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The DILA Foundation and the Yearbook are greatly saddened by the death of Professor Takabayashi Hideo in early 1997. The tireless support and unfailing loyalty of Professor Takabayashi have been of essential importance to the achievements of the Foundation and the Yearbook.

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ABBREVIATIONS

AC	-	Appeal Cases
AIR	-	All India Reporter
AJIL	-	American Journal of International Law
All ER	-	All England Reports
BP Blg.	-	Batas Pambansa [=Statute] Bilang [=No.] (Phil.)
BYIL	-	British Yearbook of International Law
CTS	-	Canadian Treaty Series
DFATS	-	Department of Foreign Affairs Treaty Series (Phillipines)
EJIL	-	European Journal of International Law
FEER	-	Far Eastern Economic Review
Hastings ICLR	-	Hastings International and Comparative Law Review
ICJ	-	International Court of Justice
ICLQ	-	The International and Comparative Law Quarterly
IHT	-	International Herald Tribune
ILC	-	International Law Commission
ILM	-	International Legal Materials
ILR	-	International Law Reports
IQ	-	Indonesian Quarterly
JAIL	-	Japanese Annual of International Law
LN	-	Lembaran Negara [State Gazette] (Indonesia)
MLJ	-	Malayan Law Journal
ODIL	-	Ocean Development and International law
PCA	-	Permanent Court of Arbitration
PCIJ	-	Permanent Court of International Justice
Phil.	-	Reports of cases decided in the Supreme Court of the Philippines
RdC	-	Recueil des cours de l'Academie de droit international de la Haye
RIAA	-	Reports of International Arbitral Awards
RV	-	Reglement op de Rechtsvordering [Code of Civil Procedure] (Netherlands Indies)
SCC	-	Supreme Court Cases (India)
SCRA	-	Supreme Court Reports Annotated (Philippines)
SLR	-	Singapore Law Reports
UBC Law Review		University of British Columbia Law Review
UNGA	-	United Nations General Assembly
UNTS	-	United Nations Treaty Series

ARTICLES

RECENT TRENDS IN THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL ARBITRAL TRIBUNALS, WITH SPECIAL REFERENCE TO TERRITORIAL AND BOUNDARY CASES*

Miyoshi Masahiro**

1. INTRODUCTION

Traditionally a clear distinction is made between judicial settlement and arbitration, with an emphasis on their functional differences. While such a distinction would have been reasonable as a matter of historical explanation of their separate functions, it seems a little too simplistic in view of their practice. Against this background, the present contribution will review the relationship between the International Court of Justice and international arbitral tribunals in the light of the territorial and boundary cases since the 1960s.

Broadly it may be said that the distinction dates back to the time of the establishment of the Permanent Court of International Justice (PCIJ).[1] The Permanent Court was set up with the intention of doing away with what were thought to be the defects of arbitration, especially its voluntary and *ad hoc* nature. In that sense it was only natural to distinguish the new system from the traditional one. On the other hand, as the Permanent Court of Arbitration (PCA) had been in existence since 1899 and thus the institutionalisation of arbitration had made a little progress, there was a need to stress the difference between the PCA and the newly organized Permanent Court of International Justice. Throughout its existence the PCIJ accomplished a good deal, and it was succeeded by the International Court of Justice (ICJ) as the judicial arm of the United Nations Organisation. These developments would have contributed to the clear distinction of the PCIJ and ICJ from the traditional institution of

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* This is a translation with some amendments of a paper presented at the autumn session of the Japanese Association of International Law in October, 1996. Grateful acknowledgement is made of the usual help of my colleague Professor JOHN HAMILTON in improving the English in my text.

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[1] As early as at the Hague Peace Conferences of 1899 and 1907 attempts were made to set up a permanent international court and make resort to arbitration compulsory. For a historic account of such attempts, *see* TAOKA RYOICHI, *Kokusaiho III - Shinpan* [International Law, Part III-New Edition] (1973)11-19. *See* also H.M. CORY, *Compulsory Arbitration of International Disputes* (1932)3-110; A.P. HIGGINS, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries* (1909) 82-84; A.S. DE BUSTAMANTE, *The World Court* (trans. by ELIZABETH F. READ, 1925) 41-67.

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 pp. 3-27

arbitration, and consequently to the wide recognition of the newer institution being superior to the traditional.

Such recognition, however, was not shared by all states. The Permanent Court of Arbitration issued a circular note in 1960 with a view to urging its active use by states[2] and the International Law Commission drafted the Model Rules on Arbitral Procedure in 1958,[3] while the declined use of the ICJ in the late 1960s and early 1970s drove the General Assembly of the United Nations to a discussion of ways and means to activate it.[4] As part of such efforts the Rules of Court were amended in 1972 and 1978 to encourage the use of a Chamber as provided for in Article 26(2), of the Statute of the Court.[5] A Chamber to be constituted under the amended Rules of Court, however, may be characterised as analogous to an arbitral tribunal.

There were other moves around the commemoration of the 50th anniversary of the founding of the ICJ. The British Institute of International and Comparative Law, for example, in March 1996 published the report of a study group on the ICJ's procedures and working methods,[6] while in the field of arbitration the Permanent Court of Arbitration adopted a set of optional rules for arbitration in 1992[7] and the Conference on Security and Cooperation in Europe (CSCE) adopted a Convention on Conciliation and Arbitration in 1993.[8]

The developments concerning review or improvement of judicial settlement and arbitration are significant. Reserving these for other studies, this contribution is limited to a comparison of recent judicial and arbitral decisions on territorial and boundary disputes with a view to showing that the two institutions have considerable common or analogous points in substantive aspects, if not in procedural aspects.

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[2] PCA, Circular Note of the Secretary-General, 3 March 1960, 54 AJIL (1960) 940-941.

[3] UN Doc. A/CN.4/113, 3 March 1958, ILC Yearbook 1958-II p. 12.

[4] *See* e.g. UNGA Res. 2733 (XXV),15 December 1970: 'Review of the role of the International Court of Justice'. For a report on the comments of the member states on this question, *see* UN Doc.A/8382 and Adds.1-4: 'Report of the Secretary-General: review of the role of the International Court of Justice'.

[5] For a brief account of the amendments to the Rules of Court, *see* MIYOSHI MASAHIRO, 'Recent trends in international arbitration' (in Japanese), 113 *Aichi Journal of Legal and Political Sciences* (1987) 142-145. *See* also E. JIMÉNEZ DE ARÉCHAGA, 'The amendment to the rules of procedure of the International Court of Justice', 67 AJIL (1973) 1-22; G. GUYOMAR, *Commentaire du Règlement de la Cour Internationale de Justice, Interprétation et Pratique* (1973); D.W. BOWETT, 'Contemporary developments in legal techniques in the settlement of disputes', 180 RdC (1983-II) 183.

[6] D.W. BOWETT, J. CRAWFORD, I. SINCLAIR, A.D. WATTS, 'The International Court of Justice: efficiency of procedures and working methods', (Report of the study group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law), 45 ICLQ Supplement S1-35 (1996).

[7] PCA, 'Optional rules for arbitrating disputes between two states', 20 October 1992, 32 ILM (1993) 575-86.

[8] Convention on Conciliation and Arbitration within CSCE. Annex 2 to 'Decision on peaceful settlement of disputes of 15 December 1992, 32 ILM (1993) 557-68.

2. DIFFERENCES BETWEEN JUDICIAL SETTLEMENT AND ARBITRATION

2.1. Classical differentiations

The basic idea of differentiating judicial settlement from arbitration would have been to signify the establishment of the Permanent Court of International Justice and emphasize its nature in contradistinction to the traditional method of arbitration. There used to be some arbitrations by tribunals without any arbitrators from third states as, for example, in the case of the Anglo-American arbitrations based on the Jay Treaty of 1794.[9] Some arbitrations were even considered as another forum of diplomatic transactions.[10] Many arbitral awards were not reasoned.[11] The Hague Convention for the Pacific Settlement of International Disputes of 1899 for the first time included a clause that an award be reasoned,[12] perhaps partly because the idea was beginning to prevail that an arbitral award should be reasoned. But it might also have shown a new idea of arbitration as it ought to be.

The main characteristics of arbitration, as compared with judicial settlement, would seem to be the parties' control over the composition of the tribunal and the process of its proceedings.[13] They would be a reflection of the state's propensity for honour and insistence that it have as much control over its international relations as possible. In respect of the composition of the tribunal, whether an *ad hoc* tribunal or one of the Permanent Court of Arbitration, it is the states parties to the dispute that choose arbitrators. That such composition is problematical has been pointed out repeatedly, and as a way of improvement the PCIJ made its appearance. But this institution, and its successor also, still

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[9] The Treaty of Amity, Commerce and Navigation between Great Britain and the United States of 19 November 1794, Arts. 5, 6 and 7. C. PARRY, 52 *Consolidated Treaty Series* 249, 250, 252. *See* also the 1903 Anglo-American *Alaska Boundary* arbitration in which the tribunal was composed of three arbitrators from each of the parties, 15 RIAA 481.

[10] In the *Bay of Passamaquoddy Islands* case of 1817 between Great Britain and the United States, the tribunal composed of one member from each of the parties determined the attribution of the islands. J.B. MOORE stated that the British commissioner had exhibited much ability and skill in his 'egotiations'with his American counterpart, while DE LAPRADELLE and POLITIS commented: "[la décision] n'est au fond, qu'une transaction . . . les deux commissaires n'ont pas toute l'impartialité désirable." J.B. MOORE, 6 *International Adjudications, Modern Series* (1936) 36; A. DE LAPRADELLE et N. POLITIS, 1 *Recueil des Arbitrages Internationaux* (1905) 304.

[11] E.g. the award of the *British Guyana/Venezuela Boundary* case of 1899 was not reasoned, 11 *Proceedings of the Arbitration between the Government of Her Britannic Majesty and the United States of Venezuela: British Guyana-Venezuela Boundary* (1899) 3237-3238. After handing down the award, the president of the tribunal stated that the rules of procedure used in this arbitration were mostly incorporated in the Hague Convention for the Pacific Settlement of International Disputes of 1899, ibid. 3238. Ironically, Art. 52 of the Convention provides: "La sentence, votée à la majorité des voix, est motivée." J.B. SCOTT (ed.), *Texts of the Peace Conferences at The Hague, 1899 and 1907* (1908) 41.

[12] *See supra* n. 11.

[13] MIYOSHI, *supra* n. 5 at 133.

has a problem in its 'national' judges or judges of the nationality of each of the parties. The control by the parties over the arbitral process is technically multi-faceted. But, common to all aspects involved is the strong will of the parties to have such control. Thus, the parties are free to keep the oral proceedings or written pleadings closed, and they may even refrain from publishing the award.[14]

This tendency of arbitration shows its low degree of objectivity. But it is quite another matter whether improving its objectivity is possible or whether it can contribute to states going to court. Indeed experience suggests that states do not altogether prefer higher objectivity of arbitration.[15] When, for example, the International Law Commission (ILC) requested governments for their comments on its draft Model Rules on Arbitral Procedure, their replies included a considerable number of critical comments that an arbitral tribunal should properly be composed of arbitrators chosen by the parties, and that the draft rules make light of the will of the parties in procedural matters.[16] Likewise, the March 1960 Circular Note of the Secretary-General of the Permanent Court of Arbitration criticised the ILC's Model Rules on Arbitral Procedure for its provisions conflicting with the essential nature of arbitration that arbitrators are

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[14] The Arbitration Agreement of 10 July 1975 for the 1977 *Anglo-French Continental Shelf* case, Art. 9(4), provides that "Any question of the subsequent publication of the proceedings shall be decided by agreement between the two Governments". 18 RIAA 6. The *compromis* of 12 March 1985 for the 1989 *Guinea-Bissau/Senegal Maritime Boundary* case, Art. 9(4), provides: "Les deux Gouvernements décident ou non de publier la sentence et/ou les pièces de procédure écrites ou orales." 20 RIAA 124.

[15] MIYOSHI MASAHIRO, 'The state's propensity for control over the settlement of disputes', 104 *Aichi Journal of International Affairs* (1996) 43-55.

[16] *See*, e.g., the reply of the Belgian government dated 13 March 1953 which stated that the ILC's draft articles, based on the idea of compulsory arbitration, would seem hardly acceptable if they were to secure the support of the majority of states, and that, according to the traditional concept of arbitration, the parties have the right to decide whether to submit a dispute to arbitration, to choose the arbitrators and to set the limits of the *compromis*. UN Doc. A/2456, 'Report of the International Law Commission to the General Assembly', ILC Yearbook 1953-II p.232. The Brazilian delegation to the United Nations, in its *note verbal* of 24 March 1953, pointed out that the draft articles apparently ignored the fact that an arbitral tribunal owes its existence to the will of the parties. Ibid. 233. In its reply dated 6 March 1953, the Indian government expressed its view that the idea of the ICJ being conferred compulsory jurisdiction by application of one of the parties without the consent of the other, in regard to the arbitrability of an existing dispute or the existence of an alleged dispute was unacceptable, and that the ruling principle of international arbitration was that there should be agreement of both parties, at least in the initial stages of the procedure. Ibid. 234. The Netherlands government, in its reply of 1 April 1953, with comparatively moderate criticism made a clear distinction between arbitration and judicial settlement and stressed the mediatory nature of arbitration as well as the 'prerogatives' of the parties in regard to both the composition of the tribunal and the course of the procedure. Ibid. 235. The British government, in its reply of 27 February 1953, presented the exceptional view of accepting the idea of compulsory arbitration as drafted by the ILC. The US delegation to the United Nations in its *note verbal* of 11 March 1953 simply acknowledged that the draft would have positive value as a statement of 'desired goals' in the field of arbitration. Ibid. 237, 238.

chosen by the parties. The Note suggested that the existing procedures remain unchanged.[17]

In respect of the applicable law, the Statute of the PCIJ contained a clear provision on the application of international law, giving the impression that its applicable law was different from that of traditional arbitrations. The 1928 General Act for the Pacific Settlement of International Disputes provided for the three different methods of conciliation, judicial settlement and arbitration for different kinds of disputes. Following the General Act, the numerous bilateral treaties for the pacific settlement of disputes which were concluded in the next few years created a pattern of submitting legal disputes to judicial settlement and non-legal disputes to arbitration.[18] This classification of disputes would seem to have led on to the idea that different applicable laws should be applied to different kinds of disputes. Such understanding would have reinforced the clear distinction of arbitration and judicial settlement.

2.2. Comparison in the light of recent developments

Recent arbitral awards in territorial and boundary cases tend to show that they are not very different in reasoning from ICJ Judgments in similar cases. Judge M. LACHS admitted the general tendency of "increasing assimilation of arbitration to adjudication" on the one hand. On the other hand he approved the revision of the ICJ Rules of Court in respect of the formation of Chambers under Article 26(2) of the Statute, by stating "[p]rovided that the judicial character of the proceedings is respected, I see little reason to spurn this injection into adjudication of some aspects of arbitral practice which States find attractive'.[19] According to CHRISTINE GRAY and B. KINGSBURY, the substantive differences between arbitration and judicial settlement have become less precise.[20] This is

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[17] Permanent Court of Arbitration, *supra* n. 2, at 940-1.

[18] *See* United Nations, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948*, New York, 1949.

[19] M. LACHS, in A.H.A. SOONS (ed.), *International Arbitration: Past and Prospects* (1991) 41, as quoted in E. MCWHINNEY, 'International arbitration and international adjudication: the different contemporary lots of the two Hague Tribunals', *Canadian Yearbook of International Law* (1991) 406-407. The fact that one or two judges *ad hoc* were chosen to compose the Chambers in the *Gulf of Maine*, the *Burkina Faso/Mali Frontier Dispute* and the *El Salvador/Honduras Land, Island and Maritime Frontier* cases implies that the ICJ Chambers thus constituted are not different from arbitral tribunals. In the *Sicula Electronics Company* case of 1989 two sitting national judges joined the chamber.

[20] C. GRAY and B. KINGSBURY, 'Developments in dispute settlement: inter-state arbitration since 1945', 63 BYIL(1992) 98. In his dissenting opinion in the 1982 *Tunisia/Libya Continental Shelf* case, Judge GROS warned against the 'arbitralisation', as it were, of ICJ Chambers by saying that the Court must answer the request of states and declare the law, not attempt a conciliation by persuasion which does not belong to the Court's judicial role. ICJ Reports (1982) 156, para. 24. Before an ICJ Chamber, by its original objective, the parties are permitted to submit a single written pleading only (Art. 92(1) Rules of Court). But in fact this rule has not been observed in the *Gulf of Maine*, the *Burkina Faso/Mali* and the *El Salvador/Honduras* cases. Although in these cases

shown, for example, in the fact that post-war *compromis* overwhelmingly refer to international law as the applicable law and that arbitral tribunals in cases where there was no express choice of law clause in the *compromis* have uniformly chosen to apply international law.[21]

GRAY and KINGSBURY also stated that there is no sign that states want to use arbitration mainly for non-legal disputes. Nor do arbitral tribunals seem prepared to avow openly that they will indulge in non-legal decision-making.[22] There is no absolute contrast, they wrote, between judicial settlement and arbitration in respect of consideration for the parties. Some arbitral tribunals appear to have failed to successfully engage with both parties, as in the *Japanese House Tax* and *Beagle Channel* cases, while some ICJ Judgments, for instance in the *North Sea Continental Shelf*, *Tunisia/Libya Continental Shelf* and *Burkina Faso/Mali Frontier Dispute* cases have been notably successful in this regard.[23] With respect to the question of diplomatic compromise as an alleged defect of the traditional arbitral practice,[24] the authors stated that some tendency towards compromise is inherent in any process of collective decision. They observed that "[t]he *Anglo-French Continental Shelf* and *Guinea/Guinea-Bissau* maritime boundary arbitrations do not appear to involve more compromise or law-making than similar decisions of the ICJ".[25] I am entirely in agreement with these comments.

Thus, recent developments do not show marked differences between judicial settlement and arbitration. Yet they have not completely assimilated into each other: the parties' control over the composition of the tribunal and the various procedural aspects of the proceedings remains unchanged as essential to the nature of arbitration. It is in the applicable law that assimilation is relatively discernible. For example, since the 1969 *North Sea Continental Shelf* cases identified equitable principles as the applicable law in cases of maritime boundary delimitation, all subsequent similar cases, whether decided by the ICJ or arbitral tribunals, have spoken of equitable principles. They are, however, thought to be part of international law, and normally strictly distinguished from decisions *ex aequo et bono*.

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more than one written pleading was filed in accordance with Art. 92(2) Rules of Court, the practice could be interpreted to point to the 'arbitralisation' of ICJ chambers.

[21] GRAY and KINGSBURY, ibid. at 103-104.

[22] Ibid. 105.

[23] Ibid. 115.

[24] W.C. DENNIS, 'Compromise - the great defect of arbitration', 11 *Columbia Law Review* (1911) 493-513.

[25] GRAY and KINGSBURY, loc. cit. n. 20 at 116.

3. THE WORLD COURT AND ARBITRAL AWARDS

3.1. Significance of reference to arbitral awards

In international jurisprudence PCIJ and ICJ Judgments used to be thought to have higher authority, and placed on a higher level, than arbitral awards.[26] Such grading would seem to hold basically true even today. ICJ Judgments are normally cited in subsequent cases and scholarly writings even though they were rendered in the absence of one of the parties or remain unfulfilled.[27] In arbitrations instituted by agreement between the parties, no preliminary objection is made to the jurisdiction of the tribunal nor, generally, does one of the parties refuse to appear before the tribunal,[28] as in some cases before the ICJ. But as it is composed *ad hoc* for each case, an arbitral tribunal cannot be expected to pay particular attention to consistency or continuity of jurisprudence. The lack of such a systematic accumulation of case law as the PCIJ and ICJ have, would be the weakest point of arbitration.

But the tendency towards undisputed supremacy of ICJ Judgments over arbitral awards in international jurisprudence appears to have faded away now.[29] Indeed, the recent *compromis* submitting territorial and boundary disputes to arbitration mostly refer to international law as the applicable law,[30] and there is little difference between the ICJ and arbitral tribunals in respect of the applicable law. Furthermore, as a matter of fact some arbitral awards are frequently referred to in recent ICJ Judgments. This tendency is worthy to note. Such reference, however, appears not only in Judgments of the Court but also, quite often, in individual opinions of judges and the parties' written pleadings and oral arguments. References by the latter mean they are intended to strengthen the quoting parties' arguments, and thus have less objectivity.

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[26] According to HUGH THIRLWAY, former Secretary at the ICJ, at the time he entered the service of the Court in 1968, there was "an unwritten rule of drafting that the Court only referred specifically to its own jurisprudence, never to arbitral awards." *See* his 'The law and procedure of the International Court of Justice 1960-1989: part two", 61 BYIL (1990) 128 n. 471. In a private conversation with Sir FRANCIS VALLAT in London on 2 July 1988, I was told that the ICJ never refers to arbitral awards.

[27] E.g. the *Corfu Channel*, *Fisheries Jurisdiction*, *United States Diplomatic and Consular Staff in Teheran*, *Military and Paramilitary Activities in and against Nicaragua* cases.

[28] In the 1970 Turriff Construction (Sudan) Ltd. *v.* Government of the Republic of the Sudan case, the Government refused to appear before the tribunal and the Government-nominated arbitrator stayed away from the proceedings, later to be replaced. 17 *Nederlands Tijdschrift voor Internationaal Recht* [Netherlands International Law Review] (1970) 200-222.

[29] THIRLWAY, immediately after the sentence quoted above in n. 26, stated: "[t]his rule appears now to have been abandoned." THIRLWAY, *supra* n. 26 at 128 n. 471.

[30] A glance at ten *compromis* of arbitrations, from the *Palena Boundary* case of 1966 to the *Mount Fitz Roy* case of 1994, indicates that, except those for the *Rann of Kutch* and the *Dubai/Sharjah Boundary* cases, they provide for some form of international law as the basis of the decisions. In the *Dubai/Sharjah* case the award shows clearly that international law governed the case. *See* 91 ILR 678.

What is important is the validity and persuasive power of the reasoning of individual arbitral awards. Perhaps the clincher would be what impact they can have on subsequent arbitral and ICJ decisions.

3.2. Reference to arbitral awards by the ICJ

There are some arbitral awards frequently referred to in ICJ Judgments. It is proposed here to identify what part(s) of such awards have been cited by the ICJ and how this was done. Some of these items are then taken up in the analysis that follows.

3.2.1. Peaceful and continuous display of State authority

The principle of effective occupation was clearly propounded as the basic principle of acquisition of territory by the Permanent Court of Arbitration in the 1928 *Island of Palmas* case. The applicable law providing this classical precedent of effective occupation was "the principles of internatonal law and any applicable treaty provisions".[31] By highly legal reasoning, reputedly extremely careful and exemplary, the award states that:

> "[t]itles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceded territory."

Thus the award held that:

> "the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title."[32]

This principle purports that such an act of the state surpasses natural accretion, contiguity or discovery[33] to constitute a title to acquisition of territorial sovereignty.

It is well known that the principle has since been quoted or cited in a good number of similar territorial cases. In the *Legal Status of Eastern Greenland* case of 1933, the earliest territorial case decided by the PCIJ after *Island of Palmas*, the Judgment stated:

> "La prétention du Danemark ne s'appuie pas sur un acte d'occupation en particulier, mais invoque - pour se servir des mots qui figurent dans la sentence

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[31] *See* the Preamble of the Special Agreement of 23 January 1925, 2 RIAA 831.
[32] Ibid. 839.
[33] Ibid. 839, 854, 845.

> rendue le 4 avril 1928 par la Cour permanente d'Arbitrage dans l'affaire de l'île de Palmas – un titre résultant «d'un exercice pacifique et continu de l'autorité étatique sur l'île».”[34]

The PCIJ did not apply the principle at face value, but found that it was satisfied with very little in the way of the actual exercise of sovereign rights in the case of claims to sovereignty over areas in thinly populated or unsettled countries, such as Greenland, provided that the other state could not make out a superior claim.[35] In one of the most recent cases, the *Land, Island and Maritime Frontier Dispute* case of 1992 between El Salvador and Honduras, the ICJ Chamber quoted the crucial passage of the *Island of Palmas* case to say that “the law of acquisition of territory invoked by El Salvador is, in principle, clearly established and buttressed by arbitral and judicial decisions.”[36]

In this connection a word is in order about the 1909 *Grisbadarna* case in which the conduct of the state in the sea area in question was appreciated. The *compromis* provided that “le Tribunal aura à fixer cette ligne frontière en tenant compte des circonstances de fait et des principes du droit international”.[37] Indeed the arbitral tribunal delimited the territorial sea boundary with due account taken of the ‘circonstances de fait’.[38] The important circumstance that was taken into account was the conduct of the state concerned, and it was significant that other states acquiesced in it. This case was referred to by the ICJ Chamber in its Judgment in the *Gulf of Maine* case of 1984, but the Chamber did so because the United States had extensively discussed this arbitral award in its pleadings. The Chamber found, however, that the issue of territorial sea boundary between Norway and Sweden was entirely different from that before it, and that even if the differences between the two cases were minimised, it was unable to conclude that the conduct of the United States was sufficiently clear, sustained and consistent to constitute acquiescence.[39] In contrast to this negative evaluation of the *Grisbadarna* case by the Chamber in 1984, Judge AJIBOLA, in his separate opinion in the 1994 case of *Territorial Dispute* between Libya and Chad, positively evaluated the conduct of the state as discussed in the *Grisbadarna* case in relation to acquiescence.[40]

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[34] PCIJ Publications, Series A/B No. 53 p. 45.
[35] Ibid. 46.
[36] ICJ Reports (1992) 563 para. 342. In the *Libya/Chad Territorial Dispute* case of 1994, Judge AJIBOLA in his separate opinion quotes this principle in emphasising the acquiescence of Spain and other countries. ICJ Reports (1994) 81 para. 109. In the same case Judge SETTE-CAMARA's dissenting opinion also refers to this principle. Ibid. 98.
[37] 11 RIAA 153-4.
[38] Ibid. 161-162.
[39] ICJ Reports (1984) 309 para. 146.
[40] *See supra* n. 36.

3.2.2. Critical date

The notion of the critical date is used to denote the date on which the fact or act in question has a critical meaning, the date of the commencement of the dispute, or even a certain period of time during which the critical situation is thought to have lasted.[41] In the sense of a critical meaning the concept is said to have been used for the first time by MAX HUBER in his award in the *Island of Palmas* case.[42] According to the award, as the island was ceded from Spain to the United States as a result of the peace treaty of 10 December 1898, the essential point was whether at the time of the conclusion of the treaty the island formed a part of Spanish or Netherlands territory. The time referred to was called the 'critical moment', rather than the critical date, while the origin of the dispute was found in the visit by General LEONARD WOOD, then Governor of the Province of Moro, to the island on 21 January 1906.[43]

In the *Legal Status of Eastern Greenland* case, Denmark maintained that it had long established effective occupation there at the time of the alleged Norwegian occupation on 10 July 1931, whereas Norway argued that it had occupied a *terra nullius* on that date.[44] Thus it was held that the critical date was that particular date, and that it was not necessary that Danish sovereignty over Greenland should have existed throughout the period preceding the date. Even if the material submitted to the Court were to be found insufficient to establish such sovereignty, the Court said, this would not exclude a finding that it was sufficient to establish a valid title in the period immediately preceding the Norwegian occupation.[45] On this particular point, however, the Judgment failed to refer expressly to the *Island of Palmas* case.

It is well known that the critical date was extensively discussed in *The Minquiers and Ecrehos* case of 1953. In this case the point at issue was the date after which no subsequent acts of the parties had to be taken into account by the Court. France argued on the basis of the Anglo-French Convention on Fishery of 2 August 1839 that 1839 be the critical date, while the United Kingdom submitted that as the dispute had not 'crystallised' before the conclusion of the Special Agreement of 29 December 1950, this date should be considered as the critical date.[46] The Court found that no dispute had arisen before 1886 and

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[41] For a detailed discussion of the concept of the critical date, *see* G.G. FITZMAURICE, 'The law and procedure of the International Court of Justice, 1951-4: points of substantive law. Part II', 32 BYIL (1955-56) 20-44; D. BARDONNET, 'Les faits posterieurs à la date critique dans les différences territoriaux et frontaliers', *Le Droit International au Service de la Paix, de la Justice et du Développement: Mélanges Michel Virally* (1991) 53-78. The arbitral award in the 1966 *Palena Frontier* case states that the parties agreed that the critical date is not necessarily the same for all purposes. 16 RIAA 167.

[42] FITZMAURICE, ibid. at 21; R.Y. JENNINGS, *The Acquisition of Territory in Inter-national Law* (1963) 31.

[43] 2 RIAA 843, 836.

[44] PCIJ Publications Series A/B No. 53 p. 44.

[45] Ibid. 45.

[46] ICJ Reports (1953) 59.

1888, when France for the first time claimed sovereignty over the Ecrehos and the Minquiers respectively. But, in view of the "special circumstances of the present case", it held that "subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned".[47] The idea that post-critical date acts should also be taken into account had been suggested in the *Island of Palmas* case before,[48] but the *Minquiers* Judgment says nothing of this earlier case on this point.[49]

Other arbitral awards which discussed the critical date in one way or another include the 1966 Argentine-Chile *Palena Frontier* case, the 1977 *Beagle Channel* case, the 1981 *Dubai-Sharjah Boundary* case and the 1988 *Location of Boundary Markers in Taba* case between Egypt and Israel.[50]

3.2.3. Uti possidetis

The principle of *uti possidetis* was referred to in the *Burkina Faso/Mali Frontier Dispute* case of 1986 and the *El Salvador/Honduras Land, Island and Maritime Frontier Dispute* case of 1992, both decided by ICJ Chambers. The latter Decision quotes the 1933 arbitral award in the *Honduras Borders* case between Guatemala and Honduras in discussing *uti possidetis*. The ICJ Chamber, assuming that it should apply the principle of *uti possidetis juris*, according to which the new international boundaries follow the colonial administrative boundaries in Spanish America, states that the problem was to determine where those boundaries actually lay.[51] Thus it quotes the arbitration of 1933 in which the task of the arbitrator was to determine the 'juridical line' of the '*uti possidetis* of 1821'. But the quoted passage of the award conceded that, due to the lack of trustworthy information during colonial times, not only had the boundaries of jurisdiction not been fixed with precision, but also great areas had remained in which no effort had been made to assert any semblance of administrative authority.[52] Consequently the Chamber referred to this award in a negative sense.

The principle of *uti possidetis* was discussed in more general terms, but without reference to any earlier arbitral award dealing with it, in the *Burkina Faso/Mali Frontier Dispute* case. The ICJ Chamber was expressly requested to

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[47] Ibid.

[48] The arbitrator found that there could not be any question of ruling out the events of the period 1898-1906. 2 RIAA 866.

[49] In the 1975 *Western Sahara* case, one of the questions on which the Court was requested to give an advisory opinion was whether Western Sahara was *terra nullius* at the time of its colonisation by Spain. ICJ Reports (1975) p. 14, para. 1. But the Court held that it was not concerned to establish the critical date in the sense given to this term in territorial disputes. Ibid. 38 para. 76.

[50] *Palena Frontier* case, 16 RIAA 166; *Beagle Channel* case, 52 ILR 93; *Dubai/Sharjah* case, 91 ILR 590-4; *Taba* case, 20 RIAA 45. In the *Taba* case the tribunal called the entire period of the mandate (29 September 1923 to 14 May 1948) "the critical period". Award, para. 172.

[51] ICJ Reports (1992) 380 para. 28.

[52] 2 RIAA 1325.

resolve the dispute on the basis of the "principe de l'intangibilité des frontières héritées de la colonisation",[53] and felt unable to disregard the principle of *uti possidetis juris* since its application precisely gives rise to respect for the 'frontières héritées'.[54] According to the Chamber, the principle is not a special rule peculiar to the Spanish-American system of international law under which it was borne, but a principle of general scope which prevents the independence and stability of new states from being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[55] In other words, the fact of the new African states respecting the boundaries established by the colonial powers must be seen, in the opinion of the Chamber, as the application of a general rule in Africa.[56] Thus, the Chamber places this principle among the most important legal principles and yet makes no express reference to earlier arbitral awards dealing with it, notably the *Honduras Borders* case of 1933 in which the tribunal fully discussed the principle of Latin American origin.

In the 1994 *Libya/Chad Territorial Dispute* case, Judge AJIBOLA developed an extensive discussion of *uti possidetis* in Section VII of his separate opinion, where he quotes a passage at the outset of the arbitral award in the *Colombia/Venezuela Frontiers* case of 1922 that discusses the '*uti possidetis juris* of 1810'.[57] The Swiss Federal Council, as the arbitrator, shows a very clear picture of the principle[58] in its strictly legal treatment of the case.

3.2.4. Natural prolongation or appurtenance

The *North Sea Continental Shelf* cases of 1969, in defining the concept of continental shelf as the basis for its delimitation, determined it to be the seabed and its subsoil as a natural prolongation of the land territory of the coastal State.[59] In another part of the Judgment the same idea was expressed by the principle that 'the land dominates the sea'.[60] The ICJ Judgment did not mention a precedent in its development of the concept, but the same Court had this to say in the Anglo-Norwegian *Fisheries* case of 1951:

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[53] *See* Preamble of the *compromis* of 16 September 1983. ICJ Reports (1986) 557.
[54] Ibid. 565 para. 20.
[55] Ibid.
[56] Ibid. 565 para. 21.
[57] ICJ Reports (1994) 84-85 para. 118.
[58] 1 RIAA 228.
[59] ICJ Reports (1969) 22 para. 19. For a comment on this point, *see* R.Y. JENNINGS, 'The limits of continental shelf jurisdiction: some possible implications of the North Sea Case Judgment', 18 ICLQ (1969) 821-823, which sets store by the relevant clause of President TRUMAN's Proclamation of 28 September 1945 and Art. 2 of the Convention on the Continental Shelf of 1958 which gives another expression to it.
[60] ICJ Reports (1969) 51 para. 96. In the 1978 *Aegean Sea Continental Shelf* (Jurisdiction) case, the ICJ, on the basis of the *North Sea* cases, stated that "legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf". ICJ Reports (1978) 36 para. 86.

> ". . . il faut signaler de façon générale l'étroite dépendence de la mer territoriale à l'égard du domaine terrestre. C'est la terre qui confère à l'État riverain un droit sur les eaux qui baignent ses côtes." [61]
> "[La laisse de basse mer] est le plus favorable à l'État côtier et met en evidence le caractère des eaux territoriales comme accessoire du territoire terrestre."[62]

Here what was being considered was the territorial sea, and not the continental shelf, but the underlying idea would be the same. However, no reference was made to a precedent on this point either.

The concept of appurtenance was clearly expounded long before in the arbitral award in the *Grisbadarna* case of 1909:

> "principes fondamentaux du droit des gens, tant ancien que moderne, d'après lesquels le territoire maritime est une dépendance nécessaire d'un territoire terrestre".[63]

For unknown reasons this precedent has not been referred to in subsequent cases. Perhaps the concept had already been established as such a commonality at the time of the *Fisheries* case that it required no citation of a precedent, or else it might have been due to the unwritten law of the ICJ that it only refer to its own jurisprudence and never to arbitral awards.[64]

Attention may now be turned to the relationship between the doctrine of natural prolongation and delimitation of the continental shelf. The *North Sea* cases Judgement stated expressly in its operative part:

> "delimitation is to be effected . . . in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.[65]

That pronouncement would appear to give the impression that natural prolongation has a direct link to delimitation. If the *North Sea* cases presented an 'absolutist' doctrine of natural prolongation, the 1977 arbitral award in the *Anglo-French Continental Shelf* case slightly revised the doctrine. Referring to the *North Sea* cases on this point, the arbitral award stated: "[s]o far as delimitation is concerned, however, this conclusion states the problem rather than solves it".[66] It pronounced first in general terms:

> "[I]t is clear both from the insertion of the 'special circumstances' provision in Article 6 and from the emphasis on 'equitable principles' in customary law that

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[61] ICJ Reports (1951) 133.
[62] Ibid. 128.
[63] 11 RIAA 159.
[64] *See supra* n. 26.
[65] ICJ Reports (1969) 53 para. 101(c)(1).
[66] 18 RIAA 49 para. 79.

> the cardinal principle of 'natural prolongation of territory' is not absolute, but may be subject to qualification in particular situations."[67]

It then went on to say that "[t]he application of that principle [i.e. of natural prolongation] . . . has to be appreciated in the light of all the relevant geographical and other circumstances" and that "the effect to be given to the principle of natural prolongation of the coastal State's land territory is always dependent not only on the particular geographical and other circumstances but also on any relevant considerations of law and equity".[68]

It is with this logic that the award concludes that a physical feature called Hurd Deep-Hurd Deep Fault Zone in the English Channel should not be considered as a gap in the natural prolongation of the land territory. It adds, importantly, that "to attach critical significance to . . . the Hurd Deep-Hurd Deep Fault Zone in delimiting the continental shelf boundary . . . would run counter to the whole tendency of State practice on the continental shelf in recent years".[69] Thus the arbitral tribunal took a 'relativist' position on the doctrine of natural prolongation.

The *Tunisia/Libya Continental Shelf* case of 1982 referred to the Hurd Deep as a precedent[70] in turning down the argments of natural prolongation and geology which the parties developed most elaborately.[71] The Hurd Deep was also referred to in the *Gulf of Maine* case of 1984.[72] It would be another instance of the impact of the Hurd Deep that the rift zone which Libya claimed to be a major feature was rejected as a relevant factor to be taken into account in delimitation in the *Libya/Malta Continental Shelf* case of 1985.[73]

3.2.5. Customary law of maritime boundary delimitation

The *North Sea* cases of 1969 showed that the customary law of continental shelf delimitation is that "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances . . .".[74] The *Anglo-French Continental Shelf* case of 1977 contributed to the further elaboration of this law. The Court of Arbitration made an effort to fuse, as it were, the mentioned customary law and the delimitation rule as provided for in the 1958 Convention on the Continental Shelf into one. Its award stated on this point:

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[67] Ibid. 91 para. 191.
[68] Ibid. 92 para. 194.
[69] Ibid. 60 para. 107. The Court of Arbitration also took into account the fact that the United Kingdom had agreed to the drawing of a median line between it and Norway in disregard of the Norwegian trough in the 1960s.
[70] ICJ Reports (1982) 57 para. 66.
[71] Ibid. 43-47 paras. 38-44; 50-54 paras. 52-61.
[72] ICJ Reports (1984) 274 para. 46.
[73] ICJ Reports (1985) 34-7 paras. 35-41.
[74] ICJ Reports (1969) 53 para. 101(c)(1).

> "[T]he rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles."[75]

The 'combined rule' thus enunciated was later quoted in the *Gulf of Maine* case of 1984 as confirming the formula of customary law of the *North Sea* cases.[76] The quoted passage of the *Anglo-French* case award was further quoted as a 'much-quoted passage' in the *Greenland/Jan Mayen Maritime Delimitation* case of 1993.[77]

It is interesting to note that the *Gulf of Maine* case was concerned not only with the continental shelf but also the fisheries zone, and that the ICJ Chamber was requested to draw a single line of delimitation common to the two regimes. It is of great significance that the Chamber thought the 'combined rule' to be the guiding principle in determining the single boundary line with primary account taken of the geographical factors. The *Libya/Malta Continental Shelf* case, in which the ICJ was requested to decide on the continental shelf only, found that the principles and rules underlying the concept of the exclusive economic zone could not be left out of consideration, that the two institutions were linked together in modern law and consequently that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts.[78] Subsequently, the *Greenland/Jan Mayen* case of 1993 quoted the relevant passage of the *Libya/Malta* case Judgment in its entirety,[79] thus indirectly appreciating the formula of the *Anglo-French* award.

Another point of interest about the formation of customary law of maritime boundary delimitation is the fact that reference is made to the contribution of unspecified arbitral awards. In its context of reviewing the concept of 'relevant circumstances' in comparison with customary law and the provisions of Article 6 of the Convention on the Continental Shelf, the ICJ Judgment in the *Greenland/Jan Mayen* case states: "General international law, as it has developed through the case-law of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of 'relevant circumstances'. This concept can be described as a fact necessary to be taken into account in the delimitation process".[80] Arbitral jurisprudence is thus duly appreciated along with the ICJ case-law and the work of UNCLOS-III.[81]

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[75] 18 RIAA 45 para. 70.
[76] ICJ Reports (1984) 293 para. 92.
[77] ICJ Reports (1993) 58 para. 46.
[78] ICJ Reports (1985) 33 para. 33.
[79] ICJ Reports (1993) 58-9 para. 46.
[80] Ibid. 62, para. 55.
[81] Judge MOSLER made a statement of similar effect in his dissenting opinion in the *Libya/Malta* case. He mentioned 40 years of development of international law regarding delimitation of

3.2.6. Legal status of islands

In the *Anglo-French* case the size and importance of the Channel Islands was a point at issue. They were in the end accorded an enclave of continental shelf area on the French side of the continental shelf divided by a median line.[82] In the *Libya/Malta* case this treatment of the Channel Islands was compared with the legal status of the island State of Malta. Apart from its very small size as compared with that of Libya, Malta was assumed to have a continental shelf area on the basis of its legal status as an independent State.[83]

Again in the *Anglo-French* case the status of the Scilly Isles was discussed extensively. In view of the relationship between their distance from the mainland and that of Île d'Ouessant off the French mainland, a 'half-effect' was accorded to the Scillies based on considerations of equity.[84] This method of giving partial effect to islands of a State depending on their location, in the delimitation of maritime boundaries was later considered as a precedent for the half-effect to be accorded to the Kerkennah Islands in the *Tunisia/Libya* case of 1982 and to Seal Island in the *Gulf of Maine* case of 1984.[85] The method was further quoted in the *Greenland/Jan Mayen* case of 1993 as a precedent for first drawing a provisional median line and then adjusting it in the light of special circumstances.[86] The logic of the ICJ was that the existence of the Scilly Isles in the *Anglo-French* case was the special circumstance justifying the adjustment or shifting of a median line provisionally adopted.

3.2.7. Proportionality

In the *North Sea* cases it was found that equity requires that in the delimitation of continental shelf boundaries there be a reasonable degree of proportionality between the extent of the continental shelf appertaining to the coastal states and the lengths of their respective coastlines.[87] This principle has been applied in all subsequent cases of maritime boundary delimitation. But in the *Anglo-French* case the principle was constituted in the opposite way: an important consideration was how disproportion should be corrected. The award stated:

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maritime areas, and stated that further detailed developments must be left to the case-law, "not forgetting the arbitrations between France and Great Britain in 1977 and . . . between Guinea-Bissau and Guinea in 1985". ICJ Reports (1985) 114.

[82] 18 RIAA 88, 89-90 paras. 184 and 187.

[83] ICJ Reports (1985) 42 paras 52-3.

[84] 18 RIAA 116 para. 249. This finding of the Court of Arbitration was based on the practice of States which includes some instances of partial effect, and especially one precedent of half effect. This, however, is not identified in the award. Ibid. 117 para. 251. For a discussion of this point, *see* MIYOSHI MASAHIRO, 'The arbitration on the delimitation of the continental shelf in the English Channel' [in Japanese], 87 *Aichi Journal of Legal and Political Sciences* (1978) 146 n. 10.

[85] ICJ Reports (1982) 89 para. 129; ICJ Reports (1984) 337 para. 222.

[86] ICJ Reports (1993) 61 para. 51.

[87] ICJ Reports (1969) 52 para. 98.

> "In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. . . . [I]t is rather a question of remedying the disproportionality and inequitable effect produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts."[88]

This principle of proportionality as expressed conversely was employed in the *Gulf of Maine* case without reference to its being the formula of the *Anglo-French* case.[89] By contrast, the relevant passage of the arbitral award was quoted in its entirety in the *Libya/Malta* case,[90] where the conclusion was that "there is certainly no evident disproportion in the areas of shelf attributed to each of the Parties respectively such that it could be said that the requirements of the test of proportionality as an aspect of equity were not satisfied".[91] Again in the *Greenland/Jan Mayen* case the earlier cases of proportionality, including this conversely expressed principle, were quoted briefly but exhaustively.[92]

3.2.8. Obligation to negotiate in good faith

That negotiations between the parties to a dispute must be conducted in good faith has been pointed out time and again. The *North Sea* cases, for example, discussed the obligation of the parties to negotiate as far as possible with a view to arriving at an agreement, by referring to the PCIJ Advisory Opinion in the *Railway Traffic between Lithuania and Poland* case of 1931.[93] The Advisory Opinion, while discussing the obligation to negotiate, did not require the obligation to reach agreement.[94] But some years before in the *Chile/Peru Tacna-Arica* case of 1925, the arbitral award had already held that whilst good faith in negotiations was important, it was not illegal if the parties failed to agree in the end:

> "The question now presented is not whether the particular views, proposals, arguments and objections of either Party during the course of the negotiations should be approved, but as to the good faith with which these views, proposals, arguments and objections were advanced. The failure to agree upon a special protocol fixing the conditions of the plebiscite cannot therefore be regarded as being in itself a breach of the treaty."[95]

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[88] 18 RIAA 58 para. 101.
[89] ICJ Reports (1984) 323 para. 185.
[90] ICJ Reports (1985) 44-45 para. 57.
[91] Ibid. 55 para. 75.
[92] ICJ Reports (1993) 67-8 para. 66. *See* also ibid. 68-9 paras. 67-70.
[93] ICJ Reports (1969) 47-48 para. 87.
[94] PCIJ Publications, Series A/B No. 42, p. 116, where the Permanent Court said: "Mais l'engagement de négocier n'implique pas celui de s'entendre et notamment il n'en résulte pas pour la Lithuanie l'engagement et, en conséquence, l'obligation de conclure les accords administratifs et techniques indispensables pour le rétablissement du trafic sur la section de ligne de chemin de fer Landwarów-Kaisiadorys".
[95] 2 RIAA 933.

The same logic was used in the *Lac Lanoux* arbitration of 1957. The award affirmed the necessity of prior notification, but denied the obligation to secure the other party's agreement which would amount to the right of veto.[96]

Thus the obligation to negotiate in good faith, as developed in the *Lac Lanoux* and *North Sea* cases was referred to by Judge GROS in his dissenting opinion in the *Tunisia/Libya* case of 1982.[97]

4. DECISIONS *EX AEQUO ET BONO*

Over a long period of time there were very few cases in which the PCIJ or ICJ and arbitral tribunals decided expressly *ex aequo et bono*. However, a number of judicial and arbitral cases, especially in the sphere of maritime boundary delimitation, have been decided by the application of equity since the *North Sea* cases of 1969. Although in this contribution the examination of equitable cases is not specifically intended, it is proposed here to include some of such cases which might be suspected of having been decided *ex aequo et bono*.

4.1. Judicial cases

Among the cases decided by the PCIJ and ICJ there is none that has been clearly decided *ex aequo et bono*. But a few cases have been criticised for allegedly deciding *ex aequo et bono*. A case in point is the *North Sea* cases. In this first-ever case of continental shelf delimitation, Denmark and the Netherlands argued in favour of the application of the equidistance principle as laid down in the 1958 Convention on the Continental Shelf, while the Federal Republic of Germany as a non-party to the Convention asserted that 'just and equitable share' be the guiding principle. The Court rejected both contentions on the grounds that the first was not a customary rule of international law and that the second relied on the theory of distributive justice, and instead preached in favour of the application of equitable principles. In discussing equity, the Court maintained that distributive justice, which means attribution, was foreign to delimitation which means the identification of the boundary line between the overlapping continental shelf areas of coastal States. But it might be doubted whether the Court's Judgment did not involve any idea of distribution. For example, in its finding that given the comparable lengths of the coastlines of the three countries, the area of the continental shelf which accrues to Germany by the application of the equidistance principle would be unduly small in the light

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[96] The arbitral award states: "De toute façon, l'obligation de donner l'avis préalable ne renfermer pas celle, beaucoup plus étendue, d'obtenir l'accord de l'Etat avisé; le but de l'avis peut être tout autre que celui de consentir à [l'Etat] B l'exercise du droit de veto . . .". 12 RIAA 309.

[97] GROS stated: "Il n'y a pas de négociation, si chaque Partie, ou l'une d'elles, insiste sur sa propre position sans jamais envisager d'atténuation ou de modification." ICJ Reports (1982) 145 para. 4.

of the proportionality principle, there could be an indication that the Court might have taken distributive justice into account. Thus criticism could arise that such a consideration or finding is one *ex aequo et bono* or extraneous to the framework of law.[98]

It was found in the *Tunisa/Libya* case of 1982 that equitable principles are those which produce equitable results.[99] If that is so, it is hard to see how the application of equitable principles is distinguished from a decision *ex aequo et bono* which is also intended to provide an equitable solution.[100] In the *Libya/Malta* case of 1985, the Court held that in light of the great difference in the lengths of the coastlines of the parties, it was equitable to attribute a much larger continental shelf area to Libya by transposing the provisionally determined median line towards Malta through 18' of latitude.[101] Here a suspicion may arise that a consideration of proportionality did in fact mean a distribution of the continental shelf, a case of deciding *ex aequo et bono*. Furthermore, the Court's Judgement that it was justified to 'attribute' a larger shelf area to Libya in view of the great difference in length between the coasts of the two countries[102] conflicts with its own strong denial in the *North Sea* cases that delimitation included attribution of a shelf area. Still another point that is hard to understand is how the idea of shifting the provisional dividing line through 18', rather than say 10', of latitude may be justified. What is the right basis of calculation of 18', rather than 10', for the distance of transposition? How can it be claimed to be different from the past arbitral decisions *ex aequo et bono* in the estimation of damages or the calculation of the rate of interest on the damages?

A somewhat similar suspicion may be raised with regard to the Court's finding in the *Greenland/Jan Mayen* case. It would suffice here to refer to the individual opinions of three judges. In his separate opinion Judge ODA admitted that the Court's choice of "the line . . . *cannot* be categorized as *mistaken* because it represents one choice from an infinite number of potential lines of delimitation in this area", but "venture[d] to suggest that it was drawn in an arbitrary manner, unsupported by any sufficiently profound analysis".[103] Judge

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[98] *See* W. FRIEDMANN, 'The North Sea Continental Shelf cases – a critique', 64 AJIL (1970) 236: "But what can scarcely be doubted is that, by rejecting the criteria laid down in the convention and other documents, the Court, in effect, was giving a decision *ex aequo et bono*, under the guise of interpretation. The Court applied a kind of distributive justice while denying that it was doing so."

[99] The ICJ Judgment stated: "It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution." ICJ Reports (1982) 59 para. 70.

[100] *See* MIYOSHI MASAHIRO, *Considerations of Equity in the Settlement of Territorial and Boundary Disputes* (1993) 192.

[101] ICJ Reports (1985) 52 para. 73.

[102] ICJ Reports (1985) 50 para. 68, where the Court stated: "In the view of the Court, this difference is so great as to justify the adjustment of the median line so as to *attribute* a larger shelf area to Libya . . ." (emphasis added).

[103] Emphasis in original. ICJ Reports (1993) 117 para. 100.

SCHWEBEL in his separate opinion commented that "the Court by this holding of distributive justice has departed from the accepted law of the matter, as fashioned pre-eminently by it".[104] Judge SHAHABUDDEEN in his separate opinion stated that "the equitable principles which the Court applies lack concreteness to the point where the Court is in fact exercising a range of discretion which is practically indistinguishable from a power to decide *ex aequo et bono*".[105]

In this connection an intriguing comment made by a former judge of the International Court of Justice may be quoted. In his private letter addressed to ELIHU LAUTERPACHT in May 1978, Sir GERALD FITZMAURICE is said to have made some observations on LAUTERPACHT's critical comments on the way equitable principles were applied in the *North Sea* and *Anglo-French* cases, by confiding that:

> "where . . . the Tribunal is precluded by its Statute or terms of reference from deciding *ex aequo et bono, but is in fact doing just that*, it cannot avow it, and has to take refuge in silence."[106]

4.2. Arbitral jurisprudence

4.2.1. Claims cases

When discussing a decision *ex aequo et bono*, one cannot afford to ignore a considerable number of claims cases which have been decided on that basis. But since this contribution is intended to discuss territorial and boundary cases, it is proposed here to take up just a few claims cases. There are not so many *compromis* using the formula of *ex aequo et bono* as such, but arbitrations applying this basis of decision abound besides those which, while they were to be decided on the basis of, say 'absolute equity' or 'law and equity', would in fact have been decided *ex aequo et bono*.

A decision *ex aequo et bono* was made in the *Death of James Pugh* case of 1933 in accordance with the provisions to that effect in the *compromis*. On 30 June 1929 JAMES PUGH, an Irish seaman who had been drinking heavily for some hours in Colon in Panama, resisted arrest and was clubbed to death by the police. The arbitrator found that the clubbing was not in excess of the lawful discharge of police duties under the prevailing circumstances, and dismissed the claim of the British Government against the Government of Panama.[107] He acted under Article 3 of the *compromis*, "taking into consideration solely for

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[104] Ibid. 120.
[105] Ibid. 193.
[106] Emphasis Sir GERALD FITZMAURICE's. E. LAUTERPACHT, *Aspects of the Administration of International Justice* (1991) 125 n. 19.
[107] 3 RIAA 1441-53.

the finding of the facts the proofs which with regard thereto are to be found in the record, [to] decide *ex aequo et bono* on the questions".[108]

In the 1931 *Campbell* case, Major CAMPBELL by a signed document declared on 5 December 1912 that he abandoned his lease of a mining concession in Mozambique in favour of its legitimate owners without right to any indemnity, and the Government of Portugal consented in 1912 to indemnify CAMPBELL for damage suffered. The arbitrator was asked to decide on the effect of the declared abandonment and on the amount of indemnity if any was due. The *compromis* provided for "a speedy settlement of the question in accordance with the principles of law and equity".[109] But in the arbitrator's reasoning the calculation of the indemnity was shown to be made *ex aequo et bono*.[110]

In the *Tinoco* arbitration of 1923 the basis of decision was "existing Agreements, the principles of Public and International Law",[111] but the single arbitrator thought himself justified in proceeding *ex aequo et bono*, at least in part, and held that:

> "the [Royal Bank] is subrogated to the title of Costa Rica in the mortgage and that . . . Costa Rica should transfer and assign the mortgage to the bank for its benefit, together with any interest which may have been meantime collected thereon."[112]

The arbitral tribunal in the *Norwegian Shipowners' Claims* case of 1922 was to proceed "in accordance with the principles of law and equity".[113] But in a section of the award, the tribunal discussed "The Law Governing the Arbitration" and stated that "[t]he words 'law and equity' . . . can not be understood in the traditional sense in which they are used in Anglo-Saxon jurisprudence" but rather mean "general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State". In the view of the tribunal, the majority of international lawyers seem to agree on this understanding of the formula.[114] Thus the tribunal proceeded to assess the amount of compensation and interest *ex aequo et bono*.[115]

In the series of protocols of agreement of 1903 instituting claims of ten Euro-American States against Venezuela, the basis of decision was 'absolute equity',[116] but the arbitrations, at least in part, proceeded on a basis which is

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[108] Ibid. 1442.

[109] *See* Preamble of the 'Compromis d'arbitrage concernant les réclamations du Major Campbell' of 1 August 1930, para. 4, 2 RIAA 1147.

[110] Ibid. 1157.

[111] Art. 1 of the *compromis* of 12 January 1922, 1 RIAA 372.

[112] Ibid. 395.

[113] Art. 1 of the *compromis* of 30 June 1921, 1 RIAA 310.

[114] Ibid. 331.

[115] Ibid. 339, 340, 341.

[116] Art. 1 of the Protocol of Agreement between the United States and Venezuela of 17 February 1903, the earliest of ten such protocols: "The commissioners, or, in case of their disagreement, the

hard to be distinguished from deciding *ex aequo et bono*. For example, in the British-Venezuelan mixed claims commission, the umpire had this to say in his award:

> "The phrase 'absolute equity' used in the protocols the umpire understands and interprets to mean equity unrestrained by any artificial rules in its application to the given case."[117]

4.2.2. Territorial and boundary cases

Among the cases of territorial and boundary disputes the *Chaco* case of 1938 is the one of which the *compromis* expressly referred to *ex aequo et bono*. Article 2 provided that the boundary line should be determined by the Presidents of Argentina, Brazil, Chile, the United States, Peru and Uruguay "en leur qualité d'arbitres selon l'équité, lesquels, agissant *ex aequo et bono*, formuleront leur décision arbitrale conformément à la présente clause et aux clauses ci-après.'[118] The arbitrators acted on this basis of decision, and said that the decided boundary was equitable. The *compromis* in this case was, however, the Bolivia-Paraguay Peace Treaty, and the arbitration accordingly was an aspect of the post-bellum adjustment between the two countries involving considerations of peace and security.[119]

Similarly, a cease-fire agreement constituted the *compromis* for the 1968 *Rann of Kutch* case. The tribunal was directed under the agreement to act "in the light of [the parties] respective claims and evidence produced before it".[120] During the meetings of the tribunal in February 1966 the question arose whether it had the power to decide *ex aequo et bono*. After hearing the parties on this issue the tribunal decided that, as both parties pointed out, equity forms part of international law and therefore the parties were free to present and develop their cases with reliance on principles of equity. As the *compromis* did not authorize the tribunal clearly and beyond doubt to decide *ex aequo et bono* and the parties had not consented by any subsequent agreement to confer it the power to do so, the tribunal resolved that it had no such power.[121] Based on this understanding of the applicable law, the tribunal carefully proceeded to examine the huge volume of evidence presented by the parties. In the last part of the decision, or the opinion of the chairman of the tribunal in which the arbitrator nominated by Pakistan concurred, the two deep inlets on either side of Nagar Parkar (a peninsula-shaped Pakistani territory jutting into the Indian ter-

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umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation." 9 RIAA 115.

[117] Ibid. 444.

[118] 3 RIAA 1819.

[119] *See* MIYOSHI, *supra* n. 100 at 165.

[120] Art. 3 (ii) of the Agreement of 30 June 1965, 17 RIAA 8.

[121] Ibid. 11.

ritory) were awarded to Pakistan for considerations of peace and stability. The opinion of the chairman states:

> "In my opinion it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such."[122]

This consideration is highly political, and therefore extra-legal, in nature, and would go beyond the bounds of equity as part of law. It could thus be considered to be a decision *ex aequo et bono* which the tribunal categorically denied in its preliminary finding.

There are some other territorial and boundary arbitrations in which a consideration of compromise was given. In the otherwise strictly legalistic award of the *Beagle Channel* case of 1977, for example, an exceptional compromise decision was made:

> "If therefore, as the Court thinks, Argentina . . . obtained the whole of Patagonia north of the Dungeness-Andes line and east of the Cordillera of the Andes, it does not seem unreasonable to regard Chile as receiving *in principle* . . . the much smaller area between that line and Cape Horn . . .."[123]

The others include: the 1931 *Aaroo Mountain* case between Saudi Arabia and Yemen where the former made a full concession to the latter for a consideration of peace combined with a spirit of chivalry; the 1817 *Bay of Passamaquoddy Islands* case between Great Britain and the United States in which the arbitrators allegedly made diplomatic transactions; the 1914 Dutch-Portuguese *Island of Timor* case where consideration was given to avoiding undue advantage being obtained by one of the parties; the 1897 *Manica Boundary* case in which the arbitrator took into account the concession which Great Britain had made of granting a large area of territory in the north of the Zambezi to Portugal in compensation for what Portugal would lose in the Manica Plateau; and the 1961 Honduras-Nicaragua *Boundary Demarcation* case where the mixed commission devised an artificial line to reconcile the claims of the parties which both conformed to the treaty.[124]

On the whole, older arbitrations seem to have more examples of decisions *ex aequo et bono*. While in most of these cases the arvitrators were not directed to decide *ex aequo et bono*, they nevertheless wielded their discretion in deciding in that way. If the Permanent Court of International Justice and the International Court of Justice have never made a decision *ex aequo et bono*, it is because the parties have never consented to such a basis for decision. But as we

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[122] Ibid. 571.

[123] Emphasis in original; 52 ILR 144 para. 46.

[124] For a more detailed discussion of each of these cases, *see* MIYOSHI, *supra* n. 100 at 166-70.

have seen above, some judicial cases could substantially be suspected of having been decided by considerations *ex aequo et bono*.

Common to arbitration and judicial settlement in this connection seems to be the tribunal's consideration for the position of each of the parties, *i.e.* consideration to make its decision equitable and acceptable to them both. Here again a comment by FITZMAURICE may be quoted, on the importance of consideration for the litigant parties and especially the losing party:

> "States and parties in the international field – entities which are proud, sensitive, and always to some extent at the mercy of their own domestic public opinion – disposed also to be distrustful of legal procedures – need to be given the feeling that their arguments have been adequately considered and above all, understood – so that they have something to show for the risks they have taken in going to law."[125]

Inasmuch as the primary function of either institution is to settle disputes, the satisfactoriness of a decision would be the pre-condition for the parties to accept and fulfil it. It is needless to say, however, that it does not mean to arrange an easy compromise.

5. CONCLUSIONS

We have seen above that, while there are differences in degree in the parties' control over the composition of the tribunal and the conduct of proceedings, arbitration and judicial settlement in recent territorial and boundary cases do not present marked differences in the basis of their decisions nor in their reasoning. This is not, of course, to deny that there are some characteristic arbitrations, such as the *Rann of Kutch*, the *Taba Boundary* and the *Dubai/Sharjah Boundary* cases, in which very careful consideration was given to the claims of the parties. In the *Rann of Kutch* case an exceptional attempt was made to show the draft text of the award to the parties for comment before its formal adoption. This arrangement is recorded in the 'Introductory Note' of the award,[126] and implies that it was made with the consent of the parties. In the *Taba* case a chamber of three arbitrators was set up within the tribunal of five, so that they were allowed to have consultations with the agents of the parties for settlement. This was the first-ever attempt of its kind in any arbitration, although un-successful. The procedure was in fact expressly provided for in the *compromis*[127] on the basis of the consent of the parties. All these cases are exceptional, however. Most recent arbitrations on territorial and boundary cases

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[125] G.G. FITZMAURICE, 'Hersch Lauterpacht and his attitude to the judicial function", 50 BYIL (1979) 11.

[126] 17 RIAA 3.

[127] Art. 9 of the *compromis* of 11 September 1986, 20 RIAA 111.

basically do not seem to be different from similar ICJ cases as far as the basis of their decisions and the reasoning of the decisions are concerned.

This notwithstanding, arbitration and judicial settlement exist side by side. The latter institution is not shunned any more as it once was, and is recently even struggling with an overload of pending cases.[128] On the other hand, the United Nations General Assembly has moved to adopt a resolution granting the status of permanent observer to the Permanent Court of Arbitration.[129] Coupled with its own adoption of the Optional Rules for Arbitrating Disputes between Two States in October 1992,[130] the Permanent Court of Arbitration may hopefully be re-activated. Also noteworthy is the establishment of the International Tribunal for the Law of the Sea, the members of which have recently been elected, with specialized functions as specified in the United Nations Convention on the Law of the Sea of 1982.

There is no doubt that such diversification of international adjudicative organs is a reflection of the will of states. It is a welcome trend for the promotion of peaceful settlement of international disputes. But since the basic attitude of states remains inclined to have as much control over the process of dispute settlement as possible,[131] there is not much ground for optimism that they will actually respond favourably to this trend of diversification of adjudicative bodies.[132]

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[128] *See* e.g. the report of the Study Group of the British Institute of International and Comparative Law, *supra* n. 6.

[129] UNGA Resolution 48/3, 13 October 1993. A commentator stated that the move reflects the attitude of states to support the existence of the Permanent Court of Arbitration in parallel with the International Court of Justice. S. ROSENNE, 'Some thoughts on international arbitration today', 27 *Israel Law Review* (1993) 458-459.

[130] PCA, *supra* n. 7.

[131] *See* MIYOSHI, *supra* n. 15.

[132] A notable critical comment on the proliferating adjudicative organs in the field of human rights protection is found in: W.M. REISMAN, 'Creating, adapting and designing dispute resolution mechanisms for the international protection of human rights", in *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (Proceedings of a Forum co-sponsored by the American Society of International Law and the Graduate Institute of International Studies, Geneva, Switzerland, May 13, 1995, reproduced in 9 *ASIL Bulletin* 8-14).

AN ENVIRONMENTAL REGIME FOR THE ARCTIC AND THE ANTARCTIC ANALOGY

Zou Keyuan*

The Arctic region, like the Antarctic, is one of the remotest areas on earth. It is mainly composed of an open sea of about 12.2 million square kilometres, and also includes the lands around the Ocean. With the strengthening of global efforts of environmental protection, the significance of the Arctic environment has become more salient as opposed to the past emphasis on national jurisdiction, human population, natural resources development as well as strategic importance. For example, ozone depletion above Antarctica and the Arctic has become a universal concern. Any change in the polar environments is of global impact,[1] and the protection of the Arctic environment is an indispensable part of global protection strategy. For that reason, in 1993 China began to consider a scientific expedition to the Arctic for the purpose of providing a scientific basis for the living environment, also the Chinese, in the 21st century. On 6 May 1995, the first Chinese Arctic expedition reached the North Pole.[2] While there is little doubt about the need of comprehensive protection of the Arctic, differences exist on the means and approaches, both at governmental and academic levels. The present paper will explore the possible applicability of the existing environmental protection regime for Antarctica to the Arctic region.

1. ARCTIC ENVIRONMENTAL CONCERNS AND EXISTING LEGAL ARRANGEMENTS

1.1. Environmental Concerns

The Arctic region generally comprises the Arctic Ocean, its marginal seas and islands, and part of the land of eight sovereign States - Canada, Denmark (for Greenland), Finland, Iceland, Norway, Russia, Sweden and the United

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[1] See MIKHAIL E. NIKOLAYEV, 'The Arctic in a global community', in L. LYCK & V.I. BOYKO (eds.), *Management, Technology and Human Resources Policy in the Arctic (The North)* (Dordrecht: Kluwer Academic Publishers, 1996) 3-9.

[2] See LI SHUANKE, 'Towards the North Pole: the first Chinese Arctic scientific expedition', 48 *Science* no. 2 (1996) 29-32 [in Chinese]. See also WEI MENGHUA, 'Thoughts on the North Pole's investigation', *Science and Technology Review* no. 8 (1993) 39-40 (in Chinese).

Asian Yearbook of International Law, Volume 6 (Ko Swan Sik *et al.*, eds.
, pp. 29-61

States (for Alaska). The Arctic is, however, defined in many ways and with different disciplines using different criteria.[3] Some scholars tend to define the Arctic and the sub-Arctic together as including, in North America, the northern part of the Canadian provinces, including all Labrador, and the whole of the Northwest Territories, the Yukon Territory, and the State of Alaska; in Eurasia, the territory north of about latitude 65^0N in Scandinavia, with the boundary dropping to 63^0 in European USSR (now Russia) and 57^0 in Asia, and including all Kamchatka; the whole of Greenland, Svalbard, and Iceland; and at sea, the Arctic Ocean, with the Barents Sea, the Norwegian Sea (including the Greenland Sea), Denmark Strait and the Labrador Sea on the Atlantic side, and the Bering Sea, the Sea of Okhotsk and the Gulf of Alaska on the Pacific side.[4]

The Arctic referred to in the present paper is the area centred on the Arctic Ocean with a boundary line roughly at 60^0 north latitude for the convenience of comparison with the Antarctic region which has been defined by the Antarctic Treaty as at 60^0 south latitude, with some exceptions for management purposes.[5]

The Arctic is essentially a basin, the centre of which is occupied by a large mediterranean sea, and which is divided into two main basins by the submarine Lomonosov Ridge which runs from the north coast of Greenland across the Pole to the New Siberian Islands. Each basin has depths of over 4,000 metres.[6] The continental shelf which borders the land masses is narrow on the North American side (20-50 nautical miles) but on the Eurasian side it extends to 450 miles and more, and is usually under 100 metres in depth. Peninsulas and island groups divide this wide shelf into four marginal seas: the Chukchi, East

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[3] As BERNARD STONEHOUSE depicts: "Geographers often use the polar circles, for they provide two regions exactly equivalent in size and shape, which are useful for comparisons. Lawyers and politicians sometimes prefer other parallels of latitude, closer to or farther from the poles. Biologists look for ecological limits, for example the boundary between tundra and forest, to define polar ecological zones. Oceanographers use boundaries between water masses, and the northern and southern limits of pack ice, to create maritime polar regions. Climatologists use isotherms (lines joining points of equal mean temperatures) to define polar climatic regions." See his book *North Pole South Pole: A Guide to the Ecology and Resources of the Arctic and Antarctic* (Toronto & Montreal: McGraw-Hill Ryerson, 1990) at 13. For the purpose of legislation, e.g. the U.S. Arctic Research and Policy Act of 1984 defines the Arctic as "all United States and foreign territory north of the Arctic Circle and all United States territory north and west of the boundary formed by the Porcupine, Yukon, and Kuskokwim Rivers; all contiguous seas, including the Arctic Ocean, and the Beaufort, Bering, and Chukchi Seas; and the Aleutian chain". See J.H. ZUMBERGE, 'Introduction', 29 *Oceanus* no. 1 (1986) at 4. This definition, if followed rigorously, would exclude the southern part of Greenland and a large part of Siberia.

[4] TERENCE ARMSTRONG, GEORGE ROGERS & GRAHAM ROWLEY, *The Circumpolar North: A Political and Economic Geography of the Arctic and Sub-Arctic* (London: Methuen & Co., 1978) 1-2.

[5] This definition has been already concurred by OSHERENKO and YOUNG as they consider all the lands and seas lying to the north of 60^0 north latitude to be Arctic. See GAIL OSHERENKO and ORAN R. YOUNG, *The Age of the Arctic: Hot Conflicts and Cold Realities* (Cambridge University Press, 1989) at 11.

[6] MOIRA DUNBAR, 'The Arctic setting', in R.ST.J. MACDONALD (ed.), *The Arctic Frontier* (University of Toronto Press, 1966) at 11.

Siberian, Laptev, and Kara seas. A fifth sea, the Barents, with rather deeper waters, leads out of the Arctic Ocean into the Norwegian Sea.[7] The main body of the Arctic Sea is covered the year round with pack ice. The greatest number of icebergs in the north is found in Baffin Bay.[8] On the land there are glaciers in all mountain areas. Ice covers about 2.3 million sq km in the northern regions. Over four-fifths of this area of ice is located in Greenland.[9] Throughout most of the Arctic and sub-Arctic all or part of the ground contains a layer which is perennially frozen and which is called permafrost.[10]

In contrast to Antarctica, the climate in the Arctic is moderate because it is a maritime area. The moderating maritime influence on temperature is quite noticeable in spite of the ice that covers the water surface for much or all of the year.[11] The mean annual temperature in the North Pole has been estimated to be -23^{0}C and that in Central Greenland is -33^{0}C. Total precipitation in the Arctic is low and ranges from about 15 to less than 5 inches per year.[12] The humidity of the air is also low, because the capacity of cold air to hold water vapour is low.

A characteristic feature of the northern flora and fauna is that the number of species is relatively small while the number of individuals in a species is relatively large. This results in instability in the ecosystem, since the number of inter-relationships is limited and the dependence of any single element on the others is considerable.[13] As to the flora, there are grasses, sedges, lichens and dwarf willows in the tundra; and conifers, birches and aspens in the taiga or boreal forest. All this is the basis for a considerable animal life. Land animals which remain the year round in the high Arctic include polar bear, muskox, Arctic fox, lemming, snowy owl, raven and ptarmigan. There are others in the forest such as reindeer (called caribou in North America), elk (called moose in North America), bear and many small fur-bearers. Of the birds, which are numerous in the northlands in summer, most migrate to the south in winter – the Arctic tern going as far as Antarctica, a round trip of 30,000km.[14] The productivity of the Arctic waters is rather low and fish fauna is poor both in species and in numbers. Seal and walrus, and polar bear are found throughout the area in varying numbers.[15] In regions where the floating ice gives way to open water, and warmer Atlantic or Pacific waters mix with those of the Arctic, biological productivity is, however, at a high level. Large populations of

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[7] DUNBAR, ibid., at 11.
[8] ARMSTRONG et al., *supra* n. 4 at 13.
[9] Ibid.
[10] DUNBAR, *supra* n. 6 at 10.
[11] Ibid., at 13.
[12] Ibid., at 15.
[13] ARMSTRONG et al., *supra* n. 4 at 18.
[14] Ibid., at 18.
[15] DUNBAR, *supra* n. 6 at 11.

cod, halibut, salmon, char, shrimp and crab are found. Sea mammals are relatively abundant.[16]

In view of the above, the Arctic environment is extremely sensitive to environmental stress. Recovery from ecological damage occurs slowly, especially due to the following four features: low temperatures, fluctuating seasonal light (short summer 'growing' periods and long winter 'rest' periods), short food chain and variable abundance of Arctic fauna and flora.[17] Arctic ecosystems are vulnerable to disturbance by humans. Permafrost may melt and lead to extensive erosion if vegetative cover is disturbed. The effects of air pollution are magnified in ecological impact by thermal inversions in the winter and by the inherent sensitivity of lichens to sulfur dioxide. Oil pollution is accentuated by concentration under and between the ice cover and by slow degradation and greater toxicity at low temperature.

It is argued that there are three real threats to the Arctic environment: poor knowledge of ecosystemic effects, technological poverty and political inability to regulate adequately the growth of economic activity in the region.[18] The main and more direct threat to the Arctic environment should, however, be the pollution resulting from human activities within and/or outside the Arctic region. The sources and causes of this pollution are complex; much pollution originates in lower latitudes and is carried by wind and ocean currents to higher latitudes. The pollution effects take the form of Arctic haze, stratospheric ozone depletion and the accumulation of toxic substances, including radioactivity, in Arctic terrestrial, marine, and aquatic environments. The Arctic region is also expected to be affected by the atmospheric consequences of global warming.[19] The most serious accident of oil spill ever around the Arctic area is the *Exxon Valdez* accident on 24 March 1989.[20]

1.2. Existing legal arrangements

The main characteristic of the Arctic legal regime is the element of bilateral or regional arrangements and domestic legislation, with only a few multilateral treaties. Strictly speaking, the only international agreement which directly

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[16] ARMSTRONG et al., *supra* n. 4 at 18.

[17] DAVID VAN DER ZWAAG, KEYUAN ZOU and CYNTHIA LAMSON, 'The Polar areas', in EDGAR GOLD (ed.), *Maritime Affairs: A World Handbook* (Longman, 2nd ed. 1991) at 304.

[18] See OLAV SCHRAM STOKKE, 'Environmental threats in the Arctic', in LASSI HEININEN (ed.), *Arctic Environmental Problems* (Finland: Tampere Peace Research Institute, 1990) 23-25.

[19] Canadian Institute of International Affairs (CIIA), National Capital Branch, *The Arctic Environment and Canada's International Relations* (Ottawa: Canadian Arctic Resources Committee, 1991) at 7.

[20] See US Congress, Office of Technology Assessment, *Polar Prospects: A Minerals Treaty for Antarctica* (US Government Printing Office, September 1989) at 140. For reference, see A. NELSON-SMITH, 'Biological consequences of oil-spill in Arctic waters', in LOUIS REY (ed.), *The Arctic Ocean: The Hydrographic Environment and the Fate of Pollutants* (London: MacMillam Press, 1982) 275-293.

addresses Arctic environmental protection and conservation is the 1973 Polar Bear Convention between the so-called Arctic states: Canada, Denmark, Norway, the United States and the Soviet Union. It restricts harvesting of polar bears (with an exception for traditional harvesting) and calls on states to

> "take appropriate action to protect the ecosystems of which polar bears are a part, with special attention to habitat components such as denning and feeding sites and migration patterns, and shall manage polar bear populations in accordance with sound conservation practices based on the best available scientific data".[21]

Research is to be coordinated and the results shared, and the parties shall consult "on the management of migrating polar bear populations". Furthermore, the Arctic countries acknowledged for the first time that the environment of the polar sea constitutes a region and that these and other conservation efforts are to be pursued in the circumpolar context.

Among other treaties which apply to the areas around the Arctic was the Convention on the Preservation and Protection of Fur Seals which was concluded by four countries - Great Britain (for Canada), Japan, Russia and the United States - on 7 July 1911 and which was the first multilateral fur seal treaty.[22] It applied to the North Pacific including the Bering Sea, and was significant in terms of environmental protection and conservation in the Arctic.[23] In 1957 the treaty was replaced by a new one among the same parties,[24] which lapsed in October 1984 because the United States did not approve a new four-year extension.[25] Another could be the 1973 Convention on Fishing and Conservation of Living Resources in the Baltic Sea and the Belts.

On the other hand, there are quite a number of bilateral agreements between respective Arctic countries. In 1971, Canada and the former Soviet Union signed the General Exchanges Agreement which contains specific provisions relating to the Arctic.[26] On 16 April 1984 the Agreement was augmented by the signing of the Protocol of Canadian-Soviet Consultations on the Development of a Programme of Scientific and Technical Cooperation in the Arctic and the North.[27] On 20 April 1988 the Protocol on Problems of Monitoring and Environmental Protection was signed. The two countries agreed to focus joint efforts on a number of scientific and technical areas, including comprehensive monitoring of pollution of the environment and its

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[21] Polar Bear Convention, Oslo, 15 November 1973, CTS No. 24 (1973). Also reprinted in (US) *Treaties and Other International Acts Series* 8409.

[22] Text reproduced in 5 AJIL (1911) 267-274.

[23] Under the US definition the Arctic includes the Bering Sea.

[24] Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, 314 *United Nations Treaty Series* 105.

[25] ERIK FRANCKX, 'Environmental protection: an Arctic-Antarctic comparison', in J. VERHOEVEN, P. SANDS and M. BRUCE (eds.), *The Antarctic Environment and International Law* (Graham & Trotman, 1992) at 114.

[26] CIIA, *supra* n. 19 at 51.

[27] Ibid., at 52.

ecological consequences; modelling of environmental processes and of the processes and impacts of atmospheric pollutants; and relations between human health and atmospheric pollution.[28] In November 1989, Canada and the Soviet Union signed a General Agreement on Arctic Cooperation[29] which spelled out the areas of cooperation, the forms such cooperation might take, the modes of implementation and the functions of the mixed commission established under the Agreement. Also in 1989, an Environmental Cooperation Agreement was concluded, a framework agreement providing for cooperation on a wide range of environmental issues. The Agreement for the first time raised the commitment to cooperate in environmental matters to the level of an internationally binding agreement.[30]

In the US-Canadian relationship, there has been an Agreement since 1974 on a joint Marine Contingency Plan for Spills of Oil and other Noxious Substances.[31] In 1977 an annex was added to it, dealing with "waters off the Arctic coast of Canada and the United States in the Beaufort Sea".[32] The Agreement on Arctic Cooperation, signed on 11 January 1988 relates primarily to navigation by ice-breakers of the two countries in their respective Arctic waters.[33] In addition, Canada and the United States have established joint working groups which meet annually to discuss arctic science, ice studies and hydrocarbon development in the Beaufort Sea.[34] They also signed the Agreement on the Conservation of the Porcupine Caribou Herd on 17 July 1987.[35]

As to the cooperation in the Arctic between the United States and the Soviet Union/Russia, an Agreement was concluded on 23 May 1972 on Cooperation in the Field of Environmental Protection. This is a comprehensive Agreement covering some eleven specific areas of cooperation, including "Arctic and subarctic ecological systems", and providing for its implementation by a joint committee.

The Scandinavian countries such as Norway and Finland may be leading the way with their cooperative effort in assisting former Soviet industry to reduce emissions of toxic chemicals into the Arctic atmosphere. In September 1990, the former Soviet government reached an agreement with the governments of Finland and Norway to rebuild the smelters with Finnish and Norwegian technology.[36]

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[28] Ibid.

[29] Agreement between the Government of Canada and the Government of the USSR on Cooperation in the Arctic and the North, 20 November 20 1989, CTS No. 21 (1989).

[30] CIIA, *supra* n. 19 at 52-53. For details on the cooperation in the Arctic by the two countries, see *Building International Relations in the Arctic: 25 Years of Canada-USSR Cooperation* (Ottawa: Indian and Northern Affairs Canada, 1991).

[31] Ottawa, 19 June 1974, CTS No. 22 (1974).

[32] Ottawa, 30 August 1977, CTS No. 25 (1977).

[33] Agreement between the Government of the United States and the Government of Canada on Arctic Cooperation, Ottawa, 11 January 1988, 28 ILM (1987) 141.

[34] CIIA, *supra* n. 19 at 54.

[35] Text reproduced in the *Third Annual Report of the Porcupine Caribou Management Board.*

[36] Ibid., at 54.

In addition, environmental cooperation has occurred between other Arctic countries. For example, Canada and Denmark signed a Marine Environmental Protection Agreement on 16 August 1983 which is aimed to protect common waters and the economic and social welfare of their inhabitants from oil pollution risks. The Agreement covers the waters between West Greenland and Canada (Baffin Bay, Davis Strait, Nares Strait) and provides response mechanisms for the control of pollution.[37]

Domestic legislation has a particular influence on the development of the legal regime for Arctic environmental protection. Just a few significant ones will be mentioned here. In *Canada*, the Arctic Waters Pollution Prevention Act, enacted in 1970, concerns the prevention of pollution in "areas of the Arctic waters and adjacent to the mainland and islands of the Canadian Arctic up to 100 miles (i.e. 160 km)". The dumping of waste into Arctic waters from ships is prohibited. Safety control zones are also established to prevent shipping accidents and to expedite the clean-up of oil spills should they occur.[38] In the former *Soviet Union*, the Presidium of the Supreme Soviet of the USSR issued a decree on 26 December 1984 to improve the protection of nature in the regions of the Far North and in the sea areas adjacent to the northern coastline of the USSR.[39] In the *United States*, a major legal document specifically relating to the Arctic is the Arctic Research and Policy Act of 1984. The main purposes of this Act are:

(1) to establish national policy, priorities, goals and to provide a Federal program plan for basic and applied scientific research with respect to the Arctic, including natural resources and materials, physical, biological and health sciences, and social and behavioral sciences;
(2) to establish an Arctic Research Commission to promote Arctic research and to recommend Arctic research policy;
(3) to designate the Natural Science Foundation as the lead agency responsible for implementing Arctic research policy; and
(4) to establish an Inter-agency Arctic Research Policy Committee to develop a national Arctic research policy and five year plan to implement that policy.[40]

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[37] 23 ILM (1984) 269-274.

[38] *Revised Statutes Canada* (1970), c. 2 (1st Supp.). For comments on and analysis of this Act, see R. BILDER, 'The Canadian Arctic Waters Pollution Prevention Act: new stresses on the law of the sea', 69 *Michigan Law Review* (1970) 1; L. HENKIN, 'Arctic anti-pollution: does Canada make - or break - international law?" 65 AJIL (1970) 131; A. UTTON, 'The Arctic Waters Pollution Prevention Act, and the right of self-protection', 7 *UBC Law Review* (1972) 221; J. SHERRIN, 'International law and Canadian Arctic Pollution Control', 38 *Albany Law Review* (1974) 921; P. NEWBURY, 'The international environmental law of the sea: the Canadian Arctic Waters Pollution Prevention Act and its effects, 1970-1980', 4 *Suffolk Transnational Law Journal* (1980) 138-61.

[39] The Decree is reprinted in LAWSON W. BRIGHAM (ed.), *The Soviet Maritime Arctic* (Annapolis: Naval Institute Press, 1991) 311-316.

[40] *Public Law* 98-373, 31 July 1984. Reproduced in M.A. STENBAEK (ed.), *Arctic Policy* (Centre for Northern Studies and Research, McGill University, 1987) A-12 to A-18.

We have to realize that in the Arctic, effective international cooperation in regard to environmental protection is seldom easy to achieve. Unlike Antarctica where a complex of cooperative arrangements in the realm of science emerged during the course of the International Geophysical Year of 1957-58, the Arctic has during the 20th century been plagued by a variety of expansive and often conflicting jurisdictional claims. This is the main obstacle to the establishment of an environmental regime in the Arctic. With the Cold War gone by, the military threat in the Arctic has been greatly reduced but the contradiction between economic development and environmental protection is salient. The inadequacy of a mixed strategy combining economic growth and environmental protection is nowhere more evident than in the Arctic. This is another obstacle. Finally, unlike the Antarctic Treaty System, the Arctic region lacks an international regime and leaves the task of protection to a larger extent to the surrounding national states. Without proper coordination and effective cooperation among all the Arctic states, there is little hope for protection of the Arctic.

2. TOWARDS COMPREHENSIVE PROTECTION

In the Arctic no single international legal regime has ever existed, and the state of the art of national environmental protection differs widely. With the worsening of the polar environment and the strengthening of efforts towards global protection, a comprehensive regime is necessary. Two severe marine oil pollution accidents that took place in the early half of 1989 influenced the evolution and development of polar environmental policies and promoted environmental measures: one was the *Bahia Paraiso*, which occurred in the Antarctic area, and the other was the *Exxon Valdez* disaster off Alaska near the North Pole. Furthermore, some initiatives took place in the past years. Continuation of these initiatives could finally lead to the establishment of a regime for environmental protection in the Arctic.

2.1. The Murmansk initiative

In the context of the increasing openness of the Soviet Union with respect to Arctic research and environmental protection, on 1 October 1987 the then Soviet leader MIKHAIL GORBACHEV delivered a remarkable speech in Murmansk, calling for cooperation among all interested States and a zone of peace throughout the Arctic. He emphasized the importance of the cooperation of the northern countries in environmental protection. He proposed to jointly draw up an integrated comprehensive plan for protecting the natural environment of the north. He stated that:

> "We attach special importance to the cooperation of the northern countries in environmental protection. The urgency of this is obvious. It would be well to

> extend joint measures for protection of the marine environment of the Baltic, now being carried out by a commission of seven maritime States, to the entire oceanic and sea surface of the globe's North.
>
> The Soviet Union proposes drawing up jointly an integrated comprehensive plan for protecting the natural environment of the North. The North European countries could set an example to others by reaching an agreement on establishing a system to monitor the state of the natural environment and radiation safety in the region. We must hurry to protect the nature of the tundra, forest tundra(taiga), and northern forest areas."[41]

Substantial progress has been made since GORBACHEV's address. For example, the circumpolar conference on Arctic scientific research proposed in the address was held in Leningrad in December 1988. Earlier that year, in March, all eight Arctic states had agreed to form an International Arctic Science Committee (IASC), and, in August 1990, they signed the Founding Articles establishing the IASC.[42]

The IASC is a non-governmental international scientific organization, and a counterpart of the Scientific Committee on Antarctic Research. It is to encourage and facilitate international consultation and cooperation in all fields of scientific research concerned with the Arctic. It is governed by a council comprising representatives of national scientific organizations in Canada, Denmark, Finland, France, Germany, Iceland, Japan, the Netherlands, Norway, Poland, Sweden, the United Kingdom, the United States, and the USSR/Russia.[43] The main substantive work of the IASC will be undertaken by international scientific working groups. Although the IASC does not directly address international cooperation on environmental protection in the Arctic, its establishment and function has no doubt considerable influence over the future comprehensive regime.

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[41] MIKHAIL GORBACHEV, address in Murmansk, 1 October 1 1987. See Foreign Broadcast Information Service (FBIS)-Sov-87-191, 2 October 1987. For comments on the initiative, see EVGENIA ISSRALIAN, 'Gorbachev's Murmansk initiative', in F. GRIFFITHS (ed.), *Arctic Alternatives: Civility or Militarism in the Circumpolar North* (Toronto: Samuel Stevens, 1992) 269-277; and T.E. ARMSTRONG, 'Soviet proposals for the Arctic: a policy declaration by Mr Gorbachev', 24 *Polar Record* no. 148 (1988) 68-69.

[42] The US Arctic Commission, established under the Arctic Research and Policy Act of 1984, in its report to the President and the Congress of the United States called for the creation of an International Arctic Science Committee in 1988. VLADIMIR GOLITSYN, 'The Arctic - on the way to regional cooperation', 1 *Marine Policy Reports* (1989) at 97.

[43] The Founding Articles are reprinted in 4 *Arctic Research of the United States* (1990) 67-69. For details on its establishment, see 'The International Arctic Science Committee: from conception to birth', *ibid.*, 65-66.

2.2. The Finnish initiative

At the end of 1988, the Finnish government contacted the other governments of the 'Arctic Eight' to garner support for a framework treaty on the Arctic environment which could later have more specific protocols attached to it. On 12 January 1989 the Finnish government sent a proposal to the seven other Arctic countries. It analyzed some relevant factors and took into account the fact that the equally fragile Antarctic environment has been taken care of fairly effectively through the Antarctic Treaty System.[44] The proposal was divided into two parts and the second part was a working paper which discussed both the substance of the proposal and certain details.

The working paper started from the fact that the ecosystem of the Arctic is very fragile. Due to the extreme climatic and ecological conditions, the flora and the micro-organisms in this area can only very slowly be renewed or, after disturbances of the Arctic equilibrium, revived. The most important threats to the Arctic environment, as the working paper identified, are climate change, pollution of the marine environment, and exploitation of the living and nonrenewable resources. The development of the living resources in the Arctic should be based on the principles of the World Conservation Strategy.[45]

It was further stated in the working paper that effective protection of the Arctic requires development of three things: intergovernmental cooperation, scientific research and monitoring of the ecosystems. Since there exists no comprehensive regime concerning the conduct of human activities having an adverse impact on the Arctic environment or its resources, the Government of Finland deemed it necessary to initiate an intergovernmental process with a view to elaborating coordinated and concerted action for the protection of the Arctic environment, which could lead to a declaration, convention or other multilateral arrangement. It was proposed that such action should be taken by the eight countries that possess sea and land areas north of the Arctic Circle.[46] As a result, governmental representatives of the Eight attended a Consultative Meeting on the Protection of the Arctic Environment in Rovaniemi, Finland, in September 1989, the first such intergovernmental gathering of the Arctic states.

2.3. Further developments

Begun with the Finnish Initiative, the process has moved with several consultative meetings among the Arctic states. On 14 June 1991, at the First Ministers Conference on the Protection of the Arctic Environment, also held in

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[44] ESKO RAJAKOSKI, 'Multilateral cooperation to protect the Arctic environment: The Finnish Initiative', in *The Arctic: Choices for Peace and Security -- Proceedings of a Public Inquiry* (West Vancouver: Gordon Soules Book Publishers, 1989) at 56.

[45] *Ibid.*, 56-57.

[46] *Ibid.*, 57-58.

Rovaniemi, governmental representatives from Canada, Denmark, Finland, Iceland, Norway, Sweden, the Soviet Union and the United States issued a Declaration on the Protection of the Arctic Environment. They also adopted an Arctic Environmental Protection Strategy to begin to better address six key environmental problems - persistent organic contaminants, oil pollution, heavy metals, noise, radioactivity and acidification. The Strategy, though a non-binding political declaration, commits the Parties to implementing a four-point action program:

- an Arctic monitoring and assessment program (AMAP) to monitor the effects of anthropogenic pollutants in the region through the establishment of an organization task force;
- protection of the Arctic marine environment, using preventive and other measures, applied directly or through international organizations with regard to origin;
- establishment of a regional emergency prevention, preparedness and response capability; and
- coordination of research and facilitation of data exchange on conservation of Arctic flora and fauna.[47]

The adoption of the Strategy marks a cornerstone towards comprehensive protection of the Arctic environment among the Arctic States. Since then, some more daunting proposals have been advocated. A significant one among them is the proposal to establish an International Arctic Council initiated by Canada.[48] According to this proposal, an Arctic Council must ensure the peace and security of the Arctic, help save the Arctic environment from the contamination that comes with disrespectful industrial development in the Arctic and elsewhere, and help secure justice for the region's aboriginal peoples.[49]

At the non-governmental level, it is remarkable that the native peoples in the Arctic have increasingly been playing an important role in the protection of the Arctic environment. This is illustrated by the Inuit Circumpolar Conference (ICC) which groups the Inuit population from Alaska, Canada and Greenland. This is important because it is the first time that a transnational private organization, which has no connection with the respective governments of the different countries, is trying to formulate rules for the exploitation of Arctic resources. They start from the principles that the Arctic environment is theirs, that it has been the base of their lives for centuries, and that there is no reason

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[47] The Declaration on the Protection of the Arctic Environment and the Arctic Environmental Protection Strategy are reprinted in 5 *Arctic Research of the United States* (1991) 29-35; and 30 ILM (1991) 1624-1669.

[48] The idea of an Arctic Council is said to have been first proposed by the Canadian Prime Minister MULRONEY during a speech in Russia in November 1989. JOHN HANNIGAN, *The Proposal for an Arctic Council: What Position Should the Government of the Northwest Territories Take?*, Circumpolar and Scientific Affairs Publication Series 92-11 (Indian and Northern Affairs Canada, February 1992) at iv.

[49] For details, see Arctic Council Panel, *To Establish an International Arctic Council: A Framework Report* (Ottawa: Canadian Arctic Resources Committee, May 1991).

for outside foreign powers to interfere with this.[50] The Inuit Circumpolar Conference developed a Comprehensive Arctic Policy and an Inuit Regional Conservation Strategy. As early as 1985, it was attempting to define policies and standards which would provide and promote conservation and sustainable development in the Arctic. The Inuit Conservation Strategy takes its inspiration from the World Conservation Strategy and ensures that the responsibility for the implementation of conservation measures will remain in the hands of those who are directly affected by its management.[51] In 1991, the ICC, the Nordic Sami Council and the Association of Small Peoples of the Soviet Union organized an Arctic Leaders Summit in Copenhagen, bringing together aboriginal and non-aboriginal leaders from circumpolar nations for discussions on international issues effecting Arctic aboriginal peoples.[52] Bilaterally, Canadian Inuvialuit and Alaskan Inupiat in 1988 finalized a polar bear management agreement providing for the establishment of two groups, a Joint Commission and a Technical Advisory Committee.[53] This growing awareness among the native peoples in the Arctic has introduced a new dimension into the Arctic environmental policies and law.

In a nutshell, the basic features of legal regimes governing comprehensive protection of the Arctic are taking discernible form. At present, however, they still lack the definition, consistency and sophistication of a mature system able to cope effectively with the complex problems arising out of the interaction of politics and the environment in a community of national sovereign states.

3. THE ANTARCTIC ANALOGY AND THE ARCTIC

Strict environmental regulations may render polar activities more expensive, but environmental concerns are also stimulating new interest in the poles. As to their similarities, both poles contain a valuable record of how the earth has responded to past climate changes, and both will provide clues about how it can be expected to change in the future.

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[50] LOUIS REY, 'Resource development in the Arctic regions: environmental and legal issues', in D.G. DALLMEYER & L. DEVORSEY (eds.), *Rights to Oceanic Resources* (Martinus Nijhoff, 1989) at 174.

[51] See PETER JULL, *Politics, Development and Conservation in the International North* (Ottawa: Canadian Arctic Resources Committee, 1986) 67-68.

[52] VAN DER ZWAAG et al., *supra* n. 17 at 309.

[53] C.D. HUNT, 'Legal aspects of implementing sustainable development in Canada's northern territories', in J.O. SAUNDERS (ed.), *The Legal Challenge of Sustainable Development* (Calgary: Canadian Institute of Resources Law, 1990) 285-286.

3.1. Significance of the analogy

In terms of legal arrangements, the two polar legal regimes would have the following characteristics: (a) in both regions, sovereignty is in dispute, although the problem is somewhat different with respect to Antarctica and to the Arctic. This makes it mandatory for each regime to provide for internal accommodation of the interests involved; (b) both regimes are based on the desire to uphold and foster cooperation concerning demilitarization, scientific research, protection of the environment, and economic uses; (c) in both regimes the institutional structures which provide for the channelling of the cooperation exhibit certain peculiarities and even similarities; and (d) both regimes rely on and presuppose the collaboration of certain states which form the 'inner circle' of institutionalized cooperation.[54]

On the other hand, the differences between the north and south poles are explicit at least in terms of their respective geographical structures. In the legal and political perspective, the following has been pointed out by ORAN YOUNG: (a) unlike the circumstances prevailing in the Antarctic, extensive North/South interactions between southern metropolis and Arctic hinterlands have long been the norm in the Far North; (b) the Antarctic region was not an arena for the deployment and operation of major military systems, whereas the Arctic was an area of growing strategic significance to both superpowers and an area for the regular deployment of critical weapons systems; (c) no industrial or commercial activities were taking place in Antarctica, while the Arctic is the scene of world-class industrial operations; (d) despite dramatic evidence concerning the occurrence of a seasonal ozone hole over Antarctica, the environmental impacts of the activities of advanced industrial societies located in the mid-latitudes are even more profound in the north polar region than in the south polar region; (e) Antarctica does not constitute an ancestral homeland for sizeable groups of indigenous peoples.[55]

The above common and different characteristics of the two poles render a comparison significantly meaningful. Besides, the peculiar natural environment of polar regions is of global significance; any change in it would result in unpredictable effects upon the climate or environment in other regions of the earth. So, the protection of the polar regions is a mirror for the protection of the global environment, and the polar regions are the testing ground for global protection. If we could not protect the polar regions well, we would have no hope for our common future. The current state of human progress has raised high expectations concerning environmental protection in a global context. The Rio Declaration, which was adopted in June 1992, provides that states shall cooperate in a spirit of global partnership to conserve, protect, and restore the

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[54] R. WOLFRUM, 'The Polar regions: legal aspects', in L. CAFLISCH and F. TANNER (eds.), *The Polar Regions and Their Strategic Significance* (Geneva: Graduate Institute of International Studies, 1989) 3-4.

[55] ORAN R. YOUNG, *The Arctic in World Affairs* (Seattle: University of Washington, 1989) 12-15.

health and integrity of the earth's ecosystem. With increasing global environmental protection, comprehensive protection of polar regions becomes more and more important and a critical link in the chain of global environmental protection.

In the political and legal domain, the success of the Antarctic Treaty in its two major purposes - keeping the peace and providing a mechanism for close scientific cooperation - has led many to wonder if something of the kind could ever be worked out for the Arctic.[56] While it could be very desirable to obtain a measure of international agreement to govern the Arctic, the differences between the Arctic and the Antarctic pose considerable difficulties in the way ahead. Some even flatly denied the idea as such by saying that

> "simplistic comparisons between the Arctic and the Antarctic do more to confuse the prospects for international cooperation in the Arctic region than to shed light on this matter. The mere fact that interested parties have had considerable success in establishing cooperative arrangements for one polar region does not entitle us to conclude that the other polar region is ripe for progress in these terms."[57]

Nevertheless, environmental protection in both polar regions is closely related with global environmental protection, even though a "brief consideration of the Antarctic experience"[58] is far from enough to reach a correct and objective conclusion. It would, however, be equally simplistic to dismiss the potential applicability of the Antarctic experience to the Arctic, especially in the current situation where global issues are so interdependent and relevant regimes interact. More and more people with breadth of vision have realized the importance of the Antarctic experience for Arctic affairs. Even Canada, which is the most conservative country among all Arctic States and has a passive attitude towards the Antarctic, has admitted the importance and significance of the Antarctic experience.[59] The Antarctic Treaty, as regarded by the Canadians, is one of the world's most successful examples of an internationally accepted, flexible conflict resolution mechanism, in which a common search for shared scientific knowledge, protection of the environment, and the sustained management of common resources take precedence over individual national goals. For this reason, some Canadians have advocated that there should be an Antarctic-type treaty in the Arctic, with reasonable and shared access for everyone in a peace-

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[56] Various references can be made to STONEHOUSE, *supra* n. 3, at 205-206; ARMSTRONG et al., *supra* n. 4, at 277; FRED ROOTS, 'Cooperation in Arctic science: background and requirements', in GRIFFITHS (ed.), *supra* n. 41 at 152.

[57] YOUNG, *supra* n. 55 at 15.

[58] *Ibid.*, at 13.

[59] W.P. ADAMS, P.F. BURNET, M.R. GORDON & E.F. ROOTS, *Canada and Polar Science* (Ottawa: Department of Indian Affairs and Northern Development, March 1987) at 17 et seq.

ful sort of way. Although the Antarctic model is not perfect, it still provides a starting point for something equally important in the North.[60]

The Antarctic Treaty System (ATS) includes the Antarctic Treaty of 1959, the measures in effect under that Treaty, and its associated separate legal documents, including the 1972 Convention for the Conservation of Antarctic Seals (CCAS),[61] the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),[62] the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) which, however, was put aside after its adoption by the Antarctic Treaty Consultative Parties (ATCPs).[63] The latest development within the ATS is the Protocol on Environmental Protection to the Antarctic Treaty (PEPAT), adopted in Madrid on 4 October 1991.[64] According to the Protocol, the whole Antarctic area is to be designated as a natural reserve, devoted to peace and science.

The Antarctic Treaty is the core of the whole Antarctic Treaty System. The effectiveness of the ATS depends upon the validity of the Treaty. If there were a similar legal arrangement for the Arctic, tension and potential conflict would be reduced and environmental protection strengthened. The Antarctic Treaty contains at least three aspects which may have implications for the Arctic region and could also be applied here.

3.2. International cooperation and scientific research

Scientific activities in Antarctica began much earlier than the emergence of the legal regime and in fact contributed to its establishment. The Antarctic Treaty reaffirms the freedom of scientific investigation and cooperation. It confers upon any country in the world the right to conduct its scientific research at any spot in Antarctica according to its capability. In order to promote international cooperation in this regard, the states parties agreed to exchange scientific information and personnel among them and to encourage the establishment of cooperative working relations with international organizations which have scientific and technical interest in Antarctica. With the legal guarantee of the Antarctic Treaty, international cooperation of scientific research has worked quite satisfactorily at Antarctica. In particular, progress in our knowledge of world climate change is largely due to research carried out in Antarctica.[65]

As to individual countries, a typical example can be drawn from the Chinese practice. China, as a leading developing country in the world, has bene-

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[60] GORDON HODGSON, 'Editorial: who owns the land?" 41 *Arctic* (1988) at iii.

[61] See *Handbook of the Antarctic Treaty System* (7th ed., 1990), Part IV, 4105.

[62] Text is reprinted in *ibid.*, 4209.

[63] For the whole text, see *Antarctic Treaty: Final Report of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources* (Wellington, 1988) 43-109.

[64] ATS Doc. XI ATSCM/2/3/2, 3 October 1991.

[65] ROLAND DUMAS, 'The Antarctic in world politics', 10 *International Challenges* (1990) at 5.

fited a lot from other countries, especially at its first stage of Antarctic activities under the provision of the international cooperation in the Antarctic Treaty, Japan offered training to Chinese explorers before the first Chinese expedition; the Soviet Union gave assistance; Chile and Argentina helped in choosing a suitable site for China's first Antarctic station; and the United States and New Zealand shared their Antarctic experiences with Chinese scientists.[66] Such scientific cooperation more or less softened tensions and promoted friendly relations among the countries concerned.

Scientific activities in the Arctic began as early as those in the Antarctic. Usually scientists from various countries cooperate and help each other. Unfortunately no legal framework exists to stabilize and promote such cooperation. We may recall that, in SCAR's[67] meeting in Oslo in August 1970, it was decided to request the International Council of Scientific Unions to establish an Arctic sister-organization of SCAR, a so-called SCAB, i.e. 'Scientific Committee for the Arctic Basin', but the plan later died out.[68] Only in recent years the possibility was explored to establish an 'Arctic SCAR' to enhance international scientific cooperation in the Arctic region. Interestingly, such kind of discussion first took place at the SCAR meeting in 1986 when representatives of several countries at that meeting felt that the time was propitious, in light of both the international political situation and the needs of science. In February 1987, a formal meeting among the Arctic countries was held in Oslo. The meeting was historic in the sense that for the first time senior people from all countries with territories north of the Arctic Circle had come together to discuss cooperation in Arctic science. There was a general consensus on the need for an international organization devoted to such cooperation.[69] After several consecutive fruitful meetings, the countries concerned signed the Founding Articles of the International Arctic Science Committee (IASC) on 28 August 1990 at Resolute Bay, Canada.

According to those Founding Articles, IASC is a non-governmental scientific organization established to encourage and facilitate international consultation on and cooperation in scientific research concerned with the Arctic. The Committee covers all fields of Arctic science and provides a forum for discussion, exchange of information and cooperation. It is composed of a Council, a

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[66] For details, see ZOU KEYUAN, 'China's Antarctic policy and the Antarctic Treaty System', 24 *Ocean Development and International Law* (1993) 237-255.

[67] The Scientific Committee on Antarctic Research (SCAR) is a coordinating organization subordinate to the International Council of Scientific Unions. SCAR is to initiate, promote and coordinate scientific activity in Antarctica, with a view to framing and reviewing scientific programmes of circumpolar scope and significance. The Constitution of SCAR is reprinted in *Handbook of the Antarctic Treaty System* (7th ed., 1990) Part 4 at 4401. For reference, see J.H. ZUMBERGE, 'The scientific committee on Antarctic research and the Antarctic Treaty System', in Polar Research Board (ed.), *Antarctic Treaty System: An Assessment* (Washington: National Academy Press, 1986) 153-168.

[68] SKAGESTAD, *infra* n. 88 at 172-173.

[69] Loc. cit. n. 43 at 65.

Regional Board, Working Groups, the Arctic Science Conference and a Secretariat. The establishment of the IASC is quite meaningful in terms of establishing an international legal regime in the Arctic if we recall that SCAR also preceded the Antarctic Treaty.[70]

3.3. Legal arrangement for territorial sovereignty

The sovereignty issue in the Antarctic is very complicated and was a major obstacle to international cooperation and scientific research in territory. There are seven countries which formally made territorial claims over parts of the Antarctic. The first claim was made by Britain in 1908. Since then, six other countries, one after another, have also made claims in Antarctica: New Zealand in 1923, France in 1924, Australia in 1933, Norway in 1939, Chile in 1940 and Argentina in 1942. These claims are pie-shaped, extending from 60°S latitude to the South Pole, except for the undefined northern limit of the Chilean[71] and the northern/southern limits of the Norwegian.[72] The bases of the claims vary from discovery, historic rights and symbolic act to geographic contiguity, sector principle, etc., but they are not sufficient in international law to support the claims. Furthermore, the claims made by Argentina, Britain and Chile overlap each other. All the claims together cover 85% of the Antarctic continent, leaving about 15% unclaimed (the Marie Byrd Land) which was tacitly reserved for the US.

The US has never officially made territorial claims, nor has it recognized the claims made by other countries. It has, however, reserved for itself the right to make territorial claims in the future. A similar position is taken by Russia. The rest of the world community of states has never accepted these claims or rights to make claims.

The controversy on Antarctic territorial sovereignty during the 1940s-1950s was a serious problem among the relevant countries. The tension and rivalry resulting from the territorial claims was, however, softened by the International Geophysical Year in 1957-1958. There was a gentleman's agreement among the countries conducting scientific investigations in Antarctica that they would not engage in legal or political argumentation during that period, in order for

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[70] We have to note that the International Geophysical Year was a catalyst for the Antarctic Treaty but it failed in the Arctic context.

[71] One of the reasons was articulated as "Chile is a single geographic unit which extends from Arica (on the northern border with Peru) to the South Pole". JACK CHILD, 'Latin *lebensraum*: the geopolitics of Ibero-American Antarctica', 10 *Applied Geography* (1990) at 294.

[72] For the purpose of avoiding disadvantages resulting from the 'sector principle' for her rights or interests in the Arctic. In fact, AMUNDSEN individually claimed for Norway a circular area comprising the plateau around the South Pole and named it 'King Haakon VII Plateau'. JOHN HANESSIAN, Jr., 'National interests in Antarctica', in TREVOR HATHERTON (ed.), *Antarctica* (New York: Praeger, 1965) at 21.

the scientific programme to proceed without impediment.[73] The International Geophysical Year represented a major turning point for scientific research in Antarctica, and provided a sound foundation for the development of Antarctic scientific research in a wide range of disciplines of natural science. Politically, it became a catalyst for the negotiation of the Antarctic Treaty.

The Antarctic Treaty freezes the different legal positions of the state parties regarding territorial claims. Article IV of the Antarctic Treaty provides:

> "1. Nothing contained in the present Treaty shall be interpreted as:
> a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
> b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
> c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
> 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting, or denying a claim to territorial sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

The provision created an ingenious solution to the delicate issue of territorial claims which otherwise would have caused great confrontation, even armed conflict, around Antarctica.[74] Thus the *status quo* of Antarctica maintained by the Antarctic Treaty has effectively prevented it from becoming the scene or object of international discord. The bifocalism in Article IV of the Antarctic Treaty is in fact only a *modus vivendi*, but it successfully put aside the tough issue of Antarctic sovereignty after all, and instead established the basis for international cooperation in the Antarctic continent.

In early years, the sovereignty problem posed a serious issue around the Arctic, as it did in the *Eastern Greenland Case*.[75] Over time, however, almost all territorial disputes have been settled. Some exceptions relate to delimitation of some maritime areas among the countries concerned or between Arctic countries and the international community.[76] Tracing back into history, sover-

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[73] P.C. DANIELS, 'The Antarctic Treaty', in R.S. LEWIS and P.M. SMITH (eds.), *Frozen Future: A Prophetic Report from Antarctica* (New York: Quadrangle Books, 1973) at 35.

[74] Irrespective of the Cold War during the 1950s-1960s which culminated in the Berlin and Cuban crises, the two superpowers cooperated well in Antarctic affairs. And during the Falkland/Malvinas War in 1982, the delegates from respectively Britain and Argentina sat together, with other Antarctic Treaty Consultative Parties, to negotiate the Antarctic minerals regime.

[75] PCIJ Ser. A/B, No. 53 (1933).

[76] It is recalled that Hand Island, less than a mile in length and located between Greenland and Ellesmere Island at 80°49'N, is still contested between Canada and Denmark. FRANCKX, *supra* n.

eignty issues in the Antarctic and the Arctic interacted. For instance, the sector principle was applied in both regions by some of the territorial claimants. The sector principle/theory was first invoked by a Canadian Senator, PASCAL POIRIER, in 1907 as a basis for claiming sovereignty over all of the islands north of Canada. He advocated that "all the lands between the two lines up to the North Pole should belong and do belong to the country whose territory abuts up there."[77] It was later supported by some other scholars.[78] In practice, Canada and the Soviet Union openly or tacitly apply this theory to their respective Arctic territorial claims, but it was rejected by other Arctic States and the rest of the world community. Likewise, six of the claimants of Antarctic territories also use this theory as one of the bases of their claims. As one authority put it, the sector principle has not developed as a principle of customary law, neither general nor regional, and cannot serve as a root of title for the acquisition of sovereignty, particularly not to sea areas.[79]

The only legal arrangement for territorial sovereignty in the Arctic is the 1920 Svalbard Treaty which granted Norway full and absolute sovereignty while setting some conditions on its exercise of sovereignty. The salient principles of the Treaty are demilitarization and neutralization of the region, and free access for and equal treatment of the state parties and their subjects with regard to the conduct of certain forms of economic activity on Svalbard. The Svalbard arrangement is different from the Antarctic arrangement in that the Antarctic model may be characterized as a 'cooperation-apparatus without a solution', while the Svalbard model may be termed a 'solution without a cooperation-apparatus'. With a view to these factors, it is natural to emphasize the dynamic character of the Antarctic model as compared to the static character of the Svalbard model.[80]

Another question which is closely related to the sovereignty issue over polar regions is whether the concept of common heritage of mankind (CHM) should apply to them and the resources therein. It is not possible for the polar regions to be recognized as CHM at present time nor in the near future, although they are often categorized as the 'global commons'.[81] Nevertheless, there is a tendency of these areas advancing towards becoming CHM, but, because of their global environmental importance and unlike the legal arrangement for the deep seabed in the 1982 UN Convention on the Law of the Sea,

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25 at 115.

[77] *Canadian Senate Debates*, 20 February 1907 at 271; cited in DONAT PHARAND, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988) at 10.

[78] See D.H. MILLER, 'Political rights in the Arctic', 4 *Foreign Affairs* (1925) 47-60; and W.L. LAKHTINE, 'Rights over the Arctic', 24 AJIL (1930) 703-717.

[79] PHARAND, *supra* n. 77 at 79.

[80] GUNNAR SKAGESTAD, *infra* n. 88 at 181.

[81] For details, see ZOU KEYUAN, 'The common heritage of mankind and the Antarctic treaty system', 38 *Netherlands International Law Review* (1991) 173-198; and DONAT PHARAND, 'L'Arctique et l'Antarctique: patrimoine commun de l'humanité', 7 *Annals of Air and Space Law* (1982) 415-430.

the arrangement as such, if applied to the polar regions, should be environment and conservation-oriented rather than towards economic development.

In 'polar literature', the question whether the Arctic is CHM is much less discussed than that with regard to the Antarctic. A simplistic perception may arise in the fact that all territories in the North have already been attributed and there is little debate on sovereignty. Consequently, there are hardly areas beyond the limits of national jurisdiction in the Arctic region, and there is no room for application of the CHM concept. The possibility of such application has been explored and advocated by a number of scholars. As LOUIS REY wrote:

> "One of the world's most precious wildlife sanctuaries, the last frontier, the delicate remnants of nature's original schemes, the Arctic is a unique feature which is part of the common heritage of mankind and as such, deserves reverence and protection."[82]

A similar argument was made by a Canadian lawyer, THOMAS R. BURGER, who noted that "all nation-states who are the joint custodians of the circumpolar basin" should "for all mankind, participate in the stewardship of the resources of that region".[83] According to others, the CHM principle could materialize in the Arctic context by establishing institutions for that purpose.[84] Whether the Arctic should be classified as CHM is still a matter of debate, but in any case the sea areas in the Arctic beyond the limits of national jurisdiction are part of CHM, even under the UNCLOS arrangement.

3.4. Consultative mechanism

As provided in Article IX of the Antarctic Treaty, the ATCPs shall meet regularly for the purposes of exchanging information, consulting each other on matters of common interest pertaining to Antarctica, and formulating measures in furtherance of the principles and objectives of the Antarctic Treaty, including measures regarding: (a) use of Antarctica for peaceful purposes only; (b) facilitation of scientific research in Antarctica; (c) facilitation of international scientific cooperation in Antarctica; (d) facilitation of the exercise of the rights of inspection provided for in Article VII of the Treaty; (e) questions relating to

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[82] LOUIS REY, 'The Arctic: mankind's unique heritage and common responsibility', 19 *Arctic and Alpine Research* no. 4 (1987) 346.

[83] T.R. BURGER, 'The north as frontier and homeland', in *The Arctic*, *supra* n. 44 at 41. The Arctic Council Panel also recognized the Arctic as common heritage, but of all Arctic peoples. See *supra* n. 49 at 6.

[84] HEIKKI PATOMAKI, 'Legal principles and political visions: territorial sovereignty versus the common heritage of mankind in the Arctic environmental protection', in LASSI HEINIEN and JYRKI KAKONEN (eds.), *Arctic Complexity: Essays on Arctic Interdependencies* (Finland: Tampere Peace Research Institute, 1991) 115-116.

the exercise of jurisdiction in Antarctica; and (f) preservation and conservation of living resources in Antarctica.

In practice, the Antarctic Treaty Consultative Meeting (ATCM) discusses all matters concerning Antarctic affairs. In these meetings the parties negotiate conventions relating to Antarctica as well as adopt a large number of recommendations.

With the consultative mechanism provided in Article IX of the Antarctic Treaty as a legal guarantee, the ATS maintains its strong vitality and remains dynamic. The ATCM can, at any time, negotiate and conclude a legal regime for various Antarctic activities, thus enhancing the development of the ATS. Furthermore, the provision ensures active cooperation instead of passive co-existence among the Antarctic Treaty parties in dealing with Antarctic affairs. This has been one of the key reasons for the rapid development of the ATS in a period of thirty years.

On the other hand, the mechanism of the decision-making process in the ATS consists of a two-tiered system, i.e., those countries who have conducted substantial activities in Antarctica can obtain the position of Consultative Parties and have the right of decision-making, whereas other Antarctic Treaty Parties have no such right. This system in practice obstructs the developing countries from participating in the Antarctic decision-making process because the financial and technological capabilities of these countries are comparatively weak.[85] Nevertheless, since 1983 this situation has greatly improved: non-ATCPs are invited to attend the ATCM as observers, thus enabling them to exert some influence on the development of the ATS.

While this institutional structure has been criticized as a closed shop or 'rich man's club',[86] it still has some advantages. Since Antarctica is a peculiar environment, newcomers without sufficient knowledge would easily cause environmental damage there. Thus the qualification system will ensure safer and more meaningful contributions from new countries.[87] The same situation would occur in the Arctic region.

Several consultative meetings have been held among the Arctic countries in response to the Finnish Initiative to protect the Arctic environment. Although they were first steps and lacked established forms and substance, there is little doubt that this form of discussion was to some extent influenced by the ATS consultation mechanism and will develop in a similar way in the near future. As SKAGESTAD pointed out, it is conceivable that such a consultative mechanism may be a useful, practical gateway towards cooperation meeting the need of measures of regulation and control in the Arctic where the conflict-potential

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[85] ZOU, *supra* n. 84 at 196.

[86] Remark by J.V. GBEHO, Permanent Representative of Ghana to the UN, 80 *Proceedings American Society of International Law* (1986) at 281.

[87] See ZOU, *supra* n. 84 at 196-197.

is so comprehensive that the parties involved cannot be expected to agree upon any radical political 'New Deal'.[88]

4. CONSERVATION PURPOSES

Having discussed some elements contained in the Antarctic Treaty and of Arctic relevance, we now turn to some of the conservationist and environmental principles and purposes embodied in the ATS to see whether they could be applied in the Arctic context. Finally, PEPAT will be discussed since it is now a legal framework of comprehensive environmental protection in the Antarctic.

4.1. Ecosystem principle

As noted above, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) endorsed the ecosystem approach to the management of the entire Southern Ocean. This approach is in contrast to other conventions on fisheries such as IWC, NAFO and ICSEAF, where the aim is a sustainable yield of the target species and the welfare of the industry dependent upon it.[89] CCAMLR is based upon the conviction and understanding that the waters surrounding the Antarctic continent form a distinct marine region. Thus there was recognition from the outset that the ecosystem management would require coverage of an area larger than that of the Antarctic Treaty. As early as 1977, the ATCPs agreed that the Convention should apply not only to the area of the Antarctic Treaty but also "extend north of 60^0 South latitude where that is necessary for the effective conservation of species of the Antarctic ecosystem".[90] The scope of application of the Convention is up to the Antarctic Convergence or the Polar Front which is a complex transition zone lying between 45^0 and 60^0 South latitude within which colder Antarctic waters sink beneath the warmer sub-Antarctic waters to the north.

According to Article II of CCAMLR, the ecosystem approach contains three basic elements or conservation principles: maximum net recruitment; maintenance of ecological relationships; and the avoidance of non-reversible reductions of any species in the Southern Ocean.

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[88] GUNNAR SKAGESTAD, 'The frozen frontier: models for international cooperation', 10 *Cooperation and Conflict* (1975) at 186.

[89] M. BASSON and J.R. BEDDINGTON, 'CCAMLR: the practical implications of an ecosystem approach', in A. JORGENSEN-DAHL and WILLY OSTRENG (eds.), *The Antarctic Treaty System in World Politics* (MacMillam, 1991) at 54.

[90] See TUCKER SCULLY, WILLIAM BROWN and BRUCE MANHEIM, 'The Convention for the Conservation of Antarctic Marine Living Resources: a model for large marine ecosystem management', in K. SHERMAN and L.M. ALEXANDER (eds.), *Variability and Management of Large Marine Ecosystems* (Boulder, Colorado: Westview Press, 1986) at 282.

The first conservation principle requires harvesting and associated activities to prevent a decrease in the size of any harvested population to levels below those which ensure the population's stable recruitment. For this purpose, the size of a population should not be allowed to fall below a level close to that which ensures greatest net annual increment. The level of greatest net annual increment is the ultimate limit on harvest. If a population falls below this level, then harvest must be consistent with recovery to the level of greatest net annual increment, or must cease. This ultimate limit on harvesting activities not only applies to krill, fish, and whales, which are the principal subjects of harvest, but also to populations of other species that directly or indirectly interact with a harvested population.[91]

The second principle requires harvesting and associated activities which prevent changes, or minimize the risk of changes in marine ecosystems which are not potentially reversible over two to three decades. This principle recognizes that adaptive change may result from artificial selection as well as ecological change, and thus addresses the resilience of the Antarctic ecosystem to harvesting and associated activities. Hence, while the first principle sets limits on the degree to which populations may be altered by human exploitation, the second conservation principle sets a rate at which such changes must be reversible.

The third principle requires parties to the Convention to maintain the ecological relationships that exist between harvested, dependent, and related populations of Antarctic marine living resources, and to restore depleted populations to levels which ensure the greatest net annual increment. This provision provides authorization for designating selected protected areas of sea, where harvest would be prohibited unless it would restore the ecosystem to such a structure and function as it was before harvesting occurred. Establishment of such areas in the Southern Ocean would provide a hedge against uncertainty and the risk of inadvertent exploitation in harvesting elsewhere.[92]

The ecosystem standard provided in the CCAMLR was viewed as an important innovation in international arrangements for living resource management.[93] It is designed to protect the marine ecosystem as a whole while conserving the living species. Due to the absence of an effective enforcement mechanism and comprehensive scientific data about the whole marine ecosystem, there are, however, many difficulties in its implementation.[94] Secondly,

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[91] SCULLY et al., *ibid.* at 283.

[92] *Ibid.*, at 285.

[93] See T. SCULLY, 'The Convention on the Conservation of Antarctic Marine Living Resources – a case study', in L.M. ALEXANDER, S. ALLEN and L.C. HANSON (eds.), *New Developments in Marine Science and Technology: Economic, Legal and Political Aspects*, 22 Law of the Sea Institute Proceedings (1989) at 138.

[94] See M.W. HOLDGATE, 'Antarctica: ice under pressure', 32 *Environment* no. 6 (1990) at 9. The ecosystem standard has been criticised to the extent that Art. II(3)(a), which sets as the criterion for the protection of species that they not be harvested below the level which ensures the greatest net annual increment, is suitable for those predatory species at the top of the food chain, but not

the term "rational use" in the conservation principle of the CCAMLR is yet to be defined unambiguously, i.e. how and to what extent the use is rational. Further, since the entry into force of the CCAMLR the ecosystem standard has not been effectively enforced - particular conservation measures come into being so late that some species and areas have already been over-exploited.[95] In this context, for the purpose of the effective implementation of the ecosystem standard of the CCAMLR, it is necessary, in furtherance of the concept of sustainable development, to apply the precautionary principle: the catch of the species of which mankind has collected sufficient scientific data is permissible, but must be sustainable and subject to the total allowed catch which must ensure the greatest net recruitment of the taken species. As to the species for which there is lack of sufficient scientific data, the catch should be strictly controlled or forbidden, waiting for further scientific justification. In short, fishing activities shall be prohibited unless they are conducted in full compliance with the ecosystem standard.

The Antarctica and Southern Ocean Coalition once stressed the urgent need for the creation of a management protocol to CCAMLR to improve the existing legal provisions. Accordingly, the protocol should include, *inter alia*, the following elements: (a) prior to the commencement or expansion of a fishery, the state party shall submit in advance to the Commission on the Conservation of Antarctic Marine Living Resources a proposal for harvesting which includes details of the nature and extent to which it wishes the fishery be established or expanded, and available biological data pertinent to management; (b) the Scientific Committee shall assess the likelihood that the objectives of the ecosystem standard will be achieved by this proposal; (c) the Commission shall establish a management plan for the new or developing fishery so that all the objectives of the ecosystem standard will be confidently satisfied.[96] These elements should be gradually embodied in the future Antarctic marine living resources regime.

Despite difficulties in the implementation and elaboration of conservation measures and desire to improve the existing regime, the ecosystem principle has in fact been a legal principle within the ATS, with ramifications for other conservation regimes, especially those regulating marine fisheries.

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suitable for prey species. See J.G. GARDAM, 'Management regimes for Antarctic marine living resources - an Australian perspective', 15 *Melbourne University Law Review* (1985) at 302. Someone even argued that Article II, which sets out the ecosystem approach, was impractical: not enough was known about the Antarctic marine ecosystem to enable it to work if the pressure to take krill increased and it could therefore, become a source of weakness. See J.A. HEAP, 'Has CCAMLR worked? Management policies and ecological needs', 10 *International Challenges* no. 1 (1990) at 15.

[95] See F. ORREGO VICUNA, 'The implementation of CCAMLR: is the decision-making machinery conducive to good management?' 10 *International Challenges* no. 1 (1990) at 9.

[96] Antarctica and Southern Ocean Coalition, *The Convention for the Conservation of Antarctic Marine Living Resources - A Management Protocol Is Urgently Needed* (23 October 1990) at 7.

Like the Southern Ocean, the Arctic Ocean has its own uniqueness and natural features. To some extent, it is more ecosystematically integrated than the Southern Ocean. In terms of marine living resources, the Arctic Ocean proper is not productive, but the sea areas in the sub-Arctic are abundant in fisheries. Further, Arctic systems are usually simpler than other ones, involving lower diversity of species, so that the extinction of a given link in the food web may have serious consequences.[97] Thus the ecosystem principle, which has been governing the management and conservation of the Antarctic marine living resources as well as the protection of the marine environment, can also be used in the Arctic context. As BELSKY put it:

> "The international community has accepted an obligation to protect the marine environment so as to protect its use for future generations, and to manage living and non-living resources so as to reduce or eliminate overexploitation. The only scientific means to accomplish this goal is through a total ecosystem approach."[98]

On the other hand, the application of this approach, which currently is done mainly to ocean management, can be expanded to land ecosystems, especially in the polar regions since the ecosystems in these areas are vulnerable and sensitive to human invasions. In order to effectively implement the principle, it is necessary to sub-divide the application area into ecologically differentiated management areas.

4.2. Precautionary principle

The precautionary principle originated from concepts embodied in national laws, notably the German law *Vorsorgeprinzip*. It first achieved some prominence at the international level over a decade ago, when concern was gathering over the state of the shallow Wadden Sea which borders the North Sea coast of the Netherlands, Germany and Denmark.[99] This principle is designed to ensure that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage.[100]

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[97] M.J. DUNBAR, 'Arctic marine ecosystems', 29 *Oceanus* (1986) at 40.

[98] M.H. BELSKY, 'Developing an ecosystem management regime for large marine ecosystems', in KENNETH SHERMAN and LEWIS M. ALEXANDER (eds.), *Biomass Yields and Geography of Large Marine Ecosystems* (Boulder: Westview Press, 1989) at 444.

[99] DAVID FREESTONE, 'The precautionary principle', in ROBIN CHURCHILL and DAVID FREESTONE (eds.), *International Law and Global Climate Change* (Graham & Trotman, 1991) at 21.

[100] J. CAMERON and J. ABOUCHAR, 'The precautionary principle: a fundamental principle of law and policy for the protection of the global environment', 14 *Boston College International & Comparative Law Review* (1991) at 2. See also A. NOLLKAEMPER, 'The precautionary principle in international environmental law: what's new under the sun?', 22 *Marine Pollution Bulletin* (1991)

Some people may argue that the precautionary principle is an elusive concept and has a variety of aspects which makes it difficult to develop a common understanding. But the precautionary principle, though not yet firmly established in international law, is a stringent form of preventive environmental policy. It is more than repair of damage or prevention of risks. Precautionary action requires reduction and prevention of environmental impacts irrespective of the existence of risks. Precautionary action must be taken to ensure that the loading capacity of the environment is not exhausted, and it also requires action even if risks are not yet certain but only probable, or, even less, not excluded.[101]

The first explicit reference to the precautionary approach and the principle of precautionary action is to be found in the text of the 1987 London Declaration, issued by the North Sea states at the end of the Second International North Sea Conference in November 1987:

> ". . . in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence."[102]

Afterwards, a number of other political and legal documents also mentioned the approach.

Since the precautionary principle has been more and more recognized by the international community, it is necessary to apply or extend the principle to activities in Antarctica so as to improve the existing regime. Besides, for Antarctic activities, especially resource activities, another criterion should also be applied: the physical scale of human activity must be kept below the total carrying capacity of the planetary biosphere.[103] Accordingly, the Antarctic resource activities should be subject to some restraints, at least by limiting them to the extent that they will not have grave adverse impact on the Antarctic natural environment and that they will not compromise the needs and interests of future generations.

In fact, within the ATS, the precautionary principle is to some extent reflected in the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA). For example, whether or not a mineral resource activity is allowed depends upon the strict procedure of environmental impact assessment.[104] Furthermore, as to predictability, the legal arrangements of the

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at 107.

[101] LOTHAR GUNDLING, 'The status in international law of the principle of precautionary action', in DAVID FREESTONE and TON IJLSTRA (eds.), *The North Sea: Perspectives on Regional Environmental Cooperation* (Graham & Trotman, 1990) at 26.

[102] FREESTONE, *supra* n. 99 at 23.

[103] J. ROBINSON et al., 'Defining a sustainable society: values, principles and definitions', 17 *Alternatives* no. 2 (1990) at 44.

[104] See Arts. 2 and 7 CRAMRA, *supra* n. 63 at 48-49 and 51-52.

ATS are advanced. There is no commercial sealing in the Southern Ocean at present, but whenever it occurs it shall be automatically controlled under the CCAS. The prohibition of mineral resource activities in Antarctica for fifty years in the recently adopted Environmental Protection Protocol (PEPAT) is another typical example. As mentioned above, the conservation of Antarctic marine living resources and the protection of Antarctic ecosystems requires the application of the precautionary principle as well. The most significant development which was achieved during the 1991 CCAMLR annual meeting was the Commission's adoption of a conservation measure to set a precautionary catch limit on krill fishing in a certain area in the Southern Ocean.[105] It is submitted that the precautionary principle is also applicable to the Arctic environment since it may be considered as a gradually accepted rule of international customary law.

4.3. The Protocol on Environmental Protection to the Antarctic Treaty (PEPAT)

The adoption of PEPAT represented an essential step towards the comprehensive protection of the Antarctic environment and ecosystems. The Preamble to the Protocol established the principle that the instrument developed partly out of "the need to enhance the protection of the Antarctic environment and dependent and associated ecosystems." To this end, the parties "commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science."

Article 3 of the Protocol established the basic environmental principles. It provides in paragraph 1:

> "The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, . . . shall be the fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area."

In pursuance to this principle, paragraph 2 of the Article states that:

> "(a) activities in the Antarctic Treaty area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems;
> (b) activities in the Antarctic Treaty area shall be planned and conducted so as to avoid:
> (i) adverse effects on climate or weather patterns;

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[105] See Antarctica and Southern Ocean Coalition, *Report on the Tenth Meeting of the Commission for the Conservation of Antarctic Marine Living Resources* (1991) at 3.

(ii) significant adverse effects on air or water quality;
(iii) significant changes in the atmospheric, terrestrial (including aquatic), glacial or marine environments;
(iv) detrimental changes in the distribution, abundance or productivity of species or populations of species of fauna and flora;
(v) further jeopardy to endangered or threatened species or populations of such species; or
(vi) degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance;

(c) activities in the Antarctic Treaty area shall be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgements about, their possible impacts on the Antarctic environment and dependent and associated ecosystems and on the value of Antarctica for the conduct of scientific research."

Any assessments and decisions made are to take full account of whether technology and procedures are available to provide for environmentally safe operations, and, according to Article 3(c):

"whether there exists the capacity to monitor key environmental parameters and ecosystem components so as to identify and provide early warning of any adverse effects of the activity and to provide for such modification of operating procedures as may be necessary in the light of results of monitoring or increased knowledge of the Antarctic environment and dependent and associated ecosystems."

The decisions are further to take account of whether the capacity exists "to respond promptly and effectively to accidents", particularly those with potential environmental effects.

Article 3 is one of the key provisions of the Protocol. In many respects, its substance is borrowed from Article 4 of the CRAMRA. But it is more comprehensive in that its provisions introduce a basis for a uniform standard for assessment of all human activity on the continent, irrespective of whether the activity is related to mining or to scientific research.[106]

Five Annexes have been attached to the Protocol, dealing respectively with the environmental impact assessment (EIA) (Annex I), the management of specially protected areas (Annex V), waste management (Annex III), prevention of marine pollution (Annex IV), and conservation of fauna and flora (Annex II). According to PEPAT, a Committee for Environmental Protection is to be established to provide advice and formulate recommendations to the Parties in connection with the implementation of the Protocol, including the operation of its Annexes, for consideration at the ATCM.

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[106] S.K.N. BLAY, 'New trends in the protection of the Antarctic environment: the 1991 Madrid Protocol', 86 AJIL (1992) at 389.

5. PROSPECTS

Having discussed the legal framework of the ATS in the field of environmental protection, we now turn back to the Arctic to see if the Antarctic regime is meaningful for the Arctic and to what extent we can learn from the Antarctic experience in establishing an Arctic regime.

5.1. Assessment of the Arctic Council proposal

As mentioned above, the proposal to establish an international Arctic Council was first made in Canada, and in January 1990 the Arctic Council Project was initiated as a private venture for public service. In May 1991, the Panel of the Arctic Council Project published a report which contained a detailed proposal to establish the Arctic Council. According to the proposal, the goals of an Arctic Council would be both substantive and procedural. It must help protect and rehabilitate circumpolar ecosystems from the contamination that comes with inconsiderate industrial development in the Arctic and elsewhere, find a way to abate and then end the uncivil practice of Arctic states, and help secure justice for the region's aboriginal peoples.[107] As to the structure of the Council, the Panel forwarded several options, but it preferred a compact structure which would consist of ten delegations, acting on the basis of consensus, and including eight Arctic States, the Arctic aboriginal conference and the Northern Forum.[108] As suggested, the items with respect to the Arctic environment constitute the main load for the Council's potential agenda, such as environmental impact assessment procedures, fisheries management, habitat protection, oil spill clean-up in the Arctic waters, parks creation, removal of hazardous materials, sewage disposal and water management, and wildlife management.[109]

The above was largely endorsed by the Canadian government when it released a governmental proposal to the public in December 1991. According to that proposal, the Arctic Council would be an instrument of the Arctic countries and would not become a supra-national authority. Its functions would be:

(a) to provide a forum for the Arctic countries to consider and discuss issues of common interest relating to the Arctic;
(b) to support the development of the Arctic region by promoting cooperation among the Arctic countries and within the Arctic region in general;

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[107] Arctic Council Panel, *supra* n. 49 at 6-7.

[108] *Ibid.*, at 19. The Northern Forum was launched in Anchorage, Alaska in September 1990. Among the signatories to the Anchorage Statement were governors and ministers from Alaska, Alberta, British Columbia, Chukhotka, Greenland, Heilojiang (China), Hokkaido, the Jewish Autonomous Region (USSR), Lappland (Finland), Magadan, the Northwest Territories, the Russian Republic, Sakhalin, Trondelag (Norway), Vasterbotten (Sweden) and Yukon.

[109] *Ibid.*, at 25.

(c) to support, as appropriate, the advancement of Arctic interests within appropriate international organizations.[110]

The Council would be composed of the representatives of the governments of the eight Arctic countries, as members, and the representatives of international Arctic non-governmental organizations as permanent observers. All decisions of the Council would be taken by consensus. Representatives of other non-Arctic national and sub-national governments could attend the meetings of the Council, as observers, upon request. A small Secretariat would be established in Canada.[111]

The above proposal is meaningful in terms of environmental protection in the Arctic because the polar environment can only be protected through international cooperation and effective international arrangement. Although we recognize the values inherent in the proposal, we shall not overestimate them. The proposal still has a number of weaknesses. These are also reflected in PHARAND's Arctic Treaty proposal. While addressing the Declaration and Strategy of environmental protection in the Arctic as adopted by the Arctic countries, PHARAND emphasized at least two reasons for his preference for a treaty. First, the legal status of Ministerial Declarations is uncertain; and second, Declarations cannot serve as the founding instrument of an Arctic Council.[112] In comparison with the Canadian government's proposal, PHARAND's is more comprehensive and detailed. However, a common weakness lies in the solution of the question of fairness of representation in the decision-making process. According to both proposals, substantial power is attributed to the so-called Arctic countries who have territories north of the Arctic Circle. For example, PHARAND proposed that the Commission – the main body of the Council – would consist of twelve members, of which the founding Arctic states would be permanent members. The four non-permanent members would be elected by the Assembly, on the basis of an equitable representation of the admitted members. The non-permanent members would be elected for a four-year term, except for the first election when two would be elected for two years only.[113] It is obvious that such an arrangement is too exclusive and not inducive for worldwide participation and cooperation, and in fact preventing effective protection of the Arctic rather than enhancing it. This reminds us of criticism raised in the United Nations that the ATS was too exclusive. For example, it might be peculiar that Iceland could be a permanent member in the Commission while Britain could not.

In comparison with the above proposal, the decision-making mechanism in the ATS is more open and accountable. Thus one may wonder whether the

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[110] JOHN HANNIGAN, *supra* n. 48 at 39.

[111] *Ibid.*

[112] DONAT PHARAND, 'The case for an Arctic regior ouncil and a reaty proposal', 23 *Revue general de droit* (1992) at 186.

[113] PHARAND, *ibid.*, at 193, admitted that the Commiss.on would be a governing body where the founding members have a controlling voice by their number (8 out of 12) and permanency.

above proposal could be acceptable on a worldwide scale. If not, the initial sense of universality of an emerging Arctic Treaty would disappear and reduce the whole exercise to a mere regional arrangement. Such arrangements already exist with respect to the Arctic and proved insufficient to protect the Arctic environment. That is the main reason why we should have an Arctic Treaty similar to the Antarctic Treaty. The decision-making process of the ATS appears to be a better arrangement, i.e. a parallel system should be endorsed. While the Arctic states should play an essential role, the states which have conducted substantial activities in the Arctic should be granted the same power in the Arctic Council. Equity and fairness could then be fully realized in the formation of such an organization. A second consideration is the fact that a large part of the Arctic Ocean is beyond the limits of national jurisdiction and should be governed by an international organization. In 1996, the Arctic states finally agreed to establish the Arctic Council.[114]

5.2. Elements for the future Arctic regime

Cooperation in protecting the global environment, including that of the polar regions, is an obligation that international law imposes upon all states. As indicated above, the Arctic Council or Arctic Treaty proposals are helpful to establish an international regime for the Arctic environment. But there are still doubts whether these proposals are feasible and/or whether an Arctic Council or an Arctic Treaty will be enough to protect the Arctic environment. It is clear that a comprehensive regime is required, i.e. to take the Arctic Treaty as an umbrella, and then develop step by step individual regimes for particular protection and conservation items. The format of the Annexes to the PEPAT could be borrowed. At the procedural level, the annex system is useful in that whenever a new environmental issue emerges and needs regulation, a relevant annex could be quickly negotiated to solve the issue by legal means. In substance, the environmental principles and standards provided for in the PEPAT are most advanced in international environmental law. Thus there is no doubt that these principles and standards should also apply to the Arctic. Likewise, the Annexes to the PEPAT which regulate particular environmental issues are also conducive to Arctic environmental protection. For example, the environmental impact assessment procedures have become international standards to be used anywhere in the world. Secondly, such matters as marine pollution, waste disposal and management, specially protected areas, and conservation of fauna and flora are important environmental issues to be resolved in the Arctic too.

Whether the Antarctic model can apply to the Arctic has long been a matter of discussion. The comparisons above show that it may not fully apply to the

[114] See the Declaration on the Establishment of the Arctic Council, reprinted in ILM (1996) 1382-1390.

Arctic.[115] Some of the elements in the ATS, however, especially those concerning environmental protection, are of obvious suitability, not only to the Arctic but to the global environment as a whole. As early as World War II, the then US Vice President HENRY A. WALLACE proposed that the US should take the initiative to develop an international treaty for the Arctic which would provide for cooperative efforts in the Arctic and assist Arctic exploration. During the late 1960s the concept of a 'Northlands Compact' emerged. This idea, which appears to have been influenced by the Antarctic Treaty, looked toward the development of an umbrella-type agreement to which Arctic nations could accede for particular purposes like economic development, environmental protection, health and medicine.[116] Though unrealized, these early ideas and proposals offer insights in and incentives for establishing an environmental regime for the Arctic.

BLOOMFIELD noted in the early 1980s with some dismay that,

> "Arctic political cooperation will not be as easy as it was in 1959 in the Antarctic. Whereas rudimentary institutions could be created and legal issues bypassed in the Antarctic, the Arctic is already an arena of competition in the newly vital realm of resource availability, and potentially in the strategic realm as well. Moreover, the political climate today for multilateral institution-building is nowhere near as propitious as it was two decades ago."[117]

Nevertheless, the current situation is favourable for broad international cooperation in the Arctic. Environmental protection could be regarded as a first step in this respect. If successful, such experience can be extended to cooperation in other fields. This is the so-called 'spill-over' effect, i.e. cooperation in one subject area might 'infect' other areas and possibly also pave the way for more directly conflict-preventive measures.[118] The opportunities for expanded cooperation are much improved with the end of the Cold War. Not only has the easing of East-West relations improved the climate for regional cooperation in the Arctic and elsewhere; it has also removed, or lessened, obstacles caused by military considerations.[119]

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[115] Such a view is also concurred by DON ROTHWELL as he points out that "despite obvious similarities, it is not suggested that the Antarctic model should be adopted in the Arctic. Nevertheless, there are sufficient similar characteristics for the Arctic States to learn from the southern experience". D. ROTHWELL, 'International law and the protection of the Arctic environment', 44 ICLQ (1995) at 305; see also D.R. ROTHWELL, 'Polar lessons for the Arctic regime', 29 *Cooperation and Conflict* (1994) 55-76.

[116] TUCKER SCULLY, 'Arctic policy: opportunities and perspectives', in IRA DYER and CHRYSSOSTOMOS CHRYSSOSTOMIDIS (eds.), *Arctic Technology and Policy* (Washington: Hemisphere Publishing Corporation, 1984) at 5.

[117] LINCOLN P. BLOOMFIELD, 'The Arctic: last unmanaged frontier', *Foreign Affairs* (Fall 1981) 103-104.

[118] SKAGESTAD, *supra* n. 88 at 173.

[119] JOHN SKOGAN, 'International Arctic co-operation: scope and limitations', 19 *North Perspectives* no. 2 (1991) at 18.

To establish an environmental regime for the Arctic is not an easy task. The Antarctic experiences only provide some useful elements of reference. The real challenge lies on the Arctic nations and the native peoples. Apart from the Antarctic analogy, other international experiences are also worth learning from. For example, the arrangements for combatting marine pollution in the Mediterranean Sea may provide a useful model for approaching the Arctic.[120] It is appropriate to keep in mind that an environmental regime for the Arctic is urgently needed. There is no reason to delay its process of formation.

[120] As SCULLY notes, in some cases, the region that most directly resembles the Arctic is not the Antarctic but the Mediterranean. See *supra* n. 116 at 6.

SYMPOSIUM ON THE LAW OF INTERNATIONAL CIVIL PROCEDURE IN ASIAN COUNTRIES

Editorial note

The topic of the present symposium is the outcome of a deliberate choice, giving expression to several considerations that underlay the initiative to start publication of the *Yearbook*.

Among these considerations is the perceived need to enhance the presentation of under-exposed Asian views and practices in the field of international law in a broad sense of the term. This includes law emanating from international sources as well as municipal law relating to transnational relationships. The latter encompasses both 'public' and 'private' matters, and includes, most eminently, the conflict of laws. The law on civil procedure of the various Asian countries relating to transnational relationships obviously also falls under the same category.

Another consideration is the need for jurists from the different Asian countries to familiarize themselves with each other's legal views and practices and thus to learn from the legal successes and failures of their neighbours, after having, for much too long indeed, focused their interest and attention almost exclusively on the law, institutions and policies of societies which are (far) more distant to their own in more than a merely geographic sense. From this point of view, the law on international civil procedure as the set of legal rules governing transnational litigation among private parties is an eminently practical, and consequently most suitable, field of the law to be taken as the subject matter of a comparative presentation.

The scope of the topic is, of course, very broad, certainly too broad for an exhaustive analysis of all relevant aspects of the subject. The paucity of existing expositions of the field as a whole in a commonly accessible form and language, however, has led us to the conclusion that the present first effort should offer a general survey as a starting point for further research and investigation.

The Editors have been most fortunate to be able to benefit from the expertise and experience of Professor KONO TOSHIYUKI who not only participated as one of the authors but who has acted as a Co-Editor for the present Symposium.

It is a matter of profound regret that it has not been possible to have scholars from more countries to participate in the symposium. However, the *Yearbook* welcomes contributions for additional 'national chapters', which may be published in its future Volumes, and thus enrich the discussion on the topic.

The Editors express the hope that the present symposium will serve as a reminder to those colleagues who regularly deal with transnational private law and international conflict of laws rather than public international law, that the *Yearbook* is theirs as well and should be used as the natural forum of communication and presentation of Asian aspects of their fields of expertise.

PHILIPPINE CIVIL PROCEDURE IN TRANSBOUNDARY DISPUTES

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1. GENERAL CONTEXT

1.1. The Philippine Judicial System in Brief

The Philippine judicial system consists of one Supreme Court and such lower courts as are established by law. These courts were given judicial power, defined as "the authority to settle justiciable controversies or disputes involving rights that are enforceable and demandable before the courts of justice or redress of wrongs for violation of such rights".[1] This includes the power "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government".[2]

One gathers, therefore, that the Philippine judiciary is unitary. Unlike the American system, after which that of the Philippines was patterned, there are no state and federal systems in the Philippines. Instead, there is just one Supreme Court. The Philippine judicial system is tiered: below the Supreme Court are such lower courts as are established by Congress and which exercise such jurisdiction as is conferred upon them by law.[3]

The Supreme Court is a collegial body composed of a Chief Justice and fourteen Associate Justices.[4] It sits en banc when hearing cases involving the constitutionality of a treaty, international or executive agreement, or law;[5] and the constitutionality, application or operation of presidential decrees, proclamations, orders, instructions, ordinances and other regulations;[6] in which the required majority was not obtained when heard by division;[7] where the Supreme Court modifies or reverses a doctrine or principle of law previously laid down either en banc or in division;[8] of administrative nature involving

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[1] Lopez *v.* Roxas, 17 SCRA 756 (1966).

[2] Phil. Const., Art. VIII, Sec. 1.

[3] Ibid., Sec. 2.

[4] Ibid., Sec. 4(1).

[5] Ibid., Sec. 4(2).

[6] Ibid.

[7] Ibid., Sec. 4(3).

[8] Ibid.

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judges, where the vote is for dismissal or the imposition of disciplinary sanction;[9] concerning election contests involving the President and/or the Vice-President.[10] In all other cases, the Supreme Court may, at its discretion, sit en banc or in division.

The powers of the Supreme Court are provided in the Constitution,[11] as follows:

– To exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*.

– To review, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts: (a) in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question; (b) involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto; (c) in which the jurisdiction of any lower court is at stake; (d) concerning criminal cases in which the penalty imposed is *reclusion perpetua* or higher; (e) in which only an error or question of law is involved.

– To temporarily assign judges of lower courts to other stations, as public interest may require. Such temporary assignment shall not exceed six months without the consent of the judge concerned.

– To order a change of venue or place of a trial to avoid a miscarriage of justice.

– To promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

– To appoint all officials and employees of the Judiciary in accordance with the Civil Service Law.

The Constitution likewise vests in the Supreme Court the power of administrative supervision over all courts and the personnel thereof.[12]

Directly below the Supreme Court is the Court of Appeals, another collegial body of sixty-nine Justices sitting in twenty-three divisions. The Court of Appeals does not sit en banc except to discharge ceremonial and administrative functions. These twenty-three divisions are divided into three

[9] Ibid., Sec. 11.
[10] Ibid., Art. VII, Sec. 4.
[11] Ibid., Art. VII, Sec. 5.
[12] Ibid., Sec. 6.

groups and are stationed in three different cities of the country to address cases coming from Luzon, Visayas and Mindanao, respectively.[13]

The Court of Appeals has, among others, exclusive original jurisdiction over actions for annulment of judgments of Regional Trial Courts, and exclusive appellate jurisdiction over all final orders, decisions, resolutions, orders or awards of Regional Trial Courts and quasi-judicial agencies, instrumentalities, boards or commissions. In the exercise of its original and appellate jurisdiction, the Court of Appeals has the power to try cases and conduct hearings, receive evidence and perform any and all acts necessary to resolve the factual and legal issues raised in cases before it.[14]

The *Sandiganbayan* ('Sandigan') is a Court co-equal to the Court of Appeals but essentially exercises trial functions and has limited jurisdiction. It is a special court of fifteen Justices, and was created especially for the purpose of hearing cases involving crimes committed by high-ranking public officers in relation to their office.[15]

At the lowest rung are the trial courts. Trial courts are single-judge courts, where the presiding judge is both a trier of facts and arbiter of law. Trial courts are courts of first instance. Judicial reliefs are initially sought either in a Regional Trial Court or a Municipal Trial Court.

Essentially, the jurisdictions of the Regional Trial Court and the Municipal Trial Court are similar. Both have jurisdiction to take cognizance of cases involving title to or possession of real property. Likewise, these courts are empowered to resolve admiralty and probate cases. The proper court in these cases is determined by the amount of the claim.[16]

Certain cases, however, are only cognizable by a particular court. For instance, where the subject matter of litigation does not lend itself for pecuniary estimation or pertains to a contract of marriage and marital relations or refers to juvenile and domestic matters, jurisdiction lies with the Regional Trial Court. The Municipal Trial Court, on the other hand, has exclusive jurisdiction over forcible entry and unlawful detainer cases.[17]

The procedure on appeal from final orders and judgments of trial courts has recently been clarified.[18] From the Regional Trial Court, appeal may be taken to the Court of Appeals on issues of fact and law[19] or to the Supreme Court on pure questions of law.[20] From the Municipal Trial Court, first an ordinary appeal must be taken to the Regional Trial Court before the appellant may go to

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[13] Rep. Act No. 8246, approved 30 December 1996.
[14] BP Blg. 129, as amended by Rep. Act No. 7902, approved 23 February 1995.
[15] Pres. Dec. No. 1606, as amended by Rep. Act No. 8249, approved 5 February 1997.
[16] BP 129, as amended by Rep. Act No. 7691, approved 25 March 1994.
[17] Ibid.
[18] 1997 Rules of Civil Procedure, promulgated on 8 April 1997 and effective as from 1 July 1997.
[19] Ibid., Rule 41, Sec. 2(a) and (b).
[20] Ibid., Sec. 20(c).

the Court of Appeals.[21] Appeal from the Court of Appeals to the Supreme Court is strictly by petition for review.[22]

Where appeal is not a plain, speedy and adequate remedy, or when there is no appeal, a party may invoke the *certiorari* jurisdiction of the Regional Trial Court, Court of Appeals or Supreme Court. *Certiorari* is to determine whether or not a tribunal, a quasi-judicial agency or an officer has acted without or in excess of jurisdiction or with grave abuse of discretion.[23]

The time consumed by litigation varies from one month to ten years, according to the circumstances. The Philippine Constitution provides some insight into the reasons why, in many cases, litigation is protracted:[24]

> "Sec. 15(1) All cases or matters filed after the effectivity of this Constitution must be decided or resolved within twenty-four months from date of submission for the Supreme Court, and, unless reduced by the Supreme Court, twelve months for all lower collegiate courts, and three months for all other lower courts."

In other cases, however, the proceedings are significantly abbreviated by the successful employment of various modes for amicable settlement. Among these modes is the conciliation proceeding before the *Lupong Tagapamayapa* ('Lupon') of the *Sangguniang Barangay*.[25] The Lupon has the authority to bring together for amicable settlement parties actually residing in the same city or municipality. Submission to conciliation proceedings is a pre-requisite for the filing of any complaint in court.[26]

The pre-trial[27] presents another opportunity for amicable settlement. The possibilities to settle the dispute or submitting it to alternative modes of dispute resolution are carefully weighed during this stage.[28] The pre-trial also serves the purpose of simplifying the proceedings during trial. At this stage, the parties are allowed to agree on which matters are really in controversy. Stipulations and admissions may also be requested and given during pre-trial. And, together with the various modes of discovery (e.g. deposition, request for admission, production and inspection of documents and things),[29] the pre-trial may be utilized to show that judgment on the pleadings or summary judgment or dismissal of the action, is warranted.

Arbitration is also recognized[30] as a mode of settling disputes. Two or more persons may submit to arbitration any controversy existing between them. The

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[21] Ibid., Rule 40.
[22] Ibid., Rule 45.
[23] Ibid., Rule 65, Sec. (1).
[24] Phil. Const., Art. VII, Sec. 15(1).
[25] Rep. Act No. 7160, Chap. 7, Sec. 410.
[26] Ibid. Sec. 412(a).
[27] 1997 Rules of Civil Procedure, Rule 18.
[28] Ibid., Sec. 2(a).
[29] Ibid., Rules 23 to 29.
[30] Rep. Act No. 876.

parties to a contract may agree to submit to arbitration any controversy that may arise from or in relation to the contract.

No special court is designated to resolve trans-boundary civil disputes. Such cases fall within the general jurisdiction of trial courts. In the exercise of jurisdiction over cases involving a foreign element, the trial court should apply the *lex fori*. A ruling recently enunciated by the Supreme Court clearly puts this as follows:

> "It is settled that matters of remedy and procedure such as those relating to the service of process upon a defendant are governed by the *lex fori* or the internal law of the forum. In this case, it is the procedural law of Japan where the judgment was rendered that determines the validity of the extraterritorial service of process or SHARP."[31]

This ruling reiterates an earlier Supreme Court decision:[32]

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

1.2. Sources

The sources of Philippine laws governing international civil procedure are both written and unwritten. Foremost among the written sources is the Constitution.[33] The Constitution defines who are Filipino citizens and prescribes their rights and obligations. It is also noteworthy that this fundamental document "adopts the generally accepted principles of international law as part of the law of the land".[34] Another source of rules that govern international civil procedure is the Spanish Civil Code of 1888. This Code took effect in the Philippines in 1889 and remained in force even after the country was ceded by Spain to the United States. The Americans did not alter this Code and it was only on 30 August 1950 that it was superseded by a new Civil Code of the Philippines. The relevant provisions on conflict of laws in the Spanish Civil Code, however, were retained.

There are other special statutes which may also be referred to as sources of the law on international civil procedure. Among these are the Corporation Code,[35] the General Banking Act,[36] the Retail Trade Law,[37] the Anti-Dummy

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[31] Northwest Orient Airlines *v.* CA, 241 SCRA 192 (1995).
[32] Cadalin *v.* POEA's Administrator, 238 SCRA 721 (1994).
[33] Adopted on 15 October 1986 and ratified on 2 February 1987.
[34] Phil. Const. Art. II, Sec. 2.
[35] Batas Pambansa Blg. 68 which took effect on 1 May 1980.
[36] Rep. Act No. 337, approved on 24 July 1948.
[37] Rep. Act. No. 1180, approved on 15 June 1955.

Law,[38] the Insurance Code,[39] the Intellectual Property Code,[40] Negotiable Instruments Law,[41] the Patent Law,[42] the Trademark Law,[43] the Salvage Act,[44] the Carriage of Goods by Sea Act,[45] the Civil Aeronautics Act,[46] the Philippine Overseas Shipping Act,[47] the Investment Incentives Act,[48] the Export Incentives Act,[49] the Bank Liberalization Act,[50] the Philippine Passport Act[51] and the Omnibus Investments Code.[52] These special laws contain rules which determine how cases involving a foreign element should be resolved.

Treaties and international conventions are also sources of law governing private international law. Among them are the Convention on International Civil Aviation,[53] the Convention for the Unification of Certain Rules Relating to the Warsaw Convention,[54] the Convention on Offenses Committed on Board Aircraft,[55] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,[56] the Convention on Carriage of Goods By Sea,[57] the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,[58] the Convention on Traffic in Persons,[59] the Convention on the Elimination of All Forms of Discrimination Against Women,[60] the Convention on the Political Rights of Women,[61] the International Convention for the Suppression of Traffic in Women and Children,[62] the Convention Establishing the World Intellectual Property Organization,[63] the Convention on the International Recognition of Rights in Aircraft,[64] the Vienna

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[38] Com. Act No. 108, approved on 30 October 1936.
[39] Pres. Decree No. 612, approved on 18 December 1974.
[40] Rep. Act No. 8293, approved on 6 June 1997.
[41] Act 2031, enacted on 3 February 1911.
[42] Rep. Act No. 165, approved on 20 June 1947.
[43] Rep. Act No. 166, approved on 5 June 1951.
[44] Act No. 2616, enacted on 7 February 1916.
[45] Com. Act 65, approved on 22 October 1936.
[46] Rep. Act No. 776, approved on 20 June 1952.
[47] Rep. Act No. 1407, as amended, approved on 9 September 1955.
[48] Rep. Act No. 5186.
[49] Rep. Act No. 6135.
[50] Rep. Act 7722, enacted on 18 May 1994.
[51] Rep. Act No. 8239.
[52] Executive Order No. 226, issued April 1987.
[53] 15 UNTS 295.
[54] 137 UNTS 11.
[55] 704 UNTS 219.
[56] IX-1 DFATS 101.
[57] Signed by the Philippines on 14 June 1978.
[58] 521 UNTS 231.
[59] 96 UNTS 271.
[60] Signed by the Philippines on 15 July 1980.
[61] 193 UNTS 135.
[62] 53 UNTS 39.
[63] Entered into force for the Philippines on 14 July 1980.
[64] 310 UNTS 151.

Convention on Diplomatic Relations,[65] the Vienna Convention on Consular Relations,[66] the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons,[67] the Berne Convention for the Protection of Literary and Artistic Works,[68] the Paris Convention for the Protection of Industrial Property[69] and several Hague Conventions which deal with the validity of marriage contracts, the effect of marriage on property and status, divorce, judicial separation, minors and persons under civil interdiction and succession.[70]

While there is an increasing tendency towards the codification of rules governing the conflict of laws, there is always a need for judicial decisions to fill the gaps in the existing statutes. Thus, in these times of globalization and increasing interface between nations and between individuals of different nationalities, judicial decisions play a most important role in the conflict of laws. More and more cases have now risen from which guidance may be sought in resolving disputes and controversy involving a foreign element.

2. JURISDICTION

2.1. The Concept of Jurisdiction

The concept of jurisdiction should not be confused with a state's right to exercise authority over persons and things within its territory. Rather, jurisdiction should be understood in the sense of the competence or authority of a court or tribunal to entertain, hear and decide certain controversies, ending in a binding judgment which is enforceable upon all parties.[71] In this sense, we must consider four things: jurisdiction over the subject matter, jurisdiction over the person, jurisdiction over the *res*, and constraints on the exercise of jurisdiction.

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[65] 500 UNTS 95.

[66] 596 UNTS 261.

[67] Signed by the Philippines on 7 June 1974.

[68] 331 UNTS 219; entered into force for the Philippines on 16 July 1980.

[69] The Philippine Instrument of Accession was deposited on 14 April 1980 and the Convention entered into force for the Philippines on 16 July 1980.

[70] Treatises, commentaries and statutes of learned societies also provide an interesting source of rules governing the conflict of laws. Among the foreign writers whose works carry persuasive weight in the Philippines are HUBER, MANRESA, SAVIGNY, WEISS, BEALE, CAVERS, CHEATHAM, CURRIE, KUHN, GOODRICH, GUSSBAUM, RABEL, STORY, WHARTON, CHESHIRE, WESTLAKE and REESE.

[71] People *v.* Mariano, 71 SCRA 604 (1976).

Jurisdiction over the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong.[72] It is conferred by law.[73] The power to define, prescribe and abolish the jurisdiction of the various courts, except the Supreme Court, is vested in Congress.[74] When a particular court, therefore, was by law granted jurisdiction to try a particular case, the parties may not waive, enlarge or diminish such jurisdiction by their agreement.[75] Where no jurisdiction was granted, the parties may likewise not agree to vest such jurisdiction upon any particular court.[76] Neither may jurisdiction be conferred by the mere acquiescence of the court. Jurisdiction over the subject matter exists as a matter of law and may not be denied except by another law duly enacted by Congress.

Jurisdiction over the subject matter is reckoned at the time of the commencement of the action and it is determined on the basis of the allegations made in the complaint.[77] Where, for instance, the complaint fails to allege jurisdictional facts, a court duly conferred with jurisdiction over the subject matter may not take cognizance thereof. Should the court persist, its action may be questioned either for the first time on appeal or by *certiorari* for having been done without jurisdiction. We note, however, that the Supreme Court, in a case noting the delay of twenty-eight years before a party raised the ground of lack of jurisdiction in a motion to dismiss, rejected the motion on the ground of equitable estoppel.[78]

Jurisdiction over the person is the authority or competence to render judgment with binding effect upon the parties.[79] In the case of plaintiff, jurisdiction is acquired by the filing of the complaint, or the proper initiatory pleading.[80] In the case of defendant, it is acquired by his voluntary appearance and submission to the authority of the court, or by the service upon him of compulsory process served by the court.[81] Jurisdiction over the defendant may be had by personal or substituted service of summons. Service of summons is governed by Rule 14 of the 1997 Rules of Civil Procedure:

> "Sec. 6. Service in person on defendant.
> Whenever practicable, the summons shall be served by handing a copy thereof to the defendant in person, or, if he refuses to receive and sign for it, by tendering it to him."
>
> "Sec. 7. Substituted service.

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[72] Perkins *v.* Roxas, 72 Phil. 514 (1941).
[73] Lozon *v.* NLRC, 240 SCRA 1 (1995).
[74] Philippine Constitution, Art. VII, Sec. 2.
[75] Fortune Life and General Insurance Co. *v.* CA, 224 SCRA 829 (1993).
[76] Department of Health *v.* NLRC, 251 SCRA 700 (1995).
[77] Alleje *v.* CA., 240 SCRA 465 (1995); De Luna *v.* CA, 221 SCRA 703 (1992).
[78] Tijam *v.* Sibonghanoy, 23 SCRA 29 (1968).
[79] Banco Filipino-Español *v.* Palanca, 37 Phil. 921 (1918).
[80] Manila Railroad Co. *v.* Attorney General, 20 Phil. 523 (1911).
[81] Munar *v.* CA, 238 SCRA 372 (1994); People *v.* Dulos, 37 SCRA 141 (1994).

> If, for justifiable causes, the defendant cannot be served within a reasonable time as provided in the preceding section, service may be effected (a) by leaving copies of the summons at the defendant's residence with some person of suitable age and discretion then residing therein, or (b) by leaving the copies at defendant's office or regular place of business with some competent person in charge thereof."

Objections to jurisdiction over the person of the defendant may be waived. Thus, a party who has not been properly served with summons may appear voluntarily and submit to the court's jurisdiction.[82] If he does so, he cannot later question on appeal the court's jurisdiction over his person.[83]

A defendant's objection to a court's jurisdiction over his person, however, is not deemed waived where he appears before the court and submits an answer wherein he specifically assails as improper the service of summons upon him and, at the same time, sets up special and affirmative defenses:[84]

> "Sec. 6. Pleading grounds as affirmative defense.
> If no motion to dismiss has been filed, any of the grounds for dismissal provided for in this Rule may be pleaded as an affirmative defense in the answer and, in the discretion of the court, a preliminary hearing may be had thereon as if a motion to dismiss had been filed.
> The dismissal of the complaint under this section shall be without prejudice to the prosecution in the same or separate action of a counterclaim pleaded in the answer."

The same is true where the defendant submits a motion to dismiss which pleads other grounds together with the objection to jurisdiction.[85]

> "Sec. 20. Voluntary appearance.
> The defendant's voluntary appearance in the action shall be equivalent to service of summons. The inclusion in a motion to dismiss of other grounds aside from lack of jurisdiction over the person of the defendant shall not be deemed a voluntary appearance."

Jurisdiction over the *res* refers to a court's jurisdiction over the property or thing in litigation.[86] It is acquired by actual or constructive seizure, by attachment or garnishment or by provisions of law, as in land registration proceedings or those involving the civil status of a non-resident defendant. In the case of the former, the property must be placed in *custodia legis*, actual or constructive. If this is not possible, for example when the property is beyond the territorial limits of the state, jurisdiction cannot be acquired and a judgment will not affect nor bind the property in any way.

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[82] Aban *v.* Enage, 120 SCRA 778 (1983).
[83] Rules of Civil Procedure, Rule 14, Sec 20; see also La Naval Drug Corp. *v.* CA, 236 SCRA 78 (1994).
[84] Rules of Civil Procedure, Rule 16, Sec. 6.
[85] Ibid., Rule 14, Sec. 20; see also La Naval Drug Corp. *v.* CA 236 SCRA 78 (1994).
[86] Perkins *v.* Dizon, 66 Phil. 186 (1939).

Despite the fact that a court is qualified to entertain a case involving a foreign element, it may still refuse to take cognizance thereof in view of the existence of constraints. In some instances, a court declines to try a case where the controversy may be more conveniently tried in another state. This is the doctrine of *forum non-conveniens*. It is founded on the principle that the end of justice would be better served by the elimination of any unfair advantage which either party deliberately sought by bringing the trial to a particular forum. This is especially true where the plaintiff chose a forum with the intention of harassing the defendant by compelling him to incur unnecessary expenses and hardship in defending himself. The doctrine is also applied if the choice was made by the plaintiff, intending to shop for a forum where he may obtain a more favourable judgment.

But while the doctrine of *forum non-conveniens* is upheld in the Philippines, there is among its courts an inclination to exercise jurisdiction when the requirements for the exercise thereof are clearly present. This is sanctioned by Article 9 of the Civil Code which reads as follows: "No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws". In a recent case,[87] involving a Japanese and a Philippine corporation, the Supreme Court did not apply the doctrine of *forum non-conveniens*, "there being still numerous material facts to be established in order to arrive at a conclusion" and deemed it best "to allow the trial court to proceed ... and consider whatever defense may be raised by private respondent after they have filed their answer and evidence to support their conflicting claims has been presented".

The 'political question doctrine' poses another constraint on the exercise of jurisdiction. A 'political question' is defined as "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government".[88] Where the question is clearly political, Philippine courts will refuse to take cognizance thereof. The court's duty is not to determine whether or not a particular action of the legislative or executive branch is wise and proper under the circumstances, but to adjudicate whether or not the mandate of the Constitution is strictly followed. We observe, however, that the doctrine of 'political question' in many cases has succumbed to the expanded jurisdiction of Philippine courts. As stated earlier, judicial power now includes the duty to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.

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[87] Keihin Narasaki Corp. *v.* Crystal Navigation SA, 193 SCRA 484 (1991).
[88] Tañada *v.* Cuenco, 103 Phil. 1051 (1965).

2.2. Exercise of jurisdiction

2.2.1. Requirements for the Exercise of Jurisdiction

In conflict of laws cases specific requirements have to be complied with before a court may validly exercise jurisdiction. We first consider the requirements *ratione personae* and distinguish between natural and juridical persons. We further delimit ourselves by considering cases *in personam*, *in rem* and *quasi in rem*.

An action *in personam* is directed against a particular person on the basis of his/her personal liability. Judgment therein is binding only upon them or their successors-in-interest.[89] In cases such as these, involving natural persons, Filipinos or aliens who are residents of the Philippines, it is indispensable that summons be served upon them in accordance with the above-quoted provision. In the case of non-resident aliens, jurisdiction over their person may not be exercised unless they are first duly served with summons. The same is true in the case of a non-resident citizen.

The rule for juridical persons is entirely different. Where the juridical person is a private domestic entity, service of summons may be made on the president, managing partner, general manager, corporate secretary, treasurer or in-house counsel.[90] If service is to be made upon a foreign juridical person which is doing business in the Philippines, service may be made upon it through its resident agent designated in accordance with laws for that purpose, or upon the government officer in charge of regulating such corporation, or on any of its officers or agents who may be found within the Philippines.[91] Where the juridical person involved is a foreign corporation not doing business in the Philippines, jurisdiction over its person may not be acquired.

A case *in rem* is an action directed against the whole world and its object is to bar all who might be minded to make any objection against the rights sought to be enforced.[92] Here, when the defendant is not a resident and may not be found in the Philippines, service of summons may, by leave of court, be effected out of the Philippines by personal service or by publication in a newspaper of general circulation in which case a copy of the summons and order shall be sent by registered mail to the last known address of the defendant.[93] For instance, petitions for the registration of land should be furnished to all adjoining owners and the actual occupant of the land. In addition, they should be published in accordance with the rules. Accordingly, the court may acquire jurisdiction over the *res* and its judgment may be held valid and binding not only against actual parties but also against the whole world. In cases such as

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[89] Sandejas *v.* Robles, 81 Phil. 421 (1948).
[90] 1997 Rules of Civil Procedure, Rule 14, Sec. 11.
[91] Ibid., Sec. 12.
[92] Sandejas *v.* Robles, 81 Phil. 421 (1948).
[93] Rules of Procedure, Rule 14, Sec. 19.

these, where a court cannot acquire jurisdiction over the defendant, it nevertheless acquires competence to hear the case where jurisdiction over the *res* has been acquired.

A case *quasi in rem*, on the other hand, is directed against a particular person but the judgment therein is binding and valid against all who may possess an interest in the property under litigation.[94] An example of an action *quasi in rem* is an action to judicially foreclose a mortgage.

Special jurisdictional rules *ratione materiae* are likewise prescribed for different categories of legal relationships. To illustrate:

– The principle of territoriality provides that Philippine penal laws and laws of public security and safety are obligatory upon all who live or sojourn in Philippine territory, subject to the principle of public international law and to treaty stipulations.[95]

– The nationality theory sanctions the application of Philippine laws relating to family rights and duties or to the status, condition and legal capacity of persons upon all citizens of the Philippines even though living abroad. Implicitly, the theory provides that aliens are governed by their national law with respect to the above-enumerated matters.[96]

– The *situs* of real property as well as personal property determines the applicable law.[97]

– In intestate and testamentary successions, the national law of the decedent prescribes the order of succession, the amount of successional rights, the validity of testamentary provisions[98] and the capacity to succeed of an heir.[99]

– The forms and solemnities of contracts, wills and other public instruments are subject to the *lex loci celebrationis*.[100]

– Prohibitive laws concerning persons, their acts or property and those which have as object such things as order, public policy and good customs are not rendered ineffective by laws or judgments promulgated or by treaties or conventions agreed upon in a foreign country.[101]

– In marriages involving aliens, to be celebrated in the Philipines, the capacity of each party to contract marriage is determined by their national law and the parties are required to submit a certificate of legal capacity to contract marriage to be issued by their respective diplomatic or consular officials.[102]

– Marriages solemnized outside the Philippines between Filipinos in accordance with the law of the country where they were solemnized are valid and as such are also valid in the Philippines, except those which are considered void

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[94] Sandejas *v.* Robles, *supra*.
[95] Civil Code, Art. 14.
[96] Ibid., Art. 15.
[97] Ibid., Art. 16(1).
[98] Ibid., Art. 16(2).
[99] Ibid., Art. 1039.
[100] Ibid., Art. 17(1).
[101] Ibid., Art. 17(3).
[102] Family Code, Art. 26(1).

by reason of public policy, incestuous marriages and those that do not comply with the essential and formal requisites of marriage.[103] This rule is modified by another conflict rule which gives effect to a divorce validly obtained by an alien spouse abroad and which capacitates the Filipino spouse to remarry under Philippine laws.[104]

– The property relations of spouses are governed by Philippine law regardless of the place of celebration of the marriage. The rule does not apply: where both spouses are aliens; with respect to the extrinsic validity of contracts affecting property not situated in the Philippines and executed in the country where the property is located; and with respect to the extrinsic validity of contracts entered into in the Philippines but affecting property situated in a foreign country whose laws require different formalities for their extrinsic validity.[105]

– A Filipino who is in a foreign country may execute a will in accordance with the formalities established by the law of the country where he is. Such a will may be probated in the Philippines.[106]

– A will executed by an alien who is abroad, produces effect in the Philippines if made in accordance with the law of the place of his residence, or the law of his country, or in conformity with Philippine laws.[107]

– A will executed in the Philippines by a citizen of another country in accordance with his national law, which might be proved and allowed by the law of his country, shall have the same effect as if executed according to Philippine laws.[108]

– Joint wills executed by Filipinos in a foreign country are not valid in the Philippines.[109]

– The revocation of a will may be effected by a person who is not a domiciliary of the Philippines in accordance with the law of the place where the will was made or according to the law of the place in which the testator had his domicile at the time or in accordance with Philippine laws if the revocation takes place in this country.[110]

– The law of the country to which the goods are to be transported shall govern the liability of the common carrier for their loss, destruction or deterioration.[111]

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[103] Ibid., Art. 26(2).
[104] Ibid., Art. 80.
[105] Civil Code, Art. 815.
[106] Ibid., Art. 816.
[107] Ibid., Art. 817.
[108] Ibid., Art. 818.
[109] Ibid., Art. 829.
[110] Ibid., Art. 1753.
[111] Antam Consolidated, Inc. *v.* CA, 143 SCRA 288 (1985), reiterated in National Sugar Trading Corp. *v.* CA, 246 SCRA 465 (1995).

2.2.2. Exercise in case of non-fulfilment of requirements

Notwithstanding the non-fulfilment of the general requirements for its exercise, jurisdiction may still be exercised in exceptional cases. The voluntary appearance of a non-resident citizen or alien to answer a complaint against him effectively confers jurisdiction upon the court. It should also be pointed out that while a foreign corporation "not doing business in the Philippines" cannot ordinarily be sued in this country, because Philippine courts cannot acquire jurisdiction over it, jurisdiction may nonetheless be acquired by its voluntary submission to Philippine courts. There is no bar against these foreign corporations' voluntary appearance before Philippine courts and availing of judicial remedies for violations of its rights in isolated transactions:[112]

> "The doctrine of lack of capacity to sue based on failure to first acquire a local license is based on considerations of sound public policy. It was never intended to favor domestic corporations who enter into solitary transactions with unwary foreign firms and then repudiate their obligations simply because the latter are not licensed to do business in this country."

This right in favor of foreign corporations not doing business in the Philippines is also recognized in statutes subject to the principle of reciprocity. For example: foreign corporations "not doing business in the Philippines" may maintain actions in the Philippines for infringement of trademark and/or unfair competition.[113]

Parenthetically, a definition of the phrase "doing business in the Philippines" is in order. A description of the effects of "doing business in the Philippines without a license" is also now called for. The phrase "doing business in the Philippines" is expressly defined in Article 44 of the Omnibus Investments Code, as follows:

> "Definition of Terms.
>
> As used in this Book, the term 'investment' shall mean equity participation in any enterprise formed, organized or existing under the laws of the Philippines, and the phrase 'doing business' shall include soliciting orders, purchases, service contracts; opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totalling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines, and any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object, of the business corporation."

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[112] Trademark Law, Rep. Act No. 166, as amended, Sec. 21-A.

[113] Philippine Columbian Enterprises Co. *v.* Lantin, 39 SCRA 376 (1971).

The determination of whether or not a foreign corporation is doing business in the Philippines is, therefore, essentially a question of fact.

The fatal consequence of doing business in the Philippines without a license is laid down in Section 133 of the Corporation Code:

> "Doing business without a license.
> No foreign corporation transacting business in the Philippines without a license, or its successors or assigns, shall be permitted to maintain or intervene in any action, suit or proceeding in any court or administrative agency of the Philippines; but such corporation may be sued or proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognized under Philippine laws."

Therefore, while a foreign corporation doing business in the Philippines without a license cannot sue before Philippine courts, it may still be sued and a counterclaim filed against a foreign corporation is not an admission of its legal capacity to sue before Philippine courts.[114]

It is also noteworthy that a party to a contract who is not subject to a Philippine court's jurisdiction may voluntarily surrender to the jurisdiction of such court where the contract itself provides that disputes arising therefrom are subject to the Philippines' jurisdiction.

2.2.3. Jurisdiction to enjoin or to arrest

Where a Philippine court is properly vested with jurisdiction, it is empowered to issue a writ of injunction to enjoin the performance of an act or to compel its performance. This injunction may be an ancillary remedy or the main action itself. It will be issued only after strict compliance with the provisions of Rule 58 of the Rules of Court.

The power to order arrest is also possessed by Philippine courts[115] and is governed strictly by the Bill of Rights[116] and other pertinent laws.[117] It should be observed, however, that the powers to enjoin and order arrest may be exercised only within the territories of the Philippines. An act may be enjoined only where it is sought to be performed within the Philippines and the person who seeks to commit the same has been subjected to the jurisdiction of the court. The same is true with respect to the power to order arrest. In certain cases, however, the power to order arrest is constructively extended with the execution of bilateral agreements for extradition.

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[114] Rules on Civil Procedure, Rule 113.
[115] Phil. Const., Art. III.
[116] Rep. Act. No. 7438, approved on 27 April 1992, 88 OG 3880 No. 25.
[117] Rules on Civil Procedure, Rule 4, Sec. 2.

2.3. Forum selection

Forum selection is sanctioned by written and unwritten rules. The written rules which allow forum selection have already been stated earlier in this paper. In addition, the Rules of Civil Procedure give the plaintiff, in personal actions, the right to choose in which court his action will be tried:

> "Sec. 2. Venue of personal actions.
> All other actions may be commenced and tried where the plaintiff or any of the principal plaintiffs resides, or where the defendant or any of the principal defendants resides, or in the case of a non-resident defendant where he may be found, at the election of the plaintiff."

Likewise, the Supreme Court recently enunciated a rule concerning forum selection as follows:[118]

> "The parties to a contract may select the law by which it is to be governed. (CHESHIRE, *Private International Law*, 7th ed., 187). In such a case, the foreign law is adopted as a 'system' to regulate the relations of the parties, including questions of their capacity to enter into the contract, the formalities to be observed by them, matters of performance, and so forth (16 Am Jur 2d, 150-61).
>
> Instead of adopting the entire mass of the foreign law, the parties may just agree that specific provisions of a foreign statute shall be deemed incorporated into their contracts as a set of terms. By such reference to the provisions of a foreign law, the contract does not become a foreign contract to be governed by the foreign law. The said law does not operate as a statute but as a set of contractual terms deemed written in the contract (ANTON, *Private International Law*, 1967, 197; DICEY and MORRIS, *The Conflict of Laws*, 8th ed., 702-703)."

It is basic, however, that the forum must bear some relationship to the party or their transaction.

Further, the application of Philippine law should be insisted on in the following cases:

1. Where the law itself provides for the application of Philippine law. This is illustrated in Article 124, paragraph 1(1) of the Civil Code which provides:

> "If the husband is a citizen of the Philippines and the wife is a foreigner, the provisions of this Code shall govern their property relations;"

2. Where the application of foreign law is specifically proscribed. The rule is stated in Article 17, paragraph 3 of the Civil Code which states:

> "Prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country."

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[118] Northwest Orient Airlines *v.* CA, *supra* n. 31.

3. Where the applicable foreign law was not properly pleaded and proved. As a norm, Philippine courts do not take judicial notice of foreign laws. This must be proven as a fact and shown to be applicable under the circumstances of the case. If not pleaded and proven, Philippine courts engage in the processual presumption that the foreign law is the same as the corresponding Philippine law and will proceed to apply the latter. The Supreme Court explains this as follows:

> "Alternatively, in the light of the absence of proof regarding Japanese law, the presumption of identity or similarity or the so-called processual presumption may be invoked. Applying it, the Japanese law on the matter is presumed to be similar with the Philippine law on service of summons on a private foreign corporation doing business in the Philippines. Section 14, Rule 14 of the Rules of Court provides that if the defendant is a foreign corporation doing business in the Philippines, service may be made: (1) on its resident agent designated in accordance with law for that purpose, or, (2) if there is no such resident agent, on the government official designated by law to that effect, or (3) on any of its officers and agents within the Philippines."

On the other hand, the application of foreign law is justified where Philippine law mandates the application of such law. Specific examples are Articles 16(1), 17(1), 124(2) of the Civil Code. These rules are obligatory when properly applicable and the parties do not enjoy any discretion to derogate from them. Where the application of any of these is clearly warranted, a court which does otherwise, acts without or in excess of jurisdiction.

2.4. Lis Pendens

Lis Pendens is also referred to in the Philippines as *auter action pendant* or *litis pendentia*. There is *litis pendentia* where the parties to the action are the same, there is substantial identity in the causes of action and the relief sought, and the result of the first action is determinative of the second in any event.[119] When there is *litis pendentia*, the subsistence of one action may be pleaded to abate the other.[120]

Litis pendentia is intimately related[121] to the concept of forum selection or forum shopping, a proscribed practice[122] in the Philippines of seeking recourse in two or more fora to increase the chances of obtaining a favourable decision.[123] Forum shopping is penalized as a contumacious act. The counsel is held liable for disciplinary action and his client for criminal prosecution. The rule was recently incorporated into the new Rules of Civil Procedure.[124] How-

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[119] Northcott & Co. *v.* Villa-Abrille, 41 Phil. 462 (1921).
[120] 1997 Rules of Civil Procedure Rule 16, Sec. 1(e).
[121] First Philippine International Bank *v.* CA, 252 SCRA 2259 (1996).
[122] Supreme Court Administrative Circular 04-94, 8 February 1994.
[123] International Container Terminal Services, Inc. *v.* CA, 249 SCRA 389 (1995).
[124] 1997 Rules of Civil Procedure, Rule 7, Sec. 5.

ever, *litis pendentia* as a ground to dismiss an action is limited in application to forum shopping in Philippine courts only. It does not comprehend a situation where the courts involved belong to different jurisdictions. Moreover, Philippine courts cannot take judicial notice of the pendency of a similar action in another state. Thus, this further limits the application of the rule against forum shopping in the above situation. Despite the absence of a rule, however, it is submitted that filing an identical action in two or more courts of different jurisdictions is provable in the proper case as forum shopping and may be struck down as unethical and in abuse of the processes of the courts. The doctrine of *forum non-conveniens* likewise exists as a deterrent against this pernicious practice.

2.5. Immunities

The granting of immunities in favor of a foreign state, international organizations and diplomatic officials is contained in several treaties, conventions and agreements. Among them is the 1961 Vienna Convention on Diplomatic Relations[125] which grants criminal as well as civil and administrative immunity to diplomatic representatives of a foreign country. Similarly, complete immunity is given to specialized agencies of the United Nations under the relevant Convention.[126] Other, regional international organizations created by multilateral and bilateral agreements such as the Southeast Asia Fisheries Development Center[127] are also given immunity from the jurisdiction of the host state in order to allow them to work effectively towards the attainment of the purposes for which they are created. These treaties and agreements were given express recognition by Congress, which enacted Republic Act No. 75, penalizing acts which impair the Philippines' proper observance of the immunity rights and privileges of accredited diplomatic representatives.

These immunities notwithstanding, there are instances where our courts may still acquire jurisdiction over a foreign state or an international organization or over diplomatic representatives. An envoy himself may waive his immunity by instituting an action against another person in a Philippine court. Or he may voluntarily appear in an action against him, in which case, in the absence of an express reservation, he may be deemed to have shed his immunity. A foreign state's immunity is also set aside where it has descended to the level of an individual and has entered into business contracts or transactions not related to the exercise of its sovereign functions.[128]

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[125] *Supra* 1.2.

[126] 327 UNTS 326.

[127] Entered into force for the Philippines on 16 January 1968.

[128] National Development Corp. *v.* Tobias, 117 Phil. 703 (1963); National Development Corp. *v.* NDC Employees and Workers Union, 66 SCRA 18 (1975).

3. SERVICE OF PROCESS

In a 1939 decision the Philippine Supreme Court, citing American authorities, held that:

> "The process of a court has no extraterritorial effect, and no jurisdiction is acquired over the person of the defendant by serving him beyond the boundaries of the state. Nor has a judgment of a court of a foreign country against a resident of this country having no property in such foreign country based on process served here, any effect here against either the defendant personally or his property situated here."[129]

The *Boudard* ruling was relied upon by the Court of Appeals in a recent case where it said:

> "In its decision, the Court of Appeals sustained the trial court. It agreed with the latter in its reliance upon *Boudard* v. *Tait* (67 Phil., 1939, 170) wherein it was held that "the process of the court has no extraterritorial effect and no jurisdiction is acquired over the person of the defendant by serving him beyond the boundaries of the state". To support its position, the Court of Appeals further stated:
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> "In an action strictly *in personam*, such as the instant case, personal service of summons within the forum is required for the court to acquire jurisdiction over the defendant. To confer jurisdiction on the court, personal or substituted service of summons on the defendant not extraterritorial service is necessary.
>
> ...
>
> It is a general rule that processes of the court cannot lawfully be served outside the territorial limits of the jurisdiction of the court from within which it issues and this is regardless of the residence or citizenship of the party thus served. There must be actual service within the proper territorial limits on defendant or someone authorized to accept service for him. Thus, a defendant, whether a resident or not in the forum where the action is filed, must be served with summons within that forum."[130]

However, in reversing the Court of Appeals, the Supreme Court held in *Northwest* that our rules on service of process are inapplicable because "matters of remedy and procedure are governed by the *lex fori*.[131] The *Northwest* case deserves closer scrutiny. Northwest, an American airline, entered into an International Passenger Sales Agency Agreement with Sharp (a Filipino corporation) whereby Northwest authorized Sharp to sell its airline tickets through the latter's Japanese branch. Sharp failed to remit the proceeds of the ticket sales, so Northwest sued Sharp in Tokyo, Japan for collection of the unremitted amounts. The Tokyo District Court issued writs of summons against

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[129] Boudard *v.* Tait, 67 Phil. 170 (1939).
[130] Northwest Orient. *v.* CA et al., *supra* n. 31.
[131] Ibid., p. 199.

Sharp in Japan but failed twice. Finally, the Tokyo court had the summons served at the head office of Sharp in Manila. It requested the Supreme Court of Japan to serve the summons through diplomatic channels. It delivered the summons to the Japanese Ministry of Foreign Affairs which passed it on to its Philippine counterpart. The Ministry (now Department) of Foreign Affairs of the Philippines delivered the court processes to the Executive Judge of the Court of First Instance of Manila (now Regional Trial Court) and the latter forthwith ordered the sheriff to serve the same on Sharp in Manila. Despite receiving the summons, Sharp failed to appear at the hearings in Tokyo. The Tokyo court proceeded to hear the case and rendered judgment, ordering Sharp to pay Northwest the unremitted amounts.

Northwest was unable to execute the decision in Japan, hence a suit for enforcement of the judgment was filed by Northwest before the Regional Trial Court of Manila. Unable to settle the case amicably, the case was tried on the merits. After the plaintiff rested its case, the defendant on 21 April 1989 filed a Motion for Judgment on a Demurrer to Evidence based on two grounds: (1) the foreign judgment sought to be enforced is null and void for want of jurisdiction, and (2) the said judgment is contrary to Philippine law and public policy and rendered without due process of law. The trial court and the Court of Appeals found for plaintiff Northwest following the *Boudard* ruling. On the question of jurisdiction, the Supreme Court laid down its main premise that procedural rules are governed by *lex fori*. Then it proceeded to rule that, since defendant Sharp failed to plead and prove the relevant Japanese rules, they are presumed to be the same as Philippine rules. Under Philippine rules, the procedure adopted by the Japanese court in serving court processes was sufficient to acquire jurisdiction over defendant. From this case, it would appear that the service of foreign court processes will be given effect in the Philippines as long as it is in accordance with the law of the forum.

4. TAKING OF EVIDENCE

4.1. Taking of evidence abroad for a litigation in the Philippines

The Philippine Rules of Civil Procedure governing the taking of evidence abroad for use in cases pending in the Philippines are fairly well-defined. A person, whether a party or not, may be asked to testify in connection with a pending action in the Philippines despite the fact that (s)he is outside the country. Such testimony may be taken by deposition upon oral examination before the person enumerated in Rule 23, Section 11 which reads:

> "Sec. 11. Persons before whom depositions may be taken in foreign countries. In a foreign state or country, depositions may be taken (a) on notice before a secretary of embassy or legation, consul-general, consul, vice-consul, or consular agent of the Republic of the Philippines; (b) before such person or officer

> as may be appointed by commission or under letters rogatory; or (c) the person referred to in section 14 hereof."

In cases where deposition is not practicable or inconvenient, it may still be taken before the proper judicial authority in the foreign country where the proposed deponent may be found through the use of a commission or letters rogatory. The rule in respect to this, as contained in section 12, is as follows:[132]

> "Sec. 12. Commission or letters rogatory.
>
> A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such direction as are just and appropriate. Officers may be designated in notices or commissions either, or name or descriptive title and letters rogatory may be addressed to the appropriate judicial authority in the foreign country."

In brief, the request should state that certain named persons are subject to a foreign court's jurisdiction and are material witnesses in a case pending before the requesting court. The letter asks that said persons be brought before the foreign court or persons appointed by it to answer to interrogatories and cross-interrogatories annexed to the letter and that the answers be transmitted to the requesting court. The taking of evidence in the foreign court is subject to its rules.

The issuance of letters derogatory is generally founded on the principle of reciprocity. In the absence of treaties or customary law, the requesting court offers reciprocity to that foreign court as a gesture for the latter to grant the request.

4.2. Taking of evidence in the Philippines in connection with litigation abroad

The same principle of reciprocity allows the taking of evidence in the Philippines in connection with litigation abroad. There is, however, no Philippine rule on this matter and it is submitted that it is governed by the law of the forum, being procedural in character.

5. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

5.1. Philippine rule on recognition and enforcement of foreign judgments

The rule on the recognition and enforcement of foreign judgments in the Philippines is laid down in Rule 39, Section 48 of the Rules of Civil Procedure which provides:

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[132] Rules of Civil Procedure, Rule 23, Sec. 12.

> "The effect of a judgment or final order of a tribunal of a foreign country, having jurisdiction to render the judgment or final order is as follows:
> In case of a judgment or final order upon a specific thing, the judgment or final order is conclusive upon the title of the thing.
> In case of a judgment or final order against a person, the judgment or final order is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title.
> In either case, the judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact."

This rule is based on the theory of comity and reciprocity. A forum will accord recognition to a final judgment or order of another forum provided its own final judgments or order are similarly recognized in the other forum.[133] The rule also gets support from the vested rights theory[134] which provides that adjudication by a competent court as to the liability of one person to another creates a legal obligation which may be enforced in another country by an action for collection of a sum of money.

Finally, the principle of *res judicata* bars a second litigation between the same parties over matters that have already been tried and decided with finality in a first one. Public policy requires that litigation comes to a definite end, so that the parties who have litigated the issues therein are bound by the judgment rendered and the matters resolved are forever settled between them.[135]

We distinguish between recognition and enforcement. Recognition is the passive act of giving legal effect to a foreign judgment, while enforcement requires a separate action or proceeding to actually realize a foreign judgment. The Philippines, as shown by the above-quoted provision and by jurisprudence, favors enforcement over recognition.[136] This means that a foreign judgment cannot be given effect by mere execution. Rather, a separate action for enforcement must be instituted. This procedure harmonizes the principles of territoriality of courts with *res judicata*.

5.2. Requisites for recognition and enforcement

The judgment must have been rendered by a court of competent jurisdiction. Otherwise, the judgment is null and void and it is as if there is nothing to be recognized or enforced. The *Northwest* case illustrates this point. If the service of summons upon Sharp were held improper, the Tokyo court had not

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[133] CHESHIRE, *Private International Law* (1947) 628.
[134] Esperanza *v.* Avila, 20 SCRA 59 (1967).
[135] Paraphrasing COQUIA, 'Enforcement and Recognition of Foreign Judgment', 241 SCRA 40 (1995).
[136] Perkins *v.* Benguet Consolidated Mining Co., 93 Phil. 1034 (1954).

thereby acquired jurisdiction over Sharp and the judgment in favor of Northwest would be unenforceable in the Philippines for being null and void.

The judgment must be valid under the laws of the court that rendered it. The requisite is simple: a judgment which is invalid under the laws of the court that rendered it cannot be given effect in a court of another country. This is so because the second court merely recognizes or enforces the judgment in the manner that it would operate if enforced where the first court is sitting.

The judgment must be final and executory. In an early case the Supreme Court ruled that a decree awarding custody of a child granted by a US court could not be implemented in the Philippines because it was merely interlocutory. It did not finally settle and adjudge the rights of the parties and thus it was unenforceable in the Philippines.[137]

There must be reciprocity between the Philippines and the State where the foreign judgment was obtained. This is a reiteration of the principles of comity and reciprocity.

The judgment must be for the delivery of a specific thing or the declaration of status or right. This is evident from the above-quoted rule. Unless the judgment calls for the delivery of a particular thing or the performance of specific acts in the country, there is no reason for that judgment to be enforced in the Philippines.

The foreign judgment must not contravene the law, public policy, morals and good customs of the country where it is to be enforced. This is supported by Article 17 paragraph 6 of the Civil Code quoted earlier. The case of *Gonzales* v. *Gonzales*[138] is on all fours. Defendant here obtained a decree of divorce in Nevada which he asked the trial court of Manila to confirm. Plaintiff joined defendant in his efforts to convince the trial court to recognize and enforce the decree of divorce. In disposing of the case, the Supreme Court held that such a decree cannot be given effect in the Philippines as it violates Philippine law, public policy, morals and good customs.

Lastly, the judgment must not have been obtained by fraud, collusion, mistake of law or fact. During the proceedings on the action for enforcement, a party may show that the judgment was attended by any of the above defects. In the event he is successful the judgment will not be enforced by Philippine courts.

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[137] Querubin *v.* Querubin, 87 Phil. 124 (1950).
[138] 58 Phil. 67 (1933).

INTERNATIONAL CIVIL PROCEDURE IN INDONESIA

Sudargo Gautama*

1. GENERAL CONTEXT

1.1. Introduction

More than half a century after Independence, civil law and civil procedure law in Indonesia are still under the influence of the Dutch legal system. As a colony of the Netherlands, the Netherlands Indies in its legal system in civil matters closely followed the law and prevailing doctrines of the 'motherland' under the so-called concordance principle.[1] This principle was embodied in Article 131(2)(a) of the colonial quasi Constitution.[2] It was, of course, abandoned after independence. Yet, even in today's legal practice Dutch judicial decisions and Dutch scholarly opinions and interpretations are still widely followed.[3]

While the concordance principle applied to the part of the law that was of European origin, the colonial legal regime was simultaneously based on a system of different substantive and procedural civil law for various racially defined sub-divisions of the population and for different culturally defined parts of the country. This feature of the system was anchored in the notorious Article 163 of the above quasi Constitution. Although the legal distinctions along racial lines[4] were immediately abolished after independence as far as public law was concerned, this was not necessarily the case with regard to private law.[5]

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[1] On this principle, *see* S. GAUTAMA and R.N. HORNICK, *An Introduction to Indonesian Law* (Alumni Publ., Bandung, 4th printing, 1983), and also S. GAUTAMA, *Indonesian Business Law* (Citra Aditya Bhakti Publ., Bandung, 1995) 10 et seq.

[2] In Dutch *Indische Staatsregeling*; also 'Constitution of the Indies'. Netherlands Act of 23 June 1925, *Netherlands Indies State Gazette* (NISG) (1925) No. 415.

[3] *See* the proceedings in Kartika Thahir *v.* Pertamina, *Singapore Law Reports* (1993 No. 1) 735, where the issue of to what extent Indonesian case law and legal practice is still being influenced by Dutch case law and legal learning was hotly debated.

[4] The law distinguished between 'Europeans', 'Natives' (Dutch: *Inlanders*) and 'Foreign Orientals'. Europeans comprised Dutch citizens, other persons of European stock, Japanese nationals, and all others who in their native country were subjected to family laws essentially similar to Dutch law, such as the Thais and the Turks, and the children of Europeans born in Indonesia and their descendants. Indigenous people or Natives included the main Indonesian population except those who were legally 'equated' with Europeans or women who had moved to the category of Europeans by marriage. The Foreign Orientals comprised all those not belonging to either of the two previous

Asian Yearbook of International Law, Volume 6 (Ko Swan Sik *et al.*, eds.
 pp. 87-103

In order to avoid a legal vacuum after independence, the Constitution contains a provision on the validity and applicability of the law, including the Netherlands Indies codes of law, as it existed at the time independence was attained, i.e. on 17 August 1945. Article II of the Transitory Provisions of the Constitution stipulated, *inter alia*, that all existing regulations were to remain in force as far as they were not replaced in accordance with the Constitution. The application of this provision later underwent the impact of another instrument that was promulgated shortly afterwards. On 10 October 1945, barely two months after the declaration of independence, Government Regulation 1945 No.2 was proclaimed.[6] It essentially repeated the above transitory rule but added the proviso that existing regulations would only remain in force "insofar as they are not contrary to the Constitution itself". Because of this last sub-sentence the transitory regulation was later interpreted as prescribing the abolition of the existing law unless it was not contrary to the 1945 Constitution. If found to be contrary to that Constitution, it should be considered invalid even though no new legislation had yet been enacted to replace it.[7]

In practice it has not always been entirely clear which rules were abolished or altered since independence. This applies also to the ('European') Civil Code[8] and Code of Civil Procedure[9] and is, among other things, caused by the ambiguous interpretation and application of the transitory provisions relating to the law at the time of the attainment of independence. Another reason for this ambiguity is that, in introducing new law, the Indonesian legislature frequently does not clearly identify which parts of the existing law shall be deemed to be

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categories.

[5] The distinction was upheld in court practice as late as the 1970s: in its Decision of 25 August 1971 (case No. 268K/Sip/1971) the Supreme Court held "that the relationship between plaintiff and defendant is one governed by the law on internal inter-legal relationships [*hubungan hukum antar tata-hukum intern*], to which *Western law* [emphasis added] is applicable, as the defendant [an indigenous Indonesian] should be deemed, in accordance with relevant precedent, to have voluntarily entered into the legal sphere of the other party [an Indonesian of Chinese descent, and thus subject to the 'European' civil law]. *See* SUDARGO GAUTAMA, *Himpunan yurisprudensi Indonesia yang penting untuk praktek sehari-hari - Landmark decisions* [Collection of Important Indonesian Court Decisions for Daily Legal Practice - Landmark decisions], Vol. 9 (1994) case No. 2.

[6] KOESNODIPRODJO (ed.), 1 *Himpunan Undang2, Peraturan2, Penetapan2 Pemerintah Republik Indonesia* [Collection of Acts, Regulations and Decisions of the Government of the Republic of Indonesia] p. 34.

[7] In 1962, Minister of Justice SAHARDJO, in line with the 'revolutionary approach', suggested at a session of the National Law Development Institute that the (European) civil and commercial codes should no longer be regarded as proper codes of law but merely as 'law books' or 'commentaries', comparable to the 'restatements' in the US. *See* GAUTAMA and HORNICK, op. cit n. 1 p. 185 et seq.

[8] NISG 1847 No. 23.

[9] The so-called (Dutch) *Reglement op de Rechtsvordering* (hereinafter RV), NISG 1847 No. 52.

abolished, but rather confines itself to the phrase "earlier regulations contrary to the new law are no longer in force".[10]

1.2. The judicial system

Under the 1945 Constitution judicial power is vested in the Supreme Court and other judicial organs as determined by law.[11] The Basic Law on Judicial Power[12] mentions four branches of the judiciary: general courts, religious courts, military courts and administrative courts. For practical purposes only the first branch mentioned will be dealt with in the present paper.

The '*Pengadilan Negeri*' (hereinafter: PN) or 'Country Court' or District Court is the court of first instance. There is a PN in every 'second degree autonomous region'.[13] PNs are created by the Minister of Justice with the consent of the Supreme Court. Although according to the text of the law the PN is a panel court requiring at least three judges for taking valid decisions, it often acts as a single-judge court due to lack of qualified personnel.[14]

Before the Japanese occupation during World War II the prevailing racially based legal pluralism did not only refer to the substantive law but to the competence of the courts and the law of procedure as well. According to the so-called 'dualist' system there were separate categories of state courts for those who were classified legally as Europeans and so-called Foreign Orientals on the one hand, and for the indigenous Indonesians on the other.[15] The PN essentially replaced the pre-war first-instance state courts for the indigenous population (in Dutch: *Landraad*).

The '*Pengadilan Tinggi*' or High Court is the court of appeal. In civil cases appeal to the High Court is open provided the claim is more than 100 Rupiah, which is a nominal amount.[16]

The '*Mahkamah Agung*' or Supreme Court is the highest court of the country. Decisions of the High Court may be brought before the Supreme Court for appeal in cassation. Examination at this stage is confined to the legal aspects of the case. Besides, the Supreme Court is entitled to start a special

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[10] By way of example reference may be made to the discussions on this issue in connection with the introduction of the Basic Agrarian Act in 1960. *See* S. GAUTAMA, *Tafsiran Undang² Pokok Agraria* [Interpretation of the Basic Agrarian Act] (Citra Aditya Bakti publ., Bandung, 9th ed., 1993); S. GAUTAMA, *Indonesian Business Law*, ch. IV 'Land Law'. Art. 58 of the Act provided that all earlier law, whether written or unwritten, that was not explicitly revoked, would continue to be in force to the extent that it was not contrary to the spirit and content of the Act.

[11] Constitution, Art. 24.

[12] *Lembaran Negara* [(Indonesian) State Gazette; hereafter LN] 1970 No. 19.

[13] In Indonesian: *Daerah Swatantra Tingkat Kedua* or *Kabupaten*. Constitution, Art. 18; Law No. 1/1957, LN 1957 No. 6.

[14] This is especially the case in smaller cities.

[15] There were also indigenous courts (in Dutch: *inheemse rechtbanken*) with limited jurisdiction.

[16] The present (end of 1996) rate is Rp 2,300 to 1 US dollar.

kind of revision procedure by which it, by way of court of last instance, scrutinizes cases of blatant error, fraud, corruption or collusion of judges in a certain case, and the emergence of new facts or evidence which were not known at the time of the original decision and which are of such a nature that, had the court rendering the decision known them, it would certainly not have rendered such a decision. Further, the Supreme Court has jurisdiction over disputes on competence between different branches of courts. Lastly, whenever parties have not agreed about the finality of an arbitral award, an appeal is open directly to the Supreme Court.[17]

1.3. The sources

Reference has already been made to the pre-war 'dualist' court system. Accordingly, there was a rather complete though outdated Code of Civil Procedure (RV). It dated from 1847 and essentially was a copy of the corresponding Code in the Netherlands. It applied to proceedings before the 'European' state courts, next to a set of much more compact 'Native Regulations', dating from 1848 though later revised[18], for use in the state 'Native' courts as far as Java was concerned.[19]

With the abolition of the pre-war legal pluralism, as far as its public law aspects were concerned, and the resulting uniformation of the courts, the revised 'Native Regulations' were taken to become the directly applicable and principal rules of (penal and civil) procedure in the unified state court system, under the name of 'Revised Indonesian Regulations' (hereinafter RIB, after its Indonesian designation). It is, however, established Indonesian legal practice that RV provisions are being used by the courts supplementary to the RIB whenever the latter does not provide adequately for the matter at hand and when application of the RV would serve the realization of the substantive law.

2. JURISDICTION

2.1. The notion of jurisdiction

The notion of jurisdiction, within the meaning of the internationally recognized adjudicatory power of Indonesian courts as organs of the Indonesian state, plays no effective role in the Indonesian law or doctrine of international civil procedure. The issue is avoided or, rather, denied by focusing on domestic jurisdictional rules.

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[17] RV Art. 641.

[18] NISG 1848 No. 16, subsequently revised: NISG 1926 No. 559 and NISG 1941 No. 44.

[19] A separate but similar set of rules was applicable for the 'Native' state courts in the 'Outer Possessions'.

2.2. The exercise of jurisdiction

2.2.1. General

2.2.1.1. Forum

According to the RIB as applied by the Indonesian courts, a civil law suit is to be filed with the court of the defendant's habitual residence (in Dutch: *woonplaats*; in Indonesian: *tempat tinggal*): '*actor sequitur forum rei*'.[20] In case the defendant is a legal entity, the place of habitual residence is to be substituted by the place of the entity's legal seat (which is the place of incorporation or principal place of business).[21] In case of more than one defendant, the plaintiff has the right to choose among the courts competent in respect of each of the defendants.[22] These requirements show that the 'basis of presence' is essential. If, however, the defendant's habitual residence is unknown or if the defendant himself is unknown, the petition may by way of exception be filed with the Court of the plaintiff's residence.[23]

In determining the rules relating to 'international jurisdiction', Indonesian judicial practice follows the Dutch model according to which the defendant's domicile basically determines jurisdiction in international (transboundary) matters. The Indonesian court is deemed to have international jurisdiction if the defendant's residence is in Indonesia and may consequently be sued under the (domestic) *forum rei* rule.[24]

2.2.1.2. Forum actoris

As already mentioned earlier, if the defendant's habitual residence is unknown, or if the defendant himself is unknown, then the court of the plaintiff's habitual residence is competent. This rule is also applied in transboundary cases following the RV, according to which, in case the defendant has no legal residence nor an actual residence in the country, the Indonesian court is deemed to be competent provided the plaintiff has his habitual residence in Indonesia.[25]

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[20] RIB, Art. 118. The term 'habitual residence' has been used in the Hague Conventions on private international law. *See* the 1961 Child Protection Convention and the 1965 Adoption Convention. The term is regarded to be more factual than the English term 'domicile'. The requirement of *forum rei* is in line with the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

[21] Depending on the doctrine adhered to. *See* S. GAUTAMA, 7 *Hukum perdata internasional Indonesia* [Indonesian Private International Law] (3d ed., 1995) Ch. 22.

[22] RIB, Art. 118(2).

[23] Ibid., Art. 118(3). *Forum actoris*, *see infra*.

[24] Cf. R. VAN ROOIJ and M.V. POLAK, *Private International Law in the Netherlands* (1987) 45. The same approach is taken in the European Convention on Jurisdiction and Execution, Art. 2.

[25] RV, Art. 99(3).

Another exception to the *forum rei* rule is the possibility to sue before an Indonesian court non-resident aliens without a known address in Indonesia, for obligations arising from transactions concluded with Indonesian nationals.[26] This mode, unknown in the RIB and applied by analogy to the RV, was in fact derived from the French Code. It is a less known exception to the *forum rei* rule and has been much criticized by various authors[27] It enables an Indonesian plaintiff to bring a foreign party without a known address in Indonesia before an Indonesian court.[28] Of course the ultimate decision of the Indonesian court would not be enforceable in the foreign country where the defendant company has its legal seat, but it may be of value to bring foreign opponents to the negotiating table.[29]

2.2.2. Jurisdiction to enjoin and to arrest

The RV contains specific provisions with regard to the filing of a suit by an alien before the Indonesian courts. Under one of these provisions the foreign plaintiff is obliged to provide 'security for costs', the so-called *cautio judicatum solvi*.[30] The RIB does not contain rules on the matter and, according to Indonesian judicial practice as well as legal writings, the court is not obliged to order the provision of such security for costs, not in relation to foreign plaintiffs nor to foreign defendants who file a counterclaim. The rationale is that at present any plaintiff has to pay an advance for the court fees when filing a civil law suit with the state courts. Besides, the final costs which the defeated party may ultimately be ordered to pay are confined to the official court fees which are

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[26] This possibility is also derived from the RV, Art. 100: [translated from the Dutch text] "An alien who has no permanent residence in Indonesia, or who is not even living in Indonesia, may be sued before the Indonesian court in respect of transactions with an Indonesian national, concluded in Indonesia or elsewhere". The corresponding provision in Dutch law (Art. 127 Code of Civil Procedure) has been referred to as a 'dead letter' as far as Dutch judiciary practice is concerned. *See* VAN ROOIJ and POLAK, op. cit. n. 24 p. 53.

[27] *See, inter alia*, L.I. DE WINTER, 'Excessive jurisdiction in private international law', 17 ICLQ (1968) 706, who classified it as having a 'chauvinistic character'. L. STRIKWERDA, in *Nederlands Internationaal Privaatrecht*, special issue, 1996, p. 96, observed that, internationally, *forum actoris* is in fact no more accepted as a proper forum. DELAUME, in *American-French Private International Law* (1953) 57, called it "a legal trap into which foreigners, unaware of the existence of the privilege, may fall".

[28] In my personal experience as a litigation lawyer this has proven to be useful. Reference may be made to the case filed against a Liberian shipping company by the Indonesian state-owned oil company Pertamina before the Central Jakarta Court in the 1970s for the annulment of overpriced tanker lease contracts between Pertamina and the Rappaport Group. The case was settled out of court.

[29] This was in fact what happened in the case referred to in the preceding note.

[30] RV, Art. 128: [translated from the Dutch text] "Non-resident aliens who act as plaintiff or . . . intervening party are obliged, upon request of the opposing party, . . . to provide security for costs, damages and interests for which he might be declared liable."

nominal.[31] Under Indonesian law the defeated party is not liable for the victorious party's lawyer's fees.

Another special aspect of proceedings involving non-residents is that the other party may always apply and obtain permission for attachment of the non-resident's assets in Indonesia.[32]

Depending on the subject matter of the case, provisional measures may be requested from, and ordered by the court, enjoining a party to refrain from acting in a certain way or from altering the *status quo* pending a decision in the case. These measures may also be ordered in transboundary cases.

2.2.3. Jurisdiction in rem

Claims with respect to rights to immovables fall under the jurisdiction of the court having jurisdiction at the place where the immovable is situated (in Indonesia). The RIB itself does not contain a provision to this effect, but Indonesian judicial practice follows the relevant RV rule.[33]

2.2.4. Constraints on exercise of jurisdiction (forum non conveniens)

According to the *forum non conveniens* doctrine, the court may refrain from exercising jurisdiction by declaring itself incompetent in the matter, despite having jurisdiction according to the criteria for international jurisdiction. This possibility for refusal to exercise jurisdiction is based on the consideration that in some cases insufficient connections with the legal sphere to which the court belongs might exist.

The doctrine may thus practically serve as a general exception to the international jurisdiction of the court. It is well-known in Anglo-American private international law but much less in the continental European systems. Consequently the doctrine seems to flourish in countries like Singapore and Malaysia,[34] while there is no comparable rule nor praxis in Indonesia.

2.3. Forum selection

The Indonesian law of civil procedure recognizes the freedom of choice of forum. This implies the recognition of the jurisdiction of the court chosen by

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[31] RIB, Art. 182.

[32] RV, Art. 757.

[33] RV, Art. 99(8).

[34] *See* e.g., Justice JUDITH PRAKASH's paper, '*Forum non conveniens* and *lis alibi pendens*', presented at the 8th Singapore Conference on International Business Law on Current Legal Issues in International Commercial Litigation, 1996. Justice PRAKASH quoted the House of Lords in Spiliada *v.* Cansulex Ltd, (1986) 3 All ER 843, and outlined that Commonwealth jurisdictions such as Singapore, Malaysia, New Zealand and Canada have fully adopted and applied the doctrine, while Australia has some reservations.

the parties. Such choice of forum can, for example, be found in many standard maritime transport contracts (bills of lading) of Indonesian shipping companies where it sometimes appears next to a clause on choice of applicable law. Indonesian judicial practice shows that Indonesian courts have no problem in exercising jurisdiction that has been conferred on them by the parties by way of choice of forum.

A choice of forum without a choice of applicable law implies a choice for the *lex fori*. In Indonesian legal practice transnational loan agreements often contain a clause opting for the forum of the foreign lender, thus extricating the Indonesia-based borrower from the Indonesian courts and Indonesian law. The present author considers a choice of this kind completely valid, although no court decisions are available on the question yet. On the other hand, the Jakarta District Court decided that it had no jurisdiction in a case in which the parties had made an express choice of Singapore law but no choice of forum.[35] This was, in my opinion, a wrong decision. A choice of law should be regarded as something separate and different from a choice of forum.[36]

Just like it often occurs that transnational loan agreements contain a choice of forum clause, they sometimes contain a choice of law clause without a choice of forum. In a loan agreement between the Jakarta branch of a foreign bank and a local Indonesian company Japanese law was chosen by the parties as the applicable law. The Jakarta District Court in 1982 correctly took cognizance of the case while ruling that the choice of law should be respected[37] in spite of an exception raised by the foreign defendant that the court should declare itself incompetent since the parties had opted for foreign law. In another case involving Singapore citizens as the plaintiffs and a Jakarta branch of a foreign bank as the defendant, the Central Jakarta District Court also correctly refused the defendant's contention that, since Singapore law was chosen by the parties, the Singapore court should have jurisdiction in the matter. The Court held itself competent.[38]

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[35] Case No. 560/1982G. In appeal, however, the Jakarta High Court has not upheld the lower court's decision.

[36] *See* GAUTAMA, op. cit. n. 21.

[37] P.T. Indokaya Nissan Motors *v.* Marubeni Corporation, Central Jakarta District Court, Case 560/1982/Pdt. G of 11 October 1983; (in appeal) Jakarta High Court, No. 18/1984/Pdt. of 22 May 1984; (in cassation) Supreme Court No. 2820K/Pdt. 1984 of 27 February 1986. Commented on in *S. Gautama*, op. cit. n. 5, Vol. 6, case No. 4. The recognition of the choice of law as the expression of the intention of the parties is established case law in the field of inter-personal law in Indonesia.

[38] Case No. 325/1982G. Since there was, according to the Court, no difference between Singapore and Indonesian law in respect of the matter, it chose to apply the Indonesian Civil Code.

2.4. Lis alibi pendens

This stay of action on grounds of pending proceedings between the same parties on the same subject matter before another court is known in the Indonesian law of civil procedure, though only in the RV[39] and not in the RIB. In my opinion the RV provision should be applied in transboundary cases too, but there is neither directly applicable legislation nor a court decision available on the matter.

2.5. Immunities

Following Article 13A of the Dutch 'General Provisions of Legislation' (abbreviated AB after its Dutch name *Algemene Bepalingen van Wetgeving*), Article 22A of the Indonesian version of the General Provisions stipulates that "[t]he jurisdiction of the Indonesian courts, as well as the enforcement of court decisions [. . .] are limited by the exceptions contained in the law of nations".[40]

Under this provision it is suggested that foreign states and state organs, when acting *iure imperii*, are to be regarded as having immunity precluding the Indonesian courts to sit in judgment over them. But if they act *iure gestionis* in daily civil undertakings, such as renting a house, it should be possible to sue them before Indonesian civil courts.

Yet, in its attitude towards the outside world Indonesia used to adhere to the doctrine of absolute immunity.[41] This has become apparent in the attitude of state organs in judicial practice in Indonesia towards foreign states. In cases concerning non-payment of rent by foreign embassies or consulates, or of compensation due for returning leased houses in a bad state etc. (i.e. acts *jure gestionis*), where a foreign state refuses to appear before the court, the court channels its summons through the Indonesian Ministry of Foreign Affairs. In practice this Ministry appears reluctant to service the summons under the impact of the doctrine of absolute immunity.[42] In case the foreign embassy, even though

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[39] RV, Art. 134.

[40] The provision was inserted into the 19th century AB in the Netherlands in response to a Dutch court decision during the First World War convicting the German state for tort. In accordance with the concordance principle, the article was inserted in the Indonesian AB in 1918.

[41] *See* e.g., Yuan Ismael & Company Inc. *v.* Government of the Republic of Indonesia, [1955] AC 72, before the Hongkong courts in 1954; the series of cases before various foreign courts concerning the nationalization of Dutch tobacco plantations in Indonesia during the struggle for the return of Western New Guinea (now: Irian Jaya); and several other cases.

[42] For these practices, *see* S. GAUTAMA, *Aneka masalah hukum perdata internasional* [Miscellaneous Problems of Private International Law], 1985. *See also*, for the doctrine of immunity and the 'act of state' doctrine, YUDHA BHAKTI ARDINISASTRA, *Perkembangan penerapan imunitas kedaulatan negara dalam penyelesaian perkara diforum pengadilan - Studi perbandingan atas praktek Indonesia diforum pengadilan asing* [The Development of the Application of State Immunity in the Settlement of Disputes before the Court - a Comparative Study of the Indonesian

it was properly served, still refuses to appear, the Jakarta court used to declare itself incompetent for lack of jurisdiction.[43]

3. SERVICE OF PROCESS

According to the RIB, a law suit starts with the filing of a request or petition by the plaintiff at the court of the defendant's habitual residence.[44] In case of a defendant abroad, the service is channelled through the Foreign Ministry which delivers the summons through the embassy or consulate in the country of residence or seat of the defendant. The foreign party is as a rule represented by an Indonesian attorney who is given a legalized power of attorney. The power of attorney must not be worded in general terms, but should specify the name of the other party in the case, a short description of the case and, whenever possible, the registration number of the case at the Indonesian court.

4. TAKING OF EVIDENCE ABROAD

There are no special provisions in the RIB, nor in the RV, with regard to the taking of evidence abroad. Indonesia, however, has concluded a treaty with Thailand on the subject.[45] Although the treaty bears the broader title of judicial cooperation, it deals primarily with cooperation between the courts of the two countries concerning the taking of evidence by way of 'letters of request'. Indonesian courts may request the hearing of witnesses domiciled in Thailand by a Thai court by way of 'rogatory commission'.

So far no such a request has yet been made by the Thai judiciary to its Indonesian counterpart, nor the other way around. Nonetheless, ultimately this bilateral treaty will serve as a starting point and model for closer multilateral judicial cooperation between the states in the ASEAN region.

5. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

In dealing with this subject it may be useful to note the distinction between recognition and enforcement of foreign judgments. Enforcement is something more profound than recognition and is broader in scope. It requires some

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Practice before Foreign Courts], doctoral dissertation, Pajajaran University, Bandung, 1995.

[43] In some cases the defendant foreign state subjected itself voluntarily to the jurisdiction of the Indonesian court. *See* e.g. Supreme Court 16 July 1974 in case No. 635/Sip/1973, in S. GAUTAMA, op. cit. n. 5 Vol. 7 (1993), case No. 4, with comments by the author.

[44] RIB, Art. 118.

[45] For this Convention *see* S. GAUTAMA, *Indonesia dan Konvensi-konvensi hukum perdata internasional* [Indonesia and Conventions on Private International Law], rev. ed. 1996.

positive action by the court and organs of the executive branch of government. Recognition, on the other hand, is more passive and does not require action by the court. Therefore, states may be more liberal in recognizing foreign judgments than enforcing them.[46]

Contrary to its adherence to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Indonesia has so far not concluded any treaty for the recognition and enforcement of foreign court judgments.

In principle the situation in Indonesia with regard to the status of foreign judgments is quite clear: they are as a rule not recognized and cannot be enforced in Indonesia. There are no directly applicable written rules, as the RIB does not contain provisions on the matter, but the non-enforceability of foreign judgments is explicitly stated in Article 436 of the RV which reads:

> "Except in cases referred to in Article 724 of the Commercial Code no judgments handed down by foreign . . . courts can be enforced in Indonesia. The cases may be tried afresh and finalized by the court in Indonesia.
> In case of the above exception, the judgment of the foreign court shall not be enforced before a leave for enforcement (*exequatur*) has been obtained . . . [from the Indonesian court]."

This article, or at least its substance, is still being applied.

Although a foreign judgment is not directly enforceable, it is by no means totally worthless: it serves as *prima facie* evidence in the new case to be filed in Indonesia.[47] Moreover, the classical view of non-enforceability has undergone a tempering/moderating development. As a result the court is practically free to determine, in each specific case, whether and to what extent the foreign judgment is accepted. Judgments containing condemnatory money payments are not enforceable, but declaratory decisions are usually recognized.

Meanwhile there are proposals in the context of national law development by the National Law Development Institute[48] towards giving positive effect to, and allowing enforcement of, foreign judgments.[49] On another aspect, the present author has argued for a treaty for the harmonization of enforcement and recognition of foreign judgments in the ASEAN countries.[50] To standardize the

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[46] Especially in Anglo-Saxon literature due attention is paid to the difference between the two concepts.

[47] *See* B.A. CAFFREY, *Enforcement of Foreign Judgments* (a study for Lawasia, 1985) 67 et seq., for the different systems in the ASEAN region: the 'common law method' and the 'legislative method' based on the 'obligation theory' (*inter alia*, Singapore); the 'Indian method'; the 'Japanese method' based on the German system; the 'evidentiary method' (Indonesia, Thailand); the 'appeal method' (Philippines, modeled on the US system).

[48] An autonomous Directorate-General of the Ministry of Justice.

[49] Reference is made here to Art. 76 of the draft for a new Civil Procedure Code which reads as follows: "Judgments of a court belonging to a different legal sphere and decisions of foreign courts, of which enforcement is requested, may be enforced under the present Part of the code in accordance with the applicable law and on order of the Supreme Court."

[50] 'Recognition and enforcement of foreign judgments and arbitral awards in the ASEAN region',

existing different rules and procedures it was suggested to have an ASEAN Convention along the lines of the European Convention of 1968[51] and the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[52]

The tendency not to enforce foreign judgments is in line with the principle of territorial sovereignty. Under this principle judgments cannot be automatically enforced in the territory of another state, and the principle of 'judicial sovereignty' is closely connected with it.[53] Moreover, the non-enforceability of foreign judgments in Indonesia may also be considered as being in accordance with Article 22a of the 'General Provisions of Legislation'.[54] For foreign judgments to qualify for enforcement in other states, there must, as a rule, be a treaty between the state of enforcement and the state where the judgment has been pronounced rendering each other's judgments reciprocally enforceable in the same way as judgments emanating from national courts. So far Indonesia has concluded no such execution treaty.

The above-mentioned exception to non-enforceability in Article 436 of the RV refers to foreign judgments dealing with 'general average' compensation in the law on maritime transport and will not be elaborated here because of its specific nature.

Does the doctrine on the non-enforceability of foreign judgments apply to all kinds of judicial decisions or is a differentiation to be made between types of judgments, such as condemnatory and declaratory ones, and decisions concerning the personal or family law status of a person? There is no consensus of opinion on this matter.

Foreign judgments of a declaratory nature, such as those dealing with the validity of a marriage or a divorce, or the validity of proprietary rights (ownership) to goods expropriated from the original owner, will as a rule be recognized by the Indonesian courts.[55] The same is the case with constitutive

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paper presented at the 5th ASEAN Law Association Conference at Denpasar, Bali, 1989. The idea obtained the support of other scholars. *See* PEARLIE M.C. KOH, 'Foreign judgments in ASEAN - a proposal', 45 ICLQ (1996) 844. *See also* S. GAUTAMA, 8 *Hukum perdata internasional Indonesia* [Indonesian Private International Law] (2nd ed. 1987) 807 et seq.

[51] This Convention directly distributes jurisdiction amongst the courts of the EEC (now European Union) member states. The success of this Convention is primarily due to the fact that jurisdictional issues of the different courts are clearly outlined. *See* B.A. CAFFREY, op. cit. n. 47 p. 24.

[52] The text of this Convention is included in *Recueil des Conventions de La Haye de Droit International Privé (1951-1988)*, edited and published by the Permanent Bureau of the Hague Conference on Private International Law, The Hague.

[53] The Supreme Court of the Netherlands said in an early decision of 31 January 1902: "Since a judge acts as a state organ, the scope of his decisions is limited to the territory over which the state authority extends; outside that territory, they are only binding in such a manner and under such prerequisites as the competent authority in each state involved determines." *Weekblad van het Recht* [Law Weekly] No. 7717.

[54] *See supra*, section 2.5.

[55] This is in line with the 'Act of state' doctrine. Cf. SUDARGO GAUTAMA (GOUW GIOK SIONG), *Segi-segi hukum internasional pada nasionalisasi di Indonesia* [International Law Aspects of

decisions which create a certain legal situation or relationship, e.g. decisions concerning the annulment of a contract, the termination of a marriage, the appointment of a guardian, adoption, etc. Declaratory decisions do not need any enforcement by Indonesian courts as they merely affirm rights and duties between the parties. It is natural that these, so-called 'status decisions', are recognized rather easily because they only require the adjustment of the registers of the Civil Registry by administrative authorities. When status decisions of foreign courts deal with persons of Indonesian nationality, they must not only be rendered by a competent court but must also comply with Indonesian private international law rules applicable to the facts of the case concerned, in order to be eligible for recognition and enforcement. Foreign divorce judgments involving Indonesian nationals, for example, will only be recognized if Indonesian law was applied and Indonesian grounds of divorce were duly observed. Similarly, it may be assumed that foreign guardianship decisions concerning Indonesian minors and foreign adoption decisions involving Indonesian nationals would only be recognized if Indonesian law was applied. The reason of all this is that under Indonesian private international law the nationality principle is adhered to in matters of personal status.[56]

Finally, the general limit set to the discretion of the Indonesian court to recognize or enforce a foreign judgment is, of course, that this judgment must not be contrary to Indonesian 'international public policy'.

The fact that foreign judgments cannot be automatically enforced in Indonesian territory is a matter that has not been sufficiently taken into consideration by foreign parties to contracts with Indonesian counterparts. We often see that in such contracts a choice of jurisdiction is made in favour of a foreign court, usually that of the country of the foreign party's domicile. The foreign party and his counselling lawyer are usually of the opinion that it is to their advantage to be entitled to sue the Indonesian counterpart before the courts of the chosen jurisdiction. They appear, however, to be less aware that a favourable decision obtained from the foreign court cannot be enforced in Indonesia where the assets of the Indonesian party, as a rule, are located. Thus the value of a foreign decision is different from a decision obtained through an Indonesian court, and it may well be that the foreign party is only losing time and money by instituting the case before a foreign court.

Nationalization in Indonesia] (1960).

[56] Art. 16 of the General Provisions of Legislation *cf. supra* section 2.5.

6. ARBITRATION

6.1. The law on arbitration

The regulation of arbitration in Indonesia is to be found in Title One of Book III of the RV. The Articles 615-651 are similar to those of the Dutch Code of Civil Procedure before the latter's revision, which were in turn based on the [former] French Code. Under the colonial regime the articles were meant to apply only to those persons who were subject to 'European' or 'Western' civil law. The RIB does not contain provisions on the matter. Consequently, in present practice the RV provisions are applied to relationships among persons belonging to any group of the population. As far as the application to members of the majority group of indigenous Indonesians is concerned, recourse is sometimes taken to the presumption that, whenever such a person claims a right to submit to arbitration, he is deemed to have subjected himself voluntarily to the 'Western, European' law.

Since the applicability of the RV and its articles is based on the Transitory Provisions of the Constitution, and in view of the proviso that the existing law may not be contrary to the Constitution, Indonesian courts are in fact free to set aside or to reshape any of the arbitration rules of the RV whenever they are regarded no longer suitable in an independent Indonesia. Article 617(2), for example, prohibits the appointment of women as arbitrators. In independent Indonesia, however, women are treated on an equal footing with men and, consequently, the relevant provision is considered to be no more valid.[57]

At present the Indonesian Ministry of Justice has completed a draft of a new arbitration law[58] which is now scheduled for submission to Parliament.

Finally, some specific laws provide for arbitration as a means of dispute settlement. For instance, the Foreign Capital Investment Law of 1967 and the 1974 Foreign Investment Law *inter alia* provide for arbitration in case of disagreement on the amount of compensation in case of nationalization.[59]

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[57] Supreme Court Circular Letter 1963 No. 3.

[58] An academic draft was submitted by the present author upon request. It formed the basis for the official draft which has now been accepted by various government departments. For the successive drafts *see* S. GAUTAMA, *Aneka hukum arbitrase* [Miscellaneous Aspects of Arbitration Law] (1996). In 1994 another academic draft was submitted by a committee of economic law experts sponsored by US AID under the so-called 'Elips project'.

[59] International instruments may also provide for arbitration. As far as Indonesia adheres to such instruments, the possibility of arbitration offered may be relevant for Indonesia. *See* e.g. the Convention for the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID Convention); and the following case decided by ICSID arbitration: Amco Asia Corp. and others *v.* The Republic of Indonesia, 89 *International Law Reports* 366 et seq. and, as to the latest decision in this case (of 3 December 1992): S. GAUTAMA, *Arbitrase Bank Dunia terhadap penanaman modal asing di Indonesia dan yurisprudensi Indonesia dalam perkara hukum perdata internasional* [World Bank Arbitration on Foreign Investment in Indonesia and Indonesian Case Law in the Field of Private International Law] (1994).

6.2. The practice of arbitration

While arbitration was frequently resorted to in the pre-independence period, later the number diminished significantly. At present, however, the importance of arbitration as a way of settlement of disputes is gradually increasing again in the field of economic transactions, particularly in respect of international commercial contracts. The foreign party often still feels uneasy before the national courts of his Indonesian contract partner and prefers to avoid the (in his eyes) biased national court of his opponent. In this situation arbitration is the most suitable form of dispute settlement. Nowadays it is in fact standard procedure in most contracts between Indonesian and foreign parties.

The Indonesian Chamber of Commerce has set up its own National Indonesian Arbitration Institute (BANI after its Indonesian name '*Badan Arbitrase Nasional Indonesia*'. Arbitration clauses in favour of arbitration outside Indonesia refer to various arbitration tribunals and rules, such as the International Chamber of Commerce in Paris, the London Arbitration Court, and Tokyo. Increasingly reference is made to the UNCITRAL arbitration rules and the Regional Arbitration Centre in Kuala Lumpur under the auspices of the Asian-African Legal Consultative Committee.

The Supreme Court has emphasized the obligation of courts to give effect to arbitration clauses by rendering courts incompetent in such cases. In *Ahju Forestry Comp. Ltd.* v. *P.T. Balikpapan Raya* a dispute had arisen between a Korean company and its Indonesian partner concerning their joint venture company. Upon the request of the Indonesian party the North Jakarta District Court regarded itself competent by pronouncing on the validity of the transfer of the company's management, notwithstanding an arbitration clause. On appeal, the Jakarta Appeal Court affirmed the lower court's decision. The Supreme Court, however, gave effect to the arbitration clause and declared that the Indonesian court had no jurisdiction.[60] The same happened in *P.T. Metropolitan Timbers* v. *P.T. Gapki Trading Comp.*[61] where the dispute was between a foreign contractor engaged in the exploitation of a timber forestry concession and its Indonesian counterpart.

6.3. The enforcement of foreign arbitral awards

For the question of enforcement a distinction is to be made between whether or not a treaty on the matter applies to the case. Two multilateral treaties are relevant for the Indonesian situation: the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards (in conjunction with the 1923 Geneva

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[60] Supreme Court 8 February 1982, No. 2924K/Sip/1981, in *Himpunan putusan Mahkamah Agung tentang arbitrase internasional* [Collection of Supreme Court Decisions concerning International Arbitration] (1988).

[61] Supreme Court 30 September 1983, case No. 2225K/Sip/1976, ibid.

Protocol on Arbitration Clauses) and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

As to the 1927 Geneva Convention and the 1923 Protocol, the Netherlands were a party to the Convention and Protocol and extended their application to Indonesia on 28 April 1933.[62] The Supreme Court, in a decision of 1984, considered the question whether Indonesia was bound by the Convention after its attainment of independence.[63] It held that, in spite of the application of the Convention to Indonesia in 1933 and in spite of a devolution provision in the Indonesian-Dutch Agreements on the occasion of the Dutch recognition of Indonesian independence in 1949, new principles of international law regarding state succession had emerged since World War II according to which Indonesia was not bound by pre-independence treaties.

In the same decision of 1984, the Supreme Court scrutinized whether the 1958 Convention was to be applied by the Court. Acknowledging that Indonesia had acceded to the Convention which came into effect for it on 7 October 1981, the Supreme Court held that:

> " . . . in accordance with Indonesian practice it is necessary for the government to introduce implementing legislation. Such legislation must be observed both in case of a request to the District Court for the enforcement of a foreign award and in case of a direct request to the Supreme Court for the determination as to whether the award is contrary to Indonesian public policy".

The court concluded that pending such implementing legislation the Indonesian courts cannot order the enforcement of foreign arbitral awards on the basis of the Convention.

This was a disappointing decision since a formal implementing regulation is not normally required in respect to treaties. It is suggested that the enforcement of foreign awards should be effected in the same manner as domestic arbitral awards, and in fact along the lines of the enforcement of a normal court decision, through the District Court of the defendant's place of habitual residence. This is essentially the way prescribed by Article 639 of the RV. My conclusion is, therefore, that a foreign award, enforcement of which is sought under the New York Convention, can be executed even without implementing legislation. This does not imply an automatic enforcement, as recognition and enforcement may be refused by the Indonesian court on one of the five grounds listed in

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[62] NISG 1933 Nos. 131 and 132.

[63] Cf. S. GAUTAMA, *Capita selecta hukum perdata internasional* (1974) 97; R. HORNICK and SIDIK SURAPUTRA, 'Beberapa masalah hambatan terhadap pelaksanaan perwasitan internasional di Indonesia' [Some problems obstructing the enforcement of international arbitration in Indonesia], *Hukum dan Pembangunan* [Law and Development; Journal of the Faculty of Law of the University of Indonesia] (1986) 283 and 289; H. Gunanto, "Implementing regulations for the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards in Indonesia", 1 AsYIL 151-155. The decision was of 29 November 1984, case No. 2944 K/Pdt/1983 in Navigation Maritime Bulgare *v.* P.T. Nizwar.

Article V(1) of the Convention or one of the two grounds stated in Article V(2).

The Supreme Court's decision of 1984 is being criticized especially because of its attitude towards the applicability of the New York Convention. The question about the Geneva Convention has become rather theoretical since the Convention's replacement by the New York Convention and the almost world-wide adherence to the latter. Later the Supreme Court took measures to fill the suspected gap in legislation, by issuing Supreme Court Regulation No. 1 of 1 March 1990.

The courts will always refuse enforcement of the foreign award if it is found to be contrary to Indonesian public policy. However, no clear criteria exist for this notion in regard to arbitral awards. In the case of *E.D. and F. Mann (Sugar) Ltd.* v. *Yani Harjanto*[64] the Supreme Court had issued a *fiat exequatur* to the foreign sugar firm Mann, for the enforcement of a London arbitration award, in accordance with the applicable rules as embodied in a Supreme Court Regulation of 1990. Yet, in a subsequent decision the Supreme Court denied further enforcement of the award in Indonesia for being contrary to Indonesian public policy (*ketertiban umum*). The decision was based on grounds that the sugar sale contract which contained the arbitration clause was null and void for being in violation of an Indonesian government regulation under which a certain government body was designated as the sole body entitled to import sugar into Indonesia, thereby excluding private individuals like YANI HARJANTO.

[64] Supreme Court case No. 1203/Pdt/1990 of 14 December 1991, in conjunction with Central Jakarta District Court case No. 736/Pdt/G/1988/PN Jakarta Pusat, and Jakarta High Court case No. 485/Pdt/1989/PT DKI. Commented on in S. GAUTAMA, op. cit n. 5 Vol. 6 case No. 2.

INTERNATIONAL CIVIL PROCEDURE IN JAPAN

Kono Toshiyuki*

1. GENERAL CONTEXT[1]

1.1. The judicial system[2]

1.1.1. Introduction

All judicial power is vested in the Supreme Court and in such other inferior courts as are established by law. Accordingly, a single judicial hierarchy decides administrative as well as civil and criminal actions. Since Japan is a unitary (non-federal) state, all courts are national courts. Thus the organization and power of the courts are determined by the Japanese Constitution and the national Court Law.

The hierarchy of the courts is as follows: the summary courts are at the bottom, the district courts and the family courts at the second level, the high courts at the third level and the Supreme Court at the top. There is no limitation to the right of appeal from summary courts to district courts, or from district courts, as the courts of first instance, to a high court. A re-appeal may be made to a high court against appellate judgments of the district court, and to the Supreme Court against judgments of either first or second instance rendered by a high court. The grounds for re-appeal in civil cases are restricted to violation or misconstruction of the law or the Constitution.

1.1.2. Summary Court

The summary courts are the base of the whole court structure and have power to try civil cases involving small claims. They are the courts of first instance for civil cases involving claims not exceeding 900,000 Yen. In summary courts a single judge decides the case. The court may use judicial com-

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[1] Important articles in this field are included in ANDREAS HELDRICH and KONO TOSHIYUKI (eds.), *Herausforderung des Internationalen Verfahrensrecht* [The Challenge of the Law on International Procedure] 1994. For an overview, see AOYAMA YOSHIMITSU, 'Problems in international litigation', in *Collected Reports of the International Symposium on Civil Justice in the Era of Globalization* (1993) 44-63; TANIGUCHI YASUHEI, in BAUM and DROBNIG (eds.), *Japanisches Handels- und Wirtschaftsrecht* [Japanese Commercial and Economic Law] (1994) ch. 6 sec. 13 pp. 683-689.

[2] HATTORI TAKAAKI and DAN HANNO HENDERSON, *Civil Procedure in Japan* (1985) Ch. 1 and 3.

Asian Yearbook of International Law, Volume 6 (Ko Swan Sik *et al.*, eds.
, pp.105-134

missioners[3] in effecting a settlement or conducting a hearing. There are special provisions in the Japanese Code of Civil Procedure (CCP)[4] for the simpler character of summary court proceedings.[5] In 1995, 243,569 civil cases were handled by the summary courts, out of which 112,446 were finished by judgment, 68,267 by settlement and 51,702 by withdrawal. Circa 80% of the 243,569 cases were finished within three months after the commencement of the litigation.[6]

1.1.3. District Court/Family Court

The district courts have general adjudicatory authority over civil cases (including transboundary) and criminal cases as courts of first instance. There is one district court in each of the 47 prefectures, except for Hokkaido which has four such courts. The Supreme Court may establish branches of a district court within its district. Each branch has its own territory and usually hears cases arising therein. The main office remains competent, however, to hear all cases within its territory. The district court bench consists of judges and assistant judges. Usually one judge presides over the court and decides the cases. In exceptional cases a three-judge collegiate court is required. Two kinds of cases require such a collegiate court: appeal cases from summary court judgments, and cases where a collegiate court has ruled that they are to be decided by a collegiate court, upon request of a single judge in a complicated case. In 1995, 146,772 cases were handled by the district court in first instance, out of which 69,951 were finished by judgment, 48,144 by settlement and 22,532 by withdrawal. Around 60% of the 146,772 cases were finished within 6 months, around 15% within one year, and around 15% within two years after the commencement of the procedure.[7]

The family courts rank with the district courts in the judicial system. Family courts specialize in domestic relations and juvenile delinquency. Except for their different competence, family courts are quite similar to district courts. Almost all cases in family courts are heard by a single judge. Laymen often take part in domestic relations cases. When the family court hears domestic cases affecting personal relations or status within a family, family court councillors assist the judge by making recommendations, but they have no vote in deciding the case.

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[3] Judicial commissioners are all laymen of experience who are appointed in advance every year by the supervising district court. The purpose of this system is to project the common sense of the community into the resolution of disputes and to make justice more accessible to the citizens. *See* HATTORI and HENDERSON, ibid., ch. 3 p. 9.

[4] A new Code of Civil Procedure (Law No. 109 of 1996) will replace the old CCP (Law No. 29 of 1890) as of 26 June 1998.

[5] E.g. oral complaint (Art. 271 new CCP), no submission of preparatory writings (Art. 276) or a simpler judgment (Art. 280).

[6] Supreme Court, *Shiho Tokei* [Judicial Statistics] (1996) 96.

[7] Ibid., p. 118.

Conciliation procedures in certain domestic relations cases are mandatory and must be conducted by a conciliation committee. This committee is usually composed of one family court judge and two lay conciliation commissioners appointed by the court.

1.1.4. High Court

The high courts are the highest of the lower courts and serve as intermediate appellate courts. They are located in eight large cities.[8] Some of the high courts with the larger territorial districts have one or two branches. High courts have authority over appeals from district or family court judgments rendered within their respective territories.[9] From summary court judgments in civil cases, appeals may be brought to the district court and then re-appeal to the high court. All cases in the high court are heard by a three-judge bench. Only the judicial review of the decisions of the Fair Trade Commission and crimes concerning insurrection must be heard by a five-judge bench. In 1995, 15,369 civil cases were handled by the high court as the court of second instance, out of which 8,207 were finished by judgment, 5,455 by settlement and 1,415 by withdrawal. Around 70% of 15,369 cases were disposed of within one year after the commencement of the procedure.[10]

1.1.5. Supreme Court

The Supreme Court is the highest court of Japan, the court of last resort, and the so-called 'Constitutional Court' required by the Japanese Constitution. The Supreme Court exercises appellate competence only. Its main case load consists of appeals from judgments of the high court. The Supreme Court usually sits in three divisions composed of five justices (petty benches). The Grand Bench consists of all 15 justices. All cases filed with the Supreme Court are first assigned by rotation to one of the petty benches. A case is transferred to the Grand Bench, if, in the course of review, it turns out to fall into one of the following categories: (1) when, as a result of the contention of the party concerned, the Court is required to determine whether a law, ordinance, regulation or official disposition is constitutional; (2) when the Court finds, on its own initiative, that a law, ordinance, regulation or official disposition is unconstitutional; (3) when the opinion of the Court (petty bench) in the instant case is contrary to precedent of the Supreme Court on the interpretation or application of the Constitution or any other law; (4) when the opinion of the justices of a petty bench are evenly divided; or (5) when a petty bench deems it appropriate that the case be heard by the Grand Bench. In principle, judgments

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[8] Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo and Takamatsu.

[9] The high courts have original jurisdiction over certain subject matters designated by special laws such as violations of the election law or the crime of insurrection. The Tokyo High Court has jurisdiction to review decisions made by such quasi-judicial agencies as the Fair Trade Commission, the Patent Office, and the Marine Accident Adjustment Agency.

[10] Loc.cit. n. 6 p. 164.

are made by majority. To declare a law or ordinance unconstitutional, a majority of eight in the Grand Bench is required. In 1995, 2,429 civil cases were handled by the Supreme Court, out of which 2,371 cases were finished by judgment, 10 by settlement[11] and 48 by withdrawal. Around 80% of the 2,429 cases were finished within one year after the commencement of the procedure.[12]

Mainly because of the heavy case loads of Supreme Court justices[13] and delays in the lower courts, several ways to reform the court system were proposed.[14] As a result of the reform of the CCP in 1996, the re-appeal system has been amended. Under the old CCP, there were three main grounds for re-appeal: violation of the Japanese Constitution, violation of laws or ordinances which clearly affects the judgment (old CCP Art. 394) and violation of important procedural rules (as absolute grounds of re-appeal,[15] old CCP Art. 395). Re-appeal had to be accepted, unless certain formal procedural requirements were not met (old CCP Arts. 399 and 399(3)). Therefore, when a party contended that the judgment of the inferior court suffered from one of the above three deficiencies, and when the re-appeal fulfilled all formal procedural requirements, the Supreme Court must accept the re-appeal and start oral proceedings. In practice, however, the second ground (violation of laws or ordinances which clearly affects the judgment) was often misused. It caused heavy case loads for the Supreme Court and hampered the latter's role in unifying the interpretation of laws and ordinances.

Besides modification of the grounds for re-appeal, the new CCP introduced a new system for re-appeal: "acceptance of the case for re-appeal". Under the new law, there are only two grounds for re-appeal: violation of the Japanese Constitution and violation of important procedural rules.[16] The often misused ground of violation of laws or ordinances which clearly affects the judgment is no ground for re-appeal to the Supreme Court any more.[17] When, however, "a judgment of an inferior court might contain important issues concerning the interpretation of laws or ordinances, such as contradiction with the precedents of the Supreme Court", the parties can apply for re-appeal to the Supreme

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[11] This shows that re-appeal cases are highly complicated.

[12] Loc.cit. n. 6 p. 188.

[13] The number of newly accepted civil and administrative re-appeal cases was 2406 in 1992, 2500 in 1993 and 2726 in 1994.

[14] HATTORI and HENDERSON, op.cit. n. 2 ch. 3 p. 21.

[15] Such absolute grounds for re-appeal were: (1) the court was not lawfully constituted, (2) a judge who should not take part in the procedure did participate, (3) violation of rules on exclusive jurisdiction, (4) incompetence of the representative of the parties to act in the procedure, (5) violation of rules on public trial, and (6) lack of, or contradictions in, reasons given in the judgment.

[16] New CCP, Art. 312. There is no difference between the old and the new CCP list of 'important procedural rules'.

[17] The purpose is to reduce the case load of the Supreme Court. It is still a re-appeal ground to the High Court (Art. 312(2)).

Court. The Supreme Court may accept or refuse the case. By the decision to accept the case, the application is considered a re-appeal (Art. 318).

1.2. The sources of international civil procedure

Japanese law has only a few provisions on international procedural matters in the CCP. The Horei (Law No. 10 of 1898, as amended), regulating private international law, contains no provision on the matter. The number of international treaties that Japan has ratified is quite limited.[18] Therefore academic theories and case law play an important role. Judicial precedents are relied on by lawyers and courts in applying statutes and court rules to particular cases. The courts are, however, not bound by *stare decisis*, except that lower courts must follow the Supreme Court precedents and generally they follow their own precedents until overruled by higher courts.

The *lex fori*, including the CCP and the Rules of Civil Procedure[19] as primary sources, is in principle also applicable to procedural matters in cases of transboundary litigation. This does not mean that the CCP should be applied to transboundary litigation without any modification. It is argued that in certain matters of transboundary litigation, like those closely connected with substantive law,[20] foreign law should be taken into consideration in determining procedural matters.[21]

1.3. The historical background of the CCP and its amendment in 1996[22]

The old CCP referred mainly to the German Code of Civil Procedure of 1877 but also to Prussian and Austrian laws.[23] It was promulgated in 1890 and came into force in 1891. In 1927 it was substantially amended. Partial amendments were made several times afterwards. Due to drastic changes in the Japanese economy and society and the complications in litigation since then, gradually the old CCP became less adequate for the current situation in Japan. Therefore a reform was carried out, and on 26 June 1996 a new CCP was promulgated. It will replace the old CCP within two years after promulgation. Not only have several new systems been introduced in the new CCP, but unchanged provisions have been rewritten into modern Japanese so as to make the Code more accessible. This was the reason why the reform was put in the form of a new law.

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[18] International treaties can be directly applied by the Japanese court, as far as they are self-executing. They are generally considered superior to national laws.

[19] Technical rules made by the Supreme Court for the implementation of the CCP.

[20] E.g. in which circumstances the standing of the party should be recognized.

[21] See YAMAMOTO KAZUHIKO, 'Kokusai Minji Sosho Ho' [Law of International Civil Procedure], in SAITO HIDEO (ed.), *Chukai Minji Sosho Ho* [Commentary on Civil Procedure Law] Vol.5 (2nd. ed., 1991) 402-422.

[22] MIYAKE HIROTO, 'Comparative legal analysis of the reform of the Code of Civil Procedure', in *Collected Reports*, op.cit. n. 1 p. 179.

[23] About the history preceding the old CCP, see HATTORI and HENDERSON, op.cit.n.2, ch. 1 p. 28.

The main features of the new CCP are:
(1) Three new procedures to clarify issues and evidence: preparatory oral proceeding, proceeding-preparing procedure[24] and proceeding-preparing procedure by documents.[25]
(2) Improvement of procedures for the taking of evidence.[26]
(3) Creation of a special procedure for claims not exceeding 300,000 Yen.[27]
(4) Modification of the system of re-appeal to the Supreme Court.

2. JURISDICTION[28]

2.1. The notion of jurisdiction

2.1.1. Jurisdiction in the sense of 'Kankatsu-ken'

In this context, '*Saiban-ken*' and '*Kankatsu-ken*' should be distinguished. *Saiban-ken* denotes comprehensively the power to adjudicate legal disputes and to enforce decisions.[29] It constitutes the main portion of the judicial power (*Shiho-ken*) prescribed by the Japanese Constitution and can be limited only by that Constitution and by international law.

Kankatsu-ken, on the other hand, presupposes the existence of Saiban-ken. It is the Japanese equivalent of *Zuständigkeit*, as used in German law to refer to a specific portion of the judicial competence. In transboundary civil litigation it defines if and how Japanese courts are authorized to exercise *Saiban-ken*,[30] while in regular domestic civil litigation it is assigned to a particular court as a

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[24] The difference between the preparatory oral proceeding and the proceeding-preparing procedure is as follows: the preparatory oral proceeding is an oral proceeding for the purpose of sorting out and clarifying the issues and the evidence (Arts. 164-167). It takes place in the court room and is open to the public. The court which handles the case also presides over the procedure during which any kind of acts regarding the sorting out and clarifying of issues and evidence may be conducted. The proceeding-preparing procedure, on the other hand, takes place at another place, such as the room for settlement or even the judge's chambers. The procedure is not necessarily open to the public, although the parties may require the attendance of certain people. Due to its nature, the kinds of acts allowed under this procedure are limited, for example regarding the examination of testimony. The procedure can be conducted by a judge exclusively appointed for this purpose, or by a telephone conference system (Arts. 168-174).

[25] This is the proceeding-preparing procedure without attendance of the parties. It is mainly available for those who live far from the seat of the court (Arts. 175-178).

[26] E.g. the court may order the parties to produce more kinds of documents (Art. 220).

[27] This is a summary court procedure. The claim can be brought orally to the court. The oral proceeding takes place only once and judgment is rendered right after it. The procedure is dependent of the plaintiff's option. Otherwise the case will be treated according to the ordinary summary court procedure (Arts. 270-280).

[28] Besides HELDRICH and KONO, op.cit. n. 1, see also NOMURA YOSHIAKI, 'Japanese court jurisdiction in transnational litigation', 21 *Osaka University Law Review* (1984) 31.

[29] HATTORI and HENDERSON, op.cit. n. 2, ch. 4 p. 4.

[30] Ibid.

limited portion of *Saiban-ken*.[31] Therefore, *Kankatsu-ken* is regulated in principle by national laws. In this paper 'jurisdiction' will be used in the sense of *Kankatsu-ken*. *Kankatsu-ken* and *Saiban-ken* should be theoretically distinguished, but court decisions often use the word *Saiban-ken* in the sense of *Kankatsu-ken* or do not clearly distinguish between the two.[32]

2.1.2. How to determine international jurisdiction?

According to unanimous opinion in case law and academic doctrine, there is no provision on international jurisdiction in Japanese law, and, to fill this lacuna, the notion of '*Jori*' should be used.[33] *Jori* is a notion similar to justice, meaning "fairness between parties and speedy and appropriate judgment".[34] Although this is the unanimous understanding of *Jori* in its abstract content, it is not clear how to determine whether jurisdiction can be exercised in concrete cases. The following theories have been proposed as to possible criteria:

(1) Jurisdiction acquired under a provision of the CCP implies jurisdiction for transboundary cases.[35] In other words, according to this theory the contents of *Jori* is contained in the CCP. The theory does not allow any jurisdiction which is not based on the CCP. This theory seems contradictory to me: it says that there is no provision on international jurisdiction in the Japanese law, but at the same time it says that *Jori* as contained in the CCP should be applied. In my opinion, this is practically the same as saying that the CCP regulates not only domestic, but also transboundary jurisdiction. The theoretical advantage of this theory is not clear to me. The judgment of the Supreme Court in the so-called *Malaysian Airline case*[36] seems to adhere to this theory.

(2) The leading opinion is that, since there is no provision on international jurisdiction in the CCP, special jurisdiction rules for specific types of transboundary cases should be created based on international considerations.[37] Although this theory looks different from the first one, it refers so often to provisions of the CCP that it leads to similar results.

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[31] *Kankatsu-ken* for domestic civil litigation is further sub-divided into three categories: *Shokubun-kankatsu* (functional competence: e.g. some cases must be brought in the family court because of their nature), *Jibutsu-kankatsu* (subject matter competence: claims not exceeding 900,000 Yen go to the summary court), and *Tochi-kankatsu* (territorial competence: this indicates the geographical district where an action must be commenced). Cf. ibid., ch. 4 p. 6.

[32] E.g. Supreme Court 16 October 1981, 35 *Minshu* No. 7 p. 1224 (English translation in 26 JAIL (1983) 122).

[33] Ibid. See also, IKEHARA SUEO, 'Kokusaiteki Saiban Kankatsu-ken' [International Jurisdiction], in 7 *Shin Jitsumu Minji Sosho Ho Koza* [New Series of Practice of Civil Procedure] (1982) 14.

[34] Supreme Court, loc.cit. n. 32.

[35] EGAWA HIDEFUMI, 'Kokusai Shiho ni okeru Saiban Kankatsu-ken' [Jurisdiction in private international law], *Hogaku Kyokai Zasshi* [Journal of the Jurisprudence Association, University of Tokyo] Vol.60 No.3 (1942) 374.

[36] Loc.cit.n. 32.

[37] IKEHARA, loc.cit.n. 33 p.22. *See* also Tokyo District Court 15 February 1984, *Hanrei Taimuzu* No. 525 p. 132 (English translation in 28 JAIL (1985) 243) and cf. Tokyo District Court 20 March 1979, *Hanreijiho* No. 925 p. 78 (English translation in 24 JAIL (1981) 127).

(3) Specific rules should be created on a case by case basis, whereby concrete circumstances in each individual case, such as close connection between the case and the forum or protection of the weaker party, should be taken into consideration.[38] This third theory is criticized as the results are unpredictable.

(4) The rule on international jurisdiction is in principle determined under the provisions of the CCP. Exceptions can be made by taking into consideration 'special circumstances' in each individual case. Lower courts started to use this test[39] after the judgment of the Supreme Court in the *Malaysian Airline case* and some scholars elaborated it as a theory.[40] This theory offers the possibility to modify the jurisdiction rules of the CCP. A broad interpretation of 'special circumstances', the taking into consideration of the many elements of an individual case and the creation of exceptional rules for each individual case, may, however, lead to unpredictable results.

As the comment on each theory shows, a choice in favour of one theory does not automatically lead to clear-cut results. The important thing is not to select one theory, but to examine individual jurisdiction rules and their theoretical backgrounds.

2.2. The exercise of jurisdiction

2.2.1. Requirements

In this section we shall deal with jurisdiction rules for specific types of cases.

(1) The court at the place of the defendant's domicile is entitled to exercise jurisdiction. This rule applies to all types of transboundary cases. If the defendant has his domicile in a foreign country and only his residence in Japan, a Japanese court may not exercise jurisdiction.[41]

Recently, however, the Supreme Court confirmed jurisdiction of the Japanese court in a case where the defendant had her domicile exclusively in Germany.[42] The German wife of a Japanese husband had filed a claim for divorce with a German court, which admitted the claim. Then the Japanese husband filed a claim for divorce in a Japanese court, where the German wife raised the exception of lack of jurisdiction. According to the Supreme Court, the case should be distinguished from the ones in which the jurisdiction of the Japanese court was recognized on the basis of special circumstances,[43] such as the fact

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[38] ISHIGURO KAZUNORI, *Gendai Kokusai Shiho* [Contemporary Private International Law] Vol.1 (1986) 291.

[39] E.g. Tokyo District Court 27 September 1982, *Hanrei Taimuzu* No. 487 p. 167 (English translation in 27 JAIL (1984) 174); Tokyo District Court 27 March 1989, *Hanreijiho* No. 1318 p. 82 (English translation in 33 JAIL (1990) 199).

[40] E.g. KOBAYASHI HIDEYUKI, *Kokusai Torihiki Funso* [International Trade Disputes] (1987) 116.

[41] YAMAMOTO, loc.cit. n. 21 p. 443.

[42] Supreme Court 24 June 1996, *Hanreijiho* No.1578 p.56.

[43] Supreme Court 25 March 1962, 18 *Minshu* No.3 p.486; Nagoya High Court 30 May 1995, 891 *Hanrei Taimuzu* p. 248.

that the plaintiff was abandoned or that the defendant's domicile is unknown or even abroad. In order to recognize jurisdiction of the Japanese court in the above recent case, not only the defendant's interest, i.e. not being forced to appear before a foreign court, but also the plaintiff's interest, i.e. being entitled to sue, should be taken into consideration, as well as the legal or practical obstacles involved in a foreign forum. The German divorce judgment would not be eligible for recognition in Japan, since service was conducted by way of public notice, while a claim of the Japanese husband would be dismissed in Germany due to *res judicata* of the earlier German divorce judgment. In order to protect the plaintiff's interest, i.e. his right to sue, the Japanese court should exercise jurisdiction.

The judgment should be criticized, however, since, following this judgment, the Japanese court may take cognizance of lawsuits without referring to any jurisdiction rule, merely based on the fact that the foreign judgment cannot be recognized in Japan. The last domicile in Japan of a person who has no domicile nor residence in any country cannot be a ground of jurisdiction either.[44]

The *principal place of business* of a corporation determines jurisdiction in all types of cases.[45] An office which has nothing to do with the case does not suffice for the Japanese court to exercise jurisdiction, although in some cases the courts have nevertheless asserted jurisdiction.[46] The general rule cedes to special rules in case of applicability of the Convention on Civil Liability for Oil Pollution Damage (1969) or the Convention for Unification of Certain Rules relating to International Transportation by Air (1953) and the additional Protocol (1967).

(2) The *place of performance*[47] may determine jurisdiction only in case of contract-related[48] disputes and only when the place of performance can be clearly identified from the contract.[49] The rule should not be applied to monetary obligations. Since the place of performance of a monetary obligation is often not closely connected to the contract itself, such as when chosen for tax or other reasons, the evidence available at the place of performance is usually less decisive.[50] However, case law tends to take a more generous attitude.[51]

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[44] DOGAUCHI MASATO, 'Kokusaiteki Saiban Kankatsu-ken' [International Jurisdiction], in SHINDO KOJI and KOJIMA TAKESHI (eds.), *Chushaku Minji Soshoho* [Commentary on International Civil Procedure] (1991) 111.

[45] Ibid.

[46] Supreme Court, *supra* n. 32. Also, Tokyo District Court 27 September 1982, *Hanreijiho* No. 1113 p. 137 (English translation in 27 JAIL (1984) 174).

[47] According to Tokyo District Court 30 August 1995, *Hanrei Taimuzu* No. 909 p. 270, the place of performance should in principle be determined by applying Art. 484 of the Japanese Civil Code and, consequently, the place of obligee's domicile is the place of performance. To determine his domicile, his house number should be specified.

[48] This means that the rule does not apply to tort cases.

[49] YAMAMOTO, loc.cit. n. 21.

[50] DOGAUCHI, loc.cit. n. 44.

[51] Interlocutory judgment Tokyo District Court 27 November 1981, *Hanrei Taimuzu* No. 460 p. 118.

(3) The *place of tort* determines jurisdiction in tort cases.[52] It can be the place of the tortuous act or the place of occurrence of the damage.[53] In the latter case, indirect damage such as economic loss caused by physical damage should be excluded, since it would lead to jurisdiction based on the place of domicile of the injured (plaintiff!). The rule should also apply to product liability cases.

(4) The *action for negative declaratory judgment*, in which it is declared with *res judicata* effect that party A (plaintiff) is not liable, is often used as a counter- or preventive measure against lawsuits in a foreign forum where party A is the defendant. Although the parties and the type of case (e.g. product liability case) are the same, the parties change their roles in the lawsuit (i.e. the defendant in the foreign case becomes the plaintiff with an action for negative declaratory judgment case in Japan). The inferior courts tend to apply the same jurisdiction rule to normal product liability cases and to actions for negative declaratory judgment, exercising jurisdiction as the court of the place of tort.[54] As a result, the plaintiff in the action for negative declaratory judgment in Japan can obtain such a judgment with *res judicata* effect to protect himself against a lawsuit by the opposing party in a foreign forum. This tendency has been criticized: although the rule of jurisdiction by reference to the place of the tort is originally intended to serve the interest of the injured person, it has come to serve rather the interests of the manufacturer through the action for negative declaratory judgment.

Under Article 8 of the old CCP (Art.5(4) of the new CCP),[55] when the obligation relating to a "property right" forms "the object of the claim", the place of the obligor's domicile is understood to be the place where the obligation is "situated". If this rule would apply also to an action for negative declaratory judgment, the plaintiff (obligor) would be able to bring the action against his obligee before the court at the place of his domicile. This would be unfair,[56] as the Tokyo District Court pointed out in its judgment.[57]

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[52] E.g. interlocutory judgment of the Tokyo District Court 27 October 1995, *Hanrei Taimuzu* No. 891 p. 71 (plaintiff: the US Government, defendant: a US company, place of tort: Japan).

[53] Tokyo District Court 15 February 1984, *Hanrei Taimuzu* No. 525 p. 132 (English translation in 28 JAIL (1985) 243).

[54] Tokyo District Court 27 March 1984, *Hanreijiho* No. 1113 p.26 (English translation in 28 JAIL (1985) 248); Tokyo District Court 30 May 1989, *Hanrei Taimuzu* No. 703 p. 240; Tokyo District Court 19 June 1989, ibid.p.246 (English translation in 33 JAIL (1990) 202). See also the interlocutory judgment of the Tokyo District Court of 28 August 1989, *Hanreijiho* No. 1338 p.121 (English translation in 33 JAIL (1990) 206).

[55] An action concerning a property right against a person who does not live in Japan or whose abode is unknown may be brought in the judicial district where the object of the claim, or a security thereof, or any seizable property of the defendant, is situated.

[56] *See*, for a different opinion, YAMAMOTO, loc.cit. n. 21 p. 444.

[57] Tokyo District Court 28 July 1987, *Hanreijiho* No.1275 p.77 (English translation in 32 JAIL (1989) 161).

2.2.2. Exercise of jurisdiction in case of non-fulfilment of requirements

This section deals with rules on the exercise of jurisdiction, even if the above-mentioned requirements are not fulfilled.

(1) Joinder of claims

This notion can be sub-divided into joinder of claims as a multiplicity of objects in a suit, and joinder of parties as a multiplicity of subjects in a suit.

According to the majority opinion, in order to exercise jurisdiction based on joinder of claims, a mutual relevance between the claims is required.[58] Set-off claims can also be treated as joinder of claims. As for joinder of parties, opinions differ: according to a negative opinion,[59] if jurisdiction is based on the joinder of parties, a co-defendant would be forced to participate in a procedure before an unexpected forum. On the other hand, a positive opinion says that jurisdiction based on the joinder of parties should be exercised when the rights or liabilities which are the key issues of the claims are common to the various parties, or when the rights or liabilities of both claims are based on common facts and laws.[60] Case law tends to follow the positive opinion.[61]

(2) Appearance

As far as it does not violate the exclusive jurisdiction of another forum, jurisdiction may be exercised on the basis of appearance. This rule shares its theoretical basis with the rule of forum selection.

2.2.3. Jurisdiction to enjoin and to arrest

In Japanese law, injunction or arrest does not create a ground for jurisdiction. The issue here is rather what requirements should be fulfilled in order to enable the court to order injunction or arrest. The forum which has jurisdiction over the merits should be able to exercise jurisdiction over the question of injunction/arrest.[62] In fact in a number of cases the court exercised jurisdiction over injunction or arrest after they asserted jurisdiction over the merits.[63] In

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[58] DOGAUCHI, loc.cit. n. 44 p. 117; YAMAMOTO, loc.cit. n. 21 p. 445; TAKAHASHI HIROSHI, 'Kokusai Saiban Kanktsu' [International Jurisdiction], in AOYAMA YOSHIMITSU and SAWAKI TAKAO (eds.), *Kokusai Minji Sosho no Riron* [Theories on International Civil Procedure] (1987) 64. *See* also Tokyo District Court 23 October 1987, *Hanreijiho* No.1261 p.48; Tokyo District Court 27 March 1989, *Hanrei Taimuzu* No. 703 p. 240; Tokyo District Court 19 June 1989, ibid. p. 246.

[59] DOGAUCHI, loc.cit.n. 44 p. 118.

[60] YAMAMOTO, loc.cit.n. 21 p. 445. For a similar opinion, see KIDANA SHOICHI, MATSUOKA HIROSHI and WATANABE SATOSHI, *Kokusaishiho Gairon* [Compendium of Private International Law] (2nd ed., 1991) 256.

[61] Tokyo District Court 8 May 1986, *Hanreijiho* No.1196 p.87 (English translation in 31 JAIL (1988) 220); Tokyo District Court 1 June 1987, *Hanreijiho* No.1261 p.105.

[62] DOGAUCHI, loc.cit. n. 44 p. 120.

[63] Tokyo District Court 26 April 1965, 16 *Rominshu* No.2 p.308; Yokohama District Court

addition, when assets of the defendant are (even temporarily) located in Japan, the Japanese court should be able to exercise jurisdiction over the question of injunction/arrest on the basis of the mere fact of their location.[64] Otherwise the enforcement of the ultimate decision may not be secured.

2.2.4. *Jurisdiction* in rem *and* quasi in rem

Japanese law in general does not know these notions. The function of Article 8 of the old CCP (Art.5(4) new CCP) is, however, similar to that of jurisdiction *quasi in rem*, although, in contradistinction to the common law rule, the jurisdiction is not limited to the assets. But in transboundary cases, the Japanese court may exercise jurisdiction only if the object of the claim consists of the assets, on the basis of their location. Otherwise such jurisdiction would be excessive.

In relation to real property the court of the place of location has exclusive jurisdiction.

2.2.5. *Constraints on exercise: special circumstance test*

Apart from a rigid standpoint as represented by the above-mentioned first theory (2.1.2.), it is generally admitted that the jurisdiction rule may be modified based on the circumstances of each case. A 'special circumstance test' has been developed by the lower courts and is adhered to by some scholars.[65] This test has both a negative and an affirmative function. The latter is that when the Japanese court finds itself without jurisdiction but if this would lead to a situation where the plaintiff would have no forum at all, the Japanese court should exercise jurisdiction based on the special circumstances of the case. An example of the negative function is that when no judicial assistance is available due to lack of diplomatic relations between Japan and the country where important evidence is available, the court may consider Japan an inappropriate forum and refuse to exercise jurisdiction.[66]

Although the test offers the possibility of a flexible solution, there is a risk that 'special circumstances' is too extensively interpreted and thus practically plays the principal role in determining jurisdiction. In fact, the generally used criteria of this test, i.e. fairness between the parties and speedy and appropriate

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29 September 1966, 17 *Kaminshu* No.9-10 p. 874.

[64] WATANABE SATOSHI on international jurisdiction over arrest, in IKEHARA SUEO and HAYATA YOSHIRO (eds.), *Shogai Hanrei Hyakusen* [100 Selected Judgments in the Field of Private International Law] (3rd ed., 1996) 209.

[65] *See supra* 2.1.2, theory 4.

[66] As to the negative function, the test has a function similar to that of the *forum non conveniens* test in US law. Different from the *forum non conveniens* test, however, the existence of another forum which has jurisdiction over the case is not required. Moreover, the criteria of the special circumstance test (fair, speedy and appropriate judgement) are not as flexible as the criterion of the American test. In addition, using the Japanese test, the court in fact cannot react in a really flexible manner (cf. stay); it must either affirm or refuse to exercise jurisdiction. DOGAUCHI, loc.cit. n. 44 p. 109.

proceeding[67], are identical to the abstract contents of *Jori*.[68] This would mean that the criteria of the most fundamental guideline for the determination of international jurisdiction and the criteria for exceptional and individual solutions are the same. The 'special circumstance' test would then practically obtain the character of a general rule and most existing jurisdiction rules might be replaced by it. This would lead to an uncertain and unpredictable situation.

2.3. Forum Selection

Forum selection is generally recognized as a basis of jurisdiction. Such a selection may raise various questions, such as those on the existence and the validity of the forum selection agreement. In order to find an answer to these questions, the applicable law must be determined. According to the leading opinion, the applicable law is the *lex fori*. In case of selection in favour of a Japanese forum, the *lex fori* would thus be the Japanese law on international civil procedure.[69] Since there is no provision in the CCP on this matter, Article 25 of the old (Art. 11 new) CCP should apply *mutatis mutandis*. This provision requires that the agreement on forum selection should be made in the form of a document. If this were taken literally, both offer and acceptance should be contained in one document. However, the Supreme Court modified the requirement by ruling that it is not necessary to have both offer and acceptance in one document.[70] The requirement is deemed to be fulfilled when one party makes a manifest designation of a court in a specific country. This view of the Supreme Court is generally accepted by the literature.[71] Some scholars try to make the requirement much less strict by taking the position that the designation of a country (without mentioning a court) should suffice.[72]

In the above-mentioned case, the Supreme Court recognized exclusive jurisdiction of a foreign court based on agreement of the parties, provided that the Japanese court does not have exclusive jurisdiction over the case and that the country of the agreed forum exercises its jurisdiction based on its own law. Reciprocity is not required. Nor is it necessary that a judgment rendered in the agreed forum can be recognized and enforced in Japan.

If the forum selection would violate Japanese public policy, jurisdiction should be denied. In addition, the 'special circumstance' test may be used to modify a forum selection.

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[67] E.g. Tokyo District Court 20 June 1986, *Hanreijiho* No.1196 p.87 (English translation in 31 JAIL (1988) 216); Tokyo District Court, Hachioji Branch 22 May 1991, *Hanrei Taimuzu* No.755 p. 213.

[68] See the Supreme Court in the Malaysian Airlines case, supra n. 32.

[69] DOGAUCHI, loc.cit. n. 44 p. 112.

[70] Supreme Court 28 November 1975, 29 *Minshu* No. 10 p. 1554.

[71] MITSUKI MASATSUGU, 'Goi Kankatsu' [Jurisdiction Agreement], in SAWAKI TAKAO and AKIBA JUNICHI (eds.), *Kokusaishiho no Soten* [Issues of Private International Law] (new ed., 1996) 231.

[72] E.g. DOGAUCHI, loc.cit. n. 44 p. 113.

2.4. Lis (alibi) pendens[73]

There are two typical cases of *lis alibi pendens*. In the first, the same plaintiff files a suit against the same defendant in another forum. In this case the plaintiff's purpose is to secure his claim by instituting more than one litigation. In the second, the defendant in the original litigation (original defendant) files a suit against the original plaintiff. In this case the original defendant's purpose is to shift the forum to the place where he can proceed with the litigation more conveniently, or protect his assets by obtaining a negative declaratory judgment.

While for domestic cases, Article 142 of the new CCP (Art. 231 of the old CCP) allows only one litigation, there is neither a municipal nor a treaty provision covering the matter for transboundary litigation. If, however, several litigations in several fora were allowed, the burden on parties could become too heavy, and, moreover, the litigations could lead to contradictory results. It is not possible to await the developments in the other forum, since Japanese law does not provide for the possibility of a procedural 'stay' whereby the procedure is temporarily suspended. Consequently, there has been a discussion on if and how to regulate *lis alibi pendens*.

Earlier court decisions have ignored the pending litigation abroad and have allowed litigation in Japan, even where the foreign litigation had commenced earlier.[74] More recent judgments tend to have better understood the issue or, at least, to have taken the issue into consideration.[75] As for doctrine, there are two opinions. The first one says that if a judgment to be rendered in a foreign litigation would be eligible for recognition in Japan, that litigation should be considered as a Japanese one and, consequently, no new claim before the Japanese court should be allowed.[76] According to this view, the time element is important for the determination which (i.e. the Japanese or the foreign) litigation should be granted priority. The second view says that *lis alibi pendens* is inevitable under the current system of civil procedure in the world, and that it can be taken into consideration only as a factor to determine which forum has the closest relationship with the case. For this purpose, the court must have broad discretion.[77]

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[73] See SAWAKI TAKAO, 'Battle of Lawsuits', 23 JAIL (1980) 17.

[74] Tokyo District Court 23 December 1955, 6 *Kaminshu* No.12 p.2679; Tokyo High Court 18 July 1957, 8 *Kaminshu* No. 7 p.1282; interlocutory judgment of Tokyo District Court 23 June 1987, *Hanreijiho* No. 1240 p.27; Tokyo District Court 27 May 1965, 16 *Kaminshu* No.5 p.923; interlocutory judgment of Osaka District Court 9 October 1973, *Hanreijiho* No.728 p.76; interlocutory judgment of Tokyo District Court, *Hanrei Taimuzu* No. 703 p. 246.

[75] Interlocutory judgment of the Tokyo District Court 30 May 1989, *Hanrei Taimuzu* No.703 p.240; Tokyo District Court 15 February 1984, *Hanrei Taimuzu* No.525 p.132; Tokyo District Court 29 January 1991, *Hanreijiho* No. 1390 p. 98 (English translation in 35 JAIL (1992) 171).

[76] DAGAUCHI MASATO, 'Kokusaiteki Sosho Kyogo' [International concurrent litigation], 100 *Hogaku Kyokai Zasshi* [Journal of the Jurisprudence Association, University of Tokyo] 771.

[77] ISHIGURO KAZUNORI, 'Gaikoku ni okeru Sosho Keizoku no Kokunaiteki Koka' [Effects of *lis alibi pendens* in Japan], in AOYAMA and SAWAKI (eds.), op.cit. n.58 p.361.

2.5. Immunities[78]

The judicial power of Japan in principle reaches all legal subjects within the territory of Japan. By way of exception foreign states are exempt from litigation, based on the principle of sovereign or state immunity. Against the background of *par in parem non habet imperium*, immunity was understood to be absolute. *Par in parem non habet imperium* has, however, been losing its validity since states often commit themselves in the field of trade or economics. As a result, the traditional principle of absolute immunity has been replaced in many countries by restrictive immunity.[79] In Japan, an early decision of the Great Court of Cassation adhered to the principle of absolute immunity,[80] and this position has never officially been changed. A number of judgments of lower courts after World War II followed this lead.[81] The Japanese executive branch has never made its official position clear, but from the fact that Japan has concluded a number of bilateral treaties which contain provisions based on the principle of restrictive immunity,[82] the Japanese government may be said not to be rigid in its attitude.[83]

The majority of authors support the principle of restrictive immunity[84] and according to one author this principle has even become part of international customary law.[85] Following this opinion, *acta jure imperii* and *acta jure gestionis* should be distinguished, and the foreign state should enjoy immunity only for the first type of acts. As to the criteria for the distinction, the leading view looks at the nature of the state act, i.e. whether the act can be carried out only by the state or also by private persons.[86] Since this criterion is very abstract, some typical cases are examined here:

(1) Immunity is not granted in cases concerning real property (except embassies and military bases), succession, tax or intellectual property, since the forum state's interests in these matters should be protected.

(2) The foreign state does not enjoy immunity in cases relating to labour or sales contracts.[87]

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[78] TSUTSUI WAKAMIZU, 'Subjects of international law in the Japanese courts', 37 ICLQ (1988) 325.

[79] The USA and major European countries including France, Germany and the UK adhere to the principle of restrictive immunity.

[80] Great Court of Cassation 28 December 1928, 7 *Minshu* 1128.

[81] Fukuoka High Court 15 March 1956, 7 *Kaminshu* No.3 p.629; Tokyo District Court 19 September 1960, 11 *Kaminshu* No. 9 p.1931.

[82] E.g. the Treaty of Friendship, Commerce and Navigation between Japan and the USA (1953), Art. 18(2).

[83] TAIJUDO KANAE, *Minji Saibanken no Menjo* [Sovereign Immunity], in op.cit. n. 33 p. 50.

[84] TAKAKUWA AKIRA, *Minji Saibanken no Menjo* [Sovereign immunity], in AOYAMA and SAWAKI, op.cit. n.58 p.170.

[85] DOGAUCHI, loc.cit. n.44 p.96.

[86] YAMAMOTO, loc.cit. n. 21 p.436.

[87] Some judgments have accepted immunity of international organizations in cases concerning labour contracts: Tokyo District Court 21 September 1977, *Hanreijiho* No.884 p.77 (relating to the United Nations University, English translation in 23 JAIL (1980) 196); Tokyo High Court 12

(3) The foreign state does not enjoy immunity for commercial activities. According to one interpretation, a state activity should be qualified as 'commercial', if the activity brings "profit" to the state.[88]
(4) In tort cases, the foreign state enjoys immunity only if the tort is caused by the foreign state as a result of its sovereign act.

These rules are applicable only to foreign states that Japan has recognized, and should also apply to international organizations, foreign municipalities and public corporations.

Foreign diplomats also enjoy immunity,[89] since their functions require them to be able to perform their duties as a diplomat smoothly. Japan is a party to several treaties concerning diplomatic immunity.[90] According to the Great Court of Cassation,[91] the service of procedural documents is a function of the sovereign power of the forum state, and to serve such documents on the representative of a foreign state would violate the sovereignty of that foreign state.[92]

The Japanese court must examine *ex officio* if it may exercise judicial power over the foreign state. The plaintiff must prove that the act of the foreign state is not a sovereign act. Under normal procedure, the defendant would have to prove the sovereign nature of his act.[93]

The foreign state can waive the privilege of immunity. Although the Great Court of Cassation[94] held the view that the waiver should take place by agreement between the two states after the commencement of the litigation, it can in fact be made by a statement of the foreign state to the private party before the litigation.

2.6. How to examine jurisdiction?

The examination by the court whether it may exercise jurisdiction usually starts with an objection raised by the defendant.[95] The hearing on the issue of

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December 1983, 34 *Rominshu* No.5-6 p.922 and Tokyo District Court 31 May 1982, 33 *Rominshu* No.3 p.472 (Representative of the European Community).

[88] YAMAMOTO, loc.cit. n. 21 p. 437.

[89] *See*, as precedents on this issue, Yokohama District Court 16 July 1924, *Horitsu Shinbun* No.2294 p.7; Tokyo District Court 29 September 1965, *Hanrei Taimuzu* No.184 p.170; Yokohama District Court 4 March 1987, *Hanreijiho* No.1225 p. 45.

[90] Vienna Convention on Diplomatic Relations (1961) Art.31; Vienna Convention on Consular Relations (1963) Art.43; Japan-US Consular Convention (1964) Art.11; Japan-UK Consular Convention (1965) Art.14; Japan-USSR Consular Convention (1967) Arts.18 and 27; Agreement under Article VI of the Japan-US Treaty of Mutual Cooperation and Security regarding Facilities and Areas and the Status of United States Armed Forces in Japan (1960) Art.18. Concerning the 1961 Vienna Convention, see Tokyo High Court, 8 April 1970, 21 *Kaminshu* No.3-4 p. 557.

[91] *Supra* n. 80.

[92] For a critical opinion on this judgement, see ODA SHIGERU and IWASAWA YUJI, 'Saibanken Menjo (1)' [State Immunity], in op.cit. n.64 p.193.

[93] YAMAMOTO, loc.cit. n.21 p.438.

[94] *Supra*, n. 80.

[95] In cases where the 1953 Convention for the Unification of Certain Rules relating to International Transportation by Air, its 1967 Additional Protocol or the 1969 Convention on Civil Liability for

jurisdiction takes place prior to that on the merits. This sequence (objection - hearing on jurisdiction - hearing on merits) also applies where the relevant facts serving as the basis for the exercise of jurisdiction and the facts on the merits are closely connected. The exercise of jurisdiction in a tort case, for example, requires the determination of the place of the tort. At this stage, however, it suffices to prove that the alleged tortious act has been committed, or the damage resulting from the act was caused, in the forum state. It is not necessary to prove negligence or, for that matter, legal capacity of the defendant. Therefore, as to the degree of proof, it is sufficient for the court to believe that exercise of jurisdiction and hearing on the merits would bring no irrational burden to the defendant.

The burden of proof of the facts which serve as the basis of jurisdiction should be borne by the plaintiff. Once jurisdiction is confirmed on the basis of the facts at the time of filing, it can no more be influenced by later changes of the facts.

The unsatisfied party may appeal against a final judgment which denies or confirms jurisdiction but there is no provision in the CCP on appeal against an interlocutory judgment confirming jurisdiction.[96]

3. SERVICE OF PROCESS[97]

3.1. Service abroad of process in Japan

If service of process is seen as a function of the sovereign power of the state,[98] it cannot be performed on persons outside Japanese territory. Therefore, according to Article 108 of the new CCP (Art. 175 of the old CCP), the chief judge of the court commissions the responsible foreign official or the Japanese diplomatic representative in the foreign state to perform service of process. Japan has concluded bilateral[99] or multilateral agreements for this purpose.[100].

Service by public notice may be made, when none of the means of international judicial assistance is available, or when the commissioned foreign official does not send a document as proof of performance of service within six months

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Oil Pollution Damage applies, or in cases where a foreign forum has exclusive jurisdiction over the case, the claim can be dismissed even without the defendant's objection to jurisdiction.

[96] One opinion supports the possibility of appeal against an interlocutory judgment, while according to another opinion appeal would cause terrible delay of the proceeding. See TAKAHASHI HIROSHI, loc.cit. n.58 p.57; YAMAMOTO, loc.cit. n.21 p.449.

[97] OHARA YOSHIO, 'Judicial assistance to be afforded by Japan for proceedings in the United States', *The International Lawyer* (1989) 10.

[98] Great Court of Cassation, *supra* n. 80.

[99] As on 1 January 1992 Japan had concluded bilateral agreements on service abroad with the following countries: UK, Italy, Austria, Switzerland, Denmark, Germany, Norway, Iraq, Iran, Australia, Kuwait, Syria, Sri Lanka, Thailand and Brazil.

[100] The Hague Convention on Civil Procedure (1954) and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1965).

since the commissioning by the Japanese court (Art. 110(1) sub-paras. (3) and (4) new CCP). Article 15 of the 1965 Hague Service Convention allows service by public notice while Article 16 provides for appeal within two months by the party who was not aware of the litigation in Japan (Art. 97 new CCP).[101]

In domestic litigation, service may be performed by registered mail (Art. 107 new CCP). Under this system, the service is deemed to be made at the time of mailing. According to one opinion, this form of service should be available also for service on a party in a foreign state.[102] But, making it so available would ignore the character of this type of service as a last resort. Furthermore, if service abroad may be easily performed in this way, the commencement of litigation will often not be notified to the other party.[103] Therefore, it should not be allowed for service on a party abroad.

3.2. Service in Japan of process abroad

This issue will be discussed together with the requirements of recognition of foreign judgments, *infra* 5.1.

4. TAKING OF EVIDENCE ABROAD

4.1. Taking of evidence in foreign states

Since the taking of evidence is also a sovereign function, it must be commissioned to a responsible foreign official or the Japanese diplomatic representative (Art.184 new CCP). Evidence may be taken by Japanese consular officers in the foreign state in the context of judicial assistance and on the basis of consular conventions. Under the system of the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters an organ designated by each contracting state takes the evidence upon request from another state. Since Japan has not ratified the Hague Convention, the taking of evidence is only possible on the basis of bilateral treaties.[104] According to Article 184 of the new CCP, a Japanese consul may take any voluntary testimony from any person in a foreign state in accordance with Japanese law, but without violating the law of the foreign state. Nobody can be forced to appear as a witness, and

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[101] In Supreme Court 26 May 1961, 15 *Minshu* No.5 p.1425, service was performed by public notice instead of service abroad. The defendant did not know of the filing of a lawsuit nor of the judgment. After he became aware through the enforcement against his car, he appealed within two months. The Supreme Court considered the appeal lawful.

[102] ISHIGURO KAZUNORI, op.cit. n.38 p.224.

[103] YAMAMOTO, loc.cit. n. 21 p.454.

[104] As on 1 January 1992 Japan had concluded bilateral agreements on taking of evidence with the following countries: USA, UK, Israel, Italy, Switzerland, Sweden, Spain, Denmark, Germany, Pakistan, Iraq, Iran, India, Kuwait, Syria, Sri Lanka, Thailand and Brazil.

if a person does appear, he may refuse to take an oath. And even if he makes a false statement on oath, the Japanese criminal law would not apply.[105]

Article 184(2) of the new CCP declares the evidence to be valid, even if taken in a manner which violates the foreign law, as long as it is in accordance with the Japanese law. The opposite case, i.e. the taking of evidence in violation of Japanese law, is not much discussed. When the fundamental principles of Japanese civil procedure are violated, the evidence should be considered unlawful.[106]

4.2. Taking of evidence in Japan

Foreign countries can, in reverse direction, use the same judicial assistance mechanisms. The often debated issue in other civil law countries concerns the unilateral taking of evidence outside the framework of a treaty on judicial assistance, such as discovery in US law. When a foreign court orders a party or a third party to produce evidence in their possession in Japan, the question arises whether the order must be followed. Although in practice Japanese companies may have followed discovery orders, there is no court decision on this issue nor any official statement about the attitude of the Japanese government. It is suggested that the order be classified as a violation of Japanese sovereignty.

4.3. Application of foreign law

When the applicable law designated by the *Horei*, the Japanese private international law, is a foreign law, the Japanese court must apply it *ex officio* even if the party concerned fails to prove its content. Therefore, even if both parties agree on the contents of the foreign applicable law, the court can yet determine otherwise. In order to fulfil its obligation, the court may conduct its own research, consult various organizations or call expert witnesses to clarify the content of the foreign law, and it may ask for the parties' assistance. The parties do not have a burden of proof, and failure of proof does not lead to any disadvantage for them. On the other hand, the court is not bound by any 'proof'.[107]

The Japanese court must interpret the foreign applicable law as if it were a court of the foreign state. This means that the foreign applicable law is not transformed into Japanese law, but applied as foreign law *per se*.

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[105] Perjury is not included in the list of crimes to which the Japanese criminal law applies extraterritorially. See Arts. 2 and 3 of the Japanese Criminal Code.

[106] E.g. the case where the opposite party could not attend the examination of witness. YAMAMOTO, loc.cit. n.21 p.470.

[107] KAWAMATA YOSHIYA, 'Gaikoku Ho no Naiyou no Shomei' [The proof of the contents of foreign law], in SAWAKI and AKIBA, op.cit. n. 71 p. 71.

Despite the efforts of the court, the foreign law may remain unknown or unclear. Yet, since the principle *jus novit curia* applies also to foreign law, the court must render judgment. According to the prevailing view, the law most probably resembling the foreign law should be applied.[108] This resemblance should be judged on the basis of the historical, ethnical and cultural backgrounds of the foreign state. For example, where the law of North Korea is to be applied the laws of South Korea and socialist countries such as China should be taken into consideration.[109] The practical outcome of this method is not always clear. In fact, there is a judgment in which Japanese law was applied instead of North Korean law although the court adhered to the prevailing view referred to above.[110] Obviously, the prevailing view is not always practical for the courts. As a consequence, another view, emphasizing practicability for the courts, is becoming popular.[111] According to this view, Japanese law as the *lex fori* should be applied.[112] Unfortunately, this approach may lead to the automatic application of the *lex fori* and may spoil the fundamental principle of conflict of laws, i.e. the equal status of the foreign and national laws.

According to the prevailing view, when the court misinterprets the foreign law, a re-appeal to the Supreme Court may be made.[113] The same is the case when the court has failed to take appropriate measures to find the contents of the foreign law and has rendered a judgment by applying the *lex fori*.[114] The Japanese Supreme Court has not taken a clear stand, but the possibility of re-appeal is assumed through interpretation of its jurisprudence.[115] As a result of its reform, the CCP now grants the Supreme Court more discretion in accepting re-appeals. It remains to be seen how generously the Supreme Court will allow re-appeal in cases concerning the application of foreign law.

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[108] Ibid. *See* also Tokyo Family Court 13 June 1963, 15 *Kasaigeppo* No.2 p.163; Tokyo District Court 25 October 1962, *Hanreijiho* No. 321 p. 23.

[109] KIDANA in KIDANA et. al., op.cit. n. 60 p. 71.

[110] Nagoya Family Court 12 March 1982, 35 *Kasaigeppo* No.1 p.105.

[111] MIKAZUKI AKIRA, 'Gaikoku Ho no Tekiyou to Saibansho' [The application of foreign law and the Japanese court], in SAWAKI and AOYAMA, op.cit. n.58, p.269; YAMAMOTO, loc.cit. n.21 p.459. The same view is expressed in some judgments: Nagoya District Court 7 October 1975, *Hanreijiho* No. 817 p.98; Kyoto District Court 30 September 1987, *Hanreijiho* No.1275 p.114.

[112] As a result Japanese law was applied in the judgment of the Nagano Family Court 12 March 1982, 35 *Kasaigeppo* No. 1 p.105.

[113] KAWAMATA, loc.cit. n.107.

[114] Ibid.

[115] Supreme Court 2 July 1981, 35 *Minshu* No.5 p.81.

5. RECOGNITION OF FOREIGN JUDGMENTS[116]

Like the topic of international jurisdiction, the recognition of foreign judgments raises many important theoretical and practical matters. The 1996 reform of the CCP on this issue (Arts. 200 of the old CCP and 118 new CCP) was minimal and consequently the theories developed so far and existing court decisions will continue to play an important role.

The victorious party in a foreign lawsuit against a person with assets in Japan is interested in having his rights under the foreign court's judgment realized through execution on the assets in Japan. For that purpose he needs an exequatur judgment required by Article 24(2) of the Law of Civil Execution.[117] Under this provision the foreign judgment must fulfil the requirements of Article 118 of the new CCP (Art. 200 of the old CCP). The discussion of these requirements will be the core of the present section. Another feature of the provision is the prohibition of *révision au fond*: any substantive examination of the foreign judgment as to the propriety of its solution in the specific case is excluded.[118]

5.1. Requirements for the recognition of foreign judgments

5.1.1. Jurisdiction of the foreign court

The principal requirement is that the foreign forum was entitled to exercise international jurisdiction. This jurisdiction is described as 'indirect' international jurisdiction in contrast to the jurisdiction dealt with earlier. Article 200(1) of the old CCP, which stated that "the jurisdiction of a foreign court is not denied by law or by treaty", was amended and according to Article 118(1) of the new CCP "the jurisdiction of a foreign court is admitted by law or by treaty". Under the old CCP, a minor view held that it is not necessary for the existence of jurisdiction of the foreign court to be confirmed,[119] but under the new CCP such a view cannot be maintained.

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[116] KONO TOSHIYUKI and ALEXANDER TRUNK, 'Anerkennung und Vollstreckung ausländischer Urteile in Japan' [Recognition and enforcement of foreign judgements in Japan], 102 *Zeitschrift für Zivilprozessrecht* (1989) 319. TAKESHITA MORIO, 'Neuere Tendenzen der Anerkennung und Vollstreckung ausländischer Entscheidungen in Japan, 109 *Zeitschrift für Zivilprozessrecht* (1996) 305 et seq.; SAWAKI TAKAO, 'Recognition and enforcement of foreign judgments in Japan', *The International Lawyer* (1989) 29.

[117] For an overview, see ISEKI MASAHIRO and HIGASHI TAKAYUKI, 'Civil Execution', in KITAGAWA ZENTARO (ed.), 16 *Doing Business in Japan* Ch. 6.

[118] This is sometimes referred to as 'automatic recognition'. *See* WATANABE, in KIDANA et al., op.cit. n. 60 p. 280. It may, however, be misleading. Although it raises the impression that all effects of the foreign judgment under the foreign law are automatically recognized, this is not always the case. E.g. the range of *res judicata* may be vastly different in Japan and in other states.

[119] See KOSUGI TAKEO, in SAWAKI and AKIBA, op.cit. n. 71 p. 234.

A key issue concerns the criteria by which to confirm indirect jurisdiction. According to the prevailing view,[120] the rule governing the question of jurisdiction of the Japanese court should also apply to the recognition of foreign judgments.[121] This means that the jurisdiction of a foreign court must be determined from the Japanese perspective, since rendering and recognizing a judgment are essentially the same functions. There is, however, another opinion which allows the application of different rules to the question of indirect jurisdiction, especially in case of divorce judgments. Situations in which a marriage is valid in country A but not in Japan could be avoided through a generous attitude towards recognition of foreign judgments.[122] Finally, a third view suggests the establishment of specific rules on indirect jurisdiction.[123]

Following the leading opinion, the rules which are explained in section 1 of this paper apply to indirect jurisdiction.

5.1.2. Service and appearance

These requirements serve the protection of the defendant who has not been notified about the commencement of the foreign litigation and who has, therefore, not been able to prepare his defence. Although they have remained the same under the new CCP, there are two minor differences between Article 200(2) of the old CCP and Article 118(2) of the new CCP. First, Article 200(2) only covered the service on defendants who are Japanese nationals. This nationalistic bias has been abolished. Secondly, while the old CCP regarded only service by public notice as an inappropriate means of service, under the new CCP other equivalent means of service may also be classified as inappropriate. Consequently, Article 118(2) of the new CCP may be broadly interpreted as regulating not only the service, but also other procedural issues relating to due process.

With regard to the requirements, service by mail from the USA has raised an important theoretical and practical issue.[124] Under Article 10 item (a) of the 1965 Hague Service Convention, each contracting state could declare its objection to, and consequently refuse service from abroad, by mail. Japan has not made such objection, giving rise to a number of questions. When a company or a person in Japan receives judicial documents by mail directly from an American attorney of the plaintiff, should it be deemed "service" within the meaning

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[120] WATANABE, in KIDANA et al., op.cit. n. 60 p. 286.

[121] Some judgments have followed this approach. *See* Tokyo District Court 19 September 1980, *Hanrei Taimuzu* No.435 p.155; Osaka High Court 25 February 1992, 45 *Kaminshu* 29 (English translation in 39 JAIL (1993) 217).

[122] See YAZAWA SHOJI, in IKEHARA and HAYATA, op.cit. n. 64 p. 227.

[123] Ibid.

[124] Besides HELDRICH and KONO, op.cit. n.1, see also WILLIAM TEMPLE JORDAN, 'Beyond jingoism: service by mail to Japan and the Hague Convention on Extrajudicial Documents in Civil or Commercial Matters', 16 *Law in Japan* (1983) 69; FUJITA YASUHIRO, 'Service of American process upon Japanese nationals by registered airmail and enforceability of resulting American judgments in Japan', 12 *Law in Japan* (1979).

of Article 200(2) of the old CCP (Art. 118(2) new CCP)? If so, is it always considered valid or only under certain circumstances?

There are two views on the matter: according to one it is "service" within the meaning of the CCP, since Japan has not raised an objection under Article 10 of the Hague Convention. The validity of the service by mail should be determined by whether or not a translation has been attached[125] and by various elements of the case, such as the language ability of the defendant, or by the type of case.[126]

According to the other opinion, taking the concrete circumstances of each case into consideration in order to determine the validity of service would lead to uncertainty of procedure. The service should rather be considered invalid or simple *de facto* notice.[127]

According to the official position of the Japanese government, the fact that Japan has not made the declaration only means that Japan will not consider service by mail to be violative of Japanese sovereignty, but does not mean that Japan recognizes it as a measure of service.[128] Some court decisions have held that service by mail without translation does not meet the requirements of Article 200(2) of the old CCP.[129] It is, therefore, recommended to use the judicial assistance procedures or, at least, attach a Japanese translation to service by mail.

5.1.3. Public policy

Article 200(2) of the old CCP as well as Article 118(2) of the new CCP lays down that foreign judgments shall not violate Japanese public policy. Not only the CCP, but also the *Horei* (Art. 33) and the Japanese Civil Code (Art. 90) use public policy as an instrument to protect the fundamental values of Japanese law. However, public policy in the CCP (and in the *Horei*) protects more fundamental values than public policy in Article 90 of the Japanese Civil Code.[130] The Japanese court is to examine *ex officio* whether a foreign judg-

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[125] TAKAKUWA AKIRA, 'Shogaiteki Minji Sosho Jiken ni okeru Sotatsu to Shokoshirabe' [Service and taking of evidence in transboundary civil litigation], 37 *Hosojiho* [Lawyers Association Journal] (No. 4) 54.

[126] KONO TOSHIYUKI, commentary on the judgment of the Tokyo District Court, 11 November 1988, *Jurisuto* No. 957 p.282.

[127] FUJITA YASUHIRO, 'Nihon no Hikoku ni taisuru Amerika Sojo no Chokusetsu Yuso to sono Koryoku' [Service by mail from USA to Japanese defendants and its effect], *Hanrei Taimuzu* No.354 p.84; MIKAZUKI AKIRA, in Yuasa law firm (ed.) *Kokusaitorihiki to Keiso no Horitsujitsumu* [International Trade and Legal Practice of Conflicts] p. 480.

[128] HARA MASARU, 'Shiho no Kokusaiteki Toitsu Undo' [International unification of private law], 17 *Kokusai Shoji Homu* [Journal of the Japanese Institute of International Business Law] (No.12) 1287.

[129] Tokyo District Court 21 December 1976, 27 *Kaminshu* No. 9-12 p. 801; Tokyo District Court 11 November 1988, *Hanreijiho* No. 1315 p. 96 (English translation in 33 JAIL (1990) 208); Tokyo District Court 26 March 1990, *Kinyu Shoji Hanrei* No. 1857 p.39 (English translation in 34 JAIL (1991) 174).

[130] TAKAKUWA AKIRA, 'Gaikoku Hanketsu Shouinyoken toshiteno Kojoryozoku' [Public policy as a

ment violates Japanese public policy. In this examination, not only the formal aspects of adjudication, but also the facts underlying the *ratio decidendi* may be taken into consideration. It must, however, not be a *révision au fond*, although as a matter of fact the public policy test may lead to *révision au fond*.[131]

After the amendment of Article 200(3) of the old CCP, Article 118(3) of the new CCP now prescribes that the content and the procedure of judgments (of foreign courts) shall not violate the public policy of Japan. Accordingly, the public policy test will also be made from the procedural point of view. Not only judgments with unacceptable contents, but also judgments rendered on the basis of a very unfair procedure, cannot be recognized. The prevailing view under the old CCP adhered to this standpoint too and the Supreme Court endorsed it in an *obiter dictum*.[132] It is now the official position of the Japanese law. Lack of judicial independence, lack of equal opportunity for both parties to examine the evidence, or lack of opportunity for those supervising against the forging of evidence are often mentioned as examples of procedures violating Japanese public policy.[133] The qualification 'violating public policy' can only be made on a case-by-case basis, since the ultimate criterion of fairness of the procedure cannot be defined in an abstract manner.[134]

One of the most debated issues concerning public policy is the recognition of American so-called 'punitive damages judgments'. These judgments tend to order the defendant to pay enormous amounts of money. The purpose of these judgments, i.e. deterrence of unlawful acts or punishing the defendant, is foreign to Japanese civil procedure. The matter can be sub-divided into two issues:

(1) Since recognition of foreign judgments deals exclusively with 'civil' judgments,[135] it should be asked whether a judgment awarding punitive damages can be classified as a 'civil' judgment? If the answer to this question is in the negative, the recognition of punitive damages judgments is generally excluded.[136]

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requirement for the recognition of foreign judgments], in AOYAMA and SAWAKI, op.cit. n. 84 p. 237.

[131] For a problematic case in this sense, see the judgment referred to in n. 139.

[132] Supreme Court 7 June 1983, 37 *Minshu* No. 5 p. 611.

[133] Yokohama District Court 24 March 1989, *Hanrei Taimuzu* No. 703 p.268. In its decision of 22 December 1977, the Osaka District Court, *Hanrei Taimuzu*, No. 361 p. 127, refused to recognize a judgment rendered in the State of Washington, USA. The reasoning was that an existing judgment in Japan had led to a different result and that recognition would violate Art. 200(2) of the old CCP. The majority of scholars endorse this position. See TAKAKUWA, loc.cit. n.130.

[134] TAKAKUWA, ibid. Notice of litigation or guarantee of defence possibilities is covered by Art. 118(2).

[135] Neither Art. 200 old CCP nor Art. 118 new CCP explicitly mentions the 'civil' nature of foreign judgements as a requirement for their recognition. This is, however, the general understanding.

[136] DOGAUCHI MASATO, *Hanreijiho* No.1388 p.202; HAYAKAWA YOSHIHISA, 'Chobatsuteki Songaibaisho Hanketsu no Shonin Shikko' [The recognition and execution of punitive damage judgments], *Hongo Hosei Kiyo* [Journal of Law and Politics of Tokyo University Graduate Students] No.1(1993) 257; ISHIGURO KAZUNORI, 'America no Chobatsuteki Songaibaisho to 'Kokkyo' [US punitive damages and the border], *Boeki to Kanzei* [Trade and Tax] (October 1994)

(2) Should the judgment be classified as 'civil', would recognition violate Japanese public policy? If it does, should the recognition of the whole judgment be refused[137] or could part of the judgment be recognized?[138] In the latter case, the question is how to determine the part of the judgment (especially the punitive damages awarding part) which could be recognized, since re-examination of the case is impossible due to the prohibition of *révision au fond*. The Tokyo District Court refused recognition of the punitive damages award part of a Californian judgment (compensatory damages were fixed at US$ 420,000 and punitive damages at US$ 120,000).[139] The judgment has been criticized for actually performing *révision au fond*.[140] It is certainly not easy to draw a clear border line between the public policy test and *révision au fond*, if partial recognition is to be granted. Therefore, the opinion is held that beyond a certain level acceptable in Japan, the award should be assumed to be foreign to Japanese law. Consequently, the victorious party should bear the burden of proof that this latter part is also acceptable in Japan.[141] During appeal from the judgment of the Tokyo District Court, the High Court said that it was doubtful that the judgment could be the object of recognition due to the criminal law nature of the punitive damages award. Even if it could, the recognition and execution would violate public policy.[142]

5.1.4. Reciprocity

According to an old judgment,[143] reciprocity exists between Japan and a foreign state when the foreign state recognizes Japanese judgments under the same requirements as those of the Japanese (old) CCP or under more generous requirements. This interpretation was criticized for the following reasons. First, a strict application would disturb mutual recognition rather than achieve a more generous attitude of both states to each other. Second, it is sometimes difficult to determine which state is more generous in recognizing foreign judgments, since requirements for recognition differ in each country. Thirdly, if a foreign judgment cannot be recognized due to the requirement of reciprocity, the price

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[137] FUJITA YASUHIRO, 'Shogai Minjijiken no Jitsumu to Mondaiten' [Practice and issues in international civil cases], 31 *Jiyu to Seigi* [Liberty and Justice] No.11 (1980) 18.

[138] KONO TOSHIYUKI, 'Amerika no Chobatsuteki Baisho Hanketsu to Kokusai Minjisoshoho jo no jakkan no Mondai nitsuite' [US punitive damages judgment and several issues of international civil procedure], 58 *Hosei Kenkyu* [Journal of Law and Politics, Kyushu University] No. 4 (1991) 867; KOBAYASHI HIDEYUKI, 'Chobatsuteki Songaibaisho to Gaikoku Hanketsu Shonin' [Punitive damages and the recognition of foreign judgments], NBL No. 473 (1991) 6; see also No. 477 p. 20.

[139] Decision of 18 February 1991, *Hanreijiho* No.1376 p.79. (English translation in 35 JAIL (1992) 177).

[140] ISHIGURO KAZUNORI, in *Shiho Hanrei Rimakusu* [Remarks on Civil Law Judgments] No.4 (1992) 167.

[141] KONO, loc.cit. n.138.

[142] Tokyo High Court 28 June 1993, *Hanreijiho* No.1471 p.89 (English translation in 37 JAIL (1994) 155).

[143] Great Court of Cassation 5 December 1933, *Horitsushinbun* No.3670 p.15.

must be paid by the persons who try to materialize their rights, and this would be quite unfair. As a result, the Supreme Court modified its old opinion and now holds that, if a foreign state recognizes a similar type of Japanese judgment under conditions not essentially different from the requirements of Article 200 (of the old) CCP, reciprocity is deemed to exist between the two countries.[144] Under these criteria, the judgment of a foreign state which takes a more rigorous attitude than Japan, can be recognized. In fact, reciprocity has been generously recognized by lower courts[145] and is generally endorsed by scholars.[146] According to some, even this liberal interpretation of reciprocity is not generous enough to enhance the recognition of foreign judgments and, consequently, the requirement should be abolished.[147] However, Article 118 of the new CCP has retained the requirement. Therefore the existing discussion and case law remains relevant.

5.1.5. Other requirements

5.1.5.1. Recognition of constitutive judgments

Foreign judgments must be recognized to the extent that under the Civil Execution Law recognition is required for the purpose of execution. Some kinds of judgments do not need execution, however, for example divorce judgments. According to one opinion, Article 200 of the old CCP (Art. 118 new CCP) should apply *mutatis mutandis* and the requirement of reciprocity should be ignored in these cases. Instead, there should be a requirement that the foreign court has applied the same law as that referred to as the applicable law by Japanese private international law.[148] This opinion has the following background: a judgment acquires its constitutive effect from substantive law. In case of judgments of Japanese courts in transboundary cases, this constitutive effect is derived from the foreign applicable law referred to by Japanese private international law. If the judgment is rendered by a foreign court and intended to

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[144] Supreme Court 7 June 1983, 37 *Minshu* No.5 p.611 (English translation in 27 JAIL (1984) 119). Before this judgment, reciprocity was denied in two cases: Tokyo District Court 20 July 1960, 11 *Kaminshu* No.7 p.522 (Belgium), and Fukuoka District Court 25 March 1982, 31 *JCA Journal* No. 12 p.2 (Hong Kong).

[145] Nagoya District Court 6 February 1987, *Hanreijiho* No. 1236 p. 113 (Germany) (English translation: 33 JAIL (1990) 189); Tokyo District Court 16 December 1991, *Hanrei Taimuzu* No. 794 p. 246 (State of Nevada); Tokyo District Court 30 January 1992, *Hanrei Taimuzu* No. 789 p. 259 (State of Texas); Kobe District Court 22 September 1993, *Hanrei Taimuzu* No. 826 p. 206 (Hong Kong); Tokyo District Court 31 January 1994, *Hanrei Taimuzu* No. 837 p. 300 (United Kingdom).

[146] KONO TOSHIYUKI, 'Shoninyoken toshiteno Sogo no Hosho' [Reciprocity as a requirement of the recognition of foreign judgments], in SAWAKI and AKIBA op.cit. n. 71 p. 239.

[147] SAKURADA YOSHIAKI, in *Hanreihyoron* No. 288 p. 32. Against this opinion: TAKAKUWA AKIRA, in 90 *Minshoho Zasshi* [Journal of Civil and Commercial Law] (no. 1) 101.

[148] EGAWA HIDEFUMI, 'Gaikoku Hanketsu no Shonin', 50 *Hogaku Kyokai Zasshi* [Journal of the Jurisprudence Association, University of Tokyo] (no. 11) 2054. *See* also: Tokyo District Court 15 March 1961, 12 *Kaminshu* No. 3 p. 486.

be recognized in Japan, it should fulfil the same condition, i.e. having applied the same law as the Japanese court would apply (the so-called applicable law requirement).

Another school of thought applies Article 200 of the old CCP (Art. 118 new CCP) *mutatis mutandis* without the applicable law require-ment,[149] i.e. items 1, 2 and 3 of the Article.

The prevailing opinion applies Article 200 of the old CCP (Art. 118 new CCP) in its entirety, including the reciprocity requirement but without the applicable law requirement.[150] As far as the requirement of reciprocity is interpreted generously, as stated above, it does not make sense to ignore this requirement. Therefore, under the new CCP the prevailing opinion should also be followed.

5.1.5.2. Final judgments

Article 200 of the old CCP (Art. 118 new CCP) refers to 'final' judgments. 'Final' means the state of judgment where neither annulment nor alteration is allowed any more. Therefore, among other things, recognition of arrest, being a provisional measure, is not allowed under the current system.

5.1.5.3. Foreign courts

The foreign judgment must have been rendered by a court or institution of the foreign state vested with judicial power. It may be an administrative organ, as long as it possesses judicial power. Settlement made in court does not fulfil this requirement, since it is based on agreement between the parties and not the result of the exercise of judicial power.

5.2. Effects of the recognition of foreign judgments

The recognition of a foreign judgment, according to prevailing opinion, extends the effects conferred to the judgment by the law of the foreign state.[151] This view is closely connected with the notion of automatic recognition.[152] When the foreign judgment fulfils the requirements of Article 200 (old, now 118 new) of the CCP, it is deemed to be "automatically" recognized and accordingly its effects extend to the Japanese legal order. There is a possibility, however, of limiting these effects as far as they are very different from those under Japanese law. For example, the range of *res judicata* may be vastly different in the two legal systems. Therefore another opinion, according to

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[149] TAMAIKE YOSHIO, *Kokusaishiho Kogi* [Lectures of Private International Law] (1995) 454. *See* also Yokohama District Court 7 September 1971, *Hanreijiho* No. 665 p. 75.

[150] YAMADA RYOICHI, *Kokusaishiho* [Private International Law] (1992) 406. *See also* Tokyo District Court 17 December 1971, *Hanreijiho* No. 665 p. 72.

[151] See WATANABE, in KIDANA et al., op.cit. n. 60 p. 281.

[152] See the introductory part on recognition of foreign judgments in this paper.

which recognition implies the conferment of effects to the judgment by Japanese law, is also persuasive. This has not yet been sufficiently discussed so far and will be an important future issue.

5.3. Procedure of exequatur

The examination of whether a foreign judgment fulfils the requirements of Article 200 (old, now 118 new) of the CCP, is part of the exequatur procedure. From a theoretical point of view the exequatur procedure originates in a claim for a constitutive judgment granting executive effects to the foreign judgment. A normal hearing and the regular evidence examination procedure take place. No examination is, however, undertaken as to the question of whether the foreign judgment was an appropriate solution of the concrete case (prohibition of *révision au fond*). When the situation of the case has changed after the judgment,[153] the defendant can assert such changes by way of an objection against the execution.[154]

6. ARBITRATION

6.1. Law applicable to international arbitration

According to the majority of Japanese court decisions on the subject, an arbitral agreement is a kind of contract in the field of civil law.[155] Therefore, the applicable law is to be determined by the *Horei*,[156] unless international conventions apply.[157]

When the validity of an arbitral agreement is in question in the context of the recognition of a foreign arbitral award, the law applicable to the question of validity is determined by Article 5(1)(a) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. If the question arises in different contexts, Article 7 of the *Horei* determines the applicable law by leaving the choice to the parties. In the absence of a choice, the intention of the parties should be determined. A recent judgment held that, when the parties chose the place of arbitration, they must have had the intention to apply the law of that place.[158] This view finds support in the literature.[159] The law applicable

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[153] E.g. when partial payment has been made.

[154] Tokyo District Court 13 October 1965, 16 *Kaminshu* No. 10 p. 1560.

[155] Supreme Court 15 July 1975, 29 Minshu No. 6 p. 106; Tokyo High Court 30 May 1994, *Hanreijiho* No. 1499 p. 68.

[156] For an overview of the Japanese conflict of laws, see FUJITA YASUHIRO, 'Transnational litigation - conflict of laws', in KITAGAWA (ed.), op.cit. n. 117 Ch. 5.

[157] International conventions are usually applicable when issues of applicable law are raised in the context of recognition of foreign arbitral awards.

[158] Tokyo High Court 30 May 1994, *Hanreijiho* No. 1499 p. 68.

[159] *See* e.g. KOJIMA TAKESHI and TAKAKUWA AKIRA (eds.), *Chukai Chusaiho* [Commentary of the Arbitration Law] (1988) 219.

to the question of the validity of an arbitral agreement is also applicable to the question of the effects of the agreement.[160]

The applicable law in procedural matters in the field of arbitration is, according to the leading opinion, the law chosen by the parties, and, in the absence of a choice, the law of the place of arbitration.[161] The majority of the available court decisions, however, apply the *lex fori* to the procedural effects, such as the litigation-excluding effect.[162] This is also the prevailing view among scholars.[163]

6.2. Recognition of foreign arbitration

Japan is a party to multilateral and bilateral treaties on the recognition of foreign arbitral awards,[164] but it has not enacted any municipal law on the implementation of these treaties. The treaties usually specify the kinds of arbitration awards covered by them and the recognition and enforcement of most international arbitration awards are dealt with on the basis of these treaties.[165] When both the New York Convention and a bilateral treaty are applicable to the same case, the bilateral treaty applies if it is more generous than the New York Convention.[166] In fact, many of the Japanese bilateral treaties are considered to be more generous than the New York Convention.[167]

When there is no treaty applicable, the Japanese *lex fori* should be applied. However, Articles 801 and 802 of the old CCP[168] are generally considered to be applicable only to domestic arbitration.[169] There are two opinions on this issue. According to the first one, there are some lacunae in the Japanese law

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[160] *See* Supreme Court, *supra* n. 155.

[161] KOJIMA and Takakuwa, op.cit. n.159, p. 226; KOYAMA NOBORU, *Chusaiho* [Arbitration Law] (new ed., 1983) 182 and 248. *See* also Art. 5(1)(d) of the New York Convention.

[162] Tokyo District Court 10 April 1953, 4 *Kaminshu* No. 4 p. 502; Tokyo District Court 25 December 1973, *Hanrei Taimuzu* No. 308 p. 230. Cf. Tokyo High Court supra n. 158.

[163] Op.cit. n. 159 p. 223.

[164] The most important treaty is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Japan has concluded 14 bilateral treaties concerning the recognition and enforcement of foreign arbitral awards (with the USA, the Soviet Union, Poland, Yugoslavia, the Czech Republic, Pakistan, Peru, Argentina, the UK, El Salvador, Rumania, Bulgaria, China and Hungary).

[165] KOBAYASHI, loc.cit. n. 138 p. 256.

[166] New York Convention Art.7(1).

[167] KOBAYASHI, loc.cit. n. 138 p. 244.

[168] Art.801 deals with the reasons for annulment of arbitral awards. Art.802 lays down the requirement of an exequatur judgment for the execution of arbitral awards, and proscribes exequatur in case of existence of one of the reasons for annulment. As a result of the amendment of the CCP, these provisions will be transferred to the sections on public protest procedure (German: *Aufgebotverfahren*) and arbitration procedure, without substantial change.

[169] NAKATA JUNICHI, *Sosho oyobi Chusai no Hori* [Legal Theory of Litigation and Arbitration] (1937) 413; KOBAYASHI, op.cit. n.40 p.210. Cf. Tokyo District Court 19 June 1995, *Hanrei Taimuzu* No. 919 p. 252.

which should be filled by *Jori*.[170] The other view says that Articles 801 and 802 of the old CCP should be applied also to international arbitral awards[171] or should be applied *mutatis mutandis*.[172] In the present situation, where most countries are party to treaties governing the matter, this debate has, however, very little practical meaning. Also the judgments which by way of formal reasoning applied Articles 801 and 802 of the old CCP *mutatis mutandis* took the requirements of the relevant treaties into consideration.[173]

Since there is no special procedure for the recognition of foreign arbitral awards, the procedure for domestic arbitration should be used: an application should be submitted seeking an enforcement judgment for the foreign arbitral award. When the enforcement judgment is rendered and becomes final, enforcement can take place. Dismissal of the claim for reasons of existing grounds for annulment (cf. Arts. 801 and 802 of the old CCP) does not imply the annulment of the award, since annulment requires a separate procedure.

The Legal System Council, an advisory organ for the Minister of Justice, is at present preparing a draft in the field of arbitration. It is hoped that provisions on international arbitration will be included in the draft.

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[170] NAKATA, ibid., p. 423. As to the requirements for *Jori*: the arbitration award must (1) be valid according to the law applicable to the arbitration contract and (2) not violate Japanese public policy; (3) *ex parte* hearing must have been held and the parties must have been appropriately represented in the procedure.

[171] AGAWA KIYOMICHI, 'Gaikoku Chusai Handan no Shonin oyobi Shikko nitsuite' [The recognition and enforcement of foreign arbitral awards], *Jurisuto* No.232 p.42; YAMAMOTO, loc.cit. n. 21 p. 473.

[172] KOBAYASHI, in op.cit. n. 159 p. 243.

[173] Tokyo District Court 20 August 1959, 10 *Kaminshu* No. 8 p. 1711 (1927 Geneva Convention); Tokyo District Court 23 October 1959, 10 *Kaminshu* No. 10 p. 2232 (Japan-US Treaty of Friendship, Commerce and Navigation); Osaka District Court 27 November 1961, 6 *Kaijihanrei* No. 5 p. 118 (idem); Nagoya District Court, Ichinomiya Branch 26 February 1987, *Hanreijiho* No. 1232 p. 138 (idem); Osaka District Court 22 April 1983, *Hanreijiho* No. 1090 p. 146 (New York Convention).

THE LAW OF INTERNATIONAL CIVIL PROCEDURE IN CHINA

Li Shuangyuan* and Lü Guoming**

INTRODUCTION

Although differing in regard to the relationship between private international law and the law of international civil procedure,[1] almost all Chinese legal scholars define the latter as a body of rules binding the courts and the litigating and other parties involved when dealing with civil and commercial cases involving foreign elements. They hold that it is made up of three principal components: (a) the rules regulating the status of the litigating foreign nationals, foreign countries and international organizations in civil proceedings; (b) the rules concerning the jurisdiction of courts over international civil and commercial cases; (c) the rules governing the taking of evidence abroad, the

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[1] Some Chinese scholars regard the law on international civil procedure as a separate branch of law, while others are of the opinion that it is just a sub-division of private international law. The following definitions are from two scholars who take contrasting attitudes:
(1) "International civil procedure law and private international law are closely connected, but they are two branches of law of different nature. Private international law, which is substantive law, governs the substantive rights and obligations of the parties in international civil and commercial legal relationships, whereas the law on international civil procedure is procedural law which determines the procedural rights and obligations of parties in international civil litigation. The subjects of private international law relationships in most cases are two parties, while in an international civil procedure there is always a third party involved, i.e. the court or another judicial organ with jurisdiction to adjudicate." XIE SHISONG, 'Guoji Minshi Susongfa Shi Yige Duli de Falü Bumen' [The science of the law on international civil procedure as an independent legal discipline], *Law Review* (1996, no. 5) 38-42.
(2) "Traditional private international law also covers international civil procedure. In view of the close connection between private international law and international civil procedure law - i.e. the rules of civil procedure applicable to cases with foreign elements - it is suitable to include the latter into, and regard it as a component of, private international law . . . until it constitutes an independent branch of law." YU XIANYU, *Jianmin Guoji Sifaxue* [A concise treatise on the science of private international law] (Beijing; 1986) 362.

Discussions on the relationship between international civil procedure law and private international law can also be found in other books and articles, such as LI SHUANGYUAN, *Guoji Sifa* [Private International Law] (Wuhan; 1987) 29-30; LIU ZHENJIANG, ZHANG ZHONGBO and YUAN CHENDI (eds), *Guoji Sifa Jiaochen* [A Course of Private International Law] (Lanzou; 1988) 8; QIAN HUA (ed.), *Guoji Sifa* [Private International Law] (Beijing, 1992) 441-442.

Asian Yearbook of International Law, Volume 6 (Ko Swan Sik *et al.*, eds.
, pp. 135-167

proof of foreign laws, the preservation of property rights, the service abroad of judicial and extrajudicial documents in civil and commercial matters, and the recognition and enforcement of foreign judicial decisions and arbitral awards.[2]

Since the adoption of the policy of opening to the outside world in 1978, the Chinese legislature, the people's courts (especially the Supreme People's Court), the Chinese legal profession and legal scholars have paid increasing attention to the law of international civil procedure. In less than ten years, two statutes on the law of civil procedure have been promulgated, both of which include a part entitled "Special Provisions on Civil Procedure in Cases Involving Foreign Elements".[3] Since the 1980s, and especially in recent years, Chinese scholars have published numerous articles and several monographs on international civil procedure law.[4] This has pushed scholarship in the field of the Chinese law on international civil procedure to a new stage and has been of great help to the Chinese legislature and Chinese legal practice. A brief introduction to the principles and new developments of international civil procedure law in China will be provided below.

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[2] *See* HAN DEPEI (ed.), *Guoji Sifa* [Private International Law] (Wuhan; 1983) 418; XIE SHISONG, loc.cit. n. 1 p. 38. A newly published law textbook written by LI HAOPEI lists the following six topics within the law on international civil procedure: immunities from civil and commercial adjudication; adjudication jurisdiction over international civil and commercial cases; the legal status of foreigners in the law of international civil procedure; recognition and execution of foreign civil and commercial judgements; international civil and commercial judicial assistance; international civil and commercial arbitration. LI HAOPEI, *Guoji Minshi Chengxufa Gailun* [An Introduction to the Law of International Civil Procedure] (Beijing, 1996) 5.

[3] The two statutes are the Provisional Law of Civil Procedure of the PRC, adopted by the 22nd session of the Standing Committee of the Fifth National Congress on 8 March 1982 and abrogated on 9 April 1991, and the Law of Civil Procedure of the PRC (hereinafter CPL) which was both adopted and entered into force on 9 April 1991.

[4] Almost all books on private international law published in China contain a part on international civil procedure. *See* e.g., YAO ZHUANG and REN JISHEN, *Guoji Sifa Jichu* [Basic knowledge of private international law] (Beijing, 1981) 209; HAN DEPEI, op.cit. n. 2, p. 373; LI SHUANGYUAN (ed.), *Guoji Sifa* [Private International Law] (Beijing, 1991) 437. At the end of 1996 there were six monographs on the law on international civil procedure: LIU ZHENJIANG, *Guoji Minshi Susongfa Yuanli* [The Basic Principles of International Civil Procedure Law] (Beijing, 1985); LI SHUANGYUAn and XIE SHISONG, *Guoji Minshi Susongfa Gailun* [An Introduction to International Civil Procedure Law] (Wuhan, 1990); LI YUQUAN (ed.), *Guoji Minshi Susong He Guoji Sangshi Zhongcai* [International Civil Procedure and International Commercial Arbitration] (Wuhan, 1994); JIN PENGNIAN, *Guoji Minshi Chengxufa* [International Civil Procedure Law] (Hangzhou, 1995); XIE SHISONG, *Guoji Shangshi Zhongcai He Guoji Minshi Susongfa* [International Commercial Arbitration and International Civil Procedure Law] (Guangzhou, 1995); LI HAOPEI, op.cit. n. 2.

1. GENERAL CONTEXT

1.1. The judicial system

1.1.1. Structure

As a unitary state, China has one general judicial system. All judicial organs apply uniform substantive and procedural laws throughout the country, unless the law provides otherwise.[5] The organization of the judicial system of the People's Republic of China (PRC) is laid down in the Law on the Organization of the People's Courts of the PRC, which was adopted at the second session of the Fifth National People's Congress (NPC) on 1 July 1979, and amended at the second session of the Sixth NPC on 2 September 1983.[6] Article 2(1) of the law provides that "the judicial authority of the PRC is exercised by the following people's courts: (a) local people's courts at various levels; (b) military courts and other special people's courts; (c) the Supreme People's Court". Paragraph 2 of the same sub-divides the local people's courts according to level, into 'basic people's courts', 'intermediate people's courts', and 'higher people's courts'.

Basic people's courts are county people's courts and municipal people's courts, people's courts of autonomous counties, and people's courts of municipal districts.[7] Intermediate people's courts are those established in prefectures of a province or an autonomous region and in municipalities which fall directly under the central government, namely Beijing, Shanghai and Tianjin. There are also intermediate people's courts of municipalities which come directly under the jurisdiction of a province or an autonomous region and of autonomous prefectures.[8] Higher people's courts include those of provinces, autonomous regions, and municipalities which fall directly under the central government.[9] The Supreme People's Court, located in Beijing, is the highest judicial organ of the PRC.[10] It supervises the administration of justice by local people's courts at various levels and by special people's courts.[11] It also renders interpretations in case of questions concerning specific applications of laws and decrees in judicial proceedings.[12]

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[5] Hongkong and Macao will be two exceptions to China's general judicial system. According to the Sino-British Joint Declaration on the question of Hongkong and the Sino-Portuguese Joint Declaration on the question of Macao, the two regions will keep their judicial systems unchanged for at least fifty years after 1997 and 1999 respectively.

[6] Chinese text in *Fagui Huibian* [Collection of Laws] 47-51; English translation in *Statutes and Regulations*, code No. 790705.1.1.

[7] Law on the Organization of the People's Courts of the PRC, Art. 18.

[8] Ibid., Art. 23.

[9] Ibid., Art. 26.

[10] Ibid., Art. 30(1).

[11] Ibid., Art. 30(2).

[12] Ibid., Art. 33.

In addition to military courts, which are provided for in Article 2(2) of the Law on the Organization of the People's Courts, there are some other special people's courts which have jurisdiction in particular fields. These include, for instance, railway courts and maritime courts. The position of the special people's courts runs parallel with that of intermediate people's courts.

Under the Law of Civil Procedure (CPL), a collegiate court is the general rule and single-judge courts are the exception. Article 40 of the CPL provides that the people's court of first instance shall try civil cases by a collegiate panel composed of judges with or without judicial assessors. The collegiate panel must have an odd number of members.[13] Single-judge courts operate only in civil cases under a summary procedure.[14]

In civil cases, adjudication by the people's courts takes place in two instances.[15] A party has the right to file an appeal against a judgment of first instance with the people's court at the next higher level. The judgment of the latter people's court shall then be final. The CPL, however, also lists some special cases where no appeal to a higher court is allowed and where the judgment of first instance is final.[16] These comprise the following four categories: cases concerning the qualification of voters; cases concerning a declaration of a person as missing or dead; cases on the adjudgment of the legal incapacity or the restricted legal capacity of persons; and cases on the determination of property as being without an owner.

1.1.2. Competent courts dealing with civil litigation involving foreign elements

As there are no special courts for transboundary civil matters in China, every people's court is competent to hear cases in international civil litigation. Besides, the CPL does not distinguish between cases involving foreign elements and those without such elements as far as jurisdiction is concerned. Therefore, civil cases involving foreign elements may, in first instance, fall under the jurisdiction of the people's courts of different levels, including the basic people's courts.

1.1.3. The scheme of civil procedure

In China, parties may choose among three methods to resolve their disputes, namely, mediation, arbitration and litigation.[17] The third method is the most effective one. Where the parties are unwilling to submit their dispute to mediation, or have not included an arbitration clause in their contract, or have not made an arbitration agreement upon the emergence of the dispute, they can

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[13] CPL, Art. 40(1).
[14] Ibid., Art. 40(2).
[15] Ibid., Art. 10.
[16] Ibid., Ch. 15 (Arts. 160-176).
[17] See CAI FABANG, *Minshi Susongfa* [Civil Procedure Law] (Beijing, 1992) 1-2.

bring a lawsuit to a people's court. Provided the lawsuit fulfils the requirements stipulated by law, the court entertains the case and renders a judgment based on the facts and the law. This stage is called the procedure of first instance, which is roughly divided into the following stages: bringing a lawsuit and entertaining a case, preparations for trial, trial in court, suspension and termination of litigation, judgment and orders.[18] In case of an appeal with the people's court at the next higher level, the people's court of second instance may, in the form of a judgment, reject the appeal or render its own decision (thereby replacing the judgment of first instance with one of its own), or remand the case to the original people's court for retrial. The judgment of a people's court that has become final is to be enforced either by the parties themselves or by an execution authority.

In addition to the procedures of first and second instance, the CPL provides for the procedure of 'trial supervision' which offers the possibility of a retrial in case of a judgment which is legally effective but in which definite errors have been found.

In trying civil cases the courts are under strict time limits which are clearly stipulated in the CPL. In procedures of first instance the courts are prescribed to conclude the proceedings of ordinary cases (as distinguished from simple cases) within six months after the entry of the case in the court's docket. Where lengthening of the period is necessary because of special circumstances, a six-month extension may be allowed subject to the approval of the president of the court.[19] For simple cases, the time period is fixed at three months.[20] In the procedure of second instance, the people's court shall conclude the proceedings within three months, with a possible extension of the period whenever necessitated by special circumstances subject to approval by the president of the court.[21] The time period for special cases[22] is similar to that of simple cases of first instance.

1.1.4. Lex fori

Article 4 of the CPL states that "whoever engages in civil litigation within the territory of the People's Republic of China must abide by this law". Consequently, the Chinese people's courts will exclusively follow the procedure as laid down by Chinese procedure law when dealing with both domestic civil actions and those involving foreign elements. The conclusion can thus be drawn that China, like many other countries, adheres to the principle of *lex fori* in matters of procedural law. Many Chinese scholars view the application of the *lex fori* as based on the principle of sovereignty.

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[18] CPL, Ch. 12.
[19] CPL, Art. 135.
[20] CPL, Art. 146.
[21] CPL, Art. 159.
[22] *See supra* 1.1.1.

1.2. The sources

Unlike the practice in most common law countries, decisions of Chinese courts are not regarded as a source of Chinese law.[23] The sources of the Chinese law on international civil procedure can be conveniently sub-divided into two categories: national sources containing domestic legislation and interpretation of laws, and international sources, mainly consisting of multilateral conventions and bilateral agreements.[24]

1.2.1. National legislation

There is no special statutory law on international civil procedure in China. The provisions on the subject are to be found scattered among the following various laws and regulations:

A. The Civil Procedure Law

This law was adopted at the fourth session of the Seventh NPC on 9 April 1991 and became effective on the same day.[25] It is composed of four Parts, 29 Chapters and 270 Articles. Part Four ("Special Provisions on Civil Procedure in Actions Involving Foreign Elements", Arts. 237-269) lays down the fundamental provisions of the law on international civil procedure. Its main contents include: General Principles (Chapter 24); Jurisdiction (Chapter 25); Service and Time Periods (Chapter 26); Property Preservation (Chapter 27); Arbitration (Chapter 28) and Judicial Assistance (Chapter 29).

B. Regulations on Diplomatic Privileges and Immunities

The "Regulations of the People's Republic of China on Diplomatic Privileges and Immunities" were adopted at the seventeenth session of the Standing Committee of the Sixth National People's Congress (NPCSC) and became effective as of the date of its promulgation, 5 September 1986. This law, consisting of 29 Articles, defines the diplomatic privileges and immunities of diplomatic missions in the PRC and their members. Indeed, in essence it serves public international law purposes. However, it also plays an important role in international civil procedure as it contains rules on issues of civil procedure involving persons enjoying diplomatic privileges and immunities.[26]

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[23] Nevertheless most Chinese scholars acknowledge that the decisions of the Supreme People's Court play an important role in the development and improvement of the Chinese legal system.

[24] Some Chinese scholars also regard international custom to be a source of international civil procedure law. See Jin Pengnian, op.cit. n. 4, p. 13.

[25] CPL, Art. 270. This article simultaneously abrogated the 1982 Provisional Civil Procedure Law. Cf. *supra*, n. 3.

[26] The provisions on civil procedural issues of persons enjoying diplomatic privileges and immunities include Arts. 14 and 15. Art. 14(2, 3 and 4) reads: "[A diplomatic agent] shall [. . .]

C. Regulations on Consular Privileges and Immunities

This act came into force on 30 October 1990. It also contains some provisions on international civil procedure.[27]

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enjoy immunity from civil and administrative jurisdiction, except in case of: (1) an action relating to succession in which he is involved as a private person; (2) an action relating to any professional or commercial activity conducted by him in the PRC outside his official functions in violation of sentence three of Article 25 of this law.

Execution shall not be enforced against a diplomatic agent with the exception of a forcible execution resulting from the circumstances referred to in the previous paragraphs of this Article, and provided that the measures of execution do not constitute any violation of his person and residence.

A diplomatic agent is not obliged to give evidence as a witness."

Art. 15(1 and 3) provides: "The immunity from jurisdiction of diplomatic agents and of persons who enjoy immunity under Art. 20 may be waived through expliexpression [of such waiver] by the government of the sending state.

The initiation of proceedings by a diplomatic agent or by a person who enjoys immunity from jurisdiction under Art. 20 shall preclude him from invoking immunity from jurisdiction with respect to any counter-claim which is directly connected with the claim.

Waiver of immunity from civil or administrative jurisdiction shall not imply waiver of immunity with respect to execution of a judgment, for which a separate and explicit waiver shall be required."

[27] These provisions include:

Art. 14: "Consular officers and members of the consular administrative and technical staff shall enjoy immunity from judicial and administrative jurisdiction with respect to acts performed in the exercise of their functions. The immunity from jurisdiction of consular officers with respect to acts other than those performed in the exercise of their functions, shall be handled according to bilateral treaties and agreements between China and the foreign state or on the basis of reciprocity.

The immunity from judicial jurisdiction enjoyed by consular officers and members of the consular administrative and technical staff does not apply to civil actions involving:

1. a contract which was not concluded expressly as an agent of the sending state;
2. private immovable property within the territory of China other than immovable property which is owned in the person's capacity as an agent of the sending state and is used for the consular post;
3. the inheritance of an estate, brought in a private capacity; or
4. damage arising from an accident caused by a vehicle, vessel, or aircraft within the territory of China."

Art. 15: "Members of a consular post may be required to act as a witness in the course of judicial or administrative proceedings, but are under no obligation to give evidence concerning matters connected with the exercise of their functions. They are entitled to decline to give evidence as expert witnesses with regard to the law of the sending state.

If a consular officer declines to give evidence, no coercive measure or penalty may be applied to him.

Members of the consular administrative and technical staff or of the consular service staff may not decline to give evidence except for matters connected with the exercise of their functions."

Art. 16: "The sending state may expressly waive the immunity from jurisdiction enjoyed by the staff as provided for in these Regulations.

The initiation of proceedings by a person who enjoys immunity from jurisdiction under these Regulations shall preclude him from invoking immunity with respect to any counterclaim directly connected with the principal claim.

The waiver of immunity from civil or administrative jurisdiction shall not entail a waiver of immunity from execution of a judgment. With respect to such an execution, a separate express waiver by the sending state will be necessary."

1.2.2. Treaties

Treaties to which China is a party are regarded as a component of Chinese domestic law. In case of conflict the provisions of the treaty shall prevail.[28] Since the 1980s, China has become a party to an increasing number of treaties, both multilateral and bilateral ones. Some of them relate to international civil procedure. The multilateral treaties among them comprise the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965. On 2 December 1986, the Standing Committee of the Sixth NPC ratified the New York Convention. Ratification took place with the following two reservations:

> (1) "The People's Republic of China will apply the Convention, only on the basis of reciprocity, to the recognition and enforcement of arbitral awards made in the territory of another Contracting State"; and
>
> (2) "The People's Republic of China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the People's Republic of China."

The principle of reciprocity, better known in China as the principle of 'mutual benefit', is much emphasized by Chinese authors as being one of the fundamental principles of private international law.[29] It is regarded as a prerequisite for Chinese judicial assistance. As to the meaning of the concept 'contractual and non-contractual legal relationships of a commercial nature', the Supreme People's Court rendered a ruling specifying its scope.[30]

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[28] Although there is no pertinent provision in the Chinese Constitution on the relation between Chinese domestic law and the treaties to which China is a party, provisions of this kind can be found in some separate laws. E.g. Art. 142(2) of the General Provisions of Civil Law (*see* n. 58) stipulates: "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the PRC, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has made a reservation." Article 238 of the CPL reads: "If an international treaty concluded or acceded to by the PRC contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except those in respect to which China has made a reservation".

[29] See HAN DEPEI, op.cit. n. 2, p. 32; YU XIANYU, op.cit. n. 1, pp. 23-24; YAO ZHUANG and REN JISHENG, op.cit. n. 4 p. 19; JIN PENGNIAN, op.cit. n. 4 p. 16.

[30] In its "Circular on the Implementation of the International Convention on the Recognition and Implementation of Foreign Arbitration Awards" of 10 April 1987 the Supreme People's Court stated that the so-called contractual and non-contractual commercial legal relationships are generally understood to be relationships of economic rights and duties arising from contract, tort or other relevant legal provisions, on topics such as the purchase and sale of goods, lease of property, contracts on projects or processing, transfer of technology, joint-ventures, equity joint ventures, prospecting and extraction of natural resources, insurance, loans, labour services, agencies, consultation services, the carriage of passengers and goods by sea, air, rail and road, product

On 2 March 1991 the Standing Committee of the Seventh NPC ratified the Hague Service Convention of 1965. This was the first Convention concluded under the auspices of the Hague Conference on Private International Law that was ratified by the PRC after it had become a member of the Conference on 3 July 1987. Participation in this Convention was regarded conducive to international cooperation in the field of judicial assistance on a wider scope and, also, as furthering the role of China in the Hague Conference on Private International Law.[31] In order to better implement the Convention in China, the Supreme People's Court, the Ministry of Foreign Affairs and the Ministry of Justice jointly issued two circulars, entitled "Certain Procedures in the Implementation"[of the Convention] (4 March 1992) and "Enforcement Measures on the Implementation" [of the Hague Service Convention] (19 September 1992).

Besides the above two conventions, China is a party to some other treaties containing provisions relating to international civil procedure.[32] As far as bilateral agreements are concerned, China, up to March 1996, had signed nineteen agreements on judicial assistance in civil, commercial and/or criminal matters.[33] The majority of these agreements contain provisions on the following matters: fundamental principles, the scope of civil, commercial and/or criminal matters,[34] the designation of authorities who are to carry out the assistance, the law applicable to the assistance, the procedures to be followed in case of judicial assistance and provisions governing specific issues, such as the exemption of documents from authentication, the exchange of information, the entry into force and the termination of the agreement.

1.2.3. Judicial interpretations and rulings by the Supreme People's Court

The "Resolution Providing for an Improved Interpretation of the Law", adopted by the NPCSC on 10 June 1981, vested the competence of judicial interpretation in the judicial organs, enabling the courts to elaborate on laws

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liability, environmental pollution, maritime incidents and disputes regarding ownership. However, they do not include disputes between foreign investors and local governments.

[31] *People's Daily* (Overseas Edition), 26 February 1991 p. 4.

[32] Such as the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, the Convention on International Civil Aviation of 7 December 1944, etc.

[33] These countries are: France (signed 4 May 1987 and entered into force 2 Aug 1988); Poland (5 Jun 1987 and 13 Feb 1988); Mongolia (31 Aug 1989 and 29 Oct 1990); Romania (16 Jan 1991 and 22 Jan 1993); Russian Federation (19 Jun 1992 and 14 Nov 1993); Belarus (11 Jan 1993 and 29 Nov 1993); Spain (2 May 1992 and 1 Jan 1994); Ukraine (31 Oct 1992 and 19 Jan 1994); Cuba (24 Nov 1992 and 26 Mar 1994); Italy (20 May 1991 and 1 Jan 1995); Egypt (29 Jul 1994 and 31 Mar 1995); Bulgaria (2 Jun 1993 and 30 Jun 1995); Kazhakstan (14 Jan 1993 and 11 Jul 1995); Belgium (signed 20 Nov 1987); Thailand (signed 16 Mar 1994); Turkey (28 Sep 1992 and 26 Oct 1995); Greece (signed 17 Oct 1994); Cyprus (25 Apr 1995 and 11 Jan 1996); Hungary (signed 9 Oct 1995).

[34] Most of the agreements cover civil and commercial matters. Only a few of them relate to civil, commercial as well as criminal matters.

while applying the law in specific cases. The Supreme People's Court has issued many interpretations and rulings concerning laws and treaties on various issues of international civil procedure. These interpretations and rulings are also a source of the Chinese law on international civil procedure.

A striking example of judicial interpretation by the Supreme People's Court are the "Opinions on Certain Matters Relating to the Implementation of the Civil Procedure Law", issued on 14 July 1992 and including 18 Parts and 320 Articles. Part 18 (Arts. 304-320) deals with questions concerning civil cases involving foreign elements. Most of the articles specify the contents of related articles of the CPL, with only a few of them touching on new issues not covered by the CPL.[35]

In connection with the establishment of maritime courts,[36] the Supreme People's Court in 1989 issued the "Stipulations of the Supreme People's Court Regarding the Acceptance of Cases by Maritime Courts". These Stipulations entered into force on 13 May 1989 and listed forty-two categories of maritime cases that were determined to fall under the jurisdiction of the maritime courts. They concerned maritime torts, maritime contracts, maritime commercial matters including general average, execution and preservation in regard to ships.

On 31 January 1986, the Supreme People's Court issued "Specific provisions on jurisdiction of maritime litigation involving foreign elements", which are regarded as the most comprehensive regulation specifically dealing with the jurisdiction of Chinese courts over cases involving foreign elements. These provisions consist of seventeen Articles and establish two or more connecting factors for each of the sixteen kinds of maritime legal actions in regard to which the maritime courts have jurisdiction. Article 17 further explicitly prescribes that the maritime courts may exercise jurisdiction over maritime lawsuits involving the following foreign elements:

(a) the defendant has his domicile, habitual residence, main business office, or permanent agency within Chinese territory;

(b) a Chinese maritime court has - for the purpose of preserving rights of a maritime nature - seized a foreign vessel at the request of the alleged holder of the right, or a party has provided a guarantee in China;

(c) the foreign defendant has property in China which could be seized;

(d) the parties have agreed to submit the dispute before a Chinese court.

Since the 1980s, the Supreme People's Court has also issued numerous replies, notices and letters, some of which are concerned with questions of

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[35] E.g., Art. 310 states that the People's Court may make a written judgment upon the parties' request after having reached a settlement by conciliation (i.e. settlement on the basis of mediation).

[36] In accordance with the "Decision concerning the establishment of maritime courts in China's coastal harbour cities" (adopted by the Sixth NPC on 14 November 1984) and the "Decision concerning the establishment of maritime courts" (issued by the Supreme People's Court on 28 Nov. 1984), China has set up nine maritime courts in the following harbour cities: Guangzhou, Shanghai, Wuhan, Qingdao, Tianjin, Dalian, Haikou, Xiamen and Ningbo.

international civil procedure.[37] Chinese scholars differ in their views regarding the nature of these replies, notices and letters. Some treat them as sources of law, others hold the opposite view. Finally, the Supreme People's Court has ruled on the implementation of certain conventions on international civil procedure to which the PRC is a party.[38]

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[37] The replies, notices and letters made or issued by the Supreme People's Court (SPC) comprise: (1) Circular of the SPC on the use of answer-back instruments for mutually entrusting the service of legal documents between China and Japan; (2) Official reply of the SPC according to which in case of a defendant resident abroad who was served a petition by public notice and who failed to enter an appearance, the judgment must be communicated by public notice; (3) Letter of the SPC on the question as to whether a request from a Chinese-American to file an appeal with Chinese courts can be granted; (4) Official reply of the SPC concerning litigation documents involving foreigners and the service of these documents after the case has been put on record; (5) Official reply of the SPC as to whether a reconciliation agreement can be formulated and issued to Japanese who had stayed in China as war orphans, later returned to their homeland, subsequently were sued for divorce by their spouses in China and whose case was settled through mediation by Chinese courts; (6) Letter of the SPC on the question whether, pursuant to Chinese law, the validity of a divorce between Chinese citizens who live abroad and who concluded a separation agreement in accordance with the laws of the country where they reside, can be recognized; (7) Official reply of the SPC as to whether staff members of a foreign embassy in China may act in their official capacity in briefing Chinese lawyers to act on behalf of their countrymen in civil lawsuits; (8) Official reply of the SPC as to whether foreign parties to a case before a Chinese court can be permitted to entrust foreigners residing in China or staff members of their country's embassy in China to act as their agents; (9) Official reply of the SPC on how to determine the statute of limitations for appeal in civil cases involving foreign interests in which one party lives in China and the other lives abroad; (10) Official reply of the SPC concerning the divorce case involving YIE LILI and LIANG WENRUI, a Chinese couple with Venezuelan citizenship; (11) Official reply of the SPC as to whether Chinese courts are entitled to take cognizance of cases involving a Chinese citizen who lives abroad and who has lodged appeals both with Chinese and foreign courts; (12) Official reply of the SPC on the handling of cases involving divorce decrees sent to Chinese people's courts directly by American courts and not through diplomatic channels; (13) Specific provisions of the SPC on the jurisdiction over maritime cases involving foreign interests; (14) Circular of the SPC, the Ministry of Foreign Affairs, and the Ministry of Justice on certain matters concerning Chinese and foreign courts entrusting each other with service of legal documents through diplomatic channels; (15) Regulations of the SPC on procedures for Chinese citizens in applying for recognition of divorce judgments rendered by foreign courts. The instruments issued by the SPC are published in *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao* [Gazette of the SPC of the PRC].

[38] When a treaty in which China participates as a party has come into force, the Chinese government or the SPC in most cases would issue a notice or some other instrument on the implementation of the treaty in China. With regard to international civil procedure, the following notices should be heeded: (1) Notice of the SPC on the implementation of Sino-foreign judicial assistance agreements; (2) Notice of the SPC, the Ministry of Foreign Affairs, and the Ministry of Justice on certain procedures in the implementation of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters; (3) Notice of the SPC on the implementation of the Convention on the Recognition of Foreign Arbitral Awards.

2. JURISDICTION

2.1. The notion of jurisdiction

Jurisdiction in international civil procedure refers to the scope of judicial power to which a country is entitled under international law. Jurisdiction over international civil cases is more complex than that over domestic civil cases. It involves two questions.[39] One concerns the distribution of jurisdictional competence over international civil cases among related countries. The other refers to the distribution of jurisdiction over international civil cases among the courts of different levels and among those of the same level at different places in the same state. The second question is fully dependent on the settlement of the first one.

Most Chinese scholars insist that a country enjoys the power to decide on the jurisdictional competence of its courts over civil cases involving foreign elements unless otherwise prescribed by multilateral conventions or bilateral treaties to which the country is a party.[40] In China, where a separate law of international civil procedure does not exist, the provisions on jurisdiction over domestic civil cases are as a rule also applied to civil cases involving foreign elements.[41] In addition, China is a party to three Conventions which contain some provisions on jurisdiction over certain special kinds of international civil cases.[42]

2.1.1. Jurisdiction of courts of a certain level

According to the CPL, the basic people's courts exercise jurisdiction in first instance over civil cases involving foreign elements unless they are assigned by the law to the jurisdiction of higher level courts. Thus Article 19(1) of the CPL states that the intermediate people's courts exercise jurisdiction in first instance over 'important cases' involving foreign elements. Further, civil cases involving foreign elements, which exert an 'important influence' in the territory falling under the competence of higher Chinese people's courts or throughout the country, fall under the jurisdiction of the higher people's court concerned or, in the latter case, under the jurisdiction of the Supreme People's Court in first instance.[43] In the 1992 'Opinions' of the Supreme People's Court the notion of 'important cases' refers to "foreign-related cases with a large-sum litigation object, or with complex case details, or with a great number of the parties residing abroad".

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[39] See CAI FABANG, *Zhongguo Minshi Susongfa* [Chinese civil procedure law] (Beijing, 1992) 589.
[40] Ibid., p. 590.
[41] LI HAOPEI, op.cit. n. 4 p. 48.
[42] These are: the Convention on the Unification of Certain Rules on International Air Transportation, the International Agreement on Transport of Goods by Train, and the Convention on Civil Liability for Oil Pollution.
[43] CPL, Arts. 20 and 21.

2.1.2. Territorial jurisdiction

Territorial jurisdiction or jurisdiction by region refers to the power of courts of the same level to entertain cases in first instance. Under the CPL, territorial jurisdiction can be further sub-divided into two categories: general territorial jurisdiction and special territorial jurisdiction.[44]

2.1.2.1. General territorial jurisdiction

In respect of general territorial jurisdiction, the maxim 'the plaintiff goes to the defendant' is regarded to be the basic principle. Article 22 of the CPL adheres to that principle and states:

> "A civil lawsuit brought against a citizen shall be under the jurisdiction of the people's court of the place where the defendant has his domicile; if the place of the defendant's domicile is different from that of his habitual residence, the lawsuit shall be under the jurisdiction of the people's court of the place of his habitual residence.
>
> A civil lawsuit brought against a legal person or any other organization shall be under the jurisdiction of the people's court of the place where the defendant has his domicile."

Consequently, the people's courts may exercise jurisdiction in civil cases involving foreign elements if the defendants' domicile or habitual residence is within Chinese territory.

Article 23 lays down 4 exceptions to the above principle. These exceptional cases fall under the jurisdiction of the people's court of the place of the plaintiff's domicile or habitual residence. One of these four exceptions is specifically related to international civil jurisdiction, i.e. lawsuits concerning personal status brought against persons not residing within the territory of the PRC.[45]

2.1.2.2. Special Territorial Jurisdiction

Special territorial jurisdiction is based on the object of the claim or the legal facts involved. According to Articles 23-33 of the CPL, the people's court can exercise jurisdiction over civil cases involving foreign elements if the defendant's domicile or habitual residence is not in Chinese territory whenever one of the following connecting factors refers to a place under the territorial jurisdiction of the court: (a) the place where the contract is to be performed;[46] (b)

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[44] See CAI FABANG, *Minshi Susong Faxue* [Science of civil procedure law] (Beijing, 1991) 90.

[45] The other three exceptions are: lawsuits concerning the personal status of persons whose whereabouts are unknown or who have been declared as missing; lawsuits brought against persons who are undergoing rehabilitation through labour; and lawsuits brought against imprisoned persons.

[46] CPL, Art. 24.

the place where the insured object is located;[47] (c) the place where the bill (of exchange) is to be paid;[48] (d) the place of dispatch or destination (in disputes over transport contracts);[49] (e) the place where the tort is committed;[50] (f) the place where the accident has occurred or where the ship at fault is detained;[51] (g) the place where the salvage took place or where the salvaged ship first docked after the ship accident (in disputes concerning expenses of maritime salvage);[52] (h) the place where the salvaged ship first docked or where the adjustment of general average was conducted or where the voyage ended.[53]

Moreover, Article 243 of the CPL, also dealing with the jurisdiction of the court of the place of the performance of the contract, provides another six connecting factors by which the people's court can exercise jurisdiction over contractual or other disputes over property rights and interests in case of the defendant's domicile being outside China. These connecting factors are the place in China where the contract is signed or is to be performed, where the object of the action is located, where the defendant's distrainable property is located, where the tort is committed, and where the defendant's representative office is located.[54]

2.1.3. Exclusive Jurisdiction

In international civil procedure, exclusive jurisdiction refers to the fact that under the law of a state certain civil cases involving foreign elements are exclusively assigned to the jurisdiction of the courts of that country. Exclusive jurisdiction does not accept parallel jurisdiction, and cannot be avoided by agreement between the parties.[55] Article 246 of the CPL specifically stipulates that the following three types of Sino-foreign contracts fall under the exclusive jurisdiction of the people's courts of the PRC: contracts on Sino-foreign contractual joint ventures, on Sino-foreign equity joint ventures and on Sino-foreign cooperative exploration and development of natural resources in the PRC which are performed in China. Article 34 of the CPL confers exclusive jurisdiction on people's courts at a certain place in case of certain types of actions in domestic civil procedure. It is suggested here that this provision may be equally applied in cases involving foreign elements.[56] The actions and the respective courts are then as follows:

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[47] Ibid., Art. 26.
[48] Ibid., Art. 27.
[49] Ibid., Art. 28.
[50] Ibid., Art. 29.
[51] Ibid., Arts. 30-31.
[52] Ibid., Art. 32.
[53] Ibid., Art. 33.
[54] Ibid., Art. 243.
[55] See CAI FABANG, op.cit. n. 44 p. 101.
[56] See JIN PENGNIAN, op.cit. n. 4 p. 77.

(a) An action arising from a dispute over real estate falls under the jurisdiction of the people's court at the place where the real estate is located;[57]
(b) An action lodged in connection with a dispute over the operations of a harbour falls exclusively under the jurisdiction of the people's court at the place of the harbour;[58]
(c) An action relating to a dispute concerning succession falls exclusively under the jurisdiction of the people's court at the place where the deceased had his domicile at the time of his death, or the place where the principal part of the estate is located.[59]

2.2. The Exercise of Jurisdiction

As mentioned above, the principle of 'the plaintiff goes to the defendant' also applies to jurisdiction in international civil cases. So if the defendant (a natural person or a legal person) has his domicile in China, the people's court has jurisdiction, with some exceptions. According to the General Provisions of Civil Law,[60] the domicile of a natural person is the place where his residence is registered. If his habitual residence does not coincide with his domicile, his habitual residence is regarded as his domicile.[61] The domicile of a legal person is the place where its main administrative office is located.[62]

If the defendant's domicile is not within the territory of the PRC, the CPL stipulates other connecting factors by which a people's court can exercise jurisdiction. Such a connecting factor, for example, is the fact that the place where the contract is performed, or where the tort is committed, or where the accident occurred, is in China.[63]

There are some special circumstances in which the people's court can exercise jurisdiction even if no effective connecting factors exist in China. Art. 126 of the CPL provides: "Additional claims by the plaintiff, counterclaims by the defendant and third-party claims related to the [original] case can be tried in combination". According to this article, the people's court is entitled to entertain these claims even if the general requirements for jurisdiction over each of the claims are not fulfilled. Some Chinese scholars, however, suggest that this article allows for some exceptions. For example, when the additional claims

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[57] CPL, Art. 34(1).
[58] Ibid., Art. 34(2).
[59] Ibid., Art. 34(3).
[60] The General Provisions of Civil Law (GPCL), which were adopted at the fourth session of the 6th NPC on 12 April 1986 and became effective as of 1 January 1987, consist of 156 Articles in 9 Chapters. Chapter 8 (Arts. 142-150) deals with the law applicable to civil relationships involving foreign elements.
[61] GPCL, Art. 15.
[62] Ibid., Art. 39.
[63] CPL, Arts. 24-34.

concern real estate located abroad, it is obvious that the people's court may not try them in combination with the original one.[64]

The principle of *perpetuatio fori* is adhered to by both Chinese scholars and judicial practice.[65] Although the CPL doesn't contain provisions to this extent, the Supreme People's Court has pointed out in its 1992 'Opinions' that once a people's court has started to entertain a case, its jurisdictional competency cannot be influenced by a change of a party's domicile or habitual residence.[66]

Finally, Article 245 of the CPL is particularly designed to confer jurisdiction over international civil cases to the people's court in case of non-fulfilment of the general requirements for such jurisdiction.[67] It stipulates that a people's court may hear a suit over which it originally has no jurisdiction if the defendant raises no objection to its jurisdiction and responds to the action by making his defence. If these requirements are fulfilled, the defendant shall be deemed to have accepted the people's court's jurisdiction and is no longer able to raise objections.[68]

2.3. Forum selection

According to the CPL, the parties are entitled to opt for a court of their own choice.[69] They may agree to submit their dispute to either a Chinese people's court or a foreign court. This freedom of choice is, however, limited by the

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[64] LIU WEIXIANG, YU SULIN, ZENG ZIWEN and HUANG GUOHUA, *Zhongguo Guoji Sifa Lifa Lilun Yu Shijian* [Theory and Practice of the Legislation of Chinese Private International Law] (Wuhan, 1995) 225.

[65] LI SHUANGYUAN and XIE SHISONG, op.cit. n. 4 p. 191.

[66] See Art. 34 of the Opinions.

[67] Some scholars consider this article as a form of forum selection. In their opinion, forum selection consists of two types, i.e. in express form and in implied form, and Article 245 belongs to the latter type. See JIN PENGNIAN, op.cit. n. 4 p. 77.

[68] CAI FABANG, op.cit. n. 39 p. 598.

[69] The CPL contains two articles which regulate the question of forum selection. Art. 25 reads: "The parties to a contract may agree in their written contract on the choice of the people's court of the place where the defendant has his domicile, where the contract is performed, where the contract is signed, where the plaintiff has his domicile or where the object of the action is located, to exercise jurisdiction over the case, provided that the provisions of this Law regarding jurisdiction by forum level and exclusive jurisdiction are not violated". Art. 244 reads: "Parties to a dispute over a contract with a foreign element or over property rights and interests involving foreign elements may, through written agreement, choose the court of the place which has practical connections with the dispute to exercise jurisdiction. If a people's court of the PRC is so chosen to exercise jurisdiction, the provisions of this Law on jurisdiction by forum level and on exclusive jurisdiction shall not be violated".

These two articles have both similarities and differences. Art. 25 is limits to a situation of contract, while Art. 244 covers disputes arising from contract as well as from property rights and interests. Chinese scholars differ as to the relationship between these two Articles. Some hold that Art. 25 applies only to domestic civil cases while Art. 244 applies to civil cases involving foreign elements. Others insist that Art. 25 can also be applied to foreign-related cases.

following requirements:[70] (a) only parties to a dispute over a contract with a foreign element or over property rights and interests involving a foreign element have the right to choose; (b) the parties' choice should be made in written form; (c) the court chosen by the parties must have practical connections with the dispute; (d) if the choice is made in favour of a people's court of the PRC, the provisions of the CPL on forum level and on exclusive jurisdiction shall in any case be applicable. The CPL sets a further limit to the parties' freedom to choose a forum by conferring exclusive jurisdiction on the people's courts of the PRC over actions concerning the performance of contracts on Sino-foreign equity joint ventures, Sino-foreign contractual joint ventures, and Sino-foreign cooperative exploration and development of the natural resources in the PRC.[71]

As to other issues relating to forum selection, such as the law applicable to the determination of the validity of the selection and the question whether and to what extent the parties may derogate from the selection made, we can hardly find answers in present Chinese law. Many Chinese scholars favour the application of the *lex fori* for the determination of the validity of the selection.

2.4. *Lis pendens*

Lis pendens has not received adequate attention among Chinese scholars, nor in Chinese legislation.[72] The CPL devotes only one Article to the question of *lis pendens* which applies exclusively to domestic cases.[73] According to this Article, parallel proceedings are not allowed. With regard to international civil and commercial cases, however, the attitude of the people's courts towards parallel proceedings is quite different. This conclusion can be drawn from Articles 15 and 306 of the 1992 'Opinions' of the Supreme People's Court which read, respectively:

> "In a divorce case where one party files a lawsuit in a foreign court and the other party resorts to a Chinese court, the Chinese people's court will entertain the case."

and:

> "The people's court may exercise jurisdiction over a case which falls under the jurisdiction of both the people's court of the PRC and a foreign court if one

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[70] See CAI FABANG, op.cit. n. 44 p. 101.

[71] CPL, Art. 246.

[72] There is only one article published in China on this issue: ZHANG MAO, 'Guoji Minshi Susong Zhongde Susong Jinhe' [Parallel proceedings in international civil litigation], *Faxue Yanjiu* [Journal of Law] no. 18 (Chinese Academy of Social Sciences, 1996).

[73] Art. 35 of the CPL: "When two or more people's courts have jurisdiction over a lawsuit, the plaintiff may bring his lawsuit in one of these; if the plaintiff brings the lawsuit in two or more people's courts that have jurisdiction over the lawsuit, the people's court in which the case was first entertained shall exercise jurisdiction". This article is silent on the situation arising if one party brings the lawsuit in one competent people's court, while the other party brings the lawsuit in another competent court, and on how then to determine the court that shall exercise jurisdiction.

party has submitted the case to a foreign court. When the foreign court has rendered a judgment in the case and an application is filed to a people's court for recognition and enforcement, the people's court shall reject the application unless otherwise stipulated by the treaties to which China and the country concerned are parties."

It is obvious that these regulations are very vague and do not tally with the practice adopted by many other countries.[74]

Some bilateral treaties concluded by China on judicial assistance contain provisions on *lis pendens*, but they are inconsistent.[75] Most of the bilateral treaties provide that the requested country will not recognize or enforce a judgment rendered by the court of a requesting country if the same case is being handled by the court of the requested country, regardless of which court entertained the case first. Some other bilateral treaties stipulate that the requested country may not refuse to recognize and execute a foreign judgment unless its court has taken cognizance of an identical case before the foreign court had done so.[76]

2.5. Immunities

The *Huguang Railway Bonds* case[77] brought about a comprehensive discussion on the question of immunities in China in the 1980s.[78] Almost all Chinese

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[74] See ZHANG MAO, loc.cit. n. 72.

[75] See LI SHUANGYUAN, JIN PENGNIAN, ZHANG MAO and LI ZHIYONG, *Zhongguo Guoji Sifa Tonglun* [A general introduction to Chinese private international law] (Beijing, 1996) 580.

[76] See Art. 18(4) of the agreement with Mongolia, and Art. 21(5) of the agreement with Italy, in FEI ZONGYI and TANG CHENYUAN, *Zhongguo Sifa Xiezhu de Lilun Yu Shijian* [Theory and Practice of Judicial Assistance in China] (Beijing, 1992) 267 and 303.

[77] In November 1979 some Americans initiated lawsuits in the US against the Chinese government claiming the repayment of bonds issued on the occasion of the building of the Huguang Railway by the Qing imperial government in 1911. On 9 March 1987 the US Supreme Court rejected the claims.

[78] Almost all Chinese general treatises on private international law contain a chapter on the matter of immunities. In addition, there are some articles and two monographs especially devoted to the issue. The articles include: SUN LIN and SUN HONGHONG, 'Guoji Zuzhi de Tequan yu Huomian' [Privileges and immunities of international organizations], *Chinese Yearbook of International Law* (1982); CHEN TIQIANG, 'Guojia Zhuquan Huomian yu Guojifa-Ping Huguang Tielu Zhaijuanan' [Immunity of sovereignty of state and international law: on the Huguang Railway Bonds Case], ibid.; LI ZHERUI, 'Guojia Huomian Wenti de Huigu yu Qianzhan' [State immunity: its history and future], *Chinese Yearbook of International Law* (1986); LI HAOPEI, 'Lun Guojia Guangxia Huomian' [On jurisdictional immunity of a state], ibid.; HUANG JIN, 'Lun Xianzhi Guojia Huomian Lilun' [On the theories of restrictive immunity of states], ibid.; Jiang Zhaodong, 'Waiguo Guojia Huomian Guize yu Youguan Guoji Shangshi Zhongcai de Susong' [Rules of foreign state immunity and relevant questions of immunity and international commercial arbitration], *Chinese Yearbook of International Law* (1987); LI SHUANGYUAN, 'Meiguo 1976 nian Waiguo Zhuquan Huomian Fa suo Fengxing de Xianzhi Huomian Lun Pipan' [Critique on the theory of restrictive immunity adopted in the American Act on Sovereign Immunity of Foreign States of 1976] *Faxue Pinglun* [Law Review] (Wuhan, no. 1, 1983). The two monographs are HUANG JIN, *Guojia Jiqi Caichan*

scholars support the principle of 'absolute sovereign immunity' and criticize the practice of 'restrictive immunity' adopted by some developed countries.[79] They maintain that immunities can be divided into two categories, state immunity and diplomatic immunity,[80] and that the following three aspects may be distinguished: immunity from judicial jurisdiction, immunity from litigation procedures (such as giving evidence) and immunity from compulsory execution.

The provisions on the immunities of states and their property are scattered among the following laws: the CPL,[81] the PRC Regulations on Diplomatic Privileges and Immunities, and the PRC Regulations on Consular Privilege and Immunities. In addition, China is a party to some treaties containing special provisions on immunities.[82]

The Chinese principles on immunities, which have been developed through Chinese legal and diplomatic practice and elaborated by Chinese scholars, can be summarized in the following points:

A. China views the immunity of states, and their property, from the jurisdiction of courts of other countries as a natural right of sovereign states, and also as a principle of international law. The PRC favours the doctrine of absolute sovereign immunity and opposes the doctrine of restrictive immunities or the abolition altogether of immunities.

B. A distinction must be made between the state's own activities and property and the activities and property of state corporations and enterprises. While China adheres to absolute sovereign immunity, it does not seek immunity for the activities and property of its state corporations. "China holds that state corporations and enterprises are separate economic entities with their own independent legal status, so they should not enjoy sovereign immunity."[83]

C. Immunity of diplomatic agents from the civil and administrative jurisdiction of Chinese people's courts, with some exceptions, is laid down as a principle in Chinese law.

D. The principle of reciprocity is to be applied by Chinese courts *vis-à-vis* those countries which restrict the immunity of China and its state property in contravention of international law.

Huomian Wenti Yanjiu [A Study of the Immunity of States and their Property] (Beijing, 1987); GONG RENREN, *Guoji Huomian Wenti Bijiao Yanjiu* [A Comparative Study of the Question of International Immunities] (Beijing, 1994).

[79] A few Chinese scholars neither approve the doctrine of absolute immunity, nor support the doctrine of restrictive immunity. In their view, the enjoyment of judicial immunity in international civil litigation by states and their property is a basic principle of international law. *See* LI SHUANGYUAN and XIE SHISONG, *Guoji Minshi Susongfa Gailun* [An Introduction to the Law on International Civil Procedure] 280.

[80] See LI SHUANGYUAN (ed.), *Guoji Sifa* [Private International Law] (Beijing, 1991) 458.

[81] CPL, Art. 239.

[82] Such as the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on the Privileges and Immunities of the United Nations.

[83] See LI SHUANGYUAN and XIE SHISONG, op.cit. n. 4 p. 279.

E. Jurisdictional immunity enjoyed by sovereign states, diplomatic agents, and international organizations, can be waived by the states and the international organizations concerned.[84]

3. SERVICE OF PROCESS

3.1. Means

The service of documents abroad refers to the service of judicial and extra-judicial documents to parties or other litigants residing abroad, according to international treaties, national law or the principle of mutual benefit.[85] It may refer to service of Chinese documents outside China as well as service of documents from abroad on parties in China.

3.1.1. In case of absence of treaties

According to Article 247 of the CPL, a people's court may serve litigation documents on a party who doesn't have domicile in China by one of the following means if there are no treaty provisions applying to China and the country where the party to be served resides:

A. Diplomatic Channels

Diplomatic channels are the most important means recognized and adopted by China and other countries to serve documents abroad.[86] On 14 August 1986, the Supreme People's Court, the Ministry of Foreign Affairs and the Ministry of Justice jointly issued a Notice on Certain Matters Relating to the Service of Legal Documents through Diplomatic Channels between the People's Courts and Foreign Courts. This Notice bases the service by diplomatic channels on the principle of mutual benefit and lays down the procedure which the people's courts and foreign courts should observe in serving civil and economic judicial documents.

B. By entrustment

Service outside China may be entrusted to the embassy or consulate of the PRC accredited to the country where the person resides if the person is of Chinese nationality.[87] Similarly, foreign embassies and consulates in China may serve legal documents directly on their nationals in China provided that such

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[84] See Art. 15, PRC Regulations on Diplomatic Privileges and Immunities.
[85] JING PENGNIAN, op.cit. n. 4 p. 109.
[86] CPL, Art. 247(2).
[87] CPL, Art. 247(3).

documents are not detrimental to the sovereignty or security of China and no coercive measures are applied.[88]

C. Service may be executed on the agent *ad litem* who is authorized to receive the documents served.[89]

D. The documents may be served on the representative who has been entrusted by the litigant to receive service of documents.[90]

E. Documents may be served by mail where the law of the country in which the litigant to be served has his abode, permits such service. If the documents are mailed and no certificate of delivery has been received within six months, service will nonetheless be regarded as having been made if it can otherwise be confirmed – taking account of all the circumstances – that the service has been carried out.

F. When a document cannot be served through the above-mentioned means, it must be served by public notice. It is deemed to be served after six months from the date of such notice.

The CPL strictly prohibits the service of legal documents within the jurisdiction of the PRC by foreign organizations or persons, unless expressly approved by the appropriate Chinese authorities.[91] Hence, in the absence of relevant treaty provisions, diplomatic channels remain the chief method for the service of documents abroad.

3.1.2. Under bilateral treaties

As mentioned earlier,[92] China has concluded bilateral treaties with 19 countries on civil and commercial judicial assistance, in which the service abroad of judicial and extrajudicial documents is regulated. On 1 February 1988, the Supreme People's Court issued a Notice on the implementation of Sino-foreign judicial assistance agreements designating the Ministry of Justice as the central authority to accept and send out the application papers and the judicial documents to be served. When the Ministry receives judicial documents to be served in China from the other party to the treaty, it shall transmit them to the Supreme People's Court for conveyance to a higher people's court for further disposal of the matter. The latter assigns the execution of the service

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[88] Art. 2 of the above-mentioned Joint Circular from the Supreme People's Court, the Ministry of Foreign Affairs and the Ministry of Justice of 1986.
[89] CPL, Art. 247(4).
[90] CPL, Art. 24(5).
[91] CPL, Art. 263(3).
[92] *Supra* n. 33.

to an intermediate people's court or a special court in accordance with the regulations laid down in the bilateral agreement.

3.1.3. Under the 1965 Hague Service Convention

As the first and only Convention of the Hague Conference on Private International Law that has been ratified by the PRC, the 1965 Hague Service Convention is given much emphasis by Chinese authorities and scholars because its provisions basically tally with the spirit of relevant Chinese laws and judicial practice. In ratifying the Convention, China made a reservation to Article 8(1) and to Article 10.[93] According to this reservation, service by diplomatic or consular agents can only take place within PRC territory when the documents are served upon a national of the state where the documents have originated. Furthermore, under Article 10 of the Convention, the PRC has opted for objecting to, and thus not allowing, the three liberal means of service offered in that Article.

In order to better implement the Convention in China, the Supreme People's Court, the Ministry of Foreign Affairs, and the Ministry of Justice jointly issued two circulars (*supra* p.143). The Circulars designated the Ministry of Justice as the central authority in China to receive documents served by consular channels, and specified the concrete procedures on the service of documents from China to foreign countries and from foreign countries to China.

3.2. Procedures

Procedures for service abroad are largely determined by the means of service. In some circumstances, the procedures are very simple, such as service by mail, service by public notice, service made on the agent *ad litem* or the

[93] In ratifying the Convention, the Standing Committee made the following declarations:
(1) In accordance with the provisions of Article 2 and Article 9 of the Convention, the Ministry of Justice of the People's Republic of China is designated as the Central Authority that is also entitled to receive the documents forwarded through consular channels.
(2) It is declared, in accordance with paragraph 2 of Article 8 of the Convention, that the method of service regulated in the first paragraph of this Article can only be used within the territory of the People's Republic of China when a document is to be served upon a national of the state from which the documents originate.
(3) It is not permitted to use the methods of service provided for by Article 10 of the Convention for service within the territory of the People's Republic of China.
(4) It is declared, in accordance with paragraph 2 of Article 15 of the Convention, that a judge, notwithstanding the provisions of the first paragraph of this Article, may render judgment even if no certificate of service or delivery is received if all the conditions provided for by paragraph 2 of this Article are fulfilled.
(5) It is declared, in accordance with paragraph 3 of Article 16 of the Convention, that a defendant may apply for relief from losing the right to appeal for not having taken recourse to it within a year from the date of the judgment.

representative office, etc. At present, documents are served mainly through diplomatic channels in China, and our discussion here consequently focuses on the procedures for service through diplomatic channels. The procedures specified in the 1965 Hague Service Convention and the bilateral agreements will be referred to briefly.

According to the 1986 Notice on the service of legal documents through diplomatic channels, the following procedures shall be followed in case of service of legal documents upon a natural person or a legal person with the nationality of the PRC or of a third country on behalf of a foreign court:

(a) The documents must be delivered to the Consular Section of the Ministry of Foreign Affairs of the PRC by the embassy or consulate of the country in question. The Consular Section transmits the documents to the relevant higher people's court, which designates the relevant intermediate people's court to serve the documents upon the party concerned. Depending on whether or not the party served has signed a certificate acknowledging receipt of service, the intermediate people's court returns this certificate or the attestation of service to the authorizing party through the Consular Section of the Ministry of Foreign Affairs.

(b) A letter of authorization must be issued for the service. All such letters and accompanying legal documents must be served together with Chinese translations attached thereto.

(c) Legal documents containing detrimental statements relating to the sovereignty or security of China will be rejected; when the person towards whom the service must be performed enjoys diplomatic privileges or immunities, the document is as a rule not accepted for service. When service does not take place for being outside the jurisdiction of the Chinese courts, or because it is unclear for whom the document is intended, or for any other reason, the relevant higher people's court must state how the matter should be handled further and clearly state the reasons for the non-execution of the service. The Consular Section of the Ministry of Foreign Affairs will be responsible for returning the document to the authorizing party with an appended explanation.

The 1986 Notice also stipulates the procedures and requirements which the people's court must observe in case of the reverse service of legal documents upon a party outside the territory of China through diplomatic channels:

(a) The legal documents to be delivered abroad shall first be approved by the higher people's court of the province, autonomous region or municipality (from where the request originated) and then transmitted (to the requested country) by the Consular Section of the Ministry of Foreign Affairs.

(b) The correct name, sex, age, nationality and address abroad of the intended recipient shall be provided, together with the document to be delivered. The material facts of the case shall be disclosed to the Consular Section of the Ministry of Foreign Affairs.

(c) A letter of authorization must be attached to the documents. If the name of the foreign court is not known, the request shall be addressed to the higher court of the jurisdiction in which the foreign party resides. A translation of the

authorization letter and the documents into the language of the requested country or, with the consent of that country, into another language, shall also be attached. If the requested country requires the legal documents to be legalized or authenticated, the Consular Section of the Ministry of Foreign Affairs shall so notify the requesting people's court.[94]

The methods of service of documents as regulated in China's judicial assistance agreements and the 1965 Hague Convention are to a high degree similar. The authorization letter requesting the service of judicial and extrajudicial documents must be submitted by the requesting state's central authority, or consulate in the case of the Hague Service Convention,[95] to that of the requested country. The form of the authorization letter and the language to be used are stipulated in the appendices of the treaties. Typically, the authorization letter must be written in the official language of the requesting party and accompanied by a translation in the counterpart's language.[96]

Since the treaties do not prescribe detailed procedures for the effectuation of the service, the central authority of the requested party chooses the appropriate methods according to its domestic law.[97] If, however, the address of the person on whom a document is to be served is unclear or incomplete, the requested central authority may ask for further information. If the address remains unclear and the document cannot be served, the central authority should notify its counterpart and return all documents.

A receipt is required for every document served and must bear the addressee's signature and the date of receipt. Moreover, the central authority must record the method of service, the place and the date on the receipt. A request for judicial assistance, including the service of documents, may be refused if the request is contrary to the sovereignty, national security, or *ordre public* of the requested state. The requested state is, however, obliged to provide the requesting country with an explanation for the refusal.

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[94] According to Art. 7 of the Notice on the implementation of the 1965 Hague Convention, a bilateral agreement concluded with another state party of the 1965 Hague Convention shall have priority in case of inconsistency with the Convention.

[95] Hague Service Convention, Art. 9.

[96] For example, Art. 6 of the Sino-French Treaty stipulates that all judicial and extrajudicial documents shall include a copy and a translation in the counterpart's language. Arts. 8 and 8(1) of the Sino-Polish and Sino-Mongolian treaties, respectively, stipulate that judicial assistance applications should include either a translation in the language of the requested country or in English.

[97] See French-Sino Treaty, Art. 7; Sino-Mongolian Treaty, Art. 10.

4. TAKING OF EVIDENCE ABROAD

4.1. Means

The system of evidence-taking in China is quite different from that in common law countries as well as that in civil law countries.[98] This gives rise to serious conflicts of laws between China and other countries. As to the taking of evidence abroad, regulation in China is quite undeveloped and remains, for the time being, dependent on domestic laws. Similar to service of process abroad discussed above, the means that may be used for the taking of evidence abroad, as stipulated by Article 262 of the CPL, may be conveniently sub-divided into two categories: direct and indirect means. The provision reads:

> "In accordance with the international treaties concluded or acceded to by the PRC, or the principle of reciprocity, a people's court and its foreign counterpart may request each other to assist in the service of legal documents, in carrying out investigation, in collecting evidence, or in other actions regarding litigation."

A people's court shall not handle a request from a foreign court, if the case in question undermines the PRC'S sovereignty, security or social and public interests.

4.1.1. In case of absence of treaties

Under Article 263 of the CPL, when no regulation by treaty exists, the taking of evidence abroad is permitted through diplomatic channels on the basis of the principle of reciprocity. The above-mentioned Notice of 1986 jointly issued by the Supreme People's Court and the Ministries of Foreign Affairs and Justice prescribes in its Article 8 that "[i]n rendering mutual assistance in the taking of evidence between our courts and foreign courts, the above procedures [on judicial assistance through diplomatic channels] may be applied by analogy". Thus the Notice also covers the taking of evidence abroad. According to the law and the joint Notice, except for a foreign embassy or consulate, no foreign organization or individual may, without the consent of the competent authorities of the PRC, serve documents or make investigations and collect evidence within the territory of the PRC. Moreover, the CPL places the following limits on the taking of evidence by consuls: (a) the person to be investigated must have the nationality of the home state of the embassy or consulate; (b) the laws of the PRC must not be violated; (c) no compulsory measures may be taken.[99]

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[98] See JING PENGNIAN, op.cit. n. 4 pp. 126-128.
[99] CPL, Art. 263(2).

4.1.2. Under bilateral agreements

Although China has not participated in multilateral conventions on the taking of evidence abroad, almost all the Chinese bilateral agreements on judicial assistance include some articles on this issue.[100] Besides, as the circumstances of service of documents abroad resemble those of the taking of evidence abroad in many respects, quite a few provisions relating to the former may be applied to the latter and vice versa.

In most of the agreements, the taking of evidence abroad includes more or less the following items:[101]

(a) The scope of evidence-taking, comprising the examination of the parties, the witnesses, and the identifier, carrying out inspection and judicial certification, and collecting other evidence;

(b) The form of the letter of request, which is often appended to the agreement;

(c) The law applicable to the taking of evidence abroad. The majority of the agreements adhere to the *lex fori* as the applicable law;

(d) The regulation of the protection of witnesses and identifiers;

(e) The supply of documents on civil commercial substantive law, law of procedure and judicial practice.

Apart from bilateral assistance agreements, China has concluded or acceded to some consular treaties which contain a few provisions on the taking of evidence abroad, but these provisions are usually limited and vague.

On 18 March 1970, the Hague Conference on Private International Law adopted a comprehensive Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Although China is not a party to the Convention, it is obvious that many provisions of the Convention are basically consistent with the stipulations in China's judicial assistance agreements, and the Convention is sure to have exerted much influence on China's practice in the domain of evidence-taking abroad.[102]

4.2. Procedures

As the taking of evidence abroad is, for the time being, mainly carried out by means of a letter of request in China,[103] we shall limit ourselves here to the procedures followed in employing this means. First, a letter of request shall be sent to the central authority of the state of execution in light of the procedures and requirements stipulated by the domestic law of that state or by international

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[100] Some bilateral agreements separate the provisions on service from the provisions on evidence taking. Others combine and mix these provisions.

[101] See LI HAOPEI, op.cit. n. 4 pp. 195-197.

[102] See JING PENGNIAN, op.cit. n. 4 p. 129.

[103] Ibid.

treaties.[104] The letter of request must be in specified form and must have the required contents.[105] Furthermore, it must be made in the language of the state of execution or be accompanied by a translated version.[106]

After receiving the letter of request, the requested authority shall, according to its domestic law, collect the evidence. Where the letter of request requires special methods or procedures, the requested authority shall follow them unless they are in conflict with his domestic law.[107] In China, after receiving the letter of request, the Ministry of Justice shall transmit it to the Supreme People's Court which then sends it to an appointed intermediate people's court through a higher people's court. Generally speaking, it is the intermediate people's courts or special courts that undertake the responsibility for collecting evidence.

After having collected the evidence, the requested authority shall inform the requesting authority and transmit the evidence materials to it. If the requested authority has been unable to collect the evidence for various reasons, it must inform the requesting authority accordingly. Under Chinese law, the people's court shall not collect the evidence requested by a foreign authority if it impairs the sovereignty, security, or social and public interest of the PRC.[108]

5. RECOGNITION AND EXECUTION OF FOREIGN JUDGMENTS[109]

5.1. Essence and place

Scholarly doctrine and the current legislation in China differ with regard to the relation between recognition and execution of foreign judgments and judicial assistance. Recognition and execution of foreign judgments is defined by many Chinese scholars as a subject separate from judicial assistance.[110] But the Chinese bilateral agreements on civil and commercial judicial assistance cover also the recognition and enforcement of foreign judgments and arbitral awards. For the sake of convenience the present paper follows the scholars' view and deals with the subject of recognition and execution of foreign judgments separately from judicial assistance.[111]

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[104] Under Art. 2 of the 1970 Hague Convention, the Central Authority to receive letters of request coming from abroad and to transmit them to the authority competent to execute them is designated by the state itself. In China, the Ministry of Justice is designated as the Central Authority.

[105] Art. 3 of the 1970 Hague Convention lists 9 items altogether. See JING PENGNIAN, op.cit. n. 4 p. 129.

[106] CPL, Art. 264(2).

[107] Ibid., Art. 265.

[108] Ibid., Art. 262(2).

[109] "Foreign judgment" should be understood in a broad sense, comprising judgments rendered by foreign courts as well as written orders, mediation statements, etc.

[110] See LI SHUANGYUAN, *Guoji Sifa* [Private International Law] (Beijing, 1991) 469.

[111] In the broad sense of the term, judicial assistance should include the recognition and execution of foreign judgments and arbitral awards.

Generally speaking, to recognize foreign judgments is to endow the foreign judgment with the same legal effect as that of a domestic judgment. To enforce foreign judgments is to force the parties to fulfil their obligations provided by the foreign judgment. The recognition of a foreign judgment is a prerequisite for the enforcement of that judgment.[112] Of course, the recognition of foreign judgments doesn't necessarily lead to their enforcement, if only because some foreign judgments, such as those on the capacity of a person and divorce, only require recognition and do not need to be executed.

In certain countries, foreign judgments need no explicit recognition and are automatically effective, but under Chinese law and the treaties concluded by China, we cannot find an answer to this question. In 1991, the Supreme People's Court issued a circular concerning the procedures to be followed by Chinese citizens in applying for the recognition of foreign divorce judgments. Article 20 of this circular points out that, as long as a party has not applied to the people's court for the recognition of a foreign judgment in a matrimonial dispute, the other party retains the right to bring a new divorce action before a people's court. Based on this Article, many Chinese authors have come to the conclusion that the legal effect of foreign judgments in China is not automatic and that such judgments must be recognized by a Chinese people's court in order to have legal effect in the Chinese legal order.[113]

5.2. The legal basis of recognition and execution of foreign judgments

International conventions and mutual benefit are the two legal bases for the recognition and execution of foreign judgments.[114] Article 267 of the CPL stipulates that a foreign court may, in accordance with the provisions of treaties to which the foreign country involved and China are bound, or on the basis of the principle of reciprocity, request for recognition and enforcement of its judgment by a people's court. Article 268 further prescribes that, in examining the application, the people's court follow the treaties concerned and the principle of reciprocity.

As to the principle of mutual benefit, we can hardly find any specific definition of this concept in Chinese law or legal practice. It has met with strong opposition and criticism for its vagueness. Some Chinese scholars even assert that recognition and execution of foreign judgments based on mutual benefit is neither reasonable nor practicable.[115]

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[112] LI SHUANGYUAN, op.cit. n. 110, p. 486.

[113] See JING PENGNIAN, op.cit. n. 4, p. 138.

[114] See FEI ZONGYI and TANG CHENYUAN, op.cit. n. 76 p. 118.

[115] LI HAOPEI, one of the most senior Chinese legal scholars, pointed out that the principle of benefit is in fact a principle of reprisal. See LI HAOPEI, op.cit. n. 4 pp. 140-141.

5.3. Requirements

Article 268 of the CPL lays down two main requirements which foreign judgments must fulfil in order to qualify for recognition and enforcement: they must be final and they may not contradict the basic principles of the law of the PRC nor violate the sovereignty, security and social and public interest of China. Besides these requirements, Chinese authors have listed some others, including the following:[116] (a) the foreign court which rendered the judgment had jurisdiction over the case; (b) the litigation in the foreign court was fair; (c) the foreign judgment was not in conflict with a domestic judgment between the same parties on the same dispute, nor inconsistent with a judgment rendered by a third country and recognized by a Chinese court, between the same parties on the same dispute; (d) the recognition and enforcement was allowed under treaties in force between China and the requesting State, or there existed a 'mutually beneficial relationship' between the two countries; (e) the judgment has applied the proper *lex causae*.

5.4. Procedure

According to Article 266(1) of the CPL, a litigant may directly apply to a competent foreign court for recognition and enforcement of a legally binding judgment rendered by a Chinese court. A people's court itself may also request a foreign court to recognize and enforce one of its judgments. Such a request may be made at the instigation of the victorious litigant, either under the provisions of an international treaty or on the basis of the principle of reciprocity, whenever the convicted party or his property is not within Chinese territory.

Reversely, the CPL also provides that a foreign litigant may directly apply to a Chinese people's court for the recognition and enforcement of a foreign judgment.[117] Similarly, the foreign court may make such a request, either under a treaty binding its home state and the PRC or on the basis of the principle of reciprocity or mutual benefit.[118]

Generally speaking, the procedure followed for the recognition and enforcement of foreign judgments by a Chinese people's court can be roughly divided into the following three stages:

(1) *the application* - as mentioned above, the application may come either from the litigant or from the foreign court. In both cases some necessary papers have to be presented to the people's court, such as a verified copy of the judgment, a Chinese version of it, etc.

(2) *the examination* - upon receipt the people's court examines the application to see whether it meets the requirements. In accordance with the CPL and the

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[116] See JING PENGNIAN, op.cit. n. 4 pp. 142-148.

[117] CPL, Art. 267.

[118] Ibid.

judicial assistance agreements to which China is a party, Chinese courts have adopted the system of examination on form rather than examination on substance. For example, Article 18(2) of the Judicial Assistance Convention between the PRC and the Russian Federation stipulates clearly that the requested court may limit itself to examining whether the judgment is in conformity with the provisions of the Convention, without an examination on substance.

(3) The last stage is the *recognition and enforcement* itself. After examination, the foreign judgment may be recognized and enforced by the Chinese people's court unless it is found to be in contravention with the basic principles of the law or with the sovereignty, security, and social and public interests of the PRC, or if it does not meet other necessary requirements.[119] For the enforcement of a foreign judgment in China, an enforcement decree is issued by the people's court. The judgment will be enforced in accordance with the relevant provisions and rulings on the execution of domestic judgments.[120]

6. ARBITRATION

6.1. The position of arbitration

Arbitration is becoming ever more important in China as a means for the resolution of both domestic and international civil and commercial disputes. On 31 August 1994 a Chinese arbitration law was adopted at the ninth session of the Standing Committee of the Eighth NPC. It entered into force on 1 September 1995. The law consists of eight chapters and 80 articles. Chapter Four, on "Special provisions on arbitration involving foreign elements", lays down the fundamental provisions on international civil and commercial arbitration. At present, there are two arbitration institutions dealing with international civil commercial and maritime disputes in China, namely the International Economic and Trade Arbitration Commission and the Maritime Arbitration Commission. Both have their own regulations and are gaining a favourable reputation for their fairness and promptness.[121]

According to the Arbitration Law and the two regulations, arbitration may take place on the basis of an arbitration clause in the contract or an arbitration agreement between the parties. A lawful arbitration clause or arbitration agreement can exclude the jurisdiction of the courts in favour of the will of the parties. They may submit their disputes to an arbitral tribunal in the home

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[119] *See supra.*

[120] Arts. 207-236 of the CPL provide for the execution of domestic judgments and rulings. They can also be applied to the execution of foreign judgments.

[121] See JING PENGNIAN, op.cit. n. 4 pp. 196-203. On 17 March 1994, the Chinese International Commercial Commission (or Chinese International Trade Promotion Commission) amended its "Arbitration Rules of the Chinese International Economic Trade Arbitration Commission". The new Rules came into force on 1 June 1994.

country of any of the parties or in a third country. The arbitrators, the arbitration rules and the applicable law can also be chosen by the parties. The award rendered by a Chinese arbitral institution is final and binding, and the parties can no more file a suit concerning the same dispute in any Chinese court. If, however, a party refuses to perform its obligations under the arbitral award,[122] the other party may file an enforcement action in court.

6.2. The power of the court to examine the validity of arbitration awards

Generally speaking, the parties enjoy the right either to submit their disputes to arbitration or to the court. Their choice depends, *inter alia*, on whether or not they have arrived at an arbitration agreement or have included an arbitration clause in their contract. If they have done so, only the arbitral tribunal is competent to handle the dispute. Since arbitral institutions have no right to enforce their own awards, the court has the power to determine the validity of arbitral awards. Article 260 of the CPL stipulates that a people's court shall refuse to recognize the validity of an arbitral award and shall not enforce it if it is proven that: (a) the parties have in fact not agreed to an arbitration clause in the contract or have not subsequently reached a written arbitration agreement; or (b) the party against whom the enforcement is intended has not been given notice of the appointment of an arbitrator or of the inception of the arbitration proceedings, or was unable to present his case due to causes for which he is not responsible; or (c) the composition of the arbitration tribunal or the arbitration procedure was not in conformity with the rules of arbitration; or (d) the issues dealt with by the award fall outside the scope of the arbitration agreement or are matters which the arbitral organ was not empowered to arbitrate.[123] The people's court shall also ignore the legal effects of an arbitral award if it determines that the enforcement of the award would go against the social and public interests of the PRC.

7. MEDIATION

Mediation has for centuries been the most favoured dispute resolution technique among Chinese. At present it is still regarded as a useful mode of dispute settlement. According to the CPL, mediation includes two categories: mediation in litigation and mediation out of court. The main difference between the two is that the former is legally binding upon the parties, while the latter doesn't have any legal effect.

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[122] Arbitration Law, Art. 62.
[123] CPL, Art. 260.

7.1. Mediation in litigation

Mediation in litigation, also called mediation by court, is a basic and important method that can be carried out at any stage of the litigation,[124] including the procedures of first or second instance and that of trial supervision.[125] It is, however, clearly specified in the CPL that mediation relies on the parties' consent and that the courts cannot force the parties to settle their dispute by mediation against their will. Article 9 of the CPL stipulates that the people's courts, in trying civil cases, shall conduct mediation for the parties on a voluntary and lawful basis. If mediation fails, judgment shall be rendered without delay.

In most cases, when a settlement agreement is reached through mediation, the people's court draws up a mediation statement. The mediation statement is quite similar to a judgment as far as the contents are concerned. It must clearly set forth the facts of the case, the claims, and the result of the mediation. It shall, moreover, be signed by the judge and the court clerk, and appended with the seal of the people's court. Generally speaking, once it is receipted by the two parties, the mediation statement becomes legally effective. That means that effect of a receipted mediation statement is identical to that of a final judgment regardless of whether the mediation statement is made at the stage of first or second instance. No appeal is possible against a mediation statement. However, if there is evidence that the mediation has violated the principle of voluntariness or that the content of the mediation agreement is in violation of the law, a retrial may be requested.

Although the CPL does not contain special provisions on mediation in international civil cases, the rules on domestic mediation must be deemed equally applicable to international cases provided the parties wish to resort to mediation.

7.2. Mediation out of court

Mediation out of court, or people's mediation, is deeply rooted in China and refers to mediation by a people's mediation commission. A people's mediation commission consists of 3 to 9 members who are elected by the people. Its activities must abide by the principle of lawfulness and that of voluntariness. The most distinct characteristic of people's mediation is that it has no legal effect. It is not a compulsory procedure to be followed before any litigation. When a dispute occurs, the parties may resort directly to the court if they are unwilling to try mediation by the people's mediation commission. Moreover, even if the parties have reached a conciliation agreement through mediation of

[124] Arts. 9, 85-91, 155 and 180 of the CPL contain provisions on mediation.

[125] *See* above, section 1.1.3.

a people's mediation commission, they may still refuse to confirm the agreement and as yet bring a lawsuit to a people's court.

TRANSBOUNDARY CIVIL LITIGATION IN KOREA

Suh Chul Won*

1. INTRODUCTION

This paper purports to present a concise survey of Korean law and practice relating to transboundary civil litigation. In such a presentation in the English language the problem arises of differences in contents and nuances between Korean and English legal terms. In order to facilitate understanding of the Korean law, an attempt has been made to use, as much as possible, terms popularly used in Anglo-American legal literature. This may, however, not eliminate the existing differences in meaning between certain Korean concepts and their English equivalents.

2. GENERAL CONTEXT

2.1. The judicial system

Korea, being a unitary state, has a uniform judicial system. The courts in Korea can be classified into courts of limited jurisdiction and those of general jurisdiction. Courts of limited jurisdiction have jurisdiction over certain kinds of subject matter only. Examples are the Constitutional Court, the Martial Court, the Family Court, the Administrative Court and the Patent Court. The Constitutional Court has jurisdiction over such matters as the constitutionality of laws and of acts of government branches, the removal of high-ranking officers, the dissolution of a political party, and jurisdictional conflicts between different branches of government. A Martial Court hears criminal cases involving military or civil members of the Korean Armed Forces. Family Courts adjudicate cases involving family law issues, such as marriage, divorce and adoption. Administrative courts deal with cases involving acts of government of a public law character. The Patent Court is a special court to adjudicate cases involving acts of the Patent Office or issues of intellectual property law. These Courts of limited jurisdiction are already in existence, except the Administrative Court and the Patent Court which are scheduled to be established on 1 March 1998. Apart from the Constitutional

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 pp. 169-200

Court, appeal in last resort for cases decided by courts of limited jurisdiction is with the Supreme Court.

Courts of general jurisdiction adjudicate all civil and criminal matters except those falling under the scope of courts of limited jurisdiction. A civil case is dealt with by a court of general jurisdiction, with the exception of family law cases which are dealt with by the Family Court. Questions concerning the constitutionality of laws fall under the jurisdiction of the Constitutional Court.

The three levels of courts of general jurisdiction are the District Court, the High Court and the Supreme Court. The High Court and the Supreme Court are exclusively panel courts. A District Court may act as a single-judge court as well as a 3-judge panel court. The District Court has original jurisdiction in civil cases. The character of a case determines whether the first instance court is a single-judge court or a panel court. Panel court cases are: (a) cases involving amounts exceeding 30 million won (about US$ 30,000), except cases arising from check and bill of exchange relationships which are always single-judge cases regardless of the amount involved;[1] (b) property cases, the sum of which is incalculable;[2] (c) cases concerning immaterial rights;[3] (d) cases classified as panel court cases by a panel court;[4] (e) categories of cases classified as panel court cases by the law;[5] (f) multi-claim cases one of which is under the jurisdiction of a panel court. A panel court case may be adjudicated by a single-judge court upon a corresponding decision by the panel court.[6]

A judgment by a first instance court may be reviewed twice - by the intermediate appellate court and by the last resort appellate court. The intermediate appellate court reviews the judgments of first instance courts not only on the legal issues but also on those of a factual nature. The review is invoked by appeal from a party. There are no limits to the right of appeal to the intermediate appellate court. The last resort appellate court reviews legal issues only. This review is also invoked by appeal from a party. There is no system of *certiorari*, but in order to prevent overburdening of the court, small claims and cases with no real legal issues involved are excluded from its appellate jurisdiction. The Supreme Court is the last resort appellate court.

Which court serves as intermediate appellate court depends on the kind of first instance court. If the first instance court is a single-judge chamber of the District Court, the panel chamber of the District Court serves as intermediate

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[1] Supreme Court Regulation on Material Jurisdiction in Civil and Family Litigation (Supreme Court Reg. 706 of 14 January 1980), Art. 2(1).

[2] Ibid.

[3] Regulation on Material Jurisdiction, Art. 2(2).

[4] Court Organization Act (Act No. 3992 of 4 December 1987), Art. 32(1)(1).

[5] Court Organization Act, Art. 32(1)(6).

[6] Regulation on Material Jurisdiction, Art. 2(1).

appellate court.[7] If the first instance court is a panel chamber of the District Court, the intermediate appellate court is the High Court.[8] One of the characteristics of the Korean judicial system is that trial and appellate jurisdiction may be exercised by the same court.

There is no special court for transboundary civil cases in Korea. However, in view of the increasing number of transboundary litigations, special divisions for this category of litigation have been set up in the Seoul District Court and in the Seoul High Court. In the Seoul District Court, 2 panel chambers and 2 single-judge chambers were established on 1 March 1994, under the name of "Special Division for International Transactions and Special Commerce Cases". In the Seoul High Court, the 1st and 12th Civil Cases Divisions were designated special divisions for transboundary civil litigation on 1 March 1996. No such special divisions exist in the other courts.[9]

Except by adjudication, civil disputes can also be concluded by other methods, such as arbitration, conciliation and settlement. Arbitration will be dealt with in section 7 of this paper. Settlement can be subdivided into private settlement and court settlement. Private settlement means that the dispute is settled by agreement between the parties. The general law on contract applies to such an agreement. No special form or specific content is required for a settlement agreement to be valid, and consequently, 'seal' or 'consideration' requirements as exist in the Anglo-American legal system do not apply. If, however, a settlement is the result of an unreasonable exercise of economic supremacy, it may be declared invalid for being in breach of a good moral or social order.[10]

There are two kinds of court settlement: pre-trial settlement and in-trial settlement. In the case of pre-trial settlement, the District Court upon request of the parties provides its good offices and supervises the efforts through one of its judges, leading to the dispute being settled by agreement between the parties. The agreement reached has the effect of a final judgment.[11] The applicable procedure is laid down in Articles 355-359 of the Korean Civil Procedure Code (KCPC). In-trial settlement refers to settlement of the dispute during the trial. Here too the dispute is settled by agreement between the

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[7] Court Organization Act, Art. 32(2)(1).

[8] Court Organization Act, Art. 281(1).

[9] As to the activities of the special divisions of the Seoul District Court, reference is made to its 21st and 22nd divisions. Kukjekeorae mit Sangsasakeon Jeondamjaepanbu [Special Division on International Transactions and Special Commerce Cases], *Inkwonkwa Jeongeui* [Human Rights and Justice] (April 1995) 133.

[10] LEE SIYOON, *Minsasosongbub* [Civil Procedure Law] (Bakyungsa, 1995) 21.

[11] Korean Civil Procedure Code (Act No. 547 of 4 April 1960), Art. 206.

parties with permission from the court where the case is pending, and the agreement has the effect of a final judgment.[12]

As to conciliation, there are again two kinds: conciliation by the court and conciliation by a government agency. Both may either be consensual or compulsory. Conciliation by a government agency has been institutionalized in various fields, such as environment protection, consumer protection, labour disputes and medical disputes. Consensual conciliation begins with the request of both parties to the dispute. Compulsory conciliation begins either with the request by the injured party or through a motion of the agency itself. Both types of conciliation do not take effect without the consent of both parties to the recommendations made.

Conciliation by the court is regulated by law, for example in the Civil Conciliation Act[13] or the Family Conciliation section of the Family Litigation Procedure Code.[14] All kinds of civil disputes may be settled by conciliation. It begins with a request to a District Court either by both parties or by one of the parties to the dispute, or on authority of the court where the case is pending.[15] The motion may be made at any time up to the end of the pleadings.[16] The provisions on regional jurisdiction (in the literature some- times referred to as jurisdiction *ratione loci*) apply in case of conciliation at the request of a party.[17] In this case, a judge in charge of conciliation or a conciliation committee of the court hears the case. In case of conciliation on authority of the court, the competent court is the one where the case is pending.

If no agreement can be reached, the judge or committee may propose a compromise whenever deemed proper. The compromise takes effect if both parties do not file objections within 2 weeks.[18] The agreement reached through conciliation by court has the effect of a final judgment.[19] If no agreement is reached, nor a compromise proposed, or if an objection to the compromise proposal is filed, then the original request for conciliation is regarded as the filing of a lawsuit.[20]

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[12] Ibid. Art. 206.
[13] Act No. 4202 of 13 January 1990.
[14] Act No. 4300 of 31 December 1990.
[15] Civil Conciliation Act, Art. 6.
[16] Civil Conciliation Act, Art. 1706.
[17] Ibid., Art. 3.
[18] Ibid., Art. 34.
[19] Ibid., Art. 29.
[20] Ibid., Art. 36.

2.2. Sources of law

Korea is a civil law country profoundly influenced by the German and Japanese legal systems. As is usual in a civil law country, the basic laws, including those on civil procedure, are systematically codified. The substantive law applicable to transboundary civil relationships is determined by applying the rules of private international law. In Korea this law is systematically codified in the Private International Law Act or, after its Korean name, the 'Excavational Law Act'.[21] There is, however, no systematic code of the law of procedure relating to transboundary civil litigation. Provisions are scattered over various codes or acts. Some are to be found in the Korean Civil Procedure Code, such as provisions on regional jurisdiction (jurisdiction *ratione loci*) over foreign legal persons (Art. 4 para. 2), the legal capacity of foreigners to litigate (Art. 53), the method of service in a foreign country (Art. 176), service by public notice (Art. 179), the effect of foreign judgments (Art. 203), the taking of evidence in a foreign country (Art. 268), the presumption of authenticity of foreign official documents (Art. 327 para. 3), the execution of foreign judgments (Arts. 476 and 477) and the seizure of foreign vessels (Art. 688). International judicial co-operation in civil matters is regulated in a separate statute.[22] Other important matters are not regulated by any existing statutory law.

The question is whether the law on (principally domestic) civil procedure applies to transboundary civil litigation as well. A current school of thought answers affirmatively, precisely because there is no indication that the KCPC is supposed to apply to domestic cases only.[23] It is argued that the absence of a specific provision prescribing such limitation and the only partly available specific provisions on transboundary litigation should lead to the conclusion that all general provisions are to be interpreted as being applicable not only to domestic litigation but also to transboundary litigation, with the exception of provisions whose scope of application specifically excludes transboundary civil litigation. This view has been criticised as not taking sufficient account of the difference between domestic and international cases. The latter school of thought argues that the KCPC applies to transboundary civil cases only if the transboundary characteristics of the case do not indicate otherwise.[24] The controversy is especially serious with respect to the issue of international jurisdiction, which will be dealt with below in sub-section 3.2.

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[21] Act No. 966 of 15 January 1962. It is strongly influenced by the Japanese Act on Private International Law.

[22] The Act on International Judicial Cooperation in Civil Cases (Act No. 4342 of 8 March 1991).

[23] CHUNG DONGYOON, *Minsasosongbub* [Civil Procedure Law] (Bubmunsa, 1995) 110.

[24] CHOI KONGWOONG, *Kukjesosong* [International Litigation] (Yookbubsa, 1994) 234.

Besides the above-mentioned statutes, there are a number of Supreme Court regulations on civil litigation. The Korean Constitution empowers the Supreme Court to make regulations with legally binding force provided they do not violate statutory law.

Korea is not a party to any multilateral treaty on transboundary civil litigation. As to bilateral treaties, it is only in the field of criminal law that Korea has recently concluded judicial cooperation treaties with the US, Australia and Canada.

The fact that Korea is a civil law country does not exclude the possibility and importance of judge-made law. Though judicial decisions have no generally binding force, they play an important role in the interpretation of the written law and in filling up lacunae. Their importance is particularly great in the field of procedural law relating to transboundary civil litigation, as there are a great many gaps in the written law on the matter.

The opinion of scholars is also important in the law of procedure in transboundary civil litigation. As there have not been many such litigations in Korea, there are not enough judicial decisions yet to provide sufficient predictability of Korean practice on all relevant issues. In such cases the opinion of scholars is the last resort in predicting possible judgment. Actually, there are several examples of opinions of scholars to which reference has been made in judicial decisions.

With regard to the question of the applicable procedural law, it is generally recognized in Korea that the *lex fori* is applicable in transboundary civil litigation.[25] The problem is how to distinguish between substantive and procedural matters. According to the current school of thought in Korea, this is determined through application of the legal criteria of the forum state, although the result may be modified by *jori* (*see infra,* sub-section 3.2.1) in view of the specific features of a transboundary procedure.[26]

3. JURISDICTION

3.1. Notion of jurisdiction

The term jurisdiction is used in several meanings in Korea. It may refer to the competence of a state to exercise prescriptive, adjudicative or enforcing power. In transboundary civil litigation it refers to the adjudicative competence of a state to hear and decide a case, which is equivalent to juris-diction in US legal terminology. The terms 'general jurisdiction', 'general competence' and 'international jurisdiction' are used to specify this meaning.[27] In this paper, the term 'international jurisdiction' is employed.

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[25] Ibid. p. 244; CHUNG DONGYOON, op. cit. n. 23 p. 110.

[26] CHOI KONGWOONG, op. cit. n. 24 p. 247.

[27] SUH HEEWON, *Kukjesabubkangeui* [Lectures on private international law] (Ilchogak, 1996)

International jurisdiction can be relevant in a direct or indirect way. The issue may be whether the judiciary of a country has competence to hear a given transboundary civil case. The term 'direct international jurisdiction' is employed to refer to this meaning. The notion of international jurisdiction may also be relevant as a requirement in recognizing and enforcing a foreign judgment. The term 'indirect international jurisdiction' is used to specify that meaning. Although a different term is used, the basic idea underlying both jurisdictions is said to be the same.[28]

The term jurisdiction is also used to refer to the competence of a specific Korean court to adjudicate a given case, on the presumption that the Korean judiciary has international jurisdiction. For this purpose, terms like 'specific jurisdiction', 'specific competence', 'concrete jurisdiction' and 'domestic jurisdiction' are employed.[29] This paper uses the term 'domestic jurisdiction'.

Domestic jurisdiction in Korea can be categorized in various ways. First, there is the categorization according to the basis of jurisdiction. Under this categorization, jurisdiction can be sub-divided into law-deciding jurisdiction, court-deciding jurisdiction and party-deciding jurisdiction. Law-deciding jurisdiction refers to jurisdiction based on the distribution of cases among the courts and can be sub-categorized into functional, material and regional jurisdiction. Court-deciding jurisdiction refers to the jurisdiction of a higher court to decide in a dispute over, or uncertainty about, jurisdiction of a lower court. Party-deciding jurisdiction refers to jurisdiction on the basis of the will of the parties. It can be sub-divided into jurisdiction by acquiescence and consensual jurisdiction.

The second categorization distinguishes between exclusive and optional jurisdiction. Exclusive jurisdiction refers to jurisdiction that may not be set aside, irrespective of the consent of the parties concerned. It applies where such public interests as fair trial or due process demand adjudication of the case by a specific court. Functional jurisdiction, as mentioned below, is usually exclusive, unless the law provides otherwise, for example where a so-called jumping appeal is allowed. Optional jurisdiction may be substituted by another by consent of the parties concerned, since it is provided for the benefit of the private interests of the parties concerned, such as convenience or equal opportunity of the parties. Material jurisdiction and regional jurisdiction[30] are usually optional, except where the law provides otherwise.

Functional jurisdiction refers to the distribution of functions among various courts. One may distinguish between the functions of adjudication and execution, or may refer to the different functions of single-judge courts

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[28] CHUNG DONGYOON, op. cit. n. 23 p. 109.

[29] CHOI KONGWOONG, op. cit. n. 24 p. 268.

[30] *See infra.*

and panel courts, or to the different levels of courts. An adjudication court assumes functions like taking and preserving evidence, and ordering provisional attachment. An execution court entertains functions like compulsory execution of property and supervision of the process. An execution court is usually a single-judge court.

The distribution of functional jurisdiction among single-judge courts and panel courts refers to the distribution of various functions relating not only to trial procedures but also to appellate procedures, and to pre-trial and post-judgment matters as well. The general rule is that single-judge courts assume jurisdiction over issues that are simple and require a speedy decision, while panel courts adjudge issues that are complex and require careful consideration. Exclusion and challenge of judges are typical examples of the functions of a panel court. Pre-trial settlement, preservation of evidence, special speedy trial[31] and questions of public notice are salient examples of single-judge court functions. Functional assignment of jurisdiction may take place for a case falling under the material jurisdiction of another court.

Level jurisdiction refers to the different functions of the various levels of courts. The function of every court at any level begins with the filing of the suit or the appeal and ends with the delivery of judgment. Before a higher court begins its functions by filing the appeal and transferring the relevant documents from the lower court, actions such as provisional attachment and preservation of evidence remain under the responsibility of the lower court.

Regional jurisdiction (or jurisdiction *ratione loci*) refers to the distribution of cases among courts of the same level in different districts. It is similar to 'venue' in the US legal system. It is decided by various factors connecting the court and the case concerned. These factors can be categorized in two ways. First, categorization may take place by distinguishing between factors *ratione personae* and those *ratione materiae*. Jurisdiction *ratione personae* relates to the connection between the court and the parties concerned, typical examples of which are residence and domicile. Jurisdiction *ratione materiae* concerns the connection between the court and the facts of the case concerned, such as the place of commission of the tort or the place of first arrival of the salvaged ship. A second categorization is the distinction between general factors and special factors. General factors apply to all the civil litigations of a person, regardless of their factual aspects, whereas special factors apply to specific kinds of claims.

A tort suit may be brought in the court of the place where the act was committed.[32] A lawsuit for damages due to a collision of vessels or aircraft or any other accident relating to vessels or aircraft, may be brought in the court

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[31] Under this procedure the court may issue an order for the payment of an alleged debt without hearing the debtor. The latter may follow the order or may raise objection. In the latter case a formal trial will follow. The Supreme Court Office uses the English translation "demanding procedure" for the Korean term.

[32] KCPC, Art. 16(1).

of the place where the damaged vessel or aircraft first arrived.[33] A suit relating to salvage may be brought in the court of the place where the salvage was effected or the place where the salvaged vessel first landed.[34] A suit relating to a right of succession, a testamentary gift or any act that is to take effect by death, may be brought in the court of the place where the deceased was at the time of the opening of the succession.[35] A suit relating to a claim against the estate of a deceased or relating to an incumbrance upon such estate may also be brought in the court where the deceased was at the time of the opening, but only when the whole or part of the estate lies in the jurisdictional district of that court.[36]

3.2. Exercise of jurisdiction

3.2.1. Requirements

The first thing to note regarding the requirements for international jurisdiction of Korean courts is that the KCPC does not deal with them directly. It only contains provisions on domestic jurisdiction. The Korean Private International Law Act contains special provisions on the requirements for international jurisdiction of Korean courts only in some specific cases, such as the declaration of incompetence and its revocation, and the appointment and removal of guardians for incompetent persons.[37]

How then should an answer be found to the question whether a Korean court has international jurisdiction? There are two prominent schools of thought in Korean scholastic opinion. One school argues that the problem should be solved by analogy, i.e. by applying the KCPC provisions on domestic jurisdiction.[38] According to this view, one should first ask whether, if the case were a domestic one, the court would have jurisdiction under the KCPC. If the answer is in the affirmative, the Korean court also has jurisdiction in transboundary cases. This school of thought is called the 'Nationalist School'. Another school of thought argues that the issue should be settled by applying *jori* on transboundary civil litigation.[39] *Jori* may be translated into

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[33] KCPC, Art. 16(2).

[34] KCPC, Art. 17.

[35] KCPC, Art. 20.

[36] KCPC, Art. 21.

[37] Korean Private International Law Act, Arts. 7(2), 8 and 25(2).

[38] LEE SIYOON, op. cit. n. 10 p. 60; CHUNG DONGYOON, op. cit. n. 23 p. 114; LEE YOUNG-SEOP, *Sinminsasosongbub* [New Civil Procedure Law] (Bubmunsa, 1972) 61.

[39] KANG HYUNJOONG, 'Kukjeminsasosongbub' [International civil procedure law], *Sabubhaengjung* [Judicial Administration] (April 1987) 48; CHOI KONGWOONG, op. cit. n. 24 p. 300.

'legal reasoning' or 'natural law'. It is a very vague notion which emphasizes the need for due respect to international comity, due process of law, fair opportunity for the parties concerned, and speedy and efficient trial. This school of thought is called the 'Internationalist School'.

The Internationalist School criticizes the Nationalist School for putting the cart before the horse. It argues that international jurisdiction should be affirmed before the issue of domestic jurisdiction becomes relevant. The Internationalist School emphasizes the different rationale of international and domestic jurisdiction and holds that there is no reason why international jurisdiction should be dependent on domestic jurisdiction. However, the Internationalist School is also not free from criticism. The Nationalist School argues that the theory of the Internationalist School is too vague and that the core notion of *jori* cannot provide sufficient criteria for the court to decide on the issue of its international jurisdiction.

The Korean courts seem to espouse, roughly speaking, a compromise view. Accordingly, the court first analyses whether the court's domestic regional jurisdiction would be established if the case were a domestic one. Next, the court considers whether *jori* would change the result of the application of the general rule. Through this process, full account is taken of the characteristics of transboundary civil litigation. The degree of the effect of *jori* and its nuances are, however, not uniform. The following decisions of the Supreme Court may illustrate this.

A transboundary case on broker fees arose out of a broker agreement in respect of an international financial transaction concluded between a Korean company and a Japanese company in Japan. The Supreme Court recognized the Korean court's international jurisdiction. The reasoning reads, *inter alia*:

> "Art. 6 of the KCPC provides that a claim relating to a property right out of contract may be brought before the court of the place of performance. According to the Korean Private International Law Act, the applicable law is Japanese commercial law, the law of the place where the contract was concluded, since no special agreement on the applicable law is provided in the contract. The Japanese Commercial Code provides that, except in case of an obligation to deliver specific goods, the place of performance of the contract is the domicile of obligee. The Japanese company established a subsidiary in Seoul, Korea to manage the work concerned. Under these conditions, the judiciary of Korea, being the place of performance, has international jurisdiction, barring any special provision to the contrary."[40]

Through this reasoning the Supreme Court decided on the issue of international jurisdiction by applying the provisions on domestic regional jurisdiction by analogy.

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[40] Supreme Court, 20 April 1972, Pankyul [Judgment] Da 248.

In a divorce case between foreigners *jori* was more emphasized.[41] The plaintiff was an American citizen who had lived in Korea since 1964. The defendant was also an American, with domicile in the US. The Korean Family Litigation Procedure Code[42] stipulates that, unless otherwise provided, a family lawsuit shall be brought in a court which is the general forum of the defendant. It also provides that this general forum is determined by the defendant's residence, domicile or last domicile, and that, if there is no such place, the proper court is the family court of the place where the Supreme Court is located. Considering the nationality and domicile of the parties and the above provision, the Supreme Court denied international jurisdiction of Korean courts in the case, even though the proper court might be the family court of the place where the Supreme Court is located, if the case were a domestic one. The reason provided was that in a divorce case between aliens, Korean courts have international jurisdiction only if the domicile of the defendant is located in Korea, barring special circumstances to the contrary.

However, there is another decision according to which the case is presumed to meet the *jori* on international jurisdiction if it meets the requirements of the KCPC on domestic regional jurisdiction. An officer of the Korean branch of a foreign company filed a lawsuit on grounds of unlawful dismissal. On the issue of international jurisdiction of the Korean court, the Supreme Court held:

> "As no treaty on international jurisdiction is concluded, as no generally recognized principle of international law on international jurisdiction is established, and no provision on international jurisdiction is provided by the KCPC, this issue should be decided by *jori*, having due consideration of fairness for the parties concerned and of a speedy and faithful trial. In this regard, it should be acknowledged that if the requirements of the KCPC provision on domestic jurisdiction are met, the requirements of international jurisdiction are deemed to be met also, as the KCPC provisions are made in accordance with the above-mentioned *jori*."[43]

For this reason, international jurisdiction over the case was recognized by analogy of Article 10 of the KCPC. This Article provides that a suit against a person holding office or other place of business at some place may, insofar as the claim exclusively concerns the business affairs of such office or place of business, be brought before the court of the place where the office or place of business is situated.

The principle adhered to in the above decision was re-affirmed in a recent case, as follows:

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[41] Supreme Court, 22 July 1975, Pankyul Meu 22.

[42] Act No. 4300.

[43] Supreme Court, 20 July 1992, Seongo 91 Da 41897.

> "As there is no provision in the KCPC on international jurisdiction, nor a treaty or a relevant generally recognized [rule of] inter-national law, [the question] should be settled by *jori* on inter-national jurisdiction consisting of fairness for the parties con-cerned and a speedy and faithful trial. As the provisions on domestic regional jurisdiction of the KCPC follow the *jori*, it is reasonable that if one of such factors as the domicile of the defendant, the office of the legal person, the place of performance, the location of the property, or the place of commission of the tort is in Korea, the international jurisdiction of the Korean judiciary is presumed, barring special circumstance to the contrary."[44]

From the above cases it may be inferred that, if a case includes one of the factors required by the KCPC for the determination of domestic regional jurisdiction, the existence of international jurisdiction is presumed unless the *jori* on international jurisdiction demands otherwise. The divorce case also seems to infer that *jori* is more emphasized in family law cases.

As the provisions on domestic regional jurisdiction play an important role, it is necessary to elaborate on them. They are laid down in Articles 1-2 [Art. 1a according to Western usage] to 21. Articles 1-2 and 2 relate to general regional jurisdiction over natural persons. Articles 3 to 5 concern general regional jurisdiction over Korean diplomatic officers, Korean legal persons and the Korean government respectively. Articles 6 to 21 are provisions on special regional jurisdiction, which means that they apply only to such special kinds of cases as tort, claims relating to immovable property and claims relating to salvage.

Several factors, such as the domicile of the defendant and the place of tort, may apply to a case so that several courts may have regional jurisdiction over the case. In these situations the plaintiff may choose among the eligible courts. The choice of the plaintiff is, however, not final and he may file the same suit at another court. The result is that it may lead to *lis pendens* with the effect of dismissal or suspension of the later suit.

3.2.2. Exercise of jurisdiction in case of non-fulfilment of jurisdictional requirements

If a claim seeks the determination of personal liability of the defendant, his appearance in court to contest the case on its merits constitutes submission to the jurisdiction of the court, even when jurisdiction would not have existed otherwise. This basis of jurisdiction is called general appearance or jurisdiction by acquiescence. There is no rule on international jurisdiction by acquiescence in the KCPC which only contains a provision on domestic jurisdiction by acquiescence:

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[44] Seoul District Court, 12 January 1996, Seongo 64 KaHab 66533.

> "When a defendant pleads on the merits of a suit or makes statements in the preliminary proceedings without contesting the jurisdiction of the court of first instance, the said court shall have jurisdiction."

There is no court decision on whether jurisdiction by acquiescence is recognized with respect to international jurisdiction. It is presumed, however, that if a case meets the requirements of domestic jurisdiction by acquiescence and if *jori* on international jurisdiction does not demand otherwise, international jurisdiction by acquiescence would be recognized.[45] This is inferred from the judicial decisions on the relationship between domestic jurisdiction and international jurisdiction. Therefore, it is necessary to elucidate the requirements and effects of domestic jurisdiction by acquiescence.

Jurisdiction by acquiescence is recognized only in cases of optional jurisdiction. It takes effect when the defendant pleads on the merits without making jurisdictional pleas. Jurisdictional pleas after pleading on the merits cannot prevent the effect of the jurisdiction vested by acquiescence. It has effect only for the case concerned, and not for a renewed suit filed after dismissal of the original one on the notion of the court or upon the request of the plaintiff.

Joinder of causes of action or of parties may be a ground for establishment of jurisdiction. It could mean that even though a court has no domestic regional jurisdiction over a claim, yet it may exercise jurisdiction if the court has jurisdiction over other claims co-related to the former one. Article 22 of the KCPC provides as follows:

> "(1) In the case of joinder of several claims in one suit, such a suit may be brought in any court having jurisdiction over any one of the claims in accordance with the provisions of Articles 1-2, 2 to 5, 5-2, 6 to 21.
>
> (2) The provision of Paragraph (1) shall be applicable in case the right or duty which is the object of the lawsuit is common to more than one person, or if several persons become parties as common litigants due to the same actual or legal cause."

This provision is interpreted as giving rise to new jurisdiction in a multi-party case if the legal or factual bases of the original claims are co-related. In a multi-claim case between the same parties, however, co-related jurisdiction is recognized although there is no common factual or legal basis between the various claims. The provision applies only to regional jurisdiction and not to other jurisdictions, such as functional, material or level jurisdiction.

Though the provision is designed to apply only to domestic jurisdiction, it has been acknowledged by the Supreme Court that joinder of causes of action

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[45] CHOI KONGWOONG, op. cit. n. 24 p. 308.

creates new jurisdiction also in transboundary litigation. The defendant in the case concerned requested attachment and auction of plaintiff's property in Korea. The plaintiff filed a counter-claim, the cause of which was related to the basis of attachment. In regard to the counter-claim, the defendant made a jurisdictional plea that the Korean court had no international jurisdiction. The Supreme Court rejected the plea by ruling that:

> "Contrary to his argument that the Korean court has no international jurisdiction diction over him, the defendant, a foreign company, has submitted to the jurisdiction of the Korean court by requesting attachment and auction to a Korean court. Therefore, in light of *jori*, it would be reasonable for the Korean court to exercise international jurisdiction over the case of which the facts are related to the basis of the attachment and auction."[46]

Thus international jurisdiction was assumed in case of joinder of causes of action. It is not certain whether international jurisdiction would also be assumed in case of joinder of parties, but it is likely to be the case if the claims have a common factual or legal basis.

3.2.3. Jurisdiction of compulsory execution

The Korean legal system does not recognize civil arrest in the sense of public authority taking a person in custody for the purpose of forcing him to answer to a civil claim. Compulsory execution in the Korean legal system can be divided into direct execution, substituted execution, and indirect execution. Direct execution is performed by public authority in regard to the object of the judgment. Substituted execution is performed by public authority in regard to another object when the execution of the original object is considered not feasible by the executing court. Indirect execution aims at compelling the defeated party to perform or to refrain from some act by threatening to impose disadvantages on him. In that respect it is similar to civil arrest, but the only disadvantage that can be imposed in the Korean legal system is that of punitive damages.

The jurisdiction to perform substituted execution and indirect execution is exercised exclusively by the court which has rendered the judgment.[47] The jurisdiction of direct execution is exercised by the public execution authority or court of the place where the object of the execution is located. The Court with jurisdiction over direct execution deals with compulsory auction of immovable property and direct execution of contract rights of the original obligor against a third-party obligor, and other property rights.[48] The public execution authority deals with other compulsory executions such as provisional attachment, provisional execution or compulsory auction of tangible

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[46] Supreme Court, 12 December 1989, Seongo 88 DaKa 3391.

[47] KCPC, Art. 693.

[48] KCPC, Arts. 557 and 667.

and movable property, compulsory execution of or conveyance of immovable or movable property.[49]

3.2.4. Jurisdiction in rem and quasi in rem

In rem action in the US legal system purports to affect the interests of persons in a specific thing, instead of imposing personal liability on anyone. The effect is that the possible judgment only determines the status of a thing adjudicated. The intended result is reflected only in certain kinds of action, such as an action for the confirmation of title or confirmation of paternity. This notion is unknown in the Korean legal system. The jurisdictional effect of *in rem* jurisdiction is that the court which does not have personal jurisdiction may exercise jurisdiction by the mere fact that the thing adjudicated is located in the district. Such reasoning is reflected in some provisions on regional jurisdiction, including Articles 9, 18 and 19 of the KCPC.

Quasi in rem action in the US legal system refers to an action that would have been *in personam* if jurisdiction over the defendant had been attainable. It is referred to as half-way house between *in rem* and *in personam*. It is *in rem* in that the court is able to exercise jurisdiction because the defendant has property within the jurisdiction. It is *in personam* in that the subject matter of the suit is unrelated to the property seized. The characteristic of *quasi in rem* action is that property and intangibles are seized not as the real object of the litigation, but merely as a means of establishing jurisdiction over the defendant. A judgment *quasi in rem* has no *res judicata* value as the court has not exercised jurisdiction with regard to personal liability. That notion is also unknown and is in fact unnecessary in the Korean legal system. Because of the uniform character of the Korean judicial system, the judgment of a Korean court is valid in all other courts in Korea. The scope of the judgment depends exclusively on the mode of judgment and the intention of the court.

Things may, however, be different in transboundary civil litigation. As a Korean judgment is not always recognized in foreign countries, it may be enforced only by execution of property located in Korea. In such a situation, *quasi in rem* jurisdiction may be at issue. In this regard, Articles 9 and 12 of the KCPC become relevant. Article 9 provides, in part, that an action concerning property rights against a person who has no domicile in Korea, or whose domicile is unknown, may be brought before the court of the place where attachable property of the defendant is situated. Article 12 provides that an action based on an obligation related to or secured by a vessel may be brought in the court of the place where the vessel is situated. Since the court may have no other connecting factor for its jurisdiction, the effect of a possible judgment is similar to that of a *quasi in rem* action. In fact the

[49] KCPC, Arts. 492, 527, 689 and 690.

Supreme Court has recognized that Article 9 applies to transboundary civil litigation:

> "A property right action against a person who has no domicile in Korea, or whose domicile is unknown, may be brought before the court located in the place where the subject matter or the security therefor, or any attachable property of the defendant is situated, even though he is a foreigner. The reason for the recognition of this jurisdiction is that the possible judgment will be enforced by the execution of such property."[50]

3.2.5. Constraints on the exercise of jurisdiction

Although jurisdiction might formally exist, special factors might constrain its exercise. This section will deal with two of the most frequently occurring factors: *forum non conveniens* and 'political question'.

The doctrine of *forum non conveniens* in the US legal system is defined as the discretionary power of a court to decline to exercise the jurisdiction it possesses when it appears that it may be more appropriate for the case before it to be tried elsewhere. In the *Piper Aircraft* case, the US Supreme Court held that this doctrine applies to international civil litigation. The rationale of the doctrine is to avoid unreasonable inconvenience for the parties and the burdening of the court with cases unconnected to it. In the Korean legal system, the term *forum non conveniens* is not used and there is no provision dealing with it. However, the transfer of a suit may meet the rationale of *forum non conveniens*. Article 32 of the KCPC provides:

> "A court may, if it deems necessary to avoid considerable damage or delay in regard to a suit over which it has jurisdiction, transfer the whole or part of such suit to another competent court upon its own authority or upon motion of parties, except in case of a lawsuit under exclusive jurisdiction of the court."

Since the provision is designed for domestic jurisdiction, there is uncertainty as to whether and under what conditions it is applicable to international jurisdiction. There is no judicial decision on the issue. Some scholars argue that the policy consideration of *forum non conveniens* should be applied to international jurisdiction whenever exercise of jurisdiction would result in an unreasonable burden on the defendant.[51]

'Political questions' also constitute a constraint on the exercise of judicial jurisdiction. In the Korean legal system, the doctrine of political question means that the court refrains from the exercise of its jurisdiction in highly political matters. The act of state doctrine is, however, not included. In the

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[50] Supreme Court, 25 October 1988, Seongo 87 Ka 1728.

[51] RYU YUNGIL, *Kukjeminsasabubkongjoe Kwanhan Yunku* [A Study on International Assistance and Cooperation in Civil and Commercial Matters], doctoral dissertation (Seoul National University, 1994) 34.

US legal system this doctrine means that an act of a state carried out within its own territory cannot be challenged in the domestic courts of another state. Such a doctrine is not recognized in Korea. Korean courts would decide on the validity of an act of a foreign state (under the law applicable in the case) whenever the issue is raised. International comity is usually considered by recognizing the validity of the act unless it is contrary to the good morals or public policy of Korea.

3.3. Forum selection

Article 26 of the KCPC provides the following on forum selection:

> "(1) Parties in a case may decide on a first instance court by agreement.
>
> (2) The agreement referred to in Paragraph (1) shall be valid only if it is made in writing with respect to a suit based on a specific legal relationship."

This provision is interpreted to apply only to optional jurisdiction. In the absence of relevant court decisions it is presumed that the requirement of specification of a court is considered to be fulfilled if a specific court can be determined by interpretation of the agreement, even if it does not specifically designate a court. Consequently it would seem that a forum selection is valid even though it only refers to a country, provided the competent court can be determined under the law of the forum state. The right of selection is available in all civil cases, including family cases. The only aspect of the issue treated in scholastic opinion is the invalidity of the selection if it is the result of unreasonable exercise of power by one of the parties.

As the rule formally applies to domestic jurisdiction, scholastic opinion and court decisions are important in determining its applicability to international jurisdiction. It seems that forum selection is indeed considered applicable also to transboundary civil litigation, as soon as the requirements for domestic forum selection are fulfilled.[52] There is no court decision on whether forum selection is restricted to some special kinds of transboundary issues, and there seems, in fact, to be no such limitation.

Forum selection may, however, not be recognized if it were to result in a denial of justice. [53] Accordingly, a forum selection cannot bar the filing of a suit in another forum than the one selected, if the selected forum refuses to entertain the selection and to exercise jurisdiction. This reasoning has been well illustrated in a lower court decision. The issue at hand was the validity

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[52] CHOI KONGWOONG, op. cit. n. 24 p. 307.

[53] Ibid.

and effect of a forum agreement in transboundary civil litigation. The plaintiff and defendant had agreed on a forum selection clause in an international financial transaction contract, designating the District Court of Tokyo as the proper forum. In spite of the clause, the plaintiff filed a suit in the Seoul Civil District Court in Korea. The defendant made a jurisdictional objection. The court upheld this objection for the following reasons:

> " . . . The case before it is not subject to the exclusive jurisdiction of the Korean courts. It is certain that the Japanese court would entertain the case, as the Japanese court does not reject a forum selection in a case where a Japanese company demands payment of capital and interest arising out of a financial transaction contract concluded in Japan between a Japanese company and a Korean company."[54]

The nexus between the case and the selected forum is relevant for determining whether the original jurisdiction is optional and, consequently, the forum selection is allowed, and whether the selected forum will recognize the selection made. The forum selection agreement may contain an express provision as to whether the selected forum is intended to be exclusive or cumulative to the statutory forum. In the above case the explicit intention of the parties was entertained. In the absence of such express intention, the Supreme Court decided that if the selected forum is among the law-deciding forums it is exclusive, while it is cumulative if it is not one of them.[55]

Whether the parties may derogate from their own selection depends on whether the initially selected jurisdiction is exclusive or cumulative. In the above-mentioned decision, the court admitted the jurisdictional plea, as follows:

> "From the facts presented, the forum selection seems not to be cumulative to that of the Korean judiciary but an exclusive jurisdiction of the Japanese court [. . .]."[56]

As in domestic cases, forum selection in transboundary cases should be done in writing.

3.4. Lis (alibi) pendens

Article 234 of the KCPC prohibits the filing of a double suit: "With regard to a case pending before a court, neither party may bring another suit on the [same] case". This provision is considered not to apply to a duplicate suit in the court of a foreign state because the territorial scope of judicial power is limited to the territory of the state concerned. Reversely, the pend-

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[54] Seoul Civil District Court, 21 October 1981, Seongo 81 KaHab 949.

[55] Supreme Court, 15 May 1963, 63 Da 111.

[56] Seoul Civil District Court, 21 October 1981, Seongo 81 KaHab 949.

ing of a case in another state has no effect on the exercise of jurisdiction by the Korean court. However, in light of the economy of civil litigation and judicial justice, the courts constrain that exercise by way of the recognition of foreign judgments.

This attitude is well illustrated in a decision by the Supreme Court.[57] A Korean man and a Korean woman had married in Korea and had been living in New York since shortly after the marriage. The woman filed a divorce suit in a New York court. While the suit was pending, the man returned to Korea for his work and instituted another divorce suit against the woman in a Korean court. The woman did not appear in the Korean court and, consequently, did not make a plea of *lis pendens*. While the Korean lawsuit was pending, the New York court rendered a final judgment allowing divorce and mandating the payment of child allowance. The Korean court later rendered a judgment which was more favourable to the husband. The woman appealed to an intermediate appellate court and to a last resort appellate court. Among the grounds of appeal was the double suit plea. The Supreme Court remanded the case to the intermediate appellate court, holding as follows:

> "A foreign judgment may have *res judicata* effect by recognition. Therefore, it is incorrect for the lower court not to have considered the possibility of recognition of the New York court judgment."

The lower court consequently decided that the judgment of the New York court had *res judicata* effect in Korea, as it fulfilled the requirements of Article 203 of the KCPC on recognition of foreign judgments. The man appealed but the Supreme Court upheld the decision of the lower court.

It may be inferred from this case that, although a lawsuit in a foreign country in itself does not bar an identical claim on the same facts in a Korean court, the judgment of the foreign court may affect that suit if it is rendered first and meets the requirements for recognition of foreign judgments. In considering the fulfilment of these requirements, due process and the interest of the parties, as well as the reasonableness of an exercise of jurisdiction by the Korean court are taken into account.

Some issues remain unsettled. First, it is uncertain how the new lawsuit should be dealt with while the foreign lawsuit is pending and judgment is not yet rendered. There is no judicial decision available on this issue as yet. Some scholars have argued that the Korean court should suspend the trial of the new case until the foreign court has rendered its final judgment. Others argue that suspension of the case is unnecessary and that the admissibility of the new suit should be decided later in light of the possibility of recognition of the future foreign judgment.[58]

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[57] Supreme Court, 14 March 1989, Seongo 88 Meu 184, 191.

[58] *International Civil Litigation* (Korean Judicial Training Institution, 1995 no. 3) 88-89.

It is also uncertain which of the decisions takes effect if a Korean judgment is rendered and becomes final while a prior foreign final judgment has remained unnoticed. Some argue that the foreign judgment will not take effect on the ground that it is in breach of public policy as it contradicts a final judgment of a Korean court. Others argue that the issue should be decided by the *jori* on transboundary civil litigation.[59]

3.5. Immunities

There are special circumstances, due to the special status of the party concerned, by which the forum state lacks jurisdiction although all other requirements for such jurisdiction are fulfilled. Sovereign immunity and diplomatic immunity are typical examples.

As to sovereign immunity, there is no written law on the subject, except for a reference, in Article 18(2) of the Korea-US Friendship, Commerce and Navigation Treaty,[60] to the status of public entities of the US. The Article prescribes that an enterprise of one party, including a public-owned or public-controlled corporation, association, or government agency, does not enjoy tax exemption, nor immunity from judicial jurisdiction, compulsory execution, and other obligations regularly imposed in the territory of the other party on privately owned or privately managed companies, if it engages in commercial, industrial, shipping or other business activities. Three judgments deal with the sovereign immunity of foreign public entities. The first two decisions seem to follow the so-called 'absolute immunity' doctrine, while the third one seems to tend to adhere to the so-called 'restrictive immunity' theory.

First, there is a judgment of 1975 in a lawsuit against the state of Japan.[61] The plaintiff was a Korean resident in Japan. He had a user right to public-owned riverside land for a sightseeing boat business. The right was repealed when the land was needed for the construction of a highway. The Japanese government did not pay any compensation, whereupon the Korean filed a claim for damages against the Japanese government in a Korean court. The defendant raised the objection of sovereign immunity, which was accepted by the Supreme Court. The reasons provided were as follows:

> "Korea can not exercise judicial jurisdiction over a foreign country because it is international practice that a State does not submit to the judicial jurisdiction of a foreign country, with the exception of the existence of special treaty provisions to the contrary, or waiver by the state enjoying immunity. Such exceptions do not apply in this case."

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[59] Ibid. 89.

[60] Treaty of 27 November 1956; *Korean Bilateral Treaty Series*, Bk. No. 2 (1940-1960) 501; TIAS 3947; 8 UST 2217.

[61] Supreme Court, 23 May 1975, Koji 74 Ma 281.

The second decision, of 1985, concerned a suit by a Korean citizen against Thailand.[62] An officer of the Thai Embassy in Korea had borrowed money from a Korean, the alleged purpose of which was the payment of salaries to employees of the Embassy. The officer issued a pre-dated check with the seal of the Thai Embassy. On the day of payment, the Thai Embassy declined payment on the ground that the officer was not empowered to issue a check with the seal of the Embassy and had embezzled the money. The Embassy consequently claimed not to be liable for the check. The Korean creditor filed a suit against the Thai Government but the defendant pleaded sovereign immunity. The Supreme Court accepted the plea on the same reason as that provided in the case mentioned above. It added the following reasoning:

> "Though there is a substantial number of countries which in their domestic laws and judicial decisions do not recognize sovereign immunity with regard to transactions of a private character, this practice has not attained the status of customary international law."

In a recent case of 1994, the Korean court seems to have changed its attitude.[63] A Korean had leased an electronics shop in a US government-managed hotel in Seoul. An officer of the hotel had said that due to the special status of the US Army in Korea, all goods sold in the shop were tax-free. The Korean believed this and a corresponding clause was included in the contract. As it turned out that some goods sold in the shop were not tax-free after all, the Korean filed a suit against the US Government seeking indemnity for the resulting loss. The defendant raised the sovereign immunity objection, which the Seoul District Court rejected on the following ground:

> "An act of a foreign state or its agency is not always immune from the jurisdiction of the domestic court of another state. If [the act] is of a private economic or commercial character, it is not immune from the jurisdiction of a domestic court."

This being the typical argument in favour of restrictive immunity, it might be assumed that Korea has changed its attitude by following the restrictive immunity doctrine, but for the fact that the decision was taken by a lower court. Nevertheless, most authors in Korea support the doctrine of restrictive immunity.[64]

Diplomatic and consular immunity is covered by the Vienna Conventions on diplomatic and consular relations, and international customary law on the

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[62] Seoul Civil District Court, 25 September 1985, Seongo 81 KaHab 5303.

[63] Seoul Civil District Court, 22 July 1994, 90 KaHab 4223.

[64] LEE SIYOON, op. cit. n. 10 p. 54; CHOI KONGWOONG, op. cit. n. 24 p. 255.

matter. Korea ratified the former in 1970 and the latter in 1977.[65] It should be noted that international law binding on Korea is regarded as having the same effect as domestic law in the Korean legal system.

Under Article 23 of the Korea-US Status of Forces Agreement[66] the US Army and its personnel are immune from the jurisdiction of Korean courts or at least subject to special judicial procedures. The US and Korean Governments waive mutual claims for damage to military property or military personnel of the other party if the claim has arisen during the performance of official duties. In case of a claim for damage to other public property as a result of the performance of official duties, it is settled by arbitration. Claims for damage to a civilian as a result of the performance of official duties by US Army personnel are to be settled following the procedural and substantive law applicable to similar claims arising from the performance of official duties by Korean Army personnel. Claims for damage to a civilian arising from private activities of US Army personnel are to be treated as a normal civil case except that it is preceded by a special mediation procedure. Under this special procedure, the Korean government hears the case and fixes the amount of compensation. If the victim accepts the amount, the case ends there. If he refuses, a suit may be filed.

4. SERVICE OF PROCESS

4.1 Service of process in general

Korea is not a party to any treaty relating to international cooperation on service of process, although the participation in the 1965 Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters is under discussion (in 1997). The only international law affecting service of process and binding on Korea is the Vienna Convention on Consular Relations. Domestic law on the matter is to be found in the KCPC[67] and the International Judicial Cooperation in Civil Cases Act (IJCC) of 8 March 1991.[68] The IJCC regulates judicial cooperation on service of process and taking of evidence. Before this Act took effect, the Supreme Court Guideline on the Treatment of Judicial Cooperation regulated the matters concerned. Article 3 of the IJCC prescribes the precedence of inter-

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[65] *See* 2 AsYIL (1992) 187.

[66] Agreement under Art. 4 of the Mutual Defence Treaty between the Republic of Korea and the USA, regarding facilities and areas and the status of US armed forces in the Republic of Korea, 9 July 1966, *Korean Bilateral Treaty Series*, Bk. No. 3 (1960-1970) 695; TIAS 6127; 17 UST 1677.

[67] Art. 176 on Methods of Service in a Foreign Country, Art. 179 on Service by Public Notice.

[68] Act No. 4342.

national law over domestic law in case of service of process,[69] but it has no real effect, as there is only domestic law on civil judicial assistance available in Korea.

4.2. Service of process in a foreign country for proceedings in Korea

The request for service of process in a foreign country is made by the presiding judge of the court where the suit is pending, through the head of the court to which the requesting judge belongs, the Director of the Court Administration Office, and the Minister for foreign affairs, to the Korean consul in the foreign country or to the competent public authority of the foreign country.[70]

Service of process by the Korean consul is invoked if the person to be served is a Korean national residing in the foreign country, if that country is a party to the Vienna Convention on Consular Relations and if such manner of service is not contrary to that country's law or its 'declaration of intent'.[71] Japan is said to be the only country that has prohibited the service of process by the Korean consul on Korean nationals in its territory.[72] In case of service by the Korean consul, the relevant documents are delivered directly to the person served, or by mail with attestation that the delivery has in fact taken place.[73]

Service by the competent public authority of the foreign country where the service is to be made may be entrusted to the court or another official agency of that country, if the country concerned has approved by law or 'declaration of intent' to entertain such entrustment.[74] Such declaration may be made expressly as well as implicitly. A translation is appended to the related documents in the official language of the country where the service is to be made or in English if the official language cannot be identified.[75] The expenses for translation shall be part of the lawsuit cost.[76] All other expenses

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[69] Art. 3. In case the treaty and other international laws corresponding to it provide otherwise with respect to judicial cooperation procedures as prescribed by this Act, the former shall prevail.

[70] IJCC, Art. 5.

[71] Ibid., Art. 5(2)(1).

[72] See RYU YUNGIL, op. cit. n. 51 pp. 126-129.

[73] IJCC, Art. 8.

[74] Ibid., Art. 5(2).

[75] Ibid., Art.7(1).

[76] Ibid., Art. 7(4).

needed for the service are to be borne by the party requesting it and the estimated amount shall be paid in advance.[77]

If both manners of service of process are legally or practically not possible, service by public notice is the last resort. In this case, the court official shall keep the documents to be served, and put up a corresponding notice on the court billboard. At the same time, the Korean ambassador or consul residing in the foreign country concerned is notified[78] by the court, through the head of the court to which the requesting judge belongs, the Director of the Court Administration Office, and the Minister for foreign affairs.[79]

4.3. Service of process in Korea for proceedings in foreign country

The IJCC provides that all services in Korea for proceedings in a foreign country shall be done through the Korean court. The request from the foreign country is made through diplomatic channels and is assigned by the Director of the Court Administration Office to a proper court, i.e. the District Court which has jurisdiction over the place where the service is to be carried out.

Neither service by mail or personal service on the defendant directly by an authority of the foreign country, nor direct service between the parties are allowed in Korea. Yet such illegitimate ways of service are reported to be frequently used in practice[80] although they may result in the refusal of recognition of the later foreign judgment. Meanwhile, some scholars argue that they should be allowed for reasons of convenience and reliability.[81]

In addition to service through the Korean court, service by a foreign consul on his nationals is permitted, if the country concerned is a party to the Vienna Convention on Consular Relations. Under this Convention the service of process is part of the functions of the consul. However, the service by a foreign consul on Koreans or nationals of a third country is not permitted.

Statistics about the numbers of service of process in Korea for foreign proceedings are not available[82] but there are reports about entrustments from the US, Germany, Switzerland, Singapore, the UK, Canada, Turkey, Norway, Australia, Hongkong and Qatar.[83]

Some requirements must be fulfilled for an entrustment from a foreign country to be effective. One is that of reciprocity. There shall be either a judicial cooperation treaty between Korea and the entrusting country or a

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[77] Ibid., Art. 9.

[78] Ibid., Art. 10(1).

[79] Ibid., Art. 10(2).

[80] RYU YUNGIL, op. cit. n. 51 pp. 114-117.

[81] Ibid., p. 119.

[82] Supreme Court, 12 July 1992, 92 Da 2585.

[83] *Kukjesabubkongjoeobmucheriyokang* [Handbook on International Judicial Cooperation] (Court Administration Office, 1985) 6.

commitment from the entrusting country that it would in turn comply with any entrustment of judicial cooperation by the Korean court.[84] Other requirements include that the entrustment may not be detrimental to the public morals in Korea; that the entrustment is made through diplomatic channels; that the entrustment of service is made in writing specifying the name, nationality, address or residence of the person to be served; that a translation in the Korean language is appended; that the entrusting country guarantees the payment of expenses needed for implementing the entrusted matters.[85]

5. THE TAKING OF EVIDENCE

5.1. The taking of evidence in a foreign country for proceedings in Korea

Like the service of process, taking of evidence is regulated only by domestic law. Korea is not a party to any treaty on judicial cooperation, such as the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The main domestic law is contained in the IJCC and some provisions of the KCPC.[86] In the absence of a treaty, the question whether the requested country entertains an entrustment for the taking of evidence depends on international comity.

The request for the taking of evidence in a foreign state is made by the presiding judge in the case at hand. As in the case of a request for service of process, the request for taking evidence is made through the head of the court to which the requesting judge belongs, the Director of the Court Administration Office, and the Minister for Foreign Affairs.[87] The taking of evidence is done by the Korean consul in the foreign country or by the competent public authority of the foreign country concerned. A direct request by the parties to a foreign court or foreign authority is not permitted. The taking of evidence by the Korean consul can only take place if the person undergoing inquiry is a Korean national who is residing in the foreign country, if that country is a party to the Vienna Convention on Consular Relations, and if the mode is not contrary to that country's law or its 'declaration of intent'.[88] No case on the application of this procedure has been reported

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[84] IJCC, Art. 12.

[85] IJCC, Art. 12.

[86] Art. 268(3) on Investigation of Evidence in a Foreign Country; Art. 327 on the Presumption of Authenticity of a Foreign Official Document.

[87] IJCC, Art. 6.

[88] IJCC, Art. 5.

yet.[89] Therefore, it is said that the only realistic way of taking evidence is by the court or other official agency of the country where the evidence is taken.

A translation must be appended to the related documents in the official language of the country where the service is made, or in English if the official language thereof cannot be identified. The expenses for the translation shall be part of the lawsuit cost. All other expenses needed for the taking of evidence are to be borne by the requesting party and the estimated amount shall be paid in advance.

The law does not exclude any kind of evidence from being acquired. There are, however, no reported cases on requests for the production of documents, the summons of a witness, or the consultations of an expert. The only form practised so far has been the questioning of persons.[90]

5.2. The taking of evidence in Korea for the proceedings in a foreign country

Taking evidence for foreign proceedings can only be done by a Korean court. The entrustment by the foreign country is made through diplomatic channels and is assigned to the proper court by the Director of the Court Administration Office.[91] This is the District Court having jurisdiction at the place where the evidence or the other objects to be verified or appraised are located.[92]

In order for the entrustment by the foreign country to be entertained in Korea, there shall be either a judicial cooperation treaty on which the entrustment is based or a commitment by the entrusting country that it will comply with any entrustment by the Korean court. In addition there are the following other requirements:

> "The taking of the evidence in question must not be detrimental to the public morals of Korea; the entrustment is made through diplomatic channels; the entrustment is made in writing specifying the party, a summary of the case, the kind of evidence, the name, the nationality, the address or residence of the person to be heard and the matters to be inquired in case of the hearing of a witness; a translation in the Korean language must be appended; the entrusting country guarantees the payment of expenses needed for the implementation of the entrusted matters."[93]

The law does not prescribe any restrictions as to the methods of evidence-taking such as the production of evidence, the consultation of experts, and

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[89] RYU YUNGIL, op. cit. n. 51 p. 162.

[90] Ibid.

[91] IJCC, Arts. 13 and 14.

[92] IJCC, Art. 11.

[93] IJCC, Art. 12.

the hearing of witnesses or the party concerned.[94] However, as is shown in the following case, one may presume that entrustment of compulsory evidence examination is not entertained in Korea. A German court requested the blood sampling of the defendant in a German proceeding for the determination of a child-father relationship. The entrustment said that compulsory blood sampling was a permissible method of collection of evidence under German law if the defendant refuses to render cooperation voluntarily. The Korean court sent a summons to the defendant, who refused to appear. It thereupon terminated the procedure and concluded on the impossibility of the taking of evidence.[95]

6. RECOGNITION AND EXECUTION OF FOREIGN JUDGMENTS

Korea is not a party to any treaty on recognition and enforcement of foreign judgments, and one therefore has to turn to domestic law to look for an answer to the question of recognition and execution of foreign judgments. Recognition is dealt with in Article 203 of the KCPC and execution in Articles 476 and 477.

A foreign judgment is recognized or executed after it is confirmed that it meets the formal requirements set by the law without inquiry into its contents. In deciding whether a foreign judgment meets the public policy requirement, its contents may, however, be considered.[96] By recognition, the foreign judgment obtains an effect identical to that of final and conclusive judgment in the country where it was rendered. The requirements for recognition of foreign judgments are as follows (Art. 203 KCPC):

> "A foreign judgment which is final and conclusive shall be valid only upon the fulfilment of the following conditions:
>
> 1. The jurisdiction of the foreign court is not denied by domestic or treaty law;
>
> 2. The defeated defendant, if he is a citizen of Korea, has received the summons or any other orders necessary for the commencement of the suit through other than public notice, or has voluntarily responded to the claim without such notice;
>
> 3. The foreign judgment does not violate good morals and the social order of Korea; and

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[94] RYU YUNGIL, op. cit. n. 51 p. 159.

[95] Family Court, 89 Cheu 1 Kongjosakun [Cooperation case].

[96] CHOI KONGWOONG, op. cit. n. 24 p. 401.

4. There is mutual guarantee."[97]

A foreign judgment must be final and conclusive in order to be recognized. Any kind of final and conclusive judicial decision having the character of a judgment is considered to meet this requirement, regardless of its name and format.[98] The finality, conclusiveness and judgment character of the foreign judicial decision are determined by Korean law. 'Conclusive' means that no further general remedy is available to the defeated party to obtain a change of the judgment. 'Final' means that no further court action is required to declare the matter exhaustively adjudged. 'Judgment' means an official decision of the court on the claim object of the litigation. Usually, it is rendered at the end of the proceedings, but it may be rendered in the middle of the proceedings if there are several claims and if an intermediate judgment is necessary for the further proceedings. No differentiation is made between the different types of judgment: execution judgment, declaratory judgment, or judgment changing the legal status of the parties.

The requirement of international jurisdiction of the foreign court is called 'indirect international jurisdiction'. As mentioned above in section 3.1., its criteria are the same as that of direct international jurisdiction. This is illustrated by a decision of the Supreme Court of 1988 on the recognition of a foreign divorce judgment. In that judgment, the Supreme Court reiterated the reasoning provided in its decision on direct international jurisdiction, as follows:

> "In transnational divorce cases, the issue of the international jurisdiction of the foreign court should be decided by such criteria as the fair and just settlement of the case and the policy consideration of the recognition of a foreign judgment. In light of these criteria, international jurisdiction is exercised by the courts of the country where the domicile of the defendant in the international divorce case is located, except in special circumstances, such as unknown place of domicile or voluntary response by the defendant so that the exercise of jurisdiction does not breach his due process rights."[99]

In a 1995 case on the recognition of a product liability judgment by a court in Florida, USA, the Supreme Court repeated the above reasoning. It is interesting that the Supreme Court also applied the criteria of the reasonable expectation of the defendant and of the substantial connection, similar to those applied in the US legal system. It held:

> "In product liability cases, *jori* demands that the question of whether to exercise international jurisdiction should be decided by taking into account the reasonable expectation of the producer that damage might arise and that a suit

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[97] This Korean term has a meaning different from 'reciprocity'. It is deemed to be met if the other country recognizes and executes Korean judgments under the same or more favourable conditions than those in Korea.

[98] CHOI KONGWOONG, op. cit. n. 24 p. 396.

[99] Supreme Court, 12 April 1988, Seongo 85 Meu 71.

> might be filed at the place where it is in fact instituted, and the existence of a substantial connection between the producer and the place where the damage occurred. In determining this connection, an important factor is provided by the acts of the producer which are consciously aimed at obtaining business profit in that very place. . . . The facts in the present case show that there was no such reasonable expectation or substantial connection."[100]

The requirement of service of process applies only when the defeated defendant holds Korean nationality. Its purpose is to guarantee the right of Korean citizens to proper notice of the commencement of a case. Thus, the requirement is interpreted to include the prohibition of service by public notice and any other extraordinary mode of notice.[101] Notice by mail to a Korean national residing in Korea is considered to be such an extraordinary mode, even though it is a legitimate mode of notice under the law of the country where the judgment has been rendered.[102] As to voluntary response in case of absence of notice, it is interpreted to include not only general appearance but also special appearance, as the requirement is deemed to be fulfilled by the mere fact that the defendant knew about the filing of the suit.[103]

The public policy requirement is applied in extraordinary situations where the international comity of recognizing foreign judgments gives way to the public policy of the forum state.[104] Public policy here is interpreted to include procedural justice as well as substantive justice.

Finally, the 'mutual guarantee' requirement is deemed to be satisfied if it can be shown that a Korean judgment would be recognized in the state of the original court under the same or more favourable conditions.[105]

A foreign judgment may be executed only after its validity has been pronounced by an execution judgment (*exequatur*) of a Korean court.[106] As to jurisdiction to render an execution judgment, Article 476(2) of the KCPC provides that an application seeking an execution judgment falls under the jurisdiction of the District Court located at the place of the general forum of the debtor. Where there is no such general forum, it falls under the jurisdiction of the court of the place where the property of the debtor is located. The

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[100] Supreme Court, 21 November 1995, Pangyul [Judgment] P3 Da 33607.

[101] Supreme Court, 3 December 1968, Pangyul 68 Da 1929. This judgment stated that "[i]t does not meet the requirement for a service of process if notice is given at an old office where no member of the defendant is present".

[102] CHOI KONGWOONG, op. cit. n. 24 p. 399.

[103] Ibid., p. 400.

[104] Seoul High Court, 14 February 1985, Seongo 84 Na 4043.

[105] E.g., Supreme Court, 22 October 1971, Seongo 71 Da 1393; Supreme Court 28 April 1987, Seongo 85 DaKa 1767.

[106] KCPC, Art. 476(1).

competent District Court has jurisdiction over all kinds of foreign judgments including those on issues of family law.[107]

An execution judgment is rendered upon fulfilment of the formal requirements, without considering the contents of the foreign judgment. These requirements are the same as those on recognition and are contained in Article 477 of the KCPC:

> "(1) An execution judgment shall be rendered without inquiring into the propriety of the foreign judgment;
>
> (2) An application for an execution judgment shall be rejected in the following instances: (i) if it has not been proven that the foreign judgment has become final and conclusive; and (ii) if the foreign judgment does not fulfil the conditions required by Article 203."

7. ARBITRATION

Korea is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[108] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The most important domestic law on arbitration is the Arbitration Act[109] which applies to both domestic and international arbitration. A treaty duly concluded and published has the same effect in the Korean legal order as a statute. Since the conventions relating to international arbitration are *lex specialis*, they have priority over the Arbitration Act. Therefore, the Arbitration Act applies to international arbitration only if there are no treaties applying to the case or if there is no treaty provision applicable to the case.[110]

An international arbitration agreement is respected in Korea and a foreign arbitral award is recognized and executed if it fulfils the requirements of either of the above Conventions. The details are beyond the scope of this paper. Mention will, however, be made of the provisions necessary to obtain some insight into the requirements for an arbitration agreement to be respected and for an arbitral award to be executed.

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[107] Supreme Court, 28 December 1982, Pangyul Meu 25; Seoul High Court, 3 May 1982, Seongo 82 Reu 5.

[108] The Republic of Korea made a commerce and a reciprocity reservation upon ratification of the New York Convention.

[109] Act No. 1767 of 3 March 1966.

[110] LEE HOWON, 'Oykukjungjepanjeongeui Seunginkwa Jiphaeng' [Recognition and execution of foreign arbitral awards], in *Seopoisabubeui Jemunje* [Legal problems of transnational transactions] (Court Administration Office, 1986) 663; HONG CHANGSIK, *Oykukjungjepanjeongeui Seunginkwa Jiphaenge Kwanhan Kukjeyeonhabhyubyak Haeseol* [Commentary on the New York Convention] (Korean Arbitration Institute, 1972) 41.

An arbitration agreement shall be made up in writing, or stipulated in a contract or contained in an exchange of correspondence or telegrams.[111] No arbitration agreement is allowed regarding matters which are not at the disposal of the parties. These matters of public interest include patent disputes and antitrust disputes. The existence of a valid arbitration agreement bars the institution of a lawsuit.[112]

Acts or matters which the arbitrator deems necessary for an arbitral award but which he cannot directly perform, shall be performed by the Court at the request of the arbitrator or the parties concerned.[113] An arbitrator may proceed with an arbitration procedure and deliver an award, even if a party challenges the validity of the arbitration agreement, or contends that the arbitration agreement has no relevance to the dispute, and/or that the arbitrator has no authority.[114]

An arbitral award shall have the same effect between the parties as a final court judgment.[115] An application for the annulment of an arbitral award may be filed on any of the following grounds within certain peremptory terms[116]:

> "1. The selection of the arbitrators or the determination of the arbitration rules of procedure have not come about in accordance with [the . . . Act] or with the arbitration agreement;
>
> 2. In the process of selecting the arbitrators or the determination of the arbitration rules of procedure, a party was incompetent or his representative was not lawfully designated;
>
> 3. The contents of an arbitral award requires an action which is prohibited by law;
>
> 4. The parties have not been examined properly in accordance with the arbitration procedures; or the arbitral award is not properly reasoned;
>
> 5. The case falls under items 4 through 9 of Article 422 of the Code of Civil Procedure."

The right to apply for annulment of the award lapses upon agreement reached on the dispute relating to the above-mentioned item 4.[117] The compulsory

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[111] Arbitration Act, Art. 2.
[112] Arbitration Act, Art. 3.
[113] Ibid., Art. 9.
[114] Ibid., Art. 10.
[115] Ibid., Art. 12.
[116] Ibid., Art. 13(1).
[117] Ibid., Art. 13(2).

execution of an arbitral award may only take place after its validity has been affirmed by an execution judgment.[118]

[118] Ibid., Art. 14.

LEGAL MATERIALS

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

INDIA

JUDICIAL DECISIONS**

Status of refugees; Human rights; Right to equality before the law; Right to life and personal liberty; Applicability of human rights to aliens; Indian Constitution Articles 14 and 21; Indian policy of conferment of citizenship to members of the Chakma tribe

Supreme Court, 9 January 1995[1]
AIR 1996 SC 1234, SCALE 1996 Vol.1 p.155

A.M. AHMADI CJ, S.C. SEN J

NATIONAL HUMAN RIGHTS COMMISSION *v.* STATE OF ARUNACHAL PRADESH & ANOTHER[2]

A. The case

The case arose before the Supreme Court of India through a public interest action (class action) by the National Human Rights Commission of India (NHRC) in the form of a writ petition under Article 32 of the Indian Constitution: this Article provides a right to constitutional remedies through the Supreme Court for violations of fundamental rights. The NHRC is empowered to move the Supreme Court in appropriate cases, pursuant to Section 18 of the Human Rights Protection Act, 1993. The NHRC's allegation was that some 65,000 Chakma/Hajong tribals, settled mainly in the State of Arunachal Pradesh, were being persecuted by sections of the citizens of that State.

A large number of Chakmas had been displaced from the erstwhile East Pakistan as a result of the Kaptai Hydel Power Project in 1964. They took shelter in the nearby Indian States of Assam and Tripura and most of them later became Indian citizens. When Assam expressed its inability to bear the whole burden of the refugees, some of them who took refuge in Assam were resettled in Arunachal Pradesh (or North East Frontier Agency as it then was) after consultation with the local administration. These

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* Edited by KO SWAN SIK, General Editor.
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[1] Judgment in Writ Petition (C) No.720 of 1995.
[2] The second respondent was the Union of India.

Asian Yearbook of International Law, Volume 6 (Ko Swan Sik *et al.*, eds.
, pp. 203-232

resettled Chakmas were about 4,012 at that time. They were allotted lands in consultation with the local tribes and also granted some financial assistance. The present population of these Chakmas in Arunachal Pradesh, after two generations, amounts to some 65,000.

In recent years, however, thanks mainly to local politics, the relations between the original population and the Chakmas deteriorated to a point that certain sections of the former took to repressive measures against the latter. The All Arunachal Pradesh Students Union (AAPSU) called on the Chakmas to quit Arunachal Pradesh by 30 September 1995 and threatened to use force if its demand was not acceded to. Yet, in response to a communication from NHRC at the instance of a Delhi-based NGO, the People's Union of Civil Liberties, the State administration reported that the situation was totally under control.

On 15 October 1994, a Chakma NGO (the Committee for Citizenship Rights of the Chakmas - CCRC) filed a representation with NHRC complaining of the persecution of Chakmas. NHRC treated this as a formal complaint and concluded *prima facie* that the Arunachal Pradesh authorities were acting in coordination with AAPSU with a view to expelling the Chakmas from the State. NHRC consequently approached the Supreme Court to seek appropriate reliefs.

B. The Judgment

The Chief Justice delivered the judgment of the Court.

The Court noted at the outset that "[t]he Chakmas have been residing in Arunachal Pradesh for more than three decades, having developed close social, religious and economic ties. To uproot them at this stage would be both impractical and inhuman".[3]

As to the issue of conferring citizenship on the Chakmas the second respondent (the Union of India) referred to the fact that Chakma children born in Indian territory prior to 1987[4] had legitimate claims to Indian citizenship. The Court's attention was also drawn by the Joint Statement issued by the Prime Ministers of India and Bangladesh in February 1972 pursuant to which the Union government had conveyed to all the States [of the Union] concerned its decision to confer citizenship on the Chakmas under Art.5(1)(a) of the Citizenship Act.[5] The State government of Arunachal Pradesh, however, was found to frustrate the process by not forwarding the individual applications to the Union government authorities.[6]

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[3] Para.10.

[4] I.e.prior to the 1987 amendment of the Citizenship Act.

[5] Citizenship Act (No.57) of 1955.

[6] The State government contended that the issue of citizenship of the Chakmas has been conclusively determined by the decision of the Supreme Court in *State of Arunachal Pradesh* v. *Khudiram Chakma* (1994 AIR SCW 904). In the present case the Supreme Court said that this contention was 'misconceived'. *See* para.17. That case dealt with Chakmas who migrated to India in 1964, and who had left the lands allotted to them and had strayed out and secured land in another area by private negotiations. When the State government (of Assam) questioned the legality of the transaction and ordered them to move to the area earmarked for them, the order was challenged on the ground that Chakmas who had settled there were citizens of India, invoking Sec.6-A of the 1955 Act. This Article (made pursuant to the so-called Assam Accord) provides that all persons of Indian origin who had come to Assam before 1 Jan.1966 from territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985, and who had been

The Court also noted the contention of the first respondent (the State government) that since the Chakmas were foreigners, they were not entitled to the protection of fundamental rights except Article 21 [of the Constitution, recognizing the right to life and personal liberty], and that, consequently, the authorities may, at any time, ask the Chakmas to move and ask the Chakmas to quit the State, if they so desire.[7] The first respondent emphasized the *sui generis* constitutional position of Arunachal Pradesh State resulting from its ethnicity, which debarred it from permitting outsiders to be settled within its territory[8], and reiterated its lack of financial resources for such contingencies. The Court found it "clear that there exists a clear and present danger to the lives and personal liberty of the Chakma".

Having rejected the first respondent's arguments the Court held:

> "We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, he be a citizen or otherwise, and it cannot permit any body or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by the local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, Constitutional and statutory, to be considered for being registered as citizens of India."[9]

Accordingly, the Court allowed the NHRC petition and ordered that the State of Arunachal Pradesh shall protect "the life and liberty of every Chakma residing within the State" and shall repel, even by use of force, any attempt by any organized group to forcibly evict the Chakmas and that "except in accordance with law, the Chakmas shall not be evicted from their homes and shall not be denied domestic life and comfort therein".[10]The Court also ordered that the State "shall not evict or move the concerned persons from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision in that behalf".[11]

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ordinarily resident in Assam since their entry into Assam shall be deemed to be citizens of India as from 1 Jan.1966. Others who had come to Assam after 1 Jan.1966 but before 25 March 1971 and had been ordinarily resident in Assam since then, could register themselves. The persons concerned in the case had claimed citizenship under this special provision, but the High Court, affirmed by the Supreme Court, held that they did not fall under the said category by having strayed away from Assam into an area within the later State of Arunachal Pradesh.

[7] Para.11.

[8] Paras 12,14.

[9] Para 20.

[10] Para 21(2).

[11] Para 21(5)

C. Comments[12]

A few comments may be offered on this case. First, India has had its share of refugees from its neighbouring countries in different changing economic and political contexts. Its non-participation in the various international refugee conventions has been chiefly due to this continuing political and economic burden of refugees. Second, the present case highlights some of the problems of economic-environmental refugees, in so far as the Chakmas were originally displaced by a hydro-electric project in the erstwhile East Pakistan and it should have been the primary responsibility of the Pakistan Government to rehabilitate them. Third, having, however, played host to these hapless refugees since 1964, for about three decades, the Indian authorities (in this case, a State of the Indian Union) have a duty to protect their life and liberty, and respect their right to equality before the law and ensure equal protection of the laws. Fourth, these refugees have a right to have their citizenship applications duly considered by the Central Government and until then, a right not to be uprooted or evicted. Whether this amounts to a temporary right of *non-refoulement* is arguable. Finally, those fundamental rights under the Indian Constitution which apply to all *persons* may in appropriate cases apply to refugees. These include the right to equality before the law and equal protection of laws (Article 14), the right to protection against *ex post facto* law (Art. 20), the right to life and personal liberty (Article 21), the right to protection against arrest and detention in certain cases (Article 22), the right against exploitation (Articles 23 and 24), the right to freedom of conscience and religion (Article 25), the right against religious taxes (Article 26), and the right to move the Supreme Court to enforce the fundamental rights (Article 32).

From an international law point of view, the traditional rule has been that it is the sovereign right of a state to decide whether or not to admit a foreigner (including a refugee) or to grant him shelter. However, once admitted, the law of the state shall apply to the alien. The dictates of the international law on human rights, however, have now become part of the legal systems of most civilized societies. The International Covenant on Civil and Political Rights, 1966 clearly stipulates [Art. 4(2)] that certain human rights are non-derogable in any circumstances and that they include the right to life (Art. 6), the right against torture or cruel, inhuman and degrading treatment (Art. 7), the right not to be held in slavery (Art. 8), the right not to be imprisoned on the ground of inability to fulfil a contractual obligation (Art. 11), the right not to be subjected to *ex post facto* law (Art. 15), the right to recognition as a person before the law (Art. 16) and the right to freedom of thought, conscience and religion (Art. 18). Once admitted to the territory of a state, a refugee has, therefore, the right to expect the protection of these non-derogable basic human rights. The above decision of the Indian Supreme Court appears to endorse this international law position in so far as its application through the Indian law is concerned, although the Court did not pause to consider international law aspects as such.

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[12] By V.S. MANI.

Human rights; Right to equality before the law; Right to residence; Right to life and personal liberty; Indian Constitution Arts.14,19,21; Inter-national Covenant on Economic, Social and Cultural Rights, Art.11

Supreme Court, 14 December 1994[13]
1995 Supp (2) SCC 182

K. RAMASWAMY, S. MOHAN AND N.VENKATACHALA JJ

P.G. GUPTA *v.* STATE OF GUJARAT AND OTHERS

A. The Case

The Gujrat government had allotted 396 newly constructed houses to its employees on rental basis. Subsequently, the Government converted these houses from a "Lower Income Group Housing Scheme" to a "Hire Purchase Scheme". Under the converted scheme, houses would be allotted to various categories of employees fulfilling two conditions: first, continuous residence for five years; and second, not having retired from service. Later the Government passed two resolutions. The allotment of houses was sought to be given, *inter alia,* to certain categories of employees transferred out of the city of Ahmedabad.

This was challenged before the State High Court. The latter set aside the entitlement to this special allotment, while upholding the other criteria for other categories.

In appeal it was argued that the State government had no power under the State law to pass any resolution contrary to the statutary regulation of allotment; that allotment on priority basis defeated the rights of the weaker segments among the employees; that the criteria were irrational and arbitrary and violative of Articles 14 (equality before the law), 19(1)(e) (right to residence), and 21 (right to life and personal liberty) of the Constitution of India.

B. The Judgment

N. Venkatachala J. delivered the judgment. The Court held, *inter alia*:

> "7. It is true that Gujarat Housing Board had constructed houses under low income group scheme for allotment to the poorer segments of the society within prescribed annual income. Article 19(1)(e) protects the right to residence and settlement in any part of the territory of India. The protection of life assured under Article 21 has been given expanded meaning of right to life. It is settled law that all the related provisions under the Constitution must be read together and given meaning of widest amplitude to cover variety of rights which go to constitute the meaningful right to life. The Preamble to the Constitution says that the people of India having resolved to secure to all its citizens social and economic justice also made it subject to equality of status and opportunity to promote the dignity of the individual in the united and integrated Bharat. Article 37 declares the rights in Part IV [as] fundamental law in the governance of the country. Article 39(b) enjoins that the owner-

[13] Before the Division Bench of the Supreme Court through Civil Appeal No.1529 of 1988 with Nos.1525-28 of 1988 from a judgment of the High Court of the State of Gujrat of 7 Nov.1987. With comment by GOVINDRAJ HEGDE.

> ship and control of the material resources of the community are to promote the welfare of the people by securing social and economic justice to the weaker sections so as to subserve the common good, to minimise the inequalities in income and endeavour to eliminate inequalities in status. The State, thereby, evolved the scheme to provide facilities and opportunities to the individuals and also groups of people who have no houses of their own. Article 46, in particular, enjoins that the State shall promote with special care the economic interest of the weaker sections of the people and ... protect them from social injustice.
> 8. Article 11(1) of the International Covenant on Economic, Social and Cultural Rights laid down that the States parties to the Covenant recognise the "right of everyone to an adequate standard of living for himself and for his family including food, clothing and housing and to the continuous improvement of living conditions". The States parties will take appropriate steps to ensure the realisation of these rights. Recognising these obligations of the State and [in order] to give effect to the essential importance of international co-operation [and] the directions contained in Articles 38,39 and 46, the Housing Scheme for allotment to lower income group of the people was made. Possession of real property is the basis for and the symbol of wealth and influence in society. To the poor, settlement with a fixed abode and right to residence guaranteed by Article 19(1)(e) remain more a teasing illusion unless the State provides them the means to have food, clothing and shelter so as to make their life meaningful and worth living with dignity."

The Supreme Court rejected the appeal on the ground that the State's housing allotment was flawed in the face of the law on human rights.

C. Comments

[See the comments under the next case.]

Human rights; Universal Declaration of Human Rights 1948, Art.25; International Covenant on Economic, Social and Cultural Rights 1966, Art.7; Constitution of India, Art.14

Supreme Court, 10 May 1995[14]
AIR 1995 SC 1811

K.RAMASWAMY AND N.VENKATACHALA JJ

LIFE INSURANCE CORPORATION OF INDIA AND ANOTHER (appellants) *v.* CONSUMER EDUCATION & RESEARCH CENTRE AND OTHERS (respondents)

A. The Case

Life Insurance Corporation of India (LIC) had turned down proposals for housing insurance as presented by insurance agents on behalf of individual respondents. LIC

[14] Through civil appeal No.7711 of 1995 and cross-appeal No. 5651 of 1995, on a Division Bench decision by the High Court of the State of Gujrat, of 31 January 1994.

imposed conditions which were assailed as arbitrary, discriminatory, and violative of Articles 14, 19(1)(g) and Article 21 (right to life) of the Constitution.

The High Court of Gujrat declared a part of the conditions, namely, ". . . [P]roposals for assurance under the plan will be entertained only from persons in Government or Quasi Government organisation or a reputed commercial firm which can furnish details of leave taken during the preceding year under Table 58" as violative of equality and hence unconstitutional and invalid. This decision came in for appeal and cross-appeal before the Supreme Court.

B. The Judgment

The judgment was delivered by K.RAMASWAMI J. The Court held, *inter alia*:

> "14. From this material matrix, the question emerges whether the appellant is justified in law . . .[to] restrict the term policy only to the specified class, namely, salaried persons in Government, quasi-Government or reputed commercial firms. The Preamble, the arch of the Constitution, assures socio-economic justice to all Indian citizens in matters of equality of status and of opportunity with assurance to dignity of the individual. Article 14 provides equality before law and its equal protection. Article 19 assures freedoms with right to residence and settlement in any part of the country and Article 21 by receiving [an] expansive interpretation of [the] right to life . . . to right to livelihood. Article 38 in the Chapter [on] Directive Principles enjoins the State to promote the welfare of the people by securing and protecting effective social order in which socio-economic justice shall inform all the institutions of the national life. It enjoins to eliminate inequality in status, to provide facilities and opportunities among . . . individuals and groups of the people living in any part of the country and engaged in any avocation. Article 39 assures to secure the right to livelihood, health and strength of workers, men and women and the children of tender age. The material resources of the community are required to be so distributed at best to subserve the common good. Social security has been assured under Article 41 and Article 47 [which] impose a positive duty on the State to raise the standard of living and to improve public health.
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> 15. Article 25 of the Universal Declaration of Human Rights envisages that every one has the right to [a] standard of living adequate for the health and well-being of himself and of his family including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control. Article 7 of the International Covenant on Economic and Social Rights equally assures [the] right [of] everyone to the enjoyment of just and favourable conditions of work which ensures not only adequate remuneration and fair wages but also decent living to the workers for themselves and their families in accordance with the provisions of the Covenant. [The] Covenant on [the] Right to development enjoins the State to provide facilities and opportunities to make rights a reality and truism, so as to make these rights meaningful."[15]

C. Comments[16]

The International Covenant on Economic, Social and Cultural Rights, 1966 and the Universal Declaration of Human Rights are often referred to by the Indian Courts when called

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[15] Paras. 14-15.

[16] By Govindraj Hegde.

upon to interpret constitutional and other statutory provisions. In *P.G. Gupta's* case the Supreme Court of India encountered no intricate legal issues. The Court had to determine simply whether the State High Court was justified in disentitling certain categories of Government employees for the allotment of houses on a special scheme. But in an oblique way this question had a bearing on the interpretation of the rights guaranteed under the Indian Constitution, particularly the right to reside and settle in any part of the territory of India under Article 19(1)(e). The unique point to note here was the willingness of the Court to mention Article 11(1) of the International Covenant, although it was never raised by the appellant. For its decision, the Court relied upon its two earlier cases, namely, *Olga Tellis* v. *Bombay Municipal Corporation*[17] and *Shantistar Builders* v. *Narayan Khimalal Totame.*[18] In the former case 'right to life' under Article 21 of the Indian Constitution was interpreted to include the 'right to livelihood'. The right to life under Article 21 was given an extended meaning in *Shantistar Builders* encompassing in its sweep a reasonable accommodation to live in. A reasonable accommodation does not necessarily mean adequate housing facilities, because each state's economic and social problems vary. No new propositions were offered by the Court as it had simply applied the *ratio* in the above two cases to *P.G. Gupta's* case.

The *LIC of India* case presents a different picture. A clause in an insurance policy restricting benefits only to the salaried class in Government, quasi-Government and reputed commercial firms was declared unconstitutional. The Court in this case recalled a number of its earlier decisions. In *CESC Ltd.* v. *Subash Chandra Bose*[19] the Court had interpreted the meaning of Article 19(1)(e) of the Indian Constitution *vis-à-vis* Article 25(2) of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Economic, Social and Cultural Rights. The Court in that case had held the right to 'social justice' as a fundamental right. Another important decision on which the Court relied was *Regional Director, Employees State Insurance Corporation* v. *Francis De Costa*[20] where the Court emphasized the need to give an effective interpretation to the Indian Employees' State Insurance Act. It held that the right to medical benefit is a fundamental right. Therefore the Court in the *LIC of India* case struck down the conditions in the insurance policy as violative of fundamental rights guaranteed in the Indian Constitution in view of their arbitrary exclusion of other similarly placed individuals.

However, the merits of these decisions should not obscure the fact that the Supreme Court had failed to analyse properly the relevant international human rights law provisions in interpreting the provisions of the Indian Constitution.[21] Instead it merely stated them and made no attempt whatsoever to analyse them. Secondly, the Court also failed to examine how 'fundamental' are the 'second generation' human rights (social, economic and cultural rights). The Court appears to take the facile course of looking at all human rights through the device of Article 21 of the Indian Constitution.

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[17] *Supreme Court Cases* 1985, Vol. 3, pp. 545, 572.
[18] *Supreme Court Cases* 1990, Vol. 1, p. 520.
[19] *Supreme Court Cases* 1992, Vol. 1, p. 441.
[20] *Supreme Court Cases* 1993, Vol. 1, Supp. 4, p. 100.
[21] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 imposes an obligation on promotional basis "to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the Covenant by all appropriate means, including particularly the adoption of legislative measures".

Despite these comments, these decisions seek to develop a universal view of human rights based on developmental stages, and project a judicial willingness to treat the international human rights instruments almost as part of the domestic human rights law.

State succession; Act of State in municipal context

Supreme Court, 9 May 1995[22]
1995 Supp (3) SCC 297

N. VENKATACHALA AND KULDIP SINGH JJ

MAHARAJA KUMAR KHARAK SINGH *v.* STATE OF PUNJAB AND
MAHARAJA KUMAR GURBAX SINGH *v.* STATE OF PUNJAB AND OTHERS

A. The Case

The case related to a farm land, 'Bir Bhadson', claimed by the appellants to have been part of the private property of the erstwhile Ruler of the Princely State of Nabha. Nabha along with seven other princely states of the Punjab signed a covenant on 5 May 1948 (which came into force on 20 August 1948) for the formation of a new state, the Patiala and East Punjab States Union (PEPSU). In 1956 the PEPSU merged with the State of Punjab, a State of the Union of India.

On 25 April 1948 the Ruler of Nabha wrote a letter to appellant GURBAX SINGH (one of his brothers), whereby he made over the above farm land to his two brothers (appellants). GURBAX SINGH returned to India from overseas some time in November 1948 and accepted the conveyance of the farm land. The PEPSU and later the State of Punjab refused to release the land and hence the present case.

Actions for recovery of possession were initiated in 1960. The District Judge, Patiala, held that the non-recognition of the rights of the plaintiffs in regard to the grant of land covered in the above letter was an 'act of state', and hence adjudication by a municipal court upon the correctness of such an 'act of state', whether it had reference to public or private rights, was beyond its competence as a municipal court. Consequently, it dismissed the suits. The case was then taken up by the plaintiffs in 1963 before the Punjab and Haryana High Court, which agreed substantially with the findings of the District Judge. The case then came before the Supreme Court.

B. The Judgment

The judgment was delivered by VENKATACHALA, J.

The crux of the case was whether the land in question was part of the Nabha ruler's private property or part of the state property of the Nabha State. Neither in his letter nor in the documents relating to the covenant did the Ruler clarify if the land in question was his private property, or whether his letter to his brother amounted to its effective conveyance. The crucial point of fact was that the conveyance made by the Ruler of Nabha in favour of his brothers was accepted by the appellant only after the covenant on the state merger had come into force.

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[22] Civil appeal No.316 of 1978, against the judgment of the Punjab and Haryana High Court of 9 March 1977.

> "If that be so, 'Bir' continued to be the state property of Nabha State till 5-5 1948, when [the] covenant for bringing into existence of [the] State of PEPSU was signed and further up till 20-8-1948 when the State of PEPSU actually came into existence, becomes indisputable."[23]

The question whether all the State properties came to vest in the State of PEPSU was answered by the Court in the affirmative.[24] The Court then continued:

> "16. Next question is . . . is it open to a person, who claims title to 'Bir' . . . to recover possession of the same from the successor State of PEPSU of Nabha State or the successor State of Punjab of PEPSU although it was the subject-matter of the said covenant . . .
> 17. [In case of] state properties of Nabha for which private parties have a claim as in the present case, can they claim . . . by filing a suit in an ordinary civil court (Municipal Court) on the plea that the sovereign Ruler . . . entering into the covenant with other sovereigns had wrongly transferred that property to the new State of PEPSU so as to vest in it?"

This question was answered by the Court in the negative on the ground of the act of state doctrine, with reference to, *inter alia,* Article 363(1) of the Indian Constitution. In the Court's view, the subject-matter of the case was "the subject of the covenant between sovereign Rulers of independent States".

Therefore, the appeal was dismissed.

C. Comments[25]

There were more than 500 princely states in India at the time of Independence in 1947 and they became part of the Indian Union through covenants, sanads and agreements. All questions relating to these relationships are, pursuant to Article 363 of the Indian Constitution, debarred from adjudication by the Indian judiciary. While this bar was imposed in view of the territorial integrity of India, there is no doubt that a host of legal issues are still beckoning legal researchers even after 50 years of Indian independence.[26]

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[23] Para 12.
[24] Para.14.
[25] By V.S. Mani.
[26] A pioneering effort in this regard has been the work by T.T. POULOSE, *Succession in international law: A study of India, Pakistan and Burma* (New Delhi,1974).

INDONESIA

LEGISLATION

Maritime territory; archipelagic waters; passage rights

Act on Indonesian Waters (Act No.6/1996 of 8 August 1996)[27]

Considering that . . .

(c) the regulation of the archipelagic legal regime in Government Regulation in lieu of Act No.4 of 1960 on Indonesian Waters is no more in accordance with the developments of the law on archipelagic states as contained in Part IV of the [UN] Convention [on the Law of the Sea];

. . .

Decides:

. . .

CHAPTER I: GENERAL PROVISIONS

. . .

CHAPTER II: THE INDONESIAN WATERS

Article 3

1. The Indonesian waters comprise the Indonesian territorial sea, the archipelagic waters and the internal waters.
2. The Indonesian territorial sea consists of a belt of sea extending to 12 nautical miles measured from the Indonesian archipelagic baselines referred to in Article 5.
3. The Indonesian archipelagic waters consist of all waters enclosed by the [situated on the inward side of the] straight archipelagic base lines regardless of their depth or distance from the coast.
4. The Indonesian internal waters consist of all waters situated on the landward side of the low-water line along the coasts of Indonesia, including all waters situated on the landward side of a closing line as referred to in Article 7.

Article 4

The sovereignty of the Republic of Indonesia over Indonesian waters extends to the territorial sea, the archipelagic waters and the internal waters and to the air space

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[27] The Act is published in the *Lembaran Negara* [State Gazette for legislative instruments] 1996 No.73, and the explanatory memorandum in the *Tambahan Lembaran Negara* [Annex to the State Gazette] No. 3647.
Translation by the General Editor. Barring manifest intention of the legislature to deviate from the provisions of the 1982 Convention on the Law of the Sea, the text of the Convention has been followed in translating the corresponding provisions of the Act.

over the territorial sea, the archipelagic waters and the internal waters, as well as to their seabed and subsoil including the natural resources contained therein.

Article 5

1. The archipelagic baseline is drawn by using straight archipelagic lines.
2. In case no straight archipelagic baselines as referred to in paragraph 1 can be drawn, normal baselines or straight baselines shall be used.
3. The straight archipelagic baselines referred to in paragraph 1 are straight lines joining the outermost points of the outermost islands and drying reefs of the Indonesian archipelago.
4. The length of a straight archipelagic baseline as referred to in paragraph 3 shall not exceed 100 nautical miles, except that up to 3 percent of the total number of baselines enclosing the Indonesian archipelago may exceed that length, up to a maximum length of 125 nautical miles.
5. The straight archipelagic baselines referred to in paragraph 3 shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
6. A normal baseline as referred to in paragraph 2 is the low-water line along the coast.
7. A straight baseline as referred to in paragraph 2 is a straight line joining the outermost points of a coastline which is deeply indented and cut into or of a fringe of islands along the coast in its immediate vicinity.

Article 6

1. The archipelagic baselines of Indonesia drawn in accordance with Article 5 shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical co-ordinates of points, specifying the geodetic datum may be substituted.
2. The charts of an scale or scales adequately illustrating the area of the Indonesian waters or the list of geographical co-ordinates of points of the archipelagic baselines of Indonesia as referred to in paragraph 1 shall be established by Government Regulation.
3. The Indonesian Government shall give due publicity to the charts or lists referred to in paragraph 1 and shall deposit a copy of the lists [!!] with the Secretary-General of the United Nations.

Article 7

1. The Indonesian Government may draw closing lines at the mouth of rivers, estuaries, bays, inland seas and harbours in the archipelagic waters for the delimitation of the internal waters.
2. The internal waters consist of (a) the internal sea and (b) the inland waters.

3. The internal sea referred to in paragraph 2 item (a) is that part of the sea which is situated on the landward side of the closing line at the seaward side of the low-water line.
4. The inland waters referred to in paragraph 2 item (b) consist of all waters situated on the landward side of the low-water line except at a river mouth, where the inland waters comprise all waters situated on the landward side of the closing line of the river mouth.

Article 8

The outer limit of the Indonesian territorial sea shall be measured from the base-lines drawn in accordance with the provisions of Article 5.

Article 9

1. Without prejudice to the provisions of Article 4, the Indonesian Government shall respect existing agreements and treaties with other states relating to areas falling within the archipelagic waters.
2. The terms and conditions for the exercise of the rights and activities referred to in paragraph 1, including the nature, the extent and the areas to which they apply shall, at the request of any of the states concerned, be regulated by bilateral agreement.
3. The rights referred to in paragraph 2 shall not be tranferred to, or shared with third states or their nationals.
4. Existing submarine telecommunication cables laid by another state or a foreign legal entity and passing through Indonesian waters without making a landfall shall be respected.
5. The Indonesian Government shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.

Article 10

1. Where the Indonesian coast and that of another state are opposite or adjacent to each other, and failing agreement between them to the contrary, the line of delimitation between the territorial seas of Indonesia and the other state shall be the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two states is measured.
2. The provision of paragraph 1 shall not apply where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two states in a way which is at variance with that provision.

CHAPTER III: RIGHTS OF PASSAGE OF FOREIGN SHIPS

PART ONE: INNOCENT PASSAGE

Article 11

1. Ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea and the archipelagic waters of Indonesia.
2. Passage means navigation through the Indonesian territorial sea and archipelagic waters for the purpose of:
(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
(b) proceeding to or from internal waters or a call at such roadstead or port facility.
3. Innocent passage as referred to in paragraph (1) shall be continuous and expeditious, but includes stopping and anchoring in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 12

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of Indonesia, and so long as it takes place in conformity with the Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of Indonesia if in the territorial sea or in the archipelagic waters it engages in any activity prohibited by the Convention or by other rules of international law.
3. Further rules on innocent passage as referred to in paragraphs 1 and 2 shall be established by Government Regulation.

Article 13

1. The Indonesian Government may suspend temporarily in specified areas of the territorial sea and archipelagic waters the innocent passage of all kinds of foreign ships if such suspension is essential for the protection of the security of Indonesia, including weapons exercises.
2. The suspension referred to in paragraph 1 shall take effect only after having been duly published according to the applicable rules.
3. Further rules on temporary suspension as referred to in paragraphs 1 and 2 shall be established by Government Regulation.

Article 14

1. Where necessary, having regard to the safety of navigation, the Indonesian Government shall designate sea lanes and traffic separation schemes in the territorial sea and the archipelagic waters.
2. Further rules on the use of sea lanes and traffic separation schemes in the territorial sea and the archipelagic waters as referred to in paragraph 1 shall be established by Government Regulation.

Article 15

In exercising the right of innocent passage in the territorial sea and the archipelagic waters, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

Article 16

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage, carry documents and observe special precautionary measures established for such ships by international agreements.

Article 17

Further rules on the rights and duties of commercial ships, warships and government ships operated for commercial and for non-commercial purposes when exercising the right of innocent passage shall be established by Government Regulation.

PART TWO: RIGHT OF ARCHIPELAGIC SEA LANES PASSAGE

Article 18

1. Archipelagic sea lanes passage in specially designated sea lanes means the exercise in accordance with the Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, direct, expeditious and unobstructed transit.
2. Foreign ships and aircraft of all states, whether coastal or land-locked, enjoy the right of archipelagic sea lanes passage in the Indonesian archipelagic waters between one part of the high seas or the Indonesian exclusive economic zone and another part of the high seas or the Indonesian exclusive economic zone.
3. Further rules on the rights and duties of foreign ships and aircraft when exercising the right of archipelagic sea lanes passage as referred to in paragraphs 1 and 2 shall be established by Government Regulation.

Article 19

1. The Indonesian Government shall designate sea lanes and air routes thereabove, suitable for the exercise of the right of archipelagic sea lanes passage by foreign ships and aircraft as referred to in Article 18 and may also prescribe traffic separation schemes as referred to in Article 14 for the safe passage of ships in such sea lanes.
2. Such sea lanes and air routes as referred to in paragraph 1 shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points through the archipelagic waters and the adjacent territorial sea.
3. When circumstances require, after giving due publicity thereto, sea lanes and traffic separation schemes may be substituted by other sea lanes and traffic separation schemes.

4. In designating or substituting sea lanes or prescribing or substituting traffic separation schemes, the Indonesian Government shall refer proposals to the competent international organization with a view to their adoption.
5. The Government shall indicate the axis of the sea lanes and the traffic separation schemes designated or prescribed by it on charts which shall be published.
6. Foreign ships conducting archipelagic sea lanes passage shall respect established sea lanes and traffic separation schemes.
7. Further rules on sea lanes and traffic separation schemes as referred to in paragraph 1 shall be established by Government Regulation.

PART THREE: RIGHT OF TRANSIT PASSAGE

Article 20

1. All foreign ships and aircraft enjoy the freedom of navigation and overflight solely for the purpose of continuous, direct and expeditious transit of a strait through the Indonesian territorial sea between one part of the high seas or the Indonesian exclusive economic zone and another part of the high seas or the Indonesian exclusive economic zone.
2. The right of transit passage shall be exercised in accordance with the provisions of the Convention, other rules of international law and legislative regulations in force.

Article 21

1. Where necessary, having regard to the safety of navigation, the Indonesian Government may designate sea lanes and prescribe traffic separation schemes for transit passage as referred to in Article 20.
2. Further rules on sea lanes and traffic separation schemes as referred to in paragraph 1 shall be established by Government Regulation.

PART FOUR: ACCESS AND COMMUNICATION

Article 22

1. If a part of the archipelagic waters of Indonesia lies between two parts of the territory of an immediately adjacent neighbouring state, Indonesia shall respect the existing rights and all other legitimate interests which that state has traditionally exercised in such waters through regulation by bilateral agreement.
2. The Indonesian Government shall respect the installation of submarine cables and shall permit the maintenance and replacement of existing cables upon receiving prior and appropriate notice.

CHAPTER IV: UTILIZATION, MANAGEMENT, PROTECTION AND ENVIRONMENTAL PRESERVATION OF THE INDONESIAN WATERS

Article 23

1. The utilization, management, protection and environmental preservation of the Indonesian waters shall take place on the basis of national legislative regulations in force and international law.
2. The administration and jurisdiction, protection and environmental preservation of the Indonesian waters shall take place on the basis of the legislative regulations in force.
3. Where necessary for an increased utilization and an improved management, protection and environmental preservation of the Indonesian waters as referred to in paragraph 1 a coordinating body may be established by Presidential Decree.

CHAPTER V: UPHOLDING OF SOVEREIGNTY OND LAW ON OHE INDONESIAN WATERS

Article 24

1. The upholding of sovereignty and the law in the Indonesian waters, the airspace thereover, the seabed and the subsoil including their natural resources as well as the sanctions against their violation shall take place in accordance with the Convention, other international law and applicable legislative regulations.
2. The exercise of jurisdiction over foreign ships traversing the territorial sea and the Indonesian archipelagic waters for the purpose of upholding sovereignty and the law shall take place in accordance with the provisions of the Convention, other international law and applicable legislative regulations.
3. Where necessary for the upholding of the law as referred to in paragraphs 1 and 2 a coordinating body may be established by Presidential Decree.

CHAPTEF VI: TRANSITORY PROVISIONS

Article 25

(1) Pending the Government Regulation as referred to in Article 6 paragraph 2, an illustrative chart of a scale or scales indicating the territory of the Indonesian waters or a list of geographical coordinates of the baselines of the Indonesian archipelago shall be annexed to this Act.
(2) The implementing regulations of the Government Regulation in lieu of Act No.4 of 1960 on the Indonesian Waters shall remain in force to the extent that they are not contrary to the present Act or not yet replaced by new implementing regulations based on the present Act.

CHAPTER VII: CONCLUDING PROVISIONS

Article 26

With the coming into effect of this Act, the Government Regulation in lieu of Act No.4 of 1960 relating to the Indonesian Waters is abolished.

. . . .

JAPAN

JUDICIAL DECISIONS*

Obligation on the part of the accused of foreign nationality to bear the expenses for the defence counsel and the interpreter; International Convention on Civil and Political Rights, Article 14(3)(d) and (f)

Tokyo High Court, 3 February 1993

X *v.* STATE OF JAPAN

X, a Nigerian national, was found guilty of violating the Cannabis Control Law and the Customs Law at the Yokohama District Court on 5 August 1992. X appealed to the High Court which also found him guilty.

X asserted that it was a misapplication of the law by the Court when it obliged the accused of foreign nationality to bear the expenses for the official defence counsel and the interpreter, as it was in violation of the International Covenant on Civil and Political Rights, Article 14(3)(d) and (f)[28], and that the decision must, therefore, be reversed.

The Court examined the question of whether it was permitted in light of the Covenant to oblige the accused to bear the expenses for the litigation. First, with regard to the expenses defrayed to the official defence counsel, the object of Article 14(3)(d)

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* Contributed by TOMIOKA MASASHI, Nagoya Economics University, Nagoya, member of the Study Group on Decisions of Japanese Courts Relating to International Law.

[28] The relevant provisions read as follows, in part:

"Art.14(3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ...

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; ...

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court."

of the Covenant is to prevent an accused from being tried if he is denied the assistance of defence counsel for financial reasons despite such need on his part for his defence, by appointing a defence counsel without any payment by the accused, thus guaranteeing sufficient means of defence in the process of the trial. The Court, therefore, did not find that Article 14(3)(d) prohibited obliging the accused to bear the expenses when the accused had already been found guilty and the sentence pronounced, and held for this reason that it could not support the claim of the accused, on the basis of Article 14(3)(d) of the Covenant on Civil and Political Rights, that it was not allowed to order the accused to bear the expenses for defence counsel.

Secondly, with regard to the expenses defrayed to the interpreter, the Court found that the expenses for interpretation were of a different nature than those for defence counsel in the following three respects:

(1) The right to the assistance of interpreters is provided a statutory basis by the Covenant, which has self-executing power in Japan. However, even before the Covenant was ratified, the assistance of interpreters was offered as a matter of customary practice in Japanese courts, reflecting an understanding that the assistance of interpreters for the accused constituted an indispensable element for the court proceedings.

(2) In the case of the right to assistance of defence counsel, private defence counsel and defrayment by the accused himself are the rule, while the right of the accused to the assistance of interpreters is unconditional and absolute, and consequently the principle of private defrayment of the costs shall not be applicable here.

(3) In the International Covenant on Civil and Political Rights, Article 14(3)(f) the term 'free assistance' is used, which means that the expenses are not assumed to be borne by private persons. Consequently, the assistance shall be offered free of charge regardless of the financial state of the accused.

Based on the reasoning presented above, the Court decided that, with regard to the expenses defrayed to the defence counsel, the Code of Criminal Procedure, Article 181, stipulating that the accused may be exempted from the obligation to bear these expenses if the accused finds himself in acute financial difficulties, should be applied, and, with regard to the expenses for the interpreter, Article 14(3)(f) of the International Covenant should be applied and the litigation costs for the first and second instances should not be borne by the accused.

The right to vote in local elections for foreign nationals permanently residing in Japan; the meaning of the terms 'the people' and 'the residents' as stipulated in Article 15 paragraph 1 and Article 93 paragraph 2, respectively, of the Japanese Constitution; the meaning of the term 'the citizens' as stipulated in Article 25 of the International Covenant on Civil and Political rights; Articles 27 and 29 of the same Covenant

Fukui District Court, 5 October 1994

Hanrei Jiho [Judicial Reports] No.1535 (1995) p.77; Hanrei Taimuzu [Law Times Reports] No.881 (1995) p.76; Shomu Geppo [Monthly Bulletin of Litigations] Vol.41, No.11(1995) p.2762

X ET AL. *V.* STATE OF JAPAN ET AL.

The plaintiffs, who were nationals of the Republic of Korea and had the right of permanent residence in Japan, brought a suit against the State of Japan and the election administration
committees of the various cities and towns where the plaintiffs resided in Japan, claiming the determination of the unlawfulness of the state's behaviour by denying the plaintiffs the right to be registered in the electorate lists, and demanding a compensation for the violation of the plaintiffs' right to vote. The plaintiffs, who either were born in the former Japanese colony of Korea or were offsprings of such persons, asserted that they were entitled to the right to vote in the elections for heads and members of the assemblies of local public entities where they had their residence.

The plaintiffs' claims were mainly based on the following grounds:
(1) Article 15 paragraph 1 of the Japanese Constitution[29] stipulates that 'the people' have the right to vote. "The people: here refers to all those who are under a legal obligation to obey the decisions from the public entities of which they are constituent members, and foreign nationals permanently residing in Japan are included therein.
(2) Article 93 paragraph 2 of the Constitution of Japan[30] stipulates that the representatives of local public entities shall be elected by 'the residents'. 'The residents' here refers to the constituent members of local public entities, and foreign nationals oermanently residing in Japan are included therein.
(3) Article 25 of the International Covenant on Civil and Political Rights[31] which prescribes the right to vote, stipulates that 'every citizen' (the expression "the people possessing the nationality" is not used) is entitled to the right to vote, which implies that the right to vote is not restricted to the people who have the nationality of the country concerned. It is, therefore, evident that under the provision foreign nationals permanently residing in the country are included in 'the citizens'.

The Court, dismissing the claim of the plaintiffs, decided as follows:
(1) 'The people' as provided in Article 15 of the Japanese Constitution refers to those who are the constituent members of the state, namely, "the persons possessing Japanese nationality". The right to vote presupposes the existence of the state and can be granted only to those people meeting some specific requirements, and, due to its unique nature, is rightfully granted only to the Japanese people and foreign nationals are, therefore, not entitled to it.

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[29] Art.15 reads as follows, in part: "The people have the inalienable right to choose their public officials and to dismiss them".

[30] The relevant provision reads as follows:
"Art.93 . . . (2) The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law *shall be elected by direct popular vote within their several communities*." (The italicized words are the official translation of "jumin ga chokusetsu . . . senkyosuru" which literally means "shall be elected by the direct vote of the residents")

[31] The relevant provisions read as follows, in part:
"Art.25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."

(2) 'The residents' as provided in Article 93 paragraph 2 presupposes 'the people' as stipulated in Article 15 paragraph 1, and it is appropriate to interpret the term as referring to 'the residents' which are a constituent part of 'the whole people'. Consequently, the Japanese Constitution grants only those who possess the Japanese nationality the right to vote in the elections of local public entities, to which foreign nationals permanently residing in Japan are not entitled.
(3) Article 25 of the International Covenant on the Civil and Political Rights, which corresponds to Article 21 of the Universal Declaration of Human Rights, stipulates in paragraph 1that everyone "has the right to take part in the government of his country" and declares that only those who possess the nationality of the country concerned are granted the right to vote. It is evident that the term 'every citizen' as used in Article 25 of the Covenant is not intended to prohibit making the possession of the nationality of the country concerned a condition of the right to vote. The term 'citizens' refers to those who possess civil rights and should be distinguished from such terms as 'peoples' or '[every-]one'. In the International Covenant on Civil and Political Rights the term 'every citizen' is used only in Article 25 with reference to the right to vote, thus reflecting the exclusive nature of this right. Therefore, the term 'every citizen' as used in Article 25 of the International Covenant cannot be interpreted as including foreign nationals permanently residing in the country concerned.

Lastly, the Court, citing the examples of countries such as Sweden where foreign nationals are vested with the right to vote in elections for members of the assemblies of the localities where they reside permanently, found that it would not be unconstitutional to grant the right to vote in elections at local levels to foreign nationals who meet some specific requirements, and that it is a matter of legislative policy whether or not to grant such a right to foreign nationals.

SINGAPORE

JUDICIAL DECISIONS[32]

Arbitration; Requirements for enforcement of foreign award; public policy; comity of nations

High Court, 29 September 1995
[1996] 1 SLR 34

JUDITH PRAKASH J

RE AN ARBITRATION BETWEEN HAINAN MACHINERY IMPORT AND EXPORT CORPORATION AND DONALD & MCARTHY PTE LTD

[32] Texts of the decisions contributed by Soh Tze Bian, Attorney General's Chambers, Singapore.

The plaintiffs were an organization constituted under the laws of China; the defendants were an organization constituted under the laws of Singapore. The parties entered into a contract for the sale of goods by the defendants to the plaintiffs. A dispute subsequently arose which was submitted to arbitration in China by the plaintiffs, in accordance with the contract. The award was in favour of the plaintiffs. As the defendants did not satisfy the award, the plaintiffs applied for an order that they be at liberty to enforce the award as a judgment or order of the court. An order to that effect was made. The defendants then applied for the order to be set aside and for another order that the award should not be enforced against them. The application was heard by the assistant registrar and was dismissed. The defendants appealed to the High Court.

Among the arguments put forward by the defendants were the following: (a) the subject matter of the difference was not capable of settlement by arbitration under the law of Singapore since the jurisdiction conferred upon the arbitrators did not specify the law governing the contract nor the curial law of the arbitration proceedings, and under section 31(4)(a) of the International Arbitration Act 1994 (*see* 5 AsYIL 267) the court may refuse to enforce the enforcement of an award on such subject matter; (b) it would be contrary to the public policy of Singapore to allow the award to be enforced because the defendants had raised facts which would give rise to the possibility that the award did not decide on the real matter in dispute between the parties and an injustice would be done to the defendants if the award were to be enforced.

As to the first argument the court held that it was not in accordance with the facts. In regard to the second argument the court agreed with the plaintiffs that the argument was a back door route to inviting the court to look at the merits of the case. The 1994 Act does not provide as a ground for setting aside an award the fact that the court, hearing the application, considered that the defendants had an arguable case. The court said:

> "In my view, public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public good. . . . [T]he principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad. . . ."

The appeal was dismissed. The defendants appealed to the Court of Appeals.

Habeas corpus; Extradition; Relevant considerations governing exercise of discretion by magistrate; political offence; extradition brought in conjunction with refugeeship

High Court, 22 May 1996
[1996] 2 SLR 747

RUBIN J

JOHN MUHIA KANGU *V.* DIRECTOR OF PRISONS

The applicant, a police officer from Kenya, was involved in an incident in which he and his colleague had reportedly opened fire and killed two unarmed persons owing to some confusion over their identities. He fled, first to Norway, and later arrived in Singapore using his nephew's passport. He was first granted a 14-day social visit visa but was later arrested for being in possession and having used another person's passport. The authorities subsequently learned that he was wanted by Interpol Nairobi for two counts of murder and that a warrant had been issued for his arrest in Kenya, and a requisition from Kenya was received for the applicant's arrest and surrender.

The Minister for Law exercised his discretion and issued a notice under section 22(1)(a) of the Extradition Act , authorizing a district judge to issue the requisite warrant for the apprehension of the applicant provided that the provisions of the Act relating to the issue of such a warrant had, in the opinion of the district judge, been complied with. The government in its affidavit averred that the minister had no grounds to believe that the request by the Kenyan government was politically motivated. The district judge ruled that there was sufficient evidence to justify the extradition. The applicant then applied for a writ of habeas corpus.

RUBIN J:

> " . . .
> The main contention of the applicant . . . is that the charges brought against him are not made in good faith, that they contain an element of political flavour . . . and further, that he had been framed.
> . . .
> The matters that should weigh in the mind of the court to which an application has been made for a writ of habeas corpus are tabulated under s.25 of the [Extradition] Act . . .
> . . .
> Besides the foregoing, there is a restriction under s.20(1) of the [Extradition] Act in relation to the surrender of persons connected with offences of a political character. Section 20(1) provides as follows:
>
> ". . . A person shall not be liable to be surrendered to a declared Commonwealth country if the offence to which the requisition for his surrender relates is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character."
> . . .
> It is clear . . . that the court hearing a habeas corpus application does not rehear the case that was before the magistrate or district court. Its function, . . . is to consider whether the applicant was lawfully detained, besides hearing any issue as to whether the offence charged is political in nature. In my opinion, the principal contention of the applicant that the charges preferred against him possessed a political flavour, is outlandish and without any substance. The offences reportedly committed were not in pursuance of any political objective and the feature that a relative of one of the victims called at the residence of a Kenyan Minister soon after the incident to relate the event, does not transform the offences referred to as being political by any yardstick, . . .

. . .

The applicant also referred the court to the Geneva Convention, apparently to the Convention relating to the Status of Refugees signed at Geneva on 28 July 1951. Apart from the fact that Singapore is not a signatory to the said Convention, there is no evidence whatsoever to suggest that the applicant's refusal to return to Kenya was due to his fear of being persecuted for reasons of religion, nationality, membership of a particular social group or any political opinion so as to bring him within the description of 'refugee' within art.1(A) therein. At any rate art.1F(b) of the Convention expressly excludes from its ambit persons such as the applicant, who are alleged to have committed serious non-political crimes outside the country of refuge prior to his admission to that country as a refugee.

. . .

It is an established principle of law that when all the evidence has been presented,the magistrate's duty is simply to enquire whether a *prima facie* case has been made out against the accused by credible evidence (see *Chua Han Mow* v. *Superintendant of Pudu Prison* [1979] 2 MLJ 70 adopting the principles enunciated by BELLAMY J in *Re Osman Bin Abdullah* [1954] MLJ 237 at p.238). In my opinion, the dispositions placed before the learned district judge amply justified his issuing the warrant of commitment; he had in no way exceeded his jurisdiction nor had he applied the wrong principles in arriving at the conclusion as he did.

. . . As a result, I dismissed this application . . ."

Private international law; passing of property in respect to chattels; determination of lex situs

Court of Appeal, 26 September 1996
[1996] 3 SLR 377

M. KARTHIGESU and L.P. THIAN JJA, LAI KEW CHAI J

DIAMOND CENTRE PTE & ANOTHER *v.* R. ESMERIAN, INC. & ANOTHER

Jewellery was consigned by R.Esmerian, Inc. (RE, incorporated in New York) to Corvina Inc. (incorporated in Panama), who consigned them to Wolfers Trading AG (Swiss company), who in turn consigned them and handed them to FAKHREDDIN (Iraqi national, first defendant), all this having taken place in Geneva. Under the memorandum of consignment between WOLFERS and FAKHREDDIN the jewellery were handed to FAKHREDDIN to enable him to do a special presentation to his customers in the United Arab Emirates. They might not leave the UAE for any destination except Geneva. The jewellery were entrusted to FAKHREDDIN for 15 days only. Any item sold was to be paid for immediately and any item not paid for and not returned remained the property of WOLFERS. The memorandum was to be interpreted according to Swiss law and both parties agreed to submit to the jurisdiction of the Swiss courts. FAKHREDDIN was supposed to return the consignments by 11 November 1989, but he failed to do so or to pay for the goods. The jewellery were misappropriated by

FAKHREDDIN who sold them in Singapore to Diamond Centre Pte Ltd. and its director, TEO (second and third defendant).

Some of the jewellery was traced and found in Diamond Centre's premises in Singapore. RE and Corvina sued the defendants for conversion, seeking the return of certain pieces of jewellery and damages. RE also sought a declaration that they were the rightful owners of the jewellery.

The second and third defendants claimed that the recovered jewellery were purchased by them in good faith from the first defendant, being a mercantile agent in possession of them with the consent of the owners. The defendants mounted an alternative defence that under Swiss law, property in the jewellery had passed to FAKHREDDIN. The court heard two expert witnesses. According to the first witness (for the plaintiffs) the memorandum of consignment was a 'commission contract', under which the commissionnaire undertakes to arrange the sale of movable property in the commissionnaire's own name, but for the account of the principal, to a third party buyer for a commission. As a result the commissionnaire acquires no title. According to the second witness (for the defendants) the memorandum was a 'consignment contract', whereby the consignor undertakes to transfer the goods at a fixed price to the consignee for the consignee to sell to a third party in the consignee's own name and for the consignee's own account. Consignment essentially being for a fixed period only, the consignee has to return the goods or pay for them at the end of the period, becoming their owner in the latter case. If the consignee does neither, the consignor can assert an ownership claim after having terminated the agreement. Until then the consignor only has a claim in contract for the price of the goods.

The trial judge found that the defendants had not shown they purchased the jewels in good faith. He found, *inter alia,* that the jewels were bought at a substantial undervalue and that the invoices given by the first defendant were irregular. As to the defendants' Swiss law argument, the trial judge did not appear [according to the Court of Appeals] to have made a finding that Swiss law applied, though apparently he accepted that the lex situs rule does not apply where the person claiming title has not acted bona fide, though it was not clear whether he was referring to Singapore law or Swiss law as the lex situs. As FAKHREDDIN had in fact elected to return the jewellery he could acquire no title under Swiss law and hence could not confer title on the defendants. The defendants appealed.

M. KARTHIGESU JA (delivering the judgment of the court):

> ". . .
> We do not think that Swiss law is applicable at all. The inescapable fact was that the jewellery were in Singapore when Fakhreddin sold them to Teo. It seems to us clear beyond argument that the lex situs was Singapore law.
> . . .
> Swiss law is only relevant if it was shown that under Swiss law, Fakhreddin had acquired title to the goods in Switzerland, before he purported to sell them in Singapore to Teo. According to Professor Piotet's theory, which was advanced by the defendants' expert witness, a consignee acquires the property to the consigned goods in a blocking situation when he either acquires the goods, sells them to a third party, or otherwise disposes of them in breach of his obligation. Fakhreddin did none of these acts while he was in Switzerland. It was only when the seized jewellery were in Singapore that he sold them to Teo. By which time, the lex situs was Singapore law. . . ."

The appeal was dismissed.

THAILAND[33]

LEGISLATION

Contiguous zone

Royal Proclamation establishing the Contiguous Zone, 14 August 1995[34]

". . .

For the purpose of exercising the rights of the Kingdom of Thailand with regard to the contiguous zone, which are based on generally recognized principles of international law, it is deemed appropriate to establish the contiguous zone of the Kingdom of Thailand as follows:

1. The contiguous zone of the Kingdom of Thailand is the area beyond and adjacent to the territorial sea of the Kingdom of Thailand , the breadth of which extends to twenty-four nautical miles measured from the baselines used for measuring the breadth of the territorial sea.
2. In the contiguous zone, the Kingdom of Thailand shall act as necessary to:

(a) prevent violation of customs, fiscal, immigration or sanitary laws and regulations, which will or may be committed within the Kingdom or its territorial sea;

(b) punish violation of the laws and regulations defined in (a), which is committed within the Kingdom or its territorial sea.

. . ."

JUDICIAL DECISIONS

Extradition of nationals; Sanctity of contract and good faith in the law of treaties; object and purpose of a treaty

Court of Appeal, 26 December 1995
(unpublished)

SOMCHAI JULNITI, BANCHA SAHAKIATMONTRI, SERI CHOONHATANOM JJ

THE PUBLIC PROSECUTOR *V.* THANONG SIRIPRECHAPONG[35]

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[33] Contributed by Kriangsak Kittichaisaree, Royal Thai Embassy, Washington D.C.

[34] Royal Gazette, Vol.112, Part 69 (Ngor), 29 August B.E.2538 (A.D.1995),p.1. Unofficial translation by the ministry of foreign affairs of Thailand.

[35] English summary made from an unofficial Thai summary provided by the Thai ministry of foreign affairs and from a transcript of the judgment as published in Thai newspapers.

The US had requested the extradition of Mr. THANONG SIRIPRECHAPONG, a former Member of Parliament, to stand trial for the offence of narcotic drugs trafficking involving the importation into the US of multiple container loads of marijuana over a ten-year period between 1977-1987 in which the said person together with five or more others were involved and from which they gained a great amount of profit.

The defendant sought a motion to dismiss the extradition proceedings, arguing:(1) the prosecution could not seek a court order for his detention pending extradition since the Thai Cabinet had not resolved to extradite him;(2) the offences for which his extradition was sought were committed outside the US, but since the jurisdiction in which the alleged offences had taken place was not specified the defendant was neither punishable under US law nor under Thai law;(3) the defendant was in fact not the same person as the one sought by the US;(4) a Thai national was not extraditable under section 16 of the 1929 Extradition Act[36];(5) the prosecution had no sufficient evidence to substantiate their allegation against the defendant.[37]

The Criminal Court[38] on 17 July 1995 (Black Case No.1973/2538) held against the defendant and ordered his detention pending his extradition since extradition was allowed pursuant to the Thai-US Extradition Treaty of 1983[39] and the Extradition Act of 1990 for the implementation of the Treaty. The defendant appealed to the Court of Appeal.[40]

Regarding the question of permissibility of extradition of nationals the Court of Appeal, *en banc,* started its opinion by mentioning the principal Thai law on the matter, viz. the Extradition Act,B.E.2472 (1929 AD), section 4 of which reads:

> "Even in the absence of an extradition treaty, the Siamese government may extradite an accused if it deems appropriate to do so, or if the offence carries a punishment in the jurisdiction of the requesting state provided that it shall also be an offence punishable by Siamese law with imprisonment of at least one year."

According to the court this provision sets out the principle that it is within the government's discretion to extradite a person if the stipulated requirements are met.

The court drew attention to exceptions to the rule, such as provided in sections 5 and 16 of the Act. Section 5 stipulates:

> "A request for extradition shall not be granted if the person sought has been tried and convicted or acquitted in the requested state for the offence for which extradition is requested."

Section 16 provides:

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[36] 46 Royal Gazette 271, Part 43, of 22 Dec.B.E.2472 (A.D.1929).

[37] The following summary of the judgment is limited to items 1 and 4.

[38] 'Criminal Court' refers to the criminal court in Bangkok. Provincial courts have jurisdiction in both criminal and civil matters and are identified by the name of the provinces where they are located. The court took its decision in the following composition: Manitya Jittjantaraklub, president, Samakki Maneeratna and Jamras Srithawachpongse, members.

[39] Treaty of 14 Dec.1983, not yet published in the UNTS. The treaty entered into force on 17 November 1991.

[40] By virtue of sec.17 of the 1929 Extradition Act the Court of Appeal is the court of final judgment in extradition cases.

> "If the court finds that the defendant is a Siamese subject . . . the court shall report to and consult the minister of justice before issuing a court order for the defendant to be released."

Most important, however, section 3 of the Act provides:

> "This Act shall be applicable to all extradition proceedings in Siam so far as it is not inconsistent with the terms of any treaty, convention or agreement with a foreign state, or any royal proclamation issued in connection therewith."

Consequently, it was necessary to find out whether the extradition treaty between Thailand and the US of 1983 contained any term which is inconsistent with the 1929 Act.

The issue of the nationality of the requested person is dealt with in Article 8 of the Treaty:

> "(1) Neither Contracting Party shall be bound to extradite its own nationals.
> In a case in which the United States of America is the requested state, the executive authority shall have the power to extradite its nationals if, at its discretion, it is deemed proper to do so.
> In a case in which Thailand is the requested state, the competent authority may extradite its nationals if not prevented from doing so.
> (2) If extradition is not granted pursuant to paragraph 1 of this Article, the requested state shall, at the request of the requesting state, submit the case to its competent authority for prosecution. . . .
> (3) Notwithstanding paragraph 2 of this Article, the requested state shall not be required to submit the case to its competent authority for prosecution if the requested state has no jurisdiction over the offence."

Article 8(1) thus lays down the principle that in case of the requested person being a national of the requested state, the latter is not obliged under the treaty to comply with the request for extradition. However, Article 8 also shows the intention of both contracting parties to extradite their own nationals.[41] For Thailand, it appears from section 4 of the 1929 Act that the competent authority specified in the treaty is the Royal Thai government.

The intention of both contracting parties to benefit each other comported with their wish to conclude the 1983 treaty and replace the previous treaty of 30 December 1922.[42] This is evident from the preamble of the 1983 treaty which reads: ". . . Desiring to provide for more effective co-operation between the two States in the suppression of crime; and Desiring to conclude a new Treaty for the reciprocal extradition of offenders; . . ."

Apparently the previous extradition treaty was not sufficiently beneficial to the parties. For example, Article 8 of the 1922 treaty provided that "each of the Contracting Parties may decide not to extradite its own nationals to the other Contracting

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[41] The 1983 Treaty with the US which, like the one with the UK, leaves room for the extradition of Thai nationals, is an exception to the consistent practice in 27 Thai extradition treaties under which Thailand denies extradition of Thai nationals. The exceptions are borne out by the practice of the US and the UK of permitting extradition of their own nationals.

[42] 25 LNTS 394.

Party", and Thailand later enacted the 1929 Extradition Act, section 16 of which prohibited extradition of Thai nationals. It was true that section 3 of the Act provided an exception to section 16 in case of an international agreement to the contrary, but article 8 of the 1922 Treaty was not inconsistent with section 16 of the 1929 Act. The issue for the court to decide was, consequently, whether the proviso "if not prevented from doing so" under Article 8(1) of the 1983 treaty fell within the purview of the provision of section 16 of the 1929 Act.

In the opinion of the Court of Appeal, not only the sanctity of contract but also good faith is a factor of utmost significance in treaty relations. At a time of facilitated inter-state intercourse, treaties between states and the good faith of the parties to a treaty has become even more important. This was apparent from the provisions of the Vienna Convention on the Law of Treaties of 1969, which, although Thailand was not a party, could be taken into account in deciding the present case. The court then quoted Article 31 of the Convention which contained a general rule of interpretation of treaties: "1. 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. . . ."

The 1983 Treaty had as its object and purpose more effective cooperation between the two states in the suppression of crime by extending mutual cooperation. Suppose the contracting parties to the 1983 Treaty had indeed agreed to have unequal treaty obligations, with the Thai side prohibiting extradition of Thai nationals pursuant to section 16 of the 1929 Extradition Act by adhering to the principle of personal jurisdiction over Thai nationals even if they commit offences outside Thailand, while on the other hand the United States would strictly adhere to the principle of territorial jurisdiction, why then had the Thai government agreed to the provision of Article 8(1) of the 1983 Treaty, allowing the government to extradite Thai nationals in spite of the prohibition under section 16 of the 1929 Act? If Thailand had actually intended not to extradite Thai nationals, it would be useless for the Treaty to provide that Thailand had discretion to extradite Thai nationals. Instead, the Treaty would have provided that only the United States was obligated to extradite its nationals if, at its discretion, it was deemed proper to do so.

With regard to section 13 of the 1929 Extradition Act which compels the court to take account of the defendant's defence of nationality, the section would be applicable only if there were indeed a prohibition of extradition on grounds of nationality.

The next question was whether the 1983 Treaty has retroactive effect. Article 19 of the Treaty provides that it shall apply to extraditable offences committed before as well as after the date of the entry into force of the Treaty. The court emphasized that the Treaty merely stipulates extradition procedures without mandating punishment and that the imposition of punishment by the court of the requesting state is unrelated to the extradition. The period in which the defendant was alleged to have committed the offences, from 1973 to 1987, was covered by the treaty and his extradition was, therefore, not prohibited for that reason.

The next question raised in the appeal was whether the government had in fact resolved to extradite the defendant. According to testimony of the Secretary-General of the Cabinet, an inter-agency meeting had been arranged of representatives of the

ministries of foreign affairs and justice, the Office of the attorney-general and the Office of the Juridical Council for the formulation of a recommendation to be forwarded to the Cabinet. According to the testimony the meeting unanimously agreed that the government should decide in favour of extradition. The question of a prohibition of extradition of nationals should be left to the court to decide, but could be dealt with only after the Cabinet had resolved to extradite.

In dealing with the question the court took account of sections 8 and 9 of the 1929 Act. These provisions deal with the procedures to be followed by the government in submitting the case to the court and those to be followed by the court. The court concluded that according to these provisions extradition cases indeed come before the court only after the government has resolved in favour of extradition. The request by the public prosecutor to the court to order the detention of the defendant pending his extradition and the contents of a note sent by the Cabinet to the Attorney-General were considered by the court to be convincing evidence of the fact that the government had indeed decided for extradition.

The appeal was dismissed.

PARTICIPATION IN MULTILATERAL TREATIES*

Editorial introduction

This section records the participation of Asian states in open, multilateral law-making treaties which mostly aim at world-wide adherence. The present Volume includes the cumulative and updated data contained in Volumes 1-5 of the *Yearbook*. For the purpose of this section states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered. The Editors wish to express their gratitude to all those international organizations which have so kindly responded to our request by making available information on the status of various categories of treaties.

Note:

- Where no other reference to specific sources is made, data are derived from Multilateral Treaties deposited with the Secretary-General - Status as at 31 December 1996 (ST/LEG/SER.E/15).
- No indication is given of reservations and declarations made.
- Sig. = signature; Cons. = consent to be bound.

TABLE OF HEADINGS

* Compiled by Karin Arts, Assistant Editor.

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ANTARCTICA

Antarctic Treaty
Washington, 1 Dec. 1959
Entry into force: 23 June 1961
(Status as included in A/46/604 and TIF)

State	*Cons.*	*State*	*Cons.*
China	yes	Korea (DPR)	yes
India	"	Korea (Rep.)	"
Japan	"	Papua New Guinea	"
		"	

COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
New York, 1958
Entry into force: 7 June 1959

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh	6 May 92		Malaysia	5 Nov 85	
Cambodia	5 Jan 60		Mongolia	24 Oct 94	
China	22 Jan 87		Pakistan	30 Dec 58	
India	10 Jun 58	13 Jul 60	Philippines	10 Jun 58	6 Jul 67
Indonesia	7 Oct 81		Singapore	21 Aug 86	
Japan	20 Jun 61		Sri Lanka	30 Dec 58	9 Apr 62
Kazakhstan	20 Nov 95		Thailand	21 Dec 59	
Korea (Rep.)	8 Feb 73		Vietnam	12 Sep 95	

CULTURAL MATTERS

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character
New York, 15 July 1949
Entry into force: 12 August 1954

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	29 Dec 49		Pakistan		16 Feb 50
Cambodia	20 Feb 52		Philippines	31 Dec 49	13 Nov 52
Iran	31 Dec 49	30 Dec 59			

Agreement on the Importation of Educational, Scientific and Cultural Materials
New York, 22 November 1950
Entry into force: 21 May 1952

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	8 Oct 51	19 Mar 58	Pakistan	9 May 51	7 Jan 52
Cambodia	5 Nov 51		Philippines	22 Nov 50	30 Aug 52
Iran	9 Feb 51	7 Jan 66	Singapore		11 Jul 69
Japan	17 Jun 70		Sri Lanka		8 Jan 52
Laos	28 Feb 52		Thailand	22 Nov 50	18 Jun 51
Malaysia	29 Jun 59				

Convention concerning the International Exchange of Publications
Paris, 3 December 1958
Entry into force: 23 November 1961
(Status as at 18 April 1997, provided by UNESCO)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Brunei	25 Jan 85	Japan	29 May 84
Indonesia	10 Jan 67	Tajikistan	28 Aug 92

Convention concerning the Exchange of Official Publications and Government Documents between States
Paris, 3 December 1958
Entry into force: 30 May 1961
(Status as at 18 April 1997, provided by UNESCO)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Brunei	25 Jan 85	Sri Lanka	7 Dec 59
Indonesia	10 Jan 67	Tajikistan	28 Aug 92
Japan	29 May 84		

International Agreement for the Establishment of the University for Peace
New York, UNGA Res. 35/55, 5 December 1980
Entry into force: 7 April 1981

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Bangladesh	8 Apr 81	Pakistan	30 Mar 81
Cambodia	10 Apr 81	Philippines	20 Mar 84
India	3 Dec 81	Sri Lanka	10 Aug 81

Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific
Bangkok, 16 December 1983
Entry into force: 23 Oct. 1985
(Status as at 18 April 1997, provided by UNESCO)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
China	25 Sep 84	Mongolia	19 Oct 91
Kazakhstan	14 Mar 97	Nepal	2 Nov 89
Korea (DPR)	26 Apr 89	Sri Lanka	10 Jan 86
Korea (Rep.)	29 Aug 89	Tajikistan	28 Aug 92
Kyrgyzstan	7 Nov 95	Turkmenistan	4 Jun 96
Maldives	14 May 90		

CULTURAL PROPERTY

Convention for the Protection of Cultural Property in the Event of Armed Conflict
The Hague, 14 May 1954
Entry into force: 7 August 1956
(Status as at 18 April 1997, provided by UNESCO)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Cambodia	4 Apr 62	Mongolia	4 Nov 61
India	16 Jun 58	Myanmar	10 Feb 56
Indonesia	10 Jan 67	Pakistan	27 Mar 59
Iran	22 Jun 59	Tajikistan	28 Aug 92
Kazakhstan	14 Mar 97	Thailand	2 May 58
Kyrgyzstan	3 Jul 95	Uzbekistan	21 Feb 96
Malaysia	12 Dec 60		

Protocol for the Protection of Cultural Property in the Event of Armed Conflict

The Hague, 14 May 1954

Entry into force: 7 August 1956; for each state 3 months after date of deposit

(Status as at 18 April 1997, provided by UNESCO)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Cambodia	4 Apr 62	Myanmar	10 Feb 56
India	16 Jun 58	Pakistan	27 Mar 59
Indonesia	26 Jul 67	Tajikistan	28 Aug 92
Iran	22 Jun 59	Thailand	2 May 58
Kazakhstan	14 Mar 97	Uzbekistan	21 Feb 96
Malaysia	12 Dec 60		

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970

Paris, 14 November 1970

Entry into force: 24 April 1972; for each state 3 months after date of deposit

(Status as at 18 April 1997, provided by UNESCO)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Bangladesh	9 Dec 87	Kyrgyzstan	3 Jul 95
Cambodia	26 Sep 72	Mongolia	23 May 91
China	28 Nov 89	Nepal	23 Jun 76
India	24 Jan 77	Pakistan	30 Apr 81
Iran	27 Jan 75	Sri Lanka	7 Apr 81
Korea (DPR)	13 May 83	Tajikistan	28 Aug 92
Korea (Rep)	14 Feb 83	Uzbekistan	15 Mar 96

Convention concerning the Protection of the World Cultural and Natural Heritage

Paris, 16 November 1972

Entry into force: 17 December 1975

(Status as at 18 April 1997, provided by UNESCO)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Afghanistan	20 Mar 79	Maldives	22 May 86
Bangladesh	3 Aug 83	Mongolia	2 Feb 90
Cambodia	28 Nov 91	Myanmar	29 Apr 94
China	12 Dec 85	Nepal	20 Jun 78
India	14 Nov 77	Pakistan	23 Jul 76
Indonesia	6 Jul 89	Philippines	19 Sep 85
Iran	26 Feb 75	Sri Lanka	6 Jun 80
Japan	30 Jun 92	Tajikistan	28 Aug 92
Korea (Rep.)	14 Sep 88	Thailand	17 Sep 87
Kazakhstan	29 Apr 94	Turkmenistan	30 Sep 94
Kyrgyzstan	3 Jul 95	Uzbekistan	13 Jan 93
Laos	20 Mar 87	Vietnam	19 Oct 87
Malaysia	7 Dec 88		

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre

ESCAP, Bangkok, 1 April 1982
Entry into force: 1 July 1983

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh	9 Sep 82		Malaysia		9 Sep 82
Brunei	14 Feb 85		Maldives		25 Apr 83
China	18 Feb 83		Nepal		25 Apr 83
India	25 Apr 83		Pakistan		9 Sep 82
Indonesia	7 Jan 83		Philippines		15 Dec 82
Japan	9 Sep 82		Sri Lanka	9 Sep 82	
Korea (Rep.)	9 Sep 82		Thailand		27 Jun 83
Laos	9 Sep 82		Vietnam		9 Sep 82
Macau (ass. member)		3 Jun 93			

Agreement to Establish the South Centre

Geneva, 1 September 1994
Entry into force: 30 July 1995

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia	30 Sep 94		Malaysia	1 Dec 94	15 Jun 95
China		4 May 95	Pakistan		12 May 95
India	30 Sep 94	13 Dec 94	Philippines	13 Oct 94	14 Jun 96
Indonesia	30 Sep 94	17 Feb 95	Sri Lanka	30 Sep 94	16 Mar 95
Iran	30 Sep 94		Vietnam	25 Nov 94	2 Jun 95
Korea (DPR)	6 Dec 94	31 May 95			

DISPUTE SETTLEMENT

Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Washington, 18 Mar 1965
Entry into force: 14 October 1966
(Status as at 3 June 1997, provided by the World Bank)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	30 Sep 66	25 Jun 68	Nepal	28 Sep 65	7 Jan 69
Bangladesh	20 Nov 79	27 Mar 80	Pakistan	6 Jul 65	15 Sep 66
Cambodia	5 Nov 93		Papua New		
China	9 feb 90	7 Jan 93	Guinea	20 Oct 78	20 Oct 78
Indonesia	16 Feb 68	28 Sep 68	Philippines	26 Sept 78	17 Nov 78
Japan	23 Sep 65	17 Aug 67	Singapore	2 Feb 68	14 Oct 68
Korea (Rep.)	18 Apr 66	21 Feb 67	Sri Lanka	30 Aug 67	12 Oct 67
Malaysia	22 Oct 65	8 Aug 66	Thailand	6 Dec 85	

Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court

State	*Date of (last) deposit*	*State*	*Date of (last) deposit*
Cambodia	19 Sep 57 (with res.)	Pakistan	13 Sep 60 (with res.)
India	18 Sep 74 (with res.)	Philippines	18 Jan 72 (with res.)
Japan	15 Sep 58 (with res.)		

ENVIRONMENT, FAUNA AND FLORA

International Convention for the Prevention of Pollution of the Sea by Oil, as amended
London, 12 May 1954
Entry into force: 26 July 1958; for each state 3 months after date of deposit
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*State*	*Cons.*
Bangladesh	28 Sep 81	Papua	
India	4 Mar 74	New Guinea	12 Mar 80
Japan	21 Aug 67	Philippines	19 Nov 63
Korea (Rep.)	31 Jul 78	Sri Lanka	30 Aug 83
Maldives	17 May 82		

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties
Brussels, 29 November 1969
Entry into force: 6 May 1975
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	6 Nov 81	4 Feb 82	Papua New		
China	23 Feb 90	24 May 90	Guinea	12 Mar 80	10 Jun 80
Japan	6 Apr 71	6 May 75	Sri Lanka	12 Apr 83	11 Jul 83
Pakistan	13 Jan 95	13 Apr 95			

Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil
London, 2 November 1973
Entry into force: 30 March 1983
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
China	23 Feb 90	24 May 90	Pakistan	13 Jan 95	13 Apr 95

International Convention on Civil Liability for Oil Pollution Damage
Brussels, 29 November 1969
Entry into Force: 19 June 1975
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Brunei	29 Sep 92	28 Dec 92	Korea (Rep.)	18 Dec 78	18 Mar 79
Cambodia	28 Nov 94	26 Feb 95	Malaysia	6 Jan 95	6 Apr 95
China	30 Jan 80	29 Apr 80	Maldives	16 Mar 81	14 Jun 81
India	1 May 87	30 Jul 87	Papua New Guinea	12 Mar 80	10 Jun 80
Indonesia	1 Sep 78	30 Nov 78	Singapore	16 Sep 81	15 Dec 81
Japan	3 Jun 76	1 Sep 76	Sri Lanka	12 Apr 83	11 Jul 83
Kazakhstan	7 Mar 94	5 Jun 94			

Protocol to the International Convention on Civil Liability for Oil Pollution Damage
London, 19 November 1976
Entry into force: 8 Apr 81
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Brunei	29 Sep 92	28 Dec 92	Korea (Rep.)	8 Dec 92	8 Mar 93
China	29 Sep 86	28 Dec 86	Maldives	14 Jun 81	12 Sep 81
India	1 May 87	30 Jul 87	Singapore	15 Dec 81	15 Mar 82
Japan	24 Aug 94	22 Nov 94			

1992 Protocol to amend the International Convention on Civil Liability for Oil Polution Damage, 1969
London, 27 November 1992
Entry into force: 30 May 1996
(Status as included in IMO doc. J/62333, as at 31 December 1995)

State	*Cons.*
Japan	24 Aug 94

Convention on Wetlands of International Importance especially as Waterfowl Habitat
Ramsar, 2 February 1971
Entry into force: 21 December 1975
(Status as provided by UNESCO on 18 April 1997)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Bangladesh	21 May 92	Malaysia	10 Nov 94
China	31 Mar 92	Nepal	17 Dec 87
India	1 Oct 81	Pakistan	23 Jul 76
Indonesia	8 Apr 92	Papua New Guinea	16 Mar 93
Iran	23 Jun 75	Philippines	8 Jul 94
Japan	17 Jun 80	Sri Lanka	15 Jun 90
Korea (Rep.)	28 Mar 97	Vietnam	20 Sep 88

Protocol to amend the Convention on Wetlands of International Importance especially as Waterfowl Habitat
Paris, 3 December 1982
Entry into force: 1 October 1986
(Status as provided by UNESCO on 18 April 1997)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
India	9 Mar 84	Japan	26 Jun 87
Iran	29 Apr 86	Pakistan	13 Aug 85

Amendments to Articles 6 and 7 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat
Regina, 28 May 1987
Entry into force: -
(Status as included in UNESCO Doc. CL 3343)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Bangladesh	21 May 92	Japan	2 Jun 88
Indonesia	8 Apr 92	Pakistan	20 Sep 88
Iran	20 Jul 94		

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage
Brussels, 18 December 1971
Entry into force: 16 October 1978
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Brunei	29 Sep 92	28 Dec 92	Malaysia	6 Jan 95	6 Apr 95
India	10 Jul 90	8 Oct 90	Maldives	16 Mar 81	14 Jun 81
Indonesia	1 Sep 78	30 Nov 78	Papua New		
Japan	7 Jul 76	16 Oct 78	Guinea	12 Mar 80	10 Jun80
Korea (Rep.)	8 Dec 92	8 Mar 93	Sri Lanka	12 Apr 83	11 Jul 83

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, as amended
London, Mexico City, Moscow, Washington, 29 December 1972
Entry into force: 30 August 1975
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Afghanistan	2 Apr 75	30 Aug 75	Pakistan	9 Mar 95	8 Apr 95
China	14 Nov 85	14 Dec 85	Papua New		
Japan	15 Oct 80	14 Nov 80	Guinea	10 Mar 80	9 Apr 80
Korea (Rep.)	21 Dec 93	20 Jan 94	Philippines	10 Aug 73	30 Aug 75

Protocol Relating to the International Convention for the Prevention of Pollution from Ships, as amended
London, 17 February 1978
Entry into force: 2 October 1983
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*Excepted annexes*	*State*	*Cons.*	*Excepted. annexes.*
Brunei	23 Oct 86	III, IV, V	Korea (DPR)	1 May 85	
Cambodia	28 Nov 94		Korea (Rep.)	23 Jul 84	III, IV, V
China	1 Jul 83	IV	Myanmar	4 May 88	III, IV, V
Annex V:	21 Nov 88		Pakistan	22 Nov 94	
Annex III:	13 Sept 94		Papua		
India	24 Sep 86	III, IV, V	New Guinea	25 Oct 93	
Indonesia	21 Oct 86	III, IV, V	Singapore	1 Nov 90	IV, V
Japan	9 Jun 83		Annex III:	2 Mar 94	
Kazakhstan	7 Mar 94		Vietnam	29 May 91	III, IV, V

Convention for the Protection of the Ozone Layer, 1985
Vienna, 22 March 1985
Entry into force: 22 September 1988

State	*Cons.*	*State*	*Cons.*
Bangladesh	2 Aug 90	Nepal	6 Jul 94
Brunei	26 Jul 90	Pakistan	18 Dec 92
China	11 Sep 89	Papua	
India	18 Mar 91	New Guinea	27 Oct 92
Indonesia	26 Jun 92	Philippines	17 Jul 91
Iran	3 Oct 90	Singapore	5 Jan 89
Japan	30 Sep 88	Sri Lanka	15 Dec 89
Korea (DPR)	24 Jan 95	Tajikistan	6 May 1996
Korea (Rep.)	27 Feb 92	Thailand	7 Jul 89
Malaysia	29 Aug 89	Turkmenistan	18 Nov 93
Maldives	26 Apr 88	Uzbekistan	18 May 93
Mongolia	7 Mar 1996	Vietnam	26 Jan 94
Myanmar	24 Nov 93		

Protocol on Substances that Deplete the Ozone Layer, 1987
Montreal, 16 September 1987
Entry into force: 1 January 1989

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		2 Aug 90	Myanmar		24 Nov 93
Brunei		27 May 93	Nepal		6 Jul 94
China		14 Jun 91	Pakistan		18 Dec 92
India		19 Jun 92	Papua		
Indonesia	21 Jul 88	26 Jun 92	New Guinea		27 Oct 92
Iran		3 Oct 90	Philippines	14 Sep 88	17 Jul 91
Japan	16 Sep 87	30 Sep 88	Singapore		5 Jan 89
Korea (DPR)		24 Jan 95	Sri Lanka		15 Dec 89
Korea (Rep.)		27 Feb 92	Thailand	15 Sep 88	7 Jul 89
Malaysia		29 Aug 89	Turkmenistan		18 Nov 93
Maldives	12 Jul 88	16 May 89	Uzbekistan		18 May 93
Mongolia		7 Mar 96	Vietnam		26 Jan 94

Asian States operating under Article 5 paragraph 1 of the Montreal protocol: Bangladesh, China, Iran, Malaysia, Maldives, Philippines, Sri Lanka, Thailand.

Amendment to the Montreal Protocol
London, 29 June 1990
Entry into force: 10 August 1992

State	*Cons.*	*State*	*Cons.*
Bangladesh	18 Mar 94	Nepal	6 Jul 94
China	14 Jun 91	Pakistan	18 Dec 92
India	19 Jun 92	Papua	
Indonesia	26 Jun 92	New Guinea	4 May 93
Japan	4 Sep 91	Philippines	9 Aug 93
Korea (Rep.)	10 Dec 92	Singapore	2 Mar 93
Malaysia	16 Jun 93	Sri Lanka	16 Jun 93
Maldives	31 Jul 91	Thailand	25 Jun 92
Mongolia	7 Mar 96	Turkmenistan	15 Mar 94
Myanmar	24 Nov 93	Vietnam	26 Jan 94

Amendment to the Montreal Protocol, 1992
Copenhagen, 25 November 1992
Entry into force: 14 June 1994

State	*Cons.*	*State*	*Cons.*
Japan	20 Dec 94	Pakistan	17 Feb 95
Korea (Rep.)	2 Dec 94	Tajikistan	6 May 96
Malaysia	5 Aug 93	Vietnam	26 Jan 94
Mongolia	7 Mar 96		

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989
Basel, 22 March 1989
Entry into force: 5 May 1992

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	22 Mar 89		Nepal		15 Oct 96
Bangladesh		1 Apr 93	Pakistan		26 Jul 94
China	22 Mar 90	17 Dec 91	Papua		
India	15 Mar 90	24 Jun 92	New Guinea		1 Sep 95
Indonesia		20 Sep 93	Philippines	22 Mar 89	21 Oct 93
Iran		5 Jan 93	Singapore		2 Jan 96
Japan		17 Sep 93	Sri Lanka		28 Aug 92
Korea (Rep.)		28 Feb 94	Thailand	22 Mar 90	
Kyrgyzstan		13 Aug 66	Turkmenistan		25 Sep 96
Malaysia		8 Oct 93	Uzbekistan		7 Feb 96
Maldives		28 Apr 92	Vietnam		13 Mar 95

Framework Convention on Climate Change, 1992
New York, 9 May 1992
Entry into force: 21 March 1994

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	12 Jun 92		Maldives	12 Jun 92	9 Nov 92
Bangladesh	9 Jun 92	15 Apr 94	Mongolia	12 Jun 92	30 Sep 93
Bhutan	11 Jun 92	25 Aug 95	Myanmar	11 Jun 92	25 Nov 94
Cambodia		18 Dec 95	Nepal	12 Jun 92	2 May 94
China	11 Jun 92	5 Jan 93	Pakistan	13 Jun 92	1 Jun 94
India	10 Jun 92	1 Nov 93	Papua New		
Indonesia	5 Jun 92	23 Aug 94	Guinea	13 Jun 92	6 Mar 93
Iran	14 Jun 92	18 Jul 96	Philippines	12 Jun 92	2 Aug 94
Japan	13 Jun 92	28 May 93	Singapore	13 Jun 92	
Kazakhstan	8 Jun 92	17 May 95	Sri Lanka	10 Jun 92	23 Nov 93
Korea (DPR)	11 Jun 92	5 Dec 94	Thailand	12 Jun 92	28 Dec 94
Korea (Rep.)	13 Jun 92	14 Dec 93	Turkmenistan		5 Jun 95
Laos		4 Jan 95	Uzbekistan		20 Jun 93
Malaysia	9 Jun 93	13 Jul 94	Vietnam	11 Jun 92	16 Nov 94

Convention on Biological Diversity, 1992
Rio de Janeiro, 5 June 1992
Entry into force: 29 December 1993

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	12 Jun 92		Maldives	12 Jun 92	9 Nov 92
Bangladesh	5 Jun 92	3 May 94	Mongolia	12 Jun 92	30 Sep 93
Bhutan	11 Jun 92	25 Aug 95	Myanmar	11 Jun 92	25 Nov 94
Cambodia		9 Feb 95	Nepal	12 Jun 92	23 Nov 93
China	11 Jun 92	5 Jan 93	Pakistan	5 Jun 92	26 Jul 94
India	5 Jun 92	18 Feb 94	Papua New		
Indonesia	5 Jun 92	23 Aug 94	Guinea	13 Jun 92	16 Mar 93
Iran	14 Jun 92	6 Aug 96	Philippines	12 Jun 92	8 Oct 93
Japan	13 Jun 92	28 May 93	Singapore	10 Mar 93	21 Dec 95
Kazakhstan	9 Jun 92	6 Sep 94	Sri Lanka	10 Jun 92	23 Mar 94
Korea (DPR)	11 Jun 92	26 Oct 94	Thailand	12 Jun 92	
Korea (Rep.)	13 Jun 92	3 Oct 94	Turkmenistan		18 Sep 96
Kyrgyzstan		6 Aug 96	Uzbekistan		19 Jul 95
Laos		20 Sep 96	Vietnam	28 May 93	16 Nov 94
Malaysia	12 Jun 92	24 Jun 94			

FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance
New York, 20 June 1956
Entry into force: 25 May 1957

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia	20 Jun 56		Philippines	20 Jun 56	21 Mar 68
Pakistan		14 Jul 59	Sri Lanka	20 Jun 56	7 Aug 58

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
New York, 10 December 1962
Entry into force: 9 December 1964

State	*Sig.*	*Cons.*	*State*	*Sig.*
Mongolia		6 Jun 91	Sri Lanka	12 Dec 62
Philippines	5 Feb 63	21 Jan 65		

Convention on the Law Applicable to Maintenance Obligations Towards Children,
The Hague, 24 October 1956
Entry into force: 1 January 1962
(Information provided by the Permanent Bureau of the
Hague Conference on Private International Law on 14 October 1997)

State	*Sig.*	*Cons.*
Japan	10 Feb 77	22 Jul 77

Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
The Hague, 5 October 1961
Entry into force: 5 January 1964
(Information provided by the Permanent Bureau of the
Hague Conference on Private International Law on 14 October 1997)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei		10 May 88	Japan	30 Jan 64	3 Jun 64

Convention on the Law Applicable to Maintenance Obligations
The Hague, 2 October 1973
Entry into force: 1 October 1977
(Information provided by the Permanent Bureau of the
Hague Conference on Private International Law on 14 October 1997)

State	*Sig.*	*Cons.*
Japan	28 Feb 86	5 Jun 86

Convention on Protection of Children and Co-operation in respect of Intercountry Adoption
The Hague, 29 May 1993
Entry into force: 1 May 1995
(Status on 4 June 1997 as furnished by the Permanent Bureau of the
Hague Conference on Private International Law)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Sri Lanka	24 May 94	23 Jan 95	Philippines	17 Jul 95	2 Jul 96

FINANCE

Agreement Establishing the Asian Development Bank
Manila, 4 December 1965
Entry into force: 22 August 1966

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	4 Dec 65	22 Aug 66	Maldives		14 Feb 78
Bangladesh		14 Mar 73	Myanmar		26 Apr 73
Bhutan		15 Apr 82	Nepal	4 Dec 65	21 Jun 66
Cambodia	4 Dec 65	30 Sep 66	Pakistan	4 Dec 65	12 May 66
China	10 Mar 86		Papua		
Hong Kong	27 Mar 69		New Guinea		8 Apr 71
India	4 Dec 65	20 Jul 66	Philippines	4 Dec 65	5 Jul 66
Indonesia	24 Nov 66		Singapore	28 Jan 66	21 Sep 66
Iran	4 Dec 65		Sri Lanka	4 Dec 65	29 Sep 66
Japan	4 Dec 65	16 Aug 66	Taipei, China	4 Dec 65	22 Sep 66
Korea (Rep.)	4 Dec 65	16 Aug 66	Thailand	4 Dec 65	16 Aug 66
Laos	4 Dec 65	30 Aug 66	Vietnam	28 Jan 66	22 Sep 66
Malaysia	4 Dec 65	16 Aug 66			

Convention Establishing the Multilateral Investment Guarantee Agency, 1988
Seoul, 11 October 1985
Entry into force: 12 April 1988
(Status as at 3 June 1997, provided by the World Bank)

State	*Sig.*	*Cons. (deposit)*	*State*	*Sig.*	*Cons.(deposit)*
Bangladesh	13 Mar 87	13 Mar 87	Nepal	23 Sep 92	23 Sep 93
Cambodia	1 Oct 93		Pakistan	7 Jul 86	1 Dec 86
China	23 Apr 88	30 Apr 88	Papua New		
India	13 Apr 92	20 Sep 93	Guinea	9 May 90	29 Oct 90
Indonesia	26 Jun 86	26 Sep 86	Philippines	15 Sep 86	22 Nov 93
Japan	12 Sep 86	5 Jun 87	Sri Lanka	3 Oct 86	27 May 88
Korea (Rep.)	11 Oct 85	24 Nov 87	Vietnam	27 Sep 93	4 Apr 94
Malaysia	2 Jul 91	2 Aug 91			

HEALTH

Protocol Concerning the Office International d'Hygiène Publique
New York, 22 July 1946
Entry into force: 20 October 1947

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		19 Apr 48	Myanmar		1 Jul 48
China		22 Jul 46	Pakistan		23 Jun 48
India	22 Jul 46	12 Jan 48	Philippines		22 Jul 46
Iran	22 Jul 46	27 Jan 47	Sri Lanka		23 May 49
Japan		11 Dec 51	Thailand		22 Jul 46

HUMAN RIGHTS, INCLUDING RIGHTS OF WOMEN AND CHILDREN

Convention on the Political Rights of Women
New York, 31 March 1953
Entry into force: 7 July 1954

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	16 Nov 66		Myanmar	14 Sep 54	
India	29 Apr 53	1 Nov 61	Nepal	26 Apr 66	
Indonesia	31 Mar 53	16 Dec 58	Pakistan	18 May 54	7 Dec 54
Japan	1 Apr 55	13 Jul 55	Papua New Guinea		27 Jan 82
Korea (Rep.)	23 Jun 59		Philippines	23 Sep 53	12 Sep 57
Laos	28 Jan 69		Thailand	5 Mar 54	30 Nov 54
Mongolia	18 Aug 65				

Convention on the Nationality of Married Women
New York, 20 February 1957
Entry into force: 11 August 1958

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India	15 May 57		Singapore		18 Mar 66
Malaysia		24 Feb 59	Sri Lanka		30 May 58
Pakistan	10 Apr 58				

Convention against Discrimination in Education, 1960
Paris, 14 December 1960
Entry into force: 22 May 1962
(Status as provided by UNESCO on 18 April 1997)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Brunei	25 Jan 85	Mongolia	4 Nov 64
Indonesia	10 Jan 67	Philippines	19 Nov 64
Iran	17 Jul 68	Sri Lanka	11 Aug 63
Kyrgyzstan	3 Jul 95	Tajikistan	28 Aug 92

International Covenant on Economic, Social and Cultural Rights, 1966
New York, 16 December 1966
Entry into force: 3 January 1976

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		24 Jan 83	Kyrgyzstan		7 Oct 94
Cambodia	17 Oct 80	26 May 92	Mongolia	5 Jun 68	18 Nov 74
India		10 Apr 79	Nepal		14 May 91
Iran	4 Apr 68	24 Jun 75	Philippines	19 Dec 66	7 Jun 74
Japan	30 May 78	21 Jun 79	Sri Lanka		11 Jun 80
Korea (DPR)		14 Sep 81	Uzbekistan		28 Sep 95
Korea (Rep.)		10 Apr 90	Vietnam		24 Sep 82

International Covenant on Civil and Political Rights, 1966
New York, 16 December 1966
Entry into force: 23 March 1976

State	*Sign.*	*Cons.*	*State*	*Sign.*	*Cons.*
Afghanistan		24 Jan 83	Kyrgyzstan		7 Oct 94
Cambodia	17 Oct 80	26 May 92	Nepal		14 May 91
India		10 Apr 79	Philippines	19 Dec 66	23 Oct 86
Iran	30 May 78	21 Jun 79	Sri Lanka		11 Jun 80
Japan	30 May 78	21 Jun 79	Thailand		29 Oct 96
Korea (DPR)		14 Sep 81	Uzbekistan		28 Sep 95
Korea (Rep.)		10 Apr 90	Vietnam		24 Sep 82

Optional Protocol to the International Covenant on Civil and Political Rights, 1966
New York, 16 December 1966
Entry into force: 23 March 1976

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Korea (Rep.)		10 Apr 90	Nepal		14 May 91
Kyrgyzstan		7 Oct 94	Philippines	19 Dec 66	22 Aug 89
Mongolia		16 Apr 91	Uzbekistan		28 Sep 95

International Convention on the Elimination of All Forms of Racial Discrimination, 1966
New York, 7 March 1966
Entry into force: 4 January 1969

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons*
Afghanistan		6 Jul 83	Mongolia	3 May 66	6 Aug 69
Bangladesh		11 Jun 79	Nepal		30 Jan 71
Bhutan	26 Mar 73		Pakistan	19 Sep 66	21 Sep 66
Cambodia	12 Apr 66	28 Nov 83	Papua New Guinea		
China		29 Dec 81	27 Jan 82		
India	2 Mar 67	3 Dec 68	Philippines	7 Mar 66	15 Sep 67
Iran	8 Mar 67	19 Aug 68	Sri Lanka		18 Feb 82
Japan		15 Dec 95	Tajikistan		11 Jan 95
Korea (Rep.)	8 Aug 78	5 Dec 78	Turkmenistan		29 Sep 94
Laos		22 Feb 74	Uzbekistan		28 Sep 95
Maldives		24 Apr 84	Vietnam		9 Jun 82

Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination
14th Meeting of the states parties, 15 January 1992
Entered into force: -

State	*Acceptance*
Korea (Rep.)	30 Nov 93

Convention on the Elimination of All Forms of Discrimination against Women
New York, 18 December 1979
Entry into force: 3 September 1981

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	14 Aug 80		Mongolia	17 Jul 80	20 Jul 81
Bangladesh		6 Nov 84	Nepal	5 Feb 91	22 Apr 91
Bhutan	17 Jul 80	31 Aug 81	Papua		
Cambodia	17 Oct 80	15 Oct 92	New Guinea	12 Jan 95	
China	17 Jul 80	4 Nov 80	Philippines	15 Jul 80	5 Aug 81
India	30 Jul 80	9 Jul 93	Singapore		5 Oct 95
Indonesia	29 Jul 80	13 Sep 84	Sri Lanka	17 Jul 80	5 Oct 81
Japan	17 Jul 80	25 Jun 85	Tajikistan		26 Oct 93
Korea (Rep.)	25 May 83	27 Dec 84	Thailand		9 Aug 85
Laos	17 Jul 80	14 Aug 81	Uzbekistan		19 Jul 95
Malaysia	5 Jun 95		Vietnam	29 Jul 80	17 Feb 82
Maldives	1 Jul 93				

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
New York, 10 December 1984
Entry into force: 26 June 1987

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	4 Feb 85	1 Apr 87	Philippines		18 Jun 86
Cambodia		15 Oct 92	Seychelles		5 May 92
China	12 Dec 86	4 Oct 88	Sri Lanka		3 Jan 94
Indonesia	23 Oct 85		Tajikistan		11 Jan 95
Korea (Rep.)		9 Jan 95	Uzbekistan		28 Sep 95
Nepal		14 May 91			

International Convention against Apartheid in Sports, 1985
New York, 10 December 1985
Entry into force: 3 April 1988

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China	21 Oct 87		Maldives	3 Oct 86	
India		12 Sep 90	Mongolia	16 May 86	16 Dec 87
Indonesia	16 May 86	23 Jul 93	Nepal	24 Jun 86	1 Mar 89
Iran	16 May 86	12 Jan 88	Philippines	16 May 86	27 Jul 87
Malaysia	16 May 86				

Convention on the Rights of the Child, 1989
New York, 20 November 1989
Entry into force: 2 September 1990

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	27 Sep 90	28 Mar 94			
Bangladesh	26 Jan 90	3 Aug 90	Maldives	21 Aug 90	11 Feb 91
Bhutan	4 Jun 90	1 Aug 90	Mongolia	26 Jan 90	5 Jul 90
Brunei		27 Dec 95	Myanmar		15 Jul 91
Cambodia		15 Oct 92	Nepal	26 Jan 90	14 Sep 90
China	29 Aug 90	2 Mar 92	Pakistan	20 Sep 90	12 Nov 90
India		11 Dec 92	Papua New		
Indonesia	26 Jan 90	5 Sep 90	Guinea	30 Sep 90	2 Mar 93
Iran	5 Sep 91	13 Jul 94	Philippines	26 Jan 90	21 Aug 90
Japan	21 Sep 90	22 Apr 94	Singapore		5 Oct 95
Kazakhstan	16 Feb 94	12 Aug 94	Sri Lanka	26 Jan 90	12 Jul 91
Korea (DPR)	23 Aug 90	21 Sep 90	Tajikistan	26 Oct 93	
Korea (Rep.)	25 Sep 90	20 Nov 91	Thailand	27 Mar 92	
Kyrgyzstan		7 Oct 94	Turkmenistan	20 Sep 93	
Laos		8 May 91	Uzbekistan		29 Jun 94
Malaysia		17 Feb 95	Vietnam	26 Jan 90	28 Feb 90

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
UNGA, New York, 18 December 1990
Entry into force: -

State	*Sig.*	*Cons.*	*State*	*Cons.*
Philippines	15 Nov 93	5 Jul 95	Sri Lanka	11 Mar 96

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV
Geneva, 12 August 1949
Entry into force: 21 October 1950
(Status as provided by the ICRC on 6 June 1997)

State	*Cons.*	*State*	*Cons.*
Afghanistan	26 Sep 56	Maldives	18 Jun 91
Bangladesh	4 Apr 72	Mongolia	20 Dec 58
Bhutan	10 Jan 91	Myanmar	25 Aug 92
Brunei	14 Oct 91	Nepal	7 Feb 64
Cambodia	8 Dec 58	Pakistan	12 Jun 51
China	28 Dec 56	Papua	
India	9 Nov 50	New Guinea	26 May 76
Indonesia	30 Sep 58	Philippines	6 Oct 52
Iran	20 Feb 57	Seychelles	8 Nov 84
Japan	21 Apr 53	Singapore	27 Apr 73
Kazakhstan	5 May 92	Sri Lanka	28 Feb 59
Korea (DPR)	27 Aug 57	Tajikistan	13 Jan 93
Korea (Rep.)	16 Aug 66	Thailand	29 Dec 54
Kyrgyzstan	18 Sep 92	Turkmenistan	10 Apr 92
Laos	29 Oct 56	Uzbekistan	8 Oct 93
Malaysia	24 Aug 62	Vietnam	28 Jun 57

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977
Geneva, 10 June 1977
Entry into force: 7 December 1978
(Status as provided by the ICRC on 6 June 1997)

State	*Cons.*	*State*	*Cons.*
Bangladesh	8 Sep 80	Maldives	3 Sep 91
Brunei	14 Oct 91	Mongolia	6 Dec 95
China	14 Sep 83	Tajikistan	13 Jan 93
Kazakhstan	5 May 92	Turkmenistan	10 Apr 92
Korea (DPR)	9 Mar 88	Uzbekistan	8 Oct 93
Korea (Rep.)	15 Jan 82	Vietnam	19 Oct 81
Kyrgyzstan	18 Sep 92		

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977
Geneva, 10 June 1977
Entry into force: 7 December 1978
(Status as provided by the ICRC on 6 June 1997)

State	*Cons.*	*State*	*Cons.*
Bangladesh	8 Sep 80	Maldives	3 Sep 91
Brunei	14 Oct 91	Mongolia	6 Dec 95
China	14 Sep 83	Philippines	11 Dec 86
Kazakhstan	5 May 92	Tajikistan	13 Jan 93
Korea (Rep.)	15 Jan 82	Turkmenistan	10 Apr 92
Kyrgyzstan	18 Sep 92	Uzbekistan	8 Oct 93
Laos	18 Nov 80		

INTELLECTUAL PROPERTY

Convention for the Protection of Industrial Property
Paris, 1883, most recently revised Stockholm, 1967 and amended 1979
(Status as included in WIPO doc. 423(E) of 3 July 1997)

State	*Party*	*Latest Act to which State is party*	*State*	*Party*	*Latest Act to which State is party*
Bangladesh	3 Mar 91	Stockholm	Mongolia	21 Apr 85	Stockholm
China	19 Mar 85	id.	Philippines	27 Sep 65	Lisbon, Stockholm
Indonesia	24 Dec 50	id.			
Iran	16 Dec 59	Lisbon	Singapore	23 Feb 95	Stockholm
Japan	15 Jul 1899	Stockholm	Sri Lanka	29 Dec 52	London, Stockholm
Kazakhstan	25 Dec 91	id.			
Korea (DPR)	10 Jun 80	id.	Tajikistan	25 Dec 91	Stockholm
Korea (Rep.)	4 May 80	id.	Turkmenistan	25 Dec 91	id.
Kyrgyzstan	25 Dec 91	id.	Uzbekistan	25 Dec 91	id.
Malaysia	1 Jan 89	id.	Vietnam	8 Mar 49	id.

Convention for the Protection of Literacy and Artistic Works
Berne, 1886, most recently revised Paris, 1971 and amended 1979
(Status as included in WIPO doc. 423(E) of 3 July 1997)

State	*Party*	*Latest Act to which State is party*	*State*	*Party*	*Latest Act to which State is party*
China	15 Oct 92	Paris	Pakistan	5 Jul 48	Rome, Stockholm
India	1 Apr 28	id.			
Indonesia	5 Sep 97	Paris	Philippines	1 Aug 51	Paris
Japan	15 Jul 1899	id.	Sri Lanka	20 Jul 59	Rome, Paris
Korea (Rep.)	21 Aug 96	id.	Thailand	17 Jul 31	Paris
Malaysia	1 Oct 90	id.			

Universal Copyright Convention
Geneva, 6 September 1952, revised Paris, 24 July 1971
Entry into force: 16 September 1955 (revision: 10 July 1974)
(Status as provided by UNESCO on 18 April 1997)

State	*Cons. (deposit)*	*Cons. (rev.)*	*State*	*Cons. (deposit)*	*Cons. (rev.)*
Bangladesh	5 May 75		Korea (Rep.)	1 Jul 87	
Cambodia	3 Aug 53		Laos	19 Aug 54	
China	30 Jul 92		Pakistan	28 Apr 54	
India	21 Oct 57	7 Jan 88	Sri Lanka	25 Oct 83	
Japan	28 Jan 56		Tajikistan	28 Aug 92	
Kazakhstan	6 Aug 92				

Protocol 1 annexed to the Universal Copyright Convention concerning the application of the Convention to the works of stateless persons and refugees
Geneva, 6 September 1952 (revised Paris, 24 July 1971)
Entry into force: 16 September 1955 (revision: 10 July 1974)
(Status as provided by UNESCO on 18 April 1997)

State	*Cons. (deposit)*	*Cons. (rev.)*	*State*	*Cons. (deposit)*	*Cons. (rev.)*
Bangladesh	5 May 75		Korea (Rep.)	1 Jul 87	
Cambodia	3 Aug 53		Laos	19 Aug 54	
India	21 Oct 57	7 Jan 88	Pakistan	28 Apr 54	
Japan	28 Jan 56	21 Jul 77	Sri Lanka	27 Jul 88	

Protocol 2 annexed to the Universal Copyright Convention concerning the application of the Convention to the works of certain international organizations
Geneva, 6 September 1952 (revised Paris, 24 July 1971)
Entry into force: 16 September 1955 (revision: 20 July 1974)
(Status as provided by UNESCO on 18 April 1997)

State	*Cons. (deposit)*	*Cons. (rev.)*	*State*	*Cons. (deposit)*	*Cons. (rev.)*
Cambodia	3 Aug 53		Laos	19 Aug 54	
India	21 Oct 57	7 Jan 88	Pakistan	28 Apr 54	
Japan	28 Jan 56	21 Jul 77	Sri Lanka	27 Jul 88	

Protocol 3 annexed to the Universal Copyright Convention concerning the effective date of instruments of ratification or acceptance of, or accession to, the Convention
Geneva, 6 September 1952
Entry into force: 7 August 1956
(Status as provided by UNESCO on 18 April 1997)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Cambodia	3 Aug 53	Pakistan	28 Apr 54
India	21 Oct 57	Sri Lanka	27 Jul 88
Japan	28 Jan 56		
Laos	19 Aug 54		

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
Rome, 26 October 1961
Entry into force: 18 May 1964
(Status as included in WIPO Doc. 432(E) of 3 July 1997)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Japan	26 Jul 89	Philippines	25 Jun 84

Convention Establishing the World Intellectual Property Organization
Stockholm, 14 July 1967
(Status as included in WIPO doc. 423(E) of 3 July 1997)

State	*Membership*	*State*	*Membership*
Bangladesh	11 May 85	Malaysia	1 Jan 89
Bhutan	16 Mar 94	Mongolia	28 Feb 79
Brunei	21 Apr 94	Nepal	4 Feb 97
Cambodia	25 Jul 95	Pakistan	6 Jan 77
China	3 Jun 80	Papua New Guinea	10 Jul 97
India	1 May 75	Philippines	14 Jul 80
Indonesia	18 Dec 79	Singapore	10 Dec 90
Japan	20 April 75	Sri Lanka	20 Sep 78
Kazakhstan	25 Dec 91	Tajikistan	25 Dec 91
Korea (DPR)	17 Aug 74	Thailand	25 Dec 89
Korea (Rep.)	1 Mar 79	Turkmenistan	25 Dec 91
Kyrgyzstan	25 Dec 91	Uzbekistan	25 Dec 91
Laos	17 Jan 95	Vietnam	2 Jul 76

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971
Geneva, 29 October 1971
Entry into force: 18 April 1973

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		5 Jan 93	Japan	21 Apr 72	19 Jun 78
India	29 Oct 71	1 Nov 74	Korea (Rep.)		1 Jul 87
Iran	29 Oct 71		Philippines	29 Apr 72	

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties
Madrid, 13 December 1979
Entry into force: -

State	*Cons.*
India	31 Jan 83 (except Arts. 1 to 4 and 17)

INTERNATIONAL CRIMES

Slavery Convention

Geneva, 25 September 1926 as amended in New York, 7 December 1953
Entry into force: 7 July 1955

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	16 Aug 54		Pakistan		30 Sep 55
Bangladesh	7 Jan 85		Papua New Guinea		27 Jan 82
India	12 Mar 54		Philippines		12 Jul 55
Mongolia		20 Dec 68	Sri Lanka		21 Mar 58
Myanmar	29 Apr 57				
Nepal		7 Jan 63			

Convention on the Prevention and Punishment of the Crime of Genocide

New York, 9 December 1948
Entry into force: 12 January 1951

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		22 Mar 56	Mongolia		5 Jan 67
Cambodia		14 Oct 50	Myanmar	30 Dec 49	14 Mar 56
China	20 Jul 49	18 Apr 83	Nepal		17 Jan 69
India	29 Nov 49	27 Aug 59	Pakistan	11 Dec 48	12 Oct 57
Iran	8 Dec 49	14 Aug 56	Papua New Guinea		27 Jan 82
Korea (DPR)		31 Jan 89	Philippines	11 Dec 48	7 Jul 50
Korea (Rep.)		14 Oct 50	Singapore		18 Aug 95
Laos		8 Dec 50	Sri Lanka		2 Oct 50
Malaysia		20 Dec 94	Vietnam		9 Jun 81
Maldives		24 Apr 84			

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

Geneva, 7 September 1956
Entry into force: 30 April 1957

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		16 Nov 66	Mongolia		20 Dec 68
Bangladesh		5 Feb 85	Nepal		7 Jan 63
Cambodia		12 Jun 57	Pakistan	7 Sep 56	20 Mar 58
India	7 Sep 56	23 Jun 60	Philippines		17 Nov 64
Iran		30 Dec 59	Singapore		28 Mar 72
Laos		9 Sep 57	Sri Lanka	5 Jun 57	21 Mar 58
Malaysia		18 Nov 57			

Convention on Offences and Certain Other Acts Committed on Board Aircraft

Tokyo, 14 September 1963
Entry into force: 4 December 1969
(Status as at 30 June 1997, provided by the ICAO Secretariat)

State	*Cons.*	*Eff. date*	*State*	*Cons.*	*Eff. date*
Afghanistan	15 Apr 77	14 Jul 77	Maldives	28 Sep 87	27 Dec 87
Bangladesh	25 Jul 78	23 Oct 78	Mongolia	24 Jul 90	22 Oct 90
Bhutan	25 Jan 89	25 Apr 89	Myanmar	23 May 96	21 Aug 96
Brunei	23 May 86	21 Aug 86	Nepal	15 Jan 79	15 Apr 79
Cambodia	22 Oct 96	20 Jan 97	Pakistan	11 Sep 73	10 Dec 73
China	14 Nov 78	12 Feb 79	Papua New		
India	22 Jul 75	20 Oct 75	Guinea	15 Dec 75	16 Sep 75
Indonesia	7 Sep 76	6 Dec 76	Philippines	26 Nov 65	4 Dec 69
Iran	28 Jun 76	29 Sep 76	Seychelles	4 Jan 79	4 Apr 79
Japan	26 May 70	24 Aug 70	Singapore	1 Mar 71	30 May 71
Kazakhstan	18 May 95	16 Aug 95	Sri Lanka	30 May 78	28 Aug 78
Korea (DPR)	9 May 83	7 Aug 83	Tajikistan	20 Mar 96	18 Jun 96
Korea (Rep.)	19 Feb 71	20 May 71	Thailand	6 Mar 72	4 Jun 72
Laos	23 Oct 72	21 Jan 73	Uzbekistan	31 Jul 95	20 Oct 95
Malaysia	5 Mar 85	3 Jun 85	Vietnam	10 Oct 79	8 Jan 80

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity
New York, 26 November 1968
Entry into force: 11 November 1970

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		22 Jul 83	Mongolia	31 Jan 69	21 May 69
India		12 Jan 71	Philippines		15 May 73
Korea (DPR)		8 Nov 84	Vietnam		6 May 83
Laos		28 Dec 84			

Convention for the Suppression of Unlawful Seizure of Aircraft
The Hague, 16 December 1970
Entry into force: 14 October 1971
(Status as at 30 June 1997, provided by the ICAO Secretariat)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	16 Dec 70	29 Aug 79	Maldives		1 Sep 87
Bangladesh		28 Jun 78	Mongolia	18 Jan 71	8 Oct 71
Bhutan		28 Dec 88	Myanmar		22 May 96
Brunei		16 Apr 86	Nepal		11 Jan 79
Cambodia	16 Dec 70	8 Nov 96	Pakistan	12 Aug 71	28 Nov 73
China		10 Sep 80	Papua		
India	14 Jul 71	12 Nov 82	New Guinea	15 Dec 75	
Indonesia	16 Dec 70	27 Aug 76	Philippines	16 Dec 70	26 Mar 73
Iran	16 Dec 70	25 Jun 72	Seychelles	29 Dec 78	
Japan	16 Dec 70	19 Apr 71	Singapore	8 Sep 71	12 Apr 78
Kazakhstan		4 Apr 95	Sri Lanka	30 May 78	
Korea (DPR)		28 Apr 83	Tajikistan		29 Feb 96
Korea (Rep.)		18 Jan 73	Thailand	16 Dec 70	16 May 78
Laos	16 Feb 71	6 Apr 89	Uzbekistan		7 Feb 94
Malaysia	16 Dec 70	4 May 85	Vietnam		17 Sep 79

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation
Montreal, 23 September 1971
Entry into force: 26 January 1973
(Status as at 30 June 1997, provided by the ICAO Secretariat)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		26 Sep 84	Malaysia		4 May 85
Bangladesh		28 Jun 78	Maldives		1 Sep 87
Bhutan		28 Dec 88	Mongolia	18 Feb 72	14 Sep 72
Brunei		16 Apr 86	Myanmar		22 May 96
Cambodia		8 Nov 96	Nepal		11 Jan 79
China		10 Sep 80	Pakistan		24 Jan 74
India	11 Dec 72	12 Nov 82	Papua New Guinea		15 Dec 75
Indonesia		27 Aug 76	Philippines	23 Sep 71	26 Mar 73
Iran		10 Jul 73	Singapore	21 Nov 72	12 Apr 78
Japan		12 Jun 74	Sri Lanka		30 May 78
Kazakhstan		4 Apr 95	Tajikistan		29 Feb 96
Korea (DPR)		13 Aug 80	Thailand		16 May 78
Korea (Rep.)		2 Aug 73	Uzbekistan		7 Feb 94
Laos	1 Nov 72	6 Apr 89	Vietnam		17 Sep 79

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents
New York, 14 December 1973
Entry into force: 20 February 1977

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bhutan		16 Jan 89	Korea (Rep.)		25 May 83
China		5 Aug 87	Maldives		21 Aug 90
India		11 Apr 78	Mongolia	23 Aug 74	8 Aug 75
Iran		12 Jul 78	Nepal		9 Mar 90
Japan		8 Jun 87	Pakistan		29 Mar 76
Kazakhstan		21 Feb 96	Philippines		26 Nov 76
Korea (DPR)		1 Dec 82	Sri Lanka		27 Feb 91

International Convention on the Suppression and Punishment of the Crime of Apartheid
New York, 30 November 1973
Entry into force: 18 July 1976

State	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	6 Jul 83	Maldives		24 Apr 84
Bangladesh	5 Feb 85	Mongolia	17 May 74	8 Aug 75
Cambodia	28 Jul 81	Nepal		12 Jul 77
China	18 Apr 83	Pakistan		27 Feb 86
India	22 Sep 77	Philippines	2 May 74	26 Jan 78
Iran	17 Apr 85	Sri Lanka		18 Feb 82
Laos	5 Oct 81	Vietnam		9 Jun 81

International Convention Against the Taking of Hostages
New York, 17 December 1979
Entry into force: 3 June 1983

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bhutan		31 Aug 81	Kazakhstan		21 Feb 96
Brunei		18 Oct 88	Korea (Rep.)		4 May 83
China		26 Jan 93	Mongolia		9 Jun 92
India		7 Sep 94	Nepal		9 Mar 90
Japan	22 Dec 80	8 Jun 87	Philippines	2 May 80	14 Oct 80

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
Rome, 10 March 1988
Entry into force: 1 March 1992
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Sig.*	*Cons.*
China	20 Aug 91	1 Mar 1992

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
Rome, 10 March 1988
Entry into force: 1 March 1992
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei	3 Feb 89		Philippines	10 Mar 88	
China	20 Aug 91	1 Mar 92			

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation
Montreal, 24 February 1988
Entry into force: 6 August 1989
(Status as at 30 June 1997, provided by the Secretariat of the ICAO)

State	*Cons.*	*Effective date*	*State*	*Cons.*	*Effective date*
Cambodia	8 Nov 96	8 Dec 96	Pakistan	24 Feb 88	
China	24 Feb 88		Philippines	25 Jan 89	
India	22 Mar 95	21 Apr 95	Singapore	22 Nov 96	22 Dec 96
Indonesia	24 Feb 88		Sri Lanka	11 Feb 97	13 Mar 97
Kazakhstan	18 May 95	17 Jun 95	Sri Lanka		28 Oct 88
Korea (DPR)	11 Apr 89		Tajikistan	29 Feb 96	30 Mar 96
Korea (Rep.)	27 Jun 90	27 Jul 90	Thailand	14 May 96	13 Jun 96
Malaysia	24 Feb 88		Uzbekistan	7 Feb 94	9 Mar 94
Myanmar	22 May 96	21 Jun 96			

International Convention against the Recruitment, Use, Financing and Training of Mercenaries
New York, 4 December 1989
Entry into force: -

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Maldives	17 Jul 90	11 Sep 91	Turkmenistan		18 Sep 96

Convention on the Marking of Plastic Explosives for the Purpose of Detection
Montreal, 1 March 1991
Entry into force: -
(Status as at 30 June 1996, provided by the Secretariat of the ICAO on 18 April 1997)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	1 Mar 91		Korea (Rep.)	1 Mar 91	
Kazakhstan		18 May 95	Pakistan	1 Mar 91	

INTERNATIONAL REPRESENTATION
(*see also*: Privileges and Immunities)

Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character
Vienna, 14 March 1975
Entry into force: -

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Iran		30 Dec 88	Mongolia	30 Oct 75	14 Dec 76
Korea (DPR)		14 Dec 82	Vietnam		26 Aug 80

INTERNATIONAL TRADE

Convention on the Limitation Period in the International Sale of Goods
New York, 14 June 1974
Entry into force: 1 August 1988

State	*Sig.*	*Cons.*
Mongolia	14 Jun 74	

Convention on Transit Trade of Land-locked States
New York, 8 July 1965
Entry into force: 9 June 1967

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	8 Jul 65		Nepal	9 Jul 65	22 Aug 66
Laos	8 Jul 65	29 Dec 67	Uzbekistan		7 Feb 96
Mongolia		26 Jul 66			

UN Convention on Contracts for the International Sale of Goods, 1980
Vienna, 1980
Entry into force: 1 January 1988
(Status as provided in UNCITRAL doc. A/CN.9/440, 22 May 1997)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China	30 Sep 81	11 Dec 86	Uzbekistan		27 Nov 96
Singapore	11 Apr 80	16 Feb 95			

UN Convention on the Liability of Operators of Transport Terminals in International Trade
Vienna, 19 April 1991
Entry into force: -

State	*Sig.*	*Cons.*
Philippines	19 Apr 91	

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure
The Hague, 1 March 1954
Entry into force: 12 April 1957
(Status as on 5 June 1997 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Japan	12 Mar 70	28 May 70	Uzbekistan		4 Oct 96
Kyrgyzstan		16 Jun 97			

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents
The Hague, 5 October 1961
Entry into force: 24 January 1965
(Status on 5 June 1997 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei		23 Feb 87	Japan	12 Mar 70	28 May 70

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965
The Hague, 15 November 1965
Entry into force: 10 February 1969
(Status on 5 June 1997 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		1 Dec 91	Pakistan		6 Jul 89
Japan	12 Mar 70	28 May 70			

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters
The Hague, 18 March 1970
Entry into force: 7 October 1972
(Status on 5 June 1997 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*
Singapore		27 Oct 78

LABOUR

Forced Labour Convention
1930 (ILO Convention 29)
Entry into force: 1 May 1932
(Status as at 31 December 1996, information furnished by the ILO)

State	*Ratif. registered*	*State*	*Ratif. registered*
Bagladesh	22 Jun 72	Myanmar	4 Mar 55
Cambodia	24 Feb 69	Pakistan	23 Dec 57
India	30 Nov 54	Papua New Guinea	1 May 76
Indonesia	12 Jun 50	Singapore	25 Oct 65
Iran	10 Jun 57	Sri Lanka	5 Apr 50
Japan	21 Nov 32	Tajikistan	26 Nov 93
Kyrgyzstan	31 Mar 92	Thailand	26 Feb 69
Laos	23 Jan 64		
Malaysia	11 Nov 57		

Freedom of Association and Protection of the Right to Organise Convention
1948 (ILO Convention 87)
Entry into force: 4 July 1950
(Status as at 31 December 1996, information furnished by the ILO)

State	*Ratif. registered*	*State*	*Ratif. registered*
Bangladesh	22 Jun 72	Pakistan	14 Feb 51
Japan	14 Jun 65	Philippines	29 Dec 53
Kyrgyzstan	31 Mar 92	Sri Lanka	15 Sep 95
Mongolia	3 Jun 69	Tajikistan	26 Nov 93
Myanmar	4 Mar 55		

Right to Organise and Collective Bargaining Convention
1949 (ILO Convention 98)
Entry into force: 18 July 1951
(Status as at 31 December 1996, information furnished by the ILO)

State	*Ratif. registered*	*State*	*Ratif. registered*
Bangladesh	22 Jun 72	Pakistan	26 May 52
Indonesia	15 Jul 57	Papua New Guinea	1 May 76
Japan	20 Oct 53	Philippines	29 Dec 53
Kyrgyzstan	31 Mar 92	Singapore	25 Oct 65
Malaysia	5 Jun 61	Sri Lanka	13 Dec 72
Mongolia	3 Jun 69	Tajikistan	26 Nov 93
Nepal	11 Nov 96		

Equal Remuneration Convention
1951 (ILO Convention 100)
Entry into force: 23 May 1953
(Status as at 31 December 1996, information furnished by the ILO)

State	*Ratif. registered*	*State*	*Ratif. registered*
Afghanistan	22 Aug 69	Kyrgyzstan	31 Mar 92
China	2 Nov 90	Mongolia	3 Jun 69
India	25 Sep 58	Nepal	10 Jun 76
Indonesia	11 Aug 58	Philippines	29 Dec 53
Iran	10 Jun 72	Sri Lanka	1 Apr 93
Japan	24 Aug 67	Tajikistan	26 Nov 93

Abolition of Forced Labour Convention
1957 (ILO Convention 105)
Entry into force: 17 January 1959
(Status as at 31 December 1996, information furnished by the ILO)

State	*Ratif. registered*	*State*	*Ratif. registered*
Afghanistan	16 May 63	Papua New Guinea	1 May 76
Bangladesh	22 Jun 72	Philippines	17 Nov 60
Iran	13 Apr 59	Thailand	2 Dec 69
Pakistan	15 Feb 60		

Discrimination (Employment and Occupation) Convention
1958 (ILO Convention 111)
Entry into force: 15 June 1960
(Status as at 31 December 1996, information furnished by the ILO)

State	*Ratif. registered*	*State*	*Ratif. registered*
Afghanistan	1 Oct 69	Mongolia	3 Jun 69
Bangladesh	22 Jun 72	Nepal	19 Sep 74
India	3 Jun 60	Pakistan	24 Jan 61
Iran	30 Jun 64	Philippines	17 Nov 60
Kyrgyzstan	31 Mar 92	Tajikistan	26 Nov 93

Employment Policy Convention
1964 (ILO Convention 122)
Entry into force: 15 July 1966
(Status as at 31 December 1996, information furnished by the ILO)

State	*Ratif. registered*	*State*	*Ratif. registered*
Cambodia	28 Sep 71	Papua New Guinea	1 May 76
Iran	10 Jun 72	Philippines	13 Jan 76
Japan	10 Jun 86	Tajikistan	26 Nov 93
Korea (Rep.)	9 Dec 92	Thailand	26 Feb 69
Kyrgyzstan	31 Mar 92	Uzbekistan	13 Jul 92
Mongolia	24 Nov 76		

NARCOTIC DRUGS

International Opium Convention
Geneva, 19 February 1925, amended by Protocol, New York, 11 December 1946
Entry into force: 3 February 1948

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	29 Jan 57		Malaysia		21 Aug 58
Cambodia	3 Oct 51		Papua New Guinea		28 Oct 80
India	11 Dec 46		Sri Lanka		4 Dec 57
Indonesia	3 Apr 58		Thailand	27 Oct 47	
Japan	27 Mar 52				
Laos		7 Oct 50			

Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium
Geneva, 11 February 1925, amended by Protocol, New York, 11 December 1946
Entry into force: 27 October 1947

State	*Cons.*	*State*	*Cons.*
Cambodia	3 Oct 51	Laos	7 Oct 50
India	11 Oct 46	Thailand	27 Oct 47
Japan	27 Mar 52		

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs
Geneva, 13 July 1931, amended by Protocol, New York, 11 December 1946
Entry into force: 21 November 1947

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	11 Dec 46		Laos		7 Oct 50
Cambodia	3 Oct 51		Malaysia		21 Aug 58
China	11 Dec 46		Papua		
India	11 Dec 46		New Guinea		28 Oct 80
Indonesia	3 Apr 58		Philippines	25 May 50	
Iran	11 Dec 46		Sri Lanka		4 Dec 57
Japan	27 Mar 52		Thailand	27 Oct 47	

Agreement Concerning the Suppression of Opium Smoking
Bangkok, 27 November 1931, amended by Protocol, New York, 11 December 1946
Entry into force: 27 October 1947

State	*Cons.*	*State*	*Cons.*
Cambodia	3 Oct 51	Laos	7 Oct 50
India	11 Dec 46	Thailand	27 Oct 47
Japan	27 Mar 52		

Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936
New York, 11 December 1946
Entry into force: 11 December 1946

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		11 Dec 46	Papua		
China		11 Dec 46	New Guinea		28 Oct 80
India		11 Dec 46	Philippines	11 Dec 46	25 May 50
Iran		11 Dec 46	Thailand		27 Oct 47
Japan		27 Mar 52			

Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931
Paris, 19 November 1948
Entry into force: 1 December 1949

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		19 Nov 48	Myanmar	19 Nov 48	2 Mar 50
China		19 Nov 48	Pakistan	21 Nov 48	27 Aug 52
India	19 Nov 48	10 Nov 50	Papua		
Indonesia		21 Feb 51	New Guinea		28 Oct 80
Japan		5 May 52	Philippines	10 Mar 49	7 Dec 53
Laos		7 Oct 50	Sri Lanka		17 Jan 49
Malaysia		21 Aug 58			

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs
Geneva, 26 June 1936, amended by Protocol, New York, 11 December 1946
Entry into force: 10 October 1947

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia		3 Oct 51	Japan		7 Sep 55
China	11 Dec 46		Laos		13 Jul 51
India	11 Dec 46		Sri Lanka		4 Dec 57
Indonesia		3 Apr 58			

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium
New York, 23 June 1953
Entry into force: 8 March 1963

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia	29 Dec 53	22 Mar 57	Pakistan	3 Dec 53	10 Mar 55
India	23 Jun 53	30 Apr 54	Papua		
Indonesia		11 Jul 57	New Guinea		28 Oct 80
Iran	15 Dec 53	30 Dec 59	Philippines	23 Jun 53	1 Jun 55
Japan	23 Jun 53	21 Jul 54	Sri Lanka		4 Dec 57
Korea (Rep.)	23 Jun 53	29 Apr 58			

Single Convention on Narcotic Drugs
New York, 30 March 1961
Entry into force: 13 December 1964

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	30 Mar 61	19 Mar 63	Malaysia		11 Jul 67
Bangladesh		25 Apr 75	Mongolia		6 May 91
Brunei		25 Nov 87	Myanmar	30 Mar 61	29 Jul 63
Cambodia	30 Mar 61		Pakistan	30 Mar 61	9 Jul 65
India	30 Mar 61	13 Dec 64	Papua		
Indonesia	28 Jul 61	3 Sep 76	New Guinea		28 Oct 80
Iran	30 Mar 61	30 Aug 72	Philippines	30 Mar 61	2 Oct 67
Japan	26 Jul 61	13 Jul 64	Singapore		15 Mar 73
Korea (Rep.)	30 Mar 61	13 Feb 62	Sri Lanka		11 Jul 63
Kyrgyzstan		7 Oct 94	Thailand	24 Jul 61	31 Oct 61
Laos		22 Jun 73	Turkmenistan		21 Feb 96

Protocol amending the Single Convention on Narcotic Drugs, 1961
Geneva, 25 March 1972
Entry into force: 8 August 1975

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		9 Mar 80	Mongolia		6 May 91
Brunei		25 Nov 87	Pakistan	29 Dec 72	
Cambodia	25 Mar 72		Papua		
India		14 Dec 78	New Guinea		28 Oct 80
Indonesia	25 Mar 72	3 Sep 76	Philippines	25 Mar 72	7 Jun 74
Iran	25 Mar 72		Singapore		9 Jul 75
Japan	15 Dec 72	27 Sep 73	Sri Lanka		29 Jun 81
Korea (Rep.)	29 Dec 72	25 Jan 73	Thailand		9 Jan 75
Malaysia		20 Apr 78			

Single Convention on Narcotic Drugs as Amended by the Protocol of 25 March 1972 Amending the Single Convention on Narcotic Drugs 1961
New York, 8 August 1975
Entry into force: 8 August 1975

State	*Sig.**	*Cons.***	*State*	*Sig.**	*Cons.***
Bangladesh	9 May 80		Nepal		29 Jun 87
Brunei	25 Nov 87		Papua New		
China		23 Aug 85	Guinea	28 Oct 80	
India	14 Dec 78		Philippines	7 Jun 74	
Indonesia	3 Sep 76		Singapore	9 Jul 75	
Japan	27 Sep 73		Sri Lanka	29 Jun 81	
Korea (Rep.)	25 Jan 73		Thailand	9 Jan 75	
Kyrgyzstan		7 Oct 94	Turkmenistan	21 Feb 96	
Malaysia	20 Apr 78		Uzbekistan		24 Aug 95
Mongolia	6 May 91				

* Ratification or accession in respect of Protocol 1972 or participation upon deposit of an instrument of ratification or accession to the Convention of 1961 (art. 19 Protocol).
** Ratification or accession in respect of the Convention as amended.

Convention on Psychotropic Substances
Vienna, 21 February 1971
Entry into force: 16 August 1976

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		21 May 85	Myanmar		21 Sep 95
Bangladesh		11 Oct 90	Pakistan		9 Jun 77
Brunei		24 Nov 87	Papua		
China		23 Aug 85	New Guinea		20 Nov 81
India		23 Apr 75	Philippines		7 Jun 74
Indonesia		19 Dec 96	Singapore		17 Sep 90
Iran	21 Feb 71		Sri Lanka		15 Mar 93
Japan	21 Dec 71	31 Aug 90	Thailand		21 Nov 75
Kyrgyzstan		7 Oct 94	Turkmenistan		21 Feb 96
Korea (Rep.)		12 Jan 78	Uzbekistan		12 Jul 95
Malaysia		22 Jul 86			

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
Vienna, 20 December 1988
Entry into force: 11 November 1990

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	20 Dec 88	14 Feb 92	Malaysia	20 Dec 88	11 May 93
Bangladesh	14 Apr 89	11 Oct 90	Maldives	5 Dec 89	
Bhutan		27 Aug 90	Myanmar		11 Jun 91
Brunei	26 Oct 89	12 Nov 93	Nepal		24 Jul 91
China	20 Dec 88	27 Mar 90	Pakistan	20 Dec 89	25 Oct 91
India		27 Mar 90	Philippines	20 Dec 88	7 Jun 96
Indonesia	27 Mar 89		Sri Lanka		6 June 91
Iran	20 Dec 88	7 Dec 92	Tajikistan		6 May 96
Japan	19 Dec 89	12 Jun 92	Turkmenistan		21 Feb 96
Kyrgyzstan		7 Oct 94	Uzbekistan		24 Aug 95

NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons
New York, 28 September 1954
Entry into force: 6 June 1960

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Korea (Rep.)		22 Aug 62	Philippines	22 Jun 55	

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality
Vienna, 18 April 1961
Entry into force: 24 April 1964

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia		31 Aug 65	Malaysia		9 Nov 65
India		15 Oct 65	Myanmar		7 Mar 80
Indonesia		4 Jun 82	Nepal		28 Sep 65
Iran	27 May 61	3 Feb 65	Philippines	20 Oct 61	15 Nov 65
Korea (Rep.)	30 Mar 62	7 Mar 77	Sri Lanka		31 Jul 78
Laos		3 Dec. 62	Thailand	30 Oct 61	23 Jan 85

Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality
Vienna, 24 April 1963
Entry into force: 19 March 1967

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India		28 Nov 77	Laos		9 Aug 73
Indonesia		4 Jun 82	Nepal		28 Sep 65
Iran		5 Jun 75	Philippines		15 Nov 65
Korea (Rep.)		7 Mar 77			

NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage
Vienna, 21 May 1963
Entry into force: 12 November 1977
(Information furnished by IAEA Secretariat)

State	*Cons. (deposit)*	*E.i.f.*
Philippines	15 Nov 65	12 Nov 77

Convention on the Physical Protection of Nuclear Material
Vienna, 1980
Entry into force: 8 February 1987
(Status as at 31 December 1996, IAEA doc. INFCIRC/274/Rev.1/Add.6)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		10 Jan 89	Mongolia	23 Jan 86	28 May 86
Indonesia	3 Jul 86	5 Nov 86	Philippines	19 May 80	22 Sep 81
Japan		28 Oct 88	Tajikistan		11 Jul 96
Korea (Rep.)	29 Dec 81	7 Apr 82			

Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy)
Vienna, 21 September 1988
Entry into force: 27 April 1992
(Status as at 31 December 1996, IAEA doc. INFCIRC/402/Add.2)

State	*Sig.*
Philippines	21 Sep 88

Convention on Early Notification of a Nuclear Accident
Vienna, 26 September 1986
Entry into force: 27 October 1986
(Status as furnished by the IAEA Secretariat on 13 May 1997)

State	*Sig.*	*Cons. (deposit)*	*State*	*Sig.*	*Cons. (deposit)*
Afghanistan	26 Sep 86		Korea (Rep.)		8 Jun 90
Bangladesh		7 Jan 88	Malaysia	1 Sep 87	1 Sep 87
China	26 Sep 86	10 Sep 87	Mongolia	8 Jan 87	11 Jun 87
India	29 Sep 86	28 Jan 88	Pakistan		11 Sep 89
Indonesia	26 Sep 86	12 Nov 93	Philippines		5 May 97
Iran	26 Sep 86		Sri Lanka		11 Jan 91
Japan	6 Mar 87	9 Jun 87	Thailand	25 Sep 87	21 Mar 89
Korea (DPR)	29 Sep 86		Vietnam		29 Sep 87

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency
Vienna, 26 September 1986
Entry into force: 26 february 1987
(Status as furnished by IAEA Secretariat on 13 May 1997)

State	*Sig.*	*Cons. (deposit)*	*State*	*Sig.*	*Cons. (deposit)*
Afghanistan	26 Sep 86		Korea (Rep.)		8 Jun 90
Bangladesh		7 Jan 88	Malaysia	1 Sep 87	1 Sep 87
China	26 Sep 86	10 Sep 87	Mongolia	8 Jan 87	11 Jun 87
India	29 Sep 86	28 Jan 88	Pakistan		11 Sep 89
Indonesia	26 Sep 86	12 Nov 93	Philippines		5 May 97
Iran	26 Sep 86		Sri Lanka		11 Jan 91
Japan	6 Mar 87	9 Jun 87	Thailand	25 Sep 87	21 Mar 89
Korea (DPR)	29 Sep 86		Vietnam		29 Sep 87

OUTER SPACE

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies
London, Moscow, Washington, 27 January 1967
Entry into force: 10 October 1967
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Myanmar	yes	yes
Bangladesh	„		Nepal	„	„
China	„		Pakistan	„	„
India	„	„	Papua New Guinea		„
Indonesia	„		Philippines	„	„
Iran	„		Singapore		„
Japan	„	„	Sri Lanka	„	„
Korea (Rep.)	„	„	Thailand	„	„
Laos	„	„	Vietnam		„
Malaysia	„				
Mongolia	„	„			

Convention on Registration of Objects Launched into Outer Space
New York, 12 November 1974
Entry into force: 15 September 1976

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		12 Dec 88	Mongolia	30 Oct 75	10 Apr 85
India		18 Jan 82	Pakistan	1 Dec 75	27 Feb 86
Iran	27 May 95		Seychelles		28 Dec 77
Japan		20 Jun 83	Singapore	31 Aug 76	
Korea (Rep.)		14 Oct 81			

Agreement governing the Activities of States on the Moon and other Celestial Bodies
New York, 5 December 1979
Entry into force: 11 July 1984

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India	18 Jan 92		Philippines	23 Apr 80	26 May 81
Pakistan		27 Feb 86			

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations
New York, 13 February 1946
Entry into force: for each state on the date of deposit of its instrument of accession

State	*Cons.*	*State*	*Cons.*
Afghanistan	5 Sep 47	Mongolia	31 May 62
Bangladesh	13 Jan 78	Myanmar	25 Jan 55
Cambodia	6 Nov 63	Nepal	28 Sep 65
China	11 Sep 79	Pakistan	8 Jan 48
India	13 May 48	Papua	
Indonesia	8 Mar 72	New Guinea	4 Dec 75
Iran	8 May 47	Philippines	28 Oct 47
Japan	18 Apr 63	Singapore	18 Mar 66
Korea (Rep.)	9 Apr 92	Thailand	30 Mar 56
Laos	24 Nov 56	Vietnam	6 Apr 88
Malaysia	28 Oct 57		

Convention on the Privileges and Immunities of the Specialized Agencies
New York, 21 November 1947, UNGA Res. 179 (II)
Entry into force for each state: on date of deposit or receipt of notification

State	*Cons.*	*applicable to*
Cambodia	15 Oct 53	UPU
	26 Sep 55	FAO, ICAO, UNESCO, WHO, ITU, WMO
China	11 Sep 79	FAO, ICAO, UNESCO, WHO, UPU, ITU, WMO, IMO
	30 Jun 81	IMF, IBRD, IFC, IDA
	9 Nov 84	ILO
India	10 Feb 49	ILO, FAO, ICAO, UNESCO, WHO
	19 Oct 49	IMF, IBRD, UPU
	9 Mar 55	WMO
	3 Jun 55	WHO (Annex rev.), ITU
	3 Jul 58	WHO (Annex rev.)
	3 Aug 61	IFC
	12 Apr 63	FAO (Annex rev.)
Indonesia	8 Mar 72	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC, IDA

State	*Cons.*	*applicable to*
Iran	16 May 74	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC, IDA
Japan	18 Apr 63	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC, IDA
Korea (Rep.)	13 May 77	FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO
Laos	9 Aug 60	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC
Malaysia	29 Mar 62	ILO, FAO, ICAO, UNESCO, WHO, UPU, ITU, WMO
	23 Nov 62	WHO (Annex rev.)
Maldives	26 May 69	WHO, UPU, ITU, IMO
Mongolia	3 Mar 70	ILO, UNESCO, WHO, UPU, ITU, WMO
	20 Sep 74	FAO
Nepal	23 Feb 54	WHO
	28 Sep 65	FAO, ICAO, UNESCO, IMF, IBRD, UPU, ITU
Pakistan	23 Jul 51	IBRD
	7 Nov 51	IMF
	15 Sep 61	ILO, ICAO, UNESCO, WHO, UPU, ITU, WMO
	13 Mar 62	FAO, IMO
	17 Jul 62	IFC, IDA
Philippines	20 Mar 50	ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO
	21 May 58	WMO
	12 Mar 59	WHO (Annex rev.)
	13 Jan 61	IFC
Singapore	18 Mar 66	ILO, FAO, ICAO, UNESCO, WHO, UPU, ITU, WMO
Thailand	30 Mar 56	FAO, ICAO
	19 Jun 61	ILO, FAO, UNESCO, IMF, IBRD, WHO, ITU, WMO, IFC
	28 Apr 65	UPU
	21 Mar 66	FAO

Vienna Convention on Diplomatic Relations
Vienna, 18 April 1961
Entry into force: 24 April 1964

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons*
Afghanistan		6 Oct 65	Mongolia		5 Jan 67
Bangladesh		13 Jan 78	Myanmar		7 Mar 80
Bhutan		7 Dec 72	Nepal		28 Sep 65
Cambodia		31 Aug 65	Pakistan	29 Mar 62	29 Mar 62
China		25 Nov 75	Papua New Guinea		4 Dec 75
India		15 Oct 65	Philippines	20 Oct 61	15 Nov 65
Indonesia		4 Jun 82	Seychelles		29 May 79
Iran	27 May 61	3 Feb 65	Sri Lanka	18 Apr 61	2 Jun 78
Japan	26 Mar 62	8 Jun 64	Tajikistan		6 May 1996
Kazakhstan		5 Jan 94	Thailand	30 Oct 61	23 Jan 85
Korea (DPR)		29 Oct 80	Turkmenistan		25 Sep 96
Korea (Rep.)	28 Mar 62	28 Dec 70	Uzbekistan		2 Mar 92
Kyrgyzstan		7 Oct 94	Vietnam		26 Aug 80
Laos		3 Dec 62			
Malaysia		9 Nov 65			

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes
Vienna, 18 April 1961
Entry into force: 24 April 1964

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia		31 Aug 65	Malaysia		9 Nov 65
India		15 Oct 65	Nepal		28 Sep 65
Iran	27 May 61	3 Feb 65	Pakistan		29 Mar 76
Japan	26 Mar 62	8 Jun 64	Philippines	20 Oct 61	15 Nov 65
Korea (Rep.)	30 Mar 62	25 Jan 77	Sri Lanka		31 Jul 78
Laos		3 Dec 62			

Vienna Convention on Consular Relations
Vienna, 24 April 1963
Entry into force: 19 March 1967

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		13 Jan 78	Maldives		21 Jan 91
Bhutan		28 Jul 81	Malaysia		1 Oct 91
China		2 Jul 79	Mongolia		14 Mar 89
India		28 Nov 77	Nepal		28 Sep 65
Indonesia		4 Jun 82	Pakistan		14 Apr 69
Iran	24 Apr 63	5 Jun 75	Papua New Guinea		4 Dec 75
Japan		3 Oct 83	Philippines	24 Apr 63	15 Nov 65
Kazakhstan		5 Jan 94	Tajikistan		6 May 96
Korea (DPR)		8 Aug 84	Turkmenistan		25 Sep 96
Korea (Rep.)		7 Mar 77	Uzbekistan		2 Mar 92
Kyrgyzstan		7 Oct 94	Vietnam		8 Sep 92
Laos		9 Aug 73			

Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes
Vienna, 24 April 1963
Entry into force: 19 March 1967

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India		28 Nov 77	Nepal		28 Sep 65
Iran		5 Jun 75	Pakistan		29 Mar 76
Japan		3 Oct 83	Philippines	24 Apr 63	15 Nov 65
Korea (Rep.)		7 Mar 77	Seychelles		29 May 79
Laos		9 Aug 73			

Convention on Special Missions
New York, 8 December 1969
Entry into force: 21 June 1985

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Indonesia		4 Jun 82	Philippines	16 Dec 69	26 Nov 76
Iran		5 Jun 75	Seychelles		28 Dec 77
Korea (DPR)		22 May 85			

Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes
UNGA, New York, 8 December 1969
Entry into force: 21 June 1985

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Iran		5 Jun 75	Philippines	16 Dec 69	26 Nov 76

REFUGEES

Convention relating to the Status of Refugees
Geneva, 28 July 1951
Entry into force: 22 April 1954

State	*Cons.*	*State*	*Cons.*
Cambodia	15 Oct 92	Kyrgyzstan	8 Oct 96
China	24 Sep 82	Papua	
Iran	28 Jul 76	New Guinea	17 Jul 86
Japan	3 Oct 81	Philippines	22 Jul 81
Korea (Rep.)	3 Dec 92	Tajikistan	7 Dec 93

Protocol relating to the Status of Refugees
New York, 31 January 1967
Entry into force: 4 October 1967

State	*Cons.*	*State*	*Cons.*
Cambodia	15 Oct 92	Kyrgyzstan	8 Oct 96
China	24 Sep 82	Papua New Guinea	17 July 86
Iran	28 Jul 76	Philippines	22 Jul 81
Japan	1 Jan 82	Tajikistan	7 Dec 93
Korea (Rep.)	3 Dec 92		

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic
Vienna, 8 November 1968
Entry into force: 21 May 1977

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Indonesia	8 Nov 68		Philippines	8 Nov 68	27 Dec 73
Iran	8 Nov 68	21 May 76	Tajikistan		9 Mar 94
Kazakhstan		4 Apr 94	Thailand	8 Nov 68	
Korea (Rep.)	29 Dec 69		Turkmenistan		14 Jan 93
Kyrgyzstan		22 Mar 94	Uzbekistan		17 Jan 95
Pakistan		19 Mar 86			

Convention on Road Signs and Signals
Vienna, 8 November 1968
Entry into force: 6 June 1978

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India		10 Mar 80	Pakistan		14 Jan 80
Indonesia	8 Nov 68		Philippines	8 Nov 68	27 Dec 73
Iran	8 Nov 68	21 May 76	Tajikistan		9 Mar 94
Kazakhstan		4 Apr 94	Thailand	8 Nov 68	
Korea (Rep.)	29 Dec 69		Turkmenistan		14 Jan 93
Kyrgyzstan		22 Mar 94	Uzbekistan		17 Jan 95

SEA

Convention on the Territorial Sea and the Contiguous Zone

Geneva, 29 April 1958
Entry into force: 10 September 1964

State	*Sig.*	*Cons.*	*State*	*Sign.*	*Cons.*
Afghanistan	30 Oct 58		Nepal	29 Apr 58	
Cambodia		18 Mar 60	Pakistan	31 Oct 58	
Iran	28 May 58		Sri Lanka	30 Oct 58	
Japan		10 Jun 68	Thailand	29 Apr 58	2 Jul 68
Malaysia		21 Dec 60			

Convention on the High Seas

Geneva, 29 April 1958
Entry into force: 30 September 1962

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	30 Oct 58	28 Apr 59	Mongolia		15 Oct 76
Cambodia		18 Mar 60	Nepal	29 Apr 58	28 Dec 62
Indonesia	8 May 58	10 Aug 61	Pakistan	31 Oct 58	
Iran	28 May 58		Sri Lanka	30 Oct 58	
Japan		10 Jun 68	Thailand	29 Apr 58	2 Jul 68
Malaysia	21 Dec 60				

Convention on Fishing and Conservation of the Living Resources of the High Seas

Geneva, 29 April 1958
Entry into force: 20 March 1966

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	30 Oct 58		Nepal	29 Apr 58	
Cambodia		18 Mar 60	Pakistan	31 Oct 58	
Indonesia	8 May 58		Sri Lanka	30 Oct 58	
Iran	28 May 58		Thailand	29 Apr 58	2 Jul 68
Malaysia		21 Dec 60			

Convention on the Continental Shelf

Geneva, 29 April 1958
Entry into force: 10 June 1964

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	30 Oct 58		Nepal	29 Apr 58	
Cambodia		18 Mar 60	Pakistan	31 Oct 58	
Indonesia	8 May 58		Sri Lanka	30 Oct 58	
Iran	28 May 58		Thailand	29 Apr 58	2 Jul 68
Malaysia		21 Dec 60			

Optional Protocol of Signature concerning the Compulsory Settlement of Disputes
Geneva, 29 April 1958
Entry into force: 30 September 1962

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia	22 Jan 70		Nepal		29 Apr 58
Indonesia	8 May 58		Pakistan		6 Nov 58
Malaysia		1 May 61	Sri Lanka		30 Oct 58

United Nations Convention on the Law of the Sea
Montego Bay, 10 December 1982
Entry into force: 16 November 1994

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	18 Mar 83		Maldives	10 Dec 82	
Bangladesh	10 Dec 82		Mongolia	10 Dec 82	13 Aug 96
Bhutan	10 Dec 82		Myanmar	10 Dec 82	21 May 96
Brunei	5 Dec 84	5 Nov 96	Nepal	10 Dec 82	
Cambodia	1 Jul 83		Pakistan	10 Dec 82	
China	10 Dec 82	7 June 96	Papua		
India	10 Dec 82	29 Jun 95	New Guinea	10 Dec 82	
Indonesia	10 Dec 82	3 Feb 86	Philippines	10 Dec 82	8 May 84
Iran	10 Dec 82		Seychelles	10 Dec 82	16 Sep 91
Japan	7 Feb 83	20 Jun 96	Singapore	10 Dec 82	17 Nov 94
Korea (DPR)	10 Dec 82		Sri Lanka	10 Dec 82	19 Jul 94
Korea (Rep.)	14 Mar 83	29 Jan 96	Thailand	10 Dec 82	
Laos	10 Dec 82		Vietnam	10 Dec 82	25 Jul 94
Malaysia	10 Dec 82	14 Oct 96			

Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982
New York, 28 July 1994
Entry into force: 28 July 1996
(all countries listed below agreed to provisional application as from 16 November 1994)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan			Maldives	10 Oct 94	
Bangladesh			Mongolia	17 Aug 94	13 Aug 96
Bhutan			Myanmar		21 May 96
Brunei		5 Nov 96	Nepal		
Cambodia			Pakistan	10 Aug 94	
China	29 Jul 94	7 Jun 96	Papua		
India	29 Jul 94	29 Jun 95	New Guinea		
Indonesia	29 Jul 94		Philippines	15 Nov 94	
Japan	29 Jul 94	20 Jun 96	Singapore		17 Nov 94
Korea (Rep.)	7 Nov 94	29 Jan 96	Sri Lanka	29 Jul 94	28 Jul 95
Laos	27 Oct 94		Vietnam		
Malaysia	2 Aug 94	14 Oct 96			

SEA TRAFFIC AND TRANSPORT

Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation
Bangkok, 22 June 1956
Entry into force: -

State	*Sig.*	*State*	*Sig.*
Cambodia	22 Jun 56	Laos	22 Jun 56
China	22 Jun 56	Thailand	22 Jun 56
Indonesia	22 Jun 56		

International Convention for the Safety of Life at Sea
London, 17 July 1960
Entry into force: 26 May 1965
(Status as included in IMO Doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 May 78	10 Aug 78	Maldives	29 Jan 68	29 Apr 68
Cambodia	24 Nov 70	24 Feb 71	Myanmar	12 Jul 65	12 Oct 68
China	5 Oct 73	5 Jan 74	Pakistan	24 Feb 66	24 May 66
India	28 Feb 66	28 May 66	Papua New		
Indonesia	26 Oct 66	26 Jan 67	Guinea	18 May 76	18 Aug 76
Iran	31 May 66	31 Aug 66	Philippines	11 Aug 65	11 Nov 65
Japan	23 Apr 63	26 May 65	Singapore	12 Feb 69	12 May 69
Korea (Rep.)	21 May 65	26 May 65	Sri Lanka	10 May 74	10 Aug 74
Malaysia	16 Aug 65	16 Nov 65	Vietnam	8 Jan 62	26 May 65

Convention on Facilitation of International Maritime Traffic
London, 9 April 1965 (as amended)
Entry into force: 5 March 1967
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
China	16 Jan 95	17 Mar 95	Korea (DPR)	24 Apr 92	23 Jun 92
India	25 May 76	24 Jul 76	Singapore	3 Apr 67	2 Jun 67
Iran	27 Mar 95	26 May 95	Thailand	28 Nov 91	27 Jan 92

International Convention on Load Lines, 1966
London, 5 April 1966
Entry into force: 21 July 1968
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 May 78	10 Aug 78	Malaysia	12 Jan 71	12 Apr 71
Brunei	6 Mar 87	6 Jun 87	Amendm. 79:	4 Mar 83	
Cambodia	28 Nov 94	28 Feb 95	Maldives	29 Jan 68	21 Jul 68
China	5 Oct 73	5 Jan 74	Amendm. 79:	11 Mar 80	
Amendm. 71:	1 Aug 80		Amendm. 83:	25 Apr 84	
Amendm. 75:	1 Aug 80		Myanmar	11 Nov 87	11 Feb 88
Amendm. 79:	1 Aug 80		Amendm. 71:	11 Nov 87	
Amendm. 83:	9 Sep 86		Pakistan	5 Dec 68	5 Mar 69
India	19 Apr 68	21 Jul 68	Papua New		
Amendm. 75:	31 Jan 77		Guinea	18 May 76	18 Aug 76
Amendm. 79:	23 May 88		Philippines	4 Mar 69	4 Jun 69
Indonesia	17 Jan 77	17 Jan 77	Amendm. 71:	1 Feb 73	
Iran	5 Oct 73	5 Jan 74	Singapore	21 Sep 71	21 Dec 71
Japan	15 May 68	15 Aug 68	Sri Lanka	10 May 74	10 Aug 74
Kazakhstan	7 Mar 94	7 Jun 94	Amendm. 79:	27 Nov 80	
Korea (DPR)	18 Oct 89	18 Jan 90	Thailand	30 Dec 92	30 Mar 93
Korea (Rep.)	10 Jul 69	10 Oct 69	Vietnam	18 Dec 90	18 Mar 91

Protocol Relating to the International Convention on Load Lines 1966
London, 11 November 1988
Entry into force: -
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
China	3 Feb 95		Korea (Rep.)	14 Nov 94	

International Convention on Tonnage Measurement of Ships
London, 23 June 1969
Entry into force: 18 July 1982
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	6 Nov 81	18 Jul 82	Malaysia	24 Apr 84	24 Jul 84
Brunei	23 Oct 86	23 Jan 87	Maldives	2 Jun 83	2 Sep 83
Cambodia	28 Nov 94	28 Feb 95	Myanmar	4 May 88	4 Aug 88
China	8 Apr 80	18 Jul 82	Pakistan	17 Oct 94	17 Jan 95
India	26 May 77	18 Jul 82	Papua New		
Indonesia	14 Mar 89	14 Jun 89	Guinea	25 Oct 93	25 Jan 94
Iran	28 Dec 73	18 Jul 82	Philippines	6 Sep 78	18 Jul 82
Japan	17 Jul 80	18 Jul 82	Singapore	6 Jun 85	6 Sep 85
Kazakhstan	7 Mar 94	7 Jun 94	Sri Lanka	11 Mar 92	11 Jun 92
Korea (DPR)	18 Oct 89	18 Jan 90	Vietnam	18 Dec 90	18 Mar 91
Korea (Rep.)	18 Jan 80	18 Jul 82			

Special Trade Passenger Ships Agreement
London, 6 October 1971
Entry into force: 2 January 1974
(Status as included in IMO Doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 Aug 78	10 Nov 78	Philippines	2 Jul 73	2 Jan 74
India	1 Sep 76	1 Dec 76	Sri Lanka	10 Dec 81	10 Mar 82
Indonesia	13 Apr 73	2 Jan 74			

Protocol on Space requirements for Special Trade Passenger Ships
London, 13 July 1973
Entry into force: 2 June 1977
(Status as included in IMO Doc. 6233, as at 31 December 1996)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 Nov 78	10 Feb 78	Indonesia	10 Oct 79	10 Jan 80
India	1 Dec 76	2 Jun 77	Sri Lanka	10 Mar 82	10 Jun 82

Convention on the International Regulations for Preventing Collisions at Sea, as amended
London, 20 October 1972
Entry into force: 15 July 1977
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 May 78	10 May 78			
Brunei	5 Feb 87	5 Feb 87	Korea (Rep.)	29 Jul 77	29 Jul 77
Cambodia	28 Nov 94	28 Nov 94	Malaysia	23 Dec 80	23 Dec 80
China	7 Jan 80	7 Jan 80	Maldives	14 Jan 81	14 Jan 81
Hong Kong	30 Oct 74	15 Jul 77	Myanmar	11 Nov 87	11 Nov 87
(by decl. UK)			Pakistan	14 Dec 77	14 Dec 77
India	30 May 73	15 Jul 77	Papua New		
Indonesia	13 Nov 79	13 Nov 79	Guinea	18 May 76	15 Jul 77
Iran	17 Jan 89	17 Jan 89	Singapore	29 Apr 77	15 Jul 77
Japan	21 Jun 77	15 Jul 77	Sri Lanka	4 Jan 78	4 Jan 78
Kazakhstan	7 Mar 94	7 Mar 94	Thailand	6 Aug 79	6 Aug 79
Korea (DPR)	1 May 85	1 May 85	Vietnam	18 Dec 90	18 Dec 90

International Convention for Safe Containers, as amended
Geneva, 2 December 1972
Entry into force: 6 September 1977
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Afghanistan	24 Jun 87	24 Jun 88	Kazakhstan	7 Mar 94	7 Mar 95
China	23 Sep 80	23 Sep 81	Korea (DPR)	18 Oct 89	18 Oct 90
India	27 Jan 78	27 Jan 79	Korea (Rep.)	18 Dec 78	18 Dec 79
Indonesia	25 Sep 89	25 Sep 90	Pakistan	10 Apr 85	10 Apr 86
Japan	12 Jun 78	12 Jun 79			

Convention on a Code of Conduct for Liner Conferences
Geneva, 6 April 1974
Entry into force: 6 October 1983

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		24 Jul 75	Korea (Rep.)		11 May 79
China		23 Sep 80	Malaysia		27 Aug 82
India	27 Jun 75	14 Feb 78	Pakistan		27 Jun 75
Indonesia	5 Feb 75	11 Jan 77	Philippines	2 Aug 74	2 Mar 76
Iran	7 Aug 74		Sri Lanka		30 Jun 75

International Convention for the Safety of Life at Sea, as amended
London, 1 November 1974
Entry into force: 25 May 1980
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	6 Nov 81	6 Feb 82	Malaysia	19 Oct 83	19 Jan 84
Brunei	23 Oct 86	23 Jan 87	Maldives	14 Jan 81	14 Apr 81
Cambodia	28 Nov 94	28 Feb 95	Myanmar	11 Noc 87	11 Feb 88
China	7 Jan 80	25 May 80	Pakistan	10 Apr 85	10 Jul 85
India	16 Jun 76	25 May 80	Paupua New		
Indonesia	17 Feb 81	17 May 81	Guinea	12 Nov 80	12 Feb 81
Iran	17 Oct 94	17 Jan 95	Philippines	15 Dec 81	15 Mar 82
Japan	15 May 80	25 May 80	Singapore	16 Mar 81	16 Jun 81
Kazakhstan	7 Mar 94	7 Jun 94	Sri Lanka	30 Aug 83	30 Nov 83
Korea (DPR)	1 May 85	1 Aug 85	Thailand	18 Dec 84	18 Mar 85
Korea (Rep.)	31 Dec 80	31 Mar 81	Vietnam	18 Dec 90	18 Mar 91

UN Convention on the Carriage of Goods by Sea
Hamburg, 31 March 1978
Entry into force: 1 November 1992

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Pakistan	8 Mar 79		Singapore	31 Mar 78	
Philippines	14 Jun 78				

Protocol Relating to the International Convention for the Safety of Life at Sea, as amended
London, 17 February 1978
Entry into force: 1 May 1981
(Status as included in IMO doc. J/6233, as at 31 December 1995)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Brunei	23 Oct 86	23 Jan 87	Korea (DPR)	1 May 85	1 Aug 85
Cambodia	28 Nov 94	28 Feb 95	Korea (Rep.)	2 Dec 82	2 Mar 83
China	17 Dec 82	17 Mar 83	Malaysia	19 Pct 83	19 Jan 84
India	3 Apr 86	3 Jul 86	Myanmar	11 Nov 87	11 Feb 88
Indonesia	23 Aug 88	23 Nov 88	Pakistan	10 Apr 85	10 Jul 85
Japan	15 May 80	1 May 81	Singapore	1 Jun 84	1 Sep 84
Kazakhstan	7 Mar 84	7 Jun 94	Vietnam	12 Oct 92	12 Jan 93

SOCIAL MATTERS

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications
Geneva, 12 September 1923
Entry into force: 7 August 1924

State	*Cons.*	*State*	*Cons.*
Afghanistan	10 May 37	Iran	28 Sep 32
China	24 Feb 26	Japan	13 May 36
India	11 Dec 25	Thailand	28 Jul 24

International Convention for the Suppression of the Traffic in Women of Full Age
Geneva, 11 October 1933
Entry into force: 24 August 1934

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons*
Afghanistan		10 Apr 35	Iran		12 Apr 35
China	11 Oct 33				

Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications
Geneva, 12 September 1923, amended by Protocol, New York, 12 November 1947
Entry into force: 2 February 1950

State	*Cons.*	*State*	*Cons.*
Afghanistan	12 Nov 47	Malaysia	21 Aug 58
Cambodia	30 Mar 59	Myanmar	13 May 49
China	12 Nov 47	Pakistan	12 Nov 47
India	12 Nov 47	Sri Lanka	15 Apr 58

Convention for the Suppression of the Traffic in Women and Children
Geneva, 30 September 1921, amended by Protocol, New York, 12 November 1947
Entry into force: 24 April 1950

State	*Cons.*	*State*	*Cons.*
Afghanistan	12 Nov 47	Pakistan	12 Nov 47
China	12 Nov 47	Philippines	30 Sep 54
India	12 Nov 47	Singapore	26 Oct 66
Myanmar	13 May 49		

Convention for the Suppression of the Traffic in Women of Full Age
Geneva, 11 October 1933, amended by Protocol, New York, 12 November 1949
Entry into force: 24 April 1950

State	*Cons.*	*State*	*Cons*
Afghanistan	12 Nov 47	Singapore	26 Oct 66
Philippines	30 Sep 54		

International Agreement for the Suppression of the White Slave Traffic
Paris, 18 May 1904, amended by Protocol, New York, 4 May 1949
Entry into force: 21 June 1951

State	*Cons.*	*State*	*Consent*
China	4 May 49	Pakistan	16 Jun 52
India	28 Dec 49	Singapore	7 Jun 66
Iran	30 Dec 59	Sri Lanka	14 Jul 49

International Convention for the Suppression of the White Slave Traffic
Paris, 4 May 1910, amended by Protocol, New York 1949
Entry into force: 14 August 1951

State	*Cons.*	*State*	*Cons.*
China	4 May 49	Pakistan	16 Jun 52
India	28 Dec 49	Singapore	7 Jun 66
Iran	30 Dec 59	Sri Lanka	14 Jul 49

Agreement for the Suppression of the Circulation of Obscene Publications
Paris, 4 May 1910, amended by Protocol, New York, 4 May 1949
Entry into force: 1 March 1950

State	*Cons.*	*State*	*Cons.*
Cambodia	30 Mar 59	Malaysia	31 Aug 57
China	4 May 49	Myanmar	13 May 49
India	28 Dec 49	Pakistan	4 May 51
Iran	30 Dec 59	Sri Lanka	14 Jul 49

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
New York, 21 March 1950
Entry into force: 25 July 1951

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		21 May 85	Laos		14 Apr 78
Bangladesh		11 Jan 85	Myanmar	14 Mar 56	
India	9 May 50	9 Jan 53	Pakistan	21 Mar 50	11 Jul 52
Iran	16 Jul 53		Philippines	20 Dec 50	19 Sep 52
Japan		1 May 58	Singapore		26 Oct 66
Korea (Rep.)		13 Feb 62	Sri Lanka		15 Apr 58

Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
New York, 21 March 1950
Entry into force: 25 July 1951

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India	9 May 50	9 Jan 53	Myanmar	14 Mar 56	
Iran	16 Jul 53		Pakistan	21 Mar 50	
Japan		1 May 58	Philippines	20 Dec 50	19 Sep 52
Korea (Rep.)		13 Feb 62	Sri Lanka		7 Aug 58

TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity

ESCAP, Bangkok, 27 March 1976
Entry into force: 25 February 1979

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	12 Jan 77	17 May 77	Malaysia	23 Jun 77	23 Jun 77
Bangladesh	1 Apr 76	22 Oct 76	Maldives		17 Mar 80
Brunei		27 Mar 86	Mongolia		14 Aug 91
China	25 Oct 76	2 Jun 77	Myanmar	20 Oct 76	9 Dec 76
Hong Kong	31 Aug 77	31 Aug 77	Nepal	15 Sep 76	12 May 77
(by UK decl.)			Pakistan	25 Jan 77	1 Jul 77
India	28 Oct 76	26 Nov 76	Papua New		
Indonesia	29 Apr 85		Guinea	29 Sep 76	17 Dec 92
Iran	15 Sep 76	3 Mar 80	Philippines	28 Oct 76	17 Jun 77
Japan	22 Mar 77	25 Nov 77	Singapore	23 Jun 77	6 Oct 77
Korea (DPR)	22 Feb 94		Sri Lanka		3 Oct 79
Korea (Rep.)	8 Jul 77	8 Jul 77	Thailand	15 Sep 76	26 Jan 79
Laos		20 Oct 89	Vietnam		11 Sep 79
Macau (associate member)		9 Feb 93			

Amendments to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity

Bangkok, 13 November 1981
Entry into force: 2 January 1985

State	*Cons.*	*State*	*Cons.*
Afghanistan	22 Jul 83	Myanmar	27 Sep 84
Bangladesh	9 Feb 88	Nepal	3 Dec 84
China	26 Jul 82	Pakistan	24 Aug 84
India	15 Jul 83	Singapore	22 Jul 82
Iran	10 Apr 86	Sri Lanka	26 Mar 82
Korea (Rep.)	2 Jul 82	Thailand	1 Nov 82
Malaysia	7 Jan 86	Vietnam	28 Dec 83
Maldives	28 May 82		

Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity

Colombo, 29 November 1991
Entry into force: -

State	*Cons.*	*State*	*Cons.*
Brunei	4 Feb 94	Korea (Rep.)	18 Feb 93
China	25 May 93	Maldives	3 Feb 93
Indonesia	26 Sep 94	Thailand	14 Jan 94

Convention on the International Maritime Satellite Organization (INMARSAT)

London, 3 September 1976, as amended
Entry into force: 16 July 1979
(Status as included in IMO Doc. J/6233, as at 31 December 1995)

State	*Cons.*	*Cons. Amendm. 1985*	*State*	*Cons.*	*Cons. Amendm. 1985*
Bangladesh	17 Sep 93		Korea (Rep.)	16 Sep 85	
Brunei	4 Oct 94		Malaysia	12 Jun 86	
China	13 Jul 79	15 May 86	Pakistan	6 Feb 85	
India	6 Jun 78		Philippines	30 Mar 81	17 Aug 87
Indonesia	9 Oct 86		Singapore	29 Jun 79	6 Oct 88
Iran	12 Oct 84		Sri Lanka	15 Dec 81	10 Jun 86
Japan	25 Nov 77		Thailand	14 Dec 94	

Agreement establishing the Asia-Pacific Institute for Broad-casting Development
Kuala Lumpur, 12 August 1977
Entry into force: 6 March 1981

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	23 Aug 78		Maldives		25 Jun 85
Bangladesh	14 Sep 77	11 Aug 81	Nepal	15 May 80	11 Sep 80
Brunei		6 Dec 88	Pakistan	10 Apr 78	7 Jul 81
China		5 Feb 88	Papua New		
India	20 May 80	25 Feb 86	Guinea	9 Mar 78	1 May 80
Indonesia	12 Aug 78	31 Aug 89	Philippines	12 Sep 77	
Iran		18 Nov 96	Singapore		29 Jun 82
Korea (Rep.)	11 Oct 78	6 Mar 81	Sri Lanka	15 Sep 78	7 Nov 88
Laos		12 Sep 86	Thailand	25 Apr 81	
Malaysia	11 Oct 78	10 Nov 80	Vietnam	8 Sep 78	23 Feb 81

TREATIES

Convention on the Law of Treaties
Vienna, 23 May 1969
Entry into force: 27 January 1980

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	23 May 69		Mongolia		16 May 88
Cambodia	23 May 69		Nepal	23 May 69	
Iran	23 May 69		Pakistan	29 Apr 70	
Japan		2 Jul 81	Philippines	23 May 69	15 Nov 72
Kazkhstan		5 Jan 94	Tajikistan		6 May 96
Korea (Rep.)	27 Nov 69	27 Apr 77	Turkmenistan		4 Jan 96
Malaysia		27 Jul 94	Uzbekistan		12 Jul 95

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations
Vienna, 21 March 1986
Entry into force: -

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Japan	24 Apr 87		Korea (Rep.)	29 Jun 87	

WEAPONS

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Warfare

Geneva, 17 June 1925
Entry into force: 8 February 1928
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		yes	Malaysia		yes
Bangladesh		„	Maldives		„
Bhutan		„	Mongolia		„
Cambodia		„	Nepal		„
China		„	Pakistan		„
India	yes	„	Papua New		
Indonesia		„	Guinea		„
Iran		„	Philippines		„
Japan	„	„	Sri Lanka		„
Korea (DPR)		„	Thailand	yes	„
Korea (Rep.)		„	Vietnam		„
Laos		„			

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water

Moscow, 5 August 1963
Entry into force: 10 October 1963
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Mongolia	yes	yes
Bangladesh		„	Myanmar	„	„
Bhutan		„	Nepal	„	„
India	„	„	Pakistan	„	„
Indonesia	„	„	Papua		
Iran	„	„	New Guinea		„
Japan	„	„	Philippines	„	„
Korea (Rep.)	„	„	Singapore		„
Laos	„	„	Sri Lanka	„	„
Malaysia	„	„	Thailand	„	„

Treaty on the Non-Proliferation of Nuclear Weapons

London, Moscow, Washington, 1 July 1968
Entry into force: 5 March 1970
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Malaysia	yes	yes
Bangladesh		„	Mongolia	„	„
Brunei		„	Nepal	„	„
Cambodia		„	Papua New Guinea		„
Indonesia	„	„	Philippines	„	„
Iran	„	„	Sri Lanka	„	„
Japan	„	„	Thailand		„
Korea (DPR)	„		Vietnam		„
Korea (Rep.)	„	„			
Laos	„	„			

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof
London, Moscow, Washington, 11 February 1971
Entry into force: 18 May 1972
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Cons.*	*Sig.*
Afghanistan	yes	yes	Laos	yes	yes
Cambodia	„		Malaysia	„	„
China		„	Mongolia	„	„
India		„	Myanmar	„	„
Iran	„	„	Singapore	„	
Japan	„	„	Vietnam		„
Korea (Rep.)	„	„			

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction
London, Moscow, Washington, 10 April 1972
Entry into force: 26 March 1975
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Malaysia	yes	
Bangladesh		„	Mongolia	„	yes
Brunei		„	Myanmar	„	
Cambodia	„	„	Nepal	„	
China		„	Pakistan	„	„
India	„	„	Papua New Guinea		„
Indonesia	„		Philippines	„	„
Iran	„	„	Singapore	„	„
Japan	„	„	Sri Lanka	„	„
Korea (DPR)		„	Thailand	„	„
Korea (Rep.)	„	„	Vietnam		„
Laos	„	„			

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques
New York, 10 December 1976
Entry into force: 5 October 1978

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		22 Oct 85	Mongolia	18 May 77	19 May 78
Bangladesh		3 Oct 79	Pakistan		27 Feb 86
India	15 Dec 77	15 Dec 78	Papua New Guinea		28 Oct 80
Iran	18 May 77		Sri Lanka	8 Jun 77	25 Apr 78
Japan		9 Jun 82	Uzbekistan		26 May 93
Korea (DPR)		8 Nov 84	Vietnam		26 Aug 80
Korea (rep.)		2 Dec 86			
Laos	13 Apr 78	5 Oct 78			

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols
Geneva, 10 October 1980
Entry into force: 2 December 1983

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	10 Apr 81		Mongolia	10 Apr 81	8 Jun 82
China	14 Sep 81	7 Apr 82	Pakistan	26 Jan 82	1 Apr 85
India	15 May 81	1 Mar 84	Philippines	15 May 81	15 Jul 96
Japan	22 Sep 81	9 Jun 82	Vietnam	10 Apr 81	
Laos	2 Nov 82	3 Jan 83			

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction
Paris, 13 January 1993
Entry into force: 29 April 1997

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	14 Jan 93		Mongolia	14 Jan 93	17 Jan 95
Bangladesh	14 Jan 93		Myanmar	14 Jan 93	
Brunei	13 Jan 93		Nepal	19 Jan 93	
Cambodia	15 Jan 93		Pakistan	13 Jan 93	
China	13 Jan 93		Papua New Guinea	14 Jan 93	17 Apr 96
India	14 Jan 93	3 Sep 96	Philippines	13 Jan 93	11 Dec 96
Indonesia	13 Jan 93		Singapore	14 Jan 93	
Iran	13 Jan 93		Sri Lanka	14 Jan 93	19 Aug 94
Japan	13 Jan 93	15 Sep 95	Tajikistan	14 Jan 93	11 Jan 95
Kazakhstan	14 Jan 93		Thailand	14 Jan 93	
Korea (Rep.)	14 Jan 93		Turkmenistan	12 Oct 93	29 Sep 94
Kyrgyzstan	22 Feb 93		Uzbekistan	24 Nov 95	23 Jul 96
Laos	13 May 93		Vietnam	13 Jan 93	
Malaysia	13 Jan 93				
Maldives	4 Oct 93	31 May 94			

ASIA AND INTERNATIONAL ORGANIZATIONS

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE: ANNUAL SURVEY OF ACTIVITIES 1995-1996, including the work of its Thirty-fifth Session, held in Manila, 4-8 March 1996*

M.C.W. Pinto**

* Source: Report of the Thirty-fifth Session ('Report') and related documents prepared by the Secretariat of the AALCC.

** General Editor

Asian Yearbook of International Law, Volume 6 (Ko Swan Sik *et al.*, eds.
, pp. 287-327

1. MEMBERSHIP AND ORGANIZATION

1. There were forty-three Members of the Committee on 4 March 1996: Bahrain, Bangladesh, China, Cyprus, Egypt, Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates and Yemen. Botswana is an Associate Member.

2. The Thirty-fifth Session of the Committee was held in Manila from 4-8 March 1996 at the invitation of the Government of the Philippines. H.E. Fidel V. Ramos, President of the Philippines delivered the inaugural address, and the Honorable Teofisto T. Guingona, Secretary, Ministry of Justice of the Philippines, an address of welcome. The Honorable Teofisto T. Guingona was elected President, and H.E. Joshua T. Terer, High Commissioner for Kenya at New Delhi, was elected Vice-President of the Committee.

3. H.E. Raul I. Goco, Solicitor-General of the Philippines, was elected Chairman of the Special Meeting on the Establishment of an International Criminal Court, held from 5-6 March 1996. Mr. Ragaa Ismail El-Araby, Prosecutor-General of Egypt, was elected Vice-President of the Special Meeting. Mr. Jun Yoshida, Assistant Director of the Legal Division of the Ministry of Foreign Affairs of Japan, and Mr. Kwabena Baah-Doudu, Minister-Counsellor of the Ghana High Commission in New Delhi were elected, respectively, Rapporteur and Co-Rapporteur of the Special Meeting.

4. The Secretary-General of the Committee, Mr. Tang Chengyuan, Deputy Secretaries-General Mr. Tohru Kumada and Mr. Waflk Zaher Kamil, and Assistant Secretary-General Mr. Asghar Dastmalchi, and other members of the AALCC Secretariat were responsible for the organization of the Session.

5. The Committee decided, at the seventh and final plenary meeting of the Session, to accept the invitation of the Government of the Islamic Republic of Iran to hold the Thirty-sixth Session of the Committee in Tehran in March-April 1997, on dates to be determined in consultation with the Secretary-General.

2. QUESTIONS UNDER CONSIDERATION BY THE INTERNATIONAL LAW COMMISSION

6. The Committee had before it document AALCC/XXXV/MANILA/96/1 prepared by the Secretariat entitled Report of the International Law Commission on the Work of its Forty-seventh Session, containing a summary of, and comment upon, the Commission's work on the following topics: State responsibility, Draft Code of crimes against the peace and security of mankind, Law and practice relating to reservations to treaties, International liability for injurious consequences arising out of acts not prohibited by international law, and State succession and its impact on the nationality of natural and legal persons. The Committee heard an introductory statement by the representative of the International Law Commission, Dr. Kamil ldris, Deputy Director-General of the WIPO (*Report,* pp.8-18).

7. In the resolution (*Report,* p.81) adopted after discussion of the item (*Report,* pp.61-64), the Committee *inter alia* requests that its Secretary-General convey to the Commission (1) its earnest expectation that the formulation of draft articles on the "Code of Crimes against the Peace and Security of Mankind", as well as the first reading of draft articles on "State Responsibility" would be completed at the Commission's session in 1996; (2) its appreciation for commencing work on the topics "Law and Practice relating to Reservations to Treaties" and "State Succession and its Impact on the Nationality of Natural and Legal Persons"; and (3) its interest that the Commission include in its agenda the topic "Diplomatic Protection", and initiate a feasibility study on a topic concerning the law of environment, as suggested by the Commission at its Forty-seventh Session.

3. LEGAL PROBLEMS REFERRED TO THE COMMITTEE BY PARTICIPATING STATES

3.1. The status and treatment of refugees

8. The Committee had before it document AALCC/XXXV/MANILA/96/2 prepared by the Secretariat, dealing with (a) Model legislation on the status and treatment of refugees (for which see 5 AsYIL 324-44) and comment thereon by some Member States and the UN High Commissioner for Refugees; (b) Establishment of safety zones for displaced persons in their country of origin (for the proposed legal framework currently before the Committee, see 5 AsYIL 344-9); and (c) Deportation of Palestinians in violation of international law, particularly the Fourth Geneva Convention of 1949, and the massive immigration and settlement of Jews in the Occupied Territories.

9. In the resolution (*Report,* pp.81-2) adopted after discussion of the item (*Report,* pages 73-8), the Committee

> 1. *Takes note* of the proposals advanced by the Representative of the United Nations High Commissioner for Refugees, in particular that of rendering financial and technical assistance to the Secretariat for the purposes of organizing a seminar;
> 2. *Appeals* to Member States to take all possible measures to eradicate the causes and conditions which force people to leave their countries and cause them to suffer unbounded misery;
> 3. *Urges* Member States who have not already done so to ratify and/or accede to the Convention relating to the Status of Refugees, 1951 and the 1967 Protocol thereto;
> 4. *Requests* the Member Governments to transmit their observations and comments on the Model Legislation prepared by the Secretariat and set out in Part A of doc.No. AALCC/ XXXV/Manila/96/2;
> 5. *Also requests* the Member Governments to send their comments and observations on the proposed legal framework for the establishment of safety zones for displaced persons in their country of origin prepared by the Secretariat;
> 6. *Directs* the Secretariat to study further the concept of safety zone in the light of the comments received and to continue to monitor and assess the developments relating to the establishment of safety zones for the internally displaced persons in their country of origin;
> 7. *Requests* the Secretariat to organize in collaboration with and financial and technical assistance of the UNHCR, a seminar in 1996, on the status and treatment of

refugees to commemorate the 30th Anniversary of the Principles of Refugees adopted by the AALCC at its 8th Session in Bangkok in 1966;
8. *Takes cognizance* of the hardships suffered by the Palestinian people;
9. *Expresses* the hope that the next round of the peace process will witness the resolution of outstanding issues including the question of the Jewish Settlements in Palestine and the deportation of Palestinians;
. . ."

3.2. Law of the sea

10. The Committee had before it document AALCC/XXXV/MANILA/ 96/3 entitled *Law of the Sea: Report of the Secretary-General* containing a summary of developments since the adoption on 28 July 1994 of the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* its provisional entry into force on 16 November 1994, and the termination on 28 July 1995 of the period during which it had been open for signature, including an outline of the work of the third and final part of the First Session of the Assembly of the International Sea-bed Authority held at Kingston, 27 February- 17 March 1995, and of the 1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

11. In the resolution (*Report,* pp.82-3) adopted after discussion of the item (*Report,* pp.65-7), the Committee

1. *Urges* the Member States who have not already done so to consider ratifying the Convention on the Law of the Sea;
2. *Expresses* its appreciation to the Secretariat for the comprehensive brief;
3. *Urges* the full and effective participation of the Member States in the International Seabed Authority so as to ensure and safeguard the legitimate interests of the developing countries, and for the development of the principle of the Common Heritage of Mankind;
4. *Reminds* Member States to give timely consideration to the need for adopting a common policy and strategy for the interim period before the commercial exploitation of the deep seabed mineral's becomes feasible, and for this purpose urges Member States to take an evolutionary approach especially to the 'initial function' of the Authority so as to make the International Seabed Authority useful t) the international community and developing countries during this initial period;
5. *Urges* Member States to co-operate in regional initiative for the securing of practical benefits of the new ocean regime.

3.3. Legal protection of migrant workers

12. The Committee had before it a preliminary study of the item prepared by the Secretariat containing an outline of some of the basic issues concerning migrant workers in Asia and Africa, as well as references to the relevant legal framework provided for within the UN system.

13. After discussion of the item (*Report,* p. 78), the Committee adopted an essentially procedural resolution (*Report,* p. 86).

4. MATTERS OF COMMON CONCERN HAVING LEGAL IMPLICATIONS

4.1. United Nations Conference on Environment and Development: follow-up

14. The Committee had before it document AALCC/XXXV/MANILA/96/4 prepared by the Secretariat, containing an overview of recent developments concerning (a) the 1992 Framework Convention on Climate Change (FCCC or UNFCC) since the first session of the Conference of Parties in March-April 1994 adopted the 'Berlin Mandate' intended to launch a process to strengthen the commitments of Annex I Parties under article 4, paragraphs (a) and (b) of the Convention through adoption of a protocol or other legal instrument; (b) the 1992 Convention on Biological Diversity since the second session of the Conference of Parties held in Jakarta in November 1995; and (c) the 1994 Convention to Combat Desertification (not yet in force), in particular, discussions in the Inter-governmental Negotiating Committee on organizational and substantive measures in anticipation of its February 1996 meeting. The document highlights aspects of the divergence of views between the developed and the developing countries, and contains an outline of AALCC's work-programme on this item. It reads, *inter alia*:

1. Introduction

1. The item entitled "United Nations Conference on Environment and Development: Follow-up" has been briefly considered by the Committee at its 32nd (Kampala, 1993), 33rd (Tokyo, 1994) and 34th (Doha, 1995) Sessions. The Secretariat studies prepared for these sessions focused on the developments in regard to the implementation of Agenda 21 in general, and the three International Conventions namely, the Framework Convention on Climate Change (FCCC), the Bio-diversity Convention and the Convention to Combat Desertification, in particular.

2. The FCCC came into force on 21 March 1994. The first Session of the Conference of Parties (COP) was held in Berlin from 28 March to 7 April 1994. The most important decision adopted at that Conference was the 'Berlin Mandate' which provided for launching a process to strengthen the commitments of Annex I Parties in Article 4 para 2 (a) and (b) of the Convention through adoption of a protocol or another legal instrument. A note reviewing the recent developments in this regard has been set out in Section II of the brief.

3. The Convention on Bio-diversity came into force on 29 December 1993. Section III contains a review of the Second Session of the COP held in Jakarta in November 1995.

4. The Convention to Combat Desertification which was adopted on 17 June 1994, has not yet come into force. As of 1st December 1995 it has been signed by 115 States but so far only 16 States have ratified the Convention. Among the AALCC Member States only Egypt and Senegal are parties to the Convention. The discussions in the Inter-governmental Negotiation Committee have been continuing on organizational and substantive matters. The Eighth Session of the INC-D will be held in Geneva from 5 to 16 February 1996. A note on the outcome of that Session will be prepared by the Secretariat.

II. UNFCC : AN OVERVIEW OF THE RECENT DEVELOPMENTS

. . .

AALCC Secretariat's Comments.

1. The guiding principle set out in Article 3(1) of the Convention clearly states that the State parties to the Convention should "protect the Climate System for the benefit of present and future generations of humankind on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country parties are expected to take the lead in combating climate change and the adverse effects thereof". Implementation of the Convention's provisions by all the Parties is the key aspect.

2. The COP in Berlin recognized that commitments as envisaged in Article 4.2 (a) and (b) were inadequate to achieve the objectives of the Convention. It took the momentous decision to launch a process and gave a time bound mandate to take appropriate action for the period beyond 2000, including the strengthening of those commitments of Annex I Parties through adoption of a protocol or another legal instrument. However, the priority should be given to implementation of the Convention in accordance with its provisions.

3. Given the complex nature of the issues involved, one can understand why little progress has been made at the two sessions of the AGBM so far. It is, however, imperative that if the task has to be completed in time, the negotiating process needs focused discussion on priority issues.

4. The need to utilize the wealth of information available from the first communications from the Annex I parties and the ongoing work in several International Organizations and National Institutions can hardly be over-emphasized. The IPCC's second Assessment Report finalized recently may set at rest many of the issues which are being raised in the context of analysis and assessment. The emphasis ought to be on the identification of possible policies and measures which might facilitate early elaboration of a legal instrument to supplement the Convention regime.

5. The SBSTA and SBI have an important role to play in the AGBM process. A consensus, if achieved on accelerating the establishment of the Technical Advisory Panels, would further strengthen the institutional mechanism to deal with the matters concerning scientific, technical and technological assessments.

6. Provision concerning mobilization of adequate international resources and transfer of environmentally sound technologies are the two key issues which reflect the concern and interest of the developing countries in their effective participation in the implementation of the Convention. These issues need to be addressed seriously in the AGBM process.

7. While no consensus has yet been achieved, it appears that the proposed legal instrument could be in the form of a protocol together with certain annexes. Such an instrument therefore should contain in clear and precise terms the commitments of Annex I Parties indicating quantified targets and specified time-frames.

8. The very purpose of the AGBM is to find ways to strengthen the commitments of Annex I parties. Paragraph 2.b of the Berlin Mandate clearly states that "the process will not include any new commitments for parties not included in Annex 1, but reaffirm" existing commitments mentioned in Article 4.1 and continue to advance the implementation of' these commitments. Some of the developing countries are obliged to submit their national communications in 1997 but that is contingent upon

providing them necessary financial and technological assistance whether by the GEF or from other sources.

9. The Second Meeting of the Conference of the Parties to the FCCC scheduled in Geneva from 8 to 19 July 1996 will be an occasion to review the progress thus far made by the AGBM process. It is hoped that by that time issues concerning rules of procedure and composition of the Bureau will he resolved and the AGBM would be able to register satisfactory progress on substantive issues, particularly on the preparation of a working draft on the proposed legal instrument for adoption in 1997.

III. THE CONVENTION ON BIOLOGICAL DIVERSITY: PROGRESS OF IMPLEMENTATION AT NATIONAL AND INTERNATIONAL LEVELS

. . .

AALCC'S FUTURE WORK-PROGRAMME IN THE FIELD OF ENVIRONMENT

1. Issues concerning environmental protection have been on the agenda of the AALCC for over 20 years. After preliminary discussions at the Tehran (1975) and Kuala Lumpur (1976) Sessions, a detailed questionnaire was sent to the Member Governments with a view to seek information on their national legislation and the administrative machinery including implementation measures. The information thus collected was examined by an Expert Group which met in 1978. The Expert Group recognized the importance of collective regional action to tackle marine pollution problems. It also suggested that the Secretariat should take up the question of promoting ratification of important international conventions in the field of protection of the marine environment.

2. A second meeting of the Expert Group which was held in 1979, identified areas for priority consideration. A third meeting of the Expert Group which was held in 1982 in co-operation with IMO and UNEP considered the ways and means to promote ratification of the conventions dealing with the prevention and control of marine pollution. Another meeting was held in Jakarta in 1984 to consider the revision of the IMO Convention on Civil Liability and the Fund Convention. In 1989, the AALCC took up the issues concerning a ban on transboundary movement of hazardous wastes.

3. The next phase of the AALCC's initiatives began in 1990 against the backdrop of the United Nations decision to convene the Rio Conference on Environment and Development in 1992. The AALCC Secretariat was actively involved in the preparatory phase and prepared extensive material to assist the Member Governments. As a follow-up to the UNCED, the AALCC Secretariat has been engaged in monitoring the developments in the context of the implementation of Agenda 21 and the three recent environmental conventions namely, the Framework Convention on Climate Change, the Bio-diversity Convention and the United Nations Convention to Combat Desertification.

4. It would be seen from the foregoing account that the AALCC has kept pace with the developments in the field of environment and took up issues of topical importance. It would, therefore, be desirable to give impetus to AALCC's work and

identify areas where it could provide useful and productive service to its Member Governments.

5. Broadly, some of the areas which the Member Governments may wish to consider for the future work-programme of the AALCC Secretariat could be as follows:
(i) Preparation of studies on important international environmental conventions with a view to promoting their wider adherence by the AALCC Member States;
(ii) Establishment of co-operative programmes with the United Nations Agencies and other Inter-governmental Organizations and research institutions engaged in activities related to environmental matters. In that context, co-operation with UNEP could be most useful in matters concerning capacity building;
(iii) Organization of training programmes for the officials of the Member Governments to promote awareness and skills to deal with legal problems in the field of environment; and
(iv) Constitution of a panel of legal experts from the AALCC Member States whose services could be utilized by the Member Governments.

6. The implementation of such a vast programme would be possible only when there is financial and material support from the Member Governments. It may be recalled that the Committee has already established a Special Environment Fund in 1991. The Governments of Saudi Arabia and Myanmar contributed US$ 25,000 and US$ 500 respectively to this Fund. This was utilized to meet the expenses of participation of the Secretariat officials in the environmental meetings during 1992 and 1993. The Fund now needs replenishment. The Committee, at its Doha Session urged the Member Governments to consider making voluntary contributions to the Special Fund on Environment. This would help immediately to launch new initiatives related to the AALCC's work programme on Environmental Law, particularly the convening of a meeting jointly with the UNEP.

15. After discussion of the item (*Report,* pp. 67-70) the Committee adopted an essentially procedural resolution (*Report,* p. 83).

4.2. United Nations Decade of International Law

16. The Committee had before it two documents prepared by the Secretariat: document AALCC/XXXV/MANILA/96/5, containing a Note on the item by the Secretary-General covering *inter alia* the AALCC seminar on the role of the International Court of Justice, the 1995 Meeting of the Legal Advisers of Member States of AALCC held at United Nations Headquarters, and activities to mark the 40th anniversary of the Bandung Conference and of AALCC, and the 50th anniversary of the United Nations, as well as the anticipated end (1999) of the UN Decade of International Law; and document AALCC/XXXV/MANILA/ 96/10 entitled *AALCC Legal Advisers' Meeting: Report of the Secretary-General.*

17. After discussion of the item (*Report,* pp. 64-5), the Committee adopted an essentially procedural resolution (*Report,* p. 84).

4.3. Proposed establishment of an International Criminal Court

18. The Committee had before it document AALCC/XXXV/MANILA/96/6 entitled *International Criminal Court: a background note*, containing *inter alia* an overview of

the Draft Statute for an International Criminal Court, and a summary of the Report of the United Nations *ad hoc* Committee on the Establishment of an International Criminal Court dealing with contentious issues under discussion, as well as the views and comments of the AALCC Secretariat. The Committee also had before it the report of AALCC's Special Meeting on the subject held during the Manila Session (*Report,* pp. 25-29). The Report of the Special Meeting contains the following:

. . .

12. The following countries presented their respective positions during the Special Meeting: Islamic Republic of Iran, Singapore, Japan, Ghana, Egypt, People's Republic of China, Sudan, Republic of Korea, Tanzania, India, Cyprus, Thailand, Qatar, Pakistan, Sri Lanka and the Philippines. Australia and Finland submitted their views as observers. Some countries made only oral presentations. The following trends were identified in the country positions presented by the various delegations :

A. MODE OF ESTABLISHMENT

13. The delegations unanimously favoured the establishment of an independent and impartial international criminal court, free from political pressures and tendencies. However, they differed on the mode of establishment of the same, viz, whether it should be through a resolution of the UN General Assembly, a treaty or by an amendment of the UN Charter. The majority favoured the establishment of the Court through a treaty or by a multilateral agreement. While accepting the difficulties involved in amending the UN Charter, some delegations also noted the difficulties of getting a sufficient number of accessions to the treaty proposal.

Few delegations were not inclined to keep the ICC independent from the UN to allow it to function as a completely independent judicial body. Many of the delegations generally sought the universality of the Court so as to ensure its effectiveness.

B. THE PRINCIPLE OF COMPLEMENTARITY

14. Several delegations sought a clear definition of the principle of complementarity. The mere reference to the principle in the preambular paragraphs, according to many delegations, did not adequately ensure its clarity. Emphasis was made by some delegations on the drawing up of clear jurisdictional boundaries between the national courts and the ICC to avoid unnecessary overlapping in the administration of justice over international crimes. Therefore, delegations sought to stipulate in the main text the principle of complementarity.

15. The principle of complementarity is derived from the sovereignty of States. The clear expression of this principle, according to one delegation, meant working, as far as possible, within the confines of existing criminal procedures and existing regimes governing extradition and mutual criminal assistance. The said delegation further noted that the achievement of balance in the principle would command the widespread acceptance of States which was essential to the draft Statute's effectiveness. References were made to Article 42 of the ILC draft which permitted the Court to consider whether proceedings in national courts "were not impartial or independent or were designed to shield the accused from international criminal prosecution or the case was not diligently prosecuted". This Article was understood by some delegations as an infringement of the sovereignty of States, and thus was not acceptable.

16. Majority of the delegations favoured a consensual approach towards the application of the principle of complementarity. According to one delegation, this principle was crucial and only under exceptional circumstances, where no appropriate alternative might be found, would an ICC be called upon to fill in the gap.

C. ISSUES PERTAINING TO JURISDICTION AND APPLICABLE LAW

17. The precision in the definition of the ICC's jurisdiction was felt extremely essential for the effective operation of the Court as well as upholding the principle *nullum crimen sine lege*. Several delegations required a clear definition of the jurisdiction of the ICC in the Statute. The role of the Statute, it was pointed out, should be to set out the judicial mechanism for the prosecution of crimes rather than to deal with the substantive definitions of the crimes themselves. It was also suggested that the definitions of crimes under the purview of the Court could properly be made in the Statute or be dealt with by the respective multilateral treaties creating or embodying those crimes. Majority agreed that the jurisdiction of the Court could be limited to the most serious crimes of international concern, notably, genocide, serious violations of the laws and customs applicable to armed conflicts and crimes against humanity. However, there was no agreement on the precise definition of 'aggression' and its determination. Therefore, its inclusion was not unanimously accepted. Several delegations, however, felt that crimes of drug trafficking, terrorism and piracy could be under the scope of the Court.

18. One delegation held the view that Article 20 should be amended by deleting references to the crime of aggression and crimes against humanity. It also sought in Article 20(c) specific provisions referring to the 1949 Geneva Conventions defining the serious violations of the laws applicable to armed conflicts. With respect to aggression and crimes against humanity, it was pointed out by some delegations, that these could only be dealt with upon the finalization of the draft Code of Crimes against the Peace and Security of Mankind. However, one delegation expressed the opinion that the Court should exercise jurisdiction in respect of the 'hard core' crimes until the draft Code of Crimes against the Peace and Security of Mankind was completed. It was also pointed out that the concept of 'grave breaches' instead of 'serious violations' should be brought in while dealing with the crimes connected with laws and customs of war.

19. Considering the evolution of the PCIJ and its successor ICJ, one delegate noted that only when the system of law had matured to an advanced degree after centuries, that such institutional mechanisms were set up to settle all disputes under international law. So, in his view, it was doubtful whether international criminal law had developed to the same degree to warrant a permanent Court of General, International, Criminal Jurisdiction. Furthermore, he also noted the difficulties involved in determining the offences/crimes that would come within the jurisdiction of the Court and their relations with the draft Code of Crimes against Peace and Security of Mankind. For instance, he pointed out, it was not clear as to whether the crime of aggression would cover political or economic aggression or what violations of the laws of war would be 'serious' and what would not be. He agreed with the assertion that individuals should have the responsibility for certain serious crimes at the international level when they enjoyed certain rights at that level. However, in his view that did not necessarily call for the mechanism of a permanent Court of General, International, Criminal Jurisdiction. So, he felt that the proposed Court could be convened as and when required, like all its predecessors.

D. ICC AND ITS RELATIONSHIP WITH THE SECURITY COUNCIL

20. Several delegations pointed out that the inherent jurisdiction envisaged for the ICC upon referral by the Security Council (Article 23 of the Draft Statute) could cloud the objectivity and independence of the ICC and hence, not in the interest of developing a uniform, non-discriminatory, and impartial international criminal justice system. One delegation was of the view that in the case of the crime of genocide, the invocation of the jurisdiction of the ICC should be only on the basis of consent of all concerned States and not as proposed under Article 25 of the draft Statute; otherwise it might amount to a backdoor amendment to an existing treaty. It was the view of another delegation that the logic behind the principle of separation of powers between judicial and executive branches, as employed in domestic legal systems, had to be taken into account in the context of the relationship between the Security Council and the ICC.

21. Some delegations would want to give the Security Council only a limited role vis-à-vis the ICC. According to one delegation, although the ICC should be independent from the influence of the Security Council, it should maintain adequate respect for the decisions and resolutions of the Security Council. This was felt necessary in the interest of preserving international peace and security which was the primary responsibility of the Security Council. One delegation, referring to Article 2 which incorporates the relationship between the ICC and the UN, sought clarification on the scope of Article 2, particularly concerning the role which the Security Council was envisaged to play in the proceedings before the Court.

E. PROCEDURAL ISSUES

22. Some delegations favoured the rules of the Court in relation to, *inter alia,* the conduct of investigations, procedure and the rules of evidence to be drafted together with the Statute. According to them, procedural issues were fundamental to ensuring the fairness of the Court's proceedings and the adequacy of the protection accorded to the rights of the accused. Several delegations pointed out that the role of a prosecutor and surrender of the accused by States, and waiving of national jurisdiction were crucial issues and therefore, needed to be settled on the basis of broad consensus. Some delegations also sought that extensive pre-trial investigations be left to the courts of the complainant State.

23. One delegation sought to have more clarity with regard to the relationship between investigation, arrest and pre-trial detention by the Court and by a State party rendering judicial assistance. Some delegations found paragraph 2 of Article 45 inappropriate as it allowed decision to convict an accused of a criminal charge to be reached by a mere majority of three out of the five judges of the trial chamber. Reference was also made to the fact that the draft Statute did not require all the judges to be present continuously throughout the hearings. Some delegations sought to know what factors should be taken into account to decide the 'gravity of the crime' and the 'individual circumstances of the convicted person', such as (a) the aggravating as well as mitigating factors; (b) the extent and severity of the damage or injury caused by the commission of the offence; and (c) the antecedents of the convicted persons. References were made by some delegations to the necessity of providing adequate and proper protection to victims and witnesses.

F. CONSENT AND ACCOUNTABILITY

24. Several delegations favoured the exercise of jurisdiction by the ICC through consensus i.e. jurisdiction to be conditional upon the acceptance by concerned States

in a given case. It was also pointed out that while the consent of the custodial and territorial State was considered generally necessary, the consent of the State of nationality of the accused and the State of the victim were also emphasized as important. Some delegations, therefore, sought to invoke the Court's jurisdiction only by making an express declaration to this effect i.e. by 'opting-in' procedures. However, many delegations felt that the rigid consensual basis of jurisdiction implied in the 'opting-in' system should not frustrate the objective of the Court.

25. One delegation referring to the principle of accountability pointed out that both the ICC and sovereign States had to be held accountable for actions taken or refusals to act. The delegation also referred to the various grounds on which the ICC could be held accountable. These were respect of human rights of the accused, judicial nature of the decision and the equal justice for all. On the other hand, it was pointed out that when a State refused to co-operate with the ICC, either in the case of transfer of the accused from national jurisdiction to ICC or arresting an accused who happened to be in its territory, that State should provide ICC and the international community through the ICC the reasons for such a refusal.

26. The Chairman invited H.E. Mr. Chusei Yamada, Member, International Law Commission, to address the Special Meeting. In his statement H.E. Mr. Yamada referred particularly to the close co-ordination between the draft Code of Crimes against the Peace and Security of Mankind and the draft Statute of the ICC. Dr. P.S. Rao, Chairman, International Law Commission, noted the problems which might come in the way of effective functioning of the ICC. He said that various quasi-legal and political factors hindered the effective functioning of the ICC. He wondered whether State parties were in a position to accept international criminal jurisdiction vis-à-vis national jurisdiction. Welcoming the establishment of the Court, he made pertinent reference to the contentious issues and suggested that these aspects should be considered with utmost care. In view of this, he felt that the establishment of the Court should not be rushed through. Dr. Idris Kamil, Member, International Law Commission, in his address, appraised the Special Meeting of the work completed on the Draft Code of Crimes by the ILC until its last session.

27. According to one delegation, Article 6 of the draft Statute, providing for the appointment of judges, did not adequately reflect the necessary qualifications and experience required. Two experts, Mr. Adriaan Bos and Prof. Hafner while responding to the discussion requested all the countries to take part in the forthcoming Preparatory Committee Meeting to be held on March 25-April 12, 1996 in New York.

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19. The Committee heard statements by Mr. Adriaan Bos (Netherlands), the Chairman of the UN *ad hoc* Committee, and by Professor Gerhard Hafner (Austria), the Chairman of the Working Group of the UN *ad hoc* Committee.

20. After discussion of the item (*Report,* pp. 79-80), the Committee adopted an essentially procedural resolution (*Report,* p. 84).

4.4. Mutual co-operation in judicial assistance

21. The Committee had before it document AALCC/XXXV/MANILA/96/7 prepared by the Secretariat, entitled *Extradition of Fugitive Offenders*, containing, *inter alia*, draft articles on the subject for inclusion in a treaty, as well as a note and commentary thereon prepared by the Secretariat of AALCC:

EXTRADITION OF FUGITIVE OFFENDERS

1. The promotion of mutual judicial co-operation among the Asian-African countries remains one of the primary concerns of the AALCC. In furtherance of this objective, the AALCC at its Arusha Session (1986), while considering the draft of the mutual bilateral arrangements for judicial co-operation in criminal matters in regard to service of process, recording of evidence and other related matters, expressed the view that as a further step forward in promoting mutual judicial co-operation, the current problems and issues concerning extradition of fugitive offenders should be taken up for study.

2. It should, however, be noted that the topic 'Extradition of Fugitive Offenders' was on the agenda of the Committee since its establishment in 1956. In 1956 itself, it may be recalled, the Government of the Union of Burma by a reference made under Article 3(b) of the Committee's Statutes, had requested consideration of this topic. India, by a separate reference, had requested the opinion of the Committee on certain specific issues. Japan had submitted a memorandum dealing with various issues raised in the two references. The Committee considered these various viewpoints till 1961 (in four sessions) and presented a final report in February 1961. That report contained a set of articles on the principles concerning extradition of' fugitive offenders together with commentaries, without expressing any opinion whether extradition should take place under a multilateral convention or a bilateral treaty.

3. The need for the consideration of this topic since the Arusha Session (1986) arose as a result of certain new developments. Although the general pattern of extradition arrangements on a bilateral basis continues to be the practice, some multilateral arrangements as between neighbouring and closely-knit countries are evolving. For instance, some special arrangements between the countries of the Commonwealth have been contemplated, on the lines of the pattern which had previously existed for extradition of offenders within the British Empire under the Fugitive Offenders Act of 1881. The extradition arrangements at the multilateral level could be identified in the following classes of offences, namely, terrorism, unlawful seizure of aircraft. acts against safety of civil aviation, crimes against internationally protected persons and taking of hostages.

4. Considering some of the above mentioned developments, particularly in the multilateral fora, the AALCC Secretariat submitted a preliminary study to the Bangkok Session (1987). That study analyzed the AALCC's 1961 principles in the light of new developments. It also undertook the examination of each article in the 1961 principles with the particular emphasis on the following issues, namely, the scope of extraditable crimes, political offences exception, the requirement of *prima facie* evidence, the principle of double jeopardy and the rule of speciality. The Singapore Session (1988), while considering that study, suggested that it would he worthwhile to study the developments within the Commonwealth, especially the 1966 Com-

monwealth Scheme Relating to the Rendition of Fugitive Offenders as revised in 1983 and 1986.

5. Pursuant to the above suggestion, the AALCC Secretariat prepared a study for the Nairobi Session (1989), entitled, "Extradition of Fugitive Offenders: A Brief Comment on the Commonwealth Scheme for the Rendition of Fugitive Offenders as Reviewed in 1983 and 1986". While considering this study, the Nairobi Session noted that the developments within the Commonwealth would be a useful source for the Committee's efforts to update its principles. The Nairobi Session also directed the AALCC Secretariat to prepare new draft principles on extradition as a basis for Committee's future deliberations. Accordingly, the AALCC Secretariat prepared a set of draft articles on extradition for the 29th Session held at Beijing (1990). While taking note of the draft articles, the Committee declared that it was necessary to discuss the report submitted in-depth beforehand. It also felt that it would be desirable to hold an intersessional meeting of experts on this topic. Due to lack of time at that Session, thorough discussion on the draft articles could not be undertaken.

6. The AALCC Secretariat put forward the draft articles, with a brief note on the recent developments, before the Cairo Session (1991).* Once again, due to paucity of time the Cairo Session did not take up this item for discussion. In subsequent sessions, i.e., 1992 onwards, this item did not get consideration on account of the Committee's extensive work programme on the United Nations Conference on Environment and Development (UNCED) and other matters.

7. In recent times, however, the issues relating to extradition have assumed importance on account of UN's increasing emphasis on 'crime prevention' and the evolution of 'criminal justice' programmes. For example, the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Cairo from 29 April - 8 May 1995 (Ninth UN Crime Congress, hereinafter), *inter alia* had on its agenda the following topic which elaborately dealt with the question of extradition: "International Cooperation and Practical Technical Assistance for Strengthening the Rule of Law : Promoting the United Nations Crime Prevention and Criminal Justice Programme". One of the recommendations of the Ninth UN Crime Congress noted the UN's role in enhancing multilateral co-operation aimed at combating crime and to provide technical assistance to developing countries. This Congress also urged the UN Member States to intensify efforts to strengthen the rule of law and to promote the use and application of UN standards and norms in crime prevention and criminal justice giving due consideration to the political, economic, social and cultural conditions. To achieve this objective, the Ninth UN Crime Congress found it necessary to intensify sub-regional and regional co-operation in crime prevention and criminal justice, within the framework of regional arrangements, infrastructure and mechanisms.

8. Considering the escalation of organized crime, particularly in the cases of transnational crimes, mutual assistance and co-operation is now increasingly necessary. In other words, the transnational forms of criminality, such as drug trafficking, terrorism and hijacking necessitate bilateral and multilateral co-operation among States. For instance, it may be necessary to acquire the necessary evidence for prosecution; or it may be necessary to deal with the convicted offender to investigate the crime. In these cases, extradition of the offenders would help in meeting the objectives of criminal justice.

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* See 1 AsYIL 230 et seq.

9. The AALCC Secretariat, while preparing the revised draft articles on extradition, has made an attempt to take into consideration various aspects of the law of extradition as evolved by both Common Law and Civil Law systems. Furthermore, the membership of the AALCC comprises States from different legal systems, in particular the criminal justice systems. In order to reflect the principles of criminal justice systems as evolved in the legal systems of the Asian and African States references have been made to some multilateral, regional, bilateral and municipal extradition arrangements. These are: the European Convention on Extradition 1967; 1986 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders; and the Inter-American Extradition Convention, 1981. The UN study of 1985, entitled "Extradition for Drug-Related Offences: A Study of Existing Extradition Practices and Suggested Guidelines for Use in Concluding Extradition Treaties" provides a useful insight into the practices relating to the law of extradition.

10. The Draft Articles on Extradition of Fugitive Offenders have been annexed to this note. These articles, after due consideration by the Committee, could be formulated as a model framework.

ANNEX

DRAFT ARTICLES ON EXTRADITION OF FUGITIVE OFFENDERS

Article 1 : Obligation

The Contracting Parties undertake to surrender to each other under the present Treaty/Convention, persons who are within the jurisdiction of one party and are being prosecuted or have been convicted by the judicial authorities of other parties.

Commentary

Although there appears to be a fair measure of agreement among states on the general principles relating to the extradition of fugitive offenders, the position regarding a State's obligation to extradite a fugitive and the legal basis for the same continues to be debated. There is a general agreement that in juridical terms "no legal duty is imposed by customary international law on States to extradite fugitive offenders".[1] However, states, perhaps due to the exigencies of circumstances also hold that "extradition may, in the absence of a treaty, be effected by way of international co-operation in suppression of crimes on a reciprocal basis".[2] In view of the existing controversy between theoretical positions such a non-obligation to extradite in the absence of a treaty and practical considerations that without extradition international crimes could not be controlled, every arrangement on extradition generally provides this enabling clause. Therefore, the AALCC framework should also provide for this.

Article 2 : Extraditable Offences

(1) Extradition shall not be granted unless the act constituting the offence for which the person sought is being prosecuted or has been convicted is punishable at least by two years of imprisonment under the laws of both the requested and requesting States.
(2) Where the extradition of a person is sought for the execution of a sentence involving deprivation of liberty, the duration of the sentence still to be served shall be at least six months.
(3) The principle of retroactivity of crimes shall not be applicable for the purposes of extradition.

Commentary

One of the major questions arising in respect of extradition is the method of qualifying an extraditable offence. There are at least two differing methods namely, the enumeration ('list') method and eliminative ('no list') method. The adoption of either of these two methods has always been the prerogative of the parties concerned whether it is in the context of bilateral or multilateral extradition arrangements.

The enumerative method which specifies each offence for which extradition may be granted is based on an exhaustive list of extraditable offences, either in the text of an agreement, or in an appendix forming an integral part of the treaty. Historically speaking this is the older approach, which was used in most extradition arrangements in the nineteenth and early twentieth centuries[3] irrespective of the legal system involved. Many of the municipal legislations[4] as well as bilateral treaties[5] even today adopt the enumerative method.

The enumerative method had, however, in the course of its existence, revealed a number of problems in terms of both elaboration and application of exhaustive lists.[6] One of the visible shortcomings of this method relates to the choice of offences and their exact definition in the context of different legal systems.[7] The most important drawback of this enumerative method however, would seem to be the permanent need to update the list of offences vis-à-vis emerging new crimes.[8] Therefore this method is slowly giving way to the other method, namely, the eliminative method.

The eliminative method is the more recent approach and in general, it is the one usually applied by the civil law countries including the socialist countries. It is also the system incorporated in several international conventions on extradition. The eliminative method defines extraditable offences by reference to a maximum or minimum penalty which may be imposed. Some of the multilateral conventions that have adopted the eliminative method are: The Arab League Extradition Convention 1962,[9] the European Convention on Extradition 1957,[10] the Convention de l'organisation de la Communauté Africaine et Malgache 1961,[11] the Benelux Extradition Convention 1967[12] and the Inter-American Convention on Extradition, 1981.[13]

Even the practice within the Commonwealth is yielding to the eliminative (no list) method. The Commonwealth Revised Scheme Relating to the Rendition of Fugitive Offenders 1986 has opted for eliminative method,[14] whereas the original scheme adopted in 1966 provided for the enumerative method. A vivid illustration of Commonwealth (common law) countries opting for eliminative (no list) method of late, is the Indo-Canadian Extradition Treaty 1987.[15]

As seen earlier, one of the major shortcomings of the enumerative list method is the constant need to update the list of the extraditable offences vis-à-vis the emergence of new crimes. Of late a few new crimes such as computer frauds, due to their serious consequences, frequency and the difficulty in tracing the offender, have posed serious problems for the international community. The enumerative method, however, would not automatically cover these new crimes for purposes of extradition and the time-consuming process of updating the crimes might enable the offender to escape punishment. Therefore, a new trend is emerging towards their inclusion as an extraditable offence either through specialized multilateral conventions or by unilateral or bilateral arrangements. Such crimes would include fiscal offences, particularly international white collar crimes, drug and narcotics offences, terrorist acts, marine as well as nuclear offences.

Traditionally, fiscal offences were treated as exceptions to extradition. However, recent trends indicate the reversal of such attitude. There is a increasing agreement in various quarters to incorporate fiscal and similar offences as extraditable offences. For instance, the Second Additional Protocol to the European Convention, 1978, establishes a duty to extradite for "offences in connection with taxes, duties, customs, or exchange regulation of the same kind as of the requesting party".[16]

Moreover, while recognizing the different fiscal structures prevailing in various countries, the Convention attempts to prevent any possibility of refusal on the ground of dissimilarity of fiscal regulations between the requesting and the requested states.[17]

The Ad Hoc Inter-Governmental Working Group on the Problem of Corrupt Practices in International Commercial Transactions in 1977, in its report, suggested certain measures relating to extradition for the offences of all forms of illicit payments.[18]

The Council of Europe in 1981[19], having identified as many as sixteen instances as economic offences, recommended that :

"The Governments of the member states intensify their co-operation at international level in particular by signing and ratifying the European Conventions on Mutual Assistance in Criminal Matters and on Extradition, the Protocols thereto and any other international instruments facilitating the prosecution and punishment of economic offences".

International white collar crimes figure as an important item during the 1982 review meeting of the Commonwealth Scheme relating to the Rendition of Fugitive Offenders.[20] This resulted in inclusion of a general clause to the list of 'returnable offences' to the effect that further offences which are returnable under the law of the requested part of the Commonwealth should be treated as returnable "notwithstanding the fact that any such offences are purely of a fiscal character". It may be pointed out here that in view of the 1986 agreement within the Commonwealth that all offences punishable with two years of imprisonment are returnable, most of the fiscal offences would seem to have been covered as extraditable offences.

The set of crimes that led to a wide acceptance among the States and which resulted in many instances in the redoing of their extradition arrangements are crimes that are considered as terrorist acts. Although traditionally, extradition arrangements provide that offfences such as murder, manslaughter, causing grievous harm etc. are extraditable offences, new forms of crimes that are committed in the context of international political and ideological pursuits as tactics needed to be redefined whether they were offences for extradition purposes or extradition itself by virtue of their being committed for political interests.

Several international conventions have come into existence with a view to combating and controlling several such specialized crimes irrespective of the motives for which they are committed. They would include: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963[21], the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970[22], the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on 23 September 1971[23], the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, signed at New York on 14 December 1973[24], the International Convention Against Taking of Hostages adopted at New York on 13 December 1979 as well as the Convention on the Physical Protection of Nuclear Material, concluded at Vienna on 3 March, 1980.

In addition to the adoption of international conventions on instances of terrorism, the increasing incidence of these acts has also led to the conclusion of some regional conventions for the suppression of terrorism. These include the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortions that are of International Significance, 1971 (OAS Convention)[25], the European Convention on Suppression of Terrorism 1979[26], the Agreement on the Application of the European Convention for the Suppression of Terrorism, 1979 (Dublin Agreement)[27] and the SAARC Regional Convention on Suppression of Terrorism, 1987.[28]

There are also bilateral extradition arrangements seeking to suppress terrorist activities. For instance, the United States–Cuba Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offences, 1973[29], the Afghanistan-USSR Agreement on the Hijacking of Aircraft 1971 and the Indo-Canadian Treaty on Extradition.[30]

Although the practice relating to the inclusion of drug-related offences in extradition treaties started even before the Second World War, the two post-war international instruments[31] that serve as the basic legal framework for containing the drug offence seem to suffer from inadequacies. For instance, under these conventions, the requested state can refuse extradition if it considers that the offence is not serious enough.

However, in light of the increasing activities in drug trafficking and its serious consequences, the General Assembly has termed the trafficking in narcotic drugs as 'international criminal activity', the eradication of which is the 'collective responsibility of all states'.

Besides this, many extradition arrangements (among common law countries or between them and other countries) apply what is known as 'mixed approach' by adding a general eliminative clause to the list of extraditable offences. A number of more recent treaties apply an even broader kind of 'mixed approach'. They provide a list of extraditable offences, subsequently add an eliminative clause, and then augment that scheme by a further provision to the effect that extradition should be granted also in respect of any other offence that, according to the laws of both contracting parties, is one for which extradition may be granted. Australia, in particular, has used this approach in a number of treaties.

To sum-up, while the departure from the enumerative or list method is clear, the eliminative or no list method is increasingly resorted to qualify the extraditable offences. With the Commonwealth Scheme adopting the eliminative method, it has become almost universal practice.

It may be pointed out that in 1961, a majority of member States of the Committee favoured the eliminative method. Since however there was no unanimity, the Committee in its final report, provided three alternatives.

The somewhat long commentary on this aspect is the consequence of the need to place the evolving trend relating to qualification of extraditable offence in proper perspective. However, it is recommended that the Committee, a unique forum comprising members belonging to the major legal systems of the world should not brook any delay in adopting the eliminative (no list) method.

Clause (2) is to meet the situation wherein a person is sought to be extradited for purposes of serving a sentence which has already passed by the competent authority of the requesting state which the fugitive has evaded.

All the major extradition arrangements including that of the Committee's 1961 principles have provided different terms of imprisonment before and after trial for extradition.

Clause 3 is based on the well established principle that there should not be any post facto laws regarding crimes. A specific mention of this time-honoured principle is herein called for in view of the possibility of a party to an extradition treaty specifying some crimes with retroactive effect in the hasty move to capture some individuals.

Article 3 : Political Offence Exception

(1) Extradition shall not be granted for political offences. The requested state shall determine whether the offence is political.
(2) The requested state has the right to seek information and clarification from the requesting state as to the nature of the offence for which extradition has been requested in order to determine whether the offence is of a political character or not.

(3) Notwithstanding the provisions of clauses (1) and (2) the following offences shall not be regarded as political offence or offences of a political character.

(4) (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on December 16, 1970;
(b) an offence within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;
(c) an offence within the scope of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, signed at New York on December 14, 1973;
(d) any offence within the scope of recent IMO Conventions (against hijacking of ships);
(e) an offence within the scope of any Convention to which both contracting parties are party and which obligates to prosecute or grant extradition if the requested State is not willing to prosecute;
(f) offences related to terrorism, which are as follows:
(i) murder, manslaughter, assault causing bodily harm, kidnapping, hostage taking and offences involving serious damage to property or disruption of public facilities and offences relating to firearms, weapons, explosive or dangerous substances (when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury or serious damage to property);
(ii) an attempt or conspiracy to commit an offence described in subparagraphs (a) through ((f) or counselling the commission of such an offence or participation as an accomplice in the offences so described;
(iii) an offence against the life or person of a Head of State or a member of his immediate family or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence ;
(iv) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as aforesaid.

Commentary

The obligation to extradite an offender under any arrangement has always been subject to some exceptions, such as the political offence exception.[32] Notwithstanding the fact that there exists no precise definition of political offence, all extradition arrangements refer to political offence exception as a standard clause, and non extradition of political offenders has become a general norm relating to extradition. A raging controversy continues ever since its advent regarding whether an act in question is political or criminal and who will determine - judiciary or executive. Conflicting legislative and judicial precedents still continue to compound the difficulties of this concept and in the course of its development the exception has been given different treatment. It may be mentioned that despite the difficulties surrounding the definition of political offence, certain exceptions to this have received nearly universal acceptance along with the advent of the modern extradition practice. They would include: 'clause d'attentat', international war crimes, genocide, hijacking, hostage taking etc. and a host of other crimes as designated by some of the recent regional and bilateral arrangements on the suppression of terrorism.

Although there is no universally acceptable definition for the mutually exclusive terms of terrorism and political offence, the recent trend is to specify several acts as terrorist acts which are extraditable and do not attract the political offence exception. For instance the SAARC Convention provides the following acts as not political harm:

"Murder, manslaughter, assault, causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property."[33]

Thus, all arrangements on extradition, while honouring the political offence exception also categorically provide the circumstances and acts that would not be treated as political offences. In view of this fact the Secretariat wishes to emphasize to the Committee the inadequacy of merely mentioning of the political offence exception by stating "extradition shall not be granted for political offenders" as done by the Committee's 1961 principles. It would therefore be necessary to specifically provide for the increasing number of instances that are now considered as not within the ambit of 'political offences' for the purpose of extradition. That is why the draft article seeks to provide the long list of exceptions to the political offences in the text itself. The Committee may wish to consider this list to establish the validity of each exception and to decide whether it should be considered exhaustive or not.

Moreover, the 1961 principles provide two important, interconnected issues. Firstly the requested state's right to seek information and clarification from the requesting State as to the nature of offence for which extradition has been requested in order to determine whether the offence is of political character or not. Secondary, the draft also states that, "in cases where the person sought to be extradited submits prima facie evidence that his offence is of a political character, the burden of proving the opposite lies on the requesting state".

These provisions are extremely important in complementing and strengthening the genuine instances of political offences and therefore should form an integral part of this article.

Article 4 : Extradition of a National

(1) Extradition of a national of the requested State shall be a matter of discretion for the requested state.
(2) In the event of refusing to extradite the fugitive who is a national, the requested State shall submit the case to the competent authorities for prosecution and inform the requesting State of the result.
(3) In case a national of the requested state is prosecuted and is being punished by the requesting state, the States Parties shall negotiate to the effect that the fugitive may serve his sentence in the State of which the fugitive is national.

Commentary

The general practice relating to the extradition of nationals is the strict application of non-extradition. The whole of civil law States and socialist States very zealously uphold this principle.[34] Even at the peak of the drug offensive by the Mafia some governments were unable unilaterally to decide whether nationals could be extradited to foreign states and were forced to place the matter for referendum before citizens.[35]

Within the Commonwealth, although there is no strict rule regarding the extradition of nationals, there are instances where extradition of nationals is pre-empted by assuming jurisdiction over the offender irrespective of the place of commission of the offence. This is based on the 'active nationality' principle. *Inter alia,* United Kingdom law has provided for jurisdiction over its nationals in respect of treason, murder, bigamy and breaches of official secrets acts wherever committed.[36] Other Commonwealth members have also enacted legislation providing for jurisdiction over nationals for their crimes committed outside their territories. It might be paradoxical that while the common law system practices the territoriality principle re-

garding criminal jurisdiction (including the foreigners committing crimes) they nevertheless seek to exercise jurisdiction over their own nationals if they happen to commit certain classes of crimes in other jurisdictions under the plea of active nationality principle.

Assumption of jurisdiction over one's own nationals for crimes committed beyond its jurisdiction indicates the intention of some states that these crimes are not extraditable. It could therefore lead to controversy if a national is sought to be extradited by other states.

The rationale given when a national of a requesting state is prosecuted under the active nationality principle for an offence committed abroad, is that the accused is well within his national legal system, culture and language. This is not possible in the case of nationals of the requested state being extradited to the requesting State. Here, the fugitive might face hardships due to the differences in cultural, linguistic and professional aspects which would place him in a disadvantageous position in the requesting state.

There is however, a concern that if the nationals of the requested State are not extradited, the end of justice might be defeated and the validity of the principle of territorial jurisdiction would be jeopardized. The necessary evidence to prosecute may not be easily available. Such contingencies are therefore sought to be tackled by demanding the extradition of nationals on the basis of reciprocity.[37] On the other hand reciprocity could be a basis for prosecuting nationals in their own national systems especially when the offence for which extradition is sought happens to be one of double criminality i.e. crime under both the jurisdictions. It, nevertheless, should be mentioned that the major trend in the world is to prosecute the nationals by the requested State itself rather than extraditing them.

While the civil law and socialist legal systems are clear, the trend within the Commonwealth is unclear and the question is regarded as a matter of discretion of the parties to an extradition arrangement.[38] This divergence may be due to historical reasons. Before the emergence of independent States within the Commonwealth, extradition was a matter merely of transferring the fugitive from one part of the empire to another part for reasons of expediency of administering a vast empire, since the issue of nationality did not arise in most cases. Commonwealth nations, however, today have independent nationality laws, constitutional safeguards for individuals during a trial etc. In fact some courts, such as Nigeria, are precluded by their constitution from extraditing nationals but accept the obligation, when so refusing, to consider initiating prosecution locally. Article 4(3) is provided to facilitate the rights enjoyed by the fugitive as well as his family members to enable the convicted person to serve his term within his country in a familiar surrounding. The transfer of the fugitive to serve the sentence in his own State serves the purpose of meeting the demands and concerns of both the requesting and requested state.

The draft articles, therefore, while providing discretion in the matter of extraditing the national of a contracting party, seeks to make it obligatory to prosecute the fugitive locally in case there is no extradition of the national. This would therefore provide a viable compromise between the civil law approach and the practice of the Commonwealth countries.

Article 5 : Grounds for Non Extradition Other than Political Offence Exception

Extradition may be denied in the following circumstances :

1. Extradition shall not be granted for purely military offences.
2. When the prosecution or punishment is barred by the statute of limitations according to the laws of the requesting State or the requested State (Prior to the presentation of the request for extradition).
3. When the person sought (is to be tried) before an extraordinary or *ad hoc* tribunal of the requesting state.

4. When there is reason to believe that extradition is sought in fact for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions.
5. If the offence for which extradition is sought is of a trivial nature.
6. If the allegation against the fugitive is not made in good faith or in the interests of justice.
7. Any other sufficient humanitarian consideration that warrant the denial of extradition such as acute ill health, physical frailty etc. (In this case the requesting State could postpone the request until such time is required for the fitness of the fugitive).

Commentary

The grounds on which extradition could be denied as stated in the draft article have been in usage under various legal systems with regard to extradition. The multilateral and regional extradition arrangements traditionally contain a fairly acceptable list of such grounds for denial of extradition. The draft article has been given the present shape after incorporating the familiar grounds from existing regional extradition arrangements. Thus, the draft article might appear to be a longer one than other schemes. However, in view of the emerging universal consensus on the method of prescribing an extraditable offence, efforts should be made to unify the trends regarding other areas of extradition such as the present one.

The grounds for denial of extradition as propounded by the present article might be familiar within the Asian-African region and accordingly warrant no explanation. However, clause (3) which speaks of the possible trial before an *ad hoc* tribunal of the requesting State is a completely new one that was not deliberated within the Committee when adopting the 1961 principles. Modern extradition arrangements such as the Inter-American Extradition Treaty[39] preclude categorically extradition, on that ground.

In view of the increasing universal concern for the human rights of individuals and particularly the relevance of human rights to criminal procedure and justice, there is a visible trend within Europe to preclude extradition if the procedural law in the requesting State is not in conformity with the European Convention on Human Rights.[40] Like the Inter-American Convention, a number of European States do not extradite a fugitive if he is to be tried before an extraordinary or *ad hoc* tribunal.[41] This is perhaps due to the fear that such extraordinary or *ad hoc* prosecution mechanisms are generally created with such powers the exercise of which may not correspond with the basic principles of natural justice or the fundamental norms of criminal jurisprudence. Further, more often than not, such tribunals are also created with an element of subjectivism, sometimes *ultra vires* of the requesting state's own constitution.

Article 6 : Speciality Rule

(1) The requesting State shall not try or punish the fugitive extradited except for the offence for which he was extradited.
(2) In the event of the requesting State trying or punishing the fugitive for other offences that are likely to be directly related, it shall do so only with the consent of the requested State.

Commentary

The speciality rule, like the double criminality rule, is a well respected tenet of the extradition process among States of all legal systems.[42] The rule seeks the compliance by the requesting State to try or punish the fugitive only for the offence for which the fugitive was extradited. The requesting State is prohibited from using the opportunity of an extradition grant to prosecute for other offences which may or

may not have been extraditable. For any other offence allegedly committed by the fugitive the requesting State is obligated to make an altogether new request.

All the major extradition arrangements, such as the Commonwealth Scheme, the Inter-American Convention on Extradition, 1981, the European Convention on Extradition, 1957, provide specially for the speciality rule. Most of the bilateral treaties and municipal legislations also reflect the same.

However, slight modifications are taking place with regard to the speciality rule, without questioning the fundamental validity of the rule. For instance, within Europe there seems to be a trend that the requesting State may without prior consent of the requested State, prosecute for an offence even if the description of the offence charged is altered in the course of the proceedings, provided that the offence is based on the same facts and constitutes itself a returnable offence. There are extradition treaties that require prior consent only if, for the offence in its altered description, a higher minimum punishment is fixed than for the offence for which extradition was granted.[43]

The Committee's 1961 principles have put adequate emphasis on the speciality rule in article 9. The present draft article, however, while retaining essentially the same content, is divided into separate clauses: clause (1) addresses positively the need to uphold the speciality rule and clause (2) provides a procedure in case the requesting State wishes to try or punish the fugitive on a directly related offence other than the one for which the extradition was sought. In other words, clause (2) still prohibits a State's clandestine effort to try the fugitive for other offences.

Article 7 : Double Jeopardy (Non bis in idem)

Extradition shall be refused if the offence in respect of which extradition is sought is under investigation in the requested State or the person sought to be extradited has already been tried and discharged or punished or is still under trial in the requested State for the offence for which extradition is sought.

Commentary

The principle of *non bis in idem* is primarily applicable in the domestic penal law which prohibits the courts from trying a person twice for the same offence. In this sense it has been recognized as part of the human rights.[44] While all the extradition treaties inevitably provide for this basic rule, some variations in its application have been noticed. Such variations normally relate, on the one hand, to the question whether the double jeopardy rule is to be applied only with regard to decisions of the other contracting State, or also with regard to those of third States and on the other hand, whether all or only certain judicial decisions are to be taken into consideration when deciding upon a request for extradition.[45]

The legal arrangements and the practice of most of the member States of the Committee contain provisions against double jeopardy for the same act. See for instance, the Criminal Procedure Code of Iraq, the Iraqi-Egyptian Treaty of 1941, the Law of the United Arab Republic (as understood in 1961), the Egypt-Iraq Agreement of 1931, the laws of Japan and Indonesia. The extradition agreement concluded between the countries of the League of Arab States contains the principle non bis in idem.[46] Moreover, the 1961 rule on this principle was unanimously adopted by the members of the Committee. In view of its universality as well as acceptability within the Committee the same article has been retained.

Article 8 : Capital Punishment

If the offence for which extradition is requested is punishable by death under the law of a requesting State and the law of the requested State does not provide such penalty, the requested State has the discretion to refuse extradition, unless the re-

questing State gives such guarantee which the requested State considers sufficient that the death penalty will not be carried out.

Commentary

The question of capital punishment has generated a good deal of controversy since the Second World War with regard to its nature as a punishment.

Although legislation in many countries prescribe the death penalty for capital offences, there is a trend at the global level seeking to abolish capital punishment. A number of other States, however, have enlarged the category of capital offences. As far as the extradition arrangements are concerned the trend is clearly towards refusal to grant extradition where the fugitive is likely to be awarded the death penalty if the requested State does not itself provide for the death penalty. Extradition is granted under such circumstances only after the guarantee of the requesting State that in case the death penalty is awarded it will not be carried out. The trend has been explicitly provided for under some modern extradition treaties. For instance, both the European Extradition Treaty[47] and the Inter-American Convention on Extradition[48] uphold the right of the requested State to refuse extradition in case the requesting State does not assure the commutation of the death sentence. The Commonwealth Scheme has, however, left the present question as a matter of discretion to the parties to decide whether to grant extradition or not in case where the fugitive is likely to suffer the death penalty. It has followed, in principle, the European Convention on Extradition.[49]

However, within the Commonwealth where several member States keep capital punishment in their statute books, still there is a trend toward following the European Convention.[50] States that still provide for the death sentence in their criminal law could, while dealing with the extradition of a fugitive who is likely to face the death sentence in the requesting State, keep in mind the relevant provisions of Article 6 of the International Covenant on Civil and Political Rights which states, *inter alia:*

> "Any one sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."
>
> "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

The Committee's 1961 principles have not addressed this question. It is opportune to consider the issue in light of the experiences of existing major regional extradition arrangements.

Article 9 : Prerequisites of a Request

The requisition for extradition shall be made through diplomatic channel or any other appropriate channel in writing and accompanied by:

(a) information concerning the identity, description, nationality and location of the person sought;

(b) a statement of the offences for which extradition is sought, the time and place of commission, their legal descriptions, probable punishment and a reference to the relevant legal provisions with utmost accuracy;

(c) the original or authenticated copy of the conviction and sentence or detention order passed by competent judicial authority and immediately enforceable or of the warrant of arrest or other having the same effect and issued in accordance with the procedure laid down in the law of the requesting State;

(d) a copy of the statute of limitation governing prosecution and punishment.

Commentary

Traditionally, an extradition request which is an act between Governments of sovereign States is made through the diplomatic channel. However, in view of its time-consuming nature the practice relating to the request has witnessed a recent trend in which communication could be made directly between the concerned ministries of both the requesting and requested States. For example article 12 of the European Convention on Extradition provides:

> "The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more parties."

Regional extradition treaties such as the Inter-American Extradition Convention have even provided for a situation wherein there may not be any diplomatic relations between States. Thus the relevant provision states:

> "The request for extradition shall be made by the diplomatic agent, or if none is present by its consular officer, or, when appropriate, by the diplomatic agent of a third State to which is entrusted, with the consent of the government of the requested State, the representation and protection of the interests of the requesting State. The request may also be made directly from government to government in accordance with such procedure as the governments concerned may agree upon.[51]

Thus, it is discernible that the traditional diplomatic channel of communications is complemented by new methods. The guidelines of the Committee's 1961 principles, while providing that "the requisition shall . . .. be submitted normally through diplomatic channel" did not envisage other possible modes of communication between the requesting and the requested States. Therefore the present article provides the words, "or any other appropriate channel" with a view to providing the broadest possible channels of communications.

The other requisites for an extradition request have been similar in almost all the major extradition arrangements, though there may happen to be some trivial differences. Basic requirements, however, are two. If extradition is sought for prosecution, the basic document is a warrant of arrest signed by the competent judicial authority of the requesting State. If the fugitive is sought for imprisonment as a consequence of an indictment, a certified copy of the final judgment must be submitted. As far as the texts of the relevant legal provisions are concerned, the minimum requirement is to submit the text of the substantial penal law that was breached. Keeping in mind that the modern extradition arrangements preclude extradition if the offender could not be prosecuted for lapse of the limitation period, which aspect also finds a place in the present draft articles, there is a need for the requesting State to produce a copy of the statute of limitation governing the criminal prosecution and punishment.

Supplementary Information or Evidence

If the evidence or information submitted by the requesting State in support of a request is found to be insufficient, the requested State may ask the requesting State to provide supplementary information or evidence as it may consider necessary to finalise a decision on the request. The requested State may also set a time limit for the receipt of such supplementary information evidence, and if the requesting State fails to comply with the subsequent requirement within the prescribed time the requested State may set free the fugitive.

Commentary

It is not always possible that the particulars accompanying the extradition request be correct or adequate at the first instance itself. Therefore, there is a need to provide for a mechanism to enable the requested State to demand supplementary information from the requesting State on all aspects of the request with a sole purpose of ascertaining the facts that are necessary to extradite a fugitive. All the modern extradition arrangements provide for seeking supplementary information.[52] However, in the event of extradition being refused the requested state has to, without fail, give reasons for the same.

Article 10 : Evidential Requirement

(1) Extradition shall not be granted unless the competent authorities of the requested State are satisfied that the material furnished before them establishes (sufficient evidence) (*prima facie* case) that the fugitive has committed an offence in the requesting State.
(2) When the person sought is already convicted for an offence in the requesting State the requesting State shall establish that he was convicted by competent judicial authorities in respect of an extraditable offence within the jurisdiction of the requesting State and that he has not served his sentence in accordance with the laws of the requesting State.

Commentary

Besides general rules, which are more or less a common feature of all extradition treaties, owing to the particular situation of the countries involved, there are sometimes specific additional requirements that needed to be fulfilled. One such requirement is the prerequisite of establishing a *prima facie* case by the requesting state against the fugitive offender.

As regards this requirement, in case where extradition is requested for the purpose of prosecution rather than for execution of punishment following conviction, the approaches in the common law and civil law systems are divergent. The question arises in the former case whether or not an extradition request must be supported by further evidence if it is based solely on a warrant of arrest.

In most common-law countries, the establishment of a prime facie case is traditionally a paramount requirement if the extradition of an accused person is sought for the purposes of prosecution. According to typical extradition treaties entered into by common law countries, prima facie evidence is "such evidence as, according to the law of the requested party, would justify his (i.e. accused person) committal for trial if the offences had been committed in the territory of the requested party.[53]

Most common law countries apply particularly a strict approach in this respect. The basic idea is to ensure equality of treatment for all persons who stand before the court accused of an offence wherever this was committed.[54]

The typical approach of civil law countries on the other had may be characterized as a common understanding that extradition is a preliminary auxiliary system of bringing an offender to justice.[55] According to this view, it is up to the court of the requesting State to take and evaluate evidence. The requested State is not called upon to investigate the subject and its authorities may content themselves with the fact that valid judicial warrant of arrest exists, based on an extraditable offence and that the contractually stipulated State has grounds for doubting the reasons given for an extradition request.[56]

The differences in the rule of evidence between common law and civil law countries have made the extradition proceedings very difficult. It seems that a high percentage of extradition requests submitted by civil law countries to common law countries fail for these formal reasons.[57] Some countries have decided that no further extradition request should be made where a *prima facie* case needs to be estab-

lished.[58] In fact Spain, a civil law country, has already terminated its extradition treaty with the United Kingdom, due to this reason.[59]

Even though within the common law system, wherein the requirement of prime facie case has been zealously guarded, there are radical views questioning the validity of this rule. A case in point is the position taken by Australia within the Commonwealth. There are, however, trends within England also which argue for the abolition of the requirement.[60] Two most important common law countries India and Canada have not adhered to the *prima facie* requirement so stringently in a recent agreement.[61] Though such trends are discernible in bilateral and municipal settings, when it comes to the Commonwealth as such, the *prima facie* requirement has been largely retained.

On the other hand, the civil law countries who follow the inquisitorial method in criminal prosecution do not require the establishment of a *prima facie* case before granting an extradition request. Reference may be made to Article 12 of the European Convention on Extradition which makes no reference to the *prima facie* case. However, Article 13 enables the requested State to seek any supplementary information which is thought to be necessary in order to reach a decision. Although there is no express provision for contracting States to provide a *prima facie* case, some States have nevertheless, on acceding to the Convention, made a reservation on this point. Israel for instance insists upon *prima facie* case in all cases, whereas Norway and Denmark reserve the right to ask for such evidence in any particular case. The Federal Republic of Germany is also in the process of a radical change in this regard. Following recent Court decisions, Article 10(2) of the new German Statute requires documents establishing a *prima facie* case if in the circumstances of the case there is reasonable doubt whether the requested person has in fact committed the offence.

Thus, the rule relating to *prima facie* requirement within the common law and civil law system is changing but no distinct developments are taking place in both systems. Perhaps this is another area in which there could be efforts to harmonize the evidential requirements. One possible compromise is to make the requirement of *prima facie* case discretionary.

The Committee's 1961 principles, however, provided specifically for the establishment of *prima facie* case in Articles 16 and 17. The practice in the member countries (as of 1961) is that a fugitive offender would be discharged if a *prima facie* case is not made out against him. There was a unanimity within the Committee then on this point. The draft article seeks to retain the requirement of *prima facie* case. However, if any change is contemplated to reduce the rigors of this requirement, it should seek to strike a balance between the requirement of an absolute *prima facie* case and the presentation of a simple warrant of arrest. This is essential since the requested state should be in a position to satisfy itself before extraditing a fugitive. That is the intent of the inclusion of the words 'sufficient evidence' in parentheses in the draft articles.

Article 11 : Surrender

(1) The competent authorities of the requested State shall take the necessary steps to enable the requesting State to take away the accused.
(2) The requesting State shall be informed of the place and date of surrender and of the length of time for which the fugitive will be detained for the purposes of surrender.
(3) The requested State may release the fugitive in question, if the requesting State fails to take custody of the fugitive within the prescribed time from the day of notification to the requesting State.

(4) If circumstances beyond their control prevent either of the States from surrendering or taking over the fugitive within the time, the States shall agree on a new date for surrender.

Article 12 : Reply by the Requested State

The requested state shall inform the requesting state through diplomatic channel or other appropriate channel, in writing of its decision on the request for extradition. If the request for extradition is rejected, the reasons shall be stated.

Commentary

Once a request has been submitted to the requested state, the requested state has to act on it. The decision to grant or refuse extradition shall be made in writing and shall be transmitted through the same channel through which the requesting State made the request. In the event of extradition being refused the requested State has to give reasons for its decision.

Article 13 : Concurrent Requests

(1) If there are concurrent requests for extradition in respect of the same person the requested State shall have the discretion to decide upon the priority of requests.
(2) The requested State, while doing so, shall take into account all the circumstances and especially the relative gravity of the offences, place of commission, order of requests, penalty to be imposed and the nationality of the person claimed.

Commentary

It is possible that several States could make concurrent requests for the extradition of the same fugitive who has committed extraditable offences in the territories of all the requesting States. The major trend relating to this point is that the requested State shall have the discretion to decide as to which of the requesting States the fugitive shall he surrendered. However, the requested State is expected to take into account certain factors in exercising its discretion. Such factors according to the major extradition arrangements currently in force include the relative gravity of the offences, places of commission, order of requests and the nationality of the person. The requested state may also take into account other necessary circumstances before deciding. As highlighted by the Inter-American Extradition Convention on this question :

> "When extradition is requested for the same offence, the requested State shall give preference to the request of the State in which the offence was committed. If the requests are for different offences, preference shall be given to the State seeking the individual for the offence punishable by the most severe penalty, in accordance with the laws of the requested State. If the requests involve different offences that the requested State considers to be of equal gravity, preference shall be determined by the order in which requests are received".

Article 14 : Seizure of Property, Articles etc.

Articles seized which were in the possession of the fugitive, at the time of his arrest, and which may be used as proof of the offence shall be delivered to the requesting State at the time of the actual extradition.

Commentary

While arresting the fugitive it is the duty of the requested State to seize all articles and objects that are found with him. This is essential since they might be needed during the committal proceedings in the requesting State as evidentiary objects. It is also the duty of the requested State to deliver all such articles seized from

the fugitive to the requesting State. In view of the unanimity that prevails within the Committee and elsewhere the present draft article is almost identical to that of the 1961 principles on this matter.

Article 15 : Abduction of the Fugitive

If the fugitive is abducted from the requested State by the agents of the requesting State, the requested state shall be entitled to demand the return of the fugitive.

Commentary

The question of abduction instead of formal extradition of a fugitive by the agents of the requesting State came into the limelight after the seizure on May 11, 1960 of Adolf Eichmann by "private" Israeli citizens in Argentina and his transportation to Israel on an Israeli aircraft to face trial as a Nazi war criminal.[62] It may, however, be noted that the extradition of a fugitive is a prerogative of the asylum/requested state and that the requesting State, i.e. the State which seeks jurisdiction over the fugitive, has an obligation to seek the consent of the territorial State where the fugitive is hiding. It is not a question of protection of the fugitive by the requested State, but of its prerogative to have a say on the matters that take place within its territory. That is why the draft article makes it explicit that the requested State still has the right to demand the custody of the fugitive who might have been abducted by force by the agents of the requesting State.

Article 16 : Deferral of Surrender

When the fugitive is being tried or is serving a sentence in the requested State for an offence other than the one for which extradition is requested, surrender may be postponed until he is set free either through acquittal, completed service or commutation of sentence, dismissal, pardon or grace. Civil suit that may be pending against the fugitive in the requested State would not, however, defer his surrender.

Commentary

There might be a situation wherein the request of extradition may be made to procure a fugitive who is on trial in the requested State. Under such circumstances, it is the practice to wait for the final disposal of the on-going trial by the requested State. Therefore, the surrender could be postponed until the final ruling of the case. However, if the trial in the requested State takes unduly long time, the States concerned could arrive at a decision through negotiation as to whether to postpone the case of the fugitive to stand trial in the requesting state. Postponement or deferral of extradition is permissible only in a criminal case but not in civil cases.

Article 17 : Provisional Arrest

In case of urgency the requesting State may request the provisional arrest of the fugitive and the requested State may do so and keep the fugitive in custody.

Commentary

Normally the fugitive is kept in custody after committal proceedings are over and the decision has been taken that the fugitive shall be extradited. However, in urgent cases the custody may precede the committal proceedings. Although the requesting State may request the requested state to do so, ultimately it is at the discretion of the requested state to keep the fugitive in custody or not before committal. This matter, however, seems to be analogical to the preventive custody and accordingly would depend upon the provisions of relevant laws.

Article 18: Urgent Requests

(1) In urgent cases requests for extradition may be made by post, telegram, or telephone, provided that the requests include a short account of the offence, a notification that a warrant of arrest has been issued by the competent authority and that extradition shall be requested through diplomatic channel or other appropriate channels.
(2) The requested State may, if necessary, arrest and detain the fugitive for a period not exceeding thirty days, after which he shall be released unless the written request accompanied by the necessary details of information is received.
(3) If the request is made by post, telegram or telephone the requested State shall have the right to ascertain the request by seeking a written request from the requesting State.

Commentary

This article addresses the possible modes of communication relating to urgent requests for extradition. Similar provision is found in almost all the modern extradition arrangements although with slight variations. In the case of urgency it may not be possible to adopt all the formalities or prerequisites of a normal extradition request. That is why it may provide for the use of simpler communication means such as post, telegraph, telephone and other modern communication means. Such requests need not even be sent through diplomatic channels and the governments could communicate directly at ministerial level. However, it may be pointed out that urgent requests would result only in the provisional arrest of the fugitive and within the time limit set by the requested State. The requesting State shall have to make a proper and formal request in order to effect the surrender of the fugitive. The requested state has the right to set free the fugitive from provisional arrest if the requesting state has not presented the necessary details of information within the time set by the former.

Article 19 : Extradition of a Third State's National

If the fugitive whose extradition is requested is not a national of the requesting State, the requested State may notify the State of which the fugitive is a national of that request as soon as it is received in order to enable the said State to defend him if necessary.

Commentary

There are instances in which a State may be requested to surrender the fugitive who may be the national of a third State, having committed an extraditable offence within the territory of the requesting State. This is slightly different from concurrent requests wherein the [national] State of the fugitive besides the requesting State may request the extradition on the basis of the active nationality principle. Here the situation may be that the national state may not be aware that one of its nationals having committed an extraditable crime in one country has fled to a third country. Although the requested State in whose territory the fugitive is found has the right to decide on the question of surrender, it is, however, in the interests of the comity of nations, to notify the national State of the fugitive, giving it an opportunity to be aware of the matter and if possible, to defend the fugitive. Those States who subscribe to the non-extradition of their nationals may find such provision useful.

Article 20 : Re-extradition

The requesting State shall not without the consent of the requested State, surrender the fugitive to a third State in respect of an offence committed before the surrender.

Commentary

The basic presumption of extradition law is that the fugitive is surrendered to the requesting State to stand trial or serve sentence only for the specific offence or sentence for which he was sought to be extradited. Therefore, the requesting State has an obligation to obtain the consent of the requested State if there is an intention to hand over the fugitive to a third country. The requested State has the right to decide the fate of the fugitive in relation to other offences that he might have committed other than the one for which he was surrendered. Such provision is found in the European Convention on Extradition,[63] and it may be adopted by the AALCC.

Article 21 : Procedural Law

The procedure with regard to extradition, provisional arrest or committal before the judicial authorities shall be in accordance with the law of the requested State.

Commentary

Basically extradition is a domestic matter and analogical to a trial under the domestic law, although it has an international element in as much as the request for surrender comes from another State. However, the extradition process relating to provisional arrest, committal, evidence will have to be in accordance with the law of the requested State.

Article 22 : Simplified Extradition (Waiver of Committal Proceedings)

The requested State may grant extradition without a formal extradition proceeding if the fugitive sought irrevocably consents in writing to the extradition after being advised by a judge or other competent authority of his right to a formal extradition proceeding and the protection afforded by such proceeding.

Commentary

There is a possibility where the whole process of committal proceedings might become superfluous in view of the possibility that the fugitive may not contest the decision to surrender him. This amounts to a virtual waiver of committal proceedings by the fugitive and of course with the full knowledge of the consequences of such a voluntarism. Extradition arrangements such as the Inter-American Convention and the Commonwealth Scheme provide for such waiver of committal procedure by the fugitive. It is, however, the duty of the requested State to advise him of his rights as a fugitive.

Article 23 : Rights of the Fugitive

The fugitive sought shall, during the process of extradition, enjoy all the legal rights and guarantees granted by the law of that [the requested] State.

The fugitive shall be assisted by legal counsel and if the official language of the requested State is other than his mother tongue, he shall also be assisted by an interpreter free of cost.

Commentary

This article guarantees the equality before the law of the requested State if he decides to contest the decision to extradite him. The requested State is obliged in such cases to provide the fugitive with adequate legal assistance, for instance, the service of a legal counsel and an interpreter free of cost. This would guarantee the fugitive impartiality in the requested State.

Article 24 : Costs of Extradition

The requesting State shall bear all expenses incurred in the execution of the request, and if the fugitive is discharged or acquitted, the said State shall bear the expenses necessary for his return to the requested state.

Commentary

The requesting state is expected to bear the expenses that might accrue in the execution of an extradition. for instance, the cost of conveyance, transport etc. from the territory of the requested State to the territory of the requesting State. In the event of the fugitive being acquitted or discharged the requesting State shall bear the expenses for the fugitive's return to the requested State.

NOTES:

[1] See the agreement reached within the AALCC during its fourth session 1961. *Asian-African Legal Consultative Committee, Report of the Fourth Session 1961* p. 23. Also see Gerhard von Glahn, Law Among Nations: An Introduction to Public International Law (second edition), The MacMillan Company, London 1970 p. 252; Ian Brownlie, Principles of Public International Law third edition 1979).

[2] Ibid., *AALCC Report of the Fourth Session.*

[3] For instance, the United Kingdom Extradition Acts 1870, 1873, 1906 and 1932, Belgian law of 1933. Extradition Acts of most of the Commonwealth countries which are based on the British model provide for enumerative method.

[4] For example, Extradition Act of India 1961, Extradition Act of Nigeria 1966. The 1966 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders until recently provided for the list approach.

[5] Japan-US Extradition Treaty signed on March 3, 1978 and entered into force on March 26, 1980. This Treaty adopts the enumerative method listing out 47 offences as extraditable ones. See the *Japanese Annual of International Law*, No. 24, 1981, pp. 263-271.

[6] For a brief survey of the historical evolution of the enumerative and eliminative methods of qualifying extraditable offences and the difficulties involved in adopting the enumerative method, see *Extradition for Drugs Related Offences, A Study of Existing Extradition Practices and Suggested Guidelines for use in Concluding Extradition Treaties* (United Nations Sales No. E.Xl 6, pp. 22-25 1985).

[7] Ibid., at p. 22.

[8] Ibid.; similar views were expressed by the Indian delegation to the 28th session of the AALCC held in Nairobi. For details see *Verbatim Records of the 28th Session* (Nairobi) 13th to 18th Feb. 1989, pp. 373-378.

[9] Approved by the Council of the League of Arab States on 14 September 1952, entered into force on 23 August 1954. For text see *League of Arab States, A Collection of Treaties* No. 95(1978).

[10] Signed on 13 December 1957; entered into force on 18 April 1980. See *European Treaty Series* No. 24, United Nations Treaty Series Vol. 359, No. 5196.

[11] Signed in 1961 by Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Gabon, Ivory Coast, Madagascar, Mauritania, Niger and Senegal.

[12] Entered into force on 11 September 1967.

[13] Signed on 25 Feb. 1981 by Bolivia. Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Uruguay and Venezuela. For the text see *International Legal Materials* Vol. 20, No. 3 1981 pp. 723-728.

[14] Article 2(2) of the Revised Scheme adopted at the Meeting of the Commonwealth Law Ministers at Harare, 1986. For the text see *Commonwealth Law Bulletin* Vol. 12 No. 4 October 1986, pp. 1124-1130.

[15] Article 3 stipulates that "An extradition offence is committed when the conduct of the person whose extradition is sought constitutes an offence punishable by a term of imprisonment for a period of more then one year", *Indian Journal of International Law*, Vol. 27 No. 2 & 3, April-Sep., 1987, p. 279.

[16] For the text of the Convention *see International Legal Materials* 1978, p. 113.
[17] Ibid.
[18] *International Legal Materials,* 1977, p. 1236.
[19] *International Legal Materials,* Vol. 21, pp. 886-1982.
[20] See *Commonwealth Law Bulletin,* Vol. 9 No. 1, 1983, p. 285.
[21] *United Nations Treaty Series*, Vol. 704 No. 10106, p. 219.
[22] *United Nations Treaty Series*, Vol. 860, No. 12325, p. 106.
[23] *United States Treaties and other International Agreements* Vol. 24 (1973) p. 268.
[24] *United Nations Treaty Series* Vol. 1035 No. 15410 p. 167.
[25] Signed at Washington in February 1971 by Colombia, Costa Rica, Dominican Republic, Jamaica, Honduras. Mexico, Nicaragua, Panama, El Salvador, Trinidad and Tobago, USA, Uruguay and Venezuela.
[26] See *International Legal Materials,* Vol. 15, 1976, p. 1272.
[27] See *International Legal Materials,* Vol. 19, 1980. p. 325.
[28] *Indian Journal of International Law,* Vol. 27, No. 2 & 3 April-September 1987, pp. 315-318.
[29] *International Legal Materials,* Vol. 12, 1973, p. 370.
[30] *Indian Journal of International Law,* Vol. 23, 1987, pp. 279-294.
[31] Single Convention on Narcotic Drugs 1961, as amended by the 1972 Protocol, and the 1971 Convention on Psychotropic Substances.
[32] For the meaning and evolution of the political offence concept see : Shearer, Extradition in International Law (1971). However, the courts in England and other common law jurisdictions approach the definition of political offence from case to case basing themselves on precedents. Some of the celebrated cases in this regard are : *Re Castioni* (1891) 1 Q.B.149, In *Re Meunier* (1894) 2 Q.B. 415, *R. .v. Governor of Brixton Prison, ex p. Kolczynski* (1955) QB 540, *Schiraks v. Government of Israel* (1964) A.C. 556; etc.
[33] See Article I of SAARC Convention; for text see *Indian Journal of International Law* Vol. 27, 1987 at p. 316.
[34] For the position of socialist countries, for instance, Article 63 of Treaty Between the Mongolian People's Republic and the People's Republic of Bulgaria Concerning the Provision of Legal Assistance in Civil, Family and Criminal Cases, states: "Extradition shall be precluded if: (a) The offence was committed by a national of the Contracting Party applied to". UNTS Vol. 677 1969 at p. 172. Also see Article 55 of the Treaty between Hungary and Mongolia, UNTS Vol. 678, 1969 at p. 176. For the position of civil law countries, see Treaty on Extradition Between Brazil and Argentina 1961. Article 1 states: "1. However, should the person in question be a national of the State to which application is made, the said State shall not be obliged to surrender him. In such cases, where extradition has been refused, the person shall be proceeded against and tried in the State to which application is made for the act which gives rise to the application for extradition, unless such act is not punishable under the laws of that State. 2. In such cases the applicant Government shall supply the necessary evidence for prosecution and trial of the accused and it shall be incumbent upon the other government to communicate to it the final sentence or decision in respect of the case. The Constitution of Guatemala vide Article 61 provides that "No Guatemalan shall be handed over to a foreign government for trial or punishment except for crimes covered by international treaties in force in Guatemala".
[35] The Colombian Government of President Virgilio Braco is putting the question of whether or not suspected Colombian traffickers should be extradited to the United States for trial to a referendum. *Times of India* (New Delhi) Oct 7, 1989.
[36] Ian Browlie, Principles of Public International Law (2nd Edition 1979) p. 300.
[37] E.g. Indian statement on this point at the 28th session of the AALCC, Verbatim Records p. 377.
[38] Clause 2 of Annex 2 of the Commonwealth Scheme Relating to Rendition of Fugitive Offenders states as follows:
(1) The return of a fugitive offender who is a national or permanent resident of that part of the Commonwealth in which he is found (a) may be precluded by law, or (b) may be refused by the competent executive authority, provided that return will not be so refused if the fugitive is also a national of a part of the Commonwealth to which his return is requested.

(2) For the purposes of this paragraph a fugitive shall be treated as a national of a part of the Commonwealth if that part consists of, or include (a) A commonwealth country of which he is a citizen or, (b) A country or territory his connection with which determines his national status, in either case at the date of the request.

[39] Clause (3) Article 4 of Inter-American Convention on Extradition, which states "When the person sought has been tried or sentenced or is to be tried before an extraordinary or Ad Hoc tribunal of the requesting state". See International Legal Materials, Vol. XX, No. 3, May 1981 at p. 724.

[40] For example, Swiss and Austrian legislation on the subject have made such provisions. See the paper prepared for the Commonwealth Secretariat by Dr. Torsten E. Stein, in 1982 Review of Commonwealth Extradition Arrangements, Report of a Meeting of Government Representatives, Commonwealth Secretariat 1982 at p. 102.

[41] Ibid.

[42] See Shears, Extradition in international law (1971); Ian Brownlie, Principles of Public International Law, Third Edition (1979), p. 315.

[43] As for instance the extradition treaties between Germany and the United States, and between Germany and Yugoslavia. See Torsten E. Stein, op. cit. p. 101.

[44] See the Seventh Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms.

[45] See Extradition for Drug Related Offences, op. cit. p. 53.

[46] See the Report of AALCC 4th session 1961 p.33.

[47] Article 11 (Capital Punishment) states that ". . . If the offence for which extradition is requested is punishable by death under the law of the requesting Party and if in respect of such offence the death penalty is not provided for by the law of the requesting party or is not normally carried out extradition may be refused unless the requesting party gives such assurance which the requested party considers sufficient that the death penalty will not be carried out."

[48] See Article 9 (Penalties Excluded) states: "The States parties shall not grant extradition when the offence in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested state has previously obtained from the requesting state, through the diplomatic channel, sufficient assurances that none of the above mentioned penalties will be imposed on the person sought or that, if such penalties are imposed. they will not be enforced.

[49] See Annex 2, paragraph 1 of the Commonwealth Scheme.

[50] For example Article 6 of the Indo-Canadian Extradition Treaty echoes the views of the European Convention on this question.

[51] Article 10, which speaks of 'Transmission of Request', see: International Legal Materials, Vol. 21, pp. 725.

[52] Article 12 Inter-American Convention; Article 13 of European Convention on Extradition; Article 10 of Indo-Canadian Extradition Treaty 1987 speaks of 'additional evidence' although effectively it is supplementary information.

[53] See Article VII paragraph 3 of the Extradition Treaty between the United Kingdom of Great Britain and Northern Ireland and the United States of America of June 1972), United Nations Treaty Series Vol. 49, No. 15811.

[54] Review of the Law and Practice of Extradition in the United Kingdom : Report of an Inter-Department working party, in 1982. Review of Commonwealth Extradition Arrangements: Report of a Meeting of Government Representatives, op. cit. pp. 231-262.

[55] Extradition for Drug Related Offences, op. cit. p. 43.

[56] Ibid.

[57] Ibid., p. 42.

[58] Ibid., p. 43.

[59] Ibid.

[60] See 'Green Paper on Extradition' in Commonwealth Law Bulletin, Vol. 11 No.2 , April 1985, pp. 433-499.

[61] Article 9 of (India-Canada Extradition)Treaty states: "Article 9: Extradition Evidence. 1. The evidence submitted in support of the request for extradition shall be admitted in extradition proceedings in the requested State if it purports to be under the stamp or seal of a department, ministry or minister of the requesting State, without proof of the official character of the stamp

or seal. 2. The evidence referred to in paragraph 1 may include originals or copies of statements, depositions or other evidence purporting to have been taken on oath or affirmation whether taken for the purpose of supporting the request for extradition or for some other purpose. 3. The evidence described in paragraph 2 shall be admissible in extradition proceedings in the requested state, whether sworn or affirmed to in the requesting State, or in some third State" it is clear from the text of this article that there is no obligation on the part of the requesting state to establish a *prima facie* case and on the other hand any evidence adduced by the requesting state shall be 'extradition evidence'. There is no qualification whatsoever to this 'extradition evidence'.

[62] See Gerhard von Glahn, Law Among Nations: An introduction to Public International Law, Second Edition (1970) pp. 268-269.

[63] Article 15 of the European Convention.

22. After discussion of the item (*Report,* p. 78) the Committee adopted an essentially procedural resolution (*Report,* p. 85).

5. TRADE LAW MATTERS

5.1. World Trade Organization (WTO)

23. The Committee had before it document AALCC/XXXV/MANILA/96/9 entitled "WTO as a Framework Agreement and Code of Conduct for World Trade" containing notes and comments on the main features of the WTO Agreement and its Annexes, and their possible impact on the developing countries:

Background

1. The Uruguay Round of Multilateral Trade Negotiations, launched in 1986, [was] concluded on 15 April 1994, in Marrakesh (Morocco) with the signing of the Final Act embodying the results of that Round and opening for signature the Agreement establishing the World Trade Organization (WTO) to which all substantive agreements and understandings were annexed, as well as the Ministerial Declarations and Decisions adopted at Marrakesh and the Understanding on Commitments on Financial Services to form an integral part thereof. It was also agreed that the WTO Agreement must be accepted as a package deal without any exception.

2. Of the 125 countries which formally participated in the Uruguay Round, 111 signed the Final Act and -104 signed the WTO Agreement, in many cases with the stipulation that their acceptance was subject to ratification[1] [fn 1: International Legal Materials Vol. XXXIII No 3 (September 1994) p. 1132. The AALCC Member States signatory to the WTO Agreement include Bahrain, Bangladesh, China, Cyprus, Egypt, Ghana, Indonesia, Kenya, Kuwait, Malaysia, Mauritius, Myanmar, Nigeria, Pakistan, Philippines, Qatar, Senegal, Singapore, Sri Lanka, Tanzania, Thailand, Turkey, Uganda and United Arab Emirates]. Seven countries, Australia, Botswana, Burundi, India, Japan, Republic of Korea and USA, were unable to sign the WTO Agreement because of domestic legislative impediments[2] [fn 2: Ibid.].

3. The most significant feature of the Final Act was that it represented a single undertaking integrating all the key agreements under one umbrella, i.c. tariffs and now also service commitments as well as substantive trade rules are part of a single package. This was reinforced by the organizational and institutional framework which the WTO Agreement and the WTO, as the international economic organization, provide.

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Impact on Developing Countries

46. The establishment of the WTO is most likely to result in an overall increase in the scope of obligations for all its members, but developing country members, in particular, will be faced with a dramatic increase in the level of their obligations. This is because they are required to accept all Multilateral Trade Agreements (MTAs) incorporated in Annexes 1. 2 and 3 of the WTO Agreement without any exceptions or reservations, as well as to submit their schedules of concessions on goods and concessions with respect to market access and national treatment for trade in services. They are also required to accept new obligations in the area of trade in services, and, in particular, intellectual property rights. Prior to WTO, few developing countries were parties to the Tokyo Round Codes[10] [fn 10: As of May 1994, 15 developing countries were parties to the Agreement on Technical Barriers to Trade; 2 to the Agreement on Government Procurement; 13 to the Subsidies Code; 11 to the Anti-Dumping Code; 12 to the Customs Valuation Code; 12 to the Agreement on Import Licensing], but under the revised codes they are required to assume new obligations flowing from them. The very strict conditions for accession to the WTO thus pose a serious challenge to the developing countries.

47. The process of accession will also be much more difficult for those developing countries and economies in transition that are now negotiating their terms of accession to the GATT, as they will need to adopt the new agreements negotiated in the Uruguay Round. For example, they will have to negotiate an 'entry fee' on both goods and services, accept a variety of Agreements that until now had been optional (i.e. most Tokyo Round Codes as revised), and commit themselves to a set of new multilateral rules and disciplines in the areas of agriculture, subsidies and intellectual property rights, among others.

48. The setting up of the WTO, effective from 1 January 1995, represents a significant step towards the full integration of all countries irrespective of their levels of economic development into a global trading system of shared commitments, shared rules and shared opportunities. Unlike the case of the two Bretton Woods institutions, viz. the World Bank and the IMF, in the case of the WTO developing countries have had a role in its evolution and establishment. More than two-thirds of its over 100 members are developing or transition economies, as are the great majority of those in the process of becoming its members[11] [fn 11: Twenty-one governments are now negotiating accession to GATT or resumption of contracting party status: Albania, Algeria, Armenia, Belarus, Bulgaria, China, Crotia, Ecuador, Estonia, Jordan, Latvia, Lithuania, Moldova, Mongolia, Nepal, Panama, Russian Federation, Saudi Arabia, Slovenia, Taiwan, and Ukraine. Fourteen governments can succeed to contracting party status under Article XXVI: 5(c) (GATT 1947) upon request: Angola, Bahamas, Cambodia, Cape Verde, Equatorial Guinea, Kiribati, Papua New Guinea, Qatar, Sao Tome and Principe, Seychelles, Solomon Islands, Tonga, Tuvalu, and Yemen]. These prospective members include China and Russia whose inclusion in the multilateral system and its rules is vital not only to the completion of the global market but to global stability.

49. However, membership of the WTO system requires unequivocal commitment to, and enforcement of, the multilateral rules; no country can be exempt therefrom. The WTO Agreement itself imposes a general obligation on each of its Members to ensure "the conformity of its laws, regulations and administrative procedures with the obligations as provided in the annexed Agreements". Many countries, in-

cluding the developing countries in Asia and Africa and elsewhere, have already brought their domestic legislation into line with the aforesaid general obligation, or are in the process of doing so before the expiry of the relevant transition periods.

50. Compliance with this general obligation is particularly emergent in the case of the Agreements on Services, Trade-Related Aspects of Intellectual Property Rights (TRIPs) and Trade-Related Investment Measures (TRIMs) as they call for not only restructuring of existing legislation, but also the building up of requisite infrastructure and operative mechanisms in the national domain. The Agreement on Services obligates the Members of the WTO to enact domestic regulations for the administration of services in a reasonable and objective manner (MFN, transparency). The Agreement on TRIPs obligates the Members of the WTO to establish procedures and remedies in their domestic laws to ensure effective enforcement of Intellectual Property Rights (IPRs) through civil and administrative procedures which include provisions on evidence of proof, injunction, damages and other remedies, including the right of the judicial authorities to order the disposal or destruction of infringing goods. The developing countries and countries in transition have been given a five-year transition period, and the LDCs 11 years, during which they have to bring their laws and practices into conformity with the Agreement. Further, developing countries which do not presently provide product patent protection have been given 10 years to introduce such protection, although in case of pharmaceutical, agricultural and chemical products, the patent need not be granted until the end of the 10 year period. The TRIMs Agreement has prohibited investment measures which cause trade restrictions and distorting effects and requires mandatory notification of such measures and their disposal within two years. Thus, the existing legislation would need to be brought into line with the stipulations contained in the aforesaid Agreements.

Conclusion

51. Notwithstanding the transitional arrangements provided in the various WTO Agreements some of the issues involved definitely need further substantive and specific elaboration from the developing countries' standpoint before undertaking the revision of the relevant national legislation. The Secretariat of the AALCC, which is a major forum of Afro-Asian co-operation in the area of law and economic relations, can certainly assist its Member States in enacting or revising legislation so as to meet their obligations under the WTO system, but before embarking on the exercise it would be useful to have a general discussion in the AALCC focusing on the problems and difficulties being faced by them in enacting the WTO obligations in the national domain.

5.2 Legislative activities of the United Nations and other organizations

24. The Committee had before it document AALCC/XXXV/MANILA/96/9 entitled *Report on legislative activities of the United Nations and other organizations concerned with international trade law,* prepared by the Secretariat, covering recent work by the UN Commission on International Trade Law (UNCITRAL) (Draft Convention on Independent Guarantees and Standby Letters of Credit, Draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, Draft Notes on Organizing Arbitral Proceedings, Assignment in Receivables Financing, Cross-border Insolvency, and Build-Operate- Transfer (BOT) projects); of the United Nations Conference on Trade and Development (UNCTAD), and the United Nations

Industrial Development Organization (UNIDO), and of the Institute for the Unification of Private Law (UNIDROIT).

25. The Committee heard statements from Dr. Mohamed Aboul-Encin, Director of the Regional Centre for International Commercial Arbitration at Cairo, on the activities of arbitration institutions in the African region (Report, pp. 45-54); and by Ms. P.G. Lim, Director of the Regional Centre for Arbitration, Kuala Lumpur, on the activities of arbitration institutions in the Asia-Pacific region (Report, pp. 40-5). The latter statement contains the following:

> "An account of the Kuala Lumpur Centre's activities for 1995 appears in page XIII 4 of the AALCC's Progress Report on the Regional Centres (Document No. AALCC/ XXXV/Manila/96/14) and I shall not repeat them here, but I would like to comment on some of the current issues mentioned in the Progress Report – in particular that relating to the existing Centres of Cairo and Kuala Lumpur and the establishment of additional Regional Centres. In this respect the establishment of the Kuala Lumpur Centre may help to focus attention on some of the important issues involved in setting up a new Centre.
>
> HISTORY
>
> When the Regional Centres were set up in the late seventies, it was hard to predict whether they could fulfil the purposes for which they were established. At that time the practice of western style arbitration was relatively unknown in the former colonial territories of Asia and Africa and institutional arbitration, a rare bird. Institutional arbitration centres for international arbitrations did not exist in the region and the Centres were created to fill that gap. The Centres were established on an experimental basis, were non-profit, and were to function under the supervision of the AALCC during the initial period of three years.[1] [fn 1: Article 3. Administrative Rules of the KL Centre].
>
> FUNCTIONS
>
> As mentioned in the AALCC'S Progress Report (the Progress Report), the Centres were entrusted with certain broadbased functions such as the promotion of the institution of arbitration in dispute settlement; wider use and application of UNCITRAL Arbitration Rules 1976; establishment and growth of national arbitration institutions and agencies and encouraging inter-institutional co-operation between them; rendering assistance in the enforcement of awards. In addition, the Centres would also function as arbitration institutions in providing facilities for arbitration under their Rules.[2] [fn 2: Ibid.]
>
> RULES OF THE CENTRES
>
> The procedural Rules for arbitration adopted by the Centres are those of UNCITRAL which had in 1976 promulgated these Rules. They were adopted by the UN General Assembly and were recommended to member countries for use in *ad hoc* arbitration. It was hoped that adoption of these Rules by member countries would lead to the harmonisation of arbitration Rules world-wide. The Regional Centres were the first arbitral institutions to adopt the UNCITRAL Rules. They were, therefore, the launching pad for these Rules which themselves were experimental in nature. It was not possible at the early stages to predict with any certainty whether these Rules would take off.
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> . . .

NEW ARBITRAL INSTITUTIONS IN ASIA AND THE PACIFIC, 1985-1995

In Asia, interest has grown in arbitration as a means of dispute settlement especially in the last decade or so, following the establishment of the Kuala Lumpur Regional Centre. Its establishment was in some ways timely as it drew attention to the existence in the region of an international arbitral institution which could offer facilities and assistance for arbitration at a time when interest was growing in this field.

This in turn led many countries in the Asian region to set up arbitral institutions of their own so that business disputes could be settled within their own boundaries. The decade following the Centre's establishment saw a burgeoning of arbitration centres in the Pacific Rim and the emergence of new players in the field of international commercial arbitration, as follows :

1. Hongkong International Arbitration Centre (HKIAC), 1985;
2. Australian Centre for International Commercial Arbitration (ACICA), 1985;
3. Australian Commercial Disputes Centre, Sydney (ACDC), 1986;
4. British Columbian International Commercial Arbitration Centre (BCICAC) 1986;
5. American Arbitration Association (AAA) Asia-Pacific Centre in San Francisco, 1986;
6. Centre for International Commercial Dispute Resolution (CICDR), Hawaii, 1990;
7. Singapore International Arbitration Centre (SIAC), 1991;
8. The Thai Arbitration Institute, 1994;
9. The Vietnam International Arbitration Centre (VIAC), 1995.

. . .

As national governments remodel their arbitration laws to create a favourable environment for international arbitration in their countries, this will result in fewer cases coming to the Centre.

In earlier years, the superior bargaining position of parties wishing to invest or trade in the Asian-African region meant that they could dictate the venue and the arbitral institutions to which disputes and differences arising out of business transactions would be referred to for arbitration. Inevitably, standard form contracts preferred by the buyers would contain reference to arbitration outside the region. In the two decades that followed the establishment of the Centres, the bargaining position of developing countries has improved from one of passive acceptance of a predetermined venue to that of being able to negotiate for themselves their preferred venue for arbitration. As the network of commercial transactions between the developed and developing world has expanded from the restricted colonial markets to those which now encompass the globe, developing countries can now 'shop' in any country of the world that can provide them with the tools, the cash and the technology that they need.

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THE EXPERIENCE OF THE KUALA LUMPUR CENTRE

With few exceptions, unless a Centre enjoys a monopoly over arbitrations, it would be unrealistic to expect that running an Arbitration Centre would be a profitable exercise, particularly if it is non-profit. Unlike the Cairo Centre, the Kuala Lumpur Centre does not enjoy such a monopoly. It operates in a competitive environment where arbitrations, both domestic and international, are also administered by professional bodies, such as Associations of architects, engineers, quantity surveyors, Chambers of Commerce, as well as commodity associations of rubber and palm oil.

Moreover, as it is non-profit, the administrative charges of the Kuala Lumpur Centre are a fraction of the arbitrator's fees. These charges cover the costs of servicing the arbitration; advising parties on the application of procedural rules of UNCITRAL and – as provided in the Rules – deciding on challenges to the arbitrators when questions about their impartiality or independence are raised; appointing arbitrators in default of appointment; and deciding on the amount of arbitrator's fees according to its Schedule of Fees; and collecting deposits – to name some of its responsibilities. These charges do not contribute much to the finances of the Centre. Nevertheless, the emphasis is to offer efficiency and quality service to the user of arbitration.

Another limiting factor in the number of cases coming to the Centre is the existence of standard form contracts which refer arbitrations to the established arbitral institutions in the West. Until businessmen are able to effect a change of venue in their contracts, this is a factor to be taken into account in setting up a Centre.

From information received, some contracts concluded in Indonesia, Thailand and India contain the Centre's arbitration clause but so far only one original dispute has been referred to the Centre and this originated from India.

Interest in arbitral services was indicated by recent visits from the Ministers of Justice of Vietnam, Laos, Indonesia and Thailand, seeking information on the Centre's facilities for arbitration and on the expenses and problems involved in setting up an Arbitration Centre. Information was provided and assistance offered in administering arbitrations for them, if need be.

According to a number of surveys conducted by the Centre between the years 1988-1993, among construction, shipping, oil and commodity sectors in Malaysia alone, there are now more than 5,000 contracts which have incorporated the Centre's arbitration clause in their contracts, but not all of them have reached the stage of arbitration. It must be concluded that a large number may have been settled. The fact that there is an arbitration clause which obliges parties to arbitrate sometimes leads to settlement before the stage of arbitration is reached.

Thus despite the fact that in Malaysia alone there is a large number of international contracts which contain the Centre's arbitration clause, the number of arbitrations conducted at the Centre is small. In fact, with the exception of the ICC, arbitration ceases form a relatively small part of the caseload of most institutions.[3] [fn 3: ICSID (The World Bank International Centre for Settlement of Investment Disputes) cases from date of inception 1966 to 1995 is 32.]

It is my impression that Centres which operate in an open, competitive environment cannot expect to attract a large number of international arbitrations. The new national Centres may, therefore, have to depend on active Government intervention and support to increase their international arbitration caseload. Promotional efforts will have to be carried out to encourage the public and private sectors to refer disputes to these Centres.

However, a Centre's importance should not be judged by the number of arbitrations handled by it. What interests the user, is the efficacy with which cases are handled, how problems which arise during arbitrations, some of which are outlined earlier, are solved, and above all, what steps are taken by the Centre or institution concerned to prevent tactical manoeuvres to frustrate the arbitral process.

In its pioneering efforts, the Centre was indeed fortunate to obtain from the host Government – Malaysia – not only financial support but legal logistics aimed at attracting international arbitrations to the Centre. The steps taken were as follows:

(1) In 1980, Malaysia amended its Arbitration Act 1952 to exclude International Arbitrations held under the Rules of the Centre from the ambit of the Arbitration Act (S. 34 of the Arbitration Act 1952);
(2) In 1985, the Government of Malaysia, having ratified the 1958 New York Convention, passed implementing legislation to bring its provisions into effect;

(3) In its Agreement with the AALCC, the Government of Malaysia guarantees the independent functioning of the Centre.

In addition, the Malaysian Courts have given judicial support to the arbitral process in two notable decisions when they upheld :

(1) The right of parties to be represented by persons of their own choice in arbitrations held in Malaysia. [fn 4: Zublin Muhibbah Joint Venture v. Government of Malaysia (1990) 3 MLJ 125.]
(2) The principle of non-intervention of the Courts in arbitrations held under S. 34 of the Arbitration Act. The Court refused to intervene in a pending arbitration held under the Rules of the Centre.

I should add that the Malaysian Ministry of International Trade has also applied its efforts to recommend and encourage parties in joint venture contracts to refer their trade disputes to arbitration under the Centre's Rules. There is no question of compulsion here, as parties are free to choose where they want to arbitrate within Malaysia.

As announced by the Secretary-General a new Agreement has just been concluded between the Government of Malaysia and the AALCC for the continued functioning of the Kuala Lumpur Centre under the auspices of the AALCC.

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CHRONICLE

CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW
July 1995-June 1996

Ko Swan Sik*
in co-operation with PETER B. PAYOYO and with contributions from JAMAL SEIFI (Tehran), KRIANGSAK KITTICHAISAREE (Bangkok/Washington D.C.), and SOH TSE BIAN (Singapore)

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Japan denied a request by the US Federal Express Corp. (Fedex) to have seven new routes through Japan and to change its routes in order to fly to Subic Bay in the Philippines with stop-overs in Japanese cities.(FEER 06-07-95 p.71) Japan insisted on prior amendment of the 1952 US-Japanese Air Transport Services Agreement which entitled Japanese carriers to much more limited possibilities than US carriers. For example, Japanese carriers were not allowed to transport goods between points in the US and cannot pick up Japan-bound passengers and cargo from more than one US point on a single journey.

A basic agreement was announced on 20 July 1995, under which Japan granted Fedex seven new routes through Japan to other points in Asia. In exchange, the US would grant Japanese cargo airlines a new route between Osaka and Chicago and agreed to start discussions aimed at revising the cargo-related provisions of the 1952 Agreement so as to achieve 'equality of opportunity' for Japanese and US carriers.

According to the Japanese side, the US made a verbal promise to talk about passenger service issues after the conclusion of six months of talks on cargo service. This was, however, denied by the US negotiator.(IHT 06-07,22/23-7-95) Yet the two countries began talks to revise the 1952 Agreement in late February 1996.

The US wanted to see 'open skies' outside Japan, which was opposed by Japan. The US-Japan aviation industry, was, however, divided on what it wanted from the talks. Airlines which were granted rights under the 1952 treaty, including Japan Airlines, United, Northwest and Fedex, wanted additional 'beyond' rights, while the so-called 'have-not' companies, including ANA, Nippon Cargo Airlines, American Airlines, Delta, and Continental wanted a bigger share in the Japan-US aviation market in order to redress the existing imbalance with the 'have' companies.(FEER 14-03-96 p.56)

An agreement was reportedly reached on 27 March 1996 which did not include the issue of so-called 'beyond rights'. The new agreement amended the 1952 Agree-

ment which granted preferential treatment to PanAm (whose rights were later purchased by United Airlines), Northwest, Fedex, and (in a more limited sense) Japan Airlines. The new agreement liberalized air cargo services and would allow Fedex, Nippon Cargo Airlines and United Parcel Service to significantly increase their trans-Pacific flights; it would also remove the limitations previously imposed on JAL.(IHT 28-03-96; FEER 11-04-96 p.79)

Philippines - US

Civil aviation between the two countries is governed by an agreement of 1982 that contains an 'open sky' provision, but implementation of that provision had been frozen through transitory agreements, the latest of which was due to end on 30 September 1996. In talks to liberalize the aviation markets the Philippines sought to defer the application of the provision for ten years as Philippine Airlines was not yet in a position to compete with big US carriers. The US was willing to postpone the provision for four years but asked for one more US passenger airline and three additional US air cargo carriers to be allowed to operate in the Philippines on the basis of national treatment ('seventh freedom rights').(IHT 15-09-95) It was reported in October 1995 that the two countries signed a memorandum of understanding to postpone the lifting of restrictions on US-Philippine passenger flights.(FEER 05-10-95 p.91)

Hongkong - Australia

The two countries settled their dispute over the number of passengers that Qantas Airways would be allowed to carry from Hongkong to other Southeast Asian cities. The dispute flared up in April 1995 when Hongkong said it would limit the number of passengers, whereupon Australia responded by threatening to impose a load limit on Cathay Pacific Airways flights between Sydney and Hongkong.

The agreement was signed on 14 December 1995. A Hongkong government spokesman said that the key element of the agreement was the limitation of so-called 'fifth freedom' loads.(IHT 15-12-95)

India - US

India signed an air services pact with the US allowing state-owned Air India to add five cities to the three US destinations it already served. In return, US carriers gained landing rights in Madras, and United Airlines will be able to fly daily from New Delhi to London and Hongkong.(FEER 14-12-95 p.79)

China opened 'Mongol' route

Beginning 31 March 1996, China allowed planes to take the 'Mongol' route through Chinese airspace. The opening of this airspace would allow Korean Air, for example, to cut flight time from Seoul to London up to one and a half hours. Previously flights were routed through Japanese and Russian airspace.(FEER 04-04-96 p.65)

Thai-US Air Transport Agreement

The two countries concluded a new air transport agreement on 8 May 1996. Under the agreement the designated airlines of each party are entitled to operate 31 weekly round trips on the agreed routes. Each party enjoys full fifth freedom traffic rights with a total of 14 frequencies out of 31 frequencies. The frequency of non-stop flights between the two countries are excluded from these 31 frequencies. The Agreement was in line with the Thai policy of promoting Thailand as a regional hub in air navigation.

ALIENS

See also:Diplomatic and consular protection

Release of German hostage in Pakistan

A German engineer was freed by his kidnappers in a tribal area of Northwest Pakistan on 3 July 1995. Three Germans were kidnapped on 25 June from a government power project in the neighbourhood of the city of Peshawar.(IHT 04-07-95)

US citizen accused of espionage in China (the HARRY WU case)

A Shanghai-born US citizen, who had entered China from Kazakhstan (5 AsYIL 387), was arrested on 19 June 1995 and later formally charged with "illegally sneaking into China by using aliases [the man used a westernized name in his US passport since 1994] several times [since 1991], obtaining China's state secrets, and conducting criminal activities". The espionage charge also said that he "travelled to places not open to foreigners, spied, bought secrets, stole secret documents, carried them abroad and provided them to outside organizations". It was later reported that the US state department had urged WU not to travel to China after he was naturalized as an American citizen [in 1994], warning that he might be arrested for his undercover research into Chinese forced labour camps. The materials collected by him were used for a CBS and a BBC documentary program, showing that China, despite denials, continued to ship goods made by forced labour to the US.(IHT 11-07,15/16-07-95)

The US state department accused China of abrogating the Sino-US consular agreement by refusing to grant American officials access to WU within two days of notifying them, on 23 June, that he was being detained.(FEER 20-07-95 p.17) After the arrest, the US president's national security adviser expressed "the administration's unwavering position that Mr. WU should be released immediately". On 1 August, the US secretary of state clarified to his Chinese counterpart that the proposal to have a Sino-US summit would be 'very difficult' while WU was still detained.(FEER 27-07-95 p.18)

In early August 1995, it was reported that WU had made a purported confession saying that some of his television documentary evidence of prison abuses may have been falsified. According to the English subtitles in the videotape of WU's admissions, WU said that instead of actually showing the alleged prison abuses as claimed, the documentary producers at the BBC knowingly substituted footage.(FEER 10-08-95 pp.14-17)

WU was convicted and sentenced to 15 years imprisonment for espionage and for impersonating a police officer, but was expelled immediately after the trial court had handed down its decision.(IHT 25-08-95; FEER 07-09-95 p.16)

Expulsion from China of two US officers

Two US military attaches at the US consulate-general at Hongkong were detained by the Chinese authorities on 29 July 1995. They were accused of sneaking into Chinese restricted military zones along the southeastern coast, in the port of Xiamen, and of having "illegally acquired military intelligence by photographing and videotaping". China's southern coast, facing Taiwan, is a sensitive area where military installations are located.

The two persons had entered China on 23 July on visas for the purpose of holding consultations with US diplomatic personnel in China. They were detained for five days before being expelled on 3 August 1995.

China lodged a protest and demanded assurances that there would be no further similar incidents.(IHT 03-08-95; FEER 17-08-95 p.16)

Chinese detention of Greenpeace demonstrators

Foreign members of the environmental group Greenpeace were detained for deportation on 15 August 1995 after they had started demonstrating in Beijing against the Chinese plan to carry out a nuclear test.(IHT 16-08-95)

Expulsion of Hongkong journalists from China

Two Hongkong reporters, who admitted having entered China without getting the required permission, were charged in China with espionage by entering the coastal area of eastern Fujian Province to obtain military secrets. The two allegedly photographed military bases and looked into troop movements. They were expelled on 25 August 1995.(FEER 07-09-95 p.13)

Vietnamese conviction of US citizens for subversive activities

Two Vietnamese-American dual nationals were arrested in November 1993 for attempted subversion and topplement of the Vietnamese government. They were convicted in August 1995 and sentenced to serve jail terms by a court in Ho Chi Minh City.

The US State Department criticized the court decision since the two Americans had simply 'peacefully' asserted their political views by trying to organize a meeting on democracy and human rights. It added that the Vietnamese treatment would not promote the granting of Vietnamese requests for US trade privileges, such as those accorded under most-favoured-nation status.(IHT 17-08,18-08-95)

Vietnam later expelled the two persons, removing an obstacle to improved trade ties.(IHT 07-11-95)

Alien residents in Japan

The number of resident foreigners in Japan as of 31 December 1994 rose to a record 1.35 million, up by 2.5 percent compared to the previous year. Foreign residents included 676,793 Koreans; 218,585 Chinese including Taiwanese and Hongkong Chinese; 159,619 Brazilians; 85,968 Filipinos; and 43,320 Americans.(IHT 17-08-95)

Expulsion of aliens from China

A Chinese news service reported that China had expelled a total of 15,000 foreigners in the last five years for committing various crimes.(IHT 22-11-95)

Japanese fingerprinting of aliens

A US citizen who challenged the Japanese law requiring foreigners to be fingerprinted lost his 14 year-old case. The Japanese Supreme Court on 15 December 1995 upheld the statute, saying that since the procedure involved only one finger, "that should not cause excessive psychological or physical pain".(IHT 16/17-12-95)

Denial of voting rights to aliens in Japan

On 26 June 1996, the Kanazawa branch of the Nagoya High Court turned down an appeal by four Korean permanent residents seeking the right to vote in local elections, thereby upholding a 1994 lower court ruling. The judge said that, while suffrage for aliens was not prohibited by the constitution, this was a matter for the legislature to decide.(IHT 27-06-96)

Iranian pilgrims at Mecca

Fearful of clashes with Saudi security forces, Iran called-off an anti-Israel and anti-US rally by Iranian pilgrims in Mecca. The Saudi authorities had previously banned political rallies in Mecca. There had been violent incidents in the past at such rallies. In 1987 more than 400 pilgrims, mostly Iranians, were killed in clashes with Saudi security forces.(IHT 25-04-96)

The 'disavowal of the pagans' ceremony, as such rallies have been called, was later conducted inside the confines of the Iranian camp, following the practice held the previous year.(IHT 29-04-96)

Repatriation of Vietnamese from Germany

In mid-1995, Germany and Vietnam concluded an agreement to repatriate about 40,000 Vietnamese contract workers and illegal immigrants in Germany. The agreement provided a schedule for the annual repatriation of Vietnamese, so that Vietnam would have taken back all 40,000 by the year 2000. Germany, in turn, would provide a $140 million-aid to Vietnam, to cover the cost of resettling the returnees and to finance other projects. Most of the Vietnamese were sent to East Germany in the 1980s as contract workers and remained there after German unification.On 18 June 1996 Vietnam announced that it was ready to take back more than 2,000 Vietnamese, the first substantial group to be repatriated under the Agreement.(IHT 19-06-96; FEER 27-06-96 p.13; 03-08-95 p.13)

Vietnamese-born Americans in Cambodia

It was reported that an anti-Vietnamese government armed group, numbering between several hundred and 2,000, had set up training camps in Cambodia and were stockpiling weapons. Many of the resistance group's leaders were identified as naturalized, Vietnamese-born American citizens who had served as officers in the South Vietnamese army during the Vietnam War. The goverments of Vietnam, Cambodia

and the US had monitored the group and took steps in order to clamp down on the movement before it did any damage. Many of the rank and file of the resistance movement were recruited in Cambodia, mostly among the Kampuchea Kraom, who are known in Cambodia for their anti-Vietnamese stance.(FEER 16-11-95 pp.16-17)

Aliens in Philippine waters

Philippine naval patrol boats seized a Chinese cargo vessel off the coast of Zambales province after it had tried to ram a navy ship on 10 February 1996. The 20 crew aboard were arrested. A top navy officer said that the vessel may have been involved in piracy and the smuggling of human cargo into the Philippines.(FEER 22-02-96 p.13)

Undercover missionaries in North Korea

In South Korea, the conservative wing of the Presbyterian Church trained missionaries to spread the gospel along the Sino-North Korean border, following fundamentalist churches that had already sent udercover missionaries on proselytizing missions inside North Korea. China, which bans foreign missionary activities, lodged diplomatic protests over Korean evangelists operating in its border areas.(FEER 30-05-96 p.25)

ARBITRATION (COMMERCIAL)

Iranian bill on international commercial arbitration

In September 1996 the Iranian parliament adopted the text of a "bill on international commercial arbitration" in first reading. The bill was greatly inspired by the 1985 UNCITRAL Model Law on international commercial arbitration. The bill contained an improved regulation of the matter compared with the Articles 632-676 of the Code of Civil Procedure.

China's enforcement of international arbitration award

Under a 1988 agreement between Revpower (of Hongkong) and state-owned Shanghai Far East Aero-Technology Import and Export Corp. (SFAIC), Revpower undertook to supply machinery, raw materials and expertise, while SFAIC would make industrial batteries that Revpower would sell. In 1989, just before Revpower was to take its first shipment, SFAIC said that the battery prices would have to be raised due to increased costs. This apparently breached the agreement which had fixed prices for three years. Revpower canceled the deal. After failure of settlement by negotiations, Revpower submitted the case to the Arbitration Institute of Stockholm, which awarded compensation for breach of contract, by award of July 1993. When Revpower tried to enforce the award through the Shanghai Intermediate People's Court, the case was refused. Yet China had acceded to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in 1987.

It was reported that in view of the above case US legislators contemplated possible changes to US law. Among the proposed legislative measures was one that would require the US president, before agreeing to China's accession to the WTO, to determine whether China is fulfilling its obligations under the 1958 New York Convention.

Besides, an amendment was proposed to the Foreign Sovereign Immunity Act that would enable American companies to seize Chinese state-owned assets in the US if Chinese government firms do not pay claims awarded by international arbitration.(FEER 20-07-95 p.78, 28-09-95 p.14)

ARMS SALES AND SUPPLIES

US arms for Pakistan

(*see also*: Sanctions)

Following on his April 1995 promise to the prime minister of Pakistan (*see* 5 AsYIL 486), the US president asked the consent of the US Congress to deliver to Pakistan military equipment worth more than $370 million as part of a compromise plan to break a six-year impasse over Pakistan's order of military hardware which were already paid for but never delivered because of US sanctions. The Congress was asked for a one-time waiver of the PRESSLER Amendment, the law that bans US economic aid to countries which develop nuclear weapons.(IHT 27-07-95) Delivery of the military equipment destined for Pakistan was blocked because the US president could not certify that Islamabad did not have a nuclear bomb. Under a proposal that would require a specific waiver of the law, the US would deliver to Pakistan certain military provisions, but not 28 F-16 jet fighters, which would be sold to third countries and the proceeds returned to Pakistan.(*see infra*)

The announced US administration position was to 'engage' Pakistan, but the PRESSLER amendment had prevented it from doing so. For instance, US energy firms were only prepared to proceed with Pakistani projects with investment insurance from the (US) Overseas Private Investment Corp., which was, however, blocked because of the PRESSLER Amendment.

Those who supported the application of the PRESSLER Amendment, on the other hand, argued that the engagement policy pursued by the US in the 1980s was largely unsuccessful: although Pakistan had received over $5 billion in aid from the US, it still continued with its programme to develop nuclear weapons.(FEER 10-08-95 p.28)

On 24 October 1995, a US Senate-House joint committee passed the BROWN Amendment, which allowed for closer economic ties with Pakistan and the one-time delivery to Pakistan of arms and spare parts worth $370 million. The amendment modified the PRESSLER Amendment. Under the BROWN Amendment, US companies also would receive insurance coverage from the government for investments in Pakistan, while the latter would be able to apply for long-term loans from American banks. In addition, the US would be able to restart aid to Pakistan's anti-narcotics and counter-terrorism programmes.

All the military equipment paid for by Pakistan, except the 28 F-16 jets, would be delivered. The US government also promised to return the $658 million that Pakistan paid for the aircraft once another buyer had been found.(FEER 09-11-95 p.31)

The easing of the PRESSLER amendment prompted protests from India.(FEER 05-10-95 p.15) The Indian foreign minister said earlier that "[i]f arms are supplied to Pakistan, ... [w]e shall also have to match their striking power".(IHT 01-08-95)

F-16 jets headed for Indonesia

It was reported that Indonesia reacted coolly to the American offer to sell at a bargain price 28 F-16 fighters, originally destined for Pakistan. Nevertheless US officials said that the purchase of 9 F-16s was a 'done deal'; the option to purchase the 19 others would be decided by Indonesia later, depending on financial terms. It was reported that Indonesia wanted guaranteed soft loans, which the US does not offer for such sales. The price for the entire package would be $400-$500 million.(FEER 21-03-96 p.24)

French arms for the Third World

France surpassed the US as the leading arms dealer to the Third World in 1994. Sales from the US to developing countries fell to their lowest levels in eight years to $6.1 billion in 1994, down from $15.4 billion in 1993. But sales from France jumped from $3.8 billion to $11.4 billion over the year.The total US share of sales to Third World countries fell to 24 percent in 1994 from 61 percent in 1993, while France's share increased to 45 percent from 15 percent. Overall, arms sales to Third World countries dropped slightly from $25.5 billion in 1993 to $25.4 billion in 1994, continuing a steady decline since the end of the Cold War.(IHT 09-08-95)

Missiles and frigates from France for Taiwan

Following vehement denials, France confirmed that it was preparing to deliver anti-aircraft missiles to Taiwan. It said that this delivery was not violative of the French promise to China to halt arms sales to Taiwan, because the transaction predated the 1994 pledge.(IHT 26-10-95)

In early 1996, after news leaked that France's arms manufacturer MATRA HACHETTE was selling shoulder-fired anti-aircraft rockets to Taiwan, the French prime minister ordered the sale delayed indefinitely.(FEER 01-02-96 p.12)

However, the first Lafayette-class missile frigate built by France for Taiwan was reported to be due to arrive in Taiwan in mid-May 1996. Taiwan would be receiving two more frigates from France during the year.(FEER 11-04-96 p.13)

French warplanes for Pakistan

Pakistan confirmed on 26 October 1995 that it would buy Mirage warplanes from France.(IHT 27-10-95)

F-16s for Taiwan

In December 1995, it was reported that delivery of F-16 warplanes to Taiwan would start in July 1996. The aircraft would be part of a purchase of 150 F-16s agreed to in 1992.(IHT 18-12-95) In March 1996, however, the US defense department said that delivery would in fact start in May 1997. The announcement of an earlier delivery date came at a time of rising cross-strait tensions caused by Chinese missile tests and military exercises around Taiwan.(IHT 15-03-96)

China bought war planes from Russia

A Chinese foreign ministry official confirmed China's $2.2 billion purchase of SU-27 war planes from Russia.(FEER 22-02-96 p.13)

Malaysian offshore patrol vessels

Malaysia was contemplating the purchase of 27 offshore patrol vessels over the next 15 years. The ships would be up to 1,300 tons in size and would have a range of 10,000 kilometres with the capability to carry helicopters for anti-submarine warfare, reconnaissance, and pursuit. The ships would be needed to protect the oil and gas fields and fishing grounds in Malaysia's maritime territory.

The Malaysian plan was first announced in 1993. One of the front-runners in the bidding was Transfield Shipbuilding Pty. of Australia. As Australia itself needed new patrol vessels, the Australian government and Transfield agreed to pay the cost of designing a ship that would suit the needs of both countries.(IHT 15-01-96)

Arms sales to Bosnia

The Malaysian prime minister declared that his country was willing to sell arms to Bosnia despite a UN arms embargo on the former Yugolsavia.(FEER 03-08-95 p.13)

Russian helicopter gunships for Myanmar

Myanmar took delivery of at least two Russian-made helicopter gunships, carried to Yangon in November 1995 by a Russion transport plane. The delivery followed the trip to Moscow of a Myanmarese army commander. It was reported that the choice of Russia, as an alternative supplier of arms from China, was prompted by the poor quality of the Chinese equipment which had flooded Myanmar in the past years.(FEER 21-12-95 p.14)

Chinese arms sales into the US

On 23 May 1996, the US attorney's office announced that federal agents had seized 2,000 Chinese-made AK-47 assault rifles and arrested 7 California residents in connection with an arms-smuggling racket allegedly run by two Chinese armament companies, Polytechnologies Inc. and Norinco.

On the morning of 24 May, customs officers in the cargo terminal of Hongkong's Kai Tak airport discovered two undeclared fighter-training bombs on their way to Israel from China. The bombs were being shipped to Israel by China National Aero-Technology Import & Export Co., the marketing and transport arm of the state aero-space conglomerate, Aviation Industries of China.

On 25 May 1996, China's foreign trade ministry announced plans for a new ex-port-control law that would enhance restrictions on the sale of sensistive items such as arms or nuclear technology.(IHT 24-05,25/26-05,29-05-96,06-06-96; FEER 06-06-96 p.16)

ASIA-PACIFIC ECONOMIC CO-OPERATION FORUM (APEC)

Implementation of the Bogor Declaration

In July 1995 a meeting of officials was held at Sapporo, Japan, to develop a 'road map' outlining a set of general principles for the implementation of the 'Bogor Declaration', adopted in November 1994. After that meeting, differences remained on what exactly liberalization entailed and whether it would be binding or voluntary. Japan, which had responsibility for developing an 'action agenda' for the next ministerial meeting at Osaka, proposed a two-pronged, compromise approach. It called for trade liberalization to be achieved through voluntary actions of individual states as well as through collective efforts. The officials met again in September and in October.(IHT 06-07-95)

A key round of talks held in Tokyo in early October 1995 revealed the differences among the APEC members that needed to be overcome, particularly in the field of agriculture markets. Japan, China, South Korea and Taiwan were opposed to making firm commitments to include their sensitive agricultural sectors in the free-trade plan, while major exporters like the US, Canada, Australia and New Zealand insisted to include agriculture.(IHT 09-10-95)

Osaka summit meeting of November 1995

At the threshhold of the Osaka meeting disagreements became visible within ASEAN about the issue of whether anyone of its members had the right to exclude politically sensitive sectors of their economies from the free trade arrangement being negotiated by APEC. Indonesia, Singapore, Thailand and Brunei joined Australia and the US in supporting a comprehensive coverage for free trade. On the other hand, Malaysia and the Philippines were joined by Japan, China, South Korea, and Taiwan in supporting the principle of flexibility and no deadlines. APEC officials agreed to leave four issues to be resolved by the ministerial meeting on 16 and 17 November.

In a draft declaration it appeared that APEC was retreating from its aim of liberalization. Instead of affirming the target dates set in the 1994 Bogor Declaration, the draft said that APEC "will achieve trade and investment liberalization steadily and progressively".(IHT 14-11,15-11-95) A joint statement of 17 November of the foreign and trade ministers reflected the "voluntary commitment and the political determination of each member" to achieve free and open trade and investment no later than 2020 among developing countries and 2010 for developed economies. It remained unclear what was exactly meant by a voluntary commitment, and it was emphasized that the accord was not a binding agreement.(IHT 18/19-11,20-11-95)

The APEC leaders who gathered for the summit meeting in Osaka on 18-19 November 1995 adopted a 33-page 'Action Agenda' for further liberalizing trade and investment, endorsing the ministerial joint statement of 17 November. The Action Agenda called for members to start implementing initial liberalization plans by January 1997, three years earlier than planned. However, the document allowed for flexibility "due to the diverse circumstances in each economy". It was not clear whether the time limits set for meeting Bogor's free trade targets were strict deadlines or vague goals.(FEER 30-11-95 p.14)

A distinctive feature of the Osaka meeting lay in its adopted method of decision-making and decision-implementation. Trade liberalization would not be undertaken through reciprocally negotiated, precisely scheduled and legally binding commitments by all members across all sectors. Instead, it would be done through unilateral offers by members, followed by a process of consultations, review and peer pressure to

ensure that each APEC economy undertake comparable market-opening measures. The Japanese foreign minister referred to the approach as an Asia-style formula. The finance secretary of Hongkong described the result of the APEC meeting as a 'gentleman's agreement'. And the Philippine president considered the method of making progress - that each member will decide for itself how best to move forward to achieve the goal of free trade and open investment by 2020 or 2010 - as "the Asian way'. It was said that this was the first time that a major international economic grouping, with the US among its participants, had so strongly resisted the postwar Anglo-Saxon model of trade liberalization.(IHT 22-11,24-11-95; FEER 07-12-95 p.48)

Implications of trade liberalization

China, with significant support from other members, particularly Japan, contended that non-discriminatory or most-favoured-nation status should be an inherent element of APEC's regional trade liberalization program. The US, however, could not agree because US law requires annual renewal of the right of Communist countries to such MFN status. The US trade representative said that the US would not alter its law for APEC.(IHT 16-11-95)

US efforts to extend APEC's scope to security matters

The US defense secretary said that the scope of APEC should be extended to cover regional security issues as well. He also proposed a separate conference of regional defence ministers. He was careful, however, to avoid any suggestion that he saw the organization as a cold war defence pact. Officials of other APEC countries expressed concern at the proposal, saying it was premature and could be counterproductive.(IHT 16-11-95; FEER 02-05-96 p.12)

The view of the defense secretary was contradicted by the US secretary of state who said on 17 November 1995 that economics, not security, should be the focus of APEC.(IHT 18/19-11-95)

Membership

During the China-Russia summit in late-April 1996, China reiterated its support for Russia to join the APEC forum.(FEER 23-05-96 p.40)

APEC agreement to stabilize currencies

In March 1996, finance ministers from APEC countries met in Kyoto and agreed to cooperate in stabilizing the region's currencies. They also stressed the importance of avoiding large exchange-rate fluctuations and of 'sound macro-economic policies' such as inflation control and balanced budgets.(FEER 28-03-96 p.63)

ASIAN DEVELOPMENT BANK (ADB)

Diminishing funds for the Asian Development Fund

The ADB reported that the Asian Development Fund had only $1.3 billion left, enough to last to early 1997. It requested $5.3 billion for the Fund. The current fund, the sixth such program in the ADB's 29-year history, was originally allocated $4.2

billion in 1991. The Fund's money comes mainly from wealthy industrialized states and is lent free of interest with repayment terms of up to 40 years, to the poorest Asian countries.

The US was reluctant to pay its arrears ($337 million) in restocking the Fund, while other Western donors were waiting to see the US attitude. These donor countries were hard-pressed with budget deficits, and the so-called Asian 'tigers' were challenged to raise their contributions. These countries once received loans from the Fund and had since become wealthy.(IHT 19-04,29-04-96) However, Singapore held that supporting the Fund would contravene its stand against this kind of aid, and Taiwan held its legislature would not approve new funds for the Bank as long as it is designated 'China,Taipei'. South Korea said it might raise its contribution but only if it obtained an increased role in running the Bank. Hongkong was not expected to cooperate unless China, to which it would revert in 1997, would be given access to loans from the Fund.(IHT 30-04-96)

In June 1996 the US disclosed that it would slash its future contributions, including the $680 million pledged in 1991 for the development fund's sixth replenishment in half, while demanding to keep a leading role in setting key policies of the Bank. The US wanted major changes in the way the Fund should be administered in the future. It also firmly opposed granting India and China access to the Fund. Nevertheless, it would reject any moves to limit the eligibility of US firms to supply goods and services to projects financed by the fund. These wishes were accompanied by threats to leave the Fund in case the wishes were ignored.(IHT 27-06-96)

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)

See also: Inter-state relations:general aspects, Labour, Regional security, Territorial claims and disputes

Membership

At the 28th [Foreign] Ministerial Meeting in July 1995 Vietnam was accepted as a member and Cambodia was granted observer status.

Myanmar acceded to the 1976 Treaty of Amity and Cooperation in South-East Asia on 27 July 1995. Cambodia followed the next day.(Joint Communique; A/49/953-S/1995/652; IHT 25-07-95,03-08-95; FEER 03-08-95 pp. 23,26, 07-15-95 p. 23)

In early April 1996, Laos formally applied for membership in ASEAN.(FEER 11-04-96 p.13)

It was reported that the Malaysian foreign minister was dispatched by ASEAN to warn the co-prime ministers of Cambodia not to allow their rivalry to veer out of control, otherwise Cambodia, which planned to join ASEAN, 'will be on its own'. (FEER 27-06-96 p.12)

External relations

Dialogue and consultation processes on political and security issues with China and the European Union, now also included the ASEAN-China Senior Officials Meeting (ASEAN-China SOM) and the ASEAN-European Union Senior Officials Meeting (ASEAN-EU SOM).

An ASEAN-Canada Consultation was held in May 1995 in Halifax, in order to present ASEAN's view to the following G-7 Meeting.

Cooperation with 'Non-Dialogue Partners' took place on a sectoral basis. (A/49/953-S/1995/652)

In early 1996, India, which maintained consultative status in ASEAN, was promoted to full dialogue partner. As such India would be able to participate more actively in the post-ministerial conference which follows the annual ASEAN ministerial meeting.(FEER 01-02-96 p.12)

The ASEAN Senior Officials Meeting on 10 April 1996 approved China's application to become a full dialogue partner, subject to approval by the ASEAN summit meeting in Jakarta in December 1996. China had been 'Consultative Partner' since 1991.(IHT 16-04-96; FEER 25-04-96 p.13) In mid-June 1996 China would have an official bilateral dialogue with ASEAN in Indonesia.(FEER 13-06-96 p.28)

Tariff cuts

As part of an effort to establish a free-trade area by 2003 the ASEAN member states decided to reduce tariffs for unprocessed agricultural products as of January 1996. It was the first time for tariffs of these products to be reduced.(IHT 26/27-08-95) However, on 10 December 1995 agreement was reached, at the initiative of Indonesia, that 15 agricultural products would be exempted from tariff reductions until 2003.(IHT 11-12-95) Indonesia had earlier expressed concern about opening its market to uprocessed agricultural goods, while Malaysia wanted extended protection for its strategic primary products. (FEER 21-09-95 p.80)

In early August 1995, ASEAN Foreign Ministers agreed to push forward the target date for creating an Asean Free Trade Area (AFTA) to the year 2000. The Bangkok Summit in December (*see infra*) confirmed this new timetable.(FEER 10-08-95 p.15)

Preferential trade in services

The ASEAN would extend its preferential trade agreement to services. The member states agreed to start negotiations to liberalize trade in areas like aviation, shipping and possibly business services and construction, and an action plan would be drawn up within three years for approval by the summit meeting to be held in Hanoi.(IHT 12-12-95)

Bangkok Summit Meeting 1995

The historic summit meeting from 14-15 December 1995, in which the heads of state of Laos, Cambodia and Myanmar participated, saw the adoption of a 'Bangkok Summit Declaration'. In the Declaration, the Southeast Asian leaders pledged to work towards the inclusion of all Southeast Asian countries in ASEAN as it enters the 21st century.

On political and security co-operation the ASEAN leaders pledged to continue playing a central role in developing the ASEAN Regional Forum (ARF); to seek a peaceful resolution of the South China Sea dispute consistent with the Treaty of Amity and Cooperation in Southeast Asia, the 1992 ASEAN Declaration on the South China Sea and the UN Convention on the Law of the Sea; and to turn Southeast Asia into a nuclear-weapons-free zone.

The Asean leaders also agreed to meet informally every year.

In the field of economic co-operation an Agenda for Greater Economic Integration was adopted, aimed at, *inter alia*, the completion of the implementation of the ASEAN Free Trade Area (AFTA) by the year 2000, instead of 2003; liberalization of key service industries such as banking, telecommunications and tourism through the accelerated implementation of the ASEAN Framework Agreement on Services; and implementation of the Framework Agreement on Intellectual Property Cooperation, including the exploration of the possibility of setting up an ASEAN patent system and an ASEAN trademark system. The Summit also agreed to foster closer economic ties with China.

There was mention of an ASEAN investment region as well as the implementation of an ASEAN Plan of Action on Cooperation and Promotion of Foreign Direct Investment and Intra-ASEAN Investment.(FEER 07-12-95, p. 26)

In the Declaration's chapter on 'functional co-operation' reference was made to, *inter alia*, goals of striving towards technological competitiveness; upgrading human resources by investing in institutional capacities for education, training and research; science and technology and technology transfer; promoting the networking of institutions; advancing economic prosperity and social well-being in a sustainable manner for the benefit of future generations; and conserving, preserving and promoting the cultural and artistic heritage.(*Fifth ASEAN Summit Declaration*; FEER 30-11-95 p.12; FEER 29-12-95/04-01-96 pp.16-17)

The Summit Meeting also discussed other issues, such as the development of the Mekong Basin area, the harmonization of immigration procedures, the idea of a rail link between Singapore and Kunming in Yunnan, a network of gas pipelines linking ASEAN with Cambodia, Laos and Myanmar and possibly southern China, and a common time zone for the ASEAN region. (ASEAN Update Jan/Feb 1996)

Plan for free-trade zone

The Philippines had launched a plan for opening the ASEAN Free Trade Area (AFTA) to all countries by the year 2000 and thus changing it from a preferential trading block to become a free-trade zone. It was reported that Indonesia was supporting the plan. The plan would be considered by the ASEAN economic ministers conference in September 1996.(IHT 13-05-96)

ASYLUM

See also: Specific territories within a state: East Timor

South Korean-New Zealand dispute

Relations between the two countries worsened sharply because of the disposal made by the New Zealand government of a request for political asylum by a South Korean dismissed diplomat. The person had caused a political dispute in South Korea in June 1995.

As a consequence the South Korean ambassador was summoned back to Seoul. (IHT 13-09-95)

Australia's attitude toward East Timorese refugees

Protecting delicate relations with Indonesia, Australia on 10 October 1995 ruled out granting political asylum to people fleeing East Timor. A top-ranking official

referred to the fact that Portugal still considered the persons in question as its citizens: "These people have dual citizenship, therefore they cannot argue that they are refugees".(IHT 11-10-95)

Asylum for North Korean defectors

The South Korean foreign ministry said that the third secretary in the North Korean embassy in Zambia arrived in Seoul following the earlier defection of his wife and their friend.(FEER 08-02-96 p.13)

Asylum for Timorese through British embassy

Five Timorese activists sought asylum in the British embassy in Jakarta. Portugal afterwards offered them permanent asylum.(FEER 05-10-95 p.15) By the end of 1995, it was reported that more than 50 Timorese had been granted political asylum by Portugal since 1994 after intruding into embassy premises at Jakarta, including the Dutch, Japanese, and French missions.(FEER 21-12-95 p.19)

BORDERS, BORDER DISPUTES AND BORDER INCIDENTS

India-Myanmar-Thai delimitation of the trijunction point in the Andaman Sea

The ratification of the Agreement on the matter took place on 24 May 1995, on which day the Agreement also entered into force. The Indo-Thai agreement on their maritime boundary from Point 7 to the Trijunction Point (Point T, between Thailand, India and Myanmar) entered into force on 17 January 1996.

Maritime boundaries between Kuwait and Iran

It was reported on 18 July 1995 that the two states were to start negotiations shortly on the demarcation of the border between them. (UNdoc. A/50/713 para.136)

Closure of Myanmar-Thai border

In the wake of accusations following the killing of Myanmarese passengers on a Thai trawler and reports of Thai sailors boarding Myanmarese boats and beating crewmen while throwing others overboard, Myanmar closed the country's last overland border checkpoint with Thailand between the southern Thai port town of Ranong and Myanmar's southernmost city of Victoria Point. The northern border town of Tachilek was closed earlier after an attack by guerillas.(IHT 15-08-95)

After the closure of the land borders in March 1995, Myanmar practically abandoned 'constructive engagement' with Thailand and halted work on a 'friendship bridge' over the Moei river. It was speculated that because Myanmar had other allies and partners in the region - like China, Indonesia and Singapore - it was now hitting back at its historicial enemies, the Thais, who had allegedly provided sanctuary for anti-government rebels for many years.

Following efforts by the business community in Bangkok for the two countries to patch up differences, in November 1995 high level officials from Myanmar and Thailand met to resolve border disputes.(FEER 13-07-95 p.19; 26-10-95 p.14; 16-11-95 p.15)

Border problems, however, persisted. In January 1996, it was reported that Myanmar officials complained that the small island in the middle of the Moei River which

marks the Thai-Myanmar border had been effectively taken over by Thailand: it filled-in the narrow channel separating the island from the Thai bank of the river.(FEER 11-01-96 p.12)

Thailand-Vietnam

Vietnam and Thailand said they had made progress in solving a border dispute in the Gulf of Thailand. Officials meeting in Pattaya in September 1995 said that the two countries had agreed to use Tho Chu island, located off the Vietnamese coast, as the starting point in delineating a common border in future talks.(FEER 21-09-95 p.15)

Sino-Indian border disengagement

India and China agreed on 20 August 1995 to pull back their troops from four border posts in the northeast Indian state of Arunachal Pradesh, parts of which are claimed by China. When the Indian prime minister visited China in September 1993, the two countries had already agreed to work for peace and tranquility along the disputed frontiers.(*see* 4 AsYIL 417)(IHT 21-08-95)

Cambodia - Vietnam

During a visit by the Cambodian foreign minister in September 1995 it was agreed between the foreign ministers of the two countries to continue talks on their common border.(IHT 12-09-95) In December 1995 the Cambodian king reaffirmed a January 1995 agreement between the two countries which, among other things, required the two sides to resolve border matters as far as feasible at the provincial level. Diplomats from the two countries then met on 2 February 1996. They considered the issue of high volumes of smuggled goods carried or floated across their borders, especially in the major smuggling haven of Chau Doc. Smuggling drains Vietnam of huge tax revenues. (FEER, 22-02-96, p. 26)

The Vietnamese prime minister later visited Phnom Penh in April 1996 in an effort to end a land border dispute. The leaders from both countries reaffirmed procedures for settling border disputes and agreed to refrain from airing problems in the media.(IHT 09- and 11-04-96; FEER 25-04-96 p.13)

Sino-Russian and Sino-Russian-Kazakh-Kyrgyz-Tajik border agreements

The border agreement (*see* 4 AsYIL 418) settling a dispute over a western (56 kilometre) section of the border, which was signed in September 1994, went into effect on 17 October 1995, immediately after the exchange of ratification instruments.(IHT 19-10-95) It was reported that on 1 December 1995 remaining border issues were resolved with Russia ceding about 3,700 acres.(IHT 30/31-12-95/01-01-96) (*see infra* p. 406)

Among the accords signed during the visit of the Russian President to Beijing in late-April 1996 was an agreement to stabilize the two countries' other, 4,000 kilometer border through the reduction of the number of troops along the frontier.

After the Beijing summit, the presidents of the two countries flew to Shanghai where they, together with the presidents of Kazakhstan, Kyrgyzstan and Tajikistan, signed an agreement on confidence-building measures along their respective borders. The main aim of the 16-article agreement was defined in its first article, prescribing that the armed forces of both parties which are stationed in the border area shall not be used to attack the other party or carry out military activities threatening the other party and disturbing

tranquility and stability in the border area. (FEER 02-05-96 p.15; 23-05-96 p.40; UN-doc. A/51/137, Annex.)

Sino-Vietnamese border

The two countries resumed talks on their contested border on 23 January 1996, being the seventh round of negotiations on the issue since October 1993.

The talks dealt with the demarcation of the land border. The differences stemmed from the Chinese-Vietnamese war of 1979 when, according to Vietnam, China moved the border in violation of previous Sino-French agreements. The recently presented Chinese proposals for a new demarcation contained about 100 differences from the Vietnamese map.(IHT 24-01-96)

Wall between Thailand and Malaysia

Thai officials said they felt offended after Malaysia started to build a wall to cover certain sections of the Thai-Malaysian border. Malaysia informed Thailand in 1995 that it planned to build the wall as part of an effort to stem the tide of illegal immigrants and stamp out smuggling.(FEER 07-03-96 p.22)

BROADCASTING

See also: Space activities

Foreign broadcasting in India

India's state-run Doordarshan television in a landmark move signed an agreement to allow CNN to broadcast in India. Under the agreement CNN (Turner Int.) was to pay $1.5 million a year to lease a 24-hour channel on the Indian Insat-2B satellite.

Previously, foreign organizations could only distribute news through India's domestic agencies.(IHT 1/2-07,03-07-95)

Popular protest against US broadcast in Sri Lanka

(*see* 5 AsYIL 394)

Protesters demanding the scrapping of a Voice of America project in Sri Lanka set fire to an American flag during a demonstration outside the US embassy in Colombo. The VOA project received parliamentary backing in May 1995. The government had given its approval despite strong opposition by local inhabitants who believed the project could deprive fishermen of their livelihood.(IHT 05-07-95)

Radio Free Asia

The US House of Representatives in July 1995 ordered the establishment of a broadcasting authority called Radio Free Asia.(IHT 22/23-07-95) It was reported that because of possible opposition from countries leery of upsetting China, the US government-funded broadcasting body, operating under the name of Asia Pacific Network, was looking for alternative broadcast relay stations for the service it planned to start in mid-1996. The existing transmitters closest to the target audiences in China and Indochina were in Thailand, but Thai officials said that Thailand would not allow the transmitters to be used for purposes that might offend China and the socialist states of Indochina.(FEER 04-04-96 p.12)

Foreign broadcasting in China

China in 1993 banned watching foreign satellite broadcasts without government approval. But in 1995 new regulations allowed Chinese cable operators to show a limited quantity of foreign satellite programming with government approval. This possibility of purchasing programs was successfully used by foreign broadcasters.(IHT 26-03-96)

Chinese broadcasting abroad

In early April 1996 PanAmSat Corp. of the US signed a 10-year contract with China Central Television to carry a number of channels of programming from CCTV to Europe, the Middle East and Africa.(IHT 04-04-96)

'Voice of Tibet'

A new international radio station under Norwegian auspices began broadcasting directly to Tibet and to exiled Tibetans in Asia. It used material from a network of producers in Norway, Italy, Britain and the US.(IHT 24-05-96)

CIVIL WAR

Tajikistan

Texts of a "Protocol on the Fundamental Principles for Establishing Peace and National Accord in Tajikistan", signed by the President and the leader of the opposition, were exchanged on 17 August 1995. The Protocol confirmed an agreement to conduct negotiations aimed at concluding a general agreement, consisting of several protocols, on political problems, military problems, the repatriation and integration of refugees, a commission to monitor and verify compliance by the parties with the general agreement, guarantees for implementing the general agreement, and a donors' conference.

With a view to creating the conditions for conducting further negotiations, it was agreed to extend the period of validity of the "Agreement on a Temporary Cease-Fire and the Cessation of Other Hostilities on the Tajik-Afghan Border and within the Country" (Tehran, 17 Sept 1994) until 26 February 1996.(UNdocs.S/1994/1102, S/1995/720, S/PRST/1995/54)

Afghanistan

On 2 July 1995, an emissary of the former king of Afgahnistan arrived in Islamabad to discuss a political formula for peace among the warring factions in the country. The plan that was set out by the King, living in exile in Rome since he was deposed in 1973, called for an "Emergency Council of Tribal Elders" (*Loya Jirga*) so that the Afghan people could freely and democratically express their will and bring about a government. The foreign ministry in Kabul issued a protest note to Pakistan condemning the invitation of the ex-king's emissary.(FEER 20-07-95 p.25)

It was reported that the Taleban movement had captured the second biggest airbase in Afghanistan at Shindand on 3 September 1995, and the western city of Herat on 5 September from forces loyal to the president.(IHT 06-09-95) Of Afghanistan's 31 provinces, only six remained under the control of the Kabul government. Kabul blamed Paki-

stan for backing the offensive, though Pakistan denied the charges.(FEER 21-09-95 p. 23)

It was said that Iran, Russia, Tajikistan and India were backing the Kabul government to counter the advance of the militant-islamic Taleban to the Afghan capital. The aid came in the form of military equipment and ammunition tansported to Kabul via massive air and land bridges. On the other hand, the Taleban side was supported by Pakistan, Uzbekistan and some Arab Gulf states including Bahrain, Qatar, Saudi Arabia and the United Arab Emirates.(FEER 01-02-96 pp.20-21)

The fighting on the ground continued despite efforts at the diplomatic level to resolve the conflict. In May 1996, the UN Secretary-General recalled his negotiator for Afghanistan, who was disliked by all the warring factions.

On April 18, Pakistan approved a major review of Afghan policy and stepped up its diplomatic efforts with regional countries. As a result, the Iranian foreign minister visited Islamabad to iron out differences, and the foreign minister of Pakistan visited Moscow at the end of the month.

On 10 April 1996, during the first debate in the UN Security Council on the Afghanistan issue in six years, a number of states among which the US supported the idea of an arms embargo on the Afghan factions. In mid-April, the US assistant secretary of state for South Asia visited Islamabad, Afghanistan and Moscow on a tour to review Washington's policy towards the Afghan peace process. It was reported that tacit agreement for an arms embargo was obtained from Pakistan, India and five Central Asian republics, and indirectly from Iran; but Russia refused to join. It was also reported that the US would give greater support to UN efforts to convene a peace conference of all the Afghan factions.

On 26 May 1996, the Taleban retreated from their outpost on a mountain ridge outside Kabul, and were also forced to retreat 70 kilometers on the southeast of Kabul; but from the southwest, the Taleban repeatedly launched rocket attacks on Kabul's civilian population in retaliation for their defeat.

Prior to the May 1996 battles, the Afghan president signed a peace agreement with his long time rival, the head of the opposition Hizbe Islami party. Other opposition forces were also aproached to join talks for a new interim coalition government. The Taleban, however, rejected the invitation to the talks. (IHT 28-03-96; FEER 02-05-96 p.22; 13-06-96 p.24)

CULTURE AND SCIENCE

Sino-US nuclear fusion laboratory

The two countries agreed to build the world's largest nuclear fusion laboratory in China for experimenting on the controlled use of nuclear fusion.(IHT 23-05-96)

Smuggling of Myanmar's cultural heritage

It was reported that large numbers of Myanmarese puppets were being smuggled to Thailand, where they are sold along with ancient Buddha images, religious scriptures, and other items of the Myanmarese cultural heritage.(FEER 27-07-95 p.63)

Afghanistan's cultural treasures looted

The systematic looting of Afgahnistan's National Museum in Kabul, leading to the decimation of the nation's cultural heritage, was described as the "crime of the century". It was reported that months before its destruction by devastating rocket attacks and machine gun fire, the museum building was repeatedly looted by mujahideen soldiers, often guided by antique dealers. According to the Afghan minister of information and culture, 90% of the museum's collection had been looted. He added that the museum was one of the richest in the entire region, covering 5,000 years of history in Afghanistan and central Asia.(FEER 21-09-95 pp.60-62)

Thai cultural diplomacy

Thailand's attempt to improve ties with its neighbors also took the form of delegations sent to Laos, Cambodia, and Myanmar for special ceremonies to mark the end of the Buddhist lent. Thai foreign ministry officials were especially happy with the warm response to this gesture from the authorities at Yangon, which had not responded positively to diplomatic or military initiatives from Thailand.(FEER 16-11-95 p.14)

The 13 April 1996 Thai New Year, celebrated in Chiang Mai, was also used by Thai officials to boost relations with neighboring Myanmar, Cambodia and Laos, which also observe the festival. It was hoped that an invitation of officials from the three countries would add impetus to the formation of an economic subregion encompassing countries in the Mekong River basin. Myanmar did not send an official delegation to Chiang Mai. Late in 1995, Thailand even sponsored Buddhist ceremonial festivities in Yangon, Vientiane and Phnom Penh. For 1997 the Thai government had planned to take its cultural diplomacy as far as Sri Lanka.(FEER 25-04-96 p.17)

Taiwan as centre of new Chinese culture

During his inaugural address, the newly-elected Taiwanese president said: "Equipped with a much higher level of education and development than other parts of China, Taiwan is set to gradually exercise its leadership role in cultural development and take upon itself the responsibility for nurturing a new Chinese culture".(FEER 06-06-96 p.38)

Return of a stolen Thai sand lintel

In 1973 or 1974 a 12th-century sand lintel was stolen from Pranom Roong Castle, the ruin of an ancient Khmer temple situated in what is now north-eastern Thailand. The lintel was later put on display at a museum in St.Louis, Missouri, USA.

In 1995 the US defense department informed the Thai government of its intention to return the sand lintel. Since the lintel appeared to have been stolen by members of the US armed forces stationed at a US airforce base in Nakorn Ratchasima Province, Thailand, during the Vietnam War, the US defense department requested, in exchange for the lintel's return, that the Thai government sign a legal document exonerating the US government from all legal liability arising from the theft. This was initially refused by the Thai Fine Arts Department since the relevant Thai law stipulates mandatory punishment for those smuggling archaeological objects out of the country. The US side repeated its position in 1996, emphasizing that the soldiers concerned had already been punished by a court of law, and that under US law and prevailing prac-

tice a contract exonerating liability on the part of the US government must be concluded between the US government and the government of the recipient country. The relevant Thai authorities were exploring possible solutions to the impasse.

DEBTS

Russian debts

Russia signed a debt-rescheduling agreement on 10 July 1995 to repay part of a debt to South Korea in raw materials and weapons. The repayment of $450.7 million would take place until 1998. The amount was part of the principal and overdue interest on a $1.47 billion loan extended to the USSR in 1990.(IHT 11-07-95; FEER 30-11-95 p.28)

Unpaid debt of North Korea

According to a Thai official, Thailand stopped rice shipments to North Korea because North Korea had not paid its bills amounting to $15 million for nearly four months.(FEER 07-12-95 p.15)

Vietnamese loans forgiven

The Netherlands wrote off $13 million of overdue outstanding debt to Vietnam, which was in the midst of negotiating with foreign commercial creditors for the restructuring of its $800 million external debt. The written-off debts related to soft loans extended to Vietnam in the 1970s. A Dutch Embassy statement said that the decision was taken to help Vietnam's external debt situation.(FEER 11-01-96 p.81)

Restructuring of Vietnamese loans

On 20 May 1996, Vietnam signed a preliminary agreement to restructure its roughly $900 million of arrears in commercial bank debts. The central bank of Vietnam and a creditor group agreed in principle on restructuring options to be presented to creditor banks. The terms would require creditors of the so-called London Club to write off about 45% of their outstanding loans to Vietnam. Many bankers expected that Vietnam would ask the World Bank to help finance its commitments under the deal.(FEER 30-05-96 p.45)

DIPLOMATIC AND CONSULAR INVIOLABILITY

Attack on Pakistani embassy in Kabul

About 5,000 persons attacked the Pakistani embassy in Kabul on 6 September 1995 to protest the alleged Pakistani support for the Islamic Taleban militia in the Afghan civil war. Two people were killed and twenty-five, including the Pakistani ambassador, were injured. The embassy was ransacked and several buildings were set on fire. This was the second attack on the embassy in less than two years. In February 1994 Afghan protesters sacked the mission to protest the killing in Islamabad of three Afghan gunmen who had hijacked a schoolbus from Peshawar.(*see:* 4 AsYIL 425)

The Afghan acting defence minister said that security men had tried to contain the crowd, but lost control when a shot fired from the embassy killed an Afghan student, one of the two persons who had died. The Afghan authorities evacuated the embassy staff and escorted them to a military hospital.

The acting minister said: "We are unhappy with what happened at the Pakistani embassy. . . . But we see no reason to apologize to Pakistan because the government was not directly involved. This was a matter for the Afghan people, who are angry about foreign involvement in southwest Afghanistan". [The Afghan government had accused Pakistan of aiding the Taleban movement.]

Pakistan criticized the Afghan government for failing to protect the embassy despite a request for additional security, and denied any shooting by Pakistani embassy guards. The next day the wounded Pakistani diplomats and embassy personnel, as well as the body of the killed embassy worker, were flown to Islamabad and the embassy was closed.(IHT 07-09,08-09,11-09-95; FEER 21-09-95 p.23)

After having expelled 13 Afghan diplomats, including the chargé d'affaires, in September 1995, Pakistan on 17 October ordered 6 more diplomats to leave the country within 48 hours.(IHT 18-10-95) Later the Afghan government offered apologies and compensation. Talks opened on 6 May 1996.(IHT 07-05-96)

Bombing of Egyptian embassy in Islamabad

An explosives-packed truck was driven by a suicide-bomber into the Egyptian embassy in Islamabad on 19 November 1995, killing 16 persons, including five Egyptians, and injuring 60 others. The Pakistani government condemned the violence as an act of terrorism and promised to do everything possible to bring the perpetrators to justice. Three militant Islamic groups in Egypt took responsibility for the bombing. The following day, Pakistani authorities detained 13 Egyptian Islamic preachers who had attended religious conventions in Punjab Province.(IHT 20-11-95; FEER 30-11-95 p.13) By December, a total of 16 people had been arrested in connection with the bombing.(FEER 14-12-95 p.13)

[Pakistan had ordered foreign militants to leave the country in 1993 after several Arab states complained that radical groups were using Pakistan as a base for subversion. At that time some Egyptians, Saudis and Lebanese fled the northwestern city of Peshawar into Afghanistan. Pakistan and Egypt had signed an extradition treaty in 1994](IHT 21-11-95)

Cambodia – US/France

The second prime minister of Cambodia warned that demonstrations might be arranged at the French and US embassies in Phnom Penh if the US and France did not stop interfering with Cambodia's internal affairs.(IHT 06-12-95)

Alleged espionage by diplomats

(*see also*: Aliens)

China on 17 January 1996 accused US and Japanese air force attaches of spying and thus having seriously encroached upon China's sovereignty and compromised China's national security.

On 8 January the two attaches were stopped near a military area on Hainan Island, near the southern port of Zhanjiang. Chinese authorities confiscated photo film and

videotapes. Several days later the same persons were stopped when they entered a military airport in Guangdong Province. They were accused of having acted deliberately and premeditatedly. China then demanded their withdrawal.

The US state department denied any trespass by the US attache, and said that the Chinese authorities had approved the US attache's mission in the area concerned. The Japanese government said that the two men had unintentionally strayed into a restricted area and announced that it would withdraw the attache concerned. Both the US and the Japanese governments lodged a protest with China over the detention and questioning of their attaches as being in violation of international conventions on the treatment of diplomats.(IHT 18-01-96)

Melee in the Dutch embassy in Jakarta

On 7 December 1995, the Dutch ambassador was struck on the head with a pipe and two other diplomats were hurt when a melee broke out in the Dutch embassy in Jakarta. The incident occured as East Timor activists occupying embassy premises in sit-in demonstrations were disrupted by counter-protesters who stormed over the embassy fence. The Indonesian foreign minister apologized to the Ambassador. It was reported that the embassy occupation by East Timor activists was part of a tactic that began with sit-ins at the Swedish and US embassies in 1994. The December 7 sit-in demonstrators all left the Dutch embassy compound voluntarily and were later freed after police questioning.(FEER 21-12-95 p.19)

Tight security for Sri Lanka's president in China

The Chinese government provided extremely tight security for the Sri Lankan president during her state visit from 20-26 April 1996. China politely declined the president's request that she get out of her bullet proof limousine to meet crowds lined up to greet her. Press reports referred to a group of Tamils who had entered China in a bid to assassinate her.(FEER 23-05-96 p.14)

DIPLOMATIC AND CONSULAR PROTECTION

US - China
(*see also*: Aliens)

The US protested against a turnaround by the Chinese authorities when a US official tried to establish contact with a detained China-born US citizen (*see* 5 AsYIL 387) and was misled about the person's whereabouts. The US claimed that under a consular treaty binding the two states China should have given the US access to the detainee within 48 hours upon request.

On the other hand, the Chinese ministry said it was upset that a US consular official based in Beijing had tried to track down the American "without the approval of the Chinese side". It denied that China had broken any agreements by failing to allow access within 48 hours.

It was reported that diplomats in China had been allowed in recent years to travel freely to a growing number of areas, but still needed government permission to visit restricted zones.(IHT 04-07,05-07-95)

The US consul-general finally met with the detained man in Wuhan on 10 July 1995. According to a Chinese statement the visit "was arranged at the request of the US embassy at Beijing in accordance with the China-US Consular Agreement".(IHT 11-07-95)

Singapore death sentence for Filipina

In the case of the death sentence for a Philippine woman in Singapore (the FLOR CONTEMPLACION case, 5 AsYIL 400) the two parties had asked the US Federal Bureau of Investigation to conduct another autopsy on the body of the murder victim. In their report the American pathologists disputed Philippine findings about the way the victim of the killing had died and essentially reinforced the conclusions of the Singapore court. The Philippines on 14 July 1995 accepted the US findings and had since began normalizing ties with Singapore; Singapore for its part said that it was prepared to repair bilateral relations. (IHT 15/16-07-95; FEER 27-07-95 p.15, 31-08-95 p.13)

Full diplomatic ties between the two countries were restored on 16 January 1996 when new ambassadors were appointed by each country and the Philippine ban on sending domestics to work in Singapore was lifted.(IHT 17-01-96;FEER 25-01-96 p.13)

Consular protection for foreign workers in North Korea

The Korean Peninsula Energy Development Organization (5 AsYIL 547) reached an agreement with North Korea in late May 1996 on the status of workers, mostly South Korean, who would build the projected nuclear reactors. North Korea granted them the equivalent of a system of consular protection.(FEER 13-06-96 p.15)

DIPLOMATIC AND CONSULAR RELATIONS
See also: (Non-)Interference

Establishment of Vietnam-US diplomatic relations
(*see also*: Vietnam War)

The US president announced on 11 July 1995 his decision to establish full diplomatic relations with Vietnam. Normalization of ties, the President said, "serves our interest in working for a free and peaceful Vietnam in a stable and peaceful Asia". US officials denied that the US was taking the step as a way of countering China's growing power in the region, as China welcomed the normalization of US-Vietnam ties.(-IHT 12-07-95;FEER 20-07-95 p.16) The relevant documents were signed by the US and Vietnamese foreign ministers on 5 August 1995.(FEER 17-08-95 p.22) The following October, a Vietnamese foreign ministry official visited Washington to discuss arrangements for a visit by the Vietnamese president to the US capital.(FEER 05-10-95 p.14)

The US Commercial Service opened an office in Hanoi on 2 April 1996. The office, a branch of the US Department of Commerce, aimed at encouraging investment in Vietnam by small and medium-sized US businesses.(FEER 11-04-96 p.79)

Appointment of controversial Indonesian ambassador to Australia

The impending arrival of the new Indonesian ambassador to Australia in mid-1995 had stirred an uproar among the political opposition and East Timorese activist goups in Australia. At issue were the controversial remarks made by the ambassadorial appointee, an army general, about the 1991 Dili incident, where he was quoted as saying that the event was not really as serious as people overseas thought. He had made the remarks after his appointment as regional commander in the East Timor region and at a time before a military tribunal had released its findings on the Dili incident. (2 AsYIL 374)

The Australian foreign minister explained to parliament that the Austalian government did not withhold its approval over the designation of the new ambassador because the ambassador was chosen personally by the Indonesian president, because he had no personal involvement in the Dili shootings, and because he was highly regarded by the Australian defence establishment.

On 7 July 1995, the Indonesian government announced that it was withdrawing its nomination of the retired general.(FEER 13-07-95 p.31; 20-07-95 p.13)

China - Gambia

China announced that it had suspended relations with Gambia on 25 July 1995, two weeks after Gambia resumed diplomatic relations with Taiwan.(FEER 03-08-95 p.13)

South Korea - Russia

South Korea and Russia reached agreement concerning the sites for their respective embassies. A protocol on the issue was signed. Land for the two countries' embassies had been one of the knotty issues in Moscow-Seoul relations. The two sides agreed to exchange same-size lots in downtown Seoul and Moscow to build their embassy buildings.

It was reported that the other sticking point which remained to be resolved was how much compensation Seoul should be paying for the site of the old Tsarist Russian consulate, which it took over years ago.(FEER 19-10-95 p.14;30-11-95 p.28; Korea Times 29-09-95)

Iran - Jordan

Jordan expelled the first secretary of the Iranian embassy in Amman for allegedly trying to incite an attack on Israeli tourists. Iran replied by expelling a Jordanian diplomat on charges of "activities incompatible with his status as a diplomat". The mutual expulsions signaled a growing tension over the Arab-Israeli peace process and the conciliatory behaviour of the Jordanian king.(IHT 11-12-95)

Pakistan - Afghanistan

As a result of deteriorating relations between the two countries (*see supra* p. 352) Pakistan, on 24 December 1995, declared the Afghan consul-general at Peshawar *persona non grata*.(IHT 27-12-95)

Taiwan - Senegal

Taiwan reopened formal dipomatic ties with Senegal on 3 January 1996. On 9 January, Beijing announced that it would sever ties with Senegal, describing its decision to open an embassy in Taipeh as 'erroneous'.(FEER 18-01-96 p.13)

Malaysia - Israel

The Malaysian minister for international trade and industry said that Malaysia would start trading with Israel. She added that "the question of diplomatic ties does not arise", citing trade with Taiwan, with which Malaysia did not have diplomatic ties either.(FEER 25-01-96 p.13)

Disagreement on protocol between Malaysia and Germany

It was reported that the planned meeting between the Malaysian prime minister and Germany's chancellor at the Asia-Europe Meeting in Bangkok (*infra* p. 71) was called off because neither side could agree on who should call on whom. The Germans said that the Malaysian premier should drop in on the chancellor while the Malaysians argued that since Germany had requested the meeting, the chancellor should make the short trip to a neighboring hotel where the Malaysian leader was staying.(FEER 14-03-96 p.12)

France reopens consulate in Guangzhou

As a result of the visit of the Chinese premier to France, China would allow France to reopen its consulate in Guangzhou. China had ordered the closure of the consulate in 1992 (3 AsYIL 443). In return, it was reported that France promised not to raise human rights issues in public.(FEER 25-04-96 p.16)

Consulates in Hongkong

China had asked all governments concerned to reapply for permission to open a consulate in the future Special Administrative Region of Hongkong, adding that the jurisdiction of the consultates would be limited to the territory. China also said that the principle of reciprocity would have to apply, such that, for e.g., Jakarta would be asked to allow China to open a consulate elsewhere in Indonesia in return for keeping its consulate in Hongkong.(FEER 30-05-96 p.25)

China's diplomatic offensive in Africa

China's president made a two-week tour of Africa in May 1996. The visit was reported to be aimed at countering Taiwan's diplomatic efforts on the African continent. During his trip, the president praised the Organization of African Unity and said that China was Africa's 'all-weather friend'. In Kenya, the Chinese president extended a $13 million soft loan plus a $1.3 million technical assistance grant. He offered a $51 million loan to fund joint ventures in Egypt and extended a $10 million loan plus a $1.2 million grant to Zimbabwe.(FEER 06-06-96 p.22)

Transfer of embassy land

Through an exchange of notes with the Malaysian ambassador at Bangkok the Thai government on 14 November 1995 approved the transfer of part of the Malaysian

embassy grounds to a (Thai-Malaysian) private company, exempt from Thai taxation and other related charges. The company would, by way of consideration, build the chancery, the ambassador's residence and other diplomatic residences on the remaining embassy land, and, in addition, transfer to the embassy the ownership of a number of units of the condominium to be built on the tranferred land.

The Malaysian side agreed to accord reciprocity and approve a similar transaction by Thailand regarding the development of the Thai embassy premises at Kuala Lumpur on a one-time basis.

DISARMAMENT AND ARMS CONTROL

China's White Paper on disarmament and arms control published

Apparently in response to requests from many countries that China should make its defence policies and strategic planning more transparent, China published its first-ever White Paper on arms control and disarmament. The White Paper pointed out, among others, that "regional conflicts must be fairly and rationally resolved and force or threat of force should not be used in international relations"; that "China has never exported sensitive technologies such as those for uranium enrichment, reprocessing and heavy-water production"; and that "stern legal sanctions shall be taken against any company or individual who transfers military equipment and technologies without proper government examination and approval".(FEER 30-11-95 p.38)

Southeast Asia nuclear weapon-free zone

The US told Indonesia in late July 1995 that it would no longer oppose a plan to make Southeast Asia a nuclear-free zone. The treaty to that effect, which bans the manufacture, possession, storage, testing and using of nuclear arms, was at that time being drafted by ASEAN (Treaty of 15 December 1995, text in 5 AsYIL 605).
[In contrast to China, Russia and the UK, the US and France had so far refused to sign on to a treaty on a similar zone in the South Pacific (Raratonga Treaty,1985). The US argued that such zones could weaken global nuclear deterrence and impede the US Navy's freedom of navigation. The end of US-Soviet rivalry, the removal of tactical nuclear weapons from US warships and the closing of US military bases in the Philippines have, however, eliminated these objections, and in September 1995 the US announced it would sign a protocol endorsing the treaty.](IHT 01-08,11-12-95)

The treaty is supplemented by a Protocol which the five declared nuclear weapon states were asked to sign in support of the treaty. China had not indicated that it would do so. The Chinese foreign ministry said that although China supported the establishment of a nuclear weapon-free zone in Southeast Asia in principle, its position on the exact geographical area that should be covered by the treaty differed from that of the ASEAN countries. The spokesman of the foreign ministry said that China was concerned that the treaty area would include extensive parts of the South China Sea claimed by China as well as some Southeast Asian states.(IHT 9/10-12-95)

On 8 December 1995 the US joined China in publicly expressing concerns about the treaty. One of the main US concerns was that the regular movement of its nuclear-powered or nuclear-armed naval vessels and aircraft through Southeast Asia could be restricted by the treaty. The US also wanted assurances that the treaty would not disturb existing regional security arrangements, such as those between the US and the

Philippines and Thailand.(IHT 11-12-95) The US seemed also worried that ambiguous drafting of the treaty could enable regional states to challenge the right of other states to allow port visits and landing rights to ships and planes of nuclear powers unless prior assurances were given that they did not carry nuclear arms. The objections raised against the treaty also stressed that it differed from similar regional agreements in the South Pacific and Latin America because it included exclusive economic zones and continental shelf areas where national jurisdiction is normally confined to economic resources and imposition of environmental controls. As a result the ASEAN countries agreed to review the Protocol in order to accomodate the objections of nuclear states.(IHT 16/17-12-95;FEER 28-12-95/04-01-96 p.17) [The first informal meeting of the ASEAN heads of state and government on 30 November 1996 resolved that the revised Protocol should be available by the 30th anniversay of ASEAN, i.e. 8 August 1997.]

The treaty was signed by 10 Southeast Asian leaders in Bangkok on 15 December 1995.(IHT 15-12-95)

Chinese attitude towards nuclear weapons

In a major policy statement of 16 November 1995 on arms control, China sharply rebuked the US, Russia, the UK and France for continuing to develop nuclear and outer space weapons, "including guided missile defence systems" while resorting to discriminatory anti-proliferation and arms-control measures as a pretext for denying the peaceful use of nuclear technology to the developing world.

The statement expressed China's formal opposition to a US proposal to deploy ballistic missile defence systems in Asia to protect Japan and American military forces in Japan from ballistic missile threats. China believed that a missile defence system in Asia could potentially undermine the effectiveness of its strategic nuclear forces, which were developed to put US, Japanese and Russian targets at risk of retaliatory attack.

[In May 1995 the US and Russian presidents agreed that the two countries should cooperate in developing ballistic missile defences.](IHT 17-11-95)

Indian attitude toward Comprehensive Test Ban Treaty

After having co-sponsored the drafting of a comprehensive nuclear test ban treaty, India reverted to its original stand at the Geneva Disarmament Conference in autumn 1995 and insisted that the five acknowledged nuclear powers should agree to a time-bound elimination of their nuclear arsenals.

India feared that a test-ban treaty, along with the indefinite extension of the Nuclear Nonproliferation Treaty would sanction a perpetual nuclear monopoly by the premanent members of the UN Security Council.(IHT 09-01-96)

The debate on the treaty resumed on 23 January 1996 in Geneva. In the following months, the Geneva deliberations on the CTBT encountered further complication by Pakistan's reluctance to agree to the treaty. Pakistan said it would not sign the treaty unless India does so; and India insisted that it would not join unless a ban on all testing is explicitly linked to a timetable for nuclear disarmament - something the five declared nuclear powers were not prepared to agree to.(FEER 11-04-96 p.28)

Transfer of dual-use technology from the US to China

It was reported that state-of-the-art telecommunications technology was transferred to Hua Mei Telecommunications, a 50-50 joint venture between US-based partnership SCM/Brooks and China's People's Liberation Army firm Galaxy New Techology. Hua Mei aims to build advanced telecom networks in the Southern Chinese city of Guangzhou. Hua Mei had grown from the US-China Defense Conversion Commission, a 1994 initiative co-convened by the US Department of Defense and the PLA's Commission for Science, Technology and Industry for National Defence, whose goal was to promote peace through civilian co-operation by turning arms industries into industries producing civilian goods and services.

The transfer, which was backed by the US secretary of defense, alarmed US national security officials who feared that the technology could be used by the PLA to substantially upgrade its war communications systems. The transfer was reportedly made in spite of objections from the Pentagon and US National Security Agency officials. (FEER 11-01-96 p.14-16)

In the aftermath of the Hua Mei revelations, the US president in December 1995 vetoed a bill on a $50 million fund meant to back up the China-US bilateral Defense Conversion Commission. The funding's first beneficiary would have been Hua Mei Telecommunications. Meanwhile, a US delegation was due to arrive in China on 21 January 1996 for a week-long tour of air-traffic-control facilities, another area pinpointed by the conversion commission to gain US technology. This development had also alarmed US security officials.(FEER 18-01-96 p.15) Besides, the US defense department requested the intelligence community to prepare an assessment of "whether the transfer of technology to Hua Mei Communications had any significant implications for PLA modernization goals".(FEER 01-02-96 p.15)

DISSIDENTS

Release of dissident

The Myanmarese authorities lifted the house arrest on AUNG SAN SUU KYI. She had been on house arrest since 20 July 1989, after her conviction for 'endangering the state', an offense she had alledgedly committed when she returned from abroad and led the opposition against the military-led government.(IHT 11-07-95)

In the wake of the release, the US assistant secretary of state, testifying before a Senate Committee, said that the US wants dialogue with, not sanctions against Myanmar's military rulers. Imposing trade and investment sanctions, he said, would be counterproductive.(FEER 02-08-95 p.13)

Vietnamese-born Americans in Cambodia

It was reported that an anti-Vietnamese government armed group, numbering between several hundred and 2,000, had set up training camps in Cambodia and were stockpiling weapons. Many of the resistance group's leaders were identified as naturalized, Vietnamese-born American citizens who had served as officers in the South Vietnamese army during the Vietnam War. The goverments of Vietnam, Cambodia and the US had monitored the group and took steps in order to clamp down on the movement before it did any damage. Many of the rank and file of the resistance move-

ment were recruited in Cambodia, mostly among the Kampuchea Kraom, who are known in Cambodia for their anti-Vietnamese stance.(FEER 16-11-95 pp.16-17)

DIVIDED STATES: CHINA
See also: Arms sales, Diplomatic and consular relations

Further consequences of the visit by the Taiwanese President to the US
(*see also infra*, p. 396)

Talks between Taiwan and the mainland, scheduled to take place in late July 1995 in Beijing, were postponed by the Beijing side to protest the visit of the Taiwanese president to the US. The unsuitability of talks in the near future was confirmed by officials of the (Taiwanese) Mainland Affairs Council, who said that the Taiwanese government's annual lobbying effort to re-enter the UN would continue to irritate the government at Beijing.(FEER 06-07-95 p.12)

China wanted the US to reaffirm its one-China policy and to state that Taiwan's president would not be a allowed into the US again. In addition, said the Chinese foreign ministry, the US president must declare that his original decision to admit Taiwan's president to the US was a mistake.(FEER 27-07-95 p.18)

Taiwan's relations with Hongkong after the hand-over

On 23 June 1995 the Chinese foreign minister made a formal statement on China's basic policy towards Taiwanese entities operating in Hongkong after June 1997. Thus, official contacts between Taiwan and Hongkong must be approved by Beijing. Taiwanese organizations and their staff must abide by the Basic Law and cannot engage in activities which would "damage Hongkong's stability and prosperity". Taiwan's businessmen would remain welcome in the ex-colony although they and other Taiwanese would require special travel documents as Beijing does not recognize the Taiwanese passport. Official matters, such as setting up of representative offices and the signing of bilateral arrangements, would have to be negotiated through Beijing. Air and sea links, meanwhile, would be put in the category of 'special regional routes' under the one-China principle. Details of the routes, which would require reciprocity, had yet to be worked out.(FEER 06-07-95 p.21, 13-07-95 p.38)

Military exercises off the Taiwan coast
(*see also infra*, p. 396)

Chinese military exercises were held in early July 1995 north of Taiwan. It was widely believed that the military manoeuvres were staged to show China's displeasure over Taiwan's aggressive international diplomacy, especially the visit of the Taiwanese president to the US in June.(FEER 20-07-95 p.26)

On 18 July 1995 China announced plans for a week-long surface-to-surface missile exercise beginning 21 July and warned ships and airplanes to stay out of an area about 140 kilometres north of Taiwan's north coast and within 25 kilometres of Pengchia, a sparsely populated island claimed by Taiwan. After the exercise had started, Taiwan began naval war drills, firing shells off the island's northern coast. China ended its missile-training exercise on 26 July.(IHT 19,20,26,27-07-95; FEER 27-07-95 p.15)

The Taiwanese president's response included a strong reaffirmation of his policies, including the eventual reunification of China under democratic rule, and continued efforts to gain 'international space' for Taiwan to participate in world affairs.(FEER 10-08-95 p.21)

On 15 August 1995 China started a second series of testing of guided missiles in the East China Sea about 100 kilometres north of Taiwan, in combination with a three-month military exercise along the Chinese coast. The tests were to last till 25 August. According to experts China used to test missiles every year. However, it was the first time this year that the exercises were so publicly announced.

On its part Taiwan said it would hold a military exercise before 10 October. The exercises which started 27 September had a much more limited scope than the original plans in an apparent effort to avoid provoking China.(IHT 11-08,16-08,26/27-8,28-09-95)

In late November 1995 China held military exercises in the coastal area of Fujian Province opposite Taiwan. They were seen in connection with parliamentary elections held in Taiwan.(IHT 27-11-95)

China meanwhile announced that it would hold renewed missile tests northeast and southwest of Taiwan from 8 to 15 March 1996, two weeks before presidential elections on the island. The announcement warned ships to stay away from an area 35 to 65 kilometres off Keelung and about 30 to 50 kilometres off Kaohsiung. It was acknowledged that the tests were intended to change the behaviour of the Taiwanese president towards actual independence of the island (creating two Chinas), and to show the Chinese determination and capability to saveguard Chinese sovereignty and territorial integrity. Exercises with live ammunition were scheduled to start on 13 March 1996 in a sea area southwest of Taiwan near the Chinese coast, to continue up to 20 March.

The US defense secretary deplored the Chinese plans, expressed his concern about the political impact, but did not believe that the tests would be a threat to shipping in the area. (Cf.*infra* p. 398) The Japanese foreign ministry said that the escalation of tension in the Taiwan Straits was 'undesirable' and could imperil ships passing in the area. Indonesia was not concerned, according to its foreign ministry spokesman. The Philippines' response was similar but "we are concerned about the fact that some miscalculation might happen".

While ending its missile tests on 15 March, China announced a new round of military exercises northwest of Taiwan beginning 18 March 1996, within 17 kilometres of the islands of Matsu and Wuchiu, which are under Taiwan's control.(IHT 06,07,12 and 16/17-03-96)

On 2 April 1996, the Taiwanese defence ministry suspended military exercises on off-shore islands until the end of June. It said the halt was intended to ease tensions in the Taiwan Strait and to avoid any misunderstandings. (FEER 11-04-96 p.13)

Boarding of fishing vessels

It was reported that an armed Chinese patrol boat had boarded and inspected two Taiwanese fishing vessels in the Spratly achipelago in July 1995, the first time that such activity occurred.(IHT 21-07-95)

Chinese press berates Taiwanese president

The official Chinese press agency in a commentary started a vehement attack on the Taiwanese president on 23 July 1995, accusing him of advocating independence for the island. The commentary criticized his call for Taiwan to be given an expanded "space of existence in the international community". Another long attack on the character and personality of the Taiwanese president was launched in the press on 24 August 1995.(IHT 24,25, and 26-07,25-08-95)

Denial of re-establishment of US-Taiwan relations

On 19 July 1995, the Speaker of the US House of Representatives called on the US to re-establish diplomatic ties with Taipei. In reaction, a spokesman from the Taiwanese foreign ministry said that "we don't want Taipei-Washington ties to affect the US relationship with Beijing, and vice versa". A member of the ruling KMT party also played down the statement: "So far, it has not been government policy to promote full diplomatic relations with the US or any of the G-7 nations". "We are surprised by his comments" . . . "because formal recognition is not what we are seeking at this moment. . . . We are not publicly asking the international community to recognize us as two Chinas. We are still saying publicly that we will be reunited. . . . If we publicly promote this two-country approach . . . we risk being attacked".(FEER 27-07-95 p.19)

Taiwan pledge to reunification

Speaking to the National Assembly, the Taiwanese president insisted that he stood for reunification of Taiwan and the mainland, but condemned the Chinese government for ignoring the reality of separate governments since 1949. He also criticized domestic advocates of formal separation, saying independence would "put an end to stability and prosperity" and "destroy the future" of Taiwan.(IHT 04-08-95) However, on 4 December 1995 he said that the island would not reunify with an undemocratic China: "[D]emocracy and freedom on the mainland is a prerequisite to national reunification".(IHT 05-12-95) Amid tensions and Chinese military exercises the Taiwanese president said on 20 March 1996 that he sought better relations and eventual reunification with the mainland.(IHT 21-3-96)

In his inaugural address on 20 May 1996 the Taiwanese president, who won the elections on 23 March 1996, said that he was willing to visit the mainland for talks: "In the future, at the call of my country and with the support of its people, I would like to embark upon a journey of peace to China, taking with me the consensus and will of 21.3 million people". He also said that "I am also ready to meet with the top leadership of the Chinese communists for a direct exchange of views". But he also vowed to continue raising the island's international profile despite protests and pressure from the Beijing government. He said: "The Republic of China has always been a sovereign state. Disputes around the strait center around system and lifestyle; they have nothing to do with ethnic or cultural identity. Here in this country it is totally unnecessary or impossible to adopt the so-called course of "Taiwan independence'".(IHT 20-05-96; FEER 30-05-96 p.14)

The Taiwanese president's 'journey of peace' proposal marks a change in Taiwan's position according to which the best venue for a meeting between the leaders of the two sides was in an international conference to be held in a third country.(FEER 06-06-96 p.38)

Repatriation of Chinese hijackers

Taiwanese authorities announced that Chinese hijackers who were serving their prison terms in Taiwan would be repatriated after the end of their sentences. There were 16 mainland Chinese involved in 12 hijacking cases who were serving prison terms in Taiwan.(IHT 18-08-95)

Offshore shipping centre

In response to long-standing Taiwanese shipowners' complaints that they were denied the benefits of direct commercial ties with the mainland, Taipei proposed to let shippers operate special transshipment centres for cargo from China. Under the plan, ships would be allowed to move goods across the Taiwan Strait, stopping at three designated transshipment centres, including the port of Kaohsiung. There, the goods would be loaded onto larger vessels. The goods would then have to move on to third destinations, as the shippers are not allowed to deliver cargo from China to Taiwan or vice versa. The plan awaited approval from Beijing, which had expressed concern about that part of the proposal which would allow foreign carriers to share the cross-straits market with vessels owned by mainland Chinese and Taiwanese companies.(*see* 5 AsYIL 405) China had always preferred direct transport links between the mainland and Taiwan.(IHT 01-09-95;FEER 06-07-95 p.69)

Meanwhile, the Taiwanese minister of transport and communications agreed to remove references to the Republic of China from shipping documents involved in cross-strait trade. The name would be replaced with reference to 'our country' in the hope that China would permit shipments from designated 'offshore' zones as the first step in direct shipping between the two sides.(FEER 01-02-96 p.57)

Taiwanese freighter attacked by Chinese vessel

On 26 January 1996, a Taiwanese freighter was attacked by a Chinese-flagged vessel in the Bashi Channel, 300 kilometres off the Fujian coast and 70 kilometers off Taiwan's southern coast. After pursuing the freighter for several hours, the smaller boat fired automatic weapons and struck the starboard side of the ship. The boat fled after being rammed by the freighter. (FEER 08-02-96 p.20)

Mutual calls on 50th anniversary of the Second World War

On the occasion of the 50th anniversary of Japan's surrender in World War II, the Chinese and Taiwanese presidents addressed the issue of the separation of the two sides. The Taiwanese president on 3 September 1995 called for reconciliation with the mainland, saying that both sides must be more pragmatic in order to achieve real harmony and eventual unification. "Chinese people should help Chinese people", and Beijing must not misinterpret his moves to increase Taiwan's international profile as attempts to seek global recognition for Taiwan's separate status. He said that a conciliatory speech by the Chinese president in January 1995 and his reply in April 1995 (*see* 5 AsYIL 403) should form the basis of the relationship.

In his address the Chinese president said, *inter alia*: "There does exist a force in Taiwan that intends to split the nation and sabotage the cause of peaceful reunification. . . . They went so far as to go abroad to say to foreigners that Taiwan is an in-

dependent sovereign state and advocate the idea of Taiwan independence . . ".(IHT 04-09-95)

Rejection of Taiwanese effort to obtain UN seat

For the third successive year, a proposal to consider "Taiwan's lack of representation' in the UN General Assembly was rejected by the steering committee. According to the proposed agenda item Taiwan's 'exceptional situation' would be considered "in accordance with the established model of parallel representation of divided countries at the United Nations".(IHT 22-09-95) Taiwan's vice-minister of foreign affairs was quoted as saying that Taiwan offered to donate $1 billion to a special international development fund in the UN if it can gain admission to the world body.(FEER 06-07-95 p.13)

The question of Taiwan's membership bid in the UN is closely linked to the resolution of the China-Taiwan impasse. In this regard, it was proposed that in order to end this impasse, the two countries should agree that there is only one China, and that eventually Taiwan and the mainland will be reunified. In the meantime, China would not use force against Taiwan on the understanding that Taiwan would abandon the independence option. But neither side would force the issue until the other side is ready. A proposed accompanying agreement would have to shelve the dispute over sovereignty, which could pave the way for Taiwan to rejoin the UN on the basis of parallel representation, similar to the representation of the two Koreas or the two Germanies.(FEER 21-09-95 p.42)

China called the move an infringement upon its sovereignty and a gross interference in its internal affairs. As for Taiwan's admission into some regional organizations, China said this was based on a special arrangement made through agreement and understanding between China and the parties concerned based on the one China principle under which Taiwan acts as a region of China and in the name of 'Chinese Taipei". (UNdoc.A/50/145, A/50/298)

Suggestion of exchange of presidential visits

It was reported that the Chinese president had expressed his willingness to receive the Taiwanese president in Beijing and to go to Taiwan himself. He did not say, however, whether he would treat the Taiwanese president as a head of state.(IHT 17-10-95)

Invitation to peace talks

The Taiwanese president in a television campaign forum on 25 February 1996 invited the mainland government to hold peace talks.(IHT 26-02-96)

Following the election victory of the incumbent Taiwanese president on 23 March 1996 the Chinese foreign ministry called for a meeting between the Chinese and Taiwan presidents and for the opening of direct air, shipping and mail links across the Taiwan Strait. The Taiwanese side responded by saying it wanted to explore both a 'peace agreement' and a long-term policy of 'détente'.(IHT 25-03-96)

Air links

The official Chinese Xinhua news agency reported that preparations for direct air links between the mainland and Taiwan would continue despite escalating cross-strait tensions.(FEER 15-02-96 p.13)

Mainland-Taiwan trade

Trade between the two territories grew 27 percent in 1995, to $21 billion. Taiwan posted a surplus of $14.8 billion, up 16 percent from 1994.(IHT 01-03-96)

Taiwan investments on the mainland

Taiwan's government liberalized its investment ceiling on the mainland to 60 million Taiwan dollars (US$2.18 million) from 40 million.(IHT 01-03-96)

Taiwan reserves reach record high

The Taiwanese Central Bank reported that foreign exchange reserves climbed to a record $100 billion at the end of May 1995. This was second only to Japan's $157 billion. (FEER 27-07-95 p.83)

Reiteration of Chinese attitude

The Chinese prime minister said on the opening day of the National People's Congress that "the question of Taiwan is China's internal affair and China will brook no interference by outside forces under whatever pretext and in whatever form". He said that China preferred peaceful reunification but he reiterated China's position that "we shall not undertake to renounce the use of force".(IHT 06-03-96)

In this speech, which was delivered on the anniversary of a major speech delivered by the Chinese President JIANG ZHEMIN in 1995, the prime minister reaffirmed the earlier speech's message that "[w]e fully respect the lifestyle of our Taiwanese compatriots and their aspirations to become masters of their own destiny". He also renewed the offer of peace talks in order to "end the state of hostility and accomplish peaceful reunification step by step". He emphasized that "adhering to the principle of 'one China' is the basis and premise of peaceful reunification".(FEER 15-02-96 p.29)

DIVIDED STATES - KOREA

See also: Korean War, Emergency aid, Inter-state relations: general aspects

Pilot inter-Korean joint venture

On 17 May 1995 Daewoo Corp. of South Korea won approval from the South Korean government to invest $5.1 million in a joint venture with Samchonri (Samcholli?) General Corp. of North Korea. The venture, under the name of National Industrial General Corporation, in the North Korean port of Nampo, would produce garments and other light-industry goods.(*see* 5 AsYIL 407)

In July 1995 the South Korean government gave approval for a team from Daewoo Corp. to work in North Korea.(IHT 07-07-95; FEER 09-05-96 p.79)

Inter-Korean rice-aid and economic co-operation talks

It was reported that the talks held in Beijing on South Korean rice deliveries under an agreement reached on 21 June 1995, broke off on 19 July 1995, but would be continued in August, to include issues of economic co-operation.(IHT 19-07,20-07-95)

The talks were suspended by an incident over alleged spying by a South Korean (*see infra*) but were to resume on 27 September 1995.(IHT 06-09-95)

Rice aid linked to peace talks

In May 1996 the US, Japan and South Korea agreed to withhold any more rice aid to North Korea until the latter accepted four-way talks to reduce tension in the Korean peninsula (*infra*). The US assistant secretary of state said that his government would consider lifting sanctions only when North Korea implemented the 1994 nuclear accords and participated in talks.(FEER 23-05-96 p.15)

Arrest of South Korean vessels

North Korea had detained the South Korean freighter 'Samsun Venus' and its crew on spying charges for a week but released them on 13 August 1995. After three days of talks in Beijing, South Korea acknowledged a photo-taking incident that led to the seizure as being a violation of North Korean law and expressed its apology.(IHT 14-08-95;FEER 24-08-95 p.22)

With regard to the crew members of the South Korean trawler 'Woosung' which was seized in May 1995 (*see* 5 AsYIL 407), North Korea on 26 December 1995 released the five surviving crew members. Also released as part of North Korea's 'peace gesture' were the cremated remains of two crew members who were killed during the capture, and the remains of a third sailor who had died of illness.(IHT 23/24/25-12 and 27-12-95)

Reunification efforts

In a speech marking the end of World War II the South Korean president on 15 August 1995 urged North Korea to jointly work out a way to end their cold-war division. In the meantime, North Korea went ahead with a unification rally at Panmunjom, inside the demilitarized zone.(IHT 16-08-95)

In response to the statement made by the South Korean president before the UN General Assembly on 22 October 1995 on the occasion of the 50th UN anniversary, the DPRK issued a written statement which, in part, reads:

> "The great leader President Kim Il Sung proposed that national reunification should be realized through confederation based on the concept of one nation and one State, two systems and two Governments, while leaving two different systems and ideas existing in the north and south of Korea as they are. . . ." (UNdoc.A/50/732, 07-11-95)

It was reported that the two Koreas held secret, direct talks in May-June 1996, with at least one session held in Beijing. The two Koreas had held top level talks only twice in the past 25 years. The first foundered in 1972 when South Korea rejected a proposal on mutual arms reduction, the second was held in 1991-92, but the resulting agreements (2 AsYIL409) were frustrated in 1993 after North Korea's threat to pull out from the Nu-

clear Non-prolifereation Treaty triggered suspicions that North Korea was producing nuclear weapons.(FEER 06-06-96 p.12; 13-06-96 pp.14-15)

Defection of North Korean pilot and aircraft

A North Korean Air Force captain defected to South Korea with his fighter plane on 23 May 1996.(IHT 24-05-96)

North Korean incursion into South Korea

The South Korean defence ministry said that on 4 June 1996, three North Korean vessels crossed into South Korean waters on the west coast for about three hours. The vessels were chased out by South Korean navy ships without incident. The defence ministry said the incursions seemed unintentional.(FEER 27-06-96 p.13)

EAST ASIA ECONOMIC CAUCUS (EAEC)

Australian attitude

In a significant change of its policy, Australia said on 15 March 1996 that it no longer objected to Malaysian efforts to form an East Asia Economic Caucus.(IHT 16/17-03-96)

ECONOMIC CO-OPERATION AND ASSISTANCE

See also: Nuclear capacity

Japanese aid to Myanmar

It was reported that the Laotian prime minister, during his visit to Japan in early June 1995, requested the Japanese government to resume full development assistance to Myanmar. It was the first time that Laos had made an appeal on behalf of a third country.(FEER 20-07-95 p.12)

Japan said that it was considering resuming full-scale economic aid to Myanmar after the unconditional release of the dissident AUNG SAN SUU KYI on 10 July 1995 (*supra* p. 360). Tokyo had frozen aid since 1988. The first amount of aid would go towards expanding a nursing school in Yangon. Officials of the two countries exchanged documents on Japanese grants in late October 1995.(IHT 29/30-07,28/29-10-95;FEER 10-08-95 p.13)

Suspension of Japanese grant-aid to China

Japan decided to freeze grant-aid to China except for emergency and humanitarian use, in protest against China's nuclear tests in August 1995 (*infra* p. 436). The decision met with fierce Chinese criticism. China filed a protest, asserting that China opposed linking economic aid with political issues and that the move could harm bilateral relations. Japan's grant aid to China totaled $79 million in fiscal 1994.(IHT 18 and 29-08-95)

IMF assistance to Myanmar

Myanmar was pushing with an ambitious economic reform agenda which the IMF and the World Bank had asked for. In a meeting of the IMF's executive board on 20 October 1995, the IMF expressed confidence in the reform process and in the eventual devaluation of the kyat.

A US official said, however, that the US would oppose any financial assistance to Myanmar unless there is progress on three issues: human rights, democracy and counter-narcotics efforts. It was said that, on the other hand, other key IMF board members - Japan, Germany, France and Switzerland - wanted to see loans extended to Myanmar.(FEER 23-11-95 p.5)

Three-Gorges Dam project in China

The US Exim Bank said it would not help finance American firms bidding for the $30 billion Three Gorges Dam project. Following US opinion, the bank said it doubted the project could meet environmental guidelines. US construction giants Caterpillar and ROTC Industries criticized the decision.(FEER 13-06-96 p.71)

EMBARGO

See also: Arms sales

New export control system for weapons and high-technology goods: 'New Forum'

At the end of 1995, the US and 27 other industrial states (including France, Russia, Germany, the UK and Italy) agreed to set up a new export control system in April 1996, which would replace the much more rigid cold war system of the Coordinating Committee on Multilateral Export Controls (COCOM). Unlike the latter which had the power to block exports, the sucessor system, to be named the New Forum, would leave all export decisions to individual governments, although the participating states reached a common understanding that they would not sell arms or sophisticated equipment to at least Iraq, Iran, North Korea and Libya.

The agreement called for withholding armaments and sensitive items that have military application "if the behaviour of a state is or becomes a cause for serious concern". But the group was unable to reach an understanding of the type of behaviour that should provoke such concern.

China was not invited to join the group because of the US concerns about its alleged exports of weapons to Pakistan and Iran. Under the new export control regime, China would itself still be subject to export licensing.(IHT 21-09-95;FEER 08-02-96 p.17)

Chinese aid in setting up Iranian chemical industry

The US defense department testified before a US Congressional committee that China was providing assistance to Iran, consisting of infrastructure for building chemical plants and some of the precursors for developing chemical agents.(IHT 11/12-11-95)

EMERGENCY AID

See also: Divided states: Korea

Food aid for North Korea: South Korea, Japan, China

For the first time since the country's division in 1946, a merchant vessel flying South Korea's flag steamed into a North Korean port on 26 June 1995. The vessel carried 2,000 tons of rice as the first part of South Korea's effort to help in the worsening food shortage in the North. The shipments were stopped on 30 June 1995 because of a dispute over which flag the ships should fly in North Korean ports, but were resumed on 4 July.(IHT 04-07-95)

South Korea said it did not believe that the situation was as bad as presented by North Korea and kept additional aid conditional upon the renewal of a political dialogue.(IHT 05-02-96) However, it later joined the US in pledging additional aid in response to a UN appeal. It announced on 11 June 1996 that it would provide $3 million in food aid, consisting of ground grains and milk powder, for humanitarian reasons.(IHT 12-06-96; FEER 20-06-96 p.13)

It was reported that Japan would ship 44,000 ton of rice to North Korea in the middle of July 1995. Half the shipment would be a gift and the other half would be paid over a period of thirty years (*see* 5 AsYIL 411).(IHT 04-07-95;FEER 06-07-95 p.13,13-07-95 p.15). This would be the first delivery of a 300,000-ton food-aid package negotiated in June 1995.

Japan and North Korea in late September 1995 negotiated on additional rice aid in late September 1995. Japan offered 200,000 tons of rice on deferred-payment terms, and a deal was signed on 3 October.(IHT 02 and 04-10-95) However, it was reported in late December that the shipments were delayed because of North Korea's problems in sending vessels to carry the rice.(IHT 29-12-95)

In January 1996 Japan rejected a request from North Korea for more food aid, saying it had no surplus rice to donate, and stressed that 100,000 tons of the already promised rice was still awaiting collection by North Korea. However, after the US granted additional aid (*see infra*) Japan later also decided to do so and to donate exactly the same amount, $6 million, as the US.(IHT 24-01-96,12-06-96)

Chinese officials said in January 1996 that China was not considering increasing a $3.6 million offer of assistance.(IHT 24-01-96)

North Korean request for rice from the US

It was reported that North Korea had requested the US for a large donation of rice one month after South Korea and Japan had pledged rice shipments.(IHT 24-07-95)

Officials from the US, Japan and South Korea met in Hawaii on 25-26 January 1996 and agreed on a joint response to North Korea's appeal for emergency food aid. The three countries agreed that any food aid must be used to draw North Korea out of its isolation. South Korea would agree to deliver aid only if North Korea showed its readiness to resume talks with the South. After the officials noted that American food aid must be provided only as part of an international humanitarian relief effort and not as a government-to-government deal, the meeting closed with the consensus that any provision of government aid should be contingent on North Korea allowing donors to monitor distribution.(IHT 01-02-96;FEER 08-02-96 p.29) The US decided to donate $2 million to the UN Food Program as a symbolic gesture.(IHT 05-02-96;FEER 15-02-96 p.13)

It was reported in June 1996 that the US planned to grant an additional $6 million of food aid. The decision was said to have been made under an informal arrangement

that North Korea would respond by making a concession regarding the proposed multilateral talks on a peace treaty.(IHT 8/9-06-96)

UN relief aid for North Korea

North Korea, suffering from torrential rains and severe floods, appealed for emergency relief aid from the UN. It had asked UNICEF for more rice but the organization had rejected the request upon allegations that some of the rice it previously supplied might have been diverted to the market to raise cash. UNICEF insisted to see first-hand where the rice had gone, but Pyongynag was reluctant to give a UNICEF representative an entry permit.(FEER 17-08-95 p.12)

After a UN humanitarian mission toured North Korea, the UN on 12 September 1995 appealed for $15.7 million in disaster relief for North Korea. The UN World Food Program in November 1995 sent 5,140 tons of rice which was to arrive later that month. The North Korean authorities allowed WFP monitors to be at the port at the time of arrival and to follow the aid to the provinces where it would be distributed.(IHT 30-08,13-09 and 24-11-95) In March 1996, the WFP sent a freighter carrying 5,600 tons of rice bought from Thailand and 903 tons of supplies from the aid group Caritas, to North Korea. The WFP said it was finalizing plans for a another shipment in April 1996.(FEER 21-03-96 p.13)

Red Cross estimates of North Korean flood damage

Officials of the International Committee of the Red Cross said that flood damage in North Korea was far worse than originally estimated and would necessitate international aid until late 1996. The flooding of August 1995 had affected an estimated 5 million people, leaving about 500,000 homeless.(IHT 19-12-95)

North Korean food shortage

According to a report by the FAO and the UN World Food Program, the food shortages in North Korea were not only caused by hailstorms and devastating summer floods. These resulted from its stagnating agriculture and its overreliance on Soviet-era intensive farming methods. North Korea's previously-assured economic ties with the former Soviet Union, China and Eastern Europe had masked shortages and bad harvests and its little capacity to pay for food in the international market. Without a dramatic increase in foreign assistance, North Korea would fall short of its 6 million ton annual grain requirement by at least 1.2 million tons.(IHT 30/31-12-95/01-01-96)

Thai rejection of request for aid
(*See also*: Debts)

Thailand rejected a request for 140,000 metric tons of rice by North Korea, because the latter was not able to offer the purchase price. The Thai commerce ministry said that North Korea already owed Thailand $20 million from previous rice purchases.(IHT 19-01-96;FEER 07-12-95 p.15)

ENVIRONMENTAL POLLUTION AND PROTECTION

Transfrontier Biodiversity Conservation Area

Malaysia and Indonesia in October 1994 declared a nearly 800,000-hectare rain forest stradling the Sarawak-Kalimantan border a nature reserve. After the Sarawak part of 187,000 hectares was made a reserve in 1992, Indonesia in 1994 set aside an additional 600,000 hectares in 1994. The forest reserve and wildlife sanctuary is known as the Lanjak Entimau/Bentaung Karimun Transfrontier Biodiversity Conservation Area.(FEER 08-12-94 p.28)

Sanctions for increased fauna protection

The US lifted sanctions against Taiwan on 30 June 1995. The sanctions were imposed under the 1967 PELLY Amendment in 1994 on certain fish and wildlife imports from Taiwan in response to an international call for increased protection of tigers and rhinos.(4 AsYIL 435). The US president certified that Taiwan had taken 'substantial steps' to halt commercial trade in the animals, such as tough penalties for illegal traders and the establishment of a conservation police.(IHT 1/2-07-95; FEER 13-07-95 p.15)

Oil spill off the Korean coast

On 23 July 1995 the Cyprus-registered 140,000 -ton oil tanker 'Sea Prince' was unloading its cargo of more than 83,000 metric tons of oil when it was hit by a typhoon. The vessel smashed onto rocks off the Korean coast. An estimated 700 metric tons of oil spilled over a 32-kilometre and later even a 50-kilometre radius to the southern coastline. The crude oil cargo tanks were unruptured.(IHT 26 and 27-07-95)

Implementation of Biodiversity Convention in the region

At the second meeting of the parties to the Convention on Biodiversity in Jakarta in November 1995, three questions concerning the regulation of 'bioprospecting' - the search for wild species of flora and fauna whose genes can yield new medicines and improved crops - were raised: Who should have access to genetic resources? Who should monitor this access? Who should get what share of the financial reward of biotechnology? The meeting was not able to reach any consensus on these questions.

Much of the implementation of the Convention is left to the discretion of national legislation. In Indonesia the government's efforts to come to terms with bioprospecting were reported to be proceeding very slowly. The Philippines was the first country in Asia to enact a law regulating access to genetic resources, with an executive order signed by the President in May 1995. Thailand and India completed draft laws. In Malaysia, a national committtee on biodiversity was working to amend existing laws.(FEER 11-01-96 pp.66-69)

Sino-US co-operation

Despite their strained relations, China and the US embarked on a programme of environmental co-operation to deal with rapid urbanization, pollution from energy consumption, and the changing agricultural patterns of a growing population. Details were considered during a three-day meeting of senior officials held in early 1996 in Washington, D.C.(IHT 02-05-96)

ESPIONAGE
See also: Aliens, Diplomatic and consular inviolability

Japanese protest against US espionage

Japan asked the US for an investigation of reported spying by the CIA during recent US-Japanese trade talks.(IHT 17-10-95) On 26 October the US assistant secretary of state told the Japanese ambassador that he could not comment on US intelligence-gathering activities, whereupon the ambassador expressed regret that the US did not firmly deny the reports.(IHT 28/29-10-95)

ETHNICITY
See also: Inter-state relations, *infra* p. 408

Relevance of ethnicity

It was reported that the Reserve Bank of India would permit ethnic Indians overseas to invest in certain bond issues of the Industrial Bank of India.(IHT 24/25-02-96)

FINANCIAL CLAIMS

Westinghouse pays Philippine government $100 million

It was reported that the Philippines would settle out-of-court its claim against US company Westinghouse Electric for building a defective nuclear plant in the mid-1980s.(*see* 3 AsYIL 377) The company would pay $100 million. In return, the government would lift a ban on Westinghouse taking part in Philippine energy projects.(FEER 26-10-95 p.79)

Transfer of Marcos-accounts
(1 AsYIL 330)

A Swiss court approved the transfer to the Philippines of nearly $500 million from Swiss bank accounts of the late president MARCOS. Under the decision, which was still subject to appeal, the money would be put in an escrow account in the Philippines pending court action there to settle various claims to the money.(IHT 29-08-95; FEER 07-09-95 p.13)

Several weeks later the victims of human rights abuses under the MARCOS regime reached agreement with the government to divide up the above amount. A complete settlement would be reached if Mr. MARCOS' heirs agreed to contribute another $50 million. In return, the victims would drop all claims against the estate. If an agreement signed by the president were reached, it would set aside a ruling of a US federal court in Hawaii under the Alien Tort Claims Act, which ruled that Mr. MARCOS estate was liable for human rights abuses carried out during his rule and which awarded the victims about $2 billion in damages.(IHT 19-09-95; FEER 28-09-95 p.15)

On 15 January 1996 talks were started in Hong Kong between the representatives of the 10,000 claimants in the US case and two Swiss banks concerning the evidence that was introduced at the US trial showing that the banks were holding an estimated $475 million in MARCOS-linked funds. In the absence of a settlement the Swiss banks feared that the US court would impose significant penalties if they continued to main-

tain that they did not have to disclose the amounts they were holding, and that they would face court orders in different countries which would force them to pay claims more than once. (IHT 28-11-95, 12-01-96)

Pakistani claim against the US

(AsYIL Vol. 1 p. 271, Vol. 2 p. 286, Vol. 3 p. 442, Vol. 4 p. 508, Vol. 5 p. 486. *See also*: Arms sales)

The government of Pakistan said on 24 January 1996 that it would consider legal action if the US failed to refund $658 million paid for 28 F-16 fighter planes that had been withheld since 1990 because of US suspicion of Pakistan's nuclear plans. (IHT 25-01-96)

FISHERIES

Chinese fishermen convicted by the Philippines

The Philippine president hinted that 62 Chinese fishermen who were detained since March 1995 might be released soon. The fishermen were originally charged with using explosives and poison to catch fish in a Philippine-claimed sector of the Spratlys, but later pleaded guilty to a lesser misdemeanour, for which they would soon complete their jail term.(IHT 16-08-95)

On 29 December 1995 China demanded the release of four fishermen who were sentenced to a 10-month jail sentence for entering waters claimed by the Philippines.(IHT 30/31-12-95/01-01-96)

Four Chinese fishing boat captains who were detained by the Philippines since 1995 were deported on 25 January 1996. The Chinese consul-general in Manila reiterated China's position that the captains had been fishing in Chinese territory.(IHT 26-01-96)

Japanese-Russian talks on fishing rights

The two countries held talks in late August 1995 over fishing rights off the Kuril Islands.(IHT 24-08-95)

Negotiations to ensure the safety of Japanese fishing vessels ended without agreement on 21 February 1996, but the two parties agreed to hold a next round of talks soon. Discussions on the issue started after a series of incidents in which Russian patrol boats fired at Japanese fishing vessels near the four disputed islands off Hokkaido.(IHT 22-02-96)

Thai-Malaysian fisheries incidents

The Thai fishing vessel 'Tor Laksana 14' was apprehended by a Malaysian naval vessel on 6 November 1995. The captain and a crew member were killed by shots from the naval vessel and three other crew members were sentenced to four months' imprisonment after having pleaded guilty to the charge of illegal fishing in Malaysian fisheries waters.

Thailand protested against the allegedly unnecessary and excessive use of force and sought an apology and compensation. On 27 November 1995 about 300 Thai fishermen rallied in front of the Nakon Si Thammarat provincial townhall near the Malaysian border to protest the Malaysian action and to launch various threats. While

Thai authorities came out against these threats as they might adversely affect Thai-Malaysian relations, the Malaysian authorities paid an amount to the families of the two dead fishermen as a humanitarian gesture. With regard to the imprisoned fishermen the Malaysian side promised to find ways to release them as soon as possible. Besides, the owner of the seized vessel would be allowed to contact the Malaysian authorities for the return of the vessel.

On 3 December 1995 the Malaysian authorities repatriated the bodies of the dead fishermen by air at the former's expense. As a result of an autopsy performed on the bodies it was revealed that the men had been shot at close range and it was concluded that they had been shot point-blank while raising their hands in surrender.

The matter was raised by the Thai prime minister with his Malaysian counterpart on the occasion of the ASEAN Summit in December 1995. During these talks the Malaysian prime minister expressed his regret about the incident and agreed that long-term solutions needed to be sought. The prime ministers agreed to resuscitate the moribund Thailand-Malaysia Sub-Committee on Fisheries under the Thailand-Malaysia Joint Commission. The Thai prime minister expressed as his opinion that the only way to avoid disputes was for the Thai navy to increase its capabilities and to patrol more strenuously. The Thai fishermen were dissatisfied with the outcome and threatened to resort to another protest demonstration.

The situation worsened when three more Thai fishing vessels were arrested on 17 December 1995 and confiscated by the Malaysian navy while passing through the Malaysian EEZ on their way to fish in Indonesian waters under licences. The Malaysian side argued that the vessels had been caught fishing in the Malaysian EEZ. The crew of two of the three vessels pleaded guilty and the captains as well as the other members of the crews were fined, while the vessels were ordered impounded.

Later in December 1995 the Malaysian government granted pardon to the three imprisoned crewmen of the 'Thor Laksana 14' and allowed the owner of the vessel to get the vessel back.

Thailand-Vietnam fisheries problems

A Thai naval ship detained a Vietnamese fishing boat which Thai officials described as a pirate ship. The Vietnam News Agency in turn reported that 40 Thai fishing vessels were charged with illegal activity in Vietnamese waters.(FEER 07-03-96 p.13)

According to reports from the Vietnamese news media 40 Thai fishing vessels had been engaged in (illegally) fishing off Vietnam's Cape Ca Mua on 16 February 1996, under the protection of two Thai naval vessels, and that subsequently, on 18 February, the Thai vessels arrested two Vietnamese vessels.

The Thai foreign ministry denied the report and the Thai navy emphasized that it always warned Thai fishing vessels not to fish illegally in the maritime zones of a foreign country. According to the Thai navy, on 16 February 1996 an armed vessel with no identifiable nationality pursued the Thai fishing vessel 'Chok Veera' and fired at the latter in the maritime area claimed by both Thailand and Vietnam, despite the fact that both countries had agreed in March 1995 not to arrest fishing vessels of their respective countries when found fishing in that area. On 18 February the Thai navy responded to these and similar reports and went to the rescue of the Thai fishing vessels. As a result the suspected vessel was arrested, with eight Vietnamese nationals on board. It transpired that the vessel had once been a Thai fishing vessel named

'Sithiwat 2', arrested by the Vietnamese provincial authority of Kien Yang in 1994. The eight Vietnamese crew were charged with piracy and the Vietnamese ambassador was informed of the action on 21 February 1996.

In April 1996, the bilateral Joint Committee on Fisheries and Order at Sea agreed to set up a contact channel for emergency situations and to operate a joint patrol in order to prevent undesired incidents.

Thai fishing in Myanmar waters

A Thai-Myanmar inter-agency meeting in November 1995 adopted a number of measures to solve fishing problems in the maritime zones of Myanmar, such as the requirement for Thai trawlers to be equipped with radio communications devices to verify their position at sea, the screening by the Thai department of fisheries of applications to fish in Myanmar maritime zones, and the posting of financial guaranty against breach of obligations.

The poaching of Thai fishermen in Myanmar waters led Myanmar to abrogate earlier agreements and bar Thai fishermen from Myanmar waters. Although 50 Thai boats were arrested during the period of January to April 1996, Thai fishing boats had reportedly tried to circumvent the ban by incorporating in Singapore. It was said that the potential profits far outweigh the risks of capture.(FEER 25-04-96 p.12)

FOREIGN INVESTMENT, TRANSNATIONAL CONTRACTS, AND JOINT VENTURES

Enron Corp. power plant project in India
(*see* 5 AsYIL 418)

Dabhol Power Co., the Indian company founded by Enron Development Corp., a subsidiary of Enron Corp.of the US and its minority partners, General Electric Co.'s 'GE Capital' unit and Bechtel Enterprises, said in early July 1995 that it was ready to come up with alternatives to please the new government of ths state of Maharashtra which was reviewing its $2.8 billion power-plant project. The project was to be by far India's largest single foreign investment. The Enron plant was one of the most advanced projects to come out from India's decision of September 1991 to open the power sector to private investment. It was one of two firms as of July 1995 to secure financing, with power-purchase agreements backed by state and central government guarantees.

The state cabinet's committee reviewing the Enron power project handed its report to the Chief Minister on 18 July 1995.

On 3 August 1995 the government of Maharashtra state announced that it was scrapping the whole project [which had been approved by the former, different party government] as being "against the interests of Maharashtra besides being harmful to the environment". It alleged that costs of the project had been inflated and that the contract had been negotiated in secret without competitive bidding. The state electricity board was ordered to pay compensation "if necessary". Enron said that in case of cancellation it would claim more than $300 million in compensation.(IHT 03-07,06-07,04-08,5/6-08,09-08-95; FEER 27-07-95 p.80)

Some confusion arose when the state electricity board wrote that the government had 'repudiated' the first phase of the project and canceled the second phase, but that the power-purchase agreement had not been terminated. It was also said that the government would put a power plant contract out to tender. Meanwhile Enron sent an arbitration notice to the state government on 4 August.(IHT 17-08-95)

The Chief Minister of India's Maharashtra state announced on 23 September 1995 that his government would agree to renegotiate with Enron after the latter had proposed earlier in the month that it would cut costs and reduce the electricity tariff at competitive rates.(FEER 05-10-95 p.82) In October the state government formally invited Enron to discuss reviving the power plant project while Enron was considering Maharashtra's request to delay arbitration proceedings.(FEER 12-10-95 p.159)

In November 1995 it was reported that the renegotiations were completed. Under the tentative agreement Enron would cut the costs of the power plant by at least $750 million and the costs of the whole project by $1 billion, while the capacity of the project would be increased so that the cost per megawatt could fall to 26.5 million rupees from 49 million. Dabhol Power Co. would save about $470 million by transferring the cost of one of its facilities to a separate company. This facility would sell its output (liquefied natural gas turned back into gas) to the plant. Further, Enron would tender for equipment for the project's second phase rather than buying it from its partners in the venture. As a reciprocal goodwill gesture Enron suspended its London arbitration proceedings while the state would not pursue its Bombay lawsuit for the repudiation of the deal.(IHT 22-11,23-11,24-11-95; FEER 30-11-95 p.72)

The government would announce its decision on 17 December (IHT 14-12-95) but it finally announced on 8 January 1996 that Enron could go ahead with the project if it cut its proposed tariff 1.6 percent to 1.86 rupees a unit, from the 1.89 rupees to which Enron had already offered to reduce the earlier 2.40 rupees.(IHT 09-01-96)

Formal agreement was reached on 21 January 1996. The cost of the project was reduced from $2.8 billion to $2.5 billion while the capacity of the projected plant was increased to 2,450 megawatts. The cost of the electric power per kilowatt-hour would be lowered, and 30 percent interest in Dabhol Power Corp., the Indian subsidiary of Enron, would be sold to the Maharashtra State Electricity Board.(IHT 23-01-96)

Enron's Chairman said that it would take up to three months to get the project on line, and unless the tractors and builders return to the site, Enron would not cancel the arbitration proceedings it launched. It was reported that in spite of the appearance of huge concessions made in favor of the Maharashtra government, the details of the repackaged agreement revealed that Enron may not really have conceded that much.(FEER 01-02-96 p.54)

Investment in Myanmar

It was reported that since late 1988, $2.7 billion of foreign investment had come into the country, and it was expected that the amount would reach $4 billion by March,1996.(IHT 8/9-07-95)

As of March 1995, the US was the fourth-largest investor in the country. The California-based Unocal oil company held a 33.25% stake in a $1 billion joint venture including a 416-kilometre gas pipeline to carry gas into Thailand. This venture was the biggest foreign investment in Myanmar since the supression of the pro-democracy movement in 1988. When completed in 1998, the pipeline would carry an estimated

525 million cubic feet of gas per day for export and 125 million cubic feet per day for Myanmar's domestic market.(FEER 13-07-95 p.65)

In January 1996, Myanmar awarded a contract to the Singaporean company Sum Cheong Exploration to explore and conduct a feasibility study for gold in a 1,400 square kilometer block in the Northern Shan state. The block was one of 16 for which the government had invited bids from foreign companies in October 1994.(FEER 25-01-96 p.57)

Development of Iranian oil fields

Total SA of France signed an agreement with the National Iranian Oil Co. on 13 July 1995 to develop two sensitive Gulf oil fields, in defiance of US pressures to isolate Iran. In March of the same year the US president had barred a US oil company (Conoco Inc., *see* 5 AsYIL 430) from proceeding with a similar contract.

Total would be responsible for securing all financing, and would get about a third of the crude oiul in return for its investment. The capacity of the oil fields was estimated at 120,000 barrels per day.(IHT 14-07-95)

Philippine-Taiwanese joint venture at Subic Bay

The Nationalist Party at Taiwan and the Philippine government formed a joint venture to develop an industrial park on the site of the former US military installation at Subic Bay in the Philippines. The venture would be 25 percent owned by China Development Corporation which is run by the Nationalist Party, 25 percent by Century Development Corp., a consortium of twenty Taiwanese and one Singapore companies, and 50 percent by the Philippine government.(IHT 20-07-95)

Singapore investments abroad

It was reported that Singapore Technologies Industrial Corp.(STIC) was to sign a financing deal for a resort project in Indonesia. These STIC initiatives were seen as part of the efforts by Singapore to sustain economic growth at home, where it lacks natural resources and space, by finding profitable investments elsewhere in Asia. Similarly, STIC is involved in the development of industrial parks in China and Indonesia, and is looking to similar projects in norther China, Myanmar and Vietnam. STIC is majority-owned by the government.(IHT 20-07-95)

China contracts with German companies

On the occasion of the visit by the Chinese president to Germany in July 1995 a $1.4 billion agreement was concluded between China and the Mercedes-Benz AG of Germany for a joint venture to build minivans and engines, while a separate, smaller deal concerned the production of buses and bus chassis. (IHT 13-07-95)

Besides Siemens AG signed agreements for three joint ventures and two power-plant projects, the Audi unit of Volkswagen AG entered into a joint venture for the eventual production of cars and engines, and the Walter Bau construction company signed a preliminary agreement to take a majority stake in a state-owned Chinese company.(IHT 15/16-07-95)

The state visit took place amidst a crisis in China-US relations; the Chinese president stressed that the eight joint-venture agreements signed during his visit were decided solely on business grounds.(FEER 27-07-95 p.22)

American investment lobby for Pakistan

It was reported that Pakistan was preparing to launch a lobbying organization in Washington similar to the one established in 1994 by US businesses investing in India. Having seen the effectiveness of US firms lobbying in support of China and India, Pakistan wanted to enlist the help of American investors to influence the US administration and Congress. The US is one of the largest investors in Pakistan, especially in the energy-related industries.(FEER 10-08-95 p.12)

Korean investments in foreign companies

South Korean conglomerates had made several investments in well-known US companies dealing in consumer products and high-technology recently. While they amounted only to a small fraction of the Japanese-led purchases in the past, the investments were taking place for the same reasons: to gain technology or entry into new markets.

In mid-1995 LG Electronics bought a controlling stake in Zenith Electronics Corp. In February 1995 Samsung Electronics Co. bought a 40 percent stake in AST Research Inc.(personal computers) and also invested in six other, small US high-technology companies. In 1994 Hyundai bought a micro-electronics division from AT&T Corp., and in the year before it bought 40 percent of Maxtor Corp.(disk-drives). In April 1995 Cheil Food & Chemicals Inc. agreed to buy a 11.1 percent stake in Dreamworks SKG (entertainment). Samsung also bought two Japanese concerns among which an audio equipment producer.(IHT 20-07,22/23-07-95; FEER 27-07-95 p.83)

It was reported in August 1995, however, that the government had introduced new regulations under which a company had to put its own money for at least 20 percent of an investment abroad.(IHT 10-08-95)

Gas pipeline projects

Japan's Mitsubishi, China's National Petroleum and Esso China, an affiliate of America's Exxon, agreed to study the feasibility of building an 8,000-kilometer pipeline to transport natural gas from Turkmenistan through China to supply the Asia-Pacific region. The construction cost would run to $10 billion.(FEER 31-08-95 p.65)

A 778-kilometre pipeline, which had been under construction for three years, linking a gas field in the South China Sea south of Hainan island, to Hongkong, was closing to completion in late-1995. The ambitious gas pipeline project is a joint venture between China National Offshore Oil Corp., Kuwait Foreign Petroleum Exploration and Atlantic Richfield Oil Co.(Arco). The pipeline is expected to supply about 85 billion cubic meters of gas over 20 years and generate about $12 billion in revenue.(FEER 05-10-95 p.17)

Oil refinery in Malaysia

The giant US oil company Conoco, a fully owned subsidiary of US chemical producers Du Pont, formed an alliance with Malaysia's national oil corporation, Petronas. In early October 1995 construction began on a $1.1 billion oil refinery in Malacca in which Conoco has a 40% stake and Petronas 45%. The remaining 15% is held be Statoil of Norway.(FEER 26-10-95 p.78)

Withdrawal of Elf from Chinese refinery project

Elf Aquitaine S.A. of France decided to withdraw from a project to build a $2.5 billion refinery in Shanghai following a feasibility study. The project was launched in 1991. The company said the decision was also part of a strategy review emphasizing smaller projects.(IHT 24-10-95)

China-General Motors co-operation

China selected General Motors as a partner in a $1 billion project for an assembly plant in Shanghai, implying the beginning of negotiations for a joint venture agreement. It was said that GM promised to be liberal with export rights, and that it met Chinese demands for technology transfer.(IHT 25-10-95)

Expiration of preferential policies for foreign investors in China

It was announced that all but one of the preferential policies for foreign investors in China's special economic zones would expire at the end of 1995, leaving one unchanged: foreign enterprises in the zones would continue to pay less income tax than the national rate.(IHT 25-10-95) However,the new tax laws would cut tax benefits enjoyed by foreign companies. Joint ventures would be required to begin paying duty and VAT on imports of capital equipment, tax breaks for joint-venture income would be abolished, imports for projects funded by multilateral lenders would lose duty free status, and the VAT rebate allowed for manufacture inports that are later exported would be cut.(FEER 21-12-95 p.56)

It was emphasized in January 1996 that China would not remove a five-year business tax exemption currently enjoyed by foreign banks operating in the country's six special economic zones (Shenzhen, Zhuhai, Xiamen, Shantou, Hainan and the Pudong district of Shanghai).(IHT 23-01-96)

Caltex gas storage unit in China

It was reported that Caltex Petroleum Corp. (jointly owned by Texaco Inc. and Chevron Corp.) and the Shantou Ocean Enterprises (Group) Petroleum and Petrochemical Co. would form a joint venture in building China's largest liquid petroleum gas storage facility. The underground granite vaults would be able to store 100,000 metric tons of gas, and to blend more than 1 million tons a year of liquid petroleum gas by combining butane and propane.(IHT 14-12-95)

Foreign investments in Vietnam

It was reported that the pace of foreign investment in Vietnam was picking up sharply after the establishment of diplomatic relations with the US (*supra p. 355).* The Japanese were especially encouraged by the US move, while Taiwan was currently the top foreign investor in the country.(FEER 10-08-95 p.12)

It was also reported that Vietnam was anxious to get more American firms involved in its oil and gas industries. Industry sources said that PetroVietnam was eager to negotiate with US company Enron on the construction of a $150 million processing plant for LPG.(FEER 30-05-96 p.12)

Vietnam oil refinery

The first oil refinery, $1.2 billion project in Vietnam was relaunched after the withdrawal of Total SA of France. In its place Vietnam had invited the LG Group of Korea, Petronas of Malaysia and Conoco Inc., a unit of Du Pont Co.

PetroVietnam and LG Group would each take a 30 percent stake, Petronas and Conoco would get a combined stake of 30 percent. Chinese Petroleum Corp. and Chinese Investment Development Corp., both of Taiwan, would get the remainder.

The refinery would be built at Dung Quat Bay, 130 kilometres south of Danang, and would have a capacity of 130,000 barrels a day.

Total had considered the project to be unviable because the site was too far from the main source of crude oil and isolated from its major consumption base, and because the area was lacking in infrastructure.(IHT 11-01-96)

Chinese natural gas field

On 1 January 1995, the Yacheng project, located 90 kilometres southwest of Hainan Island, started supplying natural gas to Hong Kong's Black Point power plant, 775 kilometres away, through the world second longest undersea pipeline. The Yacheng project, China's biggest offshore natural gas field in the South China Sea, is a joint venture involving Atlantic Richfield Co.(Arco) of the US holding 34.3 percent stake in the $1.2 billion project, China National Offshore Oil Corp. 51 percent, and Kuwait Foreign Petroleum Exploration Co. the remaining 14.7 percent. In 1992 Castle Peak Power Co.(Capco) - a US-Hong Kong joint venture - won user rights to the gas for the life of the Yachen reserves, estimated at more than 20 years. Capco contracted to buy 85% of the projected yield for its Black Point power plant. (IHT 11-01-96; FEER 28-12-95/04-01-96 p.120)

Three-Gorges Dam project in China

The US Exim Bank said it would not help finance American firms bidding for the $30 billion Three Gorges Dam project. Following US opinion, the bank said it doubted the project could meet environmental guidelines. US construction giants Caterpillar and ROTC Industries criticized the decision.(FEER 13-06-96 p.71)

Foreign fast-food chain protested in India

A Kentucky Fried Chicken restaurant in Bangalore was the object of nationalist protests since it opened in June 1995. The protests, led by a farmers' association, accused KFC of undermining local agriculture and threatening public health by serving carcinogenic chicken. Within three months of its opening, the outlet was closed by local authorities, alledgedly for using more taste-enhancers than permitted, but the outlet reopened hours later after the company appealled to the state High Court.(FEER 28-09-95 p.103) Farmers later broke through a police cordon on 30 January 1996 and ransacked the outlet, demanding that it leave India.(IHT 31-01-96)

KFC's New Delhi outlet, its second in India, was also ordered to close on health grounds. The chief minister, who was a member of a political party opposed to foreign fast foods, cited unhygenic conditions and the presence of a banned chemical in the chicken.(FEER 23-11-95 p.83) Here again, KFC reopened after a court overturned a municipal order canceling its operating license.(FEER 14-12-95 p.79)

Foreign investments in North Korea

In spite of North Korea's push since 1993 to bring in foreign investors to the Rajin-Sonbong free-trade zone, effectively the only place where foreigners may directly invest in the country, foreigners had only committed 10% of the $ 200 million planned investment. Western companies found the facility lacking in infrastructure. Other identified deterrents to foreign investments included relatively expensive labour costs and the absence of legal safety nets. North Korea has not signed treaties protecting investments from nationalization or double taxation.(FEER 25-01-96 p.54)

In early 1996, upon invitation by a firm owned by Taiwan's ruling Kuomintang party, a five-person official delegation from North Korea led by the deputy director of the country's foreign trade bureau visited Taiwan for discussions on investment in North Korea.(FEER 11-04-96 p.13)

Foreign investments in Bangladesh

Between July and November 1995, foreign investors proposed a record $850 million in projects for Bangladesh. In the previous year ending on 30 June 1995, foreigners had proposed $750 million. These figures contrasted with the $53 million foreign investors registered in fiscal year 1993. It was reported that the time lag between proposed and actual projects could be brief, as Bangladesh's Board of Invesment simply registers projects and does not submit investment proposals for reviews.(FEER 25-01-96 pp.55-56)

Intra-Asian investments

It was reported that NEC of Japan planned to invest about $1 billion in China over the next five years, in addition to about a same amount already invested, to expand its semiconductor and telecommunications-equipment business there.

According to another report the LG Group (formerly Lucky-Goldstar) of South Korea planned to invest about $5 billion over the next five years in oil refining, semiconductor, petrochemical, construction and telecommunications ventures in Southeast Asia and India.(IHT 05-02-96)

Canadian investment in Myanmar

Nortel, a Canadian company, was doing business in Myanmar through the Israeli company Telerad. Nortel had long standing ties with Telerad and had bought 20% of the company in 1995. The deal allowed Nortel "to be in a market it would be otherwise hard to reach" due to protests and shareholder resolutions in Canada.(FEER 29-02-96 p.12)

Southeast Asian investments in Pakistan

A delegation of Pakistani businessmen headed by the Pakistani prime minister visited Indonesia and Brunei in early March 1996. The special assistant to the Prime Minister said that "Pakistan has always concentrated on markets in the west and ignored the growth areas in Southeast Asia. Last year we decided to correct this with a focus on five countries - Japan, the Philippines, Malaysia, Singapore, Indonesia and Brunei". As a result of the initiative, Singapore and Malaysia would finance three power-generation projects. Malaysia also put up a $100 million oil terminal near Ka-

rachi and recently signed a joint venture deal to explore oil and gas in Pakistan.(FEER 04-04-96 p.24)

European investments in Asia

The Japan External Trade Organization reported that EU countries provided 10.8 percent of foreign investments in Asia excluding Brunei in 1994, down from 13.3 percent in 1990.(IHT 28-02-96)

Power plants in Indonesia

A group of foreign banks led by America's Chase Manhattan and the Industrial Bank of Japan agreed to finance $1.8 billion for Paiton Energy's two coal-fired power units to be built on the northeast coast of Java. Power from the Paiton plants, expected to be generated by 1999, would be sold to the state electricity company PLN under a 30-year purchase agreement signed in 1994.(FEER 27-07-95 p.83)

Enron Development Corp. of the US and the Indonesian state-owned oil company Pertamina were reported in May 1996 to be close to an agreement for the development of large power plants fueled by natural gas from a gas field operated by Mobil Corp. The deal would be worth about $525 million. Under the agreement Enron would build, own and operate a 500-megawatt power plant near Wates in East Java in a joint venture with two Indonesian concerns. The state-owned power utility PLN would buy electricity from the plant under an agreement negotiated in 1995.(IHT 21-05-96)

General Motors investment in Thailand

The Opel AG unit of General Motors Corp. announced on 30 May 1996 that it would build a $750 million factory in Thailand, to be completed in the year 2000.(IHT 31-05-96)

HIJACKING OF AIRCRAFT

Hijack of Iranian aircraft to Israel

An Iranian airliner on a domestic flight with more than 170 people aboard was hijacked by a crew member on 19 September 1995 and directed to land in Israel. The hijacker sought political asylum in the US but was charged with hijacking in Israel. Iran demanded the return of the hijacker but Israel refused. The airplane was released on 20 September.(IHT 20,21-09-95,16-10-95)

HONGKONG AND MACAO

See also: Divided states: China; Diplomatic and consular relations

Agreement on airport financing

China and the UK reached a final agreement on 30 June 1995 on the financing of the new airport, thus ending a four-year dispute. The agreement set specific borrowing amounts and borrowing conditions.

Simultaneously China approved a consortium to run an air cargo service that included a company related to the British colonial trading house Jardine Matheson Holdings Ltd.(IHT 1/2-07-95)

British Dependent Territories Citizenship and right of abode

A suggestion by the Governor of Hongkong that the colony's 3.2 million holders of British Dependent Territories Citizen passports be given the right to abode in Britain was rejected by China as well as Britain.(IHT 25-09,26-09-95;FEER 05-10-95 p.22)

[The BDTC status (and corresponding passport) under British law entitled the person to obtain British consular protection abroad, but did not permit the person to settle in the UK ('non-patrial', no 'right of abode'). Consequently the BDTC passport was for all intents and purposes a travel document. As the status of BDTC based on a connection with Hongkong would be abolished with the hand-over of Hongkong, Hongkong BDTCs could, between 1987 and the hand-over, apply for and obtain another, newly created status under British law, viz. British National (Overseas)(BNO). Those who would not apply for BNO-status and who would consequently become stateless, would become British Overseas Citizen (BOC) by operation of law as of 1 July 1997. Neither BNOs nor BOCs would have right of abode in the UK.]

Hongkong passports

China unveiled a new passport that would be issued to permanent Chinese residents of Hongkong after resumption of Chinese sovereignty over the territory. The passport would not be available for the some 7,000 members of ethnic minorities. China would try to persuade countries with close ties to Hongkong to exempt Hongkong residents from visa requirements. The central government would authorize the immigration authorities of Hongkong to issue the passports beginning 1 July 1997.(IHT 17-10-95)

The British prime minister announced during a visit to Hong Kong in early March 1996 that after the 1997 hand-over, Britain would allow people who hold passports issued by the new Hong Kong Special Administrative Region the right to visit the UK without first obtaining a visa.

Meanwhile large numbers of people were applying to become [British Nationals (Overseas)]. It was to be expected that the corresponding travel document (*see supra*) would give visa-free access to many more countries than the Hongkong passport [*See* Chinese memorandum on the occasion of the 1984 Joint Declaration, permitting Chinese nationals in Hongkong who were previously BDTCs, to use UK travel documents after 1 July 1997. 5 AsYIL 590]. (FEER 04-04-96 p.40, 11-04-96 p.14)

Sino-British agreement on hand-over issues

On 3 October 1995 a four-item plan was agreed between the Chinese foreign minister and the British foreign secretary, outlining procedures for better communication between the two sides in the remaining 21 months of British rule.

Among other things a liason office would be set up to promote contacts between the Hongkong government and the Chinese Preparatory Committee, and provision was made for the addition of consulates in the two countries. (IHT 06-10-95; FEER 12-10-95 p.15,19-10-95 pp.16-17)

British involvement after hand-over

In early March 1996, the British prime minister said that in light of the Joint Declaration prescription that Hongkong would remain a capitalist society for 50 years after the handover, "we would have a duty to pursue every legal and other avenue available to us" if China would breach the Joint Declaration.(FEER 04-04-96 p.40)

Issue of Macao currency (patacas) by Bank of China

Under an agreement between China and Portugal the Bank of China began issuing Macao currency on 16 October 1995.(IHT 17-10-95)

Nationality issue in Macau

With the approach of the hand-over to China in 1999, it was reported that the Macanese - those of mixed Chinese and Portuguese descent - feared that they would be forced to relinquish their Portuguese nationality, because China does not recognize dual citizenship. The 50,000 or so Macanese have traditionally filled senior posts in the civil service.(FEER 10-08-95 p.12)

Review of Hongkong Bill of Rights

On 18 October 1995 the Preliminary Working Committee proposed that the 1991 'Bill of Rights' be amended after the return of Hongkong to Chinese rule. The Working Committee found several elements of the Bill to be inconsistent with the Hongkong Basic Law, and accused the UK of ignoring repeated Chinese calls not to enact the Bill. The 'Bill of Rights' consisted of a package of laws designed to enshrine the UN Covenant on Civil and Political Rights, to which China is not a party, in local laws.

China subsequently confirmed its intention to review the Bill of Rights and other laws which had lately been modified by the British administration, in order to bring them in line with the Basic Law.

The proposed changes would repeal a provision that requires Hongkong laws to conform with the Bill and eliminate its connection to the International Covenant on Civil and Political Rights.(IHT 19 and 20-10-95)

A foreign ministry spokesman said that the Basic Law would be the major, cardinal law to which other laws must be subordinated. He accused the British administration of violating agreements by 'unilaterally' passing the Bill of Rights and other laws in an effort to fold them into the Basic Law.(IHT 25-10-95)

Nationality of Indians in Hongkong

The British government refused an appeal by the Hongkong governor on behalf of 7,000 Indians living in Hongkong to be given full british citizenship with right of abode in the UK.(IHT 30-10-95)

In March 1996 the Chinese authorities gave an assurance that the ethnic Indian minority could obtain Chinese nationality.(IHT 15-03-96)

Hongkong air agreements

Hongkong was to sign air services agreements with Japan and the US by the end of November 1995. Both agreements would be subject to approval by the Chinese-British Joint Liaison Group.(IHT 01-11-95)

US attitude toward Hongkong

It was reported that as the 1997 hand-over came near, US policy towards Hongkong changed from a largely hands-off to a more pro-active one.

In response to publicly aired worries by a number of prominent US politicians about the future of Hongkong, the US government set up a special inter-agency task force on Hongkong in March 1995, and the US state department would issue its bi-annual report on Hongkong in March 1996, a year earlier than scheduled. In May 1995, the US consul general in Hongkong delivered a speech concerning the colony's political autonomy, the rule of law and democratic institutions. He said that these fundamentals "are not to be impaired" and that "the US government is carefully watching developments on all these fronts". He added that the US would continue to support Hongkong's participation in international institutions and to maintain bilateral agreements such as extradition. The consul general later said that "if Hongkong ceases to have an independent voice in trade, then the US may not be able to treat it independently for trade policy".

China denounced these US moves as interference in its domestic affairs, but did not threatened any retaliation. (IHT 08-11-95; FEER 06-07-95 p.26)

Hongkong and the UN Covenant on Civil and Political Rights

In late October 1995, the UN Human Rights Committee held its fourth hearing on Hongkong. The hearings focused on a British report to the Committee, prepared with the guidance of the British governor. [The Covenant was extended to Hongkong in 1976.](FEER 19-10-95 p.38)

The Committee later issued a report made public on 3 November 1995. The Committee in its report welcomed the enactment of the 1991 Bill of Rights Ordinance in Hongkong and "noted with appreciation the various ordinances that have been reviewed as to their conformity with the Bill of Rights and amended accordingly". The Committee also reiterated the view that "once the people living in a territory find themselves under the protection of the [Covenant], such protection cannot be denied them by virtue of the mere dismemberment of that territory or its coming within the jurisdiction of another state or of more than one state". The Committee went on to say that "As the reporting requirements will continue to apply, the Human Rights Committee considers that it is competent to receive and review reports that must be submitted in relation to Hongkong".

It was reported that China's initial response to the Committee's report was negative. The China-appointed Preliminary Working Committee had recommended that the Bill of Rights be watered down by removing clauses stating that all other legislation must be consistent with it. (*see supra*) (FEER 23-11-95 p.40) The Chinese foreign ministry said that since China is not a party to the UN Covenants, it would not report to the UN on human rights in Hongkong after China resumed control of Hong kong.(IHT 15-11-95)

Preparatory Committee on Hongkong

The Preliminary Working Committee, appointed by China to advise it on Hongkong's transition, was replaced by a new, more powerful, body, the new 150-member Preparatory Committee on Hongkong. Its tasks included the setting up of a new Hong Kong government and the formation of a provisional legislature until elections can be held. The Committee was formally appointed on 26 January 1996.(IHT 08-12,28-12,29-12-95,27/28-01-96)

Residence and nationality questions

During a visit by the British foreign minister to China in January 1996 agreement was reached that those who were permanent residents in Hongkong at the time of reversion to Chinese rule, including those belonging to non-Chinese ethnic minorities, would be allowed to stay.(IHT 10-01-96)

According to Chinese policy a distinction was made between Chinese and non-Chinese residents. The latter have foreign nationality but would be allowed living in Hongkong after the return of Hongkong to Chinese rule.(IHT 10-04-96)

On the right of abode of Hongkong Chinese who were living abroad the Chinese foreign minster said that ethnic Chinese exiles who were permanent residents of Hongkong would be allowed to retain the privilege after 1997, so long as their stay abroad did not exceed a certain number of years, a period to be worked out by the Joint Liaison Group.(FEER 25-01-96 pp.14-15)

The head of the Hongkong and Macao Affairs Office said that China did not care what other (foreign) passports Hongkong residents hold, provided they do not rely on consular protection from other countries and claim Chinese nationality at the same time. Hongkong residents who would choose to declare their foreign nationality on entering the territory after the 1997 hand-over would automatically have no right to vote and to be employed and would be granted conditional residency and work rights. On the other hand, if Hongkong residents would choose to travel abroad on non-Chinese travel documents without notifying the local Hongkong authorities, that would be acceptable also although it would constitute a departure from the normal Chinese stance of not recognizing dual nationality. There were an estimated 700,000 to 1 million people in Hong Kong with foreign passports. (IHT 13/14-04-96)

The question whether Hongkong people would acquire Chinese nationality after the 1997 takeover was clarified. It was opined that from a British standpoint, those who hold British Dependent Territories Citizen passports (or are British subjects) would become British overseas nationals (BNO or BOC, *see supra* p. 384). From the Chinese standpoint, ethnic Chinese residents of Hongkong were considered Chinese nationals before the handover and would remain Chinese nationals while the others would remain aliens.

The issue was raised about the status of the hundreds of thousands of holders of 'certificate of identity' documents (CI's) - which had been issued to those Chinese who had acquired some foreign citizenship but chose to stay in Hongkong after having relinquished their acquired citizenship. (FEER 29-02-96 p.33)

It was reported that the Preparatory Committee, which had effectively replaced the Sino-British Joint Liaison Group for discussion of transition issues, would find difficulty settling issues related to immigration. China was said to be perplexed about whether to allow Hongkong Chinese with foreign passorts to retain their right to reside permanently in the territory. Allowing it would require changes in China's na-

tionality law, which does not recognize dual citizenship. China was aware, however, of the importance to Hongkong's economic future of keeping home some 700,000 locals who had a right of abode abroad, as well as coaxing some 40,000 rich locals, who had moved abroad after the 1989 Tiananmen incident. (FEER 27-06-96 p.28)

Agreement on container terminal facilities

China had protractedly refused to allow the old colonial British-controlled Jardine Matheson conglomerate, which had played an important role in the 19th-century opium trade, to participate in new large-scale construction projects, such as the building of new shipping container handling facilities. Other participants in the consortium had requested the withdrawal of Jardine Matheson but this was rejected by the UK.

The dispute on the matter between Britain and China was resolved during negotiations between the UK foreign minister and the Chinese government in January 1996. China was prepared to endorse the outcome of any agreement among the participating companies concerned.(IHT 11-01-96; FEER 25-01-96 p.14-15)

Abolition of existing Legislative Council

In October 1995, the Chinese foreign minister said that China would disband Hongkong's existing, largely elected, legislative council.(FEER 12-10-95 p.15) The Hongkong Preparatory Committee (*see supra*) accordingly decided on 24 March 1996 to abolish the Council as of 1 July 1997 and to replace it with an appointed Provisional Legislative Council.(IHT 25-03-96; FEER 11-04-96 p.14)

HUMAN RIGHTS
See also: Hongkong

German attitude toward China

As eight Sino-German business deals were signed on the occasion of the visit by the Chinese president to Germany, the German chancellor, while saying that Germany wanted an "open dialogue that is marked by mutual recognition of universal human rights principles", added that in view of China's different stage of economic development and different cultural traditions "it is to be respected that there are still differences in forms and understanding of human rights".(IHT 14-07-95)

This attitude reinforced the announced new EU policy on China which was unveiled in mid-1995 (*infra* p. 395) and which firmly backed a circumspect approach to China on issues such as human rights, Tibet and nuclear weapons. (FEER 20-07-95 p.20, 27-07-95 p.22)

Vietnamese attitude toward linkage of trade and human rights

Responding to comments by the US state department regretting the imprisonment of a number of dissidents, the Vietnamese foreign ministry said Vietnam would not accept human rights conditions on trade accords with the US. (*see also* Aliens, *supra* p. 335)(IHT 18-08-95)

Western condemnation of Chinese conviction of dissident

The conviction of the Chinese dissident WEI JINGSHENG on 13 December 1995 on criminal charges gave rise to expressions of indignation and protest from Western countries, such as the US, Britain, France, Germany, and the EU, and also from the British governor of Hongkong. On the other hand, Asian states were restrained, in accordance with the practice of not passing public judgement on their neighbours' internal affairs.(IHT 15-12 and 20-12-95)

Chinese human rights report

China published a government report on human rights in China. Justifying China's human rights record it stressed group rights over individual ones and noted that China had given priority to the people's rights to economic development and political order.(IHT 28-12-95)

UN report on human rights in Myanmar

In his report to the UN Commission on Human Rights, the (Japanese) UN Special Rapporteur on Myanmar said that forced labour, torture and arbitrary killing are still widespread in Myanmar.(IHT 17-04-96)

No UN action on issue of human rights in China

For the sixth straight year the UN Commission on Human Rights upheld a Chinese motion to take no action on a Western draft resolution criticizing China's human rights record.(IHT 25-04-96) EU foreign ministers had backed an American-sponsored resolution calling on the UN to condemn China's human rights record.(FEER 11-04-95 p.13)

French attitude on human rights in China

It was reported that after the visit of the Chinese premier in April 1996, France promised not to raise human rights issues in public. The French foreign minister said that "[i]f France forges a partnership with China, then it can hope to make China shift its stance" on human rights.(FEER 25-04-96 p.16)

US inspection of Chinese prison facilities

In April 1996 China allowed a US customs official to inspect a prison factory, approximately a year since the previous visit. China had agreed to such visits under a Sino-US memorandum of understanding on prison labour but did not allow them after the deterioration of China-US relations in 1995.(IHT 07-05-96)

IMMUNITY
See also: Diplomatic inviolability

Thai law on state immunity

The Thai government established an inter-agency committee on 21 November 1995 to study and draft legislation on state immunity. The resolution was motivated by the fact that, in view of the developments in international business relations and joint

ventures, it is more likely than ever before that a foreign sovereign might be sued in a Thai court and the defendant might raise state immunity as a defence. So far Thailand did not have legislation on the matter, nor was there a judicial decision setting a legal precedent in the field.

INSURGENTS
See also: Red Cross

Muslim insurgents in the Philippines

It was reported that since the 1992 truce between the Government and the MNLF (Moro National Liberation Front), the breakaway Moro Islamic Liberation Front (MILF) had been using the negotiated ceasefire to build up its strength and that it might start an MILF offensive if the MNLF-government talks would collapse. Aware of these developments, the MNLF demanded the implementation of the Tripoli Agreement including autonomy for 13 provinces in the southern Philippines (*see* 5 AsYIL 426)(FEER 13-07-95 p.24)

The government insisted on constitutional grounds that a referendum be held before autonomy could be granted to the 13 provinces. It referred to a final paragraph in the Tripoli Agreement which read: "The government of the Philippines shall take all necessary constitutional processes for the implementation of the entire agreement". On the island of Mindanao, which is their homeland, the Muslims are, however, outnumbered by the Christians and, therefore, were against a plebiscite. The rebels said such a referendum would violate the 1976 Tripoli Agreement which called for 13 provinces in the south to become an autonomous region with the MNLF serving as provisional government until a legislature would be elected. They emphasized that in fact the idea of a referendum was explicitly rejected when the agreement was negotiated.

After their third round of talks in July 1995 the government and the Front had agreed on nearly all the details of the Tripoli Accord's implementation, except the issue of the process of establishing the autonomous region. As a way-out, the president proposed that the MNLF leader run as a government candidate for governor in the 1996 elections in the already existing (limited) Autonomous Region of Muslim Mindanao (*see* AsYIL Vol.3 p.393, Vol.5 p.426). As a governor he would then be in a position to prepare a referendum for an extended autonomous region.

A next round of talks in Jakarta in November-December 1995 failed to produce results.(IHT 03-07,27-11-95; FEER 24-08-95 p.23, 14-12-95 p.13)

In early 1996, an intelligence memorandum reported that the MILF was set "to declare an independent Islamic State" and that "some Islamic countries" would support the declaration.(FEER 15-02-96 p.12) While the government said that the MILF had just about 8,000 troops - far below the 20,000 estimated by a Philippine senator and former defence secretary, or the 40,000 estimate from Western intelligence sources - the MILF claimed that it had 120,000 troops. It was said that in the past two years the MILF had landed 29 arms shipments from Islamic-fundamentalist allies in the Middle East.(FEER 28-03-96 p.26-28)

The government on 13 May 1996 offered the chairman of the MNLF the post of chairman of a proposed "Southern Philippines Council on Peace and Development".(FEER 23-05-96 p.15) The MNLF chairman went to Tripoli alledgedly to get

Lybian support before agreeing to head the government-proposed Council. Lybian support was needed to convince the MILF to go along with the proposal.(FEER 30-05-96 p.12)

A breakthrough was achieved in early June 1996.(IHT 06-06-96) It was announced on 7 June 1996 that the two sides had agreed on "a fresh approach" to the long stalled peace talks. The government offered to set up a "transitional implementation structure" which would consist of a 5-man body called the Southern Philippines Development Council which would be headed by MNLF leader NUR MISUARI. An aide to the President said that the Council would "monitor, coordinate, and even propose and implement peace and development projects in Mindanao". He added that it would have "administrative powers and functions independent of the existing local government units". It was suspected, however, that the proposal skirted the only remaining question in the peace talks - how the provisional government provided for under the 1976 Tripoli agreement would be set up.(FEER 20-06-96 p.21) A joint statement issued at Davao City on 23 June 1996 expressed the hope that a peace agreement might be signed in July 1996 at Jakarta.

The Muslim revolt was launched in 1972.(IHT 24-06-96)

Peace plan to end Sri Lankan insurgency

(*See also*: Inter-state relations: general aspects, *infra* p. 395)

The Sri Lankan government proposed a peace plan that would establish strong local councils in the country's eight provinces, including one where Tamil rebels had been fighting for autonomy. The plan was part of a constitutional amendment that would require the approval of two-thirds of Parliament and a national referendum.(IHT 28-07-95) The President on 3 August 1995 unveiled her devolution proposals, including the merger of the Northern and Easterm provinces demanded by the Tamils. Such a merger would form a Tamil majority region covering 30% of the country's territory and two-thirds of its coastline, including the best deep-water harbour in the region. The package sought to grant control over sensitive subjects such as land and law and order to the regions.(FEER 17-08-95 p.17)

A radical Sinhalese group, however, denounced the proposals as a 'giant step' toward breaking the country in two.(IHT 01-08-95) The plan also met opposition from the Buddhist leadership and from members of the cabinet itself. They preferred a military defeat of the rebels before implementing political reforms.(IHT 04-09-95) The 'Liberation Tigers of Tamil Eelam' never cared to consider the plan. (IHT 27-11-95).

The city of Jaffna was conquered by the government forces on 5 December 1995. A Tiger leader announced that peace talks would be impossible as long as government troops occupied the city. (IHT 06-12-95;FEER 14-12-95 p.13)

On 16 January 1996, a legal draft of the government proposals was published. It contained specific clauses denying the regional councils the power to hold a referendum on secession. (FEER 01-02-96 p.25)

On 31 January 1996, a bomb exploded in a business district in Colombo killing 80, injuring 1,400 and damaging property worth millions of dollars. The explosion was set off by a suicide squad, a telltale sign that the Tigers were responsible for the blast. Yet, speaking at the 4 February 1996 Independence Day celebrations, the Sri Lankan president affirmed the government's commitment to find a solution to the ethnic questions by political means.(FEER 15-02-96 p.14)

On 19 April 1996 government forces launched an offensive against the rebels in the eastern part of the Jaffna Peninsula.(IHT 20/21-04-96) Also on 19 April, the government forces started an operation to encourage the return of displaced civilians to Jaffna. The operation was described a success, and the ICRC confirmed that around 250,000 people had returned, or were in the process of returning, to a Jaffna suburb.

Later in the month it was reported that the rebel movement was looking for a third party to come forward to mediate between the government and the LTTE (IHT 29-04-96) and that Tiger supporters in London and Berne had asked the Swiss government to act in that capacity. (FEER 09-05-96 p.26)

Myanmar

In June 1995 the cease-fire between the government and the Karenni rebels (*see* 5 AsYIL 427) collapsed when government troops pushed into the Karenni heartland between the Salween river and the Thai border.(IHT 23-08-95)

In the meantime, the Karen National Union guerilla group was hit by a rash of defections, about 400 since early July 1995, to a rival organization allied to the government - the Democratic Karen Buddhist Army.(FEER 02-08-95 p.13) It was later reported that the Karen National Union and the Myanmarese government planned to hold peace talks on 14 February 1996.(IHT 14-02-96)

It was reported in early January 1996 that government troops had overrun the headquarters of KHUN SA, the leading opium warlord who also claimed to be fighting for an independent state for the Shan minority people. There were rumours that KHUN SA was selling out his troops (Mong Tai Army) for an amnesty. Earlier in 1995 part of the Mong Tai Army had broken away from KHUN SA'S leadership, accusing him of lack of interest in Shan national aspirations.(IHT 03 and 04-01-96) The formal surrender of 5,000 insurgents took place on 5 January 1996.

The surrender of KHUN SA'S Mong Tai Army ended the decades-old control by KHUN SA of the 'Golden Triangle'. Reportedly, the 10-point agreement included an amnesty for the drug lord, his retention of a smaller militia, and promises that he would not be extradited to the US. (FEER 25-01-96 p.15)

KHUN SA had been indicted on heroin trafficking charges in the US in 1989, and the US had since demanded his extradition. (FEER 14-12-95 p.12) However, the Myanmarese foreign minister said on 9 February 1996 that Myanmar would not extradite him to the US. (IHT 19-02-96) (Cf. the extradition of THANONG SIRIPRICHAPONG 5 AsYIL 270) In April 1996 the Myanmarese authorities announced that KHUN SA was freed and would not be tried more or less as a reward for his surrender.(IHT 27/28-04-96)

After KHUN SA'S surrender, some 2,000 guerillas from the Shan-minority Mong Tai Army crossed into northwestern Laos to set up base there. Another 1,000 insurgents joined the Shan factions that merged under one command in February 1996 and vowed to continue armed resistance against the Myanmarese government. (FEER 29-02-96 p.12)

Philippine talks with communist insurgents

The communist-led National Democratic Front refused to join peace talks with the Philippine government which were scheduled in late June 1995 in Brussels. The rebels

said that Manila must first release one of the Communist Party's ranking members and allegedly a member of their negotiating team, who was arrested in May 1995.

It was announced about a year later that a Manila court had ordered the release of a senior communist leader who had been held since May 1995. The Philippine president said on 19 June 1996 that the talks would be resumed.(IHT 20-06-96; FEER 06-07-95 p.13)

INTELLECTUAL PROPERTY

Singapore patents law

A new Patents Act had been adopted under the name of Patents (Amendment) Act 1995. It entered into force on 23 February 1995, and brought the Patents Act into conformity with the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

Intellectual property protection in Vietnam

Among the subjects dealt with by negotiators from the US and Vietnam, who were resuming talks on the normalization of trading relations, was the protection of intellectual property. It was reported that the protection of trademarks in Vietnam is among the best in the region - Vietnam's patent and trademark office, the National Office of Industrial Property, being a model government body. Vietnam had already acceded to various international agreements on intellectual property and hoped to join the Berne Convention for the Protection of Literary and Artistic Works and the WTO. A new copyright law was passed in October 1995.(FEER 18-01-96 p.28)

Japanese copyright protection of recordings

The US launched a complaint against Japan at the WTO on 9 February 1996 because of the limited character of the protection of foreign recordings dating from before 1971 under the Japanese current copyright law. The US contended that the 1993 Agreement on Trade-related Aspects of Intellectual Property Rights that took effect in developed countries on 1 January 1996 obligated Japan to extend copyright protection to foreign recordings of fifty years old.

Japan argued that the 1993 Agreement provided for exceptions, and that Japan got approval for its position from the US and the EU during the Uruguay Round negotiations. There were signs, though, that Japan would concede. According to newspaper reports on 5 February 1996 the Japanese government decided to extend the period of protection for recordings back 50 years, the same as in the US.(IHT 07-02 and 10/11-02-96)

Chinese court decision

In a landmark decision of April 1996 a Beijing court ordered a computer retailer to pay damages to Microsoft and two other US software producers.(IHT 10-05-96)

US-China relations on intellectual property rights protection in China

In October 1995 China and the US started new talks on intellectual property rights and market access.(IHT 11-10-95) Testifying before the US Senate subcommittee on

East Asian and Pacific Affairs the deputy US trade representative said that while China had staged thousands of raids on retailers and established special courts to try offenders, "China's overall implementation of the [26 February 1995] agreement [on intellectual property rights, 5 AsYIL 428] falls far short of the requirements of the agreement".(IHT 01-12-95) The US subsequently threatened that if China would not enforce the agreement within 90 days [until the end of February 1996] it would again risk the imposition of serious trade sanctions.(IHT 2/3-12-95) In late January 1996 the US again warned China with economic sanctions in the next months.

While acknowledging that China had made significant efforts to improve its intellectual property protection, the US wanted China to revoke business licenses of an estimated 34 plants believed to be making pirated cd's, destroy their equipment and products and prosecute their owners, all before 15 May 1996. To stem a flow of pirated cd's into international markets China was asked to better police its borders, especially with Hong Kong. To reduce the financial incentives for unauthorized local copying, the US would press China to lower its tariffs on licensed computer software, movies, music and other copyrighted goods imported from the US.

China responded by warning that US businesses would suffer if the US imposed sanctions.(IHT 05 and 07-02-96) But it was reported in early March 1996 that the business licenses of two foreign companies would be revoked for illegally copying compact disks and that four to six cd-plants would be closed.(IHT 06-03-96)

In April 1996 the US delivered an ultimatum, warning that if China continued to tolerate abundant violation of the 1995 IPR agreement it would be difficult for the US government to obtain Congressional approval for renewal of most-favoured nation status for China.(IHT 17-04-96) The Chinese ministry of foreign trade and economic co-operation (MOFTEC) responded that "[if] the US goes so far as to implement its trade retaliation, China will, according to its foreign trade law, take countermeasures to safeguard its sovereignty and national esteem".(IHT 4/5-05-96) This developed even as the US ambassador to China said that China would not face a deadline to crack down on intellectual property rights infringements. He said that China had taken steps to clamp down on domestic piracy but had fallen short on the other terms of the guidelines to implement the IPR agreement.(FEER 02-05-96 p.81)

On 15 May 1996 the US announced punitive trade sanctions affecting more than $2 billion in textile and electronic goods, unless the talks would result in a breakthrough in the following month, before 17 June.(IHT 15-05-96) The sanctions would mean imposing 100% tariffs on $2 billion worth of US imports from China unless the latter would agree by June 17 to crack down on counterfeiters. As it was analyzed, the sanctions to be imposed on China on June 17 would hit hardest the trade in the following sectors: the $2 billion export trade in textiles and apparel, $500 million in consumer electronics, and $500 million in other consumer products.(FEER 30-05-95 p.49, 51) The following day China issued its list of counter-measures, consisting of, *inter alia*, the halting of the approval process for US-funded ventures seeking to set up joint ventures, branches or representative offices in China. China would also block imports of all US-made audio-visual products, and would levy 100 percent punitive tariffs on a wide range of US exports to China.(IHT 16-05-96) The two parties agreed to resume talks on the issue as from 6 June.(IHT 31-05-96)

[The EU trade commisioner said on 9 May 1996 that the EU would not support the US in the latter's threat of trade sanctions against China for failing to stop copyright piracy.(FEER 30-05-95 p.49)]

On 13 June 1996 the US trade representative said that last minute Chinese measures were still insufficient unless China, *inter alia*, would agree on a long-term mechanism for monitoring plants to ensure that, once closed, they did not reopen unless they had negotiated licenses with the foreign companies to produce their goods legally.(IHT 14-06-96)

On 17 June 1996 the US withdrew its threat of punitive sanctions, confirming that China had taken genuine steps to curb piracy, to prosecute those who were in violation of the law and to prevent future infringements, such as heightened border controls to prevent export and increased access for legitimate US products, the introduction of identification codes on cd's, regulating the importation of cd-presses, the suspension of the establishment of any new cd-production enterprises, and the permission for foreign recording companies to license their entire repertoire of artists to Chinese companies.(IHT 18-06-96; FEER 27-06-96 p.65)

INTER-STATE RELATIONS: GENERAL ASPECTS

European Union - China

The European Trade Commissioner outlined plans on 5 July 1995 for a global EU policy toward China. In recognition of "China's worldwide and regional economic and political influence" the EU Commission unveiled a blueprint for upgrading Europe's relations with China. The EU paper which outlined the new EU strategy was said to assert that China is set to become "a cornerstone in Europe's external relations, both with Asia and globally". It promised 'wholehearted' support for China's involvement in the international community, including speedy Chinese membership in the WTO. The main focus of the new EU policy would be on developing closer economic ties with China. [Bilateral Euro-Chinese trade had grown from $12 billion in 1985 to over $40 billion in 1994]

The policy firmly backed a circumspect approach to China on issues such as human rights, Tibet, and nuclear arms. Unlike past relations, trade, human rights and even scientific and cultural ties would be brought under one umbrella, and the test of any policy should be its effectiveness rather than 'easy popularity at home'.(IHT 06-07-95; FEER 20-07-95 p.20, 27-07-95 p.22)

Indian support for Sri Lanka

It was reported that India offered to help the Sri Lankan armed forces in their fight against the Tamil Tigers with non-lethal defence equipment including mine detectors and anti-missile flares for aircraft. The Indian navy would also try to tighten its cordon around the sea approaches to the Jaffna Peninsula, the Tigers' stronghold.

India's recent formal request for extradition of a Tiger leader in connection with the assassination of prime minister RAJIV GANDHI in 1991 had tipped India's policy closer to the Sri Lankan government.(FEER 13-07-95 p.14)

Laos - Cambodia - Myanmar

It was reported that Laos was playing a crucial role in negotiations aimed at improving relations between Cambodia and Myanmar. Laos was seen as a neutral gound for such talks and Cambodia wanted to conduct negotiations in a discreet environ-

ment, as openly flaunting its relationship with the military government in Yangon would anger Cambodia's backers in the West. Laos also seemed to have played a useful role when the Laotian prime minister, during his visit to Japan in early June 1995, requested the Japanese government to resume full development assistance to Myanmar.(*see supra* p. 368) It was the first time that Laos had made an appeal on behalf of a third country.(FEER 20-07-95 p.12)

Besides, common political views coupled with anti-Thai feelings appeared to have resulted in the emergence of a new mini-block in Southeast Asia. As Thai policy was maintaining links with rebels against the governments in Laos, Cambodia and Myanmar, the three countries mistrusted Thailand's intentions.(FEER 18-04-96 p.23)

China - US

It was reported that China was suspecting a containment-like pattern in recent US actions, such as the decision to allow the Taiwanese president to visit the US, the establishment of diplomatic relations with Vietnam, a historically troublesome neighbour for China, the open discouragement of Chinese sales of nuclear equipment to Iran and arms sales to Myanmar and Pakistan, the opposition to China's admission to the WTO, the criticism of China's nuclear tests, the US discussions on a security relationship with India, the insistence on undisrupted navigation in the South China Sea where China and other countries have rival claims, the pressure on China over human rights, the similar pressures over trade issues. The Chinese suspicions could be summarized in four points: the US was trying to divide China territorially, subvert it politically, contain it strategically and frustrate it economically.(IHT 10-07,02-08-95)

In his speech to the UN General Assembly in September 1995 the Chinese foreign minister criticized the US for pursuing 'hegemonic' aims, seeking to contain China.(IHT 28-09-95)

It was reported that China wanted the US to denounce independence movements in Taiwan and Tibet, and an assurance that there would be no repeat of a visit by the Taiwanese president to the US, as a condition for sending its ambassador back to Washington (*see* 5 AsYIL 434).

After the US State Department publicly restated the US one-China policy on 10 July 1995, it was reaffirmed by the US White House on 13 July that Taiwan is part of China. As to visits by the Taiwanese president, the spokesman said: "According to our policy, President Lee would not be allowed to make an official visit to the US", adding that any furture requests for private visits "we would consider on a case-by case basis".(IHT 13-07,14-07-95)

In early October 1995 the Chinese foreign minister referred to a US offer to make a commitment in these terms, but said that China was not satisfied, urging a new formulation of US policy toward Taiwan clearly distancing itself from a Taiwan strategy of achieving an international status independent of the mainland.(IHT 02-10-95)

Among the positive gestures offered by the US in July 1995 aiming at halting the deterioration in its relations with China was the suggestion by the US president to the Chinese president to meet during the celebration of the UN's 50th anniversary when the latter would be in New York, and even to invite the Chinese president to Washington, but only provided China would release the arrested US citizen who was ac-

cused of espionage (*see supra*, Aliens, p. 334). The following day China rejected the idea of releasing the arrested man before completion of the investigation and the trial.

The meeting between the US and Chinese foreign ministers in Brunei on the occasion of the ASEAN Regional Forum talks on 1 August 1995 resulted in agreement to continue high-level contacts, but failed to resolve the key issues undermining Sino-US relations. Nor was there agreement on resuming talks on human rights or arms proliferation which were broken off by China following the Taiwanese president's trip to the US.

The US secretary of state clarified to his Chinese counterpart on 1 August 1995 that he "could not rule out possible future visits" by the Taiwanese premier to the US, although such visits would be "strictly private and strictly unofficial".

As to a Chinese demand for a US apology for allowing the Taiwanese president to visit the US, the US assistant secretary of state for East Asia and the Pacific said: "We cannot meet that condition".(IHT 31-07,01-08,02-08-95; FEER 10-08-95 pp.14-17)

The official Chinese press agency said on 23 August 1995 that relations with the US were at their worst since ties were established in 1979, and warned against the start of a Chinese-US Cold War. The commentary also included a harsh attack on the US media for articles that were feeding animosity by depicting China as belligerent and dangerous.

Sino-US relations had sharply deteriorated since May 1995 when the US agreed to let Taiwan's president become the first Taiwanese leader to visit the US. China had accused the Taiwanese and the US of attempting to make Taiwan independent.(IHT 24-08-95)

Relations started improving with the expulsion of the US citizen convicted for espionage (*see* Aliens, *supra* p. 334), China deciding in late August 1995 to send its ambassador back to Washington, and the US government's decision that the US president's wife would visit China as the head of the US delegation to the UN World Conference on Women. (*see* 5 AsYIL 402)(IHT 29-08-95;FEER 07-09-95 p.16)

After a three-months delay, China agreed to the nomination of a next US ambassador to Beijing. Reversely, the Chinese ambassador, who had been called back in June 1995 after the row about the visit of the Taiwanese president to the US (5 AsYIL 434), returned to his post in October 1995 in order to be present at the planned meeting in New York between the Chinese and US presidents.(IHT 18-10-95; FEER 05-10-95 p.15)

There was disagreement initially over the ceremonial aspects of a meeting that could take place during the presence of the Chinese president in the US to attend the commemoration of the UN's 50th anniversary. China insisted on a full state visit in case of a meeting in Washington. When the US refused to give in, China accepted a meeting of the presidents in New York.(IHT 02-10-95; FEER 12-10-95 p.18) The meeting took place in New York on 24 October 1995.

It was reported that China tried hard right up until the last moments leading to the summit, to get the US to agree to a fourth communique (besides those of 1972, 1979 and 1982) setting out the principles underlying their bilateral relationship. But Washington rejected these attempts since it did not want to change the wording of the previous three communiques issued since 1972, in particular with regard to Taiwan. On the eve of the summit, the Chinese president said that "the question of Taiwan is the

most important and sensitive issue in China-US relations".(IHT 26-10-95;FEER 02-11-95 p.14)

The improvement of Sino-US relations progressed on 17 November 1995 by the resumption of a program of high-level military contacts, agreed during a visit by the US assistant secretary of defense to China.(IHT 18/19-11-95)

The US assistant secretary of state for East Asian and Pacific affairs said in late January 1996 that the US was tracking China's military build-up, "including its projection capabilities near its borders", clarifying that he referred to Taiwan and the South China Sea. Yet he said that this did not mean that the US considered China to be a threat, nor that the US was out to contain China.(IHT 25-01-96)

It was reported in January 1996 that on 19 December 1995 a US aircraft carrier had passed through the Taiwan strait for the first time in 17 years. Although US officials blamed bad weather for the unusual route, it was seen as a sign of the tensions between China and the US over Taiwan's impending elections. Aircraft carriers usually pass to the east of Taiwan.(IHT 27/28-01-96) China filed a protest.(IHT 29-01-96)

After having granted a visa to the Taiwanese vice-president for a stopover in the US on his flight to Guatemala in early January 1996, the US again granted a visa to the Taiwanese vice-president for stop-overs in the US on his flights to Haiti and El Salvador in February 1996. According to the US spokesman there would be "no public activities" by the official during the stopovers. China made representations to the US over the issuance of the visa.(IHT 01 and 02-02-96)

Upon reports that China planned to conduct a large military exercise in the Taiwan strait beginning early February 1996, apparently as part of an effort to intimidate Taiwan before the presidential elections on the island on 23 March 1996, it was reported that the US would explicitly warn China that heightened tension could lead to miscalculation and accident. Although the Chinese foreign ministry called the military exercises a normal occurrence, the US side considered the planned operation exceptionally large and meant to be destabilizing. The US approach to the problem for three decades had been to sell Taiwan enough arms to defend itself, deterring China from attack and reducing the chances that US forces would be drawn in.(IHT 06-02-96)

The US defense minister said on 13 February 1996 that China had failed to fulfill its promise to become a 'responsible world power' by conducting missile tests and large military maneuvres off Taiwan and allegedly exporting nuclear weapons technology and abusing human rights. He said that US policy toward China was based on 'constructive engagement' because the US could not ignore the world's most populous country.(IHT 14-02-96) Advocating closer American ties to the Chinese military leadership, he said: "We can not make our entire relationship hostage to a single issue".

In the same month it was reported that the US had decided to conduct more high-level talks with China. These intentions were depicted as the beginning of a new 'strategic dialogue' aimed at fostering closer ties despite the growing frictions. The underlying idea was the hypothesis that the two countries have more to agree about

than squabble over, if they consider a broad range of common concerns instead of focusing only on problems.(IHT 22-02-96)

By way of response to Chinese missile tests off the Taiwan coast in March 1996 (*supra* p. 362) the US on 10 March 1996 moved an aircraft carrier group close to Taiwan although still between Okinawa and Taiwan and not yet in the Taiwan Strait. Meanwhile the US called the tests 'reckless' and 'risky' and warned that there would be 'really grave consequences' if China continued to threaten Taiwan.(IHT 11-03-96;FEER 21-03-96 pp.14-16) It was later reported that US and Taiwan officials met 'unofficially' in a New York hotel on 11 March 1996 and discussed China's position on Taiwan as well as the prevention of provocative responses from the Taiwanese side. It was the highest level meeting held since the severance of formal relations in 1979.(IHT 4/5-05-96)

The following day, 11 March 1996, the Chinese foreign minister warned the US against intervening, saying: "It is ridiculous for some people to call openly for interference by the Seventh Fleet or even for protecting Taiwan. These people must have forgotten that Taiwan is part of China and not a protectorate of the US". He added that "Should foreign forces collude to interfere in Taiwan or try to split the motherland, then the situation would become very risky".

Meanwhile the US government said it was sending extra warships, including a second aircraft carrier, to the region as a 'precautionary measure'. The US assistant secretary of state for East Asia and the Pacific said that the two nuclear-powered carriers were dispatched to ensure that there would be no further escalation by China and to reassure Asian countries that the US was willing to play a stabilizing role in the region. A US administration official further said that "from a policy of comprehensive engagement we have suddenly lurched into containment".(IHT 12-03-96; FEER 21-03-96 p.14-16, 28-03-96 p.16)

It was reported the following day that China had been sending signals to the US that China did not intend to invade or attack Taiwan, while the Taiwanese vice-president was reported to have circulated a document in which he stated: "I reiterate that the Republic of China government is adamant in its pursuit of national reunification and strong opposition to Taiwan independence".(IHT 13-03-96) It was later reported that on 8 March 1996 Chinese and US officials had met privately and had reached an 'understanding' that the US would use its influence to try to restrain Taiwan from any more far-reaching moves toward independence, and in return China would not use military force to resolve its dispute with Taiwan.(IHT 25-03-96,4/5-05-96) At a news conference the Chinese prime minister on the one hand warned the US not to make a show of force in the Taiwan Strait, but on the other hand said that China could resolve its differences with Taiwan peacefully, while expressing himself about Sino-US relations in a conciliatory way.(IHT 18-03-96) On 19 March 1996 it was announced that the Chinese and US foreign ministers would meet on 21 April (IHT 20-03-96), and on 26 March the US announced that its aircraft-carriers would be withdrawn from the area, while Taiwan announced a plan to lift the ban on direct travel, trade and communication links to the mainland that had existed since 1949.(IHT 26 and 27-03-96)

The Chinese foreign ministry warned the US in March 1996 it "must immediately stop its activities designed to interfere with China's internal affairs", referring to, *inter alia*, US arms sales to Taiwan.

Although the US under-secretary of state said that the US had no plans to speed up arms deliveries to Taiwan, the US and Taiwan agreed during the same month on the sale of missiles, an advanced targeting and navigation system for fighter planes and a package of electronic warfare devices. The sale was presented as resulting from a long-standing US commitment to bolster the defence of Taiwan and "not out of the historical pattern".(IHT 21-03-96)

Meanwhile, the US House of Representatives approved a non-binding resolution on 19 March 1996 according to which US forces "should defend Taiwan in the event of invasion, missile attack, or blockade by China".[This refers to the State Department authorization bill, later also adopted by the US Senate on 28 March 1996. The bill included inviting the Taiwanese president to the US, increasing ties with Taiwan, toughening human rights pressure on China, designating an envoy to Tibet and setting up Radio Free Asia broadcasts into China].(IHT 01-04-96; FEER 28-03-96 pp.16-18)

The Chinese foreign ministry denounced the resolution as having 'intensified tensions' and accused the US of "attempting to obstruct the Chinese nation from realizing the reunification of the motherland". As to the US arms deliveries to Taiwan the Chinese foreign ministry said that it violated the 1982 US pledge to limit weapons sales to Taiwan and contradicted the US calls for a reduction in international arms sales.(IHT 22-03-96)

It was reported that after having decided to extend MFN-status to China in late May 1996 the US president in early June was preparing to send his national security adviser to China to try to ease the frictions between the two countries. The most recent visit of a top-level US official was that of the US commerce secretary in October 1995.(IHT 03-06-96)

Vietnam - US
(*see also* Aliens)

After the US president announced his decision to grant full diplomatic recognition to Vietnam on 11 July 1995 (*supra* p. 355), it was reported that there still remained the question of granting MFN trade status to Vietnam: being a communist country like China, its trade status would be subject to renewal annually.(FEER 20-07-95 p.16) Under the terms of the 1974 US law that governed US commerce with Vietnam, before the US could grant most-favoured-nation status to Vietnam a trade agreement must be concluded between the two countries, eliminating the high tariffs faced by US companies when they export to Vietnam.(IHT 13-07-95) On 5 August 1995, the US secretary of state said that US officials would visit Hanoi to begin work on a trade treaty. MFN status and US government insurance for investments in Vietnam should follow eventually.(FEER 17-08-95 p.22)

Cambodia - Vietnam

The Vietnamese president made a state visit to Phnom Penh aimed at 'consolidating the friendship' between the two countries 'despite some remaining issues'. The two countries have disputes over borders and migration. Vietnamese troops invaded Cambodia in 1978 and eventually toppled the Khmer Rouge government.(FEER 17-08-95 p.13)

US - Asia

It was reported that the US government considered the 100,000 US troops stationed in Japan and South Korea vital to the security in Asia, particularly because of threats from China and North Korea. The US was spending about $2.7 billion a year to station 37,000 troops in South Korea, supplemented by $300 million, to be increased to $390 million by 1998, from South Korea for their maintenance.(IHT 11-04-96)

On the occasion of his visit to Japan in April 1996 the US president said, *inter alia*: "I believe that our presence is needed here as long as people have any fear at all that some countries might seek to dominate others, or that Asia might become a battleground for any sort of security problem that would affect the freedom and independence and the safety of the people of Japan or our other allies in the area". He said no one was "immune to the threat posed by rogue states, by the spread of weapons of mass destruction, by terrorism, crime and drug trafficking, by environmental decay and economic dislocation".(IHT 18-04-96)

Thailand - Myanmar

Relations between the two countries had deteriorated since late 1994. Contentious issues were fishing activities and Myanmarese accusations that Thailand was harboring ethnic rebels who fought the Myanmarese government. On 1 September 1995 a Thai delegation arrived in Yangon for a two-day visit to try to repair the strained relations.(IHT 2/3-09-95)

A visit by the prime minister of Thailand to Yangon - the first visit by a Thai premier since 1980, planned for January 1996 - finally took place in March 1996. On that occasion the two countries agreed that Myanmar would release 100 Thai nationals who were serving prison terms in Myanmar. Most of them were believed to be fishermen who had intruded into Myanmarese waters.(IHT 19-03-96; FEER 11-01-96 p.12)(*see supra* p. 374)

Asia-Europe Meeting (ASEM)

The EU gave its endorsement to the ASEAN intitiative [at the first ASEAN-EU Senior Officials Meeting, Singapore, May 1995] for a summit of Asian and European leaders in March 1996. The idea was originally launched by the prime minister of Singapore during a 1994 visit to France. The projected meeting was to consist of the members of the European Union, the members of ASEAN, China, Japan and South Korea.

The plan was bluntly criticized by the Indian foreign minister because it left out India. "How could you hold an Asian summit without taking India into it, a country with the second largest population in the world? It is almost like playing Hamlet without the Prince of Denmark".(IHT 05-12-95)

The meeting was intended to focus on economic co-operation, especially expansion of trade and investment. Asian officials were concerned that some European countries, influenced by domestic political pressures, would bring up issues that would sour the atmosphere of the summit, divert its attention from matters of mutual interest and prompt the Asian side to reply in kind.(IHT 13-02-96)

At the threshhold of the meeting, the French president urged Asian and European leaders to forge a 'new relationship'.(IHT 29-02-96) The president of the EU Council of Ministers said that "what we need is a global partnership, covering trade, but also politics,science and culture". While the EU Trade Commissioner stated earlier that "Europe has no intention of trying to enforce a social *diktat* on the rest of the world", he asserted that "the question of the relationship between social standards and trade needs to be looked at carefully and openly".(FEER 29-02-96 p.16)

The meeting finally took place on 1 and 2 March 1996. Senior officials of the participating states would hold follow-up talks in Brussels on 25 July 1996.(IHT 2/3-03-96)

The meeting agreed to launch an Asia-Europe Partnership for Greater Growth to cover expanded trade, investment, technology, scientific, educational and cultural exchanges. It did not establish a new organization nor did it set firm targets for economic liberalization. It was agreed to reconvene in Britain in 1998 and in South Korea in 2000, with foreign, economic and possibly finance ministers meeting in the interim, as well as businessmen, officials and experts. The meeting also decided to back a Malaysian-coordinated study to build an integrated Asian railroad network, and to form an Asia-Europe Business Forum. It also decided to set up an Asia-Europe Foundation in Singapore to promote exchanges between think-tanks, peoples and cultural groups, and an Asia-Europe University Program to develop better understanding of the cultures, histories and business practices of both regions.(IHT 04-03-96)

North Korea – US

On the occasion of the opening of a Korean War memorial in Washington in July 1995 the US president said that further US efforts to improve ties with North Korea would be contingent upon North Korea's willingness to talks with South Korea.

Later in early 1996 the same assurance was again given by the US national security advisor to allay fears that the US might deal with North Korea behind the South's back, especially in connection with the US decision to contribute a symbolic $2 million to famine aid in North Korea.(IHT 06-02-96; FEER 10-08-95 p.22)

A US delegation was to visit North Korea beginning 23 September 1995 to discuss setting up a liaison office. This was part of the North Korea-US 'Agreed Framework' (5 AsYIL 545). It was expected that the first US mission would be set up at the German embassy which had ample room.(IHT 07-09,28-09-95)

The US began to alter US policy towards North Korea since late 1995. It believed that North Korea, suffering under food shortage and longer-term economic problems, might some time collapse as East European governments did in the late 1990s. Such change should be made more gradual, and a decision to provide $2 million of food was to be seen in this context.[*see supra* p. 370](IHT 12-02-96)

The two countries agreed to start talks on the production and sale of missiles on 19 April 1996 in Berlin.(IHT 19-04-96)

A US emissary was sent to North Korea in an effort to entice North Korea to accept the US proposal for quadrulateral peace talks.(IHT 25/26-05-96)(*see infra* p. 423)

North Korea - Russia

Russia announced on 7 September that it would abolish a 1961 Treaty of friendship, co-operation and mutual assistance with North Korea that obliged Russia to military intervention in case North Korea come under attack. A foreign ministry spokesman said that the agreement "has become outdated and does not correspond to new realities in Russia, in Russian-Korean relations and in Northeast Asia". The treaty had been renewed automatically every five years, but could be revised or canceled one year before the expiration date.(IHT 08-09-95)

After the Treaty expired on 10 September 1995, discussions between the two countries produced a new draft treaty based 'on friendly relations.' The new accord removes a key element in the old treaty which called for either side to come to the other's aid in the event of an armed attack.(FEER 05-10-95 p.14)

South Korea - Russia

The visit by the Russian prime minister to Seoul in late September 1995 resulted in a Declaration on the Promotion of Trade, Economic, Scientific, and Technological Co-operation. Under the Declaration the two countries agreed, *inter alia*, to seek the implementation of large-scale joint projects, such as the development of gas deposits in Siberia, and the laying of gas pipelines to Korea.

The Declaration also referred to Korean support for Russian membership in APEC. Further, reference was made to an agreement on the resolution of part of the outstanding Russian debts, which was signed on 10 July 1995. The two countries would also encourage mutual private investment and the conclusion of agreements between their respective institutions and companies dealing with air, sea and other transportation, promote exchanges of economic, scientific and technological information, develop co-operation in the field of basic and applied science research, further protection of each other's intellectual property rights, further economic and other exchanges between provinces of the two countries, and reinforce co-operation within the framework of the international economic system and international financial institutions.(Korea Times 29-09-95)

Indonesia - New Zealand

New Zealand apologized to Indonesia after several incidents of burning of the Indonesian flag by East Timorese activists demanding independence for East Timor, and following Indonesian protest.(IHT 16/17-09-95)

Legality of Japan's annexation of Korea in 1910

In response to a question in the Japanese parliament on 9 October 1995 the prime minister said that the Japanese-Korean annexation treaty of 1910 had been concluded and carried out following proper procedures and had been 'legally effective'. [The treaty was in fact signed under duress by a Korean prime minister who was widely considered a Japanese puppet]

The South Korean government immediately rejected these remarks. A South Korean foreign ministry statement said: "The government has made it clear time and again that the Korea-Japan annexation treaty was enforced on the Korean people against their will, so the treaty was null and void".(IHT 11-10-95) The Japanese

prime minister later expressed regret over his remarks but did not retract them, while admitting that the parties were not on an 'equal footing'.

As a result of the incident a planned Japanese-Korean summit meeting at the UN was scrapped and an annual South Korean-Japanese parliamentarians' meeting scheduled for November 1995 was shelved.(IHT 13-10,19-10-95)

Restatement of Chinese policy

The Chinese president in his speech on the occasion of the 50th UN anniversary celebration warned other countries against dictating China's internal politics, especially on Taiwan.(IHT 25-10-95)

Indonesia - Israel

The normalization of Indonesian-Israeli relations progressed with the second meeting of the heads of state in New York in October 1995. The meeting came two years after the Israeli prime minister briefly visited Jakarta in 1993.(FEER 02-11-95 p.13)

Iran - Bangladesh

The Iranian president made an official 4-day trip to Dhaka in October 1995. His delegation promised to build an oil refinery and a liquefied petroleum gas plant in Bangladesh, worth $1 billion. The visit was part of a three-country Asian tour aimed at boosting Iran's ties with Vietnam, the Philippines and Bangladesh.

During the Dhaka visit, Iran managed to successfully broker a tripartite transit deal involving Bangladesh, Iran and Turkmenistan. Under the agreement, Turkmenistan would be allowed to ship goods via Iran and Bangladesh and vice versa. Bangladesh would also be allowed to ship goods through Turkmenistan to other Central Asian republics.(FEER 26-10-95 p.74)

China - South Korea

The Chinese president came to South Korea on 13 November for a five-day visit, to discuss security on the Korean Peninsula. It was the first trip to Seoul by a Chinese head of state since diplomatic ties were established in 1992.

The two countries signed an agreement under which China could benefit from a Korean Economic Development Cooperation Fund, set up in 1987 to offer soft loans to Korean companies investing in developing countries in the region.

In his speech to the South Korean National Assembly the Chinese president pledged that China would "never take part in an arms race, never engage in expansion, never seek hegemony". (IHT 01-11,14-11,15-11-95)

China - North Korea

It was reported that North Korea rejected a proposed state visit by the Chinese president. The Chinese wanted to balance the visit of the president to South Korea.(FEER 30-11-95 p.12)

Pakistan-Iran friction on Afghanistan

The Pakistani prime minister paid a visit to Iran early November 1995 to try to end a dispute with Iran over Afghanistan.

Iran had been alarmed by the rapid rise of the Sunni Muslim Taleban militia in Afghanistan, and accused it of being supported by Pakistan and the US. Pakistan denied the allegations.(IHT 07-11-95)

Japan - US

On the occasion of a visit by the US president to Japan in April 1996 two declarations were issued, one on security matters [*see infra*,p. 427] and another on expansion of co-operation on global issues as earlier included in a joint statement of July 1993, by adding food shortages, terrorism, infectious diseases, democracy, technological education and natural disasters.(IHT 18-04-96)

In an address to the Japanese parliament during the above visit the US president urged Japan to forge an alliance with the US for the next century and to develop an international leadership role. Besides he strongly defended the US' presence in Asia.(IHT 19-04-96)

South Korea - Japan

In an off-the-record briefing in November 1995 the Japanese minister in charge of the management and coordination agency said about the period of Japanese colonization of Korea: "During the colonial period, Japan also did good things". This remark was angrily rejected by both South and North Korea. The row threatened a bilateral meeting scheduled between the Japanese prime minister and the South Korean president at the Osaka summit of the APEC on 18 November.(IHT 11/12-11-95)

The minister concerned resigned some days later.(IHT 14-11-95)

The South Korean president and the Japanese prime minister held a meeting at the Korean island of Cheju on 23 June 1996 aimed at improving ties. The impetus for the meeting was the joint hosting of the 2002 (football) World Cup.(IHT 22/23-06,24-06-96)

India - France

India postponed a meeting of the Indo-French Joint Commission planned for late November 1995, allegedly because of French plans to sell Mirage fighter aircraft to Pakistan.(*supra* p.339) It would have been the first meeting of the commission in four years.(IHT 17-11-95)

India - China

On the occasion of a visit by the chairman of the Chinese National People's Congress to India the two countries pledged to strengthen economic ties and resolve their border dispute.(IHT 18/19-11-95)

China - Japan

On the occasion of a visit by the Japanese foreign minister to China the Chinese foreign minister reiterated that awareness of the past was the key to unlocking a better future, and expressed the hope that the Japanese government could fully recognize the

importance and sensitiveness of the historical issue, and would treat properly questions in this regard. The Japanese minister underscored his country's commitment to view the country's wartime past in a 'correct manner' and said that the development of relations between Japan and China was the highest purpose of Japan's foreign policy.(IHT 20-12-95)

China - Japan - US
(*see*: Military alliance, *infra* p. 429)

Iran - Russia

During a visit to Iran the Russian deputy prime minister called for an increase of economic and trade ties between the two countries. Joint financial commissions were set up and agreement was reached on banking structures and expanding economic and technological co-operation. It was reported that a 10-year economic co-operation agreement was being prepared.(IHT 28-12-95)

China - Russia

It was reported that in the context of improving relations the two countries agreed in September 1995 to cease aiming nuclear weapons at one another.(IHT 30/31-12-95/01-01-96)

The Russian president visited China in late April 1996. The relationship between the two countries was called a 'strategic partnership' towards the 21st century.

During the visit the two countries concluded 14 agreements, many of which reiterated earlier ones yet to be implemented. They ranged from trade deals and nuclear energy co-operation to a partnership to fight crime. Besides a declaration gave expression to a joint stand on major regional and international problems, while an agreement among China, Russia and three Central Asian republics (*see infra*) contained confidence-building measures along their common borders. A most notable agreement provided that Russia and China would set up a telephone hot line linking the two capitals.

The two presidents also agreed to renew efforts to remove the existing controversy over the demarcation of the 4,300-kilometre common border. This demarcation would take place under a 1991 border agreement (1 AsYIL 274).(IHT 25-04,26-04-96;FEER 23-05-96 p.40)

China-Russia-Central Asia
(*see also*: Borders)

The presidents of China, Russia, Kazakhstan, Kyrgyzstan and Tajikistan signed a treaty on 26 April 1996, stipulating that the military forces of the five countries would not attack each other, inform each other of any exercises, and establish friendly ties.(IHT 24-04,27/28-04-96;FEER 02-05-96 p.17)

Iran - Syria

The foreign minister of Iran acknowledged on 3 January 1996 that there were differences between Iran and Syria, apparently on Syrian efforts to make peace with Israel. Iranian officials and the press had been sharply rebuking Syria for resuming

peace talks with israel and backing the United Arab Emirates in a territorial dispute with Iran (2 AsYIL 379).(IHT 04-01-96)

India - Pakistan

The Indian foreign minister said that India was ready to resume bilateral talks with Pakistan, stalled since January 1994. He welcomed a statement by Pakistan's prime minister that Pakistan was keen on further dialogue with India. He ruled out any third party role on bilateral issues.(IHT 16-01-96)

Upon the istallation of a new Indian cabinet early June 1996 the Pakistani prime minister appealed for bilateral talks to stabilize the subcontinent to which the Indian prime minister responded positively, writing: "As we approach a new millennium, I believe there is a historic opportunity for us who are at the helm of affairs in our respective countries to give a lead in this direction".(IHT 10-06-96)

Singapore - Australia

Increasingly close ties between the two countries over a broad spectrum, from security to trade and investment, had paved the way for a wide-ranging bilateral agreement to be formally concluded shortly under the name "Singapore-Australia New Partnership".(IHT 17-01-96)

China - Vatican

It was reported that China launched new efforts to revive talks with the Vatican on ending their 45-year-long rift. But China still demanded that the Vatican should cut its links with the Taipei government. Earlier talks had broken down because of the 1989 Tiananmen incident.(IHT 29-02-96)

China - Haiti

During the UN Security Council discussions on the extension of a UN force mandate to support the new Haitian government, China tried to mess up the plans by opting for a maximum of 1,200 instead of the requested 1,900 troops, by way of punishing Haiti for its ties to Taiwan.[Canada made up for the missing 700 by promising to send them at its own expense](IHT 2/3-03-96)

Iran - Western powers

Iran was accused by the US of being involved in recent suicide bombings in Israel and Jerusalem that had taken place since late February 1996. The bombings were claimed by the Muslim 'Hamas' organization. The US alleged that Iran had provided "encouragement, funding and perhaps some direction" which was denied and rejected by Iran as being 'baseless', 'uncorroborated', 'reckless' and 'irresponsible'.

France called in the Iranian ambassador to protest Iran's gloating over the bombings ('divine retribution'), but Germany and the UK said they would prevail with the policy of 'critical dialogue' adopted by the EU towards Iran in 1992, rather than follow the US demands for the complete isolation of Iran.(IHT 07-03-96) France later also adhered to this view. At a conference on terrorism on 13 March 1996 in Cairo the US and Israel tried to have Iran singled out for condemnation but failed to obtain the necessary support.(IHT 15-03-96)

Japan - North Korea

In a letter to Japanese officials in Tokyo, North Korea requested talks on boosting aid and normalizing relations between the two countries. (FEER 28-09-95 p.15) The Japanese prime minister confirmed in early April 1996 that preparatory discussions between the two countries were under way for the resumption of talks on normalizing relations. In this context the three coalition parties in Japan might send a mission to South Korea to seek the latter's understanding before resuming such talks.

The two countries had held eight rounds of talks since 1991. The most recent talks took place in November 1992, and broke down when Japan brought up the case of a Japanese woman allegedly abducted by North Korea to train spies.

The talks followed a landmark visit by leaders of the (Japanese) Liberal Democratic Party and the Social Democratic Party to North Korea.(IHT 04-04-96)

Vietnam - Cambodia

The Vietnamese prime minister visited Cambodia on 10 April 1996 for talks including the issue of the poorly defined border. (*see*: Borders) (IHT 09 and 11-04-96)

China - France

The Chinese prime minister arrived for a visit in France on 9 April 1996. It was the first visit by a Chinese prime minister in 12 years. The visit resulted in the signing of deals worth $2 billion, including an order for $1.5 billion worth of Airbus passenger planes.(IHT 10 and 11-04-96; FEER 25-04-96 p.16)

China - Southeast Asia
(*see also*: Association of South East Asian Nations)

China proposed to issue a joint declaration of principles on the maintenance of good relations.(IHT 16-04-96)

China - Sri Lanka

The Sri Lankan president made a state visit to China from 20-26 April 1996. (FEER 23-05-96 p.14)

Malaysia - Singapore

Singapore's Senior Minister said that reunification with Malaysia could be possible as Malaysia developed its economy, since growing prosperity lessens racial tensions between Chinese and Malays in both countries. He mentioned as one of the conditions for a merger the adoption by Malaysia of a policy of 'meritocracy' similar to Singapore in which no race has a privileged position; another condition was that Malaysia had to pursue Singapore's goal of bringing maximum economic benefits to its people. In reaction, the Malaysian prime minister said that at the moment "the likelihood of that happening is remote".(FEER 20-06-96 p.17)

China - Germany

As a consequence of a German parliamentary resolution critical of China's Tibet policy in June 1996 (*see*: Specific territories within a state:Tibet), China withdrew an invitation for the German foreign minister to visit China in July 1996.(IHT 26-06-96)

(NON-)INTERFERENCE
See also: Diplomatic and consular inviolability

Alleged interference in Afghanistan by Pakistan

In a letter of 10 September 1995 the foreign minister of Pakistan reacted to Afghan allegations about Pakistani interference in the internal affairs of Afghanistan, particularly its support to the Taleban movement in the latter's conquest of western parts of Afghanistan.

The letter denied Pakistani involvement, and posed that the continuance of the armed conflict in Afghanistan was in fact attributable to the fact that the Kabul government had reneged on its commitment to relinquish power on 21 March 1995 and to hand over power to an interim mechanism. According to the letter the accusations against Pakistan were in fact an attempt to justify a mob attack on the Pakistan embassy at Kabul on 6 September 1995.(*supra* p. 352)

The letter recalled that Pakistan followed a policy of strict neutrality and non-interference in Afghanistan's internal affairs. While emphasizing that a solution to the Afghan problem had to emerge from the Afghans themselves, Pakistan had, as an immediate neighbour, a vested interest in peace and stability as this would enable 1.6 million Afghan refugees in Pakistan to return to their country.(A/49/962-S/1995/786)

In a letter of the Afghan government to the UN Secretary General of 14 September 1995 it was alleged that "the western parts of Afghanistan, including the city of Herat, have been overrun by the Pakistani militia, backed by Pakistani regular air and ground forces, in collusion with the mercenaries known as Taliban, forged by the Pakistani Interservice Intelligence, in an attempt to impose the subsequent transfer of power to a Pakistani-approved regime in Kabul".

The letter referred to "incontestable reports saying that hundreds of Pakistani military personnel marched inside the city" and to "these acts of aggression". It called attention to the point that "the situation developing out of this direct aggression will bear grave and irreparable consequences for peace and security in our region".(S/1995/795)

In letters of 12 October and 12 November 1995 the Afghan foreign minister again accused the government of Pakistan of interference in the internal affairs of Afghanistan by their backing of the Taleban forces, allegedly "under the direct control of the Pakistani Government". (UNdoc. S/1995/88,S/1995/950, S/1995/950, S/1995/961)

US objections against Thai ministerial posts

The US warned that relations with Thailand could be strained if drug-tainted politicians were appointed to posts in a new cabinet to be formed as a result of recent parliamentary elections in Thailand. While the dominant Thai party described the warning as an interference in Thai internal affairs, the US embassy in Bangkok said "the US

govenment has no intention of interfering" in the formation of the [Thai] government".(IHT 06-07-95)

Thai ambassador visits Myanmar dissident

The Thai ambassador on 3 August 1995 visited the Myanmar dissident AUNG SAN SUU KYI, being the first ambassador from an ASEAN country to do so.(IHT 04-08-95)

Dalai Lama meeting with US president
(see infra, p. 455)

US covert actions against Iran

The US government agreed to accept a bill from the Congress authorizing secret spending of up to $20 million for a small-scale covert action program aimed at "moderating" the government of Iran, including cultivating new opponents to the regime. The bill does not authorize any spending for lethal military aid to anti-Iran forces.

The US government had resisted the funding of any program aimed at overthrowing the Iranian government, but agreed with a less ambitious program.(IHT 23/24/25-12-95)

Anonymous weapons drop in India

There had been a clandestine and unexplained drop of arms near the east Indian town of Purulia in West Bengal on 17 December 1995. As a result controls over aircraft flying over India were tightened. On 22 December an aircraft, believed to have carried out the airdrops, was forced by the Indian Airforce to land in Bombay. The six crew members, consisting of West and East Europeans, were detained. According to Indian news reports arms had been purchased in Bulgaria, of which two consignments were left in Pakistan, one was dropped near Purulia and a fourth was dumped in the sea off Thailand.(IHT 27,28-12-95)

Upon Indian allegations that Pakistan was involved the Pakistani foreign minister said that "[i]t has become a knee-jerk habit of the Indian leadership to blame Pakistan for all their ills".(IHT 29-12-95)

Intervention in Pakistani crisis

It was reported that the US State Department stepped up behind-the-scenes talks with the Pakistani prime minister and the opposition Muhajir Qaumi Movement to resolve the escalating crisis in Karachi. The prime minister of Pakistan was also told by the Japanese government during her state visit to Japan in mid-January that unless she solved the crisis, Pakistan cannot expect more Japanese private investment. (FEER 01-02-96 p.12)

European Parliament invites Indonesian separatists

The Indonesian foreign minister protested against an invitation by the European Parliament to separatist rebels from the Indonesian province of Irian Jaya, stating that it was an interference in Indonesian internal affairs.(IHT 27-03-96)

Accusations of Iranian intervention in Bahrain

Iran recalled its ambassador to Bahrain on 6 June 1996 as "a sign of protest against the accusations of the Bahraini government that Iran was backing a plot to topple it". Bahrain had also recalled its ambassador to Tehran.(IHT 07-06-96)

INTERNATIONAL AGREEMENTS

See: Asia-Pacific Economic Co-operation, *supra* p. 341.

INTERNATIONAL ECONOMIC RELATIONS AND TRADE

Japan-US pact on flat glass

Japan and the US signed a market-opening pact in December 1994 in the long-disputed area of flat glass (5AsYIL 446). Under the so-called framework agreement, Japanese distributors pledged to start handling foreign glass products, while Japan accepted 'objective criteria' to measure the extent of market access. In the first quarter of 1995, imports soared 75% from a year earlier, although foreigners still claim only 5% of the market for flat glass.(FEER 20-07-95 p.69)

Vietnam – EU trade on textiles

A textile agreement between Vietnam and the EU became void at the end of 1995 because of non-ratification by Vietnam. The agreement was meant to boost Vietnam's textile quota to the EU by about 15%, and to give Vietnam more leeway in switching goods from one quota category to another. Officials said Vietnam stood to gain $50-70 million annually in textile exports. In return Vietnam was supposed to lower import tariffs on some European goods and to guarantee minimum exports of certain raw materials, such as silk, to European importers.(FEER 08-02-96 p.12)

Kodak complaint of Japanese unfair practices

The US government announced it would launch an investigation into allegations by Eastman Kodak Co. about unfair practices by Fuji Photo Film Co. Kodak contended that the film market in Japan was dominated by four wholesalers loyal to Fuji. The investigation would take place under sec.301 of the US Trade Law, allowing the US Trade Representative up to one year to conduct a review of the charges and seek a market-opening agreement with Japan. If no deal is reached, the government can impose trade sanctions against Japan.

Kodak claimed that Fuji and the Japanese government had conspired to block its entry into the Japanese photographic $9.37 billion-a-year market. The Japanese countered that Kodak's film is not particularly cheap and that when prices were the same, Japanese consumers simply preferred the better-known Fuji. The current market shares in Japan were: Fuji, roughly 70 percent; Kodak, 10 percent.

Tariffs on imported rolls of film hovered at 40 percent for years and quotas restricted those imports. In 1990, however, Japanese tariffs had fallen to zero, while the US still imposed a duty of 3.7 percent on imported film. In 1970 guidelines were issued, factually preventing Kodak from expanding and driving others out. The guidelines called for low rebates to distributors, an infrequent delivery schedule to keep

costs low for young companies, and strict accounting for payments among manufacturers, wholesalers and retailers. The measures were intended to ensure that competition would be fair, but were seen by the American side as proof of collusion between the Japanese government and Japanese industry to restrict US products.(IHT 04 and 06-07-95,22-02-96)

On 13 June 1996 the US announced it would file complaints with the WTO for alleged collusion of the Japanese government with Fuji to block sales in Japan by Eastman Kodak and other non-Japanese rivals. The shift in strategy might mean that the US was bowing to the accusation that it had used the threat of sanctions too often and was undercutting the authority of the WTO.(IHT 14-06-96; FEER 27-06-96 p.54)

US most-favoured-nation treatment for Cambodia

The US granted most-favoured-nation status to Cambodia on 11 July 1995.(IHT 13-07-95)

World financial services agreement

Japan joined the EU and 70 other countries in forging a global financial services agreement that was intended to become effective in August 1996 for an initial 17-month period.

The treaty became possible when Japan and South Korea, which had been hesitating, announced their agreement. India, Pakistan and Egypt finally also agreed to join.

The US so far had preferred not to join since it refused on 29 June 1995 to extend blanket most-favoured-nation status to other countries because some Asian and Latin-American countries had not offered enough market-opening measures.(IHT 27-07-95)

Malaysia refrains from asking trade preferences

The Malaysian government announced on 17 August 1995 that it would not ask the US to retain special trade privileges under the Generalized System of Preferences when the US would decide to remove Malaysia from that system.(IHT 18-08-95)

South Korea - US

The US Trade Representative threatened to impose punitive tariffs on South Korean car exports to the US unless Korea announces market-opening measures. The US trade representative was expected to decide by 30 September 1995 whether to use a provision in the US trade law allowing investigation of the American car makers' complaints (Sec. 301). American trade officials also said that they may take their complaint to the WTO. American frustration with South Korea's import policies was shared by the EU.(FEER 05-10-95 p.80) The US move less than three months after the conclusion of a similar dispute with Japan reflected a determination to prevent other Asian countries from following Japan in building up exports behind the sanctuary of protected domestic markets. The US exported about 1,900 cars to South Korea in 1994, against South Korea exporting 206,000 vehicles to the US. In 1994 foreign car imports accounted for 0.3 percent of the Korean automobile market, in contrast to 5 percent in Japan, 38 percent in France and Germany, and 33 percent in the US.

South Korean and US negotiators reached agreement on 28 September 1995 and issued a memorandum of understanding, allowing foreign car-producers enhanced access to the South Korean market. According to a high Korean official "the basic

logic of the US demands, including the notion that Korea must import more American cars since Korea is selling huge quantities in the US, could have been questioned but political considerations had to take precedence".

The Korean concessions, including the reduction of the special excise tax on cars with engines larger than 2,000cc, would cut the cost of buying and driving an imported car in the first year by 15%. These changes were expected to have only minimal effect on the import of US cars. The import tax remained 8 percent.(IHT 20-09-95,29-09-95; Korea Times 29-09-95, Korea Herald 30-09-95; text MOU in KT 30-09-95)

China - US

(*see also*: Intellectual property)

The US Trade Representative decried the US trade deficit with China. The magnitude of the trade deficit as measured by the US was, however, criticized as understating the value of US exports to China while overstating the export figures for China. According to US officials the US trade deficit with China might reach $38 billion in 1995 and $45 billion to $50 billion in 1996. The US had a trade deficit of $30 billion with China in 1994, second to the $66 billion deficit with Japan. According to China these figures were exaggerated. Chinese data showed that the Chinese trade surplus in 1994 was only $7.4 billion and that of 1995 was $8.6 billion. The discrepancy was caused by the US practice of including re-exports from Hongkong as being goods originating from mainland China, and overlooking the fact of goods processed in China but imported from elsewhere. These processed goods accounted for 69 percent of China's exports to the US in 1994. The Brookings Institution in Washington, factoring-in the trade that passed through Hong Kong, said that the bilateral deficit would be $23 billion in 1995.(IHT 7/8 and 09-10-95,12-02-96; FEER 22-02-96 p.33, 30-05-96 p.50)

The US president on 20 May 1996 called for the unconditional renewal of MFN status for China, emphasizing that the US would continue to pursue a nuanced carrot-and-stick policy of engagement with China, which might at times produce apparently contradictory measures.(IHT 21-05-96)

Japan-US semiconductor trade agreement

(*see* AsYIL Vol.1 p.321, Vol.2 p.339, Vol.3 p.411)

As the 1986 US-Japan bilateral agreement to raise foreigner's share of the Japanese electronic chip market drew nearer to its expiration on 31 July 1996 (after renewal in 1991), there was disagreement between the two countries on whether to continue the bilateral approach to trade. The goals of the agreement had been achieved. American observers claimed that it was the pact that played a major role in allowing foreigners to break into the Japanese market; Japan argued that it was market forces that allowed the key objective of the agreement to be reached, the agreement should therefore be scrapped.

On 4 June 1996 the Electronic Industries Association of Japan (EIAJ) proposed the creation of a World Semiconductor Council, a voluntary private-sector body that would represent all the key players in the industry and examine trade flows and international standards for the next generation of computer chips. The chairman of EIAJ said that "some features of the current semiconductor agreement are not only unreal-

istic, but also in violation of WTO rules".The semiconductor agreement became the model for the US government's later 'results-oriented' approach to trade negotiations, rejected by Japan as 'managed trade'.(IHT 03-11-95; FEER 27-06-96 p.54)

Liberalization of China's foreign trade

The Chinese president on 19 November 1995 announced that two-thirds of the country's tariffs on imports would be cut by at least 30 percent in 1996. Even at the lower level, however, the duties would still be among the highest in APEC.(IHT 20-11-95) The announcement was confirmed in a decision of late December 1995 by which the average import tariff rate was reduced from 35 to 23 percent, beginning April 1996. The reduction would affect more than 4,000 of about 6,000 possible items. This was the biggest trade liberalization package since the country opened up in 1979.(IHT 29-12-95; FEER 07-12-95 p.44,48)

China-Japan trade imbalance

According to the Japanese finance ministry, China's trade surplus with Japan increased sharply to $12.27 billion in the first ten months of 1995, compared with $8.8 billion for the whole of 1994. However, according to Chinese statistics, which exclude trans-shipped goods via third-country ports like Hong Kong, the surplus over the first ten months of 1994 was only $300 million.(IHT 22-11-95)

EU charge of Chinese textile dumping

The EU started investigations into dumping charges against about 30 Chinese textile companies, accusing them of exporting unbleached fabric to Europe at below-market prices. The targeted products were, however, "under export quota restrictions by the EU". Similar dumping charges were made in 1994 but were dropped for lack of evidence.

China condemned the EU's practice of substituting figures from a third country to estimate the production costs of Chinese exports to ascertain whether dumping had occurred. This so-called surrogate approach, designed for countries where government-set prices do not provide a basis for estimating production costs, was considered to fail to take account of China's market-oriented reforms or low labour-costs.(IHT 11-03-96)

Phase-out of Multifibre Arrangement (MFA)

The implementation of a 1994 agreement to phase-out the Multifibre Arrangement was the subject of controversy between the EU and the US, on the one hand, and Asian textile exporters on the other. The 10-year phase-out began in January 1995 and would be completed in 2005. In a first stage 16% of the European and US textile trade was transferred out of the MFA and placed under the WTO general rules, 17% would follow in a second stage, 1998, and a further 18% in 2001. The remaining 49% would be transferred in 2005. Although the US and the EU had technically met the requirements of the phase-out agreement, it was argued that their action had no real liberalizing effect on the textile trade. The EU and the US had started to 'liberalize' items that were not under any quota restriction at all, and were in any case not commercially meaningful, representing, for instance, only 8% in value terms of EU imports from developing countries.

The EU's chief textile negotiator said that a more rapid dismantling of the MFA barriers could occur by 1998 when the next round of liberalization would begin, if Asian countries agreed to open their markets to European textiles and clothing. The International Textile and Clothing Bureau, which represents Asian and Latin American textile exporters, was against such deals, saying that "Asian countries made their market-opening commitments in the WTO and are implementing them".(FEER 11-04-96 p.74)

Chinese aircraft purchases from Europe

On the occasion of a visit by the Chinese prime minister to France in April 1996 China agreed to buy 33 Airbus aircraft at a price of $1.5 billion. Thus far it had bought or leased 24 planes with 16 more on order.(IHT 11-04-96)

Japan - European Union

The record high of EU-Japan trade of $119 billion in 1995, and the significant fall of Japan's trade surplus with the EU since 1993, was attributed to the EU's new approach to trade talks with Japan. In contrast to the US strategy of high profile ministerial encounters, the EU was organizing up to 30 low-key 'technical meetings' with their Japanese counterparts every year to discuss trade problems. According to Japan's mission to the EU, "the trade-assessment mechanism is a useful vehicle for discussing trade problems".(FEER 16-05-96 p.74)

South Korea - European Union

On 10 May 1996, the EU Trade Commissioner complained to the WTO that South Korea excluded EU companies from bidding to supply telecommunication equipment, and that it favoured American suppliers over European ones. South Korea had signed two bilateral deals with Washington that, according to the EU, gave US telecom-equipment suppliers assured access to Korean markets. It was alleged that as a result AT&T held an estimated 20% of the South Korean market for switching equipment.

South Korea promised to open the sector to EU suppliers by 1998; but then it was said that these suppliers would need an additional two years to complete qualification and certification procedures.(FEER 30-05-96 p.48)

Japanese insurance market

An agreement between Japan and the US that would open the Japanese insurance market to foreign companies was concluded in 1994, but was vague and open to different interpretations. A Japanese law for the implementation of the agreement that had come into force on 1 April 1996 was considered by the US to be in violation of the agreement. The regulation would allow insurance companies working in the field of 'life' or 'non-life' insurance [the normal division in the insurance business] to enter the other field through subsidiaries, causing US fear that they would be able, by using local competition forms, to diminish the existing US share (about 5 percent) of the market.

[In Japan, the second-largest insurance market in the world, insurance companies are generally required to offer the same rates. When a new product is proposed, all competitors generally are entitled to offer it at the same time. So competition has taken

other forms, such as offers to make stock purchases or loans or to donate computers.](IHT 12-04-96)

Asian share of Japanese export

For the first time ever Japan exported more goods to its Asian neighbours than to the US and Europe combined. Exports to Asian countries rose 16.9 percent to $192.78 billion in the financial year ending March 1996, while combined exports to the US and Western Europe totaled $188.80 billion.

A sharp rise in production in Asia by Japanese industries had led to a jump in Japanese exports to the region of components and manufacturing machinery. US and European regulations requiring Japanese transplants to use a specified amount of local components had made moving to Asian countries a more attractive option.(IHT 19-04-96)

Indonesian preferential tax and tariff treatment (The 'Timor' case)

The EU trade commissioner said that preferential tax and tariff treatment granted by the Indonesian government to domestic car companies on 28 February 1996 was in violation of WTO rules. The measure introduced a national car project by granting an exemption from import duties on components and a luxury sales tax for local car producers who (none as yet) could meet certain requirements, such as regarding local content. Simultaneously, the Indonesian government assigned the implementation of the national car project to Kia-Timor Motors, an Indonesian-South Korean joint venture, which was accorded 'pioneer status'. As such the company was granted an exclusive 3-year exemption of the duties and tax, provided the 'Timor' would attain a 20% local content after the first year, 40% at the end of the third year and 60% by September 1999. Apparently since Kia-Timor could not yet meet the requirements, the Indonesian president on 4 June 1996 promulgated decree No. 42/1996 that allowed the importation of 45,000 Timor sedans from South Korea during an initial period until June 1997. It was expected that by then the joint venture is expected would have opened its first production line near Jakarta.

Diplomats said that the decree contravenes WTO most-favored-nation rules that forbid importing from one country at terms more favourable than from other countries.

Eager to avoid damage in relations the Japanese ambassador to Indonesia said that the national car issue and the subject of Japanese development aid were entirely separate issues.(IHT 24-04,06-06,28-06-96; FEER 20-06-96 p.60)

Unilateral trade sanctions

The Japanese government called for an end to the use of unilateral trade sanctions as such action was inconsistent with the rules governing international trade and the WTO. While acknowledging the problems with which a trading country may be faced it was against the method of solving them.(IHT 20-05-96)

Days later the US through its ambassador to the OECD rejected the Japanese call and "reject[ed] entirely the notion that these actions are aimed at undermining the multilateral trading system".(IHT 21-05-96)

Foreign law firms in China

For the first time since early 1995 China authorized 16 foreign law firms to open offices, bringing the number of foreign law firms in China to 73: five from the US, the others from Japan, Hongkong, Britain, Italy and Jordan.(IHT 28-06-96)

Foreign law firms in Vietnam

The Vietnamese ministry of justice released a circular (No.791) which obliged the 25 foreign law firms operating in Vietnam to apply for a 'branch' license by January 1996, or else leave Vietnam. According to the circular, law firms are eligible to open up to two branches, and must employ at least two full-time lawyers with at least five years experience. They may not hire Vietnamese lawyers but they may employ Vietnamese 'law trainees' for up to three years, although the trainees may not advise on Vietnamese law. Foreign law firms are stricly limited to giving advice on international [and foreign? Ed.] law. All questions concerning Vietnamese law must be referred to local firms, which are not allowed to employ foreign lawyers. Exclusive partnerships between Vietnamese and foreign law firms were prohibited.(FEER 09-11-95 p.34)

US embargo on import of wild shrimps caught without turtle excluder devices (TEDs)

On 19 April 1996 the US banned the importation of shrimps, effective 1 May 1996, from countries not certified to be using TEDs or comparable devices (for the protection and conservation of sea turtles). Asian countries or territories potentially affected were Bangladesh, Pakistan, Sri Lanka, Thailand, Indonesia, Philippines, Singapore, Malaysia, Myanmar, Vietnam, China, Taiwan, Macao, Japan, South Korea, and Hongkong. The eight countries with the largest shrimp export to the US are Thailand, India, Indonesia, Mexico, Malaysia, Brazil, South Korea and Japan.

Senior officials of ASEAN met on 23 April 1996 and concluded that the embargo should not be imposed on any ASEAN country, basically because these countries had already extensive sea turtle conservation programs in place, because the record in the region showed that incidental catches of sea turtles had been minimal, and that most trawlers in use in the ASEAN region were devoted to fishing while the catch of shrimp was only an incidental activity. These conclusions were conveyed to the US secretary of state on 10 June 1996.

Besides, Thailand, Malaysia, India and Pakistan had entered into consultations with the US under Article 22 of the GATT, alleging that the US "fails to carry out its obligations and commitments under several provisions of the GATT and WTO Agreements, including but not limited to Art.I, Art.XI and Art.XIII of the GATT, and that such failure is not justified by any provision of the said Agreement, including the exceptions set forth in Art.XX of the GATT". The case found strong support in the GATT Panel report of 3 September 1991 regarding *US Restrictions on Imports of Tuna* where the panel ruled unequivocally that "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own".

At the bilateral level the Thai side by note of 5 September 1996 asked the US to remove Thailand from the list of countries subjected to the embargo on grounds of the minimal rate of incidental catch of sea turtles in Thai waters, equaling that in the US. Meanwhile Thailand introduced new rules including, *inter alia*, the requirement that

shrimp trawl nets used in Thai fishery waters be installed with a Thai Turtle-Free Device (TTFD) or a comparable device. As a result the US state department certified that Thailand fulfilled the conditions under the US law.

INTERNATIONAL LAW IN THE MUNICIPAL LEGAL ORDER

Japanese courts and international treaties

A number of Japanese living near an American air base filed a law suit against the Japanese and US governments, demanding a ban on night flights and damages. In the past local residents had sued the Japanese government for failure to protect them from the noise. In 1993, the Japanese Supreme Court ruled that they could claim compensation from the Japanese government, but it refused to order a ban on night flights because they arose from the US-Japan Security Treaty and were considered to be beyond the jurisdiction of the court.(IHT 11-04-96)

ISLAM

See: United Nations

JAPAN'S MILITARY ROLE

Participation in UN peace-keeping

Japan was to send troops to the Middle East in February 1996 for the first time in its history, as part of a UN peacekeeping force in the Israeli-occupied Golan Heights.(IHT 26/27-08-95; 07-09-95 p.13) The troops would be dispatched to participate in the UN Disengagement Observer Force. A total of 113 members would help provide transport, medical care, and other logistical support until August 1996.(FEER 14-12-95 p.13)

Constitutional ban on collective security arrangements; scope of 'the Far East'

Successive Japanese governments had interpreted the Japanese constitution as prohibiting the country to enter collective security alliances. This was affirmed by the current governing coalition, which also decided not to expand the definition of the notion of 'the Far East' as the area protected by US forces under the Japan-US security treaty. According to the Japanese interpretation 'the Far East' includes the Philippines.(IHT 23-04-96)

JOINT DEVELOPMENT AND JOINT VENTURES

See also: Foreign investment

Thai-Malaysian landbridge

The Malaysian prime minister proposed that Malaysia and Thailand should develop a so-called landbridge as an alternative to the searoute through the Strait of Malacca. Under the $10 billion project, an oil pipeline would be built and an existing

road upgraded into a superhighway. Both the pipeline and the road would run in a northeastern direction from Pulau Paya in Langkawi, Malaysia, crossing the Thai border and ending at Songkhla, located on the Gulf of Thailand.

The aim is to save tankers a passage through the Straits of Malacca and reduce the risk of collissions and spillage. Currently, 10,000 million barrels of oil pass through the Straits each day, and this was expected to increase to 16,000 million barrels by the year 2000.

Officials and businessmen from Japan, South Korea, Indonesia, Malaysia and Thailand met in Kuala Lumpur in late September 1995 to discuss the idea. Thai support for the proposal was ambiguous because it clashes with Thailand's plans for a similar but far more ambitious development program that would be entirely within Thai territory. The all-Thai program would link Krabi on the Andaman Sea just north of the entrance to the Strait of Malacca with Nakhon Si Thammarat on the Gulf of Thailand.(IHT 04-07-95; Japan Times 28-09-95)

Fibre-optic cable system for six countries

It was reported that China would build a transnational fibre-optic cable system linking it to Vietnam, Laos, Thailand, Malaysia and Singapore. The 7,000-kilometer land cable would provide 30,000 digital telecoms upon completion in 1997. Each country would set up its own section of the cable.(FEER 03-08-95 p.57)

Gas pipeline projects

Japan's Mitsubishi, China's National Petroleum and Esso China, an affliate of America's Exxon, agreed to study the feasibility of building an 8,000-kilometre pipeline to transport natural gas from Turkmenistan through China to supply the Asia-Pacific region. The construction cost would run to $10 billion.(FEER 31-08-95 p.65)

A 778-kilometre pipeline, which had been under construction for three years, linking a gas field in the South China Sea south of Hainan island, to Hongkong, was closing to completion in late-1995. The ambitious gas pipeline project is a joint venture between China National Offshore Oil Corp., Kuwait Foreign Petroleum Exploration and Atlantic Richfield Oil Co.(Arco). The pipeline is expected to supply about 85 billion cubic meters of gas over 20 years and generate about $12 billion in revenue.(FEER 05-10-95 p.17)

Vietnam's joint venture deals in the South China Sea

Vietnam rejected an offer by US-based Crestone Energy to cooperate in exploring for off-shore oil in an area which both China and Vietnam claim. China had awarded Crestone the right to explore part of the disputed area. A Vietnamese official said that Crestone would have to withdraw from its contract with China before any joint development plans could be considered.(FEER 26-10-95 p.15)

On 10 April 1996, PetroVietnam leased two off-shore exploration blocks located about 400 kms from Ho Chi Minh City to the American company Conoco. The area granted by the leases total more than 14,000 square kilometres and, significantly, cover more than half of the zone which China leased to US company Crestone in May 1992.(*see also infra*, p. 458)(FEER 25-04-96 p.65)

Sino-Korean commercial airplane project

The ambitious venture by South Korea and China to jointly produce mid-sized 80 to 110-passenger commuter jets with a foreign partner became the focus of heated marketing campaigns by aircraft manufacturers in the US and Europe. The project has its roots in the Phoenix Programme, a South Korean plan to build a 50-seat commuter plane. Seoul's plan received a boost at a summit meeting in Beijing in March 1994, when the South Korean president promised the Chinese premier to turn Phoenix into a Sino-Korean venture.(FEER 03-08-95 p.50)

China and South Korea delayed the choice of a Western partner for their planned project until the end of 1995 because of wrangling over the location of the final assembly plant. The foreign partner would take a stake of about 20 percent in return for technology and assistance. The Korean consortium and government would jointly hold a stake of between 35 and 40 percent in the project. The Chinese side would match that stake, and a smaller Asian investor would hold 10 percent.(IHT 13-10-95) The decision on the Western partner was later delayed.(IHT 28-12-95)

Kazakhstan oil exploitation

The 1993 oil exploration contract between Kazakhstan and Chevron (*see* 3 AsYIL 380 and 434) was obstructed by a dispute over the construction of a pipeline from Tengiz to the West. The Caspian Pipeline Consortium, founded by Oman and including Amoco Corp.,Pennzoil Co., Unocal Corp., Exxon Corp. and McDermott International Inc., as well as companies from the UK, Norway, Russia, Saudi Arabia, Oman and Turkey had the exclusive rights to build the pipeline, but had difficulty in arranging the financing. Kazakhstan had begun talks with Mobil Corp. on selling half of its stake in the joint venture, while Chevron, Mobil and other energy companies had started talks on helping finance the pipeline.(IHT 14/15-10-95,07-03 and 12-03-96) On 27 April 1996 a protocol was signed under which the original consortium founders (Russia, Kazkhstan, Oman) would have their shares scaled back to a combined 50 percent. Eight oil companies would take on the remainder and commit themselves to funding the entire cost of the pipeline.(IHT 29-04-96)

Korean-Russian and Sino-Russian energy deals

The Russian premier's visit to Seoul in September 1995 had given new impetus to the plan to pipe Russian gas to South Korea via North Korea. South Korea and Russia agreed to put up $10 million each for preliminary surveys. The project, expected to cost $22 billion, would reach completion by 2010.(FEER 30-11-95 p.28)

It was announced in Moscow in December 1995 that China and Russia would sign a framework accord in March 1996 on a project to pump Russian oil and gas to China via Mongolia. The deal would be worth about $8 billion.(IHT 29-12-95) According to a later report the two countries would sign an agreement in principle for the joint development of a pipeline to bring natural gas from Siberian fields to the Yellow Sea.(IHT 19-04-96; FEER 02-05-96 p.17)

China's interest in joint development

It was reported that China had asked Thailand for information about the Joint Development Area that was set up between Thailand and Malaysia to resolve an

overlapping maritime boundary in 1994 (4 AsYIL 479). The Thai foreign minister said that the Chinese were interested in the concept and had asked for relevant documents. He also pointed out that recent Beijing statements on its claims in the South China Sea had referred to joint development of seabed resources, which is the central point of the Thai-Malaysian agreement.(FEER 11-01-96 p.12)

Sino-French aircraft development

During the Chinese prime minister's visit to France in April 1996 it was agreed that China would cooperate with Airbus Industrie in the development of airplanes for short-haul flights. A declaration of intent was signed to carry on discussions.(IHT 15-04-96)

JURISDICTION
See also: Military co-operation

Indonesian police investigation in Germany denied

It was reported that German authorities refused to grant entry visas to Indonesian police searching for evidence of who was behind a series of demonstrations against President Suharto during his state visit to Germany in April 1995. It was also reported that the investigators wanted to look into the role of an outspoken former Indonesian parliamentarian who claimed that he was merely a bystander in a protest demonstration in Hannover.(FEER 06-07-95 p.12)

Rape incident in Okinawa

Three US servicemen were suspected of abducting and raping a 12-year old Japanese girl on 4 September 1995 in Okinawa. Although the US ambassador expressed the US government's regret and promised to cooperate with the Japanese authorities in bringing the perpetrators of the crime to justice, the three suspects were in US custody, and the US authorities initially refused to turn them over to Japanese police because of a clause in the status of forces agreement (SOFA) that bars such a rendition until the Japanese prosecution had issued a formal indictment. The incident led to an outcry, and the governor of Okinawa urged the agreement to be revised. The suspects were later turned over on 29 September.(IHT 22-09-95,30-09/01-10-95)

Okinawa is host to 27,000 US military personnel and three-quarters of the 135 US military facilities in Japan, for which Japan pays about 70 percent of the non-salary cost.(IHT 06-10,01-11-95)

[The US had gradually given up its claims to jurisdiction. In 1957 a US soldier shot and killed a Japanese woman. Eventually the US handed over the suspect and he was convicted. The soldier was never sent to prison, however, but was released and returned to the US. Nowadays American soldiers are routinely convicted in Japanese courts and serve their sentences in Japanese prisons.](IHT 26-10-95)

Revision of Japan-US Status of Forces Agreement

Japan and the US agreed on 21 September 1995 that they would review the criminal jurisdiction procedures for US troops stationed in Japan. The resulting negotiations centered on Japanese requests to allow Japanese police officers to take custody

of US military suspects before indictment. On 25 October 1995 the US agreed in a 'side letter' to hand over to the Japanese police American troops accused of murder or rape. This was possible under the existing provision that the US "will give sympathetic consideration" if Japan requests custody of US military suspected of murder or rape who have not yet been indicted. The new policy brought the SOFA with Japan in line with the SOFAs between the US and its European and Canadian partners.(IHT 22-09-95,30-09/01-10-95,09-10-95,26-10-95,15-11-95)

South Korea-US Status of Forces Agreement

Following Japanese efforts South Korea also asked the US to revise the SOFA between the two countries that dated from 1966. The SOFAs between the US and host countries regulate jurisdiction over US personnel stationed on foreign soil. While the Japanese SOFA calls for US officials to turn over American suspects to the custody of local authorities when they are indicted, under the Korean SOFA the US is obliged to transfer jurisdiction only after conviction and the completion of all appeals.

A senior US official explained that while the US was willing to renegotiate its SOFA with Japan, it would resist any such revision with South Korea. He said that not only are the reasons for US troop presence in the two countries different; the cost-sharing for the US military presence in the two countries is also different: Japan provides 75% of the cost of US bases in its territory while South Korea pays only 35%.

Early November 1995 the two sides agreed to establish a panel which would make recommendations in order to put it in line with the new Japan-US arrangements. The panel was likely to recommend that the US authorities hand over military personnel accused of rape or murder.(IHT 20-10,03-11-95; FEER 23-11-95 p.14)

SALMAN RUSHDIE death edict

A top Iranian official who was scheduled to become Iran's next president, said that Iran would not send death squads to carry out the death edict against SALMAN RUSHDIE, but it would never give the pledge in writing because it would hurt the country's honour.(IHT 01-11-95)

On 15 February 1996 the European Parliament urged Iran in a resolution "to make a written declaration that it will not carry out the *fatwa* and will seek to restrain Iranian citizens from trying to do so".(IHT 16-02-96)

German investigation of Iranian official

The German federal prosecutor launched an investigation of the Iranian minister for security affairs who headed the Iranian intelligence service, relating to his alleged role in the death of four Iranian Kurdish opposition militants in Berlin in September 1992 (the so-called *Mykonos*-case named after the Berlin restaurant where the killing took place). It was the first time that a Western country had directly challenged a senior Iranian official over a 'terrorism' incident.(IHT 11-12-95) In a later development a German investigating magistrate issued a warrant for the arrest of the Iranian minister for intelligence and security affairs on suspicion of murder and attempted murder although, as was reported, the German foreign ministry had sought to block the issuance of the warrant.(IHT 16/17-03-96)

KOREAN WAR

North Korean-US talks on m.i.a.

North Korea and the US held talks in January 1996 on the return of remains of US servicemen killed during the Korean War. The two sides agreed in principle on joint excavation teams for the remains, but disagreed on US insistence that they start work immediately. North Korea and the US began discussing the search for the remains of lost US soldiers in 1987.(IHT 16-01-96; FEER 18-02-96 p.13)

In May 1996 the two countries reached agreement to start their joint search efforts later in the year. It was reported that the US would pay $2 million to North Korea for its efforts to locate the remains of more than 8,100 American and UN personnel reported missing as a result of the Korean war.(FEER 18-02-96 p.13, 23-05-96 p.15)

North Korea had so far delivered more than 200 sets of US remains. The US had reimbursed North Korea for the cost of search and recovery.(IHT 11/12-05-96)

North Korean proposal for peace accord

North Korea on 22 February 1996 proposed a temporary peace accord with the US to replace the truce agreement of 1953, pending a definitive peace treaty.(IHT 24/25-02-96)

North Korean repudiation of demilitarized zone

North Korea issued a statement on 4 April 1996 according to which it would 'give up its duty' of controlling the demilitarized zone, while accusing South Korea of moving military personnel and equipment into the buffer zone. The statement said that North Korean personnel and vehicles would no longer bear distinctive insignia and markings when entering the six kilometre demilitarized zone.(IHT 05-04-96) Between 5 and 7 April 1996 North Korean soldiers entered into the demilitarized zone but pulled out some hours later. The armistice agreement allows no more than 35 soldiers and 5 officers to enter the DMZ.(IHT 08-04-96) China urged North Korea on 9 April 1996 to respect the truce and to desist from intruding into the DMZ. It expressed the hope of North and South Korea reaching a peace agreement.(IHT 10-04-96)

Proposal for four-country peace talks

The South Korean and US presidents on 16 April 1996 publicly invited North Korea to take part in quadrilateral talks involving the two Koreas, the US and China to achieve permanent peace on the Korean peninsula. China responded positively to the proposal. In agreeing to four-way talks, South Korea had relaxed its insistence that any peace treaty be negotiated only by the two Koreas. The two leaders rejected North Korea's bid for separate exclusive talks with the US to replace the 1953 armistice agreeement with a new peace treaty. (IHT 17-04-96;FEER 25-04-96 p.13)

LABOUR

Linkage of labour standards with international trade

The ASEAN Foreign Ministers Meeting in July 1995 reiterated their stand to oppose any attempt to link labour standards with international trade and to use labour standards

to interfere in the internal affairs of developing countries. They welcomed the position adopted by the ILO Governing Body's Working Party to suspend any further discussion of the link between international trade and social standards. However, they renewed their call on the ILO to undertake a thorough review of labour standards, some of which are not relevant to the economic and labour environment of developing countries on the road to industrialization.(Joint Communique; A/49/953-S/1995/652)

The agenda of the ministerial-level meeting of the WTO to be held in Singapore in December 1996 was the subject of controversy, although the meeting was still a year away and although the WTO Director-General said that the agenda would focus on 'non-controversial' issues.

The US trade representative said that the debate should include the social clause - linking labour rights to trade. The EU trade commissioner insisted that it was legitimate to look at issues such as child labour, prison labour and the right of association. On the other hand, an Asian dipomat said that the focus should be on market access - implementing the trade liberalization commitments made in the Uruguay Round.(FEER 11-01-96 p.76)

A communique issued on 3 April 1996 after a G-7 summit [including Japan] on employment held in France noted the importance of "enhancing core labour standards around the world". Asians, on the other hand, expressed cynicism about the attempt to make a connection between labour standards and trade. The Pakistani envoy to the EU, for example, said that labour-rights pressures were driven by the desire of Western unions and industrialists to protect jobs and market share; while the proper way to deal with social conditions in Asia was to give more development aid.(FEER 18-04-96 p.82)

MIGRANT WORKERS

See also: Diplomatic protection

Phase-out of migrant workers

The president of the Philippines on 13 July 1995 ordered a phase-out on the deployment of Philippine domestic workers and bar girls abroad. The presidential commission's report which was endorsed by the presidential order, called for an "immediate phase-out of all women domestic helpers in the Middle East" and a stop to the deployment "of the so-called women entertainers for Japan, Greece and Cyprus". However, on 17 July the president retreated and decided to have another panel investigate the conclusions of the earlier panel.(IHT 14-07,18-07-95)

Migrant workers in Malaysia

The Malaysian government said in mid-1995 it would allow foreigners working in construction, manufacturing, hotels and restaurants to stay for up to five years. The current limit was two years plus a one year extension. More than 1 million overseas workers in Malaysia sent home $1 billion in 1994.(FEER 27-07-95 p.83)

A Malaysian-based non-governmental organization, *Tenaganita*, called a press conference on 27 July 1995 and offered details about alleged maltreatment of illegal immigrants in Malaysia's holding centres for illegals. It was said that between January

and May 1995 at least 10 illegal immigrants, mostly from Bangladesh, had died from contageous diseases caused by unsanitary conditions. According to Tenaganita, the majority of the illegal immigrants, who came to Malaysia for work, were frail, weak and undernourished.

Malaysian authorities denied the allegations and the Bangladeshi High Commission in Kuala Lumpur declined to comment.(FEER 10-08-95 p.26) The following month, the Malaysian government froze the recruitment of Bangladeshi workers, saying it sought to prevent their exploitation by both local and Bangladeshi agents.(FEER 24-08-95 p.15)

Joint investigation into death of maid

A Filipino maid in Singapore plunged from a ninth-storey appartment on 7 December 1995 and died. The Philippine president formed a group to investigate the incident, whereupon the Singapore government offered to cooperate in the investigation.(IHT 22-12-95)

Migrant workers in Asia

It was reported that while migrant workers have become part of the Asian economic progress, the current migration of Asians to other Asian destinations was unprecedented. An Australian study conservatively put the number of migrants across East Asia at 2.6 million. As of May 1996, Southeast Asian figures showed, for example, that Brunei had 49,000 migrant workers from 4 neighboring countries; Malaysia had at least 1 million guest workers, Thailand hosted 400,000 Myanmarese workers; and Singapore had 170,000 migrant workers. The same figures showed that the Philippines sent out 372,000 workers to its neighbors; Indonesia, 653,000; and Thailand, 122,000.(FEER 23-05-96 pp.60-66)

MILITARY ALLIANCES

Japanese contribution for US military bases

Japan and the US on 27 September 1995 signed a five-year agreement on the Japanese financial contribution for US military bases in Japan, replacing an earlier agreement of 1991. The agreement would be called Special Measures Agreement. Japan's contribution would be $5 billion a year, implying an increase of $0.5 billion annually. The figures pale in comparison to the initial demands by the US which has about 100 bases and 40,000 troops in Japan.(IHT 14-09-95; Japan Times 28-09-95)

US bases on Okinawa

The Japanese government had requested the governor of Okinawa that Okinawa landlords renew land leases with the US forces on the island, but the governor refused to agree, arguing that after fifty years since the end of the war there should be a reduction of the bases. The attitude of the islanders was strongly influenced by the rape incident (*see*: Jurisdiction). The governor's stance led the Japanese prime minister to declare that he would force the landowners to renew the leases, some of which would expire in March 1996. Okinawa hosts over 28,000 US troops and is home to 40 bases that occupy a fifth of the island. The governor of Okinawa vowed not to sign docu-

ments ordering land owners to extend base leases, although the prime minister can overrule him.(IHT 31-10,22-11-95,24-01-96; FEER 23-11-95 pp.16-22) [The US-Japan Security Treaty requires the Japanese government to provide land, facilities and part of the cost of stationing US servicemen in Japan.]

In December 1995 the Japanese government sued the Okinawa governor, and on 25 March 1996 the Naha branch of the Fukuoka High Court ruled that the governor must sign the leases. If he continued to refuse, the prime minister would be permitted to sign in his place.(IHT 26-03-96; FEER 04-04-96 p.13)

Meanwhile the US secretary of defense said the US was prepared to scale back the US military presence on Okinawa, but adjustments had to be made within the constraint of keeping a total of 47,000 troops in Japan. He said in essence that the bases were in Japan for the latter's good more than that of the US.(IHT 01 and 2-11-95) It was reported in February 1996 that the US had proposed to the Japanese government to transfer part of its air base from Okinawa to the Japanese mainland.(IHT 19-02-96)

The US agreed on 12 April 1996 to return a major American air base, Futenma Air Station at Okinawa, in five to seven years. It was later announced that about 20 percent of the land at Okinawa used for US purposes would be returned to Okinawans. In return, Tokyo agreed to supply spare parts and services to the US when taking part in joint training exercises and peacekeeping missions.(IHT 15-04-96; FEER 25-04-96 p.13, 02-05-96 p.15)

Revision of Japan-US security arrangements

On the occasion of the US president's visit to Japan in April 1996 the two countries agreed to revise their security arrangements by increasing Japan's role in defending its own security. Japan would share transportation, refueling, food, water, clothing, medical care, maintenance and weapons parts during peacetime. Japan would also reconsider Japan's military role during a war in East Asia involving US forces. Japan promised to 'review' the joint guidelines for military co-operation that were agreed upon in 1978.(IHT 16-04-96; FEER 02-05-96 pp.14-16)

The 1960 Japan-US security treaty was established for the purpose of enabling the US to defend Japan from communist aggression, without Japan having to maintain a military force for purposes other than self-defence. The treaty said nothing about Japanese assistance in case of conflict with third countries. The premise of the arrangement was that defence was provided against countries with which neither the US nor Japan would develop significant economic ties. The treaty was originally a 10-year pact but was extended indefinitely in 1970, subject to one year's notice of termination by either side.

While some questioned the continued usefulness of the Japan-US Security Treaty, a former Japanese prime minister expressed his belief that the Treaty, which was originally motivated as an anti-Soviet treaty, must seek to play a new post-Cold War role: as the linchpin in the Japan-China-US security 'trialogue'. A US government security adviser agreed that the US-Japan pact was the keystone to stablity in East Asia and must be adapted to new missions.

A US-Japan joint security declaration was scheduled to be signed during a summit in November 1995. The declaration would mark the culmination of 13 months of diplomatic work which was seriously shaken by the public furore in early September when three US servicemen raped a 12-year old girl in Okinawa. Because of the US

president's absence at the APEC summit in Osaka (*see supra*: APEC), the signing of the US-Japan declaration was postponed.(FEER 23-11-95 pp.16-22; 30-11-95 p.16)]

The "US-Japan Joint Declaration on Security - Alliance for the 21st Century" of 17 April 1996 provides, *inter alia*:

> "1. . . . The two leaders agreed that the future security and prosperity of both the United States and Japan are tied inextricably to the future of the Asia-Pacific region.
>
> . . .
>
> 2. For more than a year, the two governments conducted an intensive review of the evolving political and security environment of the Asia-Pacific and of various aspects of the US-Japan security relationship. On the basis of this review, the President [of the US] and the Prime Minister [of Japan] reaffirmed their commitment to the profound common values that guide our national policies: the maintenance of freedom, the pursuit of democracy, and respect for human rights.
>
> . . .
>
> THE REGIONAL OUTLOOK
>
> 3. . . . [I]nstability and uncertainty persist in the region. Tensions continue on the Korean Peninsula. There are still heavy concentrations of military force, including nuclear arsenals. Unresolved territorial disputes, potential regional conflicts, and the proliferation of weapons of mass destruction and their means of delivery all constitute sources of instability.
>
> THE US-JAPAN ALLIANCE AND THE TREATY OF MUTUAL CO-OPERATION AND SECURITY
>
> 4. . . . [T]he President and the Prime Minister . . . reaffirmed that the US-Japan security relationship, based on the Treaty of Mutual Cooperation and Security between the United States and Japan, remains the cornerstone for achieving common security objectives, and for maintaining a stable and prosperous environment for the Asia-Pacific region as we enter the twenty-first century.
>
> (a) The Prime Minister confirmed Japan's fundamental defense policy as articulated in its new "National Defense Program Outline" adopted in November,1995, which underscored that the Japanese defense capabilities should play appropriate roles in the security environment after the Cold War.
>
> . . .
>
> The leaders again confirmed that US deterrence under the Treaty of Mutual Co-operation and Security remains the guarantee for Japan's security.
>
> (b) The President and the Prime Minister agreed that continued US military presence is also essential for preserving peace and stability in the Asia-Pacific region. The leaders shared the common recognition that the US-Japan security relationship forms an essential pillar which supports the positive regional engagement of the US.
>
> . . .
>
> On the basis of a thorough assessment, the US reaffirmed that meeting its commitments in the prevailing security environment requires the maintenance of its current force structure of about 100,000 forward deployed military personnel in the region, including about the current level in Japan.

(c) The Prime Minister welcomed the US determination to remain a stable and steadfast presence in the region. He reconfirmed that Japan would continue appropriate contributions for the maintenance of US forces in Japan, such as through the provision of facilities and areas in accordance with the Treaty of Mutual Cooperation and Security and Host Nation Support.

. . .

BILATERAL CO-OPERATION UNDER THE US-JAPAN SECURITY RELATIONSHIP

5. The President and the Prime Minister, with the objective of enhancing the credibility of this vital security relationship, agreed to undertake efforts to advance co-operation in the following areas:
   (a) Recognizing that close bilateral defense co-operation is a central element of the US-Japan Alliance, both governments agreed that continued close consultation is essential.

   . . .

   (b) The President and the Prime Minister agreed to initiate a review of the 1978 Guidelines for US-Japan Defense Cooperation to build upon the close working relationship already established between the US and Japan.
   The two leaders agreed on the necessity to promote bilateral policy coordination, including studies on bilateral co-operation in dealing with situations that may emerge in the areas surrounding Japan and which will have an important influence on the peace and security of Japan.
   (c) The President and the Prime Minister welcomed the April 15, 1996 signature of the Agreement . . . Concerning Reciprocal Provision of Logistic Support, Supplies and Services Between the Armed Forces of the United States of America and the Self-Defense Forces of Japan, and expressed their hope that this Agreement will further promote the bilateral cooperative relationship.
   (d) Noting the importance of interoperability in all facets of co-operation between the US forces and the Self-Defense Forces of Japan, the two governments will enhance mutual exchange in the areas of technology and equipment, including bilateral cooperative research and development of equipment such as the support fighter (F-2).
   (e) The two governments recognized that the proliferation of weapons of mass destruction and their means of delivery has important implications for their common security. They will work together to prevent proliferation and will continue to cooperate in the ongoing study on ballistic missile defense.

   . . .

6. . . . In particular, with respect to Okinawa, where US facilities and areas are highly concentrated, the President and the Prime Minister reconfirmed their determination to carry out steps to consolidate, realign, and reduce US facilities and areas consistent with the objectives of the Treaty of Mutual Cooperation and Security. . . .

REGIONAL CO-OPERATION

7. The President and the Prime Minister agreed that the two governments will jointly and individually strive to achieve a more peaceful and stable security environment in the Asia-Pacific region. In this regard, the two leaders recognized that the engagement of the United States in the region, supported by the US-Japan security relationship, constitutes the foundation for such efforts.

> The two leaders stressed the importance of peaceful resolution of problems in the region. They emphasized that it is extremely important for the stability and prosperity of the region that China play a positive and constructive role, and, in this context, stressed the interest of both countries in furthering co-operation with China. Russia's ongoing process of reform contributes to regional and global stability, and merits continued encouragement and co-operation. The leaders also stated that full normalization of Japan-Russia relations based on the Tokyo Declaration is important to peace and stability in the Asia-Pacific region. They noted also that stability on the Korean Peninsula is vitally important to the United States and Japan and reaffirmed that both countries will continue to make every effort in this regard, in close co-operation with the Republic of Korea.
>
> . . .
>
> GLOBAL CO-OPERATION
>
> 8. The President and the Prime Minister recognized that the Treaty of Mutual Co-operation and Security is the core of the US-Japan Alliance, and underlies the mutual confidence that constitutes the foundation for bilateral co-operation on global issues. . . ."
>
> (Courtesy US Department of State)

The commander of US forces in Japan said in May 1996 that the review of guidelines would take up to two years, and would include Japan's potential role in a military conflict in Korea and in mine-sweeping operations in regional waters. In the discussions on this review between the Japanese prime minister and his coalition partners the former referred to the formal Japanese position ruling out arrangements on collective self-defence as being against the constitution. The review would consider topics such as rescuing Japanese nationals overseas and accepting refugees.(IHT 14-05-96; FEER 06-06-96 p.21) Other concrete issues were: the use of civilian airports by US planes in a war, the use of Japanese military planes or warships to pick up refugees from elsewhere, the right of Japanese ships or planes to fire in international waters if they were about to be fired on, the assistance by Japan to an American warship which was being attacked.(IHT 29-05-96)

China's position vis-à-vis the Japan–US security arrangements

The spokesman of the Chinese foreign ministry gave a reaction in early November 1995 to security talks which were to be held between Japan and the US later in the month, saying that "when drafting or amending their national defence policies, these countries should do so to maintain regional peace and stability instead of undermining it".(IHT 08-11-95)

The issue was raised again in April 1996 in connection with the impending visit by the US president to Japan and both countries' review of their security treaty. During his visit to Japan the Chinese foreign minister expressed the hope that the US visit would not cause 'new problems', and warned Japan not to use its alliance with the US to try to contain China. The Japanese prime minister assured that Japan-US security agreements were not directed against China.

It was generally believed that the triangle relationship between China, Japan and the US was the main issue in maintaining stability in Asia.(IHT 02-04,04-04-96)

With regard to the Japan-US arrangements, China warned Japan against a military build-up as it would be bound to cause concern and vigilance among Asian nations. Yet the Chinese foreign ministry said it did not believe that the US-Japan security agreement was targeted at China.(IHT 19-04-96)

It was reported that the US went out of its way to reassure China that it was not a target of the security pact. The Chinese embassy in Washington was briefed in advance on the US-Japan announcements. (FEER 02-05-96 p.40) Japan decided on 19 April 1996 to send special envoys to China and South Korea to calm fears that it would expand its military role in Asia as a result of the agreements reached at the US-Japan summit.(IHT 20/21-04-96)

MILITARY CO-OPERATION

Status of forces agreements

(*see*: Jurisdiction)

Philippine - US

The Philippine and US navies held special-warfare training exercises near the contested Spratly islands in July 1995. The Philippine defense department and military said that these exercises were 'normal' and were conducted every year, and had nothing to do with the tensions over the Spratly islands.(IHT 25-07-95)

Yet according to a US official, Philippine-US defence relations had been boosted as a result of the Chinese occupation of Mischief Reef (5 AsYIL 495). It was reported that the two countries had been working closely together to determine Philippine defence needs and possible US aid. Thus the late July 1995 training of Philippine troops by US navy commandos and reports about the Philippines considering buying some of the F-16 fighter planes which were not delivered by the US to Pakistan (5 AsYIL 486 and *supra* p.338).

The two sides were also completing negotiations on a status-of-forces agreement that would govern visits to the Philippines by US servicemen. In addition, it was reported that the two countries were close to agreeing upon a deal to refit and resupply US vessels in the Philippines. Lastly, along with neighbouring countries, discussions had been held on the possibility of holding multilateral naval exercises. The US-Philippine Mutual Defense Board held a meeting at the end of June. (FEER 03-08-95 pp.22-23)

Sino-US military ties

China on 31 October 1995 called for the resumption and improvement of Chinese-American military ties, as such co-operation was essential to securing global peace and stability. Earlier China had suspended military exchanges in retaliation for the US decision to allow a visit to the US by the Taiwanese president. Senior military exchanges were scheduled to resume in November 1995.(IHT 01-11-95)

A US naval ship sailed into the port of Shanghai on 31 January 1996 for a friendly port call, the first after 1989.(IHT 01-02-96)

A delegation from the National Defence University in Washington was due to go to Beijing in late April 1996 under a long-term agreement with counterparts in China to exchange ideas, faculty members, and students. But the Chinese side postponed the

visit indefinitely in response to the US decision to call off a visit by the Chinese defence minister to the US in March.(FEER 09-05-96 p.12)

China pledge to stop military assistance to Myanmar

The defence minister of Thailand said China had reassured Thailand that it would stop helping to build up the Myanmar military.(FEER 09-11-95 p.15)

Indonesia – Australia military co-operation
(*See*: Regional security, *infra* p. 445.)

Stationing of Singapore air force planes in Australia

The two countries were preparing an arrangement under which much of the Singapore air force might be stationed in Australia over the next few years. In 1994 Singapore moved its air force flying training school to Western Australia.(IHT 17-01-96)

Chinese aid to Cambodian forces

China agreed to provide military training and $1 million in aid to the Cambodian armed forces. It had provided uniforms, boots and medicine since 1992. The Cambodian secretary of national defence said that "co-operation between the two armies and countries is becoming stronger and stronger".

Assistance to the Khmer Rouge ceased after China signed the 1991 Paris peace accord.(IHT 24-04-96; FEER 09-05-96 p.28)

MINORITIES

Muslims in Thailand

Instead of struggling for a separate state centered on the muslim province of Pattani in Southern Thailand, local muslim politicians decided to exploit Thailand's democracy to build up a muslim presence in parliament and to lobby for cabinet positions. The muslim MP for Pattani said: "Before, we played separatists; now we're playing politics". At the same time, a new generation of religious teachers were working hard to strengthen Islam in their community, saying they sought by peaceful means to foster better relations with the Thai government. On the economic development of the Thai muslim region, it was reported that many Muslims were hopeful about the planned 'growth triangle', encompassing southern Thailand, northern Malaysia, and the adjacent province of North Sumatra in Indonesia.(FEER 11-04-96 p.29)

MISSILE TECHNOLOGY

Chinese missile tests
(*see*: Divided states: China, *supra* p. 362).

Chinese missile exports to Pakistan

On 12 and 13 June 1996, Washington-based newspapers disclosed US intelligence reports that Pakistan had deployed Chinese-made M-11 ballistic missiles, and that the

country had probably completed the development of nuclear warheads for the missiles. A spokesman from the Chinese foreign ministry dismissed the Washington press reports as 'totally groundless.'

Under the 1978 Missile Technology Control Regime, 28 countries agreed not to export missiles capable of carrying a 500-kilogram warhead with a range of more than 290 kms (*see* 1 AsYIL 270). The M-11 has a range of 290 kms but can carry a payload of 800 kgs. China is not a signatory to the MTCR but a 1990 US law requires the US government to impose sanctions on a country that violates the accord regardless of whether that country is a party to the MTCR.(FEER 27-06-96 p.14)

Indian tests and Pakistani response

India announced that it successfully tested a longer-range version of the surface-to-surface Prithvi missile on 27 January 1996. It was the 15th test of the indigenously developed, liquid-fueled missile since 22 February 1988, but the first to boost a range beyond 100 miles.(IHT 29-01-96) A few days later the Pakistani president warned that Pakistan might be forced to build its own missiles if India continues its program. He emphasized that the Indian missile is capable of carrying nuclear warheads, which was the reason for Pakistan's proposal for a zero-missile regime in South Asia. Pakistani military officials said that India was planning to deploy the missiles along the western Indo-Pakistan border.(IHT 01-02-96; FEER 22-02-96 p.14)

Iranian test

Iran tested a Chinese anti-ship missile in the Arabian Sea outside the Gulf on 6 January 1996. The missile had a range of up to 100 kilometres.(IHT 31-01-96)

Russian sale of SS-18 missile technology to China

The US urged Russia and Ukraine not to sell China the technology for the intercontinental SS-18 missile which has a range of 11,000 kilometres. The US defense secretary said such sales could violate both the Strategic Arms Reduction Treaty (START) and the Missile Technology Control Regime. Under START parties to the treaty may not transfer strategic offensive weapons to non-treaty states, and the MTCR put further constraints to the technology that may be transferred to non-parties, like China.

It was reported that China had asked Russia to supply SS-18 rocket boosters for commercial space launching. The Treaty allows launching from the territory of a non-party state as long as the party to the treaty retains 'possession and control' of the launcher.(IHT 22-05-96)

MONETARY MATTERS

IMF assistance to Myanmar

(*see*: Economic co-operation and assistance, *supra* p.369)

Mutual currency support

In the wake of the Mexican peso crisis, the central bankers from Hong Kong, China, Japan, Thailand, Indonesia, the Philippines, Malaysia, South Korea, New Zealand and Australia gathered in a historic meeting in Hongkong on 20 November

1995. In a series of bilateral agreements, to none of which Japan was a party, many of the central banks agreed to help each other if their currencies come under fire from global speculators. They put in place a system in which they would fend off attacks on their currencies by translating their reserves quickly into cash. The agreements would allow the banks to borrow cash (US dollars) from each other by pledging their securities as collateral. The dollars could then be used to buy their own currency in the market.

There were doubts, however, that it would really be possible to manage the exchange rates in view of the extremely vast amounts involved in the foreign-exchange market. It was conceded that the mutual support would be as much moral as financial.(IHT 18/19-11-95; FEER 07-12-95 p.70)

Three months later, an agreement was reached between Hong Kong, Singapore and Japan to coordinate central-bank interventions in currency markets. The accord would, *inter alia*, allow the Bank of Japan to ask its counterparts to intervene in dollar-yen trading to prevent Japan's fragile economic recovery from being derailed by the strong yen.(FEER 29-02-96 p.55) Japanese financial authorities had called for a regional system aimed at stabilizing currencies, which would be some kind of Asian repurchase pact. The point would be to support regional currencies if they were being sold off suddenly, in case of a crisis like that in Mexico. The issue would be discussed at an APEC meeting in March 1996.(IHT 22-02-96)

In April 1996 it was reported that the Japanese finance ministry and the Bank of Japan had signed bilateral securities-repurchase agreements with their counterparts of Australia, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Hongkong. Under the agreements, central banks needing US dollars would be able to borrow foreign reserves or dollars from each other against collateral in the form of US government securities. Formally the securities are being bought for an amount of cash under an agreement to sell them back at a specified date for a specified amount.(IHT 26-04-96)

IMF loan to Pakistan

The IMF agreed to extend a $600 million emergency stabilization loan to Pakistan provided the government trimmed its expenditures, reduced its budget deficit, restrict its domestic borrowing and shore up its foreign currency reserves. On 13 Dec 1995, the IMF agreed to release the first tranche of $200 million, with the rest to be released over 15 months provided the government met IMF targets.

In June 1995, a $1.5 billion loan agreement of 1993 was cancelled because Pakistan failed to meet IMF conditions.(FEER 11-01-96 p.76)

Partial convertibility of Chinese currency

The governor of China's central bank announced that current account convertibility of the yuan would be introduced by the end of 1996, making it easier for foreign companies to do normal, commercially related currency business with local banks and to repatriate profits. As conditions enabling such convertibility the governor mentioned political and economic stability, a balanced sheet for international payments, a stable exchange rate of the currency and abundant exchange resources. [The current account convertibility was to be distinguished from full convertibility, involving a free flow of capital in and out of Chinese stock and bond markets.]

The new system would replace the current one which requires companies to find individual counterparties with whom to exchange money in a series of designated swap centres. It would enable those in need of foreign exchange to access, via banks, a national foreign exchange market centred in Shanghai.(IHT 21-06-96)

NATIONALITY
See: Asylum, Hongkong, Refugees

NON-ALIGNED MOVEMENT

Eleventh summit meeting

The 11th summit meeting of the Movement was held in Colombia in October 1995. Fifty-two heads of state and government attended from the 113 member states. The admission of Turkmenistan and Eritrea as new members was on the agenda.

The communique issued at the end of the meeting called for more representation for Africa, Asia and Latin America in the UN Security Council.(IHT 19-10 and 21/22-10-95)

NUCLEAR CAPACITY
See also: Sanctions

Sino-Japanese talks

More than two months after Japan announced on 15 May 1995 it would reduce aid to China because of the Chinese nuclear test on that day, Japan proposed to hold discussions on nuclear matters, such as nuclear testing, disarmament and the Comprehensive Test Ban Treaty. The discussions were held on 25 July 1995.(IHT 19-07,26-07-95)

Reactions to French nuclear testing

The Japanese prime minister on 19 July 1995 accused France of 'betraying' non-nuclear countries by planning to resume nuclear tests. He announced that Japan would sponsor a draft resolution in the UN calling for a halt to such testing, and summoned the French ambassador in order to lodge a formal protest. He refrained, however, from a call to boycott French goods, as proposed by several Japanese politicians. Japan thus did not use its economic clout as it did toward China where it cut economic aid.(IHT 20-07,21-07-95) After the second French nuclear weapon test on 2 October 1995 the French ambassador was told by the Japanese foreign minister that he 'strongly regretted' that France did 'not understand Japan's consistent position' on the matter.(IHT 03-10-95)

The Philippine foreign minister said at the ASEAN Regional Forum meeting in early August 1995 that the members of ASEAN felt 'betrayed' by France, which agreed in May 1995 to an indefinite extension of the Nuclear Non-proliferation Treaty and yet proceeded with nuclear tests.

It was reported that when members of the ASEAN Regional Forum called for an immediate end to nuclear testing, the EU, represented by Spain, objected to the call.(FEER 10-08-95 pp.14-16,17-08-95 p.14-15)

In August 1995 the Maldives High Commission in Sri Lanka issued a statement, saying: "The Maldives is alarmed about the ecological outcomes of nuclear testing in view of the fragile ecosystem with which it is endowed".(IHT 10-08-95)

Taiwan's nuclear weapon capability

As tensions heightened between the mainland and Taiwan, the Taiwanese president answered to a question from a member of the National Assembly on Taiwan's future stance on nuclear weapons: "Everyone knows we had the plan before, but this issue drew international attention and affected the whole country's image. . . . Whether we need the protection of nuclear weapons - we should re-study the question from a long-term point of view".

According to the Asia-Pacific editor of Jane's Defense Weekly, "[t]hey had a nascent program with basic technological capabilities in both weapons and a delivery platform". The efforts were halted under pressure from the US and Japan in the 1980s.(IHT 29/30-07-95;FEER 10-08-95 p.21)

Implementation of North Korea light-water reactor accord

By way of implementation of the accord to provide North Korea with light-water reactors (*see* 5 AsYIL 545) a team of US, Japanese and South Korean officials left for North Korea on 15 August 1995 to inspect the possible site for one of the power stations.(IHT 16-08-95)

In the same context a ship carrying the first batch of the 100,000 tons of fuel oil for North Korea left for North Korea on 17 August 1995. Another 20,000-ton shipment would depart later in the month. The oil deliveries were being carried out under contract by a South Korean refinery and transported on Chinese ships. In November 1995 North Korea confirmed the shipping of the oil that had to be delivered. A second contract for the delivery of 11.8 million gallon would be carried out in late March 1996.(IHT 18-08,22-11-95,18-03-96)

In early September 1995 a team of US nuclear experts went to North Korea to discuss the treatment of spent nuclear fuel.(*see* 5 AsYIL 471)

Talks to work out details of the implementation of the agreement to provide North Korea with two nuclear reactors started in Kuala Lumpur on 11 September 1995 and continued in New York later in the month. The supply agreement (*see* 5 AsYIL 554) was finally signed on 15 December 1995.(IHT 15-12 and 16/17-12-95; Korea Herald 30-09-95) The consortium would provide North Korea with a 20-year, interest-free loan.(FEER 28-12-95/04-01-96 p.123)

In January 1996, the Korean Peninsula Energy Development Organization delivered 43,000 tons of oil to North Korea's power stations. 457,000 tons were left to be delivered overdue in 1996 because KEDO lacked the necessary funds.

KEDO needs $50-55 million a year. The US contribution for 1996 was meant to be $22 million but was not paid up. As a result South Korea and Japan were bearing all expenses, and it was hoped that other countries would contribute for the oil.(FEER 18-01-96 p.12)

Chinese nuclear tests

China conducted an underground nuclear test on 17 August 1995, but sought to defuse international criticism by reiterating that it was ready to stop such testing under a global ban. The previous Chinese test was on 15 May 1995. It was expected that China would conduct two tests in 1996 in addition to its 43 tests in the past years.

Japan made a strongly worded protest and threatened a further cut in its grant aid (*see*: Economic co-operation and assistance).(IHT 18-08-95,09-02-96; FEER 07-09-95 p.13)

On 8 June 1996 China conducted another nuclear weapon test in its underground Lop Nor test site in Xinjiang province, and said it would carry out one more test in September before joining an international moratorium on further tests.(IHT 10-06-96; FEER 20-06-96 p.13)

Russian nuclear fuel for Iran

Russia and Iran signed an agreement for the supply of nuclear fuel by Russia to Iran for ten years to be used in a nuclear power plant in southern Iran. The accord was supplementary to a contract to complete building the plant in Bushehr.(*see* 5 AsYIL 477)(IHT 25-08-95)

It was reported on 27 August 1995 that Russia would supply two 400-megawatt nuclear reactors to Iran. They were to be installed at the Neka nuclear research complex in northern Iran.(IHT 28-08-95)

Japanese breeder-reactor

(*see* 3 AsYIL 428)

Japan's breeder-reactor at Monju (Fukui Prefecture, north of Kyoto), the world's second largest, would start operations in late August 1995.(IHT 28-08-95) On 8 December 1995 an accident occurred, in which two to three tons of sodium leaked from the reactor's secondary cooling system because of corrosion, but no radioactive materials were discharged. As a result the reactor would be shut for at least six months. Plans for such breeder reactors, using plutonium, once supported by many experts, had been dropped by most countries. The head of the Japanese Nuclear Safety Commission said that unless the cause of the accident could be sufficiently determined and appropriate steps taken, fast-breeder reactors would not be used commercially.(IHT 11 and 18-12-95,26-02-96)

Cancellation of Sino-Iranian nuclear reactor deal

China had concluded an agreement with Iran in 1994 for the supply of two nuclear power reactors. (*see* 5 AsYIL 478) In September 1995 the Chinese foreign minister was reported to have told the US that China would cancel the contract. However, the Iranian foreign ministry denied these reports.(IHT 29-09-95)

South Korean nuclear weapons project in the 1970s

A South Korean member of parliament confirmed earlier reports according to which South Korea in the 1970s actively pursued a nuclear weapons project to establish a more independent military relationship with the US. The project was later dropped under US pressure in the early 1980s.(IHT 06-10-95)

Alleged Indian and Pakistani plans for nuclear tests

There had been rumours in US newspapers of Indian preparations for a second nuclear test, after its first one in 1974. According to reports India was excavating an underground shaft at its nuclear test side in the Rajistan desert. India dismissed the reports. It affirmed its nuclear capability but denied that it was preparing to conduct a nuclear test.(IHT 16/17-12,18- and 20-12-95,07-03-96)

It was later reported that the US government had quietly warned India that in case of an Indian nuclear test the US would, under the 1994 GLENN Amendment, cut off virtually all the economic benefits it offered. This law requires the US to cut off all economic aid, credits, bank loans and export licenses to any country, other than the five acknowledged nuclear powers, that tests a nuclear weapon. The law also dictates that the US oppose World Bank loans and all other international lending. Exceptionally the GLENN Amendment prescribes mandatory sanctions instead of entitling the president to grant a waiver.(IHT 17-01-96)

In early March 1996 US newspapers mentioned intelligence reports alleging that Pakistan planned its first nuclear explosion if India conducted such test. The Pakistani ambassador to the Geneva Disarmament Conference said in February 1996 that Pakistan "will be obliged to take the appropriate counter-measures to safeguard its security" in case of an Indian test. But a foreign ministry spokesman said that Pakistan had decided not to use its nuclear know-how for non-peaceful purposes.(IHT 07 and 08-03-96; FEER 11-04-96 p.28)

Nuclear energy projects in Asia

According to IAEA figures, of the 48 nuclear power plants under construction in the world, 17 were in Asia. China, Japan, South Korea, Taiwan, India, Indonesia, Pakistan, Vietnam and Bangladesh were among the countries which planned to expand their nuclear power programs or launch new ones.

The countries may allow international inspection of their nuclear power plants, but excluding their research reactors. India and Pakistan do not allow outside inspection of either. Japan, South Korea, Taiwan, Indonesia, Vietnam and Bangladesh have agreed to all inspections. As is the case with other declared nuclear weapon powers, China has signed the non-proliferation treaty but excludes military reactors used to make plutonium for weapons production.(IHT 12-01-96)

Indonesian plans for nuclear power

Indonesia was reported to be considering an offer from Canada to help building its first nuclear power plant, estimated to cost $2.1 billion. Canada was said to seek tax exemption for the first 10 years on the revenue earned from the electricity generated by the plant.

The site of the plant would be at Mount Muria in Central Java. According to Indonesian forecast Java would need a generating capacity of 27,000 megawatts by 2015, with 7,000 megawatts expected to come from nuclear-powered generators.(IHT 01-02-96)

Alleged Chinese exports for Pakistan's nuclear facilities
(*see also*: Sanctions, *infra* p. 447)

It was reported in early February 1996 that, according to the US CIA, China had exported to Pakistan in 1995 about 5,000 magnet assemblies for use in centrifuge machines that enrich bomb-grade uranium in a Pakistani nuclear facility. China and Pakistan initially denied the reports.(FEER 22-02-96 p.14, 07-03-96 p.32)

China reaffirmed its commitment to nuclear non-proliferation following a US decision on 10 May 1996 not to impose sanctions on it for the sale of the ring magnets to Pakistan. The Chinese foreign ministry said China would not transfer nuclear technology to 'unsafeguarded facilities' in the future.(FEER 23-05-96 p.15)

Resistance against expanded power of the IAEA

Germany and Japan resisted US efforts to expand the powers of the IAEA. The new powers would require nuclear installations to provide more detailed reports about domestic nuclear activity and about the imports and exports of material that can be used to make nuclear weapons. Besides, IAEA inspectors would acquire more sweeping search authority. Germany and Japan are of the opinion that the proposals would place unfair economic and financial burdens on the owners of nuclear power plants.(IHT 05-06-96)

Prospects for a comprehensive test-ban treaty

In 1995 the five declared nuclear powers had agreed on a commitment to complete a comprehensive test ban treaty (CTBT) in 1996, as a condition for the indefinite extension of the Nuclear Non-Proliferation Treaty by the international community. China and France indicated that their current tests would be their last.(FEER 01-02-96 p.29)

In the Geneva negotiations on the CTBT in early 1996 China said it wanted a treaty that would allow for 'peaceful nuclear exlosions', but the US proposed to have all nuclear test explosions banned. It offered China computer software to simulate the effects of a nuclear explosion in return for China agreeing to a nuclear test ban.(FEER 28-03-96 p.20) China announced on 6 June 1996 that while it held to its demand that a comprehensive test-ban treaty should exempt 'peaceful explosions' needed for scientific and economic development, it was prepared to put off a decision on the issue until the treaty would come up for a future review, possibly in ten years.(IHT 07-06-96)

The negotiations in Geneva on the CTBT entered into difficulties also because Pakistan said it would not sign the treay unless India does so; and India insisted that it would not join unless a ban on all testing was explicity linked to a timetable for nuclear disarmament - something the five declared nuclear powers were not prepared to agree to.(FEER 15-02-96 p.12, 11-04-96 p.28)

India said at the Geneva conference on 20 June 1996 that it would not sign a test-ban treaty unless there was agreement on the destruction of existing nuclear weapons within a specified period of time. Meanwhile four of the five declared nuclear weapons states, with subsequent US support, agreed that the treaty would not enter into force unless ratified by the five nuclear powers and India, Pakistan and Israel. This requirement was rejected by India.(IHT 21-06-96)

Pakistan warned on 21 June 1996 that the treaty would be worthless unless adhered to by the five nuclear powers and the three 'threshold nuclear states'. It also held that the draft put control over verification too much in the hands of the declared nuclear powers.(IHT 22/23-06-96)

The eighteen-month conference ended on 28 June 1996 with no agreement on a draft treaty, but would reconvene on 29 July.(IHT 28 and 29/30-06-96)

OIL AND GAS

See also: Foreign investment

Indonesian supply to South Korea

Indonesia's oil company, Pertamina, signed a $3.3 billion contract to supply an additional 1 million tons of liquefied natural gas to Korea annually. The 20-year agreement takes effect in 1998. Pertamina, the world's largest LNG exporter, supplies 4.3 million tons of LNG annually to South Korea.(FEER 24-08-95 p.59)

Indonesian and Malaysian supply of gas to China

It was reported that officials of the Indonesian and Malaysian state-owned oil companies, Pertamina and Petronas, held discussions with Chinese officials and companies about possible sales of liquefied natural gas.

Petronas had entered into an agreement with subsidiaries of foreign oil companies to supply gas from the Central Luconia area in the South China Sea off the Malaysian state of Sarawak, to a new LNG plant in Bintulu. Pertamina would get the gas from the Natuna gas field, 225 kilometres northeast of the Natuna Islands, Indonesia's northernmost territory in the South China Sea.(IHT 7/8-10-95)

Pertamina would supply 1.8 million tonnes of LNG annually to Chinese Petroleum Corp. for 20 years in a deal worth $6 billion. Shipments from East Kalimantan starting in 1998 would bring Pertamina's Bontang plant to a total capacity of 21 million tons per year. The company had earlier signed contracts with Japan and South Korea.(FEER 09-11-95 p.87)

Natural gas from Turkmenistan

(*see* 4 AsYIL 500)

Bridas Corp., a Virgin Islands-based petroleum explorer, announced in October 1995 that it had discovered a huge natural gas field in Turkmenistan, in the centre of the Amu-Daria basin, with estimated reserves of 27 trillion cubic feet of gas and 165 million barrels of condensate, a high quality grade of crude oil.

Meanwhile, Unocal Corp. of the US had begun a study on an $18 billion project to transport gas and oil from Turkmenistan across Afghanistan to Pakistan.(IHT 23-10-95)

PASSPORTS AND VISAS

See also: Hongkong

Indonesian reaction to Australian visa policy

The Indonesian foreign minister dismissed as groundless a decision by the Australian government to grant 'bridging visas' to a number of asylum seekers from East Timor, saying "Our position is that these people are not being persecuted".(IHT 22/23-07-95)

Abolition of French visa requirement for some Southeast Asian countries

Starting late August 1995 Malaysian citizens would no longer need a visa for France for a visit of less than 3 months. That made Malaysia the third member state of ASEAN, next to Singapore and Brunei, whose citizens are exempted from the visa requirement.(IHT 12/13-08-95)

PIRACY
See also: Fisheries

Increase in Asian waters

The Regional Piracy Center of the International Maritime Bureau stated in an official report that there was a surge in piracy, with nearly a third (seventeen) of the world's sea robberies taking place in Indonesian waters during the first five months of 1995. There were 25 piracy cases in the first nine months of 1995 compared with 12 in the previous year.(IHT 11-07-95,16-11-95)

Of the 87 cases worldwide reported in 1994, sixty-eight took place in East Asian waters. In the first five months of 1995, thirty-four incidents of piracy in East Asian waters were reported to the International Maritime Bureau.(FEER 13-07-95 p.25) The biggest increase of cases of piracy in the first 9 months of 1995 compared with the same period in 1994 was in the China-Hongkong-Macau region, where piracy increased from 3 to 18.(FEER 30-11-95 p.13)

Suspected piracy in the South China Sea

There was hightened anxiety about the safety of Asian shipping routes after the experience of two cargo vessels. The first ship, the *Hye Prosperity*, carrying a cargo of cigarettes from Singapore to Cambodia, was intercepted in March 1995 in international waters in the Gulf of Thailand. The ship with its cargo was then diverted to the Chinese port of Shanwei, 60 kilometers north of Hongkong, where the crew were apparently made to sign documents stating that they had been smuggling cigarettes into China. The cargo was confiscated but the ship released three weeks later. In a second incident, another vessel owned by the same company, the *Hye Mieko*, lost radio contact while in the Gulf of Thailand on 23 June. It was spotted two days afterwards off Vietnam's coast and eventually also found its way to Shanwei. Shanwei port officials later confirmed that the Hye Mieko was under their custody, having "veered off course and entered our territorial waters". It was not clear whether the two ships were actually engaged in smuggling, or whether Chinese officials were sponsoring piracy - or unable to control rogue naval personnel or customs and port officials. China denied involvement of its government agencies in pirate attacks. It did admit that its patrol boats sometimes approached other vessels in an attempt to stop smuggling. According to the official People's Daily China had ordered harsh punishments against those who "pretend to be naval vessels and commit piracy".(FEER 13-07-95 p.25)

Piracy in China

China reported 209 cases of coastal piracy in 1994.(FEER 13-07-95 p.25) It was reported in mid-1995 that police in the southern Chinese province of Guangdong had arrested nine pirates accused of robbing ships at the mouth of the Zhu River, one of

China's most important waterways. Local police had received more than 20 reports of piracy in the area since February 1995.(FEER 20-07-95 p.13)

RAIL TRAFFIC AND TRANSPORT

Vietnam-China

The rail links between the two countries which were severed during the border war of 1979, would be officially reopened on 12 February 1996.(IHT 26-01-96)

Thailand-Laos

Construction had begun on a railroad between the northeastern Thai town of Nong Khai and the Laotian capital Vientiane. It is to be the first phase of a planned rail network that will eventually link Southeast Asia and southern China.(IHT 29-01-96)

Asia-Europe

The Asia-Europe Meeting (ASEM) appointed Malaysia to oversee building of an electric-rail system linking Singapore to Europe via China. The privatized rail link would pass through Malaysia, Thailand, Vietnam, and China before connecting with the trans-European rail track.(FEER 14-03-96 p.63)

Iran-Turkmenistan

A 295-kilometre railroad from Mashhad in Iran to Tejen in Turkmenistan was opened on 13 May 1996 as part of the Istanbul-Beijing railroad. It will also become the shortest way from the Central Asian republics to the Gulf.(IHT 13-05-96)

RECOGNITION

Sri Lankan proposed recognition of Israel protested

News that Sri Lanka was planning to renew diplomatic ties with Isreal drew protests from the government's muslim allies in parliament, who threatened to quit the government. The reported 'recognition-for-arms deal' between the two countries was clarified by Sri Lanka's foreign minister in Parliament on 20 June 1995. He stated that no decision had yet been taken and that the matter was still under consideration. He noted, however, that renewed ties with Israel would allow Sri Lanka to tap Israeli military expertise.(FEER 06-07-95 p.27)

Switching recognition of Chinese governments

Senegal announced in January 1996 that it broke off relations with the Chinese government in Beijing and established relations with the government in Taipei. If Senegal was enticed by financial offerings by Taiwan, it would have followed other African countries like Gambia and Niger.(IHT 25-01-96)

RED CROSS
See also: Specific territories within a state: Kashmir

The ICRC in Sri Lanka

The influential Buddhist clergy demanded the expulsion of the International Committee of the Red Cross for its alleged support of Tamil rebels. Since the negotiations between the government and the Tamil insurgents collapsed on 19 April 1995, and fighting resumed, tension had been mounting between the Red Cross and the authorities. Matters came to a head when the government expressed displeasure over the Red Cross's decision to release a statement on civilian casualties during a military offensive against the rebels. The foreign minister said the agency had violated protocol by issuing the press statement without first informing the government. The head of the Red Cross delegation thereupon apologized to the president.

The Red Cross operated the main hospital in the rebel-controlled Jaffna Peninsula, and had consistently maintained its neutrality and concern for the protection of civilians in the combat zone.(IHT 27-07-95)

REFUGEES

Vietnamese refugees successfully integrated in Israel

It was reported that Vietnamese refugees have successfully integrated into Israeli society. Most of the original refugees who were resettled in Israel and granted citizenship had set themselves up in the restaurant business. Despite their success, it was reported that religion remained an outstanding problem. Most Israeli-Vietnamese are Confucians or Buddhists but Israeli law requires that all matters relating to marriage, divorce, and death must be handled by respective Jewish, Muslim, or Christian religious authorities.(FEER 02-11-95 p.22)

Mon refugees in Thailand

The UNHCR was involved in delicate negotiations with Myanmar officials over the return of some 20,000 Mon refugees from Thailand. The Mon, an ethnic minority in Myanmar, were in refugee camps along the Thai-Myanmar border. In previous years they had crossed the border, often as rebels of the New Mon State Party, a rebel party that had signed a ceasefire with the government in Yangon. The Mon wanted the UNHCR to monitor the repatriation exercise to ensure that the refugees were not punished on their return.(FEER 23-11-95 p.14)

Bhutanese refugees in Nepal

Talks between the two countries ended on 8 April 1996 with no progress over the status of thousands of people who had fled Bhutan since 1990.(*see* 2 AsYIL 349)

Bhutan refused to take the refugees back, arguing that they had forfeited Bhutanese citizenship because of their voluntary departure. Nepal wanted Bhutan to receive them back as they were in possession of documents proving citizenship or land ownership.

About 100,000 Bhutanese of ethnic Nepalese origin had fled Bhutan in the past six years.(IHT 09-04-96)

Repatriation of Vietnamese refugees

Vietnam agreed on 9 April 1996 to speed up repatriation of the nearly 19,000 boat refugees still held in the camps in Hongkong.(IHT 10-04-96)

On 20 April 1996, some 317 Vietnamese illegal immigrants in Malaysia who had not signed up for voluntary repatriation were sent back to Vietnam. A total of 252,400 Vietnamese refugees had fled to Malaysia since 1975; 248,000 have since resettled in other countries.(FEER 02-05-96 p.13)

New possibility of asylum for Vietnamese refugees

It was reported that the passage in the US House of Representatives of a bill which called for all boat people in camps around the Asian region to go through another round of screening to determine who were genuine political refugees, had brought to a halt a carefully worked-out plan to clear all the camps by the end of 1995. The plan was drafted in March 1995 by the international community, including the US.(FEER 28-09-95 p.42)

Notwithstanding a decision taken in the context of the Comprehensive Plan of Action aimed at having the Indo-Chinese refugee camps closed by the end of 1995 (5 AsYIL 482), there were at that time still camps in Hongkong, Indonesia, Thailand, Japan, and the Philippines housing a total of 37,000 refugees. After having been screened out, these refugees were intended to be voluntarily sent back to Vietnam.

It was reported that the lack of progress in the repatriation of these refugees was caused by a US plan to hasten repatriation, known as 'Track II'. Under Track II, the refugees might after all be eligible, under a new screening process, for resettlement in the US if they returned home first and momentarily settle in a transit centre somewhere in Vietnam while they undergo a new screening process. After six months of negotiations Vietnam and the US agreed on implementation of the plan.(IHT 16-05-96; FEER 11-01-96 p.19)

Possibility of Philippine asylum

In the Philippines, holding to the principle of voluntary repatriation as its official policy, forced repatriation was suspended and the 2,700 remaining Vietnamese refugees were allowed to apply for permanent residence, although there was no certainty yet about the final numbers that would be admitted. It was reported that the government had tacitly agreed to allow hundreds of Vietnamese to remain in the country.(IHT 18/19-05-96)

REGIONAL SECURITY

ASEAN Regional Forum (ARF)

The ARF met formally for the second time (cf.5 AsYIL 484) in Brunei Darussalam on 1 August 1995. In preparation of that gathering the ASEAN foreign ministers began their annual meeting on 28 July 1995. The ARF was launched in 1994 by ASEAN and their dialogue partners. As of 1995, there were 19 ARF participants: Brunei Darussalam, Indonesia, Malaysia, The Philippines, Singapore, Thailand, Aus-

tralia, Cambodia, Canada, China, EU, Japan, South Korea, Laos, New Zealand, Papua New Guinea, Russia, US and Vietnam. At least 10 other countries had applied to join.

A 'concept paper', which ASEAN officials had threshed out in May, was presented to the August meeting. The paper sought to ensure that ASEAN would remain the security forum's centre of gravity, or 'primary driving force'. The concept paper set out broad guidelines for future meetings of the security forum: the meetings would have no formal agenda and would approach sensitive security issues in an oblique and non-confrontational manner. The paper outlined a gradual three-step process beginning with confidence-building measures, moving to preventive diplomacy and finally conflict resolution. It was thought that the ARF is an acknowledgement by ASEAN governments that ASEAN is not competent to cope with the wider problems of regional security linking Southeast to East Asia.(FEER 03-08-95 pp.16-20, 30-11-95 p.34)

The meeting reaffirmed that the ASEAN concept paper indicated a pace for moving the ARF process forward comfortably to all participants, and stressed the importance of building confidence among ARF participants so as to develop a more predictable and constructive pattern of behaviour. They re-emphasized that the ARF is intended to be a high-level consultative forum to facilitate open dialogue and discussions on political and security issues of common interest and concern in the Asia-Pacific region.(UNdoc. A/49/953-S/1995/652) The meeting included dicussions on tensions on the divided Korean peninsula, French and Chinese nuclear weapons testing, political developments in Myanmar, and the Spratly Islands.(FEER 10-08-95 pp.15-16)

It was reported that the US opposed India's membership in the ARF on the grounds that it should not be ASEAN alone that made the decision. India was invited to the ARF after it became a full dialogue partner of ASEAN in December 1995 at the Bangkok Summit . The US expressed concern about ASEAN's core role in the ARF, but the ASEAN responded that if it were not the driving force, China would be reluctant to join.(FEER 14-03-96 p.12)

Australia's defence minister told ASEAN officials that his country does not want to see the ARF become a venue for discussion of contentious issues on the Indian subcontinent, such as Kashmir. During discussions with Thai officials in Bangkok on 20-22 April 1996, however, the minister agreed that India had a claim to membership in the ARF because of its common boundary with ASEAN states in the Indian Ocean.(FEER 02-05-96 p.12)

At meetings of officials at Jakarta and Tokyo during the first half of 1996 a number of confidence-building agreements were reached. Among other things, the 19 countries of the ARF signed a confidence-building agreement in Tokyo on 8 May 1996 requiring advance notice and an exchange of observers during military exercises.(IHT 09-05-96; FEER 23-05-96 p.15)

Exchange of defence data

At the meeting of the ARF on 1 August 1995 China agreed for the first time to give its Asian and Pacific neighbours more information about its defence program. Countries like the US, Japan, Australia, New Zealand and Thailand publish regular defence policy statements, presenting details about military numbers, structure, spending, doctrine and planning, without revealing secrets that could compromise national security. But many other ARF members did not provide such information.

China also agreed to increase high-level contacts and exchanges between its military training institutions and those of the other states in the region.(IHT 04-08-95)

Indonesia-Australia Security Agreement

The Australian prime minister first raised the idea of security co-operation in June 1994, but only halting progress was made until the Australian and Indonesian leaders met at Bali in September 1995, when the Indonesian president expressed renewed interest. As a result the two countries signed an agreement "on the maintaining of security" on 18 December 1995. The aim was defined as contributing to regional security and stability because this would be most conducive to the economic development and prosperity of both parties and of the region. Under the four-article agreement the parties undertake to consult each other regularly on their common security and to develop co-operation beneficial to their and the region's security, and in case of adverse challenges to either party or to their common security interests, to consult each other and, if appropriate, to consider either individual or joint measures. The parties also pledged to promote mutually beneficial cooperative activities in the security field.(Text of agreement courtesy Australian Embassy, The Hague)

The Australian prime minister said that the long-term strategic interests of the two countries coincide. As to the term 'adverse challenges' he said that this applied only to external challenges. The accord had "treaty status, but it is not a defence pact, which implies a military response".(IHT 15-12-95) The treaty terms were similar to those in the security agreements between Australia and Papua-New Guinea, and between Australia, New Zealand, the UK, Singapore and Malaysia. On the other side, Australia and the US are allies under the ANZUS mutual defence pact. It was the first time that Indonesia entered into a formal security arrangement with another state.(IHT 18-12-95; FEER 28-12-95/04-01-96 p.18)

Philippines - Indonesia

It was reported that Indonesia and the Philippines discussed the framework of a security agreement similar in nature to that which was signed by Indonesia and Australia in December 1995 (*supra*).(FEER 22-02-96 p.12)

US ships near Korea

A US naval group led by the aircraft carrier Independence and two nuclear submarines was stationed and would stay near the Korean Peninsula in January 1996 to deter 'any kind of provocations' by North Korea.(IHT 18-12-95)

Peace and military power in Asia

At a conference in Tokyo on the future of Asia the Malaysian prime minister on 17 May 1996 rejected the notion of basing regional peace on a balance of military power, recalling that the region had not enjoyed the present stability for the past 150 years.(IHT 18/19-05-96)

RIVERS

India – Bangladesh water sharing talks

Talks on water-sharing between the foreign ministers of India and Bangladesh took place in late June 1995. The meeting achieved three things. First, both sides agreed to come to an understanding on permanent sharing of river waters without setting any conditions. Secondly, the officials decided to de-link the water-sharing talks from other disputed issues. And third, it was decided to revive the Joint Rivers Commission which was established since Bangladesh's independence to monitor the flow of water, but had remained dormant since 1988.(*see infra* p.516)(FEER 20-07-95 p.29)

Laos policy on the Mekong

The foreign minister of Laos expressed the Laotian desire to play a central role in the Mekong River Commission, an organization of riparian states. The minister said that a third of the river flows through Laos and 40 percent of its tributaries come from Laos. Because Vientienne is located at the centre of the region, Vientiane had been bidding for the Commission's Secretariat to be transferred from Bangkok to the Laotian capital. He also said that China and Myanmar should be full members of the Commission.

The idea of uniting countries along the lower reaches of the Mekong was first conceived by a retired US general in the 1950s. In 1957, the UN, under US auspices, set up the Committee for Coordination of Investigations of the Lower Mekong Basin, with headquarters in Bangkok, as part of a strategy to unite the pro-Western regimes in the region against China and Vietnam. The issue of navigation and water allocation led Thailand, Laos, Vietnam and Cambodia to agree in April 1995 to the revitalization of the Mekong Basin concept (5 AsYIL 591).(FEER 10-08-95 p.30)

ASEAN Mekong River Development project

At the ASEAN Bangkok summit in December 1995 Southeast Asian leaders endorsed a plan to invite China, Japan and South Korea to join ASEAN in the development of the Mekong River basin.(FEER 28-12-95/04-01-96 p.17)

Nepal-India water agreement

On 29 January 1996, the Indian foreign minister and the Nepalese water resources minister reached agreement on scrapping a 1991 water agreement between the two countries and substituting it with a new one which gave Nepal a better deal. Under the agreement (*infra* p.511) Nepal will get seventy megawatts of energy from the Tanakpur barrage, which India had built on the Mahakali River that straddles the India-Nepal border. Nepal also obtains 1,000 cusecs (cubic feet per second) of water. In addition, the ministers initialed details on a 6,000-megawatt project on the same river that would take eight years and $4 billion to build.(FEER 15-02-96 pp.53-54)

SANCTIONS

See also: Air traffic and transport, Environment

US drive for tighter sanctions against Iran

(*see also*: Foreign investment)

The US government expressed willingness to tighten existing US trade sanctions in co-operation with the US Congress. At the same time, however, it was against a pro-

posal to create a covert intelligence program aimed at destabilizing the Iranian government. (*see supra* p.410)

A bill sponsored by the senator ALPHONSE M.D'AMATO would impose a variety of penalties against foreign companies that cooperate with Iran in the field of oil and gas. It would also force the government to bar the chief executives of these foreign companies from entering the US, ban US government purchases from such companies and bar exports by their US subsidiaries. It would also give the president discretion to bar loans to such companies and refuse their imports.(IHT 11/12-11-95) The bill was later amended in order to win the government's support, by dropping some tough sanctions like a ban on imports of all products made by companies that do business with Iran. It would still empower the president to impose a range of sanctions against foreign companies that aid the development of Iranian energy programs, including stripping them of the right to obtain big loans from US banks or to deal in US securities. The US Federal Reserve would be barred from allowing any financial institution to become a primary dealer in bonds of US origin.(IHT 14-12-95)

It was later reported that the bill was aimed at both Iran and Libya and that it called for sanctions against foreign companies that invest more than $40 million per year in either of the two countries. Violation of the bill would be punished with a ban on imports to the US, a ban on loans of more than $10 million from US credit markets, a ban on participation in US procurement contracts, a ban of export licences to products manufactured in the US by the sanctioned company. The bill was adopted by the US House of Representatives on 19 June 1996.

One of the main companies concerned was Total SA of France, which took over two Iranian oil fields in July 1995 from Conoco of the US after the latter was prohibited from doing business with Iran.(IHT 03-06,20-06-96)

US sanctions on missile-delivery to Iran

A US law, dating from the 1980-1988 Iran-Iraq War, required economic penalties against states that supply Iran or Iraq with "destabilizing numbers and types of advanced conventional weapons". Alleged Chinese exports of anti-ship missiles to Iran in 1995 might qualify for such sanctions to be applied and the US was considering the application of sanctions.(IHT 08-02,08-03-96)

US sanctions against Chinese deliveries to Pakistan
(*see also*: Nuclear capacity)

According to US intelligence reports China sold nuclear weapons-related equipment to Pakistan in 1995, involving specialized magnets allegedly meant to be installed in high-speed centrifuges that enrich uranium. The Chinese deputy foreign minister who was on a visit to the US did not deny the sale but argued that it amounted only to legitimate 'peaceful nuclear co-operation'. China also argued that the magnets in question were allowed to be exported because they did not appear on an agreed list of items subject to control under the Nuclear Non-proliferation Treaty. Specialist experts conceded that this might be technically correct while legalistic in nature.

The 1994 Nuclear Proliferation Prevention Act 1994 required that if the reports were considered to be true, the president either would have to apply sanctions blocking loan guarantees by the US Export-Import Bank or formally waive them for rea-

sons of being vital to US national interests or to US national security interests. In a previous alleged sale of missiles to Pakistan sanctions were avoided by concluding that the evidence was not strong enough. If the government of the state in question is considered not to be involved, the company might be barred from conducting further business with the US.

According to later reports the US intended to apply selective sanctions meant to hurt China without disrupting US business. That would require the formal imposition of broad sanctions, then waive them on grounds of national interest and immediately order the narrower measures. The US asked China to limit future deliveries of nuclear-related technology to Pakistan, and suggested that in return it could waive some of the economic sanctions currently being considered. Meanwhile the US government had asked the (US) Export-Import Bank to hold off financing for 30 days. China rejected the US demand.(IHT 08,09,22 and 29-02,25-03,28-03-96) It became clear later that the US government had decided that no sanctions across-the-board would be imposed. On 16 April 1996 the Eximbank approved a $160 million guarantee of a loan for the purchase of civilian aircraft (IHT 18-04-96) but it was later reported that after a request from the state department the bank deferred a $35.9 million guarantee for the financing of the sale of subway-system components for the Guangzhou Metro project.(IHT 27/28-04-96)

The US announced on 10 May 1996 that it had decided not to impose sanctions on China for the alleged export of nuclear weapons-related technology because China had agreed not to make such sales in the future. It was reported that China had refused to make public pledges to that effect, and that, instead, the US would say what it thought were the Chinese intentions while the absence of Chinese denial would be taken as its assent. The US secretary of state had "concluded there is not a sufficient basis to warrant a determination that sanctionable activity has occurred". China announced that it "pursues the policy of not endorsing, encouraging or engaging in the proliferation of nuclear weapons, or assisting other countries in developing such weapons. The nuclear co-operation between China and the countries concerned is exclusively for peaceful purposes". (IHT 11/12-05,13-05,15-05-96) It was reported later that China considered new law to control exports of sensitive technology.(IHT 27-05-96)

In June 1996 it was reported that the US government was to approve a sale of advanced US technology by Westinghouse Electric to China Nuclear Energy Industry, the company that was accused by the US to have sold the nuclear equipment to Pakistan and to have concluded contracts with Iran. The deal was to receive support from the US Exim Bank and, therefore, needed a presidential decision as being "in the national interest". The agreement was signed in 1995, aquired preliminary approval from the Exim Bank in November 1995 and Congressional approval in January 1996, before the issue of the alleged Chinese deliveries to Pakistan.(IHT 21-06-96)

Delay of US arms delivery to Pakistan
(*see also*: Arms sales and supplies)

In late 1995 the US Congress authorized the transfer of $368 million worth of arms under a one-time exemption (BROWN Amendment) from a US law (PRESSLER Amendment) that bars military co-operation with Pakistan because of its alleged development of nuclear weapons.

The US in February 1996 considered delaying the shipment of the arms because of an alleged (but denied) new acquisition of sensitive nuclear equipment from

China.(IHT 16-02-96) In March, however, the US government notified the Senate that it intended to proceed with the deliveries, ruling out immediate sanctions on the alleged acquisition by Pakistan of nuclear-related equipment. The law prescribing sanctions was not applicable because the arms were a substitute for original orders already paid for much earlier.(IHT 21-03-96) The US government said the decision to proceed with the delivery was "based on Pakistan's current restraint in its nuclear and missile activities".(IHT 18-04-96)

It was reported in June 1996 that a three-way deal was being prepared under which part of the undelivered F-16s ordered by Pakistan would be sold to Indonesia and the proceeds returned to Pakistan (*supra* p.339). Pakistan paid $658 million in the early 1990s for the planes, along with another $350 million for other military equipment which was not delivered either.(*see* above).(IHT 06-06-96)

SEA AND SEA TRAFFIC

Iranian-Russian Statement on the Caspian Sea

The two countries reached a mutual understanding on the legal status of the Caspian Sea on 30 October 1995, the essence of it being that any issues relating to regulation of the uses of the Caspian Sea and its resources shall be decided jointly by all Caspian coastal states alone, and that the Caspian Sea shall be used exclusively for peaceful purposes. Undoc. A/51/59 Annex)

Marine scientific research in Indonesia's EEZ

Foreign oceanographic research in Indonesia's EEZ, meant to probe into the El Nino phenomenon, was refused approval by Indonesia's military. Military officials denied security clearance in May and again in September 1995 to research cruises for the Tasmania-based Commonwealth Scientific and Industrial Research Organization and the California-based Scripps Institute of Oceanography. The research cruises were supposedly conducted within the framework of the World Ocean Circulation Experiment.

An Indonesian naval officer said that the security concerns were linked to fears that the scientific intelligence about sea conditions and water temperatures off South Java could be used by foreign submarines to dodge Indonesia's ship-born sonar equipment.

In an apparent retaliation, Australia and the United States abandoned joint-mapping projects going back 20 to 25 years.(FEER 30-11-95 pp.29-30)

Thai contiguous zone

The Thai government decided to amend the Customs Act and the Navigation in Thai Waters Act in order to implement the proclamation of a contiguous zone (*supra* p.228). This proclamation was made with a view to suppressing and preventing oil smuggling at sea.

Japanese 'general policy guidelines' regarding disputed islands

It was reported that in view of its intention to ratify the UN Convention on the Law of the Sea and the existing disputes with China and Korea over some islands, the

Japanese government had adopted 'general policy guidelines' for the implementation of the Convention. It was said that the guidelines might include 'reservations' about an EEZ around the islands and might provide for separate fishing agreements for the islands.(IHT 20-02-96)

Indonesian-US talks on right of transit
(*see also*: Disarmament and arms control)

It was reported that the US has been trying to persuade the Indonesian navy to back off from its plan to demarcate three north-south archipelagic sealanes. Under the plan lateral movement of ships through the archipelago would be under the right of 'innocent passage' (instead of 'archipelagic sealane passage'), which would require submarines to surface and warships to turn off weapon radars. In December 1995, Indonesian officials were invited aboard a US carrier to see the problems that battlegroups would encounter in operating under such conditions.(FEER 25-01-96 p.12)

The designation of three archipelagic sealanes by Indonesia was supposedly undertaken to control access to the Java Sea. In opposing the designation, a US diplomat said that Jakarta "was trying to claim that all the sea between the islands is really land". The US wanted Indonesia to refer the matter to the IMO but Indonesia, although it recognizes IMO's role on matters related to navigational aides and safety of shipping, did not agree that IMO had any competence over the matter of delineation of sealanes.(FEER 29-02-96 p.30)

Up to 28 March 1996 the two countries had had four rounds of negotiations on the US demand of having unlimited right to send warships, submarines and military aircraft through and beyond Indonesian archipelagic waters. Indonesia wanted to restrict free movement of foreign ships in its waters (archipelagic transit passage) to three designated north-south sealanes, while the US and some other western powers urged Indonesia to agree on an east-west sealane as well.

The three north-south sealanes proposed by Indonesia are: through the Sunda and Karimata straits to the South China Sea, through the Lombok and Makassar straits to the South China Sea, and from the Indian Ocean and Arafura Sea north of Australia to the Pacific Ocean via the Moluccan Sea. Indonesia is of the opinion that many of the proposed additional sea lanes were too shallow or had become too crowded with local vessels and oil and gas rigs for safe passage by foreign naval vessels, especially submerged submarines. Apart from the three proposed sea lanes foreign ships could use other routes on the basis of innocent passage.

US-Indonesian negotiations would resume on 17 May 1996, and those between Indonesia and Australia in June. Indonesia had already ratified the UN Convention of the Law of the Sea, but the US had not.(IHT 29-03,16-05-96; FEER 02-05-96 p.12))

SHIPPING
See also: Emergency aid

Downturn in container shipping business

Because of the price war in the container shipping business, freight rates from Asia to the US saw their biggest dive in a decade. Industry executives estimated that since 1995, freight rates from Asian ports outside Japan to America had dropped 15%-20%. The three factors which had pushed rates lower were identified as the

addition of capacity at an unprecedented rate, lower American consumption of Asian products, and undercutting of prices set through a shipping conference by competitors from South Korea, Taiwan and China.(FEER 11-04-95 p.76)

SOUTH ASIAN ASSOCIATION FOR REGIONAL CO-OPERATION (SAARC)

South Asian Preferential Trading Arrangement

Bangladesh ratified the South Asian Preferential Trading Arrangement, designed to minimize trade gaps among the seven SAARC countries. The accord, already signed by the other six members, took effect on 8 December 1995.(FEER 16-11-95 p.15)

India-Pakistan trade under SAARC

India and Pakistan, which had both committed themselves to extend MFN status on each other under the WTO, the GATT and the SAARC, inched their way to closer trade ties. Pakistan was reluctant to take any quick decisions because of concern that a flood of cheap Indian goods would drive Pakistani out of business. Pakistan also complained that India's import duties were quite high and that non-tariff barriers existed. On its part, India argued that it had already granted MFN status to Pakistan. It expected Pakistan to approve reciprocal rights during a SAARC meeting scheduled to take place in Colombo in March 1996.(FEER 08-02-96 p.52)

SPACE ACTIVITIES

South Korean launch

South Korea sent its first telecommunications satellite, Koreasat-1, into space but fell short of its intended orbit. The satellite had to give up some of its fuel - and therefore a bit of its lifespan - to climb the rest of the way.(FEER 17-08-96 p.71)

Apstar-2 mishap explained

The China Great Wall Industry and America's Hughes Space and Communication released a joint statement on 25 July 1995 saying that the 26 January 1995 mishap involving the blow-up of a Chinese rocket and its payload satellite, Apstar-2 (5 AsYIL 490), was caused by adverse winds. It was reported, however, that the underlying cause for the launch failure was still the subject of continuing disagreement between the two companies. The January explosion was the second failure in the two firms' collaboration. The first, which involved the same models of rocket and satellite, occurred in December 1992 (3 AsYIL 445-446).(FEER 10-08-95 pp.70-71)

AsiaSat-2

It was reported that the launching of the AsiaSat-2 satellite, due for spring 1995 (*see* 5 AsYIL 490), was delayed as the Chinese launcher company had to modify the launching rocket's fairing (i.e. the nose cone that encases the satellite). This was considered necessary since an investigation into the causes of the failed launching of the Apstar-2 satellite in January 1995 (*see* ibid.) had shown that wind shear had either led to structural damage to the satellite, or had damaged the fairing of the rocket. The

satellites were made by Hughes Space & Communications International Inc. and the launcher company was China Great Wall Industry Corp.(IHT 27-07,29/30-07-95)

The launch later took place successfully on 28 November 1995 from a site in Sichuan province. The satellite will enable StarTV to deliver local language programmes to countries within the region.(IHT 29-11-95; FEER 07-12-95 p.83)

APT - AsiaSat talks

On 5 December 1995, APT Satellite representatives began a meeting with their counterparts from the rival Asia Satellite Telecommunications in Beijing to resolve their competing claims for a space in orbit (5 AsYIL 489-490). APT planned to launch its Apstar-1A in February 1996 into a position that is close to the spot booked for AsiaSat-3, set for launch in 1997.(FEER 14-12-95 p.12)

The two Hongkong-based rival satellite operators would be launching satellites in 1997. APT satellite, majority-owned by several Chinese ministries, planned to have Apstar-2R in orbit in early 1997, while Asia Satellite Telecommunications planned to launch AsiaSat-3 later the same year. APT had still to coordinate a slot for its Apstar-2R as required by the ITU for any spacecraft that may be close enough to others to disrupt signals.(FEER 16-05-96 p.73)

Malaysian satellite

Malaysia launched a satellite of its own, the Measat-1, owned by the Telecom company Binariang.

When Measat-1 would be ready for test transmissions in April 1996, Binariang's sister company Measat Broadcast Network Systems would be poised to beam at least 10 channels to an estimated 30 million homes in the region.(FEER 23-11-95 p.66) Measat-1 was launched by Arianespace in January 1996.(FEER 25-01-96 p.57)

Launch of Japanese satellites

A telecommunication satellite of the Nippon Telegraph and Telephone Corp. (NTT) was launched by Arianespace on 29 August 1995.(IHT 30-08-95) In early September 1995, it was reported that Japan Satellite Systems successfully launched its third satellite into space aboard a Lockheed Martin rocket. The satellite's reach extends from India to Hawaii and as far as Austalia and New Zealand.(FEER 07-09-95 p.67)

Launch of Indonesian satellite

On 1 February 1996, Indonesia launched a new-generation Palapa-C satellite atop a Lockheed-Martin rocket. The satellite's footprint has the capacity to cover most of Asia and Oceania.(FEER 15-02-96 p.55)

Launch of Indian satellite

A new communication satellite, the ISAT 2C, was launched on 7 December 1995 by Arianespace and would be ready for operation by the middle of January 1996.(IHT 14-12-95)

Chinese launches

It was reported that China Aerospace Corp. would launch three foreign-owned satellites in late December 1995 and in February and March 1996, following the successful launching of AsiaSat-2. The first satellite to be launched would be the Echostar-1 of the US.(IHT 21-12-95)

On 16 February 1996 a new type of rocket (Long March 3B) launching the three-ton 'Intelsat 708' satellite exploded and disintegrated, destroying the satellite. Consequently China suspended other satellite-launchings which were already planned.(IHT 17/18-02-96) Intelsat later cancelled two other launch contracts with the Chinese launcher, China Great Wall Industry Corp.(IHT 28-03-96)

US satellites for China

The US president, evoking American national interest, on 6 February 1996 announced the lifting of sanctions blocking the sale of telecommunication satellites to China. These sanctions were imposed after the Tiananmen incident in 1989.

The announcement referred to three Chinese projects: COSAT, which featured two Lockheed satellites, ChinaSat, which would purchase a Hughes satellite, and Mabuhey, which was to have a Loral satellite for communications in the Philippines and neighbouring countries.(IHT 08-02-96)

SPECIFIC TERRITORIES WITHIN A STATE: EAST TIMOR

Portugal vs. Australia before the International Court

In the case Portugal had claimed that the Australian-Indonesian treaty of December 1989 on exploitation of the continental shelf of the so-called 'Timor Gap' was invalid because Indonesia was not entitled to act on behalf of East Timor.

The International Court of Justice decided on 30 June 1995 that it could not in the present case exercise the jurisdiction conferred upon it, because Australia's behaviour could not be assessed without first entering the question whether Indonesia could or could not lawfully have concluded the 1989 Treaty with Australia, while the Court could not make such a determination in the absence of Indonesian consent.(IHT 1/2-07-95; ICJ Communique No.95/19bis)

Indonesian-Portuguese talks

Since the resumption of the talks in 1992 the UN Secretary General had held six rounds of discussions with the foreign ministers of the two countries (the fifth round took place in January 1995, the sixth in July 1995). The seventh round would be held in January 1996. (Undoc. A/50/436 of 19-09-95)

In March 1996 Portugal offered partial restoration of diplomatic relations by setting up 'interests sections' in friendly embassies in the two countries, in exchange for the release of a convicted East Timorese leader and a guarantee of human rights in East Timor. The foreign minister of Indonesia said that there was no hope for a settlement so long as Portugal insisted on self-determination for East Timor. He also said, "I can't foresee any development in the way of a framework for a possible solution". (IHT 2/3-03-96; FEER 14-03-96 p.17, 21-03-96 p.21)

Intra-East Timorese Dialogue

The UN Secretary General took the initiative to facilitate the convening of an All-Inclusive Intra-East-Timorese Dialogue, the first meeting of which, with 30 participants, took place in Austria in June 1995 and resulted in the adoption of the "Burg Schlaining Declaration". The Ministers of Portugal and Indonesia welcomed the convening of a further meeting or meetings.

The above Declaration, *inter alia*,
- reaffirmed the need to implement the necessary measures in the field of human rights and other areas with a view to promoting peace, stability, justice and social harmony,
- reaffirmed the necessity for the social and cultural development of East Timor on the basis of the preservation of the cultural identity of the people, including tradition, religion, history and language, as well as the teaching of Tetun and Portuguese. (Undoc. A/50/436 of 19-09-95;IHT 11-07-95)

The Indonesian ambasador-at-large issued a clarifying statement on the declaration, noting, *inter alia*, that the reference to UNGA resolution 37/30 violated the statement of the UN Secretary-General issued after the fifth UN-sponsored Jakarta-Lisbon meeting in January 1995, according to which the intra-Timorese dialogue would not discuss the political status of the province.(FEER 20-07-95 p.21)

On 19-20 March 1996, Timorese delegates from the pro- and anti-Indonesia factions gathered again in Austria for a second All-Inclusive Intra-Timorese Dialogue. It was reported that the Vatican instructed the bishop of Dili, East Timor to stay away from the dialogue.(FEER 21-03-96 p.21)

Government talks with East Timorese leaders

The chairman of the Indonesian Supreme Advisory Council held talks with some 50 East Timorese leaders in October 1995.(IHT 18-10-95)

Asylum-seekers

(*see also*: Asylum, Diplomatic and consular inviolability)

Five Timorese activists sought asylum in the British embassy in Jakarta. Portugal afterwards offered them permanent asylum.(FEER 05-10-95 p.15)

Eight East Timorese sought asylum at the Dutch embassy on 7 November 1995. At the request of the latter and with the consent of the Indonesian authorities, the International Committee of the Red Cross facilitated the entry of the persons into Portugal. They left Indonesia for Portugal the following day.(IHT 08 and 09-11-95)

On 14 November 1995 21 East Timorese climbed a fence into the Japanese embassy compound in Jakarta, seeking political asylum. On 16 November 1995 five East Timorese entered the French embassy in Jakarta to seek asylum. Both groups later left for Portugal.(IHT 15-11,17-11,18/19-11-95)

On 20 November 1995 another four East Timorese sought refuge in the French embassy, while other youths staged a pro-government demonstration in front of the embassy. The four also later left for Portugal after intervention of the International Committee of the Red Cross.(IHT 21-11,22-11-95)

With five more East Timorese leaving for Portugal on 15 January 1996 after having entered the New Zealand embassy, there had been 50 of them who had been brought to Portugal.(IHT 16-01-96)

Nine East Timorese who sought refuge in the Australian embassy in February 1996 were not granted asylum for lack of evidence.(IHT 12-02-96)

On 18 March 1996 there were again reports of East Timorese entering the French and Polish embassies at Jakarta.(IHT 19-03-96)

SPECIFIC TERRITORIES WITHIN A STATE: KASHMIR

See also: Broadcasting

ICRC allowed in Kashmir

The Indian government decided to allow neutral observers into its detention camps. Under an agreement signed in New Delhi on 2 June 1995, the Geneva-based International Committee of the Red Cross would be allowed access to anyone detained in connection with the Kashmir insurgency. Since the ICRC would not be allowed a permanent office in Kashmir, it would have to send monitors from New Delhi. Following the ICRC standard practice, the reports of the monitors would not be made public but sent to the Indian authorities concerned.(FEER 06-07-95 p.29)

Indo-Pakistani military skirmishes

A rocket attack on a mosque in the Kashmiri town of Forward Kahuta, controlled by Pakistan, led to skirmishes between troops of both countries on the border of Kashmir on 28 January 1996. India denied that the projectile was part of an Indian missile-test on 27 January, that took place from a test site on the Orissa coast, 150 miles into the Bay of Bengal. India claimed that Pakistani rockets meant to disrupt Indian Republic Day (26 January) went awry and hit the small town of Forward Kahuta. The head of the UN Military Observer Group in India and Pakistan visited the place and confirmed craters made by two rockets. He also said that two other rockets had landed on the Indian-held side of the cease-fire line on 26 January.(IHT 29-01-96; 8-02-96, p.13)

There was renewed firing along the Kashmir border on 10 February 1996 with mutual accusations.(IHT 12-02-96)

Indian-Kashmiri talks and policies

The Indian home minister met with a delegation of Kashmiri Muslim separatists for the first time since the insurgency in Kashmir began in 1989.(IHT 16/17-03-96) The first parliamentary elections in Kashmir since 1989 were held on 23 May 1996, amid calls for a boycott from separatist political leaders.(IHT 24-05-96) On 6 June 1996 Pakistan rejected a new Indian plan to give greater autonomy to the Indian-ruled part of Kashmir.(IHT 07-06-96)

SPECIFIC TERRITORIES WITHIN A STATE: TIBET

See also: Broadcasting

Visit of the Dalai Lama to the US

On the occasion of his visit to the US in September 1995 the Dalai Lama urged the US president to press the Chinese government to start negotiations with him on

granting Tibet "genuine self-rule in association with China". He took pains to say that he was not asking for negotiations on full independence.(IHT 13-09-95)

The US president met the Dalai Lama on 13 September 1995, being the fourth encounter since 1991 between a US president and the Tibetan spiritual leader. The following day the US chargé d'affaires in Beijing was summoned to the Chinese foreign office to receive a protest against the meeting which was qualified as a gross interference in the internal affairs of China. The meeting represented "a connivance at and support for the Dalai Lama's clamour for the independence of Tibet and his political activities aimed at splitting the motherland".(IHT 15-09-95)

The selection of the reincarnation of the Panchen Lama

The Chinese government decided not to recognize the selection by the Dalai Lama of a young boy as the reincarnation of the Panchen Lama. The selection was made on 14 May 1995, probably on the basis of a list of finalists clandestinely recommended by the search committee.

The Chinese authorities directed a meeting of 75 Tibetan leaders to prepare to select a new Panchen Lama from a list of three boys who had been among 28 finalists. An approved reincarnation was later chosen on 29 November 1995.(IHT 14-11,30-11-95) The enthronement ceremony took place on 8 December 1995.(IHT 09/10-12-95)

German parliamentary resolution

The German parliament on 20 June 1996 adopted a resolution condemning "China's continued policy of repression in Tibet", a text which the German foreign minister said essentially reflected the government's view. China classified the action as "an open violation of the principle of the international norm and a gross interference in the internal affairs of China".(IHT 22/23-06-96)

TELECOMMUNICATION

See also: World Trade Organization

Regulating the Internet

At a 27-30 June 1995 meeting of the Internet Society in Hawaii, a representative of the Chinese ministry of posts and telecommunications announced that China planned to block access to objectionable information on the internet. In April 1995 the ministry launched ChinaNet, China's first commercial provider of Internet access. Underway is CERNET, the Chinese Education and Research Network, managed by the Chinese State Education Commission, which aims to link all of China's universities to the internet.

In Singapore, the prime minister affirmed that the goverment retains the right to define the limits of what is acceptable in cyberspace. The minister for information added that "laws against theft of libel still apply to cyberspace".(FEER 27-07-95 p.71)

TERRITORIAL CLAIMS AND DISPUTES

See also: Divided states: China, Fisheries, Foreign investment, Military co-operation, Sea and sea traffic

Territorial disputes relating to the South China Sea

Even while reiterating that it had 'indisputable sovereignty' over the disputed Spratly Islands and adjacent waters, the Chinese foreign minister said at a meeting with the foreign ministers of ASEAN in Brunei, 30 July 1995, that China was ready to negotiate differences according to 'recognized international law', including the 1982 Convention on the Law of the Sea. Until recently China seemed to have based its claim to control much of the South China Sea on historical evidence and its own national laws.

The Chinese minister also said that China would discuss the issue on the South China Sea with all seven ASEAN members. Previously, China had insisted that disputes over the Spratlys should be negotiated in bilateral forums. Nonetheless, China indicated that it did not want outside powers such as the US involved in any negotiations on the South China Sea, preferring to discuss the conflict 'the oriental way'.

The Chinese minister also assured his interlocutors that China was committed to settling disputes peacefully.

Noting that the South China Sea was located "at a strategic point for international navigation and aviation", he said that China had always attached great importance to the safety and freedom of navigation through the international sea and air lanes in the region.

The Philippine foreign affairs secretary stated that the Chinese gesture was not a concession, although "China is having a position now of opening the door to possible political compromise". The Indonesian foreign minister welcomed Chinese willingness to use the UN Law of the Sea Convention as a basis for resolving the disputes. A US official said that "the tone of China referrring to international law and the law of the sea gives greater possibility for trying to find a diplomatic solution, even though China hasn't changed its fundamental position on its sovereignty claims". A US state department statement had said that "[m]aintaining freedom of navigation is a fundamental interest of the US". (IHT 31-07-95; FEER 10-08-95 pp.15-16)

The ASEAN foreign ministers in their Ministerial Meeting on 30 July 1995 "expressed their concern over recent events in the South China Sea. They encouraged all parties concerned to reaffirm their commitment to the principles contained in the 1992 ASEAN Declaration on the South China Sea . . . They also called on them to refrain from taking actions that could destabilise the region, including possibly undermining the freedom of navigation and aviation . . . [T]hey reiterated the significance of promoting confidence-building measures (CBMs) and mutually beneficial cooperative ventures in the ongoing Informal Workshop Series on Potential Conflicts in the South China Sea initiated by Indonesia".(Joint Communique; Undoc.A/49/953-S/1995/652)

After two days of talks in Manila the Philippines and China on 10 August 1995 agreed on a 'code of conduct' that rejects the use of force to settle their dispute over the Spratly Islands. The code consisted of eight prescripts and was contained in a Joint Statement. Details of the code were to be worked out later.(IHT 11-08-95; FEER 24-08-95 p.15) Prescript 4 reads: "The two sides agree to settle their bilateral disputes in accordance with the recognized principles of international law, including the UN Convention on the Law of the Sea".

The sixth workshop in the series of informal "Workshop(s) on Potential Conflicts in the South China Sea" was to be held on 10-14 October 1995 at Balikpapan, Indonesia.(IHT 26-09-95)
[The series of workshops under the above name is convened by the Research and Development Agency of the Indonesian department of foreign affairs and sponsored by various Indonesian and Canadian corporations and institutions. The first Workshop was held at Bali in 1990, followed by subsequent Workshops at Bandung (1991), Yogyakarta (1992), Surabaya (1993), Bukittinggi (1994), Balikpapan (1995), Batam (1996) and Pacet (1997.]

Vietnam and the Philippines held talks on 6 and 7 November 1995, resulting in an agreement to resolve their dispute about the Spratly Islands "through peaceful negotiatioons in a spirit of friendship and equality, and in accordance with the UN 1982 Convention on the Law of the Sea".(IHT 09-11-95)

At a workshop in Manila in November 1995, attended by experts from the ASEAN countries, the US, Japan, South Korea, Taiwan, New Zealand and Canada but snubbed by China, there was a consensus that China would not risk an armed confrontation in the Spratly archipelago because of the economic and political costs that would ensue. But the experts said in a summary of their positions, that "conflicts of various sorts and extent" were possible either by reason of accident, provocation and competition in oil-drilling rights.(IHT 15-11-95)

Overlapping oil concessions from Vietnam and China

Referring to the area of the South China Sea where the American Crestone company explored under a Chinese license, known in Chinese as *Wan'an Bei*, China declared on 30 August 1995 that it lay within its national waters.

Thereupon the Vietnamese foreign ministry accused China of illegally exploring in the area that the Vietnamese call *Tu Chinh*. Vietnam had granted drilling rights to several foreign companies just to the west of Tu Chinh, and the state-owned Vietnam Oil and Gas Corp. had drilled at least one exploratory well in the same area as Crestone. (IHT 01-09-95)

In April 1996, PetroVietnam leased two offshore exploration blocks located about 400 kms from Ho Chi Minh City to the American company Conoco. The area covers more than half of the zone which China had leased to Crestone. (*see*: Joint development).

A Chinese foreign ministry spokesman reacted to the announcement of the Vietnamese lease by saying that China "will never accept any exploration by any country in this area. China has indisputable sovereignty over the Nansha [Spratly] islands". A Vietnamese foreign ministry statement replied that the areas awarded to Conoco "are on Vietnam's continental shelf and fall totally under the sovereignty of Vietnam". It was reported that Conoco was specifically warned by China months before the PetroVietnam deal was signed that China would protect Creston's right to the concession and recommended that Conoco cease its negotiations with Vietnam.

Crestone's president said that "both Conoco and Crestone anticipate eventually working together" as "the Chinese military won't let Conoco drill by themselves". While Conoco did not comment on the prospect of joint development, PetroVietnam, however, said that "[w]e have never discussed joint development . . . The area is under our jurisdiction and we can do whatever we want with it".(FEER 25-04-96 p.65)

Chinese reef-building in the Spratlys

It was reported that a Chinese reef-building expedition, tasked to pour 1,000 tonnes of cement and stone onto a submerged reef in the disputed Spratlys in early November 1995, went badly wrong after hurricane force winds and frigid temperatures wrought havoc with the naval personnel.(FEER 21-12-95 p.14)

US position on Spratlys

The initial response of the US admistration to develoments in the Spratlys was a reiteration of long-standing policy according to which the US "strongly opposes the threat or use of military force to assert any nation's claim. The US takes no position on the legal merits of the competing claims and is willing to assist in the peaceful resolution of the dispute". On 10 May 1995, the state department issued a statement which added that the US would "view with serious concern any maritime claim, or restriction on maritime activity, in the South China Sea that was not consistent with international law". On 16 June 1995, the assistant secretary of defense for international security said that if military action occurred in the Spratlys and this interfered "with freedom of the seas, then we would be prepared to escort and make sure that free navigation continues".(FEER 03-08-95 p.22)

Impact of China's ratifcation of the Law of the Sea Convention on its South China Sea claim

On 15 May 1996, China's National People's Congress ratified the UN Convention on the Law of the Sea (CLOS) [*see* 5AsYIL 211]. China asked all parties to the Convention to respect its new territorial sovereignty and maintained its claim to the Paracel and Spratly Islands.(FEER 30-05-96 p.13)

As a consequence of China's ratification of the Convention, it was suggested that it was now possible to agree on a comprehensive interim solution to the Spratly Islands dispute. A scholar at the East-West Centre in Hawaii said that a shared area surrounding the Spratlys could be governed by a Spratly Management Authority, its costs being covered by member states on the basis of each state's length of coastline bordering the South China Sea. Formal sovereignty would not be surrendered as the Authority would serve only to facilitate exploration and management of the resources of the shared area.(FEER 06-06-96 p.32)

Meanwhile, the Indonesian foreign minister questioned China's claim to a 200 nautical mile-EEZ around the Paracels after China ratified the CLOS. The minister asserted that according to the CLOS, only archipelagic states could make such claims.(FEER 20-06-96 p.12)

Malaysian military exercises in the Spratlys

Malaysian armed forces ended a series of exercises on one of the disputed islands in the Spratlys on 24 May 1996. Eighteen ships, six helicopters, and four jet fighters took part in the drills off the island called Layang-Layang.(FEER 06-06-96 p.13)

Abu Mussa Island
(AsYIL Vol.2 p.379, Vol.3 p.450, Vol.5 p.500)

Iranian and UAE officials held negotiations on the three disputed islands in the Persian Gulf, the first time since 1992. The discussions were to set an agenda for a meeting between the foreign ministers. Abu Dhabi demanded a comprehensive negotiation on all three islands, but Iran was ready only to discuss Abu Mussa island. Iran contended that its sovereignty over all three islands was not negotiable, but it had called for talks to remove misunderstandings.(IHT 21-11-95)

Takeshima/Tokdo Islands

The islands (Takeshima in Japanese, Tokdo in Korean) have a total area of 250 square metres and are located about 700 kilometres northwest of Tokyo and about 450 kilometres east of Seoul in the Sea of Japan. They are traditionally inhabited only by birds, but are surrounded by rich fishing grounds and the sea bed is believed to contain extensive mineral deposits. Currently 34 South Korean maritime police and two civilians lived on the islands.

Japan says it has had sovereignty over the islands since 1905, when it annexed the islands during the Russo-Japanese War. It regularly sends coast guard cutters to patrol areas around the islands. South Korea had claimed them since the 6th century (512) and has reasserted its sovereignty after the Second World War in 1945. It has deployed border guards on them since 1954.

The Korean-Japanese dispute over the islands erupted anew on 9 February 1996 when the Japanese foreign minister protested about Korean plans to improve a pier on one of the islands. He said that the islands were "historically, and in the view of international law, an integral part of Japan". The South Korean president said that the Japanese claim to the islands was 'intolerable', and demonstrations were being held in Seoul. On 14 February 1996 South Korea ordered air and sea exercises around the islands after the presence of a Japanese fishing patrol boat in the area. On 22 February 1996 South Korea announced it would install a water treatment plant on the islands but denied that it had anything to do with the dispute.

South Korea said it would declare an EEZ only if Japan acts first. On 20 February 1996 both countries in fact established overlapping EEZs without mentioning the islands which lie within 200 miles of both shores. At their closest point, Japan and South Korea are about 50 kilometres apart.

After the two countries declared their EEZs, it was reported that they would enter into separate discussions on the issues of fishing areas and overlapping maritime zones. Regarding the disputed islands South Korea's ambassador to Japan said: "This is our territory and we'll defend it no matter who says what".(IHT 12,13,14,15,16,19,21 and 23-02-96; FEER 29-02-96 p.13, 07-03-96 p.16)

Sipadan and Ligitan
(AsYIL Vol.1 p.348, Vol.2 p.379, Vol.3 p.451, Vol.5 p.515)

The Indonesian foreign minister said on 19 June 1996 that Indonesia would be prepared to have the International Court of Justice resolve the dispute over the two islands if talks fail. Indonesia preferred to resolve it amicably, but "We are ready to solve it legally and we are ready to solve it politically".(IHT 20-06-96)

Japanese-Russian islands dispute

Japan reacted angrily to remarks by the Russian foreign minister that negotiations on the disputed islands should be postponed, repeating similar remarks in January 1996. The Japanese foreign ministry said that "We strongly feel that this is an issue which must be addressed by our generation and not deferred to the next generation". A Japanese protest was lodged with the Russian foreign ministry.(IHT 22/23-06-96)

TERRORISM

Anti-terrorism co-operation

The Philippine president stated that the Philippines would join Egypt, Jordan, Pakistan and the US to form an effective network to fight terrorism.(IHT 26-10-95) A coordination network to combat terrorism was finally formed in February 1996 at a conference of 19 countries, among which Japan, Pakistan and the Philippines.(IHT 22-02-96)

Muslim foreigners in the Philippines

Philippine security forces arrested a group of Muslim foreigners accused of plotting to kill the president, bringing the number of suspected foreign extremists detained in the past month to twenty-four. One of the suspects was linked to the man who was arrested and deported to the US some time ago to face trial in connection with the 1993 bombing of the World Trade Center in New York. The group was also suspected of being involved in a December 1994 bomb attack on a Philippine Airlines plane that killed a Japanese national.(IHT 03-01-96)

UNITED NATIONS

Malaysian campaign to oust UN Secretary General

It was reported that Malaysia was holding consultations with members of the Organization of the Islamic Conference about efforts to remove Mr.BOUTROS GHALI from his post. The latter was blamed for the continuing war in the former Yugoslavia. Malaysia had repeatedly condemned the UN arms embargo on the Bosnian Muslims.(IHT 15-08-95)

Korea to join UN peacekeeping mission

It was reported that South Korea would send 200 army engineers to Angola in September 1995 as part of a UN peacekeeping mission to build roads and bridges. This would be the second such South Korean mission to Africa, the first being in July 1993 when an army engineering team was sent to Somalia.(FEER 20-08-95 p.13)

Proposal of Singapore for the reform of the Security Council

In addition to the replies of early 1994 to questions on the matter submitted by the UN (4 AsYIL 516 et seq.) the suggestions of Singapore were later reformulated in

September 1995 for the benefit of the Open-ended Working Group. They read, *inter alia*:

". . .
2. There are two basic problems. The first is simply to decide what is the current configuration of international power that should be reflected in the distribution of permanent seats. . . .
3. When the Charter was being drafted, the end of the Second World War was in sight and prepared for, with easily discernible winners and losers. The intention was for the winners to have primary responsibility for guiding the new international order. The end of the cold war took everyone by surprise and was far from clear-cut in its resolution. Economic, political and military power no longer necessarily cohere in a single locus.
4. The second problem is even more vexing. If the new Security Council is really to reflect the current international distribution of power, it should logically entail the relegation of some from the élite as well as the appointment of others. Even if some were to be so elevated without necessarily displacing others, the expansion of the small group of the select would imply the relative diminution of the status of the current permanent members. This reality compels us to confront the difficult question of the veto.
. . .
6. At this stage, it would be most useful to try to identify and build consensus on objective general criteria that all permanent members, present or aspiring, must fulfil. This is a more clinical and constructive approach than attempting to identify and promote one specific Member State or another. . . .
7. Singapore suggests the following criteria that could be used for selecting new permanent members of the Security Council:
(a) a permanent member must have a long-established tradition of good conduct in keeping with the purposes and principles of the Charter of the United Nations and in particular in the maintenance of international peace and security;
(b) The Charter confers upon the Security Council the primary responsibility for the maintenance of international peace and security. A permanent member must therefore first of all have the capacity and will to wield military force in support of the United Nations to maintain international peace and security. All permanent members should be prepared to give effect to Article 43 of the Charter and be ready to place their military forces at the disposal of the United Nations;
(c) A permanent member must also have the capacity and will to contribute civilian and humanitarian resources, which are increasingly needed in the growing multidimensional nature of United Nations peace-keeping operations;
(d) Privilege must be paid for. A permanent member should not shirk its financial commitments to the United Nations and must be prepared to carry a larger portion of the financial burden of the United Nations. In particular, a permanent member must bear special financial responsibilities for peace-keeping;
(e) A permanent member must be a major contributor to other aspects of the United Nations besides peace-keeping. These include international economic, financial and social co-operation, which are major elements in bringing about international peace and security;
(f) A permanent member should have the widest possible if not consensual support of all the members of the United Nations".(UNdoc.A/49/965)

Indonesian position on UN reform

Similarly the Indonesian position was reformulated under the heading "Criteria for permanent membership in the Security Council". It read, *inter alia*:

> "1. . . . [I]t is essential to ensure that the question of an increase in the permanent membership reflects the current configuration of membership of the United Nations and to ensure a more representative and effective Security Council. It is undeniable that the present arrangements do not reflect the profound changes and transition that have taken place in the global arena. The international community continues to face an untenable anomaly where three States from Europe are among the five permanent members. At the same time Asia is underrepresented, while Africa and Latin America are not represented, an arrangement that in geopolitical terms is unacceptable.
> 2. Objective criteria should therefore guide the selection process . . . While the principle of equitable geographic representation is a valid basis, it should not constitute the sole criterion . . .
> 3. Far from paying mere lip service and perfunctory exhortations, States must have supported the United Nations as the principal multilateral organization through which Governments can and should resolve conflicts . . .
> 4. Furthermore, the willingness of Member States to assume the onerous responsibilities inherent in permanent membership of the Security Council . . . must be deemed to be essential. These should have been convincingly demonstrated by their contribution to the promotion of regional peace and global security through successful diplomatic initiatives . . . Equally important is participation in peace-keeping activities over a period of time, as well as contributions to the civil, military, financial and other resources of the United Nations. Proven capacity for constructive global influence and for undertaking global responsibilities, especially in guiding a coalition of the largest number of States in history comprising all continents and regions, would constitute yet another criterion.
> 5. Moreover, a country's standing within the new realities of regional and subregional dynamism and in building the edifice of confidence and concordance should be fully considered. It is also pertinent to take into account the legitimate aspirations of the largest States . . . Of no less importance is a prominent and constructive role in resolving issues of global concern, particularly through compromise, co-operation and consensus.
> 6. Additionally, economic power - both current and potential - and social stability, as well as the capacity and willingness to contribute significantly to socio-economic development, are other factors. Another central criterion . . . is a record of strong and sustained economic growth . . . that would make it one of the largest and vibrant economies in the world. . . . Likewise, sustained economic performance and resilience even in the face of adverse global economic conditions such as recession should also be given due weight. Stable macroeconomic performance, substantial domestic and foreign investment flows and demographic strength . . . are also essential attributes. It is from such strength that a country's capacity to contribute towards development co-operation under multilateral auspices is derived.
> . . .
> 8. . . . [T]he exclusion of developing countries through a process of predetermined selection should be unacceptable. Enlargement [of the permanent membership] should be accomplished through a process of open-ended negotiations on the basis of consensus and as a comprehensive package. . . ."(UNdoc.A/49/965)

The foreign minister of Indonesia said in an interview that the United Nations must be the central instrument of a new world order. He agreed that Japan and Germany should become permanent members of the security council, but only as part of a package that would give council membership to an appreciable number of developing countries. The suitability of countries should be evaluated by using objective criteria. He expressed himself against the formula of admitting a security member each from Asia, Africa and Latin America as this would, in the case of Asia, automatically point to India as the country with the largest population. Instead he proposed criteria including a country's track record, such as its contribution to peace-keeping missions, as well as its capacity for discharging council functions. This would include its size, the state of its economy, and its political influence.

Echoing the position of the Non-aligned Movement, he said that the reforms must include the World Bank and the IMF.(FEER 13-06-96 p.38)

Japanese participation in peace-keeping
(*see*: Japan's military role)

UNRECOGNIZED ENTITIES

See also: Diplomatic and consular relations

Russian relations with Taiwan

The Taiwanese foreign ministry said that Russia was to open a representative bureau in Taipei by the end of 1996 to promote trade and technological co-operation. Both countries agreed to exchange aviation rights, while direct shipping services would be discussed eventually.(FEER 23-05-96 p.15)

VIETNAM WAR

American MIAs

The US president notified the US Congress on 31 May 1996 that Hanoi was cooperating in full faith in the search for remains of American soldiers missing from the Vietnam War. The president was required to notify the US Congress before additional funds could be spent in expanding diplomatic ties with Vietnam.(FEER 13-06-96 p.13)

WEAPONS

US accusations on illegal weapons research

A US government report released on 14 July 1995 alleged that China and Russia had carried out research in the 1980s in violation of the 1972 Biological and Toxin Weapons Convention. China on 18 July condemned the report and qualified the allegations as "groundless and utterly irresponsible".(IHT 19-07-95)

WORLD TRADE ORGANIZATION
See also: International economic relations and trade

Institutional functions

Singapore was appointed Chairman of the General Council, and Thailand Chairman of the Committee of Agriculture.(Undoc.A/49/953-S/1995/652)

Singapore - Malaysia

The Singapore Ministry of Trade and Industry withdrew a complaint to the WTO about Malaysia's restrictions on polypropylene imports (5 AsYIL 506).(FEER 03-08-95 p.57)

Terms for Chinese participation

With the support of almost half of the WTO members but against US objection China obtained observer status pending its acceptance as a full member. As a result, although it cannot vote, China would have a say in key issues, including foreign-labour rules, the environment, financial services and telecommunications.(FEER 20-07-95 p.79) The US assisant secretary of state said later that "we just can't let them in on political grounds".(FEER 10-08-95 pp.14-17)

The so-called Quadrilateral Grouping, consisting of Canada, the EU, Japan and the US, decided in October 1995 that the terms proposed by China for its membership were unacceptable.(IHT 23-10-95) On the other hand, China rejected the conditions set by the US and other countries for China's entry. According to a foreign ministry spokesman, "their demands exceed the level of China's economy and are against the basic principles of WTO". Neither China nor the Quadrilateral group disclosed details of their respective bargaining positions.(IHT 25-10-95)

At a meeting with the EU trade commissioner, China's foreign trade minister denounced as 'unrealistic' American demands for too-rapid economic and trade liberalization in China as a condition for WTO entry. The Chinese minister insisted that when it joins the WTO, China should be treated like any other developing country, specifically be given three to seven years to bring down tariffs, open the service sector, and take on the other WTO trade-opening requirements. EU officials said that they were ready to give China more time than developed countries to implement the world rules on free trade. In addition, EU wanted China to phase out its system of industrial subsidies and to step up its protection of intellectual property rights.(FEER 26-10-95 p.74)

The objections against China's entry into the WTO were questioned by a senior Chinese official as double standards. As to the argument that the trading regime of China was less in conformity with the WTO, it was countered that the WTO had a regime of exceptions which could be applied to China as it was applied to members that are developing or are in transition. The export potential of China, it was argued, should also be beyond doubt. Lastly, the interest of a multilateral trading system based on rigorous requirements and rules was best met with China inside, rather than out, of the WTO. The willingness of China to join the WTO was shown by the announcement in Osaka during the APEC meeting of the biggest liberalization package since the country opened up in 1979.(FEER 07-12-95 p.44)

The Chinese foreign ministry said in March 1996 that the condition made by the US that China be classified as a developed nation was unreasonable as it exceeded China's level of development. Classification as developed nation would entail more stringent standards for market opening which cannot even be fulfilled by current WTO members. The same would apply to the demand to comply with the EU free investment treaty as even current WTO members had not yet agreed to it.(IHT 04-03-96)

Failing efforts to conclude new agreements to liberalize trade

Bilateral negotiations among 50 participating countries that should lead to a multilateral global telecommunication trade pact started on 10 April 1996 in Geneva. Asian policy makers had been generally hesitant to open national markets because of perceived needs to protect strategic national sectors and because some Asian national telecommunications were not strong enough to face full-blown foreign competition. The Philippines, for example, had set a 40% ceiling for foreign investments in telecommunications, and Singapore's offer would limit foreign investment to 49% in any local telecommunications provider; besides it would also not open its monopolized market until 2007.(FEER 11-04-96 p.75)

After having failed to reach agreement before 1 May 1996 it was thereupon decided to postpone the deadline for agreement until 15 February 1997. The breakdown highlighted the trade tensions between the major industrial countries and the developing countries. The US blamed the latter countries for blocking a deal by failing to match a US offer of full access to foreign telephone companies; the US said it could not agree to a deal unless Asian nations improved market-opening measures. EU officials blamed 'election year politics' in the US, rather than Asian inaction, for the failure of the talks. (FEER 16-05-96 p.83)

The postponement was expected to influence the parallel WTO negotiations aimed at opening up trade in maritime services which had 30 June 1996 as a deadline and which were deadlocked by the US refusal to remove long-standing preferences for American vessels and shipyards.(IHT 02-05-96)

WORLD WAR II

Korean and Chinese reaction to Japanese remark on the war

The Japanese education minister said in August 1995 that it was only a matter of opinion whether Japan's war and colonization in Asia and the Pacific could be characterized as 'aggressive'. The South Korean and Chinese governments swiftly responded with expressions of regret and protests. After being prodded by the prime minister the education minister apologized for causing 'misunderstanding': "My intended meaning was that instead of repeating apologies, as has been done by successive prime ministers, it is more important to take actions to compensate based on that remorse".(IHT 11-08-95)

Japanese apology for the war

On the occasion of the 50th anniversary of the end of the Second World War the Japanese prime minister on 15 August 1995 delivered a statement which read, *inter alia*:

"During a certain period in the not too distant past Japan, following a mistaken national policy, advanced along the road to war, only to ensnare the Japanese people in a fateful crisis, and through its colonial rule and aggression caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations.

In the hope that no such mistake be made in the future, I regard, in a spirit of humility, these irrefutable facts of history, and express here once again my feelings of deep remorse and state my heartfelt apology . . .."

The expression of remorse was welcomed by the governments of the Philippines, South Korea and China.

In June 1995 the Japanese parliament had passed a weaker version of an apology. It said: "We recognize and express deep remorse for those acts our country carried out in the past and for the unbearable pains inflicted upon people abroad, particularly those people in Asia". The resolution also refered to "many colonial rules and acts of aggression in the modern history of the world".(*see* 5 AsYIL 508)(IHT 16-08-95; FEER 20-07-95 p.34, 24-08-95 p.18)

UN report on 'comfort women'

According to a report by the UN Special Rapporteur on violence against women, the system of 'comfort stations' set up by the Japanese Imperial Army during the Second World War and involving a network of women forced to provide sexual services to soldiers, was a violation of its obligations under international law.(IHT 07-02-96; UNdoc.E/CN.4/1996/53/Add.1 of 04-01-96)

Korean and Japanese positions on the issue of 'comfort women'

The above report of the UN Special Rapporteur also contained a presentation of the Korean and Japanese positions.

The Democratic People's Republic of Korea, (para.66 et seq.) *first*, holds the opinion that the forcible recruitment of Korean women as military sexual slaves (the term preferred by the Special Rapporteur to the phrase 'comfort women' as the latter does not reflect the suffering and severe physical abuse endured by the persons concerned "during their forced prostitution and sexual subjugation and abuse in wartime", *see* para.10), their severe sexual assault and the killing of most of them in the aftermath constitutes a crime against humanity. Furthermore, as the annexation of the Korean peninsula by Japan is considered not to have been attained through legal means (legal invalidity of the 1905 'Ulsa Five-Point Treaty' and the 1910 'Treaty of Annexation') and the Japanese presence on the Korean peninsula is considered to have constituted a state of military occupation, the forcible recruitment of the women should also be considered a crime under international humanitarian law, since these crimes were committed against civilians in an occupied area. *Secondly*, the DPRK contends that the establishment of a 'comfort women' scheme, and in particular the forcible recruitment and coercion into prostitution, is contrary to the 1921 International Convention for the Suppression of the Traffic in Women and Children (ratified by Japan in 1925). *Thirdly,* the system of military sexual slavery is inconsistent with the 1926 Slavery Convention, which is considered declaratory of customary international law at that time. *Finally,* the act of military sexual slavery is to be considered an act of genocide, in accordance with the 1948 Convention which is considered to represent generally accepted norms of customary international law even before 1948.

None of these issues have been settled between the DPRK and Japan as no diplomatic relations have been established between the two countries. The (Japanese) 'Asian Peace and Friendship Fund' is considered "a ploy or trick to dodge the issue of state compensation".

The position of the Republic of Korea (para.77 et seq.) is that under the 1965 Japan-ROK Treaty diplomatic relations between the two countries have been 'normalized' and compensation was paid by the Japanese government for property damage incurred during the war, but that at that time the issue of military sexual slaves has not been addressed. After the first public articles about the issue, the Korean president has made public assurances that the ROK would not request any material compensation from Japan with regard to the issue. Government officials are aware of the difficulty of determining whether Japan actually has a legal responsibility to compensate for crimes committed 50 years ago and whether or not the treaties concluded afterwards might have also settled the issue. The Asian Peace and Friendship Fund is considered to be a sincere effort to accomodate the wishes of the ROK and the victims.

The Japanese government (para.91 et seq.) feels itself to be under no legal compulsion towards the victims, but only a moral obligation. The 1949 Geneva Conventions and other instruments of international law did not exist during the period of the Second World War and Japan was not a signatory of the 1929 Geneva Convention. Therefore, Japan is not responsible for violating international humanitarian law. Japan ratified the 1910 International Agreement for the Suppression of the White Slave Traffic and the 1921 International Convention for the Suppression of the Traffic in Women and Children but it exercised its prerogative under Art.14 of the 1921 Convention to declare that Korea was not included in the scope of the Convention. Even if there were to exist responsibilities under international law, these were met by the 1951 San Francisco Peace Treaty (Art.14) and other bilateral peace treaties and international agreements dealing with reparations and/or settlement of claims. The San Francisco Peace Treaty states, *inter alia*, that "the Allied Powers waive all reparation claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of actions taken by Japan and its nationals in the course of of the war, and the claims of the Allied Powers for direct military costs of occupation". As to the 1965 Japan-ROK Agreement on the Settlement of Problems concerning Property and Claims and on Economic Cooperation (583 UNTS 258), Art.II deals with the matter. (UNdoc. E/CN.4/1996/53/Add.1; FEER 20-07-95 p.34)

Japanese chemical weapons in China

Japanese experts began unearthing and disposing of Japanese chemical weapons left behind in China and buried in Jilin Province. Chinese officials estimated that the dump holds 1.8 million pieces and that it could take up to nine years and $1 billion to clear.(IHT 15-05-96) After the survey the Japanese experts found evidence of only 770,000 pieces.(IHT 04-06-96)

LITERATURE

BOOK REVIEWS*

International Terrorism by AMRITH ROHAN PERERA, Vikas Publishing House PVT Ltd, New Delhi, 1997, ISBN 110007, Price Rs 450.

This book is an investigation into the development of legal principles in the area of international terrorism, already for long a scourge of the international community. In pursuit of these legal principles, PERERA considers the various international initiatives which have attempted to deal with the problem.

All work in this area must overcome a definitional hurdle: what precisely is terrorism? While taking the simplistic explanation whereby terrorism "involves the systematic threat or use of violence calculated to inspire a feeling of fear or dread in the victims of such acts" (p. 1) as a starting point, PERERA makes clear that such an elementary exposition is only of limited use in creating an international regime to control terrorism. Any such regime must overcome a core definitional difficulty, summed up by FREIDLANDER as follows: "For some terrorism exists in the mind of the beholder, depending upon one's political views and national origins. For others terrorism consists of a criminal act or acts according to the law of any civilized society" (p. 11). This "freedom fighter-terrorist" debate is the conundrum lying at the heart of all initiatives to combat international terrorism.

The surprisingly long history of anti-terrorist initiatives, as PERERA suggests, bears investigation, given its impact on later efforts such as, for example, the 'extradite or prosecute principle' found in the work of the International Conferences for the Unification of Penal Law (held in the 1920s and 30s) and in the League of Nations Conventions (the Geneva Convention for the Prevention and Punishment of Terrorism, and its sister Convention for the Creation of an International Criminal Court). While these efforts had limited impact at the time, and the League of Nations Conventions even failed to come into force, PERERA sees them as the genesis of legal principles which have since developed.

PERERA's discussion of United Nations initiatives is of particular interest to the reader concerned with the freedom fighter-terrorist debate. The dichotomy of views which has dogged all efforts to control terrorism has been most apparent in the global arena: while Western states condemn all acts of terrorism, the Non-Aligned Movement emphasises the principle of self-determination and the notion of legitimacy of national liberation struggles. Accordingly, the history of United Nations activity in this area is one of stalemate and uneasy compromise.

Regional organisations (tending to include states with cultural as well as geographical similarities) have been more successful in this area, though a definition of terrorism remains elusive. PERERA's clear exposition of regional efforts in this area (e.g. within the European Union, the South Asian Association for Regional Co-operation, the Organization of American States, the Non-Aligned Movement, and the non-regional but historically and culturally connected Commonwealth of Nations), involving a comparison of the various organisational achievements and failures, is of particular interest to the international lawyer considering anti-terrorist initiatives.

Through this investigation, the author discerns the existence of four legal principles which have developed from the various anti-terrorist initiatives: the principle of non-use of the territory of a state for terrorist acts against another state, the principle of universality of jurisdiction, the extradite or prosecute principle (*Aut Dedere Aut Judicare*), and the principle of non-extradition of political offenders.

In the conclusion, PERERA looks forward to the future of terrorism control and suggests that the end of the Cold War and the growth of international co-operation represent new hope for an

* Edited by Surya P. Subedi, Book Review Editor.

"international order based on respect for the rule of law" (p. 295). This is perhaps a rather optimistic view, given that it is traditional divergence of views between the non-aligned states and the west, rather than an east-west divide, which has dominated disagreement in this area. PERERA also contemplates the possible impact of an International Criminal Court on this area, and suggests that it could be positive: "An independent International Criminal Court vested with jurisdiction over international crimes of a terrorist character as 'codified' in existing multilateral Conventions enjoying general acceptance, would greatly enhance the development of a self-contained legal regime to serve as an effective legal response to the threat posed to the international community by the phenomenon of international terrorism" (p. 306).

The book affords a detailed and well organised examination of the various initiatives which have emerged in the fight against international terrorism. The historical analysis and investigation of the various conventions and initiatives aimed at controlling terrorist activities provide a sound base for the international lawyer concerned with international activity in this area. This work is perhaps flawed in its limited discussion of the freedom fighter-terrorist debate - an evermore important area as the notion of self-determination, and its adjunct the struggle of national liberation movements, become increasingly central to international law. While PERERA emphasises the importance of this debate, he fails to fully consider its implications. For example, a discussion of current initiatives by the Non-Aligned Movement, with its emphasis on the right of self-determination and the legitimacy of national liberation struggles, only accounts for five pages of the book (pp. 146-151) while, according to the author himself, "the Non-Aligned approach . . . made an impact on International Conventions . . ." (p. 147). In addition, the book (perhaps deliberately, for this is in itself a massive topic) fails to come to grips with the problem of state terrorism which is probably, as the Non-Aligned Movement insists, a greater threat to international peace and security than the terrorist activity of individuals.

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The International Status of Taiwan in the New World Order: Legal and Political Considerations, by JEAN-MARIE HENCKAERTS (ed.), Kluwer Law International/ Martinus Nijhoff Publishers, London/The Hague/Boston, 1996, pp. xviii and 337, ISBN 90-411-0929-3, price DFl. 135.00/US $ 88.00/£ 60.00.

With the end of the Cold War the time has come to reconceive notions of the international system and the world order. One case that will merit increasing attention is that of Taiwan and its relationship with China. The increased awareness of fundamental human rights and self determination, forces consideration of the question of where Taiwan stands within the international order of sovereign states. *The International Status of Taiwan in the New World Order* seeks to do this. It is the result of a conference held in Brussels, organised by the Centre for United Nations Law at the University of Brussels on 16 June 1995 to commemorate the golden anniversary of the United Nations. This was seen as a good occasion to examine in depth one of the issues that so far evaded solution. The book itself is comprehensive in that it takes a politico-legalistic approach to the problem and provides a host of relevant documents. It should prove useful to international law researchers in the areas of statehood and recognition, as well as self-determination. It could also prove useful to politics students examining the concept of the nation state and the politics of exclusion.

The book is divided into five broad sections. Part One sets the stage for what is to follow by scrutinising the international legal status of Taiwan. In this section HUNGDAH CHIU summarises the events that have shaped the future of the island of Taiwan (formerly Formosa), highlighting the ceding of the territory by China to Japan, Japan's renunciation after World War Two and the effective control exercised by the government of the so-called Republic of China (ROC). He

concludes that the "Peoples Republic of China (PRC) could not acquire title over Taiwan through the international law principle of occupation or prescription because it had no physical control over the island" (p. 8). HANS KUIJPER, while disagreeing with HUNGDAH that the ROC should be recognised as a State and represented in major organisations, examines the issues of statehood under the Montevideo Convention. He suggests that the only solution to the problem is to have two separate independent countries. MICHAEL DAVIS concludes the first section proposing that for a solution to the problem both China and Taiwan need to abandon nineteenth century rhetoric. He flags up the issue of modern concepts of sovereignty and statehood, however, which pose the question as to whether conferring statehood on Taiwan might be the imposition of outdated Westphalian values of statehood.

The second section of the book relates to the Taiwanese response to diplomatic isolation. LINJUN WU, in examining the "Limitations and Prospects of Taiwan's Informal Diplomacy" (p. 35), points out that the economic success of the 1980s was the prime factor in the success of 'informal diplomacy' employed by the island. He however recognises that this approach has limitations and expresses reservations on the extent to which it is likely to succeed. KAY MÖLLER asks the question: "Does Flexible Diplomacy Improve Taiwan's International Status?" and answers that the "new pragmatic foreign policy (of Taiwan) is neither an improvement nor a weakening of its international status but rather the logical outcome of a new international and regional setting in which China's calls for reunification have been increasingly and effectively orchestrated by incentives and pressures" (p. 62).

Part Three of the book looks at the "Responses to Diplomatic Isolation" and focuses in particular on the return of Taiwan to international organisations. It is the longest section of the book and includes an article by DENNIS VAN VRANKEN HICKEY who looks at policies, problems and prospects of Taiwan's return to International Organisation (p. 65). KO SWAN SIK looks at the implication of the meaning of 'Taiwan' to different actors in "Taiwan's "Return" to International Organisations" (p. 79). VINCENT WEI-CHENG WANG examines whether Taiwan can join the United Nations now that the Cold War has ended. He argues that Taiwan is a state and thereby has the right to membership of International Organisations, which also raises the question of the legality of Resolution 2758 (replacing the ROC with the PRC in the United Nations).[1] SHENG-TSUNG YANG in "The Republic of China's Right to Participate in the United Nations" claims that the state has existed since 1912, while the PRC has only existed since 1949. Therefore participation in international organisations is the right of Taiwan - being a peace-loving nation satisfying conditions of statehood. Being an original member of the United Nations unfairly dismissed, and showing the readiness to provide technical and financial assistance are other factors that weigh strongly in its favour. JANET LORD looks at "Taiwan's Right to be Heard Before the Security Council" (p. 133) and concludes that as long as the Security Council is discussing the Taiwan Question, the country has the right to be represented and heard at Security Council fora. LOUIS SOHN advises that Taiwan could perhaps work its way back into the international fold by seeking to first gain status as a permanent observer. NERI SYBESMA-KNOL looks at "The UN Framework for the Participation of Observers" and builds on the suggestion made by SOHN, comparing different freedom movements around the world. Finally, LUNG-CHU CHEN states emphatically that "Taiwan is a sovereign independent state in every sense of the word. Taiwan is not a part of China. Taiwan's present and future destiny are not an internal affair of China" (p. 190).

The fourth part focuses on "Relations Across the Taiwan Strait" and contains articles by JAMES HSIUNG and CHENG-WEN TSAI. While the former analyses "The Paradox of Taiwan-Mainland Relations", the latter looks at "The Development of Cross-Strait Policies in China and Taiwan". HSIUNG highlights how despite the growth in trade and economic interaction between the

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[1] For the legality of Resolution 2758 see JOHN BOLTON's testimony in the United States Congress, House of Representatives, Committee on International Relations, H. Con. Res 63, relating to the Republic of China (Taiwan's) Participation in the United Nations, 104th Congress, 1st session, Washington D.C., August 3, 1995.

two entities there has been a rise in the level of political tension. TSAI holds the PRC responsible for the lack of political headway and claims that "Beijing has always refused to face up to reality and has, instead interpreted cross-strait relations from a legalistic and ideological point of view" (p. 230). The ROC, on the other hand, the author claims, has "in substance . . . a real peaceful unification formula" (p. 233). In the concluding section of the book, the editor JEAN-MARIE HENCKAERTS assimilates the various sections to look into "Self-Determination in Action for the people of Taiwan". He explores the use of the self-determination argument from the point of view of a separate state of Taiwan.

One aspect that the study perhaps ignores, is the self-determination of the original Formosans of Malay-Polynesian origin. As noted by KUIJPER, they were brutally repressed by the occupying forces of CHIANG KAI-SHEK (pp. 10 and 12). The study, whilst dealing with the politics of exclusion of the 21 million people of Taiwan, strangely excludes these indigenous people. It also operates from an area of weakness in that it has not yet been ascertained what the 'people' of Taiwan really want. There is a degree of contradiction in this respect, with some claims for the maintenance of the status quo (DAVIS, p. 32) while others claim that the ruling KMT government speaks for the people. Another weakness that presents itself is the considerable bias in favour of the ROC views to the exclusion of the views of the PRC. This demonstrates succinctly the subjectivity that is rife in examining issues of international law. It needs to be pointed out, however, that despite these weaknesses the book is exciting since it brings together some vital issues surrounding the resolution of the problem. The appendices are particularly useful to researchers seeking to enter into the area of Taiwan, containing the various documents to be examined. Researchers will find the book a useful and comprehensive source of reference material.

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Sovereignty over Natural Resources: Balancing Rights and Duties in an Interdependent World by NICO SCHRIJVER, Cambridge Studies in International and Comparative Law, Cambridge University Press, 1997, pp. 452, ISBN 0 521 56269 4 hardback, price £55.00.

The de-colonisation and self-determination processes led to the emergence as independent states of many new actors on the world stage. These entities often asserted their independence in part through a re-examination of the economic and political *status quo*. A fundamental perspective of the 'new states' has been that one of the most important attributes of statehood is sovereignty. At its simplest, the claim to sovereignty is that no other entity can control the actions of a state. In the economic context, it is the claim that a state can freely chose with whom it does business and on what terms, can change or terminate those relationships or terms, can recover economic assets (or their value) taken from it on terms it considers unfair, etc. One of the legal concepts reflective of this emphasis on sovereignty, which has grown up over the last 50 years, is that of 'permanent sovereignty over natural resources'.

Professor NICO SCHRIJVER of the Institute of Social Studies and the Free University of Amsterdam has written an excellent and ground-breaking study of the genesis, development and consolidation of this concept. The emphasis on sovereignty which the 'new states' adopted had an at least implicitly political dimension, as they sought to distance themselves from their former colonial masters and to tangibly demonstrate that they were not to be taken for granted in the changing socio-economic-political scene. Sovereignty was therefore aggressively pursued in fact and argued in theory. States claimed the widest scope for their powers, to terminate concession agreements, to create producer cartels that set prices, to expropriate property, to strictly control the business activities of non-nationals, to exclude competition by establishing monopolies in key areas of the economy, or to own natural resources located in the state or off its shores.

SCHRIJVER clearly sets out the three objectives of this book, a revised doctoral dissertation presented at the University of Groningen. They are "to map the evolution of permanent sovereignty over natural resources from a political claim to a principle of international law", "to show that the principle of permanent sovereignty has not evolved in isolation but as part and parcel of other trends in international law", and "to demonstrate that, apart from rights, duties relating to resource management can also be inferred and that under modern international law they are being given increasing significance". SCHRIJVER meets these objectives and in doing so provides us with a study that illuminates many other aspects of international economic law.

The first part of the book is devoted to a review of the development of the principle of permanent sovereignty primarily at the United Nations. Unlike some other works, this book examines the early stirrings of the permanent sovereignty debate. The early link recognised between sovereignty over natural resources and the protection of human rights is pointed out, for example. Most of this section of the book is taken up with detailed descriptions of the various proposals, resolution and reports related to permanent sovereignty over natural resources continuing to the Rio Summit on Environment and Development in 1992. The study is notable for looking behind the texts adopted to the drafts and comments made by governments.

This method allows a fuller appreciation of the range of the debate and the areas in which compromise was necessary, as well as the bases for compromise. Uniquely, there is a section on sovereignty over resources in territories under foreign occupation or administration, in which Namibia, the Israeli-Occupied Territories and the Panama Canal and Zone are discussed .

The middle section deals with developments in three areas of international relations related to permanent sovereignty in practice. Here SCHRIJVER examines international investment law, the law of the sea and international environmental law. In each area he provides a primer for anyone who wishes to understand these areas of law. Indeed, each chapter is a 'mini-textbook' in which the background of the issues are reviewed from both a legal and political perspective, developments over recent decades are analyzed and future trends are discussed. These are not superficial reviews but could be used as the basis for either teaching or further research in each field.

The most difficult issue which SCHRIJVER examines is whether and how the principle of permanent sovereignty over natural resources has been transformed from political slogan to legal principle. The final part of the book applies the principle to many claims and examines to what extent it can actually be applied. Very usefully there is a chapter on the duties of states. This area is often neglected in the rhetoric of rights, and would usefully make a study in its own right. The author has led the way with an examination of the duties which arise in the context of permanent sovereignty. In his final chapter he makes a masterful connection between permanent sovereignty of natural resources, the theme of the 1960s and 1970s, to sustainable development, the theme for the 1990s and the next century. He makes the point that "permanent sovereignty in an interdependent world" can serve as "an important corner-stone of rights and duties".

Professor SCHRIJVER has provided many useful tools for the reader. No review would be complete without referring to the very interesting tables and appendices which appear throughout the book. One can mention the table reviewing the "drafting history of provisions on permanent sovereignty over natural resources in the human rights covenants" and the appendix "survey of main cases" as two outstanding examples of highly useful collections. The comparative presentation of these materials makes it easy to understand the development of the law. Often authors will use specialist words without realising that the reader may not be as familiar as they with these terms of art. SCHRIJVER has provided a glossary of Latin phrases. He has also explained the main symbols used in United Nations documents, which can be so opaque. Finally, there is a comprehensive bibliography and index.

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The International Law on Foreign Investment, by M. SORNARAJAH, Grotius Publications, Cambridge University Press, 1994, pp. 427 + Index, ISBN 0 521 46528 1 hardback, price £60.00/US$ 100.00.

The present reviewer cannot agree more with the author of this book when he states that "[i]n the second half of the twentieth century, apart from the international law on the use of armed force, no area of international law has generated as much controversy as the law relating to foreign investment" (p. 1). Yet, the irony was that no systematic attempt had been made to produce a cohesive and comprehensive treatment of the public international law applicable to the protection of foreign investment prior to the publication of this book, which nicely fills that gap.

This thorough, well argued and extremely well written book appears to be a climax of the writings of Professor SORNARAJAH of the Faculty of Law of the University of Singapore on the subject. This book is a good example of how the wealth of experience and expertise of an author on his subject matter can be expressed in a mature and lucid fashion. It is indeed a very welcome addition to the existing body of literature in this area of study and will, no doubt, serve as a very useful source of reference for both students and teachers alike interested in the public international law on foreign investment.

As stated at the introductory page of the book, "[i]t examines the different techniques that have been adopted by States for attracting foreign investment as well as for ensuring that foreign investment serves their economic objectives." The author compares foreign investment legislation and assesses its legality in the light of international norms, and provides a good survey of the development of foreign investment law and a competent critique of the current tendencies that exist within both the Bretton Woods institutions and the new GATT/WTO regime.

The book is divided into nine chapters taking us all the way from the early days of the development of foreign investment law (in the first and second chapters), to the state of affairs as they stood at the completion of writing (in the eighth and ninth chapters). The author devotes entire chapters to some fundamental matters in foreign investment law such as the issues concerning host and home country control of transnational corporations. A very useful select bibliography and an index are included. The style of organisation of the material presented is sound and the lay-out of the book is quite logical.

In the nine chapters of the book the author touches on more or less every relevant topic or issue of foreign investment law, whether it is related to the nature of the risks to foreign investment or the ways of avoiding them. He analyses the reasons why, in spite of all the efforts made in the past two/three decades, the international community has failed to agree on an internationally binding code of conduct for transnational corporations - the main vehicles for foreign investment. As warranted by the scope and nature of the study, in this process account is taken not only of the law, but also of other disciplines such as economics and political science. The law of foreign investment is an illustrative example of the tension that exists in international economic relations between the developed and developing states.

Whilst developing states demonstrate a desire to emulate the success of the industrialised in general and the newly industrialised states in particular, they appear apprehensive about the dangers that lurk in the wholesale subscription of the Western approach to foreign investment. SORNARAJAH alerts the developing countries about the pitfalls of the Western agenda championed by the World Bank and the WTO. He is critical of the content of the 1992 Guidelines of the World Bank on foreign investment and tells us what are the ideas behind the GATT/WTO agreement on trade-related investment measures (TRIMS).

Since in the name of restructuring and reorganisation the UN bodies working for the establishment of a better and fairer international economic system have either been taken out of business or denied the resources necessary to carry out their tasks, the world is left with less and less inter-governmental 'think tanks' working for a fairer international economic system. This is

one reason why studies such as the one presented by Professor SORNARAJAH are of value to those prepared to listen to both sides of the argument.

Indeed, there are quite a few assertions made in this study which some people may find difficult to understand. For instance, SORNARAJAH dismisses the idea that private arbitration bodies such as the ones constituted by the International Chamber of Commerce can refer to the law of the International Convention on Settlement of Investment Disputes between States and Nationals of Other States (ICSID) in settling disputes before them. "As much as it is an error for tribunals not created by an international convention to imitate the powers of ICSID, it is an unwelcome development in many ICSID arbitrations that an effort is being made to marry ICSID jurisprudence with the internationalisation theory" (pp. 352-353). While one can understand the frustration of the author with the idea expressed in the second part of the quoted sentence, some people might say there is no reason for private tribunals to be barred from using the technique of choice of law conferred on a tribunal created by an international convention, if the private tribunals are allowed by the parties in the disputes concerned to use that technique and find it to be helpful in resolving the dispute before them.

Another area of difficulty for some people could be with Professor SORNARAJAH's trouble expressed regarding the attempts made by "a coterie of scholars of the developed countries", who are "totally committed to the protection of the multinational corporation and hostile to the interests of the developed countries", to "create investment protection through the formulation of spurious doctrines" (p. 335). This is because the type of scholars described by the author have always existed and will continue to exist and they would find it difficult to see the points made by the author. Not much can be done about the efforts they are making to advance the interests of multinationals. One can only hope that their line of argument would continue to be dismissed by the developing states as well as those scholars who labour to come up with an unbiased set of research findings. Given the current politico-economic climate of the world, it is, however, anticipated that the developing states might not hold on to their beliefs. This is because they have abandoned their traditional position with regard to many areas of international relations such as the deep sea-bed mining regime of the Law of the Sea Convention, 19982.

There are a couple of minor technical deficiencies in the book. For instance, the author does not always give a source of reference or the standard or primary source of reference for international instruments where they are mentioned for the first time in the text (e.g. ICSID at p. 41). Also, it would have been convenient for casual readers, or for those looking for a quick reference, had the author given his main research findings or summarising thoughts in a concluding chapter at the end of the book. Equally useful would have been tables of cases and of treaties and international instruments in a study of this nature. Nevertheless, the book can certainly be regarded as the definitive study of the public international law of foreign investment. It is a masterly treatment of the subject matter and constitutes a highly recommendable book for anybody interested in this area of international law.

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Essays in Honour of Wang Tieya, by RONALD ST. JOHN MACDONALD (gen. ed.), Martinus Nijhoff Publishers, Dordecht/Boston/London, 1994, pp. viii and 964, ISBN 0792 324 692, price Dfl. 375.00/US $ 228.00/£ 150.00.

The book under review is a collection of a wide range of essays in honour of a well known and well respected Chinese scholar of international law, Professor WANG TIEYA. It was edited by Professor ST. JOHN MACDONALD, and the list of contributors includes established names in the field of international law from all parts of the world: a befitting tribute indeed to a scholar of the stature of Professor TIEYA.

Essays in Honour of Wang Tieya is a skilfully structured book in that the editor has managed to include a wide range of topics in the field of international law in a coherent and orderly manner without giving a 'cramped' feeling to the reader. The book is one of considerable length, with an introduction and 58 chapters. Two of the chapters are written in French while the rest of the contributions are in English. Rather than writing a 'conventional' introduction where the main issues to be discussed are highlighted, usually by summarising the contents of the book, the editor in a poignant manner gives us a flavour of the themes to come through an insight into the multi-faceted and rich professional life and personal struggles of Professor TIEYA in the promotion and development of international law. The themes thus emerging from this chapter sets the scene for the diverse aspects and subjects of international law dealt with by contributors to the volume. Thus, we find themes ranging from the problems of teaching of international law in law schools, to environmental law, law of the sea, governing Antarctica, the UN system, sovereignty, state succession, self determination, the European system for the protection of human rights, to Chinese concerns in international law and Asian perspectives on international law, to mention but a few. In fact one may safely put forward the view that most topical issues effecting current discourse in international law have been dealt with.

The thematic treatment of the book thus reflects the various aspects of the professional interests and pursuits of WANG TIEYA in the field of international law. The common thread running through the volume is the conviction that even in politically and economically 'unequal' states, international law has a decisive and positive role to play. Faith in the efficacy of international law and the struggle towards a core of universalism appears as the dominant theme. MANFRED LACHS's statement is rather apt: "an important phenomenon of our days is the growing interdependence of States, which creates a new environment: the weak become ever more dependent on the strong but so do the strong. Thus disparities have to be made less impressive. It is here that the notion of equality integrated into contemporary international law can play a decisive role" (p. 488). LEE reiterates this importance of international law in his contribution "International Law Reaching Out" thus: "International law should now be disseminated as an area of knowledge to the public at large rather than as a tool relevant only to certain professions" (p. 509).

The book is particularly useful in that it is one of the few texts on international law that deals at some length with Asian perspectives and concerns regarding international law. The tone of the articles is positive and optimistic without failing to portray the very real difficulties of developing an effective regime for implementing international law. The excellent contribution of VAN HOOF, entitled "Human Rights in a Multi-Cultural World: The Need for Continued Dialogue", is a clear example.

This collection will be of special interest to international law students and researchers who usually have little access to works and writings of non-western scholars as well as non-western perspectives on the subject. In this regard, one article deserves special mention as it has raised an issue one rarely encounters in international law debates. TERESA SCASSA's article entitled "The English Language and the Common Law: China and Hong Kong After 1997" deals with the impact of linguistic and cultural difference on law and legal systems. She describes the adverse impact of 'transplanting' the English legal system (in English) into the Chinese society, and how divisive it has proved for the people. The sensitivity and perceptiveness with which the author has dealt with this subject is indeed laudable. Her inference and conclusions are of almost universal application to the post colonial (and particularly) Third World.

An omission that has detracted slightly from the truly international flavour of this collection was the absence of any specific discussion concerning international law issues pertaining to the African continent. This omission is perhaps made more pronounced by the presence of contributions touching upon international legal issues relating to Europe, Asia, the Middle East and America. The predominance of contributions highlighting Asian concerns is understandable bearing in mind the aim and purpose of the collection, but one would have welcomed contributions reflecting African concerns and interests in international legal discourse.

In a vast multi-authored collection of this kind, the main aim of which is to honour an individual, it is rather difficult to strike a balance in terms of how evenly various topics of international law have been spread through the book. One will therefore discern a more detailed

treatment of particular subjects. Two such subjects may be mentioned here. Firstly, nine chapters have been devoted to Chinese concerns and perspectives on international law which of course is quite appropriate and welcome, considering the context and aim of the book. Secondly, ten chapters treat various aspects of law of the sea at some length. This
concentration on the law of the sea probably stems from the fact that it constituted the special area of interest of the contributors. A reader looking for a more general text on international law may therefore be excused for mistaking the book as a collection focusing on law of the sea.

In sum, it has to be said that the book under review is an important and useful contribution to existing materials on international law and is highly recommended for international law students and researchers.

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BIBLIOGRAPHY OF INTERNATIONAL LAW CONCERNING ASIAN AFFAIRS*

Editorial introduction

Except for a few minor modifications this bibliography follows our usual format: it provides information on books, articles and other materials dealing with Asian topics and, in exceptional cases, it includes other publications considered of interest. Only English language publications are cited.

In the preparation of this bibliography good use has been made of book review sections in established professional journals of international law, Asian studies and international affairs. Special mention should be made of the bibliography on Public International Law published by the Max Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany, and of the regular list of acquisitions of the Peace Palace Library in The Hague, The Netherlands.

The headings used in this year's bibliography are:

1. General
2. States and groups of states
3. Territory and jurisdiction
4. Sea, rivers and water-resources
5. Air and Space
6. Environment
7. International conflict and disputes.
8. War, peace and neutrality, armed conflict and peace-keeping
9. International criminal law
10. Peaceful settlement of international disputes
11. Diplomatic and consular relations
12. Individuals, groups of persons - human rights
13. Decolonization and self-determination
14. International economic relations
15. Development
16. Information and communication
17. United Nations and other international/regional organizations

* Edited by J.J.G. Syatauw, General Editor.

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SELECTED DOCUMENTS

PROTOCOL TO AMEND THE FRAMEWORK AGREEMENT ON ENHANCING ASEAN ECONOMIC CO-OPERATION[1]
Bangkok, 15 December 1995

[The Heads of State or of Government of the Member States of ASEAN]

Recalling the Framework Agreement on Enhancing ASEAN Economic Cooperation ('the Agreement') signed on 28 January at the Fourth Summit Meeting held in Singapore;

Desiring to expedite the implementation of the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA);

Have agreed as follows:

Article 1

Article 2, section A, paragraph 1 of the Agreement shall be amended by deleting the expression '15 years' and substituting it with the expression '10 years (beginning 1 January 1993)'.

Article 2

The following shall be inserted after Article 12 as a new Article 12A to the Agreement:

"Accession of New Members

New Members of ASEAN shall accede to the Agreement on terms and conditions consistent with it and which have been agreed between them and the existing Members of ASEAN."

Article 3

This Protocol shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN which shall be done not later than 1 January 1996.

This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member Country.

. . .

Done at Bangkok, . . . in a single copy in the English language.

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[1] Text from: *Fifth ASEAN Summit-Meeting of the ASEAN Heads of Government - Bangkok 14-15 December 1995* p.86. For the Framework Agreement, *see* Vol. 2, p. 412.

Asian Yearbook of International Law, Volume 6 (Ko Swan Sik *et al.*, eds.
© Kluwer Law International; printed in the Netherlands), pp. 501-518

PROTOCOL TO AMEND THE AGREEMENT ON THE COMMON EFFECTIVE PREFERENTIAL TARIFF (CEPT) SCHEME FOR THE ASEAN FREE TRADE AREA (AFTA)[2]
Bangkok, 15 December 1995

The Governments of . . ., Member States of the Association of South East Asian Nations (ASEAN);

Noting the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) ('the Agreement') signed in Singapore on 28 January 1992;

. . .

Recognising the need to amend the Agreement to reflect the latest developments in ASEAN;

Have agreed as follows:

Article 1

Article 2, paragraphs 3, 5 and 6 of the Agreement be amended to read as follows:

"3. Exclusions at the HS 8/9 digit level for specific products are permitted for those Member States, which are temporarily not ready to include such products in the CEPT Scheme. For specific products, which are sensitive to a Member State, pursuant to Article 1(3) of the Framework Agreement on Enhancing ASEAN Economic Cooperation, a Member State may exclude products from the CEPT Scheme, subject to a waiver of any concession herein provided for such products. These temporarily excluded products are to be gradually included into the CEPT by 1 January 2000.

5. All manufactured products, including capital goods, and agricultural products shall be in the CEPT Scheme. These products shall automatically be subject to the schedule of tariff reduction set out in Article 4 of the Agreement as revised in Article 3 of this Protocol. In respect of PTA items, the schedule of tariff reduction provided for in the revised Article 4(A) set out in Article 3 of this Protocol shall be applied, taking into account the tariff rate after the application of the existing margin of preference (MOP)as at 31 December 1992.

6. All products under the PTA which are not in the list for tariff reductions of the CEPT Scheme shall continue to enjoy the MOPs existing as at 31 December 1992."

Article 2

Article 3 of the Agreement be amended to read as follows:

"This Agreement shall apply to all manufactured products including capital goods, and agricultural products."

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[2] Text from op.cit.n.1 p.88. For the Agreement, *see* Vol. 2, p. 415.

Article 3

Article 4 of the Agreement be substituted with the following:

"Schedule of Tariff Reduction and Enjoyment of Concessions

A. Schedule of Tariff Reduction

1. Member States agree to the following schedule of effective preferential tariff reductions:

a. The reduction from existing tariff rates to 20% shall be completed within a time frame of 5 years, from 1 January 1993, subject to a programme of reduction to be decided by each Member State, which shall be announced at the start of the programme. Member States are encouraged to adopt an annual rate of reduction, which shall be (X-20)%/5, where X equals the existing tariff rates of individual Member States.

b. The subsequent reduction of tariff rates from 20% or below shall be completed within a time frame of 5 years. The rate of reduction shall be at a minimum of 5% quantum per reduction. A programme of reduction to be decided by each Member State shall be announced at the start of the programme.

c. For products with existing tariff rates of 20% or below as at 1 January 1993, Member States shall decide upon a programme of tariff reductions, and announce at the start, the schedule of tariff reductions.

2. The above schedule of tariff reduction shall not prevent Member States from immediately reducing their tariffs to 0%-5% or following an accelerated schedule of tariff reduction.

B. Enjoyment of Concessions

Subject to Articles 4(A)(1b) and 4(A)(1c) of the Agreement, products which reach, or are at tariff rates of 20% or below, shall automatically enjoy the concessions."

Article 4

The following be inserted after Article 9 as a new Article 9A to the Agreement:

"Accession of New Members

New Members of ASEAN shall accede to this Agreement on terms and conditions, which are consistent with the Framework Agreement on Enhancing ASEAN Economic Cooperation (1992) and the Agreement, and which have been agreed between them and the existing Members of ASEAN."

Article 5

This Protocol shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN which shall be done not later than 1 January 1996.

This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member Country.

. . .

ASEAN FRAMEWORK AGREEMENT ON INTELLECTUAL PROPERTY CO-OPERATION[3]
Bangkok, 15 December 1995

The Governments of . . ., Member States of the Association of South East Asian Nations (hereinafter refrerred to as 'ASEAN');

Recognising the important role of intellectual property rights in the conduct of trade and the flow of investment among the Member States of ASEAN and the importance of cooperation in intellectual property in the region;

Have agreed as follows:

Article 1 : Objectives

1. Member States shall strengthen their cooperation in the field of intellectual property through an open and outward looking attitude with a view to contributing to the promotion and growth of regional and global trade liberalisation.
2. Member States shall promote cooperation in the field of intellectual property among government agencies as well as among the private sectors and professional bodies of ASEAN.

3. Member States shall explore appropriate intra-ASEAN cooperation arrangements in the field of intellectual property, contributing to the enhancement of ASEAN solidarity as well as to the promotion of technological innovation and the transfer and dissemination of technology.

4. Member States shall explore the possibility of setting up and ASEAN patent system, including an ASEAN Patent Office, if feasible, to promote the region-wide protection of patents bearing in mind developments on regional and international protection of patents.

5. Member States shall explore the possibility of setting up of an ASEAN trademark system, including an ASEAN Trademark Office, if feasible, to promote the region-wide protection of trademarks bearing in mind developments on regional and international protection of trademarks.

6. Member States shall have consultations on the development of their intellectual property regimes with a view to creating ASEAN standards and practices which are consistent with international standards.

Article 2 : Principles

1. Member States shall abide by the principle of mutual benefits in the implementation of measures or initiatives aimed at enhancing ASEAN intellectual property cooperation.

2. Member States, being mindful of the international conventions on intellectual property rights to which they are parties, and the international obligations assumed under the provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights, shall implement intra-ASEAN intellectual property arrangements in a manner in line with

[3] Text from op.cit.n.1 p.105.

the objectives, principles, and norms set out in such relevant conventions and the Agreement on TRIPS.

3. Member States shall strive to implement intra-ASEAN intellectual property cooperation arrangements which are beneficial to creators, producers and users of intellectual property and in a manner conducive to social and economic welfare.

4. Member States shall recognise and respect the protection and enforcement of intellectual property rights in each Member State and the adoption of measures necessary for the protection of public health and nutrition and the promotion of the public interests in sectors of vital importance to the Member States socio-economic and technological development, which are consistent with their international obligations.

5. Member States are conscious of and understand the necessity for each Member State to adopt appropriate measures to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Article 3 : Scope of Cooperation

1. Cooperation shall include, inter alia, the fields of copyright and related rights, patents, trademarks, industrial designs, geographical indications, undisclosed information and layout designs of integrated circuits.

2. Cooperative activities under this Agreement shall aim, among others, to strengthen ASEAN intellectual property administration; to enhance ASEAN cooperation in intellectual property enforcement and protection; and to explore the possibility of setting up the ASEAN patent and trademark systems.

3. Cooperative activities under this Agreement shall include, *inter alia*:

3.1 Activities to enhance intellectual property enforcement and protection:
   a. Effective protection and enforcement of intellectual property rights;
   b. Cross border measures cooperation;
   c. Networking of judicial authorities and intellectual property enforcement agencies.

3.2 Activities to strengthen ASEAN intellectual property administration such as:
   a. automation to improve the administration of intellectual property; and
   b. the creation of an ASEAN database on intellectual property registration.

3.3 Activities to strengthen intellectual property legislation such as:
   a. comparative study of the procedures, practices and administration of ASEAN intellectual property offices; and
   b. activities related to the implementation of the TRIPS Agreement and other recognised international intellectual property conventions.

3.4 Activities to promote human resources development such as:
   a. Networking of intellectual property training facilities or centres of excellence on intellectual property and to explore the possibility of establishing a regional training institute for intellectual property or other appropriate structures; and
   b. Exchange of intellectual property personnel and experts.

3.5 Activities to promote public awareness of intellectual property rights.

3.6 Activities to promote private sector cooperation in intellectual property such as to explore the possibility of:
   a. The establishment of an ASEAN Intellectual Property Association; and
   b. Providing arbitration services or other alternative dispute resolution mechanisms for the resolution of intellectual property disputes.

3.7 Information exchange on intellectual property issues.

3.8 Other cooperative activities as determined by Member States.

4. Details and the modalities to implement the cooperative activities are to be formulated in the form of a program of action on intellectual property under this Framework Agreement.

Article 4 : Review of Cooperative Activities

An ASEAN mechanism shall be established, comprising representatives from Member States, to review the cooperative activities under this Agreement. It shall meet on a regular basis to review the progress of the cooperative activities and any arrangement arising therefrom and to submit its findings and recommendations to the ASEAN Senior Economic Officials Meeting (SEOM). The ASEAN Secretariat shall give necessary secretariat support to the mechanism.

Article 5 : Consultations

1. Any differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties.

2. Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States in relation to the differences between them. If such differences cannot be settled amicably, they shall be dealt with by the SEOM and finally by the ASEAN Economic Ministers Meeting.

Article 6 : General Provisions

Nothing in this Agreement shall prejudice any existing or future bilateral or multilateral agreement entered into by any Member State or the national laws of each Member State relating to the protection and enforcement of intellectual property rights.

Article 7 : Funding

Activities under this Agreement will be subject to the availability of funds. Expenses incurred as a result of any activity undertaken by a Member State to fulfil the objectives of this Agreement shall be borne by the Member State concerned unless all Member States decide otherwise.

Article 8 : Final Provisions
1. The respective Governments of Member States shall undertake the appropriate measures to fulfil the agreed obligations arising from this Agreement.

2. Any amendment to this Agreement shall be made by consensus and shall become effective upon acceptance by all Member States.

3. No reservation shall be made with respect to any of the provisions of this Agreement.

4. This Agreement shall be deposited with the Secretary-General of ASEAN who shall promptly furnish a certified copy thereof to each Member State.

5. This Agreement shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN.
. . .

ASEAN FRAMEWORK AGREEMENT ON SERVICES[4]
Bangkok, 15 December 1995

The Governments of ..., Member States of the Association of South East Asian Nations (hereinafter referred to as 'ASEAN');

Reiterating their commitments to the rules and principles of the General Agreement on Trade in Services (hereinafter referred to as 'GATS') and noting that Article V of GATS permits the liberalising of trade in services between or among the parties to an economic integration agreement;

Affirming that ASEAN Member States shall extend to one another preference in trade in services;

Have agreed as follows:

Article I : Objectives
The objectives of the Member States under the ASEAN Framework Agreement on Services (hereinafter referred to as 'this Framework Agreement') are:

(a) to enhance cooperation in services amongst Member States in order to improve the efficiency and competitiveness, diversify production capacity and supply and distribution of services of their service suppliers within and outside ASEAN;

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[4] Text from op.cit.n.1 p.110.

(b) to eliminate substantially restrictions to trade in services amongst Member States; and

(c) to liberalise trade in services by expanding the depth and scope of liberalisation beyond those undertaken by Member States under the GATS with the aim to realising a free trade area in services.

Article II : Areas of Cooperation

1. All Member States shall participate in the cooperation arrangements under this Framework Agreement. However, taking cognizance of paragraph 3 of Article I of this Framework Agreement on Enhancing ASEAN Economic Cooperation, two or more Member States may proceed first if other Member States are not ready to implement these arrangements.

2. Member States shall strengthen and enhance existing cooperation efforts in service sectors and develop cooperation in sectors that are not covered by existing cooperation arrangements, through *inter alia*:

(a) establishing or improving infrastructural facilities;

(b) joint production, marketing and purchasing arrangements;

(c) research and development; and

(d) exchange of information.

3. Member States shall identify sectors for cooperation and formulate Action Plans, Programmes and Understandings that shall provide details on the nature and extent of cooperation.

Article III : Liberalisation

Pursuant to Article 1 (c), Member States shall liberalise trade in services in a substantial number of sectors within a reasonable time-frame by:

(a) eliminating substantially all existing discriminatory measures and market access limitations amongst Member States; and
(b) prohibiting new or more discriminatory measures and market access limitations.

Article IV : Negotiation of Specific Commitments

1. Member States shall enter into negotiations on measures affecting trade in specific service sectors. Such negotiations shall be directed towards achieving commitments which are beyond those inscribed in each Member State's schedule of specific commitments under the GATS and for which Member States shall accord preferential treatment to one another on an MFN basis.

2. Each Member State shall set out in a schedule, the specific commitments it shall undertake under paragraph 1.

3. The provisions of this Framework Agreement shall not be so construed as to prevent any Member State from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Article V : Mutual Recognition

1. Each Member State may recognise the education or experience obtained, requirements met, or licenses or certifications granted in another Member State, for the purpose of licensing or certification of service suppliers. Such recognition may be based upon an agreement or arrangement with the Member State concerned or may be accorded autonomously.

2. Nothing in paragraph 1 shall be so construed as to require any Member State to accept or to enter into such mutual recognition agreements or arrangements.

Article VI : Denial of Benefits

The benefits of this Framework Agreement shall be denied to a service supplier who is a natural person of a non-Member State or a juridical person owned or controlled by persons of a non-Member State constituted under the laws of a Member State, but not engaged in substantive business operations in the territory of Member State(s).

Article VII : Settlement of Disputes

1. The Protocol on Dispute Settlement Mechanism for ASEAN shall generally be referred to and applied with respect to any disputes arising from, or any differences between Member States concerning the interpretation or application of, this Framework Agreement or any arrangements arising therefrom.

2. A specific dispute settlement mechanism may be established for the purposes of this Framework Agreement which shall form an integral part of this Framework Agreement.

Article VIII : Supplementary Agreements or Arrangements

Schedules of specific commitments and Understandings arising from subsequent negotiations under this Framework Agreement and any other agreements or arrangements, Action Plans and Programmes arising thereunder shall form an integral part of this Framework Agreement.

Article IX : Other Agreements

1. This Framework Agreement or any action taken under it shall not affect the rights and obligations of the Member States under any existing agreements to which they are parties.

2. Nothing in this Framework Agreement shall affect the rights of the Member States to enter into other agreements not contrary to the principles, objectives and terms of this Framework Agreement.

3. Upon the signing of this Framework Agreement, Member States shall promptly notify the ASEAN Secretariat of any agreements pertaining to or affecting trade in services to which that Member is a signatory.

Article X : Modification of Schedules of Specific Commitments

1. A Member State may modify or withdraw any commitment in its schedule of specific commitments, at any time after three years from the date on which that commitment entered into force provided:

(a) that it notifies other Member States and the ASEAN Secretariat of the intent to modify or withdraw a commitment three months before the intended date of implementation of the modification or withdrawal; and

(b) that it enters into negotiations with an affected Member State to agree to necessary compensatory adjustment.

2. In achieving a compensatory adjustment, Member States shall ensure that the general level of mutually advantageous commitment is not less favourable to trade than that provided for in the schedules of specific commitments prior to such negotiations.

3. Compensatory adjustment shall be made on an MFN basis to all other Member States.

4. The SEOM [Senior Economic Officials Meeting] with the endorsement of the AEM [ASEAN Economic Ministers Meeting] may draw up additional procedures to give effect to this Article.

Article XI : Institutional Arrangements

1. The SEOM shall carry out such functions to facilitate the operation of this Framework Agreement and further its objectives, including the organisation of the conduct of negotiations, review and supervision of the implementation of this Framework Agreement.

2. The ASEAN Secretariat shall assist SEOM in carrying out its functions, including providing the support for supervising, coordinating and reviewing the implementation of this Framework Agreement.

Article XII : Amendments

The provisions of this Framework Agreement may be amended through the consent of all the Member States and such amendments shall become effective upon acceptance by all Member States.

Article XIII : Accession of New Members

New Members of ASEAN shall accede to this Framework Agreement on terms and conditions agreed between them and signatories to this Framework Agreement.

Article XIV : Final Provision

1. The terms and definitions and other provisions of the GATS shall be referred to and applied to matters arising under this Framework Agreement for which no specific provision has been made under it.

2. This Framework Agreement shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member State.

3. This Framework Agreement shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN.

. . .

INDIA - NEPAL TREATY CONCERNING THE INTEGRATED DEVELOPMENT OF THE MAHAKALI RIVER INCLUDING SARADA BARRAGE, TANAKPUR BARRAGE AND PANCHESWAR PROJECT
New Delhi, 12 February 1996*

. . .

Recognizing that the Mahakali River is a boundary river on major stretches between the two countries;

Realizing the desirability to enter into a treaty on the basis of equal partnership to define their obligations and corresponding rights and duties thereto in regard to the waters of the Mahakali River and its utilization;

Noting the Exchange of Letters of 1920 through which both the Parties had entered into an arrangement for the construction of the Sarada Barrage in the Mahakali River, whereby Nepal is to receive some waters from the said Barrage;

Recalling the decision taken in the Joint Commission dated 4-5 December, 1991 and the Joint Communique issued during the visit of the Prime Minister of India to Nepal on 21st October, 1992 regarding the Tanakpur Barrage which India has constructed in a course of the Mahakali River with a part of the eastern afflux bund at Jimuwa and the adjoining pondage area of the said Barrage lying in the Nepalese territory;

Noting that both the parties are jointly preparing a Detailed Project Report of the Pancheshwar Multipurpose Project to be implemented in the Mahakali River;

Now, therefore, the Parties hereto hereby have agreed as follows:

Article 1

1. Nepal shall have the right to a supply of 28.35 m3/s (1000 cusecs) of water from the Sarada Barrage in the wet season (i.e. from 15th May to 15th October) and 4.25 m3/s (150 cusecs) in the dry season (i.e. from 16th October to 14th May).

2. India shall maintain a flow of not less than 10 m3/s (350 cusecs) downstream of the Sarada Barrage in the Mahakali River to maintain and preserve the river eco-system.

3. In case the Sarada Barrage becomes non-functional due to any cause:

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* Courtesy of the Minister of Water Resources of Nepal.
The notes exchanged on the same date between the two prime ministers are not reproduced. The notes recall certain items in the Treaty previously regulated on 4-5 Dec. 1991 by the Joint Commission and governed by the Prime Ministers' Joint Communique of 21 October 1992.

a) Nepal shall have the right to a supply of water as mentioned in Paragraph 1of this Article, by using the head regulator(s) mentioned in Paragraph 2 of Article 2 herein. Such a supply of water shall be in addition to the water to be supplied to Nepal pursuant to Paragraph 2 of Article 2.

(b) India shall maintain the river flow pursuant to Paragraph 2 of this Article from the tailrace of the Tanakpur Power Station downstream of the Sarada Barrage.

Article 2

In continuation of the decisions taken in the Joint Commission dated 4-5 December, 1991 and the Joint Communique issued during the visit of the Prime Minister of India to Nepal on 21st October, 1992, both the Parties agree as follows:

1. For the construction of the eastern afflux bund of the Tanakpur Barrage, at Jimuwa and tying it up to the high ground in the Nepalese territory at EL 250 M, Nepal gives its consent to use a piece of land of about 577 metres in length (an area of about 2.9 hectares) of the Nepalese territory at the Jimuwa Village in Mahendranagar Municipal area and a certain portion of the No-Man's Land on either side of the border. The Nepalese land consented to be so used and the land lying on the west of the said land (about 9 hectares) upto the Nepal-India border which forms a part of the pondage area, including the natural resources endowment lying within that area, remains under the continued sovereignty and control of Nepal and Nepal is free to exercise all attendant rights thereto.

2. In lieu of the eastern afflux bund of the Tanakpur Barrage, at Jimuwa thus constructed, Nepal shall have the right to:

(a) a supply of 28.35 m3/s (1000 cusecs) of water in the wet season (i.e. from 15th May to 15th October) and 8.50 m3/s (300 cusecs) in the dry season (i.e. from 16th October to 14th May) from the date of the entry into force of this Treaty. For this purpose and for the purposes of Article 1 herein, India shall construct the head regulator(s) near the left undersluice of the Tanakpur Barrage and also the waterways of the required capacity upto the Nepal-India border. Such head regulator(s) and waterways shall be operated jointly.

(b) a supply of 70 millions kilowatt-hour (unit) of energy on a continuous basis annually, free of cost, from the date of the entry into force of this Treaty. For this purpose, India shall construct a 132 Kv transmission line upon the Nepal-India border from the Tanakpur Power Station (which has, at present, an installed capacity of 120,000 kilowatt generating 448.4 millions kilowatt-hour of energy annually on 90 percent dependable year flow).

3. Following arrangements shall be made at the Tanakpur Barrage at the time of development of any storage project(s) including Pancheshwar Multi-purpose Project upstream of the Tanakpur Barrage:

(a) Additional head regulator and the necessary waterways, as required, up to the Nepal-India border shall be constructed to supply additional water to Nepal. Such head regulator and waterways shall be operated jointly.

(b) Nepal shall have additional energy equal to half of the incremental energy generated from the Tanakpur Power Station, on a continuous basis from the date of augmentation of the flow of the Mahakali River and shall bear half of the additional operation cost and, if required, half of the additional capital cost at the Tanakpur Power Station for the generation of such incremental energy.

Article 3

Pancheshwar Multipurpose Project (hereinafter referred to as the 'Project') is to be constructed on a stretch of the Mahakali River where it forms the boundary between the two countries and hence both the Parties agree that they have equal entitlement in the utilization of the waters of the Mahakali River without prejudice to their respective existing consumptive uses of the waters of the Mahakali River. Therefore, both the Parties agree to implement the Project in the Mahakali River in accordance with the Detailed Project Report (DPR) being jointly prepared by them. The Project shall be designed and implemented on the basis of the following principles:

1. The Project shall, as would be agreed between the Parties, be designed to produce the maximum total net benefit. All benefits accruing to both the Parties with the development of the Project in the forms of power, irrigation, flood control etc., shall be assessed.

2. The Project shall be implemented or caused to be implemented as an integrated project including power stations of equal capacity on each side of the Mahakali River. The two power stations shall be operated in an integrated manner and the total energy generated shall be shared equally between the Parties.

3. The cost of the Project shall be borne by the Parties in proportion to the benefits accruing to them. Both the Parties shall jointly endeavour to mobilize the finance required for the implementation of the Project.

4. A portion of Nepal's share of energy shall be sold to India. The quantum of such energy and its price shall be mutually agreed upon between the Parties.

Article 4

India shall supply 10 m3/s (350 cusecs) of water for the irrigation of Dodhara-Chandani area of Nepalese Territory. The technical and other details will be mutually worked out.

Article 5

1. Water requirements of Nepal shall be given prime consideration in the utilization of the waters of the Mahakali River.

2. Both the Parties shall be entitled to draw their share of waters of the Mahakali River from the Tanakpur Barrage and/or other mutually agreed points as provided for in this Treaty and any subsequent agreement between the Parties.

Article 6

Any project, other than those mentioned herein, to be developed in the Mahakali River, where it is a boundary river, shall be designed and implemented by an agreement between the Parties on the principles established by this Treaty.

Article 7

In order to maintain the flow and level of the waters of the Mahakali River, each Party undertakes not to use or obstruct or divert the waters of the Mahakali River adversely affecting its natural flow and level except by an agreement between the Parties. Provided,

however, this shall not preclude the use of the waters of the Mahakali River by the local communities living along both sides of the Mahakali River, not exceeding five (5) percent of the average annual flow at Pancheshwar.

Article 8

This Treaty shall not preclude planning, survey, development and operation of any work on the tributaries of the Mahakali River, to be carried out independently by each Party in its own territory without adversely affecting the provision of Article 7 of this Treaty.

Article 9

1. There shall be a Mahakali River Commission (hereinafter referred to as the 'Commission'). The Commission shall be guided by the principles of equality, mutual benefit and no harm to either Party.

2. The Commission shall be composed of an equal number of representatives from both the Parties.

3. The functions of the Commission shall, inter alia, include the following:

(a) To seek information on and, if necessary, inspect all structures included in the Treaty and make recommendations to both the Parties to take steps which shall be necessary to implement the provisions of this Treaty.

(b) To make recommendations to both the Parties for the conservation and utilization of the Mahakali River as envisaged and provided for in this Treaty.

(c) To provide expert evaluation of projects and recommendations thereto.

(d) To co-ordinate and monitor plans of actions arising out of the implementation of this Treaty, and

(e) To examine any differences arising between the Parties concerning the interpretation and application of this Treaty.

4. The expenses of the Commission shall be borne equally by both the Parties.

5. As soon as the Commission has been constituted pursuant to Paragraphs 1 and 2 of this Article, it shall draft its rules of procedure which shall be submitted to both the Parties for their concurrence.

6. Both the Parties shall reserve their rights to deal directly with each other on matters which may be in the competence of the Commission.

Article 10

Both the Parties may form project specific joint entity/ies for the development, execution and operation of new projects including Pancheshwar Multipurpose Project in the Mahakali River for their mutual benefit.

Article 11

1. If the Commission fails under Article 9 of this Treaty to recommend its opinion after examining the differences of the Parties within three (3) months of such reference to the

Commission or either Party disagrees with the recommendation of the Commission, then a dispute shall be deemed to have been arisen which shall then be submitted to arbitration for decision. In so doing either Party shall give three (3) months prior notice to the other Party.

2. Arbitration shall be conducted by a tribunal composed of three arbitrators. One arbitrator shall be nominated by Nepal, one by India, with neither country to nominate its own national and the third arbitrator shall be appointed jointly, who, as a member of the tribunal, shall preside over such tribunal. In the event that the Parties are unable to agree upon the third arbitrator within ninety (90) days after receipt of a proposal, either Party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to appoint such arbitrator who shall not be a national of either country.

3. The procedures of the arbitration shall be determined by the arbitration tribunal and the decision of a majority of the arbitrators shall be the decision of the tribunal. The proceedings of the tribunal shall be conducted in English and the decision of such a tribunal shall be in writing. Both the Parties shall accept the decision as final, definitive and binding.

4. Provision for the venue of arbitration, the administrative support of the arbitration tribunal and the remuneration and expenses of its arbitrators shall be as agreed in an exchange of notes between the Parties. Both the Parties may also agree by such exchange of notes on alternative procedures for settling differences arising under this Treaty.

Article 12

1. Following the conclusion of this Treaty, the earlier understanding reached between the Parties concerning the utilization of the waters of the Mahakali River from the Sarada Barrage and the Tanakpur Barrage, which have been incorporated herein, shall be deemed to have been replaced by this Treaty.

2. This Treaty shall be subject to ratification and shall enter into force on the date of exchange of instruments of ratification. It shall remain valid for a period of seventy five (75) years from the date of its entry into force.

3. This Treaty shall be reviewed by both the Parties at ten (10) years interval or earlier as required by either Party and make amendments thereto, if necessary.

4. Agreements, as required, shall be entered into by the Parties to give effect to the provisions of this Treaty.

IN WITNESS WHEREOF the undersigned being duly authorised thereto by their respective governments have hereto signed this Treaty and affixed thereto their seals in two originals each in Hindi, Nepali and English languages, all the texts being equally authentic. In case of doubt, the English text shall prevail.

TREATY BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH ON SHARING OF THE GANGA/GANGES WATERS AT FARAKKA

New Delhi, 12 December 1996

Determined to promote and strengthen their relations of friendship and good neighbourliness,

. . .

Being desirous of sharing by mutual agreement the waters of the international rivers flowing through the territories of the two countries and of making the optimum utilisation of the water resources of their region in the fields of flood management, irrigation, river basin development and generation of hydro-power for the mutual benefit of the peoples of the two countries,

. . .

Being desirous of finding a fair and just solution without affecting the rights and entitlements of either country other than those covered by this Treaty, or establishing any general principles of law or precedent,

Have agreed as follows:

Article 1

The quantum of waters agreed to be released by India to Bangladesh will be at Farakka.

Article 2

(i) The sharing between India and Bangladesh of the Ganga/Ganges waters at Farakka by ten day periods from the 1st January to the 31st May every year will be with reference to the formula at Annexure I and an indicative schedule giving the implications of the sharing arrangement under Annexure I is at Annexure II.

(ii) The indicative schedule at Annexure II, as referred to in sub para (i) above, is based on 40 years (1949-1988) 10-day period average availability of water at Farakka. Every effort would be made by the upper riparian to protect flows of water at Farakka as in the 40-years average availability as mentioned above.

(iii) In the event flow at Farakka falls below 50,000 cusecs in any 10-day period, the two governments will enter into immediate consultations to make adjustments on an emergency basis, in accordance with the principles of equity, fair play and no harm to either party.

Article 3

The waters released to Bangladesh at Farakka under Article I shall not be reduced below Farakka except for reasonable uses of waters, not exceeding 200 cusecs, by India between Farakka and the point on the Ganga/Ganges where both its banks are in Bangladesh.

Article 4

A Committee consisting of representatives nominated by the two Governments in equal numbers (hereinafter called the Joint Committee) shall be constituted following the signing of this Treaty. The Joint Committee shall set up suitable teams at Farakka and Hardinge Bridge to observe and record at Farakka the daily flows below Farakka Barrage, in the Feeder Canal, and at the Navigation Lock, as well as at the Hardinge Bridge.

Article 5

The Joint Committee shall decide its own procedure and method of functioning.

Article 6

The Joint Committee shall submit to the two Governments all data collected by it and shall also submit a yearly report to both the Governments. Following submission of the reports the two Governments will meet at appropriate levels to decide upon such further actions as may be needed.

Article 7

The Joint Committee shall be responsible for implementing the arrangements contained in this Treaty and examining any difficulty arising out of the implementation of the above arrangements and of the operation of Farakka Barrage. Any difference or dispute arising in this regard, if not resolved by the Joint Committee, shall be referred to the Indo-Bangladesh Joint Rivers Commission. If the difference or dispute still remains unresolved, it shall be referred to the two Governments which shall meet urgently at the appropriate level to resolve it by mutual discussion.

Article 8

The two Governments recognise the need to cooperate with each other in finding a solution to the long-term problem of augmenting the flows of the Ganga/Ganges during the dry season.

Article 9

Guided by the principles of equity, fairness and no harm to either party, both the Governments agree to conclude water sharing Treaties/Agreements with regard to other common rivers.

Article 10

The sharing arrangement under this Treaty shall be reviewed by the two Governments at five years' interval or earlier, as required by either party and needed adjustments, based on principles of equity, fairness, and no harm to either party made thereto, if necessary. It would be open to either party to seek the first review after two years to assess the impact and working of the sharing arrangements as contained in this Treaty.

Article 11

For the period of this Treaty, in the absence of mutual agreement on adjustments following reviews as mentioned in Article X, India shall release downstream of Farakka Barrage, water at a rate not less than 90% (ninety per cent) of Bangladesh's share according to the formula referred to in Article II, until such time as mutually agreed flows are decided upon.

Article 12

This Treaty shall enter into force upon signature and shall remain in force for a period of thirty years and it shall be renewable on the basis of mutual consent.

. . . .

DONE at New Delhi 12th December, 1996 in Hindi, Bangla and English languages. In the event of any conflict between the texts, the English text shall prevail.

ANNEXURE I

Availability at Farakka	*Share of India*	*Share of Bangladesh*
70,000 cusecs or less	50%	50%
70,000 - 75,000 cusecs	Balance of flow	35,000 cusecs
75,000 cusecs or more	40,000 cusecs	Balance of flow

Subject to the condition that India and Bangladesh each shall receive guaranteed 35,000 cusecs of water in alternate three 10-day periods during the period March 1 to May 10.

[Annexure II is not reproduced]

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GENERAL INFORMATION

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Contributions to the Yearbook

The *Yearbook* invites contributions in the form of:
- articles (5000 words or more) on topics of international law, either with special reference to Asia or of general relevance;
- (shorter) notes and comments;
- translated versions of articles originally written in a language other than English;
- materials in the field of municipal or international state practice of Asian states and organizations, with relevance to international law;
- data on events and incidents relating to Asia and Asian countries and with relevance to international law and relations;
- information on literature and documents (in any language) either concerning international law in Asia or concerning international law in general and published or issued in Asia.

Contributors of articles and notes will receive 25 offprints free of charge. Contributors of other materials will receive 25 offprints free of charge. Contributors of other materials will receive 10 offprints of the *Yearbook*-section in which their materials are included.

Submission of manuscripts and other materials

The regular schedule of the *Yearbook* provides for publication in June of each year.

The final date of submission of manuscripts for articles and notes is 1 July. The final date of submission of other materials is 31 August.

Submission of a manuscript should be accompanied by information whether it has been published, submitted, or accepted elsewhere, or whether it is a translation.

Submission of manuscripts implies the readiness to consider editorial suggestions for change and, as the case may be, to introduce revisions. It also implies the author's agreement with linguistic revision by native speakers so far as these services are available to the Editors.

Authors are requested to submit one copy of their manuscript accompanied by a 3,5" disk (typed on IBM-compatible computer Windows 3.11 or higher, and wordprocessing packages Wordperfect 5.0 or higher or Word for Windows), or three copies of the manuscript typed and triple-spaced.

PAUL GUGGENHEIM PRIZE

TO BE AWARDED IN 1999

The Paul Guggenheim Prize, amounting to **Swiss francs 12,000.-**, will be awarded to a monograph of major importance in the field of public international law (except European law). The monograph must be of the highest quality and be the work of a young author at the beginning of his/her career. Works submitted may be in the form of published books or of manuscripts intended for publication; they may be written in English, French, German, Italian or Spanish. Works which have already been awarded a prize of a similar nature will not be considered.

Applications accompanied by a **curriculum vitae,** a list of publications and five copies of the work submitted **must be received, no later than lst February 1999,** by: The Paul Guggenheim Foundation, The Graduate Institute of International Studies, 132, rue de Lausanne, 1211 Geneva 21 (Switzerland). Applicants are required to specify whether the work submitted has already been awarded a prize.

The Regulations pertaining to the Prize may be obtained at the same address.

SATA PRIZE 1999

In 1997 the Governing Board of the DILA Foundation decided to devote part of an annual grant by Tokibo Ltd, Tokyo to the Foundation, for the award of a prize of US $ 1,500 for an original essay of excellent quality written by a young scholar of Asian nationality on a topic of public or private international law. The prize is named after the President of Tokibo Ltd, Mr.Sata Yasuhiko.

The winning essay will be published in the Asian Yearbook of International Law. The 1999 Sata Prize will be for an essay to be published in Volume 8 (1998) of the Yearbook.

Essays must be received by the General Editors of the Yearbook not later than 31 July 1999. Each essay should be accompanied by a curriculum vitae. Participants must not be over the age of 30 years on that date. Essays must be written in English, and be of a length not less than 8,000 words and not more than 16,000 words excluding footnotes.

The Editors of the Yearbook will determine the winning essay and notify competitors of the result not later than 31 October 1999. They may also decide that none of the essays submitted is of a quality that would justify award of the prize. The decisions taken by the Editors will be final.