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ASIAN YEARBOOK OF INTERNATIONAL LAW

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The objects of the Yearbook are two-fold. 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. 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 has decided to make the Yearbook open access.

TABLE OF CONTENTS

ARTICLES

1.	LI-ANN THIO International Law in the Courts of Singapore: No Longer a Little Island?	1
2.	V.G HEGDE International Law in the Courts of India	63
3.	FRANCIS TOM TEMPROSA Reflections of a Confluence: International Law in the Philippine Court 1940–2000	88
4.	JAMAL SEIFI & KAMAL JAVADI The Consequences of the “Clean Hands” Concept in International Investment Arbitration	122

LEGAL MATERIALS

5.	TREATY SECTION – KARIN ARTS	171
6.	STATE PRACTICE OF ASIAN COUNTRIES IN INTERNATIONAL LAW	201
	a. Air Law	204
	b. Aliens	207
	c. ASEAN	209
	d. Arbitration	212
	e. Courts and Tribunals	216
	f. Criminal Law	218
	g. Diplomatic and Consular	229
	h. Dispute Settlement	241
	i. Environmental Law	242
	j. Extradition	260
	k. Human Rights	264
	l. Humanitarian Law	306
	m. International Economic Law	306
	n. International Labour Organisation (ILO)	314
	o. International Law Commission	317

p. International Organisations	323
q. Jurisdiction	328
r. Law of the Sea	338
s. Municipal Law	351
t. Sovereignty	356
u. Territory	358
v. Terrorism	360
w. Treaties	364
x. United Nations	379

LITERATURE

Bibliographic Survey

JEONG WOO KIM, INTERNATIONAL LAW IN ASIA: A BIBLIOGRAPHIC SURVEY — 2013	382
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<i>General Information</i>	444
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International Law in the Courts of Singapore: No Longer a Little Island?

*Li-ann Thio*¹

1. INTRODUCTION

This article examines the role and scope of international law within the courts of Singapore,² a former British colony, and makes comparative references to other common law jurisdictions, where appropriate, to highlight points of convergence and divergence in judicial methodology. It considers in particular the reception, interpretation and treatment of treaty law, customary international law and soft law, and also examines the factors that might preclude the court from considering arguments based on international law. It concludes by offering observations on the interaction and impact of international law within the municipal legal order of Singapore.

2. CONSTITUTIONAL SILENCE AND WESTMINSTER PARLIAMENTARY SYSTEMS

Like most Asian common law jurisdictions, the Singapore Constitution, which is a modified variant of the Westminster parliamentary system, is silent on the reception and status of international law within the domestic legal order. This is distinct from the approach adopted in contemporary constitution-making in the Post-Cold War era where, the reception and

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2 See generally Li-ann Thio, *Reception and Resistance: Globalisation, International Law and the Singapore Constitution*, 4(3) NATIONAL TAIWAN UNIVERSITY LAW REVIEW 335, 335-86 (2009) [hereinafter Thio, *Reception and Resistance*]; LI-ANN THIO, A TREATISE ON SINGAPORE CONSTITUTIONAL LAW 82-93 (2012) [hereinafter THIO, A TREATISE].

ranking of international law within the municipal legal system is explicitly provided for.³ The Constitution does not specifically identify which government agency has the power to enter into treaties. Following British practice, this falls to the parliamentary executive or Cabinet government. There is no requirement, as in the US model, that the executive needs Parliament's advice and consent in treaty-making.

Judicial receptivity to international law based arguments turns on a range of factors,⁴ not least judicial knowledge of international law. Unfamiliarity with international law can breed a culture of legal resistance⁵ and disposition to treat international legal norms as an exotic creature to gasp at but give no legal weight to, or alternatively, to adopt a dismissive attitude. In terms of British practice, the approach of the courts has been increasingly open to international law, and the predominant approach to customary international law has been monist in orientation, whereby the law of nations is treated as part of the common law.⁶

A key point to note in relation to Singapore practice is that there has been a significant sea change in relation to the treatment of international law based arguments raised before national courts. In the last decade of the

3 See, e.g., Constitution of the Democratic Republic of Timor-Leste May 22, 2002, § 9. See generally Antonio Cassese, *Modern Constitutions and International Law*, in 192 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 331 (1985).

4 Thio, *Reception and Resistance*, *supra* note 2, at 339.

5 ROSALYN HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 206-07 (1994).

6 *Somerest v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.). This was also the US approach adopted in *The Paquete Habana*, 175 U.S. 677 (1900). More recently, after an apparent turn to a dualist approach in *R v. Keyn*, [1876] 2 Exch. Div. 63 (Eng.) which required an Act of Parliament to transform a permissive international legal norm into domestic English law, a more robust monist approach was adopted in *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] Q.B. 529 (Eng.). This recognized an exception to the doctrine of precedent or *stare decisis* insofar as the courts are allowed to declare a new customary international law norm is part of the common law even if an existing precedent is based on an older customary international norm, without legislative intervention. On British practice, see generally SHAHEED FATIMA, *USING INTERNATIONAL LAW IN DOMESTIC COURTS* (1st ed. 2005).

20th century, the approach may be characterized as a curt, even contemptuous dismissal of international law. For example, Article 18 of the Universal Declaration on Human Rights⁷ was invoked, presumably to accentuate the weight of the Article 15 constitutional guarantee of religious freedom in the case of *Chan Hiang Leng Colin and others v. Public Prosecutor*.⁸ This related to the truncation of the religious freedom of the Jehovah's Witnesses community by laws which deregistered them under the Societies Act⁹ and which banned their religious publications under the Undesirable Publications Act,¹⁰ on the basis that their pacifist orientation was harmful to national security and compulsory military conscription. While noting that arguments were raised that the ban was "a violation of the freedom of religion as enshrined in the Constitution and also a violation of international declarations of human rights," Chief Justice Yong tersely declared: "All things being said, I think that the issues here are best resolved by a consideration of the provisions of the Constitution, the Societies Act and the UPA alone."¹¹ This unwillingness to consider whether Article 18 of the UDHR was applicable to Singapore law, as customary international law perhaps, reflects the statist bias of the Singapore court in the 1990s,¹² which unsurprisingly translates into a dualist mentality towards international law. Speaking extra-judicially, this parochialist approach is evident in Chief Justice Yong's declaration, in response to arguments that international law norms challenged the constitutionality of the death penalty: "I am not

7 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), at 71 (Dec. 10, 1948).

8 *Chan Hiang Leng Colin v. Pub. Prosecutor*, [1994] 3 SLR(R) 209 (HC) (Sing.).

9 Societies Act, 2014, c. 311 (Sing.).

10 Undesirable Publications Act, 1998, c. 338 (Sing.).

11 *Chan Hiang Leng Colin*, 3 SLR, ¶ 54.

12 The statist bias is evident in the adjudicative method adopted, where the Chief Justice declared extra-textually, a paramount mandate based on the "sovereignty, integrity and unity of Singapore," which trumped all fundamental liberties, operating as a collectivist trump. *Id.* ¶ 64. Dualism is consistent with legal orders where the primary public value is statist, which valorizes security and sovereignty, and thereby resists the contraction of 'domestic jurisdiction' by international legal regulation.

concerned with international law. I am a poor humble servant of the law in Singapore. Little Island.”¹³

Since then, particularly under the judicial bench helmed by Chief Justice Chan Sek Keong from 2006 and by Chief Justice Sundaresh Menon from 2012, there has been a shift in the approach towards judicial review, which has been described thus:

The Bench now regularly engages with foreign case law and international legal arguments, produces expository judgments, references academic opinion and has demonstrated a culture of elaborated reason-giving, as opposed to the statist, cursory judgments of a former age. If these reflect a concern with communitarianism, with local conditions and autochthony, it is clear that the trend is towards a “particularism without parochialism,” which is to be welcomed.¹⁴

Other commentators have noted that the various government branches today have demonstrated “a keen appreciation of what international law requires and allows.”¹⁵ Indeed, the courts have drawn on international law as a source of constitutional law in *Public Prosecutor v. Taw Cheng Kong*, where the issue was whether the legislative power of the Singapore Parliament included the power to enact anti-corruption legislation with extra-territorial reach.¹⁶ The answer was located in the concept of state sovereignty, insofar as it indicates “plenary authority with respect to internal or external affairs.”¹⁷

The Court of Appeal held that on secession from the Federation of Malaysia when Singapore became independent on August 9, 1965, “it acquired the attributes of sovereignty.”¹⁸ The “inherent nature” of being a sovereign state meant that the Singapore Parliament would have “plenary power” and could enact laws “to regulate the rights and liabilities between

13 K.S. Rajah, *Cj on “Death Penalty” Article*, STRAITS TIMES (Sing.), Oct. 1, 2003, at 6.

14 THIO, A TREATISE, *supra* note 2, at xiii.

15 Chin Leng Lim & Mahdev Mohan, *Ch.05 Singapore and International Law*, SINGAPORELAW.SG, <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-5>.

16 *Pub. Prosecutor v. Taw Cheng Kong*, [1998] 2 SLR(R) 489 (CA), ¶ 30 (Sing.).

17 JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 90 (2d ed. 2007).

18 *Taw Cheng Kong*, 2 SLR(R) (CA), ¶ 30.

persons in Singapore, or for that matter, anywhere else.”¹⁹ Parliament could “empower the local courts to punish any person present in its territories for having done physical acts wherever the acts were done and wherever their consequences took effect. Parliament’s power, however, would have no legal effect in other countries, except to the extent that those countries permit it.”²⁰ The understanding is that a statute “generally operates within the territorial limits of the Parliament that enacted it.”²¹ This understanding of prescriptive and enforcement jurisdiction is consonant with classic international law, as expounded in the *Lotus* case.²² In that case, the Permanent Court of International Justice also observed that “in all systems of law, the principle of the territorial character of criminal law is fundamental,”²³ though underscoring this was not an absolute international legal principle²⁴ as there are other heads of jurisdiction. Indeed, the Singapore legislature has enacted laws based on the active nationality principle, whereby Singapore citizens may be liable for offences committed outside Singapore contrary to the United Nations Act²⁵ which is to facilitate Singapore’s compliance with obligations flowing from Article 41 of the UN Charter.

3. INTERNATIONAL LAW BEFORE NATIONAL COURTS

The question of international law within municipal legal orders raises the following issues a court may have to consider: first, the court has to ascertain if the international norm raised does in fact have the juridical status of an international legal norm; second, the court must ascertain if the international legal norm applies to the facts at issue; third, it must

19 *Id.*

20 *Id.*

21 *Id.* ¶¶ 30, 66. In *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928), the arbitrator Max Huber stated: “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”

22 *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

23 *Id.* ¶¶ 44-47.

24 *Id.* ¶ 50.

25 United Nations Act, 2002, c. 339, § 6 (Sing.).

determine whether the international law norm applies automatically or requires an additional step of legislative incorporation or judicial recognition. Fourth, even if an international legal norm applies, how does it rank vis-à-vis domestic legal sources? Informing this process is the primary issue of whether the international norm is one based on treaty or customary international law.

a. Treaty Law

I. DUALISM AND THE SUPREMACY OF DOMESTIC LAW

Singapore law follows English practice in adopting a dualist approach towards international treaties and domestic law. Consonant with the doctrine of parliamentary sovereignty, British practice knows no notion of the self-executing treaty and treaty norms must be legislatively incorporated through an Act of Parliament before it may be given direct effect within the domestic legal order.

The Singapore High Court in the *Sahand* case²⁶ confirmed that treaties are not self-executing. This flows from a dualist model which treats international and municipal law as distinct systems of law. The court approved of the statement by the House of Lords in *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*, [1990] 2 AC 418 at 500:

[A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.²⁷

26 The *Sahand*, [2011] 2 SLR 1093 (HC) (Sing.).

27 *J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus.*, [1990] 2 A.C. 418 (H.L.) 500 (appeal taken from Eng.).

Quentin Loh J. in the *Sahand* case observed that the English approach was based on preventing the Crown through its treaty-making powers from altering domestic law “without the authority of Parliament”: *The Parlement Belge*.²⁸ In principle, this accords some degree of legislative review over executive policy, though this is formal where the Cabinet controls the parliamentary majority, as it does in the Singapore context. Although the Singapore Constitution departs from the British model in being supreme,²⁹ Loh J. considered that the English approach was “equally applicable” to Singapore on the basis of Article 38 of the Constitution which vests legislative power in the Legislature.³⁰ He stated it would be contrary to Article 38 “to hold that treaties concluded by the Executive on behalf of Singapore are directly incorporated into Singapore law, because this would, in effect, confer upon the Executive the power to legislate through its power to make treaties.”³¹ Without incorporation by primary or subsidiary legislation, a treaty “does not create independent rights, obligations, powers or duties.”³²

For example, the United Nations Convention on Contracts for the International Sale of Goods was given effect to by the Sale of Goods (United Nations Convention) Act (Cap 283), section 4, which provides that the Convention provisions “prevail over any other law in force in Singapore to the extent of any inconsistency.” This ranks convention provisions over statute law. The United Nations Act (Cap 339) provides that any regulations under this Act will not be invalid because it is inconsistent “with any written law other than the Constitution,”³³ preserving constitutional supremacy.

28 *The Parlement Belge*, [1879] 4 PD 129 at 154–55 (Eng.).

29 Constitution of the Republic of Singapore Aug. 9, 1965, art. 4: “This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”

30 *The Sahand*, 2 SLR (HC), ¶ 33.

31 *Id.*

32 *Id.*

33 United Nations Act, c. 339, § 2(3).

II. JUDICIAL REVIEW: THE MEANING OF TREATIES WITHIN THE DOMESTIC LEGAL ORDER AND THEIR RANK VIS-À-VIS DOMESTIC STATUTES

While the executive may enter into a treaty that creates binding international obligations for Singapore on the international plane, and while the legislature through legislation gives the treaty domestic legal effect, the courts may nonetheless subject these treaties to judicial review, pursuant to the judicial power to declare a statute null and void for inconsistency with the Constitution.³⁴ The courts will determine the proper meaning, scope and applicability of such legislation. The courts have imposed heavy sentences for the breach of statutory offences designed to give effect to treaty obligations, to demonstrate the seriousness of Singapore's commitment to a treaty regime. The High Court in *Public Prosecutor v. Kuah Kok Choon* held that possessing engendered birds without import permits "went against the spirit" of Singapore's commitment to co-operate with other countries "to preserve their endangered species"³⁵ under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which Singapore ratified and gave effect to by the Endangered Species (Import and Export) Act³⁶ As such, deterrent sentences were warranted.

i. Terms of Statute Wider than Terms of Convention

To the extent that an Act of Parliament, which seeks to transform treaty law into Singapore law, is inconsistent with the treaty terms, the statute prevails, provided that its wording is clear.³⁷

This is evident from the case of *Tan Ah Yeo v. Seow Teck Ming*, a case involving a collision on the Singapore River between two inland crafts,

34 "The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land." *Taw Cheng Kong*, 2 SLR(R) (CA), ¶ 89.

35 *Pub. Prosecutor v. Kuah Kok Choon*, [2000] 3 SLR(R) 752 (HC), ¶ 30 (Sing.).

36 *Endangered Species (Import and Export) Act*, 2008, c. 92A (Sing.).

37 This is also the Malaysian approach where, in event of a conflict, the general rule is that the statute should prevail: *Pub. Prosecutor v. Wah Ah Jee*, [1919] 2 FMSLR 193 (S.C.) (Malay.). This followed the English case of *Mortensen v. Peters*, 8 F.(J) 93 (Scot.) under which courts are bound to give effect to duly passed legislation and are not to consider whether the law is contrary to international law.

where all parties concerned were Singaporean.³⁸ The Maritime Convention (MC) Act 1911 (c57) (UK) was the relevant Act, and had been extended to Singapore during the time of British colonial rule. This imperial Act had been enacted to give effect to two conventions dealing with collisions between vessels and salvage, adopted at a conference in Brussels in 1910. On becoming independent, Singapore formally accepted these conventions.

The plaintiffs argued that the MC Act should be interpreted in line with the Convention since it had been enacted to give effect to it, and as such, should not apply to the case facts. This is because the collision did not involve two sea-going vessels or a sea-going vessel and vessel of inland navigation, as required under Article 1 of the 1910 Collision Convention.³⁹ In addition, Article 12 of the Convention provided that national law rather than the convention applied where all relevant parties belonged to the same State.

However, the terms of the MC Act as enacted were broader than those in the Convention. Section 1(1) referred to “two or more vessels” without stipulating what type of vessels they must be while section 2(2) in dealing with loss of life or personal injuries referred to “any person” or “vessel” without qualification. Chao Hick Tin JC did not see any justification for the court to restrictively qualify “vessel” to require at least one be sea-going or that “any person” should mean one parties must hold different citizenship, given the plain and clear meaning of the words. In other words, although the MC Act was enacted to give effect to the two Conventions, Parliament could widen its scope to cover its own nationals or its own inland watercraft. Chao JC said “I know of no general principle of international law which forbids that;” while he accepted that “it is a principle of legal policy that an Act should be interpreted to conform with international law, there is nothing here in conflict between the MC Act and the Collision

38 Tan Ah Yeo v. Seow Teck Ming, [1989] 1 SLR(R) 134 (HC) (Sing.).

39 1910 International Convention for the Unification of Certain Rules of Law Related to Collision between Vessels and Protocol Signature art. 1, Sept. 23, 1910, [1930] A.T.S. 14 reads: “[w]here a collision occurs between sea-going vessels or between seagoing vessels and vessels of inland navigation the compensation due . . . shall be settled in accordance with the following provisions in whatever waters the collision takes place.”

Convention.⁴⁰ He clarified that in the event of a “real conflict”⁴¹ between international and national law, national law must prevail, citing various English cases. He approved a passage from *Maxwell on the Interpretation of Statutes* (12th Ed, 1969) at page183:

Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. But if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal and international law which results.

He hastened to add that a state could not breach an international legal obligation with impunity and that he regarded state responsibility on the international plane as “a distinct and separate matter.”⁴²

ii. Scope of the Presumption of Concordance with International Law in Interpreting Domestic Legislation

Subsequent cases have affirmed the proposition that courts apply the presumption that Parliament intends to conform with international law or indeed, international comity: *Public Prosecutor v. Taw Cheng Kong*.⁴³ In *The Sahand*, Loh J. underscored that “the courts will always strive to give effect to Singapore’s international obligations within the strictures of our Constitution and laws.”⁴⁴ In *Yong Vui Kong v. Public Prosecutor*, the Court of Appeal agreed that “domestic law, including the Singapore Constitution, should, as far as possible, be interpreted consistently with Singapore’s

40 Tan Ah Yeo, 1 SLR(R), ¶¶ 13-14.

41 *Id.* ¶ 15. The Court of Appeal in *Seow Teck Ming v. Tan Ah Yeo*, [1991] 2 SLR(R) 38 (CA) (Sing.) agreed at paragraph 18, noting that the scope of the Maritime Conventions Act 1911 was wider than that of the Convention but not in conflict with it.

42 Tan Ah Yeo, 1 SLR(R), ¶ 16.

43 *Taw Cheng Kong*, 2 SLR(R) (CA), at 209.

44 *The Sahand*, 2 SLR (HC), ¶ 33.

international legal obligations.”⁴⁵ Loh J. in *The Sahand* also briefly observed the “truism” that the executive could consider Singapore’s international obligations when exercising its legal discretion, provided “it is not *ultra vires* the empowering law or the Constitution.”⁴⁶ Presumably, the adoption of the Tripartite Declaration on Equal Remuneration for Men and Women Performing Work of Equal Value on November 6, 2002, to give effect to ILO Convention 100 on Equal Remuneration, which Singapore ratified in May 2002, was such an exercise of executive discretion by the Manpower Ministry.⁴⁷

However, in *Public Prosecutor v. Tan Cheng Yew*, the High Court noted there were “defined limits” within which the canon of interpretation that courts would endeavor to interpret domestic statutes in accordance with a state’s international treaty obligations operated.⁴⁸ The case itself concerned the rule of specialty and the basis on which Tan could be extradited from Germany to Singapore for criminal breach of trust, whether this was governed by the terms of the narrower Article VII, Singapore-Germany Extradition Treaty⁴⁹ or the wider section 17(a) of the Singapore Extradition Act.⁵⁰ The latter is broader in providing that a person surrendered by a foreign state may only be tried for “the offence to which the requisition of his surrender relates” (first proviso of section 17(a)) or under the broader limb, “any other offence of which he could be convicted upon proof of the facts on which that requisition was based.” (second proviso of section 17(b)). Article VII may not be brought to trial “for any other crime or on account of any other matters than those for which the extradition shall have taken place.”

45 Yong Vui Kong v. Pub. Prosecutor, [2010] 3 SLR 489 (CA), ¶ 59 (Sing.).

46 *The Sahand*, 2 SLR (HC), ¶ 35.

47 INDUS. ARB. CT., <http://www.iac.gov.sg/collective-agreements/preparing-a-ca/sample-clauses> (last updated Nov. 20, 2014).

48 *Pub. Prosecutor v. Tan Cheng Yew*, [2013] 1 SLR 1095 (HC) (Sing.).

49 This has its roots in the United Kingdom-Germany Treaty for the Mutual Surrender of Fugitive Criminals 1872 was entered into in 1960 and extended to Singapore. The provisions for extradition between Singapore and Germany are set out in the Second Schedule of the Federal Republic of Germany (Extradition) Order 1960.

50 Singapore Extradition Act, 2000, c. 103 (Sing.).

Because it was “trite law that Singapore follow[ed] a dualist position,”⁵¹ the High Court held that Singapore’s international law obligations under the Extradition Treaty did not give rise to individual rights and obligations in the domestic context “until and unless transposed into domestic law by legislation.”⁵² As such, the issue of whether Article VII or section 17(a) *prevailed* did not arise, as “they exist on different planes.” As such, Article VII could not directly apply to circumscribe the prosecutor’s power to charge an extradited person as this was governed by the terms of the Extradition Act that “gives domestic effect to the entirety of Singapore’s obligations to other states”⁵³ under the various extradition treaties Singapore is party to.

As such, the High Court rejected the view that the scope of section 17(a) be truncated by requiring it to be read consistently with Article VII, as the words in section 17(a) were not “abstruse”⁵⁴ and should be given a natural meaning. In relation to the canon of interpretation of reading a domestic statute in accordance with international treaty obligation, Lee Sei Kin J. approvingly cited Lord Diplock in the English Court of Appeal decision of *Salomon v. Commissioners of Customs & Excise* to the effect that the clear and unambiguous terms of legislation “must be given effect to, whether or not they carry out Her Majesty’s treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties.”⁵⁵ As such, any remedy for an international wrong “lies in a forum other than Her Majesty’s own courts.”⁵⁶ Where the terms of legislation are unclear and “reasonably capable of more than one meaning,” and “the treaty itself becomes relevant” as the *prima facie* presumption arises that Parliament “does not intend to act in breach of international law.”⁵⁷

51 Tan Cheng Yew, 1 SLR, ¶ 56.

52 *Id.*

53 *Id.*

54 *Id.* ¶ 59.

55 *Salomon v. Comm’rs of Customs & Excise*, [1967] 2 Q.B. 116 at 143E (Eng.) *cited in* Tan Cheng Yew, 1 SLR, ¶ 60.

56 Tan Cheng Yew, 1 SLR, ¶ 60.

57 *Id.*

iii. *Scope of Prosecution Power in Extradition Cases: Governed by Treaty or Statutory Regime – Considerations Arising from Monist / Dualist Jurisdictions*

Lee J. in *Tan Cheng Yaw* noted that the respondent was asking the court not to resolve an ambiguity but to ignore purportedly ambiguous words (“requisition” and “any other offence”).⁵⁸ As extradition was an exercise of sovereign power or *dominium* of the sending state to surrender a fugitive, rooted in “the Grotian tradition of territorial sovereignty”⁵⁹ the Singapore court was not in a position to “go behind the discretion exercised by the Executive of another country.”⁶⁰ It accepted as conclusive a verbal note confirming that the judicial and executive arms of Germany under their internal law base extradition not on the particular charge stated in the requisition but the factual circumstances surrounding the charge. There was nothing in the principle of comity between nations requiring a restrictive construction of section 17(a), which governed prosecution powers after extradition.

Lee J. noted *obiter* that comity in this context “must refer to the position that the sending state takes on the specific extradition and subsequent prosecution of an individual.”⁶¹ He observed that the American specialty rule based on comity of nations and respect for foreign relations set out in treaty arrangements was based on protecting and prioritizing the position of the sending state “against abuse of its discretionary act of extradition.”⁶² He noted that as America was a monist jurisdiction where ratified treaties were self-executing, US courts considered the interpretation and breach of extradition treaties directly “to determine if any individual rights”⁶³ had been infringed, given that the treaty automatically gave rise to domestic rights and obligations. In contrast, courts in dualist countries approached the issue not from an “individual rights” model but a state centric one which

58 *Id.* ¶ 61.

59 *Id.* ¶ 68.

60 *Id.* ¶ 40.

61 *Id.* ¶ 65.

62 Ouseley J., *Welsh v. Sec’y of State for the Home Dep’t*, [2007] 1 W.L.R. 1281 (Divisional Ct.) ¶ 37 (Eng.); *Tan Cheng Yew*, 1 SLR, ¶ 65.

63 *Tan Cheng Yew* 1 SLR, ¶ 66.

asked “whether the prosecution is in conformity with domestic law.”⁶⁴ That is, the focus is on the scope of statutory obligations owed by a state to an individual with the extradition treaty “only tangentially in issue.”⁶⁵ It was clear that comity might be of immediate relevance in monist jurisdictions in determining whether a breach in an extradition treaty disabled prosecution for an offence; however, Lee J. noted it was “much more equivocal” how comity might apply to the different inquiry of whether prosecution conformed to domestic law.⁶⁶

He noted in passing a novel legal argument which would have “benefited from fuller argument,” which he described as an “individual rights” conception of the specialty rule.⁶⁷ This drew from a statement in the English case of *R v. Seddon*⁶⁸ that located the rationale for the principle of specialty principally in inter-state obligations though “it may owe something to the protection of the individual.”⁶⁹ It was left open whether this was to inform a reading of section 17(a) or provide an independent ground of challenge. Lee J. offered a “tentative observation” that much of the theoretical debate was motivated by American jurisprudence addressing self-executing treaties and the question of whether extradited persons had standing drawn from an independent or derivative right in domestic courts to raise breaches of treaty specialty provisions.⁷⁰ However, the issue of whether a specialty rule in an extradition treaty was additionally premised on an individual rights protection rationale was academic in Singapore as “any individual rights that can be asserted in domestic courts” had to be derived from implementing legislation in a dualist system.⁷¹

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* ¶ 69.

68 *R v. Seddon*, [2009] 1 W.L.R. 2342 (AC) ¶ 68 (Eng.).

69 *Tan Cheng Yew* 1 SLR, ¶ 68.

70 *Id.* ¶ 69.

71 *Id.*

III. INTERNATIONAL LAW AS PART OF THE INTERPRETIVE MATRIX

i. Unincorporated Treaties & Judicial Review: Legitimate Expectations?

The English practice is to operate on a presumption that Parliament will not legislate contrary to an unincorporated treaty.⁷² This favors a certain interpretation in the event of statutory ambiguity, the one consonant with treaty terms.

The Australian High Court found that the Convention of the Rights of the Child, which Australia had ratified but not incorporated into domestic law still had “significance” in determining the residency permit of a Malaysian who had married and had three children with an Australian citizen in *Minister of State for Immigration and Ethnic Affairs v. Teoh*.⁷³ The relevant treaty norm related to the primary consideration of the best interests of the child in all actions concerning children. The High Court stated that international treaty norms which declare “universal fundamental rights” may be used by the courts “as a legitimate guide to developing the common law,” though caution was advocated lest such an interpretive approach be viewed as “a backdoor means of importing an unincorporated convention into Australian law.”⁷⁴ It declared that the executive government had made a “positive statement” by ratifying the treaty that it intended to live up to its provisions, which provided an “adequate foundation for a legitimate expectation,” absent contrary statutory provisions.⁷⁵ This went to finding that procedural fairness required that *Teoh* be given notice and a hearing before deported. Disgruntled, the Australian government issued executive statements⁷⁶ that same year that sought to terminate the uncertainty the

72 *Regina v. Sec’y of State for the Home Dep’t*, [1991] 1 A.C. 696 (H.L.) (appeal taken from Eng.).

73 *Minister of State for Immigration & Ethnic Affairs v. Teoh* (1995) 183 CLR 273 (Austl.).

74 *Id.* ¶ 28.

75 *Id.* ¶ 34.

76 Susan Roberts, *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh: The High Court Decision and the Government’s Reaction to It*, 2(1) Australian Journal of Human Rights 10 (1995), available at <http://www.austlii.edu.au/au/journals/AJHR/1995/10.html#fnB31>.

Teoh decision had imported into government activity,⁷⁷ thus precluding the finding of legitimate expectations based on ratified but unincorporated treaties,⁷⁸ which would have had the effect of expanding the law regarding the effect of treaties.

There has been no Singapore case on the use of international law to ground legitimate expectations; Australian courts are perhaps more ready to refer to international law as a “legitimate and important influence on the development of the common law,” particularly where universal human rights are concerned.⁷⁹

ii. *Reference to Convention Terms in Interpreting Statutory Terms*

Section 9A(3) of the Interpretation Act⁸⁰ permits reference to any treaty or international agreement referred to in the written law. In addition, Loh J. in *The Sahand*, noted that international law could fall within the compass of “extrinsic materials” which section 9A(2) of the Act stated was permissible to use in interpreting primary or subsidiary legislation if they assisted in ascertaining the meaning of the provisions.⁸¹

77 Officials would need to know which treaty would be relevant and what their effect would be, in relation to a possibility that their discretionary powers must be exercised in accordance with a legitimate expectation. Government officials may not be aware of either the contents, or even existence of such treaties. *Id.*

78 “The Court, although acknowledging that a treaty does not become part of municipal law, regarded the Convention as having legal effect, for why otherwise would government officials be required to act in a particular way, on pain of legal sanctions if they did not do so? If the decision is not to be regarded as self-contradictory, it must have created a new exception to the general rule regarding the effect of treaties that have not been incorporated by statute in the law of Australia.” See Sir Harry Gibbs, *Chapter Seven: Teoh: Some Reflections*, 15 UPHOLDING THE AUSTRALIAN CONSTITUTION (2003), available at <http://www.samuelgriffith.org.au/papers/html/volume15/v15chap7.html>.

79 *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 (Austl.) (international human rights standards invoked as a challenge against racist conception of terra nullius upon which Crown Title rested).

80 Interpretation Act, 1985, c. 1 (Sing.).

81 *The Sahand*, 2 SLR (HC), ¶ 6.

In *Ng Kwok Chun v. Public Prosecutor*⁸² the court examined the meaning of “import” in the UN Single Convention on Narcotic Drugs (1961) to which Singapore acceded in 1973, to interpret the meaning of “import” within section 7 of the Misuse of Drugs Act (MDA),⁸³ which was enacted to give effect to Convention obligations. They rejected the narrow reading of “import” in the mercantilist sense and preferred a wider reading as given by section 2 of the Interpretation Act.⁸⁴ This meant “to bring or cause to be brought into Singapore by land, sea or air.”⁸⁵ The Court noted the legislative intent of the Act was to control dangerous or harmful drugs, such that the Act was directed not simply at the control of the use and distribution of drugs in Singapore, but also the movement of drugs through Singapore for distribution elsewhere.⁸⁶ The Court then referred to the definition of “import” in Article 1(1)(m) of the Convention (“the physical transfer of drugs from one state to another state ...”) and found there was nothing in this giving “import” in section 7 of the MDA a narrower meaning than that ascribed to it by the Interpretation Act: “It is clear that Parliament intends to give effect to its international obligations, and ‘import’ in s 7 of the Act must have the same meaning as that given by the Interpretation Act (Cap 1).”⁸⁷ Further, the Convention indicated that comity required Singapore to exert “every effort to prevent illegal movement of drugs,” including where Singapore was used as the transit point for drug movement between countries. A narrow judicial reading of “import” would frustrate the legislative intent and policy to give “import” in the MDA the meaning given to it by the Interpretation Act.⁸⁸

82 *Ng Kwok Chun v. Pub. Prosecutor*, [1992] 3 SLR(R) 256 (CA) (Sing.).

83 *Misuse of Drugs Act*, 2008, c. 185, § 7 (Sing.) (“Except as authorised by this Act or the regulations made thereunder, it shall be an offence for a person to import into or export from Singapore a controlled drug.”).

84 *Interpreting Act*, c. 1.

85 *Id.*

86 *Ng Kwok Chun*, 3 SLR(R), ¶¶ 12-13.

87 *Id.* ¶ 22.

88 *Id.* ¶ 35.

iii. *Giving Effect to Security Council Resolutions within the Domestic Legal Order through Subsidiary Legislation*

In *the Sahand* case, the court had to consider the effect of various binding United Nations Security Council Resolution 1737, 1747, 1803, and 1929 (“the Iran Resolutions”). Operative paragraphs 13-15 of Resolution 1737 required all states to implement an assets freeze in relation to assets owned and controlled by designated entities as identified in the Annex, which were associated with supporting Iran’s nuclear proliferation activities. States were to ensure that their nationals or any persons or entities within their territories did not make economic resources available for designated entities. Certain exemptions were listed.

Singapore implemented these obligations through subsidiary legislation, namely, the Monetary Authority of Singapore (Sanctions and Freezing of Assets of Persons – Iran) Regulations 2007 (S 104/2007) (“the MAS Regulations”) and the United Nations (Sanctions – Iran) Regulations 2007 (S 105/2007) (“the UN Regulations”). The UN regulations are designed to give effect to the Iran resolutions and apply to persons in and citizens of Singapore, excepting financial institutions subject to the directions of the Monetary Authority of Singapore under section 27A of the MAS Act. The Minister or designated person under regulation 14 of the UN regulations may by written notice exempt any person (which would be a body of corporate or unincorporated persons under section 2(1) of the Interpretation Act) or activity from the operation of the regulations, provided this is consistent with the UN Security Council’s intent as expressed in its Resolutions. The MAS regulations applies to all financial institutions in Singapore and seeks to give effect to the Iran Resolutions through regulations 5(1) and (2) which require any financial institution in possession or control of economic resources owned or controlled by any designated person to freeze such assets. Exemptions apply as regulation 5(3) provides, such as funds for basic expenses like food and rent or payment of professional or legal services fees, funds subject to any judicial, administrative or arbitral lien or any *extraordinary expenses*. This is subject to MAS determination which “would be sufficient in the domestic sphere.”⁸⁹

The issue was whether certain vessels were subject to assets freeze under the terms of the Iran Resolutions. If so, the financial institutions

89 The Sahand, 2 SLR (HC), ¶ 44.

covered by MAS regulations would not be able to receive any funds or financial assets from designated entities as consideration for furnishing a guarantee to secure the release of arrested vessels as such funds would have to be frozen once received. This would impact the arrest of vessels owned by designated entities.

On the facts, the defendants did not fall within the designated entities under the relevant Resolution and so there was no question of applying the implementing legislation directly or indirectly on them.⁹⁰

iv. *Giving Indirect Effect to an Unenacted Chapter VII UN Charter Security Council Resolution Provision by a Common Law Presumption*

Loh J. in *the Sahand* case stated *obiter* that it might be possible to give indirect effect to a Security Council Resolution paragraph which had not been enacted, in being used as an interpretive aid to explain domestic law obligations. In the instant case, operative paragraph 15 of the Security Council Resolution 1737 did not prevent a designated person from making a due payment under a contract entered prior to the listing of such person or entity, provided the relevant States determined the contract did not relate to any prohibited items or financial assistance.

This was not expressly enacted in the MAS Regulations but Loh J. said the court could give “indirect effect” to paragraph 15 by applying a common law principle against retroactivity: “that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears,” as stated by Staughton L.J. in *Secretary of State for Social Security v. Tunncliffe*.⁹¹ The presumption had to be applied consistently with the object of the MAS regulations, to give effect to the

90 *Id.* ¶ 62.

91 *Sec’y of State for Soc. Sec. v. Tunncliffe*, [1991] 2 All E.R. 712 at 724 (Eng.), approved by Lord Nicholls of Birkenhead, *Wilson v. First County Trust Ltd. (No 2)*, [2004] 1 A.C. 816 (H.L.) ¶ 19 (appeal taken from Eng.); *The Sahand*, 2 SLR (HC), ¶ 46. This presumption was considered applicable to subsidiary legislation, even if Staughton L.J. was referred to Acts of Parliament. Loh J. indicated it would be “helpful” from a judicial perspective for operative paragraphs 14 (payment of interest and earning to frozen accounts) and 15 (payment under existing contracts unrelated to nuclear proliferation activities) to be expressly enacted, given that the facts did not require him to reach a concluded view. *The Sahand*, 2 SLR (HC), ¶ 47.

Iran resolutions. The presumption could not be applied with full force, as operative paragraph 15 itself only applied to certain payments under existing contracts; therefore, the common law presumption could apply insofar as the stated criteria in operative paragraph 15 had been met. Thus, “indirect effect” could be given to operative paragraph 15.⁹²

IV. THE IMPACT OF TREATY ON DOMESTIC LAW: BLUNTING THE IMPACT OF INTERNATIONAL LAW WITH RESPECT TO INDIVIDUAL RIGHTS

As far as the executive is concerned, there seems to be a presumption that the domestic legal framework suffices to discharge its international obligations when it becomes party to treaties which address individual rights. In relation to the Internationally Protected Persons Bill, enacted to give effect to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons,⁹³ a parliamentary question asked why Article 9 of the Convention dealing with the fair treatment of persons charged with such crimes was not included in the Statute. The response was that no specific provision was needed as anyone prosecuted under the Act “would be entitled to the rights of due process guaranteed under the Constitution and our other laws.”⁹⁴

It is also clear that as far as executive policy is concerned, Singapore when acceding to a rights-oriented treaty such as the Convention on the

92 The Sahand, 2 SLR (HC), ¶ 46. Operative paragraph 15 allows payment under a contract provided (a) the contract is not related to any of the prohibited items, materials, equipment, goods, technologies, assistance, training, financial assistance, investment, brokering or services referred to in paragraphs 3, 4 and 6 above; and (b) the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 12 above. The relevant state would need to inform the Committee of such intention to authorize payment at least ten working days beforehand.

93 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, opened for signature Dec. 14, 1973, 1035 U.N.T.S. 167; 28 U.S.T. 1975 (entered into force Feb. 20, 1977).

94 *Singapore Parliamentary Debates, Official Report* (6 March 2008) vol 84 at col 2447 “Internationally Protected Persons Bill” (Zainul Abidin Rasheed, Senior Minister of State (Foreign Affairs)).

Rights of the Child (CRC)⁹⁵ is of the view that it is not accepting rights “going beyond the limits” prescribed by the Constitution or accepting obligations to introduce new rights as Singapore laws provided “adequate protection and fundamental rights . . . in the best interests of the child.”⁹⁶ In addition, no dedicated child rights legislation was adopted to give effect to the CRC.

i. Treaties that Singapore is a Party to

Despite the absence of dedicated legislation to give effect to the CRC, the apex Court of Appeal has made approving references to CRC norms where these reiterate domestic rules. The idea of joint parental responsibility, the court noted, is “deeply rooted in our family law jurisprudence.” It is embodied in section 46(1) of the Women’s Charter⁹⁷ which “exhorts both parents to make equal co-operative efforts to care and provide for their children,” as noted in *CX v. CY (minor: custody and access)*.⁹⁸ The Court noted that Article 18 of the CRC “also endorses the view that both parents have common responsibilities for the upbringing and development of their child.”⁹⁹ The CRC was referenced merely to demonstrate the generality of joint parenting, with a nod to similar approaches in jurisdictions like England and Australia. Article 18 encapsulated “the universal human value that both parents have common responsibilities for the upbringing and development of their child.”¹⁰⁰ The invocation of international law here serves to show how domestic law is harmonized with international (and comparative) standards, and is presented as a set of *universal values* or alternative legal considerations that frame the interpretive matrix. This reiterative approach minimizes the transformative potential of international law on domestic law and policy.

In *AAG v. Estate of AAH, deceased*, the Court of Appeal had to “regretfully” dismiss an appeal made on behalf of two illegitimate daughters

95 Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. Doc. A/44/49, at 167 (Nov. 20, 1989). Singapore acceded to the CRC in 1995.

96 Instrument of Accession, Convention on the Rights of the Child ¶ 3 (Oct. 2, 1995).

97 Women’s Charter, 2009, c. 353 (Sing.).

98 *CX v. CY*, [2005] 3 SLR(R) 690 (CA), ¶ 26 (Sing.).

99 *Id.*

100 *UW v. UX*, [2007] SGDC 259, ¶ 10 (Sing.) (referring to CRC).

for maintenance from the deceased's estate under the Inheritance (Family Provisions) Act 1938 (U.K.).¹⁰¹ This law discriminated against illegitimate children, flowing from the unchanged value that "the family within marriage was considered to be the only acceptable social grouping in which to raise children."¹⁰² While adopting a dialogical approach in urging Parliament to consider legal reform to enable the illegitimate child of a deceased person to claim maintenance, the Court of Appeal noted that the CRC requires state parties "to use their best efforts to ensure recognition of the principle that both parents have common responsibilities" in raising a child.¹⁰³ However, "nothing in the Convention compels Singapore to equate an illegitimate child with a legitimate child."¹⁰⁴ This shows how treaty norms may feature as a legal consideration in adjudication, or as a persuasive element deployed in a dialogical approach to Court-Parliament relations.

In the absence of incorporating legislation, Singapore courts are likely to follow the dualist approach of Malaysian courts, as reflected in *Kok Wah Kuan v. Pengarah Penjara Kajang, Selangor Darul Ehsan*, where the High Court said it could not apply Article 40 (fair trial) of the CRC, to which Malaysia was a party, as it remained unincorporated and therefore in the realm of the Executive.¹⁰⁵ It would be considered a matter of "judicial vandalism or judicial trespass" rather than interpretation, for the High Court to apply a provision from an unincorporated treaty.¹⁰⁶ The Malaysian courts thus eschewed giving direct effect to a treaty by applying a treaty provision literally as a corrective, as this might set it in conflict vis-à-vis the Executive.

101 *AAG v. Estate of AAH, deceased* [2009] 1 SLR 769 (CA) ¶ 44 (Sing.).

102 *Id.* ¶ 23.

103 *Id.* ¶ 36.

104 *Id.*

105 *Kok Wah Kuan v. Pengarah Penjara Kajang*, [2004] 5 MLJ 193 (HC) ¶ 93 (Malay.).

106 *Id.*

Singapore, like Malaysia, acceded to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁰⁷ in 1995.¹⁰⁸ It also did not adopt gender equality legislation and the government has insisted that sex discrimination would be covered by the general Article 12 equality constitutional guarantee. In contrast, Malaysia amended Article 8(2) of its Constitution in 2001 to include “gender” as a prohibited ground of discrimination.¹⁰⁹

Malaysian jurisprudence in this respect is instructive, particularly since the Part IV Fundamental Liberties chapter of the Singapore Constitution is derived, with modifications, from Part II of the Malaysian Federal Constitution (1957).¹¹⁰

Reference was made to CEDAW norms in interpreting and giving content to Article 8(2) of the Federal Constitution of Malaysia by the High Court in *Noorfadilla bt Ahmad Saikin v. Chayed bin Basirun*.¹¹¹ The case concerned the dismissal by a public authority of an education officer for being pregnant.

Zaleha Yusof J. noted that the word “gender” was incorporated into Article 8(2) to prohibit discrimination on grounds of gender, in fulfilment of Malaysia’s international obligations under CEDAW.¹¹² Particular reference was made to the Article 1 definition of “discrimination against women”¹¹³

107 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46, at 193 (Dec. 18, 1981). [hereinafter CEDAW].

108 *States Parties*, UNITED NATIONS TREATIES COLLECTION, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (follow “Ratification, Accessions and Successions” hyperlink).

109 Federal Constitution of Malaysia (2010 Reprint) Art 8(2).

110 The Privy Council in *Ong Ah Chuan v. Pub. Prosecutor*, [1980-1981] SLR 48 (PC), ¶¶ 561-62 (Sing.) (noting that the eight article in Part IV were “identical with similar provisions in the Constitution of Malaysia”).

111 *Noorfadilla bt Ahmad Saikin v. Chayed bin Basirun*, [2012] 1 MLJ 832 (HC) (Malay).

112 *Id.* at 833.

113 *Id.* (Article 1 of CEDAW defines “discrimination against women” as 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

and the Article 11(1)(b) obligation of states to take appropriate measures to eliminate gender discrimination in the field of employment.¹¹⁴ Specifically, Article 11(2)(a) required state parties to take appropriate measures to prohibition dismissal on grounds of pregnancy.¹¹⁵

The High Court endorsed the view, drawing from soft law instruments,¹¹⁶ that it was obliged to consider Malaysia's obligations under CEDAW in interpreting Article 8(2) in relation to equality and gender discrimination.¹¹⁷ It referenced the Australian case of *Minister for Immigration and Ethnic Affairs v. Teoh*¹¹⁸ for the proposition that where legislation was ambiguous, the court should favor the interpretation which accords to a state's treaty obligations, even if not legislatively incorporated. It concluded by holding that discrimination for pregnancy was a form of gender discrimination because of the "biological fact that only woman has the capacity to become pregnant."¹¹⁹ This case was distinguished from the *Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor*¹²⁰ where the Federal Court held that Article 8(2) did not apply to a private contract whereby an air stewardess was fired for becoming pregnant, as it did not have horizontal application.

Article 2(e) of CEDAW is potentially intrusive, providing that as an implementation measures, state should take "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."¹²¹ This reaches into the private realm; however, a statute would

women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.).

114 *Id.* at 841.

115 *Id.*

116 *Id.* at 842-43 (The Bangalore Principles on the Domestic Application of International Human Rights Norms (1988), produced by a high level judicial colloquium and the Putrajaya Declaration and Programme of Action on the Advancement of Women in Member Countries of the Non-Aligned Movement; Beijing Statement and Fourth World Conference on Women in Beijing.).

117 *Id.* at 842.

118 *Teoh*, 183 CLR 273.

119 Noorfadilla bt Ahmad Saikin, 1 MLJ 832 (HC), ¶ 32.

120 *Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor*, [2005] 2 CLJ 713 (Fed. Ct.) (Malay.).

121 CEDAW, *supra* note 107.

be necessary to prohibit gender discrimination between private actors. CEDAW only applied in public law cases, where legislation or executive action contravened individual rights. Indeed, the Court of Appeal in *AirAsia Berhad v. Rafizah Shima Binti Mohamad Aris*,¹²² rejected the approach in *Noorfadilla*, pointing out that CEDAW did not have the force of law in Malaysia because it had not been enacted by local legislation.¹²³ Unless treaties were domesticated, they could not be enforced. From a dualist perspective, the Court said this approach was necessary to serve as a “democratic check”, to mitigate the lack of “direct participation of parliament in treaty-making.”¹²⁴ Treaties had to be incorporated as legislators “may regard it necessary to tailor the treaty, through an act of transformation, to match domestic circumstances.”¹²⁵ In addition, legislators may want to delay the implementation of parts of the treaty or limit direct application of certain provisions.¹²⁶

Nonetheless, the position in Malaysia is confused, given a later High Court judgment which followed the *Noorfadilla* approach, such that provisions in the Convention on the Rights of the Child, which Malaysia acceded to in 1995 were treated as incorporated into Malaysian common law.¹²⁷ Articles 3 and 7 of the CRC were raised as the basis for the exercise of inherent judicial power to order the defendant to undergo DNA testing to determine the child’s paternity, as this was in the best interest of the child. Further, a minor’s right to know and be cared for by his or her parents following Article 7 was not inconsistent with Malaysian law, and was based on the article 8 constitutional guarantee of equal protection of the law, which extended to knowing who his biological father was. The Court

122 *AirAsia Berhad v. Rafizah Shima Binti Mohamad Aris*, [2014] MLJU 606 (CA) (Malay).

123 *The High Court in SIS Forum v. Dato’ Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)*, [2010] 2 MLJ 378 (HC), ¶ 37 (Malay.) (noting that the Australian case of *Teoh* had received its “fair share of criticism,” and that the approach of Malaysian courts was not to directly accept norms of international law unless incorporated as part of municipal law).

124 *AirAsia Berhad*, MLJU 606 (CA), ¶ 52.

125 *Id.*

126 *Id.*

127 *Lee Lai Ching v. Lim Hooi Teik*, [2013] 4 MLJ 272 (HC), ¶ 30 (Malay.).

appeared to discard the precedent of *Binsted v. Juvencia Autor Partosa*¹²⁸ where forcing one to undergo a DNA test constituted causing voluntary hurt under the section 323 of the Penal Code; it also noted there were no specific statutory restrictions that allowed or disallowed DNA testing to prove paternity.¹²⁹ The CRC as an unincorporated international treaty was thus resorted to, to interpret the content of equal protection and to depart from past precedent.

It is likely that Singapore courts will adopt the same domestic posture as Malaysian courts, given the dualist model for treaties and respect for the separation of powers. Singapore courts would certainly not adopt the activist approach of the Indian court in the noted case of *Vishaka v. State of Rajasthan*¹³⁰ where CEDAW norms and even non-binding recommendations of the CEDAW Committee which has “no enforcement authority,”¹³¹ were invoked to enlarge constitutional rights in reading the Article 21 right to life guarantee and the Article 19(1)(g) right to carry on trade safely, as well as the Articles 14-15 equality clauses.

The case itself concerned a brutal gang rape of a social worker.¹³² In what might fairly be characterized as an act of judicial legislation, the Court in the absence of sexual harassment legislation referred to international law norms to read Articles 14, 15, 19, and 21 of the Indian Constitution, to give content and to elaborate “implicit” sexual harassment safeguards supposedly located within these norms.¹³³ It referred to Article 11 and 24 of CEDAW and to the general recommendation on Article 11, concluding that gender equality included “protection from sexual harassment and right to work with dignity” which it considered “a universally recognized basic human right.”¹³⁴

It issued a series of judicially crafted guidelines to prevent sexual harassment at the work places pursuant to Article 32 of the Constitution which requires effective redress of rights violations, to “fill the legislative

128 *Binsted v. Juvencia Autor Partosa*, [2000] 2 MLJ 569 (HC) (Malay).

129 *Lee Lai Ching*, 4 MLJ 272 (HC), ¶ 42.

130 *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011 (India).

131 *AirAsia Berhad*, MLJU 606, ¶ 34.

132 *Vishaka*, A.I.R. 1997 S.C. 3011, ¶ 2.

133 *Id.* ¶ 7.

134 *Id.*

vacuum.”¹³⁵ These detailed guidelines which read like a framework law, were to be treated as the law, and to be applied to the public realm and private workplace “until a legislation is enacted for a purpose.”¹³⁶ Citing cases like *Minister of State for Immigration and Ethnic Affairs v. Teoh*, the expansive approach adopted by the Indian courts in the face of legislative failings was that international treaties and norms were to be read to elaborate the meaning and content of fundamental rights “in the absence of enacted domestic law occupying the fields when there is no inconsistency between them.”¹³⁷

In the face of legislative incompetence, Indian courts may step in to enact quasi-legislation, drawing on international norms to formulate the terms of such guidelines, which in this case declared “These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.”¹³⁸

This is an extraordinary use of international treaties by a domestic court to fashion domestic law.

ii. *Treaties that Singapore is not Party to*

When it comes to human rights treaties, Singapore courts do not give weight to treaties which Singapore is not a party to. In contrast, Philippines courts have considered treaties the state is not a party to, such as the International Convention for the Protection of All Persons from Enforced Disappearances, to support actions for Amparo writs, regarding the treaty as if it embodied customary international law.¹³⁹

Singapore courts have consistently rejected right cases from foreign common law jurisdictions influenced by the Inter-American Convention on Human Rights and the European Convention on Human Rights (ECHR),¹⁴⁰ which generally accord more weight to fundamental rights.¹⁴¹

135 *Id.*

136 *Id.* ¶ 16.

137 *Id.*

138 *Id.*

139 *Razon v. Tagitis*, G.R. No. 182498 (S.C., Dec. 3, 2009) (Phil.).

140 European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

141 *Chee Siok Chin v. Minister for Home Affairs*, [2006] 1 SLR 582 (HC) (Sing.).

Chee Siok Chin v. Minister for Home Affairs concerned the scope of the freedom of speech and assembly as guaranteed in Article 14 of the Constitution against public order considerations.¹⁴² The High Court rejected the more rights-protective proportionality standard of review of late adopted by English law, galvanized by the Human Rights Act (1998), which sought to give effect to the ECHR.¹⁴³ This is contrasted with the enthusiastic embrace of the test of proportionality by Hong Kong courts, which regularly draw inspiration from the European Court of Human Rights and Covenant on Civil and Political Rights standards.¹⁴⁴ The Hong Kong courts' inspiration is incorporated in accordance with Article 39 of the Hong Kong Bill of Rights Ordinance Cap 383 (the UK extended its application to Hong Kong while it was still under British rule.)¹⁴⁵ Rajah J. underscored the distinctiveness of the Singapore context and constitutional text and the more restrictive formulation of the scope of free speech in Singapore.¹⁴⁶ He noted that "the infiltration of European law into English law" had left more recent English public order decisions with "neither persuasive nor logical force," as these applied "legal and political conditions that do not and cannot extend to Singapore."¹⁴⁷ Underscoring the need for an autochthonous approach, Rajah J. stressed that the proportionality standard of review was a feature of European jurisprudence rather than the common law and had never been part of Singapore law.¹⁴⁸ He further noted there were no immutable "universal standards" given the disparate approaches towards acceptable public conduct, as the "margins of appreciation for public conduct vary from country to country as do their respective cultural, historical and

142 *Id.*

143 *Id.* ¶ 5.

144 *See, e.g.,* Leung Kwok Hung v. HKSAR, [2005] 8 H.K.C.F.A.R. 229 (C.F.A.) (where the ECHR and its cases as well as Covenant on Civil and Political Rights norms were cited.).

145 *Id.*

146 Free speech in Singapore is subject to restrictions on eight stipulated grounds which Parliament deems "necessary and expedient." In contrast, article 10 of the ECHR requires that any restrictions be "necessary in a democratic society," subject to a test of proportionality review. *Chee Siok Chin*, 1 SLR 582.

147 *Chee Siok Chin*, 1 SLR, ¶ 5.

148 *Id.* ¶ 87.

political evolutions as well as circumstances.”¹⁴⁹ This is because value judgments are involved, and in the adjudicatory process, the court would be guided “by the manifest intent and purport of both the Constitution and domestic legislation.”¹⁵⁰

In the field of human rights law, arguments based on international or regional norms are not a force for harmonization; instead, they are discussed to demonstrate difference and divergence of views, which is unsurprising, in a plural and postmodern world. Again, this shows the primacy of local particularities, including the supremacy of the constitutional text and of history, in the reading of rights.¹⁵¹

V. CONCLUSION ON TREATIES BEFORE SINGAPORE COURTS

What is striking about the approach of Singapore courts to treaty law is its state-centricity, both in terms of its dualist posture and the clear ranking of the supremacy of domestic law over treaties and international agreements.¹⁵² Nonetheless, while breaches of treaty norms may not incur domestic liability, it does not preclude international responsibility. Apart from legislative incorporation, treaty law will have minimal effect on the domestic legal system.

149 *Id.* ¶ 132.

150 *Id.*

151 Although the ECHR applied to certain British colonies, including Singapore and the Federation of Malaya in 1953, it ceased to apply when these became independent. While former colonies in the Caribbean like Belize modeled their Constitutions after the ECHR, Singapore and Malaysia did not. Yong Vui Kong, 3 SLR (CA), ¶ 61.

152 In *Pub. Prosecutor v. Salwant Singh s/o Amer Singh*, [2003] SGDC 146 (Sing.), an international agreement which sought to stipulate the maximum terms of imprisonment a foreign national which Singapore wanted to extradite and try was found to violate article 93 of the Constitution, which vests judicial power in independent courts. The executive agreement was found to contravene judicial sentencing powers.

b. Customary International Law

A distinctive approach is adopted towards customary international law (CIL), an unwritten source of international law, as compared to treaty norms that need to be statutorily incorporated to have domestic legal effect. As the constitution is silent on the reception and status of CIL within the municipal order,¹⁵³ it falls to the courts to determine whether a general international law norm exists and what its content is.

The formation of CIL norms is governed by the finding of two components: general, consistent state practice of sufficient duration, and *opinio juris*, which is the subject state belief that a norm is to be obeyed because it is legally binding.

I. Evidence of a Customary International Law Norm

A clearly established CIL norm may become part of Singapore law and it falls to the judiciary to ensure its juridical status as a binding legal obligation, as opposed to something *de lege ferenda*.

This is demonstrated in *Nguyen Tuong Van v. Public Prosecutor*¹⁵⁴ with respect to the judicial attitude towards Article 36(1) of the Vienna Convention on Consular Relations (VCCR) (1963),¹⁵⁵ a treaty Singapore was not then a signatory to. This provision relates to the right of consular officers to visit a national of the sending State who is imprisoned or detained, and to arrange for their legal representation. Defense counsel argued that the VCCR applied to Singapore because it is CIL.¹⁵⁶ In response the Prosecution stated Article 36 was not breached on the facts and was silent as to whether Article 36(1) was CIL.

The High Court found that Article 36(1) was CIL, noting that there was an “established practice” for a state detaining a foreign Australian national,

153 In contrast, CIL is deemed “incorporated” into the Philippines legal system through the constitutional incorporation clause: Cont. (1987), art. II, sec. 2 (Phil.); *Pharmaceutical & Health Care Ass’n v. Health Sec’y Francisco T. Duque III*, G.R. No. 173034 (S.C. Oct. 9, 2007) (Phil.).

154 *Pub. Prosecutor v. Nguyen Tuong Van*, [2004] 2 SLR 328 (HC) (Sing.).

155 Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 596 U.N.T.S. 261, 21 U.S.T. 77 (entered into force Mar. 19, 1967).

156 *Nguyen Tuong Van* (2004), 2 SLR (HC), ¶ 55.

to notify the consular officers of the accused person's state.¹⁵⁷ This was part of the "standard operating procedure" of the Central Narcotics Bureau; the court drew what it considered a reasonable inference that other Singapore law enforcement agencies would have similar directives.¹⁵⁸ Kan Ting Chiu J. stated that the directive "suggests the acceptance of the obligations set out in Art 36(1)" which "applies in Singapore."¹⁵⁹ He noted that the Prosecution "which is in a good position to have knowledge of Singapore's position on this issue, did not assert the contrary" and that "Singapore holds herself out as a responsible member of the international community and conforms with the prevailing norms of the conduct between states."¹⁶⁰ A form of tacit consent or *opinio juris* may be derived from the Prosecutor's non-protest against the invocation of Article 36(1) as an applicable standard. The reference to prevailing inter-state norms of conduct suggests both generality and consistency of practice.

Further state practice was referenced to ascertain the content of what "without delay" might mean.¹⁶¹ The High Court concluded that Article 36(1) was not breached on the facts; while it required consular notification, it did not stipulate a time period though this was to take place "without delay."¹⁶² In the immediate case, the time period between arrest and notification was about 20 hours.¹⁶³ The High Court noted that Australia, for example, considered three days (72 hours) an adequate period for notification, as

157 *Id.* ¶ 24.

158 *Id.* ¶ 35.

159 *Id.* ¶ 36.

160 *Id.* ¶¶ 30-39.

161 *Id.* ¶ 39.

162 Vienna Convention on Consular Relations, *supra* note 155, art. 36(1)(b) ("if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.").

163 Nguyen Tuong Van (2004), 2 SLR (HC), ¶ 38.

provided for in its 2000 Agreement on Consular Relations between Australia and the People's Republic of China.¹⁶⁴

II. Judicial Recognition as Precursor to Domestic Law Applicability

To become part of Singapore law, CIL norms do not have to be legislatively incorporated although these do not automatically apply without some receptive act. An established CIL norm only becomes part of Singapore law if there is judicial recognition of it first, absent which the CIL norm in question “would merely be floating in the air.”¹⁶⁵ The Court of Appeal in *Yong Vui Kong v. Public Prosecutor* endorsed the common law approach of Lord Atkin in *Chung Chi Cheung v. R*¹⁶⁶ under which international law has no validity “save in so far as its principles are accepted and adopted by our own domestic law.”¹⁶⁷ The judicial role in any given case is first to ascertain the relevant rule of international law “which nations accept amongst themselves” and to treat it as incorporated into domestic law “so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.”¹⁶⁸ Various jurists, including Brownlie, Oppenheim, and Akehurst were cited in support of this proposition.¹⁶⁹

Thus, a Singapore court would need to determine that the relevant CIL rule is consistent with Singapore statute law or finally declared by Singapore courts, and “either declare that rule to be part of Singapore law or apply it as part of our law.”¹⁷⁰ This declaration and application is needed to operationalize a CIL norm that is “not self-executing.”¹⁷¹ As I have elsewhere observed, this “suggests a dualist orientation towards CIL

164 *Id.* ¶ 39.

165 *Yong Vui Kong*, 3 SLR (CA), ¶ 90.

166 *Chung Chi Cheung v. R*, [1939] A.C. 160 (P.C.), 167-68 (appeal taken from H.K.), cited in *Nguyen Tuong Van* (2004), 2 SLR (HC), ¶ 94.

167 *Nguyen Tuong Van* (2004), 2 SLR (HC), ¶¶ 89-91.

168 *Id.*

169 *Yong Vui Kong*, 3 SLR (CA), ¶ 89.

170 *Id.*

171 *Id.* ¶ 91.

law and domestic law, with a monist sensibility in so far as the courts can directly apply CIL without legislative intervention.”¹⁷²

This is consonant with the positivist theory that international legal obligation rests on state consent, whether express or tacit, and binds a sovereign state on the basis of auto-limitation.

III. Ranking CIL Norms

Arguments have been raised to the effect that CIL norms, where these inform constitutional interpretation, should be received and ranked as part of constitutional law i.e. at the apex of the domestic legal hierarchy.

If this was accepted, statutory or common law norms inconsistent with the Constitution would be void. This would be judicially enforceable and would open the door to international law playing a greater transformative role in the shaping of domestic law.

This argument was raised in *Yong Vui Kong v. Public Prosecutor* in relation to the meaning of “law” in Article 9 of the Singapore Constitution which provides that no one shall be deprived of life or personal liberty “save in accordance with the law.”¹⁷³ This hinged on “law” in Article 9 encompassing CIL, that is, Article 9 should be read such that the legislative acts of depriving a person of life or personal liberty must be accomplished in a manner inconsonant with customary international law. International standards would then be directly imported into constitutional construction, as part of the constitutional clause itself.

However, this was rejected by the Court of Appeal in *Yong* who asserted that once courts had incorporated CIL rules, “it becomes part of the common law,” as opposed to having constitutional status, and is thereby “subordinate to statute law.”¹⁷⁴ To cloak a CIL norm with constitutional status would reverse the hierarchy of legal rules, which would “nullify any statute or any binding judicial precedent which is inconsistent with it.”¹⁷⁵

172 THIO, A TREATISE, *supra* note 2, at 602. This apparently is the Malaysian approach as well. See *Chung Chi Cheung v. R*, A.C. 160 (Malay).

173 *Yong Vui Kong*, 3 SLR (CA), ¶ 11.

174 *Id.*

175 *Id.* ¶ 90.

Clearly, in the event of a conflict between a CIL rule and domestic statute, the latter prevails.¹⁷⁶

IV. Determining the Content of a Putative CIL Norm

The judicial approach in determining the content of a CIL norm is discussed in the section below (Part c).

c. International Human Rights Law, the UDHR and Singapore Courts

At its inception, the Universal Declaration on Human Rights (UDHR), adopted as a General Assembly Resolution, was a legally non-binding statement of moral aspirations. Today, many, perhaps all of its provisions, have become CIL.¹⁷⁷ There is no harmony in the attitudes of various Asian courts towards the UDHR; indeed, there are divergent views within single jurisdictions.¹⁷⁸

176 *Nguyen Tuong Van v. Pub. Prosecutor*, [2005] 1 SLR 103 (CA), ¶ 94 (Sing.); For a comment, see C.L. Lim, *The Constitution and the Reception of Customary International Law: Nguyen Tuong Van v. Public Prosecutor*, SINGAPORE JOURNAL OF LEGAL STUDIES 218, 218-33 (2005); See also *Star Cruise Services Ltd. v. Overseas Union Bank Ltd.*, [1999] 2 SLR(R) 183 (HC) (Sing.) where the right of innocent passage was found to be a CIL norm but would, if relevant, be subject to the Common Gaming Houses Act. Other CIL norms Singapore courts have recognize include the width of territorial waters and immunity for non- enemy ambassadors: *The Trade Resolve*, [1999] 2 SLR(R) 107 (HC), ¶ 25 (Sing.) and *Re Contraband Mails: ex MfcV Conte*, [1949] MLJ 5 (Malay.), respectively.

177 Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 *GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 287 (1995); Kevin YL Tan, *Fifty Years of the Universal Declaration of Human Rights: A Singapore Reflection*, 20 *SINGAPORE LAW REVIEW* 239, 271 (1998).

178 In *Mohd EzamMohd Noor v. Ketua Polis Negara*, [2002] 4 MLJ 449 (Fed. Ct.), 514 (Malay.), Siti Norma FCJ said the UDHR was not a convention and its principles were declaratory in nature, having no legal force and so not a part of municipal law. In *Suzana bt Md Aris (claiming as administrator of the estate and a dependant of Mohd Anuar bin Sharip, deceased) v. DSP Ishak bin Hussain*, [2011] 1 MLJ 107 (HC), ¶ 27 (Malay.), the High Court stated: “The UDHR is part and parcel

Within the Singapore context, certain articles of the UDHR have been invoked for various reasons, as embodying customary human rights law. These include efforts to ground an independent cause of action or to influence and accentuate the interpretation of existing rights. Singapore courts have been careful to examine claims that a UDHR norm has the status of a CIL norm, based on evidence rather than bare assertion.

There are generally four issues that are addressed where CIL norms are invoked to inform constitutional arguments. First, the status of the putative CIL norm must be ascertained and the courts required that this be “clearly and firmly established” before it is adopted.¹⁷⁹ Second, the manner of *reception* of a CIL norm into the domestic legal order – it needs to receive judicial recognition or application, without need for legislative incorporation. Third, the *content* of the CIL norm must be identified, to see if it is breached on the facts. Last, its *rank* in the domestic hierarchy of legal sources.

A range of UDHR articles have been invoked by counsel to found or buttress claims, with vary degrees of cogency and success. These include matters relating to free speech and assembly (Articles 19 and 20, UDHR); the equal right to property (Articles 7, 17, UDHR), the right to vote (Article

of our jurisprudence as the international norms in the UDHR are binding on all member countries unless they are inconsistent with the member countries’ constitutions.” In a Hong Kong case relating to the right to asylum, it was stated that the UDHR was “a proclamation of ethical values, rather than legal norms” and so subject to domestic law. *See C v. Dir. of Immigration*, [2008] H.K.E.C 281 (C.F.I.) (H.K.). The Philippines court noted that its country could “rightfully take credit for the acceptance, as early as 1951, of the binding force of the Universal Declaration of Human Rights even if the rights and freedoms therein declared are considered by other jurisdictions as merely a statement of aspirations and not law until translated into the appropriate covenants. In the following cases decided in 1951, *Mejoff v. Director of Prisons*, 90 PHIL. REP. 70 (S.C., July 30, 1949); *Borovsky v. Comm’r of Immigration*, 90 PHIL. REP. 107 (S.C., June 30, 1949); *Chirskoff v. Comm’r of Immigration*, 90 PHIL. REP. (S.C., Oct. 26, 1951); *Andreu v. Comm’r of Immigration*, 90 PHIL. REP. 347 (S.C., Oct. 31, 1951), the Supreme Court applied the Universal Declaration of Human Rights. *Jose Reyes v. Ramon Bagatsing*, G.R. No. L-65366 (S.C., Nov. 9, 1983) (Phil.).

179 Nguyen Tuong Van (2005), 1 SLR (CA), ¶ 88.

21)¹⁸⁰ and the prohibition against torture, cruel and inhumane treatment (Article 5).

I. ARTICLES 19 UDHR – FREEDOM OF SPEECH

In *Yap Keng Ho v. Public Prosecutor*, certain demonstrators, including opposition politician Chee Soon Juan, were arrested for holding a demonstration without a police permit after a failed attempt to get one, and were charged under the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R1, 2000 Rev Ed).¹⁸¹

It was argued that the police standing policy not to grant permits for outdoor demonstrations was unconstitutional for violating Article 14 of the Constitution (free speech, assembly) and inconsistent with Articles 19 and 20 of the UDHR as customary human rights norms.¹⁸² It was argued that CIL does not tolerate “massive, arbitrary and disproportionate” bans on free expression.¹⁸³

The High Court stated the proper recourse was an application for judicial review to challenge the police exercise of discretion in refusing a permit, rather than proceeding with the demonstration.¹⁸⁴ Chee merely asserted that Articles 19 and 20 of the UDHR were binding as CIL norms.¹⁸⁵ In contrast, the Philippines Supreme Court had an evidential basis for concluding that article 19 of the UDHR was a CIL norm:

Article 19 forms part of the UDHR principles that have been transformed into binding norms. Moreover, many of the rights in the UDHR were included in and elaborated on in the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by over 150 States, including the Philippines. The recognition of freedom

180 In *Vellama d/o Marie Muthu v. Attorney-General*, [2012] 2 SLR 1033 (HC) (Sing.), the issue was the scope of the Prime Minister’s discretion to call by-elections, which indirectly implicated the right to vote. Article 21 of the UDHR was raised but Pillai J noted that “[t]he UDHR, not having been enacted as Singapore legislation, is not domestic law to which these proceedings relate.”

181 *Yap Keng Ho v. Pub. Prosecutor*, [2011] 3 SLR 32 (HC) (Sing.).

182 *Id.* ¶ 1.

183 *Id.* ¶ 16.

184 *Id.* ¶ 6.

185 *Id.* ¶ 12.

of expression is also found in regional human rights instruments, namely, the European Convention on Human Rights (Article 10), the American Convention on Human Rights (Article 10), and the African Charter on Human and Peoples' Rights (Article 9).¹⁸⁶

II. ARTICLE 17 UDHR – RIGHT OF PROPERTY

In *Chan Kin Foo v. City Developments Ltd.*, Chan, a minority shareholder, owned a unit in a block of apartments subject to *en bloc* collective sale, regulated under sections 84A and 84G of the Land Titles Strata Act (Cap 158, 2009 Rev Ed).¹⁸⁷ He argued that the sale violated the Article 12 equal guarantee clause as well as Articles 1, 7, and 17 of the UDHR as it discriminated against the right of the minority to own property.¹⁸⁸

Ang J. noted that the Singapore constitution did not contain a right to property and indeed, this had been omitted deliberately from the Independence Constitution in 1965, owing to land scarcity.¹⁸⁹ Article 13 of the right to property in the Malaysian Federal Constitution was deliberately left out when Singapore imported most of the Part II fundamental liberties into Part IV (Fundamental Liberties) of the Singapore Constitution. Because of this, it was incumbent upon Chan to provide reasons why Article 17 of the UDHR formed part of local law, and no submissions had been made on this. Ang J. made two observations, *obiter*. First, that if Article 17 of the UDHR were to have legal effect in Singapore, it must be show to form “part of customary international law.”¹⁹⁰ He stated, “there is no state practice or *opinio juris* which supports a right to property.”¹⁹¹ Indeed “widespread state practice” is allowed for “collective sales by majority vote” in countries like Canada, Hong Kong, and America (Hawaii). Further, the existence of

186 *Chavez v. Gonzales*, G.R. No. 168338, n.27 (S.C., Feb. 15, 2008) (Phil.).

187 *Chan Kin Foo v. City Devs. Ltd.*, [2013] 2 SLR 895 (HC) (Sing.).

188 *Id.* ¶ 2.

189 The 1966 Report of the Constitutional Commission recommended the inclusion of a modified version but this was rejected: Singapore, *Report of the Constitutional Commission 1966*, (1966) (Chairman: Wee Chong Jin), ¶¶ 41-42; *Singapore Parliamentary Debates, Official Report* (15 March 1967) vol. 25 at 1295-97 (Lee Kuan Yew, Prime Minister).

190 *Chan Kin Foo*, 2 SLR (HC), ¶ 31.

191 *Id.*

compulsory land acquisition legislation in Malaysia, India, South Australia, and Pakistan made “wholly untenable”¹⁹² the assertion that Article 17 of the UDHR was customary international law. Second, even if the right to property was a CIL norm, these were not self-executing and had first to be incorporated into Singapore law.¹⁹³ No such right had been legislatively incorporated, such that the right to property was “wholly inconsistent” with the Land Titles (Strata) Act.¹⁹⁴

III. ARTICLE 10 OF THE UDHR

A peculiar argument was raised in *Re Gavin Millar Q.C.*¹⁹⁵: a failed application under the Legal Professions Act (Cap 161) to admit a foreign Queen’s Counsel to the Singapore bar to hear an allegedly complex liberal case involving senior politicians.¹⁹⁶

It was argued that since the opposing side had a Senior Counsel, the court ought to give due regard to “the need for a level playing field between the parties to the defamation suits.”¹⁹⁷ This was anchored by an appeal to Article 10 of the UDHR, which declares that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations”¹⁹⁸ It was contended that inherent in Article 10 was the principle of equality of arms, which would be breached “where there was disparity between the respective levels of legal representation.”¹⁹⁹ Two decisions by the European Court of Human Rights were cited to support this propositional argument.²⁰⁰ In addition, it was argued that as Singapore was a member of the United

192 *Id.*

193 *Id.* ¶ 32.

194 *Id.* ¶¶ 28-33.

195 *Re Gavin Millar Q.C.*, [2008] 1 SLR 297 (HC) (Sing.).

196 See Li-ann Thio, *Reading Rights Rightly: The UDHR and Its Creeping Influence on the Development of Singapore Public Law*, SINGAPORE JOURNAL OF LEGAL STUDIES 264 (2008) (Sing.).

197 *Re Gavin Millar Q.C.*, 1 SLR (HC), ¶ 3.

198 *Id.* ¶ 8.

199 *Id.*

200 *Id.*

Nations, it was bound by the UN Charter to respect UDHR standards.²⁰¹ While the UDHR was aspiration in origin, it is no ordinary General Assembly Resolution. Such resolutions are recommendatory in nature.

In *Filartiga v. Pena Irala*,²⁰² which examined whether the prohibition against torture was CIL, it was observed of UN declarations that these were significant “because they specify with great precision the obligations of member nations under the Charter.”²⁰³ “Since their adoption, ‘[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote.’”²⁰⁴ Indeed, some UN Declarations were “a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.”²⁰⁵ As such, the UDHR “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.”²⁰⁶ The UDHR created an “expectation of adherence,” and “insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.”²⁰⁷ The court noted that several commentators considered that the UDHR had totally become a part of binding CIL.²⁰⁸

No argument or evidence was put forward to support the view that Article 10 of the UDHR embodied CIL, nor did the High Court decide this question. As the Singapore Constitution does not contain an explicit right to a fair trial, one may speculate as to why Article 10 of the UDHR was invoked

201 *Id.*

202 *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).

203 *Id.* at 883.

204 Sohn, “A Short History of United Nations Documents on Human Rights,” in *The United Nations and Human Rights*, 18th Report of the Commission (Commission to Study the Organization of Peace ed. 1968) *cited in* *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).

205 Memorandum of Office of Legal Affairs, U.N. Secretariat, 34 U.N. ESCOR, Supp. No. 8 (Vol. 15), U.N. Doc. E/cn.4/1/610 (1962) *cited in* *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).

206 E. Schwelb, *Human Rights and the International Community* 70 (1964) *cited in* *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).

207 *Filartiga v. Pena Irala*, 630 F.2d, ¶ 26.

208 *Id.*

by counsel within the context of constitutional law argumentation.²⁰⁹ It was not invoked to inform the content of an existing constitutional right nor to accentuate the importance of an existing right. Perhaps it was raised to support an argument that there was an *implicit* right to a fair trial, drawing from conceptions of the rule of law²¹⁰ as a constitutional principle.²¹¹ The European cases would then be used to formulate the content of a fair trial as encompassing the principle of equality of arms.²¹²

Alternatively, if Article 10 of the UDHR is customary human rights law, it could have been invoked to establish a free-standing or independent civil right. There is no precedent on this point or whether courts would be receptive to such argument.

IV. ARTICLE 5 OF THE UDHR

The most illuminating cases in relation to the interpretation of international human rights norms in light of domestic constitutional rules have revolved around Article 5 of the UDHR. This reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²¹³

209 Within the context of administrative law, human rights may well be a relevant consideration in the exercise of administrative discretion, as in decisions whether to admit foreign lawyers to the Singapore bar under the Legal Profession Act, 2009, c. 161 (Sing.).

210 Chng Suan Tze v. Minister of Home Affairs, [1988] 2 SLR(R) 525 (CA), ¶ 156B.

211 The Law Minister has stated that the right to vote in Singapore was an implied constitutional right, drawn from its system of representative democracy and articles 65 and 66 of the Constitution which provide for General Elections within 3 months after Parliament is dissolved: Kong Chian Lee, *Voting in Singapore: A right or a privilege?*, TODAY (Singapore), Feb. 14, 2009, at 6. Implied freedoms derived from a system of representative democracy have been judicially declared in the Australian context. Australian Capital Television Pty. Ltd. v. Commonwealth (1992) 177 CLR 106 (Austl.).

212 Interestingly, Tay J. in discussing the equality of arms principle seemed to focus on the complexity (or otherwise) of the case, rather than the equality of standing between opposing counsel. This is giving substantive content to the principle and implicitly, applying it, either as a relevant consideration in the administrative process, or a right, whether constitutional or common law, which is defeasible rather than absolute. Re Gavin Millar Q.C., 1 SLR (HC), ¶¶ 42-43.

213 Universal Declaration of Human Rights, *supra* note 7.

It has been argued that “death by hanging” and the “mandatory death penalty” violate Article 5 of the UDHR before the Singapore courts.²¹⁴

In *Public Prosecutor v. Nguyen Tuong Van*, it was argued that “law” in Article 9 of the Singapore Constitution should be read to incorporate Article 5 of the UDHR and further, that “death by hanging” was unconstitutional as it was a cruel and inhumane method of execution.²¹⁵ Kan J. noted that the UDHR “is not an international treaty”²¹⁶ and that there was “no consensus” it codified CIL.²¹⁷ In addition, it did not expressly refer to hanging.²¹⁸ Even assuming that Article 5 of the UDHR codified CIL, the High Court pointed out it was “by no means a settled view”²¹⁹ that hanging was in fact a cruel, inhumane, or degrading punishment, pointing out the view of the United States Court of Appeals in *Campbell v. Wood*.²²⁰ Negative practice in the form of foreign case law was cited to show dissensus that hanging fell clearly into the ambit of Article 5 of the UDHR.

The Court of Appeal went beyond the High Court in finding that article 5 UDHR did embody CIL and that this was “quite widely accepted.”²²¹ Notably, the Prosecution did not make any contrary assertions. While accepting that Article 5 of the UDHR embodied CIL, the Court of Appeal found there was “simply not sufficient state practice” to indicate that this prohibition extended to the specific method of death by hanging.²²² To demonstrate dissensus, the Court referred to a 2002 UN report from the Commission on Human Rights, which indicated the following in relation to the status of the death penalty worldwide as of 1 December 2002.²²³

214 *Nguyen Tuong Van* (2004), 2 SLR 328 (HC).

215 *Id.* ¶ 55.

216 *Id.* ¶ 106.

217 *Id.*

218 *Id.*

219 *Id.* ¶ 107.

220 *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994).

221 *Nguyen Tuong Van* (2005), 1 SLR (CA), ¶ 91.

222 *Id.* ¶ 92.

223 *Question of the Death Penalty: Report of the Secretary-General submitted pursuant to Commission resolution 2002/77*, UN ESCOR, 59th Sess, UN Doc E/CN.4/2003/106 (2003), cited in *Nguyen Tuong Van* (2005), 1 SLR (CA), ¶ 92.

Number of retentionist countries 71

Number of completely abolitionist countries 77

Number of countries abolitionist for ordinary crimes only 15

Number of countries that can be considered *de facto* abolitionist 33

Even if death by hanging was cruel and inhuman punishment, the Misuse of Drugs Act which provided for such punishment would prevail over a CIL norm incorporated as part of the common law.

The constitutionality of the mandatory death penalty (MDP) under the Misuse of Drugs Act²²⁴ was challenged in the case of *Yong Vui Kong v. Public Prosecutor*,²²⁵ on the basis of two main arguments. First, the MDP was challenged on the basis of Article 9(1) of the Constitution and developments in Privy Council jurisprudence, that the MDP violated Article 9(1) of the Singapore Constitution as being a deprivation of life not in accordance with “law.”²²⁶ The MDP constituted an inhumane method of punishment because it treated all guilty persons not as unique individuals with varying degrees of moral blameworthiness, but as a member of a “faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”²²⁷ As such, the MDP legislation is inhuman and contrary to the right to life set out in Article 9(1), as not constituting “law”

224 Misuse of Drugs Act, c.185. This provides for the MDP for crimes of trafficking certain amounts of prohibited drugs.

225 *Yong Vui Kong*, 3 SLR (CA). For commentaries on this case, see Li-ann Thio, “*It is a little known legal fact*”: *Originalism, customary human rights law and constitutional interpretation - Yong Vui Kong v. Public Prosecutor*, SINGAPORE JOURNAL OF LEGAL STUDIES 558 (2010); Yap Po Jen, *Constitutionalising Capital Crimes: Judicial Virtue or ‘Originalism’ Sin?*, SINGAPORE JOURNAL OF LEGAL STUDIES 281 (2011); Jack Lee, *The Mandatory Death Penalty and a Sparsely Worded Constitution*, 127 LAW QUARTERLY REVIEW 192 (2010); Arvind Ganesh, *Insulating the Constitution: Yong Vui Kong v. Public Prosecutor [2010]* SGCA 20, 10(2) OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 273 (2010); Chen Siyuan, *The Relationship between International Law and Domestic Law*, 23 SINGAPORE ACADEMY OF LAW JOURNAL 350 (2011).

226 *Yong Vui Kong*, 3 SLR (CA), ¶ 87-99.

227 *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), referenced in *Yong Vui Kong*, 3 SLR (CA), ¶ 7.

within its terms.²²⁸ Privy Council decisions from the Caribbean did not deal with the meaning of the word “law” in analogues of Article 9, but interpreted explicit constitutional clauses that prohibited torture, cruel and inhuman punishment, which the Singapore constitution did not have.²²⁹ Lord Bingham in *Reyes v. The Queen*,²³⁰ a decision from Belize, said the MDP for convicted murderers “long predated any international arrangements for the protection of human rights.”²³¹ As such, the Singapore Privy Council decision from Singapore, *Ong Ah Chuan v. Public Prosecutor*²³² was made “at a time when international jurisprudence on human rights was rudimentary.”²³³ Various foreign cases from the US, Africa, and India considered that the MDP was inhuman punishment as it precluded judicial sentencing discretion, producing results that were not individualized and disproportionate.

Second, “law” was to be read as incorporating a system of law which did not impose inhumane punishment, drawing from Article 5 of the UDHR as a CIL norm. Article 5 itself did not provide much guidance as to what the content of “inhuman punishment” encompassed.

While affirming the general principle that domestic law should presumptively be interpreted in a manner consistent with Singapore’s international human rights obligations,²³⁴ the Court of Appeal stated there were “inherent limits” to this approach, and identified two major obstacles in the form of the constitutional text and constitutional history.

First, the constitutional text did not contain an express prohibition against inhuman punishment.²³⁵ This departed from the approach of various Caribbean constitutions that shared the same British legacy of the Westminster parliamentary system, which based their bill of rights on the ECHR. Malaysia and Singapore adopted a distinct constitutional trajectory in this respect. The Court emphasized the “little known legal fact” that

228 *Yong Vui Kong*, 3 SLR (CA), ¶ 99.

229 *Id.* ¶ 61.

230 *Reyes v. The Queen*, [2002] 2 A.C. 235 (P.C.) (appeal taken from Belize).

231 *Id.* ¶ 17.

232 *Ong Ah Chuan v. Public Prosecutor*, [1981] AC 648, 674 (Sing.).

233 *Reyes*, 2 A.C. (P.C.), ¶ 17.

234 *ong Vui Kong*, 3 SLR (CA), ¶ 59.

235 *Id.* ¶ 61.

the constitutional drafters must have been aware of the existence of such a inhuman punishment clause given that the ECHR had applied to Malaysia and Singapore in 1953, as well as to other British colonies by virtue of the UK's declaration under Article 63 of the ECHR.²³⁶

Second, plunging deep into constitutional history, the Court of Appeal showed that the recommendation of the 1966 constitutional commission to include a clause prohibiting torture and inhuman punishment, a new "Article 13,"²³⁷ which essentially was modeled after Article 5 of the UDHR²³⁸ and Article 3 of the ECHR.²³⁹ The court found, problematically,²⁴⁰ that the government's rejection of Article 13 was "unambiguous," even if

236 *Id.*

237 The proposed Art. 13 reads: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment." Clause 2 provided that nothing done "under the authority of any law" in relation to the infliction of punishment or treatment that as lawful prior to the Article came into force shall be held to be inconsistent with the proposed Article. The Court of Appeal was of the opinion that the decision of *R v. Hughes*, [2002] 2 A.C. 259 (P.C.) (appeal taken from Caribbean) was not applicable as the Art 13(2) "savings" clause, similar to that considered in *The Saint Lucia Constitution Order 1978*, was not part of the Constitution of the Republic of Singapore (1999 Reprint). Nonetheless, if it had been, they were of the opinion that the 1966 Constitutional Commission (Singapore, *Report of the Constitutional Commission, 1966* (1966) (Chairman: Wee Chong Jin)) intended that the proposed Art 13(2) clause was designed to prevent arguments that pre-existing lawful punishments would be in violation of Art 13 after the proposed Article 13 took effect. *Yong Vui Kong*, 3 SLR (CA), ¶ 70.

238 Universal Declaration of Human Rights, *supra* note 7.

239 European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

240 The reasons for not including Article 13 could be given an alternative reading. Perhaps the constitutional framers did not include it because they considered it was covered by article 9 insofar as such prohibition was intrinsic to the idea of "law" demanded by article 9(1). This would be independent of the Court of Appeal's speculation that the constitutional commission recommended Article 13 because they did not believe it was covered within the ambit of article 9(1). See *Yong Vui Kong*, 3 SLR (CA), ¶¶ 71-72.

the reasons for this were not clear.²⁴¹ The deliberate exclusion of Article 13 was equated with repealing an existing constitutional right.²⁴² From this, the Court offered what it considered to be a reasonable assumption; that the Commission recommended a new Article 13 because it was not considered to overlap with the content of Article 9.²⁴³ Otherwise, its inclusion would be superfluous.

Thus, the court found it illegitimate to read into Article 9(1) the content of what would have been Article 13(1) given that this had been “decisively rejected” by the government in 1969, “especially given the historical context in which the right was rejected.”²⁴⁴ It was not legitimate to “expand via an interpretative exercise” the scope of Article 9(1) to include a prohibition against inhuman punishment.²⁴⁵

The Court took note that the Singapore government had expressed the view that torture was wrong in the local context and that it was criminalized under Penal Code provisions relating to offences affecting the human body.²⁴⁶ In “sharp contrast,” no government statement has stated that the MDP constitutes inhuman punishment. The Court observed that while the majority of states did not impose the MDP for drug and other serious offences, a “significant number of states” did.²⁴⁷ While counsel argued that only 14 countries in the world still retained the MDP for drug offences, the Attorney-General stated there were in fact 31 states who did so.²⁴⁸

241 Yong Vui Kong, 3 SLR (CA), ¶ 72.

242 *Id.* ¶ 74.

243 *Id.* ¶ 72.

244 *Id.* ¶ 72.

245 *Id.*

246 *Singapore Parliamentary Debates, Official Report* (29 July 1987) vol. 49, 1491–92 (Prof. S Jayakumar, Minister for Home Affairs); Penal Code, 2008, c. XVI (Sing.), *referenced in* Yong Vui Kong, 3 SLR (CA), ¶ 75.

247 Yong Vui Kong, 3 SLR (CA), ¶ 96.

248 In countries like India where the Supreme Court considered the MDP under section 303 of the Indian Penal Code 1860 (Act No. 45 of 1860) (India), to be unconstitutional, the practice was equivocal as the government subsequently enacted legislation which included the MDP, *i.e.*, the Narcotics Drugs and Psychotropic Substances Act 1985 (Act No. 61 of 1985) (India) and the Scheduled

Thus, applying international legal rules of CIL formation, the Court of Appeal found insufficient state practice, which had to be “extensive and virtually uniform”²⁴⁹ to indicate that the substantive content of a CIL norm prohibiting inhuman punishment included a specific prohibition of the MDP.²⁵⁰

This line of cases shows the reticence of Singapore courts in utilizing international law as a source for expanding or creating new rights; given its judicial modesty and aversion to the prospect of judicial legislation, the Court of Appeal refused to “legislate new rights” under the guise of constitutional interpretation.²⁵¹ New rights would have to be the produce of parliamentary processes or constitutional amendment. The primacy of democracy and national sovereignty was further underscored in the 2015 Court of Appeal decision of *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129. Here, the court assumed, for the sake of argument, that the punishment of caning amounted to ‘torture’. It noted that there was “strong evidence” that the prohibition against torture was a peremptory international law norm, referencing local parliamentary debates, international tribunals and foreign decisions.²⁵² It directly addressed the question of what ‘rank’ a jus cogens norm would have within the Singapore domestic order.

Citing academic articles and reviewing the summary records of the United Nations Conference on the Law of Treaties, the Court of Appeal rejected the argument that a jus cogens norm, which was a fundamental international norm, applied with constitutional force in the domestic context. It adopted a dualist position, noting that no authority had been provided “for the proposition that a peremptory norm of international law would automatically acquire the status of a constitutional norm when transposed into domestic law.” The Court of Appeal underscored that such a proposition would be “untenable” as it would mean that the content of the Singapore constitution “could be dictated by the views of other states,

Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 (Act No. 33 of 1989) (India); see *Yong Vui Kong*, 3 SLR (CA), ¶¶ 93-99.

249 *North Sea Continental Shelf* (Ger. v. Den.) 1969 I.C.J. 3, ¶ 74 (Feb. 20), cited in *Yong Vui Kong*, 3 SLR (CA), ¶ 98.

250 *Yong Vui Kong*, 3 SLR (CA), ¶ 96.

251 *Id.* ¶ 59.

252 *Yong Vui Kong*, [2015] 2 SLR 1129 at 1143, [27].

regardless of what the people of Singapore, expressing their will through their elected representatives, think.” Thus, it held that jus cogens norms could not override domestic statutes “whose meaning and effect is clear.”²⁵³ Of course, if Singapore were to violate a jus cogens norm, this did not preclude it being held to account in an international forum, as the court acknowledged. The concept of jus cogens was meant to government international or inter-state relations, rather than to apply with “some special or extraordinary effect at the intra-state level.”²⁵⁴

d. Soft International Law and International Comity

There have been instances where soft international law norms, in the sense of non- juridically binding international instruments, have been raised by counsel in cases in an attempt to influence the balancing process in adjudicating rights.²⁵⁵

For example, the Attorney-General in the contempt of court decision of *Attorney-General v. Hertzberg Daniel and others* referred to Articles 13 and 14 of the UDHR,²⁵⁶ a document adopted by the private Inter-Action Council in 1998, in arguing that different countries guaranteed the right to freedom of expression in different ways such that local conditions were paramount, while foreign case law was not determinative in the local context.²⁵⁷ These

253 *Id.*, ¶ 38.

254 *Id.*, ¶ 36.

255 Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *INTERNATIONAL & COMPARATIVE LAW QUARTERLY* 850 (1989).

256 Article 13: “No politicians, public servants, business leaders, scientists, writers or artists are exempt from general ethical standards, nor are physicians, lawyers and other professionals who have special duties to clients. Professional and other codes of ethics should reflect the priority of general standards such as those of truthfulness and fairness.” Article 14: “The freedom of the media to inform the public and to criticize institutions of society and governmental actions, which is essential for a just society, must be used with responsibility and discretion. Freedom of the media carries a special responsibility for accurate and truthful reporting. Sensational reporting that degrades the human person or dignity must at all times be avoided.” Universal Declaration of Human Rights, *supra* note 7.

257 *Attorney General v. Hertzberg Daniel*, [2009] 1 SLR(R) 1103 (HC), ¶ 11 (Sing.).

articles related to codes of professional ethics and to the responsibility a free media had for accurate and truthful reporting. Soft international law was invoked as a counterpoint to rights-oriented readings of constitutional rights that valorized individual rights over competing rights, interests, and goods. In other common law jurisdictions, soft law documents may be invoked for the purpose of supporting a rights-expansive or protective reading of constitutions. For example, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted by the Chief Justices of Asia on August 19, 1995 (including the Singapore Chief Justice), was invoked in *Vishaka v. State of Rajasthan*.²⁵⁸ This included as an objective of the judiciary the promotion “within the proper limits of the judicial function, the observance and the attainment of human rights.”²⁵⁹ This was invoked to support the extraordinary judicial role in “legislating” anti-sexual harassment guidelines in the absence of legislation.²⁶⁰

The same Statement was raised by the defense counsel before the Singapore High Court in *Public Prosecutor v. Nguyen Tuong Van*, and was treated more dismissively.²⁶¹ The defense sought to add force to its submissions, challenging the constitutionality of the mandatory death penalty in relation to the equal protection clause, and underlining the importance of the judicial role in death penalty cases.²⁶² The statement declared the indispensable role of the judiciary in implementing rights under the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR), to which Singapore is not a party.²⁶³ The judicial function was to promote the “attainment of human rights” and have jurisdiction over all justiciable issues, including sentencing.²⁶⁴ Thus, to afford the accused “the equal protection of the law,” sentence had to be passed by an independent, impartial tribunal.²⁶⁵ This was directed at the mandatory death penalty where courts have no discretion as to sentencing

258 *Vishaka*, A.I.R. at 3011.

259 *Id.* ¶ 11.

260 *Id.*

261 *Nguyen Tuong Van* (2004), 2 SLR (HC).

262 *Id.* ¶ 72-73.

263 *Id.* ¶ 100.

264 *Id.*

265 *Id.*

once guilt is found. Kan Ting Chiu J. briefly noted that nothing in the Statement related to death sentences or mandatory death sentences, and counsel failed to explain “how the Statement, which does not have the force of a treaty or a convention, assists the accused’s argument that mandatory death sentences are illegal.”²⁶⁶ The reference to a soft law instrument served only to be some sort of rhetorical flourish rather than a substantive argument.

Attempts to require statute to conform to norms contained in General Assembly resolutions have failed before Indian courts.²⁶⁷ In *People’s Union for Civil Liberties v. Union of India* (2005), the argument was raised that the Protection of Human Rights Act (1993) governing the National Human Rights Commission fell short of the Paris Principles of National Human Rights Institutions, endorsed in General Assembly Resolution 48/134 of 1993.²⁶⁸ Section 3(2)(d) provides that persons having “knowledge of, or practice experience in, matters relating to human rights” should be appointed commissioners.²⁶⁹

The People’s Union for Civil Liberties (PUCL) argued that the Paris Principles would be breached if a retired police officer was appointed to be a human rights commissioner, since the police were major human rights violators.²⁷⁰ The Court held that the Paris Principles did not exclude police personnel from sitting on national human rights commission (NHRC) and that the General Assembly Resolution could not be exalted to a status of a covenant at international law; even though India had supported the Resolution, this did not cast any binding legal obligation on it.²⁷¹ Soft law norms could not be used to interpret domestic law without regard to the wording of the statutory text, which did not preclude policemen from becoming NHRC members. Soft international law contained in General Assembly resolutions could not be invoked to override express legislation.²⁷²

Clearly, none of these documents have legally binding force and their utility lies in the realm of their moral force; their power to influence is

266 *Id.* ¶101.

267 *People’s Union for Civil Liberties v. Union of India*, (2005) 2 S.C.C. 436 (India).

268 *Id.*

269 The Protection of Human Rights (Amendment) Act, 1993, No. 43, Acts of Parliament, 2006 (India).

270 *Id.*

271 *Id.*

272 *Id.*

based on persuasion, not obligation. This is evident in the Malaysian case of *Nor Anak Nyawai v. Borneo Pulp Plantation Sdn Bhd*, where Judge Ian Chin referred to the standards in the non-binding U.N. Draft Declaration on the Human Rights of Indigenous Peoples, although this decision played “no part in my decision” on the case issues as it did not form “part of the law of our land.”²⁷³ Declaration provisions, such as that relating to the right of indigenous people to protect them from forcible removal from their land and cultural genocide, were cited to serve an educative function. In particular, these standards “provide valuable insight as to how we should approach matters concerning the natives,” showing the defendant government authorities their wrongful attitudes towards Sarawak natives and to instruct them concerning the “global attitude towards natives.”²⁷⁴ Thus, soft international human rights law was judicially referenced to serve the purposes of censuring and educating state officials as to global standards, with the hope of shaping future policy and conduct.

International soft law thus provides some sort of moral imperative for courts to acknowledge international standards and values, engaging domestic courts in dialogue with cosmopolitan values.

International comity is not a binding legal obligation but a matter of courtesy and goodwill. It has on occasion influenced judicial review where rights are concerned and is invoked along with some mention of state sovereignty. For example, comity spoke to whether a corruption offence under the Prevention of Corruption Act (PCA) (Cap 241, 1993 Rev Ed) based on a classification between citizens and non-citizens was a reasonable one, so as to meet the requirements of the Article 12 equal protection of the law guarantee in *Public Prosecutor v. Taw Cheng Kong*.²⁷⁵

Section 37(1) of the PCA provides for the application of the PCA to Singapore citizens outside Singapore.²⁷⁶ A Singapore citizen in Hong Kong

273 *Id.* at 298.

274 *Id.* at 297.

275 *Taw Cheng Kong*, 2 SLR(R) (CA) 489.

276 “The provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore; and where an offence under this Act is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed in Singapore.” Prevention of Corruption Act (Cap 241, 1993 Rev Ed).

was convicted for a corruption offence and argued that section 37(1) PCA was discriminatory as it would not extend to the same act committed in the same place, presumably with the same impact on Singapore, if the perpetrator was a non-citizen. The classification was therefore under-inclusive and contrary to the Article 12 equal protection constitutional guarantee, bearing in mind the Act's purpose to provide for the more effectual prevention of corruption.

The Court of Appeal noted that a statute "generally operates within the territorial limits of the Parliament that enacted it" and would apply to all persons within that state including foreigners.²⁷⁷ It approved an English canon of construction to the effect that if any other construction were possible, an Act would not be construed as to apply to acts done by foreigners outside the state.²⁷⁸ This rule was "based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."²⁷⁹ This territorial principle in criminal law served various rationales, including avoiding cases when other states may take offense if a country attempts to regulate matters taking place within their territories.²⁸⁰

The Court of Appeal noted that non-citizens were left out of the ambit of section 37(1) out of consideration of comity, and consequently, in considering the reasonableness of the classification, the Act's objective "must be balanced against Parliament's intention to observe international comity."²⁸¹ Given the broad ambit of section 37(1) which would capture all corrupt acts independent of their harmful consequences in Singapore, the Court of Appeal concluded it was "rational to draw the line at citizenship and leave out non-citizens so as to observe international comity and the sovereignty of other nations."²⁸² The court agreed with the Attorney-General that section 37(1) PCA was "a piece of highly responsible legislation which took into account international norms and practices."²⁸³ International law and comity

277 Taw Cheng Kong, 2 SLR(R) (CA), ¶ 66.

278 *Id.* ¶¶ 66-68.

279 R v. Jameson, [1896] 2 Q.B. 425 at 430 (Eng.).

280 Taw Cheng Kong, 2 SLR(R) (CA), ¶ 69.

281 *Id.* ¶ 70.

282 *Id.* ¶ 75.

283 *Id.* ¶ 83.

was thus a consideration in the application of the rational classification test to interpret the equal protection clause.²⁸⁴ Adopting a dialogical tone, the Court also suggested that Parliament adopt the effects test, which was recognized at international law,²⁸⁵ as the basis for its extra-territorial laws.²⁸⁶

e. Issues of Recognition and State Immunity before Singapore Courts

Questions of recognition of putative states/government frequently arise in connection with claims of state immunity before courts, bringing to the fore the role of executive certificates.

These issues arose before the Singapore courts in *Civil Aeronautics Administration v. Singapore Airlines Ltd.* in relation to an air accident when a Singapore Airlines flight took-off from Taipei Airport in Taiwan, which is run by the Civil Aeronautics Administration (CAA), a department under the Ministry of Transport and Communications of the government of Taiwan charged with the administration of civil aviation in the Republic of China.²⁸⁷ Injured passengers sued Singapore Airlines, who claimed indemnity from CAA and joined it as third parties to the suit. The CAA then invoked foreign state immunity under section 3(1) read with section 16(1)(c) of Singapore's State Immunity Act (SSIA) (Cap 313, 1979), in an attempt to set aside third party proceedings.²⁸⁸

Under this Act, foreign states can claim immunity from the civil jurisdiction of Singapore courts.²⁸⁹ This is largely similar to the United Kingdom's State Immunity Act (1978), which endorses a model of restrictive immunity, and was enacted to give effect to the 1972 European Convention

284 *Id.*

285 *E.g.*, *S.S. Lotus (Fr. v. Turk.)*, judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); *United States v. Aluminium Co. of America*, 148 F.2d 416 (1945).

286 *Taw Cheng Kong*, 2 SLR(R) (CA), ¶ 88.

287 *Civil Aeronautics Admin. v. Singapore Airlines Ltd.*, [2004] 1 SLR 570 (CA), ¶ 14 (Sing.).

288 *Id.* ¶ 9.

289 *State Immunity Act*, 2014, c. 313 (Sing.).

on State Immunity, to which Singapore is not a party.²⁹⁰ As the Court of Appeal in *Civil Aeronautics Administration v. Singapore Airlines Ltd.* has noted, sovereign immunity “is based on mutual respect and international comity . . . [requiring] every sovereign state to respect the independence and dignity of every other sovereign state” so as to “decline to exercise by means of its courts, territorial jurisdiction” over the person or public property of the sovereign.²⁹¹ Thus, a sovereign state “could not be sued in the courts of another state unless the former submits to the jurisdiction of the latter.”²⁹²

Section 3(1) embodies a general principle of immunity from the jurisdiction of Singapore courts, with stated exceptions. Section 16(1) provides that reference to a state includes, *inter alia*, reference to “any department of that government.”²⁹³ Section 18 provides that an executive certificate from the Ministry of Foreign Affairs (MFA) “shall be conclusive evidence”

290 Law Minister EW Barker noted that there were certain provisions in the UK Act which were not appropriate to Singapore, “particularly those concerning the European Convention on State Immunity.” Thus, while the Singapore Act is based on the UK Act, it “has been modified to suit our needs and circumstances.” ‘State Immunity Bill’, 39 Singapore Parliament Reports 7 Sept 1979 col 408 at 409. None the less, while not being bound by the UK Parliament’s intention in adopting the State Immunity Act, references have been made to Hansard to interpret the scope of section 15 of the Singapore State Immunity Act which is *in pari material* with section 13(2)(b) of the UK Act. It emerged that an original provision to grant immunity for orders for security of costs was deleted from the final bill. Choo Han Teck J held that the Singapore Act does not curtail the court’s jurisdiction to order security for costs despite its silence. Such orders were not part of ‘enforcement jurisdiction’, which is distinct from ‘adjudicative jurisdiction’ – state consent to submit to the latter does not entail submission to the former. Security for cost orders were “a procedural condition precedent for the continuation of legal proceedings” and did not constitute an affront to the dignity of a foreign sovereign where asked to provide security for the costs of proceedings that sovereign has voluntarily institute in the forum court. *See* Ministry of Rural Dev., Fishery, Craft Indus. & Env’t of the Union of Comoros v. Chan Leng Leng, [2013] 3 SLR 214 (HC), ¶¶ 5, 8 (Sing.).

291 *Civil Aeronautics Admin.*, 1 SLR (CA), ¶ 14.

292 *Id.*

293 State Immunity Act, 2014, c. 313, § 16(1) (Sing.).

on any question as to whether “any country is a State for the purposes of Part II”²⁹⁴

Counsel for both SIA and CAA wrote to the MFA requesting a positive response to the question of whether the MFA would issue a certificate confirming that Taiwan was a state for the purposes of the SIA. MFA responded to both with a letter stating “we are unable to issue the certificate pursuant to s18 of the State Immunity Act.”²⁹⁵

I. PRIMACY OF STATE IMMUNITY ACT OR CUSTOMARY INTERNATIONAL LAW ON SOVEREIGN IMMUNITY – THE TREATMENT OF EXECUTIVE CERTIFICATES

The High Court in *Woo v. Singapore Airlines Limited and Civil Aeronautics Administration (joining)*, rejected counsel’s argument that the court should “follow the principles of international law and draw a distinction between ‘*de jure* and *de facto* recognition,’ given the absence of official recognition of Taiwan as a state by the Singapore government.”²⁹⁶ Counsel had argued that the court was entitled to determine whether there was a *de facto* recognition of the Republic of China if the Singapore government’s position on this point was unclear. Evidence was set forth before the High Court and on appeal in *Civil Aeronautics Administration v. Singapore Airlines Ltd.* on the history of Singapore-Taiwan interactions, including the conclusion of a double-taxation treaty, investment and tourism agreements.²⁹⁷

However, the High Court, affirmed by the Court of Appeal, held that the refusal of the Ministry of Foreign Affairs (MFA) to issue a certificate stating that the Singapore government recognized Taiwan as a state under the SSIA was conclusive and a clear indication of non-recognition, even if couched in “polite and diplomatic terms.”²⁹⁸ Since the SSIA did not distinguish between *de jure* or *de facto* recognition, it had to “be read as inclusive of both.”²⁹⁹

294 *Id.* § 18.

295 *Civil Aeronautics Admin.*, 1 SLR (CA), ¶ 10.

296 *Woo v. Singapore Airlines Ltd.*, [2003] 3 SLR 688 (HC) (Sing.).

297 *Civil Aeronautics Admin.*, 1 SLR (CA), ¶¶ 12-28, 34-35.

298 *Id.* ¶ 11.

299 *Woo*, 3 SLR (HC), ¶ 7.

Ultimately, the CAA was denied immunity from suit under the SSIA, based on the executive's view rather than judicial determination of what international law required.³⁰⁰ Several justifications were given for this approach:

i. "One Voice" Doctrine

The High Court emphasized that the recognition of statehood was something requiring "a common stand to be taken by all the organs of the recognizing state."³⁰¹ The SSIA thus requires the application of a "one voice" doctrine as it conferred upon the Executive the power to make a conclusive determination whether to recognize a state or government for the purposes of the Act. This requires judicial deferral to executive determinations as "[r]ecognition by the court follows recognition by the state to which that court belongs."³⁰²

ii. The Determinative Voice of the Executive

The question of whether Taiwan was entitled to immunity under the SSIA was to be determined by the views of the executive rather than international law. Irrespective of what the court views the status of Taiwan to be under general principles of international law, once the MFA says Taiwan is not a state for SSIA purposes, "the court should fall in line."³⁰³ This reflects the "pre-eminence given to recognition"³⁰⁴ under section 18 SSIA.

Citing a string of English cases, the Court of Appeal highlighted Lord Atkin's judgment in *Government of the Republic of Spain v. SS Arantzazu Mendi*,³⁰⁵ which rejected earlier views that the court could examine sec-

300 One might argue that since the SSIA removed immunity from *acta jure gestionis* (non-sovereign acts of state) and placed the issue from the political to the legal sphere to be determined by the judicial application of international law, pursuant to the doctrine of restrictive immunity, that the SSIA should be construed subject to international law.

301 Woo, 3 SLR (HC), ¶ 6.

302 *Id.* ¶ 11.

303 Civil Aeronautics Admin., 1 SLR (CA), ¶ 14.

304 *Id.* ¶ 25.

305 *Gov't of the Republic of Spain v. SS Arantzazu Mendi*, [1939] A.C. 256 (H.L.) at 263-64 (Eng.).

ondary evidence where the Crown declined to answer a question about statehood.³⁰⁶ He said “[o]ur state cannot speak with two voices Our Sovereign has to decide whom he will recognize as a fellow sovereign,” and the issue of foreign state immunities must flow from that decision.³⁰⁷

iii. Is there No Role for the Court? What about Ambiguity?

The door was left open as to whether the court could conduct its own independent inquiry³⁰⁸ based on other evidence about whether the Singapore government had recognized Taiwan as a state, *de facto* or *de jure*, where the MFA’s actions were ambiguous. In the instant case, the Court of Appeal asserted that the MFA’s reply was clear and had to be viewed in the context of the request, noting it was “not for the judiciary to criticize any obscurity” in the executive’s expression.³⁰⁹ By refusing to certify that Taiwan was a state for SSIA purposes, the “only logical conclusion” was that Taiwan was not a state within the meaning of the SSIA.³¹⁰

Even if this was ambiguous, the preferred course of action would be to revert to the MFA for “a more specific answer.” The Court of Appeal underscored that the issue of recognition of statehood was a matter “wholly within the Executive’s domain,”³¹¹ being not only a matter of fact but of policy.³¹² There was no room for the courts to “get themselves involved in international relations” which they were ill-equipped to deal with. The sensible option was to seek further clarification rather than second-guess the Executive or determine the answer based on evidence placed before

306 Specifically, Lord Sumner’s views *in* *Duff Dev. Co. v. Gov’t of Kelantan*, [1924] A.C. 797 (H.L.) (appeal taken from Eng.).

307 *SS Arantzazu Mendi*, A.C. at 264.

308 The CAA cited *In re Al-Fin Corporation’s Patent*, [1970] Ch. 160 where North Korea was recognized as a “state” for the purposes of section 24 of the UK Patents Act (1949), despite the government not recognizing it. “State” in this context was to be apprehended by the “objective conditions of statehood” as “state” under section 24 did not depend on recognition.

309 *GUR Corp. v. Trust Bank of Africa Ltd. & the Gov’t of Ciskei*, [1986] 2 Lloyd’s Rep. 451 (A.C.) (Eng.), *cited at* *Civil Aeronautics Admin.*, 1 SLR (CA), ¶ 12.

310 *Civil Aeronautics Admin.*, 1 SLR (CA), ¶ 13.

311 *Id.* ¶ 15.

312 *Id.* ¶ 22.

it. It was only when the Executive refused to respond to a request for an executive certificate, that the courts would take their own decision on the basis of customary international law.³¹³

The different approach of the Canadian courts flowed from the fact that their statutory equivalent of section 18 SSIA indicated that a Canadian executive certificate was but *one* means of determining whether Taiwan was a state for the purposes of the Canadian Act.³¹⁴ In addition, where the executive's reply is vague, the court could consider evidence and come to its own conclusion.³¹⁵

II. THE SPECIAL QUESTION OF SOVEREIGN IMMUNITY AS DISTINCT FROM STATEHOOD

The Court of Appeal in *Civil Aeronautics Administration v. Singapore Airlines Ltd.* stressed that the question of sovereign immunity was “special” and to be treated differently from the different question of whether a state had come into being. A state must first be recognized before it can be accorded state immunity.³¹⁶

Singapore endorses the “declaratory” theory of statehood, that there are four conditions under customary international law for an entity to be a state: defined territory, permanent population, effective government, and the capacity to enter into relations with other states.³¹⁷ Recognition in this conception is not constitutive of statehood but a mere acknowledgement of fact.

However, where sovereign immunity is concerned, “recognition is vital.”³¹⁸ One cannot respect what one does not recognize. The court evaluated the evidence to see if Singapore had in fact recognized Taiwan

313 *Id.* ¶¶ 27, 41.

314 See generally Olufemi A. Elias, *The International Status of Taiwan in the Courts of Canada and Singapore*, 8 SINGAPORE YEAR BOOK OF INTERNATIONAL LAW 93 (2004).

315 *Parent v. Singapore Airlines Ltd. & Civil Aeronautics Admin.*, [2003] IIJ Can 7285 (Can. Que.).

316 *Civil Aeronautics Admin.*, 1 SLR (CA), ¶ 20.

317 *Id.* ¶ 30.

318 *Id.* ¶ 31.

as a sovereign state.³¹⁹ The evidence was read in the light of Singapore's one-China policy and the fact that Singapore had treated Taiwan different from other sovereign states.³²⁰ For example, Taiwan had no diplomatic representation, only a Trade Mission that was not allowed to use the title "republic of China" from 1990 when Singapore established formal relations with the PRC.³²¹ The approach was consonant with treating Taiwan as "a political subdivision of another State."³²²

While clear that Singapore was in "close co-operation" with Taiwan in various areas like tourism, tax and air services, this did not imply recognition as sovereign state.³²³ Recognition was intentional and could not be easily implied from actions; acts must leave "no doubt" of the intention to recognize, and the acts indicated Singapore had taken care to ensure its actions could not be construed as recognizing Taiwan's status in a manner contrary to its one-China policy.³²⁴

III. CAN YOU SUE SOMETHING WHOSE EXISTENCE YOU DENY?

The Court of Appeal in *Civil Aeronautics Administration v. Singapore Airlines Ltd.* rejected the argument that if Taiwan was not a state for the purposes of SSIA, it could not be sued. Taiwan could be a state for other purposes and still have the capacity to sue and be sued, as determined by the law of Taiwan. American case law was cited for the proposition that unrecognized governments were not totally devoid of some legal status. Indeed, the House of Lords articulated a sensible approach insofar as non-recognition could not be pushed to its "ultimate logical limit," particularly where private acts or daily administrative acts were concerned.³²⁵ It was thus possible not to grant recognition to an entity for the purposes of state

319 *Id.* ¶ 32.

320 *Id.* ¶ 34.

321 *Id.* ¶¶ 32-34.

322 If Taiwan had taken the stand that it should enjoy immunity as part of the People's Republic of China, which Singapore recognizes as a state, this would have been "a serious argument." *Id.* ¶ 8.

323 *Id.* ¶ 35.

324 *Id.* ¶ 36.

325 *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd. (No 2)*, [1967] 1 A.C. 853 (H.L.) (Eng.).

immunity while permitting it to be sued for its acts, since non-recognition does not deny a foreign government exists, and denies only that it cannot represent the state on the international plane.³²⁶ As such, Taiwan existed and its government was in effective control over a specific area, and thus the CAA bore responsibility for its role in the tragedy.

4. LIMITS ON INTERNATIONAL LAW IN SINGAPORE COURTS AND CONCLUDING OBSERVATIONS

a. Factors Restricting Judicial Review – Non-Justiciability/Act of State

Certain doctrines and principles, like the act of state doctrine and doctrine of non-justiciability operate to limit judicial review over issues that may engage international law. This implicates constitutional doctrines like the separation of powers.

It has been recognized that there are “clearly provinces of executive decision-making that are, and should be, immune from judicial review.”³²⁷ This includes “high policy” matters pertaining to making treaties, recognizing foreign governments, declaring war, the conduct of foreign affairs and international boundary disputes.³²⁸ The “one voice” policy is adopted to avoid embarrassing the executive in the conduct of foreign relations, locating this in the realm of politics rather than law. Certain issues were more suited to diplomatic settlement as opposed to judicial determination, particularly where highly politicized, complex and contested, placing the court in a “judicial no man’s land.”³²⁹

The act of state doctrine is a prudential one that limits the forum court from inquiring into the validity and propriety of the sovereign acts of a foreign state committed within its own territory. This immunizes the sovereign acts of a foreign state from judicial review as such acts are considered

326 DW Grieg, *The Carl-Zeiss Case and the Position of an Unrecognised Government in English Law*, 83 LAW QUARTERLY REVIEW 96 (1967).

327 Lee Hsien Loong v. Review Publ’g Co., [2007] 2 SLR(R) 453 (HC), ¶ 95 (Sing.).

328 *Id.* ¶ 96.

329 Kuwait Airways Corp. v. Iraqi Airways Co., [2002] UKHL 19, [113].

“automatically non-justiciable by reason of their sovereign nature.”³³⁰ This is distinct from the doctrine of sovereign immunity which raises question of jurisdiction, not prudence.

The act of state doctrine only applies if the relevant act is an act of the state, which must be done in the exercise of the supreme sovereign power of a state, as opposed to private acts.³³¹ The subject matter of the act must be located within the foreign sovereign’s territory. It only applies to acts of foreign legislatures or governments, and not judicial acts,³³² which were covered by the common law conflicts of law rules on the recognition of foreign judgments. One of its rationales, drawn from international law, is that respect is shown for the independence of other sovereign states when “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”³³³

As Chao Hick Tin JA noted in *Republic of the Philippines v. Maler Foundation*, this understanding of act of state emphasizes “the Westphalian notion of sovereignty” under which each state exercised “absolute power and sovereignty within its territorial boundaries.”³³⁴ He noted the American act of state doctrine was “initially conceived from this perspective as a matter of judicial restraint and comity,” much like the British approach towards non-justiciability/act of state, which Singapore appears to follow.³³⁵ However, the American doctrine has since been established on a more constitutionalist basis, resting on the separation of powers.³³⁶ Under this model, it would be improper for courts to consider certain disputes between foreign sovereigns as judicial intervention might “hinder rather

330 WestLB AG v. Philippine Nat’l Bank, [2012] 4 SLR 894 (HC), ¶¶ 38-39 (Sing.).

331 Maldives Airports Co. v. GMR Male Int’l Airport Pte Ltd, [2013] 2 SLR 449 (CA) (Sing.).

332 The Republic of the Philippines v. Maler Found., [2014] 1 SLR 1389 (CA) (Sing.).

333 Chief Justice Fuller, *Underhill v. Hernandez*, 168 U.S. 250 (1897), *discussed in* WestLB AG, 4 SLR (HC) at 894.

334 Maler Found., 1 SLR (CA), ¶ 42 (*referring to Underhill v. Hernandez*, 168 U.S. 250 (1897)).

335 *Id.*

336 *Id.* ¶ 48.

than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."³³⁷

These doctrines of judicial restraint may be seen to uphold the international law concept of state sovereignty, in preserving to states the exclusive competence to regulate people and activities within their territorial domains. This truncates the effect of international law as an influence on the development and content of domestic law. However, in English common law practice, exceptions have developed in relation to the act of state doctrine, where English courts will refuse to give effect to the acts and laws of foreign sovereign states where these represent gross human rights violations or violate fundamental principles of international law, such as the prohibition on the use of force, an accepted *ius cogens* norm.³³⁸ These sorts of issues have yet to arise in the Singapore context.

b. Concluding Observations

Gone are the days where the "little island" mentality towards international law translated into judicial dismissiveness towards international law norms and arguments. This is not to say that Singapore courts see themselves as agents of the international community in the enforcement of international norms. Their focal point is more modest and nationalist. There is no fear of judicial over-reaching here in terms of jurisdictional assertions, as one might associate with Belgian courts and legislation, which at its zenith provided for universal jurisdiction for the commission of war crimes.³³⁹

Nonetheless, Singapore courts are well versed with international law, citing jurists more frequently and carefully distinguishing between *lex lata* and *lex ferenda*. International law is no longer an exotic creature but increasingly becoming part of the regular diet of judges. While their first

337 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), *quoted in* Maler Found., 1 SLR (CA), ¶ 40.

338 *Oppenheimer v. Cattermole*, [1976] A.C. 249 (H.L.) 277-78 (appeal taken from Eng.); *Kuwait Airways Corp.*, [2002] UKHL 19. For a comment, see Li-ann Thio, *English Public Policy, the Act of State Doctrine and Flagrant Violations of Fundamental International Law: Kuwait Airways Corp. v. Iraqi Airways Co.* (2002), 18 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 585 (2003).

339 Michele Hirsch and Nathalie Kumps, *The Belgian Law of Universal Jurisdiction Put to the Test*, 35 JUSTICE (2003) (Belg.).

frame of reference is Anglo-American case law, this is not applied wholesale but with discernment, with sensitivity shown to local values. It gives weight to particularism, without descending into the parochialism of the past where Singapore could be characterized as a “little island” whose courts were reactive in rejecting international law, at least when it came to public law.

It is clear that Singapore courts do not accord primacy to international rules within the national legal system, thereby downplaying the transformative role international law could play in the domestic setting. Its dualist sensibility that prevents treaty law from being directly applied in concrete disputes reflects a vindication of state sovereignty in the form of the power to control “whether and how international rights should be enforced in that municipality.”³⁴⁰

The hierarchical superiority of the constitution and statutes to international norms provide the court great latitude not to give effect to international rules. If CIL rules are received by judicial recognition (a form of state consent) as common law rules, they cannot invalidate statutes. This approach consolidates state sovereignty based on the Westphalian model rooted in territorial integrity and the non-interference of states in domestic affairs. In this conception, international law is applied provided it does not conflict with national law; therefore, it cannot pose a serious threat to national values.

340 David J. Bederman, *Enforcement and Compliance*, in *THE SPIRIT OF INTERNATIONAL LAW* 186, 187-99 (2002).

International Law in the Courts of India

V.G. Hegde¹

1. INTRODUCTION

Domestic courts and tribunals have, in recent years, been taking frequent recourse to international law as a means to settle disputes. Two reasons can be adduced for this trend. Firstly, it could be that domestic courts and lawyers are increasingly exposed to or getting well-versed in international law and its principles. Secondly, due to globalization, there is an inevitable foreign element in majority of the disputes. Both factors are interrelated. Domestic courts are using international law through broad interpretations coupled with domestic constitutional and legal provisions. This is the prevailing perception about international law within various domestic legal jurisdictions.² India is no exception.

Domestic courts in various jurisdictions, including India, continue to rely and decide the cases primarily on the basis of their own laws or constitutions while using international law as a supplementary means to substantiate the arguments.³ Indian courts have been applying international law to fill the gaps in the domestic law and policy.⁴ In some domestic

1 Associate Professor, South Asian University, New Delhi, India.

2 See A.M. Slaughter & W. Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARVARD INTERNATIONAL LAW JOURNAL 327 (2006).

3 Soli Jehangir Sorabjee, *Equality in the US and India*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE US CONSTITUTION ABROAD (L. Henkin & A.J. Rosenthal eds., 1990); P. CHANDRASEKHARA RAO, *THE INDIAN CONSTITUTION AND INTERNATIONAL LAW* (1995); V.G. Hegde, *Indian Courts and International Law*, 23 LEIDEN JOURNAL OF INTERNATIONAL LAW 53 (2010).

4 Sunil Kumar Agarwal, *Implementation of International Law in India: Role of Judiciary* 12 (June 14, 2010) available at http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf.

jurisdictions, international legal norms are referred directly, though this is done subject to certain prior constitutional approvals and procedures.⁵

According to one view, this kind of international-law-dominance is inevitable considering the impact and reach of globalization process in various fields. The dire need for evolving the globally accepted norms to deal with certain kinds of transnational issues, transactions, and problems is increasing. States do accept such a need. However, they, especially the courts, are reluctant to cede their sovereign right to accept or reject such norms on an automatic basis.⁶ Regardless of States' intent, international legal norms embodied through various treaties and agreements have influenced domestic legal framework.⁷

The other view is that international law is entering into domestic legal space through changes that had been brought about to give effect to obligations undertaken under various treaties and agreements.⁸ In majority of the domestic legal systems, international law cannot be directly given effect to, or for that matter, it cannot be a stand-alone norm.⁹ The effective implementation of international law in the domestic sphere, therefore, is essentially an international legal question bringing to the fore the issues relating to the relationship between international law and municipal law.¹⁰

A distinction, however, will have to be made between application of substantive international legal norms and of taking recourse to certain for-

5 *Id.* at 1.

6 *Id.* at 3.

7 Several new legislations have been enacted in India to give effect to its multilateral obligations. Courts will have to find ways and means to interpret some of these legislations. The obligations undertaken under the agreements of the World Trade Organization (WTO) are good examples. India has either enacted several new legislations or amended several existing legislations to give effect to its WTO obligations such as, for example, amendments to its various Intellectual Property Rights legislations, introducing several new legislations like the Geographical Indications of Goods (Registration and Protection) Act, 1999, Protection of Plant Varieties and Farmers Rights Act, 2001, Biological Diversity Act, 2002. Reference can also be made to Arbitration and Conciliation Act, 1996 based on the United Nations Commission on International Trade Law (UNCITRAL) model.

8 Agarwal, *supra* note 4, at 1.

9 *Id.*

10 *Id.*

foreign legal elements. It could be safely asserted that customary international law, multilateral and bilateral treaties and agreements that are in force could be regarded as constituting the core of substantive international legal norms. On the other hand, courts and other tribunals while dealing with various cases might be referring to or would rely on various legal principles and norms drawn from different legal systems. It could, for example, be a foreign law or legislation which could be used as a fact or as an analogy in a judgment. Any interpretation or placement of a foreign legal element could also be regarded as part of the usage of international law, although this could be strictly regarded as part of what could be termed as private international law. In the context of Indian courts at all levels, this interface between international law and private international law is a constant factor.

International law continues to be an exotic legal domain for the Indian courts, at least for certain level of courts. It can also be stated that questions of international law arise primarily at the level of higher judiciary.¹¹ At the level of lower judiciary in the Indian context, the questions of international law seem to appear very rarely. However, there are certain designated areas of law, particularly with regard to procedural laws, wherein international legal norms and procedures become important, even within a limited context. Some of these areas in the Indian context at the level of lower judiciary can be identified such as, for example, ensuring observance of human rights in custody, enforcement of foreign judgments, implementation of foreign arbitral awards, matrimonial cases and issues concerning maintenance, bail application for foreign nationals with sureties, internet crimes, extradition matters, service of summons in foreign jurisdictions, enforcement of intellectual property rights, recognition and dissolution of marriages that had been solemnized in foreign jurisdictions, breach of contract suits, especially in cases where the suit has been dismissed in other foreign jurisdictions, inter-country adoptions, breach of contract by multinational companies, child custody and alimony rights, and environmental issues and granting of injunctions. This list, in recent years, is expanding to include many new legal issues.

Considering the above context, this article seeks to examine the application and use of international law in the Indian courts. The specific focus of the study will be on higher judiciary and where necessary to lower

11 *Id.* at 11.

judiciary as well. The assumption is that it is the higher judiciary that is taking recourse to international law frequently. The first part of the study will outline the Indian constitutional and legal context for the application of international law. The second part will deal with the evolution of the Indian court cases that had dealt with international legal issues with specific focus on applicability and acceptance of customary international law. The third part will focus on some important cases in recent years and will make an attempt to outline the future trends. The final part will end with conclusions.

2. INTERNATIONAL LAW IN THE INDIAN CONSTITUTIONAL SCHEME

Article 51 of the Indian Constitution makes reference to “international law and treaty obligations.”¹² This particular provision, however, is a general provision on the promotion of “international peace and security” followed by the Indian commitment to “maintain just and honourable relations between nations.”¹³ The last two paragraphs of Article 51 specifically refer to “international law and settlement of international disputes.”¹⁴ To be specific, Article 51(c) seeks to “foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (d) encourage settlement of international disputes by arbitration.”¹⁵

In the context of Article 51, there is an argument that it does not provide a priority to the application of international legal norms. It merely seeks to “exhort the Indian State to make all possible endeavours to adhere to and respect international law.”¹⁶ This argument comes essentially from the reasons that relate to the placement of Article 51 within the constitutional

12 INDIA CONST. art. 51.

13 *Id.* (providing that “[t]he State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration”).

14 *Id.*

15 *Id.* §§ (c), (d).

16 *Id.* art. 51.

scheme. It appears in Part IV of the Indian Constitution which has been termed as “Directive Principles of State Policy.”¹⁷ These Directives, unlike the Fundamental Rights which appear in Part III of the Constitution, are not enforceable by any court.¹⁸ However, they are “fundamental in the governance of the country.”¹⁹ The Indian State also has the duty to apply these principles that had been embodied in the Directives in making laws.²⁰

The Fundamental Rights which appear in Part III of the Indian Constitution are enforceable and any law made in contravention of fundamental rights is, to the extent of the contravention, shall be void.²¹ Fundamental rights grant some basic rights to all persons and citizens and they are to be respected. Without going into the extensive debates, discussions and numerous court cases that had saddled the Indian constitutional scheme about the primacy of Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy), it suffices to say that there seems to be a balance achieved between these two parts through various interpretations given by the higher judiciary.²²

The drafting history of Article 51 of the Indian Constitution essentially reflects the approach of the Indian State to the issues concerning interna-

17 *Id.* PART IV.

18 INDIA CONST. art. 37 (Article 37, in Part IV of the Indian Constitution, provides that “[t]he Provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”).

19 *Id.*

20 *Id.*

21 INDIA CONST. art. 13(2) (providing *inter alia*, that “[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void”).

22 See INDIA CONST. art 31C, *amended by* The Constitution (Forty-second Amendment) Act, 1976. This issue specifically appeared with the amendment of the Indian Constitution in 1976. This was the Constitution (Forty-second Amendment) Act, 1976 by inserting Article 31C, which sought to provide that laws made pursuant to Part IV shall not be held void on the ground that it was inconsistent with Part III (specifically Article 14 – right to equality and Article 19 – freedom of speech and expression).

tional relations and the place of international law in that context. Some scholars have argued that the language of Article 51 was drawn mainly from the Havana Declaration adopted by the International Labour Organization (ILO) on November 30, 1939.²³ The soft approach to Article 51 is also attributed to India's hard engagements with its neighbours such as Kashmir, water sharing issues, boundary problems and host of other issues.²⁴ India preferred a negotiation in settlement of most of these issues amicably or through arbitration, and sought to reflect that in its constitutional mandate.

The soft constitutional mandate in Article 51 is clear from its references to such phrases as “[t]he State shall endeavour to” and “foster respect for international law.”²⁵ As we have seen, Article 37 of the Indian Constitution requires that these mandates, including international legal obligations, in Part IV would have to be implemented through appropriate legislations.²⁶ In order to accomplish this, the Constitution provides for an implementation mechanism through Article 253 which *inter alia*, vests in the Parliament the power to make laws implementing international instruments to which India becomes a party.²⁷ This provision appears in Part XI of the Indian Constitution which seeks to outline and determine the scope of

23 Hegde, *supra* note 3, at 57; RAO, *supra* note 3.

24 Some of the issues went to the ICJ. *Right of Passage case*, Pakistan's preference to take Indus Water issue to the ICJ is well-known and documented. See NIRANJAN. D. GULATI, *INDUS WATER TREATY: AN EXERCISE IN INTERNATIONAL MEDIATION* (1973); STEPHEN C. MCCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES* (2nd ed. 2007).

25 INDIA CONST. art. 51.

26 *Id.* art. 37.

27 *Id.* art. 253 (providing that “[n]otwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body”).

legislative powers shared between the Central Government and the Federal structures, i.e., States.²⁸

Article 253 should be read along with Article 73 of the Indian Constitution. Article 73 which is in Part V of the Constitution defining the scope of executive power of the Central Government provides that “the executive power of the Union shall extend – (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.”²⁹In Article 246, this legislative power is specified through three different lists, namely Union List, State List and Concurrent List which outline the areas of their respective dominance.³⁰ While Parliament has the sole power to legislate and deal with all subject matters that fall within the Union List, States have the power to legislate with regard to the subject matter within the State List. The subject matters within the Concurrent List overlap between the Union and the States.

The Entry 14 in the Union List vests the Parliament with the power “to enter into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.”³¹ States

28 *See id.* arts. 245-63. Part XI of the Indian Constitution (from Articles 245 to 263) is equally contentious as it seeks to demarcate the legislative powers between Union and the States. Under Article 245(1), the Parliament has power to make laws for the whole or any part of the territory of India, and the Legislature of a State has power to make laws for the whole or any part of the state. Further, it provides that “[n]o law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.” Reference should also be made to Article 260, which seeks to confer on the Central Government power to extend its executive, legislative, or judicial functions to territories outside India. This extension of jurisdiction is exercised through Foreign Jurisdiction Act, 1947 which, *inter alia*, provides for the exercise of jurisdiction by the Government of India over territories outside India in respect of which the Government of India has acquired jurisdiction by treaty, agreement, grant, usage, political sufferance, or other lawful means.

29 *Id.* art. 73.

30 *See id.* art. 246. These Lists (I, II and III) are referred to Article 246 and the subject matters covered under these Lists are provided in the Seventh Schedule of the Indian Constitution.

31 *Id.* Seventh Schedule, List I, Entry 14.

(the Federal structures) have no authority to conclude treaties and agreements. To put it broadly, States have no authority to undertake directly any international obligations or to implement such obligations *sans* the concurrence of the Central Government.

There are at least ten topics in the Union List that refer to various kinds of subject matter that fall within the realm of international law and relations.³² These subject matters include: foreign affairs; diplomatic, consular and trade representation; United Nations; participation in international conferences, associations and other bodies and implementing of decisions concluded there; war and peace; foreign jurisdiction; citizenship; naturalization; extradition; passports and visas; piracy and crimes committed on the high seas or in the air; and offences against the law of nations.³³

a. Relationship between Articles 51, 253, and 246

As we have observed from the above discussion, there are mainly three provisions, namely Articles 51, 253, and 246 in the Indian Constitution, which deal with creation and observance of international law obligations.³⁴ What is the relationship between these three provisions? Do they altogether adhere to what is known either as *transformation* or *incorporation* doctrine in international law? Transformation doctrine requires international law to be specifically *transformed* into municipal law by the use of appropriate constitutional machinery, such as an act of parliament.³⁵ The Indian constitutional scheme under Article 73 and 253 recognises the fact that the making of a treaty is an executive act.³⁶ However, if it involves, while

32 See *e.g.*, *id.* Entry 10, 19; *id.* Entry 25 (Maritime shipping and navigation); *id.* Entry 37 (Foreign Loans); *id.* Entry 41(Trade and commerce with foreign countries, import and export across customs frontiers, and definition of customs frontiers; also overlapping with Entry 26 of the State List); *id.* Entry 49 (Patents, copyrights, designs and other forms of Intellectual Property Rights); *id.* Entry 25 (Fishing and fisheries beyond territorial waters; also overlapping with Entry 21 of the State List).

33 See *id.* Seventh Schedule, List I.

34 *Id.* arts. 51, 73, 246.

35 Brahm A. Agrawal, *Enforcement of International Legal Obligations in a National Jurisdiction*, ALL INDIA REPORTER 71 (2009).

36 See INDIA CONST. arts. 73, 253.

performing its obligations, an alteration of existing domestic law, it would require legislative action.

The relationship between Articles 51, 73, 246, and 253 within the constitutional scheme were first examined by the Supreme Court of India in *Maganbhai Ishwarbhai Patel v. Union of India*.³⁷ The essential question in this case was about the adjustment of the boundary with another country and as to whether it could be done through an executive act or it required an amendment of the Constitution.³⁸ While examining this issue, the Supreme Court referred to the constitutional scheme. The Court noted that according to Article 73, the executive power of the Union extended to matters in which the Parliament had power to make laws.³⁹ It also noted that the Constitution made no provision making legislation a condition of entry into an international treaty in times of either war or peace. The Court noted that:

The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or other or modifies the laws of the State.⁴⁰

The Court concluded by stating that “[i]f the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.”⁴¹ Accordingly, the Court pointed out that adjustment of a boundary which international law regards as valid

37 *Maganbhai Ishwarbhai Patel v. Union of India*, A.I.R. 1969 S.C. 783 (India), available at <http://indiankanoon.org/doc/1310955/>.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*; see also MALCOLM N. SHAW, *INTERNATIONAL LAW* 129, 151 (4th ed. 1997). Treaties concerning relatively unimportant administrative agreements which do not require ratification as they do not purport to alter municipal law need no intervening act of legislation.

between two Nations, should be recognized by the Courts and its implementation can always be with the executive unless a clear case of cession is involved.⁴² In such cases, the Court further noted that a parliamentary intercession could be expected and should be had.⁴³

The *Maganbhai* decision is crucial as it overruled Supreme Court's own earlier opinion. The Court in an earlier advisory opinion upon reference by the President of India, *In re The Berubari Union and Exchange of Enclaves* (hereinafter "*Berubari I*"), had stated that a mere executive action is insufficient to alter boundaries.⁴⁴ The *Berubari I* was about the exchange of certain enclaves between India and East Pakistan (now Bangladesh) pursuant to an agreement between two prime ministers.⁴⁵ The Government of India had argued that this agreement between two prime ministers could be "implemented by executive action alone without Parliamentary legislation whether with or without a constitutional amendment."⁴⁶

b. Transiting from Transformation to Incorporation Doctrine

The Indian Supreme Court stayed with this *transformation* doctrine framework for a very long time. However, in 1984 with *Gramophone Co. of India v. Birendra Bahadur Pandey*, the Court seemed to have moved to recognise the *incorporation* doctrine.⁴⁷ This doctrine treats international law as part of municipal law, particularly with reference to customary international law. The averment of the Court with regard to this needs reference.⁴⁸ The Court stated, "[t]wo questions arise, first, whether international law is, of its own force, drawn into the law of the land without the aid of a municipal

42 *Maganbhai Ishwarbhai Patel*, A.I.R. 1969 S.C. 783.

43 *Id.*

44 *In re the Berubari Union and Exch. of Enclaves*, (1960) 3 S.C.R. 250 (India).

45 *Id.* at 16.

46 *Maganbhai Ishwarbhai Patel*, A.I.R. 1969 S.C. 783 concluding that "[t]he decision to implement the Award by exchange of letters, treating the Award as an operative treaty after the boundary has been marked in this area, is within the competence of the Executive wing of Government and no Constitutional amendment is necessary".

47 *Gramophone Co. of India v. Birendra Bahadur Pandey*, A.I.R. 1984 S.C. 667 (India).

48 Agrawal, *supra* note 35.

statute and, second, whether so drawn, it overrides municipal law in case of conflict.⁴⁹ The court, however, noted that “[t]he doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament.”⁵⁰ The Court concluded that the national courts would endorse international law but not if it conflicts with national law.⁵¹

Although the Indian Supreme Court was trifle ambivalent in *Gramophone* about the application of the *incorporation* doctrine, it took more than a decade for it to conclusively speak in its favour. In *Vishaka v. State of Rajasthan*, the Court, *inter alia*, stated that any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.⁵²

The Court, in fact, went a step ahead and formulated certain basic principles and guidelines based on available international instruments. According to the Court:

In ... the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance...until a legislation is enacted for the purpose.⁵³

The Indian courts have usually attempted to balance their approach towards both transformation and incorporation doctrines. In other words, the courts have always looked for a more harmonious construction of the provisions to be inclusive of international law. The Indian Supreme Court has consistently referred to more holistic and harmonious interpretation of international and municipal law, especially in the event of conflict. While acceding to the primacy of municipal law to international law in the event of inevitable conflict, it had been advocating for a more harmonious inter-

49 Gramophone Co. of India, A.I.R. 1984 S.C. 667, 671.

50 *Id.*

51 *Id.* at 673.

52 *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011 (India).

53 *Id.* ¶ 16.

pretation. This approach was outlined in *Maganbhai* itself when the Court stated that “if there is any deficiency in the Constitutional system it has to be removed and the State must equip itself with the necessary power.”⁵⁴ In another case, the Court noted:

[I]f there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations.⁵⁵

The Indian constitutional scheme is essentially based on transformation doctrine. Article 253 read with Article 73, and Article 246 provides this basis.⁵⁶ Article 51, as embodied in Part IV of the Indian Constitution, appears to be more aspirational and provides guidance to the construction of law and policy.⁵⁷ However, as examined above, the Courts have been dealing with several cases outlining the relationship between international and municipal law in different contexts. In the initial years of India’s post-independent era, these cases predictably concerned with boundary and related issues. In the last two decades, the issues dealt by the courts have moved into newer areas such as international environment law and international trade law. There appears to be a change in the approach of the Courts as well as in dealing with some of these issues in the context of international law. We shall attempt to examine some of these in the next section.

3. CUSTOMARY INTERNATIONAL LAW: CHANGING PERCEPTIONS

A survey of cases dealt with by the Indian higher judiciary concerning international law during the last five decades shows that there is a consistent

54 *Maganbhai Ishwarbhai Patel*, A.I.R. 1969 S.C. 783.

55 *A.D.M. Jabalpur v. S. S. Shukla*, A.I.R. 1976 S.C. 1207 (India).

56 INDIA CONST. arts. 73, 253, 246.

57 *Id.* art. 51.

emphasis on *transformation* doctrine.⁵⁸ Although in some cases, courts had shown some inclination to transit from *transformation* to *incorporation* doctrine particularly with regard to the application of customary international law, that was, however, subject to the adherence to basic constitutional guarantees.

As noted earlier, in *Vishaka* the Supreme Court was ready to accept any international convention not inconsistent with fundamental rights and in harmony with its spirit and to promote the object of constitutional guarantee.⁵⁹ The situation, however, would differ if a domestic norm conflicts with customary norm of international law. In such a scenario, the Indian courts have been suggesting many conciliatory approaches while maintaining that domestic law would prevail in case of a clear conflict. These conciliatory approaches are in the form of conflict-free interpretations of domestic law. The effort would be to not read conflict into the interpretations of the domestic law and to look for a harmonious interpretation. As mentioned in *Maganbhai*, “if there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power.”⁶⁰

The Indian Supreme Court had noted these changing perceptions that had taken place in other jurisdictions in its 1984 *Gramophone* decision itself.⁶¹ In this decision, the Court had gone on to examine the practices in the courts of United Kingdom and France.⁶² Referring to 1977 *Trendtex* decision of the Court of Appeal of the United Kingdom, the Indian Supreme Court in *Gramophone* had noted that Lord Denning, who had once accepted the transformation doctrine without question, later veered round to express a preference for the doctrine of incorporation and ex-

58 See *Midnapore Zamindary Co. v. Province of Bengal*, (1949) F.C.R. 309 (India); *In re the Berubari Union and Exch. of Enclaves*, (1960) 3 S.C.R. 250; *Ram Kishore Sen v. Union of India*, A.I.R. 1966 S.C. 644 (India); *Maganbhai Ishwarbhai Patel*, A.I.R. 1969 S.C. 783; *Rev. Mons. Sebastiao Fransisco Xavier dos Remedios Monteiro v. State of Goa*, A.I.R. 1970 S.C. 329 (India); *Jabalpur*, A.I.R. 1976 S.C. 1207; *Jolly George Verghese v. Bank of Cochin*, A.I.R. 1980 S.C. 470 (India); *Gramophone Co. of India*, A.I.R. 1984 S.C. 667; see also SHAW, *supra* note 41.

59 *Vishaka*, A.I.R. 1997 S.C. 3011.

60 *Maganbhai Ishwarbhai Patel*, A.I.R. 1969 S.C. 783.

61 *Gramophone Co. of India*, A.I.R. 1984 S.C. 667.

62 *Id.* at 672, 691.

plained how courts were justified in applying modern rules of international law when old rules of international law changed.⁶³ *Trendtex* also referred to the changing nature of international law and the specific problems of ascertaining it.⁶⁴ It also noted that this process created difficulties “in the way of adopting, or incorporating, or recognising as already incorporated, a new rule of international law.”⁶⁵

The above difficulties of identifying and applying international law, specifically customary international law, exist within the Indian courts as well. There is also a notable change in the process and the mechanism of international law-making and the evolution of an international legal norm at the global level. The time lag for a norm to evolve and the concurrent State practice that is required to provide consistency to norm creation has also now transformed and considerably shortened. The subject matters that are being dealt with by international law are also now wide-ranging. The impact of international law on domestic laws, particularly with regard to implementation is a real issue.⁶⁶ The Indian Supreme Court in several of the cases during the last two decades had to deal with these fast-changing

63 *Id.* at 691; *See Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] 2 W.L.R. 356 at 365 (Eng.).

64 *Trendtex Trading Corp.*, 2 W.L.R. 356 at 379.

65 *Id.*

66 Various implementing legislation that are required in the context of the Agreements under the auspices of World Trade Organization (WTO) is a case in point. India, like other member countries of WTO, is also at different stages of implementation by changing, amending or making new domestic laws. Similar examples emerge from various binding resolutions passed by the United Nations Security Council concerning International Terrorism. India, in a statement made to the Sixth Committee of the United Nations on the topic “Measures to Eliminate International Terrorism,” G.A. Res. 66/105, U.N. Doc. A/RES 66/105 (Jan. 13, 2012), informed that it had also amended and strengthened its domestic legislation entitled Unlawful Activities (Prevention) Act, 1967, Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE (1967), integrating the sanctions regime of the Al Qaida Sanctions Committee established pursuant to resolutions 1267 and 1989. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1989, U.N. Doc. S/RES/1989 (June 17, 2011). India also noted that its amended domestic law incorporated provisions dealing with all aspects of terrorism including conspiracy and incitement to terrorism. *See* U.N. GAOR, 66th Sess.,

and evolving international legal norms.⁶⁷ Some of these areas are related to environment, human rights, international trade, maritime issues, extradition and terrorism.

It was in *Vellore Citizens* that the Supreme Court had no hesitation in holding aspects relating to sustainable development as part of customary international law and consider them as part of domestic law.⁶⁸ Once these principles were accepted as part of customary international law, the Court concluded, that there would be no difficulty in accepting them as part of

1st mtg. Agenda Item 109, A/C.6/66/SR.1 (Oct. 3, 2011) available at <https://www.pminewyork.org/adminpart/uploadpdf/37496ind1912.pdf>.

- 67 Some of the notable cases surveyed include the following: *Vellore Citizens Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715 (India), dealt with environment-related issues; *A.P. Pollution Control Bd. v. M.V. Nayudu*, A.I.R. 1999 S.C. 812 (India), dealt with issues relating to environmental degradation; the second case was decided in 2001, *A.P. Pollution Control Bd. II v. M.V. Nayudu*, (2001) 2 S.C.C. 62 (India); *M.C. Mehta v. Kamal Nath*, (1997) 1 S.C.C. 388 (India), laid down the basics of “Public Trust doctrine”; *Narmada Bachao Andolan v. Union of India*, (2000) 10 S.C.C. 664 (India), dealt with environment and rehabilitation issues; *G. Bassi Reddy v. Int’l Crop Research Inst.*, (2003) 4 S.C.C. 225 (India), was about implementation through domestic legislation the UN Convention on Privileges and Immunities; *N.D. Jayal v. Union of India*, A.I.R. 2004 S.C. 867 (India), about the safety and environmental aspects of Tehri dam; *Essar Oil Ltd. v. Halar Utkarsh Samiti*, A.I.R. 2004 S.C. 1834 (India), concerned laying down pipelines through a sanctuary; *People’s Union of Civil Liberties*, A.I.R. 2004 S.C. 456 (India), dealt with issues concerning terrorism; see also *Madan Singh v. State of Bihar*, [2004] I.N.S.C.225 (India), on terrorism issues; *Union of India v. Azadi Bachao Andolan*, A.I.R. 2004 S.C. 1107 (India), challenged Indian Bilateral Taxation and Investment Agreement with Mauritius; see *Sarbananda Sonowal v. Union of India*, A.I.R. 2005 S.C. 2920 (India), about illegal migrants and issues concerning aggression; *Karnataka Industrial Areas Dev. Bd. v. C. Kenchappa*, A.I.R. 2006 S.C. 2038 (India), was about environmental degradation and its consequences; *Intellectual Forum v. State of A.P.*, (2006) 3 S.C.C. 549 (India), reiterated the “Public Trust doctrine”; *Suman Sood v. State of Rajasthan*, (2007) 5 S.C.C. 634 (India), dealt with extradition issues; *Ishikawajma-Harima Heavy Indus. Ltd. v. Dir. of Income Tax, Mumbai*, (2007) 3 S.C.C. 481 (India), examined Double Taxation Agreements and this followed by DIT (International Taxation); *Mumbai v. Morgan Stanley & Co.*, (2007) 7 S.C.C. 1 (India), on double taxation agreements.
- 68 *Vellore Citizens Welfare Forum*, A.I.R. 1996 S.C. 2715.

domestic law.⁶⁹ Referring to the “precautionary principle” and the “polluter pays principle” the Court regarded them as part of the environmental law of the country noting that these principles were accepted as part of customary international law.⁷⁰ However, the Court was not ready to grant a blanket primacy to customary international law and that was clear when the court noted that “...[i]t is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.”⁷¹

In other words, the rules of customary international law that are not contrary to the municipal law would pass the muster, not otherwise. It took more than a decade for the Supreme Court to lay down some of the basic principles relating to the acceptance of customary international law as part of domestic law. This was done in *M/s Entertainment Network (India) Ltd. v. M/s Super Cassette Industries Ltd.*⁷² The main issue before the Court was about broadcasting of sound records through various FM radio stations without a valid license and payment of royalty.⁷³ Appellants had asked for the issuance of compulsory license under Section 31 of the Indian Copyright Act.⁷⁴ One of the main issues was also related to India’s obligations under various copyright-related international conventions.⁷⁵ Examining both the domestic copyright law and also international conventions, the Court noted that the interpretation of a statute could not remain static.⁷⁶ The Court further noted that:

While India is a signatory to the International Covenants, the law should have been amended in terms thereof. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in

69 *Id.*

70 *Id.*

71 *Id.*

72 *M/s Entm’t Network (India) Ltd. v. M/s Super Cassette Indus. Ltd.*, 2008 (9) S.C.A.L.E. 69 (India).

73 *Id.*

74 *Id.*; The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

75 *M/s Entm’t Network Ltd.*, 2008 (9) S.C.A.L.E. 69.

76 *Id.*

societal conditions vis-à-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.⁷⁷

The court moved a step further and sought to outline the role of international law in the domestic legal sphere.⁷⁸ These were - (a) as a means of interpretation; (b) justification or fortification of stand taken; (c) to fulfill the spirit of international obligation which India has entered into, when they are not in conflict with existing domestic law; (d) to reflect international changes and reflect the wider civilization; (e) to provide a relief contained in a covenant, but not in a national law; and (f) to fill gaps in law.⁷⁹

While not conceding entirely the primacy of domestic law to international law in case of conflict, the Supreme Court was ready to accord maximum space to those international conventions that have been negotiated, taking into account different societal conditions in different countries by laying down minimum norms. The Court was even prepared to follow those international conventions to which India was not a party, provided the norms emanating from those conventions were followed as part of an enactment or a Parliamentary statute or by way of an amendment to the existing enactment.

In *Aban Loyd Chiles Offshore Ltd. v. Union of India*,⁸⁰ the Supreme Court had to consider the obligations created by the United Nations Convention on Law of the Sea (UNCLOS)⁸¹ vis-à-vis its compatibility with the Maritime Zones Act, 1976,⁸² Customs Act, 1962,⁸³ and the Customs Tariff Act, 1975.⁸⁴ In fact, Indian domestic law was enacted much before the conclusion of the UNCLOS, 1982. Referring to earlier cases on the subject, the Court reiterated its position that “even in the absence of municipal law,

77 *Id.*

78 *Id.*

79 *Id.*

80 *Aban Loyd Chiles Offshore Ltd. v. Union of India*, 2008 (6) S.C.A.L.E. 128 (India).

81 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

82 The Maritime Zones of India Act, 1976, No. 42, Acts of Parliament, 1976 (India).

83 The Customs Act, 1962, No. 52, Acts of Parliament, 1962 (India).

84 The Customs Tariff Act, 1975, No. 51, Acts of Parliament, 1975 (India).

the treaties/conventions can be looked into and enforced if they are not in conflict with the municipal law.”⁸⁵

To sum up, the Indian Supreme Court is prepared to take into account customary international law and all the related interpretations as part of its law of the land as long as it does not conflict with any domestic law. In the absence of a clear legislation or an enactment, the touchstone of consistency lies within the constitutional guarantees. As long as the international treaties and customary norms are broadly consistent with the basic structures of the Constitution, the Indian courts have no hesitation in applying these international legal norms. As regards the applicability of customary international law, the Indian Supreme Court continues to follow primarily *transformation* doctrine with some occasional tilt towards *incorporation* doctrine.

4. FUTURE TRENDS

Considering the operational complexities of various global regimes in several sectors and their impact on the structures of the Indian legal framework in recent years, it is inevitable that the Indian courts moved away from the doctrinal discourse concerning the implementation of international law. Some recent decisions by the Indian Supreme Court had to deal with complex legal and technical issues in the realm of international law. Though doctrinal discourse is important for the domestic courts, the inevitability of applying ‘foreign’ element of a national or international legal aspect is real. It is pertinent to note that all of these cases in the Indian context, perhaps many more, do not refer to international legal norms *per se*. However, these cases involve some *foreign* legal and factual elements. The Indian courts seem to be comfortable dealing with them through available domestic legal formulations with the sprinkling of some aspects of international law.

First, *Vodafone International Holdings B.V. v. Union of India*⁸⁶ raised complex array of facts with particular reference to corporate structures both within and outside India. In this case, the Indian Income-tax department had raised a tax demand on an overseas transaction concerning Indian

85 Aban Loyd Chiles Offshore Ltd., 2008 (6) S.C.A.L.E. 128.

86 Vodafone Int’l Holdings B.V. v. Union of India, (2012) 6 S.C.C. 613(India).

assets which had resulted in huge capital gain for one of the companies.⁸⁷ In this case, the Supreme Court did not go into any of the basic international legal issues although the case had substantial foreign element in terms of investment issues, chain of command, structure and operation of some off shore and Indian companies.⁸⁸ The decision, besides referring to and mapping complex structure of holding companies, made references to foreign direct investment and its impact on India.⁸⁹ It also to an extent referred to the flow of foreign direct investment based on certain parameters by companies.⁹⁰ The case dealt with corporate governance, regulatory framework and its impact on Indian law.⁹¹

*Republic of Italy v. Union of India*⁹², was about the killing of two Indian fishermen off the coast of Kerala by two Italian Marines while on duty on an Italian ship who mistook them for pirates.⁹³ These marines were arrested by Kerala State police.⁹⁴ The matter went before both the High Court of Kerala and later to the Indian Supreme Court. The main contention before these Courts, including the Indian Supreme Court was that the State of Kerala being a federal unit had no jurisdiction to try the case.⁹⁵ Italy argued before the Indian Supreme Court that taking into account the existing international legal principles the matter was essentially to be dealt with by two sovereign States.⁹⁶ It was argued before the Court stating that “determination of international disputes and responsibilities as well as proceedings connected therewith, must necessarily be between

87 *Id.* ¶¶ 35-36.

88 *Id.* ¶ 127.

89 *Id.* ¶ 68.

90 *Id.* ¶ 73.

91 *Id.* ¶ 47.

92 *Republic of Italy v. Union of India*, (2013) 4 S.C.C. 721 (India).

93 This incident happened at a distance of 20.5 nautical miles within the Indian Sea, i.e., within the contiguous zone. *Id.* ¶ 2.

94 *Id.*

95 *Id.* ¶ 20.

96 *Id.* ¶ 15.

the Sovereign Governments of the two countries and not constituent elements of a Federal Structure.”⁹⁷

The arrest of two Italian Marines for their act of shooting was regarded as violating customary international law.⁹⁸ References were also made to the Principles of International Comity and Sovereign Equality amongst States with specific reference to Declaration on Principles of International Law concerning Friendly Relations and Cooperation between States in accordance with the United Nations Charter.⁹⁹ The other important issue related to the determination of relationship between Indian Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (Maritime Zones Act) and the United Nations Convention on Law of the Sea (UNCLOS).¹⁰⁰ The Maritime Zones Act, 1976 was enacted prior to the adoption of UNCLOS. Accordingly, it was argued that there was no harmony between the two.¹⁰¹ Several key provisions of the Maritime Zones Act and the UNCLOS such as, for example, right of innocent passage, the rights of the coastal state in the Exclusive Economic Zone area, issues and measures taken to combat piracy both at the global and local level have all been discussed.¹⁰²

The Court referring to *Maganbhai* and *Gramophone* decisions and the parameters outlined with regard to the extent of application of international law in the domestic sphere noted that the Maritime Zones Act is in harmony with the UNCLOS.¹⁰³ Further, the Court noted that “it is [a] settled law in India that once a Convention of this kind is ratified, the municipal law on similar issues should be construed in harmony with the

97 *Id.* ¶ 13.

98 *Id.* ¶ 14.

99 *Id.*

100 UNCLOS, *supra* note 81.

101 Republic of Italy, 4 S.C.C. 721.

102 *See id.*

103 *Id.*

Convention, unless there were express provisions to the contrary.”¹⁰⁴ The Court further noted

Conventions, such as these, have not been adopted by legislation, the principles incorporated therein, are themselves derived from the common law of nations as embodying the felt necessities of international trade and are, therefore, a part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.¹⁰⁵

The Supreme Court decided the case of *Novartis A.G v. Union of India* which related to a patent for beta crystalline form of a chemical compound called Imatinib Mesylate on the basis of several technical grounds.¹⁰⁶ This was a therapeutic drug for chronic myeloid leukemia and for certain kinds of tumours.¹⁰⁷ It was marketed under the name Glivec.¹⁰⁸ This patent held by Novartis in Switzerland and in other countries was refused grant of patent by the Indian Patent Office based on its interpretation of Section 3(d) of the Indian Patents Act.¹⁰⁹ Section 3(d) was included pursuant to an amendment to Patents Act in 2005.¹¹⁰ Section 3 of the Indian patent law broadly provided what kinds of subject matter that cannot be patented.¹¹¹ Section 3(d) was part of this and was more specific to disallow patenting of known substances which did not result in the enhancement of the known efficacy of the substance. It also disallowed mere discovery of any new

104 *Id.* ¶ 34.

105 *Id.* ¶ 39.

106 *Novartis A.G. v. Union of India*, A.I.R. 2013 S.C. 1311, ¶3 (India).

107 *Id.*

108 *Id.*

109 *Id.* ¶ 14.

110 *Id.* One major reason for introducing this provision was to disallow what has been termed as “ever-greening” of patents; Patents (Amendment) Act, 2005, No. 15, Acts of Parliament, 2005 (India).

111 *See* Patents (Amendment) Act, 2005, No. 15, Acts of Parliament, 2005 (India).

property or new use for a known substance or mere use of known process, machine or apparatus.¹¹²

Novartis which held a patent for Glivec internationally was not happy with this provision and took a claim that it was in violation of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs)¹¹³ under the auspices of the World Trade Organization.¹¹⁴ The Supreme Court examined in detail the history and evolution of Indian patent law and policy since its independence and also outlined the benefits it derived for the chemical and pharmaceutical industry.¹¹⁵ The case was, in fact, decided more on technical grounds interpreting the making and content of the drug. The case peripherally touched the issue of violations of TRIPs obligations and also its implementation mechanism.¹¹⁶ The Supreme Court rejected the grant of patent more on the ground that how different processes

112 “[T]he mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. *Explanation* – For the purpose of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.” *Id.* § 3(d).

113 Agreement on Trade-related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299.

114 *Novartis A.G.*, A.I.R. 2013 S.C. 1311.

115 *Id.*

116 This contention relating to TRIPs violation was discussed at length when the matter was before the Chennai High Court. The High Court had, however, taken the view that they would be bound by the domestic law, not by the TRIPs obligations. The Court had further noted that the application and interpretation of TRIPs fell outside the scope of its scrutiny. The Court also stated that it is for the States concerned to take up this issue at the WTO forum. For them, the Court reiterated, what mattered most was the domestic law on the subject. *Novartis A.G.*, A.I.R. 2013 S.C. 1311.

could produce Imatinib Mesylate.¹¹⁷ The Court sent back the case to Indian Patent Office for a fresh review and examination.¹¹⁸

The above three decisions by the Supreme Court of India, though discussed briefly, show that *foreign* elements come in the form of transnational location of parties and the international dimensions of the subject matter of the cases. *Vodafone*¹¹⁹ traverses between tax and investment issues. Substantial part of this decision attempts to explain the structure of several national and international companies that hold shares and as to how they seek to control the entire offshore transaction without attracting any tax liability.¹²⁰ This also explains in a way how global corporate structures operate across several jurisdictions without violating any of the respective domestic laws. The decision also reflects as to how Indian courts could deal with such issues.

*Italian Marines*¹²¹ case has more direct references to implementation of a multilateral convention like UNCLOS and other related United Nations Conventions. The consistency of the Indian Maritime Zones Act, 1976, with the provisions of UNCLOS is also a crucial issue. *Novartis* case, like *Vodafone*, has both national and international dimensions.¹²² Major part of the decision outlines the historical account of the Indian patent system and its policy options.¹²³ This historical aspect of patents is examined by the Court while examining the relevancy of Section 3(d) provision in the Indian context.¹²⁴ Technical aspects and interpretations of the subject mat-

117 *Novartis A.G.*, A.I.R. 2013 S.C. 1311, ¶ 157.

118 *Id.* ¶¶ 195-96.

119 *Vodafone Int'l Holdings B.V.*, 6 S.C.C. 613.

120 *Id.*

121 *Republic of Italy*, 4 S.C.C. 721.

122 *Novartis A.G.*, A.I.R. 2013 S.C. 1311.

123 *Id.* ¶¶ 26-30.

124 *Id.*

ter take precedence over the more general aspect relating to Section 3(d) compatibility with TRIPs obligations and other related issues.

5. CONCLUSIONS

Indian courts in recent times have been taking recourse to international law frequently. Sometimes they would use international legal norms as a tool to meet the ends of justice when domestic law is of no help. In many other cases, the very nature of disputes would require them to apply international legal norms. The scope of definition of international law needs to be broadened to include not only traditional areas, but also any foreign legal element that may need interpretation or application. Domestic courts usually do not apply international law directly. They would look for an implementing legislation to give effect to international law. This approach is based on the *transformation* doctrine.

A majority of the States, including India, apply this doctrine. The doctrine of *incorporation* accepts international law as part of the law of the land. United Kingdom and many other jurisdictions prefer to apply international law directly. In the Indian context, there appears to be an effort to move from the *transformation* to *incorporation* doctrine. In *Gramophone*, *Vishaka* and later by *M/s Entertainment Network (India) Ltd.*, *Italian Marine* cases, the Indian Supreme Court seem to transit from transformation to incorporation doctrine.¹²⁵ These developments relating to the content, form and mode of reception of international law into India's domestic legal space span almost three decades and more. In recent times, the Courts, particularly the Indian Supreme court appears to be more comfortable with the application of international legal norms in the absence of clear domestic law on the subject.

In order to understand the evolutionary trajectory of the Indian approach it is crucial to understand the relationship between Articles 51, 73, and 253 of the Constitution. These provisions are read in conjunction with Article 246 which seeks to authorize the executive to enter into treaties and agreements. This relationship between these Articles of the Constitution has been examined in various cases of the Supreme Court from time to time. *Maganbhai*, *Gramophone*, *Vishaka*, *Intellectual Forum*, and *M/s*

125 Gramophone Co. of India, A.I.R. 1984 S.C. 667; Vishaka, A.I.R. 1997 S.C. 3011.

Entertainment Network Ltd are some of the key cases that deal with and interpret the Indian constitutional scheme.¹²⁶ At the same time, these cases also deal with how courts would deal with the application of customary international law. There is one view that customary international law which is not inconsistent with the Indian Constitution could be applied directly. As we have seen in the study, Indian courts have been taking a cautious approach to directly implement customary norms. As long as these customary norms are not in conflict with any domestic law or that they are consistent with the basic structures of the Constitution, the courts have found no difficulty in applying these norms directly.

In recent years, Indian courts are moving towards more specialized areas of international law. As shown in the study, through three important cases of *Vodafone*, *Novartis* and *Italian Marines*, the courts have been examining and applying specialized and complex areas in the field of international trade and economic law, including intellectual property rights, international environmental law and natural resources law. Areas for regulation and application of subject matters are increasingly becoming complex and technical.

The courts will have to eventually specialize in applying complex issues of international law. With the development of technology and other related areas, several complex issues would arise and require specialized attention of the courts in applying international legal norms. It would, therefore, be essential for the Indian Courts to be responsive to the evolution of norms within the context of global legal framework and the judiciary. In this sense, Indian courts, as of now, should be regarded as conservative and tend to be cautious. However, that may not be possible in the future. While Lord Denning was ready to change his stance from the transformation to the incorporation doctrine to accommodate quickly to the changing nature of international law in his *Trendtex* decision¹²⁷ (as quoted in *Gramophone*), the Indian courts and perhaps the Asian courts should exhibit flexibility to accommodate evolving and increasingly changing normative structures of international law.

126 Maganbhai Ishwarbhai Patel, A.I.R. 1969 S.C. 783; *Gramophone Co. of India*, A.I.R. 1984 S.C. 667; *Vishaka*, A.I.R. 1997 S.C. 3011; *Intellectual Forum*, 3 S.C.C. 549; *M/s Entm't Network (India) Ltd.*, 2008 (9) S.C.A.L.E. 69.

127 *Trendtex Trading Corp.*, 2 W.L.R. 356.



Reflections of a Confluence: International Law in the Philippine Court 1940–2000

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1. INTRODUCTION

In 1901, at the brink of the establishment of a civil government in the Philippines, the present Supreme Court of the Philippines was born. Under American influence, the Philippine Commission instituted a new system modeled after the judicial system of the United States. Judicial powers of government were vested in the Supreme Court and other inferior courts, and the Court was entrusted with the power to issue writs and hear controversies brought before it.²

In the same year, one of the very first potential interfaces between international law and municipal law in the country could have happened. The Court was asked to rule on the propriety of the issuance of a writ of *habeas corpus* in *In re the Application of John W. Calloway for a Writ of Habeas Corpus*.³ Justice Willard wrote that, at that time, no judge was

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2 INSTITUTE OF DEVELOPING ECONOMIES, *THE PHILIPPINE JUDICIAL SYSTEM* 3 (Raul C. Pangalangan ed., 2001).

3 *In re the Application of John W. Calloway for a Writ of Habeas Corpus*, G.R. No. 456 (S.C., Aug. 28, 1901) (Phil.).

conferred with an authority to issue such a writ, and thus, the writ previously issued to free Calloway, who was arrested by virtue of military orders, was repealed.⁴ This started the inexorable march of international law jurisprudence into domestic law.

Years later, during the 1940s, the Court cited international law in a decision involving the freedom and detention of Filipinos who were displaced from their homes by the United States military. In *Raquizza v. Bradford*, decided in 1945—proximate in time to the Second World War—the Court, in further justifying their detention, said that the Filipinos might be considered as prisoners of war.⁵ It reasoned:

In volume II, Hyde International Law, page 345, section 676, we read:

It should be borne in mind that an army in the field, in the course of any operation in any locality . . . may also avail itself, of the right to make civilians prisoners of war.

The author cites from the Rules of Land Warfare which contains circumstances under which civilians may be considered as prisoners of war. This enumeration includes:

(c) Persons whose services are of a particular use and benefit to the hostile army or its government, such as the higher civil officials, diplomatic agents, couriers, guides, etc. . . . (Emphasis added)

We think that the petitioners would, *prima facie*, qualify as prisoners of war under the charges of “Espionage activity for Japanese,” “Active collaboration with the Japanese,” and “Active collaboration with the enemy.”⁶

There is a confluence of international law and municipal law on the bed of the Philippine judicial system. There have been ripples in this movement before. But increasingly, through the years, the Philippine Court has referred to international law—and have decided upon questions of international law—on many and different occasions, forming strong currents of disjoint and opposition at times. These movements give rise to implications, as well as questions on the application and operation of international law in the domestic courts of the Philippines.

4 *Id.*

5 *Raquizza v. Bradford*, G.R. No. L-44, 75 PHIL. REP. 50 (S.C., Sept. 13, 1945) (Phil.).

6 CHARLES HYDE, INTERNATIONAL LAW VOLUME II 345 §676 (2nd ed. 1945).

This article seeks to provide an overview of such application and operation of international law in the Philippine domestic court. In so doing, it lays down a baseline study on how the court has dealt with international law through cases until 2010. In particular, this article articulates a few observations on the Philippine Court's interpretation of international treaties, treatment and application of customary international law, including the nature of its application, its definition and interpretation in the local setting, the impact of international legal norms on the development of the domestic law, and as a special case, the interpretation of international human rights norms in light of domestic constitutional rules. However, this article by no means presents itself as a comprehensive treatise on the matter.

Before answering those questions, the Philippine legal system and its judiciary must be discussed. This is crucial because the legal system of the Philippines stands unique in its own way, and it is against this backdrop that international law has operated. The judiciary, as an equally unique agent of the government, is the *situs* of the judge who decides on the application or non-application of international law.

2. THE BACKDROP AND AGENT OF THE (NON)APPLICATION OF INTERNATIONAL LAW IN PHILIPPINE COURTS

a. A Hybrid Legal System

Due to its colonial history, the Philippines has an unusual admixture in its legal system. The Philippines is a democratic and republican State with a mixed civil and common law tradition. Primarily, Philippine law is based on the Spanish civil legal tradition. It has been, however, heavily influenced by the United States' common law tradition, while Shari'ah law (personal law) applies to Muslims.⁷ The Philippines acquired the common law system from the United States, and the civil law system from Spain.⁸ This resulted in the current hybrid system, but it is still largely rooted in the civil law tradition.

7 Soliman M. Santos, *Common Law Elements in the Philippine Mixed Legal System*, 2 AUSTRALIAN JOURNAL OF ASIAN LAW 34 (2000).

8 MIRIAM DEFENSOR-SANTIAGO, INTERNATIONAL LAW: WITH PHILIPPINE CASES AND MATERIALS, AND ASEAN INSTRUMENTS 31 (1999).

Villanueva has opined that because of the mixed legal traditions, the Philippine legal system bears the underlying philosophies of the principle of *stare decisis* of the common law system, and the evolving principles of judicial precedents of the civil law system.⁹ As background, he writes that the Philippines has been subjugated, Christianized, and governed by Spain for more than 350 years until the end of the 19th century, and then further subjected to four decades of American domination.¹⁰ This blend of diverse cultures causes a unique hybrid legal scenario. The geographic location of the Philippines largely contributes to this uniqueness because the nation lies strategically as the gateway to and from Southeast Asia into the Pacific Ocean.¹¹ The legal system is full of “elasticity and progressiveness” as the two great western legal systems confluence.¹²

Others have regarded the amalgam as having a unique blend of not only civil law (Roman) and common law (Anglo-American), but also of Muslim (Islamic) and indigenous law.¹³ This is due to the presence, as stated above, of Shari’ah law in the system and some form or recognition of indigenous justice.¹⁴ Also, there had been desire to refashion the Philippine legal system to conform to the Filipino way and to make it responsive to the nation’s needs.¹⁵ Additionally, just as other developing countries, the

9 Cesar Lapuz Villanueva, *A Comparative Study of the Judicial Role and its Effect on the Theory on Judicial Precedents in the Philippine Hybrid Legal Systems*, 65 PHILIPPINE LAW JOURNAL 42, 45 (1990).

10 *Id.* at 42 (citing PASCUAL, *THE LEGAL SYSTEM OF THE PHILIPPINES* 7 (1970)).

11 *Id.*

12 *Id.*

13 Milagros Santos-Ong, *Part 2: Philippine Legal Information Resources and Citations*, HAUSER GLOBAL LAW SCHOOL PROGRAM (Mar. 2015), http://www.nyulawglobal.org/globalex/philippines1_part2.htm#Aviii2.

14 See The Indigenous Peoples Rights Act, Rep. Act No. 8371, § 15, (Oct. 29, 1997) (Phil.) (“Justice System, Conflict Resolution Institutions and Peace Building Processes.- The ICCs/IPs shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights.”).

15 Villanueva, *supra* note 9, at 43.

Philippines faces the challenge of developing its legal system into a more logical and structurally coherent one that is responsive to the complex needs of its diverse society.¹⁶ In all these, there was, however, a warning by Laurel in the 1930s of great confusion as the “cross-breeding of the Castilian lion and the American eagle had resulted in the evil birth of a phenomenal creature.”¹⁷

As far as international law and its application in Philippine courts are concerned, Defensor-Santiago confirms that the unusual admixture in the legal system leads to the present constitutional provision that relates to international law.¹⁸ This constitutional provision, as discussed below (*see*, discussion *infra* Part 4.b), directly prescribes the relation between domestic law and international law. This bears an impact on how the courts have perceived international law and has applied the same. Feliciano makes a legal theory that Philippine internal or civil law is a formally complete system so that it enjoins the use of alternative bases for legal decisions (*i.e.*, customary law and general principles of law). In short, there is no problem of *non-liquet* in internal law.¹⁹ There is always a rule or standard that applies to every controversy.

b. The ‘Gatekeeper’ Judiciary and Cases on International Law

A judicial system already existed in the Philippines prior to the Spanish conquest of the Philippines.²⁰ During the Spanish rule, courts consisted of superior courts and inferior or lower courts. Appointments to the superior courts or *Audencia* were made by the King through a royal decree. Usually, the Governor General, who was the presiding officer, was given the power to appoint judges of lower courts and even to fill in the *Audencia*.²¹ As pre-

16 *Id.*

17 *Id.* at 42-43 (citing LAUREL, ASSERTIVE NATIONALISM 80 (1931)).

18 DEFENSOR-SANTIAGO, *supra* note 8.

19 Florentino Feliciano, *On the Functions of Judicial Review and the Doctrine of Political Questions*, 39 PHILIPPINE LAW JOURNAL 444, 455 (1964) (citing CIVIL CODE, § 9-11, Rep. Act 386 (Phil.)).

20 INSTITUTE OF DEVELOPING ECONOMIES, *supra* note 2, at 1.

21 *Id.* at 2 (citing JOSE R. BENGSON, THE PHILIPPINE JUDICIAL SYSTEM 6).

viously mentioned, the present judicial system was organized and formed with the advent of the American period. Changes occurred years after.

At present, under the regime of the 1987 Constitution, judicial power is vested in one Supreme Court and in such lower courts as may be established by law. This power includes “the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”²² Congress has the power to define, prescribe, and apportion the jurisdiction of courts, but may not deprive the Supreme Court of jurisdiction over certain cases.²³ One of those powers directly relates to international law: the power to review on appeal or certiorari, as the law or Rules of Court may provide, final judgments and orders of lower courts in cases in which the *constitutionality* or *validity* of any treaty, international or executive agreement is in question.²⁴

What comes out of this is the natural predisposition of the Court to uphold the Constitution above all. It is the ultimate litmus test of the validity of an act, such as a treaty. It is but natural since as a domestic court, it applies—first, foremost, and solely in many times—domestic law.

The high court already held this power of judicial review even before the 1987 Constitution; the 1935 Constitution had authorized the court to review all cases in which the constitutionality or validity of any treaty, law, ordinance or executive order, or regulation was in question.²⁵ Feliciano refers to judicial review as the “assaying by a court,” in an appropriate case, of the constitutional quality of a legislative or executive act.²⁶ He suggests that at least three functions are performed by the Supreme Court in judicial review: the checking function, the legitimating or validating function, and the symbolic or educational function.²⁷ The first, namely, the checking function, is to read the constitutional map and to allocate the constitutional

22 CONST. (1987), art. VIII, sec. 1 (Phil.).

23 *Id.* art. VIII, sec. 2.

24 *Id.* art. VIII, sec. 5(2)(a).

25 CONST. (1935), art. VIII, sec. 2(1) (Phil.).

26 Feliciano, *supra* note 19, at 444.

27 *Id.*

authority among major structures of the government.²⁸ The second, namely the legitimating or validating function, indicates that the courts' sustaining of an act or refraining from ruling on it, is equivalent to legitimating the act. Of course, the court's power involves the power to reject the act as illegitimate.²⁹ The third, namely the symbolic or educational function, happens when the Supreme Court discharges the parameters of when the court acts as the "pronouncer and guardian" of the more fundamental values that the community seeks.³⁰

In the realm of foreign relations, Bernas notes that most framers of the 1935 Constitution worked from the perspective of what they know of foreign relations in the United States.³¹ They captured the essence of the allocation of foreign relations powers from the American perspective.³² Foreign relations are thus conducted by political departments, Congress and the executive President, or through the President's bureaucracy.³³

Does the judiciary, particularly the Supreme Court, have any role in this? Bernas rejoins that the Court has original jurisdiction over cases affecting ambassadors, other public ministers, and consuls.³⁴ More importantly, courts can affect the course of foreign involvements through its aforementioned power of judicial review.³⁵ When an official act is declared unconstitutional (invalid), the impact could be far reaching because the act becomes unenforceable in domestic law. Internationally, when it involves a treaty, the State is "faced with having an international obligation without the possibility of hiding behind an assertion of unconstitutionality."³⁶ This is because as we know, the Vienna Convention on the Law of Treaties provides, in Article 27, that a party may not invoke internal law as a justi-

28 *Id.*

29 *Id.* at 448.

30 *Id.* at 450.

31 JOAQUIN G. BERNAS, FOREIGN RELATIONS IN CONSTITUTIONAL LAW 100 (1995).

32 *Id.*

33 *Id.* at 122.

34 *Id.*; see CONST. (1987), art. VIII, sec. 5(1) (Phil.).

35 BERNAS, *supra* note 31.

36 *Id.*

fication for failure to perform a treaty.³⁷ Moreover, Malaya says that when the Court decides to act, far-reaching consequences include ordering the executive branch to renegotiate an implementing agreement.³⁸

In practice, the Court is most hesitant in nullifying foreign relations actions (e.g., concluding treaties and executive agreements).³⁹ *People's Movement for Press Freedom v. Manglapus* explained this reticent attitude.⁴⁰ It stated as follows: “[t]he conduct of foreign relations of our Government especially the sensitive matter of negotiating a treaty with a foreign government is lodged with the political Departments of the government... the propriety of what may be done in the exercise of their political powers is not subject to judicial inquiry.”⁴¹

For instance, when called upon to rule on an apparent conflict between international and municipal laws, as shown in cases below, the Court has tried to harmonize treaties with domestic law in cases of conflict. Some scholars argue that this hesitation to render these foreign relations acts as invalid or unconstitutional confuses the dichotomy between international law and municipal law in jurisprudence.

In *Bayan v. Zamora*, the court considered the question of whether the constitutional requirement that the treaty, the Visiting Forces Agreement with the United States, be “recognized as a treaty by the other contracting state,” has been met.⁴² To recall, after the expiration in 1991 of the agreement between the Philippines and the United States on military bases, foreign military bases, troops or facilities were not allowed in the Philippines except under a treaty duly concurred by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty

37 Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

38 J. Eduardo Malaya, *Conflict and Cooperation in the Crafting and Conduct of Foreign Policy*, 55 ATENEO LAW JOURNAL 126, 138 (2010).

39 BERNAS, *supra* note 31, at 123.

40 Peoples Movement for Press Freedom v. Manglapus, G.R. No. 84642 (S.C., Sept. 13, 1988) (Phil.).

41 *Id.*

42 Bayan v. Zamora, G.R. No. 138570, 342 S.C.R.A. 449 (Oct. 10, 2000) (Phil.).

by the other contracting State.⁴³ The bone of contention was the character of the agreement, which was undoubtedly an executive agreement. The Supreme Court, however, sustained the executive agreement as a treaty, which satisfies the constitutional requirement, citing the definition of treaty in the Vienna Convention on the Law of Treaties.⁴⁴

Magallona asserts that *Bayan* transports the meaning of “treaty” to the international plane, shifting the paradigm from the law of treaties under the Constitution to the law of treaties in objective international law.⁴⁵ Evident from the Constitution is the intent to disallow executive agreements as means of concluding agreements on the visit of foreign troops. For Magallona, there was a double shift: (1) the first shift is the interpretation of the term “treaty” from its constitutional meaning to its “ordinary” meaning;⁴⁶ and (2) the second shift is the transference of the interpretation of the concept of “treaty” from the national law to objective international law.⁴⁷

There have been spirited dissents on this and other similar cases.⁴⁸ Azcuna quotes the strong dissent by Chief Justice Puno which points out that the framers of the Constitution precisely wanted to end the “analogous asymmetry” in treaties of the past when the other State signed a mere executive agreement.⁴⁹ He contends that executive agreements are not as binding as treaties under international law.⁵⁰

Nonetheless, the hesitation of the Court is not without legal basis since the caution is built into the present Constitution. Bernas states that the power of judicial review is extended to the determination of “whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the

43 CONST. (1987), art. XVIII, sec. 25 (Phil.).

44 *Bayan*, G.R. No. 138570.

45 Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*, 85 PHILIPPINE LAW JOURNAL 1 (2010).

46 *Id.* at 10.

47 *Id.*

48 Malaya, *supra* note 38, at 142.

49 Adolfo S. Azcuna, *The Supreme Court and Public International Law*, 46 ATENELO LAW JOURNAL 24, 27 (2001).

50 *Id.*

Government.”⁵¹ The Court’s description of grave abuse of discretion—for example, as capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction—narrows down what Bernas calls the “playing room for judicial action.” The Court would more likely apply the political questions doctrine to bar itself from ruling on contentious issues.⁵²

Additionally, since the final decision on disputes and cases rests upon the Court, it holds in its hands the key to determine whether a particular rule in international law becomes part of the domestic legal system, thereby capable of being applied by the Court. Almost always, the Court refers to the Constitution in its determination, particularly the provision that directly prescribes the relation between domestic law and international law. Evidently, international law *per se* is rarely, or almost never, directly utilized in inferior domestic courts.

Indeed, the judiciary in the Philippines has played a definitive role throughout the years. Laws and jurisprudence since the first Philippine Republic are applicable until they are repealed or superseded.⁵³ Under the Civil Code of the Philippines, judicial decisions applying or interpreting the laws or the Constitution form part of the Philippine legal system.⁵⁴ Scholars assert that the courts have a role of creation in society. This creative role and the underlying theory on judicial precedents are attributable to five factors: (1) the adoption of the American court system; (2) the constitutional powers vested in the Supreme Court; (3) the transplant of Anglo-American principles in the Philippine legal system; (4) the continuing influence of civil law; and (5) the cultural, social, and economic demands of Philippine society.⁵⁵ These are the factors that influence the Philippine theory on judicial precedents.

The judiciary is the passive branch of Philippine government, or the least dangerous branch among the three. But, if and when it does act on matters of foreign affairs, the impact is ample,⁵⁶ even drastic and disconcerting.

51 BERNAS, *supra* note 31, at 122; *see also* CONST. (1987) art. VIII, sec. 2(1) (Phil.).

52 BERNAS, *supra* note 31, at 123-24.

53 Santos-Ong, *supra* note 13.

54 CIVIL CODE, § 10, Rep. Act 386, as amended (Phil.).

55 Villanueva, *supra* note 9, at 45.

56 Malaya, *supra* note 38, at 141.

3. A BRIEF VIEW OF INTERNATIONAL LAW CASES IN THE PHILIPPINE COURT THROUGH THE YEARS

What areas or themes in international law has the Supreme Court dealt with, directly or indirectly? In 2001, Azcuna surveyed leading cases decided by the Court from 1945 to 2000 pertaining to international law. Two general observations were made: (1) that the Court adopts a situational approach of developing the law through a changing factual environment; and (2) that primacy is given to the Constitution, with special attention to the provision that “the Philippines adopts the generally accepted principles of international law as part of the law of the land.”⁵⁷

Cases cited in this section are not a comprehensive list of decisions pertaining to international law during the respective periods below. Rather, they are presented only for the purposes of this paper.

a. 1940s to 1950s

In the 1940s to the early 1950s, decisions had principles, such as the privilege of extraterritoriality of a liberating army, the Hague Resolutions and the impact of war on private property, as issues therein. The treatment of an alien brought in by the belligerent occupant as a spy was also at issue.⁵⁸ It was understandable as the country was then reeling from the effects and incidents of the Second World War. These were concerns arising from the war. But Azcuna stated that the case of the alien spy paved the way for the opening up of international human rights law.⁵⁹

Lockwood explains that, as might be expected, the Second World War opened a Pandora’s Box of legal troubles in the Philippines.⁶⁰ The Government struggled to solve the problems resulting from the war.⁶¹ The bench was confronted with problems that involved questions of municipal law

57 Azcuna, *supra* note 49, at 26 (citing CONST. (1987) art. II, sec. 2 (Phil.)).

58 *Id.*

59 *Id.*

60 L.D. Lockwood, *The Philippine Supreme Court and Postwar Problems of International Law*, 3 STANFORD LAW REVIEW 3, 3 (1950).

61 *Id.*

only, while others involved that of international law.⁶² The most important ones, however, are purely international law questions, a subject which the Philippines had little to do with in the past.⁶³

In *Raquiza v. Bradford*, the Court ruled that it had no jurisdiction over the United States Army since a foreign army permitted to march through a friendly country or to be stationed in it, by permission of its government, was exempted from civil and criminal jurisdiction of the hosting nation.⁶⁴ Dissents argued that the Army was not foreign since the Philippines was then under American sovereignty.⁶⁵ During the Japanese occupation, *Haw Pia v. China Banking Corporation* upheld the confiscation of movables belonging to the State susceptible of military use or occupation.⁶⁶ A bank was declared as an enemy as it was controlled by enemies of Japan and incorporated in a country at war with Japan.⁶⁷ Dissents opined that private property should be protected.⁶⁸ Contrary to *Haw Pia*, the Court in *Lo Ching Y So Sun Chong Co.* enunciated the doctrine that a belligerent army had no right to confiscate private property in the territory invaded.⁶⁹

Of particular note at this time is the 1949 case of *Koroda v. Jalandoni*, where the Court declared that the rules and principles of land warfare, contained in the Hague and Geneva Conventions, became a part of Philippine law via the incorporation clause in the Constitution.⁷⁰ Chief Justice Moran reasoned that the Constitution was general and extensive, and did not confine the recognition of international law rules to only those in treaties under which the Philippines is a party.⁷¹

62 *Id.*

63 *Id.*

64 *Raquiza*, G.R. No. L-44.

65 *Id.* (Ozaeta, J., dissenting).

66 *Haw Pia v. China Banking Corp.*, G.R. No. L-554, 80 PHIL. REP. 604 (S.C., Apr. 9, 1948) (Phil.).

67 *Id.*

68 *Id.* (Hilado, J. dissenting).

69 *Lo Ching Y So Sun Chong Co. v. Tribunal De Apelacion Y El Arzobispo Catolico Romano de Manila*, G.R. No. L-1337, 81 PHIL. REP. 601 (S.C., Oct. 16, 1948) (Phil.).

70 *Kuroda v. Jalandoni*, G.R. No. L-2662, 83 PHIL. REP. 171 (S.C., Mar. 26, 1949) (Phil.).

71 *Id.*

Moreover, in *Gibbs v. Rodriguez*, the Court noted that decisions of municipal tribunals were subsidiary means for the determination of the rules of international law, citing Article 38(1) of the Statute of the International Court of Justice.⁷² Courts are organs of the State which generally proclaims what it believes international law is. Furthermore, *Mejoff v. Dir. of Prisons*, a landmark *habeas corpus* case concerning the detention of a stateless person, referred, *inter alia*, to the incorporation clause in the 1935 Constitution (see below) and the Universal Declaration of Human Rights (UDHR) in finding that no one should be subjected to arbitrary arrest, detention or exile.⁷³ A few years later, however, the Court ruled in *Inchong v. Hernandez* that the Declaration contained nothing more than a mere recommendation or a common standard of achievement for all peoples and nations.⁷⁴

b. 1950s to 1990s

Azcuna describes the Court of this time as charting a course through international obligations and national exigencies. An example of national importance is the case relating to the nationalization of retail trade. Other issues include the recognition of relations with other States, scope of treaties on practice of professions, sovereign immunity from suit of foreign States and specialized international agencies, and the interpretation of the Warsaw Convention on International Carriage by Air.⁷⁵

Questions affected trade and commerce. In *Inchong*, a statute on retail trade nationalization was questioned for violation of treaties and international obligations, and the Court held that the UN Charter imposed no strict or legal obligations with regard to rights and freedoms of international actors.⁷⁶ And, as previously mentioned, the UDHR contained mere recom-

72 *Gibbs v. Rodriguez*, G.R. No. L-1494, 84 PHIL. REP. 230 (S.C., Aug. 3, 1949) (Phil.).

73 *Mejoff v. Dir. of Prisons*, G.R. No. L-2855, 90 PHIL. REP. 70 (S.C., July 30, 1951) (Phil.).

74 *Inchong v. Hernandez*, G.R. No. L-7995, 101 PHIL. REP. 1155 (S.C., May 31, 1957) (Phil.).

75 Azcuna, *supra* note 49, at 26-27.

76 *Inchong*, G.R. No. L-7995.

mendations or common standards of achievement.⁷⁷ *Gonzales v. Hechanova* involved rice and corn importation through executive acts and contracts with Vietnam and Burma.⁷⁸ *Aasali v. Comm'n of Customs* declared that customs laws applied to Philippine ships even outside Philippine territory.⁷⁹

There were issues on immunity. For example, *World Health Org. v. Aquino* held that where the plea of immunity was recognized and affirmed by the executive branch, the Court had to accept the immunity claim.⁸⁰ It would not embarrass the executive. Other cases ruled that immunity from suit was inapplicable where a State entered into a contract of commercial nature;⁸¹ that the doctrine of State immunity from a lawsuit was not applicable to unauthorized acts for which private responsibility was sought;⁸² and that immunity was also inapplicable to private acts.⁸³

A special note on *Int'l Catholic Migration Comm'n v. Calleja* is in order.⁸⁴ Like the case on immunity from local jurisdiction, the *Int'l Catholic Migration Comm'n* case determined whether the right of labor to petition for certification election was availing alongside claims of diplomatic immunity.⁸⁵ It is also an application of the incorporation clause in the Constitution.

In a Memorandum of Agreement with the International Catholic Migration Commission (ICMC), the government granted ICMC the sta-

77 *Id.*

78 *Gonzales v. Hechanova*, G.R. No. L-21897, 9 S.C.R.A. 230 (S.C., Oct. 22, 1963) (Phil.).

79 *Aasali v. Comm'r of Customs*, G.R. No. L-24170, 26 S.C.R.A. 382 (S.C., Dec. 16, 1968) (Phil.).

80 *World Health Org. v. Aquino*, G.R. No. L-35131, 48 S.C.R.A. 242 (S.C., Nov. 29, 1972) (Phil.).

81 *United States v. Guinto*, G.R. No. 76607, 182 S.C.R.A. 644 (S.C., Feb. 26, 1990) (Phil.).

82 *Shauf v. Court of Appeals*, G.R. No. 90314, 191 S.C.R.A. 713 (S.C., Nov. 27, 1990) (Phil.).

83 *Minucher v. Court of Appeals*, G.R. No. 97765, 214 S.C.R.A. 242 (S.C., Sept. 24, 1992) (Phil.).

84 *Int'l Catholic Migration Comm'n v. Calleja*, G.R. No. 85750, 190 S.C.R.A. 130 (S.C., Sept. 28, 1990) (Phil.).

85 *Id.*

tus of a specialized agency with corresponding diplomatic privileges and immunities.⁸⁶ The Department of Foreign Affairs (DFA) supported the claim of immunity and held that an order to hold certification election violates this immunity.⁸⁷ The Court ruled that specialized agencies are international organizations with functions in particular fields.⁸⁸ ICMC enjoyed immunity as necessitated by its international character and recognized purposes.⁸⁹ Besides, the labor organizations had recourse to resolve disputes with management.⁹⁰

According to Magallona, a number of points militate against this. First, international organizations characterized as persons in law are intergovernmental organizations; the States establishing it in a multilateral treaty comprise its membership.⁹¹ ICMC, a non-governmental organization although international, was not created under international law as an international person.⁹² It is a private corporation composed of individuals.⁹³ Second, it is through the Memorandum of Agreement that ICMC acquired its “status of a specialized agency” or “similar to that of a specialized agency.”⁹⁴ Third, it is intriguing how the government can create a specialized agency out of ICMC by means of a Memorandum of Agreement and conjure unilaterally its coverage under the Convention on Specialized Agencies.⁹⁵ Fourth, despite the pretense that the Philippine government is capable of granting the status of specialized agency as well as “diplomatic privileges and immunities” by agreement, the problematic Memorandum of Agreement is devoid of legal status.⁹⁶ Other cases on the alleged confusion as to

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 Magallona, *supra* note 45, at 75.

92 *Id.* at 76.

93 *Id.*

94 *Id.*

95 *Id.* at 78.

96 *Id.*

diplomatic immunity with international immunity were cited,⁹⁷ such as *Lasco v. UN Revolving Fund for Natural Resources Exploration*,⁹⁸ *Dep't of Foreign Affairs v. Nat'l Labor Relations Comm'n*,⁹⁹ and *Se. Asian Fisheries Dev. Ctr.-Aquatic Dep't v. Nat'l Labor Relations Comm'n*.¹⁰⁰

c. 1990s to 2000s

During this time, according to Azcuna, cases dealt with the environment and human rights, and extradition.¹⁰¹ The question of the Visiting Forces Agreement with the United States was also at issue. Landmark cases include *Laguna Lake Dev. Auth. v. Court of Appeals*, which held in part as *ratio* that the right to health was a human right.¹⁰² Of course, there is the case of *Oposa v. Factoran* on intergenerational responsibility.¹⁰³ These and other cases on the interface of international human rights law with municipal law are discussed in more detail in Part 4.d. As for extradition, *Sec'y of Justice v. Lantion* ruled that there was no right to notice and hearing during the evaluation stage of an extradition proceeding.¹⁰⁴

Azcuna's categorization of the periods in which the Supreme Court of the Philippines have referred to, or decided upon, certain topics relating to international law, is by no means neat and exclusive of other topics within each epoch. It, however, provides an overall picture of how the court has applied international law given the changing discourses in Philippine society through the years.

97 *Id.* at 81-85.

98 *Lasco v. UN Revolving Fund for Natural Res. Exploration*, G.R. Nos. 109095-109107, 241 S.C.R.A. 681 (S.C., Feb. 23, 1995) (Phil.).

99 *Dep't of Foreign Affairs v. Nat'l Labor Relations Comm'n*, G.R. No. 113191, 262 S.C.R.A. 39 (S.C., Sept. 18, 1996) (Phil.).

100 *Se. Asian Fisheries Dev. Ctr.-Aquatic Dep't v. Nat'l Labor Relations Comm'n*, G.R. No. 86773, 206 S.C.R.A. 283 (S.C., Feb. 14, 1992) (Phil.).

101 Azcuna, *supra* note 49.

102 *Laguna Lake Dev. Auth. v. Court of Appeals*, G.R. No. 110120, 231 S.C.R.A. 292 (S.C., Mar. 16, 1994) (Phil.).

103 *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 782 (S.C., July 30, 1993) (Phil.).

104 *Sec'y of Justice v. Lantion*, G.R. No. 139465, 322 S.C.R.A. 160 (S.C., Jan. 18, 2000) (Phil.).

It must be noted that the Court has consistently grappled with the questions on the relationship between international law and municipal law (including the treatment of customary norms) and treaty interpretation. And, these are discussed in Part 4 below.

d. 2000s to 2010

The variety of the topics on international law discussed by the Court took on new heights during this decade. There was an increase in the number of cases interfacing international human rights law with municipal law (see Part 4.d). Likewise, the Court made pronouncements on the ratification of treaties and *pacta sunt servanda*. A case involved the extent of the power of the President in pursuing the peace process and other novel questions in international law. Questions in miscellany included obligations related to corruption and transnational crime, and again, the Visiting Forces Agreement between the Philippines and the United States.

Cases dealt with treaty law. In *Pimentel v. Exec. Sec'y*, petitioners filed a petition for *mandamus* to compel the Office of the Executive Secretary and the DFA to transmit the signed copy of the Rome Statute of the International Criminal Court to the Senate of the Philippines for its concurrence pursuant to the Constitution.¹⁰⁵ It was claimed that ratification of a treaty, under both domestic and international law, was a function of the Senate, hence it was the duty of the executive to transmit the signed copy to the Senate to allow it to exercise its discretion. The Court, however, citing the President's role as the sole organ and authority in external relations, said that it was not a ministerial duty to transmit the copy.¹⁰⁶ *Abaya v. Ebdane* considered a provision in domestic law as embodying the fundamental principle of *pacta sunt servanda*.¹⁰⁷ The case involved a loan agreement between Japan and the Philippines.¹⁰⁸

One case involved a peace agreement and other novel issues in this jurisdiction. There were several pronouncements in *Province of N. Cotabato*

105 *Pimentel v. Exec. Sec'y*, G.R. No. 158088, 462 S.C.R.A. 622 (S.C., July 6, 2005) (Phil.).

106 *Id.*

107 *Abaya v. Ebdane*, G.R. No. 167919, 515 S.C.R.A. 720 (S.C., Feb. 14, 2007) (Phil.).

108 *Id.*

v. Gov't of the Republic of the Phil. Panel which are related to international law.¹⁰⁹ The Memorandum of Agreement on Ancestral Domain (MOA-AD) identified as terms of reference, two local statutes (*i.e.*, the Organic Act for the Autonomous Region in Muslim Mindanao and the Indigenous Peoples Rights Act) and several international law instruments (*e.g.*, ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries in relation to the UN Declaration on the Rights of the Indigenous Peoples, and the UN Charter).¹¹⁰ The Court however ruled that the MOA-AD, in its present form, was inconsistent with the Constitution and laws.¹¹¹

The Court said that the objections against the MOA-AD generally focused on the extent of the powers conceded to the Bangsamoro Juridical Entity (BJE), the entity created under the agreement.¹¹² A general idea that unifies the different provisions of the MOA-AD is international law's concept of association. The Court, speaking through Justice Carpio-Morales, said:

The nature of the “*associative*” *relationship* may have been intended to be defined more precisely in the still to be forged Comprehensive Compact. Nonetheless, given that there is a concept of “association” in international law, and the MOA-AD—by its inclusion of international law instruments in its TOR—placed itself in an international legal context, that concept of association may be brought to bear in understanding the use of the term “*associative*” in the MOA-AD.

Keitner and Reisman state that [a]n association is formed when two states of unequal power voluntarily establish durable links. In the basic model, one state, the associate, delegates certain responsibilities to the other, the principal, while maintaining its international status as a state. Free associations represent a middle ground between integration and independence.

...

In international practice, the “associated state” arrangement has usually been used as a transitional device of former colonies on their way to full independence. Examples of states that have

109 Province of N. Cotabato *v.* Gov't of the Republic of the Phil. Peace Panel, G.R. No. 183591, 568 S.C.R.A. 402 (S.C., Oct. 14, 2008) (Phil.).

110 *Id.*

111 *Id.*

112 *Id.*

passed through the status of associated states as a transitional phase are Antigua, St. Kitts-Nevis-Anguilla, Dominica, St. Lucia, St. Vincent and Grenada. All have since become independent states.

Back to the MOA-AD, it contains many provisions which are consistent with the international legal concept of association, specifically the following: the BJE's capacity to enter into economic and trade relations with foreign countries, the commitment of the Central Government to ensure the BJE's participation in meetings and events in the ASEAN and the specialized UN agencies, and the continuing responsibility of the Central Government over external defense. Moreover, the BJE's right to participate in Philippine official missions bearing on negotiation of border agreements, environmental protection, and sharing of revenues pertaining to the bodies of water adjacent to or between the islands forming part of the ancestral domain, resembles the right of the governments of FSM and the Marshall Islands to be consulted by the U.S. government on any foreign affairs matter affecting them.

These provisions of the MOA indicate, among other things, that the Parties aimed to vest in the BJE the status of an *associated state* or, at any rate, a status closely approximating it.¹¹³ (Emphasis added)

Moreso, the concept of association is not recognized under the Constitution, says the Court, for it also implies the recognition of the associated entity as a State.¹¹⁴ The Constitution does not contemplate any State in this jurisdiction, except the Philippine State. There is no provision for a transitory status towards independence.¹¹⁵ Mere concepts animating the agreement, though unsigned, require amendment of the Constitution for validity.¹¹⁶ Although the MOA-AD would not amount to an international agreement or unilateral declaration which binds the Philippines, the Court cautioned that the act of guaranteeing amendments was, by itself, already a constitutional violation that rendered the MOA-AD fatally defective.¹¹⁷ The aspects of the case on the relation between municipal and international laws, and on indigenous people's rights are discussed, *infra*.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

In miscellany, it was held that the control of movement of considerable foreign currency across borders was included in the UN Convention against Corruption and the UN Convention against Transnational Organized Crime.¹¹⁸ In *Nicolas v. Romulo*, the Visiting Forces Agreement was once again questioned, this time as to a non-surrender agreement contained therein.¹¹⁹ The Court still sustained the agreement on similar reasons as *Bayan*. Magallona decries *Nicolas* as it “pursues the defense of the VFA by pursuing further the thesis that the United States Government has recognized it as a treaty as required by the Constitution.”¹²⁰

Vinuya v. Exec. Sec’y, pertained to the issue of whether the State could be compelled to espouse the claims of “comfort women” for official apology and other forms of reparations against Japan before the International Court of Justice and other international tribunals.¹²¹ The Court held that the Philippines was not under any international obligation to espouse the claims.¹²² The only means available for individuals to bring a claim within the international legal system has been when the individual is able to persuade a government to bring a claim on the individual’s behalf.¹²³ It is not the individual’s rights that are being asserted, but rather, the State’s own.¹²⁴ Even the invocation of *jus cogens* norms and *erga omnes* obligations would not alter this.¹²⁵

After 2010, the array of questions answered by the Court widened, including matters related to the Law of the Sea, non-surrender agreements, and the character of a national society of the Red Cross. Indeed, courts moved with the times. The Philippine domestic courts have moved from answering questions mainly confined within the laws of war to the present-day issues confronting State sovereignty. It is this postmodernity that is brought before the Court. Judicial review power has expanded with

118 *Spouses Dela Paz v. Senate Comm. on Foreign Relations*, G.R. No. 184849 (S.C., Feb. 13, 2009) (Phil.).

119 *Nicolas v. Romulo*, G.R. No. 176051, 578 S.C.R.A. 438 (S.C., Feb. 11, 2009) (Phil.).

120 *Magallona*, *supra* note 45, at 19.

121 *Vinuya v. Exec. Sec’y*, G.R. No. 162230 (S.C., Apr. 28, 2010) (Phil.).

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

the advent of the 1987 Constitution. But, since the 1940s, the backdrop of a hybrid legal system has remained the same.

4. TREATY INTERPRETATION, HUMAN RIGHTS, AND THE DEVELOPMENT OF DOMESTIC LAW IN LIGHT OF INTERNATIONAL LAW

As evident in the discussions hitherto, the Court has dealt with questions on the interpretation of treaties, and the treatment of international customary law and international human rights in light of constitutional rules in different periods. Further reflections on these are thus in order.

a. Interpretation of Treaties

Under the Constitution, no treaty or international agreement is valid and effective, unless it is concurred by at least two-thirds of the entire Senate.¹²⁶ By an act of the legislature, international law norms may be transformed into domestic law, or it may determine the specific terms by which treaty rules are to be applied or enforced as part of domestic law.¹²⁷ Therefore, a treaty then assumes a double character, namely, as a source of international obligations and as domestic law.¹²⁸

How does the Court interpret treaties? The words, intent of the parties, and the object and purpose of a treaty are crucial. But, jurisprudence holds that the cardinal rule of interpretation must involve an examination of the text, which is presumed to verbalize the parties' intentions.¹²⁹

For instance, Senate concurrence on its own does not transform a treaty into domestic law if its provisions have not yet entered into force.¹³⁰ Also,

126 CONST. (1987), art. VII, sec. 21 (Phil.).

127 MERLIN M. MAGALLONA, A PRIMER IN INTERNATIONAL LAW IN RELATION TO PHILIPPINE LAW 49 (1997).

128 *Id.* at 51.

129 *Lim v. Exec. Sec'y*, G.R. No. 151445 (S.C., Apr. 11, 2002) (Phil.) (“The Convention likewise dictates what may be used as aids to deduce the meaning of terms, which it refers to as the context of the treaty, as well as other elements may be taken into account alongside the aforesaid context.”).

130 MAGALLONA, *supra* note 127.

generally, only the concurrence is required for a treaty to be valid and effective. Magallona writes that, “the Supreme Court has applied treaties to which the Philippines is a party, as self-executing instruments, requiring no further prerequisite to their effectivity within Philippine jurisdiction.”¹³¹ This is evident in the Tax Convention with Japan, the Paris Convention for the Protection of Industrial Property, the Convention for the Unification of Certain Rules Relating to International Air Travel (Warsaw Convention), and the Convention on the Privileges and Immunities of the Specialized Agencies of the UN.¹³² It is also possible that a treaty itself may provide for its application or enforcement through an enactment of a legislative, executive or administrative act.¹³³ Thus, without enactment, the treaty may not be enforced in the Philippines.¹³⁴

Sec’y of Justice v. Lantion lays the rule that all treaties, including the Philippines-United States Extradition Treaty, should be interpreted in light of the signatories’ intent.¹³⁵ The Court stated that nothing less than the Vienna Convention on the Law of Treaties, to which the Philippines is a party, provided that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”¹³⁶ Because countries like the Philippines forge extradition treaties to respond to dramatic increase in international and transnational crimes, the treaty calls for an interpretation that will minimize, if not prevent, the escape of an extradited person from the long arm of the law and expedite their trial.¹³⁷ Withal, the Court emphasized that equally compelling factors to consider were the understanding of the parties themselves to the treaty and the general

131 *Id.*

132 *Id.* at 54 (citing *Marubeni v. Comm’r of Internal Revenue*, G.R. No. 76573, 177 S.C.R.A. 500 (S.C., Sept. 14, 1989) (Phil.); *La Chemise Lacoste v. Fernandez*, G.R. No. L-63796-97, 129 S.C.R.A. 373 (S.C., May 2, 1984) (Phil.); *KLM Royal Dutch Airlines v. Court of Appeals*, G.R. Nos. L-52153-54 (S.C., Nov. 17, 1980) (Phil.); *Aquino*, 48 S.C.R.A. 242).

133 *Id.* at 55.

134 *Id.*

135 *Lantion*, G.R. No. 139465.

136 *Id.*

137 *Id.*

interpretation of the issue by other countries with similar treaties with the Philippines.¹³⁸ The meaning given to treaties by the government departments particularly charged with their negotiation and enforcement is accorded great weight only.

Documents related to a treaty were resorted to aid interpretation. Case in point is *ABS-CBN v. PMSI*, where the Court ruled that “retransmission” as described in the Working Paper prepared by the Secretariat of the Working Committee on Copyright and Related Rights in relation to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961 Rome Convention), and as defined in the Convention, did not extend to cable retransmission.¹³⁹

On several occasions, the Court had to rule on the meaning of reciprocity or comity in a treaty regulating the practice of professions. *In re Garcia* held that such a treaty did not apply to a Filipino who seeks to practice his profession in the Philippines even if he was allowed by Spain.¹⁴⁰ Obviously, the Court referred to the intent of the agreement. In a similar manner, the Warsaw Convention has been interpreted a few times. One such case is *Alitalia v. Immediate Appellate Court*, holding that the Convention limiting the amount of recoverable damages did not apply where there was a special or extraordinary form of injury.¹⁴¹ Hence, it disregarded the literal import of the treaty.

The agreements of the Philippines with the United States on military bases and troops have been interpreted by the court again and again. In 1948, *Dizon v. Commanding Gen.* held that the waiver of jurisdiction of courts under the Military Bases Agreement covered the area in question in the case.¹⁴² Petitioners contended that the General Court Martial had no jurisdiction over the alleged offense, which was committed in a place that

138 *Id.*

139 *ABS-CBN Broad. Corp. v. Phil. Multi-Media Sys., Inc.*, G.R. Nos. 175769-70 (S.C., Jan. 19, 2009) (Phil.).

140 *In re Petition of Arturo Efren Garcia for Admission to the Phil. Bar Without Taking Examination*, 2 S.C.R.A. 984 (S.C., Aug. 15, 1961) (Phil.).

141 *Alitalia v. Immediate Appellate Court*, G.R. No. 71929, 192 S.C.R.A. 9 (S.C., Dec. 4, 1990) (Phil.).

142 *Dizon v. Commanding Gen. of the Phil. Ryukus Command*, G.R. No. L-2110, 81 PHIL. REP. 286 (S.C., July 22, 1948) (Phil.).

was not a base of the US Army within the meaning of the agreement.¹⁴³ But, the Court held that the main storage area outside the base qualified as a “temporary installation” under the same agreement.¹⁴⁴ In *Bayan*, the Court was criticized for transporting the meaning of “treaty” to the international plane, shifting the paradigm from the law of treaties under the Constitution to the law of treaties in objective international law, *supra*.¹⁴⁵ It was alleged, as above, that *Nicolas* pursued this defense of the Visiting Forces Agreement.¹⁴⁶

On the interpretation of treaties to which the Philippines is not a party, in *Kuroda*, the Court applied the Hague Convention on Rules and Regulations Covering Land Warfare and the Geneva Convention even when it was not a party thereto.¹⁴⁷ The Geneva Convention was signed only later on. The action was justified on the theory that the conventions were wholly based on the generally accepted principles of international law.

b. Customary International Law Rules: The Incorporation Clause and Monist-Dualist Debate

The treatment and application of customary international law in Philippine domestic law hinge on the question of whether the Philippines is a monist or dualist State.

The first modern Constitution of the Philippines, or the 1899 Constitution, did not contain any explicit reference to international law. The so-called ‘constitutionalism’ of international law is traceable to the 1935 Constitution, which established the Commonwealth of the Philippines under American rule. Article II, Section 3 of the said constitution provides that, “[t]he Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the Nation.”¹⁴⁸

143 *Id.*

144 *Id.*

145 *Bayan*, G.R. No. 138570.

146 *Nicolas*, G.R. No. 176051.

147 *Kuroda*, G.R. No. L-2662.

148 CONST. (1935), art. II, sec. 3 (Phil.).

For our purposes, the second part of the provision is important. Desierto posits that the intent in relation to this provision apparently affirms the universalist orientation towards fundamental human dignity values and the Philippines' responsible participation in international public order. She cites Aruego:

The second part of this declaration of principle --- the adoption of the generally accepted principles of international law as a part of the law of the Nation --- was borrowed from section 4 of the German Constitution and section 7 of the Constitution of the Republic of Spain.

The intention of the framers of the Constitution was to incorporate expressly into the system of municipal law the principles of international law, *the observance of which would be necessary to the preservation of the family of nations* which the Philippines was expected to join at the expiration of the Commonwealth period in the Tydings-McDuffie Law.

This provision is a formal declaration of what is considered to be the primordial duty of every member of the family of nations, namely, *to adjust its system of municipal law so as to enforce at least within its jurisdiction the generally accepted principles of international law.*¹⁴⁹

Notably, many cases of international law were decided after the inclusion of the above provision in the 1935 Philippine Constitution. They quoted the provision in detail. For instance, in *Kuroda*, the Court applied the two treaties even when the country was not a party thereto under the justification that the two treaties were based on the generally accepted principles of international law.¹⁵⁰

In the 1987 Constitution, the same tenor was included as Article II, Section 2. It reads: “[t]he Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.”¹⁵¹ As to the

149 Diane A. Desierto, *A Universalist History of the 1987 Philippine Constitution*, 11 HISTORIA CONSTITUCIONAL 427 (2010) available at <http://www.historiaconstitucional.com/index.php/historiaconstitucional/article/download/277/244>.

150 *Kuroda*, G.R. No. L-2662.

151 CONST. (1987), art. II, sec. 2 (Phil.).

intent of the framers of the 1987 document, Bernas writes that it is a reiteration of both the 1935 and the 1973 constitutions.¹⁵² During the debates, when asked whether “generally accepted principles of international law” was part of statutory law or constitutional law, the sponsor’s answer was unclear. Rather, he seemed to suggest that at least provisions of the UN Charter were to form part of both constitutional and statutory law. In the period of amendment, it was clarified that the principles were to be part of statutory law only.¹⁵³

There are opposing views among scholars as to whether this made the Philippines a monist or dualist State. No case law has thus far categorically stated the position of the Philippines. Also, another question lingers: What does the phrase “generally accepted principles of international law” mean?

On the one hand, Defensor-Santiago argues that the Philippines is a *monist* State because of Article II, Section 2 of the Constitution. Cases decided by the Court usually begin by quoting this provision, and then proceeding to apply international law directly, without finding any need to search for an enabling act of Congress.¹⁵⁴ And, in most cases, the Court did not find any difficulty in reconciling international law with national law. The consequence is that all treaties have the status of national law. A treaty does not need affirming legislation from the Philippine Congress. International law is directly applicable in judicial litigation. Another result is that international law is equal to national law in the hierarchy of norms. In case of conflict, the last in point of time will control.¹⁵⁵ In adding support to her argument, she stated that principle that the law of nations was part of the law of the land was adopted in the United States, even before the US Constitution was drafted, as it was stated in *The Paquete Habana*.¹⁵⁶

On the other, Bernas states that the Constitution manifested its adherence to the dualist theory, and at the same time adopted the incorporation theory, and thereby made international law part of domestic law with

152 JOAQUIN G. BERNAS, THE INTENT OF THE 1986 CONSTITUTION WRITERS 75-76 (1995).

153 *Id.*

154 DEFENSOR-SANTIAGO, *supra* note 8, at 30.

155 *Id.*

156 *Id.* at 31; *The Paquete Habana*, 175 U.S. 677 (1900).

regard to customary law and treaties which had become customary law.¹⁵⁷ In the case of treaties as international law, they become part of the law of the land when concurred by the Senate in accordance with the Constitution, thereby transforming a treaty into binding municipal law.¹⁵⁸ Thus, treaty law and customary international law are placed on the same level as statutes passed by the Congress.¹⁵⁹ He once added that the provision made the Philippines one of the States which make a specific declaration that international law also has the force of domestic law. Similar provisions are found in the Austrian Constitution, Article 9: “[t]he generally recognized rules of international law shall be considered as component parts of the Federal Law,” and in Article 25 of the Constitution of the Federal Republic of Germany: “[t]he general rules of public international law are an integral part of federal law.”¹⁶⁰

According to scholars, the provision has caused confusion in jurisprudence. Llamzon writes that the elements of international law, which become part of Philippine law by incorporation, are not uniformly applied.¹⁶¹ The distinction that only customary law “automatically” become part of the law of the land is sometimes blurred in some Philippine Supreme Court decisions.¹⁶² This is because since treaties become part of Philippine law only by ratification, the principle of incorporation applies only to customary law and to treaties which have become part of customary law.¹⁶³

Magallona adds a different dimension to the debate. According to him, with regard to the internalization of international law, only general international law is to be understood as forming part of the law of the land.¹⁶⁴ This means not only customary law, but also general principles of

157 JOAQUIN G. BERNAS, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 57(2002).

158 *Id.*

159 JOAQUIN G. BERNAS, THE PHILIPPINE CONSTITUTION FOR LADIES, GENTLEMEN AND OTHERS 12 (2007).

160 BERNAS, *supra* note 157, at 58.

161 Aloysius P. Llamzon, *The Generally Accepted Principles of International Law: Towards a Structurally Consistent Use of Customary International Law in Philippine Courts*, 47 ATENEO LAW JOURNAL 243 (2002).

162 *Id.*

163 *Id.*

164 MAGALLONA, *supra* note 127, at 36-37.

law.¹⁶⁵ He cites that, at times, the attitude of the Court is not in line with the incorporation clause. For example, in *obiter* in at least two cases, treaty norms were considered to be covered by the clause.¹⁶⁶ In *Agustin v. Edu*, the Court said that the Vienna Convention on Road Signs and Signals was impressed with the character of generally accepted principles, which the Constitution adopted as part of the law of the land.¹⁶⁷ Magallona opined that, in *Marcos v. Manglapus*, the Court that quoted certain rights under the International Covenant on Civil and Political Rights, failed to mention that the Philippines was a party to the treaty, but found it necessary to explain that the right to return to one's country was a generally accepted principle of international law which was part of the law of the land.¹⁶⁸

Aside from the treatment of customary law, several areas are affected by this ongoing debate, like the so-called shifting of concepts between the two spheres of international law and domestic law (as illustrated above). Also, the incorporation or reception of international law into domestic Philippine law can become a problem when international law, whether customary or conventional, comes into conflict with domestic law, whether constitutional or statutory.¹⁶⁹ It could also affect the application or non-application of human rights norms for the Court has often invoked certain human rights norms as custom in its decisions. This trend of a confused Court will reverberate in jurisprudence.

Notwithstanding, through the years, the Court has consistently referred to a definition of international custom¹⁷⁰ as a source of international law stated in the Statute of the International Court of Justice. It also referred to its two elements: (1) State practice, the objective element; and (2) *opinio juris sive necessitates*, the subjective element.¹⁷¹ It made mention of genocide, war crimes, and crimes against humanity as attaining custom-

165 *Id.*

166 *Id.* at 38.

167 *Agustin v. Edu*, G.R. No. L-49112, 88 S.C.R.A. 195 (S.C., Feb. 2, 1979) (Phil.).

168 *Marcos v. Manglapus*, G.R. No. 88211, 177 S.C.R.A. 668 (S.C., Sept. 15, 1989) (Phil.).

169 BERNAS, *supra* note 157, at 60.

170 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. §102(2) (1987).

171 *Id.*

ary status, and some even went further and stated that the prohibition of these crimes had attained the status of *jus cogens*.¹⁷²

c. Interpretation of International Human Rights Norms in Light of Domestic Constitutional Rules

International human rights norms, like any other norms in international law, have been always tested as to constitutionality. Many norms have been applied on the strength that they are customary, through the incorporation clause found in the Constitution. For instance, in *Mejoff v. Dir. of Prisons*, the freedom from arbitrary detention of a stateless person was decided using the incorporation clause in the 1935 Constitution and the provisions of the UDHR.¹⁷³

Evidently, human rights cases in the Philippines commonly take the form of petitions for writs of *habeas corpus*, or injunctions against the police and military. The cases do not deal with international human rights law, in itself, but with national human rights law found in the Philippine Constitution's Bill of Rights in relation with international human rights law. The latter sometimes influences deportation cases against undesirable aliens and the application by non-nationals for admission to certain professions.¹⁷⁴

As could be seen from a quick survey of the cases in international law in the past years, human rights, as enunciated in the UDHR, have been the subject of several cases before the Court, such as those that involved the right to political participation, freedom from undue detention and torture, and even violence.¹⁷⁵

A bifurcation exists, however, as to the treatment and application of civil and political rights, on the one hand, and of economic, social, and cultural rights, on the other. From the time that the Court decided on *Raquiza v. Bradford* in 1945,¹⁷⁶ a variety of cases involving civil and political

172 Bayan, G.R. No. 138570.

173 Mejoff, G.R. No. L-2855.

174 DEFENSOR-SANTIAGO, *supra* note 8, at 275.

175 *E.g.*, Reyes v. Bagatsing, G.R. No. L-65366, 125 S.C.R.A. 553 (S.C., Nov. 9, 1983) (Phil.); Phil. Assoc. of Labor Unions v. Sec'y of Labor, G.R. No. L-22228, 27 S.C.R.A. 40 (S.C., Feb. 27, 1969) (Phil.).

176 Raquiza, G.R. No. L-44.

rights had been decided. Deportation as inherent to sovereignty has been asserted.¹⁷⁷ But, aliens are protected by the UDHR and the Bill of Rights of the Constitution, particularly as to civil and political rights.¹⁷⁸

Desierto writes that over the last two decades since the promulgation of the 1987 Constitution, the Court has issued writs and/or resolved cases on fundamental civil liberties and basic constitutional rights guarantees using its expanded judicial review power, including, among others: nullifying administrative rules and regulations issued by the executive department that contravened the constitutionally-mandated agrarian reform program; affirming the constitutional right to a fair and a speedy trial; affirming a lower court judgment finding the government's use of arrest, detention, or deportation orders to be illegal and arbitrary; enjoining the military and police's conduct of warrantless arrests and searches, "aerial target zonings" or "saturation drives" in areas where alleged subversives were supposedly hiding; declaring search warrants defective and the ensuing seizure of private properties to be illegal; acquitting a person whose conviction for murder was based largely on an inadmissible extrajudicial confession (obtained without the presence of counsel); upholding the dismissal of a criminal charge on the basis of the constitutional right against double jeopardy; acquittal of a public officer due to a violation of the constitutional right of the accused to a speedy disposition of his or her case; prohibiting the compelled donation of print media space to the Commission on Elections without payment of just compensation; and prohibiting governmental restrictions on the publication of election survey results for unconstitutionally abridging the freedom of speech, expression, and the press.¹⁷⁹

This is no perplexity since civil and political rights are found in the Bill of Rights, and the Bill is self-executing. As emphasized earlier, the Court is in reality not applying international law, but domestic law. A mirror study of the Bill and the International Covenant on Civil and Political

177 *Harvey v. Defensor Santiago*, G.R. No. 82544, 162 S.C.R.A. 840 (S.C., June 28, 1988) (Phil.).

178 *Borovsky v. Comm'r of Immigration*, G.R. No. L-4352, 90 PHIL. REP. 107 (S.C., Sept. 28, 1951) (Phil.); *People v. Chan Fook*, G.R. No. L-16968, 42 PHIL. REP. 230 (S.C., Oct. 6, 1921) (Phil.).

179 Diane A. Desierto, *Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa*, 11 ASIAN-PACIFIC LAW & POLICY JOURNAL 114, 129-30 (2009).

Rights readily reveals the commonality in each of them. The ramification is that civil and political rights could be pleaded and decided upon by the domestic court.

Meanwhile, economic, social and cultural rights are nowhere found in the Bill of Rights. Although they exist in other parts of the Constitution, many of them appear not to be self-executing. That being said, as a general rule, the provisions of the Constitution are still considered self-executing, and do not require further legislation for their enforcement. This is because if they are not treated as self-executing, the mandate of the fundamental law can be easily nullified by inaction of Congress. However, some provisions have already been categorically declared by the Court as non-self-executing based on their tenor.¹⁸⁰ The 1987 Constitution's provisions on socio-economic rights are found in Article II (Declaration of Principles and State Policies), others in Articles XIII (Social Justice and Human Rights), XIV (Education, Science and Technology, Arts, Culture, and Sports), and XV (The Family).¹⁸¹

In the 1990s, the justiciability of economic, social and cultural rights was decided in a landmark case. In *Oposa v. Factoran*, Article II, Section 15 (right to health) and Section 16 (right of the people to a balanced and healthful ecology) formed the constitutional basis for standing in a class suit seeking the cancellation of Timber License Agreements.¹⁸² The undivided Court ruled that while the right to a balanced and healthful ecology was found under the Declaration of Principles and State Policies and not under the Bill of Rights, it did not follow that it was less important than any of the civil and political rights enumerated in the latter.¹⁸³ Such a right belongs to an entirely different category of rights for it concerns nothing less than self-preservation and self-perpetuation, aptly and fittingly stressed by the petitioners, the advancement of which may even be said to predate all governments and constitutions.¹⁸⁴ Another one is *Laguna Lake Dev.*

180 *Tondo Med. Ctr. Emps. Ass'n v. Court of Appeals*, G.R. No. 167324 (S.C., July 17, 2007) (Phil.).

181 *Desierto*, *supra* note 179, at 134.

182 *Oposa*, G.R. No. 101083.

183 *Id.*

184 *Id.*

Auth. v. Court of Appeals.¹⁸⁵ The Court asked, “[h]ow do we strike a balance between environmental protection, on the one hand, and the individual personal interests of people, on the other?”¹⁸⁶

A string of other cases followed in recent times with regard to the health of the people, and the environment. The Court seems to take a rights-based approach to these topics. In *Metro Manila Dev. Auth. v. Concerned Residents of Manila Bay*, the Court ordered concerned government agencies to coordinate the cleanup, restoration, and preservation of the water quality of Manila Bay in line with the country’s development objective of attaining economic growth consistent with the protection, preservation, and revival of marine waters.¹⁸⁷ *Roma Drug v. Reg’l Trial Court of Guagua, Pampanga* recognized the constitutional right to health, and declared that the provision of a law classifying “unregistered imported drugs” as “counterfeit drugs” and criminal penalties against its importation deprived Filipinos to choose a less expensive regime for their health care.¹⁸⁸ In these cases, the Court considered the language of the provisions that animate the economic, social, or cultural right involved. It had to be authoritative—a mandate or an imperative—and self-executing in this regard.

Recently, the Court’s decisions on human rights cases also focus on writs for the protection of the right to life, liberty and security due to the issuance of the writs of *Amparo*, among others.¹⁸⁹ For example, in *Razon v. Tagitis*, the Court reflected on the nature of *Amparo*— a protective remedy against violations or threats of violation against the rights to life, liberty and security.¹⁹⁰ It embodies, as a remedy, the court’s directive to police agencies to undertake specified courses of action to address the disappearance of an individual.¹⁹¹ It does not determine guilt or pinpoint criminal culpability for the disappearance; rather, it determines responsibility, or at

185 *Laguna Lake Dev. Auth.*, G.R. No. 110120.

186 *Id.*

187 *Metro Manila Dev. Auth. v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48 (S.C., Dec. 18, 2008) (Phil.).

188 *Roma Drug v. Reg’l Trial Court of Guagua, Pampanga*, G.R. No. 149907 (S.C., Apr. 16, 2009) (Phil.).

189 *See Razon v. Tagitis*, G.R. No. 182498 (S.C., Dec. 3, 2009) (Phil.).

190 *Id.*

191 *Id.*

least accountability, for the enforced disappearance for purposes of imposing appropriate remedies to address the disappearance.¹⁹² Other equally important writs may now issue, such as those on the environment and the right to information, affording the respect, protection, and fulfillment of rights. The rights of collective minorities have been also passed upon. In *obiter*, *Province of North Cotabato* pondered on the possibility of regarding the UN Declaration on the Rights of Indigenous Peoples as embodying customary law.¹⁹³

Truly, a process of transformation implicitly underlies the whole framework of the 1987 Constitution. This means that to bring about a regime of comprehensive human rights is the function of the entire political system established by the Constitution and the individual, and the collective efforts of the citizens to realize human rights in their social life is a supreme constitutional responsibility. The provisions on human rights in the Constitution constitute the vehicle by which the people must transform themselves into a politically-conscious force and an agency for comprehensive democratic changes.¹⁹⁴ And, international law is part of that process.

d. Impact of International Legal Norms on the Development of Domestic Law

There are various ways in which international legal norms have aided the development of domestic law. Firstly, as stated above, the Court on occasion made use of binding international law to settle domestic problems. Relevant to this are the cases of *Mejoff* and *Agustin*. International law, therefore, can be used by the Philippine Court to settle domestic disputes in much the same way that it would use the Civil Code, the Penal Code, or other laws passed by the Congress.¹⁹⁵ Secondly, although not a party to the convention or treaty, the Court has used an underpinning treaty to resolve a legal question. This is evident in *Kuroda*. Corollary to this, it is reasonable to expect that the activist Court, reinvigorated by the not-

192 *Id.*

193 *Province of N. Cotabato*, G.R. No. 183591.

194 MERLIN M. MAGALLONA, *INTERNATIONAL LAW ISSUES IN PERSPECTIVE* 150-51 (1996).

195 BERNAS, *supra* note 157, at 58-59.

so-distant rapture of the political system, will play a role in appropriating international legal norms to develop the domestic.

Conversely, it had been suggested also that judgments of the Philippine domestic court could be of considerable practical importance for determining the right rule of international law. The Court said in *Gibbs*: “[a] decision of the Supreme Court of a small Republic of the Philippines is as much a source of International Law as a decision of the great Republic of the United States of America.”¹⁹⁶

Procedurally, due to the Philippines’ incorporation clause, the cumulative effect combined with the rule on judicial notice, is that no proof at all is needed for the application of generally accepted principles of international law. This results in ease and convenience for the courts of law with regard to the probative value of international legal norms.¹⁹⁷

5. CONCLUSION

There is a confluence of the two streams of national law and international law in the Philippine Court. The relation between them is complex, and at times, perplexing. This holds true from the earliest times when the Philippine Court dealt with international law in the 1940s, where much of the questions centered on the laws and exigencies of war, to the present where postmodernity necessitates ruling on various areas of law, including human rights and technology. The Supreme Court of the Philippines, sitting as a national court, invariably applies domestic law, and tries to deliver its duty of fidelity to the Constitution of the Philippines as the fundamental law via the power of judicial review. Where concepts, postulates, and theories of international law form part of the domestic, the Court applies them as domestic law.

However, there have been, at several points in time, divergence in and out of the Court as to what really is incorporated into Philippine law from international law. Further, the shifting of ideas from the two planes of law has been noted. The relation between the two in the application of customary law, human rights norms, and the development of domestic law through the enrichment thereof by international law, has been deliberately vibrant and alive. These operate within the framework of a legal system that is unique, unusual, and evolving in time.

196 *Gibbs*, G.R. No. L-1494.

197 *MAGALLONA*, *supra* note 127, at 39.

The Consequences of the “Clean Hands” Concept in International Investment Arbitration

Jamal Seifi¹ & Kamal Javadi²

1. INTRODUCTION

The uncertainty surrounding the scope of application of the Clean Hands doctrine resulted in its exclusion from the 2006 International Law Commission (ILC) Draft Articles on Diplomatic Protection.³ The Clean Hands doctrine was not even considered for inclusion in the ILC Draft Articles on Diplomatic Protection as a matter of the progressive development of international law.⁴ This exclusion, in the view of a minority of members at the ILC, was in part due to a conceptual confusion as to the function of the Clean Hands doctrine in the context of diplomatic protection as distinguished from inter-State claims. In accordance with the aforementioned view, in the context of diplomatic protection, the Clean Hands doctrine operates as a precondition for the admissibility of claims, whereas in the broader context of inter-State claims, the Clean Hands doctrine is equated

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2 Legal Adviser, Iran-United States Claims Tribunal.

3 *Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. No. 10, U.N. Doc. A/61/10 (2006).

4 It would seem that the human rights aspect of international claims – the possibility of invoking the Clean Hands doctrine by respondent States to block access to international remedies – was also a relevant consideration. This point will be taken up later.

with the principle of good faith and thus, does not create a procedural bar. However, as other members of the ILC (including the Special Rapporteur, Professor Dugard) have noted, the Clean Hands doctrine was not concerned with diplomatic protection alone, or even primarily.⁵ This latter view had been confirmed by a number of inter-State cases.

The ILC's codification exercise revealed the existence of uncertainty as to the scope of application of the Clean Hands doctrine and crystallized various points of contention. For example, more recently, the *Yukos* tribunal referred to the traditional meaning of the doctrine by referring to the argument advanced by Russia based on the Clean Hands doctrine as a bar to a claim as "the 'unclean hands' doctrine proper".⁶

In the last decade, the jurisprudence of investment treaty arbitration has led to the application of the Clean Hands doctrine outside the context of diplomatic protection; it has been applied both in the context of the *first strand*, the "legality requirement" and in the context of the *second strand*, the "abuse of process" debate. These *two strands* should be considered as a reinvention of the Clean Hands doctrine as applied in international investment law.

In the context of the *first strand*, the illegality of investment has operated in some instances as a jurisdictional bar, rendering the consent of the host State invalid. As will be illustrated by the reviewed cases, in the context of the legality requirement case-law, only a limited version of the Clean Hands doctrine comes into play when the illegality of the investment operates as a jurisdictional bar. As such, the arbitral tribunal's legality analysis will be limited to the establishment stage, i.e., the "making" of an investment, as opposed to the post-establishment conduct of the investor, i.e., the alleged wrongdoing at the performance stage. In this limited sense, it has been well-established that the Clean Hands doctrine does not need treaty stipulation. Thus, investment arbitration tribunals

5 Report of the International Law Commission to the General Assembly, *supra* note 3, at 14.

6 *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, Final Award of July 18, 2014 (hereinafter, "Yukos Award"), para. 1361. Of course, in *Yukos*, the claim against Russia was an investor-State claim. In an investor-State claim, the investor has an international remedy of its own and for this reason, for the purposes of the clean hands doctrine analysis, an investor-State claim should be equated with an inter-State claim as distinguished from a diplomatic protection claim.

have found that, “a clean hands principle or legality requirement [may] be read into the [Energy Charter Treaty (ECT)]”;⁷ it “is implicit even when not expressly stated in the relevant [Bilateral Investment Treaty] (BIT)”⁸; and is “inherent in every BIT.”⁹

At the same time, beyond the initial stage of the making of an investment, non-compliance with the host State’s law is captured by the Clean Hands concept in its broad sense to be considered at the merits stage. Thus, the *Yukos* Tribunal, relied on Article 39 (Contribution to the injury) of the ILC Draft Articles on State Responsibility and accordingly reduced the damages owed to the Claimants by 25% due to their violation of Russian tax law.¹⁰ More recently, the *Mamidoil* Tribunal, after rejecting the jurisdictional consequences of the legality requirement on the facts of the case, took the non-compliance with the domestic law of the host State into account at the merits stage to reject Claimants’ claim regarding the violation of the fair and equitable treatment (FET) standard.¹¹

The *second strand* of the “unclean hands” case-law concerns the issue of “abuse of process,” which deals with the consequences of abusing the system of investment protection.¹² This strand was initiated by *Phoenix*, where the tribunal highlighted the issue of abusing the system of investment protection and found that the tribunal lacked jurisdiction *ratione materiae*¹³ as a result of the abuse.¹⁴ Whereas the (first) legality requirement strand of the case-law is based on the domestic legality of the investment, the (second) “abuse of process” strand is based on international legality of the investment. In fact, the *Phoenix* Tribunal acknowledged that the investment had been made lawfully, such as, in accordance with the Czech

7 *Id.* at 429.

8 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 101 (Apr. 15, 2009) [hereinafter *Phoenix Award*].

9 *SAUR Int’l S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 306 (June 6, 2012) [hereinafter *SAUR Award*].

10 *Yukos Award*, *supra* note 6, at ¶ 1637.

11 *Mamidoil Jetoil Greek Petroleum Prod. Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (Mar. 30, 2015) [hereinafter *Mamidoil Award*].

12 *See Phoenix Award*, *supra* note 8, at ¶ 113.

13 *Id.* ¶ 54.

14 *Id.* ¶ 68.

legal order.¹⁵ However, it considered the question whether “assets invested bona fide” as part of its jurisdiction *ratione materiae* inquiry.¹⁶ Thus, the Tribunal held that if the investor had “unclean hands” and the investment had been made in bad faith – solely to bring a pre-existing dispute under the International Centre for Settlement of Investment Disputes (ICSID)/Bilateral Investment Treaties (BITs) dispute settlement mechanism – then the arbitral tribunal lacked jurisdiction *ratione materiae*.¹⁷ Nevertheless, it would seem that going beyond the “*Salini* test” to accommodate abuse of process concerns has not been the only way to address the jurisdiction issue.¹⁸ For example, as evidenced by the *Levy* case, the tribunals have established by case-law that they are precluded from exercising jurisdiction.¹⁹

This article examines the uncertainty surrounding the meaning and function of the Clean Hands doctrine as well as its legal status as part of general international law. Furthermore, it discusses various manifestations of the application of the Clean Hands concept in investment treaty arbitration.

After a brief review of the treatment of the Clean Hands doctrine by the ILC in Section II, we will consider the application of the Clean Hands doctrine in investment treaty arbitration in Section III. Part A examines the *first strand*, the legality requirement and relevant case law. Part B will address the *second strand*, abuse of process. Two representative cases from the abuse of process case-law will be examined to illustrate the evolution of case-law within this strand.

This article does not purport to try to bring coherence to a fast moving subject, rather, it seeks to examine different aspects of the application of the Clean Hands doctrine in international investment law.

15 *Id.* ¶ 134.

16 *Id.* ¶ 114.

17 *Id.* ¶ 144.

18 *Id.* ¶ 39.

19 *See, e.g.*, Renée Rose Levy v. Republic of Peru, ICSID Case No. ARB/11/17, Award (Jan. 9, 2015).

2. THE TREATMENT OF THE CLEAN HANDS DOCTRINE BY THE ILC

Generally, the Clean Hands doctrine is a positive defence based on equity and it is also recognized in the Common Law tradition. In accordance with the Clean Hands doctrine, one seeking equitable relief cannot take advantage of one's own wrong.²⁰ In the words of the ILC, “[a]ccording to the clean hands doctrine no action arises from willful [sic] wrongdoing: *ex dolo malo non oritur actio*.”²¹ In public international law, and in the context of diplomatic protection, the Clean Hands doctrine “is invoked to preclude a State from exercising diplomatic protection if the national it seeks to protect has suffered an injury in consequence of his or her own wrongful conduct.”²²

20 *Clean Hands Doctrine*, BLACK'S LAW DICTIONARY (5th ed. 1979) (Black's Law Dictionary defines the Clean Hands doctrine as follows: “Under “clean hands” doctrine, equity will not grant relief to a party, who, as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party in his prior conduct has violated conscience or good faith or other equitable principle.”). In his discussion of the possible consequences of the U.S. rescue mission in the context of the United States Diplomatic and Consular Staff in Tehran (U.S. v. Republic of Iran), Judgment (May 24, 1980), <http://www.icj-cij.org/docket/files/64/6293.pdf>, Oscar Schachter referred to the Clean Hands doctrine in the following terms:

The equitable doctrine of “clean hands” applied in domestic law provides an analogy. A plaintiff seeking relief from a Court may reasonably be denied such relief because of conduct that is contumacious or that interferes with the judicial process or anticipates its outcome. International tribunals have the same kind of authority and should exercise it whenever appropriate. Would it have been appropriate to do so in the hostage case because of the U.S. rescue mission (as in fact two dissenting judges proposed)? The decision of the majority of the Court to do no more than rebuke the United States was a more reasonable way of dealing with the problem.

Oscar Schachter, *International Law in the Hostage Crisis: Implications for Future Cases*, in *AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS* 344 (Paul H. Kreisberg ed., 1985).

21 John R. Dugard (Special Rapporteur on Diplomatic Protection), *Sixth Rep. on Diplomatic Protection*, ¶ 2, International Law Commission, U.N. Doc. A/CN.4/546 (Aug. 11, 2004).

22 *Id.*

There is, however, uncertainty as to the scope of application of the Clean Hands doctrine. In this regard, Ian Brownlie has pointed out that the Clean Hands doctrine may also have substantive aspects:

[T]here will be a residue of instances in which questions of inadmissibility and 'substantive' issues are difficult to distinguish. This is the case with the doctrine of 'clean hands,' according to which a claimant's involvement in activity illegal under either municipal or international law may bar the claim.²³

On two specific occasions the ILC declined the opportunity to regulate the Clean Hands doctrine, namely, during preparation of the Draft Articles on State Responsibility (2001) and the Draft Articles on Diplomatic Protection (2006).²⁴

First, the Commission had the opportunity to elaborate on the Clean Hands doctrine during the course of preparing the Articles on State Responsibility but it did not do so. For instance, in Special Rapporteur, which is Professor Crawford's Second Report, he noted that when dealing with the provisions on the "circumstances precluding wrongfulness":

The doctrine has hardly been referred to in the Commission's previous work on State responsibility. Special Rapporteur Garcia Amador dealt with it only in relation to 'Fault on the part of the alien', which is now subsumed in Part Two, article 42 (2), as a basis for limiting the amount of reparation due. To the extent that 'clean hands' may sometimes be a basis for rejecting a claim of diplomatic protection, the doctrine appears to operate as a ground of inadmissibility rather than as a circumstance precluding wrongfulness or responsibility, and it can be left to be dealt with under the topic of diplomatic protection.²⁵

23 IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 503 (7th ed. 2008).

24 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supp. No. 10 (A/56/10) (Nov. 2001), <http://www.refworld.org/docid/3ddb8f804.html>; United Nations, *Draft Articles on Diplomatic Protection* (2006), <http://www.refworld.org/docid/525417fc4.html>.

25 James Crawford (Special Rapporteur on State Responsibility), *Second Rep. on State Responsibility*, ¶ 333, International Law Commission, U.N. Doc. A/CN.4/498 (Apr. 30, 1999). Referring to J. Salmon, the Second Report noted that even within the context of diplomatic protection, the authority supporting the existence of a doctrine of Clean Hands is "fairly long-standing and divided," dealing largely with

While acknowledging that legal principles based on the underlying notion of good faith can play a role in international law, the Special Rapporteur was not convinced that new and vague maxims such as the Clean Hands doctrine should be included within the category of “circumstances precluding wrongfulness.”²⁶ He also noted that the passage taken from Sir Gerald Fitzmaurice’s Hague Academy Lecture quoted in Judge Schwebel’s dissenting opinion in the *Nicaragua* case was only concerned with questions such as *locus standi* or the admissibility of claims.²⁷ In that passage – which Judge Schwebel relied on to conclude that Nicaragua’s claim should fail because Nicaragua had not come to Court with “clean hands” – Fitzmaurice opines that:

“[A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short, were provoked by it.”²⁸

For these reasons, the Special Rapporteur concluded that there was no basis for including the Clean Hands doctrine as a new “circumstance precluding wrongfulness.”²⁹ At the same time, during the Commission’s discussions of the issue, “the view was expressed that the clean hands doctrine was a principle of positive international law. That principle came under the determination of responsibility because it had an impact on the scope of compensation.”³⁰ Thus, in the Special Rapporteur’s view, the Clean Hands

individuals involved in slave-trading and breach of neutrality. *Id.* ¶ 334. The Special Rapporteur further stated that the conclusion reached by Charles Rousseau that “it is not possible to consider the ‘clean hands’ theory as an institution of general customary law” still seemed to be valid. *Id.* ¶ 336.

26 *Id.*

27 Dugard, *supra* note 21, at ¶ 5.

28 *Id.* ¶ 2.

29 Crawford, *supra* note 25, at ¶ 336.

30 *Report of the Commission to the General Assembly on the Work of its Fifty-First Session*, [1999] 2 Yearbook of the International Law Commission 85, ¶ 414, U.N. Doc. A/CN.4/SER.A/1999/Add.1.

doctrine could be analysed subsequently in connection with the loss of the right to invoke State responsibility.³¹

Nevertheless, when dealing with the provisions concerning determination of the form and amount of reparation (Articles 34-39 of the ILC Draft Articles on State Responsibility), no specific provision was allocated to the Clean Hands doctrine, although the terms of Article 39³² are drafted broadly so as not to exclude consideration of conduct falling under the Clean Hands doctrine with regards to reparation sought.³³ Moreover, no place was given to the Clean Hands doctrine when drafting the provisions on "Admissibility of claims" and "Loss of the right to invoke responsibility" (Articles 44 and 45).³⁴

Likewise, in the course of the ILC's preparation of the Draft Articles on Diplomatic Protection, the Special Rapporteur, Professor Dugard, did not include an article specifically addressing the Clean Hands doctrine. After the submission of the Fifth report, a suggestion was made to include the Clean Hands doctrine as a condition for admissibility of diplomatic

31 *Id.* ¶ 415.

32 Crawford, *supra* note 25, at 109.

Article 39 - *Contribution to the injury* – In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

33 As will be discussed below, the *Yukos* Tribunal in its recent award confirmed this point.

34 Crawford, *supra* note 25, at 120-21.

Article 44 - *Admissibility of claims* – The responsibility of a State may not be invoked if:

- (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45 - *Loss of the right to invoke responsibility* – The responsibility of a State may not be invoked if:

- (a) the injured State has validly waived the claim;
- (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

protection.³⁵ This would mean that if an internationally wrongful act of a State that caused an injury to an alien resulted from this alien's initial wrongful conduct, the alien's State of nationality should be precluded from exercising diplomatic protection. As articulated by Alain Pellet during the ILC's work on diplomatic protection, if the Clean Hands doctrine had any separate existence or real consequences at a procedural level, it could only be in connection with diplomatic protection.³⁶ In this regard, Pellet drew the Commission's attention to the pleadings submitted in the *Oil Platforms*³⁷ case.

It is worth mentioning that in *Oil Platforms*, the United States in its Counter-Memorial had argued that the Court should deny the relief sought by Iran because of Iran's own allegedly illegal conduct.³⁸ Iran observed that "the United States seems to invoke the 'plaintiff's own wrongful conduct'"

35 It should be noted that after the submission of the Third Report, the Commission considered suggestions for issues, including the Clean Hands doctrine, which could be included within the scope of its work. There was a division of opinion as to how to deal with the Clean Hands doctrine issue. Some members suggested that it would be better for the Commission not to take any position on the "clean hands" rule. The Special Rapporteur in his concluding remarks noted that the "clean hands" principle could arise in connection with the conduct of the injured person, the claimant-State or the respondent-State, so that it would be difficult to formulate a rule applicable to all cases. *Report of the Commission to the General Assembly on the Work of its Fifty-Fourth Session*, [2002] 2 Yearbook of the International Law Commission 52-53, U.N. Doc. A/CN.4/SER.A/2002/Add.1.

36 *Summary Records of the 2791st Meeting*, [2004] 1 Yearbook of the International Law Commission 4, U.N. Doc. A/CN.4/SR.2791.

37 *Oil Platforms (Islamic Republic of Iran v. U.S.)*, Judgment, 2003 I.C.J. 177, ¶ 29 (Nov. 6).

38 *Oil Platforms (Islamic Republic of Iran v. U.S.)*, Counter-Memorial and Counter-Claim Submitted by the U.S. (June 23, 1997), <http://www.icj-cij.org/docket/files/90/8632.pdf>. The United States contended that, "[n]otwithstanding its own manifestly illegal armed attacks against neutral shipping and neutral trade, Iran seeks in this case to invoke a treaty designed to regulate friendly relations between States." *Id.* at 156.

defence in Part V of its Counter-Memorial as both: a) a ground for *inadmissibility* of the Iranian claim and b) a defence on the merits.”³⁹

On the question of inadmissibility, Iran countered by arguing that the Clean Hands argument only operates as a procedural defence in the context of a diplomatic protection claim, as distinguished from an inter-State claim:

It is true that in another field of State responsibility, the clean hands concept appears as one of the prerequisites for the admissibility of State claims, namely those arising in the context of diplomatic protection. But, it must be stressed, the prerequisite is exclusively confined to that context, and hence it deals only with a foreign individual's clean hands and not his own State's. Therefore, one can only agree with the United States' contention, supported by extensive jurisprudential and doctrinal quotations, according to which a citizen requesting diplomatic protection from his own State must present himself with clean hands. Yet this falls far short of demonstrating that such a principle is required in direct State-to-State claims.⁴⁰

As already noted, Iran acknowledged that issues broadly relating to the Clean Hands doctrine may, outside the specific context of diplomatic protection, be considered by an international judicial body at the merits stage.⁴¹ However, Iran argued that even under such a scenario, “the “clean hands” concept does not operate independently”⁴² and that “at most, the clean hands defence could have an effect in relation to the quantification of damages.”⁴³

The Court characterized the U.S.'s arguments in the nature of a defence on the merits. It noted that the U.S.'s arguments on this issue were first raised in its Counter-Memorial after the Court's Judgment of December 12, 1996 confirmed its jurisdiction.⁴⁴ Despite detecting a degree of inconsistency in the arguments advanced by the U.S. on this issue as further

39 Oil Platforms (Republic of Iran v. U.S.), Reply and Defence to Counter-Claim Submitted by the Islamic Republic of Iran, at 178 (Mar. 10, 1999), <http://www.icj-cij.org/docket/files/90/8630.pdf>.

40 *Id.* at 179.

41 *Id.* at 181-82.

42 *Id.* at 182.

43 *Id.*

44 Oil Platforms (Islamic Republic of Iran v. U.S.), Judgment, 1996 I.C.J. 1 (Dec. 12).

developed throughout subsequent pleadings and in oral argument – where the United States had presented its argument as having a preliminary character – the Court noted that:

The United States does not ask the Court to find Iran’s claim inadmissible; it asks the Court to dismiss that claim. It does not argue that the Court should be debarred from examining the merits of the Iranian claim on the grounds of Iran’s conduct; rather it argues that Iran’s conduct is such that it “precludes it from any right to the relief it seeks from this Court”, or that it “should not be permitted to recover on its claim”. The United States invites the Court to make a finding “that the United States measures against the platforms were the consequence of Iran’s own unlawful uses of force” and submits that the “appropriate legal consequences should be attached to that finding”. The Court notes that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period — which it has also to do in order to rule on the Iranian claim and the United States counter-claim.⁴⁵

In the course of the Commission’s discussions, Pellet went on to argue that “[t]he ‘clean hands’ doctrine was a specific legal institution inseparable from the question of diplomatic protection, and was only of relevance if the protected individual’s hands were ‘not clean’.”⁴⁶ He further noted that:

The vague concept of “clean hands” was not very different from the general principle of good faith in the context of relations between States, and had no autonomous consequences and little practical effect on the general rules of international responsibility. However, in the context of diplomatic protection, which involved relations between States and individuals, the concept took on new significance: it became functional, for in the absence of “clean hands” the exercise of diplomatic protection was paralysed.⁴⁷

Professor Dugard, however, while agreeing with Pellet on the importance of the Clean Hands doctrine, was not sure that it concerned diplomatic

45 Oil Platforms, 2003 I.C.J., ¶ 29. The Court, thus, did not find it necessary to deal with the request of the United States to dismiss Iran’s claim. *Id.*

46 *Summary Records of the 2791st Meeting*, *supra* note 36, at ¶ 24.

47 *Summary Records of the 2793rd Meeting*, [2004] 1 Yearbook of the International Law Commission, ¶ 5.

protection alone, or even primarily.⁴⁸ Professor Dugard further explained that the Clean Hands doctrine “had not arisen in connection with diplomatic protection in the *Oil Platforms* case, or in the more recent *Arrest Warrant* case.”⁴⁹ Accordingly, in view of Professor Dugard, “[i]t was the type of topic that might well be considered separately, and should not be included under diplomatic protection, because it extended well beyond it.”⁵⁰

Furthermore, Brownlie’s position as reflected in the Commission’s Report was that “[t]here was little or no evidence of the existence of a doctrine in general international law called the “clean hands” doctrine, and even if there were, he agreed with the Special Rapporteur[, Professor Dugard,] that it had nothing to do with the exercise of diplomatic protection.”⁵¹ While acknowledging that there are instances such as the *Oil Platforms* case where references to this doctrine may be found in international litigation, he pointed out that:

ICJ had shown no tendency to adopt or encourage references to the “clean hands” doctrine. Mr. Pellet had referred to a number of perfectly respectable principles of treaty law, and elements analogous to the “clean hands” doctrine were indeed present in the law. The principle of “good faith” was related, but it was not the same thing: it had considerable authority behind it, whereas the “clean hands” doctrine did not. It would make life unnecessarily difficult for the Special Rapporteur if the Commission asked him to study the non-subject of “clean hands.”⁵²

Pellet, highlighting once again the distinction between the particular meaning of the Clean Hands doctrine in the context of diplomatic protection (as an admissibility consideration) and its broader meaning in inter-State claims, noted that the cases referred to by Brownlie were related to inter-State claims and thus, Pellet did not find Brownlie’s argument persuasive.⁵³ Pellet explained that the inter-State cases may not be cited for the proposition that the Clean Hands doctrine does not apply to

48 *Summary Records of the 2791st Meeting*, *supra* note 36, at ¶ 32.

49 *Id.*

50 *Id.*

51 *Summary Records of the 2793rd Meeting*, *supra* note 47, at ¶ 42.

52 *Id.*

53 *Id.* ¶ 43.

diplomatic protection.⁵⁴ In fact, Pellet “agreed with Mr. Brownlie that in proceedings between States[,] the doctrine was inapplicable[,]” noting that “where a case involved an individual and a State via diplomatic protection, the doctrine was relevant.”⁵⁵

Human rights considerations relating to international claims were also referred to during the debate on this issue. Attention was drawn to the fact that commentators, based on the ruling of the European Court of Human Rights in the *Slivenko* case, had spoken of banishing the Clean Hands doctrine from international cases involving the protection of human rights, arguing that the applicability of the doctrine would be highly controversial in this context.⁵⁶

As a result, “the Commission requested the Special Rapporteur to consider whether the Clean Hands doctrine [was] relevant to the topic of Diplomatic protection and[,] if so[,] whether it should be reflected in the form of an article” in the Draft Articles.⁵⁷ Ultimately, the ILC did not include the Clean Hands doctrine in its Draft Articles on Diplomatic Protection adopted in 2006. In the Special Rapporteur’s view, the evidence in favour of the Clean Hands doctrine was inconclusive. He concluded that:

In these circumstances the Special Rapporteur sees no reason to include a provision in the draft articles dealing with the clean hands doctrine. Such a provision would clearly not be an exercise in codification and is unwarranted as an exercise in progressive development in the light of the uncertainty relating to the very existence of the doctrine and its applicability to diplomatic protection.⁵⁸

54 *Id.*

55 *Id.* Pellet also pointed out that, “[i]n the context of inter-State relations, the fact that two States were in violation of international law did not preclude the responsibility of both States being invoked.” *Id.* ¶ 2.

56 *Id.* ¶ 48. See Aleksandr Shapovalov, *Should a Requirement of “Clean Hands” be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission’s Debate*, 20 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 829 (2005).

57 Int’l Law Comm’n, Rep. on the Work of Its Fifty-Sixth Session, U.N. Doc. A/59/10, ¶ 54 (2004).

58 Dugard, *supra* note 21, at ¶ 18.

It has been remarked that the decision of the ILC not to include the Clean Hands doctrine in the Draft Articles “is not to say that the principle is not part of international law; rather, this decision clarifies that the only conduct relevant to assessing the admissibility of claims under international law is that of the claimant itself.”⁵⁹

It is worth noting in this regard that more recently, the *Yukos* Tribunal held that the Clean Hands doctrine as a bar to a claim does not exist as a principle of international law.⁶⁰ In the *Yukos* case, Russia argued that the Claimants’ engagement in tax evasion arrangements in violation of Russian tax laws would trigger the Clean Hands doctrine, thus barring their claim.⁶¹ Consistent with the well-settled practice of investment arbitration tribunals, the Tribunal did not read into the ECT any legality requirement with respect to the performance of the investment (as opposed to the “making” of the investment) as a jurisdictional bar.⁶² As such, the Tribunal had to pronounce upon Russia’s proposition to the effect that the Clean Hands doctrine as a general principle of law would operate as a bar to the Claimants’ claim. In this regard, the Tribunal held that:

[A]s Claimants point out, despite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of “unclean hands” in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.⁶³

The Tribunal thus concluded that “‘unclean hands’ does not exist as a general principle of international law which would bar a claim by an investor.”⁶⁴ However, as will be discussed below, the Tribunal acknowledged that the

59 Rahim Moloo, *A Comment on the Clean Hands Doctrine in International Law*, 8 TRANSNATIONAL DISPUTE MANAGEMENT 4 (SPECIAL ISSUE) 1 (2011).

60 *Yukos* Award, *supra* note 6, at ¶ 1373.

61 *Id.* ¶¶ 1281-1310.

62 *Id.* ¶¶ 1349-1356.

63 *Id.* ¶ 1362. Due to the fact that Judge Schwebel was a member of the *Yukos* Tribunal, Russia relied on his dissenting opinion in the Nicaragua case, as well as referred to “other dissenting ICJ and PCIJ opinions where the principle of ‘unclean hands’ was invoked (albeit often without referring to it by name).” *Id.* ¶ 1361.

64 *Id.* ¶ 1363.

Claimants' illegal conduct during the performance of the investment could have an impact on the Tribunal's analysis of liability and damages.⁶⁵

3. THE CLEAN HANDS DOCTRINE IN INVESTMENT TREATY ARBITRATION

The idea that when individuals have access to an international remedy of their own the Clean Hands doctrine should be applicable to them directly can be found in the party submissions in private cases before the Iran-United States Claims Tribunal (*hereinafter* "the Iran-U.S. Tribunal"). In its pleading in the *Aryeh* case, Iran invoked the Clean Hands doctrine as follows:

The claim should be dismissed under the universal, equitable doctrine of 'clean hands.' The doctrine, which is supported by a vast and diverse body of international legal literature, State practice and international case-law, states that anybody wishing to bring a claim before an international court, must have acted properly and correctly prior to the claim⁶⁶

In *Aryeh*, Iran's "clean hands" argument was based on an assertion regarding the making and use of forged corporate documents by the Claimants to substantiate their claim for the expropriation of their shareholdings in a number of Iranian corporations.⁶⁷ The Iran-U.S. Tribunal, however, held that the allegations of forgery required an enhanced standard of proof and should be proved by clear and convincing evidence.⁶⁸ In light of this standard, the Iran-U.S. Tribunal found that no forgery was proven.⁶⁹

65 *Id.* ¶ 1374.

66 *Aryeh v. Republic of Iran*, Respondent's Hearing Memorial and Written Evidence, Case No. 842, 843, 844, 44 exhibit C (Iran U.S. Claims Trib., Mar. 23, 1993).

67 *Id.*

68 *Id.*

69 *Vera-Jo Miller Aryeh v. Republic of Iran*, Award No. 581-842/843/844-1, 33 Iran-U.S. C.T.R., at 317-18 (May 22, 1997). A discussion of other cases before the Tribunal involving the allegation of claimant-induced fraud, and raising the possibility of applying the Clean Hands doctrine. See W. MICHAEL REISMAN & CHRISTINA PARAJON SKINNER, *FRAUDULENT EVIDENCE BEFORE PUBLIC INTERNATIONAL TRIBUNALS: THE DIRTY STORIES OF INTERNATIONAL LAW* 101 (2014).

Professor Crawford has remarked that the ICJ has never applied the Clean Hands doctrine, even in cases such as *Oil Platforms* where it might have done so.⁷⁰ However, in the context of investment treaty arbitration and referring to *Inceysa*,⁷¹ he points out that “[t]he only investment tribunal award to apply the clean hands doctrine did so on the basis of applicable national law.”⁷² In this context, and referring to the *Hamester* award as an example,⁷³ Professor Crawford goes on to observe that “[g]eneric claims of wrongdoing have not succeeded.”⁷⁴

At the same time, two investment treaty awards rendered in 2014 specifically referred to or discussed the Clean Hands doctrine. The *Fraport* Tribunal referred to the Clean Hands doctrine in *obiter dictum* in the context of its discussion of the legality requirement as applicable when the relevant BIT does not contain a legality clause.⁷⁵ Moreover, the *Yukos* Tribunal did not apply the Clean Hands doctrine to the post-establishment illegalities and thus refused to treat Claimants’ “unclean hands” as a procedural hurdle.⁷⁶ Yet, the *Yukos* Tribunal took the Claimants’ illegal conduct (“unclean hands”) into account in the assessment of damages.⁷⁷ Furthermore, in a recently rendered award, the *Mamidoil* Tribunal after

70 JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 701 (8th ed. 2012).

71 *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006).

72 CRAWFORD, *supra* note 70.

73 *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010) [hereinafter *Hamester Award*].

74 CRAWFORD, *supra* note 70. It should be noted, however, that the *Hamester* Tribunal rejected the Respondent’s objection to its jurisdiction based on the distinction between legality at the initiation of the investment, and legality during the performance of the investment. *Hamester*, ICSID Case No. ARB/07/24. The Tribunal reasoned that the legality of the investor’s conduct during the performance of the investment is a merits issue, as opposed to a jurisdictional bar. *Id.* This will be discussed further below.

75 *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award, (Aug. 16, 2007) [hereinafter *Fraport 2007 Award*].

76 *Yukos Award*, *supra* note 6.

77 *Id.* ¶ 1374.

rejecting the jurisdictional consequences of the legality requirement on the facts of the case, took the Claimant's non-compliance with the domestic law of the host State into account at the merits stage to reject its claim regarding the violation of the FET standard.⁷⁸

It should be noted that the "legality requirement" strand of the case-law is only one avenue for considering the consequences of the Clean Hands doctrine by investment arbitration tribunals. The *second strand* of the "unclean hands" case-law concerns the issue of abuse of process, which deals with the consequences of abusing the system of investment protection. These *two strands* will be addressed respectively in subsections A and B below.

a. The Legality Requirement: Illegal Investments Are Not Covered by BIT Protection

Cases representative of the "legality requirement" case-law include *Inceysa v. El Salvador*, *Fraport v. Philippines*, and *Mamidoil v. Republic of Albania*.⁷⁹ They respectively include a jurisdictional decision based on a finding as to the illegality of the investment at the preliminary objections stage, a finding of lack of jurisdiction with the benefit of full briefing, and a holding rejecting the jurisdictional objection based on the illegality of the investment while dismissing the Claimant's claim for the violation of the FET standard on the merits for its failure to comply with Albanian law.⁸⁰

I. INCEYSA V. EL SALVADOR⁸¹

Inceysa was an arbitration case under the ICSID Convention with the main consent instrument being the BIT concluded between Spain and El Salvador. At issue in this case were the Claimant's allegations of contractual breach and expropriation on the part of El Salvador.⁸²

78 *Mamidoil Award*, *supra* note 11.

79 *Inceysa Vallisoletana, S.L.*, ICSID Case No. ARB/03/26; *Fraport 2007 Award*, *supra* note 73; *Mamidoil Award*, *supra* note 11.

80 *Inceysa Vallisoletana, S.L.*, ICSID Case No. ARB/03/26; *Fraport 2007 Award*, *supra* note 73; *Mamidoil Award*, *supra* note 11.

81 *Inceysa Vallisoletana, S.L.*, ICSID Case No. ARB/03/26.

82 *Id.* ¶ 3.

The dispute in *Inceysa* concerned a service contract for installation, management and operation of mechanical inspection stations for vehicles and for the provision of emission control services.⁸³ In June 2000, the Ministry of the Environment and Natural Resources (MARN) of El Salvador organized a bidding process for providing the aforementioned services.⁸⁴ Inceysa, a company incorporated under the laws of Spain, was the winning bidder.⁸⁵ In November 2000, the contract between Inceysa and MARN (*hereinafter* "the Contract") was signed⁸⁶ and in December 2000, Inceysa acquired the land on which to perform the Contract.⁸⁷ In February 2001, it bought additional parcels of land for this purpose.⁸⁸ However, several problems arose between the parties in 2001, with reference to which Inceysa sent a letter to the Minister at MARN referring to the BIT concluded between Spain and El Salvador.⁸⁹

In July and August 2002, Inceysa complained to MARN about contractual breaches caused by the fact that MARN hired other companies to provide the services which Inceysa had been hired to provide, thus denying the exclusivity given to it under the Contract.⁹⁰ Having not been provided with a satisfactory reaction from MARN, Inceysa ultimately filed its Request for Arbitration with the Centre on July 21, 2003, alleging contractual breach and expropriation.⁹¹

For its part, El Salvador filed a civil lawsuit in a domestic court asking for the termination of the Contract.⁹² More importantly, and in the context of the ICSID arbitration, El Salvador, among other jurisdictional objections, countered that Inceysa had acted in the process of obtaining

83 *Id.*

84 *Id.* ¶ 23.

85 *Id.* ¶ 27.

86 *Id.* ¶ 30.

87 *Id.* ¶ 32.

88 *Id.*

89 *Id.* ¶ 33.

90 *Id.* ¶ 34.

91 *Id.* ¶¶ 1-3.

92 *Id.* ¶ 43.

the Contract and thus could not claim the protection of the BIT.⁹³ In its Memorial on Objections to Jurisdiction, the Respondent argued that the BIT was only intended to extend its protection to the investments made legally in El Salvador, i.e., “in accordance with its laws.”⁹⁴

El Salvador asserted that it had clear evidence that the concession contract had been procured by fraud, including on the grounds of (1) the submission of false financial statements; (2) the submission of forged documents to misrepresent the experience of Mr. Lavado, Inceysa’s sole administrator at the time; (3) misrepresentations and deceit surrounding evidence submitted regarding Inceysa’s prior experience in the field of vehicle inspections; (4) violation of bidding provisions by obfuscating the true association between Inceysa and another participant (ICASUR).⁹⁵ It further argued that the BIT protects only legitimate investments and that the necessary condition for an investment to benefit from the BIT is that the investment should be made in accordance with the domestic legislation of the host State.⁹⁶ It concluded that:

The Investment Treaty was meant to protect only investments made in accordance with the host State’s laws, and the parties consented to ICSID jurisdiction only over disputes arising from such legal investments.⁹⁷

Given the objections to jurisdiction by the Respondent, the tribunal declared the proceeding on the merits suspended.⁹⁸ Inceysa denied that it fabricated its financial statements to secure the Contract.⁹⁹ It also denied other grounds relied on by El Salvador to establish fraud and illegality, such as its failure to disclose its connection with ICASUR.¹⁰⁰ The Tribunal,

93 *Id.* ¶ 3.

94 *Id.* ¶ 45.

95 *Id.* ¶ 53.

96 *Id.* ¶¶ 46-48.

97 *Id.* ¶ 48.

98 *Id.* ¶ 13.

99 *Id.* ¶ 68.

100 *Id.* ¶¶ 68-71.

however, found that based on the evidence on the record, the Respondent's allegations of fraud were established to the satisfaction of the Tribunal.¹⁰¹

In determining whether El Salvador's consent to submit disputes to the jurisdiction of ICSID through the BIT covers illegal investments, the Tribunal characterized this issue as a question of jurisdiction *ratione voluntatis*.¹⁰² Inceysa argued that resolving this issue would involve the resolution of substantive issues on the merits of the matter.¹⁰³ In rejecting the argument advanced by Inceysa, the Tribunal noted that:

Article 41 of the ICSID Convention is clear when it indicates that 'The Tribunal shall be the judge of its own competence.' Consequently, the ICSID Convention recognizes the 'Kompetenz-Kompetenz' principle and imperatively obligates the Arbitral Tribunal to decide the issues formulated on this subject.

It is obvious that because the ICSID Convention obligates the Arbitral Tribunal to decide on its own competence, it implicitly gives the Tribunal the right to analyze all factual and legal matters that may be relevant in order to fulfill this obligation.¹⁰⁴

The Tribunal noted that in this context, the reference to the "merits issues" was imprecise.¹⁰⁵ It observed that if in the process of determining its own competence, "the Arbitral Tribunal is obligated to analyse facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal's competence . . . it has no alternative but to deal with them."¹⁰⁶ It further explained that:

even though it might be considered that the analysis the Arbitral Tribunal is obligated to make involves the determination of issues of a substantive nature, such as the conformity of Inceysa's investment with the laws of El Salvador, it is obvious that these issues constitute a premise that must necessarily be examined in order to decide the issue of the competence of the Arbitral Tribunal.¹⁰⁷

101 *Id.* ¶ 97.

102 *Id.* ¶ 144.

103 *Id.* ¶ 146.

104 *Id.* ¶¶ 148-149.

105 *Id.* ¶ 154.

106 *Id.* ¶ 155.

107 *Id.* ¶ 157.

In turning to the legality requirement, the Tribunal noted that as evidenced by the negotiating history of the BIT, El Salvador consistently expressed its intention that the scope of investment protection of the BIT be limited to investments made in accordance with its laws.¹⁰⁸ In fact, one of the additions suggested by El Salvador to the draft text days before the entry into force of the BIT, was to qualify the word “investment” in Article 1(2) of the draft – which dealt with the definition of “investment” – by adding the phrase “... in accordance with the laws in force in each of the Contracting Parties.”¹⁰⁹ Spain, however, took the position that the proposed addition to Article 1 was not necessary due to the fact that the legality requirement was more closely related to the process of admission of the investment and that another article already contained such limitation.¹¹⁰ Spain admitted in its communication that compliance with the laws of the host State was a “necessary condition for an investment to benefit.”¹¹¹

Accordingly, the Tribunal determined that the evident intent of the Contracting Parties was to include a limitation based on the legality requirement despite the apparent absence of such a condition in Article 1(2) of the BIT.¹¹² Accordingly, basing this limitation on the consent granted by Spain and El Salvador, the Tribunal concluded that:

[T]he disputes that arise from an investment made illegally are outside the consent granted by the parties, and, consequently, are not subject to the jurisdiction of the Centre, and that this Tribunal is not competent to resolve them, for failure to meet the requirements of Article 25 of the Convention and those of the BIT.¹¹³

The Tribunal then turned to Article XI, paragraph 3, of the BIT, which provided that the arbitration will be based, among other sources, on: “generally recognized rules and principles of International Law.”¹¹⁴ The Tribunal thus found it useful to consider Article 38, paragraph 1(c) of the

108 *Id.* ¶ 207.

109 *Id.* ¶ 192.

110 *Id.* ¶ 194.

111 *Id.*

112 *Id.* ¶¶ 194-197.

113 *Id.* ¶ 207.

114 *Id.* ¶ 222.

Statute of the ICJ, according to which “the general principles of law are an autonomous or direct source of International Law, along with international conventions and custom.”¹¹⁵ The Tribunal went on to analyze Inceysa’s investment in light of the general principles of law which it considered to be applicable to the case.¹¹⁶ First and foremost, the Tribunal found that Inceysa’s conduct during the public bidding process violated the principle of good faith, which was described by the Tribunal as a “supreme principle.”¹¹⁷ The Tribunal concluded that:

By falsifying the facts, Inceysa violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadoran law. Faced with this situation, this Tribunal can only declare its incompetence to hear Inceysa’s complaint, since its investment cannot benefit from the protection of the BIT, as established by the parties during the negotiations and the execution of the agreement.¹¹⁸

In addition, applying a number of good-faith-related legal maxims, including “*Ex dolo malo non oritur actio*” to the case at hand, the Tribunal held that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes.¹¹⁹ The Tribunal also found that Inceysa’s conduct violated international public policy, the “essential function” of which “is to preserve the values of the international legal system against actions contrary to it.”¹²⁰ In the Tribunal’s view, sanctioning illegal acts, as contemplated by the inclusion of the “in accordance with law” clause in the BITs, was a clear manifestation of such a policy.¹²¹ Extending its legality requirement analysis to another consent instrument, i.e., the consent contained in the Investment Law of El Salvador, the Tribunal found that

115 *Id.* ¶ 226.

116 *Id.* ¶ 229.

117 *Id.* ¶ 230.

118 *Id.* ¶ 239.

119 *Id.* ¶¶ 240-242.

120 *Id.* ¶ 245 (footnote omitted).

121 *Id.* ¶ 246.

the legality requirement as contained in Article 96 of the Constitutional of El Salvador and the Foreigners Law, would produce the same result.¹²²

II. FRAPORT V. PHILIPPINES¹²³

This ICSID arbitration arose under the Germany-Philippines BIT.¹²⁴ The dispute concerned a concession contract for the construction and operation of a new international passenger airport terminal in Manila.¹²⁵ The Claimant's investment was made in a Philippine company, later known as PIATCO in 1999.¹²⁶ Fraport's investment in PIATCO, both as a shareholder and lender, was influenced by the fact that the Respondent had, prior to the investment at issue, conferred upon PIATCO the concession rights for the construction and operation of a new international passenger airport terminal in Manila (*hereinafter* "the Terminal").¹²⁷ Following the collapse of Fraport's investment in PIATCO, the taking over by the Philippine authorities of the Terminal prior to its completion, and the May 1993 decision of the Philippine Supreme Court rendering the investment "null and void" on the basis of a "serious violation of Philippine law and public policy,"¹²⁸ Fraport filed its request for arbitration claiming violations of the BIT on September 17, 2003.¹²⁹

For its part, the Respondent challenged the jurisdiction of the Tribunal and denied any liability under the Germany-Philippines BIT.¹³⁰ In essence, the Respondent argued that the Claimant made its investment in PIATCO

122 *Id.* ¶¶ 258-264.

123 *Fraport 2007 Award*, *supra* note 73; *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment (Dec. 23, 2010); Resubmitted Case: *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award (Dec. 10, 2014) [*hereinafter Fraport 2014 Award*].

124 *Fraport 2014 Award*, *supra* note 123.

125 *Id.* ¶ 2.

126 *Id.*

127 *Id.*

128 *Id.* ¶ 217.

129 *Id.* ¶ 6.

130 *Id.* ¶ 4.

in violation of the laws of the Philippines, in particular foreign ownership and control legislation laws, known as the Anti-Dummy Law (ADL).¹³¹ In this connection, the Respondent contended that the concession contract for the Terminal was a public utility project and thus, subject to the nationality restrictions of the Philippine Constitution and the ADL (in particular, a 40% foreign ownership limitation, as well as foreign management and control restrictions).¹³²

The Philippines contended that Fraport had knowingly made secret arrangements (secret Shareholders' Agreements) to sidestep these restrictions.¹³³ As a result, the Philippines argued that Fraport's investment would fall outside the scope of the protection afforded by the Germany-Philippines BIT because "it was not made in compliance with Philippine law."¹³⁴ At the request and insistence of the Tribunal's President, some of these secret Shareholders' Agreements were made available to the Tribunal in January 2006 during the hearing on jurisdiction and liability.¹³⁵

On the basis of the evidence on the record, including the Claimant's own internal documents (the secret Shareholders' Agreements), the Tribunal found that the limitation on foreign management and control had been knowingly breached, in the sense that:

Fraport was consciously, intentionally and covertly structuring its investment in a way which it knew to be a violation of the ADL. Fraport's equity investment in terms the statutorily limited percentage in [the Terminal] project was lawful under Philippine law. Fraport's controlling and managing the investment was not. Despite having been advised and plainly understanding this, Fraport secretly designed its investment in the project so as to have that prohibited management and control, in particular by reserving to itself the ultimate authority as a shareholder in PIATCO to decide those matters set out in [. . .] Article 2.02 (2) (a) of the . . . Shareholders' Agreement of 6 July 1999.¹³⁶

131 *Id.*; An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges, Comm. Act No. 108 (Oct. 30, 1936) (Phil.).

132 *Fraport 2014 Award*, *supra* note 123, at ¶ 287.

133 *Id.* ¶ 401.

134 *Id.* ¶ 285.

135 *Id.* ¶ 322.

136 *Id.* ¶ 323.

In assessing the impact of the illegality of the investment, the Tribunal recalled that Article 25 of the ICSID Convention, which provides, *inter alia*, the parameters of jurisdiction *ratione materiae*, does not define “investment.”¹³⁷ The Tribunal’s rejection of Fraport’s contention that “the parties’ dispute in this arbitration [was] indeed about an ‘investment’ made pursuant to the BIT”¹³⁸ was as follows:

With respect to a bilateral investment treaty that defines ‘investment’, it is possible that an economic transaction that might qualify *factually and financially* as an investment (*i.e.* be comprised of capital imported by a foreign entity into the economy of another state which is party to a BIT), falls, nonetheless, outside the jurisdiction of the tribunal established under the pertinent BIT, because *legally* it is not an “investment” within the meaning of the BIT. This will occur when the transaction that might otherwise qualify as an “investment” fails *ratione temporis*, as occurred in [*Lucchetti v. Peru*], or fails *ratione personae*, as occurred in *Soufraki v. The United Arab Emirates*. It will also occur when the transaction fails to qualify *ratione materiae*, as occurred in *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*.¹³⁹

The Tribunal noted that the Germany-Philippines BIT had a jurisdictional limitation *ratione materiae*.¹⁴⁰ Article 1(1) of the Germany-Philippines BIT contained a legality requirement, providing that “[t]he term ‘investment’ shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State . . .”¹⁴¹ Additionally, the Tribunal noted that Article 2, paragraph 1 of the Germany-Philippines BIT, an accompanying Protocol, as well as the Instrument of Ratification of the Republic of the Philippines (which was exchanged with Germany) contained references to the legality requirement.¹⁴² This, combined with the Tribunal’s factual finding regarding the breach of the ADL, resulted in a finding of lack of jurisdiction *ratione materiae* by the Tribunal:

137 *Id.* ¶ 305.

138 *Id.* ¶ 298.

139 *Id.* ¶ 306 (footnotes omitted).

140 *Id.* ¶ 334.

141 *Id.* ¶ 335.

142 *Id.* ¶¶ 335-337.

Compliance with the host state's law is an explicit and hardly unreasonable requirement in the Treaty and its accompanying Protocol. Fraport's ostensible purchase of shares in [the Terminal] project, which concealed a different type of unlawful investment, is not an 'investment' which is covered by the BIT. As the BIT is the basis of jurisdiction of this Tribunal, Fraport's claim must be rejected for lack of jurisdiction *ratione materiae*.¹⁴³

In his Dissenting Opinion, Bernardo Cremades relied on the fact that Fraport was a shareholder in PIATCO in 1999 and argued that the fact that the Claimant's asset may have engaged in illegal conduct in the Philippines "does not change the fact that its shareholdings are an asset accepted in accordance with Philippine law."¹⁴⁴

After an *ad hoc* Committee rendered a decision annulling the Fraport Award on December 23, 2010 on due process grounds, the resubmitted case was decided on December 10, 2014. The new panel in an *obiter* referred to the Clean Hands doctrine in its analysis of the legality requirement, explaining that:

Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case [. . .], or, absent an express provision in the treaty, based on rules of international law, such as the 'clean hands' doctrine or doctrines to the same effect. One of the first cases having ruled on this issue, *Inceysa v. El Salvador*, has held that 'because Inceysa's investment was made in a manner that was clearly illegal, it is not included in the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre.'¹⁴⁵

The new tribunal noted that at the jurisdictional stage, its analysis would be limited to examining whether there was a violation of the ADL at the time of Fraport's initial investment.¹⁴⁶ The assessments of the new Tribunal were consistent with the original Tribunal's assessments. Thus, a finding of the ADL violation by Fraport resulting from the secret Shareholders Agree-

143 *Id.* ¶ 404.

144 *Id.* ¶ 13 (Dissenting Opinion of Arbitrator Cremades).

145 *Fraport 2014 Award*, *supra* note 123, at ¶ 328 (footnotes omitted).

146 *Id.* ¶ 388.

ments to secure control over the Terminal's operations was confirmed; this finding reaffirmed that the "Pooling Agreement" entered into by Fraport with the Philippine shareholders in July 1999 established a block voting arrangement in favour of Fraport, allowing it to make binding recommendations.¹⁴⁷ In part replying to the point made in the Dissenting Opinion appended to the original Award, the Tribunal held that:

Fraport violated the ADL when making its Initial Investment, the latter being consequently excluded as investment protected by the BIT because of its illegality. The illegality of the investment at the time it is made goes to the root of the host State's offer of arbitration under the treaty. [. . .] Lack of jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement.¹⁴⁸

Accordingly, the Tribunal found that there was "no legal dispute arising out of" an "investment" in the language of Article 25(1) of the ICSID Convention, and that the Respondent had not consented to the arbitration of Claimant's claims with respect to its (factual) investment.¹⁴⁹

III. MAMIDOIL V. REPUBLIC OF ALBANIA AND THE IMPACT OF THE LEGALITY REQUIREMENT AT THE MERITS STAGE¹⁵⁰

Greek investors, Mamidoil Jetoil Greek Petroleum Products Societe S.A. (*hereinafter* "Mamidoil"), submitted to the ICSID an application for arbitration against the Republic of Albania in connection with an alleged breach of the 1991 Greek-Albanian BIT.¹⁵¹ *Mamidoil* – whose main field of activity in Albania involved the construction and operation of an oil container terminal on a land plot in the *Durres Port* area (*hereinafter* "*Durres Port* project")¹⁵² – claimed that by constructing and operating a "tank farm" in the port of Durres, it had made an investment in Albania.¹⁵³

147 *Id.* ¶ 395.

148 *Id.* ¶ 467.

149 *Id.* ¶ 468.

150 *Mamidoil* Award, *supra* note 11.

151 *Id.* ¶ 7.

152 *Id.*

153 *Id.* ¶ 279.

It asserted that the measures taken by Albania to re-zone the site of the investor's operations, and subsequent interruptions to and relocation of petroleum-related activities from the *Durres Port* area to other locations violated the terms of the Greek-Albanian BIT arrangements.¹⁵⁴

Mamidoil alleged that by rejecting any claim for compensation, Albania violated its own expressed commitments in relation to the relocation of *Durres Port* project.¹⁵⁵ It claimed that its decision to go through with the construction of the *Durres Port* project in October 1999 was based on the substantive approval of the project by high-level Albanian governmental authorities, as expressed in the lease contract dated June 1999, as well as their consistent, oral endorsements of the *Durres Port* project; their assurances as to the regulatory requirements relating thereto, and their encouragement for the project to go ahead.¹⁵⁶

Mamidoil contended that its investment was made legally and in compliance with all necessary permits and Governmental authorizations.¹⁵⁷ Mamidoil insisted that it applied for all, and received some, of the necessary governmental permits; those that it did not receive, or received belatedly, were due to failures by Albania.¹⁵⁸ Relying on the award in *Tokios Tokelés v. Ukraine* (where the tribunal noted that "minor errors" and "a failure to observe the bureaucratic formalities of domestic law" would not amount to illegality), the Claimant asserted that mere formal failures, such as the failure to obtain a permit which would have been granted, are not sufficient to constitute illegality of an investment under international law.¹⁵⁹ Rather, Claimant argued that only a serious violation of domestic law can lead to illegality of the investment.¹⁶⁰

Albania did not contest the fact that the tank farm formed the basis of Mamidoil's investment.¹⁶¹ However, Albania contested the legality of

154 *Id.* ¶ 303.

155 *Id.* ¶ 159.

156 *Id.* ¶ 541.

157 *Id.* ¶ 295.

158 *Id.* ¶ 297.

159 *Id.* ¶ 304.

160 *Id.* ¶ 306.

161 *Id.* ¶ 282.

the Mamidoil's operations in Albania.¹⁶² Albania argued that, in spite of numerous notifications regarding the need to obtain necessary permits, Mamidoil failed to address in any way the receipt of government approvals, authorizations or permits that were necessary to conduct its investment (*Durres Port* project) pursuant to Albanian Law.¹⁶³ As such, it asserted that the illegality of the investment constitutes a bar to jurisdiction because neither the BIT nor the ECT protects investments that are illegal or made in bad faith.¹⁶⁴

Moreover, Albania claimed that Mamidoil had been informed of the decision regarding the re-zoning of the *Durres Port* area through a letter from the Durres Sea Port Authority dated November 17, 1999 (less than a year after the approval of the agreement to lease the land to the investor for the *Durres Port* project).¹⁶⁵

Albania argued that Mamidoil failed to exercise the necessary due diligence required for an investment of such scale, particularly in light of the publicized infrastructural developments scheduled in Albania and Albania's cooperation with international development agencies such as the World Bank and other European institutions.¹⁶⁶ Instead, Albania alleged that Mamidoil relied on undocumented, vague, oral assurances of support by certain government officials (*Durres Port* authority) as proof of a "general non-objection" to its investment.¹⁶⁷

The Tribunal identified the issue of the legality of the investment as a central issue in the dispute between Mamidoil and Albania, which was determinative for both jurisdiction over, and the merits of, the dispute.¹⁶⁸ The Tribunal also noted that the significance of legality at the jurisdictional level depended on the fact that States' consent to investment arbitration largely due to the expectation that arbitral tribunals extend investment protection only to investments that have been made lawfully.¹⁶⁹ Neverthe-

162 *Id.*

163 *Id.* ¶ 337.

164 *Id.* ¶ 324.

165 *Id.* ¶ 197.

166 *Id.* ¶ 196.

167 *Id.* ¶ 193.

168 *Id.* ¶ 289.

169 *Id.* ¶ 291.

less, the Tribunal distinguished between the substantive and procedural dimensions of illegality of the investment as alleged by Albania.¹⁷⁰

With respect to substantive illegality, the Tribunal noted that the decisive moment for the appreciation of the investment's substantive legality is when the investment is planned and made.¹⁷¹ It further noted that "not every type of non-compliance with national legislation bars the protection of an investment."¹⁷² Reviewing the illegality jurisprudence, the Tribunal observed that investment arbitration tribunals "have stated that the illegality must be "serious" or "manifest," and that "minor errors" and "a failure to observe the bureaucratic formalities of the domestic law" will not justify the denial of jurisdiction."¹⁷³

At the same time, the Tribunal found that the Claimant's failure to apply for all the necessary permits, and thus Albania's non-issuance of the permits, was not just a minor issue.¹⁷⁴ This finding was based on the significance on the domestic laws on Urban Planning, which actually required such permits.¹⁷⁵ However, the Tribunal noted that, as established by the record, Albanian authorities consistently tried to cooperate with Claimant by repeatedly requesting and inviting it to submit the necessary applications accompanied by the necessary documentation.¹⁷⁶ As a result, the Tribunal found that the Respondent, by its conduct, conveyed to the Claimant that these illegalities were curable.¹⁷⁷ Based on this finding, the Tribunal observed that

It is true that a State cannot be expected to have consented to an arbitral dispute settlement mechanism for investments made in violation of its legislation. However, it can be expected to accept the jurisdiction of an arbitral tribunal when, in that State's own appreciation, the illegality of the investment was susceptible of being cured, as that State's own legalization offers show. In such

170 *Id.* ¶ 371.

171 *Id.* ¶ 375.

172 *Id.* ¶ 481.

173 *Id.* ¶ 482 (footnotes omitted).

174 *Id.* ¶ 489.

175 *Id.* ¶ 407.

176 *Id.* ¶ 490.

177 *Id.* ¶ 493.

circumstances, the legal significance of the absence of permits is to be determined as a question of merits – namely whether Respondent’s international responsibility is engaged in the face of Claimant’s violation of Albanian law – rather than this Tribunal’s jurisdiction.¹⁷⁸

At the merits stage, the Tribunal took into account the violation of Albanian law in dealing with the Claimant’s claim for the violation of the FET standard, as formulated in Article 10.1 of the ECT, and Claimant’s legitimate expectations of the investment.¹⁷⁹ In this regard, as a preliminary matter, the Tribunal held that legitimate expectations can only arise at the time the investment is made.¹⁸⁰

Although the Tribunal confirmed its jurisdiction despite the absence of permits (i.e. illegality of the investment), it noted that, as previously explained, the complete absence of applications for the relevant permits had no bearing on jurisdiction.¹⁸¹ However this issue could not be overlooked at the merits stage.¹⁸² The incomplete applications for the relevant permits, rendered the Claimant’s operations illegal under Albanian law, including the Law on Urban Planning.¹⁸³ The fact that Albania subsequently offered to help with the legalization of the situation was found by the Tribunal as not having a bearing on its legitimate expectations analysis.¹⁸⁴

The Tribunal reasoned that the conduct post-dated the totality of the investment process.¹⁸⁵ As a result, the Tribunal ultimately dismissed the claim for the FET violation and found that the “Claimant [was] not entitled to rely on the perpetuation of its activities in illegal circumstances and cannot claim a violation of legitimate expectations with respect to the illegal operation of the tank farm.”¹⁸⁶

178 *Id.* ¶ 494.

179 *Id.* ¶ 496.

180 *Id.* ¶ 695.

181 *Id.* ¶ 712.

182 *Id.*

183 *Id.*

184 *Id.* ¶¶ 713-714.

185 *Id.* ¶¶ 712-714.

186 *Id.* ¶ 716.

The dissenting arbitrator Hammond disagreed with the Majority's approach to the issue of illegality. His core disagreement with the Majority's approach was on the question of permits and licenses, and his view of the fact that the "Claimant's alleged failings with respect to permits and licenses had no relationship to Respondent's laws on foreign investment."¹⁸⁷ In this regard, Hammond noted the legality requirement analysis of the tribunal in the *Saba Fakes* case, wherein it was found that a violation of the regulations in the telecommunications sector or domestic competition law did not implicate a violation of the legality requirement.¹⁸⁸ Hammond argued that the same logic should be applied to the FET violation analysis.¹⁸⁹ While he agreed with the Majority that the Claimant failed to comply with the Respondent's domestic permit laws, in his view, the fact that Respondent failed to enforce the licensing norms throughout the entire period of Claimant's operations, should have been taken into account in the Tribunal's FET analysis.¹⁹⁰

IV. CONCLUDING OBSERVATIONS WITH RESPECT TO THE LEGALITY REQUIREMENT

The previous subsections have highlighted the developments with regard to the applications of the requirement of legality of investments in investment disputes and their implications for the Clean Hands doctrine. In this regard, two additional observations may be made.

First, it must be noted that the legality requirement does not necessarily need to be stipulated in the relevant treaty. This point has been made by a number of tribunals. For example, in *Plama Consortium Ltd. v. Bulgaria*,¹⁹¹ the tribunal noted that the ECT does not include a provision calling for the investment's conformity with a given law. The tribunal articulated its approach regarding this issue as follows:

Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with

187 *Id.* ¶ 126 (Dissenting Opinion of Arbitrator Hammond).

188 *Id.* ¶ 128 (footnote omitted).

189 *Id.*

190 *Id.* ¶ 131.

191 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008).

a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law. [. . .] In accordance with the introductory note to the ECT “[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues” Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.¹⁹²

Thus, Claimant’s misrepresentation in obtaining approval for the purchase of a Bulgarian entity was “contrary to the principle of good faith which is part not only of Bulgarian law” but also “of international law – as noted by the tribunal in the *Inceysa* case” and resulted in depriving Claimant’s investment in Bulgaria from the protections provided by the ECT.¹⁹³

It should be noted, however, that the *Plama* tribunal, confronted with a case of first impression – where for the first time a jurisdictional objection based on an allegation of misrepresentation and illegality in the context of the ECT was at issue – in its Decision on Jurisdiction in February 2005, held that “the Respondent’s allegation of misrepresentation by the Claimant does not deprive the Tribunal of jurisdiction in this case.”¹⁹⁴ Accordingly, the tribunal’s analysis in its 2008 Award in the passage quoted above was effectively a finding that *Plama*’s claim was inadmissible. This was reflected in paragraph 3 of the *dispositif* of the 2008 Award as follows: “Claimant is not entitled to any of the substantive protections afforded by the ECT”.¹⁹⁵

192 *Id.* ¶¶ 138-139 (footnotes omitted).

193 *Id.* ¶ 144.

194 *Id.* ¶ 229.

195 *Id.* ¶ 325.

In *SAUR International v. Argentine Republic*,¹⁹⁶ the tribunal held that the legality requirement is “inherent in every BIT”.¹⁹⁷ With regard to the interpretation of the BIT, the tribunal held that:

The requirement of not having engaged in a serious violation of the legal regime is a tacit condition, inherent in every BIT, since it cannot be understood under any circumstance that a State is offering the benefit of protection through investment arbitration when the investor, to reach that protection, has committed an unlawful action.¹⁹⁸

On the facts, however, the tribunal found in favour of SAUR, holding that there was no evidence in the record that the investor had breached Argentine law.¹⁹⁹ Relying on the findings of a domestic judicial process commenced against the investor in relation to the payments, the tribunal found that the money was indeed intended to pay salaries and that the payments were correctly recorded in the company's accounts.²⁰⁰

The *Yukos Award* further confirmed the *Plama* Tribunal's approach regarding the issue of legality under the ECT.²⁰¹ The *Yukos Award*, rendered

196 *SAUR Award*, *supra* note 9. This case concerned an Argentine water concession awarded to the French company, SAUR International. SAUR claimed that the measures taken by the host State constituted indirect expropriation, as well as a violation of the fair and equitable treatment standard. Among other things, Argentina objected to the jurisdiction of the tribunal alleging that the investor had acted illegally in making a series of secret payments to certain parties. Countering this objection, SAUR pointed out that the France-Argentina BIT did not contain a legality requirement. It also factually denied engaging in any illegal activity. *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 As is well-known, three cases were brought by two Cypriot companies (Hulley Enterprises and Veteran Petroleum) and Yukos Universal, a company organized under the laws of the Isle of Man, which collectively held just over 70% of the shares of the former Yukos Oil Company. The three arbitrations were held in parallel as a single set of proceedings, but due to the fact that the three Claimants maintained separate claims, three separate awards were rendered. In the following discussion reference is made to the most recent *Yukos Award*. See *Yukos Award*, *supra* note 6.

on July 18, 2014, did not characterize the legality-based objection in the context of the ECT. The *Yukos* Tribunal found that, under the circumstances of the case, it did not need to decide whether the legality requirement it read into the ECT operated as a bar to jurisdiction or, as suggested in *Plama*, as a deprivation of Claimants' substantive protections under the ECT.²⁰²

In answering the question of whether a Clear Hands doctrine or a legality requirement could be read into the ECT, the Tribunal agreed with the *Plama* Tribunal and held that:

In imposing obligations on States to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and *bona fide* investments. An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host State, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.²⁰³

Turning to the second concluding observation, it must be noted there is supporting case law to the effect that the illegality of the investment may operate as a jurisdictional objection only if the alleged illegality is related to the initial stage of making an investment.

The important distinction between “the making of the investment” in the host State, as opposed to the post-establishment “performance of the investment,” and limiting the operation of the legality requirement as a jurisdictional bar to the former, was first articulated by the *Hamester* Tribunal as follows:

The Tribunal considers that a distinction has to be drawn between (1) legality as at the *initiation* of the investment . . . and (2) legality *during the performance* of the investment. [. . .] Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue.²⁰⁴

More recently, the *Yukos* Tribunal further confirmed this approach as applied to the ECT by rejecting Russia's contention “that the right to invoke the ECT must be denied to an investor not only in the case of illegality in

202 *Yukos* Award, *supra* note 6, at ¶ 1353.

203 *Id.* ¶ 1352.

204 *Hamester* Award, *supra* note 73, at ¶ 127.

the *making* of the investment but also in its *performance*.”²⁰⁵ The Tribunal observed that there was no compelling reason to deny altogether the right to invoke the ECT in such circumstance.²⁰⁶ In the Tribunal’s view, the appropriateness of the imposed domestic sanctions by the host State should remain under the scrutiny of investment tribunals:

[I]f the investor believes these sanctions to be unjustified (as Claimants do in the present case), it must have the possibility of challenging their validity in accordance with the applicable investment treaty. It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.²⁰⁷

On the facts, the Tribunal did not find that the investment had been made in bad faith or in violation of the laws of the host State. However, it held that instances of Claimants’ illegal conduct during the performance of the investment could be considered at the merits stage:

The Tribunal concludes that Respondent’s ‘unclean hands’ argument fails as a preliminary objection. It does not operate to deprive the Tribunal of its jurisdiction in this arbitration, render inadmissible any of the Claimant’s claims or otherwise bar Claimants from invoking the substantive protections of the ECT.

However, [. . .] some of the instances of Claimants’ ‘illegal and bad faith’ conduct complained of by Respondent in the context of this preliminary objection, could have an impact on the Tribunal’s assessment of liability and damages.²⁰⁸

Addressing the issue of liability, the Tribunal found that the primary objective of the Russian Federation was not to collect taxes, but rather to bankrupt Yukos and appropriate its valuable assets.²⁰⁹ In particular, the Tribunal noted that:

Among the many incidents in this train of mistreatment that are within the remit of this Tribunal, two stand out: finding Yukos

205 *Yukos Award*, *supra* note 6, at ¶ 1354.

206 *Id.* ¶ 1355.

207 *Id.*

208 *Id.* ¶¶ 1373-1374.

209 *Id.* ¶ 1579.

liable for the payment of more than 13 billion dollars in VAT in respect of oil that had been exported by the trading companies and should have been free of VAT and free of fines in respect of VAT; and the auction of YNG at a price that was far less than its value. But for these actions, for which the Russian Federation [. . .] was responsible, Yukos would have been able to pay the tax claims of the Russian Federation justified or not; it would not have been bankrupted and liquidated[.].²¹⁰

The Tribunal concluded that the Russian Federation violated its obligation under Article 13 (the expropriation provision) of the ECT.²¹¹ It held that although the Russian Federation did not explicitly expropriate Yukos or the holdings of its shareholders, the measures that it took in respect of Yukos had an effect “equivalent to nationalization or expropriation.”²¹² In light of the Tribunal’s assessments on expropriation, the Tribunal did not deem it necessary to consider whether Respondent’s actions were also in breach of the FET standard as contained in Article 10 of the ECT.²¹³

At the same time, relying particularly on Article 39 of the ILC Draft Articles on State Responsibility (Contribution to the injury), and based on its apportionment of responsibility, the Tribunal reduced the damages owed to the Claimants by 25% due to a finding of their contributory fault as a result of, *inter alia*, Yukos’ “tax optimization” misconduct in the Russian low-tax regions.²¹⁴

b. Abuse of Process: Abusing the System of Investment Protection Under the ICSID Convention

Whereas the legality requirement strand of case-law is based on the domestic legality of the investment, the abuse of process strand is based on international legality of the investment. In fact, as will be discussed below, the abuse of process inquiry is only triggered when the domestic legality hurdle is surmounted and the tribunal is satisfied that the investment has been made in compliance with the domestic law of the host State. This

210 *Id.*

211 *Id.* ¶ 1888.

212 *Id.* ¶ 1580.

213 *Id.* ¶ 1585.

214 *Id.* ¶ 1637.

second strand was initiated in *Phoenix*, where the Tribunal first dealt with the issue of abusing the system of investment protection, and found that as a result, it lacked jurisdiction *ratione materiae*.

The *Levy* case represents a recent example of a departure from the *Phoenix* Tribunal's approach. It would seem that going beyond the "Salini test" to accommodate abuse of process concerns has not been the only way to address the issue.

I. PHOENIX ACTION, LTD V. THE CZECH REPUBLIC²¹⁵

Phoenix was an ICSID arbitration arising under the Israeli-Czech Republic BIT.²¹⁶ The Claimant, an Israeli company registered under the laws of the State of Israel on October 14, 2001, was entirely owned by Mr. Vladimir Beno, a former Czech national.²¹⁷ Phoenix complained about the treatment of its investment by the Czech Republic, its investment being two Czech companies, Benet Praha (*hereinafter* "BP") and Benet Group (*hereinafter* "BG").²¹⁸ BP, and its subsidiary, BG, were involved in trading of ferroalloys.²¹⁹ The Tribunal noted that in December 26, 2002, at the time when Phoenix purchased the two Czech companies, BP and BG were involved in ongoing legal disputes, BG with a Private party, BP with the Czech fiscal authorities.²²⁰ In fact, a criminal investigation related to a series of tax and custom duty evasion was commenced in April 2001 against Mr. Beno, who was at the time BP's Executive Officer.²²¹ The criminal investigation against Mr. Beno also involved the freezing of BP's funds and the seizure of accounting business documents.²²² The investigation resulted in an arrest warrant being issued against Mr. Beno.²²³ However, Mr. Beno escaped the Czech police and fled to Israel, where he thereafter, on October 14, 2001,

215 *Phoenix Award*, *supra* note 8.

216 *Id.* ¶ 6.

217 *Id.* ¶ 22.

218 *Id.*

219 *Id.* ¶ 25.

220 *Id.* ¶ 28.

221 *Id.* ¶ 32.

222 *Id.* ¶ 33.

223 *Id.* ¶ 32.

registered a new company, Phoenix Action Ltd.²²⁴ The Tribunal noted that Mr. Beno created an Israeli company to buy the two Czech companies he owned as a Czech citizen living in the Czech Republic, after the actions taken by the Czech Republic against these companies.²²⁵

In its jurisdictional decision after the Tribunal decided to bifurcate the proceedings to deal with the jurisdictional objections raised by the Czech Republic, the Tribunal held that it was limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment.²²⁶ As a result, the Tribunal found that it lacked jurisdiction with respect to the acts directed against BP and BG that occurred before December 26, 2002.²²⁷

The Tribunal next turned to the question whether it had jurisdiction *ratione materiae*, namely, whether there is a legal dispute arising directly out of an investment.²²⁸ In its analysis, the Tribunal added more elements to the traditional elements mentioned in the "*Salini* test."²²⁹ Accordingly, the Tribunal held that in order for it to have jurisdiction *ratione materiae*, the following six elements had to be taken into account: "1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*."²³⁰

As far as the fifth element (the domestic legality) was concerned, the Tribunal found that there was no violation of a rule of the Czech Republic legal order, and not even the principle of good faith as embodied in the national legal order.²³¹ In this regard the Tribunal noted that Phoenix

224 *Id.*

225 *Id.* ¶ 137.

226 *Id.* ¶ 68.

227 *Id.* ¶ 71 (footnote omitted).

228 *Id.* ¶ 73.

229 *Salini Construttori S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001).

230 *Phoenix Award*, *supra* note 8, at ¶ 114.

231 *Id.* ¶ 134.

duly registered its ownership of the two Czech companies in the Czech Republic.²³²

However, with respect to the sixth element, namely, whether or not the investment was a *bona fide* investment, the Tribunal found that based on the totality of evidence, it was clear that the main aim of Phoenix was to bring the pre-existing dispute involving BP and BG before this Tribunal.²³³ In fact, on December 26, 2002, Phoenix acquired an investment that was already burdened with the civil litigation as well as problems with the tax and customs authorities.²³⁴ In addition, the Tribunal noted that apparently all transfers were merely done inside the family of Mr. Beno.²³⁵ The shares of BP were purchased from Mr. Beno's wife, a Czech citizen; while the shares of BG, belonging to Yougo Alloys, were bought from Mr. Beno's daughter.²³⁶ The Tribunal thus found that the Claimant made an investment for "the sole purpose of bringing international litigation against the Czech Republic."²³⁷ Consequently, the Tribunal held that:

The conclusion of the Tribunal is therefore that the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration. If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would *ipso facto* constitute a "protected investment" – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal's view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties. The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed

232 *Id.*

233 *Id.* ¶ 144.

234 *Id.* ¶ 136.

235 *Id.* ¶ 139.

236 *Id.*

237 *Id.* ¶ 142.

for to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism.²³⁸

The Tribunal thus ultimately concluded that it did not have jurisdiction *ratione materiae* over the claim because the Claimant's purported investment did not qualify as a protected investment under the ICSID Convention and the Israeli/Czech BIT.²³⁹ In the course of its reasoning, the Tribunal noted that the situation in the instant case does not involve the violation of the national legal order of the host State and thus is distinguishable from *Inceysa* and *Fraport*.²⁴⁰ Rather, in its abuse of process analysis, the *Phoenix* Tribunal was merely concerned with the international principle of good faith.²⁴¹ It noted that, "in most cases, but not in all, a violation of the international principle of good faith and a violation of the national principle of good faith go hand in hand."²⁴²

II. RENEE ROSE LEVY AND GREMCITEL S.A. V. REPUBLIC OF PERU²⁴³

Renee Rose Levy and Gremcitel S.A. (hereinafter "*Levy*") was an ICSID arbitration arising under the France-Peru BIT.²⁴⁴ The Claimants were Ms. Levy, a French national, and Gremcitel, a company organized under the laws of Peru, with its offices in Lima.²⁴⁵ The dispute concerned three parcels of land, located along Peru's Pacific coast near Lima, within the Municipality of Chorrillos.²⁴⁶ The three parcels of land were adjacent to the so-called "Morro Sollar," an area which is claimed to be the site of one of the most important battles in Peruvian history, the Battle of San Juan

238 *Id.* ¶ 144.

239 *Id.* ¶ 145.

240 *Id.* ¶ 113.

241 *Id.*

242 *Id.* ¶ 109.

243 *Renee Rose Levy v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (Jan. 9, 2015).

244 *Id.* ¶ 1 (footnote omitted).

245 *Id.* ¶ 2.

246 *Id.* ¶ 7.

and Chorrillos, which occurred in 1881 between Peru and Chile.²⁴⁷ In 1995, the Municipality of Chorrillos held a public bidding process to sell the three parcels of land to private individuals on the basis of the projects proposed by the bidders for the development of the land.²⁴⁸ By December 1995, Gremco, a Peruvian company (and part of the Levy Group),²⁴⁹ was the owner of the three projects, which were later consolidated into the “Costazul Project,” a tourism and real estate project.²⁵⁰ In July 2001, Gremco submitted a proposal for the historical delimitation of the Moro Solar to Peru’s National Institute of Culture (INC).²⁵¹

Between 2003 and 2004 the Peruvian company, Gremcitel (part of the Levy Group), acquired the land and the rights relating to the development project.²⁵² On March 22, 2006, Gremcitel applied for the Urban Development Permit.²⁵³ On October 10, 2007, the INC issued a Resolution (*hereinafter* the “2007 Resolution”), which provided a precise delimitation of the boundaries of the Morro Sollar.²⁵⁴ There were also previous Resolutions related to Morro Sollar issued by the Peruvian authorities in 1977 and 1986.²⁵⁵ However, the scope and importance of these earlier Resolutions, in particular, their impact on the crystallization of the controversy, were disputed between the Parties.²⁵⁶ More importantly for the purpose of the abuse of process analysis, in 2005, a Historical Commission was created entrusted with proposing the delimitation of the intangible historical area of Morro Solar.²⁵⁷ The findings of the Historical Commission contained in its 2005 Report was the basis for the 2007 Resolution.²⁵⁸

247 *Id.*

248 *Id.* ¶ 11 (footnotes omitted).

249 *Id.* ¶ 14 (footnote omitted).

250 *Id.* ¶ 18 (footnote omitted).

251 *Id.* ¶ 26 (footnote omitted).

252 *Id.* ¶ 20.

253 *Id.* ¶ 36.

254 *Id.* ¶ 37 (footnote omitted).

255 *Id.* ¶ 112.

256 *Id.*

257 *Id.* ¶ 35 (footnotes omitted).

258 *Id.*

The Claimants claimed that the 2007 Resolution imposed on the land an intangibility status which did not exist until then and thus rendered the Costazul Project meaningless.²⁵⁹ For the Claimants, the 2007 Resolution was the measure that gave rise to the dispute.²⁶⁰ More specifically, the Claimants in the context of their FET argument contended that the Respondent frustrated their legitimate expectations that they would be able to develop the Costazul Project.²⁶¹ As for the Tribunal's jurisdiction under the France-Peru BIT, the Claimants argued that they met the nationality requirement due to the fact that Ms. Levy was a French national and that she owned and controlled Gremcitel, a Peruvian company, indirectly since 2005 (through the company Hart Industries Ltd.) and directly since 2007.²⁶²

For its part, Peru contested the fact that prior to the 2007 Resolution, there was no limitations on the development of the subject parcels of land.²⁶³ The Respondent insisted that the Claimants could have no legitimate expectations that they could develop their land free from restrictions and that the 2007 Resolution should be seen as a mere confirmation of the legal framework established by the previous Resolutions dating back from 1986 to 1977.²⁶⁴ Regarding the Tribunal's jurisdiction, the Respondent argued, among other things, that the hurried transfer of shares which made Ms. Levy the controlling shareholder of Gremcitel constituted an abuse of process," having been carried out for the sole purpose of attracting the France-Peru BIT protection at a time when the dispute had either already arisen or was at least entirely foreseeable.²⁶⁵

The Tribunal identified the central issue as one relating to the chronological crystallization of the dispute, which was determinative for both the Tribunal's jurisdiction *ratione temporis*, and its abuse of process analysis.²⁶⁶ The Tribunal noted that according to the Claimants, Ms. Levy had acquired indirect control over Gremcitel in 2005 (when she acquired just over 33% of

259 *Id.* ¶ 37 (footnote omitted).

260 *Id.*

261 *Id.* ¶ 65.

262 *Id.* ¶ 63.

263 *Id.* ¶ 71.

264 *Id.*

265 *Id.* ¶ 69.

266 *Id.* ¶ 135.

the shares in Hart Industries, which was the main shareholder in Gremcitel) and direct control over Gremcitel in 2007 (when she acquired 58.82% of shares in Gremcitel), which also would turn Gremcitel into a French company for the purposes of Article 25(2)(b) of the ICSID Convention.²⁶⁷

Aside from its abuse of process argument, Peru alleged that Ms. Levy had not put forward reliable evidence as to her shareholding.²⁶⁸ Based on evidence in the record, including the evidence addressed at the Hearing establishing instances of backdating with regard to the relevant corporate resolutions, the Tribunal found that the Claimants had not discharged their burden to prove their assertion as to Ms. Levy's shareholding and indirect control in 2005.²⁶⁹ The Tribunal, however, found that the Claimants met their burden of proof as to the 2007 shareholding.²⁷⁰ As to the exact timing of the transfer, the Tribunal noted that it had already found that the dispute between the Parties ultimately crystallized by the 2007 Resolution of the INC, and more precisely, by the date of its publication in the Official Journal, i.e., October 18, 2007.²⁷¹ Accordingly, the Tribunal found that it was satisfied that the second transfer (the 2007 transfer) had occurred on October 9, 2007, which was before the critical date, i.e., before October 18, 2007, which would be enough for a finding that The Tribunal had jurisdiction *ratione temporis*.²⁷² This finding, in turn, satisfied the requirement of "foreign control" under Article 25(2)(b) of the ICSID and Article 8(3) of the France-Peru BIT, resulting in a finding that Gremcitel also satisfied the requirement of *ratione temporis*.²⁷³

The Tribunal next dealt with the issue of abuse of process. As a preliminary matter, it noted that the Parties had not expressly discussed the characterization of this objection.²⁷⁴ The Tribunal asked the question: "Is

267 *Id.* ¶ 124.

268 *Id.* ¶ 69.

269 *Id.* ¶¶ 154-155.

270 *Id.* ¶ 161.

271 *Id.* ¶¶ 149-150.

272 *Id.* ¶ 161.

273 *Id.* ¶¶ 170-173.

274 *Id.* ¶ 180.

it a matter of jurisdiction, admissibility, or something else?”²⁷⁵ However, the Tribunal did not think it was necessary to resolve the issue:

The Tribunal considers that the characterization of the abuse of process objection as a jurisdictional or as an admissibility issue can be left open in the present case. Under the circumstances of this dispute, such differentiation is, to use the words of the *Pac Rim* tribunal, ‘a distinction without a difference’, in the sense that it would have no impact on the outcome of the case.²⁷⁶

Turning to the substance of the objection, the Tribunal noted, as in particular articulated by the *Phoenix* Tribunal, that the doctrine of abuse of process or abuse of rights may be applicable in cases involving disputed corporate restructuring.²⁷⁷ Reviewing the relevant case-law, the Tribunal further explained that it had been well-established that an organization, or reorganization of a corporate structure designed to obtain investment treaty benefits (sometimes referred to as “treaty shopping”), was not illegitimate *per se*, including where this is done with a view to shielding the investment from possible future disputes with the host State.²⁷⁸ This, however, was not the case when a specific future dispute was about to crystallize:

In this respect, the Tribunal agrees with the test suggested in *Pac Rim* whereby ‘a specific future dispute’ must be ‘forsee[able] [. . .] as a very high probability and not merely as a possible controversy’. In the Tribunal’s view, this test strikes a fair balance between the need to safeguard an investor’s right to invoke a BIT’s protection in the context of a legitimate corporate restructuring and the need to deny protection to abusive conduct.²⁷⁹

The Tribunal acknowledged that the threshold for a finding of abuse of process was high.²⁸⁰ However, based on the facts, it determined that the test was satisfied in the instant Case.²⁸¹ This was due to the established fact that Gremcitel and Mr. Levy had learned about the content of the

275 *Id.*

276 *Id.* ¶ 181 (footnote omitted).

277 *Id.* ¶ 183.

278 *Id.* ¶ 184.

279 *Id.* ¶ 185 (footnote omitted).

280 *Id.* ¶ 186.

281 *Id.* ¶ 195.

2005 Report of the Historical Commission, on which the delimitation implemented through the 2007 Resolution was largely based, around the time of its issuance.²⁸² This knowledge enabled them to come up with a family decision to transfer the majority of the shares to Ms. Levy, in order to secure protection under the BIT.²⁸³ Addressing Mr. Levy's explanation that the transfer was motivated by the intention to internationalize the project, the Tribunal noted:

The Tribunal does not see how transferring shares to a family member with a foreign nationality would internationalize *the project*. What was sought to be internationalized was the soon-to-be-crystalized *domestic dispute*. In other words, the only purpose of the transfer was to obtain access to ICSID/BIT arbitration, which was otherwise precluded.²⁸⁴

The Tribunal therefore concluded that the corporate restructuring by which Ms. Levy became the main shareholder of Grencitel on October 9, 2007 constituted an abuse of process and thus, the Tribunal was precluded from exercising jurisdiction over the dispute.²⁸⁵

III. CONCLUDING OBSERVATIONS WITH RESPECT TO ABUSE OF PROCESS

This *second strand* was initiated by *Phoenix*, where the Tribunal highlighted the issue of abusing the system of investment protection and found that as a result, it lacked jurisdiction *ratione materiae*.²⁸⁶ Nevertheless, it would seem that going beyond the "Salini test" to accommodate the abuse of process concerns has not been the only way to address the issue. For example, in *Alapli*²⁸⁷, the Majority of the Tribunal followed two lines of reasoning to reach the conclusion that the Tribunal lacked jurisdiction.²⁸⁸ Subsequently, the Claimant based its application for annulment on this

282 *Id.* ¶ 190.

283 *Id.* ¶ 191.

284 *Id.* ¶ 191.

285 *Id.* ¶ 195.

286 See *Phoenix Award*, *supra* note 8.

287 *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award (July 16, 2012).

288 *Id.* ¶ 313.

very issue, claiming that there was a lack of a true majority. The Annulment Committee quoted paragraph 315 of the original Award to illustrate these lines of reasoning as follows:

The Majority has found Claimant not entitled to protection under either the Energy Charter Treaty or the Netherlands-Turkey BIT. For Arbitrator Stern this conclusion derives from notions of timing and *bona fides*, considering that Claimant did not make an investment until after the root of the controversy was evident and dispute itself had become a high probability. For Arbitrator Park, the Claimant simply lacks the status of an investor, for want of any contribution to the Alapli Project.²⁸⁹

The Annulment Committee, however, observed that these lines of reasoning were not contradictory, but complementary, and that in any case, this situation would not affect the validity of the Award.²⁹⁰ As far as our discussion of the abuse of process strand is concerned, the central point is that while Arbitrator Stern, following the *Phoenix* line of reasoning, relied on the abusive nature of the corporate restructuring to deny jurisdiction, Arbitrator Park's way of dealing with the situation was to rely on a traditional *Salini* element, *i.e.*, the investor's failure to make any personal contribution to the Alapli Project. In any event, as evidenced by the *Levy* case, the case-law has also evolved into a holding by the tribunals that they are precluded from exercising jurisdiction, without necessarily characterizing this issue as jurisdictional bar.

4. CONCLUSION

Despite the fact that the Clean Hands doctrine in its traditional sense was not included in the ILC Draft Articles on Diplomatic Protection, subsequent developments in international investment law illustrate the extent to which this doctrine has gained popularity. Indeed, the jurisprudence of investment treaty arbitration over the last decade has led to the application of the Clean Hands doctrine in its broad sense, both in the context of the legality requirement and in the context of the abuse of process debate. Whereas the legality requirement strand is based on the domestic legality

289 *Id.* ¶ 315.

290 *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, ¶ 165 (July 10, 2014).

of the investment, the abuse of process strand is based on international legality of the investment.

These *two strands* should be considered as a reinvention of the Clean Hands doctrine as applied in international investment law.²⁹¹ In the context of the legality requirement, the illegality of the investment has operated in some instances as a jurisdictional bar, rendering the consent of the

291 It is worth pointing out that in *Hesham Talaat Al-Warraq v. Indonesia* (*Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, 15 December 2014), the Tribunal read into Article 9 of the OIC Agreement the Clean Hands doctrine in its traditional sense. This Claim was brought by a national of Saudi Arabia against Indonesia under the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (the "OIC Agreement"). Article 9 of the OIC Agreement reads as follows:

The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

Referring to Article 9 of the OIC Agreement, the Tribunal noted at the outset that unlike most BITs, "the OIC Agreement contains an explicit provision that binds an investor to observe certain norms of conduct." (Final Award, para. 631). The Tribunal further noted that the record establishes the Claimant's involvement in six types of fraud, including uneconomical swap with his own entity and replacing valuable assets for trash. At the same time, the Claimant's actions had occurred "after" the making of the investment. Equating the language of Article 9 of the OIC with the Clean Hands doctrine in its traditional sense, the Tribunal held that:

[I]t is established the Claimant has breached Article 9 of the OIC Agreement by failing to uphold the Indonesian laws and regulations and in acting in a manner prejudicial to the public interest. The Claimant's actions were also prejudicial to the public interest. The Tribunal finds that the Claimant's conduct falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement. (Final Award, Para. 647)

The Tribunal thus found that the Claimant was not entitled to any damages in respect of the Respondent's breaches of the FET standard due to his post-establishment conduct. (Final Award, para. 683).

host State invalid. In some other instances, the Clean Hands doctrine has operated at the merits stage, where it has either (i) led to rejection of the claimant's claim regarding the violation of the fair and equitable treatment standard or (ii) has resulted in a proportionate reduction of the reparation awarded due to claimant's conduct. In addition, the abuse of process strand, which began by the *Phoenix* Tribunal's holding that it lacked jurisdiction *ratione materiae*, has evolved into a holding by tribunals that they are precluded from exercising jurisdiction, which leaves the characterization of the abuse of process objection open.

LEGAL MATERIALS

Participation In Multilateral Treaties¹

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 2013. 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>
- 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 <http://ola.iaea.org/ola/treaties/multi.html>
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from <http://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>
- 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>

1 Compiled by Dr. Karin Arts, Professor of International Law and Development at the International Institute of Social Studies of Erasmus University Rotterdam (ISS), based in The Hague, The Netherlands.

- Where reference is made to the Secretariat of the Antarctic Treaty, data were derived from <http://www.ats.aq/devAS/ats_parties.aspx?lang=e>
- 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=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.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>
- 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; Min. age spec. = Minimum age specified; Rat. = Ratification or accession

TABLE OF HEADINGS

Antarctica	Judicial and administrative cooperation
Commercial arbitration	Labour
Cultural matters	Narcotic drugs
Cultural property	Nationality and statelessness
Development matters	Nuclear material
Dispute settlement	Outer space
Environment, fauna and flora	Privileges and immunities
Family matters	Refugees
Finance	Road traffic and transport
Health	Sea
Human rights, including women and children	Sea traffic and transport
Humanitarian law in armed conflict	Social matters
Intellectual property	Telecommunications
International crimes	Treaties
International representation	Weapons
International trade	

ANTARCTICA

(Status as provided by the Secretariat of the Antarctic Treaty)

Antarctic Treaty, Washington, 1959: see Vol. 6 p. 234.

COMMERCIAL ARBITRATION

**Convention on the Recognition and Enforcement of
Foreign Arbitral Awards, 1958**

(Continued from Vol. 18 p. 99)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Myanmar		16 Apr 2013

CULTURAL PROPERTY

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954: see Vol. 13 p. 263.

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954: see Vol. 13 p. 263.

Convention concerning the Protection of the World Cultural and Natural Heritage, 1972: see Vol. 18 p. 100.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005: see Vol. 18 p. 100.

**Convention on the Means of Prohibiting and Preventing the Illicit
Import, Export and Transfer of Ownership of Cultural Property, 1970**

(Continued from Vol. 18 p. 100)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Myanmar		5 Sep 2013

**Second Protocol for the Protection of Cultural Property in the Event
of Armed Conflict, 1999**

(Continued from Vol. 13 p. 263)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		17 Sep 2013

**Convention for the Safeguarding of the Intangible Cultural Heritage,
2003**

(Continued from Vol. 17 p. 100)
(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Malaysia		23 Jul 2013

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre, 1982: see Vol. 7 pp. 323-324.

Agreement to Establish the South Centre, 1994: see Vol. 7 p. 324.

Amendments to the Charter of the Asian and Pacific Development Centre, 1998: see Vol. 10 p. 267.

**Multilateral Agreement for the Establishment of an International
Think Tank for Landlocked Developing Countries, 2010**

(Continued from Vol. 18 p. 101)

Entry into force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan	19 Oct 2011	20 Feb 2013

DISPUTE SETTLEMENT

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965: see Vol. 11 p. 245.

Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court: see Vol. 18 p. 101.

ENVIRONMENT, FAUNA AND FLORA

International Convention for the Prevention of Pollution of the Sea by Oil, as amended, 1954: see Vol. 6 p. 238.

International Convention on Civil Liability for Oil Pollution Damage, 1969: see Vol. 15 p. 215.

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969: see Vol. 9 p. 284.

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.

International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990: see Vol. 12 p. 237.

Amendment to the Montreal Protocol, 1990: see Vol. 15 p. 216.

Amendment to the Montreal Protocol, 1992: see Vol. 18 p. 103.

Framework Convention on Climate Change, 1992: see Vol. 13 p. 266.

Convention on Biological Diversity, 1992: see Vol. 14 p. 229.

Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1992: see Vol. 16 p. 161.

UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994: see Vol. 11 p. 247.

Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995: see Vol. 12 p. 238.

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001: see Vol. 18 p. 104.

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989

(Continued from Vol. 16 p. 161)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Afghanistan	22 Mar 1989	25 Mar 2013

Protocol to Amend the 1972 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

London, 27 November 1992

Entry into Force: 30 May 1996

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Brunei	31 Jan 2002	31 Jan 2003
Cambodia	8 Jun 2001	8 Jun 2002
China	5 Jan 1999	5 Jan 2000
India	21 Jun 2000	21 Jun 2000
Iran	5 Nov 2008	5 Nov 2009

Japan	24 Aug 1994	30 May 1996
Korea (Rep.)	7 Mar 1997	16 May 1998
Malaysia	9 Jun 2004	9 Jun 2005
Maldives	20 May 2005	20 May 2006
Papua New Guinea	23 Jan 2001	23 Jan 2002
Philippines	7 Jul 1997	7 Jul 1998
Singapore	31 Dec 1997	31 Dec 1998
Sri Lanka	22 Jan 1999	22 Jan 2000

Amendment to the Montreal Protocol, 1997

(Continued from Vol. 18 p. 103)

<i>State</i>	<i>Cons.</i>
Papua New Guinea	12 Nov 2013

Protocol to the Framework Convention on Climate Change, 1997

(Continued from Vol. 16 p. 161)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		25 Mar 2013

**Rotterdam Convention on the
Prior Informed Consent Procedure for Certain
Hazardous Chemicals and Pesticides in International Trade, 1998**

(Continued from Vol. 16 p. 162)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		6 Mar 2013
Cambodia		1 Mar 2013
Indonesia	11 Sep 1998	24 Sep 2013

Amendment to the Montreal Protocol, 1999

(Continued from Vol. 18 p. 103)

<i>State</i>	<i>Cons.</i>
Iran	14 Feb 2013
Papua New Guinea	12 Nov 2013

**Cartagena Protocol on Biosafety to the Convention on Biological
Diversity, 2000**

(Continued from Vol. 15 p. 217)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		20 Feb 2013

**International Convention on the
Control of Harmful Anti-Fouling Systems on Ships**

London, 5 Oct 2001

Entry into Force: 17 September 2008

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
China	7 Mar 2011	7 Jun 2011
Japan	8 Jul 2003	17 Sep 2008
Iran	6 Apr 2011	6 Jul 2011
Korea (Rep.)	24 Jul 2008	24 Oct 2008
Malaysia	27 Sep 2010	27 Dec 2010
Mongolia	28 Sep 2011	28 Dec 2011
Singapore	31 Dec 2009	31 Mar 2010

Stockholm Convention on Persistent Organic Pollutants, 2001

(Continued from Vol. 15 pp. 217)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		20 Feb 2013

**International Convention for the Control and
Management of Ships' Ballast Water and Sediments**

London, 13 February 2004

Entry into Force: not yet

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Iran	6 Apr 2011	
Korea (Rep.)	10 Dec 2009	
Malaysia	27 Sep 2010	
Maldives	22 Jun 2005	
Mongolia	28 Sep 2012	

FAMILY MATTERS

Convention on the Recovery Abroad of Main-tenance, 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

(Continued from Vol. 17 p. 168).

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (Rep.)	24 May 2013	

FINANCE

Agreement Establishing the Asian Development Bank, 1965: see Vol. 7 p. 327.

Convention Establishing the Multilateral Investment Guarantee Agency, 1988

(Continued from Vol. 12 p. 240)

(Status as provided by the World Bank)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Myanmar		16 Dec 2013

HEALTH

Protocol Concerning the Office International d'Hygiène Publique, 1946:
see Vol. 6 p. 245.

World Health Organization Framework Convention on Tobacco Control, 2003

(Continued from Vol. 18 p. 105)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Tajikistan		21 Jun 2013

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. 16 p. 164.

International Covenant on Economic, Social and Cultural Rights, 1966:
see Vol. 14 p. 231.

International Covenant on Civil and Political Rights, 1966: see Vol. 16 p. 165.

International Convention on the Elimination of All Forms of Racial Dis-
crimination, 1966: see Vol. 8 p. 179.

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.

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. 17 p. 170.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000: see Vol. 18 p. 106.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000: see Vol. 18 p. 106.

Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008: see Vol. 18 p. 107.

International Convention for the Protection of All Persons from Enforced Disappearance, 2010: see Vol. 16 p. 166.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

(Continued from Vol. 18 p. 106)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Vietnam		7 Nov 2013

Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002

(Continued from Vol. 18 p. 106)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Mongolia		24 Sep 2013

Convention on the Rights of Persons with Disabilities, 2008

(Continued from Vol. 18 p. 107).

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (DPR)	3 Jul 2013	
Papua New Guinea	2 Jun 2011	26 Sep 2013
Singapore	30 Nov 2012	18 Jul 2013

International Convention for the Protection of All Persons from Enforced Disappearance, 2010

(Continued from Vol. 18 p. 107)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		27 Jun 2013

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 Industrial Property, 1883 as amended
1979: see Vol. 18 p. 108.

Convention for the Protection of Literary and Artistic Works, 1886 as
amended 1979: see Vol. 18 p. 108.

Madrid Union Concerning the International Registration of Marks, including the Madrid Agreement 1891 as amended in 1979, and the Madrid Protocol 1989: see Vol. 16 p. 168.

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.

Convention Establishing the World Intellectual Property Organization, 1967: see Vol. 12 p. 245.

Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001: see Vol. 15 p. 221.

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.

WIPO Performances and Phonograms Treaty, 1996: see Vol. 18 p. 109.

WIPO Copyright Treaty, 1996: see Vol. 18, p. 109.

Patent Law Treaty, 2000: see Vol. 17 p. 172.

Singapore Treaty on the Law of Trademarks, 2006: see Vol. 18 p.110.

**Patent Cooperation Treaty, 1970
as amended in 1979 and modified in 1984 and 2001**

(Continued from Vol. 15 p. 221)

(Status as provided by WIPO)

<i>State</i>	<i>Party</i>
Iran	4 Jul 2013

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. 8 p. 182.

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. 16 p. 171.

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 Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988: see Vol. 18 p. 112.

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 Marking of Plastic Explosives for the Purpose of Detection, 1991: see Vol. 15 p. 224.

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. 14 p. 236.

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. 15 p. 224.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: see Vol. 15 p. 224.

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. 17 p. 174.

United Nations Convention Against Corruption, 2003: see Vol. 17 p. 175.

**United Nations Convention Against
Transnational Organized Crime, 2000**

(Continued from Vol. 18 p. 112)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Maldives		4 Feb 2013
Thailand	13 Dec 2000	17 Oct 2013

**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. 18 p. 112)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Thailand	18 Dec 2001	17 Oct 2013

**International Convention for the
Suppression of Acts of Nuclear Terrorism, 2005**

(Continued from Vol. 16 p. 172)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Afghanistan	29 Dec 2005	25 Mar 2013

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 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. 14 p. 239.

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. 16 p. 173.

Convention on Transit Trade of Land-locked States, 1965: see Vol. 17 p. 176.

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention on Civil Procedure, 1954: see Vol. 6 p. 258.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: see Vol. 17 p. 176.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: see Vol. 9 p. 291.

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: see Vol. 16 p. 173.

LABOUR

Employment Policy Convention, 1964 (ILO Conv. 122): see Vol. 8 p. 186.

Promotional Framework for Occupational Safety and Health Convention (ILO Conv. 187), 2006: see Vol. 18 p. 114.

Forced Labour Convention, 1930 (ILO Conv. 29)

(Continued from Vol. 15 p. 226)

<i>State</i>	<i>Rat. registered</i>
Maldives	4 Jan 2013

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87)

(Continued from Vol. 15 p. 226)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Maldives	4 Jan 2013

**Right to Organise and Collective Bargaining
Convention, 1949 (ILO Conv. 98)**

(Continued from Vol. 15 p. 226)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Maldives	4 Jan 2013

Equal Remuneration Convention, 1951 (ILO Conv. 100)

(Continued from Vol. 14 p. 240)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Maldives	4 Jan 2013

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105)

(Continued Vol. 12 p. 250)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Maldives	4 Jan 2013

**Discrimination (Employment and Occupation) Convention, 1958
(ILO Conv. 111)**

(Continued from Vol. 12 p. 250)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Maldives	4 Jan 2013

Minimum Age Convention, 1973 (ILO Conv. 138)

(Continued from Vol. 18 p. 114)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. reg.</i>	<i>Min. age spec.</i>
Maldives	4 Jan 2013	16

Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182)

(Continued from Vol. 16 p. 174)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Maldives	4 Jan 2013
Myanmar	18 Dec 2013

NARCOTIC DRUGS

Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: see Vol. 6 p. 261.

Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: see Vol. 6 p. 261.

International Opium Convention, 1925, amended by Protocol 1946: see Vol. 7 p. 334.

Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: see Vol. 6 p. 261.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: see Vol. 7 p. 334.

Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the Protocol of 1946: see Vol. 6 p. 262.

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: see Vol. 6 p. 262.

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: see Vol. 6 p. 262.

Single Convention on Narcotic Drugs, 1961: see Vol. 13 p. 276.

Convention on Psychotropic Substances, 1971: see Vol. 13 p. 276.

Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972:
see Vol. 15 p. 227.

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. 13 p. 276.

NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons, 1954: see Vol. 17
p. 178.

Convention on the Physical Protection of Nuclear Material, 1980: see Vol.
12 p. 252.

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 con-
cerning Acquisition of Nationality, 1963: see Vol. 8 p. 187.

NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage, 1963: see Vol. 17 p. 179.

Convention on the Physical Protection of Nuclear Material, 1980: see Vol.
18 p. 116.

Joint Protocol Relating to the Application of the Vienna Convention (and
the Paris Convention on Third Party Liability in the Field of Nuclear
Energy), 1980: see Vol. 6 p. 265.

Convention on Nuclear Safety, 1994: see Vol. 18 p. 117.

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.

Amendment to the 1980 Convention on the Physical Protection of Nuclear Material, 2005: see Vol. 18 p. 117.

Convention on Early Notification of a Nuclear Accident, 1986

(Continued from Vol. 18 p. 117)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Laos		10 May 2013

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986

(Continued from Vol. 17 p. 179)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Laos		10 May 2013

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997

(Continued from Vol. 18 p. 116)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Vietnam		9 Oct 2013

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. 14 p. 242.

Convention on the Privileges and Immunities of the Specialized Agencies,
1947: see Vol. 7 p. 338.

Optional Protocol to the Vienna Convention on Diplomatic Relations con-
cerning the Compulsory Settlement of Disputes, 1961: see Vol. 6 p. 269.

Optional Protocol to the Vienna Convention on Consular Relations con-
cerning 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 United Nations, 1946

(Continued from Vol. 14 p. 242)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Brunei		1 Aug 2013

Vienna Convention on Diplomatic Relations, 1961

(Continued from Vol. 13 p. 277)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Brunei		24 May 2013

Vienna Convention on Consular Relations, 1963

(Continued from Vol. 13 p. 278)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Brunei		24 May 2013

REFUGEES

Convention relating to the Status of Refugees, 1951: see Vol. 12 p. 254.

Protocol relating to the Status of Refugees, 1967: see Vol. 12 p. 254.

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968: see Vol. 12 p. 254.

Convention on Road Signs and Signals, 1968: see Vol. 7 p. 338.

SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: see Vol. 6 p. 271.

Convention on the High Seas, 1958: see Vol. 7 p. 339.

Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: see Vol. 6 p. 271.

Convention on the Continental Shelf, 1958: see Vol. 6 p. 271.

Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: see Vol. 6 p. 272.

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: see Vol. 18 p. 119.

United Nations Convention on the Law of the Sea, 1982

(Continued from Vol. 17 p. 182)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Timor Leste		8 Jan 2013

Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994

(Continued from Vol. 17 p. 182)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Timor Leste		8 Jan 2013

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.

International Convention for Safe Containers, as amended 1972: see Vol. 10 p. 286.

Protocol on Space Requirements for Special Trade Passenger Ships, 1973: see Vol. 6 p. 275.

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.

Protocol Relating to the International Convention on Load Lines, 1988: see Vol. 17 p. 183.

Protocol Relating to the International Convention for the Safety of Life at Sea, 1988: see Vol. 18 p. 120.

Convention on the International Regulations for Preventing Collisions at Sea, 1972

(Continued from Vol. 15 p. 231)

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Philippines	10 Jun 2013	10 Jun 2013

International Convention for Safe Containers, as amended 1972

(Continued from Vol. 10 p. 286)

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Vietnam	30 Sep 2013	not yet

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, as amended, 1978.

London 7 July 1978

Entry into Force: 28 April 1984

(Status as provided by IMO)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Bangladesh	6 Nov 1981	28 Apr 1984
Brunei	23 Oct 1986	23 Jan 1987
Cambodia	8 Jun 2001	8 Sep 2001
China	8 Jun 1981	28 Apr 1984
India	16 Nov 1984	16 Feb 1985
Indonesia	27 Jan 1987	27 Apr 1987
Iran	1 Aug 1996	1 Nov 1996
Japan	27 May 1982	28 Apr 1984
Kazachstan	7 Mar 1994	7 Jun 1994
Korea (DPR)	1 May 1985	1 Aug 1985
Korea (Rep)	4 Apr 1985	4 Jul 1985
Malaysia	30 Jan 1992	30 Apr 1992
Maldives	22 Jan 1987	22 Apr 1987
Mongolia	26 Jun 2002	26 Sep 2002
Myanmar	4 May 1988	4 Aug 1988

Pakistan	10 Apr 1985	19 Jul 1985
Papua New Guinea	28 Oct 1991	28 Jan 1992
Philippines	22 Feb 1984	22 May 1984
Singapore	1 May 1988	1 Aug 1988
Sri Lanka	22 Jan 1987	22 Apr 1987
Thailand	19 Jun 1997	19 Sep 1997
Turkmenistan	4 Feb 2009	4 May 2009
Vietnam	18 Dec 1990	18 Mar 1991

SOCIAL MATTERS

International Agreement for the Suppression of the White Slave Traffic, 1904, amended by Protocol 1949: see Vol. 6 p. 278.

International Convention for the Suppression of the White Slave Traffic, 1910, amended by Protocol 1949: see Vol. 6 p. 278.

Agreement for the Suppression of the Circulation of Obscene Publications, 1910, amended by Protocol 1949: see Vol. 6 p. 278.

International Convention for the Suppression of the Traffic in Women and Children, 1921: see Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Women and Children, 1921, amended by Protocol in 1947: see Vol. 6 p. 277.

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: see Vol. 6 p. 277.

Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, 1923, amended by Protocol in 1947: see Vol. 6 p. 277.

International Convention for the Suppression of the Traffic in Women of Full Age, 1933: see Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended by Protocol, 1947: see Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: see Vol. 12 p. 257.

Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: see Vol. 12 p. 257.

TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976: see Vol. 13 p. 280.

Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: see Vol. 8 p. 193.

Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: see Vol. 9 p. 298.

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: see Vol. 10 p. 287.

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.

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended)

(Continued from Vol. 8 p. 193)

(Status as provided by IMO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (DPR)	15 Oct 2013	15 Oct 2013

TREATIES

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: see Vol. 6 p. 280.

Vienna Convention on the Law of Treaties, 1969

(Continued from Vol. 12 p. 258)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Timor Leste		8 Jan 2013

WEAPONS

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: see Vol. 6 p. 281.

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: see Vol. 6 p. 281.

Treaty on the Non-Proliferation of Nuclear Weapons, 1968: see Vol. 11 p. 262.

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: see Vol. 6 p. 282.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: see Vol. 13 p. 281.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: see Vol. 12 p. 258.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: see Vol. 11 p. 263.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993: see Vol. 12 p. 259.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997: see Vol. 13 p. 281.

Convention on Cluster Munitions, 2008: see Vol. 16 p. 259.

Comprehensive Nuclear Test Ban Treaty, 1996

(Continued from Vol. 12 p. 259)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Brunei	22 Jan 97	10 Jan 2013

**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)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh		26 Sep 2013

STATE PRACTICE

State Practice of Asian States in the Field of International Law

EDITORIAL NOTE

The Editorial Board has decided to reorganize the format of this section from Volume 16 (2010) onwards. Since the Yearbook's inception, state practice has always been reported and written up as country reports. While this format has served us well in the intervening years, we felt that it would make a lot more sense if we reported state practice *thematically*, rather than geographically. This way, readers will have an opportunity to zoom in on a particular topic of interest and get a quick overview of developments within the region. Of course, this reorganization cannot address our lack of coverage in some Asian states. We aim to improve on this in forthcoming volumes and thank the contributors to this section for their tireless and conscientious work.

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Air Law

CHINA

AIR LAW – ESTABLISHMENT OF AIR DEFENSE IDENTIFICATION ZONE IN EAST CHINA SEA

On November 23, 2013, the Ministry of National Defense of the People's Republic of China issued a statement on establishing the East China Sea Air Defense Identification Zone. The full text is as follows:

Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone. Issued by the Ministry of National Defense on November 23.

The government of the People's Republic of China announces the establishment of the East China Sea Air Defense Identification Zone in accordance with the Law of the People's Republic of China on National Defense (March 14, 1997), the Law of the People's Republic of China on Civil Aviation (October 30, 1995) and the Basic Rules on Flight of the People's Republic of China (July 27, 2001).

The zone includes the airspace within the area enclosed by China's outer limit of the territorial sea and the following six points: 33°11'N (North Latitude) and 121°47'E (East Longitude), 33°11'N and 125°00'E, 31°00'N and 128°20'E, 25°38'N and 125°00'E, 24°45'N and 123°00'E, 26°44'N and 120°58'E.¹

On the same day, China's Ministry of National Defense issued an announcement of the aircraft identification rules for the East China Sea Air Defense Identification Zone of the People's Republic of China. The full text is as follows:

Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People's Republic of China. Issued by the Ministry of National Defense on November 23.

1 *Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone*, CHINA DAILY (Nov. 23, 2013, 11:45 AM), http://www.chinadaily.com.cn/china/2013-11/23/content_17126611.htm.

The Ministry of National Defense of the People's Republic of China, in accordance with the Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone, now announces the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone as follows:

First, aircraft flying in the East China Sea Air Defense Identification Zone must abide by these rules.

Second, aircraft flying in the East China Sea Air Defense Identification Zone must provide the following means of identification:

1. Flight plan identification. Aircrafts flying in the East China Sea Air Defense Identification Zone should report the flight plans to the Ministry of Foreign Affairs of the People's Republic of China or the Civil Aviation Administration of China.
2. Radio identification. Aircrafts flying in the East China Sea Air Defense Identification Zone must maintain the two-way radio communications, and respond in a timely and accurate manner to the identification inquiries from the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ.
3. Transponder identification. Aircrafts flying in the East China Sea Air Defense Identification Zone, if equipped with the secondary radar transponder, should keep the transponder working throughout the entire course.
4. Logo identification. Aircraft flying in the East China Sea Air Defense Identification Zone must clearly mark their nationalities and the logo of their registration identification in accordance with related international treaties.

Third, aircraft[s] flying in the East China Sea Air Defense Identification Zone should follow the instructions of the administrative organ of the East China Sea Air Defense Identification Zone or the unit authorized by the organ. China's armed forces will adopt defensive emergency measures to respond to aircraft that do not cooperate in the identification or refuse to follow the instructions.

Fourth, the Ministry of National Defense of the People's Republic of China is the administrative organ of the East China Sea Air Defense Identification Zone.

Fifth, the Ministry of National Defense of the People's Republic of China is responsible for the explanation of these rules.

Sixth, these rules will come into force at 10 am November 23, 2013.²

INDONESIA

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDONESIA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON COOPERATION IN THE EXPLORATION AND PEACEFUL USE OF OUTER SPACE

On 2 October 2013, Indonesia and China signed an agreement relating to cooperation in the exploration and peaceful use of outer space. Within the Agreement, both parties have agreed on the fact that outer space is one of the common heritages of mankind, meaning that outer space shall be used for the benefits of all countries and must not be exploited based on national interests.

The Agreement is mainly focused on cooperation for peaceful purposes such as scientific research and the development of new satellites; launch and control service of all satellites including the management and operation within the orbit; and the utilisation of satellites data. All of the activities that will be conducted by both parties will be held through a joint research and training with notable outer space experts and free-sharing scientific information through academic workshops or seminars for and by both parties.

By establishing this Agreement, Indonesia and China are both aiming to achieve and strengthen the beneficial relationship through scientific and technology development within outer space based on mutual interest and lawful act.

2 *Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People's Republic of China*, CHINA DAILY (Nov. 23, 2013, 12:02 PM), http://www.chinadaily.com.cn/china/2013-11/23/content_17126618.htm.

Aliens

BANGLADESH

ACCEPTANCE OF REFUGEES – STATUS OF MYANMAR (ROHINGYA) REFUGEES IN BANGLADESH – UNDOCUMENTED FOREIGN NATIONALS – ACCEPTANCE OF REFUGEES ON HUMANITARIAN GROUNDS

National Strategy on Myanmar Refugees and Undocumented Myanmar Nationals 2013

The government of Bangladesh, in its Cabinet meeting of 9 September 2013, adopted the National Strategy Paper on Myanmar Refugees and Undocumented Myanmar Nationals 2013 (the Strategy) in order to address the situation of the registered refugees as well as the undocumented Myanmar nationals living in Bangladesh. Being the first national initiative, this Strategy aims to provide a long-term solution to the challenges presented by the presence of a large number of undocumented Myanmar population in Bangladesh. The Strategy calls these people as “undocumented Myanmar nationals.” Myanmar does not, however, recognise them as its citizens/nationals. Therefore, for all practical purposes, both the registered refugees and the undocumented Rohingyas are stateless people.

One of the main purposes of this Strategy is to provide ‘temporary basic humanitarian relief’ (e.g. health, food, water, sanitation, and nutrition) to these people. Other key objectives of this Strategy have been to: (a) record or survey the undocumented Myanmar Nationals (UMNs), (b) strengthen Bangladesh-Myanmar border management, (c) to sustain diplomatic engagement with Myanmar at bilateral and multilateral levels, and (d) to establish a national-level coordination through a National Task Force (NTF) and a District Task Force (DTF). The Bangladesh government intends to identify undocumented Rohingyas living outside of the two official camps, and to collect data relating to their socio-economic conditions, age, education, and occupation in the source-country, Myanmar.

Bangladesh has not joined the 1951 Refugee Convention, but accepted some 250,877 Myanmar nationals (Rohingyas) in 1978 and 1991 as refugees out of ‘humanitarian considerations.’ In the following years, the vast majority of these Myanmar refugees were repatriated to Myanmar, following an “intense diplomatic engagement with the government of Myanmar”

and with the cooperation of the UN High Commission for Refugees. Approximately 30,000 registered refugees, however, have been living in the two official camps in Bangladesh since then. In addition to the registered refugees, around 300,000 to 500,000 undocumented Myanmar nationals have settled in villages and towns without intervention of the authorities (known as 'self-settled' Myanmar nationals). Notably, after the adoption of the abovementioned national Strategy, Bangladesh has been working in partnership with international organisations to implement several measures to protect Rohingyas refugees in Bangladesh.

Diplomacy to resolve the problem of Rohingya refugees in Bangladesh

In 2013, Bangladesh launched a discussion in the Organisation of Islamic Council (OIC), with a view to establish and extend international support towards resolving the Rohingya refugee problems. On 13-16 November 2013, the OIC Contact Group on Rohingya Muslims visited Myanmar to inspect the conditions of Rohingyas in the Rakhine State of Myanmar. Bangladesh joined as a member of this Contact Group.

CHINA

ALIENS – REGULATION ON ADMINISTRATION OF EXIT AND ENTRY

On July 12, 2013, the State Council adopted the Regulations on Administration of Entry and Exit of Foreigners. This set of regulations has five chapters. Chapter 1 is about the general principles, Chapter 2 is about the categories of visas and the issuance of the visas, Chapter 3 is about the administration of stay and residence, Chapter 4 is about the investigation and repatriation, and Chapter 5 is about supplementary rules.³ They are aimed to implement the Act on Administration of Entry and Exit of Foreigners adopted by the Standing Committee of National People's Congress in 2012.

3 Zhonghua Renmin Gongheguo Chujing Rujing Guanli Fa (中华人民共和国税收征收管理法 [Entry and Exit Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 3, 2013, effective Sept. 1, 2013).

ASEAN

INDONESIA

PROTOCOL TO IMPLEMENT THE EIGHTH PACKAGE OF COMMITMENTS ON AIR TRANSPORT SERVICES UNDER THE ASEAN FRAMEWORK AGREEMENT ON SERVICE

Protocol to Implement the Eighth Package of Commitments on Air Transport Services Under the ASEAN Framework Agreement on Services was signed on 20 December 2013 but has not entered into force.

The Protocol itself aims to maximise cooperation among member states and liberalise trade in services. This Protocol referred to several ASEAN Agreements, such as the Protocol to implement previous packages commitment and also the agreement relating to integration of priority sectors and the movement of natural persons that contained regulation about the trade in goods. The Indonesian Government, along with other member states, have agreed to use this Protocol and its annex as an integral part of the ASEAN Framework Agreement.

PROTOCOL TO AMEND CERTAIN ASEAN ECONOMIC AGREEMENTS RELATED TO TRADE IN GOODS

On March 8, 2013, a protocol to amend certain ASEAN Economic Agreements related to Trade in Goods was signed and was soon after ratified through the Presidential Regulation No. 10 of 2014. The Protocol went into force after all member states have successfully deposited their instruments of ratification or acceptance of the Protocol.

The Protocol itself amends or removes several clauses within the ASEAN Economic Agreements. Such amendments include the amendment of Article 2(A)(2) of the Framework Agreement on Enhancing ASEAN Economic Cooperation, which was based on the amendment of the ASEAN Trade in Goods Agreement and will be the new mechanism for the ASEAN Free Trade Area (AFTA). In addition, Articles 6(1) and 14 of e-ASEAN Framework Agreement were also amended. A major change within ASEAN Sectoral Integration Protocol is that the revised version consists of the elimination of import duties on Priority Integration Sectors and the revocation of Article 3 in every ASEAN Sectoral Protocol for agro-based

products, automotives, e-ASEAN, electronics, fisheries, healthcare, rubber-based products, textiles and apparel products, and wood-based products.

MALAYSIA

TREATIES AND CONVENTIONS – COUNTER TERRORISM – ASEAN CONVENTION ON COUNTER TERRORISM – FRAMEWORK FOR REGIONAL COOPERATION

ASEAN Convention on Counter Terrorism

Malaysia ratified the ASEAN Convention on Counter Terrorism on 11 January 2013. This Convention provides a framework for regional cooperation to counter, prevent and suppress terrorism in all its forms and manifestations. It is also aimed at strengthening cooperation among law enforcement agencies and relevant authorities in countering terrorism. Amongst the areas of cooperation iterated in the said Convention include provision of early warning through exchange of information; preventing and suppressing financing of terrorist acts and movement of terrorists between borders; capacity building such as trainings and technical cooperation and regional meetings; promoting inter-faith and intra-faith dialogue; cross-border cooperation; exchanging intelligence; strengthening the capability and readiness to deal with chemical, biological, radiological, nuclear (CBRN) terrorism, cyber terrorism and any new form of terrorism; and undertaking research and development measures to counter terrorism.

TREATIES AND CONVENTIONS – SUSTAINABLE DEVELOPMENT – AGREEMENT ON THE ESTABLISHMENT OF THE ASEAN CENTRE FOR BIODIVERSITY – COORDINATION ON THE CONSERVATION AND SUSTAINABLE USE OF BIODIVERSITY

Agreement on the Establishment of the ASEAN Centre for Biodiversity

Malaysia ratified the Agreement on the Establishment of the ASEAN Centre for Biodiversity on 31 May 2013. As the title suggests, the Agreement establishes an ASEAN Centre for Biodiversity in the Philippines. The said Centre will facilitate cooperation and coordination among members of ASEAN, and with relevant national governments, regional and international organisations, on the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from the use of such biodiversity in the ASEAN region.

TREATIES AND CONVENTIONS – FREEDOM OF MOVEMENT OF PERSONS – ASEAN AGREEMENT ON THE MOVEMENT OF NATURAL PERSON – IMMIGRATION PROCEDURES – PROTECTION OF BORDERS AND LABOUR FORCE OF ASEAN MEMBERS

ASEAN Agreement on the Movement of Natural Persons

Malaysia ratified the ASEAN Agreement on the Movement of Natural Persons on 17 June 2013. The objectives of the Agreement are to facilitate the movement of natural persons engaged in the conduct of trade of goods, services and investment between ASEAN Member States; establish streamlined and transparent procedures for applications for immigration formalities for the temporary entry or stay of natural persons; and protect the integrity of the borders of and the domestic labour force and permanent employment of ASEAN Member States.

HEALTHCARE – MEDICAL DEVICE ACT – IMPLEMENTATION OF THE ASEAN AGREEMENT ON MEDICAL DEVICE DIRECTIVE – CONFORMITY OF MEDICAL DEVICES IN THE ASEAN REGION

Medical Device Act 2012

The Medical Device Act 2012 which came into force on 30 June 2013 was enacted to give effect to the ASEAN Agreement on Medical Device Directive; the said Directive requires ASEAN Member States to take measures to ensure that only medical devices that conform to the provisions in the said ASEAN Agreement may be placed in the markets of that Member State.

The Act was promulgated with a view to regulate medical devices and the industry. The definition of “medical device” in the Act mirrors the definition provided in the ASEAN Agreement on Medical Device Directive. In addition, the Act requires manufacturers to comply with prescribed principles of safety and performance; and ensure that medical devices are manufactured in accordance with any written directive and labelled, packaged and marked in accordance with the prescribed manner.

The Act also requires all medical devices to be registered under the Act before it can be imported, exported, or placed in the market. Failure to register attracts a punishment (upon conviction) of a fine not exceeding MYR 200,000 or imprisonment for a term not exceeding three years or both.

PRIVACY – PERSONAL DATA PROTECTION ACT 2010 – USE OF

PERSONAL DATA IN COMMERCIAL TRANSACTIONS

Personal Data Protection Act 2010

The Personal Data Protection Act 2010 came into force on 15 November 2013 and it has been said that the said Act was enacted as part of Malaysia's commitment to establish an integrated ASEAN Economic Community by 2015 – one of the priority actions for the ASEAN Economic Community 2015 includes adopting the best practices/guidelines on cyber-law issues such as data privacy and consumer protection in order to support regional e-commerce activities.

The Act defines “personal data” as any information, in respect of commercial transactions, which is being processed by means of equipment operating automatically in response to given instructions; or recorded with the intention of being processed or recorded as part of a relevant filing system. The data in question must relate directly or indirectly to a data subject who can be identified by or identifiable from that information, including any sensitive personal data and expression of opinion about the data subject. However, the data excludes information processed for credit reporting business.

The Act applies to any person who processes; and who has control over or authorises the processing of any personal data in respect of commercial transactions. It is based on seven Personal Data Protection Principles, i.e. the General Principle; the Notice and Choice Principle; the Disclosure Principle; the Security Principle; the Retention Principle; the Data Integrity Principle' and the Access Principle.

Arbitration

CHINA

ARBITRATION

The Philippines v. China Arbitration

On February 19, 2013, the Embassy of the People's Republic of China in the Republic of the Philippines presented its compliments to the Department of Foreign Affairs of the Philippines and, with reference to the latter's Note Verbale No. 13-0211 dated January 22, 2013, stated the following:

The Position of China on the South China Sea issues has been consistent and clear. China has indisputable sovereignty over the Nansha Islands and their adjacent waters. At the core of the disputes between China and the Philippines in the South China Sea are the territorial disputes over some islands and reefs of the Nansha Islands. The two countries also have overlapping jurisdictional claims over parts of the maritime area in the South China Sea. The direct cause of these disputes has been the illegal occupation by the Philippines of some islands and reefs of China's Nansha Islands. China has been firmly opposed to such illegal occupation.

The territorial disputes between China and the Philippines are still pending and unresolved, but both sides have agreed to settle the disputes through bilateral negotiations. By initiating arbitration proceedings, the Philippines runs counter to the agreement between the two countries, and also contravenes the principles and spirit of the Declaration on the Conduct of Parties in the South China Sea (DOC), and particularly "to resolve their territorial and jurisdictional disputes by peaceful means . . . through friendly consultations and negotiations by sovereign States directly concerned."

The Notification and Statement of Claim (hereinafter referred to as "Notification") attached to Note Verbale No. 13-0211 contains grave errors both in fact and in law, and includes many false accusations against China. At some places, the Notification even seriously violates the "One China" principle, undermining the political foundation of the bilateral relationship between China and the Philippines. China firmly opposes to this.

China therefore rejects and returns the Philippines' Note Verbale No. 13-0211 and the attached Notification.

China has been committed to resolving disputes peacefully through bilateral negotiation, and has made every effort to maintain stability and to promote regional cooperation in the South China Sea. In March 2010, China made a formal proposal to the Philippines on establishing a bilateral regular consultation mechanism on maritime issues, and China has also repeatedly proposed to the Philippines to resume the operation of the Confidence Building Measures Mechanism (CBMs) as established between the two countries. The Philippines has failed to respond to the proposals mentioned above.

China hopes that the Philippines will revert to the right track of settling the disputes through bilateral negotiations.

The Embassy of the People's Republic of China avails itself of this opportunity to renew to the Department of Foreign Affairs

of the Republic of the Philippines the assurance of its highest consideration.⁴

On April 26, 2013, the spokesperson of the Foreign Ministry made the following statement:

On 22 January 2013, the Philippines sent China a note verbale, attached with a notification, to initiate arbitration proceedings against China regarding issues of the South China Sea. On 19 February, China stated its rejection of the request for arbitration by the Philippines and returned the latter's note verbale and the attached notification. The position of China, as indicated above, will not change.

Since the 1970s, the Philippines, in violation of the Charter of the United Nations and principles of international law, illegally occupied some islands and reefs of China's Nansha Islands, including Mahuan Dao, Feixin Dao, Zhongye Dao, Nanyao Dao, Beizi Dao, Xiyue Dao, Shuanghuang Shazhou and Siling Jiao. Firmly and consistently opposed to the illegal occupation by the Philippines, China hereby solemnly reiterates its demand that the Philippines withdraw all its nationals and facilities from China's islands and reefs.

The Philippines professed in the notification of 22 January 2013 that it "does not seek . . . a determination of which Party enjoys sovereignty over the islands claimed by both of them." On 22 January, however, the Philippines publicly stated that the purpose for initiating the arbitration was to bring to "a durable solution" the Philippines-China disputes in the South China Sea. These statements are simply self-contradictory. In addition, by initiating the arbitration on the basis of its illegal occupation of China's islands and reefs, the Philippines has distorted the basic facts underlying the disputes between China and the Philippines. In so doing, the Philippines attempts to deny China's territorial sovereignty and clothes its illegal occupation of China's islands and reefs with a cloak of "legality". The Philippines' attempt to seek a so-called "durable solution" such as this and the means it has employed to that end are absolutely unacceptable to China.

In accordance with international law, and especially the principle of the law of the sea that "land dominates the sea", determined

4 Note Verbale from Embassy of the People's Republic of China in the Republic of Philippines to Department of Foreign Affairs of the Republic of Philippines (Feb. 19, 2013), http://www.globalcompetitionreview.com/cdn/files/gar/china_note_verbale.pdf.

territorial sovereignty is the precondition for, and basis of maritime delimitation. The claims for arbitration as raised by the Philippines are essentially concerned with maritime delimitation between the two countries in parts of the South China Sea, and thus inevitably involve the territorial sovereignty over certain relevant islands and reefs. However, such issues of territorial sovereignty are not the ones concerning the interpretation or application of the UN Convention on the Law of the Sea (UNCLOS). Therefore, given the fact that the Sino-Philippine territorial disputes still remain unresolved, the compulsory dispute settlement procedures as contained in UNCLOS should not apply to the claims for arbitration as raised by the Philippines. Moreover, in 2006, the Chinese Government made a declaration in pursuance of Article 298 of UNCLOS, excluding disputes regarding such matters as those related to maritime delimitation from the compulsory dispute settlement procedures, including arbitration. Therefore, the request for arbitration by the Philippines is manifestly unfounded. China's rejection of the Philippines' request for arbitration, consequently, has a solid basis in international law.

In the interest of maintaining the Sino-Philippine relations and the peace and stability in the South China Sea, China has been persistent in pursuing bilateral negotiations and consultations with the Philippines to resolve relevant disputes.

It is a commitment undertaken by all signatories, the Philippines included, under the Declaration on the Conduct of Parties in the South China Sea (DOC) that disputes relating to territorial and maritime rights and interests be resolved through negotiations by sovereign states directly concerned therewith. The DOC should be implemented in a comprehensive and serious manner. China will adhere to the means of bilateral negotiations to resolve territorial and maritime delimitation disputes both in accordance with applicable rules of international law and in compliance with the spirit of the DOC.⁵

On August 1, 2013, China addressed a Note Verbale to the Permanent Court of Arbitration in which it reiterated its position that "it does not

5 *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes Between China and the Philippines in the South China Sea*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 26, 2013), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1035577.shtml.

accept the arbitration initiated by the Philippines” and stated that it was not participating in the proceedings.⁶

Courts and Tribunals

CHINA

COURTS AND TRIBUNALS – INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS)

On November 26, 2013, China filed a written statement with the ITLOS in the case of *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*. China made the following submissions in response to the request by the SFRC (the Request):

- (a) That the conferment of advisory competence upon an international court or tribunal, and subsequent variation of the competence, are to be based in agreement of the States Parties to the constituent treaty of the court or tribunal;
- (b) That there is, at present, no provision in the United Nations Convention on the Law of the Sea (UNCLOS) that can serve as a basis for the advisory competence of the full bench of the ITLOS;
- (c) That the applicability of the doctrine of inherent jurisdiction is confined to such competence that is both ancillary in nature and incidental to the primary jurisdiction of an international court or tribunal based in the constitutive instruments, and advisory competence belongs to the category of primary jurisdiction;
- (d) That the advisory competence of the full bench of the ITLOS may be acquired by way of amendment of UNCLOS;
- (e) That, supposing the full bench of the ITLOS had advisory competence, the Request still falls outside that competence; otherwise, there are still factors in Case No. 21 that would require the full bench to decline to exercise its competence over the Request;
- (f) That there is much room for enhanced international cooperation with the questions of the Request;

6 The South China Sea (Phil. v. China), Case No. 2013-19, Award, at 13 (Perm Ct. Arb. 2013), <https://www.pcacases.com/web/sendAttach/1506>.

(g) That the SRFC member States may also consider to avail themselves of measures recognized in relevant international agreements; and

(h) That the Chinese Government hereby reserves the right to make further comments in the proceedings of Case No. 21.⁷

On December 9, 2013, a Chinese representative made a statement at the 68th Session of the UNGA on the oceans and the law of the sea. He stated:

[A]s the International Tribunal for the Law of the Sea handles more and more cases that touch upon ever wider areas, the Tribunal is enjoying growing influence and has entered a new phase of comprehensively fulfilling its mandate under the Convention. The Chinese delegation supports the Tribunal as it continues to play an important role in the peaceful settlement of maritime disputes, the maintenance of international maritime order and the dissemination of the law of the sea. We appreciate the active role played by the Tribunal in helping developing countries with capacity-building. At the same time, we believe that neither UNCLOS nor the Tribunal's statute confirm advisory competence upon the full Bench of the Tribunal. We hope that the Tribunal will take into full consideration the concerns of the various parties and deal carefully with Case No. 21, Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), in order to ensure the legitimacy and authority of its work.⁸

7 ITLOS, REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION: WRITTEN STATEMENT OF THE PEOPLE'S REPUBLIC OF CHINA 41-42 (2013), http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_8_China_orig_Eng.pdf.

8 U.N. GAOR, 68th Sess., 63rd plen. mtg. at 8, U.N. Doc. A/68/PV.63 (Dec. 9, 2013).

Criminal Law

BANGLADESH

INTERNATIONAL CRIMINAL LAW – INTERNATIONAL
HUMANITARIAN LAW – HUMAN RIGHTS – CUSTOMARY
INTERNATIONAL LAW – DOMESTIC APPLICATION OF
INTERNATIONAL (CRIMINAL) LAWS – STATUTES OF THE ICC,
ICTY, AND ICTR – INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS – FAIR TRIAL STANDARDS

Abdul Quader Molla v. Chief Prosecutor of International Crimes Tribunal [Criminal Appeal No. 25 of 2013; 22 BLT (2014) AD 8; Judgment September 17, 2013; Appellate Division of the Supreme Court of Bangladesh]

Abdul Quader Mollah v. Chief Prosecutor of International Crimes Tribunal, Bangladesh [22 BLT (2014) AD 541; Review Decision of December 12, 2013; Appellate Division]

The Chief Prosecutor v. Abdul Quader Molla [ICT-BD Case No. 02 of 2012; 65 DLR (2013) AD 1; Judgment February 5, 2013]

In *Abdul Quader Molla*, the appellant was convicted by the International Crimes Tribunal (ICT) in 2013 on charges of crimes against humanity and war crimes committed by the convict in 1971 during the Bangladesh war of independence. Mr. Molla was sentenced to a life term. On appeal, the Appellate Division replaced the life imprisonment with the death penalty. A petition for review of the conviction and the death penalty was lodged with the Appellate Division, but was unsuccessful. The question before the Appellate Division was whether the ICT should have applied customary international law in the trial of international crimes under Bangladesh's domestic law. The defence argued that the crimes under the International Crimes Tribunal Act 1973 of Bangladesh must be proved by applying the test of international criminal laws.

The Appellate Division of the Supreme Court in *Abdul Quader Molla* came to a unanimous decision that, although the ICT is required to follow municipal laws as a domestic court, it could rely on customary international law principle if there is a clear gap in the domestic law. The Court found the 1973 Act sufficient for the trial of war criminals (per Miah,

J.).⁹ The Court rejected the objection that international standards of fair trial were not followed by the ICT. Sinha, J. commented that “[t]here is no doubt that the trials [in ICTs] are held in accordance with international legal and human rights standards,”¹⁰ while Miah, J. held that “the essence of fair trial” is instilled into the 1973 Act.¹¹ Chowdhury, J. also discussed the fair trial issues and found that the 1973 Act incorporated the global concept of due process.

On the other hand, the trial court, the International Crimes Tribunal (ICT No. 2), remarked that the provisions of the 1973 Act are at par “with the rights of the accused as granted by Article 14 of the ICCPR” (quoting the Appellate Division’s appellate judgment in *Molla*).¹² The ICT No. 2 discussed several decisions of different chambers of the International Criminal Tribunal for Rwanda (ICTR) and International Tribunal for the Prosecution of Persons responsible for serious violations of International Humanitarian Law committed in the territory of the Former Yugoslavia (ICTY). This approach, which is quite appreciable, was overruled at the Appellate Division by Miah, J., who found no reason to look at international decisions while adjudicating under a domestic law.¹³ On this, Chowdhury, J.’s view that ratio or observation made by the international criminal tribunals created by the United Nations may be relied on by “treating them as persuasive, rather than binding authorities”¹⁴ seems to be more logical.

Regarding the applicability of international law in domestic jurisdiction concerning war crimes trials, the majority view was that “there is no doubt” that the international laws and customs are applicable in the ICTs of Bangladesh, especially with regard to the offences not defined in the domestic law of 1973.¹⁵ In support of its reasoning, the Court cited previous decisions on the question of general application of international law in

9 Abdul Quader Molla v. Chief Prosecutor of International Crimes Tribunal (2014) 22 BLT (AD) 8, at 261.

10 *Id.* at 77.

11 *Id.* at 273.

12 *Id.* at 515.

13 *Id.* at 261.

14 *Id.* at 575.

15 *Id.* at 99.

Bangladesh,¹⁶ as well as jurisprudence and practice of several international criminal tribunals, such as the ICTY, ICTR, and International Criminal Court (ICC). The Appellate Division further explained that the Act of 1973 defines a number of offences including war crimes and crimes against humanity, while also empowering the ICTs to try ‘any other crimes under international law.’ While it is not imperative for the tribunal to follow customary international law while trying the offences defined in the Act of 1973 such as the offence of crimes against humanity,¹⁷ a person charged with ‘*any other crimes under international law*’ is entitled to claim the application by the tribunal of customary international law.

In its appellate judgment, the Appellate Division discussed customary international law principles and drew a vivid account of the development and evolution of international humanitarian law. The Court cited the 1899 Conference for codifying the rules of land warfare, the Four Geneva Conventions, Hague Conventions, the Treaty of Versailles, the Nuremberg Charter, the statutes of the Tokyo Tribunal, ICTY, ICTR, and ICC. In endorsing the victim’s “right to punish” the perpetrators, the Court approvingly quoted Hugo Grotius who wrote that, “the very commission of the crime creates a legal connection between the offender and the victim such as vests in the victim the right to punish the offender”¹⁸

For the Court, there is no denial of the fact that the provisions of the Act of 1973 are in conformity with international standards and reflect “international due process.”¹⁹ The provisions discussed the rise of international

16 The cases cited were: *Hossain Mohammad Ershad v. Bangladesh* 21 BLD (AD) 69; *Bangladesh v. Sheikh Hasina* 60 DLR (AD) 90; and *M/S. Supermax International Private Ltd. v. Samah Razor Blades Industries* 2 ADC 593.

17 On this, the Court held that “[i]t is also not correct to infer that the constituent elements of [c]rimes against [h]umanity as recognised under the international law must be present for convicting a person in respect of a charge of [c]rimes against [h]umanity,” because this offence was defined in the domestic law. Relevantly, it further observed that, “our tribunal which is a domestic judicial body . . . is not obliged by the provisions contained in the Rome Statute. The Rome Statute is not binding upon tribunal for resolving the issue of elements require[d] to constitute the offen[c]e of crime against humanity.” [(2013) 65 DLR (AD) 1, 27, ¶ 130].

18 *Molla*, 22 BLT (2014) AD 8 at 41-42.

19 *Id.* at 87.

criminal tribunals, citing them as a catalyst for the regime of domestic prosecution of individuals for war crimes, crimes against humanity, and genocide.²⁰ It endorsed the view of an international law scholar, Professor James Crawford, that ‘the vast majority of prosecutions for international crimes will take place at the domestic level’ because the ICC lacks the capacity to prosecute large members of accused.²¹

**INTERNATIONAL CRIMES AND INTERNATIONAL CRIMINAL LAW –
CRIMES AGAINST HUMANITY – RETROSPECTIVITY OF CRIMINAL
LAW TO TRY INTERNATIONAL CRIMES**

***Murshedur Rahman Chowdhury v. Bangladesh and Others* [67 DLR (2015) HCD 69; June 19, 2013; per M. Moazzam Husain, J. agreeing with Sheikh Hasan Arif, J.; High Court Division]**

Facts

In this constitutional petition, the legality of section 3 of the International Crimes (Tribunal) (Amendment) Act 2009 was challenged. This amendment expanded the jurisdiction of ICTs to try “any individual or group of individuals” for international crimes, including war crimes committed during the Bangladesh liberation war of 1971, and was given retrospective effect. Initially, the governing law of the ICTs provided only for trial of members of any armed, defence or auxiliary forces on charges of war crimes. The petitioner also challenged the legality of section 19 of the Constitution (Fifteenth Amendment) Act 2011 that expanded the ambit of exception to the rule against retrospectivity of criminal laws in article 47(3) of the Bangladesh Constitution, which provided that constitutional validity of the prosecution of “any individual, group of individuals or organization” for war crimes could not be challenged. The central argument of the petitioner was that these amendments constituted a “colourable exercise of legislative power” and curtailed the guarantees of fundamental rights of the citizens.

20 *Id.* at 90.

21 *Id.*

Decisions and Reasoning

The High Court Division of the Supreme Court summarily rejected the petition, observing that the 2009 amendment to the International Crimes (Tribunals) Act 1973 was made to facilitate the trial of all perpetrators, either individuals or groups/organizations, for genocide, crimes against humanity, and war crimes that are offences recognized in international law. The Court endorsed the 2009 amendment by stating that the introduction of the expression ‘any individual or group of individuals’ is nothing new and is compatible with international practices. The Court argued:

[t]rial and punishment of individuals for committing war crimes and crimes against humanity are recognized in international law. Individual[s] cannot escape [the criminal] liability . . . In all international tribunals including the Nuremberg [Tribunal], [the] ICTY and [the] ICTR[,] one thing [that] was done in common [was] the trial of individuals for war crimes and crimes against humanity. No question was ever raised disputing ‘individual [criminal] liability’ in [the prosecution of] war crimes or crime against humanity.

To revert the petitioner’s argument on the ground of “rule against retroactive legislation,” the Court resorted to Hans Kelsen’s theory, and observed as follows:

The crime sought to be tried by the ICT is pre-existing under the international law. The international law is to be found not only in treatise[,] but also in the customs and practices of states[,] which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by the military courts. This law is not static, but by continual adaptation follows the needs of a changing world. The crimes under international law are found in the customary international law. And all the charters of trial of war crimes or crimes against humanity are the expression of the then existing customary international law. The Nuremberg trial is the first of its kind in the international level where [the] trial of crimes under international law took place. Therefore, the maxim “*nullem crimen sine lege*” (no punishment of crime without a pre-existing law) has no application [in case of ICT trials] . . .

INDONESIA

LAW NO. 13 OF 2015 REGARDING TREATY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE REPUBLIC OF INDONESIA AND THE SOCIALIST REPUBLIC OF VIETNAM

The Agreement between Indonesia and Vietnam relating to legal assistance in criminal matters was signed in Jakarta on 27 June 2013 and soon was ratified into Law No. 13 of 2015. The close relationship between the parties triggered the establishment of mutual legal assistance relating to criminal matters.

Specifically, the aim of this Agreement is to enhance cooperation in the field of investigation and prosecution of conviction, bearing in mind that assistance shall be carried out accordingly with each party's mutual respect for the other's sovereignty and based on their national regulations. Assistance can be carried out within the territory or jurisdiction of the requesting party. The scope of legal assistance between parties is the investigation for evidence (person and goods); the taking of evidence from both parties; the sharing of information relating to the matters at hand; the execution for search and seizure; the regulation of people who provide evidence to assist in investigation, prosecution and criminal proceedings; and other necessary measures.

In regard to this Agreement being carried out, there is an exception on the applicability. This Agreement cannot be carried out to arrest or detain a person in extradition; to transfer the convict to enforce sentence; or to transfer the criminal proceedings. This Agreement does not provide the right to one of the parties to carry out the jurisdiction and to execute the function that were owned exclusively by related institutions.

MALAYSIA

CRIMINAL LAW – DANGEROUS DRUGS ACT 1952 – BRINGING DANGEROUS DRUGS INTO MALAYSIA IN TRANSIT – RELEVANCE OF THE SINGLE CONVENTION ON NARCOTIC DRUGS 1961

JUDICIAL DECISIONS

Isidro Leonardo Quito Cruz v. PP, Federal Court [Criminal Appeal No: 05-75-2011(B). 9 January 2013]

The appellant, a Peruvian, was detained at the Kuala Lumpur International Airport on arrival from Buenos Aires *en route* to Phuket, with 790.6 grams of cocaine in his abdomen. The High Court found him guilty of drug trafficking pursuant to section 39B of the Dangerous Drugs Act 1952. The decision of the High Court was upheld by the Court of Appeal. Upon appeal to the Federal Court, the appellant submitted that he should be convicted under section 21(6) of the Dangerous Drugs Act 1952 in Part V of the said Act and not section 39B of the same Act; the said section states that any person who brings any dangerous drug into Malaysia in transit otherwise than in accordance with this section shall be guilty of an offence against this Act.

The Federal Court considered the rationale behind Part V of the Dangerous Drugs Act 1952 and the application of the United Nations Single Convention on Narcotic Drugs, 1961, which Malaysia ratified on 20 April 1978. The Federal Court held that Part V of the Dangerous Drugs Act 1952 was enacted specifically to give effect to the Single Convention on Narcotic Drugs 1961; the said Convention is an international treaty aimed at, *inter alia*, to “restrict the use of narcotic drugs to medical and scientific purposes and to prevent their diversion and abuse, while at the same time ensuring their availability for legitimate purposes.” The Federal Court went further to explain that the aim of Part V was to regulate and control the entry and exit of such dangerous drugs for legitimate purposes and as such has no application to this case. The Federal Court dismissed the appeal and confirmed the conviction and sentence.

VIETNAM

CRIMINAL LAW – LAW ENFORCEMENT – MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS – EXTRADITION

Treaty Between the Socialist Republic of Vietnam and the Republic of Indonesia Concerning Mutual Legal Assistance in Criminal Matters

On 27 June 2013, the Prosecutor General of the Supreme People’s Procuracy, Nguyen Hoa Binh, as the representative for the Socialist Republic of Vietnam and the Minister of the Ministry of Law and Human Rights, Amir Syamasuddin, as the representative for the Republic of Indonesia, signed the Treaty Between the Socialist Republic of Vietnam and the Republic of Indonesia Concerning Mutual Legal Assistance in Criminal Matters (the

“Treaty”). The Treaty consists of 25 articles regarding the content, the implementation of the mutual legal assistance, as well as other relevant provisions to guarantee the efficiency of the mutual legal assistance in the process of investigation, prosecution, adjudication or other adjudicative proceedings regarding any crime.²²

Over the years, the challenges for prosecutors and law enforcement authorities in every nation in combating crime are the issues of sovereignty, territorial borders and differences in legal systems between states. Criminal offenders are mobile and often seek to evade detection, arrest and punishment by operating across international borders. Such criminal offenders avoid being caught by taking advantage of international borders and playing on the frequent reluctance of law enforcement authorities to engage in complicated and expensive transnational investigations and prosecution. The struggle against transnational crime has been a catalyst for closer co-operation between states in criminal matters in the region.

Both Vietnam and Indonesia are members of the Association of South East Asian Nations (ASEAN) Treaty on Mutual Legal Assistance in Criminal Matters,²³ which has been designed in accordance with international instruments such as the United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC). It is expected that this bilateral Treaty will further improve and strengthen the cooperation in the subject matter between the competent authorities of the two states.

Legal assistance granted under this Treaty shall include:²⁴

- identifying persons or objects;
- examining objects and locations;
- service of documents, including the summons;
- providing information, documents, records, and evidence;
- providing the original version or the notarised copy of relevant documents, records, and evidence;
- providing objects, including the lending of evidence;

22 Treaty on Mutual Legal Assistance in Criminal Matters, Indon.-Viet., art. 1.1, June 27, 2013 [hereinafter MLAT].

23 Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 29, 2004, 2336 U.N.T.S. 271.

24 MLAT, *supra* note 22, art. 1.3.

- executing requests for search and seizure;
- taking evidence and obtaining statements of persons;
- locating the person in custody to the requesting party to provide evidence or assist the investigations, prosecution, adjudication or other adjudicative proceedings;
- facilitating the presence of the witness or the assistance of other persons in the process of investigation;
- searching, freezing, seizing, confiscating and returning the property, the proceeds of crime and the tools and means of crime;
- other assistance which is not prohibited by the laws of the requested party.

It should be noted, however, that the Treaty does not regulate some cases, including (i) arrest or detention of a person for the purpose of extradition; (ii) transfer of a person in custody for enforcement; and (iii) transfer of criminal adjudicative proceedings.²⁵

A request for legal assistance may be refused, if a competent authority of the respective state is of the opinion that:²⁶

- the execution of the request would prejudice the sovereignty, security, public order or other essential interests of the requested party;
- the request relates to a person who is officially stated to be innocent or granted amnesty;
- the request relates to the prosecution of a person who would be entitled to be discharged on the grounds of a previous acquittal or conviction;
- the requested party has reasonable ground to believe that the legal assistance is to prosecute a person for his race, religion, nationality, ethnic group, political opinion, or other reasons to believe that person would not be treated equally in the criminal proceedings;
- the requesting party does not guarantee that the legal assistance would not be used for other purposes except those

25 *Id.* art. 2.

26 *Id.* art. 5.1.

- specified in the request without the prior consent of the requested party;
- the requesting party does not guarantee that the evidence collected for the legal assistance request which is consistent with this Treaty would be returned;
 - the request relates to the investigation, prosecution or punishment of a person for an act, if it is committed in the territory of the requested party, does not constitute a crime pursuant to the law of the requested party, except the case when the requested party is still able to grant the legal assistance without compliance with the dual criminality if its laws allow to do so.
 - the request relates to an offence whose prescription is expired if the crime is committed in the authority of the requested party; and
 - the request relates to an offence that is regarded by the requested party as a military or political offence.

The successful conclusion of the Treaty has a remarkable meaning in the context of friendly relations and the continuous, comprehensive cooperation between Vietnam and Indonesia for over sixty years. The Treaty seeks to improve the effectiveness of rendering assistance by regularising and facilitating its procedures. It creates unambiguous and binding obligations and makes the mutual legal assistance process reliable and effective, as the provisions are tailored to the respective needs of the two states and can be customised to suit their respective needs.

Treaty Between the Socialist Republic of Vietnam and the Republic of Indonesia Concerning Extradition

On 27 June 2013, the Prosecutor General of the Supreme People's Procuracy, Nguyen Hoa Binh, as the representative for the Socialist Republic of Vietnam, and the Minister of the Ministry of Law and Human Rights, Amir Syamsuddin, as the representative for the Republic of Indonesia, signed the Treaty Between the Socialist Republic of Vietnam and the Republic of Indonesia Concerning Extradition. The Treaty includes 23 articles regarding the extradition as requested by either party to promote the cooperation of both nations in the progress of preventing and fighting

against crime based on the principle of respecting the other's sovereignty, equality and interests.

The crime to be extradited is the offence of which the custody period is at least ten years, or the offence which is more severe pursuant to the laws of both parties. The following are within the scope of extradition as prescribed in the Treaty: the preparation to commit a crime, incomplete commission of a crime, the planning, helping, inducing, guiding or organising for the commission of a crime, or the complicity to jointly commit a crime.²⁷

Extradition will be refused by either party if:²⁸

- the request relates to an offence that is regarded as a political offence;
- the requested party has the certain ground to believe that the extradition is made to prosecute or punish a person for his race, religion, nationality, ethnic group, political opinion or other reasons to believe that person would not be treated equally during the criminal proceedings;
- the request relates to an offence that is regarded as a military offence and is not within the applicable scope of common offense;
- the request relates to an offence whose prescription is expired or which is granted amnesty pursuant to the laws of the requesting party;
- the final judgment is effective regarding the person who is requested to be extradited for the crime which is within the scope for the extradition;
- pursuant to the laws of the requesting party, the offense which is requested for extradition condemns the death penalty, while pursuant to the laws of the requested party, that offense does not condemn the death penalty, except the requesting party commits that the death penalty condemned would not be executed.

This is the first treaty concerning extradition that Vietnam has ever concluded with an ASEAN country, which presents the determination and the

27 *Id.* art. 2.2.

28 *Id.* art. 3.1.

desire of both countries to promote the regional cooperation to prevent and fight against crimes, especially organised crimes.

Diplomatic and Consular

CHINA

RELATIONSHIP BETWEEN INTERNATIONAL LAW AND CHINESE LAW

Act on Administration of Tax Collection Revised

On June 29, 2013, the Third Session of the Standing Committee of the Twelfth National People's Congress revised the Act on Administration of Tax Collection of the People's Republic of China (Zhonghua Renmin Gongheguo Shuishou Zhengshou Guanli Fa). This is the second revision of this Act since its adoption in 1992. According to Article 91 of this revised Act, "[i]f there are different provisions between the treaties or agreements on tax collection concluded by the People's Republic of China with foreign States and this Act, the provisions in those treaties or agreements shall prevail."²⁹

Act on the Prevention and Control of Environmental Pollution by Solid Wastes Revised

On June 29, 2013, the Third Session of the Standing Committee of the Twelfth National People's Congress revised the Act on the Prevention and Control of Environmental Pollution by Solid Wastes of the People's Republic of China (Zhonghua Renmin Gongheguo Gutu FeiwuWuran Huanjing Fangzhi Fa). This is the second revision of this Act since its adoption in 1995. According to Article 90 of this revised Act, "[i]f there are different provisions between the treaties on prevention and control of environmental pollution by solid wastes concluded or participated by the People's Republic

29 Zhonghua Renmin Gongheguo Shuishou Zhengshou Guanli Fa (中华人民共和国税收征收管理法) [Tax Collection Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 2002, effective Oct. 15, 2002), art. 91.

of China and this Act, the provisions in those treaties shall prevail, unless otherwise reserved by the People's Republic of China by declaration."³⁰

Act on Animal Epidemic Prevention Revised

On June 29, 2013, the Third Session of the Standing Committee of the Twelfth National People's Congress revised the Act on Animal Epidemic Prevention of the People's Republic of China (Zhonghua Renmin Gongheguo Dongwu Fangyi Fa). This is the second revision of this Act since its adoption in 1997. According to Article 28 of this revised Act, "[t]he competent authorities of veterinarian under the State Council shall timely communicate the occurrence and process of great animal epidemic to relevant international organization or trading parties in accordance with the treaties or agreements concluded or participated by the People's Republic of China."³¹

Act on Trademark Revised

On August 30, 2013, the Fourth Session of the Standing Committee of the Twelfth National People's Congress revised the Act on Trade Mark of the People's Republic of China (Zhonghua Renmin Gongheguo Shangbiao Fa). This is the third revision of this Act since its adoption in 1982. According to Article 17 of this revised Act, "[t]he application for trademark registration from foreigners or foreign enterprises shall be dealt with in accordance with the international treaties concluded between their States and the People's Republic of China, or the principle of reciprocity."³²

30 Zhonghua Renmin Gongheguo Gutu FeiwuWuran Huanjing Fangzhi Fa (中华人民共和国固体废物污染环境防治法) [Law on the Prevention and Control of Environmental Pollution by Solid Wastes] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 30, 1995, effective Apr. 1, 1996), art. 90.

31 Zhonghua Renmin Gongheguo Dongwu Fangyi Fa (中华人民共和国动物防疫法) [Law on Animal Epidemic Prevention] (promulgated by the Standing Comm. Nat'l People's Cong., July 3, 1997, effective Jan. 1, 1998), art. 28.

32 Zhonghua Renmin Gongheguo Shangbiao Fa (中华人民共和国商标法) [Law on Trademark] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983), art. 17.

Act on Fishery Revised

On December 28, 2013, the Sixth Session of the Standing Committee of the Twelfth National People's Congress revised the Act on Fishery of the People's Republic of China (*Zhonghua Renmin Gongheguo Yuye Fa*). This is the fourth revision of this Act since its adoption in 1986. According to Article 8 of this revised Act:

Any foreigner, foreign fishing ships entering into the waters under the jurisdiction of the People's Republic of China must be approved by the relevant competent authorities of the State Council and observe this Act and other relevant acts and regulations of the People's Republic of China in order to carry out fishery product or fishery resource investigation activities; if treaties or agreements were concluded with the People's Republic of China, it shall be dealt with in accordance with such treaties or agreements.³³

Act on Customs Revised

On December 28, 2013, the Sixth Session of the Standing Committee of the Twelfth National People's Congress revised the Act on Customs of the People's Republic of China (*Zhonghua Renmin Gongheguo Haiguan Fa*). This is the third revision of this Act since its adoption in 1987. According to Article 56 of this revised Act:

Duty reduction or exemption shall be granted to the following import and export goods and inward and outward articles . . . (f) goods and articles specified as items subject to duty reduction or exemption by international treaties to which the People's Republic of China either a contracting party or an acceding party.³⁴

33 *Zhonghua Renmin Gongheguo Yuye Fa* (中华人民共和国渔业法) [Law on Fishery] (promulgated by the Standing Comm. Nat'l People's Cong., Jan. 20, 1986, effective July 1, 1986), art. 8.

34 *Zhonghua Renmin Gongheguo Haiguan Fa* (中华人民共和国海关法) [Law on Customs] (promulgated by the Standing Comm. Nat'l People's Cong., Jan. 22, 1987, effective July 1, 1987), art. 56.

RECOGNITION OF NEW STATES

Palestine

On July 23, 2013, a Chinese representative made a statement on the situation in the Middle East, including the Palestinian question at the UNSC. He stated:

China has consistently maintained that, through peace talks between Palestine and Israel, an independent State of Palestine can be established with complete sovereignty, based on the pre-1967 borders and with East Jerusalem as its capital, whereby the two States, Palestine and Israel, living side by side in peace and security, can facilitate peace and stability in the Middle East.³⁵

Kosovo

On March 22, 2013, a Chinese representative made a statement at the UNSC debate on Kosovo. He stated:

China has always maintained that Serbia's sovereignty and territorial integrity should be fully respected. Resolution 1244 (1999) is an important legal foundation for addressing the question of Kosovo. That task should be carried out within the framework of the relevant resolutions and through dialogue and negotiation between the parties concerned so as to reach a mutually acceptable solution.³⁶

Polar Regions – Arctic Council

On May 15, 2013, China was granted observer State status at the Ministerial Meeting of the Arctic Council in Kiruna, Sweden. A foreign ministry spokesperson made the following remarks:

35 U.N. SCOR, 68th Sess., 7007th mtg. at 28, U.N. Doc. S/PV.7007 (July 23, 2013).

36 *Statement by Ambassador Li Baodong at the Security Council Open Debate on Kosovo*, PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UN (Mar. 22, 2013), <http://www.china-un.org/eng/hyyfy/t1027483.htm>; see *Statement by Ambassador Wang Min at the Security Council Debate on Kosovo*, PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UN (June 14, 2013), <http://www.china-un.org/eng/hyyfy/t1056581.htm>; see also *Statement by Ambassador Liu Jieyi at the Security Council Debate on Kosovo*, PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UN (Aug. 29, 2013), <http://www.china-un.org/eng/hyyfy/t1073155.htm>.

China appreciates and welcomes the Arctic Council's decision of granting China the official observer status. China supports the Council's principles and purposes, recognizes Arctic countries' sovereignty, sovereign rights and jurisdiction in the Arctic region as well as their leading role in the Council and respects the values, interests, culture and tradition of the indigenous people and other people living in the Arctic region. The decision made by the Council will facilitate China's communication and cooperation with relevant parties on Arctic affairs within the framework of the Council, so as to make contribution to the work of the Council and promote peace, stability and sustainable development of the Arctic region.³⁷

Polar Regions – Antarctic Treaty

On April 12, 2013, China submitted the Initial Environmental Evaluation for the Construction of Inland Summer Camp, Princess Elizabeth Land, Antarctica to the Thirty-Sixth Antarctic Treaty Consultative Meeting-Sixteenth Committee on Environmental Protection Meeting in Brussels, Belgium. In this document, China stated:

Full references have been considered for the preparation of this IEE. These references include some international public laws such as the Antarctic Treaty System, the Convention on Biological Diversity, the Kyoto Protocol on Climate Change, the Protocol of the International Convention for the Prevention of Marine Pollution from Ships (MARPOL 73/78) and the Convention on the Dumping of Wastes at Sea, as well as China's relevant laws and regulations.

1.3.1 International laws, standards and guidelines

The Antarctic Treaty (1959) came into force in 1961. Its measures, resolutions and decisions and a series of conventions relevant to Antarctica have shaped up the Antarctic Treaty System. China acceded to the Antarctic Treaty in 1983 and obtained its consultative party status in 1985. China ratified the Protocol on Environmental Protection to the Antarctic Treaty in 1994. Compiling and submission of this IEE is an act of China to implement her obligations under the Protocol.

37 *Foreign Ministry Spokesperson Hong Lei's Remarks on China Being Accepted as an Observer of the Arctic Council*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (May 15, 2013), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1040943.shtml.

The international conventions such as the Convention on Biological Diversity (1993), the Kyoto Protocol on Climate Change (2005), the Protocol of the International Convention for the Prevention of Marine Pollution from Ships (MARPOL 73/78) and the Convention on the Dumping of Wastes at Sea (1975), to which China has become a contracting party, have established in different aspects the requirements for environmental protection and sustainable development and have become important bases for the development of the IEE for the construction and operation of the Chinese new summer camp.

The Council of Managers of National Antarctic Programmes (COMNAP) and the Scientific Committee on Antarctic Research (SCAR) are two international organizations involved in the Antarctic affairs. They have developed a series of relevant guidelines and documents regarding the activities in Antarctica. Among them, the draft IEE has made reference mainly to the Guidelines for Oil Spill Contingency Planning (COMNAP, 1992), the Environmental Monitoring Manual in Antarctic (COMNAP, 2000), the Technical Standards for Environmental Monitoring in Antarctica (COMNAP, 2000), the Practical Guidelines for the Development and Design of Environmental Monitoring Programs (COMNAP, 2005b) and the Guidelines for Environmental Impact Assessment in Antarctica (COMNAP/ATCM, 2005a), etc.

1.3.2 Domestic laws, standards and guidelines

The construction and operation of camp will enforce strictly relevant domestic environmental laws, standards as well as environmental guidelines such as PRC Law on Environmental Protection, PRC Law on Marine Environmental Protection, PRC Law on Environmental Impact Assessment, PRC Law on energy saving, PRC Law on Renewable Energy, National Scheme for Emergent Environmental Incident, Regulations Concerning Environmental Monitoring Management, PRC Standards on Surface Water Environmental Quality (GB3838-2002), Urban technology policy of sewage treatment and pollution control, Water Quality Standards for Using Regenerated Water for Urban Miscellaneous Uses (GB/T18920-2002), PRC Technical Guidelines for Environmental Impact Assessment-Principals, etc.

Chinese Arctic and Antarctic Administration (CAA) developed a series of measures and standards for the management of the operation of the camp in order to guarantee the safe and effective

operation of the camp. The measures and standards will minimize the risks in Antarctic expedition and environmental impacts.³⁸

INDONESIA

The Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Moldova on Visa Exemption for Holders of Diplomatic and Service Passports.

This Agreement has been signed in Chisinau on 10 December 2013 and was later ratified through Presidential Regulation No. 60 of 2014. The Agreement has been enacted for five years and could be extended as agreed upon by both parties.

The purpose of the Agreement is to enhance the bilateral relationship and cooperation between both parties. Both parties have agreed and readied upon their capability to enforce the Agreement on exempt visa obligation for people with diplomatic or service passport to enter either parties' territories. This Agreement shall be carried out based on the parties' national regulations to which the people with diplomatic and service passports are bound to obey. Bear in mind, this Agreement's validity period can be extended under the interest of both parties and can also be revised in future times.

Voluntary Partnership Agreement Between the Republic of Indonesia and the European Union on Forest Law Enforcement, Governance, and Trade in Timber Products into the European Union

This Agreement has been signed in Brussels on 3 September 2013. Both parties then ratified the Agreement through the Presidential Regulation No. 21 of 2014. Bear in mind that this Agreement must be extended no later than five years period unless one of the parties decides otherwise.

Through this Agreement, both parties have agreed to continue their cooperation in forestry. This Agreement aims to strengthen the parties' commitment to preserve forests and the like and also to provide a legal framework to ensure that all imported goods from Indonesia's forest to

38 CHINA, INITIAL ENVIRONMENTAL EVALUATION FOR THE CONSTRUCTION OF INLAND SUMMER CAMP, PRINCESS ELIZABETH LAND, ANTARCTICA 4 (XXXVI Antarctic Treaty Consultative Meeting Brussels 2013), http://www.ats.aq/documents/ATCM36/ip/ATCM36_ip021_e.doc.

the EU will be produced legally in order to boost timber trade between the parties. In addition, this Agreement was established to be a platform for both parties to conduct dialogs as a form of facilitating and boosting the timber trade in their effort to cooperate in forestry.

Joint Declaration of Intent Between the Ministry of Law and Human Rights of the Republic of Indonesia and the Federal Ministry of the Interior of the Federal Republic of Germany Concerning Cooperation on Immigration Matters

The Agreement between Indonesia and Germany was signed in Beijing on 11 April 2013. In regard to this Agreement, there was no ratification needed. This Agreement came into force on 11 April 2013.

As mandated on the Indonesia-Germany Joint Declaration for a Comprehensive Partnership, which is also known as the Jakarta Declaration, a bilateral cooperation between both parties is strongly needed. Referring to the Agreement, both parties have agreed upon the importance of immigration matters. Therefore, in order to attain a practical cooperation, both parties have agreed to cooperate in managing migration matters and supervising the territory border and to manage documents related to identification and course. In accordance to these duties, both parties must conduct a transparent system of information in order to ensure that the process is lawfully conducted.

Framework Agreement on Trade and Investment Between the Ministry of Trade of the Republic of Indonesia and the Ministry of National Planning and Economic Development of the Republic of the Union of Myanmar

The Framework between Indonesia and Turkey was signed in Nay Pyi Taw on 23 April 2013 and subsequently ratified through the Presidential Regulation No. 79 of 2015. The validity period of this Agreement will remain in effect until one or both parties decide otherwise.

Realising the importance of international trade and investment, both parties have agreed upon the fact that private investment in domestic scope or in foreign scope will embrace economic growth, open a lot of job opportunities, and expand trade and commerce. The Framework was established to boost the relationship and to enhance the competitiveness between both parties. The Framework shall promote international trading and the economic relationship between both parties. In regards to

this Agreement and its high expectation, both parties will maintain their rights and obligations during the enforcement of the Agreement and the Agreement shall be enforced according to the law.

Agreement Between the Government of the Republic of Indonesia and the Organisation for Economic Co-operation and Development (OECD) on the Establishment of the OECD Country Office in Indonesia

The Agreement between Indonesia and OECD was signed in Saint Petersburg on 5 September 2013 and ratified through the Presidential Regulation No. 174 of 2014. The Agreement also remains in effect until one or both parties decide to opt-out.

The establishment of OECD Branch in Indonesia is to strengthen the cooperation and the enforcement of its mandate. OECD's legal personality will allow them an access of authority to form a contract; OECD can open a bank account on behalf of the organisation and can be a party to legal proceedings. In regard to this, OECD has an immunity relating to its properties and assets; the representative office of OECD and its facilities; and OECD archives. All of these components remain immune to any legal procedures unless OECD decides to let go of its properties and assets. Besides immunity of its assets and properties, OECD may conduct its affairs in Indonesia and remain tax-free as long as the enforcement is conducted under the law.

The presence of the OECD Representative Office will mutually benefit both parties. As for Indonesia, it will enhance the competitiveness in trade and commerce, maintain a sustainable economic growth and provide a platform not only to Indonesia but to South East Asia as well.

KOREA

COURTS AND TRIBUNALS – MUNICIPAL / JURISDICTION – DIPLOMATIC PROTECTION – IMMUNITY FROM JURISDICTION - COMPENSATION

Decision of Seoul High Court Concerning Compensation for Japanese Forced Labor

Seoul High Court – Judgment for the obligation of compensation payment by a Japanese company to the victim of compulsory manpower draft dur-

ing the Japanese colonial era. Seoul Godeung beobwon [Seoul High Ct.], 2012Na44947, July 10, 2013 (S. Kor.).³⁹

Facts

Korean victims who were forced to work in Nippon Iron Manufacture requested compensation for the illegal acts of “Sinil Iron Casting,” the defendant. Sinil Iron Casting was formerly called Nippon Iron Manufacture (it has changed the company name) and has actively assisted the Japanese Government’s policy of compulsory manpower during the Japanese colonial era.

Legal Issues

This judgment is a follow-up on the Supreme Court decision on May 24, 2012, which covers the following legal issues. (1) Whether the activity of the Nippon Iron Manufacturing falls under the illegal acts against humanity which directly relates to the illegal colonization to Korea and the fulfillment of aggressive war; (2) whether the defendant can avoid responsibility under the argument of denying the same identity with formal Nippon Iron Manufacture or using decisions that was litigated in Japan by some of the plaintiffs, some portions of Japanese legislation, the Agreement on Reparation between Korea and Japan, statute of limitations, and so forth; (3) what is the standard for calculating the amount of compensation the defendant should pay.

Judgment

The Court held that the defendants must pay 100,000,000 KRW to the plaintiffs. In this regard, the defendant must pay it at a 20 percent annual interest from June 19, 2013 to the day it is completely repaid. Firstly, the Court decided on the argument on the extinguishment of the protected right qualification according to the Agreement on Reparation between Korea and Japan and the plaintiff’s assertion that it is against the effect of excluding further litigation.

39 This judgment is a follow-up of the Daebeobwon [S. Ct.], 2009Da68620, May 24, 2012 (S. Kor.) decision where the court denied the High Court’s decision on denying the defendant’s responsibility and remanded it, and follows and repeats the reasoning of the decision.

Agreement on Reparation is not a negotiation to claim compensation on Japan's colonization, but it is to solve the financial and civil claim obligation relationship between Korea and Japan according to the political agreement based on Article 4 of the San Francisco Treaty. The Korean and Japanese Government could not reach an agreement for the characteristic of the colonial ruling on the Korean peninsula as the economic corporation funds, which the Japanese Government paid to the Korean Government, have no legal compensational relation with the solution of right question in Article 2 according to Article 1 of the Agreement on Reparation. On the process of negotiating for the Agreement on Reparation, the Japanese Government did not admit its unlawfulness of the colonization and fundamentally denied the legal compensation for the damage by forceful labor. In this situation, it is difficult to see that a claim for damages for the unlawful act, that is like crimes against humanity and the unlawful act directly related to the colonization under Japan's national power do not come under the application target for Agreement on Reparation. Therefore, for the plaintiff's claim for damages, the individual's right of claim is not vitiated because of the Agreement on Reparation, and Korea's diplomatic protection right is not given up as well.

Viewing under the regulation of the Korean Constitution, Japan's ruling over Korea during the Japanese colonial era is not only an unlawful occupation from a normative perspective but also a legal relation caused by Japan's unlawful ruling, which is incompatible with the spirit of Korean Constitution, should no longer be effective. If so, the reason for the judgment made by Japan is in direct conflict with the essential values of the Korean Constitution, which views a forceful manpower draft as unlawful in which it was used for the fulfillment of aggressive war. The denial of justification for aggressive war and the accomplishing acts is the common value of the civilized countries in the world, including the Japanese Constitution. Nevertheless, the acceptance of the judgment made by Japan, where the reasons for the judgment is against such values, violates the fundamental moral principle that domestic law is maintained and preserved, even in consideration of the good custom and social order, a concept that contains internationality, as mentioned in the civil law above. Therefore, as the Japanese judgment on this case cannot be accepted and enforced in Korea, the defendant's argument, that on the assumption that the plaintiff's claim against the effect of excluding further litigation of the Japanese judgment on this case can be approved in Korea, is without reason.

Judging the following points by the previously mentioned legal principles, the denial of the defendants, who practically have the same legal status with the former Nippon Iron Manufacture, on the fulfillment of obligation to the plaintiffs with the contention on the expiration of the statute of limitations is unfair: after the former Nippon Japanese Iron Manufacture's unlawful act, until the diplomatic relations between Korean and Japan was established, it was severed until June 22, 1965. Thus, the plaintiffs above were not able to administer justice against the defendants; although the diplomatic relations between Korean and Japan was normalized in 1965, the individual's claim of right of Korean nationals against Japan or Japanese nationals would be comprehensibly solved because the Agreement on Reparation is widely accepted in Korea; Japan has enacted property measure law as a follow-up measure of Agreement on Reparation to domestically extinguish the plaintiff's right of claim and the Agreement on Reparation and the property measure law was stated as an additional reason to dismiss the plaintiff's claim on the litigation in Japan; and the plaintiff's individual right of claim, especially a claim for damages on unlawful act against humanity where Japanese Government power is involved in or the unlawful act that is directly related to colonization is not extinguished from Agreement on Reparation stood out during that late 1990s, when the victims of the compulsory labor filed the suit. Therefore, this must not be allowed as it abuses rights, which is against the doctrine of good faith.

Based on this point of argument, the Court decided the scope of compensation for the unlawful acts committed by Nippon Iron Manufacture.

The Court will consider the defendant's attitude, who denies the responsibility for more than fifty years after the unlawful act despite the degree of damages that the plaintiff received as a result of the degree of the unlawfulness of the act of violation and its intentionality, and the changes in income level of the citizen or currency value due to the passing of years after the time of the unlawful act to the time of defense termination. Accordingly, the compensation liabilities from the loss incurred by delay in consideration of the difference in currency value between the time of the unlawful act and the time of defense termination exceptionally starts from the day of the defense termination, which is the base period for compensation assessment. Therefore, the compensation amount the defendant should pay is more than 100,000,000 KRW, despite the situation that there was a long-term delay from the time

of the unlawful act to the time of defense termination, and the loss incurred by the delay is not counted at all.

To sum up, the Court rendered a decision that Nippon Iron Manufacture, during the Japanese colonial era, must pay damages because its forceful manpower draft without paying wages was an unlawful act to the Korean laborers.

Decision of the Supreme Court Concerning Compensation for Japanese Forced Labor [ii] – Busan High Court – Judgment for the obligation of compensation payment by Mitsubishi to the victims of compulsory manpower draft under the Japanese colonial era. Busan Godeung beobwon [Busan High Ct.], 2012NA4497, July 20, 2013 (S. Kor.).

Facts

Korean victims, who were forced to work in the Mitsubishi Machinery factory and shipbuilding yard, requested compensation for the unlawful acts from “Mitsubishi Heavy Industry Corporation,” which was formally Shin Mitsubishi Heavy Industry Corporation, which actively assisted the Japanese Government’s policy of compulsory manpower during the Japanese colonial era.

Legal Issues & Judgment

This case has similar legal issues to the 2012Na44947 judgment decided on July 10, 2013, and as it was judged on the same legal principle, the detailed information is omitted.

Dispute Settlement

CHINA

DISPUTE SETTLEMENT

On October 10, 2013, a Chinese representative made a statement on the rule of law at the national and international levels at the 68th Session of the UNGA:

The Chinese delegation believes that the decision to resort to arbitrary or judicial institutions to settle international disputes should

be based on the principles of international rule of law and premised on equality and free will of states concerned. Any action to willfully refer disputes to arbitrary or judicial institutions in defiance of the will of the states concerned or provisions of international treaties constitutes a violation of the principles of international rule of law and is thus unacceptable to the Chinese government.⁴⁰

Environmental Law

INDIA

CONSERVATION OF ASIATIC LION IN INDIA – NATIONAL AND INTERNATIONAL LAW ON ENDANGERED SPECIES – ANTHROPOCENTRIC AND ECO-CENTRIC APPROACHES – OBLIGATIONS UNDER CONVENTION ON INTERNATIONALLY ENDANGERED SPECIES (CITES) AND CONVENTION ON BIOLOGICAL DIVERSITY

Centre for Environment Law, WWF-I v. Union of India & Others [Supreme Court of India, 15 April 2013 <http://JUDIS.NIC.IN>]

Facts

The Court was called upon to decide the necessity of a second home for the Asiatic lion (*Panthera leo persica*), an endangered species, for its long term survival and to protect the species from extinction. The Court noted that the issue was “[r]ooted on eco-centrism, which supports the protection of all wildlife forms, not just those which are of instrumental value to humans but those which have intrinsic worth.” After considerable research at Gir Forest in the State of Gujarat since 1986, Ministry of Environment and Forests (MOEF) had come to the conclusion that for the long term conservation of Asiatic lions at Gir, the only habitat in the world for the lions, a second home for them was required. MOEF took the help of several specialized institutions and experts to decide on this issue. Field surveys of the potential sites were conducted during the winter as well as the summer

40 *Statement by H.E. Ambassador Wang Min on the Rule of Law at the National and International Levels at the 68th Session of the UN General Assembly, PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE UN (Oct. 10, 2013), <http://www.china-un.org/eng/hyyfy/t1087084.htm>.*

to assess water availability and the human impact on the habitat during the seasons.⁴¹ Also, the extent of the forest area in and adjoining the chosen protected areas was ascertained with the aim of establishing the contiguity of the forested habitat. As noted by the Court:

Attempts were also made to establish the relative abundance of wild ungulate prey in the three sites based on direct sightings as well as on indirect evidence. An assessment of the impact on the people and their livestock on habitat quality in all three sites was also made. Of the three sites surveyed, Kuno Wildlife Sanctuary (for short 'Kuno')⁴² was found to be the most suitable site for reintroduction in establishing a free ranging population of Asiatic lions.

These attempts entailed the “diversion of 3720.9 hectare[s] of forest land for rehabilitation of 18 villages located inside the Kuno, subject to fulfillment of certain conditions.” The State of Gujarat, where these lions were located in the Gir sanctuary, had several objections to this proposal. Gujarat pointed out several environmentally unsustainable issues with regard to the implementation of this project, such as climatic conditions, prey density and several others. The Court, after hearing these objections by Gujarat, asked the National Board for Wildlife (NBWL) to consider the veracity of these objections. After conducting a detailed study, the NBWL supported the idea of a second home for the Asiatic lions of the Gir forest. The Court had to decide the contentions raised by the State of Gujarat against this Asiatic lion translocation project while the State of Madhya Pradesh was ready to host the lions in Kuno. The Court was requested to issue a writ of mandamus directing translocation of Asiatic lion from Gir to Kuno.

Summary of the Judgment

The Court first dealt with the constitutional and legal framework of India to examine the various issues that were before it. It noted that the Indian Parliament had passed The Wild Life (Protection) Act 1972 “to provide for

41 “Three alternative sites for re-introduction of Asiatic lions were suggested for an intensive survey . . . : 1. Darrah-Jawaharsagar Wildlife Sanctuary (Rajasthan); 2. Sitamata Wildlife Sanctuary (Rajasthan); 3. Kuno Wildlife Sanctuary (Madhya Pradesh).”

42 This is located in the Central Indian State of Madhya Pradesh.

the protection of wild animals and birds with a view to ensuring the ecological and environmental security of the country.” The Court also noted:

The Parliament vide Constitution (42nd Amendment) Act, 1976 inserted Article 48A w.e.f. 03.01.1977 in Part IV of the Constitution placing responsibility on the State “*to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.*” Article 51A was also introduced in Part IVA by the above-mentioned amendment stating that “*it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.*”⁴³ [emphasis added]

The Court further noted:

This Court in *Sansar Chand v. State of Rajasthan*, (2010) 10 SCC 604 held that all efforts must be made to implement the spirit and provisions of the Wild Life (Protection) Act, 1972; the provisions of which are salutary and are necessary to be implemented to maintain ecological chain and balance. The Stockholm Declaration, the Declaration of United Nations, Conventions on Human Environment signed in the year 1972, to which India is the signatory, have laid down the foundation of sustainable development and urged the nations to work together for the protection of the environment. Conventions on Biological Diversity, signed in the year 1992 at Rio Summit, recognized for the first time in International Law that the conservation of biological diversity is “a common concern of human kind” and is an integral part of the development process. The Parliament enacted the Biological Diversity Act in the year 2002 followed by the National Biodiversity Rules in the year 2004. The main objective of the Act is the conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

43 “The Parliament later vide Act 16 of 2003 inserted Section 5A w.e.f. 22.09.2003 authorizing the Central Government to constitute the National Board for Wild Life (in short ‘NBWL’). NBWL is, therefore, the top most scientific body established to frame policies and advise the Central and State Governments on the ways and means of promoting wild life conservation and to review the progress in the field of wild life conservation in the country and suggesting measures for improvement thereto. The Central and the State Governments cannot brush aside its opinion without any cogent or acceptable reasons. The Legislature, in its wisdom, has conferred a duty on NBWL to provide conservation and development of wild life and forests.”

Bio-diversity and biological diversity includes all the organisms found on our planet i.e. plants, animals and micro-organisms, the genes they contain and the different eco-systems of which they form a part. The rapid deterioration of the ecology due to human interference is aiding the rapid disappearance of several wild animal species. Poaching and the wildlife trade, habitat loss, human-animal conflict, epidemic etc. are also some of the reasons which threaten and endanger some of the species.

The Court also noted:

India is known for its rich heritage of biological diversity and has so far documented over 91,200 species of animals. In India's biographic regions, 45,500 species of plants are documented as per IUCN Red List 2008. India has many critically threatened animal species. IUCN has noticed today the only living representative of lions once found throughout much of south-west Asia occurred in India's Gir forest which has been noticed as a critically endangered species in IUCN Red List. The IUCN adopted a resolution of 1963 by which a multi-lateral treaty was drafted as the Washington Convention also known as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973. CITES entered into force on 1st July, 1975, which aims to ensure that international trade in specimens of wild animals and plants does not threaten the survival of the species in the wild, and it accords varying degrees of protection to more than 33,000 species of animals and plants. Appendix 1 of CITES refers to 1200 species which are threatened with extinction. Asiatic lion is listed in Appendix 1 recognizing that species is threatened with extinction.

The Court asserted that:

[F]or achieving the objectives of various conventions including Convention on Biological Diversity (CBD) and also for proper implementation of IUCN, CITES etc., and the provisions of the Wild Life (Protection) Act, Bio-diversity Act, Forest Conservation Act etc. in the light of Articles 48A and 51A(g), the Government of India has laid down various policies and action plans such as the National Forest Policy (NFP) 1988, National Environment Policy (NEP) 2006, National Bio-diversity Action Plan (NBAP) 2008, National Action Plan on Climate Change (NAPCC) 2008 and the integrated development of wild life habitats and centrally sponsored

scheme framed in the year 2009 and integrated development of National Wild-life Action Plan (NWAP) 2002-2016.⁴⁴

Referring to anthropocentric and eco-centric approaches, the Court noted the efforts at the international level to rebuild certain principles relating to Sustainable Development.⁴⁵ It further elaborated:

Sustainable development, it has been argued by various eminent environmentalists, clearly postulates an anthropocentric bias, least concerned with the rights of other species which live on this earth. Anthropocentrism is always human interest focused thinking that non-human has only instrumental value to humans, in other words, humans take precedence and human responsibilities to non-human are based on benefits to humans. Ecocentrism is nature-centred, where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. Ecocentrism is, therefore, life-centred, nature-centred where nature includes both humans and non-humans . . . We re-iterate that while examining the necessity of a second home for the Asiatic lions, our approach should be eco-centric and not anthropocentric and we must apply the “species best interest standard”, that is the best interest of the Asiatic lions. We must focus our attention to safeguard the interest of species, as species has equal rights to exist on this earth. Asiatic Lion has become critically endangered because of human intervention. The specie originally existed in North Africa and South-West Asia formerly

44 The Court noted that “India has a network of 99 national parks, 515 wildlife sanctuaries, 43 conservation reserves and 4 community reserves in different biogeographic zones. Many important habitats still exist outside those areas, which requires special attention from the point of view of conservation. The Centrally Sponsored Scheme also specifically refers to the recovery programmes for saving critically endangered species and habitats. Due to a variety of reasons, several species and their habitats have become critically endangered. The Snow Leopard, Great Indian Bustard, Kashmir Stag, Gangetic Dolphin, Nilgiri Tahr, Malabar Civet, marine turtles, etc. are few examples.”

45 The Court noted the definition of ‘sustainable development’ as defined by The United Nations Commission on Environment and Development: “Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” (World Commission on Economic Development [WCED], 1987).

stretched across the coastal forests of northern Africa and from northern Greece across south-west Asia to eastern India. Today the only living representatives of the lions once found throughout much of South-West Asia occur in India's Gir Forest. Asiatic lion currently exists as a single sub-population and is thus vulnerable to extinction from unpredictable events, such as an epidemic or large forest fire etc. and we are committed to safeguard this endangered species because this species has a right to live on this earth, just like human beings.⁴⁶

Decision

The Court noted that as human beings, we had “a duty to prevent the species from going extinct and had to advocate for an effective species protection regimes.” The Court referred to the research work of the wildlife biologists of WII on Gir Forests where they “noticed the necessity for long term conservation of Asiatic lion in Gir and also highlighted the necessity of a second natural habitat for its long term conservation.” The Court pointed out that “[s]everal migratory birds, mammals, and animals in wild cross national and international borders created by man and every nation had a duty and obligation to ensure their protection.” The Court asserted that “no nation or organisation could claim ownership or possession over them” and stated that:

[T]he Convention on the conservation of migratory species of wild animals held at Bonn, 1979, supports this principle and the con-

46 The Court referring to ‘public trust’ doctrine as enunciated by it earlier, noted, “Article 21 of the Constitution of India protects not only the human rights but also casts an obligation on human beings to protect and preserve a species becoming extinct, conservation and protection of environment is an inseparable part of right to life. In *M. C. Mehta v. Kamal Nath and Others*, (1997) 1 SCC 388 (India), this Court enunciated the doctrine of “public trust”, the thrust of that theory is that certain common properties such as rivers, seashores, forests and the air are held by the Government in trusteeship for the free and unimpeded use of the general public. The resources like air, sea, waters and the forests have such great importance to the people as a whole, that it would be totally unjustified to make them a subject of private ownership. The State, as a custodian of the natural resources, has a duty to maintain them not merely for the benefit of the public, but for the best interest of flora and fauna, wildlife and so on. The doctrine of ‘public trust’ has to be addressed in that perspective.”

vention recognises that wild animals in their innumerable forms are irreplaceable part of the earth; natural system and must be conserved for the good of the mankind. It has recognised that the states are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries. Convention highlights that conservation and effective management of migratory species of wild animals require the concerted action of all states within the national jurisdictional boundaries of which such species spend any part of their life cycle. India is also a signatory to that convention.

The Court held:

MoEF's decision for re-introduction of Asiatic lion from Gir to Kuno was that of utmost importance so as to preserve the Asiatic lion, an endangered species which could not be delayed. Reintroduction of Asiatic lion, needless to say, the Court concluded, should be in accordance with the guidelines issued by IUCN and with the active participation of experts in the field of re-introduction of endangered species.

**NORMS RELATING TO SITING OF A NUCLEAR POWER PLANT –
SAFETY MEASURES TO OPERATE A NUCLEAR POWER PLANT –
NATIONAL AND INTERNATIONAL LEGAL REGIMES RELATING TO
NUCLEAR LIABILITY ISSUES – BALANCING THE BASIC PRINCIPLES
RELATING TO ENVIRONMENT AND DEVELOPMENT**

***G. Sundarrajan v. Union of India & Others* [Supreme Court of India, 6 May 2013 <http://JUDIS.NIC.IN>]**

Facts

Appellants challenged the setting up of a nuclear power plant (NPP) at Kudankulam in the State of Tamil Nadu adjacent to a sea coast. This plant was being set up by India with the technological cooperation from Russia under an Indo-Russian agreement. The Court dealt with a host of issues, such as the safety and security of the NPP, obligations to international conventions and treaties, management and transportation of nuclear fuels, civil liabilities, and impact of radiation on the eco-system. The Court was requested to examine the extent of safeguards taken on the basis of recommendations made by the Task Force of the Government of India. Appellants argued that any lack of such safety measures in implementing

the project would affect their fundamental right to life under Article 21 of the Indian Constitution.

Appellants contended that “sufficient safeguards ha[d] not been taken for the safe disposal of the radioactive waste and no site had so far been identified for the safe handling of radioactive waste, failing which it might cause serious health hazard.” Appellants also pointed out that “even, at the plant site, there [was] no proper facility for storage of spent fuel and high level radioactive waste.” Appellants also argued that there were no adequate measures “to safeguard the life and property of the people in case of any potential disaster, in accordance with the Disaster Management Plan.”

The Government of India, however, denied the Appellants’ allegations and asserted that the design of the NPP “incorporate[d] advance safety features complying with current standards of redundancy, reliability, independence and prevention of common cause failures in its safety system.” The design, the Government of India argued, had provisions for withstanding external events like earthquake, tsunami/storm, tidal waves, cyclones, shock waves, aircraft impact on main buildings and fire.” The design also incorporated “various additional safety features like Quick Boron Injection System, Passive Heat Removal System, Second Stage Hydro Accumulators, Passive Hydrogen Re-combiners, Annulus Passive Filtering System (Passive System) and Core Catcher.”

Summary of the Judgment

The Court outlined the existing Indian legal framework relating to atomic energy. It examined the context and the salient features of the Atomic Energy Act, 1948. Subsequently, the Court noted, this enactment was repealed to pave the way for much more inclusive Atomic Energy Act, 1962. This enactment, the Court noted, had the ‘welfare’ of the people as one of the basic tenets. The Court also referred extensively to the existing energy mix relating to power generation, noting that the atomic energy provided for about three percent of the entire energy production in India.

The Court also noted that “due to growing nuclear accidents and the resultant ecological and other dangers, many countries had started retreating from their forward nuclear programmes.” However, the Court indicated that “these issues [were] to be addressed to policy makers, not to courts because the destiny of a nation was shaped by the people’s representatives and not by a handful of judges, unless there [wa]s an attempt to tamper

with the fundamental Constitutional principles or basic structure of the Constitution.” However, the Court asserted that it was:

deeply concerned with the safety and security of the people of this country, its environment, its flora and fauna, its marine life, ecology, bio-diversity and so on which the policy makers cannot be on the guise of national policy, mutilate or rob of, in such an event the courts can unveil the mask and find out the truth for the safety, security and welfare of the people and the mother earth.

The Court noted that various codes and safety standards issued by the watch-dog body, namely, Atomic Energy Regulatory Board (AERB), “mainly deal with siting, design, construction, operation, quality assurance, decommissioning etc.” and that “[s]afety codes and safety standards were formulated on the basis of nationally and internationally accepted safety criteria for design, construction and operation of specific equipment, systems, structures and components of nuclear and radiation facilities.” The Court also noted that India had entered into various bilateral treaties and was also a party to various international conventions on nuclear safety, physical protection of nuclear material, nuclear accident, radiological emergency and so on. India, the Court further noted, was also governed by the safety and security standards laid down by International Atomic Energy Agency (IAEA).

The Court briefly surveyed the bilateral and multilateral treaties to which India was or was not a party such as, for example, the Nuclear Non-Proliferation Treaty (NPT) to which India was not a party and The Convention on the Physical Protection of Nuclear Material, which was adopted in 1979 to which India was a party. The Court noted that these treaties made it “legally binding for States parties to protect nuclear facilities and material for peaceful domestic use, storage as well as transport.” The survey done by the Court could be briefly summarized as follows:

The Convention on the Physical Protection of Nuclear Material ... provides expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences of sabotage and prevent and combat related offences.

The Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency was adopted by the General Conference at its special session 24-26.9.1986 and was opened for signature at Vienna on 26.9.1986 and at New York on 6.10.1986.

The Convention on Nuclear Safety was adopted on 17.6.1994 by a Diplomatic Conference convened by IAEA at its Headquarters from 14-17.6.1994. The Convention was opened for signature on 20.9.1994.

The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, the first legal instrument to directly address these issues on a global scale, was opened for signature on 29.9.1997 and entered into force on 8.6.2001.

The Convention on Early Notification of a Nuclear Accident establishes a notification system for nuclear accidents which have the potential for international trans-boundary release that could be of radiological safety significance for another State. Date of adoption is 26.9.1986.

India has also entered into various Bilateral Civil Nuclear Co-operations. India has entered into a cooperation agreement with France for the construction of ERR Power Plants (10,000 MWe) at Jethapur site in Maharashtra, which also comprises of cooperation in the areas of research, safety and security, waste management, education etc., followed by various other commercial contracts as well. India and Canada have finalized the terms for their nuclear deal paving the way for Canadian firms to export Uranium to India in the year 2010. Discussions are on for safe nuclear cooperation as well with Canada.

India has also signed civil nuclear deal with Mongolia for supply of uranium to India. MOUs on the Development of Cooperation on Peaceful Uses of Radioactive Minerals and Nuclear Energy by senior officials of the Department of Atomic Energy of both the countries. India has also entered into agreements with Namibia including one on civil nuclear energy which allows for supply of uranium from Namibia. India-Namibian Agreement for Peaceful Uses of Nuclear Energy allows for supply of uranium for setting up of nuclear reactors. India-Kazakhstan have also signed a pact on nuclear cooperation in April 2011 and agreed to have collaboration in nuclear energy for peaceful purposes. Discussions are on to execute a civil nuclear agreement with Argentina.

India-U.S. issued an Inter U.S. Joint Statement at Washington on 18.7.2005 which has located the final broad policy so as to actually facilitate and also outline the broad contours of a legally binding agreement. Some of the policy frameworks relate to preventing WMD Proliferation, goals of prompting nuclear power and achieving nuclear energy, expeditious consideration of fuel steps for safeguarded nuclear reactors etc. Nuclear 2007 – an agreement

for co-operation between India and U.S. concerning peaceful uses of nuclear energy (2007 Co-operation Agreement) laid down certain binding obligations between the two countries. Though, India is not a party to any of the Liability Conventions, specifically, IAEA Vienna Convention on Civil Liability for Nuclear Damage, India has enacted the Civil Liability for Nuclear Damage Act, 2010 (Nuclear Liability Act) which aims to provide a civil liability for nuclear damage and prompt compensation to the victims of a nuclear accident through No-Fault Liability to the operators.⁴⁷

Referring to the IAEA, the Court noted that:

India is in partnership with the IAEA and has incorporated many of its directives in the code of practice framed by the AERB, hence there could be no compromise on safety and security of the NPPs in the country. We have elaborately discussed the Safety and Security Code of Practices laid down by AERB, IAEA and its supports so as to allay the apprehension or fears expressed from various quarters on the safety and security of KKNPP and its effect on human life, property and environment and we notice that adequate and effective protection measures are in place.

The Court, referring to the implementation issues of some of these guidelines, noted that:

Various Codes of Practice, safety guidelines, extensively discussed above and the decision taken in various international conventions and the guidelines laid down by various international agencies followed by India are meant to protect the life and property of people including the environment, guaranteed under Article 21 of the Constitution of India.

Besides these safety guidelines, the Court also turned to “the problem of potential damage, which might flow from a nuclear catastrophe.” It also noted the legislations on civil and criminal liability adopted by several nuclear energy generating countries, such as “[t]he U.S. Price-Anderson Act, 1957, the German Atomic Energy Act, 1959, the Swiss Federal Law on the Exploitation of Nuclear Energy for Peaceful Purposes and Protec-

47 The Court also elaborately referred to the structure and function of the IAEA, noting that it had the responsibility to help member States to put in place the necessary infrastructure needed to develop nuclear energy safely, securely and peacefully and that it worked with member States to coordinate research to design reactors that were economical, safe and proliferation-resistant.

tion from Radiation, 1959 and the Japanese Law on the Compensation of Nuclear Damage, 1961.” The Court noted that these legislative endeavors by these countries “followed the basic principle of imposing legal liability on a strict liability basis on the operator of a nuclear installation coupled with the limitation on liability.” The Court also referred to two of the existing international conventions on this issue and its implementation in the context of India. It, *inter alia*, stated,

Currently, there are two main conventions on third-party liability in the field of nuclear energy. The first is the Paris Convention of 1960, which was supplemented by the Brussels Supplementary Convention Act, 1963. IAEA’s Vienna Convention on Civil Liability for Nuclear Damage, 1963 is yet another convention. India’s Civil Liability for Nuclear Damage Act, 2010 or the Nuclear Liability Act mainly rests on the above Conventions, though India is not a signatory to those conventions. India’s Nuclear Liability Act aims to provide a civil liability for nuclear damage and prompt compensation to victims of a nuclear incident through a No Fault Liability to the operator, appointment of Claims Commissioner, establishment of Nuclear Damage Claims Commission, Nuclear Liability Fund and other matters connected therewith.⁴⁸

The Court briefly surveyed the Indian liability regime as embodied in various cases decided by it in the last two decades.⁴⁹ Despite this juris-

48 While on this, the Court also noted, “The constitutional validity of the said Act is under challenge before this Court in Writ Petition (Civil) No. 464 of 2011. Various prayers have been made in the above mentioned writ petition, but this Court issued the notice only with regard to the prayer clause no. (e), i.e. to declare the act as unconstitutional and void *ab initio*.” The court also noted that the India’s Nuclear Liability Act sought to limit the liability of the operator to the tune of Rs.1500 crores and the maximum liability to rupee equivalent of 300 millions SDR’s, though the Act, spoke of no fault liability. The Court also felt it to be unnecessary to examine the scope of various provisions contained in the Act as the constitutional validity of the Act was under challenge before it.

49 The Court began with the constitutional validity of the U.S. Price-Anderson Act 1957 which was challenged in the year 1978 before the U.S. Supreme Court in *Duke Power Co. v. Carolina Envntl. Study Grp.*, 438 U.S. 59 (1978). It was urged before the U.S. Supreme Court that the Act did not ensure adequate compensation for victims of accidents and it violated Equal Protection Clause of the 14th Amendment by treating the nuclear accidents differently from other accidents etc. The U.S.

prudence on liability, the Court referred to the limitations that exist and particularly referred to the 1984 Bhopal Union Carbide incident⁵⁰ as to how it shaped the Indian approach to liability claims. Considering these complexities of India's population density and the national policy for setting up of various NPPs, safety and security of the plants, the Court noted,

Supreme Court upheld the validity of the Act holding that it was lawful, in that there was adequate justification for treating nuclear accidents different to other claims; that Act provides a reasonably just substitute for the common law or state tort law remedies it replaces and that it cannot be said that the Act encouraged irresponsibility in the matter of safety and environmental protection. Having examined this U.S Supreme Court case, the Court went on to outline the cases decided by itself. It noted that the Strict Liability Principle had been examined in the environmental point of view in several judgments. In *M. C. Mehta v. Union of India*, AIR 1987 SC 1086 (India), (Oleum Gas Leakage case), it had been held that the industries which were engaged in hazardous or inherently dangerous activity, possess serious threat to health and safety of persons and had an absolute and non-delegable duty to ensure that no harm was caused to the life and safety of the people. In *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212 (India), the Court had held that once the activity carried on in hazardous or inherently dangerous, the person carrying on such activity was liable to make good losses caused to any other person by his activity, irrespective of the fact that he took reasonable care while carrying on his activity. In *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647 (India), the Court had held that once the activity carried on is hazardous or potential hazardous, the person carrying on such activity was liable to make good the loss caused to any other person by his activity, irrespective of the fact that he took reasonable care. The absolute liability extended not only to compensate the victims of pollution, but also the cost of restoring environmental degradation. In *Vellore Citizens Welfare Forum*, the Court reiterated the "polluter pays principles."

- 50 The Court in *Union Carbide Corp. v. Union of India*, (1989) 2 SCC 540 (India), based on an earlier settlement, directed the Union Carbide to pay US \$ 470 million to the Union of India in full and final settlement of all claims, rights and liabilities related to and arising out of Bhopal Gas Tragedy. Following that, it was ordered that all civil proceedings arising out of Bhopal Gas Disaster, shall stand concluded in terms of the settlement and all criminal proceedings related to and arising out of the disaster shall stand quashed, wherever they were pending. Later, this Court modified that order upholding the settlement except the condition of quashing criminal charges in *Union Carbide Corp, v. Union of India*, AIR 1992 SC 248 (India).

were of extreme importance; lest, it continued, “a nuclear accident can cause immense damage both in terms of human life as well as environment destruction.” The Court also asserted that provisions would have to be made for remedying or compensating environmental damages caused by the accidents, without merely limiting it to personal injuries and damages to property.

The Court noted that the problem was to strike a balance between the benefits of rising standard of living and its costs in terms of deteriorations of the physical environment and the quality of life. In this context referring to 1972 United Nations Conference on Human Environment at Stockholm (Stockholm Conference) and other subsequent international conventions on environment, the Court, in fact, did a survey of range of these conventions and it is briefly noted:

Stockholm Conference not only brought into focus the human rights approach to the problem of environmental protection but also recognized the linkage between the development and environment from which the concept of “sustainable development” has emerged The responsibility of the people to protect and improve the environment for the present and the future generations was also recognized. Later the Nairobi Conference and Declaration 1982 re-stated the principles of Stockholm Conference and high-lighted the importance of intensifying the efforts at the global, regional and national levels to protect and improve environment. The United Nations General Assembly (UNGA) in October 1982 adopted “The World Charter for Nature” and laid down general principles of environmental protection, action plan and implementation of scheme which high-lighted the conservation principles. New Delhi hosted the Delhi International Conference on Environmental Education 1982 where the International Community called for massive programme of environmental research and monitoring. The Conference suggested that environmental education should start from childhood and it should be both formal and informal.

The United Nations General Assembly vide Resolution 38/161, in the year 1983 suggested the creation of “The World Commission on Environment and Development” for suggesting and recommending legal principles based on Stockholm Conference and Nairobi Conference and many other, then existing International Conventions and General Assembly Resolutions. The World Commission submitted its report in year 1987 which indicated that politicians, industrial leaders and environmental groups around the world had endorsed “sustainable development” i.e. meeting the

needs of the present without compromising the ability of future generations to meet their own needs. United Nations convened a conference in the year 1983 at Vienna for protection of Ozone layer which provided foundation for global multilateral undertakings to protect the environment and public health from the potential adverse effects of depletion of Stratospheric Ozone.

United Nations Environmental Programme (UNEP) convened a Conference at Plenipotentiaries in Montreal in the year 1987, called the Montreal Protocol 1987, which highlighted the necessity of limiting and reducing the use of chlorofluoro carbons and other chemicals that deplete ozone. India has acceded to both the Vienna Convention 1985 and the related Montreal Protocol, 1987, in the year 1992.

Following the Stockholm Conference the second landmark on environmental protection and development was “United Nations Conference on Environment and Development (UNCED), 1992 (Rio Summit) . . . Rio declaration sets out general non-binding commands for “sustainable development” i.e. “human beings who are at the centre of sustainable development concerns have to exercise their right to healthy and productive life in harmony with nature.” The Rio Conference also high-lighted the principle of inter generational equity. Principles like “precautionary principle” so as to prevent the environmental degradation and the principle of “polluter pays” i.e. to bear the cost of pollution with due regard to public interest” were high-lighted. The Conference resulted in conclusion of a treaty on climate change with a general recognition of the importance of curbing emission of green house gases, another treaty on bio-diversity aiming at the preservation of flora and fauna was also concluded. The Rio Conference also adopted Agenda 21. Section II of that Agenda deals with topics like protection of the atmosphere, land resources, deforestation, sustainable agriculture and rural development, conservation of biodiversity, protection of oceans, fresh water, toxic chemicals management, hazardous waste management, solid waste management and radioactive waste management.

An international instrument expressing international concern for the protection of global environment was the convention on the Climate Change (UNFCCC) 1992. The Convention high-lighted the necessity to reduce emissions of green-house gases believed to be contributing to global warming. Yet another, convention was The Biodiversity Convention, 1992 which sought to ensure that animals, plants and micro-organisms as well as genetic variety and ecosystem, water, land and air, in which they live are property

protected. It obligates the countries to promote the protection of ecosystems, natural habitat and the maintenance of viable populations of species in natural surroundings. Following the Rio Summit a Special Session of UNFA held in June 1997 in New York to review the progress of Rio Earth Summit called "Earth Summit+5" which adopted a comprehensive document titled "Programme For Further Implementation of Agenda 21." The Conference noticed that since the Rio Conference, global environment had continued to deteriorate with rising level of polluting emissions, notably of green house gases, toxic substances and waste volumes and at operational levels, including the lowest administrative levels.

UN Millennium Declaration, 2000 articulated that prudence must be shown in the management of all living species and natural resources, based on the principle of "sustainable development" and that only then, can the immeasurable riches provided to us by the nature be preserved for posterity. Further it was declared that current unsustainable pattern of production and consumption must be changed in the interest of our future welfare and that of our descendants.

United Nations General Assembly (UNGA) following the Rio Declaration and Agenda 21 created a Commission on Sustainable Development under the United Nations Economic and Social Council to ensure the effective implementation at the local, national, regional and international levels of what had been agreed at the Rio Conference, to ensure follow up of Rio Summit, to enhance adequate international, scientific and technological cooperation to catalyse inter-governmental decision making capacity to ensure regular and effective reporting on the Agenda 21 and at the national, regional and global levels.

The Delhi Sustainable Development Summit (DSDS) held in February 2002 at New Delhi, examined and elaborated the dynamics of concept of sustainable development, with a view to make recommendations for consideration at the World Summit at sustainable development to be held in Johannesburg. Delhi Summit sought to focus on poverty alleviation as the overriding concern to achieve sustainable development.

The World Summit on Sustainable Development (Johannesburg Summit) 2002 convened under the auspices of commission of sustainable development recommended various steps for further implementation of Rio Principles and Agenda 21. The Summit recognized that the reduction of poverty is the greatest global challenge facing the world, for which the World Solidarity Fund was required to be established to eradicate poverty and to promote

social and human development in various developing countries. Further, Conference also noticed that since oceans, seas, islands and coastal areas form an integrated and essential component of earth's ecosystem and are crucial for global food security and for sustaining economic prosperity and the well-being of many national economies, particularly, developing countries, it is necessary to ensure sustainable development of the oceans.

United Nations Conference on Sustainable Development, Rio +20 took place in Rio de Janeiro in June 2012, which also took forward looking decisions on a number of thematic areas including energy, food security, oceans, cities etc. Conference also focused its attention on green economy in the context of sustainable development, poverty eradication and an institutional framework for sustainable development.

The Court further held that in fact the nuclear power plant in question had been set and was made functional on the touchstone of sustainable development and taking into account its impact on ecology by following all national and international environmental principles. Reference was also made by the Court to the various provisions of the IAEA Convention on Nuclear Safety adopted in June 1994, to which India was a party, in particular its Preamble which, *inter alia*, stated that "the use of nuclear energy is safe, well regulated and environmentally sound." The Court also noted that this Convention laid down "the priority to nuclear safety, comprehensive and systematic safety assessments at all stages, including the life span of the plants, verification by analysis, surveillance, testing and inspection, regard being had to the safety requirements, emergency planning and preparedness to take care of the people in the vicinity of the nuclear installation, necessary engineering and technical support in all safety related fields available throughout the life time of the nuclear installation, constant reporting by the operator to the regulatory body pertaining to safety and the handling of radioactive waste resulting from the operation and the measures of safety carried thereon."⁵¹

Decision

51 The Court also referred to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997 to which India was not party. This Convention, the Court noted, dealt with public safety and also provided for safety of spent fuel management and safety of Radioactive Waste Management.

The Court, in its decision noted that:

[T]he appellant, by this Public Interest Litigation, has, in a way, invoked and aroused the conscience/concern of the court to such an issue. True it is, the prayer is for the total closure of the plant and the Court has not acceded to the said prayer but his noble effort is appreciated to put forth the grievance of the local people and the necessity of adequate safety measures as is perceived. When such cause comes up before this Court, it is the bounden duty to remind the authorities “Be alert, remain always alert and duty calls you to nurture constant and sustained vigilance and nation warns you not to be complacent and get into a mild slumber.” The AERB as the regulatory authority and the MoEF are obliged to perform their duty that safety measures are adequately taken before the plant commences its operation. That is the trust of the people in the authorities which they can ill afford to betray, and it shall not be an exaggeration to state that safety in a case of this nature in any one’s hand has to be placed on the pedestal of “Constitutional Trust.”

The Court also issued several directions to the Government and the agencies that dealt with the setting up of NPPs to (a) to ensure the quality of various components and systems; (b) compliance with all the conditions for environmental clearance before the plant was made operational; (c) ensure protection of human health and environment from the undue effect of ionizing radiation now and future, for which sufficient surveillance and monitoring programme have to be evolved and implemented; (d) ensure that the radioactive discharges to the environmental aquatic atmosphere and terrestrial route shall not cross the limits prescribed by the Regulatory Body; (e) take measures to minimize the impact on environment due to storage of nuclear fuel; (f) proper management and transportation of spent nuclear fuel strictly in accordance with Code of Practices laid down by the AERB following the norms and regulations laid down by IAEA; (g) to implement the National Disaster Management Guidelines, 2009 and also carry out the periodical emergency exercises on and off site; and (h) report on the implementation process to be filed before the Court before commissioning of the plant.

Extradition

INDONESIA

Extradition Treaty Between the Republic of Indonesia and the Socialist Republic of Vietnam

On 27 June 2013, the Republic of Indonesia and the Socialist Republic of Vietnam established a bilateral treaty. It was then ratified by the Indonesian Government through Law No. 5 of 2015 and subsequently entered into force. The establishment of the Treaty was for both parties to cooperate in preventing and eradicating criminal offences. The Treaty is to be conducted with respect to both sovereign and equal parties.

Within the Treaty, both parties have agreed upon several key factors, such as the obligation to request extradition; the classification of criminal offences that can be extradited; and the applied exception within the Treaty. As for the first key point, each party has the obligation to request an extradition for any criminal perpetrator to the requested party for the purpose of continuing the legal proceedings. An important notice regarding this Treaty is that extradition can be requested before or after this Treaty is entered into force. A party can request for an extradition for several crimes, such as crimes punishable up to one year or more in prison; organised crimes; and an unlawful act related to taxes, customs duty, foreign exchange, or other unlawful acts. Regarding the classification of unlawful acts, an exception was made. As for crimes related to political or military affairs, an extradition cannot be requested.

Extradition Treaty Between the Republic of Indonesia and the Independent State of Papua New Guinea

The extradition Treaty between Indonesia and Papua New Guinea was established and signed on 17 June 2013. The Treaty was soon ratified through Law No. 6 of 2015. The Treaty itself went into force after a written announcement was submitted to each party regarding the completion of each party's national requirements.

Extradition shall be requested by one of the parties in accordance with its national regulation. Every perpetrator that remains in one of the territories shall be returned to his nation to continue with the prosecution and trial. According to the Treaty, if the crime was committed where the extradition was requested outside the territory of each party or if the

perpetrator, whose extradition is requested, is a citizen of the requesting party or not a citizen of the requesting party, the requested party may grant an extradition under its own discretion. Extradition can be requested for crimes that have a conviction of one year or more prison charges. For any crime related to political affairs, for example, threatening or endangering the life of the president or the head of the government, an extradition cannot be requested. The same applies to any terrorism activities or crimes related to military affairs.

Aiming to strengthen the relationship between Indonesia and Papua New Guinea, both parties have agreed upon the assistance on eradicating and preventing criminal action through an extradition treaty. Both parties believed that the establishment of this Treaty will be beneficial and will increase mutual respect between the parties.

KOREA

COURTS AND TRIBUNALS – MUNICIPAL / EXTRADITION – EXTRADITABLE OFFENCE – POLITICAL OFFENCE

Decision of District Court Concerning Extradition

Seoul High Court – Request for Extradition Examination (Request for Extradition of Yasukuni Shrine Arsonist). Seoul Godeung beobwon [Seoul High Ct.], January 3, 2013. 2012Toel, Jan. 3, 2013 (S. Kor.).

Facts

This case dealt with the Japanese Government's request to the Korean Government for extradition of criminal A⁵² according to the agreement

52 The criminal in this case is a Chinese national. His grandmother is a Korean victim of the Japanese Military Sexual Slavery (known as the 'Comfort Women') and his grandfather is a Chinese soldier who died during the anti-Japanese struggle. Under this family background, he protested against the Japanese Government's lack of historical awareness by attempting arson on the Yasukuni Shrine in December 26, 2011. He damaged parts of the Shrine door with the specific intent to influence the related internal and external policies. However, in fact, his act of arson did not create material damages. Afterwards, the criminal entered South Korea and threw firebombs to the Japanese Embassy as he was outraged by the attitude of the Japanese Government, who did not apologize for the 'Comfort Women' issue. He was sentenced to ten months in prison by the Korean Court.

on extradition for criminals between the Republic of Korea and Japan. Criminal A has a Chinese nationality and is currently imprisoned in Korea after being convicted of creating public danger by damaging the Yasukuni Shrine by arson.

Legal Issues

(1) What are the applicable laws that determine whether Korea has an obligation to extradite a criminal to Japan? (2) What is the standard that determines the definition and types of political crime that falls into the principle of criminal non-extradition, and what kinds of crimes are political crimes? (3) Does the meaning of political crimes and the so-called 'relative political crimes' defined in Article 3 of the Criminal Extradition Treaty between Korea and Japan fall into this situation?

Judgment

The Court held that, when deciding whether Korea has an obligation to extradite criminals to Japan, the general principle of interpretation of the law is applied, such as the principle of prioritizing new laws and the principle of prioritizing special laws, because the Criminal Extradition Treaty between Korea and Japan, signed on April 8, 2002 and put into effect on June 21, 2002, was ratified by Congress, giving it the same effect as a legislation. Furthermore, this Extradition Treaty is applied primary to Criminal Extradition Law based on Article 3, No. 2 of the Criminal Extradition Law, and the Criminal Extradition Law is applied as a supplement. Meanwhile, the Court said that for criminal extradition procedure, political crimes are divided into absolute political crime or pure political crime, and relative political crime. In the case of relative political crime, an international standard is not established to be regarded as a political crime, but each country has developed different customs. The Court proposes the standard, provided below, to decide when relative crimes are political crimes:

(1) Whether the intent of the crime is not to gain personal benefits but to favor or oppose the purpose of the political organization or the institution pursues; (2) whether the intent of crime is to abandon or destroy the political structure of a country or to pressure or give

After the execution, the Japanese Government requested an extradition based on the Criminal Extradition Treaty between Korea and Japan.

an impact to change the major domestic and foreign policies of that country; (3) what are the characteristics of the targeted victim and what the characteristics symbolize; (4) whether there is a systematic relationship as a means of fulfilling the political purpose which the criminal pursues; (5) what are the legal and factual characteristics of the crime; (6) the brutalities of the crime, in other words, look to whether it involves the act of grave violence that is against life, limb, and freedom of a person, and whether there is balance between the social injury caused by the crime and its political purpose.

The overall sentence is determined by rationally considering the subjective or objective situations that are in favor of or against the criminal in relation to the criminal extradition principle. Consideration should be given to the purpose and background of the crime — whether it is a general crime or a political crime; the background between the extradition requesting country and requested country; and the political situation.

Based on such standard of review, the Court clarified that “political crime” in Article 3(c) of the Extradition Treaty has the same meaning as “the crime which has political characteristic or related to the political characteristic,” which is identified in Article 8, Section 1 of the Extradition Act. In addition, it should not only be interpreted as an absolute political crime but also should include a concept of relative political crime. Eventually, the Court decided that the crime by the Chinese Criminal A, who is now imprisoned in Korea and whom the Japanese Government requested for extradition, corresponds to political crime that is defined in Article 3, No. 3 of the Extradition Treaty. The Court further stated that there is no exceptional reason to guide the criminal for the following reasons:

(1) Criminal A’s intent for committing the crime was caused by A’s anger toward the Japanese Government’s lack of historical awareness on historical events and the related policies, thus, A had no intent to gain personal benefits for himself; (2) Criminal A’s intent for the crime was to change the policies of the Japanese Government or to give influence by pressuring the Government, in which the Government has the opposite political belief and view of Criminal A; (3) although the Yasukuni Shrine is legally an asset to the religious association, it is also regarded to have a political symbolism that corresponds to national facilities; (4) the crime was committed for political justification and the systematic relationship between the crime and the political purpose is established; (5) although the legal characteristic of the crime is arson on a general

object, the characteristic is close to destruction and the danger to the public was not that great; (6) crime allowable for extradition is a relative political crime that has more political characteristics than general criminal characteristics, which is arson as a general matter when considering (i) the historical background of Japan, the requesting country, Korea, the requested country, and China, the criminal's nationality, (ii) the political situation such as the differences in political awareness and confrontation of opinions about historical facts, and (iii) the pursuit for universal values by international organizations, such as the United Nations, and the most civilized countries. Moreover, there was no human casualty caused by the crime and the property damage was not material.

To sum up, the Court held that the non-extradition of a political offender is the established principle of International Law (Refer to *Daebeowon* [S. Ct.], 84 Do39, May 22, 1988 (S. Kor.)) and stated that the political crime of Criminal Extradition Treaty between Korea and Japan is not only interpreted as an absolute political crime, but also interpreted as a concept that includes the relative political crime. Therefore, the Court decided not to allow the extradition of the criminal to Japan, the requesting country, after considering the Criminal A's intent for and purpose of committing the crime, the characteristics of the targeted object, and the relationship to the crime and to the principle of non-extradition of a political offender.

Human Rights

BANGLADESH

LABOUR STANDARDS – COOPERATION WITH INTERNATIONAL ORGANISATIONS/AGENCIES TO IMPROVE WORK CONDITIONS AND SAFETY AT WORK IN THE GARMENTS MANUFACTURING INDUSTRY

On 22 October 2013, Bangladesh signed an agreement with the International Labour Organisation (ILO), with a view to initiate certain measures to improve working conditions in the Bangladesh readymade garments sector (RMG sector). This initiative came after the worst-ever industrial disaster in Bangladesh in April 2013, when a commercial building (RANA PLAZA) collapsed in a Dhaka suburb, killing more than 1,200 workers who were employed in several garments manufacturing factories that were housed in the building. Later in 2013, the government of Bangladesh signed

a trilateral pact, called the Sustainability Compact, with the EU and ILO to elevate the conditions of ready-made garments industries to the level of international labour standards.

**HUMAN RIGHTS – PROHIBITION OF TORTURE – CONVENTION
AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT**

**Torture and Custodial Death (Prevention) Act 2013 [Act 50 of 2013]
- an Act to provide for punishments for torture, including killing in
custodies.**

The above Act came into force on 27 October 2014, when the President signed the Torture and Custodial Death (Prevention) Bill (a private member Bill proposed in 2009) passed by the Bangladesh Parliament. Torture is expressly prohibited in article 35(5) of the Constitution of Bangladesh. There was, however, no statutory law prohibiting and criminalising “torture,” specifically, torture by law-enforcement agencies that became endemic in Bangladesh. The 2013 Act has sought to fill in this gap, and it has been premised on the normative framework of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Bangladesh ratified in 1998. The preamble of the Act categorically mentions Bangladesh’s obligations both under this Convention and the national constitution.

Although it did not fully cover the definition of ‘torture’ in the CAT, the Act’s definition of torture (sec. 2(6)-(7)) is fairly wide. Torture has been defined as both physical and mental torture by, among others, law enforcement agencies, including what is known as ‘custodial torture’ and ‘custodial death.’ The definition has been extended to non-judicial or extra-judicial punishments in any form. Accordingly, torture in the name of issuing *fatwa* (religious edicts) or corporal punishment of school children is covered within the ambit of this law. Moreover, torture inflicted during the time of war or emergency and torture committed by a custodian against any detainee/internee would also constitute an offence (secs. 12-13).

This Act criminalises torture and provides for differentiated punishments for the offence of torture, depending on the gravity of the offence. In case of the death in custody resulting from torture, the custodian on conviction is liable for a life term and for paying compensation of Bangladeshi taka 200,000.00 to the victim’s family members (secs. 14-15). A

senior criminal court (Court of Sessions) has jurisdiction to try offence under this Act.

A limitation of the anti-torture Act of 2013 is that its overriding clause (sec. 3) (that this law shall take effect notwithstanding any other law) does not seem to be in terms with article 1.2 of the CAT. Article 1.2 speaks for the application of the Convention, which is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application. In contrast, the overriding clause of the 2013 Act may potentially outweigh any provisions that are more beneficial, which may have been enacted in other laws.

The Act has sought to widen the access to justice by providing that, when the offence of torture is committed by any person, the victim or any third party (e.g. a relative or a friend) may directly lodge a complaint with a competent court, in addition to registering a case with the police. There are ancillary provisions that provide for the court's power to inspect the place of torture, to mandate medical examination of the victim, and to order inquiry into the allegation (secs. 5-6). The Act also empowers the court to make any appropriate order for the protection and security of the complainant (sec. 11). On the other hand, when the offence of torture has occurred because of any public servant's negligence, the burden of proof lies upon the accused to prove that he or she was not negligent (sec. 19).

INTERNATIONAL LABOUR MIGRATION – SMUGGLING OF MIGRANT WORKERS – LABOUR TRAFFICKING – HUMAN TRAFFICKING – THE INTERNATIONAL CONVENTION ON THE RIGHTS OF MIGRANT WORKERS AND THE MEMBERS OF THEIR FAMILIES 1990 – BILATERAL AGREEMENT TO PROTECT MIGRANT WORKERS' RIGHTS

The Overseas Employment and Migrants Act 2013 [Act No. VLVIII of 2013] – enacted to promote opportunities for overseas employment, establish a safe and fair system of migration, and ensure rights and welfare of migrant workers and members of their families.

On 27 October 2013, the President of Bangladesh gave assent to the Overseas Employment and Migrants Act 2013 (the OEM Act). The Act seeks to be in line with, and indeed complies with, International Convention on the Rights of Migrant Workers and the Members of Their Families 1990 (the ICRMW), which Bangladesh ratified on 24 August 2011. The preamble of

the Act categorically cites the ICRMW, and sets out as its objective, the establishment of a safe and rights-based regime for international labour migration from Bangladesh.

The Act seeks to establish a control of irregular migration and to prevent trafficking and smuggling of human beings in the name of overseas employment. It complements the existing laws relating to passports, immigration, international relationship on the issue of employment of migrant workers, control of foreign nationals, money-laundering, and human trafficking. The OEM Act has nine chapters and 49 sections in total. Keeping terms with the definition of a migrant worker under the ICRMW, the Act defines a “migrant worker” as a citizen of Bangladesh who has migrated to a foreign country for the purpose of overseas employment in any work or profession for wages. The definition includes a migrant worker who (a) is preparing to migrate or is departing to any foreign country for work; (b) is employed in a trade or profession in any foreign country; or (c) has returned to Bangladesh at the end of the tenure of employment or without having completed the tenure of employment in a trade or profession from a foreign country.

Like the ICRMW, the OEM Act excludes certain categories of persons from the definition of a migrant worker, such as students, persons emigrating for employment in a foreign government or international or multilateral organisation, or public servants emigrating on an official duty or for the purposes of education or training.

Salient features of the OEMA Act 2013 can be summarised as follows:

- (1) The power to recruit Bangladeshi workers for overseas employment is vested in the government or its authorised agencies, such as the Bureau of Manpower, Employment and Training (BMET). Private recruitment agents, licensed under this Act, may engage in the business of recruiting aspirant workers for employment in foreign countries (secs. 3, 9, 15).
- (2) In conformity with the 1990 Convention, section 6 of the OEM Act 2013 establishes the norm of equality and non-discrimination in regard to all activities concerning overseas employment of Bangladeshi migrant workers.

- (3) The rights of migrant workers under the OEM Act include: right to information (sec. 26), right to legal aid (sec. 27), right to file civil suit (sec. 28), and right to return home (sec. 29).
- (4) To ensure safe migration, the law requires the out-bound workers to first obtain a migration clearance certificate, without which emigration is not lawful. For the same purpose, the Act has established a mechanism of controlling the private recruitment agents. Under section 42, for example, any officer authorised may inspect any place or any transport in order to prevent irregular migration from Bangladesh.
- (5) The private recruitment agents have a duty to arrange for the conclusion of an employment contract between the recruited worker and the employer, to protect the interest of migrant workers, to employ the worker recruited in the job offered, and to provide wages and other benefits agreed to (secs. 19, 22).
- (6) Bangladesh Missions abroad, especially the Labour Welfare Wings, are given a duty to protect the rights of migrant workers of Bangladesh that are employed in their respective country of employment. Labour attachés have a duty, for this purpose, to inspect the place of work, to communicate with the authorities or foreign employers, if needed, to render legal and other assistance to migrant workers in distress, and to make an annual report, along with necessary recommendations on the condition of Bangladeshi migrant workers working in the concerned country (sec. 24).
- (7) The government is authorised to enter into any bilateral agreements or memorandums of understanding on migration with any country of employment to further protect migrant workers' rights (sec. 25).
- (8) The Act criminalises a number of activities relating to migration with a view to ensuring safe migration of Bangladeshi citizens for overseas works. It criminalises, for example, migration through unlawful and unauthorised means, charging by recruitment agents of unauthorised amount of fees,

and other fraudulent activities (secs. 31-35). Along with the criminal provisions, the Act has also enacted provisions for settlement of disputes relating to contracts between a migrant worker and the recruitment agent who acts on behalf, and as an agent, of the foreign employer (sec. 41).

Declaration of the High-level Dialogue on International Migration

On 3-4 October 2013, the UN General Assembly held the second High-level Dialogue on International Migration (UN-HLD) in New York. Following the dialogue, a Declaration was adopted, in the preparation and finalization of which Bangladesh played an active role. Bangladesh participated in the negotiation meetings and the relevant side-events before the HLD was held.

Memorandum of Understanding between Bangladesh and Iraq of 2013 Regarding the Employment of Bangladeshi Workers in Iraq (MoU)

On 31 August 2013, the government of Bangladesh entered into the MoU to ensure rights of Bangladeshi workers employed in Iraq. The MoU provided for the renewal of employment contracts of migrant workers, their access to justice, and the resolution of migrant workers' disputes with employers. It also provided that the migrant workers from Bangladesh would have the details of the job description well in advance and that they would be entitled to, among others, health care facilities at the cost of the employers and leave from work.

HUMAN RIGHTS – RIGHTS OF DOMESTIC WORKERS – ELIMINATION OF THE WORST FORM OF THE CHILD LABOUR CONVENTION (ILO CONVENTION NO. 182)

***Bangladesh National Women Lawyers Association (BNWLA) v. Bangladesh* [17 MLR (2012) HCD 121; 31 BLD (2011) HCD 265; Judgment February 11, 2011]**

The BNWLA, a human rights NGO, lodged a constitutional petition before the High Court Division of the Supreme Court with a view to improving the plights of child domestic workers in Bangladesh. The Court issued a 10-point directive against the government agencies, aiming for the protection of children employed as domestic workers. Writing the judgment for the Court, M. Imman Ali, J. relied on article 3(d) of the ILO Convention No. 182, ratified by Bangladesh but not implemented in its municipal law,

in defining ‘hazardous child labour.’ The Court directed the government to stop employment of children under the age of twelve in any work including in the household sector. The Court asked the responsible authorities to ensure for the domestic workers’ facilities, such as education, training, medical treatment, working hours, recreation, family reunion, wages, and so on, and the mandatory registration of all domestic workers by the employers. The Court stopped short of recommending the incorporation of the ILO Convention No. 182 into Bangladesh’s domestic law. The Court did not cite or mention the ILO Convention Concerning Decent Work for Domestic Workers 2011 (ILO Convention No. 189), which has not been ratified by Bangladesh. Appreciably, however, it observed that the inclusion of the domestic workers within the definition of ‘workers’ under the Bangladesh Labour Act 2006 would entitle this vulnerable group of people to the same rights and benefits as other workers. The Court stated, in its own words, “[o]nly then will the mandate of the Constitution [of Bangladesh] be fulfilled.”

**CHILDREN’S RIGHTS – APPLICATION AND INCORPORATION
OF THE CONVENTION ON THE RIGHTS OF THE CHILD 1989 –
CUSTODY AND WELFARE OF CHILDREN – THE PRINCIPLE OF BEST
INTEREST OF THE CHILD; UNITED NATIONS STANDARD MINIMUM
RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE**

Anika Ali v. Rezwanul Ahsan [17 MLR (2012) AD 49; Judgment June 9, 2012]

Facts

In this decision, the Appellate Division of the Supreme Court of Bangladesh relied upon the Convention on the Rights of the Child (CRC) 1989, which the country ratified in August 1990. *Anika Ali* involved a dispute between the separated parents of a boy child regarding, among other things, his custody and guardianship. Initially, in 2005, two opposing suits were instituted by the divorced couple, pursuant to which they arrived at two compromises. Later, however, a series of proceedings, including a constitutional petition to restore the custody of the child to the father, were initiated. Ultimately, the matter of the Family Court went all the way up to the Appellate Division of the Supreme Court.

Decision and Reasoning

The Appellate Division observed that:

[C]ustody of a child should never be presumed to be inscribed in stone. Matters such as custody must always remain fluid since change in circumstances may at any time require the terms of the custody of a child to be varied upon a fresh application in order to comply with the age-old principle that the welfare of the child is a paramount consideration

The Court categorically cited articles 3 and 12 of the CRC, which provide that the choice and preference of the child should be given due consideration by decision-making bodies when his/her interest is at stake.

The Court made a significant distinction between cases in which minor children decide to leave their parents' house for the sake of their paramour and the cases in which they are the victims of a broken marriage of their parents. It observed that since the decision of custody of a child, when wrongly made, might result in "indelible psychological damage" to the child, it is wise to allow the child to freely express his or her views so that the judge can make a better decision in the best interest of the child. It was further observed that, in adjudicating a matter of the custody of children, the concerned courts should keep in mind the provision of article 9 of the CRC, that is, the right of the child to maintain regular contacts with both parents. By citing an old dictum, the Court emphasised that unless the provisions of any international instruments are contrary to Bangladesh's domestic laws, "the beneficial provisions may profitably be referred to and implemented in appropriate cases."⁵³

The Children Act 2013 [Act 24 of 2013] – an Act to provide for a new law relating to children for the purpose of implementing the United Nations Child Rights Convention.

The Children Act 2013 received assent of the President on 20 June 2013, and was given effect from 21 August 2013. The Act was passed by the Parliament of Bangladesh with a view to bringing the country in line with the CRC and other international instruments, such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (‘the Beijing

53 State v. Metropolitan Police Comm'r (2008) 60 DLR (HCD) 660.

Rules'). Bangladesh ratified the CRC in 1990. As such, the Act of 2013 has replaced the earlier Children Act 1974 that was a pre-CRC instrument.

With 11 chapters and 100 sections in total, the Children Act is a special law with overriding effect (sec. 3). It seeks to provide for a legal regime to deal with the children in conflict with the law, the children in contact with the law, and the disadvantaged children who are in need of care. The 2013 Act is premised on the notion of "the best interests of the children" as enshrined in article 3 of the CRC, although the law has not specifically mentioned this. Keeping in mind the idea of the best interests of the children, however, the Act allocates powers, duties, and responsibilities to Children's Court, Children Affairs Police Officer, and the Probation Officer. Importantly, in line with article 1 of the CRC, the Act defines a child to be a person who has not turned the age of eighteen (sec. 4). This has been a radical change from Bangladesh's position that a child should be defined as one who is of the age of sixteen.

Salient features of the Children Act 2013 are as follows:

The Act establishes a specialist Children's Court, one in each district and metropolitan area, with the exclusive jurisdiction to deal with the children in conflict or contact with the law. The Act also makes provisions for a number of children-friendly procedures and institutional mechanisms, such as probation officers (secs. 5-6), child-friendly police-desk (secs. 13-15), and social inquiry report (sec. 31), with a view to ensuring a children-friendly justice delivery system (secs. 19, 26, 28-29). The Children's Court is responsible for assessment and determination of the age of the children, when it is in doubt (secs. 20-21), and is empowered to order an individual proven guilty of any offence against a child to pay a suitable compensation so that the money could be spent for the benefit of the child victim (sec. 38).

In conformity with article 12 of the CRC, section 22 of the Act ensures the right of the children to participate *in person* in all stages of the judicial process, while the attendance of the concerned child in court may be dispensed with in the best interest of the child (sec. 25). It is not lawful for a court to proceed with a trial without legal representation on behalf of a child, who is either in contact or in conflict with the law (secs. 55-58). On the other hand, the Act protects the right of privacy of the child concerned, by criminalising the publication/circulation of any information that directly or indirectly identifies a child involved in a trial.

The Act provides for the establishment of a Child Welfare Boards at the national, district, and sub-district levels for the purpose of monitoring, co-coordinating, reviewing, and evaluating the activities of several institutions that work under the Act (secs. 7-12). Such a Welfare Board is also tasked to provide guidance for rehabilitation and reintegration of the children in conflict with the law.

Importantly, the Act provides for diversionary measures to be taken with regard to the children in conflict with the law. Children may be diverted from the formal criminal justice system at any time after arrest and throughout the trial process. Diversion involves, for example, placement of children under the supervision of probation officers for proper monitoring. The use of family conference to settle a problem created by any child is also regarded as a diversionary measure. The Act (sec. 49) also has introduced the Alternative Dispute Resolution (ADR) mechanism for the settlement of less serious offences by children (sec. 37).

The Act prohibits imprisonment of children and the death penalty for children. It only allows the detaining of children in a Child Development Centre (CDC) or privately run Certified Institutes (secs. 59-69). A child found guilty of an offence punishable with death or imprisonment for life may be detained in such a centre or institute for up to three years. The Act further provides for the arrangement of alternative care (secs. 84-94) for the disadvantaged children, as well as the children that are in contact with the law. Alternative care may be arranged with a view to ensuring the overall welfare and the best interest of the children who need special protection, nursing, and care, in the context of their familial, social, cultural, financial, ethnic, psychological, and educational background.

The Act prohibits certain activities with regard to children and criminalises those actions or omissions of such actions. Offences in respect to children include cruelty to child, engagement of a child in begging, being drunk while in charge of a child, giving intoxicating liquor or harmful medicine to a child, permitting a child to enter places where liquor or dangerous drugs are sold, inciting a child to bet or borrow, taking on a pledge or buying articles from the child, allowing a child to be in a brothel, and so on.

DISABILITY RIGHTS – CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The Rights and Protection of the Persons with Disabilities Act 2013 [Act 39 of 2013] – an Act to enact provisions to better protect the rights of

the persons with disabilities and to provide for certain welfare measures for them.

This Act provides for provisions in compliance with the 2006 UN Convention on the Rights of the Persons with Disabilities (CRPD). Bangladesh Parliament enacted this important law on disability rights in 2013, with a view to ensuring the rights and protection of the persons with disabilities, replacing (by sec. 44) an earlier law on the subject (the Bangladesh Welfare of Persons with Disability Act 2001). Except for sections 31 and 36, the Act came into force on 9 October 2013.

Although it has not incorporated the CRPD in its entirety, the Act undoubtedly aims at reflecting, through its provisions, the Convention on Disability Rights. The preamble of the Act cites Bangladesh's ratification of the CRPD as one of the reasons for its enactment.⁵⁴

The salient features of the Act are as follows:

The Act provides for a number of rights (twenty-one heads of rights), to which persons with disabilities of any sort are entitled, depending on the nature of disability, requiring the concerned authorities (private and public) to ensure reasonable accommodation for the persons with disabilities (sec. 16(1)). The major rights of these people include the right to be employed, the right to not be removed from work on the ground of disability, and, among other rights, the right to participate in social, economic, and recreational activities.

It prohibits any kind of discrimination (sec. 16) or the creation of obstruction against persons with disabilities (PWDs) with regard to their employment in any work according to their eligibility (secs. 16(2), 35).

It requires all public places to have facilities that would be accessible to the PWDs (sec. 34), to keep certain seats reserved in public and private transportation for PWDs, and to remove disparity in admissions to educational institutions (secs. 32-33).

To ensure the implementation of the objectives of the law and to provide guidance for its better application, the Act establishes a National Co-ordination Committee (NCC) and a National Executive Committee on the rights of the PWDs. The law also provides for similar committees at the rural and municipal levels. A major function of the NCC is to coordinate the activities of different

54 Bangladesh signed the Convention on 9 May 2007 and ratified it on 30 November 2007.

ministries, agencies, and national-level private entities for the protection of rights of the PWDs. The National Executive Committee has the responsibility to implement the actions recommended by the government or the NCC for the better realisation of the rights of the PWDs (secs. 17-20).

The Act requires all government, private, and local authorities to play their role in implementing its objectives, and to render assistance to the committees established under the law.

**ENVIRONMENTAL LAW – HUMAN RIGHT TO ENVIRONMENT
– HUMAN RIGHTS AND DEVELOPMENT – SUSTAINABLE
DEVELOPMENT; RIO DECLARATION (AGENDA 21) STOCKHOLM
DECLARATION**

***Metro Makers and Developers Ltd. v. Bangladesh Environmental Lawyers' Association (BELA) and Others* [65 DLR (2013) AD 181; Judgment August 7, 2012]**

Facts

This constitutional challenge involved the legality of a development project undertaken by a private real estate developer, Metro Makers. The project, which was selling plots of land to the consumers, was situated in a Dhaka suburb (*Ameen Bazar*) identified by the government as a Sub-Flood Flow Zone, where development of land for housing or commercial purposes was banned in order to protect the city from environmental hazards. Moreover, the developer company allegedly did not receive permission from the concerned authorities, such as RAJUK (Capital City Development Authority), but rather breached their Master Plan of Dhaka and Dhaka Metropolitan Integrated Development Plans (DMDP), in which the concerned project area was declared as a protected area. Given this state of affairs, the leading environmental organisation, BELA, filed a constitutional petition before the High Court Division seeking an injunction against and the closure of the Metro Makers' project. The Court issued an injunction against new sale of land under the project, but held that the *bona fide* purchasers of lands from the development project should not be compelled to return their lands. In the context of this curious decision, the petitioner and the developer company appealed to the Appellate Division.

Decision and Reasoning

The Appellate Division of the Supreme Court of Bangladesh declared the whole project of Metro Makers unlawful and ordered an environmental restoration. The real estate developer, Metro Makers, was directed to restore the wetland to its original state, and to refund the purchasers of plots of land, double the money they paid for the lands, including the legal costs they spent (*per* Syed Mahmud Hossain, J. with whom five Justices, including the Chief Justice, agreed).

The Court held that the company in question misrepresented to the consumers and concealed necessary environmental information and legal requirements when selling plots of lands. It explained that the idea of protecting the ‘bona fide purchasers for value without notice’ is applicable in case of conflict of ownerships of property, and that this principle of equitable relief will not override the statutory provisions protecting the environment and lands located in the Sub-Flood Flow Zone, where the *Metro Makers* was carrying out its commercial project. The Court further stressed that individuals and organisations should have access to information relating to environment and development, including information on products/activities that have or are likely to have a significant impact on the environmental protection measures. The Court approvingly cited the Rio Declaration’s statement that “[wherever] there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Further, the Court considered the protection of environment and human rights inseparable from each other and focused on the people’s right to healthy environment, as found in many international instruments. On the issue of right to environment and sustainable development, it cited, specifically, article 11 of the Additional Protocol to the Inter-American Convention of Human Rights (1994), article 24(2)(c) of the CRC, and article 24(1) of the African Charter on Human and People’s Rights 1981. The Court also noted Stockholm Declaration and the UN General Assembly Resolution No. 45/94 in order to emphasize the citizens’ right ‘to live in an environment adequate for their health and well-being.’⁵⁵

55 *Metro Makers and Developers Ltd. v. BELA* (2013) 65 DLR (AD) 181, at 60.

The Appellate Division also held that the right to life established in the Constitution of Bangladesh includes the right to protection and improvement of environment and ecology. As the Court reasoned, the government has a duty to ensure that all public and private entities do follow the notion of sustainable development that requires human rights to be upheld while undertaking any development project. To buttress its argument, the Court cited the Principle 10 of the Rio Declaration (or Agenda 21 that consisted of twenty-seven principles adopted at the Earth Summit), the Report of the Brundtland Commission, environmental law cases of the Indian Supreme Court, and scholarly works on sustainable development. It specifically cited the UN General Assembly's 1990 Declaration on International Economic Co-operation, in which it recognized that "[e]conomic development must be environmentally sound and sustainable."

In his opinion, Sinha, J. noted that as the environment and human rights are inextricably linked, the impact of environmental degradation on human health has to be adjusted or mitigated through national policies. By invoking the doctrine of public trust, the Court held that the environmental conservation is a public duty and the government is a public trustee of the nature and environment. According to the Court, "the doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes."

**UNIVERSAL PERIODIC REPORT (UPR) – HUMAN RIGHTS REPORT
BY BANGLADESH – SUBMITTED TO THE HUMAN RIGHTS COUNCIL
OF THE UNITED NATIONS (DISTRIBUTED BY
THE UN GENERAL ASSEMBLY ON 7 FEBRUARY 2013;
REVIEW HELD ON 29 APRIL 2013**

Bangladesh submitted its National Report on Human Rights in accordance with paragraph 5 of the annex to the Human Rights Council Resolution No. 16/2110. The report was drafted in 2012 through a wide civic engagement. Specially, the Human Rights Forum Bangladesh, a consortium of nineteen human rights and development organizations, actively participated with the process of UPR and made their own recommendations. The Review of the 2nd Cycle of the Universal Periodic Review by Bangladesh was held on 29 April 2013 at Geneva, in the 16th session of the Human

Rights Council's Working Group on the Universal Periodic Report from 22 April to 3 May 2013.

Bangladesh submitted its first UPR in 2009. In its 2nd UPR, Bangladesh stated that the government undertook a series of reforms since 2009 in order to strengthen its legislative, institutional, and policy mechanisms, for the protection and promotion of human rights. In its 2013 UPR, Bangladesh reported measures that it implemented to protect and promote civil and political rights, social, economic, and cultural rights, rights of the vulnerable people in order to strengthen democracy, good governance, and transparency.

CHINA

INTERNATIONAL HUMAN RIGHTS LAW – UNIVERSAL PERIODIC REVIEW

On January 14, 2013, the Human Rights Council selected the following group of rapporteurs (troika) to facilitate the review of China in the second cycle of universal periodic review: Poland, Sierra Leone and the United Arab Emirates. On August 5, 2013, the Chinese government submitted the second national report to the Human Rights Council. The second national report focuses on introducing the policies and practices undertaken to promote and protect human rights in China, including the Mainland, the Hong Kong Special Administrative Region, and the Macao Special Administrative Region since the first-cycle universal periodic review in 2009, as well as the implementation of recommendations accepted at the time of the first-cycle review, the challenges remaining, and future goals for human rights work. In accordance with the principle of "One Country, Two Systems," Parts V and VI of the second national report respectively introduced the corresponding conditions in the Hong Kong and Macao Special Administrative Regions of China, and were separately compiled by the governments of those regions. On the morning of October 22, 2013, the Working Group on the Universal Periodic Review reviewed China at the 3rd meeting of the Seventeenth Session of the Human Rights Council. During the interactive dialogue, 137 delegations made statements. The Human Rights Council made 252 recommendations to China. China will examine and respond to the recommendations in due course, but no later than by the Twenty-Fifth Session of the Human Rights Council in March

2014. At its 10th meeting held on October 25, 2013, the Working Group adopted the report on China.⁵⁶

**INTERNATIONAL HUMAN RIGHTS LAW – INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)**

The Human Rights Committee considered the initial report of the Macao Special Administrative Region of the People's Republic of China at its 2962nd and 2963rd meetings held on March 18-19, 2013. This is the first report for Macao, which was submitted by the People's Republic of China, following the return of Macao to Chinese sovereignty on December 20, 1999. At its 2975th meeting held on March 27, 2013, the Committee adopted its concluding observations.⁵⁷

The Human Rights Committee considered the third periodic report of the Hong Kong Special Administrative Region of the People's Republic of China at its 2954th and 2955th meetings, which were held on March 12-13, 2013. This is the third report submitted by the People's Republic of China after the return of Hong Kong, China, to Chinese sovereignty on July 1, 1997. At its 2974th meeting, held on March 26, 2013, the Committee adopted its concluding observations.⁵⁸

56 Rep. of the Working Group on the Universal Periodic Rev of Its Twenty-Fifth Session, U.N. Doc. A/HRC/25/5, at 3 (Dec. 4, 2013).

57 H.R. Comm., Rep. on Concluding Observations on the Initial Report of Macao, China, U.N. Doc. CCPR/C/CHN-MAC/CO/1 (Apr. 29, 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCHN-MAC%2fCO%2f1&Lang=en.

58 H.R. Comm., Rep. on Concluding Observations on the Third Periodic Report of Hong Kong, China, U.N. Doc. CCPR/C/CHN-HKG/CO/3 (Apr. 29, 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCHN-HKG%2fCO%2f3&Lang=en.

**INTERNATIONAL HUMAN RIGHTS LAW – CONVENTION AGAINST
TORTURE AND OTHER CRUEL OR DEGRADING TREATMENT OR
PUNISHMENT (CAT)**

On June 20, 2013, China submitted its sixth report under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. This report is composed of three parts, which respectively introduces the new measures and development adopted by the Chinese central government, Hong Kong Special Administrative Region, and Macau Special Administrative Region in implementation of the Convention from 2008 to 2012.⁵⁹

**INTERNATIONAL HUMAN RIGHTS LAW – CONVENTION ON THE
RIGHTS OF THE CHILD (CRC)**

On September 26-27, 2013, the Committee on the Rights of the Child considered the combined third and fourth periodic reports of China,⁶⁰ including Hong Kong Special Administrative Region⁶¹ and Macau Special Administrative Region,⁶² at its 1833rd to 1835th meetings,⁶³ and adopted the concluding observations at its 1845th meeting held on October 4, 2013.⁶⁴

59 Comm. Against Torture, Rep. on Article 19 of the Convention, U.N. Doc. CAT/C/CHN/5 (Apr. 4, 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fCHN%2f5&Lang=en.

60 Comm. on the Rights of the Child, Rep. on Combined Third and Fourth Periodic Reports of China, U.N. Doc. CRC/C/CHN/3-4 (Oct. 29, 2013); *see also* Comm. on the Rights of the Child, Rep. on Article 44 Submitted by States Parties of the Convention, U.N. Doc. CRC/C/CHN/3-4/Corr.1 (Jan. 31, 2013).

61 Comm. on the Rights of the Child, Rep. on Article 44 Submitted by States Parties of the Convention, U.N. Doc. CRC/C/CHN-HKG/2 (Oct. 25, 2012).

62 Comm. on the Rights of the Child, Rep. on Article 44 Submitted by States Parties of the Convention, U.N. Doc. CRC/C/CHN-MAC/2 (Oct. 25, 2012).

63 *See* Comm. on the Rights of the Child, 64th Sess., 1833d mtg., U.N. Doc. CRC/C/SR.1833 (Nov. 8, 2013); *see also* Comm. on the Rights of the Child, 64th Sess., 1834th mtg., U.N. Doc. CRC/C/SR.1834 (Oct. 3, 2013); *see also* Comm. on the Rights of the Child, 64th Sess., 1835th mtg., U.N. Doc. CRC/C/SR.1835 (Nov. 19, 2013).

64 *Statement by Mr. Liang Heng of the Chinese delegation at the Third Committee of the 68th Session of the General Assembly on Agenda Item 66: Rights of Indigenous*

International Human Rights Law – Action Plan For Fighting Human Trafficking (2013-2020)

On March 2, 2013, the General Office of the State Council issued the Action Plan for Fighting Human Trafficking (2013–2020), and ordered provincial governments and ministries to carry out this action plan. This is the second action plan to fight human trafficking in China. The first action plan (2008–2012) was issued in 2008.

INDIA

RIGHTS OF SCHEDULED TRIBES AND PRIMITIVE TRIBES LIVING IN HARMONY WITH THEIR FOREST LAND – COMMUNITY RIGHTS, RELIGIOUS AND SACRED RIGHTS OF PRIMITIVE AND SCHEDULED TRIBES – THEIR RIGHTS UNDER INTERNATIONAL CONVENTIONS AND TREATIES OF THE UNITED NATIONS

***Orissa Mining Corporation vs. Ministry of Environment & Forests & Others* [Supreme Court of India, 18 April 2013 <http://JUDIS.NIC.IN>]**

Facts

This case related to environment clearance, under the Indian Environment Protection Act 1986, for the Lanjigarh Bauxite Mining Project in the State of Orissa, which covered an area of 723 hectares of forest land. The environment clearance for this project was subject to certain conditions and precautionary measures to be taken during the mining operation with a view to conserve and protect flora and fauna of the area. Specialized institutes such as the Wildlife Institute of India (WII) and several expert committees were involved in examining the proposal for the environment clearance for this project. In 2008, the Ministry of Environment, Forest and Climate Change (MOEF) granted conditional clearance for the project. The matter went up to the Supreme Court of India, which agreed to the conditional clearance of the project and insisted upon mandatory adherence to these conditions before the project was launched.⁶⁵

peoples, PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE UN (Oct. 21, 2013), <http://www.china-un.org/eng/hyyfy/t1091938.htm>.

65 The Supreme Court had clearly stated that, “We may, at the outset, point out that there cannot be any doubt that this Court in *Vedanta* case had given liberty to

MOEF did not agree to clear the additional forest land without the fulfilling of certain prescribed conditions by the mining companies. In order to streamline its assessment, MOEF constituted the Forest Advisory Committee (FAC) and submitted a report before the FAC, in which MOEF stated:

[T]he Primitive Tribal Groups were not consulted in the process of seeking project clearance and also noticed the violation of the provisions of Forest Rights Act, the Forest (Conservation) Act, 1980, Environmental Protection Act, 1986 and also the impact on ecological and biodiversity values of the *Niyamgiri* hills upon which the *Dongaria Kondh* and *Kutia Kondh* [tribes] depend. FAC opined that it was a fit case for applying the precautionary principle to obviate the irreparable damage to the affected people and recommended for the temporary withdrawal of the in-principle/State I approval accorded. FAC recommended that the State Government be heard before a final decision is taken by the MoEF.⁶⁶

Further, this case raised issues relating to the individual and community rights of Tribals and also made references to their religious or spiritual rights protected under Articles 25 and 26 of the Indian Constitution. The case also raised issues as to who would own these rights under the Forest Rights Act of India such as, for example, the *Gram Sabha*⁶⁷ or the Tribals as a community. It was argued that under the Forest Rights Act “concerned forest dwellers be treated not merely as right holders as statutorily empow-

Sterlite to move this Court if they were agreeable to the “suggested rehabilitation package” in the order of this Court, in the event of which it was ordered that this Court might consider granting clearance to the project, but not to Vedanta. This Court in *Vedanta* case had opined that this Court was not against the project in principle, but only sought safeguards by which the Court would be able to protect the nature and sub-serve development.”

66 MOEF further held that “The primary responsibility of any Ministry is to enforce the laws that have been passed by Parliament. For the MoE&F, this means enforcing the Forest (Conservation) Act, 1980, the Environmental (Protection) Act, 1986, the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and other laws. It is in this spirit that this decision has been taken.”

67 *Grama Sabha* is a village committee (elected in the normal course) which has the power to take the decision on its designated land area that comprises not only of the village also those lands and forests that are traditionally connected to the village itself.

ered with the authority to protect the *Niyamgiri* hills.” It was also argued that the Forest Rights Act “recognize[d] the right to community tenures of habitat and habitation for “primitive tribal groups” and that *Dongaria Kondh* tribes ha[d] the right to grazing and the collection of mineral forest of the hills and that they ha[d] the customary right to worship the mountains in exercise of their traditional rights, which would be robbed [sic] of if mining is permitted in *Niyamgiri* hills.”

Summary of the Judgment

The Court noted that there were two projects, namely, Alumina Refinery Project and Bauxite Mining Project and both were “interdependent and inseparably linked together and, hence, any wrong doing by Alumina Refinery Project” might “cast a reflection on the Bauxite Mining Project” and might be “a relevant consideration for denial of Stage II clearance to the Bauxite Mining Project.” The Court further noted that “[i]n this Judgment, [it did] not propose to make any final pronouncement on that issue but [it] would keep the focus mainly on the rights of the “Scheduled Tribes” (STs) and the “Traditional Forest Dwellers” (TFDs) under the Forest Rights Act.” While examining these rights, the Court referred to various international legal instruments and stated:

The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No.107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No.169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

The Court, continuing with its reference to international law and related legal instruments, added:

Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBD) adopted at the Earth Summit (1992) highlighted necessity to preserve and maintain knowledge, innovation and practices of the local commu-

nities relevant for conservation and sustainable use of bio-diversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

Referring to the conditions of STs and TFDs, the Court noted that many of them were “totally unaware of their rights” and that “[t]hey also experienced lot of difficulties in obtaining effective access to justice because of their distinct culture and limited contact with mainstream society.” The Court also pointed out how “many a times, they [did] not have financial resources to engage in any legal actions against development projects undertaken in their abode or the forest in which they stay.” According to the Court, it had a “vital role to play in the environmental management and development because of their knowledge and traditional practices.” Therefore, the Court continued, States “[have the] duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development.”

The Court pointed out that the Forest Rights Act had been “enacted conferring powers on the *Gram Sabhas* . . . to protect the community resources, individual rights, cultural and religious rights.” The Court further noted that the recognized rights of the forest dwelling communities “include the responsibilities and authority for sustainable use, conservation of bio-diversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling” communities.

Decision

The Court, accordingly, held that “*Gram Sabha* had a role to play in safeguarding the customary and religious rights” of the forest dwelling communities under the Forest Rights Act. Further, according to the Court,

these *Gram Sabhas* would determine the nature and extent of “individual” or “community rights.” The Court, thus, concluded:

We are, therefore, of the view that the question whether STs and other TFDs, like *Dongaria Kondh*, *Kutia Kandha* and others, have got any religious rights i.e. rights of worship over the *Niyamgiri hills*, known as *Nimagiri*, near *Hundaljali*, which is the hill top known as *Niyam-Raja*, have to be considered by the *Gram Sabha*. *Gram Sabha* can also examine whether the proposed mining area *Niyama Danger*, 10 km away from the peak, would in any way affect the abode of *Niyam-Raja*. Needless to say, if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as *Niyam Raja*, in the hills top of the *Niyamgiri* range of hills, that right has to be preserved and protected. . . . The *Gram Sabha* is also free to consider all the community, individual as well as cultural and religious claims, over and above the claims which have already been received from Rayagada and Kalahandi Districts We are, therefore, inclined to give a direction to the State of Orissa to place these issues before the *Gram Sabha* with notice to the Ministry of Tribal Affairs, Government of India and the *Gram Sabha* would take a decision on them within three months and communicate the same to the MOEF, through the State Government.

Statement by India on Agenda Item 69 – “Promotion and Protection of Human Rights (A) Implementation of Human Rights Instruments, (D) Comprehensive Implementation of and follow-up to the Vienna Declaration and Programme of Action” at the Third Committee of the 68th Session of the United Nations General Assembly on 22 October 2013⁶⁸

India thanked the UN Secretary-General for his reports as well as the High Commissioner for Human Rights and the Special Rapporteurs for their reports under this agenda item relating to ‘protection and promotion of human rights.’ It was further noted that:

Human rights are at the core of any free democratic society. They form an important institutional pillar of the United Nations. The promotion and protection of human rights within the United Na-

68 Rajani Patil, Member of Parliament & Member of the Indian Delegation, Statement on Agenda Item 69, at the Third Committee on the 68th Session of the United Nations General Assembly (Oct. 22, 2013) (transcript available in <https://www.pminewyork.org/adminpart/uploadpdf/77903pmi102.pdf>).

tions was put on a firm footing with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Since then, we have come a long way in our collective endeavour to promote and protect human rights.

Noting that this year marked the 20th anniversary of the establishment of the Office of the High Commissioner for Human Rights (OHCHR), India pointed out that the Council had the responsibility to demonstrate that it was independent and impartial by being open, fair, transparent and accountable to all stakeholders. India also added that it was important to maintain the representative character and financial independence of this office and that it remained a matter of concern that only one-third of OHCHR funding came from the regular budget, whereas two-third of the funding came from voluntary contributions. Referring to the human rights compliance mechanisms, India stated that:

The mechanism of the Universal Periodic Review has emerged as an extremely useful mechanism for the Human Rights Council and the international community to engage in an open discussion on human rights in member countries. This unique Member-State driven process of peer review, enriched by contributions from the civil society, has been a successful collaborative and constructive endeavour.

As we commemorate the 20th anniversary of the adoption of the Vienna Declaration and Programme of Action this year, India sought to recall that the Vienna Declaration had reaffirmed the Right to Development as a universal and inalienable right, as well as an integral part of fundamental rights. Further, it added:

At RIO+20, the international community renewed its commitment to sustainable development, recognizing poverty eradication to be the greatest global challenge. While States have the primary responsibility to promote the Right to Development, one cannot disregard the imperative of international cooperation, which is essential for the purpose of creating a supporting environment for the genuine realization of the Right to Development.

Noting its commitment to uphold human rights, India highlighted some important measures taken in giving effect to some of the obligations undertaken under various human rights instruments. It pointed out that:

The Right to Information Act 2005 has empowered the ordinary citizens through access to information on government action leading to a more transparent and accountable governance. The government has enacted several landmark legislations guaranteeing basic rights in the areas of work and employment, education and food security. These include the Mahatma Gandhi National Rural Employment Guarantee Act of 2005, the Right to Education Act of 2009 and most recently, the National Food Security Act of 2013. The innovative mechanism of public interest litigations crafted by the judiciary ensured that even the most vulnerable sections of society, who may not be able to approach courts otherwise, can seek justice via a public-spirited person or organization. This mechanism has been extremely effective in providing remedies to vulnerable groups.

JAPAN

TREATIES AND COVENANTS – IMPLEMENTATION – CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (Act No. 48, June 19, 2013)

Prior to the ratification of the Convention on the Civil Aspects of International Child Abduction (the Hague Convention), the 183rd Diet promulgated the “Act for Implementation of the Convention on the Civil Aspects of International Child Abduction (Act No. 48 of June 19, 2013)” to achieve the aims of the Convention such as “the return of a child to the state where the child held his/her habitual residence, etc. in the case of his/her wrongful removal or retention”.

The Act designates the Ministry of Foreign Affairs as the central authority in charge of a request for assistance and the return of children (Article 3) and sets forth two family courts (Tokyo Family Court and Osaka Family Court (Article 32) as the forums for dispute settlement related to the return of children.

The Act has two phases. The first phase is to facilitate and give, a person who has the rights of custody of a child or children, the way to find their taken child or children and to get their child or children back through non-confrontational means. For example, Article 5 provides assistance in identifying the location of children. Article 9 provides for the voluntary

return of children upon agreements. Article 16 facilitates contact with the taken child or children with the person who has the right of custody.

The second phase permits a person who has the right of custody of a child or children to invoke judicial or quasi-judicial measures if the use of force is necessary to return the child. The Act provides “the return of a child to the state where the child held his/her habitual residence, etc. in the case of his/her wrongful removal or retention (Article 1)”, based on the idea that a judgment as to which one of the parents has the right of custody of a child or children should be made in the state of their habitual residence, considering relevant information of such a child or children. Therefore, the denial of return of such a child or children is allowed in rather exceptional circumstances and subject to strict examinations of the courts, based on the provision that “the court shall not order the return of the child when it finds” that the child might be subject to physical violence, psychological harm and difficulties to be taken care of (Article 28). To ensure such procedures are effective, during the court’s deliberations, the child may be prohibited from departing Japan (“Where there is a risk that a party to the case seeking the return of child has the child depart from Japan, the family court before which the case seeking the return of child is pending, upon petition by either party to the case, may order the other party not to have the child depart from Japan.” (Article 122(1)).

The Act provides the procedures for the first instance (Article 70-100) and the procedures for appeal (Article 101-116). Parties may reach “settlement” instead of receiving judicial decisions (Article 100) and pursue other forms of dispute settlement such as mediation (Article 144).

The Act provides for compulsory procedures to ensure that the decisions made by the above are enforced (Article 134-143). Before invoking the compulsory execution procedure, however, the Act induces the relevant parties to carry out decisions by themselves. The Act defines such inducement as “indirect compulsory execution” and provides that “a petition for the execution by substitute of the return of child may not be filed until two weeks have elapsed from the day on which the order under the provision of Article 172 (1) of the Civil Execution Act became final and binding (Article 136).” After such indirect compulsory execution fails or is not invoked during certain periods (two weeks in most cases), direct compulsory execution procedures can be invoked pursuant to the provision of Article 171(1) and 172(2) of the Civil Execution Act (Act No. 4 of 1979) (Article 134).

**DISABILITY RIGHTS – DISCRIMINATION AGAINST
PERSONS WITH DISABILITIES**

Act on the Elimination of Discrimination against Persons with Disabilities (Act No. 65, June 19, 2013)

In preparation for the ratification of the Convention on the Rights of Persons with Disabilities, the 183rd Diet passed the Act on the Elimination of Discrimination against persons with Disabilities (Act No.65) on June 19, 2013. This Act adopted two main principles: “prohibition of undue treatment” and “provision of reasonable accommodation” to the persons with disabilities.

The Act defines a person with disabilities as a person who has a physical disability, intellectual disability, or mental developmental disability who suffers from one of these disabilities and faces barriers in society.

First, the Act prohibits the undue treatment of persons with disabilities without a justifiable reason. This includes denial of service, limitation of service, and conditional service because the person is disabled. The Act also prohibits the disabled from being ignored when a service provider communicates only with the disabled person’s escort or denies service unless an escort accompanies the disabled person.

The Act also requires the national and local authorities to promote “reasonable accommodation,” to meet the disabled’s request to remove a barrier in the society. For example, it includes special allocation of seats to view sign language, writing upon the disabled’s request, utilizing drawings, photos, tablets, and PCs for communication, and installing ramps instead of steps for facilitating the disabled’s access.

This Act is comprehensively enacted to implement the Convention beyond the Basic Act for Persons with Disabilities (Act No. 84 of 1970, Amendment: Act No. 90 of 2011).

**FAMILY LAW – NORMALIZATION RELATED TO THE
DIFFERENTIATED TREATMENT OF INHERITANCE RELATED TO
CHILD BORN OUT OF WEDLOCK**

Supreme Court Judgment and Subsequent Revision of Civil Code

On September 4, 2013, the grand bench of the Supreme Court ruled that the provision of differentiated treatment concerning inheritance between

a child born in wedlock and child born out of wedlock, is unconstitutional and quashed and remanded the Tokyo high court's decision which held that the first half of provisory clause of Art. 900(iv) was constitutional. The Supreme Court also held that the inheritance distribution was undertaken based on the unconstitutionality of Art. 900(iv) (2012ku) 984, *Minshu* vol. 67, No. 6.

Concerning the relevant treaties, the Supreme Court referred to the ICCPR and the Convention of Rights of the Child, which provides that each child should not be discriminated against because of the circumstances of the child's birth. The Supreme Court pointed out that in 1993, the Human Rights Committee recommended Japan to delete provisions differentiating children born out of wedlock and include the recommendations made by relevant committees relating to nationality, family registration, and inheritance.

Furthermore, the Supreme Court held that discrimination related to nationality and family registration has been already resolved. In case of family registration, a child out of wedlock is registered just as a "child" (for example, "first-born son" or "first born-daughter," etc.) born in wedlock. In the case of nationality, the Nationality Act was revised in regards to the acquisition of nationality, a child born out of wedlock is treated the same as a child born in wedlock.

The Supreme Court then examined its previous judgment of 1995 (1991(ku)143, *Minshu* Vol. 49, No. 7), which held that Article 900(iv) is not in violation of Article 14(1) of the Constitution on the following grounds:

The aim of enactment of the Provision is understood to be to respect the status of the legitimate child who was born between spouses who are married by law, and at the same time, paying due attention to the status of the illegitimate child, grant a statutory share of one-half of the legitimate child's share in order to protect the illegitimate child, and thus balance the respect of marriage by law and the protection of the illegitimate child. In other words, since the Civil Code has adopted the system of marriage by law, insofar as the statutory inheritance share is concerned, the legitimate child has to be given preference. On the other hand, the illegitimate child was allowed some share and it was intended to protect the illegitimate child.

Since the Civil Code has adopted the system of marriage by law, the reason of enactment of the Provision has a reasonable ground. The fact that the Provision set out the statutory inheritance share of

an illegitimate child at one-half that of the legitimate child cannot be regarded as excessively unreasonable in relation to the reason of enactment, and exceeded the scope of reasonable discretion granted to the legislature. The Provision cannot be regarded as an unreasonable discrimination and is against Article 14, paragraph 1 of the Constitution.” (quoted from a translation from the Japanese Supreme Court’s website)

However, this time the Court reached the opposite conclusion that such differentiation is unconstitutional based on the changing trends of people’s perception in Japan and other countries, the content of the treaties ratified by Japan and the criticism given by the committees set up under these treaties, and changes in Japanese legal system, and so on.

The Court held that “even if the legal marriage system itself is entrenched in Japan, it is now impermissible, as a result of such change in the recognition, to cause prejudice to children by reason of the fact that their mother and father were not in a legal marriage when they were born—a matter that the children themselves had no choice or chance to correct.” (quoted from a translation from the Japanese Supreme Court’s website)

Consequently, the Court determined that “it must be said that even in consideration of the discretionary power vested in the legislative body, the distinction in terms of the statutory share in inheritance between children born in wedlock and children born out of wedlock had lost reasonable grounds” by the time when the inheritance of the appellant’s father commenced as of July 2001, and the Provision was in violation of Article 14, paragraph 1 of the Constitution as of July 2001, at the latest. (quoted from a translation from the Japanese Supreme Court’s website)

On October 28, 2013, the Tokyo District Court followed the above judgment and held that the child out of wedlock, like the other two children born in wedlock, should receive one-third amount of the total inheritance since Article 900(iv) was unconstitutional at the time the inheritance was to be given. The Court referred to Article 2(1), 24(1) and 26 of the ICCPR and reiterated that there such a differentiation between a child of wedlock and a child out of wedlock was unconstitutional and Japan has been repeatedly been recommended to abolish such a differentiation by the United Nations Human Rights Committee, Committee on Economic, Social and Cultural Rights and Committee on the Rights of the Child among others.

On December 5, the 185th Diet passed the revised Civil Code (Amendment: Act No. 94 of 2013), deleting the first half of Art. 900(iv). This amendment was promulgated and enforced shortly after December 11, 2013.

FAMILY LAW – GENDER CHANGE – STATUS OF CHILDREN

The Supreme Court's decision concerning whether a child conceived by a wife during marriage with a person who has received a ruling of change in gender from female to male (2013(Kyo)5, Minshu Vol. 67, No. 9)

On December 10, 2013, the Supreme Court overturned the ruling of the Tokyo High Court holding that “a child conceived by a wife during marriage with a person who has who received judicial confirmation designating their gender from female to male under Article 3, paragraph (1) of the Act on Special Cases in Handling Gender for People with Gender Identity Disorder can be presumed to be a child born in wedlock in accordance with Article 772 of the Civil Code,” even if it is clear that a such person cannot have any child through the actual sexual relations. Article 772(1) provides as follows: (1) A child conceived by a wife during marriage shall be presumed to be a child of her husband.

In this case, although the child was born by artificial insemination by a third-party donor and thus had no blood relation to the husband, the Supreme Court held that the child should be admitted to be registered as a child in wedlock on their family registration.

This is the first judgment of the Supreme Court to identify that a child born from a father who changed his gender as a legitimate child within wedlock.

New Developments Related To The Recognition Of Minamata Disease

In 2013, The Supreme Court ruled on two past judgments that enlarged the extent of approval of recognition for Minamata disease, although the Court did not hold that the 1977 standard of approval was itself illegal.

Case 1 (2012(Gyo-Hi)202, Shyumin, No. 243)

Chie Mizoguchi, who ate fish from Minamata Bay and suffered from an abnormality of the nervous system, made an application to Kumamoto prefecture for recognition as a victim of Minamata disease. Her application was rejected and then she appealed the decision to the Kumamoto District Court. Though the Kumamoto District Court denied her claim,

the Fukuoka High Court held that Mizoguchi's should be approved and that she be given recognition as a victim of Minamata disease based on her comprehensive examination based on medical knowledge, though it did not meet the 1977 standard of approval.

The Third Petty Bench of the Supreme Court led by Justice Itsuro Terada upheld the decision of the high court that Mizoguchi should be approved as a victim. The Supreme Court did not question the validity of the 1977 standard of approval. However, it clearly held that it was possible to make a determination of Minamata disease on the basis of the existence of serious disorders even if the diagnosis was not accompanied by the presence of other symptoms as the 1977 standard of approval requires.

The Supreme Court held that judicial review concerning approval of Minamata disease (1) should be carried out through a comprehensive examination of "the circumstances concerned and the relevant evidence on a case-by-case basis and in light of the rule of thumb"; (2) should look into "whether or not there is any individual causal relationship between individual specific symptoms and the causative substance" and; (3) should determine on each basis whether or not to approve the symptoms as Minamata disease.

Chie Mizoguchi died in 1977 at the age of 77. Her relatives subsequently pursued the claim and Chie Mizoguchi was approved as a victim of Minamata disease posthumously.

Case 2 (2012 (Gyo-Hi) 245, Minshu, No. 67, Vol. 4)

A woman living in Toyonaka, Osaka, requested the court to approve her application to consider her as a victim of Minamata disease. While the first court, the Osaka District Court approved her symptoms as Minamata disease in 2010, the Osaka High Court turned over the ruling of the Osaka District Court and denied her request to be recognized as a victim of Minamata disease in 2012.

The Third Petty Bench of the Supreme Court decided to send the case back to the Osaka high court for more deliberation. The Supreme Court reiterated judicial review concerning approval of Minamata disease should be done as shown in the case above. The Supreme Court denied the approach taken by the Osaka High Court, in which the court merely examined the reasonableness of the 1977 standards of approval and the administrative disposition of Kumamoto Prefecture.

The claimant died in March 2013 at the age of 87 just before the Supreme Court decision. With respect to this decision, Kumamoto Prefecture decided to withdraw its appeal. Therefore, the judgment of the 2010 Osaka District Court became final and the woman was approved as a victim of Minamata disease posthumously.

KOREA

COURTS AND TRIBUNALS – MUNICIPAL / HUMAN RIGHTS – CONVENTION RELATING TO THE STATUS OF REFUGEES - LGBT

Decision of Seoul Administrative Court

Seoul Administrative Court – Revocation of Refugee disapproval. Seoul Haengjeong beobwon [Seoul Admin. Ct.], 2012Gu-Hap32581, April 25 (S. Kor.).

Facts

The plaintiff, a 27-years-old female with Ugandan nationality, entered Korea with a temporary Commercial Visa and applied for refugee approval after one month and fifteen days because of the risk of persecution for being a homosexual in Uganda. The plaintiff's application was rejected and she had instead received a permission of humanitarian stay. Accordingly, the plaintiff filed a lawsuit against the head of Seoul Immigration Office and requested for approval of refugee status.

Legal Issues

What is the method for deciding the credibility of a refugee applicant's testimony on proving 'sufficient reasonable fear' from her experience with persecution, which is the requirement for refugee acceptance, and whether there can be 'sufficient reasonable fear' of being persecuted because of one's Membership of a Particular Social Group status as homosexual?

Judgment

Taken together, No. 3 of Article 2, Subsection 1 No. 2 of Article 76, and Article 1 on the Convention relating to the Status of Refugees and Article 1 on Protocol Relating to the Status of Refugees suggest that the administrative authority should acknowledge the foreigner in Korea as a refugee when one is not protected from or does not

want protection from its own country because of a reasonable fear of being persecuted for their race, religion, nationality, or status by a Membership of a Particular Social Group or political opinion. “Persecution,” which is the requirement for refugee acceptance, is defined as “acts that threaten life, limb, and freedom that significantly invade or discriminate against a human being’s fundamental dignity” and the foreign applicant of refugee acceptance must prove ‘sufficient reasonable fear’ from persecution. By considering the refugee’s special circumstances, “persecution” can be proved when an applicant’s testimony is consistent and persuasive, and the acceptance of such testimony is reasonable in view of the credibility of the overall statement, such as the entry route, the length of time between the entry date and the application date, details of refugee application, the situation of the land of citizenship, the objective level of fear, political, social and cultural circumstances of the region where the applicant lives, and the level of fear a normal inhabitant feels in the same circumstances. (Refer to the judgment Daebeobwon [S. Ct.], 2007Du3930, July 24, 2008 (S. Kor.)).

The Court held that the sentence of this case is illegal based on the result of the examination and the purpose of the whole argument. The Court stated:

[T]he plaintiff is a homosexual and the villagers warned the plaintiff’s mother to expel the plaintiff out of the village; two months later, the plaintiff’s house was burned and the plaintiff’s mother and sister died from the incident; the Ugandan Government is persecuting homosexuals, and the Government does not effectively protect the plaintiff from persecution of the villagers. Thus, there is ‘sufficient reasonable fear’ of persecution because of the plaintiff’s ‘Membership of a Particular Social Group Status.’ Therefore, the disposition of this case is illegal.

**LEGISLATION AND ADMINISTRATIVE REGULATIONS /
HUMAN RIGHTS - REFUGEE**

Enactment of Refugee Law Enforcement Regulation June 28, 2013 Pronouncement, Ministry of Justice No. 7958

As the Refugee Law was enacted (Legislation No. 11298, February 2, 2012. Pronouncement, July 1, 2013. Enforcement) with the purpose to prescribe the detailed items about the status and treatment of refugees to promote the harmony between domestic law, and Convention relating to the Status of Refugees and Protocol Relating to the Status of Refugee, which Korea

became a party in December 1992, the Regulation is enacted with the purpose to decide the legislation and delegated items by enforcement ordinance, such as the application method and procedure for the refugee acceptance, management of refugee committee, and the required items for the enactment.

MALAYSIA

CHILDREN'S RIGHTS – EQUAL RIGHTS OF PARENTS IN THE RELIGIOUS EDUCATION AND RELIGION OF THEIR CHILDREN – WOMEN'S RIGHTS – EQUAL RIGHTS IN MARRIAGE AND FAMILY LIFE – FREEDOM OF RELIGION – UNILATERAL CONVERSION OF MINOR CHILDREN TO ISLAM – APPLICATION OF CEDAW, CRC, AND UDHR IN MALAYSIA

Indira Gandhi d/p Mutho v Perak Registrar of Converts, Perak Islamic Religious Department, State Government of Perak, Ministry of Education, Government of Malaysia, & Pathmanathan s/o Krishnan High Court Malaya [Judicial Review No: 25-10-2009. 25 July 2013]

The applicant Indira Gandhi and the respondent, Pathmanathan, were married in a civil marriage in 1993 and when the marriage fell apart in 2009, the respondent took the applicant's youngest child (eleven months old) away from her. The applicant later found out that her husband had converted to Islam and he had also converted their three children to Islam without her knowledge or permission; the children were not present during the conversion. She challenged the conversion of her children for non-compliance with various laws and for violating her right to gender equality and freedom of religion, guaranteed in the Federal Constitution.

In the judicial review hearing in 2013, the Court interpreted the word "parent" in article 12(4) of the Malaysian Federal Constitution to mean both father and mother to reflect the equal rights of both parents in determining the religion of the children. In this instance, the High Court was guided by the provisions in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as Malaysia has ratified CEDAW and the government had pledged commitment to CEDAW through public statements.

The Court also discussed the application of the Universal Declaration of Human Rights (UDHR) stating that the UDHR is part of the corpus of Malaysian law by way of section 4(4) of the Human Rights Commission

of Malaysia Act 1999, which requires the Human Rights Commission of Malaysia (SUHAKAM) to have “regard to the UDHR to the extent that it is not inconsistent with the Federal Constitution.” The learned High Court judge held that the relevant articles in the UDHR (articles 18, 26, and 29) were not inconsistent with the Malaysian Federal Constitution and as such, articles 8(1)-(2) and 12(4) of the Federal Constitution vest equal rights to both parents in the religious upbringing and in determining the religion of their children.

The High Court referred to articles 18 and 30 of the Convention on the Rights of the Child (CRC) and held that the unilateral conversion of the three children without the applicant’s knowledge or consent deprived her of her right as a guardian of the children and also deprived the children of their right to decide which of their parent’s religion to embrace when they attain eighteen years of age.

Accordingly, the High Court nullified the certificate of conversion and held that the conversion of the children without the applicant’s knowledge of consent violated articles 3(1), 5(1), and 11 of the Federal Constitution and international norms and conventions.

CHILDREN’S RIGHTS – CHILD PROTECTION – APPLICATION TO VARY DECREE NISI – CHILD OF MARRIAGE SEXUALLY ABUSED BY GRANDFATHER – IMPLEMENTATION OF THE CRC IN MALAYSIA – VIEWS OF THE CHILD SHOULD BE GIVEN DUE WEIGHT

Kevin Goldman v. Geraldine Audrey Herrera, High Court Malaya, Kuala Lumpur [Divorce Petition No: 33-1817-2010. 21 November 2012]

Both parties to the proceedings were married and had a daughter (M) but they subsequently filed for mutual divorce in November 2010. Part of the *decree nisi* was that both parties would share equal joint custody of M; M would live with her father (PH) and her father’s parents continuously for three weeks and then with her mother (PW) for three weeks. Subsequently, PH remarried and moved out of his parents’ home but M continued to be left in the care of PH’s parents for the entire day; PH would pick M up at night and take her back to his home.

It was consequently discovered that PH’s father was sexually abusing M over a period of two years. PH’s father was arrested and charged with four counts under section 354 of the Penal Code. As a result, PW applied for ancillary relief to vary the terms of the *decree nisi* and the agreement, in

particular, for PW to be given sole guardianship, custody, care and control of M and for PH to be denied access to M. PH counterclaimed and filed committal proceedings for breach of the terms of the *decree nisi* and the agreement and claimed for care, custody and control of M.

In determining custody, the learned High Court judge took into consideration the wishes of M and what she (M) said at the interview with the learned judge. In this regard, the Court relied on section 88(2)(b) of the Law Reform (Marriage and Divorce) Act 1976 and article 12 of the Convention on the Rights of the Child, which was acceded by Malaysia, both of which require that the wishes of the child be taken into account when deciding on matters that would affect the child. The Court allowed PW's application, *inter alia*, that the terms of the *decree nisi* be varied wherein the sole guardianship, custody, care and control of M be given to PW; PH was denied access to M until the final disposal of the criminal charges against PH's father; and PH was prohibited from exposing M to his family members.

**FREEDOM OF SPEECH AND EXPRESSION – LEGITIMATE
RESTRICTIONS TO FREEDOM OF SPEECH AND EXPRESSION –
CONSTITUTIONALITY OF THE SEDITION ACT 1948 – APPLICATION
OF INTERNATIONAL HUMAN RIGHTS TREATIES AND OTHER
REGIONAL HUMAN RIGHTS INSTRUMENTS IN MALAYSIA**

***Mat Shuhaimi Shafiei v. PP; Court of Appeal* [Criminal Appeal No: B-09-212-09-2011. 26 December 2013]**

The appellant was charged with publishing statements of a seditious tendency, which is an offence under section 4(1)(c) of the Sedition Act 1948. The impugned statements were published on the Internet and were the appellant's views on the Laws of the Constitution of Selangor 1959. Before the commencement of the trial, the appellant filed an application where he sought, *inter alia*, an order that the criminal prosecution against him be struck out, set aside, quashed or stayed, on the grounds that section 4(1)(c) of the Sedition Act was unconstitutional for two main reasons. Namely, that section 4(1)(c) was inconsistent with article 10 of the Federal Constitution and offended the reasonableness test; and that it also violated the right to equality in article 8(1) of the Federal Constitution and therefore offended the proportionality test.

In the judgement, the Court of Appeal gave due accord to the right to freedom of speech and expression in article 19 of the International Covenant on Civil and Political Rights (ICCPR), article 10 of the European Convention on Human Rights, article 13 of the American Convention on Human Rights, and article 9 of the African Charter on Human and Peoples' Rights.

Specifically on the limits to freedom of speech and expression, the Court of Appeal referred to article 19 of the Universal Declaration of Human Rights and concluded that even at the international human rights level there are restrictions to freedom of speech and expression. As such, the said Court held that the Sedition Act fell squarely within the restrictions in article 10(2) of the Malaysian Federal Constitution and "its validity and constitutionality cannot be challenged." The Court also held that section 4(1)(c) of the Sedition Act 1948 did not violate the reasonable and proportionality tests.

**HUMAN RIGHTS – DISABILITY RIGHTS – TREATY TO FACILITATE
ACCESS TO PUBLISHED WORKS BY VISUALLY IMPAIRED PERSONS
AND PERSONS WITH PRINT DISABILITIES – ACCESS TO SPECIAL
FORMAT MATERIALS**

**Statement by Malaysia at the Diplomatic Conference to Conclude a
Treaty to Facilitate Access to Published Works by Visually Impaired
Persons and Persons with Print Disabilities, Marrakech, 17-28 June 2013**

Malaysia hailed the conclusion of the treaty as a milestone as it will benefit millions of visually impaired persons throughout the world, by enhancing the availability of special format materials for visually impaired persons.

The treaty not only protects the right holders' interest but equally important, it facilitates access and use of copyright works by visually impaired persons. The copyright law in Malaysia has incorporated the former where the law requires issuing copies of any work into a format, which meets the needs of visually impaired persons.

Malaysia reiterated its support and commitment to the treaty and hoped that further cooperation and engagement would continue in this area.

**HUMAN RIGHTS – UNIVERSAL PERIODIC REVIEW – HUMAN
RIGHTS COUNCIL – MILLENNIUM DEVELOPMENT GOALS**

Outcome of Malaysia's Second Universal Periodic Review (UPR) at the 17th Session of the UPR Working Group of the United Nations Human Rights Council Geneva, Switzerland, 31 October 2013

Upon the conclusion of Malaysia's second UPR on 24 October 2013 at the UN Headquarters in Geneva, Switzerland, Malaysia (through the Ministry of Foreign Affairs) issued a press release with a summary of recommendations that were addressed to Malaysia.

In the statement, Malaysia emphasised its progress in achieving the Millennium Development Goals, in particular, measures undertaken to improve the status of women and the civil and political rights of Malaysians, to provide free primary and secondary education and to combat HIV/AIDS. Malaysia's measures also include the withdrawal from certain recommendations to the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW).

Malaysia also took cognisance of the recommendations to improve in the area of the freedom of expression, freedom of assembly and association, freedom of religion, situation of the indigenous peoples and migrants, access to housing, health and education, empowerment of women, children and persons with disabilities, application of the death penalty, statelessness and misconduct of law enforcement officials.

SRI LANKA

HUMAN RIGHTS – PROCEDURAL RIGHTS

Impeachment of the Chief Justice

The Chief Justice was impeached under Presidential warrant. Article 107(3) of the Constitution provides that the procedure for impeachment of the higher judiciary shall be by standing orders of parliament or by law. The Parliamentary Select Committee concluded that the Chief Justice was guilty of misconduct and adopted the report in Parliament. The Chief Justice and several others sought to quash this report by way of a writ petition before the Court of Appeal. The Court of Appeal in *C.A (Writ) Applica-*

tion N0.411/2012 quashed the report on the basis that the procedure for impeachment of the judiciary can be provided for only by law, consequent to the decision in *Chandra Jayaratne v Anura Yapa and others* SC Reference 3/2012; C.A. (Writ) Application No.358/2012. On 13 January 2013 however, the President impeached the Chief Justice disregarding the judgment of the Court of Appeal.

Legislative amendment extending period of detention of persons accused of identified crimes - Code of Criminal Procedure (Special Provisions) Act No 2 of 2013

Code of Criminal Procedure (Special Provisions) Act No 2 of 2013

The period of detention without an arrest warrant for offences such as murder, culpable homicide not amounting to murder, rape, kidnapping and theft, was extended from 24 hours to 48 hours.

HUMAN RIGHTS – TRANSITIONAL JUSTICE

OHCHR Report ‘Advice and Technical Assistance for the GOSL on Promoting Reconciliation and Accountability in SL’ - A/HRC/22/38

Report of the High Commissioner for Human Rights (OHCHR)

A report was issued by the OHCHR on the request of the Human Rights Council under resolution 19/2 titled ‘Advice and Technical Assistance for the GOSL on Promoting Reconciliation and Accountability in SL’. The report addressed a wide range of human rights violations that had been alleged in Sri Lanka in the context of the internal armed conflict and related issues. The OHCHR observations and recommendations included those in relation to independence of the judiciary, in the aftermath of the impeachment of the Chief Justice in January 2013, and the reconstruction and resettlement programme for internally displaced persons. The report noted that adequate remedies have not been provided for the family members of persons missing during the last stages of the war. The report recommended that independent and impartial investigations be carried out regarding the allegations of violations of human rights and international humanitarian law in Sri Lanka.

HUMAN RIGHTS – UN SYSTEM**Visit of the High Commissioner for Human Rights to Sri Lanka**

The High Commissioner paid a visit to Sri Lanka in August 2013. She commended the Government for its progress in relation to reconstruction and resettlement, the proposal to criminalise disappearances in the Penal Code, the establishment of a Court of inquiry by the Army to investigate allegations of civilian casualties and summary executions, the transfer of police powers from the Ministry of Defence to a new Ministry of Law and Order, and the proposal to introduce legislation to criminalise hate speech. However, the High Commissioner raised concerns about the independence of the judiciary subsequent to the impeachment of the Chief Justice, the limited mandate of the then appointed Commission to inquire into Disappearances and the involvement of military personnel in civilian activities.

Oral Update by the High Commissioner for Human Rights to the UN HRC on Sri Lanka

The High Commissioner commended the Government for the invitations extended to the Special Rapporteur for Internally Displaced Persons and the Special Rapporteur on Education. She noted that the majority of internally displaced persons have been returned or resettled and that infrastructure development has been commendable. The National Plan of Action for implementing the recommendations of the LLRC was welcomed and the High Commissioner noted the progress with regard to rehabilitation and reintegration of detainees. She noted with concern the impeachment of the Chief Justice and the allegations of the excessive use of force in the suppression of a protest resulting in at least one death.

Promoting Reconciliation and Accountability in Sri Lanka A/HRC/22/L.1/Rev.1 (Adopted by a vote on 21 March 2013, 25 in favour, 13 against, 8 abstentions)

This resolution followed the resolution adopted in 2012 by the Council in calling for the implementation of the recommendations of the Lessons Learnt and Reconciliation Commission, a domestic and presidential commission. It called on the Government to conduct 'independent and credible' investigations regarding allegations of violations of human rights law and international humanitarian law during the armed conflict in Sri

Lanka. Furthermore the resolution encouraged the government to cooperate with UN special procedures mandate holders by responding to their requests for invitations, to increase its dialogues and cooperation with the OHCHR and to implement the recommendations made by the OHCHR in the report of 2013.

Universal Periodic Review

In March 2013, the Human Rights Council adopted the outcome of the UPR in Sri Lanka. In doing so it noted that Sri Lanka had accepted 113 out of the 204 recommendations that it received and made 19 voluntary commitments specifically towards the protection of the rights of women and children, the advancement of the reconciliation process, and the re-integration of ex-combatants in society.

Visit by UN Special Rapporteur on the Human Rights of Internally Displaced Persons

The Special Rapporteur concluded a successful visit from 2nd to 6th December 2013. He commended the Government for working in partnership with humanitarian organizations to return or resettle more than 450 000 persons who were internally displaced due to the internal armed conflict. The rapid infrastructure development including in the areas affected by the armed conflict was appreciated. The Special Rapporteur welcomed the agreement to conduct a Joint Needs Assessment with humanitarian and development partners and noted that it would be essential for establishing jointly agreed sets of statistical data on the number of IDPs that have been returned or resettled.

HUMAN RIGHTS – INDIGENOUS PERSONS

Rights of Indigenous Persons

At the 24th Session of the Human Rights Council, Sri Lanka stated that it has initiated a three year project to develop legislation to protect the human rights of indigenous persons including measures to conserve their traditional knowledge and traditional medicines, and support to establish a museum on their heritage, among others. In order to create greater awareness about the indigenous community, which is instrumental towards the preservation of their lifestyle, the Government has also established several

cultural centres and documented the history of the community and their way of life.

VIETNAM

HUMAN RIGHTS – PROTECTION AGAINST TORTURE

Signing of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 7 November 2013

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the United Nations General Assembly on 10 December 1984. It came into force on 26 June 1987, 30 days after it had been ratified by 20 states.⁶⁹ Today, it has 83 signatories and 159 states parties.⁷⁰

CAT is the most comprehensive international treaty that deals with torture. It establishes the definition of torture⁷¹ along with the non-derogable nature of the individual right not to be tortured under any circumstances, including war or the threat of war, political instability, combating terrorism or any other emergency.⁷² The convention obliges state parties to take effective legislative, administrative, judicial and other measures to prevent torture.⁷³ It obliges state parties to establish jurisdiction, prosecute or extradite for prosecution any person found in their territories who is alleged to have committed torture, regardless of whether the crime is committed outside their borders and regardless of the alleged perpetrator's nationality.⁷⁴ It also requires states parties to train their officials about the prohibition against

69 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 27(1), opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

70 *Status of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en.

71 CAT, *supra* note 69, art. 1(1).

72 *Id.* art. 2(2).

73 *Id.* art. 2(1).

74 *Id.* art. 5-8.

torture,⁷⁵ conduct prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction,⁷⁶ and ensure that victims of torture have the right to complain and to have their case investigated promptly and impartially, as well as to receive redress and compensation.⁷⁷

Like many other international human rights treaties, CAT has established a treaty body, the Committee against Torture, to monitor the implementation of states parties.⁷⁸ The Committee considers and makes comments on reports of states parties on the measures they have taken to implement the Convention.⁷⁹ The Committee can make a confidential inquiry to examine information indicating that torture is being systematically practiced in a state party and, if necessary, make comments or suggestions it deems appropriate in the view of the situation.⁸⁰ The Committee can also consider state claims and individual communications on alleged violations of the Convention if the concerned state parties recognise its competence to do so.⁸¹

Nearly 30 years after the adoption of CAT, Vietnam finally signed the convention on 7 November 2013.⁸² The decision to sign CAT was made by the Standing Committee of the National Assembly of Vietnam on 15 October 2013.⁸³ CAT is subject to ratification⁸⁴ and Vietnam still needed to ratify the treaty in order to formally become a state party. By signing

75 *Id.* art. 11.

76 *Id.* art. 12.

77 *Id.* art. 13-14.

78 *Id.* art. 17-24.

79 *Id.* art. 19.

80 *Id.* art. 20.

81 *Id.* art. 21-22.

82 UNITED NATIONS TREATY COLLECTION, *supra* note 70.

83 Thông báo nội dung phiên họp thứ 22 của Ủy ban thường vụ Quốc hội [Result of the 22nd Session of the Standing Committee of the National Assembly], QUỐC HỘI NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM [NAT'L ASSEMBLY OF THE SOCIALIST REPUBLIC OF VIET.], <http://quochoi.vn/hoatdongcuaquochoi/cacphienhopUBTVQH/quochoikhoaXIII/phienhopthu22/Pages/thong-bao-ket-luan.aspx?ItemID=23873>.

84 CAT, *supra* note 69, art. 25(2).

CAT, however, Vietnam is already obliged to refrain from acts which would defeat the object and purpose of the Convention.⁸⁵ Against that background, the signing of CAT represents a step forward for the country in terms of participating into the international legal framework on human rights protection, although it remains to be seen whether that would substantially improve the State's behaviour in the protection against torture.

Humanitarian Law

SRI LANKA

DISPLACED PERSONS – INTERNAL ARMED CONFLICT

Registration of Electors (Special Provisions) Bill – judicial reference to Guiding Principles on Internal Displacement

The Special Determination on the *Registration of Electors (Special Provisions) Bill*⁸⁶ considered the constitutionality of a bill that sought to recognize the right to vote of persons who had been displaced due to the internal armed conflict and their children. After an examination of the proposed provisions, the Court determined that the Bill was constitutional. The Court endorses the definition of an IDP in the Bill while noting its similarity to the definition employed in the *Introduction to the Guiding Principles on Internal Displacement*.

International Economic Law

BANGLADESH

WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS AGREEMENT) – WTO

The Geographical Indications of Goods (Registration and Protection) Act 2013 [Act 54 of 2013] - an Act to provide for the protection of geographically special goods and products of Bangladesh or foreign origins.

85 Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. 331. (entered into force Jan. 27, 1980).

86 *Registration of Electors (Special Provisions) Bill* SC (SD) 16/2013 reported in 217(5) Parliamentary Debates (Hansard) 5 June 2013 382.

The Geographical Indications of Goods (Registration and Protection) Bill 2013, passed by the Bangladesh Parliament, was signed into law on 10 November 2013. The Geographical Indications (GI) Act of 2013 was enacted to provide for the protection of geographical indications in Bangladesh, that is, for the protection of locality-based goods. As a member of the WTO, Bangladesh enacted this law to comply with the provisions concerning the geographical indications of the Agreement on Trade-Related Aspects of Intellectual Property Rights, although there is no direct mention of this in the Act.

The GI Act 2013 has established a mechanism for registering products of local origin to ensure protection against any fallacious claims by other nations or territories. The law would ensure that products from other GI countries would also be protected in a similar way, if they are identified and recognised as GI products belonging to those countries/territories.

The Act contains detailed provisions concerning the application for the registration of GI of any product, the process of such registration, and the modes of disputes or objections to any applications for the registration of GI of any product. It also sets out procedures of appeal against any decisions of the Registrar and provisions relating to cancellation or rectification of any registration.

Other salient features of the GI Act 2013 are as follows:

- (a) 'Geographical indication of goods' has been defined as a geographical indication of agricultural, natural, or manufactured goods that identifies the product's originating country or territory, or a region or locality of that country or territory, where any specific quality, reputation, or other characteristic of the goods is essentially attributable to the geographical origin (sec. 2(9)).
- (b) The Act establishes a Geographical Indication Unit within the Department of Patent, Design and Trademarks to carry out all the functions relating to the registration and protection of geographical indication of goods (sec. 4). The Department of Patents, Designs, and Trademarks began receiving applications for the registration of GI of goods from 1 September 2015.
- (c) The Act provides for the protection of geographical indications, irrespective of registration and its definite territory, region, or locality, against the geographical indications that falsely represent the origin of goods to the public (sec. 6). For the purpose of registration, the classification of the goods will be in accordance

with the international classification of goods. Section 7 provides for the registration of homonymous geographical indications for the same class of goods, for which an equitable treatment and protection to every producer of such goods shall be accorded for each indication.

- (d) The Act prohibits registration of certain geographical indications when their use would result in deception of, or cause confusion among, the consumers, would hurt the religious susceptibilities of any citizens of Bangladesh, or when they represent a false geographical indication (sec. 8).
- (e) The Act provides that procedural fairness shall be maintained with respect to all affected/relevant parties when registering or refusing to register a geographical indication, or when cancelling a registration (secs. 9, 11-15).
- (f) Upon registration of a GI, a registered authorized user is given the right to use the geographical indication of goods and to obtain relief for its infringements (sec. 18). However, section 19 prohibits the alienation of the rights conferred through registration by the way of assignment, transfer, and license.
- (g) Section 28 defines certain acts as infringements of protected geographical indication. The acts which would constitute an infringement of geographical indication rights include, *inter alia*, (i) any misleading use of geographical indication, (ii) an act constituting unfair competition, including passing off, (iii) use of geographical indication to mislead the true origin by using wrong translations of the true origin or expressions such as “kind,” “style,” “imitation,” and so on. When the right relating to GI is breached, the aggrieved person, including any interested persons, producers, or consumers, may initiate a civil action in the competent district court. The available civil remedies for infringements include injunction, compensation, or any other appropriate remedies of civil nature that would be commensurate with the nature of infringements.
- (h) The Act also criminalises certain acts relating to geographical indications and the methods of registering any GIs (secs. 29–33). The offences under this Act are triable by a magistrate’s court.

**INTERNATIONAL TRADE – GENERAL AGREEMENT ON TARIFFS
AND TRADE 1994 – INTERNATIONAL COMMERCIAL LAW –
PRIVATE INTERNATIONAL LAW – ICC UNIFORM CUSTOMS AND
PRACTICE FOR DOCUMENTARY CREDITS – PRINCIPLE OF STATE
SOVEREIGNTY OVER TERRITORIAL WATERS**

***Transcom Cables Ltd v. The Commissioner of Customs* [18 MLR (2014)
HCD 97; Judgment May 24, 2012]**

Facts

Two issues were involved in this case. The first issue was whether the Pre-Shipment Inspection (PSI) Agent rightfully assessed the imported goods in question and issued the Clean Report Finding (CRF) value, which is approximately thirty percent additional valuation over the invoice value of the goods, in favour of the petitioner. The second issue was whether, upon arrival of the goods in Bangladesh, the Commissioner of Customs acted illegally by refusing to accept a bank guarantee for the difference of the CRF value and transaction value of the goods.

Decision and Reasoning

In arriving at a conclusion on these questions, the Court relied on the international legal standards on customs valuation that were incorporated in the relevant municipal law of Bangladesh, namely the Assessment of Duties (Valuation of Imported Goods) Rules 2000. The Court accepted the argument that the Valuation Rules of 2000 were in conformity with the WTO's General Agreement on Tariff and Trade (GATT) 1994. It was observed that rule 15 of the Valuation Rules 2000 specifically complies with the Agreement on Implementation of article VII of the GATT 1994 ('the Valuation Agreement'). In order to provide a fair and uniform customs valuation system, this Valuation Agreement bases the customs value on the transaction value of the imported goods, which is the price actually paid or payable for the goods when sold for export. According to the court, this Agreement provides for the international law governing the customs valuation around the world. Taking into consideration the fact that Bangladesh is a party to the GATT 1994, the Court then extensively discussed the genesis, rationale, provisions, and development of article VII of the GATT that provides the rules to determine the valuation of the goods for customs purposes. Noting the different methods of customs valuation according

to the Valuation Agreement, the Court finally declared that the Customs Authority of Bangladesh acted illegally and arbitrarily by failing to comply with the Valuation Rules 2007 and ordered to reassess the customs valuation according to international rules on the subject.

***Md. Ibrahim v. Bangladesh* [Writ Petition No. 2640 of 2011; 18 BLC (2013) HCD 415; Judgment October 16, 2012]**

Facts

The petitioner challenged the non-delivery by the Customs and Chittagong Port Authorities of his imported goods, despite the production of relevant documents and payment of customs duties and other charges. By referring to section 82A of the Customs Act 1969, the petitioner argued that the authorities had a duty to release the goods within three days after making an assessment of them. The authorities sought to defend their decision to release the goods on the ground that the relevant transport documents were legally deficient. The Court referred to article 24 of ICC Uniform Customs and Practice for Documentary Credits ('the UCP 600') that deals with road, rail, or inland waterway transport documents. The UCP 600, which came into force on 1 July 2007, governs the operation of letters of credit and, *inter alia*, requires the transport document to be signed by the carrier of goods or a named agent for, or on behalf of, the carrier. In this case, the transport document (the house bill of lading) was signed neither by the carrier nor by a named agent for the carrier. Therefore, the Court held that the house bill of lading submitted by the petitioner was not a legal bill of lading as per article 24 of the UCP 600. Also, the question of whether the Bangladeshi law would be applicable for the foreign vessels and cargos entering the territorial waters of Bangladesh was raised in this case.

Decision and Reasoning

Relying on the internationally recognized principle of state sovereignty over territorial waters, the Court observed that when a vessel flying the flag of any other country enters the territorial waters of Bangladesh, "the vessel and cargo becomes subject to the municipal laws of Bangladesh" according to section 3(3) of the Territorial Waters and Maritime Zones Act 1974. It may be noted that this 1974 Act embodied international principles relating to the jurisdiction over territorial waters.

***Novorossiysk Shipping Co., USSR v. Lever Brothers Bangladesh Ltd. and Others* [19 BLC (2014) HCD 344; Judgment May 27, 2012]**

Facts

This case involved the application of international trade law and practice in a private international law dispute before the High Court Division of the Supreme Court of Bangladesh. Lever Brothers Bangladesh Ltd. imported two consignments of inedible tallow from Auckland, New Zealand, on the vessel *MT Antares VII*, for which the carrier was Novorossiysk Shipping. The vessel with the cargo in bulk arrived at the Port of Chittagong on 6 January 1993. Three days later, the vessel discharged the cargo into the shore tanks under the supervision of the surveyors appointed by the concerned parties to the contract. The survey, which was carried out by NA Survey and Inspection, showed that on board the ship, an ullage survey⁸⁷ was conducted on the day of discharging the cargo, i.e. 9 January 1993. According to the ullage survey, a quantity of 5.984 metric tons was found allegedly short of the total consignment of 1948.265 metric tons. On the other hand, according to the shore tank survey report, a quantity of 32.001 metric tons of tallow was short when the consignment was discharged from the vessel *MT Antares VII* into the shore tanks.

Decisions and Reasoning

To recover the loss from shortage of tallow in bulk, estimated to be BDT 7,40,538.36, Lever Brothers Bangladesh Ltd. sued the Novorossiysk Shipping Co. in the primary civil court (Court of Joint District Judge). The claimant argued that the defendant (Novorossiysk Shipping Co.), among other defendants, was liable for the shortage of tallow in bulk and should be bound to compensate the loss sustained by it. The Court of Joint District Judge decided the claim in favour of the plaintiff. The defendant claimed that it was not liable for the loss and appealed the decision to the High Court Division in 1998.

The High Court Division sustained the appeal by Novorossiysk Shipping Co., and held that, according to international trade and practice, the cargo carrier Novorossiysk Shipping Co. was entitled to one percent

87 Ullage Survey is one of the typical measuring methods for cargo on board the ship (OBS) or board quantity (OBQ).

ocean allowance as ‘inevitable loss’ while carrying bulk cargo like tallow. An alleged shortage of 5.984 metric tons of tallow, as the ullage survey report showed, was covered by the one percent ocean allowance available to Novorossiysk Shipping Co. Considering the evaporating nature of the cargo of tallow, the Court further held that in the event of conflict between the ullage survey report and the shore tank survey report, the former must get priority over the latter. Therefore, the Court reasoned that the carrier Novorossiysk Shipping Co. would not be liable for the alleged shortage of cargo under international trade law and practice, as well as Bangladesh’s Carriage of Goods by Sea Act 1925.

TRADE AND INVESTMENT – BILATERAL AGREEMENT

Bangladesh – USA Trade and Investment Cooperation Forum Agreement (TICFA), 25 November 2013, Dhaka

On 25 November 2013, Bangladesh entered into a bilateral agreement with the U.S. with a view to provide for a mechanism for both governments to discuss trade and investment issues and areas of cooperation. TICFA aims at establishing an annual forum to identify and address obstacles to bilateral trade and investment. The first TICFA meeting was held in Dhaka in 2014 and the second in Washington, D.C. in 2015.

As the U.S. Trade Representative Michael Froman remarked after signing the agreement, under the TICFA, both countries “will more regularly work together to address issues of concern” in their trade and investment relationship. The U.S. government hoped, for example, that it would also be able to track and discuss Bangladeshi efforts to improve worker safety and worker rights, especially in its ready-made garment sector.

VIETNAM

IMPORT-EXPORT – WTO DISPUTE SETTLEMENT SYSTEM – ANTI-DUMPING LAW AND PRACTICES – SHRIMP II DISPUTE

United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam (WT/DS429/12)

On 17 January 2013, Vietnam officially requested the World Trade Organization (the “WTO”) Dispute Settlement Body (the “DSB”) to establish a Panel to settle the trade dispute with the United States in relation to its

application of anti-dumping measures against certain shrimp imports from Vietnam (the case “DS 429”). The Panel was established by the DSB on 28 January 2013 to examine the dispute.⁸⁸ China, the European Union, Japan, Norway, Thailand, and Ecuador have applied to be third-parties in the proceeding. Following the agreement of the parties, the Panel was composed on 12 July 2013.

Vietnam initiated the lawsuit following unsuccessful consultations with the U.S. concerning a number of anti-dumping measures on certain frozen warm-water shrimp from Vietnam, as well as certain U.S. laws or practices concerning the imposition of anti-dumping measures since the beginning of 2012 in accordance with the requirement of the WTO Dispute Settlement Understanding.⁸⁹

Vietnam requested a review of the implementation of the DSB’s ruling on a similar case from 2010, DS 404, and made claims with respect to the U.S. Department of Commerce’s use of the “simple zeroing” methodology, the assignment of a rate to the non-market economy-wide entity, and the sampling of Vietnamese shrimp imports. The Panel in DS 404 case voiced support for two out of the three issues raised by Vietnam and demanded that the U.S. government align its regulations with the WTO Anti-Dumping Agreement and the General Agreement on Tariffs and Trade 1994, saying that the zeroing methodology is inconsistent with the WTO regulations and should be banned.⁹⁰ Since then, the Vietnamese Government has asked the U.S. side to abide by the Panel’s ruling in DS 404 and revise laws on the calculation of anti-dumping margins on Vietnam’s shrimp imports.

On 31 July 2013, upon receipt of notification from the DSB on the Panel’s establishment and prior to Vietnam’s first written submission, the U.S. submitted a request to the Panel, raising its objection to the inclusion of certain claims and measures in Vietnam’s panel request, amongst which is that the sixth administrative review and the “*use of zeroing in original*

88 *Dispute DS429: United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds404_e.htm (last visited Dec. 10, 2013).

89 *Id.*

90 *Dispute DS404: United States — Anti-dumping Measures on Certain Shrimp from Viet Nam*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds429_e.htm (last visited Dec. 10, 2013).

investigations, new shipper reviews and changed circumstances reviews” are not measures within the Panel’s terms of reference.⁹¹ Subsequently, Vietnam provided comments on the U.S.’ reply and on 27 August 2013, Vietnam filed its first written submission.⁹²

On 26 September 2013, the Panel issued a preliminary ruling in which it rejected the U.S.’ argument and declined to make any ruling with respect to the remaining objections raised by the U.S. in light of Vietnam’s indication that it was not pursuing the corresponding claims.⁹³ The final rulings of DS 429 are expected to be released by the Panel by the end of 2014.

International Labour Organisation (ILO)

MALAYSIA

LABOUR LAW – TRADE UNION MEMBERSHIP – DISMISSAL FROM A PARTICULAR INDUSTRY – RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION 1949 (ILO CONVENTION NO. 98) – INTERPRETATION OF THE TRADE UNIONS ACT 1959, SEC. 26(1) – CONFLICT BETWEEN DOMESTIC AND INTERNATIONAL LAW

Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v. Ketua Pengarah Kesatuan Sekerja & Ors, High Court Malaya, Kuala Lumpur [Originating Summons No: R4(R2)-24-51-2008. 10 October 2013]

Mr. Solomon, the General Secretary of the plaintiff was dismissed from employment with nine other members of the first plaintiff by CIMB Bank Berhad for unlawful picketing. Mr. Solomon and the other members challenged the dismissal and a representation was made to the Industrial Court pursuant to section 20 of the Industrial Relations Act 1967. The issue before the Court was the interpretation of section 26(1) of the Trade Unions Act 1959 in particular whether an employee loses his membership of the trade union of that industry if he/she has been dismissed and his/her dismissal is being challenged in court.

91 Panel Report, *United States - Anti-Dumping Measures on Certain Shrimp from Viet Nam*, Annex A-3, ¶ 1.1(b)-(c), WTO Doc. WT/DS429/R/Add.1 (Nov. 17, 2014) (emphasis added).

92 *Id.* ¶ 1.2.

93 *Id.* ¶ ¶ 6.1-6.3.

One of the issues discussed by the Court was whether there was a conflict between the Industrial Relations Act 1967 and the Right to Organise and Collective Bargaining Convention 1949 (ILO Convention No. 98), which Malaysia ratified in 1961. The learned judge stated that although it is the duty of the Court to give effect to national law in this instance as per the case of *Seow Teck Ming & Anor v. Tan Ah Yeo & Anor* [1991] 3 CLJ 2731, the Court also recognised Lord Diplock’s proposition in *Solo-man v. Commissioners of Customs & Excise* [1967] 2 QB 11, that there is a “*prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another and others are not, the meaning which is consonant is to be preferred.”

The High Court ultimately held that a member of the union who was terminated from their employment is not automatically stripped of their membership; the purpose of section 26(1A) of the Trade Unions Act 1959 was not to restrict membership of a particular union to only persons employed in that particular type of trade or occupation or industry. To allow such an interpretation of section 26(1A) would arbitrarily increase the powers of the Director General of Trade Unions.

VIETNAM

LABOUR RIGHTS – PROTECTION OF SEAFARERS’ RIGHTS – INTERNATIONAL REGULATIONS OF SHIPPING

Ratification of the Maritime Labour Convention, 10 April 2013

The 2006 Maritime Labour Convention, widely known as the “seafarers’ bill of rights,” is an international labour treaty adopted under the International Labour Organization (ILO) to establish international standards for the protection of seafarers, ensure their decent work, and secure economic interests of quality ship owners.⁹⁴ The Convention covers every aspect of seafarers’ work and life on board, including minimum age, seafarers’ employment agreements, hours of work or rest, payment of wages, paid annual

94 *Basic Facts on the Maritime Labour Convention 2006*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_219665/lang--en/index.htm.

leave, repatriation at the end of contract, onboard medical care, the use of licensed private recruitment and placement services, accommodation, food and catering, health and safety protection and accident prevention, and seafarers' complaint handling. The Convention entered into force on 20 August 2013.⁹⁵ It currently has seventy-seven states parties, covering more than ninety percent of the world's gross tonnage of ships.⁹⁶

Vietnam ratified the Convention on 22 March 2013 by the President's Decision No. 47/2103/QĐ-CTN.⁹⁷ It submitted the instrument of ratification to the Director-General of the International Labour Office on 10 April 2013.⁹⁸ On 25 July 2013, the Prime Minister then adopted Decision No. 1221/QĐ-TTg approving the Plan for the Implementation of the Convention. The Government's plan requires comprehensive assessment and certification for all ships; establishment of a tripartite consultation mechanism involving representatives of the Government, shipowners and seafarers in 2013; an overall upgrading of relevant laws by 2015; and investment in public information and entertainment structures for seafarers at sea ports by 2020.⁹⁹

95 *Ratifications of MLC, 2006 - Maritime Labour Convention, 2006*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312331.

96 *Id.*

97 *Chủ tịch nước ra quyết định về việc gia nhập Công ước Lao động Hàng hải 2006 (MLC2006)* [*President Decides on Ratification of the Maritime Labour Convention, 2006*], CÔNG TY CỔ PHẦN TM VÀ VẬN TẢI BIỂN CHÂU KHANG [CHAU KANG SHIPPING AND TRANSPORT JOINT STOCK COMPANY] (Apr. 19, 2013), <http://chaukhang.vn/tin-tuc/su-kien/chu-tich-nuoc-ra-quyet-dinh-ve-viec-gia-nhap-cong-uoc-lao-dong-hang-hai-2006-mlc2006.html>.

98 *Ratifications of MLC, 2006 - Maritime Labour Convention, 2006*, *supra* note 83.

99 *New Horizon for Vietnamese Seafarers*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_220049/lang--en/index.htm.

International Law Commission

INDIA

STATEMENT BY INDIA ON AGENDA ITEM 81 – REPORT OF THE INTERNATIONAL LAW COMMISSION – PART III AT THE SIXTH COMMITTEE OF THE 65TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY ON 4 NOVEMBER 2013¹⁰⁰

Congratulating the Special Rapporteur Mr. Eduardo Valencia-Ospina for submitting the sixth report on the topic, “Protection of persons in the event of disasters,” India noted that it elaborated the draft article 5 *ter* (Cooperation for disaster risk reduction); and the draft article 16 (Duty to reduce the risk of disasters). India also noted with appreciation that the Commission had adopted the commentaries to all the draft articles adopted so far. Restricting its comments to the draft articles 5 *ter* and 16, India noted and welcomed the Special Rapporteur’s shift from response-centric model to focus also on prevention and preparedness. India also noted with interest that the Commission had relied upon variety of sources of law in order to identify the duty to reduce the risk of disasters, including international agreements and instruments (such as the 2005 Hyogo Framework for Action), regional and national laws on prevention, preparation and mitigation, which also included India’s Disaster Management Act, 2005. Regarding the draft article 16, India pointed out that it obliged each State to take measures, including through laws and regulations, to prevent, mitigate and prepare for disasters. The scope of the topic would thus, India pointed out, comprise not only the disaster phase but also the pre- and post-disaster phases. However, according to India, it was unclear whether the same would be applicable to industrial disaster situations.

India further added that:

As a State’s undertaking of rights and obligations during pre-disaster phase is largely linked with that State’s economical development, technical know-how and human resources, we would stress for a balance to ensure that the interests of developing States are

100 P. Rajeev, Member of Parliament & Member of Indian Delegation, Statement on Agenda Item 81, at the Sixth Committee of the 68th Session of the United Nations General Assembly (Nov. 04, 2013) (transcript available in <https://www.pminewyork.org/adminpart/uploadpdf/16849pmi116.pdf>).

not affected by the rights and obligations under this draft article. Similarly, 'the principle of common but differentiated responsibility' envisaged under environmental law for developing States need to be considered and respected while determining the characteristics with regard to 'due diligence.'

Turning to the topic, "Formation and evidence of customary international law," India agreed that the purpose of the work on the topic should be to provide practical assistance to the practitioners of international law as well as to the judges and lawyers in the domestic jurisdictions, who might not be well-versed in public international law but are nevertheless called upon to examine and decide on matters involving aspects of international law. India also added that this purpose would be better served if, as agreed in the Commission, the outcome of the work would be in the form of non-prescriptive "conclusions" and commentary that would provide guidance to States.

India shared the view that the substance of the rules of customary international law would not fall within the scope of the topic. It agreed that "*jus cogens*" would not also fall within the scope of the topic, as the peculiarity of non-derogation distinguished it from the customary international law rules.

Appropriately terming the change of the title of the topic to "Identification of customary international law," India pointed out that this study would also include the dynamic process of formation, with special focus on the objective evidence of the rules of customary international law. India stressed on the study of the existence and formation of regional customary international law. While the dynamic relationship between customary international law and treaties would form parts of the study of the topic, India stated that it looks forward to the study of the relationship between customary international law and other sources of international law, especially, general international law.

Further, India added that it would like to see that both elements, the State practice and *opinio juris*, were given equal importance in the study. India further noted that:

The practice of States from all regions should be taken into account. In this regard, the developing States, which do not publish digests of their practice should be encouraged and assisted to submit their State practice including their statements at international and regional fora, and the case-law, etc. At the same time, we urge the

Commission to exercise utmost caution in taking into account the arguments and positions advanced by the States before international adjudicative bodies and, should not be detached from or devoid of the context in which they were made.

Welcoming and appreciating the first report on the topic of “Provisional application of treaties by the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, India stressed that since the provisional application was a sort of formal application, it would be relevant if the study addressed various legal implications of provisional application and relations between the State parties to it, including the extent of international responsibility incurred by a State vis-a-vis other State parties for violation of an obligation under a provisionally applied treaty. India agreed with the idea that the present study should be in the form of guidelines with commentaries for the guidance of States.

Statement by India on the Agenda Item 81 – Report of the International Law Commission – Part II at the Sixth Committee of the 65th Session of the United Nations General Assembly on 1 November 2013¹⁰¹

India noted that the “Reservations to Treaties” was a topic which the Commission had been discussing since 1995. It also appreciated the work done so far and found that the “Guide to Practice” was very detailed and nuanced work, which tried to cover all possible situations relating to reservation to treaties, and was based on an in-depth and exhaustive analysis of State practice and case law. India also noted that it contained very useful materials, doctrinal discussions, and valuable examples by ways of elucidation of the guidelines and that such tools were sure to be invaluable for government legal advisers as well as practitioners in resolving problems posed by reservations to treaties and interpretative declarations.

India, referring to the adoption of the annex to the Guide to Practice namely the “reservations dialogue” as well as a recommendation on “mechanisms of assistance in relation to reservations,” stated that it supported the recommendations of the General Assembly, calling upon States and international organisations as well as monitoring bodies, to initiate

101 Neeru Chadha, Joint Secretary, Statement on Agenda Item 81, at the Sixth Committee of the 68th Session of the United Nations General Assembly (Nov. 01, 2013) (transcript available in <https://www.pminewyork.org/adminpart/uploadpdf/25032pmi121.pdf>).

and pursue such a reservations dialogue in a pragmatic and transparent manner. As regards the proposal for a Reservation Assistance Mechanism, India was willing to take this recommendation forward and was of the view that the suggestion to create a small group of experts within the Sixth Committee was worth further examination. India was, however, not for any compulsory procedure in this regard as it would not be acceptable to the States.

India was ready to accept these guidelines as a useful contribution to the process of international law-making. India also noted that these guidelines were likely to give rise to fewer problems from a policy and political angle as they were not intended to revise the regime of reservations contained in the Vienna Convention on Law of Treaties.

Statement by India on Agenda Item 81 – Report of the International Law Commission – Part I at the Sixth Committee of the 65th Session of the United Nations General Assembly on 30 October 2013¹⁰²

India in its opening statement, while appreciating the report delivered by the Chairman of the International Law Commission (ILC), focused on two topics; namely “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”; and “Immunity of State officials from foreign criminal jurisdiction.”

India agreed with the observation that the rules contained in articles 31 and 32 of the Vienna Convention reflect the customary international law. The subsequent practice, according to India, was an authentic means of interpretation that could be taken into account while interpreting the terms used in the provisions of the treaty, but could not be taken as conclusive or legally binding unless the parties had agreed to it.

India noted that there was a clear distinction between a subsequent agreement and subsequent practice. It agreed with the Commission that “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” *ipso facto* had the effect of constituting an authentic interpretation of the treaty, whereas a “subsequent

102 Neeru Chadha, Joint Secretary, Statement on Agenda Item 81, at the Sixth Committee of the 68th Session of the United Nations General Assembly (Oct. 30, 2013) (transcript available in <https://www.pminewyork.org/adminpart/uploadpdf/22873pml122.pdf>).

practice” only had this effect if it “show[ed] the common understanding of the parties as to the meaning of the terms.” The subsequent practice, India added, could only be taken into account as a means of interpretation, if it establishes an agreement between the parties. India pointed out that the basic determining factor, whether or not a subsequent agreement or practice has acquired the status as a means of interpretation of a treaty, was the acceptance thereof by all parties to the treaty.

Similarly, India continued, the evolutive interpretation of a treaty could not be merely a matter of the presumption of the intent of parties, particularly in regard to treaties that laid down specific rights for each Party, and where such an interpretation could alter the core rights of a party. Therefore India was of the view that the nature of the Treaty might be relevant for determining whether more or less weight should be given to certain means of interpretation.

Turning to the topic of “Immunity of State officials from foreign criminal jurisdiction,” India agreed with the understanding of the Commission, reflected in paragraph 10 of the commentary to paragraph 2 of draft article 1, that the rules regulating the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations were the treaty-based and custom-based “special rules.” India noted that the Commission had decided not to include an explicit reference to international conventions and instruments. However, India was of the view that making reference to the regimes under which the special rules fell, would provide greater clarity in understanding the nature and the scope of the immunity.

India pointed out that regarding the *immunity ratione personae*, it is universally accepted that the Heads of States, Heads of Governments and the Foreign Ministers, the so called *Troika*, were entitled to immunity from criminal jurisdiction of foreign States by virtue of their representational capacity for the State abroad and functional necessity. India considered that were the same criteria applied, a few other high ranking officials, especially Ministers of Defence and Ministers of International Trade, could also be considered as the State officials deserving immunity from the criminal jurisdiction of foreign States.

Statement by India on Agenda Item 77 - “Responsibility of States for Internationally Wrongful Acts” at the Sixth Committee of the 68th Session of the United Nations General Assembly on 21 October 2013¹⁰³

India noted that the draft articles on “Responsibility of States for internationally wrongful acts” were adopted by the International Law Commission (ILC) at its 53rd session in 2001. The ILC submitted the draft article to the General Assembly, with the recommendation for taking note thereof; and further recommended for the possibility of convening an international conference to examine the draft articles, with a view to conclude a convention on this topic. India also noted that the Sixth Committee considered these draft articles in 2001 vide its resolution 56/83 of 12 December 2001. Thereafter, India pointed out, the Sixth Committee took up this topic for consideration in 2004, 2007 and 2010. Subsequently, India noted that the Secretary-General had submitted several reports containing compilation of decisions of international courts, tribunals and other bodies referring to the ILC draft articles on responsibility of the States for internationally wrongful acts; and containing comments and information received from governments concerning the draft articles.

According to India, these draft articles were concise and now less complicated than it was in its initial stages. India explained this with an example, stating that:

[T]he concept of State crimes was replaced by the concept of serious breach of an obligation arising under a peremptory norm of general international law. The commentary on draft article 40 gives several illustrations of such peremptory norms. Some of the most difficult articles were refashioned and they exhibit sensitivity to the needs of States in difficult circumstances. So, as finally adopted by the ILC, the draft articles have several merits and present a delicate balance reached with difficulty.

India, however, reiterated that the draft articles addressed only secondary rules of State responsibility. These would come into play, India stated, only in case an internationally wrongful act, as defined by a primary rule, was

103 Avinash Pande, Member of Parliament & Member of the Indian Delegation, Statement on Agenda Item 77, at the Sixth Committee of the 68th Session of the United Nations General Assembly (Oct. 21, 2013) (transcript available in <https://www.pminewyork.org/adminpart/uploadpdf/49443pmi97.pdf>).

committed. In this connection, India noted that international law was still striving to achieve the type of universality that was essential in the different fields. It further noted that “[t]he international structure is still in the making and we cannot rush ahead of institutional developments and the development of the international legal system, without risking counterproductive effects.” While stating that it would be prudent to maintain a careful balance in the text of the draft articles, which ILC struggled for more than forty years to achieve, India expressed its happiness with regards to the reception of the ILC’s draft articles on the State responsibility into international law, through State practice, scholarly writings, decisions of courts, tribunals and other bodies.

International Organisations

BANGLADESH

**INTERNATIONAL RELATIONS AND COOPERATION – SECURITY/
ANTI-CORRUPTION/COMBATTING DRUGS AND ORGANISED
CRIMES – INTERNATIONAL ORGANISATIONS – ENERGY
COOPERATION – MONEY LAUNDERING AND COOPERATION TO
PREVENT TERRORIST FINANCING AND MONEY LAUNDERING**

2013 Commonwealth Heads of Government Meeting (CHOGM) and 40th OIC Sessions

On 17-18 October 2013, Bangladesh joined in a preparatory meeting in London before the 2013 Commonwealth Heads of Government Meeting (CHOGM) that was held in Sri Lanka later in the year, on 10-17 November. Bangladesh attended the Committee of the Whole (COW) meeting and the Senior Officials Meeting (SOM) in London, and played its role in adopting a Memorandum of Issues for the 2013 CHOGM. Bangladesh proposed the following, among other, issues/initiatives to be included in the Communique of the 2013 CHOGM: (i) duty-free export of goods from the least developed countries to the developed countries, (ii) inclusion of migration into the Development Programmes since 2015 onward, (iii) combatting terrorism and religious fundamentalism, and (iv) the holding of 10th Commonwealth Women Affairs Ministerial Meeting.

Bangladesh also attended the 40th Session of the Council of Foreign Ministers of OIC that was held in Conakry, Guinea, on 9-11 December 2013.

UN Office on Drugs and Crimes (UNODC)

On 26-27 November 2013, Bangladesh attended the meeting of the First Programme Steering and Policy Coordination Committee of the Regional Programme for South Asia of the UN Office on Drugs and Crime (UNODC). The meeting was held in New Delhi, India. In the meeting, Bangladesh shared its views and plans on how to implement regional programmes of the UNODC in Bangladesh.

Bangladesh-India Joint Working Group (JWG) on Renewable Energy Cooperation

On 28 November 2013, JWG on Renewable Energy Cooperation met in Dhaka. During the meeting, both parties agreed to intensify the cooperation on renewable energy in the areas of research and academic collaboration, exchange of information, and institutional and technical capacity-building, with particular respect to wind energy, solar energy, bio-gas, and biomass gasification.

UN Security Council Resolutions to Prevent Terrorist Financing

In 2013, Bangladesh worked to help implement several resolutions of the UN Security Council that aim at preventing money-laundering and terrorist financing. A delegate of the Asia Pacific Regional Review Group (AP-RRG) of the Financial Action Task Force (FATF) visited Bangladesh on 24-25 November 2013. During this visit, the Ministry of Foreign Affairs helped the AP-RRG see the progress in the implementation of measures against terrorist financing and money laundering in Bangladesh.

The United Nations Convention Against Corruption (UNCAC)

On 25-29 November 2013, Bangladesh attended the 5th Conference of the State Parties (COSP) to the UNCAC, held in Panama City. In that meeting, Bangladesh arranged for a side meeting to discuss the strategies of working against corruption through cooperation with civil society organisations. It is relevant to note that Bangladesh acceded to the UNCAC on 27 February 2007.

INDIA

Inaugural Address by Shri. E. Ahamed, Minister of State for External Affairs, Government of India, at the 52nd Annual Session of Asian-African Legal Consultative Organization (AALCO) on 9 September 2013¹⁰⁴

Welcoming all the delegates, the External Affairs Minister noted that international law was no longer a branch of law which governed only inter-State relations. The Minister noted that with the rapid pace of globalization, the scope of international law had also expanded to include newer areas which were once considered to be in the exclusive domain of domestic law. There was, the Minister noted, “virtually no area of international interest, which is not, in one way or another, governed by international law.” The Minister further noted that:

International law has witnessed a tremendous evolution in both substantive and institutional terms. It has now developed into an intense web of rules and institutions that address and govern non-State actors, such as international organizations and even the individual. Institutions have been established that provide for important mechanisms to facilitate international cooperation and compliance with international law. Today it touches the lives of millions by addressing trade and business, transnational crime and human trafficking, terrorism, intellectual property rights, child custody, piracy and a host of other issues International law is still in development and remains, as of today, the only viable means to ensure a common denominator to regulate the conduct of States and other actors. International law and the institutions it has created, continue to be the best tool to maintain international peace and security.

Referring to the AALCO, the Minister noted that its foundation was firmly built on Asian- African solidarity. He also noted that it was the only inter-governmental organisation which brought together two continents of Asia

104 E. Ahamed, Minister of State for External Affairs, Inaugural Address at the 52nd Annual Session of Asian-African Legal Consultative Organization (Sep. 09, 2013) (transcript available in https://www.mea.gov.in/Speeches-Statements.htm?dtl/22173/Inaugural_Address_by_Shri_E_Ahamed_Minister_of_State_for_External_Affairs_at_the_52nd_Annual_Session_of_AsianAfrican_Legal_Consultative_Organization).

and Africa in the progressive development of international law. Since its inception in 1956, the Minister pointed out that AALCO has served countries of the Asian-African region as a consultative inter-governmental organisation fostering deliberations of common concerns and playing an active role in developing Asian-African perspectives of international law.

Referring to the Indian contribution to AALCO, the Minister conveyed that India had been always in the forefront in facilitating the fulfillment of AALCO's noble objectives. He also noted that as a Founding Member of AALCO and as a member State which hosted the AALCO's Headquarters, India was committed in contributing to the work of AALCO. India, he added, attached the highest importance to the Organization and its work and had always played a very significant role in the activities of AALCO.

The Minister commended AALCO's role in establishing regional arbitration centres under its auspices to settle commercial disputes. He also complimented the work of the Centre for Research and Training of AALCO for undertaking training activities and bringing out publications on international law issues.

While conveying his best wishes for the Fifty-Second Annual Session of AALCO, the Minister noted that the four-day session would deliberate upon a number of international law issues of contemporary importance to our region such as Environment and Sustainable Development; Law of the Sea; Challenges in Combating Corruption; Statehood of Palestine under International Law; Extra-territorial Application of National Legislation; Sanctions Imposed against Third Parties; and Selected Items on the Agenda of the International Law Commission are on the agenda. He hoped that the in-depth exchange of views on these issues will contribute to the development of law in these areas and the promotion of the interests of Asian-African States.

VIETNAM

PRIVATE INTERNATIONAL LAW – INTERNATIONAL ORGANISATIONS

Accession to The Hague Conference on Private International Law, 10 April 2013

The Hague Conference on Private International Law (HCCH, for *Hague Conférence de La Haye*) is an international inter-governmental organisation

established in 1893 to “work for the progressive unification of the rules of private international law.”¹⁰⁵ It pursues this goal by developing a series of multilateral conventions on various matters of private international law and assisting member states in implementing these conventions.¹⁰⁶ The most widely ratified conventions that the organisation has drafted include those on the abolition of legalisation, service of process, taking of evidence abroad, access to justice, international child abduction, intercountry adoption, conflicts of laws relating to the form of testamentary dispositions, maintenance obligations and recognition of divorces.¹⁰⁷ The most recent conventions are the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007), the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (2006) and the Convention on Choice of Court Agreements (2005). To date, eighty states and the European Union are members of the Conference.

Vietnam became a member state of the organisation on 10 April 2013, exactly 120 years after the Conference was established. The decision to admit Vietnam was adopted by the majority of the votes cast at the 2013 Annual Meeting of the Conference’s Council on General Affairs and Policy.¹⁰⁸ The accession to the Conference marks an important milestone for the country in its integration into the international legal sector. As a member state, Vietnam could directly participate in the drafting of future conventions, contribute to the policy-making process of the organisation, and receive technical assistance in implementing relevant conventions that it has expressed consent to be bound.

At the 2013 Annual Meeting of the Conference’s Council on General Affairs and Policy, Vietnam also submitted its instrument of accession to

105 Statute of the Hague Conference on Private International Law art. 1, Oct. 31, 1951, 220 U.N.T.S. 121 (entered into force July 15, 1955).

106 *Vision and Mission*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://www.hcch.net/en/about/vision-and-mission>.

107 *About HCCH*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://www.hcch.net/en/about>.

108 *Instruments of Acceptance, Ratification and Accession Deposited During the Council on General Affairs and Policy of the Conference*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://www.hcch.net/pt/news-archive/details/?varevent=305>.

the 1993 Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.¹⁰⁹

Jurisdiction

CHINA

JURISDICTION – UNIVERSAL JURISDICTION – SCOPE AND APPLICATION

On October 17, 2013, a Chinese representative made a statement at the 68th Session of the UN General Assembly (UNGA) on the scope and application of the principle of universal jurisdiction:

First, on definition. Universal jurisdiction refers to criminal jurisdiction exercised according to the nature of a crime regardless of such related factors as the place where the crime is committed, the nationality of the suspect or the victim, or whether the crime has jeopardized national security or major interest of a state. Therefore, universal criminal jurisdiction is different from both the jurisdiction exercised by international criminal judicial organs and the obligation of a state to “extradite or prosecute” as a means of exercising jurisdiction.

Second, on scope. At present, there is general support for the exercise of universal jurisdiction in case of piracy on the high seas. Apart from this, some states believe that it may also be applicable to serious violations of the Four Geneva Conventions of 1949 in international armed conflicts, while some other states hold the view that some international crimes stipulated in relevant international treaties should be included in the scope of application. The Chinese delegation believes that the scope of application of universal jurisdiction should first and foremost be based on the practical need of this principle. Since universal jurisdiction is aimed at filling the gaps of territorial, personal and protective jurisdictions of states with a view to eliminating impunity, it is necessary to ascertain whether a crime is already covered by the territorial, personal or protective jurisdictions of a state before deciding if the crime should be included in the scope of application of universal jurisdiction. If a state has already established its jurisdiction, be it territorial, personal or protective, over a crime, the necessity to

109 *Id.*

place this crime in the scope of application of universal jurisdiction requires further study. In addition, the decision on the scope of application of universal jurisdiction should be based on existing customary international law and the provisions of international treaties. The aim of this agenda item should be codification rather than development of existing rules of universal jurisdiction.

Third, on application. In establishing and exercising universal jurisdiction, states should act within the existing international legal framework and abide by the fundamental rules and principles of international law enshrined in the UN Charter, including non-violation of sovereignty and non-interference in internal affairs. They should also comply with international legal regulations related to immunity, including that of states, state officials including heads of states, and diplomatic and consular personnel. As universal jurisdiction is supplementary in nature, the priority of territorial, personal and protective jurisdictions of a state must be respected. Only in cases where no state has established or exercised territorial, personal or protective jurisdictions can states concerned exercise universal jurisdiction.

[U]niversal jurisdiction is a sensitive issue of international law with a bearing on the stability and healthy development of international relations and the world order. Improper legislation or application of universal jurisdiction may create negative impacts on international relations and affect normal interstate exchanges. The Chinese delegation is of the view that the issue of universal jurisdiction should be considered in a prudent and balanced manner and decided by consensus. China supports the continuation of the exchange of views within the framework of the Working Group and is willing to enhance communication with others to bridge differences and work for consensus.¹¹⁰

110 *Statement by Mr. Xiang Xin Chinese Delegate at the 68th Session of the UN General Assembly on Agenda Item 86 Scope and Application of the Principle of Universal Jurisdiction*, PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UN (Oct. 17, 2013), <http://www.china-un.org/eng/hyyfy/t1091531.htm>.

INDIA

**THE HAGUE CONVENTION OF 1980 ON CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION – COMITY OF COURTS
– RECOGNITION OF THE FOREIGN JUDGMENTS IN DOMESTIC
JURISDICTIONS.**

***Arathi Bandi v. Bandi Jagadrakshkaka Rao & Others* [Supreme Court of India, 16 July 2013 <http://JUDIS.NIC.IN>]**

Facts

This is a child removal case (termed as ‘child abduction’ in certain jurisdictions) from the United States to India. Both the parties resided in the United States where the case arose on account of the husband filing a petition for dissolution of marriage in the Superior Court of Washington, County of King at Seattle. The mother of the child, who is the appellant in this case, returned to India with the child while the divorce and related proceedings were in progress in the United States Court and an *ex parte* order was issued restraining the wife from leaving the State of Washington. The father of the child came to India and pursued the legal remedies available to him in the local courts to take custody of the child. The parents of the child are both Indians and were married according to Indian law.

After prolonged litigation in various courts the matter reached the Supreme Court where the Court had to decide on three issues in the context of an appeal from the High Court of Andhra Pradesh. These three issues were:

- (A) Has not the Hon’ble High Court failed to exercise jurisdiction vested in it under law in not considering the welfare and well being of the minor child before issuing the impugned directions?
- (B) Has not the Hon’ble High Court erred in holding that when there is an order passed by foreign court, it is not necessary to go into the facts of the case?
- (C) Is not the judgment of the U.S. Court “not conclusive” as between the parties and hence unenforceable in India for being in violation of Section 13(c) and (d) of the Code of Civil Procedure, 1908?

Summary of the Decision

The Court noted that the petitioner was able to defy the orders issued by the Court of Competent Jurisdiction in the U.S. as India was not a signatory to the Hague Convention of 1980 on “Civil Aspects of International

Child Abduction.” The aforesaid Convention fully recognizes the concept of Comity of Courts in private international law. The Court also noted that taking note of the undesirable effect of not being the signatory to the aforesaid convention, the then Chairman of the Law Commission of India had recommended that India should keep pace and change according to the changing needs of the society. The Commission recommended that the government might consider that India becoming a signatory to the Hague Convention of 1980 which would, in turn, bring the prospect of helping return of the children to India who had their homes in India. The Court also noted that this need to accede to the Hague Convention was underscored by this Court in numerous judgments. The Court also considered some of its judgments, in particular *V. Ravi Chandran (Dr.) v. Union of India & Others* and *Shilpa Aggarwal (Ms.) v. Aviral Mittal and Another*. Both the cases were decided in 2010.¹¹¹ The other cases were - *Dhanwanti Joshi v. Madhav Unde*; *Sarita Sharma v. Sushil Sharma*; and *Ruchi Majoo v. Sanjeev Majoo*.¹¹²

The Court, after considering all the facts, noted that:

[It was] evident that the wife has reached India in defiance of the orders passed by the Courts of competent jurisdiction in the U.S. It is apparent that the appellant has scant regard for the orders passed by the Andhra Pradesh High Court also. Keeping in view the aforesaid facts and circumstances, the Andhra Pradesh High Court issued the directions which have been reproduced in the earlier part of the judgment.

Decision

The Court concluded in its opinion that no relief could be granted to the appellant in the present proceedings given her conduct in removing her son from the U.S. in defiance of the orders of the Court of competent jurisdiction. The Court further stated:

The Court has specifically approved the modern theory of Conflict of Laws, which prefers the jurisdiction of the State which has

111 *V. Ravi Chandran v. Union of India*, (2010) 1 SCC 174 (India); *Shilpa Aggarwal v. Aviral Mittal*, (2010) 1 SCC 591 (India).

112 *Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112 (India); *Sarita Sharma v. Sushil Sharma*, (2000) 3 SCC 14 (India); *Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479 (India).

the most intimate contact with the issues arising in the case. The Court also holds that Jurisdiction is not attracted “*by the operation or creation of fortuitous circumstances.*” The Court adds a caution that to allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging *forum-shopping*. The aforesaid observations are fully applicable in the facts and circumstances of this case.¹¹³

The Court held that both the parties should submit to the competent U.S. Court, i.e. the Superior Court of Washington, to resolve all the pending issues.

Statement by India on Agenda Item 86 – “The Scope and Application of the Principle of Universal Jurisdiction” at the Sixth Committee of the 68th Session of the United Nations General Assembly on 17 October 2013¹¹⁴

India thanked the Secretary-General for his reports A/68/113 on “The scope and application of the principle of universal jurisdiction,” which provided information about the laws and practice of certain States concerning the universal jurisdiction. India was of the firm view that those who commit crimes must be brought to justice and be punished. India pointed out that a criminal should not go scot free because of procedural technicalities including the lack of jurisdiction.

India noted that the exercise of jurisdiction was a unique legal subject in itself. The term “jurisdiction,” according to India:

[connoted the] power or the right of a State, which in legal parlance referred to two aspects: first, the rule-making; and second, the rule-enforcing. The widely recognized bases for the exercise of jurisdiction include: Territoriality, which is based on the place of the commission of offence; Nationality, which is based on the nationality of the accused. Some States recognize the nationality

113 The Court also noted and further added that Courts have taken cognizance of growing practice of children being removed from one country to another just to put pressure/influence the legal proceedings that are usually ending in these cases in relation to irretrievable breakdown of marriage.

114 Manjeev Singh Puri, Ambassador, Deputy Permanent Representative on Agenda Item 86, at the Sixth Committee of the 68th Session of the United Nations General Assembly (Oct. 17, 2013) (transcript available in <https://www.pminewyork.org/adminpart/uploadpdf/15196pmi91.pdf>).

of victim also, as basis for exercising jurisdiction; and Protective principle, which is based on the national interests affected. The common feature of these jurisdictional theories is some connection between the State asserting jurisdiction and the offence.

India also noted that under the present agenda item, the deliberations were upon a different type of jurisdictional basis, namely the universality theory. India further noted that:

A State invoking the universal jurisdiction claims to exercise jurisdiction over an offender, irrespective of his or her nationality or the place of commission of the offence, and without any link between that State and the offender. It assumes that each State has an interest in exercising jurisdiction to prosecute offences which all nations have condemned. The rationale for such jurisdiction is the nature of certain offences, which affect the interests of all States, even when they are unrelated to the State assuming jurisdiction.

Under general international law, India pointed out, piracy on the high seas was the only such crime over which claims of universal jurisdiction was undisputed. This principle of universal jurisdiction in relation to piracy, as noted by India, had been codified in the UN Convention on the Law of the Sea, 1982. As regards certain serious crimes like genocide, war crimes, crimes against humanity and torture, etc., India further pointed out, international treaties had provided basis for the exercise of universal jurisdiction. India also added that this was applicable between the States parties to those treaties. They included, among others, the Four Geneva Conventions of 1949 and the Apartheid Convention.

Dealing with question of applying the principle of universal jurisdiction to other international crimes, India stated:

The question that arises is 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 are a party to those treaties. Several issues remained unanswered, including those related to the basis of extending and exercising such jurisdiction, the relationship with the laws relating to immunity, pardoning and amnesty, and harmonization with domestic laws.

While concluding, India noted that several treaties obliged the State parties either to try a criminal or hand him over for trial to a party willing to do so. This was the obligation of *aut dedere, aut judicare* ("either extradite

or prosecute”). This widely recognised principle, India clarified, including the International Court of Justice in its decision of 20 July 2012 in the *Belgium v. Senegal* case, should not be confused with or short circuited by the universal jurisdiction.

Statement by India on Agenda Item 78 – “Criminal Accountability of United Nations Officials and Experts on Mission” at the Sixth Committee of the 68th Session of the United Nations General Assembly on 16 October 2013¹¹⁵

India noted that the instances of crimes being committed by the United Nations’ officials and experts on mission were a matter of grave concern to the international community and it also noted that this had an adverse impact over the image, credibility and integrity of the organisation. While welcoming the Report of the Secretary General A/68/173 on “Criminal accountability of United Nations officials and experts on mission,” submitted pursuant to the General Assembly resolution 67/88, India noted that this Report, *inter alia*, provided for information on cooperation among States and with the United Nations in the investigation and prosecution of such crimes; and on the activities within the UN Secretariat towards disciplining the officials and assisting the States to help prevent and stop such crimes.

India also noted that the General Assembly resolution 67/88 strongly urged all States to consider establishing jurisdiction over crimes committed by their nationals while serving as United Nations officials or experts on mission, at least where the conduct of the person amounting to a crime both in the host country and the country of his nationality. India pointed out that the implementation of this element would help fill the jurisdictional gap in respect of member States that did not assert extra-territorial jurisdiction over crimes committed by their nationals abroad.

India, as regards to the implementation pointed out that the Indian Penal Code extended to extra-territorial offences committed by Indian nationals. Accordingly, India drew the attention to offences that were committed by Indian officials or experts on mission while serving abroad, and were subject to the jurisdiction of the Indian courts and were punishable under the Indian law. Further, the Indian law had provisions for assistance

115 Vishnu Dutt Sharma, at the Sixth Committee of the 68th Session of the United Nations General Assembly (Oct. 16, 2013) (transcript available in <https://www.pminewyork.org/adminpart/uploadpdf/39940pmi89.pdf>).

in criminal matters, which enabled them to seek from and extend assistance to a foreign State in criminal cases. These provisions, India added, were part of the Code of Criminal Procedure of India.

Further, India also pointed out that the Indian Extradition Act, 1962, dealt with extradition of fugitive criminals and related issues. The Act allowed for extradition in respect of extraditable offences in terms of an extradition treaty with another State. The Act also allowed consideration of an international convention as the legal basis for considering an extradition request in the absence of a bilateral treaty. India stated that it had concluded more than forty bilateral treaties on extradition and mutual assistance in criminal matters. Where there was no bilateral treaty, the Government of India can provide assistance on a reciprocal and case by case basis, in accordance with the provisions of the applicable national laws.

Concluding, India reiterated its view that dealing with the wrongdoings of UN officials or experts on mission, did not require the development of an international convention. In its view, what was required was that the member States ensure that their laws provided for jurisdiction and had adequate provisions for prosecuting any such conduct of their nationals serving as UN officials or experts on missions abroad, and that their laws had provisions for international assistance for the investigating and prosecuting of committed crimes. India further added:

[It] ascribes to the zero tolerance policy and considers it extremely important that violation of any national or international law by the UN officials and experts on mission is properly investigated and prosecuted. The UN officials and experts should act and perform their duties in a manner consistent with the UN Charter that promotes the image, credibility and integrity of the Organization.

KOREA

COURTS AND TRIBUNALS – MUNICIPAL / CRIMINAL JURISDICTION

Decision of Seoul High Court Concerning Criminal Trial Jurisdiction

Seoul High Court – Judgment related to the jurisdiction over the foreign criminal who committed the crime abroad. Seoul Godeung beobwon [Seoul High Ct.], 2013No1936, Dec. 6, 2013 (S. Kor.).

Facts

The defendant committed homicide during a robbery and attempted abandonment of a corpse of Korean and Filipino victims in Philippines. The criminal trial was held in Korea. Meanwhile, the defendant was originally Korean, but he became naturalized in the Republic of the Marshall Islands.

Legal Issues

Whether the Korean domestic court can exercise jurisdiction on a foreigner who committed an overseas crime.

Judgment

The Court decided that since the defendant is a foreigner, this is a case where a foreigner committed an overseas crime that is outside the territory of Korea. Thus, in principle, criminal law cannot be applied unless it is listed in Article 5, No. 1 or No. 7 of the Korean Criminal Law. It provides:

Even if foreign criminals committed overseas crime, Article 6 of the Criminal Law is applicable if the crime is against Korea or Korean citizens. However, the exception is prescribed for the situation where the crime is constituted based on the legislation on the place of an act in the clue of alignment, or when the prosecution or execution is exempted. Therefore, based on the facts charged for the defendants, jurisdiction will be determined by applying Korean Criminal Law.

For the attempted abandonment of a corpse, there is no regulation to punish such a crime under the revised Criminal Law of the Philippines. Accordingly, the Court decided that there is no jurisdiction as the crime cannot be composed according to Philippine Law. However, for homicide committed during a robbery, the Court's opinion was as follows:

For a homicide in robbery, as the victim is a Korean citizen, Korean Criminal Law would be applied as a general rule according to Article 6 of the Criminal Law in Korea . . . Although our Constitution prohibits one from repeatedly being punished for the same crime, the effect of prohibition against double jeopardy is only subjected for the situation under the same jurisdiction. Therefore, the prohibition against double jeopardy is not effective for a foreign judgment . . . Even though the defendant received a verdict of not guilty in the Philippines on homicide in robbery, we can hold a trial by applying the Korean Constitution . . . The defendant argued that as he was

already imprisoned for more than two years, which falls under the situation of receiving a whole or part of the sentencing, he should be exempt or receive reduced sentencing according to Article 7 of the Criminal Law. However, Article 7 of the Criminal Law is not only a temporary reduction. Receiving a sentence in a foreign country means the situation when there is an actual execution on punishment of restricting physical freedom, monetary penalty, and etc. received by a judgment of a conviction from the foreign court. Therefore, the defendant's imprisonment in the Philippines in an undetermined state cannot be the applicable situation under Article 7 of the Criminal Law.

MALAYSIA

FAMILY LAW – JURISDICTION – DIVORCE PROCEEDINGS – WHETHER WIFE ACQUIRED DOMICILE OF HUSBAND – LAW (MARRIAGE AND DIVORCE ACT 1976, SEC. 28 IMPLEMENTATION OF CEDAW IN MALAYSIA)

KKP v. PCSP, High Court Malaya, Kuala Lumpur [Originating Summons No: 24-49-02-2013. 11 December 2013]

The husband (PH) and wife (DW) were married in 1970 in Ipoh, Perak and had five children (at the time of the proceedings, all five children were over eighteen years of age). Over the course of their marriage, PH, DW and their five children moved to Perth, Australia and then to Canada. However, PH continued to stay in Malaysia and travelled to see his family. Since 1997, PH frequently travelled to England for business and DW would accompany him. PH and DW purchased a property in England to stay during their frequent travels. DW held dual Australian and Canadian citizenship and had been living in England since October 2012.

In February 2013, DW filed for a petition for divorce in England. Consequently, PH applied to the Malaysian High Court for leave to petition for divorce under section 53 of the Law Reform (Marriage and Divorce) Act 1976. DW applied for all proceedings in Malaysia to be stayed, pending the hearing and disposal of the petition of divorce at the High Court in England, on the grounds that the question of domicile is being determined in the English proceedings.

Section 48(1) of the Law Reform (Marriage and Divorce) Act 1976 requires two conditions to be fulfilled before a Malaysian Court has juris-

diction to make a decree of divorce – firstly, that the marriage is registered under the 1976 Act and secondly, that the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

On the issue of domicile, PH submitted that during the course of a marriage, a wife acquires the domicile of her husband and cannot abandon such domicile and acquire her own independent domicile. On the other hand, DW argued that a wife has the freedom to choose her domicile, and in this case, the UK, particularly that Malaysia ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995 and Malaysia is obliged to respect the same rights of men and women in the area of freedom of movement of persons and freedom to choose residence and domicile.

The High Court considered articles 2(b), 2(f) and 15(4) of CEDAW and held that no provisions in the Law Reform (Marriage and Divorce) Act 1976 were amended to comply with the cited CEDAW provisions. Therefore, a Malaysian woman upon marriage will acquire her husband's domicile until that marriage is lawfully dissolved (*Neduchelihan Balasubramaniam v. Kohila Shanmugam* [1997] 3 MLJ 768). The Court dismissed DW's application and held that the Malaysian court has jurisdiction to hear the matrimonial proceedings.

Law of the Sea

CHINA

INTERNATIONAL LAW OF THE SEA – SUBMISSION TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF IN PART OF THE EAST CHINA SEA

On January 7, 2013, China presented its compliments to the Secretary-General of the U.N. and, with reference to the statement concerning Diaoyu Dao in Note Verbale SC/12/372 from China dated December 28, 2012, to the Secretary-General of the UN.

In this written communication, China stated that Diaoyu Dao and its affiliated islands have been inherent territory of China since the ancient times. China's sovereignty over Diaoyu Dao and its affiliated islands has sufficient historical, geographical, and legal basis. Japan's occupation of and claim of sovereignty over Diaoyu Dao is illegal and invalid, and in

no way change the fact that Diaoyu Dao belongs to China. In September 2012, the Chinese government delineated and announced the base points and baselines of the territorial sea of Diaoyu Dao and its affiliated islands in accordance with the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone. The Chinese government does not accept the position stated by the Note Verbale SC/12/372 of Japan.¹¹⁶

On August 5, 2013, China presented its compliments to the Secretary-General of the UN and with reference to the Note Verbale SC/12/372 from Japan dated December 28, 2012 to the Secretary-General of the UN. In this written communication, China stated that:

China does not accept the position stated in the above-mentioned Note Verbale of Japan.

The statement in Japan's Note Verbale that the establishment of the outer limits of the continental shelf beyond 200 nautical miles cannot be accomplished as "the distance between the opposite coasts of Japan and the People's Republic of China in the area with regard to the submission is less than 400 nautical miles" has no ground in the United Nations Convention on the Law of the Sea (thereafter referred to as "the UNCLOS") and the rules of the Commission on the Limits of the Continental Shelf (thereafter referred to as "the Commission"). Therefore, it does not affect or impede China's submission on the outer limits of its continental shelf beyond 200 nautical miles, nor the consideration of the submission by the Commission.

It is untenable for Japan to claim that "the delimitation of the continental shelf in this area shall be effected by agreement between the States concerned in accordance with Article 83 of the United Nations Convention on the Law of the Sea. It is, thus, indisputable that the People's Republic of China cannot unilaterally establish the outer limits of the continental shelf in this area". China made its submission concerning the outer limits of the continental shelf beyond 200 nautical miles in part of the East China Sea in strict accordance with Article 76 of the UNCLOS, its Annex II and the relevant rules of the Commission. In the above submission, China has made it clear that in accordance with Article 76, paragraph 10 of the UNCLOS and the relevant practice, the consideration of the submission and the recommendations adopted by the Commission

116 See generally Permanent Mission of the People's Republic of China, Statements on Diaoyu Dao of Note Verbale SC/12/372, U.N. Doc. CML/001/2013 (Jan. 7, 2013).

shall not prejudice the future delimitation of the continental shelf in the East China Sea between the People's Republic of China and Japan.

China reiterates its position on the Diaoyu Dao and its affiliated islands as stated in the Note Verbal CML/001/2013 dated 7 January 2013 to the Secretary-General of the United Nations. The Permanent Mission of the People's Republic of China would request the Secretary-General of the United Nations that the Note Verbale (CML/017/2013) be circulated to all members of the Commission, all States Parties to the UNCLOS and all Member States of the United Nations¹¹⁷

On August 15, 2013, China made a partial submission to the Commission on the Limits of the Continental Shelf in respect to part of the East China Sea. The following excerpt is from the website of the Commission on the Limits of Continental Shelf:

With respect to the notes verbales from Japan dated 28 December 2012 and 13 August 2013, and the notes verbales from China dated 7 January and 5 August 2013, Zhang Haiwen noted that the extended continental shelf in the submission was the natural prolongation of the mainland territory of China and that the submission made no reference to the islands of Diaoyu Dao and its affiliated islands.

Zhang Zhanhai noted that this was a partial submission which addressed one part of the continental shelf in the East China Sea and that it did not prejudice China's future submission on delineation of the outer limits of the continental shelf in the East China Sea and other areas. He informed the Commission that one of its members, Mr. Lu, had provided China with advice and assistance.¹¹⁸

INDIA

EXTENT OF CRIMINAL JURISDICTION IN MARITIME ZONES COMPATIBILITY OF INDIAN MARITIME ZONES ACT, 1976 WITH UNITED NATIONS CONVENTION ON LAW OF THE SEA (UNCLOS)

Republic of Italy & Others v. Union of India & Others [Supreme Court of India, 18 January 2013 <http://JUDIS.NIC.IN>]

117 Permanent Mission of the People's Republic of China, Statements with Reference to Note Verbale SC/12/372, U.N. Doc. CML/017/2013 (Aug. 5, 2013).

118 Comm. on the Limits of the Continental Shelf, Rep. on the Work of Its Thirty-Second Session, ¶¶ 59-60, U.N. Doc. CLCS/80 (Sep. 24, 2013).

Facts

The Italian ship *Enrica Lexie* was on a voyage from Galle, Sri Lanka to Muscat, Oman. Later it changed its destination to Djibouti. This change was conveyed to all the concerned coastal States, including India. While on its journey near the coast of the Indian State of Kerala, *Enrica Lexie* allegedly mistook an Indian fishing vessel, St. Antony, for a pirate boat. Italian marines who were on board the *Enrica Lexie* fired gun shots at this fishing vessel, killing two Indian fishermen. This incident happened on 14 February 2012 off the Indian coast at a distance of 20.5 nautical miles. Pursuant to this incident, the journey of the *Enrica Lexie* was halted and it was asked to return to the port of Cochin in the Indian State of Kerala. By then, the local police authorities had filed criminal charges against the two marines of the Italian ship *Enrica Lexie* for murder and later on 15 February 2012 took them into custody for further investigation and trial.

Italy had argued that these two marines, along with two others, were on board the *Enrica Lexie* as part of the Italian Government's initiative to check and combat piracy. Italy also argued that its marines were on board the *Enrica Lexie* in their official capacity and under proper official authorization. The Italian Embassy in India filed a writ petition before the High Court of Kerala, seeking the release of the marines as they were on board the *Enrica Lexie* in their official capacity. Italy had also argued before the High Court of Kerala that the Kerala police authorities had no jurisdiction to try and investigate the case. According to Italy, the Indian Federal/Central Government had authority and jurisdiction to try and investigate the case. Since the High Court of Kerala reserved its judgment and nothing was forthcoming, the Italian Embassy invoked the jurisdiction of the Supreme Court of India to transfer the case to the Central Government and also sought the marines to be handed over to the Central Government so that they could be tried under Italian law in Italy where the case had already been registered.

While the writ petition was pending before the Indian Supreme Court, the Kerala State Police filed charge sheet against two Italian marines on 18 May 2012 under Indian Penal Laws along with Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 ("SUA Act"). Kerala High Court, delivering its judgment on 29 May 2012, held that the entire Indian Penal Code had been extended to the Exclusive Economic Zone (EEZ) and that the

territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only. The Kerala High Court also held that under the provisions of the SUA Act, the State of Kerala had jurisdiction up to 200 nautical miles from the Indian coast falling within the EEZ of India.

Aggrieved by this order of the Kerala High Court, Italy again appealed to the Indian Supreme Court arguing that its marines were “discharging their duties as members of the Italian Armed Forces, in accordance with principles of Public International Law and Italian National Law requiring the presence of armed personnel on board commercial vessels to protect them from attacks of piracy.” Italy also argued that:

[T]he determination of international disputes and responsibilities as well as proceedings connected therewith, must necessarily be between the Sovereign Governments of the two countries and not constituent elements of a Federal Structure. In other words, in cases of international disputes, the State units/governments within a federal structure could not be regarded as entities entitled to maintain or participate in proceedings relating to the sovereign acts of one nation against another, nor could such status be conferred upon them by the Federal/Central Government.

Summary of the Judgment

The Court considered the contention of Italy which, *inter alia*, pointed out that:

[T]he incident having occurred at a place which was 20.5 nautical miles from the coast of India, it was outside the territorial waters though within the Contiguous Zone and the Exclusive Economic Zone, as indicated hereinabove. Accordingly, by no means could it be said that the incident occurred within the jurisdiction of one of the federal units of the Union of India . . . the incident, therefore, occurred in a zone in which the Central Government is entitled under the Maritime Zones Act, 1976, as well as UNCLOS, to exercise sovereign rights, not amounting to sovereignty.

Italy also argued that “since provisions of the 1976 Act and also UNCLOS recognise the primacy of Flag State jurisdiction, the Petitioner No.1 i.e. the Republic of Italy, has the preemptive right to try the Petitioner Nos.2 and 3 under its local laws.”

As to criminal jurisdiction on board a foreign ship, Italy referred to Article 27 of the UNCLOS, which provides that:

The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- (a) if the consequences of the crime extended to the coastal State;
- (b) if the crime was of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities had been requested by the Master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures were necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Italy urged that none of the aforesaid conditions were present in the facts of this case so as to attract the criminal jurisdiction of the State within the federal structure of the Union of India. Italy also argued that flag state had the primary jurisdiction for any acts or incident that took place outside the territorial sea. It also referred to Article 100 of the UNCLOS which required “[a]ll States [to] cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”

Italy also submitted that “the coastal State has no sovereignty in the territorial sense of dominion over Contiguous Zones, but it exercised sovereign rights for the purpose of exploring the Continental Shelf and exploiting its natural resources.” Italy also noted that the Coastal State had “jurisdiction to enforce its fiscal, revenue and penal laws by intercepting vessels engaged in suspected smuggling or other illegal activities attributable to a violation of the existing laws.” Italy also pointed out that “[t]he waters which extend beyond the Contiguous Zone are traditionally the domain of high seas or open sea which juristically speaking, enjoyed the status of International waters where all States enjoyed traditional high seas freedoms, including freedom of navigation.” Italy further noted:

The coastal States c[ould] exercise their right of search, seizure or confiscation of vessels for violation of its customs or fiscal or penal laws in the Contiguous Zone, but it c[ould] not exercise these rights once the vessel in question entered the high seas, since it ha[d] no right of hot pursuit, except where the vessel was engaged

in piratical acts, which ma[d]e it liable for arrest and condemnation within the seas.

Accordingly, Italy concluded, “although, the coastal States do not exercise sovereignty over the Contiguous Zone, they are entitled to exercise sovereign rights and take appropriate steps to protect its revenues and like matters.”

India argued on two issues, namely: “(i) Whether Indian Courts had territorial jurisdiction to try Petitioner Nos.2 and 3 (Italian Marines) under the provisions of the Indian Penal Code, 1860? (ii) If so, whether the Writ Petitioners were entitled to claim sovereign immunity?” On the first issue, India contended that Maritime Zones Act 1976 extended the penal jurisdiction beyond territorial waters. India also contended that:

[A]n attempt must necessarily be made in the first instance, to harmonise the Maritime Zones Act, 1976 with the UNCLOS. If this was not possible and there was no alternative but a conflict between municipal law and the international convention, then the provisions of the 1976 Act would prevail . . . that primacy in interpretation by a domestic Court, must, in the first instance, be given to the Maritime Zones Act, 1976 rather than the UNCLOS.

As regards the second issue, India submitted that:

[T]he case of the Petitioners that the Indian Courts had no jurisdiction to take cognizance of the offence which is alleged to have taken place in the Contiguous Zone, which was beyond the territorial waters of India, as far as India was concerned, was misconceived. The Contiguous Zone would also be deemed to be a part of the territory of India, inasmuch as, the Indian Penal Code and the Code of Criminal Procedure had been extended to the Contiguous Zone/Exclusive Economic Zone by virtue of the Notification dated 27th August, 1981, issued under Section 7(7) of the Maritime Zones Act, 1976.

India submitted that “the domestic law was not inconsistent with the International law and in fact even as a matter of international law, the Indian Courts ha[d] jurisdiction to try the present offence.” India further submitted that:

[I]n order to determine the issue of territorial jurisdiction, it would be necessary to conjointly read the provisions of Section 2 I.P.C., the Maritime Zones Act, 1976 and the 27th August, 1981 Notification and all attempts had to be made to harmonise the said provi-

sions with the UNCLOS. However, if a conflict was inevitable, the domestic laws must prevail over the International Conventions and Agreements.

India also submitted that “the voyage contemplated under the [relevant Indian law] [wa]s not the voyage of the *Enrica Lexie*, but the voyage of *St. Antony*.”

Decision

According to the Court:

Two issues, both relating to jurisdiction fall for determination in this case. While the first issue concerns the jurisdiction of the Kerala State Police to investigate the incident of shooting of the two Indian fishermen on board their fishing vessel, the second issue, which was wider in its import, in view of the Public International Law, involves the question as to whether the Courts of the Republic of Italy or the Indian Courts had jurisdiction to try the accused.

The Court held:

The incident, therefore, occurred not within the territorial waters of the coastline of the State of Kerala, but within the Contiguous Zone, over which the State Police of the State of Kerala ordinarily has no jurisdiction The State of Kerala had no jurisdiction over the Contiguous Zone and even if the provisions of the Indian Penal Code and the Code of Criminal Procedure Code were extended to the Contiguous Zone, it did not vest the State of Kerala with the powers to investigate and, thereafter, to try the offence. What, in effect, is the result of such extension is that the Union of India extended the application of the Indian Penal Code and the Code of Criminal Procedure to the Contiguous Zone, which entitled the Union of India to take cognizance of, investigate and prosecute persons who commit any infraction of the domestic laws within the Contiguous Zone. However, such a power is not vested with the State of Kerala.

The Court, while holding that the State of Kerala had no jurisdiction to investigate the incident, decided that it was the Government of India which had jurisdiction to proceed with the investigation and trial of the Italian marines in terms of the provisions of UNCLOS 1982. The Court directed the Government of India to set up a Special Court in consultation with Chief Justice of India “to dispose of the [case] in accordance with the pro-

visions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982.” The Court also held that “the pending proceedings before the Chief Judicial Magistrate, Kollam, shall stand transferred to the Special Court to be constituted in terms of this judgment.”

MALAYSIA

LAW OF THE SEA – UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS) – PEACEFUL RESOLUTION OF DISPUTES

Statement at the ASEAN Ministerial Meetings to Prepare for the 22nd ASEAN Summit, Bandar Seri Begawan, Brunei Darussalam, 11 April 2013

Subsequent to the ASEAN Ministerial meetings, the Minister of Foreign Affairs reported that the Ministers discussed the developments in the Korean Peninsula and South China Sea, in particular, the deteriorating security situation in the Korean Peninsula. Malaysia, together with the other ASEAN member states, agreed that conflicting parties should exercise self-restraint and take immediate action to restore calm and reduce tension.

Malaysia emphasised that the peaceful resolution of disputes in the South China Sea should be carried out in accordance with the universally recognised principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The Ministers also reiterated the need for all parties to exercise self-restraint in the conduct of activities that would complicate or escalate disputes; the Statement on the Six-Point Principles on the South China Sea; and the need to maintain the momentum on dialogue and consultations. In this regard, the Ministers agreed to work actively on concluding the Code of Conduct.

LAW OF THE SEA – DECLARATION ON THE CONDUCT IN THE SOUTH CHINA SEA – ASEAN

Statement at the 46th ASEAN Ministerial Meeting and Related Meetings, Bandar Seri Begawan, Brunei Darussalam, 1 July 2013

The statement addressed a number of issues that were discussed at the 46th ASEAN Ministerial meeting. In particular, it was reported that the meet-

ing welcomed China's willingness to start formal talks on a regional code of conduct in the South China Sea through a process of negotiation under the framework of the Declaration on the Conduct in the South China Sea (DOC). The meeting also welcomed China's proposal to organise a meeting of Senior Officials on the Implementation of the ASEAN-China DOC in Beijing in September 2013.

In this regard, Malaysia stressed that ASEAN and China should maintain the momentum of dialogue and negotiations on the issue of the South China Sea. Both sides should build on the existing relationship to find solutions to realise the regional code of conduct in the South China Sea. It was also emphasised that ASEAN and China should demonstrate to the international community that the relationship between the two sides covers various aspects and not just focused on the South China Sea issue alone.

**LAW OF THE SEA – UNITED NATIONS CONVENTION ON THE
LAW OF THE SEA (UNCLOS) – ASEAN – REGIONAL SECURITY
COOPERATION – DECLARATION OF THE EAST ASIA SUMMIT ON THE
PRINCIPLES FOR MUTUALLY BENEFICIAL RELATIONS**

**Statement at the ASEAN Regional Forum and the East Asia Summit-
Foreign Ministers' Meeting, Bandar Seri Begawan, Brunei Darussalam,
3 July 2013**

Malaysia drew attention to the issues that were discussed at the meeting, i.e. development in the South China Sea, Middle East Peace Process and situation in the Korean Peninsula and Syria.

With regard to the situation in the South China Sea, Malaysia stressed that the principles of international law, including the 1982 United Nations Convention of the Law of the Sea should guide the dialogue and negotiations.

In the area of non-traditional security, Malaysia called for greater collaboration amongst participants of the ASEAN Regional Forum, particularly, to increase preparedness and capacity to deal with cyber security threats.

As regards security cooperation, it was emphasised that a rules-based approach is vital in governing inter-state relations as this can encourage, promote and ensure the transparency of intent and predictability in behaviour in a sustained manner; in particular, the twelve points in

the Declaration of the East Asia Summit on the Principles for Mutually Beneficial Relations adopted in Bali in 2011 should be taken into account.

VIETNAM

LAW OF THE SEA – 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA – NAVIGATIONAL RIGHTS

Entry into force of the Vietnam's Law of the Sea, 1 January 2013

On 1 January 2013, the Vietnam's Law of the Sea entered into force (the "Law"). This is the country's most important and comprehensive piece of legislation on law of the sea. The Law covers all major aspects of the management and use of the sea. It regulates the regime of internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, regime of islands, archipelagos, and activities in the Vietnamese sea areas. It sets rules for protecting the marine environment and conducting marine scientific research. It also includes provisions on search and rescue, development of maritime economy, sea patrol and control, and maritime international cooperation.

Under this national Law, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) has become a guiding principle for the State's management and protection of the sea.¹¹⁹ International law, international treaties and UNCLOS are referred to in 40 provisions of the Law.¹²⁰ The Law clearly states that Vietnam shall respect and protect the rights and interests of foreign vessels in its maritime zones in conformity with international treaties to which Vietnam is a party.¹²¹ It affirms the primary role of UNCLOS in case there are differences between its provisions and those

119 Law of the Sea art. 2(1) (2012) (Viet.).

120 "International law" is referred to in 15 provisions, including *id.* arts. 4(3), 5(3), 5(4), 6(1), 16(1), 22(1), 22(3), 28, 32, 33(3), 33(6), 35(1), 35(4), 36(2), 37(9). "International treaties" is referred to in 21 provisions, including *id.* arts. 4(1), 5(4), 12(3), 12(4), 16(2), 16(3), 18(4), 18(5), 22(1), 23(1), 30(4), 33(7), 35(4), 35(5), 39(2), 48(b). The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is referred to in three provisions, including *id.* arts. 3(1), 4(3), 12(1). The Charter of the United Nations is referred to in *id.* art. 4(1).

121 *Id.* art. 22(2) (2012).

under UNCLOS.¹²² Clarifying the relationship between its provisions and those in previous legal documents on the same matters, the Law maintains that, in case of differences between the Law and the previous documents, the Law shall prevail.¹²³ This demonstrates the importance of the UNCLOS in Vietnam's maritime order and its maritime policy.

With respect to the regime of islands, for example, the Law uses identical language to Article 121(1) of UNCLOS in defining an island as "a naturally formed area of land surrounded by water, which is above water at high tide."¹²⁴ Similarly, it provides that "[r]ocks which cannot sustain human habitation or economic life of their own have no exclusive economic zone or continental shelf,"¹²⁵ which is identical to the language in Article 121(3) of UNCLOS.

In terms of navigational rights of foreign vessels in Vietnam's maritime zones, the Law states that Vietnam's sovereignty in its territorial sea shall be exercised in accordance with UNCLOS,¹²⁶ according to which vessels of all states shall enjoy the right of innocent passage.¹²⁷ Innocent passage of foreign vessels shall be conducted on the basis of international treaties to which Vietnam is a party, including UNCLOS.¹²⁸ The Law does require that, when entering Vietnam's territorial sea, foreign submarines surface and fly their national flags¹²⁹ and foreign nuclear-powered ships carry documents and observe special precautionary measures established for such ships under international law.¹³⁰ These requirements, however, are consistent with UNCLOS provisions.¹³¹ The Law provides that Vietnam

122 *Id.* art. 2(1).

123 *Id.*

124 *Id.* art. 19(1).

125 *Id.* art. 20(2).

126 *Id.* art. 12(1).

127 *Id.* art. 12(2).

128 *Id.* art. 12(3).

129 *Id.* art. 29.

130 *Id.* art. 23.

131 United Nations Convention on the Law of the Sea art. 20 & 23, opened for signature Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

may temporarily suspend the exercise of innocent passage in specified areas in Vietnam's territorial sea if such suspension is essential for the protection of its security,¹³² which is again allowed under UNCLOS.¹³³ It further specifies that the temporary suspension shall be made public domestically and internationally on the "Maritime Notice" in accordance with the international maritime practice at least fifteen days before the temporary suspension.¹³⁴ The 2012 Law also has a similar list of activities like the one in Article 19 of UNCLOS that are considered to be prejudicial to Vietnam's peace, good order and security.¹³⁵

In the contiguous zone, the Law maintains that, in addition to rights and jurisdiction over natural resources as provided in UNCLOS, Vietnam can also exercise control to prevent and punish acts of infringement of legislation on customs, tariff, health or immigration committed in the territory or the territorial sea of Vietnam.¹³⁶ This provision is consistent with Article 33 of UNCLOS.

In the exclusive economic zone, the Law provides that Vietnam "respects freedoms of navigation and overflight, the right of the laying of submarine cables and pipelines and lawful uses of the sea by other states" in accordance with this Law and international treaties to which Vietnam is a party, including UNCLOS.¹³⁷ It should be noted that this is the first time that a Vietnamese legal document formally acknowledges freedom of navigation and overflight in the exclusive economic zone.

132 Law of the Sea art. 26 (Viet.).

133 UNCLOS, *supra* note 130, art. 25.

134 Law of the Sea art. 26 (Viet.).

135 The major difference is that, unlike the UNCLOS, Law of the Sea art. 12(3) (Viet.) views threat or use of force against other countries as rendering passage in the territorial sea not innocent.

136 Law of the Sea art. 14(2) (Viet.).

137 *Id.* art. 16(2).

Municipal Law

KOREA

COURTS AND TRIBUNALS – MUNICIPAL / STATE RESPONSIBILITY

Decision of Daegu District Court Concerning Succession of National Compensation Obligation

Daegu District Court Judgment for a claim of government compensation responsibility to the victims of Daegu October incident – Korea’s succession of the liability to compensate for the damages by the U.S. Military Government in Korea. Daegu Jibang beobwon [Daegu Dist. Ct.], 2012Ga-Hap6923, Oct. 27, 2013 (S. Kor.).

Facts

In the raid of so-called “Daegu October Affair,”¹³⁸ which occurred when civilians and few leftist faction stood against the police and administrative authority as they were discontent with the U.S. military’s hiring pro-Japanese Governmental officer directly after the liberation, the delay of land reformation, and coercive delivery of food, a number of civilians suffered from cruel treatment, such as torture, or suffered retaliation after their release, and some of them were even killed without any due process. By receiving requests from the related parties of the civilian casualty from Daegu October Affair, past affairs arrangement committee for truth and reconciliation on year 2010 made a determination on the investigation for truth. In accordance with this investigation, the plaintiffs claimed a compensatory damage against the Korean Government, the defendant, for the deceased and victims’ family’s mental sufferings claiming that

138 At the occurrence of the incident, the U.S. military suppressed the incident by announcing a martial law in October 2, 1964 and 7,500 of residents were arrested in the process. On the investigation process, some of the civilians suffered from cruel treatment such as torture or they suffered retaliation such as destruction or forfeit of their asset and property by the police or right-wring group after their release. Some of them were even killed without any due process. Furthermore, some of the residents were even killed, who were totally unrelated to this incident.

the Government was the managerial supervisor of the police officers who killed the victims.

Legal Issues

Whether a claim of compensatory damage can be incurred against the Korean Government and the validity on the defendant's counter-argument on extinctive prescription.

Judgment

The defendant denied Korean Government's succession on the compensation obligation for the damages caused by the U.S. Military Government in Korea on the issue of whether a claim of compensation damages can be incurred against the Korean Government. Below is the Court's opinion:

The defendant argued that the Daegu October Affair is an incident that occurred during the U.S. Military Government in Korea, which is before the establishment of the Government of the Republic of Korea, and that the defendant is not liable for the unlawful acts committed by the government officers, who belonged to the U.S. Military Government and had the responsibility to manage the police at that time. According to the "Agreement between the Korean Government and the U.S. Government on the transfer of Sovereign Power to Korean Government and the Evacuation of the U.S. Army Occupation," made on August 11, 1948, and Article 2 of the "Administrative Agreement on Potential Military Safety for the Transition Period between the President of Korea and the U.S. Armed Forces Commander in Korea," made on August 24, 1948, "when the U.S. Forces Korea (USFK) regard it in accordance with common security, the transfer of commanding duty of the Korean national defense force to the Korean Government on the entire police, coast guard, and the existing national defense guard is gradually agreed and the Korean President agrees to receive the commanding duty of the national defense force." Therefore, the defendant's contention is without reason as the defendant has succeeded the responsibility for the unlawful acts, even though the victims of Daegu October Affair suffered from the unlawful acts committed by the police who were under the command management of the U.S. Military.

Meanwhile, the Court held that the defendant's contention on the extinction of right of compensatory claim is not allowed as it is an abuse on rights, which is against the duty of good faith.

Therefore, there was an exercise of rights within a reasonable time based on good-faith principle. The plaintiffs probably expected appropriate measure for reputation recovery and compensatory damages by enacting the Special Compensatory Law for the before and after Korean War sufferings after the defendant said that it will take appropriate measures to recover the damages and reputations of the victims and the families of the deceased according to the clarified truth through the legislation for the basic past affairs arrangement. Nevertheless, the defendant did not take any active step, leading the plaintiffs to file suits individually against the defendant for compensatory damage. In addition, the characteristics of the defendant's unlawful act, the degree of claim of right for compensation damage and the scope of the claimants, and the process of similar incidents on State compensation led to such a conclusion.

COURTS AND TRIBUNALS – MUNICIPAL / TREATIES – DOMESTIC EFFECT

Decision of Constitutional Court Concerning Domestic Effect of the Treaty

Constitutional Court – Constitutional appeal about the invasion of voting right due to Korea-U.S. FTA. Hunbeob jaepanso [Const. Ct.], 2012Hun-Ma166, Nov. 28, 2013 (S. Kor.).

Facts

The claimant claimed on February 20, 2012, a constitutional appeal requesting the validation of the constitutional violation by arguing that the "Korea-U.S. FTA," which was approved by the Assembly plenary session on November 22, 2011, invades the claimant's voting right and equal right.

Legal Issues

Whether the Korea-U.S. Free Trade Agreement (March 12, 2012 Treaty No. 2081) violates the claimant's fundamental right. More specifically, whether this treaty changes the scope of legislative power and judicial power of Korea, and whether Article 119 and Article 123 of the constitutional eco-

nomic clause is an amendment to the Constitution. If it is, whether the voting right of the claimant, a citizen of Korea, is violated as it did not go through a voting process.

Judgment

The Constitutional Court found that a citizen's voting right in Article 72 of the Constitutional Law is a fundamental right, which is only effective when the President puts some policies to a plebiscite. Therefore, unless the President puts the issue of a trade agreement between Korea and the U.S. to a plebiscite, the possibility of the invasion of citizen's right stated in Article 72 of the Constitutional Law is not recognized. In addition, the amendment to the written Constitution is only allowed by the submission of a proposal on the constitutional amendment, which contains the explicit and direct change on the Constitution's provision or statement. It is not allowed by regular legislative procedure like a lower standard of formality of law. Thus, the written Constitution cannot be amended for the trade agreement between Korea and the U.S. as its legal effect is recognized as one of the treaty that needs consent from Congress. In addition, according to the trade agreement, the possibility on the invasion of claimant's voting rights is not violated by the procedure of the constitutional amendment pursuant to Article 13, Section 2 of the Constitution. The important part of the opinion is as follows:

Article 6, Section 1 of our Constitution states that "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea" and Article 5 of the Addenda of the Constitution states that "Acts, decrees, ordinances and treaties in force at the time this Constitution enters into force, shall remain valid unless they are contrary to this Constitution." Therefore, our Constitution premises the constitutional superiority on treaties and does not accept treaties, known as constitutional treaties, the same effect as the Constitution. For the trade agreement between Korea and the U.S., its legal effect is recognized as part of the Treaty of Friendship Commerce and Navigation between Korea and the U.S., which requires the approval of Congress according to Article 60, Section 1 of the Constitution. Thus, a target of normative control is set apart and the written Constitution cannot be amended. Therefore, unless a trade agreement between Korea and the U.S. has an effect to amend the written Constitution, the pos-

sibility for the invasion cannot be acknowledged because it is hard to say that the Constitution is amended enough for the citizen's voting right to be exercised at a Constitution amendment procedure.

SRI LANKA

INCORPORATION OF TREATY – MUNICIPAL LAW

Legislative incorporation of UN Convention on the Law of the Sea 1982, the Indian Ocean Tuna Commission, the Fish Stocks Agreement 1995, the Food and Agriculture Organization, UN Agreement on Port State measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009 – Fisheries and Aquatic Resources (Amendment) Act No 35 of 2013

One of the objectives of this Amendment is to give effect to Sri Lanka's international obligations under 'certain International and Regional Fisheries agreements.' Accordingly S 14G requires that any fishing operations licensed by the Sri Lankan government shall comply with any regulations issued to implement any measures adopted under the following international and regional agreements - the UN Convention on the Law of the Sea 1982, the Indian Ocean Tuna Commission, the Fish Stocks Agreement 1995, the Food and Agriculture Organization, UN Agreement on Port State measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009. S 31 further vests power with the Minister to exercise his powers to implement any conservation and/or management measures under the aforesaid agreements.

Legislative incorporation of the Convention Against Doping in Sports - Convention Against Doping in Sports Act No 33 of 2013

The International Convention Against Doping in Sport 2005 was given effect to by this Act. Among other things, this Act establishes an Anti-Doping Agency for Sri Lanka, declares doping to be a criminal offence, and recognizes therapeutic use exemptions and provides for a procedure for determining such exemptions.

Strengthening of provisions relating to terrorist financing – Convention on the Suppression of Terrorist Financing – Convention on the Suppression of Terrorist Financing (Amendment) Act No 3 of 2013

Convention on the Suppression of Terrorist Financing (Amendment) Act No 3 of 2013

Several sections of the parent Act were repealed and replaced through this Amendment. For instance, the Amendment introduced a definition of a ‘terrorist’ following the definition provided in the Convention. The Amendment expanded the definition of a ‘terrorist act’. The definition now refers to acts which are declared to be offences under the nine treaties recognized in Schedule I of the parent Act.

Sovereignty

CHINA

TERRITORIAL – INTERNAL AFFAIRS – TAIWAN

On July 16, 2013, a Foreign Ministry spokesperson made remarks on the U.S. President’s endorsement of the Act supporting Taiwan’s participation in the International Civil Aviation Organization (ICAO).

Taiwan compatriots’ participation in activities of international organizations, including those of the ICAO is China’s internal affairs. China is firmly opposed to the interference by any foreign government, organization or individual. The relevant act of the US Congress grossly violated the “one China” policy and the principle of the three Sino-U.S. Joint Communiqués. China expresses firm opposition to that and has lodged solemn representations with the U.S. side. We urge the US side to honor its commitment to China on Taiwan-related issues, handle them in a discreet and proper manner, stop interfering in China’s internal affairs and do more things that are conducive to the peaceful development of cross-Straits relations, instead of the contrary.¹³⁹

139 *Foreign Ministry Spokesperson Hua Chunying’s Remarks on the U.S. President’s Endorsement of an Act Supporting Taiwan’s Participation in the International Civil Aviation Organization (ICAO)*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (July 16, 2013), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1059285.shtml; see *Foreign Ministry Spokesperson Hua Chunying’s Remarks on the Taiwan-Related Issue Which Arose at Japan’s Memorial Ceremony of the March 11 Earthquake*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA, http://www.fmprc.gov.cn/mfa_

TERRITORIAL INTEGRITY – NANSHA ISLANDS

At a regular press conference on January 7, 2013, a Foreign Ministry spokesperson stated:

China has indisputable sovereignty over the Nansha Islands and their adjacent waters, and opposes any action that may impair China's territorial sovereignty. We urge relevant countr[ies] to earnestly abide by the Declaration on the Conduct of Parties in the South China Sea (DOC) and [to] stop provocative acts that may complicate or amplify the issue.¹⁴⁰

NON-INTERVENTION IN INTERNAL AFFAIRS

On May 15, 2013, a Chinese representative made a statement on the voting of a resolution on the situation in Syria at the UNGA. He stated:

With regard to the Syrian issue, the international community must respect the independence, sovereignty, unity and territorial integrity of Syria and uphold the purposes and principles of the Charter of the United Nations, the principle of non-interference in internal affairs in particular, as well as international law and the basic norms governing international militias.¹⁴¹

BOUNDARY DISPUTES – CHINA-INDIA BORDER

On May 6, 2013, a Foreign Ministry spokesperson made remarks on the settlement of the standoff incident between the Chinese and Indian border.

China and India have recently reached [an] agreement on [a] proper solution [to] the incident in the western section of the China-India

eng/xwfw_665399/s2510_665401/2535_665405/t1020675.shtml; see also *Foreign Ministry Spokesperson Hua Chunying's Remarks on the European Parliament's Adoption of a Taiwan-Related Resolution*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 12, 2013), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1088457.shtml.

140 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on January 7, 2013*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1003841.shtml.

141 U.N. GAOR, 67th Sess., 80th plen. mtg. at 9, U.N. Doc. A/67/PV.80 (May 15, 2013).

boundary through consultation. Border troops of the two sides have now withdrawn from the area of standoff at the Tiannan River Valley area. Since the occurrence of the incident, China and India, with the larger interest of bilateral relations in mind, have taken a constructive and cooperative attitude, exercised restraint and maintained close communication and consultation through the border-related mechanism, border defense meetings and diplomatic channels. Maintaining peace and tranquility in the China-India border areas serve[] the common interests of both sides. China is ready to work with India to seek a fair, reasonable and mutually acceptable solution to the boundary question at an early date.¹⁴²

Territory

VIETNAM

VIETNAM – CAMBODIA RELATIONS – BORDER AND TERRITORY – SETTING UP LANDMARKS – INFORMATION EXCHANGE AND BORDER SECURITY ENHANCEMENT

The Border Committee of the Socialist Republic of Vietnam and its counterpart of Cambodia have agreed on eight border landmarks alongside the Tay Ninh Province and Kom Pong Cham of Cambodia on 26 March 2013.

Vietnam and Cambodia have cooperated to set up landmarks in compliance with the Supplementary Treaty for Treaty on National Border Planning 1985 between the Socialist Republic of Vietnam and Kingdom of Cambodia signed on 10 October 2005 and the Memorandum on the Adjustments of the Land Borderline in Unresolved Areas between the Socialist Republic of Vietnam and Kingdom of Cambodia signed on 23 April 2011. Until 30 June 2013, according to the report of the Vietnam's Ministry of Foreign Affairs, the competent authorities of the two countries have together identified 237/287 places to set up landmarks; built 231/280

142 *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Settlement of the Standoff Incident Between China and India in the Border Areas*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (May 7, 2013), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1038241.shtml.

landmarks; and delimited 850/1,137 km of borderline.¹⁴³ The two nations often exchange information regarding border administration, security and order maintenance, in compliance with the Treaty on Border Administration Regimes 1983, as well as organise friendly cultural exchanges and trade and tourism cooperation activities between the citizens of Vietnam and Cambodia.

Following the above development, the Government of Vietnam has approved the plan to negotiate with its counterpart to develop thirteen new border gates over the next seven years in areas belonging to the Central Highlands and the Mekong Delta. One of the new ports of entry will be at a railway station, three on the main highways and nine spread out along the local roads. Other border gates will be also upgraded from 2013 to 2016. Such developments should help in boosting trade that has already been growing between the two Southeast Asian nations.¹⁴⁴

The efforts of the two states on determining land borders are considered as remarkable given the boundary disputes in the past. It shows their desire to improve their bilateral relations, to become a strategic partnership to provide an umbrella for closer cooperation between the two states.

VIETNAM-LAOS RELATIONS – BORDER AND TERRITORY – SETTING UP LANDMARKS – TREATY AND CONVENTIONS

On 9 July 2013, the Prime Minister Nguyen Tan Dung of the Socialist Republic of Vietnam and the Prime Minister of the People Republic of Laos together hosted the Ceremony on the Establishment of the Landmarks number 460 at the border gate Thanh Thuy, Nghe An and the Ceremony on the Completion of the Project for Landmarks Increase and Construction between Vietnam and Laos. The two nations have built a system of 835 modern and persistent landmarks and supplemented 20 marks, thereby

143 Report No. 2840/BC-BNG-LPQT of the Ministry of Foreign Affairs on 30 July 2013 on the Conclusion and Implementation of International Treaties, Agreements and Contracts signed during the visit of Senior Leaders in the first six months of 2013.

144 GEN. STATISTICS OFFICE OF VIET., ECONOMIC REPORT 2013 (“The trade between Vietnam and Cambodia has been rising fast in recent years, reaching US\$ 4.1 billion in 2012. That’s up from US\$ 3.3 billion in 2012 and 2.8 billion 2011.”).

contributing to planning 2,067 km of the borderline between Vietnam and Laos.

In the next stages, the two nations will continue to cooperate to complete the rest of the Project for Landmarks Increase and Construction between Vietnam and Laos in 2014, as well as drafting and concluding legal documentaries regarding border issues, such as the Convention regarding the borderline and national landmarks between the Socialist Republic of Vietnam and of the People Republic of Laos, the new Treaty on Border Administration Regime, Regulations on Border Gates and the Administration of Border Gates.

Terrorism

CHINA

AGREEMENT ON THE PROCEDURE FOR ORGANIZING AND CONDUCTING JOINT ANTI-TERRORIST OPERATIONS WITHIN MEMBER STATES OF THE SHANGHAI COOPERATION ORGANIZATION

On June 29, 2013, the Third Session of the Standing Committee of the Twelfth National People's Congress decided to ratify the Agreement on the Procedure for Organizing and Conducting Joint Anti-Terrorist Operations Within Member States of the Shanghai Cooperation Organization. This Agreement was signed by China in Shanghai on June 15, 2006. It applies to Macau Special Administrative Region, and does not apply to Hong Kong Special Administrative Region, unless otherwise notified by the People's Republic of China.¹⁴⁵ Apart from the preamble and signatures, this Agreement has 36 articles, including the definitions of relevant terms, purposes and content of joint anti-terrorism operations, the decision-making and its procedure of joint anti-terrorism operations, the establishment, operation and cancellation procedures of joint antiterrorism operation commanding organs, the rights, duties and responsibilities of the troops and personnel

145 中国批准:关于在上海合作组织成员国境内组织和举行联合反恐行动的程序协定, XINHUA [China Approves: Agreement on the Organization and Conduct of Joint Anti-Terrorism Operations in the SCO Member States] (June 29, 2013, 8:29 PM), http://www.gov.cn/jrzq/2013-06/29/content_2437053.htm.

in participation of the joint operations, and the principles on exercise jurisdictions.¹⁴⁶ According to Mr. Yang Huanning, the Vice Minister of Public Security, the Agreement has a substantive significance in strengthening the stability of China's northwest neighboring areas and safeguarding China's security and development in its aims to accomplish the domestic procedure for the ratification of this Agreement, to improve the legal basis of organizing and conducting joint anti-terrorist exercises by Member States of the Shanghai Cooperation Organization, and to actively enhance the effective cooperation in suppression of "Three Forces" in Member States of the Shanghai Cooperation Organization.¹⁴⁷ The official languages of this Agreement are in both Chinese and Russian.

INDIA

Statement by India on Agenda Item 110 - "Measures to Eliminate International Terrorism" at the Sixth Committee of the 68th Session of the United Nations General Assembly on 8 October 2013¹⁴⁸

Thanking the Secretary-General for his report A/68/180 dated 23 July 2013 entitled "Measures to eliminate international terrorism," India noted that the international community is continuously facing a grave challenge from terrorism and that it was a scourge that undermined peace, democracy and freedom. India asserted that it condemned terrorism in all its forms and manifestations, including those in which States were directly or indirectly involved, including the State-sponsored cross-border terrorism,

146 关于在上海合作组织成员国境内组织和举行联合反恐行动的程序协定 [Agreement on the Organization and Conduct of Joint Anti-Terrorism Operations in the SCO Member States], 中国人大网 [China National People's Congress Network] (2006), http://www.npc.gov.cn/wxzl/gongbao/2013-10/22/content_1811025.htm.

147 中国批准:上海合作组织成员国组织和举行联合反恐演习的程序协定, XINHUA (June 29, 2013, 8:17 PM) http://news.xinhuanet.com/politics/2013-06/29/c_116339848.htm.

148 Arun Jaitley, Member of Parliament & Member of the Indian Delegation, Statement on Agenda Item 110, at the Sixth Committee of the 68th Session of the United Nations General Assembly (Oct. 08, 2013) (transcript available in <https://www.pminewyork.org/adminpart/uploadpdf/29264pmi77.pdf>).

and reiterated the call for the adoption of a holistic approach that ensures zero-tolerance towards terrorism.

While strongly supporting all efforts to eradicate international terrorism, India noted that it had been in the forefront of global counter-terrorism efforts and was part of all major global initiatives against international terrorism, including the Financial Action Task Force (FATF). India further noted that “The Global Counter Terrorism Strategy” is a unique and universally agreed strategic framework to counter terrorism. The setting up of the Counter Terrorism Implementation Task Force (CTITF) in 2010 has provided an institutional framework to support the implementation of the Strategy as well as the harmonization of an integrated counter-terrorism approach within the UN system. An effective and balanced implementation of the Strategy requires greater international and regional cooperation. In this context, we also count on the UN Counter Terrorism Center established within the CTITF Office, to supplement these efforts.

India strongly favoured the strengthening of the normative framework at the United Nations to effectively deal with the scourge of terrorism. It continued to stress the need for expanding the scope of the legal instruments, and the enforcement efforts to destroy safe havens for terrorists, their financial flows and support networks and to bring the terrorists to justice. In this context, India pointed out that it attached significance to the work undertaken by the ad hoc Committee towards negotiations of the Comprehensive Convention on International Terrorism (CCIT). In its view, the 2007 package submitted by the Coordinator of the ad hoc Committee presented a viable and, delicately balanced text of the Convention. India reiterated its support to the Coordinator’s text and was hopeful that all States, considering the seriousness of the threat of the menace of terrorism and the importance of the measures to deal therewith, would consider according their acceptance to the text of the draft Convention.

India believed that, in addition to the law enforcement measures, the preventive aspect was equally important. India also noted that focus on development, education, social integration, tolerance, rule of law and respect for human rights were the integral components of such an approach.

Referring to its brush with the scourge of terrorism for over two-and-a-half decades, India pointed out that it was, indeed, the entire region, had been wracked by the activities of the biggest terrorist actors in the world, be they Al-Qaida, elements of Taliban or Lashkar-e-Taiba, Jamat-ud Daawa or

others. India also pointed out that terrorism, extremism and radicalization continue to pose a serious challenge to peace, progress and prosperity in the region. Stressing on the regional framework, India stated:

Within the framework of the South Asian Association for Regional Cooperation (SAARC), we have the SAARC Regional Convention on Suppression of Terrorism of 1987, and its Additional Protocol of 2004 on the financing of terrorism, and the SAARC Convention on Mutual Assistance in Criminal Matters of 2008. India is working with fellow SAARC nations to strengthen counter-terrorism cooperation.

India also outlined the steps taken by it to strengthen strategic, legal and operational framework in the fight against terrorism. India noted that it had become party to 13 international counter-terrorism conventions and protocols. As regards to its national implementation, it pointed out that the Unlawful Activities (Prevention) Act incorporated provisions dealing with all aspects of terrorism including conspiracy and incitement to terrorism. The Act criminalized the raising of funds for terrorist activities, holding of proceeds of terrorism, harboring of terrorists, unauthorized possession or use of any bomb, dynamite or hazardous explosive substance or other lethal weapons. The Weapons of Mass Destruction (Prevention) Act 2005 provided detailed measures preventing the falling of weapons of mass destruction or dual use materials in the hands of terrorists and non-state actors. The Foreign Contribution (Regulation) Act, 2010 sought to further streamline, monitoring of all foreign contributions received by non-governmental organisations and religious, educational and charitable organisations. In addition to all the above, India pointed out that it had concluded more than forty bilateral treaties on extradition and mutual legal assistance in criminal matters.

As part of the operational counter-terrorism framework, India drew the attention of all the Members that its National Investigation Agency (NIA) was mandated to investigate and prosecute offences affecting the sovereignty, security and integrity of India, friendly relations with foreign States, and offences under Acts enacted to implement international treaties, and resolutions of the United Nations and other international organizations. A National Intelligence Grid (NATGRID), linking data bases for constructing actionable intelligence to combat terrorism and internal security threats, had also been set up, India added. The Financial Intelligence Unit-India

(FIU-IND) had launched Project FINnet (Financial Intelligence Network) with the objective to adopt best practices and appropriate technology to collect, analyze and disseminate valuable financial information for combating money laundering and related crimes.

Concluding, India stressed that the international community could not afford selective approaches in dealing with terrorist groups or in dismantling the infrastructure of terrorism. India called for stepping up of collective efforts with real cooperation among member states to confront the scourge of terrorism squarely and decisively.

Treaties

BANGLADESH

BILATERAL AGREEMENTS TO FOSTER COOPERATION BETWEEN FOREIGN MINISTRIES OF BANGLADESH AND AZERBAIJAN

On 10-11 June 2013, Bangladesh entered into two agreements with Azerbaijan to establish, respectively, a consultation mechanism that would foster mutual cooperation between the foreign ministries of the two countries and a relationship between the two diplomatic academies. The Memorandums of Understanding are:

- (i) Memorandum of Understanding for Consultation Mechanism between the Ministry of Foreign Affairs of the People's Republic of Bangladesh and the Ministry of Foreign Affairs of the Republic of Azerbaijan, 10 June 2013, Baku; and
- (ii) Memorandum of Understanding for Cooperation between Foreign Service Academy of the Ministry of Foreign Affairs of the People's Republic of Bangladesh and Azerbaijan Diplomatic Academy of the Ministry of Foreign Affairs of the Republic of Azerbaijan, 11 June 2013, Baku.

INDIA

IMPLEMENTATION OF TRIPS OBLIGATIONS - 'EVERGREENING
OF PATENTS' AND CHALLENGE TO INDIAN DOMESTIC
IMPLEMENTATION PROCESS - HISTORY AND EVOLUTION OF
INDIAN PATENT SYSTEM

Novartis A.G. v. Union of India & Others [Supreme Court of India, 1 April 2013 <http://JUDIS.NIC.IN>]

Facts

This case dealt with some intricate issues relating to the implementation of Indian obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) with a particular focus on section 3(d) of its Patents Act, 1970. Appellant pharmaceutical company Novartis' claim on a patent was in question, as to whether it could qualify as a "new product" involving technical advance over the existing knowledge and as to whether that made the invention not obvious to a person skilled in the art. Novartis had claimed the patent for the beta crystalline form of a chemical compound called Imatinib Mesylate which was a therapeutic drug for chronic myeloid leukemia and certain kinds of tumors and was marketed under the name 'Glivec' or 'Gleevec.'

The case also raised the issues relating to the definition of 'invention' under section 2 of the Indian Patents Act, 1970 and its relationship with section 3(d) which provided for what could not be patented. It was argued that this new drug did not pass the muster of the section 3(d) of the Indian Patents Act, 1970. There were also larger issues relating to striking a balance between the need to promote research and development in science and technology and to keep the private monopoly at the minimum while not violating any of the Indian obligations under the TRIPs. Since this was a life-saving drug, the Court felt it should not be kept beyond the reach of "multitude of ailing humanity not only in this country but in many developing and under-developed countries."

The Court noted that patents were granted to this product in 1996 both in the United States and Europe.¹⁴⁹ Appellant applied for this patent in India

149 The original patent was granted to Jurg Zimmermann in the United States in 1996 and it was known as 'Zimmermann' patent. The Court also explained in its

in 1998 at a time when Indian patent law was in transition to give effect to various obligations undertaken under the TRIPs Agreement.¹⁵⁰ Besides its TRIPs obligations, India also added a few more provisions into its patent law as a safeguard measure to regulate the abuse of patent monopoly. Appellant's patent application in India was taken up for examination in 2005 after India completed its implementation of its obligations under the TRIPs. India, as a developing country, was entitled to have a ten-year transition period under the TRIPs Agreement.¹⁵¹

Appellant's patent application was rejected in 2006 by the Indian Patent Office on the ground that it was anticipated by prior publication and that the invention claimed by the Appellant was obvious to a person skilled in the art in view of the disclosure made in earlier Zimmermann patent. Further, the Indian Patent Office also disallowed the patent under section 3(d) of the Patents Act, 1970 which, *inter alia*, held non-patentable those patents whose properties were already known. Aggrieved by this order of the Patent Office, the Appellant challenged it in the Madras High Court in 2007, seeking a declaration that section 3(d) of the Indian Patent Act was unconstitutional because it not only violated Article 14 of the Constitution of India but it is also not in compliance with TRIPs. The Madras High Court sent the matter to the newly constituted Intellectual Property Appellate Board (IPAB) for consideration of the issue. IPAB held that the appellant's invention satisfied the tests of novelty and non-obviousness,

verdict in detail as to what this new invention was about and how it was granted. The appellant filed the application (Application No.1602/MAS/1998) for grant of the patent for Imatinib Mesylate in beta crystalline form at the Chennai Patent Office on 17 July, 1998. In the application it claimed that the invented product, the beta crystal form of Imatinib Mesylate, had (i) more beneficial flow properties; (ii) better thermodynamic stability; and (iii) lower hygroscopicity than the alpha crystal form of Imatinib Mesylate. It further claimed that the aforesaid properties made the invented product "new" (and superior! as noted by the Court) as it "stores better and is easier to process"; had "better process ability of the methanesulfonic acid addition salt of a compound of formula I", and has a "further advantage for processing and storing."

150 India had provided for 'mail-box' provisions and also granted 'exclusive marketing rights' to give immediate effect to Article 70(8) and (9) of the TRIPs Agreement.

151 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 65, Apr. 15, 1994, 1869 U.N.T.S. 299 (entered into force Jan. 1, 1995).

but held that the patentability of the subject product was hit by section 3(d) of the Act. IPAB, however, held that the appellant could not be denied the process patent for preparation of Imatinib Mesylate in beta crystal form. From IPAB the matter was taken to the Indian Supreme Court for resolving some of the above mentioned issues.¹⁵² Both NATCO Pharma Ltd. and M/S Cancer Patients Aids Association also filed Special Leave Petitions (SLPs) before the Indian Supreme Court.

Summary of the Judgment

The Court, while delivering the judgment, first noted that the case of the appellant “f[e]ll in the transitional period between two fundamentally different patent regimes.” In 1998, when the patent was sought, there was no product patent regime for pharmaceutical products; only process patents were granted.¹⁵³ From 1998 to 2005, the Indian Patent Law was amended to make it compliant with the terms of the TRIPs Agreement. One of the major amendments was to introduce product patents for pharmaceutical products by deleting section 5 of the Act. There were also changes in the definition of ‘invention.’ The 2005 Indian Patent Law amendment redefined the concepts of ‘invention’ and ‘patentability.’ The Court also noted that “in order to correctly understand the present law it would be necessary to briefly delve into the legislative history of the law of patents in the country.”

The Court noted that the way the colonial patent law, Patents and Designs Act 1911, was designed to “benefit foreigners far more than Indians. It did not help at all in the promotion of scientific research and industrialization in the country, and it curbed the innovativeness and inventiveness of Indians.” The Court noted that considering this imbalance, the post-independence India constituted two Committees to rectify the anomalies that existed in the patent law of India. One Committee was the 1949 Bakshi

152 Supreme Court of India had initially decided that it would send the matter back to the Madras High Court for the resolution of these issues. However, after hearing the counsels and the impact it could have on the patents during this period, the Court agreed to hear the matter. The Court, however, made it clear that that “any attempt to challenge the IPAB order directly before this Court, side-stepping the High Court, needs to be strongly discouraged and this case is certainly not to be treated as a precedent in that regard.” See paragraph 21 of the judgment.

153 Section 5 of the then Indian Patent Act provided for only process patents in the field of food, medicines and drug.

Tek Chand Committee and the other was the 1957 Rajagopala Ayyangar Committee. It took nearly two decades for India to evolve its own patent law in the form of 1970 Indian Patents Act. Regarding the Ayyangar Committee, the Court noted:

Observing that industrial countries and under-developed countries had different demands and requirements, Justice Ayyangar pointed out that the same patent law would operate differently in two countries at two different levels of technological and economic development, and hence the need to regulate the patent law in accordance with the need[s] of the country.

The Court also noted the recommendations made by the Ayyangar Committee to constitute and formulate various provisions for the new patent law that would take into account the needs of the country, particularly in the poorer sections of society. Depicting the scenario that existed on the eve of the introduction of the new Indian Patent Law in 1972, the Court noted:

Till the early 1970s the industry was dominated by MNCs who commanded 68% of the market share. India was dependent on imports for many essential bulk drugs. This import dependence constricted consumption in a country deficient in foreign exchange, and inhibited the growth of the industry. Drug prices in India were very high.

The Court noted that due to the advent of the new Indian Patent Law, with all the necessary balances, drug production in India rapidly grew by the 1990s. However, all this changed with the introduction of TRIPs and the Court pointed out:

Even as the country's pharmaceutical industry, helped by the basic changes made in the patent system by the Patent Act, 1970, was going from strength to strength, certain developments were taking place at the international level that would deeply impact the Patent system in the country. Following the Uruguay round of multilateral negotiations under the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade-Related Aspects of Intellectual Property Rights (The TRIPs) was arrived at and it came into force on January 1, 1995. The TRIPs Agreement is the most comprehensive multilateral agreement to set detailed minimum standards for the protection and enforcement of intellectual property rights, and aims at harmonizing national intellectual property systems.

All members of the World Trade Organisation (WTO) are bound by the obligations under the TRIPS Agreement. India is one of the founding members of the GATT and thus a member of the WTO from its inception from January 1, 1995, and is bound by the obligations under TRIPS Agreement like all other members of the WTO.

Referring to various other developments that had taken place in the context of TRIPs Agreement, in particular the adoption of the ‘TRIPs and Public Health’ declaration by the Ministerial Conference of the World Trade Organization (WTO) that was to take into account and to act upon the concerns of developing and less-developed countries, the Court noted its limits in examining some of these issues, and it stated, thus:

We have referred to the TRIPS Agreement and certain developments arising from it not to comment upon the fairness or otherwise of the Agreement nor to examine the correctness and wisdom of the decision of the Government of India to subscribe to the Agreement. That is farthest from our mind. We have referred to the Agreement as being the main reason behind the basic changes brought about in the patent law of the country by legislative action. We have also referred to the Agreement as being the cause of a good deal of concern not only in this country but also (as we shall see presently) in other parts of the world; the concern being that patent protection to pharmaceutical and agricultural chemical products might have the effect of putting life-saving medicines beyond the reach of a very large section of people. . . . [W]e shall see how the Indian legislature addressed this concern and, while harmonizing the patent law in the country with the provisions of the TRIPS Agreement, strove to balance its obligations under the international treaty and its commitment to protect and promote public health considerations, not only of its own people but in many other parts of the world (particularly in the Developing Countries and the Least Developed Countries).

After considering the scope and content of section 3(d), the Court examined the technical details of the drug in the context of the legal question of its ‘patentability.’ The court noted that “in order to test the correctness of the claim made on behalf of the appellant, that the subject product is brought into being through inventive research, we need to examine in some detail the Zimmermann patent and certain developments that took place on that basis.”

Decision

After examining the technical details of the patent 'Gleevec' in detail,¹⁵⁴ the Court pointed out that:

From the above discussion it would be clear that the drug Gleevec directly emanates from the Zimmermann patent and comes to the market for commercial sale. Since the grant of the Zimmermann patent, the appellant has maintained that Gleevec (that is, Imatinib Mesylate) is part of the Zimmermann patent. It obtained drug approval for Gleevec on that basis. It claimed extension of the term of the Zimmermann patent for the period of regulatory review for Gleevec, and it successfully stopped NATCO Pharma Ltd. from marketing its drug in the UK on the basis of the Zimmermann patent. Not only the appellant but the US Board of Patent Appeals, in its judgment granting patent for beta crystalline form of Imatinib Mesylate, proceeded on the basis that though the beta crystal form might not have been covered by the Zimmermann patent, the Zimmermann patent had the teaching for the making of Imatinib Mesylate from Imatinib, and for its use in a pharmacological compositions for treating tumours or in a method of treating warm blooded animals suffering from a tumoral disease. This finding was recorded by the US Board of Patent Appeals, in the case of the appellant itself, on the very same issue that is now under consideration. The appellant is, therefore, fully bound by the finding and cannot be heard to take any contrary plea.

The Court, accordingly, concluded "[w]e thus find no force in the submission that the development of Imatinib Mesylate from Imatinib is outside the Zimmermann patent and constitutes an invention as understood in the law of patent in India." The Court held that:

[W]e firmly reject the appellant's case that Imatinib Mesylate is a new product and the outcome of an invention beyond the Zimmermann patent. We hold and find that Imatinib Mesylate is a known substance from the Zimmermann patent itself. Not only is Imatinib Mesylate known as a substance in the Zimmermann patent, but its pharmacological properties are also known in the Zimmermann patent The consequential finding, therefore, is that Imatinib Mesylate does not qualify the test of "invention" as laid down in section 2(1)(j) and section 2(1)(ja) of the Patents Act, 1970.

154 The Court subsequently referred to various scientific journals, publications, and articles to justify its assessment on technical details.

Statement by India at the Closing Plenary of the United Nations Conference on Arms Trade Treaty on 28 March 2013¹⁵⁵

India made this statement at the final session of the Conference on Arms Trade Treaty (ATT), noting that the final draft was an improvement over the earlier draft of July 2012 which had served as the basis for negotiations. India also noted that the “road to final session of the Conference has been a long one.” However, India noted that the final draft fell short of its and a number of key stakeholders’ expectations in producing a text that was clear, balanced and implementable and able to attract universal adherence. India pointed out that it had made clear that the ATT should make a real impact on illicit trafficking in conventional arms and their illicit use especially by terrorists and other unauthorized and unlawful non-State actors. The provisions in the final draft on terrorism and non-state actors, India noted, were weak and diffused and did not find any mention in the specific prohibitions of the Treaty.

According to India, ATT should ensure a balance of obligations between exporting and importing states. India further noted that it could not accept the Treaty to be used as an instrument in the hands of exporting states to take unilateral *force majeure* measures against importing states parties without consequences. While pointing out that the final draft did not meet its requirements, India asserted that there was a “fundamental imbalance in the text which is flawed as the weight of obligations is tilted against importing States. As an importing state we will take measures to ensure that the treaty does not affect the stability and predictability of defense cooperation agreements and contracts entered into by India.”

India also stressed on the principle that member states had a legitimate right to self-defence. It believed that there was no conflict between the pursuit of national security objectives and the aspiration that the ATT be strong, balanced and effective. This, it further noted, was consistent with the strong and effective national export controls that it had already in place with respect to the export of defence items.

155 Ministry of External Affairs, Gov’t of India, Statement by India at the Closing Plenary of the UN Conf. on Arms Trade Treaty (Mar. 28, 2013) (transcript available in https://www.mea.gov.in/Speeches-statements.htm?dtl/21485/Statement_by_India_at_the_Closing_Plenary_of_the_UN_Conference_on_Arms_Trade_Treaty).

India also noted that though it negotiated:

in good faith and in an open and transparent manner with respect to its essential interests, the final draft had the tell tale marks of behind-the-scenes carve outs of exclusive interests of a select few countries, such as egregiously excluding non-state actors or arms transfers as gifts or loans, thus seriously diminishing the value of a multilateral Treaty negotiated in the UN.

India also stressed that the universal adherence to this Treaty would not be possible unless all stakeholders were on board including major exporting as well as importing states.

India assured that it will examine the draft text carefully and in detail. It would also undertake a thorough assessment of the ATT from its defence, security and foreign policy interests. It also clarified that its “participation in this session does not in any way prejudice our position on the substantive aspects of the Treaty and should not be construed as our endorsement.”

Statement by India to the Conference on Disarmament (CD), at 2013 Meeting of States Parties to the Biological Weapons Convention (BWC) at Geneva, 9 December 2013¹⁵⁶

India stated that it attached high importance to the BWC as the first disarmament treaty banning an entire class of weapons of mass destruction. Through this instrument, India noted, the 170 States parties to the treaty have pledged never to “develop, produce, stockpile or otherwise acquire or retain” biological weapons and have committed not to use in any way and under any circumstances, biological agents or toxins not consistent with prophylactic, protective or other peaceful purposes.

India pointed out that it remained committed to improving the effectiveness of the BWC and strengthening its implementation and universalization. It believed this was necessary in view of the new challenges to international peace and security, emanating from proliferation trends, including the threat posed by terrorists or other non-state actors seek-

156 D.B. Venkatesh Varma, Ambassador, Statement at 2013 Meeting of States Parties to the Biological Weapons Convention at Geneva (Dec. 09, 2013) (transcript available in https://www.mea.gov.in/Speeches-Statements.htm?dtl/22600/Statement_by_Ambassador_DB_Venkatesh_Varma_Permanent_Representative_of_India_to_the_CD_at_2013_Meeting_of_States_Parties_to_the_Biological_Weapons_Con).

ing access to biological agents or toxins for terror purposes. It was the responsibility of the States parties, India noted, to ensure that their commitments and obligations under the Convention were fully and effectively implemented. India believed that only a multilaterally agreed mechanism for verification of compliance could provide the assurance of observance of compliance obligations by States parties and act as deterrence against non-compliance. Referring to the new inter-sessional process and other meetings, India outlined its broad position on the issues to be covered. It believed that the standing agenda item on review of S&T developments was important for States Parties to keep pace with the rapid developments in biological science and technology which might impact the implementation of the Convention. According to India it was important that these discussions cover all ongoing high-risk dual use research. Referring to some examples and balancing of various interests, India noted that:

It is important to review all ramifications of the recent advancements in scientific understanding related to H5N1, H7N1, H7N9, MERS as well as other BSL 3&4 pathogens. The measures taken to mitigate biological risks should be proportional to the assessed risk and not hamper legitimate peaceful activities including international cooperation. Further, peaceful activities such as vaccine development, which are important for developing countries for meeting their public health needs, should not be unnecessarily highlighted as posing a risk for uses contrary to the provisions of the Convention. India looks forward to continuing discussions on Codes of Conduct and education and awareness raising in order to address issues related to biorisk management. India would also be willing to make a contribution to the discussion on exploring the best way of conducting S&T review under the Convention in the run up to the next Review Conference, recalling the Working Paper submitted by India at the last Review Conference.

Dwelling on the full and effective implementation of the Article X of the Convention, India wanted due importance to be given to the measures suggested by the Non-Aligned Movement in its Working Paper submitted at the Meeting of Experts. While legitimate peaceful uses should not be hampered, India pointed out that it was not in favour of unregulated transfers. In this context, it believes that strengthened implementation of the Article III would ensure that the cooperation envisaged under the Article X is not abused. At the same time, it was important that factors like the lack of technical capability in developing countries were not used to

hamper international cooperation, such as by denying new and advanced technology to developing countries. Referring to national implementation, it noted that it had a broad based regulatory framework to prevent the misuse of biological science and technology, including effective export controls matching highest international standards. It also supported assistance to the States parties for strengthening their national systems for bio-safety and bio-security.

Regarding the compliance and confidence building measures (CBMs), India noted that it was an important transparency measure to enhance trust in implementation of the Convention. However, CBMs or voluntary measures for demonstrating national implementation could not be an alternative to an effective multilaterally agreed mechanism for verification of compliance.

MALAYSIA

TREATIES AND CONVENTIONS – CULTURAL HERITAGE – CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE – RATIFICATION SUBJECT TO DOMESTIC LAW

Convention for the Safeguarding of the Intangible Cultural Heritage

Malaysia ratified the Convention for the Safeguarding of the Intangible Cultural Heritage on 23 July 2013 and the Convention entered into force on 23 October 2013. The purposes of the said Convention are to safeguard the intangible cultural heritage; ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; and provide for international cooperation and assistance.

It should be noted that upon ratification, Malaysia made a declaration that the application and implementation of the provision of this Convention shall be subject to, and in accordance with, the applicable domestic laws of Malaysia and the applicable administrative and policy measures of the government of Malaysia.

**TREATIES AND CONVENTIONS – SUSTAINABLE DEVELOPMENT –
INTERNATIONAL COCOA AGREEMENT 2010 – INTERNATIONAL
COOPERATION IN THE WORLD COCOA ECONOMY**

International Cocoa Agreement 2010

Malaysia signed the International Cocoa Agreement 2010 on 5 August 2013 and ratified it on 30 August 2013. The objectives of the said 2010 Agreement are to strengthen the global cocoa sector, support the sustainable development of cocoa, and increase the benefits to all stakeholders. It also aims to promote international cooperation in the world cocoa economy and to provide an appropriate framework for discussion on all cocoa matters amongst governments, and with the private sector.

The said Agreement also establishes a Consultative Board on the World Cocoa Economy, which has the responsibility to encourage the active participation of experts from the private sector in the work of the International Cocoa Organisation and to promote a continuous dialogue among experts from the public and private sectors. The Consultative Board provides advice to the International Cocoa Council on general and strategic matters.

**TREATIES AND CONVENTIONS – INTERNATIONAL MARITIME LAW
– ILO LABOUR CONVENTION 2006 – SAFE AND SECURE WORKING
CONDITIONS FOR EVERY SEAFARER**

ILO Maritime Labour Convention 2006

Malaysia ratified the ILO Maritime Labour Convention 2006 on 20 August 2013. The Convention sets out the principles of decent work on all ships, whether publicly or privately owned. The Convention guarantees a number of rights for seafarers – for example, it ensures the right of every seafarer to a safe and secure workplace that complies with safety standards; right to fair terms of employment; right to decent working and living conditions on board ship; and right to health protection, medical care, welfare measures and other forms of social protection.

By being party to this Convention, Malaysia undertakes to ensure that seafarers' employment and social rights are fully implemented in accordance with the requirements of the Convention.

**TREATIES AND CONVENTIONS – ARMS – ARMS TRADE TREATY –
REGULATION OF INTERNATIONAL TRADE
IN CONVENTIONAL ARMS**

Arms Trade Treaty

Malaysia signed the Arms Trade Treaty on 26 September 2013 and had contributed to its adoption and drafting of the said Treaty. The Arms Trade Treaty, which entered into force on 24 December 2014, regulates the international trade in conventional arms – from small arms to battle tanks, combat aircraft and warships. The objectives of the said Treaty are to establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; and to prevent and eradicate the illicit trade in conventional arms and prevent their diversion (article 1). It should be noted that Malaysia has yet to ratify the Arms Trade Treaty.

**TREATIES AND CONVENTIONS – ENVIRONMENTAL RIGHTS –
RIGHT TO HEALTH – MINAMATA CONVENTION ON MERCURY
– BANS ON SPECIFIED MERCURY-ADDED PRODUCTS –
MANAGEMENT OF MERCURY WASTE**

Minamata Convention on Mercury

Malaysia signed the Minamata Convention on Mercury on 10 October 2013. The objective of the said Convention is to protect the human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds (article 1). The Convention calls upon state parties to, *inter alia*, ban and phase-out both new and existing manufacture; import or export of specified mercury-added products; control and reduce emissions of mercury and mercury compounds into the atmosphere, land and water; take measures to ensure that the interim storage of mercury and mercury compounds are environmentally sound and in accordance with the Convention guidelines; and to take appropriate measures so that mercury waste is managed in an environmentally sound manner.

**ARMS – ARMS TRADE TREATY –
REGULATION OF CONVENTIONAL ARMS TRADE**

Statement at the ‘Asia Regional Meeting to Facilitate Dialogue on the Arms Trade Treaty’, Kuala Lumpur, 26-27 February 2013

In the statement, Malaysia explained that the upcoming regional meeting was aimed at creating a dialogue among senior officials in Asia and the Pacific to share their views ahead of the Final Conference of the United Nations for the Arms Trade Treaty (ATT), which will be held in New York from 18 to 28 March 2013.

Malaysia reiterated its support for the organisation of the final conference for the ATT as the Treaty seeks to regulate the conventional arms trade and prevent the transfer of weapons to the black market.

**DISARMAMENT – WEAPONS OF MASS DESTRUCTION –
MULTILATERAL NUCLEAR DISARMAMENT – MODEL NUCLEAR
WEAPONS CONVENTION**

Statement by H.E. Dato’ Mazlan Muhammad, Permanent Representative of Malaysia to the United Nations in Geneva at the Open Ended Working Group on Taking Forward Multilateral Nuclear Disarmament Negotiations, Geneva, 16 May 2013

The Permanent Representative reiterated Malaysia’s commitment to the general and complete disarmament of weapons of mass destruction. Malaysia is also the prime mover of the annual General Assembly resolution on the ICJ Advisory Opinion of the Legality of the Threat or Use of Nuclear Weapons.

In this regard, Malaysia proposed the creation of a nuclear weapons convention as the best practical way to take forward the Multilateral Nuclear Disarmament negotiations. Such a convention would be able to ensure that the development and the maintenance of nuclear weapons are prohibited and all nuclear weapons under effective control are destroyed. This is because the existence of nuclear weapons will threaten humanity and all life.

Malaysia urged that the Model Nuclear Weapons Convention is used as a tool in the exploration, development, negotiation and achievement of such an instrument.

VIETNAM

STATUS OF INTERNATIONAL LAW – *PACTA SUNT SERVANDA* –
TREATY MAKING POWER**Adoption of the Constitution of the Socialist Republic of Vietnam, 28 November 2013**

Vietnam has had five different constitutions over the course of its modern history. The 1946 Constitution was the fresh voice of the new state that had just gained independence the previous year in 1945. The 1959 Constitution was adopted after the country's victory against France and its separation into the North and the South in accordance with the Geneva Peace Accord. Following the reunification of both sides in 1975, a new constitution was adopted in 1980. In 1992, another constitution was passed to provide the legal foundation for the reform process that the ruling Communist Party initiated in 1986. Finally, on 28 November 2013, the National Assembly adopted the new 2013 Constitution to further the reform process.

Under the new constitution, international law assumes a more prominent role. The 2013 Constitution is the country's first constitution that refers to the Charter of the United Nations. It is also the first constitution that acknowledges the State's commitment to implement its international obligations, thereby formally embracing the *pacta sunt servanda* principle. Article 12 of the new constitution provides that Vietnam "shall . . . abide by the Charter of the United Nations and treaties to which the Socialist Republic of Vietnam is a contracting party."

The 2013 Constitution also goes one step further than previous constitutions in defining the treaty-making powers of the National Assembly, the President, and the Government. Previous constitutions do not prescribe the types of treaties that should be subject to the ratification authority of the National Assembly.¹⁵⁷ The 2013 Constitution specifies that, for treaties related to war, peace, national sovereignty, treaties on Vietnam's membership in important international and regional organisations, treaties on human rights or fundamental rights and obligations of citizens, and other

157 See, e.g., 1992 HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM [1992 VIET. CONST.] Apr. 15, 1992, art. 103 (10).

treaties that are not consistent with the laws or resolutions of the National Assembly, the treaty-making powers belong to the National Assembly.¹⁵⁸

The new constitution further provides that the President has the authority “to decide on the ratification of, accession to, or withdrawal from, other treaties in the name of the State.”¹⁵⁹ The Government has the authority to “decide on the conclusion, accession to, ratification of, or withdrawal from, treaties in the name of the Government.”¹⁶⁰ The Prime Minister has the authority to “decide on and direct the negotiation of, and to direct the conclusion, and accession to, or ratification of, treaties within the scope of the tasks and powers of the Government; to organize the implementation of treaties to which the Socialist Republic of Vietnam is a contracting party.”¹⁶¹

United Nations

MALAYSIA

UNITED NATIONS SECURITY COUNCIL – PEACE AND SECURITY – CONFLICT RESOLUTION

Statement by the Minister of Foreign Affairs, Malaysia on Malaysia’s Candidature for the Non-Permanent Membership to the United Nations Security Council (UNSC) for the term 2015-2016, 17 September 2013

In support of Malaysia’s candidature as a non-permanent member to the United Nations Security Council (UNSC), Malaysia reiterated its commitment to ensure lasting peace and security in the world and to finding lasting resolutions to conflicts through peaceful means.

If elected, Malaysia pledged to undertake five key steps – first, to promote the Global Movement of Moderates (GMM) agenda at the UNSC in relation to the Council’s primary responsibility to maintain world security; second, to continue playing a proactive and effective role in bringing new momentum to the existing UNSC reform process; third, to promote media-

158 2013 HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM [2013 VIET. CONST.] Nov. 28, 2013, art. 70 (14).

159 *Id.* art. 88(6).

160 *Id.* art. 96(7).

161 *Id.* art. 98(5).

tion as an approach and to share its experience and expertise in finding a lasting peace in the current regional and international conflicts; fourth, to continue to contribute towards enhancing UN efforts at peacekeeping through promoting such operations; and fifth, to continue to promote as well as support, peaceful efforts of countries emerging from conflicts.

**CONFLICT RESOLUTION – MODERATION KEY ELEMENT TO PEACE
AND HARMONY AND OVERCOMING PREJUDICE**

Statement by the Honourable Mr. Anifah Aman, Minister Of Foreign Affairs Malaysia At The United Nations Alliance Of Civilizations (UNAoC) Groups Of Friends Ministerial Meeting, 27 September 2013

In the statement, the Minister Foreign Affairs emphasised the importance of moderation in efforts to bridge culture and religious divides and to overcome prejudice. He pointed out that moderation is a key element in maintaining peace and harmony in Malaysia. As regards conflicts in the region, Malaysia's efforts have been based on the principle of moderation and the belief that all conflicts can be solved peacefully. Malaysia hopes to apply the same principles to the situation in Southern Thailand.

The statement clarified that Malaysia's efforts in resolving conflicts in ASEAN should not be seen as interfering into the affairs of other States; rather, it is motivated by the desire to ensure peace in the region and the belief that member states cannot be idle bystanders in the face of conflict and violence. Peace-loving moderate nations should take action when, where and by whatever way.

The Minister pointed out that the number of conflicts in ASEAN has decreased dramatically and this is very much due to the application of the concept of moderation; this should be replicated in other parts of the world that are facing conflict.

**CONFLICT RESOLUTION – MODERATION AND TOLERANCE VITAL
TO TACKLE EXTREMISM – MUTUAL RESPECT AND INCLUSIVITY**

Statement by YAB Dato' Sri Mohd Najib Bin Tun Haji Abdul Razak, Prime Minister Of Malaysia at the UN General Assembly, New York, USA, 28 September 2013

The Prime Minister drew attention to the many conflicts around the world, which had turned into wider religious wars, such as the conflict in Syria,

Iraq and Pakistan. He underscored that the conflict is contrary to Islam and the Quran not only condemns suicide, unjust war, and retribution but it beseeches Muslims to live in peace with one another and their neighbours.

In this regard, the Prime Minister encouraged Muslims to reclaim their faith by articulating that Islam is about peace, moderation and tolerance. Moderation is not a sign of weakness; rather, speaking up to condemn violence is a show of strength and as such, Muslim leaders should speak up lest their silence is mistaken as condoning violence.

He drew parallels to Malaysia where mutual respect and inclusivity has strengthened bonds between the different communities and faiths. This has contributed to sustainable development and stable economic growth. Similarly, moderation practiced at the international level can tackle violent extremism and enhance sustainable development and equitable growth.

The Prime Minister reiterated Malaysia's commitment to resolving problems in Syria and Palestine, in particular, the need for a Syrian-led inclusive political process and a just solution for the Palestinian people.

LITERATURE

International Law in Asia: A Bibliographic Survey – 2013

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INTRODUCTION

This bibliography provides information on books, articles, notes, and other materials dealing with international law in Asia, broadly defined. Only English language publications are listed. In the preparation of this bibliography, good use has been made of the list of acquisitions of the Peace Palace Library, the Washington & Lee University law journal rankings, as well as book reviews in journals of international law, Asian studies, and international affairs. Most of the materials can be listed under multiple categories, but to save space each item is listed under a single 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 bibliography is limited to new materials published in 2013 or previously published materials that have updated editions in 2013. The headings used in this year's bibliography are as follows:

1. Asia & Regions
2. States & Sovereignty
3. ASEAN & Other IGOs
4. Territory & Borders
5. Seas & Marine Resources
6. Rivers & Water Resources
7. Law of War & Peacekeeping
8. International Criminal Law & Transitional Justice
9. Terrorism, Transnational Crime, & Piracy
10. Security & Nonproliferation
11. Environment
12. Energy

13. Development
14. Human rights – Asia in General
15. Human rights – Central Asia
16. Human rights – South Asia
17. Human rights – Northeast Asia
18. Human rights – West Asia
19. Human rights – Southeast Asia
20. Nationality, Migration, & Refugees
21. (Post-)Colonialism, & Self Determination
22. International Economic and Business Law – General
23. WTO & Trade
24. Investment & Taxation
25. Intellectual Property
26. Cultural Property & Heritage
27. Courts & Dispute Settlement
28. Alternative Dispute Resolution
29. Private International Law
30. Internet, Data, & Privacy
31. Air & Space
32. Miscellaneous

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