

WLB 2001.02, February 2001

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WLB, No. 2001.02

### ***The* WORLD LAW**

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## **AMERICAS**

### **COLOMBIA—Guidelines for Foreign Investment**

On October 18, 2000, the National Planning Department issued a Decree containing general rules for the investment of foreign capital in Colombia and Colombian capital abroad (Decree No. 2080). A guiding principle of the Decree is that foreign investors may receive neither discriminatory nor more favorable treatment than national investors. (*Diario Oficial*, Oct. 25, 2000.)

According to the Decree, foreign investment includes: direct investment, acquisition of stocks or bonds in a national firm, acquisition of rights through commercial fiduciary contracts in order to develop a business, acquisition of property through public or private offers, and contributions made by foreign investors through acts or contracts. Investments of foreign capital can be made by importing freely convertible foreign currency for national currency or tangible goods like equipment and machinery. Technological contributions and transfer of foreign patents and trademarks are also allowed.

Foreign capital will be permitted in all sectors of the economy, except for activities related to national defense and security and to processing and disposal of toxic, hazardous, and radioactive wastes. Special rules apply to foreign investment in the financial, petroleum, and mining sectors. Investors from abroad must register with the Bank of the Republic and follow procedures set forth in the Decree. The Ministry of Foreign Commerce may certify investors from the countries participating with Colombia in the Cartagena Agreement (a trade pact among the Andean nations) as national investors. The Decree provides for methods of conflict resolution, control and oversight, and penalties, including suspension and liquidation of investment activities that are unauthorized or that take place in prohibited sectors.

Investment of Colombian capital abroad is governed broadly, and the Decree allows firms or individuals to invest, reinvest, or capitalize funds abroad with the obligation to return profits generated from interest,

commissions, amortization of loans, royalties, payments for technical services, and capital reimbursements. Colombian investors may export machinery, equipment, money drafts to support a company, services, technical assistance, and technology. Certain obligations and controls are set forth, including the requirement to register with the Bank of the Republic. Financial institutions, under the oversight of the Banking Superintendency, may invest capital in foreign financial and insurance companies with approval of the oversight organization and are subject to special rules.

The Decree calls upon the National Planning Department, the ministries of foreign relations, the treasury and public credit, and foreign commerce, and the Bank of the Republic to work within their jurisdictions to negotiate and secure treaties to protect and promote investments. The Ministry of Foreign Commerce is assigned the task of approving guarantees for investments as derived from international treaties ratified by Colombia. **[GLIN]** (Sandra Sawicki, 7-9819)

### **MEXICO—Indian Rights Bill**

Federal senators announced on January 11, 2001, their determination to carefully consider a controversial bill that would expand Indian rights. The bill was submitted to the legislature in December by President Vicente Fox Quesada (see WLB 2001.01). The Senate's Constitutional Issues Committee met on that date with members of the Indigenous Affairs Committee and decided to organize working groups to study the legislation and call upon experts in Indians affairs to participate. President Fox has made passage of the indigenous rights bill a priority as an incentive for bringing Zapatista rebel leaders to the peace table. Senators from three leading parties (the National Action Party, PAN; the Party of the Democratic Revolution, PRD; and the Institutional Revolutionary Party, PRI) have declared their intention to work on the bill. (*The News*, Mexico City, Jan. 12, 2001, via <http://unam.netgate.net/novedades/nna31201.htm>.)

Twenty-four representatives of the Zapatistas are expected to arrive in Mexico City on March 6, 2001, to speak with members of Congress about the bill. The Mexican government announced on January 12 that they will not be permitted to carry weapons when they visit the capital. Santiago Creel, Secretary of the Interior, insisted, "We are not going to allow that they come armed; this must be very clear.... We want democracy to have value in our country, and what matters in democracy are arguments, ideas, and dialogue, not weapons." The Secretary said that the rebels may come disguised with hoods and capes, their customary dress, and added that they will be guaranteed free expression, according to the law. Peace talks between the Zapatistas and the Mexican government were suspended four years ago and the San Andres Accords on Indian rights and culture negotiated by the two sides have not been implemented. (*CNN en Español*, Jan. 12, 2001, via <http://cnnenespanol.com/2001/latin/MEX/01/12/zapatistas/index.html>.) (Sandra Sawicki, 7-9819)

## ASIA

### **BANGLADESH--Islamic Edicts Declared Illegal**

In an effort to stop the practice of issuance of *fatwas* (religious edicts) by the *Maulanas* (religious leaders) in the exercise of powers assumed under some provisions of the personal status law, the High Court of Bangladesh delivered an historic verdict marking a major step towards protection of fundamental rights in the country. The High Court ruling, which is expected to give relief to thousands of Bangladeshi Muslim women, was pronounced in Dhaka on New Year's Day in the case of an Islamic divorce of a woman by her Muslim husband. As a result, the court declared illegal all *fatwas* given by local religious leaders, including the verbal divorce of a woman by her husband.

In the case at hand, the husband, Saiful, was heard to utter the Islamic divorce (*talak*) to his wife, Shahida Atikha, three times after a quarrel with her 18 months

ago in the village of Naogaon in northern Bangladesh. A local *Maulana* then issued a *fatwa* to force her to marry her husband's cousin, Shahidul. The High Court took up the case on its own when the report of the stated divorce and the *fatwa* was published in a local newspaper. In declaring such *fatwas* illegal, the court stated, "*Fatwa* means legal opinion, which means legal opinion of a lawful person of authority. The legal system of Bangladesh empowers only courts to decide all questions relating to legal opinion on Muslim and other laws in force. We, therefore, hold that any *fatwa* including the instant one (as in the Shahid Akhtar case) is unauthorized and illegal." The court declared the couple, Saiful and Shahida, victims of illegal dictates.

A former law minister fought the legal battle for the couple against the *Maulana* and five of his colleagues, who had forced the husband and wife to separate and also pressured the woman to marry another man as a pre-condition to returning to her former husband. The court ordered that all of the *Maulanas* be arrested and arraigned for prosecution.

The court suggested the introduction of the Muslim Family Laws Ordinance in the curriculum of Muslim religious academies and other schools, as well as in sermons during Friday prayers. It also drew the attention of the Bangladesh Parliament to the need for enactment of a law to stop the practice of *fatwas*. (*The Hindu*, Jan. 2, 2001, <http://www.the-hindu.com/holnus/03021807.htm>.; *The Dawn*, Jan. 3, 2001, International Section.) (Krishan Nehra, 7-7103)

### **CHINA--Copyright, Trademark Amendments Submitted to Legislature**

With hopes for entry into the World Trade Organization (WTO) in mind, China's National People's Congress Standing Committee is considering amendments to the intellectual property laws. A draft of a revision of the 1991

Copyright Law was submitted to the Standing Committee by the State Council on December 22, 2000. Shi Zongyuan, director of the Press and Publication Administration and of the State Copyright Bureau, gave an explanation of the draft, stating that the new text is based on revisions proposed originally in 1998 and refined since then, that articles were revised to conform with the WTO rules on intellectual property rights, and that since developments in information technology have been rapid in recent years, provisions have been added on copyright protection in the network environment.

The changes include such things as extension of copyright protection to databases and similar works and to format, binding, and layout designs, the requirement of approval for the use of other people's works in teaching materials, amended rules on transfer of copyright, provisions on the amount of compensation for infringements and on the responsibility of infringers to produce evidence, and administrative penalties for acts that infringe on public interests. ("PRC Premier Zhu Rongji Asks NPC to Discuss Draft Amendment to Copyright Law," Xinhua, Dec. 22, 2000, via FBIS, Dec. 22, 2000.)

Draft amendments for the Trademark Law (adopted 1982, revised 1993) were also submitted to the Standing Committee on December 22, 2000, together with a presentation on the proposal by the director of the State Administration for Industry and Commerce, Wang Zhongfu. He stated that reform of the trademark administration system was needed to move China toward fully implementing the international standards on intellectual property protection. ("China To Amend Trademark Law To Facilitate WTO Accession," Xinhua, Dec. 22, 2000, via FBIS, Dec. 22, 2000.)

A panel discussion on both copyright and trademark issues was held by the Standing Committee on December 26, 2000, with further revisions proposed by some of the members. Gu Jianfen, a Committee member who is a famous composer, stated that her works are sometimes broadcast and even revised without her approval. She suggested that permission be sought from the creator before publication or broadcast

of any work. Xu Jialu, vice-chairman of the Committee, said that intellectual property laws should encourage creativity in order to promote science and culture and argued that a universal standard should be applied to cases regardless of whether any foreigners are involved or all the parties are Chinese citizens. (Xinhua, Dec. 26, 2000, via FBIS, Dec. 26, 2000.) (Constance A. Johnson, 7-9829)

### **CHINA—Draft Amendment on Medicines**

On December 22, 2000, a draft amendment to the Law on the Administration of Medicines (enacted Sept. 20, 1984, effective July 1, 1985) was submitted to the National People's Congress Standing Committee; it was discussed on December 26. The amendments are designed to control the pharmaceutical industry more firmly. The revisions include restrictions on practices such as exorbitant prices, counterfeit medications, and kickbacks. In addition, a ban on advertisement of prescribed medicines has been included in order to curb excessive and misleading advertising to consumers.

Under the amended law, medical institutions will have to provide price lists for patients upon request, no kickbacks are permitted, and those who harm the interests of patients will have to pay compensation in addition to facing administrative sanctions and possible criminal investigation.

One legislator, Wang Fusong, stated that since "the quality of medicines is closely linked to the health of every citizen," tough measures are needed to stop counterfeit drugs, and manufacturers who produce fake medicines should have their licenses revoked and be banned from re-applying for five years. Zhang Huaixi, also a legislator, stated that producers need to meet national standards for pharmaceutical manufacturing or be shut down and that the government should set lower prices for medicines in order to help with the development of a sound medical insurance system. (Xinhua, Dec. 22,

2000, via FBIS, Dec. 22, 2000; *China Daily*, Dec. 27, 2000, via FBIS, Dec. 27, 2000.)

The State Drug Administration has announced that it will draft two additional laws in the next five years, one on the management of medical equipment and the other on licensing of pharmacists, as well as regulations on traditional Chinese medicines, over-the-counter medicines, and radioactive treatments. (CND-Global, Jan. 22, 2001.)  
(Constance A. Johnson, 7-9829)

### **CHINA–Internet Copyright**

The Supreme People’s Court published the Interpretation on Some Issues Concerning Applicable Law for the Handling of Cases Involving Disputes Over Internet Copyright on December 20, 2001, effective the following day. It provides a basis for the settlement of intellectual property disputes involving the Internet, outlining Internet Content Providers (ICP’s) legal liability for copyright violations and the scope of ICP obligations and clarifying circumstances of exemption.

In accord with the spirit of the Copyright Law, the Interpretation states that network dissemination is a method for the use of works, and copyright holders enjoy the right to use of the works, to permit use by others, and to gain remuneration therefrom. Disputes over Internet copyright fall under the jurisdiction of the people’s court at the place where the infringing act occurs or at the residence of the defendant. The former includes the location of Internet servers, computer terminals, and other equipment by means of which the infringing act is implemented. If it is hard to determine the site of the infringing act or the location of the residence, the location where the plaintiff finds infringement-related content on terminal equipment will be deemed the place of the infringing act.

The range of compensation for acts of online copyright infringement is from 500 (about US\$60) to 300,000 *yuan* (about US\$36,249), depending on the harm resulting from the act. In especially serious cases of deliberate infringement, grave consequences caused to copyright holders by rapid, wide-ranging

network dissemination will be taken into consideration, so that the compensation awarded may reach the 500,000 *yuan* (US\$60,414), the highest amount permitted under the Interpretation. (“PRC Supreme Court Releases Rules on Internet Copyrights,” *Renmin Ribao*, Dec. 21, 2000, via FBIS, Dec. 22, 2000.)

It may be noted that new provisions on Internet copyright and penalties for infringement have been approved by the State Council and are under consideration by the Standing Committee of the National People’s Congress. They will designate the rights of authors of online publications and prohibit other people from using online works without authorization or privately decrypting protection programs. Infringement will entail both administrative and civil penalties. (“PRC Official on Internet Copyright Protection Plan,” *China Daily* Internet Version, Jan. 12, 2001, via FBIS, Jan. 12, 2001.)  
(W. Zeldin, 7-9832)

### **CHINA–Internet Security Resolution**

The National People’s Congress Standing Committee adopted a Decision on Safeguarding Internet Security on December 28, 2000. The decision was adopted to support network and information security and to control various kinds of criminal activities on the Internet. Its goal is to guard the safe operation of the Internet and national security interests, as well as to protect market security and the personal and property rights of individuals, corporations, and other organizations. All government offices and departments, at the local and national levels, are required to take affirmative measures to promote the use of Internet technology while protecting security.

The Decision defines as offenses punishable under the Criminal Law actions in several broad categories: breaches of state security systems, fomenting dissent or organizing groups considered to undermine social stability, and consumer or business fraud. Specifically, the document discusses using the Internet to:

- enter computer information networks that concern national affairs, defense, or advanced technology without authorization;
- create or spread an electronic virus or attack a computer system or network;
- interrupt the operation of a computer network or of information services so that systems cannot function normally;
- steal intelligence or military secrets;
- spread slander, rumors or harmful information;
- incite ethnic hatred, promote discrimination, or harm national unity;
- organize a cult and keep in touch with members or undermine the enforcement of laws and regulations;
- sell fake or substandard products or advertise in a misleading way;
- commit theft, fraud, or other crimes;
- damage the reputation of a person, business, or product;
- infringe on intellectual property rights;
- spread false information to affect securities and futures trading or in other ways harm the financial order;
- illegally intercept or alter others' email or data or infringe on the privacy and freedom of communication; or
- set up pornographic websites or distribute pornography in any form.

The resolution specifies that if the Internet is used in an unlawful manner that "runs counter to public order, yet does not constitute criminal behavior," punishment will

be by the public security officers in accordance with public order regulations or administratively, by the appropriate executive agency. It further states that if an individual's legal rights and interests are harmed via improper Internet usage, action may be taken under the civil law. (Text translated by John Gregory, available via [clnet@u.washington.edu](mailto:clnet@u.washington.edu); ChinaOnline, Dec. 28, 2000, via LEXIS/NEXIS, Asiapc library; Xinhua Dec. 28, 2000, via FBIS Jan. 2, 2001; Xinhua Dec. 22, 2000, via FBIS, Dec. 22, 2000.) (Constance A. Johnson, 7-9829)

### **CHINA—Marriage Law Revisions Publicly Debated**

On January 11, 2001, the Standing Committee of the National People's Congress took the relatively rare step of releasing to the public the draft of the amendments to the Marriage Law that it is considering (*see* WLB2000.12 for a report on the draft). This is the seventh time since 1982 that such a draft has been publicized for general debate. Relevant government departments from across the country are required to submit views received on the draft to the Committee's Commission on Legislative Affairs by February 28<sup>th</sup>; opinions can also be sent directly to the Commission, which has received more than 400 letters and thousands of messages sent to an online discussion message board.

Much of the discussion centers on the proposed two-year separation prior to divorce. The present Marriage Law (adopted Sept. 10, 1980, in force since Jan. 1, 1981) does not require any set period of separation. (*China Daily*, Jan. 12 & 17, 2001, <http://www.chinadaily.com>; Xinhua, Jan. 11, 2001, via LEXIS/NEXIS, Asiapc library, and Dec. 26, 2000, via FBIS, Dec. 26, 2000.) (Constance A. Johnson, 7-9829)

### **TAIWAN—Amended Farmers' Associations Law**

On January 4, 2001, the Legislative Yuan adopted amendments to the Farmers' Associations Law (originally adopted Dec. 30, 1930; for the text as amended to June 1999, *see Tsui Hsin Liu Fa Ch'üan Shu*, 728-734 (Sanmin Books, 1999)). The reforms are significant because the credit departments of farmers' associations have in the past "often become the private treasuries of gangsters and politicians who control the associations," according to legislators. The revised Law imposes tough restrictions on association elections and is designed to prevent persons with criminal backgrounds from gaining power over and controlling the grass-roots organizations.

The Law prescribes that convicted racketeers released from prison within the last five years and persons convicted of corruption or other crimes under the Organized Crime Prevention Act (adopted Dec. 11, 1996; *see id.* at 583-584) may not run for the position of a representative, board member, or supervisor or become the executive general of a farmers' association. People convicted of sedition or treason, or for crimes such as vote-buying, accepting bribes, embezzlement, fraud, forgery, and/or breach of trust are also prohibited from seeking those positions. Persons facing imprisonment after being convicted of crimes other than those mentioned above cannot run for election until they have finished serving their sentences. The revised Law also stipulates that anyone who has had a non-performing loan for more than one year at a financial institution, or who has served as a guarantor for a loan that has been overdue for one year at a farmers' association, is banned from running for the positions of association board member or supervisor and from becoming the executive general.

The amendments will apply to upcoming farmers' association elections in February 2001. Originally, the Kuomintang (KMT, or Nationalist Party) had wanted to delay the amendments' implementation until January 1, 2002, but the party succumbed to pressure from other political parties for more immediate institution of the reforms. The KMT may be most affected by the revisions, since local KMT factions control many of the associations and the latter are viewed as a key

component of the party's election apparatus. (*Taipei Times*, Jan. 5, 2001, via FBIS, Jan. 5, 2001.)

(W. Zeldin, 7-9832)

### **TAIWAN-Justices Rule On Nuclear Plant**

On January 15, 2001, the Council of Grand Justices, Taiwan's highest judicial authority, issued a ruling in the nuclear plant construction controversy. The decision was a reversal of the executive branch's decision on October 27, 2000, to stop the building of the latest nuclear plant, Taiwan's fourth. The original order to halt construction was based on safety and environmental concerns. The cancellation of the Taiwan Power Company project became one of the most hotly debated moves of the new administration, with the Kuomintang-dominated Legislative Yuan highly critical of the government of the first Democratic Progressive Party candidate ever elected President, Chen Shui-pien.

The Justices stated that the original order to stop construction was "a reversal of major national policy" and therefore should have been reported to the legislature in advance for discussion by the lawmakers. Although the ruling did not call the decision unconstitutional, the Justices did say that the executive branch should follow the correct procedure promptly and seek approval from the legislature. The Premier defended the plant closing at a special legislative session January 30, 2001 (Reuters, Jan. 30, 2001), but the next day the legislature voted 143 to 70 to resume work on the plant. (*New York Times*, online version, Jan. 31, 2001, <http://www.nytimes.com>.)

If no compromise is reached between the two branches of the government, there are three possible resolutions under the Constitution. Either the Premier could step down, since his policy can not be carried out; the legislature could pass a no-confidence motion, resulting in an early election; or a bill could be passed by the legislature forcing the Executive Yuan to build the plant. The plant is

now 30% complete; US\$1.3 billion, of an estimated total cost of US\$2.3-2.8 billion, has already been spent. (Central News Agency, Jan. 15, 2001, via FBIS, Jan. 15, 2001; CND-Global, Jan. 17, 2001.) (Constance A. Johnson, 7-9829)

### **TAIWAN--Lifelong Learning Law Draft**

The Ministry of Education has completed a draft of the Lifelong Learning Law and submitted it to the Cabinet for approval. The draft law reportedly defines lifelong learning as "all of the learning activities that an individual undergoes in his or her lifetime, including regular education and other training courses from different sectors of society" (*Taipei Journal*, Jan. 5, 2001, at 2). It provides that employees can take educational leave with pay and be eligible for tax breaks on tuition paid during the period away from work. It would allow government subsidies for institutions that adopt the system, to encourage public and private sector participation. The draft law also states that educational achievements outside the regular education system should be accorded official recognition; they could be used as references on applications for further education or job promotion.

Although various Western countries have enforced a system of paid educational leave for years, whereby employees may enjoy seven to 13 days of leave to attend training courses, with costs shared by the government and employers and implementation based on agreements between employers and labor unions, it is not the norm in Taiwan, and employers have in general been opposed to such a system. As a result, the draft law does not make it mandatory for enterprises to adopt a paid educational leave program, nor is the length of leave specified. The latter is left up to employers and labor unions to negotiate. (*Id.*) (W. Zeldin, 7-9832)

### **TAIWAN--Tax Law Amended**

Three amendments to the Income Tax Law (originally adopted on Feb. 17, 1943), which take effect in March 2001 when annual income tax reports are filed and are applicable to tax year 2000, were

approved by the legislature on December 29, 2000. They all serve to lower the tax bills of Taiwan's wage-earners.

First, workers will be eligible for a standard deduction of NT\$75,000 (versus NT\$62,000 under the old law) (US\$2,305 vs. 1,905). Originally a deduction of NT\$80,000 (US\$2,459) had been proposed, but it was deemed too costly to the tax coffers. Second, salary earners will also be able to write off up to NT\$120,000 (US\$3,688) in home rental expenses per year. In addition, citizens over 70 years of age will be allowed to increase their final income tax deduction by 50 percent.

The measures are expected to cost the government from NT\$8 to 10 billion (US\$246 to 307 million) in lost tax revenue. It is unclear at present what means will be used to make up for the shortfall. Proposed amendments that failed to make it through the legislature included raising the standard deduction for married taxpayers from NT\$60,000 to NT\$88,000 (US\$1,844 to 2,704); allowing up to NT\$25,000 (US\$768) in tuition write-offs; and raising the standard deduction for handicapped workers from NT\$74,000 to NT\$134,000 (US\$2,274 to 4,118), depending on the degree of the handicap. (*Taipei Times*, Dec. 29, 2000, via FBIS, Dec. 29, 2000; *Taipei Journal*, Jan. 5, 2001, at 2.) (W. Zeldin, 7-9832)

## **EUROPE**

### **FRANCE--Embryo Research**

On December 22, 2000, the French Government unveiled a draft bill revising the 1994 law on bioethics. The bill would allow limited therapeutic research on human embryos, but human cloning and in vitro conception of embryos for research purposes would remain strictly banned.

The research on human embryos would be conducted under strict controls and only registered and frozen embryos free of parental claims could be used for research. The draft bill also includes the creation of a new agency, the *Agence de la Procréation*, to control and monitor research in biology, genetic and human reproduction.

The bill will be first reviewed by both the National Advisory Ethics Committee for Health and Life Sciences and the National Advisory Committee on Human Rights. It is expected to reach Parliament by mid-2001. (*Le Monde*, Dec. 25 & 24, 2001, at 8.) (Nicole Atwill, 7-2832)

### **FRANCE--“Wrongful Birth” Case**

On November 17, 2000, the *Cour de Cassation*, France’s highest judicial court, ruled that 17-year-old Nicolas Perruche, who was born deaf, partly blind, and mentally retarded, was entitled to compensation for his disabilities, which resulted from a medical mistake that prevented his mother from exercising her choice to end her pregnancy. It is the first case of its kind to be handled by the French court.

The parents of Nicolas Perruche had already been awarded personal damages because the mother’s doctor and a laboratory had failed to discover that, while pregnant, she had German measles (rubella), a viral disease that can cause profound damage to children in the womb. Had the parents known about the rubella and the disabilities, they would have chosen to end the pregnancy through abortion.

The parents had also filed a lawsuit on behalf of their son, arguing that he suffered irreparable damage by being born instead of being aborted. The court held that “given that the mistakes committed by the doctor and the laboratory while carrying out their contract with Mrs. Perruche prevented her from exercising her choice to end the pregnancy to avoid the birth of a handicapped child, the latter can ask for compensation for damages resulting from his handicap.”

The ruling was strongly denounced by France’s main anti-abortion groups as a dangerous precedent that created “institutional eugenics.” The Alliance for the Right to Life said that the court was “implying to all handicapped people that their lives are worth less than their deaths.” Also reacting with concern were some physicians’ groups that fear that the ruling would open the door to lawsuits whenever handicapped children are born. (*Le Monde*, Nov. 19 & 20, 2000, at 10.) (Nicole Atwill, 7-2832)

### **THE NETHERLANDS--Action Against Illegal Trading in Firearms**

In November 2000, the Dutch police and criminal justice authorities carried out large-scale undercover operations to combat illegal trading in and possession of firearms. As part of a covert European operation against firearms trading and possession, known as Operation Arrow, a total of 114 operational investigations were conducted by the police in the Netherlands. Thirteen countries of the European Union took part in Operation Arrow, which was coordinated from Finland.

The focus was on searching places where it was thought that illegally possessed firearms were present. In addition, checks were made in the entertainment areas of a few cities during evenings and nights and extra checks were made at Amsterdam Airport Schiphol. Intensive checks were also made of the legal firearms sector. For example, 20 legal firearms dealers and 6 shooting associations were inspected. Fewer offenses than expected were discovered in this sector, and most of these offenses were due to administrative carelessness.

As part of Operations Arrow’s international exchange of information, a permanent police coordination center was established in the Netherlands during the period of the operations. From this center contact with the government ministries and the Public Prosecution Service was regulated. International support was provided by

police liaison officers stationed abroad. The international results of the operation will be announced in the first half of 2001. (Press Release of Dec. 29, 2000, No. 3999, Ministry of Justice, <http://www.minjust.nl:8080/c-actual/persber/pb0685.htm>.)  
(Karel Wennink, 7-9864)

### **THE NETHERLANDS--Cameras and Privacy**

On January 12, 2001, the Council of Ministers adopted a proposal from the Minister of Justice for a law that will impose stricter rules on the observation of people with cameras, in order to guarantee the protection of privacy. Cameras installed for security may be placed only in public places and in the street when it is clearly indicated on signs that cameras are present. Violation of this provision may incur a fine or a prison term. The proposal provides for some exceptions to this rule, however; for example, journalists may continue to use a hidden camera provided that they have a good reason to do so. Filming with a loose camera in the street and with a webcam continues to be permitted. The fact that a camera for traffic supervision, such as a flash camera at a traffic light, is present does not have to be made public. Notification of the presence of cameras in restaurants, bars, and shops is already required. (NRC-Handelsblad, Jan. 12, 2001.)  
(Karel Wennink, 7-9864)

### **SLOVAKIA--Auditors**

The Law on Auditors (Jan. 29, 1992, No. 73, *Collection of Laws*) was amended by the Law of June 20, 2000 (No. 228, *Collection of Laws*). It provides that both physical and legal persons may be auditors. Auditors certify the correctness of balance sheets, profit and loss accounts, and other financial returns of businesses and comment on their financial and property condition. They prepare written reports of their findings for the business. Auditors qualify by admission to the Chamber of Auditors. They must be 18 years of age, have fully completed university education and five years' experience in accountancy, of which at least three years are as auditor-candidates,

have no criminal record, and pass the auditor's examination. Foreign physical or legal persons may qualify in the same manner. Auditors must be insured.

The Chamber of Auditors is a professional organization with legal personality. It protects the interests of auditors and ensures the high standard of their services. Its seat is in the city of Bratislava; its component organs are the General Assembly, the Board of Directors, the Supervisory Board, and the Disciplinary Commission. For breaches of obligations by members, the Disciplinary Commission may issue a warning, impose a fine of up to 100,000 crowns (1 US dollar equals about 45 crowns), suspend membership for up to three years, or remove an auditor from membership. The Commission's decisions are reviewable in court proceedings.  
(George E. Glos, 7-9849)

### **UKRAINE--Hearings on Press Freedom**

Hearings in the Verkhovna Rada (parliament) were held on January 16, 2001, on "informational activities and freedom of expression" to discuss two crises facing the Ukrainian media: suppression of dissident journalists and the continuing predominance of the Russian language. In response to the far-reaching scandal surrounding the disappearance of opposition journalist Heorhiy Gongadze, including the discovery of a corpse many believe to be his and the wide circulation of tapes purported to prove some degree of involvement of President Leonid Kuchma in the affair (*see* WLB2000.09), the Verkhovna Rada invited the journalist's mother, Lesyia Gongadze, and the head of the National Society of Journalists of Ukraine, Ihor Lubchenko, to testify. During the hearings, which were made available, in Ukrainian, on the Internet (<http://www.rada.kiev.ua/press/>

ses6/ps11601), Mrs. Gongadze directly accused the Procurator General, the militia and the Security Services of Ukraine “under the personal control of the President” of carrying out extreme harassment of her and her family and appealed to the deputies of the Rada to put an end to it. Lubchenko called the situation Ukraine’s worst “crisis of confidence in the country’s administration” since independence and listed a number of other well-known deceased journalists, whose deaths the authorities claim stemmed from natural or accidental causes, which Lubchenko and others call suspicious. (For more background on these developments, see <http://www.economist.com/world/europe/displayStory.cfm?StoryID=482444>.)

Many top officials also participated in the hearings. Most of them spoke about the effort to support the use of the Ukrainian language in the media. Deputy Prime Minister Zhylynsky expressed strong criticism of the country’s weak legal infrastructure connected with mass media as “a real threat to our national security and sovereignty. The current legislation, for example, leaves legal paths open to the virtually unlimited concentration in the hands of certain juridical and physical persons the print media and all electronic means of mass information.” Stepan Pavlyuk, first deputy chair of the State Committee for Information Policy, TV and Radio of Ukraine, also discussed the legislature’s attempt to counterbalance the prevalence of the Russian language in Ukrainian media by enforcing the licensing requirements for bilingualism (see <http://globalarchive.ft.com/globalarchive/articles/html?id=010117003438&query=ukraine>.) (Natalie Gawdiak, 7-9838)

## **SOUTH PACIFIC**

### **AUSTRALIA--Judicial Independence**

The government of Australia’s Northern Territory has appealed to Australia’s highest court to consider a case involving the limits of judicial independence. The case is regarded as of major significance for the separation of powers under Australia’s Constitution. At question is the validity of the February 1998

appointment of the Chief Magistrate of the Territory, which was revealed in March 2000 to have been made by a secret two-year contract. In Australia, both magistrates and judges are normally appointed for service until retirement at age 65; their salaries and allowances are set by independent tribunals, and the amounts are public information. The Territory’s contract made Magistrate Bradley the most highly paid Magistrate in the country, with a salary of A\$50,000 (about US\$27,500) above the rate recommended by the Remuneration Tribunal, a non-political body that sets the salaries of Australian State and Federal judicial officials. He also received a luxury-class Holden V8 automobile and business-class air travel, neither being part of the usual compensation for judicial officials.

The previous Chief Magistrate resigned in 1998 in protest over the Territory’s newly enacted mandatory sentencing laws. Mr. Bradley accompanied his imposition of mandatory sentences with remarks from the bench about the policy goals of the current Territory government. The mandatory sentencing laws, which require prison terms for all minor property offences, fall most heavily on young Aboriginal Australians, who are imprisoned at a rate some fifteen times that of the general population. The Northern Australian Aboriginal Legal Aid Service had applied to the Territory’s Supreme Court for the disqualification of Mr. Bradley from hearing certain cases on the grounds of “apprehended bias,” arguing that his statements and actions demonstrated his partisan identification with the Territory’s dominant political party and lack of the impartiality to be expected of judicial officers. When the terms of his appointment became public, the Legal Aid Service asked the Supreme Court to declare the appointment invalid under the terms of the Northern Territory Magistrates Act.

On June 13, 2000, a judge of the Supreme Court recognized that the terms of the appointment might well lead to questions of bias but decided the plaintiff had no cause of action on the grounds that

the Court had no power to interfere with the action of the Executive in making the appointment. The Legal Aid Service appealed, arguing that the judge was mistaken in declaring that there was neither common law nor statutory guarantee of an independent judiciary, and that the appointment was “repugnant” to the Constitution’s requirements of an independent and impartial judiciary. On November 16, a special three-judge panel of judges from outside the Territory overturned the dismissal and ordered the Northern Territory Supreme Court to proceed with a trial. They found the assertion that judicial appointments were not justiciable, that is, subject to the decisions of the courts, to be an open question. Counsel for the Territory Government argued that even if a person won appointment to the bench by bribery, all their decisions would be valid and the only way to remove them would be by action of the legislature.

On January 17, 2001, the Northern Territory government sought from the High Court special leave to appeal the decision. Its argument to the High Court reiterated the claim that there are no grounds under the Constitution for any court to pass judgement on the appointment of any judicial officer. If the High Court agrees to hear the case, it will be one of the most significant constitutional law cases in many years. (Australian Associated Press Newsfeed, June 13, 2000, via LEXIS/NEXIS; Northern Australian Aboriginal Legal Aid Service Incorporated v Bradley and Northern Territory of Australia [2000] NTCA 13, Nov. 16, 2000 at <http://scaleplus.law.gov.au/html/nscdec/0/2000/0/NS001090.htm>.; *Sydney Morning Herald*, Jan. 17, 2001, at <http://www.smh.com.au/>.) (D. DeGlopper, 7-9831)

## **LAW AND ORGANIZATIONS -- INTERNATIONAL AND REGIONAL**

### **CHINA/VIETNAM—Cooperation Statement**

The Ministers of Foreign Affairs of China and Vietnam signed the Joint Statement on All-Round Cooperation in the New Century Between the People’s Republic of China and the Socialist Republic of

Vietnam on December 25, 2000, during the first visit to China by Vietnamese President Tran Duc Luong. The document sets forth ten areas of cooperation between the two countries. The two sides agree to:

- maintain frequent high-level meetings and enhance friendly contacts and exchanges between departments, people’s organizations, and localities;
- step up publicity, education, and contacts among the youth of the two countries;
- strengthen economic, trade, and scientific and technological cooperation (in nine aspects);
- strengthen bilateral cooperation at the UN, ASEAN, APEC, and other international and regional fora, promote solidarity with the developing countries, and continue their annual consultation mechanism;
- carry out multi-level military exchanges, build closer national defense and armed forces ties, and expand security exchanges and cooperation;
- enhance cultural, sports, and media exchanges;
- expand cooperation in education;
- strengthen cooperation in preventing and combating organized transnational crime, further judicial exchanges, and exchange experience in combating corruption;
- implement the two sides’ Land Boundary Treaty, Agreement on the Delimitation of the Beibu Bay Territorial Sea, the Agreement on the Exclusive Economic Zone and Continental Shelves, and the Agreement on Fishing Cooperation in the Beibu Bay, continue the existing negotiation mechanism on marine issues and seek a lasting solution, and not take actions that aggravate disputes or resort to force; and

- reaffirm the consensus reached in previous Joint Communiqués and in a 1999 Joint Statement wherein Vietnam reiterates its one-China policy. (“Text” of Joint Sino-SRV Statement on All-Round Cooperation in New Century,” Xinhua, Dec. 25, 2000, as translated in FBIS, Dec. 25, 2000.)

Four other documents signed during President Luong’s visit include the Agreement on the Delimitation of the Beibu Bay Territorial Sea, the Agreement on the Exclusive Economic Zone and Continental Shelves, and two inter-government agreements on the peaceful use of nuclear energy and on fishing cooperation in Beibu Bay. (“Jiang Zemin, Vietnam President Witness Signing of Five Cooperative Documents,” Xinhua, Dec. 25, 2000, via FBIS, Dec. 25, 2000.)  
(W. Zeldin, 7-9832)

CUMULATIVE CONTENTS	Criminal law	The Netherlands, 2001.02-8b
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## **THE WORLD TRADE ORGANIZATION: RECENT DEVELOPMENTS**

by Giovanni Salvo, Senior Legal Specialist, Directorate of Legal Research\*

### **DISPUTE SETTLEMENT<sup>1</sup>**

#### *Implementation Status of Adopted Reports*

The Dispute Settlement Body (DSB) agreed to refer the dispute between the United States and the European Communities (EC) concerning tax treatment of foreign sales corporations back to the original Panel, as requested by the EC.<sup>2</sup> On December 21, 2000, however, the United States and the EC jointly requested the suspension of the arbitration proceedings previously requested by the United States, until the adoption of a Panel or Appellate Body report.

On December 15, 2000, the United States requested that the reasonable period of time for implementation of the recommendations and rulings of the DSB concerning the dispute with Canada over the term of patent protection be determined by binding arbitration, according to the provisions of the Dispute Settlement Understanding (DSU).<sup>3</sup>

On January 10, 2001, the DSB adopted the Panel and Appellate Body reports concerning Korea's measures affecting imports of fresh, chilled, and frozen beef, which had been contested by the United States and Australia with separate requests for consultation.<sup>4</sup>

On the same date, the DSB adopted the Panel report as modified by the Appellate Body report which decided the dispute between the United States and the EC over US import measures on a series of products from the European Communities.<sup>5</sup>

#### *Appellate Body Reports Issued*

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<sup>1</sup> [Http://www.wto.org/wto/dispute/bulletin.htm](http://www.wto.org/wto/dispute/bulletin.htm).

<sup>2</sup> See WLB WTO Update, WLB01.01, Jan. 2001, at 17.

<sup>3</sup> See WLB WTO Update, WLB12.00, Dec. 2000, at 26.

<sup>4</sup> Supra note 2.

<sup>5</sup> Id. at 18.

The Appellate Body, whose report was circulated on December 22, 2000, upheld most of the findings of the Panel in the dispute over US definitive safeguard measures on imports of wheat gluten from the European Communities.<sup>6</sup>

### *Panel Reports Issued*

A Panel report, circulated on December 19, 2000, found against Argentina on all issues except Argentinian measures opposed by the EC on the export of bovine hides and import of finished leather.<sup>7</sup>

On December 22, 2000, the panel report concerning US anti-dumping measures for stainless steel plate in coils and stainless steel sheet and strip from Korea was circulated.<sup>8</sup> The Panel found against the United States on all issues but two.

In 1999, US safeguard measures on imports of fresh, chilled, or frozen lamb from New Zealand and on lamb from Australia caused these two countries to complain. The DSB established one Panel to examine both complaints.<sup>9</sup> The Panel report, circulated on December 21, 2000, found that the United States acted inconsistently with its obligations under the provisions of various Agreements.

### *Pending Consultations*

On January 8, 2001, the United States requested the establishment of a Panel in a dispute with Brazil over measures affecting patent protection, alleging violation of some provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Complaints were recently filed by:

- Guatemala on Chile's price band system and safeguard measures relating to certain agricultural products;
- Brazil on EC anti-dumping duties on malleable cast iron tube or pipe fittings;
- Brazil on countervailing duties on certain carbon steel products, imposed by the United States;
- Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea, and Thailand collectively on the US Continued Dumping and Subsidy Offset Act of 2000;
- Brazil on provisional anti-dumping measures on electric transformers, imposed by Mexico;
- Korea against the Philippines concerning anti-dumping measures regarding polypropylene resins.

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<sup>6</sup> See WLB WTO Update, WLB00.09, Sept. 2000, at 22.

<sup>7</sup> See WLB WTO Focus, WLB99.01, Jan. 1999, at 20.

<sup>8</sup> See WLB WTO Update, WLB99.08, Aug. 1999, at 16.

<sup>9</sup> See WLB WTO Update, WLB00.01, Jan. 2000, at 20.



## **RECENT DEVELOPMENTS IN THE EUROPEAN UNION**

by Theresa Papademetriou, Senior Legal Specialist, Western Law Division\*

### **Driving Under the Influence of Alcohol in the European Union<sup>1</sup>**

Driving under the influence of alcohol is still a major problem in the Member States of the European Union, even though the number of accidents related to drinking has been reduced in the last twenty years. In 1988, the European Commission had proposed introducing a maximum permitted blood alcohol concentration limit of 0.5 mg/ml. However, the proposal was never adopted because it was thought that it was a matter within the domain of the Members. Recently, the Commission came up with a new proposal in the form of a recommendation that includes the following: (a) all Members should adopt a general legal maximum blood alcohol concentration limit of no higher than 0.5 mg/ml; (b) all Members should adopt a lower legal limit of no higher than 0.2 mg/ml for new drivers, those who drive large vehicles and buses, and those who drive two-wheel motor vehicles; and c) all Members should adopt random breath testing and ensure that a driver will be tested at least once every three years.

### **Trafficking in Human Beings and Sexual Exploitation of Children<sup>2</sup>**

On December 21, 2000, in an effort to eradicate trafficking in human beings and the sexual exploitation of children, the Commission announced a number of measures included in a Communication and two framework decisions. The first of the framework decisions is on combating trafficking in human beings and the second is on combatting sexual exploitation of children and child pornography. Both call for harmonization of national criminal law and tackle issues of criminal procedure. The Commission proposes the following:

- C common definitions for three criminal offenses: child prostitution, sexual exploitation of children, and child pornography, including pornography on the Internet;
  - C common sanctions that are effective and proportionate, including terms of imprisonment;
  - C liability of legal entities, including sanctions, jurisdiction, and prosecution; and
  - C protection of victims in judicial procedures and enhanced cooperation among the Member States.
- Next year the Commission is planning to introduce temporary permits of stay for victims of trafficking in order to facilitate their provision of assistance to judicial authorities.

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<sup>1</sup> [Http://europa.eu.int/rapid/cgi.rapcgi.ksh?p\\_action.gettxt=gt&doc=IP/01/70/0/RAPID&lg=EN](http://europa.eu.int/rapid/cgi.rapcgi.ksh?p_action.gettxt=gt&doc=IP/01/70/0/RAPID&lg=EN).

<sup>2</sup> [Http://europa.eu.int/rapid/cgi.rapcgi.ksh?p\\_action.gettxt=gt&doc=IP/00/1530/0/RAPID&lg=EN](http://europa.eu.int/rapid/cgi.rapcgi.ksh?p_action.gettxt=gt&doc=IP/00/1530/0/RAPID&lg=EN).

### **Calls for Further Liberalization of Gas and Electricity Markets<sup>3</sup>**

The liberalization of gas and electricity markets across the European Union has had positive effects thus far. Currently, two-thirds of electricity and three-quarters of gas consumers have the freedom to choose their supplier. Electricity prices have dropped in almost all Member States. The Gas Directive, which had to be implemented by August 2000, proved also to be of benefit to those Members that have implemented it. France and Luxemburg, which have failed to implement it, have been subject to infringement procedures by the Commission.

Recently, the European Commission announced its plans to further liberalize the electricity and gas market so that every consumer in the Union will be able to select their supplier by the year 2005. Some aspects of the new proposals are: a) the operator's commercial interests must be separated from production and sales; b) third party access should be based on fixed and regulated tariffs approved by an independent regulatory authority; c) steps should be taken to improve cross-the- border trade in electricity. Among the measures contemplated is the removal of physical impediments.

### **Wheat Gluten Quota Issue<sup>4</sup>**

In 1998, the United States introduced a safeguard measure in the form of a quota on imports of wheat gluten from various countries, including the European Union. As the main supplier of wheat gluten, the European Union was greatly affected. Subsequently, the US made the wheat quota even more restrictive for the European Union, which protested. On December 22, 2000, the WTO Appellate Body upheld a previous Panel report and held that this measure is contrary to WTO rules. The ruling was welcomed by Pascal Lamy, Commissioner for Trade, who commented that "this decision confirms once again the EU's view that safeguard measures, which by definition affect fair trade, can only be adopted in exceptional situations meeting the very restrictive standards set by the WTO rules. This was obviously not the case with the measures adopted by the US."<sup>5</sup> (See WLB WTO Update, this issue.)

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<sup>3</sup> [Http://europa.eu.int/rapid/cgi/rapcgi.ksh?p\\_action.gettxt=gt&doc=IP/01/59/0/RAPID&lg=EN](http://europa.eu.int/rapid/cgi/rapcgi.ksh?p_action.gettxt=gt&doc=IP/01/59/0/RAPID&lg=EN).

<sup>4</sup> [Http://europa.eu.in/rapid/cgi/rapcgi.ksh?p\\_action.gettxt=gt&doc=IP/00/1548/0/RAPID&lg=EN](http://europa.eu.in/rapid/cgi/rapcgi.ksh?p_action.gettxt=gt&doc=IP/00/1548/0/RAPID&lg=EN).

<sup>5</sup> *Id.*



## **GERMANY: CONSTITUTIONAL COURT RULES ON THE RECOGNITION OF THE JEHOVAH'S WITNESSES**

by Edith Palmer, Senior Legal Specialist, Legal Research Directorate\*

*On December 19, 2000, the German Federal Constitutional Court issued a decision on the recognition of the Jehovah's Witnesses in Germany as a corporation of public law.<sup>1</sup> This decision reversed the decision of the Federal Administrative Court, which had denied public status to the Jehovah's Witnesses on the grounds of their disloyalty to the state, as evidenced by the group's disavowal of participation in political elections. The Federal Constitutional Court held that loyalty to the state was not a requirement for recognition and that such a requirement would violate the constitutionally mandated neutrality of the state toward religion. However, the case was remanded for fact-finding on the law-abiding attitude of this religious group, which, according to the Court, is a requirement for recognition. The decision is significant because it interprets the German constitutional provisions that deal with the relationship between the state and the religious communities.*

### **The Constitutional Framework and Its Application**

The rules on the status of religious groups in Germany date back to the Weimar Constitution of 1918.<sup>2</sup> At that time, the monarchy was replaced with a republic and the status of an established church was taken away from the Catholic Church, the German Protestant Church, and the Jewish Community. That Constitution abolished state churches and required the state to be neutral on religion and not to interfere in internal church matters. However, a total separation between church and state was not foreseen under that system. Instead, the major churches continued to interact with the state governments in certain limited areas, and this was reflected in their special status of being recognized as corporations of public law.

Other religious groups could organize themselves in the form of associations of private law, and they were free to worship in any form, but they did not have the privileges of corporations of public law unless they were granted this status in the various states, upon application. Over the years, many religious groups that were newer in Germany than those originally recognized as corporations of public law have become so recognized in the states, including the Mormons, the Seventh Day Adventists, the Salvation Army, and

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<sup>1</sup> Docket Number 2 BvR 1500/97.

<sup>2</sup> *Verfassung des Deutschen Reichs*, Aug. 11, 1919, REICHSGESETZBLATT [official law gazette of the German Reich] at 1383.

the Russian Orthodox Church. In recent years, however, there have been tensions surrounding the recognition of some religious groups deemed controversial, among them the Jehovah's Witnesses.

The Weimar Constitution's provisions on the recognition of religious groups are still in effect today. They were incorporated into the Basic Law, the German Constitution of 1949, at the time of its creation.<sup>3</sup> The Basic Law also contains some additional provisions on religious liberty in its catalogue of fundamental rights.<sup>4</sup>

The governing provision on the status of religious groups is article 137 of the Weimar Constitution, which is translated as follows:

- (1) There shall be no state church.
- (2) Freedom of association to form religious bodies shall be guaranteed. The union of religious bodies within the territory of the Reich shall not be subject to any restrictions.
- (3) Every religious body shall regulate and administer its affairs autonomously within the limits of the law valid for all. It shall confer its offices without the participation of the state or the civil community.
- (4) Religious bodies shall acquire legal capacity in accordance with the general provisions of civil law.
- (5) Religious bodies shall remain corporate bodies under public law insofar as they have been such heretofore. The other religious bodies shall be granted like rights upon application, where their constitution and the number of their members offer an assurance of their permanency. Where several such religious bodies under public law unite in one organization, such organization shall also be a corporate body under public law.
- (6) Religious bodies that are corporate bodies under public law shall be entitled to levy taxes in accordance with the Land<sup>5</sup> law on the basis of the civil taxation lists.
- (7) Associations whose purpose is the common cultivation of a philosophical persuasion shall have the same status as religious bodies.
- (8) Such further regulation as may be required for the implementation of these provisions shall be a matter for Land legislation.<sup>6</sup>

Recognition as a corporation of public law is advantageous for a religious group. Recognized groups work together with governmental authorities in social welfare<sup>7</sup> and the provision of developmental services

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<sup>3</sup> Grundgesetz für die Bundesrepublik Deutschland, [GG], May 23, 1949, BUNDESGESETZBLATT [BGBl., official law gazette for the Federal Republic of Germany] at 1, art. 140, incorporating arts. 136, 137, 138, 139, and 141 of the Weimar Constitution.

<sup>4</sup> IN PARTICULAR, GG, ART. 4, ¶¶1&2.

<sup>5</sup> THE LÄNDER ARE THE STATES OF GERMANY.

<sup>6</sup> Translation from BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (Bonn, Press and Information Office, 1989).

<sup>7</sup> BUNDESSOZIALHILFEGESETZ, re-promulgated Mar. 23, 1994, BGBl. I at 646, as amended, §10.

for children and juveniles.<sup>8</sup> Recognized groups also enjoy a privileged status in zoning law<sup>9</sup> and monument protection. The most important privileges are various tax exemptions for the group's income, receipts through donations, turnovers, and real property.<sup>10</sup> Recognized religious groups also may levy a church tax on their members and have it collected through the state authorities, even though only the Catholic Church and the German Protestant Church have made use of this tax collection system.<sup>11</sup> All religions that are recognized as corporations of public law might be viewed as having a governmental stamp of approval, which may increase their prestige and respectability and be helpful in terms of finding new members.

### **The Case of the Jehovah's Witnesses**

The Jehovah's Witnesses have been present in Germany since the beginning of the 20<sup>th</sup> century and currently have a membership of approximately 160,000. Originally registered as an association in 1927 in the town of Magdeburg, they were subsequently banned and persecuted by the Nazi government and later by the Communist regime in East Germany. In West Germany, they existed in the form of an association that bore the name of Watchtower Bible and Tract Society. The East German portion of this group was recognized by the East German government in 1990, just before German unification, and shortly after unification the same group applied to the state of Berlin for recognition as a corporation of public law. The application was rejected on the grounds that the Jehovah's Witnesses spurn the government and hold constitutional values in contempt in that they prevent their members from voting or being elected to political office.

The Jehovah's Witnesses appealed the governmental decision, and they won in the trial and first appellate instances before the administrative courts of the state of Berlin.<sup>12</sup> Both these courts held that the Jehovah's Witnesses were entitled to become a corporation of public law in the state of Berlin. This holding, however, was reversed in the third instance by the Federal Administrative Court in a decision of June 26, 1997.<sup>13</sup>

The Federal Administrative Court held that the awarding of public corporate status is not possible for a religious community that has a hostile attitude toward government. This, according to the court, is manifested in the teachings of the Jehovah's Witnesses that strictly prohibit participation in governmental elections and service in the military or the civilian alternative service. These teachings show, it was held,

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<sup>8</sup> SOZIALGESETZBUCH VIII, DEC. 8, 1998, BGBl. I AT 3546, AS AMENDED, §75, ¶3.

<sup>9</sup> BAUGESETZBUCH, DEC. 8, 1986, BGBl. I AT 2253, AS AMENDED, §1, §5, SENTENCE 2, NO. 6.

<sup>10</sup> ABGABENORDNUNG, Mar. 16, 1976, BGBl. I at 613, §54; H. Brockmeyer et al., ABGABENORDNUNG at 289 (München, 1998).

<sup>11</sup> H. Marrée, Das kirchliche Besteuerungsrecht, in J. Listl and D. Pirson, 1 HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND at 1101 (Berlin, 1994).

<sup>12</sup> Verwaltungsgericht Berlin, decision of Oct. 25, 1993, 12 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NvwZ] 609 (1994); Obergerverwaltungsgericht Berlin, decision of Dec. 14, 1995, 14 NvwZ 478 (1996).

<sup>13</sup> DOCKET NUMBER 7C 11/96.

that the religious group lacks an understanding of democracy. The Federal Administrative Court found this reason was sufficient for reversing the lower court decisions, and the Court did not find it necessary to decide whether the Jehovah's Witnesses are a law-abiding group.

### **The Decision of the Federal Constitutional Court<sup>14</sup>**

A constitutional complaint was brought by the Jehovah's Witnesses alleging that the decision of the Federal Administrative Court violated the constitutional guarantees of religious liberty. For the other side to the dispute, briefs were filed by the state of Berlin as the party to the proceeding and also by the governments of Bavaria and of the Federation, the latter acting as *amici curiae*. Among the arguments brought by these governments were that the Jehovah's Witnesses expected the end of the world within a foreseeable time and therefore could not provide the constitutionally required assurance of permanency and that they disregard constitutional values by requiring their members to abstain from voting, by calling the state an instrument of the devil, and by violating the constitutional rights of their members through coercive practices.

The Federal Constitutional Court unanimously reversed the decision of the Federal Administrative Court and held that loyalty toward the state is not a requirement for recognition, whereas a law-abiding attitude is required. The case was remanded for a judicial finding on whether or not the Jehovah's Witnesses are a law-abiding organization. The head notes of the decision are as follows:

1. A religious community that wants to become a corporation of public law in accordance with articles 140 of the Basic Law and 137 of the Weimar Constitution must be law-abiding.
  - A) Such a community must guarantee that it will observe the law as in effect, in particular, that it will use the delegated governmental powers only in accordance with constitutional and legal obligations.
  - B) Such a community must also guarantee that its future conduct will not endanger the fundamental constitutional principles referred to in article 79 paragraph 3 of the Basic Law, the fundamental rights of third parties that are entrusted to the state, or the Basic Law's fundamental principles of freedom in matters of religion and the relationship between church and state.
2. Above and beyond these principles, the Basic Law does not require any particular loyalty to the state.

The Court based its decision on the guarantees of religious liberty of article 4, paragraphs 1 and 2, of the Basic Law.<sup>15</sup> The Court reasoned that these guarantees require the government to remain neutral toward all religions and that the Federal Administrative Court's finding of disloyalty may well have violated this

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<sup>14</sup> *SUPRA* NOTE 1.

<sup>15</sup> "Article 4 (Freedom of faith, of conscience, and of creed): (1) Freedom of faith, of conscience, and freedom to profess a religion or a particular philosophy shall be inviolable. (2) The undisturbed practice of religion shall be guaranteed." [Translation from Basic Law, *supra* note 5].

requirement of neutrality. Moreover, the concept of loyalty had a dubious connotation in that it might be perceived as requiring the religious community to become intertwined with the state or become part of its apparatus, even outside of the defined areas of cooperation.

The Court held furthermore that the Constitutional provisions listed as the only requirement for recognition that the religious community give some guarantee of permanency and have an adequate number of members. The Jehovah's Witnesses fulfilled both these requirements, particularly that of permanency, even though they believe that the end of the world is near. They believe that their organization will outlast the end of the world, and their organization had already survived various dates for which the end of the world had wrongly been prophesied.

The Court, however, explained that religious communities could be recognized only if their overall behavior gave some assurance that the group was law-abiding and would not violate the constitutional rights of third parties. These assurances have to be given because a recognized religious community acts with some authority when engaging in cooperative pursuits together with the government, and therefore the government has to see to it that the religious group would not in the name of the government abuse the rights of third parties. Among these rights are human dignity, human life and bodily integrity, the welfare of children, and religious liberty.

In remanding the case, the Court instructed the lower courts that the assessment of the law-abiding nature of a religious community had to be based on its actual conduct and not its beliefs. The assessment would have to be made through the evaluation of many circumstances and facts. Mathematical precision would not be possible; instead, there would have to be a complex prognosis of the overall conduct of the religious community.

Abstention from voting would not constitute an unlawful attitude, because voting is not mandatory. Moreover, the faith of the Jehovah's Witnesses did not intend to replace democracy with an authoritarian regime. Instead, an apolitical attitude was propagated. The Court directed that the primary areas of investigation of the lower courts should be the educational practices of the Jehovah's Witnesses, because of allegations that these harm the welfare of children, and the group's practices toward members who want to leave the community; there having been allegations that these practices were unduly coercive.

Although there is agreement on the importance of the decision, public opinion is nevertheless divided on what exactly it means. Some hail the decision as a "Magna Carta" of religious liberty<sup>16</sup> that signals an end of preferential treatment of the major religions<sup>17</sup> and finally makes the constitutional prohibition against established churches a reality.<sup>18</sup> Others, however, praise the decision for its unequivocal statement that religious communities that want to be recognized must be law-abiding and express doubt whether groups with fundamentalist beliefs will pass the required hurdle and qualify for incorporation.<sup>19</sup> For the Jehovah's

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<sup>16</sup> C. Geyer, *Satanische Leitsätze*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ] at 49 (Dec. 21, 2000).

<sup>17</sup> G. Besier, *Katastrophe für die beiden Amtskirchen*, FOCUS MAGAZIN at 48 (Jan. 8, 2001).

<sup>18</sup> O. Kallscheuer, *Das Ende der ursprünglichen Harmonie*, SÜDDEUTSCHE ZEITUNG at 17 (Dec. 23, 2000).

<sup>19</sup> *Der religiös neutrale Staat*, FAZ at 1 (Dec. 20, 2000).



Witnesses, their chance of becoming incorporated will depend on the investigations of the administrative courts; in particular, whether previously made allegations of physical punishment of children and of unreasonable psychological pressure on members wishing to leave the organization prove to be isolated and non-representative cases or a recurring pattern.<sup>20</sup>

### **PEOPLE'S REPUBLIC OF CHINA: NEW LAW ON EXTRADITION**

by Wendy I. Zeldin, Senior Legal Research Analyst, Directorate of Legal Research\*

*The United States and China do not have an extradition treaty. Criminals at present must be exchanged on the basis of an agreement on mutual legal assistance in criminal matters signed in June 2000. China's recent enactment of a Law on Extradition, drafted on the basis of extradition treaties with some 14 other countries and international practice, may further smooth the transfer of criminals between the two countries and pave the way for drawing up an extradition treaty between them.*

#### **Introduction**

It was not until the 1990s that the People's Republic of China (PRC) began to negotiate bilateral extradition treaties in earnest.<sup>1</sup> The new trend was marked by the signing of the Treaty on Extradition Between the People's Republic of China and the Kingdom of Thailand on August 26, 1993.<sup>2</sup> Since then, the PRC has signed an additional twelve treaties, chiefly with countries of the former Soviet bloc and Southeast Asia. The most recent agreement was reached with the Republic of Korea, on October 18, 2000.<sup>3</sup> The United States and the PRC do not have an extradition treaty, but in July 2000 the two countries signed an

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<sup>20</sup> *Positive und negative Religionsfreiheit*, FAZ at 6 (Dec. 21, 2000).

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<sup>1</sup> The PRC reportedly signed its first treaty of extradition with the Democratic People's Republic of Korea in 1978, whereby the PRC agreed to deport back to the DPRK any North Koreans who tried to defect or arrived without a visa. "China Calls for Calm Over Defection of North Korean," Deutsche Presse-Agentur, Feb. 13, 1997, LEXIS/NEXIS, News Library.

<sup>2</sup> Reported, for example in, "Thai Premier Meets Chinese Counterpart Li Peng; Several Treaties Signed," Aug. 26, 1993, BBC Summary of World Broadcasts, Aug. 27, 1993, via LEXIS/NEXIS, News Library.

<sup>3</sup> Chang Jae-soon, "Korea, China To Sign Criminal Extradition Treaty in Seoul Today," *The Korea Herald*, Oct. 18, 2000, via LEXIS/NEXIS, News Library.

agreement on legal assistance designed to provide a framework for the return of criminals.<sup>4</sup> General procedures regarding extradition treaties are subsumed under article 7 of the 1990 Law of the PRC on the Procedure of the Conclusion of Treaties, which lists the types of “treaties and important agreements” to be ratified by the National People’s Congress (NPC) Standing Committee and steps to be taken after treaties are signed.<sup>5</sup>

On December 28, 2000, the NPC Standing Committee adopted the country’s first Extradition Law. It was promulgated and went into effect on the same date.<sup>6</sup> The Law’s four chapters include General Provisions, Requesting Extradition from the PRC, Requesting Extradition from a Foreign State, and Supplementary Provisions. Selected aspects of the new legislation will be considered below.

## **Extradition From the PRC**

### *Conditions of Extradition*

The Extradition Law sets forth two conditions that must be met in order for extradition to be carried out. First, the conduct referred to in the extradition request must constitute a crime under both the laws of the PRC and the laws of the requesting state (the principle of “double crime,” or the sameness principle). Second, the conduct must “meet the standard of a certain term of imprisonment.”<sup>7</sup> The Law stipulates that when an extradition request is made in order to bring criminal procedural action, the offense mentioned in the extradition request will be punishable under the laws of both party states by a prison sentence of at least one year or by a heavier punishment. If the extradition request is made in order to execute a criminal punishment, at the time the request is made the unserved period of punishment must be at least six months. If the extradition request includes several offenses that satisfy the double crime principle, extradition will be granted for all of them, as long as one of the offenses satisfies the punishment standard (art. 7).

### *Rejection of Extradition Requests*

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<sup>4</sup> Craig S. Smith, “Asylum Bid Puts U.S. in Dilemma,” *International Herald Tribune*, Aug. 2, 2000, via LEXIS/NEXIS, News Library. The Agreement between the Government of the People’s Republic of China and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters was signed on June 19, 2000, after two rounds of talks in September 1998 and March 1999. The two sides initiated an agreement during the latter round. The Agreement covers mutual assistance in service of documents, in investigation and taking of evidence, and in freezing, seizure, and forfeiture proceedings. Xinhua, June 19, 2000, via Foreign Broadcast Information Service (FBIS) online subscription database, June 19, 2000. A copy of the U.S. text of the Agreement was obtained by the Law Library from the State Department.

<sup>5</sup> Item 3, ¶1, covers treaties and agreements relating to judicial assistance and extradition. The Law was adopted on Dec. 28, 1990, and promulgated and effective the same day. For the Chinese text, see 30 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [Gazette of the State Council of the People’s Republic of China] 1126-1130 (Feb. 25, 1991). For an English translation, see 4 THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA (1990-1992) 137-144 (Beijing, Science Press, 1993).

<sup>6</sup> For the Chinese text, see <http://162.105.148.4/newlaw/ShowContent.asp?ID=5320>; for a translation into English, see Xinhua, Dec. 28, 2000, as translated in FBIS, Dec. 28, 2000. Work on drafting the law had begun in 1994. See, e.g., “Draft Extradition Law Submitted to Congress Standing Committee,” Xinhua, Aug. 21, 2000, as translated in BBC Summary of World Broadcasts, Aug. 24, 2000, via LEXIS/NEXIS, News Library.

<sup>7</sup> As described by Hu Kangsheng, an NPC official, in Xinhua, Aug. 21, 2000, *id.*

Under the Extradition Law, there are eight circumstances under which an extradition request *will be* rejected by the PRC. These are if:

- the person whose extradition is being requested is a Chinese citizen;
- a PRC judicial organ has already reached an effective verdict on the wanted person's crimes or concluded the relevant criminal proceedings by the time the request is received;
- the extradition request is for a political offense<sup>8</sup> or there is a prior grant of asylum by the PRC;
- the person to be extradited may face criminal prosecution or punishment or unfair treatment in judicial proceedings on racial, religious, ethnic, or gender grounds or for political opinions or identity;
- the offenses are purely military ones under the laws of either State;
- the statute of limitations for the offenses cited in the extradition request has expired or the offender has been pardoned by either State by the time the request is received;
- the person to be extradited has been subjected to or may be subjected to torture or other cruel, inhumane, or dehumanizing treatment or punishment in the requesting State; or
- the request is made on the basis of judgment by default, unless the requesting State promises to give the person to be extradited a new trial (art. 8).

An extradition request *may be* rejected under two sets of conditions. One is if the PRC has criminal jurisdiction over the offenses mentioned in the extradition request and has brought or is preparing to bring criminal action against the offender. A request may also be denied if the person to be extradited is unfit for extradition on humanitarian grounds, such as age or health (art. 9).

### *Handling of Extradition Requests*

Extradition requests between the PRC and a foreign state are to be handled through diplomatic channels, with the PRC Ministry of Foreign Affairs (MFA) the designated liaison agency (art. 4, para. 1). The requesting state is to submit an extradition request to the Ministry (art. 10). It must be in writing and is to include the name of the requesting organization, various particulars about the person whose extradition is requested, a statement of the facts of the case, and the texts of the relevant laws prescribing the punishment for the offense and related time limits (art. 11).

The requesting state must give assurances, in submitting its extradition request, that the person sought will not be held criminally liable for any other offenses committed before the extradition for which extradition has not been granted or be extradited to a third country. However, this provision does not apply if the PRC gives its consent (art. 14, item 1). If the requesting state withdraws or abandons the extradition request or submitted it in error, that state will be responsible for any damages caused by the

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<sup>8</sup> The original draft of the law stated that there would be "no extradition for political misconduct;" the final version better reflects international practice. "National Congress To Deliberate Revising Extradition Law," Xinhua, Oct. 23, 2000, via BBC Summary of World Broadcasts, via LEXIS/NEXIS, News Library.

request to the person involved (art. 14, item 2). In the absence of an extradition treaty, the requesting state will give assurances of reciprocity (art. 15).

### *Examination Process*

After receipt of an extradition request, the MFA examines it and the accompanying documents before forwarding them, provided they comply with the Law and the applicable treaty, to the Supreme People's Court (SPC) and the Supreme People's Procuratorate (art. 16, para. 1, & art. 19). When two or more countries request the extradition of the same individual for the same or for different offenses, the priority of extradition will be determined according to the order in which the requests are received, the existence or lack of an extradition treaty, and other factors (art. 17). Once the person is located and taken into extradition custody or placed under extradition surveillance in a residence, the SPC transmits the request and relevant materials to the designated Higher People's Court (art. 20, paras. 1&2).

The Higher People's Court (HPC), sitting as a three-judge bench, reviews the extradition request (art. 22). It hears statements from the person whose extradition is being sought as well as arguments from his Chinese counsel. The HPC sends a copy of the extradition request to the person involved, who has 30 days from receipt of the document to submit his views (art. 23.) If the Court determines that the extradition request complies with the Law and with the provisions of the applicable extradition treaty, it will make a ruling that the request is consistent with the terms of extradition. At the same time, at the requesting state's request, and provided certain conditions are met, the Court may rule that assets related to the case be surrendered. If the request is not in compliance, the Court will rule to deny the request for extradition (art. 24).

After issuing a ruling, the HPC will read it out to the person involved and, within seven days, transmit it to the SPC for review. If the person does not accept a ruling granting the extradition request, he and his attorney may submit his views to that effect to the SPC (art. 25). The SPC may approve the HPC ruling or nullify, remand, or modify it (art. 26). If it decides to approve the ruling or to modify it, the SPC will transmit its own ruling to the MFA and forward a copy to the person sought (art. 28, para. 1). If the MFA receives an SPC ruling denying the extradition request, it will communicate that decision to the requesting state. If the SPC rules that the request complies with the terms of extradition, the MFA, upon receiving the ruling, will immediately report it to the State Council, which then decides whether or not to extradite the person involved. If the State Council decides not to extradite, the MFA will so inform the requesting state (art. 29, paras. 1-3). When it is up to the State Council to decide whether or not to grant extradition, it may, if necessary, authorize the appropriate department under its jurisdiction to make the decision (art. 52).<sup>9</sup>

In granting an extradition request, the State Council may decide at the same time to defer surrender of the person sought, in cases in which a PRC judicial organ is in the process of bringing criminal action against him or punishing him for other offenses (art. 42). If deferred extradition could seriously hamper the criminal proceedings in the requesting state, the person may temporarily be surrendered at that state's request, provided that criminal proceedings under way in the PRC are not obstructed as a result and the state guarantees that the person will be returned to the PRC immediately and unconditionally at the

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<sup>9</sup> The issue of who has the final say in extradition cases was hotly debated in NPC Standing Committee deliberations of the Law. "National Congress To Deliberate Revising Extradition Law," Xinhua, Oct. 25, 2000, via BBC Summary of World Broadcasts, via LEXIS/NEXIS, News Library.

conclusion of its proceedings. The decision to grant temporary extradition will be made by the State Council, with the consent of the SPC or the Supreme People's Procuratorate (art. 43).

### *Coercive Measures*

In urgent cases, at the request of the foreign state, coercive measures such as extradition custody, arrest, and surveillance in the place of residence may be adopted to prevent persons sought for extradition from running away. Before submitting its formal request for a person's extradition, the requesting state must apply in writing through diplomatic channels or the Ministry of Public Security to have the person detained. On the basis of the application, a public security organ (the police) may take the person into extradition custody (art. 30). Interrogation is conducted within 24 hours. The subject may retain a Chinese attorney, and the public security organ is to inform the person of this right (art. 34).

### *Execution of Extradition*

A public security organ will execute extradition. The requesting state and the Ministry of Public Security will agree on the time and place of the surrender of the person sought, the method of surrender, and other particulars (art. 38). The public security organ will also surrender property relating to the case. The property may be surrendered even if the extradition cannot be carried out because of the death or escape of the person sought or for other reasons (art. 39). The Extradition Law also addresses failure by a requesting state to take over the person within a given time limit, treatment of a new request by that state to extradite the same individual for the same offense, and extenuating circumstances permitting new time limits or new surrender arrangements (art. 40).

### *Transit*

The Extradition Law sets forth conditions under which extradition between foreign states may be effected by means of transit through the territory of the PRC. A request for transit is made through diplomatic channels, with the MFA as liaison agency, and in accordance with the provisions on submission of an extradition request. The MFA decides whether or not to grant or deny the request based on the applicable provisions of the Law. If air transit is used and no landing in PRC territory is planned, the provision requiring a request to transit does not apply (arts. 44 & 44, in part).

## **Requesting Extradition from a Foreign State**

To request extradition from or transit through a foreign state, the competent provincial-level judicial, procuratorial, public security, state security, or prison organs handling the case are to submit a written opinion, along with other relevant documents, to the SPC, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, or the Ministry of Justice, respectively. After the relevant unit together with the MFA examine the opinion and reach agreement on it, the MFA will submit the request to the foreign state (art. 47). The necessary documents will be produced in accordance with the applicable provisions of the extradition treaty. If there is no treaty or if it does not contain such provisions, the Extradition Law's sections on submission of a request, coercive measures, and transit will apply. Special requirements of the requesting state may be complied with provided that the basic principles of the laws of the PRC are not violated (art. 49).

If the requested state imposes additional terms on the granting of extradition, the MFA may pledge to meet those terms as long as they do not infringe upon the sovereignty of the PRC or harm its national interest or the public interest. An undertaking to limit prosecution will be decided upon by the Supreme People's Procuratorate; an undertaking to limit punishments meted out will be made by the SPC. In bringing criminal action against the person extradited, a judicial organ should be bound by the undertaking made (art. 50).

### **Compensation and Expenses**

In the case of withdrawal, abandonment, or submission in error of an extradition request, causing damage to the person sought, any demand for compensation by the person is made to the requesting state (art. 53). Expenses incurred by an extradition case are handled in accordance with the applicable extradition treaty or agreement in which the requesting state and the requested state jointly participate or to which they are both signatories (art. 54).

### **Conclusion**

The Extradition Law of the PRC was formed on the basis of almost a decade of experience in forging extradition treaties. The Law's stated purpose is to ensure normal extradition proceedings, strengthen international cooperation in the punishment of criminals, protect the legitimate rights and interests of individuals and organizations, and safeguard the national interest and social order. China's impending accession to the World Trade Organization may also have given impetus to the enactment of the Law, since after joining WTO the PRC's interaction with other countries will increase, its opening up process will be promoted, and crimes involving international financial activities, among others, may proliferate.<sup>10</sup> Whether or not bilateral extradition treaties are negotiated in the near future between China and Western countries like the United States and Canada--where at present there are persons whom the PRC government would like to extradite--the new Law may help smooth the process of handling extradition cases.

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<sup>10</sup> "Chinese Lawmakers Call for Promulgation of Extradition Law," Oct. 25, 2000, via LEXIS/NEXIS, Asiapc Library.

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