

November 2005

JAPAN

(a)	Registration no.	J/1
(b)	Date	March 14, 1997
(c)	Author(ity)	Tokyo District Court
(d)	Parties	X v. the United States of America
(e)	Points of law	The Court ruled that jurisdiction of Japan cannot be exercised against foreign country, and dismissed the claims of plaintiffs
(f)	Classification no.	0.a l.a
(g)	Source(s)	The Japanese Annural of International Law No.41, 1998
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English

Demand for the Cessation of Nighttime Takeoffs and Landings by United States Military Aircrafts at Yokota Air Base, Japan, and for Compensation for the Suffering Caused by the Aircraft Noise — State Immunity

Tokyo District Court, Hachioji Branch, Judgment, March 14, 1997; H.J. (1612) 101 [1997]

X et al. v. the United States of America

The plaintiffs *X et al.*, who reside near the Yokota Air Base, brought an action against the government of the United States of America with regard to what they consider intolerable noise levels caused by the taking off and landing of military aircraft at the base. They demanded an injunction against all flights between the hours of 9 p.m. and 7 a.m., and sought compensation for past suffering as well as future suffering to be caused by noise levels exceeding 60 phons during the remaining hours, such compensation to be paid jointly by the Japanese government.

Held: 1. The demands of *X* and the others is dismissed.

2. The costs of the litigation shall be borne by the plaintiffs.

Upon the grounds stated below:

'It is a well known fact that the respondent is a foreign country.'

1. According to principles of international law, the judicial jurisdiction of Japan cannot be exercised against a foreign country that is sued. (Daishinin [Supreme Court under the Meiji Constitution of Japan], Decision, December 28, 1928; 7 Daishinin Minji Hanreishu (12) 128 [1928].) However, in exceptional cases when such a state voluntarily appears before the court with the express intention of being subject to Japanese adjudicatory jurisdiction, or when the subject of the action brought directly involves real estate in Japan, jurisdiction can be exercised over that state.

2. If that principle is applied to this case it is clear that the subject does not directly concern real estate in Japan. Therefore, it is necessary to determine whether

the respondent has the intention of being subject to the jurisdiction of Japan voluntarily.... Judging from the dossier, the respondent does not have such an intent. Adjudicatory jurisdiction of Japan thus cannot be exercised over the respondent in this case.'

(a)	Registration no.	J/2
(b)	Date	December 25, 1998
(c)	Author(ity)	Tokyo High Court
(d)	Parties	X v. the United States of America
(e)	Points of law	The Court ruled that jurisdiction over the appellee could not be exercised in this case under the Article 18 paragraph 5 of the Japan-US Agreement Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, even if the Court were to embrace the restrictive theory of immunity as the appellants argue
(f)	Classification no.	0.a 1.c
(g)	Source(s)	The Japanese Annals of International Law No.42, 1999
(h)	Additional information	This case is the appeal of the case J/1
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English

Demand for the Cessation of Nighttime Takeoffs and Landings by United States Military Aircraft and for Compensation for the Suffering Caused by the Aircraft Noise — State Immunity — Immunity Based on Article 18(5) of the Japan-U.S. Agreement under Article VI of the Japan-U.S. Treaty of Mutual Cooperation and Security

Tokyo High Court, Judgment, December 25, 1998; H.J. (1665) 64 [1999]

X et al. v. the United States of America

The appellants are Japanese citizens who reside near the United States Armed Forces' air base in Yokota, Tokyo. They originally brought their claim against the United States Government to the Tokyo District Court, requesting that the nighttime takeoffs and landings by the U.S. Air Force be stopped, and seeking compensation for past as well as future injuries caused or to be caused by the aircraft noise. The Tokyo District Court in its judgment of March 14, 1997¹⁰ dismissed their claim. The original judgment, based on the doctrine of State immunity, was in harmony with the Great Court of Judicature's decision of December 28, 1928, widely regarded as a landmark decision adopting the absolute theory of immunity. The citizens appealed to the present court.

Held: 1. The appeal is dismissed.

2. The cost of litigation shall be borne by the appellants.

Upon the grounds stated below:

- (1) Jurisdictional Immunity under the Japan-U.S. Agreement
Article 18, §5 of the Japan-U.S. Agreement Regarding Facilities and Areas and

(1) 41 JAIL 91 [1998]

the Status of United States Armed Forces in Japan, arranged pursuant to Article VI of the Japan-U.S. Treaty of Mutual Cooperation and Security, provides that the Japanese Government, not the United States Government, by appropriate means including formal adjudication, shall deal with claims for damages (other than contractual claims) arising out of acts or omissions of members or employees of the United States Armed Forces, done in the performance of official duty, or out of any other act, omission, or occurrence for which the U.S. Armed Forces are legally responsible (§5(a)). It also provides that the Japanese Government shall make payment for such claims if necessary (§5(b)), and that Japanese court orders directing such payment shall be binding upon the United States as well as upon Japan (§5(c)). The parties are to defray the costs in satisfying such claims as stipulated in §§5(d) and 5(e) of the Agreement (According to §5(e), Japan shall pay twenty-five percent of the amount and the United States shall pay seventy-five percent where the United States alone is responsible for the wrong, and each party shall pay fifty percent where both are responsible).

Resorting to this provision, a Japanese citizen who suffered injuries as a result of an act of a member or employee of the U.S. Armed Forces may bring an action in Japan against the Japanese Government, but not against the United States Government. If he or she prevails in court, he or she will receive the full amount from the Japanese Government. Japanese courts, however, lack jurisdiction where such a citizen chooses to sue the United States Government.

It could be argued that Japanese courts may exercise jurisdiction over "members or employees of the United States Armed Forces" as private citizens, for Article 18, §5(f) of the Agreement provides that "members or employees of the United States Armed Forces . . . shall not be subject to any proceedings for the enforcement of any judgment given against them in Japan in a matter arising from the performance of their official duties." Yet this section cannot be interpreted as indicating the jurisdiction of Japanese courts over the United States itself.

On the contrary, based on the Japan-U.S. Treaty of Mutual Cooperation and Security, the provision explained above immunizes the United States against the jurisdiction of Japanese courts, making sure that neither the United States nor the U.S. Armed Forces will be embroiled in legal disputes concerning acts of the U.S. Armed Forces or their members stationed in Japan, done in the performance of official duty. It makes clear that Japan abdicates its jurisdiction over the United States in this context.

Such a provision is not unique to the Japan-U.S. relationship. The 1976 Foreign Sovereign Immunities Act (FSIA) of the United States (28 U.S.C. §§1604 et seq.) has adopted the so-called restrictive (or relative) theory, enumerating acts to which the doctrine of sovereign immunity does not apply (§1605). Although the United States may exercise jurisdiction over wrongful acts committed by foreign

States as well as over commercial transactions (§1605(a)(5)), the Act provides at the same time that the existing treaties are to prevail where there are conflicts between the FSI⁴ and the treaties (§1604). Accordingly, an American citizen who suffered injuries as a result of an act of the foreign military stationed in the United States as part of the North Atlantic Treaty Organization's troops may bring an action for damages only in the United States and only against the United States Government, as stipulated in the agreement concerning the status of the NATO troops. If such a citizen prevails, the United States Government will pay the entire judgment found for him or her; the United States may then demand a contribution from the foreign State responsible for the wrong, pursuant to the agreement. American courts, on the other hand, are not authorized to exercise jurisdiction where such a citizen sues the foreign State itself.

Likewise, although the 1972 European Convention on State Immunities prepared by the Council of Europe provides that the courts of each member State may exercise jurisdiction over foreign States with respect to their tortious acts, which is an exception to the doctrine of state immunity (§11), it declares that the immunities of foreign States as to their military are out of its reach (§31). Obviously, §31 was drafted with the agreement on the status of the NATO troops in mind.⁵

(2) Jurisdiction as to Actions Seeking Injunctions

Article 18, §5 of the Japan-U.S. Agreement is, on its face, a provision concerning claims for damages, caused by wrongful acts committed in the course of official duty. Actions seeking injunctions are nowhere stipulated in the Agreement. It is, however, reasonable to apply the insight expressed in the provision concerning claims for damages to actions seeking injunctions by analogy. Noting that courts of most States nowadays do have jurisdiction over foreign States with respect to their wrongful acts and commercial transactions, Article 18, §5 of the Agreement apprehends that Japanese courts may exercise jurisdiction over the United States, following the approach of most courts in the world. It therefore dares to immunize the United States against their jurisdiction as to the U.S. Armed Forces members' wrongful acts, done in the performance of official duty. It is unthinkable that the drafters of the Agreement intended to maintain the jurisdiction as to actions for injunctions, for the necessity for immunity is much the same for such actions.

Whereas the Agreement allows an aggrieved Japanese citizen to file a lawsuit against the Japanese Government in lieu of the United States Government with respect to his or her right to compensation, it apparently does not provide such a citizen with an option to apply for an injunction. We find no authority maintaining that a citizen may seek an injunction in this context, either. Such a position may not be totally inconceivable, of course. Nevertheless, should the provision concerning actions for damages be applied to actions for injunctions by analogy, it would follow

that Japanese citizens affected by the aircraft noise may bring an action against the Japanese Government in a Japanese court, requesting that the U.S. Armed Forces' flights be stopped. It would also follow that, if the plaintiffs win the case, the Japanese Government must negotiate with the United States and take appropriate measures, and that the U.S. Armed Forces must cease to undertake flights in response to the Japanese Government's request, pursuant to their obligation under the Agreement. It is unnatural to interpret the Agreement as imposing such a duty upon the United States without any express provision. Following the two judgments of the First Perry Bench of the Supreme Court, handed down on February 25, 1993, in which the Bench held that the High Court's judgments dismissing similar applications for injunctions as unjustifiable were erroneous, but that the applications were nonetheless groundless, since the Japanese Government could not restrain the U.S. Armed Forces' activities authorized by the Japan-U.S. Treaty of Mutual Cooperation and Security without distinct foundation in the Treaty itself and in domestic laws enacted thereby, the present court concludes that Japanese citizens may not demand in court that the Japanese Government see to it that the U.S. Armed Forces discontinue nighttime takeoffs and landings. It could be argued that the Agreement is flawed in that it shields the United States Government from the jurisdiction of Japanese courts with respect to actions for injunctions and provides no alternative remedies for aggrieved Japanese citizens; however, this is a matter of diplomatic or legislative policy.

As a result, Japanese citizens cannot obtain injunctive relief in a Japanese court as to the U.S. Armed Forces' flights, whether they sue the United States Government or the Japanese Government. Yet this is the inescapable consequence under the existing law.

Needless to say, Japanese citizens may petition for the Government's diplomatic efforts. In fact, the Government negotiated with the United States, and the two states entered into the "Japan-U.S. Joint Committee's Agreement on Measures to Control the Noise at Yokota Air Base," which stipulates that "the United States Armed Forces shall refrain from making flights or engaging in ground activities between 10:00 p.m. and 6:00 a.m., unless such flights or activities are urgently needed for the U.S. Armed Forces' operations." Aside from seeking such efforts, however, citizens affected by noise cannot directly settle the matter in court by bringing actions for injunctions under the existing law.

Although the appellants cite various provisions in the Agreement and contend that they provide good grounds for extending this court's jurisdiction over the appellee in the present case, the Agreement, on the contrary, makes clear that the appellee is not subject to the jurisdiction of Japanese courts, as explained above. The appellants' claim is therefore groundless.⁶

(3) Restrictive Theory of Immunity

Recently, due to changed international circumstances, a strong argument has been made against the validity of the Great Court of Judicature's decision of December 28, 1928, as the appellants point out. The decision espoused the absolute theory of State or sovereign immunity, that is, the view that Japanese courts may not exercise jurisdiction over foreign States unless the defendant State appears without raising a jurisdictional objection or real property located in Japan is involved. We, too, are aware that a number of notable scholars consider the 1928 decision as outdated and having very little precedential value.

Although the absolute theory, according to which States were rarely subject to the jurisdiction of other States, was once widely recognized as custom in international law, most States thereafter changed their position and adopted the restrictive (or relative) theory of immunity, save a few former socialist States. This is because, as the range of governmental activities widened, and as States came to engage themselves more actively in economic activities, including commercial transactions, serious problems arose under the absolute theory. For example, since adverse parties in commercial transactions were not legally protected under the absolute theory, States' economic activities themselves were eventually constrained. The restrictive theory holds that courts of one State may exercise jurisdiction over another State where the latter's act in the private law sphere (such as employment, commercial transactions, and business administration) is in question; however, even under the restrictive theory, jurisdiction is not authorized where a foreign State's act as a sovereign (act in the public law sphere) is involved.

If we are to go against the tide and adhere to the absolute theory of immunity, it will definitely be detrimental to various activities, including economic activities, of Japan. Moreover, the restrictive theory is the more reasonable of the two from a practical point of view. Thus, the present court appreciates the appellants' argument, which insists that the original judgment was erroneous in that it followed the Great Court of Judicature's outdated decision, and that we should abandon the absolute theory.

In addition to the above-mentioned Foreign Sovereign Immunities Act of the United States and the European Convention on State Immunities, there are express provisions that exclude tortious acts of foreign governmental agencies and their members from the coverage of the doctrine of sovereign immunity in the 1978 State Immunities Act of the United Kingdom, in various statutes of other States relating to foreign sovereign immunities, in the 1982 Draft Treaty on State Immunities proposed by the International Law Association (revised in 1994), and in the 1991 Draft Treaty on State Immunities prepared by the United Nations' International Law Commission. It appears that the world trend is to authorize courts of the State where the allegedly tortious act took place to exercise jurisdiction over the wrongdoing

States.

It is true that no judicial decision manifestly embracing the restrictive theory of immunity has been rendered in Japan, but this in fact was due to the dearth of fitting cases in the past. It is even possible to maintain that Japan has already abandoned the absolute theory and adopted the restrictive, in light of the above-mentioned Article 18, §5 of the Agreement, for it is conceivable that the drafters inserted this provision because they believed that otherwise the jurisdiction of Japanese courts would be authorized in cases brought against the United States or the U.S. Armed Forces concerning tortious acts committed by the U.S. Armed Forces in the performance of official duty.

As explained above, however, we cannot exercise jurisdiction over the appellee in the present case under Article 18, §5 of the Agreement, even if we are to embrace the restrictive theory of immunity as the appellants argue.

(a)	Registration no.	J/3
(b)	Date	March 14, 2002
(c)	Author(ity)	Supreme Court
(d)	Parties	X v. the United States of America
(e)	Points of law	The Court ruled that; the nighttime take offs and landings in question were the very public acts of the United States Armed Forces based in Japan, and judging from the purpose or the nature of these activities, it is clear that they were sovereign acts. Therefore, there is no doubt that under international customary law, these activities of the United States Armed Forces based in Japan are not subject to the civil jurisdiction of Japanese courts.
(f)	Classification no	0.a I.a
(g)	Source(s)	Hanrei Jihou (Japanese) No. 1786 p. 2002
(h)	Additional information	This case is the final appeal of the case J/1
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English (translation. from the original text)

Demand for the Cessation of Nighttime Takeoffs and Landings by the United States Military Aircraft and for Compensation for the Suffering Caused by the Aircraft Noise – State Immunity

Supreme Court, Judgement, April 12, 2002; H. J. (1786) 44 [2002]

X et al. v. the United States of America

The appellants of the present case are Japanese citizens who reside near the United States Armed Forces' Air Base in Yokota, Tokyo. They brought their claim against the United States Government, requesting that the nighttime takeoffs and landings shall be stopped, and seeking compensation for past as well as future injuries caused or to be caused by the aircraft noise. Both the Tokyo District Court (March 14, 1997) and the Tokyo High Court (December 25, 1998) dismissed their claim. The citizens appealed to the present court.

- Held: 1. 'The appeal is dismissed'
2. 'The cost of litigation shall be borne by the appellants.'

Upon the grounds stated below:

- (1) The appellants of the present case brought their claim against the United States, requesting the cessation of the nighttime takeoffs and landings and compensation for damages, on the ground that the nighttime aircraft noise infringed their rights of personality.
 - (2) The judgement by the Tokyo High Court was based on Article 18 (5) of the Japan-U.S. Agreement Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, arranged pursuant to Article VI of the Japan-U.S. Treaty of Mutual Cooperation and Security. The Tokyo High Court held that Article 18 (5) grants immunity to the United States against the jurisdiction of Japanese courts, with respect to the claim for compensation based on wrongful act done in the performance of official duty by the U.S. forces based in Japan; and that by analogy, therefore, the object and purpose of this provision is applicable to the case on the claim for the cessation, and so the appeal is inadmissible and shall be dismissed.
 - (3) However Article 18 (5) shall not be interpreted as providing for civil jurisdictional immunity to the United States, as its purpose is to create a system on the dealings of the claim arising from wrongful act done by the United States Armed Forces based in Japan, which are the organs of foreign states.
- As of civil jurisdictional immunity to foreign states, the theory of absolute immunity had traditionally been considered as international customary law. With expansion of the scope of state activities, the school of idea has arisen that it is not appropriate to grant civil jurisdictional immunity to private law acts and acts *jure gestionis*. State practices of foreign states, limiting the scope of immunity granted to state activities, have also been accumulated. Even under these circumstances, however, it can be approved that there still exists international customary law to the effect that jurisdictional immunity shall be given to sovereign acts (or acts *jure imperii*). The nighttime takeoffs and

landings in question are the very public acts of the United States Armed Forces based in Japan, and judging from the purpose or the nature of these activities, it is clear that they are sovereign acts. Therefore there is no doubt that under international customary law, these activities of the United States Armed Forces based in Japan are not subject to the civil jurisdiction of Japanese courts.

Accordingly, it should be held that the present suit is inadmissible. The conclusion of the original judgement can be approved in that the suit is dismissed. But the grounds of the original judgement cannot be adopted.

(a)	Registration no.	J/4
(b)	Date	November 30, 2000
(c)	Author(ity)	Tokyo District Court
(d)	Parties	X v. the Nauru Finance Corporation, the Republic of Nauru
(e)	Points of law	The Court ruled that; considering the need to protect the legal status of their own nationals, and to secure the basis of foreign State's international economic activities, the restrictive theory has been accepted. In view of the facts in this case, i.e., the commercial nature of the issuance of bonds under the guarantee of a government and the express waiver of sovereign immunity by a prior written agreement on the bonds, we come to conclusion that there are no grounds for the arguments of defendants which demand immunity from Japanese jurisdiction.
(f)	Classification no.	0.b.1 i.b
(g)	Source(s)	The Japanese Annual of International Law No. 44, 2001
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English

Claims for Compensation — The Issuance of Bonds — Foreign Sovereign State — Immunity from Suit — Absolute Theory — Restrictive Theory — *Acta Jure Imperii* or *Acta Jure Gestionis* — Practising Attorneys Act — Prohibition of Execution of the Rights Taken Over

Tokyo District Court, Judgment, November 30, 2000, H.J.(1740) 54 [2000]

Cresh Co. Ltd. v. the Nauru Finance Corporation, the Republic of Nauru

In 1989, Y1 (the defendant), the Nauru Finance Corporation, which had been created by a special law of the Republic of Nauru, issued bonds for the amount of five billion yen (five billion yen), under the guarantee of Y2 (the defendant), the Republic of Nauru. Y1 could not redeem the bonds on the due date (27 July 1994). On 12 August 1994, Y1, Y2 and all the bondholders agreed to change and reschedule the terms and conditions of the bonds. As a result, the maturity date on the bonds was extended to 22 August 1994, 22 December 1994 and 27 April 1995. But until now, the principal together with interest has not yet been paid.

The following conditions were contained in the bonds: with respect to all disputes arising under or relating to the bonds, Y1 shall be subject to the jurisdiction of the Tokyo District Court and its upper court, explicitly, unconditionally and irrevocably; with respect to proceedings relating to Y1 itself or its property, Y1 shall waive its immunity (where it derives from its sovereignty or not) to which it is entitled at the present and will be entitled in the future, from the judicial proceedings (whether it be the service of process, acquisition of judgment, attach-

ment, execution or other proceedings) irrevocably and unconditionally, to the extent that the applicable law permits; with respect to service of judicial documents, the consul of Y2 shall be designated as an agent of Y1 to receive the documents in Japan. As to the proceedings on the guarantee of Y2, similar agreements were reached on the terms and conditions of the guarantee.

X (the plaintiff), an English company, has carried on a sales business of bad debts. The bonds in the amount of one billion yen (¥1,000,000,000) were assigned to X after the rescheduling of their maturity date. On 18 May 1995, X registered the date in accordance with the *Sbasaitou Torokoku Ho* (Act concerning the Legislation on Debentures, etc). On 1 June 1995, X brought this action in the Tokyo district court seeking the payment of the principal and interest on the bonds.

The Tokyo District Court asked Y1 and Y2 whether they would appear for the proceedings, and both responded that they had no intention of appearing. Thus, as of 30 May 1997, the court requested the serving of a summons (on 19 March 1998, at 10 am) and a complaint, in accordance with Article 175 of the Old Code of Civil Procedure⁽¹⁾, transmitted from the Ministry of Foreign Affairs of Japan to the Ministry of Foreign Affairs of Y2, and to the Supreme Court of Y2. The Secretary of State of Y2 refused to receive the summons and the complaint on the grounds of sovereign immunity. However, just before the date of the oral argument, the attorney for Y1 and Y2, with a letter of attorney, appeared in the case before the Tokyo District Court. The clerk of the court served the summons and complaint to this attorney in accordance with Article 100 of the Code of Civil Procedure⁽²⁾, and the oral argument of the proceedings was held.

Held: "The defendants shall pay to the plaintiff one billion yen (¥1,000,000,000), with interest at the rate of 7 percent per annum from July 28, 1994, until

(1) *Minji Sasho Ho* (the Old Code of Civil Procedure) (1890 Law No. 29 as amended by 1948 Act No. 149, etc.) Article 175 (the current Code of Civil Procedure maintains the rule in Article 100).

²Service which is to be made in a foreign country shall be made by the presiding judge entrusting the matter to the competent governmental authorities of such country or to the Japanese ambassador, minister envoy or consul stationed in such country.

(2) *Minji Sasho Ho* (the current Code of Civil Procedure) (1996 Law No. 109, which went into effect on January 1, 1998) Article 100.

³A court clerk may effect service in person on a person who has appeared in a case before the court to which the court clerk belongs.

the payment is completed.¹

²The cost of the action shall be borne by the defendants.

Upon the grounds stated below:

1. We conclude that neither Y2 nor Y1 is entitled to sovereign immunity, upon the grounds stated below.

The cause of action in this case is an issuance of bonds under the guarantee of a foreign government. The issuance of bonds is an example of an economic activity being carried out largely and usually as an international financial transaction in international society at the present time. In addition, the defendant agreed by a written clause on the bonds that the court of another State of which the defendants are not nationals has jurisdiction and they waived their immunity explicitly from that jurisdiction. Under such circumstances, it cannot be considered that a foreign State or the agency of a foreign State, which is acting as a subject in commercial transactions, is entitled to sovereign immunity and that this is affirmed under international customary law as "the established international norm" under Article 98 (2) of the Japanese Constitution.

Our view is clearly supported by the world trend in treaties among nations, and the statutes or decisions of other nations. The doctrine of sovereign immunity developed from the practice of national courts in the nineteenth century. One consequence of the rule that all States enjoyed sovereign equality was that no State could claim jurisdiction over another. A foreign State could bring proceedings in another country as a plaintiff, but a foreign State could not be made a defendant in proceedings unless it was voluntary subject to the jurisdiction...

³Although this doctrine, the so-called absolute theory, was once widely accepted, the circumstances have changed in the twentieth century. As the range of governmental activities widened, and as States came to engage in economic activities which used to fall within the sphere of private parties' activities, a number of countries have recognized that serious problems arose under the absolute theory. That is, the absolute theory would infringe on the legal status of their own nationals doing business with foreign States, infringe on economic predictability, and constrain states' economic activities themselves. Thus considering the need to protect the legal status of their own nationals, and to secure the basis of foreign States' international economic activities, the restrictive theory (this theory divides the States' activities into two categories according to their functions: one relates to acts of a sovereign nature (acts *jure imperii*), and the other relates to acts of a commercial/private nature (acts *jure gestionis*), and this theory gives immunity only to acts of a sovereign nature and rejects the absolute theory) has been accepted...

⁴We consider the present case in relation to the circumstances of international

society on sovereign immunity described above. In view of the facts in this case, i.e., the commercial nature of the issuance of bonds under the guarantee of a government and the express waiver of sovereign immunity by a prior written agreement on the bonds, we come to the conclusion that there are no grounds for the arguments of Y1 and Y2 which demand immunity from Japanese jurisdiction, without judging the other remaining points, such as, the characteristics of Y1 as a state agency or the purpose of the issuance of the bonds.

2. Article 73 of the *Bengohi Ho* (the Practising Attorneys Act)³ provides: "No person shall perform the business to enforce the rights he took over from others by litigation, mediation, conciliation, or other means." Article 73 concerns a situation where, if a person is allowed to perform enforcing the rights he took over as his economic purpose, the assignment of a right and the enforcement of the right would be easily subject to the unrestricted pursuit of profits, and the assignee would abuse legal proceedings or make an illegitimate request in the name of negotiation. Thus the objective and purpose of the Article are to prevent such an untoward influence and to secure legal stability by the general prohibition against performing the business of enforcing the rights taken over from others.

On the other hand, the assignment of a right is one of most important means for a creditor to dispose of his property. When... a debtor is unlikely to perform his duty and litigation or other means of dispute settlement should be considered to collect the debt, if Article 73 is read as a broad prohibition on performing the business to take over a right in expectation of such means of dispute settlement, it would unilaterally prejudice the value of the rights held by the creditor by substantially preventing a method to dispose of his rights. Moreover, it would create a situation where the debtor not performing his duty has the advantage over the creditor.

When Article 73 is interpreted in a reasonable way to balance the requirement to maintain an impartial relationship between a creditor and a debtor and the requirement to secure legal stability, which is the ultimate purpose of the Article, the scope of applicability of the Article is considered to be limited. That is, even if, at the time of the assignment, the person performing the business to take over a right from others is expecting the necessity to enforce the right through dispute settlement such as litigation, it should not be immediately found that the act is inconsistent with Article 73. We should take into account all the circumstances of the act, such as, the type of the right, the possibility and the extent of the dispute, the nature of the debtor, the purpose and modality of the obligatory right, the purpose and modality of the assignment, including a means to determine the value, and the modality of enforcing the right after the assignment including ways to demand the

(3) *Bengohi Ho* (the Practising Attorneys Act) [1949 Law No. 205]

performance of the debtor. It is proper to conclude that the person is acting inconsistently with his obligation under Article 73 only when the person is acting for the purpose of gaining interest by intervening in the dispute of others, and the act will bring an untoward influence and prejudice legal stability, contrary to the objective of the Article.'

(a)	Registration no.	J/5
(b)	Date	October 6, 2000
(c)	Author(ity)	Tokyo District Court
(d)	Parties	X v. Republic of the Marshall Islands
(e)	Points of law	The Court ruled that; though there are several opinions regarding the extent of Japan's jurisdiction over foreign states, at all events it is generally considered that Japan's jurisdiction does not extend over a civil suit concerning foreign state's fundamental public law actions and authoritative actions like the granting of the right of permanent residence.
(f)	Classification no	0.a l.a
(g)	Source(s)	The Japanese Annual of International Law No.45 2002
(h)	Additional information	
(i)	Full text – extracts – translation - summaries	Summary in English

The course of the negotiations between the Dutch delegation and the Japanese delegation [the negotiations to conclude the Peace Treaty of San Francisco (added by the translator)] indicates that the two parties settled for the understanding that although "certain types of private claims of Allied nationals that the Japanese Government is willing to address will remain" as a result of the Peace Treaty, Allied nationals will not obtain satisfaction regarding such claims.

Judge Shigeaki Asao (presiding)
 Judge Yukio Nishijima
 Judge Toshio Hara

The State's Jurisdictional Immunity — the Granting of the Right of Permanent Residence and the Jurisdictional Immunity

Tokyo District Court, Judgment, October 6, 2000, H. T. (1067)263[2001]

X et al. v. Republic of the Marshall Islands

The plaintiffs concluded, with the defendant the Republic of the Marshall Islands, the agreement that they acquired the right of permanent residence from the United States of America five years after they acquired the right of permanent residence from the Republic of the Marshall Islands (the agreement on the procedures of an acquisition program of the right of permanent residence of the United States of America) and paid a consideration. However, the defendant did not implement the obligation under the agreement, so the plaintiffs declared their intention of a rescission of the agreement and claimed for the return of the consideration having been paid to the defendant under the right of an application for return of unjust enrichment.

Held: 1. All of the plaintiffs' claims are dismissed.
 2. All costs of the action shall be borne by the plaintiffs.

Upon the grounds stated below:

According to the plaintiffs, the defendant's obligation under this agreement does not only mean the plaintiffs' acquisition of the right of permanent residence from the United States of America, but also, as a precondition of this, the inspection of the plaintiffs and the granting of the right of permanent residence from the Republic of

the Marshall Islands, which is the core and indispensable element of the agreement. Incidentally, though there are several opinions regarding the extent of Japan's jurisdiction over foreign states, at all events it is generally considered that Japan's jurisdiction does not extend over a civil suit concerning foreign a state's fundamental public law actions and authoritative actions like the granting of the right of permanent residence, exclusive of a case in which a foreign state accepts *ex proprio motu* another state's jurisdiction.

According to the relevant documents, it is not accepted that the defendant has the intention of responding to the action under this suit, so there is no other way to determine that Japan's jurisdiction does not extend over this suit.

Judge Kiraru Nantia (presiding)
 Judge Kenji Takamiya
 Judge Masanori Aitsuji

The Principle of Non-Refoulement — Article 33(1) of the Convention Relating to the Status of Refugees — Article 31(2) of the Convention Relating to the Status of Refugees — Refugees and Compulsory Deportation Procedures

Tokyo District Court, Decision, November 5, 2001, not yet reported

X v. Chief Inspector of the Tokyo Immigration Bureau

The circumstances of this case are analogous, though not identical, to those of the above-mentioned case, decided by the same tribunal on March 1, 2002, and thus are omitted here.

The plaintiff X demanded the suspension of the confinement order against himself, claiming that it violates Article 31(2) of the Convention Relating to the Status of Refugees.

Held: 1. The complaint is dismissed.
 2. The cost of litigation shall be borne by the plaintiff.

Upon the grounds stated below:

Article 33(1) of the Convention Relating to the Status of Refugees, which prohibits the deportation of a refugee to a country where he or she would be persecuted, would matter only at the moment of designation of the destination of deportation, and Article 53 (3) of the Immigration Control and Refugee Recognition Act ensures

(a)	Registration no.	J/6
(b)	Date	December 19, 2000
(c)	Author(ity)	Tokyo High Court
(d)	Parties	X v. Republic of the Marshall Islands
(e)	Points of law	The Court dismissed the claims of the appellants on the same ground as the original judgement (see the case J/5). It also ruled that restrictive theory of sovereign immunity could not be adopted unless there would be relevant treaties or national legislation.
(f)	Classification no	0.a l.a
(g)	Source(s)	Jurist (Japanese) No.1224, 2002
(h)	Additional information	This is the appeal of the case J15
(i)	Full text – extracts – translation - summaries	Appendix: Summary in English (translation from the original text)

Restitution of Unjust Enrichment – State Immunity

Tokyo High Court, December 19, 2000; Jurist (1224) 307 [2002]

X et al. v. the Republic of the Marshall Islands

In July 1996, the Plaintiffs (X), wishing to acquire the right of permanent residence in the United States of America and responding to a newspaper advertisement recruiting permanent residents placed by the Defendant (Y, being the Republic of the Marshall Islands), concluded with Y an "Agreement on the procedure for the programme of acquiring permanent resident status of the United States" (hereinafter "the Agreement"). Under the terms of the Agreement, X were to acquire the US permanent resident status five years after X had acquired permanent resident status in the Marshall Islands.

In August 1996, as directed by Y, X paid to Y a fee of three million yen required for the procedure. Y, however, only issued short-term tourist visas to X, and no further progress was made on the procedure with regard to permanent residence. After sending, in September, a request for performance of the obligation within an appropriate period, X declared in November that they had terminated the agreement and filed the present action with the Tokyo District Court, claiming the restitution of unjust enrichment from Y.

X claimed that the contract under the Agreement was "a civil law contract between genuinely private persons" based on the relationship of "delegation, quasi-delegation or contract" for acquiring the US permanent resident status, and therefore the principle of jurisdictional immunity would not apply even if Y was a State. In the present appellate proceedings, X further claimed that the central obligation of Y was to provide a real property and facilities necessary for establishing residence in Y's territory, and not the granting of permanent resident status. Furthermore, Y's obligation to return the money upon the termination of the contract due to Y's non-performance would be a purely private law obligation.

The District Court dismissed X's claim on the ground that Japan had no jurisdiction over such public law acts of a foreign State as the granting of permanent residence.

Held: 1. 'The appeal is dismissed.'

2. 'The cost of litigation shall be borne by the appellants.'

Upon the grounds stated below:

(1) Under the terms of the Agreement, X were obligated to pay the sum of ¥3 million to Y in consideration of Y's obligation to grant them permanent residence in the Republic of Marshall Islands under certain conditions, and to enable X to acquire permanent resident status of the United States five years thereafter. It was therefore expected that X would become eligible for US permanent residence only upon expiry of five years after they had become permanent residents of the Republic. The "central and essential element of the obligations" for Y was thus to grant the permanent resident status of the Republic to X.

(2) "Various opinions have been put forward regarding the acts of a foreign State to which Japan's jurisdiction should extend. However, at least in civil law proceedings like the present one, where essentially public law acts of a foreign State such as the granting of permanent resident status are involved, it should be interpreted that Japan cannot extend its jurisdiction unless that State voluntarily accepts it."

(3) Since Y has not indicated its willingness to respond to X's claim, Japan cannot exercise its jurisdiction over the present case.

