Universal Declaration of Human Rights and Article 15 of CEDAW. The Writ petitioner asked the court to issue an order to treat air hostesses equally, in terms of service, retirement, and other benefits, to male crew members.

The Supreme Court of Nepal decided that the impugned Rule was discriminatory and inconsistent with the provision of the Constitution of the Kingdom of Nepal and CEDAW. The court issued an order to the respondents to treat female crew members equally to male crew members in terms of salary, retirement age and other benefits.

PHILIPPINES*

JUDICIAL DECISIONS

Interpretation of Tax Treaties; Most Favored Nation (MFN) clause

COMMISSIONER OF INTERNAL REVENUE V. S.C. JOHNSON AND SON, INC., AND COURT OF APPEALS

[G.R. No. 127105, 309 SCRA 87. 25 June 1999, J. Gonzaga-Reyes]

SC Johnson and Son, Inc. argues that the preferential tax rate of 10% should apply to the royalties it pays to SC Johnson and Son, USA pursuant to the License agreement entered between them. The argument is based on Article 13(2) (b) (iii) of the RP-US Tax Treaty,¹ also known as the "most favoured nation" clause. It provides that "the lowest rate of the Philippine tax at 10% may be imposed on royalties derived by a resident of the United States from sources within the Philippines only if the circumstances of the resident of the United States are similar to those of the resident of West Germany."

The RP-US Tax Treaty is just one of the bilateral treaties entered into by the Philippines to avoid double taxation. The purpose of these treaties is to reconcile the national fiscal legislations of the contracting states to help the taxpayer avoid simultaneous taxation in two different jurisdictions. This is to encourage the free

² See *Constitution of the Kingdom of Nepal*, (1990). Article 11(1) of the Constitution provides, "All citizens shall be equal before the law. No person shall be denied the equal protection of the laws." Article 11 (2) provides, "No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe or ideological conviction or any combination of these."

* Contributed by Harry Roque, Senior Lecturer, University of the Philippines, College of Law.

¹ Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital, signed on 1 October 1976, entered into force on 17 October 1982, Vol. VII, Philippine Treaty Series, p. 523.

flow of goods and services and the movement of capital, technology and persons between countries, in order to create robust and dynamic economies.²

The Supreme Court ruled that since the RP-US Tax Treaty does not give a matching tax credit of 20% for the taxes paid to the Philippines on royalties as allowed under the RP-West Germany Tax Treaty, SC Johnson and Sons cannot be deemed entitled to the 10% rate granted under the latter treaty for the reason that there is no payment of taxes on royalties under similar circumstances. The reason for construing the phrase "paid under similar circumstances" as used in Article 13 (2) (b) (iii) of the RP-US Tax Treaty as referring to taxes is anchored upon a logical reading of the text in the light of the fundamental purpose of such treaty, which is to grant an incentive to the foreign investor by lowering the tax and at the same time crediting against the domestic tax abroad a figure higher than that which was collected in the Philippines.³

The Vienna Convention on the Law of Treaties states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁴

Tax refunds, being in the nature of tax exemptions, are considered to be in derogation of sovereign authority and must be strictly construed against the person or entity claiming them. Hence, the burden of proof is upon the person who claims the exemption and this must be clearly supported by organic or statute law.

SC Johnson and Son, Inc. has not overcome the burden of proof necessary to support its claim that the tax on royalties under the RP-US Tax Treaty is paid under similar circumstances as the tax on royalties under the RP-West Germany Tax Treaty.

Treaties on Industrial Property; Protection of Trademarks and Tradenames; Res Judicata

PRIBHDAS J. MIRPURI V. COURT OF APPEALS, DIRECTOR OF PATENTS AND THE BARBIZON CORPORATION

[G.R. No. 114508, 318 SCRA 516. 19 November 1999, J. PUNO]

The petitioner brings an action to register the trademark of "Barbizon" claiming that their products have been sold in the Philippines since 1970. Barbizon, Co., USA, a foreign corporation, opposes the application, hinging its cause of action on the Paris Convention. "The Convention of Paris for the Protection of Industrial Property is a multilateral treaty seeking to protect industrial property consisting of patents, utility models, industrial designs, trademarks, service marks, trade names and indications of source or appellations of origin, and at the same time aims to repress unfair competition."⁵ States have undertaken to afford trademark and other similar rights enjoyed by their nationals to citizens of the other member countries to protect the

² 309 SCRA 101-102 citing P. Baker, *Double Taxation Conventions and International Tax Law* (1994), 6.

³ 309 SCRA 106.

⁴ 309 SCRA 106-107, citing the Vienna Convention on the Law of Treaties, Article 31.

⁵ 318 SCRA 540, citing R. Agpalo, *Trademark Law and Practice in the Philippines*, (1990), 200.

latter against unfair competition and to assure them of a certain minimum of international protection of their industrial property. The Philippines and the United States of America are signatories to the Convention.

The Convention protects well-known trademarks. Each member country binds itself to refuse or cancel the registration and prohibit the use of a trademark which tends to create confusion with a mark considered well-known in the country, as being the mark of a person entitled to the benefits of the Convention and used for identical or similar goods.

Pursuant to the said Convention, the Director of Patents of the Philippines was directed to reject all pending applications for registration of signature and other world-famous trademarks by applicants apart from its original owners or users.

The oppositions filed by Barbizon, the USA, are based on different laws. The first opposition was based on the Trademark Law, i.e., on the confusing similarity of trademarks and on the requisite damage to file an opposition to a petition for registration. The second one invoked the Paris Convention,⁶ Executive Order No. 913, which provides that the rule-making and adjudicatory powers of the Minister of Trade and Industry should be revitalized to enable the Minister to apply more swift and effective solutions to problems such as infringement of internationally-known tradenames and trademarks, the Ongpin⁷ and Villafuerte⁸ Memoranda of the Minister of Trade and Industry as well as Article 189 of the Revised Penal Code. These are statutes totally different from the Trademark Law.

“Causes of action which are distinct and independent from each other, although arising out of the same contract, transaction, or state of facts, may be sued on separately, recovery on one being no bar to subsequent actions on others.”⁹ *Res judicata* therefore does not apply to the present case.

The Intellectual Property Code of the Philippines declares that

“All agreements concerning industrial property, like those on trademarks and trade names, are intimately connected with economic development since they speed up transfer of technology and industrialization.”

It was enacted in 1998 to strengthen the intellectual and industrial property system in the Philippines as mandated by the country’s accession to the Agreement Establishing the World Trade Organization (WTO).

⁶ Paris Convention for the Protection of Industrial Property, signed by the Philippines on 27 September 1965.

⁷ Signed on 25 October 1983.

⁸ Signed on 20 November 1980.

⁹ 318 SCRA 553, citing *Nabus v. CA*, 193 SCRA 732, 734, 746, (1991).

Extradition Treaty – Interpretation based on intent

SECRETARY OF JUSTICE V. HON. RALPH C. LANTION AND MARK B. JIMENEZ

[G.R. No. 139465, 343 SCRA 377. 17 October 2000]

The Supreme Court, in this motion for reconsideration, overturned its previous ruling and said that Jimenez is not entitled to the due process right to notice and hearing during the evaluation stage of the extradition process. The RP-US Extradition Treaty¹⁰ and Presidential Decree 1069,¹¹ which implements the said treaty, contains no provision which gives the extraditee the right to demand from the Secretary of Justice copies of the extradition request from the US government and its supporting documents, as well as to be given time to comment on it.

The Supreme Court said that a “court cannot alter, amend or add to a treaty by the insertion of any clause, small or great, or dispense with any of its conditions and requirements or take away any qualification, or integral part of any stipulation, upon motion of equity, or general convenience, or substantial justice.”¹²

All treaties should be interpreted in the light of their intent. The preamble of Presidential Decree 1069 defines its intent. The RP- US Extradition Treaty calls for an interpretation that will minimize, if not prevent the escape of extraditees from the long arm of the law and speed up their trial.

An extradition treaty is not a criminal proceeding that will call into operation all the rights of an accused as guaranteed by the Bill of Rights. The guilt or innocence of the accused shall be adjudged in the court of the state where he will be extradited. As a rule, an extraditee cannot invoke constitutional rights that are only relevant to determine the guilt or innocence of an accused especially by one whose extradition papers are still being evaluated.¹³

The temporary hold on private respondent’s privilege of notice and hearing is a soft restraint on his right to due process which will not deprive him of fundamental fairness should he decide to resist the request for his extradition to the United States. There is no denial of due process as long as fundamental fairness is assured a party.¹⁴

¹⁰ “Extradition Treaty Between the Government of the Republic of the Philippines and the Government of the United States of America” signed by then Secretary of Justice, Franklin M. Drilon, representing the Government of the Republic of the Philippines, on 13 November 1994.

¹¹ “Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country” issued by President Ferdinand E. Marcos on 13 January 1977.

¹² 343 SCRA 383, citing Note, *The United States v. Libelants and Claimants of the Schooner Amistad*, 10 L. Ed 826 (1841), citing *The Amiable Isabella*, 6 Wheat 1.

¹³ 343 SCRA 386, citing *Defensor-Santiago, Procedural Aspects of the Political Offense Doctrine*, 51 Philippine Law Journal 238, (1976), 258.

¹⁴ 343 SCRA 393.

Warsaw Convention; Jurisdiction

AMERICAN AIRLINES V. COURT OF APPEALS, HON. BERNARDO LL. SALAS AND DEMOCRITO MENDOZA

[G.R. Nos. 116044-45, 327 SCRA 482. 9 March 2000 J. Gonzaga-Reyes]

The private respondent filed an action for damages before the trial court in the province of Cebu for the embarrassment and mental anguish he suffered at the Geneva Airport when the American Airlines' security officers prevented him from boarding the plane, detained him for about an hour and allowed him to board the plane only after all the other passengers had boarded.

American Airlines filed a motion to dismiss for the lack of jurisdiction of the Philippine courts under the Warsaw Convention.¹⁵ The trial and the appellate courts both held that the suit may be heard in the Philippines under the pool partnership agreement among the IATA members, which include Singapore Airlines and American Airlines. In this situation, they acted as agents of each other in issuing tickets to those who may need their services.

The Supreme Court ruled that the "contract of carriage" perfected in Manila between the private respondent and Singapore Airlines binds the petitioner as an agent of Singapore Airlines. The highest court ruled that since American Airlines has a place of business in Manila, the plaintiff could avail of the third option listed under the Warsaw Convention: that the action may be brought in the place where the contract was perfected and where the airline has a place of business. Hence, Philippine courts have jurisdiction to entertain the suit.

The Warsaw Convention to which the Philippines is a party and which has the force and effect of law applies to all international transportation of persons, baggage or goods performed by an aircraft gratuitously or for hire.¹⁶ The "contract of carriage" entered into by the private respondent with Singapore Airlines and subsequently with American Airlines is a contract of international transportation, therefore the provisions of the Warsaw Convention exclusively govern the rights and liabilities of the airline and its passengers. Although the "contract of carriage" is performed by different carriers through a series of airline tickets, it still comprises a single operation pursuant to a general pool partnership agreement which members of the IATA follow. They serve as agents of each other in the issuance of tickets to passengers. Petitioner's act of accepting of the unused portion of the conjunction tickets, entering it in the IATA clearing house, and transporting the private respondent over the route covered by the unused portion of the tickets, serve as tacit recognition of its commitment to act as agent of the Singapore Airlines.

The Warsaw Convention clearly states, "A contract of air transportation is taken as a single operation whether it is founded on a single contract or a series of contracts." The number of tickets issued does not detract from the oneness of the contract of carriage as long as the parties regard the contract as a single operation. This aims to promote international air travel by facilitating the procurement of a series of

¹⁵ Convention for the Unification of Certain Rules Relating to International Transportation by Air.

¹⁶ 327 SCRA 489.

contracts for air transportation through a single principal and obligating different airlines to be bound by one contract of transportation.¹⁷

Doctrine of incorporation; Equal Remuneration For Work of Equal Value; Discrimination

INTERNATIONAL SCHOOL ALLIANCE OF EDUCATORS V. HON. LEONARDO A. QUISUMBING *ET AL.*

[G.R. No. 128845, 333 SCRA 13. 1 June 2000. J. KAPUNAN]

International School, Inc. hires both foreign and local teachers as members of its faculty, classifying them into: (1) foreign-hires and (2) local-hires. The school grants foreign-hires certain benefits that are not provided to local-hires, including housing, transportation, shipping costs, taxes and home leave travel allowance. They are also paid at a salary rate twenty-five per cent (25%) more than local-hires. The justification for the difference is that foreign-hires have to endure the “dislocation factor” and limited tenure.

The International School Alliance of Educators contested the disparity in salary rates between foreign and local-hires; it claims that the point-of-hire classification employed by the school is discriminatory to Filipinos, and further states that the grant of higher salaries to foreign-hires amounts to racial discrimination.

The Supreme Court ruled in favor of the petitioner and found the point-of-hire classification an invalid classification as there is no reasonable distinction between the services rendered by foreign-hires and local-hires. The practice of according higher salaries to foreign-hires contravenes public policy.

The Philippine Constitution exhorts Congress to “give highest priority to the enactment of measures that protect and enhance the right of all people to human dignity, reduce social, economic, and political inequalities.” The Civil Code also requires every person, “in the exercise of his rights and in the performance of his duties, to act with justice, give everyone his due, and observe honesty and good faith.”¹⁸

Furthermore, international law also proscribes discrimination. General principles of law include principles of equity and these are embodied by the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, and the Convention Concerning Discrimination in Respect of Employment and Occupation. The Philippines has made this principle part of its national laws by virtue of the doctrine of incorporation.

The International Covenant on Economic, Social, and Cultural Rights provides that member states recognize the right of everyone to enjoy just and favorable conditions of work, which ensures fair wages and equal remuneration for work of equal value without distinction of any kind. Therefore, persons who work with

¹⁷ 327 SCRA 493.

¹⁸ 333 SCRA 19-20, citing Sec. 1, Article XIII of the Philippine Constitution.

substantially equal qualifications, skill, effort and responsibility, under similar conditions, should be paid similar salaries.

Proof of foreign Law

WILDVALLEY SHIPPING CO., LTD. V. COURT OF APPEALS AND PHILIPPINE PRESIDENT LINES INC.

[G.R. No. 119602, 342 SCRA 213. 6 October 2000. J. Buena]

The ship *Philippine Roxas* ran aground in the Orinoco River, thus obstructing the ingress and egress of vessels. As a result, a vessel owned by the petitioner Wildvalley Shipping Company, Ltd. was unable to sail out of Puerto Ordaz on that day. The latter filed a suit with the Regional Trial Court of Manila against Philippine President Lines, Inc. owner of the *Philippine Roxas*, and the insurer of *Philippine Roxas* for damages in the form of unearned profits plus interest.

A Venezuelan pilot manned the *Philippine Roxas*. He was designated by the harbor authorities in Puerto Ordaz to navigate the said vessel through the Orinoco River.

The Supreme Court ruled in favor of the Philippine President Lines and said that the grounding of the vessel is attributable to the Venezuelan pilot. Vasquez was assigned to pilot the *Philippine Roxas* as well as other vessels on the Orinoco River due to his knowledge of the same. His failure to determine the depth of the said river and his decision to hold his set course, in all probability, caused damage to the vessel. Thus, he is negligent and liable for its grounding.

The Venezuelan law was not pleaded before the Philippine court. "A foreign law is considered pleaded if there is an allegation in the pleading about the existence of the foreign law, its import and legal consequence on the event or transaction in issue."¹⁹ Private international law requires a foreign law to be properly pleaded and proved as a fact, otherwise the laws of a foreign country will be presumed to be the same as our own local or domestic law. This is called processual presumption.

Although the Supreme Court does not dispute the competency of the Assistant Harbor Master, Captain Monzon, to testify on the existence of the pilotage law of Venezuela and the rules governing the navigation of the Orinoco River. His testimony as regards the *Gaceta Oficial*, and the book published by the *Ministerio de Comunicaciones* of Venezuela containing the said laws are not enough. Our Rules of Court requires a certificate stating that he is the officer who had legal custody of those records, and this certificate should be prepared by a secretary of the embassy, consul general, consul, vice consul or consular agent or by any officer in the foreign service of the Philippines stationed in Venezuela, and authenticated by the seal of his office accompanying the copy of the public document. No such certificate could be found in the records of the case.

¹⁹ 342 SCRA 223, citing Jovito R. Salonga, *Private International Law*, p. 82.

With respect to proof of written laws, parol proof is objectionable, for the written law itself is the best evidence. When a foreign statute is involved, the best evidence rule requires that it be proved by a duly authenticated copy of the statute.²⁰

Visiting Forces Agreement; Pacta Sunt Servanda; Process of Ratification and Concurrence

BAYAN V. EXECUTIVE SECRETARY

[G.R. No. 138570. 10 October 2000. G.R. No. 138572. 10 October 2000 G.R. No. 138587. 10 October 2000 G.R. No. 138680. 10 October 2000 G.R. No. 138698, 342 SCRA 449. 10 October 2000. J. Buena]

President Joseph E. Estrada ratified the Visiting Forces Agreement²¹ (VFA) approved by President Fidel V. Ramos in 1998. President Estrada officially transmitted to the Senate the Instrument of Ratification, the letter of the President and the VFA for concurrence pursuant to the requirement in the 1987 Constitution. The Senate voted in concurrence with the treaty.

On 1 June 1999, the VFA officially entered into force after an “Exchange of Notes” between respondent Foreign Affairs Secretary Domingo Siazon and United States Ambassador Thomas Hubbard.

The VFA is an agreement that defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.

The petitioners assailed the constitutionality of the VFA and imputed grave abuse of discretion to the President and the Senate for ratifying the agreement.

The Supreme Court ruled that the President, in ratifying the VFA and in submitting the same to the Senate for concurrence, acted within the powers vested in him by the Constitution. Furthermore, although he erred in submitting the VFA to the Senate for concurrence under the provisions of Section 21 of Article VII, instead of Section 25 of Article XVIII of the Constitution, he is not guilty of committing grave abuse of discretion. The Senate, by acting on the referral submitted to it by the Chief Executive, also performed a task sanctioned by the Constitution. The Senate may either accept or reject the proposed agreement, and this would pertain to the wisdom rather than the legality of the act.

Section 25, Article XVIII, of the Constitution, which specifically deals with treaties involving foreign military bases, troops, or facilities, should have been used in this case. Instead of Section 21, Article VII, for the latter will only be applicable with regard to the determination of the number of votes required to obtain the valid concurrence of the Senate.

²⁰ 342 SCRA 222-223, citing Vicente J. Francisco, *The Revised Rules of Court in the Philippines*, Vol. VII, Part 2, 1997 edition, 365, citing 20 Am Jur 371-372.

²¹ Petition, G.R. No. 138698, Annex “B,” Rollo, 61-62.

Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met: (a) it must be under a treaty; (b) the treaty must be duly concurred in by the Senate and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) recognized as a treaty by the other contracting state.²² The first two requisites were satisfied in the case of the VFA. As regards the third requisite, the Supreme Court held that the phrase “recognized as a treaty” means that the other contracting party accepts or acknowledges the agreement as a treaty. “To require the United States to submit the VFA to its Senate for concurrence pursuant to its Constitution is to accord strict meaning to the phrase. This goes against the principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed.”²³

It is of no matter whether the United States treats the VFA as an executive agreement because international law provides that an executive agreement is as binding as a treaty as long as it possesses the elements of an agreement under international law.

A treaty, as defined by the Vienna Convention on the Law of Treaties, is “an international instrument concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.”²⁴ International law makes no distinction between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained within their powers.

“The ratification, by the President, of the VFA and the concurrence of the Senate should be taken as a clear and unequivocal expression of our nation’s consent to be bound by said treaty, with the concomitant duty to uphold the obligations and responsibilities embodied thereunder.”²⁵ It is incumbent upon us to be bound by the terms of the agreement. Thus, the Constitution declares that the Philippines adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. We are tasked to assure that our government, Constitution and laws will carry out our international obligation. In addition to this, we have the duty to carry out in good faith our obligations arising from treaties and other sources of international law. This is known as the principle of *pacta sunt servanda*.

²² 342 SCRA 486.

²³ 342 SCRA 488.

²⁴ 342 SCRA 488-489, citing The Vienna Convention on the Law of Treaties, Article 2.

²⁵ 342 SCRA 491-492.

Enforcement of Foreign Judgment

PHILIPPINE ALUMINUM WHEELS, INC. v. FASGI ENTERPRISES, INC.

[G.R. No. 137378, 342 SCRA 722. 12 October 2000. J. Vitug]

FASGI Enterprises Inc., an American corporation, entered into a distributorship arrangement with Philippine Aluminum Wheels Incorporated (PAWI), a domestic corporation, and Fratelli Pedrini Sarezzo S.P.A., an Italian corporation. PAWI was remiss in its obligation under the distributorship agreement and in the later supplemental settlement agreement.

FASGI filed with the US District Court of California a stipulation for judgment against PAWI. The US District Judge issued a certificate of finality of judgment. PAWI, by this time, was approximately twenty (20) months in arrears in its obligation under the supplemental settlement agreement.

Unable to obtain satisfaction of the final judgment within the United States, FASGI filed a complaint for enforcement of foreign judgment before the Regional Trial Court of Makati, Philippines. The Makati court denied the enforcement of the foreign judgment within Philippine jurisdiction, on the ground that the decree was tainted with collusion, fraud, and clear mistake of law and fact.

FASGI appealed and the appellate court reversed the decision of the trial court and ordered the full enforcement of the California judgment.

The Supreme Court affirmed the Court of Appeals.

“Generally, in the absence of a special compact, no sovereign is bound to give effect within its dominion to a judgment rendered by a tribunal of another country. The rules of comity, utility and convenience of nations, however, have established a usage among civilized states by which final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious under certain conditions that may vary in different countries. In this jurisdiction, a valid judgment rendered by a foreign tribunal may be recognized insofar as the immediate parties and the underlying cause of action are concerned so long as it is convincingly shown that there has been an opportunity for a full and fair hearing before a court of competent jurisdiction; that trial upon regular proceedings has been conducted, following due citation or voluntary appearance of the defendant and under a system of jurisprudence likely to secure an impartial administration of justice; and that there is nothing to indicate either a prejudice in court and in the system of laws under which it is sitting or fraud in procuring the judgment. A foreign judgment is presumed to be valid and binding in the country from which it comes, until a contrary showing, on the basis of a presumption of regularity of proceedings and the giving of due notice in the foreign forum.”²⁶

In the instant case, the allegations of collusion, mistake of law and fraud were not proven. For fraud to hinder the enforcement of a foreign judgment, within a state’s jurisdiction, it must be extrinsic, or that which would go to the jurisdiction of the

²⁶ 342 SCRA 734, citing *Cuculu v. Louisiana Insurance Co.* (La) Mart NS 464 and *Jovito R. Salonga*, *Private International Law*, 1995 edition, 543.

court or would deprive the party against whom judgment is rendered a chance to defend the action to which he has a meritorious case or defense. Fraud that goes to the very existence of the cause of action such as fraud in obtaining the consent to a contract, as is questioned in this case, is deemed already adjudged, and cannot militate against the recognition or enforcement of the foreign judgment.

Extradition Treaty; Doctrine of Incorporation

JUSTICE SERAFIN R. CUEVAS, SUBSTITUTED BY ARTEMIO G. TUQUERO IN HIS CAPACITY AS SECRETARY OF JUSTICE V. JUAN ANTONIO MUÑOZ

[G.R. No. 140520, 348 SCRA 542. 18 December 2000. J. De Leon, Jr.]

The Hong Kong Magistrate's Court issued a warrant for the arrest of respondent for violating provisions in the Prevention of Bribery Ordinance of Hong Kong. The warrant remains in full force and effect up to the present time. The Philippine Department of Justice received a request for the provisional arrest of the respondent from the Hong Kong Department of Justice pursuant to the RP-Hong Kong Extradition Agreement.²⁷

The Regional Trial Court issued the Order of Arrest for respondent. The latter was arrested pursuant to the said order, and is currently detained at the NBI detention cell.

The respondent filed with the Court of Appeals a petition for certiorari, prohibition and mandamus with application for preliminary mandatory injunction and/or writ of habeas corpus assailing the validity of the Order of Arrest. The Court of Appeals declared the Order of Arrest null and void.

The Secretary of Justice appealed and said that there was urgency for the provisional arrest of the respondent and that the request for provisional arrest of respondent and its accompanying documents are valid despite lack of authentication.

The pertinent provision of the RP-Hong Kong Extradition Agreement enumerates the documents that must accompany the request. The provision does not specify that these documents must be authenticated copies.

The provisions of Presidential Decree No. 1069²⁸ and the RP-Hong Kong Extradition Agreement, as they are worded, serve the purpose that is sought to be achieved by treaty stipulations for provisional arrest.

"It is an accepted practice for the requesting state to rush its request for extradition in the form of a telex or diplomatic cable, the practicality of the use of which is conceded. Even our own Extradition Law (P.D. No. 1069) allows the transmission of a request for provisional arrest via telegraph. In the advent of modern technology, the telegraph or cable have been conveniently replaced by the facsimile machine. Therefore, the transmission by the Hong Kong DOJ of the request for respondent's

²⁷ "Agreement between the Government of the Republic of the Philippines and the Government of Hong Kong for the Surrender of Accused and Convicted Persons."

²⁸ "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country" issued by President Ferdinand E. Marcos on 13 January 1977.

provisional arrest and the accompanying documents, namely, a copy of the warrant of arrest against respondent, a summary of the facts of the case against him, particulars of his birth and address, a statement of the intention to request his provisional arrest and the reason therefore, by fax machine, more than serves this purpose of expediency.”²⁹

The request for the respondent’s provisional arrest was accompanied by facsimile copies of the outstanding warrant of arrest issued by the Hong Kong government, a summary of the facts of the case against respondent, particulars of his birth and address, an intention to request his provisional arrest and the reason therefore. The said documents were appended to the application for respondent’s provisional arrest filed in the Regional Trial Court and formed the basis of the judge’s finding of probable cause for the issuance of the warrant of arrest against respondent.³⁰

The Supreme Court granted the application for provisional arrest of respondent pursuant to the extradition treaty forming part of the law of our land through the doctrine of incorporation. It is part of our system of laws and is recognized by Presidential Decree No. 1069 and the Constitution through the adoption of international laws, treaties and conventions as part of the law of the land.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Electronic Commerce Act

Republic Act No. 8792 – “Electronic Commerce Act of 2000”

The E-Commerce Act of the Philippines was approved in September 2000 as a first step in the government’s efforts to secure a place in the New Economy spurred by Internet development. The Act, patterned after the UNCITRAL Model Law on Electronic Commerce, primarily governs the form within which E-Commerce transactions are to be conducted. The intrinsic validity of such transactions remains covered by the Philippine substantive laws.

E-commerce refers to transactions conducted digitally. It aims to facilitate business dealings made on-line. As a matter of policy, the role of the government is limited, nonetheless important in that, it is required to provide a stable legal environment and a competitive business environment. It should avoid imposing undue restrictions especially since the development of electronic commerce is envisioned to be private sector led.

Among the law’s more significant provisions include legal recognition of electronic writing or document and data messages. They are to have the same legal effect, validity and enforceability as any other document. They are also afforded evidential weight. Electronic signatures are also legally recognized and presumed the signature of the person to whom it correlates and electronic documents are considered original.

²⁹ 348 SCRA 558, citing Sec. 20(b) of Presidential Decree No. 1069.

³⁰ 348 SCRA 562-563.

Electronic documents and electronic data messages may be authenticated by any party involved including Certificate Authorities, third-party Internet Service Providers, and electronic notaries.

All departments, bureaux, offices and agencies of the government, as well as all government-owned and-controlled corporations, are required to use and accept electronic data messages, electronic documents and electronic signatures in their transactions. This is to be done within two (2) years from the date of the coming into effect of this Act.

There shall also be installed an electronic online network in accordance with RPWEB, to facilitate the open, speedy and efficient electronic online transmission, conveyance and use of electronic data messages or electronic documents among all government agencies and the general public.

The Department of Trade and Industry (DTI) shall direct and supervise the promotion and development of electronic commerce in the country in coordination with relevant government agencies aimed in protecting the interests of the consuming public.

The interpretation of the Act shall consider its international origin (UNCITRAL Model Law on Electronic Commerce) and the need to promote uniformity in its application and the observance of good faith in international trade relations. The generally accepted principles of international law and convention on electronic commerce shall also be considered.

All benefits, privileges, advantages or statutory rules established under this Act, including those involving practice of profession, shall be enjoyed only by parties whose country of origin grants the same benefits and privileges or advantages to Filipino citizens.

The Act penalizes hacking or cracking, which is the unauthorized access to or intrusion into a computer or a computer network and/or a telecommunications system by means of computer or a device through the use of information technology. Piracy of copyrighted works and legally protected sound recordings or information materials is also penalized.

The Professional Regulation Commission Modernization Act

Republic Act No. 8981 – “The PRC Modernization Act Of 2000”

The State recognizes the important role of professionals in nation building; its aim is to promote the sustained development of a reservoir of professionals whose competence has been determined by honest and credible licensure examinations, and whose standards of professional service and practice are internationally recognized and considered world-class.

The powers, functions, and responsibilities of the Commission include administering regulatory policies of the national government with respect to the regulation and licensing of the various professions and occupations including the enhancement and maintenance of professional and occupational standards and ethics. It also enforces the rules and regulations relative thereto.

“Upon recommendation of the Professional Regulatory Board concerned, the Commission also approves the registration of and authorizes the issuance of a certificate of

registration/license and professional identification card with or without examination to a foreigner who is registered under the laws of his state or country and whose certificate of registration issued therein has not been suspended or revoked: *Provided*, That the requirements for the registration or licensing in said foreign state or country are substantially the same as those required and contemplated by the laws of the Philippines and that the laws of such foreign state or country allow the citizens of the Philippines to practice the profession on the same basis and grant the same privileges as those enjoyed by the subjects or citizens of such foreign state or country."

"The Commission may, upon recommendation of the Board concerned, authorize the issuance of a certificate of registration/license or a special temporary permit to foreign professionals who desire to practice their professions in the country under reciprocity and other international agreements; consultants in foreign-funded, joint venture or foreign-assisted projects of the government, employees of Philippine or foreign private firms or institutions pursuant to law, or health professionals engaged in humanitarian mission for a limited period of time: *Provided*, That agencies, organizations or individuals whether public or private, who secure the services of a foreign professional authorized by law to practice in the Philippines for reasons aforementioned, shall be responsible for securing a special permit from the Professional Regulation Commission (PRC) and the Department of Labor and Employment (DOLE), pursuant to PRC and DOLE rules."

The Commission supervises foreign nationals who are authorized by existing laws to practise their professions either as holders of a certificate of registration and a professional identification card or a temporary special permit in the Philippines. It must ensure strict compliance with the terms and conditions for the practice or of their employment.

When the professional was hired and allowed to practise his/her profession without permit, the Commission has to file upon due process request for deportation with the Bureau of Immigration and Deportation (BID).

The Act was approved on 5 December 2000.

OTHER RELEVANT STATE PRACTICE

Opinions of the Secretary of Justice³¹

Trade-Related Investment Measures in the World Trade Organization; *Pacta Sunt Servanda*

Opinion No. 088 Series 1999- Full Implementation Of The Agreement On Trade-Related Investment Measures Under The World Trade Organization *vis à vis* The Continued Enforcement And Implementation Of Measures In Conflict With Such.

There is a conflict between the provisions of the TRIMS Agreement relating to the commitment of member countries to adopt the national treatment principle and

³¹ Executive Pronouncements.

to eliminate quantitative restrictions under the 1994 General Agreement on Tariff and Trade (GATT) and the provisions of E.O. No. 259 which require local sourcing of raw materials in the manufacture of detergent products in the country and which requires the same to be applied to imported detergent products.

TRIMS provides that the Philippines has until 31 December 1999 to comply with the commitment of eliminating all trade-related investment measures which are in conflict with the provisions of the TRIM Agreement. E.O. No. 259 being in the nature of a law needs a legislative fiat to repeal or amend it.

A treaty is a formal agreement entered into by states or entities possessing the treaty-making capacity for the purpose of regulating their mutual relations under the law of nations. It has the effect of automatically invalidating or superseding a local law inconsistent with it provided the treaty is more recent and its provisions are self-executing.

The Agreement on TRIM is not self-executing and cannot have the effect of automatically amending and/or superseding the provisions of E.O. No. 259, which is a law. In the event that E.O. No. 259 not be repealed/amended to conform with the Agreement on TRIM on or before 31 December 1999, the Philippines is still required to perform in good faith, its treaty obligation based on the fundamental rule of "*pacta sunt servanda*". Efforts to reconcile or harmonize the provisions of E.O. No. 259 with our treaty commitment under the Agreement on TRIM should therefore be made. If this is not achieved, the Executive should continue working for the amendment or repeal of inconsistent provisions of E.O. No. 259.

Doctrine of Incorporation; Reconciling Treaty Provisions and Municipal Law

Opinion No. 057 Series 2000- The Legal Effect Of The Proposal Of The German Government That Would "Allow Members Of The Families Of Members Of Diplomatic Missions, Consular Posts, Or Mission To An International Organization To Engage In Gainful Employment On The Basis Of Reciprocity".

The proposed agreement provides that "a member of the family" includes "any child under the age of 25 who permanently forms part of the household of a member of a diplomatic mission or consular post or mission to an international organization". This provision is inconsistent with the definition of "child" under the Philippine Immigration Act of 1940, as amended, which refers to an "unmarried child under 21 years of age".

The Secretary of Justice held that Section 48 of the Philippine Immigration Act of 1940, as amended, indicates that the Act shall not be construed to apply to an official of a recognized foreign government who is coming on the business of his government nor to his family, attendants, servants and employees, as long as they possess passports or other credentials showing their official status, and they are duly issued with a visa by Philippine diplomatic officials abroad. Hence, the qualitative and quantitative controls of our immigration law do not apply to individuals with diplomatic or quasi-diplomatic status since they fall within the category of "foreign government officials".

A treaty or international agreement, once ratified by the Philippine Senate in accordance with the Constitution constitutes part of the internal law of the land. It is of the same class as an enactment of Congress of the Philippines. Thus, in case of irreconcilable conflict between a treaty and a statute, the prior act is superseded

by the later act. However, when a treaty is superseded by a subsequent statute of Congress, it is repealed or amended as part of the law of the land, yet it still subsists as an engagement of the Philippines, although it may not be enforceable by our courts. Once the proposed agreement is ratified by the representatives of both the German and Philippine governments, it would have effectively amended irreconcilably inconsistent provisions of the Philippine Immigration Act of 1940, as amended.

International Agreements

Opinion No. 067 Series 2000- Memoranda Of Understanding Proposed Between The National Food Authority And The Vietnam Southern Food Corporation, The Ministry Of Commerce Of Thailand, And The China National Cereals, Oils And Foodstuffs Import And Export Corporation Of The People's Republic Of China Being Subject To The Requirements And Provisions Of And Act Providing For The Guidelines In The Negotiation Of International Agreements And Its Ratification

The Office of the Government Corporate Counsel opined that the Memorandum of Agreement between the NFA and the above-named parties are not subject to the requirements and provisions of E.O. No. 459 since the NFA is a mere government-owned and controlled corporation. Hence, its contracts cannot be classified as an international agreement or a treaty.

The Department of Foreign Affairs on the other hand contends that such MOUs are subject to E.O. No. 459, particularly to the standard provision on "Entry into Force."

The Department of Justice declined to render an opinion since the Office of the Government Corporate Counsel is the "principal law office of all government-owned or controlled corporations" and has the duty to render all important legal questions for opinion, advice and determination on all proposed contracts and important court cases. The Department of Justice will render its own opinion only when the OGCC opinion is patently erroneous.

The Department of Justice has ruled that the term "international agreement" in the Constitution refers to agreements that are permanent in nature and does not include executive agreements. Trade agreements are also not subject to legislative conformity.

'The well-recognized distinction between an executive agreement and a treaty is that the former cannot alter the existing law and must conform to all prior statutory enactments, whereas a treaty, if ratified by two-thirds of the Senate, itself becomes the supreme law of the land and takes precedence over any prior statutory enactments.'

Executive Orders³²**International Humanitarian Law Day**

Executive Order No. 134- Declaring 12 August 1999 And Every 12th Day Of August Thereafter As International Humanitarian Law Day

President Joseph Ejercito Estrada declared August 12, 1999 and every 12th day of August thereafter as International Humanitarian Law Day.

The Philippines is a Contracting Party to the: (I) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (II) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; (III) Geneva Convention Relative to the Treatment of Prisoners of War; and (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts. In this regard, the Philippines accepts direct responsibility for the application of international humanitarian law when involved in an armed conflict.

The commemoration of International Humanitarian Law Day aims to promote greater awareness of the principles of International Humanitarian Law, as such all concerned departments and agencies of the government are enjoined to observe International Humanitarian Law Day and actively to participate in programs and activities to commemorate the Day.

SINGAPORE***JUDICIAL DECISIONS****Forum non conveniens**

PEH TECK QUEE V. BAYERISCHE LANDESBANK GIROZENTRALE¹

In this case the issue arose as to whether Singapore or Malaysia was the proper law of the contract governing a 'Multi-Currency Revolving Facility' between a German bank operating in Singapore (the respondent) and a Malaysian customer (the appellant). It was held that the parties' express intention that the governing law should be Singapore law must be treated as the objective choice of law in the absence of evidence to show that application of the law is contrary to public policy and that the choice was made *mala fide*.

³² Executive Pronouncements.

* Contributed by SOH Tze Bian, Deputy Senior State Counsel, International Affairs Division (IAD), Attorney-General's Chambers, Singapore.

¹ [2000] 1 SLR 148.

YUE XIU ENTERPRISES (HOLDINGS) & ANOR V. PT HUTAN DOMAS RAYA & ANOR²

This case concerned the appeal by the Plaintiffs (a company incorporated in Hong Kong) against a stay of proceedings in favour of the first defendant (a company incorporated in Indonesia). The Singapore action against the second defendant (the guarantor) was at an advanced stage and to be heard shortly. Although the Court agreed that Jakarta is clearly the more appropriate forum for the trial, it was of the opinion that there would be a real prospect of a different outcome in respective courts in two jurisdictions on the same issue if the Singapore action against the first defendants was stayed. In the circumstances, the Court allowed the appeal.

YUSEN AIR & SEA SERVICE (S) PTE LTD V. KLM ROYAL DUTCH AIRLINES

This case involved concurrent proceedings in New York and Singapore over the same subject matter. The issue was whether the mere commencement of one set of proceedings amounted to an election to proceed in that jurisdiction. Finding that there was strong evidence that the appellant intended to pursue its claim in Singapore, the Court held that the mere commencement of proceedings in New York did not amount to election to proceed in that jurisdiction over Singapore.

PARNO V. SC MARINE PTE LTD

This case involved the issue of applicable choice of law in Singapore with respect to torts committed overseas (i.e., Myanmar). The Court of Appeal held that it is the Singapore common law of negligence that should be applied as neither party had pleaded Myanmar law with respect to the alleged negligence or raised any point of Myanmar law.

THE TRADE RESOLVE³

This case involved the defendant's claim that the arrest of their vessel was effected outside of Singapore's territorial waters and therefore the arrest was wrongful, unlawful and ineffective. The plaintiffs argued that the court had jurisdiction to hear the matter concerning the lien because the entry of appearance by the defendants would give the court *in personam* jurisdiction over the defendants and therefore the defendants were precluded from disputing the legality of the arrest of the vessel. The Court decided that while it clearly had *in personam* jurisdiction over the defendants as they had entered appearance to apply to the court for the cargo to be sold and the sale proceeds paid into court, this did not preclude the defendants from arguing that the vessel's arrest was wrongful; it accordingly dismissed the plaintiffs' claim.

² [2000] 4 SLR 522.

³ [1999] 4 SLR 424.

THE JIAN HE⁴

This case was an appeal against a decision of the High Court refusing the defendants' application for a stay of proceedings on the ground of an exclusive jurisdiction clause. One of the issues was whether the Singapore court is entitled to construe the jurisdiction clause in accordance with local rules of construction. As the bill of lading expressly provided that the laws of the People's Republic of China were to apply, the courts held that the Chinese rules of construction should have applied in the construction of the jurisdiction clause. However, as there was no evidence showing that the rules of construction under Chinese law were any different from those under Singapore law, a Singapore court would be entitled to construe the jurisdiction clause in accordance with Singapore's rules of construction.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

During the period from 1999 to 2000, the Singapore Legislature enacted or amended the following Acts to give effect to international conventions as follows

- a. Prevention of Pollution of the Sea Act 1999 was amended on 11 February 1999 to give effect to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention) which has been adopted by the International Maritime Organization (IMO) in 1990 and to enable Singapore to implement any international agreement relating to the prevention, reduction or control of pollution of the sea and pollution from ships. The amended Act also increases the penalties for various offences under the Act.
- b. Carriage by Air (Amendment) Act 1999 was enacted on 11 February 1999 to amend the Carriage by Air Act (Chapter 32A of the 1989 Revised Edition) to give effect to the provisions of Protocol No. 4 signed at Montreal on 25th September 1975 which further amended the Warsaw Convention concerning international carriage by air as amended at the Hague on 28th September 1955.
- c. Chemical Weapons (Prohibition) Act 2000 was enacted on 25 April 2000 to give effect to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction concluded at Paris on 13 January 1993.

⁴ [2000] 1 SLR 8.

SRI LANKA*

JUDICIAL DECISIONS

Fundamental Rights – Proposed agreement for exploration and mining of phosphate – Environmental and developmental policies applicable to exploitation of natural resources – International standards and requirements of domestic law – contractual provisions calculated to circumvent local laws – Denial of the rights of the public to object to the proposed agreement – Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution

**Supreme Court, 2 June 2000, (2000) 3 Sri Lanka Law Reports 243
Amerasinghe, Wadugodapitiya and Gunasekera JJ**

BULANKULAMA AND OTHERS V. SECRETARY, MINISTRY OF INDUSTRIAL DEVELOPMENT AND OTHERS

This was a fundamental rights application filed under Article 17 of the Constitution read with Article 126. The seven petitioners alleged that the proposed Mineral Investment Agreement, that was to be entered into between the Government of Sri Lanka and a foreign mining company for the exploitation of Sri Lanka's phosphate reserves, would result in the imminent infringement of their fundamental rights as it would result in their being displaced from their homes and lands. The petitioners cited Articles 12 (1) (right to equality before the law and the equal protection of the law), Article 14(1)(g) (the freedom to engage by oneself or in association with others in any lawful occupation, profession, trade, business or enterprise) and Article 14 (1) (h) (the freedom of movement and the right to choose one's residence within Sri Lanka).

Although the basis of the case was the imminent infringement of fundamental rights under the Constitution, the potential adverse environmental impacts of the mining project provided a strong basis for the arguments of Counsel for the petitioners. This in turn gave rise to an examination of issues of environment and development in the judgement. A section of the judgement entitled "Sustainable Development" contains an exhaustive analysis of principles of international environmental law and their application in Sri Lanka. In making this analysis the Court made continual reference to the Stockholm and Rio Declarations. This case is significant for its interpretation of these principles and their application in Sri Lankan law.

Discussing the principle of sustainable development, the Court observed:

Undoubtedly, the state has the right to exploit its own resources pursuant, however, to its own environmental and development policies. (Cf. Principle 21 of the U.N Stockholm Declaration (1972) and Principle 2 of the U.N. Rio de Janeiro Declaration (1992). Rational Planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration) Human beings are at the centre of

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concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio de Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio de Janeiro Declaration). In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.

The Court elaborated on the principle of sustainable development and its elements including the principle of inter-generational equity.

In my view, due regard should be had by the authorities concerned to the general principle encapsulated in the phrase 'sustainable development', namely that human development and the use of natural resources must take place in a sustainable manner.

There are many operational definitions of 'sustainable development', but they have mostly been variations on the benchmark definition of the United Nations Commission on Environment and Development chaired by Gro Harlem Brundtland, Prime Minister of Norway, in its report in 1987 "... development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

Some of the elements encompassed by the principle of sustainable that are of special significance to the matter before this court are, first, the conservation of natural resources for the benefit of future generations – the principle of inter-generational equity; second, the exploration of natural resources in a manner which is 'sustainable' or 'prudent' – the principle of sustainable use; the integration of environmental considerations into economic and other development plans, programmes and projects – the principle of integration of environment and development needs.

International standard setting instruments have clearly recognized the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations (Principle 1, Stockholm Declaration). The natural resources of the earth including the air, water, land flora and fauna must be safeguarded for the benefit of present and future generations. (Principle 2, Stockholm Declaration). The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind (Principle 5, Stockholm Declaration). The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3, Rio de Janeiro Declaration). The inter-generational principle in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.

The Court also discussed the precautionary principle as it is enunciated in the Rio and Stockholm Declarations and observed:

.... attention is drawn, especially of the 4th respondent in applying the National Environmental Act and the regulation framed thereunder, to the principles of the Stockholm Declaration: "The discharge of toxic substances..... in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is to be inflicted upon eco-system. The just struggle of the peoples of all countries against pollution should be supported" (Principle 6). "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea" (Principle 7). It might be noted, particularly by the 4th respondent, that Principle 15 of the Rio de Janeiro Declaration marked a progressive shift from the preventive principle recognized in Principles 6 and 7 of the Stockholm Declaration which was predicated upon the notion that only when pollution threatens to exceed the assimilative capacity to render it harmless, should it be prevented from entering the environment. Principle 15 of the Rio De Janeiro Declaration stated: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The precautionary principle acts to reverse the assumption in the Stockholm Declaration and, in my view, ought to be acted upon by the 4th respondent. Therefore if ever pollution is discerned, uncertainty as to whether the assimilative capacity has been reached should not prevent measures being insisted upon to reduce such pollution from reaching the environment.

Citing the "polluter pays" principle, the Court took the view that the measures contained in the mineral investment agreement in regard to the restoration of the environment were inadequate:

Moreover, learned counsel for the petitioners drew attention to the inadequacy of the protection afforded by Articles 25.1 and 25.3 of the proposed agreement with regard to the repair of environmental damage. The petitioners did not share the belief expressed by the first respondent in his affidavit on the adequacy of the safeguards by way of the proposed Environmental Compliance Bond and Environmental Restoration Escrow Account and the undertaking given with regard to environmental compliance and restoration. It seems to be that the provisions in the proposed agreement on the matter are the product of outdated mainstream economic thought: They appear to be based on the views of persons who at best nominally recognize the environment or have considerable difficulty in placing a 'value' on it. Today, environmental protection, in the light of the generally recognized "polluter pays" principle (e.g., see Principle 16 of the Rio Declaration), can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. The cost of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of

a project. This is a matter the Central Environmental Authority must take into account in evaluating the proposed project and in prescribing terms and conditions.

Although the Sri Lankan Constitution does not contain a right to information, it is significant that the Court gave judicial recognition to this right in relation to environmental issues, on the basis of the Rio Declaration. This issue arose as a result of the respondents' attempts to circumvent domestic environmental laws, specifically those requiring an environmental impact assessment (EIA) of projects of this nature. The EIA process calls for public participation in the decision-making process and requires that all EIA reports are made available to the public for a specified period for their comments. In this regard, the Court stated:

Access to information on environment issues is of paramount importance. The provision of public access to environmental information has, for instance, been a declared aim of the European Commission's environmental policy for a number of years. Principle 10 of the Rio Declaration calls for better citizen participation in environmental decision-making and rights of access to environmental information, for they can help to ensure greater compliance by States of international environmental standards through the accountability of their governments. Principle 10 states as follows: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Pointing out that the proposed agreement circumvented the laws of the country, the Court went on to say

... reinforced by the confidentiality provision of the proposed agreement, the proposed agreement effectively excluded public awareness and participation, as contemplated by our legislature as well as by Principle 10 of the Rio Declaration. Further, although the law of Sri Lanka provides for the judicial review of the acts of administrative authorities, and Principle 10 of the Rio Declaration calls for effective access to judicial and administrative proceedings, the proposed agreement substitutes arbitration for such proceedings, in which, of course, the public have no role.

Fundamental Rights – Prevention of Terrorism (Temporary Provisions) Act – Arrest and Detention of a person by a police officer for "unlawful activity" – Preconditions for a valid arrest and detention – Articles 13 (1) and 13(2) of the Constitution

Supreme Court, 26 June 2000, (2000) 1 Sri Lanka Law Reports 387**Fernando, Amerasinghe and Dheeraratne JJ****WEERAWANSA V. THE ATTORNEY GENERAL AND OTHERS**

The Petitioner, a Customs Officer, was arrested under the Prevention of Terrorism (Temporary Provisions) Act (PTA) for unlawful activity. He was detained for several months but was not informed as to the reasons for being so detained. In its decision, the Court held that there was no reasonable suspicion of unlawful activity on the part of the Petitioner and therefore his purported arrest was not in accordance with the provisions of the PTA. The arrest was in violation of his rights under Article 13(1) of the Constitution, which provides that no person shall be arrested except according to procedure established by law and that any person arrested shall be informed of the reason for his arrest. Since the Petitioner had not been arrested in accordance with the PTA, the police had no right to keep him in custody without producing him before a Magistrate and therefore his fundamental rights under Article 13(2) of the Constitution had also been infringed. Article 13(2) provides that every person held in custody or detained shall be brought before a judge of the nearest competent court according to procedure established by law and shall not be further detained except upon an order of such judge made in accordance with procedure established by law.

In the course of its judgement, the Court pointed out that these safeguards are internationally recognised. The Court stated that Sri Lanka is a party to the International Covenant on Civil and Political Rights (as well as the Optional Protocol) and quoted Article 9 of the Covenant. It asked the question as to whether this Court should have regard to the provisions of the Covenant and concluded that it must. It quoted Article 27(15) of the Constitution found in the Chapter on Directive Principles of State Policy, which requires the State to “endeavour to foster respect for international law and treaty obligations in dealings among nations”. It stated “(t)hat implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises”.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS**Suppression of Terrorist Bombings Act No. 11 of 1999**

This Act is meant to give effect to the Convention for the Suppression of Terrorist Bombings adopted by the UN General Assembly on 15 December 1997 and opened for signature on 12 January 1998. The Government of Sri Lanka became a signatory to the Convention on that date. The Act was passed to give effect to the provisions of the Convention.

Section 1 of the Act states that it shall come into operation on such date as the Minister certifies as the date on which the Convention enters into force in respect of Sri Lanka. The Minister may by Order published in the Gazette certify the States which are Parties to the Convention and these States shall be known as Convention

States. (Section 2). Section 3 and the Schedule to the Act set out the acts deemed to be offences under this statute and the High Court shall have jurisdiction in respect of such offences. The Act also provides for extradition of accused persons between Sri Lanka and Convention States.

The Government of Sri Lanka is also required to provide all necessary assistance to Convention States in respect of the investigation and prosecution of offences under Section 3 or the Schedule to the Act. The Government of Sri Lanka is also required to take measures to prevent any person or group of persons from committing or encouraging, instigation, organizing or knowingly financing the commission of any such offence whether in or outside Sri Lanka.

Mutual Assistance in Civil and Commercial Matters Act No. 39 of 2000

The long title to the Act states that it is an Act to provide for the rendering of mutual assistance in civil and commercial matters between Sri Lanka and other countries and to give effect to the Hague Convention on the service abroad of judicial and extra judicial documents in civil and commercial matters and the Hague Convention on the taking of evidence abroad in civil and commercial matters.

The objects of the Act are to facilitate the provision of, and the obtaining by Sri Lanka of, assistance in civil and commercial matters, including the service of judicial and extra judicial documents, the examination of witnesses and the obtaining of evidence, documents and other articles and the provision of documents and other records. The Central Authority to the Act is the secretary to the Ministry of Justice.

Prevention of Hostage Taking Act No. 41 of 2000

This Act was passed to give effect to the International Convention against the Taking of Hostages. According to Section 1 it shall come into force on such date as the Minister certifies as being the date on which the Convention enters into force in respect of Sri Lanka.

Section 3 sets out the offences under the Act, and Section 4 designates the High Court as the Court having jurisdiction to try such offences. The Act also provides for extradition of accused persons between Sri Lanka and other parties to the Convention. Where there is no extradition agreement between Sri Lanka and any of such parties, the Convention may be treated as an extradition agreement. Section 9 states that the Government of Sri Lanka shall afford all assistance to and may also request such assistance from, other Parties to the Convention as may be necessary to investigate and prosecute offences under the Act.

Suppression of Unlawful Acts Against the Safety of Maritime Navigation Act No. 42 of 2000

This Act gives effect to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation adopted in Rome on 10 March 1988. At the time of enactment Sri Lanka had not yet acceded to the Convention and the long title states "whereas Sri Lanka intends to accede to the aforesaid Convention and

whereas it is necessary to make legal provision to give effect to Sri Lanka's obligations under the aforesaid Convention".

The Act specifies the offences under it and designates the High Court as the Court having jurisdiction in respect of such offences. This Act also provides for extradition of accused persons between Sri Lanka and other parties to the Convention. Further provisions require the government of Sri Lanka to provide necessary assistance to other States Parties in such matters and also provides for the requesting of such assistance.

THAILAND*

JUDICIAL DECISION

The Treaty-making power of the Executive under the Constitution of the Kingdom of Thailand; Whether relevant provisions of the Convention on Biological Diversity require a change in the jurisdiction of Thailand which would in turn require prior approval by the National Assembly for its ratification by the Executive

**Constitutional Court, 5 October 2000
Judgment No. 33 / 2543**

Prasert Nasakun, president, Komen Bhatarabhirom, Joompol Na Songkla, Jul Atirek, Preecha Charoemvanij, Mongkol Saratun, Sujit Boonbongkarn, Suchinda Yong-sunthorn, Suvit Theerapongse, Anant Ketwongse, Issara Nititunprapas, Ura Wang-Omklang, JJ.

IN RE CONVENTION ON BIOLOGICAL DIVERSITY OF 1992

The case came before the Constitutional Court in the form of a writ petition by the Cabinet pursuant to Section 266 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) which provides: "In the case where a dispute arises as to the powers and duties of organs under the Constitution, such organs or the President of the National Assembly shall submit a matter together with the opinion to the Constitutional Court for decision."

The dispute arose out of the decision of the Cabinet on 28 October 1997 to the effect that Thailand could proceed to ratify the 1992 Convention on Biological Diversity, which Thailand signed on 12 June 1992, without seeking prior approval from the National Assembly. By virtue of the second paragraph of Section 224 of the Constitution, "A treaty which provides for a change in the Thai territories or the jurisdiction of the State or requires the enactment of an Act for its implementation

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must be approved by the National Assembly.” The Cabinet resolved that Thailand did not have to enact any new law to implement obligations under the Convention, and it instructed the Ministry of Foreign Affairs to draft a declaration to be deposited at the time of ratification stating that Thailand’s ratification would not result in a change in the Thai territories or the jurisdiction of the State and that implementation of the Convention would be subject to Thai law.

The Ministry of Foreign Affairs submitted that no such declaration was necessary because nothing in the Convention would result in a change in the Thai territories or the jurisdiction of the State, and the Convention does not obligate Contracting Parties to enact any new law to implement obligations under the Convention. On the other hand, the Council of State, the government body acting as legal adviser to the Royal Thai Government on Thai law and also responsible for drafting Thai law, disagreed with both the Cabinet and the Ministry of Foreign Affairs. According to the Council of State, Article 1 of the Convention makes it clear that the objectives of the Convention are, *inter alia*, “the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources ...” Article 15 of the Convention under the heading “Access to Genetic Resources” provides:

- “1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.
-”

The Council of State reasoned that Article 15 had to be read in conjunction with Article 1, and since Article 37 expressly prohibits reservations to the Convention, Thailand had to permit access to genetic resources in Thailand whenever requested by another Contracting Party to the Convention, and without any restriction on the access. In the Council of State’s view, existing Thai law was not adequate to authorize such access in all cases, and Thailand would not be able to enact any law incompatible with the relevant provisions of the Convention. This would also mean that there would be a change in the “legislative jurisdiction” of the State if Thailand became a Contracting Party to the Convention. It, therefore, concluded that the Convention had to be submitted to the National Assembly for prior approval pursuant to the second paragraph of Article 224 of the Constitution.

The Ministry of Foreign Affairs disputed the above reasoning of the Council of State. The Ministry explained that Article 15 (2) merely obligates Contracting Parties to “endeavour” to: (i) create conditions to facilitate access to genetic resources; and (ii) not to impose restrictions that run counter to the objectives of the Convention. In other words, the word “endeavour” applies throughout Article 15 (2), and this was a compromise achieved at the time of drafting the Convention. Therefore, each Contracting Party has the authority and inherent discretion to allow or deny access by other Contracting Parties to its genetic resources, as Article 15 (1) makes it clear. In addition, the wording “a change in the jurisdiction of the State” in Article 224 of the Constitution has a special meaning. It first appeared in the Constitution of the Kingdom of Thailand B.E. 2534 (1991) to signify maritime areas or zones known

as the exclusive economic zone and the continental shelf adjacent to the territorial sea or Thai territories over which Thailand merely has sovereign rights and certain jurisdiction under international law. Contrary to the Council of State's view, "a change in the jurisdiction of the State" would mean a change in the limit of the maritime zones to become larger or smaller than previously proclaimed by Thailand, and not a change in the way Thailand might exercise its "legislative jurisdiction".

The relevant Thai authorities that concurred with the Ministry of Foreign Affairs were the Ministry of Agriculture and Cooperatives, the Ministry of Commerce, and the Ministry of Science and Technology. On the other hand, the Ministry of Public Health agreed with the Council of State.

In its writ of petition, the Cabinet requested the Constitutional Court to decide:

- A. the meaning of "a change in the Thai territories or the jurisdiction of the State" under Section 224 of the Constitution; and
- B. whether Article 15 (2) of the Convention would obligate a change in the Thai law and, consequently, a change in the jurisdiction of the State as mentioned in Section 224, second paragraph, of the Constitution.

The judgment

The Constitutional Court declined to answer (A) on the ground that the Cabinet was merely seeking advice on the meaning of that constitutional provision, whereas the Constitutional Court does not give advisory opinions but renders judgments on contentious questions.

After going through all the provisions of the 1992 Convention, the Court concluded that Article 15 (2) had to be read subject to Article 1 to the effect that Contracting Parties must facilitate access to their genetic resources and must endeavour not to impose restrictions that run counter to the objectives of the Convention. This, in the Court's view, was tantamount to a change in the jurisdiction of the Contracting Parties in the use of their genetic resources because the Contracting Parties no longer have absolute sovereignty over their genetic resources. Besides, Article 4 of the Convention under the heading "Jurisdictional Scope" stipulates, *inter alia*, that the provisions of the Convention apply, in relation to each Contracting Party:

- “(a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and
- (b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.”

Therefore, by becoming a Contracting Party, Thailand would be entitled to certain new rights as well as would simultaneously lose certain rights it had already had. This would necessitate enactment of new law or amendment of existing law to comply with the objectives, principles and scope of the Convention. The Convention would thus entail a change in the jurisdiction of the State in the use of genetic resources; hence, a treaty that requires prior approval by the National Assembly.

In addition, Articles 15 (7), 16 (3) and (4), and 19 (1) provide that each Contracting Party “shall take ... legislative ... measures ... as appropriate ... with the aim

of ...". This would mean that if Thailand became a Contracting Party to the 1992 Convention Thailand would have to take such legislative measures in order to comply with its obligations under the Convention.

For these reasons, the Constitutional Court held that the Convention on Biological Diversity of 1992 was a treaty which provides for a change in the jurisdiction of the State and, as such, which must be approved by the National Assembly pursuant to the second paragraph of Section 224 of the Constitution.