# Asian Yearbook of International Law

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*Volume 23 (2017)*


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# Asian Yearbook of International Law



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# Foundation for the Development of International Law in Asia (DILA)

DILA was established in 1989, at a time when its prime movers believed that economic and political developments in Asia had reached the stage at which they would welcome and benefit substantially from a mechanism to promote and facilitate exchanges among their international law scholars that had failed to develop during the colonial era.

The Foundation was established to promote: (a) the study of and analysis of topics and issues in the field of international law, in particular from an Asian perspective; (b) the study of and dissemination of knowledge of international law in Asia; and (c) contacts and co-operation between persons and institutions actively dealing with questions of international law relating to Asia.

The Foundation is concerned with reporting and analyzing developments in the field of international law relating to the region, and not primarily with efforts to distinguish particular attitudes, policies or practices as predominately or essentially "Asian". If they are shown to exist, it would be an interesting by-product of the Foundation's essential function, which is to bring about an exchange of views in the expectation that the process would reveal areas of common interest and concern among the states of Asia, and even more importantly, demonstrate that those areas of interest and concern are, in fact, shared by the international community as a whole.

# The Asian Yearbook of International Law

Launched in 1991, the Asian Yearbook of International Law is a major internationally-refereed yearbook dedicated to international legal issues as seen primarily from an Asian perspective. It is published by Brill under the auspices of the Foundation for the Development of International Law (DILA).

When it was launched, the Yearbook was the first publication of its kind, edited by a team of leading international law scholars from across Asia. It provides a forum for the publication of articles in the field of international law and other Asian international legal topics. The objects of the Yearbook are twofold. First, to promote research, study and writing in the field of international law in Asia; and second, 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 contains articles and shorter notes, a section on State Practice, an overview of the Asian states' participation in multilateral treaties and succinct analysis of recent international legal developments in Asia, as well as book reviews when available. We believe this publication to be of importance and use to anyone working on international law and in Asian studies.

In keeping with DILA's commitment to encouraging scholarship in international law as well as in disseminating such scholarship, its Governing Board decided to make the Yearbook open access and is available through Brill Open.

# Acknowledgments

The Co-Editors-in-Chief would like to acknowledge and thank the staff of the Handong International Law School Law Review for their work reviewing and editing the citations in the Yearbook.

The staff includes Senior Editors Eunhae Oh (Editor-in-Chief), Woon Ko (Managing Editor), Judith Baek, Seorin Choi, Seonmin Kim, and Taeheon Kim; and Junior Editors Min Sun Cha, In Hyuk Hwang, Dajeong Kim, So Jin Kim, and Yeonsoo Lim.

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# Editorial Note

The 2017 edition (volume 23) of the *Asian Yearbook of International Law* has a special feature section highlighting current international legal issues facing particular Asian states and is followed by articles; legal materials including a listing of the participation of Asian states in multilateral treaties and a description of the state practice of Asian states in the field of international law; along with a literature section featuring a bibliographic survey of materials dealing with international law in Asia; and finally a summary of the activities undertaken by the Foundation for the Development of International Law in Asia (DILA) in 2017.

## 1 Special Feature: Current International Legal Issues of Asian States

The special feature articles were drawn from papers that were presented at the 2019 DILA-Korea International Conference held in Seoul, Korea from January 24 to 27, 2019. The theme of the conference was "Asian State Practice of Domestic Implementation of International Law." Participants were asked to report on the most important international legal issues that the participants' home countries were facing. The idea was to provide a comprehensive snapshot of those matters affecting their countries and a descriptive account of the issues and provide a short explanation of how international law is being applied.

Muhammad Ekramul Haque, Professor in the Department of Law of the University of Dhaka, begins with his summary of current international legal issues facing Bangladesh. He notes that Bangladesh is an active participant in the international legal system because of its transition as a "Least Developed Country" to a middle-income country. He highlights the issue of refugee law and the Rohingya crisis pointing out that an estimated one million Rohingya reside in Bangladesh due to the difficulties they face in Myanmar. Professor Haque also comments on the issue of Bangladesh's War Crimes Tribunals noting that they have delivered judgments in 34 cases against 83 criminals of war crimes up until 2018. Next, he looks at the problem Bangladesh has had with Myanmar and India over maritime boundaries and its settlement by the International Tribunal for the Law of the Sea and arbitral tribunal administered by the Permanent Court of Arbitration respectively. Professor Haque then briefly examines Bangladesh's efforts to combat climate change through various international legal mechanisms along with intellectual property law issues related to the Agreement on Trade-Related

Aspects of Intellectual Property Rights. He concludes with a discussion of the implementation of major human rights treaties.

Seokwoo Lee, of the Board of Editors and Professor of International Law at Inha University School of Law, and Seryon Lee, Professor of the School of Law of Chonbuk National University, summarize Korea's contemporary involvement in international law due in large part due to Korea's vibrant export-oriented economy, its status as an Asian middle power, and the emergence of a robust Korean democracy. They begin their examination with a look at Korea-Japan relations in the context of history and unresolved issues emanating from Japan's colonization of Korea and conduct during World War II with specific reference to the "comfort women" problem and claims for forced labor. Subsequently, they denote issues pertaining to the law of the sea and specifically, relevant national legislation and other maritime issues related to the Arctic region and joint development with Japan. Next, they look at the impact on investment and the environment in Korea along with international security matters in relation to North Korea. Lastly, the topic of refugees is addressed as Korea has become a destination country in recent years.

Mary George, Professor of the Faculty of Law and Institute of Ocean and Earth Sciences of the University of Malaya, follows with a description of Malaysia's current involvement with international legal issues. She begins with an examination of Malaysia's air law issues including liability and compensation under the Warsaw and Montreal Conventions and matters arising out of the 1944 Chicago Convention. Then, Professor George goes on to briefly address the matter of refugees observing that Malaysia has not ratified the 1951 Convention relating to the Status of Refugees and its related 1967 Protocol; the 1954 Convention relating to the Status of Stateless Persons; and the 1961 Convention on the Reduction of Statelessness. She then moves on to comment on Malaysia's understanding of the legal rights and obligations of foreign vessels, including warships in its exclusive economic zone. She then addresses the Lynas Advanced Materials Plant issue and the removal of nuclear waste from Malaysia from the perspective of related international conventions. Afterwards, Malaysia-Singapore relations in the Straits of Johore are examined in the context of the delimitation of the *thalweg* in the Straits of Johore. Professor George also looks at how Malaysia has implemented the Maritime Labour Convention through its domestic legislation. Next, she reports on Malaysia's activities in relation to the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore) case at the ICJ and lastly on Malaysia's claims in the South China Sea and its position on maritime claims by foreign states.

Next, Rommel J. Casis, Director of the Institute of International Legal Studies and Assistant Professor of the University of the Philippines (UP) Law

Center, and Maria Pia Benosa, Professorial Lecturer at the UP College of Law, report on salient international legal matters affecting the Philippines. They begin with a look at the conclusion of treaties and other international agreements within the context of the "Three Pillars of Philippine Foreign Policy" which are the preservation and enhancement of national security, promotion and attainment of economic security, and the protection of the rights and promotion of the welfare of overseas Filipinos. Next, they discuss the involvement of the Philippines in international litigation and adjudication; the matter of statehood, jurisdiction of states, and organs of states in reference to the Bangsamoro Organic Law which created the Bangsamoro Autonomous Region; and briefly examine matters pertaining to international environmental law. This follows with a discussion of important human rights matters in the Philippines as they pay particular attention to extrajudicial killings and summary executions; threats to freedom of speech; non-violent discipline of children; and the state of jails in the Philippines. Then, attention is given to international criminal law and the issues arising out of the Philippine withdrawal from the International Criminal Court. Following, they discuss the international cooperation of the Philippines with particular reference to mutual legal assistance treaties and the prevention of pandemic influenza and other dangerous communicable disease. Lastly, they focus their attention to significant law of the sea matters including the South China Sea arbitration (Philippines v. China) under Annex VII of the UNCLOS along with the successful claim to an extended continental shelf in the Benham Rise region; the maritime boundary delimitation with Indonesia; and proposed legislation on maritime affairs.

Next, Kuan-Hsiung Wang, Professor of the Graduate Institute of Political Science, National Taiwan Normal University, gives his report on current international legal issues facing Taiwan. He begins by noting that Taiwan's international legal status has been an issue since 1949 and that despite the difficulties with its international legal status given the presence of the Peoples' Republic of China, it has official diplomatic relations with a number of countries as well as close economic relations with most members of the international community. He then looks to the issue Taiwan faces in relation to concluding international treaties and participating in international organizations. He observes that under the circumstances of the non-recognition of Taiwan, it is difficult for it to conclude agreements with other states. However, he notes that Taiwan is still able to accede to certain agreements for functional purposes. Lastly, he addresses Taiwan's law of the sea matters and in particular, its maritime claims and fishery disputes in both the East China Sea and South China Sea.

Kitti Jayangakula, Professor of Law of Eastern Asia University School of Law, follows with his description of Thailand's interaction with international law

with an emphasis on human rights. He notes that human rights violations in Thailand have been acute during the period after the military coup in 2014 until the present time. He points out that the current junta government has broad authority to limit or suppress fundamental human rights and has granted itself immunity for its actions. He then addresses the problem of human trafficking on women and children noting that Thailand is a source, transit and destination country for the trafficking of children and women for sexual purposes and labor. Finally, the issue of migrant workers in Thailand, who are often forced to engage in difficult work for low wages and are placed in unsafe or unsanitary work environments, is dealt with.

Lastly, Trinh Hai Yen, Professor of Law in the Faculty of International Law of the Diplomatic Academy of Vietnam, and Ton Nu Thanh Binh, who is a teaching assistant at the same institution, provide their account of Vietnam's most significant international legal issues and how international law is being applied in these circumstances. They begin by pointing out the importance of law of the sea matters by introducing Vietnam's maritime law enforcement agencies, its efforts in the negotiation of the Code of Conduct in the South China Sea and Vietnam's response to the 2016 South China Sea arbitration. This follows with a treatment of investment and trade issues with respect to the negotiation and conclusion of investment and trade treaties and a description of investment and trade disputes Vietnam has been engaged with through international arbitration and at the WTO. Next, they address human rights issues noting Vietnam's participation in most of the key conventions on basic human rights along with a specific treatment of the protection of persons with disabilities and the prevention of torture. They end their treatment of Vietnam with a look at how Vietnam has engaged in diplomatic protection of its citizens abroad particularly in reference to Vietnamese fishermen.

## 11 Featured Articles

The special issue articles are followed by the first featured article by Ambassador Whiejin Lee who provides an in-depth analysis of "The Enforcement of Human Rights Treaties in Korean Courts". He notes that the Korean judiciary's reference to human rights treaties has been expanded in regards to the socially disadvantaged and minorities and that lower courts have on occasion cited to human rights treaties directly. His article examines the ways in which human rights treaties have been invoked and applied in the decisions of the highest courts of Korea and provides suggestions for judicial remedies.

Next, Tran Viet Dung, Associate Professor and Dean of the International Law Faculty of Ho Chi Minh City University of Law, and Ngo Nguyen Thao Vy, Law Lecturer of the International Law Faculty of Ho Chi Minh City University of Law, examine "The Settlement Practice of Environmental Disputes Involving Foreign Investors in Vietnam – The Two Sides of the FDI Coin". They have observed that foreign direct investment (FDI) has seen a strong and sustained increase after Vietnam's accession to the World Trade Organization and that FDI has contributed to various environmental problems and challenges to Vietnam. In their article, they examine how Vietnam has addressed these difficult issues through legislation and regulation and make recommendations on how to improve the resolution of these environmental disputes.

## III Legal Materials

The Yearbook from its inception was committed to providing scholars, practitioners, and students with a report on Asian state practice as its contribution to provide an understanding of how Asian states act within the international system and how international law is applied in their domestic legal systems. The Yearbook does this in two ways. First, it records the participation of Asian states in multilateral treaties; and second, it reports on the state practice of Asian states. A number of diligent scholars have provided the Yearbook with reports on the 2017 state practice of their respective countries.

### 1 *Participation in Multilateral Treaties*

Karin Arts of the International Institute of Social Studies, Erasmus University Rotterdam in The Hague, the Netherlands, has compiled and edited the participation of Asian states in multilateral treaties for the 2017 calendar year.

### 2 *State Practice of Asian States in the Field of International Law*

The State Practice section of the *Asian Yearbook of International Law* is intended to offer readers of the Yearbook an outline and summary of the activities undertaken by Asian states that have a direct bearing on international law. The national correspondents, listed in the table of contents, have undertaken the responsibility to report on the state practice of their respective countries during the 2017 calendar year. Their submissions describe how these states are applying international law in their domestic legal systems and in their foreign relations.

## IV Literature

### 1 *Bibliographic Survey*

Christine Sim, of the Board of Editors and of Herbert Smith Freehills, has prepared the bibliography for 2017 which provides information on books, articles, notes, and other materials dealing with international law in Asia.

## V DILA Activities

The 2017 edition of the Yearbook concludes with a report on the activities undertaken by DILA in 2017, namely the annual DILA International Conference and DILA Academy and Workshop that was held on June 22 – 24, 2017 at Koguan Law School on the campus of Shanghai Jiao Tong University in Shanghai, China.

*Seokwoo Lee*
Co-Editor-in-Chief

*Hee Eun Lee*
Co-Editor-in-Chief

# *Special Feature: Current International Legal Issues of Asian States*

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# Current International Legal Issues: Bangladesh

*Muhammad Ekramul Haque**

## 1 Introduction

Bangladesh is presently an active participant in the international legal system, in large part due to its emerging economy based on ready made garments[1] exports and its near graduation[2] from Least Developed Country (LDC) category towards becoming a middle-income country. The development story of Bangladesh[3] represents a successful turn from being a 'basket' case with improvements in various indices and measures of international development regime, more particularly the Millennium Development Goals (MDGs) and subsequent Sustainable Development Goals (SDGs). However, being one of the most vulnerable nations affected by climate change,[4] it also is an active advocate of various international measures on environmental issues. The recent refugee influx of *Rohingyas* from Myanmar also puts the country in focus, particularly in areas of refugee rights and their right to return. The geographic position of Bangladesh as a littoral state with exceptional coastlines also led to amicable litigation with neighbouring India and Myanmar, with the judgments and awards contributing to international maritime jurisprudence.[5]

* Professor, Department of Law, University of Dhaka, Bangladesh.

1 Kaushik Basu, *Why is Bangladesh Booming?*, The Daily Star (Apr. 27, 2018, 12:00 AM), https://www.thedailystar.net/opinion/project-syndicate/why-bangladesh-booming-1568233.

2 Debapriya Bhattacharya & Sarah Sabin Khan, *Bangladesh's Graduation from the LDC Group: Pitfalls and Promises: Clarifying the MIC-LDC Confusion*, The Daily Star (Mar. 21, 2018, 12:00 AM), https://www.thedailystar.net/opinion/economics/clarifying-the-mic-ldc-confusion-1550980.

3 *See* Oxford Union, *Bangladesh Panel Discussion: Full Discussion and Q&A*, YouTube (June 19, 2016), https://www.youtube.com/watch?v=wBv1XhkeS_0 (discussing the development of Bangladesh from a basket case to a global model of development; some prominent figures like Dr. Kamal Hossain, Dr. Gowher Rizvi, Professor Sir Paul Collier and Professor Nathan MCube took part in this discussion).

4 *See* David Eckstein et al., *Global Climate Risk Index 2019*, Germanwatch (2018), https://www.germanwatch.org/sites/germanwatch.org/files/Global%20Climate%20Risk%20Index%202019_2.pdf (showing that Bangladesh has ranked 7th in the list of most affected countries of climate change in the world in the Global Climate Risk Index 2019).

5 *See* Abdullah Al Faruque, *Judgment in Maritime Boundary Dispute Between Bangladesh and Myanmar: Significance and Implications Under International Law*, 18 Asian Yearbook of International Law 64 (2012); *see also* D. H. Anderson, *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), 106 American Journal of International Law 817 (2012).

Additionally, Bangladesh also spearheads various regional cooperation initiatives such as the South Asian Association for Regional Cooperation (SAARC) and the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC). These factors contributed to the country becoming increasingly immersed in international legal issues. In the past, the unique birth of Bangladesh as a new state in 1971 through a war against Pakistan invoked international legal concepts such as the people's right to self-determination[6] in a setting that was not colonial in the traditional sense, and as well raised issues of recognition and state succession, putting the relevant international legal rules in a new perspective.[7] Moreover, the genocide and other international crimes that occurred during the war of 1971 represent some issues that are yet to be resolved, particularly regarding the foreign perpetrators, with Bangladesh setting up domestic international crimes' courts for trial of some local offenders and collaborators. International law has become more relevant to Bangladesh as it becomes more embedded in the global economy, particularly in areas of international trade, environment, and labour rights. Furthermore, the apex judiciary of Bangladesh commendably frequently relies on the international human rights regime to expand the protection of fundamental rights granted by the Constitution of Bangladesh, particularly in areas such as protection of women and children, protection of environment, and ensuring the right to life and liberty.[8]

## 2 Refugee Law and the Rohingya Crisis

In connection with the age-old persecution carried out in Myanmar against its Rohingya minority,[9] a recent refugee crisis was encountered by Bangladesh. The Rohingya people who are historically claimed by Myanmar as Bangladesh-bred fled from Myanmar and as a result, the host State, Bangladesh experienced

6 *See* M. Rafiqul Islam, *Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh*, 22 JOURNAL OF PEACE RESEARCH 211 (1985).

7 For details of the international legal implications of the liberation war of 1971, *see* M. RAFIQUL ISLAM, THE BANGLADESH LIBERATION MOVEMENT: INTERNATIONAL LEGAL IMPLICATIONS (1st ed. 1987).

8 *E.g.*, 11 ADC (2005) 371; Bangl. v. Hasina, 60 DLR (AD) (2008) 90.

9 *See* Md Jobair Alam, *The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law*, 25 INTERNATIONAL JOURNAL ON MINORITY & GROUP RIGHTS 157 (2018); *see also* Jobair Alam, *The Rohingya of Myanmar: Theoretical Significance of the Minority Status*, 19 ASIAN ETHNICITY 180 (2018) (describing a critical examination of the Rohingya minority crisis in international law).

and witnessed one of the largest influxes of migrant refugees of this region. The Rakhine Population, resident in the Rakhine Province of Myanmar, more widely known as Rohingya, have throughout the years been considered as one of the most unwanted accumulations of people.[10] Huge amounts of people, amassing to hundreds of thousands have fled into Bangladesh to escape violence. Statistically speaking, approximately 700,000 Rohingya have fled over international borders into Bangladesh by mid-August 2018, following an operation. This very recent instance is not sole in nature. Such an incident has happened before in the past, looking back to 1978, 1992 and 1996, where these Rohingya people had made their way into Bangladesh. An estimated one million Rohingya reside in Bangladesh. These incidents of exoduses have brought up the question of what these people can be referred to from the point of view of International Law, and this has sparked debates over their status as refugees.[11]

One of the pivotal reasons of such a question arising is the fact that Bangladesh is not a party to the 1951 Convention on Refugee. However, this fact does not necessarily free Bangladesh from all responsibilities regarding Rohingya, taking into consideration the fact that Bangladesh is a party to several other International Treaties which include the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on Cruel, Inhuman and Degrading Treatment and Punishment (CAT). Bangladesh has, in compliance with its customary international obligation of non-refoulement, accepted the Rohingya population into its territory. Non-refoulement principle has bound the country despite its being a non-signatory to the Convention by dint of the character that the principle has attained beyond treaties and conventions. Even though not under the United Nations High Commissioner for Refugees (UNHCR) Convention, non-refoulement is an obligation for the country to comply with under international instruments such as the Universal Declaration of Human Rights, ICCPR and CAT. The status determination was (as it happens in the context of South Asia and other developing countries) a *prima facie* group status determination.

10 *See* Archana Parashar & Jobair Alam, *The National Laws of Myanmar: Making of Statelessness for the Rohingya*, 57 INTERNATIONAL MIGRATION 94 (2019) (critically analysing the current status of the Rohingya people); *see* Nehginpao Kipgen, *The Rohingya Crisis: The Centrality of Identity and Citizenship*, 39 JOURNAL OF MUSLIM MINORITY AFFAIRS 61 (2019) (demonstrating the Myanmar government's showing its unwillingness to address the issue of ethnicity, nationality and citizenship).

11 It is to be noted that the host country Bangladesh is not 'officially' calling the Rohingya people as 'refugee.'

The Human Rights Committee in its Concluding Observations on the initial report submitted by Bangladesh as a state party to the ICCPR expressed its concern over the issue of large number of 'refugees' in Bangladesh and observed: 'The State party [to the ICCPR] should implement legislative and administrative measures to fully comply with the principle of non-refoulement in line with articles 6 and 7 of the Covenant [ICCPR]. It should consider acceding to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. It should ensure that refugees are not forcibly relocated and that planned relocation sites offer conditions of life compatible with the international obligations of the State party.'[12] The Committee on Economic, Social and Cultural Rights (CESCR) in its Concluding Observations on the initial report submitted by Bangladesh as a state party to the ICCPR appreciated Bangladesh 'for the efforts of the State party to host over a million Rohingya refugees forced to flee systematic and violent persecution, and recognizes the immense challenges faced by the State party as host country'.[13] The CESCR expressed its deep concern 'that these Rohingya do not have legal status in the State party, which restricts their movement outside of the camps to access health-care services, education and other basic services'[14] and has made the following recommendation:

> The Committee recommends that the State party take effective measures to recognize the legal status of the Rohingya, with a view to ensuring their access to livelihoods, health care, particularly emergency medical treatment, education and other basic services provided outside of the camps.[15] It also recommends that the State party, with the humanitarian assistance of the international community, take immediate measures to ensure the safety of the Rohingya in camps and to safeguard against outbreaks of diseases such as diphtheria and cholera. Welcoming the launch of the 2018 joint response plan for the Rohingya humanitarian crisis, the Committee encourages the State party to continue its efforts to seek international assistance and cooperation in improving the living conditions of the Rohingya, and in seeking durable solutions to their situation.[16]

12 UN Human Rights Comm., *Concluding Observations on the Initial Report of Bangladesh*, U.N. Doc. CCPR/C/BGD/CO/1 (Apr. 27, 2017), https://www.refworld.org/docid/591e97c54.html.

13 UN Econ. and Soc. Council (CESCR), *Concluding Observations on the Initial Report of Bangladesh*, U.N. Doc. E/C.12/BGD/CO/1 (Apr. 18, 2018), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/BGD/CO/1&Lang=En.

14 *Id.*

15 *Id.*

16 *Id.*

UNHCR has started advocating for repatriation of the Rohingya refugees back to Myanmar; however, the concern lies with the fact that the repatriation might not be a voluntary one as has been envisaged by the international refugee instruments in order to supposedly constitute the 'end' to a refugee cycle. The repatriation that was facilitated by UNHCR in 1992 was widely thought to be tainted with an essentially 'non-voluntary' character which never led to a successful reintegration of the repatriated Rohingya people in Myanmar, and rather paved the way for further problems.

However, recently the Prosecutor of the International Criminal Court (ICC) requested the Pre-Trial Chamber of ICC under Article 19(3) of the ICC Statute to adjudge whether the ICC has jurisdiction 'over the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar ("Myanmar") to the People's Republic of Bangladesh ("Bangladesh").'[17] The main difficulty the Pre-Trial Chamber had to face was the issue of the applicability of the ICC Statute to Myanmar who is not a state party to the Statute. The Pre-Trial Chamber, applying the principle of *la competence de la competence* or *Kompetenz-Kompetenz*, a well-established principle of international law according to which a tribunal can determine its own extent of jurisdiction, exercised its jurisdiction to determine its own jurisdiction. The Chamber reasoned that since an element of crime (crossing of a border) occurred on the territory of Bangladesh (which is a state party to the Statute), the Court may exercise its jurisdiction to prosecute the crime.[18] However, the government of Myanmar rejected the ruling of the Pre-Trial Chamber and called the ruling a result of faulty procedure and dubious merit on the basis that Myanmar is not a state party to ICC Statute and therefore the country is not under any obligation to respect the decision of the ICC. However, international commentators have seen the decision as a 'step forward for stopping forced deportations'.[19]

17 Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, ¶1 (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF.

18 It is to be noted that there was a dissenting opinion from Judge Perrin de Brichambaut on the procedural grounds. Judge Perrin reasoned that the ruling requested by the Prosecutor shall amount to an advisory opinion, which the Court is not empowered to do.

19 *See* Victoria Colvin & Phil Orchard, *The Rohingya Jurisdiction Decision: A Step Forward for Stopping Forced Deportations*, 73 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 16 (2019); *see* Morten B. Pedersen, *The ICC, the Rohingya and the Limitations of Retributive Justice*, 73 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 9 (2019); *see also* Douglas Guilfoyle, *The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar*, 73 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 2 (2019).

## 3 War Crimes Tribunal and International Criminal Law

With a view to trying the accused persons of war crimes, in the liberation war of Bangladesh in 1971, the International Crimes Tribunal Act was enacted in 1973, only two years after the independence.[20] However, due to multifarious issues intertwined between domestic and international politics,[21] the trials took a substantial period of time to in fact begin. In 2009, a significant number of amendments were brought to the Act.[22] The suspects were identified by the War Crimes Fact Finding Committee prior to the formation of the Tribunal. Under the Act, the first tribunal was established and in 2010, the first few indictments were issued. A second tribunal was constituted in March 2012 in order to speed up the war crimes trials. As of 2015, only one tribunal is in place; the second one established in 2012 became a non-functioning one following a decrease in the number of cases.

In accordance with its title, this law is 'an Act to provide detention, prosecution, and punishment of persons for genocide, crimes against humanity, war crimes, and other crimes under international law'.[23] The Crimes Tribunal prosecutes offences that share a particular commonality in terms of their substantive definitions appearing within the rubric of international instruments and the domestic piece of legislation in particular. However, in terms of the elements of crimes, there is quite a distinct line differentiating the two streams. One reason that can be said to have been behind such anomaly is the fact that the nature of crimes that were committed in 1971, required such an approach. The crimes were committed by civilians from the Eastern wing of the then Pakistan, who formed Peace (*Shanti*) Committee and *Razakar*, *Al Badr*, *Al Shams Bahini* 'auxiliary forces', and led those in aiding and collaborating with the Pakistani occupation army in committing the systemic crimes constituting

20 *See* A. K. M. Saiful Islam, *Why War Crimes Tribunals Are Important for Bangladesh*, The Hill (Dec. 20, 2013, 04:00 PM), https://thehill.com/blogs/congress-blog/foreign-policy/193696-why-war-crimes-tribunals-are-important-for-bangladesh.

21 *See* M. Rafiqul Islam, *War Crimes Trial: Shimla Pact Not a Legal Barrier*, The Daily Star (Mar. 20, 2010), https://www.thedailystar.net/law/2010/03/03/index.htm (discussing how it was initially thought that Shimla Pact was a legal barrier to the trial of international crimes in Bangladesh. However, Professor M. Rafiqul Islam showed why it was not a barrier at all).

22 International Crimes (Tribunals) (Amendment) Act 2009 (Bangl.), http://www.parliament.gov.bd/index.php/en/parliamentary-business-3/business-of-the-house/bill-and-legislation/acts-of-parliament/acts-of-parliament-9th-parliament/acts-of-2nd-session/1772-23-the-international-crimes-tribunals-amendment-act-2009.

23 International Crimes (Tribunals) Act 1973, Preamble, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/0618daaa2660e9b3c125771a00264b13/$FILE/International%20Crimes%20(Tribunals)%20Act,%201973%20(as%20amended%20in%202009).pdf.

offences such as abduction, confinement, torture, murder and other inhuman acts, as crimes against humanity and war crimes. Thus, the nature of crimes was essentially different from that of the ones whose trial international criminal law envisages. The tribunals constituted under this Act are forums of first instance, appeals against whose decisions lie with the Appellate Division of the Supreme Court. This Act is not an enabling legislation for implementing the international obligations of Bangladesh under international humanitarian law, rather it is specifically dedicated to the trial of the offenders of 1971. Till August 2018, the Tribunals have delivered judgments in 34 cases against 83 criminals of war crimes. Among the accused persons, 52 were sentenced to death. After thirty-nine years of independence, the initiative taken by the State to try the accused of war crimes is laudable; however, it is of interest to note that internationally, certain human rights organizations raised some questions regarding the standard of these trial proceedings.[24]

## 4 Law of the Sea and the Settlement of Maritime Boundaries Disputes with Myanmar and India

The maritime dispute between Myanmar and Bangladesh concerned the delimitation of the territorial sea, exclusive economic zones and continental shelves of these two States.[25] The maritime boundary dispute with Myanmar was settled by the International Tribunal for the Law of the Sea (ITLOS) in the *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (*Bangladesh/Myanmar*) (Case No. 16, Judgment pronounced on 14 March 2012), which has been a milestone judgment in the history of the law of the sea.[26]

24 For critique of the trial proceedings, *see* Surabhi Chopra, *The International Crimes Tribunals in Bangladesh: Silencing Fair Comment*, 17 JOURNAL OF GENOCIDE RESEARCH 211 (2015); Muhammad Abdullah Fazi et al., *A Legal Analysis of the International Crimes Tribunal Bangladesh: A Fair Trial Perspective*, 2 THE ASIAN YEARBOOK OF HUMAN RIGHTS & HUMANITARIAN LAW 350 (2018). For a reply to the criticisms against the trial proceedings, *see* M. Rafiqul Islam, *War Crimes Trial and International Standard*, THE DAILY STAR (Feb. 19, 2011), https://www.thedailystar.net/law/2011/02/03/index.htm.

25 *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (*Bangl./Myan.*), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 4.

26 For an analytical discussion on the reason of preferring to settle the maritime dispute in an international organization rather than by bilateral negotiation, *see* Kyawt Kyawt Khine, *Maritime Boundary Dispute Between Myanmar and Bangladesh*, 6 MANDALAY UNIVERSITY RESEARCH JOURNAL 37 (2015); *see also* Aniruddha Rajput, *Bay of Bengal Maritime Delimitation Cases: Upholding the Rule of Law in International Relations*, 14 MARITIME

While delimiting the territorial sea, the Tribunal drew an equidistance line from the baselines which were drawn by the respective States in accordance with Article 15 of the 1982 Convention on the Law of the Sea (1982 Convention).[27] The Tribunal was of the opinion that there were no special circumstances (St. Martin's Island which was argued by Myanmar to constitute a special circumstance was not found by the tribunal to do so), which could render deviation from the equidistance line.

In respect of the delimitation of the exclusive economic zones and the continental shelves, the Tribunal came to the finding that in light of Articles 74 and 82 of the 1982 Convention, in order to achieve an equitable result, it was required to draw a single maritime boundary. A provisional equidistance line was initially decided to be drawn by the Tribunal; however, taking into consideration the concavity of Bangladesh coast, the said provisional equidistance line was adjusted. Through the Myanmar judgment, Bangladesh obtained the declaration of its sovereign right to a 200 nautical mile exclusive economic zone and to a substantial share of the outer continental shelf beyond 200 nautical miles. The judgment was welcomed by both the states and was regarded as a win-win case.[28]

Following the resolution of the maritime boundary dispute between Myanmar and Bangladesh through the judgment rendered by the Tribunal, came the resolution of the long-drawn maritime dispute between India and Bangladesh.[29] This dispute was decided by an arbitral tribunal administered by the Permanent Court of Arbitration (PCA) situated at The Hague. In delimiting the territorial sea between Bangladesh and India, the PCA decided to apply the equidistant methodology; but it then noted that the land boundary terminus (determined by reference to a previous *Radcliffe* Award) needed to be considered as a 'special circumstance', making a strict application of the equidistance methodology inequitable. In deciding upon the delimitation of the exclusive

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Affairs: Journal of the National Maritime Foundation of India 24 (2018) (viewing the settlement of maritime dispute of Myanmar, Bangladesh and India through binding dispute resolution mechanism under the UNCLOS as a ray of hope of establishment of international rule of law).

27 For a commentary on such decision, *see* Faruque, *supra* note 5, at 69.

28 *See* Ravi A. Balaram, *Case Study: The Myanmar and Bangladesh Maritime Boundary Dispute in the Bay of Bengal and Its Implications for South China Sea Claims*, 31 Journal of Current Southeast Asian Affairs 85 (2012) (finding the Rohingya crisis as an implication of this decision).

29 *See* Marcin Kaldunski, *A Commentary on the Maritime Boundary Arbitration Between Bangladesh and India Concerning the Bay of Bengal*, 28 Leiden Journal of International Law 799 (2015) (commenting on the award of the Tribunal from the viewpoint of law of maritime delimitation).

economic zones and the continental shelves, however, the equidistance/relevant circumstances rule was found to be the most preferable. A very interesting thing to note is that at the end of both of these cases, all the contending parties claimed a 'victory' from their respective positions.

One important aspect of these two cases is their resulting effect of the formation of a 'Grey Area' in the northern Bay of Bengal. It involves the intersection and overlap of rights and responsibilities in the exclusive economic zone and continental shelf regime.[30]

Bangladesh is a party to the United Nations Convention on the Law of the Sea (UNCLOS), 1982. The Constitution of Bangladesh by its article 143 empowered the Parliament to make necessary laws regarding the delimitation of maritime boundaries of Bangladesh. Bangladesh enacted a law regarding maritime boundaries and other ancillary matters in 1974, which is called the Territorial Waters and Maritime Zones Act. Considering the fact that the law is inadequate and has been outdated, the making of a new legislation is now in the process. The Bangladesh Maritime Zones Act, 2018 (Draft Law) is a comprehensive law comparing it to the 1974 Act. The proposed law includes certain specific objectives to attain.[31] They are: 'to provide for the declaration and determination of the maritime zones and to provide for the suppression of piracy, armed robbery, theft and to make provisions for punishment and for matters connected therewith; the determination of the boundaries of the territory of Bangladesh and of the territorial seas and the continental shelf of Bangladesh;[32] to determine maritime boundaries of territorial sea, internal waters, continental shelf, contiguous zone and Exclusive Economic Zone between Bangladesh and its neighbouring coastal States in the territorial sea in accordance with the 14 March 2012 Judgment of the International Tribunal for the Law of the Sea in the *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (*Bangladesh/Myanmar*) and the 7 July 2014 Award of the Arbitral Tribunal in the *Bay of Bengal Maritime Boundary Arbitration Between Bangladesh and India*;[33] to suppress maritime terrorism and unlawful acts against the safety of maritime

30 For a functional cooperative solution to this problem, *see* Raghavendra Mishra, *The "Grey Area" in the Northern Bay of Bengal: A Note on a Functional Cooperative Solution*, 47 OCEAN DEVELOPMENT & INTERNATIONAL LAW 29 (2016).

31 MINISTRY OF FOREIGN AFFAIR THE BANGLADESH MARITIME ZONES ACT, 2018 (DRAFT) (2018), https://mofa.portal.gov.bd/sites/default/files/files/mofa.portal.gov.bd/page/6aac40c8_cdc3_4418_8755_db68f0ec9d5a/Bangladesh%20Maritime%20Zone%20Act%202018%20Draft.pdf.

32 *Id.* at 2.

33 *Id.*

navigation and to provide for matters connected therewith or incidental thereto';[34] and 'to guide on international law applicable to armed conflicts at sea and to give conscious effect of the intrinsic, ecological, social, economic, scientific, educational, values of ocean governance, armed conflicts at sea and its *components* and protection of marine environment'.[35]

## 5 Climate Change and Its Possible Effect on Bangladesh

Bangladesh as a member of the global south has been facing the consequences of international law and its norms facilitating the developed countries. In this post-colonial era, the international environmental laws are still in the nature of soft law lacking binding mechanisms. However, the global south is continuously trying to influence international law-making, even though in the nature of soft laws in the field of environmental law. This shall ultimately result in the creation of some globally accepted norms.[36]

Even in this global trend of ignoring international law mandates, Bangladesh is a party to the United Nations Framework Convention on Climate Change 1992, Kyoto Protocol 1997, and Montreal Protocol 1987, and has accepted both the London Amendment and Copenhagen Amendment. As domestic mechanisms, there is the Bangladesh Climate Change Strategy and Action Plan (BCCSAP) 2009 which functions by focusing on six specific strategic areas: food security, social protection and health; comprehensive disaster management; infrastructure; research and knowledge management; mitigation and low carbon development; and capacity building and institutional strengthening. Bangladesh has also enacted the Climate Change Trust Fund Act in 2000 which has a close connection with BCCSAP.[37] Another domestic instrument dealing with issues of climate change is the Financial Guideline of Government Projects under Climate Change Trust Fund Act, 2000. As a result of climate change, Bangladesh is vulnerable to sea level rise as well as to the melting of polar ice. The impact of climate change on Bangladesh is multifaceted. The consequences would range from an adverse effect on the availability and quality of water

34 *Id.*

35 *Id.*

36 For a detailed discussion on the role of global south in the development of international environmental law, *see* Parvez Hassan, *Role of the South in the Development of International Environmental Law*, 1 Chinese Journal of Environmental Law 133 (2017).

37 *See* Ministry of Env't & Forests, Notification (2016) (Bangl.), http://www.dpp.gov.bd/upload_file/gazettes/15741_60576.pdf (stating the objectives of this Act in the preamble as establishing a trust fund for fighting against the climate change impacts).

indirectly leading to an adverse effect on the livestock, to natural disasters leading to human health crises in the form of infectious diseases following such calamities. Bangladesh frequently faces natural disasters like flood, drought, cyclones, and storm surges; an inevitable impact of climate change will be more frequent, severe and intense natural disasters. Another impact that climate change will have is on the ecosystem and biodiversity, and the water as well as fisheries resources and crop agriculture among others, within the territory of the country.

## 6 Intellectual Property Law Issues

The Patents, Designs and Trademarks Act of 1883 is the earliest legislation relating to intellectual property in Bangladesh. The Act was repealed. The new Patents and Designs Act was enacted in 1911 and the Trademarks Act in 1940. Both Acts were amended and the Department of Patents, Designs and Trademarks (DPDT) was formed under the Ministry of Industries in 2003. The Trademarks Ordinance was promulgated in 2008 and later in 2009, the Trademark Act was enacted. The Copyright Act, 2000 was enacted in 2000 and was amended in 2005. In 1991 Bangladesh became a member of the Paris Convention for the Protection of Industrial Property. The new regime for trademarks was established in 2009 as a requirement of compliance with the Paris Convention. This paved the way for Bangladesh to discharge some of its obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[38]

Bangladesh is a signatory of TRIPS. TRIPS has created both prospects and challenges for Bangladesh in numerous fields.[39] With its blessing, Bangladesh is able to create niche markets for geographically indicative goods like *Jamdani* or *Hilsha Fish*, *Fazli Mango*, traditional medicinal plants like *Turmeric* and *Neem*. However, it is presumed by experts that TRIPS would leave the farmers with limited rights to sell or exchange seeds on non-commercial basis.[40]

38 For a critical repercussion on this issue, *see* Muhammad A. Sayeed, *Revisiting the Regime of Trademark Protection in Bangladesh: TRIPS Compatibility and Ramifications*, 7 ASIAN JOURNAL OF INTERNATIONAL LAW 264 (2017).

39 *See* MOHAMMAD TOWHIDUL ISLAM, TRIPS AGREEMENT OF THE WTO: IMPLICATIONS AND CHALLENGES FOR BANGLADESH (1st ed. 2013) (discussing the implications and challenges of Bangladesh with regard to the TRIPS agreement).

40 *See* Mohammad Towhidul Islam, *The Legal Regime of Plant Varieties and Farmers' Rights Protection in Bangladesh: Options and Challenges*, 29 DHAKA UNIVERSITY LAW JOURNAL (2018) (discussing the legal regime of farmer's rights protection in Bangladesh).

Moreover, the issues of health and pharmaceutical industry in the IP rights regime are of particular concern in these days.[41]

In the absence of a universal policy regime for the protection of Cross-Border Geographical Indication, countries like Bangladesh are facing serious consequences in their trade interests.[42] Bangladesh has enacted the Geographical Indication of Goods (Registration and Protection) Act 2013.[43] It obtained the Geographical Indication (GI) registration on *Dhakai Jamdani* and *Hilsha* of Bangladesh. It has applied for 29 more items for GI registration like *Katari Bhog rice* and *Fazli Mango*. Very recently Bangladesh has got the Geographical Indication certificate of *Khirsapat mango* of *Chapainawabganj* as the third GI product of the country after *Jamdani* and *Hilsha fish*. The Department of Patents, Designs and Trademarks has already published a journal relating to the product. The concerned law requires such publication before issuing a GI certificate. Experts are of the opinion that in order to improve the intellectual property rights enforcement system, the government must focus on creating a special unit of law enforcement agencies and appoint special judges in order to resolve IP disputes.

## 7 Human Rights Treaties and Bangladesh

Both the UN Charter and the International Bill of Rights (comprising the UDHR, ICCPR and the ICESCR) deeply influenced the drafting of the Constitution of Bangladesh. Apart from its constitutional obligations regarding human rights, Bangladesh incurs obligations under international human rights law with regard to human rights as Bangladesh is a party to major international human rights treaties. For example, Bangladesh acceded to the International Covenant on Civil and Political Rights (ICCPR) in 2000, the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1998, the United Nations Convention on Cruel, Inhuman and Degrading Treatment and

41 *See* Mustafizur Rahman & Sherajum Monira Farin, *Research Report 2: WTO Decision on TRIPS and Public Health: A Window of Opportunity for Bangladesh's Pharmaceutical Industry*, Centre for Policy Dialogue (2018), https://cpd.org.bd/wp-content/uploads/2018/08/Research-Report-2-Rahman-and-Farin-2018_WTO-Decision-on-TRIPS-and-Public-Health.pdf (discussing the relevance of TRIPS in pharmaceutical industry).

42 *See* Mohammad Towhidul Islam & Masrur Ansari, *Cross-Border GI Protection: Challenges and Ramifications for Bangladesh*, WIPO-WTO Colloquium Papers (2017).

43 *See* Mohammad Towhidul Islam & Md. Habib, *Introducing Geographical Indications in Bangladesh*, 24 Dhaka University Law Journal 51 (2016) (discussing the pros and cons of the GI regime of Bangladesh); *see also id.*

Punishment (CAT) in 1998, the Convention on the Rights of the Child 1989 (CRC) in 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in 2011, the Convention on the Rights of Persons with Disabilities in 2007 and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1984, and therefore it has obligations to implement the rights recognized in those treaties. Apart from treaties and conventions, customary international law also acts as a significant source of human rights obligations for Bangladesh.

As Bangladesh is a dualist country, treaties are not self-executing in Bangladesh.[44] Ratification or accession to international treaties does not oblige the Government of Bangladesh under its domestic law to perform the obligations arising out of those treaties[45] until they are incorporated into the domestic legal system of Bangladesh. Thus the state remains responsible only under international law, until the treaty provisions are transformed into its domestic law.

Nevertheless, the courts in Bangladesh at different times have applied different treaty provisions in interpreting constitutional human rights. The Appellate Division of the Supreme Court of Bangladesh observed in 2001 that although the Courts were not under an obligation to apply provisions of international law, they were not barred from applying the provisions of international law provided there was no conflict with domestic laws.[46] There is a growing tendency of the Supreme Court of Bangladesh to apply different principles of international human rights law in deciding different cases in Bangladesh, which sometimes seems to be a step towards 'creeping monism' through judicial activism.[47]

The last few years as a phase has been significant for Bangladesh as it has submitted its initial reports which were overdue for more than a decade under

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44 *See* Sumaiya Khair, *Bringing International Human Rights Law Home: Trends and Practices of Bangladesh Courts*, 17 ASIAN YEARBOOK OF INTERNATIONAL LAW 47, 52 (2011).

45 *See* Sheikh Hafizur Rahman Karzon & Abdullah-Al Faruque, *Status of International Law Under the Constitution of Bangladesh: An Appraisal*, 3 BANGLADESH JOURNAL OF LAW 23, 26 (1999).

46 Hussain Muhammad Ershad v. Bangl. and others, 21 BLD (2001) 69.

47 There is a series of case laws supporting this contention. *See, e.g.*, Prof. Nurul Islam v. Gov't of Bangl., 52 DLR (2000) 413 (applying the combined effect of national and international law in the enforcement of human rights to ban and control advertisements promoting the use of tobacco); *id.* (observing that the Courts should not straightaway forget the obligations of the state under the international law); Bangl. Nat'l Women Lawyers Ass'n v. Gov't of Bangl., et al., 29 BLD (HCD) (2009) 415 (observing that in the absence of domestic laws and principles, the international covenants and treaties signed by the state are to be read into the fundamental rights of the constitution).

the ICCPR and ICESCR. Bangladesh submitted its Initial Report under article 40 of the ICCPR to the Human Rights Committee in 2015, which was due in 2001. Again, it has submitted the Initial Report under articles 16 and 17 of the ICESCR to the Committee on Economic, Social and Cultural Rights in 2017, which was due in 2000. Bangladesh has furthermore submitted its initial state report in July 2019 to the Committee against Torture after a lengthy delay of 20 years from the accession to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. By submitting its overdue state reports, Bangladesh is increasingly taking steps to fulfil its obligations under international human rights law.

# Current International Legal Issues: Korea

*Seokwoo Lee* and Seryon Lee***

## 1 Introduction

South Korea today is an active participant in the international legal system, in large part due to Korea's vibrant export-oriented economy, its status as an Asian middle power, as well as the emergence of a robust democracy. These factors have contributed to the country becoming immersed in international legal issues which include significant legal matters that resulted from the Japanese occupation of Korea until the end of World War II. Additionally, Law of the Sea matters are of paramount interest to South Korea as a littoral state. South Korea's economy is dependent on seaborne trade as it is surrounded on three sides by water and is blocked access to the rest of the Asian continent because of North Korea. Moreover, with the conclusion of World War II, the Korean nation experienced the Korean War that resulted in the division of the Korean peninsula into North and South and that has brought about a number of important international legal issues pertaining to security. International law has become more important and relevant to South Korea as it has become more enmeshed in the global economy and security issues predominate given the threat of the proliferation of nuclear weapons on the peninsula. This note seeks to introduce a number of important current international law issues that are impacting Korea and its international relations.

## 2 Korea-Japan Relations

The legacy of the Japanese annexation of Korea is the presence of a number of unresolved issues that have lingered on to the detriment of South Korea-Japan relations which include the problem of 'comfort women' which encompasses South Korean demands for an apology and appropriate restitution along with compensation for Koreans who were engaged in forced labor.

Recently, there were two cases where the highest courts in Korea and Japan made significant rulings involving victims of forced labor and sexual slavery.

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Although the factual circumstances of the two cases were similar, the reasoning reached by the two Courts were quite different. The Supreme Court of Japan gave a very broad interpretation of the relevant provisions of the San Francisco Peace Treaty by creating and applying the concept called 'the Framework of the San Francisco Peace Treaty.' This Framework was heavily relied upon by the Supreme Court of Japan to deter victims of forced labor and sexual slavery from initiating damage claims before the courts in Japan. The two cases dismissed by Japan's Court were respectively brought by kidnapped Chinese victims of forced labor and Chinese victims of sexual slavery.[1] The Court in both cases ruled by applying 'the Framework of the San Francisco Peace Treaty' that the Chinese plaintiffs had lost their rights to seek individual claims against the Japanese government and companies. The Court, moreover, stated that such Framework should be applicable to those non-contracting parties to the San Francisco Peace Treaty considering a pivotal role of the Peace Treaty in arranging the post-WW II world order. However, the Constitutional Court and the Supreme Court of Korea made it clear that individual claims may not be extinguished unless the relevant treaties have provided for such effects clearly and concretely. In contrast to the decision by the Japanese Court in 2007, Korean Courts decided that the loss of the right to initiate claims before the courts should be based on domestic legislation.[2] Some in Korea view Japan's Supreme Court as misinterpreting the provisions of Article 21 of the San Francisco Peace Treaty, under which Article 14(a)(2)[3] applies to China, but not to Korea. Therefore, the Framework of mutual waiver based on the aforementioned article would not be applicable to Korea since Korea was not entitled to dispose overseas properties of Japan or Japanese nationals at that time.

Another important matter in South Korean relations with Japan pertains to the comfort women agreement signed by South Korea and Japan in 2015. Since the 1990s, civic societies in Korea, including the Korean Council for Women Drafted for Military Sexual Slavery by Japan, have made significant efforts to publicize the so-called 'comfort women issue.' On 28 December 2015, a bilateral agreement was signed by the governments of Korea and Japan in an

1 Saikō Saibansho [Sup. Ct.] Apr. 27, 2007, 2004 (Ju) 1658, 61 Saikō Saibansho Minji Hanreishū [Minshū] 1188 (Japan); Saikō Saibansho [Sup. Ct.], Apr. 27, 2007, 1969 hanrei jihō 38 (Japan).

2 Supreme Court [S. Ct.], 2009Da22549, May 24, 2012 (S. Kor.).

3 *See* Treaty of Peace with Japan art. 14(a)(2), Sept. 8, 1951, 136 U.N.T.S. 45 ("Subject to the provisions of sub-paragraph (11) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of (a) Japan and Japanese nationals[.]").

attempt to resolve the issue of "comfort women." Korean President Moon Jae-In, after his inauguration in 2017, critically pointed out the fact that this agreement was done without fully consulting the surviving victims. As a follow-up to his statement, the Korean government publicly made it clear that the comfort women issue could not be settled through the 2015 agreement, even though Korea did not disaffirm or never intended to re-negotiate the 2015 agreement. It is generally understood that the 2015 Agreement was not intended to be an international treaty due to its non-binding terms and lack of formality. While this agreement is, at large, considered to be a political agreement or rather a gentlemen's agreement, it cannot nevertheless be simply renounced. This agreement drew attention from the international community through the concluding observations by various UN human rights committees. Non-governmental organizations working at the international level as well as various human rights organs within the UN should continue to raise these issues to prompt changes in Japan's attitude.

## 3 Issues Pertaining to the Law of the Sea

South Korea is surrounded on three sides by water; towards the west is the West Sea (Yellow Sea), to the south is the Korea Strait, and to the east is the East Sea (Sea of Japan). Given that North Korea is to the north and because ground transportation is essentially blocked because of the Demilitarized Zone, South Korea relies on the oceans for its economic livelihood and well-being including fisheries and inbound and outbound sea freight traffic which has been crucial to South Korea's rapid economic development as an export-oriented economy. As a result, sea lane safety and the securing of passageways has been necessary for South Korea to sustain its economic growth through foreign trade via shipping and securing sea power for national security. Situated at the center of the Northeast Asian Seas, the waters that surround South Korea are important from an economic, military, and strategic perspective. More recently, intensified competition over maritime jurisdiction and for marine resources among the Northeast Asian states along with island sovereignty disputes have made the issues of maritime order and safety of sea lanes a critical strategic concern, directly relevant to state survival, as well as to the peace and safety of the region. South Korea has had to engage in important legal matters pertaining to the Law of the Sea that are of vital importance especially in relation to maritime delimitation in the zones established through the 1982 United Nations Convention on the Law of the Sea ('UNCLOS') that have affected South Korea's relations with China and Japan.

### a *National Legislation*

Recently, a question has been raised as to whether Korea's laws on marine rescue are consistent with relevant international law. As the number of ship accidents on the coast of Korea continues to rise, it became urgent to enhance the rescue and salvage capabilities to protect the lives and property of the people. At the international level, the Convention on Salvage at Sea of 1989, which made substantial changes to the Convention Relating to Assistance and Salvage at Sea of 1910 due to changes in marine environment, is the most significant treaty of its kind. On the national level, Korean laws relating to assistance and salvage at sea are Commercial Act (Part V) and Act on Search and Rescue, Etc. in Water. There is a need to harmonize conflicting provisions between Commerce Act and the Act on the Search and Rescue, etc., in Water, in particular, on determination of remuneration and expenses of marine rescue operations.

Also, there has been a recently proposed bill on the development of the resources in the seabed. The Korean government has been actively working on deep sea mineral resource development as a means of expanding marine economic areas and securing steady sources of natural resources. Korea has recently become the third country after China and Russia to secure the exclusive right to explore sea-mines of three kinds of minerals namely manganese nodules, seafloor hydrothermal deposit, and manganese pavement, in the seabed. Korea has held a contract for the exploration for polymetallic shuphides in the Central Indian Ridge since 2014 and for polymetallic nodules in the Clarion-Clipperton Fracture Zone since 2001, for which a 5-year extension was signed in 2017. More recently, another 15-year contract was signed for exploration for cobalt-rich ferromanganese crusts in the east of the Northern Mariana Islands in the Western Pacific Ocean. While the participation by private sector companies is particularly important in development projects, the role of government should not be undermined as there will always be public sector participation during the development stage.

### b *Other Maritime Issues*

South Korea has taken a keen interest in the Arctic region with the "Draft Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean," which was finally agreed upon at the 6th meeting in December 2017. Korea, as a non-arctic state, secured its right to participate for the first time in decision-making processes regarding Arctic governance. While this Agreement is intended to be a provisional agreement until a more comprehensive fisheries agreement is concluded, Korea will be entitled, as an original member state, to engage in the discussion on establishment of regional fisheries

management organizations in the future. It is essential to arrange a systematic mechanism for the implementation of joint scientific researches in the Arctic and northern areas. This can be a good precedent as Korea expanded the scope of its national interests from merely focusing on the fishery to the maintenance of order in deep-sea fishery and preservation of the ecosystem as a whole.

Another current matter pertains to a joint project undertaken by Korea and Japan. In January 1974, Korea and Japan concluded an Agreement Concerning Joint Development of the Southern Part of Continental Shelf Adjacent to the Two Countries. This Agreement is to remain in force for 50 years and continue until either party gives 3 year's written notice to the other party. While Korea positively saw the potential for oil resources in the joint development zone, Japan had an opposite view, thereby expressing its intention to terminate the agreement as well as joint researches in 2010. Korea has been taking measures necessary to effectively implement the agreement, at the same time, demanding Japan to implement the agreement in accordance with the terms set forth therein. Japan's non-implementation of the agreement is clearly the breach of a treaty triggering state responsibility for its internationally wrongful act. Now it remains to be seen whether Korea should terminate the agreement, in which case the joint development zone will be changed to a zone where maritime delimitation between the two countries is required. It might be a better option if Korea suspends the agreement in part, thereby possibly gaining the sole right of development in the joint development zone.

## 4 Investment and the Environment

Measures related to climate change and international technology transfer have been closely interwoven and embodied in the provisions concerning environment-friendly technology transfer in most international environmental instruments. Particularly relevant to South Korea are the issues related to green climate technology in the Paris Agreement which entered into force in November 2016. Green climate technology is the technologies related to carbon-reduction, carbon-utilization and climate change adaption. One of the difficulties of transferring technologies lies in the fact that most technologies are, in fact, possessed by transnational corporations and other private sector entities. In order to undertake the commitment under the Paris Agreement, the governments of developed countries additionally bear the burden of conforming the commercial activities of their respective private sectors to the level of promised international obligations. This is the point where the discussion converged into potential conflicts with a number of provisions such as Most-Favored

Nation (MFN), National Treatment (NT), Fair and Equitable Treatment (FET), Expropriation, and Prohibition on Performance Requirements prevailing in international investment agreements. Therefore, a thorough review of possible conflicts is essential in order to fulfill the international obligation of good faith as well as to prevent unnecessary investor-state disputes.

Regarding energy issues, in 2017 the Korean government announced a dramatic shift in national energy policies. South Korea's new nuclear phase-out policy poses a number of challenges in fulfilling the obligations under the Paris Agreement with a particular concern to Korea's committed Nationally Determined Contribution (NDC). South Korea recently adopted an energy transition policy to phase out both coal and nuclear power and secure renewable energy. The impact of this energy policy on the accomplishment of NDC is significant as Korea declared greenhouse gas reduction of 37% as an NDC under the Paris Agreement. It has been pointed out that South Korea can utilize the market mechanism under Article 6 of the Paris Agreement,[4] and have a more balanced negotiation strategy to facilitate the accomplishment of an NDC.

## 5 International Security in Relation to North Korea

Though there was a cessation of active armed conflict with institution of the armistice between North and South Korea, both Koreas have engaged in sporadic skirmishes that have resulted in the deaths of civilians and soldiers from both sides in the area of the disputed Northern Limit Line (NLL) in the West Sea (Yellow Sea) and the Demilitarized Zone.

Although relations between North and South Korea have recently improved due to summit meetings between South Korean President Moon Jae-in and North Korean leader, Chairman Kim Jong-eun and US President Donald Trump's historic summit with Chairman Kim in Singapore in 2018, tensions were quite high between the U.S. and North Korea in 2017. These tensions produced a heated debate over options for a pre-emptive strike on North Korea. The discussion on this issue within the U.S. was primarily based on its national law such as the Constitution and War Powers Act rather than international law.

4 Paris Agreement art. 6, opened for signature Apr. 22, 2016, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016) (providing the framework of international transfers of mitigation outcomes to be counted toward NDCS, the development of cooperation mechanisms and non-market cooperation). It is commonly known as "market provision."

The UN Charter prohibits the use of force against another state unless such force can be justified as an act of self-defense. From the perspective of international law, a discussion on a pre-emptive strike has centered on the right of self-defense. In particular, this presentation drew attention to the interpretation of the term 'armed attack' within the meaning of Article 51 of the UN Charter and the possibility of exercising collective self-defense. Furthermore, it was pointed out that opinions were sharply divided on whether the U.S. could possibly exercise its right of self-defense without consent of South Korea. In sum, it is more likely that the option of pre-emptive strike would be contrary to the principles of necessity and proportionality under international law. What is more worrisome is that a pre-emptive strike, if and ever justified, can be a precarious precedent in international relations.

## 6 Refugees

The issue of refugees has recently raised a number of important questions as it involves individuals crossing international borders, causing a dilemma on the part of receiving-states to maintain the balance between national security and their international obligations. The common concern with refugee issues would be how to efficiently incorporate both the drive for protection and the value of deterrence for security reasons. The enactment of the Refugee Act[5] in Korea reflected the Korean government's continuous efforts and commitments to meeting its obligation under international law and provided a critical momentum for its refugee policy to shift from mere immigration control towards more human rights-based approach. However, with ever-increasing numbers of applications for refugee status, it became urgent to revise the existing Refugee Act to make necessary changes in terms of refugee admission and appeal procedures. While different approaches are proposed to make the procedure more efficient, there remain some concerns primarily over the long refugee screening process. Although Korea's refugee policy is currently in the process of significant change with challenges ahead, it is anticipated that the current discussion on this issue will ultimately lead to the establishment of an integrated and effective refugee admission procedure.

5 Nanmin beob [Refugee Act], Act No. 11298, Feb. 10, 2012 (S. Kor.). Refugee Act was enacted in 2012 and went into effect in July 2013.

## 7 Conclusion

South Korea has and continues to be forced to manage its relations with North Korea and its two powerful neighbors, China and Japan, along with its principal ally, the United States. South Korea has found itself in need of the processes of international law and the means by which it allows states to engage each other peacefully. The South Korean experience with international law as a mid-power state within the geopolitical circumstances of Northeast Asia offers the lesson that international law is an indispensable means to sustain order in a volatile region.

# Current International Legal Issues: Malaysia

*Mary George**

## 1 Introduction

Malaysia is a democratic State in the Association of South-East Asian Nations. As an active member of the United Nations and a past non-permanent member in the Security Council,[1] Malaysia is a Council member of the International Maritime Organisation[2] and the International Civil Aviation Organisation.[3]

## 2 Air Law

### a *Liability and Compensation under the Warsaw and Montreal Conventions*

Malaysia officially closed the search and rescue effort on a Malaysia Airlines flight, flight MH 370, an international scheduled passenger flight to Beijing with 239 passengers including 12 crew members, till further notice to start again. The investigation report was released in 2018. The flight departed the Kuala Lumpur International Airport at 0042 MYT on 8 March 2014. Less than 40 minutes after take-off, Air Traffic Controllers lost radar contact with the aircraft after passing

* Professor, Faculty of Law & Institute of Ocean and Earth Sciences, University of Malaya.

1 Term ended on December 22, 2016. Ministry of Foreign Affairs of Malaysia, *Malaysia and the UN Security Council: End-of-Term Reception* (Dec. 23, 2016), http://malaysiaunsc.kln.gov.my/index.php/component/k2/item/578-malaysia-and-the-un-security-council-end-of-term-reception-23-december-2016. The cooperation rendered by all quarters had facilitated Malaysia's work on the Council. During the past two years (2015–2016), Malaysia saw the implementation of several important initiatives, including on the protection of children from abduction in situations of armed conflict, which Malaysia chaired at the Council; non-proliferation of weapons of mass destruction to non-state actors; the question of Palestine; peace building in post-conflict countries; and the multiplier effects of climate change on international peace and security. Malaysia is gratified that the initiatives received overwhelming support from everyone both within and outside the UN machinery.

2 Ministry of Transport Malaysia, *Council Member of the International Maritime Organization*, http://www.mot.gov.my/en/maritime/international-affairs/council-member-of-the-imo (last visited Jan. 17, 2019).

3 International Civil Aviation Organization, *Council States 2016–2019: Part III – States Ensuring Geographic Representation*, https://www.icao.int/about-icao/Council/Pages/council-states-2016-2019.aspx (last visited Jan. 17, 2019).

waypoint at IGARI. In accordance with Chapter 5 para 5.3 of Annex 13 to the Chicago Convention, Malaysia as the State of Registry of the aircraft is responsible for investigating the accident. This function may also be delegated to another State by mutual arrangement and consent. To investigate the loss, the Minister of Transport, Malaysia established an independent safety investigation team under Regulation 126 (1) of the Civil Aviation Regulations 1996 known as the "Malaysian ICAO Annex 13 Safety Investigation Team ('the Team') for MH 370." The Report of the Team dated 2 July 2018 highlighted some regulatory weaknesses. However, the cause of the accident was unknown and the main wreckage was not found. The report stated that although the Civil Aviation Act 1969 required compliance with the ICAO Annexes and the airline had met the average safety standards of most international airlines, the Civil Aviation Act 1969 and 1996 Regulations may be outdated by present international regulatory standards and practices. The report anticipated that the future introduction of the Civil Aviation Safety Requirements, Acceptable Means of Compliance, and Guidance Materials would serve to streamline the Malaysian Regulatory framework, requirements and procedure, similar to the European Aviation Safety Agency Requirements. At present this lacuna is filled by issuing best practices and standards based on regulations of the U.S. and the European Union through notices, circulars, directives and information under Section 240 (Publication of Notices) of the Civil Aviation Act 1969.

Malaysia Airlines flight MH 17 was an international scheduled passenger flight from Amsterdam to Kuala Lumpur carrying 283 passengers and 15 crew members on board. It was shot down over Donetsk, Ukraine on 17 July 2014. Through a "soft" approach, the Prime Minister of Malaysia was able to negotiate the return of the black boxes of the plane with the non-State actors. A national prosecution to try the offenders is being organized in the Netherlands.

In *Wang Bao' An & Ors v. Malaysian Airline System Bhd & Other Cases*, the High Court of Malaya at Kuala Lumpur considered the binding effect of the Convention for the Unification of Certain Rules for International Carriage by Air 1999 ('the 1999 Montreal Convention')[4] and the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 ('the 1929 Warsaw Convention')[5] arising out of the disappearance of flight MH 370, considered a legal accident, under the Conventions. The air carrier took on strict

4 Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature May 28, 1999, 2242 U.N.T.S. 309 (entered into force Nov. 4, 2003) [hereinafter Montreal Convention].

5 Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature Oct. 12, 1929, 261 U.N.T.S. 423 (entered into force Feb. 13, 1933) [hereinafter Warsaw Convention].

liability under the international conventions in exchange for limited compensation, an arrangement meant to work well for both the victim and the defendant. The High Court held that the Convention provided exclusive causes of action against a carrier and consequently excluded all other common law causes of action arising under contract, tort and other legal proceedings such as arbitration. The plaintiffs had filed two different sets of suits that were consolidated before the High Court in the instant case.[6] The Malaysian Airline System Berhad, was a common defendant in all cases. The two conventions were applicable in the two different suits. The question was whether the exclusivity principle in Article 29 of the Montreal Convention, the precursor to Article 24 of the Warsaw Convention applied in Malaysia.[7] The exclusivity principle only permits liability and compensation for the international carriage by air under the respective Convention and excludes all other forms of compensation under tort, contract, and other laws. The High Court held that the exclusivity principle applies with equal force under the Montreal Convention as a matter of Malaysian law. In the instant case, the High Court referred to, and followed the decisions in *Sidhu v. British Airways plc* (1929 Warsaw Convention) [1997] AC 431, *Ong Joshua v. Malaysian Airline System* (amended Warsaw Convention) [2008] 3 HKC 26, *All Nippon Airways Co Ltd v. Tokai Marine & Trading Co Ltd* (Warsaw Convention) [2012] 9 CLJ 429 [CA], the UK Supreme Court in *Stott v. Thomas Cook* (Montreal Convention) [2014] UKSC 15, the United States Supreme Court in *El Al Israel Airlines Ltd v. Tsui Yuan Tseng* (Warsaw Convention) 119 S. Ct. 662 (1999) by Ginsburg, J. who applied the rationale of the House of Lords in *Sidhu* and upheld the exclusivity of the Warsaw Convention, and the Canadian apex court decision in *Thibodeau v. Air Canada*

6 Presided by Azizul Azmi Adnan J. The two suits were WA-21NCVC-20-03-2016 and WA-21NCVC-33-03-2016. In respect of suit WA-21NCVC-33-03-2016, the applicable treaty is the Warsaw Convention. Similar questions were posed in that case relating to the scope of the Warsaw Convention. Mr. Ganesan Nethi was counsel for the plaintiffs in case WA-21NCVC-20-03-2016, and Ms. Sangeet Kaur Deo was counsel for the plaintiffs in eight other cases.

7 Articles 17.1 and 29 of the Montreal Convention are as follows:

*Article 17. Death and Injury of Passengers – Damage to Baggage*

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

*Article 29. Basis of Claims*

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable. Montreal Convention, *supra* note 4, at 355, 360.

(Montreal Convention) [2015] 4 LRC 324 that, where the objective of a treaty is to achieve international conformity, the Canadian courts should not depart from any strong international consensus that has developed in relation to the interpretation of such treaty. The High Court also considered the U.S. decision *Zicherman v. Korean Air Lines* (Warsaw Convention) 516 U.S. 217 (1996) by Scalia, J. that upheld the exclusivity principle. However, the identity of potential claimants and the appropriate measure of damages are matters to be determined by reference to Malaysian domestic laws.

In the instant case, the High Court held that:

(a) each of the Warsaw and Montreal Conventions provides for exclusive causes of action in international air transportation, where the claims arise out of international carriage of passengers, baggage or cargo by air;

(b) where a passenger dies or suffers bodily injuries, the carrier will be liable without proof of fault under art. 17 of the Warsaw Convention or of the Montreal Convention (as applicable) if the plaintiff can prove that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking; and

(c) where art. 17 of either Convention does not apply, either because there were no bodily injuries (*Tseng, Stott* and *Thibodeau*) or because the accident occurred outside the time between embarkation and disembarkation (*Ong Joshua* and *Sidhu*), then no claim exists against the carrier, whether at common law or otherwise.

### b *Chicago Convention*

Flight paths under the 1944 Chicago Convention[8] also received attention in December 2018, in Malaysia-Singapore bilateral relations. It concerns Singapore's mandatory use of the Instrument Landing System (ILS) for Seletar Airport, a recently renovated airport in Singapore, about 2 kms away from Pasir Gudang, an industrial port town in Malaysia. Singapore had issued new ILS procedures for Seletar Airport, which was scheduled to be enforced on 3 January 2019. This raises a problem for Malaysia because the flight path required for the ILS instrument involves aircraft descending over the airspace above Pasir Gudang in Malaysia, a town scheduled for further development. Malaysia sent a protest note to Singapore over the country's intention to use the airspace above Pasir Gudang as a flight path for aircraft landing at Seletar Airport. Malaysia pointed out that there was a limitation on the airspace in Pasir Gudang as the Singapore procedure would affect development in the industrial town,

8 Convention on International Civil Aviation, opened for signature Dec. 7, 1944, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947).

as a building height restriction would have to be imposed. The two States are scheduled to discuss the problem in January 2019.

## 3 Refugees

Malaysia has not ratified the 1951 Convention relating to the Status of Refugees and its related 1967 Protocol,[9] the 1954 Convention Relating to the Status of Stateless Persons,[10] and the 1961 Convention on the Reduction of Statelessness.[11] Malaysia felt that initiatives under the New York Declaration on Refugees and Migrants, adopted unanimously on 19 September 2016 by the United Nations General Assembly, should not bind non-signatory States to the relevant international instruments, placing them in a position inconsistent with the provisions of the Vienna Convention on the Law of Treaties 1969,[12] which Malaysia acceded to, on 27 July 1994. The Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 has been widened to include labour exploitation in line with Agenda 2030 for Sustainable Development.[13]

## 4 Law of the Sea: Warships in the EEZ to Act Peacefully and with Due Regard

The third paragraph of the Malaysian declaration to the 1982 Law of the Sea Convention (1982 Convention)[14] states: "The Malaysian Government also

9 Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); 1967 Protocol – Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

10 Convention Relating to the Status of Stateless Persons, opened for signature Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960).

11 Convention on the Reduction of Statelessness, opened for signature Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

12 Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

13 Malaysia is also a State Party to several treaties on narcotic drugs and psychotropic substances, such as followings:

1. Single Convention on Narcotic Drugs, opened for signature Mar. 30, 1961, 520 U.N.T.S. 151 (entered into force Dec. 13, 1964).
2. Protocol Amending the Single Convention on Narcotic Drugs, opened for signature Mar. 25, 1972, 976 U.N.T.S. 3 (entered into force Aug. 8, 1975).
3. Convention on Psychotropic Substances, opened for signature Feb. 21, 1971, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976).

14 The Law of the Sea: Declarations and Statements with Respect to the U.N. Convention on the Law of the Sea and to the Agreement Relating to the

understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State." This paragraph highlights the interpretation of the Malaysian Government on the conduct of warships in the exclusive economic zone. The understanding is that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State. Section 7 of the 1982 Convention deals principally with safeguards and powers of enforcement in Article 224 exercisable by officials, or by warships, military aircraft or any other ship or aircraft marked and identified as being on government service and authorised to that effect. Strait States do not have a right to take prevention and enforcement measures against ships and aircraft entitled to sovereign immunity as enumerated in Article 236 including warships, naval auxiliary, and other vessels or aircraft owned or operated by a state and used, for the time being, on government non-commercial service.

The term "peaceful" is subject to two interpretations. First, the term excludes aggression and secondly, it includes a peaceful display of aggression as stated in Article 39 of the 1982 Convention. According to Article 39(1)(c), in distress situations or situations where *force majeure* applies, ships and aircraft may delay, threaten or actually use force against strait States and carry out any activity outside their mode of transit. Activities outside their normal mode of transit could be interpreted in many different ways, such as an engagement in armed warfare at sea, or illegal fishing, to deliberate and wilful discharge of oil and other pollutants at sea. This is one interpretation of Article 39(1)(c). These situations of distress are not mentioned in the 1982 Convention. *Force majeure* may be given its ordinary legal meaning according to Article 31 of the Vienna Convention on the Law of Treaties. It is interpreted as an act of God. This interpretation of Article 39(1)(c) conflicts with the UN Charter and seems to override it. The other interpretation of Article 39(1)(c) is that it should not override the United Nations (UN) Charter as it would defeat the spirit and intention of the 1982 Convention and that of the UN Charter. The first interpretation of Article 39(1)(c) of the 1982 Convention would result in the 1982 Convention being *ultra vires* the UN Charter. The problem here lies with the drafting of Article 39(1)(c). Article 103 of the UN Charter is paramount and the provisions of the 1982 Convention must fall within the scope of the UN Charter. Malaysia's

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Implementation of Part XI of the U.N. Convention on the Law of the Sea, Malaysia, ¶3, U.N. Sales No. E.97.V.3 [hereinafter Declaration to the UNCLOS].

interpretation of the term "peaceful" in the third paragraph accords with a non-aggressive stance.

The third paragraph of the Malaysian declaration is also consistent with the principle of "due regard" highlighted in the 1982 Convention. The principle of "due regard" is mentioned in several provisions, for example, submarine cables and pipelines on the continental shelf in Article 79(5), in Part XI in Articles 162(2)(d) and 163(2), fishing in Articles 60(3) and 66(3)(a), on the development and transfer of marine technology, the protection of legitimate interests of parties in Article 267, on navigation in Articles 27(4), 39(3)(a) and 234, rights and duties of States in Articles 56(2), 58(3) and in Article 87(2). Other provisions on due regard are found in geographical representation in Articles 167(2), A 2/2(1), A 4/5(1) and A 4/7(3), interests of States in Articles 87(2), 142(1), 148 and A4/5(2) and rotation of membership in Article 161(4).

The phrase "due regard" is not defined in the 1982 Convention. The principle of "due regard" was not applied in the *Nuclear Tests* case 1974 (I.C.J. Reports 1974, p. 253) but applied in the *Chagos Marine Protected Area* (MPA) case (Mauritius v. UK, PCA 2015) and in the *South China Sea* case (Philippines v. China, PCA Case 2013–19). In the *Chagos* MPA case, the Tribunal held that the principle comprised a component of inter-State consultation. In the *South China Sea* case, the Philippines argued that China had failed to prevent its vessels and nationals from exploiting the living resources in the EEZ of the Philippines, hence China had breached its "due regard" duty under Article 58(3). The Tribunal ruled in favour of the Philippines and concluded that China was in breach of its obligation of "due regard."

## 5 Environment: the Lynas Advanced Materials Plant Issue and Removal of Nuclear Waste from Malaysia

The Lynas rare earth refinery is an Australian company set up in the coastal town of Kuantan along the east coast of Malaysia bordering the South China Sea in 2012 with an annual operating licence. The current site enables the plant to be run at a lower cost than originally approved in Western Australia. The raw material for the plant, a type of rare earth mineral, is imported from Australia.[15]

15 Rare earths are chemical elements with unique magnetic, luminescent, and electrochemical properties often used in modern consumer technologies, amongst others. Examples of rare earths are: Scandium or Sc (21) Scandium, a silvery-white metal, which is a non-lanthanide rare earth; Yttrium or Y (39); Lanthanum or La (57); Cerium or Ce (58); Praseodymium or Pr (59); Neodymium or Nd (60); Promethium or Pm (61); and Samarium or Sm (62). Former tin mining operations in Malaysia have precipitated rare earth minerals.

It is not classified as a nuclear plant. Lynas produces two (2) forms of gypsum as by-products of its rare earth refining activities and a waste known as water leach purification residue (WLP) which contains very low-level naturally occurring radioactivity. Unfortunately, one of the three types of wastes generated by the plant is radioactive and the problem arises in the treatment and disposal of the nuclear waste product.

There is a view that the company should be allowed to grow by providing it with an appropriate and suitable ecosystem that meets the latest international standards on waste disposal. However, the controversial WLP residue has caused concern. The controversy is that its continued operations depend on the refinery disposing of its by-products from the country. The Ministry of Environment, Science, Technology and Climate Change is in charge of such plants. The Ministry has indicated that it would allow Lynas to renew its licence if it complied with the pre-condition of removing an accumulated 451,564 metric tonnes of radioactive WLP residue from Malaysia. While scheduled wastes are regulated by the Environmental Quality Regulations (Scheduled Waste) 2005, radioactive wastes fall under the jurisdiction of the Atomic Energy Licensing Board. The environmental risk management strategy for the nuclear waste has not been well worked out.

Malaysia acceded to the International Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on 8 October 1993 and the convention entered into force for Malaysia on 6 January 1994.[16] Malaysia is also a State Party to the 1995 Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on 26 October 2001.[17] In contrast, Malaysia is not a State Party to the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal of 10 December 1999.[18] These Conventions do not regulate the movement

16 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Mar. 22, 1989, 1673 U.N.T.S. 57 (entered into force May 5, 1992) [hereinafter Basel Convention]. The Basel Convention now has 187 States Parties.

17 Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Sept. 22, 1995 (not yet in force).

18 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature Dec. 10, 1999 (not yet in force) [hereinafter Basel Protocol].

of the radioactive WLP residue from Malaysia to Australia. The Malaysian Government needs to draw up an environmental management plan for the safe disposal of the WLP residue generated by Lynas that has better checks and balances, perhaps drawing upon the Australian experience. The transportation of nuclear materials is regulated by the conventions of the International Maritime Organisation.

## 6 Malaysia-Singapore Relations in the Straits of Johore

Following the cession of Singapore, relations with the Republic have been volatile as there are tensions regarding the supply of water, railway land, construction of bridges, international dispute settlement of maritime features, delimitation of the *thalweg* in the Straits of Johore following intense coastal expansion efforts, sovereignty over airspace, Instrument Landing System (ILS) and landing rights, and interpretation of Malaysia's declaration to the 1982 Law of the Sea Convention.[19] The issue of the *thalweg* is highlighted here.

### a *Delimitation of the Thalweg in the Straits of Johore*

In December 2018, Malaysia-Singapore relations in the Straits of Johore faced a set-back in territorial seas delimitation in the Straits of Johor as Malaysian expansion of port limits and Singapore's land reclamation activities have perhaps altered the original territorial sea delimitation of both States based on the *thalweg* median line. Consequently, it is uncertain how the *thalweg* has changed. This stretch of water was originally referred to as territorial waters in the Straits Settlements and Johore Territorial Waters Agreement 1927. Subsequently the two States have adopted a boundary agreement in 1995 based on the 1927 Agreement in the Straits of Johore. Article II of the 1927 Agreement states that the waters ceded by Their Highnesses the Sultan and Tumungong of Johore under Treaty of 1824 which are within three nautical miles of the mainland of the State and Territory of Johore measured from the low water mark shall be deemed to be within the territorial waters of the State and Territory of Johore. Article III provides that:

> All islets lying within the Territorial waters of the State and Territory of Johore, as defined in Articles I and II hereof, which immediately prior to this Agreement formed part of His Britannic Majesty's dominions, are

19 DECLARATION TO THE UNCLOS, *supra* note 14.

> hereby ceded in full sovereignty and property to His Highness the Sultan of the State and Territory of Johore, his heirs and successors forever.[20]

Singapore has a revised 1985 edition of this Treaty as an Act to approve an Agreement concluded between His Majesty and the Sultan of the State and Territory of Johore that entered into force on 30 March 1987.

Both States are now parties to the 1982 Law of the Sea Convention. In the absence of a rule for delimitation of straits between States with opposite or adjacent coasts, Article 15 provides for the delimitation of the territorial sea between States with opposite and adjacent seas. The imprimatur in Article 15 is that States must agree between them if they wish to extend the territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The Article goes onto provide that this provision does not apply where the territorial seas because of historic title or other special circumstance require a different method of delimitation. The cause of action needs to be ascertained by the two neighbouring States. Malaysian ships on government service have been told to leave Singapore's 'territorial sea' as their locus is no longer Malaysian. Singapore claims this zone of the sea falls within its jurisdiction. Talks were scheduled to be held in January 2019 but they did not come to pass. The issue concerns the unilateral action of States that perhaps shifted the original *thalweg* median maritime boundary line in the Straits, without prior consultation, by port limits expansion and land reclamation activities, that goes against the spirit of good neighbourliness and the

20 When the Straits Settlements and Johore Territorial Waters (Agreement) Bill was presented at the House of Lords, the Parliamentary under Secretary of State for Dominion Affairs (Lord Lovat) said:

> My Lords, in asking you to give a Second Reading to this Bill I should like to say that it aims at sanctioning an agreement which has been come to between Sir Hugh Clifford, as Governor of Singapore, and the Sultan of Johore. As your Lordships are aware, when the island of Singapore was ceded to the East India Company in 1824, the islands, straits, and seas were ceded at the same time. It has been found inconvenient by the Sultan of Johore and his Government that the rights of the British should run absolutely up to the shores of Johore. It is thought that it would be better in the interests of both parties if the division ran along the centre of the water between the two States, as is almost the universal custom in other parts of the world. It is more convenient for Customs, it is also more convenient for the general administration of Johore. The Sultan of Johore is a Sovereign Prince. He is directly under the protection of His Majesty, and the relations are most excellent between the State of Johore and this country. The Bill really only makes a slightly altered boundary inside the Empire. I beg to move.

70 Parl Deb HL (5th ser.) (1928) cc. 647-8 (UK).

time-honoured "due regard" principle entrenched in the *Chagos* MPA[21] and the *South China Sea Arbitration* cases.[22]

## 7 Legislation

Malaysia ratified the Maritime Labour Convention, 2006, as amended (MLC, 2006)[23] to upgrade the standards of employment of the seafarer on 20 August 2013 in accordance with Standard A4.5 paragraphs (2) and (10). The Government has specified the applicability of the following branches of social security: medical care; sickness benefit and employment injury benefit to the seafarer. In addition, Malaysia has also accepted the amendments of 2014 to the MLC, 2006. It entered into force on 18 January 2017. Malaysia also adopted the amendments of 2016 to the MLC, 2006 that entered into force on 8 January 2019. However, it has not accepted amendments of 2018 to the MLC, 2006. The amendments are expected to enter into force on 20 December 2020.[24] To implement these provisions, Malaysia has adopted an amendment to the principal shipping legislation, Act A 1519, Merchant Shipping Ordinance (Amendment) Act 2016.

On the domestic implementation of this Convention, on examining the Malaysian legislation for incorporation of international standards in the MLC, the Committee of the ILO noted that the Government of Malaysia had not provided information on the measures taken with a view to ensuring that seafarers ordinarily resident in Malaysia and, to the extent provided for in its national law, their dependants, have access to social security protection. Furthermore, the Government had not provided information on its obligation, under *Standard A4.5, paragraph 6*, to give consideration to the various ways in which comparable benefits will, in accordance with national law and practice, be provided

21 Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03 (Perm. Ct. Arb. 2011).

22 The South China Sea Arbitration (Phil. v. China), Case No. 2013-19 (Perm. Ct. Arb. 2016).

23 Maritime Labour Convention, opened for signature Feb. 23, 2006, 45 I.L.M. 792 (entered into force Aug. 20, 2013).

24 The Ministry of Transport has also adopted other legislation such as: Ocean Cargo Transport Act 1950 [Act 532]; Federal Light Dues Act 1953 [Act 240]; Penang Port Commission Act 1955 [Act 138]; Port Authorities Act 1963 [Act 487]; Bintulu Port Authority Act 1981 [Act 240]; Ports (Privatisation) Act 1990 [Act 422]; International Yacht Registration Act Langkawi 2003 [Act 630]; and Merchant Shipping Ordinance 1952 [Ord. 70/1952].

to seafarers on board ships that fly its flag, in the absence of adequate social security coverage.

The International Labour Organisation has asked the Government of Malaysia to reply by 2019 to several comments the Committee raised[25] based on the Government of Malaysia's first report on the application of the Convention that was received before the MLC amendments were received. The 2014 amended MLC introduced the new *Standard A2.5.2* and replaced *Standard A4.2* by *Standards A4.2.1* and *A4.2.2* that entered into force for Malaysia on 18 January 2017. The ILO raised about 37 comments to the Government of Malaysia of which a few are reproduced here as follows:

1. Indicate how it gives effect to the Convention's requirements regarding consultations with shipowners' and seafarers' organizations.
2. Indicate whether the determination concerning the list of categories of persons not to be regarded as seafarers has been made after consultations with the shipowners' and seafarers' organizations concerned, as required by Article 11, paragraphs 3 and 7 of the Convention. Section 3(d) of the Merchant Shipping Ordinance (Amendment) Act 2016 (the Act of 2016), while reproducing the definition of seafarer contained in the Convention, excludes from its scope of application a list of categories of persons.
3. Indicate on which grounds these categories of persons were excluded from the definition of "seafarer," taking into account the above mentioned resolution.
4. Adopt the necessary measures to ensure that all persons falling within the definition of seafarer contained in Article 11, paragraph (1)(f) benefit from the protection of the Convention.
5. Indicate whether any additional determination has been made on the basis of this provision, and if so, to provide information on whether these determinations referred to specific persons or specific categories of person and if they were made after consultations with the shipowners' and seafarers' organizations. The Committee further requests the Government to ensure that any determination is made on a horizontal basis and applies to the whole sector and not to individual shipowners.

25 Int'l Labour Org. [ILO], *Direct Request* (*CEACR*), International Labour Conference, 107th Session (2018), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:80031:0::NO::P80031_COMMENT_ID:3417497.

## 8 International Dispute Settlement

Before the 14th General Elections (GE 14), Malaysia submitted two cases to the International Court of Justice (ICJ) concerning the Application and the Interpretation of the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*) (Malaysia v. Singapore).[26] After a change of government following GE 14, the cases were discontinued at the ICJ. The first case on Interpretation concerned an Application on 2 February 2017 for revision of the *Pedra Branca* Judgment of 23 May 2008 under Article 61 of the Statute of the Court. In the earlier Judgment, the Court declared that (1) sovereignty over Pedra Branca/Pulau Batu Puteh belonged to Singapore; (2) sovereignty over Middle Rocks belonged to Malaysia; and (3) sovereignty over South Ledge belonged to the State in the territorial waters of which it was located. In the application for revision, Malaysia contended that there was a new fact that was a decisive factor within the meaning of Article 61 of the Statute of the Court. Malaysia referred to "three documents discovered in the National Archives of the United Kingdom during the period from 4 August 2016 to 30 January 2017, namely internal correspondence of the Singapore colonial authorities in 1958, an incident report filed in 1958 by a British naval officer and an annotated map of naval operations from the 1960s." Two other documents were filed under "Extra Facts." Of these, one was a 1937 map of the "Territorial waters of Johore" and associated documents. The map was addressed to Sultan Sir Ibrahim of Johore, the great great grandfather of the present Sultan Ibrahim. This map clearly shows Pedra Branca as part of Johore.

A similar fate befell the Request for Interpretation of the Judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South* Ledge (Malaysia/Singapore) filed on 30 June 2017. Malaysia sought a revision of the Court's finding concerning sovereignty over Pedra Branca/Pulau Batu Puteh. Malaysia's argument was that states parties that established a Joint Technical Committee to delimit the maritime boundaries between the territorial waters of both countries had reached an impasse in November 2013 attempting to implement the 2008 Judgment

26 Application for Revision of the Judgment of 23 May 2008 in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.) (Feb. 2, 2017), https://www.icj-cij.org/files/case-related/167/167-20170202-APP-01-00-EN.pdf; Request for Interpretation of the Judgment of 23 May 2008 in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.) (June 30, 2017), https://www.icj-cij.org/files/case-related/170/170-20170630-APP-01-00-EN.pdf.

through co-operative processes. This was because the parties were unable to agree over the meaning of the 2008 Judgment as it concerns South Ledge and the waters surrounding Pedra Branca/Pulau Batu Puteh on two points, that:

(1) sovereignty over Pedra Branda/Pulau Batu Puteh belonged to Singapore; and
(2) sovereignty over South Ledge belonged to the State in the territorial waters of which it is located.

On 28 May 2018, the Co-Agent of Malaysia notified the Court of the agreement of the Parties to discontinue the proceedings. This was communicated to the Government of Singapore. On 29 May 2018 the Government of Singapore communicated its agreement to the discontinuance of the proceedings. The Court made an order for discontinuance on 29 May 2018 and directed the removal of the case from the ICJ's List. The merits of the 1937 Map and associated documents were not aired before the ICJ. It might augur well for the future of bilateral relations between the two States to settle the issue of Pedra Branca through bilateral negotiations.

## 9 International Security in the South China Sea

The South China Sea region has been a very heavily contested region. In summary, the conflicting claims relate to islands and overlapping maritime claims as many States exerted and made known their 200 nautical miles (M) exclusive economic zone (EEZ) and continental shelf claims around various islands in the South China sea such as the Spratlys, since their participation in the negotiations of the Third United Nations Conference on the Law of the Sea (UNCLOS III negotiations, 1974–1982). With the entry into force of the 1982 Law of the Sea Convention, the South China Sea States can claim extended maritime zones, including outer continental shelves up to 350 nautical miles. Forced to meet the demands of nation-building, the clamour for natural resources brought many South-East Asian nations into conflict such as Brunei, the People's Republic of China (PRC), Republic of China (Taiwan), Malaysia, the Philippines, and Vietnam. Malaysia, like other responsible South China Sea States, has a duty to restore destroyed and degraded marine ecosystems and loss of species due to land reclamation, and artificial island construction. As there is heightened military presence with threats of nuclear power, but not closure of vital sea lines of communication, it is incumbent on Malaysia and the other States to de-escalate the tensions. The new Prime Minister of Malaysia, Tun Mahathir has repeatedly called for warships to leave the contested zones. Malaysia claims some maritime features in the Spratly archipelago of the South

China Sea that fall within its EEZ jurisdiction and 200 nautical-mile continental shelf. Malaysia published this data on a map claiming its continental shelf in December 1979. The publication drew protests from China, Indonesia (responding to China), Vietnam and the Philippines.[27]

Captain Ashley Roach identifies Malaysia's claims as:

1. Seven islands or rocks in the Spratly group, namely, Swallow Reef, Amboyna Cay (Vietnam occupied), Barque Canada Reef (Vietnam occupied), rocks forming Erica Reef, Investigator Shoal, and Mariveles Reef. Commodore Reef/Rizal Reef (Philippine occupied). Malaysia occupies the remaining four and has displayed sovereignty there.
2. Two low-tide elevations.
3. Three totally submerged reefs on its continental shelf.
4. Low-tide elevations lying more than 12 miles from an island or mainland or submerged at low tide.

**a** ***Malaysia's Position on Maritime Claims by Foreign States***

The Malaysian Declaration to the 1982 Law of the Sea Convention (1982 Convention) stated that the Malaysian Government was not bound by any domestic legislation or by any declaration issued by other States upon signature or ratification of this Convention. Malaysia reserved the right to state its position concerning all such legislations or declarations at the appropriate time. In particular, Malaysia's ratification of the Convention in no way constituted recognition of the maritime claims of any other State having signed or ratified the Convention, where such claims were inconsistent with the relevant principles of international law and the provisions of the 1982 Convention that were prejudicial to the sovereign rights and jurisdiction of Malaysia in its maritime areas.

During the recent visit of the Malaysian Prime Minister Tun Mahathir Mohamad to China (Friday, 17 August 2018), both States agreed to:

– maintain peace, security and stability, as well as safety and freedom of navigation in the South China Sea;
– resolve their differences between sovereign States directly concerned by peaceful means through friendly consultations and negotiations, in accordance with universally recognized principles of international law, including the 1982 Convention;

27 J. Ashley Roach, *A CNA Occasional Paper – Malaysia and Brunei: An Analysis of Their Claims in the South China Sea*, CNA ANALYSIS & SOLUTIONS ii (2014), https://www.cna.org/cna_files/pdf/iop-2014-u-008434.pdf.

– exercise self-restraint in the conduct of activities, and to avoid actions that would complicate or escalate tensions in the South China Sea; and
– work with the ASEAN Member States "for the full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC) and encourage maritime cooperation, as well as actively push forward consultations on a Code of Conduct (COC) to see the early conclusion of an effective COC."[28]

## 10 Conclusion

Malaysia is a peaceful and law-abiding member of the UN and ASEAN using international law rules to uplift standards both nationally and internationally and uplift the rule of international law in all its international relationships. Enforcement through an evidence-based mechanism to assess compliance with international standards is well-worth the effort to ensure that international standards reach the people.

28 Li Keqiang, Premier of the State Council of the People's Republic of China, Mahathir Bin Mohamad, Prime Minister of Malaysia, Joint Statement between the Government of the People's Republic of China and the Government of Malaysia (Aug. 20, 2018).

# Current International Legal Issues: Philippines

*Rommel J. Casis and Maria Pia Benosa**

## 1 Treaties and Other International Agreements

Philippine diplomacy is guided by the "Three Pillars of Philippine Foreign Policy" with the President as principal architect. These are the preservation and enhancement of national security, promotion and attainment of economic security, and the protection of the rights and promotion of the welfare of overseas Filipinos. Pursuant to these overarching goals, the Philippines negotiated and concluded several significant treaties, other international agreements, and arrangements in recent years.

The governments of the Philippines and the United States signed an Enhanced Defense Cooperation Agreement,[1] following an earlier Status of Visiting Forces Agreement with Australia,[2] bolstering defense partnership with the two countries. Within the region, negotiations with countries in the Association of South East Asian Nations (ASEAN) brought forth the ASEAN Charter,[3] the legal and institutional framework for the regional organization – which ASEAN leaders signed in 2007.

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1 Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines on Enhanced Defense Cooperation, Phil.-U.S., opened for signature Apr. 28, 2014, T.I.A.S. No. 14-625 (entered into force June 25, 2014).

2 Agreement Between the Government of Australia and the Government of the Republic of the Philippines Concerning the Status of Visiting Forces of Each State in the Territory of the Other State, Austl.-Phil., opened for signature May 31, 2007, A.T.S. 31 (entered into force Sept. 28, 2012).

3 Ass'n of Southeast Asian Nations [ASEAN] Charter, opened for signature Nov. 20, 2007 (entered into force Dec. 15, 2008).

In the realm of trade and investment, the country entered into the Agreement on Comprehensive Economic Partnership Among the Member States of the Association of Southeast Asian Nations and Japan,[4] the Framework Agreement on Partnership and Cooperation with the European Union,[5] and a Free Trade Agreement with the European Free Trade Association,[6] adding to the web of economic liberalization agreements aimed at facilitating economic engagements with partner countries. In 2018, the Philippines and China also signed several legal instruments, including some on the China-led Belt and Road Initiative, infrastructure-related arrangements, and oil and gas development.

The Philippines acceded on 14 July 2010 to the Hague Conference on Private International Law (HCCH), an intergovernmental organization that develops and administers international conventions, protocols, and soft law instruments for the facilitation of cross-border transactions. Notably, the Philippines acceded to the HCCH Apostille Convention on 12 September 2018, which would serve to streamline cross-border document authentication processes, and benefit overseas Filipino workers (OFWs), with six out of ten major OFW destination countries being parties to the Convention.

In the field of protecting the rights and welfare of Filipino workers overseas, the country has prioritized the conclusion of bilateral labor agreements with labor-receiving countries, particularly in the Middle East. It took a leading role in the adoption of the Global Compact on Migration,[7] a voluntary international framework that will manage migration and provide better treatment for millions of migrants worldwide.

On 12 September 2010, the Philippines acceded to the Convention for the Pacific Settlement of International Disputes, establishing the Permanent Court of Arbitration (PCA).[8] In 2013, the Philippines came before the PCA, serving as

4 Agreement on Comprehensive Economic Partnership Among the Member States of the Association of Southeast Asian Nations and Japan, Mar. 26-Apr. 14, 2008, http://ajcep.asean.org/wp-content/uploads/2014/05/Agreement.pdf.

5 Framework Agreement on Partnership and Cooperation Between the European Union and Its Member States, of the One Part, and the Republic of the Philippines, of the Other Part, opened for signature July 11, 2012, 2017 O.J. (L 343) 3 (entered into force Mar. 1, 2018).

6 Free Trade Agreement Between the EFTA States and the Philippines, opened for signature Apr. 28, 2016 (entered into force June 1, 2018), https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/philippines/Philippines-EFTA-Main%20Agreement.pdf.

7 G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration (Dec. 19, 2018).

8 Convention for the Pacific Settlement of International Disputes, opened for signature Oct. 18, 1907, 32 Stat. 1779, T.S. 392, 1 Bevans 230 (entered into force Jan. 26, 1910).

registry for an arbitral tribunal constituted under Annex VII of the UNCLOS[9] in the South China Sea Arbitration against China.[10]

In 2017, the Philippines entered into 114 agreements. The more notable ones, indicative of priority areas for the Duterte Administration, include: the Paris Agreement on Climate Change,[11] Defense Cooperation agreements with the Czech Republic[12] and the Russian Federation,[13] a Memorandum of Understanding with the Republic of Korea under the Employment Permit System,[14] a Memorandum of Cooperation between the Philippine Coast Guard and the Japan Coast Guard,[15] a Protocol to the ASEAN Charter on Dispute Settlement Mechanisms,[16] and a Protocol on the Legal Framework to Implement the ASEAN Single Window[17] which is "a regional initiative that connects and integrates National Single Window (NSW) of ASEAN Member States . . . to expedite cargo clearance and promote ASEAN economic integration by enabling the electronic exchange of trade-related documents among ASEAN Member States."[18]

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9 United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

10 The South China Sea Arbitration (Phil. v. China), Case No. 2013–19, Award (Perm. Ct. Arb. 2016) [hereinafter South China Sea Arbitration Award].

11 Paris Agreement, opened for signature Apr. 22, 2016, U.N.T.S. 54113 (entered into force Nov. 4, 2016).

12 Press Release, Department of National Defense of the Philippines, Philippines and Czech Republic Sign Defense Cooperation Agreement (June 20, 2017), http://www.dnd.gov.ph/PDF2017/DND-Press%20-%20Defense%20cooperation%20agreement%20between%20Philippines%20and%20Czech%20%20Republic.pdf.

13 *Russia and Philippines Sign Military-Technical Agreement*, MINISTRY OF DEFENSE OF THE RUSSIAN FEDERATION (Oct. 24, 2017), http://eng.mil.ru/en/news_page/country/more.htm?id=12148115@egNews.

14 Memorandum of Understanding Between the Department of Labor and Employment, Republic of the Philippines and the Ministry of Labor, Republic of Korea on the Sending and Receiving of Workers Under the Employment Permit System of Korea, Phil.-S. Kor., May 30, 2009.

15 Memorandum of Cooperation Between the Philippine Coast Guard and the Japan Coast Guard, Japan-Phil., Jan. 12, 2017, https://pco0.gov.ph/japan-ph-sign-several-agreements-to-enhance-bilateral-ties-12-jan-2017/.

16 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, opened for signature Apr. 8, 2010 (entered into force July 28, 2017), http://agreement.asean.org/media/download/20160829075723.pdf.

17 Protocol on the Legal Framework to Implement the ASEAN Single Window, opened for signature Sept. 4, 2015 (entered into force Aug. 1, 2017), http://agreement.asean.org/media/download/20150915020056.pdf.

18 ASEAN SINGLE WINDOW, http://asw.asean.org/index.php (last visited Feb. 24, 2019).

## 2 International Litigation and Adjudication

As a founding member of the United Nations and an adherent to the principle of peaceful settlement of disputes, the Philippines participated in litigation and arbitration involving issues related to foreign policy and international law[19] in recent years.

Most notably, the Philippines brought its maritime disputes with China in the West Philippine Sea/South China Sea to international arbitration. As earlier mentioned, the *South China Sea Arbitration* was initiated by the Philippines in January 2013 under Part XV and Annex VII of the UNCLOS, and had the Permanent Court of Arbitration as its registry.[20] The arbitration involved the characterization of certain maritime features and Chinese actions in the subject maritime area.

The Tribunal's award on the merits of said arbitration has significantly contributed to case law in the law of the sea, particularly in its discussions on the legal status of "historic rights" under the UNCLOS, parameters constituting an island under Articles 13 and 121 of the same convention, and the rights and duties of third States within a coastal State's exclusive economic zone.[21] The Tribunal's pronouncements in its earlier Award on Admissibility[22] have also been widely cited for providing valuable guidance on the duty to seek peaceful settlement of disputes,[23] and the duty to enter into negotiations and exchange views.[24]

On 16 September 2014, the Philippines won its third investor-State arbitration concerning a decade-long dispute over an international airport terminal in Manila. The Philippines secured a complete dismissal on jurisdictional grounds of the claims of Fraport AG in proceedings before the International Centre for Settlement of Investment Disputes (ICSID).[25]

On 23 January 2017, the ICSID rendered a decision in *Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines*, on the termination of a contract for

19 *Digest of United States Practice in International Law 2014*, U.S. DEP'T OF ST., https://www.state.gov/s/l/2014/ (last visited Feb. 24, 2019).

20 South China Sea Arbitration Award, *supra* note 10.

21 *Id*.

22 The South China Sea Arbitration (Phil. v. China), Case No. 2013–19, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2015) [hereinafter Award on Jurisdiction and Admissibility].

23 UNCLOS, *supra* note 9, at 129-30.

24 *Id.* at 130.

25 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB 11/12, Award (Dec. 10, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4114.pdf.

the rehabilitation of the Laguna Lake on the basis of a bilateral investment treaty between the Philippines and Belgium-Luxembourg.[26]

As a member of the World Trade Organization (WTO), the Philippines has abided by its commitments under international trade agreements and enforced its rights by, among others, participating in dispute settlement proceedings within the organization's ambit. As of this writing (January 2019), the Philippines is a party to 27 on-going WTO cases, including five cases in which it acts as complainant, notably those against Brazil,[27] the United States,[28] Australia,[29] and Thailand.[30]

## 3 Statehood, Jurisdiction of States, Organs of States

The Philippines hopes to put a peaceful end to decades of Muslim insurgency in its southern region. An earlier attempt at a lasting settlement, through the creation of the Autonomous Region of Muslim Mindanao (ARMM), fell short of achieving lasting peace and development for the region's Muslim population. A Memorandum of Agreement on Ancestral Domain (MOA-AD), executed between the Philippine government and the Moro Islamic Liberation Front (MILF) on 5 August 2008, contemplated the expansion of the ARMM and the creation of a Bangsamoro Juridical Entity. The Philippine Supreme Court nullified the MOA-AD, citing the lack of transparency and consultation in its formation, and its violation of existing legislative policy on the rights of indigenous peoples.[31] The Supreme Court also struck down a provision committing the government to amending the Constitution.

26 Baggerwerken Decloedt En Zoon NV v. Republic of the Phil., ICSID Case No. ARB 11/27, Award (Jan. 23, 2017), https://www.italaw.com/cases/5170.

27 Appellate Body Report and Panel Report, *Brazil–Measures Affecting Desiccated Coconut*, WTO Doc. WT/DS22/11/Rev.2 (June 6, 1997).

28 Request to Join Consultations, *United States–Import Prohibition on Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS61/3 (Nov. 22, 1996).

29 Request for the Establishment of a Panel by the Philippines – Revision, *Australia–Certain Measures Affecting the Importation of Fresh Fruit and Vegetables*, WTO Doc. WT/DS270/5/Rev.1 (July 11, 2003); Acceptance by Australia to Join Consultations, *Australia–Certain Measures Affecting the Importation of Fresh Pineapple*, WTO Doc. WT/DS271/4 (Nov. 12, 2002).

30 Notification of an Appeal, *Thailand–Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc. WT/DS371/27 (Jan. 14, 2019).

31 North Cotabato v. Republic of the Philippines, G.R. No. 183591 (S.C., Oct. 14, 2008) (Phil.), http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm.

After a reconfiguration of the agreement with the MILF to comply with the Supreme Court decision, Congress passed the Bangsamoro Organic Law (BOL).[32] The BOL creates a political entity called the Bangsamoro Autonomous Region which encompasses the current ARMM and subject to a plebiscite, additional cities and provinces in Mindanao, with powers beyond that of any local government corporation or any previous autonomous region.

The Bangsamoro will have a parliamentary government, empowered to enact laws on budgetary matters, the civil service, health, and education, among other matters subject only to the general supervision of the President. This power of supervision applies in case the Bangsamoro government violates the Constitution, national laws, and the Bangsamoro Organic Law. The BOL allows the administration of justice based on *Shari'ah* Law, which will apply to Muslims in the Bangsamoro. A case has been filed before the Supreme Court assailing the constitutionality of the law.

The Philippines is also considering shifting to a federal form of government. There are several pending draft constitutions under consideration, with different pathways for autonomy in Mindanao. The draft from a consultative committee formed by the President contemplated a Bangsamoro region along with another autonomous region in the north, and originally intended to include the BOL as an attached ordinance. Another draft pending before Congress makes no express commitment for a Bangsamoro region.[33]

## 4 International Environmental Law

The Philippines became a State Party to the Convention on Biological Diversity (CBD)[34] on 8 October 1993. Since then, three protocols have been adopted under the CBD, on Biosafety,[35] Access and Benefit-sharing,[36] and on Liability and

32 An Act Providing for the Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao, Rep. Act No. 11054 (July 27, 2018) (Phil.), https://www.lawphil.net/statutes/repacts/ra2018/ra_11054_2018.html.

33 Resolution of Both Houses No. 15, 17th Cong. (2018) (approved).

34 Convention on Biological Diversity, opened for signature June 5, 1992, 1760 U.N.T.S. 69 (entered into force Dec. 29, 1993).

35 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, opened for signature May 15, 2000, 2226 U.N.T.S. 208 (entered into force Sept. 11, 2003).

36 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, opened for signature Feb. 2, 2011 (entered into force Oct. 12, 2014), https://treaties.un.org/doc/Treaties/2010/11/20101127%2002-08%20PM/XXVII-8-b-Corr-Original.pdf.

Redress.[37] The Philippines ratified the Cartagena Protocol on 5 October 2006, and acceded to the Nagoya Protocol on 29 September 2015. Meanwhile, deliberations on Philippine accession to the Nagoya-Kuala Lumpur Supplementary Protocol, which provides for "international rules and procedures in the field of liability and redress relating to living modified organisms,"[38] are ongoing.

While issues under the CBD and its Protocols are wide and varied, certain issues are of particular importance to the Philippines, given its geophysical features, location in the heart of marine biodiversity in the world, and limited resources and capability for technological advancement. These include the streamlining of efforts for climate change adaptation and mitigation, establishment of protected areas and designation of more Ecologically or Biologically Significant Marine Areas (EBSAs), and sustainable use of biodiversity. Access and benefit-sharing in relation to traditional knowledge, innovation, and practices are also important given the presence of diverse indigenous communities across the Philippines.

In 2015, typhoon victims, human rights groups, and concerned citizens petitioned the Commission on Human Rights (CHR) to investigate the activities of public- and privately-owned entities engaged in the production of fossil fuels, also known as "carbon majors."[39] The CHR is the constitutionally-mandated body for investigating and monitoring all matters concerning human rights in the Philippines. Findings of this national inquiry, the last hearing of which was held in December 2018, are set to be published in June 2019.[40] In a press release, the CHR expressed hope that the inquiry will "establish clear mechanisms and processes for hearing human rights cases, especially those imbued with extra-territorial obligations."[41] It also anticipates that the report "would help to clarify standards for corporate reporting of carbon majors on their activities relating to greenhouse gas emissions, as well as help identify basic

37 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, opened for signature Mar. 7, 2011 (entered into force Mar. 5, 2018), https://treaties.un.org/doc/Treaties/2010/12/20101215%2005-26%20PM/Ch_27_8_c.pdf.

38 *About the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress*, CONVENTION ON BIOLOGICAL DIVERSITY, https://bch.cbd.int/protocol/supplementary/about/ (last visited Feb. 24, 2019).

39 Janvic Mateo, *CHR to Hold Climate Change Inquiry on 'Carbon Majors,'* PHILSTAR GLOBAL (Mar. 24, 2018, 12:00 AM), https://www.philstar.com/headlines/2018/03/24/1799803/chr-hold-climate-change-inquiry-carbon-majors.

40 *CHR Concluded Landmark Inquiry on the Effects of Climate Change to Human Rights; Expects to Set the Precedent in Seeking Climate Justice*, COMM'N ON HUM. RTS (Dec. 13, 2018), http://chr.gov.ph/chr-concluded-landmark-inquiry-on-the-effects-of-climate-change-to-human-rights-expects-to-set-the-precedent-in-seeking-climate-justice/.

41 *Id.*

rights and duties relative to the impacts of climate change."[42] The Philippines has signed and ratified the UN Framework Convention on Climate Change, its Kyoto Protocol, and the Paris Agreement. The inquiry forms part of domestic and international efforts emphasizing that climate change is both an environmental and human rights issue, in view of challenges it poses against various protected rights. Related efforts to negotiate regulatory measures on marine debris and microplastics are also underway, following the Philippines' recent citation as being among the world's largest ocean polluters.[43]

## 5 Human Rights

### a *Extrajudicial Killings and Summary Executions*

In November 2018 the Philippine Drug Enforcement Agency (PDEA) reported that 4,999 persons have been killed in the context of President Rodrigo Duterte's "War on Drugs" through "Oplan Tokhang" operations, from June 2016 to October 2018.[44] However, human rights organizations and critics of the Administration estimate the figure to be closer to around 20,000 deaths.[45] The Philippine National Police (PNP) claims that the use of deadly force had been necessary in a number of these cases, since drug suspects resisting arrest often endanger the lives of law enforcement officers.[46] UN Special Rapporteur on extrajudicial, summary, or arbitrary executions Agnes Callamard has repeatedly expressed grave concern on the matter.[47]

While the PNP has acknowledged possible abuse by its law enforcement officers during the raids, and committed to investigating their liability, only one conviction has been secured in November 2018 against three police officers for

42 *Id.*

43 Alixandra Vila, *Philippines Plastic Pollution: Why So Much Waste Ends up in Oceans*, S. China Morning Post (Oct. 18, 2018, 8:45 AM), https://www.scmp.com/lifestyle/health/article/2168819/philippines-plastic-pollution-why-so-much-waste-ends-oceans.

44 Catherine Gonzales, *PDEA: Almost 5,000 Killed in Duterte's War on Drugs as of Oct. 2018*, INQUIRER.NET (Nov. 27, 2018, 11:34 AM), https://newsinfo.inquirer.net/1057464/pdea-almost-5000-killed-in-dutertes-war-on-drugs-as-of-oct-2018#ixzz5gQNkiPAM.

45 Ted Regencia, *Senator: Rodrigo Duterte's Drug War Has Killed 20,000*, Al Jazeera (Feb. 22, 2018), https://www.aljazeera.com/news/2018/02/senator-rodrigo-duterte-drug-war-killed-20000-180221134139202.html.

46 *PNP Reports on Anti-Drugs Drive*, Manila Bulletin (Dec. 20, 2017, 10:01 PM), https://news.mb.com.ph/2017/12/20/pnp-reports-on-anti-drugs-drive/.

47 *Callamard: Duterte 'Destroying Rule of Law,'* ABS-CBN News (Sept. 27, 2018, 11:29 PM), https://news.abs-cbn.com/news/09/27/18/callamard-duterte-destroyed-rule-of-law.

the murder of 17-year old victim Kian Loyd delos Santos.[48] Earlier, in January 2017, the Supreme Court also granted the first Writ of Amparo in favor of survivor Efren Morillo, and families of victims of extra-judicial killings by officers of Quezon City Police District Station 6. The Writ of Amparo, an extraordinary remedy available to persons whose right to life, liberty, and security is violated or threatened, including victims of extra-legal killings and enforced disappearances or threats, was made permanent by the Philippine Court of Appeals in February 2017.

Two other petitions remain pending in the Supreme Court seeking Writs of Amparo and Prohibition against the implementation of "Oplan Tokhang," *Almora v. Dela Rosa*, and *Daño v. Philippine National Police.* Relevant documents ordered to be produced by the Supreme Court, including those on some 4,000 deaths of persons who allegedly resisted authority or arrest, could potentially serve as evidence in related proceedings concerning the War on Drugs before the International Criminal Court.

### b *Threats to Freedom of Speech*

The Duterte administration passed a Freedom of Information mechanism in 2016 intended to provide transparency amid public criticism of governmental policies.[49] Despite this, the human rights community finds that the right to freedom of speech is threatened in the country, with the stifling of dissent by public officials, private citizens, and even media organizations. Since President Rodrigo Duterte took office in 2016, opposition Senator Leila de Lima, also formerly the Commissioner of Human Rights and Secretary of Justice who launched investigations against the latter during his tenure as mayor, has been imprisoned on supposed drug-related charges.[50] Supreme Court Chief Justice Maria Lourdes Sereno was likewise ousted through the unlikely legal mechanism of *quo warranto,* rather than constitutionally-prescribed impeachment (*Republic of the Philippines v. Maria Lourdes P.A. Sereno*, G.R. No. 237428, 11 May 2018). Rappler, an online media organization which has regularly published articles critical of the Duterte Administration, also had its operating license revoked, with tax evasion and cyber libel cases similarly being filed against its

48 Dharel Placido, *Palace Lauds Conviction of Cops in Kian's Slay*, ABS-CBN News (Nov. 29, 2018, 11:57 AM), https://news.abs-cbn.com/news/11/29/18/palace-lauds-conviction-of-cops-in-kians-slay.

49 Exec. Ord. No. 02 (Phil.).

50 *Senator Leila de Lima Arrested in the Philippines*, Al Jazeera (Feb. 25, 2017), https://www.aljazeera.com/news/2017/02/leila-de-lima-arrested-philippines-170224003808389.html.

founder, journalist Maria Ressa. The Committee to Protect Journalists has since tagged these incidents as a direct assault on press freedom in the Philippines.[51]

### c *Non-Violent Discipline of Children*

The Philippine House of Representatives passed on final reading House Bill No. 8239 promoting positive and non-violent discipline of children.[52] The bill, if passed into law, will protect children from physical, humiliating, or degrading acts as a form of punishment. Such acts include "any form of punishment or discipline in which physical force is used and intended to cause pain or discomfort or any non-physical act that causes children to feel belittled, denigrated, threatened, or ridiculed."[53] Children will be protected from these acts in their homes, in schools, institutions, alternative care systems, the juvenile welfare system, places of religious worship, and in all other settings where there is direct contact with them.

The bill establishes reporting mechanisms and penalizes violations of the acts that could lead to charges under existing penal laws. It also stresses the role of government agencies concerned in the implementation of safeguards and protection measures. If passed into law, it constitutes significant compliance with international human rights obligations under the Universal Declaration on Human Rights (UDHR),[54] and the Convention on the Rights of the Child. The latter instrument mandates States parties in Article 19 thereof to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians, or any other person who has the care of the child."

### d *State of Jails in the Philippines*

In October 2018, the House Committee on Human Rights conducted a *motu proprio* inquiry into the state of custodial facilities under the supervision of the

51 Joel Simon & Christophe Deloire, *CPJ, RSF Call on Philippines to End its Persecution of Rappler and Maria Ressa*, COMM. TO PROTECT JOURNALISTS (Nov. 26, 2018, 4:55 PM), https://cpj.org/2018/11/cpj-rsf-call-on-philippines-to-end-its-persecution.php.

52 An Act Promoting Positive and Non-Violent Discipline, Protecting Children from Physical, Humiliating or Degrading Acts as a Form of Punishment and Appropriating Funds Therefor, H.R. 8239, 17th Cong. (2018) (Phil.), http://www.congress.gov.ph/legisdocs/first_17/CR00861.pdf.

53 *Id.*

54 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

PNP, and possible violations of the human rights of persons under police custody (PUPC) due to prison overcrowding and inhumane living conditions.[55] In a letter to the Committee, the PNP Human Rights Affairs Office Chief raised concerns on the deplorable state of facilities for some 2,137 PUPCs, which translates to a 283.05 percent congestion rate in Metro Manila.[56] Such congestion has made PUPCs especially susceptible to contagious diseases, resulting in the death of many while in their custodial cells.[57]

The Committee recommended the review of remedies and procedures that could lead to amendments to relevant laws, which should thereby be compliant with the Philippines' international human rights commitments.[58] These include prohibitions against degrading and inhumane punishment under the UDHR, the UN Standard Minimum Rules for the Treatment of Prisoners,[59] and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[60]

In 2016 the Philippine Supreme Court denied an action for *mandamus* filed by British national Albert Wilson for the enforcement of a United Nations Human Rights Committee (HRC) Communication[61] finding that reparations were due to him for violations of his rights under the ICCPR.[62] Wilson complained, among others, of the inhumane and torturous conditions of his detention at a Valenzuela City Municipal Jail.[63] The Court concluded, however, that views of the HRC do not form part of the ICCPR or its Optional Protocol, which are the treaties actually applicable within Philippine jurisdiction. Neither are they decisions *per se* which may be enforced outright, but are rather, "mere recommendations to guide the State it is issued against," which display "important characteristics of a judicial decision."[64]

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55 Press Release, House of Representatives of the Philippines, Committee on Human Rights Looks into Deplorable State of Jails (Oct. 3, 2018), http://www.congress.gov.ph/press/details.php?pressid=10954.

56 *Id.*

57 *Id.*

58 *Id.*

59 U.N. Specialised Conferences, *Standard Minimum Rules for the Treatment of Prisoners* (Aug. 30, 1955).

60 G.A. Res. 43/173, U.N. Doc. A/43/173 (Dec. 9, 1988).

61 Wilson v. Philippines, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003).

62 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

63 Wilson v. Ermita, G.R. No. 189220 (S.C., Dec. 7, 2016) (Phil.).

64 *Id.*

## 6 International Criminal Law

### a *ICC Prosecutor Preliminary Examination of the Philippine Situation*

In a statement dated 13 October 2016, International Criminal Court (ICC) Prosecutor Fatou Bensouda expressed that her office is "aware of worrying reported extra-judicial killings of alleged drug dealers and users in the Philippines," which, at that time, had recorded about 3,000 deaths.[65] The statement continued to say that the prosecutor is "deeply concerned about these alleged killings and the fact that public statements of high officials of the Republic of the Philippines seem to condone such killings and further seem to encourage State forces and civilians alike to continue targeting these individuals with lethal force."

The statement then made the legal point that "[e]xtra-judicial killings may fall under the jurisdiction of the International Criminal Court . . . if they are committed as part of a widespread or systematic attack against a civilian population pursuant to a State policy to commit such an attack." This mirrors the language of the provision of the Rome Statute penalizing crimes against humanity.

After having received and reviewed communications and reports on alleged crimes punished under the Rome Statute, the ICC Office of the Prosecutor (OTP), on 08 February 2018, opened a preliminary examination into the Philippine situation since at least 01 July 2016.[66]

In its 2018 Report on Preliminary Examination Activities, the OTP discussed the procedural history of the examination, the preliminary jurisdictional issues which assert that the ICC has jurisdiction over Rome Statute crimes committed on the territory of the Philippines or by its nationals since 1 November 2011, and the contextual background of the preliminary examination that focused on the "war on drugs" waged by President Rodrigo Duterte, and the extrajudicial killings that have occurred since he took office.[67]

Describing the alleged crimes, the report states that the examination focuses on allegations that President Duterte and other senior government officials promoted and encouraged the killing of suspected or purported drug users

65 Int'l Crim. Ct., *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda Concerning the Situation in the Republic of the Philippines* (Oct. 13, 2016), https://www.icc-cpi.int/pages/item.aspx?name=161013-otp-stat-php.

66 Int'l Crim. Ct., *Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on Opening Preliminary Examinations into the Situations in the Philippines and in Venezuela* (Feb. 8, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat.

67 Int'l Crim. Ct., *Report on Preliminary Examination Activities* (Dec. 5, 2018), https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.

and/or dealers, and in such context, members of PNP forces and private individuals (such as vigilante groups) have carried out thousands of killings throughout the Philippines and in particular in the Metro Manila area.[68]

In light of the allegations and the reports, the OTP, as stated in the report, continues to:

- conduct "a thorough factual and legal assessment of the information available in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the [ICC]";[69]
- "gather, receive[,] and review information available from a wide range of sources on the crimes allegedly committed in the context of the 'war on drugs' in the Philippines,"[70] and subject "such information to rigorous source evaluation, including assessment of reliability of sources and credibility of information received";[71]
- "[focus] on recording, on an ongoing basis, relevant alleged incidents and examining the circumstances in which such incidents reportedly occurred and particular key features, such as in relation to the profile of alleged victims, the identity of the perpetrators and *modus operandi* employed";[72] and
- engage and consult "with relevant stakeholders, including by holding meetings at the seat of the [ICC]."[73]

The report concludes with the statement that the OTP will continue the preliminary examination and the assessment of the information available "in order to reach a determination on whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court."[74]

### b *Philippines Withdraws from the ICC*

On 16 March 2018 the Philippines, which signed the Rome Statute on 28 December 2000 and deposited its instrument of ratification on 30 August 2011, formally transmitted its notice of withdrawal from the ICC to the office of the United Nations (UN) Secretary-General in New York.[75] In its Note Verbale, the Permanent Mission to the United Nations conveyed that:

68 *Id.* ¶ 51.
69 *Id.* ¶ 41.
70 *Id.* ¶ 54.
71 *Id.*
72 *Id.* ¶ 55.
73 *Id.* ¶ 40.
74 *Id.* ¶ 122.
75 Press Release, Department of Foreign Affairs of the Philippines, PH Officially Serves Notice to UN of Decision to Withdraw From ICC (Mar. 16, 2018), https://dfa.gov.ph/dfa-news/

> The Government affirms its commitment to fight against impunity for atrocity crimes, notwithstanding its withdrawal from the Rome Statute, especially since the Philippines has a national legislation punishing atrocity crimes. The Government remains resolute in effecting its principal responsibility to ensure the long-term safety of the nation in order to promote inclusive national development and secure a decent and dignified life for all.
>
> The decision to withdraw is the Philippines' principled stand against those who politicize and weaponize[d] human rights, even as its independent and well-functioning organs and agencies continue to exercise jurisdiction over complaints, issues, problems and concerns arising from its efforts to protect its people.[76]

This step follows the procedure outlined in Article 127 (1) of the Rome Statute.[77] In that provision, the effectivity of the withdrawal shall occur one year after the date of receipt of the notification, unless the notification specifies a later date.

The Note Verbale dated 15 March 2018 informs the UN Secretary-General "of the decision of the Government of the Republic of the Philippines to withdraw from the Rome Statute of the International Criminal Court in accordance with the relevant provisions of the Statute."[78] In a statement following the transmittal of the notice, President Duterte disputed that the ICC had acquired jurisdiction over the alleged acts committed by his administration.[79]

The ICC, in a statement released on 20 March 2018, acknowledged that on 19 March 2018, it was officially notified by the United Nations that the Philippines had deposited a written notification of withdrawal from the Rome Statute,

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dfa-releasesupdate/15975-ph-officially-serves-notice-to-un-of-decision-to-withdraw-from-icc.

76 Letter from the Secretary of Foreign Affairs of the Philippines to the Secretary-General of the U.N. (Mar. 19, 2018), https://treaties.un.org/doc/Publication/CN/2018/CN.138.2018-Eng.pdf.

77 Rome Statute of the International Criminal Court, opened for signature July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

78 Philippine Mission to the U.N., Note Verbale Dated Mar. 18, 2018 from the Philippine Mission to the United Nations Addressed to the U.N. Secretary-General, No. 000181-2018 (Mar. 18, 2018).

79 *Full Text: Duterte's Statement on Int'l Criminal Court Withdrawal*, RAPPLER (Mar. 14, 2018, 07:20 PM), https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal.

with the United Nations Secretary-General as the depositary of the Statute.[80] The ICC expressed its regrets regarding this development and continued to encourage the Philippines to remain part of the ICC. Nevertheless, it also recognized that "[w]ithdrawing from the Rome Statute is a sovereign decision, which is subject to the provisions of article 127 of that Statute."[81] It then made a statement that this withdrawal does not have an impact on "on-going proceedings or any matter which was already under consideration by the Court prior to the date" of the effectivity of the withdrawal.[82] Such action, according to the ICC, also does not affect the status of any judge already serving at the ICC.

The Executive's withdrawal from the ICC has not gone unchallenged before the Philippine Supreme Court. Oral arguments in consolidated petitions filed by six incumbent senators, and the Philippine Coalition for the International Criminal Court, were concluded in August 2018.[83] Resolution of the case largely depends on a determination of the necessity of Senate participation in withdrawal from treaties – a point on which the Philippine Constitution is silent.

## 7 International Cooperation

### a *Mutual Legal Assistance Treaty*

The Philippines is a labor-sending state which largely depends on remittances of overseas Filipino workers (OFWs) for more than 20% of its export earnings and more than 5% of its gross national product (GNP). In view of this dependence on migration, the Philippines committed itself to several mutual legal assistance treaties to better protect the interests of its citizens, pursue absent or absconding suspects, and collect pertinent evidence with the assistance of other States parties.

On 12 December 2008, the Philippines became a party to the 2004 Treaty on Mutual Legal Assistance in Criminal Matters among States in the ASEAN. The Treaty covers mutual assistance among member countries in facilitating the taking of evidence or voluntary statements from persons, and effecting service of judicial documents, among others.

80 Press Release, International Criminal Court, ICC Statement on the Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law (Mar. 20, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=pr1371.

81 *Id.*

82 *Id.*

83 Amended Advisory, Pangilinan v. Cayetano, G.R. No. 238875 & PCICC v. Madialdea, G.R. No. 239483 (S.C., Aug. 28, 2018) (Phil.).

The Philippines is also a party to thirteen extradition treaties. Most of these treaties use the non-list dual criminality approach as a means of determining whether a person-of-interest can be subjected to extradition. Under the said system, the conduct on which a petition for extradition is based must be an offense in both States. Contrary practice is embodied in the extradition treaties with two other ASEAN Member States, Indonesia,[84] and Thailand,[85] under which the list dual criminality approach is used. Under the latter, extraditable offenses are expressly listed, and no extradition can be granted for offenses outside the same.

### b *Prevention of Pandemic Influenza and Other Dangerous Communicable Disease*

In the period between January 1918 and December 1920, 500 million people around the world contracted the H1N1 influenza virus, resulting in the deaths of 50 to 100 million people. Persons afflicted include people from such remote areas as the Pacific Islands and the Arctic. Since that time, there have been multiple near misses in infectious disease outbreaks, including the Avian Influenza A, SARS, MERS, Ebola, and Zika virus. Coupled with increasing global trade and travel, the danger of a recurrence of the Spanish Flu of 1918 is something States ought to pay attention to. The Philippines is at particular risk for these types of illnesses, in view of its active promotion of tourism as a source of revenue. Coupled with the lack of universal access to health care, an outbreak of illness like the pandemic flu would be devastating to the Philippine public. The rate of migration of Filipino citizens likewise increases the risk of spreading such illnesses to receiving States.

One of the means by which the Philippines has addressed this concern is through participation in the Pandemic Influenza Preparedness Framework, a non-binding agreement negotiated by the WHO governing the sharing of influenza viruses with a pandemic potential, to spur the rapid development of vaccines and countermeasures.[86]

84 Extradition Treaty Between the Republic of Indonesia and the Republic of Philippines, Indon.-Phil., Feb. 10, 1976, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39797304.pdf.

85 Treaty Between the Government of the Kingdom of Thailand and the Government of the Republic of the Philippines Relating to Extradition, Phil.-Thai., Mar. 16, 1981, http://www.oecd.org/site/adboecdanti-corruptioninitiative/39816273.pdf.

86 *Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits*, WORLD HEALTH ORGANIZATION (May 24, 2011), http://apps.who.int/gb/pip/pdf_files/pandemic-influenza-preparedness-en.pdf.

## 8 Law of the Sea

### a *The South China Sea Arbitration* (*Philippines v. China*) *Under Annex VII of the UNCLOS*

On 22 June 2013, the Philippines initiated arbitration against China under Annex VII to the UNCLOS.[87] The Philippines sought a ruling that would specifically address China's claims to disputed waters within a unilaterally declared "Nine-Dash Line," the legal character of various maritime features in that area, and China's breaches of the UNCLOS. Despite China's refusal to participate in the proceedings, the arbitration continued in accordance with Article 9 of Annex VII, with only the Philippines appearing as a Party.

After determining that it had jurisdiction to hear the case,[88] the arbitral tribunal gave the Philippines a sweeping legal victory. It invalidated China's claim to "historic rights" in the South China Sea – the basis for its "Nine-Dash Line" policy – and declared that China had abandoned such claims after it signed and ratified the UNCLOS.[89] Notably, the award also clarified the status of the various land features in the disputed area.[90] It found that none of them were "islands" capable of generating their own exclusive economic zone (EEZ), and that many of them were not even "rocks" that would entitle their claimant to a territorial sea.[91] Consequently, a number of the features analyzed by the arbitral tribunal were properly found to be within the Philippines' EEZ and not subject to any possible Chinese entitlement.[92]

The arbitral tribunal also found that China breached its obligations under the UNCLOS when: (1) it interfered with Philippine fishing and petroleum activities in the Philippines' own EEZ, (2) it constructed artificial islands, thereby causing significant marine environmental damage to the area, (3) it engaged in dangerous maneuvering against Philippine ships, and (4) it failed to prevent Chinese fishermen from engaging in destructive fishing practices in the Philippine EEZ.[93] Specifically, China violated its obligations to recognize and respect the Philippines' sovereign rights over its EEZ, to protect and preserve the marine environment, to refrain from taking actions that cause permanent damage

87 South China Sea Arbitration Award, *supra* note 10.
88 Award on Jurisdiction and Admissibility, *supra* note 22.
89 South China Sea Arbitration Award, *supra* note 10.
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*

and irreparable harm to the marine environment, and to exercise restraint and not aggravate the dispute.[94]

### b *Successful Claim to an Extended Continental Shelf in the Benham Rise Region*

The Benham Rise Region (BRR) is a 13-million hectare area off the northeastern coast of Luzon, the country's largest island. It is the "natural submarine prolongation of the Luzon Island extending up to 318 nautical miles (589 kilometers), from the Eastern Philippine Seaboard facing the Pacific Ocean."[95] The BRR is "geomorphologically distinct from the deep ocean floor and forms a thick crust lying at about 3,000–3,500 meters below sea level, except for the Benham Bank, its shallowest point, which towers up to 48–70 meters below sea level."[96] During previous explorations of the BRR, government scientists found that the area exhibited rich biodiversity due to the presence of a thick and virtually pristine coral cover, which in turn sustains over 200 species of fish, as well as an unidentified number of algae and sponges. They further observed that the BRR is a spawning ground for tuna, and has the potential to yield the country's highest catch rate for the species.[97] The seabed is also thought to contain a number of important mineral resources, including gas hydrates and cobalt-rich ferromanganese crusts.[98]

On 8 April 2009, the Philippines submitted to the United Nations Commission on the Limits of the Continental Shelf (CLCS) its claim to an extended continental shelf in the BRR.[99] In accordance with Article 76, paragraph 8, of the UNCLOS, the Philippine submission contained information showing the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. On 12 April 2012, the CLCS adopted by consensus its Recommendations, effectively confirming the country's claim.[100]

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94 *Id.*

95 Foreign Service Institute, *The Philippine Rise*, THINK-ASIA, www.fsi.gov.ph/wp-content/uploads/2017/12/The-Philippine-Rise.pdf (last visited Feb. 25, 2019).

96 *Id.*

97 *Id.*

98 *Id.*

99 *Commission on the Limits of the Continental Shelf* (*CLCS*) *Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Republic of the Philippines*, U.N. DIV. FOR OCEAN AFF. & THE L. OF THE SEA (July 19, 2012), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_phl_22_2009.htm.

100 *Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by the Philippines in Respect of the Benham Rise Region on 8 April 2009*,

Notwithstanding the UN's recognition of the Philippines' sovereign rights over the BRR, the International Hydrographic Organization (IHO) still approved China's proposal to name five of the underwater features located in the area.[101] China's move was the direct result of unsanctioned underwater surveys that it conducted in the BRR in 2004. Although the Philippines did not file a formal protest against China, it nonetheless raised its objections during the meeting of the Philippines-China Bilateral Consultative Mechanism held on 13 February 2018. Prior to this, President Rodrigo Duterte renamed the Benham Rise to "Philippine Rise" for purposes of reinforcing the country's claim to sovereign rights.[102]

In 2018, President Duterte also formally declared[103] the portion of the Philippine Rise located within the country's exclusive economic zone (EEZ) as the "Philippine Rise Marine Resource Reserve" (PRMRR) under the National Integrated Protected Area Systems (NIPAS) Act.[104] The PRMRR is comprised of two distinct areas: a 49,684 hectare Strict Protection Zone and a 302,706 hectare Special Fisheries Management Area. The former is effectively a "no take" zone due to the importance of preserving the undisturbed state of the marine environment for purposes of scientific study, environmental monitoring, and for the maintenance of genetic resources. The latter is technically open to commercial fishing but subject to a stringent management plan designed to prevent illegal, unreported, and unregulated (IUU) fishing, and to promote the sustainable utilization of the marine resources in the area.

### c *Maritime Boundary Delimitation with Indonesia*

In August 2018, hearings resumed in the Philippine Senate on the body's concurrence in the country's ratification of the maritime boundary agreement signed on 23 May 2014 delimiting its exclusive economic zone from that of Indonesia in the Sulu-Celebes Sea Area. The Agreement was ratified by then President Benigno Aquino III in 2015, and has been pending in the Senate Committee of Foreign Relations since January 2016. It is the product of twenty years of negotiations, and builds on the findings and doctrines enunciated in

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Commission on the Limits of the Continental Shelf (Apr. 12, 2012), https://www.un.org/Depts/los/clcs_new/submissions_files/phl22_09/phl_rec.pdf.

101 Frances Mangosing & Leila B. Salaverria, *Palace Objects to China Naming PH Rise Features*, INQUIRER.NET (Feb. 15, 2018, 07:00 AM), http://globalnation.inquirer.net/164203/palace-objects-china-naming-ph-rise-features.

102 Exec. Ord. No. 25 (Phil.).

103 Proc. No. 489 (Phil.).

104 An Act Providing for the Establishment and Management of National Integrated Protected Areas System, Defining Its Scope and Coverage, and for Other Purposes, Rep. Act No. 7586, O.G. (June 1, 1992) (Phil.).

the landmark *Island of Palmas* arbitration between the two States' colonial predecessors, the United States and the Netherlands.[105] While concurrence to the boundary agreement's ratification is already approved in principle, lawmakers continue to cite as problematic the frequent detention of Filipino fishermen, and interdiction of Philippine-flagged vessels in Indonesia, for alleged violations of fisheries laws along the two States' porous maritime border.

The Philippines and Indonesia have likewise entered into a Trilateral Cooperation Agreement (TCA) with Malaysia on 14 July 2016, for the conduct of joint naval and air patrols and enhanced information-sharing, to combat acts of armed robbery, kidnapping, piracy, and terrorism in the tri-border area in the Sulu Sea.[106] The coordinating mechanisms employed by the three States under the TCA are often credited as instrumental to the decrease of incidents of armed robbery and piracy in the region.

### d *Proposed Legislation on Maritime Affairs*

To date, several bills remain pending before the relevant Senate committees of the 17th Congress, geared at promoting the Philippines' full compliance with its commitments under the Law of the Sea and international maritime law. These include bills for a Maritime Safety, Security, and Prevention of Ship-Sourced Pollution Act,[107] and a Department of Maritime Affairs Act.[108]

Two other bills that have been pending before the Committee on Foreign Relations since 2016 are particularly pertinent to the State's exercise of rights in maritime areas under its national jurisdiction. At the most basic level, the proposed Philippine Archipelagic Sea Lanes Act[109] and Philippine Maritime Zones Act[110] both purport to clarify ambiguities that may have resulted from the piling on of territorial treaties, the entry into force of the UNCLOS, the archipelagic doctrine, the South China Sea Arbitration Award, and inexact Constitutional and statutory language on the national territory and maritime jurisdiction. Legislators, executive officials, and law enforcement officers alike must, however, tread the process carefully, since enacting either or both pieces of legislation would potentially reduce the breadth of Philippine jurisdictional rights, and require vast human and material resources for the maintenance of security in the subject maritime zones.

105 Island of Palmas Case (Neth. v. U.S.), 2 U.N. Rep. of Int'l Arb. Awards 829 (Apr. 4, 1928).

106 Press Release, Department of National Defense of the Philippines, Defense Ministers Affirm Trilateral Cooperative Agreement (Aug. 3, 2016), http://www.dnd.gov.ph/PDF%20 2016/Press%20-%20Trilateral%20Meeting%20Statement.pdf.

107 S. 2135, 17th Cong. (2018) (Phil.).

108 S. 477, 17th Cong. (2016) (Phil.).

109 S. 92, 17th Cong. (2016) (Phil.).

110 S. 93, 17th Cong. (2016) (Phil.).

# Current International Legal Issues: Taiwan

*Kuan-Hsiung Wang*

## 1 Introduction

Taiwan is an island situated 124 miles off the eastern shore of the Chinese mainland and surrounded by the East China Sea, West Pacific Ocean, Bashi Channel, and Taiwan Strait. Owing to its strategic location 725 miles south of Japan and 207 miles north of the Philippines, Taiwan used to play a key role during the Cold War period and was praised as an "unsinkable aircraft carrier" during the Korean War (1950–1953). Taiwan faces several international legal issues including: Taiwan's international legal status (including Taiwan and mainland China relations, also referred to as "cross-strait relations"), concluding international treaties, participating in international organizations, environmental law issues, law of the sea issues, as well as the relationship between international and domestic law. This chapter will introduce those issues which are crucial to Taiwan's practices in international law.

## 2 International Legal Status

Taiwan's international legal status has been an issue since 1949. In December 1949, due to its defeat in the civil war with the Chinese Communist Party (CCP) between 1945 to 1949, the government of the Republic of China (ROC) retreated to Taiwan while the CCP established the People's Republic of China (PRC) in Beijing. Since then, two Chinese regimes have existed, both of which claim to be the sole legal representative of the whole Chinese people and to be entitled to the territory of the whole of China.

In 1949, Nationalist forces led by Chiang Kai-shek fled to the island of Taiwan and established its administration there while still claiming to be the legitimate government of all of China including the Chinese mainland. At the same time, the Chinese Communist forces led by Mao Zedong, in control of mainland China, established the People's Republic of China (PRC) in 1949, which also claimed to be the legitimate government of China, including the island of Taiwan. It is a fact that both sides of the Taiwan Strait claim to be the representative of China. This can be viewed from their respective constitutions. For example, according to Constitution of the Republic of China, Article 4 stipulates that, "The territory of the Republic of China according to its

existing national boundaries shall not be altered except by resolution of the National Assembly."

Furthermore, the Preamble of the Constitution of the People's Republic of China states that:

> Taiwan is part of the sacred territory of the People's Republic of China. It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.

The United Nations had become the central battlefront on the matter of the sole representation of China during the 1950s and 1960s. Since the United Nations General Assembly passed Resolution 2758 in 1971 that recognized the PRC as "the only legitimate representative of China to the United Nations" and to expel the representatives of Chiang Kai-shek from the United Nations, Taiwan faced growing isolation from the international community. Currently in 2019, only 16 countries have official diplomatic relations with Taiwan.[1]

However, Taiwan (ROC) has not vanished from the international community. It still retains official diplomatic relations with those 17 countries as well as close economic relations with most members of the international community. As a result, particular "unique" international legal issues concerning Taiwan's status are present. For example, agencies of foreign governments, such as the American Institute in Taiwan, operate as *de facto* embassies of their home countries in Taiwan, and Taiwan operates similar *de facto* embassies and consulates in most countries under the nomenclature of the "Taipei Representative Office" (TRO) or "Taipei Economic and Cultural (Representative) Office" (TECO).

## 3 International Treaties

As far as the capacity to conclude agreements or treaties is concerned, every state possesses this capacity.[2] Statehood is an important element in obtaining such capacity. According to the International Law Commission's Commentary, the term "State" used in Article 6 of the Vienna Convention on the Law of Treaties "with the same meaning as in the Charter of the United Nations, the

1 These countries are Belize, Eswatini, Guatemala, Haiti, Holy See, Honduras, Kiribati, Marshall Islands, Nauru, Nicaragua, Palau, Paraguay, Saint Lucia, St. Kitts and Nevis, St. Vincent & the Grenadines, and Tuvalu.

2 The Vienna Convention on the Law of Treaties, Article 6 provides that "[e]very state possesses capacity to conclude treaties."

Statute of the Court, the Geneva Convention on Diplomatic Relations; i.e. it means a State for the purpose of international law."[3]

Under such circumstances, Taiwan's capacity to conclude international agreements is restricted if other parties consider Taiwan not to be a state. In the case of a bilateral agreement, a non-recognising state could refuse to negotiate with Taiwan. In multilateral agreements, the non-recognised state will be regarded by non-recognising states as incompetent to conclude a multilateral treaty. Due to its recognition of the PRC, the UK refused to regard the signature by the ROC government to the International Sugar Agreements of 1953 and 1958 as valid on behalf of China.[4] The UK issued the following declaration: "At the time of signing the present Agreement I declare that since the Government of the United Kingdom does not recognise the Nationalist authorities as the competent Government of China."

In the *International Registration of Trade-Mark* (*Germany*) case, the judgment of the court also made this point clear that "[i]n relation to other States which do not recognise it as a subject of international law, such an entity cannot be a party to a treaty. . . ."[5] Hence, under the circumstances of non-recognition, it is difficult for Taiwan to conclude agreements with other states. Nevertheless, Taiwan is still able to accede to certain agreements with functional purposes. For instance, in the context of the WTO, Taiwan acceded to the Agreement Establishing the World Trade Organization and became a member of the WTO in January 2002 under the name of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).[6]

## 4 Participation in International Organizations

Apart from acceding to the WTO, Taiwan also participates in other international organizations. Its participation in regional fishery management

3 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 192 (1966).

4 MAJORIE WHITEMAN, 2 DIGEST OF INTERNATIONAL LAW 53–54 (1963); 6 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 302–03, 508–09 (1957).

5 *International Registration of Trade-Mark* (*Germany*) *Case*, 28 INTERNATIONAL LAW REPORTS 82 (1959). *See also* OPPENHEIM'S INTERNATIONAL LAW 199 (Robert Jennings & Arthur Watts eds., 1992).

6 Agreement Establishing the World Trade Organization, Article XII ACCESSION: "1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto."

organizations (RFMOs) is an example. In the absence of an effective centralized authority in dealing with the matters of international fisheries, the establishment of regional fisheries organizations are probably a better alternative to secure sustainable conservation and management of transboundary marine resources. Such regional fisheries cooperation involves efforts by states to overcome collective action problems related to the use of shared and common fish stocks. This cooperation arises when two or more states concerned identify a shared problem or goal which requires a common and co-operative solution. Such cooperation is often formalized through bilateral or multilateral agreements establishing principles, rules, procedures and institutional organizations for the implementation of cooperation between the parties. In many cases these agreements are institutionalized by the formation of RFMOs.

Taking the Inter-American Tropical Tuna Commission (IATTC) as an example, on May 31 1949, the United States and Costa Rica signed the "Convention for the Establishment of an Inter-American Tropical Tuna Commission." The 1949 IATTC Convention entered into force on March 3, 1950 when the IATTC was established. It is one of the oldest RFMOs in the world. In 1998, it was decided that the IATTC and the 1949 IATTC Convention should be modernized to take into account recently adopted international instruments, such as the 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement (UNFSA)[7] and the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Therefore, an Ad Hoc Working Group to Review the 1949 Convention was established.

Although there were few Taiwanese fishing vessels in the East Pacific Ocean or in the convention area of the IATTC during the 1980s and 1990s, Taiwan had been invited to participate in the IATTC meetings since 1973 with "observer" status under the name of "Taiwan" or "Taiwan (Republic of China)." As a result of its presence and the consequent concern regarding Taiwanese fishermen operations in the East Pacific Ocean and to enhance conservation and management of tuna resources, the ROC government expressed its willingness to participate more directly in the work of the IATTC. Most of the Working Group delegates accepted that it was both practical and important to ensure Taiwan's participation in the IATTC framework. In other words, Taiwan's participation was not an issue *per se*, however, it was benefit of its status and capacity that was in debate.

7 *See* Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, http://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm/.

In June 2003, the Working Group recommended to the 70th Meeting of the IATTC that a new convention, the Antigua Convention,[8] be adopted. According to the Convention, the status of Taiwan is as a "fishing entity," by which the Antigua Convention takes a similar approach as the 1995 UNFSA. A *mutatis mutandis* modality was used to confer rights and obligations to fishing entities. Therefore, Taiwan as a fishing entity will be able to enjoy all the rights and obligations stipulated in the Antigua Convention on an equal footing with other members of the Commission. Taiwan's participation issue for the IATTC was resolved such that Taiwan will be able to participate in this RFMO in the capacity of a fishing entity and with an organizational status as a member of the Commission under the designation of Chinese Taipei.

## 5 Law of the Sea Issues

### a *Maritime Claims in the East China Sea*

The East China Sea is a semi-closed sea, with a total area of around 482,000 square miles, bordered by the Yellow Sea to the north, the South China Sea and Taiwan to the south, Japan's Ryukyu and Kyushu islands to the east, and the Chinese mainland to the west. Scientific research shows there are potentially abundant oil and natural gas deposits. This has made the East China Sea to become one of the flashpoints in the East Asian region.

The width of the East China Sea is less than 400 nautical miles between the littoral states with the immediate implication that the presence of two 200 nautical miles exclusive economic zones creates the circumstances of having no areas of high seas in the region. Furthermore, littoral states' extension of their maritime jurisdiction inevitably creates overlapping claims and areas. This would lead to disputes over the exploration and exploitation of fishery and hydrocarbon resources, as well as the control of strategic areas. Some of the developments in the region are making the situation much worse. There has been a ceaseless sovereignty dispute over the Diaoyutai Islands between China, Japan, and Taiwan for decades, but the center of the dispute seems to be the need for living resources or non-living resources. According to a 1968 research report, "Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea" (also known as Emery Report), there is

8 *See* Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (also known as "Antigua Convention"), http://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf.

indication that "[s]ediments beneath the continental shelf and in the Yellow Sea are believed to have great potential as oil and gas reservoirs. . . . The shallow sea floor between Japan and Taiwan appears to have great promise as a future oil province of the world" which has inflamed the conflict among the littoral states.

The disputes in the East China Sea can be divided into two parts: one is the sovereignty dispute over the Diaoyutai islands; and the other is the delimitation of the maritime areas surrounding those islands. Both parts are so entangled with one another that it is difficult to find a solution.

In terms of the sovereignty issue, the ROC government asserts that the Diaoyutai Islands are an inherent part of the territory of the ROC that fall under the administrative jurisdiction of Daxi Village in Toucheng Township, Yilan County, Taiwan. Whether looked at from the perspective of history, geography, geology, practical use or international law, the Diaoyutais are indisputably an inherent part of its territory.

The ROC claims that its continental shelf is based on the natural prolongation principle. This position could be seen from the reservation made by its Legislative Yuan in 1970 when it decided to ratify the 1958 Geneva Convention on the Continental Shelf. The reservation states that:

> With regard to the determination of the boundary of the continental shelf as provided in Paragraphs 1 and 2 of Article 6 of the Convention, the Government of the Republic of China considers:
>
> 1. that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and/or opposite each other shall be determined in accordance with the principle of the natural prolongation of their land territories; and
> 2. that in determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account.

Such claim was also expressed in its 1998 Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China, Article 2(3) which provides that "[t]he continental shelf of the Republic of China is the submarine area that extends beyond its territorial sea through the natural prolongation of its land territory to the outer edge of the continental margin."

It is well known that the ROC, the PRC and Japan all claim sovereignty over the Diaoyutai Islands, which are situated on the edge of the continental shelf extended from the Chinese mainland and Taiwan. From the ROC and PRC perspective, the natural prolongation is the principle to be used in deciding the limits of the continental shelf. In such case, the limit of the continental

shelf in the East China Sea is to be located in the central part of the Okinawa Trough.

### b *Maritime Claims in the South China Sea*

The littoral States surrounding the South China Sea claim sovereignty over all or part of the islands, rocks, reefs, or sandbanks in the area. The ROC and the PRC governments have essentially identical positions toward the legal status of the geographical features in the South China Sea because they draw on the same historic evidence and practices.

In 1947, the ROC Ministry of the Interior's subsequent proposal to the central government to "temporarily transfer jurisdiction of the islands to the ROC Navy" was approved. In addition, an official map titled "Map of the Location of the South China Sea Islands" was released that showed the Pratas Islands, Macclesfield Bank, Paracel Islands, and Spratly Islands within the 11 dotted U-shaped lines.

A closer examination of the map titled "Map of the Location of the South China Sea Islands" shows that there are 11 intermittent dotted lines encompassing most of the islands and islets in the South China Sea. The series of lines starts from the estuary of the Bei-Lun River, which is the boundary river between China and Vietnam. The first two segments go through the middle part of Tonkin Bay. The third and the fourth segments are located between Vietnam and the Paracel Islands as well as the Spratly Islands, respectively. Then, the fifth and the sixth lines take a circumgyration back toward the north. At the southernmost point, the lines include the James Shoal, which is claimed as the southernmost territory of China. The position of the seventh and the eighth lines are in the middle between the Spratlys and the north coast of Borneo as well as Palawan Island. The last three segments could be treated as a subseries of the U-shaped lines because they represent the continuation of the previous lines and they also imply a maritime division between Taiwan and the Philippines. It is reasonable to conclude that the median line principle was applied in making the U-shaped lines. This presumption can be clarified by the seventh segment, which not only demonstrates the division between Spratlys and Sabah (the northern part of Borneo), but also shows a delimitation between the Philippine Balabac Island and the Malaysian State of Sabah with a short side segment connected with the seventh one.

Furthermore, the manner of depicting the dotted lines is the same as the one applied on the map to the national boundaries between China and Vietnam as well as Vietnam and Cambodia. However, the ROC government took a conservative position by using dotted lines in an inconsecutive fashion. The implication for this is possibly to leave room for future negotiations.

### c *Fishery Disputes*

Taiwan is a legitimate claimant to the island sovereignty disputes in the East and South China Seas. However, due to problems with Taiwan's international status, a frequent issue that arises is to determine what role Taiwan can play in these important and timely matters. The development of fishery cooperation between Taiwan and Japan is worth giving attention in approaching this question.

In taking into consideration the fostering of regional peace and stability, economic prosperity and the sustainable development of the marine environment, as well as seeking to find a path to coexistence and mutual prosperity, former President Ma Ying-jeou declared the East China Sea Peace Initiative in August 2012 and called on all parties concerned to:

1. Refrain from taking any antagonistic actions;
2. Shelve controversies and not abandon dialogue;
3. Observe international law and resolve disputes through peaceful means;
4. Seek consensus on a code of conduct in the East China Sea; and
5. Establish a mechanism for cooperation on exploring and developing resources in the East China Sea.[9]

The main points of the Initiative are "shelving disputes and working on joint development". These ideas also conform to the "provisional arrangement" which is provided in the UNCLOS Article 74(3) on EEZ delimitation and Article 83(3) on continental shelf delimitation. The text reads:

> Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Having a closer look at the wording in the UNCLOS, states in dispute are encouraged to take the following actions:

A. Initiate negotiations in good faith. Under Articles 74(3) and 83(3), the states concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical

9 Ministry of Foreign Affairs of the Republic of China (Taiwan), East China Sea Peace Initiative (5 August 2012), https://www.mofa.gov.tw/en/News_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=8791CAB0BB21333B.

nature. The phrase, "in a spirit of understanding and cooperation", indicates that the parties concerned should negotiate in a spirit of good faith (or *bona fide*). The obligation to seek agreement in good faith has been defined in many well-established precedents of international law.

B. Self-restraint. Even if the parties fail to reach a final agreement, they still have to restrain themselves from taking any action that would cause the dispute to deteriorate. That is to say, mutual restraint should be exercised pending final agreement or settlement in order not to impede the completion of the final delimitation. Only under such a presumption can the arrangement correspond to the spirit of the provision, not to jeopardize or hamper the reaching of the final agreement.

In addition, two aspects of the provisional arrangements should not be overlooked:

A. Transitional nature: In the interests of international peace, the states concerned shall enter into provisional arrangements so as not to jeopardize or hamper the reaching of the final delimitation.

B. Practical nature: Because the provisional arrangement is of a practical nature, it focuses on practical issues, i.e. utilization of resources, and puts the maritime boundary/jurisdiction delimitation and sovereignty issues aside.

The East China Sea Peace Initiative would be meaningful in the present circumstances because: on the one hand, "promoting joint development" might be a better way to ease the disputes; while on the other hand, it is also important to observe the role that Taiwan could and might play since Taiwan has a position of leverage. The practice of the Taiwan-Japan Fishery Agreement of 10 April 2013 is a good example of the East China Sea Peace Initiative.[10]

There are some legal points which are noteworthy if the Agreement is to be reviewed thoroughly:

1. A wider "Agreement Application Zone" is designated for fishermen from both sides who may conduct fishing operations without being disturbed by the other side. In other words, this Zone is a joint fishery zone which could accommodate fishery activities from both Taiwan and Japan.
2. Due to heavy fishery activities by Taiwanese and Japanese fishermen and for the purposes of regulating the operation of fisheries, a "Special Cooperation Zone," located in the south-east corner of the aforementioned

10 *See* Taiwan-Japan Fishery Agreement, https://www.mofa.gov.tw/Upload/WebArchive/979/The%20Taiwan-Japan%20Fisheries%20Agreement%20(illustrated%20pamphlet).PDF.

"Agreement Application Zone," has been designated and is a matter for further discussion by the Taiwan-Japan Fishery Committee. This Committee was set up on 7 May 2013.

3. There is no accord in the Agreement regarding the area of 12 nautical miles surrounding the Diaoyutai Islands. This is a result of shelving the sovereignty disputes and will be subject to future discussion. However, this might be one of the most controversial points causing a lot of discussion and discontent.

The Agreement is a good start for sustaining peace in the East China Sea. It focuses on the fisheries issue and puts aside the sovereignty or delimitation issues, which is a praise worthy move made by both Taiwan and Japan. It is also a putting into practice of the "provisional arrangement" stipulated in the UNCLOS. Nonetheless, there are many matters to discuss and to be developed in the future between the parties concerned.

# Current International Legal Issues: Thailand

*Kitti Jayangakula**

## 1 Introduction

As a member of the international community, Thailand plays an active role in participating in the international legal system and implementing international obligations into the Thai domestic legal system. The country has some interesting international legal issues, which reflect Thailand's application of international law as well as the practice of Thailand in integrating international law at the domestic level. Human rights is one of the key issues in which Thailand has been involved. The country is a party to seven of nine core human rights treaties; however, it has been facing some practical problems with regard to its application. Next, the issue of human trafficking in women and children has become an important problem for not only the concern of Thailand but, also regional (ASEAN) and global concerns. During the last five years, Thailand has taken not only legal measures but also political and social measures to fight human trafficking; however, the problem still remains in the country. One last issue facing Thailand is the issue of migrant workers. The number of migrant workers moving into Thailand is increasing gradually, and the country has improved domestic measures in every aspect to meet international standards with regard to the protection of migrant workers and also their families.

## 2 Human Rights

Human rights violations have been pointed to as one of the most controversial problems in Thailand, in particular, during the period after the military coup in 2014 until the present, where the rule of law in the country has been questioned and the violation of fundamental rights and freedom of people has happened frequently. Importantly, the current junta government has broad authority to limit or suppress fundamental human rights and is granted immunity for its actions.

Thailand has witnessed various changes concerning human rights. The country voted for the 1948 Universal Declaration of Human Rights (UDHR).

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Gradually, Thailand became a party to a number of human rights treaties.[1] Nevertheless, after the coup in 2014, fundamental rights and freedom of people have been restricted under the administration of the junta government. In particular, when the Interim Constitution was promulgated in late 2014, freedom of expression and association which is recognized under the ICCPR has been limited. The Junta ordered print media not to publicize commentaries critical of the military. TV and radio programs were instructed not to invite guests who might comment negatively on the situation in Thailand. Furthermore, the junta has detained politicians, activists, journalists, and people that it accused of supporting the deposed government, disrespecting the monarchy, or being involved in anti-coup protests and activities. After the coup, the country has stepped into the process of reformation. A number of laws and regulations were promulgated, in particular, the Constitution of the Kingdom of Thailand in 2017. And human rights guarantees have been re-recognized under the current 2017 Constitution of the country.

Section 4 of the 2017 Constitution stipulates that human dignity, rights, liberties and equality of the people shall be protected and that the Thai people shall enjoy equal protection under this Constitution.[2] In addition, Chapter III of the 2017 Constitution recognized rights and liberties of the Thai people and Section 27 provides the equal protection of rights and liberties of all people in the country. The unjust discrimination against a person

1 These human rights treaties are: International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 U.N.T.S. 1 (entered into force Jan. 4, 1969); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC]; and Convention on the Rights of Persons with Disabilities, opened for signature Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008). *See* International Convention for the Protection of All Persons from Enforced Disappearance, opened for signature Feb. 6, 2007, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010) [hereinafter CED]. Thailand has already signed the CED but not yet ratified and now in the considering process for the ratification. *See also* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003) [hereinafter CRMW]. The CRMW is the only core human rights treaty, which Thailand has not yet processed to become a party.

2 Constitution of the Kingdom of Thailand (B.E. 2560 (2017)), § 4.

on the grounds of differences shall not be permitted.[3] All rights shall be guaranteed in accordance with the international standard and these rights of the people shall be respected, protected and fulfilled in practice.

## 3 Human Trafficking in Women and Children

These days, Thailand is now facing with the problem of human trafficking, in particular, in women and children. Thailand is a source, transit and destination country for trafficking of children and women for sexual purposes and labor, including forced begging. The number of persons, in particular women and children, that are trafficked to all regions around the globe is increasing gradually. At the same time, women and girls from neighboring countries such as Myanmar, Cambodia, and Vietnam transit through Thailand's southern border to Malaysia as well as in Europe and North America. In addition, women and children are exploited from the countries close to its borders such as Laos, Myanmar, Cambodia, and China, including Russia and Uzbekistan, for sexual and labor exploitation.

In line with the UDHR, the principles of equality, non-discrimination and equal protection of the law are binding Thailand. In addition, Thailand ratified the CEDAW and CRC,[4] which obligate Thailand to suppress and protect women and children from all forms of trafficking, exploitation and sexual abuse. Also, Thailand is obligated to ensure decent work in accordance with international labor standards as it has agreed to the Declaration on Fundamental Principles

3 *Id.* at § 27. Article 27 provides that:
> All persons are equal before the law, and shall have rights and liberties and be protected equally under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of differences in origin, race, language, sex, age, disability, physical or health condition, personal status, economic and social standing, religious belief, education, or political view which is not contrary to the provisions of the Constitution or on any other grounds, shall not be permitted. Measures determined by the State in order to eliminate an obstacle to or to promote a person's ability to exercise their rights or liberties on the same basis as other persons or to protect or facilitate children, women, the elderly, persons with disabilities or underprivileged persons shall not be deemed as unjust discrimination under paragraph three. Members of the armed forces, police force, government officials, other officials of the State, and officers or employees of State organisations shall enjoy the same rights and liberties as those enjoyed by other persons, except those restricted by law specifically in relation to politics, capacities, disciplines or ethics.

4 Thailand is a party to CEDAW and CRC, and their Optional Protocols. *See* CEDAW, *supra* note 1; CRC, *supra* note 1.

and Rights at Work set by the International Labour Organization (ILO) in 1988, as well as ratified the labor conventions issued by the ILO.

ILO Convention No. 182 spotlights the urgency of action to eliminate as a priority the worst forms of child labor, without losing the long-term goal of the effective elimination of all child labor. According to this Convention, Thailand shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor. In addition, Convention No. 138 ensures that children do not start working too young by setting the age at which children can legally be employed. Furthermore, the ILO's mandate on gender equality is to promote equality between all women and men in the world of work.

At the regional level, Thailand is serious about strengthening cooperation against human trafficking through bilateral and multilateral agreements among countries in the Mekong Sub-region (such as Cambodia, Lao PDR, Vietnam, and China), which is susceptible to human trafficking. The following four bilateral and multilateral MOUs have been signed.

In addition, Thailand implemented those international obligations into the domestic level. A number of domestic laws regarding the issue of exploitation of women and children have been promulgated. In 1997, the Penal Code Amendment Act (No.14) B.E. 2540 (1997) amended a number of Sections of the Penal Code to criminalize human trafficking for a sexual purpose. Section 282 of the Penal code defines sexual offences to include the procurement or trafficking of boys or girls under 18 years old for the purpose of sexual gratification regardless of consent. Further, the procurement, lure, traffic, or bringing of a man or woman for an indecent sexual purpose committed by using deceitful means, threats, physical assault, immoral influence, or mental coercion by any means and by the offender is punished according to Section 283 and Section 284 of the Penal Code.

In 2008, the Prevention and Suppression of Human Trafficking B.E. 2551 (2008) was promulgated. The Act provides a comprehensive approach to addressing the issue of human trafficking and makes the punishment of traffickers more severe and protection of victims, including regular and irregular migrants, more effective. In addition, the Act is targeted at preventing, circumventing, and suppressing a wider range of activities related to human trafficking, including the procurement or trafficking of persons into or out of Thailand for prostitution, sexual exploitation, production/distribution of pornography, slavery, forced labor or services, begging, organ amputation for commercial purposes, or any other forms of exploitation.

In 2017, the National Legislative Assembly of Thailand enacted the Prevention and Suppression of Human Trafficking (No. 3) Act B.E. 2560 (2017) for

amending the definitions of terms and adding acts for the offence of human trafficking contained in the Prevention and Suppression of Human Trafficking Act, B.E. 2551 (2008). It redefined the meanings of the acts for the purpose of exploitation as: procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person, by means of the threat or use of force, abduction, fraud, deception, abuse of power, illegal exertion of influence over others on account of their physical, psychological, educational, or any kind of vulnerability, threat to take abusive legal action against others, or of the giving money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control; or procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child.

## 4 Migrant Workers

The issue of migrant workers is also one of the key issues in Thailand. Currently, a number of migrants are living in Thailand, both legal and illegal migrants. Interestingly, some surveys and the available researches concerning migrant labor show that migrants are being hired to work in various types of jobs such as in agricultural work and on fishing boats, in particular, children. Migrant girls and young women are being hired as domestic workers. In addition, there is another group of migrant children who come in to be beggars or to sell small items in the street. Migrants are perhaps more victims of crimes, such as smuggling and trafficking of broker syndicates and gangs, than perpetrators themselves.

Migrant workers in Thailand are often forced to do heavy and difficult work for low wages and are placed in unsafe or unsanitary work environments. Most migrants are unable to access proper health care and generally are not protected by Thai labor laws. Importantly, migrants frequently become victims of systematic violence (including torture and killings), extortion, unlawful arrest, detention, and other kinds of exploitation in their everyday lives. Women migrants are more likely to encounter abusive practices than their male counterparts. There have been a considerable number of well-documented reports of physical violence against children and women, but very few arrests have been made in any of these cases.

The vulnerability of women migrants partly stems from the physical and social isolation of their employment. While male migrants usually live and work with other migrants, women migrants often work in jobs in the domestic and service sectors, in which they may have no contact with other migrant

women. Female migrants are likely to be trapped by the human trafficking trade and/or physically and sexually abused.

As a state party to a number of major international human rights treaties, Thailand has international obligations to respect human rights of all persons and provide them with basic social services. Thailand is also obligated to ensure decent work in accordance with international labor standards as it has agreed to the Declaration on Fundamental Principles and Rights at Work set by the ILO in 1988.

In addition, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers was also jointly signed with all other ASEAN members, including Thailand, in 2007. Under the agreement, Thailand has obligations to promote decent, humane, productive, dignified and remunerative employment for migrant workers, as well as to establish and to implement resource development and reintegration programs for migrant workers in their countries of origin. Hence, although the government of Thailand has not signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, nor the three specific migrant worker standards of ILO *i.e.*, ILO Conventions No. 66 on Migration for Employment Convention, 1939; No. 97 on Migration for Employment Convention (Revised), 1949; and No. 143 on Migrant Workers (Supplementary Provisions) Convention, 1975, the standards contained in these instruments generally overlap with the main rights conventions that already bind the country.

Also, Thailand has signed bilateral MOUs with the countries such as Cambodia, Lao PDR, and Myanmar on the "Cooperation in the Employment of Workers" as a plan to regularize cross-border migrant workers in Thailand. Terms of the MOU reaffirm that the right of migrant workers who have entered the country under the MOU are to be protected equally with Thai nationals.

The 2017 Constitution recognizes human dignity, rights, and liberties of people, and they enjoy equal protection under the law.[5] This means that the government cannot discriminate against migrants because of their being non-Thai, stateless, or undocumented persons.

Currently, the Royal Ordinance Concerning the Management of Foreign Workers' Employment B.E. 2560 (2017) and the Immigration Act B.E. 2522 (1979) are two guidelines for immigration. The Immigration Act clearly indicates that when an immigrant enters the country illegally, that is, without a visa and/or acts in breach of the immigration law, he or she may be deported and/or penalized by other sanctions. The Alien Working Act requires an alien to have a work

5 Constitution of the Kingdom of Thailand (B.E. 2560 (2017)), §§ 4, 27.

permit to work in Thailand and to work only in activities designated by law by the relevant authorities. Hence, only a small number of skilled workers can be permitted to work in Thailand. Apart from the above laws, Thailand has also enacted a number of domestic laws regarding the issue of the right of workers to receive security and welfare. The Labour Protection Act B.E. 2541 (1998) is the main law specifying the rights and duties of both employers and employees, with provisions for minimum standards to which all employees must adhere regarding all aspects of employment, including working days, holidays, leave, wages, overtime, work safety and environment, welfare as well as employment of women and children. Under the Act, all workers are protected regardless of race, nationality, or any other status. Hence, all employees working in Thailand are able to enjoy protection under the Labour Protection Act, including migrant workers. If the migrant workers are not registered with the Department of Labour Protection and Welfare, the Department will coordinate with relevant agencies, especially the Department of Employment, the Immigration Office, or the Royal Thai Police to provide assistance as appropriate.

The Labour Protection Act provides protection to all employees, including migrant workers. However, the Act excludes the protection from agricultural work, marine fishing, the loading or unloading of goods on and from maritime vessels, work to be performed at home and transportation (Section 22). The rights of domestic workers and agricultural workers are protected under the Ministerial Regulation on the Protection of Home Workers B.E. 2547 (2004) and the Ministerial Regulation on the Protection of Agricultural Workers B.E. 2548 (2005). However, these are not effective enough since there is no enforcement mechanism. There is no job security and no fair wage. Some jobs are risky and hazardous, with longer work hours than the labor standard. In addition, the worker could not access the Social Security Fund and other relevant public services.

## 5 Conclusion

At present, Thailand is in the process of the country's reformation. The country continues to participate in the international community and also the application of domestic measures, which is in accordance with international standards. Since 2014, after the coup, the country has faced the problem of the violations of fundamental rights and freedom, and the country also has been questioned on adherence to the rule of law. Solving these current problems will lead to the integration of Thailand into the ASEAN Community as well as the world community.

# Current International Legal Issues: Vietnam

*Trinh Hai Yen* and Ton Nu Thanh Binh***

## 1 Introduction

With the foreign policy of independence, self-reliance, peace, cooperation and development, Vietnam has been actively participating in the international legal system since Doi Moi (Renovation) in 1986. International law plays an important role in protecting sovereignty, territorial integrity, peace, security and cooperation. This article aims to introduce some of the most significant international law issues that Vietnam is currently facing and how they are being applied in practice. They are issues pertaining to the law of the sea, investment and trade law, human rights, and diplomatic protection of citizens abroad.

## 2 Law of the Sea

Vietnam, with 3,444 km of coastline, is surrounded by the South China Sea to the east, the south and the southwest. The latter is widely known as home to most maritime disputes in the Asia Pacific region, due to its geopolitical location and abundant resources. The South China Sea serves as the sea route for more than half of global trade and the majority of oil imports from the Middle East to China, Japan and South Korea, while providing 12% of global fish products, which greatly contributes to food security and economic development of China, Vietnam and the Philippines,[1] as well as non-living resources that are essential for the energy needs of industrializing countries like China.[2] Situated at the center of South East Asia, Vietnam is a key stakeholder in maritime disputes over the South China Sea. Issues pertaining to the Law of the Sea are therefore a critical concern for Vietnam, not only for the protection of national sovereignty and territorial integrity, but also for the maintenance of peace and

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1 Sharif Mustajib, *Geopolitical and Strategic Landscape of South China Sea*, http://internationalaffairsbd.com/geopolitical-strategic-landscape-south-china-sea/.

2 *China Claims Breakthrough in Mining 'Flammable Ice'*, BBC News (May 19, 2017), http://www.bbc.com/news/world-asia-china-39971667.

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security in the region. This is evidenced in the adoption of Vietnam Law of the Sea in 2012, whose objective is to clarify and reaffirm Vietnam's sovereignty, sovereign rights and jurisdiction in its respective maritime zones, as well as to regulate maritime economic development, the management and protection of the sea and islands.[3]

This part seeks to briefly introduce Vietnam's maritime law enforcement agencies (MLEA), efforts in the negotiation of the Code of Conduct in the South China Sea (COC) and response to the 2016 South China Sea arbitration.

### a *Vietnam's Use of MLEA*

Since the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS), the newly-created maritime zones have made sea management more challenging. On the one hand, there is the rise of a wide spectrum of maritime threats – from natural disasters to transboundary maritime crimes, such as environmental pollution, IUU fishing, drug trafficking, slavery, armed robbery and piracy, which requires the policing role of coast guards. On the other hand, from Vietnam's perspective, there is China's growing assertiveness to control the whole South China Sea, which calls for response from claimant states to protect their legitimate rights and interests. In this regard, it is beneficial to share the mandate of defence among navies and other MLEA, given the cost-effectiveness and flexibility in maneuver of coast guard vessels.

The new Law on Vietnam Coast Guard (VCG) was adopted in November 2018 and will come into force in July 2019. The Law, which replaces the 2008 Ordinance on VCG, aims to clarify the responsibilities and function of the VCG, giving it more flexibility to operate. Under this Law, the VCG is a core force of Vietnamese MLEA due to its full spectrum of charges in maritime law enforcement in all maritime zones. It has the double role of a military force and a professional "police at sea,"[4] being responsible for defending national sovereignty, sovereign rights and jurisdiction, maintaining security, order and safety, preventing and combating crimes and violations of the law, as well as search and rescue activities in accordance with international law.[5]

Unlike other professional forces, the VCG has two rights specialized for military ships: hot pursuit and open fire. The right of hot pursuit is realized outside the territorial sea and safety zones around artificial islands, installations and structures on continental shelf zone, to the high sea for subjects who have committed violations in the internal water, territorial sea, exclusive economic

3 LAW OF THE SEA OF VIETNAM, No. 18/2012/QH13, *promulgated by* the National Assembly on June 21, 2012, art. 1.

4 LAW ON VIETNAM COAST GUARD [VCG] arts. 3, 8.

5 VCG art. 8.

zone or on continental shelf of coastal state.[6] The right of opening fire can be adopted amid a hot pursuit over vehicles at sea that violate laws and regulations of Vietnam, but only limited to exceptional cases.[7]

The key of success of Vietnamese MLEA lies in the mechanism of division and coordination. The VCG acts as a core force of the MLEA with the other professional forces in satellite, such as the Navy, Vietnamese Fishery Resources Surveillance Force (VFRSF), Vietnam Border Defense Force, the maritime militia and self-defense force. In emergency situations, officers and soldiers of the VCG may mobilize people, vessels and civil engineering means and equipment of other MLEAs.[8] This mobilization must depend on the actual capabilities of the mobilized persons, vessels or civil engineering means or equipment, which must be returned immediately after the emergency situation ceases to exit.[9]

The effectiveness of coordination among Vietnam's MLEA has been proven in the Haiyang Shiyou-981 oil rig incident.[10] On May 1, 2014, the HYSY 981 oil rig, escorted by a large fleet of armed vessels, military ships and aircraft, was placed deeply inside Vietnam's exclusive economic zone.[11] In accordance with the UNCLOS, Vietnam demanded China to withdraw the oil rig. In response, China announced its intention to deploy the oil rig until the end of August 2014 as a normal operation in the Chinese claimed water. Vietnam mobilized about 60 vessels of the VCG, VFRSF and militia under the command of the coast guard to prevent this illegal action. Meanwhile, China used more than 130 vessels from China Coast Guard (CCG), civilian fishing and Chinese navy vessels to threaten by ramming or firing water cannons. Throughout the period of over two and a half months, despite the ramming and firing with high-pressure water cannons by the Chinese part, the Vietnamese MLEA remained patient and persistent in demands towards China. Eventually, on July 15th, 2014, the Chinese National

6 U.N. Convention on the Law of the Sea art. 111, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

7 VCG art. 14.

8 VCG art. 13.

9 *Id.*

10 *Fisheries Surveillance Force*, GLOB.SECURITY.ORG, https://www.globalsecurity.org/military/world/vietnam/fisheries-surveillance.htm (last visited Mar. 24, 2019).

11 Michael Green et al., *Counter-Coercion Series: China-Vietnam Oil Rig Standoff*, ASIA MAR. TRANSPARENCY INITIATIVE (June 12, 2017), https://amti.csis.org/counter-co-oil-rig-standoff/; Carl Thayer, *4 Reasons China Removed Oil Rig HYSY-981 Sooner Than Planned*, THE DIPLOMAT (July 22, 2014), https://thediplomat.com/2014/07/4-reasons-china-removed-oil-rig-hysy-981-sooner-than-planned/; Tran Sy Vy, *Oil Rig HD 981 Incident: From the Angle of the International Law*, VIET. L. & LEGAL F. (Aug. 22, 2014), http://vietnamlawmagazine.vn/oil-rig-hd-981-incident-from-the-angle-of-the-international-law-3588.html.

Offshore Oil Company (CNOOC) announced the rig's withdrawal a month in advance.[12]

This incident has proven the rightness of Vietnam's approach in coordinating its different maritime law enforcement forces under the unique commandment of the VCG to reach its goal. Facing the Chinese detachment, which is greater in size and weapons, Vietnam MLEA convincingly demonstrated their determination to settle conflicts by peaceful means, adhering to international law, which has avoided a possible military clash between the two countries.

### b *The Code of Conduct in the South China Sea* (*COC*)

Participating in the negotiation of the COC is one of Vietnam's priorities in the law of the sea. On October 22, 2018, the 12th Party Central Committee of Vietnam passed Resolution 36/NQ-TW on "Strategy for the sustainable development of Vietnam's marine economy until 2030, with a vision until 2045." The Resolution noted that Vietnam will "actively participate in international and regional forums, especially maritime cooperation activities within ASEAN, coordinating with other countries to fully and effectively implement the Declaration on the Conduct of the South China Sea (DOC) and promoting the signing of the Code of Conduct in the South China Sea (COC)."[13]

At the 15th ASEAN-China Senior Officials' Meeting on the Implementation of the Declaration on the Conduct of Parties in the South China Sea in Changsha, China, on 27 June 2018, ASEAN Member States and China had agreed on a Single Draft COC Negotiating Text.[14] However, challenges still lie ahead for the negotiation on COC as Vietnam and China retain their opposing opinions. For Vietnam, the COC should regard many of the actions carried out by China in the South China Sea in recent years as violating international law, including artificial island building, blockades and use of force.[15] Vietnam also proposes a ban on the establishment of new Air Defence Identification Zones, which

12 Michael Green et al., *supra* note 11.

13 *Về Chiến lược phát triển bền vững kinh tế biển Việt Nam đến năm 2030, tầm nhìn đến năm 2045* [*About the Strategy of Sustainable Sea Economic Development in Vietnam to 2030, Vision to Year 2045*] Oct. 22, 2018, Resolution No. 36-NQ/TW.

14 Ass'n of Southeast Asian Nations [ASEAN], *Joint Communique of the 51st ASEAN Foreign Ministers' Meeting*, ¶ 74 (Aug. 2, 2018), https://asean.org/storage/2017/08/51st-AMM-Joint-Communique-Final.pdf?fbclid=IwAR2Uh69XSda19I8c_grlmyAkiIOjGjxWwobBG-WLCwhJIc05UvtsOIA5YqM.

15 Greg Torode, *Tough South China Sea Talks Ahead as Vietnam Seeks to Curb China's Actions*, REUTERS (Dec. 31, 2018, 8:10 AM), https://www.reuters.com/article/us-china-southchina sea-asean/tough-south-china-sea-talks-ahead-as-vietnam-seeks-to-curb-chinas-actions-idUSKCN1OT0ML.

China unilaterally announced over the East China Sea in 2013.[16] Most remarkably, Vietnam demands states to clarify their maritime claims in the South China Sea in accordance with international law, an apparently opposing attempt with the China's policy of blurring its claims with the "nine-dash line."[17]

In 2020, Vietnam will hold the ASEAN Chair, which will be a significant opportunity for Vietnam to promote the COC negotiation, highlighting its guiding role in building an ASEAN community with strong solidarity and enhanced position in the region.

### c *Vietnam's Response to the 2016 South China Sea Arbitration*

Being one of the claimants in the South China Sea disputes, Vietnam closely followed the South China Sea arbitration and participated as an observer. As soon as the final award was rendered on July 12, 2006, Vietnam announced its endorsement for the judgment and reaffirmed its position on the case, as demonstrated in the Statement of the Ministry of Foreign Affairs, filed to the Tribunal on December 5, 2014.[18] It strongly supported the settlement of disputes on the South China Sea by peaceful means, refraining from the use or threat of use of force, in accordance with international law, maintaining peace, security and stability in the region.[19] On that occasion Vietnam also restated its sovereignty over the Spratlys and Paracels, sovereignty, sovereign rights and jurisdiction over its respective waters.[20]

The positive response from Vietnam is evidence that it benefited from the decision of the Tribunal. Indeed, the arbitral award agrees with Vietnam's position on several points: (1) the Tribunal has jurisdiction over the requests of the Philippines relating to the interpretation or application of the UNCLOS;[21] (2) all claims by China based on the "nine-dash line" are rejected;[22] and (3) all the maritime features claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal and the Mischief Reef and Second Thomas Shoal themselves are rocks or low-tide elevations that do not generate any maritime zones of their own.[23] The award, although binding only upon the Philippines

16 *Id.*

17 *Id.*

18 Nguyễn Hùng, *Việt Nam hoan nghênh Tòa Trọng tài đã đưa ra phán quyết cuối cùng* [*Vietnam Welcomes the Final Arbitration Award*], VOV.VN (July 12, 2016, 17:49 pm), https://vov.vn/chinh-tri/viet-nam-hoan-nghenh-toa-trong-tai-da-dua-ra-phan-quyet-cuoi-cung-529614.vov.

19 *Id.*

20 *Id.*

21 The South China Sea Arbitration (Phil. v. China), Case No. 2013–19, Award, ¶ 36 (Perm. Ct. Arb. 2016).

22 *Id.*

23 *Id.*

and China in respect of their dispute,[24] will become an inseparable part of the interpretation and application of the UNCLOS. It will thus be a reliable legal basis for Vietnam and other claimant states in the South China Sea to clarify and substantiate their claims.

## 3 Investment and Trade

### a *Negotiation and Conclusion of Investment and Trade Treaties*

In its active participation in international economic relations, Vietnam has recently joined a number of key free trade agreements, such as the EU-Vietnam Investment Protection Agreement (EVIPA) (2018), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018, in force for Vietnam on January 14, 2019), EU-Vietnam FTA (EVFTA) (Published text as of August 2018) and Eurasian Economic Union – Viet Nam FTA (2015), as well as bilateral agreements like Macedonia – Viet Nam BIT (2016), Viet Nam – Chile FTA (2015), Viet Nam – Korea FTA (2015).

In addition, Vietnam, as a member of ASEAN, is also a party to several ASEAN+1 FTAs, namely the ASEAN – Australia New Zealand FTA, ASEAN – China FTA, ASEAN – India FTA, ASEAN – Japan FTA, ASEAN – Republic of Korea FTA, ASEAN – AEC. Several FTAs are still under negotiation, such as RCEP (ASEAN+6).

### b *Disputes*

Vietnam has actively participated as claimant in five disputes under the WTO dispute settlement mechanism and respondent in eight international investment disputes. Throughout these disputes, Vietnam has made successful attempts in protecting its legal rights and interests.

#### i Investment Disputes

In the 8 investment disputes, Vietnam has won in 3 cases (*McKenzie v. Viet Nam*,[25] *Dialasie v. Viet Nam*,[26] RECOFI *v. Viet Nam*[27]), settled 1 case (*Trinh and*

24 *Id.* at ¶ 637.

25 McKenzie v. Viet Nam (Perm. Ct. Arb. 2013) (applying US-Viet Nam Trade Relations Agreement).

26 Dialasie v. Viet Nam (Perm. Ct. Arb. 2014) (applying France – Viet Nam BIT (1992)).

27 RECOFI v. Viet Nam, Ruling No. 4A_616/2015 (Fed. Sup. Ct. of Switz. 2016) (applying France – Viet Nam BIT (1992)).

*Binh Chau v. Viet Nam*[28]), 1 case is discontinued (*Bryan Cockrell v. Viet Nam*[29]) and 3 cases are pending (*Trinh v. Viet Nam*,[30] *ConocoPhillips and Perenco v. Viet Nam*,[31] *Baig v. Viet Nam*[32]). Most of these investment arbitrations were brought under bilateral investment treaties with the exceptions of two cases brought under the US-Viet Nam Trade Relations Agreement. They are mainly related to real estate activities, human health and social work activities, accommodation and food service activities, and manufacture of food products.

This success is due to Vietnam's policy in settling investment disputes. When a dispute arises, Vietnam tries to settle with the investor to avoid the costly and lengthy arbitration proceedings. For example, in *Trinh and Binh Chau v. Viet Nam*, Mr. Trinh Vinh Binh, a Dutch-Vietnamese businessman, alleged that he suffered the confiscation of assets amounting to more than US$100 Million.[33] Mr. Trinh brought claims before the UNCITRAL arbitration, then settled his claim with the Vietnamese government on confidential terms.[34]

In some cases, bifurcation of arbitrations helps host states like Vietnam to minimize costs and resources for the proceedings when they win at the jurisdiction stage. In *McKenzie v. Viet Nam*[35] and RECOFI *v. Viet Nam*,[36] Vietnam successfully objected to the tribunal's jurisdiction by alleging that the investor did not own an investment in Vietnam under the respective BIT.[37] In another

28 Trinh and Binh Chau v. Viet Nam (Stockholm Chamber of Commerce 2007) (applying US-Viet Nam Trade Relations Agreement).

29 Cockrell v. Viet Nam, PCA Case No. 2015–03 (Perm. Ct. Arb. 2014) (applying US-Viet Nam Trade Relations Agreement).

30 Trinh v. Viet Nam (ICC Int'l Ct. Arb. 2014) (applying Netherlands – Viet Nam BIT (1994)).

31 ConocoPhillips and Perenco v. Viet Nam (2017) (applying United Kingdom – Viet Nam BIT (2002)).

32 Baig v. Viet Nam, ICSID Case No. ARB(AF)/18/2 (2018) (applying Republic of Korea – Viet Nam BIT (1993)).

33 *INVEST-SD: Investment Law and Policy News Bulletin*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (May 27, 2005), https://www.iisd.org/pdf/2005/investment_investsd_may27_2005.pdf.

34 *Investment Treaty News*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Mar. 27, 2007), https://www.iisd.org/pdf/2007/itn_mar27_2007.pdf.

35 McKenzie v. Viet Nam (Perm. Ct. Arb. 2013).

36 RECOFI v. Viet Nam, Judgment of Sept. 20, 2016, Ruling No. 4A_616/2015 (Fed. Sup. Ct. of Switz.).

37 *Thông cáo báo chí của Bộ Tư pháp về vụ kiện của ông Michael McKenzie* (*công dân Hoa Kỳ*) *đối với Chính phủ Việt Nam liên quan đến dự án xây dựng khu du lịch nghỉ dưỡng tại huyện Bắc Bình, tỉnh Bình* [*Ministry of Justice Press Release on Michael McKenzie's* (*US citizen*) *Lawsuit Against the Government of Vietnam Regarding a Project to Build a Resort in Bac Binh District, Binh Dinh*], VIET. MINISTRY OF JUST. (Mar. 4, 2014), http://www.moj.gov.vn/qt/thongtinbaochi/Pages/thong-cao-bao-chi-ve-cac-su-kien.aspx?ItemID=20.

case, *DialAsie v. Viet Nam*,[38] all the claims by the investor were dismissed since no Vietnamese government agency has violated the France-Vietnam BIT, Vietnamese law or committed any misconduct.[39]

## II Trade Disputes

Since becoming a member of the WTO on 11 January 2007, Vietnam has actively used the dispute settlement mechanism of this Organization to protect its benefits under the WTO rule. Vietnam initiated five cases involving trade remedies against Vietnam's trade in goods. In two cases, *DS429 – United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam* and *DS404 – United States — Anti-dumping Measures on Certain Shrimp from Viet Nam*, the WTO Dispute Settlement Body ruled that the United States had to change its anti-dumping measures so as to be consistent with the WTO rules, ensuring benefits of Vietnam enterprises. Vietnam filed a complaint about the safeguard measure applied by Indonesia against imports in 2015 (*Indonesia — Iron or Steel Products from Viet Nam*) and two complaints in 2018 about measures of the United States imposed on Vietnamese fish fillets and pangasius seafood products (*DS536: United States — Anti-Dumping Measures on Fish Fillets from Viet Nam* and *DS540: United States — Certain Measures Concerning Pangasius Seafood Products from Viet Nam*).

Vietnam's claims in DS429 and DS404 focus on two main issues: (i) the "zeroing methodology" in the calculation of dumping margins and (ii) the application of non-market economy (NME)-wide entity rates in administrative reviews.[40]

The US's adoption of the "zeroing methodology" to calculate dumping margins has been decided as violating the Anti-dumping Agreement (ADA) and GATT in various prior WTO Appellate Body rulings;[41] therefore, Vietnam did not face any difficulty in requesting the similar finding. Regarding the application

38 Dialasie v. Viet Nam (Perm. Ct. Arb. 2014).

39 Võ Phương-Sơn Bách, *Toà án La Haye phán quyết Chính phủ Việt Nam thắng kiện vụ DialAsie* [*La Haye Court Ruled That the Vietnamese Government Won the DialAsie Case*], VIETNAM+ (Dec. 31, 2014), https://www.vietnamplus.vn/toa-an-la-haye-phan-quyet-chinh-phu-viet-nam-thang-kien-vu-dialasie/299733.vnp.

40 *US – Shrimp* (*Viet Nam*) (*DS404*), WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds404sum_e.pdf; *US – Shrimp II* (*Viet Nam*) (*DS429*), WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds429sum_e.pdf.

41 *US – Shrimp II* (*Viet Nam*) (*DS429*), *supra* note 40.

of NME-wide entity rates by the US in DS429, the Panel found this practice to be inconsistent with Arts. 6.10, 9.2 and 9.4 of the ADA since it "presumes that all producers/exporters in a non-market economy (NME) country belong to a single, NME-wide entity and assigns a single rate" to that entity.[42] In this case, Vietnam has successfully invoked paragraph 255(a) of the Vietnam Accession Working Party Report to argue that "the only special rule committed to by Vietnam concerns the substitution of surrogate values for actual values in calculating normal value."[43] Thus "the USDOC has no legal basis for applying the presumption of state ownership and control that underpins the NME-wide entity practice."[44] Vietnam's argument also relied on *EC – Fasteners* (*China*),[45] in which the Appellate Body explained that "an authority may not assume affiliation among several supplier."[46]

The DS429 case demonstrated an important issue faced by Vietnam relating to international trade law: the recognition of Vietnam as a market economy. In the WTO framework, Vietnam and China are considered non-market economies. Consequently, when determining price comparability under Article VI of the GATT 1994 and the ADA concerning products from these two countries, the importing WTO Member may use prices or costs of a third country instead of prices or costs of Vietnam or China.[47] As a result, the anti-dumping duties imposed upon products from Vietnam and China are usually much higher than those from market economies.

Recently, China has been engaged in debate with the EU over its market economy status. Paragraph 15(d) of Protocol on the Accession of China provides that "[o]nce China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated . . . [I]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession." Accordingly, China argued that it shall automatically be recognized as a market economy from December 11,

42 Appellate Body Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, ¶ 1.5.c, WTO Doc. WT/DS429/AB/R (adopted Apr. 7, 2015).

43 Panel Report Addendum, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, at B-15, WTO Doc. WT/DS429/R/Add.1 (adopted Nov. 17, 2014) [hereinafter Panel Report Addendum].

44 *Id.* at B-5.

45 *Id.*

46 *Id.*

47 Report of the Working Party on the Accession of Viet Nam, *Accession of Vietnam*, ¶ 255, WTO Doc. WT/ACC/VNM/48 (Oct. 27, 2006); Decision, *Accession of the People's Republic of China*, ¶ 15(a), WTO Doc. WT/L/432 (Nov. 10, 2001).

2016. Right after this day, China lodged a WTO complaint against the EU (DS516) and that panel is ongoing.[48]

The Report of the Working Party on the Accession of Vietnam has a similar provision with paragraph 15(d) of the China's counterpart, "the provisions of subparagraph (a)(ii) shall expire on 31 December 2018." It is recommended that Vietnam should follow the dispute between China and the EU on this issue.

To gain experience in the WTO dispute settlement mechanism, Vietnam has also participated in 33 disputes as third party at consultation, panel and appellate body stages. Some disputes, such as DS422 relating to imported shrimp to the United States or DS402, DS464, DS471 relating to calculation method of the US in anti-dumping investigations and DS490 relating to safeguard measures of Indonesia on imported steels from Taiwan, are similar to the claims Vietnam has brought against other members. Nonetheless, Vietnam rarely made third-party submissions to express its views on the disputed issues. Its contribution to negotiations on amending the Dispute Settlement Understanding is also limited. Vietnam's full participation in the meetings of the Dispute Settlement Body focuses on advocating for its claims in cases brought before the WTO. This is a priority in Vietnam's international integration policy, as stated in the Comprehensive Strategy on International Integration to 2020 with a vision to 2030.

## 4 Human Rights

In December 2018, Vietnam released its third-cycle UPR national report,[49] which provided a comprehensive review of the promotion and protection of human rights in Vietnam over the course of 5 years. According to the report, by October 2018, Vietnam has implemented 175 recommendations (96.2%) by the UN Human Rights Council's (UNHRC) second-cycle UPR which it accepted in June 2014.[50]

48 Request for Consultations by China, *European Union — Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1 (Dec. 15, 2016), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm.

49 *Vietnam's Third-Cycle UPR National Report Released*, VIET. L. & LEGAL F. (Apr. 12, 2018), http://vietnamlawmagazine.vn/vietnams-third-cycle-upr-national-report-released-6487.html.

50 National Report Submitted in Accordance with ¶ 5 of the Annex to Human Rights Council Resolution 16/21 – Viet Nam, Working Group on the Universal Periodic Review on Its Thirty-Second Session, UN Doc. A/HRC/WG.6/32/VNM/1 (Nov. 14, 2018).

A remarkable achievement of Vietnam in the law of human rights is the participation in most of the key conventions on basic human rights, such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Rights of the Child (CRC), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography, Convention on the Rights of Persons with Disabilities (CRPD), Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT). In addition, Vietnam has also participated in many international conventions on human rights and international humanitarian law, including the Geneva Conventions, Convention on the Prevention and Punishment of Genocide, Convention Statutory Limitations to War Crimes, United Nations Convention Against Transnational Organized Crime.

In terms of national law, between 2014 and 2018, Vietnam has amended, revised and promulgated 96 new laws and ordinances related to human rights. Many important laws were adopted, relating to the People's Procuracy, People's Court, new criminal law with less stringent penalties, right of transgenders, treatment of prisoners and detainees, freedom of speech and expression, freedom of religion, children rights, the reduction of administrative procedures, the use of weapons and explosives and cybersecurity.[51]

### a *Protection of Persons with Disabilities*

After signing the Convention on the Rights of Persons with Disabilities in 2007, Vietnam has actively promoted the implementation of the Convention in all areas. First, the adoption of the Law on Persons with Disabilities in 2010 shows Vietnam's strong commitment in ensuring rights of the disabled. This is the first Vietnamese law that expressly recognizes the rights of the disabled in their access to basic necessities and social integration. Many legal instruments were then adopted to establish a stable legal framework for the persons with disabilities, serving as the foundation for Vietnam's ratification of the Convention on the Rights of Persons with Disabilities in 2014. They are ordinances and decisions on the protection of and support for people with mental disorders, orphan abandoned children, or children wth HIV/AIDS. In drafting these legal instruments, the disabled are consulted and encouraged to give direct opinions.

51 Panel Report Addendum, *supra* note 43, at § 11.

Besides the development of a legal framework, Vietnam established the National Committee for Persons with Disabilities in 2015, with the function of assisting the Prime Minister in directing and facilitating the coordination among ministries, agencies in works related to the disabled. In addition, 63 legal aid centers are established throughout Vietnam to serve the right of accessing to law of the disabled.

### b *Prevention of Torture*

Vietnam ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 28 November 2014. On 7 March 2015, it entered into force for the country. Once Vietnam became a member of the Convention, it had to report on a periodic basis of the implementation of the convention within one year of ratification and then every four years. Accordingly, Vietnam had its first national report on the implementation of the Convention against Torture approved by the Prime Minister on 28 April 2017, before being delivered to the UN Committee Against Torture in Geneva, Switzerland.

The report introduces the efforts and results in the implementation of Vietnam's legislative, executive and judicial measures to prevent and punish acts related to torture and other cruel, inhumane or degrading treatment or punishment. It listed a number of cases related to torture and the use of inhumane treatment which have been investigated and prosecuted recently in Vietnam. The report also identifies shortcomings and challenges that Vietnam faces while implementing the convention and provides plans for effective implementation.

In the implementation of the Convention against Torture, the Prime Minister issued Decision No.65/QD-TTg approving the scheme on propagation of officials, public officers and people about the Convention against Torture and Vietnamese law on the prevention and control of torture. An action plan for implementing the Convention against Torture was also approved by the Supreme People's Procuracy of Vietnam to raise the awareness of public officers about their responsibilities.

## 5 Diplomatic Protection of Citizens Abroad

Vietnam has actively protected the legitimate rights and interests of its citizens abroad. Over the last few years, there occurred many incidents where Vietnamese fishermen entered the exclusive economic zone of other countries in the South China Sea to fish and violated these countries' laws and regulations, despite the Vietnamese government's attempts to prevent. In response, the

maritime law enforcement forces of other countries have employed tough measures against Vietnamese fishermen, such as the confiscation of fishing vessels, detention of violating fishermen and even use of force. One notable incident happened on 23 September 2017, where two Vietnamese fishermen were killed while 5 others were arrested by the Philippine Navy for illegal fishing inside the Philippine exclusive economic zone.[52] According to a report by the Philippine police, the Vietnamese boat was spotted in the Bolinao sea, within the Philippines's exclusive economic zone. A navy boat with Bolinao police and coast guard personnel aboard approached and fired warning shots, yet the vessel disregarded and tried to escape, prompting a chase. The boats then collided, the Vietnamese boat stopped after several minutes. The Philippine police boarded and found two dead bodies on the deck.[53]

A legal question arises from the incident: whether the shooting of Vietnamese fishermen by the Philippine Navy was lawful? A Philippine lawyer argued that "[t]he Philippines has the sole and exclusive jurisdiction to do so under established international law," therefore "[a]ny foreign vessel that is found fishing in the (EEZ) is considered to be committing the crime of poaching," violating the Philippine Fisheries Code of 1998.[54]

However, even if there has been a violation, the shooting and arresting of Vietnamese fishermen could not be enforced in the EEZ where the Philippines only has sovereign rights for exploring, exploiting, conserving and managing the natural resources but not sovereignty. Moreover, under international law, the use of force in the course of maritime law enforcement operations is limited to exceptional cases. As the International Tribunal for the Law of the Sea (ITLOS) Tribunal stated in *M/V "SAIGA"* case: "Although the [UNCLOS] does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."[55]

52 Carmela Fonbuena, *2 Vietnamese Fishermen Killed in West PH Sea Incident*, RAPPLER (Sept. 24, 2017, 5:45 PM), https://www.rappler.com/nation/183206-vietnamese-fishermen-killed-west-philippine-sea-south-china-sea; Felipe Villamor, *Philippines Promises Vietnam a Full Investigation into Fishermen's Deaths*, N.Y. TIMES (Sept. 25, 2017), https://www.nytimes.com/2017/09/25/world/asia/philippines-vietnamese-fishermen.html.

53 Villamor, *supra* note 52.

54 Arianne Christian Tapao & Ellen T. Tordesillas, *Probe Finds PH Navy at Fault in Death of 2 Vietnamese Fishermen, Source Says*, ABS-CBN NEWS (Sept. 30, 2017, 04:09 AM), https://news.abs-cbn.com/focus/09/30/17/probe-finds-ph-navy-at-fault-in-death-of-2-vietnamese-fishermen-source-says.

55 M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 10, 61–2, ¶ 155.

Relying on this principle, Vietnam has raised objections to the Philippines in many occasions. At the request of Vietnamese Deputy Prime Minister and Foreign Minister H.E. Pham Binh Minh, Embassy of Vietnam at the Philippines and Vietnam Ministry of Foreign Affairs' (MOFA) Consular Department in Hanoi, the Philippines has promptly conducted an investigation, sent off the five arrested Vietnamese fishermen, made apologies and promised compensation for the deaths of the two fishermen.[56]

## 6 Conclusion

Being a responsible member of the international community, Vietnam uses international law not only for national interests but also for the maintenance of peace and security in the region and the world, contributing to the sustainable development for all. Vietnam's experience with international law is good evidence of how a small and developing country can both rely on and actively contribute to the development of international law in realizing its foreign policies.

56 Fonbuena, *supra* note 52; Pia Ranada, *'Sorry' Duterte Sends Off Vietnamese Fishermen Shot at by PH Navy*, RAPPLER (Nov. 29, 2017, 10:20 PM), https://www.rappler.com/nation/189931-philippines-duterte-sorry-send-off-vietnamese-fishermen-navy.

*Articles*

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# The Enforcement of Human Rights Treaties in Korean Courts

*Whiejin Lee**

## 1 Introduction

Korea acceded to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1990 as a result of democratization. Korea's accession to seven major human rights treaties is symbolic of its development of democracy and respect for human rights. The ICCPR, among human rights treaties, has been the most frequently referred to in decisions of courts, though their effects are sometimes dubious. The advice and comment of international human rights committees have been disregarded by Korean courts, with regard to the freedom of expression in the National Security Act, death penalty and conscientious objection to military service. The opinions of the courts have been split, revealing possible room for change in the future. It was evidenced in the decision of the Constitutional Court in 2018, ordering the government to make amendments to the Military Service Act so that conscientious objectors could make the choice of performing alternative service. Invocation of human rights treaties has been expanded to more specific protection of the socially weak and minorities. Lower courts have been occasionally active in referring to human rights treaties directly. The formation and activities of the international human rights research society under the Supreme Court have drawn attention to the more active invocation of human rights treaties. In light of the limitation to the enforcement of human rights treaties by courts, some feasible remedies are suggested.

This article analyses the attitude of Korean courts and their perspective toward human rights treaties in their rulings, featuring the main holdings of the court decisions. The way human rights treaties have been invoked in the decisions of the highest courts of Korea in major areas and their content and application will be examined. Suggestions for feasible judicial remedies in Korea will be made.

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## 2 Korea's Accession to Human Rights Treaties and Current Situation

Korea has acceded to major human rights treaties.[1] Speaking of the main features[2] of accession to the human rights treaties, Korea above all acceded to the ICCPR and the ICESCR in 1990 with the democratization of domestic politics, followed by the accession to other human rights treaties. Second, the National Assembly has been involved in the process of acceding to the treaties by giving its consent.[3] Article 60(1) of the Constitution[4] requires treaties to obtain consent of the National Assembly before ratification or accession, if the treaties restrict the sovereignty of the state, or need legislation etc. Third, reservations which have been made upon accession or ratification have been withdrawn over time.[5]

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1 Human rights treaties (seven treaties and protocols) Korea acceded to are as follows (Digits in brackets refer to the date of entry into force for Korea): International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1979) [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Jan. 26, 1985) [hereinafter CEDAW]; Optional Protocol to the CEDAW, opened for signature Dec. 10, 1999, 2131 U.N.T.S 83 (entered into force Jan. 18, 2007) [hereinafter CEDAW-OP]; International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S 171 (entered into force July 10, 1990) [hereinafter ICCPR]; Optional Protocol to the ICCPR, opened for signature Dec. 19, 1966, 999 U.N.T.S 171 (entered into force July 10, 1990) [hereinafter CCPR-OP1]; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S 3 (entered into force July 10, 1990) [hereinafter ICESCR]; Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S 3 (entered into force Dec. 20, 1991) [hereinafter CRC]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S 85 (entered into force Feb. 8, 1995) [hereinafter CAT]; Convention on the Rights of Persons with Disabilities, opened for signature Mar. 30, 2007, 2515 U.N.T.S 3 (entered into force Jan. 10, 2009) [hereinafter CRPD].

2 Whiejin Lee, *Ingwon-ui Gugjejeog Bohowa Gugnaejeog Ihaeng* [*International Protection of Human Rights and Their Domestic Implementation*], 61 THE KOREAN JOURNAL OF INTERNATIONAL LAW 207, 218 (2016).

3 The treaties to which the National Assembly gave consent are as follows: CEDAW, ICCPR, ICESCR, CCPR-OP1, CAT, CRPD, CEDAW-OP.

4 Article 60(1) of the Constitution provides:

> 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 important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaty; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 16.

5 The treaties whose reservations have been withdrawn are as follows (Digits in brackets refer to the date of entry into force): CEDAW arts. 16(1)(c), (d), (f) (Mar. 15, 1991), ICCPR art. 23(4) (Mar. 15, 1991), ICCPR art. 14(7) (Jan. 21, 1993), CERD art. 14 (Mar. 5, 1997), CEDAW art. 9 (Aug.

The accession of these treaties is related to the domestic political situation. The accession to human rights treaties has been achieved mainly since 1990 when Korea joined the international human rights covenants coinciding with democratization. Naturally, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) were acceded to beforehand, but their accession had less realistic implications, though symbolic, as these treaties with the provisions of basic obligations to be carried out by states have not very much reflected Korea's domestic situation.

The Korean government, which has given priority to national security under the circumstances of division between South and North Korea, suppressed the people's desire for democracy and human rights. A set of laws were legislated to control freedom and civil liberties. Typically, the National Security Act, the Assembly and Demonstration Act, and the Basic Act on the Press were legislated, exercising control over the freedom of press and thought.[6] This policy has been used as a means of maintaining the regime.

The accession to human rights treaties has been related to Korea's policy on human rights and human right situations, and the year 1987 became a watershed in its democratization with the amendment of the Constitution which limited the term of the president to only one 5 year term.[7] With the progress of economic development, the Korean people's desire for democracy and human rights has accelerated and led an aversion to dictatorships. The hosting of significant international events such as the Asian Games in 1986 and the Seoul Olympics in 1988 has elevated Korea's status in the international community as well as Korea's commitment to human rights and democratization. In this context, Korea acceded to the ICCPR and the ICESCR.

The National Assembly has been involved in the process of acceding to treaties by giving its consent. However, accession to the Convention on the Rights of the Child (CRC) was not referred to the National Assembly for its consent. It may be a lapse of judgement or was construed as not requiring consent of the National Assembly as the CRC was considered outside the range of treaties

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24, 1999), ICCPR art. 14(5) (Apr. 2, 2007), CAT arts. 21, 22 (Jan. 3, 2008), CRC art. 9(3) (Oct. 16, 2008).

6 Jongdae Bae, *Eine Theorie des Politischen Strafrechts* [*Theory on Political Criminal Law*], 26 Beob Hak Non Jip 197, 200–04 (1991).

7 *See* Kyungsoo Chung, *Hangukbeobwon-ui Ingwongyujeong-ui Jeogyonggwa Baljeonbanghyang: Gukjeingwonjoyageul Jungsimeuro* [*Critical Analysis on the Domestic Application of International Human Rights Law – Focused upon Korean Practice*], 8 Constitutional Research Journal 152 (2002); Hyebong Shin, *Hangugeseoui Gukjeingwonbeom Gungnae Silsi - Beobwongwa Gukgawiwonhoereul Jungsimeuro* [*Domestic Implementation of International Human Rights Law in Korea*], 46 International Law Review 135, 137 (2017).

provided for in Article 60(1) of the Constitution. Whether the CRC is the type of treaty not applicable to Article 60(1) of the Constitution is arguable.[8]

It is characteristic that the reservations which were made upon accession or ratification have been withdrawn incrementally over time.[9] More concretely, in reference to reservations and the withdrawal of reservations, reservations have been made upon the accession or ratification of the CEDAW, the Convention against Torture (CAT), the CRC, and the ICCPR. Reservation to Article 16(1)(c)(d)(f) of the CEDAW was withdrawn on March 15, 1995, followed by the ICCPR, the CAT, and the CRC. The CERD, with the acceptance of Article 14 on individual communication, was acceded to.

Having gone over reservations made upon accession to human rights treaties, Korea's attitude is illustrated as follows.[10] First, it has been deduced that if the provisions of treaties are found to be inconsistent with municipal law upon their ratification or accession, a reservation tends to be made without making amendment to municipal law. The significance of accession to human rights treaties has been undermined, since concern has been raised that accession would not lead to better protection of human rights. Second, in the process of accession, stringent comparative analysis of treaties has not been made with relevant municipal law and human rights treaties that were acceded to beforehand. For example, one year after accession to the ICCPR, withdrawal of reservation to Article 14(7) was made. Taking note of a lapse in the interpretation of the treaty, it seems that reservation was withdrawn accordingly. Third, the withdrawal of a reservation through amendment to municipal law has been half-hearted. A rare example is the CEDAW, whose reservation to Article 16(1)(c)(e)(f) was withdrawn after amending municipal law.

## 3 The Application of Human Rights Treaties in Korean Courts

Korean courts started to invoke human rights treaties since Korea's accession to the ICCPR. Though Korea was a party to the CERD and the CEDAW ahead of

8 Not just the CRC, but also two protocols supplementary to the conventions have not received consent of the National Assembly upon their accession.

9 The withdrawals of reservations to treaties made by Korea are as follows (Digits in brackets refer to the date of entry into force): CEDAW arts. 16(1)(c), (d), (f) (Mar. 15, 1991); ICCPR art. 23(4) (Mar. 15, 1991), art. 14(7) (Jan. 21, 1993); CERD art. 14 declaration (Mar. 5, 1997); CEDAW art. 9 (Aug. 24, 1999); ICCPR art. 14(5) (Apr. 2, 2007); CAT arts. 21, 22 declaration of acceptance (Jan. 3, 2008); CRC art. 9(3) (Oct. 16, 2008).

10 Kyungsoo Chung, A Study on Domestic Application of International Human Rights Law 158 (1999) (Master's Degree thesis, Korea University) (on file with Korea University Library).

the ICCPR, no court decisions have been observed to invoke those treaties. Following the accession to the ICCPR, court precedents that have referred to human rights treaties tended to increase incrementally.[11] The ICCPR is the most frequently invoked treaty, and the courts have adhered to an inactive position concerning direct application[12] of treaties, based upon the perception that treaties are in principle to regulate relations among states, and without relevant implementing laws, are not to be applied to individuals.[13] The cases are as a general rule limited and not diverse in kinds, concentrated around the decisions relating to conscientious objection of military service. In the cases concerning the National Security Act and death penalty, the Supreme Court and the Constitutional Court have handed down rulings to the exclusion of the provisions of human rights treaties and held that the National Security Act and death penalty would not infringe human rights treaties.

Even in case of inconsistency with municipal law, the issue has been evaded by means of construction in decisions of the Supreme Court or Constitutional Court and so treaties are not deemed to be in breach of municipal law, without invoking treaties directly. It is a tendency that the range of treaties that are invoked in the court decisions has been widened incrementally. It has been shown that the most frequently invoked treaty is the ICCPR and in addition,

11 According to the international human rights law research society under the Supreme Court, it was revealed that the number of cases that invoked human rights treaties inclusive of the refugee convention and the UDHR etc. tended to increase; from zero before 1990, 18 in the 1990s, 949 in the 2000s to 1,959 in the period of 2010 to September 2013. Particularly, rapid increase in 2000s has been shown. Among human rights treaties, to name some of the most invoked treaties: 1,428 (ICCPR), 736 (Refugee Convention), and 721 (Refugee Protocol). INT'L HUMAN RIGHTS LAW RESEARCH SOC'Y, DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW AND COURTS 34 (2013); Shin, *supra* note 7, at 152–53.

12 Direct application of treaties derives from the division of treaties between self-executing and non-self – executing [treaties] by a decision of the U.S. Supreme Court in *Foster v. Neilson* (1829). A self-executing treaty is "directly applied within domestic jurisdiction without requiring implementing legislation," while a non-self-executing treaty implies that the treaty requires "implementing legislation." M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts in the United States*, 10 ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 27, 28 n.4 (2004).

13 The application of international human rights law in decisions of courts is classified into two categories: first, decisions directly applying human rights treaties; second, decisions indirectly applying treaties. Among the decisions directly referring to treaties, there are two types: decisions in which treaties are applied directly or indirectly, by the argument of litigants or the authority of courts, and decisions in which despite the argument of litigants for their application, it was dismissed by the courts. INT'L HUMAN RIGHTS LAW RESEARCH SOC'Y, *supra* note 11, at 32.

the CEDAW, the CAT, the CRC, the CERD, the ICESCR, and the UDHR are also invoked occasionally.

Since 2011 when the international human rights law research society was formed under the Supreme Court, junior judges who hold forward-looking positions toward international human rights law have raised their voices for the direct application of human rights treaties and thus their opinions have been reflected in the decisions of lower courts. The kinds of human rights treaties have been extended in their scope of application progressively to the CRC, the CEDAW, the CAT, and the CRPD, from the ICCPR in 1990s.[14]

The way human rights treaties have been invoked in the decisions of the highest courts of Korea in major areas and their content and application will be examined.

### a *Freedom of Expression*

The Constitution of Korea provides for the freedom of speech and the press, and freedom of assembly and association in Article 21(1). Article 21(2) states that licensing or censorship of speech and the press, and licensing of assembly and association shall not be recognized. Article 7 of the National Security Act has been criticized for suppressing the freedom of expression.[15]

With regard to the issue of the unconstitutionality of the National Security Act, the Constitutional Court and the Supreme Court have maintained in their decisions the position that the National Security Act is constitutional. The views of the UN Human Rights Committee have been at variance with the decisions of Korean courts. With regard to the interpretation of Article 7 (praise, incitement etc.), paragraphs 1 & 5 of the National Security Act, the Constitutional Court, in an adjudication on the unconstitutionality of Article 7 of the

14 To take a look at the breakdown of human rights treaties that have been invoked, in 1990s the ICCPR was invoked 18 times, with no other human rights treaties invoked. After 2000, the ICCPR was still the most frequently invoked, followed by the ICESCR which was invoked 5 times in the 2000s and 3 times in the period between 2010 to September 2013, the CEDAW 7 times in the 2000s, the CAT 5 times in the 2000s and 1 time in the 2010s, the CRC 1 time in the 2000s and the 2010s respectively, the CRPD 1 time in the 2010s. *Id.* at 34.

15 Article 7 (Support, Incitement, etc.) paragraph 1 of the National Security Act provides:

> Any person who supports, incites or propagates the activities of an antigovernment organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years.
>
> Kukga Boan Beob [National Security Act], Act No. 10, Dec. 1, 1948, *amended by* Act. No. 13722, Jan. 1, 2016, art. 7, ¶ 1.

National Security Act of 1990,[16] interpreted that "[t]he above provisions are not deemed to infringe the constitution, if it is construed and applied in a narrow sense only that the applicable act endangers the existence and security of a state or poses clear threat to the basic order of a free democratic society." In another case on the unconstitutionality of Article 7, paragraphs 1, 3 & 5 of the National Security Act of 2002 as well,[17] the Constitutional Court held that, unlike the provisions of the previous act prior to the amendment made as law no. 4373 on May 31, 1991, the act is not deemed to contravene the Constitution. The amended act removed the danger of an expansive interpretation likely to cause deviation from the purpose of enactment by getting rid of unambiguity of the concept in comparison with the original act by means of adding a subjective constituent element like knowingly endangering the existence and security of a state or the basic order of a free and democratic society. Thus, the court has maintained the same position as before. The Supreme Court has the same position as that of the Constitutional Court concerning the issue of unconstitutionality of the National Security Act. The Supreme Court, in its full bench ruling of 1997,[18] held that:

> [T]he National Security Act whose purpose is to establish the security of a state and livelihood and freedom of people by regulating anti-state activities which pose danger to the security of the state is not considered to be unconstitutional, and as far as the provisions of the National Security Act are interpreted reasonably in light of the purpose of the Act, the constituent element of crimes enumerated in the National Security Act is not deemed so ambiguous and extensive as to contravene the intrinsic content of the principle of *nulla poena sine lege*, and as far as the purpose and limits of application of the National Security Act is construed restrictively within the limits of not infringing the intrinsic content of freedom and rights in accordance with Article 37(2) of the Constitution, the Act is not unconstitutional.

In the wake of this decision, the Supreme Court delivered the same rulings of constitutionality.[19]

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16 Constitutional Court [Const. Ct.], 89Hun-Ka113, Apr. 2, 1990 (2 KCCR, 49, 49).

17 Constitutional Court [Const. Ct.], 99Hun-Ba27 & 51, Apr. 25, 2002 (14 KCCR, 278, 280).

18 Supreme Court [S. Ct.], 97Do985, July 16, 1997.

19 Supreme Court [S. Ct.], 98Do1395, July 28, 1998; Supreme Court [S. Ct.], 99Do4027, Dec. 28, 1999; Supreme Court [S. Ct.], 2000Do1226, May 30, 2000; Supreme Court [S. Ct.], 2002Do47, July 8, 2004; Supreme Court [S. Ct.], 2003Do758, Apr. 17, 2008.

Unlike the decisions of the Constitutional Court and the Supreme Court that the National Security Act is constitutional, the UN Human Rights Committee has expressed disparate opinions. In the *Park Taehoon* case in 1998, the Human Rights Committee held that the criminal punishment in Article 7(5) of the National Security Act violated the freedom of expression under Article 19 of the covenant unjustifiably. [20] In the *Kim Keuntae* case, the Human Rights Committee considered that without any proof that his political speech and distribution of political documents alleged to be sympathetic with North Korean policy posed a danger to national security, prosecution and punishment imposed upon him under the National Security Act and the restriction of his right to freedom of expression was not compatible with the requirements of Article 19, paragraph 3 of the Covenant.[21] The Human Rights Committee, in its concluding observations (paragraphs 48 & 49)[22] on the fourth periodic report

20 U.N. Human Rights Comm., Tae Hoon Park v. Republic of Korea, Comm. No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995, ¶10.3 (Nov. 3, 1998):

> While the State party has stated that the restrictions were justified in order to protect national security and that they were provided for by law, under article 7 of the National Security Law . . . . [T]he Committee notes that the State party has invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of Article 19. The Committee has carefully studied the judicial decisions by which the author was convicted and finds that neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by Article 19 (3). The author's conviction for acts of expression must therefore be regarded as a violation of the author's right under article 19 of the Covenant.

21 U.N. Human Rights Comm., Keun-Tae Kim v. Republic of Korea, Commc'n No. 574/1994, U.N. Doc. CCPR/C/64/D/574/1994 (Jan. 4, 1999).

22 U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the Republic of Korea, General Comment, CCPR/C/KOR/CO/4 (Dec. 3, 2015):

> 48. The Committee is concerned that prosecutions continue to be brought under the National Security Act. In particular, it is concerned that the unreasonably vague wording of article 7 of the Act could have a chilling effect on public dialogue and is reported to have unnecessarily and disproportionately interfered with freedom of opinion and expression in a number of cases. The Committee notes with concern that the Act is increasingly used for censorship purposes (art. 19).
>
> 49. The Committee recalls its general comment No. 34 (2011) on freedoms of opinion and expression and its concluding observations on the second periodic report of the State party . . . and reminds the State party that the Covenant does not permit restrictions on the expression of ideas merely because they coincide with those held by an enemy entity

of Korea, expressing concern about the continuous prosecution and imposition of punishment under the National Security Act, made the recommendation to abrogate Article 7 of the said act.

In the event of a conflict between the opinions of domestic courts and international organizations, the issue is which opinion has prevailing effect. The views of the UN Human Rights Committee do not have binding force and in general has the character of a recommendation.[23] The interpretation of the ICCPR by the Human Rights Committee could be conferred the status as an authoritative interpretation, but the decision of domestic courts concerning the National Security Act has legally binding force on the concerned case and creates a direct effect. In the *Park Taehoon* case[24] in 1993, the Supreme Court held that:

> Though the Human Rights Committee established by the ICCPR pointed out some problems relating to the National Security Act from its perspective, the effect of the National Security Act would not naturally be lost by itself . . . . [P]unishing the defendant on the charge of a breach of the National Security Act would not be deemed to contravene the ICCPR, as is argued.

In light of Supreme Court decisions on the views of the Human Rights Committee and other general circumstances, there is no other choice but to respect and follow the decision of the Supreme Court domestically. It is also necessary and practical to respect the interpretation of the Human Rights Committee on the ICCPR as an authoritative view.[25] Korea has submitted its periodic report to the Committee by which its compliance and implementation of the ICCPR has been regularly evaluated, enhancing its status as a law-abiding state whose Constitution provides for and directs toward the respect of international law and international pacifism.

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or may be considered to create empathy for that entity. The State party should abrogate article 7 of the National Security Act.

23 Whether binding force will be granted to the view of the Human Rights Committee has been in controversy. Some opinions support the recognition of its binding force. Geungwan Lee, Jayugwongyuyagwiwonhoe Gyeonhae(view)-ui Gyubeomjeog Hyoryeog-e Gwanhan Gochal [*An Inquiry into the Normative Effect of the Views of the Human Rights Committee*], 13 SEOUL INTERNATIONAL LAW JOURNAL 1, 11 (2006).

24 Supreme Court [S. Ct.], 93D01711, Dec. 24, 1993.

25 Jisung Kang, *Gukgaboanbeob Wiban* (*Chanyang, Gomudeung*) *Joe Deunggwa Pyohyeon-ui Jayu* [*Violations of the National Security Act and Freedom of Expression*], *in* HUMAN RIGHTS LAW CASES 97 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa 2017).

### b *Death Penalty and the Right to Life*

The right to life is not provided for in the Constitution, but it is recognized by the decisions of the Constitutional Court. Article 41 of the Criminal Act stipulates death penalty as a punishment.

The Constitutional Court has on two occasions taken decisions concerning the issue of the unconstitutionality of the death penalty. In the first decision[26] of 1996, the Court declared by a majority of 7 to 2 that it was constitutional, and the second decision[27] was taken by 5 to 4 in 2010. The dissenting opinion, which argued the unconstitutionality of death penalty, invoked human rights treaties including the ICCPR. Because there has been no exercise of the death penalty during the past 20 years or so, Korea has been considered a *de facto* abolitionist state in terms of the death penalty. Whereas the number of states abolishing the death penalty tends to be on the rise in the world, and as the number of justices objecting to the death penalty in the Constitutional Court seems to be increasing, the likelihood of a decision that the death penalty is determined to be unconstitutional is a real possibility depending upon the composition of the justices on the Court.

The Constitutional Court, in its decision of 1996, held that "if only applied in exceptional circumstances meeting the unavoidable need for the protection of the public interest, even the punishment of depriving life is not deemed to contravene Article 37(2) of the Constitution." It ruled that as far as the death penalty is seen as constitutional as a kind of punishment, the provisions for capital punishment in the law as a punishment for homicide, which is a type of crime that takes away human life, is not considered to breach the Constitution. The minority opinion enumerated several reasons that emphasized the abolition of the death penalty: death penalty is contrary to the purpose of rehabilitation; in terms of preventing crime, the effect seems negligible compared with life imprisonment; in particular, the number of states which has abolished the death penalty has increased; Article 6 of the ICCPR and Article 1 of the European Convention on Human Rights (ECHR) emphasize the abolition of the death penalty and the number of states which acceded to these treaties has increased. While these two treaties do not provide for the abolition of death penalty explicitly, it is presumed that the provisions on the protection of human life are broadly construed to abolish the death penalty.[28]

26 Constitutional Court [Const. Ct.], 95Hun-Ba1, Nov. 28, 1996 (8 KCCR, 537).

27 Constitutional Court [Const. Ct.], 2008Hun-Ga23, Feb. 25, 2010 (22 KCCR, 36).

28 Jinee Nah, *Saengmyeonggwongwa Sahyeongjedo* [*The Right to Life and Capital Punishment*], *in* HUMAN RIGHTS LAW CASES 3, 6–10 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa 2017).

Though the minority opinion invokes human rights treaties, treaties to which Korea acceded do not explicitly prohibit or abolish death penalty and it is deemed that treaties are not likely to affect a decision on the unconstitutionality of the death penalty decisively. However, in the future, the decisions may be affected by the fact that the Protocol to the Convention abolishes the death penalty and that the basic purpose of human rights treaties is oriented towards the respect of life and the abolition of the death penalty.[29]

The Human Rights Committee has expressed the view that the deprivation of life by state authorities is a matter of utmost gravity. It expressed the view that laws should control and limit strictly the circumstances in which the right to life is deprived by state authorities.[30] The exercise of state immunities is not compatible with the protection of the right to life of an individual. That is, the justification for the deprivation of the right to life in the exercise of the state's sovereign right is not acceptable. In its concluding observations[31] on the fourth periodic report of Korea, the Human Rights Committee, acknowledging the current non-application of the death penalty, made recommendations that Korea should give due consideration to the legal abolition of the death penalty.

### c *Freedom of Conscience*

#### 1 Conscientious Objection to Military Service

Article 19 of the Constitution provides for freedom of conscience and Article 20(1) for freedom of religion. Whether refusing the obligation of military service on account of religious belief is in the realm of freedom of religion and conscience is at issue.

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29 The dissenting view of Justice Seunghyeong Cho concerning death penalty held that:

> Death penalty should be abolished conforming to the change of times *i.e.* changes in political, social, cultural, international and other fields. Internationally, treaties such as Article 6 of the ICCPR and Article 1 of the ECHR put emphasis on the abolition of death penalty and the number of states which has acceded to these treaties has increased gradually.

Constitutional Court [Const. Ct.], 95Hun-Ba1, Nov. 28, 1996 (8 KCCR, 537, 563).

30 U.N. Human Rights Comm., CCPR General Comment No: Article 6 (Right to Life) (Apr. 30, 1982).

31 U.N. Human Rights Comm., *supra* note 22, ¶¶ 22–23:

> 22. While acknowledging the current non-application of the death penalty, the Committee is concerned that a significant number of persons remain sentenced to death.
>
> 23. The State party should give due consideration to the legal abolition of the death penalty as well as to the commutation of all death sentences to terms of imprisonment. On the occasion of the twenty-fifth anniversary of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, the State party should also consider acceding to that instrument.

A host of cases on which decisions have been taken invoking human rights treaties are concerned with conscientious objection to military service. The Constitutional Court and the Supreme Court, while denying the direct effect of human rights treaties, have ruled that punishing conscientious objectors to military service would not contravene the right to freedom of conscience in the Constitution.

In 2011 decision,[32] the Constitutional Court by a majority of 7 to 2 held that taking into account Korea's real circumstances such as:

> Its specific security situation where South and North Korea have been confronted against each other, the possible reduction of military manpower in case of the introduction of alternative service, and the difficulty of examining whether military objector is attributable to genuine conscience, the introduction of alternative service would impede social unity and cause serious damage to national capabilities, if public opinion is critical of conscientious objection.
>
> It appears difficult to realize conscientious objection to military service and this does not infringe the principle of minimum legal encroachment. This does not appear to violate the ICCPR and the principle of respect for international law.[33]
>
> In respect of the ICCPR, it is difficult to recognize the right of conscientious objection in the covenant itself or for the covenant to have legally binding force concerning conscientious objection. There are no human rights treaties recognizing the right of conscientious objection explicitly, and even though some European states guarantee the right of conscientious objection, it is not considered that the right of conscientious objection is recognized as customary international law, and therefore, the right of conscientious objection cannot be accepted in Korea as a generally

32 Constitutional Court [Const. Ct.], 2008Hun-Ka22, Aug. 30, 2011 (23 KCCR, 174, 192–94).

33 More concretely, as to the issue of the application of the ICCPR and formation of customary international law, the Constitutional Court held:

> Not only Article 18 of the ICCPR, but any other provisions of the covenant have not stated the right of conscientious objection to military service as one of basic human rights, and in fact though there was argument to include conscientious objection in Article 18 of the ICCPR in the process of drafting, general opinions of negotiating states were negative, and the interpretation of international organizations has only recommendatory effect in each state, with no legally binding force. The issue of recognizing conscientious objection of military service and introducing alternative service is considered as the field in which policy choice should be respected in light of disparate and diverse factors in respective states such as history and security environment, the structure of social strata, and political, cultural, religious, or philosophical value of a state.

> recognized international norm, and accordingly the punishment of conscientious objectors pursuant to the applicable provision of the law would not violate Article 6(1) of the Constitution which proclaims the principle of respect for international law.

The dissenting opinion, without judging explicitly upon Article 6(1) or the principle of respect for international law, articulated the recommendation of the Human Rights Committee made to every state of the world on numerous occasions to recognize the right of conscientious objection and provide for alternative service with disciplinary consequences, while citing examples of foreign states enforcing conscientious objection. The Constitutional Court on June 28, 2018 changed its position and found that Article 5(1) of the Military Service Act, which does not allow alternative service to conscientious military service objectors, does not conform to the Constitution.[34]

In its decision of 2007,[35] the Supreme Court dismissed the lawsuit for reasons that the right to receive an exemption from the obligation of military service cannot be derived from the provisions of the ICCPR itself, since Article 18 of the ICCPR provides for the same content as the scope of protection of basic human rights guaranteed in the interpretation of Article 19 of the Constitution on the freedom of conscience and Article 20 on the freedom of religion. With regard to the application of the ICCPR, the Supreme Court held that:

> Not only Article 18 of the ICCPR, but any other provisions of the covenant have not stated the right of conscientious objection to military service as one of basic human rights, and in fact though there was the argument to include conscientious objection in Article 18 of the ICCPR in the process of drafting, general opinions of negotiating states seemed to be negative . . . . [A]rticle 8(3)(c)(ii) of the covenant on the prohibition of forced labor provides for 'any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors' as one of those which are excluded from the scope of forced labor prohibited in the covenant.

34 The Constitutional Court ruled: "Categories of military service, which have not included alternative service program for conscientious objectors, infringe on objectors' freedom of conscience by violating principle of excessive restriction." Constitutional Court [Const. Ct.], 2011Hun-Ba379, June 28, 2018 (30 KCCR, 370, 371).

35 Supreme Court [S. Ct.], 2007Do7941, Dec. 27, 2007.

In considering an individual communication, the ICCPR Committee reached a conclusion that Article 18 of the ICCPR does not guarantee conscientious objection in consideration of Article 8(3)(c)(ii) of the Covenant.[36] The European Commission of Human Rights, in numerous decisions, held that Article 9 of the ECHR, while protecting the freedom of thought, conscience, and religion in the general sense, is not interpreted to confer the right to demand exemption from the obligation of military service upon conscientious objectors.[37]

The main reason for not recognizing conscientious objection is that Article 8(3)(ii) of the ICCPR and Article 4(3)(b) of the ECHR provide that "in countries where conscientious objection is recognized, any national service required by law of conscientious objectors" is excluded from the scope of forced labor prohibited in the covenant. The phrase "where conscientious objection is recognized" in the relevant provision presupposes that the state party can determine for itself whether conscientious objection could be recognized or not.

This position has changed in the 1990s, shifting toward recognizing the right of conscientious objection. The Human Rights Committee, in its General Comment no. 22 in 1993,[38] adopted the position that "[t]he Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief," opening the possibility of recognizing conscientious objection, but not definitively recognizing the right to conscientious objection.

Following this decision, the Human Rights Committee has intensified its position and point of argument. In an individual communication case adopted on November 3, 2006,[39] the Human Rights Committee held that "Article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of Article 18

36 U.N. Human Rights Comm., L.T.K. v. Finland, Commc'n No. 185/1984, UN doc. CCPR/C/OP/2, at 61 (July 9, 1985). The complainant was initially not recognized as a conscientious objector, and on appeal was ordered to perform unarmed military service which he refused. He was subsequently sentenced to nine months imprisonment for refusing military service.

37 N. v. Sweden, No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203 (1984); Autio v. Finland, No. 17086/90, Eur. Comm'n H.R. Dec. & Rep. 246 (1991).

38 U.N. Human Rights Comm., CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4 (Jan 30, 1993).

39 U.N. Human Rights Comm., Commc'n Nos. 1321/2004 and 1322/2004, CCPR/C/88/D/1321-1322/2004 (Jan. 23, 2007). The Human Rights Committee made a decision in *Yeobeom Yoon* and *Myungjin Choi Communication* case of 2006 that Korea violated Article 18 of the ICCPR.

of the Covenant, the understanding of which evolves like that of any other guarantee of the Covenant over time in view of its text and purpose," judging that the Korean government's measure is unjustifiable. Thereafter, the Committee made public its views of accepting five individual communications concerning conscientious objection.[40] In its decision of 2011, the Committee held that "military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion,"[41] strengthening its point of argument. In its decision of 2014, the Committee referred to the violations of the prohibition of arbitrary detention in Article 9(1) of the ICCPR, in addition to the freedom of conscience and religion in Article 18(1) of the Covenant.

Thus, the decisions of the Human Rights Committee and the European Court of Human Rights have recognized the right of conscientious objection which has further evolved into the provisions of the Charter of Fundamental Rights of the European Union[42] which recognizes the right explicitly. From this trend, there may be room for a changes in the positions of the Constitutional Court and the Supreme Court of Korea arising from the changing situations of the international community. It was expected that the decisions of Korean courts might be modified through a progressive interpretation of the ICCPR.[43] It resulted in the decision of the Constitutional Court in 2018, which ordered the amendment to the Military Service Act to allow alternative military service for conscientious objectors. Furthermore, the Supreme Court decided on November 1, 2018 that conscientious military service objectors shall

40 U.N. Human Rights Comm., Eun-min Jung et al. v. Republic of Korea, Commc'n. Nos. 1593 to 1603/2007, U.N. Doc. CCPR/C/98/D/1953-1603/2007 (Mar. 23, 2010); U.N. Human Rights Comm., Min-Kyu Jeong et al. v. Republic of Korea, Commc'n Nos. 1642 to1741/2007, U.N. Doc. CCPR/C/101/D/1642-1741/2007 (Mar. 24, 2011); U.N. Human Rights Comm., Jong-nam Kim et al. v. Republic of Korea, Commc'n No. 1786/2008 (Oct. 25, 2012); U.N. Human Rights Comm., Young-kwan Kim et al. v. Republic of Korea, Commc'n. No. 2179/2012, U.N. Doc. CCPR/C/112/D/2179/2012 (Oct. 15, 2014).

41 U.N. Human Rights Comm., Min-Kyu Jeong et al. v. Republic of Korea, Commc'n. Nos. 1642 to 1741/2007, U.N. Doc. CCPR/C/101/D/1642-1741/2007 (Mar. 24, 2011).

42 Article 10(2) of the Charter provides "[t]he right to conscientious objection is recognized, in accordance with the national laws governing the exercise of the right."

43 Youngsik Kim, *Yangsimjeog Byeongyeog Geobugwon* [*The Right of Conscientious Objection to Military Service*] *in* HUMAN RIGHTS LAW CASES 71–75 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017); Jaewon Kang, *Yangsimjeog Byeongyeog Geobuja-e Daehan Hyeongsacheobeol-ui Wiheonseong* [*The Unconstitutionality of Criminal Punishment Against Conscientious Objectors*] *in* HUMAN RIGHTS LAW CASES 60–64 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

not be punished criminally, considering that the conscientious objection to military service is a justifiable reason for refusal of military service in the Military Service Act.[44]

### 11 Apology Advertisement Contrary to Freedom of Conscience

In a lawsuit against a publisher for compensation and the publication of an apology on account of alleged defamation resulting from a report from a monthly article, the publisher filed a constitutional appeal arguing that Article 764 of the Civil Act was unconstitutional on account of the inclusion of the publication of the apology. Article 764 provides that in the case of defamation "the court may order the person who has defamed another's reputation to take measures appropriate for repairing the injured party's reputation, either in lieu of, or together with provision of compensation including the publication of an apology in newspapers, etc." The Constitutional Court made the decision of limited unconstitutionality, considering that the provision of the Civil Act, which is construed to include the publication of an apology, is contrary to the principle of proportionality and unjustified due to an excess of the means in comparison with the ends, and is deemed to be in violation of Article 19 of the Constitution on freedom of conscience and infringe the right of personality guaranteed in the Constitution. Furthermore, the Constitutional Court held that referring to Article 18(2) of the ICCPR to which Korea acceded to in 1990 and which provides that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice," the publication of an apology is contrary to the freedom of conscience guaranteed in Article 19 of the Constitution, as the publication of an apology was ordered by judicial proceeding against the belief of the person.[45] There is a minority opinion concerning law-abiding oath with regard to the freedom of expression and conscience.[46]

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44 Supreme Court [S. Ct.], 2016D010912, Nov. 1, 2018.

45 Constitutional Court [Const. Ct.], 89Hun-Ma160, Apr. 1, 1991 (3 KCCR, 149, 151).

46 In the dissenting opinion, Justices Seonhoe Ju and Hyojong Kim held:

> Law-abiding oath, though a medium of expression, is considered to de facto force inward belief rather than the aspect of an act of conscience realization, in the sense that the state forces an individual to confess one's inmost belief as a matter of fact. . . . [A]rticle 18(2) of the ICCPR providing that 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice' is to prevent the infringement of inmost freedom that such a compulsion of confession of belief might bring about.
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> Constitutional Court [Const. Ct.] 98Hun-Ma425, Oct. 27, 2005 (14 KCCR, 351, 352) (Seonhoe Ju, J., and Hyojong Kim, J., dissenting).

### d *Personal Liberty*

Article 12 of the Constitution provides for the right not to be tortured, *habeas corpus*, and the right of access to lawyers and Article 13 for the prohibition of retroactive punishment and the principle of *non bis in idem.* that guarantees human rights in criminal proceedings.

In the constitutional appeal in which the meetings with visitors, communication by letter, and exercise for inmates were banned pursuant to the Enforcement Decree of the Criminal Administration Act, the Constitutional Court, referring to the ICCPR, recognized the unconstitutionality with regard to the order of banning exercise. The Constitutional Court held that:

> Even inmates, as human beings, have the right of human dignity and value which is non-derogable. The ICCPR to which Korea acceded, providing in Article 10(1) that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' and with the provision of Article 7 on the prohibition of 'cruel, inhuman or degrading treatment or punishment' represents the institutional manifestation of universal spirit to respect such basic authority of human beings. . . . [T]hen, the absolute ban of exercise of the inmate who received prohibitive measures is deemed to deviate from the necessary minimum extent in terms of ways and means even in consideration of the purpose of discipline and reach the extent of infringing human dignity and value under Article 10 of the Constitution and personal liberty of Article 12 of the Constitution inclusive of the freedom of physical safety not to be derogated.[47]

In the case in which the suspect who was arrested while participating in a demonstration for the annulment of the National Security Act was investigated in the prosecutor's office, being handcuffed and with his upper body and arms bound with rope, the Constitutional Court considered its constitutionality, referring to the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) and held that:

> As rule 111(2) of the UN Standard Minimum Rules for the Treatment of Prisoners[48] adopted by the UN General Assembly on the Prevention of

47 Constitutional Court [Const. Ct.], 2002Hun-Ma478, Dec. 16, 2004 (16 KCCR, 548, 562).

48 A revised version of the UN Standard Minimum Rules was adopted on December 17, 2015 unanimously by the 70th session of the UN General Assembly in Resolution A/RES/70/175.

> Crime and the Treatment of Offenders in 1955 provides that '[u]nconvicted prisoners are presumed to be innocent and shall be treated as such,' the principle of presumption of innocence is the guiding principle which governs the whole process of criminal procedure from investigation to prosecution, and the use of restraining implements in this case cannot be seen as an indispensable measure at all for the purpose of maintaining safety and order in the prosecutor's investigation office, if any, becoming unconstitutional exercise of state power which excessively infringes personal liberty and contravenes the spirit and purpose of guaranteeing the principle of presumption of innocence and the right of defense.[49]

### e *Right to Labor*

Article 32 of the Constitution provides for the right to labor and Article 33 for the right to organize trade unions and other social rights.

The petitioner, Sohn Jongkyu, filed a communication with the Human Rights Committee on July 7, 1992 pursuant to the Optional Protocol to the ICCPR, for reasons that his punishment contravened the freedom of expression set forth in Article 19(2) of the ICCPR. The Committee found that:

> The facts before it disclose a violation of Article 19, paragraph 2 of the Covenant. The Committee is of the view that Mr. Sohn is entitled, under Article 2, paragraph 3(a) of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review Article 13(2) of the Labor Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.[50]

The Supreme Court held that as the ICCPR, which guarantees the freedom of expression in Article 19(2) and meanwhile restricts "the exercise of the rights in consideration of the rights or reputations of others or for the protection of national security or of public order such as are provided by law or necessary"

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The revised Rules are known as the "Nelson Mandela Rules" to honor the legacy of Nelson Mandela.

49 Constitutional Court [Const. Ct.], 2001Hun-Ma728 May 26, 2005 (17 KCCR, 709, 709).

50 U.N. Human Rights Comm., Jongkyu Sohn v. Republic of Korea, Commc'n No. 518/1992, UN Doc. CCPR/C/54/D/518/1992, ¶¶ 11–12 (1995).

in Article 19(3), recognizes the freedom of expression to the necessary extent pursuant to the law. Further, Article 13 *bis* of the Labor Dispute Adjustment Act provides for the prohibition of a third party's intervention to adjust, incite, disturb, or influence the concerned parties concerning a labor dispute. The punishment of the plaintiff according to this provision is not deemed to infringe upon freedom of expression in contravention of the object of Article 19 of the ICCPR. As Article 2(3) of the ICCPR provides for the reciprocal obligation of states parties in international law to ensure within a legal system for individuals to receive an effective remedy, including appropriate compensation when their rights and freedom in the covenant are violated, nevertheless, the right to make a compensation claim against the state is only exercisable based upon municipal law. Thus, the Supreme Court held that pursuant to the covenant, a special right of an individual to claim compensation and other remedial measures against the state is not created.[51] It appears that the decision of the Supreme Court, seeing it as a provision on the obligation of a state, denies the direct effect of the covenant with respect to individuals insofar as it does not recognition the self-execution or direct applicability of the covenant.

In the above case, Article 2(3)(a) of the ICCPR confers the obligation to secure an effective remedy upon the state. Other provisions of the covenant, rather than taking the form of conferring this obligation upon the state, provides for the right of an individual definitively. In this regard, the interpretation of the Supreme Court in its decision, which excludes direct application of the covenant concerning the obligation of a state for compensation, cannot be applied extensively to other provisions of the Covenant.[52]

In relation to the issue of non-performance of international law and state responsibility, the Supreme Court held that Article 13 *bis* of the Labor Dispute Adjustment Act does not contravene Article 19(2) of the ICCPR without addressing whether the legislation and enforcement of law in breach of international law could be the cause of state compensation.

The said case is the first circumstance where an international claim was filed after exhaustion of local remedies since Korea's accession to the ICCPR, which drew considerable attention. It was anticipated that the Supreme Court would determine the scope of the right along with whether the rights of laborers included the intervention of a third party and whether the law that prohibits the intervention of a third party is be lawful or not. However, the Supreme

51 Supreme Court [S. Ct.], 96Da55877, Mar. 26, 1993.

52 Junghoon Ha, *Sohn Jongkyu Guggabaesang Sageon – Gugjebeobgwa Gugnaebeob-ui Gwangye* [*Sohn Jongkyu State Compensation Case – the Relationship Between International Law and Municipal Law*], *in* HUMAN RIGHTS LAW CASES 233, 239 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

Court did not accept the views of the Human Rights Committee, but instead ruled that state compensation would be paid in accordance with municipal law.

In the case of the unconstitutionality of imposing criminal punishment on laborers collectively refusing to provide labor on charge of forcible business obstruction, the Constitutional Court held that:

> As Article 8(3) of the ICCPR provides that '[n]o one shall be required to perform forced or compulsory labor save in pursuance of a sentence to such a punishment by a competent court' and forced labor refers to labor imposed against the will of the person . . . which is equivalent to the provision of Article 12(1) of the Constitution in its purpose which provides that labor shall not be imposed against the will of the person except in pursuance of law and due process of law. . . . [F]or the Covenant and the Constitution concerning the prohibition of forced labor are deemed to provide for the same content substantially, and as far as the relevant provision for this case or the interpretation of the Supreme Court regarding this issue is not considered to contravene the Constitution, there is no room for a determination of unconstitutionality of this provision.[53]

In the constitutional appeal on the provisions of the Local Public Officials Act which prohibits labor movements and other collective actions by local public servants and punishes them in violation thereof, the Constitutional Court dismissed the argument of the claimant.[54] Denying the binding force of soft laws including general comments and recommendations of international human rights organizations, the Constitutional Court held that:

> Even though 'the Committee on the Freedom of Association' of the ILO, 'the Committee on the Economic, Social and Cultural Rights' of the UN, and 'the Consultative Committee on Trade Union' of the OECD and other international organizations make recommendations to Korea to ensure basic labor rights to public servants of all areas as soon as possible, they themselves would not render the provisions of the said Act unconstitutional, thus losing no effect naturally.

53 Constitutional Court [Const. Ct.], 97Hun-Ba23, July 16, 1998 (10 KCCR, 243, 264).

54 Constitutional Court [Const. Ct.], 2003Hun-Ba50, Oct. 27, 2005 (17 KCCR, 238, 240) (Hyosook Chun, J., and Daehyun Cho J., dissenting).

Two justices, however, offered dissenting opinions,[55] interpreting the Constitution in consideration of the object and purpose of international human rights law. The dissenting opinions remarked that Korea has accepted most human rights treaties, and as a member of the ILO has to respect the UDHR, international human rights covenants, and the conventions and recommendations of ILO. The legislative body has to take them into account in determining the scope of public servants for whom basic labor rights are ensured. Furthermore, referring to the relevant provisions of the treaty and recommendations of international organizations, the dissenting opinions held that the provisions of the law which excessively restrict the basic labor rights of public servants are not consistent with the Constitution. The declarations, treaties, and recommendations of international organizations could be important guidelines to interpret the meaning, content and scope of application of the Constitution whose provisions are highly abstract.

### f *Violations of Human Rights by State Organs and Statute of Limitations*

Claimants argued for the non-applicability of statute of limitations with respect to their claims for arrest, violence, and detention by the abuse of authority. Their claims were based on the Statute of the International Criminal Court (ICC) which has domestic legal effect pursuant to Article 6(1) of the Constitution, and further that the crime of torture is not subject to the statute of limitations under customary international law as a generally recognized international norm under Article 6(1) of the Constitution having the same effect as municipal law.

55 In the dissenting opinion concerning the provision of the State Public Officials Act which prohibits labor campaigns and other collective actions by public officials and punishes them in violation thereof, Justice Doohwan Song held:

> Article 6, paragraph 1 of the Constitution declares that we accept and respect international law, stating that 'treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as municipal law of the Republic of Korea,' and currently our nation is an official member of the ILO and a treaty power that has accepted almost all international human rights norms, with the consent of our National Assembly. Therefore, the Constitution is interpreted to cover the Universal Declaration of Human Rights and the International Human Rights Covenants of the UN, and the agreement and recommendations of the ILO. Also, though municipal law that does not conform with such international regulations cannot immediately be declared unconstitutional, international law should serve as an important standard when evaluating the constitutionality of said laws.
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> Constitutional Court [Const. Ct.], 2003Hun-Ba51, Aug. 30, 2007 (19 KCCR, 213, 245).

In its decision of 2004,[56] the Constitutional Court deemed that it was hard to exclude the application of statute of limitations in this case by applying the provision of the ICC Statute because the crime of torture, which is under the jurisdiction of the ICC, and whose application of prescription is excluded in pursuance of Article 29 of the ICC Statute. The Constitutional Court further ruled that the crime of torture alleged by the claimants as customary international law which should be excluded from the application of statute of limitations has no ground to be recognized as universal norm of the international community by most of states the world over, and is not deemed to be applied in this case as a "generally recognized international norm" under Article 6(1) of the Constitution.

Article 29 of the ICC Statute provides that the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations. Article 6 of the Act on Punishment, etc. of Crimes under Jurisdiction of the International Criminal Court which is an implementing act legislated for ratification of the ICC Statute provides, concerning Articles 8 through 14 including the crime against humanity in Article 9 of the Act, that:

> The crime of genocide, etc. shall not be subject to the prescription for public prosecution provided for in Articles 249 through 253 of the Criminal Procedure Act and Articles 291 through 295 of the Military Court Act and the prescription for execution of judgment of the guilty provided for in Articles 77 through 80 of the Criminal Act.

The crime of torture in this case should be an act related to the "widespread or systematic attack directed against any civilian population". The violence and torture in this case, though inhumane, is deemed difficult to be regarded as a crime against humanity under the Statute. The Constitutional Court has not articulated the crime in the case not applicable to torture as a crime against humanity. The crimes enumerated in Article 7(1) of the ICC Statute do not require occurrence during armed conflicts or on a massive scale. Even one crime, if occurred on a large scale or as part of a systematic attack, could be recognized as a crime against humanity.[57]

56 Constitutional Court [Const. Ct.], 2004Hun-Ma889, Dec. 14, 2004.

57 It was agreed at the diplomatic conference held in Rome to adopt the ICC Statute that to be established as a crime against humanity the requirement that the crime should take place on a massive scale was deleted. YOUNGSUK KIM, GUGJE HYEONGSA JAEPANSO BEOB GANG-UI [LECTURE ON INTERNATIONAL CRIMINAL COURT] 58 (2d ed. 2014).

Taking into account Korea's situation in which torture is not provided for as an independent crime, the Human Rights Committee, in its concluding observations[58] on the fourth periodic report in 2015, recommended that:

> The State party should amend the Criminal Code to include a definition of torture that is fully in line with Article 7 of the Covenant and internationally established norms, preferably by codifying it as an independent crime. It should ensure that all cases of torture and ill-treatment are properly investigated by an independent mechanism and that the law adequately provides for the prosecution and conviction of perpetrators and accomplices of such acts, in accordance with the gravity of the acts, before ordinary criminal courts, as well as for remedies of victims and their families, including rehabilitation and compensation.

The Committee, in its general comment in 1982,[59] reiterated that to ensure the right not to be tortured, "[c]omplaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation," and in the general comment in 1992 noted that:

> Some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[60]

In this case, the claimant attempted to invoke the provision of the ICC Statute because punishment was impossible due to the expiry of statute of limitations under municipal law. It was decided by the court that the crime concerned was not a crime against humanity and thus the application of prescription was appropriate. The ICC Statute provides for the non-applicability of statute of

58 U.N. Human Rights Comm., *supra* note 22, ¶ 27.

59 U.N. Human Rights Comm., Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, art. 7, U.N. Doc. HRI/GEN/1/Rev.1, at 7 (July 29, 1994).

60 Id. at 30.

limitations with respect to crimes against humanity. The type of crime that belongs to this constituent element seems to be considerably narrow and will not be easy to prove. It is desirable to achieve justice and exclude the application of prescription for crimes involving a state organ, however there must be limitations to its realization in consideration of the exceptions to prescription prescribed by the state.[61]

Meanwhile, the dissenting opinion of three justices concerning the provision of the Special Act of the May 18 Democratization Movement which suspends the statute of limitations retroactively, holding that the objection to adjudication infringes not only the Constitution, but international human rights norms.[62]

### g *Right to Assistance of Counsel*

A claimant who was detained on suspicion of violation of the National Security Act made a constitutional appeal on the infringement of the right of an accused to an attorney in the Constitution. Interpreting that the right of access to an attorney without the presence of prison officials was guaranteed under Article 12 of the Constitution includes the right to assistance of an attorney, the Court held that the provision of the Criminal Administration Act was unconstitutional. The Act required the presence of concerned public officials in a meeting of pretrial detainee with attorney. In the decision, the Court referred to the UN principle of detainee protection making it supplementary to the decision of unconstitutionality. The Court held that:

61 Mijung Hwang, *Gugga Gigwan-ui Ingwonchimhae Haeng-wiwa Gongsosihyo* [*Violations of Human Rights by the State Organ and Statute of Limitations*], *in* Human Rights Law Cases 415, 422–24 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

62 The UN confirmed that statute of limitations does not apply to war crimes and crimes against humanity in international law by adopting the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity" in the General Assembly on November 26, 1968 in its resolution no. 2391(xxiii). The provisions of the Convention apply to "representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspires to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission." States parties pledged to abrogate the laws which provide for statute of limitations on those crimes. It is to be interpreted, therefore, that the prescription of a public prosecution proceeds only if there are no legal and systematic obstacles to the effective exercise of prosecutorial rights by the prosecuting authorities.
Constitutional Court [Const. Ct.], 96Hun-Ka2, Feb. 16, 1996 (8 KCCR, 51, 75–76).

> As Article 18(4) of a 'body of principles for the protection of all persons under any form of detention or imprisonment' adopted by the UN General Assembly resolution 43/173 of December 9, 1988 provides that 'Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official,' concerned public officials must not be placed within the distance of making them possible to listen to or record the conversation between the detainee and attorney, and must not disrupt free interview, while taking photos and causing other uneasy atmosphere for safe custody or on other pretexts.[63]

**h** ***Prohibition of Torture***

Article 12(2) of the Constitution provides that "[n]o citizen shall be tortured or be compelled to testify against himself in criminal cases." Article 12(7) states that "In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession." Article 309 of the Criminal Procedure Act provides for similar content. The principle of the prohibition of torture is established in municipal and international law.

In a case of torture that resulted in the death of a criminal suspect during investigation by prosecuting authorities, the Seoul High Court, in its decision of 2005,[64] held that the defendant has the obligation to pay damage to the plaintiff with state compensation due to illegal act attributable to the performance of duties of public officials. It took note of the UDHR and the ICCPR which provide for the absolute prohibition of torture and was the result of the endeavors of all human beings to make clear inhuman act of torture by state authorities and public officials and to prevent its harmful effects. This decision did not accept the argument of self-defense with respect of the act of torture and pointed out no possibility of reducing damages in case of death caused by torture.

The decision of the Seoul High Court, though invoking the ICCPR and other international human rights law, did not directly mention the Convention Against Torture and did not accept the argument of self-defense against torture by recognizing the absolute prohibition of torture. The possibility of a

63 Constitutional Court [Const. Ct.], 91Hun-Ma111, Jan. 28, 1992 (4 KCCR, 51, 59–60).

64 Seoul High Court [Seoul High Ct.], 2004Na13610, Apr. 13, 2005.

reduction in compensation was not deemed to conform to the provision of the Convention in case of harm due to torture.[65]

### i *Prohibition of Discrimination and the Right to Equality*

Article 11(1) of the Constitution provides that "[a]ll citizens shall be equal before the law, and there shall be no discrimination in religion or social status," and in Article 11(2) that "[n]o privileged caste shall be recognized or ever established in any form," establishing the right to equality and the principle of prohibition of discrimination. Article 31 provides for the right to education and Article 36 for gender equality.

#### 1 Qualification of Membership for Women in Meeting of a Family Association with Same Clan

Plaintiffs argued that women are naturally qualified for membership in the meeting of a family association with the same clan. The basis of the argument was that the regulation of a family association does not confine qualification of membership to men only. The court of first instance dismissed the plaintiffs' claims holding that considering the family association as a natural grouping composed of the same clan whose members are men for the purpose of the care of the ancestral graveyard, holding of memorial service for ancestors and promotion of friendship among the members of the association under the customary law, individuals not of the familial bloodline and women are not qualified for membership of the meeting of the family association.

In the appeal filed by the plaintiffs, the Supreme Court quashed the original decision holding that in light of the changed perception of society in general toward the family association and the changed legal order of society, there was a mistaken legal reasoning about the effect of customary law that led to error in the original decision. The original decision gave effect to customary law which limited the qualification of membership in the meeting of the family association to adult males only to the exclusion of females.[66] The majority opinions[67] raised the point of argument with regard to the change of legal

65 Jongho Song, *Gomun-e Daehan Gugga Baesang-Uimu* [*The Obligation of State Compensation for Torture*], *in* Human Rights Law Cases 460, 469 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

66 Supreme Court [S. Ct.], 2002Da1178, July 21, 2005.

67 The Constitutional Court decided: "In the light of the CEDAW and other international conventions, provisions of the Constitution, and legal system, the prohibition of discrimination and the protection in respect of women and disabled people is deemed as a definitively established basic order within Korea's legal system at the present." Constitutional

order in this society. It recognized that CEDAW had the same effect as municipal law from January 26, 1985. It provides for the term "discrimination against women" which means "any distinction, exclusion or restriction made on the basis of sex" and obliges the states parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" and "imposes the obligation to take appropriate measures with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

Concerning the mode of the application of CEDAW by the Supreme Court, the opinions diverge in line with the theory of direct application and theory of indirect application. The opinion which argues for indirect application holds that the Convention takes the form of imposing duties to pursue policies conforming to the Convention upon the states parties which are the subjects of the Convention in consideration of its text, rather than providing for concrete and specific rights of individuals. Meanwhile, the argument supporting direct application is that as the Convention provides for the obligation to take all appropriate measures inclusive of legislation, the measures undertaken by the Court would be included.[68]

Holding that previous customary law on the qualification of members of a family association does not conform to the changed legal order, the decision of the Supreme Court referred to the provisions of the CEDAW for its rationale. This decision is the first precedent which invoked CEDAW. Whether it represents direct application is not clear, but it is significant that the Convention abolishes existing custom that constitute discrimination against women in pursuance of the obligation imposed upon the state party by the Convention, and obliges the state party to undertake measures to correct the social and cultural mode of action of men and women.[69]

## II Discrimination against Women by Private Groups

In the case in which Seoul YMCA claimed damage for the action that has not recognized the qualification of members of family association for women, the

Court [Const. Ct.], 93Hun-Ma363; Constitutional Court [Const. Ct.], 98Hun-Ba33, Dec. 23, 1999; Constitutional Court [Const. Ct.], 97Hun-Ka12, Aug. 31, 2000.

68 Jinsoo Yoon, *Yeoseong Chabyeol Cheolpye Hyeobyak-gwa Hanguk Gajokbeop* [*CEDAW and Korean Family Law*], 46 SEOUL NATIONAL UNIVERSITY BEOB HAK 76, 83–84 (2005).

69 Juil Lee, *Yeoseong-ui Jonghoe Hoewon Hwagin* [*Membership of Women in the Meeting of Family Association with Same Clan*], *in* HUMAN RIGHTS LAW CASES 139, 145 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

Seoul High Court decided that the payment of damage should be made for the delict, admitting discrimination against women referred to in Article 1 of the CEDAW. The court ruled that:

> The realization of the right to equality, as the foundation for the guarantee of all basic human rights manifested in the Constitution, is the indispensable premise for the guarantee of human dignity and basic human rights, and especially the discrimination due to gender, together with racial discrimination, is an essential area for the protection of human rights that requires special attention and efforts internationally. In this context, the CEDAW which has the same effect as municipal law from January 26, 1985 has a great implication. In consideration of Article 1 of the Convention which provides that the term 'discrimination against women' shall mean 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, civil or any other field,' the restriction on the qualification of membership of the family association for women is apparently applicable to the definition of the Convention.[70]

### j *Rights of the Child*

In the case in which a child was physically, emotionally and sexually abused and left untreated without being provided basic protection and that led to death, the court of first instance[71] declared the defendant guilty of the crime of accidental death and a crime in violation of the Child Welfare Act. The second original decision[72] reduced the penalty slightly with regard to the crime in violation of the Child Welfare Act and the Act on Special Cases Concerning the Punishment etc. of Sexual Crimes. The appellate court, the Daegu High Court, increased the penalty combining the two original decisions.[73]

The appellate court held that the child is elevated as an active subject of rights from the passive object of protection based upon the Child Welfare Act on the concrete guarantee of the rights of the child. This is mainly because the fundamental spirit of the rights of child can be drawn from Article 10 of the Constitution on human dignity and value and Article 34(4) on the policy

70 Seoul High Court [Seoul High Ct.], 2007Na72665, Feb. 10, 2009.
71 Daegu District Court [Dist. Ct.], 2013Go-Hap461, Apr. 11, 2014.
72 Daegu District Court [Dist. Ct.], 2014Go-Hap218, 434, Nov. 17, 2014 (combined).
73 Daegu High Court [Daegu High. Ct.], 2014No214, 2014No699, May 21, 2015 (combined).

concerning the improvement of adolescent welfare. The CRC states the enhancement of four rights such as the rights of livelihood, protection, development, and participation on a basis of the highest priority for the interest of the child, non-discrimination, respect for life and guarantee of development, and the principle of respect for opinions. The court decided that the responsibility of protecting children from all forms of violence and mistreatment should be carried out applying a firm and rigorous punishment against the perpetrator.

This decision is significant, in the sense that the child is declared as the active subject of rights on the basis of the Constitution, the Child Welfare Act and other municipal law and the CRC. Looking into relevant provisions of the CRC, Article 5 of the CRC provides for the rights and duties of parents to provide direction and guidance, and Article 18 for the primary responsibility of parents or guardians for the upbringing and development of the child and the state's assistance to parents or guardians. Accordingly, parents can exercise the right to upbringing, direction and guidance of the child ahead of the state and the state should respect these rights. Article 19 of the CRC states the obligation of "states parties to take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation," despite the priority right of parents to the upbringing, direction and guidance of children. In sum, the child possesses the rights to receive direction, guidance and upbringing of parents or guardians and in case of abandonment or mistreatment by parents, has the right to demand the protection of the state which has a secondary responsibility.

Since the rights of child in the CRC in general are provided for with the state as the main subject of obligation to respect and protect the rights of child, the Convention is deemed difficult to be directly applied through judicial norms. However, some articles like Article 7 on the right to registration, life, acquisition of nationality, and upbringing by parents; Article 16 on private life and the right not to be interfered with in family, home or communication; and Article 30 on the intrinsic right of racial, religious, or linguistic minority or indigenous child to enjoy culture, religion, and language are provided for with the child as the subject of the rights with concrete and specific contents and can be directly applied.[74] Even in case of no direct application of the Convention, it can be indirectly applied, being used as subsidiary means or guidance for the interpretation of provisions of municipal law.

74 Jisung Kang, *Bumo Mich Bohoja-ui Hagdaelobuteo Bohobad-eul Adong-ui Gwonli* [*The Right of Child to Protection from Maltreatment of Parents and Guardians*], *in* HUMAN RIGHTS LAW CASES 235, 258 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

This decision recognizes that the child is an active subject of rights rather than a passive object of protection of the rights on the basis of the CRC, and in case of any maltreatment of the child by parents or guardians who have primary responsibility, the rights of the parents are restricted and on the premise that the state, on behalf of parents, has the responsibility to protect the rights of the child. In such cases, the court enforces the obligation by punishing parents who mistreat their children.

### k *Status of Refugees*

Korea acceded to the Refugee Convention and the Refugee Protocol in 1992. The Immigration Act was subsequently amended as part of domestic implementing measures for accession to the treaties and entered into force on July 1, 1994. Thereafter, the Act on the Status and Treatment of Refugee was enacted and has been enforced from July 1, 2013.

In the case in which a plaintiff, a Myanmar national who was working without a relevant stay visa, was caught and received a penalty notice disposition, the plaintiff applied for refugee status. After his application was rejected, he filed an objection and received permission for a stay extension. While working in the same company, he received a compulsory eviction order for breach of the Immigration Act. The court of first instance cancelled the compulsory eviction order and protection order.[75] It held that the plaintiff violated the Immigration Act while working without a relevant visa. The reason for the compulsory eviction order was admissible, but the disadvantage the plaintiff suffered was determined to be greater than the public interest achieved through the compulsory eviction order, thus causing the illegality due to deviation from and abuse of the discretionary power contravening the principle of proportionality. The defendant appealed in protest against the original decision, but the Seoul High Court dismissed it, for reasons that the order was deemed illegal and contravened the principle of proportionality, considering that the disadvantage of the plaintiff was greater than the public interest achieved by means of the compulsory eviction order.[76]

The appellate court held that Korea legislated the Refugee Act with concrete provisions for a refugee recognition procedure and the treatment of refugees on February 10, 2012 with the goal of speediness, transparency, and fairness in the refugee recognition procedure and help to maintain the minimum livelihood of refugee applicants and seek reconciliation between the Refugee Convention and other international and municipal law. Though the plaintiff, who

75 Seoul Administrative Court [Seoul Admin. Ct.], 2013Gu-Hap13624, Nov. 14, 2013.
76 Seoul High Court [Seoul High. Ct.], 2013Nu52638, Oct. 7, 2014.

applied for refugee status, has not received a refugee recognition decision, a stay should be permitted during the period of consideration on the refugee application, as far as the refugee recognition procedure or lawsuit appealing the refugee rejection decision is underway and the application is not explicitly abused. It was decided that the plaintiff, as part of a minority who has been treated discriminately by the Myanmar government, should not be considered an economic refugee, and the compulsory eviction order, while the administrative suit is underway regarding refugee status, is deemed to cause greater disadvantage of applicants than the public interest achieved by the order.

The main issue in this case is whether the compulsory eviction order in regards to the refugee applicant violates Articles 32 and 33 of the Refugee Convention which prohibits deportation or repatriation. Article 32(1) of the Convention provides that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." Article 33(1) indicates that "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" which makes it clear that the prohibition on the expatriation or repatriation of refugee is the obligation of states parties. If the refugee applicant who filed a lawsuit against the administrative authorities with regard to a refugee rejection received a compulsory eviction order because he violated Articles 18(1) and 20 of the Immigration Act and was employed without permission, and the compulsory eviction order is issued by the perfunctory application of the law, then the applicant would be deprived of the opportunity of a court proceeding concerning his refugee rejection decision. If in consequence of a court hearing, it is adjudged that the refugee applicant satisfies the conditions for refugee status, it would result in violation of Article 33 of the Convention on the basis of the *non-refoulement* principle which constitutes the minimum obligation of protection irrespective of how the state party regulates the legal status of refugees in municipal law.[77]

In consideration of the above, Articles 3 and 2(c) of the Refugee Act provides for the prohibition on the compulsory repatriation of applicants against their will while the administrative proceedings on the denial of refugee status is underway which settles the issue legislatively. The decision in this case gives priority consideration to the interest of refugee applicants, as far as no evidence is offered regarding a significant public interest such as national security

77 Mirim Yoon, *Nanmin Sincheongja-e Daehan Gangje Toegeo Myeonglyeong* [*Compulsory Eviction Order to Refugee Applicants*], *in* HUMAN RIGHTS LAW CASES 297, 303 (Int'l Human Rights Law Research Soc'y ed., Parkyoung-sa, 2017).

and public order necessary for a compulsory eviction order for an applicant for refugee status.

Meanwhile, in the decision of a Côte d'Ivoire national who applied for refuge on account of a well-founded fear of persecution upon return to Côte d'Ivoire, which has been in a state of war, the Supreme Court held, admitting the possibility of persecution, that:

> The harm the plaintiff suffered, even though having occurred during the civil war, is not deemed to amount to simply the level of agony or danger ordinary Ivorians suffered in terms of degree and severity, and the allegation of the plaintiff can be sufficiently admitted that the attack against the plaintiff is attributable to the fact that the plaintiff was involved in the activities of FPI political party as a member of Betha tribe who took power. . . . [T]aking into account all the circumstances, if the plaintiff is repatriated to Côte d'Ivoire, it is reasonably admitted that he is likely to be persecuted on account of his tribal relationship or political activities, and it will be difficult to be sufficiently protected by the home state.[78]

In the decision on a Nigerian national who applied for refugee status for being persecuted due to religion, the Seoul Administrative Court referred to the Refugee Convention, the UDHR, and the ICCPR. The decision articulated that:

> The rights to freedom of thought, conscience, and religion which are declared by the UDHR and the ICCPR contain the right to change religion, or to express one's religion in education, faith, worship, and ceremony, whether public or private. . . . [i]n considering the above admitted facts and the special circumstances under which the plaintiff is placed, the well-founded fear of persecution is applicable to the plaintiff who as a devout Christian faced the danger to his life, body, and freedom caused by the traditional religious adherents.[79]

## 4 Main Features of Korean Court Decisions

Seldom in the past have the decisions of the Supreme Court or the Constitutional Court dealt with cases invoking international human rights laws. The positions of the highest courts in Korea, similar to other countries, have been

78 Supreme Court [S. Ct.], 2010Du27488, Apr. 26, 2012.

79 Seoul Administrative Court [Seoul Admin. Ct.], 2012Gu-Hap218, Aug. 16, 2012.

that human rights treaties regulate relations among states and therefore have no direct effect upon individuals. The courts have ruled that treaties, to be implemented in Korea, need to be implemented into municipal law.

The reasons for this include; first, not many cases are found in which human rights treaties have been invoked. In comparison with the number of human rights treaties Korea has ratified or acceded to, including the ICCPR, the ICESCR, the CAT, the CEDAW, the CERD, the CRC, the CRPD etc. the decisions invoking human rights treaties amount to only 30 cases or so except for cases dealing with conscientious objection to military service.[80] In the past, the ICCPR has been invoked predominantly, and since 2005, other treaties have been cited beginning with the CEDAW, the CERD, the CAT, and the CRC, which demonstrates the tendency that the range of treaties that have been looked to has increased gradually. In the decisions of the highest courts, only rarely have human rights treaties been invoked in dissenting opinions, and seldom in majority opinions.

Second, in the event human rights treaties are invoked, they are used as a supplementary means for the interpretation of municipal law. Treaties are considered to be norms that regulate relations among states in terms of rights and duties and are not considered to be judicial norms to be applied directly to individuals. This perspective of treaties was clearly shown in the *Sohn Jongkyu* damage claim case in which the Supreme Court decided that the provisions of human rights treaties do not create rights for an individual to claim damages against the state.[81]

Third, in the case of a conflict between municipal and international law, municipal law is interpreted in such a way as to be consistent with international law. Concerning the punishment of conscientious objectors to military service, the Supreme Court interpreted that the punishment did not violate the ICCPR.[82] There is concern that failure to interpret municipal law to be consistent with international law, the converse, that international law is to be interpreted and adapted to municipal law would downgrade the effectiveness of human rights treaties.[83]

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80 Gwanpyo Hong, *Beobwon Pangyeol-eul Tonghae Salpyeobon Gugje Ingwonjoyag-ui Gugnae Ihaeng* [*Domestic Implementation of International Human Rights Treaties in View of Court Decisions*], 32 BEOB HAK NON CHONG 81, 94 (2015). Professor Hong's article covers court decisions in the period from December 1994 to June 2014.

81 Supreme Court [S. Ct.], 96Da55877, Mar. 26, 1999.

82 Supreme Court [S. Ct.], 2007Do7941, Dec. 27, 2007.

83 Seungjin Oh, *Gugje Ingwonjoyag-ui Gugnae Jeog-yong-gwa Munjejeom* [*Domestic Application of International Human Rights Treaties and the Issues*], 56 KOREAN JOURNAL OF INTERNATIONAL LAW 113, 127 (2011); Seungjin Oh, INGWONBEOB GANG-UI [INTERNATIONAL HUMAN RIGHTS LAW] 34 (Jinwon-sa, 2d ed. 2014).

Fourth, the references were made to treaties inexactly. For example, the abbreviated names of treaties were utilized as opposed to their formal designations, and in some cases, no provisions of treaties were referred to or the dates for the entry into force or accession and ratification were mistaken.

Fifth, in the decisions of courts, the interpretation of international human rights institutions has been disregarded or not respected due to their decisions and opinions having only aspirational effect. In making an interpretation of human rights treaties, courts tended not to refer to the views of human rights institutions or even making reference to them, disregarded them since they have no binding force.

However, in contrast with the highest courts, the courts of lower instance have made more frequent reference to human rights treaties. Within the courts, the international human rights law research society has been organized to enhance the understanding of judges regarding human rights law. Moreover, in the research articles written by member judges of the society, the arguments have been made as to the necessity for the direct application of human rights treaties or to use them as for judicial norms.

## 5 Feasible Remedies in Korea and Suggestions

### a *National Plan for Human Rights Policy*

Since joining international human rights covenants in 1990, Korea has in earnest exerted administrative and judicial efforts to realize international human rights domestically. Administratively, the first national plan for human rights policy started to be implemented in 2007 for a period of 5 years. The national plan was the work to implement the task of the National Plan of Action for Promotion and Protection of Human Rights which was proclaimed at the World Conference on Human Rights in 1993 in Vienna.

The basic plan for national human rights policy is drawn up and adopted by the national human rights policy consultative committee chaired by the Minister of Justice. Beforehand, the National Human Rights Commission makes a recommendation to the government about the basic plan; then the Ministry of Justice considers the opinion of the National Human Rights Commission and the advice of the international human rights institutions and selects policy tasks and sets up implementation objectives and refers them to the consultative committee for final adoption.

Human rights treaty committees make recommendations to provide effective remedies including compensation to victims in response to individual communications. In addition, other measures such as prevention of recurrence, restitution, restoration of honor, and apology and other satisfaction

have been recommended. With regard to the recommendations of the human rights treaty committees, the task force within the Korean government composed of officials from the ministries of justice, foreign affairs, health and welfare, and family and gender equality etc. discuss and formulate implementation measures.[84]

Currently, the third national plan for the period of 2017–2021 is underway. The national plan is mainly composed of the protection of the socially weak and vulnerable and the establishment of infrastructure for the promotion of human rights.[85]

### b *Feasible Remedies in Korea*

In Korea, there exists a practical restriction on remedies for human rights violations due to the passive position of judicial organs toward human rights treaties. Narrowing down the discrepancy between international and municipal law remains a complex task. Therefore, filling in the gap that exists between municipal and international law continues to be challenging.

The feasible means of providing for legal remedies consistent with international law in Korea will be suggested and analysed with the context of the following: due process by means of human rights treaties in criminal proceeding; the protection of human rights in proceedings that seek the annulment of administrative decisions; the use of international law in damage claims; and the settlement of disputes through the invocation of international law.[86]

First, a defendant can seek the rejection of prosecution by invoking human rights treaties in a criminal case.[87] In criminal proceedings, human rights treaties to which Korea is a party to can be invoked to form favorable circumstances

84 Juhyung Lee, The Role of The Administrative for Domestic Incorporation of International Human Rights Law 109–10 (2013).

85 *See* Ministry of Justice of Republic of Korea, Je-3cha Gugga Ingwon-Jeongchaeg Gibongyehoeg [The Third National Human Rights Plans of Action] (2018), http://www.moj.go.kr/moj/334/subview.do?enc=Zm5jdDF8QEB8JTJGYmJzJTJGbW9qJTJGMTIxJTJGNTAxNDYzJTJGYXJoY2xWaWV3LmRvJTNGcGFzc3dvcmQlMoQlMjZyZ3NCZ25kZVNociUzRCUyNmJicoNsU2VxJTNEJTI2cmdzRW5kZGVTdHIlMoQlMjZpc1ZpZXdNaW5lJTNEZmFsc2UlMjZwYWdlJTNEMSUyNmJic09wZW5XcmRTZXElMoQlMjZzcmNoQ29sdW1uJTNEJTI2c3JjaFdyZCUzRCUyNg%3D%3D.

86 Chanwoon Park, *Gugje Ingwonjoyag-ui Gugnaejeog Hyolyeoggwa Geu Jeog-yong-eul Dulleossan Myeochgaji Gochal* [*Study on Domestic Effect and Application of International Human Rights Treaties*], 609 Korean Lawyers Association Journal 141, 174–77 (2007); Miyoung Oh, *Gugjebeob-ui Gugnaejeogyong-e Gwanhan Ilbon-ui Beobchegyewa Gyeongheom* [*Implementation of International Law in National Legal System: Japanese Legal System and Experience*], 28 International Law Review 67, 74–75 (2008).

87 Park, *supra* note 86, at 174–75; Oh, *supra* note 86.

for criminal defendants. According to Article 327 (Judgment rejecting Public Prosecution) of the Criminal Procedure Act, "Where the procedure for instituting public prosecution is void by reason of its having been contrary to the provisions of Acts," the rejection of prosecution or judgment on the reversal of an original judgement can be sought by appealing to a rule of *jus cogens* or the ICCPR. In case a warrant is issued without examination by judges in the process of the issuance of a warrant against a detained suspect, the illegality of detention examination can be invoked in the spirit of Article 9(3) of the ICCPR which requires compulsory warrant examination. In a similar vein, the Constitutional Court recognized the domestic effect of the WTO Agreement in imposing an aggravated penalty ruling that it would not deviate from *nulla poena sine lege*.[88]

Second, the annulment of an administrative decision or judgment that is in violation of human rights treaties can be sought.[89] If an administrative proceeding is instituted seeking the annulment of an administrative decision, the aggrieved party can seek a broader remedy by including a petition that invokes human rights treaties. For example, the annulment of a forced eviction order can be requested based upon a decision to deny refugee status because it conflicts with the principle of non-extradition of political offenders as it violates obligations under international human rights covenants and the Refugee Convention. Recently as arguments have been put forth that the decision on the admission of refugees does not rest merely upon the substantive law, but should also be based on procedural fairness, the applicability of international law is thought to have widened.[90]

Third, a damage claim could be filed based upon an allegation of a violation of a human rights treaty.[91] The range of remedies could be expanded if the damage suit is filed which includes that public officials intentionally or negligently failed to meet their obligations under human rights treaties. In such a claim, the public official's intent or negligence would be at issue. The claimant could prove the intention or negligence of such a public official by pointing out that the act of the public officials violates human rights treaties while the

88 Constitutional Court [Const. Ct.], 97Hun-Ba65, Nov. 26, 1998 (10 KCCR, 685, 685). Recognizing direct applicability of a treaty, the Court ruled as follows:

> As the Maraakesh Agreement has the effect identical to municipal law as a treaty concluded and promulgated in accordance with the Constitution, constituting a new offence or imposing aggravated punishment upon offenders by the provisions of the Agreement would be equivalent to punishment by municipal law.

89 Park, *supra* note 86, at 174; Oh, *supra* note 86, at 74–75.

90 Oh, *supra* note 86, at 74–75.

91 Park, *supra* note 86, at 175; Oh, *supra* note 86, at 75.

defendant, state institution, would attempt to prove the legality of public official's action.

Fourth, in various legal proceedings, courts could utilize human rights treaties as a supplementary means for the interpretation of municipal law.[92] With regard to the treatment of prisoners, Article 14(1) of the ICCPR could be utilized in the interpretation of the Constitution, the Criminal Act, and the Criminal Administration Act. For improving the human rights of prisoners, relevant municipal law could be interpreted by making reference to the ICCPR and the CAT to create a lawful environment for prisoners. In the case in which the plaintiff, who had not been convicted, argued that his "right to assistance of an attorney" in Article 12 of the Constitution was violated by the presence of prison officials as he met with his attorney, the Constitutional Court confirmed the principle of "within sight, but not within the hearing" according to international human rights law and declared the provision of the Criminal Administration Act as unconstitutional. Articulating the ground for the principle of "within sight, but not within the hearing," the Constitutional Court referred to the principle mentioned in Principle 18(4)[93] of the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" adopted by the General Assembly Resolution 43/173 of December 9, 1988.

### c *Suggestions and the Way Forward*

It is acknowledged that a main function of the judiciary is to provide remedies for violations of human rights and realize legal justice through the decisions rendered by the independent judgment of a judge. If the function of the court is confined to the interpretation and application of municipal law, it is feared that the realization of justice remains much to be desired. In connection with this, as international law evolves, many states have implemented international law into their municipal legal systems. Both international law and municipal law act upon each other, contributing to the guarantee of human rights.

As the systems of municipal and international law are different, there are realistic impediments that exists in accepting and applying international law domestically which can be viewed with respect to the approach of the judiciary to interpretation of treaty and the structural aspect of the judiciary. In regards to the structural aspect of the judiciary, as the main work of judges is

92 Park, *supra* note 86, at 176–77.

93 Principle 18(4) provides: "Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing of a law enforcement official."

focused upon the interpretation and application of municipal law, problems such as the low degree of understanding and familiarity about international law; limitations of lawsuits; and structural restrictions in judicial administration are present. In regards to the interpretation of international law, the impact of the special political and security environment of the divided Korea is of importance.[94]

First, the low degree of understanding and familiarity of judges about international law is an issue.[95] Judges conduct trials by primarily interpreting and applying municipal law. In doing so, the knowledge and understanding of judges about international law turns out to be limited as a result. Not only is knowledge about international law limited, but judges are also known to have perspectives about role of international law in contrast to municipal law.[96] Based upon the perception that international law has the character of mainly regulating the relations among states, and that municipal law is to regulate relations between the state and individual and relations between individuals, judges have a low familiarity with international law about its importance within the domestic legal system based on their view that the two legal systems are of different character. Human rights treaties aim to protect the human rights of individuals and provide a foundation that underpins the basic human rights of municipal law. While in keeping with the purpose of the Constitution, human rights treaties function as guidelines to complement the provisions of the Constitution and other municipal law. In the era of a borderless world, in recognizing that precedents of the human rights of certain states affect other states and the uniform standard of human rights needs to be made, it is necessary to move to enhance the understanding of international law and raise the protection of human rights.[97]

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94 Minjin Kim et al., *Hanguk Beobwon-ui Ingwon Gyujeong-ui Jeogyonggwa Baljeon Banghyang: Gukje Ingwonjoyageul Jungsimeuro* [*A Study on Current Situation and Development of Human Rights Instruments in Korean Courts : Focused on International Human Rights Treaties*], 22 Korean Criminological Review 153, 175–79 (2011); Int' l Human Rights Law Research Soc' y, *supra* note 11, at 85–88.

95 Kim et al., *supra* note 94, at 176–77.

96 Yongwhan Cho, *Teugjib : Heonjeong 60junyeongwa Ingwon Bojang ; Je 2-bu Heonjeong 60-nyeongwa Ingwon : Joyag-ui Gugnaebeob Suyong-e Gwanhan Bipanjeog Geomto* [*Symposium : "The 60th Anniversary of Constitutional Government in Korea and the Protection of Human Rights" ; Symposium 2 : "The Sixty Years of Constitutional Government and Human Rights" : Critical Analysis of Cases regarding Domestic Effect of International Treaties*], 34 Korean Journal of Law and Society 89, 133 (2008); Kim et al., *supra* note 94, at 176–77.

97 In Japan, the necessity for education of judges on international human rights law has been raised and special lectures in international human rights law have been conducted in the judicial training institute or in the education program of judges. It is said that the education itself is not enough and due to the heavy workload of judges, it is hard to give

Second, in terms of obstacles to court proceedings, the requirement of appeals to the court of upper instance to contest the decision of lower courts is decided by the application and judgment of municipal law.[98] Appeals based on a violation of international law is not expressly stipulated in the text of the law. Apart from the indirect application of international law, the effect would be different in case of a textual stipulation on international law for the requirement of an appeal. Even though the Constitution provides for the domestic effect of treaties to which Korea is a party, their practical effect would hardly come into being if their self-execution is not recognized by judges or treaties are not directly applied in the case.[99] It has been suggested by some scholars that a study needs to be made of amending the Procedure Act to expressly recognize appeals made on the basis of human rights treaties.[100]

Third, the limitations in the structure of judicial administration are present. In principle, the judge performs the tasks of delivering judgments fairly in pursuance of law and conscience in an independent manner. In reality, however, judges are influenced by the diverse political and social environment and are also restricted by the structure of the organization as they work within the organization of courts. The promotion, reappointment, assignment and other personnel administration of the court can affect the work of judges as constraining factors.[101] The existing viewpoint of judges about human rights treaties can influence them to follow in the footstep of precedents and make it

priority to the education of human rights law. It is suggested that judges can pay more attention to the study of human rights and enhance knowledge about it as a result under the circumstance where human rights lawyers make argument about international human rights law in court proceedings. Higasijawa Yasushi, *International Human Rights Law as Adjudicatory Norms: Toward the Actualization of International Human Rights Law by the Judiciary*, 13 Seoul International Law Journal 69, 85 (2006).

98 In the case of Japan, it has been pointed out that the biggest obstacle to the utilization of international human rights law by the court is that the Supreme Court does not have an obligation to make judgments on the issue relating to customary international law or human rights treaties. In civil, criminal and administrative lawsuits, the cause of appeals to the Supreme Court is limited to the unconstitutionality and judgment on the issues of human rights treaties is left to the discretion of the Supreme Court. To settle this problem, it has been argued that the Supreme Court needs to make judgments on human rights more actively or should be legally obligated to adjudicate on the issues of human rights treaties. Higashizawa, *supra* note 97, at 83–84; Kim et al., *supra* note 94, at 178–79.

99 To make sure that human rights treaties are applied by the court in recognition of their self-execution, the best way is to make an implementing act, unlike trade treaties which are directly applied in Korea by the Supreme Court. However, domestic legislation of human rights treaties might be very complex.

100 Kim et al., *supra* note 94, at 175–79; Higashizawa, *supra* note 97, at 83–84.

101 Kim et al., *supra* note 94.

difficult for them to play a pioneering role in the protection of human rights of defendants or victims. Naturally, this observation can be criticized as being extremely superficial and incidental, but it should be recognized as a substantive factor in certain cases.

Turning to other areas of judicial administration, the facilities of the court should be geared to strengthening and guaranteeing the rights of minorities to trial to protect their rights not just in the process of the trial, but also the trial procedure and make-up of the judiciary. Efforts toward publicizing and utilizing human rights in trial proceedings should be exerted without ceasing to create diversity and improve facilities for the protection of minorities.[102]

Next, there are problems in the interpretation of human rights treaties. Basic human rights and freedoms may be restricted by law when necessary for national security, maintenance of law and order and public welfare pursuant to Article 37(2) of the Constitution. The human rights of an individual are not guaranteed beyond the limits of the welfare and security of the whole society and restrictions on individual human rights to achieve the greater legal interest is an unavoidable necessity of maintaining a communal society. Where individuals live together in a community and their interests collide against each other, restricting the interest of an individual is to be tolerated to preserve the interests of the community and thus, the maintenance of law and order can prevail against individual interests. Even in restricting the basic rights of an individual, the limits to the restriction are provided to protect the essential content of human rights. The restriction of basic human rights of an individual must be consistent with a legitimate objective, adequacy of means, minimum harm, and balance of legal interest. This requirement is based on the principle of excess prohibition.[103] It is true that human rights treaties may be disregarded in court proceedings. This phenomenon is exemplified in cases where the right of expression has been played down for reason of national security in the context of the confrontation between the two Koreas.[104] Additionally, the comments or recommendations of international organizations concerning freedom of conscience or the rights of labor have not been accepted by Korean courts.

With regard to the means of overcoming these constraining factors, the invocation of human rights treaties as judicial norms, raising awareness of the public about human rights through education and promotional activities, and

102 Int' l Human Rights Law Research Soc' y, *supra* note 11, at 88.

103 Kim et al., *supra* note 94, at 175.

104 *Id.* at 176.

legislation and amendment of municipal law relevant to the restriction of human rights need to be considered. Specifically, legislation of domestic acts to implement human rights treaties is encouraged, which will make clear the domestic effect of treaties. Also, the court has held on to a passive and cautious attitude in accepting and invoking human rights treaties due to limitations in the knowledge and understanding of international law. When human rights treaties are not invoked as a judicial norms, this reveals the limits in the elevation to a more advanced state in human rights in terms of foreign policy, and furthermore, a gap between foreign policy and domestic reality is evidenced. A more active attitude is required of the court in protecting human rights through the application of human rights treaties as judicial norms given that Korea has acceded to most major human rights treaties. Having witnessed more cases of human rights treaties being applied directly by the courts of lower instance, in contrast with the highest courts, and where more attention to and research on international human rights law by setting up the international human rights law research society within the court, it is expected that the understanding and familiarity about human rights law will increase and lead to the direct application of treaties.

Second, as society has democratized and national income has increased, the awareness of human rights has been raised accordingly. While political rights having been realized and increased, in socio-economic areas more effort is required to narrow down the gap between the rich and poor and protect the rights of minorities and the disabled. To conform to diversified human rights, Korea has striven to accede to human rights treaties actively that have been codified in the international community. For respect and protection of human rights, each person should assert his or her own rights based on the knowledge of human rights. To this end, the awareness of human rights should be raised and deepened through education and promotional activities on human rights in all walks of life. More specifically, the active role of the National Human Rights Commission, which is responsible for increasing awareness, is required. The education of law enforcement officials who are in the position to potentially infringe upon human rights needs to be conducted, in addition to the public in general.

Third, with regard to treaties to which reservations have been made due to a possible conflict with municipal law, it is necessary to consider enacting and amending relevant municipal law actively to improve the environment of human rights. The achievement of gender equality by eliminating various forms of discrimination in the Civil Act and the Nationality Act that have existed for a long time due to convention and practice is deemed to be the outcome of the accession and enforcement of human rights treaties.

## 6 Conclusion

The role of courts as the final bulwark of human rights cannot be underrated. In the implementation of human rights treaties, the approach of courts in the interpretation of treaties and the structural aspect of courts need to be considered. The low degree of understanding and familiarity of judges about international law is at issue, as the main function of judges is focused upon the interpretation and application of municipal law. Judges are also known to have perspectives about international law different from municipal law. Judges are influenced by the diverse political and social environment and are also restricted by the structure of the judicial organization.

Under these circumstances, unlike the conservative and inactive attitude of the highest courts, lower courts have shown some tendency to hand down decisions which apply international human rights law directly in a forward-looking and progressive manner. It seems that this trend will likely change the perspective about the domestic acceptance of international human rights law. Following the establishment of the international human rights law research society which is comprised of many junior judges, the enhanced awareness and understanding of international law through their research activities will likely lead to the reflection of international law in the decision of courts.

It needs to be borne in mind that because of the administrative structure of the court, there are currently limits to potential pioneering role of judges in the protection of human rights of victims or defendants in accordance with international human rights law. In principle, the judge carries out the tasks of making judgments in pursuance of law and conscience in an independent manner. In reality, the prevailing perspective of human rights treaties influences and induces them to follow in the footstep of precedents, and thus makes it difficult for them to have a more active role in the protection of human rights.

In conclusion, the hurdles for the protection of human rights need to be sorted out legally and administratively. The direct application of human rights treaties as judicial norms, legislation and amendment of municipal law relevant to the restriction of human rights, and raising of awareness about human rights through education and promotional activities are to be advocated and reiterated.

# The Settlement Practice of Environmental Disputes Involving Foreign Investors in Vietnam – the Two Sides of the FDI Coin

*Tran Viet Dung* and Ngo Nguyen Thao Vy***

## 1 Introduction

The last two decades have been an extraordinary period for Vietnam. The country has undergone dramatic economic development from a centrally planned economy to a "socialist-oriented market economy"[1] under the umbrella of the Doi Moi (Renovation) Policy. Significantly, Vietnam has openly recognized the importance of international economic cooperation.[2] Attracting foreign direct investment ("FDI") has been a key part of Vietnam's external economic affairs. The Government of Vietnam has made tremendous efforts to develop the business and investment climate, and by recognizing that the FDI sector is an integral part of the economy – essential to restructuring the economy and raising national competitiveness.[3]

Vietnam has offered certain forms of legal protection to foreign investors, such as most-favored-nation treatment, national treatment, equitable

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1 Pursuant to Political Report of the Vietnamese Communist Party Central Committee at Party Congress XII, the Vietnam's "socialist-oriented market economy" is an economy operating fully and synchronously according to the rules of a market economy while ensuring the socialist orientation suitable to each period of national development. It is a modern and internationally integrated market economy which is administered by a law-ruled socialist state [nhà nước pháp quyền xã hội chủ nghĩa] and led by the Communist Party of Vietnam toward the goal of a rich people and a developed, democratic, equal and civilized country. The term is first used in the 1992 Vietnamese Constitution to characterize the new model of economic structure in the era of Doi Moi.

2 Viet Dung Tran, Anti-Dumping Policy and Law of Vietnam: A Critical Analysis from Integration and Competition Policy Perspectives 55 (2011).

3 World Bank, Vietnam Development Report 2006 – Business (2005), http:/siteresources.worldbank.org/INTVIETNAM/Resources/vdr_2006_english.pdf.

 | DOI:10.1163/9789004415829_010

treatment, protection and security, provision on compensation for losses incurred by foreign investors as a result of expropriation. These protections are cemented as the country's international obligations under bilateral investment treaties ("BIT")[4] and regional trade agreements.[5] The participation in the multilateral and regional economic arrangement indicates that Vietnam is concerned to protect also the interests of foreign investor in its territory.

It should be noted that FDI inflows have seen a steady and strong increase after Vietnam's successful accession to the World Trade Organization ("WTO"). The period of 2010–2015 showed the establishment of Vietnam as a major manufacturing hub in the region, with the large majority of FDI flowing into the manufacturing and processing sector.[6] It is recognized that foreign investment projects have played a very important role, not only in providing investment capital but also in stimulating export activities, as well as introducing new labor and management skills, transferring technologies and generating job opportunities in Vietnam.

However, FDI also contributes to various environmental problems and challenges to Vietnam. According to the survey provided in the "Mitigation of Environmental Impacts Related to FDI in Vietnam" workshop held by the Central Institute for Economic Management ("CIEM") and the EU-MUTRAP Project in June 2016, nearly 67 percent of FDI enterprises operating in Vietnam are export manufacturing companies with low value-added products, backward energy-consuming technologies and high emissions to the environment.[7] Regarding environmental impacts from operation activities, while most of the FDI companies are aware of their obligation to comply with the environment

4 Vietnam has executed 65 BITs since 1992, amongst them 12 BITs have not been in force and three BITs were terminated (the BITs with Indonesia (1994), Korea (1993) and Finland (1996) were replaced by new BITs). UNCTAD, *International Investment Agreements Navigator: Viet Nam*, http://investmentpolicyhub.unctad.org/IIA/CountryBits/229#iiaInnerMenu (last visited Mar. 10, 2017) [hereinafter UNCTAD].

5 *Id.* Vietnam has executed eight Regional Trade Agreements, including seven free trade agreements (FTA) and the ASEAN Comprehensive Investment Agreement (ACIA), which is a component of the legal framework of the ASEAN Economic Community.

6 Dubai Exps., Vietnam – Economic Overview & Trade Analysis 7 (2017), http://www.dedc.gov.ae/StudiesAndResearchDocument/MTR-23092017-VIETNAM-Q3.pdf.

7 Central Institute for Economic Management, *Proceedings of the Workshop on the Mitigation of Environmental Impacts Related to FDI in Vietnam* (June 15, 2016) (transcript available in the Central Institute of Economic Management).

regulations that requires them to prepare an Environmental Impact Assessment Report ("EIAR") upon application for approval of the investment project, most of them choose to disregard or not fully comply with environment protection requirements by the law.

Such non-compliance leads to the increasing rise of environment disputes on a national scale. According to the year 2000 report of the Inspectorate of the Ministry of Science, Technology and Environment on the results of inspection, from 1994 to 2000, there were 3,252 cases of breach of environment protection laws, of which the breaching entities in 1,515 cases, accounting for 46.57 percent of the total number of breaches, had the responsibility to compensate for damage caused to organisations and individuals. While data concerning the number of environment disputes in Vietnam is not officially collected or widely published since then, most of the disputes related to the violation committed by FDI companies through their operation activities and are on the increasing trend. The major environmental disputes caused by FDI projects arose in the period from 2008 to 2016, which included among others Vedan Vietnam Enterprise Corporation Limited's (Vedan Vietnam) committed pollution acts in Thi Vai River in 2008 and Formosa Steel's toxic waste water alleged causing massive fish deaths in Ha Tinh province in April 2016. Therefore, it is of essential to have an insight into the legal framework on foreign investment, environmental protection as well as the practice of environmental dispute settlement in Vietnam in order to find solutions to meet the urgent needs of the society.

## 2 International Instruments to Regulate FDI in Vietnam

It is important to understand the international and national instruments regulating FDI in Vietnam, in order to assess the issues of environmental protection related to FDI and settlement of environmental disputes involving foreign investors in Vietnam. The implementation of international obligations of Vietnam on the protection of foreign investments in the light of national environmental policy should be highlighted, as it would ensure the sustainability of economic growth for the state.

Vietnam, like most developing countries, has been regarded the international investment agreements ("IIAs") as a vehicle to attract FDI. By concluding IIAs, the Vietnamese government seeks to bind itself with international obligations to protect FDI as well as to make the regulatory framework for FDI more transparent, stable and predictable – and thereby more attractive to foreign investors. The government understands that the obligations embedded in

IIAs would constrain its sovereignty by specifically limit their ability to take necessary legislative and administrative actions to advance and protect their national interests.[8]

In the 1990s, Vietnam signed the first BITs with important trading partners, such as Thailand (1991), Singapore (1992), China (1992), Australia (1991), Korea (1993), France (1992). By execution of the BITs, Vietnam sought to demonstrate to the international community about its new open door policy towards FDI and thereby reduce political risks for foreign investors.[9] The BITs of Vietnam were designed to regulate following issues: (i) the definition and foreign investors and their investments, (ii) fair and equitable treatment towards FDI, (iii) national treatment – foreign investors must not be treated less favourably than their domestic counterparts, (iv) most-favoured-nation treatment, (v) compensation in the event of expropriation, (vi) guarantees of the free transfer and repatriation of capital and profits, and (vii) method of settling investment dispute. By granting foreign investors access to international arbitration under the BITs, the Vietnamese government demonstrated a strong commitment to honour its obligations, which should further enhance investor confidence.

As a member of the Association of Southeast Asian Nations ("ASEAN"), Vietnam signed the Framework Agreement on the ASEAN Investment Area (AIA) on October 7, 1998 and ASEAN Comprehensive Investment Agreement ("ACIA") on 29 February 2009. The latter aims to make ASEAN a competitive, conducive and liberal investment area. After accession to the ASEAN and ASEAN Free Trade Area in 1995, Vietnam has become a party to 5 FTAs between ASEAN and China, Japan, South Korea, India, Australia-New Zealand.[10] These regional trade treaties also make reference to the foreign investment protection provisions. The participation of Vietnam in these regional trade arrangements indicates the Vietnamese government's commitment toward deep economic integration[11] and development of a strong FDI protection system in accordance with international law. The development of IIAs

8 Karl P. Sauvant & Lisa E. Sachs, The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows 67 (2009).

9 Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harvard International Law Journal 67 (2005).

10 The ASEAN-China FTA was concluded in 2009 (effective in 2010); the ASEAN–Korea FTA was concluded in 2009 (effective in 2010); the ASEAN–Australia–New Zealand FTA was concluded in 2009 (effective in 2010); and the ASEAN-Japan FTA was concluded in 2008 (effective in 2008). *See also* UNCTAD, *supra* note 4.

11 *See* Tran, *supra* note 2, at 57–59.

network together with liberalisation policy have facilitated the FDI inflows in Vietnam. In 2016, foreign investments climbed to US$24.4 billion, indicating a nine percent growth compared to 2015.[12] Of these, US$15.1 billion flew to 2,556 newly registered projects, 1,225 existing projects added a total of US$5.76 billion to their capital, and foreign investors purchased stakes in 2,547 companies for a total value exceeding US$3.4 billion.[13]

To date, Vietnam is a party to over 85 IIAs.[14] In general, these IIAs acknowledge the significance of investment relation promotion and pursue objectives regarding the protection of investments, by legalizing a clear statement of principles to protect foreign investments. However, only very few of them cover the issue of protection of human health and the environment. Accordingly, only two out of 65 BITs concluded during 1990 to 2016 contain provisions referring to the environment protection together with the purpose to enhance the investment cooperation, which are the Japan – Vietnam BIT and the Finland – Vietnam BIT.

The Japan – Vietnam BIT (2004) recognizes that the investment objectives "can be achieved without relaxing health, safety and environmental measures of general application."[15] Article 21 of the BIT also asserts that:

> The Contracting Parties recognize that it is inappropriate to encourage investment by investors of the other Contracting Party by relaxing environmental measures. To this effect, each Contracting Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion in its Area of investments by investors of the other Contracting Party.[16]

Moreover, the Japan-Vietnam BIT also emphasizes the "public purpose" as the basis of exercising the State's police powers, in spite of there being no detailed clarification of the term. This provision aims to help the investment hosting

12 General Statistics Office Report (2016), https://www.gso.gov.vn/Default_en.aspx?tabid=515 (last visited Oct. 10, 2017); *see also Brief on Foreign Direct Investment in 2016*, MINISTRY OF PLANNING & INV., http://www.mpi.gov.vn/en/Pages/tinbai.aspx?idTin=35721 (last visited Oct. 10, 2017).

13 *Brief on Foreign Direct Investment in 2016*, *supra* note 12.

14 UNCTAD, *supra* note 4.

15 Agreement between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment, Japan-Viet., Preamble, Nov. 14, 2003, https://investmentpolicyhubold.unctad.org/Download/TreatyFile/1738.

16 *Id.* art 21.

state to carry out regulatory measures against the FDI that would serve the non-economic interest and welfare of the society.

Amongst 21 BITs with EU member states, only the Finland – Viet Nam BIT (2008) contains the reference to environmental issue in its Preamble[17] and the exception for expropriation regarding "public interest."[18] Hence, it is expected that these 21 BITs will be replaced by the free trade agreement between the European Union and Viet Nam (EVFTA), which completed negotiation in 2015. The EVFTA unifies the objectives of the former BITs among the regional countries with Vietnam by providing that "each Party retains the right to adopt, maintain and enforce measures necessary to pursue legitimate policy objectives such as the protection of society, the environment and public health" in both the Preamble and provision regarding investment and regulatory measures.[19] Significantly, the EVFTA has a separate chapter on Trade and Sustainable Development, reaffirming the parties' commitment to pursue sustainable development and providing a cooperative approach based on common values and interests in addressing issues concerning trade and environment.[20]

To prepare for the ASEAN Economic Community, Vietnam together with other ASEAN member states have signed the ACIA in 2012, which replaced the AIA of 1998. Hence, the ACIA does not replace the existing 28 BITs conclude amongst and between ASEAN member countries (ASEAN BITs).[21] It should be noted that while the ASEAN BITs do not include environment preservation

17 Agreement between the Government of the Republic of Finland and the Government of the Socialist Republic of Viet Nam on the Promotion and Protection of Investments, Fin.-Viet., Feb. 21, 2008, 2598 U.N.T.S. 189 (entered into force June 4, 2009) [hereinafter *Finland-Viet Nam BIT*] ("[The parties] [a]greeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application.").

18 *See id.* at 194.

19 Free Trade Agreement Between the European Union and the Socialist Republic of Vietnam, EU-Viet., Preamble & art. 13bis, July 2018, Eur. Commission.

20 *See id.* art. 9.

21 Viet Dung Tran, *Thực thi Hiệp định Đầu tư toàn diện ASEAN: Những vấn đề từ sự chồng chéo trong các cam kết bảo hộ đầu tư nước ngoài của Việt Nam* [*Implementation of ASEAN Comprehensive Investment Agreement: The Issues from the Overlapping of the Investment Protection Commitments of Vietnam*], 4 JOURNAL OF LEGAL STUDIES 45 (2017); *see also* Junianto James Losari, *Comprehensive or BIT by BIT: The ACIA and Indonesia's BITs*, 6 ASIAN JOURNAL OF INTERNATIONAL LAW 15 (2016).

objectives, the ACIA regulates that the member states are entitled to design and apply measure(s) to protect legitimate public welfare objectives, such as public health, safety, and the environment.[22] In other words, the ACIA permits the Vietnamese government to terminate the foreign investor's license and ban all of their business activities (the investors from ASEAN only), provided it can prove that the measure is non-discriminatory and necessary to protect public health and/or the environment. For FDI management, the ACIA's expropriation clause (with the Annex 2) is significant for the government, because the factors in determining whether an indirect expropriation occurs are stated explicitly. This will allow the government to design their measures accordingly.[23]

In the context of the international instrument governing FDI and environmental protection in Vietnam, it is necessary to note the role of WTO rules. The justification to engage the WTO in human rights and environmental protection can be deduced from the competency of the WTO in international trade which regulates not only international trade but also investment. Accordingly, Article XX(b) of GATT lays the groundwork for a human rights body within the WTO. Trade and human rights are linked within the WTO system as Article XX(b) and Article XX(g) GATT appears to permit WTO member countries to apply special trade sanctions to protect the human, animal health, and environment.[24] The WTO can be expected to incorporate environmental standards into its mechanisms for regulating trade. Although, the primary objects of WTO regulations have always been products as defined by their physical characteristics. However, international trade regulation has recently been expanded to include process factors as well.[25]

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22 ASEAN Comprehensive Investment Agreement Annex 2, ¶ 4, opened for signature Feb. 26, 2009, ASS'N SE. ASIAN NATIONS, http://agreement.asean.org/search.html?q=Comprehensive+Investment+Agreement+ (entered into force Feb. 24, 2012).

23 Losari, *supra* note 21.

24 Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of Discourse*, 23 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 57, 65–83 (2003); Sanford Gaines, *The WTO's Reading of the GATT Article xx Chapeau: A Disguised Restriction on Environmental Measures*, 22 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 739, 739–806 (2001); Mike Meir, *GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?*, 8 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 241 (1997).

25 The rules and regulations of the TBT and SPS agreements of the WTO can presumably create base for national measures for the purpose of protection of environment and/or human rights. Such a presumption of validity would help to prevent disputes or claims based on indirect discrimination or de facto expropriation. *See* Sol Picciotto, *Rights,*

Overall, to date, most of the IIAs in which Vietnam is a member do not specify the interrelationship between the investment and environment, the sustainable development and reference to environmental aspects (except those mentioned above), as well as not clearly defining the term "public purpose" or "public interest" which is taken to account in case the State exercises its police power. Therefore, it is difficult for Vietnam, as host State, to acknowledge its rights regarding the environment protection purpose and the extent of such rights in case an environmental violation by the foreign investor arises. This leads to the risk that the government is put under pressure as it would be subject to claims by multinational corporations (MNC) through international arbitration based on indirect expropriation. Moreover, the vague and general provisions of IIAs do not ensure or encourage the compliance of the investor with environmental legal regulations in the stages of establishment and operation of an investment project. The current IIAs of Vietnam seem to tie the hands of the government in regard to FDI and environmental protection (by imposing high liabilities for the state upon conducting any action/measure against the FDI which might be tantamount to indirect expropriation).

## 3 National Regulations on Foreign Investment and Environmental Protection

Since the implementation of the Doi Moi Policy, the Vietnamese Government has recognized the significance of foreign investments as an important source for modernization of the economy and sustainable economic growth. To attract FDI, the government introduced the Foreign Investment Law (FIL) in 1987, which was regarded as the cornerstone of the 'opened door' policy for foreign capital in Vietnam.

The Constitution 1992 has recognized, for the first time, the development of a market economy with socialist orientation, the concept of private property and the right of individuals to conduct business activities. It expressly acknowledges foreign-owned capital as a legitimate sector of the economy, encouraging foreign investment and guaranteeing that assets of foreign investors will not be expropriated.

The National Assembly has further modified the FIL in 1996 and 2000 to improve the conditions for FDI, including the acknowledgment of the foreign investor's rights to open branches in Vietnam and assign interests in the

*Responsibilities and Regulation of International Business*, 42 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 131 (2003).

foreign-owned enterprise to any parties. In 2005, the Law on Investment and Law on Enterprises were passed by the National Assembly to establish a common regime and unified ground for domestic and foreign investment in Vietnam, which makes it easier for foreign investors to invest and carry out business in the country. This legislative development on investment was influenced by the process of negotiation to access the WTO.[26] The law and regulations on investment should be harmonized with the TRIMs Agreement and other relevant agreements of WTO.

From 2007 to 2014, many regulations were issued, specifically mentioning the steps the Government has taken to improve the investment climate. It is worth noting that the regulations of the business sectors and sub-sectors that are conditionally open to FDI. In 2014, Vietnam has adopted a new Law on Investment (LOI 2014), which has taken effect as of July 1, 2015, and replaced the Law on Investment 2005, which deems to further update and strengthen the regulations of investment guarantees. Notably, regarding investment incentives in the event of changes in law, the LOI 2014 and its guiding regulations warrant that existing investors should be able to benefit from whichever provisions are most favorable during the remaining time in which the project is entitled to incentives.[27] The LOI 2014 introduced many changes to open opportunities for foreign investors through new provisions on licensing procedures applicable to certain common investment forms, including investment along with setup of enterprise and investment in the form of capital contribution or sharing purchase in enterprises in Vietnam. It also reduced the number of conditional business lines for foreign investment.[28]

The LOI offers a chance to utilize a multi-layer ownership structure of subsidiaries in Vietnam to enter sectors where foreign investment is restricted. Accordingly, foreign-invested enterprises investing or acquiring equity in another Vietnamese enterprise (foreign-invested economic organizations – FIEO) shall only be subject to the same conditions and investment procedures applicable to foreign investors if they can own at least 51 percent of charter capital of the targeted enterprise.[29]

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26 The Vietnam's commitments under the WTO influence the legal framework for foreign direct investment, regarding various issues such as the limitation on foreign ownership, corporate voting rights, trading rights, distinction of foreign invested company and domestic companies.

27 LAW ON INVESTMENT [LOI] [Law No. 67/2014/QH13] art. 13, §§ 1–2 (Viet.).

28 *Id.* app. 4. The number of conditional business lines is 267 compared to 386 in the LOI 2005.

29 *Id.* art. 23, § 1.

Environmental protection in Vietnam, like most developing countries, was not the main focus of the policy makers. In fact, when economic growth was supposed to be the sole motive force for national development, the environment protection was not regarded as an important issue. Only at the turn of the century, when Vietnam has faced the danger of natural resource exhaustion, ecological imbalance, and repeated natural disasters, the environmental protection issue began to emerge as a social challenge. The promulgation of environmental law was one of the measures to surmount that challenge.

Although the 1993 Law on Environmental Protection and the subsequent 2006 Law on Environment Protection have created a legal framework for environmental protection, it revealed limitations that had to be addressed amid the country's efforts to boost industrialization, modernization, and Vietnam's global economic integration. To improve protection of the environment, the National Assembly of Vietnam adopted a new Law on Environmental Protection in 2014 ("LEP 2014"), which replaced the 2006 Law. The government has also introduced a number of guideline regulations for the purpose of the LEP's implementation.[30]

Ministry of Natural Resources and Environment (MONRE), the primary regulatory body responsible for protecting the environment, issued a number of circulars on the management of hazardous wastes and discarded materials in industrial parks.[31] MONRE and its agencies shall collaborate with investment authorities to carry out state management of environmental protection by individuals and organizations operating in Vietnam.

30 Decree 19/2015/ND-CP, GOV'T (Feb. 14, 2015) (Viet.) (detailing and guiding implementation of a number of articles of the Law on Environmental Protection); Decree 179/2013/ND-CP, GOV'T (Nov. 14, 2013) (Viet.) (on sanctioning administrative violations in environmental protection); Decree 18/2015/ND-CP, GOV'T (Feb. 14, 2015) (Viet.) (regulating strategic evaluation on environmental impact, commitment to environmental protection). *See* Circular 27/2015/TT-BTNMT, MINISTRY OF NAT. RES. AND ENV'T [MONRE] (May 29, 2015) (Viet.) (implementing strategic environmental assessments, environmental impact assessment and environmental protection undertakings); Circular 26/2015/TT-BTNMT, MONRE (May 28, 2015) (Viet.) (regulating detailed environmental protection, simple environmental protection); Circular 41/2015/TT-BTNMT, MONRE (Sept. 9, 2015) (Viet.) (on environmental protection in import of scrap for use as raw production materials); Circular 25/2009/TT-BTNMT, MONRE (Nov. 16, 2009) (Viet.) (promulgating national technical regulations on the environment); Circular 32/2013/TT-BTNMT, MONRE (Oct. 25, 2013) (Viet.) (promulgating national technical regulations on environment); Circular 47/2011/TT-BTNMT, MONRE (Dec. 28, 2011) (Viet.) (on national technical regulation on environment).

31 Circular 36/2015/TT-BTNMT, MONRE (June 30, 2015) (Viet.) (on management of hazardous wastes); Circular 35/2015/TT-BTNMT, MONRE (June 30, 2015) (Viet.) (providing for the environmental protection of economic zones, industrial parks, export processing zones and hi-tech parks).

The current Vietnamese laws on environmental protection require investors (both foreign and domestic) to prepare either an Environmental Impact Assessment Report (EIAR) or an Environmental Protection Plan ("EPP") for their projects, depending on the importance and level of environmental impact of the project. An EIAR must be submitted to the appropriate authority for appraisal, while an EPP only needs to be registered. Under Article 19.2 of the LEP 2014, an EIAR must be prepared concurrently with the feasibility study of a project. Depending on the nature of each project, the appropriate authority shall appraise an EIAR (such as the MONRE, or a government agency, or provincial-level people's committee). Meanwhile, the EPP is registered with the district-level people's committee. That body, when necessary, may authorize commune-level people's committees to issue a certificate of registration before the investor may proceed with the activity.

As the EIAR is one of the most important documents of the whole investment project dossier, the LEP 2014 lists out certain types of investment projects that require the preparation of such report.[32] Decisions on the approval of EIAR shall serve as a basis for competent authorities to: (i) decide on investment in projects; (ii) grant or modify licenses for mineral exploration projects; (iii) approve exploration and field development plans for oil and gas exploration and exploitation projects; (iv) grant or modify construction permits for projects having construction work items subject to construction licensing.[33] After getting the EIAR appraised, a list of post-EIAR tasks are required for the investors, including the newly-prescribed duty to prepare the Environmental Supervision Report (ESR).[34] The specification of such provision is vested on the authority of the Department of Resources and Environment ("DORE").[35]

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32 Law on Environmental Protection [LEP] art. 20, § 1 (Viet.).

The EIAR preparation requirement applies to nationally important projects, telecommunications, construction projects, industrial zones, many light and heavy manufacturing facilities, most mining projects and large-scale tourism and entertainment projects. Only the investor of the project not operated within 24 months or changed the location shall re-prepare the EIAR. In addition, when projects that change the scale, capacity, and technology resulting in the increase of negative impacts on the environment, the Government regulates the projects in detail. *See also Một số vấn đề về dự thảo Luật Bảo vệ môi trường sửa đổi* [*Some Issues Regarding the Revised LEP*], INST. FOR LEGIS. RES. (Feb. 19, 2014), http://vnclp.gov.vn/ct/cms/tintuc/Lists/cacduanluat/view_detail.aspx?ItemID=212.

33 LEP art. 25 (Viet.).

34 Decree No. 18/2015/ND-CP, GOV'T art. 16 (Feb. 14, 2015) (Viet.) (on environmental protection planning, strategic environmental assessment, environmental impact assessment and environmental protection plans).

35 Official Correspondence No. 3105/TNMT-QLMT, Ho Chi Minh City Department of Resources and Environment (Apr. 18, 2008) (details of the ESR content); Public Report No. 4228/CCBVMT-KS (while the relevant law and decrees remain unclear about the

Despite the significance of such reports, there is no legal provision prescribing the standards or methods used for the preparation of EIAR and ESR to ensure their transparency and quality. In our observation, this is due to the impossibility of establishing a set of unified technical standards or methods applicable to various type of projects, as well as the desire of the legislator to create a flexible legal framework for the attraction of foreign investors.

Regarding the EPP, as a new concept and definition replacing the Environmental Protection Commitment under the LEP 2014, it is a token of the noticeable effort of the Government of Vietnam to create a flexible administrative legal framework on environmental protection.[36] The EPP covers location, form, and scale of the establishment as well as the energy used and types of waste produced. They must also include an undertaking to minimize and treat waste and comply with environmental laws. A certificate showing registration of the EPP is required before manufacturing or other business activities may commence. As the EPP does not need to be reviewed and appraised by the governmental agencies, such flexibility encourages self-evaluation by the business community regarding environment protection activities. Moreover, such plan is seen as proof of legal compliance in the administration's point of view. Therefore, the new regulation of LEP 2014 ensures that the investors fully acknowledge their industrial impacts to the environment, serving the purpose of administration well and reducing the cost of compliance efficiently. It is believed that together with the current flexible mechanism of assessment, the EPP and EIA will offer favorable treatment for the investor while still ensuring the environment protection in Vietnam.

Overall, it is observed that during the last decades, Vietnam is determined to develop a comprehensive and updated national legal framework on FDI and environmental protection. The relevant laws and regulations are designed to support and facilitate investment, but are also concerned about environmental protection. In the area of environmental protection, the flexibility and

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frequency of ESR submission, this report provides that project owners in Binh Duong Province are obliged to prepare the ESR quarterly and submit to the competent authority the whole annual collection of such report at the beginning of the following year. Meanwhile, project owners in other provinces and cities are required to do such task once in six months). *See also* Official Correspondence No. 4228/CCBVMT-KS (supplementing the Decision No. 63/2012/QD-UBND, People's Committee of Binh Duong Province (Dec. 18, 2012) (on guiding the preparation of environment supervision report for local enterprises)).

36 Some opinions oppose that the EPC cannot be replaced by the EPP and should be maintained in parallel, as each provision has different nature and applies in different stages of the investment project. Nevertheless, the majority of the Drafting Committee agrees that the EPP reflects the environment protection awareness and responsibilities of the business entities through their actions, administered by the competent authority.

low standard of environmental protection required by the LEP seems to help foreign investors to save business performance expenses. It should be noted that in most cases, investors want to optimize production costs by extending the life cycle of the technology which has been banned in the investor's home country while it is acceptable in such developing countries thirsting for investment such as Vietnam. Thus, loosely-designed legal regulations on environmental assessment and inefficient environmental enforcement system in Vietnam is one of decisive factors attracting foreign investment.[37] According to Dinh Duc Truong, nearly 20 percent of the FDI corporates reported that they can save up to 10 percent environment protection costs in comparison to that of their home countries, 68 percent admit that they can save from 10–50 percent and 12 percent of them believe that the costs can be reduced to more than 50 percent.[38] Moreover, with low environment protection costs, taxes and fees, 68 percent of FDI companies expect to save 10–50 percent of the costs while operating in Vietnam, which is an ideal vision the investors want to obtain once their investment projects are launched.[39] With such new regulations, Vietnam tries to define itself as an "apple of the investor's eyes."

However, such FDI-favoured approach in the legal framework also produces side-effects relating to the compliance of foreign investors with their environment protection duties. It is reported that more than 51 percent of the investors participating in the research by CIEM in 2015 admited their projects do not fully observe the environment protection requirements and the operation of the factory may cause negative impacts to the environment.[40] The reports of the Environmental Inspectorate Department of the Ministry of Natural Resource and Environment ("MONRE") showed that from 2010 to 2015, there were 89 cases monetary fines charged against foreign companies for violating procedural and environment standard rules. However, it is also observed that administrative fines are relatively quite low and not substantial enough to urge strict compliance by the MNCs.[41] Such non-compliance and lax regulations are the

37 Dinh Duc Truong, *Quản lý môi trường tại các doanh nghiệp đầu tư nước ngoài (FDI) tại Việt Nam* [*Managing Environment Issues at the Foreign Invested Enterprises in Vietnam*], 31 VNU JOURNAL OF SCIENCE 46 (2015).

38 *Id.* at 48.

39 *Id.*

40 Central Institute for Economic Management, *supra* note 7.

41 According to regulation of Decree No. 179, the administrative fine would range from VND 5,000,000 (approximately USD 240) to VND 180,000,000 (appromiximately USD 8,570). *See* Decree 179/2013/ND-CP ch. 2, § 1 (Nov. 14, 2013) (Viet.) (on the sanction of administrative violations in the domain of environmental protection).

Meanwhile in Singapore, according to the Environmental Public Health Act 1987, as amended by Act 16 of 2016, an offender shall be responsible for a penalty of $2,000 in

source of negative environmental impacts and potential environmental disputes. As one of many undesired consequences of such FDI, the one who suffers most are the people living in such polluted areas, especially when their legal rights and interests are not effectively protected.

## 4 Environmental Disputes Involving Foreign Investors in Vietnam

### a *Overview of Environmental Disputes Involving Investors in Vietnam*

There is no national, published survey on environmental disputes by government agencies in Vietnam in the last decade.[42] However, according to private research, environmental disputes, especially those arising from the industrial performance, are currently in the trend of increasing in various complexity levels and scales.[43] The Institute for Strategic Studies and Implementation of Industrial Policy of MONRE reported that in Ho Chi Minh City, Dong Nai, Thai Nguyen, Hung Yen and Da Nang, the environmental pollution in industrial areas had been discovered mostly by local peoples and recognized only when they put pressure on local authorities to investigate.[44] Environmental disputes in Vietnam are happening on a large scale and rank second after land disputes in terms of seriousness, causing great damage to many stakeholders, especially

minimum or $20,000 in maximum depending on the type of violation committed (yet taking into account the additional fine for a continuing offence). *See* Environmental Public Health Act, 1987 (Sing.). In Thailand, pursuant to the 1992 Enhancement and Conservation of National Environmental Quality Act, B.E. 2535, the penalty for failure to meet environmental standards is to one-year imprisonment and/or a fine of up to 100,000 bahts. *See* Enhancement and Conservation of National Environmental Quality Act, 1992 (Thai.).

42 The only thorough research regarding the environmental disputes and alternative dispute resolution means in Vietnam was conducted by the Institute of State and Law of the National Centre for Social Sciences and Humanities Vietnam for period 1990–2000. *See* Institute of Developing Economies, *The Alternative Dispute Resolution in Vietnam*, 20 INSTITUTE OF DEVELOPING ECONOMIES ASIAN LAW SERIES (2002), https://www.ide.go.jp/library/English/Publish/Download/Als/pdf/20.pdf.

43 Nguyen Trung Thang et al., *Nghiên cứu, đề xuất cơ chế giải quyết tranh chấp môi trường ngoài tòa án ở Việt Nam* [*Examining and Proposing the Out-of-Court Environment Dispute Settlement Mechanism in Vietnam*], VIET. ENV'T ADMIN. (July 31, 2015, 4:47 PM), http://vea.gov.vn/vn/truyenthong/tapchimt/nctd42009/Pages/Nghiên-cứu,-đề-xuất-cơ-chế-giải-quyết-tranh-chấp-môi-trường-ngoài-tòa-án-ở-Việt-Nam.aspx.

44 Mai Chi, *Difficulties in Handling Environmental Disputes*, VIET. ENV'T ADMIN. (Sept. 11, 2013, 2:38 PM), http://vea.gov.vn/en/EnvirStatus/StateOfEnvironmentNews/Pages/Difficulties-in-handling-environmental-disputes-.aspx.

local communities.[45] One of the main sources of the problem is FDI projects. Many large-scale investment projects invested by MNCs operate in pollution-intensive and hazardous industries that have products or processes that may harm the environment or negatively impact human health.

Nevertheless, the practice of environmental dispute settlement in Vietnam pose many shortcomings due to the lack of an effective legal framework, organization structure, and enforcement mechanism. First, it can be clearly seen that the nature of the LEP after many revisions is still administration-oriented, illustrated by the entrustment of dispute settlement only to governmental agencies. This is because of the implied recognition by the legislator that environmental disputes are distinct from any civil disputes, as they concern both private and public interests.[46] According to Daniel Louis, environmental cases "are technically and legally complex, [and] have serious environmental concerns and contain public policy considerations."[47] For instance, victims of environmental pollution themselves may not only pursue compensation for personal damage, but also may advocate restoration of their local environment. Therefore, in this case, the regulation of administrative oversight seems to be necessary, and the mediator's primary task is to help parties reach an agreement that meets their interests and comports with the law on environmental protection.[48]

Second, regarding the environmental dispute settlement mechanisms, the LEP adopts both judicial and out-of-court means. In particular, Article 161.3 of LEP 2014 specifies that the settlement of environmental disputes shall comply with regulations on settlement of non-contractual civil disputes and other relevant regulations of Vietnamese law. In particular, Article 161.3 of LEP 2014 specifies that the settlement of environmental disputes shall comply with regulations on settlement of non-contractual civil disputes and other relevant regulations of Vietnamese law. Furthermore, in order to provide further opportunities for disputing parties to effectively resolve their cases, the LEP 2014 also offers a mediation mechanism entrusted to the Commune Level People's

45 *Proposals to Resolve Environmental Disputes*, TALK VIET. (Aug. 16, 2013), https://www.talkvietnam.com/2013/08/proposals-to-resolve-environmental-disputes.

46 Douglas J. Amy, *Environmental Dispute Resolution: The Promise and the Pitfalls,* 11 ECOLOGY LAW QUARTERLY 1 (1983), *in* ENVIRONMENTAL POLICY IN THE 1990S 211 (Norman J. Vig & Michael E. Kraft eds., 1990).

47 *How ADR Can Enhance Environmental Negotiations*, ALTERNATIVES TO THE HIGH COST LITIG. (CPR Inst. For Dispute Resolution, New York, N.Y.), May 1998, at 65–78.

48 Matthew Taylor et al., *Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices*, 22 DALHOUSIE LAW JOURNAL 51, 68 (1999).

Committee for any environmental disputes arising in a local region.[49] However, there is no guideline for the People's Committee's mediation commission considering the nature of environmental disputes to find an appropriate approach to resolve the case. As a consequence, resolving environment disputes are understood by such commissions as resolving security disorder rather than resolving environmental conflicts.[50]

Third, the complexity of discharging the plaintiff's burden of proof in environmental cases also results in protracted and expensive legal proceedings with only a small chance of success. Although the local residents make demands about compensation for health problems as well as losses to their livelihood, it is difficult for the local People's Committees alone to assign blame, determine the victims and assess the cost of pollution. While the burden of proof does lie upon the plaintiff, the judge retains a general discretion to vary the distribution of the burden of proof in the requirements of justice in each case.[51] Nevertheless, in any circumstance, this principle still imposes a heavy duty for people who in the majority of cases originate from the socially and economically weak sectors of society and are lacking accessibility to evidence as well as technical knowledge of environment.[52] The research of ISPONRE conducted amongst citizens in 3 environmental disputes in Hai Duong, Nghe An and Dong Nai provinces (which are the large industrialised cities in Vietnam) shows that there is only 43–62 percent local peoples reporting their cases have been partially resolved. Especially, in Dong Nai, 70 percent of the peoples involved in the air pollution case with an FDI corporation claim that their case has not been resolved. Amongst "7 legal cases claiming damages for pollution . . . all submitted in the 2010–2012 period[,]. . . only one . . . case[] was settled while the other[s] . . . remained pending at the time of survey."[53] Regarding the dispute settlement result, in most of the resolved cases claiming for environmental damages, "the compensation amount is only equal to 20 to 30 percent of the actual damage value and does not take into account any potential

49 LEP art. 143(3)(d) (Viet.).

50 Nguyễn Trung Thắng et al., *Nghiên cứu, đề xuất cơ chế giải quyết tranh chấp môi trường ngoài tòa án ở Việt Nam* [*Research and Propose Environmental Dispute Settlement Mechanism Outside Court in Vietnam*], VIỆN CHIẾN LƯỢC, CHÍNH SÁCH TÀI NGUYÊN VÀ MÔI TRƯỜNG [INST. OF STRATEGY AND POL'Y ON NAT. RESOURCES AND ENV'T], http://isponre.gov.vn/home/dien-dan/1076-nghien-cu-xut-c-ch-gii-quyt-tranh-chp-moi-trng-ngoai-toa-an-vit-nam (last visited Oct. 10, 2017).

51 LEP arts. 165–66 (Viet.).

52 *Id.* art. 166 (Viet.).

53 UNDP, JUSTICE INDEX: ASSESSMENT OF DISTRIBUTIVE JUSTICE AND EQUALITY FROM A CITIZEN-BASED SURVEY IN 2012 35 (2013).

damage."[54] Thus, it is no surprise that 75–93 percent of the affected residents are not satisfied with the dispute settlement result.

Lastly, regarding the current environmental dispute settlement mechanism, the granting of such authority to the Commune Level People's Committee seems to be ineffective in practice as the mediation committee's establishment and settlement procedures are not specified in the law. Moreover, this agency does not have enough experts to deliver exact decisions in complicated environmental disputes. To resolve such conflicts, the Commune Level People's Committees usually have to seek the assistance from the local Department of Resources and Environment of Province or transfer the claim to another competent authority, leading to delays in procedures which may affect the statute of limitations in case the claimant later wants to file his case in court. As a consequence, it usually takes from 2 to 3 years to handle the environmental cases.[55] Regarding administrative complaints, "[t]he average time taken to address . . . ranged from 17 to 27 months, depending on the type of individual or household enquiry," while the dispute settlement outcome does not always satisfy the stakeholders.[56] Besides, entrusting the local government as authority to settle the dispute is not appropriate and objective, since such agency is also involved in granting investment approval for the FDI project and environmental certificate.

All of these abovementioned drawbacks can be illustrated by two typical infamous pollution disputes involving FDI investors which are the Vedan case in 2008 and Formosa case in 2016. The merits of those disputes mainly concern (1) social welfare, (2) requests for environmental pollution treatment and compensation, and (3) requests for state authorities' resolution of tax and business registration problems. To the extent of our research in this paper, we focus on the analysis of the first two issues, which both will be discussed in detail below.

### b *Some Typical Environmental Disputes Involving FDI in Recent Decades*

#### I Vedan Vietnam Case

Vedan Vietnam case is one of the most significant environmental disputes in the recent history of Vietnam. The dispute involves Vedan Vietnam Co. Ltd.

54 Institute of Developing Economies, *supra* note 42, at 117.

55 Nguyễn et al., *supra* note 50 (stating 67 – 86 percent of the affected stakeholders claim that it takes a great deal of time for the case to be handled).

56 *Right to Live Free of Pollution Unprotected in Vietnam*, THANH NIEN NEWS (Oct. 4, 2013, 3:00 PM), http://www.thanhniennews.com/society/right-to-live-free-of-pollution-unprotected-in-vietnam-1049.html.

("Vedan"), a 100 percent owned Vedan International (Holdings) Limited, "[the] premier manufacturer of fermentation-based amino acids, [starch,] food additive and cassava starch-based products [in Asia]."[57] "[Vedan's] prominent reputation has been built on the quality manufacture of MSG."[58] Since 1993, it started the business operation in Vietnam with almost 2,000 employees. The company attained ISO 9001:2000 certification, and was proud of being awarded on several occasions by the Vietnamese government for the company's contribution to the economy.[59]

Such image of the company was seriously tarnished by the fact that in 2008, the company was caught at the very moment of illegal "discharging [of] untreated effluent directly into the Thi Vai River through secret underground pipes."[60] This activity was done largely at night and in a regular manner. "Government inspectors [concluded] that the company had been dumping 105 million liters of untreated liquid waste [per] month into the river for 14 years[,]" causing 2,700 hectares of land along the river to become severely damaged and 80–90 percent of water in the Thi Vai River (which runs nearly 80km through HCM City, Dong Nai and Ba Ria-Vung Tau provinces) to become polluted by the illegal discharges.[61]

> This case received high publicity in Vietnam[,] . . . [followed by] a mass condemnation of the company. Farmers, NGOs, politicians, a local [C] atholic bishop, and even business partners such as BigC and Sai Gon Co.op denounced the company . . . [and] refused to conduct commercial transactions [with Vedan Vietnam] until the due restitution is made. The Prime Minister . . . [also] demanded the closure of the factory and severe punishment of the offenders according to criminal law.[62]

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57 VEDAN INT'L (HOLDINGS) LTD., ANNUAL REPORT 2017 7 (2017), http://www.vedaninternational.com/investor/ir2018/Report2018/E-2018041904.pdf.

58 *Id.*

59 *Corporate Major Event*, VEDAN INT'L, http://www.vedaninternational.com/aboutvedan/milestones.htm.

60 Minh Quang, *Vedan "giết" sông Thị Vải* [*Vedan "Kills" Thi Vai River*], TUOITRE ONLINE (Sept. 15, 2008, 07:25 AM), http://tuoitre.vn/vedan-giet-song-thi-vai-278294.htm.

61 Dong Nai, *Old Habit: Infamous Polluter Vedan at it Again in Southern Vietnam*, THANH NIEN NEWS (Apr. 14, 2015, 6:01 PM), http://www.thanhniennews.com/society/old-habit-infamous-polluter-vedan-at-it-again-in-southern-vietnam-41107.html; *Vedan Begins to Pay Compensation*, VIET NAM NEWS (Jan. 26, 2011, 8:45 AM), http://vietnamnews.vn/environment/207952/vedan-begins-to-pay-compensation.html#72DOutC5bQq2CvD1.97.

62 Alexandre Chitov, *Environmental Considerations in Investment Law of Vietnam in the Context of Vedan Vietnam Case*, 5 MFU CONNEXION JOURNAL OF HUMANITIES AND SOCIAL SCIENCES 1, 11 (2016).

However, no criminal charges were brought against the polluter pursuant to the criminal code at that time. Vedan finally only had to pay over VND 200 million (approximately 16,000 USD) as a fine charged for its behavior of discharging untreated wastewater and the arrears of VND 120 billion (629 million USD) for backdated environment pollution fees.[63] Along with such monetary punishments, Vedan Vietnam has to suspend its operations, dismantle the illegal drainage system within one month, and clean the environment within 6 months.

However, Vedan Vietnam had turned down the district's compensation requests and made meager counter-offers to affected farmers. In 2009, approximately 6,000 farmers filed lawsuits against the company as they did not accept Vedan's proposal.[64] It was the first time a foreign company operating in Vietnam was sued for environmental pollution.[65] The governmental agencies, particularly the Ministry of Natural Resources and Environment, were actively lobbying on behalf of the interests of farmers. The company then conducted individual compensation negotiations with the representatives of the farmers in each affected region. For example, in August 2010, "representatives from the Can Gio District Farmers Association in [Ho Chi Minh City] signed an agreement to postpone litigation on the condition that Vedan pays out 50 percent of the sums promised[,]" which is VND 45.7 billion (US$2.39 million) within a week.[66]

Farmers in the southern province of Ba Ria Vung Tau signed a similar agreement for VND 53.6 billion (US$2.8 million) the same day, while the farmers in Dong Nai Province agreed to settle the case at nearly VND 120 billion ($6.29 million).[67] It was reported that Vedan had compensated the affected farmers altogether more than VND 200 billion (over $10 million).[68]

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63 Stephan Ortmann, Environmental Governance in Vietnam: Institutional Reforms and Failures 181–82 (2017).

64 Ninh Kieu, *Vedan Lawsuit Warning for Other Foreign Firms Investors*, Vietnam Investment Review (Aug. 28, 2010, 4:38 PM), http://www.vir.com.vn/vedan-lawsuit-warning-for-other-foreign-firms-investors.html.

65 *Id.*

66 *Farmers to Drop Lawsuits Following Vedan Payout Agreement*, Thanh Nien News (Aug. 14, 2010, 11:35 AM), http://www.thanhniennews.com/society/farmers-to-drop-lawsuits-following-vedan-payout-agreement-15355.html.

67 *Id.*

68 David Shepardson, VW *Agrees to Pay $200 Million into U.S. Pollution Reduction Fund*, Reuters (Dec. 17, 2016, 3:22 AM), http://www.reuters.com/article/us-volkswagen-emissions/vw-agrees-to-pay-200-million-into-u-s-pollution-reduction-fund-idUSKBN1452Fo.

## II Formosa Case

The 2016 Vietnam marine life disaster was a water pollution crisis affecting Ha Tinh, Quang Binh, Quang Tri and Thua Thien–Hue provinces in central Vietnam. Formosa Ha Tinh Steel is a steel plant established in the Vung Ang Economic Zone, Vietnam by the Hung Nghiep Formosa Ha Tinh Steel Company under the backing of the Formosa Plastics Group of Taiwan. The steel plant of USD 22 billion is regarded as one of biggest FDI projects in Vietnam, recruiting about 10,000 workers in phase 1.[69] The project enjoyed many investment incentives from the Government, including low "import taxes on machines, equipment[,] materials as well as . . . taxation and land."[70]

In 2016, the Formosa Ha Tinh steel plant ("Formosa") discharged toxic industrial waste illegally into the ocean through drainage pipes.[71] Fish carcasses were reported to have washed up on the beaches of Ha Tinh province from at least 6 April 2016.[72] Later, a large number of dead fish were found on the coast of Ha Tinh and three other provinces (Quang Binh, Quang Tri and Thua Thien–Hue) until 18 April 2016.[73] The Prime Minister claimed that the project of Formosa is the biggest investment ever in Vietnam but also causes the most severe pollution incident so far.[74]

After denying responsibility for months, Formosa accepted responsibility for the fish deaths on 30 June 2016.[75] Authorities estimate that seafood catches have fallen 1,600 tons per month, according to the report. 140 tons of fish, 67 tons

69 *Formosa Steel Lifts Investment to $22b in Cast Iron Refinery*, VIET. NEWS (Apr. 24, 2012, 10:14 AM), http://vietnamnews.vn/Economy/223894/formosa-steel-lifts-investment-to-22b-in-cast-iron-refinery.html#QzwzKqGZkFbFIZ9F.97.

70 *Ministry Opposes Steel Region Plans*, VIET. NEWS (June 28, 2014, 10:49 AM), http://vietnamnews.vn/economy/256780/ministry-opposes-steel-region-plans.html#J7VZCjiXrypDYUtF.99.

71 *Vietnam Protest over Mystery Fish Deaths*, BBC (May 1, 2016), http://www.bbc.com/news/world-asia-36181575.

72 Ho Binh Minh, *Vietnam, Grappling with Mass Fish Deaths, Clamps Down on Seafood Sales*, REUTERS (Apr. 28, 2016, 4:26 PM), http://www.reuters.com/article/us-vietnam-formosa-plastics-environment/vietnam-grappling-with-mass-fish-deaths-clamps-down-on-seafood-sales-idUSKCN0XP0QD.

73 Diep Pham & Mai Ngoc Chau, *Beaches of Dead Fish Test New Vietnam Government's Response*, BLOOMBERG (May 2, 2016, 7:10 AM), https://www.bloomberg.com/news/articles/2016-05-01/beaches-full-of-dead-fish-test-new-vietnam-government-s-response.

74 Hải Quan, *Thủ tướng Nguyễn Xuân Phúc: Nếu Formosa vi phạm trở lại sẽ đóng cửa nhà máy* [*Prime Minister Nguyen Xuan Phuc: To Close the Steel Plant If Formosa Violates Again*], BÁOMỚI.COM (July 24, 2017, 6:41 PM), http://www.baomoi.com/thu-tuong-nguyen-xuan-phuc-neu-formosa-vi-pham-tro-lai-se-dong-cua-nha-may/c/22834093.epi.

75 Steve Mollman, *A Taiwanese Steel Plant Caused Vietnam's Mass Fish Deaths: The Government Says*, QUARTZ (June 30, 2016), https://qz.com/718576/a-taiwanese-steel-plant-caused-vietnams-mass-fish-deaths-the-government-says/.

of oysters and 16 tons of shrimp died as a result of the disaster. The toxic pollution caused by Formosa has hit at least 200,000 people by disrupting people's lives and destroying their livelihoods. The massive marine life destruction led to a number of protests by Vietnamese citizens in some cities on 1 May 2016, calling for a cleaner environment and demanding transparency in the investigation process.

On 30 June 2016, after two months facing the unrested wave of anger from the locals and pressure from the media, Formosa reached a settlement agreement in which Formosa agreed to pay VND 11.5 trillion (or $500 million) in compensation to treat the pollution and mitigate consequences.[76] On 29 September 2016, the Prime Minister issued the Decision on the amount of compensation for the affected four regions' local citizens: "Ha Tinh, Quang Binh, Quang Tri and Thua Thien[,] Hue."[77] Accordingly, there are 7 groups of industries hurt by the pollution incident, and the people working in these fields would receive the compensation determined by the Decision, in which each person is compensated at least VND 2.91 million per month and at maximum VND 39.37 million per month.[78] Notably, pursuant to this Decision, the time to calculate damages runs from April 2016 until September 2016, which is no more than 6 months.[79] Moreover, the payment by Formosa "covers only direct material damages, not psychological losses to fishermen whose income was severed."[80] Many affected people, however, were unhappy with the result of the settlement agreement as they wanted Formosa to close the steel plant and pay more compensation, as well as provide a better environmental cleanup.

## III Analysis

Although the Formosa disaster happened 8 years after the Vedan pollution incident, they still share many common points which indicate that environmental dispute settlement in Vietnam has not been improved significantly.

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76 Cần Văn Kình, *Làm cá chết hàng loạt, Formosa bồi thường 500 triệu* USD [*Formosa Compensates 500 Million* USD *for Causing Massive Fish Death*], TUITRE ONLINE (June 30, 2016, 4:14 PM), http://tuoitre.vn/hop-bao-cong-bo-nguyen-nhan-ca-chet-o-mien-trung-1127815.htm.

77 Thế Dũng, *Formosa bồi thường người dân mức thấp nhất 2,91 triệu đồng/tháng* [*Formosa Compensates at Least 2.91 Million Dong per Month for Local Residents*], NGƯỜI LAO ĐỘNG (Sept. 29, 2019, 10:18 PM), http://nld.com.vn/thoi-su-trong-nuoc/formosa-boi-thuong-nguoi-dan-muc-thap-nhat-291-trieu-dong-thang-20160929215332338.htm.

78 *Id.*

79 *Id.*

80 Ralph Jennings, *Vietnam's Solution to Fish Death Scandal Leaves Many Locals Unsatisfied*, FORBES (Aug. 11, 2016, 10:30 PM), https://www.forbes.com/sites/ralphjennings/2016/08/11/why-mass-fish-kill-in-vietnam-still-smells-fishy-despite-a-solution/.

First, regarding the discovery and investigation of violations, it is not clear whether any EIA procedure was complied with at the time of granting the investment certificate. In this respect, the legal provisions only attribute the competence to detail such provision, for example – the frequency and primary content of an EIAR, on the MONRE, without any further guidance or explanation on the standards or methods used in such a report. In practice, it is reported that in the 2005–2009 period, "[q]uantitative methods such as modeling, cost-benefit analysis and map convolution [methods] to specify impact scope are rarely used . . . in EIAR in Vietnam."[81] It was reported that: "the choice of model, parameters and input data is still [inappropriate, unreliable] and [lacks] scientific basis."[82] Besides, there is a "lack of information and input data for EIAR process,"[83] as well as the limit of technical "equipment[] to verify EIAR results."[84] It was not until LEP 2014 that the Vietnamese legislature enacted a comprehensive rule of continuous environmental assessment for special areas along with the provision on EIAR.[85] Nevertheless, the same problems may also be found in the execution of these tasks due to the lack of legal basis and proper guidance from the competent authority as mentioned above.

Second, most of the environmental disputes are resolved by way of negotiation and conciliation with the participation of the body in charge of State administration of the environment only. Regarding the process, residents in the affected area will first try to complain to the local governments, then engage in negotiations with the company to find a mutually acceptable solution. However, there are many questions unresolved regarding the transparency of this mechanism, in particular: (i) the procedures of environmental dispute mediation and negotiation, (ii) the procedure to elect the authorized representative for the stakeholders involved in such cases and his scope of authority, (iii) the calculation and types of damages, (iv) the assessment and categorization of the affected residents to be compensated, and (v) the plan to distribute compensation and clean up the pollution consequences. Furthermore, in the process of making a case for environmental courts which are mostly about the

81 Can Anh Tuan et al., *Potential Uses of Environmental Impact Assessment Report for Environmental Dispute Resolution in Vietnam*, 28 VNU JOURNAL OF SCIENCE, NATURAL SCIENCES AND TECHNOLOGY 64, 67 (2012).

82 *Id.* at 68.

83 *Id.*

84 *Id.* at 70.

85 LEP art. 65(3) provides that management boards of economic zones shall coordinate with state management agencies in charge of environmental protection in their localities in conducting environmental protection activities; and report on environmental protection in their economic zones in accordance with law.

claim for compensation after the settlement is promised, it was acknowledged that "the initiation of lawsuits into court to claim for environmental damages is very difficult due to lack of legal basis."[86] In fact, although the local residents make claims about compensation for health problems as well as losses to their livelihood, it is difficult for the local People's Committees to assign blame, determine the victims and assess the cost of pollution. While the burden of proof does lie upon the plaintiff, the judge retains a general discretion to vary the distribution of the burden of proof in the requirements of justice in each case.[87] Nevertheless, in any circumstance, this principle still imposes a heavy duty for such people who in the majority of cases originate from the socially and economically weak sectors of society and lack accessibility to evidence as well as technical knowledge of environment.[88]

Problems regarding ineffective approaches to environmental disputes may lie not only in the lack of expertise in dispute settlement and the inappropriate allocation of burden of proof, but also in the level of corruption amongst the government officials. In many cases, the local authorities are not even serious in sanctioning polluting companies.[89] While such administrative agencies "are supposed to represent the demands of people, the local economy is much more important not only because it provides taxes and jobs but because the opportunities for promotion depend on reaching economic targets."[90] Even though there are reports that some local governments refused to grant their approval to foreign investment projects after considering their impact on the environment,[91] it is more likely that the financial flows from the investment projects will be treated with greater favor than unprofitable nature conservation projects. As one NGO country representative stated:

> When you look at environmental issues in Viet Nam, you have to reali[z]e that it's only within the last ten years that environment even got on the agenda. Every country has problems[] and every country is trying to achieve economic growth. For most countries it is obvious how it will turn out environmentally and economically . . . . In Viet Nam it could go either

86 ORTMANN, *supra* note 63, at 114.
87 LEP arts. 165–66 (Viet.).
88 LEP art. 166 (Viet.).
89 *Id.*
90 ORTMANN, *supra* note 63, at 137.
91 VU XUAN NGUYET HONG ET AL., SUSTAINABLE DEVELOPMENT IMPACTS OF INVESTMENT INCENTIVES: A CASE STUDY OF THE MINING INDUSTRY IN VIETNAM 7 (2009).

> way. They could become another 'tiger[,]' or they could fall off into some [other] kind of ecological disaster.[92]

Therefore, weak enforcement, lack of follow up on prosecution, and lack of technical capability especially in local government pose significant obstacles for enforcing environmental protection regulations and protection of the legitimate rights of aggrieved residents.

Third, news from media agencies only focuses on the happenings of the incident, ignoring the later stages of compensation and enforcement of the environment recovery measures. Meanwhile, the websites of competent governmental agencies do not regularly update the stages and timeline of the dispute after the settlement, which limits the accessibility of the stakeholders and other interested entities regarding the case. Together with the above-mentioned analysis, it is clear that the environmental dispute settlement mechanism in Vietnam does not fully satisfy any of the following important factors to effectively resolve environmental cases: (i) the independence of a environment dispute settlement mechanism, (ii) the flexibility and accessibility of such mechanism, (iii) the screening of cases suitable for mediation, (iv) the transparency of the dispute settlement process, and (v) the human resources of competent agencies.

Lastly, in both of these cases, the government threatened to "close" the projects if the violation of its environmental protection responsibilities by the MNCs continues. However, in fact, the government was not eager to exercise the State's police power in the public interests as it must ensure the measure taken complies with the "fair and equitable treatment" (FET) standard set under the IIAs.[93] This standard is viewed as the main source of limitations to regulatory power in international investment law, which requires the examination of legitimate expectations of the investor and on the other hand, the good faith, transparency, fairness (by proportionality test), arbitrariness and discrimination of the measures conducted by the State to protect its public

92 Brent Doberstein, *Environmental Capacity-Building in a Transitional Economy: The Emergence of* EIA *Capacity in Viet Nam*, 21 IMPACT ASSESSMENT AND PROJECT APPRAISAL 25, 29 (2003).

93 Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* 35 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09–46, 2009); Qinglin Zhang, *On Public Interest in International Investment Agreements* 21, http://dosya.marmara.edu.tr/huk/Sempozyumyay%C4%B1nlar%C4%B1/ipekyolucanlan%C4%B1yor/Prof.Dr.QinglinZHANG.pdf.

interests against the investor.[94] Under the international investment law, the measure by the hosting state against the FDI that is tantamount to unlawful indirect expropriation may be subject to severe remedy. Given the weak environmental governance and institution in Vietnam, the application of strong penalties against one FDI may be easily found in non-compliance with the FED and national treatment requirements under the Vietnam-Taiwan BIT.

## 5 Recommendations to Improve the Settlement of Environmental Disputes Involving FDI in Vietnam

Attracting FDI for economic development and environmental protection are two of the most important components of the national social and economic development policy. Therefore, settling the environmental disputes involving FDI is not an easy task for Vietnam. The biggest challenge is how to balance FDI protection and environmental protection regimes that are mutually beneficial and supportive of each other. Based on the analyses above, it is suggested that Vietnam shall consider several solutions that follow.

### a *Adopting the Reversed Burden of Proof in the Environmental Dispute Settlement Process*

From the cases studied, one of the main problems in the environmental disputes is that the claimants – people affected by industrial pollution, have limited expertise and financial resources to carry out the assessment and prepare the evidence against the foreign investor as required by the law.

To that end, a reversed burden of proof is suggested as a possible solution to the difficulties the claimants may face in an environment dispute. Pursuant to such a principle, the affected stakeholders do not have to prove the causation between the pollution or environmental incidents and their damages. Instead, the alleged polluter is obliged to provide evidence showing that they are not liable for such claims, or their liabilities could be mitigated in specific circumstances according to the law, or there is no causational link between the alleged violation and the damages at all. Such regulation has been adopted in China, providing that: "in compensation lawsuits concerning environmental pollution, the polluter carries the burden of proof with respect to demonstrating the lack of causal link between the polluter's actions and the

94 Dávid Rédli, Limitations to States' Regulatory Power in International Investment Arbitration Resulting from Standards of Protection, with a Focus on Fair and Equitable Treatment Standard 39–71 (May 30, 2016) (unpublished Master's thesis, Masaryk University).

harmful result."[95] To offer a more specific guide for such burden of proof, Article 6 of the Application of Law in the Trial of Liability for environmental Tort of China confirms that there is no causal connection in the following typical circumstances: (i) there is no possibility that the discharged pollutant could cause such damage, (ii) the discharged pollutants which could cause such damage have not arrived the place where the damages occurred, and (iii) the damages occurred before the discharge of pollutants. Thus, not only does this reversal of the burden of proof lighten the responsibility for the victims but it also shifts it to the party who has enough capacity, in both financial and technical aspects, to prove. Besides, in case of a *force majeure* incident, the alleged polluter is more accessible to its own source of evidence to prove the absence of a causal link between the alleged violation and the damage caused to the victims. Moreover, such a principle will urge the party seeking justice to file their claim to the dispute settlement bodies. The advantages of such an approach is illustrated by the Rongping case, where the judges in both trials correctly applied the doctrines of no-fault and reversal of burden of proof by stating that: "In accordance with the ['']Supreme People's Court Certain Regulations Regarding Evidence in Civil Litigation['] in compensation litigation brought about by environmental pollution, the polluter has the burden to raise evidence to show the lack of causal connection between his behavior and the harmful result."[96] Even though such provision on reversed burden of proof in China is praised as an ideal approach to resolving problems in environment dispute settlement, in practice, courts in this country are still known to require plaintiffs to produce evidence sufficient to demonstrate causation.[97]

In Vietnam, the call for a revision of the burden of proof in environment claims for compensation is not new, as it has arisen while the 2005 Law on Environmental Protection was still effective. Although the new law in 2014 has just revised the attribution of burden of proof in a more effective way, it still falls short of such an innovative reversal of the traditional burden of proof.

95 Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju De Ruogan Guiding (最高人民法院关于民事诉讼证据的若干规定) [Provisions of the Supreme People's Court on Evidence in Civil Procedures of People's Republic of China] (promulgated by the Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002), art. 4(3) (China).

96 Zhang Changjian et al. v. Pingnan Rongping Chem. Plant (Pingnan Interm. People's Ct. Apr. 2005); Zhang Changjian et al. v. Pingnan Rongping Chem. Plant (Fujian Provincial High People's Ct. Nov. 2005); *see also* Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 Vermont Journal of Environmental Law 195, 219 (2007).

97 Xu Kezhu & Alex Wang, *Recent Developments at the Center for Legal Assistance to Pollution Victims* (CLAPV), 8 China Environment Series 103, 103–04 (2006).

This suggested approach requires the governmental agencies' courage to comprehensively change its attitude toward innovative ideas and seriously implement such proposals in practice. Furthermore, in order to achieve the best justice and effective results in the application of such a principle, a reasonable allocation for burden of proof should be maintained. The legislative body must further elaborate on the evidence to be provided by each party. For example, the claimant is usually liable for providing evidence regarding the level of expected compensation, official health checks and other documents for this purpose in an environmental dispute. For the respondent's position, the certificate for environmental standard compliance, the scheme of a sewage system compliant to the EIAR or evidence of the presence of a *force majeure* incident, is required. Amongst those documents, the content of an EIAR, and/or ESR is useful for the resolution of environmental disputes. The EIAR includes information about manufacturing and business activities, industrial wastes and data on the impacts on the natural resources and the environment.[98] Furthermore, such assessment reports determine the scope and seriousness of the impact and damage caused to the environment, resources and community health, which is of significance in the process of environmental dispute resolution. The EIAR also defines the cost of performing environmental protection methods mentioned in the project implementation process, which also serves as a basis to calculate damages and indemnity costs. Meanwhile, the ESR specifies the environmental situation where the project is implemented or operated, methods to mitigate negative environmental impacts, the results and the commitments of the project owners. Amongst other benefits, most of all, the appraisal of the EIAR/ESR means that the information and data contained in such reports is legalized. Therefore, the EIAR and ESR could be used as one piece of important evidence provided by the respondent to a neutral third party to consider his responsibility. Considering such reports together in the process of environmental dispute resolution will better enhance the accuracy, transparency and justice of the settlement outcome. To ensure the effective use of the reports, a unified system for EIAR and ESR needs to be improved, along with the well-specified guidance on mandatory use of methods and calculation software for quantitative assessment of the scope and extent of environment impacts.[99] National and industry input information database for EIAR and ESR needs to be built systematically and under the control of specialized authorities such as the MONRE and the DORE.

98 Tuan et al., *supra* note 81, at 69.

99 *Id.* at 71.

### b *Establishing the Mediation Center for Environmental Disputes*

According to the practice of environment dispute settlement in Vietnam, it is crucial to introduce a proper alternative dispute resolution (ADR) approach to assist courts in resolving environmental disputes. Amongst which, mediation seems to be the most feasible and appropriate means of environmental dispute settlement. Some insist mediation is not suitable when it comes to such kind of disputes, as the conflicts involve public issues that must be resolved by the court.[100] Besides, "others claim environmental ADR [including mediation] is useful only in limited circumstances"[101] as such disputes often "provoke sharp disagreements, or serious uncertainties about predicting the long-term efficacy of settlements" (such as issues regarding the assessment of cleanup remedy effectiveness), which should be excluded.[102] Moreover, mediation results are not binding as judicial awards, so it always "carries the risk that disgruntled parties will refuse to enter into a settlement."[103]

Nevertheless, it is undeniable that the use of mediation in environmental disputes cites many advantages. First, while an environmental lawsuit may be rigid and time-consuming, mediation may offer a quicker resolution for the dispute. Second, "[e]nvironmental disputes are often complex cases involving multiple parties, complicated statutes and regulations, and reams of scientific and technical evidence . . . . The typical environmental dispute is dynamic, as new issues tend to arise throughout the life of the dispute and the cast of parties changes continually."[104] Hence, this kind of dispute needs flexible means of dispute resolution to effectively assist parties involved in such a byzantine situation, particularly mediation, in which the participants themselves decide what the process will be and what form of dispute settlement will be most appropriate. Given such preferable flexibility, mediation can encourage "settlements

100 Amy, *supra* note 46; Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tulane Law Review 1, 17–18 (1987), *in* Federal Administrative Dispute Resolution Deskbook for Practitioners 372–73 (Marshall J. Breger et al. eds., 2000).

101 Joel B. Eisen, *Alternative Dispute Resolution at the Environmental Protection Agency*, *in* Federal Administrative Dispute Resolution Deskbook for Practitioners 373 (Marshall J. Breger et al. eds., 2000).

102 Allan R. Talbot, *Settling Things: Six Case Studies in Environmental Mediation 91 (1983)*, *in* Federal Administrative Dispute Resolution Deskbook for Practitioners 373 (Marshall J. Breger et al. eds., 2000).

103 Stephanie Pullen Brown, *Alternative Dispute Resolution: An Alternative to Superfund Litigation*, http://www.pipermar.com/article10.html (last visited Oct. 10, 2017), *in* Federal Administrative Dispute Resolution Deskbook for Practitioners 373 (Marshall J. Breger et al. eds., 2000).

104 Eisen, *supra* note 101, at 371–72.

that go beyond mere recovery of costs or imposition of monetary penalties, and maximize opportunities for improvements to environmental quality . . . as part of settlements."[105] Moreover, while litigation admits the existence of the dispute and may be too adversarial and clear-cut, which may render the participation of both parties in the settlement impossible, mediation may help preserve relationships between parties and provide communication environment for parties to restore mutual trust.[106] Therefore, it is easily found that many countries adopt ADR, especially mediation, as an effective means to resolve environmental disputes.

First and foremost, the independence of such committee should be ensured by the establishment of a separated administrative mediation mechanism, for example, the Committee for Environmental Dispute Settlement Cooperation (EDSC Committee). This organization should be under administrative control of the MONRE, in particular, the Head of the committee should be appointed by the Minister of the MONRE. This requirement could preserve the neutrality of the Committee when a party involved in the environmental dispute is the investor whose project is ratified by the Prime Minister or the Chairman of the People's Committee. Such an approach has also been adopted in the USA and Japan, which are countries with enormous experiences in environmental protection legislation.[107]

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105 *Id.* at 372.

106 *Id.*

107 *United States Environmental Protection Agency* (*EPA*), JOURNAL OF REGULATION, http://thejournalofregulation.com/en/article/united-states-environmental-protection-agency-epah/ (last visited Oct. 10, 2017) ("The United States Environmental Protection Agency (EPA or sometimes USEPA) is an agency of the federal government of the United States which was created for the purpose of protecting human health and the environment by writing and enforcing regulations based on laws passed by Congress."). The Head of the EPA is the Administrator who is accorded Cabinet rank. The Conflict Prevention and Resolution Center (CPRC) is the EPA's primary resource for services and expertise in the areas of consensus-building, collaborative problem solving, alternative dispute resolution, and environmental conflict resolution. *See Conflict Prevention and Resolution Center: About the CPRC*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/adr/about-cprc (last visited Oct. 10, 2017).

Japan has been focusing on the development of administrative ADR to resolve environmental disputes instead of resorting to judicial system. AYA YASUI, ALTERNATIVE DISPUTE RESOLUTION SYSTEM IN JAPAN 1, http://www.iadcmeetings.mobi/assets/1/7/18.2_-_Yasui-_ADR_System_in_Japan.pdf (last visited Oct. 10, 2017) ("By 1940, other mediation systems such as tenant farmer (peasant) mediation, labor dispute mediation, commercial mediation, personal status (family) mediation and environmental compensation mediation have been implemented in Japan."). The Environmental Dispute Coordination Commission of Japan was established in 1972 as an external agency of the Prime Minister's Office, by consolidating the Land Coordination Commission and the Central Pollution

The main function of the EDSC Committee is to resolve environmental disputes promptly and appropriately through ADR means, as the research activities and other duties are taken by the MONRE. An administrative mediation mechanism should be adopted by the Committee as the disputing parties may enjoy the benefit of a simplified, flexible and speedy closed-door proceeding, while the public interests are preserved with the administrative observation. The Committee's full-time personnel should be selected from the Ministry and from different background such as engineers, scientists, legal, public affairs, financial experts, and information technologists in order to effectively solve various complex issues arisen from an environmental dispute. The EDSC Committee may also engage its staff on a contractual basis in case the situation requires more people to be involved. Furthermore, to assist people quickly in environmental issues, the Committee's offices should be located in three major cities in Vietnam including Ha Noi, Da Nang and Ho Chi Minh City and other provinces undergoing industrialization.

Second, in such severe environmental disputes such as that of Formosa Steel or Vedan, an *ad hoc* mediation committee should be composed to rapidly ease public disorder and settle the post-settlement ADR procedures, especially issues concerning the damages, compensation and clean-up remedies. The *ad hoc* mediation committees in Japan are the ideal models to follow. The most well-known dispute handled through mediation is the Minamata case, where a fatal disease first identified in the late 1950s was traced to the eating of shellfish

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Examination Commission. The Commission consists of one President and six members, together executing the mission to provide mediation, conciliation, arbitration and adjudication services to resolve environmental disputes quickly and justly amongst other tasks. *Paying for Pollution: Environmental Mediation in Japan,* THE ALICIA PATTERSON FOUNDATION, https://aliciapatterson.org/stories/paying-pollution-environmental-mediation-japan (last visited Oct. 10, 2017) ("Headed by a chairman of Cabinet rank, the commission mediates dozens of major disputes between industrial enterprises and persons whose health or property has been injured by hazardous wastes."). Its success is recorded in the annual report, in particular, from April 1, 2014 to March 31, 2015, 74,785 complaints have been received by local governments. *See* Environmental Dispute Coordination Commission, *Characteristics of the System for Settling Environmental Disputes*, http://www.soumu.go.jp/kouchoi/english/settlement/charact.html (last visited Oct. 10, 2017); *see* Environmental Dispute Coordination Commission, *Environmental Pollution Complaints*, http://www.soumu.go.jp/kouchoi/english/settlement/comp.html (last visited Oct. 10, 2017) [hereinafter Environmental Dispute Coordination Commission, *Complaints*]; *see also Environmental Dispute Coordination Commission: Activities*, PRIME MINISTER OF JAPAN AND HIS CABINET, http://japan.kantei.go.jp/syoukai_e/e_html/kogai/01.html; *Pollution Complaints Consultation and Pollution Dispute Processing*, MINISTRY OF INTERNAL AFF. AND COMM., http://www.soumu.go.jp/kouchoi/menu/main7dispute.html.

in Minamata Bay which was contaminated by the mercury compound discharge from a fertilizer plant named Chisso.[108] In this case, the Governor Teramoto established an *ad hoc* mediation committee called the "[C]ommittee on Mediation for Fishery Disputes in the Shiranui Sea on November 24, 1959, and started mediating the disputes."[109] The committee's role was to help determine the size of the compensation for the "official victims," as well as to control the Minamata disease affair as an orderly affair. On December 30, 1959, a mediation draft on compensations for patients was agreed to and signed between the representative of Minamata Disease Patient's Families Mutual Aid Society and Chisso.[110] Furthermore, the Japanese government in April 2011 established the Dispute Reconciliation Council for Nuclear Damage Compensation (*Genshiryoku Songai Baisho Funso Shinsa-kai*; *"Reconciliation Council"*) in the Ministry of Education, Culture, Sports, Science and Technology in order to ensure proper and efficient compensation for those victims afflicted by the release of radioactive substances in the power plant accident in Fukushima in March 2011.[111] The Japanese government also established the Nuclear Damage Compensation Dispute Resolution Center ("Nuclear Damage ADR Center") under the Reconciliation Council to deal with an exceptionally high number of claims arising from the accident.[112] Learning from Japan, how such an *ad hoc* committee is established in Vietnam to resolve environment disputes is within the authority of the EDSC Committee and should be regulated with transparent regulations. This *ad hoc* committee would be staffed by part-time mediators and assistants appointed by the EDSC Committee.

Besides, the screening of cases suitable to be resolved by mediation is also of significance and should be regulated as the first stage of a mediation process. There are two methods to categorize environmental disputes to be mediated, consisting of: (i) the categorization based on the scale, and (ii) the categorization based on the content of a dispute. The first approach was taken by Japan where its National-level Environmental Dispute Coordination Commission handles environmental grave cases, cases with nation-wide implications, and inter-prefectural cases, while the Prefectural Commissions have competence

108 NAT'L INST. FOR MINAMATA DISEASE, IN THE HOPE OF AVOIDING REPETITION OF THE TRAGEDY OF MINAMATA DISEASE: WHAT WE HAVE LEARNED FROM THE EXPERIENCE 1–2 (2001), http://nimd.env.go.jp/syakai/webversion/pdfversion/e_houkokusho.pdf.

109 *Id.* at 43.

110 *Id.* at 52.

111 YASUI, *supra* note 107, at 2.

112 *Id.*

on cases that do not fall under the jurisdiction of the Commission.[113] Along with other factors, such an effective structure of organization helps resolve 90 percent of environmental claims in Japan.[114] Regarding the second method of categorization, the Environment Protection Agency of the USA adopts such an approach by creating a list of factors to select a suitable case for environment, including the feasibility in the negotiation regarding time and cost, the negotiable possibilities, the information to substantiate the violations, and the statute of limitations.[115] The Committee in Vietnam should take both approaches and organize its structure to handle cases with different scales and nature, such as the Ministry-level Committee to resolve grave and inter-provincial cases and local Committees to address other cases.

Third, another important issue to be considered is the confidentiality/transparency of environment mediation. Although mediators may argue that the confidential nature of their relationships with the disputants is critical to their success, the content of the dispute may relate to the human health, environment management and recovery costs as well as other consequences which pose negative effects on the public interests of stakeholders who are not directly involved in the mediation process.[116] Therefore, all stages concerning the settlement of disputes (both pre and post-mediation) and enforcement should be updated continuously in the media, such as on the website of the EDSC Committee or the MONRE, to ensure the transparency, accessibility, and justice of the proceedings. Moreover, the dispute parties and the mediation committee can consider and agree on the publishing of some documents such as records generated in the mediation process which may be potential evidence for future litigation, content of the mediation settlement, and facts of the dispute.[117]

### c *Adopting the Corporate Social Responsibility Clause in the BITs and RTAs*

In order to facilitate the flow of international investment while minimizing the negative side of FDI, it is necessary to condition the relationship between interested parties. Corporate Social Responsibility (CSR) is defined as a way in which enterprises give consideration to the impact of their operations on society,

113 Environmental Dispute Coordination Commission, *Complaints*, *supra* note 107.

114 *Id.*

115 *The Alternative Dispute Resolution Fact Sheet*, https://quicksilver.epa.gov/work/05/275605.pdf.

116 Eric R. Max, *Confidentiality in Environmental Mediation*, 2 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL 210, 211 (1993).

117 *See* Taylor et al., *supra* note 48, at 82–85.

aiming for best practice and experimentation with new technologies and innovative approaches.[118] It is a voluntary, enterprise-driven initiative encouraging activities beyond the compliance with the law.[119] In Vietnam, most multinational companies implement these programs, contributing to improvement in the business environment.[120] Noticeably, not only is it popular amongst foreign companies, the awareness of CSR programs is also increasing in domestic enterprises, though mostly adopted by the largest Vietnamese companies.[121] In the context where there is a trade-off between environment protection and FDI attraction, in order to promote these programs amongst investors as well as to give them a certain standing, the inclusion of CSR in bilateral and regional trade agreements (RTAs) should be considered as a significant factor in policymaking. The absence of a requirement to go beyond enforcement of domestic provisions may indeed lead to trading partners' escaping responsibility sooner than their incurring it.

In such agreements, CSR should include both compliance and voluntarism, underlying the significance of voluntary approaches backed by mandatory requirements. To be more specific, the crucial aspect of CSR is that "it encourages companies to not only serve the traditional needs of shareholders, but also the needs of other stakeholders, including civil society groups, community leaders, customers, employees, government entities, international organizations, media, suppliers, trade unions, trustees, and future generations."[122] Although in some stages, the interests of stakeholders and companies confront each other, they are in fact closely connected and mutually dependent. For instance, 61 percent of FDI companies in Vietnam state that building good reputation and image amongst customers is the most significant driving force to urge their compliance with environment protection regulations.[123] In return, the FDI projects create jobs, improve infrastructure in industrializing areas which benefit the locals and help the government achieve its goal in the macro economic context.

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118 Rafael Peels et al., *Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Businesses, and Workers* (ILO Research Paper No. 13, 2016), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf.

119 *Id.* at 6.

120 *2016 Investment Climate Statements*, U.S. DEP'T OF ST., http://www.state.gov/e/eb/rls/othr/ics/2016/eap/254329.htm (last visited Oct. 10, 2017).

121 *Id.*

122 UNEP, CORPORATE SOCIAL RESPONSIBILITY AND REGIONAL TRADE AND INVESTMENT AGREEMENTS 13 (2011), http://unep.ch/etb/publications/CSR%20publication/UNEP_Corporate%20Social%20Responsibility.pdf.

123 Dinh, *supra* note 37, at 48.

Hence, by adopting CSR clauses in the BITs and RTAs, this provision should not only impose responsibilities upon the investing corporations, but also provide regular consultation on CSR issues between the governments party to an agreement and stakeholder groups, between the stakeholder groups and FDI companies and between the governments and FDI companies before an investment decision is made and during the business' performance. It allows company executives and stakeholders to address social or environmental concerns before the problems become serious, and to help government and FDI companies have a better understanding of their rights and obligations imposed by CSR provisions. Besides, the government may provide funding for companies that become certified to particular CSR standards or facilitate their research about new and environment-friendly technology.

Therefore, in order to prevent environmental conflicts as well as to effectively resolve any environmental dispute involving foreign investors, Vietnam should fully understand its limitations in the exercise of State police power regarding environment protection and, on the other hand, adopt CSR provisions in the BITs and RTAs to which it is a party. Such provisions may be adopted from that of the Canada-Peru agreement, which is a typical example that references CSR in both the preamble and in several chapters of the body of the Agreement. For instance, in the Preamble of the agreement, both Canada and Peru agree to:

> Encourage enterprises operating within their territory or subject to their jurisdiction, to respect internationally recognized corporate social responsibility standards and principles and pursue best practices.[124]

Furthermore, the investment section of the Canada-Peru agreement includes a special section even named "Corporate Social Responsibility":

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labor, the environment, human rights, community relations and anti-corruption. The Parties, therefore, remind those enterprises of the importance of

124 Canada-Peru Free Trade Agreement, Can.-Peru, Preamble, May 28, 2008, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng (entered into force Aug. 1, 2009).

> incorporating such corporate social responsibility standards in their internal policies.[125]

The Canada-Peru agreement also creates an institutional mechanism to, *inter alia*, promote cooperation on CSR as a formal forum.[126] This action initiated by Canada and Peru is not a single case, but it is followed by the good practice found in the Netherlands – where its Centre for the Promotion of Imports from developing countries (CBI) provides training to exporters from developing countries on social and environmental issues. It is easy to see that the governments of these countries have soon realized CSR is one of the effective solutions for negative effects of FDI in such robust international commerce contexts. In short, by providing CSR clauses directly in the investment and trade agreements, the parties are encouraged to be responsible for environmental preservation and social welfare as well as to cooperate effectively and harmoniously.

## 6 Conclusion

In order to enhance environmental protection activities and achieve many tasks at the same time, Vietnam's environmental laws are ambitious and becoming more detailed to catch up with the changes of society. However, they are at times contradictory as they conflict with other laws and regulations on the responsibilities of the investor regarding environment protection. The inefficiency of State governance for environmental issues also poses another challenge. Furthermore, the lack of appropriate concern about the sustainable development objectives in BITs is considered to affect not only the business environment and the effort to attract investments in Vietnam, but also the State's regulatory capacity to pursue public interest needs through legitimate policies in the fields of health, environment, security, etc. These shortcomings are proved to be the source of increasing and unresolved environmental disputes in practice. Hence, it is imperative for Vietnam to settle the issue in such manner that can maintain the status of an "FDI friendly" country and at the same time reasonably protect human and animal health, as well as the environment.

The government shall design a good policy and also a good plan on how to overcome the challenges. The solutions must be taken in various aspects, especially the restructuring of an environmental dispute settlement system. It is

125 *Id.* art. 810.
126 *Id.* art. 817.

important to help the victims of the industrial pollution by easing their burden of proof in environmental disputes by shifting this responsibility to the investor. The flexible and independent ADR with the supports of administrative authorities should be encouraged for settlement of environmental disputes with FDI. Lastly, foreign investors should be encouraged to voluntarily contribute to the protection as well as the cleaning up of the environment. Thus, it is advisable to ensure adoption of Corporate Social Responsibility provisions in Vietnam's future BITs and RTAs.

*Legal Materials*

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# Participation in Multilateral Treaties

*Karin Arts*[1]

## 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 2017. 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 were derived from *Multilateral Treaties Deposited with the Secretary-General*, https://treaties.un.org/pages/participationstatus.aspx or, when not available there, from the *United Nations Treaty Series Online*, https://treaties.un.org/pages/UNTSOnline.aspx?id=2&clang=_en
- Where reference is made to the Hague Conference on Private International Law (HccH), data were derived from https://www.hcch.net/en/instruments/conventions
- Where reference is made to the International Atomic Energy Agency (IAEA), data were derived from https://www.iaea.org/resources/treaties/treaties-under-IAEA-auspices
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from https://www.icao.int/Secretariat/Legal/Pages/TreatyCollection.aspx
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from https://www.icrc.org/applic/ihl/ihl.nsf/
- Where reference is made to the International Labour Organization (ILO), data were derived from http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0

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- Where reference is made to the International Maritime Organization (IMO), data were derived from http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from http://portal.unesco.org/en/ev.php-URL_ID=12024&URL_DO=DO_TOPIC&URL_SECTION=201.html
- Where reference is made to WIPO, data were derived from http://www.wipo.int/treaties/en
- Where reference is made to the Worldbank, data were derived from www.worldbank.org/en/about/leadership/members#4 and www.worldbank.org/en/about/leadership/members#5
- 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 or accession.

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### Antarctica

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### Commercial Arbitration

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### Cultural Matters

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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. 16 p. 157.
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**Revised Asia-Pacific Regional Convention on the Recognition of Qualifications in Higher Education, 2011**
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(Status as provided by UNESCO)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Japan | | 6 Dec 2017 |
| Korea (Rep.) | | 19 Dec 2017 |

### Cultural Property

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. 22 p. 306.
Convention concerning the Protection of the World Cultural and Natural Heritage, 1972: *see* Vol. 22 p. 306.
Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1999: *see* Vol. 19 p. 178.
Convention for the Safeguarding of the Intangible Cultural Heritage, 2003: *see* Vol. 22 p. 306.
Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005: *see* Vol. 22 p. 306.

**Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954**
(Continued from Vol. 13 p. 263)
(Status as provided by UNESCO)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Afghanistan | | 26 Oct 2017 |

### Development Matters

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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.

**Multilateral Agreement for the Establishment of an International Think Tank for Landlocked Developing Countries, 2010**
(Continued from Vol. 21 p. 239)
Entry into force: 6 October 2017

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kyrgyzstan | | 1 Jun 2017 |
| Nepal | | 7 Aug 2017 |
| Tajikistan | | 5 Jul 2017 |

**Dispute Settlement**

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**Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court**
(Continued from Vol. 21 p. 239)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Pakistan | | 29 Mar 2017 |

**Environment, Fauna and Flora**

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International Convention on Civil Liability for Oil Pollution Damage, 1969: *see* Vol. 15 p. 215.
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Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971: *see* Vol. 18 p. 103.
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971: *see* Vol. 12 p. 237.
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. 15 p. 225.
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. 15 p. 215.
Protocol on Substances that Deplete the Ozone Layer, 1987: *see* Vol. 16 p. 161.
Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987: *see* Vol. 13 p. 266.
Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989: *see* Vol. 22 p. 309.
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Amendment to the Montreal Protocol, 1992: *see* Vol. 18 p. 103.
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Convention on Biological Diversity, 1992: s*ee* Vol. 14 p. 229.
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 Montreal Protocol, 1997: *see* Vol. 19 p. 182.
Protocol to the Framework Convention on Climate Change, 1997: *see* Vol. 19 p. 182.
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998: *see* Vol. 19 p. 182.
Amendment to the Montreal Protocol, 1999: *see* Vol. 19 p. 182.
Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000: *see* Vol. 19 p. 183.
International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001: *see* Vol. 22 p. 309.
Stockholm Convention on Persistent Organic Pollutants, 2001: *see* Vol. 19 p. 183.
International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001: *see* Vol. 20 p. 199.

**International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990**
(Continued from Vol. 20 p. 199)
(Status as provided by IMO)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| Myanmar | 15 Dec 2016 | 15 Mar 2017 |

**Protocol to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1992**
(Continued from Vol. 16 p. 161)
(Status as provided by IMO)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| Thailand | 7 Jul 2017 | not yet |

**Protocol to Amend the 1972 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992**
(Continued from Vol. 19 p. 181)
(Status as provided by IMO)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| Thailand | 7 Jul 2017 | not yet |

**Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995**
(Continued from Vol. 12 p. 238)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Maldives | | 19 Jun 2017 |

**International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004**
(Continued from Vol. 21 p. 241)
Entry into force: 8 Sep 2017
(Status as provided by IMO)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| Indonesia | 24 Nov 2015 | 8 Sep 2017 |
| Iran | 6 Apr 2011 | 8 Sep 2017 |
| Japan | 10 Oct 2014 | 8 Sep 2017 |
| Korea (Rep.) | 10 Dec 2009 | 8 Sep 2017 |
| Malaysia | 8 Sep 2017 | 8 Sep 2017 |
| Maldives | 22 Jun 2005 | 8 Sep 2017 |
| Mongolia | 28 Sep 2011 | 8 Sep 2017 |
| Singapore | 8 Jun 2017 | 8 Sep 2017 |

**Amendment to Annex B of the Kyoto Protocol to the United Nations Framework Convention on Climate Change**
Nairobi, 17 November 2006
Entry into force: not yet

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| China | | 16 Jul 2010 |
| India | | 18 Nov 2008 |
| Iran | | 10 Apr 2012 |
| Kazakhstan | | 7 Oct 2011 |
| Korea (Rep.) | | 10 Dec 2009 |
| Kyrgyzstan | | 2 Nov 2009 |
| Turkmenistan | | 21 Aug 2008 |
| Uzbekistan | | 16 Oct 2007 |
| Vietnam | | 29 Jul 2008 |

**Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, 2010**
(Continued from Vol. 22 pp. 309–310)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Japan | 11 May 2011 | 22 May 2017 |
| Korea (Rep.) | 20 Sep 2011 | 19 May 2017 |

**Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 2010**
(Continued from Vol. 21 p. 242)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Japan | 2 Mar 2012 | 5 Dec 2017 |

**Doha Amendment to the Kyoto Protocol**
Doha, 8 December 2012
Entry into force: not yet

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Bangladesh | | 13 Nov 2013 |
| Bhutan | | 29 Sep 2015 |
| Brunei | | 14 Nov 2014 |
| Cambodia | | 17 Nov 2015 |
| China | | 2 Jun 2014 |
| India | | 8 Aug 2017 |
| Indonesia | | 30 Sep 2014 |
| Malaysia | | 12 Apr 2017 |
| Maldives | | 1 Jul 2015 |
| Myanmar | | 19 Sep 2017 |
| Pakistan | | 31 Oct 2017 |
| Philippines | | 13 Apr 2016 |
| Korea (Rep.) | | 27 May 2015 |
| Singapore | | 23 Sep 2014 |
| Sri Lanka | | 2 Dec 2015 |
| Thailand | | 1 Sep 2015 |
| Vietnam | | 22 Jun 2015 |

**Minamata Convention on Mercury, 2013**
(Continued from Vol. 22 p. 310)
Entry into force: 16 Aug 2017

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Afghanistan | | 2 May 2017 |
| Indonesia | 10 Oct 2013 | 22 Sep 2017 |
| Iran | 10 Oct 2013 | 16 Jun 2017 |
| Laos | | 21 Sep 2017 |
| Singapore | 10 Oct 2013 | 22 Sep 2017 |
| Sri Lanka | 8 Oct 2014 | 19 Jun 2017 |
| Thailand | | 22 Jun 2017 |
| Vietnam | 11 Oct 2013 | 23 Jun 2017 |

**Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer**
Kigali, 15 October 2016
Entry into force: not yet

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Korea (DPR) | | 21 Sep 2017 |
| Laos | | 16 Nov 2017 |
| Maldives | | 13 Nov 2017 |

## 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. 22 p. 310.

### Finance

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 7 p. 327.
Convention Establishing the Multilateral Investment Guarantee Agency, 1988: *see* Vol. 19 p. 184.

### 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. 19 p. 185.
Protocol to Eliminate Illicit Trade in Tobacco Products, 2012: *see* Vol. 22 p. 311.

### 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. 22 p. 312.
International Covenant on Civil and Political Rights, 1966: *see* Vol. 16 p. 165.
Optional Protocol to the International Covenant on Civil and Political Rights, 1966: *see* Vol. 15 p. 219.
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. 21 p. 245.
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.
Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1989: *see* Vol. 18 p. 106.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990: *see* Vol. 18 p. 106.
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. 7 p. 170.
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000: *see* Vol. 20 p. 202.
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000: *see* Vol. 22 p. 312.
Convention on the Rights of Persons with Disabilities, 2008: *see* Vol. 22 p. 312.
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008: *see* Vol. 22 pp. 312–313.
International Convention for the Protection of All Persons from Enforced Disappearance, 2010: *see* Vol. 22 p. 313.

**International Convention on the Elimination of All Forms of Racial Discrimination, 1966**
(Continued from Vol. 21 p. 245)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Singapore | 19 Oct 2015 | 27 Nov 2017 |

**International Covenant on Economic, Social and Cultural Rights, 1966**
(Continued from Vol. 14 p. 231)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Myanmar | 16 Jul 2015 | 6 Oct 2017 |

**Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002**
(Continued from Vol. 21 p. 245)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Sri Lanka | | 5 Dec 2017 |

### 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. 18 p. 107.
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.
Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 2005: *see* Vol. 17 p. 171.

### Intellectual Property

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979: *see* Vol. 22 p. 314.
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.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 18 p. 109.
Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001: *see* Vol. 22 p. 314.
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 18 p. 109.
Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.
Trademark Law Treaty, 1994: *see* Vol. 15 p. 222.
Patent Law Treaty, 2000: *see* Vol. 22 p. 315.
Beijing Treaty on Audiovisual Performances, 2012: *see* Vol. 22 p. 315.

**Convention Establishing the World Intellectual Property Organization, 1967**
(Continued from Vol. 12 p. 245)
(Status as provided by WIPO)

| *State* | *Membership* |
|---|---|
| Timor Leste | 12 Sep 2017 |

**Convention for the Protection of Industrial Property, 1883 as amended 1979**
(Continued from Vol. 12 p. 244)

| *State* | *Party* | *Latest Act to which State is party* |
|---|---|---|
| Afghanistan | 14 Feb 2017 | Stockholm |

**Madrid Union Concerning the International Registration of Marks, Including the Madrid Agreement 1891 as Amended in 1979, and the Madrid Protocol 1989**
(Continued from Vol. 22 p.314)
(Status as provided by WIPO)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Brunei | | 6 Jan 2017 |
| Thailand | | 7 Nov 2017 |

**WIPO Performances and Phonograms Treaty, 1996**
(Continued from Vol. 18 p. 109)
(Status as provided by WIPO)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Brunei | | 2 Feb 2017 |

**WIPO Copyright Treaty, 1996**
(Continued from Vol. 18, p. 109)
(Status as provided by WIPO)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Brunei | | 2 Feb 2017 |

**Singapore Treaty on the Law of Trademarks, 2006**
(Continued from Vol. 22 p. 315)
(Status as provided by WIPO)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Afghanistan | | 14 Feb 2017 |

**Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 2013**
(Continued from Vol. 22 pp. 315–316)
(Status as provided by WIPO)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Kyrgyzstan | | 15 May 2017 |

## International Crimes

Slavery Convention, 1926 as amended in 1953: *see* Vol. 15 p. 223.
Convention on the Prevention and Punishment of the Crime of Genocide, 1948: *see* Vol. 21 p. 249.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956: *see* Vol. 14 p. 236.
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.
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973: *see* Vol. 14 p. 236.
International Convention Against the Taking of Hostages, 1979: *see* Vol. 20 p. 206.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol. 18 p. 111.
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.
International Convention for the Suppression of Terrorist Bombings, 1997: *see* Vol. 20 p. 206.
Statute of the International Criminal Court, 1998: *see* Vol. 16 p. 171.
International Convention for the Suppression of the Financing of Terrorism, 1999: *see* Vol. 17 p. 174.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 21 p. 250.
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, 2001: *see* Vol. 21 p. 250.
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 2005: *see* Vol. 18 p. 112.

**Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991**
(Continued from Vol. 15 p. 224)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Laos | | 18 Apr 2017 |

**United Nations Convention against Transnational Organized Crime, 2000**
(Continued from Vol. 22 p. 317)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Japan | 12 Dec 2000 | 11 Jul 2017 |

**Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000**
(Continued from Vol. 22 p. 317)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Japan | 9 Dec 2002 | 11 Jul 2017 |

**United Nations Convention Against Corruption, 2003**
(Continued from Vol. 22 pp. 317–318)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Japan | 9 Dec 2003 | 11 Jul 2017 |

**International Convention for the Suppression of Acts of Nuclear Terrorism, 2005**
(Continued from Vol. 22 p. 318)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Singapore | 1 Dec 2006 | 2 Aug 2017 |

### 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. 17 p. 176.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 6 p. 257.
UN Convention on Contracts for the International Sale of Goods, 1980: *see* Vol. 21 p. 251.
UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.
United Nations Convention on the Use of Electronic Communications in International Contracts, 2005: *see* Vol. 21 p. 251.

### Judicial and Administrative Cooperation

Convention on Civil Procedure, 1954: *see* Vol. 20 p. 208.
Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: *see* Vol. 17 p. 176.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: *see* Vol. 22 p. 319.
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 22 p. 319.

## Labour

Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 19 p. 192.
Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): *see* Vol. 22 p. 319.
Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 19 p. 193.
Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 22 p. 320.
Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): *see* Vol. 19 p. 193.
Employment Policy Convention, 1964 (ILO Conv. 122): *see* Vol. 8 p. 186.
Promotional Framework for Occupational Safety and Health Convention, 2006 (ILO Conv. 187): *see* Vol. 22 p. 320.

**Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111)**
(Continued from Vol. 22 p. 320)
(Status as provided by the ILO)

| *State* | *Rat. Registered* |
|---|---|
| Thailand | 13 Jun 2017 |

**Minimum Age Convention, 1973 (ILO Conv. 138)**
(Continued from Vol. 19 p. 193)
(Status as provided by the ILO)

| *State* | *Rat. Registered* | *Min. age spec.* |
|---|---|---|
| India | 13 Jun 2017 | 14 |

**Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182)**
(Continued from Vol. 19 p. 194)
(Status as provided by the ILO)

| *State* | *Rat. Registered* |
|---|---|
| India | 13 Jun 2017 |

### 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.
Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972: *see* Vol. 21 p. 253.
Convention on Psychotropic Substances, 1971: *see* Vol. 13 p. 276.
Protocol amending the Single Convention on Narcotic Drugs, 1972: *see* Vol. 15 p. 227.
United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988: *see* Vol. 20 p. 210.

### Nationality and Statelessness

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 17 p. 178.
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. 17 p. 179.
Amendment to the 1980 Convention on the Physical Protection of Nuclear Material, 2005: *see* Vol. 22 p. 322.
Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1988: *see* Vol. 6 p. 265.
Convention on Early Notification of a Nuclear Accident, 1986: *see* Vol. 19 p. 196.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 19 p. 196.
Convention on Nuclear Safety, 1994: *see* Vol. 22 p. 323.
Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997: *see* Vol. 19 p. 196.
Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 16 p. 178.
Protocol to Amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 17 p. 180.
Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol. 22 p. 322.

### 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. 16 p. 178.
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. 15 p. 229.

### Privileges and Immunities

Convention on the Privileges and Immunities of the United Nations, 1946: *see* Vol. 19 p. 197.
Vienna Convention on Diplomatic Relations, 1961: *see* Vol. 19 p. 197.
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. 19 p. 197.
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.
United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004: *see* Vol. 15 p. 230.

**Convention on the Privileges and Immunities of the Specialized Agencies, 1947**
(Continued from Vol. 7 p. 338)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Brunei | | 1 Feb 2017 |

**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. 20 p. 213.

**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. 19 p. 198.
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. 19 p. 199.

**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. 20 p. 214)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Thailand | | 28 Apr 2017 |

**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. 15 p. 230.
International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 15 p. 231.
Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.
Convention on the International Regulations for Preventing Collisions at Sea, 1972: *see* Vol. 19 p. 200.
International Convention for Safe Containers, as amended 1972: *see* Vol. 20 p. 215.
Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.
Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.
International Convention for the Safety of Life at Sea, 1974: *see* Vol. 15 p. 231.
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.
International Convention on Standards of Training, Certification and Watch-keeping for Seafarers, as amended, 1978: *see* Vol. 19 p. 200.

**Protocol Relating to the International Convention on Load Lines, 1988**
(Continued from Vol. 17 p. 183)

| *State* | *Cons.* (*dep.*) | *E.i.f.* |
|---|---|---|
| Indonesia | 28 Nov 2017 | not yet |

**Protocol Relating to the International Convention for the Safety of Life at Sea, 1988**
(Continued from Vol. 18 p. 120)

| *State* | *Cons.* (*dep.*) | *E.i.f.* |
|---|---|---|
| Indonesia | 28 Nov 2017 | not yet |

**Nairobi International Convention on the Removal of Wrecks, 2007**
(Continued from Vol 22 p. 325)
(Status as provided by IMO)

| *State* | *Cons.* (*dep.*) | *E.i.f.* |
|---|---|---|
| China | 11 Nov 2016 | 11 Feb 2017 |
| Korea (DPR) | 8 May 2017 | 8 Aug 2017 |
| Singapore | 8 Jun 2017 | 8 Sep 2017 |

### 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.
International 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.
International 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.

**International Convention Against Doping in Sports, 2005**
(Continued from Vol. 20 p. 217)

| *State* | *Sig.* | *Rat.* |
|---|---|---|
| Laos | | 23 Jan 2017 |

**Telecommunications**

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 13 p. 280.
Convention on the International Mobile Satellite Organization (INMARSAT), 1976 (as amended): *see* Vol. 19 p. 202.
Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.
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.
Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998: *see* Vol. 15 p. 232.
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.

### Treaties

Vienna Convention on the Law of Treaties, 1969: *see* Vol. 19 p. 203.
Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 6 p. 280.

### 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. 22 p. 327.
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 21 p. 259.
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1992: *see* Vol. 21 p. 259.
Comprehensive Nuclear Test Ban Treaty, 1996: *see* Vol. 22 p. 328.
Convention on Cluster Munitions, 2008: *see* Vol. 19 p. 204.

**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**
(Continued from Vol. 11 p. 263)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Afghanistan | 10 Apr 1981 | 9 Aug 2017 |

**Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997**
(Continued from Vol. 13 p. 281)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Sri Lanka | | 13 Dec 2017 |

**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**
(Continued from Vol. 12 p. 259)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Afghanistan | 10 Apr 1981 | 9 Aug 2017 |

**Arms Trade Treaty, 2013**
(Continued from Vol. 22 p. 328)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kazakhstan | | 8 Dec 2017 |

**Treaty on the Prohibition of Nuclear Weapons**
New York, 7 July 2017
Entry into force: not yet

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Bangladesh | 20 Sep 2017 | |
| Indonesia | 20 Sep 2017 | |
| Laos | 21 Sep 2017 | |
| Malaysia | 20 Sep 2017 | |
| Nepal | 20 Sep 2017 | |
| Philippines | 20 Sep 2017 | |
| Thailand | 20 Sep 2017 | 20 Sep 2017 |
| Vietnam | 22 Sep 2017 | |

# State Practice of Asian Countries in International Law

***Bangladesh***

*Sumaiya Khair**

**Criminal Law – Transnational Crime – Corruption – UNCAC – Mutual Legal Assistance**

**Professor M. Samsul Alam vs. Bangladesh & Others, Writ Petition No. 5673 of 2016, Judgment Delivered on 24 August 2017, 10 SCOB [2018] HCD**

The backdrop against which this writ petition was filed is that Niko Resources (Bangladesh) Ltd., a subsidiary of a Canadian corporation, entered into a joint venture agreement with BAPEX in 2003 to develop gas fields in Feni and Chattack. Petrobangla became the buyer of gas from the Feni field under a gas purchase and sales agreement (GPSA) with Niko. When Niko was drilling the Chattack gas field, two blowouts occurred on 7 January and 24 June 2005 respectively, causing extensive damage to the gas wells, human lives, and the surrounding environment. The two fires destroyed billions of cubic feet of gas and forced thousands of nearby villagers to evacuate. Damage caused by Niko to Bangladesh has since been estimated to be over $1bn. The energy ministry's inquiry committee determined that the fire was the result of Niko's operational failure and inappropriate casing design. There were allegations of corruption in the process in which Nico was awarded the work.

The first time Niko's corruption came to light was in June 2005, when the press reported that Niko had provided a luxury car to the Bangladeshi Minister for Energy. This prompted the Canadian High Commissioner in Bangladesh at the time, to alert the Canadian Department of Foreign Affairs and International Trade about the matter, which in turn informed the Royal Canadian Mountain Police (RCMP). RCMP started an investigation which lasted for several years in various jurisdictions including Canada, Barbados, the Cayman Islands, the US, Switzerland, Singapore, and the UK. The RCMP investigation was joined by the FBI and Bangladesh's Anti-Corruption Commission (ACC). Despite widespread condemnation of Niko's corruption and its role in causing the blowouts, Niko again managed to obtain a gas purchase and sales agreement

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with Petrobangla in 2006. In 2007, joint international investigations of the RCMP, FBI, and ACC revealed a web of corruption worth millions of dollars involving individuals at the highest levels of power in the government. Niko had hired businessmen to pay off corrupt officials and politically influential persons to win its natural gas contracts.

The petitioner in this instance is a reputed energy expert and one of the leading activists in the protection of natural resources of the country. Being concerned about the welfare of the people and vigilant regarding the duties of government authorities to act in public interest and protect the rights and resources of the people in discharging their statutory duties, he moved the Court seeking redress.

In an application under Article 102 of the Bangladesh Constitution, a Rule Nisi was issued on 09.05.2016 calling upon the respondents to show cause as to why the Joint Venture Agreement for The Development and Production of Petroleum from the Marginal/Abandoned Chattak and Feni Fields ("JVA") dated 16.10.2003 between respondents No. 3 and No. 4 should not be declared to be without lawful authority and of no legal effect and thus *void ab initio*; and why the Gas Purchase and Sale Agreement for the sale of gas from Feni Gas Field ("GPSA") dated 27.12.2006 between respondents No. 2, as Buyer, and a joint venture between respondents No. 3 and No. 4, as Seller, should not be declared to be without lawful authority and of no legal effect and thus *void ab initio*; and also why the assets of respondents No. 4 and No. 5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9 should not be attached and seized to provide adequate compensation for the 2005 blowouts, and/or such other or further order or orders be passed as this Court may deem fit and proper.

Respondent No. 1 is the Government of Bangladesh, represented by the Secretary, Energy Division, Ministry of Energy, Power and Mineral Resources; respondent No. 2 is the Bangladesh Oil, Gas and Mineral Corporation (Petrobangla), a statutory corporation established under the Bangladesh Oil, Gas and Mineral Corporation Ordinance, 1985; respondent No. 3 is a company incorporated under the Companies Act, a wholly owned subsidiary of the respondent No. 2, and falls within the definition of "statutory public authority" under Article 152 of the Constitution; respondent No. 4 is Niko Resources (Bangladesh) Limited, a private company incorporated under the laws of Barbados, which entered into the JVA with the respondent No. 3 and the GPSA with the respondent No. 2; respondent No. 5 is Niko Resources Limited, a publicly traded corporation with head office in Calgary, Alberta, Canada and the parent company of the respondent No. 4, and which owns 80% working interest in the Chattak and Feni gas fields and 60% working interest in Block 9 gas field in Bangladesh.

The Court maintained that government activity has a public element in it and it must therefore be guided by public interest. As such, any misuse of power by a government functionary or exercise of unfettered discretion which benefits a private party in dealing with any State property, goes against public interest and is therefore, unacceptable, unconstitutional and invalid. If the government awards a contract or leases out any of its property or grants any targets, the same is liable to be tested for its validity on grounds of reasonableness and public interest and if found deficient, is liable to be invalid.

In their reasoning the Court drew extensively on the United Nations Convention against Corruption (UNCAC) to which Bangladesh is Party and observed that on ratification, Bangladesh has incurred an obligation to conform to the principles laid down in the convention. Therefore, Bangladesh has a duty under international law, as laid out in Article 31 of the UNCAC, to confiscate the proceeds of crime in this case. Article 51 of the UNCAC makes the return of assets as proceeds of crime a fundamental principle of the convention. As such, the Court held that all proceeds of crime acquired through corruption must be returned to Bangladesh. The Court also referred to Article 53 of UNCAC which calls for the recovery of assets obtained through corruption, including laws permitting private civil causes of action, to recover damages owed to victim States and the recognition of a victim State's claim as a legitimate owner of stolen assets. The Court also flagged Article 54 of the UNCAC which requires State Parties to give effect to any confiscation order for corruption proceeds issued in another State Party, and to "consider taking such measures as may be necessary to allow confiscation ... without a criminal conviction."

The Court was convinced that the evidence of corruption produced before them was the product of international law enforcement co-operation through the use of the Mutual Legal Assistance (MLA) arrangement between Bangladesh, Canada, and the United States under the UNCAC. They believed that the confiscation and return of the assets to Bangladesh would result in some form of restorative justice whereby the State and the people would obtain at least some financial benefit or compensation for the hardship caused by the corruption committed by respondents No. 4 and No. 5 and the suffering resulting from the 2005 blowouts. The Court observed how corrupt international companies hide behind corporate veils and rely on sovereignty issues to protect themselves and to orchestrate transnational crimes with impunity.

Perusing all facts and finding ample evidence of corruption, the Court declared that the Joint Venture Agreement for the Development and Production of Petroleum from the Marginal/Abandoned Chattak and Feni Fields (JVA) dated 16.10.2003 between respondents No. 3 and No. 4 to be without lawful authority and of no legal effect and thus void ab initio. They also maintained

that the Gas Purchase and Sale Agreement for the sale of gas from Feni Gas Field (GPSA) dated 27.12.2006 between respondents No. 2, as Buyer, and a joint venture between respondents No. 3 and No. 4, as Seller, were also without lawful authority and of no legal effect and thus void *ab initio*. The assets of respondents No. 4 and No. 5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9 PSC were attached. In view of these considerations, the Court made the Rule absolute.

### Criminal Law – Transnational Crime – Trafficking of Persons

#### Statement by Bangladesh on Agenda Item 107: Crime Prevention and Criminal Justice and Agenda Item 108: International Drug Control, at the Third Committee of the 72nd Session of the UN General Assembly, 4 October 2017

Bangladesh delivered a statement at the 72nd Session of the United National General Assembly (UNGA) on 4 October 2017 raising concerns over transnational crimes such as, trafficking in persons, money laundering, drug trafficking and drug abuse, terrorism and violent extremism, which are posing grave threats to countries generally and crime prevention and justice systems specifically. As Party to related UN Conventions, Bangladesh has been making sincere efforts to combat transnational organized crimes.

In the statement, Bangladesh reiterated its commitment to strengthen the work of Inter-Agency Coordination Group against Trafficking in Persons (ICAT). Besides, as a member of the Group of Friends United Against Human Trafficking, Bangladesh has been actively supporting the United Nations Global Plan of Action to Combat Trafficking in Persons by joining the high-level deliberations and other related events held at the UNGA. The statement highlighted various policy and legislative developments at the domestic level to address the problems including the Prevention and Suppression of Human Trafficking Act 2012. A National Plan of Action is being formulated focusing on 4Ps – Prevention, Protection, Promoting legal justice and Partnership development and effective monitoring. The government has set up Counter-Trafficking Committees up to the grassroots level and has established data collection and analysis cell recently. Bangladesh has been in the forefront in promoting safe, orderly and regular migration. To this end, Bangladesh hosted the 9th Global Forum on Migration and Development in 2016 and is now actively involved in the deliberations for adopting a norm-setting Global Compact for Migration.

One of the key aims is to retain the human trafficking dimension in the migration discourse.

Bangladesh practices zero tolerance against all forms of terrorism and violent extremism and has taken bold steps to stop financing and other support to curb such acts. The government has formed a Counter Terrorism and Transnational Crime Unit and Anti-Corruption Commission and strengthened law enforcement agencies, prosecutorial bodies and financial intelligence to ensure effective support in investigation and reduction of corruption and all forms of organized crime and illicit financial flows to criminal activities.

The statement concluded that in order to achieve SDGs, Bangladesh would prioritize the strengthening of the rule of law, crime prevention, and the promotion of fair, humane and accountable criminal justice systems.

## Environmental Law – Biodiversity – Eco-System Preservation – Conservation – Indigenous Peoples – Cultural Heritage – Access and Benefit Sharing – Traditional Knowledge

### The Bangladesh Biodiversity Act, 2017 (Act No. 11)

The enactment of the Bangladesh Biodiversity Act reinforces Bangladesh's commitment under the United Nations Convention on Biological Diversity to protect biodiversity and ensure sustainable use of resources. The Act in its Preamble explicitly refers to Bangladesh's obligation under the Convention on Biological Diversity 1993 in terms of conservation of bio-diversity, sustainable use of its components and fair and equitable sharing of benefits arising from the use of biological resources and related knowledge.

Drawing on the Convention on Biological Diversity, the Act defines biodiversity as the variability among living organisms which includes diversity within species, genes and ecosystems (Section 2[11]). It defines biological resources as genetic resources, such as plants, animals and micro-organisms or parts thereof, their genetic material and by-products or biotic component of an ecosystem but does not include human genetic material (Section 22[13]).

The Act provides for the establishment Biodiversity Committees at the national and subnational levels comprising of representatives of concerned ministries and departments of the government (Sections 8, 13, 16, 19, 22, 25). The role of the National Committee is most critical and includes inter alia approval of applications under the Act and advising the government on various aspects conservation of biodiversity including sustainable use of resources,

management of heritage sites, and harnessing indigenous knowledge (Section 10). The work of these Committees would be supplemented by teams, societies and sub-committees formed at the grassroots (Section 28).

The government has an obligation under the Act to formulate and update the National Biodiversity Strategy and Action Plan for the conservation, promotion and sustainable use of biological resources. This will include the identification and monitoring of biological resource rich areas and related research and educational programmes (Section 31[1][2]). The Act empowers the government to issue directives to relevant authorities or persons to take necessary measures to prevent deterioration or extinction of resources as a result of overuse, abuse or neglect (Section 31[3]). Participation of local communities (Section 31[5]) and recognition and preservation of local knowledge on biodiversity must be ensured in the impact assessment process (31[6]).

The Act entitles the government to declare, through official gazette, an area as a biodiversity heritage site (32[1]) which would be managed, developed and conserved in line with specific guidelines framed for the purpose (Section 32[4]). Declaration of such heritage sites shall be made after due consultation with local people and coordination of government ministries and departments (section 32[2]). The government shall have the onus of compensating or rehabilitating any organization or person who is economically affected by the decision to undertake a development project in the area (32[3]).

The Act prohibits activities that may adversely affect ecologically threatened/endangered species and communities (Section 36) and the environment and ecology of a wetland of international importance recognized by the Ramsar Convention (Section 33[3]). The Act criminalizes the following activities:

- The undertaking of biodiversity related activities and research and the transfer of knowledge and material in contravention of this Act (Section 39);
- Application for any intellectual property right, in or outside Bangladesh, for any invention using a biological resource from Bangladesh without approval of the National Biodiversity Committee (Section 40);
- Any activity that can potentially have an adverse impact on threatened species as discussed above (Section 41).

## Environmental Law – Sustainable Development

### Statement by Bangladesh to the United Nations on Behalf of the Least Developed Countries on Agenda Item 20: Sustainable Development

**and Sub-items (a) Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the Outcomes of the World Summit on Sustainable Development and of the United Nations Conference on Sustainable Development, (c) Disaster Risk Reduction, (d) Protection of Global Climate for Present and Future Generations of Humankind, (e) Implementation of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa and (i) Ensuring Access to Affordable, Reliable, Sustainable and Modern Energy for All, at the Second Committee, UN Headquarters, 9 October 2017.**

Delivered on behalf of 47 least developed countries, Bangladesh's statement revealed that the GDP growth remains below 7 percent as set by the IPOA and emphasized the need to increase international development cooperation to address structural challenges often leading to political instability, starvation, and social breakdown in respective countries. The statement called upon the international community to deliver the resources committed to least developed countries (LDCs) in the Addis Ababa Action Agenda and the UN to further strengthen its normative and operational support to LDCs. It underlined the importance of inclusion of women, girls, children, persons with disabilities, indigenous people and local communities in access, processes, decision making and responses and resilience to climate change and disaster reduction. In this context, Bangladesh called for collaboration of all parties in all forums and processes related to disaster risk reduction and the implementation of the Sendai Framework for effective and sustainable solutions.

Bangladesh also flagged the need for concerted efforts to fully implement the Paris Agreement and urged development partners to operationalize the Green Climate Fund fully and on time, with the goals of mobilizing $100 billion per year by 2020. It stressed that enhanced efforts are vital for promoting and facilitating clean development mechanism projects in the LDCs and to address the needs of people displaced as a result of extreme weather events. Urging development partners to ensure effective delivery on climate change commitments and access by the LDCs to all relevant climate change-related funds, Bangladesh emphasized that the allocation of adaptation and mitigation funds should be additional to official development assistance commitments and should be fair, equitable and proportionate to the impact of climate change.

**Draft Remarks by Bangladesh at the High-level Meeting on Sustainable Tourism, Trade and Global Digital Assets in Support of the United**

**Nations Sustainable Development Goals, Co-organized by the Permanent Mission of Suriname, World Assets Digital Cryptology Committee (WADCC) and the United Nations Association of El Salvador (UNA-SV), 17 January 2017**

Bangladesh observed with disappointment that although the 2013 Agenda recognizes international trade as a means for inclusive economic growth and poverty eradication, and an important tool to achieve the Sustainable Development Goals (SDG) and requires timely implementation of duty-free and quota-free market access for all LDCs, to date there has not been any tangible progress in this regard. Rather, the latest UNCTAD report on trade and development suggests that the global trade slowed down dramatically to around 1.5 per cent in 2015 and 2016, compared to 7 per cent growth before the crisis. Exports of LDCs have also fallen by more than 20 per cent in 2015.

Bangladesh called for reforming trade rules to make them fairer and more pro-development. It highlighted the need to address trade barriers and provide trade capacity through aid for trade; focus on structural transformation by sufficiently developing the manufacturing sector; add and retain high value by entering into the global value chains and adding technology and knowledge content into the manufacturing sectors.

Stressing the potentials of the tourism sector, Bangladesh sought appropriate polices and mechanisms at the national and international levels and engagement of both the public and private sectors in branding, marketing and reaching out to the potential markets. Building tourism infrastructure, ensuring stability, safety and security are key prerequisites for sustainable tourism development. Progress in the realization of GATS in all four Modes can also make important contributions to the promotion of tourism.

Bangladesh pointed out how digital assets and digital media are having a major impact on the economic, social and cultural lives by providing resourcs, knowledge and entertainment in an inconceivable magnitude at the shortest possible time and contributing significantly to education, research and development, in addition to making billions of dollars commercially. However, access to such assets is a continuing challenge which needs to be addressed by ensuring appropriate infrastructure and equipment, electricity, literacy and numeracy.

Bangladesh shared its activities, policy measures, institutional development and achievements in attaining key SDG targets. It highlighted the multisectoral approach and shadow oversight mechanisms adopted to make this journey meaningful and wanted concrete actions at the global level.

### Statement by Bangladesh on Agenda Item 63: Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan over Their Natural Resources, at the Second Committee of the 72nd Session of the UN General Assembly 23 October 2017

Bangladesh expressed a deep sense of frustration over the continued occupation of the Palestinian territories for nearly five decades, systematic human rights violations, indiscriminate attacks against civilians and expansion of illegal settlements by Israel, all of which violate the rights of the Palestinian people and adversely affect their social and economic conditions.

Highlighting deficits in access to water, energy and sanitation infrastructure, Bangladesh condemned the discriminatory planning policies implemented by Israel in Palestinian territories that seriously hampered investment in infrastructure and ignored public needs. Bangladesh stressed that continued occupation of Palestinian territories by Israel has resulted in high rates of unemployment, rampant poverty, widespread population displacement and homelessness, numerous health-related problems, severe food insecurity, insufficient number of schools and high dropout rates of students and rising aid-dependency for the most basic of needs. Destruction of homes and properties and exploitation, depletion of natural resources have compounded poverty and underdevelopment.

Bangladesh reiterated that the SDG principle "Leave No One Behind" applies to all including the people under foreign occupation. As such, it called upon the international community to impress upon Israel to put an end to the systematic breach of international humanitarian law and human rights principles, and restrictive measures that prevent the growth and development of economies in the occupied territories of Palestine. Bangladesh maintained that if the SDGs and Agenda 2030 are to be achieved, it is imperative that the inalienable rights of the Palestinians and people in occupied Syrian Golan over their natural resources and to self-determination are ensured.

### Partners of the Sustainability Compact – Joint Conclusions, 18 May, 2017, Dhaka

The Partners of the Sustainability Compact comprising of the Government of Bangladesh (GoB), the European Union (EU), the United States of America (USA), Canada, and the International Labour Organisation (ILO) – met for the third follow-up meeting on Bangladesh Sustainability Compact May 18, 2017 in

Dhaka. The purpose of the meeting was to assess progress made since the last meeting held on January 28, 2016 and to review priorities for the coming year. The Compact and the Joint Conclusions of the Partners continue to serve as a set of commitments and priorities by its Partners aimed at securing respect for labour rights, occupational safety and health, and the promotion of responsible business conduct in the Ready-Made Garment (RMG) sector.

The Partners acknowledged the progress made in several areas of the Compact including increase in trade union registrations in Dhaka Division, work towards the development of standard operating procedures (SOP) to better process applications for trade union registration, strengthening of the Department of Inspection for Factories and Establishment (DIFE), formation of the Remediation Coordination Cell (RCC) and investments in factory safety pursuant to corrective action plans. They also noted with satisfaction the introduction of the concept of workplace cooperation and initiating a culture of occupational safety and health.

The Partners recognized the necessity to pursue these efforts and to ensure that the new SOPs are agreed to for the smooth and expeditious processing of trade unions' registration applications in conformity with the objective and based on transparent criteria. The Partners stressed the urgent need to further address discriminatory acts against trade unionists, and to investigate and prosecute unfair labour practices in an effective, timely and transparent manner. As part of this effort, the Partners underlined the importance of strengthening the Department of Labour (DoL) with adequate staff and resources.

They welcomed the establishment of the Tripartite Consultative Council (TCC) for the RMG sector, an advisory body for industrial relations between workers and the factory owners. The Partners recognized the urgent need for promoting responsible business conduct (RBC) and encouraged brands and retailers to adopt RBC practices and a uniform code of conduct for factory audits in Bangladesh.

The Partners emphasized that criminal complaints pending against concerned social partners need to be reviewed to ensure due process of law. Reaffirming the need to ensure that workers in the EPZs enjoy freedom of association and collective bargaining rights, they underpinned the urgent need to begin inclusive consultations towards the amendment of the Bangladesh Labour Act and associated regulations to address the conclusions and recommendations of the ILO's supervisory bodies. They noted that the draft EPZ labour law has been withdrawn for further review and the TCC has been tasked with proposing reforms to the BLA.

Recognizing the significant contributions of the Bangladesh Accord on Fire and Building Safety (Accord), and Alliance for Bangladesh Workers Safety (Alliance) to ensure factory safety in RMG factories and for their commitment to sustainable sourcing from Bangladesh, the Partners agreed that it was essential for the National Initiative, the Accord, and the Alliance to commence where not started and advance remediation work. They encouraged private initiatives to remain engaged with the government and to renew their commitments to working for safer RMG factories in the coming years.

Given the critical role the RMG sector plays in the development of the country, the Partners expressed their continued commitment to the people of Bangladesh including through supporting responsible business conduct.

## Environmental Law – Climate Change

### Third UN Special Thematic Session on Water and Disasters: Adaptation to Climate Change, Financing Infrastructure, and Advancing Science and Technology, UN Headquarters, 20 July 2017

Bangladesh recalled how adverse climate impacts caused human miseries, much of which is water related, particularly in the least developed and small island countries, including Bangladesh. Bangladesh is vulnerable to erratic patterns of rainfall and flood and water related disasters, which adversely affect people and livelihoods. Although Bangladesh's contribution to climate change is very insignificant, it is required to shoulder a disproportionate burden of addressing climate change induced disasters. In this connection, the statement highlighted some of the key policy measures and infrastructure development undertaken by Bangladesh to adapt to and mitigate the effects of climate change.

Bangladesh stressed that the task of combating climate change is a shared responsibility of the global community. In this context, in view of the magnitude of the climate change induced risks, Bangladesh needs support from the developed countries particularly in terms of financing, innovative solutions and technology transfer through different channels including overseas development assistance, the Green Climate Fund, bilateral agreements, and funding by multilateral development banks. The statement also urged the science community across the globe to transcend national barriers and create networks of ideas, knowledge and best practices for the benefit of all mankind.

### Human Rights – Right To Life – ICCPR – Death Penalty – Commutation of Death Sentence

**Kamal alias Exol Kamal vs. State, [Criminal Appeal No. 27 of 2013 with Jail Petition No. 10 of 2013, from the Judgement and Order of 19th of March, 2012 Passed by the High Court Division in Death Reference No. 60 of 2006 Heard Along with Criminal Appeal No. 6688 of 2009 and Jail Appeal No. 1229 of 2007], Judgement on 10 October 2017, 10 SCOB [2018] AD**

The prosecution case, in brief, is that on 2 March 2004, at about 20.00 hours, victim Giasuddin returned was called out of his home by the accused persons named in the First Information Report and the convict appellant on the pretext of discussing some urgent matter with him. When the victim emerged from his house, the convict-appellant, accompanied by other convicts in the case, indiscriminately opened fire inflicting multiple injuries on him. The victim was taken to the hospital where he was declared dead by the doctor on duty. The incident was witnessed by the informant (victim's son) and other members of the family. Although the defence plea was that of innocence and that the appellant had been falsely implicated in this case driven by previous enmity and grudge, the Court of the first instance found the appellant guilty and sentenced him to death. Subsequently, the High Court Division confirmed the death sentence.

In addressing the criminal appeal for commutation of death sentence, the Appellate Division affirmed that in considering commutation of death sentence it has become the practice of the Court to take into account certain mitigating factors, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent on death row. The Court acknowledged that the death sentence is the most severe and irretrievable form of punishment which, once carried out, cannot be redeemed. However, the Court hastened to add that the death sentence is not unconstitutional in Bangladesh in view of the viciousness of the act. Referring to the cases of *Gregg v. Georgia, 428 U.S. 153 (1976)*, where the majority view was that the death penalty was not unconstitutional and *Nalu v. The State, 32* BLD*(AD) 247* where the court held that "death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offence, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it", the Court reasoned that from the facts and circumstances of the present case, it is clear

that the victim was repeatedly shot from close range. Ten bullet injuries were found on the victim, which is indicative of the vehemence with which the victim was murdered. The Court also found from the evidence that as the victim was actively involved in ensuring law and order in the locality, his work impeded the activities of the criminal groups and therefore he had to be eliminated.

The Court further noted that although it is usual to take into consideration the young age of the accused, such exception is made only when the young act in the heat of the moment without considering the consequence of their actions. The facts and circumstances of the case clearly indicated that the appellant deliberately, in a preplanned manner and armed with firearms, went to the house of the victim with the sole purpose of killing him. Hence, it cannot be deduced that the act of the accused was prompted by immaturity. Taking all facts, evidence and circumstances of the case into account, the Court upheld the judgement, order of conviction and sentence passed by the High Court Division and dismissed the criminal appeal and the jail petition.

## Human Rights – Women's Rights – UN General Assembly

### Statement by Bangladesh on Agenda Item 28: Advancement of Women, at the Third Committee of the 72nd Session of the UN General Assembly, 5 October 2017

Recalling the progress in promoting gender equality and protecting women's rights through policy and practice and attaining gender related MDGs, the statement referred to the 2016 Gender Gap Index, published by World Economic Forum, which ranks Bangladesh 72nd among 144 countries, a position above all South Asian countries. Bangladesh has also prioritized gender equality and rights in its Seventh Five-Year Plan and Perspective Plan. Every year, a gender budget report is presented along with the National Budget. In 2017, 43 Ministries reported on their gender responsive programmes and indicated progress in women's advancement.

The statement flagged developments in the RMG sector which singularly employs 4 million women, constituting nearly 95% of the total workforce in this sector. Women's participation in the job market has risen from 7% in 2000 to approximately 40% in 2017. Additionally, rural and marginalized women have been empowered through social safety net programmes, micro-credit and SME schemes, and soft bank loans. Bangladesh is proud to have its women partipating in UN peacekeeping missions. The enactment of appropriate laws

and the raising of social awareness against violence against women and girls, forced labour and early marriage have contributed significantly to women's advancement. The increasing number of women leaders at the national and subnational levels is also a testament of political empowerment of women.

The statement reinforced the need for the international community to recognize and address vulnerabilities of women and girls arising from conflicts and displacement, humanitarian emergencies and adverse effects of climate change. The statement reiterated Bangladesh's commitment and the importance of other member states to comply with international obligations in respect of women and girls.

### Human Rights – Promotion and Protection – UN General Assembly

**Statement by Bangladesh on Agenda Item 72: Promotion and Protection of Human Rights, at the Third Committee of the 72nd Session of the UN General Assembly, 13 October 2017**

Recognizing the multi-faceted challenges to human rights in today's world, Bangladesh reaffirmed its commitment to safeguard human rights and fundamental freedoms of all people and uphold the principles and provisions of the Universal Declaration of Human Rights. In addition to its international obligations, Bangladesh has in place the Constitution and other laws to protect and promote the rights of its peoples particularly, women, children, minorities and other vulnerable groups.

As a member of the Human Rights Council, Bangladesh has been working with the other member states in promoting human rights and implementing various human rights instruments to the best of its ability. The statement pointed out that it is often difficult for member states to fully comply with the universal parameters of human rights given country contexts and demands. Notwithstanding, Bangladesh appreciates the role of the UN's review mechanisms including the UPR in advancing human rights.

Reflecting on the Rohingya crisis, the statement emphasized that Bangladesh is doing its best to extend all possible humanitarian assistance to these people who have been subjected to flagrant human rights violations. The statement reiterated that the Rohingyas deserve support of the international

community in ensuring their basic human rights including the right to safe and voluntary return to their place of abode in Myanmar.

**Statement by Bangladesh on Agenda Item 72(b): Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms and 72(c) Human Rights Situations and Reports of Special Rapporteurs and Representatives at the Third Committee of the 72nd Session of the UN General Assembly, on 27 October 2017**

The statement affirmed that Bangladesh is strongly committed to the promotion and protection of universal human rights and fundamental freedoms. This commitment flows from the Constitution which embodies the principles and provisions of the UN Charter and Universal Declaration of Human Rights. Bangladesh is signatory to both the principal covenants on human rights, is party to all major human rights instruments and is member of various UN bodies and agencies dealing with human rights.

The statement highlighted the importance of addressing intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and hate speech particularly based on ethnicity, religion or belief in ensuring human rights for all. Referring to the Rohingya population in Myanmar, Bangladesh flagged how they were subjected to persecution and flagrant violation of human rights for generations resulting in their mass influx into Bangladesh. Bangladesh regretted the failure of the international community to handle the Rohingya crisis in meaningful ways. In this connection, Bangladesh also raised the sorry state of human rights violation in the occupied state of Palestine.

Given the steady deterioration of human rights worldwide, Bangladesh urged the UN, its relevant institutions and tools under its disposal including the Human Rights Council, to engage and follow up on this matter and devise in a spirit of collaboration, compassion and solidarity alternative and complementary approaches to address the human rights situation in various parts of the world.

The statement reaffirmed that the goals and targets set out for a sustainable future can be achieved only if relevant human rights and humanitarian laws are adequately implemented and respect for human rights in terms of equality, non-discrimination, participation, accountability, transparency, and rule of law is promoted, with particular focus on addressing the needs of the vulnerable, marginalized and disadvantaged groups.

### Human Rights – Labor Rights

#### International Campaign Led by IndustriALL Global Union and UNI Global Union Protesting Crackdown on Labour Movement, 15–16 February 2017

Union leaders and garment workers were arrested and union offices shut down in Dhaka's garment district, following demands for a higher minimum wage in December 2016. The wage movement was suppressed by the government with support from garments factory owners. In this context, the IndustriALL and UNI Global Union launched a campaign #EveryDayCounts, which received massive support from affiliates and other actors within the labour movement. Hundreds of photographs from all over the world were posted on social media, and unions in more than 20 countries sent letters to the Prime Minister of Bangladesh calling for the release of detained garment trade union leaders and worker activists, and for dropping of all charges against them. On 15 and 16 February 2017, the movement witnessed protests in over 16 cities, including Berlin, Geneva, London, Brussels, The Hague, Washington D.C., New York, Ottawa, Kathmandu, and Seoul. Labour Start's campaign to free the jailed activists amassed more than 10,000 signatures.

A tripartite agreement to release the detained trade unionists and garment workers was reached on 23 February, 2017, signed by the Ministry of Labour, IndustriALL Bangladesh Council, and the Bangladesh Garment Manufacturers and Exporters Association. The majority of the 35 Bangladeshi unionists and garment workers arrested since December 2016 were released, and arrangements to release the remaining were underway.

### Human Rights – Rights of the Child – Legal Age of Marriage – Best Interests of the Child – Protection of Children And Young Persons – Harmful Traditional Practice

#### The Child Marriage Restraint Act 2017 (Act No. VI of 2017)

Bangladesh enacted the Child Marriage Restraint Act 2017 by replacing the earlier Child Marriage Restraint Act of 1929. While the new law retains many of the provisions of the earlier Act including the legal age of marriage (21 for boys and 18 for girls), the inclusion of an exception that allows a boy or a girl to

marry before the statutory age limit in "special circumstances" in the "best interests of the child" is essentially seen as a regressive step in law making. Section 19 states that a child marriage solemnized in special circumstances in the best interests of the minor, and on the direction of the court and with the consent of the parents or guardian of the minor, shall not be deemed an offence under this Act (Section 19). The law, being silent on what would constitute a "special circumstance" and pending formulation of rules in this regard, creates scope for subjective interpretation of the clause.

The Act establishes Child Marriage Prevention Committees comprising of a cross-section of individuals from within and outside the government at the national and subnational levels for the prevention of child marriage (Section 3). Birth certificate, national identity card, educational certificate or passport shall be the legal basis for proving age of the parties contracting marriage (Section 12).

The Act empowers selected government officials and local government representatives to stop incidents of child marriage or take legal action upon receiving information, whether written or oral (Section 4).

The Act provides punitive measures in the following situations:

- The Court may, if satisfied, suo-moto or pursuant to a complaint made by a person or any information received through any other means, that a child marriage has been arranged or is about to be solemnized, issue an injunction against it (Section 5[2]). Anyone violating the injunction shall be liable for imprisonment or fine or in appropriate cases, both (Section 5[3]).
- If the complaint is found to be false, the complainant shall be punished with imprisonment or fine or, with both (Section 6).
- Any adult, male or female, who contracts a child marriage shall be punishable with imprisonment or fine or with both. In default of payment of the fine, s/he shall be punished with imprisonment which may extend up to three months (Section 7[1]).
- If any minor, male or female, contracts a marriage, s/he shall be punished with detention which may extend up to one month, or with fine which may extend up to fifty thousand Taka, or with both (Section 7 [2]).
- Where a minor contracts a marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, promotes the marriage or permits it to be solemnized, or negligently fails to prevent it, shall be punishable with imprisonment which may extend up to two years but not less than six months, or with fine which may extend up to fifty thousand Taka, or with both; in default of payment of the fine, s/he shall be liable to imprisonment which may extend up to three months (Section 8).

- If any person solemnizes or conducts a child marriage, s/he shall be punished with imprisonment which may extend up to two years but not less than six months, or with fine which may extend up to fifty thousand Taka or with both; in default of payment of the fine, s/he shall be punished with imprisonment which may extend up to three months (Section 9).
- If any Marriage Registrar registers a child marriage, s/he shall be punished with imprisonment which may extend up to two years but not less than six months, or with fine which may extend to fifty thousand Taka, or with both, and in default of payment of the fine, shall be punished with imprisonment which may extend to three months, and his license or appointment shall be cancelled (Section 11).
- Where a child marriage is initiated but not solemnized, and the accused submits an affidavit or bond stating that he shall not be involved in a child marriage in future and takes initiatives to prevent child marriage in his locality, then the court, if it thinks fit, may exempt him from the charge framed against him (Section 10).

Offences under this Act shall are cognizable, bailable and non-compoundable (Section 14).

However, the court shall not take cognizance of an offence under this Act after the expiry of two years from the date on which the offence is alleged to have been committed (Section 18). Trial of an offence under this Act shall be conducted summarily (Section 15). The court may, in case of disposal of a complaint or any proceedings, undertake local inquiry of its own to ascertain the veracity of the incidence or may direct any government official or local government representative or any other person to make such inquiry. The inquiry must be completed within 30 (thirty) working days failing which an additional 15 (fifteen) working days will be allowed if the court is convinced that the grounds for delay are justified (Section 16). Money realized from fines shall be paid as compensation to the party in the marriage who is a minor (Section 13).

## International Economic Law – Bilateral Meeting

### United States and Bangladesh Hold 3rd Trade and Investment Cooperation Forum Agreement Council Meeting in Dhaka, 17 May, 2017

The United States-Bangladesh Trade and Investment Cooperation Forum (TICFA) Council held its third meeting on May 17, 2017 in Dhaka to promote bilateral trade and investment in goods and services. During the meeting, both

countries discussed issues of mutual interest and which fall within the ambit of the TICFA. This included business opportunities, market access and tariff reforms, intellectual property, digital economy, regional connectivity, energy and infrastructure development, transparency in government procurement, and labor issues. Both governments pledged to deepen their engagement to strengthen trade and economic ties between the two countries.

## International Economic Law – Bilateral/Multilateral Agreements

### Promotion of Trade and Commerce

Bangladesh and Turkey signed an MoU at the Turkey-Bangladesh Business Forum – 2017 pursuant to which trade and commerce is expected to increase between the two countries by way of preferential market access. According to the Export Promotion Bureau of Bangladesh, Bangladesh exported $631.63 million worth of goods to Turkey in the last fiscal year and imported goods and services worth $212.30 million from Turkey. The signing of the FTA is likely to enhance the export of ready-made garments, pharmaceuticals, frozen fish, dry food, jute and jute products, leather, plastic and ceramic products, ship building and light engineering products to Turkey.

### Bilateral Agreements with China

China is one of the most important partners in the economic development of Bangladesh providing financial assistance to diverse projects/sectors. The following examples are highlighted to demonstrate the range of areas covered by bilateral agreements between the two countries:

### Energy

The governments of Bangladesh and China signed a Framework Agreement on 29 October 2017 based on which China will provide Bangladesh with USD 550.40 million including government concessional loan of USD 82.56 million and Preferential Buyer's Credit amounting to USD 467.84 million to implement the Installation of the Single Point Mooring with Double Pipeline Project to be steered by the Energy and Mineral Resources Division of the Bangladesh Government. The primary objective of this initiative is to ensure a fine balance

between the demand and supply of the country's energy needs and help reduce system loss during the import of refined and non-refined oil.

**Economic and Technical Cooperation**

China and Bangladesh signed an Agreement on Economic and Technical Cooperation on 11 May 2017 in lieu of which China will provide Bangladesh with a grant assistance of approximately USD 83.00 million for constructing the 9th Bangladesh-China Friendship Bridge and other infra-structure. The locations of these structures will be identified and negotiated later. It may be noted that seven such bridges have already been constructed with Chinese grants and the construction of the eighth one is underway over the Kocha river in Pirojpur district.

**Digital Technology**

China and Bangladesh signed two Framework Agreements on 10 September 2017 pursuant to which China will provide financial assistance for the implementation of the Development of ICT Infra-Network for Bangladesh (Info-Sarker-3) and the Modernization for Telecommunication Network for Digital Connectivity (MoTN) to be led by the Information and Communication Technology Division and the Posts and Telecommunication Division of the Bangladesh government respectively. These projects are expected to fulfill Bangladesh government's vision of a digital Bangladesh through reliable and affordable telecommunication facilities and broadband access.

**Grant Agreement on Human Resource Development**

Japan and Bangladesh signed a grant agreement on 7 August 2017 in Dhaka under which Japan will provide Bangladesh with 345 million Japanese Yen (equivalent to USD 3.12 million) and 444 million Japanese Yen (equivalent to USD 4.00 million) totaling 789 million Japanese Yen (equivalent to USD 7.12 million) as Grant Aid to the Human Resource Development Scholarship (Three Year-Cycle and Four Year-Cycle) Project of the Bangladesh government. This grant will support young Bangladeshi government officials in obtaining their Master's degree/Doctoral degree from Japanese higher education institutions. To date a total of 240 government officials obtained Master's Degree from Japan under this project. Japan is one of the largest bilateral development partners of Bangladesh and has contributed significantly to the overall development of the country.

**Loan Agreement on Health Sector Development**

A Loan Agreement between the Saudi Fund for Development (SFD) and Bangladesh was signed on 8 October, 2017 for setting up separate Burn Treatment and Plastic Surgery Units in 5 public medical college premises in Rajshahi, Barisal, Sylhet, Rangpur and Faridpur respectively. Under this Agreement, the Saudi Fund for Development has pledged a loan amounting to 112.50 million Saudi Riyal (equivalent to USD 30.00 million).

**Grant Agreement on the Conservation of Social, Cultural and Environmental Heritage**

The governments of India and Bangladesh signed a grant agreement on 29th January, 2017 to implement a project for Sustainable Development of Rajshahi City through Improvement and Conservation of Social, Cultural, Environmental and Heritage Infrastructures. The beneficiary and implementing agency of the project is Rajshahi City Corporation. The total cost of the project would be BDT 219.5 million.

**Agreement on Climate Resilience Infra-Structure and Capacity Building**

Pursuant to 'The World 2030-Denmark's Strategy for Development Cooperation and Humanitarian Action Plan for Bangladesh', an agreement was signed on 19 December, 2017 between Denmark and Bangladesh for Climate Adaptation and Resilience Engagement (CARE) in Bangladesh. Denmark initiated this engagement project in recognition of the priorities set out in the Bangladesh Climate Change Strategy and Action Plan, 7th Five Year Plan (2016–2021) and Perspective Plan of Bangladesh (2010–2021). The total support for the programme is DKK 50 million of which Denmark will contribute DKK 30 million and Bangladesh will provide DKK 20 million. The duration of this project is three years (December 2017 to November 2020).

The Project has two components – (i) Climate Resilient and Rural Infra-Structure and (ii) Climate Resilient Water Supply and Sanitation Services through Strengthened Local Government Institutions. Climate resilient infrastructure will include the construction of cyclone shelters, social services institutions, rural markets and fish landing stations in the coastal districts of Noakhali and Lakshmipur. Under component 2, Climate Resilient Water Supply and Sanitation facilities infrastructure will be developed in climate vulnerable coastal districts of Noakhali, Lakshmipur and Patuakhali. The project will

also help build the capacity of local government institutions for handling climate change issues.

### Exchange of Note and Grant Agreement for Education

On 8 February 2017, the governments of Japan and Bangladesh signed an Exchange of Note and Grant Agreement to implement the Third Primary Education Development Programme in Bangladesh. A total of 500 million Japanese Yen will be paid to Bangladesh under these agreements. Japan has been supporting Bangladesh in this sector since 2011; this is the fifth tranche of its contribution. The main objective of this programme is to improve the quality of classroom teaching of primary school teachers by providing necessary training and teaching equipment.

### Agreement for Economic Development

The Governments of Korea and Bangladesh entered into an arrangement on 3 December 2017 for establishing a Representative Office of Export-Import Bank of Korea in Bangladesh through soft loan provided by the Economic Development Cooperation Fund (EDCF). This initiative is expected to expedite aid mobilization and enhance development cooperation between the two countries.

Exim bank of Korea has been a long standing partner of Bangladesh and has contributed to the development of infrastructure and ICT in the country since 1993. As of November 2017, Bangladesh received approximately USD 1.00 billion in financial assistance through the EDCF.

## Humanitarian Law – Economic Assistance – Humanitarian and Disaster Relief

### Statement of Bangladesh on Agenda Item 73: Strengthening of the Coordination of Humanitarian and Disaster Relief Assistance of the United Nations, Including Special Economic Assistance, at the 72nd Session of UN General Assembly, 8 December 2017

Bangladesh updated the UNGA about the status of the Rohingya influx from Myanmar including the strain it was putting on local and national government authorities in terms of resource and capacity. Citing statistics on, amongst others, the total number of Rohingyas who have entered Bangladesh and the necessary support to maintain their basic needs and essential services,

Bangladesh urged donor countries and organisations to respond to the pressing and increasing need for resources in the spirit of responsibility and burden sharing.

Bangladesh pointed out that while it continues to engage with the Myanmar authorities in good faith to facilitate the return of the Rohingyas, it is crucial for the international community to persuade Myanmar to create an environment for the safe, dignified and voluntary return of the Rohingyas without fear of reprisal. It raised concerns over restricted access to humanitarian assistance and stated that nothing can justify the breach of international humanitarian law on the pretext counter-terrorism operations.

Bangladesh observed that the humanitarian crisis of the Rohingyas cannot be resolved without a peaceful, just and lasting political solution to the root causes of problem. It maintained that the recommendations of the Kofi Annan Advisory must be implemented by all concerned actors in Myanmar without resorting to a selective approach. In order to build trust and confidence among the Rohingyas, it is imperative that those responsible for committing horrific crimes against them are duly identified and brought to justice.

In conclusion, the statement reiterated that Bangladesh attaches great importance to the UN's humanitarian and emergency relief assistance, and remains supportive of international efforts to help build resilient societies and nations to respond to humanitarian challenges. Condemning the indiscriminate armed attacks against humanitarian personnel and convoy, medical and peacekeeping personnel and civilian infrastructures essential for humanitarian operations, Bangladesh urged all parties to conflicts to refrain from such activities and comply with International Humanitarian Law.

## Terrorism

### Joint Statement against Terrorism during Prime Minister Sheikh Hasina's Visit to New Delhi, 7–10 April 2017

Prime Ministers Narendra Modi of India and Sheikh Hasina of Bangladesh issued a joint statement against terrorism during the latter's visit to New Delhi in April 2017. The joint statement said that the "fight against terrorism should not only seek to disrupt and eliminate terrorists, terror organizations and networks, but should also identify, hold accountable and take strong measures against States and entities which encourage, support and finance terrorism, provide sanctuary to terrorists and terror groups, and falsely extol their virtues."

**India and Bangladesh Sign 22 Agreements, Joint Statement against Terrorism**

India and Bangladesh signed twenty two agreements during the Bangladeshi Prime Minister's visit to India in areas of defence, nuclear energy, cyber security and media. Both Prime Ministers personally witnessed the signing of four agreements – on the judicial sector, a $4.5 billion development assistance line of credit, on outer space and on passenger and cruise services. In addition, India has offered a new $500 million line of credit specifically for defence purchases. With the new $4.5 billion offer, India has thrice extended lines of credit during bilateral visits of the Bangladesh Prime Minister in the last six years, which constitute the largest of soft loans that New Delhi has proposed to any foreign country during this period.

# State Practice of Asian Countries in International Law

***India***

*V.G. Hegde**

**Human Rights – Right to Privacy as a Fundamental Right – Analysis of Nature of Right to Privacy in the Context of Right to Life and Liberty Under the Indian Constitution – Indian Obligations Under the Human Rights Instruments to Give Effect to Right to Privacy**

**Justice K. S. Puttaswamy (retd) and Another v. Union of India and Others**

**Supreme Court of India, 24 August 2017**

***Facts***

The Constitutional validity of *Aadhaar* card scheme[1] of the Indian Government for all its citizens was challenged before the Indian Supreme Court as violating the right to privacy. According to the Indian Government the existence of a fundamental right of privacy was in doubt in view of two earlier decisions of the Indian Supreme Court by a larger bench of eight judges.[2]

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1 *Aadhaar* card scheme of the Indian Government was with regard to compilation of demographic biometric data by the Government to facilitate implementation of its various schemes. For this purpose, the Indian Government established the Unique Identification Authority of India (UIDAI) as a statutory authority under the provisions of the *Aadhaar* (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. UIDAI was mandated to issue an easily verifiable 12 digit random number as Unique Identity – *Aadhaar* to all Residents of India. For details, *see About UIDAI*, Unique Identification Authority of India, https://uidai.gov.in/about-uidai/unique-identification-authority-of-india/about.html.

2 These two decisions rendered by the bench of eight and six judges respectively were: M.P. Sharma v. Satish Chandra, (1954) SCR 1077 (India); Kharak Singh v. State of Uttar Pradesh, (1964) 1 SCR 332 (India).

However, in recent years several decisions of the Indian Supreme Court[3] delivered by the bench of two or three judges had held that the right to privacy was a constitutionally protected fundamental right. The Indian Supreme Court, faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, felt that institutional integrity and judicial discipline would require a reference to a larger bench. Accordingly, the issue was referred to a bench of nine judges by the Court itself through its Constitution bench on 18 July 2017.

***Judgment***

The Court addressed the following questions in its elaborate judgment: (i) whether there was a constitutionally protected right to privacy; (ii) if there was a constitutionally protected right, whether this had the character of an independent fundamental right or whether it arose from within the existing guarantees of protected rights such as life and personal liberty; (iii) the doctrinal foundations of the claim to privacy; (iv) the content of privacy and (v) the nature of the regulatory power of the state.

The Court after examining its own jurisprudence on the subject, also referred to the jurisprudence on right to privacy as a fundamental right as decided by the highest courts of the United Kingdom, United States of America, Canada and South Africa.[4] Besides this, the Court went into the evaluation of the origins of privacy considering the argument by the Government that the concept which was so amorphous as to defy description. Considering the nature of this right, the Government of India had argued that it would not be possible to recognize a juristic concept which was so vague and uncertain that it failed to withstand constitutional scrutiny. The Court after examining the origins of right to privacy in different jurisdictions, noted:

> Conscious as we are of the limitations with which comparative frameworks of law and history should be evaluated, the above account is of significance. It reflects the basic need of every individual to live with dignity. Urbanization and economic development lead to a replacement of

3 These decisions were: Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148 (India); R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632 (India); People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301 (India).

4 The Court referred to some of the dissenting opinions in the cases of M.P. Sharma and Kharak Singh and upheld them as well. The main point of contention was about the inter-relationship between the fundamental rights, in particular right to life and liberty (Article 21), right to freedom of speech and expression (Article 19) and others. *See* M.P. Sharma, SCR 1077; Kharak Singh, 1 SCR 332.

> traditional social structures. Urban ghettos replace the tranquility of self-sufficient rural livelihoods. The need to protect the privacy of the being is no less when development and technological change continuously threaten to place the person into public gaze and portend to submerge the individual into a seamless web of inter-connected lives.

After considering its own jurisprudence, the Court referred to various international conventions to which India was a party and the requirement to implement the same within its jurisdiction. The Court stated:

> The right to privacy has been traced in the decisions which have been rendered over more than four decades to the guarantee of life and personal liberty in Article 21 and the freedoms set out in Article 19. In addition, India's commitment to a world order founded on respect for human rights has been noticed along with the specific articles of the UDHR and the ICCPR which embody the right to privacy. In the view of this Court, international law has to be construed as a part of domestic law in the absence of legislation to the contrary and, perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party. Consequently, as new cases brought new issues and problems before the Court, the content of the right to privacy has found elaboration in these diverse contexts.[5]

Further, referring to Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17 of the International Covenant for Civil and Political Rights (ICCPR), the Court noted that the recognition of privacy as a fundamental constitutional value was part of India's commitment to a global human rights regime. The Court also noted that the Protection of Human Rights Act, 1993 which had been enacted by the Indian Parliament referred to the ICCPR as

5 The Court referring to various cases that were decided by it further noted the contexts that these would include telephone tapping, prior restraints on publication of material on a death row convict, inspection and search of confidential documents involving the banker – customer relationship, disclosure of HIV status, food preferences and animal slaughter, medical termination of pregnancy, scientific tests in criminal investigation, disclosure of bank accounts held overseas and the right of transgenders (in which the Court stated that the sexual orientation was an essential attribution of privacy). Early cases dealt with police regulations authorizing intrusions on liberty, such as surveillance. As Indian society had evolved, the assertion of the right to privacy had been considered by this Court in varying contexts replicating the choices and autonomy of the individual citizen.

a human rights instrument and went on to define in Section 2(1)(d) 'human rights' as the 'rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India'.

The Court quoting General Comments 16 under Article 17 of the ICCPR noted that 'there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and practice'. The Court, accordingly, pointed out:

> The ICCPR casts an obligation on States to respect, protect and fulfil its norms. The duty of a State to respect mandates that it must not violate the right. The duty to protect mandates that the government must protect it against interference by private parties. The duty to fulfil postulates that the government must take steps towards realization of a right. . . . [S]ignificantly, while acceding to the ICCPR, India did not file any reservation or declaration to Article 17. While India filed reservations against Articles 1, 9 and 13, there was none to Article 17.

***Decision***

The Court while rendering its decision noted that privacy was a constitutionally protected right that emerged primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arose in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III (fundamental rights) of the Indian Constitution.

The Court also noted that privacy was the constitutional core of human dignity. Privacy had both a normative and descriptive function. At a normative level, privacy sub-served those eternal values upon which the guarantees of life, liberty and freedom were founded. At a descriptive level, privacy postulated a bundle of entitlements and interests which lie at the foundation of ordered liberty.

Further, it held that privacy included at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connoted a right to be left alone. Privacy safeguarded individual autonomy and recognised the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life were intrinsic to privacy. Privacy protected heterogeneity and recognised the plurality and diversity of our culture. While the legitimate expectation of privacy might vary from the intimate zone to the private zone and from the private to the public arenas, it was important to underscore that privacy was

not lost or surrendered merely because the individual was in a public place. Privacy attached to the person since it was an essential facet of the dignity of the human being.

The Court also felt that the Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution could not be frozen on the perspectives present when it was adopted. Technological change had given rise to concerns which were not present seven decades ago and the rapid growth of technology might render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features.

The Court also held that the like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy was not an absolute right. A law which encroaches upon privacy would have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulated a procedure which was fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim and (iii) proportionality which ensured a rational nexus between the objects and the means adopted to achieve them.

### Human Rights – Constitutional Validity of Divorce to Muslim Women through Talaq-e-Biddat – Survey of Laws and Practices of Various Islamic and Non-Islamic Countries – Indian Obligation under Various International Conventions – Reference to Indian Reservation to CEDAW

**Shayara Bano v. Union of India and Others, Supreme Court of India, 17 August 2017**

***Facts***

Petitioner approached the Supreme Court challenging the divorce effected by saying three times 'talak'. This was known as triple talak (talaq-e-biddat) pronounced in the presence of witnesses. The petitioner had sought a declaration

that the 'talaq-e-biddat' pronounced by her husband be declared as *void ab initio*. It was also her contention that such a divorce which abruptly, unilaterally and irrevocably terminated the ties of matrimony, purportedly under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 be declared unconstitutional. Besides other grounds, petitioners argued that the practice of 'talaq-e-biddat' was violative of the fundamental rights guaranteed to citizens in India, under Articles 14, 15 and 21 of the Constitution. Further, petitioners also argued that the practice of 'talaq-e-biddat' could not be protected under the rights granted to religious denominations (or any sections thereof) under Articles 25(1), 26(b) and 29 of the Indian Constitution. Petitioners also submitted that the practice of 'talaq-e-biddat' is denounced internationally, and further, a large number of Muslim theocratic countries have forbidden the practice of 'talaq-e-biddat', and as such, the same could not be considered sacrosanctal to the tenets of Islam. Respondent had argued that the he had pronounced 'talaq' in consonance with the prevalent and valid mode of dissolution of Muslim marriages. It was submitted, that the pronouncement of divorce by him fulfilled all the requirements of a valid divorce, under the Hanafi sect of Sunni Muslims, and was in consonance with 'Shariat' (Muslim 'personal law').

The Court noted that the factual aspect of the case gave rise to several complicated questions relating to Muslim Personal Law in India. The Court, however, decided to limit its consideration to examine the constitutional validity of the 'talaq-e-biddat' as this would also render answer even to the connected issues.

***Judgment***

The Court examined the validity of the concept of talaq referring to the verses of The Holy Quran. The Court noted:

> A perusal of the aforesaid 'verses' reveals, that divorce for the reason of mutual incompatibility is allowed. There is however a recorded word of caution – that the parties could act in haste and then repent, and thereafter again reunite, and yet again, separate. To prevent erratic and fitful repeated separations and reunions, a limit of two divorces is prescribed. In other words, reconciliation after two divorces is allowed. After the second divorce, the parties must definitely make up their mind, either to dissolve their ties permanently, or to live together honourably, in mutual love and forbearance – to hold together on equitable terms. However, if separation is inevitable even on reunion after the second divorce, easy reunion is not permitted. The husband and wife are forbidden from casting aspersions on one another. They are mandated to recognize, what is right and

> honourable, on a collective consideration of all circumstances. After the divorce, a husband cannot seek the return of gifts or properties, he may have given to his wife. Such retention by the wife is permitted, only in recognition that the wife is economically weaker. An exception has been carved out in the second part of 'verse' 229, that in situations where the freedom of the wife could suffer on account of the husband refusing to dissolve the marriage, and perhaps, also treat her with cruelty. It is permissible for the wife, in such a situation, to extend some material consideration to the husband. Separation of this kind, at the instance of the wife, is called 'khula'. 'Verse' 230 is in continuation of the first part of 'verse' 229. The instant 'verse' recognizes the permissibility of reunion after two divorces. When divorce is pronounced for the third time, between the same parties, it becomes irreversible, until the woman marries some other man and he divorces her (or is otherwise released from the matrimonial tie, on account of his death). The Quranic expectation in 'verse' 230, requires the husband to restrain himself, from dissolving the matrimonial tie, on a sudden gust of temper or anger. 'Verse' 231 provides, that a man who takes back his wife after two divorces, must not put pressure on her, to prejudice her rights in any way. Remarriage must only be on equitable terms, whereupon, the husband and wife are expected to lead a clean and honourable life, respecting each other's personalities. The Quranic message is, that the husband should either take back the wife on equitable terms, or should set her free with kindness.

The Court referred to the law and practices of various other countries in this regard, in particular within Arab States, Southeast Asian States and South Asian States.[6] The Court pointed out, '[w]e have maintained the above

6 The Court further elaborated quoting the submissions made by the Attorney General of India who pointed out the divorce practices that existed in other Islamic foreign jurisdictions or countries with majority Muslim populations. The Court noted:

> Last of all, the Attorney General pointed out, the prevailing international trend all around the world, wherein the practice of divorce through 'talaq-e-biddat', has been statutorily done away with (Abrogation of the practice of 'talaq-e-biddat' by legislation, the world over, in Islamic, as well as, non-Islamic States). On the basis of the submissions noticed above, it was contended, that it was extremely significant to note, that a large number of Muslim countries, or countries with a large Muslim populations such as, Pakistan, Bangladesh, Afghanistan, Morocco, Tunisia, Turkey, Indonesia, Egypt, Iran and Sri Lanka had undertaken significant reforms and had regulated divorce law. It was pointed out, that legislation in Pakistan requires a man to obtain the permission of an Arbitration Council. Practices in Bangladesh, it was pointed out, were similar to those in Pakistan. Tunisia and Turkey, it was submitted, also do not recognize extra-judicial divorce, of the nature of

classifications, in order to establish their factual positions. Firstly, to demonstrate that the practice was prevalent across the globe in States having sizeable Muslim populations. And secondly, that the practice has been done away with, by way of legislation, in the countries referred to . . .'.

After referring to various decisions rendered by the Courts within India and also submissions made by the counsels for the petitioners, the Court summarized the assertions of the Indian Government with regard to its implementation obligations under various international conventions that were relevant to the current case. It, thus, stated,

> India being a founding member of the United Nations, is bound by its Charter, which embodies the first ever international agreement to proclaiming gender equality, as a human right in its preamble, and reaffirming faith in fundamental human rights, through the dignity of the human person, by guaranteeing equal rights to men and women. It was submitted, that significantly, the United Nations Commission on the Status of Women, first met in February, 1947, with 15 member States – all represented by women, including India (represented through Shareefah Hamid Ali). During its very first session, the Commission declared its guiding principles, including the pledge to raise the status of women, irrespective of nationality, race, language or religion, to the same level as men, in all fields of human enterprise, and to eliminate all discrimination against women in the provisions of statutory law, in legal maxims or rules, or in interpretation of customary law. (United Nations Commission on the Status of Women, First Session, E/281/Rev.1, February 25, 1947). It was submitted, that the Universal Declaration of Human Rights, 1948, the International Covenant of Economic, Social and Cultural Rights, 1966 and the International Covenant of Social and

'talaq-e-biddat'. In Afghanistan, divorce where three pronouncements are made in one sitting is considered to be invalid. In Morocco and Indonesia, divorce proceedings take place in a secular court, procedures of mediation and reconciliation are encouraged, and men and women are considered equal in matters of family and divorce. In Indonesia, divorce is a judicial process, where those marrying under Islamic Law, can approach the Religious Court for a divorce, while others can approach District Courts for the same. In Iran and Sri Lanka, divorce can be granted by a Qazi and/or a court, only after reconciliation efforts have failed. It was submitted, that even Islamic theocratic States, have undergone reform in this area of the law, and therefore, in a secular republic like India, there is no reason to deny women, the rights available all across the Muslim world. The fact that Muslim countries have undergone extensive reform, it was submitted, also establishes that the practice in question is not an essential religious practice.

> Political Rights, 1966, emphasized on equality between men and women.

The Court further noted:

> The other relevant international instruments on women which were brought to our notice, included the Convention on the Political Rights of Women (1952), Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1955), Universal Declaration on Democracy (1997), and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

The Court referring to the arguments put forth by the Attorney General of India noted that the Government of India ratified the Vienna Declaration and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 19 June 1993. The preamble of CEDAW, the Court further noted,

> [reiterates] that discrimination against women violate[d] the principles of equality of rights and respect for human dignity[. And that, such inequality was] an obstacle to the participation . . . on equal terms with men[] in the political, social, economic and cultural life of their countr[y. It was emphasized that such inequality, also] hamper[ed] the growth of the [personality from] society and family[, and made it] more difficult [for] the full development of potentialities of women[,] in the service of their countries and of humanity.

The Court also recorded the submissions of the Union of India which, *inter alia*, sought to outline the Indian position on some of the other international conventions. The Court noted,

> the equality principles were reaffirmed in the Second World Conference on Human Rights, held at Vienna in June 1993, as also, in the Fourth World Conference on Women, held at Beijing in 1995. It was pointed out, that India was a party to this convention and other declarations, and was committed to actualize them. It was asserted, that in the 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation, were condemned.

The Court further referred to the arguments that the 'reliance on International Conventions, particularly on CEDAW was wholly misplace, since India had expressed a clear reservation to the Conventions in order to support its constitutional policy of non-interference in the persona affairs of any community'. These declarations and reservations, the Court noted,

> were first made at the time of signing the aforesaid conventions and thereafter, even at the time of ratification. In this behalf, it was pointed out, that the first declaration was made by India in the following format: 'i) With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent'.

The Court, outlining its view on this matter, concluded,

> In view of the above, we are satisfied, that international conventions and declarations are of utmost importance, and have to be taken into consideration while interpreting domestic laws. But, there is one important exception to the above rule, and that is, that international conventions as are not in conflict with domestic law, alone can be relied upon. We are of the firm opinion, that the disputation in hand falls in the above exception. Insofar as 'personal law' is concerned, the same has constitutional protection. Therefore if 'personal law' is in conflict with international conventions and declarations, 'personal law' will prevail. The contention advanced on behalf of the petitioners to hold the practice of 'talaq-e-biddat', on account it being in conflict with conventions and declarations to which India is a signatory can therefore not be acceded to.

***Decision***

The Court, while deciding the matter, directed the Indian Government to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. The Court also hoped and expected that the 'contemplated legislation will also take into consideration advances in Muslim "personal law" – "Shariat", as have been corrected by legislation the world over even by theocratic Islamic States'.

## Law of the Sea

### Statement by India on Agenda Item 77 – 'Oceans and Law the Sea' at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 5 December 2017[7]

India, referring to the current year as a 'landmark year in the global engagement on Oceans and the Law of the Sea', noted the inter-dependence of Oceans, the global climate and weather patterns and the prospects for sustainable development. While thanking the Secretary General for his Report on the topic (A/72/70), India referred to The UN Oceans Conference held in June 2017 with its focus on the various inter-linked aspects of the condition of the oceans and its impact on sustainability of life itself. India also welcomed the comprehensive Call for Action issued by the Conference as also the Voluntary Registry of commitments, to which it had also contributed. India also referred to its initiatives to establish the India-UN Development Partnership Fund on the World Oceans Day to focus on climate resilience for Pacific Island states.

India viewed the first World Ocean Assessment Report presented in April 2017 as very useful in contributing to the science-policy interface. This Report, India noted, formed the basis for the meetings of the Ad Hoc Working Group of the Whole on the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including its Socio-economic Aspects. India also supported the deliberations held in May at the 18th meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea.

According to India, while the 1982 UN Convention on Law of the Sea that was adopted after decades-long negotiations laid down the basic framework of international law governing jurisdiction of coastal States over adjacent maritime areas, what happened to the governance of areas beyond such jurisdiction was becoming increasingly important, especially in view of the rapid advancement in technology and our scientific understanding.

India further noted that it would be important that the Preparatory Committee discussing elements of a draft International instrument on the conservation and sustainable use of marine Biodiversity of Areas Beyond National

7 For the text of the statement delivered by India at the United Nations General Assembly, *see General Assembly, Statements*, Permanent Mission of India to the UN, https://www.pminewyork.gov.in/statementgeneral?id=eyJpdiI6IlwvUzE3dFcrUUlRSHdFQ1pwb2dxMzR3PT0iLCJ2YWx1ZSI6IkVmZEpoc3o5ZkwzRGRURnhvaUF2NlE9PSIsIm1hYyI6IjhkMjdmODZjOGY1OTVlODQ5Zjc5YjcoM2Q5Y2I5NzIoZjg5MmQxZTU2NjFlZjBjNTYzYTE1ZmVkMTA1YjUxZDcifQ.

Jurisdiction (BBNJ) also reached consensus on a recommendation to convening of an Inter-Governmental Conference. India viewed the BBNJ as an important process that was expected to give shape to global governance of an aspect that was of importance to everyone.

Being a country with a vast coastline of more than 7,500 km and over 1,000 islands whose one-third population lived along the coast, India expressed its commitment to a longstanding maritime tradition and abiding interest in ocean affairs. It also noted that it was the world's third largest producer of fish and second largest producer of inland fish and that it had 12 major ports besides nearly 150 smaller ones.

Listing the challenges and opportunities that oceans represented for it, India identified them as: (a) from sustainable fisheries to prevention and control of marine litter and plastic pollution; (b) from affordable renewable energy to eco-tourism; and (c) early warning systems for disaster risk reduction and management, building resilience and adaptation to climate change. India also noted that it would be important to work towards innovative technologies for offshore renewable energy, aquaculture, deep seabed mining and marine biotechnology as these provided new source of jobs and competitive advantage. Referring to the first Summit of the Indian Ocean Rim Association, where India was an active member, it recognized the Blue Economy as a driver of inclusive and sustainable economic growth and development. It also emphasized the need for 'greening' the ocean economy.

Noting its role in the negotiations of the 1982 UN Convention on the Law of the Sea, India pointed out that it was a party to the Agreement relating to the implementation of Part XI of the Convention of 10 December 1982, Fish Stocks Convention 1995, MARPOL 73/78, the International Ballast Water Convention 2004 that protected invasive aquatic Alien species, the London Convention 1972 and other agreements that regulated various activities of the oceans, especially the conservation and sustainable use of ocean resources.

India also pointed out that it cooperated with its partners in the region through its membership of the South Asian Seas Action Plan (SASAP) 1995, which was serviced by the secretariat of the South Asia Cooperative Environment Programme (SACEP). The main focus of the South Asian Seas Action Plan, India noted, was on Integrated Coastal Zone Management (ICZM), oil-spill contingency planning, human resource development and the environmental effects of land-based activities.

According to India, the smooth functioning of the institutions established under the Convention, 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, held the key to the proper implementation of the

provisions of the Convention and to the realization of the desired benefits from the uses of the seas. India also noted that it was the first country three decades ago to receive the status of a Pioneer Investor in the Indian Ocean; that its scientists today collaborated in research stations on the Arctic Ocean studying its links with climate in its own region; that its Indian hydrographers partner in capacity building efforts with its maritime neighbours; that its institutions worked closely with regional partners in improving early warning systems for tsunamis and cyclones and that its naval ships were deployed in delivery of humanitarian assistance and emergency evacuation as also in patrolling sea-lanes against pirates.

India concluded by stating that it remained committed to a sustainable development of its Blue Economy partnership for the 2030 Agenda, including the SDG14.

> **Statement by India on Agenda Item 81 – on the Report of the International Law Commission of its Sixty-Ninth Session – Cluster III (VIII); Peremptory Norms of General International Law; (IX); Succession of States in Respect of State Responsibility; (X) Protection of the Environment in Relation to Armed Conflicts at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 31 October 2017**[8]

On the topic 'Peremptory norms of general international law (*jus cogens*)' and referring to the second report of the Special Rapporteur, India agreed with his general understanding that Article 53 of the Vienna Convention on the Law of Treaties, 1969 was the starting point for identifying the criteria of *jus cogens*. India further noted that the customary international law was the first step to search the common basis for the formation of *jus cogens* norms and the norms should have developed to a sufficient degree in all three sources of law, i.e., custom, treaties and general principles of law. According to India, all these sources had important roles with regard to the identification of *jus cogens* as a norm. India, while taking note of the draft conclusions presented by the Special Rapporteur that concerned the criteria for *jus cogens,* acceptance and recognition by the international community and the evidence for such acceptance and recognition, said that it would wait till the drafting related formalities were completed before presenting any comments and that it would look forward to the outcome of the envisaged future work concerning the concept of *jus cogens* including the effects, consequences and the illustrative list of *jus cogens* norms.

8 For the text of the Statement delivered by India at the UN Central Assembly, *see id.*

As regards the new topic 'Succession of States in respect of State responsibility' that had been included, during the current session, India noted that The Commission had earlier dealt with the subject of succession in different contexts and the State Responsibility. Referring to four draft articles proposed by the Special Rapporteur in the first report, India noted that the proposed draft Article 1 reflected on the scope of the topic, and related the subject matter and context of the topic to the responsibility of States for internationally wrongful acts. India also noted that the principle of 'responsibility' which would hold a state or organization responsible for the commission of an internationally wrongful act, was not favoured to be a part of succession in earlier attempts. For instance, in 1963, India further noted, Manfred Lachs, the Chairman of the Sub-Committee on Succession of States and Governments of the Commission, had proposed including succession in respect of responsibility for torts as one of possible subtopics to be examined in relation to the work of the Commission on the question of succession of States. Similarly, the 1998 report of the Special Rapporteur, India recalled, Mr. James Crawford on state responsibility, had indicated about a widely held view that a new State did not, in general, succeed to any State responsibility of the Predecessor State. According to India, the Commission's commentary to the 2001 draft articles on responsibility of States for internationally wrongful acts took a more nuanced view stating: 'In the context of State succession, India felt that it was "unclear" whether a new State succeeds to any State responsibility of the Predecessor State with respect to its territory'(emphasis added).

India, however, was inclined to support the approach of examining the question of whether there were rules of international law governing both the transfer of obligations and the transfer of rights arising from international responsibility of States for internationally wrongful acts. India noting that the topic at hand dealt with a complex and sensitive subject, supported the continuing work of the Commission. India also noted that as the practice of States on the topic was limited or still evolving, it believed more time and an in-depth study would be required for providing detailed comments. Further, India stated that it would look forward with interest the second report of the Special Rapporteur which would address the issues of transfer of the obligations arising from the internationally wrongful acts of the Predecessor State. It should, India further noted, distinguish cases where the original State had disappeared (in the case of dissolution and unification) and cases where the Predecessor State remained (territorial transfer, secession and newly independent States).

**Statement by India on Agenda Item 81 – on the Report of the International Law Commission of Its Sixty-Ninth Session – Cluster II (VII); Protection of the Atmosphere; (VI); Immunity of State Officials from Foreign Criminal Jurisdiction at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 26 October 2017**[9]

India, welcoming the fourth Report on the topic 'Protection of the atmosphere' by the Special Rapporteur, noted that it required further work taking into account the inter-relationship of this topic with other fields of international law like: law of the sea, international trade and international human rights law. According to India, each field of international law had its own subject matter, scope, conditions and the legal regime through treaties to regulate the activities in that field and the issues related thereto. Therefore, India felt that an in-depth study was required to find the relevant and common factors between the protection of atmosphere and such other fields of international law. In this process, India further noted, remit of established treaty regimes in the other fields of international law including their core objective would have to be taken care and respected before linking to any other field. As a general comment, India pointed out, there was no denying that the atmosphere we live in is a common resource which all states had a duty to protect for present and future generations, which was even more significant for the developing, less developed and especially the island states that faced the risk due to continuing sea rise.

On the topic 'Immunity of State Officials from Foreign Criminal Jurisdiction', while commending the work of the Special Rapporteur India noted that the Commission continued to consider the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. India also noted that draft Article 7 proposed by the Special Rapporteur listed out the crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* should not apply. India also pointed out that the list included: crime of genocide, crimes against humanity, war crimes, crime of apartheid, torture and enforced disappearance.

While appreciating the methodology adopted in the Report, India viewed this as providing less treaty practice with regard to limitations and exceptions to immunity. India placed emphasis on the widely accepted – Vienna Conventions on Diplomatic and Consular Relations which expressly contained provisions on immunity for certain categories of State officials in the

9 For the text of the Statement delivered by India at the UN General Assembly, *see id.*

context of allegations of criminal conduct, but contain no such exceptions to immunity.

According to India, the issues involved in the draft articles were highly complex and politically sensitive for the States and therefore, diligence, prudence and caution was needed to decide whether the Commission should focus on the codification aspect or progressive development of international law (*lex lata* or *lex ferenda*). India felt that this would be clear only when the Commission would be able to show consistent State and treaty practice to support the exceptions asserted in draft Article 7. Any new system, if not agreed, India further noted, would be likely to harm inter-State relations and also undermine the very objective of ending impunity of most serious international crimes.

On the substantive aspects India pointed out,

> The status of and the nature of duty being performed by persons claiming immunity is a factor of core importance at the time of the commission of offence. There could be a situation where certain persons, who though technically belonging to the category of officials immune by domestic law of a country from acts done during the course of official duty as State officials, may undertake certain contractual assignment other than or in addition to the original State official duty. In such situations, factors such as status of such officials at the time of the commission of offence, nature of their functions, the gravity of offence, position of international law concerning immunity, victims' interests, and the totality of circumstances, should be taken into account in determining immunity.

India concluded by stating that it would look forward to the next Session of the Commission, when the Special Rapporteur would introduce procedural aspects of immunity of State officials from foreign criminal jurisdiction. India also supported the consideration by the Commission of the newly proposed topic 'Evidence before international courts and tribunals'.

> **Statement by India on Agenda Item 85 – 'The Scope and Application of the Principle of Universal Jurisdiction' at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 12 October, 2017**[10]

India thanked the Secretary-General for his report A/72/112 on '[t]he scope and application of the principle of universal jurisdiction' and noted that the

10 For the text of the Statement delivered by India at the UN General Assembly, *see id.*

information provided in the Report on the laws and practice of certain States concerning the exercise of universal jurisdiction in their domestic legal systems and their understanding of the concept of universal jurisdiction was useful.

India pointed out that its position on this matter was governed by its firm belief that those who committed crimes must be brought to justice and punished. Further, it stated that a fugitive criminal should not be allowed to go unpunished because of procedural technicalities, including lack of jurisdiction. India, however, noted that the exercise of 'universal jurisdiction', in itself, remained a unique and complex legal subject.

According to India, the exercise of criminal jurisdiction was widely based on: 'territoriality' and 'nationality', which were based on the place of the commission of offence, and the nationality of the accused. Further, it noted that some States also recognised the nationality of victim as a basis for exercising jurisdiction based on the 'protective principle'. India reiterated that these concepts of state jurisdiction were based on the link between the State asserting jurisdiction and the crime committed. It also noted that under the concept of universal jurisdiction, a State claimed jurisdiction over an offence irrespective of the place of its commission or nationality of the offender or victim, and thus without any link whatsoever between that State and the offence/offender. India referring to the justification for such universal jurisdiction noted that it was in the nature of certain offences that affected the interests of all States even when they were unrelated to the State assuming jurisdiction.

India also made a reference to the principle of universal jurisdiction in relation to piracy that had been codified in the UN Convention on the Law of the Sea, 1982, making piracy on the high seas the only one crime, over which claims of universal jurisdiction were undisputed under general international law. In respect of certain serious crimes like genocide, war crimes, crimes against humanity and torture, etc., India pointed out, international treaties had provided basis for the exercise of universal jurisdiction, which was applicable as between the States parties to those treaties. Accordingly, to India they included, among others, the Four Geneva Conventions of 1949 and the Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.

Further, according to India, the question that arose was whether the jurisdiction provided for specific serious international crimes under certain treaties could be converted into a commonly exercisable jurisdiction, irrespective of the fact whether or not the other State or States were a party to those treaties. In this regard, India pointed out, several issues remained unanswered, including those related to the basis of extending such jurisdiction, the relationship with the laws relating to immunity, pardoning and amnesty and harmonization with the domestic laws.

India, reiterating its earlier views, further pointed out that several treaties obliged the States parties either to try a criminal or handover for trial to a party willing to do so. This, India noted, was the obligation of *aut dedere, aut judicare* ('either extradite or prosecute'). This widely recognised principle, applied by the International Court of Justice in its decision in the *Belgium v. Senegal* case, 2012, India pointed out, should not be confused with the principle of universal jurisdiction.

India reiterated its position that the universal jurisdiction was applicable in the case of limited set of crimes, like piracy on high seas and other specific serious crimes under the relevant treaties/conventions that had been adopted and agreed to by the States. It, therefore, stressed the need to avoid any misuse of the principle of universal jurisdiction in both criminal and civil matters, the concept and definition of which were not yet clear and agreed to.

**Statement by India on Agenda Item 83 – 'Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization' at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 10 October 2017**

India, while aligning with the statement made on behalf of Non-Aligned Movement, noted that the Special Committee's mandate was well placed to play an important role in the interpretation of the provisions of the Charter. India also took note of the Secretary-General report A/72/136 on Implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions pursuant to the General Assembly resolution A/71/146. India addressed three specific issues which were under consideration of the Special Committee. These were: peaceful settlement of disputes, maintenance of international peace and security and assistance to third States affected by the application of sanctions.

India noted that the United Nations represented collective recognition of all States that only cooperative and effective multilateralism could enable peace and prosperity in the context of the range of inter-connected challenges that States faced in the inter-dependent world. India asserted that it strongly believed in multilateralism and peaceful settlement of disputes according to laid down international laws. India further noted that the States were obliged to settle their disputes by peaceful means, which was one of the fundamental principles under paragraph 3 of Article 2 of the UN Charter. Further, India pointed out, Article 33 of the Charter further strengthened this duty and provided the means which the parties to a dispute could choose freely. India also reiterated that the International Court of Justice, the principal judicial organ of

the United Nations, played an important role in the peaceful settlement of disputes. Accordingly, India supported the retention of the 'Peaceful Settlement of Disputes between States' on the agenda of the Special Committee. It also believed that the revised proposal by the Non-Aligned Movement on 'the pacific settlement of disputes and its impact on the maintenance of peace' was an important one and hoped that the member states will engage constructively on this proposal.

According to the UN Charter, India pointed out, maintenance of international peace and security was the primary responsibility of the Security Council, which had to act on behalf of all the UN member States in the discharge of its duties. In certain situations, India further pointed out, the Security Council authorises sanctions under Chapter VII of the UN Charter. In such cases, according to India, it was important to ensure that sanctions were issued in accordance with the provisions of the UN Charter and do not violate the principles of international law.

Referring to Article 50 of the UN Charter, India noted that it conferred the right on third States confronted with special economic problems, which might arise because of the Security Council sanctions, to consult the Security Council for solution. This obliged, India stated, the Security Council to find definitive solutions to the problems of the affected third States.

Concluding, India commended the continuing efforts of the Secretariat and the Secretary-General to update the Repertory of Practice of United Nations Organs and the Repertoire of the Practice of the Security Council and to eliminate the backlog in their preparation.

**Statement by India on Agenda Item 68 (a.b) – 'Rights of the Child' at the Third Committee of the 72nd Session of the United Nations General Assembly on 10 October 2017**

India, thanking the Secretary General and his Special Representatives for presenting various reports noted that these reports provided useful snapshots of the measures undertaken by various governments to promote the rights of children and the challenges still being faced in this regard. India further noted that in a world riven by poverty, stark inequalities and underdevelopment, disparities in living standards and opportunity, situations of armed conflict, terrorism and other humanitarian crises, children were among the most vulnerable and suffer the most.

India pointed out that its Constitution guaranteed fundamental rights to all children in the country and empowered the State to make special provisions for children. It also pointed out that elementary education was a fundamental

right in India. After referring to various measures and schemes undertaken by it to eradicate child labour, India referred to various international conventions to which it had become party. India noted that it had recently ratified two core International Labour Organisation (ILO) conventions 138 and 182 on Child Labour to fight against the menace and achieve the objective of child labour-free nation. India also noted that its Child Labour (Prohibition and Regulation) Amendment Act, 2016 and Child Labour (Prohibition and Regulation) Rules of 2017 strike a balance between prohibition of employment of children below 14 years and livelihood security for economically disadvantaged sections through the provision for children to assist in family enterprises beyond school hours and employment of adolescents in non-hazardous occupations. India also pointed out that the policy and legal framework to deal with emerging threats such as online offences against children, including child pornography and grooming were also under finalisation in India.

**Statement by India on Agenda Item 79 – 'Report of the United Nations Commission on International Trade Law (UNCITRAL) on the work of its 50th Session' at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 9 October 2017**

India while appreciating the work of the UNCITRAL, noted that the legal texts and model laws developed by the Commission were directly relevant to commercial transactions of the individuals, corporations and States and thus had practical value for all. It also commended UNCITRAL for the finalization and adoption of a model law on electronic transferable records and explanatory notes, and finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions. India felt that the UNCITRAL Model Law on Secured Transactions would increase the availability of secured credit across national borders and in turn contribute to the development of international trade which, if achieved on the basis of equality and mutual benefit to all States, was an important element in promoting friendly relations among States. Likewise, India noted, the model law on electronic transferable records and explanatory notes would contribute to the development of systems to enable the progress in the field of paperless trade, including the legal aspects of electronic single-window facilities.

India welcomed and also noted the general support on the proposed reforms to Investor-State Dispute Settlement. India suggested that the proposed reforms to investor-State dispute settlement could possibly go a long way in enhancing consistency in treaty interpretation and application and therefore the work by UNCITRAL should not rush to hasty conclusions.

India appreciated the efforts of the Commission towards promoting the uniform interpretation and application of its legal instruments, including the New York Convention on the enforcement of Arbitral Awards, and agreed that CLOUT (Case Law of UNCITRAL Texts) and the digests were pivotal tools in this regard. India reiterated the importance of technical cooperation and assistance to the developing countries, specifically in matters relating to the adoption and use of texts, adopted by the Commission, at the national level.

**Statement by India on Agenda Item 78 – 'Criminal Accountability of UN Officials and Expert Missions' at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 6 October 2017**

According to India, the issue of accountability of UN personnel for any crimes committed by them during their work for the UN was an important one. It noted that even a few of such instances or allegations of crimes committed by UN personnel was highly damaging for the image and credibility of the United Nations system and its work around the world.

While thanking the UN Secretary General for the Reports A/72/121, 126, 134 and 205 on this issue submitted pursuant to the General Assembly resolution 71/134 of December 2016, India noted that there had been considerable focus on addressing the concerns over incidents of Sexual Exploitation and Abuse reported committed by certain individuals involved with UN peacekeeping operations. India also noted that it was the first country to have contributed to the Secretary General's Trust Fund set up last year to assist the victims of Sexual Exploitation and Abuse and that it had made such a contribution this year also.

India further noted that at a broader level, the issue of accountability had remained elusive in some cases because of the complexities of legal aspects relating to sovereignty and jurisdiction of member states; the 'legal personality' of the United Nations that may bestow some immunity or privileges that may be necessary for UN operations in a country and the functional capacity or the willingness of member states to investigate and prosecute the accused. According to India, the UN itself could take some disciplinary measures only and does not exercise any criminal jurisdiction. It was unclear, India further pointed out, whether investigations conducted by the UN might be accepted as evidence in criminal law proceedings in the courts of a member state.

India sought more factual information on the issue such as: (a) registered cases; (b) cases of waiver of immunity; (c) UN asking host States to prosecute and others. India also pointed out that the UN system itself might be reluctant

to waive immunity even for serious misconduct carried out by its personnel while serving on its missions, so that such cases could be prosecuted by the host governments.

According to India, in cases of member states that did not assert extra-territorial jurisdiction over crimes committed abroad by their national, it was necessary to encourage and provide appropriate assistance to those member states to update their national laws to provide for such jurisdiction, laws and regulations to prosecute any such misconduct of their nationals serving as UN officials on mission abroad. India also felt that such laws should also provide for international assistance for the investigation and prosecution of the crimes committed.

Referring to its own laws and regulations, India noted that the Indian Penal Code and the Code of Criminal Procedure of India had provisions to deal with extra-territorial offences committed by Indian nationals and for seeking and providing assistance in criminal matters. The Indian Extradition Act 1962, India noted, dealt with extradition of fugitive criminals and related issues. The Act, India further noted, allowed for extradition in respect of extraditable offences in terms of an Extradition Treaty with another State. In the absence of a bilateral treaty, this Act also allowed an international convention as the legal basis for considering an extradition request.

India stressed on the need to implement a policy of zero tolerance against any criminal acts committed by UN personnel and hoped that the UN system and the member states would further strengthen provisions to enforce accountability so that no such crimes went unpunished and the image and the work of the United Nations was not tarnished.

### Statement by India on Agenda Item 84 – 'The Rule of Law at the National and International Levels' at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 5 October 2017

India, thanking the UN Secretary General for the Report A/71/169 on Strengthening and coordinating United Nations Rule of Law activities, noted that multilateralism was based on laws that govern interaction between states for greater collective welfare. However, it further noted, the uneven impacts of globalisation, both within and among nations, were leading to a situation where the spirit of multilateralism appeared to be in retreat today, although the list of inter-connected global challenges requiring collective action continued to grow.

> According to India, [the] Rule of Law defines modern societies and nation states. It is a way of living together that respects equality in terms of

> rights of individuals and states. The legitimacy of Laws is derived from the representativeness and acceptance of the body that frames them. Laws based on the principles of justice and fairness reduce conflict and provide for predictability of interactions, if enforced well.

India also noted that this was applicable both at the national and international levels. The rule of law, according to India, implied a certain dilution of individual freedom or national sovereignty. India further noted that while at the national level rule of law was enforced by a State by legal use of force, this dichotomy was fundamental to many of the enforcement difficulties at an international level. A related aspect was the requirement of alignment of national laws with international obligations.

Referring to the evolution of this idea, India pointed out that at the international level, as better transport and communication technologies began to connect distant societies and economies, the international aspect of rule of law began to crystallize. India also referred to harmonization of practices relating to technical aspects such as postal services, shipping, telecommunication, aviation; issues relating to customs and trade and even norms about conduct during warfare were among the first to be laid down among countries. The United Nations itself, India noted, was established to prevent conflict among competing powers and bring about a greater rule of law to govern the behaviour of nation states. The UN Charter served as its ultimate guide, even prescribes use of force under specific conditions.

Pointing towards increasing globalisation in recent decades India noted that this required nation states coming together to define rules of cooperation to prevent chaos. India also listed the range of areas where rule of law governed the actions of nation states to a large measure. According to India, this included, among others, trade, investment and intellectual property; transport and communications through maritime and aviation laws; telecommunications; use of global commons such as seas and oceans, environment, climate change, and outer space; and even normative frameworks on human rights and related issues. India also pointed out the complexities involved within domestic jurisdictions and noted that just as rights and duties of citizens had different force of law in a national context, the nature of obligations and commitments, enforcement, and dispute settlement mechanisms varied across the different types of areas of international engagement.

India also referred to areas where it had not been possible to develop international rule of law such as terrorism which needed effective international collaboration. India also noted that law making on this issue continued to falter in view of narrow geopolitical interests. Ironically, India pointed out, often states hid behind legal concepts, designed for different contexts, to stop progress on

this vital issue, including at the UN in the context of a draft Comprehensive Convention on International Terrorism. According to India, the issue continued to remain unaddressed satisfactorily even at the Security Council Sanctions Committee.

India also referred to some of the emerging areas such as artificial intelligence, cyber security or maritime piracy where the technology or activities of entities outpaces law, and the situation was complicated by the involvement of non-state actors and cross border implications. India also noted that strategic and competitive concerns made progress difficult on development or enforcement of rules and laws on issues such as law of the sea or other global commons. It also referred to present engagement of States in developing norms relating to the emerging complex areas of Marine Biodiversity Beyond National Jurisdiction (BBNJ) and Global Geospatial Information Management (GGIM). India also felt that there were other more complex areas such as transboundary aspects of waterways, where it was much more difficult to achieve consensus on general principles in view of strong sovereignty and situation specific strategic concerns. Referring to another areas concern, India referred to the complexity of issues relating to extraterritorial jurisdiction to plug any gaps in accountability for crimes committed in third countries.

Referring to its own initiatives and problems faced by it in terms of its population and diversity, India laid emphasis on cooperative and effective multilateralism. It also referred to its commitment to develop norms, standards and laws governing global interactions across various sectors. India also referred to its efforts to bring its national laws in consonance with its international obligations. As an example, it mentioned that it had ratified the Paris Agreement on Climate Change under UNFCCC and had acceded to the Doha Amendment of the Kyoto Protocol. That it had also acceded to the UN Customs Convention on International Transport Goods under cover of TIR carnets. To give effect to some of these, India noted that in the last one year it had enacted nearly 20 new acts, ranging from legislations on Mental Health, Rights of persons with disabilities, Goods and Services Tax, National Waterways, Anti-Hijacking, etc. India concluded by supporting the idea of reforming and transforming the United Nations System and also the domestic legal system.

**Statement by India on Agenda Item 109 – 'Measures to Eliminate International Terrorism' at the Sixth Committee of the 72nd Session of the United Nations General Assembly on 2 October 2017**

India condemned terrorism in all its forms and manifestations, and no cause whatsoever or grievance can justify terrorism, including state-sponsored cross-border terrorism. India noted that a 'terrorist' activity did not merely cause

disturbance to law and order and that its impact was felt beyond the capacity of the ordinary law enforcement agencies to tackle it under ordinary criminal law. India further noted that no State is immune to the threat of terrorism as continuing terrorist attacks across the world, many of them with links beyond the borders of the affected state, continue to demonstrate.

India welcomed the creation of the UN Office of Counter-Terrorism that would aim to have a close relationship with Security Council bodies and Member States, strengthening existing and developing new partnerships. It hoped this would help in strengthening the delivery of United Nations counter-terrorism capacity building assistance to Member States. According to India, while the Security Council engaged with issues relating to maintenance of international peace and security, the General Assembly also had an important role to play in the fight against international terrorism.

In this context, India also noted the work done by the Ad-Hoc Committee established by the UN General Assembly for formulating international instruments against terrorism. Since its establishment 20 years ago in 1996, India further noted, this Ad Hoc Committee had negotiated texts resulting in the adoption of three sectoral treaties: 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of Financing of Terrorism and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. India also referred to its proposal in 1996 of a Comprehensive Convention against Terrorism (CCIT). India also regretted that despite global threat from terrorism, CCIT could not be adopted within the UN framework due to differences over the definitional issues concerning the term 'terrorist'. India pointed out that the narrow geopolitical interests continued to stand in the way of making meaningful progress on the discussions regarding the CCIT.

Despite the above difficulties, India appreciated the work done by this Ad Hoc Committee. It also took this opportunity to reiterate its support to the draft text of the Convention as proposed by the Coordinator of the Ad Hoc Committee in 2007. It also recalled that UNGA resolution 71/151 of 20 December 2016, in its paragraph 24 recommended that the Sixth Committee should continue the efforts of finalising the process on the draft CCIT through its Working Group in the 72nd Session. India further stated that it looked forward to the discussions in the Working Group in the present session to finalize the text of the CCIT.

While thanking the Secretary General for his report in doc. A/72/111 dated 20 June 2017 and its addendums, entitled: 'Measures to eliminate international terrorism' containing information provided by 23 States and eight intergovernmental organisations, India pointed out that it attached particular importance to counter-terrorism cooperation and exchange of information at the

international, regional and sub-regional level. India also noted that it was party to 14 universal instruments relating to the prevention and suppression of international terrorism identified by the Secretary-General in his report.

India further pointed out that it remained deeply concerned about the issue of financing terrorism, and strongly condemned direct or indirect financial assistance given to terrorist groups or individual members thereof by States or its machineries, to pursue their activities, including in defending the criminal cases involving terrorist acts against them. India supported all major global initiatives, including the Financial Action Task Force (FATF).

India also referred to number of Security Council resolutions dealing with the issue of counter-terrorism. It noted that Resolutions 1267 (1999), 1373 (2001), 1988 (2011), 1989 (2011), 2170 (2014), 2178 (2014), 2199 (2015), 2214 (2015), 2253 (2015) and 2309 (2016) mandated States to take action to prevent and suppress terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.

India called for the stepping up of collective efforts with realtime cooperation among Member States to confront the scourge of terrorism squarely and decisively. India asserted that the use of terrorism as an instrument of State Policy cannot be tolerated.

### Statement by India at the 10th Session of Conference of State Parties to the UN Convention on the Rights of Persons with Disabilities: CRPD Article 12 Implementation – Realising the Rights to Legal Capacity of Persons with Disabilities, 14 June 2017

India noted that it was a collective responsibility of Governments to uphold the principles of human dignity, equality and equity, including for persons with disabilities, at all levels, local, national and global. India also noted that Article 12 of the UN Convention on the Rights of Persons with Disabilities was at the heart of the landmark convention adopted in 2007. The provisions of Article 12, India further noted, aim to address the right to equality before the law and the issue of legal capacity, which was the law's recognition of the decisions a person makes.

India referring to its own legal framework pointed out that Article 14 of its Constitution guaranteed right to equality and it mandated the State not deny to any person (including Persons with Disabilities) the right to equality before the law or the equal protection of the law. This, according to India, met the

objective of Article 12(1) of UNCRPD. It was further noted that to recognise the need for specific policy intervention to support persons with disabilities, India had enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act in 1995. Several institutions and infrastructure had been established to facilitate delivery of services to persons with disabilities for their empowerment and to ensure them a life of dignity and well-being. India also mentioned that it had recently enacted the Rights of Persons with Disabilities (RPwD) Act 2016 which came into force on 19 April 2017. This Act, India pointed out, was in line with the spirit of the UNCRPD and was a significant stride towards the full realisation of the human rights and fundamental freedoms of persons with disabilities.

The new law, according to India, provided various rights and entitlements to persons with disabilities such as right to equality and non-discrimination, community life, protection from cruelty, abuse, violence and inhuman treatment, access to justice, home and family and reproductive rights. The RPwD Act 2016, India noted, laid special focus on the creation of a barrier free environment for persons with disabilities. India also pointed out that Section 13 of the RPwD Act which exclusively deals with legal capacity of persons with disabilities was commensurate with provision of Article 12 of the CRPD. Section 13(2), *inter alia*, stated that appropriate Government should ensure that persons with disabilities enjoyed legal capacity on an equal basis with others in all aspects of life and had the right to equal recognition everywhere as any other person before the law. In addition, Sections 13 (1, 3, 4 and 5) of the new disabilities law equate with the sub provisions of Article 12 of the CRPD.

Similarly, India further noted, Section 14 provided for a mechanism of support in the form of limited guardianship to enable the persons with disabilities to exercise their legal capacity. India pointed out that the new law provided a boost to the 'Accessible India Campaign' launched in 2015 for achieving universal accessibility, barrier free environments and a supportive ecosystem for persons with disabilities. The campaign, according to India, aimed to fulfil India's commitments under the Incheon strategy, as well as facilitate access to rights under the Convention on Rights of Persons with Disabilities to which India was a party.

The immediate steps also involve sensitization of the administrators, judiciary and other public functionaries about the provisions of new Act to enable effective implementation of the provisions and ensure better exercise of legal capacities by persons with disabilities. India also pointed out that the subordinate legislations, policy and programmes in accordance with the provisions of the Act were now at various stages of formulation. Once the

implementation process stabilized, India stated, there would be a comprehensive mechanism available for persons with disabilities to exercise their legal capacity equally with others.

In conclusion, India believed that mainstreaming the rights, participation, perspectives, needs and well-being of persons with disabilities into all relevant strategies and programmes for sustainable development is the key to the achievement of the vision of 2030 Agenda for sustainable development.

# State Practice of Asian Countries in International Law

***Japan***

*Kanami Ishibashi**

## Criminal Law – Implementation of UNTOC

### Enactment of the Amended Act on Punishment of Organized Crimes and Control of Crime Proceeds (also referred to as "the Act on Punishment of the Preparation of Acts of Terrorism and Other Organized Crimes")

Japan enacted the Amended Act on Punishment of Organized Crimes and Control of Crime Proceeds (also referred to as "the Act on Punishment of the Preparation of Acts of Terrorism and Other Organized Crimes") on 15 June 2017 and it entered into force on 11 July 2017.

This Act aims to implement UNTOC (United Nations Convention against Transnational Organized Crime). Japan signed the UNTOC in 2003. However, it had not implemented the agreement before this enactment, since under the Japanese criminal law system, the mere existence of a "plan" or "preparatory action" to commit a crime is by no means to be a crime unless a special act prescribes it be so. Therefore, to implement the UNTOC, there needed to be new legislation that made it a crime to "plan" or take "preparatory action" for a crime. While Article 5 of UNTOC requires state parties to criminalize at least one of the acts set forth in its subparagraphs, (i) "agreeing to commit a serious crime" and (ii) "participation in activities of an organized criminal group," Japan's legal system does not have laws to criminalize these activities. Therefore, the introduction of new legislation was necessary for Japan to implement the Convention.

In this act, the main provision was to introduce a punishment for criminal acts that were previously not provided for under Japanese law as follows:

> Article 6 : 2(1)Two or more persons who plan, as part of activities of terrorist groups or other organised criminal groups, the commission of criminal acts listed in the following sections by such groups, are subject

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> to the punishment prescribed in each of those sections, if any of them have arranged funds or goods or carried out preliminary inspections of relevant locations pursuant to the plan or other preparatory acts for the purpose of committing the planned criminal acts. An organized criminal group means a group of persons whose common purpose is to carry out the crimes enumerated in Appendix 3. However, those who surrender prior to executing the crime will have a reduced or exemption from that sentence.

According to the definitive explanation of the Ministry of Justice, the new conception of "plan" is indicative of a "concrete and realistic agreement" and the term "act of preparation" refers to an "act which is distinct from an act of planning, carried out based on the planning, and a manifestation towards the commissioning of the planning."

However, the Special Rapporteur of the UN Human Rights Council strongly expressed his concern about the protection of the right to privacy.[1] He found that the new bill required not only "planning" to conduct the activities listed but also taking "preparatory actions" to trigger investigations. He observed there was no sufficient clarification on the specific definition of "plan" and "preparatory actions." He expressed concern that in order to establish the existence and the extent of such "planning" and "preparatory actions," it would be logical to assume that those charged would have had to be subjected to a considerable level of surveillance beforehand.

Additionally, he also pointed out that there are no safeguards and remedies regarding the right to privacy in the Japanese legal system to deter more intensified surveillance with regard to privacy. In regard to these concerns, the Government of Japan responded as follows:

> Under the Japanese Code of Criminal Procedure, investigations are carried out only where there is evidentially supported suspicion that a crime has occurred. Under the provision of the "offence of the preparation of acts of terrorism and other organized crimes," investigations can only be initiated when there is evidentially supported suspicion that all three necessary conditions that constitute the offence ("involvement of an organized criminal group", the existence of "an act of planning", and the

1 Japan's Response to the Letter Issued by Prof. Joseph Cannataci, Special Rapporteur on the Right to Privacy (18 August 2017), https://www.mofa.go.jp/mofaj/files/000282252.pdf.

> existence of "an act of preparation for implementation (of the crime)") exist. Therefore, the amended Act by no means allows state authorities to conduct surveillance against certain groups before any suspicion is acknowledged and the possibility for state authorities to do so is excluded by law. In addition, the establishment of the "offence of the preparation of acts of terrorism and other organized crimes" creates a new offence but does not change the powers of investigation stipulated under the Code of Criminal Procedure. Therefore, investigations into the "offence of the preparation of acts of terrorism and other organized crimes" will be conducted just like other existing crimes, and the allegation that the amended Act would intensify surveillance towards citizens is unfounded. As stated above, both in terms of law and practice, it is absolutely not the case that the amended Act will intensify surveillance of citizens, and therefore there was no need to introduce additional safeguards and remedies. Furthermore, as described in the following paragraphs, in Japan, judicial review over investigations is well functioned.

The Special Rapporteur raised the further concern that the new crime is listed in the Appendix and some are not related to the crime regulated under the UNTOC. Japan responded that the Appendix is an integral part of the main clause and contributes to clarifying the actual scope of the provision and crimes such as theft of "forestry products" and acts of terrorism and other organized crime.

The Special Rapporteur noted that the term "organized criminal group" is vague and not clearly limited to terrorist organizations. Furthermore, the authorities when questioned on the broad scope of application of the new norm indicated that the new bill require not only "planning" to conduct the activities listed but also taking "preparatory actions" to trigger investigations. Nevertheless, there was no sufficient clarification on the specific definition of "plan" and "preparatory actions".

Japan responded that it is a matter of course that the scope of "the offence of the preparation of acts of terrorism and other organized crimes" prescribed in paragraph 2 of Article 6 of the amended Act, which is an implementing legislation of the Convention, is not limited to terrorist organizations. Japan focuses on terrorism but in fact Japan does not have domestic terrorist organizations, therefore it needs another type of definition for such organizations. Thus, Japan chose the term "planning" which means a "concrete and realistic agreement" and the term "act of preparation" which means an "act distinct from an act of planning, carried out based on the planning, and a manifestation towards the commissioning of the plan."

The Special Rapporteur also expressed concerns about the right to privacy through methods such as "GPS detection or monitoring of activities on electronic devices." Japan responded there was no activation of surveillance by using GPS detection or monitoring of activities on electronic devices until warrants are issued by judges. Furthermore, with regards to wiretapping, extremely stringent conditions must be fulfilled for judges to issue warrants, and crimes for which wiretapping is allowed is restrictively prescribed by law. The "offence of the preparation of acts of terrorism and other organized crimes" will not be included in this restrictive list. Therefore, under Japan's current domestic law, authorities will not be allowed to conduct wiretapping for the purpose of investigating the offence of the preparation of acts of terrorism and other organized crimes.

The Special Rapporteur also questioned the compatibility of the Act with international human rights norms and standards. Japan reiterated the amended Act is an implementing legislation of the UNTOC which 187 countries and regions are already state parties to and an act subject to punishment under the amended Act is "an act of planning" and "an act of preparation for implementation (of the crime)". Therefore, the amended Act by no means criminalizes thought or unduly undermines the freedom of expression and the right to privacy. Furthermore, with regard to concerns on intensified surveillance, the offence of the preparation of acts of terrorism and other organized crimes is not listed in the list of crimes for which wiretapping is allowed in the first place. As such, investigative authorities are not allowed to undertake wiretapping through SNS and email, or to conduct real-time surveillance. Therefore, the concerns that the offence of the preparation of acts of terrorism and other organized crimes would lead to intensified surveillance and undermine the right to freedom of expression are unfounded.

On July 11, Japan deposited its instruments of acceptance of UNTOC with the Secretary-General of the UN. As a result, the UNTOC entered into force for Japan on August 10 2017.[2] Japan also deposited two more Protocols: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UNTOC; and Protocol against the Smuggling of Migrants by Land, Sea and Air that supplements the UNTOC and the UN Convention against Corruption. Japan has demonstrated its strong commitment to prevent transnational organized crime such as terrorism, trafficking in persons

2 Ministry of Foreign Affairs of Japan, Deposit of the Instruments of Acceptance of Four Treaties, including the United Nations Convention against Transnational Organized Crime (UNTOC), https://www.mofa.go.jp/press/release/press3e_000108.html.

and smuggling of migrants, and to build an international framework to promote cooperation in combating transnational organized crime.

## Environment – Nuclear Disaster – Fukushima

In 2017, seven years after the Fukushima nuclear accident, there were three important judgments delivered on the claims for damages sought by evacuees, two of which acknowledged the government's responsibility.

### Maebashi District Court

The Maebashi District Court ruled for the first time that the government has responsibility for inaction during the nuclear disaster. The court order the government and the TEPCO (Tokyo Electric Power Co.) to pay a total of only 38.55 million yen, which would be awarded to 62 of the 137 plaintiffs. In this case, psychological damages were not included in the compensation.[3]

### Chiba District Court

The Chiba District Court ordered TEPCO to pay 376 million yen in damages to a group of Fukushima nuclear disaster evacuees and it gave concrete recognition to the evacuees' loss of hometowns, jobs and personal relationships for the first time. In this case, damages for voluntary evacuation were awarded, although the majority of the plaintiffs were residents of designated evacuation zones.[4]

### Fukushima District Court

The Fukushima District Court ordered TEPCO and the government to pay a total of 500 million yen in damages to Fukushima and its neighboring prefectures. It also covered people who lived outside the evacuation area. The decision also allowed those who voluntarily evacuated to be compensated and extended the scope of those eligible for payment. The minimum amount paid to people living in the evacuation area was 8.5 million yen, while the amount

3 Maebashi District Court, March 17, 2017 (Jap.), http://www.courts.go.jp/app/files/hanrei_jp/691/086691_hanrei.pdf.

4 Chiba District Court, September 22, 2017 (Jap.), http://www.courts.go.jp/app/files/hanrei_jp/264/087264_hanrei.pdf.

given to voluntary evacuees was set at 80,000 yen. Regarding government involvement in the accident, the court ruled that it was possible to foresee that a 15.7 meter tsunami wave could have hit the power plant and the government's failure to order utilities to prepare for such an event by the end of 2002 created government responsibility.[5]

## Environment – Biological Diversity

### Enactment of the Act (April 21, 2017 promulgated, Act No. 18) which Amends a Part of the Act (Cartagena Act) on Securing Biological Diversity by Regulation Such as the Use of Genetically Modified Organisms etc.[6]

Before the revision, the Cartagena Act specified measures to prevent the adverse effects on biodiversity caused by the use of genetically modified organisms. However, there is no provision for implementing the measures to be taken in the event of adverse effects on biological diversity, which is required of the parties following the Supplementary Protocol adopted thereafter.

In order to implement the Supplementary Protocol in Japan, the Act amending the Cartagena Act was promulgated on April 21, 2017. The revised Cartagena Act came into effect on March 5, 2018, when the supplementary protocol comes into effect, along with the revisions to relevant ministerial decrees and notifications. The amended Cartagena Act add to the provision that the Minister of the Environment can order measures to achieve its recovery if there is a significant negative impact on biodiversity.

Specifically, as a result of the illegal use of genetically modified organisms (import, distribution, cultivation, etc.) without approval based on the Cartagena Act, there has been adverse effects on biological diversity. If there is a decline in population density, a decrease in the area of the habitat, a deterioration in the habitat environment, etc., the user will be required to take necessary measures to cure the problem.

The species and area subject to the action order are designated by the Ministry of the Environment. In addition, the requirements of the action order and the contents of the action necessary curing the harm are stipulated in the basic matters.

5 Fukushima District Court, October 10, 2017 (Jap.), http://www.courts.go.jp/app/files/hanrei_jp/223/087223_hanrei.pdf.

6 *See*, http://www.maff.go.jp/j/syouan/nouan/carta/about/attach/pdf/kaisei-1.pdf.

## Environmental Law – Genetic Resources – Fair and Equitable Sharing

### ABS Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization[7]

In October 2010, at the 10th Conference of the Parties to the Convention on Biological Diversity, which was chaired by Japan, The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity" (Nagoya Protocol) was been adopted.

The Nagoya Protocol sets out the opportunity for acquisition of genetic resources under the Convention and rules for more consistent access and benefit-sharing (ABS) of benefits arising from its use. In order to implement this Protocol, Japan adopted the Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization as domestic measures.

By taking measures to promote ABS (Access and Benefit-Sharing), the Guideline ensures the precise and smooth implementation of the Nagoya Protocol and contribute to the conservation and sustainable use of biodiversity. Protocol Articles 15, 16 and 17 (Measures taken as a User Country) requires that a report be provided on the acquisition of genetic resources including:

1. The acquirer of genetic resources, in principle, will report to the Minister of the Environment within six months after the International Compliance Certificate is posted on the International Clearing House (ABSCH). In addition to genetic resources, when acquiring related traditional knowledge, report them together. The Minister of Environment request a report for non-reporters.
2. Notification of legally acquired genetic resources domestically and internationally. The Minister of the Environment publishes the content of the report on the Ministry of the Environment website and provides it to ABSCH.
3. After 5 years from the report, the Minster of Environment request information related to the use of genetic resources. The Minister of the Environment ask for information again to non-given person. In addition, the Competent Minster provide guidance and advice as needed.

7 ABS Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, http://abs.env.go.jp/pdf/english_guidelines.pdf. *See also*, http://abs.env.go.jp/pdf/pamphlet_en.pdf.

4. Cooperation to the petition for violation of laws and regulations in the providing country.

If a party reports the violation of the laws and regulations of Japan as the providing country, the Minister of the Environment shall, as necessary, request information to persons handling genetic resources etc. and provide them to that party.

Protocol Article 6 (Measures as a Providing Country) provide acquisition opportunities for Japan's use of genetic resources. In this case, Japan's prior consent is not required. However, in consideration of changes in the social situation regarding ABS, etc., examination should be made within 5 years from the enforcement, and when it is deemed necessary, measures will be taken.

Protocol Article 5, 9, 17, 19 and 20 (Encouragement concerning ABS) ensures that provider/user of genetic resources in Japan or the user of genetic resources etc. in the provider country ensures that the distribution of profits arising from the use of resources is fair and equitable. They are required to conclude a contract; strive to use the benefits for biodiversity conservation, etc.; and attempt to include information sharing provisions in mutually agreed conditions set forth the contract. According to this Guideline, the Nagoya Protocol entered into force in Japan on August 20, 2017.

# State Practice of Asian Countries in International Law

***Korea***

*Buhm-Suk Baek**

## Human Rights – Refugee – Treaties

### Decision of Supreme Court Concerning the 'Revocation of Denial of Refugee Status,' Supreme Court Decision 2016Du56080

**(decided on July 11, 2017)**

#### *Facts of the Case and Issues Presented*

One of the main issues, in this case, is whether same-sex orientation constitutes, within the meaning of the Article 2 subparagraph 1 of the Refugee Act,[1] "a particular social group." Taking into account the provisions of the 1951 Convention Relating to the Status of Refugees (*hereinafter* the "Refugee Convention") and the 1967 Protocol Relating to the Status of Refugees, the Court ruled that "a particular social group" under the Article 2 subparagraph 1 of the Refugee Act means a group of individuals who share an innate characteristic, an immutable shared history, or a religious faith so fundamental to their individual identities/conscience that they ought not to be required to renounce it, and who form a separate group which is perceived by the society as being distinct. Here, same-sex orientation can be deemed to constitute "a particular social group" when, as same-sex orientation is denounced in the moral norms prevailing in the refugee applicant's country of origin, its disclosure would readily expose the applicant to persecution, and the government of his/her country of origin refuses or is unable to offer protection.

* Professor, Kyung Hee University, Korea.

1 Nanminbeob [Refugee Act], Act No. 11298, Feb. 10, 2012, *amended by* Act No. 14408, Dec. 20, 2016, art. 2 (S. Kor.).

Article 2 (Definitions)

Definitions of the terms in this Act are as follows:

1. A "refugee" refers to an alien who is unable or unwilling to avail him/herself of the protection of his/her country of nationality owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or who, not having a nationality, is unable or, owing to such fear, unwilling to return to the country of his/her former residence (hereinafter "the country of habitual residence") prior to entry into the Republic of Korea.

Also, the Court highlighted that "persecution" means "acts causing a serious infringement of, or discrimination against, inherent human dignity, including threats to life, liberty, or security of person." If the risk to which the refugee applicant is likely to be exposed due to same-sex orientation exceeds the ordinary level of social reproach to reach the level of a serious infringement of, or discrimination against, inherent human dignity, including threats to life, liberty, or security of person, then such acts would constitute persecution within the meaning of the Refugee Convention. But, if the disclosed same-sex orientation would likely expose the applicant to only antipathy and social reproach from family, friends, and the general public for its contravention of moral norms in the country of origin, then it may constitute an unfair social restraint, but not persecution per se within the meaning of the Refugee Convention. Therefore, for an applicant to be recognized as a refugee, he/she must be a person whose sexual orientation has already been disclosed in the applicant's country of origin, who for that reason has been subject to specific persecution in the country of origin prior to his/her admission to the Republic of Korea, and who has a well-founded fear of being persecuted by a specific force or the government should he/she return to the country of origin. Lastly, the burden of proof of a "well-founded fear" of being persecuted rests on the applicant.

***Judgment***

In this case, the Court confirmed that the Plaintiff has neither disclosed his sexual orientation nor actively engaged in related activities, and also he was never subject to specific persecution on account of his homosexuality before. Thus, the Court remanded the case to the lower court (Seoul High Court) as it is difficult to conclude that the Plaintiff has a well-founded fear of being persecuted by drawing the attention of the government of his home state on account of his same-sex orientation.

***Comment***

Though the case was remanded, the acknowledgment by the Court that same-sex orientation constitutes a particular social group within the definition of "refugee" under Article 2 subparagraph 1 of the Refugee Act, is meaningful development for the protection of human rights of LGBT individuals.

## Human Rights – Criminal Law – Sovereignty

### Decision of Supreme Court Decision on 'Murder Case', Supreme Court Decision 2017D05977

**(decided on August 24, 2017)**

***Facts of the Case***

The Defendant had been charged with murder in the Philippines, and he was released after a Philippine court rendered a not-guilty verdict. But he was prosecuted again in a Korean trial court which sentenced him to imprisonment of ten years. The Defendant then appealed on the ground that Article 7 of the Criminal Act should be applied for the period exceeding five years when he was detained pending trial abroad. The Court rejected the Defendant's claim and also confirmed that the lower court did not err in applying the Criminal Act.

***Issues Presented***

One of the main issues, in this case, was how to interpret "an offender who has undergone the whole or partial execution of sentence imposed abroad" under Article 7 of the Criminal Act.[2] The Court reviewed whether a person accused in a criminal case and detained pending trial for a considerable period before being acquitted in a foreign country falls under this provision and whether such period detained before trial can be deemed sentence executed abroad as prescribed by Article 7 of the Criminal Act.

***Judgment***

Criminal sentencing is exercised by the penal authority as a part of state sovereignty. Therefore, even if punishment imposed on an offender by a foreign court is final and conclusive, Korean courts are not bound by such foreign judgment, and the doctrine of double jeopardy cannot be applied since it does not have any res judicata in Korea. The Court found that the legislative intent of Article 7 was to mitigate possible disadvantages experienced by a criminal defendant facing punishment for the same offense under Korean penal law. Yet, in view of the language and purpose of Article 7, "an offender who has undergone the whole or partial execution of sentence imposed abroad" should be construed as an offender who has actually undergone the whole or partial execution of sentence, such as imprisonment or fine, imposed upon conviction by a foreign court. Therefore, the Court confirmed that, even if having been detained pending trial for a considerable period prior to acquittal in that country, a person accused in a criminal case but then acquitted abroad cannot be

2 Hyeongbeob [Criminal Act], Act No. 14415, Dec. 20, 2016, art. 7 (S. Kor.).

Article 7 (Inclusion of Sentence Executed Abroad)

If an offender has undergone the whole or partial execution of sentence imposed abroad because of crime, the sentence either wholly or partially executed shall be included in the sentence to be declared in Korea.

(This Article is amended by Act No. 14415, December 20, 2016 in accordance with the Constitutional Court's decision [2013Hun-Ba129,] May 28, 2015 that held this paragraph unconstitutional and inconsistent with the Constitution.)

regarded as falling under "an offender who has undergone the whole or partial execution of sentence imposed abroad" and the period detained before trial abroad cannot be deemed sentence executed abroad as prescribed by Article 7 of the Criminal Act.

*Comment*

In this case, it is interesting to read dissenting opinions by five Justices from the perspective of human rights. They admitted that Article 7 of the Criminal Act could be construed as inapplicable to a person who was merely held in pre-trial detention before acquittal abroad rather than an offender who has undergone the whole or partial execution of sentence imposed upon conviction by a foreign court. However, five dissenting judges maintained that the number of days detained pending trial should be either wholly or partially counted toward the sentence to be declared in Korea based on analogical interpretation. This is because if a criminal defendant, who was held in pre-trial detention before being acquitted abroad, were to have been prosecuted for the same offense in Korea and subsequently punished under Korean criminal law without taking into consideration the fact that the defendant had been previously detained abroad, then this could be deemed an excessive infringement of the defendant's right to personal liberty. This corresponds with the constitutional spirit declaring the principle of due process to protect personal liberty, too. Furthermore, to fully realize the legislative intent of Article 7 of the Criminal Act, for example for the protection of human rights to mitigate any disadvantages that a criminal defendant may experience due to double punishment at home and abroad, it would be more tenable to allow the analogical application of Article 7 of the Criminal Act rather than relying on a judge's sentencing decision that regards pre-trial detention abroad as a factor in the sentencing guidelines.

## Customary International Law – Treaties – Jurisdiction

### Decision of Constitutional Court Concerning the 'Impeachment of the President', Constitutional Court Decision 2016Hun-Na1

**(decided on March 10, 2017)**

*Issues Presented & Judgment*

This case did not directly deal with the implementation of international law, but in the decision, the Court confirmed the legal status of international

treaties and customary international law under a domestic legal system in Korea as below.

> The Constitution provides that the ground for impeachment is the "violation of the Constitution or other laws," and by giving the Constitutional Court jurisdiction over adjudication on impeachment, prescribes that the impeachment procedure is normative, and not political. The purpose of the impeachment system is to realize the principle of the rule of law which prescribes that nobody is above the law, and to protect the Constitution. The considerable political chaos that may occur by removing a President elected by the public from office should be deemed an inevitable cost of democracy paid by the nation in order to protect the basic order of liberal democracy.
> Article 65 of the Constitution provides that the ground for impeachment is a 'violation of the Constitution or other laws in the performance of official duties' committed by the President. The "official duties" as provided here mean the duties that are inherent in particular governmental offices as provided by law and other duties related thereto as commonly understood, and thus is a concept that includes not only acts based on law, but also all of those performed by the President in his or her office with respect to the implementation of state affairs. The "Constitution" includes the unwritten constitution formed and established by the precedents of the Constitutional Court as well as the express constitutional provisions. "Other laws" include not only statutes in their formal context, but also, inter alia, international treaties that have the same force as statutes and international law that has been generally accepted (2004Hun-Na1, May 14, 2004).

### Municipal Law – Tax – Treaties

### Decision of Supreme Court Concerning the Revocation of Disposition Imposing Corporate Tax, Supreme Court Decision 2015Du2611

**(decided on December 15, 2016)**

***Facts of the Case & Issues Presented***

Lone Star Fund, a private equity fund, which was launched in 1995, made over 700 investments worldwide approximately KRW 50 trillion in total. While

investing in Korea since 1999, Lone Star Fund established Lone Star Fund III in July 2000. A limited partnership established under the laws of the state of Delaware, U.S.A., Lone Star Fund III consists of Plaintiff Lone Star Fund III (U.S.) LP, Plaintiff Lone Star Fund III (Bermuda) LP, and Hudco Partners Korea Ltd., a corporation established under the laws of Bermuda for the purpose of offering investment opportunities to Lone Star Fund's officers, executives, and employees worldwide. By reviewing the various tax benefits under the tax and corporate laws of each country and tax treaties to which Korea is a party, Lone Star Fund III sought means to avoid capital gains tax, etc. in the event it invested in real property in Korea. Specifically, it sought to design an optimal investment structure using special purpose companies overseas. Within this context, Lone Star Fund III bought Gangnam Finance Center in 2001 via its company Star Holdings in Belgium, and then sold it in 2004, making some 245 billion won in profit. The Plaintiff, however, did not pay tax on the sale. In 2005, the National Tax Service's Yeoksam branch ordered Lone Star Fund III to pay some 100 billion won in tax on the profit it made selling the building in Gangnam. It objected, saying it shouldn't be subject to income tax as a foreign company. The case made it to the Supreme Court, which in 2012 judged in favor of the Lone Star Fund III, ruling that while it is subject to corporate tax, it is not subject to income tax. The Yeoksam tax office then imposed a corporate tax of 104 billion won on Lone Star, which said it was not liable due to a tax treaty between Belgium and Korea, as it bought and sold the building via its company in Belgium.

***Judgment***

The court's major rulings can be summarized as follows:

> The principle of substantial taxation as provided under Article 14(1) of the former Framework Act on National Taxes (amended by Act No. 8830, Dec. 31, 2007 . . . ) means that, in the event there is another person to whom such taxable items as income, profit, property, or transaction substantially accrue, apart from the one nominally designated, tax authority shall deem liable for tax the one to whom such items substantially accrue, instead of the nominally designated person in formality or appearance. . . . [t]he determination whether the organization may be deemed a foreign corporation shall depend on whether the organization may be deemed an independent agent to which rights and obligations accrue, apart from its constituent members, under the private law of the Republic of Korea in light of the statutory content of the country where the organization was established and the substance of the organization,

> barring any special provision under the former Corporate Tax Act as to the specific requirements for a foreign corporation other than the location of the headquarters or principal office. . . . [A]rticle 27 of the *Convention Between the Republic of Korea and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and the Encouragement of International Trade and Investment* . . . provides not only for mutual agreement on specific tax disposition, but also for mutual agreement in the general sense aimed at resolving "difficulties or inquiries arising in connection with the application of the Convention." . . . [I]t is evident that income derived from a transfer of stock of a corporation in excessive possession of real property . . . apparently constitutes capital gains from that transfer of stock. . . . [A]ccordingly, Korea may tax the capital gains from the transfer of stock of a corporation in excessive possession of real property situated in Korea. In such a case, the mere fact that the agreement has not undergone domestic procedures tantamount to treaty amendment does not constitute a ground for denying its validity.

***Comment***

The lower court ruled in favor of the tax office, saying the bilateral tax treaty contains agreements on preventing tax evasion and "Star Holdings appears to be a company built solely for the purpose of avoiding paying taxes and the regulation that waives taxes on foreign companies therefore cannot be applied to it." The higher court doled out a similar judgement, but maintained that 39.2 billion won imposed on Lone Star as additional tax should be cancelled because the Yeoksam tax office did not provide an explanation on why and how it was calculated. Then, this Supreme Court finally ruled that the company should pay 64.8 billion won in corporate tax. Overall, all appeals were dismissed by the Supreme Court.

## Law of the Sea – Legislation and Administrative Regulations

### Act on the Exclusive Economic Zone and Continental Shelf (Amended Mar. 21, 2017 by Act No. 14605)

On March 21, 2017, this Act was amended with the purpose to protect rights and interests of the Republic of Korea in the sea and contribute to establishing international maritime order by prescribing the sovereign right exercised by

the Republic of Korea and jurisdiction thereof regarding its exclusive economic zone and continental shelf in accordance with the United Nations Convention on the Law of the Sea.

Based on Art. 2, the continental shelf of the Republic of Korea comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin. Art. 3 stipulates that the Republic of Korea shall have sovereign rights to explore its continental shelf and to exploit mineral of the seabed and subsoil, other non-living resources, and sedentary species (referred to in Article 77(4) of the Convention). Also in Art. 4, it is confirmed that in the exclusive economic zone and continental shelf of the Republic of Korea, foreign states or foreigners may, on condition that they shall comply with the relevant provisions of the Convention, enjoy the freedom of navigation, overflight, the laying of submarine cables or pipelines, and other internationally recognized lawful uses of the sea in relation to the freedom. Furthermore, Art. 5 is amended for the relevant agency to take necessary measures including the exercise of the right of hot pursuit referred to in Article 111 of the Convention, stopping or boarding vessels, inspection, arrest, and judicial proceedings against the persons who infringe the rights referred to in Article 3 in the exclusive economic zone and continental shelf of the Republic of Korea or who are deemed to be under suspicion of violating the statutes of the Republic of Korea applied in relation to the relevant exclusive economic zone and continental shelf.

## Environmental Law – Hazardous Waste – Legislation and Administrative Regulations

### Act on the Transboundary Movement of Hazardous Wastes and Their Disposal (Amended Apr. 18, 2017 by Act No. 14784)

The purpose of this Act is to prevent any environmental pollution caused by the transboundary movement of wastes and to promote international cooperation, and to contribute to environmental conservation and qualitative improvement in the lives of people by implementing the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and bilateral, multilateral, or regional agreements based on the aforesaid Convention and by restricting the export or import of wastes, and the transit of wastes across the Republic of Korea. Based on Art. 18, any person who intends to export or import wastes subject to export or import control shall make a

declaration for export or import to the Minister of Environment along with the type, quantity, and plan of disposal of such wastes. And a person who fails to make a declaration for export or import or makes a false declaration for export or import shall be punished by imprisonment with labor for not more than two years or by a fine not exceeding 20 million won.

### International Economic Law – Customs and Duties – Legislation and Administrative Regulations

**Act on Origin Labeling of Agricultural and Fishery Products (Amended Oct. 13, 2017 by Act No. 14902)**

The purpose of this Act is to protect producers and consumers by guaranteeing the right of consumers to be informed and inducing fair trade by having the producers indicate the country of origin of agricultural and fishery products or the processed products thereof, etc. in an appropriate and reasonable manner. Based on amended Art. 7, the Minister of Agriculture, Food and Rural Affairs, the Minister of Oceans and Fisheries, the Commissioner of the Korea Customs Service or the Mayor/Do Governor shall require the relevant public officials to collect or investigate agricultural and fishery products or the processed products thereof subject to labeling of the country of origin, as prescribed by Presidential Decree, in order to ascertain whether country of origin labels are placed and the labeled matters, the methods of labeling, etc. are appropriate pursuant to Article 5. In such cases the affairs for collection or investigation of the Commissioner of the Korea Customs Service are limited to agricultural and fishery products or the processed products of agricultural and fishery products (excluding the processed products which are processed in the Republic of Korea) which are imported among products subject to labeling of the country of origin under Article 5 (1). Here, the term "place of origin" means a country, area, or waters where agricultural products or fishery products are produced, gathered, or caught.

### Human Rights – Rights of the Child – International Agreements

**Withdrawal of a Reservation of Article 21 Paragraph (a) of the Convention on the Rights of the Child (Withdrawal of a Reservation on Aug. 11, 2017)**

To implement Article 21 paragraph (a) of the Convention, the Government revised the Act on Special Cases Concerning Adoption in August 2011, under which both domestic and intercountry adoptions are subject to court authorization. Also, a new provision on permission from the family court concerning the adoption of minors was established in the Civil Act in February 2012. In July 2013, the Government introduced in Family Litigation Act a procedure for permission for adoption, requiring the Family Court to hear the opinion from a prospective foster child where the prospective foster child is at least 13 years of age. Upon refurbishing the adoption system, the Government ratified Article 21 paragraph (a) of the Convention, which it had reserved at the time of its accession to the Convention, and finalized the procedures to withdraw the reservation in August 2017.

Article 21 stipulates that:

> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

# State Practice of Asian Countries in International Law

*Malaysia*

*Shaun Kang**

## Dispute Settlement – International Court of Justice – Revision of Decision

### Application for Revision of the Judgment of 23 May 2008 in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore), International Court of Justice

On 2 February 2017, Malaysia submitted an application pursuant to Article 61 of the Statute of the International Court of Justice, for the review of the Pedra Branca/ Pulau Batu Puteh decision of the ICJ rendered on 23 May 2008. The application was premised on the discovery of three documents at the National Archives of the United Kingdom, during the period of 4 August 2016 and 30 January 2017. Malaysia contended that the discovery of the new documents raises new facts not previously considered by the ICJ. The documents are the internal correspondence of the Singapore colonial authorities in 1958, an incident report filed in 1958 by a British naval officer and an annotated map of naval operations from the 1960s.

Malaysia opined that the ICJ awarded sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore based on a shared understanding between Johor and Singapore that sovereignty over Pedra Branca/Pulau Batu Puteh had passed from the former to the latter. The court arrived at the decision after concluding that the shared understanding was demonstrated by an exchange of correspondence between the representatives of the parties' predecessors in 1953 and by the subsequent conduct of the parties. Malaysia submits that the recently discovered documents will show that Singapore had not considered Pedra Branca/ Pulau Batu Puteh as part of its territory until at least February 1966; by that time, Singapore had already ceased to be part of Malaysia. Malaysia submits that the discovery of the facts as such fulfils the requirement under

* Legal Adviser, International Committee of the Red Cross (ICRC). Any views expressed here are solely the authors and does not reflect the ICRC's views and positions.

Article 61 of the Statute, in particular, that the fact discovered was of a decisive factor, and that the fact was not known at the time the court rendered the judgment not owing to the negligence of the party. Accordingly, Malaysia requests that the court allow its application for revision of the decision. Proceedings were discontinued on 29 May 2018, following the agreement of the parties to the same.

### United Nations – General Assembly Resolution – Jerusalem – Israel – Palestine

**Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, United Nations General Assembly Resolution,** ES-10/L.22.

On 21 December 2017, the UNGA held an emergency meeting where a vote was called to adopt a resolution on measures and actions relating to the Holy City of Jerusalem. This follows the decision by the United States Government to move its embassy from Tel Aviv to Jerusalem and to recognize Jerusalem as Israel's capital. 128 States including Malaysia voted in favour of the resolution, while 9 were against, and 35 abstained. The resolution called on all States to refrain from establishing embassies in the Holy City of Jerusalem. Further, the resolution demanded that States comply with all relevant UN Security Council resolutions and work to reverse the negative trends imperilling a two-State resolution of the Israeli-Palestinian conflict. In a statement, Malaysia deemed the Jerusalem decision as an infringement on the Palestinian people's rights. Malaysia expressed concern that the dire situation will feed into the agenda of the extremists and frustrate collective efforts towards combating terrorism and ending the cycle of violence.

### Dispute Settlement – International Court of Justice – Statute of the International Court of Justice – High Court, Malaysia-Mandamus – Judicial Review

**Prabagaran a/l Srivijayan & Anor v Minister of Foreign Affairs & Anor and Another Application** [2017] MLJU 1636

***Facts***

On 22 September 2014, Mr Prabagaran a/l Srivijayan, the first applicant was sentenced to death by the Singapore High Court for drug trafficking. The

decision was affirmed by the Singapore Court of Appeal on 2 October 2015. Following the decision, the applicant applied for leave for judicial review at the High Court of Malaysia, requesting for the court to grant leave and to subsequently compel the Government of Malaysia (respondent) to initiate proceedings against Singapore at the International Court of Justice (ICJ) as the Government has a duty to take all reasonable steps to uphold and protect the rights of the applicant.

In particular, the applicant asked that the Malaysian Government initiate proceedings against Singapore pursuant to Articles 35, 36 and 41 of the Statute of the ICJ. The applicant argued that the ICJ would be able to indicate provisional measures, halting the death sentence from being carried out on the applicant. Further, the applicant asked that the High Court of Malaysia declare that the Malaysian Government is legally obliged to protect and give effect to the applicant's right to a fair trial. The applicant contended that the order by the court for the Government to initiate proceedings against Singapore does not interfere with the policy decisions of the Government, instead, it is a lawful step to protect the constitutional right to life and liberty of the applicant. Further, the applicant argued that the right to a fair trial is guaranteed as a matter of customary international law (relied on the Prosecutor v Zlatko Aleksovski, Case No.: IT-95-14/1-T). The court also considered if Article 5 of the Federal Constitution of Malaysia, guaranteeing the right to life save by law, has extraterritorial application in Singapore.

***Decision***

The High Court of Malaysia found that it did not have the jurisdiction to hear the application as the decision to refer a matter to the International Court of Justice was a foreign policy decision best determined by the Government. Regarding the applicability of Article 5 of the Federal Constitution of Malaysia in Singapore, the Court found that it had no extraterritorial application.

The court recognized that the principle of non-intervention as customary international law and is deeply rooted in Article 2(4) of the UN Charter – it involves the right of every sovereign State to conduct its affairs without outside interference. The court underlined that the respondent has no obligation to meddle in the criminal justice system of Singapore as every State's domestic laws are sovereign. Furthermore, the court agreed that the invocation of the jurisdiction of the ICJ by Malaysia is contingent on Singapore providing consent to the same. Finally, the court concluded that the substantive question raised by the applicant is non-justiciable. Accordingly, the High Court denied leave for the application, underlining that there is no purpose for the court to grant leave for the purpose of investigation on full inter parts basis as there is no arguable case.

### Human Rights – Statelessness – Convention on the Rights of the Child (CRC)

**Tan Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 5 MLJ 662**

*Facts*

Mr Tan (the appellant) adopted a child born in Malaysia. There was no information pertaining to the biological parents of the child. The appellant applied for citizenship of his child. The authorities, however, rejected the application, leading to the child being stateless. The appellant submitted an application at the High Court asking that the court reverse the decision of the authorities. The High Court disagreed with the appellant, leading to an appeal before the Court of Appeal.

The appellant submitted that the High Court judge had erred as the judge had failed to appreciate that there are provisions in domestic and international law, including the Convention on the Rights of the Child which compel the avoidance of statelessness of the appellant's child.

*Decision*

The Court of Appeal decided that the appellant had not fulfilled the requirement as provided for by the Federal Constitution, namely that the appellant had failed to prove that the child is born in Malaysia and have not acquired citizenship in another country. The adoption of the child does not confer a right of citizenship by operation of law. The Court emphasized that the Convention on the Rights of the Child have no force of law as it has not been incorporated into municipal legislation. Accordingly, the Court dismissed the appeal.

### Human Rights – Capital Punishment – Rights – Right to Life

**Amendment to Section 39B of the Dangerous Drugs Act 1952**

Section 39B of the Dangerous Drugs Act 1952 (DDA), criminalises the act of trafficking in dangerous drugs, offer to traffic in a dangerous drug or do/ offer to do an act preparatory to, or for the purpose of trafficking in a dangerous drug. On conviction, the court is bound to sentence the accused to death by hanging. On 27 December 2017, the Parliament of Malaysia amended the provision (in force on 15 March 2018), giving courts the discretion to mete out a life

sentence and whipping instead of the death penalty, provided certain conditions are met. These conditions, as inserted by Section 39B (2A) DDA are that (i) there was no evidence of buying and selling of dangerous drug at the time when the person convicted was arrested, (ii) there was no involvement of agent provocateurs or the involvement of the person convicted is restricted to transporting, carrying, sending or delivering an dangerous drug and that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

## Treaties – Disarmament – Nuclear Weapons

### Treaty on the Prohibition of Nuclear Weapons 2017

The Treaty on the Prohibition of Nuclear Weapons is a treaty adopted in 2017, comprehensively prohibiting nuclear weapons, with the goal towards its total elimination. Malaysia voted in favor of the treaty. In a statement, the representative of Malaysia underlined that the Treaty sent a powerful political message that nuclear weapons were unacceptable and categorically rejected. The representative emphasized that the focus should now be on bringing the Treaty into force.

## Treaties – Climate Change – Amendment to Treaty

### 2012 Doha Amendment to the Kyoto Protocol

In 2012, the parties to the Kyoto Protocol adopted an amendment to the Protocol. It adds new emission reduction targets for the Second Commitment Period (2012–2020) for participating countries. On 12 April 2017, Malaysia accepted the 2012 Doha Amendment. The amendment is not yet in force as the minimum number of instruments (144 instruments) of acceptance have not been received.

# State Practice of Asian Countries in International Law

***Philippines***

*Jay L. Batongbacal**

## Criminal Law – Extradition – Double criminality – Extraditable Offences

**Government of Hong Kong Special Administrative Region, Represented by the Philippine Department of Justice, v. Juan Antonio Muñoz [G.R. No. 207342, 7 November 2017]**

In a previous decision in 2016, the Supreme Court ruled that under the Hong Kong Special Administrative Region under the terms of the Agreement Between the Government of the Republic of the Philippines and the Government of Hong Kong for the Surrender of Accused and Convicted Persons (RP-HK Agreement), the respondent Juan Antonio Muñoz could be extradited for purposes of trial in Hong Kong for seven counts of the crime of conspiracy to defraud under Hong Kong law, but not the associated three counts of the crime of accepting an advantage as an agent. The latter was due to non-compliance with the dual-criminality rule expressed in Article 2 of the RP-HK Agreement which provided that extradition by the Requested State shall only be for an offense within the descriptions of offenses punishable by detention or imprisonment for more than one year, or by a more severe penalty, according to the laws of both countries. The crime as charged in Hong Kong related to bribery by a member of the private sector, but Muñoz was a civil servant employed by the Central Bank in the Philippines who should be charged and prosecuted with a public sector offense under Philippine law.

The petitioner moved for reconsideration of the Court's ruling, arguing that under Hong Kong jurisprudence in the case of B. v. The Commissioner of the Independent Commission Against Corruption, the offense of accepting an advantage as an agent also covered public servants in another jurisdiction. The Court denied the motion on the ground that acceptance of the argument would require the court to take judicial notice of the ruling of the Hong Kong courts. This could not be done as the Court was without liberty to take judicial

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notice of the ruling without contravening its own rules on evidence under which foreign judgments and laws are not considered as matter of a public or notorious nature that proved themselves. Instead, such judgments and laws have to be duly alleged and competently proved like any other disputed fact. Moreover, opinion testimonies of qualified experts in Hong Kong law testified before the trial court that the crime of accepting an advantage as an agent was a private sector offense that did not have an equivalent in Philippine criminal law. The Court thus reaffirmed its previous judgment, that Muñoz could only be extradited for the offenses of conspiracy to defraud, but not accepting an advantage as an agent, on the ground of the dual-criminality rule.

### Human Rights – Treaties and Covenants – Related Instruments

**Saturnino Ocampo et al. v. Rear Admiral Ernesto Enriquez, et al. [G.R. No. 225973, 8 August 2017]**

In an earlier decision promulgated in 2016, the Supreme Court dismissed several petitions of numerous private citizens questioning the burial of former President Ferdinand E. Marcos at the Libingan ng mga Bayani (National Heroes Cemetery) on the ground, among others, that such act violated the rights of the petitioners and other victims of human rights violations under Marcos' rule to "full and effective" reparations under numerous human rights instruments. These included the *International Convention on Civil and Political Rights* (ICCPR)*, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Principles and Guidelines)*, and the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Principles on Impunity). In dismissing the petition, the Supreme Court ruled that the Philippines was more than compliant with its international obligations, citing the 1987 Constitution's provisions on human rights, laws passed by the legislature, judicial remedies afforded by the courts, and administrative and executive issuances of the Executive Branch.

The petitioners moved for reconsideration of the dismissal, and on this point argued that the mere existence of human rights laws, administrative rules, and judicial issuances was not equivalent to full compliance with international law standards. They contended that the victims of human rights violations must be given full satisfaction and guarantees of non-repetition, and are

entitled to restitution, compensation, rehabilitation, and satisfaction as contemplated in the international instruments invoked.

The Supreme Court denied the motion, pointing out that the Basic Principles and Guidelines and UN Principles on Impunity are neither treaties nor have attained the status of general accepted principles of international law and/or international customs. It also determined that they are merely expressions of non-binding norms, principles, and practices that influence state behavior, but cannot be validly considered as sources of international law binding upon the Philippines under Art. 38(1), Chapter 2 of the Statute of the International Court of Justice. The plain text of these instruments also stated that they are recommendatory in character. The Court declared that if Congress intended to incorporate these recommendations, it could have done so by expressly mentioning the instruments in human rights legislation it had enacted. Besides, even if the Basic Principles and Guideline and UN Principles on Impunity were binding international law, they did not prohibit the Marcos' burial at the LNMB. It added that the protection of a person's human rights and dignity must not trample upon that of another, and the Bill of Rights should have the same interpretation for both unloved and despised persons on one hand and the rest who are not so stigmatized on the other.

## Treaties – Agreements Concurred in by the Senate in 2017

### *13 February 2017*

The Philippine Senate issued Resolution No. 38 concurring in the ratification of the Agreement between Japan and the Philippines on Social Security. The Agreement guarantees the application of basic social security principles such as Equality of Treatment between their nationals, Export of Benefits in case such nationals decide to reside in the other country, and Totalization of Periods of Coverage which allows the tacking of creditable periods of covered periods under the social security schemes of the two parties.

### *14 March 2017*

The Philippine Senate issued Resolution No. 42 concurring in the ratification of the Paris Agreement. The Agreement sets out a plan to limit the increase in the global average temperature to well below 2°C. To this end, state parties must determine their own contributions to the global effort to combat climate change.

*14 August 2017*

The Philippine Senate passed Resolution No. 58 concurring in the ratification of the Convention Concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service. The Convention grants protection to public employees against acts of anti-union discrimination in respect of their employment. It also provides facilities and rights to be granted to public sector organizations and their members.

### Treaties – Form – Conclusion – Binding Effect

**Mitsubishi Corporation – Manila Branch v. Commissioner of Internal Revenue, [G.R. No. 175772, 5 June 2017]**

The governments of Japan and the Philippines executed an Exchange of Notes in 1987 through which the former extended a loan for the construction of a coal-fired thermal power plant project. In the said Exchange of Notes, the Philippine government undertook to assume all taxes imposed by the Philippines on all Japanese firms and nationals operating as suppliers, contractors, or consultants engaged in the project. The National Power Corporation, a government-owned and controlled corporation that implemented the project on behalf of the Philippine government, engaged the petitioner Mitsubishi Corporation as a contractor for the steam generator, auxiliaries, and civil works of project. In 1998, Mitsubishi filed its income tax returns reflecting, among others, income from its operations in connection with the project. It paid all of the income taxes due thereon, but subsequently filed an administrative claim for refund of the taxes erroneously paid. It also filed a petition for review with the Court of Tax Appeals. The Court of Tax Appeals ultimately denied the petitioner's claim for refund, noting that the Exchange of Notes did not clearly grant a tax exemption to the petitioner, and in any case could not be read as a treaty granting a tax exemption in the absence of Senate concurrence.

The Supreme Court reversed the decision of the Court of Tax Appeals and declared Mitsubishi to be entitled to a tax refund. It noted that an Exchange of Notes is considered as a form of executive agreement, which is a valid and binding international agreement even without Senate concurrence. In accordance with its terms, the Philippine government must assume the tax liability of Mitsubishi with respect to the project. Thus, the taxes were indeed erroneously collected from Mitsubishi and subject to refund.

# State Practice of Asian Countries in International Law

***Singapore***

*Jaclyn L. Neo* and Rachel Tan Xi'En***

### Treaty – Ratification of Treaties – Singapore and Indonesia

The Ministers of Foreign Affairs of Singapore and Indonesia exchanged the Instruments of Ratification for the Treaty Between the Republic of Singapore and the Republic of Indonesia Relating to the Delimitation of the Territorial Seas in the Eastern Part of the Strait of Singapore on 10 February 2017. The Exchange of Instruments of Ratification brings the treaty into force.

### Treaty – Ratification of Treaties – Singapore and Australia

Singapore and Australia marked a milestone in bilateral economic relations with the ratification of the upgraded Singapore-Australia Free Trade Agreement on 1 December 2017. The upgraded Free Trade Agreement will enter into force following ratification. The key benefits include updated trade rules in goods, increased opportunities for businesses to bid for Government Procurement contracts, enhanced access to each other's services sectors and greater facilitation for investments.

### Treaty – Ratification of Treaties – Singapore and Turkey

Turkey and Singapore ratified the Turkey-Singapore Free Trade Agreement on 21 August 2017. The Free Trade Agreement will enter into force on 1 October 2017. This Free Trade Agreement is Turkey's first comprehensive free trade agreement in a single undertaking. It includes Turkey's first treaty commitments

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in Government Procurement and newer elements such as intellectual property rights, e-commerce, competition and transparency. The Free Trade Agreement will reduce barriers to trade and investment between Turkey and Singapore, enhance access to services sectors and procurement markets, as well as promote greater connectivity between businesses and people.

### Treaty – Registration of Treaties

At a ceremony at the Office of the United Nations Undersecretary-General of Legal Affairs Miguel de Serpa Soares on 25 September 2017, Singapore and Indonesia jointly submitted for registration the Treaty Between the Republic of Singapore and the Republic of Indonesia Relating to the Delimitation of the Territorial Seas in the Eastern Part of the Strait of Singapore, which was signed in Singapore on 3 September 2014. This is in accordance with Article 102 of the Charter of the United Nations. The joint submission was held in conjunction with the commemoration of the 50th anniversary of the establishment of diplomatic relations between Singapore and Indonesia. The treaty is the third treaty relating to the delimitation of the territorial sea boundary between the two countries.

### Dispute Resolution – Memorandum of Understanding – International Court of Arbitration of the International Chamber Of Commerce

On 28 June 2017, the Singapore Ministry of Law and the International Court of Arbitration of the International Chamber of Commerce announced that the ICC Court will set up a case management office in Singapore aimed at boosting arbitration and serving the dispute resolution needs of businesses around the world. The ICC Court is the first international arbitral institution to set up a physical case management office and team in Singapore.

### Dispute Resolution – Host Country Agreement – Permanent Court of Arbitration

On 25 July 2017, the Permanent Court of Arbitration (PCA) and the Singapore Ministry of Law signed a Host Country Agreement for the setting up of a PCA office in Singapore. The Singapore PCA office provides a Singapore base from

which the PCA can administer the growing number of PCA cases held in Singapore and Asia.

### Treaty – Multilateral Competent Authority Agreements – Tax

Singapore signed the Multilateral Competent Authority Agreements on the Automatic Exchange of Financial Account Information under the Common Reporting Standard, and the Exchange of Country-by-Country Reports on 21 June 2017. The signing of both agreements reaffirms Singapore's commitment to the international standards on tax cooperation.

### Treaty – Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

Singapore signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument") on 7 June 2017, together with over 60 other jurisdictions. The Multilateral Instrument seeks to facilitate the implementation of tax-treaty related measures to counter base erosion and profit shifting. Signatories to the Multilateral Instrument can efficiently update their Avoidance of Double Taxation Agreements ("DTAs") to incorporate the measures, without the need to re-negotiate each DTA. These measures include base erosion and profit shifting minimum standards on preventing treaty abuse and enhancing dispute resolution.

### Review of Investor-State Awards in the Singapore Courts – Investment Treaty Law

*Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited and others* ("*Lesotho v Swissbourgh*") [2017] SGHC 195 was brought before the Singapore High Court (SGHC), in which the plaintiff, the Kingdom of Lesotho (Lesotho), successfully sought to set aside the final award issued against it by the arbitral tribunal (Tribunal) in an ad hoc arbitration administered by the Permanent Court of Arbitration (PCA) and heard in Singapore. This case is the second time an investment treaty arbitration award has been brought to the Singapore

courts for review. The decision signals the Singapore courts' willingness to undertake a critical review of investor-state awards where the seat of arbitration is Singapore. In this case, the SGHC undertook an extensive *de novo* review of the arbitral tribunal's jurisdictional decisions, and the review of all the objections raised and authorities cited by the parties will provide valuable guidance for future cases in Singapore.

In examining Lesotho's objections to jurisdiction relating to the arbitral award, the SGHC found the following in summary: (a) The Tribunal was correct in finding jurisdiction *ratione temporis*; (b) The Tribunal was incorrect in finding jurisdiction *ratione materiae*; (c) The SGHC agreed with the Tribunal's decision on jurisdiction *ratione personae* but disagreed with the reasoning; and (d) The investors had not exhausted local remedies as required by the relevant treaty. Accordingly, the SGHC found in favour of the Kingdom of Lesotho and set aside the award rendered by the Tribunal on the basis that it had no jurisdiction.

***Human Rights – Statements – 68th Session of UN CEDAW***

Singapore presented opening and closing statements at the 68th Session of the UN CEDAW Committee in October 2017. Singapore affirmed its full commitment to the protection and promotion of human rights of its citizens including women. Singapore's representative highlighted the introduction of new laws like the Prevention of Human Trafficking Act and the Protection from Harassment Act, as well as the enhancement of several laws like the Employment of Foreign Manpower Act and the Women's Charter. Singapore also assured the CEDAW Committee that it recognized that enhancing the status of women was a continuous process and remained committed to this effort.

Following the oral statements made, the UN CEDAW Committee acknowledged Singapore's efforts in promoting gender equality and protecting the rights of women, and continued to recommend that Singapore include in its laws a prohibition of all forms of discrimination against women. In reply, the Singapore government affirmed that it would consider the Committee's recommendations when reviewing its policies to address gaps in Singapore society and continue to engage the relevant stakeholders, including civil society, to facilitate women's progress in Singapore.

# State Practice of Asian Countries in International Law

***Thailand***

*Kitti Jayangakula**

## Treaties – Agreements Concurred by Thailand in 2017

### Labor Rights – ILO Convention No. 111 on Discrimination (Employment and Occupation)

On 13 June 2017, Thailand has become a party to the International Labour Organization (ILO) Convention No. 111 on Discrimination (Employment and Occupation), which is among the most widely ratified ILO Conventions, with 175 ratifications as of today, out of 187 member states. This ratification encourages Thailand's commitments in protecting persons from all forms of discrimination in employment in compliance with international labor standards. The Convention will enter into force for Thailand on 13 June 2018.

The ILO Convention No. 111 is one of eight ILO fundamental conventions on the elimination of discrimination in respect of employment and occupation. Member states that ratify this Convention are obliged to enable legislation which prohibits all forms of discrimination. The Convention provides the definition of discrimination as "any distinction, exclusion or preference based on race, color, sex, religion, political opinion, national or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". In addition, it calls on States that have ratified it to commit to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in employment and profession, to eliminate discrimination in this field. Its provisions cover matters such as discrimination in access to vocational training, to employment and to particular occupations, and conditions of employment.

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### Environmental Law – The International Convention on Civil Liability for Oil Pollution Damage – The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

On 7 July 2017, Thailand has become a party to the 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention). These Conventions cover compensation for pollution damage caused by spills from oil tankers is governed by an international regime elaborated under the auspices of the International Maritime Organization (IMO). The framework for the regime was originally the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

The CLC Convention ensures that compensation is available to people who suffer oil pollution damage from maritime casualties, involving oil-carrying ships, and places liability on the owner of the ship from which the polluting oil escaped or was discharged. While the IOPC Fund Convention provides additional financial compensation for oil pollution damage that occurs in the member states, resulting from spills of persistent oil from tankers.

### Environmental Law – Laws and Regulations

#### Civil Liability for Oil Pollution Damage Caused by Ships Act, B.E. 2560 (2017)

To comply with the obligations as a party to the 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC) of the International Maritime Organization (IMO), on 7 July 2017, the National Legislative Assembly of Thailand enacted the Civil Liability for Oil Pollution Damage Caused by Ships Act, B.E. 2560 (2017). The main purpose of this Act is to provide civil liability for pollution damage which may be made against the shipowner and this new law will become effective on 6 July 2018. This Act defines important terms for the application with regard to the oil pollution damage caused

by ships in Section 3 of the Act such as 'ship',[1] 'shipowner',[2] 'oil',[3] or 'pollution damage'.[4]

Pursuant to the principle of territoriality, this Act covers pollution damage caused in the areas of Thailand, including the territorial sea and in the exclusive economic zone; and the costs of preventive measures, wherever taken, for preventing damage in those areas (Section 5). Accordingly, it also applies to ships owned by a Contracting State to the Convention and used for commercial purposes. Then it provides that the Act shall not apply to warships or any other ships owned or operated by a State on government non-commercial service (Section 6).

At the time of an incident or at the time of the first of the series of occurrences, the shipowner shall be liable for any pollution damage as a result of such incident (Section 7). In the case where two or more ships are involved in any incident causing pollution damage which is not separable amongst any of the ships, the owners of all the ships concerned shall be jointly and severally liable for all such damage which has arisen (Section 8).

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1 The Civil Liability for Oil Pollution Damage Caused by Ships Act, B.E. 2560 (2017), Section 3 provides:

"ship" means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship within this meaning only when it is actually carrying oil in bulk as cargo and shall continue to be regarded as a ship during any voyage following the carriage of oil until it is proved that it has no residues of oil in bulk aboard.

2 *Id.*, Section 3 provides:

"shipowner" means the person registered as the owner of the ship or, in the absence of registration, shall mean the person actually owning the ship, and, in the case of a ship owned by a State and operated by a company which is registered in that Sate as the ship's operator, "shipowner" shall mean such company.

3 *Id.*, Section 3 provides:

"oil" means any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.

4 *Id.*, Section 3 provides:

"pollution damage" means:

(1) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, including compensation for impairment of the environment and loss of profit from impairment of the environment;

provided that compensation for impairment of the environment shall be limited to costs of reasonable measures already undertaken or to be undertaken for the reinstatement of the impaired environment;

(2) the costs of preventive measures and loss or damage caused by such measures.

The Act contains some exceptions for the liability such as pollution damage resulted from an act of war, hostilities, civil war, insurrection or natural phenomenon of an exceptional, inevitable and irresistible character; wholly caused by an act or omission done by a third party with intent to cause such damage; or wholly caused by the negligence or wrongful act of the State or an agency having the duty to take care of or maintain lights or other navigational aids in the exercise of such duty (Section 9). The shipowner may be exonerated wholly or partially from liability if the shipowner proves that the pollution damage resulted wholly or partially from an act or omission done, whether willfully or negligently, by the person who suffered such damage (Section 10).

The Act also contains some limitation of liability of the shipowner in respect of any one incident to an aggregate amount as 4.51 million Special Drawing Rights, for a ship not exceeding 5,000 gross tonnage; or 4.51 million Special Drawing Rights, for a ship with a tonnage in excess of 5,000 gross tonnage and, for each additional unit of tonnage over 5,000 gross tonnage, 631 Special Drawing Rights, provided that the aggregate amount of liability shall not exceed 89.77 million Special Drawing Rights (Section 12).

Importantly, the Act provides a number of measures for its application such as a Thai ship carrying more than 2,000 tons upwards of oil in bulk as cargo shall have a certificate issued by the Marine Department (Section 16); the maintenance of insurance or financial security under paragraph one shall be in accordance with the rules, procedures, and conditions prescribed in the Ministerial Regulation (Section 15); a foreign ship not registered in a Contracting State to the Convention may apply for a certificate from the Marine Department (Section 17).

### Requirement of Contributions to the International Fund for Compensation for Oil Pollution Damage Caused by Ships Act, B.E. 2560 (2017)

As a party to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) of the International Maritime Organization (IMO), on 7 July 2017, the National Legislative Assembly of Thailand enacted the Requirement of Contributions to the International Fund for Compensation for Oil Pollution Damage Caused by Ships, B.E. 2560 (2017), which will become effective on 6 July 2018.

The main purpose of this Act is to provide the annual contributions to the fund for compensation for pollution damage caused by ships of person who has received the contributing oil in total quantities exceeding 150,000 metric tons in each calendar year; and each of associated persons who has received oil in each calendar year in the quantity not exceeding 150,000 metric tons but has

had the quantity of contributing oil, when aggregated altogether, exceeding 150,000 metric tons; in this regard, each associated person shall pay contributions in respect of the quantity actually received (Section 20).

The contributing oil under this Act means oil received from the carriage by sea at a port or an oil terminal installation in the Kingdom; and oil first received, at any installation in the Kingdom, from any other country not being a Contracting State to the Fund Convention after the carriage by sea and discharge in such country (Section 21). And legal proceedings for making claims under this Act shall fall within the jurisdiction of the Intellectual Property and International Trade Court. In this regard, the Chief Judge of the Central Intellectual Property and International Trade Court, with the approval of the President of the Supreme Court, has the power to issue any Rules on the conduct of proceedings (Section 30).

## Human Rights – Human Trafficking – Laws and Regulations

### Prevention and Suppression of Human Trafficking (No. 3) Act B.E. 2560 (2017)

On 26 January 2017, the National Legislative Assembly of Thailand enacted the Prevention and Suppression of Human Trafficking (No. 3) Act B.E. 2560 (2017) (Human Trafficking (No. 3) Act) for amending the definitions of terms and adding acts for the offence of human trafficking contained in the Prevention and Suppression of Human Trafficking Act, B.E. 2551 (2008). This new law on human trafficking has become effective since 28 January 2017.

The Human Trafficking (No. 3) Act amended termed in Section 6 of the Human Rights Trafficking Act and redefined the meanings of the acts for the purpose of exploitation as: procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person, by means of the threat or use of force, abduction, fraud, deception, abuse of power, illegal exertion of influence over others on account of their physical, psychological, educational or any kind of vulnerability, threat to take the abusive legal action against others, or of the giving money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control; or procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child.

In addition, it also adds the definitions of the terms of "exploitation" and "forced labor or service". The exploitation means the exploitation of the prostitution of others, the production or distribution of pornographic materials, the exploitation of other forms of sexual acts, slavery or practices similar to slavery, begging, removal of organ for commercial purpose, forced labor or services, or any other similar forcible extortion, regardless of such person's consent. While the term "forced labor or service" is defined as compelling the other to work or provide service through the following means: (1) Threaten to cause injury to life, body, liberty, reputation or property of the person threatened or any other person; (2) Intimidation; (3) Use of force; (4) Retention of identity documents or use the accumulated debt burden incurred by such person or any other person as the unlawful obligation; and (5) Causing such person to be in an irresistible situation.

Furthermore, this Act amends the penalty that the offence of human trafficking committed by both a person and a juristic person in Sections 52, 53 and 53/1 of the Human Trafficking Act. According to this new law, any person who committed the offence shall be liable to the punishment of an imprisonment from four years to twelve years and a fine from four hundred thousand Baht to one million and two hundred thousand Baht. If the offence is committed against a child between fifteen and eighteen years of age, the offender shall be liable to the punishment of an imprisonment from six years to fifteen years and a fine from six hundred thousand Baht to one million and five hundred thousand Baht. But if the offence is committed against a child under fifteen years of age or a person with a physical disability or mental infirmity, the offender shall be liable to the punishment of an imprisonment from eight years to twenty years and a fine from eight hundred thousand Baht to two million Baht.

The offence of human trafficking committed by a juristic person shall be liable to the punishment of a fine from one million Baht to five million Baht. If the offence is committed by a juristic person is caused by an order or an act of any director, managing director, or any person responsible for operation of such juristic person, or in case where the said person has a duty to issue an order or to perform an act refrains from issuing an order or performing an act leading to the commission of offence by such juristic person, such person shall be liable to the punishment of imprisonment from six years to twelve years and a fine from six hundred thousand Baht to one million and two hundred thousand Baht.

If an offence committed by either a person or a juristic person causes a serious injury or infection with a life-threatening serious disease to the victim, this

shall be liable to the imprisonment from eight years to twenty years and a fine from eight hundred thousand Baht to two million Baht or life imprisonment.

Moreover, the Act has added the offence which whoever procures, buys, sells, vends, brings from or sends to, detains or confines, harbors, or receives any person not over fifteen years of age for work or service which is seriously harmful and having an impact on body or mind, growth or development, or by its nature or the circumstances in which it is carried out, is likely to harm the safety or morals of such person, shall be liable to the punishment of imprisonment, not exceeding four years and a fine of not exceeding four hundred thousand Baht. And in the case where the offence has committed an ascendant against his descendant due to the indigency, or after taking into account the offence condition, or other extenuating grounds, the Court may not inflict any punishment upon the offender at all (Section 56/1).

# State Practice of Asian Countries in International Law

***Vietnam***

*Tran Viet Dung**

**International Economic Law – Expropriation – Investor-State Dispute Settlement – Property Taking – Investor Protection**

**Trinh Vinh Binh v. Socialist Republic of Vietnam (International Court of Arbitration – International Chamber of Commerce)**

From 21 August 2017 to 27 August 2017, the International Court of Arbitration (ICA) begun the hearing between Mr. Trinh Vinh Binh, a Dutch-Vietnamese businessman, and the Socialist Republic of Vietnam. The case concerns the alledged breaches by Vietnam the 1994 Treaty between Vietnam and Netherlands on Encouragement and Reciprocal Protection of Investments (BIT).

The Trinh Vinh Binh v. Vietnam case was originally initiated in 2003 before the Stockholm Arbitration Institute of the Stockholm Chamber of Commerce by Mr. Trinh. The case arose out of Mr. Trinh's investment in real estate, food processing and several tourism assets in Vietnam in the early 1990s. As the Law on Foreign Investment 1987 did not allow foreigners (including Vietnamese with foreign citizenship) to use their own names to buy house and receive transfer of land ownership, Mr. Trinh asked his family members to use their names to register ownership of the land, houses and a few Vietnamese businesses in order to justify these certificates *prima facie*.

In 1996, Mr. Trinh was arrested and prosecuted by the provincial competent authorities for many criminal charges, including violations of regulations on land rights, tax evasion and bribery. It was reported that until the time of being arrested, Mr. Trinh held the *de facto* ownership of 11 houses, 114 grounds and 2,847,745 meter square of land. Mr. Trinh was sentenced by the court of Ba Ria Vung Tau Province for 11 years of prisonment and all of his property was confiscated.

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In 2000, the Vietnamese authorities expelled Mr. Trinh to Cambodia. After returning to the Netherlands Mr. Trinh proceeded to sue the government of Vietnam in 2003, bringing the case to international arbitration based on the provisions of Article 9.4 of the BIT. Accordingly, he claimed that "he suffered illegal detention, torture and abuse at the hands of state officials, as well as the confiscation of assets amounting to more than $100 million," which all breached the terms of the BIT.[1]

In 2006, the parties settled the dispute under a confidential agreement signed in Singapore.[2] However, the process of implementation of the said agreement by Ba Ria – Vung Tau Province was not appropriate.

In 2014, Mr Trinh initiated another arbitration against the government of Vietnam before the ICC to enforce the settlement agreement and demanded US$1.25 billion in compensation.[3] It is noticeable that in both cases filed in 2003 and 2015 in succession, Mr. Trinh Vinh Binh did not claim for the return of his assets but for the compensation from the host State government (respectively 100 million USD and 1.25 billion USD), showing a wise strategy from the investor to dodge the issue of whether there was a investment and, even more, a legal investment in case the domestic law is considered by the *lex loci proprietas*. So far there is no official announcement on the result of the case due to the nature of confidentiality of arbitration proceedings.

Besides other controversial disputes made by foreign investors such as Saigon Metropolitan and Recofi against the Vietnamese government, the case of Trinh Vinh Binh is considered a landmark one attracting much consideration and comments from not only Vietnam but also international community. Had the arbitral award been rendered in favour of the investor, the Vietnamese government may face a substantial burden of damages and the undermined reputation as a host State.

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1 Dai Tamada, *Impact of Trans-Pacific Partnership Agreement and Investor-State Dispute Settlement on Vietnam and Japan*, 64 KOBE LAW JOURNAL 1, 4 (2014); Luke Eric Peterson, *BIT Claim Against Vitetnam Settled on Confidential Terms*, *Investment Treaty News*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Mar. 27, 2007), https://www.iisd.org/pdf/2007/itn_mar27_2007.pdf; *see also* Luke Eric Peterson, *The Future of Moral Damages in Investment Treaty Arbitration*, KLUWER ARBITRATION BLOG (Apr. 14, 2009), http://arbitrationblog.kluwerarbitration.com/2009/04/14/the-future-of-moral-damages-in-investment-treaty-arbitration.

2 *Về vụ ông Trịnh Vĩnh Bình kiện VN hơn 1 tỷ USD* [*About the Case, Mr. Trinh Vinh Binh Sued Vietnam over 1 Billion USD*], BBC NEWS (Aug. 29, 2017), https://www.bbc.com/vietnamese/vietnam-41087774.sin.

3 Nguyễn Thanh Tuân, *Vụ kiện Trịnh Vĩnh Bình vs. Chính phủ Việt Nam: Một số nhận định sơ bộ* [*The Case Trinh Vinh Binh v. Vietnam Goverment: Some Preliminary Analysis*], NGHIÊN CỨU QUỐC TẾ (Sept. 4, 2017), http://nghiencuuquocte.org/2017/09/04/vu-kien-trinh-vinh-binh-vs-chinh-phu-viet-nam.

### International Economic Law – Enhancing the Legalisation and Compliance with WTO Law – Law on Foreign Trade Management

The National Assembly of Vietnam on 12 June 2017 adopted the Law on Foreign Trade Management No. 05/2017/QH14 (LFTM) which has entered into force since 1 January 2018. The LFTM provides amendments, supplementation and abolishment of a number of articles under the current 2005 Commercial Law of Vietnam which has been criticized for considerable lack of international integration and complicated governemental management. The law also prescribes new regulations for foreign trade activities management and development, as well as solutions for dealing with disputes regarding the imposition of foreign trade management measure in line with commitments under international treaties to which Vietnam is a signatory.

LFTM contains 8 chapters with 113 articles. Regarding the scope and subject of application, the law regulates the State management measures involved in international trade of goods, including (i) prohibition from export and import, temporary suspension from export and import; (ii) restriction from export and import; (iii) management by export and import license and conditions; (iv) certificate of origin of goods; (v) certificate of free sale; and other measures for management of foreign trade activities, including: temporary import and re-export, temporary export and re-import and border gate transfer; (vi) transit of goods; (vii) agency for goods sale and purchase for foreign business entities, authorization and acceptance of authorization in export and import; (viii) processing goods for foreign business entities and having goods processed in foreign countries.

LFTM emphasizes three main principles as basis of its provision summerized as (i) upholding compliance with international treaties which Vietnam has entered into and (ii) ensuring transparency and non-discrimination amongst economic actors, as well as (iii) simplification of procedures.[4] It is the first time a legislation in Vietnam expressly affirmed that the freedom to import and export of business entities is only restricted by prohibition or restrictive provisions, while the State only acts when the law permits.[5] The rights of

4 Law on Foreign Trade Management art. 4 (Viet.) [hereinafter LFTM].

5 For example, as specified in LFTM Article 9, the requirements of management by export and import licenses and conditions are as follows: (i) the management by condition will only be imposed if it is necessary for reasons of social safety and order, social ethics, community health, fine customs and traditions and environment protection; (ii) the management by export and import license and conditions must ensure public disclosure and transparency and savings of time and costs for State administrative agencies and of business entities; and

foreign-invested and non-commercial presence business entities are respected pursuant to international treaties that Vietnam is a member, which is in line with Vietnam's Constitution, 2014 Investment Law and 2014 Business Entities Law.

Concerning the responsibilities of the government in foreign trade management, LFTM prescribes that competent authorities should follow the "one specific measure for one specialized authority" principle. The measures are sorted in five categories, including: (i) procedural measures (Chapter II), (ii) technical and sanitary measures (Chapter III), (iii) trade defense measures (Chapter IV), (iv) emergency controlling measures (Chapter V) and foreign trade development measures (Chapter VI). There are three notable changes of the foreign trade law in this section of LFTM. First, the foreign trade measures are prescribed to be applied once for each special custom zone in order to simplify administrative procedures to gain benefits from such areas which are border gate economic and seaport zones. Second, the purpose of providing technical and sanitary measures is to facilitate export activities and the State's risk management.[6] LFTM also categorizes types of goods as subjects of specific measures with the aim to harmonize the need for foreign trade management, domestic industry protection and export encouragement.[7] Third, the trade defense measures provisions are codified from and basically reiterates the three separate Ordinances issued by the Standing Committee of the National Assembly, namely Ordinance on Antidumping No. 20/2004/PL-UBTVQH11

(iii) the management by export and import license and conditions shall comply with international treaties to which the Socialist Republic of Vietnam is a signatory.

6 LFTM art. 60 prescribes:

1. The imposition of technical and quarantine measures aims to ensure the quality of products and the safety of human health; protect animals, plants, ecological environment and biodiversity; prevent epidemics and ensure the national security and interests.
2. The imposition of technical and quarantine measures shall comply with the following principles:
   a. The imposition shall be transparent, not discriminate and avoid creating unnecessary barriers to foreign trade activities, especially to exports;
   b. Measures for risk management shall be imposed within the allowable conditions and in accordance with the management requirements and international treaties to which the Socialist Republic of Vietnam is a signatory;
   c. The imposition shall ensure other principles in accordance with regulations of law on the quality of products, products, technical standards and regulations, food safety, measurements, phytosanitary measures and plant protection, veterinary medicine and prevention of infections.

7 Article 62 on the imposition of sanitary measures on animals and animal products, *id.* art. 62; Article 63 on the imposition of phytosanitary measures, *id.* art. 63; and Article 64 on the imposition of border health quarantine measures, *id.* art. 64.

dated 29 April 2004, Ordinance on Countervailing Duty No. 22/2004/PL-UBTVQH11 dated 20 August 2004 and Ordinance on Safeguard Measures No. 42/2002/PL-UBTVQH10 dated 11 June 2002.[8] However, while the application period of the anti-dumping and countervailing duties is consistent with the relevant provisions of the WTO's Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,[9] the LFTM provides for an application period of maximum 10 years (inclusive of the original period of four years and any extensions thereof) with respect to safeguard measures.[10] In previous regulations the maximum period for application of safeguard was 8 years only. This new regulation of LFTM reflects the S&D regulations of the WTO's Agreement on Safeguards applicable for developing countries. It should be noted that the LFTM also provides notable supplements regarding anti-evasion of trade remedies[11] and how to deal with investigation invoked by foreign authorities.[12]

LFTM shall take effect from 1 January 2018 and replace a number of laws and regulations on foreign trade, including (i) Ordinance No. 42/2002/PL – UBTVQH10 on trade remedies for imports; (ii) Ordinance No. 20/2004/PL-UBTVQH11 on anti – dumping; (iii) Ordinance No. 22/2004/PLUBTVQH11 against commodity subsidies, excluding the cases handled by the state authorities before 01/01/2018; (iv) and Article 28.3, Article 29.3, Article 30.3, Articles 31, 33, 242, 243, 244, 245, 246 and 247 of the Commercial Law in 2005.

Overall, the adoption of LFTM has demonstrated the relentless effort of Vietnam in ensuring the transparency, publicity, equality and simplification of administrative procedures, as well as securing legal rights and benefits of the State and business entities in all economic sectors.

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8 Accordingly, trade remedy duties are in addition to normal import duties (if any), and are applied only after an investigation into the matter has been properly conducted and has resulted in an affirmative determination. The lesser duty rule is also applied. That is, the application of the trade remedy duties should be limited only to adequately remove the injury to the domestic industry.

9 LFTM, *supra* note 4, arts. 81.3(d), 89.3(d).

10 *Id.* art. 95.2(d) (regulating "[t]he total duration of the safeguard measure including the duration of the provisional measure, the official measure and extension thereof shall not exceed 10 years").

11 *Id.* art. 72.2 (specifying "[t]he trade remedy being imposed will be expanded if the investigating authority discovers the evasion of trade remedy").

12 *Id.* art. 76.1 (stating "[i]f a Vietnamese trader is subject to trade remedy investigation, at the request of the relevant association or trader, the Ministry of Industry and Trade will take charge and cooperate with Ministries, ministerial authorities and competent authorities in the provision of the following assistance for the trader within its duties and powers").

## International Economic Law – Import-Export – Trade Remedies – WTO Dispute Settlement

### Imposition of Anti-Dumping Measures against Imported H-Shaped Steel Products from the People's Republic of China (Including Hong Kong)

On 20 March 2017, the Vietnam Ministry of Industry and Trade (MOIT) issued the Decision No.957/QD-BCT on Imposition of Provisional Anti-Dumping Measure on H-Shaped Steel Products imported from the People's Republic of China (including Hong Kong). Results of the investigation conducted from 1 April 2015 to 31 March 2016 showed that, based on the import volume of subject merchandise into Vietnam with the dumping margin ranging from 21.18 percent to 36.33 percent, deferred imposition of provisional anti-dumping measure would significantly obstruct the establishment of Vietnamese domestic manufacturing industries and that it is difficult to handle the anti-dumping status. Hence, pursuant to the Decision, the provisional anti-dumping measure would come into force after 15 days from the date of promulgation of the Decision on imposition of provisional anti-dumping measure, i.e., 5 April 2017. The provisional anti-dumping measure shall be imposed within duration of 120 days, i.e., up to 2 August 2017. The provisional anti-dumping measure shall be lifted at the end of the investigation period.

At the end of the review period, based on the findings of the investigation, Vietnam Trade Remedies Authority may propose to the MOIT one of the following options: (i) continue to apply anti-dumping measures in accordance with the current regulations; (ii) adjust anti-dumping measures in line with the results of the review; or (iii) terminate the application of anti-dumping measures.

### Termination of the Investigation Regarding the Alleged Dumping of Wind Towers Exported to Australia from the Socialist Republic of Vietnam

The Anti-Dumping Commission of Australia (ADC) initiated an investigation into the alleged dumping of certain wind towers under HS Code 7308.20.00, 7308.90.00 and 8502.31.10 exported to Australia from Vietnam on 8 June 2017, following an application lodged by Australian wind tower manufacturers Keppel Prince Engineering Pty Ltd and Ottoway Fabrication Pty Ltd in 2014.

The investigation examined transactions that took place from 1 January 2015 to 31 December 2016, with the ADC estimating a dumping margin of 15.7 per cent on Vietnam's wind towers.

On 7 August 2017, the ADC temporarily decided not to apply anti-dumping duties on wind towers imported from Vietnam as there were not sufficient grounds to establish that the goods are dumped or to establish a causal link between dumped goods and material injury for the Australian industry.[13]

### Initiation of Safeguard Investigation Against Imported Fertilizer Products by the Vietnam Ministry of Industry and Trade

The Vietnam Ministry of Industry and Trade has officially issued Decision No. 1682A/QĐ-BCT to initiate safeguard investigation on diammonium phosphate (DAP) and monoammonium phosphate (MAP) fertiliser products imported into Vietnam on 12 May 2017. On 17 May 2017, Vietnam also notified the WTO's Committee on Safeguards that it initiated on 12 May 2017 a safeguard investigation on mineral or chemical fertilizers.

It followed by the request of two Vinachem manufacturers operating in DAP fertiliser production on 31 March 2017, proposing that safeguard measures should be applied to a number of imported fertiliser products due to their negative impact on domestic industry. The investigation was carried out in accordance with the provisions of the World Trade Organisation (WTO) Agreement on Safeguards and Ordinance No.42/2002 on Safeguards against import products into Vietnam. On August 4th, the Ministry of Industry and Trade decided to apply temporary safeguard measures on some DAP and MAP fertiliser products imported into Vietnam, with the applied temporary safeguard tax being VND 1,855,790 per tonne, as the preliminary investigation concluded that the imported goods seriously harmed domestic fertiliser production. The decision was effective from 19 August 2017, to 6 March 2018. According to the schedule published by the MOIT, the decision to impose official safeguard measures was concluded on 2 March 2018.[14]

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13 Anti-Dumping Commission, Statement of Essential Facts No. 405 – Alleged Dumping of Wind Towers Exported to Australia from the Socialist Republic of Vietnam §§ 7.10, 8 (2017), https://www.industry.gov.au/sites/default/files/adc/public-record/029_-_report_-_statement_of_essential_facts_-_sef_405.pdf.

14 WTO Center, *Phân bón – Việt Nam điều tra áp dụng biện pháp tự vệ* (*SG06*) [*Fertilizer-Vietnam Safeguard Investigation* (*SG06*)], WTO Center VCCI Trungtamwt (Dec. 5, 2017), http://chongbanphagia.vn/phan-bon--viet-nam-dieu-tra-ap-dung-bien-phap-tu-ve-sg06-n16646.html.

### International Economic Law – Trade Liberalisation – International Economic Cooperation – The Trans-Pacific Partnership Trade Pacts Advances Without the United States

After the United States has formally withdrawn from the Trans-Pacific Partnership Agreement (TPP), Vietnam together with other members like Japan, Australia and New Zealand had actively persuaded other TPP negotiating members to continue the regional trade agreement without the United States.

On 9 November 2017, ministers of eleven TPP member countries held a private meeting to discuss the consigning of the TPP without the United States at the APEC Ministerial Meeting held in the city of Danang, Vietnam. Despite the facts that some delegates were concerned that some provisions of the agreement may negatively affect their domestic industries, such as the yarn-forward rules of origin in textile sectors and the investor protection mechanism, or that some countries showed preference for negotiation trade agreement with the United States, the countries agreed on the necessity to foster the establishment of a free trade area in Asia-Pacific.

On 11 November 2017, after two days of negotiation, the 11 countries announced to stick to the core elements of the TPP. The new deal – the Comprehensive and Progressive Agreement for the TPP (CPTPP) has suspended 20 provisions of the original TPP, mostly on intellectual property. Vietnam's Deputy Prime Minister Pham Binh Minh commented that the declaration achieved this year is stronger than ever, "[it would play a] crucial role in support[ing] a rules-based, free, open, fair, transparent, and inclusive multilateral trading system,"[15] and "also note the importance of non-discriminatory, reciprocal and mutually advantageous trade and investment frameworks."[16]

The observers highly valued the role of Vietnam as chair, co-chair of the APEC committees and working groups. This event affirmed the active role of Vietnam in the APEC and marked an important milestone in the country's external policy of expansion, diversification and multilateralisation of relations

15 Asia-Pacific Economic Cooperation, *The 25th APEC Economic Leaders Cooperation Da Nang Declaration: Creating New Dynamism, Fostering a Shared Future* ¶ 20 (Nov. 11, 2017), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2017/2017_aelm.

16 *See id.* ¶ 14.

and international economic integration.[17] Furthermore, as the CPTPP is open for later participation of other countries besides the 11 original members, by becoming an earlybird, Vietnam took the opportunities to voice its concern during the drafting negotiation and, therefore, sucessfully protected the country's essential priorities and interests.

17 *APEC 2017: Vietnam Affirms Active Role in APEC*, The Voice of Vietnam (Nov. 6, 2017), https://english.vov.vn/apec-vietnam-2017/apec-2017-vietnam-affirms-active-role-in-apec-361817.vov.

*Literature*

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# International Law in Asia: A Bibliographic Survey – 2017

*Christine Sim*

## Introduction

This bibliography provides information on recently published books, articles, notes, book reviews and other materials dealing with international law in Asia, broadly defined. Only English language publications are listed. Most of the materials can be listed under multiple categories, but each item is listed under a single primary category. Edited books, however, may appear more than once if multiple chapters from the book are listed under different categories. Readers are advised to refer to all categories relevant to their research. The headings used in this year's bibliography are as follows:

1. Asian Culture and Theory
2. Boundary Delimitation and Sovereignty
3. International Organizations and Non-State Actors
4. International Humanitarian Law and Criminal Law
5. Transnational Migration
6. Law of the Sea
7. International Dispute Settlement
8. Development
9. Environmental Law
10. Intellectual Property and Technology
11. International Economic Law
12. International Space Law

The bibliography is limited to new materials published in 2017 or previously published materials that have updated editions in 2017. Please refer to previous editions of the Asian Yearbook of International Law for bibliographies from earlier editions.

## 1 Asian Culture and Theory

Amitav Acharya, '*Theorising the International Relations of Asia: Necessity or Indulgence?' Some Reflections*, 30(6) The Pacific Review (2017).

C.H. Alexandrowicz, David Armitage and Jennifer Pitts, The Law of Nations in Global History (2017).

Bhavani Raman, *Law and Identity in Colonial South Asia*, 42(4) Law & Social Inquiry 1210–1214 (2017).

Weitseng Chen, The Beijing Consensus? How China Has Changed Western Ideas of Law and Economic Development (2017).

B.S. Chimni, International Law and World Order: A Critique of Contemporary Approaches (2017).

Chen Yifeng, *International Law as Mere Obligations: Supremacy of International Law and a Chinese Conception*, 5(2) Peking University Law Journal (2017).

Chia-Jui Cheng (Ed.), A New International Legal Order: Collected Courses of the Xiamen Academy of International Law (2017).

Bryan H. Druzin, *Why Does Soft Law Have Any Power Anyway?*, 7(2) Asian Journal of International Law 361–378 (2017).

George Rodrigo Bandeira Galindo, César Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16(2) Chinese Journal of International Law 251–270 (2017).

Andreas Herberg-Rothe, *Lessons for World War I for the Rise of Asia and Their Civilizations*, 14(2) International Studies Journal (isj) 125–134 (2017).

Yang Liu, *History and Theory of International Law – "L'être situé", Effectiveness and Purposes of International Law: Essays in Honour of Professor Ryuichi Ida edited by Shotaro HAMAMOTO, Hironobu SAKAI, and Akiho SHIBATA. Leiden/Boston: Brill-Nijhoff, 2015. 315 pp.*, 7(1) Asian Journal of International Law 217–218 (2017).

Tiyanjana Maluwa, Max du Plessis and Dire Tladi (Eds.), The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard (2017).

Anthony Milner, *Culture and the International Relations of Asia*, 30(6) The Pacific Review (2017).

Richard Nzerem, *Europe in Emerging Asia, Opportunities and Obstacles in Political and Economic Encounters Book Review*, 43(2) Commonwealth Law Bulletin 296–300 (2017).

Bimal N. Patel, The State Practice of India and the Development of International Law: Dynamic Interplay Between Foreign Policy and Jurisprudence (2017).

Shisong Jiang, *Invitation to the Sociology of International Law by Moshe HIRSCH. Oxford: Oxford University Press, 2015. xvii+221 pp.*, 7(1) Asian Journal of International Law 218–219 (2017).

Anthea Roberts, Is International Law International? (2017).

DIAN A.H. SHAH, CONSTITUTIONS, RELIGION AND POLITICS IN ASIA: INDONESIA, MALAYSIA AND SRI LANKA (2017).

Joel Slawotsky, *The Clash of Architects: Impending Developments and Transformations in International Law*, 3(1) CHINESE JOURNAL OF GLOBAL GOVERNANCE 83–159 (2017).

Elizabeth Wishnick, *In Search of the 'Other' in Asia: Russia–China Relations Revisited*, 30(1) THE PACIFIC REVIEW (2017).

SATOSHI YAMADA, SELECT HISTORY AND THEORY OF INTERNATIONAL LAW (2017).

PO JEN YAP, COURTS AND DEMOCRACIES IN ASIA (2017).

ONUMA YASUAKI, INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD (2017).

YUN ZHAO, MICHAEL NG (EDS.), CHINESE LEGAL REFORM AND THE GLOBAL LEGAL ORDER: ADOPTION AND ADAPTATION (2017).

## 2 BOUNDARY DELIMITATION AND SOVEREIGNTY

JANE A. HOFBAUER, SOVEREIGNTY IN THE EXERCISE OF THE RIGHT TO SELF-DETERMINATION (2017).

Hee Eun Lee, *South Korea's Claim to Dokdo*, 5(2) KOREAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 175–195 (2017).

Sharmila L. Murthy, Fatima Mendikulova, *Water, Conflict, and Cooperation in Central Asia: The Role of International Law and Diplomacy*, 18(3) VERMONT JOURNAL OF ENVIRONMENTAL LAW 400–454 (2017).

Roda Mushkat, *China's Multi-Layered Attitude Towards State Sovereignty: Theory, Practice and Broad Implications*, 47(2) HONG KONG LAW JOURNAL 659–688 (2017).

S.M. Noor, Abdul Maasba Magassing, Laode Abd. Gani, Birkah Latif, Saputan Kadarudin, Robert Lowell, *Indonesia and South China Sea from International Law Point of View*, 67 JOURNAL OF LAW, POLICY AND GLOBALIZATION 208–217 (2017).

MARÍA QUEROL, FRESHWATER BOUNDARIES REVISITED: RECENT DEVELOPMENTS IN INTERNATIONAL RIVER AND LAKE DELIMITATION (2017).

Waseem Ahmad Qureshi, *The Indus Basin: Water Cooperation, International Law and the Indus Waters Treaty*, 26(1) MICHIGAN STATE INTERNATIONAL LAW REVIEW 43–82 (2017).

Waseem Ahmad Qureshi, *Indus Basin Water Management Under International Law*, 25(1) UNIVERSITY OF MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW 63–126 (2017).

Constantinos Yiallourides, *Senkaku/Diaoyu: Are They Islands*, 50(2) INTERNATIONAL LAWYER 347–366 (2017).

## 3 Non-State Actors and International Organisations

Gu Bin, MDBs' *Accountability Mechanism: A Perspective of AIIB*, 51(3) Journal of World Trade 409–423 (2017).

Yen-Lin Agnes Chiu, *The AIIB and the EU: Legal Opportunities and Risks*, 28(5) European Business Law Review 689–711 (2017).

Imelda Deinla, The Development of the Rule of Law in Asean: The State and Regional Integration (2017).

Ian Hurd, International Organizations: Politics, Law, Practice (2017).

Natalie Y. Morris-Sharma, *The ILC's Draft Articles Before the 69th Session of the UNGA: A Reawakening?*, 7(1) Asian Journal of International Law 1–12 (2017).

Michael Ramsden, *Uniting for MH17*, 7(2) Asian Journal of International Law 337–360 (2017).

Gerard J. Sanders, *The Asian Infrastructure Investment Bank and the Belt and Road Initiative: Complementarities and Contrasts*, 16(2) Chinese Journal of International Law 367–371 (2017).

Peter Yeoh, *Risk Issues in Global Supply Chain Management*, 38(3) Business Law Review 80–88 (2017).

## 4 International Humanitarian Law, Human Rights and Criminal Law

Shreya Atrey, *Fifty Years on: The Curious Case of Intersectional Discrimination in the ICCPR*, 35(3) Nordic Journal of Human Rights (2017).

Nicola Edwards, *The Biak Massacre Citizens' Tribunal and the Disputed Indonesian Region of West Papua*, Andrew Byrnes & Gabrielle Simm (Eds.) Peoples' Tribunals and International Law (2017).

Agnes Chong, *Analysis of Right to Water Needs Further Depth*, 18(1) Asia-Pacific Journal on Human Rights and the Law 109–[ii] (2017).

Nalesti Dewi, Yustina Trihoni, Grant R. Niemann, Marsudi Triatmodjo, *Indonesia's Human Rights Court: Need for Reform*, 18(1) Asia-Pacific Journal on Human Rights and the Law 28–47 (2017).

Andrew Heiss, Judith G. Kelley, *From the Trenches: A Global Survey of Anti-TIP NGOs and Their Views of U.S. Efforts*, 3(3) Journal of Human Trafficking 231–254 (2017).

Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence (2017).

Atin Prabandari, Antje Missbach, Yunizar Adiputera, *Whither Refugee Protection in Indonesia: Evaluating the New Presidential Regulation 125/2016 on Foreign Refugees*, 26(3) Human Rights Defender 11–13 (2017).

Heejin Kim, Regime Accommodation in International Law: Human Rights in International Economic Law and Policy (2017).

Jiang Xiaoyi, *Guan Jianqiang, Zhongri Zhanzheng Lishi Yiliu Wenti de Guojifa Yanjiu, Unsolved Issues from the Sino-Japanese War and International Law*, 16(4) Chinese Journal of International Law 847–849 (2017).

Thomas N. Kim, *Recent Japanese Legislation Unconstitutional: Reasons and Consequences*, 50(1) Cornell International Law Journal 147–vi (2017).

Ekaterina Yahyaoui Krivenko, Rethinking Human Rights and Global Constitutionalism from Inclusion to Belonging (2017).

Yao Li, Exclusion from Protection as a Refugee: An Approach to a Harmonizing Interpretation in International Law (2017).

César Rodriguez-Garavito (Ed.), Business and Human Rights Beyond the End of the Beginning (2017).

Vitit Muntarbhorn, The Core Human Rights Treaties and Thailand (2017).

Myriam Oehri, *Labour Rights Promotion in the Absence of Conditionality? How the EU and the US Engage China and India*, 22(2/1) European Foreign Affairs Review, 137–156 (2017).

Matthew Seet, *Finding Reprieve: Should the Global Movement Against Capital Punishment Embrace China's Suspended Death Sentence as a Model for Other Retentionist States to Emulate?*, 16(3) Chinese Journal of International Law 453–474 (2017).

Heidarali Teimouri, *Other Areas of International Law – Routledge Handbook of Law and Terrorism edited by Genevieve Lennon and Clive Walker. New York: Routledge, 2015. xix+486 pp.*, 7(1) Asian Journal of International Law 225 (2017).

Jeremy M. Tsuchitani-Watson, *Karoshi, Karo Jisatsu, and Gender Discrimination: Japan's Human Rights Violations*, 19(2) Asian-Pacific Law & Policy Journal 141–193 (2017–2018).

Dire Tladi, *The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?*, 16(3) Chinese Journal of International Law 425–451 (2017).

Yoon Jin Shin, A Transnational Human Rights Approach to Human Trafficking: Empowering the Powerless, Series: Studies in Intercultural Human Rights (2017).

## 5 Transnational Migration

Greg Acciaioli, Helen Brunt & Julian Clifton, *Foreigners Everywhere, Nationals Nowhere: Exclusion, Irregularity, and Invisibility of Stateless Bajau Laut in Eastern Sabah, Malaysia*, 15(3) Journal of Immigrant & Refugee Studies 232–249 (2017).

Catherine Allerton, *Contested Statelessness in Sabah, Malaysia: Irregularity and the Politics of Recognition*, 15(3) Journal of Immigrant & Refugee Studies 250–268 (2017).

Jessica Ball, Leslie Butt & Harriot Beazley, *Birth Registration and Protection for Children of Transnational Labor Migrants in Indonesia*, 15(3) Journal of Immigrant & Refugee Studies 305–325 (2017).

Megan Bradley, Angela Sherwood, Lorenza Rossi, Rufa Guiam & Bradley Mellicker, *Researching the Resolution of Post-Disaster Displacement: Reflections from Haiti and the Philippines*, 30(3) Journal of Refugee Studies 363–386 (2017).

Bilah Dewansyah, Wicaksana Dramanda & Imam Mulyana, *Asylum Seekers in a Non-Immigrant State and the Absence of Regional Asylum Seekers Mechanism: A Case Study of Rohingya Asylum Seekers in Aceh-Indonesia and Asean Response*, 7(3) Indonesia Law Review 341–366 (2017).

Bassina Farbenblum, *Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin*, 7(1) Asian Journal of International Law 152–184 (2017).

Vannessa Hearman, *Troubled Transit: Asylum Seekers Stuck in Indonesia. By Antje Missbach*, 30(4) Journal of Refugee Studies 628–630 (2017).

Dhammika Herath, R. W. D. Lakshman, A. Ekanayake, *Urban Resettlement in Colombo from a Wellbeing Perspective: Does Development-Forced Resettlement Lead to Improved Wellbeing?*, 30(4) Journal of Refugee Studies 554–579 (2017).

Gerhard Hoffstaedter, *Refugees, Islam, and the State: The Role of Religion in Providing Sanctuary in Malaysia*, 15(3) Journal of Immigrant & Refugee Studies 287–304 (2017).

Claire Higgins, *Status Determination of Indochinese Boat Arrivals: A 'Balancing Act' in Australia*, 30(1) Journal of Refugee Studies 89–105 (2017).

Choon Yen Khoo, Maria Platt & Brenda S.A. Yeoh, *Who Migrates? Tracking Gendered Access to Migration Within Households "In Flux" Across Time*, 15(3) Journal of Immigrant & Refugee Studies 326–343 (2017).

Marie McAuliffe, *Protection Elsewhere, Resilience Here: Introduction to the Special Issue on Statelessness, Irregularity, and Protection in Southeast Asia*, 15(3) Journal of Immigrant & Refugee Studies 221–231 (2017).

Nyi Nyi Kyaw, *Unpacking the Presumed Statelessness of Rohingyas*, 15(3) Journal of Immigrant & Refugee Studies 269–286 (2017).

Tom Obokata, *The Value of International Law in Combating Transnational Organized Crime in the Asia-Pacific?*, 7(1) Asian Journal of International Law 39–60 (2017).

Andreas Schloenhardt, Hamish Macdonald, *Barriers to Ratification of the United Nations Protocol Against the Smuggling of Migrants Reawakening?*, 7(1) Asian Journal of International Law 13–38 (2017).

Paradee Thoresen, Angela Fielding, Sue Gillieatt, Stian H. Thoresen, *Identifying the Needs of Refugee and Asylum-Seeking Children in Thailand: A Focus on the Perspectives of Children*, 30(3) Journal of Refugee Studies 426–446 (2017).

Alexandra Xanthaki, Sanna Valkonen, Leena Heinämäki and Piia Kristiina Nuorgam (Eds.), Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges (2017).

Sangeetha Yogendran, *ASEAN Failure to Implement the Customary International Law Principle of Non-Refoulement during the 2015 Boat Crisis*, 26(3) Human Rights Defender 13–15 (2017).

## 6 Law of the Sea

*State Law of the Sea Practice in Asian Pacific States,* 2(2) Asia-Pacific Journal of Ocean Law and Policy 317 (2017).

Donald K. Anton, *Restricted Access Negotiating the Settlement of the Timor Sea Boundary Dispute Between Australia and Timor Leste*, *2(1)* Asia-Pacific Journal of Ocean Law and Policy 187–191 (2017).

Lowell Bautista, *Philippine Recent Legal Developments on Adapting to Climate Change*, (2)1 Asia-Pacific Journal of Ocean Law and Policy 171–173 (2017).

John G. Butcher and R.E. Elson, Sovereignty and the Sea: How Indonesia Became an Archipelagic State (2017).

Edwin Bikundo, *Restricted Access Artificial Islands, Artificial Highways and Pirates: An East African Perspective on the South China Sea Disputes*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 140–166 (2017).

Zaki Mubarok Busro, *Burning and/or Sinking Foreign Fishing Vessels Conducting Illegal Fishing in Indonesia Some Obligations and Loopholes*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 174–179 (2017).

Huey-Shian Chung, *Recent Developments and Challenges of Ocean Laws in Taiwan*, 2(2) Asia-Pacific Journal of Ocean Law and Policy 338–346 (2017).

Huey-Shian Chung, *Recent Developments and Challenges of Ocean Laws in Taiwan: Progress in Area-Based Marine Conservation*, 2(2) Asia-Pacific Journal of Ocean Law and Policy 338–346 (2017).

Vu Hai Dang, Marine Protected Areas Network in the South China Sea (2017).

David Freestone, Moon Sang Kwon and Seokwoo Lee, *Marine Environmental Protection in Asia: Regional Implementation of IMO Conventions*, 2(2) Asia-Pacific Journal of Ocean Law and Policy 195–200 (2017).

Robert Beckman and Zhen Sun, *The Relationship Between* UNCLOS *and* IMO *Instruments*, 2(2) Asia-Pacific Journal of Ocean Law and Policy 201–246 (2017).

International Tribunal for the Law of the Sea, The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016 (2017).

David Leary, *The Prevailing Wind: Recent Developments, Challenges and Future Prospects for Wind Energy in the Coastal Zone in Key Jurisdictions in the Asia-Pacific Region*, 20 Asia Pacific Journal of Environmental Law 115–137 (2017).

Nengye Liu and Md Saiful Karim, *South China Sea after the Philippines v. China Arbitration Conflict and Cooperation in Troubled Waters*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 3–7 (2017).

Michelle Lim and Nengye Liu, *Condominium Arrangements as a Legal Mechanism for the Conservation of the South China Sea Large Marine Ecosystem*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 52–87 (2017).

Douglas MacFarlane, *The Slave Trade and the Right of Visit Under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand* 7(1) Asian Journal of International Law 94–123 (2017).

Naila Maier-Knapp, *The EU as an Actor in Southeast Asia in the Context of the South China Sea Arbitration*, 22(4) European Foreign Affairs Review 455–472 (2017).

Sri Asih Roza Nova, *Illegal, Unreported and Unregulated Fishing: The Impacts and Policy for Its Completion in Coastal West of Sumatera*, 14(2) Indonesian Journal of International Law 237–250 (2017).

James Kraska, *Maritime Confidence-Building Measures for Navigation in the South China Sea*, 32(2) International Journal of Marine and Coastal Law 268–297 (2017).

Jeffrey McGee, Brendan Gogarty and Danielle Smith, *Associational Balance of Power and the Possibilities for International Law in the South China Sea*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 88–116 (2017).

Moira McConnell, Dominick Devlin and Cleopatra Doumbia-Henry, The Maritime Labour Convention, 2006: A Legal Primer to an Emerging International Regime (2017).

Cameron Moore, *The Arbitral Award in the Matter of the South China Sea Between the Philippines and China: What are the Implications for Freedom of Navigation and the*

*Use of Force?*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 117–139 (2017).

Elisa Morgera, Elsa Tsioumani and Matthias Buck, Unraveling the Nagoya Protocol (2017).

A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity (2017).

Joanna Mossop, *Can the South China Sea Tribunal's Conclusions on Traditional Fishing Rights Lead to Cooperative Fishing Arrangements in the Region?*, 3(2) Asia-Pacific Journal of Ocean Law and Policy (2017).

Joanna Mossop, The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities (2017).

Myron H. Nordquist, John Norton Moore, Robert Beckman and Ronán Long (Eds.), Freedom of Navigation and Globalization (2017).

Arif Havas Oegroseno, *State Practices in Southeast Asia: Possible Collaboration Amongst Claimants in the South China Sea Dispute*, 32(2) International Journal of Marine and Coastal Law 364–372 (2017).

Hadyu Ikrami, *Indonesia's Reform of Its Fisheries Law and Policy & Cooperation with* asean *in Combating iuu Fishing*, 2(2) Asia-Pacific Journal of Ocean Law and Policy 318–330 (2017).

Min Gyo Koo, *Belling the Chinese Dragon at Sea: Western Theories and Asian Realities*, 48(1) Ocean Development and International Law 52–68 (2017).

Sophia Kopela, *Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration*, 48(2) Ocean Development and International Law 181–207 (2017).

Xuexia Liao, *Evaluation of Scientific Evidence by International Courts and Tribunals in the Continental Shelf Delimitation Cases*, 48(2) Ocean Development and International Law 136–157 (2017).

Jamil Ddamulira Mujuzi, *The Mauritian Piracy Act: A Comment on the Director of Public Prosecutions v Ali Abeoulkader Mohamed Decision*, 48(1) Ocean Development and International Law 69–78 (2017).

Millicent McCreath, *Burgeoning Practice of Southeast Asian States to Protect the Marine Environment from the Effects of International Shipping*, 2(2) Asia-Pacific Journal of Ocean Law and Policy 268–295 (2017).

Monacelli Nicholas, *Applying Cold-Ironing Regulation in Southeast Asian Ports to Reduce Emissions*, 2(2) Asia-Pacific Journal of Ocean Law and Policy 296–316 (2017).

Zoe Scanlon, *Incorporating Taiwan in International Fisheries Management: The Southern Indian Ocean Fisheries Agreement Experience*, 48(1) Ocean Development and International Law 35–51 (2017).

Jeffrey J. Smith, *A High Tide of Cooperation? The Canada-United States Joint Statement on the Arctic*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 168–170 (2017).

Stephen Wakefield Smith, *asean, China, and the South China Sea: Between a Rock and a Low-Tide Elevation*, 29(1) University of San Francisco Maritime Law Journal 29–42 (2016–2017).

Matthew Stubbs and Dale Stephens, *Dredge Your Way to China? The Legal Significance of Chinese Reclamation and Construction in the South China Sea*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 25–51 (2017).

Yoshifumi Tanaka, *Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits)*, 48(1) Ocean Development and International Law 365–385 (2017).

Yen Hoang Tran, *The South China Sea Arbitral Award: Legal Implications for Fisheries Management and Cooperation in the South China Sea*, 6(1) Cambridge International Law Journal 87–94 (2017).

Anastasia Telesetsky, *New Governance Models for Managing Coastal Fisheries*, 5(1) Korean Journal of International and Comparative Law 83–99 (2017).

Chris Whomersley, *The Award on the Merits in the Case Brought by the Philippines Against China Relating to the South China Sea: A Critique*, 16(3) Chinese Journal of International Law 387–423 (2017).

Md Saiful Karim, *Maritime Terrorism and the Role of Judicial Institutions in the International Legal Order*, 16(2) Chinese Journal of International Law 373–375 (2017).

Hui Zhong and Michael White, *South China Sea: Its Importance for Shipping, Trade, Energy and Fisheries*, 2(1) Asia-Pacific Journal of Ocean Law and Policy 9–24 (2017).

Keyuan Zou and Lei Zhang, *Implementing the London Dumping Convention in East Asia*, 2(2) Asia-Pacific Journal of Ocean Law and Policy 247–267 (2017).

## 7 International Dispute Settlement

Nobuo Hayashi, Cecilia M. Bailliet (Eds.), The Legitimacy of International Criminal Tribunals (2017).

Bill Hayton, *Denounce but Comply: China's Response to South China Sea Arbitration Ruling*, 18(2) Georgetown Journal of International Affairs 104–111 (2017).

Qisheng He, *Chronology of Practice: Chinese Practice in Private International Law in 2016*, 16(4) Chinese Journal of International Law 787–843 (2017).

Hoa Nguyen, *Principled Negotiation: The Final Answer to the South China Sea Dispute*, 4(2) Texas A&M Law Review 287–[iv] (2017).

H.P. Lee, Marilyn Pittard (Eds.) Asia-Pacific Judiciaries: Independence, Impartiality and Integrity (2017).

J.G. Merrills, International Dispute Settlement (2017).

Kaijun Pan, *A Re-Examination of Estoppel in International Jurisprudence*, 16(4) Chinese Journal of International Law 751–786 (2017).

Sahana Rao, *Governance of Water Resources Shared by India and Pakistan Under the Indus Waters Treaty: Successful Elements and Room for Improvement*, 25(1) New York University Environmental Law Journal 108–[ii] (2017).

Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (Eds.), Conciliation in International Law (2017).

James K. Williams, *Reigning in a Rogue: Achieving and Drafting a North Korean Nuclear Deal*, 17(1) Chicago-Kent Journal of International and Comparative Law 1–50 (2017).

Yang Chengming & Yuwen Li, *The Judicial System and Reform in Post-Mao China*, 16(1) Chinese Journal of International Law 134–136 (2017).

Kenny Yang, *Towards Cross-Cultural Fluency in Mediation Standards*, 36(1) University of Tasmania Law Review 69–86 (2017), 36 University of Tasmania Law Review 69 (2017).

Sienho Yee, *Notes on the International Court of Justice* (*Part 6*) – *The Fourth Use of Travaux Préparatoires in the LaGrand Case: To Prove the Non-Preclusion of an Interpretation*, 16(2) Chinese Journal of International Law 351–365 (2017).

Wenliang Zhang, *Sino-Foreign Recognition and Enforcement of Judgments: A Promising "Follow-Suit" Model?*, 16(3) Chinese Journal of International Law 515–545 (2017).

## 8 Development

Sharif Bhuiyan, Philippe Sands and Nico J. Schrijver (Eds.), International Law and Developing Countries (2017).

Irene Calboli, Wee Loon Ng-Loy (Eds.), Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific (2017).

Richard Kyle Paisley, Riley T. Denoon, Theressa Etmanski and Patrick Weiler, Transboundary Waters, Infrastructure Development and Public Private Partnership: Through the Prism of the Nam Theun 2 and Xayaburi Hydropower Projects (2017).

Tomme Rosanne Young and Morten Walløe Tvedt, Drafting Successful Access and Benefit-Sharing Contracts Series: Legal Studies on Access and Benefit-Sharing (2017).

## 9 Environmental Law

Handa Abidin, The Protection of Indigenous Peoples and Reduction of Forest Carbon Emissions: The Redd-Plus Regime and International Law (2017).

Harro van Assel, *The Continuing Relevance of the Asia-Pacific Partnership (†) for International Law on Climate Change*, 2017(3) Carbon & Climate Law Review (cclr) 184–186 (2017).

Nengye Liu, *International Environmental Law – Polar Oceans Governance in an Era of Environmental Change edited by Tim* stephens *and David* l. vanderzwaag. *Cheltenham/Northampton: Edward Elgar, 2014. xv + 354 pp.*, 7(1) Asian Journal of International Law 224 (2017).

Kerryn Anne Brent, *The Certain Activities Case: What Implications for the No-Harm Rule?*, 20(1) Asia Pacific Journal of Environmental Law 28–56 (2017).

Ed Couzens & Tim Stephens, *Editorial: The prospects for a Truly Regional Asian Pacific Environmental Law?*, 20(1) Asia Pacific Journal of Environmental Law 1–4 (2017).

Edward Davey, *Tropical Forests: Present Reality, Future Prospects*, 20(1) Asia Pacific Journal of Environmental Law 162–179 (2017).

Josephine Gillespie, *Andrew Cock, Governing Cambodia's Forests: The International Politics of Policy Reform*, 20(1) Asia Pacific Journal of Environmental Law 206–208 (2017).

Parvez Hassan, *Role of the South in the Development of International Environmental Law*, 1(2) Chinese Journal of Environmental Law 133–157 (2017).

Lee Jing, Preservation of Ecosystems of International Watercourses and the Integration of Relevant Rules (2017).

Joanna Kulesza, Due Diligence in International Law (2017).

David Leary, *The Prevailing Wind: Recent Developments, Challenges and Future Prospects for Wind Energy in the Coastal Zone in Key Jurisdictions in the Asia-Pacific Region*, 20(1) Asia Pacific Journal of Environmental Law 115–137 (2017).

Kathryn McCallum, *Changing Landscapes: Enforcing Environmental Laws in China Through Public Interest Litigation*, 20(1) Asia Pacific Journal of Environmental Law 57–93 (2017).

Benoit Mayer, *Climate Change Reparations and the Law and Practice of State Responsibility*, 7(1) Asian Journal of International Law 185–216 (2017).

Maureen Papas, *The 2030 Sustainable Development Agenda and the Paris Climate Agreement – Taking Urgent Action to Combat Climate Change: How Is Australia Likely to Fare?*, 20(1) Asia Pacific Journal of Environmental Law 94–114 (2017).

Tapas Kumar Sarangi, *The Forest Rights Act 2006 in Protected Areas of Odisha, India: Contextualizing the Conflict Between Conservation and Livelihood*, 20(1) Asia Pacific Journal of Environmental Law 180–205 (2017).

Peter H Sand, *International Protection of Endangered Species in the Face of Wildlife Trade: Whither Conservation Diplomacy?*, 20(1) Asia Pacific Journal of Environmental Law 5–27 (2017).

Peter H. Sand, *The Discourse on Protection of the Atmosphere in the International Law Commission*, 26(3) Review of European, Comparative & International Environmental Law 201–209 (2017).

Jay Sanderson, Plants, People and Practices: The Nature and History of the upov Convention (2017).

Raya Marina Stephan, *Climate Change Considerations Under International Groundwater Law*, 42(6) Water International (2017).

Sarah Tan Yen Ling, *The ASEAN Agreement on Transboundary Haze Pollution: Exploring Mediation as a Way Forward*, 20(1) Asia Pacific Journal of Environmental Law 138–161 (2017).

Maureen F. Tehan, Lee C. Godden, Margaret A. Young & Kirsty A. Gover, The Impact of Climate Change Mitigation on Indigenous and Forest Communities: International, National and Local Law Perspectives on redd+ (2017).

Ceri Warnock, Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal*, 20(1) Asia Pacific Journal of Environmental Law 238 (2017).

## 10 Cultural Hertiage, Intellectual Property and Technology

Lorenzo Cello, *The Legitimacy of International Interventions in Vattel's the Law of Nations*, 2(2) Global Intellectual History (2017).

Ge Chen, Copyright and International Negotiations: An Engine of Free Expression in China? (2017).

Steven Gallagher, *Purchased in Hong Kong: Is Hong Kong the Best Place to Buy Stolen or Looted Antiquities*, 24(4) International Journal of Cultural Property 479–496 (2017).

Graham Greenleaf, Asian Data Privacy Laws: Trade & Human Rights Perspectives (2017).

Yuji Hosaka, *Article 2 of the Korea-Japan Basic Treaty and Japan's Repatriation of Korean Cultural Properties: Reviewing Travaux Preparatoires*, 10(1) Journal of East Asia and International Law 157–178 (2017).

Zhixiong Huang, Kubo Mačák, *Towards the International Rule of Law in Cyberspace: Contrasting Chinese and Western Approaches*, 16(2) Chinese Journal of International Law 271–310 (2017).

Uta Kohl, The Net and the Nation State Multidisciplinary Perspectives on Internet Governance (2017).

Shin-yi Peng, Han-wei Liu, *The Legality of Data Residency Requirements: How Can the Trans-Pacific Partnership Help?*, 51(2) Journal of World Trade 183–204 (2017).

Elizabeth Siew-Kuan Ng, Graeme W. Austin (Eds.), International Intellectual Property and the asean Way: Pathways to Interoperability (2017).

Zhang Xinbao, *China's Strategy for International Cooperation on Cyberspace*, 16(3) Chinese Journal of International Law 377–386 (2017).

Weihuan Zhou, Junfang Xi, *China's Liberalization of Legal Services Under the ChAFTA: Market Access or Lack of Market Access for Australian Legal Practices*, 51(2) Journal of World Trade 233–264 (2017).

## 11 International Economic Law

Yusuf Aksar (Ed.), Implementing International Economic Law Through Dispute Settlement Mechanisms (2017).

Yvette Anthony, *The Evolution of Indirect Expropriation Clauses: Lessons from Singapore's BITs/FTAs*, 7(2) Asian Journal of International Law 319–336 (2017).

Kate Apostolova, Lexi Menish, *China and International Investment Law: Twenty Years of* icsid *Membership edited by Wenhua* shan *and Jinyuan* su. *Leiden: Brill/Nijhoff, 2015, 435 pp.*, 7(1) Asian Journal of International Law, 222–223 (2017).

Chris Brummer, *The Renminbi and Systemic Risk*, 20(3) Journal of International Economic Law 447–508 (2017).

Thomas Cottier, Ilaria Espa (Eds.) International Trade in Sustainable Electricity: Regulatory Challenges in International Economic Law (2017).

Patricia Garcia-Duran, Leif Johan Eliasson, *The Public Debate over Transatlantic Trade and Investment Partnership and Its Underlying Assumptions*, *51(1)* Journal of World Trade 23–42 (2017).

Robin Hui Huang, Nicholas Calcina Howson (Eds.), Enforcement of Corporate and Securities Law: China and the World (2017).

Xiuli Han, *The China–South Africa Bilateral Investment Treaty: National Rule of Law Versus International Rule of Law*, 24(3) South African Journal of International Affairs (2017).

Locknie Hsu, *The Role and Future of Sovereign Wealth Funds: A Trade and Investment Perspective*, 52(4) Wake Forest Law Review 837–856 (2017).

Khuram Iqbal, *Significance and Security of* cpec*: A Pakistani Perspective*, 66 China International Studies 132–147 (2017).

Jong Woo Kang, Dorothea M. Ramizo, *Impact of Sanitary and Phytosanitary Measures and Technical Barriers on International Trade*, 51(4) JOURNAL OF WORLD TRADE 539–573 (2017).

ILJOONG KIM, HOJUN LEE, ILYA SOMIN (EDS.), EMINENT DOMAIN: A COMPARATIVE PERSPECTIVE (2017).

Jochem de Kok, *Chinese SOEs Under EU Competition Law*, 40(4) WORLD COMPETITION 583–612 (2017).

Jaemin Lee, *A More Widely Available Public Good: Proposed DSU Reform and Its Implication for Developing Members*, 51(6) JOURNAL OF WORLD TRADE 987–1019 (2017).

Jieun Lee, *China's Nonmarket Economy Treatment and US Trade Remedy Actions*, 51(3) JOURNAL OF WORLD TRADE 495–516 (2017).

Yong-Shik Lee, *Future of Trans-Pacific Partnership Agreement: Just a Dead Trade Initiative or a Meaningful Model for the North-South Economic and Trade Integration?*, 51(5) JOURNAL OF WORLD TRADE 907–932 (2017).

Ching-Fu Lin, *Toward a More Rounded Strategy to Eliminate Illicit Trade in Tobacco Products*, 51(2) JOURNAL OF WORLD TRADE 265–284 (2017).

Han-Wei Liu, *Inside the Black Box: Political Economy of the Trans-Pacific Partnership's Encryption Clause*, 51(2) JOURNAL OF WORLD TRADE 309–333 (2017).

Thaddeus Manu, *The Complexity of Using the Patent Standards Under TRIPS for the Promotion of Domestic Industrial Development in Developing Countries in the Absence of Local Working Requirements*, 51(3) JOURNAL OF WORLD TRADE 517–538 (2017).

Desmond McNeill, Pepita Barlow, Carolyn Deere Birkbeck, Sakiko Fukuda-Parr, Anand Grover, Ted Schrecker, David Stuckler, *Trade and Investment Agreements: Implications for Health Protection*, 51(1) JOURNAL OF WORLD TRADE 159–182 (2017).

Sundaresh Menon, *International Economic Law – Building International Investment Law: The First 50 years of ICSID edited by Meg KINNEAR, Geraldine FISCHER, Jara Minguez ALMEIDA, Luisa Fernanda TORRES, and Mariée URAN BILDEGAIN. Alphen aan den Rijn: Wolters Kluwer, 2015. iii + 723 pp.*, 7(1) ASIAN JOURNAL OF INTERNATIONAL LAW 221–222 (2017).

WENDY NG, THE POLITICAL ECONOMY OF COMPETITION LAW IN CHINA (2017).

Jadranka Petrovic, Benjamin Grunberg, *Intersecting Trade, Politics and Human Rights: The Negotiation Phase of the Australia-China Free Trade Agreement*, 51(1) JOURNAL OF WORLD TRADE 67–104 (2017).

Virak Prum, *Global Justice and International Economic Law – Three Takes by Frank J. Garcia. New York: Cambridge University Press, 2015. xi+348 pp.*, 7(1) ASIAN JOURNAL OF INTERNATIONAL LAW 220 (2017).

Dilini Pathirana, *An Overview of Sri Lanka's Bilateral Investment Treaties: Status Quo and Some Insights into Future Modifications*, 7(2) ASIAN JOURNAL OF INTERNATIONAL LAW 287–318 (2017).

David Price, *Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?*, 7(1) Asian Journal of International Law 124–151 (2017).

Asif H. Qureshi, *International Legal Aspects of "Monetary" Relations in Northeast Asia*, 16(2) Chinese Journal of International Law 215–250 (2017).

Pravakar Sahoo, Niloptal Goswami, Rahul Mazumdar, *Trade Facilitation: Must for India's Trade Competitiveness*, 51(2) Journal of World Trade 285–307 (2017).

Sergey Sayapin, *A World Trade Organization for the 21st Century: The Asian Perspective edited by Richard Baldwin, Masahiro Kawai, and Ganeshan Wignaraja. Cheltenham: Edward Elgar Publishing, 2014. 429 pp.*, 7(1) Asian Journal of International Law 223–224 (2017).

Muhammad A. Sayeed, *Revisiting the Regime of Trademark Protection in Bangladesh: TRIPS Compatibility and Ramifications*, 7(2) Asian Journal of International Law 264–286 (2017).

Amit Kumar Sinha, *Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries*, 7(2) Asian Journal of International Law 227–263 (2017).

Yubaraj Sangroula, *China South Asia Connectivity: Reflections on Benefits of OBOR in Nepal from International Law Perspective*, 5(1) Kathmandu School of Law Review 1–38 (2017).

Wonkyu Shin, Dukgeun Ahn, *Firm's Responsive Behaviours in WTO Trade Disputes: Countervailing Cases on Korean* DRAMs, 51(4) Journal of World Trade 605–644 (2017).

M. Sornarajah, The International Law on Foreign Investment (2017).

Trinh Hai Yen, The Interpretation of Investment Treaties (2017).

Xiaohui Wu, *Friendly Competition for Co-Progressive Development: The Asian Infrastructure Investment Bank vs. the Bretton Woods Institutions*, 16(1) Chinese Journal of International Law 41–76 (2017).

Weihuan Zhou, Junfang Xi, *China's Liberalization of Legal Services Under the ChAFTA: Market Access or Lack of Market Access for Australian Legal Practices*, 51(2) Journal of World Trade 233–264 (2017).

Shucheng Wang, *Brexit's Challenge to Globalization and Implications for Asia: A Chinese Perspective*, 10(1) Journal of East Asia and International Law 47–64 (2017).

Christopher S. Wong, *Regulating Currency Manipulation: Political, Legal and Economic Barriers to Reform*, 51(4) Journal of World Trade 691–710 (2017).

Peter K. Yu (Cited 1768 times), *The RCEP and Trans-Pacific Intellectual Property Norms*, 50(3) Vanderbilt Journal of Transnational Law 673–740 (2017).

Noam Zamir, Paul Barker, *The Trans-Pacific Partnership Agreement and States' Right to Regulate Under International Investment Law*, 45(2) Denver Journal of International Law and Policy 205–224 (2017).

Chenguo Zhang, *Enhancing the Standards of Civil Damages Remedies to Fight Copyright Piracy in International Trade? A Commentary on the Proposed TRIPS-Plus Damages Reforms in the Third Amendment to the Copyright Law of the PRC Through Comparison with the US and EU*, 51(1) JOURNAL OF WORLD TRADE 131–158 (2017).

## 12 INTERNATIONAL SPACE LAW

IRMGARD MARBOE, SMALL SATELLITES: REGULATORY CHALLENGES AND CHANCES (2017).

Jinyuan Su, *Space Arms Control: Lex Lata and Currently Active Proposals*, 7(1) ASIAN JOURNAL OF INTERNATIONAL LAW 61–93 (2017).

YUN ZHAO, NATIONAL SPACE LAW IN CHINA: AN OVERVIEW OF THE CURRENT SITUATION AND OUTLOOK FOR THE FUTURE (2017).

## *DILA Events*

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# 2017 DILA International Conference and 2017 DILA Academy & Workshop

The 2017 DILA International Conference entitled "International Law and the Legacy of Colonialism and Imperialism: Revisited" and the 2017 DILA Academy and Workshop on "Chinese Contributions to the Development of International Law" and "State Practice in International Law in Asian States in the Year 2016" was held on June 22 to June 24 at KoGuan Law School on the campus of Shanghai Jiao Tong University in Shanghai, China.

The conference opened in the morning of June 23 with a welcome address by Guifang Julia Xue, Director of the Center for Rule of Ocean Law Studies and Center for Polar and Deep Ocean Development and Chair Professor of KoGuan Law School, Shanghai Jiao Tong University, China and Seokwoo Lee, Chairman for the Development of International Law in Asia (DILA) and Professor of International Law at Inha University Law School, Korea.

Session one of the conference was entitled "The Past: The Vestiges of Colonialism" and was chaired by Guifang Julia Xue. The first presenter, Hee Eun Lee, Handong International Law School, Korea, presented his paper "Colonialism and International Law: Legal Positivism as a Theoretical Foundation". The second presenter, Si Jin Oh, College of Liberal Arts, Sahmyook University, Korea, presented on "The Relevance of Colonial International Law Today". The final presenter of the session was Sung-Won Kim, Wonkwang University School of Law, Korea who presented his paper "A Revisit to the Eastphalia: woher, warum und wohin".

Session two, "The Contribution of Minority Perspectives to the Development of International Law – Part 1" was chaired by Hee Eun Lee. The first presenter, Pyoung Keun Kang of Korea University School of Law examined "The Historical Legacies in Korea-Japan relations and the Korean Courts with Specific References to the Issues of 'Enforced Sexual-Slaves'". The second presenter, Seung-Jin Oh, College of Law, Dankook University, Korea presented on his paper, "The 'Final and Irreversible' 2015 South Korea-Japan Comfort Women Deal: Revisited". The final presenter of the session, Lan Hua of the China University of Political Science and Law presented on "Indigenous People and Right of Cultural Property in International Law".

Session three, "The Present: The Contribution of Minority Perspectives to the Development of International Law – Part 2" and was chaired by Seokwoo Lee. The first presenter was Xu Bujun of the University of Hong Kong Law Faculty who presented on "The First Sino-Japanese War and the Inter-temporal

Rule". The second presenter was Zhang Xinjun, Tsinghua University Law School, China who examined "Reparation for the Chinese Victims of Gross Violations of Rules of Jus In Bello arising out of Sino-Japanese War". Lastly, Zhang Xiaoshi of the University of Hong Kong Law Faculty presented on "Rethinking Narrative on Nineteenth Century International Law: Is There a Chinese Intellectual Connection?"

The final session of the day entitled "The Future Constructive Contribution of Colonialism" was chaired by Dustin Kuan-Hsiung Wang of National Taiwan Normal University. The first presentation was given by Deok-Young Park of Yonsei Law School, Korea who discussed the "Paris Agreement and its Subsequent Negotiations: Conflict of Interests between States". Following, John Anthony (Tony) Carty, Tsinghua University Law School, China gave his talk on "International Law and China: Heads (Coin Toss) the West Wins, Tails China Loses". The conference then came to a close with final remarks by chairpersons Guifang Julia Xue and Seokwoo Lee.

The following day, June 24, the 2017 DILA Academy and Workshop was opened with a welcome address by Guifang Julia Xue and Seokwoo Lee. Session one, titled "Chinese Contributions to the Development of International Law – Part 1" was chaired by Seokwoo Lee. The first speaker of the session was He Zhipeng of Jilin University School of Law, China who presented on "Challenges and Possibilities for China to Contribute to the International Legal System". The presentation was followed by Liao Li of Wuhan University who spoke on "China and International Disputes". The final speaker of the session was Zho Jiang of the Research Center of the Law and Policy of the Sea and Space and Southwest University of Political Science and Law, China who presented on "The Metaphysical Interpretation on the New Maritime Silk Road Strategy".

Session two was titled "Chinese Contributions to the Development of International Law – Part 2" and was chaired by Seokwoo Lee. The first presenter was Matthias Vanhullebusch of KoGuan Law School, Shanghai Jiao Tong University, China who spoke on "China's Air Defence Identification Zone: Towards a Crystallization of a New International Custom". This was followed by Zhao Jun of Zhejiang University Law School, China who presented on "Opportunities and Challenges: Mutual Encouragement and Interactions between International Rule of Law and China's Rule of Law". Lastly, Xie Jingjing of the University of International Relations, China presented on "An Overview of the Enforcement of International Law in the People's Republic of China: Transformation, Adoption and Development".

Session three was titled "State Practice in International Law in Asian States in the Year of 2016 – Part 1" and was chaired by Seokwoo Lee. First, Guifang

Julia Xue spoke on "State Practice in International Law in China in the Year of 2016". Afterwards, Kanami Ishibashi of Tokyo University of Foreign Studies, Japan presented on "State Practice in International Law in Japan in the Year of 2016". Finally, Dustin Kuan-Hsiung Wang, National Taiwan Normal University, discussed the "State Practice in International Law in Taiwan in the Year of 2016".

Session four was titled "State Practice in International Law in Asian States in the Year of 2016 – Part 2" and chaired by Seokwoo Lee. Buhm-Suk Baek of the College of International Studies, Kyung Hee University, Korea discussed "State Practice in International Law in Korea in the Year of 2016". He was followed by Eon Kyung Park and Tea-Gil Kim of Kyung Hee University Law School, Korea who spoke on "Regulations and Measures relating to Living Modified Organisms in Korea". Lowell Bautista of the University of Wollongong School of Law, Australia followed with a discussion of "State Practice in International Law in the Philippines in the Year of 2016". Lastly, Tran Viet Dung of Ho Chi Minh City University of Law, Vietnam presented on "State Practice in International Law in Vietnam in the Year of 2016".

Session five was a special session on "Climate Change and International Law" chaired by Seokwoo Lee. The first presentation was given by Seungmin Kim of Yonsei University, Korea who spoke on "Climate Change as Threat to Security? Same Bed, Different Dreams". Next, Il Ho Lee of Yonsei University presented on "Technology Transfer as a Response to Climate Change: Half Full or Half Empty?"

Guifang Julia Xue and Seokwoo Lee then offered their final remarks and closed the 2017 DILA Academy and Workshop.

*Seokwoo Lee*
Co-Editor-in-Chief

*Hee Eun Lee*
Co-Editor-in-Chief