



Asian Yearbook of International
Law, Volume 14 (2008)

Edited by

B. S Chimini, M. Masahiro and L. Thio

BRILL

ASIAN YEARBOOK OF INTERNATIONAL LAW

Launched in 1991, *The Asian Yearbook of International Law* is a major refereed publication dedicated to international law issues as seen primarily from an Asian perspective, under the auspices of the Foundation for the Development of International Law in Asia (DILA). It is the first publication of its kind edited by a team of leading international law scholars from across Asia. The Yearbook provides a forum for the publication of articles in the field of international law, and other Asian international law topics, written by experts from the region and elsewhere.

Its aim is twofold: to promote international law in Asia, and to provide an intellectual platform for the discussion and dissemination of Asian views and practices on contemporary international legal issues. Each volume of the Yearbook normally contains articles and shorter notes; a section on State practice; an overview of Asian states participation in multilateral treaties; succinct analysis of recent international legal developments in Asia; an agora section devoted to critical perspectives on international law issues; surveys of the activities of international organizations of special relevance to Asia; and book review, bibliography and documents sections. It will be of interest to students and academics interested in international law and Asian studies.

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B.S. Chimni – Miyoshi Masahiro – Thio Li-ann

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INTRODUCTION BY THE GENERAL EDITORS

We are delighted to present, in Volume 14 of the *Asian Yearbook of International Law*, a range of perspectives written by “third world” international legal scholars on topics ranging from international investment law, trade law, treaty law, the law of war and human rights law. This is the second issue of the *Yearbook* published by Routledge, a division of Taylor & Francis, since our partnership with them commenced with Volume 13.

We want to place on record our continuing gratitude to Mr Yasuhiko Sata of Tobiko Corporation for his generous donation which enables the award of the SATA prize to a young international legal scholar who authors an article of outstanding merit in this annual competition. His generosity helps us to recognize and reward the work of the next generation of Asian international law scholars, which is essential to ensure the longevity and sustainability of this academic enterprise. This year’s SATA prize winner is Mr Zhu Lijiang for his essay entitled “Some Asian states’ opposition to the concept of war crimes in non-international armed conflicts and its legal implications.” We look forward to continuing to receive essays of high calibre. We also encourage our readers to contact the General Editors to suggest and author notes for the *Developments* section, which seeks to offer succinct, insightful notes on international legal developments of interest to Asia (from 2,000 to 4,500 words generally), such as noteworthy cases, treaties, foreign policy, the work of international and municipal bodies implementing international law, etc.

In this volume, we are pleased to launch a new section, *Agora*, which is the Greek term for “marketplace”. To promote a marketplace of ideas about world public order and the intersection of international with municipal law, we seek to invite distinguished international legal scholars to offer critical pieces (ranging from 4,000 to 6,500 words) which relate to Asian approaches towards international law topics. We are honoured in the inaugural *Agora* section to feature essays on the theme “Is there an Asian approach to International Law” by Professor M. Sornarajah and Professor B.S. Chimni. We are confident that these thought-provoking pieces, born of mature reflection, will be stimulating to our readers. We welcome suggestions from readers on themes or topics they would like to see addressed by some of the leading Asian international law scholars in the near future.

B.S. Chimni
Miyoshi Masahiro
Thio Li-ann

ABBREVIATIONS

AJIL	American Journal of International Law
AUILR	American University International Law Review
BISD	Basic Instruments and Selected Documents (GATT)
BIT	Bilateral Investment Treaty
BYIL	British Year Book of International Law
CLR	Columbia Law Review
CTR	Iran-US Claims Tribunal Report
CWILJ	Case Western International Law Journal
ECHR	European Convention on Human Rights
EJIL	European Journal of International Law
FILJ	Fordham International Law Journal
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International Law
HLR	Harvard Law Review
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice, Reports of Judgments, Orders and Advisory Opinions
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC Yb.	International Law Commission, Yearbook
ILM	International Legal Materials
ILR	International Law Reports
IMO	International Maritime Organization

IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IRRC	International Review of the Red Cross
It.YIL	Italian Yearbook of International Law
JAIL	Japanese Annual of International Law
JIEL	Journal of International Economic Law
JIJIS	Journal of the Institute of Justice and International Studies
JTLP	Journal of Transnational Law and Policy
JWIT	Journal of World Investment and Trade
NAFTA	North American Free Trade Agreement
NHRI	National Human Rights Institutions
NILR	Netherlands International Law Review
NYLJ	New York Law Journal
OHCHR	Office of the UN High Commissioner for Human Rights
RBDI	Revue Belge de Droit International
RCADI	Recueil des Cours de l'Académie de Droit International de La Haye
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
SCOR	Security Council Official Records
Sg.JICL	Singapore Journal of International and Comparative Law
Sg.YIL	Singapore Year Book of International Law
STLR	South Texas Law Review
TDM	Transnational Dispute Management
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCIO	United Nations Conference on International Organization
UN GA	United Nations General Assembly
UNTEC	United Nations Conference on Trade and Employment
UNTS	United Nations Treaty Series
UNYB	United Nations Yearbook
UPJIEL	University of Pennsylvania Journal of International Economic Law
VJTL	Vanderbilt Journal of Transnational Law
Va.JIL	Virginia Journal of International Law
VCT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
YLJ	Yale Law Journal

ARTICLES

JAPAN – ALCOHOLIC BEVERAGES CASE REVISITED: A CASE OF TREATY INTERPRETATION OR FORMATION OF INTERNATIONAL LAW?

Miyazaki Takashi*

THE ISSUE: “LIKE” OR “COMPETITIVE/SUBSTITUTABLE” PRODUCTS

Two decades ago, in 1987, a GATT panel ruled in favour of the EEC, the complainant, that, among other issues, Japan’s traditional alcoholic beverage “shochu” was a “like product” (hereinafter referred to as LP in abbreviation) of vodka and a “directly competitive and substitutable product” (DCS for short) in relation to whisky, brandy, and other distilled spirits and that the higher taxes that Japan applied to vodka, whisky, brandy and other spirits in excess of those on shochu were contrary to Article III(2)¹ of the General Agreement on Tariffs and Trade or the GATT. Japan

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¹ The texts of Article III, paragraph 2, of the GATT and its interpretative note follow: I. GATT Article III, National Treatment on internal Taxation and Regulation: paras.1–5:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specific amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported to the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any

had held that shochu was not a like product of vodka and that no LP or DCS relationship existed between shochu and vodka, whisky, brandy or other spirits² and that therefore the Japanese liquor taxes were consistent with GATT requirements.

This is not a simple case of a trade dispute that happened twenty long years ago, soon to be forgotten. The issue raised then still lives on today.

Twenty years later, in January 2007, Vietnam was admitted to the World Trade Organization, but it was harassed by the same problem with regard to its liquor taxes. At the moment of its accession, some Members of the Organization called Vietnam's liquor taxation inconsistent with Vietnam's WTO obligations, invoking "extensive WTO jurisprudence on excise tax systems based on ad valorem rates" as the only rule of law admissible and "urged Viet Nam's National Assembly to take this jurisprudence into account when implementing its commitments on excise taxes".³ Vietnam was obliged to concede that it would subject all distilled spirits with

other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture in specific amounts or proportions which requires, directly or indirectly, that any specific amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1

II. The interpretative note to GATT Article III(2):

A tax conforming to the requirements of the first sentence of paragraph 2 would be inconsistent with the provisions of the second sentence only in cases where competition is involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

² 3.12 of the 1987 panel report L/6216 adopted on 10 November 1987, BISD 34S/83.

³ See paras. 197 and 198 of the WTO document WT/ACC/VNM/48, Accession of Viet Nam, Report of the Working Party which is cited below:

197. The issue of taxation of alcoholic beverages was of considerable interest to a large number of Members. Some Members noted that a specific tax per litre of pure alcohol would be the way to ensure non-discriminatory treatment, as required by Viet Nam's commitments on excise taxes. . . . These same Members noted that Viet Nam needs to change its legislation to make its excise tax regime consistent with Viet Nam's WTO obligations. These Members recalled extensive WTO jurisprudence on excise tax systems based on ad valorem rates and urged Viet Nam's National Assembly to take this jurisprudence into account when implementing these commitments. The representative of Viet Nam noted that in becoming a Member of the WTO, Viet Nam retained the sovereign right to implement transparent and non-discriminatory tax policies in furtherance of domestic policy objectives and in accordance with its obligations under the WTO Agreement.

198. The representative of Viet Nam confirmed that its laws . . . relating to internal taxes

an alcohol content of 20% or higher to a single specific rate per litre of pure alcohol or a single ad valorem rate. This is a setback suffered by a developing nation and an infringement on its sovereign right of taxation that should not have happened.

WTO experts have pointed out that the issue of the scope of application of national treatment as provided for in GATT Article III has not been settled.⁴ In fact, the issue of internal taxes that are often found to be discriminatory vis-à-vis imports continue to cause difficulties throughout the world, often involving developing nations that wish to preserve traditional domestic products against inroads of contemporary artificial or synthetic substitutable products being produced newly in their own countries or imported from abroad.

Some may wonder what is the use of bringing up an old case such as this one after a long lapse of time. However, the problem of national treatment, i.e. non-discrimination between domestic and imported products, has always been a serious issue that has been taken up frequently in GATT/WTO dispute settlement. Japan, again in 1996, and Korea and Chile in 1999, were the object of complaints in the WTO dispute settlement procedure with regard to their liquor taxes and were defeated on the basis of the 1987 GATT decision on Japan's liquor taxes. Vietnam's accession to the WTO offered another occasion that reminded us all of the contemporary relevance of the question of product identity or likeness.

There is another aspect of the problem whose importance can be considered transcendental: although the question at issue is mainly one of fact-finding and treaty interpretation, it also involves that of the formation of international law that usually takes the form of customary law (rules to which various states are deemed to have tacitly consented) and treaty (i.e. explicit expression of state consent). As at the time of Vietnam's accession to the WTO, claims have been made that the GATT/WTO decisions on the application of Article III to liquor taxes have become WTO law and a considerable pressure has been applied on some WTO members to induce them into compliance. This vital question of case law formation will also be discussed later.

The concepts of "like products" or "directly competitive or substitutable products" are used in a number of GATT articles. The working party report on

... levied on imports, except for those relating to distilled spirits and beer, would be in full conformity with its WTO obligations, in particular Article III of the GATT 1994. . . . The representative of Viet Nam further confirmed that, within three years after the date of accession, all distilled spirits with an alcohol content of 20% or higher would be subject to either a single specific rate per litre of pure alcohol or a single ad valorem rate. The Working Party took note of these commitments.

The United States submitted as an interested third party in the 1987 Japan liquor tax case that most countries other than Japan provided for tax rates on the basis of alcohol content (4.4, Report of the Panel adopted on November 1987, L/62161). To the best knowledge of this author, this contention has never been pronounced to be law in the subsequent GATT/WTO dispute settlement reports/decisions.

⁴ See Horn, Henrik and Petros Mavroidis, "Still hazy after all these years: The interpretation of national treatment in the GATT/WTO case law on tax discrimination", 15(1) *EJIL* 39–69 (2004).

border tax adjustment of 1970, often referred to as the BTA report, counted some 16 instances of such use.⁵ In fact, GATT Article I provides for MFN treatment for like products traded between Member countries with respect to customs duties, other trade-related charges and regulations. Other examples are: Article II on tariff concessions, Article III on national treatment for imports, Article VI on anti-dumping and countervailing duties, Article X on rules of origin, Articles XI and XIII on quantitative restrictions, and Article XIX on safeguards, which refers to DCSs as well.

However, neither the GATT drafters nor GATT dispute settlement panel reports including the BTA report chose to define them; they decided to rule on a case-by-case basis, relying on certain criteria. Although it seems common sense that it is the market, i.e. manufacturers, distributors and consumers, which determines the likeness and competitiveness/substitutability of a product, paragraph 6.22 of the 1996 Japan Alcoholic Beverages panel report,⁶ after recognizing that the arbitrary test of product likeness and competitiveness/substitutability was the marketplace, reverted to the case-by-case approach and opted for a decision based on it. The AB (Appellate Body) on the same case even remarked: “The concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as the different provisions of the WTO Agreement are applied”⁷ and faulted the panel for referring to the marketplace as the arbitrary test.

Thus, GATT/WTO dispute settlement reports have adhered to the case-by-case approach sanctioned by the BTA report, which took into account three criteria in determining the identity of a product, namely: i) the end uses of the product in a given market; ii) consumers’ tastes and habits which change from country to country; iii) the properties, nature and quality of the product. A fourth criterion has been added in the so-called GATT/WTO jurisprudence: the tariff classification of the product, provided the classification is specific enough and sufficiently detailed.⁸

Works have been written on the subject, even in very recent years as shown in the footnote.⁹ Yet none has come up with a clear-cut solution that would eliminate the

⁵ See the working party report adopted 2 December 1970, L/3464, BISD/18S/97/101.

⁶ WT/DS8/R adopted 21 November 1996.

⁷ H. Article III:2, 1. First Sentence (a) “Like Products”, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R dated 4 October 1996.

⁸ See 4.2 of the panel report on the EEC Measures on Animal Feed Proteins, adopted on 14 March 1978 (L/4599, BISD, 35S/63) and the Appellate Body report on Japan adopted on 4 October 1996 at H. Article III: 2, 1. First Sentence, (a) Like Products.

⁹ For detailed discussions of the subject, refer to Choi, Wong-Mog, *“Like Products” in International Trade Law, Towards a Constant GATT/WTO Jurisprudence* (Oxford: Oxford University Press, 2000); Verhoosel, Gaetan, *National Treatment and WTO Dispute Settlement, Adjusting the Boundaries of Regulatory Autonomy*, (Oxford-Portland Oregon: Hart Publishing, 2002); Bhala, Raj, *Modern GATT Law, A Treatise on the General Agreement on Tariffs and Trade* (London: Thomson, Sweet and Maxwell, 2003), at 3–57, 107–134; Horn and Mavroidis, *loc. cit.*, n. 4, at 39–69.

legal uncertainty caused by the case-by-case approach adhered to by GATT/WTO dispute settlement reports.

There have been settlement reports that go apparently against the economic reality of the marketplace: the panel report in Spain – Tariff Treatment of Unroasted Coffee¹⁰ ignored the very important distinction the market makes between robusta and arabica coffee; the 1987 panel report in Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages¹¹ confounded “like products” and “directly competitive or substitutable” products in condemning discriminatory taxation yet has been quoted as precedent in three subsequent cases and some regard it as established jurisprudence. The 2000 panel report on the Asbestos case¹² ruled that asbestos and PVA, cellulose and glass fibres were LPs and was overruled by the Appellate Body.

In many respects, these reports, particularly the 1987 report, seem to have serious flaws in their conclusions including a neglect of the GATT drafting history and an arbitrary interpretation of GATT Article III that cannot be justified by the wording of relevant provisions. Rather, it seems certain that these reports, in defining DCSs in multilateral GATT/WTO law, have been influenced by Euro-American anti-trust law that has a tendency to define “the relevant market” broadly.¹³

This author considers that it must be the market that defines which products are like or competitive/substitutable and that it is an issue of fact (social cognition) and not a question of law.¹⁴ The market automatically takes account of the aforementioned four criteria and never claims two physically different products (say, oranges and apples) to be like. The three subsequent GATT/WTO panel/AB reports on liquor taxes have adopted the arguments initiated by the 1987 panel report that found shochu and vodka to be like, but the Japanese market has always distinguished them as two different products with different images (and tastes). Professor Choi reports that in the Korean market ginseng produced in China is traded as a distinct product from ginseng grown in Korea.¹⁵

In the Japanese market shochu and vodka are never deemed like or directly

¹⁰ L/5135, adopted on 11 June 1981.

¹¹ L/6216, BISD 34S/83, adopted on 10 November 1987.

¹² WT/DS/35/12, 18 September 2000.

¹³ Refer to Komuro Hodowo, “EC kameikoku no sabetsuteki naikokuzei” (Discriminatory internal taxation in EC nations), serials in *Boueki to Kanzei* (Trade and Tariffs) monthly, November 1996 to March 1987; *idem*, *Seminar: An Introduction to International Economic Law* (Tokyo: Nihon Keizai Shimbunsha (Japan Economic Journal), 2003), at 118–119, and Choi, *op. cit.*, n. 9, at 197–201.

¹⁴ The 1996 Appellate Body report, referring to DCSs, admitted that “the GATT 1994 is a commercial agreement”, and that “the WTO is concerned, after all, with markets”. It proceeded to assert that it did not seem inappropriate to look at competition in “the relevant markets” in defining DCSs (WT/DS8/AB/R, H. Article II, para. 2, Second Sentence (a) “Directly Competitive or Substitutable Products”).

¹⁵ Choi, *op. cit.*, n. 9, at 186.

competitive or substitutable. The market infallibly distinguishes products which may be competitive but have different physical properties, though having similar uses, say apples and oranges. In the Japanese market, shochu and vodka are perceived to be different products with distinct features and tastes in spite of their physical similarity.

It all started on 22 July 1986 when the EEC requested consultations with Japan under GATT Article XXII(1) on Japanese duties, taxes and labelling practices on imported wines and alcoholic beverages.¹⁶

The EEC held the following to be facts, which Japan did not contest:

Japan taxed various liquors differently sometimes by classing them into special, first and second grades (ex. sake and whisky). The tax was the heaviest on the special grade and lower on the first and second grades. Taxing was progressive according to fruit extract contents in the case of liqueurs made from fruits. It was evident that imported fruit liqueurs were disadvantaged on account of their higher fruit extract contents. Most imported liquors, particularly whisky and brandy belonged in higher taxed brackets as they were classified in special grade categories. In the case where the manufacturers' selling price (CIF+customs duty for imported products) exceeds the non-taxable threshold, an ad-valorem tax was applied in lieu of the specific tax. As most imports were classified special grade, higher ad-valorem taxes were applied instead of lower specific taxes.

A number of Japan's domestic products were also subject to higher ad-valorem taxes.

The EEC claimed that the Japanese system of taxation on alcoholic beverages was contrary to Article III, paragraphs 1, 2 in several respects:

- a. Categorization favouring traditional beverages such as sake and shochu.
- b. Grading: the grading system applicable to whisky and brandy was mandatory by raw material and alcohol content, and automatic, while grading of sake was voluntary and by taste where sake producers could choose whether to submit their products for grading and to which grade.
- c. Ad-valorem taxes applied to imported products the prices of which are in excess of certain levels.
- d. Calculation of price for tax purposes: Domestic manufacturers could choose between two methods of calculation while the tax base for imports was usually the CIF cost plus duty. This could lead to taxes on imports in excess of like domestic products and constituted a breach of Article III(4) and indirect tax discrimination in Article III(2).
- e. Taxation according to extract content

¹⁶ See, for the issues raised by the EEC, 3.2 of the report of the Panel adopted on 10 November 1987, L/6216, at 88-92.

- f. The high rates of tax on imported alcoholic beverages reduced their availability at points of sale and the average consumer's choice and distorted competition.

Japan contended that, for example, a relatively higher tax burden was carried by special grade whisky, which was regarded as a high-class liquor, while a lower burden was carried by shochu, which was considered a low-class liquor and was mainly consumed by low-income persons, and that the retail price of EEC whisky was high because of a high-price policy followed by exporters and distributors who took advantage of consumers' perception that imported whisky was high quality and precious. In Japan's view, Article III, paragraphs 1 and 2 stipulated only that imported products must not be subject to internal taxes in excess of those applied to like domestic products and that internal taxes must not be applied to directly competitive or substitutable products so as to afford protection to domestic production; as long as internal taxes were non-discriminatory and not applied so as to afford protection to domestic production, establishing tax rate differences did not constitute an infringement; there was no category where only imported products were subject to taxation. Japan pointed out that the 1947 Geneva draft of Article III limited the scope of non-discrimination to competitive/substitutable products to cases where there was no substantial domestic production of the product at issue and that there was sufficient domestic production of like products for all the EEC products in question (e.g. 91 per cent of Japan's whisky consumption was produced domestically).¹⁷

In support of this argument, Japan quoted the Reports of Committees and Principal Sub-Committees, UN Conference on Trade and Employment 1948, p. 64:

The Subcommittee was in agreement that under the provision of Article 18 [author's note: ITO Charter Article 18 corresponding to GATT Article III] regulations and taxes would be permitted which, while perhaps having the effect of assisting the production of a particular domestic product (say, butter) are directed as much against the domestic production of another product (say, domestic oleomargarine) of which there was a substantial domestic production as they are against imports (say, imported oleomargarine).

Most Japanese practices incriminated by the EEC, such as grading, ad-valorem taxes on expensive liquors and taxation according to extract content, some apparently discriminatory vis-à-vis imports, were abandoned through subsequent Japanese legislation. However, the tax differences between shochu and other spirits remain substantial, albeit reduced as the tax on the former was raised and that on the latter lowered, effectively resulting in higher shochu prices and lower whisky prices for imported as well as domestic whisky. Nonetheless, sales of shochu soared in spite of higher taxes while those of whisky declined, as shown further on.

¹⁷ See 3.9–3.12 of the 1987 panel report, *op. cit.*, n. 11, at 97–106.

THE 1987 GATT DECISION

On 10 November 1987, Contracting Parties of the General Agreement on Tariffs and Trade adopted the report of the panel charged with the task of examining the EEC complaint. The panel ruled to the effect that Japan's liquor taxes were inconsistent with the provisions of Article III, paragraph 2 of the General Agreement on Tariffs and Trade,¹⁸ as claimed by the EEC.

Among other issues, Japan's liquor taxes on shochu in particular were found in fact to be considerably lower than those imposed on whisky and other "Western style" distilled liquors (most of which were produced also in Japan) and the panel considered this contrary to Article III, paragraph 2, second sentence, as asserted by the EEC. The EEC had contended:¹⁹

If the criteria were based on characteristics of almost entirely domestically produced products . . . such product differentiation could result in direct tax discrimination. . . . For instance, the most exclusively domestically produced spirit shochu benefitted from favourable tax differences of between 1/7 (shochu B/other neutral spirits) and 1/41 (shochu B/special grade whisky) in comparison with all other spirits, some of which were "like products" and all of which were competitive and substitutable.

The EEC rebutted as follows the Japanese contention that, as there was substantial domestic production of products that were almost identical with the products of the EEC and both imported and domestic products were subject to the same taxation, there was no discrimination in violation of GATT Article III, paragraphs 1 and 2:²⁰

The Communities considered that a difference in taxation between "like" products based on different categories for tax purposes could certainly not be justified under Article III on the mere fact that there were domestic goods in all tax categories. More specifically, such a situation should be ruled as contrary to Article III:2 when the following conditions were met:

there was substantial production by the domestic industry of products in the less heavily taxed categories;

¹⁸ 5. Findings and conclusions, Report of the Panel, *op. cit.*, n. 11, at 112–127.

¹⁹ 3.5 of the 1987 report. *See also ibid.*, 5.11, at 122 and 5.12, at 123. In fact, according to *Zeisei Chousa-Kai kannkei Shiryō-shū* (data provided by the Tax System Investigation Council) (*See*, March, 1996) the liquor tax rate on whisky was 15.5 times higher than that on shochu A class before the 1994 Liquor Tax Law revision, finally to lower to a level 3.9 times higher than that on shochu A class in 1996.

²⁰ As for the fact that most of the whisky consumed in Japan is domestically produced, *see* the afore-quoted L/6216, 3.11 (bottom of p. 105 of BISD 34S/83) where Japan pointed out that 91% of Japanese whisky consumption was produced in Japan.

all or a very high proportion of imported products were in the categories subject to the higher rates of tax; . . .²¹

The EEC held that this practice was disadvantageous to imported liquors and violated national treatment requirements prescribed in GATT III.

Japan responded that Japanese liquor taxes were equitably levied according to the tax-bearing capacity of consumers, higher on more expensive liquors than on cheaper ones, and that there existed no discrimination between domestic and imported products, the liquors at issue being produced in substantial quantities in Japan itself and subjected to the same taxes according to definite categories established by Japan's Liquor Tax Law.²²

The EEC had contended, as quoted above, that most imports belonged in higher tax brackets and that shochu in particular was almost entirely produced in Japan ("imported shochu representing 0.4% of domestic production"), which, the EEC suggested, motivated Japanese protection of its domestic product by tax discrimination.²³

The panel based its decision more or less on the assertion of the complainant, EEC, that in applying the said GATT provisions one should first determine whether the disputed domestic and imported products were "like products" (LPs) as mentioned in Article III(2), first sentence, and if so whether there was discrimination in the tax rates applied to the products in question, in violation of the first sentence. If the products were not like, the EEC contended, then it should be examined whether the products at issue were directly competitive or substitutable (DCS) and whether the taxes were levied "not similarly" "so as to afford protection to domestic production" as stipulated in Article III(2), second sentence and in the interpretative note to Article III annexed to the text of the GATT 1947.²⁴

This method of interpretation adopted by the EEC and the panel is called the "two-step approach". Note, however, that no clear interpretative ground was shown for adopting this approach, neither by the EEC nor by the panel.²⁵ The approach posits that Article III(2), second sentence, applies to discrimination in tax rates, quoting as the normative source the interpretative note, yet without explaining why the interpretative note textually justifies the approach and the panel's (and the EEC's) interpretation of Article III(2) underlying it.

The panel accepted the EEC argument that shochu and other disputed distilled liquors such as whisky were at least DCSs if not LPs.²⁶

²¹ 3.6 of the 1987 panel report.

²² 3.10(a), (b) and (c) as well as 3.11 of the 1987 panel report.

²³ 3.5 and 3.6 of the 1987 panel report.

²⁴ See the text of the interpretative note, n. 1.

²⁵ 3.4 of the 1987 panel report. The EEC maintained that "the interpretive note to Article III:2 made it clear that the second sentence of Article III:2 extended the prohibition to discrimination between directly competitive or substitutable products", without adding specifically why or on what ground the interpretative note can be so construed.

²⁶ 5.6 and 5.7 of the 1987 report.

To understand the tortuous argument deployed by the panel that confuses LPs and DCSs finally to arrive at the conclusion that GATT Article III(2), second sentence, is applicable to tax rate discrimination between domestic and imported DCSs, it is necessary to reread very carefully the pertinent passages of the 1987 panel report so as to find out how DCSs came to be made the target of the tax discrimination ban without textual justification.

Paragraph 5.5 of the same report which contains the most important passages leading to the conclusion that the Japanese *shochu* tax contravened GATT III(2), second sentence, is cited below in extenso (direct and complete quotation, with the addition of this author's notes identifying the prior reports quoted in the report):

c) the drafting history confirms that Article III:2 was designed with the "intention" that internal taxes on goods should not be used as a means of protection (see: UN Conference on Trade and Employment, Reports of Committees, and Principal Sub-Committees, 1948, page 61). As stated in the 1970 Working Party Report on Border Tax Adjustments in respect of various provisions on taxation, "the philosophy behind these provisions was the insuring of a certain trade neutrality" (BISD 18/99 [author's note: this refers to the above-mentioned BTA report]). This accords with the broader objective of Article III "to provide equal conditions of competition once goods have been cleared through customs" (BISD 7S/64 [author's note: the panel report on the Italian Agricultural Machinery case]) and protect thereby the benefits accruing from tariff concessions. This object and purpose of Article III:2 of promoting non-discriminatory competition among imported and like domestic products could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products.

d) Subsequent GATT practice in the application of Article III shows that past GATT panel reports adopted by the CONTRACTING PARTIES have examined Article III:2 and 4 by examining, firstly, whether the imported and domestic products concerned were "like" and secondly, whether the internal taxation or other regulation discriminated against the imported products (see, for instance, BISD 25S/49, 63 [author's note: the Animal Proteins report]; L6175, paragraph 5 [note: the Superfund case report]).

Past GATT practice has clearly established that "like products" in terms of GATT Article III, paragraph 2 are not confined to identical products but cover also other products, for instance if they serve substantially identical end-uses (see L/6175, paragraph 5.1.1).

The panel concluded that the ordinary meaning of Article III, paragraph 2, in its context and in the light of its object and purpose²⁷ supported the past GATT practice of examining the conformity of internal taxes with Article III, paragraph 2

²⁷ Language borrowed from Article 31 of the Vienna Convention on the Law of Treaties.

by determining, firstly, whether the imported and domestic products are “like” or “directly competitive or substitutable” and, secondly, whether the taxation is discriminatory (first sentence) or protective (second sentence of Article II, paragraph 2). The panel decided to proceed accordingly also in this case.

If the phrase “the past GATT practice of examining the conformity of internal taxes with Article III(2)” refers to past GATT reports, it is to be observed that none of the past reports quoted by the 1987 report had dealt with taxes on DCSs but only concerned discrimination between LPs, as specifically explained further on. As for the “ordinary meaning” of the wording of Article III(2), “in its context and in the light of its object and purpose”, a more detailed analysis will be made after the examination of the drafting history and the purpose of the article that follow below.

Thus, in the absence of substantial justification, the liquor tax on shochu, which was drastically cut to facilitate the consumption of the inexpensive popular drink by low-income earners in the years immediately following the end of the Pacific War,²⁸ was found to be inconsistent with GATT Article III(2), second sentence, as shochu, a DSC product in relation to whisky and other distilled liquors (Japan’s contention to the contrary notwithstanding) was considered “not similarly taxed” as prescribed in the interpretative note to Article III(2). This clearly represents an arbitrary expansion onto DCSs of the application of Article III(2), first sentence, banning tax rate discrimination against imports in comparison with “like” domestic products.

The panel indicated that it drew on the drafting history of Article III as well as on “past practice” in the GATT dispute settlement in reaching its conclusions. This author intends in this paper to examine whether these findings are correct.

THE DRAFTING HISTORY OF ARTICLE III(2)

A careful study of the drafting history has revealed the fact that the US propositions to expand to competitive or substitutable products the scope of prohibition of discriminatory internal taxation on imported products (in order to protect domestic production of competitive and substitutable products when there is no substantial domestic production of LPs) were not accepted in the course of the United Nations Conferences on Trade and Employment (UNTEC) held successively in London, New York, Geneva and Havana from October 1946 to March 1948. The original American proposal to do so met with stiff opposition from developing countries

²⁸ The shochu tax was not set at a low level before World War II, but immediately after the War. As cheap (and dangerous) bootleg liquors became prevalent, the government revised the law to lower the tax rate down by 56% in a political attempt to make it possible (for workers) to buy shochu at a cheap price (Iwata Youko, “Shochu no zeiritu nikansuru WTO paneru repooto” (The WTO panel report on the shochu tax rate), *Referensu* (Reference), No. 550 (1996.11), at 47–48.

such as China, Lebanon, Syria, India, Chile and other Latin American nations in addition to that from Australia, Switzerland, Norway and some other European nations.²⁹ Finally, it was deleted and replaced by the currently worded text. The opposing nations felt that the American draft, if adopted, would hamper the use of internal taxation as an instrument of domestic policy.

The interpretation, subsequently made by the GATT and WTO panels and the Appellate Body since the 1987 Japan Liquors case, revived and even enlarged further the scope of application of the non-discrimination rule in internal tax rates proposed by the United States in the course of the UNTEC and extended it to DCSs, even in cases where LPs of imports are domestically produced in substantial quantities, which eventuality was expressly excluded from the proposed American text.³⁰

Article 9 of the US-proposed ITO draft charter as submitted to the London session of the UN Conference on Trade and Employment stated:

The products of any Member country shall be exempt from internal taxes . . . higher than those on like products of national origin, and shall be accorded treatment no less favorable than that accorded like products of national origin in respect of all internal laws, regulations . . .

The Members recognize that the imposition of internal taxes on the products of other Member countries for the purpose of affording protection to the domestic production of competitive products, would be contrary to the spirit of this Article, and they agree to take such measures as may be open to them to prevent in the future the adoption of new or higher taxes of this kind . . .

At the London session, a US delegate explained that the second paragraph of the US-proposed Article 9 appeared to be based on the decision of the 1927 Economic Conference that internal taxes should not be used to protect domestic products from competition by foreign products. He proposed as an example that France could not impose a tax on coffee unless it placed a similar tax on chicory, a competitive product.³¹

Various views were expressed by other participating countries and, at the

²⁹ See E/PC/T/A/PV/9, 5 June 1947, E/PC/T/A/SR/9, 5 June 1947, and E/PC/T/174, 15 August 1947, at 2.

³⁰ For the initial national treatment clause as proposed in Article 9 of the draft ITO Charter, see E/PC/T/C.II/W.5 dated 31 October 1946, at 2, as well as the Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33, at 54.

³¹ London E/PC/T/C.II/W.2, 29 October 1946, at 6. A UK delegate contended later at the Geneva session that if country A gets a duty binding on oranges from country B that does not produce oranges and country B protects the apples it grows by putting a very high internal tax on oranges, the consequence is that the duty binding which country A secured from country B on its oranges is made of no effect (E/PC/T/A/PV/9, 5 June 1947, at 7).

UNTEC New York session, the US put forward, in lieu of the London draft Article 9, a new text as Article 15 of the ITO Charter:³²

Article 15: National treatment on internal taxation and regulation

1. The Members agree that neither internal taxes nor other internal charges nor internal laws and regulations should be used to afford protection . . . for any national product.
2. The products of any Member country imported into any other Member country shall be exempt from internal taxes . . . higher than those imposed on like products of national origin.

In June 1947 the United States proposed that the above text be amended to expand the ban of tax discrimination to DCS products in clearer and mandatory terms. The UK supported the proposal but Norway, China, Chile, France and India opposed it.³³ Adjustment was delegated to a subcommittee. The subcommittee presented the following draft³⁴ on the basis of the American proposal:

Article 15

1. The products of any Member country imported into any other Member country shall be exempt from internal taxes . . . higher than those applied to like products of national origin. Moreover, in cases in which there is no substantial domestic production of like products of national origin, no Member shall apply new or increased internal taxes on the products of other Member countries for the purpose of affording protection to the production of directly competitive or substitutable products which are not similarly taxed.

The report of the Geneva session contains the following text of Article 18(1), second sentence of the draft ITO Charter, which was later incorporated in GATT Article III(2) as well as in the interpretative note to the same paragraph with some modifications:³⁵

Article 18: National Treatment on Internal Taxation and Regulations

1. The products of any Contracting Party imported into . . . any other Contracting Party shall be exempt from internal taxes . . . in excess of those applied . . . to like

³² The pertinent text is to be found in the Report of the Second Session of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Lake Success, 20 January to 25 February 1947, E/PC/T/34/Rev.1, 29 May 1947, at 10.

³³ E/PC/T/A/SR/9, 5 June 1947, at 1–3; E/PC/T/A/PV/9, 5 June 1947, at 3–21.

³⁴ E/PC/T/174, 15 August 1947, at 20.

³⁵ EPCT/189 dated 30 August 1947, at 5. See the Report of the Second Session of the Preparatory Committee of the UNTEC, E/PC/T186, 10 September 1947, at 18.

products of national origin. Moreover, in cases in which there is no substantial domestic production of like products of national origin, no Contracting Party shall apply new or increased internal taxes on the products of other Contracting Parties for the purpose of affording protection to the production of directly competitive or substitutable products which are not similarly taxed; existing internal taxes of this kind shall be subject to negotiation for their reduction or elimination in the manner provided for . . . under Article 17.

2. The products of any Member country imported into any other Member country shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use . . .

It is clear from this text that national treatment for imports, i.e. the discrimination ban in the draft Charter, centred on LPs and that DCS products which were domestically produced in substantial quantities were not targeted by the US proposed ban on tax discrimination between DCSs in the form of “new or increased internal taxes” on imports.

It seems to be little known that during the Geneva session virulent exchanges took place between the delegates from the US, UK and Canada on one hand and China, Australia, New Zealand, Syria, Lebanon, Chile, Columbia, Mexico, Switzerland, Norway et al. on the other, who wanted to take exception to the ban on tax measures aimed at industrial development or price stabilization. These countries vehemently opposed the expansion of national treatment, stressing that Article III aimed at preventing nullification of tariff concessions and that the US-proposed expansion was not to be regarded as a general principle which is usually incorporated in trade agreements other than those concluded between the US and UK. On the other hand, the US insisted that it could not accept a general agreement without such a general principle and the UK, Canada, Belgium, France and some others supported the US, arguing *inter alia* that Article III was subject to the Grandfather Clause.³⁶

The debate was carried over to the Havana session (November 1947 to March 1948), where the passage expanding tax national treatment to competitive products was finally deleted and the present GATT Article III (Article 18 of the draft ITO Charter) was adopted.³⁷ The Working Party, to whom the final drafting had been entrusted for readjustment, reported that the new form of Article 18 emphasized more than had the Geneva text the intention of the Conference that “internal taxes

³⁶ For the big debate, *see* E/PC/T/TAC/PV/10, 4 September 1947. The Grandfather Clause refers to the provision contained in the protocol signed on 30 October 1947 for the provisional application of the GATT that marked the undertaking of the eight nations including the US, UK and France to apply provisionally from 1 January 1948 Part II of the GATT comprising Article III “to the fullest extent not inconsistent with existing legislation”.

³⁷ E/CONF/2/C.3/A/W.47, 6 February 1948.

should not be used as a means of protection and that the details had been relegated to interpretative notes so that it would be easier for Members to ascertain the precise scope of their obligations under Article 18”.³⁸

Reading the finalized pertinent GATT text including the interpretative note, however, one is left with no sense or impression of clarity.

THE PURPOSE OF ARTICLE III

Another point to be emphasized is that GATT Article III was introduced to head off nullification of tariff concessions by internal tax measures implemented “so as to protect domestic production”. At the UNTEC Geneva session, a UK delegate explained that there was need for a provision preventing a country having made tariff concessions from offsetting these by internal taxation in order to protect a competitive domestic product.³⁹ Japan’s low shochu tax apparently did not serve the purpose of protecting domestic shochu production against imports of shochu (from other Asian countries where it originated)⁴⁰ to which the same shochu tax is applied or, at least initially, against imports of other foreign DCSs such as Scotch and bourbon whisky or vodka. In fact there was no need for such protection, since imports of shochu and other spirits had never been very significant in Japan. The need for protection if any had been felt in particular against whisky, domestically produced or imported. In reality shochu consumption in Japan increased markedly only in recent years, since the late 1970s, as shochu mixed with hot water (oyuwari) or with other beverages such as juice (chuhai) came to be quite popular and fashionable, independently of the levels of liquor tax rates or liquor prices.

According to Japanese statistics, notably the annual statistical report (Toukei-nennpousho) of the National Tax Agency (Kokuzeichou, in spite of the shochu tax increases and whisky tax cuts carried out by Japan in 1989 and 1994 after the adoption of the 1987 report, shochu consumption rose from 570,000kl in 1988 (whisky: 280,000kl) to 690,000kl in 1998 (whisky: 140,000kl) to reach 920,000kl in 2003 (whisky: 100,000kl). This would appear to indicate that there has been a shift in Japanese taste for drinks since the 1970s when whisky was apparently more popular than at present. In fact, Japanese alcoholic beverage consumption that centred on sake, beer and whisky until the 1970s has diversified over the years to include not

³⁸ E/CONF.2/C.3/A/W.49, 10 February 1948, at 1–6.

³⁹ E/PC/T/A/SR9, 5 June 1947, at 2. *See also* the EEC argument at 3.3 of the 1987 report as well as 5.1.9 of the 1987 panel report on US taxes on petroleum.

⁴⁰ Shochu is not a drink unique to Japan. It originated in East Asia and came to Japan in the 14/15th century. Main producers are Korea, China, Vietnam and Malaysia. Korea since the 1980s and Vietnam in more recent years have been principal exporters of the drink to Japan. For the history of shochu, *see* for instance 4.175 of the 1996 panel report on Japanese alcoholic beverages, WT/DSS/R, 21 June 1996.

only shochu but also grape wine, cognac and other drinks of foreign origin, imports of which have conspicuously increased in recent years, in contrast to whisky, whose consumption has declined.⁴¹

The purpose pursued by the US-proposed Article III, paragraph 2 (ITO Charter Article 18) was evident in the original text of the Article that explicitly sought to prohibit nullification of tariff concessions through imposition of “new or increased” internal taxes.

The history of the shochu tax in Japan shows that it was not introduced to protect domestic production against imports and much less to nullify the effect of tariff concessions, since Japan was admitted to GATT membership only in 1955, six years after the introduction of a low shochu tax rate in 1949, though it seems that in more recent years, when whisky gained popularity among Japanese consumers, the Japanese government, in keeping the shochu tax low, has taken into consideration the political pressure for the protection of domestic shochu, produced mostly by small distillers, against whisky, whether imported or domestically produced by large distillers.⁴²

The GATT drafting history alone seems to exclude the interpretation made by the 1987 panel that DCSs should be targeted by the tax discrimination ban on the basis of GATT Article III(2). However, the 1987 panel report, which was repeatedly quoted by later reports, based its interpretation on the GATT drafting history⁴³ and went on to hold that past practice justified the enlarged interpretation, explicitly quoting previous reports that in fact are not related to the case in point: the panel reports on the Border Tax Adjustment, the Italian Agricultural Machinery and the Superfund cases, in which only like products were involved, and the Animal Feed Proteins case where the question was how to implement Article III(5), providing for national treatment in regulations on the mixing of materials and not in matters of taxation.⁴⁴ What the 1987 report claimed to be “the past GATT practice of examining the conformity of internal taxes with Article III(2)”, first by determining whether the products at issue were LPs to which the first sentence applied and, if in the negative, then whether they were DCSs to which the second sentence applied,⁴⁵ usually referred to as the “two-step test”, did not exist in reality. Rather, the 1987 report initiated this practice.

⁴¹ See Japan’s customs clearance statistics as well as the above-mentioned National Tax Agency statistics.

⁴² The US once submitted that the purpose of the 1994 Shuzeitou (Liquor Tax Law) revision was to protect the domestic shochu producers (4.107, 1996 panel report on Japan – Taxes on Alcoholic Beverages, WT/DS8/R, 21 November 1996).

⁴³ 5.5 c), the 1987 report, *op. cit.*, n. 11.

⁴⁴ 5.5 d), *ibid.* See the text of Article III, para. 5, n. 1.

⁴⁵ Language used at 5.5 d) of the report.

TEXTUAL INTERPRETATION OF ARTICLE III(2)

Finally, the literal interpretation to be given to Article III(2) also does not favour the interpretation the past liquor reports have made. Treaty text must be interpreted in the ordinary meaning of the terms used therein, according to Article 31(1) of the Vienna Convention on the Law of Treaties of 1969 or VCLT, often quoted in WTO panel and AB reports.⁴⁶ The 1987 and succeeding reports founded their expansive interpretation upon the assumption that Article III(2), second sentence, was applicable to discriminatory differences in tax rates.⁴⁷ Yet it appears evident from the wording of the second sentence that it addresses solely discrimination in methods of taxation, discrimination in tax rates being exhaustively covered in the first sentence.

Article III(2) reads:

The products . . . imported into . . . any other Contracting Party . . . shall not be subject . . . to internal taxes . . . in excess of those applied . . . to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes . . . to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 [note: i.e. “so as to protect domestic production”].⁴⁸

The words “Moreover” and “otherwise” at the beginning of the second sentence as well as “in a manner” towards its end indicate that the second sentence does not address tax rate differences but discriminatory taxation methods.

Paragraph 5.8 of the 1987 panel report states “the panel further found that the wording ‘directly or indirectly’ and ‘internal taxes of any kind’ implied that in assessing whether there is tax discrimination, account must be taken not only of the rate of the applicable internal tax but also of the taxation methods”

It is to be noted that in this passage the panel is referring to the first sentence prohibiting discrimination in tax rates and not to the second sentence, which obviously concerns discriminatory taxation methods.

⁴⁶ Article 31, Vienna Convention on the Law of Treaties:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose.

3. There shall be taken into account, together with the context:

. . .

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

See also E. Status of Adopted Panel Reports in the 1996 AB report on Japan – Alcoholic Beverages WT/DS8/AB/R dated 4 October 1996.

WTO dispute settlement reports have explicitly applied the Vienna Convention in spite of the fact that the US and France *inter alia* refused to join it. About half of the nations of the world including China, Germany, Italy, Japan and the UK have adhered to it.

⁴⁷ 5.11–5.13, 1987 panel report.

⁴⁸ See the text of GATT Article III, para. 2, second sentence, n. 1.

Professor Raj Bhala takes the view that the second sentence of Article III(2) applies to tax rate differences which he believes are comprised in the term “not similarly taxed” used in the interpretative note.⁴⁹ Professor John Jackson passed over the misinterpretation made by the 1987 panel by quoting the above-mentioned passage of the 1987 report in extenso without comment.⁵⁰

As for the interpretative note to Article III(2), it says somewhat enigmatically:

A tax conforming to the requirements of the first sentence of paragraph 2 would be inconsistent with the provisions of the second sentence only in cases where competition is involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which is not similarly taxed.

“A tax conforming to the requirements of the first sentence” clearly refers to a tax that does not discriminate against an imported product in terms of tax rates imposed on domestic and imported LPs. The interpretation made by the pertinent reports that justify the expansion of national treatment to DCSs on the basis of the interpretative note is not logically feasible unless the tax conformant to the first sentence includes not only taxes on LPs, non-discriminatory in terms of tax rates, but also taxes on DCSs that are discriminatory in terms of tax rates but that logically conform to the requirements of the first sentence. This premise cannot be retained, however, in the light of the drafting history presented above.

It should be noted in this respect that many experts, including those composing the GATT/WTO panels and the AB, have believed that the term DCS is larger in scope than the term LP and that all LPs are automatically DCS⁵¹ and that therefore the interpretative note covers all DCSs inclusive of LPs. It is worth recalling, however, that various governments and businesses have claimed that certain LPs are not competitive on account of differences in quality and price and that in reality they are not LPs as they cater to different classes of clients. Japan used to contend in trade talks in the 1960s that some consumer products exported from Japan were not “like” European or American products of the same kind as they were destined for popular consumption and did not compete with local high-quality/de luxe products and that they therefore could not cause market disruption. See also the 1998 panel report on the Indonesian National Car case⁵² where Indonesia contended that US and EU cars

⁴⁹ Bhala, *op. cit.*, n. 9, at 119–123. It is true that the term “not similarly taxed” in the draft ITO Charter Article 18 in the UNTEC Geneva session and quoted early on did refer to tax rate discrimination on DCSs. However, its meaning has obviously changed in the current version of the GATT, as it is used in the interpretative note to Article III, para. 2. This point will be developed further below in greater detail.

⁵⁰ Jackson, John H., et al. *The Legal Problems of International Economic Relations*, (West Publishing Co., St. Paul Minn., 1995), p. 527.

⁵¹ Bhala, *op. cit.*, at 115–116, 119, and paragraphs 5.72–5.76 of the US Measures Affecting Malt and Alcoholic Beverages panel report adopted 19 June 1992, BISD39/S/206.

⁵² Adopted 2 July 1998, WT/DS/64/R, at 8204–8221.

were not like the Indonesian Timor car in terms of quality, brand image, ride and comfort, available options and so on. It is the market that determines whether products are “like”, and often luxurious goods are thought to belong to a market distinct from that of mass-consumption goods and indeed are conceived not to be like. These “like” products are often subject to different customs duties and different internal taxes, as different products.⁵³ Consequently, the wording of Article III(2), second sentence can reasonably be interpreted to stipulate that the injunction of discrimination in taxation methods prescribed in paragraph 2, second sentence applies only to LPs that are indeed DCS and not to all LPs or DCSs in general including non-LPs.

In the 1987 case, Japan evidently thought that all LPs were competitive and went along with the interpretation of the second sentence and of the interpretative note put forth by the EEC.

Japan furthermore failed to insist enough on the intent element in Article III as prescribed in Article III(1) and (2), second sentence: “so as to afford protection to domestic production”. There is no doubt that when applying this provision it should be judged whether the tax measure in dispute intends to protect domestic production against imports as set forth in Article III(1) which, by its nature as a declaration of a leading principle placed at the beginning of the article, incontestably applies to the whole of the article. Nonetheless, a later AB report declares that this criterion: “so as to afford protection to domestic production” is not an “issue of intent” and is to be judged by how a tax measure is applied and that the protective application of the measure can most often be discerned from “the design and the architecture and revealing structure of a measure”.⁵⁴ It referred to Japan’s import duty on shochu on top of the low shochu liquor tax as constituting a protective structure which tends to crystallize consumer preference in favour of shochu. Trade law, however, allows the protection of domestic industry by means of import duties that are not bound at a lower level as a result of tariff concessions, though it points out that high customs duties often constitute serious obstacles to international trade, making it of great importance to reduce them through multilateral negotiations (GATT Article XXVIII *BIS*).

At all events, to interpret the second sentence of Article III(2) as prohibiting tax rate differentiation between all imported and domestic DCSs would be to stretch it much too far, given that the first sentence manifestly limited such prohibition to like products. Such expansive interpretation would completely annihilate the *raison d’être* of the first sentence. If the second sentence is interpreted to ban all forms of

⁵³ See the non-adopted panel report on US Taxes on Automobiles DS/31/R, 11 October 1994 (4.33–4.35) which found that GATT Article III, para. 2 did not exclude tax differentiation for legitimate policy purposes and accepted application of luxury taxes. This way of reasoning based on policy purposes has been called “the aim and effect theory”. Japan asserted in the 1996 dispute that shochu belonged in a *sui generis* tariff classification and that it was not a like product nor a DCS of whisky and other spirits (4.19, 4.120, 4.175, WT/DS8/R, 11 July 1996).

⁵⁴ The 1996 Japan AB report WT/DS8/AB/R, 4 October 1996, H.2(c). The theory of the crystallization of consumer preference started in the 1987 panel report, 5.9 b) and 5.7.

tax discrimination, including tax rate differentials with regard to DCSs in addition to LPs, the first sentence would have become redundant and would have been deleted. It would have sufficed to leave the second sentence as paragraph 2, striking out “Moreover” and “otherwise”. Article III(2) would have read quite simply: “No contracting party shall apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”

CONSEQUENCES OF THE 1987 REPORT

As is well known, the reasoning used in 1987 panel decisions has been cited and readopted in the panel and appellate body reports in the ensuing disputes over alcoholic beverage taxes: 1996 EU/US/Canada vs. Japan, 1999 EU/US vs. Korea and 1999 EU et al. vs. Chile.⁵⁵ Some experts even predict consolidation of the interpretations made in these reports as a precedent or a practice established post facto – “subsequent practice” mentioned in Article 31(3)(b) of the Vienna Convention on the Law of Treaties.⁵⁶ For this reason, it is of great importance to re-clarify the scope of application of the interdiction laid down in Article III(2). For a broad interpretation naturally leads to a serious infringement of state sovereignty in matters of internal taxation, over-stepping the purpose of insuring the effect of tariff concessions originally assigned to Article III(2).⁵⁷ It is to be noted in this context that the effect of the consolidation of GATT/WTO liquor tax reports would be to deprive the nations of the world of an arm by which to try to preserve traditional beverages and other domestic products, which may constitute a precious cultural heritage not merely for the nations concerned but also for mankind as a whole.

The WTO Dispute Settlement Understanding makes it clear that the dispute settlement mechanism is not authorized to add to or subtract from the member state consent as expressed in the WTO agreements (DSU Article 3(2)).⁵⁸ It is the Ministerial

⁵⁵ The panel report of 17 September 1998 WT/DS75/R and the AB report WT/DS75/AB/R of 18 January 1999 on the Korea – Taxes on Alcoholic Beverages and the panel report WT/DS87/R of 15 June 1999 and the AB report WT/DS87/AB/R dated 13 December 1999 on Chile – Taxes on Alcoholic Beverages.

⁵⁶ Marceau, Gabrielle, “Pratique et pratiques dans le droit de l’Organisation Mondiale du Commerce”, Société Française pour le Droit International, *Colloque de Genève (mai 2003), la Pratique et le Droit International* (Paris: Editions Pedone, 2004), at 176–177.

⁵⁷ The UNTEC Havana Report, at 61, and 5.5 c), the 1987 Japan – liquor tax report.

⁵⁸ The Understanding on Rules and Procedures governing the Settlement of Disputes postulates:

3.2 The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members of the WTO recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB (Dispute Settlement Body) cannot add to or diminish the rights and obligations of Members.

Conference and the General Council that have the exclusive authority to adopt interpretations of the WTO agreements (Article 9(2) of the Marrakesh Agreement Establishing the WTO).⁵⁹ Enlargement in the interpretation of the WTO agreements, in particular injunctive provisions, should be banned by all means if the WTO dispute settlement mechanism is to function correctly and develop as the authentic guardian of world trade. In this context, the automatic adoption of panel and AB reports or “reverse consensus”, where decisions are taken unless all Members oppose them, should be replaced by majority decisions of the Dispute Settlement Body in which all Member nations are represented, in order to enable a thorough authoritative review of dispute settlement reports and alleviate the burden of the panel and the AB which are not only prone but in fact forced (for the purpose of enhancing the authority of their reports) to depend excessively on “precedents” in reaching their conclusions (this means that a “dejudicialization” of the WTO dispute settlement mechanism is in order).⁶⁰

At this juncture, it must be pointed out that the WTO Appellate Body itself has denied, rather than endorsed, the consolidation of dispute settlement precedents into case law. The 1996 AB report on Japanese liquor taxes stated:

Although GATT 1947 panel reports were adopted by decisions of the CONTRACTING PARTIES, a decision to adopt a panel report did not under GATT 1947 constitute agreement by the CONTRACTING PARTIES on the legal reasoning in that panel report. The generally accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel bound by the details and reasoning of a previous panel report.

... [W]e do not agree with the Panel’s conclusion . . . that “panel reports adopted by the CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case” as the phrase “subsequent practice” is

⁵⁹ The Marrakesh Agreement Article 9(2):

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements . . .

⁶⁰ Pace Virgile: “Cinq ans après sa mise en place: la nécessaire réforme du mécanisme de règlement des différends de l’Organisation Mondiale du Commerce”, 104 *RGDIP* 626–632 (2000–3), warns that panel and AB members lack sufficient time and professionalism to ensure the high quality of work they are expected to render. Dependence on past reports or precedents is evident as numerous previous reports are quoted in WTO dispute settlement reports (e.g. Chile – Taxes on Alcoholic Beverages quoted past reports some 195 times).

Peter Southerland, the former Director-General et al., *The Future of the WTO*, Report by the Consultative Board to the Director General Supachai Panitchpakdi (2004), para.232, refers to “US – Definitive Safeguard Measures on Imports of Certain Steel Products”, WT/DS248/R, WT/DS248/AB/R in which the panel report contained over 5800 footnotes, most of which are references to prior cases, and actually cited and relied on 54 cases.

used in Article 31 of the Vienna Convention. Further, we do not agree with the Panel's conclusion . . . that adopted panel reports in themselves constitute "other decisions of the CONTRACTING PARTIES to GATT 1947" for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement.⁶¹

CONCLUSIONS

1) Based on the drafting history of the ITO Charter and the GATT, it is not possible to conclude that there existed consensus at the UNTEC as to the applicability to DCSs of GATT Article III(2), first sentence, and that tax rate differentials between DCSs are among discriminatory practices banned by the second sentence. On the contrary, attempts to incorporate this expansion into the GATT 1947 seem to have failed, judging from the final wording of Article III(2).

2) The interpretative note to GATT Article III(2) aims to clarify the conditions for application of the second sentence by limiting the scope of application of the ban on discrimination in taxation methods to cases where there is real competition between LPs which are subjected to taxes conformant to the first sentence.⁶² The four alcoholic beverage cases concerned tax rate differences and should have been regulated under the first sentence that applies only to tax differentials on LPs. Literal interpretation dictates that the second sentence address only discrimination in taxation methods and not discrimination in tax rates applied to domestic and imported products, which is entirely covered by the first sentence that targets solely LPs.

⁶¹ See E. Status of Adopted Reports, WT/DS8/AB/R, 4 October 1996 and the Agreement Establishing the WTO, Annex IA, General Interpretative Note to Annex IA, 1.b.iv shown immediately below:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex IA, the provision of another agreement shall take precedence to the extent of the conflict.

1. General Agreement on Tariffs and Trade 1994 . . . consisting of :
 - a. The provisions in the (GATT) dated 30 October 1947 . . . are hereby made an integral part of this Annex.
 - b. The provisions of the legal instruments that have entered into force under the GATT 1947 before the date of entry into force of the Agreement Establishing the WTO, as set forth below:
 - i. protocols and certifications relating to tariff concessions;
 - ii. protocols of accession . . .
 - iii. waivers granted under Article XXV of the GATT 1947 and still in force . . . and
 - iv. other decisions of the CONTRACTING PARTIES to the GATT 1947.

⁶² In this context, it is to be recalled that a UK delegate at the UNTEC Havana session remarked that the interpretative note "narrowed the scope of Article III:2" and that the ITO would have to interpret it more precisely when actual cases are put before it (E/CONF/2/C/3/SR40, 23 February 1948, at 2).

3) The purpose of the non-discrimination principle set forth in Article III(1) is clearly to incriminate discrimination against imports (particularly those for which tariff concessions have been made) with a view to protecting domestic production. Therefore, government measures introduced for a variety of legitimate policy purposes, without the intent to restrain imports so as to afford protection to domestic production, should not be condemned as being inconsistent with this principle. The so-called “aim and effect theory (or test)” is a foregone conclusion.⁶³

The intent element should be respected in trade law as in criminal cases where the intent to kill or premeditation is determinant in distinguishing between murder and manslaughter. It cannot be stressed too much that a requirement for the incrimination of an act in an injunctive provision must be strictly fulfilled.

In this respect, it is to be noted that Japan failed to produce evidence as to the motive for the lowering of the shochu tax after World War II, perhaps for fear that protection of shochu producers in more recent years might be construed as constituting a protection of domestic production inconsistent with Article III(2).

4) The setback suffered by Vietnam presented early on would not have happened in the absence of flawed “WTO jurisprudence”. A decision of the WTO Council is urgently needed to articulate the correct interpretation of Article III(2) falling within the state consent, which can be ascertained from the drafting history as well as from the wording of the Article, which obviously conflicts with the conclusions of panels and those of the Appellate Body.

5) While it is never certain exactly when a norm of customary international law is born, an international practice can be considered to have been recognized as constituting such a norm when an authoritative international court, particularly the International Court of Justice, has sanctioned an international practice or an interpretation of an international agreement as law in its decisions and the majority of the international community accept such decisions. In the case of WTO dispute settlement, the Dispute Settlement Body is evidently not empowered to perform similar sanctioning or declaratory functions. It is up to the Ministerial and General Councils to come up with authoritative interpretations of WTO agreements. With respect to the question of interpretation of pertinent WTO agreement provisions, the panel and the AB are thought to observe the treaty law as embodied in the Vienna Convention on the Law of Treaties. The basic principle of treaty interpretation – literal, textual interpretation – may be supplemented by the study of drafting history in an attempt to ascertain the existence and scope of state consent. However, this exercise does not always guarantee disclosure of the state consent behind the

⁶³ The panel report on US alcoholic beverages adopted on 19 June 1992 ruled that classification of beer by alcohol content creates a certain market division and that product likeness should be determined according to the policy objective pursued by the tax measure (5.72 and 5.74, DS23/R, BISD 39S/206). Although here the question is posed as one of determining product likeness, it clearly concerns the interpretation of the condition of application of all Article III provisions inclusive of paragraph 2 second sentence: “so as to afford protection to domestic production”.

text. In the case of GATT Article III(2), it seems impossible, on the basis of UNTEC documents, to ascertain the compromise reached in the working group that led to the birth of the final text. Therefore, it is natural for us to depend on textual interpretation, taking into account the actual transformation of the wording of Article III(2) that took place at the last stage of negotiations: that is, the elimination from the final text of the language explicitly extending national treatment to DCSs. The interpretation made by past panel/AB reports based on the wording of the interpretative note cannot be justified by textual interpretation, as explained above. The interpretative note, which defines the scope of application of GATT Article III(2), second sentence, that apparently prohibits discrimination in taxation methods, mentions “like products” only and does not refer to “directly competitive or substitutable products” and cannot therefore constitute a justification for condemning tax rate differentials on such products, as asserted by the GATT/WTO reports on liquor taxes.

6) The predictability of legal situations in international law is assured by internationally agreed instruments clarifying state consent. WTO panels and the Appellate Body are not authorized to lay down binding norms independently of the state consent embodied in WTO covered agreements. The formation of jurisprudence may be a natural phenomenon which may provide legal predictability in international trade. Yet only the establishment of just jurisprudence based on a conscientious research for state consent can guarantee the required legal security for international economic actors.⁶⁴

⁶⁴ The Southerland Report, *op. cit.*, n. 60, discusses this question under “C. WTO Jurisprudence Is Breaking Important New Ground”, *ibid.*, at 51, on a note somewhat different from this author’s view, that is, in favour of an acceleration of the precedent accumulation achieved so far in the GATT/WTO dispute settlement system.

In addition to Dispute Settlement Understanding 3.2, quoted above at n. 58, which defines the WTO dispute settlement system as “a central element in providing security and predictability to the world trading system”, 19.2 of the Understanding reaffirms again that “the panel and Appellate Body cannot add or diminish the rights and obligations provided in the covered agreements.” These provisions seem to counter views influenced by the concept of Anglo-Saxon case law, such as those noticeable in the Southerland Report.

CAVEAT EMPTOR: THREE ASPECTS OF INVESTMENT PROTECTION TREATIES

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INTRODUCTION

There are now over 2,300 treaties that provide investment protection,¹ either in the form of bilateral investment treaties (hereinafter “BITs”) or free trade agreements (hereinafter “FTAs”) containing substantive investment chapters.² These treaties allow member states to define the international law that is to apply between them. Their proliferation was driven by the belief in the need for investor protection by capital exporting states, which first arose in the post-colonial era when such states wanted investment treaties to protect their multinational corporations from host states³ which had previously justified the nationalization of foreign-owned property by invoking the Calvo doctrine.⁴ A second wave of investment treaties started in the 1990s when the triumph of capitalism over socialism led to the liberal economic belief that inflows of foreign investment were unquestionably good for the host

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¹ According to UNCTAD, there were 2,392 such treaties in force by 2004. *See* UNCTAD, “Foreign Investment Database”, online: <http://www.unctad.org/templates/Page.asp?intItemID=1923&lang=1>.

² Within this paper, BITs and FTAs with investment chapters will collectively be referred to as “investment treaties”. Examples of FTAs containing substantive investment chapters include the US-Singapore FTA, the North American FTA (hereinafter “NAFTA”) and the Singapore-Australia FTA.

³ Within this paper, “home state” is used to refer to the country of origin of a foreign investor, while “home state refers to the country in which the foreign investment takes place.

⁴ This doctrine is associated with Carlos Calvo, who was an eminent Latin American jurist and diplomat. Essentially, it argues that the applicable standard of protection to be accorded to foreign investment is the national standard of treatment accorded by the laws of the host state, then thought by home states to offer an inferior level of protection because the national laws of a host state would inevitably permit any nationalizations by the host state. Investment treaties concluded with host states allowed home states to define the standards of protection that would apply to their investments in the host states. This allowed home states to impose their own, supposedly more robust domestic standards of investment protection.

economy,⁵ causing states to conclude treaties offering substantial investment protection in the belief that this would provide a more favourable investment climate which would consequently attract greater inflows of foreign investment.⁶

The ongoing proliferation of investment treaties is also attributable to the failure of multilateral investment protection initiatives. The OECD's proposed Multilateral Agreement on Investment (hereinafter "MAI") came to a standstill because states could not come to agreement on its terms. The WTO's Doha Development Agenda had proposed to look at investment protection, potentially portending greater WTO involvement in investment protection, but the talks have since been suspended with uncertain prospects for revival.⁷ Hence states have resorted to investment treaties which, as bilateral or regional initiatives, provide the next best alternative.

Today, despite being negotiated separately, many of these treaties possess similar basic structures. While there are some variations, most treaties will contain a preamble detailing the treaty aims, and provisions establishing the types of investments protected, the standard of treatment to be accorded to the foreign investor, the right of repatriation of profits, provision of compensation for expropriation, the standard of compensation payable and dispute settlement.

Although most of these treaty provisions possess a certain commonality and use relatively similar terminology,⁸ it is possible that states may have negotiated for some of these provisions without truly realizing their full ramifications. Arbitral jurisprudence has revealed this possibility. When subjected to interpretation by arbitration tribunals, the tribunals have sometimes given treaty provisions interpretations that differ from what the states had in mind when they drafted these provisions. As these provisions are given a different interpretation, unexpected consequences may arise, perhaps causing states to incur additional and unwanted obligations and liability. Thus, when concluding treaties, states may unknowingly be subjecting themselves to additional commitments and exposing themselves to potential claims made against them, beyond what they believed they were agreeing to as they negotiated the treaties.

The aim of this paper is to highlight how some specific types of provisions have been, or may potentially be, interpreted by arbitral tribunals in ways that may create

⁵ The idea was that the foreign investment could create new employment, lead to the building and upgrading of infrastructure and allow for the diffusion of technology and management skills to locals, all of which would benefit the host economy.

⁶ For a comprehensive outline of the history of investment treaties, see Sornarajah, M. *The International Law on Foreign Investment*, 2nd ed. (Cambridge: Cambridge University Press, 2004) at 18–30, 37–65.

⁷ Fink, Carsten and Martín Molinuevo, "East Asian free trade agreements in services: Roaring tigers or timid pandas?" (Draft, Jan. 2007), at 4.

⁸ To name a few, terms and concepts such as "most-favoured nation", "national treatment", "indirect expropriation", "fair and equitable treatment", "full protection and security", "prompt, adequate and effective compensation" and "international minimum standard of treatment" are present in most investment treaties.

unexpected and perhaps unwanted consequences or obligations for members of investment treaties. To prevent this, states committed to existing treaties or involved in negotiating for new treaties may want to consider phrasing these provisions more specifically, unambiguously and in accordance with their expectations. This paper will offer suggestions on how some provisions may best be phrased so that tribunals will interpret them as the states expect, absent of undesired consequences. Where applicable, the efforts already made by some states to rephrase some provisions which had given rise to unexpected interpretations will be traced and evaluated to see if lessons from their experience can be extracted.

Part 2 of this paper will discuss the consequences arising from the interpretation of the expropriation provisions. Part 3 covers the provisions on the minimum standard of treatment. Part 4 examines the most-favoured nation (hereinafter “MFN”) clauses.

EXPROPRIATION

Introduction

Most investment treaties give investors the right to bring an expropriation claim against the host state and provide for compensation⁹ to be paid whenever the host state expropriates the property of the foreign investor. Granting such a right is important for a host state in attracting foreign investment because it secures the property rights of the foreign investor and this in turn fosters confidence in the host state as an investment destination. However, it will be shown in the next section of the paper that, with the exception of the newer treaties concluded largely by the United States (hereinafter “US”) which will be discussed later, the treaties do not offer any definition of what constitutes expropriation. It is left to arbitral tribunals to determine what constitutes expropriation at international law. As will be seen in the following section, the arbitral jurisprudence has revealed to states some potential areas in the provisions they may want to improve upon. The tribunals do not have a uniform understanding of what expropriation is.

This may cause uncertainty because states are then never completely sure when a government measure will be deemed to be expropriatory and when it will not. Indeed, some tribunals have adopted expansive definitions of expropriation and have paid little heed to the right of states to undertake regulatory measures without having to compensate the foreign investor. Some states may regard such an arbitral trend as constituting an intrusion into their regulatory space, due to the enhanced exposure to potential liability for expropriation, to an extent which they had never

⁹ Although there has also been much discussion over the appropriate standard of compensation that should be paid for an expropriation, this area is beyond the purview of this essay. For more information on this area, *see* n. 6, at 435–488.

intended when they concluded the investment treaties, thus creating an unexpected and unwanted chilling effect on state regulation. The US is one such country. It has responded to this situation by amending and expanding on the expropriation provisions in its newer treaties. These measures are evaluated in the final section of this part of the paper, which will also consider whether further improvements beyond these measures may be attempted.

The expropriation provisions in treaties

Expropriation can occur directly or indirectly. Most treaties provide for both forms of expropriation to be compensable. Since direct expropriation involves the direct seizure of the investor's property by the host state, it is easily identifiable and does not invite controversy.¹⁰ However, indirect expropriation has been the source of much uncertainty. What is generally agreed is that it involves situations where a diminution of the investor's property rights has been accomplished without any direct dispossession of those property rights.¹¹ Unfortunately, the expropriation provisions in treaties generally do not elaborate on what exactly constitutes indirect expropriation, particularly what extent of diminution of property rights is required for there to be an indirect expropriation, aside from an array of adjectives such as "equivalent", "tantamount", "*de facto*", "creeping",¹² "constructive", "disguised", "consequential", "same" or "virtual",¹³ which appear to offer little guidance to tribunals.¹⁴ Also,

¹⁰ Few states are likely to object to the requirement of providing compensation to a foreign investor if there has been an outright seizure of his private property by a host government.

¹¹ Sornarajah, *loc. cit.*, n. 6, at 349–350. In other words, the legal title to the property remains formally with the investor.

¹² Generally, commentators have regarded creeping expropriation as denoting the bringing about, by the host state, of the slow and insidious strangulation of the interests of the foreign investor via slow and progressive measures adopted to initiate attrition of ownership and control rights over a period of time. See Dolzer, Rudolph, "Indirect expropriation of alien property", 1 *ICSID Rev.* 41 (1986) and Weston, Burns, "Constructive takings under international law" 16 *Va. JIL* 103 (1975). In *Tecmed S.A. v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003 the tribunal emphasized that creeping expropriation takes place "gradually and stealthily" (at 114).

¹³ Newcombe, Andrew, "The boundaries of regulatory expropriation in international law", 20(1) *ICSID Rev.* 1, at 10, 22–23 (2005).

¹⁴ For example, Article 1110 of NAFTA provides that "No party may directly or indirectly nationalize or expropriate an investment of an investor . . . or take a measure tantamount to nationalization or expropriation of such an investment. . . ."; Article III of the US-Jamaica BIT, 7 March 1997, reads: "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)".

no clear guidelines are given as to when a government measure can be regarded as a regulatory measure which is not expropriatory.¹⁵ Thus it is left to arbitral tribunals to determine more specifically what would amount to indirect expropriation at international law.¹⁶

The arbitral jurisprudence on indirect expropriation and how it will affect states

Generally, there are two main considerations in determining whether a government measure by a host state constitutes an act of indirect expropriation that has to be compensated for. The first, covered in the first section of this part of the paper, involves examining the extent of deprivation of the investor's property rights; the second, covered in the section that follows, involves evaluating whether the government measure can be said to be a regulatory measure that does not amount to an expropriatory act and is thus non-compensatable. An examination of the arbitral jurisprudence reveals that the tribunals cannot be said to have taken a consistent approach in both considerations. Lastly, the final section examines how some tribunals seem to have made further extensions to the concept of expropriation in a haphazard manner.

The extent of deprivation

At international law, the primary consideration for determining whether there has been an indirect expropriation is the extent of the adverse impact a government measure has on the foreign investor, specifically the extent of deprivation of his property rights.

Allowing for some differences in wording, the majority of tribunals, as represented for example by the tribunals in *S.D. Myers Inc. v. Canada* (hereinafter "*S.D. Myers*"),¹⁷ *Compania del Desarrollo de Santa Elena, S.A. v. The Republic of Costa*

¹⁵ Akpan, George S., "The investment provisions of the United States-Singapore Free Trade Agreement and the NAFTA – Old wine in a new skin or something else?" 6(6) *JWIT* 873, at 886 (2005).

¹⁶ Coe, Jr., Jack & Noah Rubins, "Regulatory expropriation and the *Tecmed* case: Context and contributions" in Weiler, Todd (ed.), *International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005), at 601. For instance, Article 102(2) of NAFTA provides that its provisions are to be interpreted in accordance with applicable rules of international law, while Article 1131(1) provides that tribunals established to hear disputes under NAFTA shall apply international law.

¹⁷ 1st Partial Award, 13 Nov. 2000, 40 *ILM* 1408. Here, at [283], the tribunal held that "An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."

Rica (hereinafter “*Santa Elena*”),¹⁸ *Tecmed S.A. v. Mexico* (hereinafter “*Tecmed*”),¹⁹ *Starrett Housing Corporation v. Islamic Republic of Iran* (hereinafter “*Starrett*”) ²⁰ and *GAMI Investment Inc. v. Mexico* (hereinafter “*GAMI*”),²¹ seem to agree generally on the extent of deprivation required. They hold that, in what has been referred to as the “orthodox approach”,²² an indirect expropriation is said to occur when the investor is deprived of the fundamental rights of ownership, or effective control of the investment, or more specifically, the use, benefit, management or enjoyment of all or substantially all of his investment, such that the deprivation can be said to amount to an expropriation.

However, a line of cases has emerged which has taken a more expansive approach towards expropriation by requiring a lower extent of deprivation. In the North American Free Trade Agreement (hereinafter “NAFTA”) ²³ case of *Metalclad Corporation v. The United Mexican States* (hereinafter “*Metalclad*”) ²⁴, the tribunal stated that expropriation includes “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of the property”.²⁵

Whereas the abovementioned orthodox approach requires a deprivation of the fundamental rights of ownership, all that the approach in *Metalclad* apparently requires is for the investor to show that he was deprived in whole or significant part of the reasonably-to-be expected economic benefit from his investment. In other words, all he possibly has to show to establish expropriation is that the government measure had deprived him of a significant part of his anticipated profits, or had

¹⁸ Award, ICSID Case No. ARB/96/1, 17 Feb. 2000, 15 *ICSID Rev. – FILJ* (2000). Here the tribunal held that “property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.” (at 77)

¹⁹ Award, ICSID Case No. ARB(AF)/00/2), 29 May 2003. Here the tribunal held that “[The issue is whether the investor] was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such, as the income or benefits related to the [property] or to its exploitation – had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss.” (at 115)

²⁰ 4 *Claims Tribunal Rreport* 122 (1983). Here Lagergren held that “it is recognised in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.” (at 154)

²¹ NAFTA Award, Nov. 15, 2004. Here the tribunal held that “the affected property must be impaired to such an extent that it must be seen as “taken”. (at 126)

²² Newcombe, *loc. cit.*, n. 13, at 10–11.

²³ The North American Free Trade Agreement, 17 Dec., 1992, Can.-Mex.-US. 32 *ILM* 605 (1993).

²⁴ Award, ICSID Case No. ARB(AF)/98/2, 2 June 2000.

²⁵ *Ibid.*, at 103.

significantly affected his business plans. A tribunal taking the more orthodox approach would not equate the deprivation of anticipated profits or adverse impact on business as deprivations of fundamental ownership or effective control. This is clear from the decisions in *Robert Azinian and Others v. The United Mexican States* (hereinafter “*Azinian*”)²⁶ and *Martin Feldman v. Mexico* (hereinafter “*Feldman*”),²⁷ where the tribunals stated that not all government measures that may affect investors’ business plans by making it difficult, impossible or uneconomical for an investor to carry out a particular business is an expropriation. In *Pope & Talbot, Inc. v. Canada* (hereinafter “*Pope & Talbot*”),²⁸ the measures diminished the investor’s profits but the tribunal did not deem this sufficient to constitute indirect expropriation.

While the majority of tribunals adopt the orthodox approach, there is no guarantee that future tribunals will always follow the majority because such arbitral decisions do not have any binding effect on one another.²⁹ The effects of *Metalclad* cannot be said to be confined to NAFTA because the interpretation of the NAFTA provision will be relevant to the interpretation of similarly-worded provisions in other treaties,³⁰ and it has become common practice for tribunals to consider and sometimes follow (even absent an obligation to do so) the decisions of other tribunals interpreting similar provisions of other treaties.³¹ Indeed, the possibility of another tribunal adopting the expansive approach of *Metalclad*³² to a non-NAFTA

²⁶ Award, 1 Nov. 1999, 14 *ICSID Rev. – FILJ* 2 (1999). The tribunal observed that “It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities . . . It may be safely assumed that many Mexican parties can be found who had business dealings with governmental entities which were not to their satisfaction”. (at 18)

²⁷ Award, 16 Dec. 2002, 42 *ILM* 625 (2003). The tribunal held that “[N]ot every business problem experienced by a foreign investor is an indirect or creeping expropriation under Article 1110 [of NAFTA]”. (at 112)

²⁸ UNCITRAL, Interim Award, 26 June 2000. The tribunal held that “Even accepting (for the purpose of this analysis) the allegations of the Investor concerning diminished profits, the Tribunal concludes that the degree of interference with the Investment’s operations due to the Export Control Regime does not [give] rise to an expropriation (creeping or otherwise) within the meaning of Article 1110 [of NAFTA].” (at 101)

²⁹ For instance, under the NAFTA regime, Article 1136(1) states: “An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.”

³⁰ And most, if not all, other investment treaties provide for compensation to be paid for direct and indirect expropriation.

³¹ Gantz, David A. “The evolution of FTA investment provisions: From NAFTA to the United States-Chile Free Trade Agreement” 19 *AUIJR* 679 (2004), at 689, 708. According to Article 38 of the Statute of the International Court of Justice, decisions of arbitral tribunals are a source, albeit a subsidiary source, of international law.

³² The fact that the *Metalclad* award was later set aside partially in the appeal to the Supreme Court of British Columbia in *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664 (2 May 2001) did not prevent a subsequent tribunal from adopting its approach.

treaty³³ has already manifested recently in *Occidental Exploration & Prod. Co. v. Republic of Ecuador* (hereinafter “*Occidental*”).³⁴ In light of *Metalclad* and *Occidental*, it becomes necessary for states to query if they had intended for the guarantees against expropriation they have offered in their investment treaties to extend to a guarantee of the anticipated profits and business expectations of investors as well. An overly broad definition of expropriation could cause states to think twice about embarking on any measures that could significantly affect the anticipated profits and business plans of investors negatively for fear of incurring liability, resulting in regulatory chill. On the other hand, some states may think that the greater protection *Metalclad* offers to investments can actually attract more foreign investment. States may want to rephrase the expropriation provision to clearly indicate their preferred approaches towards expropriation.

The regulatory measures doctrine

Under international law, not all deprivations of property are expropriatory. Under the doctrine of regulatory expropriation, or the exercise of a state’s police powers,³⁵ a state action that would otherwise amount to a compensable deprivation of property can constitute a regulatory measure, or a legitimate and bona fide exercise of sovereign police powers that is non-expropriatory and does not give rise to an obligation to pay compensation.³⁶ One would have thought that the difficult question

³³ In this case, the US-Ecuador BIT was involved.

³⁴ Final Award, London Court of International Arbitration Case No. UN3467, 1 July 2004, 43 *ILM* 1248, where the tribunal held that “the Respondent in this case did not adopt measures that could be considered as amounting to direct or indirect expropriation. In fact, there has been no deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment.” (at 89) (emphasis added)

³⁵ According to Clough, Daniel, “Regulatory expropriations and competition under NAFTA”, 6(4) *JWIT* 553 (2005), at 563, the doctrine regards the government as an agency for the advancement of the interests of its society. Hence, the legitimate expectations of foreign investors cannot reasonably contemplate that the government would controvert that role as circumstances change over time.

³⁶ Section 712 of the *Restatement (Third) on the Law of Foreign Relations*, Vol. 2, cmt. g (1987) states that “A state is responsible as for an expropriation of property . . . when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property or its removal from the state’s territory . . . A state is not responsible for loss of property or for other economic disadvantages resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory . . . and is not designed to cause the alien to abandon the property to the state or sell it at a distress price. As under United States constitutional law, the line between ‘taking’ and regulation is sometimes uncertain.” (emphasis added) While the *Restatement* was written by US scholars, it purports to reflect objectively international law rather than US policy and is occasionally consulted by tribunals. Also, according to para. 10(5) of Professors L. B. Sohn’s and R. R.

would therefore be *when* such a government measure can be regarded as a regulatory measure or a bona fide exercise of state police powers.³⁷ However, a survey of the arbitral jurisprudence reveals that there is no agreement among tribunals on whether the doctrine should even apply at all in the first place.

While some tribunals such as those in *S.D. Myers*³⁸, *Feldman*³⁹ and recently, *Técnicas Medioambientales Tecmed S.A. v. Mexico* (hereinafter “*Tecmed*”)⁴⁰ and *Methanex Corporation v. United States of America* (hereinafter “*Methanex*”)⁴¹ have endorsed the doctrine, there are tribunals, such as those in *Metalclad*⁴² and *Pope & Talbot*⁴³ which could have considered the application of the doctrine but ignored it.

In fact, in *Compania del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (hereinafter “*Santa Elena*”),⁴⁴ the tribunal appeared to have explicitly rejected the doctrine when it held that: “Expropriatory environmental measures – no matter

Baxter’s 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 *AJIL* 545 (1961), “An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results . . . from the action of the competent authorities of the state in the maintenance of public order, health, or morality . . . shall not be considered wrongful, provided . . . it is not a clear and discriminatory violation of the law of the State concerned, . . . [and] it is not an unreasonable departure from the principles of justice recognised by the principal legal systems of the world.” The Iran-US Claims Tribunal has also accepted as a principle of international law that a state is not responsible for *bona fide* regulation that falls within the scope of a generally recognized police power. See *Sedco Inc. v. Nat’l Iranian Oil Co.*, Interlocutory Award 55-129-3, 27 Mar. 1986, 25 *ILM* 629 at 640.

³⁷ Newcombe, *loc. cit.*, n. 13, at 3.

³⁸ The tribunal observed that “The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under [NAFTA’s expropriation provision], although the tribunal does not rule out that possibility.” *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), First Partial Award, 13 November 2000, available at http://ita.law.uvic.ca/documents/PartialAward_Myers_000.pdf, at 281.

³⁹ The tribunal stated that “not all regulatory activity that makes the investment uneconomical is an expropriation”. *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 (NAFTA) Award on Merits, 16 December 2002, at 112.

⁴⁰ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2 (Spain/Mexico BIT) Award, 29 May 2003. The court said that “a serious urgent situation, crisis, need or social emergency” could be “weighed against the deprivation or neutralisation of the economic or commercial value of the Claimant’s investment” to lead to the conclusion that an otherwise expropriatory regulation “[does] not amount to an expropriation under the Agreement and international law”. (at 139)

⁴¹ Final Award, 3 Aug. 2005, Part IV – Chapter D available at <http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf>. This case is elaborated upon later.

⁴² Here, the Mexican local government had refused the investor a permit to operate a hazardous waste landfill. The state government also intended to create an ecological preserve in the area.

⁴³ Here, the tribunal did not consider if the export limits imposed by Canada in order to implement a Canada-US softwood lumber agreement were regulatory measures.

⁴⁴ Award, ICSID Case No. ARB/96/1, 17 Feb. 2000, 15 *ICSID Rev. – FILJ* (2000).

how laudable and how beneficial to society as a whole – are in this respect similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."⁴⁵ The effect of this statement is that any measure a host government undertakes, even if laudable and regulatory in nature, is compensable if it has an expropriatory effect.

Amongst the tribunals that have been receptive towards the regulatory measures doctrine, the tribunal in *Methanex* stands out for proffering the most unequivocal endorsement of the doctrine. In its decision, which may be seen as a backlash against the cases which had ignored or rejected the doctrine,⁴⁶ the tribunal held that as long as a regulatory measure was for a public purpose, non-discriminatory and enacted in accordance with due process, it is not an expropriation and need not be compensated, unless the government had given specific commitments that such regulation would be refrained from.⁴⁷

The survey of the arbitral jurisprudence reveals that states can never be sure if a tribunal will apply or ignore the doctrine. The sheer inconsistency is best illustrated by the *CME v. Czech Republic* (hereinafter "*CME*")⁴⁸ and *Lauder v. Czech Republic* (hereinafter "*Lauder*")⁴⁹ cases. Both cases arose from a single dispute that was brought to arbitration under two different treaty regimes.⁵⁰ Yet, the tribunals managed to reach different conclusions as to whether the doctrine was applicable to the same measure. In *CME*, the measure in issue was deemed as an indirect expropriation which was compensable;⁵¹ in contrast, the tribunal in *Lauder* held that it was a regulatory measure excused from compensation.⁵² Thus, states that may have concluded investment treaties with prior expectations of whether the regulatory measures doctrine is to apply may find that their expectations are not met consistently, due to the seemingly arbitrary nature of the application of the doctrine. Particularly, states may have acceded to the expropriation provisions expecting to retain their regulatory space, but may find their regulatory powers circumscribed by the non-

⁴⁵ *Ibid.*, at 72.

⁴⁶ It is interesting to note that this backlash only occurs when the United States is the respondent.

⁴⁷ The exact words of the tribunal were that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensatory unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation." *Methanex v. United States*, UNCITRAL (NAFTA). Final Award, 3 August 2005 available at <http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf>, Part IV – Chapter D, at 7.

⁴⁸ UNCITRAL Partial Award, 13 Sept. 2001.

⁴⁹ UNCITRAL Final Award, 3 Sept. 2001.

⁵⁰ The *CME* case involved the Netherlands-Czech Republic BIT while the *Lauder* case involved the US-Czech Republic BIT.

⁵¹ *See* n. 48, at 599, 609.

⁵² *See* n. 49 at 202, 302.

consideration of the doctrine. To avoid this, states may want to rephrase the expropriation provision to indicate explicitly whether the doctrine is to apply.

Even if states indicate in the expropriation provision that the doctrine should be considered, the next problem arises – that of deciding on *when* a measure can be regarded as regulatory and thus justifiably excused from the obligation to pay compensation. As all government measures can ostensibly be argued to be “regulatory” in nature,⁵³ the requirement for expropriation to be compensated would lose much of its practical use if no limits are placed on what measures can be regarded as regulatory. Without secure protection offered by the prospect of compensation, there may be a dampening effect on incoming investments.

There is no clear agreement on when a measure can be regarded as regulatory, and when not. Commentators studying the cases that have applied the doctrine have noted that tribunals have cited reasonableness,⁵⁴ non-arbitrariness,⁵⁵ non-discrimination⁵⁶, due process⁵⁷ and there being a plausible relationship between the measure and the reasons justifying it⁵⁸ as relevant factors in determining if a measure was regulatory. In *Tecmed*, there was a fresh attempt to introduce limits to the doctrine. The tribunal required a “reasonable requirement of proportionality” between the measure and the host government’s aim behind the measure. This standard will involve comparisons of the extent of deprivation of the investor with the public interest involved behind the measure,⁵⁹ and perhaps with the consideration

⁵³ Or, alternatively, to be within the state’s “police powers”.

⁵⁴ Newcombe, *loc cit.*, n. 13, at 38.

⁵⁵ Dolzer, Rudolf and Margrete Stevens, *Bilateral Investment Treaties* (The Hague: M. Nijhoff Publishers, 1995), at 104–108.

⁵⁶ Maniruzzaman, A.F.M., “Expropriation of alien property and the principle of non-discrimination in international law of foreign investment: An overview”, 8 *JTLP* 57 (1998).

⁵⁷ In *Methanex*, the tribunal’s assessment of the report regarding the banned substance, MTBE showed that the tribunal deemed due process as important in assessing the legitimacy of the government measure. The tribunal ensured that the report was subject to public hearings, testimony and peer review, and satisfied itself that its “emergence as a serious scientific work from such an open and informed debate is the best evidence that it was not the product of a political sham”. See n. 41 Part III – Chapter A, at 101.

⁵⁸ Christie, G. C., “What constitutes a taking of property under international law”, 33 *BYIL* 307 (1962), at 332.

⁵⁹ The tribunal states that “After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterised as expropriatory, whether such actions or measures are proportional to the public interest presumed protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.” See n. 40, at 122. The tribunal also added that “a serious urgent situation, crisis, need or social emergency” could be “weighed against the deprivation or neutralisation of the economic or commercial value of the Claimant’s investment” to lead to the conclusion that an otherwise expropriatory regulation “[does] not amount to an expropriation under the Agreement and international law”. *Ibid.*, at 139.

whether, similar to that in trade law, the measure taken was the least restrictive necessary in order to meet the government's objectives.⁶⁰ Although the *Tecmed* approach introduces a more systematic analysis in limiting the application of the regulatory measures doctrine, it is not supported by much authority.⁶¹ There is no guarantee that future tribunals will adopt this approach. States which favour this approach may want to codify it into their expropriation provisions.

The tribunal in *Methanex* seems to have set the least limits on the doctrine thus far. Whereas previous tribunals have at most cited factors to consider in determining if a measure is regulatory, the *Methanex* tribunal appears to be stating an absolute rule with a single exception – as long as a regulatory measure is for a public purpose, non-discriminatory and enacted in accordance with due process, it is not an expropriation and need not be compensated, only unless the government had given specific commitments that such regulation would be refrained from.⁶² To previous tribunals, findings of factors like public purpose, non-discrimination and due process would at most tend towards making a finding of there being no expropriation likely, but never absolute. While to lay down an absolute rule would bring about some much-needed certainty in this area of the law of expropriation, the absolute rule has no supporting authority⁶³ and limits the discretion of the court to consider other factors mentioned earlier.

⁶⁰ The *Tecmed* approach has been described as analogous to how WTO panels have determined if a particular measure is “necessary” under Articles XX(a), (b) and (d) of GATT 1994. See Coe, Jr. and Rubins, *loc. cit.*, n. 16, at 665.

⁶¹ The approach taken in *Tecmed* seems to draw explicitly on the concept of proportionality under Article 1 of the *First Protocol of the European Convention on Human Rights* (hereinafter “ECHR”), which prohibits deprivations of “peaceful enjoyment” of possessions “except in the public interest and subject to the conditions provided for by law and by general principles of international law”. The tribunal cited *Matos e Silva, Lda., and Others v. Portugal*, 37 *Eur. Ct. H.R.* (1996), at 85 and other ECHR jurisprudence such as *Mellacher and Others v. Austria*, (10522/83) 25 *Eur. Ct. H.R.* (1989), at 48; *Pressos Compania Naviera S.A. & Others v. Belgium*, (17849/91) 47 *Eur. Ct. H.R.* (1995), at 38 and *James & Others v. United Kingdom*, 3 *Eur. H.R. Rep.* 19 (1986), at 20. Besides these, there is very little international law commentary or precedent to support the tribunal's approach.

⁶² The tribunal stated that “as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensatory unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.” See n. 41, at 7.

⁶³ To support its absolute rule, the tribunal in *Methanex* cited two cases: *Revere Copper & Brass, Inc. v. OPIC*, American Arbitration Association Case No. 16 10 0137 76, Award of 24 August 1978; 56 *ILR* 258, 17 *ILM* 1321 and *Waste Management, Inc., v. Mexico, Resubmitted Claim (Waste Management II)*, Final Award, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)/00/3, 30 Apr. 2004. However, the former award only confirms that in cases where a breach of good faith exists, an expropriation can be found – not that an expropriation can be found only in such circumstances. The latter award actually concerns how state responsibility for detrimental

The exception stated in *Methanex* that regulatory measures could be compensable in cases of detrimental reliance on a government's promise comes close to protecting the legitimate expectations of the investor under the expropriation provision as a substantive property right. Again there is no basis for this proclamation and it appears to be an extension of the scope of investment protection, in this case under NAFTA, beyond what the parties intended because the parties have not defined legitimate expectations of investors as a form of protected investment under the definition of "investment" under Article 1139 of NAFTA. Almost none, if not none, of the other treaties provide for the protection of legitimate expectations as an investment as well.⁶⁴ Given these considerations, states should clarify if they want the absolute rule of *Methanex* to apply in expropriation cases in the provision.⁶⁵ It should be noted, however, that since *Methanex's* claim was actually dismissed on jurisdictional grounds,⁶⁶ the tribunal's statements on regulatory measures is strictly obiter dicta and hence may not be very persuasive.

Further extensions to the concept of expropriation

While it has been clarified within NAFTA jurisprudence by the tribunals in *S.D. Myers*⁶⁷, *Pope & Talbot*⁶⁸ and *Feldman*⁶⁹ that "tantamount" in NAFTA Article 1110

reliance can be founded upon the principle of good faith as reflected in the customary international law minimum standard of treatment and NAFTA Article 1105. It had nothing to do with Article 1110 or the customary international law of expropriation.

⁶⁴ Additionally, Todd Weiler has argued that the absolute rule stated in *Methanex* cannot be reconciled with the relevant expropriation provision. See Weiler, Todd, "*Methanex Corp. v. U.S.A. – Turning the page on NAFTA Chapter Eleven?*" 6(6) *JWIT* 903 (2005), at 919. According to him, Article 1110 of NAFTA quite clearly states that even if an expropriatory measure is executed for a public purpose, on a non-discriminatory basis and in accordance with due process, it must be accompanied by suitable compensation. He argues that the focus of Article 1110 is on the extent of deprivation of the investment and it does not matter how the expropriation was executed; it only matters whether an expropriation has actually occurred. However, it is submitted that the effect of the regulatory measures doctrine is to render the measure in issue non-expropriatory in the first place. Thus, if the measure in issue is regarded as regulatory, Article 1110 will not even come into consideration because there is no expropriation in the first place. The *Methanex* tribunal was talking about when a measure can be deemed regulatory and thus non-compensable, and not about when a measure that has already been deemed expropriatory can be non-compensable.

⁶⁵ Indeed, as will be seen later, the United States has incorporated some elements of the *Methanex* absolute rule in its newer treaties, but the absolute rule has been watered down to a rebuttable presumption.

⁶⁶ See n. 41, at 292, or [22] of Part IV, Chapter E, at 10.

⁶⁷ See n. 38, at 286. The tribunal explained that "tantamount" was intended to "embrace the concept of so-called 'creeping expropriation', rather than to expand the internationally accepted scope of the term 'expropriation'".

⁶⁸ See n. 28, at 104.

⁶⁹ See n. 38, at 100.

means “equivalent” and does not expand the meaning of expropriation, it remains possible that “tantamount to expropriation” may be interpreted as a broader concept than indirect expropriation under other treaties that provide for it.⁷⁰ For instance, in *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt* (hereinafter “*M.E. Cement*”),⁷¹ the tribunal held that a breach of due process amounted to a measure tantamount to expropriation under the Greece-Egypt BIT.

There are further cases that add to the confusion over what can amount to expropriation. In *Loewen Group Inc. and Raymond L. Loewen v. United States of America* (hereinafter “*Loewen*”),⁷² the tribunal held that a denial of justice that results in a breach of the fair and equitable standard of treatment could also amount to expropriation. In *S.D. Myers*, earlier identified as a case where the orthodox approach was taken, the tribunal appears to have, after spelling out the orthodox approach focusing on the extent of deprivation,⁷³ gone on to regard benefits derived by the host state from the measure in issue as relevant to a finding of expropriation.⁷⁴

The result is that states can never be certain if future tribunals might elect to extend the concept of expropriation similarly, thus expanding the scope of potential liability for states. States should query if they are prepared to accept such extensions. If not, they may want to clarify the scope of expropriation by rephrasing the expropriation provision.

Measures taken by states and suggested further improvements

Evaluation of measures taken by states

In response to the unexpected consequences and uncertainties from the expropriation provisions that have been exposed by arbitral jurisprudence some states,

⁷⁰ Such treaties include the Greece-Egypt BIT and the US-Argentina BIT. Interestingly, the French version of the NAFTA treaty uses the term “equivalent” which means the same in English as the word “equivalent” rather than the word “tantamount”.

⁷¹ Final Award, ICSID Case No. ARB/99/6, 12 Apr. 2002. Here, the tribunal, interpreting the Greece-Egypt BIT which, similar to Article 1110 of NAFTA provides for compensation for measures “the effects of which would be tantamount to expropriation, held that “[T]hough, normally, a seizure and auction ordered by the national courts do not qualify as a taking, they can be a ‘measure the effects of which would be tantamount to expropriation’ if they are not taken under due process of law”. (at 139)

⁷² Final Award, ICSID Case No. ARB(AF)/98/3, 26 June 2003. Here, the tribunal held that “a claim alleging an appropriation in violation of Article 1110 [the expropriation provision] can succeed only if Loewen [the investor] establishes a denial of justice under Article 1105 [the minimum standard of treatment provision].” (at 141)

⁷³ See n. 38, at 283.

⁷⁴ *Ibid.*, at 287. In concluding that there was no expropriation, the tribunal noted that “Canada realised no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others.”

particularly the US, have since reflected on their policy stance, and particularly on the appropriate balance between investor protection and regulatory space for themselves, and recently attempted to rephrase the expropriation provisions in their newly-concluded treaties⁷⁵ so that they will be interpreted and applied by tribunals in a manner that accords more with their expectations. These new provisions remain untested as they have yet to be applied by any tribunals and they are evaluated here. Other states, especially those seeking to achieve a similar balance, can decide if these measures are worth emulating.

The biggest change comes in the form of an Annex on expropriation which all the newer US treaties,⁷⁶ such as the US-Chile FTA,⁷⁷ US-Singapore FTA,⁷⁸ US-Australia FTA,⁷⁹ the 2004 US Model BIT,⁸⁰ and some non-US treaties like the 2004 Canadian Model BIT⁸¹ and the India-Singapore Comprehensive Economic Cooperation Agreement (hereinafter “CECA”)⁸² contain. According to the Annex, the determination of whether a measure constitutes an indirect expropriation will require the consideration of three factors. The Annex also provides for a rebuttable presumption.

The first factor is the economic impact of the government action.⁸³ Here, the Annex also stresses that adverse economic impact on the investor per se is insufficient to establish a finding of indirect expropriation. The main consequence of this addition is that tribunals can no longer make a finding of indirect expropriation based solely on an economic analysis of the extent of deprivation to the investor, like the tribunal in *Metalclad* did. This means tribunals have to consider other relevant factors as well. Since the Annex only provides for an inclusive list of factors for tribunals to consider, tribunals are free to consider other factors outside of those listed within the Annex. However, the problem is determining which factors are

⁷⁵ To date it does not appear that any state has amended the expropriation provisions of an existing treaty.

⁷⁶ Besides the FTAs mentioned here, the US has since December 2003 concluded FTAs containing similar language with other countries such as Central America (Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica), the Dominican Republic, Bahrain and Morocco. Others underway or planned include FTAs with Colombia, Thailand, the entire American hemisphere (FTAA), Malaysia, Oman, Panama, South Korea, the United Arab Emirates and the South African Customs Union.

⁷⁷ Annex 10-D, 6 May 2003.

⁷⁸ 6 June 2003. For the US-Singapore FTA, there is no Annex on expropriation in the investment chapter but the exact same provisions are found in the Exchange of Letters on Expropriation which are binding on the two states.

⁷⁹ Annex 11-B, 18 May 2004.

⁸⁰ Annex B.

⁸¹ Annex B.13.

⁸² Annex 3 of Letter of Exchanges between India and Singapore, 29 June 2005.

⁸³ US Model BIT 2004, Annex B, (4)(a)(i), which states that “the economic impact of the government action [should be considered], although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.”

relevant. Presumably the drafters intended to preserve the discretion for tribunals to consider any factors they deem relevant. The consequence is naturally some resultant uncertainty. Perhaps, the various factors tribunals have considered for the regulatory measures doctrine analysis, such as reasonableness, non-arbitrariness, proportionality and the requirement for a plausible link between the measure and its aim, are applicable here.⁸⁴ Also, states should clarify whether the deprivation of the reasonably-to-be-expected benefit from the investment is a relevant factor, as the *Metalclad* and *Occidental* tribunals held it to be.⁸⁵

A difficulty with the first factor is that determining the economic impact of a measure necessarily depends on the categorization of the investment which has been affected. If a discrete segment of an investor's total investment, such as one line of business or a facility, has been taken but the rest of his investment remains profitable, he may strategically attempt to conceptually "sever" that discrete property interest that was taken from the rest of his other investments such that the severed property stands alone as a separate whole investment, and argue that that particular whole of his investment had been taken. In this case, should a tribunal regard part of his investment or the whole of it to have been taken?⁸⁶

If states do not want to allow such arguments to be made, they should pre-empt them by clarifying with greater precision how the economic impact is to be assessed. States may also want to note that basing the assessment of the economic impact of the measure on the economic effect the measure has on the investor's entire investment in the host state in order to determine if compensation is payable is inherently illogical. It is not satisfactory that between two investors who lose the same quantum of property rights to an expropriation, one investor is not compensated because his total investment is larger and the loss only constituted a small part of his total investment and is not deemed to have a sufficient economic impact on his investment, but the other investor receives compensation because his loss constituted his entire investment and thus had the requisite economic impact.⁸⁷

⁸⁴ See the section of this paper headed "Further extensions to the concept of expropriation" for an elaboration on these factors.

⁸⁵ If so, it can be said that a more expansive approach is being taken in assessing the economic impact of the government measure.

⁸⁶ Radin, M. J., "The liberal conception of property: Crosscurrents in the jurisprudence of takings", in Radin, M. J., *Reinterpreting Property* (Chicago: University of Chicago Press, 1993), at 127–128. Radin describes this as the "conceptual severance" problem. She explains: "To apply conceptual severance one delineates a property interest consisting of just what the government action has removed from the owner, and then asserts that the particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing."

⁸⁷ Paulsson, Jan, "Indirect expropriation: Is the right to regulate at risk?", Paper presented on 12 Dec. 2005 in Paris at a symposium on "Making the Most of International Investment Agreements," organized by ICSID, OECD and UNCTAD, published in 3 (Issue 2) *Transnational Dispute Management* (Apr. 2006) at 5; online: www.oecd.org/dataoecd/5/52/36055332.pdf.

The second factor is the extent to which the government measure interferes with distinct, reasonable investment-backed expectations.⁸⁸ On the face of it the second factor resembles the exception in *Methanex*.⁸⁹ Presumably, if the host government has given specific commitments to the investor to refrain from interfering with the investment through certain forms of regulation, the expectations created as a result, especially those which have crystallized into some form of a legal right such as contracts or licences, should be protected.⁹⁰ However, the main problem with this concept is its circularity because it begs the question of when these expectations can be said to be reasonable. When the abovementioned expectations are pitted against the public interest in protecting the public and the environment from harm, it will not be easy to determine if it remains reasonable to protect those expectations.⁹¹ It seems that in the end, this factor cannot be analysed in isolation from other factors such as the character of the government measure and its economic impact.⁹² It is also unclear if this second factor extends to protecting the reasonably-to-be-expected benefit of the investment alluded to in *Metalclad* and *Occidental*.

The third factor is the character of the government action.⁹³ While the Annex does not elaborate further, the apparent interpretation of this third factor is that it directs tribunals to examine the purpose behind the government measure. Presumably, when the government acts for economic purposes, such as for protectionist reasons, the measure should be deemed as an indirect expropriation which is compensable. When the government acts bona fide for the public welfare, for instance for health and environmental reasons, then non-compensation may be justified. A problem arises when a single measure serves both an economic purpose as well as the public welfare. To resolve this, it has been suggested that the extent of expropriation by the government should be the determinant in such cases. Where the government acquires an economic benefit from the measure, such as some property right, it should pay compensation for that benefit. Where the government acquires no economic benefit, but merely improves the public welfare or prevents the

⁸⁸ US Model BIT 2004, Annex B, (4)(a)(ii), which states that “the extent to which the government action interferes with distinct, reasonable investment-backed expectations” should be considered.

⁸⁹ See n. 41, at 7, where the tribunal states that “specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation” may be compensable if the commitments are not adhered to.

⁹⁰ Newcolombe, *loc. cit.*, n. 13, at 45.

⁹¹ Probably, the host state would argue that it cannot be reasonable for an investor to expect the host state to abdicate its responsibility to look after the welfare and well-being of its citizens.

⁹² Kaplow, L., “An economic analysis of legal transitions”, 99 *HLR* 511 (1986), at 520–524.

⁹³ US Model BIT 2004, Annex B, (4)(a)(iii), which states that “the character of the government action” should be considered.

public from some harm through the measure, then the measure should not be compensable.⁹⁴

The rebuttable presumption states that regulatory measures that are non-discriminatory and designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations except in rare circumstances.⁹⁵ What is significant about this provision is that it is now mandatory for tribunals to consider the doctrine of regulatory measures. A tribunal can no longer take the approach of the tribunal in *Santa Elena* that regulatory measures that have an expropriatory effect are compensable without exceptions, no matter how laudable and beneficial the measures may be to society. Tribunals can no longer ignore the consideration of whether a measure at issue was regulatory and thus excused from compensation as the tribunals in *Metalclad* and *Pope & Talbot* did. While it was uncertain at international law which factors were relevant in determining when a measure was regulatory, the provision provides a starting point for tribunals by listing out some factors for tribunals to consider.⁹⁶

Some aspects of the provision remain open or vague and could result in undesirable uncertainty, although it may have been the intention of the drafter to leave tribunals with some discretion to supplement the provision with considerations that they think are relevant. First, there is no elaboration on what could constitute an exceptional rare circumstance where compensation remains obligatory. Silence here means most future disputes would centre on the consideration of whether the measure in issue was such a rare circumstance. Perhaps, considerations of the abovementioned three factors may be relevant here.⁹⁷ It has also been suggested

⁹⁴ Sax, J. L., “Takings and the police power”, 74 *YLLJ* 36 (1964–5). Sax explains that “The precise rule to be applied is this: when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some government enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.” (at 67)

⁹⁵ US Model BIT 2004, Annex B, (4)(b). The exact words of this provision are: “Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”

⁹⁶ It can be pointed out that the provision does not define what a “regulatory action” is. It is inferred that the various considerations listed in the provision, such as that the action be non-discriminatory and that it is designed and applied to protect legitimate public welfare objectives, will be factors in determining if an action is indeed regulatory.

⁹⁷ For instance, the fact that the host government has made specific commitments arising to expectations by the investor that they be met, or that the state has acquired a large economic benefit from the measure, may, alone or together, sufficiently constitute such a rare circumstance.

that a high burden of proof would be required to overcome the presumption,⁹⁸ and that the situation where a state, although well-meaning, imposes measures in reaction to unsubstantiated scientific theories may be such a rare circumstance.⁹⁹ Second, while by no means certain, “designed . . . to protect legitimate . . . objectives” might require for an analysis of proportionality¹⁰⁰ and perhaps whether the measure was the least restrictive necessary to meet the government’s objectives as the tribunal in *Tecmed* called for, while “applied . . . to protect” might call for a review into the due process and non-arbitrariness behind the measure. Third, the list of public welfare objectives provided is phrased as illustrative, rather than exhaustive. If unconfined, it is unclear how far the list may be further extended by the arbitral imagination.¹⁰¹

Elsewhere beyond the Annex, a minor change has been made to the main expropriation provisions in the newer treaties.¹⁰² Reflecting NAFTA jurisprudence, the new provisions replace “tantamount” with “equivalent”, which will stem any misunderstanding that “tantamount to expropriation” allows for a standalone category of claims broader than indirect expropriation to be made. Regrettably, no other clarifications were made regarding the further extensions which some tribunals have given to the concept of expropriation, as described earlier.¹⁰³

While the various changes will definitely go some way in realizing the policy aims of the member states to preserve their regulatory space by mandating tribunals to consider some aspects of the regulatory measures doctrine, tribunals may have difficulty interpreting certain vague areas which will require clarification. States which have not had the opportunity to amend their existing treaties, which contain expropriation provisions worded similarly to that of NAFTA, may want to try to argue that the newer expropriation provisions actually reflect the true interpretation of the NAFTA expropriation provisions, and thus provisions worded similarly should be interpreted accordingly. However, this argument is untested and may be too tenuous for tribunals to accept.

Suggested further improvements

States that wish to preserve their regulatory space further may want to go on to explicitly exclude specific sectors such as the environment and public health from the

⁹⁸ Grants, *loc. cit.*, n. 31, at 765.

⁹⁹ Coe, Jr. and Rubins, *loc. cit.*, n. 16, at 642.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² For instance, Article 10.9 of the US-Chile FTA, Article 15.6 of the US-Singapore FTA, Article 11.7 of the US-Australia FTA, Article 13 of the 2004 Canadian Model BIT and Article 6 of the 2004 US Model BIT. The new provisions now state that “Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures *equivalent* to expropriation or nationalisation”. (emphasis added)

¹⁰³ See the section of this paper headed “The regulatory measures doctrine” for the other doubts that exist for this aspect of expropriation.

ambit of the expropriation provisions.¹⁰⁴ This measure would be unprecedented. The newer FTAs now devote whole chapters to labour and environmental issues.¹⁰⁵ These chapters do not explicitly provide for compensation to be excused, although a provision is usually added to the investment chapter, providing that in the event of inconsistency between the investment chapter and the labour and environment chapters, the latter shall prevail.¹⁰⁶ However, this provision will not excuse labour and environmental measures from compensation because there is no inconsistency between the chapters in the first place. If the labour or environmental chapter requires the state to perform a particular measure, the investment chapter will provide for compensation to be paid if that measure is deemed expropriatory.¹⁰⁷

Additionally, states may want to consider making the determination of whether compensation should be payable less of an all-or-nothing proposition. States can do so by allowing for the flexible remedy of allowing reduced compensation to be payable in situations where a legitimate measure, which would not have required for compensation to be payable under the new Annex, imposes a significant, disproportionate burden on the investor.¹⁰⁸

In deciding if these further measures are viable, states should note that a consequence of tilting the balance in favour of preserving regulatory space is that the state may become a less attractive destination for foreign investment as the level of protection accorded falls. While no clear study has shown a causal link between increasing investor protection and increasing inflows of foreign investment, it should also be noted that if the host state is also a capital exporting state, the state's own investors, investing abroad, will also be given the same weakened standard of protection as most treaties are reciprocal.¹⁰⁹ States may also want to query whether the

¹⁰⁴ Akpan, *loc. cit.*, n. 15, at 897.

¹⁰⁵ See Chapters 18 (Labour) and 19 (Environment) of the US-Chile FTA and the US-Australia FTA and Chapters 17 (Labour) and 18 (Environment) of the US-Singapore FTA.

¹⁰⁶ See Article 15.2 of the US-Singapore FTA; Article 11.2 of the US-Australia FTA and Article 10.2 of the US-Chile FTA.

¹⁰⁷ Gagne, Gilbert and Jean-Fredric Morin, "The evolving American policy on investment protection: Evidence from recent FTAs and the 2004 Model BIT", 9(2) *JIEL* 357 (2006), at 381.

¹⁰⁸ Radin, *loc. cit.*, n. 86, at 6. But of course, states must be able to clarify clearly what could constitute such a significant, disproportionate burden.

¹⁰⁹ Already, there have been complaints from the US business community about the lower standards of protection provided in the recent treaties. The Report of the Advisory Committee on International Economic Policy Regarding the Draft Model Bilateral Investment Treaty (11 Feb. 2004) states that "the investment chapters of recent FTAs serves only to perpetuate a downward trend in protection for US investors", and goes on to note that the investor representatives on the Advisory Committee favoured the 1994 US Model BIT which contained provisions similar to those in NAFTA Chapter 11, stating that "The 1994 model BIT offers strong protections [*sic*] against the substantial risks that face US investors abroad." (at 2)

concerns of regulatory chill are overstated as expropriation claims do not actually succeed very often.¹¹⁰

THE MINIMUM STANDARD OF TREATMENT

Introduction

Historically, home states would negotiate for a minimum standard of treatment to be applicable because they were wary that the national standard of treatment offered by the host state would not provide sufficient protection to their investors. As with expropriation provisions, the guarantee of an external standard of protection may well be useful in attracting investors to a host state though the causal links are difficult to prove. Today, most treaties provide for member states to accord to investors treatment in accordance with international law (hereinafter “international minimum standard of treatment”), including fair and equitable treatment.¹¹¹ Unfortunately the treaties do not flesh out the content of both standards of treatment. Again, reference to international law is necessitated.

The next section shows that there is no definite content for both standards at international law, and yet tribunals have attempted to create new content for both standards. The danger of this is that states can never be certain of what commitments they may be making via the minimum standard provision. A tribunal may effectively create new, unexpected and unwanted laws that are binding on states when they hold that a state owes an obligation to an investor which the state never intended to commit to when it drafted the provision. The section that follows charts how the NAFTA states responded to the expansionary approach some tribunals took by issuing an Interpretation¹¹² to halt the expansionary trend, and subsequently how the newer treaties have tried to further clarify the content of both standards.

¹¹⁰ Coe, Jr. And Rubins, *loc. cit.*, n. 16, at 599 and Grants, *loc. cit.*, n. 30, at 731. For instance, there has only been one instance in *Metalclad* where a NAFTA tribunal has found a violation of Article 1110, although admittedly claimants seem to have more success in expropriation claims outside of the NAFTA framework, for instance in cases like *Tecmed*, *CME* and *M.E. Cement*.

¹¹¹ For instance, Article 1105(1) of NAFTA provides that: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Within this paper, full protection and security will not be considered as it is relatively uncontroversial. For more information on this standard. See Sornarajah, *op. cit.*, n. 6, at 342.

¹¹² NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions 2 (2001).

The arbitral jurisprudence and how it will affect states

What does the international minimum standard of treatment comprise?

The uncertainty that surrounds the international minimum standard of treatment is best illustrated by the fact that there is a view that it still cannot even be said with certainty that such a standard actually exists in customary international law.¹¹³ However, treaties that make reference to it will establish conclusively that the standard exists at least between the parties.¹¹⁴ Despite the uncertainty, arbitral tribunals have identified certain elements to be part of the standard. As tribunals identify more and more elements to constitute part of the standard, the obligations of the states under the international minimum standard have increased as the tribunals impose unexpected obligations on the parties via the treatment provision.¹¹⁵ In this section and the following section, such specific elements are identified and the consequences of these elements crystallizing as obligations under the treatment provision are analysed.

The most established component of the standard may be denial of justice,¹¹⁶ which was identified in *L.F.H. Neer (U.S.A.) v. United Mexican States* (hereinafter “*Neer*”),¹¹⁷ where the tribunal held that, in order to constitute a denial of justice, a government’s conduct must amount to an outrage, bad faith, wilful neglect of duty or insufficiency of government action so far short of international standards that

¹¹³ According to Section 102(2) of the *Restatement (Third) on the Law of Foreign Relations*, Vol. 2, cmt. g (1987) and Kelly, J. Patrick, “The twilight of customary international law”, 40 *Va.JIL* 449 (2000), at 453, assertions that an international minimum standard of treatment exists have never been supported by any comprehensive empirical study of the actual practice of nations with regard to foreign investment to demonstrate that it is the general and consistent practice of states to afford foreign investment a certain minimum standard of treatment.

¹¹⁴ See Thomas, J. C., “Reflections on Article 1105 of NAFTA”, 17 *ICSID Rev.* 21 (2002); *ADF Group, Inc. v. United States*, Final Award, ICSID Case No. ARB(AF)/00/1, 9 Jan. 2003, at 178, where the tribunal stated that Article 1105(1) “clarifies that so far as the three NAFTA Parties are concerned, the long-standing debate as to whether there exists such a thing as a minimum standard of treatment of non-nationals and their property prescribed in customary law, is closed”; and *Mondev Int’l, Ltd. v. United States*, Award, ICSID Case No. ARB(AF)/99/2, 11 Oct. 2002, at 120, where the tribunal stated that “it is clear that Article 1105 was intended to put at rest for NAFTA purposes a long-standing and divisive about whether any such thing as a minimum standard of treatment of investment in international law actually exists. Article 1105 resolves this issue in the affirmative for NAFTA parties.”

¹¹⁵ Once a certain element is identified by a tribunal, there will always be a chance that a future tribunal will endorse the identified element as constituting the part of the state’s obligations under the international minimum standard and thus find the state liable for breach.

¹¹⁶ But even so, the *Neer* tribunal conceded, at 61, that denial of justice was nevertheless a vague concept, saying that it was not a “precise formula”.

¹¹⁷ 4 *RIAA* 60 (Mex./U.S.A. Gen. Claims Comm’n 1926).

every reasonable and impartial man would recognize its insufficiency.¹¹⁸ The *Loewen* decision demonstrates the potential ramifications of a claim of denial of justice. The case involved a Canadian investor claiming that a civil case ruling against it by a jury in a Mississippi state court and the requirement for a hefty bond to be posted in order to appeal, which the investor could not afford and alleged was excessive, constituted a denial of justice which violated both the international minimum standard of treatment and fair and equitable treatment. Although the case was dismissed on jurisdictional grounds,¹¹⁹ the tribunal went on to determine, as obiter dicta, that the trial and its verdict did breach both standards of treatment.¹²⁰ This dicta clearly indicates that the tribunal believed itself competent to rule upon the fairness and legitimacy of a domestic court ruling after local remedies have been exhausted.¹²¹

While it is conceded that the *Loewen* case involved a particularly egregious situation, it is unlikely that any state would intend for the treatment standard provisions to serve as a means for investors to challenge civil verdicts or legitimate rules of civil procedure such as the requirement to post a surety bond on appeal,¹²² and for an unelected international trade body to review their validity. This would probably constitute an unacceptable ceding of sovereignty for most states.¹²³ Yet, it is not an unlikely result as there is no stopping a future tribunal from adopting such an expansionary approach as the tribunal in *Loewen* did.

In *S.D. Myers* the tribunal ruled that a violation of the national treatment standard meant a violation of the minimum standard.¹²⁴ If this is indeed the case,

¹¹⁸ *Ibid.*, at 60–61. It must be noted that this *Neer* standard arose in the context of the abuse of the physical security of the alien and was not grafted into the context of protecting foreign investment property until recently in cases like the *ELSI Case*, *ICJ Rep. 1989*, at 1, which further clarifies that it is not the misapplication of a rule of law which would engage a state's responsibility, but the violation of the rule of law. See Sornarajah, *op. cit.*, n. 6, at 340.

¹¹⁹ See n. 72, at 1.

¹²⁰ *Ibid.*, at 39, the tribunal concluded that the state court proceedings were "highly deficient" and that the plaintiff's trial strategy seemed calculated to inflame jury prejudice on the basis of the defendant's national origin. The tribunal then went further to find that the Mississippi trial and its verdict were "clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment".

¹²¹ Hill, H. Hamner, "NAFTA and environmental protection: The first 10 years", *JIIIS* 157, at 168.

¹²² As mentioned earlier, the court was further prepared to accept that a finding of denial of justice could in turn lead to a finding of expropriation. (at 141)

¹²³ See n. 120, at 167.

¹²⁴ The tribunal held that "on the facts of this particular case the breach of Article 1102 [the national treatment provision] essentially establishes a breach of Article 1105 as well". The tribunal justified its conclusion in part by asserted the international minimum standard was considered broader in scope than the national treatment obligation, but then refused to rule out the possibility that there could be circumstances in which a denial of national treatment "might not offend" the minimum standard provision. (at 266)

states might wonder if there is actually any point in drafting a national treatment provision if the minimum standard provision already covers it. The tribunal was later criticised by US State Department lawyers as having misinterpreted the minimum standard provision.¹²⁵

What does fair and equitable treatment comprise?

In *Pope & Talbot* the NAFTA tribunal held that the fair and equitable treatment was in addition to, rather than limited by, the international minimum standard.¹²⁶ This attribution of an additive character would mean that the fair and equitable standard would require a higher standard of protection than the international minimum standard. However, Article 1105(1) of NAFTA seems to support the other interpretation instead as it says that the international minimum standard includes fair and equitable standard within it.¹²⁷ It could be that the tribunal may have taken into account the language in the 1994 Model US BIT which differs from the NAFTA provision and does suggest the interpretation adopted by the tribunal.¹²⁸

In line with the expansive attitude of the tribunal in *Pope & Talbot*, some other tribunals appear to be subscribing to the view that the fair and equitable treatment term constitutes “an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty’s object and purpose in particular disputes”,¹²⁹ over and above the protection afforded under the international minimum standard.

Some tribunals have regarded a violation by a state of one of the provisions of the same treaty as constituting a denial of fair and equitable treatment. In *Metalclad*,

¹²⁵ Clodfelter, Mark, “US State Department participation in international economic dispute resolution”, 42 *STLR* 1273 (2001), at 1282, where he comments that *S. D. Myers* “interpreted Article 1105’s minimum standard of treatment in a way we think is at odds with the provision”.

¹²⁶ Award on the Merits Phase 2, 10 Apr. 2001, at 118.

¹²⁷ Article 1105(1) of NAFTA reads: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, *including* fair and equitable treatment and full protection and security.” (emphasis added)

¹²⁸ The Model BIT states that “[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security *and* shall in no case be accorded treatment less than that required by international law.” (emphasis added) This allows more for the interpretation that the two standards are independent of each other as there is no suggestion here that one standard is part of the other, or is included within the other as is the case for Article 1105(1) of NAFTA.

¹²⁹ Brower, Charles H., “Structure, legitimacy, and NAFTA’s investment chapter”, 36 *VJTL* 37 (2003), at 66, note 163 and Vandeveld, Kenneth J., *United States Investment Treaties: Policy and Practice*, (Boston : Kluwer Law and Taxation, 1992), at 76, where he writes that: “The phrase [fair and equitable treatment] is vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the dispute provisions.”

the tribunal seemed to indicate that the violation of NAFTA's transparency provisions¹³⁰ established a breach of the fair and equitable standard.¹³¹ This notion also appears to be supported by the tribunal in *S.D. Myers*.¹³² According to the tribunals in *CMS Gas Transmission Co. v. The Argentine Republic* (hereinafter "*CMS*")¹³³

¹³⁰ Article 1802(1) of NAFTA states: "Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them." Paragraph 6 of the NAFTA Preamble states: "The Parties to NAFTA specifically agreed to ensure a predictable commercial framework for business planning and investment". The tribunal stated that "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA." (at 99) While there was no explicit statement that the breach of the fair and equitable treatment was found as a result of a breach of the Preamble and Article 1802(1) (*i.e.* breach of fair and equitable treatment was established as a result of a breach of a NAFTA provision), this can be inferred because, at 71, the tribunal cited the Preamble and Article 1802(1) as the applicable law relevant to the dispute. The alternative interpretation of the *Metalclad* ruling would be that the tribunal found the breach due to the lack of transparency *per se*. In other words, it identified an additional obligation imposed by the fair and equitable treatment provision on states to provide transparency to investors, the consequences of which have been mentioned in Ewing-Chow, Michael, "Investor protection in free trade agreements: Lessons from North America", 5 *Sg.JICL* 748 (2001), at 761, as potentially imposing unduly onerous obligations on states to serve as an investor's *de facto* counsel in identifying legal obligations and pitfalls for them. Again, states should query if they want to take on such onerous obligations, as it is possible that a future tribunal may cite *Metalclad* as authority for such a proposition, even though in the appeal to the Supreme Court of British Columbia, the court poured cold water on this proposition when it held that there were no transparency requirements in Article 1105, and that Article 1105 would only be violated if the treatment in question did not accord with international law. The court said that customary international law did not require for transparency and thus transparency requirements should not be imported into Article 1105.

¹³¹ Porterfield, Matthew C. "An International common law of investor rights?", 27 *UPJIEL* 79 (2006), at 90–91.

¹³² Here, the Tribunal held Article 1105 not only to reflect custom, but added too that breach of another NAFTA provision could itself be capable of amounting to a breach of Article 1105, and thus the investment chapter. The tribunal quoted Dr. Mann's article above with approval: "... it is submitted that fair and equitable treatment goes much further than the right to most-favoured-nation and to national treatment ... so general a provision is likely to be almost sufficient to cover all conceivable cases, and *it may well be that provisions of the Agreement affording substantive protection are not more than examples of specific instances of this over-riding duty.*" (at 265) (emphasis added)

¹³³ Award, ICSID Case No. ARB/01/08, 12 May 2005. The tribunal stated there: "There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment." (at 274)

and *Occidental*,¹³⁴ the fair and equitable treatment standard obliged the state to ensure the “stability of the legal and business framework”.

In *Waste Management, Inc., v. Mexico, Resubmitted Claim* (hereinafter “*Waste Management II*”),¹³⁵ the tribunal suggested that breach of representations made by the host state which were reasonably relied on by the claimant were relevant to determining a breach of the fair and equitable standard.¹³⁶ In *International Thunderbird Gaming Corporation v. The United Mexican States* (hereinafter, “*Thunderbird*”),¹³⁷ the tribunal affirmed the principle of “legitimate expectations” as being capable of forming the basis of an investment claim under NAFTA.¹³⁸ Although the tribunal failed to state which substantive head of claim legitimate expectations should be attached to,¹³⁹ the dissenting arbitrator was very clear in his opinion that legitimate expectations came under the fair and equitable treatment requirement in Article 1105.¹⁴⁰ It is possible that future tribunals, even those outside NAFTA,¹⁴¹ may come

¹³⁴ The tribunal stated that the “stability of the legal and business framework is thus an essential element of fair and equitable treatment.” (at 183) The tribunal stated that under fair and equitable treatment “there is certainly an obligation not to alter the legal and business environment in which the investment has been made”. (at 191)

¹³⁵ Final Award, NAFTA/ICSID(AF) Tribunal, Case No. ARB(AF)/00/3, 30 Apr. 2004.

¹³⁶ *Ibid.*, at 98. However, the tribunal did not specifically refer to “legitimate expectations” as forming a discrete part of the fair and equitable standard under Article 1105. It also did not analyse the elements of breach in any great detail. While *Waste Management II* was cited by the tribunal in *Methanex* on this point, the tribunal did so for its analysis of the expropriation claim under Article 1110 of NAFTA and not for the fair and equitable treatment standard under Article 1105.

¹³⁷ Final Award, NAFTA Arbitration under the UNCITRAL Arbitration Rules, 26 Jan. 2006.

¹³⁸ The tribunal held that “the concept of ‘legitimate expectations’ relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.” (at 147)

¹³⁹ The tribunal deliberately addressed the legitimate expectations aspect of the claim prior to its specific analysis of Articles 1102 (national treatment), 1105 (treatment standards) and 1110 (expropriation) of NAFTA without indicating which Article the claim of legitimate expectations was relevant to.

¹⁴⁰ Dissenting Opinion of Professor Thomas Walde, *See* n.137, at 37. Here, he states: “One can observe over the last years a significant growth in the role and scope of the legitimate expectation principle, from an earlier function as a subsidiary interpretative principle to reinforce a particular interpretative approach chosen, to its current role as a self-standing subcategory and independent basis for a claim under the ‘fair and equitable standard’ as under Art. 1105 of the NAFTA.” Professor Walde’s opinion on this point is not necessarily at odds with the majority opinion. The disagreement between him and the majority of the tribunal related to whether the legitimate expectations standard was applicable on the facts of the case; there was no real disagreement as to whether the standard was to apply, and if so, how.

¹⁴¹ Fietta, Stephen, “The ‘legitimate expectations’ principle under Article 1105 NAFTA: *International Thunderbird Gaming Corporation v. The United Mexican States*”, 7(3) *JWIT* 423 (2006), at 431. This is because most other treaties provide for the fair and equitable treatment standard as well.

to regard legitimate expectations as an additional obligation under the fair and equitable treatment provisions, and again states must query if this addition, along with the others described above, is desirable.

A continued expansionary trend and its danger

Regarding arguments that additions by tribunals to the content of the treatment standards are not founded on any authority, commentators argue that it is unconvincing to confine the meanings of “international minimum standard” and “fair and equitable treatment” as they were understood in the past if they have taken on a different modern meaning.¹⁴² Commentators and the tribunals in *Mondev Int’l, Ltd. v. United States* (hereinafter “*Mondev*”)¹⁴³ and *ADF Group, Inc. v. United States* (hereinafter, “*ADF*”)¹⁴⁴ have affirmed that the treatment standards are to have an evolutionary potential and arbitral tribunals have a role in determining the course of that evolution. Implicit in this accepted concept of evolutionary treatment standards is the continued expansion of the scope of foreign investor rights.¹⁴⁵

States should consider the consequences, described in the preceding sections, of some of the extensions that have been given to both standards by the tribunals and query if such an expansionary trend is indeed desired. The practice of states simply providing for the treatment standards in treaties and then allowing or expecting tribunals to be able to identify or even create new content for these standards, effectively creating new and indeterminate law that is binding on the member states without being given any guidance as to how this should be done, may offend several important values.

¹⁴² For instance, to the modern eye, what is unfair and inequitable need not necessarily be outrageous, egregious or performed in bad faith, as the traditional notion of the treatment standards may require before a breach is found. It is possible for a tribunal to deem a state’s treatment of a foreign investment to be unfair and inequitable without the treatment possessing these characteristics, as explained in *Metalclad*, n. 130, at 97.

¹⁴³ Final Award, ICSID Case No. ARB(AF)/99/2, 11 Oct. 2002. The tribunal said that while the “evolutionary potential” of the minimum standard of treatment did not provide a tribunal with an “unfettered discretion to decide for itself, on a subjective basis, what was ‘fair’ or ‘equitable’ . . . without reference to established sources of law”, it went on to identify “the jurisprudence of arbitral tribunals” as such a source. (at 119)

¹⁴⁴ Final Award, ICSID Case No. ARB(AF)/00/1, 9 Jan. 2003. the tribunal observed that “customary international law . . . is not ‘frozen in time’ and that the minimum standard of treatment does evolve”, and further noted that “what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development”. (at 179) The tribunal specifically referred to arbitral case law as a source of law guiding the evolution of the international minimum standard. (at 184)

¹⁴⁵ *Metalclad*, n. 130, at 98.

First, this does not give fair warning to states so they have a reasonable opportunity to know what is prohibited and may then act accordingly. Instead, states may find themselves liable for obligations they never knew existed. Second, this practice delegates legislative authority to unelected and unaccountable ad hoc tribunals for resolution, with the attendant dangers of arbitrary and erratic application.¹⁴⁶ The analogy drawn from domestic courts also performing quasi-legislative roles is illusory because domestic courts are checked by constitutions and revisions by legislatures possessing democratic mandates. Ad hoc investment tribunals cannot claim the same basis in legitimacy.¹⁴⁷

Measures taken by states and suggested further improvements

In response to the expansive attitudes of some of the abovementioned NAFTA tribunals, the NAFTA Commission issued Notes of Interpretation of Certain Chapter 11 Provisions of 31 July 2001 (hereinafter the “Interpretation”).¹⁴⁸ The Interpretation stated the following three propositions with respect to Article 1105:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” found in Article 1105 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1). Interpretation of Article 1105 (hereinafter the “Interpretation”) comprising of three paragraphs.

The first paragraph of the Interpretation confirms that “international law” in Article 1105 means “customary international law”.¹⁴⁹ While at first glance this

¹⁴⁶ *United States v. Salerno* (1987) 481 US 739, at 745 and *State v. Afanador* (1993) 134 N.J. 162, at 170, providing a general commentary on the dangers of having a system of vague laws.

¹⁴⁷ *Metalclad*, n. 130, at 110.

¹⁴⁸ This is allowed for by Article 2001, which establishes a Free Trade Commission comprising representatives from each NAFTA state and is empowered to resolve disputes arising from the interpretation or application of NAFTA, and Article 1131(2) of NAFTA, which in turn provides that “[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section”.

¹⁴⁹ The first paragraph reads: “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”

appears to be of little significance, as most cases dealing with the treatment standards already purport to be drawing their authority from customary international law,¹⁵⁰ it is possible that they may have actually been referring to simply international law instead. The two are not identical.¹⁵¹ International law refers to the full range of sources in the hierarchy set forth in the Article 38(1) of the Statute of the International Court of Justice,¹⁵² and includes customary international law¹⁵³ and judicial decisions.¹⁵⁴ Thus, single, isolated arbitral decisions fall within the ambit of international law and are applicable by subsequent tribunals instructed to apply “international law” as opposed to “customary international law”, which on the other hand is only a subset of the broader idea of international law, and has been described as “a usage felt by those who follow it to be an obligatory one”, “a common practice of countries”¹⁵⁵ or “a general and consistent practice of states that they follow from a sense of legal obligation”.¹⁵⁶

Customary international law requires for practice that is common and consistent among states. Depending on how attentive future tribunals are to this point, it actually means that single, isolated arbitral decisions that attempt to extend the concepts of international minimum standard and fair and equitable treatment cannot constitute or create new customary international law because they do not and cannot reflect a common and consistent practice among states and cannot form part of the applicable law to be followed by subsequent tribunals. Such an understanding of the first paragraph of the Interpretation would put a stop to the attempts by tribunals in cases like *Occidental*, *Thunderbird*, *Mondev*, *ADF*, *Pope & Talbot*, *Metalclad* and *S.D. Myers* to add unprecedented new content, which is not supported by the common and consistent practice of states, to the treatment standards.¹⁵⁷ This could stem the unexpected and probably unwanted indeterminable creation of new law by the tribunals, as described earlier. However, the post-Interpretation cases like *Thunderbird* do not indicate that this approach will be taken. States thinking of adopting a similar approach may want to highlight the

¹⁵⁰ There is another ramification of this change which is discussed later in this paper.

¹⁵¹ Grantz, *loc. cit.*, n. 31, at 714.

¹⁵² 26 June 1945, 59 Stat. 1055.

¹⁵³ Article 38(1)(b) of the ICJ Statute.

¹⁵⁴ Article 38(1)(d) of the ICJ Statute.

¹⁵⁵ *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664 (2 May 2001), at 62.

¹⁵⁶ This is the understanding of customary international law as purported by the Annex in the newer investment treaties, which are discussed later in this section. See, for instance, Annex A of the 2004 US Model BIT.

¹⁵⁷ To elaborate, in order to establish that certain content constitutes part of the applicable customary law on international minimum standard or fair and equitable treatment, an arbitral tribunal must first satisfy itself that such content is reflected in the general and consistent practice of states. It seems that other than denial of justice, there is no other content that can lay claim to being reflected in the general and consistent practice of states.

significance of the difference between international law and customary international law more clearly.¹⁵⁸

The second paragraph states that “fair and equitable treatment” does not require treatment in addition to or beyond that required by the international minimum standard.¹⁵⁹ This effectively overrules the decision in *Pope & Talbot* that fair and equitable treatment had an additive character. While the second paragraph appears to effectively stifle any future development of new content to the fair and equitable treatment standard, again *Thunderbird* seems to dispel this notion as it appears to have added new content to the standard.

The third paragraph determines that breach of another provision of NAFTA or of a separate international agreement does not establish a breach of Article 1105(1).¹⁶⁰ This beats back the expansive tendencies of *Metalclad* and *S.D. Myers*, which had seemed to suggest the opposite. The issuance of the Interpretation is a clear indication that the NAFTA states were not prepared to accept the outcomes reached by the above tribunals and took action to ensure future arbitral tribunals would reach outcomes more in accordance with their expectations. It must be noted that the Interpretation will only apply directly to NAFTA, though it will be plausible for non-NAFTA states to argue that the minimum standard provisions in other treaties that are similarly worded to Article 1105(1) should be interpreted likewise.

Subsequently, a number of the newer treaties today, such as the US-Australia,¹⁶¹ US-Chile,¹⁶² US-Singapore FTA¹⁶³, the 2004 US Model BIT¹⁶⁴ and the 2004 Canadian Model BIT¹⁶⁵ now contain a lengthier and more comprehensive provision on the minimum standard of treatment. They all incorporate the three paragraphs of the Interpretation within the minimum standard provision,¹⁶⁶ and with the exception of the 2004 Canadian Model BIT, all of them contain an additional provision clarifying

¹⁵⁸ See Ewing-Chow, *loc. cit.*, n. 130, at 771, for some reasons why clearer limits may not have been politically feasible for the NAFTA Commission at that time.

¹⁵⁹ The second paragraph reads: “The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”

¹⁶⁰ The third paragraph reads: “A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

¹⁶¹ Article 11.5.

¹⁶² Article 10.4.

¹⁶³ Article 15.5.

¹⁶⁴ Article 5.

¹⁶⁵ Article 5.

¹⁶⁶ In the 2004 US Model BIT, the first paragraph is reproduced in Article 5(2) and further clarifies in Annex A that “customary international law” should be understood as the “general and consistent practice of States that they follow from a sense of legal obligation”. The second paragraph is reproduced in Article 5(2) and the third paragraph is reproduced in Article 5(3). The changes made in the other treaties are similarly structured. For the US-Singapore FTA, there is no Annex on customary international law but the exact same provision is found in the Exchange of Letters on Customary International Law which are binding on both states.

that “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in “the principal legal systems of the world”.¹⁶⁷ The new provision specifies denial of justice as a cause of action under fair and equitable treatment instead of the international minimum standard.

Some vague aspects of the provision, however, need clarification. The provision does not explain how a legal system may qualify as a “principal legal system of the world”. It also does not address the potential problem of such principal legal systems disagreeing amongst themselves about the requirements for a denial of justice claim.¹⁶⁸ For example, the requirements for “due process” under US law, which should pass muster as a “principal legal system”, may differ from that of other significant legal systems.¹⁶⁹ The standard for substantive due process review under the due process clauses of the Fifth and Fourteenth Amendments of the US Constitution is extremely deferential and only requires that the legislation in question bear some rational relationship to the objectives of the legislature.¹⁷⁰ Under US law, a court will not use substantive due process review to “sit as a superlegislature” and strike down laws it considers to be unwise, inefficient or unfair.¹⁷¹

¹⁶⁷ Article 5(2)(a) of the 2004 US Model BIT, Article 11.5(2)(a) of the US-Australia FTA, Article 10.4(2)(a) of the US-Chile FTA and Article 15.5(2)(a) of the US-Singapore FTA.

¹⁶⁸ This is not an unlikely prospect, and can be portended by a disparity that already exists even over the notion of fair and equitable treatment itself. While presumably not a few significant legal systems would regard concepts such as “equity, fairness, due process and appropriate protection” as relevant to defining fair and equitable treatment, the US has recently argued the opposite. For example, compare cases such as *North Sea Continental Shelf*, ICJ Rep. 1969, at 48; *Diversion of Water from the Meuse (Neth. v. Belg.)*, 28 June 1937, PCIJ Ser. A/B, No. 70 (1937), at 76; *Barcelona Traction*, 5 Feb. 1970, ICJ Rep. 1970, at 85 which have alluded to these concepts as relevant to fair and equitable treatment, against *Methanex. Response of Respondent United States of America (First Submission) To Methanex’s Submission Concerning the NAFTA Free Trade Commission’s July 31, 2001 Interpretation on Article 1105, 26 October 2001*, at 6–7 where the US argues against the application of these concepts to fair and equitable treatment.

¹⁶⁹ *Metalclad*, n. 130, at 95.

¹⁷⁰ See *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, (1993) 508 US 602, at 639 where the court held that “under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means”, and *United States v. Carolene Products*, (1938) 304 US 144 at 152 where the court held that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”

¹⁷¹ In *Exxon Corp. v. Governor of Maryland*, (1978) 437 US 117, at 124, the court held that “the Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation.” See also *Eastern Enterprises v. Apfel*, (1998) 524 US 498, at 537–538, where the court, quoting *Williamson v. Lee Optical of Oklahoma*, (1955) 348 US 483, at 488, held: “The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”

The provision also directs tribunals to examine adjudicatory proceedings, which means the possibility raised in *Loewen* of investors challenging civil verdicts or legitimate rules of civil procedure remains possible. While the NAFTA states may have thought this was an acceptable outcome, other states may want to query whether they think likewise. Finally, the provision indicates that fair and equitable treatment is inclusive of, and hence not limited to, denial of justice. Presumably this is to allow for the flexibility of adding new obligations under fair and equitable treatment that may crystallize through the common and consistent practice of states. However, given the propensity of tribunals to nevertheless recognize certain obligations as being required by fair and equitable treatment even though they are not part of the common and consistent practice of states, it may be a good idea to explicitly limit the content of the fair and equitable treatment standard to denial of justice alone if states want to prevent such expansive tendencies.

Some states like India and Australia have made their stand on the minimum standards provision rather clear by opting for the relatively drastic measure of doing away with the provision altogether in the CECA and FTA,¹⁷² respectively, that they have recently concluded with Singapore. States entirely uncomfortable with the developments that have followed the provision may find this a viable option.

In deciding whether to impose measures to stop the expansion of obligations under the treatment standards, states should weigh the importance of ensuring that their obligations under the treatment provision remain predictable, and of protecting themselves from any unwanted erosion of their sovereignty through the creation of new binding obligations by unelected and unaccountable tribunals, against the need to enhance protection for their own investors and, possibly, enhancing the state's attractiveness as an investment destination by observing and adhering to the newly-created obligations.¹⁷³

THE MOST-FAVORED NATION CLAUSE

Introduction

Today, most treaties contain a Most-Favoured Nation (MFN) clause which usually states that each party to the treaty shall accord to investors of other parties treatment no less favourable than that it accords, in like circumstances, to investors of any

¹⁷² Singapore-Australia FTA, 28 July 2003.

¹⁷³ Despite their negative repercussions, the expansion of obligations through the treatment provision will nevertheless offer better protection for investors. Host states which agree to observe these newly-created obligations may become more attractive investment destinations.

non-party.¹⁷⁴ The effect of an MFN clause in an investment treaty, which shall be referred to as the “primary treaty”,¹⁷⁵ is that if one of the party states of the primary treaty has made an agreement with a third party in another treaty, which shall be referred to as the “secondary treaty”,¹⁷⁶ which favours nationals of that third country over those of the other party state to the primary treaty, nationals from that other party state can claim the additional benefits provided under the secondary treaty via the MFN clause so that they are placed on an equal footing with the nationals from the third country. The purpose of the MFN clause is to prevent discrimination against nationals of different countries and allow for harmonization of the level of protection accorded to foreign investors and their

¹⁷⁴ For example, *see* Article 910(1) of the Australia-Thailand FTA, 1 Jan. 2005, which provides that: “Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to investors of any non-Party.”, and Article 910(2) which provides that: “Each Party shall accord to all covered investments treatment no less favourable than it accords, in like circumstances, to investments in its territory of investors of any non-Party”; Article II(2) of the US-Turkey BIT, 18 May 1990, which provides that: “Each Party shall accord to these investments, once established, and associated activities, treatment no less favorable than that accorded in like situations to investments of its own nationals and companies or to investments of nationals and companies of any third country, whichever is most favorable”; Article II(1) of the US-Czech Republic BIT, 19 Dec. 1992, which provides that: “Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country” and Article 3 of the 1998 German Model BIT, which provides that: “(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State. (2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State.”

¹⁷⁵ For clarification, for the purposes of this paper, the “primary treaty” refers to the treaty that contains the MFN clause that the claimant investor relies upon in a dispute.

¹⁷⁶ For clarification, for the purposes of this paper, the “secondary treaty” refers to the treaty which provides for allegedly more favourable treatment than the treatment in the primary treaty, and is sought to be applied by the claimant investor.

investments.¹⁷⁷ What is uncertain is the extent of the applicability of the clause. While it is generally agreed that the MFN clause applies to substantive provisions¹⁷⁸ in treaties,¹⁷⁹ it is unclear if it extends to procedural rights such as more favourable dispute settlement arrangements negotiated in another treaty. If it does, the consequence is that investors will begin “shopping” for applicable secondary treaties that contain procedural arrangements that are most favourable to them. Consequently, states may never be certain which dispute settlement provisions are to govern in investment disputes.

Contrary to the intentions of the states, the specific dispute settlement arrangements that the states have carefully negotiated for within their primary treaties may be rendered otiose because the MFN clause may allow them to be overridden. The next section examines the relevant arbitral jurisprudence. Generally, while all the tribunals agree that the MFN clause *can* potentially apply to dispute settlement provisions, there is an irreconcilable split as to *when* it applies. The final section of this part of the paper looks at measures that states can take or have taken, in light of the arbitral jurisprudence that has emerged, to ensure that the MFN clause operates in accordance with their expectations.

The arbitral jurisprudence and how it will affect states

The first modern tribunal to specifically address the question of whether the MFN clause is applicable to dispute settlement provisions was the tribunal in *Emilio Augustin Maffezini v. Kingdom of Spain* (hereinafter “*Maffezini*”),¹⁸⁰ where the tribunal held that the MFN clause in the primary treaty between Argentina and Spain¹⁸¹

¹⁷⁷ See UNCTAD, *Most-Favored Nation Treatment* (New York: United Nations, 1999), at 1, where the United Nations Conference on Trade and Development defines the MFN standard as “a core element of international investment agreements. . . . The MFN standard gives investors a guarantee against certain forms of discrimination by host countries, and it is crucial for the establishment of equality of competitive opportunities between investors from different foreign countries.” It was also mentioned in the International Court of Justice case of *Anglo-Iranian Oil Company*, Decision of 27 Aug. 1952, *ICJ Rep. 1952*, at 192 that MFN clauses “maintain at all times fundamental equality without discrimination among all of the countries concerned”.

¹⁷⁸ Examples of substantive provisions include protection against uncompensated expropriation through guarantees of treatment standards discussed earlier in the second and third parts of this paper respectively.

¹⁷⁹ Hsu, Locknie, “MFN and dispute settlement: When the twain meet”, 7(1) *JWIT* 25 (2006), at 25.

¹⁸⁰ Decision on Objections to Jurisdiction, ICSID Case No. ARB/97/7, 25 Jan. 2000, 16 *ICSID Rev. – FILJ* 212 (2003), 5 *ICSID Rep.* 396 (2002).

¹⁸¹ Agreement for the Protection and Reciprocal Protection of Investments, Argentina-Spain, 3 Oct. 1991, in 3 *ICSID, Investment Promotion and Protection Treaties* (Release 97-2, Aug. 1997). Article IV of the BIT was the MFN clause and it read that: “In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the

applied not just solely to provisions offering substantive protection to investments, but also to provisions dealing with dispute resolution.¹⁸² The case involved an Argentine investor who tried to invoke the MFN clause in the Argentina-Spain BIT in order to avail himself of the dispute resolution arrangements in the Chile-Spain BIT¹⁸³ (the secondary treaty), which unlike those in the Argentina-Spain BIT,¹⁸⁴ were supposedly more favourable to the investor as they allowed for arbitration to be commenced earlier and imposed no requirement for resort to local courts before commencing arbitration.¹⁸⁵ In reaching its conclusion, the tribunal relied primarily on the *Ambatielos* award of 1956,¹⁸⁶ where the commission of arbitration decided that the MFN clause could apply to the “administration of justice”,¹⁸⁷ as authority for its holding.¹⁸⁸ The tribunal rationalized that the dispute settlement provision in

investments made in its territory by investors of a third country.” (unofficial translation from Spanish text.) The original Spanish text reads: “En todas las materias regidas por el presente Acuerdo, este tratamiento no será menos favorable que el otorgado por cada Parte a las inversiones realizadas en su territorio por inversores de un tercer país.” See ICSID, *Investment Treaties*, (1983–) for the original text.

¹⁸² See n. 180, at 54.

¹⁸³ The dispute resolution process in the Chile-Spain BIT entitles an investor to begin arbitration once a six-month negotiation period has expired, with no requirement to go through the local courts of the host state.

¹⁸⁴ Article X of the Argentina-Spain BIT requires a claimant first to submit its investment dispute to the Spanish courts, and then to defer commencing ICSID arbitration until either (i) a local court has ruled on the dispute; or (ii) eighteen months have passed with no decision.

¹⁸⁵ It was important for the investor to invoke the dispute resolution provision in the Chile-Spain BIT because the investor had not brought his dispute before the Spanish courts, as required by Article X of the Argentina-Spain BIT.

¹⁸⁶ *Ambatielos* (Greece v. United Kingdom), United Nations, 12 *RIAA* (1963).

¹⁸⁷ In *Ambatielos*, the MFN clause primary treaty applied to “all matters relating to commerce and navigation”. The commission of arbitration held that: “It is true that the ‘administration of justice’, when viewed in isolation, is a subject-matter other than ‘commerce and navigation’, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation. Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favored-nation clause, when the latter includes ‘all matters relating to commerce and navigation’.” *Ibid.*, at 107.

¹⁸⁸ The tribunal in *Maffezini* also referred to a prior ICSID arbitration award in *Asian Agricultural Products Limited v. Republic of Sri Lanka*, Award, ICSID Case No. ARB/87/3, 27 June 1990, *ICSID Reports*, Vol. 4, 246. (at 51) There, the investor sought to rely on the more favourable dispute settlement provisions in the Sri Lanka-Switzerland BIT by relying on the MFN clause in the Sri Lanka-United Kingdom BIT. The tribunal found that the secondary treaty did not contain provisions more favourable than those in the primary treaty, and for that reason did not permit the invocation of the MFN clause. However, by considering this, it seems that had such more favourable treatment been shown, the tribunal would have allowed for the MFN clause to apply to the dispute settlement provisions. See UNCTAD, *op. cit.*, n. 177, at 27.

an investment treaty is a fundamental element “inextricably related to the protection of foreign investors” like the substantive provisions and should therefore not be treated differently.¹⁸⁹ The tribunal also explained that applying the MFN clause to dispute settlement arrangements “might result in the harmonisation and enlargement of the scope of such arrangements”.¹⁹⁰

After adopting this stance, the tribunal examined the negotiating history of the Argentina-Spain BIT¹⁹¹ as well as the treaty practice of Spain vis-à-vis BITs with other countries, and found that Spain appeared to favour access to arbitration unfettered by a requirement of prior court action.¹⁹² Subsequently, the tribunal was seemingly mindful of the potential negative effects of its decision, namely treaty-shopping and the consequent uncertainty it would cause,¹⁹³ and sought to limit the scope of its decision by stating that the MFN clause should not be used to “override public policy considerations that the contracting parties may have envisaged as fundamental conditions for their acceptance of the agreement, particularly if the beneficiary is a private investor”.¹⁹⁴ It listed four situations as non-exhaustive¹⁹⁵ examples of when the clause should not apply.

The first situation is where one of the treaty states conditions its consent to arbitration on the exhaustion of local remedies by investors, as Article 26 of the ICSID Convention permits, because, the tribunal explained, “the stipulated condition reflects a fundamental rule of international law”, which presumably is that the unilateral will of one of the parties shall be decisive.¹⁹⁶

The second situation is where there is a “fork in the road” provision which requires investors to make a final and irreversible choice of submission to either the local courts or arbitration, because to apply the MFN clause in this situation “would

¹⁸⁹ See n.180, at 54.

¹⁹⁰ *Ibid.*, at 62.

¹⁹¹ *Ibid.*, at 57.

¹⁹² *Ibid.*, at 57, 58. The tribunal said that “The Claimant has convincingly explained that at the time of the negotiations of the Agreement, Argentina still sought to require some form of prior exhaustion of local remedies, while Spain supported the policy of a direct right of submission to arbitration, which was reflected in the numerous agreements it negotiated with other countries at that time. (at 57)

¹⁹³ *Ibid.*, at 63.

¹⁹⁴ *Ibid.*, at 62.

¹⁹⁵ *Ibid.*, at 63, the tribunal indicates that the four enumerated situations are non-exhaustive when it says that “[o]ther elements of public policy limiting the operation of the [MFN] clause will no doubt be identified by the parties or tribunals”.

¹⁹⁶ Dolzer, Rudolf and Terry Myers, “After *Tecmed*: Most-favoured-nation clauses in investment protection agreements”, 19 *ICSID Rev.* 49 (2004), at 53. Article 26 of the ICSID Convention states that: “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

upset the finality of arrangements that many countries deem important as a matter of public policy”.

The third situation is where there is an express reference to a specific forum, such as ICSID. In such a case, investors cannot refer to “a different system of arbitration”. However, no detailed reasons were given for this conclusion.¹⁹⁷

The fourth situation is where there are express provisions on a “highly institutionalised system of arbitration that incorporates precise rules of procedure”, such as that of NAFTA, because “these very specific provisions reflect the precise will of the contracting parties”.¹⁹⁸

The tribunal did not explain exactly how it arrived at its list of public policy exceptions, which has been criticized as lacking basis and authority.¹⁹⁹ However, it may be possible to rationalize the four stated exceptions, and view the attempts of the tribunal to examine the negotiating history behind the primary treaty and the treaty practice of the respondent state, as being brought about by the “public policy consideration” of identifying and giving effect to the will or intent of the contracting states. After all, Article 31(4) of the Vienna Convention on the Law of Treaties²⁰⁰ does provide that, as a general rule of treaty interpretation, “[a] special meaning shall be given to a term if it is established that the parties so intended.” Through their negotiating history, treaty practice, or by their insertion of a sufficiently specific regulation on dispute settlement, the contracting states may be presumed to be indicating their will or intent that the dispute settlement provision and the MFN clause should be interpreted such that they do not permit another regulation that is “borrowed” from a secondary treaty via the MFN clause to override the original dispute settlement arrangements.²⁰¹

However, this approach will not be entirely satisfactory as it would involve some second-guessing of the intentions of the states, or a narrowing of the scope of the MFN clause merely on the basis of perceived limitations that have not been expressly stipulated by the parties.²⁰² Whatever its merits or credibility, *Maffezini* will have a significant influence on how MFN clauses apply to dispute settlement provisions. The result of the decision appears to be that, as a starting point, the MFN clause will apply to dispute settlement provisions unless the respondent state can

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, at 63. Also, see UNCTAD, *op. cit.*, n. 177, at 28.

¹⁹⁹ In the subsequent case of *Plama Consortium Ltd. v. Republic of Bulgaria*, Award, ICSID Case No. ARB/03/24, which will be discussed later, the tribunal remarked that it was “puzzled as to what the origin of [the *Maffezini*] ‘public policy considerations’ is”. (at 221) Also, see UNCTAD, *op. cit.*, n. 177, at 29 and Freyer, Dana H. & David Herlihy, “Most-favored-nation treatment and dispute settlement in investment arbitration: Just how ‘favored’ is ‘most-favored?’”, 20(1) *ICSID Rev.* 58 (2005), at 67.

²⁰⁰ 23 May 1969.

²⁰¹ See n.180, at 54.

²⁰² Gaillard, Emmanuel, “Establishing jurisdiction through a most-favoured-nation clause”, 233(105) *NYLJ* (2005), at 2.

argue otherwise by showing that there was no such intention for it to apply, via the negotiating history of the primary treaty, its treaty practice or by showing that the dispute settlement provisions fall under one of the four exceptions, or that the provisions are specific enough to convey the intention of the contracting states that they are not to be overridden by dispute settlement arrangements from a secondary treaty.

Thus, the specificity of the dispute settlement provisions becomes a crucial determinant. States with treaties that provide for the typical, generic MFN clause²⁰³ and very general dispute settlements arrangements will run the risk of having those arrangements overridden by those from a secondary treaty, via the MFN clause, if a tribunal decides to endorse the approach in *Maffezini*. However, given that most of the newer investment treaties today contain very sophisticated and detailed prescriptions for the settlement of disputes, *Maffezini* is likely to affect only the older treaties which tend to provide for more general arrangements.²⁰⁴ *Maffezini* was subsequently endorsed by the tribunals in the decision on jurisdiction of *Siemens A.G. v. The Argentine Republic* (hereinafter “*Siemens*”)²⁰⁵ and *Tecmed*.²⁰⁶

There has been a backlash against the *Maffezini* approach in two cases. In *Salini Construttori S.p.A. v. The Hashemite Kingdom of Jordan* (hereinafter “*Salini*”),²⁰⁷ the tribunal expressed its concern about the danger of treaty shopping which the

²⁰³ This means no specific limitations are placed on the MFN clause. Placing limitations on MFN clauses is discussed later is a measure some states have taken to limit the scope of the MFN clause.

²⁰⁴ As an example, it may be useful to compare the 2004 US Model BIT with the US-Senegal BIT, 25 Oct. 1990. The dispute settlement provisions for the former are much lengthier and detailed than the latter’s.

²⁰⁵ Decision on Jurisdiction, ICSID Case No. ARB/02/8, 3 Aug. 2004. The tribunal stated that even though the MFN clause in the primary treaty here, which was to apply to “treatment” of “investments” and “activities related to the investments”, was a narrower formulation than the MFN clause used in the primary treaty in *Maffezini*, which contained the expression “all matters subject to this Agreement”, the MFN clause here was nevertheless sufficiently wide to be applicable to dispute settlement arrangements (at 103). In fact, the tribunal appeared to go further than *Maffezini* when it said: “In fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted” (at 106). The Final Award of the *Siemens* case is discussed later.

²⁰⁶ The tribunal approved of the *Maffezini* ruling but effectively added a fifth exception to the four enumerated in *Maffezini* by holding that there are certain matters that “due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties” and “cannot therefore be impaired by the principle contained in the most-favoured nation clause” (at 69). Here, the tribunal held that “the time dimension of the application of [the BIT’s] substantive provisions” was one such “core” item. Thus, an MFN clause could not be invoked to give the basic treaty retroactive effect.

²⁰⁷ Decision on Jurisdiction, ICSID Case No. ARB/02/13, 15 Nov. 2004.

Maffezini approach would bring about.²⁰⁸ In deciding that the MFN clause did not apply to the dispute settlement provisions in the present case, the tribunal adopted a different approach by focusing on the wording of the MFN clause. It distinguished the MFN clause in the present primary treaty from those in *Maffezini* and *Ambatielos*,²⁰⁹ explaining that in those cases the MFN clauses referred to “all matters subject to this Agreement” and “all matters relating to commerce and navigation” respectively, while the MFN clause in the present primary treaty did not include any provision extending its scope of application to dispute settlement and did not envisage “all rights or all matters covered by the agreement”.²¹⁰

However, the tribunal seems to have omitted to address the fact that the tribunal in *Siemens* had permitted the claimant to rely on the MFN clause even though it did not refer to “all matters” of the agreement.²¹¹ The *Siemens* tribunal was of the opinion that, while the MFN clause, which applied to “treatment” of “investments” and “activities related to the investments”, was a narrower formulation than the MFN clause used in the primary treaty in *Maffezini*, the MFN clause was nevertheless sufficiently wide to be applicable to dispute settlement arrangements.²¹²

Next, the *Salini* tribunal found that the claimants had not shown that the common intention of the contracting states was to have the MFN clause apply to dispute settlement.²¹³ From this, it appears that, while the tribunal still, like the *Maffezini* tribunal, places emphasis on the intention of the states, it seems to have adopted a different starting point, or allocation of burden of proof, from *Maffezini* although the tribunal did not say so explicitly. Apparently the starting point here is that the MFN clause will not apply to dispute settlement, and it is for the claimant to show that the

²⁰⁸ The tribunal commented that it “shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by the authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of ‘treaty shopping’”. (at 115)

²⁰⁹ The MFN clause of the primary treaty, Article 3 of the Italy-Jordan BIT, states: “Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effect by, and income accruing to, its own nationals or investors of Third States.”

²¹⁰ See n.207, at 117–118.

²¹¹ Dolzer and Myers, *loc. cit.*, n. 196, at 74.

²¹² See n.205, at 103.

²¹³ See n.207, at 118. The tribunal then found that the specific dispute resolution procedures in the primary treaty actually evidence an opposite intention, continuing: “Quite on the contrary, the intention as expressed in [the dispute settlement provision,] Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party such that disputes might be settled in accordance with the procedures set forth in the investment agreements” (emphasis in original). Article 9(2) of the primary treaty, the Italy-Jordan BIT, states that: “In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.”

states intended otherwise, presumably via the negotiating treaty, treaty practice or the wording of the dispute settlement provisions and the MFN clause.²¹⁴

The most sweeping rejection of the *Maffezini* approach comes from the tribunal in *Plama Consortium Ltd. v. Republic of Bulgaria* (hereinafter “*Plama*”).²¹⁵ Here, the primary treaty had provided for a specific, albeit limited, form of dispute settlement²¹⁶ which the claimant sought to replace, via the MFN clause in the primary treaty,²¹⁷ with ICSID arbitration which a secondary treaty provided for.²¹⁸ The tribunal decided that the MFN clause could not apply to displace the specific dispute settlement arrangements under the primary treaty.²¹⁹ This conclusion could have been reached under the *Maffezini* framework because the dispute settlement provision here would have been sufficiently specific to fall within one of the four exceptions precluding the application of the MFN clause.

However, the *Plama* tribunal deliberately started on a different starting point from *Maffezini*, similar to what the *Salini* tribunal did.²²⁰ It opined that where an MFN clause is silent on its applicability to dispute settlement, “one cannot reason *a contrario* that the dispute settlement provisions must be deemed to be incorporated.”²²¹ The tribunal then proposed its own starting point: an MFN clause should not apply to dispute settlement provisions, subject to a sole exception – that it leaves no doubt that the states intended to incorporate them.²²² Nevertheless, the tribunal

²¹⁴ As pointed out in Dolzer and Myers, *loc. cit.*, n. 196, at 75, this can be inferred from the tribunal’s conclusion, at 119, that “the Claimants have not cited any practice in Jordan or Italy in support of their claims” and that “[f]rom this, the tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned.”

²¹⁵ Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 Feb. 2005.

²¹⁶ The dispute settlement provision of the primary treaty, Article 4 of the Bulgaria-Cyprus BIT, limited Bulgaria’s consent to arbitration to ad hoc UNCITRAL arbitration of disputes “with regard to the amount of compensation” due to an investor only after the merits of the investor’s claims had first been adjudicated “through the regular and legal procedure[s] of [Bulgaria].”

²¹⁷ The MFN clause, Article 3 of the Bulgaria-Cyprus BIT, reads: “Each Contracting Party shall apply to the investments in its territory of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states.”

²¹⁸ The dispute resolution provisions of other BITs signed by Bulgaria, such as the Bulgaria-Finland BIT, provides for ICSID arbitration of a broader class of investment disputes.

²¹⁹ The tribunal explained that “[w]hen concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto.” (at 212)

²²⁰ Dolze and Myers, *loc. cit.*, n. 196, at 77.

²²¹ See n.215, at 203. The tribunal noted that it “was puzzled as to what the origin of [*Maffezini*’s] ‘public policy considerations’ [test] is”, the tribunal observed that the potential exceptions to *Maffezini*’s starting point would “take away much of the breadth of the preceding observations made by the tribunal in [that case].” (at 221)

²²² *Ibid.*, at 223. The tribunal’s exact words were that “the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute

did not state what degree of expression would amount to the required “no doubt” standard, other than citing the uncontroversial example of the UK Model BIT which expressly states that the MFN clause extends to dispute settlement.²²³ In particular, the tribunal did not clarify if the expression “all matters subject to this Agreement” found in the MFN clause at issue in *Maffezini* would have met its “no doubt” standard.²²⁴

Despite the lack of clarification as to its exact requirements, it appears that under the apparently more conservative “no doubt” test of *Plama*, which presumes as a starting point that the MFN clauses are inapplicable, MFN clauses are unlikely to be applied to dispute settlement as readily as under the *Maffezini* approach. Its “no doubt” test, with only a single exception, also provides more certainty than the *Maffezini* approach, which may contain other potential exceptions that are yet to be determined. Because of these reasons, states will probably welcome the *Plama* approach.

Nonetheless, the *Plama* approach suffers from the same lack of authority and basis as the *Maffezini* approach.²²⁵ Furthermore, the three most recent decisions on the subject, namely *Cammuzi Int’l S.A. v. Argentine Republic* (hereinafter “*Cammuzi*”),²²⁶ *Gas Natural S.D.G., S.A. v. Argentine Republic* (hereinafter “*Gas Natural*”)²²⁷ and the final award of *Siemens*,²²⁸ have all sided with the *Maffezini* approach.

settlement provisions in whole or in part set forth in another treaty, unless the MFN provision leaves no doubt that the Contracting Parties intended to incorporate them.” Like the approaches of the tribunals in *Maffezini* and *Salini*, the emphasis of the *Plama* approach remains on giving effect to the intention of the states.

²²³ *Ibid.*, at 204. Article 3(3) of the U.K. Model BIT explicitly states that for the avoidance of doubt the guarantee of MFN treatment shall apply to Articles 1 to 11 of the treaty, thereby including the dispute settlement provisions which are found in Article 8.

²²⁴ Dolser and Myers, *loc. cit.*, n. 196, at 78.

²²⁵ UNCTAD, *op. cit.*, n. 177, at 34.

²²⁶ Decision on Jurisdiction, ICSID Case No. ARB/03/7, 10 June 2005. Here, although the MFN clause in the primary treaty did not explicitly refer to dispute settlement, the tribunal nonetheless gave it the same effect accorded to the MFN clauses in *Maffezini* and *Siemens*, holding at [34(iii)] that “[c]onsistent with the most-favoured nation clause (Article 4 of the Treaty), invoked by *Cammuzi* and applicable in the present case . . . the Claimant may resort directly to arbitration, without having to comply with the [18 month waiting period in the Luxembourg-Argentina BIT].” (translation from *supra* note 197 at 79.) The tribunal also did not consider the “no doubt” test adopted in *Plama*.

²²⁷ Decision on Jurisdiction, ICSID Case No. ARB/03/10, 17 June 2005. The tribunal held that: “Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favoured-nation provisions in BITs should be understood to be applicable to dispute settlement.” (at 49) This is an adoption of the *Maffezini* starting point.

²²⁸ Final Award, 6 Feb. 2007, at 68, where the tribunal distinguished *Plama* and *Salini* as situations where the respective tribunals faced extensions of the MFN clause to situations widely different from the facts considered by the tribunals in the present case and in *Maffezini* or *Gas*

An alternative way of viewing the entire series of cases is to classify them according to the purpose for which the MFN clause was invoked. In *Maffezini*, *Siemens*, *Cammuzzi* and *Gas Natural*, the tribunals gave effect to MFN clauses to overcome admissibility requirements, such as the requirements to submit disputes initially to local courts for an 18-month period. This merely affected the timing of the host state's consent to ICSID arbitration and allowed tribunals to hear, more promptly, claims over which they would have had jurisdiction eventually. In contrast, the claimants in *Salini* and *Plama* were more ambitiously seeking to invoke the MFN clause to vest ICSID tribunals with jurisdiction over a class of claims for which ICSID jurisdiction had specifically been excluded under the primary treaty. Viewing the cases this way, it appears the MFN clause cannot be used to effect more dramatic changes to the dispute settlement arrangements, such as importing an entirely different dispute settlement regime, or creating a consent to arbitration that is otherwise lacking.²²⁹

While the *Maffezini* approach appears at present to be in the ascendency, the arbitral jurisprudence on this issue cannot yet be deemed settled. Given this, states should consider taking more concrete measures to ensure that MFN clauses operate according to their expectations as far as possible.

Measures taken by states and suggested further improvements

States can pre-empt unwanted extensions of the MFN standard by determining beforehand if the MFN clause is to apply to dispute settlement. This can be done by ensuring that the MFN clause in their treaties expressly includes or excludes dispute settlement provisions in order to remove all uncertainty. For instance, Article 3(3) of the UK Model BIT explicitly states that the guarantee of MFN treatment shall apply to Articles 1 to 11 of the treaty, thereby including the dispute settlement provisions which are found in Article 8. A less laudable example would be the MFN clauses in the 2004 US Model BIT and NAFTA, which provide that MFN treatment is limited to the "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments".²³⁰ While this seems

Natural. According to the tribunal here, "[t]he Claimant in *Salini* sought to include, through the application of a MFN clause, an umbrella clause where the basic treaty had none. In *Plama*, there was no ICSID clause in the basic treaty. There had never been any question that the parties to these proceedings agreed to ICSID jurisdiction and the issue was avoidance, through the MFN clause, of a procedural requirement that Argentina has consistently dispensed within the investment treaties it has concluded since 1994."

²²⁹ Dolzer and Myers, *loc. cit.*, n. 196, at 82–83.

²³⁰ Article 3 of 2004 US Model BIT and Article 1103 of NAFTA. Other treaties like US-Singapore (Article 15.4), US-Chile (Article 10.3) and US Australia (Article 11.4) contain similar MFN clauses.

to exclude dispute settlement,²³¹ it is plausible to argue that the “management” of an investment actually includes the dispute procedures to protect it.²³²

A second approach is to insert what some negotiators call a “disappearing footnote” such as that in the draft of the Free Trade Area of the Americas (hereinafter “FTAA”), which expressly explains whether an MFN clause includes or excludes dispute settlement.²³³ The footnote will subsequently be removed from the final treaty text but will remain in the negotiating history of the treaty for future reference.²³⁴

A third solution for states, as highlighted earlier in Section B, would be to provide for specific dispute settlement arrangements in their treaties because specific arrangements are less likely to be overridden via the MFN clause as they will probably fall under one of the four exceptions under the *Maffezini* approach.

Lastly, some states, such as Australia and India, have, respectively, in their FTA and CECA with Singapore, elected to omit the MFN clause altogether, as they did with the minimum standards provision.

Earlier, the second and third parts of this paper highlighted some recent measures taken by states to clamp down on unwanted expansionary trends in expropriation and minimum treatment standards by drafting their provisions in newer treaties differently in response. Their efforts may potentially be undermined if investors rely on the MFN clauses in these newer treaties to argue that they are entitled to import the expropriation and minimum standard provisions from the older treaties, which offer relatively more favourable treatment to them. To prevent this, states may also want to exclude the MFN clause from the expropriation and treatment standard provisions.

²³¹ The tribunal in *Plama*, at [203], did however comment on NAFTA’s Article 1103 as a clear example where the MFN clause explicitly excludes dispute settlement provisions.

²³² Gagne and Morin, *loc. cit.*, n. 107, at 375.

²³³ This technique was highlighted by the tribunal in *Plama* (at 202). Footnote 13 to the FTAA draft of 21 November 2003 reads: “Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties’ shared understanding of the Most-Favored-Nation Article and the *Maffezini* case. This footnote would be deleted in the final text of the Agreement: The Parties note the recent decision of the arbitral tribunal in the *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38–64 (January 25, 2000), reprinted in 16 *ICSID Rev.-FILJ* 212 (2002). By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.”

²³⁴ UNCTAD, *op. cit.*, n. 177, at 35–36.

CONCLUSION

The preceding parts of this paper have attempted to highlight some of the uncertainty caused by three aspects of investment treaties. Knowledge of these concerns will help states to respond to the undesired consequences that have emerged from the way arbitral tribunals have interpreted and applied what are sometimes very common and basic provisions in investment treaties.

States which are currently negotiating for new treaties can pre-empt some of these ramifications by negotiating for appropriately worded provisions with a clearer understanding of the exact commitments they are making through the provisions. Lessons can also be learnt from the measures some states have already taken to counter some of the unwanted consequences.

For states which are already members of treaties that contain provisions which have been interpreted and applied in ways giving unwanted results, it may be necessary to go through the proactive but probably cumbersome process of renegotiating their treaties, either by amendment or through the issue of joint diplomatic notes, so that problematic provisions can be reworded and the treaties can be interpreted and applied in accordance with the intentions, expectations and policy stances of the member states.²³⁵

As a new generation of provisions are drafted, and present provisions reworded, they will be put to the test by arbitral tribunals. It is never easy to predict the impact of a provision subjected to the fertile arbitral imagination. A new series of unexpected and unwanted consequences may result from the interpretation and application of the new provisions. In anticipation of this, states currently negotiating new treaties will do well to provide for alternative epistemological mechanisms to facilitate future amendments or joint binding interpretations of their treaties.

Basically, the advice generally given to buyers of products to check on their goods applies likewise to host states buying into some of these provisions as suggested by capital exporting states – *caveat emptor*: buyer beware.

²³⁵ UNCTAD, *op. cit.*, n. 177, at 36.

SOME ASIAN STATES' OPPOSITION TO THE CONCEPT OF WAR CRIMES IN NON-INTERNATIONAL ARMED CONFLICTS AND ITS LEGAL IMPLICATIONS*

Zhu Lijiang†

INTRODUCTION

“Asia was the cradle of international criminal justice.”¹ However, Asia lags behind many other continents in terms of the vindication of international criminal justice, even Africa. As of 10 April 2006, only eight Asian States had become State parties to the Rome Statute of the International Criminal Court (ICC)², namely Afghanistan, Cambodia, Cyprus, Jordan, Mongolia, Republic of Korea, Tajikistan and East Timor. In addition, 13 Asian States signed it, but did not ratify it, namely Bahrain, Bangladesh, Iran, Israel,³ Kuwait, Kyrgyzstan, Oman, Philippines, Syrian Arab Republic, Thailand, United Arab Emirates, Uzbekistan and Yemen. Most of them are middle-sized or small States in Asia. Among the only seven States voting against the Rome Statute in the United Nations Conference of Plenipotentiaries on the Establishment of an ICC (hereinafter “Rome Conference”) from 15 June to 17 July 1998, five were Asian States, namely the People’s Republic of China (PRC), Israel,

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¹ Song, Sang-Hyun, “The International Criminal Court: Impartial and efficient international justice for Asia and the world”, in Gao Mingxuan and Zhao Bingzhi (eds.), *The International Criminal Court: Choice of China* (Beijing: Chinese People’s Public Security University Press, 2005), at 17. Judge Song is one of the two judges from the Asian States sitting in the ICC.

² 2187 UNTS 90.

³ Israel signed the Rome Statute on 31 December 2000. However, On 28 August 2002, the UN Secretary-General received from the Government of Israel the following communication: “. . . in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [. . .] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.”

Iraq, Qatar and Yemen,⁴ and the majority of the 21 abstaining States were also the Asian States. One of the main reasons why the Asian States are so reluctant to ratify or accede to the Rome Statute is the provisions of war crimes in non-international armed conflicts (hereinafter “internal war crimes”) therein. Some Asian States even expressed their clear opposition to the concept of internal war crimes and argued that war crimes could only be conducted in the context of international armed conflicts.

The purpose of this study is to examine the opposition of some Asian States to the concept of internal war crimes and its legal implications in international law. How many Asian States oppose the concept? Why do they oppose? Is the opposition valid in international law? And what is the legal consequence for the opposition in international law? For these purposes, it consists of four parts, besides the introduction and concluding remarks. I will explore the historical origin of the concept of internal war crimes and its recent development in international law in part II. In the third part, the opposition of some Asian States to the concept and the reasons for the opposition will be provided. Part four is the core of this study, which deals with the legal implications of the opposition in international law. Although it is exaggerated to say there is an “Asian international law” with respect to this concept, the challenge to it is not totally impossible. I will question the decision of the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY) in the *Tadić* case in 1995 and other academic opinions with respect to the concept in terms of customary international law or international *jus cogens*.

THE HISTORICAL ORIGIN OF INTERNAL WAR CRIMES IN INTERNATIONAL LAW AND ITS RECENT DEVELOPMENT

The concept of war crimes before the beginning of the 1990s

In traditional international law before the First World War (WWI) it was unimaginable that the individual could violate laws or customs of war.⁵ Should the individual violate them, he or she could only be suppressed in domestic courts by domestic law.⁶ Furthermore, there were amnesty provisions for those who violated

⁴ Scharf, Michael P., “Results of the Rome conference for an international criminal court”, <http://www.asil.org/insights/insigh23.htm> (visited on 7 October 2006).

⁵ For the history before 1648, see Green, Leslie C., *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester: Manchester University Press, 2000), at 20–24; *id.*, “International regulation of armed conflicts”, in Bassiouni, M. Cherif (ed.), *International Criminal Law*, 2nd ed. (Ardsey: Transnational Publishers, Inc., 1999), at 355–360; Green, Leslie C., “Criminal responsibility of individuals in non-international conflicts”, 45 *German Yearbook of International Law* 82–85 (2002).

⁶ Jescheck, Hans-Heinrich, “International crimes”, in Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, Vol. II (1995), at 1119.

them in many peace treaties before WWI.⁷ The Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1907 (1907 Hague Convention IV) did not stipulate any provision concerning individual criminal responsibility.⁸ It merely established the state responsibility in the form of compensation in article 3. The idea that individuals who violated laws or customs of war should entail criminal responsibility in international law and be punished by an international tribunal was reactivated after WWI.⁹ The Peace Treaty of Versailles of 1919 made it realized through articles 227 and 228. Although not put into practice due to the asylum granted to the German Emperor William II of Hohenzollern by the Dutch government, they were one of the milestones to the realization of individual criminal responsibility in international law by enriching the previous simple suppression measures against individuals violating law or customs of war. It was the first time for the international community to attempt at realizing the individual criminal responsibility by establishing an international tribunal directly under international law. However, there was no expression of “war crimes” in the Peace Treaty of Versailles of 1919, but the expression of “a supreme offence against international morality and the sanctity of treaties” or “acts in violation of the laws and customs of war” without any further definition.¹⁰

The international convention which contained the expression of “war crimes” and their definitions for the first time in the history of international law was the Charter of the International Military Tribunal (IMT) in 1945. Article 6 (b) of the Charter was important because it not only reiterated the principle of individual criminal responsibility, but defined it as well. A similar provision was also contained in the Charter of the International Military Tribunal for the Far East (IMTFE). What is more significant is that both article 6 (b) of the Charter of the IMT and article 5 (b) of the Charter of the IMTFE were eventually put into practice. Their definitions of war crimes were adopted by Resolution 95 (I) of the

⁷ Domb, Fania, “Treatment of war crimes in peace settlements: Prosecution or amnesty?”, in Dinstein, Yoram & Mala Tabory (eds.), *War Crimes in International Law* (The Hague: Martinus Nijhoff Publishers, 1996), at 305–321.

⁸ Jia, Bing Bing, “The differing concepts of war crimes and crimes against humanity in international criminal law”, in Goodwin-Gill, Guy S. and Stefan Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Clarendon Press, 1999), at 245.

⁹ For example, the British scholar Professor Bellot called for trials of those who violated laws or customs of war by establishing an impartial international tribunal in 1916. See Ferencz, Benjamin B., “International Criminal Court”, in Bernhardt, R. (ed.), n. 6, at 1123.

¹⁰ But see Report of the Commission on the Responsibility of the Authors of War and Enforcement of Penalties (29 March 1919) (excerpts), in McDonald, Gabrielle Kirk and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Volume II, Part I, Documents and Cases (The Hague: Kluwer Law International Law, 2000), at 41–42. See also Sandoz, Yves, “Penal aspects of international humanitarian law”, in Bassiouni, n. 5, at 49–50.

United Nations (UN) General Assembly (GA) in 1946¹¹ and also in the Principle of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal by the UN International Law Commission (ILC) in 1950.¹² Article 2 (12) of the Draft Code of Offences against the Peace and Security of Mankind adopted by the ILC in 1954 considered war crimes as “the offences against the peace and security of mankind”, and defined them as “acts in violation of the laws or customs of war”.¹³ Accordingly, “war crimes” means “acts in violation of the laws or customs of war”.¹⁴ Since almost all the treaties in the field of laws or customs of war before the Second World War (WWII) regulated the hostilities conducted in the context of international armed conflicts, it was accepted that war crimes could only be conducted in international armed conflicts. In other words, traditionally, the laws or customs of war were irrelevant to non-international armed conflicts.¹⁵

However, non-international armed conflicts have been of concern to the international community since WWII. The common article 3 of the four Geneva Conventions of 1949 is the first article to regulate the hostilities between conflicting parties in non-international armed conflicts in international conventions. The International Court of Justice (ICJ) declared it constituted the “minimum yardstick”¹⁶ applicable to armed conflicts, whether international or not, in the judgment of the *Nicaragua* case in 1986. It is widely accepted by international lawyers that the common article 3 is a rule of customary international law, and binds all States, even those States which have not ratified the four Geneva Conventions.¹⁷ However, the common article 3 is not covered by the “grave breaches” regime in the four Geneva Conventions. Thus, no article in the four Geneva Conventions requires the State parties to criminalize the violations and impose criminal penalties on the individual violators.¹⁸ The common article 3 was supplemented and developed by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of

¹¹ UNGA Res. 95 (I) (1946), UN Doc.A/64/Add.1.

¹² See Principle VI (b), *ILC Yb.*, 1950, Vol. II, para. 97.

¹³ See *ILC Yb.*, 1954, Vol. II. Cf. Article 20 of the *Draft Code of Crimes against the Peace and Security of Mankind* and its commentaries adopted by the ILC in 1996.

¹⁴ See commentary (1) of Article 20 of the *Draft Code of Crimes against the Peace and Security of Mankind* adopted by the ILC in 1996, *ILC Yb.*, 1996, Vol.II, Part II, p.54.

¹⁵ Green, n.5, *The Contemporary Law of Armed Conflict*, at 44.

¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits) of 27 June 1986, *ICJ Rep. 1986*, at 114, para.218.

¹⁷ See, e.g., Moir, Lindsay, *The Law of Internal Armed Conflicts* (Cambridge: Cambridge University Press, 2002), at 273. As of 27 May 27 2006, 192 States had ratified the four Geneva Conventions.

¹⁸ The Appeal Chamber of the ICTY in the *Tadić* case denied that the grave breaches regime of the four Geneva Conventions could cover common Article 3. See the second part of this study.

Non-International Armed Conflicts (Protocol II) in 1977 (AP II),^{19,20} which is the first international convention to regulate the hostilities between conflicting parties in non-international armed conflicts.²¹ However, the AP II does not require the State parties to impose criminal penalties on those individuals who seriously violated it, either.²² In addition, the Convention for the Protection of Cultural Property in the Event of Armed Conflicts adopted by UNESCO in 1954 in The Hague also contained a provision on the hostilities of the conflicting parties in non-international armed conflicts, namely article 19. Although article 28 of this convention requires the State parties to “undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention”, it is not applicable to article 19.²³

Accordingly, before the beginning of the 1990s, although there were some provisions regulating the hostilities of the conflicting parties in non-international armed conflicts in conventional international law, no provision existed with a view to imposing criminal penalties on those who seriously violated them. The expression of “war crimes” was limited to the context of international armed conflicts in terms of conventional international law. However, it was unclear whether it was so in terms of customary international law.

The two UN *ad hoc* international criminal tribunals

The establishment of the two UN *ad hoc* international criminal tribunals provides a precious opportunity to clarify the above question. Article 4 of the Statute of the International Criminal Tribunal of Rwanda (ICTR)²⁴ stipulates the “violations of article 3 common to the Geneva Conventions and of Additional Protocol II”. The UN Secretary-General made the following explanation of article 4 in his report to the Security Council in 1995:

¹⁹ 1125 *UNTS* 609. The AP II consists of only 28 articles, among which ten are the final provisions. For the general introduction of the drafting history, see, e.g., Forsythe, David P., “Legal management of internal war: The 1977 protocol on non-international armed conflicts”, 72 *AJIL* 272–295 (1978).

²⁰ See Sandoz, Yves Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross (Geneva: Martinus Nijhoff Publishers, 1987), at 1350.

²¹ *Ibid.*, 1319; see also Green, n.5, *The Contemporary Law of Armed Conflict*, at 61.

²² Herik, L. J. van den, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff Publishers, 2005), at 204.

²³ Gioia, Andrea, “The development of international law relating to the protection of cultural property in the event of armed conflict: The Second Protocol to the 1954 Hague Convention”, 11 *It. YIL* 32 (2001).

²⁴ S/RES/955 (1994), 8 November 1994.

11. Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide and crimes against humanity, or may be committed only in internal armed conflict, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II.

12. In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common article 3 of the four Geneva Conventions.²⁵

Therefore, the UN Secretary-General did not make it clear whether serious violations of international humanitarian law applicable to non-international armed conflicts might also entail individual criminal responsibility in customary international law. However, since the common article 3 of the four Geneva Conventions and the AP II are the international humanitarian law applicable to non-international armed conflicts, the falling of the violations of them into the competence *ratione materiae* of the ICTR is tantamount to declare that those serious violations of them constitute war crimes in international law. Accordingly, the Statute of the ICTR is the first document to stipulate internal war crimes in international law, though it is not an international treaty.

Although no corresponding article in the Statute of the ICTY²⁶ could be found, article 2 of the Statute of the ICTY stipulates “grave breaches of the 1949 Geneva Conventions”, and article 3 is “violations of the laws or customs of war”. Whether the serious violations of international humanitarian law applicable to non-international armed conflicts also fall into the jurisdiction of the ICTY is a key controversial question before the first case of the ICTY, namely the *Tadić* case. In this case, the Appeals Chamber overthrew the interpretation of article 2 by the Trial Chamber by finding that “in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts”,²⁷

²⁵ UN Doc. S/1995/134, at 3–4.

²⁶ S/RES/827 (1993), 25 May 1993; UN Doc.S/25704.

²⁷ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 84. See also UN Doc.S/25704, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, at 10, para. 37. But see Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction.

though a recent trend appeared in both state practices and scholars' opinions showing "grave breaches" could be extended to non-international armed conflicts. Meanwhile, the Appeals Chamber maintained the interpretation of article 3 by the Trial Chamber that "the term 'laws or customs of war' should not be limited to international conflicts. Laws or customs of war include prohibitions of acts committed both in international and internal armed conflicts",²⁸ and that "Article 3 of the Statute provides a non-exhaustive list of acts which fit within the rubric of 'laws or customs of war'. The offences that it may consider are not limited to those contained in the Hague Convention and may arise during an armed conflict regardless of whether it is international or internal."²⁹ The Appeals Chamber made further interpretations of it by listing the application conditions for article 3, namely, "(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. . . . (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule." It concluded that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.³⁰ As to the contention of the Appellant that even if customary international law included certain basic principles applicable to both internal and international armed conflicts, such prohibitions did not entail individual criminal responsibility when breaches were committed in internal armed conflicts, and that these provisions could not, therefore, fall within the scope of the jurisdiction of the ICTY, the Appeals Chamber responded by resorting to the famous statement of the IMT that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced", and had no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts.³¹ Thus, article 3 of the Statute of the ICTY stipulates all of the war crimes besides those in article 2 of the Statute.³² Accordingly, the ICTY also established a principle that war crimes could also be conducted in the context of non-international armed conflicts. It paved the way for the trial of subsequent cases before the ICTY. In other words, in the eyes of the ICTY, the concept of internal war crimes has been established in customary international law at least in 1995.

²⁸ *Ibid.*, para. 60.

²⁹ *Ibid.*, para. 64.

³⁰ *Ibid.*, para. 94.

³¹ *Ibid.*, paras. 128–129.

³² See also Zhu, Wenqi, "The problem of the relationship between war crimes and the nature of armed conflicts" (Zhanzheng Zui yu Wuzhuang Chongtu Xingzhi de Guanxi Wenti), *Journal of Xi'an Political Academy of the People's Liberation Army* (Xi'an Zhengzhi Xueyuan Xuebao), No. 2, 2003, at 81.

Draft Code of Crimes against the Peace and Security of Mankind of the ILC

Article 1 of the Draft Code of Offences against the Peace and Security of Mankind in 1954 read: “Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.” Article 2 listed 13 acts as “offences against the peace and security of mankind”, among which, paragraph (12) stipulated “acts in violation of the laws or customs of war”. In accordance with the commentary by the ILC, “this paragraph applies to all cases of declared war or of any other armed conflict which may arise between two or more States, even if the existence of a state of war is recognized by one of them”.³³ Thus, the concept of internal war crimes did not exist in the eyes of the members of the ILC in 1954. A second Draft Code of Crimes against the Peace and Security of Mankind was accomplished in 1996. Article 20 expressly used the expression of “war crimes”, that “any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale”. Paragraph (f) of article 20 stipulated internal war crimes. In the commentary of this paragraph, the ILC pointed out that

the sixth category of war crimes addressed in subparagraph (f) consists of serious violations of international humanitarian law applicable in non-international armed conflict contained in article 3 common to the Geneva Conventions of 12 August 1949 and article 4 of Protocol II. The provisions of this subparagraph should be understood as having the same meaning and scope of application as the corresponding provisions contained in the Geneva Conventions and Protocol II. . . . The subparagraph is drawn from the statute of the International Tribunal for Rwanda (art. 4), which is the most recent statement of the relevant law. The Commission considered this subparagraph to be of particular importance in view of the frequency of non-international armed conflicts in recent years. The Commission noted that the principle of individual criminal responsibility for violations of the law applicable in internal armed conflict had been reaffirmed by the International Tribunal for the Former Yugoslavia.³⁴

Therefore, it is obvious that the position of the ILC on the concept of internal war crimes in 1996 was influenced by article 4 of the Statute of the ICTR and the *Tadić* case of the ICTY.

The Rome Statute

By virtue of paragraph 2 (c)–(f) of article 8, the Rome Statute becomes the first international convention which expressly contains the internal war crimes.³⁵ Compared

³³ *ILC Yb.*, 1091, Vol. II, at 136.

³⁴ *ILC Yb.*, 1996, vol. II, Part II, at 55–56.

³⁵ Kress, Claus, “War crimes committed in non-international armed conflict and the emerging system of international criminal justice”, 30 *Israel Yearbook on Human Rights* 103 (2000).

with article 3 of the Statute of the ICTY and article 4 of the Statute of the ICTR, paragraph 2 (c)–(f) of article 8 of the Rome Statute apparently contains more acts of the internal war crimes, in particular paragraph 2 (e) of article 8.³⁶ Almost all of the 12 acts in paragraph 2 (e) of article 8 could be found in paragraph 2 (b) of article 8. However, some acts are laid down only in the context of international armed conflicts, such as employing poison or poisoned weapons, employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, and intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions³⁷, *etc.* This was severely criticized by some observers. They questioned why the employment of such weapons or methods of hostility in the context of international armed conflicts could be subject to the jurisdiction of the ICC, while they are not so when conducted in the context of non-international armed conflicts.³⁸ It should be noted that, unlike article 3 of the Statute of the ICTY and article 4 of the Statute of the ICTY, paragraph 2 (c) and (e) of article 8 of the Rome Statute do not contain the expression of “include, but not be limited to”. In other words, the acts contained in paragraph 2 (c) and (e) of article 8 of the Rome Statute are exhaustive.³⁹

Subsequent development after the Rome Statute

On 26 March 1999, the UNESCO adopted the Second Protocol to the Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict in The Hague. Unlike the Hague Convention of 1954 and its First Protocol, the Second Protocol is clearly applicable in the event of non-international armed conflict.⁴⁰ Article 15 of the Second Protocol provides “serious violation of this Protocol”, where the first paragraph provides acts of any person which may commit an offence within the meaning of the Protocol if committed intentionally and in violation of the Convention or this Protocol,⁴¹ and the second paragraph requires each Party to adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences

³⁶ But note the expression of “include, but not be limited to” in Article 3 of the Statute of the ICTY and Article 4 of the Statute of the ICTR.

³⁷ Note article 14 of the AP II of 1977.

³⁸ Robinson, Darryl and Herman von Hebel, “War crimes in internal conflicts: Article 8 of the ICC Statute”, 2 *Yearbook of International Humanitarian Law* 208 (1999).

³⁹ Note the expression of “namely, any of the following acts” in paragraph 2 (c) and (e) of Article 8 of the Rome Statute.

⁴⁰ See Article 22 (1) of the AP II.

⁴¹ For the acts, see Article 15 (1) of the AP II.

punishable by appropriate penalties. In effect, by so doing, the Second Protocol partly provides internal war crimes, although there is no such expression throughout the text. On 6 June 2000, the UN Transitional Administration in East Timor adopted Regulation No.2000/15, titled “On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences”. Article 8 of the Rome Statute was incorporated into the Regulation word for word.⁴² Article 3 of the Statute of the Special Court for Sierra Leone of 2002⁴³ provides “Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”, which is almost a copy of article 4 of the Statute of the ICTR.⁴⁴ Article 4 of the Statute of the Special Court for Sierra Leone provides “Other serious violations of international humanitarian law”, including paragraph 2 (e) (i) (ii) and (vii) of article 8 of the Rome Statute, which is applicable to non-international armed conflicts.

Domestic laws have made great progress in this regard. Article 7 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea adopted by Cambodia on 10 August 2001 provides that “the Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979”.⁴⁵ Article 13 (c) and (d) of the Statute of the Iraqi Special Tribunal adopted by the Iraqi Governing Council on 10 December 2003 clearly provides internal war crimes, which are the same as paragraph 2 (c) and (e) of article 8 of the Rome Statute.⁴⁶ The States which have ratified the Rome Statute made or are making domestic laws in order to implement it. Some States have incorporated paragraph 2 (c)–(f) of article 8 of the Rome Statute into their domestic law word by word, such as Australia,⁴⁷ Canada,⁴⁸ New Zealand,⁴⁹ South Africa,⁵⁰ the United Kingdom,⁵¹ *etc.* Some States

⁴² Section 6 “War Crimes”, UNTAET/REG/2000/15.

⁴³ The Special Court for Sierra Leone is actually an international criminal tribunal, not a domestic criminal tribunal; see *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, para. 42.

⁴⁴ Note there is no expression of “include, but not be limited to” in article 3 of the *Statute of the Special Court for Sierra Leone*, but also note Article 4 of the same Statute.

⁴⁵ *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, <http://www.derechos.org/human-rights/seasia/doc/krlaw.html> (visited on 18 August 2006).

⁴⁶ *The Statute of the Iraqi Special Tribunal*, http://www.cpa-iraq.org/human_rights/Statute.htm (visited on 18 August 2006).

⁴⁷ International Criminal Court (Consequential Amendment) Act 2002, Act No. 42 of 2002, assented to 27 June 2002.

⁴⁸ Crimes against Humanity and War Crimes Act 2000, but note Article 6 (4) of the Act.

⁴⁹ International Crimes and International Criminal Court Act 2000.

⁵⁰ Implementation of the Rome Statute of the International Criminal Court Act, No. 27 of 2002, 445 *Government Gazette of the Republic of South Africa*, 18 July 2002, No.23642.

⁵¹ International Criminal Court Act 2001; International Criminal Court (Scotland) Act 2001.

even provide internal war crimes with more acts than paragraph 2 (c)–(f) of article 8 of the Rome Statute, such as Belgium,⁵² The Netherlands,⁵³ Germany,⁵⁴ *etc.* These States are mostly the Common Law States and western European Roman Law States.

THE OPPOSITION OF SOME ASIAN STATES TO THE CONCEPT OF INTERNAL WAR CRIMES

The substantive development of internal war crimes at the international level and in the domestic laws of a number of States in other continents seems not to occur in Asia. Indeed, quite a number of the Asian States are not interested in this concept, except those several States having ratified or signed the Rome Statute. Moreover, during its drafting process, the concept was one of the most controversial issues in the negotiation of article 8.⁵⁵ The debate focused on the question whether the concept has been established in customary international law. The States in favour of it mainly used article 4 of the Statute of the ICTR and the decision of the *Tadić* case by the Appeals Chamber of the ICTY as the evidence. But such an argument was opposed by several States. It is said that, besides the Russian Federation⁵⁶ and a couple of north African States, quite a few Asian States are expressly opposed to it, namely the PRC, India, Indonesia, Iran, Pakistan and Turkey.⁵⁷ I will examine their positions one by one with a view to finding their genuine attitude.

The People's Republic of China

The PRC supports the establishment of a permanent international criminal court marked by genuine independence, impartiality, effectiveness, and universality in

⁵² Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions, *Moniteur Belge*, 5 August 1993; Loi relative à la répression des violations graves du droit international humanitaire, *Moniteur Belge*, 23 March 1999. *see also* 38 *ILM* 918 (1999).

⁵³ Act of 19 June 2003 containing Rules concerning Serious Violations of International Humanitarian Law (International Crimes Act).

⁵⁴ Act to Introduce the Code of Crimes Against International Law 2002, 42 *ILM* 995 (2003).

⁵⁵ Kirsch, Philippe and John T. Holmes, "The Rome conference on an international criminal court: The negotiating process", 93 *AJIL* 7 (1999); Graditzky, Thomas, "War crimes issues before the Rome diplomatic conference on the establishment of an international criminal court", 5 *U.C. Davis Journal of International Law and Policy* 208 (1999).

⁵⁶ It was said that the Russian Federation had originally opposed the concept during the very beginning of the drafting, but seemed to have ceased the opposition later. The Russian signature of the Rome Statute on 13 September 2000 indicates that it is not opposed to it any longer.

⁵⁷ Zimmermann, Andreas, "Preliminary remarks on para. 2 (c)–(f) and para. 3: War crimes committed in armed conflict not of an international character", in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at 269; *see also* Robinson and von Hebel, n. 38, at 200.

the world.⁵⁸ With respect to the crimes within the jurisdiction of the permanent international criminal court, the PRC is of the opinion that the court's jurisdiction should cover the core crimes in international law.

On 30 October 1995, the Chinese representative, H.E. Ambassador Chen Shiqiu, made a statement to the Sixth Committee on the Establishment of an International Criminal Court, where he said, "The Chinese delegation agrees that the court's jurisdiction should cover the crimes of genocide, *serious violations of the rules of war* [emphasis added] and crimes against humanity listed in article 20 of the draft Statute."⁵⁹ It was unclear whether the expression of "serious violations of the rules of war" here included the serious violations of international humanitarian law applicable to non-international armed conflicts. On 21 October 1997, the deputy Chinese representative, Mr Duan Jielong, made a statement before the Sixth Committee of the 52nd UN General Assembly, where he said, "With regard to core crimes, we are in favor of placing genocide, *war crime* [emphasis added] and crime against humanity under the jurisdiction of the court."⁶⁰ It was also unclear whether the expression of "war crime" here covered internal war crimes.

It is assumed that the expression of "war crimes" in the above statements did not include internal war crimes because the Chinese delegation made it clear that it is opposed to the concept. The PRC voted against the Rome Statute in the Rome Conference on 17 July 1998. One of the five legal reasons was, according to the explanations by the Head of the Chinese delegation, Mr Wang Guangya, to the media after the voting, that

The Chinese delegation makes serious reservation on the incorporation of war crimes in internal armed conflicts into the universal jurisdiction of the ICC. First of all, the Chinese delegation contends that a state with a sound and perfect legal system has the capacity to suppress war crimes in internal armed conflicts, and holds more evident advantages than the ICC in the suppression of this category of crimes; secondly, the definition of war crimes in internal armed conflicts in the present Statute has gone beyond customary international law, and even the provisions in the Additional Protocol II of the Geneva Conventions. Considering these, China consistently suggests that States should have the right to opt to accept the jurisdiction of the ICC over them or not. Although the relevant provision of the present Statute makes a provisional arrangement on whether to accept the jurisdiction of the ICC over them, it essentially

⁵⁸ *Position Paper of the People's Republic of China on the United Nations Reforms*, 7 June 2005, "China supports the establishment of an International Criminal Court characterized by its independence, impartiality, effectiveness and universality, capable of punishing the gravest international crimes", 4 *Chinese Journal of International Law* 685–698 (2005).

⁵⁹ <http://www.iccnw.org/documents/China1PrepCmt30Oct95.pdf> (visited on May 30, 2006).

⁶⁰ <http://www.iccnw.org/documents/China6thComm21Oct97.pdf> (visited on May 30, 2006).

denies this method of opting to accept the jurisdiction, and will make many States flinch from the ICC.⁶¹

On 4 November 1998, the Chinese representative, Mr Qu Wensheng, made a statement before the Sixth Committee of the 53rd UN General Assembly, where he reiterated the Chinese position towards the concept:

With regard to the definition of crimes, China had doubts about the inclusion of domestic armed conflicts under the Court's jurisdiction within the definition of war crimes, because the provisions of international law concerning war crimes committed during such conflicts were still incomplete. The provisions of Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 were very weak in comparison with those of Additional Protocol I and the question of whether some of those provisions had acquired the status of customary international law was still in debate. The definition of war crimes committed during domestic armed conflicts in the Statute had far exceeded not only customary international law but also the provisions of Additional Protocol II.⁶²

Accordingly, it is clear that the PRC is opposed to the concept and questions whether it has been established in customary international law. The reason is very simple. Since the Taiwanese authorities seek to realize the independence of Taiwan region from China, the PRC has been stating that the PRC will by no means promise to abandon the use of armed force against the Taiwanese authorities. For this purpose, the PRC especially adopted the Anti-Secession Law on 14 March 2005. Article 8 of the Law provides that "In the event that the 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the State shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity."⁶³ The PRC is

⁶¹ See Department of Policy Research of the Ministry of Foreign Affairs of the People's Republic of China (ed.), *Zhongguo Waijiao* (China's Foreign Affairs) (Beijing: World Affairs Press, 1998), at 665; see also "Wang Guangya on the Statute of International Criminal Court", *Fazhi Ribao* (Legal Daily), 29 July 1998, at 4; Jia, Bing Bing, "China and the International Criminal Court: Current Situation", 10 *SYIL* 9–10 (2006); Shigui, Tan, "Zhongguo yu Guoji Xingshi Fayuan Guanxi Chutan (The preliminary discussion on the relationship between China and the International Criminal Court)", in Zhao, Bingzhi (ed.), *Guoji Xingshi Fayuan Zhuanlun* (Study on Major Issues Relating to the International Criminal Court) (Beijing: The People's Court Press, 2003), at 64–65.

⁶² UN Doc.A/C.6/53/SR.11, at 5, para.36.

⁶³ *Zhonghua Renmin Gongheguo Fan Fenlie Guojia Fa* (Anti-Secession Law of the People's Republic of China), adopted at the Third Session of the Tenth National People's Congress on 14 March 2005, http://english.peopledaily.com.cn/200503/14/eng20050314_176746.html (visited on 7 October 2006).

also concerned with secessionists, terrorists and extremists in the Xinjiang Uygur Autonomous Region. Although the situation there is far from non-international armed conflicts, even in the most serious time at the end of the 1990s, the PRC has been on high alert for them. Should the use of armed force against Taiwan and Xinjiang secessionists occur, it is almost unavoidable that acts which might constitute internal war crimes by both sides would probably be committed.

India

India is one of the States which have not yet signed the Rome Statute in Asia. Moreover, an Agreement between India and the US regarding the Surrender of Persons to International Tribunals was signed on 26 December 2002, according to which either party is restrained from making available or subjecting to the jurisdiction of any international tribunal, nationals of the other party, without the consent of the other party, and extradition or otherwise surrender of Indian nationals by US or of US nationals by India to a third country for the purpose of subjecting them to the jurisdiction of any international tribunal is prohibited.

In the Rome Conference, India abstained from voting. One of the reasons why India abstained and has not yet signed the Rome Statute, if not the main reason, is that it is against the concept of internal war crimes.⁶⁴ On 16 June 1998, the Additional Secretary of the Indian Minister of External Affairs, Mr Dilip Lairi, made a statement in the Rome Conference, where he pointed out:

There is a generally accepted definition of genocide. But, as we have seen from the numerous brackets, there is no such general agreement either regarding war crimes or crimes against humanity. There is also no agreement about whether or not conflicts not of an international nature could be covered under the definition of such crimes under customary international law.⁶⁵

On 26 December 2002, the External Affairs Ministry spokesperson, in explaining the reasons why India had not signed the Rome Statute, pointed out, *inter alia*, that it blurred the distinction between customary law and treaty obligations in respect of definition of internal conflicts and crimes against humanity.⁶⁶ One Indian writer also points out that “the inclusion of ‘armed conflict not of an international character’ in

⁶⁴ Sunga, Lyal S., “The attitude of Asian countries towards the International Criminal Court”, 2 *ISIL Yearbook of International Humanitarian and Refugee Law* 41 (2002).

⁶⁵ <http://www.un.org/icc/index.htm> (visited on June 18, 2006).

⁶⁶ Mani, V. S., “Indo-U.S. non-extradition pact”, *The Hindu*, 9 January 2003, <http://www.hinduonnet.com/2003/01/09/stories/2003010900691000.htm> (visited on June 16, 2006). See also Mr. Chandumajra’s statement on behalf of the Indian representative before the Sixth Committee of the 53rd General Assembly, UN Doc.A/C.6/53/SR.11, at 4, para.28.

defining 'war crimes' in article 8 of the Statute for an ICC has met with resistance from the Indian establishment."⁶⁷

It appears that the Indian opposition to the concept is stronger than the Chinese one. In other words, India seems to oppose the concept as a whole in customary international law. Like the PRC, it is also very easy to understand why India is so severely against the concept. The level of use of armed force by the separatists in the India-controlled Kashmir region seems to be increasing. Sporadic conflicts launched by various armed groups, whether seeking state formation or state control, exist in the territory, covering most of the States in the southern, central and northern part. Some acts committed by the Indian army or the armed groups may constitute internal war crimes.

Indonesia

Indonesia has not signed the Rome Statute. Although it is said that Indonesia is opposed to the concept, the position seems not to be clear due to lack of the materials available. On 16 June 1998, H.E. Mr Muladi, Minister for Justice and Head of the Indonesian delegation, stated in the Rome Conference that "aside from supporting the incorporation of genocide, *war crimes* [emphasis added] and crimes against humanity into the statute, Indonesia closely associates itself with the position of the Non-Aligned Countries which firmly support the inclusion of the crime of aggression and, within *war crimes* [emphasis added], the use and threat of the use of nuclear weapons".⁶⁸ It is unclear whether the expression of "war crimes" in his statement covers internal war crimes. It is a pity that I cannot clearly say that Indonesia is for or against the concept of internal war crimes due to lack of the first-hand materials, though the conflicts between the Indonesian army and various armed groups or between the various groups may reoccur in the territory, in particular in Aceh, Irian Jaya, the Molucca (Maluku) islands and other islands.

Iran

The Iranian representative, H.E. M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran, expressed the Iranian position on the Rome Statute on 17 June 1998 in the Rome Conference, that "We are in favor of inclusion the crime of genocide, *the serious violations of the laws and customs applicable in international armed conflicts* [emphasis added], and *grave breaches of the four Geneva Conventions*

⁶⁷ Ramanathan, Usha, "India and the ICC", 3 *Journal of International Criminal Justice* 631 (2005).

⁶⁸ Statement by H.E. Mr. Muladi, Minister for Justice and Head of the Indonesian delegation, <http://www.un.org/icc/index.htm> (visited on 17 June 2006).

[emphasis added]. We also believe that the crime of aggression as a punishable crime should be included in the Statute.”⁶⁹ His expression did not include the serious violations of international humanitarian law applicable to non-international armed conflicts. Unfortunately, I cannot find other resources which could directly demonstrate that Iran was expressly against the concept. Although it is said that Iran was opposed to the concept in the Rome Conference, its stance seems to have been changed afterwards. It signed the Rome Statute on 31 December 2000, which means that at least it assumes the obligation of not derogating the purposes and spirit of it, and that it has accepted the concept. But it is unclear whether it has accepted the concept as an existing customary international law or merely a conventional international law.

Pakistan

It appears that Pakistan is also against the concept of internal war crimes. The Pakistani representative favoured the view that “the jurisdiction of the Court should be limited to only the ‘hard core crimes’, namely: (1) crime of genocide; (2) *serious violations of the laws and customs applicable in armed conflicts* [emphasis added]; and (3) crimes against humanity” in his statement made in the Sixth Committee of the 50th UN General Assembly on 3 November 1995. Such a view was expressed in the subsequent statements made in the Sixth Committee of the UN General Assembly⁷⁰ and also in the Rome Conference.⁷¹ It is unclear whether the expression of “armed conflicts” covers non-international armed conflicts. However, on 3 November 1998, the Pakistani representative, Mr Kanju, said that “armed conflicts not of an international character fell entirely within the domestic jurisdiction of the state concerned, in which case the Statute’s provisions in that connection violated both the principle of the sovereignty of the States and the principle of complementarity.”⁷²

The legally claimed reason why Pakistan is against the concept is not the denial of its proclaimed status in customary international law, but the principle of domestic jurisdiction and the principle of complementarity. Therefore, it is not clear whether Pakistan considered the concept as a rule in customary international law or not. But the political reason for the Pakistani opposition is also easy to understand. The sectarian violence across Pakistan and military operations in north-eastern Pakistan-controlled Kashmir still continue.

⁶⁹ Statement by H.E. M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran, <http://www.un.org/icc/index.htm> (visited on 17 June 2006).

⁷⁰ See the speeches and interventions in the Sixth Committee in the website of the Pakistani Permanent Mission to the UN, <http://www.un.int/pakistan/00home13.htm> (visited on 17 June 2006).

⁷¹ See the statement made by Ambassador Arif Ayub, Head of the Pakistani Delegation, on June 16, 1998 in the Rome Conference, <http://www.un.org/icc/index.htm> (visited on 17 June 2006).

⁷² UN Doc.A/C.6/53/SR.11, at 8, para.72.

Turkey

Turkey has not signed the Rome Statute yet. It is said that Turkey is against the concept of internal war crimes possibly because of its military suppression of the Kurdish separatists in its south-eastern territory. However, I could not find any direct material to prove its opposition. On the contrary, the Turkish government is making preparations for possible accession to the Rome Statute. It amended its Constitution on 7 May 2004 to allow the extradition of its citizens to the ICC, and adopted a new penal code on 26 September 2004, which for the first time contains articles on genocide (article 76) and crimes against humanity (article 77). A new working group has been formed by the Ministry of Justice with the participation of the General Staff and Ministry of Foreign Affairs as well as prominent academicians. It started its work in February 2005 with a view to elaborating and structuring the articles related to the war crimes in the Turkish civil and military legislation in light of the Rome Statute.⁷³

THE LEGAL IMPLICATIONS OF SOME ASIAN STATES' OPPOSITION

The above survey shows that a few Asian States do oppose the concept of internal war crimes, in particular the PRC, India and possibly Pakistan. Whether their oppositions carry legal implications in international law depends on the nature of the concept of internal war crimes in international law. If it is merely a rule with a conventional nature, their oppositions are out of the question. In fact, the debate between those opposing Asian States and other States favouring it goes around the question whether it has been established in customary international law. Such a nature requires every state to abide by it, except the persistent objector. However, one might further argue that it has not only been established in customary international law, but also in international *jus cogens*, and accordingly, the opposition might become null and void in international law.

Is the concept of internal war crimes customary international law?

Today, the dominant answer to this question in international scholarship is in the affirmative, but there is disparity on the extent of the acts of internal war crimes. Some argue that not all of the acts contained in paragraph 2 (c) and (e) of article 8 of the Rome Statute constitute internal war crimes in customary international

⁷³ http://www.mfa.gov.tr/MFA/ForeignPolicy/InternationalOrganisations/ICC/ICC_Turkey.htm (visited on June 17, 2006).

law,⁷⁴ while others argue that the acts contained in paragraph 2 (c) and (e) of article 8 as a whole constitute internal war crimes in customary international law.⁷⁵ In a study report on *Customary International Humanitarian Law* in 2005, the International Committee of the Red Cross (ICRC) not only considers paragraph 2 (c) and (e) of article 8 as the internal war crimes in customary international law, but concludes that other acts committed in non-international armed conflicts also constitute internal war crimes, including the use of prohibited weapons, launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury, or damage; making non-defended localities and demilitarized zones the object of attack; using human shields; slavery; collective punishments; using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies; as well as composite acts, such as enforced disappearance and ethnic cleansing.⁷⁶

However, it is not totally impossible to launch a challenge to such dominance. Whether the concept of internal war crimes has been established in customary international law could still be open to discussion. It is well established in international law theory that for a customary international law to be formed, two constitutive elements are required, namely, the State practices and *opinio juris*.⁷⁷

As far as State practices are concerned, they must be “extensive”.⁷⁸ However, the State practices concerning the concept of internal war crimes are not so. First of all, the number of States which have already stipulated internal war crimes in their domestic criminal law is small. Quite a number of States, even in western Europe and northern America, have not yet stipulated the internal war crimes in their domestic

⁷⁴ Boot, Machteld, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen: Intersentia, 2002), at 629. See also Ratner, Steven R. & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Oxford University Press, 2001), at 103; Zhu, Wenqi, “Zhongguo Jiaru Guoji Xingshi Fayuan zhi Zhanwang” (The prospect for China to participate in the International Criminal Court), in Gao, Mingxuan and Zhao Bingzhi (eds.), *Guoji Xingshi Fayuan: Zhongguo Mianlin de Xuanze* (International Criminal Court: Choices Faced by China) (Beijing: Chinese People’s Public Security University Press, 2005), at 158–159.

⁷⁵ Von Hebel, Herman and Darryl Robinson, “Crimes within the jurisdiction of the court”, in Lee, Roy S. (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), at 126.

⁷⁶ Henckaerts, Jean-Marie and Louis Doswarld-Beck, *Customary International Humanitarian Law*, Volume I: Rules (Cambridge: Cambridge University Press, 2005), at 599–603.

⁷⁷ *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, *ICJ Rep. 1985*, at 29–30, para. 27.

⁷⁸ *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, *ICJ Rep. 1969*, at 43.

criminal law, including Austria, Denmark,⁷⁹ France,⁸⁰ Italy,⁸¹ Norway and Sweden, let alone many States in Africa, Asia and Latin America. Japan, for the first time, provided war crimes in its criminal law by an Act of 2004. Nevertheless, that Act is only applicable in international armed conflicts.⁸² In the case that there are no stipulations of internal war crimes in their domestic criminal law, how could their prosecutariate services charge a person with such crimes and the judges convict him or her of such crimes? One may argue that although the concept is absent in the domestic criminal laws of the majority of States, should it have been provided in the concluded treaties, and should treaties be directly applicable in their domestic courts, they still could convict the criminals of internal war crimes. With respect to such an argument, I would like to remind the argument holders of the lessons from the case of *Habré* before the Court of Cassation of Senegal⁸³ and the case of *Pinochet* before the Luxemburg Court of Appeal,⁸⁴ which vividly tell us that such an argument is almost a theoretical hypothesis. Unlike the judges sitting in the international criminal tribunals, few judges of any State are willing to merely invoke the treaty as the legal basis to convict a person of crimes in the treaties without criminalization in its domestic criminal law. One may further argue that although the concept is absent in the domestic criminal laws of the majority of States, should it have been established in customary international law, they still could convict the criminals. But whether the concept has been established in customary international law is the very question I am attempting to answer. In fact, the picture of invoking customary international law as the sole legal basis to convict a person of crimes in customary international law is very similar to that of invoking treaties due to the uncertainty and ambiguity of the rules of customary international law.

Secondly, even for those States which have stipulated internal war crimes in their domestic criminal laws, it is a very recent development. It was in 1993 that Belgium adopted an Act where internal war crimes were provided,⁸⁵ which made Belgium

⁷⁹ Hoyer, Gitte, Martin Spencer and Vagn Greve, *The Danish Criminal Code* (Copenhagen: DJØF Publishing, 1999); Report by the International Law Committee of the Danish Red Cross, "Implementation of international humanitarian law by Denmark", 320 *International Review of Red Cross* 583–590 (1997).

⁸⁰ Turns, David, "Aspects of national implementation of the Rome Statute: The United Kingdom and selected other states", in McGoldrick, Dominic, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford and Portland Oregon: Hart Publishing, 2004), at 371.

⁸¹ Gaeta, Paola, "War crimes trials before Italian criminal courts: New trends", in Fischer, Horst, Claus Kreß, Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin: Verlag Arno Spitz GmbH, 2001), at 767.

⁸² Mayama, Akira, "Japan's new emergency legislation and international humanitarian law", 47 *JAIL* 83 (2004).

⁸³ *Habré*, Senegal, Court of Appeal of Dakar, 4 July 2000; Court of Cassation, 20 March 2001; 125 *ILR* 569–580 (2004).

⁸⁴ *Pinochet*, Luxembourg, Court of Appeal, 11 February 1999; 119 *ILR* 360–367 (2002).

⁸⁵ See n. 52.

the first State in the world to have such stipulations in its domestic criminal laws.⁸⁶ The fact that some western States have such stipulations in their domestic laws is obviously very recent, such as Australia in 2002,⁸⁷ Canada in 2000,⁸⁸ Germany in 2002,⁸⁹ The Netherlands in 2003,⁹⁰ New Zealand in 2000,⁹¹ South Africa in 2002,⁹² the UK in 2001⁹³ and the US in 1996.⁹⁴ One may argue that the State practices in this respect should not be limited to the domestic legislations, and should extend to the military manuals and government statements. The military manuals are not the legal basis to convict someone of internal war crimes, but merely the disciplines of the armies. The violation of them will not necessarily entail individual criminal responsibility, but administrative penalties or disciplinary sanctions. The government statements could not be used as the legal basis, either.

Thirdly, the State practices should be “virtually uniform”.⁹⁵ If the domestic criminal laws of the States are carefully examined, it is disappointing not only that the majority of States have not yet had such stipulations in their domestic criminal laws, but also, even for those States which have already had them, they are not uniform. The German Act of 2002 stipulates a very extensive series of acts of internal war crimes, going far beyond paragraph 2 (c) and (e) of article 8, while the Canadian Act of 2000, the South African Act of 2002, and the United Kingdom Act of 2001 are just the incorporation of them. The United States Act of 1996 is merely the common article 3 of the four Geneva Conventions (or actually paragraph 2 (c) of article 8 of the Rome Statute). Finally, and most importantly, it should not be forgotten that the practices of the States whose interests are specially affected should be taken more into consideration in the assessment of the formation of customary

⁸⁶ Andries, A., Eric David, C. Van Den Wyngaert and J. Verhaegen, “Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire”, 74 *Revue de Droit Pénal et de Criminologie* 1133 (1994).

⁸⁷ See n. 47; see also Boas, Gideon “An overview of implementation by Australia of the Statute of the International Criminal Court”, 2 *Journal of International Criminal Justice* 186 (2004).

⁸⁸ See n. 48.

⁸⁹ See n. 54; see also Zimmermann, Andreas, “Main features of the new German code of crimes against international law”, in Neuner, Matthias (ed.), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (BWV-BERLINER WISSENSCHAFTS-VERLAG GmbH, 2003), at 147.

⁹⁰ See n. 53; see also Sluiter, Göran, “Implementation of the ICC Statute in the Dutch legal order”, 2 *Journal of International Criminal Justice* 175 (2004).

⁹¹ See n. 49; see also Hay, Juliet, “Implementing the Rome Statute: A pragmatic approach from a small jurisdiction”, in Neuner, n. 89, at 33.

⁹² See n. 50.

⁹³ See n. 51.

⁹⁴ Sec. 2441 War crimes, U.S. Code, Title 18, Chapter 118. Since the US has not yet been a party to the AP II and the Rome Statute, the internal war crimes in the US are limited to the acts in common Article 3 of the four Geneva Conventions.

⁹⁵ *Asylum* (Colombia/Peru), Judgment of 20 November 1950, *ICJ Rep.* 1950, p. 266; the *North Sea Continental Shelf* cases, *ICJ Rep.* 1969, p. 43.

international law concerned.⁹⁶ “If the ‘specially affected States’ do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required as explained.”⁹⁷ The positions of the States where non-international armed conflicts exist or most probably occur should be especially noted and granted more weight. They are the “specially affected” States in this area. The PRC, India and Pakistan represent such States.

As far as *opinio juris* is concerned, although as of 22 August 2006, 102 States have concluded the Rome Statute and another 37 States have signed it, though not yet ratified it,⁹⁸ which indicates that they accept the concept, it is unclear whether they accepted it as customary international law or conventional international law. In the field of international humanitarian law, eminent international criminal lawyers contend that *opinio juris* should be granted more weight than State practices, and that the great powers in terms of economy, politics and military should play a greater role.⁹⁹ However, it should also be always kept in mind that for a customary international law to be established, “the shared view [of the Parties] as to the content of what they regard as the rule is not enough. [The Court must satisfy itself that] the existence of the rule in the *opinio juris* of the States is confirmed by practice”.¹⁰⁰

The question whether customary international law prohibits the conflicting parties from doing particular acts in non-international armed conflicts should be differentiated from the question whether any serious violations of such customary international law will entail individual criminal responsibility in customary international law. For the former question, contemporary international law has a very clear, positive answer,¹⁰¹ But for the latter, it is not necessarily so at the present stage of customary international law. The dominant view in international scholarship on this question is lame. Its main problem is lack of the sufficient evidence of State practices, and it does not distinguish *lex lata* from *lex ferenda* in this regard. However, I wish to say that the fact that the current customary international law has not yet criminalized the serious violations of international humanitarian law applicable in non-international armed conflicts does not mean the individuals committing such violations may live with impunity. Such violations could constitute the “ordinary” crimes in every domestic criminal law, such as the crime of murder, the crime of rape, the crime of torture, *etc.* It should also be added that the fact that the concept of war crimes has not yet been extended to the context of

⁹⁶ The *North Sea Continental Shelf* cases, *ICJ Rep.* 1969, p. 43; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Rep.* 1996, p. 226.

⁹⁷ Henckaerts and Doswarld-Beck, n. 76, at xxxviii.

⁹⁸ <http://www.iccnw.org> (visited on 7 October 2006).

⁹⁹ Meron, Theodor, “The continuing role of custom in the formation of international humanitarian law”, 90 *AJIL* 249 (1996); also in Meron (ed.), *War Crimes Law Comes of Age: Essays* (Oxford: Oxford University Press, 1998), at 264.

¹⁰⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, *ICJ Rep.* 1986, p. 98, para. 184.

¹⁰¹ *Ibid.*, 113–114, para. 218.

non-international armed conflicts in customary international law does not mean that it should not be so. On the contrary, the expansion of the concept of war crimes to the context of non-international armed conflicts in customary international law will no doubt effectively promote the punishment of such crimes at the international level. The concept is being brought out in customary international law with more and more States making such stipulations in their domestic criminal laws.

Could the opposing Asian States claim themselves as the persistent objector?

Even if the concept of internal war crimes has been established in customary international law at the present stage of customary international law, those opposing Asian States might still be exempt from the binding of it if their claim is established as the persistent objector in international law. The persistent objector is recognized in customary international law,¹⁰² meaning that “[a] State that has persistently objected to a rule is not bound by it, *so long as the objection was made manifest during the process of the rule’s emergence* [emphasis added]”.¹⁰³ Accordingly, the first requirement which has to be met for the purpose of a persistent objector is that the rule concerned should be in the process of emergence when the objection is raised. Based on the conclusion of the earlier part of this study, the situation of the concept of internal war crimes meets such a requirement.

As has been explored above, the statement that the concept of internal war crimes has been established in customary international law for the first time derives from the *Tadić* case before the Appeals Chamber of the ICTY in 1995. This finding is really a breakthrough for the concept of war crimes in international law, and is described by some observers as a “small revolution” in international humanitarian law.¹⁰⁴ Prior to the beginning of the 1990s, the concept of war crimes was widely considered to exist only in the context of international armed conflicts. As one Italian scholar, Mr Condorelli, said, this is a very special question, and just a few years ago, even at the beginning of the 1990s, the international law academia could not imagine such a question.¹⁰⁵ The concept of internal war crimes is a relatively new concept in

¹⁰² *Asylum case (Colombia/Peru)*, Judgment of 20 November 1950, *ICJ Rep. 1950*, at 266, 277–8; *Fisheries case (United Kingdom v. Norway)*, Judgment of 18 December 1951, *ICJ Rep. 1951*, at 116, 131.

¹⁰³ Stein, Ted L., “The approach of the different drummer: The principle of the persistent objector in international law”, 26 *Harvard International Law Journal* 458 (1985); Charney, Jonathan I., “The persistent objector rule and the development of customary international law”, 56 *BYIL* 2 (1985).

¹⁰⁴ Kress, n. 35, at 103.

¹⁰⁵ Condorelli, Luigi, “War crimes and internal conflicts in the Statute of the International Criminal Court”, in Politi, Mauro and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Hants.: Ashgate Publishing Limited, 1998), at 108.

international law.¹⁰⁶ Indeed, if the international law scholarship is carefully examined, it will be found that prior to the Statute of the ICTR in 1994 and the decision in the *Tadić* case by the Appeals Chamber of the ICTY in 1995, the majority of international legal scholars held the opinion that war crimes could only be conducted in international armed conflicts;¹⁰⁷ only a few scholars argued that war crimes could also be conducted in non-international armed conflicts.¹⁰⁸ Influenced by the Statute of the ICTR in 1994 and the decision of the *Tadić* case by the Appeals Chamber of the ICTY in 1995, the majority of the international legal scholars in western States switched their previous opinion to the present one, that war crimes could also be conducted in non-international armed conflicts, and few scholars deny such a rule.¹⁰⁹

¹⁰⁶ Bothe, Michael, "War crimes", in Cassese, Antonio, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2000), at 417.

¹⁰⁷ See, e.g., Plattner, Denise, "The penal repression of violations of international humanitarian law applicable in non-international armed conflicts", 278 *IRRC* 414 (1990); Davidehousse, Eric, "Le Tribunal international pénal pour l'ex-Yougoslavie", 25 *RBDI* 574–575 (1992); Kress, n. 35, at 104–105. See also Ratner, Steven R., & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Oxford University Press, 2001), at 106, saying "while one guesses at one's peril when a norm of customary international law becomes crystallized, it seems safe to say that the criminality of the violations of Common Article 3 was not well-established before perhaps the mid to late 1980s"; UN Doc.S/1999/231, 16 March 1999, at 20–21, saying "As for international humanitarian law governing internal conflict, the only relevant treaty provision in effect during the Khmer Rouge years was common article 3 of the Geneva Conventions of 1949. Violations thereof are not grave breaches of the Conventions, and do not appear to have been viewed as war crimes under customary law as of 1975"; DDM/JUR/442 b, 25 March 1993, para. 4, saying "according to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflicts"; UN Doc.A/CONF.169/NGO/ICRC/1, Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt, Statement of the International Committee of the Red Cross, 30 April 1995 (Topic IV), p. 4, saying "According to the terms of the Geneva Conventions and Additional Protocol I, international criminal responsibility for certain violations of humanitarian law, and the relevant obligations, have been established only in respect of international armed conflict".

¹⁰⁸ Generally speaking, the argument that war crimes could also be conducted in non-international armed conflicts was based on the argument that the grave breaches regime in four Geneva Conventions was applicable to common Article 3, see Paust, Jordan, "Applicability of international criminal laws to the events in the former Yugoslavia", 9 *Am. Univ. Journal of International Law and Policy* 511 (1994); *id.*, "War crimes jurisdiction and due process: the Bangladesh experience", 11 *Vanderbilt Journal of Transnational Law* 28 (1978); see also Bothe, Michael, "War crimes in non-international armed conflicts", 24 *Israel Yearbook on Human Rights* 241–251 (1994); Meron, Theodor, "International criminalization of internal atrocities", 89 *AJIL* 554–577 (1995). But such an argument has been rebutted by the chamber appeal of the ICTY in the *Tadić* case in 1995, see part two of this study.

¹⁰⁹ See, e.g., Meindersma, Christa, "Violations of common Article 3 of the Geneva Conventions as tribunal for the Former Yugoslavia", 42 *NILR* 375–397 (1995); Graditzky, Thomas, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts", 332 *International Review of Red Cross* 29–56 (1998).

In my observation, the decision of the *Tadić* case by the Appeals Chamber of the ICTY in 1995 confused the question whether customary international law prohibits certain hostilities of the conflicting parties in non-international armed conflicts with the question whether the serious violations may entail individual criminal responsibility in customary international law. The evidence used by the decision to prove the existence of the concept of internal war crimes is far from sufficient.¹¹⁰ The decision used the military manuals of Germany, New Zealand, the US and the UK as evidence, but as I have said above, the military manuals are not the direct legal basis to convict someone of internal war crimes, but the administrative or disciplinary penalties. In the way of national legislations, the decision only used the national legislations of two States as the evidence, namely the former Yugoslavia (the practice of the former Yugoslavia here is questionable) and Belgium. In fact, by 1995, there had been only one state in the world which had stipulated internal war crimes in its domestic criminal laws, namely Belgium. The reference to the resolutions of the UN Security Council was also problematic, because it only used two resolutions on Somalia as evidence and no expression of war crimes could be found in these two resolutions. In fact, the main basis to reach such a finding in the decision is the famous statement of the IMT (the Nuremberg Tribunal) that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.¹¹¹ Furthermore, it is also fully warranted from the point of view of “substantive justice and equity”.¹¹² Accordingly, the decision, in my opinion, is more a creation of law than the finding of the existing customary international law.¹¹³ Furthermore, these two international criminal tribunals are *ad hoc* tribunals after all, their decisions are not the precedents in international law, and they are only binding on the war crimes in former Yugoslavia and Rwanda.¹¹⁴ Three years later, when the question of whether the concept of internal war crimes should be incorporated in the Rome Statute was negotiated in the Rome Conference, it had not yet been crystallized into customary international law.¹¹⁵ Therefore, the oppositions by the PRC, India and

¹¹⁰ See also Simma, Bruno and Andreas L. Paulus, “The responsibility of individuals for human rights abuses in internal conflicts: A positive view”, 93 *AJIL* 312 (1999).

¹¹¹ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 128.

¹¹² *Ibid.*, para. 135.

¹¹³ See also separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, *loc. cit.*, para. 13 (He argues that the Decision on this question is in fact an unwarranted assumption of legislative power which has never been given to this Tribunal by any authority); Simma and Paulus, n. 110, at 313.

¹¹⁴ Arnold, Roberta, “The development of the notion of war crimes in non-international conflicts through the jurisprudence of the UN *ad hoc* tribunals”, *Humanitäres Völkerrecht-Informationsschriften*, Heft 3, 2002, at 139, note 56.

¹¹⁵ See also Simma and Paulus, n. 110, at 313 (arguing that “[the Rome Statute] might sooner or later be recognized as an expression of customary law or of general principles”, which indicates that the authors did not consider the concept as customary international law in 1999).

Pakistan are simultaneous with the emergence of this concept. They are not the “subsequent objector”.

The second requirement for a persistent objector is that the emerging rule should be “manifestly and continuously”¹¹⁶ objected. The oppositions by the PRC, India and Pakistan to the concept are obviously “manifest” and “continuous”. No signals have appeared that they will change their stance on the concept. Their genuine concerns that internal war crimes exist or may occur in their territory seem irreconcilable with the concept in the near future.¹¹⁷ However, whether their oppositions will be sustained in the future is hard to say. Just as Professor Charney has said, after all, “the persistent objector rule is, at best, only of temporary or strategic value in the evolution of rules”.¹¹⁸

Is the prohibition of internal war crimes international *jus cogens*?

The third requirement for a persistent objector is that a State cannot claim itself a persistent objector when the rule in question is international *jus cogens*.¹¹⁹ *Jus cogens* has been established in contemporary international law. The Vienna Convention on the Law of Treaties (VCT) not only recognizes the existence of *jus cogens* in international law, but also declares that any treaty in conflict with it at the time of its conclusion is null and void, and that any existing treaty in conflict with the emerged international *jus cogens* becomes void and terminates.¹²⁰ International *jus cogens* also prevails over “ordinary” customary international law. Therefore, it is the highest norm in the international legal framework.¹²¹

According to article 53 of the VCT, international *jus cogens* are those norms “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Therefore,

¹¹⁶ Stein, n. 103, a 459.

¹¹⁷ For the Chinese part, see Jia, n. 61, at 9–10.

¹¹⁸ Charney, n. 103, at 24.

¹¹⁹ See, e.g., Bos, Maarten, “The identification of custom in international law”, 25 *GYIL* 43 (1983); Charney, Jonathan I., “Universal international law”, 87 *AJIL* 541 (1993); Bantekas, Ilias, Susan Nash and Mark Mackarel, *International Criminal Law* (London: Cavendish Publishing Limited, 2001), at 29. Cf. Cassese, Antonio, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), at 178; Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers’ Publishing Company, 1988), at 242.

¹²⁰ Articles 53 and 64, 1155 *UNTS* 331; see also Article 53 of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, A/CONF.129/15

¹²¹ *US v. Matta-Ballesteros* (9th circuit, 1995), 71 F.3d 754, at 764, note 4.

their constitutive elements are extremely strict, so they are very rare.¹²² The VCT itself does not provide which norms are international *jus cogens*. The Drafting Committee of the VCT did not refer to the prohibition of war crimes as international *jus cogens*. Although the prohibition of torture has been recently identified as international *jus cogens* by some international judicial practices,¹²³ the commentary to article 26 of the Draft Articles on the State Responsibility to International Wrongful Acts of 2001 by the ILC did not refer to war crimes as international *jus cogens*.¹²⁴ However, eminent scholars of international criminal law argue that the prohibition of war crimes has been international *jus cogens*.¹²⁵

In my opinion, whether the prohibition of internal war crimes has been international *jus cogens* should be determined on the basis of its definition.¹²⁶ International humanitarian law applicable to non-international armed conflicts prohibits certain acts of the conflicting parties. Whether all of them are international *jus cogens* is controversial among international lawyers.¹²⁷ Nevertheless, there is no

¹²² Crawford, James (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002); Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 7th ed. (London and New York: Routledge, 1997), at 58.

¹²³ See, e.g., *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment in the Trial Chamber, 10 December 1998, paras. 144, 154; *Siderman v. Argentina*, 26 F.2d 699, 714–718; *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3), England, House of Lords, 24 March 1999, 119 *ILR* (2002), at 135, 200, 206–207, 244; *Al Adsani v. Government of Kuwait*, 107 *ILR* (1996), at 540–541.

¹²⁴ Crawford, n. 122.

¹²⁵ Bassiouni, M. Cherif, *Introduction to International Criminal Law* (New York: Transnational Publisher, Inc., 2003), at 142, 172; see also *id.*, “International crimes: *Jus cogens* and *obligatio erga omnes*”, 59 *Law and Contemporary Problems* 68 (1996). The concept of war crimes in his works includes war crimes in non-international armed conflicts. Cassese, Anthony, “On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law”, 9 *EJIL* 3 (1998); see also *id.*, “Reflections on international criminal prosecution and punishment of violations of humanitarian law”, in Charney, Jonathan I., Donald K. Anton, Mary Ellen O’Connell (eds.), *Politics, Values and Functions: International Law in the 21st Century: Essays in Honor of Professor Louis Henkin* (The Hague: Martinus Nijhoff Publishers, 1997), at 265.

¹²⁶ “The question whether a norm is part of the *jus cogens* relates to the legal character of the norm”, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Rep.* 1996, 253, para. 83.

¹²⁷ Some argue that international humanitarian law as a whole is international *jus cogens* because it is not based on reciprocity, but the unilateral commitments to the international community. See, e.g., Gasser, H.P., “Ensuring respect for the Geneva Conventions and Protocols: The role of third states and the United Nations”, in Fox & Meyer (eds.), *Armed Conflict and the New Law, Vol. II: Effecting Compliance* (London: British Institute of International and Comparative Law, 1993), at 21. Others argue that in international humanitarian law, only the common Article 3 of the Geneva Conventions and those articles which could reflect the principle and spirit of the common article could be considered as international *jus cogens*. See, e.g., Nieto-Navia, Rafael, “International peremptory norms (*jus cogens*) and international humanitarian law”, in Vohrah,

doubt that common article 3 of the four Geneva Conventions and those articles in AP II which reflect the principle and spirit of the common article are not only customary international law, but also international *jus cogens*. It would be unimaginable that two or more States, or the authorities of a State and the organized armed group, conclude a treaty or an agreement in order to jointly conduct the violations of them or conduct the violations as a countermeasure. Accordingly, those substantive rules prohibiting certain acts of the conflicting parties in international humanitarian law applicable to non-international armed conflicts are international *jus cogens*.

However, whether the substantive rules prohibiting certain acts of the conflicting parties in international humanitarian law applicable to non-international armed conflicts are international *jus cogens* is one thing, while whether the violations of such rules would entail criminal responsibility in international *jus cogens* is another thing. Although the dominant view in the western States holds that the concept of internal war crimes has been established in customary international law, it is doubtful whether it is international *jus cogens*. This is because it has not yet been “accepted and recognized by the international community of States as a whole”. The PRC, India and Pakistan are not small States in terms of their ideology, legal tradition, religion and military. Without their consents, it could hardly say the concept has been “accepted and recognized by the international community of States as a whole”. Furthermore, the concept of internal war crimes is not that “no derogation is permitted”. Unlike genocide and crimes against humanity, article 124 of the Rome Statute lays down a transitional provision, namely, “notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory”. It appears that article 124 of the Rome Statute is an opt-out provision with a view to attracting more States which are opposed to, make reservation on or hesitate over, the concept of internal war crimes

Lal Chand *et al.* (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003), at 636. See also Fleck, Dieter, “Humanitarian protection in non-international armed conflicts: The new research project of the International Institute of Humanitarian Law”, 30 *Israel Yearbook of Human Rights* 11 (2000); Veuthey, Michel, “Remedies to promote the respect of fundamental human values in non-international armed conflicts”, *ibid.*, at 40; Moir, Lindsay, “The implementation and enforcement of the laws of non-international armed conflicts”, 3 *Journal of Armed Conflict Law* 174 (1998); International Institute of Humanitarian Law, *Armed Conflicts and Disintegration of States: Humanitarian Challenge*, 21st Round Table on Current Problems of International Humanitarian Law, Report, September 1996, at 78; Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing Company, 1988), at 720.

to become parties to the Rome Statute.¹²⁸ Accordingly, it attempts to balance those States strongly arguing for the incorporation of the concept and those opposing States. This demonstrates the peculiarity of the concept. In practice, France made a declaration upon ratification that “pursuant to article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory”.¹²⁹ A similar declaration was also made by Colombia.¹³⁰ Since article 124 confers the right to exclude the concept on the State parties by unilateral declarations, it is an article with the nature of derogation. Therefore, it is doubtful whether the concept has been international *jus cogens*. Should two or more States conclude a treaty with a view to punishing the serious violations of international humanitarian law applicable to non-international armed conflicts as “ordinary” crimes instead of war crimes, such a treaty is not necessarily null and void in present international law.

CONCLUDING REMARKS

The concept of internal war crimes is a relatively recent rule in contemporary international law. Although it has been confirmed by the two *ad hoc* UN international criminal tribunals, provided in conventional international law and the domestic criminal laws of quite a few States, as well as endorsed by the majority of international law scholars, it is not completely impossible to challenge its status as customary international law. Its greatest problem lies in the absence of sufficient State practices. The *opinio juris* with respect to the concept obviously goes far ahead. Such a situation could not convince me that at the present stage of the development of customary international law, the concept has been well established. In my opinion, what could be safely said is that it is at most an emerging rule in customary international law. Neither has the concept acquired the status of international *jus cogens* due to the opposition of some Asian powers and the derogative nature of it in the Rome Statute. Accordingly, the oppositions to the concept by some Asian States,

¹²⁸ See also Wilmschurst, Elizabeth, “Jurisdiction of the court”, in Lee, Roy S. (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), at 139–141 (arguing that “the common sense view” resulting from the negotiations of the Statute is that a declaration under Article 124 in effect insulates nationals of the State from prosecution by the Court, and that after expiry of the declaration, the Court will be blocked from prosecuting war crimes committed during the period of the declaration); Askin, Kelly Dawn, “Crimes within the jurisdiction of the International Criminal Court”, 10 *Criminal Law Forum* 50 (1999) (noting that Article 124 may in fact provide an incentive to States to ratify the Statute).

¹²⁹ See France’s Declaration under Article 124, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (visited on 18 October 2006).

¹³⁰ See Colombia’s Declaration, *ibid.*

namely, the PRC, India and Pakistan, could be accommodated as the persistent objectors in international law. However, from the perspective of *lex ferenda*, this is not a celebratory thing for Asia. Whether serious violations of international humanitarian law applicable to non-international armed conflicts constitute war crimes in international law determines the effectiveness of suppression of such crimes at the international level. If they do, they might jump to the international level and be subject to the universal jurisdiction of every State. In this sense, the concept is desirable in customary international law or international *jus cogens*. Of course, the most essential way is to prevent the occurrence of non-international armed conflicts and to end their existence in quite a number of Asian States. There is a long way to go for the Asian States and the rest of the international community.

EFFECTIVENESS OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN INTERNATIONAL HUMAN RIGHTS LAW: PROBLEMS AND PROSPECTS

Sanzhuan Guo*

INTRODUCTION

In the course of international human rights protection and promotion, the focus has been changed from setting up international standards to domestic implementation. National Human Rights Institutions (NHRIs) are one of the mechanisms for such implementation. Before the Principles relating to the Status of National Institutions (“Paris Principles”) were adopted in the First Workshop on National Institutions for the Promotion and Protection of Human Rights in 1991, in response to the request of the Commission on Human Rights (“CHR”) of the United Nations (“UN”), and then by the CHR in 1992 and the General Assembly in 1993, there had only been eight independent NHRIs worldwide, though the concept of NHRIs can be dated back to 1946.¹ However, as of June 2009, the number of NHRIs had grown to 89 including 64 with status A (full compliance with the *Paris Principles*) under the accreditation of the International Coordinating Committee of NHRIs (“ICC”) and 25 with other status including A(R), B, C and suspended.²

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¹ As for the evolution of NHRIs, see Pohjolainen, Anna-Elina, *The Evolution of National Human Rights Institutions: The Role of the United Nations* (2006). With regard to the *Paris Principles*, see the UN Doc.: E/CN.4/1992/43 and Add.1, E/CN.4R3shES/1992/54 and A/RES/48/134; As for the NHRIs before the *Paris Principles*, see Burdekin, Brian, *National Human Rights Institution in the Asia-Pacific Region* (2007), at 6; Kjaerum, Morten, *National Human Rights Institutions Implementing Human Rights* (2003), at 5.

² See *ICC Rule of Procedure* and *The Chart of the Status of National Institutions: Accredited by the ICC* (as of 16 June 2008), available at <http://www.nhri.net/?PID=253&DID=0> (visited 20 July 2009).

With NHRIs' fast growth in the last two decades, their effectiveness has attracted intense discussion. In the area of international law, especially in the field of human rights, environmental and international economic laws, the issue of effectiveness has been given more and more attention. Oona Hathaway's article, "Do International Human Rights Treaties Make a Difference?" is an example in the human rights area of an attempt to define or test the effectiveness of international human rights law.³ Applying the idea of effectiveness in international human rights law to NHRIs, the question of "Do International Human Rights Treaties Matter?" can be addressed as "Do NHRIs matter?"

Since 2000, the International Council on Human Rights Policy ("ICHRP") has published two books on the effectiveness of NHRIs: *Performance and Legitimacy: National Human Rights Institutions* and *Assessing the Effectiveness of National Human Rights Institutions*, with the coordination of the Office of the UN High Commissioner for Human Rights ("OHCHR").⁴ The former is based on three case studies and the latter tries to set up indicators for effectiveness of NHRIs and benchmarks for effectiveness factors.⁵ However, the theoretical understandings on the effectiveness of NHRIs have yet to be examined. As Rachel Murray has pointed out, although the *Paris Principles* were regarded as central to measuring NHRIs' effectiveness, the criteria set up therein focus more on factors relevant to the establishment of such bodies, rather than how they perform once created and how they are perceived by others, not even mentioning how NHRIs can contribute to the development of thematic issues of substantive rights.⁶ Put simply, there is a difference between NHRIs' effectiveness *per se* and the factors contributing to that effectiveness ("effectiveness factors"). Furthermore, even though the *Paris Principles* listed some effectiveness factors, they focused mainly on the criteria of establishment rather than broader consideration. Murray's article broadens the scope of effectiveness factors, but it touches little on NHRIs' effectiveness *per se*.

Thus, after briefly defining NHRIs, this paper will use the compliance theory of international human rights law to identify NHRIs' effectiveness and then review the *Paris Principles* mainly from the perspective of effectiveness factors of NHRIs. To test the causal relationship between NHRIs' effectiveness and effectiveness factors exceeds the scope of this paper. This paper's main purpose is to provide theoretical understanding and measurement of these two variables: effectiveness as a dependent variable and effectiveness factors as an independent variable. Thus,

³ Oona Hathaway, "Do International Human Rights Treaties Make a Difference?", 111 *YLLJ* (2002), at 1935.

⁴ ICHR, *Performance and Legitimacy: National Human Rights Institutions*, 2nd edition, Geneva: ICHR, 2004 (hereinafter referred to as "*Performance and Legitimacy*"); ICHR, *Assessing the Effectiveness of National Human Rights Institutions*, Geneva: ICHR, 2005 (hereinafter referred to as "*Assessing the Effectiveness of NHRIs*").

⁵ *Ibid.*

⁶ Murray, Rachel, "National human rights institutions criteria and factors for assessing their effectiveness", 25(2) *Netherlands Quarterly of Human Rights* (2007), at 189–192.

after the theoretical description of NHRIs' effectiveness, this paper will attempt to measure the effectiveness, and accordingly the next section will focus on the measurement of effectiveness factors based on and beyond the *Paris Principles*. Finally, some conclusions will be made.

WHAT IS AN NHRI?

As the UN's handbook on NHRIs in 1995 said, despite the existence of comprehensive standards relating to practice and functions, there is not yet an agreed definition of NHRIs.⁷ Different institutions and scholars define NHRIs differently.

Under the *UN Handbook 1995*, the term NHRI was taken to refer to "a body which is established by the Government under the constitution, or by law or decrees, the functions of which are specifically defined in terms of the promotion and protection of human rights".⁸ This definition did not emphasize the importance of NHRIs' independence. Additionally, under this definition, NHRIs may be set up by a governmental decree while in the *Paris Principles* a constitutional provision or parliament act is required. To answer the question what an NHRI is, Mr Morten Kjaerum, the former director of Danish NHRI, adopts the standards of the *Paris Principles* as the criteria.⁹ Orest Nowosad does the same. He pointed out in his article that "if it is a national human rights institution it must comply with the *Paris Principles*."¹⁰ Sonia Cardenas defined NHRIs as "government agencies whose purported aim is to implement international norms domestically".¹¹ In Anna-Elina Pohjolainen's eyes, NHRIs can be described as "permanent and independent bodies, which governments have established for the specific purpose of promoting and protecting human rights".¹² Brian Burdekin, the former UN Special Advisor on NHRIs, defined effective NHRIs with six features, including independence, an appropriate and clearly defined mandate, pluralistic and representative composition, accessibility, cooperation with NGOs and adequate resources.¹³

⁷ United Nations Centre for Human Rights, *Professional Training Series No. 4: National Human Rights Institutions – A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, New York and Geneva: United Nations, 1995 (hereinafter *UN Handbook 1995*), para. 36.

⁸ *Ibid.*, para. 39.

⁹ Kjaerum, *op. cit.*, n 2, at 6–9.

¹⁰ Nowosad, Orest, "National institutions and the protection of economic, social and cultural rights", in Ramcharan, Bertrand G. (ed.), *The Protection Role of National Human Rights Institutions*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, at 183.

¹¹ Cardenas, Sonia, "Emerging global actors: The United Nations and national human rights institutions", 9 *Global Governance* (2003), at 23.

¹² Pohjolainen, *op. cit.*, n. 2, at 6.

¹³ Burdekin, Brian and Anne Gallagher, "The United Nations and national human rights institutions", in Alfredsson, Gudmundur and et al (eds.), *International Human Rights Monitoring*

After considering all elements of the above definitions, this paper defines NHRIs as independent bodies which are established by the Government under either the constitution or Parliament acts, the functions of which are specifically defined in terms of the promotion and protection of human rights and with the aim of implementing international human rights standards at domestic level. Although not all NHRIs will apply to ICC to be accredited with the status of A, A(R) or B in accordance with the *Paris Principles*, only NHRIs with A status accredited by ICC can fully participate in the UN's forum.¹⁴

Thus, for this paper's purpose, an NHRI can be characterized with the following four features: (1) it is a state organ and enforces state powers to protect and promote human rights, which is different from NGOs; (2) its establishment and mandates are legally guaranteed by either a constitution or parliament acts; (3) though a part of the executive branch, it is independent from the government, which differentiates it from other state bodies with human rights mandates; (4) its functions are specifically focusing on human rights protection and promotion, its mandates are broad and it is a bridge between international and domestic human rights protection and promotion. Generally speaking, an NHRI's mandates include conducting human rights education and research, advising governmental agencies, investigating human rights violation and cooperating with international human rights mechanisms.

Although any classification of NHRIs may be found difficult to apply to some specific cases, NHRIs can be generally categorized into four groups, based on their function and organizational structure:

- (1) Consultative human rights commission (French Model): Represented by the French National Consultative Commission of Human Rights (CNCDDH), a French-Model NHRI usually includes a large group of members (CNCDDH includes more than 60 members even after the 2007 reform) but small secretariat (CNCDDH's Secretariat has about seven staff); its main function is to advise the government on human rights issues and it does not accept individual complaints.¹⁵
- (2) Human rights research institution/center (Danish Model): This category includes the Danish Institute of Human Rights (DIHR), German Institute of Human

Mechanisms: Essays in Honour of Jakob Th. Moler, The Hague/Boston/London: Martinus Nijhoff Publishers, 2001, at 819–821.

¹⁴ As for the status of NHRIs in the UN, see UN Doc. A/HRC/RES/5/1; Kjaerum, Morten, "National Human Rights Institution: A Partner in Implementation" (unpublished, 2007, on file with the author).

¹⁵ As for CNCDDH, see Décret n°2007–1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme, art 5, available at http://www.cncddh.fr/article.php?id_article=316 (visited 19 July 2009); it is also based on the author's interview with CNCDDH in July 2007.

Rights and Norwegian Human Rights Center. NHRIs in this category do not usually accept individual complaints.¹⁶ They often include a board of members and a director-led staff team. Given that the work of Danish-Model NHRIs is research-based, their members play a less active role than the staff in the institution. For example, DIHR includes only 13 board members but has more than 100 staff, a structure which is opposite to the one of French-Model NHRIs.¹⁷

- (3) National human rights commission with quasi-judicial competence (Commonwealth Model): Most Asia-Pacific, African and Commonwealth NHRIs are in this category, which we can attribute to the tireless efforts of Brian Burdekin, the former Human Rights Commissioner of the Australian Human Rights and Equal Opportunity Commission (“HREOC”) and the former special advisor to the UN on NHRIs.¹⁸ NHRIs in this model have broad mandates and can accept individual complaints. They include a plural representation in membership from three (Mongolia) to 35 (Indonesia).¹⁹
- (4) Human rights ombudsman (Ombudsman Model). Generally speaking, the key function of a human rights ombudsman is to deal with individual complaints. It can be seen from the title that there is only one leading member in this type of NHRI. Most East European and Latin American countries take this form for their NHRIs, for example Mexico’s National Human Rights Commission and Commissioner for Civil Rights Protection of Poland (although the name of those NHRIs may include the word Commission).²⁰

¹⁶ Before 2003, DIHR could not accept individual complaints, but in 2003, DIHR was empowered to handle complaints relating to racial discrimination. By the time of the author’s interview, Denmark had passed a law in 2007 to transfer this complaint mandate from DIHR to some other organs although the transfer has not yet been finalized. *See also* Kjaerum, Morten, “The protection role of the Danish Human Rights Commission”, in Ramcharan, Bertrand G. (ed.), *The Protection Role of National Human Rights Institutions*, Leiden/Boston: Martinus Nijhoff Publishers, 2005, at 30–31.

¹⁷ *See* DIHR’s annual report. It is also based on the author’s interviews with DIHR in May 2007 and October 2008.

¹⁸ As for Asian-Pacific NHRIs, *see* Burdekin, *op. cit.*, n. 2. As for the African NHRIs, *see* Human Rights Watch, *Protectors or Pretenders? – Government Human Rights Commission in Africa*, New York: Human Rights Watch, 2001.

¹⁹ As for Mongolian NHRI, *see* *The National Human Rights Commission of Mongolia Act 2000*, art 3. Regarding Indonesian NHRI, *see* *Republic of Indonesia Legislation No. 39 of 1999 Concerning Human Rights*, art 83.

²⁰ As for Polish NHRIs, *see* Letowska, Ewa, “The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)”, 39 *ICLQ* (1990), at 206; *id.*, “The Commissioner for citizens’ rights in Central and Eastern Europe: The Polish experience”, *St. Louis-Warsaw Transatlantic Law Journal* (1996), at 1; *id.*, “The ombudsman in ‘new’ democracies: The Polish perspective”, in Hesse, J. J. and T. A. J. Toonen (eds), 3 *Europe Yearbook of Comparative Government and Public Administration*, Baden-Baden: Nomos-verl.-Ges., 1997; Elcock, Howard, “The Polish Commissioner for Citizens’ Rights Protection: Decaying communism to pluralist democracy through an ombudsman’s eyes”, 75 *Public Administration* (1997), at 359; Spring; Klich, Agnieszka, “Human

WHAT IS NHRIS' EFFECTIVENESS? – A THEORETICAL REVIEW

It is clear that one would not expect an NHRI to be “the panacea for all society’s ills”.²¹ The question is to what degree an NHRI can be marked as “effective”? Take the Indonesian National Human Rights Commission (“Komna HAM”) as an example. After its establishment in 1993, Komna HAM’s independence and effectiveness was doubted widely.²² However, at the same time, there were also some positive comments on it, arguing that its work is “a step in the right direction for Indonesia”.²³

Due to the importance of the *Paris Principles*, the full compliance with them is emphasized every time NHRIs are mentioned. However, as Rachel Murray has pointed out, the compliance with the *Paris Principles* does not equate to NHRIs’ effectiveness but is closer to attaining some features of an effective NHRI.

To trace the theoretical understanding of NHRIs’ effectiveness, this paper will primarily apply the compliance theory of international human rights law. Since World War Two, international human rights standards have been established step by step. However, the human rights situation in the world will not improve just because of the existence of international human rights standards. Even though questioned by some scholars, Hathaway’s article “Do Human Rights Treaties Make a Difference?” highlighted with some truth that the ratification of international human rights may not be the essential part of compliance with international human rights standards.²⁴ Thus, in the wave of the growth of NHRIs, the question has to be asked: “Do NHRIs matter?”, or, “To what extent do they matter?” To answer this question, the general theory on compliance in international law, particularly in international human rights law, will be explored first and then the application of general theory to the case of NHRIs will be examined.

rights in Poland: The role of the Constitutional Tribunal and the Commissioner for Citizens’ Rights”, *St. Louis-Warsaw Transatlantic Law Journal* (1996), at 33. As for Mexico’s NHRIs, see Human Rights Watch, *Mexico’s National Human Rights commission: A Critical Assessment*, New York: Human Rights Watch, 2008, available at <http://hrw.org/reports/2008/mexico0208/> (visited 20 July 2009); Fernandez, Jose Luis Soberanes, “The protection role of the Mexican Human Rights Commission”, in Ramcharan, *op. cit.*, n. 10, at 107–115.

²¹ Murray, *op. cit.*, n. 6, at 191.

²² South Asia Human Rights Documentation Centre (“SAHRDC”), *National Human Rights Institutions in the Asia Pacific Region: Report of the Alternate NGO Consultation on the Second Asia-Pacific Regional Workshop on National Human Rights Institutions*, New Delhi: SAHRDC, 1998, at 39–50.

²³ Talwar, Monika, “Indonesia’s National Human Rights Commission: A step in the right direction?”, 4(2) *The Human Rights Brief* (1997), available at <http://www.wcl.american.edu/hrbrief/v4i2/indo42.htm> (visited 14 July 2008).

²⁴ Hathaway, *loc. cit.*, at 1935; and Goodman, Ryan and Derek Jinks, “Measuring the effects of human rights treaties”, 14 *EJ IL* (2003), at 171.

Compliance/Effectiveness theory in general

The issue of effectiveness in international law is mainly discussed by two groups: one is international lawyers debating the importance of international law, and the other is international relations (“IR”) scholars, especially neo-liberal institutionalists questioning whether international regimes matter, particularly including environmental, human rights and international trade regimes.²⁵

As Benedict Kingsbury has correctly argued, different theories of law lead to different notions of compliance and there is no one definition of compliance in international law.²⁶ Different scholars even classify the compliance/effectiveness theories very differently. However, there are basically two models: one is the international law (IL) model and the other is the IR model.²⁷

Within the IL model, Chambers categorized four theories: (1) positivism pioneered by Jacobson and Weiss; (2) social legal model represented by Abram and Antonia Chayes’ work; (3) economic legal model represented by Oran Young; and (4) natural legal model represented by Thomas Franck.²⁸

Under the IR model, according to Robert Keohane, there are two different optics to view compliance in international law: Instrumentalist and Normative.²⁹ Oona Hathaway developed Keohane’s classification and included realism, institutionalism and liberalism within the rational actor pool and managerial, fairness and transnational legal process models in the normative optic.³⁰

As Raustiala and Slaughter have discussed, the overview of theories of compliance is in many ways a review of the burgeoning body of “IR–IL” scholarship.³¹ Harold Hongju Koh is one such scholar. Koh divided the compliance theories into four strands: (1) realist strand, which indicated that states did not obey international law; (2) utilitarian rationalist strand, which argued that states only followed international law when it was in their interests to do so; (3) liberal strand, which posited that a sense of moral and ethical obligation was the chief source of compliance; and

²⁵ Chambers, W. Bradnee, “Towards an improved understanding of legal effectiveness of international environmental treaties”, 16 *Georgetown International Environmental Law Review* (2003–2004), at 504; Kent, Ann, *Beyond Compliance: China, International Organizations and Global Security*, Stanford: Stanford University Press, 2007 (hereinafter referred to as “*Beyond Compliance*”), at 6.

²⁶ Kingsbury, Benedict, “The concept of compliance as a function of competing conceptions of international law”, 19 *Michigan Journal of International Law* (1998), at 346.

²⁷ Chambers, *loc. cit.*, n. 25, at 504–518.

²⁸ *Ibid.*

²⁹ Keohane, Robert, “International relations and international law: Two optics”, 38 *Harvard International Law Journal* (1997) 487 (hereinafter referred to as “Two optics”).

³⁰ Hathaway, *loc. cit.*, n. 3, at 1942–1962.

³¹ Raustiala, Kal and Anne-Marie Slaughter, “International law, international relations and compliance”, in Carlsnaes, Walter, Thomas Risse and Beth A. Simmons (eds.), *Handbook of International Relations*, London: SAGE, 2002, at 538.

(4) a process-based strand, which attributed compliance to complex patterns of interaction and legal discourse between states.³²

Actually, no matter by which classification, the representative works are similar, including positivism, realism, institutionalism based upon the rationalist strand, Abram and Antonia Chayes's managerial model, Thomas Franck's legitimacy and fairness, Slaughter's democracy theory and Koh's transnational legal process theory. Additionally, a new theory of acculturation or socialization from Ryan Goodman and Derek Jinks could also be added for this paper's purpose. As Ann Kent has pointed out in her new book on compliance, realism is not a very useful basis for comparison "because it provides no alternative explanation apart from self-interest, a motive already included in most of the other theories, particularly rationalism".³³ Thus, this paper will focus on positivism (Jacobson and Weiss), institutionalism (Keohane and Chayes), liberalism or natural law (Franck and Slaughter), process-based (Koh) and acculturation (Goodman and Jinks).

As for the positivism, according to Jacobson and Weiss, (1) implementation "refers to measures that states take to make international accords effective in their domestic law" and compliance "goes beyond implementation" and "refers to whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted"; (2) effectiveness in international law is related to, but not identical with, compliance; (3) although countries are in compliance with a treaty, a treaty may be ineffective to achieve its goals or the treaty itself is not effective in addressing the problems that it was intended to address.³⁴ It seems very true that "the connection between compliance and effectiveness is neither necessary nor sufficient" and "while high levels of compliance can indicate high levels of effectiveness, they can also indicate low, readily met and ineffective standards".³⁵ Under the positivist approach, many factors impact a country's implementation of and compliance with international treaties, including the intrusiveness of the activity, mechanisms for implementation, treatment of non-parties, the existence of freeloaders, other countries' approaches to compliance, the role of international organizations and the media, and the social, cultural, political, and economic characteristics of the countries.³⁶

Recognizing the difference between instrumentalist and normative optics, Keohane sketched three concepts which are, in his opinion, essential to the effect of

³² Koh, Harold Hongju, "Why do nations obey international law?", 106 *YJL* (1997), hereinafter referred to as "Why do nations obey?", at 2603–2635; and *see also* Kent, *Beyond Compliance*, *op. cit.*, n. 25, at 6–7.

³³ Kent, *Beyond Compliance*, *op. cit.*, n. 25, at 7.

³⁴ Jacobson, Harold K. and Edith Brown Weiss, "A framework for Analysis" in Brown Weiss, Edith & Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, Cambridge, Mass.: The MIT Press, 1998, at 4–5.

³⁵ Raustiala and Slaughter, *loc. cit.*, n. 31, at 539.

³⁶ Jacobson and Brown Weiss, *loc. cit.*, n 34, at 6–12.

rules on state behaviors: interest, reputation and institutions.³⁷ Particularly, he emphasized the importance of international institutions and argued that interest and concerns about reputation could be reconciled only within institutions, because “interests shape institutions, which affect beliefs, including reputations, which in turn affect interests”.³⁸ Keohane argued that international institutions facilitate cooperation by reducing transaction costs and uncertainties, and, in his words, “international regimes perform the function of establishing patterns of legal liability, providing relatively symmetrical information and arranging the costs of bargaining so that specific agreements can more easily be made”.³⁹ It is fair to say that compliance theory under institutionalism is based on rational calculation of state interests, including reputation, although the power of institutions to shape the interests is emphasized.

Whether Abram and Antonia Chayes’ “managerial model” is best categorized under the rationalist,⁴⁰ the normative optics⁴¹ or “process-based theories”,⁴² the key point of this approach is that coercive enforcement measures to sanction violations cannot be utilized for the routine enforcement of treaties, and state compliance is more like a matter of management, relying primarily on “a cooperative, problem-solving approach instead of a coercive one”.⁴³ In their book of *New Sovereignty*, Abram and Antonia Chayes argue that (1) states have a general propensity to comply with their treaty obligations because of the consideration of “efficiency, interests and norms”; (2) states’ violation of treaties frequently are not deliberate, but result more from “ambiguity and indeterminacy of treaty languages, limitations on the capacity of parties to carry out their undertakings; and the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties”; and (3) compliance tends to be the result of an ongoing interaction between states and the norms, rules, membership, and organization of international regimes, producing, through reporting procedure, interacting process of justification, discourse and persuasion.⁴⁴

According to Thomas Franck, the reason why states comply with international law, which is unsupported by an effective structure of coercion comparable to a national police force, is that they perceive international law as legitimate.⁴⁵ Legitimacy

³⁷ Keohane, “Two optics”, *loc. cit.*, n. 29, at 495–501.

³⁸ *Ibid.*, at 499–500.

³⁹ Keohane, Robert, *After Hegemony: Cooperation and Discord in the World Political Economy*, 1984 (hereinafter referred to as “*After Hegemony*”), at 88.

⁴⁰ Kingsbury, *loc. cit.*, n. 26, at 352–353.

⁴¹ Keohane, “Two optics”, *loc. cit.*, n. 29, at 490 and Hathaway, *loc. cit.*, n. 3, at 2635–2641.

⁴² Kent, *Beyond Compliance, op. cit.*, n. 25, at 7–8.

⁴³ Chayes, Abram & Antonia Handler Chayes, *New Sovereignty: Compliance with International Regulatory Agreement*, Cambridge, Mass.: Harvard University Press, 1995 (hereinafter referred to as “*New Sovereignty*”), at 3.

⁴⁴ *Ibid.*, at 1–28.

⁴⁵ Franck, Thomas, “Legitimacy in international system”, 82 *AJIL* (1988), at 706–707.

was defined as “that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process”.⁴⁶ There are four elements of rule legitimacy in the community of states, which are determinacy, symbolic validation, coherence, and adherence.⁴⁷ The more legitimacy an international law has, the more pull of compliance it will have and the higher probability it will be complied with. In addition, Franck argues that legitimacy is determined not only by the text of a rule, but also by the process of text formation and by the nature of the rule-giving institution. However, as Keohane points out, the compliance pull and legitimacy under Franck is in fact circular, and it is impossible to separate one from the other.⁴⁸ The fairness theory of Thomas Franck can be read as the extension of his legitimacy theory where he defines the fairness as a composite of two independent variables: legitimacy and distributive justice.⁴⁹ Under Franck’s fairness theory, the key question is not “whether a state obeys international law”, but “whether the international law is fair”, because an unfair rule will exert only a small compliance pull. In addition, it should be also noted that, under Franck’s theories, the power and interests of a state have never been denied, but the role of norms is emphasized.

As for Anne-Marie Slaughter’s liberal theory, a corresponding theory to the liberal school of IR theory in international law, as Ann Kent has commented, it “relies too heavily on the shared understandings of liberal states”, while its initial basis was the idea that state behavior is primarily determined by an aggregation of individual and group preferences and the developed version “permits, indeed mandates, a distinction among different types of states based on their domestic political structure and ideology”.⁵⁰ According to Slaughter’s theory, compliance will depend on whether a state has liberal democracy, such as having a representative government, civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law.⁵¹

In “Why Do Nations Obey International Law?”, Harold Hongju Koh makes thoughtful comments and reflections on Chayes and Franck’s compliance theory and further argues that transnational legal process provides the key to understanding the question.⁵² According to Koh’s explanation, the transnational legal process

⁴⁶ *Ibid.*, 706.

⁴⁷ *Ibid.*, 712.

⁴⁸ Keohane, “Two optics”, *loc. cit.*, n. 29, at 493.

⁴⁹ Franck, Thomas, *Fairness in International Law and Institutions*, Oxford: Clarendon Press, 1995, at 7–9, 25.

⁵⁰ Kent, *Beyond Compliance*, *op. cit.*, n. 25, at 14; Burley, Anne-Marie, “Law among liberal states: Liberal internationalism and act of states”, 92 *CLR* (1992), at 1909; Burley, Anne-Marie, “International law and international relations theory: a dual agenda”, 87 *AJIL* (1993), at 205; and Slaughter, Anne-Marie, “International law in a world of liberal state”, 6 *EJIL* (1995), at 503, 504.

⁵¹ Slaughter, *loc. cit.*, n. 50, at 503, 504; Kent, *Beyond Compliance*, *op. cit.*, n. 25, at 14.

⁵² Koh, “Why do nations obey?”, *loc. cit.*, n. 31, at 2645.

means “the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation’s domestic legal system”.⁵³ This process includes three phases: interaction, interpretation and internalization, and international laws become integrated into national law through this process.⁵⁴ Koh distinguishes four kinds of relationships between stated norms and observed conduct, including coincidence, conformity, compliance and obedience, which shifts from the external to the internal, from the instrumental to the normative, and from the coercive to the constitutive; he also argues that there are four compliance strategies combined to enforce the norms, i.e., coercion, self-interest, communitarian impulses and internalization through legal process.⁵⁵ More specifically, there are three forms of internalization: social, political and legal; and six key agents in the transactional legal process, which are (1) transnational norm entrepreneurs; (2) governmental norm sponsors; (3) transnational issue networks; (4) interpretive communities and law-declaring fora; (5) bureaucratic compliance procedures; and (6) issue linkage.⁵⁶

Marked as the Second Generation of interdisciplinary scholarship in international law, Ryan Goodman and Derek Jinks apply a new discipline – not political science and/or international relations, which have traditionally been the social sciences applied to international legal studies, but law and sociology – and bring forth a new theory of “acculturation”, in contrast to two mechanisms by which international law might change state: coercion and persuasion.⁵⁷ By acculturation, Goodman and Jinks mean “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture”.⁵⁸ According to Goodman and Jinks, their theory of acculturation is “an extension of Koh’s and others’ work on transnational norm diffusion” and they intend to “supplement that larger constructivist agenda by isolating the microprocesses of social influence”.⁵⁹ Specifically, acculturation encompasses a number of microprocesses, including “mimicry, identification, and status maximization”, and the touchstone of this mechanism is “that identification with a reference group generates varying degrees of cognitive and social pressures – real or imagined – to conform”.⁶⁰ As Koh has observed, Goodman and Jinks’s theory goes beyond the question of the First Generation of IR/IL scholarship, namely “Does international law matter?” and brings the microscope into

⁵³ Koh, Harold Hongju, “The 1998 Frankel Lecture: Bring international law home”, 35 *Houston Law Review* (1999) 623 (hereinafter referred to as “Bring international law home”), at 626.

⁵⁴ Koh, Harold Hongju, “Transnational legal process”, *Nevada Law Review* (1996), at 183–184.

⁵⁵ Koh, “Bring international law home”, *loc. cit.*, n. 53, at 627–633.

⁵⁶ *Ibid.*, at 642–655.

⁵⁷ Goodman, Ryan and Derek Jinks, “How to influence states: Socialization and international human rights law”, 54 *Duke Law Journal* (2004) 621; and Koh, Harold Hongju, “Internalization through socialization”, 54 *Duke Law Journal* (2004) 975, 977.

⁵⁸ Goodman and Jinks, *loc. cit.*, n. 57, at 626.

⁵⁹ *Ibid.*, “note 8”.

⁶⁰ *Ibid.*, at 626.

sharper focus, asking: “Given that international law matters, what are the social mechanisms that help make international law matter?”⁶¹

As Koh has analysed, the various theoretical explanations offered for compliance are complementary, not mutually exclusive.⁶² It is true that institutionalism’s interest theory may work better in some international regime or institution such as trade and arms control, but it has little explanatory power, especially in human rights and environmental law.⁶³ Regarding Chayes’s managerial model, it does not pay enough attention to the substance of rules in their managerial process. Moreover, sometimes securing a greater compliance with treaties may not even be desirable if “the treaties are themselves unfair or enshrine disingenuous or coercive bargains”.⁶⁴ It might be true that, “if a decision has been reached by a discursive synthesis of legitimacy and justice, it is more likely to be implemented and less likely to be disobeyed”, but Franck does not explain why this is so and by what process this implementation takes place.⁶⁵ As for liberal identity theory, some nations are “neither permanently liberal or illiberal, but make transitions back and forth, from dictatorship to democracy, prodded by norms and regimes of international law”, and “the claim that nonliberal states somehow do not participate in a zone of law denies the universalism of international law and effectively condones the confinement of nonliberal states to a realist world of power politics”.⁶⁶ Regarding Ryan and Jinks’s acculturation theory, Koh recognizes its importance, but also points out that their approach is not new in the sense of world polity model, which has close family ties to the English “international society” school of Grotian heritage.⁶⁷

As Ann Kent has pointed out, Koh’s transnational legal process is theoretically the most comprehensive of all the theories analysed because “it incorporates the importance of process in managerial theory, the insights of constructivism, and even a modified acceptance of the role of self-interest and need for the ‘threat’ of enforcement”, and it is also inclusive in a structural sense, because “it comprehends all levels of state and non-state interaction, influence, and compliance – the international and the domestic, the vertical, and the horizontal”.⁶⁸ Additionally, while it might be the case that different regimes apply different compliance theories, Koh’s transnational legal process theory has been applied and tested in international human rights law.⁶⁹ Therefore, for this paper’s purpose, I apply Koh’s transnational legal process theory to explain the effectiveness of NHRIs.

⁶¹ Koh, “Internalization through socialization”, *loc. cit.*, n. 57, at 977.

⁶² Koh, “Why do nations obey?”, *loc. cit.*, n. 32, at 2649.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, at 2641.

⁶⁵ *Ibid.*, at 2645.

⁶⁶ *Ibid.*, at 2650.

⁶⁷ Koh, “Internalization through socialization”, *loc. cit.*, n. 57, at 978.

⁶⁸ Kent, *Beyond Compliance*, *op. cit.*, n. 25, at 10.

⁶⁹ Koh, Harold Hongju, “1998 Harris Lecture: How is international human rights law enforced?”, 74 *Indiana Law Journal* (1999), at 1397 (hereinafter referred to as “How human rights enforced”).

Applying the compliance/effectiveness theory to NHRIs

As Oran Young says, there are different approaches to understanding effectiveness, including problem-solving, legal, economic, normative and political, and the political approach is generally used to refer to the observation that “effective regimes cause changes in the behavior of actors, in the interests of actors, or in the policies and performance of institutions in ways that contribute to positive management of the targeted problem”.⁷⁰ Although we notice the possible difference between effectiveness and compliance (depending on how compliance is defined) as discussed above, the connection is still rather obvious because both focus on the change of a regime on state behaviors.

NHRIs, as one of the mechanisms integrating international human rights standards with national systems, can be regarded as a part of the international human rights regime. Applying Koh’s transnational legal process theory to the international human rights law/regime and furthermore to NHRIs, the following four components would be the key to understanding NHRIs’ effectiveness.

*Firstly, NHRIs’ effectiveness is indicated in the process of their interaction with and between different human rights actors, including governmental organs and civil societies at domestic, regional and international levels. As Koh says, “many efforts at human rights norm-internalization are begun not by nation-states, but by ‘transnational norm entrepreneurs’, private transnational organizations or individuals who mobilize popular opinion and political support within their host country and abroad for the development of a universal human rights norm.”*⁷¹ NHRIs, as domestic statutory bodies established in compliance with international standards (the *Paris Principles*), can be a good bridge between the government and NGOs, and between international and domestic human rights communities.

More importantly, NHRIs themselves are one of the actors in international human rights regimes. For example, NHRIs have played and will continue to play very significant roles in initiating, drafting and promoting the ratification of the UN Convention on the Rights of Persons with Disabilities.⁷² With the coming into being of a Human Rights Council, NHRIs are seeking to participate more actively in the international human rights regime. Following the CHR resolution 2005/74, the UN General Assembly Resolution 60/251 which established the Human Rights Council, and the Human Rights Council’s practice, both NHRIs (with the accreditation of Status A) and their regional and international coordination committees can fully

⁷⁰ Young, Oran and Marc Levy, “The effectiveness of international environmental regimes”, in Young, Oran (ed.), *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms*, Cambridge, Mass.: The MIT Press, 1999, at 3–6.

⁷¹ Koh, “How human rights enforced”, loc. cit., n. 69, at 1409.

⁷² See ICC’s Annual Session Reports, in particular, 19th Session Report, at 15–17; 18th Session Report, at 8; 17th Session Report, at 4–5; 16th Session Report, at 5–6; 15th Session Report, at 4; 14th Session Report, at 26–28.

participate in the sessions of the Human Rights Council.⁷³ In addition, NHRIs can also be very helpful in the establishment and operations of regional and international human rights institutions, such as the roles of four Southeast Asian NHRIs in the establishment of ASEAN human rights mechanisms (including NHNIs of Thailand, the Philippines, Indonesia and Malaysia).⁷⁴

Furthermore, the network of NHRIs, either at regional or international level, is becoming more and more important in the international human rights field. As Slaughter and Zaring argue, “networks offer an alternative to the paradigm of a regulatory race to the top or bottom”.⁷⁵ The Asia Pacific Forum of National Human Rights Institutions (“APF”) is an example. APF provides “a framework for NHRIs to work together and cooperate on a regional basis through a wide range of services, including training, capacity building, networks and staff exchanges”, and “practical and tailored support to its members to assist them to more effectively undertake their own human rights protection, monitoring, promotion and advocacy”, and even “support to governments and civil society groups”.⁷⁶ According to the research of Andrew Byrnes and his team, APF is not an organization over and above states, but through its accreditation and membership review procedure, it works horizontally to promote convergence and conformity with international standards in the form of the *Paris Principles*.⁷⁷ More interestingly, as human rights NGOs have observed, APF is also playing some key roles in Asia-Pacific regional human rights protection and promotion and the possible contribution to a regional human rights regime.⁷⁸

Secondly, NHRIs’ effectiveness is also shown in the process of their interpretation of international human rights norms. NHRIs can help promote understandings of international human rights standards through their functions in different areas. According to the *Paris Principles*, besides increasing international cooperation, NHRIs primarily have three other mandates: (1) advising human rights policy and reviewing laws and regulation in accordance with human rights standards;

⁷³ See the UN Doc. E/CN.4/RES/2005/74 and A/RES/60/251, and “Information for national human rights institutions” of Human Rights Council, available at <http://www2.ohchr.org/english/bodies/hrcouncil/nhri.htm>, and “Regional coordinating committees of NHRIs, Speaking on behalf of A accredited institutions”, available at: http://www2.ohchr.org/english/bodies/hrcouncil/icc_meeting.htm (visited 21 July 2009).

⁷⁴ See Thio, Li-ann, “Implementing human rights in ASEAN countries: ‘Promises to keep and miles to go before I sleep’”, 2 *Yale Human Rights and Development Law Journal* (1999), at 1.

⁷⁵ Slaughter, Anne-Marie and David Zaring, “Networking goes international: An update”, 2 *Annual Review of Law and Social Science* (2006), at 211, 217.

⁷⁶ See APF’s official website: <http://www.asiapacificforum.net/about> (visited 20 July 2009).

⁷⁷ Byrnes, Andrew, Andrea Durbach and Catherine Renshaw, “Joining the club: the Asia Pacific Forum of national human rights institutions, the *Paris Principles*, and the advancement of human rights protection in the region”, a paper submitted to the 5th Asian Law Institute Conference, on file with the author, at 4.

⁷⁸ Asia-Pacific Human Rights Network, “Establishing a regional human rights mechanism for the Asia-Pacific region”, 2 *Asia-Pacific Journal of Human Rights and the Law* (2003), at 82.

(2) handling individual complaints and investigating human rights violations; and (3) promoting the human rights public awareness through human rights research and education. As the UN Deputy High Commissioner for Human Rights, Ms Kyung-wha Kang, emphasized on the twentieth anniversary of the Danish Institute for Human Rights, “NIs can take the lead in ensuring the national legislation is in conformity with international human rights standards, and protecting vulnerable groups against discrimination”, and “NIs can also ensure that international standards are properly reflected in the domestic administration of justice to enable it to provide protection, redress and effective remedies.”⁷⁹ When NHRIs perform their functions, they not only answer the specific questions and solve the problems, but more importantly, they interpret human rights rules and deliver such interpretation and understandings to their clients, including governmental officials, NGOs, individuals, or the public in general.

ICC, APF and other regional networks of NHRIs also play important interpretative roles for international human rights standards. As Walter Powell points out, because networks are based on complex communication channels, they are able not only to communicate information but also to generate new meanings and interpretations of the information transmitted, thereby providing a context for learning by doing.⁸⁰ For example, the APF has established “a number of professional and thematic focal-point networks that support Commissioners and staff from APF member institutions to share information and resources, develop co-operative partnerships and establish ‘best practice’ standards”, including “Senior Executive Officers Network”, “IDP Focal Point Network” and “Trafficking Focal Point Network”.⁸¹ In addition, the Advisory Council of Jurists of APF (“ACJ”) has reported on a wide range of human rights issues since its establishment in 1998, including the death penalty, terrorism, prohibitions on torture and trafficking, the application of the right to education, and the impact of the environment on human rights, which “reflects the APF’s recognition of the need for access to independent, authoritative advice on international human rights questions and to develop regional jurisprudence relating to the interpretation and application of international human rights standards”.⁸²

⁷⁹ Statement by the UN Deputy High Commissioner for Human Rights, Ms Kyung-wha Kang, Seminar on the future role of NIs, Danish Institute for Human Rights, 3 May 2007 (hereinafter referred to as “Ms Kang’s statement in DIHR”), available at: http://www.demotemp360.nic.in/2007/Statement_DHC_Copenhagen030507_Final.pdf (visited 20 July 2008), at 2–3.

⁸⁰ Powell, Walter, “Neither market nor hierarchy: Network forms of organization”, 12 *Research in Organizational Behavior* (1990), at 295, 325.

⁸¹ APF, *Network of Asia Pacific Forum*, available at <http://www.asiapacificforum.net/services/networks> (visited 20 July 2008).

⁸² See Terms of Reference of the Advisory Council of Jurists of the Asia-Pacific Forum of National Human Rights Institutions, available at <http://www.asiapacificforum.net/acj/downloads/acj-terms-of-reference/tor.pdf> (visited 20 July 2008), and some introduction to ACJ in the APF official website, available at: <http://www.asiapacificforum.net/acj> (visited 20 July 2008).

Thirdly, NHRIs' effectiveness relates to their roles in the internalization of international human rights standards at domestic levels, including social, political and legal internalization. Social internalization in the human rights area means the acceptance of international human rights standards by the society, or, in Koh's words, "a norm acquires so much public legitimacy that there is widespread general adherence to it"; political internalization occurs when "the political elites accept an international norm and advocate its adoption as a matter of government policy"; and legal internalization occurs when international human rights laws are incorporated into the domestic legal system.⁸³ However, as Koh states, the sequence of social, political and legal internalization could vary from case to case.⁸⁴ For example, in the establishment of the Asia-Pacific regional human rights regime, it could be true that legal internalization cannot be realized until political internalization finally occurs. In contrast, at a domestic level, under international pressure or other considerations, legal internalization could come first before political internalization exists. As Sonia Cardenas has observed, sometimes international human rights pressure can lead a state to undertake extensive institutional reforms, although political willingness to comply with international human rights standards remains far from resolved.⁸⁵ Understandably, in the human rights field, social internalization could be the last step, compared with legal and political internalization, especially in countries with a weak rule of law.

Fortunately, NHRIs can play important roles in legal, political and social internalization of human rights norms. In practice, it is more apparent in NHRIs' participation in the legal internalization of international human rights standards, such as their facilitating and urging the governments to ratify the UN human rights treaties, to pass new laws implementing international or regional human rights treaties, or to review previous laws in order for them to meet human rights standards. In addition, as the UN Deputy High Commissioner for Human Rights Ms Kang has observed, the key roles of NIs is "crystallized in their protection function as well as in shoring up the rule of law at the national level".⁸⁶ In other words, NHRIs not only function within the specific field of human rights protection and promotion, but also contribute generally to the establishment and strengthening of the rule of law in their own states, which in the long run is the key to realizing human rights protection. NHRIs' promotion of the rule of law can be seen as a key part of the political internalization of the international human rights regime. Finally, but not least importantly, NHRIs take active roles in promoting the acceptance of international human rights standards in societies, through human rights education, research and other promotions. The social internalization of international human rights law is the

⁸³ Koh, "How human rights are enforced", *loc. cit.*, n. 69, at 1413.

⁸⁴ Koh, "Bring international law home", *loc. cit.*, n. 53, at 643.

⁸⁵ Cardenas, Sonia, *Conflict and Compliance: State Response to International Human Rights Pressure* (2007), at 3–5.

⁸⁶ Ms. Kang's statement in the DIHR, *op. cit.*, n. 79, at 2.

fundamental basis of the next step of obedience to international human rights standards because obedience can occur only after the public legitimacy of international human rights standards has been established and the following of such standards has become a habit or part of the culture.

Fourthly, NHRIs' effectiveness depends on obedience with international human rights standards. Since obedience, rather than coincidence, conformity or compliance, is the key for transnational legal process theorists to understand the impact of the international human rights regime, NHRIs' effectiveness will finally focus not only the conformity of behavior and international human rights standards, but deepen the obedience culture. Put simply, obedience to international human rights standards should become an internal value of a state, and, to be effective, NHRIs should contribute to this obedience culture.

SOME THOUGHTS ON INDICATORS OF NHRIs' EFFECTIVENESS: BEYOND PERFORMANCE AND LEGITIMACY

Although ICHRP tried to differentiate “benchmark” and “indicator” as “minimum attributes of national institutions with respect to their legal foundation, membership, mandate, funding and so on” and “tools that measure NHRIs' performance”, or referred to benchmarks for features of NHRIs (effectiveness factors) but indicators of performance (effectiveness), this difference is vague and obscure. In my understanding, an indicator is something like a variable, but a benchmark is a value or the most favorite or minimum value for a variable. To measure a social phenomenon, some variables should be identified and each variable might have different values. For example, to measure the social status of a person in a certain society, annual income, among others, might be used as one variable, and USD50,000 or USD100,000 is just the value of annual income. In this example, it can be said that “annual income” is an indicator of social status, and “USD50,000” could be the minimum benchmark for a middle class (let us say, in the USA). Obviously the benchmark does not set up a new variable. It is true that a variable might be quantitative or qualitative. In this paper, it is impossible to give each NHRI a value on all variables (indicators) of effectiveness, but it might be feasible to find out what these indicators are.

A methodological approach is the key to measuring NHRIs' effectiveness. The current literature on the effectiveness of NHRIs generally adopts a performance measurement approach, which refers to NHRIs' effectiveness in performing their job. The UN published a handbook on NHRIs in 1995 (*UN Handbook 1995*) and tried to measure NHRIs' task of (1) promoting awareness and educating about human rights; (2) advising and assisting government; and (3) investigating alleged human rights violations.⁸⁷ ICHRP saw the connection between NHRIs' effectiveness

⁸⁷ *UN Handbook 1995, op. cit.*, n. 7, para. 139–297.

and the human rights situation, but regarded measuring the human rights situation as beyond its scope.⁸⁸ In addition, ICHRP tried to separate measuring performance from the impact, but performance cannot be measured without measuring its impact on the targeted actors, unless ICHRP's performance actually means NHRIs' operating efficiency. Stephen Livingstone and Rachel Murray used "capacity, performance and legitimacy" to measure NHRIs' effectiveness.⁸⁹ But as they have also recognized, "capacity" mainly deals with the conditions under which an NHRI is established and those conditions are key factors for an NHRI's effectiveness rather than the determinants of effectiveness.⁹⁰ In fact, Livingstone and Murray's measurements of performance also relate to effectiveness factors rather than effectiveness *per se*, such as strategic plan, coherent management and internal structure.

However, the question of measuring NHRIs' effectiveness by performance or tasks lies in who should determine the job of NHRIs: the *Paris Principles*, the NHRIs' legal basis, or NHRIs themselves? The result could be the same given that the majority of NHRIs were set up in accordance with the *Paris Principles*, and NHRIs always have certain discretion to decide their work priorities. But, are these mandates of NHRIs appropriate, or are other standards more appropriate?

On the other hand, both ICHRP and Livingstone and Murray used "legitimacy" to measure the effectiveness of NHRIs. Legitimacy in compliance or effectiveness theory is not new, as this paper has discussed above, particularly in Franck's theory. The question arises what does legitimacy means in ICHRP and Livingstone and Murray's measurements? If legitimacy is only another word for effectiveness, then from external parties' perspective, such as governments, NGOs and affected individuals or groups, legitimacy measurement will not provide anything new to understand NHRIs' effectiveness. For example, under Livingstone and Murray's legitimacy understanding, an inaccessible NHRI will be marked as "ineffective". The external perspective on effectiveness of NHRIs surely provides some useful information, especially about the relationship between NHRIs and other parties, but should not NHRIs' effectiveness always be assessed by the parties affected of the work of NHRIs, if effectiveness means the impact on those targeted? In other words, legitimacy *per se* does not give us a new criterion to assess NHRIs' effectiveness but is only a change of term. As similarly discussed in Franck's legitimacy theory, it is a circular argument to measure compliance/effectiveness by "legitimacy".

In my understanding, the failure of the current literature on measuring NHRIs' effectiveness is due to the lack of theoretical support. Based on the introduction of transnational legal process theory into NHRIs, the effectiveness of NHRIs should be measured in the process of interaction, interpretation, internalization and obedience.

⁸⁸ ICHRP, *Assessing the Effectiveness of NHRIs*, *op. cit.*, n. 4, at 30–32.

⁸⁹ Livingstone, Stephen and Rachel Murray, "The effectiveness of national human rights institutions", in Halliday, S., and P. Schmidt (eds.), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, Oxford: Hart Publishing, 2004, at 139–143.

⁹⁰ *Ibid.*, at 142.

Specifically, but simply due to the space limitation, indicators of NHRIs' effectiveness could be understood as follows:

- 1) *Interaction*. In the interaction process, the indicators to evaluate NHRIs' effectiveness might include: (1) *International level*: Whether or not the NHRI has been accredited with Status A by the ICC? What is the role of the NHRI in the ICC? Has the NHRI sent delegates to the UN human rights bodies, including treaty bodies and charter bodies? (2) *Regional level*: Is the NHRI a member of any regional network of NHRIs? In the case of the Asia-Pacific, whether the NHRI has ever initiated or participated in the establishment of a regional or sub-regional mechanism? In the case of other regions, what is the cooperation of the NHRI with the regional human rights bodies? (3) *National level*: What is the connection between the NHRI and NGOs and government agencies? Does the NHRI have any national inquiry or similar procedure?
- 2) *Interpretation*. In the interpretation process, the measurement might include: (1) *National Human Rights Plan*: Whether or not the NHRI has ever published a national human rights plan? Is there any annual publication on the human rights situation in the country? (2) *Individual Complaint*: Is there any individual complaint procedure? If yes, some indicators to measure the individual complaints could include: (a) total number of complaints; (b) breakdown of complaints by type; (c) breakdown of complaints by the body complained against; (d) breakdown of complaints by type of complaint; (e) tracking of complaints by location; (f) tracking of complaints by outcome.⁹¹ (3) *Human Rights Violation Investigation*: Are there any investigations on major human rights violations in the country? Can the NHRI publish the result of its investigation? How about follow-ups? (4) *Human Rights Education and Research*: Are there any research teams under the NHRI and what do they publish on human rights? For example, the Research Department in the DIHR and the ACJ of the APF are conducting research and publishing reports on human rights, which provide important expert opinions to understand human rights laws. What are their education activities, such as seminars, training, conferences, and how about the thematic coverage and feedback?
- 3) *Internalization*. To assess NHRIs' effectiveness in internalization, these questions can be asked: (1) *Legal internalization*: Has the NHRI persuaded the government to ratify the related human rights treaties, or to withdraw the reservation? Is the persuasion successful, and to what extent? For example, the CMI Report on three NHRIs in Southeast Asia ("CMI Report") used this as one criterion to assess the NHRIs' effectiveness.⁹² In addition, to what extent does the NHRI get

⁹¹ ICHRP, *Assessing the Effectiveness of NHRIs*, *op. cit.*, n. 4, at 35.

⁹² Stokke, Hugo, *Taking the Paris Principles to Asia: A Study of Three Human Rights Commissions in Southeast Asia: Indonesia, Malaysia and the Philippines: CMI Report R2007:3*, Bergen: Chr. Michelsen Institute, available at <http://www.cmi.no/publications/file/?2680=taking-the-paris-principles-to-asia> (visited July 24, 2008), at 16.

involved in incorporating international human rights law into domestic legal systems? For example, are there any court cases relating to the implementation of human rights standards which the NHRI supports? How many laws has the NHRI reviewed according to international human rights standards, and what is the result or impact? How about proposed legislation? (2) *Political internalization*: Whether or not the NHRI itself complies with international human rights standards, such as anti-discrimination and transparency; what roles has the NHRI played in advising government on human rights issues (see the *UN Handbook 1995*, para. 200–206). (3) *Social internalization*: What is the media coverage of the NHRI's activities?

- 4) *Obedience*. Measuring the contribution of NHRIs in a state's obedience in international human rights standards is complex. As we discussed above, social internalization could be the fundamental basis of the obedience of a state, although social internalization mainly refers to society's acceptance while obedience comes from the government. At this stage, the effectiveness of NHRIs is unavoidably connected with the measurement of the human rights record of the state. If a state has internally accepted the international human rights standards, its human rights record should be fairly good, or at least become better and better. Measuring the human rights situation of a state is not easy in any sense, but it could be easier for this paper's purpose to test the effectiveness of NHRIs in the process of obedience because focus can be given to human rights violation and the gap between formal commitment and human rights record can be ignored due to the lack of resources and political will. The assumption is that the higher level of obedience, the lower the violation of human rights.

Finally, as Oran Young says, "delineating the range of potential effects is an important step, but it constitutes only the first stage in the effort to assess the effectiveness of international regimes", and the next stage "involves an effort to determine which of the changes captured in the before-and-after snapshots can be attributed, wholly or in part, to the operation of the regimes we have studied".⁹³ In other words, NHRIs may play effective roles in the above process, but NHRIs may not be the only role player. To define the effects of NHRIs is one thing, but separating the impact of NHRIs from other elements is another. Separating the effects of NHRIs from other players in the four processes of the international human rights regime is beyond this paper's scope, but the methods of "variation finding analysis" and/or "tendency finding analysis" might be helpful in further research.⁹⁴

⁹³ Young, Oran, "Regime effectiveness: Taking stock", in Young, *op. cit.*, n. 70, at 256.

⁹⁴ *Ibid.*, at 256–258; see also Olson, Mancur, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Cambridge, Mass.: Harvard University Press, Rev. ed., 1971; King, Gary, Robert Keohane and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton: Princeton University Press, 1994; Nagel, Ernest, *The Structure of Science*:

THE *PARIS PRINCIPLES* AND BEYOND: EFFECTIVENESS FACTORS OF NHRIS

Compared to measuring NHRIs' effectiveness *per se*, there is more general agreement on indicators and measurement of effectiveness factors. The *Paris Principles* provide the starting point and some common language. Due to the historical background, the *Paris Principles* were not drafted to list all conditions or factors contributing to the effectiveness of NHRIs, but focused more on the minimum criteria for establishing such bodies.⁹⁵ In addition, the *Paris Principles* might not be sufficient or necessary conditions for the effective operation of an NHRI. Rachel Murray lists some eighteen factors within three categories to influence the effectiveness of NHRIs,⁹⁶ while ICHRP lists the features of effective NHRIs with the category of "character of national institutions", "mandate" and "accountability".⁹⁷ The *UN Handbook 1995* includes six main effectiveness factors including (1) independence, (2) defined jurisdiction and adequate power, (3) accessibility, (4) cooperation, (5) operational efficiency and (6) accountability.⁹⁸ As discussed above, Brian Burdekin, a leading NHRI expert, has also characterized an effective NHRI as having six features in accordance with the *Paris Principles*.⁹⁹

It is fair to say that the *Paris Principles* provide the basis to understand NHRIs' effectiveness factors, but we must also go beyond them. Any efforts to exhaust the list of effectiveness factors could be futile. For the purpose of this paper, three categories of effectiveness factors will be analyzed: independence, internal (endogenous) and external (exogenous) factors. Because independence is related to both internal and external factors, and also because the importance of the independence of an NHRI requires an NHRI to be a national human rights institution, the independence of NHRIs will be first discussed.

Independence of NHRIS

Independence or autonomy of NHRIs is regarded as fundamental to the effectiveness of such bodies, especially independence from the executive branch. The *Paris Principles* not only emphasize the importance of the independence of NHRIs, but also lay down some mechanisms to guarantee it.

Problems in the Logic of Scientific Explanation, Indianapolis: Hackett Publishing Company, 2nd ed., 1961; Dessler, David, "The architecture of causal analysis", paper presented at the Center for International Affairs, Harvard University, 1992.

⁹⁵ Murray, *loc. cit.*, n. 6, at 190.

⁹⁶ *Ibid.*, at 194–219.

⁹⁷ ICHRP, *Assessing the Effectiveness of NHRIs*, *op. cit.*, n. 4, at 11–23.

⁹⁸ *UN Handbook 1995*, *op. cit.*, n. 7, para. 63–138.

⁹⁹ Burdekin and Gallagher, *loc. cit.*, n. 13, at 819–821.

Firstly, an NHRI should be established upon a strong legal basis with clear mandates. If an NHRI is established with a constitutional foundation, its formal legitimacy will be high. Although laws might not guarantee the independence of NHRIs, they provide the first keystone for the independence of NHRIs. The legal bases in the *Paris Principles* are limited with the constitutional law and parliament act but exclude decrees which the *UN Handbook 1995* included instead.¹⁰⁰ To participate in the activities of the UN Human Rights Council, an NHRI must obtain Status A from the ICC where one criterion for such accreditation is the legal basis on the form of constitutional law or an act of parliament rather than a presidential decree. More importantly, a clear mandate is the key to keeping NHRIs independent from other governmental organs. Without the defined boundary of a clear mandate, an NHRI could be easily interfered with by other organs, especially in those countries without a strong tradition of rule of law. The law itself may not be enough to keep NHRIs independent, but without laws it will be almost impossible to have independent NHRIs.

Secondly, the importance of leadership for the effectiveness of an organization is widely recognized and, especially for those countries with a strong authoritarian governance tradition, appropriate leadership could be the only way to maintain the independence of an NHRI. To locate and guarantee good leadership in NHRIs, the appointment and dismissal procedure of an NHRI's leading members is essential. Kristine Yigen makes a detailed research of the guarantees of independence of NHRIs from the perspective of appointment and dismissal procedures of leading members.¹⁰¹ Pursuant to the *Paris Principles*, the procedure of appointment:

affords all necessary guarantees to ensure the pluralist representation of the social forces involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representation of nongovernmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, association of lawyers, doctors, journalists and eminent scientists; trends in philosophical or religious thoughts; universities and qualified experts; parliament; government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity).¹⁰²

In other words, pluralism is an important way to maintain the independence of an

¹⁰⁰ *UN Handbook 1995*, *op. cit.*, n. 7, para. 39.

¹⁰¹ Yigen, Kristine, "Guarantees of independence of national human rights institutions: Appointment and dismissal procedures of leading members", in Lindsnaes, Birgit, Lone Lindholt and Kristine Yigen (eds.), *National Human Rights Institutions: Articles and Working Papers – Input to the discussions of the establishment and development of the functions of national human rights institutions*, Copenhagen: The Danish Centre for Human Rights, 1st rev. ed., 2001, at 59–81.

¹⁰² *The Paris Principles*, "Composition and guarantees of independence and pluralism".

NHRI. It might be arguable whether or not it is necessary to have plural representation of membership of an NHRI for its effectiveness, but surely the diversity of composition of an NHRI would greatly increase its capacity to fight against intervention from outside. As for the appointment and dismissal procedure, it is more desirable that the members of an NHRI be directly appointed by the parliament than the executive branch of government. Preferably, the member of an NHRI should enjoy similar rights and privileges to judges, such as a fixed term, adequate remuneration, and no legal liability for actions taken in their official capacity.¹⁰³ The leaders of NHRIs should also have independent power and authority to hire and/or fire their own staff, that is to say, personnel independence.

Thirdly, another crucial element for the independence of NHRIs is financial independence. As ICHRP points out, “financial autonomy guarantees the overall freedom of NHRIs to determine their priorities and activities”, “public funds should be provided through a mechanism that is not under direct government control”, and “NHRIs should also be free to raise funds from other sources such as private or foreign donor agencies”.¹⁰⁴

Fourthly, beyond a strong legal basis and personnel and financial independence, a political context and the link between NHRIs and other organizations such as NGOs and the international community can be very important for NHRIs' independence. Consider the Australian and Korean NHRIs as examples. HREOC is accountable to Parliament through the Attorney-General's Department and its independence has never been questioned on its connection with such an administrative branch. During my interviews with human rights experts in Australia, I realized that the political culture or tradition in Australia guarantees the independence of HREOC if the applicable laws say so, and it does not really matter if the HREOC directly reports to the Parliament or has to go through an executive agency. In contrast, it was regarded as a great threat to the independence of the National Human Rights Commission of Korea (“NHRCK”) that the newly-elected President of Korea attempted to put NHRCK under his branch in early 2008. Interestingly, the French National Consultative Commission of Human Rights (“CNCOH”) is a part of the French Prime Minister's Office legally, even though its legal basis was changed from a Presidential Decree to an Act of Parliament in 2007. According to my interview experience in France, the independence of CNCOH has never been challenged with regard to its connection with the Prime Minister's Office. It seems that the independence of NHRIs in those countries with advanced democracy is easier realized than in those countries with less democracy or in the process of transition to democracy.

¹⁰³ ICHRP, *Assessing the Effectiveness of NHRIs*, *op. cit.*, n. 4, at 12–13.

¹⁰⁴ *Ibid.*, at 13.

Internal factors

The internal factors for NHRIs' effectiveness consist of the organizational resources available to accomplish their goals.

Firstly, from the perspective of the organization's efficacy, there are some common requirements for NHRIs and many other organizations, including qualified staff with professional knowledge and skills, proper internal structure and sound management including leadership. This is similar to what Rachel Murray terms "coherent management and internal structure and operational efficiency".¹⁰⁵

During the author's interview in 2007 with Frauke Seidensticker, the deputy director of the German Institute for Human Rights, she advised that the key to the success of the German NHRI is working staff with good communications skills. Without professional human rights staff, NHRIs cannot work successfully. In addition, good leadership is not only required to keep the institution independent, but it is also the key to maintaining good administration and overall management. During the author's interviews, the importance of leadership was emphasized by almost all NHRIs and regional and international NHRI networks, including APF, ICC, the UN's NI Unit, Denmark, Germany, Poland, Australia, South Korea, Mongolia and others. For example, in the case of the Sri Lankan Human Rights Commission, "its legal framework was weak, but it had an impact because of the dynamism of its chairperson, his stature as a former judge of the Supreme Court, and his ability to function almost full time".¹⁰⁶

Furthermore, financial adequacy is not only important for the independence of NHRIs, as discussed above, but is also important for NHRIs' operation. For instance, in 2004, the annual budget of the National Human Rights Commission of Mongolia ("NHRCM") equalled USD61,635 and only 3.9 per cent was allocated for operational costs.¹⁰⁷ Obviously, this financial restraint greatly reduced the effectiveness of the organization.

Secondly, NHRIs should include clearly defined mandates and adequate powers, and different mandates of NHRIs require different working methods. In accordance with the *Paris Principles*, the mandates of NHRIs usually include four: (1) policy advising and commenting on existing and draft laws complaints; (2) monitoring the domestic human rights situation and in some cases handling individual complaints; (3) promoting the public awareness of human rights by educating and distributing information; and (4) monitoring compliance with international human rights standards and

¹⁰⁵ Murray, *loc. cit.*, n. 6, at 209–210.

¹⁰⁶ Gomez, M., "Sir Lanka's new Human Rights Commission", 20(2) *Human Rights Quarterly* (1998), at 281, 299.

¹⁰⁷ The Capacity Building Project funded by the UN greatly helps on this financial issue since NHRCM's establishment in 2001. However, this makes NHRCM's operation rely too much upon on the external project. See NHRCM 2004 Annual Activity Report, in *Report on Human Rights and Freedoms in Mongolia 2005*, at 71.

cooperating with regional and international human rights organizations. Not only can clear mandates safeguard the independence of NHRIs, they are also important for the effectiveness of NHRIs in terms of administrative management. The organization can achieve its goals only when these are clear. Furthermore, as Rachel Murray has argued, “no NHRI is likely to have all the powers, resources and funding that it would ideally wish”; however, “what is clear is that the NHRI has a clear strategy for the most effective use of its resources, budget and powers”.¹⁰⁸ The mandates of NHRIs could be different from each other and in particular the working priorities will certainly be different because different states always face different human rights issues. The difficulties may lie in how to choose and form the priorities and proper strategy.

Thirdly, an NHRI must be accessible to be effective. The *Paris Principles* require the establishment of local or regional sections to assist when necessary.¹⁰⁹ Mohammad-Mahmoud Mohamedou contends that accessibility is assessed in relation to the location of the commission [NHRI]’s office, a commitment to openness and to a consultative approach and the use of different languages.¹¹⁰ This is especially relevant for those countries with a very large population or territory.

External factors

The effectiveness could vary according to the NHRIs’ *political and social contexts*. Because an NHRI can be effective only to the extent that it can play certain roles, it does matter whether an NHRI was created under the condition to end a conflict, such as the Northern Ireland Human Rights Commission, or under international pressure over human rights records, such as Komna HAM, or as the result of a state decision to set up an NHRI to strengthen its commitment to human rights and coordinate the different human rights protection mechanisms, as was the case of European countries such as Denmark, France and Sweden. In addition, NHRIs may work more effectively when they are a part of a functioning democratic framework rather than a voice in the wilderness.¹¹¹ However, as Ann Kent has argued, democratic countries such as Australia do not necessarily comply in every aspect with international human rights law better than non-democratic countries like China.¹¹²

Although the independence of an NHRI is essential to its effectiveness because

¹⁰⁸ Murray, *loc. cit.*, n. 6, at 207.

¹⁰⁹ The *Paris Principles*, Item (e) under “Methods of Operation”.

¹¹⁰ Mohamedou, Mohammad-Mahmoud, “The effectiveness of national human rights institutions”, in Lindsnaes, Lindholt and Yigen, *op. cit.*, n. 101, at 52.

¹¹¹ Murray, *loc. cit.*, n. 6, at 199.

¹¹² Kent, Ann, “Influence on national participation in international institutions: Liberal v. non-liberal states”, in Charlesworth, Hilary and et al. (eds.), *The Fluid States: International Law and National Legal Systems*, Sydney: The Federation Press, 2005, at 251–276.

of the nature of human rights protection and promotion, it is also clear that *NHRIs must work actively and cooperatively, rather than often in confrontation or conflict, with governmental organs. In addition, an appropriate relationship with NGOs is particularly important for the success of NHRIs.* The *Paris Principles* recognized the importance of the relationship of NHRIs with civil societies to protect their independence and pluralism. Many NHRIs include members from or formerly working with NGOs, such as NHRCK and DIHR. ICHRP has also pointed out that the relations with civil societies can “enhance NHRIs’ effectiveness by deepening their public legitimacy, ensuring they reflect public concerns and priorities”.¹¹³ Mohamedou argued that public consultation is one key for the effectiveness of NHRIs and the failure to include target groups and the public in policy formation undermines the effectiveness and eventually the legitimacy of the institution.¹¹⁴ For the most vulnerable groups, NGOs could be the only channel for them to get access to an NHRI. NHRIs may also get help from NGOs to implement their programs and activities.

Beyond the national level, we should also notice the role the international community can play in the effectiveness of NHRIs. First of all, the role of the UN in the establishment and strengthening of NHRIs is widely recognized. Sonia Cardenas traced the UN’s role in four related mechanisms of influence, including standard setting, capacity building, network facilitating, and membership granting,¹¹⁵ while Anna-Elina Pohjolainen focused on the roles of the UN in the historical evolution of NHRIs including the introduction, development, popularization and diffusion of NHRIs.¹¹⁶ Secondly, as Andrew Byrnes and his team have explored by applying Anne-Marie Slaughter and others’ theory on international networks, the regional and international networks of NHRIs could play a very important role in keeping NHRIs effective.¹¹⁷ Kieran Fitzpatrick, the executive director of the APF, discussed one unique point in my interview with him; that is, the function of peer review and support. Encouragement and review from a peer can sometimes be very important in keeping an NHRI effective. Similarly, not only do international organizations or networks including NGOs play active roles to support NHRIs, but sometimes support also comes from national governments who already have a human rights commission. For example, as Sonia Cardenas points out, the Canadian government has played a leading role globally in the creation and strengthening of these emerging institutions, through training, consultation, exchange and networking.¹¹⁸

¹¹³ ICHRP, *Assessing the Effectiveness of NHRIs*, *op. cit.*, n. 4, at 15–16.

¹¹⁴ Mohamedou, *loc. cit.*, n. 110, at 56.

¹¹⁵ Cardenas, Sonia, “Emerging global actors: The United Nations and national human rights institutions”, 9 *Global Governance* (2003), at 23, 27–34.

¹¹⁶ Pohjolainen, *op. cit.*, n. 1, at 30–84.

¹¹⁷ Byrnes et al., *loc. cit.*, n. 77.

¹¹⁸ Cardenas, Sonia, “Transgovernmental activism: Canada’s role in promoting national human rights commissions”, 25 *Human Rights Quarterly* (2003), at 775, 776.

CONCLUSION

The answer to the question “Do NHRIs matter?” seems very clear: “Yes”. However, to understand to what extent NHRIs matter in the international human rights regime requires more than a simple “Yes”. Defining NHRIs’ effectiveness as well as effectiveness factors is only the first, though probably the foremost, step towards this understanding. Without the theoretical support, it would be difficult to give persuasive answers. After considering different compliance theories in international law, this paper applied Koh’s transnational legal process theory to define NHRIs’ effectiveness from the perspectives of interaction, interpretation, internalization (including social, legal and political), and obedience. This paper also provided more measurable indicators for the general understanding of NHRIs’ effectiveness, but it also realized that the question of NHRIs’ effectiveness is different from the question of the contribution of NHRIs to the collective outcome, which requires further research. Regarding the effectiveness factors of NHRIs, this paper bases itself on but also goes beyond the *Paris Principles* and classifies them under three categories: independence, internal and external factors. A deeper understanding of effectiveness and effectiveness factors will hopefully build up some basis for further regime or institutional design, and hypothesis testing, which are the next steps of my research.

NOTE

VIETNAM'S MEMBERSHIP OF THE WTO: THE CHALLENGE OF RECONCILING SOCIALIST POLICIES WITH THE PRINCIPLES OF OPEN ECONOMY

Lan Anh Tran*

INTRODUCTION

After China, Vietnam was another major socialist country to join the World Trade Organization (WTO). Vietnam concluded its accession negotiations in 2006 and formally became the 150th WTO member on 11 January 2007. Like China did from the late 1970s, Vietnam had also been pursuing a policy of economic liberalization since 1986 while maintaining a socialist political system.¹ As part of her endeavour to integrate the Vietnamese economy into the world economy, membership of the WTO became a major objective for the country. The events leading up to the agreement of the WTO to Vietnam's accession, especially the accession negotiations and the content of the final deal reached with WTO members by Vietnam, have had a profound impact on Vietnam as a nation in general and its economy and the legal system in particular. On the road to WTO membership, Vietnam accepted many new obligations heralding a fundamental shift in its economic policy and legal framework. Consequently, the country is going through a period of breathtaking changes in not only transforming the economy but also the legal landscape.²

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¹ See generally Cass, Deborah Z., Brett G. Williams and George Barker (eds.), *China and the World Trading System: Entering the New Millennium* (Cambridge: Cambridge University Press, 2003); Porter, Gareth, *Vietnam: The Politics of Bureaucratic Socialism* (Ithaca: Cornell University Press, 1993); Masina, Pietro P., *Vietnam's Development Strategies* (London: Routledge, 2006); Balme, Stephanie & Mark Sidel (eds.) *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (London: Palgrave Macmillan, 2007); Sidel, Mark, *Law and Society in Vietnam: the Transition from Socialism in Comparative Perspective* (Cambridge: Cambridge University Press, 2008).

² Prime Minister of Vietnam, Nguyen Tan Dung, "The WTO's membership: opportunities and challenges for Vietnam" at <http://vietnamnet.vn/chinhtri/2006/11/631087>, visited 21 May 2010.

Vietnam's membership of the WTO represents a rather unique case of an attempt to reform a centrally planned economy in order to transform itself into a system which was supposed to be compliant with the multilateral trading system led by the WTO and based mainly on the values of capitalism. While still maintaining a single party political system, a huge transformation has been carried out in the legal framework of Vietnam in the recent past to bring the Vietnamese legal system up to the international legal standards expected by foreign traders and investors interested in doing business with and in Vietnam. In an attempt to harmonize the principles of international trade and open economy with the existing political system based on a one-party system of government, Vietnamese leaders sought to develop a legal framework whose aim was to support "a socialist-oriented market economy". The hope was that this new concept would allow the Vietnamese economy to integrate itself into the international trading system led by the WTO.

Having gone through a process of transition in its modern history from Confucian thoughts to the French colonial system and finally to the Marxist philosophy, the country now finds itself once again managing the challenges brought about by the drive to transform not only the economy but also the legal system into a modern system based on an open economy. Indeed, the economic and legal transformation that Vietnam is going through as a result of her membership of the WTO and the nature and scope of obligations that Vietnam was required to undertake to become a member of this world trade body makes a fascinating case for study. For instance, by the time Vietnam had finished her first two years with the WTO "machine" in operation in the country, the country witnessed a triple increase in foreign direct investment capital and the highest increase of GDP in 2007 out of the last ten years.

It is in this context that this study aims to examine the background to Vietnam's desire to join the WTO, the nature and scope of obligations that Vietnam undertook for this membership, and the impact this membership has had on the Vietnamese political, legal and economic landscape. The focus of this study is to analyse the challenges encountered by a socialist country in embracing the principles of economic openness while maintaining the socialist political structure. In doing so, this study aims to analyse the main features of the accession negotiations, compare and contrast them with other similar negotiations, and look at the lessons that can be learnt from Vietnam's membership of the WTO.

AN OVERVIEW OF THE HISTORICAL DEVELOPMENT OF THE VIETNAMESE LEGAL SYSTEM

The first State of Vietnam was established in the seventh century BC.³ The Van Lang (the Au Lac) was one of the earliest states to come into existence in the Southeast

³ Le Minh Tam and Vu Thi Nga, *History of the State and Law of Vietnam* (Hanoi: The People's Police Publishing House of Vietnam, 2003).

Asian region. In ancient times, Vietnam's legal concepts were perhaps built on the wet rice farming culture, social rules and religious traditions. But when Vietnam came under the domination of different Chinese dynasties for more than a thousand years from the second century BC, the traditional Vietnamese legal concepts were heavily influenced by the Chinese legal and political tradition and thought. The traditional Vietnamese political-legal regime was strongly influenced by the ancient Chinese system: for example, in 113 BC, when An Duong Vuong King failed to protect ancient Vietnam from the Han Chinese Empire, all existing Vietnamese law was replaced by the Chinese political-legal system.⁴

As in China and other feudal nations of the time, the King had the highest authority in all law-making, executing and dispensing justice in the nation. The manner in which the kings exercised their powers, along with antecedents and village customs, were the main sources of law in antiquity. Two legal nominative law codes named *Quốc Triều Hình Luật* (the National Criminal Legal Code) and *Quốc Triều Khâm Tụng Điều lệ* (the National Procedural Code), created during the time of the Le Dynasties (1428–1788), were the most significant achievements of the monarchical period.

During a hundred years or so of colonial rule, the legal system in Vietnam was developed around French legal concepts and notions. From 1858 to 1945, as a French colony, the Vietnam legal regime was built on the French model. For instance, the French Civil Procedure Code 1806 was implemented more or less in its entirety in Vietnam. The General Governor of Indochina promulgated three Vietnamese Civil Codes which applied to separated regions: in the Northern region in 1931, in the Central region in 1936 and in the South in 1937. During the French colonial time, the Vietnam legal system was regarded as “subservient to the French system”.⁵ Even today, the French legal model is still influencing the Vietnamese legal system in many ways and examples of such influence are the Civil Law Codes of 1995 and 2005.

The contemporary legal regime of the Socialist Republic of Vietnam was established after the National Independence Declaration on 2 September 1945. Through the Declaration of Independence, Vietnam announced that it would repeal the colonial legal framework in Vietnam and denounce its international commitments arising from colonial rule. However, a month after the Declaration of Independence, President Ho Chi Minh issued Order No. 47 on 10 October 1945, which allowed the application of the French colonial legal normative documents if they were not contrary to the principles and objectives of the newly independent nation. When the People's Parliament (now called the National Assembly) was elected in January 1946, the first constitution of the Democratic Republic of Vietnam was adopted. The 1946 Constitution was replaced later by the constitutions adopted in 1959, 1980 and 1992, under the single-party political system.

When Vietnam decided to embark on the road to economic openness under the

⁴ Ta Van Tai, *The Vietnamese Tradition of Human Rights* (Berkeley: Institute of East Asian Studies, University of California, 1988), at 37.

⁵ Hooker, M.B., cited in Nicholson, Penelope (Pip), *Borrowing Court Systems: The Experience of Socialist Vietnam* (The Hague: Martinus Nijhoff Publishers, 2007), at 215.

banner of a “socialist-oriented market economy” in 1986, the country began to reform its legal system to make it more business friendly and the adoption of the 1992 Constitution was a step in this direction. The 1992 Constitution was amended in 2001 with further provisions designed to usher the country towards economic openness. It was in 1995 that crucial reforms were introduced in Vietnam’s national legal system with a view to eventually bringing the national legal system up to the level expected to join the WTO.

After experiencing a serious crisis during the centrally planned economy of the 1980s, Vietnamese leaders decided to embark on a new policy designed to make the country a successful industrialized nation by the year 2020. To achieve this, they expressed their determination to modernize the Vietnamese legal system by strengthening the rule of law. Being a member of a number of regional trade organizations like ASEAN, AFTA, APEC and ASEM, there also was a gradual pressure to reform the internal legal structure.

Accordingly, in order to develop the legal system of Vietnam so that it was ready to be reconciled with the eventual WTO obligations that had to be undertaken, the National Assembly promulgated a programme of new legislation.⁶ During accession negotiations with the WTO, 29 law codes and other legislative instruments that cover the WTO commitments were revised and promulgated. Consequently, Vietnam was named as one of the 12 new members of the WTO that have implemented the full WTO obligations into their national legal system.⁷

THE ROAD TO WTO MEMBERSHIP AND VIETNAM’S COMMITMENTS

The accession rounds

Vietnam applied for WTO membership and was named as an observer of the General Agreement on Tariffs and Trade (GATT) from June 1994. Its application for WTO membership was accepted on 4 January 1995. After 11 years of negotiation and meeting the requirements of the WTO legal regime, Vietnam concluded the final stage of WTO accession in November 2006. The Working Party on the accession of Vietnam, which was established on 31 January 1995, held 14 negotiation rounds with over 200 meetings, in which there were 14 multilateral negotiation meetings and 28 nation partners with whom Vietnam was required to negotiate bilateral agreements. During accession negotiations, Vietnam had to answer around 3,000 questions on legal reform, governmental transparency, and on many economic-related policies in finance, foreign investment, banking and trade.

⁶ The statement of the Chief Negotiator of Vietnam at the 10th section of the Working Party on the Accession of Vietnam to the WTO, Geneva, 15 September 2005, at <http://www.wto.org>, visited 6 December 2005.

⁷ Statement of Mr. Luong Van Tu, Vice Minister of Trade and Chief Negotiator, http://www.wto.org/english/news_e/news06_e/acc_vietnam_27march06_e.htm, visited 26 May 2006.

Considered a large market with a population of 84 million, Vietnam ranks 13th among the world's largest country populations with over 40 million people who are of working age. Located in Indochina, Vietnam is favourably situated in terms of land, sea and air links with other countries. All these play a key role in the country's trading development. Moreover, a stable political system and high-speed economic growth in comparison with other regional nations are creating an attractive FDI environment in Vietnam. Ironically, these were also the conditions which meant that Vietnam was required to meet a higher level of conditions to join the WTO; for example, in the tenth session (Geneva, September, 2005), Vietnam had to commit to open its domestic market at a higher level than was the case with many other new WTO member countries. In addition, Vietnam had to deal with the WTO plus conditions in order to finalize the bilateral agreements.⁸ All commitments on tax binding, eliminating export subsidies in the form of direct payment from the State budget; tax and tariff provision with regard to the free tax zones, open economic parks; expanding the trade areas for foreign enterprises; and import licensing regulation had to be carried out from the date of accession even though those obligations were very difficult to implement with regard to the Vietnamese socio-economic infrastructure existing at the time.⁹

Vietnam's commitments in comparison with other similar countries

Due to the fact that Vietnam was one of the last ASEAN countries to conclude WTO accession, Vietnam had to present more favourable offers than other countries in the region such as China, Cambodia and Nepal in order to conclude bilateral and multilateral agreements with the other WTO members. For example, in the tax sector, Vietnam was required to reduce import tax by approximately 22 to 30 per cent on average in the first five years from the time of formally becoming a member of the WTO. The kinds of import tax that were required to be reduced account for 36 per cent of 10,600 kinds of Vietnamese import tax with the deduction ranging from 2 to 63 per cent. Among these, the import tax for industrial and agricultural sectors was to be reduced by 23.9 per cent and 10.6 per cent, respectively. Import tax was required to be reduced at the highest level for the textile industry (63.2 per cent as compared with MFN); 38.4 per cent for fish and aquaculture products; 32.8 per cent for the wood and paper industries; 23.6 per cent for the electrical equipment industry; 21.5 per cent for the leather and rubber industry. The mineral industry had the lowest tax reduction, with only 2 per cent taken off the then existing import tax.¹⁰

⁸ All bilateral agreements between Vietnam and other nations are available at the Vietnam Government website, <http://www.chinhphu.vn>.

⁹ For more information, see Vietnam and the WTO at http://www.wto.org/english/thewto_e/countries_e/vietnam_e.htm, visited 21 May 2010.

¹⁰ Vietnam newspaper, [www.laodong.com.vn/pls/dislay\\$.htnoidung](http://www.laodong.com.vn/pls/dislay$.htnoidung), visited 11 July 2006.

The highest rate of reduction in tax was required for a group of industrial products and processed agricultural products such as alcoholic drinks, tobacco products, instant coffee and related products, and motor vehicles and their components. These “bound” tax rates were only the formal legal ceiling; in practice the applied tax would be at a lower rate than the legal ceiling. In comparison with the Chinese offers, this deduction is higher in the industrial sector (China deducted 9.6 per cent) and lighter on the agricultural sector (China deducted 16.7 per cent). In general, Vietnam’s access to the global economy was similar to the level secured by China and most of their accession agreements are at a similar level.¹¹

At the beginning of the negotiation period, i.e., in the late 1990s, Vietnam was ranked as one of the least developed countries in the world and was able to ask for favourable conditions such as the bound tax, a flexible agenda for enacting laws in conformity with WTO obligations, and flexibility in meeting the deadline of WTO commitments. However, as a result of steady economic growth, maintenance of a good education and health care system, strengthening of the national legal system and rapid trade extension, Vietnam was soon ranked as a developing country even though the GDP was under US \$800 per capita per annum until the year 2008, which would categorize it as the least developed country under the UN classification. This classification creates greater challenges for Vietnam. For example, Vietnam had to complete the law-making agenda before the last negotiation session, whereas Cambodia’s enactment of law codes in conformity with the WTO was allowed to be under draft status until the date of the conclusion of actual accession by the country to the WTO. In some sections, such as IP law, Cambodia was allowed to fully implement TRIPS obligations three years from the date of accession while Vietnam was required to implement full IP protection from the date of accession. Furthermore, Vietnam was asked to offer lower bound taxes than Cambodia and most of these have come into force from the date of accession.¹² The WTO accession conditions of Cambodia and Nepal were named as the “best package in the history of the WTO”,¹³ based on the fact that they were classified as LDCs. However, basically, as with many poor countries, Vietnam, Cambodia and Nepal are facing some similar challenges beyond the WTO accession on issues such as the legislation and reform implementation, competitive capacity, agricultural issues and IP protection.¹⁴

¹¹ More details on the Working Party Reports of Vietnam and China are available at www.wto.org.

¹² Report of the Working party on the accession of Cambodia, at <http://docsonline.wto.org/DDFDocuments/t/WT/ACC/KHM21.doc>, visited 7 February 2007.

¹³ Sharma, Rudra P., “Nepal’s road to the World Trade Organization: a pragmatic overview” in *Asian Yearbook of International Law*, Volume 10 (B.S Chimini et al., eds., Leiden: Koninklijke Brill NV, 2005), at 152.

¹⁴ Stiglitz, Joseph E. and Andrew Charlton, *Fair Trade for All: How trade can promote development* (Oxford: Oxford University Press, 2005), at 1.

The impact of international commitments on the legal reform in Vietnam

It has generally been agreed that international commitments in regional trade agreements and the WTO accession were the main driving forces of the reform in Vietnam.¹⁵ To complete the WTO negotiation, Vietnam had made “tremendous efforts and progress”¹⁶ and did its utmost to reconcile the WTO commitments into domestic law. In order to be fully compliant with most of the WTO agreements and the WTO’s plus conditions required by her trading partners, Vietnam would have to promulgate and amend around 100 law codes, excluding other subsidiary legislative instruments in the area of economic-administrative reform.¹⁷ However, as in many transitional and developing nations, it is becoming difficult for Vietnam to fulfil the obligations arising out of her membership of the WTO. The international trade system does not fully take into account the specific needs and demands of a country like Vietnam. Having said that, one of many positive aspects of WTO membership by Vietnam was that the country had to carry out massive reforms to complete the WTO accession. This process has had a huge positive impact on the transformation of a command economy into a socialist-orientated market economy. Even though free trade and international commitments have not provided the same opportunities for all, it must be submitted that without external pressures led by the WTO membership requirements, the reform in Vietnam could not have reached the level that it has reached today.

DEVELOPMENT CHALLENGES AHEAD

The WTO commitments have made a great contribution to the legal transformation in Vietnam in order to meet the international legal standards expected by the WTO and its member States. The legislative system and enforcement mechanism has been upgraded under the pressures of the global economy. A more genuine rule of law has gradually replaced the rigid administrative orders of previous centrally planned economy. However, the perception is that the reforms have not gone far enough and the Vietnamese legal system is still inadequate in term of both legislative capacity and enforcement system.

¹⁵ “Mind the Gap: Countdown to Vietnam’s Accession to the WTO” (Oxfam Briefing Note December 2005).

¹⁶ The WTO report on “Working Party examines first revision of membership report”, 20 September 2005.

¹⁷ Luong Van Tu, Vice Minister of Ministry of Trade, Chief Negotiator of Vietnam, “the WTO’s accession: opportunities and challenges for Vietnam”, available in the Vietnamese version at http://www.mot.gov.vn/mot/tag.idempotent.render.userLayoutRootNode.target.n106.uP?uP_root=root&cmd=item&ID=1725, visited 15 April 2009.

The effects of socialist legal ideology and centrally planned economic policy

As a socialist country, which originally followed the former Soviet Union model for a long period, the current Vietnamese legal system is still partially influenced by the former Soviet communism, such as the structure of the national legal framework. The legislative, executive and judicative powers are still not totally separated as in the Western democracies. Some historical fields of private law, such as contract, commercial law, civil responsibilities and tort, are mixed with public law. Some kinds of property such as land still cannot be privatized.

The challenges for Vietnam are to reconcile the WTO regulation into domestic legislation under a situation where the existing national legal system is not totally driven by a market economy. Despite the mention of concepts of a “law-based state” and a “socialist legality” for more than ten years in the reform agenda, the completion of Vietnam’s legal framework for economic development and international trade integration is still a big challenge. Of course, during twenty years of reform, Vietnam has undertaken a massive legislative transformation. However, the Vietnamese legal framework has only just completed revising exiting laws and promulgating new ones. In the meantime, there are many problems inherited from the centrally planned economic ideology which still remains effective in the enforcement system, judicial system, and in the functions of legal institutions and social attitudes of Vietnam.

The role of the legislative power, the capacity of the NA and the quality of law-making

The shortcomings in the real role and authority of the National Assembly (NA) have been indicated as “a key continuing problem”¹⁸ during over twenty years of reform. In the Vietnamese law-making regime, the NA is in charge of the legislative power. However, the distinction between legislative power, the executive system and the judicial body is not clear. For example, the law code, which is promulgated by the NA, only provides a general legal framework. The laws providing for detailed provisions are drafted, guided and implemented by the government and ministerial-level organizations. The government still spends much time in drafting of law as well as issuing and implementing legal documents. Moreover, in the laws enacted by the NA there is a mention of the implementing organizations but there is no deadline prescribed for issuing the implementing legal documents. As a result, many law codes which had already entered into force have not been implemented because the implementing legal document has not yet been issued by the relevant executive organizations. For example, the 1999 Criminal Law Code entered into effect from 1 July 2000, but only 14 out of 24 secondary legislations necessary to implement it

¹⁸ Sidel, *op. cit.*, n. 1, at 25.

properly were implemented. Similarly, the 1995 Civil Law Code went into force from 1 July 1996, but until 2005 there were still 20 secondary legislations which had not yet been promulgated.¹⁹

In addition, the necessary cooperation between the State organs that are in charge of law drafting, law promulgation and implementing legal documents is lacking. Even when a bill has been written by a government department and reviewed by all related State organs, it still can overlap with other bills that are drafted by different State organs. Furthermore, in some cases, the secondary legislation might contradict the primary legislation. Much of the legislative process did not reach international standards due to the lack of ability to access adequate international information and professional legal knowledge, especially in areas such as the law relating to business enterprises, land ownership and use, investment, and intellectual property.

The law-making process is still not codified. Although the National Assembly is in charge of legislation, most of the NA representatives are concurrently leaders in the State organs. Some of them lack time and professional knowledge for law-making activities. Only 121 representatives out of 494 NA representatives work as full-time National Assembly representatives. They take main responsibilities for discussion, evaluation and modification of the final bill before formal submission to the plenary NA session. Within this small group, the full-time representatives meet many difficulties in fulfilling their duties. At an informal meeting in August, 2005, Mr Nguyen Van An, Chairman of the National Assembly said that around 90 per cent of the members of the National Assembly have not yet worked to their full capacity. The lack of a highly qualified workforce in law drafting is considered to be a fairly serious problem in Vietnam. In a recent interview, the chairman of a Vietnamese law firm said that, nowadays, it is very difficult to find Vietnamese lawyers nationwide who have expertise in international law, English law or with any foreign language qualification, and the experience to deal with international disputes.²⁰

An inconsistent law-making regime²¹

There is broad agreement that Vietnam has made enormous progress in terms of developing its legal framework²² under the pressure of WTO membership, but the

¹⁹ NA's Representative, Mrs Duong Thi Loi, Representative for Bac Giang province, spoken at the 8th NA meeting 23 November 2005, at www.vietnamnet.vn/chinhtri/2005/11/515012/, visited 24 May 2010.

²⁰ Interview with Mr Nguyen Tran Bat, Chairman of Invest Consult Group on Vietnam Net, at <http://www2.vietnamnet.vn/baylenvietnam/2006/12/645861/>, visited 27 December 2006.

²¹ Delegate comments about the Vietnam law-making on the "Universal forum about new economies", 29/6-1/7/2008 in Hanoi, Vietnam, at <http://vietbao.vn/Chinh-Tri/Viet-Nam-dang-hon-nhien-lam-luat/20777935/96/>, visited 1 September 2008.

²² World Bank "Vietnam aiming high: Vietnam development report 2007" Report No 38064-VN, at 154.

law-making technique still is in a confusing situation. Law codes seem to provide a general legal framework rather than a set of rules that can be implemented. Some law codes were considered as political resolution or moral declaration. The Youth Law Code of 2005, passed on 29 November 2005, presents a typical example. Concerning the responsibilities of the State, social organization and family to Youth, Article 4 states:

Youth is the future of a nation, a great social force, significant potentiality, and leading role in the construction and protection of the country. Training, cultivating and promoting for the Youth development are the duties of the Communist Party and the State.

There is a similar situation in the rights and obligations provisions. Article 9, chapter II states that “Young people have the same right in study . . . must have a positive attitude to study.” There are many similar articles that not only regulate a very general moral norm but also provisions impossible to implement. In fact many NA delegates themselves broadly agreed that it was not truly necessary to draft, adopt and implement the Youth Law code 2005.²³ However, under political pressure, this code was passed and it is playing a small role in social life. Many similarly unrealistic legal documents exist in the national legal system.

Socialist approaches to law-making

With an enormous ambition to transform a legal system of administrative orders to a national law system capable of driving market reform and embracing international rules, Vietnam introduced a concept known as “Socialist Legality” in which law plays the highest role in the conduct of socio-economic activities. The idea that there should be fewer laws but many secondary legal instruments as guiding documents has resulted in an unnecessarily huge number of guiding documents that are issued by ministerial agencies and local authorities. Any main legal code provides only a general framework and it needs to be guided by plenty of secondary normative regulations. According to Dr Nguyen Dinh Cung, a prominent law-maker and legal researcher, and Head of the Research Department on Macro Economic Policies of the Central Institute for Economic Management of Vietnam, there are more than eight pages of implementing documents for an average page of a main legal code, especially in the land law area.

At present, there are around 200 main legal codes, 100 ordinances and more than 10,000 implementing documents in the Vietnam legal system. With 26 types of normative legal documents being issued by various state authorities and govern-

²³ National Assembly delegates’ opinions during the law drafting, at <http://vietnamnet.vn/chinhtri/doinoi/2005/03/403757/>, visited 3 September 2008.

mental agencies, coherence and unification between all of those documents is not a realistic prospect.²⁴

REFORMING THE LEGAL SYSTEM BEYOND THE WTO ACCESSION REQUIREMENTS

As with many Asian countries, the Vietnamese economy has been developing very rapidly. Indeed, a comprehensive legal framework has been developed as part of a long-term vision for economic development. However, there are many challenges that lie ahead and they are as follows.

The rule of law in the socialist-oriented market economy

Concluding the WTO negotiation, Vietnam has completed a main stage of law-making and reconciling of international law with the national legal system. However, problems such as those in other transitional nations, dilemmas, and obstacles to the implementation of the rule of law in Vietnam will not be solved easily as they are the consequence of the previous command economy, political system and legal traditions. To be able to create an appropriate legal regime for national development and meet international standards, the rule of law and the principal objectives of the development of the legal system must be clearly determined. The theory of “the socialist-oriented market economy” should be carefully reviewed to find out which concept is still suitable for current socio-economic development.

Strengthening the capacity of legal institutions

The effect of a socialist legal regime still plays a strong role in the Vietnamese jurisdiction as an overlap of power among the three principal organs of the national legal system, namely the legislature, the executive and the judiciary. To make a clearer separation of powers between these state organs is an urgent task. Within the legislative branch, the NA must enhance the quality and level of performance of its representatives by changing its working regime. The numbers of full-time NA members must account for at least 50 per cent of total NA members and they must be paid an adequate salary together with their technical and personal assistants.

The process of law-drafting and law adoption should be renovated by establishing an independent administration for such purposes. They should be equipped with high professional skills and a decent salary. Further, there should be an independent committee of the NA to review law and proposals for new laws. These

²⁴ World Bank, *loc. cit.*, n. 21, at 155.

organizations should be in charge of strengthening the legislative functions of the NA and the effectiveness of the NA's operation. Such a professional law-making body will ensure the constitutionality, legitimacy and uniformity of the process of building and strengthening the rule of law in Vietnam. Enhancing the judicial system is an urgent task in Vietnam at present as it has been evaluated as the weakest branch of the national legal regime.²⁵ Courts are considered as expensive, time-consuming and not well equipped, especially in resolving economic and trade disputes.

The lack of an adequate number of qualified judges, prosecutors and lawyers is leading to a crisis in Vietnam. Further training with comprehensive programmes in potential areas such as international law, international trade law, intellectual property, investment law and international environment law is urgently needed for judges, lawyers, prosecutors and state officials to prepare them for the challenges ahead when Vietnam faces the growing challenges of implementing international commitments into its economic development policies.

Will the national legal regime meet the international standards?

Although there have been a number of efforts made by the legislative, administrative and judicial authorities, they have not gone far enough. What has been achieved thus far is just the first step towards the integration of the Vietnamese legal system into the economic world. Building a comprehensive legal system and strong law implementation and enforcement are not easy tasks. However, being aware of the importance of furthering the national economic development agenda, Vietnam has to embark on a programme of reviewing the current legislation and the real situation of the legal system, researching and legislating in all law sectors in order to bring them in line with international standards.²⁶ The country has to incorporate international trade rules into national legislation. The target of meeting the minimum standards of international law is not only an essential part of the process of becoming a member of WTO but is also part of keeping national development moving at a realistic speed.

Together with upgrading the legislation, the current law enforcement system will have to be improved by the establishment of a specialized court for new areas such as IP infringements. For this there will have to be an increase in the capacity in the judicial system. A number of judges capable of handling foreign-involved cases will have to be trained both within and outside of the country.

²⁵ Working paper 3, April 2000 of the Australian Government Overseas Aid Program: Vietnam legal and judicial development, at 15.

²⁶ Nguyen Dinh Loc, former Minister of Ministry of Justice, "The role of legal system development in building a knowledge-based economy". This article was presented at the conference, "Building a knowledge-based economy to Vietnam development", 21–22 June 2000 in Hanoi, Vietnam.

Effectiveness in disseminating legal information

Basically, almost all Vietnamese citizens have a gentle nature. They generally respect the law and state regulations. However, the current Vietnam legal system provides inadequate access to legal information, particularly for the general public. People lack a proper understanding about the contents of the law and how the law can benefit ordinary citizens. With over 30,000 pages of documents, the WTO's legal regime is a highly complex system even for professional legal researchers. It is not surprising then that with over 80 per cent of the population working as farmers, the Vietnamese general public are strangers to the legal system in general and the WTO regime in particular.

To improve the incorporation of international law into the national legal system, a comprehensive legal strategy to synchronize and coordinate the law-making, law implementation, legal education, legal information and legal dissemination activities should be worked out, applied and put into action.

Harmonizing the national interests and the WTO obligations

A crucial objective for the Vietnam national legal system should be to create a comprehensive legislative programme containing not only the rules to liberalize the economy and investment but also to protect national sovereignty and the vital interests of its citizens. Vietnam should aim for an IP regime which brings the greatest benefit to everyone. Protection and registration for traditional knowledge, folklore and plant variety is a new concept in both legal normative documents and social attitudes in Vietnam. An adequate protection has to be achieved to ensure that foreign companies cannot exploit unfairly the opportunities that exist in relation to IP products and especially plant varieties in a predominantly agricultural nation such as Vietnam.

CONCLUSIONS

After the enactment of the 1992 Constitution, Vietnam has nearly completed its comprehensive law reform programme with respect to the main legal aspects of public law and private law. A crucial change has been made to place a high emphasis on the principles of the rule of law in the management and governance of the country. The WTO legal regime has played a key role in the reform of the Vietnamese legal system. During the WTO negotiations, Vietnam signed a number of bilateral treaties and became a party to more than 180 multilateral treaties.²⁷

²⁷ Report of the Inter-Agency Steering Committee for Vietnam's Legal System Development Needs Assessment on "Comprehensive needs assessment for the development of Vietnam's legal system to the year 2010", available at <http://www.jus.umu.se/Vietnam/frame.htm>, visited 20 August 2008.

Beginning from a command economic policy based on the Soviet system of governance, Vietnam has achieved enormous progress in developing her legal system. The number of laws and legal documents promulgated during the WTO accession is much greater than the laws enacted during the entire period of war with America and the period during which the centrally planned economic policy was in operation. After the WTO accession, the law-making process in Vietnam has met, in principle, the basic standards of the international trade regime. The law-making capacity has been strengthened.

It can be submitted that within three years of becoming a WTO member, Vietnam has implemented its accession commitments in a satisfactory manner. Vietnam's accession to the WTO has been the principal driving force not only for the legislative sector but also for the law implementation and law enforcement sectors. It has been generally agreed that due to the changes brought about to fulfil obligations arising out of Vietnam's membership of the WTO the country has witnessed a smooth transfer of its centrally planned economy to basically a market economy.

However, there still are, as outlined above, many shortcomings in the legal system of Vietnam, especially with regard to the powers enjoyed by the executive branch to the detriment of the legislative and judicial branches. Therefore, in order to reduce the gap between the requirements of international standards and the current status of Vietnam's economic and legal system, the government has to advance a number of action plans to upgrade the capacity in all sectors. The fundamental goal of Vietnam is to improve the living standards of all of its citizens and to develop the national economy in a sustainable manner. To maximize the achievements and reduce the disadvantages of global trade, a comprehensive approach to the integration into international trade must be built on the foundation of a deep understanding of international trade rules, the national economy, the principles of the rule of law, and the rich traditional values of the Vietnamese society.

To conclude, the desire to join the WTO and the subsequent efforts made by the government of Vietnam to fulfil its obligations under the accession agreements have hugely transformed not only the Vietnamese economy but also the legal, administrative and legislative systems. In other words, directly or indirectly the WTO has been a significant agent for a change in Vietnam. It remains to be seen whether the political system of Vietnam is able to institutionalize these achievements in order to bring about prosperity to people in all sections of society.

LEGAL MATERIALS

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

PEOPLE'S REPUBLIC OF CHINA¹

JUDICIAL DECISIONS

EXTRADITION CASE (2 April 2007)²

Court of 1st Instance: Central District Court in Seoul, Korea, 21 August 1998

Court of 2nd Instance: Higher Court, Seoul, Korea, 19 February 1999

Court of 3rd Instance: Supreme People's Court of China, 23 August 2006

Court of 4th Instance: Higher People's Court, Liao Ning Province, China, 18 December 2006

Court of 5th Instance: Supreme People's Court of China (subsequently approves Court of 4th Instance findings)

Facts

The Republic of Korea requested the extradition of criminal Mr Bian Renhao, a citizen of Korea. Mr Bian was criminally detained for contract fraud in China on 28 November 2005 and arrested on 30 April 2006. Mr Bian is currently detained in the detention house in the city of Yingkou, Liao Ning Province.

On 21 August 1998, Mr Bian was found guilty of fraud and sentenced, by the

* Edited by B. S. Chimni and Saptarishi Bandopadhyay. The responsibility for the content of the contributions is that of the national contributor to the State Practice section. The original footnote form has been retained in each contribution. The year for which the State Practice has been collated is 2006 and 2007. However, in many instances State practice for other years has been included. This editorial decision, as in the past, was taken for two reasons – first, in many instances the record of State practice is available in later years only; second, in the belief that readers may find this State practice useful.

¹ Contributed by Yun Zhao, Associate Professor, Faculty of Law, the University of Hong Kong.

² Supreme People's Court, Extradition Decision, (2006) Xing Yin Zi No. 2.

Central District Court in Seoul, Korea, to be imprisoned for a term of 15 years in addition to paying a fine of 2 million Korean Won. Mr Bian appealed to the Higher Court in Seoul. During the period of appellate proceedings, Mr Bian fled to China. The Higher Court in Seoul, upon Mr Bian's default, affirmed and maintained the original judgment on 19 February 1999. Korea requested the extradition of Mr Bian on 26 January 2006 and agreed to re-open the previous case against Mr Bian after his extradition. On 23 August 2006, the Supreme People's Court of China ordered that the Higher People's Court of Liao Ning Province, China, examine the Korean extradition request. The Higher People's Court of Liao Ning Province decided, on 18 December 2006, that the extradition request was justified in accordance with extradition conditions laid down in Extradition Law of China³ and the Extradition Treaty between China and Korea.⁴ This finding was subsequently submitted for the approval of the Supreme People's Court of China.

The Supreme People's Court confirmed that Mr Bian had committed fraud to receive a tax refund of US\$ 300 million and 400 billion Korean Won and, further, that Mr Bian illegally controlled stock prices between February 1997 and August 1998; the above acts constitute crimes both according to Criminal Law of China and Criminal Code of Korea. Mr Bian's remaining imprisonment period was more than six months at the time the extradition request was made, and such a request was therefore justified. Mr Bian did not provide any new testimony during this period.

OTHER RELEVANT STATE PRACTICE

*Joint Declaration between the People's Republic of China and the Republic of France on the Response to Climate Change, 26 November 2007*⁵

The People's Republic of China and the Republic of France decided to establish a China–France partnership arrangement, in response to climate change, under the framework of the China–France comprehensive strategic partnership. Both parties have agreed to commit themselves to joint efforts in response to the challenge of climate change, as appropriate under the “United Nations Framework Convention on Climate Change” and the “Kyoto Protocol”. The parties agreed to strengthen the dialogue and cooperation on climate change and establish a bilateral climate change

³ Standing Committee of the National People's Congress of PRC, promulgated on 28 December 2000.

⁴ Decision of the Standing Committee of the National People's Congress on Ratifying the Treaty Between the People's Republic of China and the Republic of Korea on Extradition, 29 December 2001.

⁵ The full text is available at http://news.xinhuanet.com/newscenter/2007-11/26/content_7148702.htm (last visited on 20 October 2009).

consultation mechanism based on the principle of common but differentiated responsibilities, the principle of respective capabilities as well as the principle of fairness. At present, consultations are intended to be held annually and hosted by China and France in alternate years.

The parties agreed to promote the importance of climate change at the international level, strengthen cooperation in aspects relating to climate change, and promote the development, diffusion, application and transfer of technologies in this respect. The parties stressed the importance of efforts to control the emission of greenhouse gases in the course of maintaining economic growth. Further, the parties agreed to strengthen the possibilities for pragmatic cooperation on the development, application and transfer of technologies responding to climate change, by, in particular, cooperating on issues such as energy saving, energy infrastructures of long life cycle, nuclear energy and other low carbon and carbon neutral technologies, so as to improve energy efficiency and promote the realization of low-carbon economies. The parties encouraged the development of equity joint ventures for the purpose of encouraging the promotion of innovative technologies in response to climate change. Further, the parties encouraged their respective industrial enterprises and financial institutions to increase their participation in cooperative projects surrounding the issues of climate change and sustainable development.

The parties agreed to launch technology cooperation initiatives in the following fields: energy efficiency and energy-saving technologies; renewable energy technologies; hydrogen energy and fuel battery technologies; clean coal technologies; carbon capture and storage technologies; and civil nuclear power technologies.

The parties agreed to expedite the establishment of cooperative projects in response to climate change, encourage participation, by official and private sectors and local institutions, in such projects, and promote overall progress in the following areas: (1) the development, application and transfer of advanced, zero-emission coal technologies; (2) the development, application and transfer of renewable energy technologies; (3) the facilitation of the acquisition and promotion of key energy technologies; (4) the improvement of energy efficiency in the field of construction and residence; (5) the development of environmental protection in cities and means of transportation; and (6) the sustainable development of rural areas.

The parties committed to undertake effective measures to encourage the development, application and promotion of low carbon technologies, and jointly ensure that such technologies are made available as affordable choices. The parties agreed to explore related financing aspects, including the role of private sectors, equity joint ventures and public-private partnerships as well as the potential role of carbon financing and export credit. Both France and China agreed to jointly remove obstacles to the development, application and transfer of technologies in this respect.

The parties reaffirmed their mutual bilateral agreement of 2004, for encouraging and promoting clean development mechanisms. They further agreed to promote cooperation on clean development mechanisms, exchange information concerning cooperative projects related to clean development mechanisms and the emissions trade market, and also encourage their respective enterprises to launch cooperative projects in furtherance of clean development mechanisms.

Each of the parties committed itself to provide impetus to the international community to attach increased importance to the development of means and strategies to adapt to climate change. The parties resolved to strengthen cooperation on adaptation to climate change, increase their respective capabilities of adapting to climate change, and, specifically, carry out the following activities: (1) establish climate change models; (2) conduct research and analysis on the adverse effects of, and vulnerability to, global climate change; (3) conduct research towards developing methods of analyzing and evaluating the socio-economic impacts of climate change; (4) enhance the capabilities of each party to predict climate change and the impact thereof; and (5) conduct research and develop technologies and methods to adaptation to climate change. The parties also decided to explore the possibility of expanding their joint cooperation arrangement to include a third country, for the purpose of benefiting the least developed countries, especially in Africa.

The parties agreed to strengthen cooperation in respect of capability and institution establishment, especially in respect of raising public awareness and education, personnel communication and training. The parties committed to encouraging cooperation between large-scale research institutions and laboratories, and the exchange of information between scientific research personnel and experts on issues related to climate change.

The parties acknowledged the importance of reducing emissions and deforestation, and committed themselves to better forest management and afforestation. Each of the parties shall encourage their respective institutions, such as the Agency for the development of France (the “Agence Française de Développement”), and other relevant organizations to support model and pragmatic projects in respect of developing responses to climate change.

The parties resolved to actively participate in the Conference of the Parties to the “United Nations Framework Convention on Climate Change” and the “Kyoto Protocol” held in Bali, Indonesia, in December 2007, and to devote themselves to reaching unanimous views in the post-2012 arrangement responding to climate change, as soon as possible, in particular by encouraging the Ad Hoc Working Group formed under the “Kyoto Protocol” to complete its work no later than 2009, for the purpose of ensuring linkage between the first commitment period under the Kyoto Protocol and the subsequent commitment period, both as envisioned thereunder.

China and France each committed itself to making use of the Presidency of the Asia-Europe Meeting, and the rotating Presidency of the European Union respectively, to promote dialogue and cooperation on climate change.

The parties reaffirmed that the objective of the international community in response to climate change is to stabilize the concentration of greenhouse gases in the atmosphere at a level at which the climate system is not endangered by human interference. In furtherance of the same, the parties agreed to jointly make active and constructive contributions towards reaching the post-2012 overall arrangement as projected under the framework of the “United Nations Framework Convention on Climate Change” and the “Kyoto Protocol.”

*Notice of the Supreme People's Court on the Relevant Issues concerning the People's Court's Decision to Accept Civil Cases Involving Privilege and Immunity, 22 May 2007*⁶

To strictly enforce the Civil Procedure Law and relevant international conventions that China has acceded to, and further, in order to ensure a justifiable process for accepting civil cases involving privilege and immunity, the Supreme People's Court decided to establish a reviewing system to account for such cases accepted by the People's Courts.

Where the defendant, or third party, enjoys privilege and immunity in China, before deciding to accept such cases, the People's Court shall submit the case to the Higher People's Court with jurisdiction, as applicable, for their examination; the Higher People's Court upon agreeing on the acceptance of a particular case, shall submit its examination opinions to the Supreme People's Court. No acceptance shall be made before the Supreme People's Court makes a reply.

The following categories of subjects shall enjoy privilege and immunity: (1) foreign country; (2) embassy of a foreign country in China, and its staff; (3) consulate of a foreign country in China, and its members; (4) diplomatic delegate of a foreign country to another (third) foreign country passing through China, or the spouse living therewith or an underage child thereof; (5) consular officer of a foreign country in another (third) foreign country passing through China, or the spouse living therewith or an underage child thereof; (6) foreign official holding a diplomatic visa issued by China, or a diplomatic passport (limited to a country implementing mutual visa exemption), entering China; (7) consular officer holding a diplomatic visa of China, or a diplomatic passport (limited to a country implementing mutual visa exemption), coming to China; (8) Chief of State, head of government, foreign minister, or any other official with an equivalent identity in a foreign country, when visiting China; (9) foreign delegate coming to China to attend an international meeting convened by the United Nations or a specialized agency thereof; (10) official or expert of the United Nations, or its specialized agency, coming to China on a temporary basis; (11) representative organ of an organization within the United Nations system or its staff, both present within China; or (12) any other subject enjoying privilege and immunity in China.

*The Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation, between the People's Republic of China and the Association of Southeast Asian Nations, Cebu, the Philippines, 14 January 2007*⁷

This agreement was signed during the 10th China-ASEAN Summit and became effective on 1 July 2007. The agreement aims to enhance co-operation in services

⁶ Supreme People's Court, Fa[2007] No. 69.

⁷ The full text is available at <http://tradeinservices.mofcom.gov.cn/local/2008-03-05/25707.shtml> (last visited on 20 October 2009).

between the parties in order to improve efficiency and competition, as well as to diversify the supply and distribution of services of the respective service suppliers of the parties. Under the agreement, services, services-suppliers and providers in the region enjoy improved market access and national treatment across more than 60 sectors and subsectors. The agreement also conveys higher volumes of investment to the region, especially in the following sectors: business services, construction and engineering related services, tourism and travel related services, transport and educational services, telecommunications services, recreational cultural and sporting services, environmental services and energy services.

INDIA⁸

JUDICIAL DECISIONS

India-United States Double Taxation Avoidance Agreement – Definition of “permanent establishment” and an “international transaction” – scope and application of laws relating to Transfer Pricing

DIT (INTERNATIONAL TAXATION), MUMBAI v. MORGAN STANLEY & CO. INC.

**Supreme Court of India, 9 July 2007
(2007) 7 Supreme Court Cases 1**

Facts

The case, *inter alia*, involved interpretation and application of some provisions of the India-United States Double Taxation Avoidance Agreement (“DTAA” hereinafter). The facts of the case briefly are as follows. Morgan Stanley Company (“MSCo” hereinafter), a US company, was operating within India through an independent subsidiary established in accordance with Indian laws. The issue concerned determining and attributing “permanent establishment” (“PE” hereinafter) with respect to MSCo, for the purposes of taxation. MSCo served as an investment bank engaged in the business of providing financial advisory and other related services. Morgan Stanley Advantages Services Pvt. Ltd. (“MSAS” hereinafter) was established as an independent Indian company that provided support services to MSCo through a mutually concluded services agreement. The primary question, therefore, related to the determination of PE-status of MSCo under Article 5 (1) of DTAA. MSCo sought an advance ruling before the Authority for Advance Ruling (“AAR”

⁸ Contributed by V. G. Hegde, Associate Professor, School of International Studies, Jawaharlal Nehru University, New Delhi.

hereinafter)⁹ in relation to the determination of its PE-status with a view to determining the jurisdiction under which it was liable to be taxed. The Department of Income Tax (DIT) argued before the AAR that MSAS was the PE of MSCo in India as it represented the business presence of MSCo in India. DIT further argued that MSAS was legally and financially dependent upon MSCo and consequently MSAS constituted an agency PE of MSCo under Article 5 (4) of DTAA. Both these contentions of the DIT were rejected by the AAR. The AAR, however, held that MSCo should be regarded as constituting service PE under Article 5 (2) (1) of the DTAA as it proposed to send its employees to India to undertake stewardship activities as deputationists. DIT appealed against this order of AAR before the Supreme Court challenging the interpretation of Article 5 of the DTAA.

Judgment

The Court referred to Articles 5 and 7 of the DTAA which *inter alia* incorporate the definition and scope of the terms “Permanent Establishment” and “Business Profits”, respectively. According to the Court “. . . to decide whether a PE stood constituted, one has to undertake what is called a functional and factual analysis of each of the activities to be undertaken by an establishment”. The Court agreed with the AAR that MSAS would not be covered under Article 5 (1) of DTAA¹⁰ as it merely performed back office operations in India for MSCo. The Court also agreed with AAR with regard to the non-applicability of agency PE-status to MSAS as it had no authority to enter into or conclude contracts on behalf of MSCo. Contracts, the Court noted, would be entered into in the United States and the implementation of those contracts, only to the extent of back office functions, would be carried out in India. Referring to Article 5 (3) (e) of DTAA,¹¹ the Court held that the back office functions of MSAS would not constitute a fixed place PE under Article 5 (1) of DTAA.

The other issue addressed by the Court concerned the nature of activities performed by stewards and deputationists deployed by MSCo to work in India as employees of MSAS. The Court considered stewardship activities and the work of the deputationists separately. It found that the stewardship activities were more in the nature of monitoring the outsourcing operations and there would be no involvement in the day-to-day management or specific services to be undertaken. The Court,

⁹ AAR is a quasi-judicial body constituted under the Indian income-tax laws to rule in advance on tax issues.

¹⁰ Article 5 (1) provided that “For the purposes of this Convention, the term ‘permanent establishment’ means a fixed place of business through which the business of an enterprise is wholly or partly carried on.”

¹¹ Article 5 (3) of DTAA provides for what would not be included within the term “permanent establishment”. Article 5 (3) (e) *inter alia*, states that “activities which are preparatory or auxiliary in character which are carried out at a fixed place of business will not constitute a PE”.

therefore, while disagreeing with AAR, noted that “. . . MSCo is merely protecting its own interests in the competitive world by ensuring the quality and confidentiality of MSAS services. We do not agree with the ruling of AAR that the stewardship activity would fall under Article 5 (3) (l).” As regards deputationists, the Court noted that the off-shore company would retain control over the deputationists’ terms and conditions of service. Accordingly, the Court further noted that a service PE was constituted if the multinational enterprise rendered services through its employees in India provided the services were rendered for a specified period. The Court concurred with the ruling of the AAR that a service PE under Article 5 (2) (l) existed.

The Court next turned its attention to the question of taxability of a multinational enterprise (MNE) under Article 7 of the DTAA. The Court noted that:

What is to be taxed under Article 7 is income of MNE¹² attributable to the PE in India. The income attributable to the said PE is the income attributable to foreign company’s operations in India, which in turn implies the income attributable to the activities carried on by MNE through its PE in India. Therefore, there is a difference between the taxability of PE in respect of its income earned by it in India which is in accordance with the Income Tax Act, 1961 and which has nothing to do with the taxability of MNE, which is also taxable in India under Article 7, in respect of the profits attributable to its PE. Under Article 7, the taxability is of MNE. What is taxable under Article 7 is profits earned by MNE. Under the said IT Act,¹³ the taxable unit is the foreign company, though the quantum of income taxable is income attributable to PE of said foreign company in India.

The Court, accordingly, noted that “Computation of income arising from international transactions has to be done keeping in mind the principle of arm’s length price. Charges paid, or payable, by MSCo to MSAS under the service contract have to be accounted as income at arm’s length price.” The Court referred to different methods for determining appropriate transfer pricing as provided under Section 92-C (1) of the IT Act, namely (a) Comparable Uncontrolled Price Method (CUPM); (b) Resale Price Method (RPM); (c) Cost Plus Method (CPM); (d) Profit Split Method (PSM); (e) Transactional Net Margin Method (TNMM); and (f) Such other method as may be prescribed by CBDT.¹⁴ The Court, referring to Section 92-B of the Indian Income Tax Act, succinctly explained the definition and scope of the term “international transaction” in the following words:

. . . to mean a transaction between two or more associated enterprises, either or both of whom are non-residents. The said transaction covers purchase, sale or lease of

¹² Multinational enterprise (“MNE” hereinafter).

¹³ Indian Income Tax Act, 1961.

¹⁴ Central Board of Direct Taxes (CBDT) a statutory body under the Ministry of Finance, Government of India.

tangible or intangible property or provision of services or lending or borrowing money or any other transaction having an impact on the profits, income, losses or assets of such enterprises and shall include a mutual arrangement between two or more associated enterprises for the allocation or apportionment of any cost or expense incurred in connection with the benefit, service or facility provided to any one or more of associated enterprises.

The Court next considered the question of determination of profits attributable to a PE in India on the basis of arm's length principle. Referring to Article 7 of the United Nations Model Double Taxation Convention ("UN Convention" hereinafter) the Court concluded that it advocated an arm's length approach for attribution of profits to a PE. Referring to Indian Income Tax law, the Court further pointed out that "The object behind enactment of transfer pricing regulations is to prevent shifting of profits outside India. Under Article 7 (2) not all profits of MSCo would be taxable in India but only those which have economic nexus with PE in India. A foreign enterprise is liable to be taxed in India on so much of its business profit as is attributable to the PE in India."

Determination of illegal immigrants – No separate regimes for border State – Uniform Applicability of Foreigners Act and related Orders – Primacy of Constitutional provisions and Citizenship Act

SARBANANDA SONOWAL (II) v. UNION OF INDIA

**Supreme Court of India, 5 December 2006
(2007) 1 Supreme Court Cases 174**

Facts

This case dealt with the validity of two pieces of internal subordinate legislation amending the Foreigners (Tribunals) Order, 1964 and the Foreigners (Tribunals for Assam) Order, 2006. These amendments were incorporated by the Government to give effect to the earlier 2005 decision of the Supreme Court in *Sarbananda Sonowal v. Union of India*.¹⁵ In this 2005 case the Court had extensively referred to the influx of illegal migrants into India and the effects of this on the State of Assam.¹⁶ The 2005 case had also equated this alleged massive influx to "aggression" under international law and accordingly found the 1983 Illegal Migrants (Determination by Tribunals) Act as being *ultra vires* the Constitution. The Court opined that

¹⁵ See (2005) 5 Supreme Court Cases 665.

¹⁶ This 2005 decision essentially revolved around the validity of certain provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983.

there was absolutely no reason why the illegal migrants entering the State of Assam should be treated differently from those who had migrated to other parts of India, with respect to the provisions of the Citizenship Act, 1955 and the Foreigners (Tribunals) Order, 1964. Pursuant to the decision of the Supreme Court in the 2005 case, the Government of India had amended the above-mentioned internal subordinate legislations. Petitioners argued that these amendments nullified the effect of the 2005 decision of the Supreme Court.

Judgment

The Court noted that by amending the Foreigners (Tribunals) Order, 1964 (“1964 Order” hereinafter) the Government of India sought to nullify the decision of the Court in the 2005 *Sarbananda Sonowal (I)* case that was issued “. . . in the interests of national security and to preserve demographic balance of a part of India.” The Court further noted that “[I]n making the 1964 Order inapplicable to Assam alone, when the other States having boundaries with Bangladesh are still expected to comply with that Order, the respondents have acted arbitrarily and not kept in mind the interests of the country as highlighted in *Sonowal I*.” The Court also pointed out that “. . . adequate care should be taken to see that no genuine citizen of India is thrown out of the country. A person who claims himself to be a citizen of India in terms of the Constitution of India and Citizenship Act is entitled to all safeguards both substantive and procedural provided for therein to show that he is a citizen.” The Court, accordingly, quashed the Foreigners (Tribunals) Amendment Order, 2006 and directed the respondents to implement the directions issued by the Court in *Sonowal I*.

India-Japan Double Taxation Avoidance Treaty – Territorial Nexus Doctrine – Relationship between “permanent establishment” and an “international transaction”

ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. v. DIRECTOR OF INCOME TAX, MUMBAI

Supreme Court of India, 4 January 2007
(2007) 3 Supreme Court Cases 481

Facts

Appellant, a Japanese company, challenged the taxability of offshore supply of equipments, materials and offshore services under the Indian Income Tax Act and the India-Japan Double Taxation Avoidance Treaty (“Tax Treaty” hereinafter). Appellant was executing a turnkey project in India, involving a consortium of companies, with the intention of setting up a liquefied, natural gas receiving, storage and degasification facility. The project had both onshore and offshore components and was monitored by Petronet LNG Ltd, an Indian company. Appellant had

sought a decision with regard to its tax liabilities before the Authority for Advance Rulings (AAR), an income tax tribunal under the Indian Income Tax Act, arguing that it was not liable to pay any taxes with regard to offshore services and offshore supply of materials as the entire activity fell outside the scope of Indian tax jurisdiction. Upon referring to Articles 5 and 7 of the Tax Treaty the AAR held that the appellant should pay taxes on its onshore supply of materials as this activity fell within the meaning of the phrase “directly or indirectly attributable to the permanent establishment”. Such tax liability, with regard to offshore services, however, was held as being restricted to a certain percentage (20 per cent in the present case) of the gross amount of the royalty, or fee, for technical services as per Article 12 of the Tax Treaty read with Section 115-A (1)(b)(B) of the Indian Income Tax Act. Appellant Company challenged this ruling of the AAR before the Supreme Court of India.

Judgment

The Supreme Court pointed out that the “territorial nexus” doctrine would play an important part in assessment of taxation. It noted that the “tax is levied on one transaction where the operations which may give rise to income may take place partly in one territory and partly in another. The question which would fall for our consideration is as to whether the income that arises out of the said transaction would be required to be proportioned to each of the territories or not.” As regards the tax jurisdiction, the Supreme Court stated that the “income arising out of operation in more than one jurisdiction would have territorial nexus with each of the jurisdictions on an actual basis. If that be so, it may not be correct to contend that the entire income ‘accrues or arises’ in each of the jurisdictions.” Noting that the term “permanent establishment” (“PE”) had not been defined in the Indian Income Tax Act, the Supreme Court relied on the Tax Treaty to find the relationship between PE and the impugned “international transaction”. The Court, *inter alia*, stated that:

Since the appellant carries on business in India through a permanent establishment, they clearly fall out of the applicability of Article 12 (5) of DTAA and into the ambit of Article 7. The Protocol to DTAA, in para 6, discusses the involvement of the permanent establishment in transactions, in order to determine the extent of income that can be taxed. It is stated that the term “directly or indirectly attributable” indicates the income that shall be regarded on the basis of the extent appropriate to the part played by the permanent establishment in those transactions. The permanent establishment here has had no role to play in the transaction that is sought to be taxed, since the transaction took place abroad.

The Supreme Court, while clarifying the above position, further noted that, “. . . if an income arises in Japan (contracting State), it shall be taxable in that country unless the enterprise carries on business in the other contracting State (India) through a permanent establishment situated therein. What is to be taxed is profit of the enterprise in India, but only so much of it as is directly or indirectly attributable

to the permanent establishment. All income arising out of the turnkey project would not, therefore, be assessable in India, only because the assessee has a permanent establishment.” The Court concluded that, while the “Global income of a resident . . . is subjected to tax, global income of a non-resident may not be. The answer to the question would depend upon the nature of the contract and the provisions of DTAA.” Accordingly the Supreme Court held that the AAR committed an error in holding that “. . . if services rendered by the head office are considered to be the services rendered by the permanent establishment, the distinction between Indian and foreign operations and the apportionment of the income of the operations shall stand obliterated.”

Succession to Extradition Treaty – Scope of offences to be covered – Indian Extradition Act, 1962

SUMAN SOOD v. STATE OF RAJASTHAN

**Supreme Court of India, 14 May 2007
(2007) 5 Supreme Court Cases 634**

Facts

This case, *inter alia*, referred to the applicability and validity of the 1931 Extradition Treaty (“1931 Treaty” hereinafter) that had been concluded between the United States of America and Great Britain. The extradition of the appellant had taken place from the United States to India on the basis of this 1931 Treaty and the offences referred to within that Treaty. Appellant had contended that his pursuit to India was conducted in violation of the provisions of said treaty. He further contended that the pursuit was conducted for offences that were outside the scope of terms of extradition under the aforementioned treaty.

Judgment

According to the Court “Article 14 of the Treaty expressly stated that His Britannic Majesty acceded to the Treaty on behalf of any of his dominion named in the Treaty. It, *inter alia*, included India.” The Court, referring to its earlier decisions¹⁷ on this issue, further noted that

. . . it is a well-settled legal proposition in international law that a change in the form of Government of a contracting State would not put an end to its treaties. India, even

¹⁷ *Rosiline George v. Union of India* (1994) 2 Supreme Court Cases (SCC) 80.

under British Rule, had retained its personality as a State under international law. It was a member of the United Nations in its own right. Grant of independence in 1947 and status of sovereign republic in 1950 did not put an end to the treaties entered into by the British Government prior to 15-8-1947 or 26-1-1950 on behalf of India.

The Court further rejected the contention of the appellant that he was being tried for offences that were not within the scope of the 1931 Treaty. Referring to the offences the Court pointed out that

Now, it is well settled that if the accused is charged for a higher offence and on the evidence led by the prosecution, the court finds that the accused has not committed that offence but is equally satisfied that he has committed a lesser offence, then he can be convicted for such lesser offence. Thus, if A is charged with an offence of committing murder of B, and the court finds that A has not committed murder as defined in Section 300 IPC but is convinced that A has committed an offence of the culpable homicide not amounting to murder (as defined in Section 299 IPC), there is no bar on the court in convicting A for the said offence and no grievance can be made by A against such conviction.¹⁸

The Court found that the above-mentioned principle was consistent with Section 21 of the Extradition Act, 1962 and later amended in 1993 *vide* Extradition (Amendment) Act, 1993 (Act 66 of 1993). Accordingly, the Supreme Court concluded, on this point, that “It is, therefore, clear that the general principle of administration of criminal justice applicable and all throughout applied to domestic or municipal law has also been extended to international law or law of nations and to cases covered by extradition treaties.”

Applicability of Arbitration and Conciliation Act, 1996 to International Commercial Arbitration – Appointment of Arbitrators – Indian legal position on Venue and Applicable Law

NATIONAL AGRICULTURAL COOP. MARKETING FEDERATION
INDIA LTD. v. GAINS TRADING LTD

Supreme Court of India, 22 May 2007
(2007) 5 Supreme Court Cases 692

Facts

This case was about the appointment of arbitrators under Section 11 (5) of the Arbitration and Conciliation Act, 1996 (“1996 Act” hereinafter). The purchase

¹⁸ IPC means the Indian Penal Code that defines the nature of offences. The Court also refers to its earlier decision clarifying this legal position – see *Daya Singh Lahoria v. Union of India* (2001) Supreme Court Cases (SCC) 516.

agreement concluded between the petitioner and the respondent provided for the supply of iron ore fines at FOB price. Clause 17 of this agreement provided for the settlement of disputes amicably through negotiation, failing which it would be finally resolved by arbitration in Hong Kong in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification, enactment or amendment thereof for the time being in force. Due to non-performance of certain clauses of the contract, the parties decided to terminate the contract. Accordingly, respondent argued that since the main contract was terminated, the obligation to enter into arbitration was also no longer valid. Respondents also contended that since the arbitration was to take place outside India, Section 11 of the 1996 Act would become inapplicable. Respondents' contention, on this issue, relied upon the rationale that Part I of the 1996 Act, under which Section 11 was housed, was only intended to be applicable when the place of arbitration was within India. Finally, the applicable law for arbitration was contended to be the law of Hong Kong and not the 1996 Act. On these grounds respondents refused to take part in any arbitration proceedings. Petitioners challenged these contentions of the respondents before the Supreme Court and sought the appointment of arbitrators as per the 1996 Act.

Judgment

The Supreme Court did not accept the contention of the respondent that with the abrogation of the main contract by mutual consent, the arbitration obligations, which form part of the contract, would also come to an end. On this matter, the Court noted that

An arbitration clause is a collateral term in the contract, which relates to resolution of disputes and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

In addition, Section 16 (1) of the 1996 Act provided that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract had to be treated as an agreement independent of the other terms of the contract; further, the decision that a contract was null and void should not entail *ipso jure* the invalidity of the arbitration clause contained within said contract.

As regards the applicability of Part I of the 1996 Act to arbitrations that take place outside India, the Court referred to *Bhatia International v. Bulk Trading S.A.*¹⁹ and noted that

¹⁹ (2002) 4 Supreme Court Cases (SCC) 105.

Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitration held out of India provisions of Part I would apply unless the parties by agreement express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

The Supreme Court also did not agree with the contention of the respondent that since the venue of arbitration had been agreed as Hong Kong, the laws of Hong Kong would apply. The Court, reading into the ordinary and natural meaning of the words as stated in the arbitration clause, inferred the intention of the parties to have Indian law govern their relations under said contract. Therefore, the 1996 Act would govern the appointment of arbitrator, the reference of dispute and the entire process and procedure of arbitration, from the stage of appointment of arbitrator until the award was made and executed or given effect to.

OTHER RELEVANT STATE PRACTICE

*Statement by the Indian Delegation at the Meeting of the States Parties to the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 December 2007*²⁰

India, *inter alia*, reminded the delegations that there was a need to strengthen the Biological and Toxin Weapons Convention (BWC) “. . . to deal with the widening threat spectrum arising from possible malevolent uses of biotechnology, which is creating new ways of manipulating basic life processes. The dramatic progress in the field of synthetic biology has increased the possibility of engineering living organisms. Moreover, DNA synthesis and genomic technologies utilise equipment and materials that are readily available and relatively inexpensive and much of the relevant information is accessible on e-databases. Adding to the spectre of possible new and deadlier microorganisms and toxins is the growing possibility that non-State actors could acquire and use biological warfare agents as new instruments of terror.”

India, associating itself with the statement of the Non-Aligned Movement, laid emphasis on strengthening the BWC through multilateral negotiations for a non-discriminatory, legally binding agreement, including on the issues of verification, and dealing with all the provisions of the BWC in a balanced and comprehensive manner. It further noted that, “In the face of the emerging challenges, verification of

²⁰ For India’s statements, *see generally* <http://meaindia.nic.in>.

compliance will be an important element in providing the assurance that all States Parties are meeting their commitments and obligations.”

Referring to the need for effective national enforcement measures, India noted that biological agents and toxins do not respect national frontiers. Accordingly it laid emphasis on regional and sub-regional cooperation and the development of national, regional and international capabilities for surveillance, detection, diagnosis and combating of infectious diseases, all of which require substantial investment.

*Indian Statement to the Conference on Disarmament, at the Plenary Meeting of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW Convention), 7 November 2007*²¹

India noted that it was privileged to be part of a small group of countries that had ratified or otherwise acceded to the entire CCW package of rights and obligations including Protocol I, Amended Protocol II, Protocols III, IV and V as well as the amendment to Article I of the CCW. India also welcomed the entry into force of Protocol V on ERW.²² With regard to mines other than Anti-Personnel Mines and finding common ground on the key remaining issues of detectability and active life span, India hoped that, “States Parties will demonstrate flexibility in order to adopt a legally binding protocol on MOTAPM²³ that would maintain the balance between humanitarian concerns and the military utility of these weapons.” India further noted that “. . . while we should continue to encourage the States Parties to fully meet their IHL obligations within the CCW framework, we must not lose sight of the importance of the international community as a whole coming up with a new and strengthened format that would, by common agreement, reaffirm and strengthen the application of international law in regulating methods of warfare and in protecting the victims of warfare.”

Referring to the fundamental transformation of the international landscape India conveyed that

. . . there is a need for a renewed debate and discussion on strengthening the obligations of all States to consider whether the adoption of new weapon systems or methods of warfare should, in some circumstances, be prohibited under the applicable rules of international law . . . [F]urther, given the changing circumstances, we feel that it is time for the international community to consider ways and means to continue the codification and progressive development of the rules of international law applicable to advanced conventional weapons which have devastating and

²¹ For India’s statements, *see generally* <http://meaindia.nic.in>.

²² Explosive Remnants of War (“ERW” hereinafter).

²³ Mines other than Anti-Personnel Mines (“MOTAPM” hereinafter).

indiscriminate effects, or hinder post-conflict peace building efforts or have lasting negative effects on the environment or fragile eco-systems.

*Statement by India on Oceans and the Law of the Sea at the 62nd Session of the United Nations General Assembly; Agenda Item 77 (A) & (B), 10 December 2007*²⁴

India, thanking the Secretary General for his comprehensive reports on the issues relating to ocean affairs and the Law of the Sea, noted that it “. . . attaches high importance to the effective functioning of the institutions established under the United Nations Convention on the Law of the Sea. With a coastline extending four thousand miles and with 1,300 islands, we have a traditional and abiding interest in maritime and ocean affairs. Therefore, we follow closely the work of all subsidiary institutions under the United Nations Law of Sea Convention (“UNCLOS” hereinafter), namely the International Sea-bed Authority, the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf.”

While referring to institutional aspects, India supported the joint proposal of the Asian and African groups with regard to the allocation of seats in these bodies, i.e., International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf, in accordance with the principle of equitable geographical representation. India took note of the current work of the International Seabed Authority (ISBA) in developing a legal regime for prospecting and exploring polymetallic sulphides and cobalt-rich crusts. It also appreciated the role of the ISBA in the conservation of biodiversity in areas under its jurisdiction, and in ensuring environmentally sustainable development of seabed mineral resources. India noted that the Council of the Authority had finished the first reading of the Regulations on Polymetallic Sulphides. India also noted, however, that

. . . several issues relating to the protection of the environment, including the time-frame during which temporary measures could be taken by the Authority to prevent, contain and minimize the threat of serious damage to the marine environment, are still under consideration. India is totally committed to the protection and preservation of the marine environment but we would caution against attempts to impose an unduly burdensome regime as it would act as a disincentive for any further prospecting or exploration in the Area and defeat the very purpose of setting up the Authority. We also hope that issues regarding the configuration of blocks and geographic proximity of blocks in the allocated areas for exploration can be successfully resolved in the next session of the ISBA.

²⁴ For Indian statements, *see generally* <http://meaindia.nic.in>, and <http://www.un.int/india/>.

India also stated that it would continue to follow, with interest, the reports of the groups of scientists collaborating on the Kaplan Project,²⁵ which could be of help in managing nodule mining and the design of marine protected areas in the Clairion Clipperton Zone. It also welcomed the setting up of an endowment fund by the International Seabed Authority to promote and encourage the conduct of marine scientific research in the international seabed area. The fund, India noted, would support the participation of qualified scientists and technical personnel from developing countries in marine, scientific research programmes. On the issue of “Marine Genetic Resources” currently being discussed, India pointed out that the “symbiotic relationship between the biodiversity of the deep seabed and its ecosystem makes the entire resources of the sea-bed, living and non-living, to be a common heritage of mankind.”

*Statement by India on the Report of the United Nations Commission on International Trade Law on the work of its Fortieth Session at the Sixth Committee of the 62nd Session of the United Nations General Assembly: Agenda Item 81, 22 October 2007*²⁶

India stated that it attached considerable importance to the work of the United Nations Commission on International Trade Law (“Commission” hereinafter) and the Commission’s efforts to establish and promote modern, private law standards in the field of international trade. India welcomed the completion of work on this important topic that would promote access to low-cost secured credit and supported the effort towards harmonizing the UNCITRAL and UNIDROIT model laws on this subject as well as the preparation of an annex in this regard. India also noted that a second annex to the draft guide on “security rights in intellectual property” would be an important addition to the subject as a significant part of corporate wealth exists as comprised intellectual property assets.

Noting the tasks before the Working Group on Arbitration in revising the UNCITRAL Arbitration Rules, India pointed out that, “Given the fact that a number of arbitration centers have adopted these UNCITRAL rules, it becomes important that any revision of these rules should not lead to the alteration of the structure of the text. We are also of the view that the Working Group should adopt a generic approach applicable to all types of arbitration, rather than a dispute specific approach.”

Expressing its appreciation to the Working Group on Transport Law, India, *inter alia*, stated that, “Given the highly technical nature of the work, we would support inclusiveness and transparency. We also note with appreciation the continuing

²⁵ KAPLAN is a project on biodiversity, species ranges, and gene flow in the abyssal Pacific nodule province: predicting and managing the impacts of deep seabed mining.

²⁶ For India’s statements, see generally <http://meaindia.nic.in>, and <http://www.un.int/india/>.

work under the CLOUT system.²⁷ It continues to be one of the important technical assistance activities being undertaken by UNCITRAL and contributes greatly to the benefit of practitioners in the developing world and law students.”

*Statement by India on the Report of the Special Committee on the Charter of the United Nations and on Strengthening of the Role of the Organization at the Sixth Committee of the 62nd Session of the United Nations General Assembly: Agenda Item 85, 16 October 2007*²⁸

On the role of the Security Council, specifically referring to Article 50 of the Charter, India noted that

Maintenance of international peace and security is the primary responsibility of the Security Council, which acts on behalf of all members of the UN in the discharge of its duties. The Security Council, which mandates sanctions, has the nodal responsibility for finding solutions to the problems of third States affected by UN sanctions. Article 50 of the UN Charter confers the right on third States confronted with special economic problems, because of the Security Council sanctions, to consult the Security Council for solution to those problems. We do not consider Article 50 of the Charter as merely procedural. It obliges the Security Council to find definitive solutions to the problems of affected third States. India’s stand has been from the beginning that the Security Council should hold the primary responsibility towards the affected third States, as a part of its sanctions imposing decisions. India aligns itself in this regard with the statement made by Cuba on behalf of NAM that the Security Council is obliged to directly focus upon the effects on third States of any sanctions under Chapter VII of the UN Charter.

India, referring to the Secretary General’s report on “Implementation of the Provisions of the Charter of the United Nations related to Assistance to Third States Affected by the Application of Sanctions,” pointed out that

We are pleased to note the various measures taken by the Security Council to mitigate the effects of sanctions, ranging from standardizing humanitarian exemptions to developing delisting procedures and establishing a focal point. These measures are aimed at ensuring that sanctions are targeted and have consequently led to significant reductions in unintended economic consequences for third States. In this regard measures like defreezing of funds to allow contractual dues are also steps in the right direction. We are pleased to note that due to various steps taken

²⁷ Case Law on UNCITRAL Texts (“CLOUT” hereinafter).

²⁸ For India’s statements, see generally <http://meaindia.nic.in>, and <http://www.un.int/india/>.

so far no Member State has approached any sanctions committee concerning special economic problems arising from the implementation of sanctions. These important steps have been successful as in the recent past the Security Council, as part of the international community's effort to counter global terrorism, has moved from sanctions against States to targeting individuals and non-state entities. However, these measures may not really work if the Security Council decides to mandate a major new sanction regime directed against a State. The issue of third country hardships considered by some to be moot now is likely to resurface again in such a situation.

Supporting the Russian Proposal, India stated that

... adoption of fair and clear procedures in the UN sanctions process will strengthen its effectiveness and credibility. In this regard a comprehensive framework would provide the requisite transparency and certainty in procedures. India therefore supports the idea of establishing a working group within the Sixth Committee to take up the matter of sanctions and third States. As regards the Russian proposal on Peacekeeping Operations under Chapter VI of the UN Charter, we believe that while the political and operational aspects of peacekeeping are being dealt with by other specialised committees, this Committee could contribute to the subject from the legal angle. The allocation of the agenda item on "Comprehensive Review of the Peacekeeping Operations in all their respects," to the Sixth Committee also reflects the need for focused legal scrutiny of the subject.

Turning to the joint proposal of the Russian Federation and Belarus seeking an advisory opinion of the ICJ on the legal consequences of use of force without a decision of the Security Council taken pursuant to Chapter VII, India was of the view that consideration of such a reference would provide an opportunity to clarify the position on certain important legal aspects.

On the Cuban proposal aimed at redefining the powers and functions of the General Assembly and its relationship with the Security Council, India stated that it attached importance to

... the reform of the United Nations, including the revitalization of the General Assembly and a comprehensive reform of the Security Council. The continuing encroachment of the mandates of the General Assembly by the Security Council is of great concern to the general membership of the United Nations. The clear demarcation of powers in the Charter or the expansion of non permanent membership has not prevented this. Only an expansion in the permanent membership with new permanent members held accountable through reviews would introduce the necessary checks and balances that would prevent such encroachment.

India also supported the Repertory of Practice of the UN organs to be a valuable source of information on the application of the Charter and an indispensable tool for the reservation of the institutional memory of the United Nations.

*Statement by India on Measures to Eliminate International Terrorism at the Sixth Committee of the 62nd Session of the United Nations General Assembly: Agenda Item 108, 11 October 2007*²⁹

India, laying emphasis on the need for “international cooperation” through the adoption of the Comprehensive Convention on International Terrorism (CCIT), pointed out that

A strong response to terrorism requires broad-based international cooperation, compressing the space available to terrorists, and increasing the capability of States to address terrorist threats. It requires sustained and specific cooperation by a variety of national, regional and global agencies. We hope that the Strategy would provide the impetus to unite the international community in its fight against terrorism via practical measures that facilitate cooperation by way of extradition, prosecution, information exchange, and capacity building . . . Without the early adoption of the Comprehensive Convention against International Terrorism, the global struggle against terrorism will remain incomplete.

On the substantive issues concerning CCIT, India stated that

The definitional issue is a red herring. The CCIT is not concerned with terrorism as a philosophical category but terrorist acts that are specific crimes and these have been defined. We are encouraged by the fact that serious attempts are being made to resolve the outstanding issues. The new proposal submitted by the facilitator after extensive bilateral consultations is an attempt to narrow down differences. We thank her for all her efforts. Several other proposals also still remain on the table. We call on all delegations to seriously examine these proposals and work together to reach a compromise that will satisfy all parties and help in the finalization and adoption of the CCIT. We believe that when adopted, CCIT would provide a solid legal basis for the fight against terrorism. Most of these proposals make the CCIT perfectly consistent with international humanitarian law. And this is as it should be. After all it would be a dreadful paradox if democratic societies were to make civil liberties so precious as to curtail them. This central point of democratic societies has been cogently put by Hegel in his “Phenomenology of Spirit”: the life of the spirit is not life that shrinks from death or keeps itself untouched by its devastation but that endures it and maintains itself in spite of it.

Referring to existing United Nations framework, India further noted that

UN General Assembly has successfully established a comprehensive legal framework in the field of counter-terrorism. The 13 major UN instruments relating to specific

²⁹ For India’s statements, *see generally* <http://meaindia.nic.in>, and <http://www.un.int/india/>.

terrorist activities remain fundamental tools in the fight against terrorism. India is a Party to all the 13 major legal instruments. India ratified the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism in May this year. This Convention provides a legal basis for international cooperation to prevent terrorists from acquiring nuclear weapons. The effectiveness of this instrument depends on the degree to which State Parties respect, abide by and enforce its provisions. Key in this regard is strengthening the security of fissile materials stored in nuclear facilities. If Governments fulfill their duties under this Convention, the agreement will work well and accomplish its purposes.

As regards fulfilment of its obligations, India mentioned that

India also attaches utmost importance to the fulfillment of its obligations under the relevant counter terrorism resolutions of the United Nations. It has filed five National Reports to the Counter Terrorism Committee, giving a comprehensive picture of steps taken by India to counter terrorism. A 14 member composite delegation of UN counter-terrorism experts had visited India last year. A detailed presentation of India's counter-terrorism strategy was made to the Committee. India has also entered into several bilateral and multilateral agreements to cooperate with other States in curbing the scourge of terrorism.

JAPAN

JUDICIAL DECISIONS³⁰

Not Guilty Judgment on the First Instance and Re-Detention Order by the Appellate Court

RESPONDENT: X

Supreme Court, Third Petty Bench, Decision, 13 December 2007
Saiko-Saibansho Keiji-hanreishu (Supreme Court Penal Reports),
Vol. 61, No. 9, p. 843

Facts and Judgment

X, who is a foreigner without resident status in Japan, was prosecuted, remaining under detention for illegal import of a stimulant drug into Japan. The First Instance declared X not guilty on the ground of not enough evidence of the crime. The

³⁰ Contributed by Tokugawa Shinji, Ritsumeikan University, Kyoto; member of the Study Group on Decisions of Japanese Courts Relating to International Law.

written detention order lost effect. X was released but at once committed to Tokyo Immigration Bureau's shelter because of X's lack of resident status in Japan. The Immigration Bureau commenced proceedings of expulsion against X. The prosecutor appealed to the High Court and demanded a new, written, detention order. The High Court accepted the demand and issued said order against X. Thereafter, X was transferred from the Immigration Bureau's shelter to a detention centre.

X protested that the order was based on incorrect interpretations of Articles 345³¹ and 60³² of the Penal Procedure Law and that it was also contrary to both Articles 31³³ and 34³⁴ of the Constitution of Japan and Articles 9(3) and 14(2) of the International Covenant on Civil and Political Rights ("ICCPR, 1966" hereinafter).

The Tokyo High Court³⁵ rejected X's claim, reasoning as follows. While confirming that the Appellate Court, out of regard for the not-guilty judgment by the Court of First Instance, must carefully decide whether "probable cause to suspect that he/she has committed a crime" under Article 60 of the Penal Procedure Law exists or not, the High Court decided that the written detention order satisfied the requirements under the Penal Procedure Law, that Immigration Bureau's shelter was not a fixed residence, meaning a base of life in Japan, and that there was probable cause to suspect that X might conceal or destroy evidence. Therefore, the High Court held

³¹ When there is a notification of a decision of acquittal, dismissal, exculpation, suspension of execution, dismissal of prosecution (except as otherwise prescribed in Article 338(iv)), a fine or petty fine, the detention warrant shall lose its effect.

³² Article 60: (1) The Court may detain the accused when there is probable cause to suspect that he/she has committed a crime and when: (i) The accused has no fixed residence; (ii) There is probable cause to suspect that he/she may conceal or destroy evidence; or (iii) The accused has fled or there is probable cause to suspect that he/she may flee.

(2) The period of detention shall be two months from the date of institution of prosecution. In cases where it is especially necessary to continue the detention, the period may, by a ruling with a specific reason, be extended for additional one-month periods; provided, however, that the extension shall only be allowed once, except as otherwise prescribed in item (i), (iii), (iv) or (vi) of Article 89.

(3) With regard to cases which shall be punished with a fine of not more than 300,000 yen (with regard to crimes other than those under the Penal Code, the Act on Punishment of Physical Violence and Others (Act No. 60 of 1925), and the Act on Penal Provisions related to Economic Activities (Act No. 4 of 1944), 20,000 yen for the time being), a misdemeanour detention or petty fine, the provision of paragraph (1) of this Article shall apply only when the accused has no fixed residence.

³³ No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

³⁴ No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

³⁵ Decision of 28 September 2007, in *Saiko-Saibansho Keiji-hanreishu* (Supreme Court Penal Reports), Vol. 61, No. 9, at p. 888.

that there was probable cause towards the end that X might flee or escape penal proceedings by hiding at X's foreign address after expulsion.

The High Court, therefore, decided that the claim of violations of the Constitution of Japan and the ICCPR, 1966 lacked merit. Thereafter, X made a special appeal against the High Court's decision.

The Supreme Court unanimously rejected the appeal for the following reasons. The Supreme Court, identifying that the Appellate Court had to, out of regard for the not-guilty judgment by the Court of First Instance, carefully decide whether there was "probable cause to suspect that he/she has committed a crime" under Article 60 of the Penal Procedure Law and further, whether the extent of suspicion was stronger than the one at the Court of First Instance, decided that the detention order satisfied the requirements.

Protection of Intellectual Products made in non-recognized State under the Berne Convention for the Protection of Literary and Artistic Works
("Copyright Convention" hereinafter)

X1, X2 v. NIHON TV CO.³⁶

Tokyo District Court, 14 December 2007
(Not yet reported)

Facts and Judgment

The plaintiffs were a film export-import company ("X1" hereinafter), and an affiliated administrative organ of the Ministry of Culture of the Democratic People's Republic of Korea ("DPRK" hereinafter), which insisted on its copyright for all of DPRK's films, and a Japanese company ("X2" hereinafter) which insisted on its exclusive utilization rights in Japan.

X1 and X2 sued Nihon TV Co. ("Y" hereinafter) for damages under the Civil Code, because Y had broadcast DPRK's films without the permission of X1 and X2. The main issues were the legal capacity of X1 under the Japanese legal system and the status of protection for DPRK's works under the Copyright Act.

The District Court addressed the claims as follows. It held that X1 had capacity to be a party under the Civil Procedure Law of Japan, because it was entitled to hold rights under DPRK's Civil Law. X1 was DPRK's administrative organ but could also be regarded as a private entity with the capacity to be a party under the Japanese legal system because X1 was merely one state film company which exercised copyright over DPRK films.

³⁶ The content of this case is similar to the case *X1, X2 v. Fuji TV Co.* judged by the same Court on the same day (not yet reported).

On the issue of the status of protection of DPRK's films under the Copyright Act, the District Court reasoned that the claim depended upon whether or not DPRK's films were "protected works" under Article 6 (iii) of the Copyright Act,³⁷ that is to say whether Japan was under an obligation to the DPRK to comply with the Copyright Convention, which Japan had ratified in 1975 and the DPRK in 2003.

Japan does not recognize the DPRK as a subject of international law, nor does it have any legal relationship with the DPRK under international law. Therefore, even if the DPRK ratified a multilateral treaty which Japan has also ratified, there is no legal relationship that can exist between them.

When a provision of a multilateral treaty does not prescribe an inter-state obligation but an obligation *erga omnes* to the international society as a whole, for example Article 1 (prohibition of genocide) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and Article 2 (prevention of torture) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975), the provision is considered applicable to the relationship with a non-recognized state.

As such, the Court held that, since the Copyright Convention, particularly under Article 3(1)(a), did not provide for such an obligation *erga omnes*. Japan, therefore, had no obligation to protect DPRK's works under that provision.

Obligation to enact a Municipal Ordinance Prohibiting Racial Discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination

X v. THE CITY OF OSAKA

Osaka District Court, 18 December 2007

***Hanrei-Jiho* (Judicial Reports), No. 2000, at p.79.**

Facts and Judgment

A landlord refused to conclude a lease contract for an apartment with tenant ("X" hereinafter) on the ground of X's nationality/race. X sued the City of Osaka ("Y" hereinafter) for mental distress under the State Tort Liability Law, in addition to a claim against the landlord, in which a compromise was effected before the District Court.

³⁷ Article 6 (Protected works): Only those works falling under one of the following items shall receive protection under this legislation: . . . (iii) works in addition to those listed in the preceding two items, with respect to which Japan has the obligation to grant protection under an international treaty.

The main issue was whether Y's omission to enact a Municipal Ordinance prohibiting racial discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD, 1983" hereinafter), before the said refusal was announced, was in violation of Article 1(1) of the State Tort Liability Law.

The District Court rejected X's claim, reasoning as follows. The chapeau of Article 2(1) of the ICERD, 1983 was too abstract and general to embody what, specifically, the State Party should do. Therefore, this chapeau did not impose upon the State Party any obligations to do something particular in respect of racial discrimination against an individual.

Article 2(1)(d) of the ICERD, 1983, provides that legislative measures shall be one of measures to be undertaken by the State Party in order to prohibit and eliminate racial discrimination between private persons. But that clause could not be imperative, because it was neither a specific mandatory norm, nor a code of conduct that instructed the State Party on some requirements of legislative invocations and related expectations, beforehand. As such the clause could not be regarded as a norm that imposed on a State Party any obligation to adopt particular legislation in order to prohibit and eliminate racial discrimination between private persons.

Article 5(e)(iii) of the ICERD, 1983, only enumerated rights sensitive to racial discrimination, but as Article 5's chapeau provides, they are subject to the essential obligation under Article 2 of the ICERD.

None of the provisions in the ICERD, 1983, provide obligations for specific action. As such, State Parties only assumed political responsibility for the prevention of racial discrimination under the ICERD, 1983.

Given this decision, the Court felt that the issue of whether or not a municipality of the State Party was a subject responsible for the discharge of the obligation, was moot.

The Best Interest of the Child and Deportation

X et al. v. MINISTER OF JUSTICE, SUPERVISING
IMMIGRATION INSPECTOR

Tokyo High Court, 19 March 2008
(Not yet reported)

Facts and Judgment

The plaintiffs were an Indian couple and their three children born in Japan, aged 12, 9 and 6 years respectively as of this judgment, who had stayed behind illegally in Japan. They appeared before the Tokyo Regional Immigration Bureau of their own accord, in order to apply for a special status of residence. The Immigration Bureau decided that the couple and their children violated Article 24(iv)(b) and (vii) of the

Immigration Control and Refugee Recognition Act³⁸ and thereafter issued a written deportation order against them. The plaintiffs approached the Tokyo District Court claiming a rescission of that order. The Tokyo District Court rejected the claim.³⁹ The plaintiffs thereafter appealed to the Tokyo High Court.

The Tokyo High Court rejected their claim as follows. The Court held that the fundamental rights of foreigners should be protected only within Japan's foreign residents system. The Minister of Justice assumes wide discretion to decide renewal of period of stay, which should not be recognized as a right of a foreigner under the Immigration Control and Refugee Recognition Act. Under Article 50(1)(iv)⁴⁰ of said Act, the Minister of Justice has a much wider discretion to permit special status of residence for illegal foreign residents, than to decide upon the renewal of period of stay. Claims of illegal discretionary exercise by the Minister of Justice of said special permission should be limited to cases of *ultra vires* and abuse of discretion by the Minister, based on determinations utterly incompatible with the generally accepted idea of discretion.

The plaintiffs' status with respect to both immigration and residence was extremely suspect in view of the false declaration by the plaintiff couple at the Immigration Office of Japan, and their 13-year illegal residence and unlawful work within Japan. In addition, the couple had the capacity to work and reside in India.

The Court reasoned that the plaintiff couple's children were not responsible for their own illegal residence. Their deportation would have great negative influence on them. But their ages indicated that they could not decide for themselves whether or not to live in Japan, and further, that they had adaptability and malleability to fit into new surroundings. Their deportation to India, therefore, was not against humanity.

The plaintiff couple contended that the deportation of their children to India was contrary to Article 13 of the International Covenant on Economic, Social and

³⁸ Article 24 (Deportation): Any alien who falls under any of the following items may be deported from Japan in accordance with the procedures provided for in the following Chapter . . . (iv) An alien residing in Japan (except for those to whom permission for provisional landing, permission for landing at a port of call, permission for landing in transit, landing permission for crew members, or landing permission due to distress has been granted) who falls under any of the following sub-items: . . . (b) A person who has stayed in Japan beyond the period of stay authorized without obtaining an extension or change thereof . . . (vii) A person prescribed in Article 22-2, paragraph (1), who stays in Japan beyond the period prescribed in Article 22-2, paragraph (1), without receiving permission pursuant to the provisions of Article 20, paragraphs (3) and (4), as applied *mutatis mutandis* to Article 22-2, paragraph (3) or pursuant to the provisions of Article 22-2, paragraphs (2) and (3), as applied *mutatis mutandis* to Article 22, paragraph (4).

³⁹ Judgment of 14 September 2007, not yet reported.

⁴⁰ Article 50 (Special Cases of Determination by the Minister of Justice): (1) The Minister of Justice may, even if he/she finds that the objection filed is without reason, in making the determination set forth in paragraph . . . (3) of the preceding Article, grant the suspect special permission to stay in Japan if the suspect falls under any of the following items . . . (iv) The Minister of Justice finds grounds for granting special permission to stay, other than the previous items.

Cultural Rights (1966), Article 24 of the International Covenant on Civil and Political Rights (1966), and Articles 3 and 28 of the Convention on the Rights of the Child (1989), on the grounds that they could not receive adequate education in India because of their present capacities and the cultural differences between India and Japan.

The indicated treaties were based on, and had no intent to change, the principle of international customary law under which every State may decide independently, permission and requirements of immigration for foreigners. No provisions of the aforementioned treaties guarantee rights significantly greater than those permitted under the Constitution of Japan. Even out of maximum regard for the interests of the children, the Court could not find any existence of *ultra vires* or abuse of discretion by the Minister.

Nationality of Children Born out of Wedlock

X v. THE STATE OF JAPAN⁴¹

Supreme Court, Grand Bench, 4 June 2008

***Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 62, No. 6, at p. 1367**

Facts and Judgment

This case was an action for the revocation of a written deportation order and the recognition of the plaintiff's ("X" hereinafter) Japanese nationality. X was a child who was born of a Philippine mother and was recognized by its Japanese father after its birth. Though X's mother as its legal representative made notification to the Minister of Justice, after such recognition by its father, to request that X be afforded Japanese nationality, said notification was not accepted and X's request to be afforded Japanese nationality was denied.

According to Article 3(1)⁴² of the Nationality Law of Japan, it is necessary to meet two requirements for acquiring Japanese nationality by legitimation: one is that

⁴¹ On the same day the Supreme Court, Grand Bench, adopted the same approach towards another action for declaratory judgment of Japanese nationality (not yet reported, but the judgment of the Court of first instance was delivered 29 March 2006; see this *Yearbook*, Vol. 13, at 207).

⁴² A child (excluding one who was once a Japanese national) under 20 years of age who has acquired the status of a legitimate child by reason of the marriage of its father and mother and their recognition, may acquire Japanese nationality by making notification to the Minister of Justice, if the father or mother who has affected the recognition was, at the time of the child's birth, a Japanese national, and such father or mother is presently a Japanese national or was, at the time of his or her death, a Japanese national.

the father and mother of the child be married, and the other, that the child has acquired the status of a legitimate child.

The main issues of this case were whether Article 3(1) was consistent with Article 14(1)⁴³ of the Constitution of Japan, and whether the acquisition of Japanese nationality should be recognized, in this case, in the event that provision was found to be unconstitutional.

The Tokyo District Court⁴⁴ had affirmed the claim and the plaintiff's right to acquire Japanese nationality. But the Tokyo High Court⁴⁵ denied such acquisition of Japanese nationality without judging the constitutionality of the disputed requirements in Article 3(1) of the Nationality Law. The High Court criticized the judgment by the Court of First Instance, indicating that the lower Court should have interpreted the Nationality Law by the nature of its content, not broadly nor by analogy but to the strict letter,⁴⁶ and that in recognizing nationality as being acquirable, the lower Court had moved beyond its authority into passing judgment on the constitutionality of laws, *i.e.*, whether that article was inconsistent with the Constitution.

The plaintiff appealed against the High Court judgment.

The Supreme Court cancelled the judgment, and affirmed that the disputed requirements in Article 3(1) of the Nationality Law were in themselves inconsistent with Article 14(1) of the Constitution and consequently void. As such the Supreme Court held that the plaintiff's acquisition of Japanese nationality should be recognized.⁴⁷ The Supreme Court's reasoning was as follows:

1) *The constitutionality of Article 3(1) of the Nationality Law*

The Court could not find, on the specific grounds set out in this case, a reasonable connection between the legislative purpose of the Nationality Law and that provision which provided that the decision of a child's nationality depended upon its parents, although, at the time of its enactment, it had been reasonable.

Firstly, the diversity of consciousness and actual conditions concerning family life and parent-child relationship was generated by the recent change of social and economic environments in Japan. In addition, the increasing international migration

⁴³ Art. 14 (1) of the Japanese Constitution provides: "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."

⁴⁴ Judgment of 13 April 2005, in *Hanrei Jiho* (Judicial Reports) No. 1890, at 27.

⁴⁵ Judgment of 28 February 2006, in *Katei-Saibansho Geppo* (Family Courts Monthly Bulletin), Vol. 58, No. 6, at 47.

⁴⁶ The Supreme Court, Second Petty Bench, judgment of 16 November 1973, in *Saiko-Saibansho Minji-Hanreishu* (Supreme Court Civil Reports), Vol. 27, No. 10, at 1333.

⁴⁷ This judgment revised the relevant precedent of the Supreme Court. See judgments of 17 October 1997 and 22 November 2002 by the Supreme Court, Second Petty Bench, in *Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 51, No. 9, at 3925 and in *Shomu-Geppo* (Monthly Reports on Judicial Matters), Vol. 50, No. 4, at 1325, respectively.

of people made it very difficult to conclude that the existence of a relationship between the State of Japan and a child, only one parent of which was Japanese, should directly be connected with the question whether its parents had been married legally.

Secondly, many countries have tried to settle *de jure* discriminatory treatments against illegitimate children, and the International Covenant on Civil and Political Rights (“ICCPR: 1966” hereinafter) and the Convention on the Rights of the Child (“CRC: 1989” hereinafter), both of which the State of Japan ratified, provide that no child should be discriminated against on the ground of its birth.

Thirdly, many countries which earlier had the same provision as the disputed Article 3(1) of the Nationality Law, modified it to recognize the acquisition of nationality by recognition of national father alone.

Fourthly, the acquisition of Japanese nationality was the most important element in deciding whether one person could enjoy the protection of fundamental rights under the Constitution of Japan. The disadvantages of a child based on discriminatory treatment of the acquisition of nationality, therefore, should never be overlooked. There was no difference between a child who was born of a foreign mother and was recognized by its Japanese father after its birth, and another child who was born of a foreign mother and was recognized by its Japanese father before its birth, with regard to the degree of connection with the State of Japan through its family life with such respective fathers. As such, the Court believed that it was very difficult, reasonably, to justify the two distinct requirements provided for under Article 3(1), from the viewpoint of the aforementioned degree of connection.

Fifthly, the two requirements of Article 3(1) were fundamentally inconsistent with regard to equality between men and women, because the Nationality Law adopted the principle of *jus sanguinis* based on the status of either parent.

In conclusion, at the time of the disputed notification, the Supreme Court held Article 3(1) of the Nationality Law to be inconsistent with Article 14(1) of the Constitution.

2) *The recognition by the court of nationality*

Although Article 3(1) of the Nationality Law was held to be inconsistent with Article 14(1) of the Constitution, the Court could not adopt the interpretation that the provision was in itself void and, consequently, acquisition of Japanese nationality by legitimation was completely rejected, because that interpretation denied the object and purpose of the Nationality Law, and did not represent the reasonable intention of the legislature.

From the viewpoint of the relief of victims of discrimination and the correction of an unconstitutional situation, the object, purpose and content of Article 3(1), addressing the acquisition of Japanese nationality, would have to be based on the principle of *jus sanguinis* to cover a child who was born between a Japanese father and a foreign mother and was recognized by its father after its birth.

In conclusion, the Supreme Court held that a child who was born between a Japanese father and a foreign mother and was recognized by its father after its birth

should be recognized according to Article 3(1) of the Nationality Law in the case where the notification for acquisition of Japanese nationality by legitimation satisfied the requirements of that provision except for the phrase, “. . . who has acquired the status of a legitimate child by reason of the marriage of its father and mother”.

Three judges attached dissenting opinions to the Supreme Court’s decision in this case. Two of them presented partly-dissenting opinions along the lines that, while the disputed requirements in Article 3(1) of the Nationality Law were in themselves inconsistent with the Constitution, the recognition, by the Supreme Court itself, of the acquisition of Japanese nationality was *ultra vires*.

NATIONAL LEGISLATION ON INTERNATIONAL MATTERS⁴⁸

Enactment of the Replenishment Support Special Measures Law as a renewal of Anti-Terrorism Special Measures Law

The Replenishment Support Special Measures Law (“RSSML” hereinafter)⁴⁹ was enacted on 11 January 2008. As the successor to the Anti-Terrorism Special Measures Law (“ATSML” hereinafter),⁵⁰ its purpose is (as noted by the former Prime Minister Fukuda Yasuo) to show the Japanese contribution to the international community by continuing the refuelling activities in the Indian Ocean, and to actively cooperate with the “fight against terror.” The ATSML was originally enacted by the Diet immediately after the terrorist attacks on the United States on 11 September 2001. The ATSML was valid for two years, but was amended and extended in 2003, 2005 and 2006, and finally expired on 1 November 2007. Therefore, Japan had to temporarily suspend its refuelling activities. But in early 2008 as a renewal of the ATSML, the RSSML was enacted, referring clearly to the UN Security Council Resolutions 1368 and 1776. Thereafter, Japan resumed supply activities in order to support vessels of other countries engaged in the Operation known as Enduring Freedom – Maritime Interdiction Operations (“OEF-MIO” hereinafter).

The RSSML provides that it shall expire one year after its entry into force, although it may be extended by legislation for a period of one year or less.

⁴⁸ Contributed by Yoshii Atsushi, Professor of International Law at Meiji-Gakuin University, Tokyo, and Ishibashi Kanami, Professor of International Law at Tokyo University of Foreign Studies.

⁴⁹ Hokyushien Tokubetsu Sochi Ho, Law No.1 of 2008. Available at: <http://law.e-gov.go.jp/html-data/H20/H20HO001.html> (Japanese version only; last visited 23 January 2009). No official English translation except for the title “Replenishment Support Special Measures Law.” The outline of this law is available at: http://www.mod.go.jp/ed_policy/ipca/pdf/fight_terror.pdf (last visited 29 January 2009).

⁵⁰ Terotaisaku Tokubetsu Sochi Ho, Law No. 113 of 2001. Available at: http://www.kantei.go.jp/foreign/policy/2001/anti-terrorism/1029terohougaiyou_e.html (last visited 23 January 2009).

Accordingly, the Law to Partially Amend the RSSML⁵¹ was enacted on 12 December 2008, allowing Japan to continue replenishment support activities in the Indian Ocean. This was fully welcomed by UN Secretary-General Ban Ki-moon as it would allow Japan to continue, for a further year, its activities in support of international operations in Afghanistan.⁵²

Concerning the replenishment support activities actually conducted in the Indian Ocean, the ATSMML and the RSSML might make little difference when applied. However, there are several important changes in wording between the two. Firstly, the possible extent of Japanese operations under the RSSML may be seen as being significantly narrowed in comparison to the ATSMML. Under the ATSMML, the Japanese Self-Defence Force (“SDF” hereinafter) could have engaged in activities such as co-operation assistance, search and rescue, and finally, relief activities for affected people (Arts. 7, 8), in areas including Japanese territory, high seas, EEZ and the corresponding airspace, and with each respective Government’s consent, even in foreign territories. Thirdly, under the ATSMML, the SDF was authorized to return fire under (restrictive) conditions: “when an unavoidable and reasonable cause exists for the use of weapons to protect lives and bodies of themselves . . . or those who are with them” (as per Art. 12(1)), although such operations can be conducted only “in areas where combat is not taking place” (as per Art. 2(2)). These conditions are less restrictive under the RSSML.

In contrast, the activity authorized by the RSSML is very confined in its scope of operations. The RSSML limits SDF engagement to refuelling and water supply, among other activities, “co-operation assistance” stipulated in the ATSMML as well as provisions for search, rescue and relief were dropped. Besides, the RSSML also limits its operation areas to either (1) high seas, EEZ of the Indian Ocean, a part of EEZ used for navigation en route from Japan to the Indian Ocean and the corresponding airspace, or (2) foreign territories in, and surrounding, the Indian Ocean and foreign territories which are ports of call for Japanese vessels en route from Japan to the Indian Ocean and the airspace corresponding, with the consent of the foreign Government.

Secondly, unlike the ATSMML, which required an approval, albeit *ex-post facto*, by the Diet, the RSSML has no such approval clause, and this might cause a new concern about the legislative control over the executive.

The Democratic Party of Japan (DPJ) leader, Ozawa Ichiro, has strongly argued that the operations in Afghanistan should constitute collective self-defence by the United States and its allies, and therefore any of SDF’s supportive operations in this regard would violate Article 9 of the Japanese Constitution, which prohibits the exercise of the right of collective self-defence.

⁵¹ Law No. 92 of 2008. Available at: http://www.shugiin.go.jp/itdb_gian.nsf/html/gian/honbun/houan/g17005004.htm (last visited 23 January 2009).

⁵² SG/SM/12012 AFG/322, 17 December 2008. Available at: <http://www.un.org/News/Press/docs/2008/sgsm12012.doc.htm> (last visited 23 January 2009).

Nationality Law – Japan revised the Nationality Law to enable a child born out of wedlock to a Japanese man and a foreign woman to obtain Japanese nationality

On 12 December 2008, the Japanese Nationality Law was revised and went into force on 1 January 2009.⁵³ According to the new law, a child born out of wedlock can acquire Japanese nationality by notification if affiliated by either its father or mother before it reaches 20 years of age. The former legislation prescribed that a child born outside of marriage could obtain Japanese nationality only if the Japanese father admits paternity when the child is still in the mother's womb, but not after the child is born. The Government proposed the revisions after the Supreme Court ruled in June 2008 that a provision in the law that only grants Japanese nationality if paternity is admitted before child is born is unconstitutional.

The Supreme Court, on 4 June 2008, ruled⁵⁴ that the provision in the Nationality Law resulted in discrimination without any rational reason and thus violated Article 14 of the Japanese Constitution, which stipulates equality under the law.

On 13 April 2005, the Tokyo District Court had found the clause unconstitutional, thus granting Japanese nationality to a child born between a Japanese father and a foreign mother.⁵⁵ The Tokyo High Court, in its judgment of 28 February 2006, overturned the ruling without addressing the issue of constitutionality.⁵⁶ Under the Nationality Law, a child born to a foreign woman married to a Japanese man automatically becomes a Japanese national. Japanese nationality is also granted to a child of an unmarried foreign woman and a Japanese man if the man recognizes his paternity before the child is born. If however, according to Article 3, paragraph 1 of the former Nationality Law, paternal recognition were to come after a child's birth, the child was not eligible for Japanese nationality, unless the couple was married. The Supreme Court declared this Article 3, paragraph 1 as being unconstitutional, thereby affording Japanese nationality to a child born out of wedlock to a foreign woman and a Japanese man even if the man recognizes his paternity after the child's birth.

Following this decision by the Supreme Court, in the Lower House, there was a wide range of concerns along the lines that the revision might make it too easy to acquire Japanese nationality, and lead to a surge in false paternity recognition cases. To dispel these concerns, the revision incorporates a penalty of up to a year of imprisonment or a fine of up to 200,000 yen for those making such a false claim of nationality.

⁵³ Revised Japanese Nationality Law. Available at: <http://www.moj.go.jp/MINJI/kokusekiho.html> (Japanese version only; last visited 24 January 2009).

⁵⁴ Text of the decision of the Supreme Court. Available at: <http://www.courts.go.jp/hanrei/pdf/20080818131625.pdf> (Japanese version only; last visited 24 January 2009).

⁵⁵ Text of the decision of the Tokyo District Court. Available at: <http://www.courts.go.jp/hanrei/pdf/D0CE3FFBA9C57358492570DE000EFDE1.pdf> (Japanese version only; last visited 24 January 2009).

⁵⁶ Text of the decision of Tokyo High Court. Available at: <http://www.courts.go.jp/hanrei/pdf/60144496F9BE335349257129000F4AC5.pdf> (Japanese version only; last visited 24 January 2009).

OTHER RELEVANT STATE PRACTICE⁵⁷*Escalating attacks of the Sea Shepherd Conservation Society against Japanese whaling vessels*

In 2008, attacks by the Sea Shepherd Conservation Society (“SSCS” hereinafter), a US anti-whaling group, against Japanese whaling vessels engaged in research whaling, took place rather frequently. There were three major incidents. (1) The *Yushin Maru Case*:⁵⁸ on 15 January 2008, a Japanese whaling vessel, the *Yushin Maru No. 2*, operating in the Antarctic Ocean, was harassed by members of the SSCS, who threw bottles containing an irritating chemical substance with a strong putrid smell (which appears to be butyric acid) at the ship. No one was injured. Two SSCS activists, who boarded the Japanese vessel illegally carrying a backpack, were restrained (but not harmed) and safely transferred back to their own ship, the *Steve Irwin*, after a three-day stay on board the *Yushin Maru No.2*. Following this, however, attacks were resumed against another Japanese whaling vessel, the *Yushin Maru No.3*, using the same kind of chemical. (2) The *Nisshin Maru Case*:⁵⁹ on 3 March 2008, activists aboard the SSCS’s vessel, the *Steve Irwin*, threw 100 bottles (approx.) filled with chemicals (butyric acid) onto the *Nisshin Maru*. The eyes of a crew member of the *Nisshin Maru*, and two Japanese Coast Guard officers aboard the vessel were injured. (3) The *Kaiko Maru Case*:⁶⁰ on 26 December 2008, the Japanese vessel *Kaiko Maru* was attacked, from onboard the SSCS operated *Steve Irwin*, with 15 bottles (approx.) containing a putrid-smelling chemical substance. No one was injured in this incident, but such harassment continued for approximately three hours.

The Sea Shepherd Conservation Society says that Japanese research whaling is illegal and contravenes treaties such as the Convention on International Trade of Endangered Species (“CITES” hereinafter), although Japan has made a reservation with respect to certain species of whales listed in Annex I of the CITES, and as such research whaling conducted by national vessels, Japan responds, is not in violation of the aforementioned treaty. Nevertheless, this reservation has been criticized by the international community. One of the foundations for this criticism is that meat of whales captured in “research whaling” is sold in the Japanese market. However, under the International Convention for the Regulation of Whaling (“ICRW” hereinafter), any contracting Government may grant to any of its nationals a special

⁵⁷ Contributed by Yoshii and Ishibashi.

⁵⁸ *The Japan Times*, 17 January 2008. Available at: <http://search.japantimes.co.jp/cgi-bin/nn20080117f1.html> (last visited 25 January 2009). See also *The Japan Times*, 19 January 2008. Available at: <http://search.japantimes.co.jp/cgi-bin/nn20080119a2.html> (last visited 25 January 2009).

⁵⁹ *The Japan Times*, 7 March 2008. Available at: <http://search.japantimes.co.jp/cgi-bin/ed20080307a1.html> (last visited 25 January 2009).

⁶⁰ *The Japan Times*, 28 December 2008. Available at: <http://search.japantimes.co.jp/cgi-bin/nn20081228a2.html> (last visited 25 January 2009).

permit authorizing such national to kill, take, and treat whales for the purposes of scientific research (Art. 8 (1)), and further, that whales taken under these special permits shall so far as “practicable . . . be processed” (Art. 8(2)). Japan contends that its actions are based on the fact that a continuous collection and analysis of biological data related to reproduction rates and in-depth studies of habitats are needed in order to accomplish the sound and constructive management of whale fisheries.

The Japanese government’s position is that whales are a living marine resource and as such, their sustainable use, based on scientific evidence, should be allowed. Critics, as seen in the resolution⁶¹ of the International Whaling Commission (“IWC” hereinafter), argue that research whaling should be done by non-lethal means. However, Japan responds that although Japan conducts non-lethal research, lethal research which involves the sampling of internal organs is indispensable. For example, while stomach contents show the interaction of whales in the marine ecosystem, whale ear plugs are used for age determination. Further, whale ovaries are needed to verify reproductive rates, making it possible to construct an objective population age structure.

The IWC has condemned the SSCS’s attacks seen in the *Nisshin Maru* Case as an action which jeopardizes safety at sea.⁶²

*Submission, to the Commission on the Limits of the Continental Shelf, of information on the limits of its continental shelf beyond 200 nautical miles pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea*⁶³

On 31 October 2008, the Headquarters for Ocean Policy, established pursuant to Article 29 of the Basic Act for Ocean Affairs, decided that the Japanese Government would submit, to the United Nations’ Commission on the Limits of the Continental Shelf (“CLCS” hereinafter), information on the limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

On 12 November 2008, an application was made to the CLCS for its recommendations on matters related to the establishment of the outer limits of the continental

⁶¹ IWC Resolution 2003–2. Available at: <http://www.iwcoffice.org/meetings/resolutions/resolution2003.htm#2> (last visited 25 January 2009).

⁶² Intersessional meeting of the IWC, Press Release 2. Available at: <http://www.iwcoffice.org/meetings/intersession08.htm> (last visited 25 January 2009).

⁶³ Japan’s Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea (Executive Summary). Available at: http://www.kantei.go.jp/jp/singi/kaiyou/CS/jpn_es.pdf (last visited 24 January 2009).

shelf.⁶⁴ The CLCS's review of the submission made by Japan will be included in the provisional agenda of the twenty-third session of the CLCS to be held in New York in March–April 2009.

If Japan's submission, including its assessment of territorial limits, is accepted, Japan will gain 740,000 square kilometers (approx.) of continental shelf, which is approximately double the size of existing Japanese territory. The submission claims the southern part of Oki-no-Tori Shima Island, the southernmost island in the Japanese Archipelago, and the area between Minami-Tori Shima Island, the easternmost island, and the Ogasawara islands. If these presently claimed areas overlap with the continental shelf of other States, the boundaries will be delimited through negotiations.

In the presently claimed continental shelf area to the east of Japan, there exists a potential overlap with a part of the United States' continental shelf. Japan takes the position that neither Japan's submission of, nor the CLCS's consideration of and recommendation on, these areas will prejudice the question of delimitation of the continental shelf as between the two States. Also the presently claimed continental shelf area extending southwards from Oki-no-Tori Shima Island may have a potential overlap with the continental shelf of the Republic of Palau. Japan takes the same position as it has with regard to the overlap with the United States.

Both the United States of America and the Republic of Palau have indicated that they have no objection to the CLCS considering and making recommendations with respect to Japan's submission, without prejudice to such delimitation. The Japanese submission does not include areas in the Sea of Japan or in the East China Sea.

Bilateral talks with China concerning the development of continental shelf resources in the East China Sea – Press Release – Seabed development in the East China Sea

On 18 June 2008, the governments of Japan and China in a joint press release stated that in the East China Sea, continental shelf delimitation has not yet been established as between Japan and China. Bearing in mind the sincere consultations between the two Heads of State, and based on the common understanding achieved in April and December 2007, it was agreed that the two States would continue to co-operate during the transitional period without undermining the legal position of either State on the aforementioned continental shelf. This agreement holds good until a definite boundary line is established. Necessity for further consultation was also agreed upon.⁶⁵

⁶⁴ Text of the Submission can be found on the UN Website. Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm (last visited 24 January 2009). Also available at the same site is the observation of the United States of America with regard to the Japanese Submission.

⁶⁵ Text of the Understanding will be found at: http://www.mofa.go.jp/mofaj/area/china/higashi_shina/press.html (Japanese version only; last visited 24 January 2009).

*Understanding between Japan and China on joint development in the East China Sea*⁶⁶

On 18 June 2008, Japan and China agreed to jointly develop the following areas in the East China Sea, as follows:

1. An area of the sea surrounded by a series of straight lines connecting the points the geographical co-ordinates of which are specified as follows shall be the joint development zone:

- (1) 29° 31' N, 125° 53' 30" E
- (2) 29° 49' N, 125° 53' 30" E
- (3) 30° 04' N, 126° 03' 45" E
- (4) 30° 00' N, 126° 10' 23" E
- (5) 30° 00' N, 126° 20' 00" E
- (6) 29° 55' N, 126° 26' 00" E
- (7) 29° 31' N, 126° 26' 00" E

2. The two States shall select such an area or areas as they agree upon within the above-mentioned zone through joint exploration and on the basis of the principle of reciprocity, and jointly develop the selected area or areas. Specifics will be determined by mutual consultation.

3. The two States shall make efforts to conclude, at an early date, a bilateral agreement, necessary for the implementation of the above-mentioned development, through their respective domestic procedures.

4. The two States shall continue consultations to realise joint development in other areas in the East China Sea as soon as possible.

*Understanding on the development of the Shirakaba (known as Chunxiao in Chinese) oil-gas field*⁶⁷

With regard to the development of the *Shirakaba* oil and natural gas field, both Japanese and Chinese Governments agree that

The Chinese company welcomes the participation of Japanese companies in the exploitation in the *Shirakaba* (known as *Chunxiao* in Chinese) oil-gas field in its possession, in accordance with the Chinese law on international co-operation in the development of offshore oil resources. The Governments of Japan and China confirm this and shall make an effort to agree and conclude necessary Exchange of Notes at an early date. The two States shall take necessary domestic procedures in order to conclude the Exchange of Notes.

⁶⁶ Unofficial translation by the contributor.

⁶⁷ Unofficial translation by the contributor.

New Developments in environmental protection – Experimental introduction of an integrated domestic market for emissions trading and the Amendment of the Enforcement of the Tokyo Metropolitan Environmental Security Ordinance and the Tokyo Metropolitan Nature Conservation Ordinance

With respect to climate change, Japan has proceeded to take leadership as the host of the G-8 Toyako Summit in Hokkaido (7–9 July 2008). On 9 June 2008, it was stated in the Fukuda Vision that Japan's target for reducing greenhouse gas emissions could amount to a cut of 60 to 80 per cent by 2050.⁶⁸ Also, Japan has initiated a \$10 billion programme to provide financial assistance for emission reduction in developing countries under its "Cool Earth Partnership"⁶⁹ which embodies "Cool Earth 50"⁷⁰ proposed in 2007. Currently, Indonesia is operating a Climate Change Programme Loan based on this assistance.

On 21 October 2008, the experimental introduction of an integrated domestic market for emissions trading was implemented in Japan.⁷¹ This aims to give participants adequate knowledge to prepare them for forthcoming transactions, related to emissions trading, with the world market. This experimental scheme consists of enterprises voluntarily setting their reduction targets, and with the occurrence of surplus or shortage of the emission reduction frame, trading of emission allowances is carried out. Furthermore, by trading "domestic Clean Development Mechanism (CDM)" created by small and medium-sized enterprises, through reduction activities like forestry biomass, as well as the Kyoto Protocol Target Achievement Plan (KPTAP) and the Kyoto mechanism credits, enterprises are able to achieve the initial targets. The covered gas is CO₂ generated from energy use and if enterprises are members of the Voluntary Action Plan on the Environment ("VAP" hereinafter)⁷² implemented by the Japan Business Federation (*Keidanren*), the level of reduction is required to be consistent with VAP standards. Further, in order to prevent entry of a free-riding seller, the target set by the enterprises has to be higher than the actual emission rate for the previous year. Either an absolute target (the overall amount of CO₂ emissions) or an intensity target (the ratio of the amount of carbon emitted per unit of production or amount of economic value created) can be employed when establishing the reduction target. Members can select the period of their target

⁶⁸ Fukuda Vision, 9 June 2008. Available at: http://www.kantei.go.jp/foreign/hukudaspeech/2008/06/09speech_e.html (last visited 25 January 2009).

⁶⁹ Cool Earth Partnership. Available at: http://www.mofa.go.jp/Mofaj/Gaiko/oda/bunya/environment/cool_earth_e.html (last visited 30 January 2009).

⁷⁰ Cool Earth 50, Available at: http://www.kantei.go.jp/foreign/abespeech/2007/05/24speech_e.html (last visited 30 January 2009).

⁷¹ Experimental introduction of an integrated domestic market for emissions trading (Global Warming Prevention Headquarters' Decision on 21 October 2008). Available at: <http://www.env.go.jp/en/earth/ets/idmets081021.pdf> (last visited 23 January 2009).

⁷² Keidanren Voluntary Action Plan on the Environment (Final Report), 17 June 1997. Available at <http://www.keidanren.or.jp/english/policy/pol058/index.html> (last visited 23 January 2009).

setting from 2008 until 2012 and if surplus or shortage of the emission reduction frame occurs, banking and borrowing of emission allowances can also be permitted.

From 21 October 2008, participating enterprises were strongly recruited and as of 12 December 2008, a total of 501 enterprises ranging from electricity companies, convenience stores, airline companies to universities have applied, 446 of which actually set a reduction target.

Since 2005 the Ministry of Environment has implemented Japan's Voluntary Emissions Trading Scheme ("JVETS" hereinafter)⁷³ whereby participating enterprises are subsidized as an incentive for them to enhance their effort in reducing CO₂ emissions, to obtain information and compile experience in anticipation of an emissions trading market in Japan, in the future. During the first period (2005–2007) of the JVETS scheme, however, only 31 enterprises which set a reduction target actually participated and only 24 transactions took place (currently the 2nd (2008) and the 3rd (2007–2009) periods are proceeding).

Japan has so far strongly advocated a sectoral approach and Keidanren's VAP also established reduction targets for each industrial sector.

With the amendment of the Enforcement of the Tokyo Metropolitan Environmental Security Ordinance and the Tokyo Metropolitan Nature Conservation Ordinance,⁷⁴ the Tokyo Metropolitan Government has introduced an emissions trading scheme to be applied to large-scale enterprises which emit greenhouse effect-causing gases, from 2010 onwards. This scheme has a mandatory "cap and trade" system based on an absolute target to be cleared by each enterprise. The reduction target is imposed on the enterprises based on an average emission amount. The average emission amount and the actual amount of reduction are to be verified by the Metropolitan Government. According to this scheme, if the reduction target is not attained, a further amount 1.3 times the amount by which an enterprise falls short is imposed as a penalty. In addition, an enterprise that fails to meet the target will also be fined 500,000 yen, and further, the Governor of Tokyo will procure "transferable reduction amounts" (Art. 5-11(1)2) in order to make up for the amount short and, in turn claim compensation from the enterprise in question, for such expenses (Art. 8-5(3), (4)).

By establishing a mandatory "cap and trade" system and a verification procedure (in due course), and ensuring an effective implementation, this local Government

⁷³ Outline and Results of Japan's Voluntary Emissions Trading Scheme ("JVETS" hereinafter), 4 December 2008. Available at: <http://www.env.go.jp/earth/ondanka/det/jvets.html> (in Japanese; last visited 9 June 2010).

⁷⁴ Ordinance No. 93 of 2 July 2008. Available at: http://www2.kankyo.metro.tokyo.jp/soumu/jourei-rireki/kakuho/jourei/200702_93/shinkyu_200702_93.pdf (Japanese version only; last visited 23 January 2009). See also Introduction of Tokyo's mandatory cap & trade system. The bill was passed unanimously in Tokyo's Metropolitan Assembly, 25 June 2008. Available at: http://www.kankyo.metro.tokyo.jp/kouhou/english/pdf/release_080625.pdf (last visited 23 January 2009). Introduction of Tokyo's mandatory cap & trade system, 25 June 2008. Available at: http://www2.kankyo.metro.tokyo.jp/sgw/e/climate_cap.html (last visited 9 June 2010).

scheme is one of the most advanced models, although it lacks the usage of Kyoto credit when compared to the aforementioned experimental introduction scheme. The two schemes, working together, are expected to contribute to the creation of an international emission trading market in Japan or even towards joining a “global carbon market,”⁷⁵ recently proposed by the European Commission.

Japan has signed the Convention on Cluster Munitions (“CCM” hereinafter)

The CCM⁷⁶ was adopted in Dublin by 107 states on 30 May 2008. The CCM, during the Signing Conference in Oslo on 3–4 December, was signed by 94 States, including New Zealand, Ireland, Australia and Japan. Norway, Ireland and the State of the Vatican City ratified the Convention at the same time. The Convention is now open for all States to sign. However, some States with significant volumes of weaponry, like the United States of America, Russia, China and Israel, have not signed the Convention.

KOREA⁷⁷

JUDICIAL DECISIONS

Military duty of a son whose father was a national of the Republic of China (Taiwan) and whose mother was a national of the Republic of Korea

PLAINTIFF v. MILITARY MANPOWER ADMINISTRATION BRANCH
OF INCHON PROVINCE

The Suwon District Court (29 August 2007) 2007 GuHap 2532

Facts

The plaintiff was born in the Republic of Korea (“ROK” hereinafter). His parents were not legally married. His father was a national of the Republic of China (“Taiwan” hereinafter) and his mother was a national of the ROK. Plaintiff’s birth was reported to the Government of ROK by the plaintiff’s father. After a temporary

⁷⁵ EUROPA Press Release, 28 January 2009. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/141&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited: 30 January 2009). See also BBC NEWS, 28 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7856013.stm> (last visited 30 January 2009).

⁷⁶ English text of the Convention is available at: <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf> (last visited 24 May 2010).

⁷⁷ Contributed by Eric Yong Joong Lee, Professor of International Law, Dongguk University, Seoul, Korea.

separation of the plaintiff's parents, the plaintiff's mother listed his name in the family register, with a family name, "Park", and without his father's name. The Government of ROK ("defendant" hereinafter) took an administrative measure to order the plaintiff to enter into military service on 5 April 2007.

Contentions

The plaintiff argued that the defendant's measure was illegal because the Korean Military Service Act makes it a condition that only a national of the ROK be subject to military service, and at the time of the plaintiff's birth, the father was not a national of the ROK. Thereby the plaintiff had acquired the nationality of Taiwan according to both the Nationality Act of Korea and the Nationality Law of the Republic of China, and was not subject to the conditionality in the Korean Military Service Act.

Judgment⁷⁸

According to the Korean Military Service Act, male nationals of the ROK, aged over 18, are obligated to serve in the military. The primary dispute is, therefore, over the plaintiff's nationality. The Nationality Act of Korea provides the requirements for a national of the Republic of Korea as follows:

Article 2 (Acquisition of Nationality by Birth)

(1) A person falling under one of the following subparagraphs shall be a national of the Republic of Korea at the time of his or her birth:

1. A person whose father or mother is a national of the Republic of Korea at the time of his or her birth;
2. A person whose father was a national of the Republic of Korea at the time of his death, where the father died before his or her birth; and
3. A person who is born in the Republic of Korea both of whose parents are unknown or have no nationality.

(2) An abandoned child found in the Republic of Korea shall be recognized as born in the Republic of Korea.

The plaintiff's father was a national of Taiwan and alive at the time of the plaintiff's birth. In addition, the Nationality Law of the Republic of China describes the requirement for acquisition of nationality as: a person whose father is a national of the Republic of China at the time of his or her birth. As such the Court found no

⁷⁸ Official Report of Legal Decisions, October 10, 2007.

reason to believe the plaintiff's nationality as being anything other than Chinese, notwithstanding the fact that the plaintiff was a resident registered in the ROK, and continued to reside in the ROK.

The administrative measure based on the condition that the plaintiff was a national of the ROK was therefore declared illegal.

Characteristics of National Assembly's right to consent regarding treaties

NINE MEMBERS OF THE NATIONAL ASSEMBLY (KANG KI KAP AND 8)
v. THE PRESIDENT OF THE REPUBLIC OF KOREA

The Korean Constitutional Court (26 July 2007) 2005HunRi8

Facts

The Government of the Republic of Korea ("ROK" hereinafter) entered into "rice negotiation", so called, with members of the WTO, in order to prolong the *special and differential treatment* that conferred a rice tariff waiver on the ROK from 1994 to 2004. The ROK arrived at agreements, in part, to accept requests of countries involved, in compensation for Korea's maintaining a rice tariff waiver. As the ROK Government submitted a proposal, exclusive of documents concerning agreements, for ratifying the revised tariff concession, the claimants, as members of the National Assembly, requested that the Government include the agreement documents by introducing a bill for ratification. The Government declined the request of the claimants. The claimants then called for an adjudication contending that the National Assembly's right of deliberation and voting regarding treaties had been violated by the Government's actions on 31 October 2005. Afterwards, the claimants modified their terms and argued that by entering into an agreement without the consent of the National Assembly, the Government, which is a constitutional subject, violated the National Assembly's right to consent to the conclusion and ratification of treaties as well as the National Assembly's right of deliberation and voting regarding treaties. The key issue was whether the claimants, who are members of the National Assembly, are able to request, on behalf of the National Assembly, the adjudication of a dispute, concerning a violation of the rights of the National Assembly.

Judgment⁷⁹

Article 60 of the Constitution of the ROK addresses the issues concerned as follows:

The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning

⁷⁹ The Official Report of the Constitutional Court: 130, 20 Aug 2007.

important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters. The National Assembly shall be the party in disputes about the jurisdictions.

A third party (such as the claimants) should be permitted to take part in proceedings regarding disputes about the jurisdiction if the members of the National Assembly are able to request the adjudication of a dispute concerning the jurisdictions.

The Constitutional Court Act of the ROK contains provisions regarding the issue as follows:

Article 61 (Causes for Request)

(1) When any controversy on the existence or the scope of competence arises between state agencies, between a state agency and a local government, or between local governments, a state agency or a local government concerned may request to the Constitutional Court an adjudication on competence dispute.

The members of the National Assembly do not have legal standing on this issue, and as such are not valid claimants with the authority to request the adjudication of a dispute unless allowed by the rules that permit third party participation in the process, which state as follows:

If the National Assembly's member's right of deliberation and voting could be violated by national institutions but between members of the National Assembly and the Chairman or amid members of the National Assembly.

The Court read the above stated to mean that a National Assembly's member's right of deliberation and voting is part of internal procedure that has legal force only between the Chairman and other members of the National Assembly but not among external, national institutions such as the ROK Government.

Although the actions of a Government could potentially violate the National Assembly's right to consent to the conclusion and ratification of treaties, the Court held that there was no room for considering the National Assembly's member's right of deliberation and voting as violated, by such action of such a national institution.

Thereafter, the Court dismissed the request by the claimants because it was not appropriate at the time of the decision.

NEPAL⁸⁰

JUDICIAL DECISIONS

Rights enshrined in International Convention on Civil and Political Rights, 1966

⁸⁰ Contributed by Surendra Bhandari, Advocate, Nepal.

(“ICCPR” hereinafter) – domestic law that restricts a right to participate in a periodic election is *ultra vires* the ICCPR

ADV. KAMALESH DIWEDI AND OTHERS v. PRIME MINISTER OF NEPAL AND OTHERS

Special Bench of the Supreme Court of Nepal, (Hon. Justice Anup Raj Sharma, Hon. Justice Balam K.C., Hon. Justice Tap Bahadur Magar, Hon. Justice Damodar Prasad Sharma, & Hon. Justice Kalyan Shrestha)

Decided on 27 September 2007

Facts

In this case, the writ petitioners – political leaders and lawyers – were prevented, by the Constituent Assembly Election Act, 2007, from putting up a candidate for the Constituent Assembly Elections. Nepal had promulgated the 1990 Constitution establishing a multi-party democracy and a constitutional monarchy in the Kingdom of Nepal. One of the left-wing political parties, however, being dissatisfied with the 1990 Constitution, initiated an insurgency against the Government with a view to overthrowing the monarchy and establishing communism in the Kingdom of Nepal. In 2001 the then King of Nepal and his whole family were killed. The new King was a brother of the former King Birendra. In 2004, through a political coup, the King took control of the state. This event compelled Maoist insurgents and democratic political parties to forge a unity (“Coalition” hereinafter) to oppose the King. The Coalition initiated a people’s movement, which was able to restore democratic process in 2006. The mainstream political parties and the Maoist insurgents reached an agreement for ending monarchy through a Constituent Assembly election. A new constitution – the Interim Constitution of 2007 – was prepared, which authorized ending monarchy by a declaration from the Constituent Assembly. The interim Parliament enacted legislation called the Constituent Assembly Election Act, 2007. Under section 19 it prohibited the candidacy of individuals that had earlier supported the King and were involved in the suppression of the aforementioned people’s movement.

Against this background, the writ petitioners (“Petitioners” hereinafter) approached the Supreme Court of Nepal to decide whether section 19 of the Constituent Assembly Election Act was constitutional. The Petitioners *inter alia* raised the issue that the ICCPR, to which Nepal is party, does not allow restricting political participation in a periodic election on the ground of a particular candidate’s political belief, and therefore the impugned provision was *ultra vires* to the ICCPR.

Judgment

On the issue of testing the legitimacy of a domestic law against the international obligations of the State, the Supreme Court of Nepal found the impugned provision (section 19) of the Constituent Assembly Act to be inconsistent with the ICCPR and declared the same as being *ultra vires* to the ICCPR.

The Supreme Court reasoned that the ICCPR prohibits any unreasonable restrictions imposed on the participation in a periodic election either as a voter or as a candidate. In addition, the Court found that imposing any restrictions on the right to participate in a periodic election on the ground of specific political belief is also a gross violation of the basic principles of free and fair election guaranteed by the Interim Constitution of Nepal.

The Supreme Court observed that under Article 2 of the ICCPR each state party to the ICCPR is required to ensure the rights enshrined in the ICCPR without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Against this background, the Supreme Court said that the Interim Constitution does not allow a State party to impose a restriction on participation in an election on the grounds of political belief. Therefore, the impugned section 19 of the Constituent Assembly Act had imposed an unreasonable restriction to the Petitioners' right to political participation and thereby the said provision was *ultra vires* to the ICCPR, which applies to Nepal under its domestic law (Section 9 of the Treaty Act, 1991).

“Disappearance” of arrested individuals – Government’s duty to abide by the due process of law and respect international human rights instruments to which it is a party

RABINDRA PRASAD DHAKAL ON BEHALF OF RAJENDRA PRASAD DHAKAL v. GOVERNMENT OF NEPAL, MINISTRY OF HOME AFFAIRS AND OTHERS

Division Bench of the Supreme Court of Nepal (Hon. Justice Khil Raj Regmi, and Hon. Justice Kalyan Shrestha)

Decided on 1 June 2007

Facts

The writ petitioners (“Petitioners” hereinafter) approached the Supreme Court of Nepal asking for an order of *habeas corpus* against the Government (“Respondents” hereinafter) to oblige them to disclose the status of certain individuals who had been arrested between 1999 and 2004 and to explain their “disappearance” thereafter. The Petitioners approached the Supreme Court asking for an order obliging the Government to disclose the status and whereabouts of the persons arrested by the Government between 1999 and 2004.

Judgment

In this case the Supreme Court not only interpreted the obligation of a Government under international human rights instruments but also took cognizance of the

report prepared by different organizations including the report prepared by the UN High Commissioner for Human Rights (“HCHR” hereinafter) regarding the trend of “disappearances” in Nepal.

Acknowledging that the cases of “disappearance” were related to the domestic conflict between His Majesty’s Government of Nepal and the Communist Party of Nepal (Maoist), the Supreme Court laid down that the Government bears an unequivocal responsibility to provide domestic security, and cannot be allowed to arrest individuals, by means that fall beyond the due process of law, leading for example to the “disappearance” of detainees. This responsibility of the Government arises not only from the Constitution and domestic laws but also via international legal principles and instruments including the Universal Declaration of Human Rights. The Court further noted that international law has categorized “forced disappearance” as a violation of human rights of the individual. The United Nations General Assembly (“UNGA” hereinafter) has also deemed such acts of “disappearance” as “crimes against humanity” and issued a declaration on 18 December 1992, with the aim of protecting all persons from “forced disappearance”. In line with the aforementioned declaration, the UNGA, on 20 December 2006, developed the International Convention for the Protection of All Persons from Enforced Disappearance (“Disappearance Convention” hereinafter). Although the Disappearance Convention has not yet come into force and Nepal has not yet ratified it, nevertheless it reflects an important standard concerning the obligations of a State with respect to the security of individuals who are arrested. The Supreme Court noted that the Government is expected to conform to international standards for the protection of human rights within the State.

The Supreme Court further noted that the act of “disappearance” had violated Articles 6, 7, and 9 of the 1966 International Convention on Civil and Political Rights (“ICCPR” hereinafter), and the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment and Punishment (“Torture Convention” hereinafter). Under section 9 of Nepal’s Treaty Act, 1991, all international human rights instruments, once ratified, are applicable as domestic laws and therefore there is no ground for the Government to claim that it was absolved from fulfilling the obligations arising under these aforementioned instruments. Further, the Supreme Court noted that keeping with the spirit of these binding international human rights instruments, the Nepalese Government should also take into account the International Code of Conduct of Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the Standard Minimum Rules for the Treatment of Prisoners.

Issuing the order of *habeas corpus* the Supreme Court emphasized that the Nepalese legal system approximately mirrors the principles laid down in the Disappearance Convention which are in any event presented as the minimum international standards that all Governments must observe.

Harmonious interpretation of different provisions of ICCPR – Domestic laws cannot discriminate against transsexuals

BLUE DIAMOND SOCIETY AND OTHERS v. GOVERNMENT OF NEPAL AND OTHERS

Division Bench of the Supreme Court of Nepal (Hon. Justice Bal Ram K.C., and Hon. Justice Pavan Kumar Ojha)
Decided on 21 December 2007

Facts

The Blue Diamond Society of Nepal and three other sexual minority groups petitioned the Supreme Court of Nepal demanding the protection of their fundamental human rights.

Their submissions were threefold: to recognize the civil rights of transgender people without requiring them to first renounce one gender-based identity in favour of another; to issue an order to the Nepalese Government to enact legislation that would prevent discrimination and violence against transgender and other sexual minority groups; and to be awarded reparation for any discrimination and violence previously perpetrated against the aforementioned groups. As there was no domestic law to support their claim and standing (*locus*), they approached the Court by invoking Articles 2 and 26 of the ICCPR.

Judgment

The Supreme Court of Nepal, acknowledging the validity of their claim and standing under Articles 2⁸¹ and 26⁸² of the ICCPR, interpreted the phrase “other status” stated in Articles 2 and 26 of the ICCPR, and found the phrase to include transgender individuals. Article 26 of the ICCPR is an equality provision, which provides that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. Further, that the law should prohibit any

⁸¹ Article 2.1 of the ICCPR provides, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁸² Article 26.1 of the ICCPR provides, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, Article 2(1) of the ICCPR provides that each State party undertakes to respect and to ensure to all individuals within their respective territories, subject to the State's jurisdiction, all of the rights recognized by the ICCPR, without qualifications such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Supreme Court in its decision acknowledged that the writ petition was brought before it by, and on behalf of, minority groups based on the sexual orientation and gender identity of their members. The Court recognized that the petitioners were lesbian, gay, bisexual, transsexual and inter-sex persons ("LGBTI" hereinafter), and therefore none of them could be categorized as being male and/or female. The Court acknowledged that owing to this status such individuals were denied identity documents, including citizenship, while maintaining their own LGBTI identity, by the Nepalese Government. The existing laws were based on male/female identification and therefore discriminated against LGBTIs, especially with regard to the protection of their fundamental human rights. The Court recognized that even though LGBTIs are not male or female in terms of sex, or masculine or feminine in terms of gender, they are nonetheless natural persons. Articles 12 through 32, of the Interim Constitution of Nepal, bestow fundamental rights upon all Nepali citizens including the LGBTIs. However, owing to their sexual orientation, members of the LGBTI community have been unable to enjoy those rights while maintaining their own identities.

With this understanding, the Supreme Court observed that the fundamental rights set forth in the Nepalese constitution, as well as those enshrined in international human rights treaties to which Nepal is a party, could not be interpreted in a way that would enable only male and female individuals to enjoy their prescribed rights and protections. Aside from male and female, individuals holding other identifications such as the members of the LGBTI community are natural persons and therefore entitled to the full enjoyment of the fundamental rights without any discriminatory qualifications. Therefore, to end any such discrimination, the Court observed that the State is obligated to formulate laws as necessary to protect members of the LGBTI community.

Another question before the Supreme Court was regarding an appropriate methodology that could facilitate a harmonious interpretation of Article 23 and Articles 2 and 26 of the ICCPR. Article 23(2) recognizes marriage between men and women as a fundamental unit of society, thereby institutionalizing the family. But it does not recognize the same rights for the LGBTI community. The Supreme Court upheld liberty and personal freedom as basic values and guiding principles when adopting a methodology of interpretation. Consequently, the Court observed that the existing laws on property, personal identity including citizenship, and family laws were based on male and female taxonomy and therefore unable to protect the rights of LGBTIs. Due to natural and biological factors LGBTIs might be attracted towards the same sex rather than the opposite sex, even though they may have been born as male or female. As a result of the existing laws, such individuals are unable

to establish a conjugal life. A law which restricts people from enjoying their liberty and exercising personal freedom over their personal identity should be regarded as being discriminatory. In this respect, Article 23 of the ICCPR cannot be read as a provision that curtails fundamental rights, liberty and personal freedom. Rather, it needs to be given a harmonious interpretation with Articles 2, 16, and 17 of the ICCPR, so that liberty and personal freedom can be promoted.

THE REPUBLIC OF THE PHILIPPINES⁸³

JUDICIAL DECISIONS

Extradition and mutual assistance

GOVERNMENT OF HONG KONG SPECIAL ADMINISTRATIVE REGION V. OLALIA ET AL.

G.R. No. 153675, 19 April 2007

Facts

Private respondent Muñoz was charged before the Hong Kong Court with three counts of the offence of “accepting an advantage as agent” in violation of Hong Kong’s Prevention of Bribery Ordinance. He also faced seven counts of the offence of conspiracy to defraud, which is penalized by Hong Kong’s common law. Accordingly, warrants of arrest were issued against him. If convicted, he would be imprisoned for a term of seven to fourteen years for each charge.

The Philippine Department of Justice, upon receiving from Hong Kong a request for the provisional arrest of the private respondent, forwarded said request to the National Bureau of Investigation (“NBI” hereinafter) which, in turn, filed the corresponding application with the Regional Trial Court of Manila. The Court then issued an Order of Arrest authorizing NBI agents to arrest and detain the private respondent, which the latter assailed in court. While the Court of Appeals ruled in the private respondent’s favour, by rendering a decision declaring the Order void, the Department of Justice’s petition for a reversal of the Court of Appeals’ decision was subsequently granted by the Supreme Court.

While these cases were pending, Hong Kong filed a petition for the extradition⁸⁴ of Muñoz, while the latter, for his part, filed a petition for bail. After hearing the

⁸³ Contributed by Harry L. Roque Jr, Faculty Member, College of Law, University of Philippines, Diliman, Quezon City.

⁸⁴ The Republic of the Philippines (“RP” hereinafter) and the then British Crown Colony of Hong Kong signed an “*Agreement for the Surrender of Accused and Convicted Persons*” which took effect on 20 June 1997. On 1 July 1997, Hong Kong reverted back to the People’s Republic of China and became the Hong Kong Special Administrative Region (“HKSAR” hereinafter).

merits, the Regional Trial Court denied the petition for bail on the ground that “there is no Philippine law granting bail in extradition cases” and that the private respondent is a “high flight risk”. The case was later passed on to a different branch of the Regional Trial Court, presided over by respondent Judge Olalia, who granted the posting of bail by the private respondent, set at 750 thousand Philippine pesos, subject to a list of conditions. Nevertheless, Hong Kong filed an urgent motion to vacate the abovementioned order allowing the private respondent’s bail application, but this was denied by Judge Olalia. The Government of Hong Kong, as represented by the Philippine Department of Justice, appealed to the Supreme Court.

Judgment

The Philippine Supreme Court held that while extradition law does not provide for the grant of bail to an extraditee, there is, however, no provision prohibiting the extraditee from filing a motion for bail under the right to due process under the Philippine Constitution. In this vein, the Court held that the right of a prospective extraditee to apply for bail in the Court’s jurisdiction must be viewed in the light of the various treaty obligations of the Government of Philippines concerning respect for, and promotion and protection of, human rights. According to the Court, the presumption, in such a situation, lies in favour of securing human liberty, and the Government of Philippines should ensure that the right to liberty of no individual is impaired. Although the time-honoured principle of *pacta sunt servanda* demands that the Philippines honour its treaty obligations under the extradition treaty it has entered into with Hong Kong, the Court stated that this should not be assured at the cost of diminishing the extraditee’s fundamental human rights.

The Supreme Court acknowledged that the constitutional right to bail does not squarely apply to a case like extradition, where the presumption of innocence is not at issue. As such the Court noted as a modern trend in public international law that, “primacy [is] placed on the worth of the individual person and the sanctity of human rights.” Accordingly the Court held that: “. . . the recognition that the individual person may properly be a subject of international law is now taking root. The vulnerable doctrine that the subjects of international law are limited only to states was dramatically eroded towards the second half of the past century”.

The Supreme Court further held that, given that the Universal Declaration of Human Rights (“UDHR” hereinafter)⁸⁵ applies to deportation cases,⁸⁶ there is no reason why the same cannot be invoked and extended to extradition cases. The UDHR, while not a treaty, contains principles that are now recognized as binding

⁸⁵ Universal Declaration of Human Rights, Resolution 217 A (III); UN Doc A/810 91, UN General Assembly, 1948.

⁸⁶ *US v. Go-Sioco* (1909); *Mejoff v. Director of Prisons* (1951); and *Chirskoff v. Commission of Immigration* (1951).

customary norms upon the members of the international community. The Court cited the deportation case of *Mejoff v. Director of Prisons* (1951) which *inter alia* held that under the Philippine Constitution,⁸⁷ the principles set forth in that UDHR are part of the law of the land. The Supreme Court, in this present case, further noted that in 1966, the UN General Assembly also adopted the International Covenant on Civil and Political Rights,⁸⁸ which the Philippines has signed and ratified.

Accordingly, the Court concluded that the private respondent must not be deprived of his fundamental right to apply for bail, provided that a certain standard for the grant is satisfactorily met. Hong Kong's petition was dismissed, but remanded to the trial court to determine whether the private respondent is entitled to bail on the basis of "clear and convincing evidence". In the event that the trial court found against the private respondent, the Supreme Court directed it to order the cancellation of the private respondent's bail bond and, thereafter, allow extradition proceedings.

Foreign funded procurement contracts

ABAYA ET AL. VS. EBDANE ET AL.

G.R. No. 167919, 14 February 2007

Facts

Based on Exchange of Notes, the Governments of Japan and the Philippines, through their respective representatives, reached an understanding concerning Japanese loans to be extended to the Philippines. These loans were aimed at promoting economic stabilization and development efforts in the Philippines. In accordance with the agreement, the Philippines was granted a loan ("Loan Agreement PH-P204" hereinafter) by the Japan Bank for International Cooperation ("JBIC" hereinafter). Said loan stated *inter alia* that the JBIC agreed to lend the Philippines an amount not exceeding 15,384,000,000 yen as principal for the implementation of the Arterial Road Links Development Project (Phase IV) on the terms and conditions set forth in the Loan Agreement, and in accordance with the relevant laws and regulations of Japan. The said amount was to be used for the purchase of eligible goods and services, as necessary for the implementation of the above-mentioned project, from suppliers, contractors or consultants.

The proceeds of Loan Agreement PH-P204 were to be used to finance the

⁸⁷ Art. II, Sec. 2: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

⁸⁸ International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976.

Arterial Road Links Development Project (Phase IV), of which the Catanduanes Circumferential Road was a part. This stretch of road, in turn, was divided into four contract packages (“CP” hereinafter). Subsequently, the Department of Public Works and Highways (“DPWH” hereinafter), as the government agency tasked to implement the project, published the “Invitation to Prequalify and to Bid,” for the implementation of the project, comprising four CPs in response to which seven contractors submitted bid proposals. The project was subsequently awarded to the private respondent: China Road & Bridge Corporation.

The petitioners, comprising of law-makers, taxpayers and concerned citizens, assailed the resolution that awarded the contract to the private respondent whose bid was allegedly overpriced by more than 200m Philippine pesos, based on the Approved Budget for the Contract (“ABC” hereinafter). As such, the award was alleged to have been illegal. In this regard, the petitioners contended that the contract subsequently entered into by, and between, the DPWH and private respondent China Road & Bridge Corporation was void *ab initio* for being prohibited by RA 9184, or the “Government Procurement Reform Act”. The petitioners stressed that Section 31 of the aforementioned law expressly provides that “bid prices that exceed this ceiling shall be disqualified outright from participating in the bidding”.⁸⁹ The petitioners contended that RA 9184 is applicable to both local and foreign-funded procurement contracts.

Judgment

The Supreme Court ruled that Loan Agreement PH-P204, taken in conjunction with the Exchange of Notes between the Japanese Government and the Philippine Government, constitutes an executive agreement. This agreement was subsequently executed and declared as being entered into by the parties “[i]n the light of the contents of the Exchange of Notes between the Government of Japan and the Government of the Republic of the Philippines dated December 27, 1999, concerning Japanese loans to be extended with a view to promoting the economic stabilization and development efforts of the Republic of the Philippines”. Thus, the JBIC may well be considered an adjunct of the Japanese Government. Furthermore, said loan agreement was found by the Court to be “indubitably an integral part of the Exchange of Notes” and, as such, could not be properly considered as independent thereof. Significantly, Exchange of Notes⁹⁰ is considered a form of executive

⁸⁹ Sec. 31. *Ceiling for Bid Prices* – The ABC shall be the upper limit or ceiling for the Bid prices. Bid prices that exceed this ceiling shall be disqualified outright from further participating in the bidding. There shall be no lower limit to the amount of the award.

⁹⁰ The term is defined in the United Nations Treaty Collection as: “An ‘exchange of notes’ is a record of a routine agreement that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting

agreement, which becomes binding through executive action without the need of a vote by the Senate or Congress.

On the issue of bidding price requirements, the JBIC Procurements Guidelines forbid any procedure under which bids above or below a predetermined bid value assessment are automatically disqualified. The Court observed that the language of the requirements absolutely prohibits the imposition of ceilings on bids. Thus, under the fundamental principle of international law: *pacta sunt servanda*, which is likewise embodied in Section 4 of RA 9184 when it provides that “[a]ny treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed”, the DPWH, as the executing agency of the projects, was deemed by the Supreme Court to have rightfully awarded the contract to the private respondent China Road & Bridge Corporation.

DEPARTMENT OF BUDGET AND MANAGEMENT PROCUREMENT
SERVICE et al. vs. KOLONWEL TRADING

G.R. No. 175608, 8 June 2007

Facts

The controversy surrounding these three consolidated petitions relates to the bidding and the eventual contract awards, for the supply and delivery of some 17.5 million copies of Social Studies textbooks and teachers’ manuals. This was a project of the Department of Education (“DepEd” hereinafter), to be jointly funded by the World Bank (“WB” hereinafter) through loans from the International Bank for Reconstruction and Development (“IBRD” hereinafter) and the Asian Development Bank (“ADB” hereinafter), i.e. Loan No. 7118-PH and Loan No. 1654-PHI, respectively.

The Department of Budget and Management Procurement Service (“DBM-PS” hereinafter) and the Inter-Agency Bids and Awards Committee (“IABAC” hereinafter) called for the submission of bids for the supply of said books, divided into three lots comprising various grade school levels. Of the entities, both foreign and local, which responded and procured bidding documents, only eleven bidders ultimately submitted, either as principal or in a joint venture arrangement, proposals. Among them were Watana Phanit Printing & Publishing, petitioner Vibal Publishing

State repeats the text of the offering State to record its assent. The signatories of the letters may be government ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.” It is stated that “treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, *modus vivendi* and exchange of notes” all refer to “international instruments binding at international law.”

House, Daewoo International, and respondent Kolonwel Trading. Following the bidding and book content/body evaluation process, the IABAC resolved to recommend, to the WB and ADB, the failure of bids, for all the lots, due to the following disqualifications and reservations: (1) issues of “conflict of interest” with respect to Watana and Vibal; (2) “failure in cover stock testing” for Kolonwel; and DepEd’s subsequent “reservation”.

The WB responded in writing, stating that it disagreed with the finding of “conflict of interest” and the subsequent rejection of Vibal and Watana’s bids, but upheld the disqualification of all the other bidders. IABAC was thus tasked to review its earlier evaluation and to provide the WB with a revised Bid Evaluation Report, taking into account the loans’ closing date. The IABAC then issued two resolutions recommending to the WB that the contract award be given to Vibal, Watana and Daewoo. Upon review, WB offered no objection to the recommendation and the appropriate purchaser–supplier contracts were executed. Kolonwel was informed that its bid failed to qualify and the latter’s two requests for reconsideration were subsequently denied.

Kolonwel filed a petition with the Regional Trial Court of Manila seeking to nullify IABAC’s resolutions and set aside the contract awards in favour of Vibal and Watana. To support its temporary restraining order (“TRO” hereinafter) application, Kolonwel alleged that the supply awardees were rushing with the implementation of the “void contracts” merely to beat the loans’ closing deadline. The Court subsequently granted a twenty-day TRO which Vibal and the DepEd countered with motions to dismiss on the following grounds: (1) want of jurisdiction; and (2) lack of cause of action due to Kolonwel’s failure to comply with the protest procedure prescribed by Republic Act No. 9184, or the “Government Procurement Reform Act”.

Judgment

On the issue of whether the trial court lacked jurisdiction due to Kolonwel’s failure to comply with the protest mechanism, the Supreme Court held in the affirmative, stating that the three requirements enumerated in Section 55 of R.A. 9184 (otherwise known as “An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Public Purposes”) for the protest of foreign-funded projects, had not been complied with by Kolonwel, namely: (1) Kolonwel’s letters were not addressed to the head of the procuring entity as required by law; (2) said correspondence was not in the form of a verified position paper; and (3) there was no payment of the non-refundable protest fee. As such, Kolonwel effectively failed to avail itself of the protest procedure prescribed under Section 55 before going to the trial court. Therefore, the Court held that the respondent’s suit should have been dismissed, at the trial Court stage, for lack of jurisdiction. Thus the Supreme Court confirmed that a court would have jurisdiction only if the protest procedure was complied with prior to appearing before the court in question.

In light of the Manila RTC’s holding (that the WB guidelines on Procurement

under IBRD Loans do not in any way provide superiority over local laws on the matter), however, the Supreme Court made the following observations:

As may be recalled, all interested bidders were put on notice that the DepEd's procurement project was to be funded from the proceeds of the RP-IBRD Loan No. 7118-PH . . . accordingly, the IABAC conducted the bidding for the supply of textbooks and manuals based on the WB Guidelines, particularly the provisions on International Competitive Bidding (ICB). Section 4 of R.A. No. 9184 expressly recognized this particular process, thus:

Section 4. Scope and application. – This Act shall apply to the Procurement of . . . Goods and Consulting Services, regardless of source of funds, whether local or foreign by all branches and instrumentalities of government. . . Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.

On the issue of whether or not foreign loan agreements with international financial institutions form part of an executive or international agreement within the purview of the Section 4 of R.A. No. 9184, the Supreme Court replied in the affirmative based on the previous ruling of *Abaya vs. Ebdane* (2007)⁹¹ where, observing the international legal principle of *pacta sunt servanda*, the Philippines, as a borrower, bound itself to perform in good faith all of its duties and obligations under contracted loans. Applying this finding to the present case, the Supreme Court held that the IABAC was legally obliged to comply with, or accord primacy to, the WB Guidelines on the conduct and implementation of the bidding/procurement process in question. It was on this ground that the Supreme Court subsequently granted the three consolidated petitions and set aside the TRO.

Applicability of international organization resolutions

PHARMACEUTICAL AND HEALTH CARE ASSOCIATION OF THE PHILIPPINES vs. DUQUE et al.⁹²

G.R. No. 173034, 9 October 2007

Facts

Executive Order No. 51 (“Milk Code” hereinafter) was issued by President Corazon Aquino on 28 October 1986, by virtue of the legislative powers granted to the

⁹¹ G.R. No. 167919.

⁹² *Pharmaceutical And Health Care Association Of The Philippines, petitioner, vs. Health Secretary Francisco T. Duque III; Health Undersecretaries Dr Ethelyn P. Nieto, Dr Margarita M. Galon, Atty Alexander A. Padilla and Dr Jade F. Del Mundo; and Assistant Secretaries Dr Mario C. Villaverde, Dr David J. Lozada and Dr Nemesio T. Gako, respondents.* This judgment was penned by Justice Austria-Martinez.

president under the Freedom Constitution. One of the preambular clauses of the Milk Code states that the law seeks to give effect to Article 112 of the International Code of Marketing of Breastmilk Substitutes (“ICMBS” hereinafter), a code adopted by the World Health Assembly (“WHA” hereinafter) in 1981. Between 1982 and 2006, the WHA adopted several resolutions to the end that breastfeeding should be supported, promoted and protected, hence, it should be ensured that nutrition and health claims are not permitted for breastmilk substitutes.

On 15 May 2006, the Department of Health (“DOH” hereinafter) issued Administrative Order No. 2006-0012 entitled “Revised Implementing Rules and Regulations of Executive Order No. 51”, otherwise Known as The “Milk Code”, Relevant International Agreements, Penalizing Violations Thereof, and for Other Purposes (“RIRR” hereinafter), to take effect on 7 July 2006. The RIRR was assailed by the petitioner, representing its members that are manufacturers of breastmilk substitutes, by filing the present petition for the issuance of a temporary restraining order (“TRO” hereinafter).

The main issue raised in the petition concerned the constitutionality of the RIRR, which the DOH countered with the defence that the RIRR implements not only the Milk Code but also various international instruments regarding infant and young child nutrition. In summary, it was the public respondents’ position that said international instruments were deemed part of the law of the land and therefore the DOH may implement them through the RIRR. The provisions questioned by the petitioners concerned: regulations on advertising activities for breastmilk substitutes (including the use of health and nutritional claims, additional labelling requirements), limitations in extending assistance in research and continuing education of health professionals, the regulation of donations, application of administrative sanctions, among others. Thus, the petitioners’ argument rested on the amendment and expansion of The Milk Code to their detriment. The Court subsequently issued a Resolution granting a TRO enjoining respondents from implementing the impugned RIRR.

Judgment

The Supreme Court took cognizance of the following international instruments invoked by respondents, namely: (1) The United Nations Convention on the Rights of the Child;⁹³ (2) The International Covenant on Economic, Social and Cultural Rights;⁹⁴ (3) the Convention on the Elimination of All Forms of Discrimination Against Women.⁹⁵ The Court noted, however, that these instruments only provide

⁹³ Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, entered into force 2 September 1990.

⁹⁴ International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3, entered into force 3 January 1976.

⁹⁵ Convention on the Elimination of Discrimination Against Women (18 December 1979) 1249 UNTS 13, entered into force 3 September 1981.

the measures that State Parties must undertake with regards to the right to health in general terms. Of import are those statements regarding the diminution of infant and child mortality, the right to information regarding the advantages of breastfeeding, as well as the obligation of States to ensure the health and well-being of families, and those that ensure that women are provided with services and nutrition in connection with pregnancy and lactation. Moreover, the Court pointed out that the “enumerated instruments do not contain specific provisions regarding the use or marketing of breastmilk substitutes”.

In the present case, the international instruments that do have specific provisions regarding breastmilk substitutes are the ICMBS and various WHA Resolutions. It was thus crucial for the Supreme Court to ascertain whether the absolute prohibition on advertising and other forms of promotion of breastmilk substitutes, provided for by some WHA Resolutions, has been adopted as part of the national health policy. The Court concluded that the public respondents failed to establish that the provisions of pertinent WHA Resolutions are customary international law that may be deemed part of the law of the land. Citing constitutional jurist Joaquin Bernas, S.J., the Supreme Court reiterated that:

Once the existence of state practice has been established, it becomes necessary to determine why states behave the way they do. Do states behave the way they do because they consider it obligatory to behave thus or do they do it only as a matter of courtesy? *Opinio juris*, or the belief that a certain form of behavior is obligatory, is what makes practice an international rule. Without it, practice is not law.

The Court observed that the ICMBS and WHA Resolutions are not treaties as they have not been concurred on by at least two-thirds of all members of the Senate as required under Section 21, Article VII of the 1987 Constitution.⁹⁶ However, the ICMBS, which was adopted by the WHA in 1981, had been transformed into domestic law through local legislation, namely the Milk Code. Consequently, it is the Milk Code that has the force and effect of law in the Philippines and not the ICMBS resolutions *per se*. Consequently, the Court found that legislation was necessary to transform the provisions of the WHA Resolutions into domestic law and the provisions of the WHA Resolutions may not automatically be considered as part of the law of the land that may be implemented by executive agencies without the need of legislation bringing them into effect.

The Court finally concluded that the Milk Code does not contain a total ban on the advertising and promotion of breastmilk substitutes, but instead creates an IAC which will regulate said advertising and promotion. As such, it follows that a total ban policy could, appropriately, be implemented only pursuant to an

⁹⁶ Joaquin G. Bernas, S.J. *Constitutional Structure and Powers of Government Notes and Cases* (2005).

amendment of the Milk Code by the legislature. Thus, the Court unequivocally held that only the provisions of the Milk Code, and not those of the WHA Resolutions, can be validly implemented by the DOH through the RIRR.

NATIONAL LEGISLATION ON INTERNATIONAL MATTERS

*Human Security Act of 2007, Republic Act No. 9372*⁹⁷ (“HSA” hereinafter)
6 March 2007

The Human Security Act declares that the State, as a matter of policy, condemns “terrorism as inimical and dangerous to the national security of the country and to the welfare of the people” and makes terrorism a crime “against the Filipino people, against humanity, and against the law of nations”.⁹⁸ It calls for a comprehensive approach comprising political, economic, diplomatic, military and legal means, duly taking into account the root causes of terrorism without acknowledging these as justifications for terrorist or criminal activities.

The law can be loosely classified into three main parts: Sections 7 to 16 cover the procedure for the surveillance of suspects and the interception and recording of communications; Sections 27 to 43 deal with the process for judicial authorization to examine bank deposits, accounts and records; and the rest of the provisions provide for, *inter alia*, penalties, the enumeration of the rights of a detainee, statements of policy and definitions. However, it requires the State to at all times uphold the basic rights and fundamental liberties of the people as enshrined in the constitution.

The law punishes the commission of specific acts enumerated in Section 3,⁹⁹

⁹⁷ An Act to Secure the State and Protect our People from Terrorism.

⁹⁸ Sec. 2, R.A. 9732.

⁹⁹ SEC. 3. R.A. 9732. Terrorism. Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:

- a. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
- b. Article 134 (Rebellion or Insurrection);
- c. Article 134-a (Coup d’Etat), including acts committed by private persons;
- d. Article 248 (Murder);
- e. Article 267 (Kidnapping and Serious Illegal Detention);
- f. Article 324 (Crimes Involving Destruction), or under
 1. Presidential Decree No. 1613 (The Law on Arson);
 2. Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
 3. Republic Act No. 5207, (Atomic Energy Regulatory and Liability Act of 1968);
 4. Republic Act No. 6235 (Anti-Hijacking Law);
 5. Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and,
 6. Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms,

which involve “sowing and creating a condition of widespread and extraordinary fear and panic among the populace” intended as an “order to coerce the government to give in to an unlawful demand.” Specifically, those acts include: (1) piracy in general, and mutiny in the high seas, or in Philippine waters; (2) rebellion or insurrection; (3) *coup d'état*; (4) murder; (5) kidnapping and serious illegal detention; (6) crimes involving destruction (7) arson; as well as violations of: (a) The Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990; (b) The Atomic Energy Regulatory and Liability Act of 1968; (c) Antihijacking laws; (d) The Antipiracy and Antihighway Robbery Law of 1974; and, (e) The Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives. The recommended penalty is 40 years of imprisonment, without parole.¹⁰⁰

*Oil Pollution Compensation Act of 2007, Republic Act No. 9483*¹⁰¹ 2 June 2007

The Oil Pollution Compensation Act, created in light of the Guimaras Island oil spill due to the sinking of the motor tanker *Solar 1* on 11 August 2006, seeks to adapt the provisions of the 1992 International Convention on Civil Liability for Oil Pollution Damage and the 1992 International Convention on the Establishment of an International Fund for Compensation for any Resulting Environmental Damage.

The law states that it is the ship owner who shall be liable for any occurrence or series of occurrences, each having the same origin, which causes pollution-based damage, or creates a grave and imminent threat of causing such damage. Such liability of the ship owner shall include expenses related to in-sea and on-shore clean-up costs, the loss of earnings suffered by owners or users of consequently contaminated property, and others who may rely on the said property, damage to human health and loss of life, and environmental damage and the cost of restoration. There are, however, some exceptions to the aforementioned liability, such as: (a) if the incident resulted from war, hostilities, rebellion, or from a natural phenomenon; (b) if it was caused, intentionally, by a third party; (c) if it was caused by the negligence of Government, enforcement agencies; or (d) if it was caused, intentionally, by those who ultimately suffered the damage.

Ammunitions or Explosives) creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.

¹⁰⁰ *Ibid.*

¹⁰¹ An act providing for the implementation of the provisions of the 1992 International Convention on Civil Liability for Oil Pollution Damage and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, providing penalties for violations thereof, and for other purposes.

The law likewise mandates a system for limiting liabilities by requiring a ship owner to constitute a fund, representing the limit of his liability, with the Maritime Industry Authority (“Marina” hereinafter) to cover incidents causing pollution-related damage. Under the law, any claim for compensation, in this regard, shall be brought directly to the Regional Trial Court.

The law also states that any person who has received more than 150,000 tons of contributing oil, in a given calendar at all ports or terminal installations within the Philippines, by sea, shall make contributions to the International Oil Pollution Compensation Funds (“IOPC” hereinafter). If any such person fails to contribute to the IOPC fund, he shall be required to pay P 3m as of the first occurring violation, P 4m as of the second, and P 5m as of the third such violation.

Furthermore, the establishment of an Oil Pollution Management Fund is provided for, comprised of contributions by owners and operators of tankers and barges hauling oil and petroleum products in Philippine waters, and from fines imposed by the law, to be administered by the Marina. The fund shall be used for the immediate containment, removal and clean-up operations in oil pollution cases and for research, enforcement and monitoring activities of concerned agencies.

OTHER RELEVANT STATE PRACTICE

Counter-terrorist measures

12th ASEAN Summit: Convention on Counter Terrorism (13 January 2007)
 (“The Convention” hereinafter)¹⁰²

The Philippines, together with the other ASEAN members and other concerned states, is a signatory to the Convention on Counter Terrorism as a reaffirmation of their commitment to the Vientiane Action Programme, particularly its thrust on the “shaping and sharing of norms” and the need for an ASEAN Convention on Counter Terrorism.

The Convention provides for a framework that promotes “regional cooperation to counter, prevent and suppress terrorism in all its forms and manifestations and to deepen cooperation among law enforcement agencies and relevant authorities of the Parties in countering terrorism”. For purposes of definition and limitation, several international treaties have been referenced with regard to terrorist acts, including the Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973); and the International Convention Against the Taking of Hostages (1979).

¹⁰² See <http://www.aseansec.org/19250.htm> (last visited 3 November 2009).

The Convention also provides for a system of increased international cooperation between State Parties that includes prevention at the domestic level, exchange of information, control of movements of suspected terrorists and the initiation of public awareness initiatives.

Human rights promotion

Philippine Statement: Fourth Session of the Human Rights Council Geneva
(12 March 2007)¹⁰³

Referring to the Community of Democracies Convening Group (“Community of Democracies” hereinafter), the Philippines noted that, although it comprised States from all regional groups that differ in various respects such as historic heritage, political, and religious traditions or the level of economic development, nevertheless, its members share a set of common core values. The crucial such value is the belief that democratic governance is a key element for development and security, as well as for the promotion and protection of human rights. The Philippines committed itself to the conviction that democracy, sustainable development, peace, and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.

The Philippines, on behalf of the Community of Democracies, welcomed the establishment of the Human Rights Council (“HRC” hereinafter), the latter charged with the responsibility of promoting universal respect for the protection of human rights and fundamental freedoms for all, without distinction of any kind, and in a fair and equal manner, with the following statement:

We are committed to the process of institution building of the HRC and to its timely completion, preferably through consensus. We reaffirm our common endeavor toward the promotion and protection of human rights based on the principles of cooperation and genuine dialogue with the aim of strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings. In this context we encourage states from all regional and political views to overcome their differences and continue to work together to build a strong and efficient system of human rights promotion and protection.

The Philippines further pledged *inter alia* continued commitment to, and observance of, the purpose and principles of the UN Charter, the Universal Declaration of Human Rights, and the fundamental principles of international law.

¹⁰³ This statement was delivered by Hon. Dr Alberto G. Romulo, Secretary of Foreign Affairs of the Republic of the Philippines in behalf of the Community of Democracies’ Convening Group (Cape Verde, Chile, Czech Republic, El Salvador, India, Italy, Republic of Korea, Mali, Mexico, Mongolia, Morocco, Philippines, Poland, Portugal, South Africa, United States) and Special Guests (Peru and Romania).

Condemnation of extrajudicial killings

*Philippine Statement on the Preliminary Note on the visit to the Philippines, of Prof. Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: 4th Session of the Human Rights Council (27 March 2007)*¹⁰⁴

On the issue of the prevalence of extrajudicial, summary or arbitrary executions noted by Dr Alston, the Philippines, aside from appreciating his recognition of Government cooperation, made a general comment on the number of improvements of a factual nature that could be made in the preliminary note so that a more accurate and clearer picture could be provided, of increased governmental efforts:

The Philippines condemns extrajudicial killings in the strongest terms and we are taking urgent action to stop such killings and to identify and prosecute those who perpetrate them. We thank Dr. Alston for enumerating some of the measures the Government has enacted such as creating special Courts to handle these cases, and establishing a Commission to examine this problem and make recommendations.

Another measure was the strengthening of the Presidential Human Rights Committee, now conducting an inventory of cases under investigation which reveals that 60 cases of such killings have been brought to court since 2001 which, in turn, have resulted in some convictions while the others are under active investigation. The list of cases shows the crucial role of the Government's witness protection program.

Nevertheless, the Philippines asserted that, contrary to certain conclusions in Dr Alston's interim investigations, the Armed Forces of the Philippines are not "in denial" of the issue and have, in fact, established, in February, a Human Rights Office currently investigating some 80 cases that may involve military personnel. Furthermore, the Philippines stated that it has also consistently engaged in partnerships with the international and national human rights community, and acknowledges the role of civil society in monitoring such cases.

Public health

12th ASEAN Summit: ASEAN Commitments on HIV and AIDS (13 January 2007)

The Philippines, together with the other heads of States within the ASEAN, reviewed and renewed their commitments on HIV and AIDS, to effectively respond to the spread of HIV in the ASEAN region. In line with the Millennium Development

¹⁰⁴ This statement was delivered by Ambassador Enrique A. Manalo, Permanent Representative of the Philippines to the United Nations in Geneva. For the text of Alston report see <http://www.unhcr.org/refworld/docid/4a0932280.html> (last visited 24 May 2010).

Goals, in particular Goal No. 6, which specifically refers to halting the spread of HIV/AIDS, malaria and other diseases, the States reiterated the need for universal access to comprehensive prevention, treatment, care and support by 2010, for all those in need, and the reduction of vulnerability of persons living with HIV, especially orphans, vulnerable children, and the elderly.

Some of the other specific commitments mentioned involved multi-sectoral responses to the epidemic, such as: the sharing of lessons, best practice and evidence-informed prevention policies; putting into place the necessary legislation and regulations (including workplace policies and programs) to ensure that persons living with HIV and other affected groups are protected and are not subjected to stigma and discrimination; as well as improving access to health, social welfare and education services, including continued food security and education for children at the domestic level.

SINGAPORE

JUDICIAL DECISIONS

TAN BOON HAI v TAN SWEE SWAN (a patient) defending by his guardian *ad litem* Tan Hee Liang and Tan Hee Joek

[2006] SGDC 220

FACTS

The parties approached the Court to decide whether Singapore or China was the proper forum to try a dispute involving a failed building project in China.

Judgment

The Court held, in sum, that the defendant's application to stay the proceedings on the ground that China was a more appropriate forum be dismissed based on the preponderance of local factors linking the case with Singapore, and further still, on the basis that the issues arising had, at most, only a tangential relation with China.

PETER ROGER MAY v. PINDER LILLIAN GEK LIAN

[2006] SGHC 39

Facts

The case involved an appeal, by the executor of a will, against a decision in favour of the respondent, the deceased's widow, staying proceedings in order to determine

whether a notation should be endorsed, upon the grant of probate, stating that the deceased was domiciled in Singapore. The appeal was on the grounds that there was an issue of *lis pendens* arising from proceedings being commenced in England to declare that the deceased had been domiciled there.

The respondent also sought to persuade the Court there was an issue of *forum non conveniens* with respect to the availability of witnesses.

Judgment

The Court allowed the appeal, reversing the decision to stay the proceedings, on the grounds that the respondent had submitted to the jurisdiction of the Singapore courts by consenting to the grant of probate to the specific executor, and that given such unqualified acceptance, the respondent could not now contend that Singapore was not even an (as opposed to “the”) appropriate forum.

On the question of *forum non conveniens*, the Court reasoned that the real issue was not one of convenience *per se*, but of appropriateness, and that in granting a stay application the Court must be persuaded that compelling reasons had been advanced towards the conclusion that the interests of the parties seeking justice could be more appropriately secured in some other jurisdiction.

On the matter of availability of witnesses, the respondent had not advanced any arguments to explain why adducing evidence by means of video link in this case would be inconvenient, unsuitable or prejudicial. As the English claim was not served on the relevant parties until after the executor’s notation proceedings were served on the respondent, it was clear, in the opinion of the Court, that the purported English proceedings were commenced for the specific purpose of demonstrating the existence of a competing jurisdiction, and that such proceedings had not passed beyond the stage of the initiating process. As such, the Court felt there to be no genuine issue of *lis pendens*.

The Court also observed that the easy and ready availability of video link technology nowadays warranted an altogether different, more measured and pragmatic re-assessment of the need for the physical presence of foreign witnesses in stay proceedings. Geographical proximity and physical convenience were no longer compelling factors nudging a decision of *forum non conveniens* towards the most “witness convenient” jurisdiction from the viewpoint of physical availability.

SWIFT-FORTUNE LTD v. MAGNIFICA MARINE SA

[2006] 2 SLR 323

Facts

The case involved an application by the defendant to set aside an originating summons and the order of court granting leave to serve the same out of the jurisdiction,

as well as for a discharge of the Mareva injunction granted against it in respect of a foreign arbitration.

Judgment

The Court found that it did not have the jurisdiction to issue a Mareva injunction to assist a party to a foreign international arbitration, and from this, the Singapore court cannot be the *forum conveniens* for the consideration of such an issue. Accordingly, granting service of the originating summons outside the jurisdiction would be improper.

TAY WAY BOCK v. YEUNH OI SIONG

[2006] SGHC 21

Facts

The case involved an application to stay proceedings on the grounds of *forum non conveniens* and that the proper forum to try the case was Malaysia.

Judgment

The application was granted on the facts of the case.

KUALA LUMPUR CITY SECURITIES SDN BHD v. BOSTON ASSET MANAGEMENT PTE LTD (FORMERLY KNOWN AS UNIVERSAL NETWORK EDUCATION PTE LTD) AND ANOTHER

[2006] SGHC 99

Facts

The case concerned a default judgment obtained by the plaintiff. The defendants made a subsequent application to stay the proceedings on the ground that Malaysia was the natural forum to try the case.

Judgment

The Court observed that, notwithstanding the many arguments raised on their behalf, the defendants had raised no arguable defence on the merits which warranted

that the default judgment obtained against them by the plaintiff be set aside and therefore it served no purpose therefore to stay the proceedings against them.

ALOE VERA OF AMERICA, INC. v ASIANIC FOOD (S) PTE LTD.
AND ANOTHER

[2006] 3 SLR 174

Facts

The case was an appeal against a decision to dismiss an application to set aside an order granting leave to enforce an overseas arbitral award.

Judgment

The Court held that the enforcement process was a mechanistic one and did not require judicial investigation of the jurisdiction in which enforcement was sought. The Court could only refuse enforcement if one of the grounds in Section 31(2) or Section 31(4) of the Arbitration Act was established. The Court, therefore, had no residual discretion to refuse enforcement and it would suffice to prove that the relevant parties were mentioned in the arbitration agreement and that the arbitral tribunal had made a finding to that effect.

LEE PAULINE BRADNAM v LEE THIEN TERH GEORGE

[2006] SGHC 84

Facts

The case involved an examination of whether an order for periodic maintenance falls within the definition of a “judgment” under the Reciprocal Enforcement of Commonwealth Judgments Act (“RECJA” hereinafter), and may therefore be registered under the RECJA.

Judgment

It was held that periodic maintenance orders may not be registered. Even if they were to be, however, then, on the facts of the present case, the Court found that it was neither just, nor convenient, to register the impugned periodic maintenance order.

RICKSHAW INVESTMENTS LTD AND ANOTHER v. NICOLAI BARON
VON UEXKULL

[2007] 1 SLR 377

Facts

The case concerned a dispute arising from the termination of employment of the respondent.

The employment agreement between the relevant parties contained a composite jurisdiction and choice of law clause which provided that “[t]he parties agree on German law for this contract and the competence of the German courts”. The respondent consequently commenced proceedings against the first appellant in Germany and the appellants responded with an action against the respondent in Singapore, the latter founded upon an alleged breach of the respondent’s equitable duty of confidentiality, fiduciary duty and deceit.

The appellant’s action against the respondent was stayed on the ground of *forum non conveniens*. Thereafter, the appellants appealed against the High Court’s decision to grant the stay of proceedings.

Judgment

The appeal was allowed, given the likelihood of the appellants’ claims, in the Singapore proceedings, raising a significant number of disputed factual issues. The Court reasoned further, that the location of witnesses should be attributed significant weight in assessing the appropriateness of Singapore as a forum for the dispute. Since the key witnesses were located in Singapore, this was a factor that pointed towards Singapore being the most natural forum to hear the substantive disputes. In addition, it was significant that the principal witnesses, for the claims of breach of fiduciary duty and breach of confidence, could clearly be compelled to testify in the Singapore proceedings, whereas this was not the case in so far as the German proceedings were concerned.

The jurisdictional connections of the parties also pointed towards Singapore as the appropriate forum to hear the substantive action. Whilst the risk of conflicting judgments had to be taken into account given the concurrent German proceedings, the Court held that it was not decisive and had to be weighed against the other factors which pointed towards Singapore as being the most appropriate forum to hear the case. The significance attributed to this factor had to be considered bearing in mind that concurrent proceedings in Singapore and Germany were commenced by the appellants and the respondent respectively, as opposed to a *lis alibi pendens*.

MURAKAMI TAKAKO (EXECUTRIX OF THE ESTATE OF TAKASHI MURAKAMI SUROSO, DECEASED) v. WIRYADI LOUISE MARIA AND OTHERS

[2007] 4 SLR 565

Facts

The case concerned an appeal on, *inter alia*, whether the *forum non conveniens* rule precluded a counterclaim vis-à-vis money in a bank account in New York.

Judgment

The Court held that the relevant test required a determination of which forum met the ends of justice, with regard to the interests of the parties. In the present case, the title to the bank account had already been determined, and Singapore was the *forum conveniens* since the appellant had chosen Singapore to sue the first respondent, with respect to assets under a particular judgment, and the counterclaim in question was seeking to enforce that same judgment against the appellant.

EXXONMOBIL ASIA PACIFIC PTE LTD v. BOMBAY DYEING & MANUFACTURING CO. LTD

[2007] SGHC 137

Facts

The case involved an appeal by the defendant against the dismissal of its application for a stay of proceedings on the ground that India was a more appropriate forum than Singapore to try the case. The main ground advanced by the defendant in favour of a stay of proceedings concerned the location and compellability of witnesses. This was rejected in the first instance and on appeal an affidavit was filed by the defendant stating that three witnesses had been spoken to and they had intimated that they would not be willing to attend as witnesses in Singapore, or for that matter, in India.

Judgment

The appeal was dismissed and the Court held that more was expected from a defendant who sought a stay of proceedings in Singapore on the basis that a foreign forum was a more appropriate forum than Singapore.

NOVUS INTERNATIONAL PTE LTD v. GOOD EARTH
AGRICULTURAL CO LTD

[2007] 4 SLR 402

Facts

The case involved a dispute concerning an oral distribution agreement with no governing law clause. The facts relied upon by the plaintiff had come to light in an earlier action brought in Hong Kong by the defendant, in this case, against the plaintiff. At that time, the latter had applied, after the close of pleadings, to add a counterclaim, which was not allowed on grounds of lateness. The plaintiff then brought the present proceedings in Singapore, which the defendants sought to stay.

Judgment

The defendant's application was dismissed on the basis that the defendant had failed to show that Hong Kong was the more appropriate forum, and also because, *inter alia*, there was no choice of law clause that displaced Singapore law from governing the terms of said agreement.

DATACRAFT ASIA LTD AND ANOTHER v. KAUFMAN,
GREGORY LAURENCE AND OTHERS

[2007] SGHC 111

Facts

The case concerned simultaneous proceedings in Singapore and Japan.

Judgment

The Court opined that even though there was no duplicity of proceedings, or *lis alibi pendens*, as the parties and the relief sought by each of the parties, in the Singapore and Japanese proceedings, were different, the third and fourth defendant's application for a stay of the Singapore proceedings, pending the final determination of the Japanese proceedings, should be allowed, since a contractual clause common to both proceedings would be determined in the Japanese proceedings.

It was observed that, while any such determination had no preclusive effect whatsoever on the Singapore proceedings, and the decision would not be binding on the Singapore courts, a Singapore court would, in all likelihood, regard a finding by the Japanese courts, on the effect of the clause in question, to be highly instructive and persuasive.

PERWIRA AFFIN BANK BERHAD (FORMERLY KNOWN
AS PERWIRA HABIB BANK MALAYSIA BERHAD) v. LEE HAI PEY
AND ANOTHER

[2007] 3 SLR 218

Facts

The case concerned the enforcement of a foreign judgment.

Judgment

On the facts of the case, the Court allowed the registration of said foreign judgment.

VH v. VI AND ANOTHER

[2008] 1 SLR 742

Facts

In the present case, the petitioner commenced divorce proceedings in Singapore. The respondent, thereafter, submitted to the jurisdiction of the Singapore courts. Prior to the matter being fixed for hearing, however, the respondent commenced divorce proceedings in Sweden. The respondent subsequently filed an application, in Singapore, for the Singapore proceedings to be stayed pending the determination of the Swedish proceedings. Said application was dismissed. The respondent appealed.

At the same time, the petitioner appealed, unsuccessfully, in Sweden, for the Swedish proceedings to be stayed. She subsequently applied for an anti-suit injunction in the course of the Singapore proceedings seeking to restrain the respondent from continuing with the Swedish proceedings. Accordingly, the Singapore Court issued an interim injunction, but the respondent disregarded the order and successfully applied for a divorce decree from the Swedish courts.

Judgment

The Singapore Court dismissed the respondent's appeal and the petitioner's application.

The former was dismissed as the respondent only made his application (in Sweden) 13 months after he had participated in the proceedings in Singapore, leading the petitioner and the Court to believe that he had accepted Singapore as the appropriate forum.

With regard to the dismissal of the petitioner's application, the Court found that the prerequisites for applying the principle, that the ends of justice required an anti-suit injunction to be issued, were not satisfied in the present instance, since the respondent would suffer real prejudice if he was prohibited from carrying on with the Swedish proceedings which had progressed to a stage where he could apply for the divorce decree, and further, the petitioner had allowed the Swedish proceedings to reach that stage before she applied for the injunction. Although the marriage would not be dissolved on the basis preferred by the petitioner, this was insufficient to constitute an injustice against her and she could still advance and protect the interests of herself, and her children, in the Swedish courts.

In view of the respondent's conduct, however, he was not awarded any costs.

NATIONAL LEGISLATION ON INTERNATIONAL LAW MATTERS

During the period from 2006 to 2007, the Singapore Legislature also enacted the following legislations to give effect to international conventions, to which Singapore is now party, as follows:

Endangered Species (Import and Export) Act 2006 was enacted on 1 March 2006. The enactment repeals and re-enacts the existing legislation to give effect to the enforcement obligations, within the Convention on International Trade in Endangered Species of Wild Fauna and Flora, as well as the interpretation of illegal trade.

Carriage by Air (Montreal Convention, 1999) Act 2007 came into operation on 16 November 2007, to give effect to the provisions of the Montreal Convention, 1999, concerning international carriage by air and for matters connected therewith.

Chemical Weapons (Prohibition) (Amendment) Act 2007 came into operation on 14 December 2007, to amend the existing Chemical Weapons (Prohibition) Act which gave effect to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The amendments align local legislation with the licensing regime developed under the aforementioned convention.

Geneva Conventions (Amendment) Act 2007 came into operation on 15 January 2008, to amend the existing Geneva Conventions Act to extend legal protection to the emblems of the societies included under the Geneva Convention, such as the Red Crystal and Red Lion.

(Suppression of Bombings) Act 2007 came into operation on 30 January 2008, to give effect to the International Convention for the Suppression of Terrorist Bombings and for matters connected therewith.

Trade Marks (Amendment) Act 2007 came into operation 2 July 2007, to amend the existing Trade Marks Act to facilitate the ratification of the Singapore Treaty on the Law of Trademarks.

SRI LANKA¹⁰⁵

JUDICIAL DECISIONS

IN THE MATTER OF A REFERENCE UNDER ARTICLE 129(1) OF THE CONSTITUTION

Supreme Court Reference No. 01/2008 (unreported) (Sarath N. Silva C.J., Rang Amaratunga J., Saleem Marsoof J., A.M. Somawansa J., D.J. de S Balapatabendi, J.)

Facts

This case was a reference by the President of Sri Lanka under Article 129(1) of the Constitution to obtain the opinion of the Court on the following questions:¹⁰⁶

1. Whether the legislative provisions cited in the reference that have been taken to give statutory recognition to civil and political rights in the International Covenant on Civil and Political Rights of the United Nations adhere to the general tenor of the Covenant, and whether individuals within the territory of Sri Lanka would derive the benefit and the guarantee of rights as contained in the Covenant through the medium of the legal and constitutional processes prevailing in Sri Lanka.
2. Whether the said rights recognised in the Covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka.

¹⁰⁵ Contributed by Camena Guneratne, Senior Lecturer, Department of Legal Studies, Open University of Sri Lanka.

¹⁰⁶ Article 129 of the Sri Lanka Constitution, refers to the consultative jurisdiction of the Supreme Court and states as follows:

- (1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.
- (2) Where the Speaker refers to the Supreme Court for inquiry and report all or any of the allegation or allegations, as the case may be, contained in any such resolution as is referred to in Article 38 (2) (a), the Supreme Court shall in accordance with Article 38 (2) (d) inquire into such allegation or allegations and shall report its determination to the Speaker within two months of the date of reference.
- (3) Such opinion, determination and report shall be expressed after consideration by at least five Judges of the Supreme Court, of whom, unless he otherwise directs, the Chief Justice shall be one.
- (4) Every proceeding under paragraph (1) of this Article shall be held in private unless the Court for special reasons otherwise directs.

Judgment

The Court stated that although Article 129(4) of the Constitution provides that the proceedings in relation to such a reference shall be held in private, in view of the public importance and interest in the matter, it decided to consider the questions at a public sitting of the Court and give advance notice to enable interested parties to appear and make submissions before it. Consequently, two individuals and two organizations intervened and made submissions.

At the outset the Court noted that the fundamental rights declared and recognized in Chapter III of the Sri Lankan Constitution are based on the Universal Declaration of Human Rights. In the light of Articles 3 and 4(d)¹⁰⁷ of the Constitution, fundamental rights so declared and recognized form part of the sovereignty of the people. The Court went on to state that “This is, in our opinion a unique feature of the Constitution which entrenches fundamental rights as part of the inalienable Sovereignty of the People. Thus the fundamental rights acquire a higher status as forming part of the Supreme Law of the land and cannot be abridged, restricted or denied except in the manner and to the extent expressly provided for in the Constitution itself.” The Court also noted that exclusive jurisdiction is vested in the Supreme Court to address issues of fundamental rights and the Court is empowered to grant just and equitable relief in respect of any infringement of these rights.

The Court observed that Parliament enacted special legislation titled “International Covenant on Civil and Political Rights (ICCPR) Act” No. 56 of 2007 to give legislative recognition in respect of certain residual rights and other matters in the ICCPR that have not been appropriately contained in the Sri Lankan Constitution or other laws.¹⁰⁸ This was done in compliance with Article 2.2 of the ICCPR. Further, the Court noted that it had on occasion relied on the provisions of the ICCPR “to give purposive meaning to the provisions of the Constitution and other applicable law so as to ensure to the People that they have an effective remedy in respect of any alleged infringement of fundamental rights recognized by the Constitution”.

In the light of this background the Court considered the specific submissions of Counsel for the various Interventient Petitioners (hereinafter “Counsel”). These submissions referred to provisions of the Constitution which, they, the Interventient Petitioners, argued, were inconsistent with the ICCPR.

¹⁰⁷ Article 3: “In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.” Article 4 (d): “The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided.”

¹⁰⁸ This statute was enacted in the aftermath of the decision of the Supreme Court in the case of *Nallaratnam Singarasa (presently serving a term of imprisonment in the Kalutara prison) v. The Attorney General*, see S.C. SpL(LA) No. 182/99.

The arguments and the responses of the Court are set out below.

1. Counsel argued that the Constitution permits the creation of ex post facto offences and is inconsistent with the ICCPR in this regard. The Court responded that this submission was hypothetical, and if and when a law is sought to be so enacted to create an ex post facto offence, the Court would consider the matter.
2. Counsel argued that Article 16(1) of the Constitution provides that laws existing at the time of the promulgation of the Constitution should continue in force, notwithstanding that they may be inconsistent with its provisions.¹⁰⁹ Counsel referred to certain personal laws governing the Tamil and Muslim communities in respect of certain matters, which discriminate against women. The Court noted that the laws referred to are personal family laws and not those governing State action.¹¹⁰ It stated,

In our view it could not be contended that the provisions of Article 16(1) of the Constitution that only provides for the continuance in force of the already operative law could be considered to be inconsistent with Covenant only on the ground that there are certain aspects of Personal Law which may discriminate women. The matter of Personal Law is one of great sensitivity. The Covenant should not be considered as an instrument which warrants the amendment of such Personal Laws. If at all there should be any amendment such request should emerge from the particular sector governed by the particular Personal Law.

3. Counsel also referred to the immunity granted to the President by Article 35(1)¹¹¹ and argued that this was inconsistent with Article 2(3) of the Covenant. While there was no objection to the personal immunity of the Head of State, objection was taken to his/her immunity for acts performed as Head of State. Court responded that such provisions are not unique to Sri Lanka and in any case such immunity would cease when the person concerned ceased to hold office.
4. Counsel also argued that Article 80(3) of the Constitution, which provides that the validity of a law cannot be challenged after it has been certified by the Speaker of Parliament, denies an effective remedy to those who argue that such law derogates from the rights provided in the constitution. Although under Article 121(1) of the Constitution, a citizen can challenge the constitutionality of a Bill within one week of it being presented to Parliament, Counsel was of the view that this provision was insufficient to review the constitutionality of a law.

¹⁰⁹ Article 16(1): “All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.”

¹¹⁰ Article 17: “Every person shall be entitled to apply to the Supreme Court, as provided in Article 126, in respect of the infringement or imminent infringement by executive or administrative action of a fundamental right to which such person is entitled.”

¹¹¹ Article 35(1): “(1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.”

The Court responded that there is no provision in the ICCPR, which mandates judicial review of legislation.

5. Counsel argued that an amendment to a Bill made at the Committee stage of Parliament cannot be challenged by a citizen. In response, the Court pointed out that amendments are generally made at the Committee Stage in Parliament with regard to matters of an incidental or procedural nature. In any event, under Article 77(2) of the Constitution, where an amendment is proposed to a Bill in Parliament the Attorney General is required to communicate to the Speaker his opinion as regards the constitutionality of the Bill.
6. Counsel submitted that provisions in certain laws provide for imprisonment of any person for failing to fulfil a contractual obligation and this is contrary to Article 11 of the ICCPR. However, the Court took the view that such sanctions attach to statutory obligations and not to pure contractual obligations. Further, punishments are imposed in respect of judgment debts only where there has been fraud.
7. Counsel argued that Article 107 of the Constitution, which provides that a judge of the Supreme Court may be impeached before Parliament and where an inquiry must be held by a panel of Members of Parliament, erodes the independence of the judiciary. This independence must be assured in terms of Article 14 of the ICCPR. However, the Court held that such a provision does not of itself amount to an inconsistency with Article 14 of the ICCPR, which mandates equality before courts of law and provides for a fair and public hearing by competent, independent and impartial tribunals.
8. Counsel also submitted that there is no constitutional or statutory recognition of the right of self-determination as stated in Article 1.1 of the ICCPR. He also submitted that there should be statutory recognition of “internal self-determination.”

However, the Court agreed with the view of the Additional Solicitor General that “the right to self-determination does not require enforcement through legislative means, as established by the Human Right Committee. This position is fortified by the Declaration of Principles of International Law contained in the United Nations General Assembly – Resolution 2625(XV).” It further observed that,

[W]e have to note that in terms of Article 3 of the Constitution “in the Republic of Sri Lanka sovereignty is in the People and is inalienable”. Thus sovereignty is reposed in the People as a whole and it cannot be contended that any group or part of the totality of People should have a separate right to self-determination.

Therefore the Court, held,

- i) that the legislative measures referred to in the communication of His Excellency the President dated 4.3.2008 and the provisions of the Constitutions and of other law, including decisions of the Superior Courts of Sri Lanka, give adequate recognition to the civil and political rights contained in the International

Covenant on Civil and Political Rights, and adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights as contained in the Covenant; and

that the aforesaid rights recognised in the covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka.

NATIONAL LEGISLATION ON INTERNATIONAL LAW MATTERS

International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007

The Preamble to the Act states that it is an Act to give effect to certain articles in the ICCPR relating to human rights, which have not been given recognition through legislative measures and to provide for matters connected therewith or incidental thereto.

The Act deals with only five substantive issues as set out in Articles 2–6. These are as follows:

Section 2 states that every person shall have the right to recognition as a person before the law.

Section 3 provides that “no person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Every person who does so shall be guilty of an offence under this Act and shall, on conviction in the High Court be punished with rigorous imprisonment for a term not exceeding ten years.

Section 4 deals with those charged with criminal offences. It provides that such a person shall be afforded an opportunity of being tried in her presence, to defend herself in person or through legal assistance of her own choosing, and where she does not have such assistance, to be informed of her rights. Such a person also has the right to have free legal assistance where she is unable to pay, to examine witnesses and to obtain witnesses on her behalf, to have the assistance of an interpreter where such person cannot speak or understand the language in which the trial is being conducted and not to be compelled to testify against herself or to confess guilt.

Every person convicted of a criminal offence shall be entitled to an appeal to a higher court and further, shall not be tried for an offence of which she has already been convicted or acquitted.

Section 5 deals with the rights of a child. These include the right to have his birth registered and to have a name from his date of birth; acquire nationality; be protected from maltreatment, neglect, abuse or degradation; and have legal assistance at the expense of the State in criminal proceedings affecting such child if substantial injustice would otherwise result. Further, in all matters concerning children, whether undertaken by private or public entities, the best interest of the child shall be of paramount importance.

Section 6 states that every person shall have the right and the opportunity to take part in the conduct of public affairs and have access to services provided by the State to the public.

Section 7 deals with procedural matters. It provides that a person shall be entitled to apply to the High Court in respect of an infringement or imminent infringement by executive or administrative action, of any human right specified in sections 2, 4, 5 and 6 and plead for relief or redress. Such a person may invoke the jurisdiction of the High Court himself or through any other person within three months of the alleged infringement. However, the jurisdiction of the High Court shall not conflict with the fundamental rights jurisdiction of the Supreme Court as provided for in Chapter III or Chapter IV of the Constitution. The High Court may also refer such matter to the Human Rights Commission of Sri Lanka and call for an inquiry and report. The High Court shall have the power to grant the relief prayed for or grant any other relief which it deems just and equitable. A right of appeal lies to the Supreme Court against any order of the High Court in this regard.

Section 9 confers power on the Minister to make any regulations for the purpose of giving effect to the principles and provisions of the Act.

Chemical Weapons Convention Act No. 58 of 2007 (hereinafter "Act")

This is an Act to give effect to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (hereinafter "Convention"), which was signed on behalf of the Sri Lanka Government on 14 January 1993.

According to Part I of the act its provisions apply to any act or omission of any person within Sri Lanka and on board any aircraft or ship registered in Sri Lanka, or any citizen of Sri Lanka outside Sri Lanka.

Part II of the Act establishes the National Authority for Implementation of the Chemical Weapons Convention (hereinafter "Authority"). The Secretary to the Ministry in charge of Industries shall be the Chairperson of the Authority and is charged with the implementation of the Act. Any person qualified and experienced in work related to the Authority may be appointed as its Director.

The functions of the Authority are as follows: (a) to implement a regulatory regime within the scope of the Convention in respect of the toxic chemicals specified in Schedules I, II and III of the Act; (b) to seek advice or services of specialists and experts from within or outside Sri Lanka; (c) to fulfil, on behalf of the Government of Sri Lanka, the obligations undertaken via the Convention; and (d) to serve as the national focal point for effective liaison with the Organization for the Prohibition of Chemical Weapons (hereinafter "OPCW"), and other State Parties.

The powers of the Authority include, generally, to co-ordinate with other relevant government authorities with regard to administering a licensing and permit scheme for the regulation of toxic chemicals; monitoring compliance with the Act; investigations into the use of chemical weapons or riot control agents as methods of warfare; interacting with the OPCW; training, facilitating international exchange of information, and any other functions as may be prescribed.

The Authority may also appoint inspectors to carry out specific functions under the Act. Such Inspectors shall have the power to enter and search any premises or

facility, examine items within them including documents, equipment and material, take samples, question personnel on the site, and do any other act which is necessary to carry out an inspection. Such Inspectors may also seize and detain any substance which he/she may believe to be evidence of any offence committed under this Act.

Part III of the Act entitled "Prohibition and Regulation of Chemical Weapons and Toxic Chemicals" prohibits using, developing or producing, acquiring, stockpiling or retaining such weapons. This Part also prohibits any person from transferring, directly or indirectly, any chemical weapon to another person, engaging in any military preparation to use a chemical weapon, knowingly assisting, encouraging or inducing any prohibited activity or using any riot control agent as a method of warfare. These offences are punishable with imprisonment for a period not exceeding twenty years or a fine not exceeding one million rupees.

With regard to toxic chemicals, the Act prohibits persons from developing, producing, acquiring, retaining or using a toxic chemical or precursor listed in Schedule I of the Act outside the territories of States Parties. It further prohibits the transfer of such chemicals or precursors outside the territory of Sri Lanka except to another State Party. Part III also provides that no person shall produce, acquire, retain, transfer or use any toxic chemical or precursor listed in Schedule I without the permission of the Authority, and then too, only if such chemical or precursor is to be applied for research, medical, pharmaceutical or protective purposes. It is also prohibited to import into, and export from, Sri Lanka, any chemical or precursor listed in the three Schedules to the Act, except as may be approved by the Authority and in accordance with the Customs Ordinance.

Part IV of the Act relates to the registration of persons as users and producers of toxic chemicals or precursors, while Part V addresses inspection, search and forfeiture. Other provisions of note include those facilitating international inspection of premises, in respect of which any provision of Part VI to IX of the Verification Annex to the Convention is applicable; that are subject to an on-site challenge inspection referred to in paragraph 8 of Article IX of the Convention; or in respect of which an investigation under paragraph 9 of Article X of the Convention has been initiated.

PARTICIPATION IN MULTILATERAL TREATIES*

Editorial introduction

This section records the participation of Asian states in open multilateral law-making treaties which mostly aim at world-wide adherence. It updates the treaty sections of earlier Volumes until 31 December 2008. New data are preceded by a reference to the most recent previous entry in the multilateral treaties section of the *Asian Yearbook of International Law*. In case no new data are available, the title of the treaty is listed with a reference to the last Volume containing data on the treaty involved. For the purpose of this section, states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.

Note:

- Where no other reference to specific sources is made, data have been derived from *Multilateral Treaties Deposited with the Secretary-General*, <http://treaties.un.org>, available as at 7 December 2009
- Where reference is made to the Hague Conference on Private International Law, data have been derived from http://www.hcch.net/index_en.php?act=conventions.listing
- Where reference is made to the International Atomic Energy Agency (IAEA), data have been derived from <http://ola.iaea.org/OLA/treaties/index.asp>
- Where reference is made to the International Civil Aviation Organization (ICAO), data have been derived from <http://www.icao.int/icao/en/leb/treaty.htm>
- Where reference is made to the International Labour Organization (ILO), data have been derived from <http://www.ilo.org/ilolex/english/convdisp1.htm>
- Where reference is made to the International Maritime Organization (IMO), data have been derived from *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary General Performs Depositary or other Functions*, as at 15 December 2009, available through <http://www.imo.org>

* Compiled by Dr Karin Arts, Professor of International Law and Development at the International Institute of Social Studies of Erasmus University Rotterdam (ISS), based in The Hague, The Netherlands.

- Where reference is made to the Hague Conference on Private International Law, data have been derived from http://www.hcch.net/index_en.php?act=conventions_listing
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data have been derived from http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=471.html
- Reservations and declarations made upon signature or ratification are not included
- Sig. = Signature; Cons. = Consent to be bound; Eff. date = Effective date; E.i.f. = Entry into force; Rat. = Ratification; Min. age spec. = Minimum age specified.

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Antarctica	International trade
Commercial arbitration	Judicial and administrative cooperation
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ANTARCTICA

Antarctic Treaty, Washington, 1959: *see* Vol. 6 p. 234.

COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958: *see* Vol. 12 p. 234.

CULTURAL MATTERS

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 1948: *see* Vol. 7 pp. 322–323.

Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950: *see* Vol. 12 p. 234.

Convention concerning the International Exchange of Publications, 1958: *see* Vol. 6 p. 235.

Convention concerning the Exchange of Official Publications and Government Documents between States, 1958: *see* Vol. 6 p. 235.

International Agreement for the Establishment of the University for Peace, 1980: *see* Vol. 6 p. 235.

**Regional Convention on the Recognition of Studies, Diplomas and Degrees
in Higher Education in Asia and the Pacific, 1983**

(Continued from Vol. 11 p. 244)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		30 January 2008

CULTURAL PROPERTY

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954: *see* Vol. 13 p. 263.

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954: *see* Vol. 13 p. 263.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970: *see* Vol. 12 p. 235.

Convention concerning the Protection of the World Cultural and Natural Heritage, 1972: *see* Vol. 10 p. 267.

Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1999: *see* Vol. 13 p. 263.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005: *see* Vol. 13 p. 264.

**Convention for the Safeguarding of the Intangible Cultural
Heritage, 2003**

(Continued from Vol. 13 p. 264)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (DPR)		21 Nov 2008
Papua New Guinea		12 Sep 2008
Sri Lanka		21 Apr 2008
Uzbekistan		29 Jan 2008

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre, 1982: *see* Vol. 7 pp. 323–324.
 Agreement to Establish the South Centre, 1994: *see* Vol. 7 p. 324.
 Amendments to the Charter of the Asian and Pacific Development Centre, 1998:
see Vol. 10 p. 267.

DISPUTE SETTLEMENT

Convention on the Settlement of Investment Disputes between States and Nationals
 of Other States, 1965: *see* Vol. 11 p. 245.

**Declarations Recognizing as Compulsory the Jurisdiction of the
 International Court of Justice under Article 36, paragraph 2,
 of the Statute of the Court:**
 (Corrected from Vol. 13 p. 264)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan		15 Sep 2008

ENVIRONMENT, FAUNA AND FLORA

International Convention for the Prevention of Pollution of the Sea by Oil, as
 amended, 1954: *see* Vol. 6 p. 238.
 International Convention Relating to Intervention on the High Seas in Cases of
 Oil Pollution Casualties, 1969: *see* Vol. 9 p. 284.
 International Convention on Civil Liability for Oil Pollution Damage, 1969: *see*
 Vol. 12 p. 236.
 International Convention on the Establishment of an International Fund for
 Compensation for Oil Pollution Damage, 1971: *see* Vol. 12 p. 237.
 Convention on Wetlands of International Importance especially as Waterfowl
 Habitat, 1971: *see* Vol. 13 p. 265.
 Convention on the Prevention of Marine Pollution by Dumping of Wastes and
 Other Matter, 1972, as amended: *see* Vol. 7 p. 325.
 Protocol Relating to Intervention on the High Seas in Cases of Pollution by
 Substances Other Than Oil, 1973: *see* Vol. 6 p. 239.
 Protocol to the 1969 International Convention on Civil Liability for Oil Pollution
 Damage, 1976: *see* Vol. 10 p. 269.
 Protocol Relating to the 1973 International Convention for the Prevention of
 Pollution from Ships 1978, as amended: *see* Vol. 13 p. 265.
 Protocol to amend the 1971 Convention on Wetlands of International Importance
 especially as Waterfowl Habitat, 1982: *see* Vol. 13 p. 265.
 Convention for the Protection of the Ozone Layer, 1985: *see* Vol. 11 p. 246.
 Protocol on Substances that Deplete the Ozone Layer, 1987: *see* Vol. 11 p. 246.
 Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of Inter-
 national Importance especially as Waterfowl Habitat, 1987: *see* Vol. 13 p. 266.

International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990: *see* Vol. 12 p. 237.

Amendment to the Montreal Protocol, 1990: *see* Vol. 13 p. 266.

Framework Convention on Climate Change, 1992: *see* Vol. 13 p. 266.

UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994: *see* Vol. 11 p. 247.

Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995: *see* Vol. 12 p. 238.

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998: *see* Vol. 13 p. 267.

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989
(Continued from Vol. 11 p. 247)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Korea (DPR)		10 Jul 2008

Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1992
(Continued from Vol. 13 p. 266)
(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Mongolia	8 Aug 2008	24 Oct 2008

Convention on Biological Diversity, 1992
(Continued from Vol. 12 p. 247)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Brunei		28 Apr 2008

Amendment to the Montreal Protocol, 1992
(Continued from Vol. 13 p. 266)

<i>State</i>	<i>Cons.</i>
Turkmenistan	28 Mar 2008

Protocol to the Framework Convention on Climate Change, 1997
(Continued from Vol. 12 p. 238)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Tajikistan		29 Dec 2008
Timor-Leste		14 Oct 2008

Amendment to the Montreal Protocol, 1997
(Continued from Vol. 13 p. 266)

<i>State</i>	<i>Cons.</i>
Turkmenistan	28 Mar 2008

Amendment to the Montreal Protocol, 1999
(Continued from Vol. 13 p. 266)

<i>State</i>	<i>Cons.</i>
Mongolia	24 Jun 2008
Turkmenistan	21 Aug 2008

**Cartagena Protocol on Biosafety to the Convention on
Biological Diversity, 2000**
(Continued from Vol. 13 p. 267)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		8 Sep 2008
Myanmar	11 May 2001	13 Feb 2008
Turkmenistan		21 Aug 2008

Stockholm Convention on Persistent Organic Pollutants, 2001
(Continued from Vol. 13 pp. 267)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	6 Dec 2001	17 Apr 2008

FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956: *see* Vol. 11 p. 249.

Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: *see* Vol.6 p. 244.

Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions, 1961: *see* Vol. 7 p. 327.

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962: *see* Vol. 8 p. 178.

Convention on the Law Applicable to Maintenance Obligations, 1973: *see* Vol. 6 p. 244.

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993: *see* Vol. 13 p. 267.

FINANCE

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 7 p. 327.
 Convention Establishing the Multilateral Investment Guarantee Agency, 1988: *see* Vol. 12 p. 240.

HEALTH

Protocol Concerning the Office International d'Hygiène Publique, 1946: *see* Vol. 6 p. 245.
 World Health Organization Framework Convention on Tobacco Control, 2003: *see* Vol. 13 p. 268.

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

Convention on the Political Rights of Women, 1953: *see* Vol. 10 p. 273.
 Convention on the Nationality of Married Women, 1957: *see* Vol. 10 p. 274.
 Convention against Discrimination in Education, 1960: *see* Vol. 7 p. 328.
 International Convention on the Elimination of All Forms of Racial Discrimination, 1966: *see* Vol. 8 p. 179.
 Convention on the Elimination of All Forms of Discrimination against Women, 1979: *see* Vol. 11 p. 250.
 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: *see* Vol. 13 p. 269.
 International Convention against Apartheid in Sports, 1985: *see* Vol. 6 p. 248.
 Convention on the Rights of the Child, 1989: *see* Vol. 11 p. 251.
 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990: *see* Vol. 11 p. 251.
 Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1992, *see* Vol. 12 p. 242.
 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999: *see* Vol. 13 p. 269.

International Covenant on Civil and Political Rights, 1966

(Continued from Vol. 12 p. 242)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Papua New Guinea		21 Jul 2008

International Covenant on Economic, Social and Cultural Rights, 1966

(Continued from Vol. 13 p. 268)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	3 Nov 2004	17 Apr 2008
Papua New Guinea		21 Jul 2008

Optional Protocol to the International Covenant on Civil and Political Rights, 1966

(Corrected from Vol. 13 p. 269)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan	25 Sep 2007	

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty

New York, 15 December 1989

Entry into Force: 11 July 1991

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Nepal		4 Mar 1998
Philippines	20 Sep 2006	20 Nov 2007
Timor-Leste		18 Sep 2003
Turkmenistan		11 Jan 2000
Uzbekistan		23 Dec 2008

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000

(Continued from Vol. 13 p. 269)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China	15 Mar 2001	20 Feb 2008
Singapore	7 Sep 2000	11 Dec 2008
Uzbekistan		23 Dec 2008

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000

(Continued from Vol. 13 p. 269)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Uzbekistan		23 Dec 2008

Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002

(Continued from Vol. 13 p. 269)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan	25 Sep 2007	22 Oct 2008
Kyrgyzstan		29 Dec 2008

Convention on the Rights of Persons with Disabilities

Entry into Force: 3 May 2008
(Continued from Vol. 13 p. 270)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China	30 Mar 2007	1 Aug 2008
Korea (Rep.)	30 Mar 2007	11 Dec 2008
Laos	15 Jan 2008	
Malaysia	8 Apr 2008	
Nepal	3 Jan 2008	
Pakistan	25 Sep 2008	
Philippines	25 Sep 2007	15 Apr 2008
Thailand	30 Mar 2007	29 Jul 2008
Turkmenistan		4 Sep 2008

**Optional Protocol to the Convention on the Rights of
Persons with Disabilities**

Entry into Force: 3 May 2008
(Continued from Vol. 13 p. 270)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh		12 May 2008
Kazakhstan	11 Dec 2008	
Nepal	3 Jan 2008	

**International Convention for the Protection of All Persons from
Enforced Disappearance**

Entry into Force: not yet
(Continued from Vol. 13 p. 270)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Laos	29 Sep 2008	

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I–IV, 1949: *see* Vol. 11 p. 252.

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977: *see* Vol. 12 p. 243.

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977: *see* Vol. 12 p. 244.

INTELLECTUAL PROPERTY

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979: *see* Vol. 12 p. 244.

Madrid Union Concerning the International Registration of Marks, including the Madrid Agreement 1891 as amended in 1979, and the Madrid Protocol 1989: *see* Vol. 12 p. 244.

Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.

Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as amended in 1979: *see* Vol. 13 p. 271.

Convention Establishing the World Intellectual Property Organization, 1967: *see* Vol. 12 p. 245.

Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001: *see* Vol. 12 p. 245.

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 12 p. 245.

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.

Convention for the Protection of Industrial Property, 1883 as amended 1979
(Continued from Vol. 11 p. 253)

(Status as included in WIPO doc. 423(E) of 15 Oct 2009)

<i>State</i>	<i>Party</i>	<i>Latest Act to which State is party</i>
Thailand	2 Aug 2008	Stockholm

**International Convention for the Protection of Performers, Producers of
Phonograms and Broadcasting Organizations, 1961**

(Continued from Vol. 12 p. 245)

(Status as included in WIPO doc. 423(E) of 15 Oct 2009)

<i>State</i>	<i>Cons. (deposit)</i>
Tajikistan	19 Mar 2008
Vietnam	1 Mar 2007

WIPO Copyright Treaty
Geneva, 1996

(Status as included in WIPO doc. 423(E) of 15 Oct 2009)

<i>State</i>	<i>Party</i>
China	9 Jun 2007
Indonesia	6 Mar 2002
Japan	6 Mar 2002
Kazakhstan	12 Nov 2004
Korea (Rep.)	24 Jun 2004
Kyrgyzstan	6 Mar 2002
Mongolia	25 Oct 2002
Philippines	4 Oct 2002
Singapore	17 Apr 2005

INTERNATIONAL CRIMES

Slavery Convention, 1926 as amended in 1953: *see* Vol. 7 p. 331.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948: *see* Vol. 8 p. 182.

Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: *see* Vol. 9 p. 289.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 6 p. 254.

Convention for the Suppression of Unlawful Seizure of Aircraft, 1970: *see* Vol. 8 p. 289.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: *see* Vol. 8 p. 290.

International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: *see* Vol. 7 p. 331.

International Convention Against the Taking of Hostages, 1979: *see* Vol. 13 p. 272.

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol. 13 p. 272.

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, *see* Vol. 12 p. 247.

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988, *see* Vol. 12 p. 247.

International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: *see* Vol. 11 p. 254.

Convention on the Safety of United Nations and Associated Personnel, 1994: *see* Vol. 11 p. 255.

Statute of the International Criminal Court, 1998: *see* Vol. 13 p. 273.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956

(Continued from Vol. 7 p. 331)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		1 May 2008

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973

(Continued from Vol. 13 p. 272)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Singapore		2 May 2008

Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991

(Continued from Vol. 13 p. 272)

(Status as provided by the ICAO Secretariat)

<i>State</i>	<i>Sig.</i>	<i>Eff. Date.</i>
Malaysia	27 Nov 2007	26 Jan 2008

International Convention for the Suppression of Terrorist Bombings, 1997

(Corrected from Vol. 13 p. 272)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Singapore		31 Dec 2007

International Convention for the Suppression of the Financing of Terrorism, 1999

(Continued from Vol. 13 p. 273)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Laos		29 Sep 2008

United Nations Convention Against Transnational Organized Crime, 2000

(Continued from Vol. 13 p. 273)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Brunei		25 Mar 2008
Kazakhstan	13 Dec 2000	31 Jul 2008
Mongolia		27 Jun 2008

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime

New York, 15 November 2000

Entry into Force: 25 December 2003

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Cambodia	11 Nov 2001	2 Jul 2007
India	12 Dec 2002	
Indonesia	12 Dec 2000	
Japan	9 Dec 2002	
Kazakhstan		31 Jul 2008
Korea (Rep.)	13 Dec 2000	
Kyrgyzstan	13 Dec 2000	2 Oct 2003
Laos		26 Sep 2003
Mongolia		27 Jun 2008
Myanmar		30 Mar 2004
Philippines	14 Dec 2000	28 May 2002
Sri Lanka	13 Dec 2000	
Tajikistan		8 Jul 2002
Thailand	18 Dec 2001	
Turkmenistan		28 Mar 2005
Uzbekistan	28 Jun 2001	12 Aug 2008

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime

New York, 15 November 2000

Entry into Force: 28 January 2004

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Cambodia	11 Nov 2001	12 Dec 2005
India	12 Dec 2002	
Indonesia	12 Dec 2000	
Japan	9 Dec 2002	
Kazakhstan		31 Jul 2008
Korea (Rep.)	13 Dec 2000	
Kyrgyzstan	13 Dec 2000	2 Oct 2003
Laos		26 Sep 2003
Mongolia		27 Jun 2008
Myanmar		30 Mar 2004
Philippines	14 Dec 2000	28 May 2002
Sri Lanka	13 Dec 2000	
Tajikistan		8 Jul 2002
Thailand	18 Dec 2001	
Turkmenistan		28 Mar 2005
Uzbekistan	28 Jun 2001	

**Protocol against the Illicit Manufacturing of and Trafficking in Firearms,
Their Parts and Components and Ammunition, supplementing the United
Nations Convention Against Transnational Organized Crime**

New York, 31 May 2001

Entry into Force: 3 July 2001

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Cambodia		12 Dec 2005
India	12 Dec 2002	
Japan	9 Dec 2002	
Kazakhstan		31 Jul 2008
Korea (Rep.)	4 Oct 2001	
Laos		26 Sep 2003
Mongolia		27 Jun 2008
Turkmenistan		28 Mar 2005
Uzbekistan	28 Jun 2001	

United Nations Convention Against Corruption, 2003

(Continued from Vol. 13 p. 273)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Brunei	11 Dec 2003	2 Dec 2008
Kazakhstan		18 Jun 2008
Korea (Rep.)	10 Dec 2003	27 Mar 2008
Malaysia	9 Dec 2003	24 Sep 2008
Uzbekistan		29 Jul 2008

International Convention for the Suppression of Acts of Nuclear Terrorism

New York, 13 April 2005

Entry into Force: 7 Jul 2007

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Bangladesh		7 Jun 2007
Cambodia	7 Dec 2006	
China	14 Sep 2005	
India	24 Jul 2006	1 Dec 2006
Japan	15 Sep 2005	3 Aug 2007
Kazakhstan	16 Sep 2005	31 Jul 2008
Korea (Rep.)	16 Sep 2005	
Kyrgyzstan	5 May 2006	2 Oct 2007
Malaysia	16 Sep 2005	
Malaysia	16 Sep 2005	
Mongolia	3 Nov 2005	6 Oct 2006
Philippines	15 Sep 2005	
Singapore	1 Dec 2006	
Sri Lanka	14 Sep 2005	27 Sep 2007
Tajikistan	14 Sep 2005	
Thailand	14 Sep 2005	
Timor-Leste	16 Sep 2005	
Turkmenistan		28 May 2008
Uzbekistan		29 Apr 2008

INTERNATIONAL REPRESENTATION

(*see also*: Privileges and Immunities)

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975: *see* Vol. 6 p. 257.

INTERNATIONAL TRADE

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 6 p. 257.

Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 6 p. 257.

UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.

UN Convention on Contracts for the International Sale of Goods, 1980
(Continued from Vol. 11 p. 256)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan		1 Jul 2008

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention on Civil Procedure, 1954: *see* Vol. 6 p. 258.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: *see* Vol. 12 p. 249.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: *see* Vol. 9 p. 291.

**Convention on the Taking of Evidence Abroad in Civil or
Commercial Matters, 1970**
(Corrected from Vol. 13 p. 274)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
India		7 Feb 2007

LABOUR

Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 12 p. 249.

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): *see* Vol. 9 p. 292.

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 10 p. 280.

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): *see* Vol. 12 p. 250.

Employment Policy Convention, 1964 (ILO Conv. 122): *see* Vol. 8 p. 186.

Minimum Age Convention, 1973 (ILO Conv. 138): *see* Vol. 11 p. 257.

Equal Remuneration Convention, 1951 (ILO Conv. 100)

(Continued from Vol. 10 p. 281)

(Status as provided by the ILO)

State *Ratified, registered*

Laos 13 Jun 2008

Discrimination (Employment and Occupation) Convention, 1958**(ILO Conv. 111)**

(Continued from Vol. 12 p. 250)

(Status as provided by the ILO)

State *Ratified, registered*

Laos 13 Jun 2008

Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182)

(Continued from Vol. 11 p. 257)

(Status as provided by the ILO)

State *Ratified, registered*

Brunei 9 Jun 2008

Uzbekistan 24 Jun 2008

NARCOTIC DRUGS

Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: *see* Vol. 6 p. 261.

Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: *see* Vol. 6 p. 261.

International Opium Convention, 1925, amended by Protocol 1946: *see* Vol. 7 p. 334.

Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.

Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the Protocol of 1946: *see* Vol. 6 p. 262.

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 6 p. 262.

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: *see* Vol. 6 p. 262.

Single Convention on Narcotic Drugs, 1961: *see* Vol. 13 p. 276.

Convention on Psychotropic Substances, 1971: *see* Vol. 13 p. 276.

Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972: *see* Vol. 12 p. 251.

Protocol amending the Single Convention on Narcotic Drugs, 1972: *see* Vol. 11 p. 257.

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988: *see* Vol. 13 p. 276.

NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 6 p. 264.

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: *see* Vol. 6 p. 265.

Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: *see* Vol. 8 p. 187.

NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 6 p. 265.

Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol. 12 p. 252.

Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1980: *see* Vol. 6 p. 265.

Convention on Early Notification of a Nuclear Accident, 1986: *see* Vol. 9 p. 295.

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 9 p. 295.

Convention on Nuclear Safety, 1994: *see* Vol. 12 p. 252.

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997: *see* Vol. 13 p. 276.

Protocol to amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 8 p. 188.

Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 8 p. 189.

Amendment to the 1980 Convention on the Physical Protection of Nuclear Material

Vienna, 8 July 2005

Not yet in Force

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
India		19 Sep 2007
Turkmenistan		22 Sep 2005

OUTER SPACE

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967: *see* Vol. 6 p. 266.

Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: *see* Vol. 10 p. 284.

Convention on Registration of Objects launched into Outer Space, 1974: *see* Vol. 10 p. 284.

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.

Vienna Convention on Diplomatic Relations, 1961: *see* Vol. 13 p. 277.

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol. 6 p. 269.

Vienna Convention on Consular Relations, 1963: *see* Vol. 13 p. 278.

Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963: *see* Vol. 6 p. 269.

Convention on Special Missions, 1969: *see* Vol. 6 p. 269.

Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, 1969: *see* Vol. 6 p. 269.

Convention on the Privileges and Immunities of the United Nations, 1946

(Corrected from Vol. 13 p. 277)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Turkmenistan		23 Nov 2007

United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004

(Corrected from Vol. 13 p. 277)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
India	12 Jan 2007	
Japan	11 Jan 2007	

REFUGEES

Convention relating to the Status of Refugees, 1951: *see* Vol. 12 p. 254.

Protocol relating to the Status of Refugees, 1967: *see* Vol. 12 p. 254.

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968: *see* Vol. 12 p. 254.

Convention on Road Signs and Signals, 1968: *see* Vol. 7 p. 338.

SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.

Convention on the High Seas, 1958: *see* Vol. 7 p. 339.

Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.

Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.

Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.

United Nations Convention on the Law of the Sea, 1982: *see* Vol. 10 p. 285.

Agreement relating to the Implementation of Part XI of the United Nations

Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 12 p. 255.

**Agreement for the Implementation of the Provisions of the United Nations
Convention on the Law of the Sea (. . .) relating to the Conservation
and Management of Straddling Fish Stocks and Highly Migratory
Fish Stocks, 1995**

(Continued from Vol. 12 p. 255)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (Rep.)	26 Nov 1996	1 Feb 2008

SEA TRAFFIC AND TRANSPORT

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 6 p. 273.

International Convention for the Safety of Life at Sea, 1960: *see* Vol. 6 p. 273.

Convention on Facilitation of International Maritime Traffic, 1965 as amended: *see* Vol. 12 p. 255.

International Convention on Load Lines, 1966: *see* Vol. 12 p. 256.

International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 6 p. 274.

Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.

Convention on the International Regulations for Preventing Collisions at Sea, 1972 as amended: *see* Vol. 10 p. 286.

International Convention for Safe Containers, as amended 1972: *see* Vol. 10 p. 286.

Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.

International Convention for the Safety of Life at Sea, 1974, as amended: *see* Vol. 6 p. 286.

Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.
 Protocol Relating to the International Convention for the Safety of Life at Sea, 1974
 as amended 1978: *see* Vol. 12 p. 256.
 UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 6 p. 276.
 Protocol Relating to the International Convention on Load Lines, 1988: *see* Vol. 12
 p. 256.

**Protocol Relating to the International Convention for the
 Safety of Life at Sea**

London, 11 November 1988
 Entry into Force: 3 February 2000
 (Status as provided by IMO)

<i>State</i>	<i>Cons (dep.)</i>	<i>E.i.f.</i>
Bangladesh	18 Dec 2002	18 Mar 2003
Cambodia	8 Jun 2001	8 Sep 2001
China	3 Feb 1995	23 Feb 2000
Korea (DPR)	8 Aug 2001	8 Nov 2001
Korea (Rep.)	14 Nov 10994	3 Feb 2000
India	22 Aug 2000	22 Nov 2000
Japan	24 Jun 1997	3 Feb 2000
Maldives	20 May 2005	20 August 2005
Mongolia	19 Sep 2007	19 Dec 2007
Pakistan	6 December 2001	6 Mar 2002
Singapore	18 Aug 1999	3 Feb 2000
Vietnam	27 May 2002	27 Aug 2002

SOCIAL MATTERS

International Agreement for the Suppression of the White Slave Traffic, 1904,
 amended by Protocol 1949: *see* Vol. 6 p. 278.
 International Convention for the Suppression of the White Slave Traffic, 1910,
 amended by Protocol 1949: *see* Vol. 6 p. 278.
 Agreement for the Suppression of the Circulation of Obscene Publications,
 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.
 International Convention for the Suppression of the Traffic in Women and Children,
 1921: *see* Vol. 6 p. 277.
 Convention for the Suppression of the Traffic in Women and Children, 1921,
 amended by Protocol in 1947: *see* Vol. 6 p. 277.
 International Convention for the Suppression of the Circulation of and Traffic in
 Obscene Publications, 1923: *see* Vol. 6 p. 277.
 Convention for the Suppression of the Circulation of, and Traffic in, Obscene
 Publications, 1923, amended by Protocol in 1947: *see* Vol. 6 p. 277.
 International Convention for the Suppression of the Traffic in Women of Full Age,
 1933: *see* Vol. 6 p. 277.
 Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended
 by Protocol, 1947: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.

Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.

TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 13 p. 280.

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended): *see* Vol. 8 p. 193.

Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 8 p. 193.

Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: *see* Vol. 9 p. 298.

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.

Amendments to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1999: *see* Vol. 10 p. 288.

Amendments to the Constitution of the Asia-Pacific Telecommunity, 2002: *see* Vol. 13 p. 280.

Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations

Tampere, 18 June 1998

Entry into Force: 8 January 2005

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
India	29 Nov 1999	29 Nov 1999
Mongolia	18 Jun 1998	
Nepal	23 Apr 1999	
Sri Lanka	5 Aug 1999	13 Oct 1999
Tajikistan	18 Jun 1998	
Uzbekistan	6 Oct 1998	

TREATIES

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 6 p. 280.

Vienna Convention on the Law of Treaties, 1969: *see* Vol. 12 p. 258.

WEAPONS

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: *see* Vol. 6 p. 281.

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: *see* Vol. 6 p. 281.

Treaty on the Non-Proliferation of Nuclear Weapons, 1968: *see* Vol. 11 p. 262.

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: *see* Vol. 6 p. 282.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: *see* Vol. 13 p. 281.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 12 p. 258.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: *see* Vol. 11 p. 263.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993: *see* Vol. 12 p. 259.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997: *see* Vol. 13 p. 281.

Amendment of Article 1 of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 2001: *see* Vol. 12 p. 259.

Comprehensive Nuclear Test Ban Treaty, 1996

(Continued from Vol. 12 p. 259)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Malaysia	23 Jul 1998	17 Jan 2008
Timor Leste	26 Sep 2008	

Convention on Cluster Munitions

Dublin, 30 May 2008

Entry into Force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	3 Dec 2008	
Japan	3 Dec 2008	
Laos	3 Dec 2008	
Philippines	3 Dec 2008	

**AGORA: IS THERE AN ASIAN APPROACH TO
INTERNATIONAL LAW?**

IS THERE AN ASIAN APPROACH TO INTERNATIONAL LAW? QUESTIONS, THESES AND REFLECTIONS*

B. S. Chimni

INTRODUCTION: QUESTIONS AND (HYPO)THESES

The creation of the Asian Society of International Law (AsianSIL) in 2007 is, among other things, a reflection of the growing role of and interest in international law in the region, albeit the Foundation for the Development of International Law in Asia (DILA, established in 1989) and national societies of international law (for example in India, Japan, Korea and Philippines) have existed in the region for decades.¹ The launch of new journals and the growing scholarship in international law in the region also manifest this trend.² ASIL is also in many ways an institutional expression of the increasing influence of the Asian region, in particular the emerging economies of China and India, in international relations and in the international law-making process. The general trend of regionalization of international relations has also contributed to the felt need for an ASIL. In the backdrop of growing interest in international law in the Asian region this comment explores the theme of a distinctive Asian approach to international law over and beyond a third world approach to international law (TWAIL) that has now been articulated for over six decades. The three consistent themes of TWAIL, rooted in the lived experiences of the third world peoples, are anti-imperialism, the demand for the greater

* This is a revised version of a paper written for the Second Biennial Conference of the Asian Society of International Law held in Tokyo from 1–2 August, 2009.

¹ The aims and purposes of DILA are: promotion of the study and analysis of topics and issues in the field of international law, in particular from an Asian perspective; promotion of the study of, and the dissemination of knowledge of, international law in Asia; and promotion of contacts and cooperation between persons and institutions actively dealing with questions of international law relating to Asia. DILA publishes the *Asian Yearbook of International Law*. See <http://dilafoundation.org/dilas-constitution>.

² The new journals include the *Chinese Journal of International Law* and *Journal of East Asia and International Law*. The AsianSIL has already taken the decision to start an Asian Journal of International Law. Other journals such as the *Asian Yearbook of International Law*, *Japanese Yearbook of International Law*, *Indian Journal of International Law*, *Singapore Journal of International and Comparative Law*, *Philippine Journal of International Law* have existed for some time.

democratization of international relations, and the creation of a truly universal international law.³

To determine and explore the meaning and implications of a distinctive Asian approach to international law the following questions among others need to be raised:

- What is the meaning of “civilization”? Does the idea of a civilizational approach to international law offer a conceptualization that is helpful?
- Given the enormous diversity of the Asian region, can a coherent Asian approach to international law be articulated?
- What are the distinctive elements of Asian cosmologies, epistemologies and ontologies? What features of Asian civilization can enrich the structure and process of international law?
- What has been the historical contribution of Asian States to the evolution and development of international law?
- Assuming an Asian civilizational approach to international law, on what basis should a transcivilizational dialogue between Asian civilizations and other civilizations proceed?

In order to facilitate a response to these questions the following theses are advanced:

- Both an essentialist cultural/civilizational explanation and a crude materialist understanding of an Asian approach to international law need to be rejected.⁴
- There are no pure western or non-western ideas, cultures and civilizations. The “Asian Civilization” or rather “Asian Civilizations”, like all other civilizations, is a complex configuration of diverse and multiple cultures and innumerable interpretations of it.
- There are cultural features that have greater salience in some civilizations than in others (for example, the principle of non-violence in Indian civilization). Any departure from it in practice is not necessarily a negation of its presence.
- The relationship of Asian cultural/civilizational values to foreign policies of Asian States is mediated by deep global structures including the sovereign state system. These structures define the limits to a cultural/civilizational approach to international law.

³ For a summary discussion of six decades of TWAIL scholarship see Chimni, B.S., “Towards a radical Third World approach to contemporary international law”, 5 *ICCLP Review* (2002) at 16–30; Chimni, B.S. and Anghie, A. “Third World approaches to international law and individual responsibility in internal conflicts” 2 *Chinese Journal of International Law* (2005) at 77–105.

⁴ The meaning of the term “civilization” in *The New Oxford Dictionary of English* is given as “the society, culture, and way of life of a particular area”, and of “culture” as “the customs, arts, social institutions of a particular nation, people, or other social group” and “the attitudes and behaviour characteristic of a particular social group”. It is not easy to distinguish between the two concepts. These are often used interchangeably. More significantly, both are essentially contested concepts to which a range of meanings can be attached.

- The place, meaning and salience of law differ in each civilization. Each civilization has thus its own legal culture. It colors the manner in which it approaches international law and institutions and their significance as a solution to global problems.
- An Asian approach to international law must distinguish between the civilizational values embedded in the life, world and struggles of Asian peoples and the practices of Asian States.
- The civilizational values of Asian peoples may include non-western approaches to knowledge and ways of living that can inform and illuminate not only an Asian perspective on international law but along with the interpretations and practices of other civilizations transform contemporary international law into a truly multicivilizational law.
- Only the simultaneous critique of “western” ideas and concepts, and their enrichment through non-western practices, can help produce transcultural universal categories of international law.
- The dialogue between civilizations must take place on the basis of equality, mutual understanding and open-endedness to realize the goals of global justice. The principles that constitute the idea of global justice, and need to be respected, are the principles of recognition, representation and distributive justice.
- The principle of recognition demands that the contribution of Asian States and civilizations to the evolution and growth of international law doctrines and rules be recognized; the principle of representation anticipates that the idea and practices of alternative modernities are paid due attention in the international law-making and implementation process; and the principle of distributive justice requires that Asian peoples receive a fair share of the global resources.
- In so far as developing countries in the Asian region are concerned the core features of their approach to international law is articulated by TWAIL.

In what follows there is a general discussion of the basis for advancing these theses; each individual thesis is, however, not the subject of separate reflection. Further, given my greater familiarity with it, the principal references are to the Indian civilization.

ASIA, CIVILIZATION, AND ASIAN CIVILIZATION

Asia as a region

The Asian region has been described as “a mosaic of divergent cultures and political regime types, historical estrangements, shifting power balances, and rapid economic change”.⁵ The countries in the region have historically had extensive relations with

⁵ Ikkenberry, G.J. and Mastanduno, M., “Introduction: International relations theory and the search for regional stability” in Ikkenberry, G.J. and Mastanduno, M. (eds.), *International Relations Theory and the Asia-Pacific* New York: Columbia University Press, 2003, 1–23 at 2.

each other, facilitated by the fact that “Asia was more stable than Europe in the period 1300–1900”.⁶ Asian countries are not only united by centuries of cultural and economic exchange but also by their colonial experience. Speaking at the Asian Relations Conference held in New Delhi in March 1947, five months before the independence of India, Nehru noted how “this mighty continent” had become “just a field for the rival imperialisms of Europe”, making Asian countries mere “petitioners in Western courts and chancelleries”.⁷

The story of western dominance over Asia can be traced back to the arrival of Vasco da Gama at the port of Calicut in India in 1498. According to the historian Pannikar, “the changes it directly brought about and the forces it generated in the countries of Asia in contact with Europe . . . and subjected to Western domination for over a century, have effected a transformation which touches practically every aspect of life in these countries”.⁸ The western impact was, in other words, pervasive, influencing social, political and cultural practices and institutions in Asian countries. On the other hand, colonialism led to “the isolation of countries of Asia from one another”.⁹ Therefore, even before gaining independence, leaders of freedom movements in Asia expressed the need to end the lack of sustained engagement and rebuild a “new Asia of our dreams”.¹⁰

The attempts at Pan-Asianism began in the first half of the twentieth century. Leaders such as Nehru and Sun Yat-Sen sought unity of Asian peoples to end the reign of imperialism in the region. Thus, for example, “at the two Pan-Asian People’s conferences in Nagasaki (1926) and Shanghai (1927), the delegates from China held fast to the progressive notion of Pan-Asianism by demanding that the Japanese government abrogate its imperial pretensions”.¹¹ Pan-Asianism in the post-colonial era has been propelled by the need to safeguard the independence and freedom of newly independent states. The Asian (and African) States that attended the landmark Bandung Conference in 1955 were in a fundamental way united by their common colonial history.¹² Thus the unity of the people of Asia “came from a political position against colonialism and imperialism, [and] not from any intrinsic cultural or racial commonalities”.¹³ The Bandung States were, however, conscious that if the objective of building a new Asia (and Africa) was to be achieved there was a need to understand each other better. Therefore the Bandung Communiqué directed the countries toward “the acquisition of knowledge of each other’s country, mutual

⁶ *Ibid.*, at 169.

⁷ Nehru, J., *India’s Foreign Policy*, New Delhi: Government of India, 1961, at 248 and 251.

⁸ Pannikar, K. M., *Asia and Western Dominance*, London: George Allen & Unwin Ltd, 1959 at 313.

⁹ Nehru, *op. cit.*, n. 7, at 250.

¹⁰ *Ibid.*, at 253.

¹¹ Prashad, V., *The Darker Nations: A People’s History of the Third World*, New York: The New Press, 2007 at 27.

¹² *Ibid.*, at 33.

¹³ *Ibid.*, at 34.

cultural exchange, and exchange of information”.¹⁴ The subsequent creation of regional organizations (ASEAN, SAARC etc.) is *inter alia* the result of the process of greater cultural exchange between Asian countries.

What is “civilization”?

These reflections on the Asian region raise the question of to what extent cultural/civilizational factors influence the approach of Asian peoples, states and scholars to international law. It is, however, important at first to clarify the meaning of “civilization”.

Dallmayr, drawing on the work of the German thinker Gadamer, marks out three significant features of the idea of “civilization”. First, as “a result of historical sedimentations, ‘civilization’ is an intricate, multi-layered fabric composed of different, often tensional layers or strands; moreover, every layer in that fabric is subject to multiple interpretations or readings, and so is the inter-relation of historical strands”.¹⁵ Second, “reflecting diverse historical trajectories, different civilizations manage their own complexity and multiplicity in different ways – prompting them to resort to differentiated cosmologies, ontologies, and epistemologies”.¹⁶ Third, all civilizations and cultures tell a story of borrowings that intermix with local cultures in complex ways yielding multiple interpretations that together go to produce a composite civilizational culture.

The “Asian Civilization” or rather “Asian Civilizations” (Chinese, Japanese, Indian, etc.) is like all other civilizations a complex configuration of diverse and multiple cultures formed in interaction with the outside world and ceaseless interpretations of it. The colonial era saw its social, cultural and political practices and institutions influenced more by western civilization. Therefore any attempt at a simplistic portrayal of Asian civilization (as of all civilizations) risks the trap of essentialism. It also cautions against a culturalist explanation of the behaviour of Asian states. Culturalism, as Bayart has pointed out, “commits three methodological errors”: “it maintains that a culture is a corpus of representations that is stable over time; it sees this corpus as closed in on itself, and it assumes that this corpus determines a specific political orientation”.¹⁷ Any attempt to articulate the idea of an Asian approach to international law must in other words come to terms with

¹⁴ *Ibid.*, at 45. Subsequently Asian states became an integral part of the Non Aligned Movement (NAM) that was inaugurated in Belgrade in 1961. NAM came to occupy centre stage in the period of the cold war and its principles (of independence and solidarity) continue to play a not so insignificant role in the period after the collapse of the socialist world.

¹⁵ Dallmayr, F., (2006) “Dialogue among civilizations: A hermeneutical perspective” in Rath, S.P., Nirupa Rani, K. and Sudhir, V.C. (eds.), *Dialogues of Cultural Encounters: Nations and Nationalities in Periods of Conflict*. Delhi: Pencraft International, 2006, 25–41 at 34.

¹⁶ *Ibid.*

¹⁷ Bayart, J., *The Illusion of Cultural Identity*, London: Hurst & Company, 2005, at 65.

four overlapping recognitions. First, there is no idea that is purely western, that is, untainted by intercourse with other civilizations and worlds; in the words of Sen, “the origin of ideas is not the kind of thing to which ‘purity’ happens easily.”¹⁸ Second, there is no pure non-western culture, or, in the case of countries that had been colonized, a pre-colonial culture, which can be retrieved because we know that “every rediscovery is at least partly a reinvention”.¹⁹ Third, the idea of “postcolonial revenge” that calls for the rejection of all western thought is debilitating as there is no easy way of stepping outside it, especially after the colonial era. It accounts for the fact that often the very act of retrieval of pre-colonial culture is tainted by western ideas. Fourth, the approach of Asian states to international law is crucially determined by a range of material factors, including their individual location in structures of global capitalism and the reigning idiom of diplomatic practices.

But there are yet non-western practices that, even though not uniquely non-western, are non-western nevertheless; this is what Nandy means when he states that “India is India; India is not non-West.”²⁰ Nandy illustrates the idea by showing how, in the course of the freedom struggle, Gandhi adapted western civilizational values to his own end. For instance “by judging colonialism by Christian values and declaring it to be an absolute evil” he won an important victory in the world of legitimacy. Gandhi also imbued western ideas with local symbolism and content. He thus gave the struggle for national liberation a completely new meaning when he talked of the need to save the oppressors from themselves, in particular from narrow interpretations of western knowledge and civilizational traditions. Gandhi recognized, and this is a crucial insight of the world of oppression, that “once the hegemony of a theory of imperialism without winners and losers was established, imperialism had lost out on cognitive, in addition to ethical, grounds”.²¹ The essence of this move to critical inclusiveness, both in terms of ideas and political practice, can productively inform all discourse on creating a just world order. In short, each civilization has a certain quality that sets it apart from other civilizations. Even as the trap of cultural essentialism is avoided, the answer does not lie in endorsing a crude materialist theory that does not attribute any significance to cultural/civilizational factors. Onuma

¹⁸ Sen, A., *The Argumentative Indian*, London: Allen Lane, 2005, at 132. Sen tells the story of the spice chilli which is a basic ingredient of Indian cooking. It was brought to India from the “new world” by the Portuguese. But, as he notes, this does not make Indian cooking any less Indian. Chilli has now become an Indian spice, *ibid.* Likewise, Santos cites Pieterse, who writes that “what is held to be European culture or civilization is genealogically not necessarily or strictly European”. Pieterse, J.N., *Empire and Emancipation. Power and Liberation on a World Scale*, London: Pluto, 1989 at 22–23.

¹⁹ Bhargava, R., “How should we respond to the cultural injustices of colonialism?” in Miller, J and Kumar, R. (eds.), *Reparations: Interdisciplinary Inquiries*, Oxford: Oxford University Press, 2007, 215–252, at 246.

²⁰ Nandy, A., *Exiled at Home: Comprising At the Edge of Psychology, The Intimate Enemy and Creating a Nationality*, New Delhi: Oxford University Press, 1998, at 73.

²¹ *Ibid.*, at 87.

aptly points out that “even when the policy makers calculate their national interest ‘rationally,’ such rational calculation is still influenced by their cultures, religions and other civilizational factors”.²² It is thus perfectly legitimate to posit an Asian way of thinking about the international legal process, albeit there is no easy response to the question as to what precisely is this thinking.

Asian thinking about international law: possible questions

The complexities involved in framing a possible response may be teased out through drawing on an insightful essay entitled “Is there an Indian way of thinking?” by Ramanujan, late professor of literature at Chicago University. He noted that the question “Is there an Indian way of thinking” can translate into a number of questions and equally varied responses depending on where the stress is put in the question.²³ The different accents he said could include the following:

Is there an Indian way of thinking?
Is there an Indian way of thinking?
Is there an Indian way of thinking?
Is there an Indian way of thinking?

The same can be said of an Asian approach to international law. We may ask:

Is there an Asian approach to international law?
Is there an Asian approach to international law?
Is there an Asian approach to international law?
Is there an Asian approach to international law?

The Ramanujan accents counsel against taking a facile view of the meaning of an Asian approach to international law by showing the multifarious ways the question can be approached, anticipating multiple responses.

Traditional Asian cosmologies and international law

Besides the reconfiguration, redefinition and adaptation of western ideas there are traditional cosmologies that need to be retrieved to see if these offer insights that help shape more suitable responses to problems that contemporary international law addresses. In response to the question “Is there an Indian way of thinking”,

²² Onuma, Y., (2008) *The Hague Lectures* at 10. On file with the author, at 29.

²³ Ramanujan, A.K., “Is there an Indian way of thinking? An informal essay” in Marriot. M. (ed.), *India through Hindu Categories*, New Delhi: Sage, 1990, 41–58 at 41.

Ramanujan proceeded to identify features of the traditional Indian way of thinking that may be mentioned to illustrate and explore the distinctiveness of Asian thinking and the possibility of an Asian approach to international law.

Ramanujan noted first that in the Indian way of thinking there are different logics at play in different domains of social practices (e.g. science and astrology) that gives rise to the question of inconsistency.²⁴ But from the standpoint of Indian thought the absence of epistemological unity is not viewed as being problematic. The co-existence of separate epistemologies is, however, not to be understood as an endorsement of cultural relativism but as a pointer towards strengthening the values of tolerance and plurality so fundamental to international human rights law.

Second, there is in the Indian way of thinking an “inability to distinguish self and non-self”, for example, self and nature indicating an organic view of the relationship between man and nature.²⁵ The Chipko movement in India in the early 1970s, which saw women hug trees in order to stop them from being felled, is an example of a particular understanding of self and nature that is embedded in Asian civilization values. Since the cutting of trees directly affected both the ecology and the lives of women in the region, an important message of the Chipko movement was that “environmental destruction and social injustice are two sides of the same coin”. This way of thinking can underpin a distinctive approach to international law of sustainable development that today tends to treat nature as the Other and also separates issues of environment protection from that of global justice.²⁶

A third feature Ramanujan identified was the “lack of universality” (the Kantian mode) and the stress on particularism in Indian thinking.²⁷ Traditional culture was distinguished by being context-sensitive (“the preferred formulation”) as against being context-free, be it in the domain of ethics, music or medicine. Of course Ramanujan recognized that all societies have some of both, i.e. universalism and particularism, but in the case of India context-sensitivity was the dominant trend.²⁸ A context-dependent view of international law-making and implementation can be used to justify international law principles such as that of common but differentiated responsibility.

What Asian values are not

Ramanujan was aware of the fact that traditional cosmologies were changing with “modernization”, but it could be argued only to yield alternative modernities that

²⁴ Ramanujan, *op. cit.*, n. 23, at 44.

²⁵ *Ibid.*, at 45.

²⁶ Agarwal, A., “The Chipko movement”, available at <http://www.india-today.com/itoday/millennium/100people/chipko.html> (accessed 25 May 2010).

²⁷ Ramanujan, *op. cit.*, at 46.

²⁸ *Ibid.*, at 55.

subsume tradition in new forms. What one has to be wary of in this regard is the invention of civilizational values by state structures to legitimize authoritarian responses and used by the west to portray a particular (negative) image of Asian civilization. The obvious reference is to the thesis on Asian values and human rights that tends to privilege economic, social and cultural rights over civil and political rights.²⁹ But if the focus is on the social practices of Asian peoples rather than states, in particular their struggles against all forms of domination and injustice, the argument of a distinctive Asian outlook may fall into place. The idea is not to romanticize the social practices of “peoples”: these can be as regressive as the practices of States. The caste system in India is a good example of it. The point is to prevent the submersion of the values of peoples in the policies of States. The distinction between the culture of peoples and States ensures that non-democratic States in the Asian region are not able to lay claims of being heirs to invented traditions and civilizational values that facilitate the legitimization of undemocratic practices.³⁰ That the idea of Asian values is false can be seen from the elementary fact that the values of freedom and tolerance have for centuries been championed in the Asian tradition; these are not, as suggested by the west, alien to Asia.³¹ It is in fact entirely false to state that the values of individual liberty and freedom have been part of western societies alone.

ASIAN CIVILIZATIONAL VALUES AND PRACTICES: SOME CANDIDATES

Bearing in mind the dangers of essentialism, some features of the Indian way of thinking, and the distinction between the cultures of States and peoples, three attributes of Indian civilization may be worthy of mention as representing a dominant strand of thinking in one Asian civilization, viz. the idea and practice of non-violence, an inclusive vision of cosmopolitanism, and the stress on spiritualism, all necessary elements in building a democratic and just world order.³²

²⁹ More generally, the conduct of Asian States towards their people has not always been salutary. After all, some Asian states have had an imperial past, others are presided over by authoritarian regimes and some have committed terrible acts, including genocide, against their own people.

³⁰ Thus the thesis on Asian values and human rights gets reinvented from time to time to justify the oppressive practices of one or another Asian State. See Avonius, L. and Kingsbury, D., *Human Rights in Asia: A Reassessment of the Asian Values Debate*, New York: Palgrave Macmillan, 2008.

³¹ *Ibid.*, at 135, 136.

³² In a certain way these values are mentioned here in the same general way that it is said that cooperation through international institutions is a contribution of the culture of the United States: “One hallmark of American Hegemony is its organization around international institutions.” Ikenberry and Mastanduno, *loc cit*, 9; after all, cooperation through international institutions pre-dates American hegemony even as it has gathered momentum in the era of US domination. It, however, contrasts with Asia where there is “the lack of international institutions”. Kang, D., “Hierarchy and Stability in Asian International Relations” in Ikenberry and Mastanduno., *loc. cit.*, n. 5, 163–191, at 163.

The principle of non-violence

An important contribution of the Indian way of thinking is the discourse of non-violence. From Buddha to Gandhi the idea of non-violence has been a part of the thinking and heritage of Indian civilization. To be sure, such thinking is part of other civilizations as well; what is distinctive in the case of India is the dominance it has acquired in thinking about politics. A year after independence, in his speech to the UN General Assembly on 3 November 1948, Nehru emphasized to the international community the importance of the Gandhian thought that “it was not good enough to have a good objective, that it was equally important that the means of attaining those objectives were good; means were always as important as ends”.³³ This lesson, as he noted, “has sunk deep into our souls”.³⁴ We know Gandhi inspired Martin Luther King, Nelson Mandela, Barack Obama and others. The post-colonial Indian State has not been entirely impervious to its influence. It has embraced the idea of non-violence, albeit the search for national security in a turbulent region has somewhat undermined its holistic application in the framing of national security policies. Be that as it may, the practice of non-violence has the potential of resolving long-festered international disputes and the creation of a shared and just world in which all peoples and civilizations thrive. It also helps imagine alternative futures in which civilizations will influence each other unaccompanied by domination and violence.

Inclusive cosmopolitanism

This is no utopia. Historically, elements of Indian civilization, as in the case of Sanskrit language and culture (to mention one important episode), spread unaccompanied by violence (in contrast to the spread of Latin which was disseminated through imperialism). “A little before the beginning of the first millennium”, Sanskrit “embarked on an extraordinary process of spatial dissemination and expressive elaboration. Within four or five centuries, Sanskrit would be found in use for literary and political discourse in an area that extended from today’s Afghanistan to Java and from Sri Lanka to Nepal.”³⁵ Sanskrit culture was not spread through “the actions of a conquest state”. It was spread by “traders, literati, religious professionals, and freelance adventurers. Coercion, co-optation, juridical control, and even persuasion are nowhere in evidence. Those who participated in Sanskrit cosmopolitan culture chose to do so, and could choose to do so.”³⁶ This inclusive Sanskrit Cosmopolitanism can be viewed as a unique feature of the Asian region.³⁷ It meant that:

³³ Nehru, *op. cit.*, n. 7, at 162.

³⁴ *Ibid.*, at 166.

³⁵ Pollock, S., “Cosmopolitan and vernacular in history” 12 *Public Culture* (2000), 591–625 at 599.

³⁶ *Ibid.*, at 603.

³⁷ *Ibid.*, at 599.

... people in tenth-century Angkor or Java could see themselves no less than people in tenth-century Karnataka as living not in some overseas extension of India but inside “an Indian world.” The production of this kind of feeling beyond one’s immediate environment, this vast cosmopolitanization of southern Asia, has rightly been described as “one of the most impressive instances of large-scale acculturation in the history of the world.”³⁸

In short, Sanskrit cosmopolitanism presents to the world a model of transcivilizational relationships that is benign and productive and helps imagine a global future in which all civilizations can coexist and contribute to the growth of the others. This vision is the antithesis of the clash of civilization thesis that implicitly sees the answer lie in the triumph of one or another vision of cosmopolitanism.

Role of spiritualism in creating a just world order

Indian civilization with its stress on spiritualism has also introduced it as a central element in the shaping of a just world order. Unfortunately, at present, “the visions of the future of world order that find a place in contemporary writings and scholarship are essentially those advanced by western thinkers (from Kant to Held). The work of non-western thinkers and visionaries hardly finds a mention in them.”³⁹ Sri Aurobindo, leader of the first phase of the Indian freedom movement who later turned to spiritualism, is a good example of an extraordinary vision of the future of the world order that has been ignored.⁴⁰ According to Sri Aurobindo, human unity was inevitable but minus the value of spiritualism would only yield mechanical human unity. His view contrasts with that of Kant, whose basic idea was that “even without any inner, moral improvement, man will improve his outward legal conduct. In the end, a moral attitude will come to prevail”⁴¹ Sri Aurobindo surely recognized that, for a democratic world state to be established, appropriate normative and institutional conditions need to be created. But in his view this normative and institutional architecture had to be informed by the idea of spiritual transformation of individuals and collectives. It deserves to be pointed out that his thinking does not fit the neat stereotype of the materialist west and the spiritual east. Sri Aurobindo combined materialism and spiritualism in a unique mixture and departed from the idea that “the empirical world and finite individuals are illusory”.⁴² In short, he was concerned

³⁸ *Ibid.*, at 603–604.

³⁹ Chimni, B.S., “Retrieving ‘other’ visions of the future: Sri Aurobindo and the ideal of human unity” in Jones, B.G. (ed.), *Decolonizing International Relations*, Lanham: Rowman and Littlefield, 2006, at 197–219.

⁴⁰ *Ibid.*

⁴¹ Jaspers, K., *Selected Essays: Philosophy and the World*, Chicago: A Gateway Edition, 1963, at 106.

⁴² Mohanty, J.N., *Explorations in Philosophy: Essays by J.N. Mohanty*, vol. I: Indian Philosophy, New Delhi: Oxford University Press, 2001 at 67.

with the limits of reason rather than its rejection in calling for spiritual transformation being the basis of a future democratic world order and state.

TRANSCIVILIZATIONAL DIALOGUE AND INTERNATIONAL LAW: MEANING AND IMPLICATIONS

Having looked at Asian civilizational values that can contribute to the framing of a multicivilizational international law, it is time to examine the basis on which dialogue between civilizations is to be conducted in this regard. If the dialogue between civilizations is to be productive it must be, as Dallmayr notes, “both intra- and inter-civilizational, establishing linkages across both historical and geographical boundaries”.⁴³ It must be “open-ended and hospitable to multiple and expanding horizons”.⁴⁴ It should eschew the tradition of “orientalism”, which was an “effort to dominate and ‘talk down’ the other, in such a manner that the ‘Occident’ was never called into question (or never allowed to be questioned)”.⁴⁵ To avoid this problem, the “civilizational dialogue must jettison self-aggrandizing or assimilationist agendas”; a good contrary example being Sanskrit cosmopolitanism.⁴⁶ Dallmayr concludes that “civilizational dialogue will have to be a multi-lingual discourse carried on in multiple tonalities, including the tonalities of politics, religion, philosophy, and ecology (and subsidiarily – economics and the internet)”.⁴⁷ In the final analysis such a dialogue must foster commitment to global social justice.⁴⁸

Principle of recognition: contribution of Asia to development of international law

To achieve the goals of global justice a first principle that should inform a trans-civilizational dialogue is what Fraser terms the principle of recognition, the other principles being the principles of representation and distributive justice.⁴⁹ In the context of international law it means, among other things, the recognition of the historical contribution of Asia to the doctrines and rules of international law.⁵⁰

⁴³ Dallmayr, *loc. cit.*, n. 15, at 35.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, at 36.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, at 38.

⁴⁸ *Ibid.*

⁴⁹ Fraser, N., *Scales of Justice: Reimagining Political Space in a Globalizing World*, New York: Columbia University Press, 2009. Only the principles of recognition and representation are directly relevant to the discussion at hand.

⁵⁰ For a brief application of the Fraser theory of justice to international law, see Chimni, B.S. “A just world under law: A view from the south” 22 *American University International Law Review* (2007) at 199–220.

There are several areas of international law where rules were present and observed in pre-colonial Asia, yet the Asian contribution to international law has rarely been acknowledged. Three areas of international law may be mentioned to illustrate the contribution of Asia to the evolution and growth of international law.

Law of the sea

In formulating his thesis on freedom of the seas Grotius was, as Anand has pointed out, “aware of the long tradition of freedom of navigation in the Indian Ocean” and got a “helpful cue from the Asian state practice of freedom of commerce and trade between various countries and peoples without any let or hindrance”.⁵¹ Alexandrowicz elaborates:

Historians have often overlooked one aspect of the problem which was significant to Grotius, that is the impact of the study of the actual regime of the Indian Ocean, which he carried out in the archives of the Dutch company, on the formulation of the doctrine of *mare liberum*, at a time when *mare clausum* was more prevalent in European state practice than the ideal of the freedom of the high seas.⁵²

Indeed, according to Anand, freedom of the seas “is one principle which Europe acquired from Asia through Grotius . . .”.⁵³

International humanitarian law

The practice of Asian States has also contributed to the evolution and development of international humanitarian laws. In the *Nuclear Weapons* case Judge Weeramantry recorded the strong presence in non-western cultures of international humanitarian laws. He thus sought to reinforce the universality of international humanitarian laws by referring to the presence of international law in non-western civilizations. As he observed:

It greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention. . . . it is deep rooted in many cultures – Hindu, Buddhist, Chinese, Christian, Islamic and traditional African . . . The multicultural traditions that exist

⁵¹ Anand, R.P., *International Law and the Developing Countries: Confrontation or Cooperation*, New Delhi: Banyan Publishers, 1984, at 56.

⁵² Alexandrowicz, C.H., *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th centuries)*, Oxford: Oxford University Press, 1967, at 44.

⁵³ Anand, *op. cit.*, at 61.

on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength – the strength resulting from the depth of the tradition's historical roots and the width of its geographical spread.⁵⁴

International environmental law

To turn to a final example, in the *Gabcikovo-Nagymaros* (Hungary/Slovakia) case (1993) Judge Weeramantry took pains to show how the idea of sustainable development was deeply embedded in non-western cultures of Asian and other developing societies.⁵⁵ Thus, for example, he referred in some detail to the ancient irrigation-based civilization of Sri Lanka as an example of sustainable development practices.⁵⁶ He concluded that sustainable development “is one of the most ancient of ideas in the human heritage”.⁵⁷ It greatly enriched the modern principle of sustainable development to draw from historical practices in all cultures. More recently, Benvenisti has argued, in the context of resolving disputes relating to international water resources, that “ancient Asian traditions can inform decision-makers as to the management of specific treaty regimes as well as the evolution of international law in general”.⁵⁸ According to him, “the key to sustainability [in ancient Asian traditions] was the fact that the collective decision-making process took into consideration the interests of all users of the resource. It precluded decisions that burdened some users for the benefit of others. It precluded decisions that burdened future generations.”⁵⁹

Principle of representation: enriching the principle of democratic governance

The second principle that comes into play, following the Fraser formulation of the meaning of global justice, is the principle of representation. It points to the need for greater democratization of international relations *inter alia* through taking cognizance of the social and cultural practices of non-western civilizations in giving meaning to norms or categories of international law. If “genuine, concrete, transcul-

⁵⁴ *ICJ Reports*, 1996, at 478. See also Weeramantry, C.G., “Buddhism and humanitarian law” in Mani, V.S. (ed.), *Handbook of International Humanitarian Law*, New Delhi: Oxford University Press, 2007, at 3–14.

⁵⁵ Separate Opinion, *Gabcikovo-Nagymaros* (Hungary/Slovakia) case (1993), available at <http://www.icj-cij.org/docket/files/92/7383.pdf>, at 94ff (accessed 25 May 2010).

⁵⁶ *Ibid.*, at 95 ff.

⁵⁷ *Ibid.*, at 107.

⁵⁸ Benvenisti, E., “Asian traditions and contemporary international law on the management of natural resources”, 7 *Chinese Journal of International Law* (2008), 273–283, at para 2.

⁵⁹ *Ibid.*, at para 15.

tural universals” are to be produced in the world of international law there must be constant efforts at bringing to bear divergent civilizational practices on the relevant norms and categories. Thus, to take an example of a norm of international law that may be described as “western” in origin, i.e. the principle of modern democratic governance, its content is today being shaped by transcultural social practices and interpretations that have injected the principle with divergent content. From India to Japan the meaning of democracy is being imbued with substance that makes the category of “democracy” universal in the true sense of the term.

Need for transcivilizational dialogue: the case of refugee protection

From the perspective of the principle of representation the area of refugee protection offers another example to assess the relevance and role of transcivilizational dialogue in shaping international laws. It can be argued that Asian exceptionalism in the area of refugee protection is explained by cultural factors that offer critical insights into ways to promote more effective refugee protection. It is not generally known that only five countries in Asia have signed or acceded to the widely ratified (about 145 States) 1951 UN Convention on the Status of Refugees, viz. Cambodia, China, Japan, Philippines, and South Korea. In fact no country in the South Asian Region is party to the 1951 Convention despite being host to millions of refugees. Neither is there in the Asian region, as in the case of Africa, a regional convention on the status of refugees; at best there is the not so influential 1966 (subsequently revised) AALCO soft law text on refugees (AALCO 1966). Neither for that matter are there national legislations on the status of refugees.

There are both material and cultural explanations that can be suggested. The material explanation is that, unlike Africa, which saw the 1951 Convention and the 1969 OAU Convention on the Status of Refugees as instruments in the struggle against colonialism, especially against the apartheid regime in South Africa, Asia did not relate the refugee regime with the cause of decolonization. Asian states were also aggrieved that Western States did not address refugee flows in the Asian region at the time the 1951 Convention was adopted (e.g. refugees from the partition of India). Neither were the concerns of Asian states taken cognizance of (e.g. the need for burden sharing) in the Convention.⁶⁰

A possible civilizational explanation for Asian exceptionalism is that there has been a long tradition in different cultures of Asia of offering safe haven to persons fleeing threats to their life and freedom. Secondly, law is not perceived as the principal solution to social problems. Asian cultures tend to rely equally on societal values to respond to social issues, in this case the problem of refugee protection. The downside can be the absence of a rights-based regime. What a transcivilization

⁶⁰ See generally Davis, S., “The Asian rejection?: International refugee law in Asia”, 52 *Australian Journal of Politics and History* (2006) at 562–575.

dialogue can do in this regard is to encourage a conversation on *the ideal and optimal mix of legal and societal values* that helps safeguard the interest of refugees. It would help shape a more humane and efficient global refugee regime.

FINAL REFLECTIONS

Five points may be made in conclusion. First, both cultural essentialism and reductionist materialism are unhelpful in understanding an Asian approach to international law. The relationship of civilizational values to foreign policy of States and international law is mediated by deep structures of global capitalism and the Westphalian imaginary. Yet civilizational values carry a surplus meaning that makes a transcivilizational dialogue on international law relevant and productive.

Second, it is only a dialectical process of simultaneous critique and enrichment of both “western” and “non-western” ideas and forms of life that can help shape a response that frames a progressive multicivilizational international law that takes the discourse of global justice forward.⁶¹

Third, a distinction must be made between the civilizational values of peoples (without romanticizing it) and those affirmed by States as the former are not captive to particular understandings of “national interests”. Furthermore, their thinking is imbued with local knowledge and symbolism that need to be retrieved and brought to bear on the international legal process.

Fourth, to foster transcivilizational discourse, an initial step should be to recognize the contributions of Asian States to the evolution and growth of international law. Among areas that Asian states have made a contribution are law of the sea, international humanitarian law and international law of sustainable development.

Fifth, in so far as developing countries in the region are concerned, the Asian approach to international law has in its core been articulated by TWAIL.

⁶¹ Bhargava, *loc. cit.*, n. 19, at 245 ff.

ASIAN INTERNATIONAL LAW: WHERE IS IT NOW?

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Asian international law began with optimism. It projected a vision of an international law which reacted against a European induced system that had justified colonialism, divided humanity on standards of civilization and hid injustices behind conceptual curtains such as personality or statehood. It sought to recreate a new order that accorded with the aspirations of the newly liberated people of Asia. The struggles for control of resources, the development of the economy and the eradication of poverty formed the foundation of the norms relating to the New International Economic Order and the right to development advanced by the developing countries. The redrawing of an international law driven by the needs of development was a vision that Asian international lawyers held during the period after decolonization.

This vision has now been hijacked by international lawyers who subscribe to the mainstream international law for purposes of their own. From an Asian point of view, the vision of human freedom and high moral principles which underlay the great nationalist movements, led by Gandhi, Soekarno and other Asian leaders, has become a distant memory that remains only in the hopes of Asia's poor. The ideals that characterized the early period have been deserted as a result of elite formation within the Asian societies which has shifted concern away from the pursuits of human justice towards foundations that are based on national interests and materialistic pursuits. Success is measured in terms of wealth, which has accumulated in the hands of a few who are able to wield power through its use. In many Asian states, astute politicians, in pursuit of power, have diverted the attention of the people to ethnic and religious chauvinism. Equally, the business elite has profited from the new models of neo-liberalism that animate mainstream international law to see a need for deviation. Competition between Asian states has been assiduously promoted in the name of attracting capital to promote the interests of capitalist classes which are ready to make necessary alliances with foreign corporations so as to increase their own wealth. International law has been subverted to promote the interests of these classes. Within Asia itself, the rapid formation of societies devoted to the study of Asia in the light of mainstream international law have become commonplace.

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It is true that works relating to the past history of international law have kept the early vision alive. But these works are rooted in history. They dig up more evidence of past injustices in a coherent and ordered way. Long in their rhetoric on the past historical injustices, they do little to illustrate the present course of events or what could be done to remedy the malaise that has diverted the early promise in the building of an Asian international law towards the more mundane purpose of pursuing the elite interest in the guise of national interests of the different states of Asia. Other works are intent on recasting the debate in terms of political philosophies of Western thinkers. They tend to be couched in the esoteric language of Western philosophical schemes and, when deciphered, are found to contain well-accepted truths which could have been simply stated. The problem at hand is seldom addressed in such pieces. The problem at hand is simply that Asian states, at the behest of their elite, are deviating from the early visions. They find comfort or profit in joining with the mainstream. The elite feel that the adoption of a policy that promotes their own interests as the national interests of their states requires the relinquishing of the earlier idealism of creating a more just international law that would benefit the vast majority of Asians still mired in poverty. They justify the situation on the ground that the wealth they create will trickle down to the poor and thereby eradicate poverty – a neo-liberal justification which has never been proved to work.

Parallel developments were taking place in other parts of world, particularly within the United States, the single hegemonic power of the world, in the last decade of the twentieth century. This was a period of the ascendancy of neo-conservatism after the “end of history”¹ and the absolute triumph of capitalism had been announced. During this period, the United States espoused a virulent form of neo-conservative realism that moved it far away from its traditionally liberal moorings towards the espousal of an individualism dictated by greed and a militarism that glorified the moulding of the world in America’s image. It denounced international law, which hampered its exercise of power, and espoused international law, which enhanced what it thought was in its national interest. A new group of international lawyers emphasized that the acceptance of international law principles would be inconsistent with constitutional principles and that the role of international law was to serve as an instrument for advancing the national interests of the United States. The twin forces of globalization and the war on terror justified the courses the United States took in advancing the precepts of neo-conservatism through the instrumentality of international law. Globalization itself was not observed as a fact but as a global process that advanced the neo-conservative principles. It became entwined with the neo-liberal notion that a globalizing world can only be organized

¹ Francis Fukuyama famously announced the end of history, meaning that there was an ultimate triumph of capitalism and the free market as the organizing model for the world (F. Fukuyama, *The End of History and the Last Man*, New York: Free Press, 1992). He was to recant this thesis later, decrying the effects that neo-conservatism had wrought in the world, well before the present global economic crisis.

on the basis of the free market and the liberalization of the flow of assets. Since a free market could function optimally only in a democratic society, democracy was seen as essential both to the economic order as well as to international peace. International law was to be used instrumentally to achieve these purposes. World trade was liberalized. Intellectual property, services and other areas were attached to the regime of trade. Investment treaties proliferated. Guarding these newly created rules was the threat of the use of military power on the basis of new principles that destroyed any pre-existing efforts to contain resort to force. Human rights principles were regarded as niceties to be dispensed with in the climate of fear generated by the “war on terror”. Wars were begun in Iraq and Afghanistan on the basis of these new doctrines relating to the use of force. Unilateralism prevailed. The “war on terror” became a peg on which to hang gross violations of human rights. Throughout the world abuses of human rights generally and the rights of minorities in particular were justified on the basis that the fighting of the “war on terror” required the erosion of human rights and the rights of minority groups. The United States simply withdrew from areas that it did not agree with and confronted rules that it sought to change.

The Obama administration has promised to reverse these trends. But nothing has yet been delivered. The Nobel Prize has been given to Obama in the hope that he would return to multilateral diplomacy. It is too early to judge whether Obama will deliver on this promise. There are forces that would impede the achievement of such necessary objectives. For the present it would appear that there is rhetoric but no dismantling of existing policies.

To a large extent, the elite in Asia rode on the bandwagon of these trends as their own interests were identified with those of the hegemonic power. The espousal of the free market enabled the enhancement of the wealth of the newly emerging rich of Asia. The divide between the rich and the poor, already a phenomenon in the West, became entrenched in Asia, with the elite notionally shouting slogans against poverty but enjoying massively obscene luxuries for themselves. The emergence of multi-billionaires in China and India amidst a sea of poverty attests to this phenomenon. The “war on terror” enabled the suppression of human rights and the elimination of dissent. It ensured that the rich were kept protected by the governments and, in turn, the politicians were kept in funds by the rich. It ensured that dissident voices could be suppressed, for once a climate of fear and hatred is created, it is always possible to keep the state machinery on the alert against any incipient opposition to the interests of the governing elites. In the period of the 1990s, the hold of neo-conservatism as a political force and neo-conservatism as an economic force were such that Asian leaders simply abdicated responsibility to think of any alternative system but the ones that these doctrines envisaged. Liberalization in India and China brought rapid riches to the elite but left the poor in increasing destitution. The divide that it has created will lead to increasing instability, which is already manifesting itself in riots and insurrections.

In the 1990s, with the dissolution of the Soviet Union and the consequent end of the Cold War, the cohesion of the Third World as a force diminished almost to a vanishing point. Several factors contributed to this process besides the so-called

“end of history”. The first generation of leaders of post-colonial Africa and Asia had left the scene. The adoption of Thatcherism and Reaganomics signalled a phase in which the former concern for economic development had been shown to be a thing of the past. The dominance of an economic model based on the free market came to be accepted universally. It was forced on the recalcitrant by the World Bank and the International Monetary Fund. The “Washington Consensus” came into existence, with the financial institutions promoting the policies of the White House both on the economic as well as the political front. The United States, now the sole hegemonic power, sought to force its version of democracy as the model of government mandated by international law.

The reaction of the elite of the developing world was to accept these evident changes without dissent. They joined particularly in the thrust of the free-market model knowing that it would benefit their own class interests and lead to the emergence of new entrepreneurial classes that would bring the immediate appearance of prosperity to their states. This indeed did happen. Poverty-stricken cities were converted into cities with skyscrapers within a short period of time. A new middle class grew up, providing services to a fast-integrating world organized on the basis of liberal movement of assets, investment and services. Enamoured with the changes, the electorates in democratic Asia voted into power parties that would accelerate the policies that had achieved such excess or permitted the continuation of virtual dictatorships that achieved such results. The vision of “slumdog millionaires” ruled the day, ensuring a pliant multitude fed on a diet of the future splendour of belonging to rich and powerful states. In abysmal poverty, people in South Asia, still scraping the bottom of the table on the Human Development Index, lived in a stupor, fed by hopes of future glory and riven by caste, religion and ethnicity. In that context of violence, it was possible for the rich to keep internal order through repression.

In the meantime, developments in international law entrenched neo-liberalism and neo-conservatism. A new body, the World Trade Organization, was set up to oversee the conduct not only of trade but, on the assumption that they were related to trade, the services sector, investment and intellectual property. It had a dispute settlement machinery that was the best devised so far within international law. There were arguments that many areas of international law such as human rights and the environment could be brought within the purview of this economic system which offered such effective controls. It was claimed that a constitutional system for the world could be devised on the basis of these premises.

The creation and expansion of the principles operated by the WTO provide the best examples and these have been commented upon by other writers. It is best to look for other examples. Within international law on foreign investment there is further evidence for this. Once a regime based on the ICSID Convention and the system of bilateral investment treaties could be carved out as an independent regime it was possible to extrapolate norms into the regimes that gave effect to the neo-liberal paradigm. Throughout the 1990s, the United States was intent on stamping its influence on the world and used international law actively to do so while denying that any principles of international law bound its own conduct.

Fragmentation of international law was promoted. Through such fragmentation,

it would be possible to create strong regimes of rules which only those with esoteric wisdom could operate. As a result, expertise could not develop among the weak. The strategy was to create strong secondary principles so that enforcement machinery could be created first. The tribunals so created could then fill in the law in an authoritative manner. The best example is in the area of state responsibility, where secondary rules were stated in a draft and the law, quite unfavourable to developing countries, came to be later stated by tribunals, particularly investment-related tribunals. The earlier law had thrown up many controversies between developed and developing countries in this area of the law.

Besides the triumph of neo-liberalism in the economic field, the political field came to be occupied by the neo-conservative view that democracy as practised by the United States was the preferred model which advanced the cause of international peace. The Kantian view that democratic states do not go to war with each other was espoused as a slogan for insisting that international law, which sought peace, had a duty to promote democracy. The United States insisted on using force to ensure democracy if necessary and used it selectively to achieve its purpose. In the area of humanitarian intervention during the break-up of Yugoslavia and then again with the intervention in Iraq, the justification crops up. The “war on terror” was used to ensure the decimation of Article 2(4) of the UN Charter. It ensured a justification of the total destruction of the human rights system.

Many Asian states were willingly complicit in accepting this course of events, thus dealing a body blow to the development of an Asian International Law based on principles of justice. In the economic sphere, they have been egged on by the elite, which profits immensely by espousing the market economy philosophy which has, until recently at least, dominated Western thinking. Free Trade Agreements which affect the livelihoods of farmers and workers continue to be signed without an adequate analysis of whether they bring such benefits as would outweigh the colossal impact they have on the lives of people least able to bear the consequences. Farmer suicides increase. Farmers travel from far corners to register their protest at such agreements. But these are to no avail as the elite that manages politics profits from these associations as their manufactured products have access to new markets.

The listing of this litany of woes can go on. It is more productive to think of what needs to be done to put the derailed train back on track. It is necessary to put economic development back as the focus of international law. The reinterpretation of international law can be achieved, having development as the central objective that needs to be achieved. International law has always been an instrumental device. In the past, it was an instrument to achieve the objectives of oppression in order to serve the rich few living in the developed world. There is no reason why, in times when democracy is the catch-cry, it cannot be used to serve the interests of the larger number of humanity which suffers the travails of poverty. In the light of this objective of economic development of the poor, there must be a redrawing of the rules in the areas that have been subjected in the last few years to neo-conservative influence. These areas can be identified easily as the two areas of trade and investment, where neo-liberal principles ruled supreme. The other areas are the ones which were ravaged by neo-conservatism.

Trade law shows that with the Doha Development Round there has been a limited revival of the cohesion of the developing countries. At least regarding TRIPS, there has been a limited revision of the rules on intellectual property which addresses the issue of drugs needed for mass epidemics in developing countries. Though a complete reversal has not taken place, at least there is a demonstration that a reversal of norms that were based on neo-liberalism can be achieved. The opposition to other norms inimical to developing country interests will gather strength as a result of these initial inroads. Whether such success can be repeated is yet to be seen but it demonstrates that there is a retreat from earlier positions of inflexibility taken by the developed world.

In the area of investment, there is evidence of retreat from neo-liberalism. But, surprisingly, the retreat comes as a result of the exertions of the developed world, keen to dismantle the prescriptions that they had fashioned when they were massive exporters of capital into the developing world. The US and Europe are now massive recipients of capital from newly emerging countries such as China and India, which are no doubt keen to use the rules on investment protection that had been devised by the rich countries. They have now begun to make a large number of investment treaties containing the same inflexible standards of investment protection that were imposed on them. Their strategy is to ensure that the investments which flow out from their shores into developed states are protected in accordance with stringent standards.

There is the phenomenon that the industrializing states like China and India would break ranks and join in the system of investment protection which the developed states had fashioned. The fact is that these two countries are taking these measures to help their elite interests, which are now capable of sending investment overseas and are condoning the imposition of constraints through the same norms of protection on their sovereign ability to protect the misconduct of multinational investors which hurts their poor. Those affected by the 1984 chemical leak in Bhopal remain without redress, but India is busy promoting global rules which will enable investment protection rather than investment liability for misconduct. Such activities result in the protection of elite interests without regard to the effects they have on the poor. It would be interesting to see whether China and India will become the new oppressors of the poor in the poorest parts of the world. Their scramble for resources in many parts of the developing world has begun and it is possible that they may join the ranks of the oppressors of the future. This fact must be taken into account. It must not be forgotten that Japan has been consistent in its objection to the recognition of the right to development. It was a Trojan horse among developing states. It could well be that China and India may join ranks with Japan in the exploitation of the developing world. It is a fate that must be avoided as the vision of an Asian International Law will remain a distant dream if that were to happen. But the manner in which China and India have pursued natural resources without regard to moral scruples is an indication of the possibility of such an eventuality. Yet, there are indications the other way as well. Both states fought together against the introduction of the Singapore issues, including an instrument on investment, by insisting that the misconduct of the multinational corporations must be addressed in such an instrument.

The global economic crisis will ensure the rout of neo-liberal norms. The notion of an international law that is based on individualism, the protection of property and of contract will become a thing of the past. In that context, there will come about an opportunity to restructure principles of trade and investment so that they would promote development. The opportunity should not be missed.

Likewise, there is a need to change the norms on human rights and the use of force shaped by neo-conservatism. In the area of human rights, the “war on terror”, essentially the manipulation of a situation to create a climate of fear to enable the system to be massaged so that there could be sufficient tools of repression in order to subjugate those who did not toe the line drawn by the hegemonic power and its allies, justified intrusions on human rights, torture and the denial of the rights of rebellious minority groups. While these trends kept individual dissenters and rebellious groups in check, the Bush doctrine enabled the use of force against recalcitrant states. The situation was reminiscent of the standard of civilization which at an earlier stage of history put some people and states beyond the protection of international law. Now, states and peoples who did not toe the line drawn by the hegemonic power fell beyond the protection of international law.

The need to change these norms is imperative. Again, the reinterpretation of international law as an instrument for achieving development will be able to achieve this change. Human rights are central to development. There is hardly any use in achieving development without the promotion of human dignity. The right to development itself is cast in terms of being the central human right. But it has attendant rights which are associated with those civil, political, economic and social rights as well as those spelt out more fully in the different human rights instruments. However, the collective right to development must have the central role. Neo-conservatism emphasized individualism and argued that the primary function of international law should be the protection of the individual. The centrality of development would emphasize collective rights of the community to progress while recognizing the rights attached to human dignity.

In this manner, international law will also be able to address the problem of ethnic strife that afflicts most Asian states. The secessionist struggles that are widely prevalent in Asia will hinder Asian development for a long time to come. The response of the states has been to engage in military repression under the cloak provided by the “war on terror”. The repression that occurs merely accentuates the bitterness and ensures that the secessionist wars will continue for years to come, setting back any possibility of development.

It is necessary to address the increasing phenomenon of ethnic strife in Asia other than through the lens of individualism. Identity assumes greater significance in periods of globalization. In many states of Asia, minorities are driven to take up arms to protect themselves from persistent courses of discrimination and violence. From Mindanao, Aceh, Southern Thailand, Karens in Myanmar, the Uighars, the Tibetans and the Kashmiris, the list is a long one. A solution has to be one based on the principle of self-determination for which Asia had fought in the past. Asian states are relicts of colonialism. They were born to serve the convenience of their colonial masters and not the people who inhabit them. Arrangements that show

sensitivity to the will of the people have to be fashioned to prevent this festering problem. They could range from autonomy to complete secession resulting in the creation of new states. Bangladesh and East Timor are instances of new states within Asia. There could be other arrangements like the one for Aceh. But the objective of economic development is not possible without the settlement of these issues. From the perspective of human rights, the existence of these issues has been disastrous to the preservation of human rights as well as to development. Creative solutions have to be found for these problems, which cannot be solved through military means. History does not show that these movements can be crushed for ever through military force.

Finally, the restoration of a world without fear of the use of force is necessary for development. Peace is essential for the achievement of social and economic development. The restoration of the prohibition on the use of force is essential for smaller and weaker states to exist in a world in which force would not be used to impose solutions. The dismantling of the Bush doctrine is essential. At the same time, it is necessary to ensure that barbarous regimes do not persecute their own people. It is by now clear that the rules on humanitarian intervention or the newly formulated responsibility to protect are failures. There must be a search for alternative means to achieve this. In this area, Asia has been weak. A policy of appeasement has been followed. Regimes that abuse the rights of their people have been permitted to thrive. If unilateralism is the effective means of securing protection in these circumstances, it should be permitted in a carefully limited manner.

The tasks that await the Asian international lawyer in going back to the earlier vision rooted in justice rather than in power are many. There must be a recovery of the earlier vision which has been diverted to serve elite groups. There must be a restoration of an international law rooted in development that serves the interests of the majority of the people of Asia.

DEVELOPMENTS

CASE BETWEEN MALAYSIA AND SINGAPORE CONCERNING SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE

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INTRODUCTION

On 23 May 2008 the International Court of Justice (hereafter Court) rendered its decision in the *Case between Malaysia and Singapore concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (hereafter *Pedra Branca Case*).¹ The Court ruled by a vote of 12 to 4 that Singapore has sovereignty over Pedra Branca/Pula Batu Puteh (hereafter Pedra Branca)² by a vote of 15 to 1 that Malaysia has sovereignty over Middle Rocks. The Court further ruled by a vote of 15 to 1 that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.

Pedra Branca is a small granite island which is 137 metres long and approximately 60 metres wide. It lies approximately 24 nautical miles to the east of Singapore, 7.7 nautical miles to the south of the Malaysian state of Johor and 7.6 nautical miles to the north of the Indonesian island of Bintan. Horsburgh lighthouse has stood on the island since 1850, and there are other navigational facilities and a helicopter pad on the island. Middle Rocks consists of two clusters of small rocks about 250m apart that are 0.6 to 1.2m high and permanently above water at high tide. They are located 0.6 nautical miles south of Pedra Branca. South Ledge is a rock formation only visible at low tide. It is located 1.7 nautical miles south of Middle Rocks, 2.2 nautical miles south-south-west of Pedra Branca and 7.6 nautical miles north of the Indonesia island of Bintan.³

The three features are located at the eastern entrance of the Singapore Strait,

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¹ Judgment of 23 May 2008, available at www.icj-cij.org/docket/files/130/14492.pdf (accessed on 7 November 2008).

² The island was referred to by Singapore as Pedra Branca and by Malaysia as Pulau Batu Puteh, and the Court used both names throughout its judgment. However, since the Court ruled that Singapore has sovereignty over the island, I will refer to it as Pedra Branca.

³ *Pedra Branca Case*, *supra* n. 1, at paras. 16–20.

at the point where it opens up into the South China Sea. They are situated east of Middle Channel, the main shipping channel, and east of the traffic separation scheme established by the International Maritime Organization (IMO) upon the recommendation of the governments of the three States bordering the Straits of Malacca and Singapore – Indonesia, Malaysia and Singapore.⁴

HISTORY OF THE DISPUTE

The dispute between Malaysia and Singapore over the sovereignty of Pedra Branca arose after Malaysia published a map on 21 December 1979 entitled “Territorial Waters and Continental Shelf Boundaries of Malaysia” (hereinafter “the 1979 map”) which depicted the island within the territorial waters of Malaysia. Singapore issued a diplomatic note dated 14 February 1980 challenging Malaysia’s “claim” to the island and the surrounding waters, and requesting that the map be corrected. An exchange of correspondence then took place, followed by a series of intergovernmental talks in 1993 and 1994. In February 2003 the two States signed an agreement to refer the dispute to the Court, and by a joint letter dated 24 July 2003, they notified the Registrar that they had entered into a Special Agreement requesting the Court to determine whether the sovereignty over Pedra Branca, Middle Rocks and South Ledge belongs to Malaysia or to Singapore.⁵

CRITICAL DATES

With respect to sovereignty over Pedra Branca, the Court held that the dispute between the two States crystallized on 14 February 1980, the date of Singapore’s diplomatic note protesting the 1979 map depicting the island as within the territorial waters of Malaysia. Therefore, in deciding the issue of sovereignty, the Court did not consider the conduct of either Malaysia or Singapore after 14 February 1980.⁶ With respect to Middle Rocks and South Ledge, the Court determined that the sovereignty dispute between the two States arose on 6 February 1993, the date of the first round of intergovernmental talks between the two States when Singapore referred to the two features in the context of its claim to Pedra Branca.

⁴ The traffic separation scheme was extended to the area near Pedra Branca in 1998. It was circulated to all members of the International Maritime Organization by a circular issued under its collision regulations, COLREG.2/Circ.44 dated 26 May 1998.

⁵ *Pedra Branca Case*, *supra* n. 1, para. 2.

⁶ The significance of the date upon which the dispute crystallized is explained in paragraph 32 of the Judgment, *Pedra Branca Case*, *supra* n. 1.

PEDRA BRANCA AND THE JOHOR SULTANATE

Malaysia contended that Pedra Branca has always been part of the Johor Sultanate and the Malaysian State of Johor, and that nothing has happened to displace Malaysia's sovereignty. It maintained that Singapore's presence on the island had been with the permission of the Johor sovereign, and for the sole purpose of constructing and maintaining a lighthouse. Singapore contended that Pedra Branca had been *terra nullius* prior to 1847 and that title to Pedra Branca had been acquired by the British Crown by a series of acts beginning with selection of the island for the construction of a lighthouse in 1847, and that such title had been maintained by the British Crown and by its lawful successor, Singapore.⁷

The Court stated that, given the arguments of the two States, a crucial issue was whether Malaysia could establish its original title back to the period before the agents of the British Crown in Singapore constructed a lighthouse on the island from 1847 to 1851.⁸ After examining the complex colonial history of the region, the Court concluded that the Sultanate of Johor established itself as a sovereign State in 1512 in Southeast Asia, and that its territorial and maritime domain included the islands in the Singapore Strait where Pedra Branca is located. The Court also noted the absence of any rival claims to Pedra Branca, and stated that it was appropriate to recall the pronouncement made by the Permanent Court of International Justice in the *Eastern Greenland Case*⁹ on the significance of the absence of rival claims.¹⁰ The Court also found that the nature and degree of the Sultan of Johor's authority exercised over the Orang Laut, or "people of the sea", who inhabited the islands in the Straits of Singapore, and who made this maritime area their habitat, confirmed the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca.¹¹

Singapore had maintained that this issue should be considered in light of the traditional Malay concept of sovereignty, which was based on control over people rather than control over territory. The Court observed that sovereignty comprises both personal and territorial elements, but that in any event, it need not deal with this matter any further because it had already found that Johor had territorial sovereignty over Pedra Branca and that such title was confirmed by the Sultan of Johor's exercise of authority over the Orang Laut.¹²

Having found that the Sultan of Johor had title to Pedra Branca in 1824, the Court then turned to the question whether this title was affected by the developments

⁷ *Pedra Branca Case*, *supra* n. 1, paras. 38–40.

⁸ *Pedra Branca Case*, *supra* n. 1, para. 46.

⁹ *Legal Status of Eastern Greenland (Denmark v. Norway)*, (1933), Judgment P.C.I.J. (Ser. A/B, No. 53 at 39.

¹⁰ *Pedra Branca Case*, *supra* n. 1, para. 66.

¹¹ *Pedra Branca Case*, *supra* n. 1, paras. 70–75.

¹² *Pedra Branca Case*, *supra* n. 1, para. 79.

in the period 1824 to 1840, including the 1824 Anglo-Dutch Treaty¹³ which divided the region into two spheres of influence, and the 1824 Crawford Treaty¹⁴ by which the Sultan and Temenggong of Johor ceded the island of Singapore to the East India Company.¹⁵ The Court found that the developments during this period did not change the situation. Therefore, it concluded that Malaysia had established to its satisfaction that as of the time when the British authorities in Singapore started their preparations for the construction of the lighthouse in 1844, Pedra Branca was under the sovereignty of the Sultan of Johor.¹⁶

APPLICABLE PRINCIPLES OF INTERNATIONAL LAW ON THE TRANSFER OF SOVEREIGNTY

The Court then examined the conduct of the parties and their colonial predecessors from the 1840s to 1980, the date on which the dispute crystallized, in order to determine the legal status of Pedra Branca after the 1840s. Before reviewing the conduct of the parties, the Court set out the applicable principles of international law by which sovereignty over territory belonging to one State may pass to another State through the conduct of the parties. The Court set out two principles of law. Firstly, citing the *Temple of Preah Vihear* case,¹⁷ the Court stated that under international law the passing of sovereignty may be by a tacit agreement arising from the conduct of the parties, and that it is the intention of the parties that is important rather than the form of the agreement.¹⁸ Second, citing the *Island of Palmas* case¹⁹ and the *Gulf of Maine* case,²⁰ the Court stated that sovereignty over territory might pass as

¹³ Treaty between His Britannic Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies, 17 March 1824. The practical effect of this Treaty was to broadly establish the spheres of influence of the British and Dutch colonial powers in Southeast Asia.

¹⁴ *Treaty of Friendship and Alliance*, East India Company and the Sultan of Johor and Temenggong of Johor, 2 August 1824. The Crawford Treaty, which was named after the British resident in Singapore, provided for the full cession of Singapore to the East India Company, along with all islands within 10 geographical miles of Singapore. *Pedra Branca Case*, *supra* n. 1, para 22.

¹⁵ The East India Company established the Straits Settlements of Penang, Malacca and Singapore in 1826. In 1867 the Straits Settlements became a British Crown Colony. The Straits Settlements were dissolved in 1946, and Singapore was administered as a separate Crown Colony from 1946 until 1958, when it became a self-governing colony. In 1963 Singapore became part of the Federation of Malaysia. In 1965 Singapore separated from Malaysia and became a sovereign independent State. *Pedra Branca Case*, *supra* n. 1, at paras. 24–29.

¹⁶ *Pedra Branca Case*, *supra* n. 1, paras. 115–117.

¹⁷ *Temple of Preah Vihear Case (Cambodia v. Thailand)*, Judgment, [1961] I.C.J. Rep. 17 at 31.

¹⁸ *Pedra Branca Case*, *supra* n. 1, para. 120.

¹⁹ *Island of Palmas Case (Netherlands/United States of America)* Award of 4 April 1928, R.I.A.A. Vol. II, 829 at 839.

²⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* Judgment, [1984] I.C.J. Rep. 246 at 305, para. 130.

a result of the failure of the State which has sovereignty to respond to concrete manifestations of the display of sovereignty by another State over that territory in circumstances which call for a response. In such case, its failure to respond may be interpreted as acquiescence to the sovereignty of the other State.²¹ In addition, the Court stated that a transfer of sovereignty based on the conduct of the parties must be manifested clearly and without any doubt by the conduct and the relevant facts, especially if what may be involved in the case of one of the States is in effect the abandonment of sovereignty over part of its territory.²²

CONDUCT OF THE PARTIES RESULTING IN A TRANSFER OF SOVEREIGNTY OVER PEDRA BRANCA

The Court did not explain in its statement of the applicable law how the two principles of tacit agreement and acquiescence can be combined. However, when applying the particular facts of the case to the two principles, the Court gave weight to certain conduct of the Parties which implied that there may have been a “tacit agreement” to transfer sovereignty to the authorities in Singapore. In addition, the Court gave weight to conduct of the Singapore authorities that amounted to manifestations of the display of sovereignty, and the “acquiescence” by the authorities in Malaysia to such conduct. Therefore, the Court seems to have come to its conclusion on the transfer of sovereignty by considering as significant some conduct which was evidence of tacit agreement to transfer sovereignty and other conduct which amounted to acquiescence by Malaysia to a display of sovereignty by Singapore.

With respect to the actions of the colonial predecessors with regard to the selection of the site for the Horsburgh lighthouse and the construction and commission of the Horsburgh lighthouse on Pedra Branca, the Court concluded that the correspondence with respect the selection is not conclusive. It noted that there was no written agreement relating to the lighthouse and the island on which it was to be constructed, and that it was not possible to reach a conclusion on how the colonial authorities viewed the issue of sovereignty from their conduct with respect to the selection of the lighthouse site.²³ In addition, the Court stated that it could not draw any conclusions with regard to sovereignty from the modalities of constructing and commissioning the lighthouse.²⁴

The Court gave particular consideration to an exchange of correspondence in 1953 between the Colonial Secretary of Singapore and the British Advisor to the Sultan of Johor. In a letter of 12 June 1953 the Colonial Secretary of Singapore

²¹ *Pedra Branca Case*, *supra* n. 1, para. 121.

²² *Pedra Branca Case*, *supra* n. 1, para. 122.

²³ *Pedra Branca Case*, *supra* n. 1, para. 148.

²⁴ *Pedra Branca Case*, *supra* n. 1, para. 162.

asked for information about the legal status of Pedra Branca. In his reply of 21 September 1953, the Acting Secretary of Johor stated that the Johor Government did not claim ownership of Pedra Branca. The Court considered this correspondence of central importance in determining the developing of an understanding of the Parties about sovereignty over Pedra Branca. It concluded that the reply shows that as of 1953 Johor understood that it did not have sovereignty over the island, and that the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.²⁵ Although it did not expressly state this, when viewed in light of its statement of the applicable principles of international law, the Court seems to have viewed the exchange of correspondence in 1953 as evidence of a tacit agreement between the Parties with respect to a transfer of sovereignty over Pedra Branca to Singapore.

The Court also examined particular conduct of Singapore and its predecessors after 1953 which could be characterized as acts of a territorial sovereign rather than acts of a State which merely had permission to operate a lighthouse, and the failure by Malaysia or its predecessors in some cases to respond to such conduct in circumstances where a response would be expected. The Court seems to suggest that some of the conduct of the two States amounted to acquiescence by Malaysia to displays of sovereignty by Singapore. The Court seemed to give greatest weight to the following conduct:

- (1) investigation by the Singapore authorities of marine accidents involving foreign ships within the territorial waters of the island, and the failure by Malaysia to protest such investigations prior to 2003;²⁶
- (2) exercise of control by Singapore over visits to the island, especially control over visits of Malaysian officials in 1974 and 1978 in the context of surveys of the waters surrounding the island, and Malaysia's failure to formally protest Singapore's conduct;²⁷
- (3) the display of the British and Singapore ensigns on Pedra Branca from 1850 to 1980, and the failure by Malaysia to protest this action as it had in the case of the display of the Singapore ensign on Pulau Pisang;²⁸

The Court also seems to have given weight to other conduct of Singapore, including the installation by the Singapore Navy of military communications equipment on the island in 1977 and the plans by Singapore in 1978 to reclaim areas around the

²⁵ *Pedra Branca Case*, *supra* n. 1, paras. 203, 223 & 230.

²⁶ *Pedra Branca Case*, *supra* n. 1, paras. 231–234.

²⁷ *Pedra Branca Case*, *supra* n. 1, paras. 235–239.

²⁸ *Pedra Branca Case*, *supra* n. 1, paras. 244–246. Pulau Pisang is a small island in the Malacca Strait which both States agree is under the sovereignty of Malaysia. Singapore has operated a lighthouse on the island since 1990 pursuant to an agreement between the Straits Settlements and the Johor Sultanate.

island. Although Malaysia claims that it had no knowledge of this conduct, the Court concluded that the conduct supports Singapore's case because it shows that Singapore believed that it had sovereignty over the island.

The Court also considered certain maps of importance. Although more than 100 maps were presented to the Court by the two parties, the Court only treated as significant six maps published by the Malayan and Malaysian Surveyor General and Director of National Mapping between 1962 and 1975. This series of maps indicated that Pedra Branca belonged to Singapore (Singapura), but did not indicate that Pulau Pisang, the other island on which Singapore administered a lighthouse, belonged to Singapore. The Court stated that maps falling into the category of "physical expressions of the will of the State" may be of relevance in so far as they constitute a "clear admission against interest" of the State producing them, and it cited the decision of the boundary commission in the *Eritrean/Ethiopia Case*²⁹ as support for this proposition. The Court concluded that the six maps tended to confirm that Malaysia considered that Pedra Branca fell under the sovereignty of Singapore. Therefore, the six maps seem to have been viewed by the Court as further evidence of a tacit agreement to transfer sovereignty over Pedra Branca to Singapore.³⁰

After considering the above evidence and other conduct of the two parties, the Court stated that the conduct of the parties and their colonial predecessors from 1840 to 1980 reflected "a convergent evolution" of the positions of the parties regarding title to the island. It gave particular weight to the conduct of Singapore and its predecessors as the sovereign, when considered together with the conduct of Malaysia and its predecessors, including their failure to respond to the conduct of Singapore and its predecessors. It concluded that by 1980 sovereignty over Pedra Branca had passed to Singapore.³¹

SOVEREIGNTY OVER MIDDLE ROCKS AND SOUTH LEDGE

Singapore maintained that Middle Rocks and South Ledge are dependencies of Pedra Branca and form with the latter a single group of maritime features. Consequently, it argued that whoever is determined to have sovereignty over Pedra Branca also has sovereignty over Middle Rocks and South Ledge. Malaysia contested these arguments. Malaysia also pointed out that in contrast to its claims to Pedra Branca, Singapore never advanced any claims to Middle Rocks or South Ledge. Malaysia also pointed out that when Singapore formally protested the inclusion of Pedra Branca in its 1979 Map, Singapore made no mention of Middle Rocks and South

²⁹ *Decision regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002, para. 3.28, (2002) 41 I.L.M. 1057; 130 I.L.R. 1 at 41.

³⁰ *Pedra Branca Case*, *supra* n. 1, paras. 267–272.

³¹ *Pedra Branca Case*, *supra* n. 1, para. 276.

Ledge, even though these features were shown as within Malaysian territorial waters on the 1979 Map.³²

The Court did not directly address the issue of whether Middle Rocks should be treated as a dependency of Pedra Branca. Instead, it stated that the issue of the legal status of Middle Rocks must be assessed in the context of the Court's reasoning on the issue of sovereignty over Pedra Branca.³³ In addressing the issue of the legal status of Middle Rocks in this context, the Court stated that none of the relevant conduct of the parties on the issue of the transfer of sovereignty over Pedra Branca had any application to Middle Rocks. Therefore, it concluded that sovereignty over Middle Rocks was not transferred, but remained with Malaysia, as the successor to the Sultanate of Johor.

Although the Court was specifically asked in the special agreement to determine whether Malaysia or Singapore had sovereignty over South Ledge, the Court did not expressly decide that issue. Instead, it stated that special problems were presented by South Ledge because under the United Nations Convention on the Law of the Sea, 1982 (hereafter UNCLOS),³⁴ South Ledge is a low-tide elevation, not an island. Article 121 of UNCLOS defines an "island" as a naturally formed area of land, surrounded by water, which is above water at high tide. Article 13 of UNCLOS defines a "low-tide elevation" as a naturally formed area of land which is above water at low tide, but submerged at high tide. Under international law States can claim sovereignty over islands in the same manner that they claim sovereignty over land territory. Citing its 2001 Judgment in the *Qatar and Bahrain Case*³⁵ as authority, the Court pointed out that international law is not clear whether low-tide elevations can be considered to be territory from the viewpoint of acquisition of sovereignty. However, as it observed in the *Qatar and Bahrain Case*, a coastal State has sovereignty over low-tide elevations that are situated within its territorial sea, since it has sovereignty over the territorial sea itself. The Court observed that on the basis of the evidence presented before it, South Ledge "falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca and Middle Rocks".³⁶ The Court then stated that since it had not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Singapore and Malaysia in the area in question, it could only conclude that sovereignty

³² *Pedra Branca Case*, *supra* n. 1, para. 287.

³³ *Pedra Branca Case*, *supra* n. 1, para. 288.

³⁴ Adopted in Montego Bay, Jamaica, on 10 December 1982, entered into force on 16 November 1994, 1833 UNTS 397. As of 6 July 2008, there were 156 Parties to the Convention, including Indonesia, Malaysia and Singapore (hereafter UNCLOS).

³⁵ Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, [2001] I.C.J. Rep. 40 at 101, paras. 204–206 (hereinafter *Qatar and Bahrain Case*).

³⁶ *Pedra Branca Case*, *supra* n. 1, para. 297. The Court failed to point out that since South Ledge is only 7.6 nautical miles from the Indonesian island of Bintan, it also falls within the overlapping territorial waters of Bintan.

over South Ledge “belongs to the State in the territorial waters of which it is located”.³⁷

LIMITS OF THE DECISION AND DELIMITATION OF MARITIME BOUNDARIES

As the Court pointed out in its decision with respect to South Ledge, under the terms of the Special Agreement it was asked only to resolve the issue of sovereignty over the three features. It was not asked to decide what maritime zones could be claimed around each of the three features. Nor was the Court asked to delimit the maritime boundaries between Malaysia and Singapore in the area. Given the proximity of the three features to the island of Bintan, Indonesia would also have to be involved in the negotiations to determine the maritime claims and delimit the maritime boundaries. These issues are governed by the applicable provisions of UNCLOS.³⁸ The maritime boundary delimitation in this part of Singapore Strait raises many issues that are far too complex to be discussed in this case note. However, it should be noted that the Court’s decision on the sovereignty of Pedra Branca and Middle Rocks sets the stage for maritime boundary negotiations.³⁹ Until the issue of sovereignty over Pedra Branca and Middle Rocks was resolved, it was not possible for the three States to enter into maritime boundary negotiations to finalize their maritime boundaries.

WHO “WON” THE CASE?

The main island in dispute was Pedra Branca. It is situated at the northern entrance to the Singapore Strait and is a strategic point from which to monitor ships transiting the Straits of Malacca and Singapore in a westbound direction, from the South China Sea to the Indian Ocean. Control over Pedra Branca is important to Singapore’s interests in the navigational safety and maritime security of the Singapore Strait. Therefore, the fact that the Court ruled that Singapore had sovereignty over Pedra Branca was a major victory for Singapore.

At the same time, the decision of the Court that Malaysia has sovereignty over

³⁷ *Pedra Branca Case*, *supra* n. 1, para. 298.

³⁸ UNCLOS, *supra* note 34. Among the articles that may be at issue in the maritime boundary negotiations are Articles 5 and 7 on baselines, Articles 15, 74 and 83 on delimitation of boundaries and Article 121 on islands. If a dispute arises concerning the interpretation or application of any of these provisions, Part XV on the Settlement of Disputes will be applicable.

³⁹ Robert Beckman & Clive Schofield, “Moving Beyond Disputes over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait” (2008) 40 *Ocean Devel. & Int’l L.*, No. 1 (in press).

Middle Rocks was a victory for Malaysia. Fishermen in Johor had been upset because Singapore had exercised control over all of the sea space around the three features since 1986 and had denied Malaysian fishermen access to what they believed were their traditional fishing grounds. Now that it has been decided that Malaysia has sovereignty over Middle Rocks, Malaysian fishermen will be able to return to some of their traditional fishing grounds. Because the amount of sea space under Singapore's control has been reduced as a result of the decision, this was a victory for Malaysia. Also, since the Court has determined that it has sovereignty over Middle Rocks, Malaysia no longer has to fear that Singapore will attempt to connect Pedra Branca and Middle Rocks through land reclamation.⁴⁰ The area of sea space that will be controlled by Malaysia will increase further if it is agreed that South Ledge is under the sovereignty of Malaysia because it lies within the territorial sea of Malaysia. This is likely to be the result because South Ledge is closer to Middle Rocks than to Pedra Branca.⁴¹

FINALITY OF THE DECISION

Article 6 of the Special Agreement of Malaysia and Singapore submitting the dispute to the Court expressly provides that the Parties agree to accept the Judgment of the Court as final and binding upon them.⁴² Also, Article 94 of the Charter of the United Nations provides that members of the United Nations undertake to comply with the decision of the Court in any case in which they are a party. Further, Article 60 of the Statute of the International Court of Justice (ICJ Statute)⁴³ provides that a judgment of the Court is final and without appeal.

However, reports in the Malaysian press indicate that the Malaysian government is undertaking an additional search for missing documents, especially the 1844 letter from the Governor in Singapore seeking permission from the Sultan of Johor to

⁴⁰ Noor Farida Ariffin, "Response to Salleh Buang's interpretation of the ICJ Judgment on Batu Puteh", Letter to the Editor, *New Straits Times* (14 August 2008).

⁴¹ South Ledge is 1.7 nautical miles south of Middle Rocks and 2.2 nautical miles south-south-west of Pedra Branca. During oral argument Alain Pellet, counsel for Singapore, stated that: "Singapore readily accepts that Middle Rocks generates a territorial sea of its own and that it is therefore correct to consider that, if Middle Rocks does not constitute a single group with Pedra Branca, or if it falls under different sovereignty, it would be more accurate to say that South Ledge is included in the territorial sea of Middle Rocks and not in that of Pedra Branca." *Singapore Oral Argument Day 4*, Friday 9 November 2007, CR 2007/23 (translation), para. 13, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=2b&case=130&code=masi&p3=2> (accessed on 27 October 2008).

⁴² Special Agreement, *supra* note 5.

⁴³ The Statute of the International Court of Justice is annexed to the Charter of the United Nations. Article 93 of the Charter provides that all members of the United Nations are automatically parties to the ICJ Statute.

build the lighthouse on Pedra Branca. Neither party has been able to locate this letter. The Minister of Foreign Affairs of Malaysia has been reported to have stated that if the missing letter is found, Malaysia will move to ask for a revision of the judgment under Article 61 of the ICJ Statute.⁴⁴

Article 61 of the ICJ Statute sets out the conditions under which a State may make an application for a revision of a judgment. The application for revision must meet several conditions.⁴⁵ The most important condition on the facts of this case is that the application for revision must be based upon the discovery of a fact of such a nature as to be a decisive factor in the case. It is difficult to see how Malaysia could meet this condition. Even if the 1844 letter is found and it suggests that the British only requested “permission” to construct and operate a lighthouse on Pedra Branca, this would not be a decisive factor in the Court’s decision with respect to Pedra Branca. Such a letter might be further evidence that the Johor Sultanate had sovereignty over Pedra Branca in 1844, but the Court had determined that this was the case without the letter. Given that the Court’s decision was that sovereignty over Pedra Branca had been transferred to Singapore because of the conduct of the parties from 1850 to 1980, the existence of the 1844 letter would not be a decisive factor in the case.

Despite the discussion in Malaysia about a possible revision of the judgment, a technical committee has been established by the two States to implement the Court’s decision.⁴⁶ Therefore, it seems very likely that the decision of the Court will be accepted by both States as final and binding and will be implemented.

CONCLUSION

The Court was asked to decide which of the two Parties had the better claim to sovereignty over the three features. As is often the case in sovereignty disputes over small or remote uninhabited islands, neither State was able to show that it had publicly exercised the attributes of sovereignty over the island over a long period in a clear, consistent and continuous manner. However, after examining the conduct of the parties in light of the principles of tacit agreement and acquiescence, twelve of the sixteen judges concluded that Singapore had the stronger claim to sovereignty over Pedra Branca. Singapore’s conduct may have been sporadic and weak, but it was stronger than Malaysia’s, especially when considered in light of Malaysia’s failure to

⁴⁴ “Glimmer of hope burns brightly”, *The Star*, 1 June 2008.

⁴⁵ For a discussion of the conditions and the prior case law, see Shabtai Rosenne, *The Law and Practice of the International Court 1920–2005*, 4th ed. (Leiden/Boston: Martinus Nijhoff, 2006) vol. 3 at 1623–1630.

⁴⁶ “Joint Press Statement: The Second Malaysia-Singapore Joint Technical Committee (MSJTC) Meeting on the Implementation of the International Court of Justice Judgment on Pedra Branca, Middle Rocks and South Ledge,” 1 September 2008, available at http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=4332 (accessed on 27 October 2008).

protest conduct by Singapore that were acts of a Government which believed it was the sovereign, not the operator of a lighthouse.

The Court's decision on Middle Rocks is sound in law, as is indicated by the fact that the only judge to vote against was the *ad hoc* judge appointed by Singapore. Its decision on South Ledge was understandable, given the uncertainties of the law on sovereignty over low-tide elevations and the fact that the Court was directed to address only the issue of sovereignty and not consider the delimitation of maritime boundaries.

States are often reluctant to refer sovereignty disputes to an international court or arbitral tribunal because the result is usually a winner-take-all decision. The Court's decision in this case gave something to both sides and can be described as a fair and equitable result. In fact, given the sensitive nature of sovereignty disputes, it is unlikely that the two States would have been able to agree to the same result through negotiation. Since the decision was made by a neutral third party after giving both States the opportunity to present their case, both States are likely to accept the Court's decision and implement it in good faith.

AUSTRALIA'S "RUDD PROPOSAL": BUSINESS AS USUAL

C.L. Lim*

INTRODUCTION

On 4 June 2008, Melbourne newspaper *The Age* announced that:¹

Following in the steps of his Labor predecessors, Prime Minister Kevin Rudd has proposed an initiative to create an "Asia-Pacific community" [APC] by 2020, bringing together countries as disparate as the United States, China, Japan, India, Indonesia and Australia.

It was covering Mr Rudd's speech to the Asia Society in Sydney the previous evening, during which Rudd had also announced his choice of APEC veteran negotiator, Richard Woolcott as the person tasked with selling the APC to other Asia-Pacific nations. Rudd's proposal takes place against the background of a host of competing initiatives, especially in the last decade or so but going back even earlier to the formation of APEC in 1989.

The present article offers a broad overview of these initiatives and seeks to situate the Rudd Proposal against the recent history of Asian and Asia-Pacific trade

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¹ "Rudd Pushes for Asia-Pacific Community", *The Age* [Melbourne], 4 June 2008.

regionalism. In this it seeks to measure the potential effect of the Australian Prime Minister's proposal on the nature and likely direction of the existing Asia-Pacific trading order, and more widely the Asia-Pacific international legal order.² The main argument which this article tries to make is that while the latest Australian policy statement will, if it is successfully carried out, have an impact on that legal order, in reality Australia is likely to continue to pursue more free trade agreements (FTAs) in the Asia-Pacific as a necessary means towards achieving the APC. If this is true, the Rudd Proposal might prove to have more in common with the Howard Administration's policies than it does with Mr Rudd's Labor predecessors, at least in the medium term. For the other Asia-Pacific nations already engaged in an FTA race, Australia's latest initiative signifies that it is, simply, business as usual.

SITUATING THE LEGAL QUESTION

A preliminary question has to do with the institutional nature of the APC. Will it be like APEC, which has been described as having a "soft, informal" nature,³ as opposed to what international lawyers sometimes refer to as the "trade" model – i.e. a treaty regime with compulsory dispute resolution and enforcement capabilities? Whatever the APC's ultimate form, this article contends that the best mode for getting there is still by way of "hard" treaty action in the form of legally binding, discriminatory FTAs. What one might accurately term the method of "legally discriminatory trade".

Too much has been written on the influence of domestic arrangements on international behaviour to be repeated here.⁴ So far as the domestic origins of Australian legally discriminatory trade is concerned, Professor Anne Capling has demonstrated in her admirable book that much of it lies in domestic voter concern during the 1990s that Australia was not getting a fair deal in Geneva. Beginning with the 1997 *White Paper on Foreign and Trade Policy*, Australia had embarked upon a campaign for reciprocal trade concessions under the banner of "bilateralism" in a departure

² For a methodological framework which measures the emergence of a regional legal order within the Asia-Pacific region against the regional growth of international economic regulation, see Paul J. Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation", (2004) 8 *Singapore Year Book of International Law* 165. For a study of opposing trends towards "more informal modes of cooperation", see Alison Duxbury, "Moving Towards or Turning Away from Institutions? The Future of International Organizations in Asia and the Pacific", (2007) 11 *Singapore Year Book of International Law* 177.

³ Sungjoon Cho, "Rethinking APEC: A New Experiment for a Postmodern Institutional Arrangement", in Mitsuo Matsushita & Dukgeun Ahn, *WTO and East Asia: New Perspectives* (London: Cameron May, 2004), 381, 381.

⁴ See Kenneth Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts, (1999) 93 *American Journal of International Law* 361, 366 (discussion of "liberal" theories).

from Labor's previous three-pillar approach of unilateral liberalization, regionalism and multilateralism. Essentially, the Howard Government had abandoned Labor's liberal internationalism.⁵ Reciprocity would now be about market access and both market access and reciprocity would be achieved through bilateral trade negotiations.⁶

What Australia seems to have gone through in the 90s, the United States went through in the late 70s and during the Reagan Era in the 80s with its own historic concerns about getting a fairer trade deal in the national debate on the implementation of the GATT Tokyo Round negotiations. According to the late Robert Hudec, the American public and their Government had struck a deal. The Trade Agreements Act of 1979 would be passed so long as increased competition was "fair", and fairness meant that there would be tighter anti-dumping and countervailing duty laws.⁷ That was when the issue of fairness came firmly onto the national trade policy debate agenda, and it became at least one important aspect of what fairness now means in international trade policy debate.

But there is another aspect which mirrors Australian concerns in the 90s more closely. The turn to fairness was also an "offensive" move – simply put, it is now the Government's job to get a fairer deal in foreign markets. The US Congress started putting pressure on the Executive Branch in the early 70s with Section 301 legislation in 1974 and its subsequent amendments. Section 301 was about the need for the Executive Branch to ensure that America gets a "fair" deal by attacking foreign trade barriers through legal means. The underlying logic of offensive fairness is, however, the same as in the case of "defensive" fairness. The political rationale for trade liberalization is reciprocity. Section 301 monitors US trading partners' reciprocal concessions. Monitoring reciprocal trade concessions is also what Australia's annual statement on *Trade Outcomes and Objectives* now does.⁸ But the purpose of Section 301 in the US goes further; it monitors the treaty behaviour of the Executive Branch by ensuring that trade concessions are not granted by the United States for purely political ends.⁹ The APC itself demonstrates that "danger". Because of its multi-dimensional character, it allows purely trade interests to yield to a potentially wide range of concerns – measures contemplated by the Rudd Proposal which would

⁵ See further, Ann Capling, *All the Way with the USA: Australia, the US and Free Trade* (Sydney: UNSW Press, 2005), 42 (hereafter, "All the Way").

⁶ Ann Capling, *Australia and the Global Trade System: From Havana to Seattle* (Cambridge: Cambridge University Press, 2001), 171–172 (hereafter, "Global Trade System").

⁷ Robert E. Hudec, *Essays on the Nature of International Trade Law* (London: Cameron May, 1999), 234.

⁸ Capling, *Global Trade System*, *op. cit.*, 172. See the DFAT website at <http://www.dfat.gov.au/toos> (accessed 25 May 2010). A similar example can be found in the annual report prepared by Japan's Ministry of Economy Trade and Industry; see *2007 Report on Compliance by Major Trading Partners with Trade Agreements (WTO, FTA/EPA & BIT)* (Tokyo: Industrial Structure Council, METI: 2007).

⁹ Hudec, *Essays*, *op. cit.*, 245–246.

enhance the sense of an Asia-Pacific security community include measures to combat terrorism, and for handling natural disasters and disease, as well as those dealing with more obviously trade-related issues. Other examples include long-term energy and resources concern, and the issue of food security.¹⁰ Climate change is another issue.¹¹

In a sense, the historical, underlying concern with fairness is ironic since one real advantage which bilateralism – the Australian instrument of choice in getting fairer trade deals – enjoys over the WTO in terms of the ease and flexibility of negotiations is that trading interests can more easily be used as strategic and political bargaining chips. Bilateral negotiations invite political trade-offs, thereby making the negotiations easier. On the flip-side, bilateral treaties do provide the opportunity for liberalization without political pain at home. Unlike multilateral negotiations, issues that hurt (e.g. agriculture) can simply be dropped from bilateral talks.¹² Critics say the result tends to be a “trade light” deal for political ends.¹³

Thus, while APEC forms the public (and widely publicized) backdrop to the Rudd proposal, there is also a decade of Australian bilateralism to be accounted for. After a twenty-year hiatus following the conclusion of the Australia–NZ Closer Economic Relations Trade Agreement in 1983, the Howard Administration signed Australia’s first post-Uruguay Round FTA with Singapore in 2003, followed by FTAs with the United States in 2004, Thailand in 2005 and the Australia–Chile FTA in 2008. An FTA with ASEAN and New Zealand has recently been concluded, and FTAs with China, the Gulf Cooperation Council, Japan and Malaysia are currently under negotiation.¹⁴ These are (and probably should be) the building blocks of Australia’s APC proposal, and the success of the APC partly depends on the success of Australia’s current FTA programme.

HISTORIC OBJECTIONS TO LEGALLY DISCRIMINATORY TRADE IN AUSTRALIAN TRADE POLICY AND THE GATT/WTO

Australian strategic concerns

Bilateralism was not, however, an uncomplicated option for Australia. While outwardly the Howard Government was set on the course of reciprocal, preferential

¹⁰ See (e.g.) Hadi Soesastro, “Kevin Rudd’s Architecture for the Asia-Pacific”, *The Jakarta Post* [Jakarta], 6 November 2008.

¹¹ “Kevin Rudd Suggests Formation of Asia-Pacific Community”, *The Hindu* [Chennai], 12 August 2008, reporting on Mr Rudd’s speech in Singapore.

¹² See also John Ravenhill, “The New Bilateralism in the Asia-Pacific”, (2003) 24 *The Pacific Review* 2.

¹³ For the “trade light” critique, see (e.g.) Razeen Sally, *Trade Policy, New Century* (London: IEA, 2008), 136.

¹⁴ DFAT website at <http://www.dfat.gov.au/trade/ftas.html> (accessed 25 May 2010).

trade treaties, a concurrent fear was that choosing the wrong partners could alienate Australia's Northeast Asian neighbours.¹⁵ Legally discriminatory trade is just that; it cuts off third nations and Australia did not wish to be accused of pursuing discriminatory trade, especially by key trading partners like Japan. The US, Canada and Chile had all broached the issue of having a bilateral deal with Australia when John Howard came into office but these proposals did not at first succeed, at least not until the Asian landscape changed significantly. In the meantime, a possible deal with ASEAN pointed the way ahead for Australia. This would have secured both access to ASEAN markets and the possibility of an Australia–NZ–ASEAN bloc at the WTO.¹⁶ But there was one real obstacle to all this: Malaysia, Indonesia and the Philippines objected to such a deal.¹⁷ Anecdotal evidence from the negotiators indicate that of all ASEAN's trade deals in recent years, the deal with Australia and NZ was supposed to have been the easiest to accomplish, and yet it was to transpire only after ASEAN's deals with China, Korea and Japan had been concluded.

Malaysia, under the Mahathir Administration, had championed the idea of an East Asia Economic Grouping (EAEG) instead. This would have had the effect of excluding both Australia and the United States. At the time, there was uncertainty in the region, aside from uncertainty within ASEAN itself, which was slowly undergoing a process of trade integration,¹⁸ about the wisdom of bilateralism. In any event, the EAEG idea itself did not enjoy any immediate success. The Asian countries, including Australia's key partners Japan and South Korea, were all strongly committed to the multilateral process at the WTO. Change came only when Singapore, which had already experimented with an FTA with New Zealand, concluded an FTA with Japan – the Japan–Singapore Economic Partnership Agreement – in 2002. That became a diplomatic signal that Japan was itself heading down the road of bilateralism, and Korea soon followed. The result was that Australia could no longer be blamed, and need no longer fear blame by these two Asian partners for engaging in discriminatory trade.¹⁹ Soon, East and Southeast Asia would demonstrate the domino effect theory of trade negotiations at work, transforming the Asian trading landscape entirely.

History of legally discriminatory trade in the GATT/WTO

As for legally discriminatory trade itself, it too has had an uncertain intellectual, institutional and legal history in the wider context of the global multilateral

¹⁵ Capling, *Global Trade System*, *op. cit.*, 184–185.

¹⁶ *Ibid.*, 185–186.

¹⁷ *Ibid.*

¹⁸ See further, C.L. Lim, “‘A Mega Jumbo-Jet’: South-East Asia's Experiments with Trade and Investment Liberalization”, in *The New International Architecture in Trade & Investment* (Singapore: APEC, 2007), 115.

¹⁹ Capling, *Global Trade System*, *op. cit.*, 187.

system. In the aftermath of the Second World War, the United States advocated unconditional most favoured nation (MFN) treatment in the regulation of international trade.²⁰ According to this view, any trading advantage, favour, privilege or immunity granted by one trading nation to another shall be accorded immediately, and unconditionally to the other members of the proposed but ill-fated International Trade Organization (ITO).²¹ Britain and France were unenthusiastic on account of the preferential trading schemes in place with their colonies such as the then existing scheme of British Imperial Preferences. They therefore argued for legally discriminatory trade and got it in the form of specific carve-outs from the MFN clause in Article I of the GATT Agreement of 1947 (GATT's so-called "Grandfather clauses").²² The GATT itself had survived the collapse of the ITO to regulate international trade at the multilateral level for almost half a century until the establishment of the WTO.²³ During the course of those five decades of the GATT's rule over international trade, two major developments had demonstrated the tension between MFN rule and continued demands for different forms of legally discriminatory preferential trade.

The first was the call by developing countries for special and differential treatment which, if permitted, would not require a grantor nation to offer what they offer to developing nations to other trading nations as the MFN rule would otherwise require (so-called "new preferences").²⁴ Such a clause, which would have allowed preferential trade in order to assist the economic development of what were then called "under-developed" nations, was proposed early on in the post-war negotiations but did not find their way ultimately into GATT 1947.²⁵ For example, Lebanon and Syria had attempted to push the issue but their calls for development-based preferences were met by a specific carve-out for the Lebano-Syrian Customs Union instead, not unlike that for France and Britain.²⁶ Eventually, the developing nations did succeed in having their demand for developing country preferences recognized in permanent legal form with the GATT's Enabling Clause of 1979,²⁷ but only after a struggle during much of the 60s and 70s through the work of UNCTAD.²⁸ Australia itself

²⁰ John Jackson, *World Trade and the Law of GATT* (Charlottesville: Michie, 1969), 254–255.

²¹ See GATT 1947, article 1.1.

²² GATT 1947, article 1.2(a) & (b), Annexes A & B.

²³ John Jackson, *The World Trading System: Law & Policy of International Economic Relations* (Cambridge, Mass.: MIT Press, 2d. ed., 1997), 35–42.

²⁴ Robert E. Hudec, *Developing Countries in the GATT Legal System* (London: Gower, 1987), 42, 51.

²⁵ See *ibid.*, 42 and Jackson, *World Trade*, *op. cit.*, 578 (discussing the stillborn clause in Art. 15 of the Draft ITO Charter).

²⁶ GATT 1947, Annex F.

²⁷ BISD, 26th Supplement (1980), 203–04.

²⁸ Edwina Kessie, "The Legal Status of Special and Differential Treatment Provisions in the WTO Agreements", in George A. Bermann & Petros C. Mavroidis (eds.), *WTO Law and Developing Countries* (NY: Cambridge University Press, 2007), 12–16. See further, Joel Trachtman, "Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid'", (2003) 3 *JIEL* 3.

had early on played a key role in tempering US policy, but that is another story well told elsewhere.²⁹

The second was the creation of the European Economic Community (EEC). Had it been resisted by GATT members, as there were strong legal grounds to do so, this could simply have led to the demise of the GATT itself or at least its wholesale renegotiation with all the uncertainty that would have entailed.³⁰ Tolerance of the EEC in turn led other developing nations, particularly the Latin American nations to, in turn, explore regional integration between themselves in the form of customs unions and free trade agreements.³¹

From 1947 until the present time, customs unions and free trade agreements (FTAs) have been regulated by GATT's Article XXIV, and since the establishment of the WTO in 1994, also by Article V of the General Agreement on Trade in Services (GATS). Article XXIV has long been criticized for the economic assumption which seems to underlie its permissiveness towards customs unions and FTAs. That assumption has been that FTAs would help to create or foster trade insofar as they would tend to shift consumer demand from the products of inefficient domestic producers which enjoyed tariff and other forms of protection towards more efficiently produced goods in another FTA member country. However, the argument soon emerged, following Jacob Viner's seminal work, that FTAs could also have the opposite effect. They distort trade by shifting consumer preferences towards inefficient producers in an FTA member country and away from efficient producers in non-FTA member countries.³² These and other complexities were all to fall under the somewhat skimpy regulation of Article XXIV, whose vague requirements need be stated only briefly for our present purposes. Article XXIV requires the elimination of tariff protection on "substantially all the trade" between the FTA members,³³ and requires that trade protection (i.e. "duties and other regulations of commerce") "should not be higher or more restrictive" than it was before in each of the constituent territories of the FTA members towards the outside world.³⁴ These requirements for the formation of FTAs have proven difficult to apply, not least in the example of the EEC above, and, doctrinal ambiguities aside, have led GATT members over the years to impose only the most cursory and uncertain supervision on the formation of legally discriminatory agreements. The diplomatic row which led to the compromise acceptance of the EEC notwithstanding doubt over Art. XXIV compliance did not help, and indeed ushered in what Robert Hudec called the age of the "delegalization" of the GATT. In determining their conformity with GATT's Article XXIV

²⁹ *Australia and the Global Trading System, op. cit.*, 13–35.

³⁰ Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (London: Butterworths, 2d. ed., 1990), 211–214.

³¹ Hudec, *Developing Countries, op. cit.*, 51.

³² See Kenneth Dam, "Regional Economic Arrangements and the GATT", (1963) *University of Chicago Law Review* 615, 619–620, 627–627, 633–635.

³³ GATT 1947, Article XXIV.8(b).

³⁴ *Ibid.*, Article XXIV.5(b).

requirements, the GATT Working Party in every instance but one (the customs union between the Czech and Slovak Republics) found the results of its inquiry inconclusive.³⁵ Moreover, the proliferation of FTAs in recent years has caused alarm about the complexity of different rules of origin (ROOs); namely, those rules which are necessary to maintain legally discriminatory trade by limiting such preferences only to those goods produced by members of the FTA and not by others. In any case, varied and often intricate ROOs have led some to warn against the increased transaction costs caused by a spaghetti bowl of impossibly complex trade regulation.³⁶ Or in the case of the proliferation of FTAs in Asia, an “Asian noodle bowl”.³⁷ More recently, the WTO has imposed new transparency requirements in the hope that better and more timely information by WTO members of the FTAs they intend to enter into will ultimately form the basis of better WTO surveillance, supervision and compliance.³⁸

That, in short, is the background to the present legal, economic, and institutional controversy over the growth of FTAs generally and the legally discriminatory trade which they bring. It is against that same background that many will judge the Rudd proposal, or at least its trade implications. Yet more recently, as we have seen, countries like Australia, the United States and others, including those in the Asia-Pacific region, have advocated more not less legally discriminatory trade, or at least larger regional trade agreements with a view towards curbing the phenomenon of a plethora of small (and, some say, “trade light”) FTAs.³⁹ More importantly, they say that an Asia-Pacific-wide FTA could curb an emerging tendency on the part of the Asian nations to drift away from the other Pacific Rim nations in North and South America.⁴⁰ Cynics might say that the United States is simply afraid of being cut off by an Asian trade protective wall, or worse an Asian trading bloc, while critics in the United States might point towards the current treaty behaviour of some Asian nations (in particular, the behaviour of China and ASEAN) as proof of that very purpose of Asian trade regionalism.⁴¹ Some observers argue that there should

³⁵ Jo-Ann Crawford, “A New Transparency Mechanism for RTAs”, (2007) 11 *Singapore Year Book of International Law* 133, 134.

³⁶ For a typology of ROOs worldwide, see (e.g.) Norio Komuro, “FTA Rules of origin and Asian Integration: Origin Rules and Certification”, in Mitsuo Matsushita & Dukgeun Ahn (eds.), *WTO and East Asia: New Perspectives* (London: Cameron May, 2004), 441.

³⁷ Following the recent conclusion of the ASEAN-India FTA, there has been resurgent press interest, and even hostility towards Asia’s FTAs; see “The Noodle Bowl”, *Economist*, 5 September 2009; “Bloc Party”, *Time Magazine*, 21 September 2009.

³⁸ Crawford, “A New Transparency Mechanism for RTAs”, *op. cit.*, generally.

³⁹ For the criticism that Asian FTAs are generally “quick, dirty and trade light”, see Razeen Sally, “Maintenance of the World Trade Order: Principles and Mechanics for the WTO System in the 21st Century”, Policy Research Project, European Centre for International Political Economy (ECIPE).

⁴⁰ Fred Bergsten, “Plan B for World Trade: Go Regional”, *Financial Times* [London], 16 August 2006.

⁴¹ Saadia M. Pekkanen, “Assessing the Prospects for a US-Japan FTA”, in *The New International Architecture in Trade & Investment* (Singapore: APEC, 2007), 87.

therefore be an Asia-Pacific Free Trade Area (the “FTAAP”) and that the threat of such could even prompt the European Community to conclude the current lacklustre Doha Round of trade negotiations.⁴² The Rudd proposal, properly situated, should be viewed in light of these economic, strategic and legal debates about the ultimate worth of legally discriminatory trade in the Asia-Pacific region at the present time.

Insofar as that proposal would tend to foster more legally discriminatory trade rather than less, there will also be likely implications both for the future of Asia-Pacific-wide trading arrangements and the legal architecture which might be needed to govern those arrangements. In any case, if the Rudd Proposal and other similar proposals fail to kick-start the Doha Round, its success or failure could signal the difference between having an eventual Asian trade bloc or having a broader Asia-Pacific-wide trading arrangement which, despite its discriminatory nature, will at least be more inclusive than “Fortress Asia”. The tenuous international legal regulation of FTAs by the WTO means that strategic behaviour will tend to determine real outcomes, and in turn the ultimate shape of future legal regulation.

AN ASIA TRANSFORMED AND THE “LEGALIZATION” OF APEC

East and Southeast Asia transformed

What has emerged in the meantime is a regional East Asian context which is already radically different from that which existed when APEC was first conceived by Japan and Australia. Beyond the growing opportunity it provided to Australia to embark on its *own* bilateralist course, the East Asian Agreements we have today are also made up of “hard”, discriminatory treaty rules. They are free trade agreements, as defined and regulated by GATT Article XXIV and GATS Article V.⁴³ Unlike APEC’s declared policy of open-regionalism they *are discriminatory* and that is why the WTO seeks to regulate them.⁴⁴ Those who are not party to these Asian FTAs, like Australia, risk being shut out of East Asian and Southeast Asian markets.

⁴² Bergsten, “Plan B for World Trade: Go Regional”, *op. cit.*

⁴³ See C.L. Lim, “Free Trade Agreements in Asia and Some Common Legal Problems”, in Yasuhei Taniguchi, Alan Yanovich & Jan Bohanes (eds.), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (Cambridge: Cambridge Univ. Press, 2007), 434.

⁴⁴ See Henry Gao & C.L. Lim, “Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement System as a ‘Common Good’ for RTAs”, *Journal of International Economic Law* (forthcoming).

The question of a legally discriminatory APEC

APEC on the other hand was not originally conceived in 1989 as a legally binding FTA which would have granted preferential treatment to its members while shutting out third countries from those preferences. It was a unique proposal and was opposed to discriminatory treatment. The APEC concept of open regionalism meant that APEC members would liberalize tariffs on a unilateral basis and extend the benefits of such unilateral liberalization to third countries on a most favoured nation (MFN) basis.⁴⁵ FTAs on the other hand would *bind* their members towards lowering tariffs (often to a target of zero tariffs) while precluding non-FTA members from enjoying the preferential treatment which the FTA grants to its own members.

Fear of the North American and European trade blocs

Unlike the GATT, however, developing nations too had played a fairly visible role in the creation of APEC. They did so upon Australia's and Japan's assurances at the time that APEC would not be based on any legally binding treaty. Australia had taken up a position against the emergence of global trading blocs and wanted APEC to be outward looking and extend the benefits of liberalization to countries outside APEC.⁴⁶ APEC was also a way for Australia and Japan to counter US unilateralism in the Asia-Pacific region and the sort of legally discriminatory trade regionalism found in North America and Europe which had emerged with the creation of NAFTA and Fortress Europe. At the same time, APEC would engage the US. Until the Howard Government, Australia had, by choosing the APEC model, deliberately chosen against going down the road of legally discriminatory trade. During the 80s and 90s, Washington had broached the possibility of a bilateral trade deal with Australia but both the economic calculation and reasons of negotiating power disparity had led Australia to bet on the multilateral trading system instead. According to this view, multilateralism would be sufficient to combat the potential trade diversion caused by President George Bush's "hubs and spokes" bilateralism in the Asia-Pacific, while helping to contain unfair US & EU agricultural trade policies.⁴⁷ Ideologically, this was Labor's liberal internationalism at its finest, and at work. A policy which did not favour bilateral trade deals, and which has since been abandoned by the Howard Administration. At the same time, Australia's former approach (pre-Howard) was also to guard against the emergence of an Asian

⁴⁵ Akiko Yanai, "Characteristics of APEC Trade Liberalization: A Comparative Analysis with the WTO", in Jiro Okamoto, *Trade Liberalization and APEC* (London: Routledge, 2004), 9, 15–20.

⁴⁶ *Ibid.*, 12–13.

⁴⁷ See, *All the Way*, *op. cit.*, 40–41.

trade bloc.⁴⁸ Australia simply could not commence a bilateral policy which might encourage, and eventually lead to, its own trade isolation.

The eventual collapse of open regionalism and voluntarism

Yet APEC's idea of open regionalism too has always been a troubled concept. Notwithstanding the rhetoric about the benefits of trade liberalization since the founding of the GATT in 1947, trading nations have always justified successive rounds of liberalization to their own citizens in reciprocal, mercantilist terms. They do so for good reason – in order to sell the deal. Political economists accept this as a necessary evil and take what countries say to their own citizens as some sort of elaborate hoax.⁴⁹ The larger truth is unpalatable. Nations liberalize not because tariff liberalization is good, but *because* they get reciprocal concessions in return.

The same reasons which lead trading nations to justify liberalization in mercantilist terms to their own populations would therefore tend to make it equally difficult for them to justify giving away unilateral concessions. Here, free riding is the principal sin and that sentiment led to calls for APEC to proceed upon a legally discriminatory footing instead. A serious tension began to emerge between open regionalism, where APEC members would liberalize trade unilaterally and simultaneously on the basis of peer pressure,⁵⁰ and the need to bind these same members legally to lower tariffs between themselves, in a discriminatory way, in the way FTAs do.

The choice of an “alternative” model of trade liberalization which eschewed a rule-based approach had failed, and most observers accept reluctantly that it has failed spectacularly. Aggarwal and Lin sum up the nature of that earlier failed enterprise:

In contrast to the legalistic and the highly detailed rule based approach in NAFTA, the process of negotiation in APEC reflects its ‘consensus building, non-binding, “soft law” approach to multinational cooperation . . . “Open regionalism” has been a code phrase against what many Asians regard as “Western-style institution-building”, serving as a defence against [a] bureaucratic, region-wide rules-making model of the EU and NAFTA, thus rendering commitments impossible to enforce and monitor.⁵¹

⁴⁸ *Ibid.*, 101. For some trade figures with Japan, Southeast Asia and China compared to those with Europe and the USA in 2003, see Capling, *All the Way*, *op. cit.*, 45.

⁴⁹ Hudec, *Developing Countries*, *op. cit.*, 142–144.

⁵⁰ And in accordance with so-called “Individual Action Plans”. See Yanai, *op. cit.*, 21, 25.

⁵¹ Aggarwal & Lin, *op. cit.*, 105.

Legalizing APEC

In 1991, APEC's Second Ministerial Meeting in Singapore became a turning point. The Informal Group on Regional Trade Liberalization (RTL) was established. APEC would in time come to compete with the WTO in the business of fostering treaty rule-based and rule-bound trade liberalization. The issue took centre stage in Seattle in 1993. America had arrived. Where the Bush Administration had been reluctant to engage in a broad multilateral approach to political and security issues in the Asia-Pacific region, this did not preclude its attempt to have a more legally rule-bound APEC.⁵² For the US, unlike Australia, the legal and strategic issues were to be kept separate and distinct. For Australia, as we have seen, its legal policy and trade strategy had been one and the same. To prevent Australian isolation, Australia had to prevent legally discriminatory trade. For the US, the prevention of an Asian bloc and Asian isolationism was precisely to be based on legally discriminatory trade against those outside the Asia-Pacific fold. Strategically, the US was, however, aligned to the Australian approach of guarding against the creation of a prejudicial Asian trade grouping while pressuring the EU to conclude the Uruguay Round.⁵³ So how does one promote more trade discrimination by having a rule-bound APEC while simultaneously arguing against legally discriminatory trade by the European and Asian nations? The second Bush Administration turned the problem around and called it "competitive liberalization". Legally discriminatory trade will either cause others outside an FTA to join in, or it will cause them to pursue multilateral liberalization.⁵⁴ All roads would lead to Rome. According to this way of thinking, a rule-bound APEC would therefore apply pressure towards the successful conclusion of multilateral talks by threatening to cut Europe off if such talks fail, just as it is widely believed in some quarters that it was the formation of APEC which led Europe to conclude the Uruguay Round Agreement in the first place. In this sense, APEC, especially a rule-bound APEC, would still be consistent with a WTO-friendly policy. As early as 1994, the Bogor Goals of free and open trade and investment in the Asia-Pacific by 2010 between the industrialized economies, and by 2020 for the developing economies had already been announced.⁵⁵ The only question that remained was how those goals were to be achieved.

Unsurprisingly, Mr Rudd has pointed out that his proposal is "consistent with . . . George W. Bush's call for the development of an Asia-Pacific Free Trade

⁵² *Ibid.*, 102.

⁵³ *Ibid.*

⁵⁴ Robert Zoellick, the current President of the World Bank and former US Trade Representative (2001–2005) is widely credited with, and criticized for, the argument and its underlying policy. See C. Fred Bergsten, "A Competitive Approach to Free Trade", *Financial Times* [London], 4 December 2002.

⁵⁵ Yanai, *op. cit.*, 19.

Area”.⁵⁶ But the FTAAP, as one commentator points out, is not just “Plan B” if the Doha Round fails completely. The FTAAP, if it were to present a credible – indeed, a large enough – threat has the real potential to replace the WTO altogether.⁵⁷ The problem with competitive liberalization on such a large scale, and in such large doses, is that if it were intended to revive the ailing multilateral process, it could instead end up killing the patient. The APC likewise could end up doing that.

THE VARIOUS SHAPES OF “LEGALLY DISCRIMINATORY” TRADE IN THE POLICIES OF AUSTRALIA’S NEIGHBOURS

The proposal for a Free Trade Area of the Asia-Pacific (FTAAP) is now on the table,⁵⁸ while a complex network of FTAs between ASEAN on the one hand and China, Japan, South Korea and India on the other will also largely be completed by 2012. Some observers have argued that the FTAAP is a better idea because it is a “bigger”, and therefore a “less discriminatory” idea. While it does not cut Asia off from North America as the current Asian FTAs seem to be doing, it could force Europe to the multilateral negotiating table in Geneva.⁵⁹ Or not, as the case may be.

Putting aside ASEAN’s creation of an ASEAN Free Trade Area (AFTA) the real change, so far as the current Asian trading order is concerned, came with China’s offer of an FTA to ASEAN in 2001. The ASEAN Secretariat had originally proposed economic integration between ASEAN and the “Plus Three” countries – China, Japan & South Korea – in Chiangmai as early as 2000. But no consensus could be reached within ASEAN and the ASEAN Chair proposed, in place of economic integration, individual FTAs between ASEAN and these Plus Three countries instead. A year later, China endorsed the idea of a China-ASEAN FTA (CAFTA), to the surprise of ASEAN countries.⁶⁰ ASEAN and China now aim to complete CAFTA by 2010 with the nations of “ASEAN Six” (Malaysia, Singapore, Brunei, Indonesia, Philippines and Thailand) and 2015 for the nations of ASEAN 10 (add Vietnam, Cambodia, the Lao PDR and Myanmar/Burma).⁶¹

⁵⁶ Kevin Rudd, cited in Franklin, *op. cit.*

⁵⁷ Sungjoon Cho, “‘Plan B’ is Always Inferior to ‘Plan A’”, *Financial Times* [London], 22 August 2006.

⁵⁸ “APEC to Consider the Feasibility of a Free Trade Area in the Asia-Pacific”, *APEC E-Newsletter*, Vol. 11, January 2007. See further, Fred Bergsten, “Plan B for World Trade: Go Regional”, *op. cit.*; Cho, *op. cit.*; G. de Jonquieres, “Do-It-Yourself is the Best ‘Plan B’ for Free Trade”, *Financial Times* [London], 24 August 2006.

⁵⁹ Bergsten, *ibid.*

⁶⁰ See further, Michael Ewing-Chow, “ASEAN-China FTA: Trade or Tribute?”, (2006) 10 *Singapore Year Book of International Law* 251.

⁶¹ Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People’s Republic of China, Phnom Penh, 5 November 2002; Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation Between ASEAN and

Despite China coming into the FTA game late,⁶² CAFTA therefore had a profound “catalytic” effect on the Asian trade treaty landscape; especially on the treaty behaviour of Japan and ASEAN’s other regional trading partners.⁶³ CAFTA started an FTA race in Asia. ASEAN has since completed the ASEAN–Japan Closer Economic Partnership Agreement in April 2008. What is notable is that, following the gains made in the CAFTA negotiations, Japan has in recent years been adopting a “multi-track” approach in negotiating not only with ASEAN itself but with individual ASEAN countries (Singapore, Malaysia, the Philippines and Thailand). Japan then concluded the 2008 agreement with ASEAN after having concluded these smaller bilateral deals. In doing so, Japan probably learnt from the Chinese experience where China found itself negotiating not with one partner (i.e. ASEAN) but confronting ten separate nations at once, and a Japanese strategy was found to turn that experience around.

As for Korea, which only signed its first modern FTA as late as 2003 (the Korea–Chile FTA),⁶⁴ it has since overtaken Japan and China by completing not only the Korea–ASEAN Trade in Goods Agreement in 2007, but a services chapter to the FTA in November 2007 and, most recently, an investment chapter in June 2009. These agreements followed the landmark but publicly controversial Korea–US FTA (KORUS).⁶⁵ More recently, Korea completed the negotiations for its latest FTA – with the EU – in July 2009.⁶⁶

the People’s Republic of China, Vientiane, 29 November 2004; Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People’s Republic of China, 14 January 2007. These treaties and the various protocols are available on Singapore’s FTA website at <http://www.iesingapore.gov.sg/wps/portal/> (visited 20 September 2008).

⁶² Henry Gao, “The RTA Strategy of China”, in *The New International Architecture in Trade and Investment: Current Status and Implications*, APEC Human Resources Working Group Capacity Building Network (Singapore: APEC Secretariat, 2007), 33.

⁶³ Hatakeyama Noboru, “A Short History of Japan’s Movement to FTAs (Part 3)”, 22 *Journal of Japanese Trade & Industry*, March/April 2003, 42. That effect confirms the theory of competitive liberalism as described by, amongst others, former USTR Robert Zoellick and is closely related to the domino effect theory of trade negotiations. For competitive liberalism in the Asia-Pacific, see Christopher Findlay, Mohd. Hafiah Piei & Mari Pangetsu, “Trading with Favourites: Free Trade Agreements in the Asia-Pacific”, in Riyana Miranti & Denis Hew (eds.), *APEC in the 21st Century* (Singapore: ISEAS, 2004), 89, 92.

⁶⁴ For Korea’s FTA policy, see Dukgeun Ahn, “Korea’s FTA Policy”, in *The New International Architecture*, *op. cit.*, 49.

⁶⁵ See Yong-Shik Lee, “The Beginning of Economic Integration between East Asia and North America? – Forming the Third Largest Free Trade Area between the United States and the Republic of Korea”, (2007) 41 *Journal of World Trade* 1091.

⁶⁶ “South Korea, EU Announce Conclusion of FTA Talks”, available at: <http://news.xinhuanet.com> (visited 23 September 2009).

To complete the current picture in Asia, ASEAN and India signed their much anticipated FTA in August 2009 in Bangkok.⁶⁷

So bearing in mind that the US, Southeast Asia, East Asia and South Asia seem to have headed firmly down the FTA route, what form will the APC take? Would it be rules-based or would it hark back to APEC's original notion of voluntary trade liberalization? That is our *first question* in relation to the Rudd proposal. Events suggest that we cannot now put the genie of "legalized", discriminatory regionalism back into the bottle.

THE QUESTION OF AN AUSTRALIAN ROLE

Predictions concerning the outcome for East Asian, Asian and Asia-Pacific-wide regionalism in more recent years have had to address a further tension between two scenarios; an ASEAN "Plus Three" and a "Plus Six" scenario.⁶⁸ The latter would include Australia, New Zealand and India. In recent years, impetus has been given to a Plus Six scenario with the East Asia Summit. This would bring Australia and Australia's role into the centre of debate over what a future regional arrangement would look like for the Asia-Pacific. One question in the last few years, however, has been whether an ASEAN Plus Three scenario would be preferable over a Plus Six scenario. Initially, it was to be a Plus Three scenario which would also be closely linked to the notion of an East Asian Economic Grouping (the EAEG).⁶⁹ This long-standing proposal would have been fairly exclusive. It would have left Australia, as well as New Zealand and India, out in the cold. Then came the Japanese Nikai initiative in April 2006 and the East Asia Summit, either of which would include India, Australia and NZ (i.e. ASEAN plus China, Japan, South Korea, India, Australia and NZ).⁷⁰ In contrast, the proposed APEC-wide Free Trade Area of the

⁶⁷ "India, ASEAN Sign FTA", *Straits Times* [Singapore], 13 August 2009; "India, ASEAN Resolve Differences Over FTA", *Business Standard* [Delhi], 28 May 2009; Rituparna Bhuyan, "Indo-ASEAN May Miss Target Date", *Business Standard* [Delhi], 29 October 2008; S. Arun, "India-ASEAN FTA Faces Hurdle at Indonesia End", *The Financial Express* [Delhi], 6 May 2008; "India-ASEAN FTA Hinges on Indonesia, Market Access", *Economic Times* [Haryana], 21 March 2008. For India's treaty practice, see further, Rahul Sen, "New Regionalism in Asia: A Comparative Analysis of Emerging Regional and Bilateral Trading Agreements involving ASEAN, China and India", (2006) 40 *Journal of World Trade* 554.

⁶⁸ See C.L. Lim, "A Mega Jumbo-Jet: Southeast Asia's Experiments with Trade and Investment Liberalization", in *The New International Architecture*, 115, 124–129.

⁶⁹ Robert Scollay, "East Asia and the Evolution of Preferential Trading Arrangements in the Asia-Pacific: A Stock-Take", in Charles Harvie, Fukunari Kimura & Hyun-Hoon Lee, *New East Asian Regionalism* (Cheltenham: Edward Elgar, 2005), 17, 20.

⁷⁰ The EAS ASEAN, China, Japan, Korea, India, Australia and New Zealand with the Russian Federation currently having observer status during the first summit in Kuala Lumpur in 2005. The decision to hold the First Summit in Kuala Lumpur was made during the 2004 ASEAN + 3

Asia-Pacific (the FTAA), unlike the Rudd proposal, would include the United States but not India.

There was a notable debate about having an APEC deal in the summer of 2006 carried out in the *Financial Times* of London.⁷¹ How exactly does the Rudd proposal relate to this, more established, idea? In one sense, it is even more ambitious. Does it then proceed on the premise that APEC is dead?⁷² If so, such a view would certainly have everything in common with the Howard Administration's aggressive bilateralism and nothing in common with Labor's own past policies. There are and will be a lot of questions here – why not an APEC deal instead? APEC is, after all, an established structure. On the other hand, is that all the idea of an Asia-Pacific Community is? That it is simply another way of talking about the FTAAP?

There is at least one important difference. The FTAAP and the Asia-Pacific Community (APC) present two overlapping but separate membership options and the question of membership is inevitably linked to Australia's potential leadership prospects. The Rudd proposal would include India, something which the EAS also does but the FTAAP does not. At the same time, it would include the United States, which the FTAAP does but the EAS does not.⁷³ Viewed in this way, the Rudd proposal singles out India and the United States, as well as Indonesia and China as potential key members.⁷⁴ But how likely is it that the East Asian and Southeast Asian nations would prefer an APC brokered by Australia?

Summit. The ASEAN Secretary-General, Ong Keng Yong described the EAS as a “forum for dialogue on broad strategic, political and economic issues”; H.E. Ong Keng Yong, “Leadership and Strategic Visions for the Development of East Asia”, Second Asian Economic Forum, University of Cambodia, Phnom Penh, 25 April 2006. Compare the “CEPEA” (or “Comprehensive Economic Partnership for East Asia”), also dubbed the “Nikai Initiative” or the “East Asian OECD proposal”. The proposal was formally announced in April 2006 by the Japanese trade minister, Toshiro Nikai. This proposal would include an East Asian Free Trade Agreement between the current members of the East Asian Summit (ASEAN, China, Japan, Korea, India, Australia and New Zealand). See (e.g.) “Japanese Government to Propose Big Asian Free Trade Zone” (AFX News), available on the bilaterals.org website at www.bilaterals.org (visited 20 September 2008).

⁷¹ Subsequently, the Hanoi Declaration at the 14th APEC Economic Leaders' Meeting called for further study of an APEC-wide FTA. That Declaration reads: “[W]hile affirming our commitments to the Bogor Goals and the successful conclusion of the WTO/DDA negotiations, we instructed Officials to undertake further studies on ways and means to promote regional economic integration, including a Free Trade Area of the Asia-Pacific as a long-term prospect, and report to the 2007 APEC Economic Leaders' Meeting in Australia”; Ha Noi Declaration, 14th APEC Economic Leaders' Meeting, Vietnam, 18–19 November 2006.

⁷² Capling, *All the Way, op. cit.*, 46 (on the correlation between APEC's decline and the Howard Administration's bilateralism).

⁷³ Noted in Michael Perry, “China Key to Asia-Pacific Community, Analysts Say”, *The China Post* [Taipei], 6 June 2008. What about the Russian Federation, which both exclude?

⁷⁴ “Rudd Pushes for Asia-Pacific Community”, *The Age* [Melbourne], 4 June 2008.

Another obstacle is that, so far as China, Japan and South Korea are concerned, events to date have not pushed them into a regional FTA between themselves but into having their own *separate* deals with ASEAN and with individual ASEAN nations. Asian competitive liberalization, if you like. What does this say about the prospects of a wider regional deal? So far, none of the “Big Three” Northeast Asian nations would permit any of the others to lead, and indeed to dominate. So why would they allow Australia to do that which they would not allow themselves to do?

There is a further related factor. Japan was instrumental in Australia’s eventual inclusion within a Plus Six scenario but the present relationship with Japan has become more complex, while China’s support for an Asia-Pacific Community is far from given. Here, Australia hopes to have some room to play a facilitative, if not a constructive leadership role. Richard Woollcott was quoted as saying that:

If the US or China or Japan or some other big power were to suggest it, other nations might be apprehensive and back away. It’s better for a middle power like Australia to take the initiative.⁷⁵

In such optimism justified? Time will tell but that also assumes that a Plus Three scenario will not re-emerge. It may simply be too early to count on the demise of ASEAN Plus Three in favour of a Plus Six scenario. Robert Scollay has observed that the real change seems to have been a fragmentation of the ASEAN plus Three idea in favour of the “ASEAN plus one” approach. According to this view, China, Japan and South Korea will for the foreseeable future be content to deal with each other through their trade deals with ASEAN and the ASEAN nations than with each other.⁷⁶ Even if this proves eventually to be untrue, it does not mean that China, Japan and South Korea will eventually opt for anything wider than an ASEAN Plus Three, or at most an ASEAN Plus Six scenario.

So a *second question* concerns the prospects for Australian stewardship. Insofar as China, Japan and South Korea are concerned, they have so far chosen ASEAN, not Australia to conclude separate FTAs with. There is also significant criticism that lack of prior consultation with its regional neighbours has already doomed the APC to failure.⁷⁷

How successful will Labor’s middle power diplomacy prove to be?

⁷⁵ Quoted in Franklin, *op. cit.*

⁷⁶ Scollay, *op. cit.*, 20.

⁷⁷ “Asia-Pacific Plan ‘Dead from Outset’”, *The Age* [Melbourne] 4 July 2008, quoting Barry Desker, Dean of the S. Rajaratnam School of International Studies in Singapore.

SEQUENCING AUSTRALIA'S FTA NEGOTIATIONS: THE DIPLOMATIC CHALLENGE

We come to a third issue – the diplomatic challenges ahead. Individually, China, Korea and Japan have taken a “multi-track” approach – i.e. negotiations at the global, regional and bilateral levels. The best example is Japan, which negotiated individually with each ASEAN nation while negotiating with ASEAN. Korea has, similarly, adopted a “simultaneous, multiple FTA negotiation” policy.⁷⁸ Australia would be well advised to do the same by, first, negotiating individual deals with key nations.

One might question how far recent conclusion of an ASEAN-Australia-NZ FTA would help to enlist ASEAN's support for the Asia-Pacific Community. The origins of the idea of an East Asian Economic Grouping are rooted precisely in ASEAN's previous hostility to APEC. But even if Australia were to take an incremental approach in building up the necessary diplomatic momentum, *individual* deals with India and the Plus Three nations of East Asia raise a further question. How should such deals be sequenced? The answer which Australia seems to have adopted is obvious: to have simultaneous negotiations with India, the Plus Three nations and others. What does placing the larger idea of the APC on the table add to this strategy?

A *third question* therefore is whether Australia is now compelled by practical necessity to enter into further FTAs – “aggressive bilateralism”, if we choose to call it that. Australia remains behind the FTA curve when compared to many of its Asian neighbours and if the intention of the APC is to enable Australia to “catch up” with regional FTA developments, it may not present the easiest way of doing that. This leads us to a *fourth question*. What are the practical advantages of the APC as an Australian trade policy device?

PLAYING TRADE UP OR PLAYING TRADE DOWN?

In a sense, the APC shifts some of the attention from the question of how Australia might secure its place within an emergent Asian trade grouping towards more abstract strategic, security and political questions. According to Kevin Rudd, security would be a “top issue”.⁷⁹ Where does the balance of advantage lie – in “playing up”, or “playing down” the trade dimension? That is our *fifth and final question*. Should Australia play up the trade issue regionally, play down the security issue and press for FTAs with those regional countries which already have a trade deal, or which are currently in negotiations with the US, instead?

Doing so is less likely to raise the issue of US participation too early. Australian academic opinion is mixed on the ultimate wisdom of bringing the US into the

⁷⁸ Ahn, *op. cit.*, 51.

⁷⁹ Perry, *op. cit.*

picture. Alison Broinowski finds the suggestion surprising, while Peter Drysdale has been quoted as saying that a US role is “indispensable”.⁸⁰ South Korea, Singapore and Australia itself now have FTAs with the US. Eventually Malaysia may conclude a trade deal with the US. But not all the regional countries have or would necessarily welcome early suggestions of US participation. One indication was the reaction in 2006 to the proposal for a FTAAP/an APEC-wide FTA. Notable opponents included China, Thailand, Indonesia and the Philippines.⁸¹

CONCLUSION

Our *first question* had to do with the intended form of the APC – will it be rule-based or something more informal? Will it result in a discriminatory trading bloc which will in turn alter and define the Asia-Pacific international legal order? Our *second question* had to do with Australian leadership. Our *third question* had to do with Australia’s own commitment, by virtue of its regional circumstances, to an FTA programme – i.e. Australia’s policy of having bilateral trade treaties. The APC proposal, if seriously pursued, would commit Australia even further towards a bilateral policy as a necessary instrument. A *fourth question* turns that around and asks how much the APC proposal helps Australia’s trade policy. Our *fifth* and final question suggests that there is a need to play up the trade issue in order to play down concerns of American hegemony. Put differently, Australia might choose to demonstrate its pragmatism as a trading nation in its engagement of East and Southeast Asia in order to counter an adverse impression and outright suspicion about its emotive ties with the US.⁸²

Our answers to these questions suggest that trade policy *should* lie at the heart of the APC. Australia should, and should be expected to pursue FTAs even more aggressively with regional trading partners; it should, and should be expected to commit itself firmly to bilateralism as a *means*. In other words, Australia’s FTA policy should form the bedrock of the APC proposal. Domestically, that means keeping a large part of the Howard legacy. Whatever the present Australian Government’s true sentiments about trade bilateralism, that much of the Howard Administration’s legacy seems very much alive. Aside from the sequencing issue, the question then turns on which trading partners would best serve the purpose of securing an eventual APC. Australia is currently in negotiations with China, Malaysia and Japan. It already has FTAs with Singapore and Thailand, ASEAN and NZ, as well as the US and Chile. There are FTAs currently under consideration

⁸⁰ *Ibid.*

⁸¹ Colin Espiner, “Asia-Pacific FTA Pondered”, *The Press* [Christchurch], 15 November 2006; Jewel Huang, “Taiwan, China Clash at APEC”, *Taipei Times* [Taipei], 16 November 2006.

⁸² Cf. Capling, *All the Way*, *op. cit.*, 47–48 (criticizing Mr Downer’s distinction between cultural or emotional regionalism, and practical regionalism).

with India, Korea and Indonesia.⁸³ South Korea and Indonesia are especially important: Indonesia because of its clout within ASEAN and South Korea in light of recent difficulties with Australia's relationship with Japan and, more recently, with China. The relationship with Malaysia and Indonesia should also warrant special attention for, together with the Philippines, these nations have historically presented the strongest objection to an ASEAN–Australia–NZ FTA.⁸⁴

On the flip-side, Australia's current FTA negotiating partners would now be tempted to extract an appropriate "price" in their ongoing FTA negotiations with Australia. That is why Australia should also push, simultaneously, for the FTAAP and support the expansion of the Trans-Pacific Strategic Economic Partnership Agreement (between NZ, Singapore, Brunei and Chile).

Aside from the synergy between the FTAAP and the APC, a deeper relationship with ASEAN and individual ASEAN nations would be a further invaluable step towards linking up with ASEAN's FTAs with the Plus Three nations and India by 2012. Finally, separate FTAs with China, Japan, South Korea and India, and especially China would close the circle. Broinowski put it more bluntly:

If he [Mr Rudd] has in fact got the Chinese on side with this, then it is a major triumph; if not then it is a very audacious move.⁸⁵

In sum, if the APC means anything for the Asia-Pacific legal order, it suggests that Australia is likely to continue to adopt a policy of having *simultaneous, multiple* FTA negotiations. Australia is likely to contribute to the Asian noodle bowl effect, while having the publicly stated aim of curtailing it with a larger APC. That is the likely impact of the proposal on the Asia-Pacific trade treaty landscape, and the multilateral trading system.

The Rudd Proposal, for all the attention it has received, is essentially business as usual at least for the foreseeable future, notwithstanding the worth of some of its ideals.

⁸³ See Australia's FTA website at <http://www.dfat.gov.au/trade/ftas.html> (visited 20 September 2008).

⁸⁴ Capling, *All the Way*, *op. cit.*, 46.

⁸⁵ Quoted in Perry, *op. cit.*

SUHAKAM: THE FIRST TEN YEARS: THE RECEPTION AND INTERPRETATION OF HUMAN RIGHTS NORMS IN MALAYSIA

Cheah Wui Ling*

INTRODUCTION

On 9 September 2009, Malaysia's National Human Rights Commission marked its tenth anniversary. Among Malaysians, the commission is popularly known as *Suhakam*, which is an abbreviation of the commission's title in Bahasa Malaysia – *Suruhanjaya Hak Asal Manusia*.

National Human Rights Institutions (hereinafter NHRIs) such as Suhakam are charged with ensuring the protection and promotion of human rights within their respective States.¹ Today, NHRIs have become common fixtures in the governance landscapes of many States.² Their rapid proliferation is usually traced back to the 1993 World Conference on Human Rights. During the 1993 conference, States adopted the Vienna Declaration and Program of Action that called upon States to establish and strengthen “national institutions for the promotion and protection of human rights”.³ Subsequently, the UN General Assembly adopted a set of principles commonly referred to as the *Paris Principles*. These principles set out “a set of important recommended guidelines of practice” for NHRIs.⁴ More recently, NHRIs have come together to establish the International Coordinating Committee of National Human Rights Institutions (ICC). The ICC is a representative body of

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¹ National Institutions for the Promotion and Protection of Human Rights, UN General Assembly Resolution 60/154, UN Doc. A/RES/60/154, 23 February 2006 (hereinafter 2006 GA NHRI Resolution).

² See generally, Brian Burdekin, *National Human Rights Institutions in the Asia-Pacific Region* (Martinus Nijhoff Publishers, 2007); Richard Carver, *Performance and Legitimacy: National Human Rights Institutions* (International Council of Human Rights, 2004)

³ Vienna Declaration and Program of Action, World Conference on Human Rights, 25 June 1993 (hereinafter 1993 Vienna Declaration and Program of Action), para. 36.

⁴ National Institutions for the Promotion and Protection of Human Rights, UN General Assembly Resolution 48/134, UN Doc. A/RES/48/134, 4 March 1994, Annex (hereinafter the Paris Principles).

NHRIs that is charged with, *inter alia*, assessing and accrediting NHRI compliance with the Paris Principles.⁵

To facilitate the discharge of their general mandate of protecting and promoting human rights, NHRIs are entrusted with a variety of specific monitoring, investigatory and advisory powers. The exact scope of NHRI powers varies from State to State. Many NHRIs have their mandates limited to certain rights. Even then, NHRIs have adopted creative interpretative strategies enabling their generous references to a variety of human rights. Thus, NHRIs may be seen to function as pathways through which international human rights norms are received into the domestic arena. By applying and interpreting these norms to specific domestic contexts, NHRIs also perform the important task of translating human rights from the universal level to concrete and specific local contexts. NHRI interpretations may differ from State to State or may differ from the positions adopted by other national authorities within the same State.

This note revisits the first ten years of Suhakam's existence with the aim of assessing how the Commission has facilitated the reception and application of universal human rights norms in the local Malaysian context. Drawing on Suhakam's reports and activities, it identifies and critically examines Suhakam's approach to human rights in terms of its reception of various human rights norms and its interpretation and application of human rights in the domestic context. It first provides a brief historical and institutional overview of Suhakam. It then examines the broad and flexible approach adopted by Suhakam regarding its reception of various international human rights norms into the Malaysian domestic system. It therefore assesses the group-sensitive, responsive and comprehensive theory of human rights adopted by Suhakam over its first decade.

A HISTORICAL AND INSTITUTIONAL OVERVIEW OF SUHAKAM

In 1999, the Malaysian parliament adopted the Human Rights Commission of Malaysia Act (hereinafter Suhakam Act) that established Suhakam.⁶ The commission is charged with the "protection and promotion of human rights". In line with its protection and promotion mandate, the commission is entrusted with educational, advisory and investigatory functions. First, the commission is to play an educational role in promoting the "awareness" of human rights.⁷ Second, it performs significant advisory functions vis-à-vis the government. It is to "advise", "assist" and "recommend the necessary measures" to the government in the latter's passing of

⁵ Association International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, ICC Statute at <http://www.nhri.net> (accessed 25 May 2010).

⁶ Human Rights Commission Of Malaysia Act 1999, Act 597, 9 Sept 1999 (hereinafter 1999 Suhakam Act).

⁷ *Ibid.*, Art. 4(1)1.

laws and administrative directives.⁸ It is also to “recommend” specific human rights treaties and instruments for ratification.⁹ Third, the commission is to “inquire” or investigate into complaints on human rights violations.¹⁰ To enable its execution of these educational, advisory and investigative functions, Suhakam is in turn given a number of specific powers. Among others, the commission is authorized to conduct “programmes, seminars and workshops”, disseminate the results of its research, visit places of detention, make public statements, and “undertake any other appropriate activities as are necessary”.¹¹ It may initiate public inquiries on its own motion or upon receiving a complaint.¹² In conducting these inquiries, the commission may summon individuals to give evidence.¹³

According to the Suhakam Act, there may be altogether 20 commissioners appointed to the commission at any one time.¹⁴ Sixteen commissioners are currently appointed.¹⁵ Commissioners are appointed by the Malaysian Yang di-Pertuan Agong (the head of state) based on recommendations made by the Prime Minister.¹⁶ They are to be “prominent personalities” and should include “those from various religious and racial backgrounds”.¹⁷ Suhakam’s chairman is chosen by the Yang di-Pertuan Agong from among the commissioners.¹⁸ A vice-chairman is appointed by the commissioners themselves.¹⁹ Commissioners receive “remuneration” and “allowances” determined by the Yang di-Pertuan Agong.²⁰ Each commissioner holds office for two years, at the end of which he or she may be reappointed.²¹

BETWEEN THE DOMESTIC AND THE INTERNATIONAL: SUHAKAM’S FLEXIBLE AND EXPANSIVE APPROACH TO RECEIVING HUMAN RIGHTS NORMS

The ability to refer to and apply a reasonably comprehensive range of international human rights norms is crucial to Suhakam’s work as a NHRI. A number of factors restrict Suhakam’s ability to do so. First, the Suhakam Act expressly authorizes the

⁸ *Ibid.*, Art. 4(1)2.

⁹ *Ibid.*, Art. 4(1)3.

¹⁰ *Ibid.*, Art. 4(1)4.

¹¹ *Ibid.*, Art. 4(2).

¹² *Ibid.*, Art. 12(1).

¹³ *Ibid.*, Art. 14(1)c.

¹⁴ *Ibid.*, Art. 5(1).

¹⁵ For details, see www.suhakam.org.my (visited 25 May 2010).

¹⁶ Suhakam Act, *supra* n. 137, Art. 5(2).

¹⁷ *Ibid.*, Art. 5(3).

¹⁸ *Ibid.*, Art. 6(1).

¹⁹ *Ibid.*, Art. 6(3).

²⁰ *Ibid.*, Art. 8(1).

²¹ *Ibid.*, Art. 5(4).

commission to refer to the Universal Declaration of Human Rights (UDHR).²² However, such references are limited to that which is consistent with the Federal Constitution, which contains a brief list of largely civil-political rights.²³ Second, Suhakam's ability to refer to international human rights treaties in performing its functions is constrained by Malaysia's adoption of a "dualist" model of reception that requires ratified treaties to be enacted as domestic legislature to have municipal legal effect; in the event of inconsistency with customary international law (CIL), domestic legislation takes precedence.²⁴ Third, many of the most detailed human rights instruments were intended by their adopting States to function as expressions of political commitments or guidelines rather than binding obligations.

A narrow conception of Suhakam's ability to refer to international human rights instruments would restrict the commission to three sources, namely, provisions of the UDHR that conform to the Federal Constitution, ratified treaties which are the subject of domestic enactment and customary international legal norms. This would be severely limiting, especially since Malaysia has only ratified a few human rights treaties.²⁵ Suhakam has, however, adopted a flexible and expansive model of reception pursuant to which it has drawn upon a variety of human rights treaties and instruments, including the International Covenant on Social and Economic Rights,²⁶ for example.

Suhakam's extensive reference to human rights instruments beyond the Federal Constitutional Bill of Rights

The Suhakam Act authorizes the commission to refer to the UDHR "to the extent" that this is not inconsistent with the Federal Constitution.²⁷ A narrow reading of the commission's mandate may require the relevant UDHR provision to be assessed along various lines. First, whether the said provision has the status of a CIL norm and second, if so, whether the CIL norm contravenes domestic legislation.

²² GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/180 (1948) 71.

²³ *Ibid.*, Art. 4(4).

²⁴ Abdul Ghafur Hamid & Khin Maung Sein, "Judicial Application of International Law in Malaysia: An Analysis", 31 March 2006, available at http://www.malaysianbar.org.my/international_law/judicial_application_of_international_law_in_malaysia_an_analysis.html (accessed 25 May 2010).

²⁵ Convention on the Rights of the Child GA Res. 44/25, annex, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989) at 167, *entered into force* September 2, 1990; Convention for the Elimination of All Forms of Discrimination against Women GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, UN Doc. A/34/46 at 193; Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277. In 2008, Malaysia signed the Convention on the Rights of Persons with Disabilities.

²⁶ 993 UNTS 3.

²⁷ Suhakam Act, *supra* n. 137, Article 4(4).

Alternatively, a broad reading of Suhakam's mandate could be adopted which would permit Suhakam to refer to any UDHR provision regardless of whether or not they are also CIL norms. Arguably, this approach would better enable Suhakam to discharge its general duty to protect and promote human rights. Suhakam has at times noted that the UDHR provision referred to is part of customary international law. For example, in its Internal Security Act (ISA) public inquiry report, Suhakam stated that the right to life as recognized in Article 3 of the UDHR is "customary international law" by virtue of "universal recognition".²⁸ However, in practice, Suhakam has on numerous occasions referred to and applied UDHR provisions without any assessment of whether the provisions concerned are CIL norms. Unfortunately, Malaysian courts have expressly rejected adopting the commission's more generous approach by interpreting the Suhakam Act's reference to the UDHR as a mere "invitation" for courts to consider UDHR provisions.²⁹

Suhakam has also referred to human rights treaties that have not yet been ratified by the Malaysian executive or enacted as domestic legislature by the Malaysian parliament. It has done so without assessing whether these treaties are part of customary international law. On various occasions, the commission called upon the Malaysian authorities to comply with human rights treaties that have not yet been ratified. For example, in its S. Hendry public inquiry, the commission referred to Article 10 (3) of the International Covenant on Civil and Political Rights (ICCPR)³⁰ in arguing for the Malaysian authorities to provide better prison health services.³¹ In its 2005 Poverty and Hunger Report, the commission recognized that Malaysia has yet to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) but nevertheless cited Article 11 of the ICESCR in support of its argument that the Malaysian state has the responsibility to ensure the right of its citizens to adequate food, clothing and housing.³²

Suhakam's reliance on "soft" norms: enforcing political commitments and standards of behaviour

In addition to adopting a broad approach in referring to human rights norms without assessing whether they meet the requirements of Malaysia's "dualist" model of

²⁸ Report of the Public Inquiry into the Conditions of Detention under the Internal Security Act 1960, SHM/ISA-INQUIRY/06/03 (June 2003) (hereinafter 2003 Suhakam ISA public inquiry), 13.

²⁹ *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449, see decision of Siti Norma Yaakob FCJ.

³⁰ 999 UNTS 171.

³¹ Report of Suhakam Public Inquiry into the Death in Custody of S. Hendry, Suhakam (17 & 18 Feb 2006) (hereinafter 2006 Suhakam S. Hendry public inquiry), 72 & 73.

³² Suhakam's Report on the Human Rights Approach to the Millennium Development Goals, Goal 1: Eradicate Extreme Poverty and Hunger, SHM/MDG-GOAL1/23/05 (2005) (hereinafter 2005 Suhakam Poverty and Hunger Report), 19 & 24.

reception,³³ Suhakam has also frequently applied “soft” international human rights norms that are not considered legally binding. Classical international law draws a distinction between legal norms that are “hard” and “soft” in nature. “Hard” norms are legally binding while “soft” norms are not intended by their drafters to be legally binding.³⁴ Though “soft” norms are not legally binding, they may have certain legal implications. For example, these norms may be evidence of developing customary international law. “Soft” norms include declarations, resolutions and standards of conduct adopted by the international community. They are usually indicative of “modern trends” or deal with matters of “new concern”.³⁵

In the field of human rights, the distinction between “hard” and “soft” norms has become blurred in nature as policy-makers and activists draw indiscriminately on both kinds of norms to justify their decisions or positions. Scholars have argued that it is no longer useful to distinguish between “hard” and “soft” norms.³⁶ Recent research demonstrates how human rights norms that are considered “soft” in nature have nevertheless generated a degree of compliance and change normally associated with “hard” law.³⁷ Suhakam’s practice reflects this trend by not differentiating between “hard” or “soft” laws. It has often argued that the Malaysian government should observe the political “commitments” it has entered into and reflected in “soft” law documents. For example, Suhakam has referred to commitments contained in the UN Millennium Declaration. The commission has noted that pursuant to the UN Millennium Declaration, governments “commit” to “respect fully and uphold the Universal Declaration of Human Rights” while pursuing Millennium Declaration Goals (MDGs).³⁸ Suhakam has also observed that certain Malaysian labour laws are inconsistent with the 1998 ILO Declaration on Fundamental Principles and Rights at Work adopted by Malaysia as a member of the ILO. This declaration “commits” ILO members including Malaysia to respect certain principles, namely, the freedom of association and collective bargaining, the elimination

³³ Generally, treaties must be enacted as legislation to have legal effect; customary international law applies as part of the common law, but subject to the priority of national law.

³⁴ Cassese, *supra* n. 196; Malcolm Shaw, *International Law* (Cambridge University Press, 2006), 112.

³⁵ Cassese, *ibid.*, 196.

³⁶ Dinah Shelton, “Normative Hierarchy in International Law”, (2006) 100(2) *AJIL* 291–323, 320–321; cf., Kal Raustiala, “Form and Substance in International Organizations”, (2005) 99(3) *AJIL* 581–614.

³⁷ Ellen L. Lutz and Kathryn Sikkink, “International Human Rights Law and Practice in Latin America”, (2000) 54(3) *International Organizations* 633–659.

³⁸ A Human Rights Perspective on MDGs and Beyond: New Development Targets, Proceedings of the High-level Policy Dialogue organized by Suhakam and UNDP, Suhakam, SHM/MDG-BEYOND/33/06 (28 July 2005) (hereinafter 2005 Suhakam MDG report), 3; United Nations Millennium Declaration, General Assembly Resolution 55/2, A/RES/55/2, 8 September 2000, point V.25.

of forced or compulsory labour, abolition of child labour and elimination of discrimination with respect to employment and occupation.³⁹

In addition to seeking to enforce political “commitments” reflected in “soft” law documents, Suhakam has also applied human rights standards intended by drafters to function as guidelines of conduct rather than as law. In its ISA public inquiry, the commission referred specifically to principles 1 and 7 of the 1988 UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment to argue for a wide interpretation of cruel, inhuman or degrading treatment or punishment.⁴⁰ The Commission also made reference to rules 10, 11, 92 and 95 of the UN Standard Minimum Rules for the Treatment of Prisoners in advancing the position that ISA detainees should be provided with proper sleeping accommodation, reasonable access to family and friends and the same privileges afforded to ordinary prisoners.⁴¹ In its 2005 report on the right to a fair trial, Suhakam referred to the UN Basic Principles of Justice for Victims of Crime and Abuse of Power in calling for a better recognition of victims’ rights.⁴² In its 2008 Mahkota Cheras public inquiry (concerning a dispute over road usage and tolls which gave rise to various protests), the Commission applied the UN Code of Conduct of Law Enforcement Officers and the UN Basic Principles on the Use of Force and Firearms to assess the legality of police force used.⁴³

INTERPRETING RIGHTS IN LOCAL CONTEXTS: SUHAKAM’S CONTEXTUAL, RESPONSIVE AND COMPREHENSIVE THEORY OF HUMAN RIGHTS

Suhakam’s open attitude towards international human rights is not something that could be taken for granted, given the fact that Malaysia’s former prime minister, Mohammed Mahathir, was one of the pioneers of the relativistic “Asian values” school of thought. Mahathir argued that the human rights regime largely reflects individualistic Western values, is inconsistent with “Asian values” and inappropriate for Asian societies. Asian societies manifest “an absence of extreme individualism, a sense of responsibility for the community, a belief in strong families”, “a social contract between the people and the state”, “moral wholesomeness” and “a belief

³⁹ Annual Report 2008, Suhakam, available at www.suhakam.org.my (hereinafter 2008 Suhakam Annual Report), 78.

⁴⁰ 2003 Suhakam ISA public inquiry, *supra* n. 28, 17.

⁴¹ *Ibid.*, 19–20, 22.

⁴² Report on the Forum on the Right to an Expeditious and Fair Trial, Suhakam (7–8 April 2005) (hereinafter 2005 Suhakam Fair Trial report), 2.

⁴³ Report of Suhakam Public Inquiry into the 27th of May Incident at Persiaran Bandar Mahkota Cheras 1, Bandar Mahkota Cheras, Suhakam (21 May 2009) (hereinafter 2009 Suhakam Mahkota Cheras public inquiry), 23–24.

in citizens as stakeholders”.⁴⁴ Mahathir has publicly called for the UDHR to be amended to take into account the needs of Asian societies.⁴⁵ In a twist, Mahathir has also suggested that “Asian values” are “universal” in nature but have been discarded by Westerners in exchange for a “rather self-centered materialistic approach to life”.⁴⁶

Mahathir’s rejection of the international human rights regime has drawn criticism not only from Western actors but also local activists and dissidents.⁴⁷ Present-day Malaysian politicians adopt a more nuanced position, affirming the relevance of international human rights standards such as the UDHR while recognizing the need to consider the “Asian values of our multiethnic society”.⁴⁸ Rais Yatim, Malaysia’s current Foreign Minister, recognized that Malaysia’s human rights system “reflects a wider Asian value system, where the welfare and collective well-being of the community are more significant than individual rights”. While Malaysia upholds “universal principles of human rights” it takes into account “the history of the country” and “religious, social and cultural diversities of its communities”.⁴⁹ On the 60th anniversary of the UDHR, the Malaysian government stated that the UDHR “is not the sole authority” in Malaysia’s human rights regime, which takes into account “Asian values in our multi-ethnic society”.⁵⁰ Modern-day Malaysian leaders have argued that human rights should be approached in a holistic, indivisible way. Socio-economic rights are as important as civil and political rights.⁵¹ This responds to the frequent criticisms of civil and political rights violations levelled by Western actors against developing countries such as Malaysia.

Suhakam has also adopted a nuanced approach to human rights. On the one hand, the Commission’s generous reception and application of UDHR provisions affirms the universal applicability of the UDHR regime. On the other hand, the Commission has taken into account local considerations when interpreting and applying UDHR provisions to local situations. In doing so, Suhakam has developed a contextualized approach to human rights that is group-sensitive, responsive and comprehensive in nature.

⁴⁴ “Dr Mahathir: Let’s revitalize region the Asian Way”, *New Straits Times (Malaysia)*, 21 March 2000.

⁴⁵ Sangwon Suh, “No easy answers: is the individual supreme? Or should country and community come first?”, *Asiaweek*, 31 October 1997.

⁴⁶ “Dr M: Judge us by performance”, *New Straits Times (Malaysia)*, 4 September 1997.

⁴⁷ Sangwon Suh, *supra* n. 45.

⁴⁸ “Ensuring human rights for all Malaysians”, *New Straits Times*, 14 December 2008.

⁴⁹ *Ibid.*

⁵⁰ “Malaysia says rights declaration not ‘sole authority’ in country”, BBC Monitoring Asia Pacific, 10 December 2008.

⁵¹ “Ensuring human rights for all Malaysians”, *supra* n. 48.

A group-sensitive and responsive approach to human rights: meeting the needs of vulnerable populations

Suhakam has avoided an individualistic interpretation of human rights, recognizing that “rights come along with responsibilities”.⁵² It has also recognized that the rights of the individual have to be interpreted and “balanced” against legitimate interests of the larger community of which the individual is a member.⁵³ The Commission has, however, emphasized that such community interests should not be cited as a reason for trumping or ignoring human rights. Rather, such interests shape the interpretations and application of human rights. For example, Suhakam has recognized that there is a need to respect racial and religious sensitivities given Malaysia’s multi-racial and multi-cultural society. It went on to hold that the existence of such “emotionally volatile” sensitivities does not justify the disregard of human rights issues.⁵⁴

Suhakam has also recognized that the realities of Malaysian society require a group-sensitive approach to protecting and fulfilling human rights. Certain groups, due to their particular vulnerable social and economic circumstances, are unlikely to have their basic rights met through a purely individualized rights approach. The commission has focused on groups conventionally regarded as in need of special protection, such as women and children. In doing so, the commission has identified sub-groups within these groups needing additional protection. For example, in studying the right of children to education, the commission has identified certain groups of children in need of additional protective measures, namely indigenous children, street children, refugee children and children in detention.⁵⁵ Apart from focusing on conventionally protected groups, the commission has targeted other vulnerable populations such as migrant workers, indigenous peoples and disabled persons.

Unlike other NHRIs that have their mandates limited to civil and political rights, Suhakam is authorized to address the entire array of rights set out in the UDHR. Suhakam has often drawn upon the Malaysian government’s development discourse to bolster its protection and promotion of socio-economic rights.⁵⁶ Apart from socio-economic rights, Suhakam has also from its very inception addressed civil and political rights. The latter has often incurred criticism from the Malaysian government. The commission’s earliest reports dealt with the freedom of assembly

⁵² Human Rights and Culture: Suhakam’s Conference in conjunction with Malaysian Human Rights Day 2006, Suhakam, SHM/MHRD2006/38/06 (9 September 2006) (hereinafter 2006 Suhakam Human Rights Day conference) at 62.

⁵³ *Ibid.*, viii.

⁵⁴ *Ibid.*, 62.

⁵⁵ Annual Report 2007, Suhakam, available at www.suhakam.org.my (hereinafter 2007 Suhakam Annual Report), 48.

⁵⁶ Amanda Whiting, “Situating Suhakam: Human Rights Debates and Malaysia’s National Human Rights Commission”, *Stanford Journal of International Law* 39 (2003): 59–98.

and preventive detention without trial under the ISA.⁵⁷ Contrary to the position at times adopted by Malaysian leaders that society's developmental and socio-economic needs justify limits on civil and political rights, Suhakam has insisted on treating all rights as indivisible and interdependent in nature, a cardinal principle reiterated in the 1993 Vienna Declaration. For example, the commission has noted that the fulfilment of the right to development will require simultaneous respect of the right of assembly, association, expression and information.⁵⁸

Towards a rights-based governance: reshaping developmental and administrative policies

Suhakam has argued that Malaysian authorities adopt a rights-based approach to governance. Rights should be understood as requiring positive action rather than as mere limits to governmental decisions. They should form the basis and rationale for governmental policies. At the international level, the Office of the High Commissioner for Human Rights (OHCHR) has elaborated on the relationship between human rights and good governance. These two concepts are recognized as "mutually reinforcing", with human rights being a "precondition" of good governance.⁵⁹ Given this, the OHCHR has called for more to be done to "fill the gap" between human rights standards and their actual implementation through "governance intervention".⁶⁰ Such a rights-based approach to governance does not insist on any particular political or economic model of government apart from one that is "democratic".⁶¹ It does, however, require governmental policies to be formulated on the basis of, and to be consistent with, human rights.

In advocating such a rights-based approach to governance, Suhakam has called for the Malaysian government's developmental policies to be formulated and executed based on human rights principles rather than on numerical targets. The commission has argued that developmental policies should take into account "non-quantifiable factors" such as the quality of life and active participation of beneficiaries.⁶² A human rights approach to development requires developmental policies to be designed based on principles of accountability, equality, non-discrimination and

⁵⁷ 2003 Suhakam ISA public inquiry, *supra* n. 28.

⁵⁸ 2005 Suhakam Poverty and Hunger Report, *supra* n. 163, 4.

⁵⁹ Good Governance: Practices for the Protection of Human Rights, Office of the United Nations High Commissioner for Human Rights, HR/PUB/07/04 (2007) (hereinafter 2007 OHCHR Good Governance Report).

⁶⁰ 2007 OHCHR Good Governance Report, 1.

⁶¹ "Adequate Housing – A Human Right", Suhakam (15 January 2004) (hereinafter 2004 Suhakam Adequate Housing report), vii.

⁶² 2005 Suhakam Poverty and Hunger Report, *supra* n. 163, 2.

informed participation.⁶³ For example, in addressing the issue of insufficient health-care, Suhakam has highlighted the need for adequate healthcare facilities as well as increased accessibility, health education and public consultation.⁶⁴

Suhakam has also advocated a rights-based approach to administration aimed at protecting individuals from abuses of executive power by subjecting such power to oversight.⁶⁵ International human rights instruments recognize the right of individuals to adequate and effective remedies for any violation of their rights.⁶⁶ In line with this, when executive decisions affect human rights, the individuals concerned should be given the opportunity to challenge these decisions by judicial review or any other fair and impartial procedure. Suhakam has criticized Malaysian laws that give the executive significant and conclusive decision-making powers through ouster clauses that prevent judicial review of executive decisions. Apart from Suhakam's consistent criticism of the ouster clause which severely limits the judicial review of ISA-related decisions,⁶⁷ it has also most recently criticized the 2006 Water Services Industry Act that makes any decision of the Minister final and conclusive.⁶⁸ Apart from arguing against the use of ouster clauses, the commission has called on the administration to respect principles of accountability, transparency and natural justice when taking decisions that impact the human rights of individuals. For example, the commission has criticized the Registrar of Societies for failing to respect the right of applicants to be heard and for not providing timely decisions or reasons to the applicants concerned.⁶⁹

CONCLUSION

The Malaysian government often presents Suhakam as proof of its commitment to human rights, such as during its application for membership of the UN Human Rights Council.⁷⁰ On-the-ground reports are less rosy. Suhakam's tenth anniversary

⁶³ 2005 Suhakam MDG report, *supra* n. 169, 8.

⁶⁴ 2007 Suhakam Annual Report, *supra* n. 55, 97–98.

⁶⁵ 2006 Suhakam Human Rights Day conference, *supra* n. 52, viii.

⁶⁶ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press), 113–122.

⁶⁷ See Section 8B(1) of the 1960 ISA Act, which reads: “There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.” Text available at <http://www.agc.gov.my/agc/Akta/Vol.%202/Act%2082.pdf> (accessed 25 May 2010).

⁶⁸ 2007 Suhakam Annual Report, *supra* n. 55, 121.

⁶⁹ 2007 Suhakam Annual Report, *supra* n. 55, 121.

⁷⁰ Aide Memoire, Malaysia's Candidature to the United Nations Human Rights Council: <http://www.un.org/ga/60/elect/hrc/malaysia.pdf> (accessed 25 May 2010).

celebration was boycotted by 42 Malaysian NGOs. These NGOs criticized Suhakam for not being sufficiently “proactive” and the government for its disregard of Suhakam’s reports and recommendations.⁷¹ A Suhakam commissioner has regretfully observed how the commission’s reports “are never debated” by parliament.⁷² The Malaysian government has itself admitted that it has only taken Suhakam’s recommendations into account five times since Suhakam’s inception in 1999.⁷³ Rather, the Commission has often been criticized by the government when its position directly challenges the government’s political authority.⁷⁴ Recently, a minister publicly accused the Suhakam chairman over his lack of “neutrality” in issuing an opinion that was unfavourable to the ruling party in a controversial elections case.⁷⁵

Given this, how effective has Suhakam been in introducing human rights norms into the Malaysian domestic landscape? The position occupied by Suhakam within Malaysia’s governance framework is a delicate one. NHRIs are not intended to supplant the role of the executive, the judiciary or parliament.⁷⁶ Neither are they intended to play the role of civil society in critiquing the government. However, much more can be done to ensure that Suhakam’s reports and recommendations are seriously considered by the Malaysian authorities. NHRIs are best understood as points of entry and translation through which universal human rights standards are imported into the domestic legal landscape. Thus far, Suhakam’s biggest contribution has been its attempts to develop a context-specific theory of human rights, drawing from a broad range of human rights standards beyond its Constitution and the UDHR.

⁷¹ “42 NGOs boycott Suhakam’s Human Rights Day event”, *Aliran*, 8 September 2009.

⁷² “Suhakam hopes MPs will debate issues on human rights in parliament”, Bernama: The Malaysian National News Agency, 3 April 2008.

⁷³ Andrew Khoo, “Human Rights in Malaysia: The Last 10 Years”, speech delivered at Malaysian Human Rights Day (9 September 2009).

⁷⁴ “Suhakam: let the people choose again the government in Perak”, Bernama: The Malaysian National News Agency, 12 May 2009.

⁷⁵ “Suhakam commissioners should be seen as neutral”, Bernama: The Malaysian National News Agency, 2 July 2009.

⁷⁶ Carver, *op. cit.*, 91–103.

LITERATURE

BOOK REVIEWS

Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Hart Publishing, Oxford and Portland, Oregon, 2008, pp xlvi + 586

While much has been written about the controversial nature and utility of amnesty as a tool to foster peace and reconciliation in societies emerging from conflict, the distinctive feature of this book is the comprehensive expanse (rather than a sampling) of Mallinder's empirical study based on 506 amnesty processes in 130 countries implemented after the Second World War.

Constructing an Amnesty Law Database (soon to be made available online), Mallinder's work on amnesty in international law provides statistics, charts as well as comparative analyses of global amnesty practices and case law (including the less commonly scrutinized ones resulting from smaller conflicts) which will undoubtedly prove useful to those working in the field of transitional justice. While Mallinder makes it clear that her Database does not claim to be exhaustive, one believes that it goes a long way to address the empirical lacunae as the accessibility of such information is extremely prohibitive to many researchers due to language barriers, availability of state archives, records and other published information. More specifically, Mallinder in *Amnesty, Human Rights and Political Transitions* seeks to find answers to the perennial question on the legitimacy of amnesty – whether it is a travesty of international human rights, humanitarian law and criminal justice; or whether when carried out in tandem with mechanisms like selective prosecutions, truth commissions and reparations it can heal divided societies by promoting peace and stability.

Setting the foundations for her thesis, Mallinder first explores the reasons states introduce amnesty. Delving deep into the usual reasons given for amnesty laws, such as quelling unrest and bringing about national reconcili-

ation and democracy, as well as being used as a negative tool of self-interest in protecting state agents, one appreciates Mallinder's unusual exploration of amnesty as a tool for *forgetting*. While forgetting might be impossible and the term rather a misnomer, the action of forgetting or rather laying past hurts to rest and starting anew is something that is seldom mentioned explicitly (even if it might be a significant reason behind the amnesty) because of the simultaneous need for truth and justice. The issue of not resurrecting the past so as not to split the country as it moves forward is very prevalent in post-conflict countries, as has been the case with the Khmer Rouge trials in the Extraordinary Chambers in the Courts of Cambodia (ECCC).

Regarding whom amnesties protect, Mallinder highlights that while protection of state opponents might equalize the footing between the former and state agents, self-amnesty can also be used to perpetuate imbalances between both groups in what she terms "the myth of equivalency". More interestingly, the analysis extends beyond the male combatant and the possibility of his amnesty hinging on his reasons for being a state opponent and his rank, to discuss the vulnerable women and children combatants who might have been coerced into joining rebel forces and thus themselves are victims. One was slightly disappointed, however, that though this section lists the possibility of amnesty being granted to these two groups of persons, there is insufficient elaboration of this oft-overlooked area.

The crux of amnesty's legitimacy lies in the material scope of amnesty laws. The crimes states commonly pardon are political and economic crimes, crimes against individuals and crimes under international law. It is the last category of amnesty from which the greatest tension arises as crimes under international law, whether by treaty or custom, are considered to be the most serious violations of humanitarian and human rights law – for example, war

crimes, crimes against humanity, torture and disappearances – that “shock the conscience of humanity”. While Mallinder rightly points out that a state’s obligations vary according to its treaty ratifications and the status of the crime under international law, one would think that in the climate of greater vigilance against international atrocities and universal jurisdiction, an amnesty encompassing such crimes is a travesty of justice. Yet that is apparently not the case judging by state practice and *opinio juris*. Mallinder has found that the state duty to prosecute serious war crimes of internal armed conflicts is “permissive rather than mandatory”, citing the tendency of municipal courts to uphold amnesties as constitutional even if admittedly “unequal”. This was evidenced in the South African Constitutional Court in the *AZAPO* case where, although it acknowledged the harsh impingement on victims’ rights by amnesties, the amnesty was not unconstitutional and was the parliament’s political prerogative. Moreover, in 2000, Angolan president Jose Eduardo dos Santos’ declaration of amnesty for perpetrators of crimes against humanity in armed conflict was heavily supported by the parliament.

Though somewhat dismayed and surprised that the rise of international criminal law has not yet significantly mitigated the unequal effects of amnesty law, one is grateful that these quantitative findings help to adjust opinions based mainly on observation and qualitative research, and illuminate how much more amnesties must evolve to achieve fairer outcomes. A bright spot exists, however, in the emerging practice of international and hybrid courts and it is hoped that this will influence national courts. As Mallinder points out, the Inter-American Court has a history of asserting

itself competent to rule on legality of amnesties and as recently as 2006 in the *Almonacid-Arellano* case, held that Article 2 of the American Convention on Human Rights imposed the “obligation to annul all legislation” that violated the Convention. Bolstering the principle of universal jurisdiction, the laws of the Special Court for Sierra Leone and ECCC have also explicitly stated that prior amnesties cannot exempt prosecution of crimes which the courts have competence over. The Rome Statute of the International Criminal Court might prove tricky in this area, however, as drafters were “deliberately ambiguous” vis-à-vis amnesties.

As can be seen, states enact amnesty for a wide variety of reasons and implement them according to the individual state’s interests and exigencies and no clear patterns can be seen to emerge. More often than not, amnesty will be upheld unless there is the intervention of international courts, hybrid tribunals or third party states, but this in itself is relatively rare. On the question of amnesty’s legitimacy, this question continues to remain unanswered as it all depends on the individual situation and type of amnesty declared. Nonetheless, one appreciates the sensitive analysis of policy and the law Mallinder has given to amnesty. One shares Mallinder’s hope that in time to come the manifestly unfair and self-protective practice of giving full immunity to state agents against opponents of the state will decline. With the international community’s support, effective conditional amnesties coupled with restorative justice measures, lustration, truth commissions and reparation, the prioritizing of victims’ needs and the rehabilitation of perpetrators will help mend war-torn societies.

TAN HSIEN-LI

Ilias Bantekas and Susan Nash, *International Criminal Law*, Routledge-Cavendish, New York, 3rd ed., 2007, pp xli + 594

Since the adoption of the Rome Statute of the International Criminal Court (ICC Statute) in July 1998, international criminal law has become a fast-developing discipline at law schools all over the world. Textbooks and treatises on international criminal law have been proliferating,¹ some of which are already in their second or even third editions.² *International Criminal Law* by Ilias Bantekas, Professor of International Law and Deputy Head of the Law School at Brunel University, and Susan Nash, Professor of Law and Head of Department of Postgraduate Legal Studies at the University of Westminster, is already in its third edition, with the first edition published in 2001.

The back cover of this book states: “The book explores the discipline of international criminal law from the perspective of domestic tribunals engaged with transnational/international offences, cross-border cooperation in criminal matters with particular emphasis on recent EU initiatives, as well as the practice of the Security Council-based tribunals for Yugoslavia [ICTY] and Rwanda [ICTR], the International Criminal Court [ICC] and other hybrid tribunals, such as those for Cambodia, Sierra Leone, Lockerbie and truth commissions. The authors analyse in detail substantive crimes, such as terrorism, offences against the

person, criminal law of the sea, jurisdiction and immunities amongst a variety of other topics.”

While the book has 22 chapters, its main substantive focus is on public international law and international legal cooperation to bring criminals who commit crimes with transnational/international elements to justice. The authors start the book, on page 1, by reasoning that “[i]nternational criminal law (ICL) constitutes the fusion of two disciplines: international law and domestic criminal law”. Therefore, readers can find plenty of valuable in-depth analysis of State jurisdiction (Chapter 4), the offences at sea (Chapter 9, which encompasses piracy, mutiny and other violence against ships, international maritime terrorism, offences against submarine cables and pipelines, and unauthorized broadcasting from the high seas); transnational offences (Chapters 11 and 12, with the latter also covering the relatively new phenomenon of cybercrime), extradition (Chapter 13), the legality of abduction of the suspect to secure his presence in court of another State (Chapter 14), mutual legal assistance (Chapters 15 and 16), and international police cooperation (Chapter 17). The history and operation of the international criminal tribunals to date are described in Chapters 19–21, with the last chapter, 22, touching upon the advent of “International Domestic Criminal Tribunals”. Because of its wide scope of coverage, the book deals with the issue of immunity from domestic and international criminal jurisdictions in just a few pages (pp. 100–102 and

¹ Starting from Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, July 2001); Antonio Cassese (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, 3 vols. (Oxford: Oxford University Press, 2002); Gerhard Werle, *Principles of International Criminal Law* (Cambridge: Cambridge University Press, 2005); Guénaél Métraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2006); Robert Cryer, Kakan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007); Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2007); Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007). Gaeta Paola, Katrina Gustafson, Göran Sluiter, and Robert Cryer (eds.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, August 2008).

² For example, William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 3rd ed., 2007); Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2nd ed., 2008).

110–111). The immunity issue has gained prominence in the prosecution of “international criminals” because several high-profile individuals who committed crimes of concern to the international community as a whole are incumbent or former Heads of State, Heads of Government or persons who enjoyed certain types of immunity in a foreign State under international law.³ The seemingly contradictory provisions of Article 27 and Article 98 (1) the ICC Statute⁴ are derived from the clash between the rule against impunity and the rule of immunity enjoyed by such individuals in the territory of a foreign State which receives requests for their surrender to the ICC. Hence, a more detailed analysis on this topic should assist readers to better understand the complexity of this aspect of international criminal law enforcement.

Bantekas and Nash barely analyse the substantive law governing genocide, war crimes and crimes against humanity which are the main topics covered by standard, mainstream textbooks on international criminal law; and the book omits dealing with the crime of aggression/crime against peace altogether although

the crime of aggression is included as a crime within the ICC’s jurisdiction.⁵ Slavery “and related practices”, torture as a crime under international law, apartheid, and enforced or involuntary disappearances are covered in Chapter 8 (“Offences Against the Person”) separately from Chapter 6 (“Crimes Against Humanity”), although all of the said offences against the person are enumerated as crimes against humanity under international criminal statutes.

Chapter 5 covers “War Crimes and Grave Breaches” in 12 pages. This topic is a whole subject of international humanitarian law and the list of war crimes offences in the ICC Statute is the longest list of all groups of crimes within the ICC’s jurisdiction. By its brief treatment of war crimes, the chapter can only provide a very broad overview of this group of offences. It omits to explain in Chapter 5.4, for instance, that any person who violates Article 3 common to the Geneva Conventions of 1949 can be held criminally liable for such violation, and there is no condition precedent that that person belong to a specific category (for example, being a person connected to a war

³ For example, former President Augusto Pinochet of Chile, former President Charles Taylor of Liberia, and the incumbent President Omar al-Bashir of the Sudan, who is subject to an arrest warrant issued by the ICC on 4 March 2009.

⁴ Art. 27 (Irrelevance of official capacity) provides:

- “1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

Art. 98 (Cooperation with respect to waiver of immunity and consent to surrender) stipulates in para. 1: “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

⁵ Art. 5 (1), ICC Statute. But, by virtue of Art. 5 (2) of the Statute, the ICC shall exercise jurisdiction over this crime only when a provision is adopted in accordance with the Statute’s amendment procedures defining the crime and setting out the conditions under which the ICC shall exercise jurisdiction with respect to this crime.

effort).⁶ On page 124, the authors fail to mention that using starvation as a method of warfare – a war crime in international armed conflict under the ICC Statute – is not criminalized as a war crime in internal armed conflict under that same Statute.

Chapter 6 on “Crimes Against Humanity” is 13 pages in length and gives a broad overview of this group of crimes, without detailed treatment of their elements. The authors state on page 128 that “the ICTY definition [of crimes against humanity] has retained the armed conflict nexus of the Nuremberg Charter”, whereas the absence of a nexus to an armed conflict is reflected in Article 3 of the ICTR Statute, “which, however, requires the existence of a discriminatory intent on national, political, ethnic, racial or religious grounds”. On page 134, it is stated: “As already observed, a discriminatory intent is required in the definition of crimes against humanity contained in the ICTR Statute, but not in the ICTY Statute.” This is not correct. The nexus to an armed conflict is merely a jurisdictional threshold requirement for the ICTY to exercise jurisdiction over crimes against humanity under its Statute. It is not a “definition” of the crimes as such.⁷ Likewise, the ICTR has *jurisdiction* over crimes against humanity committed in Rwanda insofar

as such crimes are committed with discriminatory intent,⁸ but persecution is the only crime against humanity that requires proof of *mens rea* that the perpetrator commits an attack against a civilian population with the discriminatory intent aiming at removing the victims from society or even humanity itself on one or more of the grounds enumerated in Article 3 (Crimes against humanity) of the ICTR Statute.⁹

The few pages allocated to this big subject of crimes against humanity do not allow for the elaboration of the elements of crimes for each crime against humanity. Footnotes on pages 129 and 130 are used to explain such elements for the enumerated crimes against humanity. Footnote 17 on page 129 explains that the crime against humanity of extermination “may be defined as ‘killing on a large scale’, which includes ‘subjecting a widespread number of people, or systematically subjecting a number of people to conditions of living that would inevitably lead to death . . .’”. Unfortunately, the law is more complex than stated in that footnote and international jurisprudence on extermination is not quite settled. The ICC Statute’s Elements of Crimes allow for the killing of one or more persons as extermination.¹⁰ The ICTY and the ICTR have not been

⁶ *Prosecutor v. Akayesu* (Case No. ICTR-96-4-A, ICTR Appeal Chamber’s Judgment, 1 June 2001, paras. 443–445).

⁷ Art. 5 of the ICTY Statute provides that the ICTY “shall have the power to prosecute persons responsible for the following crimes [against humanity] when committed in armed conflict, whether international or internal in character, and directed against any civilian population: . . .”. The reviewer’s conclusion is supported by the ICTY Appeal Chamber’s Judgment in *Prosecutor v. Dusko Tadic* (Case No. IT-94-1-A, 5 July 1999, paras. 249, 272).

⁸ Art. 3 of the ICTR Statute provides that the ICTR “shall have the power to prosecute persons responsible for the following crimes [against humanity] when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious ground: . . .”.

⁹ ICTR Appeal Chamber’s Judgment in *Prosecutor v. Akayesu*, op.cit., paras. 460–469.

¹⁰ The Elements of Crimes for extermination as a crime against humanity stipulates:

- “1. The perpetrator killed one or more persons, including inflicting conditions of life calculated to bring about the destruction of part of a population. [Footnote: ‘The inflictions of such conditions could include the deprivation of access to food and medicine.’]
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population. [Footnote: ‘The term “as part of” would include the initial conduct in a mass killing.’] . . .”

consistent in their definition of the elements of crimes for extermination. While extermination has been held in many judgments to be “killing on a large scale”,¹¹ other judgments are not so straightforward. The ICTR Trial Chamber in *Nahimana et al.*, while agreeing that in order to be guilty of the crime of extermination “the Accused must have been involved in killings of civilians on a large scale”, has ruled that the distinction between murder and extermination is “not entirely related to numbers”. The distinction is considered to be a “conceptual one that relates to the victims of the crime and the manner in which the victims were targeted”.¹² The ICTR Appeal Chamber in *Niyitegeka* did not pronounce on whether killing of one or a small number of persons could be extermination; the accused was convicted of extermination for having participated in attacks against

the Tutsi that contributed to the killing a large number of individuals, including *his* own killing of three persons.¹³ In *Milan Martić*, decided by an ICTY Trial Chamber in June 2007, a minimum number of victims is not required, and extermination may be established by an accumulation of separate and unrelated killings.¹⁴

Chapter 7 (“Genocide”) guides readers on the meaning of genocide in just over 11 pages. On page 143, the authors are correct to propound that “the *Akayesu* case authoritatively determined that genocide against the Tutsi did, in fact, take place in Rwanda in 1994”. Subsequent cases decided by the ICTR did the same until the ICTR Appeal Chamber’s Decision of 16 June 2006 in *Prosecutor v. Karemera et al.*¹⁵ that has finally done away with the need for the ICTR Trial Chambers and Appeal Chamber to

This formulation was adopted by the PrepCom for the ICC in light of the Judgment of the ICTR’s Trial Chamber II in *Prosecutor v. Kayishema and Ruzindana* (Case No. ICTR-95-1-T, 21 May 1999, para. 147), where killing of a single person as part of a mass killing event is said to be extermination.

In *Prosecutor v. Bagilishema*, the ICTR’s Trial Chamber I held that the crime against humanity of extermination, as opposed to murder, is “unlawful killing on a large scale” but “large scale” does not suggest “a numerical minimum”. It must be determined on a case-by-case basis “using a common-sense approach” (Case No. ICTR-95-1A-T, 7 June 2001, para. 87). The Trial Chamber then expressly endorsed the definition of the elements of the crime against humanity of extermination in *Kayishema and Ruzindana* (*ibid.*, paras. 88–90).

See further Kittichaisaree, *op. cit.*, pp. 105–106.

¹¹ See, e.g., *Prosecutor v. Stakić* (Case No. IT-97-24-T, ICTY Trial Chamber II’s Judgment, 31 July 2003), paras. 638, 640; and *Prosecutor v. Zigiranyirazo* (Case No. ICTR-01-73-T, ICTR Trial Chamber III’s Judgment, 18 Dec. 2008, paras. 431–438). The latter case stressed the need for killings on a mass scale; hence, killings of 10–20 victims were held not to constitute extermination.

¹² *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Case No. ICTR-99-52-T, ICTR Trial Chamber I’s Judgment, 3 Dec. 2003, para. 1061). However, the three accused “media leaders” in that case instigated killings on a large scale anyway (*ibid.*, para. 1062). Although the number of victims was not specifically mentioned, it must have been the same unspecified number as the victims of the crime of genocide perpetrated by these three media leaders’ propaganda of hatred and violence against the Tutsi through their control of the media in Rwanda at that time, and for which they were found criminally liable based on the same set of conduct as extermination and persecution as crimes against humanity (*ibid.*, para. 1090).

¹³ *Eliezer Niyitegeka v. Prosecutor* (Case No. ICTR-96-14-A, 9 July 2004, paras. 450–454).

¹⁴ *Prosecutor v. Milan Martić* (Case No. IT-95-11, ICTY Trial Chamber I’s Judgment, 12 June 2007, para. 63). The ICTY Appeal Chamber’s Judgment in that case rendered on 8 Oct. 2008 did not deal with this aspect.

¹⁵ *Decision on Prosecutor’s Interlocutory Appeal on Judicial Notice* (Case No. ICTR-98-44-AR73(C), 16 June 2006, para. 35).

determine whether genocide against the Tutsi did occur in Rwanda in 1994 before proceeding to deal with merits of the cases. The authors' omitting to mention this important Decision by the ICTR is quite surprising.

On page 144, the authors contend that "[t]he execution of genocide involves two levels of intent: that of the criminal enterprise as a collectivity and that of the participating individuals". This conclusion ignores the fact that there could be a one-person genocidaire, as provided in the Elements of Crimes of the ICC Statute which stipulates that the perpetrator's *actus reus* "took place in the context of a manifest pattern of similar conduct directed against [the destruction, in whole or in part, of a particular national, ethnical, racial or religious] group or was conduct that could itself effect such destruction."¹⁶

Chapter 10 on "Terrorism" is helpful to readers who wish to make sense of the law – both conventional and customary law – governing this matter. It should be noted that Resolution E adopted by the Rome Conference of the ICC as part of the Final Act of the Conference recommended that the Review Conference to be convened seven years after the entry into force of the ICC Statute consider including terrorism and international drug trafficking within the ICC's jurisdiction.¹⁷ If the Review Conference somehow does not include terrorism as a distinct group of crimes within the ICC's jurisdiction despite the extremely serious threat, damage and injury to the international community arising from this heinous crime, one may inquire whether acts of terrorism can fall within the rubric of war crimes, crimes against humanity, or even acts of genocide, already within the ICC's jurisdiction. This is where Bantekas and Nash do not offer any guidance.

The lengthy Chapter 18 on "Evidence before the Ad Hoc Tribunals" (pp. 437–494) written by Caroline Buisman, is the only chapter on proceedings before international criminal tribunals. One may wonder why other import-

ant aspects of such proceedings, like fair trial, rights of the accused and rights of victims, are not covered by this book as well.

There are some typographical errors or editorial oversights that cause confusion. For example, on page 18 the authors write: "... The prohibitions contained in human rights treaties are addressed to States and are of two types: the first involves a negative obligation, requiring that State officials or agents thereof be prevented from violating human rights ...; the second type involves a negative obligation, requiring States to ensure that rights guaranteed are not violated. ...". Surely, the latter type is a positive obligation. On page 29, while analyzing Article 7 (1) of the ICTY Statute, reference is made to Article 25 (3) (a) and (d) without informing readers that Article 25 is that of the ICC Statute.

Overall, Bantekas and Nash's *International Criminal Law* is recommended to students and practitioners interested in the legal regime governing crimes with international/transnational elements, including international legal cooperation to bring perpetrators of such crimes to justice in domestic courts or international criminal tribunals. European States' national practice and initiatives, as well as the EU's practice, action plans and initiatives, in the matters covered by each of the chapters are explained with clarity. The quantity of case law and materials referred to by the authors is impressive, showing the authors' extensive research on the topics covered by their work. Nevertheless, readers interested in in-depth treatment of genocide, war crimes, crimes against humanity and aggression will have to find other *International Criminal Law* books to supplement Bantekas and Nash's latest edition of *International Criminal Law*.

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¹⁶ Italics added. This is the last element of the crime of genocide in the Elements of Crimes for Article 6 of the ICC Statute. The italicized wording takes care of a possibility of one person causing destruction, in whole or in part, of a protected group, for example by stealing a nuclear bomb and using it against that group.

¹⁷ *Doc. A/CONF. 183/10* of 17 July 1998.

Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Oxford: Hart Publishing, 2nd ed., 2008, pp xli + 1781

Unlike Bantakas and Nash's work reviewed above, *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, edited by Professor Otto Triffterer of the University of Salzburg, Austria, focuses exclusively on the provisions of the ICC Statute. Contributors are mostly participants of the Rome Conference of the ICC and/or the PrepCom for the ICC that drafted the Elements of Crimes and the Rules of Procedure and Evidence, held after the Rome Conference. Since there is no official record of the work of the Rome Conference or the said PrepCom, these contributors provide authoritative accounts of the *travaux préparatoires* of the ICC Statute and the Elements of Crimes. There are commentaries for the Preamble and the 128 articles of the ICC Statute, article by article. Six contributors write on Article 8 (War Crimes) alone. Annex I reproduces the Rules of Procedure and Evidence, Annex II the Elements of Crimes, and Annex III the Regulations of the ICC. The book spans 1,954 pages in total, with no index included in the book.

One may wonder why a second edition is necessary for commentaries on an international convention concluded in 1998 and in force since 1 July 2002. The editor explains, on page v, that this second edition is a "substantially revised and amended version" of the first edition published in 1999 to take into account the jurisprudence of the ICTY and the ICTR as well as other international, "semi-international" or national courts, the adoption of the Elements of Crimes and the Rules of Procedure and Evidence by the Assembly of States Parties to the ICC Statute in September 2002 and the "Regulations of the Court" by the ICC Judges on 27 May 2004.

Commentary offers a completely different meaning of international criminal law from the

one posited by Bantakas and Nash. Triffterer, the Editor of *Commentary*, and Morten Bergsmo, who co-authors the commentary on the Preamble of the ICC Statute, propound that international criminal law is "in reality the criminal law of the community of nations, with the function of protecting the highest legal values of this community against 'such grave crimes [that] threaten the peace, security and well-being of the world'".¹ Triffterer subsequently concludes, on page 27: "Over more than 100 years of development three groups of crimes have crystallized, which are today called the 'classical Nuremberg crimes': crimes against peace (the crime of aggression), war crimes and crimes against humanity, the latter including genocide." These three groups of crimes are "the most serious crimes of international concern"/"the most serious crimes of concern to the international community as a whole" that fall within the ICC's jurisdiction.²

Commentary on the Rome Statute of the International Criminal Court is able to provide detailed analysis of the substantive law and the procedural law of the ICC. For instance, it affirms, on pages 191 and 237–243, that jurisprudence of international criminal tribunals on the crime against humanity of extermination is "not entirely consistent" regarding the legal requirement that the murder constituting extermination needs to be on a large scale, and that, pursuant to the Elements of Crimes, an individual may be held by the ICC to be criminally responsible for extermination by his/her killing one person as part of a mass killing of members of a civilian population. It also provides, on pages 1606–1614, a much-needed explanation on the meaning of the recognition of immunity under Article 98 (1) of the ICC Statute and its application vis-à-vis the rejection of impunity as a general rule under Article 27 of the same Statute.

Page 231 gives examples of acts considered by the ICTY and the ICTR to be crimes against humanity of other inhumane acts. What is missing is attempted murder, held by the ICTY in some cases to fall into this category of crimes

¹ *Commentary on the Rome Statute of the International Criminal Court*, p. 8. Citations omitted.

² Arts. 1 and 5 of the ICC Statute.

against humanity.³ It should be noted, however, that the ICC has rejected the criminalization of attempted murder as a crime against humanity of other inhumane acts under the ICC Statute,⁴ and this shows that the ICTY's and ICTR's jurisprudence cannot be transposed automatically to the ICC's.

The third edition of Bantekas and Nash's *International Criminal Law* was completed in January 2007, before the ICC's several significant decisions, some of which depart considerably from the jurisprudence of the ICTY and ICTR that had dominated legal analysis in international criminal law since the setting up of the ICTY in 1993 and the ICTR in 1994. In particular, the concept of joint criminal enterprise (JCE), covered in Chapter 2.5 of the book, which has formed the backbone of some 80 per cent of the prosecution before the ICTY and, more recently and to a lesser extent, the ICTR, has been soundly rejected by the ICC.⁵ The second edition of *Commentary on the Rome Statute of the International Criminal Court* has a "Special Print" to update pages 743–770 of that second edition itself, dealing with Article 25 of the ICC Statute ("Individual criminal responsibility"). The update (pp. 752–755) refers to the ICC's adopting the liability mode of co-perpetration and the doctrine of functional control over the act. However, the author of the commentary to this Article 27 fails to mention the fact that the JCE has been held to have no place in the ICC Statute. This is quite surprising as it is the commentary on the ICC Statute that one reads, not commentary on the jurisprudence of the ICTY or the ICTR. This occasional over-reliance on the ICTY's and the ICTR's jurisprudence in construing the relevant provisions of the ICC Statute is the main inherent weakness of this otherwise perfect work of

reference on the ICC Statute. Several commentators extensively rely on the judgments of the ICTY and the ICTR in trying to construe each relevant provision of the ICC Statute, despite the fact that the ICTY Statute, the ICTR Statute and the ICC Statute are different statutory creatures. It is true that Article 21 of the ICC Statute recognizes the role of "the principles and rules of international law, including the established principles of international law of armed conflict", which arguably derive from the jurisprudence of international criminal tribunals including the ICTY and the ICTR, in the interpretation of the ICC Statute. But these principles and rules rank "in the second place" below the ICC Statute, Elements of Crimes and the ICC's Rules of Procedure and Evidence.⁶ The ICC thus cannot follow the jurisprudence of the ICTY and the ICTR in all cases, especially where the ICC Statute and/or Elements of Crimes provide to the contrary.

The first Review Conference of States Parties to the ICC Statute will be convened in 2010 to, among other things, consider any amendment to the ICC Statute, including the list of crimes contained in Article 5 of the ICC Statute. *Commentary on the Rome Statute of the International Criminal Court* may have to be revised once again soon thereafter. In the meantime, it is the most authoritative and almost perfect work of reference on the true meaning of the provisions of the ICC Statute, article by article, compiled in one single volume, published in the English language to date.

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³ E.g., *Prosecutor v. Vasiljevic* (Case No. IT-98-32-A, ICTY Appeal Chamber's Judgment, 25 Feb. 2004, paras. 2, 143, 147, and also note 237 in the Judgment).

⁴ ICC Pre-Trial Chamber I in *Situation in the Democratic Rep. of the Congo: Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui – Decision on the confirmation of charges*, (Case No. ICC-01/04-01/07-717, 30 Sept. 2008, paras. 461, 463).

⁵ *Situation in the Democratic Rep. of the Congo: Prosecutor v. Thomas Lubanga Dyilo: Decision on the Confirmation of Charges*, (Case No. ICC-01-91/04-01/06-803, ICC Pre-Trial Chamber I, 29 Jan. 2007, para. 323 *et seq.*); and *Situation in the Democratic Rep. of the Congo: Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui – Decision on the confirmation of charges, op. cit.*, para. 520 *et seq.*

⁶ Article 21 (1), ICC Statute.

B.L. Zimenko, *International Law and the Russian Legal System*, Eleven Publications, Utrecht, 2007) edited and translated by William E. Butler, pp 389 + xliii + Bibliography and Index

What are the conditions under which a norm originating from one system can have effect in a system quite distinct in terms of social objectives and the objects it regulates? Where are such conditions prescribed? In the system of origination or the system of reception? Does the formulation of these conditions allow a broad or narrow interpretation?

These are all pertinent questions when considering the relationship between the international legal system and any national legal system. For Zimnenko the relationship between the international legal system and the national legal system, which he terms *interaction*, is a dynamic one. That is, it is possible both for national law to have an effect in the international legal system and vice versa. That is the starting point of his work. However, *International Law and the Russian Legal System* proceeds to address only one aspect of this dynamic: that relating to how, if at all, norms of international law have an effect in the national legal system. This is a particularly useful enquiry in the case of Russia for two reasons. First, the first sentence of Art. 15 (4) of the Russian Constitution (RC 1993) provides that generally recognized principles and norms of international law and international treaties of the Russian Federation form part of the Russian legal system:

... [the] generally recognized principles and norms of international law and treaties of the Russian Federation shall be constituent part of its legal system.

The interpretation of this provision raises a number of issues, some of which Zimnenko seeks to address. First are definitional issues such as what is a generally recognized principle? Is it to be interpreted as a general principle of law as recognized by civilized nations as per Art. 38 (1)(c) of the Statute of the International Court of Justice? With regard to norms of international law, do they include or are they

restricted to *ius cogens*? What is the Russian legal system of which certain international norms form part? Is it coterminous or somehow distinct from the Russian system of law? Is Art. 15 (4) a general reference norm allowing the direct application of these sources of international law or are further mechanisms needed to allow reception in the Russian legal system? Should the specification of some sources of international law be interpreted restrictively to exclude the inclusion of others? What effect does the reception of the stated sources of international law have on norms of national law? While the second sentence of Art. 15 (4) does go on to provide that:

If a treaty of the Russian Federation establishes other rules that those stipulated by the law, the treaty shall apply

it is silent on the relationship between generally recognized principles and norms of international law on the one hand and national legislation on the other. Which is supreme? Or is the idea of supremacy misplaced, and can we, as Rosalyn Higgins has done in a different context, argue that both are relevant? The second reason for which this enquiry is relevant is because several decisions of the European Court of Human Rights (the ECHR) have been rendered against the Russian Federation. The question is then raised, of what is the place of these decisions in the legal system of the Russian Federation – do they fetter the national courts in their interpretation of the European Convention on Human Rights?

Structure

The book is divided into four chapters. Chapter 1 clarifies the subject matter of the enquiry. Divided into three sections, the first examines the dynamic interaction between international and municipal law. Interestingly, the author conceptualizes interaction to somehow transcend the monist/dualist dichotomy by the *idea of separate but dependent*. Such a position is not original to the author but is shared by several Soviet scholars.¹ Thus international and national systems are conceived as independent

¹ See Tarja Langstrom, *Transformation in Russia and International Law* (Martinus Nijhoff, 2003) at 351.

spheres; the norms of each are distinct and cannot diffuse into and operate within the other system. However, through the process of interaction, norms of one system can produce effects in the other system. He notes that the relationship between the two systems, both its nature and the name attributed to it, is understood differently by Russian jurists, requiring him to delve into a detailed analysis to clarify points of divergence. Zimnenko proposes that the link between the national legal order and the international legal order be named interaction. He explores the nature of this link defining it as a system of ensuring that a) measures are adopted within the framework of international law for the realization of municipal law and b) measures are adopted within the framework of national law for the effective realization of international law. The second section gives an overview of how national law is used to implement international law norms (pp. 12–17). Before launching into this overview, he clarifies that all jurists begin from the premise that national law is not the exclusive method of implementing international law obligations; states have the sovereign right to determine how to realize norms of international law in the domestic sphere (p. 12), a right which, according to some jurists both Russian and foreign, states can relinquish or curtail. The third section examines national legal implementation as the conduit by which international legal norms have effect in the domestic sphere (pp. 17–44). He launches into an examination of the academic debate on how international legal norms give rise to effects in the domestic sphere and the name to be attributed to that aspect of interaction (p. 17). He examines the views of Chernichenko, for whom international legal norms produce legal effects in the Russian legal system through *transformation* (p. 18). Zimnenko criticizes this, arguing that transformation is not simply about harmonizing norms in the international and domestic spheres: it includes applying provisions of international law as a stopgap in the domestic sphere. Zimnenko's analysis of the term *transformation* does not end there. He questions whether it accurately describes the process by which norms of international law produce effects in the national legal system. For him, norms of international law cannot be trans-

formed to norms of national law. As each belongs to a distinct system of law, their essence and field of application are different (pp. 22–23). He appears to side with Chernichenko, who argues that it is through a norm of national law a) providing either for *renvoi* to international law or b) expressly containing legal provisions to implement specific international legal obligations that prescriptions of international law are taken in by national law. He then distinguishes the concept of transformation from a closely related concept *reception*. For Zimnenko, generally, *transformation* is linked to the process of converting norms of international law into norms of national law. In contrast, the process of *reception* involves national law grasping the prescriptions of international law. Zimnenko considers that *conversion* and *grasping* share important features: the essence of both “lies in the ‘transfer’ of rights and duties consolidated in sources of international law into rights and duties whose bearers are private persons and also specific State Agencies” (p. 35). In this discussion he examines how other jurists conceive these processes: Veliaminov agrees that an international legal treaty norm must be received into the national legal order before it can be applied; he makes it clear that the process of reception involves the creation of a norm, identical in content to the international norm from which it is derived but distinct by virtue of its field of application (pp. 35–36). That is, the original norm governs the relationship of states *inter se* in the international realm whereas the derivative regulates the conduct of private persons within a national sphere (p. 36).

His analysis of the concept of transformation pays close attention to Butkevich's theory, which the author summarizes as follows: transformation is not only a method of law creation whereby norms of international law are converted into norms of municipal law. It also involves reconfiguring municipal norms. That is, where norms of national law already exist to regulate the relationship governed by that particular provision of international law, transformation involves remoulding the national law norm to match its international law counterpart (p. 25). The author agrees and extends this theory, proposing that interaction is a dynamic process including the reverse process of converting international law norms to those in the

national legal system (p. 25). He notes that Mullerson refers to that aspect of interaction which relates to the use of national law to implement international law obligations, *National Law Implementation* (p. 26). Mullerson proposes that national law assists implementation in two ways: through *renvoi* and incorporation (p. 26). For Mullerson, *renvoi* does not transform norms of one system into norms of the other. *Renvoi's* operation prevents the referring system operating as a self-referential whole and forces it to look outside itself, to norms, which must be clear and precise, located in the *renvoi* system (p. 26). He then turns to consider the consequences of transformation, notably, whether it could lead to the transfer/concurrent exercise of duties imposed on states to private persons. The practical implications of this discussion can be located in the debate over whether human rights obligations imposed on states can be transferred/delegated to transnational corporations, which are carrying out functions traditionally carried out by states. Zimnenko presents a detailed explanation of why it should not (p. 31): “[f]irst, the duties of the State arising from an international treaty cannot be placed on third persons without the consent of the participants of this treaty. Second, duties under an international treaty may be performed solely by a subject of international law possessing international legal personality. Private persons, as follows from the Russian doctrine of international law supported by a majority of scholars, are not such. Third, any source of international law, as a rule, provides not only duties, but also rights of respective subjects of international law.”

Chapter 2 considers three juridical measures applied by a State to properly realize its international legal obligations: municipal law-creation; the incorporation of *renvoi*; and judicial interpretation (p. 48). His insights into the process and effects of *renvoi* are particularly noteworthy. Does *renvoi* somehow sanction the operation of norms of international law in the sphere of municipal relations? The author presents views for and against, before concluding that it does not. *Renvoi*, Zimnenko argues, leads to the creation of a norm of the domestic legal order whose content is identical to its international counterpart. Such norms create complex legal norms which form part of the legal

system of the State (p. 66). He supports his argument with reference to the *renvoi norm* contained in RC Article 15 (4) (pp. 66–67). Continuing with his analysis of *renvoi*, he notes that Russian jurists have left its categorization to one side (p. 81). Advancing legal thought, the author argues that they can be subdivided into two basic groups, both of which are necessary for the effective realization of international law. In one are those *renvoi* norms which introduce provisions of norms of international law into the domestic legal system (material norms). It is noteworthy that Zimnenko does not further categorize these norms according to the species of international law norm that are introduced. The second group aims at establishing rules of normative hierarchy between provisions contained in complex legal norms and norms of municipal law (p. 82).

Having dealt comprehensively with *renvoi* he examines which sources of international law can be introduced into the Russian legal system. RC 1993 Art. 15 (4) provides that only international treaties of the Russian Federation and generally recognized norms of international law are part of the legal system of Russia. But how should this provision be interpreted? Zimnenko argues against a literal interpretation which would prohibit the entry of other sources of international law into the legal system of Russia.

He rounds off this section by observing the close relation between the methods contained in national law to implement international law (p. 93). While municipal law-creation is not dependent on the other two methods, incorporative *renvoi* requires for its effectuation *renvoi* norms which, in turn, are the product of general law-creative activity of the State.

Section 3 of Chapter 2 examines the third method of realizing norms of international law: interpretation of national norms. Interpretation can be used to grasp the essence of an international legal norm where it has eluded the legislator (p. 94). He considers a) the process of interpreting municipal norms in light of provisions of norms of international law, and b) the interpretation of “complex norms” (p. 97). In his examination of the first issue, he begins by stating that the purpose of interpreting any legal norm is to elicit its meaning, content and the terms on which the respective legal norm

found expression (p. 97). His examination is thorough, looking first at the broader issue of the function of interpretation and the definition of a legal norm before addressing the central issue. He proposes that when the content of provisions of norms of international law which bind a State differ from the content of sources of national law: "a subject of law taking part in the realization of national-law norms does not simply have the right, but is obliged to turn to the content of the respective norms of international law" (p. 98). Zimnenko argues that some judges have gone further and held that it is possible to have resort to norms of international law when interpreting national legislation to reveal ambiguity (p. 99). However, he qualifies this, arguing that if the legislator intends to deviate from an international norm, then, bowing to the separation of powers doctrine, the judiciary should be guided by the national legislation (p. 99). However, what if a state failed to exercise its legislative sovereignty, whether intentionally or through neglect, and left the normative content of a concept undetermined? In this instance, Zimnenko argues, the judiciary should reach into the international legal system and be guided by the interpretation given to such concepts in international treaties and doctrine (pp. 102–103). Unconsidered, however, is the possibility that doctrine and treaty may pull the judiciary in different directions, or neither may guide the judiciary at all. The author proposes that, for a state to properly realize international legal obligations, its official agents must interpret national law in line, not with international law in *toto* , but with those international law obligations that have become binding on that state (p. 109). The author finds the legal basis for this proposition in the Constitution of the Russian Federation (Art. 15 (4)) and branch laws containing analogous branch norms (p. 109).

Having established that international law obligations can be implemented through an interpretation of national law, he then proceeds in the following section to consider the procedure for interpreting those international legal provisions binding on a state (p. 110). This is particularly important as often international legal norms are painted with a broad brush. He then makes the point that implementing international law obligations in the national legal

order should not be regarded as a matter within the exclusive control of a State (p. 132). Zimnenko urges interested subjects of international law who consider that a State has not faithfully realized international legal norms to register their protest (p. 132). Furthermore, when interpreting such obligations, State agencies have the right to take into account decisions of international organizations: a) which have become a source of international law for the state; b) which are not a source of international law but which may be evidence of a customary norm, and also as evidence of the content of the respective legal norm; and c) when interpreting provisions consolidated in a source of international law if those decisions are the result of interpretation by an international organization of the respective norms of international law under examination.

Zimnenko then turns his attention to Unilateral Interpretative Statements issued by the Executive, the Legislature and the Judiciary (p. 135). Treating first those issued by the legislature, he distinguishes unilateral interpretative statements issued at the time of ratification of the treaty from those issued after a state has given its consent to be bound. Only the former may guide the judiciary's interpretation of such treaty provisions (p. 136).

He recommends that the executive should not issue unilateral interpretative statements on provisions which, following the application of *renvoi* to international law, have become part of the state legal system, as this might encroach on the judiciary's sphere of competence, resulting in legal uncertainty (p. 137). With respect to the judiciary, its members have the power to interpret provisions contained in sources of international law and should exercise this power to avoid conflicting interpretations. Zimnenko admits this may be difficult as, in deviation from the principle of separation of powers, RC 1993 relegates ultimate questions of foreign policy, international relations and treaties ratified by the Russian Federation to the Executive (p. 137). Consequently, when issues arise connected with an interpretation of provisions provided for in sources of international law, courts must make preliminary references to the Executive Branch.

Chapter 3 focuses on the first sentence of RC 1993 Art. 15 (4), which provides that gener-

ally recognized principles and norms of international law and international treaties of the Russian Federation are an integral part of its legal system. Zimnenko's analysis of this important provision starts with a discussion of the term "legal system". As the Constitution does not flesh out the meaning of this concept, he turns not to the normative content given to the concept by the judiciary, but to that allotted to it by jurists. This takes the reader to the academic debate on whether the concepts *legal system* and *system of law* should be treated as synonymous (p. 140). Having clarified the concept of "legal system of the Russian Federation", he moves on to discuss the place of the provisions of norms of international law in it. He argues that if it is accepted that the concept of legal system is conterminous with system of law, then those provisions of international law which form part of the legal system become part of the municipal law of the land. He notes that some authors, Khelstova and Tolstik, go even further, conferring upon norms of international law the ability to permeate all elements of the legal system of Russia "including the application of law, legal consciousness" (p. 142). Others (for example Marochkin) take a contrary position, treating norms of international law and norms provided for in sources of municipal law of Russia as autonomous elements of the national legal system which do not, however, form part of the municipal law of Russia (p. 143).

Zimnenko examines how jurists have understood the effect of incorporating norms of international law in national law. Trutsevskii, for example, argues that it does not alter the norm's essence; it only conditions its operation in the municipal sphere. Thus it is applied by national courts and executed by natural persons (p. 147). The premise for such a position appears to be that international treaties can have a direct effect in the domestic sphere without the need for a conversion intermediary (p. 147). Owing to the fact that they have not mutated into norms of national law, they cannot form part of the national system of law. They do, however, form part of the legal system. Zimnenko also examines the reception of self-executing provisions of norms of international law. He observes that foreign and Russian jurists consider this question only in rela-

tion to treaties. However, for Zimnenko this issue has important ramifications for all sources of international law which have become part of the legal system of a State (p. 153). What is a self-executing provision then? Zimnenko conducts a detailed literary review (p. 154): for Mullerson it is a provision formulated sufficiently concretely and fully to regulate relations of subjects of national law, and one to which *renvoi* can apply. Thus the norms of international law apply themselves, although not directly but through a *renvoi* intermediary (pp. 154–55). Marochkin identifies the criteria of self-executing norms as "a general indication of a treaty that its norms are applicable to relations in the sphere of national law; norms being addressed to juridical and natural persons or agencies; the activity (clear and determined character) of a norm". He cites an additional indicator as "the presence in international law of the accompanying mechanism of realization" (p. 155). Then Tikhomirov adds his voice to the discussion, arguing that there are few international legal norms capable of giving rise to direct effect (p. 155). In contrast, Khelstova conceptualizes Art. 15 (4) RC 1993 as a general transformation norm, transforming norms of an international treaty duly adopted into municipal law (p. 156). The author, following through with Khelstova's thesis, proposes that, as self-executing treaties do not require transformation, the norms contained in these treaties may be directly realized in the sphere of municipal relations (p. 156). From his literary review he concludes that most jurists consider self-executing norms of international law to have direct effect in the sphere of municipal relations; and second, jurists make a reservation with respect to the possibility of the direct application of norms of international law, assuming that norms of international law operate through *renvoi* norms (p. 156).

The next issue he raises is: can self-executing norms regulate municipal relations? His conclusion is that doctrine would indicate that a self-executing norm of international law cannot regulate municipal relations. That said, where provisions contained in a source of international law have become part of the legal system of a State, they form part of a complex legal norm. This complex norm, formed within the framework of the legal system following the

consequence of *renvoi*, can regulate municipal relations (p. 157).

Section 3 of Chapter 3 examines the reception of generally recognized principles and norms of international law in the legal system of Russia (p. 170). Zimnenko starts by examining the nature of generally recognized principles and their function in international law. This examination presents him with two difficulties: first, there is no consensus in doctrine (p. 172); second, the phrase “generally recognized principles and norms of international law” is employed in the Constitution and in some national legislation of Russia, but is left undefined (p. 172). The conclusion the author draws from his examination is:

Having regard to the positions above with respect to generally-recognized principles and norms of international law, and also taking into account the content of the 1969 Vienna Convention 1969 (Art. 53), by “generally-recognized norm of international law” should be understood a rule of behaviour regulating inter-State relations adopted and recognized by the international community of States as a whole ensured by the coercive force of a State and/or international intergovernmental organization.

Zimnenko stresses that it is only those generally recognized norms of international law to which the Russian Federation has not actively objected that will be part of the legal system of Russia (p. 182). At the same time he makes the reader aware that, for certain jurists, the norms that will form part of the legal system are not those to which the Russian Federation has not objected; but those in respect of which it has been proved in a court that Russia consented (p. 183).

What are the features of a generally recognized principle? For Zimnenko a generally recognized principle must possess all the features of a generally recognized norm, and in addition must belong to that category of norms which forms “the carcass of international law” (p. 184). He notes that several Russian jurists consider that a generally recognized principle is a norm with the highest degree of normative gen-

erality and which pre-determines the content of other, more specific norms (p. 184). It is this feature that distinguishes it from a legal norm. A legal norm, whatever its system of origination, must be specific, a condition which precludes it from qualifying as a general norm (p. 185). Another feature a generally recognized principle of international law should possess is that it must be mandatory so that the community of states can achieve certain ends (pp. 186–187). Thus, at the international level, interstate agreements should not deviate from them; at the domestic level all state organs should act in compliance with them. He then addresses the classification of generally recognized principles of international law. He challenges the position taken by several jurists that they should be subdivided into two basic categories: basic principles of international law and principles regarding the functioning of law proper, putting forward the view that “the majority of representatives of the doctrine of international law construe these principles to be principles concerning directly functioning of international law as a normative system” (p. 191).

After discussing the nature of a general principle he then examines how the provisions contained in them produce effects in the domestic legal order (p. 192). He then investigates the criteria an international treaty ratified by the Russian Federation must possess to be realized in the Russian legal system (the international treaty must have entered into force and it must be in writing); and then the conditions that need to be satisfied within the national legal system so that the treaty gives rise to legal effects (the treaty must be officially published and national legislation should provide for a *renvoi* norm to international treaties).

Zimnenko notes that many jurists regard decisions of international intergovernmental organizations as a source of public international law (p. 227). While Art. 15 (4) RC refers to generally recognized principles and norms of international law and international treaties of the Russian Federation as being included in the Russian legal system, should this reference justify the application of the *iusdem generis* rule or should Art. 15 (4) be subject to a more liberal interpretation? Then, if decisions of international intergovernmental organizations produce legal effects in the legal

system of Russia, under what conditions should they do so? He investigates this question thoroughly, considering the basic criteria decisions of international organizations must possess to be regarded as a source of international law (p. 228), before focusing on the central issue.

Another issue he focuses on is the status of ECHR decisions in the Russian legal system, highlighting the relevance of this enquiry at p. 253: on 30 March 1998 the Russian Federation ratified the European Convention for the Protection of Human Rights of May 1950, expressing in a federal law its consent to be bound by its provisions. When rendering decisions, the ECHR invariably refers to its previous case-law to confirm or substantiate its position. Does this arise from an obligation either to follow or to refer to previous decisions? Zimnenko examines this question carefully, beginning with an analysis of the term *precedent*. After concluding that "a necessary indicia of a judicial precedent as a source of law is that such precedent should contain a legal norm" (p. 257), he investigates whether judgments of the ECHR contain legal norms, finally concluding that they do not and cannot for several reasons (p. 257). First, ECHR has the authority to apply, not to create norms. Implying a capacity to create would be contrary both to the ECHR treaty, which serves as a basis for the creation of the ECHR, and to the principle of sovereign equality of States. Second, states have consented to the Convention on the understanding that the ECHR's competence does not extend to law creation. Third, norms of international law are the outcome of a process of mutual relations between states. A norm of international law may bind a State only that expresses its clear or implied consent to be bound by that norm. Fourth, there is no equivalent of a state legislature in the international system to promulgate legal norms binding upon States; an important feature of international law is that theoretically the subjects of this system create the norms by which they are bound. This norm-creating power has not been centralized in any one subject of international law yet. The author supplements the conclusion that the ECHR cannot create legal precedents by adding that it may create *precedents of interpretation* (p. 259): "the ECHR is endowed by the Convention with the possibility

not only to apply respective international treaties, but also to interpret legal rules containing in those documents." Again the author demonstrates the depth of his analysis, examining the legal nature of ECHR judgments. He proposes that they cannot be classified as norms of municipal law since the latter may only be created by States. Nor can they be classified as norms of international law, since these require for their formation the consent (express or implied) of subjects of international law.

How do provisions of international legal norms which have become part of the national legal system interact with national legal norms? How are conflicts arising between individual norms of international law which form the legal system of a State resolved? This is the focus of Chapter 4. The author clarifies immediately that the subject matter of his enquiry is those norms of international law that have become part of the legal system of Russia and not international law norms *per se*. Zimnenko argues that provisions of an international-legal norm which has become part of a legal system may operate to supplement national legal regulations (p. 285). Therefore an individual's position may be enhanced by interaction (i.e. where the international legal norms confer upon an individual greater protection than under national law) or may rest unaltered (i.e. where international norms either replicate or provide less rights than the national legal norms).

Evaluation

The author is well placed to undertake this study, having authored *inter alia* an instructional manual on judicial practice of the Russian Federation connected with the realization of provisions contained in the sources of international law as of 2002.

This book is narrow in its scope, focusing in its entirety on a specific aspect of the interaction of the international legal system with the Russian legal system, without deviating to draw comparison with any other instances of interaction. Such a focus is wholly appropriate for his intended readership, Russian judges who will be faced with questions involving the extent to which they can give effect to sources of international law within the Russian legal

system and questions of the interpretation of national law which has failed to implement correctly or has not implemented at all Russia's international obligations.

It has been contended as recently as 2003 that "Soviet scholars discussed the relationship between domestic law and international law as a major problem of theory".² In light of this, Zimnenko does well to emphasize the practical relevance of this study in the introduction.

The reviewer agrees with the editor that this monograph is of value to jurists unfamiliar with the Russian legal system for its survey of principal Russian doctrinal works. However, the reviewer identified an additional value: Zimnenko's observations are useful to clarify and advance thinking on methods used to validate the application of international law norms in any domestic legal order. For example, his presentation of Veliaminov's thesis that the reception of a treaty norm involves the creation of a norm, identical in content to the international norm from which it is derived but distinct by virtue of its field of application, could clarify thought on the relationship between and the severability of the derivative norm from the original norm. Furthermore, the issues he raises have the potential to fertilize debates in other

branches of international law. For example, the detailed analysis of arguments on whether judgments of the ECHR create precedents of law and interpretation, whether such judgments are binding on the ECHR itself or national courts, could be usefully applied to the debate over whether decisions of investment tribunals such as ICSID tribunals are capable of creating binding precedent. That said, a foreign jurist might have better appreciated the importance of this study if it had been set in its broader historical context, and if the author had, even if briefly, outlined the procedures for interaction during the Soviet era.

He delivers the study with analytical precision. This is evidenced at once by the book's careful composition: a table presents treaties in chronological order; tables setting out national legislation separate out the legislation of the USSR from Russia.

In conclusion I would recommend this book to jurists both Russian and foreign, principally for the author's ability to introduce to the mind distinctions between concepts which may appear closely related or synonymous and to deconstruct that which at first sight appears irreducible.

ANOOSHA BORALESSA

² Langstrom, *supra* n. 27, at 348.

Frank G. Madsen, *Transnational Organized Crime*, Routledge, London and New York, 2009, pp xxii + 130 + annexes

Steven David Brown (ed.), *Combating International Crime: The Longer Arm of the Law*, Routledge-Cavendish, London and New York, 2008, pp xix + 259 + appendices

Globalization brings with it benefits and vices to peoples across the globe. One of the vices is transnational crime, which has become much more common when criminals are able to coordinate and cooperate across national frontiers with ease and in an organized form in realizing their criminal activities. The General Assembly of the United Nations has found it appropriate to adopt, in 2000, the United Nations Convention on Transnational Organized Crime (hereinafter referred to as “the TOC Convention”) as the main international instrument in combating international organized crime.¹ The TOC Convention is supplemented by three Protocols focusing on three of the most common types of organized crime which are of international concern: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;² the Protocol against the Smuggling of Migrants by Land, Sea and Air;³ and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.⁴

Transnational Organized Crime by Frank G. Madsen is based on the author’s PhD thesis submitted to Cambridge University. Madsen, presently a researcher in transnational crime at St Edmund’s College, Cambridge University, is a former police officer with both the Danish police force and Interpol. He analyses from his own practical experience in the field the history, economics and practices of transnational organized crime, focusing on the key current

issues of the war on drugs, anti-money-laundering efforts, the relationship between organized crime and terrorism, development of “Internet-based” criminal activity, and international responses to transnational organized crime. The book is divided into eight chapters and eight annexes. The Annotated Bibliography on pages 158–161 provides readers with a description of the books, journals, useful websites and movies as well as TV series the author recommends for study in relation to the topics covered by the book.

Throughout the book, Madsen does not follow the structures and provisions of the TOC Convention and its three Protocols. Instead, he attempts to explain the context in which transnational organized crime exists and efforts by law enforcement authorities to combat such crime, either nationally or internationally. He chooses to examine some of the more common transnational crimes, in particular illicit traffic in illicit product and illicit traffic in licit product.

Chapter 1 (“Taxonomy”) examines the concept of transnational organized crime in relation to international and municipal law and international criminal law. Chapter 2 touches briefly on “the most authoritative definition of organized crime to date” adopted by the TOC Convention, and examines it in light of the history and development of the concept of organized crime, including its models. Chapter 3 (“The transnational crimes”) is the longest chapter of the book, spanning 37 pages. It familiarizes readers with some of the actual crimes that make up the income generation for organized crime. It also demonstrates convincingly the magnitude of the accrual of funds originating from what initially looked like minor transnational crime, such as the international smuggling of untaxed tobacco product. The author reveals, through concrete

¹ UN General Assembly Resolution 55/25 of 15 November 2000. The TOC Convention entered into force on 29 September 2003.

² Adopted by UN General Assembly Resolution 55/25 of 15 November 2000. It entered into force on 25 December 2003.

³ Adopted by UN General Assembly Resolution 55/25 of 15 November 2000. This Protocol entered into force on 28 January 2004.

⁴ Adopted by UN General Assembly Resolution 55/255 of 31 May 2001. The Protocol entered into force on 3 July 2005.

cases, the horizontal as well as complementary cooperation between highly organized criminal groups brought about by pragmatism. The part on the illicit traffic in illicit product covers narcotic drugs and measures to suppress narcotic drug trafficking. It is also frightening to learn that illicit traffic in licit product, such as cigarette smuggling, generates a substantial income for transnational criminals and could even finance acts of terrorism. Trafficking in humans, a subject of one of the three Protocols to the TOC Convention, is covered on pages 42–46. The rest of Chapter 3 guides readers through actual cases of transnational organized crimes, including the illicit trade in timber in Southeast Asia, and the Chinese organized crime in Italy which is heavily involved in human trafficking. Chapter 4 then singles out financing of terrorism through transnational crime and the convergence of transnational crime and terrorism for a separate analysis.

Chapter 5 examines illegal, criminal, and terror funds (the latter consisting partly of funds of legitimate origin) flowing into the global economies each year. This is followed in the next chapter by an analysis of initiatives against transnational crime taken by national and international institutions. Chapter 7 (“Critical issues and future trends”) and Chapter 8 (“Conclusion”) add very little to what has already been elaborated in the preceding chapters. The statistics provided in the eight Annexes are helpful to shed light on the seriousness of transnational organized crime.

In all, Madsen’s short, concise book entitled *Transnational Organized Crime* is highly recommended to students, researchers and practitioners who are interested in understanding transnational organized crime. Such understanding will certainly ensure that national law against transnational organized crime be realistically enforced, and that international legal instruments in the field, especially the TOC Convention and its Protocols, be implemented with success.

While *Transnational Organized Crime* by Madsen is a one-person effort, the 18 chapters of *Combating International Crime: The Longer Arm of the Law* are written by 15 authors and edited by Steven David Brown. The authors are drawn mostly from the law enforcement community. Brown himself, a qualified barrister,

worked as a police officer with the Metropolitan Police in London and, subsequently, the National Intelligence Service and Europol, focusing on cooperation with non-EU States.

Combating International Crime elaborates practicalities and challenges in cross-border law enforcement work and how cooperation actually functions from the practitioner’s perspective. It is divided into five main parts: Part I on the context; Part II on cooperation through international organizations, liaison office networks, and judicial cooperation; Part III on the mechanics of communication; Part IV on major tools and techniques; and Part V entitled “In practice” about a case study of a criminal investigation across Europe and Asia.

In Part I, the authors explore political choices at the national level on how best to deal with international crime, the landscape of present-day cross-border criminal activities, and measures taken to counter them both domestically and internationally. Politics, law, culture and capacity of the States concerned interplay to make cross-border law enforcement a success or a failure. Part II introduces readers to the institution, structure and operation of Interpol, EU mechanisms such as the European Police Office (Europol) and Judicial Cooperation Unit (Eurojust), the European Anti-Fraud Office (OLAF), the Southeast European Cooperative Initiative (SECI) Regional Center for Combating Transborder Crime, as well as the role of bilateral liaison postings (Overseas Liaison Officers), liaison officers seconded to international organizations, and legal attachés at diplomatic missions overseas.

The 40-page Chapter 10, entitled “No hiding place: How justice need not be blinded by borders”, is the lengthiest chapter of the book. Written by Kimberly Prost, an *ad litem* Judge of the International Criminal Tribunal for the former Yugoslavia since July 2006, the chapter explains with clarity how judges, prosecutors and law enforcement authorities in general may resort to extradition and mutual assistance in criminal matters in the best possible manner. This overview by Judge Prost is supplemented in the next chapter by the Croatian experiences relating to war criminals, written by Josip Cule, Deputy Chief Public Prosecutor in Croatia since 2005.

Part III, “The mechanics of communica-

tion”, advises readers on how to get the message across during the information exchange through a cross-border communication chain, and how to make message receivers understand the message in its proper context as intended by the communicator. Part IV then explains the tools of controlled deliveries, strategic and operational analyses, and the application of science (such as the use of DNA) to bring cross-border criminals to justice. Chapter 17, the last chapter in Part IV, explores the new challenges posed by crime involving information technology.

There are eight appendices to the book. Appendix 1 contains brief descriptions of major international networks and groupings involved in international law enforcement at the global and regional levels. Appendix 2 proposes possible wording for an agreement authorizing the exchange of information between countries or agencies that would realize the suggestions in Part III of the book. Appendix 3 briefly outlines background information necessary for a Letter of Request, which is an official request for assistance from criminal justice agencies in another jurisdiction. Appendix 4 ambitiously

suggests a blueprint of minimum requirements for a successful international liaison unit. The next appendix suggests the characteristics that are ideal components for an international organization involved in law enforcement. Appendix 6 lists key international legal instruments and their website links. Appendix 7 lists the glossary of acronyms, while Appendix 8 is, in fact, a bibliography.

Combating International Crime: The Longer Arm of the Law is a very useful work of reference for anyone interested in the subject of cross-border crime suppression from the practitioner’s perspective. While its editor writes, in the Editor’s note on page xviii, that the book was not intended to be a manual, it has indeed become a must-read manual for practitioners in the field, and most of the book’s appendices can be said to constitute due diligence checklists for the topics covered therein.

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SURVEY OF INTERNATIONAL LAW LITERATURE PUBLISHED IN 2008, WITH SPECIAL RELEVANCE TO ASIA

Compiled and edited by Bimal N. Patel*

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Maritime, sea and water resources
Private International Law
Religion and laws
Security and disarmament
Trade, commerce and investment

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