Asian Yearbook of International Law

Volume 25
2019

BRILL | NIJHOFF

Asian Yearbook of International Law

Asian Yearbook of International Law

Volume 25 (2019)

BRILL
NIJHOFF

LEIDEN | BOSTON

The Development of International Law in Asia-Korea (DILA-KOREA), as the secretariat of DILA, is responsible for the management of DILA along with the Asian Yearbook of International Law and Asia Pacific Ocean Law Institutions Alliance. DILA-KOREA has generously provided financial support so that Volume 25 (2019) is available as open access.

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISBN 978-90-04-50123-2 (hardback)
ISBN 978-90-04-50124-9 (e-book)

This book is printed on acid-free paper and produced in a sustainable manner.

Asian Yearbook of International Law

VOLUME 25 (2019)

The titles published in this series are listed at *brill.com/ayil*

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

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

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

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

Asian Yearbook of International Law

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

When it was launched, the Yearbook was the first publication of its kind, edited by a team of leading international law scholars from across Asia. It provides a forum for the publication of articles in the field of international law, and other Asian international legal topics. The objects of the Yearbook are twofold. First, to promote research, study and writing in the field of international law in Asia; and second, to provide an intellectual platform for the discussion and dissemination of Asian views and practices on contemporary international legal issues.

Each volume of the Yearbook contains articles and shorter notes, a section on state practice, an overview of the Asian states' participation in multilateral treaties and succinct analysis of recent international legal developments in Asia, as well as book reviews. We believe this publication to be of importance and use to anyone working on international law and in Asian studies.

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

Acknowledgments

The Co-Editors-in-Chief would like to acknowledge and thank the staff of the Handong International Law School Law Review for their work reviewing and editing the citations in the Yearbook. The staff for 2021 includes Senior Editors Josephine Grace Mann (Editor-in-Chief), Ji Hun Park (Managing Editor), Soyeon Moon, Yaeeun Shin, and Eojin Yoo; and Junior Editors Jiwon Chae, Mun Hwan Cho, Wonmo Kang, Daria Kukushkina, and David Yoon.

Contents

Legal Materials

Literature

DILA Events

Editorial Note

The 2019 edition of the *Asian Yearbook of International Law* is the Yearbook's 25th volume. To commemorate this achievement, volume 25 begins with a personal reflection of the history of the Foundation for the Development of International Law in Asia (DILA) and its flagship publication, this *Yearbook*, by Kevin YL Tan who served as Editor-in-Chief of the *Yearbook* (volume 16 to volume 20) and is Adjunct Professor with the Faculty of Law, National University of Singapore. This is followed by a "A Panoramic Review of the State Practice Section in the *Asian Yearbook of International Law*" by Professor Seryon Lee of Jeonbuk National University, Korea.

After these special contributions, the *Yearbook* is followed with five main articles; legal materials including a listing of the participation of Asian states in multilateral treaties and a description of the state practice of Asian states in the field of international law; along with a literature section featuring a book review and a bibliographic survey of materials dealing with international law in Asia; and finally a summary of the activities undertaken by DILA in the year 2019 which marked the 30th anniversary of DILA's founding.

1 Articles

The first main article is by Makoto Seta of Yokohama City University on "The Asian Contribution to the Development of International Law: Focusing on the ReCAAP." Tran Viet Dung of Ho Chi Minh City University of Law follows with "Vietnam's Experiences with International Investment Agreements Governance: Issues and Solutions." Arron N. Honniball of the Centre for International Law, National University of Singapore examines "The Right of Access to Port and the Impact of Historic Fishing Rights." Next, Ratna Juwita from the Department of Transboundary Legal Studies, Faculty of Law, University of Groningen writes on "The Amendment of Anti-Corruption Law in Indonesia: The Contribution to the Development of International Anti-Corruption Law." Finally, Nguyen Thi Hong Yen of Hanoi Law University writes on the "Challenges in Ensuring the Rights of Vietnamese Migrant Workers in the Globalization Context – The Two Sides of the Development Process."

II Legal Materials

The *Yearbook* from its inception was committed to providing scholars, practitioners, and students with a report on Asian state practice as its contribution to provide an understanding of how Asian states act within the international system and how international law is applied in their domestic legal systems. The *Yearbook* does this in two ways. First, it records the participation of Asian states in multilateral treaties; and second, it reports on the state practice of Asian states. A number of diligent scholars have provided the *Yearbook* with reports on the 2019 state practice of their respective countries.

1 *Participation in Multilateral Treaties*

Karin Arts of the International Institute of Social Studies, Erasmus University Rotterdam in The Hague, The Netherlands has compiled and edited the participation of Asian states in multilateral treaties for the 2019 calendar year.

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

The State Practice section of the *Yearbook* is intended to offer readers an outline and summary of the activities undertaken by Asian states that have a direct bearing on international law. The national correspondents, listed in the table of contents, have undertaken the responsibility to report on the state practice of their respective countries during the 2019 calendar year. Their submissions describe how these states are applying international law in their domestic legal systems and in their foreign relations.

Additionally, for this volume, Chang Hun Cho, Daehun Kim, and Min Jae Shin, who are third year graduate law students at Inha University Law School in Korea, report on the recent state practice of Korea involving human rights of the West Sea island residents; reparations for victims of forced labor; and COVID-19 benefits for foreign residents.

III Literature

1 *Book Review*

For this edition of the *Yearbook*, Seokwoo Lee, of the Board of Editors, gives his review of *Maritime Legacies and the Law: Effective Legal Governance of WWI Wrecks* (Edward Elgar, 2019) by Craig Forrest.

2 *Bibliographic Survey*

Sharad Sharma, a graduate of Handong International Law School in Pohang, Korea and licensed attorney (Washington, D.C.), prepared the bibliography which provides information on books, articles, notes, and other materials dealing with international law in Asia published in 2019.

IV DILA Activities

The 2019 edition of the *Yearbook* concludes with a report on the activities undertaken by DILA in the year 2019, namely the DILA 30th Anniversary International Conference and DILA Academy and Workshop that was held from October 15 to October 18 in Jakarta, Indonesia at the Ministry of Foreign Affairs of Indonesia and the Universitas Indonesia.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief

Special Feature: 30 Years and 25 Volumes – DILA and the Asian Yearbook of International Law

∴

DILA at 30: A Personal Reflection

*Kevin Y.L. Tan**

1 Introduction

I seem to be getting a lot of requests for 'reflection' pieces these days. I'm quite sure it's more a sign of my advancing years than because I am a legal historian. This 'reflection' will be partly historical and partly personal. While the Foundation for the Development of International Law in Asia (DILA) was established in December 1989, I have only been directly involved in its activities since April 1997. I have previously briefly written about the founding of DILA in the pages of this Yearbook.[1] While I will try my best to avoid repetition, some material will invariably overlap with that previous reflection. I try to be as accurate as possible in my documentation of events, even if many of the views and perspectives expressed are personal.

2 Foundational Moments

2.1 *Towards a Pan-Asian International Law Organisation*[2]

The birth of any organisation begins with an ideal and an inspiration. The case is no different with societies of international law. While international law has been practised since the 15th century, communities of international law scholars did not organise themselves into societies to promote the study of international law till the latter part of the 19th century. It also took the international community a long time to recognise the importance of international law in the law student's curriculum. We often forget that the first chair in international law at the University of Oxford – the Chichele Chair in International Law and Diplomacy – was only established in 1859, even though the university itself dates from the 12th century. The same can be said of the University of

* Adjunct Professor, Faculty of Law, National University of Singapore, and Visiting Professor, S Rajaratnam School of International Studies, Nanyang Technological University; former Chairman of DILA and Editor-in-Chief of the *Asian Yearbook of International Law*.

1 Kevin YL Tan, 'The Asian Yearbook of International Law 1995–2015: A Historical and Personal Reflection' (2014) 20 *Asian Yearbook of International Law* 1–11.

2 Part of this segment appeared as Kevin YL Tan, 'Speech delivered at the Inauguration of the Asian Society of International Law, 78 April 2007 at the Faculty of Law, National University of Singapore (2007) 13 *Asian Yearbook of International Law* 21–26.

 | DOI:10.1163/9789004501249_002

Cambridge, where the Whewell Professorship in International Law was established in 1869.

The first international law society was established through the inspired energies of a Belgian scholar and government official, Gustav Rolin-Jaequemyns, founding editor of the first scholarly international law review, the *Revue de Droit International* (1869). In September 1871, he received a letter from one of the *Revue*'s contributors, the German émigré Professor Francis Lieber of Columbia Law School, proposing an international law society.[3] Lieber had been pushing this idea privately for the past decade. In 1873, a group of 10 eminent scholars and Rolin-Jaequemyns met in Ghent 1873 and established what is now known as the Institut de Droit Internationale. In Asia, the first society of international law was the Japanese Society of International Law, founded in 1897. Republican China established the Chinese (Taiwan) Society of International Law in 1913, and the People's Republic of China established the Chinese Society of International Law in 1980. In between, the Indian Society of International Law was established in 1959. In 1902, a group of Japanese scholars, led by Professor Sakuye Takahashi, established the *Review of International Law* (*Revue de Droit Internationale*), the first international law publication of its kind in Asia.

However, there was no organisation to facilitate dialogue and discourse between students and scholars on a pan-Asian basis. Indeed, the first such regional organisation was the African Association of International Law, established in 1986. Against this backdrop, DILA was founded on 21 December 1989 by three Asian émigré international lawyers – Ko Swan Sik, JJG Syatauw and MCW Pinto – then living in the Netherlands.

2.2 *The Three Founders: Ko Swan Sik, JJG Syatauw & MCW Pinto*

Ko was born on 4 January 1931 in Magelang in Central Java, Indonesia. His father, Ko Tjay Sing and granduncle, Ko Kwat Tiong, were both distinguished legal scholars and academics.[4] Ko graduated from the Faculty of Law of the University of Indonesia in 1953, after which he proceeded to Leiden University, where he obtained a PhD (*cum laude*) in 1957. During his studies in Leiden, Ko spent a year at the University of Mainz and attended the Hague Academy of International Law's summer course in 1954. He returned to Indonesia after his studies and practised as an attorney in Semarang between 1957 and 1963 and

3 Irwin Abrams, 'The Emergence of International Law Societies' (1957) 19(3) *The Review of Politics* 361–380, 367–368.

4 For this brief biographical account, I relied on Leo Suryadinata, *Prominent Indonesian Chinese: Biographical Sketches*, 4 ed (Singapore: ISEAS Yusof Ishak Institute, 2015) 102–105.

then in Jakarta from 1963 to 1965. Between 1959 and 1965, he was concurrently Senior Lecturer of Public International Law at the University of Indonesia. In February 1965, Ko left for the Netherlands where he joined the newly-created TMC Asser Institute of International Law at The Hague where, among other things, he founded the *Netherlands Yearbook of International Law* in 1970. In 1988, he moved to Rotterdam, where he became Professor of International Law at Erasmus University, taught till 1996 when he retired and was made professor emeritus.

Ko's close collaborators in the DILA enterprise were Jacob Johannes Gustaaf ('Joop') Syatauw, another Indonesian international law scholar, and Moragodage Christopher ('Chris') Walter Pinto, a diplomat and scholar. Pinto just slightly younger than Ko. He was born on 17 November 1931 in Colombo, Sri Lanka (then Ceylon), to Moragodage Walter Leopold Pinto and Judith Beatrice Blazé. He studied at the University of Ceylon at Peradeniya, where he graduated with an LLB degree. He then attended the Sri Lanka Law College where he qualified as an Attorney and after that studied at Magdalene College, Cambridge University, where he obtained his master's degree (then known as an 'LLB' rather than as an 'LLM') at Cambridge and a Diploma in International Law. He was called to the Bar at the Inner Temple in 1958. Pinto worked as a legal officer in the International Atomic Energy Agency in Vienna between 1960 and 1963, and then in the Legal Department of the World Bank from 1963 to 1967. He then returned to Sri Lanka to become Legal Advisor and Head of the Legal and Treaties Division of the Ministry of Foreign Affairs, a post he held till 1979. In 1976, he became Sri Lanka's Ambassador to Germany and Austria. Pinto represented Sri Lanka at the UN Conference on the Law of the Sea between 1980 and 1981 and was, from 1982, Secretary-General of the United States-Iran Claims Tribunal till his retirement in 2011. During this last phase of Pinto's career, he came into contact and worked with Ko in the founding of DILA.

The late Joop Syatauw[5] was born on 9 December 1923 in an army camp in Bandung, where his father was stationed as a Non-Commissioned Officer of the Royal Netherlands Indies Army (KNIL). His family came from the island of Ambon in the Moluccas. Syatauw's secondary education was interrupted by the Japanese Occupation (1942–1945), and he worked in the Department of Mining in Bandung during the War. In 1949, he obtained a scholarship to study at Leiden, where he graduated with an LLM and then proceeded to Yale Law

5 Most of the following information about Professor Syatauw was kindly shared by Professor Ko Swan Sik in two emails to me, dated 20 Mar 2015 and 8 Apr 2015.

School. He obtained his JSD in 1960 for his thesis, *Some Newly Established Asian States and the Development of International Law*.[6]

After completing his doctorate, Syatauw spent some time doing additional research at the London School of Economics and Social Science. Upon his return to the Netherlands, he became assistant to Haro Fredrik Van Panhuys, Professor of International Law at the University of Leiden. At Van Panhuys' prompting, Syatauw joined the Institute of Social Studies (ISS) in The Hague as 'Lector' – a junior professor, and the ISS's highest academic position in the early 1960s – in the Department of International Law and Relations and remained there till his retirement as Professor in 1988. When Ko was still in Indonesia, he heard about one JJ Syatauw sometime in 1961 when 'rumours began to circulate about an Indonesian who had obtained his JSD at Yale on a dissertation on newly-established Asian states.' However, it was not till 1965, when Ko relocated to The Hague, that he first met Syatauw.

2.3 *The Ideas and the Team Come Together*

Even if it is often said that Ko, Syatauw and Pinto collectively founded DILA, there is little doubt that Ko was its prime mover and organiser. Ko recalled the state of scholarship in the field of international law in those early days:

> At occasional meetings in the 1980s, some Asian jurists living in Western Europe and working in the field of international law and their colleagues from Asia developed the idea of launching activities to enhance contacts among a wider circle of Asian international law jurists; and initiating joint projects in the field of international law related to Asia. The idea was not new, and neither were the attempts to materialise it. In previous decades, various projects involving senior Asian scholars in the field had been undertaken, but none of these efforts had really been successful. Some were simply stranded soon after their inception. However, these failed attempts contributed strongly to the desire to renew and redouble these efforts.[7]

Ko's motivations in initiating 'projects focused on Asia and Asians' were primarily cultural and political. He was driven by the sense of solidarity that 'persists among [Asians] … as a result of the numerous mutual cultural and

6 JJG Syatauw, *Some Newly Established Asian States and the Development of International Law* (The Hague: Martinus Nijhoff, 1961).

7 Ko Swan Sik, 'DILA: A Brief History' (unpublished manuscript on file with author) [hereinafter 'Ko'].

religious contacts and interconnections that have emerged and developed in the course of centuries, and as a consequence of a common experience of European and other Western domination and dominance, both in the form of downright colonisation and semi-colonisation as well as otherwise.'[8] Ko was also concerned that interactions between legal scholars in Asia were few and far between and that their 'mutual familiarity and … knowledge and appreciation of the law and its development within and between the countries of the region' was grossly lacking. Indeed, it seemed absurd that many Asian jurists turned 'instinctively, and exclusively, to Western models and strategies based on society structures and national interests which are different from their own, and prefer to ignore those tried out by neighbouring and other regional, similarly structured, countries.'[9] In summary, Ko stated:

> The ambitions contained in the above ideas have several inseparable features. First, there is the issue of re-orientation, including the re-assessment of our approach to the outside world, particularly the West, and putting our view of the latter definitively in a more regional perspective. This should in no way imply a tendency to isolate ourselves from the treasure trove of Western genius and legal scholarship from which innumerable lessons could, and should, still be learnt. But it does mean the need for a (more) critical judgement, together with the determination to strengthen our efforts, test and prove our ability to materialise and carry out ourselves, whatever needs to be done in our professional field without relying on and waiting for others. Another feature is the acknowledgement that the views and practices of the countries of the region in the field of law, and more particularly international law, are underexposed in the existing literature and publications and should thus be better and more comprehensively presented to the world, both inside and outside the region. A third feature has a didactic element and consists of the promotion of the study of and research and publication in the field of international law, both in general as well as in specifically Asian perspective, by Asian students and scholars.[10]

The impetus for establishing DILA and the *Asian Yearbook of International Law* came in 1983 when Ko was nominated to participate in organising an international symposium to commemorate the 400th birth anniversary of Hugo

8 *Id.*
9 *Id.*
10 *Id.*

Grotius. As part of the effort to emphasise the international character of this meeting, Ko selected and invited several speakers from outside Europe, especially from Asia. As a result of this gathering of Asian scholars, it was decided that a 'concrete start' be made to mobilise Asian scholarship by putting together and publishing a book 'on a topic easily capable of being presented from the perspective of the different views and practices of the various countries of the region'.[11] It was further decided that the topic for the book had be 'basic and yet of the greatest importance in the municipal as well as the international practice of states.'[12] To this end, Ko persuaded the Martinus Nijhoff – a Leiden-based academic press that had been established in Belgium in 1853 – to start a new series entitled *International Law in Asian Perspective*. By the 1970s, Nijhoff had a formidable reputation as an independent publisher of international law books.[13] Ko credits Professors Chang Hyo-Sang and Chiu Hungdah (then from Hanyang University and the University of Maryland, respectively) for proposing the topic for the first volume in a projected book series. This volume, entitled *Nationality and International Law in Asian Perspective*,[14] comprised ten chapters by different Asian contributors.[15] Ko edited the volume and published it in 1990. Unfortunately, the series was difficult to sustain and failed to take off. Only one other volume was published under its auspices in 1995.[16] Nevertheless, the collective efforts involved in this book led to the idea of publishing a Yearbook. Ko explained:

> The experience of editing and publishing this volume taught us that while a collective monographic effort as the one mentioned above had proved to be undoubtedly worthwhile, the limited manpower available at our disposal to direct such projects lead to the conclusion that preference, or rather priority, should be accorded to the publication of a periodical publication which would be able to cover a broader scope and, hopefully, a broader public. A quarterly publication was considered ideal, but the

11 *Id.*

12 *Id.*

13 Martinus Nijhoff was acquired by Wolter Kluwer in the 1970s and subsequently by Brill Publishers.

14 Ko Swan Sik (ed), *Nationality and International Law in Asian Perspective* (Dordrecht: Martinus Nijhoff, 1990).

15 The Asian contributors to the volume were: Rafiqul Islam, Chiu Hungdah, SK Agrawala, M Koteswara Rao, Ko Swan Sik, Teuku Mohammad Rahdie, Hosokawa Kiyoshi, Chang Hyo Sang, Visu Sinnadurai, Irene R Cortes, Raphael Perpetuo M Lotilla, M Sornarajah and Sompong Surcharitkul.

16 P Chandrasekhara Rao, *The Indian Constitution and International Law* (Dordrecht: Martinus Nijhoff, 1995).

> available manpower and the uncertain response from colleagues in the region made it an unfeasible proposition. Hence the alternative resolution to start a Yearbook.[17]

Having arrived at the preferred mode of academic engagement, research and dissemination, it was now necessary to establish a corporate vehicle to effect this plan. Ko was particularly concerned that the founders/editors of the new Yearbook should not be personally liable for the financial success of the publication. He recalled:

> The possibility of financial consequences of the publication project and the wish of preventing individual persons from being burdened with such responsibility gave rise to the decision of founding a separate legal entity under whose auspices the Yearbook would be published. The entity that finally came about and that was DILA happens to be moulded in the formal structure of a 'foundation' under Dutch law for the simple reason that the founders, MCW Pinto (Sri Lanka), Ko Swan Sik (Indonesia) and JJG Syatauw (Indonesia) had their residence in the Netherlands. The official founding of DILA took place on December 21, 1989, by deed of a notary public in The Hague.[18]

Nonetheless, Ko was quick to point out that while the founding of DILA was 'primarily intended to meet the contingency of financial responsibility in connection with the publication of the Yearbook', it was not 'an organisation for the exclusive purpose of publishing the Yearbook'. Instead, it embodied

> … a rather broad program of academic activities in the field of international law in Asia or relating to Asia, thereby aiming at promoting contacts among Asian jurists, enhancing their endeavours in the field of research and education, improving their information of whatever developments in the field of research and literature in the field concerned, and promoting the recording and dissemination of relevant Asian materials.[19]

When Ko began conceptualising the *Asian Yearbook* in 1990, he turned to Pinto and to Syatauw for support. He recalled:

---

17 Ko (n 5).

18 'A Dialogue with Judicial Wisdom: Professor Ko Swan Sik' (2010) 3(2) *Journal of East Asia and International Law* 451, at 455.

19 *Id.* at 455–456.

> When I decided to start the DILA project, I decided that what I needed most was a number of people around me by way of touchstone who were able to share the essentials of my ideas and who would be approachable at any time to be consulted on the elaboration and realisation of any plans. It was obvious that, next to Pinto, Joop was most qualified to be invited as a member of the team.[20]

Ko then broached the idea of publishing the Yearbook with Martinus Nijhoff, who expressed an immediate interest in the enterprise and agreed to assume the financial risks of the publication 'provided there was a favourable response' to the experimental first volume.[21] That meant that the founders still needed to find money to produce the first volume of the Yearbook. They approached well-established American, European and even Japanese charitable foundations but failed to secure financial support. They then turned to the Dutch Ministry of Development Cooperation, who agreed to subsidise the production costs of the first volume and made a further grant for the purchase of 200 copies 'from the publishers for distribution among Asian government and academic institutions by way of introduction.'[22] The entire subvention from the Dutch Ministry went to the publishers. This generous grant was followed up some years by an equally generous donation from the Swedish International Development Authority for the continued publication of the Yearbook.'[23]

As noted above, DILA's initiators had decided to legalise DILA's existence as a charitable foundation or *stichting* under Dutch law because it was too much work to establish an 'association'. The initiators decided to structure the organisation as a charitable foundation. DILA was thus established by notarial deed at The Hague on 21 December 1989 with the aims to promote:

a. the study and analysis of topics and issues in the field of international law, in particular from an Asian perspective;
b. the study of, and the dissemination of knowledge of, international law in Asia;
c. contacts and cooperation between persons and institutions actively dealing with questions of international law relating to Asia.

---

20 Ko Swan Sik to Kevin Tan, 20 Mar 2015.
21 Ko (n 5).
22 *Id.*
23 *Id.*

3 Beyond the Founding

3.1 *The Yearbook*

In 1991, the first issue of the *Asian Yearbook of International Law* was published. The international law fraternity warmly welcomed it, and Martinus Nijhoff was sufficiently encouraged to assume full ownership of the Yearbook by taking care of its entire publication and distribution costs, at least insofar as the second issue was concerned. DILA's founders constituted themselves as General Editors of the *Yearbook* with principal responsibility for its editing and publication. The rest of the Editorial Board comprised some of the most distinguished Asian international law scholars at the time: Chang Hyo Sang (South Korea), Rahmatullah Khan (India), Onuma Yasuaki (Japan), M Sornarajah (Sri Lanka), and Sompong Sucharitkul (Thailand). Despite the inclusion of many distinguished scholars as part of the *Yearbook*'s editorial boards through the years, the three founding General Editors remained primarily responsible for its content, quality, and publication right up till 2009.

The founding General Editors explained what they planned to do in the first volume of the *Yearbook*:

> It is the aim of the General Editors to include in each volume of the *Yearbook*, in addition to scholarly essays of an analytical, descriptive or speculative nature, materials that are evidence of the practice of States in the region. To that end the General Editors are currently engaged in trying to establish a network of correspondents in Asian countries, who would keep them currently informed of significant developments, and provide them with the associated documentation on a regular basis. The problem of securing and maintaining the collaboration of scholars, all of whom are already fully engaged in routine pursuits of their own, is compounded by a variety of difficulties, including variations in the efficiency of communications and the fact that no funds are available to compensate collaborators for their efforts, or even for expenses connected with providing information. Also to be included in the *Yearbook* are a chronicle of events relating to the region and of relevance from an international law perspective, notes on selected activities of regional and international organisations, and a survey of selected works in the field of international law.[24]

24 *Id.*

As I have written previously on the developments relating to the *Yearbook*, I will not repeat that here but will instead focus on DILA's development as an organisation.

3.2 *Finances & Benefactors*

From its inception, DILA's founders worried about the financial viability of the *Yearbook*. They secured funds for the publication of its first issue from the Dutch Ministry of Development Cooperation, and Martinus Nijhoff underwrote the costs of Volume 2 of the *Yearbook*. However, Nijhoff needed them to raise further for funding Volume 3. DILA's founders then approached the Swedish International Development Authority who donated US$45,000 to defray the costs of producing the third volume. Thereafter, funds were still required each year to help pay for preparing the layout of the *Yearbook*, copy-editing, and the bulk purchase of the *Yearbook* for distribution to contributors and institutions.

This financial lurching from year to year was unsustainable, and it was the late Professor Onuma Yasuaki (1946–2018) who took the initiative to do something about it. Onuma was, at the time, a member of the Editorial Board and Professor of International Law at the University of Tokyo. He decided to approach his friend and neighbour, Sata Yasuhiko ('Mike' Sata), a wealthy industrialist, for support. Sata – who ran the Tokibo Group, one of Japan's leading manufacturers of medical devices – was a humanitarian philanthropist with a deep interest in international affairs. Sata agreed to contribute to the cause of DILA and the *Yearbook* as well as to Onuma's international law projects generally. Sata made three donations to DILA through the Japan Foundation between 1997 and 1999. At the same time, Sata also made a ¥2m donation towards supporting Onuma's projects through the University of Tokyo. This second donation was to be the subject of an unfortunate misunderstanding between DILA Governing Board members in 2005, as I will later recount. Over the years, Mike Sata remained the strongest and staunchest supporter of DILA, making regular donations of ¥1m a year to sustain the *Yearbook* and also to start and fund the Sata Prize (renamed the DILA Prize in 2008) for the best article by a young scholar (below the age of 35 years) in the *Yearbook*. In later years, DILA continued to raise funds and receive support from various other foundations and organisations, but these will be discussed in the appropriate segment of the narrative.

4 Rejuvenation and Renewal

4.1 *Manila 1997*

In the first few years after its inauguration, the General Editors of the *Yearbook* found their hands full with securing good articles, compiling the Chronicle section, and establishing contacts and correspondents in various Asian countries to assist with the State Practice section. Besides editing the journal, the founders were also busy networking with Asian international law scholars and other international law scholars with an interest in Asia. Ko was particularly relentless in contacting, meeting, and securing the support of as many scholars as he could. This enthusiasm, coupled with the high quality achieved by the *Yearbook* in its first few volumes, helped boost the *Yearbook*'s reputation further. But this was not enough. DILA's other objectives were not fulfilled, and the founders thought it would be good to organise a significant international law conference for Asian scholars. It was to this end that another round of fund-raising began. However, by the end of 1994, Ko had succeeded in raising only US$20,000, which was insufficient for a major conference. These moneys were subsequently used to hold a meeting of the DILA Governing Board in Manila in April 1997. Strictly speaking, the meeting was held in Quezon City, even if everyone refers to it as the 'Manila meeting'.

The convening of the 1997 meeting led to my association with DILA and the *Yearbook*. I was not supposed to be at that meeting but was asked by my senior colleague, Professor Tommy Koh (then a member of DILA's Advisory Board), to attend on his behalf. Ko's invitation to Tommy suggested that if he could not attend the meeting personally, he should designate another person to act as his 'personal representative' and that this representative 'should, apart from being familiar with international law, be familiar also with the state of affairs regarding the practice, teaching and research of international law' in Singapore.[25] Tommy offered Ko two possible 'representatives' – Yeo Bock Chuan, then Head of the International Law Division at the Ministry of Defence, and me. It is most likely that Ko invited me because I was the academic among the two. I protested to Tommy, arguing that I felt inadequate attending this meeting. While I had studied many international law subjects at the undergraduate and graduate levels, I never considered myself an international law scholar or teacher. Indeed, I never taught the subject since joining the Faculty of Law at the National University of Singapore (NUS) in 1986. Indeed, my speciality had been and continues to be constitutional and administrative law. The only possible reason warranting my attending this meeting was that, at the time, I was

25 Ko Swan Sik to Tommy Koh, 12 Feb 1997 (on file with author).

the Honorary Secretary of the recently-established Society of International Law, Singapore.[26] Tommy, ever persuasive, assured me that all would be well and that all I had to do was attend the meeting, take notes and report back to him. I reluctantly agreed, and on 18 February 1997, received a personal invitation from Ko.[27]

In his invitation, Ko explained that the meeting was to 'discuss various issues of study, research and dissemination of international law relating to Asia, take stock of the achievements of DILA so far and set up a strategy for future activities and projects in accordance with the purposes of the Foundation'.[28] Unlike what Tommy imagined, the preparation for the Manila meeting was substantial. Ko prepared a detailed set of discussion papers for our digestion before arrival, and it was in reading through them that I first understood what DILA was all about. The Manila meeting was hosted by the Institute of International Legal Studies (ILS) at the University of the Philippines Law Centre. It was held from 4 to 5 April 1997 at the Imperial Palace Suites in Quezon City. Maria Lourdes Sereno,[29] the Director of the ILS, was our host and did a superb job organising the meeting. One thing that struck me at the meeting was the relative seniority of the scholars present. I was the youngest there.[30]

The meetings were intense and among the critical issues discussed were (a) the structure and organisation of DILA and rejuvenation of its Governing Board; (b) relocating DILA's headquarters to Asia; (c) the Yearbook; and (d) further activities and actions for DILA. Many ideas were canvassed and ideas proposed. As I later discovered, these same ideas and proposals tended

26 The Society for International Law, Singapore was established in 1995 to provide a platform for scholars, students and practitioners of international law in Singapore to meet, dialogue and to promote the study and research of international law. At its founding, Tommy Koh was President. My colleague at NUS, Robert C Beckman was Executive Director while I was Honorary Secretary. I served in this capacity till 1998 when I took over as Executive Director. I stepped down from the Executive Committee in 2003.

27 Ko Swan Sik to Kevin Tan, 18 Feb 1997 (on file with author).

28 *Id.*

29 Sereno was to become, in 2012, the first woman Chief Justice in the Philippines (and in Southeast Asia for that matter). Unfortunately, she was removed after an 8–6 decision of the Supreme Court in a controversial *quo warranto* petition.

30 Others at the meeting were: DILA founders Ko Swan Sik and Chris Pinto; Chung Il-Yung (South Korea) representing Judge Park Choon Ho, Florentino Feliciano (Philippines); James Li Zhaojie (China) representing Prof Wang Tieya; Raphael M Lotilla and Dean Merlin Magallona (Philippines); VS Mani (India) representing Prof Rahamtullah Khan; Jamal Seifi; Sidek Suraputra (Indonesia); Sompong Sucharitkul (Thailand); Surya Subedi (Nepal); Nakatani Kazuhiro (Japan); and of course our host, Maria Sereno (Philippines). Absent with apologies were: JJ Syatauw (Indonesia); Jamshed A Hamid (Pakistan); Ronald St John MacDonald (Canada) and Judge Soji Yamanoto (Japan).

to be repeatedly canvassed at DILA's subsequent meetings. My main contribution to the meeting was my suggestion that a web page be created for DILA as an alternative to a proposed newsletter. I was thus designated to work on this project with James Li and Maria Sereno. Another major project presented at the meeting was the preparation of an *Asian Manual of International Law* along the lines of the highly successful two-volume by Professor Georg Schwarzenberger. Professors Ko, Subedi and Seifi were tasked with executing this major project under the chairmanship of Prof Rahmatullah Khan. Finally, it was decided that a major international law conference be organised as soon as possible. This last initiative was bolstered by the announcement by Park Il-Yung that the Paeksang Foundation (which he then chaired) would give DILA a generous donation which would be used towards organising this conference.

4.2 *The Hague Meeting of 2000*

As with so many of these things, the DILA group's enthusiasm displayed in Manila faded quickly when we all returned to our respective jobs. It was no different on my end. I tried to get some student volunteers to help set up a website, but little was done save for the registration of our domain name – 'asianinternationallaw.org' – as determined and instructed by the Governing Board at the 1997 meeting. In fact, it was not till 1999 that a rudimentary website was established with the help of a professional website designer. There was also little progress on the *Asian Manual* project, and talk of our having a big conference in Korea all but petered out. Only the *Yearbook* grew from strength to strength. Concerned that the transition and rejuvenation were not going according to schedule, Ko convened another meeting in January 2000 in The Hague.

Unlike the Manila meeting, this meeting comprised a small group of Governing Board members, which Ko called The Core Group. Other than the three DILA founders, the Core Group members were: Jamal Seifi, Surya Subedi, James Li and Nakatani Kazuhiro (who were all present at the Manila meeting), Kriangsak Kittichaisaree of Thailand, whom Professor Sompong Sucharitkul had recommended, and me. Ko explained the urgency of convening this second meeting to its invitees as follows:

> After having been at the helm of DILA, including the Yearbook, for the past decade or so, it was time for the 'founding fathers' to prepare an orderly transfer of responsibilities to a younger generation of guardians. Among the parameters that were accepted to be observed in the process were the relocation of the effective centre of decision-making from Europe to somewhere within the region and the principle of collective

> leadership by a body composed of persons from a fair selection of countries of the region. This was in fact to alter the existing situation in which the whole complex of policy- and decision-making had for all practical purposes been centred in the hands of the three founding fathers. The broader basis of the future leadership would admittedly hold positive as well as negative elements, but the former were, after all, considered to be of decisive importance. Since it appeared not feasible to select a group of persons as envisaged from among the existing membership of the Governing Board and the Yearbook Editorial Board, it was decided to compose such a group from among the circle of younger colleagues whose expertise was beyond doubt and who had already shown their dedication to DILA in the past years.[31]

Even though I had done so little for DILA in the preceding three years, I was astonished to find out that I was still somehow considered to be among those who had shown a dedication to the cause of DILA.

The group that met at The Hague was small, just six of us plus the three founders. Ko and Pinto kindly arranged for us to be billeted in a quaint bed and breakfast type accommodation in picturesque Leiden, just ten minutes from the Institute of International Studies (ISS) in The Hague, where we held our meetings from 16 to 17 January 2000. Each morning, the three founders would arrive at our inn and take us in their cars to ISS. Our discussions were serious, but our hosts ensured we all a wonderful time, touring both The Hague and Leiden and enjoying probably the best Indonesian food outside Asia. By this time, the founders of DILA were anxious to get the succession plan underway and for the Core Group to spearhead the leadership transition. Ko recalled:

> A group of six dedicated colleagues, coming from Iran to Japan and from China to Singapore, jointly committed themselves to actually take over the duties and responsibilities previously held by the 'founding fathers'. In order to ensure that the selected 'core group' acquired the formal positions held by their three predecessors in all respects, six of them have been elected members of the Governing Board as well as the Editorial Board of the Yearbook (with a seventh to follow soon). One member of the 'core group' has so far been elected co-General Editor of the Yearbook, and it is planned that the existing other General Editors will also be replaced in the near future.[32]

31 Ko (n 7).
32 *Id.*

By the end of the Hague meeting, the six of us were elected to the Governing Board. It was collectively felt that a seventh Board member from India should be co-opted, and the plan was to approach Professor Bhupinder Singh Chimni at the Jawaharlal Nehru University.[33] More renewal will take place as the terms of the other existing Governing Board Members expires.

Surya Subedi was also elected to join the founders as co-General Editor of the *Yearbook*, replacing Joop Syatauw, who stepped down. A plan was also put in place for Ko and Pinto to step down as General Editors by 2002 and for younger General Editors to be appointed. A small Executive Committee, made up of Kriangsak (Chairman), Jamal Seifi (Vice-Chairman), and Nakatani Kazuhiro (Treasurer), was also formally constituted to take over the duties which the former informal Executive Committee (comprising the three founders) performed.

The meeting also decided that for DILA to advance more international law activities in Asia, a separate bank account would be set up in Tokyo. The funds in the Netherlands would be used primarily for expenses connected with the *Yearbook*, while the account in Japan would be used for DILA's general non-Yearbook activities. Everyone at the meeting was concerned with the circulation and impact of the *Yearbook*, given its pricing. After some discussion, it was decided that the Core Group would try to find a good publisher in Asia for the *Yearbook* or licence the *Yearbook* to a publisher in Asia to produce and distribute a cheaper Asian edition throughout the region.

For my part, I came prepared to make some amends for my lack of action over the last few years. In 1998 I took over as Executive Director of the Society for International Law, Singapore (SILS) from my colleague Robert 'Bob' Beckman. Before arriving at The Hague, I managed to secure concurrence from my SILS colleagues that if funds could be raised, SILS would work with DILA to jointly host a small conference in Singapore on 'Teaching and Researching International Law in Asia'. SILS President Tommy Koh agreed to help raise funds for such a conference if DILA was keen to collaborate. I was thus able to take this offer to the DILA Governing Board at the Hague meeting, and it was received with great enthusiasm after I made my little presentation. This was one of the quickest resolutions to be passed. It was unanimously agreed that I would lead a team to work out the practicalities of this conference. I was also asked to continue working with Surya on the DILA website and design a logo and new letterhead for DILA. This led to the adoption of the image of an 'Asian lamp' as DILA's logo.

33 Later on, Chimni joined DILA as one of the General Editors of the *Yearbook*, while his colleague, Bharat Desai joined the Governing Board.

The question of relocating the seat of DILA to an Asian country was placed on the back burner since it was more symbolic than practical and did not in any way impede DILA from fulfilling its objectives and mission. The meeting ended with everyone thanking the founders for their tireless work for DILA and being such wonderful hosts. A special thanks were given to Joop Syatauw for hosting us at ISS and wishing him well in his retirement. Alas, that was the last I ever saw of Joop. He passed away on 8 February 2015.

4.3 *The 2001 Singapore Conference*

As promised at the 2000 Hague meeting, I immediately mobilised my Singapore colleagues to help organise the first-ever SILS-DILA Conference, held from 30 to 31 July 2001. As I have given a thorough account of this conference and its accomplishments elsewhere,[34] I will only recount some critical events and decisions taken at this meeting. This conference was initially scheduled to be held in November or December of 2000, but due to difficulties in scheduling and fund-raising, it was postponed to July 2001. Tommy eventually raised the requisite funds for a small conference of 60 participants from the Lee Foundation and the Tan Chin Tuan Foundation.

Given our limited capacity, I endeavoured to bring in scholars from as many Asian jurisdictions as possible. We managed to invite scholars from 18 jurisdictions, including Singapore: Australia, Bangladesh, Bhutan, China, Hong Kong, India, Indonesia, Iran, Japan, Malaysia, Nepal, Pakistan, the Philippines, South Korea, Sri Lanka, Thailand, Vietnam, United States of America, and Singapore. Also present at the conference was DILA benefactor, Mike Sata, who flew in on his own to join us. Sata took a deep interest in all that we did and was genuinely concerned for the welfare of our organisation. It was most unfortunate that he committed a *faux pas* during one discussion when he expressed dismay as to why China had not forgiven Japan so many years after the War even though Japan had apologised and had been extending large amounts of aid to Japan. This created a huge uproar, and the Chinese scholars almost staged a walkout. I never imagined that scholars – supposedly independently minded, logical people – would do something like this. It took all the diplomacy of Tommy Koh and my personal relations with the Chinese scholars to prevent the whole thing from escalating out of proportion. I thought these things only happened

34 I have given a detailed write-up on this particular conference and the results of an important survey done pursuant to the conference in Kevin YL Tan, 'The SILS-DILA Conference on "Teaching and Researching International Law in Asia": Report and Reflections' (2001) 5 *Singapore Journal of International & Comparative Law* 441–484.

at the United Nations. It was my shocking introduction to the politics that prevailed even in scholarly circles where some scholars acted more like proxies for their states than independent individuals. This outburst was terribly unfortunate, especially since I found Sata to be a genuine and well-intentioned humanitarian.

Insofar as Singapore was concerned, this was the second time we were hosting an international law conference on teaching and research. The first – the Regional Conference on Legal Education – was organised by the Association of Law Teachers and Schools in Southeast Asia back in 1964. Singapore would host the third conference of this sort almost two decades later when the Centre for International Law at NUS organised the 'Teaching and Researching International Law in Asia' Conference in June 2018. In preparation for the discussions that would take place in the 2001 Conference, I devised (with the help of my colleagues Bob Beckman and Thio Li-ann) a survey with 47 questions to determine the state of play in the teaching and research of international law in Asia. This survey was sent to over 50 participants – all of whom would be attending the Singapore conference – and compiled and consolidated. I hoped that answers to this survey would help guide DILA in its focus on future projects and activities. Being focused on research and teaching, we were anxious to discover how these activities were being carried out in the law schools of Asia. Questions included the level at which international law was taught, and whether it was a compulsory or optional subject, whether it was taught in the native tongue on in some other foreign western language. What textbooks were teachers and students using? Did they have reliable and affordable access to online materials? How comprehensive were the international law holdings of university libraries, and whether there was a ready pool of competent scholars and teachers of international law to be tapped on in each jurisdiction?

One upshot of the survey was the proposal for 'someone' to put together an Asian textbook on international law. DILA was supposed to have done something like this through the *Manual of Asian International Law* project, but that never came about, especially after Professor Rahmatullah Khan retired from teaching. Another crying need was for good English-language textbooks to be translated into native languages and to publish these translated works in cheap Asian editions, which most students could afford. Many scholars also lamented the poor collection of international law materials in their libraries and asked if DILA could facilitate a book donation project. These were all splendid ideas but were difficult to implement. The sheer logistics involved in getting books to universities in various Asian states was complicated. I tried to pilot a project and got offers from my academic friends at Yale and Stanford to secure donation of older editions of international law textbooks either from publishers or

their university libraries. Still, the cost of shipping them to Singapore and then distributing them to the different universities in the region proved prohibitive.

During the Singapore meeting, a point that was strongly made was for greater interaction between international law scholars in the region. To this end, it was proposed that a directory of scholars be created and that it might be time to start an Asian Society for international law. It is to this proposal and initiative that I will next turn.

5 The Asian Society of International Law: An Existential Challenge

Even though the idea of establishing a pan-Asian society for international law was mooted with great enthusiasm at the 2001 Singapore meeting, the idea was not new. Indeed, as mentioned earlier, DILA's founders had considered this seriously but opted to establish DILA as a foundation because of the foreseeable difficulties such a society would have. However, as the attendees at the Conference were keen to pursue the idea further, DILA members reconsidered the matter afresh. Ko Swan Sik, the prime mover of DILA, wrote an extensive note[35] to members offering detailed reasons why DILA's founders considered this possibility back in the 1980s and opted for the foundation model of organisation.

Ko went on to explain why he thought that while it was 'idealistic' to have such a society to bring members of the Asian international law fraternity together, the practicalities of running such an organisation – such as having a permanent secretariat and offering its members attractive benefits like publications and worthwhile activities – remain significant. Funding would always remain a significant and unavoidable issue, and he did not expect that such a society could be funded by member subscriptions alone. If it were realised, the society would still have to be adopted and subsidised by an institution sympathetic to its objects and cause. In closing, Ko suggested that Singapore would be a suitable location for such a society for the following reasons:

> With regard to organisational aspects due weight should be accorded to the many existing national sensitivities in Asia. This refers to, inter alia, the 'seat' of the society … it would appear that Singapore (small, politically and culturally not dominant, yet affluent and well-organised) might

35 Ko Swan Sik, 'Notes on the Idea of an Asian Society of International Law (AS)', 11 Dec 2003 (on file with author).

> qualify positively. If there is such preference in principle, consultation of Ambassador Tommy Koh would be a *conditio sine qua non*.[36]

In the meantime, other members of the Asian international law fraternity were also trying to work out how to establish such a society. The most arduous push came from former *Yearbook* editor Onuma Yasuaki of Tokyo University, who, as mentioned above, was instrumental in securing Mike Sata's long-term funding for the *Yearbook*. According to Onuma, the whole enterprise began with a telephone conversation, late in the summer of 2003, between him and Owada Hisashi, the Japanese diplomat and academic who had, at that time, just been appointed Judge of the International Court of Justice:

> He [Owada] told me that he was approached by the leaders of the Foundation for the Development of International Law in Asia (DILA) regarding possible support for the DILA's activities. In response, he suggested that a more ambitious project might better serve the overall purposes of Asian international lawyers. Briefly sharing the conversation he had with them, Judge Owada asked me if I thought an organisation such as an Asian society of international law was feasible. If I thought so, and if I was interested in such a project, he would consider working with me on it.[37]

Onuma admitted to being surprised by Owada's proposal but quickly agreed, especially he had by this time considered DILA to have 'a number of limitations as a major forum for Asian international lawyers'.[38] At a breakfast meeting Onuma organised on 12 October 2003 for his Japanese colleagues, – Professors Miyoshi Masahiro, Nakatani Kuzihiro and Okuwaki Naoya (who had just been elected President of the Japanese Society for International Law) – it was unanimously agreed that an Asian Society should soon be established. The Japanese scholars seemed concerned that this should proceed quickly since plans were already afoot to establish a European Society of International Law in 2004 in conjunction with the *European Journal of International Law*.[39]

While Onuma worked closely with his colleagues at the University of Tokyo – Iwasawa Yuji, Nakagawa Junji, Nakatani Kazhhiro and Teraya

---

36 *Id.*

37 Onuma Yasuaki, 'The Asian Society of International Law: Its Birth and Significance' (2011) 1 *Asian Journal of International Law* 71–82, 73 [hereinafter 'Onuma'].

38 *Id.* at 74.

39 Ko Swan Sik, 'Record of Discussion with Judge Hisashi Owada' 11 Dec 2003 (on file with author).

Koji – Owada approached Tommy in Singapore for support. Tommy then wrote to a number of us in Singapore for our views on the establishment of the society. In his mail to me, he also asked me if it was true that we were facing major financial difficulties with the *Asian Yearbook of International Law*. There was a suggestion that if an Asian society was indeed formed, they were keen to take over the editing and publication of the *Yearbook* from DILA. I wrote back to Tommy, reiterating the same practical difficulties I had raised many times before and that while the *Yearbook* was able to subsist on the yearly subvention from Mike Sata and from our royalties, we were far from insolvent. I ended my response by saying that unless he could persuade a university or some other research institution to provide the putative society with a home base and subsidise the running of its secretariat, the whole enterprise would fail. Tommy forwarded my email to Owada in its entirety.

Shortly after this exchange, I was informed by Tommy that Owada and a number of his University of Tokyo colleagues would be visiting Singapore to discuss the Asian Society project. The meeting scheduled for 12 to 13 July 2004 and Tommy planned to meet up with them at some point. A plenary meeting was indeed planned for 10.00 AM on the 13th of July at a conference room on the 8th floor of the Institute of Policy Studies (IPS) at NUS, and I was invited as DILA representative. When I entered the conference room, I was ushered to my seat, which was at one end of a very long conference table. As I was early, I had a chance to see who else was attending the meeting by studying place cards around the table. Seated right in the middle section of the table were Tommy and Dean Tan Cheng Han of the NUS Law Faculty on one side, and Owada, Onuma and Iwasawa on the other.

It was a very strange meeting, with most of the conversation being carried out between Tommy and Owada. I suppose I should not have been too surprised, considering how well the two of them know each other. It was like a meeting of the Law of the Sea old boys' network – that group of diplomats who worked together for over a decade leading up to the signing of the UN Convention for the Law of the Sea in 1982. Everyone addressed each other by their first names, and the atmosphere was all very clubby and chummy. Towards the end of the meeting, Tommy canvassed views from those around the table, and I repeated the same reservations that I expressed in my email to Tommy. At that point, Owada picked up the printout of my email. Never looking me in the eye, he addressed me very slowly, formally and deliberately as 'Dr Tan' and then proceeded to dismiss my reservations before letting the printout drop from his fingers to float contemptuously back onto the table.[40] He then looked

40 In obvious reference to this episode, Onuma wrote that 'Negative and even pessimistic views were also presented' at the meeting. *Id.*

at Tommy and Dean Tan Cheng Han and announced that these 'little difficulties' can easily be worked out. Only then did I realise what had happened. A deal had obviously been struck the day before for NUS to house the new society and act as its secretariat. As I later discovered, not only did Tommy succeed in convincing Dean Tan to agree to this, at least for an initial period of three years, but he also convinced the Law Faculty to convert its *Singapore Yearbook of International Law* into the *Asian Journal of International Law*. It was a fait accompli, and there was nothing else to say. The meeting concluded shortly afterwards, and Tommy, Owada and his delegation left for lunch together.

On 8 December 2004, Owada invited Ko Swan Sik and Chris Pinto – the two remaining active founders of DILA – for lunch at The Hague to discuss developments and canvas views thereon.[41] Owada asked Ko and Pinto where DILA would stand in relation to the new Society and what would be the preferred path to take if given three options: (a) further independent development of DILA and an Asian Society as two completely separate entities; (b) two closely coordinated and co-operating entities; or (c) the integration of the existing DILA into the projected Asian Society. Ko told Owada that there were adherents for each of the three alternatives within DILA's Governing Board but that he preferred the third option. Pinto, on the other hand, preferred the second option. This was not the first meeting Ko had with Owada. In December 2003, they met along with DILA Chairman Kriangsak Kittichaisaree in The Hague and discussed establishing the Asian Society and where Ko explained to Owada that DILA's financial needs were for its activities rather than the publication of the *Yearbook*.[42]

Things moved quickly for the promoters of the Asian Society after the Singapore meeting. After all, two of the most important things they needed had been settled – the seat of the Society and its journal. Both of these would be provided by the NUS Faculty of Law. Following a series of five preparatory meetings – in Tokyo (October 2004); Beijing (March 2005); Seoul (December 2005); Bangkok (July 2006); and Tokyo again (October 2006) – plans were finalised to launch the Asian Society of International Law at the NUS in Singapore on 7 July 2007. Ko Swan Sik attended the Beijing meeting and informed the promoters that while DILA was perplexed as to why a different society was needed. Onuma recalled:

> An important issue discussed in Beijing was the relationship between the proposed society of Asian international lawyers and the DILA. Professor

41 Ko Swan Sik to DILA Governing Board Members, 10 Dec 2004 (on file with author).

42 Ko Swan Sik, 'Record of Discussion with Judge Hisashi Owada' 11 Dec 2003 (on file with author).

> Ko Swan Sik, a 'founding father' of the DILA, was invited to the meeting. He told us that the DILA did not oppose the founding of a society of international lawyers in Asia. Nonetheless, Professor Ko was sceptical about the project based on his past experience. Diverse views were expressed as to his opinion, but the majority of the participants considered that an Asian society of international lawyers should be established. They believed that the society could, and should, play an essential role which could not be played by existing organisations, including the DILA; that is, to provide a central forum with an organisational structure comprising mainly (but not limited to) Asian international lawyers, serving as the centre of their research, educational, and practical activities, and fostering and encouraging Asian perspectives of international law.[43]

The active promotion of the Asian Society by our Japanese colleagues gave rise to a major misunderstanding within DILA insofar as finance was concerned. As may be recalled, it was decided at the Hague 2000 meeting that DILA would have two bank accounts – one in the Netherlands for *Yearbook* expenses and another in Tokyo to receive funds for other DILA activities and programmes. Nakatani Kazuhiro established such an account through the University of Tokyo since Mike Sata indicated his desire to make some of his donations through the university. Unknown to most of us (including Nakatani) at the time, Tokyo University rules forbid funds in its account to be used for activities outside of Japan. As a result, there lay in the Japanese account a sum of ¥2m which Sata had donated for DILA's use and generally to support the work of his close friend Onuma. After the University of Tokyo deducted its customary ten per cent administrative fee, ¥1.8m remained.

The misunderstanding arose when these moneys were used to defray the travel costs of promoters of the Asian Society – namely Onuma, Owada, Iwasawa and Miyoshi – to attend meetings in Singapore and Beijing. Kriangsak, who was the DILA Chairman at the time, protested vehemently to Nakatani and asked why DILA funds were used to promote the Asian Society. Nakatani, who was deeply hurt by this protest, explained in great detail how the series of events that led to the funds being situated in the University of Tokyo and how Mike Sata had confirmed that the funds were intended to support Onuma's international law work and not only DILA's activities.[44] The storm died down quite quickly after that, but the tensions remained for some time afterwards.

---

43 Onuma (n 35) 76.

44 Nakatani to Kriangsak & DILA Governing Board, 3 Apr 2005 (on file with author).

6 DILA (2000–2012)

The rejuvenation of DILA in 2000 led to the election of Kriangsak Kittichaisaree of the Thai Ministry of Foreign Affairs as Chairman for a six-year term. Several new Governing Board members were also inducted – James Li, Jamal Seifi, Nakatani Kazuhiro, and myself. Much of Kriangsak's tenure as Chairman was spent dealing with the *Yearbook* and with the emergence of forces that led to the establishment of the Asian Society of International Law. My memory of that period is hazy as we seemed to lurch from crisis to crisis. The *Yearbook* was behind schedule, and enormous efforts were made to catch up with the backlog. On my end, I could not spend much time on DILA matters, especially after the exacting 2001 SILS-DILA Conference and when I left the University to join the private sector.

I kept in touch with my DILA colleagues, but there were no other big conferences or events to organise or attend. All attention was focused on the *Yearbook*. One significant development on the *Yearbook* front was the retirement of Ko and Pinto as General Editors and their replacement by BS Chimni and Miyoshi Masahiro. They were joined in 2005 by my NUS colleague Li-ann Thio. I finally got a functioning website going in 2002 and handed over its management to Bharat Desai.

As the term of the 2000–2006 Governing Board drew to a close, Ko Swan Sik became very anxious about the succession plan for the next Board. Of the younger members of DILA who joined the Board in 2000, James Li was spending more of his time with the Asian Society (saying that he was of much 'greater use' to DILA on the outside rather than in), while Nakatani had pretty much withdrawn from active participation after his big spat with Kriangsak. Jamal Seifi was also busy, and being in Iran, was always a little distant from the locus of action. Ko called me up and asked me to take over as the next DILA Chairman. I was most reluctant to do so since I am not a real international law scholar and did not, till 2006, actually teach international law as a subject. Save for a few human rights pieces, I had published very little in the field of international law. More importantly, I was not significantly plugged into the international law 'circuit' and knew very few international law scholars save for those who participated in DILA activities. I raised these concerns to Ko, who seemed to consider them of little significance. Indeed, Ko and the other Governing Board members had been busy assembling a list of candidates to be appointed to the new Governing Board, most of whom were unknown to me. But Ko was extraordinarily persuasive and reassuring, and I agreed.

With the formation of the Asian Society of International Law, our main differentiating feature was our *Yearbook*, which was desperately lagging behind

its publication schedule. I thus saw it my primary responsibility to work on getting the *Yearbook* back on track. I was also getting the feeling that Brill, our *Yearbook* publisher, was neglecting us and that we were being charged for simple things like layout, which was ridiculous. I convinced the Governing Board that it was time for us to find a new publisher. Having published several books with Routledge, I approached their commissioning editor to ask if they would consider taking on the *Yearbook*. I got a very positive response, and Routledge could price the *Yearbook* at half the price Brill was charging. We moved over to Routledge in 2007 and for the next three years published with them. The project proved unprofitable for Routledge – who had commissioned the *Yearbook* as a book series rather than a serial publication – and they terminated the contract with DILA in 2010. After that, I decided to publish the *Yearbook* online and offer it as an open-access publication.

The question of finance and fund-raising was ever-pressing. In October 2006, I received a note from Ko Swan Sik informing me that he had spoken to an old friend, Kartini Muljadi, during a recent trip back to Indonesia about helping DILA with a donation. Ibu Kartini was, as I discovered, one of the richest women in Indonesia, having made her fortune through legal practice and her cosmetics and pharmaceutical companies. Ko informed me that she offered to help DILA work out a strategy for sustainability and offered to make a €25,000 donation to our bank account.[45] This was fantastic news, and Ko asked if I could follow up by writing to her to inform her of our bank coordinates. This was when my nightmare began. I had no idea where our bank account was nor what the number was. I wrote to Surya Subedi, who kindly continued to act as our treasurer even though he was no longer on the Governing Board, and he gave me the coordinates of our bank account in London. In the meantime, I tried to open a bank account in the name of DILA in Singapore and found this to be impossible. The Singapore banks were not permitted to open accounts for entities not domiciled in Singapore. This meant that if DILA wanted to have an account in a Singapore bank, it had to first register itself as a Singapore entity before opening the account. In any case, this to-ing and fro-ing took some two months, and by the time I contacted Ibu Kartini, she did not respond. Ko suggested that I call her home and speak to her, but she proved elusive as the only person I ever got to speak to was her housekeeper. I then asked Ko if he would intervene on our behalf, and he strangely demurred, saying that 'the time is over'.

One other matter with which I found myself constantly having to cope with was the DILA website. When I became Chairman, Bharat Desai was in charge

45 Ko Swan Sik to Kevin Tan, 18 Oct 2006 (on file with author).

of the website. However, when I tried in 2008 to move the website onto a more economical and flexible platform, I was informed that we no longer owned 'asiainternationallaw.org', our original domain name. This was because Desai had somehow forgotten to renew the subscription on the domain name. An attempt to get it back proved futile,[46] so I decided to register a new domain name – dilafoundation.org – under my name and paid for through automatic annual deductions on my credit card. That way, there would be no danger of our losing our domain name again. By this time, web-based website design software had gotten to a stage where I felt comfortable enough to take on the design of our website on my own so I overhauled the whole website. This website continued to be in use till a new website was established by DILA-Korea in 2018.

When I took over as Chairman, most of the stalwarts of DILA had retired from the Governing Board. After much discussion with Ko, it was decided that I would be assisted by three Vice-Chairpersons – Bharat Desai (India), Jia Bing Bing (China) and Nishii Masahiro (Japan). Other new members of the Board included Surendra Bhandari (Nepal), Noel Dias (Sri Lanka), Javaid Rehman (Pakistan), Nguyen Hong Thao (Vietnam), Azmi Sharom (Malaysia) and Lee Seokwoo (South Korea). I made every effort to meet up with all the new members personally, but it was difficult since we did not often attend the same conferences. However, one such meeting – which took place in Singapore – was to impact DILA's future significantly. This was my meeting with Lee Seokwoo at the launch of the Asian Society of International Law in 2007.

By the time the Asian Society was launched, I had taken over as DILA Chairman, and I represented DILA at the launch event. As this took place in Singapore, I was able to go through the guest list and discover that two new Governing Board members – Lee Seokwoo and Noel Dias – would be present in Singapore, and I made arrangements to meet up with them and to take them out to dinner. Lee had been recommended to our Governing Board by Judge Park Choon Ho, while Dias came highly recommended by M Sornarajah. We all got along very well, and I found them both very enthusiastic and serious about international law. However, it was with Lee that I hit off. He took his role as Board member very seriously and pressed me for a thorough account of how DILA worked and what it sought to do. Most impressively, he kept asking me what he could do to help. This was the start of a 15-year friendship and collaborative partnership that transformed DILA after I stepped down as Chairman.

46 While writing these reflections, I got curious about this and decided to see what became of the 'asianinternationallaw.org' domain name. It is currently available for purchase for USD40.00 a year.

7 DILA (2012–2019)

The task of finding a role for DILA beyond the *Yearbook* remained insurmountable so long as DILA remained the small independent organisation that it was. Without a full-time secretariat and institutional financial subvention, we could do little beyond the *Yearbook* and the odd informal meeting here and there. This situation changed after Lee Seokwoo joined the Governing Board. Lee, a Professor of International Law at INHA University in Incheon, Korea, was a Law of the Sea specialist and was, at the time, Director of the INHA's International Ocean Law Centre. Ever enthusiastic and anxious to advance DILA's mission, Lee proposed holding a joint conference between DILA and his Centre. He made this suggestion to Miyoshi, who was then one of the *Yearbook*'s General Editors in the summer of 2008 but did not get a response. Suspecting that Miyoshi may not have conveyed the offer to the Governing Board, he renewed his offer to host a small conference for up to 15 participants in Seoul on the theme of 'The Law of the Sea, Dispute Settlement, and Colonialism in International Law'.[47] This was held at Yonsei Law School on 23 April 2010. This small conference marked the beginning of a new era for DILA. Hereafter, there would be an annual DILA Conference with selected papers being published in the *Yearbook*. This was made possible by Lee's entrepreneurial leadership; he was incredibly resourceful in raising funds to sustain this annual series of conferences. In 2011, we had yet another meeting at Young Nam University in Daegu, Korea, where we met to present papers on the theme 'Asian Engagements with International Law'.

As my term as DILA Chairman neared its six-year mark, I persuaded Seokwoo to take over as Chairman from 2012. He agreed. Not only was he able to raise funds for our activities, but he was also able to bring on board several energetic scholars like Mario Gomez (Sri Lanka), Kitti Jayangakala (Thailand), Sumaiya Khair (Bangladesh) and Lee Hee Eun (South Korea) as members of the Governing Board. Lee Hee Eun was a particularly valuable addition to the team. He was educated in the United States and taught at the Handong International Law School in Pohang. The unique feature of this law school is that it teaches American law in the English language to prepare students wanting to take an American state bar examination. As an American-styled law school, most Handong students had a native command of the English

47 Most of the papers presented at this conference were published in Paik Jin-Hyun, Lee Seokwoo and Kevin YL Tan (eds), *Asian Approaches to International Law: and the Legacy of Colonialism: The Law of the Sea, Territorial Disputes and International Dispute Settlement* (London: Routledge 2012) which was primarily edited by me.

language and were keen on working on law reviews and other legal publications. Hee Eun was able to tap into this by offering student editorial positions and course credits for those willing to help with cite-checking and proofreading the *Yearbook*. This arrangement was formalised in an MOU, which I signed on behalf of DILA, with Dean Eric Enlow of Handong International Law School on 17 October 2017.

Under Lee's Chairmanship, several significant developments took place. One was the establishment of DILA-Korea, the Korean administrative support arm for DILA and its *Yearbook*. As I pointed out earlier, municipal banking laws and other government regulations make it very difficult for foreign entities to establish bank accounts and conduct financial transactions without a corresponding local entity domiciled in the host country. At the same time, funders and donors may also be restricted in making donations to locally-registered entities and not foreign organisations. The second was the annual DILA conference series about which I have already spoken. These conferences have been held in several countries but have primarily been in Korea (where Lee is most successful in raising funds) or in Indonesia, where we can capitalise on the incredible connections and networks of Hikmahanto Juwana (who succeeded Lee as DILA Chairman in 2018) to obtain venue and local hospitality sponsorship. In addition to the academic dimension of each conference, a DILA Academy has also been created where conference participants offer a short one-day course on selected topics in international law to students and staff of the host university. These academies have gone down exceptionally well in Indonesia. Third, the *Yearbook*, published online during my tenure as Chairman, returned to its old home at Brill in 2016.

In 2018, Hikmanhanto Juwana, one of Indonesia's best-known international law professors, succeeded Lee as Chairman of DILA. Little changed in terms of organisation, with DILA-Korea still providing stellar administrative and organisational support. Under Hikmah's leadership, DILA celebrated its 30th anniversary, with a conference in Jakarta with the theme of 'The Grand Anatomy of State Practice in International Law in Asia in the Last 30 Years: Past, Present and Future'. This milestone event was held at the great hall of the Pancasila Building at Indonesia's Ministry of Foreign Affairs.

8 Some Reflections

DILA has had an event-filled three decades. Conceived at a time when the world seemed so much larger and where connections were less easy to make, and platforms for collaboration were far fewer. Its main achievement has been

the *Asian Yearbook of International Law*, which lent voice to Asian scholars of international law and offered the only collection of state practice of the Asian states. This latter contribution continues to be the *Yearbook*'s main strength, and its editors have been relentless in making sure it continues to be produced to the highest standards. Indeed, this prompted Lee Seokwoo and Lee Hee Eun to initiate the massive *Encyclopaedia of Public International Law in Asia* (*State Practice*) project with Brill, which will culminate in three volumes covering the state practice of the Asian states.[48] This is another project which is managed under the auspices of DILA-Korea and taps on the expertise of the various DILA Governing Board and *Yearbook* Editorial Board members.

Had it not been for the vision and tenacity of Ko Swan Sik, DILA would never have existed. It is remarkable how three Asian scholars, all settled in the Netherlands, should come together to establish a foundation like DILA and to initiate the publication of a serious Yearbook on international law, all without institutional support. A big tribute must be paid to this remarkable team of founders, especially as both Ko and Pinto celebrate their 90th birthdays in 2021, as this goes to press.

Unfortunately, none of the chairmen who came after Ko succeeded in realising the founders' vision and mission for DILA, but that is not for want of trying. Kriangsak was a quiet, reflective leader, always preferring to hear everyone else's views before proffering his own, and his patience almost always outlasted ours. His term was probably the most challenging, especially with all the noise surrounding the establishment of the Asian Society of International Law. I saw myself primarily as a taskmaster brought in to get a job done – mainly to get the *Yearbook* back on track and perhaps organise the repeat of my 2001 conference. I was fortunate in having Lee Seokwoo on my team. His entrepreneurial energy and resourcefulness pushed DILA to new heights, and we continue to enjoy the fruits of his vast labours. Hikmah is the ultimate deal maker and mobiliser, able to move mountains by typing messages on his handphone.

It has taken the combined abilities of all of our colleagues and us to keep DILA going these twenty-odd years. Will DILA survive another 30 years? Yes, provided it can continue to adapt to changing circumstances, innovate and reinvent itself with each passing epoch. Being small and nimble is probably a good thing in such circumstances. In meeting that challenge, it might be helpful to remember what EF Schumacher has shown, that in many situations, taking small steps in the right direction may be better than taking big ones in the wrong direction. Bigger is not always better; small is beautiful. Happy 30th Birthday, DILA!

48 The three-volume set is published by Brill and will be available during 2021.

DILA's office bearers 1989–2019

Advisory Board Members	From	To
Florentino P FELICIANO	1991	2000
Kamal HOSSAIN	1991	2000
N Jasentuliyana	1996	2000
Tommy TB KOH	1991	2000
Mochtar Kusuma-Atmadja	1991	2000
Lee Han Key	1991	1995
Roy S Lee	1996	2000
GKA Lagergren	1991	1995
Frank X Njenga	1991	2000
Park Choon Ho	1996	2000
P Chandrasekhara Rao	1991	2000
S Jamal Seifi	2018	Present
Visu Sinnadurai	1991	1995
Takabayashi Hideo	1991	2000
Kevin YL Tan	2018	Present
Wang Tieya	1991	2000
Lal Chand Vohrah	1996	2000

DILA Chairman	From	To
Ko Swan Sik	1989	2000
Kriangsak Kittichaisaree	2000	2006
Kevin Y.L. Tan	2006	2012
Lee Seokwoo	2012	2018
Hikmahanto Juwana	2018	Present

Governing Board Members	From	To
Arie Afriansyah	2018	Present
Azmi Sharom	2006	2018
Jay Batongbacal	2018	Present
Surendra Bhandari	2006	2018

DILA's office bearers 1989–2019 (*cont.*)

Governing Board Members	From	To
Bharat Desai	2002	2012
Noel Dias	2006	2012
Tran Viet Dung	2018	Present
Florentino P Feliciano	1991	2006
Mario Gomez	2012	2018
Jamshed A Hamid	1991	2006
VG Hegde	2014	2018
Kitti Jayangakala	2012	Present
Jia Bing Bing	2006	2016
Hikmahanto Juwana	2006	Present
Sumaiya Khair	2012	Present
Kriangsak Kittichairsaree	1997	2006
Tommy TB Koh	1997	2006
Rahmatullah Khan	1991	2006
Ko Swan Sik	1991	2006
Lee Hee Eun	2012	Present
Lee Seokwoo	2006	Present
James Li Zhaojie	2000	2006
Lim Chin Leng	2006	2012
Ronald St J Macdonald	1991	2000
Nakatani Kazuhiro	2000	2006
Nishii Masahiro	2006	2018
Nguyen Hong Thao	2006	2012
Park Choon Ho	1997	2006
MCW Pinto	1991	2006
Javaid Rehman	2006	2018
SJ Seifi	2000	2018
Maria Lourdes Sereno	2006	2014
Kozai Shigeru	1997	2006
Yamamoto Soji	1991	2000
Surya Subedi	1997	2006
Sompong Sucharitkul	1991	2006
JJG Syatauw	1991	2000
Kevin YL Tan	2000	2018
Li-ann Thio	2014	2018

DILA's office bearers 1989–2019 (*cont.*)

Governing Board Members	**From**	**To**
Kanami Ishibashi	2018	Present
Matthias Vanhullebusch	2018	Present
Dustin Kuan-Hsiung Wang	2018	Present
Guifang Julia Xue	2018	Present

A Panoramic Review of the State Practice Section in the Asian Yearbook of International Law

*Seryon Lee**

The purpose of this article is to provide an overview of the State Practice section in the *Asian Yearbook of International Law* from Vol. 1 to Vol. 24 on the occasion of the 25th anniversary issue of the *Asian Yearbook of International Law*. For the past 24 volumes, state practice rapporteurs from 16 Asian countries[1] have reported various sources of state practice such as legislation, judicial decisions, government statements made at the United Nations and international conferences. As was evident from the voluminous record, the State Practice section from the past volumes covered topics ranging from state immunity, extradition, law of the sea, international human rights, relationship between international law and domestic law, territorial disputes among others. This collection of state reports revealed continuous efforts from Asian countries to enact the necessary legislation to give domestic effect to international treaties to which they assumed an obligation. Such efforts to abide by international obligation were also reflected in a number of court cases by referring to relevant international instruments. One notable point about the state practice of Asian countries is that there were relatively few cases of international adjudication among Asian countries. It can be inferred from such a finding that governments of Asian countries have preferred diplomacy over legal adjudication as a way of dispute settlement when faced with a conflict or dispute with other countries. The collection of state report from Asian countries over the three decades have undoubtedly contributed to the development of international law as such evidence of state practice forms an essential part of customary international law.

The following summaries have been arranged by country. While distinction between public international law and private international law has become more obscure in recent years, this article sought to confine the subject matter primarily related to public international law. In each summary, the contents are summarized mostly in chronological order, and some summaries, where appropriate, are arranged by different sources of state practice.

* Professor, Jeonbuk National University, Korea.

1 Bangladesh, China, India, Indonesia, Iran, Japan, Korea, Malaysia, Nepal, Pakistan, the Philippines, Singapore, Sri Lanka, Tajikistan, Thailand, Vietnam (in alphabetical order).

1 State Practice of Asian Countries

1.1 *Bangladesh*

Bangladesh's state practice report first appeared in Vol. 10 with introduction of the enactment of the Arbitration Act of 2001. This Act repealed the Arbitration Act of 1937 and 1940, which were legacies of the British Raj in India. This legislative step was taken in response to increasing foreign investment in Bangladesh in various sectors, especially in natural gas and power, and export trade.[2]

In Vol. 16 (2010), the Supreme Court's case, *State v. Secretary, Ministry of Law, Justice & Parliamentary Affairs and others*, decided on April 10, 2009, concerned the content of a TV news broadcast featuring the rape of a minor girl. The Court, particularly drew upon the comments of the UN Convention on the Rights of the Child (CRC) Committee on Bangladesh State Report and quoted observations and recommendations by the Committee. As part of the rulings, the Court provided a number of direction and recommendations, which included, among others, establishment of child-specific courts in every district to exclusively deal with cases relating to children.[3]

In 2012, Bangladesh enacted national laws related to human rights. On February 20, 2012, Bangladesh Parliament enacted the Prevention and Suppression of Human Trafficking Act to provide for a legal regime to combat human trafficking effectively, whether internal or cross-border as well as to protect trafficking victims. The legislation of this Act was an attempt to enact anti-trafficking provisions at par with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000 (Palermo Protocol), even though Bangladesh has not ratified the Protocol.[4] In the same year, Bangladesh also enacted the Pornography Control Act of 2012, which includes standards provided in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000.[5] Another important environmental law was enacted in 2012. The Wildlife Conservation and Security Act came into force on July 10, 2012. While there is no clear reference to specific international instruments, this Act seemed to incorporate provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),

2 Asian Yearbook of International Law, Vol. 10 (2001–2002), p. 167.
3 Asian Yearbook of International Law, Vol. 16 (2010), p. 207.
4 Asian Yearbook of International Law, Vol. 18 (2012), 250.
5 Asian Yearbook of International Law, Vol. 18 (2012), p. 157.

the Convention on the Conservation of Migratory Species of Wild Animals, and the Convention on Biological Diversity.[6]

In the following year, the government of Bangladesh adopted the National Strategy Paper on Myanmar Refugees and Undocumented Myanmar National in order to address the situation of not only the registered refugees, but also the undocumented Myanmar nationals living in Bangladesh as part of a long-term solution to tackle the issue of the presence of a large number of undocumented Myanmar nationals.[7]

In Vol. 21, the Supreme Court's case in *Salahuddin Qader Chowdhury v. The Chief Prosecutor* (July 29, 2015), international crimes were discussed. In this case, the appellant was convicted by the International Crimes Tribunal on charges of crimes against humanity and war crimes committed during the Bangladesh war of liberation in 1971. The verdict of the Court touched upon the very core principles of international humanitarian laws as well as international human rights pertaining to prohibition of torture and non-discrimination based on religion.[8]

In recent volumes of 23 and 24, the Child Marriage Restraint Act of 2017 and the Digital Security Act of 2018 were introduced respectively.[9] The Child Marriage Restraint Act included special circumstances where a boy or a girl can marry before they reach the statutory age in the best interests of the minor. The latter Act concerned the measures to deal with defamation, hurting religious sentiments, causing deterioration of law and order. This Act includes extraterritorial clause which means that Bangladesh nationals would be liable for punishment even if the offense was committed outside Bangladesh.[10]

1.2 *China*

China's state practice report starts with introduction of legislation of the Law on the Territorial Sea and Contiguous Zone, which was adopted on February 25, 1992.[11] On May 14, 2004, the Constitution of the People's Republic of China was amended to incorporate a human rights clause in Article 33, paragraph 3, which states that "the state respects and protect human rights."[12]

6 *Ibid*, p. 166.
7 Asian Yearbook of International Law, Vol. 19 (2013), p. 207.
8 Asian Yearbook of International Law, Vol. 21 (2015), pp. 267–268.
9 Asian Yearbook of International Law, Vol. 23 (2017), p. 218; Vol. 24 (2018), p. 359.
10 *Id.*
11 Asian Yearbook of International Law, Vol. 2 (1992), p. 165.
12 Asian Yearbook of International Law, Vol. 11 (2003–2004), p. 151.

Three extradition cases were presented in Vol. 11 (2003–2004) and Vol. 14 (2008) as follows:

First, the Supreme People's Court's decision on November 14, 2002 involved a French national who was suspected of committing a rape. The Supreme Court held that France duly provided evidence and materials as required by China's Extradition Law. The appellant's claim of the possibility of cruel treatment after returning to France was not accepted. The Supreme Court upheld the ruling by the High Court of Yunnan, which found that the request of France for extradition of the suspect fulfilled the conditions for extradition.[13]

Second, the Supreme People's Court decided another extradition case on April 2, 2007. This case concerned the request of extradition of a Korean citizen who was detained for committing a crime of fraud in China. He was convicted of fraud and sentenced to a sixteen-yar imprisonment by the Central District Court in Seoul, Korea. During the appeal proceeding, he fled to China. The High Court in Seoul affirmed the lower court's decision. The Supreme People's Court of China found that the crime committed constitutes crimes both under China's Criminal Law and Korea's Criminal Code. The Supreme Court held that the request for extradition met the conditions set forth in China's Extradition Law and the Extradition Treaty between China and Korea.[14]

Third, another extradition case was decided by the Supreme Cout on December 11, 2008. In this case, Korea requested the extradition of a citizen of Yemen who was convicted for the crime of illegal trading of firearms in Korea. The person subject to extradition submitted a written request to complete the remainder his sentences in his home country. The Supreme Court, noting that the extradition request met the requirements set forth in relevant laws, allowed him to be extradited to Yemen.[15]

In terms of diplomatic relations & dispute settlement issues, following statements were made: In 2011, the Ministry of Foreign Affairs made statements with regard to its relationship with Sudan,[16] and the new Libyan government. On June 21, 2011, the Ministry officially recognized and announced the establishment of diplomatic relations between China and Sudan, and endorsed support for the Libyan National Transitional Council, the new Libyan government, on July 9, 2011.[17] In 2012, a Chinese representative at the UN General Assembly made a statement and endorsed Palestine's membership in international

13 *Id. at* 149–151.
14 Asian Yearbook of International Law, Vol. 14 (2008), pp. 147–148.
15 Asian Yearbook of International Law, Vol. 15 (2009), pp. 235–236.
16 Asian Yearbook of International Law, Vol. 17 (2011), p. 199.
17 *Id.* at. 200.

organizations including the United Nations,[18] and Palestine's independence as a sovereign state.[19]

On February 19, 2013, the Embassy of the People's Republic of China in the Philippines presented its compliments to the Department of Foreign Affairs of the Philippines, referring to the latter's Note Verbale regarding initiation of arbitration on the South China Sea issues and stated that the Philippines failed to abide by the agreement between the two countries to resolve territorial and jurisdictional dispute by peaceful means. On August 1, 2013, China addressed a Note Verbal to the Permanent Court of Arbitration in which it reiterated its position that "it does not accept the arbitration initiated by the Philippines" and stated that it would not participate in the proceedings.[20]

1.3 *India*

India has provided the most comprehensive court cases in several volumes. Just to highlight a few, the court cases pertaining to international law covered the various topics on domestic implementation of international treaties, international human rights law and jurisdictional issues as follows:

On November 25, 1993, the Supreme Court rendered its judgment in *Veb. Deutfracht Seereedrei Rostock* (*D.S.R. Lines*) *v. New Central Jute Mills Co.Ltd & Another*, where the plaintiff filed a suit claiming that the defendant, D.S.R Lines sold them damaged goods. In the original case, the defendant was a company established under the laws of West Germany and carried its business both in West Germany as well as in Calcutta, India. D.S.R Lines argued that it was an agent and/or instrumentality of the government of the German Democratic Republic so that it should be recognized as a sovereign state. According to the German Democratic Republic's Constitution, private ownership in ocean shipping and large industrial enterprises was prohibited. Also, India's Code of Civil Procedure of 1908 required the prior consent of the central government if a suit involves the doctrine of state immunity. The Court, thus, examined the contemporary relevance of the absolute state immunity doctrine, which has ramifications both for international law and Indian law. The Court noted that there was a growing trend towards a restrictive theory and a distinction between commercial and sovereign acts was to be determined in terms of the nature of the acts. The appeal was allowed and the suit was dismissed.[21]

18 *Id.*

19 Asian Yearbook of International Law, Vol. 19 (2013), p. 232.

20 Asian Yearbook of International Law, Vol. 19 (2013), pp. 212–213.

21 Asian Yearbook of International Law, Vol. 5 (1995), pp. 234–235.

In *National Human Rights Commission v. State of Arunachal Pradesh & Another,* the Supreme Court delivered the judgment on January 1995. This case was brought to the Supreme Court through a class action by the National Human Rights Commission (NHRC) of India in the form of a writ petition under the Indian Constitution. A large number of Chakmas were displaced as a result of Kaptai Hydel Power Project in 1964, and they took shelter in the nearby Indian states. In 1994, a Chaka NGO filed a representation with NHRC complaining of the persecution of Chakmas. The Supreme Court allowed the NHRC petition and ordered that the State of Arunachal Pradesh shall protect "the life and liberty of every Chakma residing within the State" and shall repel, even by use of force, any attempt by any organized group to forcibly evict the Chakmas. The Court further held that except in accordance with law, the Chakmas should not be evicted from their residence. While the traditional rule of international law recognizes the sovereign right of a state to decide the maters on admitting a foreigner, the international law on human rights became part of the legal system of most civilized societies. The Court, by referring, in particular, to non-derogable clause in the International Covenant on Civil and Political Rights, noted that certain human rights are non-derogable in any circumstances. In this case, the Court endorsed the international human rights in so far as its application through the Indian law concerned.[22]

In *Narmada Bachao Andolan v. Union of India and Others*, the Supreme Court rendered its decision on October 18, 2000. One of the key issues was applicability of the ILO Convention 107 to which India is a signatory. This case involved construction of various hydropower and irrigation project, which resulted in the large-scale displacement of people, particularly the tribal villagers. The Court noted that the relevant provision in the ILO Convention which stipulates in relevant part that the removal of the tribal population is necessary as exceptional measures, and they should be properly compensated with the land of quality and any resulting loss.[23]

On February 14, 2003, the Supreme Court decided on the issue related to implementation of the United Nations Conventions on Privileges and Immunities through domestic legislation. The Appellant was an employee of the International Crops Research Institute (ICRISAT), an international organization located in India and employment was terminated by the ICRISAT. The appellant invoked the writ jurisdiction of the High Court of Karnataka, but the High Court dismissed the case on the ground that ICRISAT was an international organization, which enjoyed immunity due to a Notification issued in

22 Asian Yearbook of International Law, Vol. 6 (1996), pp. 203–204.

23 Asian Yearbook of International Law, Vol. 10 (2001–2002), pp. 171–172.

1972 under the United Nations Privileges and immunities Act. The enactment in 1947 provided for the implementation of the UN Convention on Privileges and Immunities. The UN Convention appeared as a Schedule in the 1947 legislation and the UN Convention was applied by India by issuing Notifications from time to time. The Court examined the legal character of ICRISAT and noted that the primary activity was purely on a voluntary basis. The Court also pointed out that the agreement between the Indian Government and ICRISAT is enforceable in domestic courts when the agreement does not form part of any domestic legislation.[24]

In *the Republic of Italy & Others v. Union of India & Others*, decided by the Supreme Court on January 18, 2013, the Italian ship while on its journey near the coast of the Indian States of Kerala, allegedly mistook an Indian fishing vessel for a pirate boat and fired gun shots at the fishing vessel resulting the death of two Indian fishermen. Two main issues were all related to jurisdiction matters. The first issue was whether the Kerala State Police had jurisdiction to investigate the incident. The second issue was whether the Courts of the Italy or India had jurisdiction to try the accused. Italy argued that its marines were on board in their official capacity. The Court considered the argument by Italy and pointed out that the incident happened within the Contiguous Zone and the Exclusive Economic Zone, which indicates that the incident occurred within the jurisdiction of one of the federal units of India. Accordingly the Court held that the State of Kerala had no jurisdiction, rather it was the Indian Government that had jurisdiction to proceed with the investigation and trial in accordance with the UN Convention on the Law of the Sea. The Supreme Court directed the Government of India to set up a Special Court in consultation with the Chief Justice of India to dispose of the case in accordance with the provisions of the UNCLOS along with relevant India's domestic laws.[25]

Volume 9 covered the ICJ's judgment on June 21, 2000, in the case concerning *Aerial Incident of 10 August 1999 between Pakistan and India*. India's preliminary objections concerned the so-called "commonwealth reservation" and reservation on multilateral convention, the General Act of 1928, which requires the consent of jurisdiction by the Indian government. The ICJ found that India had never been a party to the General Act as an independent state, however, even if the General Act bound India, the subsequent communication by India in 1974 served as the notification of denunciation of the Act. The ICJ found that it had no jurisdiction as contended by India.[26]

24 Asian Yearbook of International Law, Vol. 11 (2003–2004), pp. 160–161.
25 Asian Yearbook of International Law, Vol. 19 (2013), pp. 340–345.
26 Asian Yearbook of International Law, Vol. 9 (2000), pp. 223–228.

Volume 18 included a number of nationals laws, which were enacted to ratify international human rights treaties as follows: Act No. 6 of 2012 on ratification of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Act No. 9 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict, Act No. 10 of 2012 on Ratification of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

1.4 *Indonesia*

The state practice report of Indonesia first appeared in Volume 6 with the introduction of Indonesia's Act on Indonesian Waters on August 8, 1996.[27] On June 28, 2002, the Government Regulation was issued on the Rights and Obligations of Foreign Ships and Aircraft when Exercising the Right of Archipelagic Sea Lanes Passage through Established Archipelagic Sea Lanes to implement the Law of 1996 concerning Indonesian Waters.[28]

The legislations related to diplomatic relations and human rights were also adopted between 1999 and 2000 as follows: The Act on Foreign Relations of 1999, Act on Human Rights of 1999, the Act on International Agreements of 2000 and the Act on the Court for Fundamental Rights of 2000.[29]

In response to the Bali Bombing on October 12, 2002, the President issued Government Regulation in lieu of Law No. 1 of 2002 (GRL) concerning the Eradication of Criminal Acts of Terrorism. The Government Regulation applied to any person who commits or intends to commit a criminal act of terrorism in the territory of Indonesia and/or other country that has jurisdiction and expresses its intention to prosecute such criminal.[30]

In 2014, Law No. 26 of 2014 on the Ratification of the ASEAN Agreement on Transboundary Haze Pollution and Law No. 1 of 2014 on the Accession to the International Convention for the Suppression of Acts of Nuclear Terrorism were enacted.[31]

A judicial decision regarding crime against humanity was discussed in *Prosecutor Office of the Republic of Indonesia v. Abilio Jose Osario Soares*, decided on April 4, 2002. The defendant was accused of crimes against humanity under the Indonesia's Law No. 26 of 2000. One of the main arguments by the defendant

27 Asian Yearbook of International Law, Vol. 6 (1996), p. 213.
28 Asian Yearbook of International Law, Vol. 10 (2001–2002), p. 187.
29 Asian Yearbook of International Law, Vol. 9 (2000), pp. 233–236.
30 Asian Yearbook of International Law, Vol. 10 (2001–2002), p. 181.
31 Asian Yearbook of International Law, Vol. 20 (2014), p. 281.

was that the ad hoc Human Rights Court of the Central Jakarta Court did not have the jurisdiction to try his case since the alleged crime was not a criminal act at the time the incident happened. The Court, rejecting his argument, stated that crime against humanity constitutes an international crime so that the principle of universal jurisdiction applies.[32]

In *Prosecutor Office of the Republic of Indonesia v. Timbul Silaen* decided on March 28, 2002, the defendant was accused of crimes against humanity under the Law No. 26 of 2000. The defendant claimed that the ad hoc Human Rights Court of the Central Jakarta Court lacked the jurisdiction to try his case since the alleged crime occurred in East Timor. The Court rejected the defendant's claim and held that the principle of universal jurisdiction applies for the crime against humanity.[33]

1.5 *Iran*

Iran's first state practice report appeared in Volume 4 with introduction of the Act on the Marine Area of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea. As Iran has not ratified the UN Convention on the Law of the Sea and the 1958 Geneva Convention, this newly enacted Act is significant to the extent that it consolidated all the laws on Iran's maritime zones and Iran's position as to the right of innocent passage.[34]

Iran's Single Act on Jurisdiction of Iranian Judiciary to Hear Civil Suits against Foreign States was enacted on November 9, 1999. This Act designated Tehran's Courts of Justice as competent organ to hear the proceedings instituted under this Act. Under this Act, Iranian nationals may bring civil action against foreign states for damaging arising from any act of a foreign state which is contrary to international law, and damages from any act of individuals or terrorist groups supported by a foreign State, resulting in death, physical, mental or financial injury to Iranian nationals. This Act applies to two categories of foreign states: (i) states that have violated sovereign immunity of Iran or immunity of its officials; (ii) states that have assisted in the execution of judgments that are made in violation of sovereign immunity of Iran or immunity of its officials.[35]

In Volume 11, the ICJ case concerning oil platforms between Iran and the United States, decided on November 6, 2003, was discussed in detail. This case concerned a dispute arising out of the attack on and destruction of three

32 Asian Yearbook of International Law, Vol. 10 (2001–2002), p. 180.
33 *Id.*
34 Asian Yearbook of International Law, Vol. 4 (1994), pp. 239–240.
35 Asian Yearbook of International Law, Vol. 9 (2000), p. 237.

offshore oil production complexes by US warships. This case dealt a number of important issues such as use of force, meaning of armed attack to justify right of self-defence, legitimate military target, freedom of commerce and navigation. The Court found that the actions of the United States against Iranian oil platforms could not be justified as measures necessary to protect the essential security interests of the United States under the Treaty of Amity, Economic Relations and Consular Rights between the US and Iran. The Court also rejected Iran's contention that the action by the US constituted a breach of the obligation regarding freedom of commerce between the two parties.[36]

In the same volume, a case decided by Branch 213 of Tehran court in November, 2002 was discussed regarding domestic implementation of international treaties in Iran. This case concerned the expropriation of a vessel by a UAE court pursuant to the UN Security Council resolutions relating to the Iraqi oil embargos and the subsequent transfer of its ownership to an Iranian party. The Court held that the obligations arising from binding resolutions of the Security Council of the United Nations constituted binding international obligations applicable in the judicial proceedings before Iranian courts. Accordingly, it affirmed that the seizure and confiscation was made in accordance with the UN Charter and should, therefore, be respected by an Iranian court.[37]

1.6 *Japan*

A number of important court cases were introduced in the volumes published in the 1990s, starting with an extradition case involving hijacking of an airplane of China Airlines on December 16, 1989. The hijacked airplane landed at Fukuoka in Japan, where the hijacker asked for political asylum. The Chinese government issued a warrant for arrest and requested extradition. The Tokyo High Court held that the requested person could be extradited as the hijacking could not be regarded as a political crime within the meaning of Japan's Law on Extradition of Criminal Offenders.[38]

Tokyo High Court's decision on March 5, 1993 concerned compensation for Japanese prisoners of war detained in the USSR after World War. Former Japanese POWs and their surviving family instituted a lawsuit against Japan for settlement of the credit balances as well as for compensation for the injuries caused by the forced labor during the detention in the USSR. The Court examined two main issues related to international law. First, regarding the

36 Asian Yearbook of International Law, Vol. 11 (2003–2004), pp. 180–181.
37 Asian Yearbook of International Law, Vol. 11 (2003–2004), p. 182.
38 Asian Yearbook of International Law, Vol. 1 (1991), pp. 159–160.

applicability of the third Geneva Convention of 1949, the Court held that the Convention was not applicable because most of the plaintiffs lost their POW status by repatriation before the Convention had entered into force between Japan and USSR. As to the claims by the plaintiffs on applicability of the so-called "Rule of compensation by the state on which the POW depends," as provided in Articles 66 and 68 of the third Geneva Convention, the Court did not recognize such provisions as an established rule of international customary law in the absence of evidence of general state practice and opinion juris. Second, while duly promulgated treaties and international customary law are recognized to have domestic effect without any special legislative acts in Japan, the content of a treaty or a international customary law at issue was not clear and precise in terms of the scope of entitled persons, methods or duration of the compensation. Therefore, the rule in question could not be applied domestically. Accordingly, the Tokyo High Court dismissed the appeal.[39]

This High Court's decision was affirmed by the Supreme Court on March 13, 1997. The Supreme Court upheld the judgment of the High Court without further consideration to the effect that the Geneva Convention cannot be applied retroactively to the claims of the appellants whose POW status was terminated before the entry into force of the Convention between Japan and the Soviet Union. The Supreme Court confirmed that Rules of compensation by the state on which the POW depends was not an established international customary law at the time when the appellants were detained in the USSR.[40]

Apart from the above Supreme Court's decision, Japan enacted the Law on the Punishment of the Grave Violations of International Humanitarian Law, which entered into force on February 28, 2005. As to the four Geneva Conventions of 1949, while Japan acceded to them in 1953, there was no legislation to bring them into effect. An additional clause to the Penal Code was amended and extended the application of the provision of Article 4 bis to the crimes to be punished under the Geneva Conventions even when they were committed outside Japan.[41]

Another Supreme Court case related to the aftermath of war, decided on April 5, 2001, concerned the Korean appellants who were severely wounded when they served as soldiers or paramilitary personnel in the Japanese military during World War II. In *Seok Seong Gi and Successors of late Jin Seok IL v. The Minister of Health and Labour*, the appellants claimed for the cancellation of the decision by the Japan's Minister of Health to reject their application for a

39 Asian Yearbook of International Law, Vol. 6 (1996), pp. 245–252.
40 Asian Yearbook of International Law, Vol. 7 (1997), p. 287.
41 Asian Yearbook of International Law, Vol. 12 (2005–2006), p. 177.

disability pension under the relevant Japanese Act. The Supreme Court pointed out that Peace Treaty with Japan identified claims by Koreans as the subject for special arrangements between Japan and Korea (Article 4(a)) and compensation was to be settled by diplomatic negotiations. The Court noted that both governments considered that compensation to Korean residents in Japan was a matter of the other government's responsibility under "The Agreement on the Settlement of the Problems concerning Properties and Claims, and the Economic Cooperation between Japan and Korea" concluded in 1965. For this reason, while the Court recognized a discriminatory treatment between the wounded Korean resident in Japan and those Japanese under similar circumstances, it denied the unconstitutionality of the situation.[42]

In *Nishimatsu Construction Co. v. Y*, the Supreme Court rendered its judgment on April 27, 2007. In this case, the appellant, Nishimatsu Construction, forced many Chinese people to work on the site of construction in Hiroshima Prefecture during the World War II. Former workers and their survivors claimed compensation for the forced labor and damages. The issue was whether the war reparation claims of Chinese citizens had been renounced by China. The Joint Communique between Japan and China in 1972 did not extinguish the Japanese government's obligation to respond to the compensation claims of Chinese nationals. The Supreme Court held that the Joint Communique meant comprehensive renouncement of the war reparations by China, including compensation claims of its nationals. This was the first ever judgment of the Supreme Court on the issue of whether the war reparation claims of nationals were renounced by the waiver clause of the peace treaty their country concluded.[43]

Volume 20 included the ICJ's judgment of *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening). On March 31, 2014, the ICJ issued the judgment of Whaling in the Antarctic, and held that the JARPA II, Japanese Whale Research Program, was not justified as scientific research under the International Convention for the Regulation of Whaling (ICRW).

1.7 *Korea* (*The Republic of Korea*)

Korea's state practice was first featured in Volume 10. The Supreme Court's decision on October 22, 2001 in *Arah Marine Co. v. Marine Jewelry* concerned direct application of treaty. The contracting carrier concluded the transportation contract with passengers, senders or their representatives in accordance with the Warsaw Convention for the Unification of Certain Rules Relating to

42 Asian Yearbook of International Law, Vol. 11 (2003–2004), pp. 189–190.

43 Asian Yearbook of International Law, Vol. 13 (2007), pp. 211–212.

International Carriage by Air as amended at the Hague of 1955. (Amended Warsaw Convention) The Court found that the case at issue concerned the international air transportation under the amended Warsaw Convention, therefore it is correct that the amended Warsaw Convention is applicable to the contract between the plaintiff and the defendant.[44]

The Constitutional Court examined the characteristics of National Assembly's right to consent regarding treaties in its decision on July 26, 2007 (2006 HunRi8). This case concerned the so-called 'rice negotiation' with the WTO Members in order to extend the special and differential treatment, which allowed a waiver for rice tariff for Korea from 1994 to 2004. Accordingly, the Korean Government submitted a proposal along with documents for ratifying the revised tariff concession. The petitioners were the members of the National Assembly and they requested the government to include the agreement documents by introducing a bill for ratification. However, the government declined such request. The petitioners argued that by entering into an agreement without the consent of the National Assembly, the government violated the National Assembly's right to consent to the conclusion and ratification of treaties. Therefore, the Court was asked to interpret the meaning of the National Assembly's right to consent under the Constitution, however, one of the key issues in this case was whether the petitioners have capacity to request on behalf of the National Assembly. Since the Court found that members of the National Assembly had no legal standing as valid claimants, the court dismissed the case.[45]

Seoul High Court's decision on July 10, 2013 (2012Na44947), featured in Volume 19, was a follow-up on the Supreme Court's decision on May 24, 2012. The Plaintiffs were Korean victims who were forced to work at Nippon Iron Manufacture during the Japanese colonial period. The Plaintiffs filed a suit for compensation for the illegal act of "Sinil Iron Casting," previously called Nippon Iron Manufacture, in their assisting the Japanese government's policy of compulsory mobilization of manpower. The Court examined 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 of 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 parts of Japanese legislation, the Agreement on Reparation between Korea and Japan, statute of limitations,

44 Asian Yearbook of International Law, Vol. 10 (2001–2002), p. 196.

45 Asian Yearbook of International Law, Vol. 14 (2008).

and so forth, 3) the standard for calculating the amount of compensation the defendant should pay. The Court held that Nippon Iron Manufacture must pay 100,000,000 KRW to the plaintiffs because its forceful manpower draft without paying wages was an unlawful act.[46]

In the same year, Seoul High Court gave a decision on January 3, 2013 (2012To1) regarding the request for extradition. This case concerned the Japanese government's request for extradition of a Chinese national who protested against Japan for its lack of historical awareness by attempting arson on the Yasukuni Shrine in Japan. The Court examined the applicable law to determine whether Korea had an obligation to extradite him Japan, the standard to determine the definition of political crime, and lastly whether the term, 'political crimes' in Article 3 of the Criminal Extradition Treaty between Korea and Japan was relevant to this case. The Court held that non-extradition of a political offender was the established principle of international law and further pointed out that the term, political crime in the said Extradition Treaty should be interpreted as a concept which includes the relative political crime. Accordingly, the Court decided not to allow the extradition.[47]

In the most recently published volume, Korean Constitutional Court's decision on June 28, 2019 regarding conscientious objectors for military service drew much attention. The Court found that the categories of military service under the Military Service Act was non-conforming to the Constitution on the ground that the Military Service Act provided only 5 categories of military service and excluded any alternative service for conscientious objectors.[48]

In terms of legislation, the Refugee Act was enacted in 2012 and came into force in July, 2013. The enactment of the Refugee Act reflected the Korean government's efforts and commitment under international law and provided a critical momentum on its refugee policy from immigration control to more human rights-based approach.[49] On March 3, 2016, North Korean Human Rights Act entered into force. The Purpose of this Act is to contribute to protect and promote human rights of North Koreans by pursuing the right to liberty and right to life prescribed in the Universal Declaration of Human Rights and other international human rights treaties.

46 Asian Yearbook of International Law, Vol. 19 (2013), pp. 237–241.
47 Asian Yearbook of International Law, Vol. 19 (2013), pp. 261–262.
48 Asian Yearbook of International Law, Vol. 24 (2018), p. 388.
49 Asian Yearbook of International Law, Vol. 20 (2014).

1.8 *Malaysia*

Malaysia's state practice was presented in Vol. 1 by introducing Malaysia-Thailand Joint Authority Act of 1990, which was enacted pursuant to the memorandum of understanding between the two countries on the establishment of a joint authority for the exploitation of the resources of the sea-bed in a defined area of the continental shelf of the two countries.[50] In 2010, a new Wildlife Conservation Act was passed by the Malaysian parliament to adopt licensing/permit requirements to hunt, take, keep, deal, carry on a taxidermy business, import and export any protected wildlife, as well as to collect bird's nest in Malaysia.[51]

For the volumes published in the 1990s, important judicial decisions were highlighted as follows: In *Commonwealth of Australia v. Midford Sdn. Bhd. & Anor*, the appellant was the officer from the Australian Customs Service and Malaysia seized certain documents belonging to the respondent. The respondent requested for an order that the seized documents be returned and that the Commonwealth of Australia and their agents be restrained from conducting further illegal searches or seizures on the respondent's premises. As the High Court held that Australia was not entitled to absolute immunity from the jurisdiction of the Malaysian courts, the appellant made an appeal to the Supreme Court. The doctrine and practice of the sovereign immunity under international law was examined. The Supreme Court decided that the lower court's judgment based on the restrictive doctrine of sovereign immunity developed in the common law after 1956 should apply in Malaysia. However, the Court further examined and concluded that the action of the Commonwealth of Australia at issue was *acta jure imperii* so that the Commonwealth of Australia was entitled to full sovereign immunity.[52]

In *MBF Capetal Berhad & Another v. Dato'param Cumaraswami*, the High Court in Kuala Lumpur gave its decision on June 28, 1997 regarding immunity of United Nations Special Rapporteur. The plaintiffs were public-listed and a licensed stock-broking companies, and they filed a suit for defamation against an advocate and solicitor of the High Court of Malaya who was also appointed as a UN Special Rapporteur. The action involved an article in a magazine which featured the words spoken by the defendant in direct quotes. The defendant argued that he was entitled to immunity from any legal process based on the Convention on the Privileges and Immunities of the United Nations of 1946. The court examined about the mandate of a Special Rapporteur and the term

50 Asian Yearbook of International Law, Vol. 1 (1991), p. 160.
51 Asian Yearbook of International Law, Vol. 17 (2011), p. 203.
52 Asian Yearbook of International Law, Vol. 1 (1991), pp. 162–164.

'expert on mission' in detail and decided that it had jurisdiction to hear the case and accordingly dismissed the application.

However, the appeal was made and the Court of Appeal delivered its judgment on October 20, 1997. The issues examined in the appeal included two questions: i) whether the judicial commissioner was entitled to deter the question of the defendant's immunity, ii) even if the commissioner was entitled to do so, whether she properly exercised such discretion. The Court of Appeal pointed out that it was not entirely beyond dispute whether the words complained of were published by the defendant in the exercise of his functions as Special Rapporteur. It stated that the question of the independence of the defendant in the exercise of his functions as a Special Rapporteur is a matter that must be addressed with reference to the terms of his mandate. In Conclusion, the Court of Appeal upheld the judgment made by the High Court and dismissed the appeal on the ground that the High Court's decision did not result in any injustice.[53]

This case was updated in Volume 9. The Malaysian government and the Untied Nations agreed to refer the matter of immunity to the International Court of Justice. The Malaysian government also agreed to comply with the ICJ's decision. In the case concerning "Difference Relating to Immunity from Legal Processes of a Special Rapporteur of the Commission on Human Rights," the ICJ decided in favour of Dato'Param Cumaraswamy and held that immunity was a preliminary issue to be determined before hearing can continue, and further found that the defendant did have immunity and that all actions against him should be stopped.[54]

In a more recent volume, in 2018 the High Court in Kuala Lumpur decided in *Wang Bao'An & Ors v Malaysian Airline System Bhd and Other Cases*, which was a suit brought by a group of defendants of those who perished on board Malaysian Airlines Flight MH 370 on March 8, 2014 against the Malaysian Airline System Bhd. Two questions were raised at the hearing. First, whether the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention) and the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (Warsaw Convention) provided exclusive causes of action against a carrier, ousting all common law causes of action. Second, whether the cap on liability for a dependency claim imposed by Section 7 of the Civil Law Act 1956 applied in respect of a claim made under the Montreal Convention. The Court decided that the Montreal Convention provided an exclusive cause of action and ousted all

53 Asian Yearbook of International Law, Vol. 7 (1997), pp. 294–309.

54 Asian Yearbook of International Law, Vol. 9 (2000), pp. 246–247.

common law causes of action against the carrier, and the similar principle applied with regards to the Warsaw Convention.[55]

1.9 *Nepal*

From Volume 9 and onwards, a number of court cases in Nepal related to interpretation of international treaties were presented. The Supreme Court's decision on November 11, 2000, in *Javir Yasin v. HMG Ministry of Home and Others* was introduced. In this case, the petitioner was denied citizenship by the District Administration Office in Kathmandu on the ground that his father was not a Nepalese citizen. The petition was based on the claim that the petitioner was entitled to the equal protection of the Constitution of Nepal as well as the Convention on Elimination of All Forms of Discriminating against Women (CEDAW) to which Nepal is a party. The Court rendered its decision solely on the ground of the Constitution and held that citizenship of Nepal requires that the father to be a citizen of Nepal. However, the Court did not examine the relationship between the CEDAW and laws of Nepal regarding citizenship issue.[56]

Another Supreme Court's case, decided on July 19, 2001, in *Tilotam Poudyal v. HMG Ministry of Home and Others*, dealt with the issue of registration for a NGO by minors. The petitioners were minors when they applied for registration of a Non-Governmental Organization to the District Administration Office, which then asked for instructions from the Ministry of Home regarding registration of an NGO where the applicants were minors. Referring to Nepal's Association Registration Act of 1978, which stipulates that only citizens were eligible for registering an NGO, the Home Ministry noted that the applicants had not attained the age for obtaining citizenship and that they were not allowed to register an NGO in their names. One of the legal questions raised in this case was whether the denial of registration of a NGO to minor was inconsistent with the UN Convention on the Rights of Child. The Court held that the minors are citizens of Nepal, and Association Registration Act cannot preempt the fundamental rights guaranteed under the Constitution. It further noted that the UN Convention on the Rights of the Child prevailed over conflicting domestic laws. For these reasons, the Court ordered the Ministry to register the proposed application of an NGO.[57]

In the same year, the Supreme Court delivered its judgment in June 2001 on the Right to Clean Drinking Water in light of the WHO Standards. In *Advocate*

55 Asian Yearbook of International Law, Vol. 24 (2018), p. 393.
56 Asian Yearbook of International Law, Vol. 9 (2000), pp. 249–250.
57 Asian Yearbook of International Law, Vol. 10 (2001–2002), pp. 205–207.

Prakash Mani Sharma v. Drinking Water Corporation, the petitioner asked the Court to issue a Writ of Mandamus against the respondent, Nepal Drinking Water Corporation, to provide clean drinking water to the consumers. The petitioner claimed that the standards of drinking water provided by Nepal Drinking Water Corporation was below the standards given by World Health Organization. One of the issues considered by the Court was whether the WHO Standards apply as mandatory rules. The Court did not specifically examine the legal validity of the WHO Rules, but stated that the Drinking Water Corporation was an autonomous body that was not required to receive directions from anyone.[58]

In 2004, the Supreme Court reviewed the applicability of international humanitarian law and scope of the Geneva Convention of 1949 in *Advocate Rajaram Dhakal and Others v. RT. Hon. Prime Minister and Others*, and gave its decision on January 9, 2004. The petitioners asked the Court to issue an order or mandamus and/or a certiorari to give effect to the Geneva Convention, claiming that armed conflict between the Maoist and the State had escalated and resulted in casualties of civilians. Nepal ratified the Geneva Convention, but had done nothing to give effect to the Geneva Convention. Pursuant to Nepal's Treaty Act of 1991, the government was responsible for developing necessary mechanism to effectuate international law. The Court found that the situation raised by the petitioners did not involve a war between High Contracting Parties, which triggers international humanitarian law. However, it ordered the government to undertake its responsibility for enacting necessary legislation to provide sanctions for those who committed grave breaches of the Convention.[59]

In most recent Volume, a number of legislations related to human rights were noted as follows: Privacy Act, 2018, Public Health Service Act, 2018, The Right to Employment Act, 2018, Right to Food and Food Sovereignty Act, 2018, Right to Safe Motherhood and Reproductive Health Act, 2018, Social Security Act, 2018, Act Relating to Children, 2018, Act Relating to Compulsory and Free Education, 2018.[60]

1.10 *Pakistan*

Pakistan's court case was first presented in Vol. 3 with its Karachi High Court's decision on September 9, 1992. In *Messar Najib Zarab limited v. Government of Pakistan through the Secretary, Ministry of Finance Islamabad and 4 Others*, the petitioners placed orders for import of tyres of Indian origin. The consignments

58 Asian Yearbook of International Law, Vol. 10 (2001–2001), p. 207.
59 Asian Yearbook of International Law, Vol. 11 (2003–2004).
60 Asian Yearbook of International Law, Vol. 24 (2018), p. 398.

were imported for use in Afghanistan and were notified as goods in transit. The petitioners claimed that the Customs Authorities at Karachi refused clearance of the said consignments on the basis of a letter received at the Customs House, which was issued to give effect to an earlier letter containing an order to stop smuggling back to Pakistan of tyers going to Afghanistan in transit. The Court allowed the petition, however the government of Pakistan filed petition for appeal before the Supreme Court. The Supreme Court held that the High Court had neither examined the merits of the case in light of the Custom Act nor considered the effect of the Pakistan-Afghanistan Transit Trade Agreement. The order of the High Court was set aside and the case was remanded.[61] The High Court, then examined whether there was any mandate of international law, whether international law was drawn into the domestic law without the aid of a municipal law, and whether so drawn, it overrode municipal law in case of conflict. The Court held that rules of international law were incorporated into national law and considered to be part of the national law unless they are in conflict with an Act of Parliament. It further found that the Courts were under an obligation within the legitimate limits so to interpret the municipal laws as to avoid confrontation with international comity or well-established principles of international law. If conflict is inevitable, the Court noted that the latter must yield.[62]

In Vol. 11, Pakistan's Second Periodic Report to the Committee on the Rights of the Child submitted in April 2003 was covered. The Committee particularly noted the following developments: Pakistan's withdrawal (on 23 July 1997) of the general reservation to the Convention, Pakistan's ratification of the ILO No. 182 on the Worst Forms of Child Labour Convention 2001 (No. 182), the formulation of a revised National Plan of Action and of the Code of Ethics for Media on Reporting of Children's Issues, the adoption in 2002 of the Ordinance for the Prevention and Control of Human Trafficking and the Protection of Breastfeeding and Child Nutrition Ordinance, the Juvenile Justice System Ordinance in 2000, and the 1995 Compulsory Primary Education Act.[63]

1.11 *The Philippines*

A considerable number of court cases were covered in the Philippines' section. The first report on the Philippines' state practice was the Supreme Court's decision on February 26, 1990, which was featured in Vol. 1. In *U.S v. Guinto*, the Supreme Court ruled that the doctrine of state immunity was not absolute

61 Asian Yearbook of International Law, Vol. 3 (1993), pp. 206–208.

62 *Id.* at 206–208.

63 Asian Yearbook of International Law, Vol. 11 (2003–2004), p. 206.

that no plea of immunity could be availed of by U.S. Air Force officers in relation to the bidding of contracts for the operation of barbershops inside the U.S. Armed Forces nor were the facilities demandable as a matter of right by American servicemen.[64]

In this volume, the issue of termination of treaties with the German Democratic Republic (GDR) was also noted due to the German Unification in 1990. The German Democratic Republic proposed the termination of a trade agreement with the Republic of the Philippines in 1977 by invoking Article 62 of the Vienna Convention on the Law of Treaties on fundamental change of circumstances as a ground for treaty termination. The Secretary, in its opinion No. 196, conceded to the application of Article 62 and dissolution of the GDR constituted a fundamental change as contemplated in Article 62.[65]

In 1993, the Supreme Court examined the issue of immunity of international organization in *Southeast Asian Fisheries Development Center-Aquaculture Department* (*SEAFDEC-AQD*) *v. National Labour Relations Commission* (*NLRC*) and rendered its judgment on February 14, 1992. A Research Associate at SEADEC-AQD filed a complaint for non-payment of separation. SEAFDEC-AQE was the Aquaculture Department of an international organization called the Southeast Asian Fisheries Development Centre, which was organized by the governments of Malaysia, Singapore, Thailand, Vietnam, Indonesia and the Philippines in 1967. SEAFDEC argued that the NLRC had no jurisdiction over this case as SEAFDEC was an international organization which was entitled to immunity. While the Labor Arbitration dismissed the claims by SEAFDEC, the Supreme Court reversed the ruling by saying that SEAFDEC enjoys functional independence as an intergovernmental organization, as well as freedom from control of state on whose territory its office is located.[66]

The Supreme Court's decision on March 1, 1993 in *U.S v. Reyes* concerned the issue of state immunity. A suit was instituted against the Activity Exchange manager of the US Navy Exchange at the Joint United States Military Assistance Group (JUSMAG) in Quezon City, Philippines for discriminatory and oppressive acts committed by said manager beyond the scope of her authority. The Supreme court held that an exception to the doctrine of state immunity was applicable to this case and found that immunity cannot be invoked where the public official was sued in private and personal capacity. The Court held that this rule should be extended to the agents and officials of the United States Armed Forces stationed in the Philippines. Accordingly, the Court ruled that

64 Asian Yearbook of International Law, Vol. 1 (1991), p. 168.

65 *Id.*

66 Asian Yearbook of International Law, Vol. 3 (1993), p. 213.

the defendant was not entitled to immunity from civil liability for personal acts beyond the scope of official functions.[67]

Another immunity case was presented in Vol. 8 through the Supreme Court's case decided on September 18, 1996 in *Department of Foreign Affairs v. National Labor Relations Commission*. In this case, the Asian Development Bank (ADB) was sued by an employee for illegal dismissal as well as violation of the labor-only contracting law. The Supreme Court held the ADB was entitled to immunity from legal process under the Agreement Establishing the Asian Development Bank as well as under the Headquarter Agreement with the Government of the Philippines.[68]

In 2000, extradition case was decided by the Supreme Court on October 17, 2000 in *Secretary of Justice v. Hon. Ralph C. Lantion and Mark B. Jimenez*. The Supreme Court overturned its previous ruling and said that Jimenez was not entitled to the due process right to notice and hearing during the evaluation stage of the extradition process. The Supreme Court stated that a "court cannot alter, amend or add to a treaty by the insertion of any clause, small or great, or dispense with any of its conditions and requirements or take away any qualification, or integral part of any stipulation upon motion of equity, or general convenience, or substantial justice." The Court, referred that all treaties should be interpreted in the light of their intent, and examined the preamble of Presidential Decree 1069 to find its intent. Regarding the extradition treaty between the Philippines and the United States, the Court pointed out that such treaty was not a criminal proceeding that guaranteed the so-called Bill of Rights. Therefore, the temporary hold on the respondent's privilege of notice and hearing would not deprive him of fundamental fairness.[69]

The Supreme Court's decision on September 16, 2014 in *Arigo v. Swift, Commander US 7th* Fleet involved the accidental grounding of the US Navy minesweeper on Tubbataha Reef Natural Park and World Heritage Site in the Sulu Sea due to navigational error. This incident resulted in damage to the coral reef in the marine protected area. The petitioners asked for compensatory damages and the Supreme Court dismissed the petition by applying the principle of state immunity. The Court commented on the US commitment to abide by the UN Convention on the Law of the Sea despite its non-ratification status and stated that non-membership of UNCLOS should not mean that the

67 Asian Yearbook of International Law, Vol. 4 (1993), p. 269.
68 Asian Yearbook of International Law, Vol. 8(1998–1999), p. 155.
69 Asian Yearbook of International Law, Vol. 9 (2000), p. 254.

US could disregard the rights of the Philippines over its internal waters and territorial sea.[70]

1.12 *Singapore*

The state practice section for Singapore included a number of cases related to forum non-convenience under private international law as well as judicial decisions related to public international law. The first court case related to public international law was covered in Vol. 2 in *Attorney General v. Elite Wood Products (Australia) Pty Ltd & Anor*, decided by the Court of Appeal on April 30, 1992. A request was made by the Ministry of Foreign Affairs in Australia to take the evidence of certain persons with addresses in Singapore for use in criminal proceedings in New South Wales. Pursuant to a notice issued by the Minister for Law, a district judge was nominated to take the evidence as requested under Article 43 of the Extradition Act. The defendants challenged the authorization of the Minister for Law, and the High Court allowed the application. As the Attorney General appealed, the Court of Appeal examined whether the Minister was authorized under the Extradition Act, and also if the Minister was duly authorized whether he exceeded his power by delegating the exercise of it to the senior district judge. In particular, the first issue involved the question of whether Australia was a foreign state for the purpose of the Extradition Act. The Court held that Australia as a declared Commonwealth country to which the Extradition Act applies, was incapable of being considered as a foreign state for the purpose of the said Act. The Court also pointed out the fact that the Minister for Law declared that Australia is a Commonwealth country for the purpose of the Extradition Act by gazette notification, which clearly indicated that Australia was recognized as a Commonwealth country rather than a foreign state. Therefore, the Court dismissed the appeal.[71]

In Vol. 14, the Singapore Legislature enacted a number of legislations between 2006 and 2007 to give effect to international conventions to which Singapore is a party as follows: Endangered Species (Import and Export) Act 2006 on 1 March 2006 was enacted to give effect to the enforcement obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora; Carriage by Air Act 2007 came into force on November 16, 2007 to give effect to the provisions of the Montreal Convention, 1999. Chemical Weapons (Prohibition) (Amendment) Act 2007 came into operation on December 14, 2007, to amend the existing Chemical Weapons (Prohibition) Act which gave effect to the Convention on the Prohibition of

70 Asian Yearbook of International Law, Vol. 20 (2014), pp. 274–275.
71 Asian Yearbook of International Law, Vol. 2 (1992), pp. 176–177.

the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Geneva Conventions (Amendment) Act 2007 came into operation on 15 January 2008, to amend the existing Geneva Conventions Act to extend legal protection to the emblems of the societies included under the Geneva Convention, such as the Red Crystal and Red Lion. The Suppression of Bombings Act 2007 came into operation on January 30, 2008 to give effect to the International Convention for the Suppression of Terrorist Bombings and for matters connected therewith. Trade Marks (Amendment) Act 2007 came into operation July 2, 2007 to amend the existing Trade Marks Act to facilitate the ratification of the Singapore Treaty on the Law of Trademarks.[72]

In *the Sahand and other applications*, the High Court of Singapore examined the relationship between international law and municipal law. In this case, the defendants were subsidiaries of the Islamic Republic of Iran Shipping Lines and owners of a number of vessels including the Sahand. The Plaintiff, Societe Generale and the Export-Import Bank of Korea, issued a syndicate to the defendants for the construction of the vessels. However, the defendants defaulted and the vessels in Singapore waters were arrested by the plaintiffs in September 2010. The Court considered some key aspects of relationship between international law and domestic law in Singapore. The first aspect is related to the question of whether international law can, by itself, be an independent source of rights and obligations in Singapore. With respect to customary international law, the Court affirmed that it cannot become part of domestic law unless it has been applied or declared to be part of domestic law by a domestic court. However, regarding treaties, the Court noted that treaties have not been subject to judicial consideration in Singapore. So, in order for a treaty to be implemented in Singapore law, its provision must be enacted by the Legislature or by the Executive pursuant to authority delegated by the Legislature.[73]

1.13 *Sri Lanka*

Sri Lanka's state practice related to public international law first appeared in Vol. 5 with introduction of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22, 1994, which gave effect to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment of 1984.[74]

72 Asian Yearbook of International Law, Vol. 14 (2008), pp. 217–218.
73 Asian Yearbook of International Law, Vol. 17 (2011), pp. 266–270.
74 Asian Yearbook of International Law, Vol. 5 (1995), p. 268.

The Supreme Court's decision on June 2, 2000 in *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others*, concerned the issues of international environmental law. The petitioners alleged that the proposed Mineral Investment Agreement, which was to be concluded between the Government of Sri Lanka and a foreign mining company, would result in imminent infringement of their fundamental rights as they were likely to be displaced from their homes and lands. While the main issue of the case was related to the relevant provisions under the Constitution, the potential adverse environmental impacts, argued by the petitioners, provided a strong argument for the petitioners. Therefore, the Court had an occasion to discuss precautionary principle as enunciated in the Rio Declaration and Stockholm Declarations.[75]

The Supreme Court considered the aspects of international human rights in *Nallaratnam Singararsa v. The Attorney General* and rendered a decision on September 15, 2006. The petitioner was a Sri Lankan citizen resident in Batticoloa in the Eastern Province of Sri Lanka. In 1993, while he was sleeping at home, he was arrested by Sri Lankan security forces and brought to the Komanthurai Army Camp assaulted by soldiers. The petitioner made an application to the Supreme Court for the exercise of the Court's inherent power of revision and/or review of a conviction and sentence. He argued that the position of the Sri Lanka government did not accurately represent the State's obligations under the ICCPR which requires the State to provide an effective remedy for violations of rights guaranteed by it. The Court, rather than considering the substantive issues raised by the petitioner, focused on the issue of the ICCPR and its Optional Protocol and their relevance to the Sri Lankan constitutional process. The Court considered whether Sri Lanka adopted a monist or a dualist system. Citing Articles 3 and 4 of the Constitution, the Court found that Sri Lanka followed a dualist legal system. The Court noted that while the President is empowered to conclude treaties, such treaties must be implemented by the exercise of the legislative power of parliament in order to have internal effect and attribute rights and duties to individuals.[76]

Some important legislations were noted in Vol. 9 and Vol. 21. In 2000, following legislations were passed: Suppression of Terrorist Bombings Act No. 11 of 1999, Mutual Assistance in Civil and Commercial Matters Act No. 39 of 2000, Prevention of Hostage Taking Act No. 41 of 2000, Suppression of Unlawful Acts Against the Safety of Maritime Navigation Act No. 42 of 2000.[77]

75 Asian Yearbook of International Law, Vol. 9 (2000), pp. 270–272.
76 Asian Yearbook of International Law, Vol. 13 (2007), p. 239.
77 Asian Yearbook of International Law, Vol. 9 (2000), p. 274.

On May 15, 2015, the 19th Amendment to the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka was adopted. By virtue of Article 14A(1) of the Amendment, right of access to information was incorporated into the Fundamental Rights Chapter of the Constitution.[78]

1.14 *Tajikistan*

Tajikistan's section on state practice first appeared in Vol. 10 with its Constitutional Court's case decided on June 12, 2001, which dealt with the issue of incorporation of certain provisions from the Criminal Procedure Code.[79]

In 2001, in order to implement the obligations stipulated in the Geneva Conventions on the Protection of the Victims of War of August 12, 1949 and Additional Protocols, and the Rules of using the emblems of Red Cross or Red Crescent, Tajikistan enacted the Law on the Usage and Protection of the Red Cross and Red Crescent Emblems and Appellations on May 12, 2001. This Law provided the same definition of an armed conflict, medical personnel, sanitary and transport means and emblem as provided in the Geneva Conventions and Additional Protocols.[80]

In order to implement the Convention on the Elimination of All Forms of Discrimination against Women, Tajikistan enacted the Law on State Guarantees of Equal Rights for Men and Women and Equal Opportunities in the Exercise of Such Rights on March 1, 2005.[81]

In 2006, the Law on Protection of the Objects of Historical and Cultural Heritage was enacted. This legislation was the first normative framework of its kind adopted after independence of the Tajik State in 1991.[82]

Also, as part of the implementation of the Convention on the Status of Refugees of 1951, Tajikistan adopted the Law on the Status of Refugees, repealing the previous law on refugees in 1994. This law provided the definition of a refugee which is essentially the same with the definition provided in the 1951 Refugee Convention except for some technical differences.[83]

In Vol. 11, the Supreme Court's decision made on October 2, 2003 was presented. This case involved the question of implementation of the law of terrorism by the judiciary. The Court noted that terrorism differed from other crimes that are similar in their objective characteristics. However, it held that the courts should consider that criminal cases of terrorist character as well as

78 Asian Yearbook of International Law, Vol. 21 (2015), p. 315.
79 Asian Yearbook of International Law, Vol. 10 (2001–2002), p. 240.
80 Asian Yearbook of International Law, Vol. 10 (2001–2002), p. 243.
81 Asian Yearbook of International Law, Vol. 12 (2005–2006), p. 219.
82 Asian Yearbook of International Law, Vol. 13 (2007), p. 248.
83 Asian Yearbook of International Law, Vol. 10 (2001–2002), p. 246.

civil cases concerning reparations for damages caused as a result of terrorist activity may be heard.[84]

1.15 *Thailand*

Thailand's state practice section included a series of note and announcement related to maritime zones by the Thailand government in the 1990s. In November 1992, a note was made from the government of Thailand in response to Malaysia's announcement of missile firing exercises in maritime area that intruded into Thailand's maritime zones. The Malaysian authorities expressed its apology as they made an error about the geographical coordinates of the area.[85] The Office of the Prime Minister made an announcement on August 17, 1992 and February 18, 1993 concerning the straight baselines and internal waters of Thailand of June 11, 1970, and 3 areas and published such announcement in the Official Gazette.[86] On August 14, 1995, Royal Proclamation establishing the Contiguous Zone was also made.[87]

Regarding judicial decisions, the Court of Appeal's decision on December 26, 1995 dealt with extradition case. In *the Public Prosecutor v. Thanong Siriprechapond,* the United States had requested the extradition of Mr. Thanong Siriprechapong, who was a former member of Parliament for the offence of narcotic drugs trafficking involving the importation into the US of multiple container loads of marijuana between 1977–1987. The Criminal Court held against the defendant on July 17, 1995 and ordered his detention pending the extradition pursuant to the Thai-US Extradition Treaty of 1983 and Thailand's Extradition Act of 1990 for the implementation of the Extradition Treaty. The defendant appealed to the Court of Appeal. The Court of Appeal found that the purpose of Thai-US Extradition treaty was to promote more effective and mutual cooperation between the two countries in the suppression of a crime. Therefore, the Court of Appeal held that good faith was a significant factor in treaty relations especially with the increase of inter-state interaction and dismissed the appeal.[88]

In Vol. 11, another extradition case was reviewed by the Court of Appeal on September 30, 2003. In *the Public Prosecutor v. Sok Youen a.k.a. Sok Yuen*, the defendant appealed to the Court of Appeal, contending that his alleged crime of attempted murder was of a political nature and that his extradition request

84 Asian Yearbook of International Law, Vol. 11 (2003–2004), pp. 226–228.
85 Asian Yearbook of International Law, Vol. 3 (1993), p. 217.
86 Asian Yearbook of International Law, Vol. 4 (1994), p. 300.
87 Asian Yearbook of International Law, Vol. 6 (1996), p. 228.
88 Asian Yearbook of International Law, Vol. 6 (1996), pp. 228–232.

was sought in order to punish him for his membership of an opposition political party in Cambodia. The Court found that even if the attempted murder of Mr. Hun Sen had been successful, that would have led to a change of the person in charge of the government, yet not of the political regime as a whole. Therefore, the Court ruled that the defendant's offence was not political in nature, rather, it was a criminal offence with the ultimate aim to cause social disturbance in the country or an act of terrorism. While the defendant also claimed to be a refugee in accordance with the 1951 UN Convention relating to the Status of Refugees, the Court of Appeal rejected the defendant's contention as the defendant acknowledged that Thailand was not a party to the 1951 UN Convention. The Court of Appeal dismissed the appeal.[89]

Some notable legislations were introduced in Vol. 21 as follows: On 19 February 2015, the National Legislative Assembly of Thailand enacted the Protection for Children Born through Assisted Reproductive Technologies (ART), which significantly protected children born through ART and set the legal procedures that spouses must follow in order to have such children. The purposes of the Act were, inter alia, to specify the parent's legal status, to control boundaries on the proper use of enhanced technology, and to prohibit surrogacy involving a business or profit-making enterprise.[90]

On 14 May 2015, the National Legislative Assembly of Thailand voted unanimously to amend the Penal Code of Thailand to criminalize child pornography. On September 8, 2015, the Amendments to the Penal Code Act were published in the Royal Thai Government Gazette and came into effect 90 days after its publication on December 7, 2015. The Amendments defined the term 'child pornography' to meet the definition in international agreement and criminalize the acts concerning child pornography.[91]

1.16 *Vietnam*

Vietnam's state practice section first appeared In Vol. 5 by presenting declaration made upon ratification of the United Convention on the Law of the Sea. By this declaration, the National Assembly reaffirmed the sovereignty of Vietnam over its internal waters and territorial sea, the sovereign rights and jurisdiction in the contiguous zone, the exclusive economic zone and the continental shelf of Vietnam based on provisions of UNCLOS as well as principles of international law.[92]

89 Asian Yearbook of International Law, Vol. 11 (2003–2004), pp. 238–239.

90 Asian Yearbook of International Law, Vol. 21 (2015), pp. 321.

91 *Id.* at 322–323.

92 Asian Yearbook of International Law, Vol. 5 (1995), p. 272.

Along with this declaration, Vietnam's Law of the Sea entered into force on January 1, 2013. This Law was the country's most important and comprehensive legislation on the law of the sea.[93] Other than the maritime-related legislation, in 2013, new Constitution was adopted on November 28, 2013. This new Constitution was the Vietnam's first constitution that referred to the Charter of the United Nations and embraced the *pacta sunt servanda* principle.[94]

In 2016, the Law on International Treaties was adopted and entered into force on July 1, 2016, replacing the Law on Signing, Accession, and Implementation of International Treaties of 2005. One of the significant revisions made in the new Law on International Treaties was the specification of the relationship between international treaties, the Constitution of Vietnam and other legal instruments. According to this law, the Vietnamese laws and regulations must comply with the treaties to which Vietnam is a contracting party. However, it is stipulated that the conclusion of international treaties must not be contrary to the Constitution. Therefore, according to the new Law of 2016, if there is any conflict between any legal document and a treaty to which Vietnam is a contracting party, except for Constitution, international treaty must prevail. The new Law also set the hierarchy of sources of laws as follows: (i) the Constitution, (ii) international treaties, and (iii) other legal instruments.[95]

2 Conclusion

The last 24 volumes of the Asian Yearbook of International Law over three decades covered various sources of state practices from countries in Northeast Asia, South & Central Asia and Southeast Asia in the State Practice section. The extensive coverage of state actions and relevant documents showed a high level of Asian Countries' engagement and commitment in the international community mostly through their legislative measures to implement international treaties to which they signed or acceded. While the issues examined in judicial decisions were wide-ranging, most frequently featured court cases in the field of public international law dealt with the issues related to sovereign immunity, extradition, interpretation of international human rights law and international humanitarian law. Aside from judicial decisions related to international law, a number of cases involving interpretation of domestic laws, especially the constitutions of various Asian states provided very useful

93 Asian Yearbook of International Law, Vol. 23 (2017), p. 348.
94 Asian Yearbook of International Law, Vol. 19 (2013), p. 378.
95 *Id.*

information to understand the legal development of each country. Some notable points can be made as follows:

First, since a considerable number of Asian countries featured in the Asian Yearbook of International Law were costal states, they have taken a keen interest in their maritime jurisdiction upon the adoption of the UN Convention on the Law of the Sea. Those costal states often enacted the corresponding domestic law of the sea or officially proclaimed by government's statement regarding their maritime jurisdiction with respect to internal waters, contiguous zone, and Exclusive Economic Zone.

Second, it was found that a number of domestic judicial decision involved the interpretation of international human rights treaties such as the ICCPR, Convention on the Rights of Child, Convention on the Elimination of All Forms of Discrimination Against Women, which in turn, showed the Asian countries' willingness to abide by international norms on human rights.

Third, although it was pointed out that there were relatively few cases decided by international courts or tribunals among Asian countries, it should not necessarily mean that they played a passive role in terms of dispute settlement. Rather, Asian countries opted to use diplomatic means or establish cooperation mechanism to resolve contentious issues with other countries.

The reports on state practice by 16 Asian countries for the past 30 years have proven to be an invaluable asset and will indisputably continue to shed light on the development of international law in Asia.

Articles

∵

The Asian Contribution to the Development of International Law: Focusing on the ReCAAP

*Makoto Seta**

1 Introduction: Development of International Law in Asia

Although international law is universally applied, it has been criticised on account that it was established by Western States based on Western values.[1] Aside from the validity of such criticism, it is undeniable that most rules of international law originate from European values and experiences. A testament to this is the fact that most provisions in the International Covenant on Civil and Political Rights, a universal human rights treaty, are similar to those of the European Convention on Human Rights and Fundamental Freedoms, which was adopted in Europe almost fifteen years before the universal treaty.[2] Furthermore, international criminal law, particularly the crime of genocide, was developed from the European experience of the Holocaust.[3]

Meanwhile, compared to Europe, other regions have only provided a limited contribution to the development of international law. In particular, in the case of Asia, there seem to be two grounds on which such insufficient contribution originates. First, since it is challenging to define Asia and determine which states belong to it,[4] the Asian region seems to entail both vagueness and variety. Therefore, it is difficult to perceive Asian regional contributions, aside from contributions by some Asian States or experts. Second, as sovereignty plays a more critical role in Asian States,[5] the rules of international law that by

* Yokohama City University.

1 *E.g.*, Mohammed Bedjaoui, Towards a New International Economic Order 141 (1979).

2 *See, e.g.*, Ed Bates, The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights 39 (2010).

3 William A. Schabas, Genocide in International Law: The Crime of Crimes 17–52 (2d ed. 2009).

4 Asian Development Bank, Emerging Asian Regionalism: A Partnership for Shared Prosperity 24 (2008), https://www.adb.org/sites/default/files/publication/159353/adbi-emerging-asian-regionalism.pdf (noting that "Asia's geographical boundaries are not generally agreed").

5 Motoo Noguchi, *Criminal Justice in Asia and Japan and the International Criminal Court*, 6 International Criminal Law Review 585, 589–90 (2006).

nature enshrine States' sovereignty cannot be introduced and employed in the same manner as in the European region.

Given this reality, it is startling that a treaty established in the Asian region could significantly influence the development of international law, as in the case of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). Taking this context into account, this article examines the contribution of the ReCAAP in the development of international law. For this purpose, section 2 outlines the background of the establishment of ReCAAP. Following this, section 3 analyses the framework of ReCAAP, with a focus on the crime that is targeted in the agreement, as well as the system and function of the Information Sharing Centre (ISC). Finally, section 4 studies the impacts of ReCAAP and concludes the article.

2 Background of the Establishment of ReCAAP

2.1 *The Situation of the Malacca/Singapore Straits*

Geopolitically, the Malacca and Singapore Straits primarily fall under three different territorial and maritime jurisdictions, namely Indonesia, Malaysia, and Singapore.[6] Historically, the straits were important for both regional and global maritime trading networks because the straits link ports in Europe, eastern Africa, and the Arabian Peninsula, with key trade centres in the States of Southeast Asia and East Asia.[7] According to Freeman, the straits began to be used for international trade two millennia ago, when Rome replaced Greece.[8] Since then, the straits have been crucial for not only local Asian people but also European people, especially the Dutch and British East India Companies.[9]

As maritime transportation became increasingly important, so too did the Malacca and Singapore Straits. Currently, the straits are crucial for oil shipping to China and Indonesia, two of the world's fastest-growing economies.[10]

---

6 Felipe Umaña, Threat Convergence: Transnational Security Threats in the Straits of Malacca 4 (2012) (suggesting that Thailand can be a coastal State for the Malacca Strait, if the Strait is broadly defined). *See generally* Tara Davenport, *Southeast Asian Approaches to Maritime Boundaries*, 4 Asian Journal of International Law 309, 320–21 (2014) (discussing disputes on maritime delimitation).

7 Peter Borschberg, The Singapore and Melaka Straits: Violence, Security and Diplomacy in the 17th Century 1 (2010).

8 Donald B. Freeman, The Straits of Malacca: Gateway or Gauntlet? 69 (2003).

9 Nordin Hussin, Trade and Society in the Straits of Melaka: Dutch Melaka and English Penang, 1780–1830, at xx–xxi (2007).

10 U.S. Energy Information Administration, World Oil Transit Chokepoints 6 (2017), https://www.eia.gov/beta/international/analysis_includes/special_topics/

Furthermore, the Straits have become fundamental for Japan,[11] as almost 80 percent of Japan's oil import trade from the Middle East travels through the Straits of Malacca.[12]

Nevertheless, the straits are widely perceived as being unsafe. In particular, following the 1997 Asian financial crisis, the number of pirates and armed robberies against ships increased, as attested to in the chart shown below. This may be because of the overthrow of Indonesia's Suharto regime, which caused rampant unemployment, political instability, and tighter fiscal policy. As a result, poverty prevailed throughout Southeast Asia, and therefore, people in coastal regions were motivated to become pirates for survival.[13] In addition to this, over-fishing and pollution could have also motivated suffering fishermen to become pirates.[14] It is worth noting here that 66 percent of the reported piracy and armed robbery against ships on the global scale occurred in Southeast Asia between 1991 and 2002.[15]

There are three possible reasons for such a large number of incidents. First, the Malacca and Singapore Straits are the primary chokepoint, with an estimated 16.0 million barrels flow per day in 2016.[16] Therefore, it is relatively easy for criminal groups to attack oil tankers or other cargo vessels navigating through the straits. Second, criminal groups often coordinate their attacks across international borders so that the authority of each coastal State cannot effectively police their waters.[17] For similar reasons, the undelimited area in the region can also be targeted by such groups. Third, the navy and coast guards of coastal States do not have the capacity to guard such vast maritime

---

World_Oil_Transit_Chokepoints/wotc.pdf.

11 Freeman, *supra* note 8, at 111–22 (describing the importance of the Malacca and Singapore Strait to Japan).

12 Siti Zubaidah Ismail & Mohd Azizuddin Mohd Sani, *The Straits of Malacca: Regional Powers Vis-à-vis Littoral States in Strategic and Security Issues and Interests*, *in* Proceedings of the Seminar on National Resilience: Political Management and Policies in Malaysia Held on 13–15 July 2010 in Langkawi 83, 90 (2010), http://repo.uum.edu.my/3169/1/S5.pdf.

13 S. Whitman & C. Suarez, Dalhousie Marine Piracy Project: The Root Causes and True Costs of Marine Piracy (Marine Affairs Program Technical Report #1) 12–13 (2012), https://cdn.dal.ca/content/dam/dalhousie/pdf/faculty/science/marine-affairs-program/Technical_series/MAP%20Technical%20Report%20%231.pdf.

14 Joyce Dela Pena, *Maritime Crime in the Strait of Malacca: Balancing Regional and Extra-Regional Concerns*, 10 Stanford Journal of International Relations 1, 3 (2009).

15 *Id.*

16 U.S. Energy Information Administration, *supra* note 10, at 6.

17 Whitman & Suarez, *supra* note 13, at 13.

TABLE 1 Number of piracy and armed robbery incidents against ships in the Malacca and Singapore Straits, as well as their surrounding territorial waters, between 1993 and 2006 (made by the author on the basis of ICC-IMB Piracy and Armed Robbery against Ships Annual Report 2004 and 2009)

Year	1993	1994	1995	1996	1997	1998	1999
Indonesia	10	22	33	57	47	60	115
Malacca Straits	5	3	2	3		1	2
Malaysia		4	5	5	4	10	18
Singapore Straits		3	2	2	5	1	14
Year	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Indonesia	119	91	103	121	93	79	50
Malacca Straits	75	17	16	28	37	12	11
Malaysia	21	19	14	5	9	3	10
Singapore Straits	5	7	5	2	6	7	5

areas. Corruption, which is serious in the region, could further exacerbate their performance.[18]

2.2 *The Drafting Process of ReCAAP*

As shown above, while the Malacca and Singapore Straits are important for Japan, they became more unsafe after the Asian financial crisis in 1997. As some Japanese-related vessels, including the MV Tenyu and MV Alondra Rainbow, were attacked in 1998 and 1999, respectively,[19] it was essential for Japan to make the strait safer. However, as the strait is part of the coastal States, it was difficult for Japan to improve the situation alone. Therefore, Japan tried to establish a framework of cooperation in order to tackle piracy problems.

For this purpose, Japanese Prime Minister Obuchi proposed the establishment of a system for joint patrol and information exchange among coast guards at the 1999 ASEAN+1 summit.[20] In 2000, the Japanese Government hosted the

18 Łukasz Stach, *Neverending Story? Problem of Maritime Piracy in Southeast Asia*, 7 International Journal of Social Science & Humanity 723, 724–25 (2017).

19 Lindsay Black, Japan's Maritime Security Strategy: The Japan Coast Guard and Maritime Outlaws 117–19 (2014).

20 *Present State of the Piracy Problem and Japan's Efforts*, Ministry Foreign Aff. Japan (Dec. 2001), https://www.mofa.go.jp/policy/piracy/problem0112.html.

"Regional Conference on Combating Piracy and Armed Robbery against Ships", which adopted the following three documents: (1) Asia Anti-Piracy Challenges 2000, (2) Model Action Plan, and (3) Tokyo Appeal.[21] The following year, at the 2001 ASEAN + 3 summit in Brunei, Prime Minister Koizumi proposed establishing a working group of governmental experts to consider the formulation of a regional cooperation agreement related to antipiracy measures.[22]

Based on this proposal, from 2002, the ASEAN Member States, Bangladesh, China, India, Japan, Republic of Korea, and Sri Lanka, initiated negotiations to formulate an Agreement. After much negotiation, the agreement was eventually concluded on 11 November 2004. Then, on 4 September 2006, with the ratification of India as the tenth Contracting Party, the ReCAAP entered into force (including the following 14 States: Bangladesh, Brunei, Cambodia, China, India, Japan, South Korea, Laos, Myanmar, Philippines, Singapore, Sri Lanka, Thailand, and Vietnam) and the ReCAAP's ISC was established.[23]

Although the ReCAAP entered into force as a result of its acceptance by States that were required according to Article 18(3), other important States (namely, the coastal States of the Malacca and Singapore Straits, Indonesia, and Malaysia) had not ratified the agreement. There seem to be three possible reasons for this. First, two States were concerned that the acceptance of the United States (US) or other external States' cooperation would infringe upon their sovereignty. In particular, there was a worry that the presence of US marines in the Malacca Straits would encourage terrorism.[24] Second, they were not satisfied with the agreement, especially on account of Singapore being the

21 *Japan's Efforts to Combat Piracy and Armed Robbery Against Ships*, MINISTRY FOREIGN AFF. JAPAN (Nov. 2001), https://www.mofa.go.jp/region/asia-paci/asean/relation/piracy.html; *but see* Ismail & Sani, *supra* note 12, at 94–95. Although Japan led the discussion to conclude the ReCAAP, it is pointed out that Japan has basically focused on civilian cooperation and refrained from directly utilizing its maritime self-defense forces in the region. This is because Japanese military forces in this area is a sensitive issue, as Japan occupied this region during World War II.

22 *Present State of the Piracy Problem and Japan's Efforts*, *supra* note 20.

23 ReCAAP ISC, COMMEMORATING A DECADE OF REGIONAL COOPERATION 2006–2016, at 33 (2016), http://www.recaap.org/resources/ck/files/corporate-collaterals/10%20ann%20comm%20book.pdf.

24 Carrie R. Woolley, *Piracy and Sovereign Rights: Addressing Piracy in the Straits of Malacca Without Degrading the Sovereign Rights of Indonesia and Malaysia*, 8 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 447, 449 (2010); *see also* Lindsay Black, *Navigating the Boundaries of the Interstate Society: Japan's Response to Piracy in Southeast Asia*, *in* DECODING BOUNDARIES IN CONTEMPORARY JAPAN: THE KOIZUMI ADMINISTRATION AND BEYOND 79, 84–85 (Glenn D. Hook ed., 2011).

depositary of the ReCAAP and host of the ISC.[25] It is said that Malaysia considers the ReCAAP an unnecessary competitor of the International Maritime Bureau's (IMB) Piracy Reporting Centre that is located in Kuala Lumpur.[26] Third, they may have been concerned that the ReCAAP ISC would publish reports that were unfairly critical of them, as the IMB Piracy Report Centre had done, according to Indonesia.[27]

3 The ReCAAP Framework

While the United Nations Convention on the Law of the Sea (UNCLOS) is regarded as a constitution for the Ocean,[28] it also allows State parties to make a specific agreement, unless it is compatible with UNCLOS (Article 311). Although the ReCAAP seems highly relevant to the UNCLOS, it does not contradict it. Article 2 of the ReCAAP manifestly provides that "(n)othing in this Agreement shall affect the rights and obligations of any Contracting Party under the international agreements to which that Contracting Party is party, including the UNCLOS, and the relevant rules of international law".

3.1 *Targeted Crimes*

Given the aforementioned fact, it is quite understandable that the ReCAAP defined piracy similarly to UNCLOS. The definition of piracy in Article 1(1) of the ReCAAP is as follows:

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
    (i) on the high seas, against another ship, or against persons or property on board such ship or
    (ii) against a ship, persons or property in a place outside the jurisdiction of any State.

25 *See* Noraini Zulkifli, Sharifah Munirah Alatas & Zarina Othman, *The Importance of the Malacca Straits to Japan: Cooperation and Contributions Toward Littoral States*, 41 Malaysian Journal of History, Politics & Strategic Studies 80, 94 (2014).

26 Sam Bateman, *Regime Building in the Malacca and Singapore Straits: Two Steps Forward, One Step Back*, 4 The Economics of Peace & Security Journal 45, 48 (2009).

27 John F. Bradford, *The Growing Prospects for Maritime Security Cooperation in Southeast Asia*, 58 Naval War College Review 63, 69 (2005).

28 Elisabeth Mann Borgese, *A Constitution for the Oceans*, *in* The Tides of Change: Peace, Pollution, and Potential of the Oceans 340, 340 (Elisabeth Mann Borgese & David Krieger eds., 1975).

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The sole difference from UNCLOS is the targeting of piracy as stated in (a)(i). While piracy under UNCLOS includes violence against aircraft, piracy under the ReCAAP does not. Given that the aircraft has never been a target of pirates since the adoption of UNCLOS,[29] and the agreement was adopted to secure a sea lane, it is reasonable to focus on maritime piracy and not air piracy.

One of the most distinguished achievements of the ReCAAP is the introduction of "armed robbery against ships" into treaty law. As its definition reveals, piracy can occur only on the high seas; therefore, it is said that international law, which is reflected in provisions of UNCLOS, cannot appropriately react to maritime violence, as they often occur within the territorial waters of vulnerable States.[30] Diaz and Dubner argue that "the expanded definitions of piracy and armed robbery are necessary in order to cover acts occurring while ships are berthed or anchored within the 'territorial' waters of a state rather than on the 'high seas'".[31]

In fact, even before the ReCAAP was adopted, both International Maritime Organization (IMO) and IMB used the expression of "armed robbery against ships in non-legal documents". This expression publicly began to be used in *the Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships* in 2000 at the IMO.[32] Then, IMB incorporated the definition into the practice of the Piracy Reporting Centre.[33] This Centre collects information from shipping and insurance companies, and broadcasts it to

29 EDWARD MCWHINNEY, AERIAL PIRACY AND INTERNATIONAL TERRORISM: THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW 5–6, n.1 (2d ed. 1987) (indicating the difficulty of applying Article 15 of the 1958 High Seas Convention, which defines piracy in the same way as UNCLOS, to aerial piracy).

30 Rosemary Collins & Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40 JOURNAL OF MARITIME LAW & COMMERCE 89, 97–98 (2009).

31 Leticia M. Diaz & Barry Hart Dubner, *An Examination of the Evolution of Crime at Sea and the Emergence of the Many Legal Regimes in Their Wake*, 34 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW & COMMERCIAL REGULATION 521, 535 (2009).

32 Int'l Maritime Org. [IMO], MSC/Circ.984, *Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships* (Dec. 20, 2000), http://docs.yasinskiy.net/books/imo-msc-circ/984.pdf.

33 Robert C. Beckman, *Combatting Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEVELOPMENT & INTERNATIONAL LAW 317, 320 (2002).

ships every day.[34] Although these IMB activities contribute to the global diffusion of the concept of "armed robbery against ships", such activities do not have much implication from the point of view of international law. This is because IMB is a non-governmental organisation (NGO)[35] and cannot directly affect the will of States which are still crucial for making international legal rules.[36] On this point, the official adoption of *the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships* (Code of Practice) at the IMO, an intergovernmental organisation, is a milestone,[37] because its Paragraph 2.2 provides a definition of "arms robbery against ships".

That being said, the Code of Practice is just a non legally binding instrument. Then, as a legally binding instrument, the ReCAAP first defined "armed robbery against ships". Article 1(2) of the ReCAAP describes this crime in the following manner:[38]

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party's jurisdiction over such offences;
(b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

In terms of elements of a crime, the only factor that distinguishes this from piracy is the place where the crime occurs. Since the geographical scope is described as "in a place within a Contracting Party's jurisdiction over such offences", it may be a little confusing. One possible interpretation would be to include violence which occurs in Exclusive Economic Zones (EEZ) within

34 *IMB Piracy Reporting Centre*, ICC COM. CRIME SERVS., https://www.icc-ccs.org/piracy-reporting-centre (last visited Apr. 17, 2021).

35 *International Maritime Bureau*, ICC COM. CRIME SERVS., https://www.icc-ccs.org/icc/imb (last visited Apr. 17, 2021).

36 *UNITED NATIONS*, DRAFT CONCLUSIONS ON IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW, WITH COMMENTARIES 130–132 (2018), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

37 Int'l Maritime Org. [IMO], A. 922 (22), *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships* (Jan. 22, 2002), http://www.fortunes-de-mer.com/mer/images/documents%20pdf/legislation/Internationale/Piraterie/OMI/Resolution_A922_(22)_2001_RU.pdf.

38 Zhen Sun, *Tenth Anniversary of the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery Against Ships in Asia*, 1 ASIA-PACIFIC JOURNAL OF OCEAN LAW & POLICY 276, 276 (2016); Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia art. 1(2), Nov. 11, 2004, 2398 U.N.T.S. 199.

this definition, because coastal States have jurisdiction over the maritime area. However, it should be noted that parties must have jurisdiction over such offences, namely acts of violence. Within EEZ, coastal States only have jurisdiction over artificial islands, marine scientific research, and the protection and preservation of the marine environment, which are not directly related to acts of violence. Moreover, as shown above, the ReCAAP was not drafted to give effect to the right and obligation under the UNCLOS. Therefore, this provision should not be interpreted to justify the creeping jurisdiction of coastal States. If we were to interpret, "in a place within a Contracting Party's jurisdiction over such offences" should mean internal, territorial, and possibly archipelagic waters.[39] This articulation is possibly introduced because the geographical scope of piracy is described as "a place outside the jurisdiction of any State" as well as high seas. Therefore, the current expression was introduced so that no gap between the two crimes is generated.[40]

3.2 *Information Sharing Centre (ISC)*

The ReCAAP established the ISC "to promote close cooperation among the Contracting Parties in preventing and suppressing piracy and armed robbery against ships (Article 4(1))". Part II of the ReCAAP is named the "Information Sharing Centre" and consists of five Articles, and Part III is titled "Cooperation through the Information Sharing Centre" and consists of three Articles. Given that the ReCAAP only has 22 Articles, ISC-related Articles make up one-third of the total volume. The ReCAAP's ISC is composed of the Governing Council, which consists of representatives from each Contracting Party, and the Secretariat, which is headed by the Executive Director (as stated in Article 4).

---

39 Actually, even non-flag States can exercise jurisdiction over piracy, which occurs beyond their territorial water, as shown above. Therefore, if coastal States have jurisdiction over the crime provided in Article 1(2) of the ReCAAP within their EEZ, it does not necessarily lead to creeping jurisdiction. However, States exercise such jurisdiction based on the universality principle and not as an EEZ coastal State. Therefore, in any event, "a place within a Contracting Party's jurisdiction over such offences" should not be interpreted to encompass the EEZ.

40 *See* Robert Beckman & Monique Page, *Piracy and Armed Robbery Against Ships*, *in* THE HANDBOOK OF SECURITY 234, 239 (Martin Gill ed., 2d ed. 2014) (indicating that the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) can be a useful tool for combating both piracy and armed robbery against ships); *see also* Makoto Seta, *A Murder at Sea Isn't Just a Murder: The Expanding Scope of Universal Jurisdiction Under the SUA Convention*, *in* MARITIME AREAS: CONTROL AND PREVENTION OF ILLEGAL TRAFFICS AT SEA 115, 119–23 (Patrick Chaumette ed., 2016) (discussing crimes under the SUA Convention).

The ISC is comprised of four departments: operations, research, programs, and administration.[41]

The following three pillars align the roles and activities of the ReCAAP's ISC: (1) Information Sharing, (2) Capacity Building, and (3) Cooperative Arrangements. The most important pillar is information sharing, as the name of ISC demonstrates. In order to facilitate information sharing, Contracting Parties are required to designate an internal agency, such as the coast guards or port authority, as a focal point that deals with armed robbery against ships within its jurisdiction, as well as information sharing with neighbouring focal points and the ReCAAP's ISC, where necessary (Article 9).[42] In addition to making communication more smooth, the ReCAAP's ISC established its own methodology for classifying incidents. According to this classification, the significance of each incident is determined by considering the following factors: (1) the level of violence and (2) economic loss.[43] Furthermore, in order to promote information sharing, the ReCAAP's ISC issues the following three publications: (1) Special Reports, which focus on specific topics or incidents; (2) Weekly Updates, which include the details of incidents reported by ReCAAP Focal Points; and (3) Periodical Reports (on a monthly basis), which keep stakeholders informed about the trends and developments in piracy and armed robbery against ships in Asia. Thanks to the establishment of this methodology, information sharing among Contracting Parties has been more timely and accurate.[44]

"Capacity building plays a complementary role to the information sharing pillar."[45] Capacity building programs provided by the ReCAAP's ISC are of various types. Some programs, such as the Focal Point Senior Officers' Meeting, focus on the effective and efficient operation of information exchanges and suppression of criminals under the ReCAAP.[46] Other programs, such as the Capacity Building Executive Program, facilitate international cooperation to

41 Sheldon W. Simon, *Safety and Security in the Malacca Straits: The Limits of Collaboration*, 7 Asian Security 27, 37 (2011).

42 Joshua Ho, *Combating Piracy and Armed Robbery in Asia: The ReCAAP Information Sharing Centre (ISC)*, 33 Marine Policy 432, 433 (2009).

43 ReCAAP ISC, Annual Report 2018: Piracy and Armed Robbery Against Ships in Asia 69–70 (2018), https://www.recaap.org/resources/ck/files/reports/annual/ReCAAP%20ISC%20Annual%20Report%202018.pdf.

44 ReCAAP ISC, Executive Director's Report 2018, at 12–13 (2018), https://www.recaap.org/resources/ck/files/corporate-collaterals/ED's_Report_2018_Hi-Res_FINAL.pdf.

45 *Id.* at 16.

46 *ReCAAP ISC Focal Point Senior Officers' Meeting 2018 in Seoul, South Korea,* ReCAAP (Nov. 13, 2018), http://www.recaap.org/event/FPSOM_2018_in_Seoul_South_Korea/.

fight against piracy and armed robbery against ships in a way that is broad enough to include non-member States, such as Indonesia and Malaysia.[47]

The ReCAAP's ISC has also engaged in Cooperative Arrangements. Since the ISC began to publish Executive Directors Reports in 2013, it has communicated with Indonesia and Malaysia at least every year. Although they are non-member States, the ReCAAP's ISC recognises them as essential strategic partners in the region.[48] Moreover, the ReCAAP's ISC has signed a Memorandum of Understanding (MOU) for cooperation with some international organisations, such as the IMO and International Criminal Police Organization (INTERPOL). In addition to this, it also concluded similar agreements with private shipping associations, such as the Baltic and International Maritime Council (BIMCO), Asian Shipowners' Association (ASA), and the International Association of Independent Tanker Owners (INTERTANKO).[49] Furthermore, the ISC occasionally organises forums, such as the Nautical Forum and the ReCAAP ISC Piracy and Sea Robbery Conference, to bring diverse stakeholders together and foster collaboration and dialogue among them.[50]

4 Impacts of ReCAAP

As fifteen years have passed since the ReCAAP entered into force, it now seems timely to review its achievement and challenges.[51] When evaluating the ReCAAP, it is important to analyse it in terms of its intended purpose, that is, how it works to deter piracy and armed robbery against ships in the Asian Region. Additionally, this section aims to clarify how the ReCAAP has affected other regions.

47 *Implementation of the 2nd Capacity Building Executive Programme on Combating Piracy and Armed Robbery Against Ships in Asia,* MINISTRY FOREIGN AFF. JAPAN (June 1, 2018), https://www.mofa.go.jp/fp/msp/page23e_000522.html.

48 RECAAP ISC, *supra* note 23, at 71.

49 *Id.* at 67.

50 *Strategic Focus: Cooperative Arrangements*, RECAAP, http://www.recaap.org/recaap-isc_strategic_focus (last visited Apr. 18, 2021).

51 *See* RECAAP, https://www.recaap.org/recaap15 (last visited Apr. 18, 2021) (stating that the ISC held the 15th Anniversary Symposium named "Enhancing Regional Cooperation: 15 years and beyond" on 18 March 2021).

4.1 *Safe Navigation in the Region?*

Even after the ReCAAP was adopted, piracy and armed robbery against ships continue to occur in the Asian region. The number of incidents after 2006 is plotted in the table below.

Since its adoption, there were fewer incidents of piracy and armed robbery in the first half of the 2000s, but from 2010, the number increased once again. Considering this figure, it is difficult to conclude that the ReCAAP has been effective in its aim of decreasing the number of piracy and armed robbery incidents against ships.[52] However, it can be said that the number has been fluctuating at a lower level compared with what it used to be.

The effectiveness of the ReCAAP's ISC can be confirmed by several incidents, including Hai Soon 12, an Oil Products Tanker under the flag of Cook Islands. On 7 May 2016, Hai Soon 12, carrying 4,000 metric tons of Marine Gas Oil, departed from Singapore through the Southern Ocean. The next day, the ReCAAP's ISC received information that the shipping company had not been able to make contact with Hai Soon 12. Upon receiving this information, the ReCAAP's ISC immediately informed the Indonesian Maritime Security

TABLE 2 The number of piracy and armed robbery cases against ships in Malacca and Singapore Straits, as well as their surrounding territorial waters, from 2007 to 2018 (made by the author on the basis of ICC-IMB Piracy and Armed Robbery against Ships Annual Report 2009, 2014, 2018 and 2020)

Year	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Indonesia	43	28	15	40	46	81	106
Malacca Straits	7	2	2	2	1	2	1
Malaysia	9	10	16	18	16	12	9
Singapore Straits	3	6	9	3	11	6	9
Year	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**
Indonesia	100	108	4	43	36	25	26
Malacca Straits	1	5	0	0	0	0	
Malaysia	24	13	7	7	11	11	4
Singapore Straits	8	9	2	4	3	12	23

52 Stach, *supra* note 18, at 727 (arguing that "[c]omplete eradication of maritime piracy in Southeast Asia seems impossible at the moment").

Agency (BAKAMLA), who in turn shared the information with the Indonesian Navy (TNI-AL). Then, on 9 May, TNI-AL vessels intercepted and boarded Hai Soon 12 and arrested nine perpetrators on board. In this incident, the ReCAAP's ISC worked very effectively and contributed to the arrest of the perpetrators by sharing information with the regional authorities.[53]

4.2 *Participation of Non-Asian States*

Since the ReCAAP was concluded for the purpose of promoting cooperation among the Asian States, Article 18(1) of the ReCAAP limits the original Contracting Parties to sixteen Asian States, namely, Bangladesh, Brunei Darussalam, Cambodia, China, India, Indonesia, Japan, South Korea, Laos, Malaysia, Myanmar, Philippines, Singapore, Sri Lanka, Thailand, and Vietnam. However, paragraph 5 of the same Article states that "(a)fter this Agreement has entered into force, it shall be open for accession by any State not listed in paragraph 1". Therefore, even non-Asian States have been able to become members since 4 September 2006.

In fact, several Maritime Powers have already ratified the agreement. Beginning with Norway's ratification in 2009, the Netherlands and Denmark ratified it in 2010, the United Kingdom in 2012, Australia in 2013, and the US in 2014. The participation of these maritime powers has two significant implications. First, thanks to their power, the ReCAAP has been strengthened, for example, through their financial contribution. Although the expenses of the ISC are mainly provided by voluntary donations from Contracting Parties (Article 6 of the ReCAAP), Norway contributed 131,340 Singapore Dollars in 2018, the US contributed 69,000 Singapore Dollars, and the Netherlands contributed 32,178 Singapore Dollars (their contributions are ranked in 4th, 7th and 8th place, respectively). Furthermore, these States can also support other Contracting Parties in the form of capacity building. For example, Australia convened the Focal Points Senior Officers Meeting in 2015, in which the experience of the Australian Maritime Border Command (Australian Focal Point) was shared.[54]

---

53 ReCAAP ISC, Annual Report 2016: Piracy and Armed Robbery Against Ships in Asia 28 (2016), https://www.recaap.org/resources/ck/files/reports/annual/annualreport2017.pdf. As shown above, ReCAAP ISC and two coastal States, Indonesia and Malaysia, have worked very closely. However, it is also indicated that the participation of these two States strengthens the ReCAAP framework; *see* Ian Storey, *Maritime Security in Southeast Asia: Two Cheers for Regional Cooperation*, *in* Southeast Asian Affairs 2009, at 36, 45 (Daljit Singh ed., 2009).

54 ReCAAP ISC, Annual Report 2015, at 26 (2015), https://www.recaap.org/resources/ck/files/reports/2015/ReCAAPISCAnnualReport2015.pdf.

Second, their participation can lead to the expansion of Contracting Parties to tackle "armed robbery against ships" (as previously mentioned, the ReCAAP was the first treaty to define this crime clearly). In addition, the ReCAAP obliges Contracting Parties to make every effort to take effective measures for preventing armed robbery against ships and arresting the suspects of the crime (Article 3). Moreover, Contracting Parties are expected to extradite the suspects of armed robbery against ships at the request of the other Contracting Party (Article 12) and render mutual legal assistance in criminal matters concerning armed robbery against ships (Article 13). Given the power of the navy and coast guard in the non-Asian Contracting Parties, their cooperation would lead to more effective and efficient suppression of piracy and armed robbery against ships. Furthermore, from the perspective of international law, the practice of non-Asian Contracting Parties could provide the basis of evidence to establish rules of customary international law.[55] Given the fact that prevalent States' practices are needed to establish customary international law, the practice of these States is significant in establishing new customary rules that have their roots in the Asian region.

4.3 *Inspiration for the African Region*

The ReCAAP can also act as a model for other regions to implement similar rules. In fact, based on the ReCAAP, the IMO adopted a resolution which requires States in East Africa to adopt a similar agreement when piracy off the coast of Somalia became very serious.[56] In order to discuss the conclusion of a new agreement to fight against piracy and armed robbery against ships, the IMO convened the conference in January 2009. In this conference, 21 governments of the Western Indian Ocean and the Gulf of Aden, and International Organizations, including the ReCAAP's ISC, were invited to Djibouti.[57] There,

---

55 Otherwise, the rules can be a regional custom. *See* UNITED NATIONS, *supra* note 36, at 154–56.

56 Int'l Maritime Org. [IMO], A. 1002 (25), *Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia*, at art. 7 (Dec. 6, 2007), https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.1002(25).pdf (no longer in force); Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace?*, 39 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 177, 190 (2011) (suggesting that the IMO considered the ReCAAP to be a good model, even though the Resolution itself does not manifestly say that the ReCAAP should be a model); Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AMERICAN UNIVERSITY LAW REVIEW 1267, 1308 (2010) (indicating that other regions should adopt a similar agreement to the ReCAAP).

57 Int'l Maritime Org. [IMO], C 102/14, *Protection of Vital Shipping Lanes: Sub-regional Meeting to Conclude Agreements on Maritime Security, Piracy and Armed Robbery Against*

the "Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden," also known as the Djibouti Code, was adopted.[58]

Unlike the ReCAAP, it is not a legally binding instrument, but as the Djibouti Code expressly stated in paragraph 9 of its preamble, it was inspired by the ReCAAP.[59] Therefore, there are many similarities between the two instruments, including the definition of armed robbery against ships. Article 1(2) of the Djibouti Code defines armed robbery against ships in the following way:

(a) an unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, *within a States internal waters, archipelagic waters and territorial sea* (emphasis added);
(b) any act of inciting or of intentionally facilitating an act described in subparagraph (a).

This definition is not identical to that of the ReCAAP concerning the geographical scope of the crime. While the ReCAAP describes the scope as "in a place within a Contracting Party's jurisdiction over such offences", the Djibouti Code phrases it as "within a States internal waters, archipelagic waters and territorial sea". Basically, as shown above, the scope of the ReCAAP can be interpreted as having almost the same meaning as that of the Djibouti Code, though the latter is much clearer. This understanding of interpretations can be supported by the amendments of Paragraph 2.2 of the Code of Practice. As shown in section 3(a), the original version of Paragraph 2.2 of the Code of Practice is identical to the definition of armed robbery against ships under the ReCAAP. However, when the ReCAAP was amended in 2010, the definition was also modified and became identical to the definition in the Djibouti Code.[60] Given that both the

---

Ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea Areas Annex, at 2 (Apr. 3, 2009), http://www.fortunes-de-mer.com/mer/images/documents%20pdf/legislation/Internationale/Piraterie/OMI/Code%20de%20Conduite%20Djibouti/Resolution_C102-14_OMI_2009_Djibouti_Code_RU.pdf.

58 *See* J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions*, 104 American Journal of International Law 397, 410–11 (2010) (discussing the drafting history of the Djibouti Code).

59 Joshua Ho, *Piracy Around the Horn of Africa*, 10 EchoGéo 1, 8–9 (2009), http://journals.openedition.org/echogeo/11370.

60 Int'l Maritime Org. [IMO], A. 1025 (26), *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships* (Jan. 18, 2010), https://www.morkniga.ru/files/shipowner/1597931556_A.1025(26)_-_Code_of_Practice_for_the_Investigation_of_the_Crimes_of_Piracy_and_Armed_Robbery_Aganst_Ships.pdf; Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western

former and later versions of the Code of Practice were adopted to suppress the same crimes, this difference of expression does not necessarily lead to different conclusions.[61]

In addition, Article 8(1) of the Djibouti Code requires each participant to designate focal points, in order to suppress criminals and directly communicate with other focal points. However, there are some differences from the ReCAAP system. First, while the rules of the ReCAAP's ISC are established by spending one-third of all provisions of the ReCAAP, the Djibouti Code ISC does not detail such rules. Moreover, unlike the ReCAAP's ISC, which establishes the sole strong centre in Singapore, the Djibouti Code lists three centres in Kenya, Tanzania, and Yemen, for communication between focal points. Given that these three centres do not provide as much information as the ReAAP's ISC, such plural centres' system may be less effective.

Following the Djibouti Code's "Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa", the so-called Yaoundé Code was adopted in 2013, as the second instrument inspired by the ReCAAP.[62] As its name suggests, this code was adopted to fight against piracy and armed robbery against ships at the Gulf of Guinea.[63] Article 1(4) of the Yaoundé Code provides a definition of armed robbery against ships identical to that of the Djibouti Code. Moreover, Article 11(1) of the Yaoundé Code also requires each signatory to designate focal points. However, unlike the ReCAAP and the Djibouti Code, the Yaoundé Code neither designates nor establishes information sharing centres. Article 11(1) simply says, "(i)n order to ensure coordinated, smooth, and effective communication between their designated focal points, the Signatories intend to use *the piracy information sharing centres* (emphasis added)" without clarifying what are the piracy information sharing centres. After the adoption of the Yaoundé Code, the Maritime Trade Information Sharing Centre Gulf of Guinea (MTISC-GOG) was established by the Oil Companies International Marine Forum

---

Indian Ocean and the Gulf of Aden art. 1(2), Jan. 29, 2009, https://au.int/sites/default/files/documents/30848-doc-djibouti_code_of_conduct_0.pdf.

61 *See* Robin Geiss & Anna Petrig, Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden 74 (2011).

62 *West and Central Africa Regional Agreements and Information Sharing*, Int'l Mar. Org., http://www.imo.org/en/OurWork/Security/WestAfrica/Pages/Code-of-Conduct-against-illicit-maritime-activity.aspx (last visited Apr. 19, 2021).

63 Ken Ifesinachi & Chikodiri Nwangwu, *Implementation of the Yaounde Code of Conduct and Maritime Insecurity in the Gulf of Guinea*, 5 Research on Humanities & Social Sciences 54, 59–62 (2015).

as a pilot project in 2014.[64] However, the MTISC-GOG was closed after the pilot project was successfully completed in 2016. Following this, France and the United Kingdom decided to establish Marine Domain Awareness for Trade – Gulf of Guinea (MDAT-GoG) as the new maritime information network in the Gulf of Guinea by means of a virtual reporting centre.[65]

Thus far, 20 States from Eastern Africa have signed the Djibouti Code,[66] and 25 States from Western and Central Africa have signed the Yaoundé Code.[67] These agreements require them to suppress armed robbery against ships (Article 5 of the Djibouti Code and Article 7 of the Yaoundé Code). It can be concluded that State practice of policing and prosecuting armed robbery against ships, which originate from the Asian region, prevail in the African Continent. In addition, though the tasks and functions of ISC are diverse, the practice of designating national focal points are shared in all relevant documents, probably because such designation is helpful in the fight against piracy and armed robbery against ships.

5 Conclusion

It is difficult to determine whether the ReCAAP is a successful model from the perspective of numerical statistics, because although the number of piracy and armed robbery against ships initially decreased after the ReCAAP entered into force, it once again increased after a period of time. However, the ReCAAP should be deemed successful based on the following two perspectives. First, Contracting Parties of the ReCAAP seem satisfied with it. Even when the number of crimes increased around 2010, they did not consider amending the ReCAAP nor consider establishing a new alternative system. Second, as shown

64 Adeniyi Adejimi Osinowo, *Combating Piracy in the Gulf of Guinea*, 30 AFRICA SECURITY BRIEF 1, 4 (2015), https://africacenter.org/wp-content/uploads/2016/06/ASB30EN-Combating-Piracy-in-the-Gulf-of-Guinea.pdf.

65 *West and Central Africa Regional Agreements and Information Sharing*, *supra* note 62.

66 Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Jordan, Kenya, Madagascar, Maldives, Mauritius, Mozambique, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, Tanzania, Yemen and the United Arab Emirates; *Djibouti Code of Conduct*, INT'L MAR. ORG., https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/DCoC%20Newsletter%20(2015).pdf (last visited Apr. 30, 2021).

67 Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, Chad, Congo, Côte d'Ivoire, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone, and Togo.

in Section 4, the ReCAAP attracts non-Asian States and can be a good model for other regions, including Africa.

In this way, the international law that fights against piracy and armed robbery in ships has been developed by the Asian Region. Given that there is minimal Asian contribution to the development of international law otherwise, this fact is worthy of a special mention. However, dating back to the beginning of the 20th century, there was a bud flush of this Asian contribution, through the so-called Matsuda Draft. Rapporteur Mr. Matsuda from Japan and Mr. Wang Chung-Hui from China prepared this draft as a work of the Sub-Committee on Suppression of Piracy, Committee of Experts for the Progressive Codification of International Law.[68] The term 'private ends', that remains in the UNCLOS today,[69] originated in this draft, meaning that it had a significant impact on the codification of the international law of piracy.[70]

Although this is just a contribution of two Asian experts and not of the Asian region itself, the experts were elected as members of the Sub-Committee because they are from Asia, which has much experience suppressing maritime crimes. As Indonesia is now suffering from illegal, unreported, and unregulated (IUU) fishing, they are attempting to criminalise such fishing.[71] For that purpose, Indonesia held the International Symposium on Fishery Crimes and the 2018 Our Ocean Conference, in which IUU fishing was seriously debated. Given the Asian experience of establishing the framework to fight maritime crimes, this Indonesian initiative could lead to a new set of international legal rules in the fight against IUU fishing, if Indonesia successfully establishes the Asian framework from the start.

68 League of Nations Committee of Experts for the Progressive Codification of International Law, *Questionnaire No. 6: Piracy*, 20 American Journal of International Law 222, 222 (1926).

69 Arron N. Honniball, The 'Private Ends' of International Piracy: The Necessity of Legal Clarity in Relation to Violent Political Activists 3 n.8 (2015), http://www.internationalcrimesdatabase.org/upload/documents/20151102T100953-Honniball%20ICD%20Brief.pdf.

70 P. W. Birnie, *Piracy: Past, Present and Future*, 11 Marine Policy 163, 169 (1987).

71 Ema Septaria, *IUU Fishing in Indonesia, Are ASEAN Member States Responsible For?*, 11 International Journal of Business, Economics & Law 76, 79–81 (2016).

Acknowledgements

This work was supported by Konosuke Matsushita Memorial Foundation Research Grants (Grant Number 16-569) and JSPS KAKENHI (Grant Number 17K13619, 19K13519 and 21H00667). This article is based on the presentation the author made to the Development of International Law in Asia (DILA) 30th Anniversary International Conference held at the Indonesia Ministry of Foreign Affairs, Jakarta, Indonesia from 14 to 18 October 2019.

Vietnam's Experiences with International Investment Agreements Governance: Issues and Solutions

*Tran Viet Dung**

1 Introduction

Vietnam's major economic reforms of *Doi Moi* (Renovation) was launched in 1986 by the Communist Party of Vietnam (CPV) to boost the country's underperforming economy and restore international ties. Under the *Doi Moi* policy, the Soviet centrally-planned economy was replaced with a socialist market mechanism, which promoted the concept of a multi-sectoral economy, open-door policies towards international trade and investment, and recognized private property rights.

The leadership of Vietnam has identified investment treaties to be significant for the transition, therefore putting them at the forefront of national economic policy. Vietnam has been active in negotiating and concluding Bilateral Investment Treaties (BITs), with the view that the treaties would help to attract foreign investments. In addition, the BITs were also regarded by the government as a diplomatic instrument to foster integration and break the international isolation caused by the US trade embargo.[1] Over time, the International Investment Agreements (IIAs) became an important basis to protect Vietnamese investors overseas.

The expansion of the IIA network during the last decade is regarded as an important aspect of Vietnamese investment policy. As of 1 January 2019, Vietnam has entered into 67 BITs other states.[2] Among these 67 BITs, 49 are in effect.[3] Additionally, 9 out of 12 free trade agreements (FTA) to which Vietnam

* Associate Professor, Dean of International Law Faculty of Ho Chi Minh City University of Law.

1 Beth Castelli, *The Lifting of the Trade Embargo Between the United States and Vietnam: The Loss of a Potential Bargaining Tool or a Means of Fostering Cooperation?*, 13 Dickinson Journal of International Law 297, 325 (1995).

2 *International Investment Agreements Navigator: Viet Nam*, UNCTD Inv. Pol'y Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam (last visited Apr. 30, 2021) (listing Vietnam's BITs).

3 *Id.*; *See also* Cổng thông tin điện tử Bộ Kế hoạch và Đầu tư [Ministry of Planning and Investment], Danh mục Hiệp định Việt Nam – Các Nước [List of Investment and Double Taxation Treaties Between Vietnam and Other Countries], Cổng Thông Tin điện Tử Bộ

is a party have an investment chapter that provides for detailed rules dealing with investment liberalization and protection.[4] In terms of the number of BITs and FTAs with investment chapters, Vietnam now is ranked third behind China and Korea amongst Asian countries.[5]

The Vietnamese government has made substantial efforts in developing a favorable Foreign Direct Investment (FDI) environment in the light of its integration. The national legal framework for investment has been regularly amended and revised to meet the country's IIA obligations.[6] However, it is observed that the country still faces several issues relating to IIA governance, which have resulted in increasing investor-state disputes in recent years. This raises big concerns for the government.

This article seeks to analyze the IIA's governance in Vietnam. It is believed that a proper assessment of the IIA governance shall be based on two important factors. Firstly, states must have a clear IIA policy and seek to comply with their international treaty obligations. Secondly, states must take the initiative to internalize the IIA's obligations into the legal system as well as take into account the IIAs obligations in decision making at both central and local levels. It is of high significance to assess the process through which the IIAs internalization happens.[7] The internationalization could be done not only through the legislative processes – transplanting the IIAs into the national legislation, but also through other components, including informational processes – informing the

---

Kế Hoạch và Đầu tư [MPI], http://www.mpi.gov.vn/Pages/qhsp.aspx (last visited Apr. 11, 2021); Trung Tâm WTO [WTO Center], Các hiệp định khác của Việt Nam [Other Treaties of Vietnam], Trung Tâm WTO, http://trungtamwto.vn/hiep-dinh-khac (last visited Jan. 05, 2019).

4 As of July 2019, Vietnam has signed 12 FTAs, including the ASEAN – India FTA (AIFTA), ASEAN – Korea FTA (AKFTA), ASEAN – Hong Kong FTA (AHKFTA), ASEAN – Japan EPA (AJEPA), ASEAN – China FTA (ACFTA), ASEAN – Australia – New Zealand FTA (AANZFTA), CP – TPP (TPP11), Chile – Vietnam FTA (CVFTA), EU–Vietnam FTA (EVFTA), Korea – Vietnam FTA (KVFTA), EuroAsia Economic Union – Vietnam FTA (EAVFTA), Japan – Vietnam EPA (JVEPA). Kim Loan, *List of Viet Nam's FTA s as of July*, Socialist Republic Viet. Online Newspaper Gov., (July 10, 2019, 3:35 PM), http://news.chinhphu.vn/Home/List-of-Viet-Nams-FTAs-as-of-July/201910/37693.vgp.

5 *International Investment Agreements Navigator*, UNCTD Inv. Pol'y Hub, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last visited Apr. 11, 2021).

6 Tran Hao Hung, Đánh giá việc thực hiện cam kết gia nhập WTO liên quan đến đầu tư và định hướng hoàn thiện hệ thống pháp luật về đầu tư [Evaluating the Implementation of Investment-Related WTO Commitments and Orientations to Improve Legal Framework on Investment] (2010).

7 Peter J. May, *Policy Design and Implementation*, *in* The Sage Handbook of Public Administration 279, 279 (B. Guy Peters & Jon Pierre eds., 2d ed. 2012).

state's international legal obligations to the relevant domestic actors, monitoring processes – screening the investment policies and measures to ensure the compliance with state's international obligations, and remedial process – correcting or defending the state's international obligations.

The article begins with an overview of Vietnam's investment policy as reflected in its portfolio of IIAs (Part 2). It then reviews the treaty-making process and the IIA's implementation process in Vietnam (Part 3), and the problems resulting in the increase of ISDS, and the efforts of the Vietnamese government to manage the ISDS (Part 4). Against the background of issues of IIA's governance of Vietnam, this author attempts to provide some policy suggestions to improve the national system for IIA's governance (Part 5).

2 Vietnam's Policy on International Instruments Regulating FDI: Past, Present, and Future Trends

Until 1987, the relationship between Vietnam and foreign investments had been that of distrust and resentment. The country limited its economic relation with socialist countries led by the Soviet Union and shielded itself against foreign economic and political influences by setting up ideological defenses against foreign investors and their protection by international law. In line with its Marxist ideology, notions and concepts of private property and individual economic initiative were strongly rejected and the phenomenon of foreign investment gradually effaced through confiscation and nationalization of foreign capitalists' property.

Vietnam strongly advocated the concept of the sovereignty of States over their natural resources and denied any substantial protection of foreign investment under international law. Concerning foreign investment, the Vietnamese government, like most socialist countries post-colonization period, took the position that the state has the absolute sovereign right to control the economic resources within its territory as well as regulate the entry of foreign direct investments. It has been clearly demonstrated in the first regulations on foreign investment of the Vietnamese government in 1977,[8] which placed a strong emphasis on the role of the state, and subordinated foreign investment to the structure of the national economy. Under these regulations, only the State could enter into a joint venture with a foreign party, and the foreign party

8 *Nghị định Ban hành Điều lệ về đầu tư của nước ngoài ở nước Cộng hòa Xã hội chủ nghĩa Việt Nam* [Decree on Promulgating the Charter on Foreign Investment in the Socialist Republic of Vietnam], No. 115-CP (Apr. 18, 1977).

could not invest more than 49% of the joint venture's capital.[9] Moreover, the right to nationalize or expropriate foreign property was considered an inherent attribute of national economic sovereignty of the state, and the exercise of this fundamental right was not subject to any pre-conditions, including the "*public purpose, due process, and compensation*" as required by international law.[10] As a result of the above-mentioned policy, Vietnam was not able to attract a handful of investment from overseas (but some from socialist countries). In fact, between 1977–1986, "Vietnam licensed only one western foreign enterprise, a French pharmaceutical firm."[11]

However, Vietnam's policy toward international cooperation radically changed in 1987 after the leaders of the CPV decided to adopt the *Doi Moi* Policy at the Sixth National Party Congress and openly accepted the development of a "*socialist-oriented market economy*" and the significance of international economic cooperation.[12] Attracting foreign direct investment (FDI) has become a key part of Vietnam's external economic affairs.[13] Since the adoption of the first foreign investment law in 1987,[14] foreign investors

---

9 *Id.* art. 7.3.

10 Kong Qingjiang, *Bilateral Investment Treaties: The Chinese Approach and Practice*, 8 ASIAN YEARBOOK OF INTERNATIONAL LAW 105, 109 (2003).

11 Tang Thanh Trai Le, *The Legal Aspects of Foreign Investment in Vietnam*, 1 INTERNATIONAL TRADE & BUSINESS LAW JOURNAL 45, 46 (1995) (citing Douglas Pike, *Vietnam: The Winds of Liberalisation*, 12 FLETCHER FORUM 245, 247 (1988)).

12 VIET DUNG TRAN, ANTI-DUMPING POLICY AND LAW OF VIETNAM: A CRITICAL ANALYSIS FROM INTEGRATION AND COMPETITION POLICY PERSPECTIVES (2011); *see also CPV, Nghị quyết Đại hội Đảng lần thứ VII* [Resolution of the VII Communist Party Congress] (June 27, 1991), http://dangcongsan.vn/tu-lieu-van-kien/van-kien-dang/van-kien-dai-hoi/khoa-vii/doc-21012201511372346.html; *Nghị quyết của Quốc hội về nhiệm vụ phát triển kinh tế – xã hội 5 năm (1991–1995) và năm 1992* [Resolution of the National Assembly on the Tasks of Socio-Economic Development for 5 Years (1991–1995) and 1992] (Dec. 26, 1991), https://vanbanphapluat.co/nghi-quyet-nhiem-vu-phat-trien-kinh-te-xa-hoi-5-nam-1991-1995-va-nam-1992; *Nghị quyết của kỳ họp thứ 9 Quốc hội Khóa IX về đẩy mạnh việc thực hiện nhiệm vụ và ngân sách nhà nước năm 1996* [Resolution of the 9th Session of the Ninth National Assembly on Promoting the Implementation of the State's Function and Budget of 1996] (Mar. 30, 1996), http://quochoi.vn/tulieuquochoi/anpham/Pages/anpham.aspx?AnPhamItemID=2254.

13 *Tờ trình của chính phủ về luật đầu tư nước ngoài (sửa đổi)* [*Government Statement on Foreign Investment Law (Amended)*], QUỐC HỘI NƯỚC CỘNG HOÀ XÃ HỘI CHỦ NGHĨA VIỆT NAM [NAT'L ASSEMBLY VIET.], http://quochoi.vn/tulieuquochoi/anpham/Pages/anpham.aspx?AnPhamItemID=2269 (last visited Apr. 30, 2021).

14 *Luật Đầu tư nước ngoài tại Việt Nam* [Law on Foreign Investment in Vietnam], No. 4-HDNN8 (Dec. 29, 1987). The Law on Foreign Investment was replaced by the Law No. 59/2005/QH11 on Investment in 2005 (Law on Investment). The Law on Investment unified the provisions of the Law on Foreign Investment and the Law on Promotion

have been encouraged to invest and conduct business in Vietnam. The government has gradually eliminated the restrictive business sectors for foreign investment.[15]

The Constitution 1992 has declared that *"[the] State encourages foreign organizations and individuals to invest capital and technology in Vietnam in accordance with Vietnamese law and with international law and practice; ensures the legal ownership of capital and assets as well as other interests of foreign organizations and individuals. Enterprises with foreign-invested capital shall not be nationalized."*[16] The reference to 'international practice' illustrated the desire of Vietnam to engage with the habits of the international community and bound itself with international standards developed for the protection of foreign investment.

The development of the market economy together with a pro-active economic integration policy has resulted in rapid economic growth in the country. Since the 1990s, Vietnam has emerged as one of the world's most attractive places for FDI in the developing world. Inflows of foreign direct investment in Vietnam rose from 1.78 billion USD in the year 1995 to over 12.6 billion USD in the year 2016,[17] contributing to around 6.14% of the national GDP.[18] The successful accession to the World Trade Organisation (WTO) in 2007 resulted in lowering trade barriers and granted greater access for Vietnamese products to foreign markets and, thus, encouraged the growth of export-oriented FDI.[19]

---

of Domestic Investment to provide for equal treatment between foreign invested and domestic-invested enterprises in most sectors in Vietnam.

15 Vietnam has gradually removed the restrictive conditions for foreign investment. As from 2015, the Law on Investment only the keeps certain sectors in which investment is prohibited (*inter alia*, production and processing of drugs, production of certain types of chemicals and minerals, investment in and commercial operation of secret investigation services violating the state interests, prostitution business, trading of human and tissues/parts of human body, investment relating to asexual reproduction). Hence, there are still some conditional sectors for foreign investment. Foreign investors investing in conditional sectors must satisfy certain conditions, such as the amount of minimum capital, ownership percentage and investment form, investors expertise and experience in the relevant industry. Information on the list of conditional sectors for FDI is available on the website of the Foreign Investment Agency (FIA) at Cổng thông tin quốc gia về đầu tư nước ngoài [National Information Gate on FDI], https://dautunuocngoai.gov.vn/fdi/nganhnghedautu/6.

16 Hiến Pháp [Constitution] art. 25 (1992).

17 *Foreign Direct Investment, Net Inflows (BoP, Current US$) – Vietnam*, World Bank, https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2016&locations=VN&start=1970&year_low_desc=false (last visited Mar. 27, 2021).

18 *Id.*

19 Jean-Pierre Cling et al., *The Distributive Impact of Vietnam's Accession to the WTO*, 118 Économie Internationale 43, 62 (2009); Vo Tri Thanh & Nguyen Anh Duong,

The liberalization of trade in services under the General Agreement on Trade in Services (GATS) provides foreign investors with greater access to the market in various service sectors such as banking, insurance, distribution, education, engineering, logistics, legal services, tourism, telecommunications, etc.[20]

Vietnamese have been serious in developing the legal framework for FDI. At the national level, the government offered certain forms of legal protection to foreign investors, such as most-favored-nation treatment, national treatment, protection, and security for investors. The government also enacted a provision on compensation for losses incurred by foreign investors due to nationalization under the national legislation on foreign investment.[21] At the international level, Vietnam has paid special attention to developing the IIAs network. From the first BIT with Italy concluded in 1990[22] until 2019 the number of investment treaties concluded by Vietnam is over 80 IIAs, including both BIT and FTA with investment chapter.[23]

The development of Vietnam's IIAs network reflects Vietnam's economic policy during the last several decades. In the early 1990s, when Vietnam began the "open door" policy, the government primarily entered into BITs with capital-exporting countries from Europe, including Italy (1990), Belgium (signed in 1991), Switzerland (1992), France (1992), Germany (1993), the Netherlands (1994), and some neighboring countries in Asia, including Malaysia (1992), Singapore (1992), Taiwan (1993), and Korea (1993).[24] For those BITs, Vietnam

---

Vietnam After Two Years of WTO Accession: What Lesson Can Be Learnt?, 26 ASEAN ECONOMIC BULLETIN 115, 118 (2009).

20 *Đánh giá tác động tổng thể khi Việt Nam trở thành thành viên của WTO đến thay đổi xuất nhập khẩu và thể chế* [*Assessing the Overall Impact of Vietnam's Membership of the WTO on Import and Export Changes and Institutions*], SLIDESHARE, https://www.slideshare.net/changtraicodon/nh-gi-tc-ng-tng-th-khi-vit-nam-tr-thnh-thnh-vin-ca-wto-n-thay-i-xnk-v-th-ch (last visited Apr. 30, 2021); *See also Working Party on the Accession of Viet Nam*, WORLD TRADE ORG., https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=58832&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last visited Apr. 11, 2021) (listing Vietnam's schedule of specific commitments in services).

21 These standard FDI protection provisions have been provided in the Law on Foreign Investment in 1987 (as amended and supplemented in 1990, 1992, 1996, 2000) and continuously presented in the Law on Investment in 2005 (as amended and supplemented in 2014).

22 *International Investment Agreements Navigator: Viet Nam*, *supra* note 2.

23 *Id.*; *See also Danh mục Hiệp định Việt Nam – Các nước* [*List of* (*Investment and Double Taxation*) *Treaties Between Vietnam and Other Countries*], BỘ KẾ HOẠCH VÀ ĐẦU TƯ [MINISTRY PLAN. & INVESTMENT], http://www.mpi.gov.vn/Pages/qhsp.aspx (last visited June 6, 2018); *Hiệp định khác* [*Other Treaties of Vietnam*], TRUNG TÂM WTO, http://trungtamwto.vn/hiep-dinh-khac (last visited Mar. 28, 2021).

24 *Id.*

largely accepted the treaty texts proposed by counterparties without substantial modification. At that stage, Vietnam seriously needed an inflow of foreign investment capital and did not have much knowledge and expertise on the subject matter. In addition, the conclusion of international economic treaties was pushed by the government as they were used as a diplomatic instrument fostering the normalization of relations with the western countries after decades of isolation from the US embargo.[25] After the conclusion of the US-Vietnam Bilateral Trade Agreement (BTA) in 2000, Vietnam continued entering into BITs with more economies around the world. The form and substance of those BITs were generally based on the texts of the BITs Vietnam had already negotiated with European countries. These BITs contained substantive provisions to protect foreign investors and their investments, such as non-discrimination (both national and most favoured nation treatment), compensation for expropriation, fair and equitable treatment, and full protection and security, assets and capital transfers as well as access to Investor-State Dispute System (ISDS).

After joining the multilateral trading system of the WTO in 2007, Vietnam has recognized the significance of regional trade arrangements[26] and actively started negotiating FTA with key trading partners. From 2007 onwards, Vietnam has negotiated and signed 15 FTAs, all of which are already in force, covering 54 states and customs territories.[27]

Vietnam signed most of its FTAs within the framework of ASEAN-Plus, including the ASEAN – India, ASEAN – Korea (2007), ASEAN – Hong Kong, ASEAN – Japan, ASEAN – China, ASEAN – Australia – New Zealand. Currently, it is negotiating the Regional Comprehensive Economic Partnership (RCEP), the FTA between ASEAN and its six FTA partners (including China, Japan, India, South Korea, Australia, and New Zealand). Vietnam and other ASEAN members have concluded the ASEAN Comprehensive Investment Agreement (ACIA) on February 29, 2009. The ACIA forms the legal framework for investment protection within the ASEAN Economic Community. Vietnam has

25 Castelli, *supra* note 1, at 325.

26 *Nghị quyết Hội nghị Ban Chấp hành Trung ương lần thứ 10 về kiện toàn tổ chức, cải tiến lề lối làm việc* [*Resolution of the 10th Central Committee Meeting on Organizational Reform and Improvement of Working Style*], BÁO ĐIỆN TỬ ĐẢNG CỘNG SẢN VIỆT NAM [ELECTRONIC REP. VIETNAMESE COMMUNIST] (Apr. 4, 2021), https://tulieuvankien.dangcongsan.vn/van-kien-tu-lieu-ve-dang/hoi-nghi-bch-trung-uong/khoa-ii/nghi-quyet-hoi-nghi-ban-chap-hanh-trung-uong-lan-thu-10-ve-kien-toan-to-chuc-cai-tien-le-loi-lam-viec-792; *see also* Hy V. Luong, *Vietnam in 2006: Stronger Global Integration and Resolve for Better Governance*, 47 ASIAN SURVEY 168 *passim* (2007).

27 *Other Treaties of Vietnam*, *supra* note 23.

concluded bilateral FTA with Chile (2011), Korea (2015), Japan (2008), and the EuroAsia Economic Union (2015). Most of the FTAs of Vietnam include an investment chapter with ISDS.

Vietnam has been involved in the negotiation of two new-generation FTA, including the Trans-Pacific Partnership (TPP)[28] and the EU-Vietnam FTA (EVFTA). The TPP was signed in 2016, however, failed to take effect because the United States decided to walk away from the agreement. In 2018, Vietnam and 10 other countries of the TPP concluded the agreement without the United States under the framework of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[29] The investment chapter of the CPTPP in general has adopted the form and substance of the investment chapter of the North American Free Trade Agreement (NAFTA). The negotiation of the EVFTA was completed in 2015. Hence, due to the disagreement of EU members regarding the Mandate of the European Council, the EU and Vietnam have decided to split the investment chapter of the EVFTA into a separate agreement named the EU-Vietnam Investment Protection Agreement (EVIPA). The EVIPA shall replace the existing 21 BITs in force between Vietnam and EU Member States. It is noteworthy that Vietnam and the EU have attempted to establish a new ISDS model by establishing the International Investment Court system, which follows the WTO dispute mechanism.[30] The EVFTA and EVIPA were signed in Hanoi on 30 June 2019.

---

28 Fukunari Kimura & Lurong Chen, Implications of Mega Free Trade Agreements for Asian Regional Integration and RCEP Negotiation 1 (2016), http://www.eria.org/ERIA-PB-2016-03.pdf. The TPP is supposed to be the largest free trade area in the world, covering 40 percent of the global economy. The TPP was signed on Feb. 4, 2016, but never entered into force as a result of the withdrawal of the United States.

29 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), also known as TPP-11 is a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The CPTPP incorporated most of the Trans-Pacific Partnership (TPP) provisions by reference, but suspended 22 provisions that the United States had favored but which other countries opposed, and lowered the threshold for enactment so that the participation of the U.S. was not required. The CPTPP was signed on Mar. 8, 2018 and took effect on Dec. 30, 2018.

30 Viet Dung Tran, *Cơ chế giải quyết tranh chấp giữa nhà đầu tư và nhà nước của Hiệp định Thương mại tự do EU-Việt Nam – sự hình thành tòa án đầu tư quốc tế?* [*Investor-State Dispute Settlement Mechanism of the EVFTA – Formation of an International Investment Court?*], *in* Giải quyết tranh chấp đầu tư quốc tế – một số vấn đề pháp lý và thực tiễn trong bối cảnh hội nhập [Settlement of International Investment Disputes: Legal and Practical Issues in the Integration Context] 58–60 (Viet Dung Tran & Thi Lan Huong Nguyen eds., 2018).

It is observed that compared to the early stage of development of the IIA network, the approach of Vietnam in negotiating the investment chapter of the FTAs has changed. Vietnam has been active in negotiating to make the investment protection rules of the FTA more detailed to avoid the ambiguity favoring the foreign investors as well as the inclusion of the exception provisions in its new IIAs to confirm the flexibility for the host state in implementing policies for public interests, i.e. protection of the environment, and the protection of human rights. It also supported some new initiatives that would alter the ISDS landscape, such as the creation of the International Investment Court under the framework of EVFTA. In the case of CPTPP, Vietnam has concluded with New Zealand and Australia side letters to exclude compulsory ISDS.[31]

As the Vietnamese economy has grown and matured, Vietnamese enterprises have started to look for opportunities to invest overseas. According to the Foreign Investment Agency (FIA) of the Ministry of Planning and Investment (MPI), the total registered capital of outward investment of Vietnamese enterprises in 2017 is about USD 22 billion and the amount of profit transferred back to Vietnam reached about USD 1.5 billion.[32] Until 2018 Vietnam had an investment in 59 countries and territories, of which Lao is the biggest investment destination with a total registered investment capital of over USD 4.2 billion, followed by Cambodia, Russia, Myanmar, the United States, some African and South American countries.[33] This phenomenon is reflected on the Vietnamese investment treaty policy, which now has a second goal of protecting overseas investment by Vietnamese investors.[34] This partially reflects in Vietnam's negotiation and conclusion of IIAs with relevant countries such as Mozambique (2007), Venezuela (2008), Slovakia (2011), Kazakhstan (2014), and Russia (2015),

31 The side letters constitute bilateral agreements between the relevant states that shall aim to prevent the raise of investor-state disputes. The letters were signed and came in force together with the CPTPP.

32 *Báo cáo tình hình đầu tư ra nước ngoài năm 2017* [*Vietnamese Report on Outward Investment of Vietnamese Enterprises in 2017*], BỘ KẾ HOẠCH VÀ ĐẦU TƯ [MINISTRY PLAN. & INVESTMENT] (Dec. 22, 2017), http://www.mpi.gov.vn/Pages/tinbai.aspx?idTin=38656&idcm=208.

33 *Id.*; *see also Đầu tư Việt Nam ra nước ngoài và công tác thương vụ* [*Vietnam Outward Investment and the Works of Trade Missions*], BỘ CÔNG THƯƠNG VIỆT NAM [MINISTRY INDUSTRY & TRADE] (Dec. 16, 2013), http://www.moit.gov.vn/tin-chi-tiet/-/chi-tiet/%C4%91au-tu-viet-nam-ra-nuoc-ngoai-va-cong-tac-thuong-vu-102586-401.html.

34 Vu Van Chung, TỔNG QUAN VỀ ĐẦU TƯ NƯỚC NGOÀI VÀ ĐÁNH GIÁ TÌNH HÌNH QUẢN LÝ ĐẦU TƯ NƯỚC NGOÀI TẠI VIỆT NAM [Overview of the Outward Investment and Evaluation of Status of Management of Outward Investment Activities in Vietnam], Speech at Workshop: The Policy on Outward Investment for Central, Local Investment Agencies and Enterprises in the North (photo. reprint 2015) (minutes available from the Foreign Investment Agency).

where the Vietnamese negotiators had a mandate to maximize the investment protection standard during the negotiation as these countries were considered investment targets for Vietnamese investors.[35]

It could be concluded that over the years Vietnam's policy toward investment treaty has been changed. The government nowadays shall have dual missions upon negotiating the IIAs, namely (i) protecting the interests of Vietnamese investors abroad and (ii) safeguarding the public interests against foreign investment interests. Vietnam supports the inclusion of provisions on exceptions to advocate the protection of public interests and public order as well as raising the corporate social responsibility of foreign investors. This is reflected clearly in the position of Vietnam during the negotiation of the recent IIAs, such as the ACIA, EVFTA, CPTPP.

3 International Investment Agreement Adopting and Implementing Process

3.1 *IIA Adoption: Coordination of Relevant Agencies*

In Vietnam, there are three main governmental agencies in charge of investment-related issues. The Ministry of Planning and Investment (MPI) is the main agency in charge of state management of investment promotion. The MPI takes charge of matters relating to the liberalization of investment, through the conclusion of IIA, developing the investment legal framework, and admission of foreign investments. The Ministry of Foreign Affairs is the agency representing Vietnam in conclusion of all international treaties, including the IIAs. The Ministry of Justice is mandated by law to review and provide opinion on all legislations and international treaties of Vietnam. However, for investments in specific sectors, the relevant ministries will be responsible for the sectors that they manage. Their opinion regarding particular aspects of IIAs will always be requested during the treaty negotiation and conclusion.

Generally, the IIAs are not subject to ratification by the National Assembly of Vietnam (NAV) but can be approved directly by the Government to take effect in Vietnam. The IIAs must be ratified by the NAV in two cases: (i) the IIA requires ratification by the representative body, and (ii) the treaty conflicts with the existing laws, resolutions of Vietnam. In practice, most IIAs would fall into the category of a treaty to be approved by the Government; only some new

35 Interview by Viet Dung Tran with Legal Dep't of Ministry of Planning and Inv. (May, 2018) [hereinafter Interview].

generation FTAs (due to their complexity and contradiction to the existing laws), such as the EVFTA and CPTPP, would be subject to NAV's ratification.[36]

The MPI is assigned by the Government to be the lead agency for the negotiation and conclusion of IIAs, including investment protection chapters in the FTA. The MPI shall take initiative to propose negotiation of bilateral and regional investment agreements of Vietnam. If the proposed IIA does not have any content that contradicts the existing laws, resolutions of Vietnam, the Government will decide the negotiation and conclusion of the treaty and also approve the effectiveness of the treaty. If there is diverse opinion relating to the IIA, the Government Office will take initiative to organize a meeting between relevant agencies to analyze the issue and make a final decision regarding the status of the proposal.[37]

Pursuant to the law, the time required for the agencies to provide written feedback is 15 days upon receipt of the proposal. In practice, the feedback from the respective agencies usually arrive earlier. It is explained by two main factors, namely (i) the number and quality of IIA experts of the Ministry of Justice (MOJ) and Ministry of Foreign Affairs (MOFA) have improved remarkably after two decades of active integration, and (ii) the current regime allows the representatives of MOJ and MOFA to participate in all stage of treaty negotiation.[38]

After the IIA comes into effect (upon notice of the MOFA), within 15 days, the MPI shall prepare a plan for the implementation of the treaty and submit it to the Prime Minister.[39] A plan for implementation of a treaty must detail the (i) implementation schedule, (ii) proposed responsibilities of state agencies to organize the implementation of the IIA, (iii) proposed amendment and supplementation or annulment or promulgation of legal documents for the implementation of the IIA, (iv) measures of organization, management, funding for the implementation of the IIA, (v) dissemination of the IIA.

3.2 *Dissemination of IIA's Obligations*

At the implementation stage, the MPI still takes the leading role in organizing the propagation and dissemination of the term of the respective IIA, while the MOFA and the MOJ shall coordinate with the MPI in this regard. Accordingly, the MOFA is responsible for monitoring and urging the application of the IIA in Vietnam as well as coordinating in adopting necessary measures to

36 *Id.*

37 *Nghị định Quy định chức năng, nhiệm vụ, quyền hạn và cơ cấu tổ chức của Văn phòng Chính phủ* [Decree on The Functions, Tasks, Powers and Organizational Structure of the Government Office] No. 150/2016/ND-CP art. 2 (Nov. 11, 2016).

38 Interview, *supra* note 35.

39 *Luật điều ước quốc tế* [Law on Treaties], No. 108/2016/QH13 art. 76 (Apr. 9, 2016).

protect the rights and interests of Vietnam in case a foreign contracting party breaches the IIA.[40] It shall also report to the Prime Minister/the President on an annual basis or when requested, on the implementation of international treaties; regularly prepare a report for the Government to submit to the NAV on the conclusion and implementation of treaties.[41]

Meanwhile, the main responsibilities of the MOJ to implement IIA is to urge the formulation and submission for promulgation, amendment, and supplementation or annulment of legal documents (if required) to implement treaties and appraise the conformity of national normative documents with the treaty.[42] Under the Law on Treaties, other state agencies might be involved in the process of IIA internalization include the Supreme People's Court, the Supreme People's Procurator, the State Audit Office of Vietnam, ministerial-level agencies, and the People's Committees of provinces and centrally-run cities.[43] Hence, their role is rather fuzzy and vague as they are mainly focused on the accurate implementation of the national laws and regulations only, which is assumed to be designed in accordance with Vietnam's international obligations. The local governments only deal directly with certain international investment agreements that directly impact their province or city, i.e. the ODA Agreements for infrastructure development. It is observed that the knowledge and expertise on the IIA of local governments are unequal from place to place. Thus, the IIAs internalization in Vietnam is mainly put on the shoulder of the central state bodies only.

In Vietnam, the internationalization process so far has not accorded much importance to the dissemination of investment treaty obligations until 2013. Since then, the MPI and MOJ have started organising regularly workshops and training courses for government officials, especially for those who work at the provincial departments of planning and investment and departments of justice. Those workshops/training address the Investor-State dispute settlement (ISDS) as well as an explanation of various IIAs obligations. However, the effect of these events is still limited because of two factors: (i) lack of human and financial resources for conducting deep and long training. The division in charge of the MOJ and MPI does not have much human capacity to conduct a long and intensive training course. It also does not have substantial funding to invite experts for the training. As a result, they only can conduct the events within the given capacity. (ii) the officials attending the workshops/training

40 *Id.* art. 77.
41 *Id.*
42 *Id.* art. 78.
43 *Id.* art. 80.

programs only concern with provisions under the purview of their sphere of works and do not fully understand the legal implication of other provisions in the investment treaty.[44] It should also be noted that judges are usually not taking part in the workshops and training programs.[45]

3.3 *IIAs Compliance*

In Vietnam, there is no specific mechanism that ensures that governmental measures comply with IIA's obligations. Nonetheless, there are different ways in which such measures may be reviewed against Vietnam's international law obligations, including those in investment treaties. First, when the relevant agency directly seeks the legal opinion of the MOJ or MPI as the leading authority for international law issues on a draft law or measure. In Ho Chi Minh City, Hanoi, and some provinces, the Peoples Committees have set rules that the drafting of all regulations and designing of the measures must be consulted with the department of justice of the locality to ensure compliance with the laws and international obligations. Hence, the quality of this screening is not uniform across all provinces. Second, when those policies or measures require approval from a type of national committee mechanism, the representatives of the three lead agencies of MPI, MOFA, and MOJ must always participate as a member. Third, when those measures require the government office's approval, whereby all relevant agencies will be consulted, and MPI and the MOJ must caution about possible risks of IIA claims. In practice, the legal opinion does not specifically focus on compliance with investment treaty obligations. The MOJ has given many legal opinions concerning the compliance of trade-related measures with international obligations (WTO agreements as well as other regional FTAs).

In the law-making process, Vietnam ensures the compliance of IIAs through the system of consultancy of the MOFA, MOJ, and public participation. Since the WTO accession, the procedure of drafting and promulgation of the laws and regulations must be subject to comprehensive screening, which is regulated under the law on promulgation of legal documents.[46] The Government Office must not only publish all new legal documents and regulations of the government but also publish the draft of those documents on the Internet portal or in mass media for comments by agencies, organizations,

44 Interview, *supra* note 35.

45 *Id.*

46 Law on Promulgation of Legal Documents was first adopted in 2002, amended in 2008 and 2015.

and individuals.[47] Public participation in drafting law has become a part of legislative procedure.[48] The agency in charge must post the draft law on the public website at least 60 days in order to receive opinions, except for those promulgated under simplified procedures.[49] The business associations and chambers of commerce of foreign countries in Vietnam are invited to contribute opinions on the drafts of the investment law document. Their opinions are seriously considered by the law drafting agency.

At the local level, the procedure for drafting and adoption of administrative and normative documents of the local government (namely the People's Committee and Peoples Council of province/cities) shall also be subject to a screening process by the Department of Justice of the respective province. However, in practice, the quality of the review procedure of implementation of IIA at the provincial level is quite diverse from province to province. The knowledge and expertise of these agencies on the IIA are rather limited. The provincial investment authorities build their awareness and expertise related to the IIA mainly through the international investment disputes taken place in their locality. The legal officers in Ho Chi Minh City are better aware of the state obligations under IIA, as they have been dealing with most international investment dispute cases in Vietnam. This problem might potentially lead to the enactment of inaccurate decisions and/or measure by the local government against foreign investors and their investment project(s) in the locality, breaching the provisions of the IIA. To reduce this risk, in recent years the MPI and the MOJ have organized a number of workshops and training courses on the topic related to international investment law for local government officials and business associations.[50] However, as analyzed in previous sections the actual effect of these workshops and training seminars is still rather limited and needs to be improved.

47 *Của quốc hội nước cộng hoà xã hội chủ nghĩa việt nam số 02/2002/qh11 ngày 16 tháng 12 năm 2002 Luật sửa đổi, bổ sung một số điều của luật ban hành văn bản quy phạm pháp luật* [Law on Promulgation of Legal Instruments], No. 02/2002/QH11 arts. 62(2), 65(2) (Dec. 16, 2002).

48 *Luật Ban hành văn bản quy phạm pháp luật* [Law on Promulgation of Legislative Documents], No. 80/2015/QH13 art. 5 (June 22, 2015).

49 *Id.* art. 57.

50 Interview, *supra* note 35.

4 Managing Investor-State Disputes

With increased foreign investment activities in Vietnam over the years, the number of disputes involving those investments is also likely to rise. Accordingly, before 2017 there have been only six investor-state dispute settlement (ISDS) cases taken before international arbitration against Vietnam.[51] Yet, the number of disputes between investors and national agencies has increased significantly since 2010. According to the research by the Judicial Institute of the MOJ, during 2010–2017 there are 14 cases where the foreign investors have notified their intention to raise a claim against the government of Vietnam or sent a request to the national agencies to resolve the dispute between them and national agencies of Vietnam (these cases could easily be converted into the ISDS case).[52]

Most of the mentioned disputes are related to issue of land allocation and site clearance. The local government often fails to allocate the "clean land" for foreign investors to carry out the investment project after conclusion of the land lease with them causing the delay of implementation of the investment project.[53] Additionally, to attract FDI to the province, some local governments had also offered more favorable incentives to a foreign investor than legally permitted, thereby receiving claims and complaints of the investor when they could not fulfill its undertakings.[54] To that end, in recent years, the central authority has applied more strict control and supervision over local government to restrict them act beyond their power in relation to foreign investments causing wrong expectations from the foreign investors.[55]

Another phenomenon of disputes between foreign investors and state agencies in Vietnam is that the authorities do not comply with the requirements or sequence on the procedures prescribed in the law while taking action against

51 *International Investment Agreements Navigator: Viet Nam*, *supra* note 2 (including the cases of Binh and Binh Chau Joint Stock Company v. Socialist Republic of Viet Nam (Stockholm Chamber of Commerce 2004); Michael McKenzie v. Viet Nam (Perm. Ct. Arb. 2010); Dialasie SAS v. Socialist Republic of Viet Nam (Perm. Ct. Arb. 2011); RECOFI v. Viet Nam (Perm. Ct. Arb. 2013); Trinh Vinh Binh v. Viet Nam (Perm. Ct. Arb. 2014)). https://investmentpolicy.unctad.org/investment-dispute-settlement/country/229/viet-nam (last visited Dec. 12, 2020).

52 *Cơ chế giải quyết tranh chấp giữa nhà đầu tư nước ngoài và nhà nước Việt Nam và đề xuất các biện pháp phòng ngừa* [*ISDS Involving the Government of Vietnam and Recommendation for Prevention Measures*], BỘ TƯ PHÁP [MINISTRY JUST.] (2015).

53 Interview with Dep't of Justice of Ho Chi Minh City (Sept. 2018).

54 *Id.*

55 *Id.*

any misconduct or wrong-doing of foreign investors.[56] Such attitude of the state body had created grounds for a foreign investor to protest the administrative measures against them.

Under the law, whenever an investment dispute with state bodies (national or local administrative body) arises, the foreign investor or foreign-invested enterprise concerned may resort to administrative reconsideration. According to the Law on Complaints of 2011,[57] foreign investors may make a complaint and request administrative reconsideration if they consider that certain administrative measures or decisions infringe their lawful rights or interests or that a state body has infringed upon their lawful decision-making power, i.e. imposed duties on them illegally and failed to protect their property rights. When refusing to accept a specific administrative measure or decision (i.e. the late handover of clean land sites for a project), the applicant shall submit a request for administrative reconsideration to either the local government at the same level,[58] the competent Government agency, or People's Committee at the next higher level[59] depending on the circumstances. The applicant then must claim for administrative compensation while applying for administrative settlement reconsideration.[60] Foreign investors, who are not satisfied with the decision of administrative reconsideration, may then initiate an administrative lawsuit against the relevant state agency at the competent People's Court in Vietnam.[61] Although the law guarantees non-discriminatory treatment of foreign nationals at the administrative judicial proceedings, foreign investors rarely go to the administrative court for an injunction against the state agencies due to lack of trust in the impartiality of the court in cases against the state agencies. In addition, they are refrain from the court proceedings because the judges in Vietnam tend to be conservative and rarely refer to international treaties when assessing the cases. Therefore, the foreign investors find it impractical to take legal actions in the Vietnamese court, and instead, they directly initiate international arbitration proceedings if administrative reconsideration fails.

To overcome this problem, the government of Vietnam has taken efforts to develop the ISDS mechanism which is predominantly based on good office

56 *Id.*

57 *Luật Khiếu nại và quyền khởi kiện hành chính của người dân* [Law on Complaints and the Right to Initiate Administrative Lawsuits], No. 02/2011/QH13 art. 2 (Nov. 11, 2011) [hereinafter Law on Complaints].

58 *Id.* art. 5.

59 *Id.* art. 7.

60 *Id.* art. 12.

61 *Id.* art. 7.

and mediation. The investment law expressly advocates the non-litigation methods, such as consultation and mediation, for resolving investment disputes. Accordingly, Article 14 of the Law on Investment 2014 states that any dispute relating to business investment activities in Vietnam shall be resolved first through negotiation and conciliation. Similarly Decree No. 15/2015/ND-CP of the Government on public-partnership investment form also provides that any dispute between the competent authority and investors shall be resolved through negotiation and conciliation.[62] To address the investor-state disputes, the Prime Minister of Vietnam has adopted a special Decision No. 04/2014/QD-TTg in 2014 to provide uniform guidelines for state bodies in the settlement of investment disputes between Vietnam and foreign investors.[63] Under the Decision, MOJ shall be the pioneer state body assisting the government and other government agencies in settling the disputes.

Decision No. 04/2014/QD-TTg also provides the responsibility of relevant national agencies in the stage of resolving complaints of a foreign investor in order to prevent international investment disputes. Accordingly, in the case where state agencies, organizations and individuals receive complaints or requests for consultancy sent by foreign investors, but they have no competence for resolution, they shall guide foreign investors to send complaints or request for consultancy to competent agencies and notify this event to competent agencies.[64]

At the stage of good office and consultation with foreign investors, some state agencies, organizations, and individuals may be invited or assigned by superior agencies to deal with the complaints. They must immediately report the case to their direct superior agencies and the MOJ (being the legal representative of the Government) if they notice the following:

a. Measures being the subject of complaints have signs of violation of law or commitments with foreign investors, affecting the lawful rights and benefits of foreign investors; or
b. Failing to definitely resolve complaints of foreign investors; or
c. International investment dispute can arise.[65]

The state agencies, organizations, and individuals, assigned to participate in the process of consultation and good office with a particular case, shall regularly notify the status of the settlement of complaints or consultancy to

62 *Nghị định về đầu tư theo hình thức đối tác công tư* [Decree on Investment in the Form of Public-Private Partnership], No. 15/2015/ND-CP art. 63(1) (Feb. 14, 2015).

63 Law on Complaints, *supra* note 57, art. 2.

64 *Id.* art. 9(2).

65 *Id.* art. 10.

the MOJ, competent state agencies coordinating the process of settlement of the complaint. In addition, they are required to strictly comply with options approved by the directly superior agencies (after they received the advice from the MOJ).

In the case that the dispute cannot be settled via consultation and good office, and the foreign investors decide to initiate legal action against the state through the international dispute settlement mechanism (usually an *ad hoc* international arbitration as Vietnam has not participated in ICSID Convention), the Government will form an inter-branch working group, comprising of the representative of the concerned state bodies, the MOJ, and lawyers or legal consultants (if any), to formulate strategies for settling international investment disputes to be sent to the Government for approval. According to Decision 04/2014/QD-TTg, the agency in charge shall coordinate with the inter-branch working group and the lawyers to handle the dispute case within 30 working days from the date on which the strategy for settling the investor-state dispute is approved, but no later than the time of filing of the first defense report to the international arbitration panel in accordance with the respective arbitration rules.

The establishment of the coordination mechanism for settlement of international investment disputes under Decision No. 04/2014/QD-TTg has helped the government to manage the ISDS more efficiently with clear assignment of functions amongst the government agencies. However, the issue for Vietnam remains – how to prevent investor-state disputes.

Despite the efforts by the Government and relevant agencies in internalizing investment treaties, the governance of IIA is far from perfect. The challenge remains to ensure that the local governments have a proper understanding of the legal implication of the state's international obligations. As the realization of state investment treaty obligation is assumed to all state agencies, both central and local, it is significant that they accumulate appropriate understanding and awareness about investment treaty obligation. It is believed that Vietnam must pay more attention to educating and training the government officials of IIAs to strengthen their awareness of potential international investment disputes. In particular, the training must provide practical knowledge on the state's IIA obligations and liabilities, such as the content of the principles of "most-favored-nation" treatment and "national treatment", "fair and equitable treatment" and the requirements for an application of these principles; practical interpretation of the term "investor" and "investment" under the respective IIA; "indirect expropriation" and legal implication of such measure. It is of high significance that the government agencies understand the treaty obligations clearly. Such continuous education programs are crucial for IIAs governance.

5 Suggestions for Improving IIA's Governance

Based on previous analysis, it is clear that Vietnam still needs to improve its investment treaty internalization with regard to three aspects, namely (i) treaty management, (ii) coordination for treaty implementation, and (iii) investor-state dispute settlement:

First, Vietnam should review and strengthen the investment protection regime to streamline the foreign investment policy. Since Vietnam has concluded BITs and FTAs with the same countries, while standards of investment protection in those treaties may vary greatly. Having dual investment regimes may cause confusion to the government "because it cannot be completely certain of the treatment standards required to grant to investors."[66] Thus, Vietnam should analyze and identify the adoption of the investment regime of the treaty that provides more certainty to the government actions. That would help to limit the discretion of the international tribunal in interpreting the scope of the obligations of the state in the application of complex investment protection rules, such as fair and equitable treatment, expropriation, and general exceptions.

Second, the government must work on improving coordination between state agencies, both inter-ministerial coordination and national-provincial government coordination. When the government introduces any policy it must not just assign to one particular ministry to carry out the preparation of the policy. The government must require closer coordination and cooperation between the ministries in the rule-making process; encourage the active involvement of local governments in the process of rule-making so that they fully understand the policy. The provincial governments and ministries must not issue conflicting regulations, as this leads to uncertainty and may eventually lead to investor-state disputes.

More effective dissemination would be useful for a better understanding of investment treaty obligations, in particular, targeting government agencies on the legal implication of investment treaty obligations for respective agencies. The 'post-negotiation dissemination of knowledge should be encouraged. This can be accompanied by the handbook or manual which explains what types of measures can give rise to obligations.

Third, in order to prevent litigation before international arbitration, the government of Vietnam shall also develop an efficient dispute prevention mechanism that can prevent a conflict from escalating to the level of a dispute.

66 Junianto James Losari, *Comprehensive or BIT by BIT: The ACIA and Indonesia's BITs*, 6 Asian Journal of International Law 15, 43 (2016).

This mechanism shall also comprise of the investor after-care services that would provide continued assistance to foreign investors once their investment is up and running.[67]

> For investors, an ombuds office provides an institutional interlocutor to turn to, an official channel to address issues and problems at an early stage. It can remain at the informal level but can also constitute a formal approach to the host government and a request to resolve the issue. It can constitute a mandatory channel or be available to the investor as an additional choice. It may operate according to strict procedures or be available in a more flexible manner. In any event, the ombuds office can constitute a way for the investor to attempt a prompt, early, potentially cheap and amicable resolution of a problem relating to its investment.[68]

Vietnam could follow the Korean model of the Office of the Foreign Investment Ombudsman (OIO) – "an ombuds office strategically located within the KOTRA,"[69] Korea's trade-investment promotion agency, but accountable solely and directly to the Prime Minister.

> [T]he OIO includes an investment aftercare team that consists of so-called "home doctors" who are experts on various industrial sectors in the Republic of Korea. They provide individualized support to foreign investors in [the Republic of] Korea who face grievances of any kind. In addition, an investment service team within the OIO makes sure that the investment environment for foreign investors is generally favorable, by addressing, among other things, the daily concerns of foreign managers and other individuals at a personal level.[70]

By having this type of mechanism, whenever foreign investors face a problem they can turn to an official channel to address the problem at an early stage. This can provide a prompt, inexpensive, and amicable resolution of a problem for investors.

---

67 U.N. Conference on Trade & Dev., Investor-State Disputes: Prevention and Alternatives to Arbitration, at 87, U.N. Sales No. E.10.II.D.11 (2010).

68 *Id.*

69 *Id.* at 88.

70 *Id.*

6 Conclusion

Over the last thirty years, Vietnam has gradually learned the international practice on promotion and protection of foreign investment. It has become a contracting party to many IIAs, which contains provisions on full protection and security, fair and equitable treatment, umbrella clauses, minimum standards of treatment, etc. This demonstrates Vietnam's willingness to establish itself as a reliable destination for foreign investment and take an active part in the global manufacturing network.

However, with the increased integration of the number of investor-states, disputes also increased in Vietnam. This greatly contributed in raising the awareness of IIAs in general, and ISDS in particular. Vietnam now must be ready to accept international arbitration on any matters relating to IIAs obligations as well as improve the IIA governance.

The Right of Access to Port and the Impact of Historic Fishing Rights

*Arron N. Honniball**

1 Introduction

DILA's 2020 International Conference theme, "Reshaping International Law in the Asian Century", does not necessitate the challenging or subversion of established norms. Reshaping may equally occur by reflecting on overlapping fragments of international law that were previously only analyzed in silos. This article identifies a previously overlooked contribution to international law by taking historic fishing rights, a predominantly regional or bilateral custom, and assessing the extent to which it refines the lack of customary law rights for vessels to access foreign ports, an established global norm of international law.

This article therefore first proceeds with section 2 charting the lack of any general right of access to foreign ports in the law of the sea. The only widely accepted customary law exception concerns vessels in distress, or a situation of *force majeure*, where access to port is necessary to preserve human life. Section 3 then introduces the contemporary scope of historic fishing rights, and, more specifically, the recognition of associated rights in the *Eritrea/Yemen – Sovereignty and Maritime Delimitation in the Red Sea Award Stage II* (*Eritrea/Yemen Award*).[1] The explicit example of an associated right of access to port for historic fishers necessitates a refinement of the findings in section 2. The conclusion shall place this exceptional right of entry within its wider international law context, namely as an affirmative example of bilateral customary international law.[2]

Finally, this article concerns the practice of international courts and tribunals in conceptually recognizing a historic fisher's associated right of access to a port in the law of the sea. This article does not provide an exhaustive account of historic fishing regimes in which an associated access right could apply.

* Research Fellow (Ocean Law and Policy), Centre for International Law, National University of Singapore.

1 Maritime Boundary Delimitation (Eri./Yemen), 22 R.I.A.A. 335 (Perm. Ct. Arb. 1999). The author is grateful for the constructive comments received on a previous draft by colleagues, participants at the 2020 DILA International Conference and during peer review.

2 A hypothetical regional custom variant is not discussed here.

Further refinements beyond the focus of this article may also apply, such as international trade law or health regulations.[3]

2 Foreign Vessels Access to Port in the International Law of the Sea[4]

A foreign vessel's right of access to port would operate as a limitation to the otherwise applicable port state's jurisdiction. A port state is a state exercising jurisdiction over a foreign vessel visiting its port. Analyzing access rights therefore first requires reviewing what 'port' encapsulates, as well as the port state jurisdiction potentially affected.

2.1 *Ports*

In common parlance, ports are defined by synonyms or common features, such as a harbor, wharf, or seaport. Fishing ports are more diverse, sometimes lacking any port facilities normally associated with shipping. For example, fishing ports would include beach landing areas. The *United Nations Convention on the Law of the Sea* (UNCLOS) refers to ports without definition.[5] The *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (PSMA) defines ports as including analogous "offshore terminals and other installations"[6] where port services are available. Ports are thus simply locations equipped to enable vessels to visit a state and/or access port services. This definition is without prejudice to the existence of any specific infrastructure or port services.

For international lawyers this broad definition is sufficient. The term port in "access to port" or "port state jurisdiction" identifies the state with rights,

3 *E.g.*, Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait, and Related Matters art. 16 Dec. 18, 1978, [1985] ATS 4 (entered into force Feb. 15, 1985) [hereinafter *Torres Strait Treaty*]; *Coronavirus* (*COVID-19*) *Information & Updates*, TORRES STRAIT ISLAND REGIONAL COUNCIL, http://www.tsirc.qld.gov.au/coronavirus (indicating that this article was implemented since February 2020 in response to COVID-19, including restrictions on cross-border movement).

4 Arron N. Honniball, Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing 140–48 (2019) (Ph.D. dissertation, Utrecht University) (ResearchGate) (this section incorporates and builds on parts 4.2.1–4.2.3 of the author's Ph.D. manuscript).

5 United Nations Convention on the Law of the Sea arts. 11, 18(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

6 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing art. 1(g), Nov. 22, 2009, 55 I.L.M. 1157 [hereinafter PSMA].

responsibilities, and limitations concerning the exercise of jurisdiction. In international trade law ports are comparable to land-based ports of entry.[7] Concerning the law of the sea, ports "form a convenient point at which to exercise control over [visiting] vessels".[8]

Ports are not a distinct maritime zone.[9] Many ports are located in closed bays or rivers that are landward of the baselines used to measure the breadth of the territorial sea.[10] Internal waters are those waters landward "of the baseline of the territorial sea".[11] A port's infrastructure may extend out to sea, in which case the "outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast".[12] This will impact the drawing of baselines and therefore the delineation of a coastal state's maritime zones.[13] The PSMA likewise refers to a state's territory as including its ports.[14] Ports (and foreign vessels therein) are therefore often located in a state's territory or internal waters.[15] A coastal state has sovereignty over its internal waters comparable to that exercised over its land territory.[16]

Ports may also be located in the territorial sea and archipelagic waters.[17] The territorial sea actually *extends* to roadsteads that would otherwise be wholly or partially located beyond the outer limits of the territorial sea.[18] A coastal state's sovereignty, subject to UNCLOS and other pertinent international law, extends to the territorial sea and archipelagic waters.[19]

Finally, UNCLOS recognizes offshore loading and unloading points for exploration or exploitation of the exclusive economic zone (EEZ) and continental

---

7 Erik J. Molenaar, *Port State Jurisdiction*, 2021 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, pt. A, ¶ 1.

8 BEVAN MARTEN, PORT STATE JURISDICTION AND THE REGULATION OF INTERNATIONAL MERCHANT SHIPPING 21 (2013).

9 *Id.* at 22–25.

10 Stuart Kaye, *The Proliferation Security Initiative in the Maritime Domain*, 81 INTERNATIONAL LAW STUDIES 141, 144 (2006); *See* UNCLOS, *supra* note 5, arts. 9–10.

11 UNCLOS, *supra* note 5, arts. 8(1), 50 (stating that closing lines may also delimit internal waters within archipelagic waters).

12 *Id.* arts. 11, 216(1)(c) (stating that the loading occurs "[w]ithin its territory [ports] or at its off-shore terminals").

13 *Id.* arts. 5, 7.

14 PSMA, *supra* note 6, pmbl., art. 4(1)(b).

15 Gordon Earl Dunfee, *Territorial Status of Deepwater Ports*, 15 SAN DIEGO LAW REVIEW 603, 612–13 (1978).

16 UNCLOS, *supra* note 5, art. 2(1).

17 *Id.* arts. 18(1), 25(2), 211(3), 216(1)(c), 218(1), 218(3), 219, 220(1) (off-shore terminals are treated alike, but are not part of the coast).

18 *Id.* art. 12.

19 *Id.* arts. 2(1), 2(3), 34(2), 49.

shelf.[20] These offshore points, as well as other exceptional deep-water ports in the EEZ or the high seas, are not used in historic fisheries. Nevertheless, the port state will limit the entry of vessels to those flag states for which a relevant bilateral arrangement on access and jurisdiction exists. Bilateral agreements between flag states and the USA provide the USA with treaty-based port state jurisdiction for its extraterritorial ports analogous to that exercised over territorial ports.[21]

2.2 *Port State Prescriptive Jurisdiction on Port Entry*

A port state's prescriptive jurisdiction may be separated into two strands, namely; (1) the regulation of access to port and port services (e.g. landing, transshipping, packaging, processing, refueling, resupplying, maintenance, and drydocking), and; (2) the regulation of port offenses and other exercises of state jurisdiction in international law (e.g. territorial jurisdiction, protective jurisdiction or treaty-based jurisdiction).

This article concerns the regulation of access to port and port services which is best seen as a *domaine réservé* exception to the law of state jurisdiction.[22] Contemporary port state practice on access, while universally accepted as legal among states, does not follow the nexus-based approach of state jurisdiction in international law. Port entry conditions may be prescribed concerning conduct wherever and whenever it occurs. This includes imposing conditions of extraterritorial conduct with no nexus to the port state, let alone a sufficient nexus to fulfill the requirements of applying the principles of objective or subjective territorial jurisdiction. This is analogous to the legal basis for prescribing conditions of entry for foreign nationals entering a state.[23]

---

20 *Id.* arts. 56, 60, 80; Henrik Ringbom, *National Employment Conditions and Foreign Ships – International Law Considerations*, 456 Scandinavian Institute of Maritime Law Yearbook 109, 139–42 (2015).

21 33 U.S.C. § 1518; Gero Brugmann, Access to Maritime Ports 57–58 (2003) (Ph.D. dissertation, University of Hamburg) (on file with author); *e.g.*, Exchange of Letters Constituting an Agreement Concerning the Louisiana Off-Shore Oil Port (LOOP) (with Annex), Fr.-U.S., Mar. 24, 1983, 1437 U.N.T.S. 61; Dunfee, *supra* note 15, at 613.

22 Honniball, *supra* note 4, at 71–88; Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 2020 British Yearbook of International Law 11–16, https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823?searchresult=1.

23 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(b), Nov. 15, 2000, 2241 U.N.T.S. 507 (stating that the requirements may be prescribed without the need to fulfill any nexus threshold as required in state jurisdiction: "'Illegal entry' shall

Countless multilateral instruments recognize a broad right to regulate entry into port or access to port services, including the *International Convention for the Safety of Life at Sea* (SOLAS),[24] *International Convention for the Prevention of Pollution From Ships* (MARPOL),[25] UNCLOS,[26] *Salvage Convention*,[27] *United Nations Fish Stocks Agreement* (UNFSA),[28] PSMA,[29] *Hong Kong Convention*,[30] *Convention on Facilitation of International Maritime Traffic* (FAL),[31] and *International Health Regulations* (IHR).[32] Supplementary instruments, including the *International Code for the Security of Ships and of Port Facilities*,[33] reaffirm the right to deny entry to a port. Within fisheries law, port entry conditions may concern the manner of high seas fishing conducted by foreign vessels. For example, entry conditions may address whether the vessel's conduct is deemed by the port state to have undermined a conservation and management measure of a Regional Fisheries Management Organization or Arrangement (RFMO/A), or is deemed illegal, unreported, or unregulated (IUU) fishing.[34]

---

mean crossing borders without complying with the necessary requirements for legal entry into the receiving State").

24 International Convention for the Safety of Life at Sea ch. XI-2, Regulation 9/2.2, 2.5.4, Nov. 1, 1974, 1184 U.N.T.S. 276 [hereinafter SOLAS].

25 International Convention for the Prevention of Pollution from Ships art. 5(3), Feb. 17, 1978, 1340 U.N.T.S. 184.

26 UNCLOS, *supra* note 5, arts. 25(2), 211(3), 255.

27 International Convention on Salvage art. 9, Apr. 28, 1989, 1953 U.N.T.S. 165 [hereinafter Salvage Convention].

28 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 23, Aug. 4, 1995, 2167 U.N.T.S. 3 [hereinafter UNFSA].

29 PSMA, *supra* note 6, arts. 4(1)(b), 7–9.

30 Int'l Maritime Org. [IMO], SR/CONF/45, *Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships*, art. 9(3) (May 15, 2009), https://www.imo.org/en/OurWork/Environment/Pages/Ship-Recycling.aspx.

31 Convention on Facilitation of International Maritime Traffic art. 5, Apr. 9, 1965, 591 U.N.T.S. 265 [hereinafter FAL].

32 International Health Regulations arts. 28, 43, May 23, 2005, 2509 U.N.T.S. 79 [hereinafter IHR].

33 IMO, SOLAS/CONF.5/34, *Consideration and Adoption of the International Ship and Port Facility Security (ISPS) Code* (Dec. 17, 2002), https://www.imo.org/en/OurWork/Security/Pages/SOLAS-XI-2%20ISPS%20Code.aspx; IMO, MSC/Circ.1111, *Guidance Relating to the Implementation of SOLAS Chapter XI-2 and the ISPS Code*, ¶¶ 3.2, 3.5.4, 3.8.2–.4 (June 7, 2004), https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/MSC.Circ.1111.pdf.

34 *E.g.*, Western & Central Pacific Fisheries Commission [WCPFC], *Conservation and Management Measure on Minimum Standards for Port State Measures*, at 3–4, WCPFC Doc. CMM 2017-02 (Dec. 7, 2017).

The customary law breadth and basis of port state discretion over entry are evident in the lack of any treaty-based jurisdiction within these instruments, as well as their application to non-contracting parties' vessels where flag state consent is absent. Port state control regimes equally apply instruments to visiting vessels regardless their flag state or ratification status.[35]

2.3 *Port State Enforcement Jurisdiction on Port Entry*

The exceptional *domaine réservé*-based right to regulate access to port and port services is, in turn, limited in its enforcement to the denial of access to port or port services. The denial of entry to port or the denial of port services is seen as an enforcement measure.[36] Other enforcement measures, such as fines, imprisonment, or confiscation of catch and vessel would not fall within this *domaine réservé* exception and are thus reserved for validly prescribed port state offense (strand (2) in subsection 2.2 above).[37]

While the scope of a coastal state's enforcement jurisdiction significantly differs depending on the maritime zone in which enforcement occurs, a port state's enforcement jurisdiction is largely consistent regardless of where the port is located. Within internal waters, no general right of navigation exists which would limit port state jurisdiction.[38] Within other maritime zones, the navigation rights that limit coastal state enforcement are inapplicable once the vessel requests entry into port or enters a port therein.[39]

Outside of the port limits, an inbound foreign vessel may exercise innocent passage in the territorial sea. However, this is subject to the coastal state's measures necessary to enforce its conditions of port entry.[40] If it is demonstrable that a vessel is proceeding to port and a coastal state's measures are necessary

35 Memorandum of Understanding on Port State Control in the Asia-Pacific Region, § 2.5, at 4, Nov. 6, 2018, http://www.tokyo-mou.org/doc/Memorandum%20rev18.pdf.

36 TBR Proceedings Concerning Chilean Practices Affecting Transit of Swordfish in Chilean Ports, in report dated Mar. 23, 1999 from European Commission to the Trade Barriers Regulation Commission, at 32 (Mar. 23, 1999).

37 *See* Arron N. Honniball, *What's in a Duty? EU Identification of Non-Cooperating Port States and Their Prescriptive Responses*, 35 THE INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 19, 35–40 (2020) (indicating the examples of port state offenses from the Asian region).

38 UNCLOS, *supra* note 5, art. 18(1); (stating that innocent passage ends at the baselines, with no corresponding navigational rights within internal waters, bar); id. art. 8(2); *id.* art. 18(1)(a) (showing that upon calling at port this limited exception would extinguish by analogy to port calls outside internal waters).

39 *Id.* arts. 18(1), 52; *id.* art. 53(3) (showing that the right of archipelagic sea lanes passage is inapplicable as it is limited to vessels traversing from and to the EEZ/high seas).

40 *Id.* arts. 25(2), 52(1), 211(3).

and preventative, the vessel may be treated as "akin to vessels engaged in non-innocent passage" for the purposes of enforcement.[41] Concerning outbound vessels, enforcement jurisdiction remains at the coastal state's discretion.[42] For example, vessels violating port state measures could be subject to hot pursuit and enforcement measures at sea.[43]

2.4 *Access to Port by Foreign Vessels*

The finding that a port state has an exceptional *domaine réservé*-based right to condition and deny access to port provides an unlimited jurisdictional *basis* in international law. However, beyond establishing a valid legal basis, a port state must also comply with any *other* obligations assumed under international law which may limit the scope and exercise of its jurisdiction. Where the law of the sea provides foreign vessels with a right of entry into port, the corresponding obligation upon port states would limit port state jurisdiction. An otherwise legal basis to deny access to port may also be legally constrained by other examples not examined here, including obligations under human rights instruments,[44] the *International Convention on Maritime Search and Rescue*, or the *Refugee Convention*.[45]

41 Richard Barnes, United Nations Convention on the Law of the Sea: A Commentary 222 (Alexander Proelss ed., 2017).

42 UNCLOS, *supra* note 5, arts. 27(2), 28(3).

43 *Id.* arts. 111(1), (8) (indicating anticipated hot pursuit commenced in internal waters); *see also* Nicholas M. Poulantzas, The Right of Hot Pursuit in International Law 151–54 (2d ed. 2002) (showing examples of 'vertical passage').

44 Efthymios Papastavridis, *European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?*, 12 Queen Mary Studies in International Law, the Interpretation & Application of the European Convention of Human Rights 115 *passim* (2013) (succinctly stating how law of the sea rights and human rights obligations interact).

45 Felicity G. Attard, *The Duty of the Shipmaster to Render Assistance at Sea Under International Law*, 41 Queen Mary Studies in International Law 29 *passim* (2020); *see* Valentin J. Schatz & Marco Fantinato, *Post-Rescue Innocent Passage by Non-Governmental Search and Rescue Vessels in the Mediterranean*, 35 The International Jounral of Marine & Coastal Law 740, 749 (2020); Richard Barnes, *The International Law Of The Sea And Migration Control*, 21 Immigration & Asylum Law & Policy in Europe 103, 119 (2010); *see generally* Richard L. Kilpatrick & Adam Smith, *Balancing the SAR Responsibilities of States and Shipmasters*, 46 Immigration & Asylum Law & Policy in Europe 81, 82–85 (2020); *see generally* Seline Trevisanut & Salvatore Nicolosi, *Saving Lives in the Mediterranean: A Legal Analysis of Aquarius-like Incidents*, 2019 Ars Aequi 121, 122 (2019) (stating that states have conflicting interpretations).

2.4.1 A General Right of Entry to Port

Prescribed port entry conditions would be unenforceable through denial of entry if said denial conflicts with a foreign vessel's right of access. Historically, a right of port entry was the subject of a lively debate.[46] Commentators and state practice have largely concluded no such general right exists.[47] Indeed, in fisheries law quite the opposite is apparent. Port states party to PSMA are obliged to deny a foreign fishing vessel access to port if sufficient evidence suggests the vessel has engaged in IUU fishing or fishing-related activities in support of IUU fishing.[48]

In fisheries law the debate on access occasionally resurfaces. In 2016 a proposal sought to amend an RFMO Conservation Measure by exempting certain vessels from submitting documentation as a port entry requirement. This was based upon the "right of a vessel to peaceful entry into port is enshrined in international maritime law".[49] Other states disagreed and the proposal failed to gain support.[50] Equally unsuccessful have been attempts in domestic courts

46 *See generally* Myres S. McDougal & William T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea 103–17 (1987); A. Vaughan Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 San Diego Law Review 597 (1976); Louise de La Fayette, *Access to Ports in International Law*, 11 The International Journal of Marine & Coastal Law 1 (1996); Anthony Morrison, Places of Refuge for Ships in Distress: Problems and Methods of Resolution 53–74 (2012); Brugmann, *supra* note 21, at 123–24; Vasilios Tasikas, *The Regime of Maritime Port Access: A Relook at Contemporary International and United States Law*, 5 Loyola Maritime Law Journal 1 (2007); Benjamin Parameswaran, The Liberalization of Maritime Transport Services: With Special Reference to the WTO/GATS Framework 127–40 (2004); Ian J. Booth, *International Ship Pollution Law: Recent Developments at UNCLOS*, 4 Marine Policy 215, 225 (1980) (discussing both sides on the matter).

47 McDougal & Burke, *supra* note 46, at 117 (as well as numerous other texts recognizing the established exceptions of *force majeure* or treaty-based rights of access); *e.g.*, William D. Baumgartner & John T. Oliver, *Conditions on Entry of Foreign-Flag Vessels into US Ports to Promote Maritime Security*, 84 International Law Studies 33 (2008).

48 PSMA, *supra* note 6, art. 9(4).

49 Commission for the Conservation of Antarctic Marine Living Resources [CCAMLR], *Proposal by Ukraine to Amend CCAMLR Conservation Measure 10-05 on the Dissostichus Catch Documentation Scheme*, CCAMLR Doc. No. CCAMLR-XXXV/29 (2016) (reference was also made to innocent passage, but as noted, this is inapplicable).

50 *E.g.*, CCAMLR, *Report of the Thirty-Fifth Meeting of the Commission*, at 5, CCAMLR Doc. No. CCAMLR-XXXV (Oct. 28, 2016) (stating that Chile "could not agree to proposals that seek to undermine Port States' rights to establish certain requirements for port access"); *id.* at 155 (stating that other states also expressed reservations).

to challenge the legality of port state measures by arguing an international law-based right to port access.[51]

In short, even the *presumption* of access being granted for peaceful and compliant merchant vessels does not extend to fishing vessels.[52] In 1958, an arbitral tribunal had reasoned that "[a]ccording to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interest of the State so require".[53] This reasoning has however been overtaken by contrary practice,[54] and in any event, did not stand for a general right.[55] Likewise, the *Convention and Statute on the International Régime of Maritime Ports*, while sometimes argued as providing a right of port entry, neither represents customary law nor provides a right of entry for contracting parties.[56] In any event, fishing vessels were excluded from the reciprocity provided.[57]

Fishing vessels are also often excluded or further qualified in bilateral access agreements,[58] most recently including the EU/UK *Trade And Cooperation*

---

51 *Omunkete Fishing (Pty) Ltd. v. Minister of Fisheries* [2008] NZHC 968 at [40] per Mallon J. (N.Z.).

52 Lowe, *supra* note 46, at 621–22; John T Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports*, 5 South Carolina Journal of International Law & Business 209, 214–15 (2009); Henning Jessen, *Sanctions Compliance Risks in International Shipping: Closure of Five Crimean Ports, the Sanctions Regime in Respect of Ukraine/Russia and Related Compliance Challenges*, *in* Maritime Law in Motion 289, 301–02 (Proshanto K. Mukherjee et al. eds., 2020).

53 Saudi Arabia v. Arabian American Oil Co., 27 I.L.R. 117, 212 (High Ct. 1958).

54 *E.g.*, Hovrätt [HovR] [Court of Appeals] 2006 p. 67 M8471-03 (Swed.) (indicating the arguments of the Swedish Environmental Protection Agency); Havet Havsmiljökommissionens [Sea Environment Commission], Tid För En Ny Strategi [Time for a New Strategy] 268 (2003) (Swed.) (concluding that there is no right of entry).

55 Kai Trümpler, United Nations Convention on the Law of the Sea: a Commentary 84, ¶¶ 17–19 (Alexander Proelss ed., 2017) (stating that vital interests are undefined and subject to national interpretation. Trümpler argues *ARAMCO* only stood for non-discrimination).

56 *See* Convention and Statute on the International Regime of Maritime Ports art. 2, Dec. 9, 1923, 58 L.N.T.S. 285 (providing equality of treatment only on the basis of reciprocity).

57 *Id.* art. 14.

58 McDougal & Burke, *supra* note 46, at 109–10; Francisco Vicuña, *Port State Jurisdiction in Antarctica: A New Approach to Inspection, Control and Enforcement*, *in* Implementing the Environmental Protection Regime for the Antartic 45, 59–60 (Davor Vidas ed., 2000) (stating that even when States do establish rights of entry under bilateral treaties, coastal States will usually retain the right to deny entry when vital interests are threatened); Barnes, *supra* note 45, at 118.

Agreement.[59] Indeed, a vast collection of bilateral access agreements would be superfluous if a general right to port entry existed.[60] As treaty-based rights of entry for foreign vessels are a derogation from the port state's rights, the scope of the rights conferred will be restrictively interpreted to only include the classification of vessel, such as merchant vessels or warships, which are clearly identified.[61]

Further contemporary practice accepts the legality of closing ports to foreign vessels unless, as occurred with Ukraine's 2014 closure of five ports located in Russian-controlled Crimea, a dispute over territorial sovereignty exists.[62] The recent *Arctic Science Agreement* promotes territorial and port access, but via soft commitments of facilitating access through "best efforts".[63] This non-binding language, similar to that seen in FAL,[64] once again highlights the lack of port access rights. The IHR, with 196 States Parties,[65] provides for the *free pratique* of foreign vessels in the context of public health responses

59 Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part art. SERVIN.5.46(1)(a), at 126–27, Dec. 30, 2020 (stating no less favourable treatment on access to port for international maritime transport services).

60 Erik J. Molenaar, *Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage*, 38 OCEAN DEVELOPMENT & INTERNATIONAL LAW 225, 227 (2007); ERIK J. MOLENAAR, PORT AND COASTAL STATES, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 280 (Donald Rothwell et al. eds., 2015); Ted L. McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 JOURNAL OF MARITIME LAW & COMMERCE 305, 310–11 (1997); Brugmann, *supra* note 21, at 5, 32; MARTEN, *supra* note 8, at 31–35; HAIJIANG YANG, JURISDICTION OF THE COASTAL STATE OVER FOREIGN MERCHANT SHIPS IN INTERNAL WATERS AND THE TERRITORIAL SEA 48–70 (2006).

61 *See Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, Advisory Opinion, 1945 P.C.I.J. (ser. A/B) No 43, at 142 (Dec. 11) (showing distinction of a treaty provision granting the use of port for commercial purposes from the lack of any right of access and anchorage for war vessels).

62 Jessen, *supra* note 52, at 289; Lester H. Woolsey, *Closure of Ports by the Chinese Nationalist Government*, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW 350, 353 (1950) (indicating that if insurgents take control of a port the government may not be able to close the port to third states and must instead rely on blockades).

63 Agreement on Enhancing International Arctic Scientific Cooperation art. 4, May 11, 2017, T.I.A.S. No. 18-523.

64 FAL, *supra* note 31, arts. I, V; *id.* Annex § 62.12 (stating that *facilitation* of traffic by *reducing* requirements on port arrival and avoiding *unnecessary* restrictions on port entry).

65 *Id.* Annex § 64.1 (stating that non-parties to IHR shall endeavour to apply IHR to international shipping).

by Contracting Parties, including access to port.[66] However, *free pratique* is limited to not *refusing* permission to enter port "for public health reasons" and may still be subject to conditions of entry or specified ports.[67] Additional health measures, including denial of entry, may apply in response to "specific public health risks or public health emergencies of international concern".[68]

The COVID-19 pandemic and the response of many port states to prohibit or severely restrict access have demonstrated the lack of any general right of port access.[69] Technological innovations and automation in shipping may result in further restrictions on access to a port, be it to promote a transition to marine autonomous surface ships (MASS) or because future autonomous ports may be ill-equipped to address non-MASS vessels.[70]

2.4.2 A *Force Majeure* or Distress Related Right of Entry to Port

One exception to 2.4.1 (above) is the customary right of access to port, or another sheltered area, when vessels are in distress or compelled by *force majeure*, to access port. Access must be necessary to preserve human life.[71]

---

66 IHR, *supra* note 32, arts. 1, 28; WHO & IMO, A JOINT STATEMENT ON THE RESPONSE TO THE COVID-19 OUTBREAK 1 (2020), https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/JointStatement_COVID-19.pdf (indicating that WHO and IMO called upon all states to respect *free pratique* during the COVID-19 pandemic).

67 IHR, *supra* note 32, arts. 28(1)–(3); *see, e.g.*, *Press Release: Crew Member with COVID-19 (Coronavirus Disease 2019) Fully Recovers and Ship Resumes Normal Operations*, MAR. & PORT AUTHORITY SING. (Feb. 24, 2020), https://www.mpa.gov.sg/web/portal/home/media-centre/news-releases/detail/e7a16c6a-fe5c-47bb-b9ad-03538c6d9fa0; Karen N. Scott, *New Zealand: Regulating Shipping in Response to COVID-19*, 5 ASIA-PACIFIC JOURNAL OF OCEAN LAW & POLICY 351, 357–58 (2020) (stating the conditions of disembarkation for essential tasks).

68 IHR, *supra* note 32, art. 43; *cf.* Agreement on Maritime Transport Between the Governments of the Member Countries of the Association of Southeast Asian Nations and the Government of the People's Republic of China arts. 4, 16, Nov. 2, 2007.

69 Natalie Klein, *International Law Perspectives on Cruise Ships and COVID-19*, 11 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 282 *passim* (2020).

70 Henrik Ringbom, *Legalizing Autonomous Ships*, 34 OCEAN YEARBOOK ONLINE 429, 448 (2020).

71 *Collection of Sources on Entry into Port Under Force Majeure*, U.S. DEP'T STATE (2009), https://2001-2009.state.gov/s/l/2007/112701.htm; MORRISON, *supra* note 46, at 75–126; Terje Lobach, *Advances in Port State Control Measures*, *in* FISH PIRACY: COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING 291, 296 (OECD ed., 2004); Alexander Proelss, *Rescue at Sea Revisited: What Obligations Exist Towards Refugees?*, 2008 SCANDINAVIAN INSTITUTE OF MARITIME LAW YEARBOOK 1, 22–25; Aldo Chircop, *Assistance at Sea and Places of Refuge for Ships: Reconciling Competing Norms*, *in* JURISDICTION OVER SHIPS: POST-UNCLOS DEVELOPMENTS IN THE LAW OF THE SEA 140, 140 (Henrik Ringbom ed., 2015); UNCLOS, *supra* note 5, arts. 18(2), 39(1)(c), 45, 52(1), 54.

This customary law right of entry to port is recognized in soft law instruments, such as the *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU).[72] It is vicariously recognized in treaties, such as PSMA, which would, but for the situation of *force majeure* or distress, impose obligations upon port states to deny access.[73] Other instruments also implicitly recognize this exceptional right of entry by limiting the port states' obligations to vessels "voluntarily in port".[74] Similarly, treaties that promote compliance with international standards through port state control will often exempt those vessels in port due to distress or *force majeure*.[75]

This exception will limit the port state's right to deny entry, although a place of refuge will not normally require port entry but rather a sheltered area along the coastline.[76] Requests for access to a place of refuge may arise in other contexts, such as a situation presenting an environmental hazard,[77] or economic considerations, such as the otherwise total loss of an abandoned vessel and cargo.[78] However, in such cases there is no obligation under international law for the coastal state to grant permission to enter a place of refuge, nor are places of refuge necessarily a port.[79] Of course, states remain at liberty to grant

---

72 Food and Agriculture Organization of the United Nations (FAO), International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing 15 (2001).

73 PSMA, *supra* note 6, art. 10.

74 FAO, Code of Conduct for Responsible Fisheries 41 (1995); UNFSA, *supra* note 28, art. 23(2).

75 Work in the Fishing Convention art. 4(2)(d), 43(2), June 14, 2007, ILO Doc. No. 188; 1993 Torremolinos Protocol Relating to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels art. 5(2), Apr. 2, 1993, 2001 Tractatenblad 168; SOLAS, *supra* note 24, art. IV; *e.g.*, Chircop, *supra* note 71, at 149–50.

76 IMO, *Guidelines on Places of Refuge for Ships in Need of Assistance* ¶ 1.19, IMO Doc. A 23/Res.949 (Mar. 5, 2004) ("[A] place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment").

77 *Id.* ¶ 1.18.

78 *ACT Shipping (Pte) Ltd. v. Minister for the Mar.* [1995] 3 I.R. 406 (H. Ct.) 424–26 (Ir.) ("If safety of life is not a factor, then there is a widely recognized practice among maritime states to have proper regard to their own interest and those of their citizens in deciding whether or not to accede to any such [safe haven] request"); John E. Noyes, *Places of Refuge for Ships*, 37 Denver Journal of International Law & Policy 135, 138 (2008) (noting that some authors maintain other interests, including economic, remain in explaining the customary law rule of access to port or other places of refuge when in distress).

79 IMO, *supra* note 76, ¶¶ 1.19, 3.12, 3.13; *ACT Shipping (Pte) Ltd.* [1995] 3 IR 424–26 (explaining that at most one may raise a judicial review challenge in domestic law, but the decision to refuse access would have to have been patently unreasonable or irrational);

broader rights of entry into port for vessels in distress than their customary law obligations require. For example, the *Convention concerning Fishing in the Black Sea* provided Contracting Parties' vessels with access to designated ports of refuge "to shelter from bad weather or in case of damage".[80]

The port/coastal state evaluating the necessity of shelter for the preservation of human life will balance the interests raised by the vessel's circumstances against its own interests.[81] When granting humanitarian access further entry conditions may therefore be applied,[82] although illegal activity alone cannot be grounds for denial of entry.[83] A common example would be imposing financial security conditions for entry.[84] Decisions about the necessity of entry, or lack thereof, should be based on objective facts as balanced against the port state's interests.[85]

Essentially, port states should exercise due diligence in reviewing, on a case-by-case basis, whether an entry right applies.[86] The port state determines whether *force majeure* or distress is demonstrated,[87] which domestic interests are threatened, the weight to be given to competing interests, and any decision upon entry and upon what conditions. For vessels granted an exceptional right of access to port and acting in full compliance with the condition of entry imposed, the port services they can access are similarly limited. Subject to availability, the port state is obligated to provide access to port services

---

see also Schatz & Fantinato, *supra* note 45, at 761–64, 768–69 (indicating that domestic law may also exclude criminal liability for breaching orders denying port entry).

80 Convention Concerning Fishing in the Black Sea arts. 2–3, July 7, 1959, 377 U.N.T.S. 203.

81 Jon M. Van Dyke, *Safe Harbour*, 2010 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 4–6 (2010); *see* IMO, *supra* note 76, pmbl.; *see* Henrik Ringbom, *You Are Welcome, but… Places of Refuge and Environmental Liability and Compensation, with Particular Reference to the EU*, 2004 CMI YEARBOOK 208, 209–10; *see* Noyes, *supra* note 78, at 140–42.

82 Ringbom, *supra* note 81, at 209–10 (recognizing the right to impose conditions); *e.g.*, PSMA, *supra* note 6, art. 10; *e.g.*, SOLAS, *supra* note 24, art. V(b); *e.g.*, Salvage Convention, *supra* note 27, art. 11.

83 Eric Van Hooydonk, *The Obligation to Offer a Place of Refuge to a Ship in Distress*, 2003 CMI YEARBOOK 403, 408 (2003).

84 Noyes, *supra* note 78, at 139; *e.g.*, Sibulelo Seti, *Places of Refuge for Ships in Distress: The South African Approach and Challenges*, 14 TRANSNAV 67, 69 (2020) (indicating that in South Africa an insurance coverage requirement plays a pivotal role in balancing competing interests when granting entry into port).

85 Van Hooydonk, *supra* note 83, at 407.

86 Chircop, *supra* note 71, at 161–62.

87 Proelss, *supra* note 71, at 25.

essential to preserving health and safety.[88] Beyond this, services are provided at the discretion of the port state.

In the near future, the right of refuge may need to adapt to forthcoming technological revolutions. As Chircop highlights, unmanned vessels will trigger distress cases threatening serious transboundary environmental or economic damage, but without raising humanitarian concerns.[89] A right of entry in distress should necessarily either evolve to address these primarily environmental concerns, or simply fade away as remote operators move ashore and humanitarian concerns disappear.

2.5 *Sub-Conclusion*

It was seen that the jurisdiction to regulate access to port was legally valid without recourse to the principles of state jurisdiction. Port states have an exceptional *domaine réservé*-based jurisdiction to prescribe conditions of entry and enforce these through denial of access (subsections 2.1–2.3)). Within the law of the sea, the principal restriction on this jurisdiction is those rare cases where a vessel in distress, or compelled by *force majeure*, requires access to a port in order to preserve human life. In such cases, a port state may condition but not outright prohibit port entry and may condition but not outright prohibit access to port services that are essential to the health and safety of the crew and passengers (subsection 2.4).

A right of port entry, therefore, limits the port state's jurisdiction on port entry and services. However, this right may also impact the wider port state jurisdiction to enforce offenses utilising a port state nexus. Certain laws are inapplicable when *force majeure* or distress entry occurs.[90] While the scope of this limitation is unsettled, inapplicable laws would include those "in connection with actions to relieve the distress".[91] Rules closely tied to voluntarily entering a state, such as customs law, are inapplicable to vessels in port due

88 PSMA, *supra* note 6, arts. 10, 11(2)(a), 18(2).

89 Aldo Chircop, *Testing International Legal Regimes: The Advent of Automated Commercial Vessels*, 60 German Yearbook of International Law 109 (2017).

90 Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 Ocean & Coastal Law Journal 207, 210 (2000); Robin Rolf Churchill & Alan Vaughan Lowe, The Law of the Sea 68–69 (2d ed. 1988); Dyke, *supra* note 81, ¶¶ 12–14 (suggesting limitations may be relegated to comity).

91 U.S. Dep't State, *supra* note 71; *contra* Jianye Tang, *The Agreement on Port State Measures: A Commentary*, 2009 China Oceans Law Review 312, 324 ("the port State's duties only extend as far as not to deny their entry into its port, but it is not obligated to offer any port services").

to *force majeure* or distress.[92] Enforcement of treaty-based jurisdiction under Article 218 of UNCLOS is limited by a requirement, among others, that proceedings may only be instituted "[w]hen a vessel is voluntarily within a port or at an off-shore terminal".[93] Beyond these limited cases of offenses closely tied to entry or treaty-based port state jurisdiction, comity may discourage the enforcement of port state laws but port states are not limited as a matter of international law.[94]

3 Historic Fishing Rights and Associated Rights

Much like port state jurisdiction discussed above, the law on the acquisition and limits of historic fishing rights is found outside of UNCLOS and within the residual general international law.[95] As this article proposes that a second exceptional customary right of access to port can be found in the doctrine of

92 YANG, *supra* note 60, at 66; DAVID J. DOULMAN & JUDITH SWAN, A GUIDE TO THE BACKGROUND AND IMPLEMENTATION OF THE 2009 FAO AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING 45 (2012); Oliver, *supra* note 52, at 292; Case C-286/90, Anklagemyndigheden v. Poulsen, 1992 E.C.R. I-6034, I-6046 (distinguishing the inapplicability of entry-related laws from the possible continued application of other territorial-based laws).

93 UNCLOS, *supra* note 5, arts. 218(1), (3); *see also* Ho-Sam Bang, *Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea*, 40 JOURNAL OF MARITIME LAW & COMMERCE 291, 300 (2009); Doris König, *Article 218*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1487 (Alexander Proels ed., 2017); Denning Metuge & Patrick Vrancken, *Port State Jurisdiction in Terms of Article 218 of the United Nations Convention on the Law of the Sea: A South African Perspective*, *in* AFRICAN PERSPECTIVES ON SELECTED MARINE, MARITIME AND INTERNATIONAL TRADE LAW TOPICS 71, 81 (Patrick Vrancken & Charl Hugo eds., 2020) (explaining that implementation remains optional, as seen in the lack of domestic provisions in South Africa).

94 Authors disagree on whether Article 220 of UNCLOS may limit port state jurisdiction by referring to vessel voluntarily in port. *Compare* ERIK J. MOLENAAR, COASTAL STATE JURISDICTION OVER VESSEL-SOURCE POLLUTION 187 (1998), *with* Ahmed Adham Abdulla, Flag, Coastal and Port State Jurisdiction over the Prevention of Vessel Source Pollution in International Law: Analysis of Implementation by the Maldives 171 (2011) (Ph.D. dissertation, University of Wollongong) (on file with Australian National Centre for Ocean Resources and Security, Faculty of Law, University of Wollongong). Arguably, as the pollution incident occurred in the territorial sea or EEZ, unconnected to the compelled port entry, enforcement should not be limited.

95 UNCLOS, *supra* note 5, pmbl.; *see also id.* art. 2(3) for laws in the territorial sea; *see also In re* The South China Sea Arbitration (Phil. v. China), 33 R.I.A.A. 153, 470–71 (Perm. Ct. Arb. 2016) [hereinafter SCS Award].

historic fishing rights, and an overview of contemporary historic fishing rights is necessary for context and scope.

3.1 *Historic Fishing Rights*[96]

UNCLOS explicitly recognizes several regimes of historic waters.[97] Historic waters involve "claims of sovereignty over maritime areas derived from historical circumstances".[98] Alternatively, and significantly narrower, UNCLOS establishes treaty-based "traditional fishing rights" in archipelagic waters which were formally high seas, while historic fishing rights in archipelagic waters which were formally territorial seas are preserved.[99] No historic fishing access rights in the EEZ are provided. Coastal states have exclusive jurisdiction over access to living resources in their EEZ. At most, coastal states shall *take into account* historic fishing in the EEZ *if and when* allocating catch surplus to foreign states.[100] Any resulting economic dislocation in historic fishing or researching states is just one of many non-exhaustive factors the coastal state shall weigh under Article 62(3) of UNCLOS when allocating catch surplus to foreign states.[101]

UNCLOS is largely silent on defining or elaborating the broader conception and acquisition of historic rights,[102] although general requirements including consistency with UNCLOS and general international law, as well as following the UNCLOS drafters' intent, shall apply.[103] The *South China Sea Arbitration*

96 The author is indebted to Valentin Schatz for sharing an advance draft of his Ph.D. manuscript's chapter on historic fishing rights.

97 UNCLOS, *supra* note 5, arts. 10(6), 15, 46, 298(1)(a)(i); Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. 18, ¶ 100 (Feb. 24) ("It seems clear that the matter continues to be governed by general international law [which] does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognised cases of 'historic waters' or 'historic bays'").

98 SCS Award, *supra* note 95, at 271.

99 UNCLOS, *supra* note 5, art. 51(1).

100 *Id.* arts. 47(6), 62(3).

101 William T. Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 OREGON LAW REVIEW 73, 102–03 (1984); SCS Award, *supra* note 95, at 277–78, 437.

102 Seokwoo Lee & Lowell Bautista, *Historic Rights*, *in* THE DEVELOPMENT OF THE LAW OF THE SEA CONVENTION: THE ROLE OF INTERNATIONAL COURTS AND TRIBUNALS 244, 244–45 (Øystein Jensen et al. eds., 2020).

103 *See* SCS Award, *supra* note 95, at 290–91 (upon ratification of UNCLOS states "relinquished the freedoms of the high seas that it had previously utilised with respect to the living and non-living resources of certain sea areas which the international community had collectively determined to place within the ambit of the exclusive economic zone of other States").

Award (*SCS Award*) reaffirms that "historic rights" encompasses both historic waters and historic rights falling short of a claim to sovereignty, such as historic fishing rights.[104] Different historic rights require different thresholds of necessary practice and acquiescence to be established. Nonetheless, the process of acquisition is similar:

> [H]istoric waters are merely one form of historic right and *the process is the same for claims to rights short of sovereignty* [...] historic rights are, in most instances, *exceptional rights*. They accord a right that a State would not otherwise hold, were it not for the operation of the *historical process* giving rise to *the right* and *the acquiescence of other States* in the process (emphasis added).[105]

The distinguishing factor between historic waters, historic fishing rights, and traditional fishing rights is the extent of exceptional right(s) claimed. Respectively, this extent ranges from a historic right to sovereignty (a defined area: encompassing all the territorial sovereign's rights); a historic right to fishing short of claiming sovereignty (a defined area and defined marine living resource(s): encompassing non-exclusive rights of access and utilization); and a historic right to fishing short of claiming sovereignty and limited to traditional communities and/or methods (a defined area, defined marine living resource(s)and defined actors: encompassing non-exclusive rights of access and utilization). Artisanal fishing rights are, in turn, a more narrowly defined historic fishing right than traditional fishing rights.[106] In short, "the scope of a claim to historic rights depends upon the scope of the acts that are carried out

---

104 *Id.* at 270–71 (citing previous recognition of the distinction between claims to historic fishing rights and the question of sovereignty over the area in which the fishery is located); *see* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶ 236 (Mar. 16); Continental Shelf, 1982 I.C.J. 18, ¶ 100. Furthermore, *see* Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen), 22 R.I.A.A. 209, 244 (Perm. Ct. Arb. 1998) (comparing historic rights to a servitude in property law).

105 SCS Award, *supra* note 95, at 288–89.

106 *Id.* at 470 ("In keeping with the fact that traditional fishing rights are customary rights, acquired through long usage, the Tribunal notes that the methods of fishing protected under international law would be those that broadly follow the manner of fishing carried out for generations: in other words, artisanal fishing in keeping with the traditions and customs of the region"); *see id.* at 467 (explaining that if an artisanal fishing right is established, the extent of the historic fishing right excludes "industrial fishing"); *cf.* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶ 141 (July 13) (stating a comparable discussion on "subsistence fishing" in a river context, subsistence being defined by what is excluded).

as the exercise of the claimed right".[107] Figure 1 (below) captures this diversity in scope and terminology:

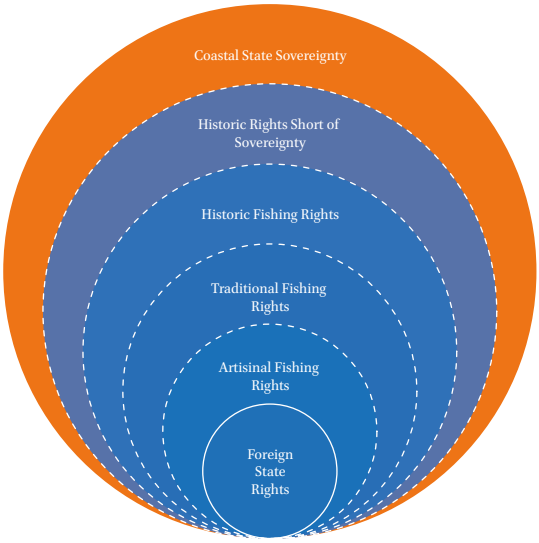

FIGURE 1
Extent of historic right exceptions to coastal state sovereignty

A coastal state's acquiescence cannot be presumed for any activities beyond the historic practices, and thus international law recognizes diverse practices resulting in diverse historic rights.[108] In cases where sovereignty is disputed, as in most international jurisprudence to date, exceptionalism has been evident among all potential claimant coastal states. Communal exceptionalism reiterates that the eventual resolution of which state has sovereignty over the territorial sea will not prejudice the continuity of the other states' historic fishing rights.

Historic fishing rights are exceptional. Exceptionalism mandates a continuous and effective exercise of fishing, combined with the acquiescence of the coastal state who would otherwise exercise full sovereignty over the fishery. Exceptionalism, therefore, dictates that customary historic fishing rights can only be established in the internal waters or territorial sea of a foreign state.[109]

107 SCS Award, *supra* note 95, at 289.

108 *E.g.*, Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, 2001 I.C.J. 40, ¶¶ 235–36 (stating that in areas of overlapping entitlements, traditional pearl diving rights common to all coastal populations and regulated by the fishers' state of nationality may develop).

109 Joanna Mossop, *Can the South China Sea Tribunal's Conclusions on Traditional Fishing Rights Lead to Cooperative Fishing Arrangements in the Region?*, 3 ASIA-PACIFIC JOURNAL OF OCEAN LAW & POLICY 210, 227–28 (2018); *contra* Sophia Kopela, *Historic Titles and*

Schatz takes this exceptionalism requirement one step further, arguing that historic fishing rights could be further limited to the belt of the territorial sea that was established before the conclusion of UNCLOS – i.e. the limited waters where sovereignty and therefore acquiescence of the coastal state could historically have been established.[110]

As the *SCS Award* held, not only are historic fishing rights in the EEZ, continental shelf, high seas, or the Area not expressly permitted in UNCLOS,[111] but Articles 56, 58, 62, 77, and 309 of UNCLOS illustrate that a continued claim to historic fishing rights in a foreign state's EEZ or continental shelf (without coastal state consent) would be incompatible with UNCLOS.[112] This position is widely shared in the region, with Indonesia, for example, citing the *SCS Award* and affirming the lack of historic rights in the EEZ or continental shelf post-UNCLOS.[113] As Schatz highlights, a "host of EEZ fisheries access agreements concluded during the 1970s [...] provided for a gradual phase-out of historic foreign fishing activity instead of recognizing permanent historic rights".[114]

Concerning high seas fishing, this is an exercise of existing freedom,[115] thus lacking any exceptionalism to establish historic rights.[116] Indeed, as a condition of establishing the UNCLOS novelty of archipelagic waters, those states immediately adjacent to archipelagic waters successfully negotiated UNCLOS-based

---

Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration, 48 OCEAN DEVELOPMENT & INTERNATIONAL LAW 181, 192–96 (2017) (stating some persuasive arguments that historic rights are preserved regardless of maritime zone), *and* Sophia Kopela, *Historic Fishing Rights in the Law of the Sea and Brexit*, 32 LEIDEN JOURNAL OF INTERNATIONAL LAW 695, 704–08 (2019).

110 Valentin J. Schatz, *Access to Fisheries in the United Kingdom's Territorial Sea After its Withdrawal from the European Union: A European and International Law Perspective*, 9 GOETTINGEN JOURNAL OF INTERNATIONAL LAW 457, 488–90 (2019) (indicating that if in 1982 the UK territorial sea was only 3nm, historic fishing rights could not have been acquired in the 3–12nm belt which was at the time part of the UK's exclusive fishery zone).

111 SCS Award, *supra* note 95, at 275.

112 *Id.* at 276–79, 283, 287.

113 Permanent Mission of Indonesia to the U.N., Letter dated May 26, 2020 from the Permanent Mission of the Republic of Indonesia to the United Nations addressed to the Secretary General of the United Nations, U.N. Doc. 126/POL-703/V/20 (May 26, 2020).

114 Valentin J. Schatz, *The International Legal Framework for Post-Brexit EEZ Fisheries Access Between the United Kingdom and the European Union*, 35 THE INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 133, 150–51 (2020).

115 UNCLOS, *supra* note 5, arts. 87(1)(e), 116.

116 SCS Award, *supra* note 95, at 289–90; Robert Beckman, *'Deliberate Ambiguity' and the Demise of China's Claim to Historic Rights in the South China Sea*, 1 ASIA-PACIFIC JOURNAL OF OCEAN LAW & POLICY 164, 180–81 (2016).

'traditional fishing rights' to preserve their former high seas fishing therein.[117] Finally, the position of certain states in the ongoing *BBNJ Agreement* negotiations has brought uncertainty to the exclusion of fisheries from the Area's regime,[118] but for the purposes of this article former technological limitations mean that historic fishing rights therein are highly unlikely.[119]

3.2 *Associated Rights and Access to Port*

Historic fishing rights are not absolute. Reasonable regulation by the coastal state may apply and international courts and tribunals have emphasized the coastal state's right to impose environmental regulation.[120] The extent of protection due to historic fishing states is established on a case-by-case basis.[121] However, the concept of associated rights may further limit a coastal state's right to regulate foreign vessels or persons exercising historic fishing rights. Associated rights were recognized and defined in the *Eritrea/Yemen Award*,[122] whereby the Tribunal held:

> In order that the entitlements be real and not merely theoretical, the traditional regime has also recognised certain associated rights.[123]

What is more, the Tribunal then affirmed an associated right of access to port and port services for historic fishers in the Red Sea. First, Stage I of proceedings recognized that historic practices included both the fishers' access to islands as a refuge from poor weather and the fishers' access to each state's coastal markets without a need for authorization.[124] Second, Stage II then confirmed:

---

117 UNCLOS, *supra* note 5, arts. 47(6), 51; Hugo Caminos & Vincent P. Cogliati-Bantz, The Legal Regime of Straits: Contemporary Challenges and Solutions 268–80 (2014).

118 UNCLOS, *supra* note 5, arts. 133–91.

119 SCS Award, *supra* note 95, at 289.

120 *Id.* at 471; *e.g.* Dispute Regarding Navigational and Related Rights, 2009 I.C.J. 213, ¶ 141.

121 SCS Award, *supra* note 95, at 471–72 (stating that the Tribunal found it unnecessary to explore the limits of protection as the extended and complete prevention of the exercise of historic fishing rights was "not compatible with the respect due under international law to the traditional fishing rights").

122 *See* Barbara Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 32 Ocean Development & International Law 1 *passim* (2001) (providing literature discussion of all aspects of the Award); Constance Johnson, *Case Analysis: Eritrea – Yemen Arbitration*, 13 Leiden Journal of International Law 427 (2000).

123 Maritime Boundary Delimitation (Eri./Yemen), 22 R.I.A.A. at 360.

124 Territorial Sovereignty and Scope of the Dispute (Eri./Yemen), 22 R.I.A.A. at 244.

> There must be *free access to and from the islands* concerned – including unimpeded passage through waters in which, by virtue of its sovereignty over the islands, Yemen is entitled to exclude all third Parties or subject their presence to licence, just as it may do in respect of Eritrean industrial fishing. This free passage for artisanal fishermen has traditionally existed not only between Eritrea and the islands, but also between the islands and the Yemen coast. *The entitlement to enter the relevant ports, and to sell and market the fish there, is an integral element of the traditional regime*. [...] Eritrean artisanal fisherman fishing around the islands awarded to Yemen have had free access to Maydi, Khoba, Hodeidah, Khokha and Mocha on the Yemen coast, just as Yemeni artisanal fishermen fishing around the islands have had an entitlement to unimpeded transit to and access to Assab, Tio, Dahlak and Massawa on the Eritrean coast. Nationals of the one country have an *entitlement to sell on equal terms and without any discrimination in the ports of the other* (emphasis added)[125]

Historic fishing regimes may therefore have application beyond the maritime zone in which the fishery is located, including associated rights in the ports of foreign states.[126] An associated right to access foreign ports will be an exceptional restriction on the sovereignty of port states to otherwise oppose access by foreign vessels.[127] Again, associated rights may also be subject to coastal state – or port state – regulation. This regulation may not however result in the denial of the right of access without the consent of the fishers' state of nationality.[128] Finally, the *Eritrea/Yemen Award*'s doctrinal contribution comes with a considerable caveat, namely critiques on the facts, including that the

125 Maritime Boundary Delimitation (Eri./Yemen), 22 R.I.A.A. at 360.

126 *Id.* at 361 ("The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters *and ports*, to the extent and in the manner specified in paragraph 107").

127 *See* Nuno Sérgio Marques Antunes, *The 1999 Eritrea–Yemen Maritime Delimitation Award and the Development of International Law*, 50 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 299, 305 (2001) (recognizing these conditions for state sovereignty).

128 Territorial Sovereignty and Scope of the Dispute (Eri./Yemen), 22 R.I.A.A. at 240; Iyob Tsehaye et al., *Rapid Shifts in Catch Composition in the Artisanal Red Sea Reef Fisheries of Eritrea*, 86 FISHERIES RESEARCH 58, 59 (2007) (stating that concerns have been expressed over unreported catch in Eritrea heading to Yemen, contributing to a lack of effective assessment and management of artisanal fisheries).

finding of an associated right of access to port goes beyond what the parties requested.[129]

International courts and tribunals have not recognized any further explicit cases of historic access to port as an associated right.[130] Interestingly, the *SCS Award* did distinguish access rights from fishing rights.[131] If, as the *SCS Award* reasons, a historic right of access to the territorial sea can limit a coastal state's territorial sovereignty, there is no additional principle of international law that prevents a historic right of access to port as limiting a port state's sovereignty. Equally, if UNCLOS essentially preserves the historic territorial sea regime and its historic fishing rights,[132] then associated rights of port entry are also preserved because UNCLOS did not introduce any meaningful novelties to the regime of internal waters.

Nonetheless, an associated right is an additional historic right and therefore must independently meet the exceptionalism requirement. A sufficient degree of unhindered access to port by historic fishing vessels, demonstrative of the acquiescence of the port state, must have occurred. It is the very rejection of a general right of port entry (subsection 2.4) which allows for the possibility of a historic customary law right of port entry.

However, if a customary historic right of access to port may only be an associated right, then practice is clearly limited to exceptional cases where an exceptional historic fishing right is also first established. For example, a convenient and historic use of foreign ports to support high seas fishing could never establish a historic right of port access because no historic fishing rights – to which port access could be 'associated' – could crystalize.

---

129 PETER DUTTON, TESTING THE BOUNDARIES: A RESEARCH REPORT FOR THE MARITIME DISPUTE RESOLUTION PROJECT 41–42 (2019). Findings on historic fishing rights in the EEZ and the entirety of the territorial sea are also inconsistent with the exceptionalism requirement.

130 *But see*, Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 1992 I.C.J. 351, 412 (Sept. 11) (recognizing historic access and innocent passage rights in a shared historic bay, which if it should be delimited, would then be internal waters subject to historic rights of innocent passage for the purposes of accessing the ports of the three coastal states); Clive R. Symmons, *The Types of Waters to Which Historic Claims may be Made*, *in* HISTORIC WATERS AND HISTORIC RIGHTS IN THE LAW OF THE SEA: A MODERN REAPPRAISAL 63, 92 (2d ed. 2019).

131 SCS Award, *supra* note 95, at 271 ("Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty.").

132 Mossop, *supra* note 109, at 220–22 (succinctly stating the Tribunal's reasoning).

Exceptional rights have, by definition, a narrow future in international law. As customary historic fishing rights progressively extinguish,[133] so too will any associated right of access to port.[134] Alternatively, historic customs of port entry could be incorporated into a treaty which, either immediately (if such an intention can be established), or upon an extended period of exercising port access under the said treaty, extinguishes the custom.[135] The exceptional historic consent to port entry would be replaced by the consent to access port established in the treaty. In a different – but comparable – context, agreements reflecting the treaty-based rights of Articles 47(6) or Article 51(1) of UNCLOS, such as seen between Indonesia and Malaysia, may include associated rights of access to territories and resupply, akin to port access.[136]

An example from Australia may nonetheless be suggestive of a historic fishing right and an associated customary right of access to port continuing in parallel to a treaty-based framework.[137] The *Torres Strait Treaty* provides for a

133 *E.g.* SCS Award, *supra* note 95, at 471 (stating that concerning traditional fishing rights, coastal states may assess "the scope of traditional fishing to determine, in good faith, the threshold of scale and technological development beyond which it would no longer accept that fishing by foreign nationals is traditional in nature").

134 Conceptually – but not yet seen in practice – a historic right of access could develop as an independent historic right. To achieve a fair and just result (as opposed to any historic claims) a *sui generis* freedoms of communication regime applies in the "Junction Area" of Croatia's territorial sea, realizing "access to and from Slovenia's ports and waters"; *In re* Arbitration Between the Government of Republic of Croatia and Government of Republic of Slovnia (Croat./Slovn.), PCA Case Repository Case No. 2012-04, ¶¶ 1122–33 (Perm. Ct. Arb. 2017).

135 *See, e.g.*, Memorandum of Understanding Between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf, Austl.-Indon., ¶ 3(b), Nov. 7, 1994 (treaty-based rights for foreign fishing vessels to continue landing for resupply, which is akin to granting port entry and service rights); *Practical Guidelines for Implementing the 1974 Memorandum of Understanding, Agreed Apr. 29, 1989* at ¶ 5 (1989), *reprinted in* 12 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 369 (1992).

136 *See* Treaty Between Malaysia and the Republic of Indonesia Relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace Above the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying Between East and West Malaysia, Indon.-Malay., art. 14(1)(c), Feb. 25, 1982 (agreement to enter into arrangements on the utilization of certain Indonesian islands for shelter and resupply by Malaysian traditional fishing vessels in distress or emergency); CAMINOS & COGLIATI-BANTZ, *supra* note 117, at 275–80.

137 Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10, at 143–46 (2018); *e.g.*, Chagos Mar. Prot. Area Arbitration (Mauritius v. U.K.), 31 R.I.A.A. 359, 551 (Perm. Ct. Arb. 2015) (Mauritius, for one, claimed fishing rights in the Chagos Archipelago's

Protected Zone which seeks to protect the traditional way of life of traditional inhabitants.[138] Apart from preserving traditional fishing, the *Torres Strait Treaty* also protects freedom of movement in the area related to traditional activities, such as the movement for the purposes of "barter and market trade".[139] This is reaffirmed in Australia's *Torres Strait Fisheries Act 1984* whereby the offense of unauthorized landing includes an exception for "fish that were taken in the course of traditional fishing and landed at that place for the purpose of the performance of traditional activities".[140] The language of the *Torres Strait Treaty* suggests that the historic rights and obligations of each state and its nationals shall "continue" and are not replaced by the *Torres Strait Treaty*.[141]

4 Conclusion

One state's historic right is another state's restriction to sovereignty. Historic rights cannot be presumed,[142] but must fulfill the exceptionalism requirement most recently reaffirmed in the *SCS Award*. By examining historic fishing rights and associated rights from the perspective of port state jurisdiction, this article has sought to demonstrate that the current consensus on access to ports should be refined by an additional exception, namely, any associated right of port entry for fishers exercising historic fishing rights. This is in addition to – and distinct from – the customary law right of access to port or another sheltered area when vessels are in distress or compelled by *force majeure*, to access port to preserve human life.

While the right of access for vessels in distress is a global custom, the right of access for historic fishers in the *Eritrea/Yemen Award* is limited to governing the rights and obligations between the port state and the fishers' state of nationality. The latter case is therefore a concrete example of the concept of bilateral customary international law, first recognized in the *Right of Passage over Indian Territory*.[143] Historic fishing rights, and thus associated

territorial sea under both the Lancaster House Undertakings and as a historic customary right, but the Arbitral Tribunal did not address the historic rights claim).

138 *Torres Strait Treaty*, *supra* note 3, art. 10(3) (traditional inhabitants, traditional fishing and traditional activities in Article 1); *see generally* Stuart B. Kaye, *Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait*, 2 Melbourne Journal of International Law 381, 391 (2001).

139 *Torres Strait Treaty*, *supra* note 3, art. 1(1)(k)(iv).

140 *Torres Strait Fisheries Act 1984* (Cth) s 50(1) (Austl.).

141 *Torres Strait Treaty*, *supra* note 3, arts. 11–12.

142 *See* S.S. Lotus (Fr. v Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

143 Right of Passage over Indian Territory (Port. v. India), Judgment, 1960 I.C.J. 6, 37 (Apr. 12).

rights (if inseverable), cannot generally be transferred to foreign states and their nationals.[144] The associated right of access to port and port services will therefore remain a bilateral custom.

144 W. Michael Reisman & Mahnoush H. Arsanjani, *Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation*, *in* Law of the Sea, Environmental Law and Settlement of Disputes 629, 632 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007).

The Amendment of Anti-corruption Law in Indonesia: The Contribution to the Development of International Anti-corruption Law

*Ratna Juwita**

1 Introduction

Corruption is categorized as an extraordinary crime that requires extraordinary measures to combat it.[1] Corruption evolves as a complex issue for civilized nations, therefore, international anti-corruption law requires adaptability to combat corruption at the domestic level. One of the adaptability issues is the balance between human rights protection and anti-corruption measures. Wiretapping, asset freeze, and revocation of the right to be elected are several examples of the intersection between anti-corruption measures and civil and political rights. The United Nations Convention Against Corruption (UNCAC) emphasizes in Article 36 the necessity to establish a national independent anti-corruption agency to effectively combat corruption.[2] As part of the commitment to the UNCAC, Indonesia is continuously reforming its national

* Ph. D. Candidate, Department of Transboundary Legal Studies, Faculty of Law, University of Groningen, the Netherlands; Assistant Professor, Department of International Law, Faculty of Law, Universitas Atma Jaya Yogyakarta, Indonesia.

1 Julio Bacio Terracino, The International Legal Framework Against Corruption: States' Obligations to Prevent and Repress Corruption 32–33 (2012); Lisa Ann Elges, *Identifying Corruption Risks in Public Climate Finance Governance*, *in* Handbook of Global Research and Practice in Corruption 138, 138–56 (Adam Graycar & Russell G. Smith eds., 2013); Larissa Gray, *Recovering Corruptly Obtained Assets*, *in* Handbook of Global Research and Practice in Corruption 359, 359–77 (Adam Graycar & Russell G. Smith eds., 2013).

2 "Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks." United Nations Convention Against Corruption art. 36, *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC]; Indonesia ratified the UNCAC on Sept. 19, 2006. Office on Drugs and Crime, *Signature and Ratification Status*, United Nations, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Feb. 13 2020) [hereinafter Office on Drugs and Crime].

anti-corruption law. Most recently, in 2019, Indonesia reformed the *Komisi Pemberantasan Korupsi* (KPK) law in Indonesia. KPK is the specialized organ to eradicate corruption in Indonesia. The reformation of the KPK law focused on the institutional design of the KPK.[3] However, the changes in the law triggered social unrest when it was announced.[4] The protesters argued that the new KPK law will weaken the power and authority of the KPK to combat corruption. On the other hand, the Parliament argued that the reform is important to balance the protection of human rights and anti-corruption measures.[5] To assess this debate, this article will analyze the change of every provision in the new KPK law and assess the merits of both viewpoints. Subsequently, this article will investigate the coherence of the change with the UNCAC and the International Covenant on Civil and Political Rights (ICCPR)[6] to provide a contribution of lessons learned in the development of international anti-corruption law, especially, concerning the intersection between human rights protection and anti-corruption measures.

This article analyzes the changes through the lens of the human rights and anti-corruption strategy to answer whether the change of KPK law in Indonesia will be beneficial to both human rights protection and anti-corruption measures. This article uses a normative approach to answer the research question.

---

3 Law No. 19 of 2019 concerning the Second Amendment of Law No. 30 of 2002 (Indon.); *Indonesia Puts Anti-Corruption Agency Under Supervisory Board*, AL JAZEERA (Sept. 17, 2019), https://www.aljazeera.com/ajimpact/indonesia-puts-anti-corruption-agency-supervisory-board-190917084614211.html.

4 Ardila Syakriah, *Majority of People Oppose KPK Law Revision, Support Student Protests, New Survey Reveals*, JAKARTA POST (Oct. 7, 2019), https://www.thejakartapost.com/news/2019/10/07/majority-of-people-oppose-kpk-law-revision-support-student-protests-new-survey-reveals.html; Michael Buehler, *Indonesia Takes a Wrong Turn in Crusade Against Corruption*, FIN. TIMES (Oct. 3, 2019), https://www.ft.com/content/048ecc9c-7819-3553-9ec7-546dd19f09ae; John Mcbeth, *End of an Anti-Corruption Era in Indonesia*, ASIA TIMES (Jan. 7, 2020), https://www.asiatimes.com/2020/01/article/end-of-an-anti-corruption-era-in-indonesia.

5 Law No. 19 of 2019 explained that the synergy between law enforcement agencies (the National Police, Attorney General and KPK) has to be improved to effectively combat corruption based on the principles of equal authority and human rights protection. It also mentioned that the enforcement of KPK tasks needs to be elevated continuously whilst respecting human rights. *See also* Reuters, *Indonesian Parliament Passes Controversial Revisions to Law on Anti-Graft Agency*, EURONEWS. (Dec. 9, 2019), https://www.euronews.com/2019/09/17/indonesian-parliament-passes-controversial-revisions-to-law-on-anti-graft-agency; Reuters, *Indonesia Approves Controversial Revisions to Law Governing Anti-Corruption Agency KPK*, S. CHINA MORNING POST (Sept. 17, 2019), https://www.scmp.com/news/asia/southeast-asia/article/3027626/indonesian-parliament-passes-controversial-revisions-law.

6 International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

The data is based mainly on legal sources, academic literature, and media reports. The two main conventions discussed in this article are the UNCAC and the ICCPR. Both treaties were chosen to study the coherence in implementation of international law in the national law of Indonesia. The General Comments (GCs) from the Committee on Civil and Political Rights (the Committee) were taken into consideration.[7] This article studies Indonesia as a single-country study, focusing on the anti-corruption law in Indonesia, considering both substantive and procedural aspects of the institutional design of the KPK.

2 Anti-corruption Legal Framework: From International to National Anti-corruption Law and Policy

International anti-corruption law is continuously progressing throughout time. Historically, the creation of international anti-corruption law started at the domestic level in the United States of America (USA). The USA promulgated the Foreign Corrupt Practices Act (FCPA) in 1977 to combat international bribery.[8] The FCPA was designated to target corporations under the US jurisdiction, which commit bribery abroad.[9] However, the problem of transnational bribery cannot be solved only by a domestic approach because of the nature of transnational corruption. The USA believed that an international approach to law-making was needed to create a strong and comprehensive anti-bribery convention.[10]

In the Organization for Economic Cooperation and Development (OECD), international negotiations for an international anti-corruption instrument began under the leadership of the USA.[11] This eventually led to the creation of the International Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) in 1997. The OECD Anti-Bribery Convention entered into force in 1999 and

7 The GCs of the International Human Rights Institutions are not legally binding. Instead, their purpose is to clarify and interpret the provisions of international human rights treaties.

8 "Foreign Corrupt Practices Act: An Overview," U.S. DEP'T JUSTICE, https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act (last visited Sept. 1, 2020).

9 *Id.*

10 Cindy Davids & Grant Schubert, *The Global Architecture of Foreign Bribery Control: Applying the OECD Bribery Convention*, *in* HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION, 319, 319–39 (Adam Graycar & Russell G. Smith eds., 2013).

11 FRITZ HEIMANN & MARK PIETH, CONFRONTING CORRUPTION: PAST CONCERNS, PRESENT CHALLENGES, AND FUTURE STRATEGIES 17–28 (2018).

became the first international anti-corruption convention.[12] The problem with the OECD Anti-Bribery Convention is the limited number of State Parties, as it is only open to the members of the OECD.[13] This hampers the enforcement of anti-corruption law in states which are not members of the OECD. Therefore, the next step was the negotiation of an international convention against corruption under the leadership of the United Nations.[14]

Before the negotiation for the UNCAC began, the issue of money laundering as a means of corruption had already been included within the United Nations Convention against Transnational Organized Crime (UNTOC) on 15 November 2000.[15] The UNTOC entered into force in 2003 and it has three additional protocols, namely, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea, and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition.[16] Negotiating countries considered with optimism that the UNTOC would constitute an effective tool and a necessary legal framework for international cooperation in combating, *inter alia*, such criminal activities as money-laundering, corruption, etc.[17]

---

12 Paul Cohen & Arthur Mariott, *The OECD Anti-Bribery Convention*, *in* INTERNATIONAL CORRUPTION 69 (Paul H. Cohen & Angela M. Papalaskaris eds., 2d ed. 2018) [hereinafter INTERNATIONAL CORRUPTION].

13 OECD has 37 member states. *See Where: Global Reach*, OECD HOME, https://www.oecd.org/about/members-and-partners (last visited Oct. 20, 2020).

14 SOPE WILLIAMS-ELEGBE, FIGHTING CORRUPTION IN PUBLIC PROCUREMENT: A COMPARATIVE ANALYSIS OF DISQUALIFICATION OR DEBARMENT MEASURES 1–2 (2012).

15 United Nations Convention against Transnational Organized Crime art. 7, Nov. 15, 2000, 2225 U.N.T.S. 209 [hereinafter UNTOC]. The Convention also considers the world's concerns as to the negative economic and social implications related to organized criminal activities, and therefore urges countries to strengthen their cooperation to prevent and combat such activities more effectively at the national, regional and global level. Matti Joutsen, *The United Nations Convention Against Corruption*, *in* HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION, 303, 303–18 (Adam Graycar & Russell G. Smith eds., 2013).

16 UNTOC, *supra* note 15; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319; Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 507; 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, May 31, 2001, 2326 U.N.T.S. 208.

17 INTERNATIONAL CORRUPTION, *supra* note 12.

The UNCAC was adopted in October 2003 through General Assembly Resolution 58/4 and entered into force in 2005.[18] The UNCAC is universally ratified by 187 countries and is considered as the umbrella treaty concerning anti-corruption on the international level.[19] The UNCAC established a set of provisions that ranged from prevention, enforcement, and inter-state monitoring of corruption. The UNCAC is the culmination of the previous international and regional law and policy to combat corruption which is mentioned in the UNCAC preamble. The development of the anti-corruption legal and policy framework becomes even more progressive with the work of the International Centre for Asset Recovery (ICAR) and the Stolen Asset Recovery Initiative (StAR), which are agents for international technical anti-corruption cooperation between countries.[20]

On the regional level, each region has its particular regional anti-corruption laws. In Europe, regional anti-corruption law was created through the Council of Europe and the European Union. The Council of Europe adopted the Criminal Law Convention Against Corruption[21] and its Additional Protocol,[22] as well as the Civil Law Convention Against Corruption.[23] The European Union approved a number of initiatives including the European Union Convention on the Protection of the European Communities Financial Interest,[24] the First and Second Protocol to the Convention on the Protection of the European Communities Financial Interest,[25] and the Convention on the Fight Against Corruption Involving Officials of the EU Member States.[26] The Organization of American States has its own Inter-American Convention Against

18 *Id.* at 143–44.

19 DAN HOUGH, ANALYSING CORRUPTION 107–26 (2017); Office on Drugs and Crime, *supra* note 2.

20 PHIL MASON, TWENTY YEARS WITH ANTICORRUPTION. PART 10: KEEPING THE VISION ALIVE: NEW METHODS, NEW AMBITIONS 2 (Arne Strand ed., 2020), https://www.u4.no/publications/twenty-years-with-anti-corruption-part-10. *See also International Centre for Asset Recovery*, BASEL INST. ON GOVERNANCE, https://www.baselgovernance.org/asset-recovery (last visited Apr. 25, 2021); STOLEN ASSET RECOVERY INITIATIVE: WORLD BANK: UNODC, https://star.worldbank.org/ (last visited Apr. 25, 2021).

21 Criminal Law Convention on Corruption, *opened for signature* Jan. 27, 1999, E.T.S. No. 173, 2216 U.N.T.S. 225.

22 Additional Protocol to the Criminal Law Convention on Corruption, *opened for signature* May 15, 2003, E.T.S. No. 191, 2466 U.N.T.S. 168.

23 Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. No. 174, 2246 U.N.T.S. 3.

24 1995 O.J. (C 316) 49.

25 1996 O.J. (C 313) 2; 1997 O.J. (C 221) 12.

26 1997 O.J. (C 195) 2.

Corruption,[27] as well as the African Union with its African Union Convention on Preventing and Combating Corruption.[28] The African region has two additional regional anti-corruption legal instruments which are the Southern African Development Community Protocol on the Fight Against Corruption,[29] and the Economic Community of the West African States Protocol on the Fight Against Corruption.[30] The Asian region does not have a legally binding regional anti-corruption instrument. The only Asian quasi-legal document against corruption is the Asian Development Bank (ADB) Framework Policy on Anti-Corruption and Integrity that was created by the ADB.[31]

On the national level, Indonesia ratified the UNCAC in 2006 through Law number 7 of 2006.[32] Indonesia adopted a number of laws and regulations based on its obligations under the UNCAC. These can be found in Table 1.

The national anti-corruption legal framework develops continually. The latest development was the amendment of the KPK law by Law number 19 of 2019. In sum, to comply with the UNCAC, Indonesia has established an independent anti-corruption agency, criminalized several acts of corruption as regulated under the UNCAC, and formulated laws to ensure the participation of whistleblowers and civil society in combating and eradicating corruption.

3 The (Presumed) Problems with the Amendment of Anti-corruption Law in Indonesia: Prior and Post Institutional Design of the KPK

This section focuses on the designation of an independent anti-corruption agency. Article 6 of the UNCAC mandates that the State Party must design an

27 Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724; CARLOS A. MANFRONI, INTER-AMERICAN CONVENTION AGAINST CORRUPTION: ANNOTATED WITH COMMENTARY 2 (Richard S. Werksman ed., Michael Ford trans., 2003).

28 African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5.

29 Southern African Development Community, Protocol Against Corruption, No. 52885 (Aug. 14, 2001), https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52885/A-52885-0800000280494 7e9.pdf.

30 Economic Community of the West African States Protocol on the Fight Against Corruption (Dec. 21, 2001), https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf.

31 ADB/OECD Anti-Corruption Initiative for Asia and the Pacific: Combating Corruption in the New Millennium, *Anti-Corruption Action Plan for Asia and the Pacific* (Nov. 30, 2001), https://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf.

32 Office on Drugs and Crime, *supra* note 2.

TABLE 1 National anti-corruption legal framework

Law	1. Law Number 8 of 1981 concerning the Code of Criminal Procedure.[a] 2. Law Number 28 of 1999 concerning Good State Governance, Free of Corruption, Collusion, and Nepotism.[b] 3. Law Number 31 of 1999 concerning Corruption Eradication.[c] 4. Law Number 20 of 2001 concerning the Changes in Law Number 31 of 1999 on Corruption Eradication.[d] 5. Law Number 30 of 2002 concerning the KPK.[e] 6. Law Number 7 of 2006 concerning the Ratification of the UNCAC.[f] 7. Law Number 5 of 2009 concerning the Ratification of the UNTOC.[g] 8. Law Number 46 of 2009 concerning Corruption Court.[h] 9. Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crime.[i] 10. Law Number 6 of 2011 concerning Immigration.[j]

a Wetboek van Strafrecht voor Nederlandsch-Indie [Criminal Code for the Dutch East Indies], *Kitab Undang-Undang Hukum Pidana* [Book of Criminal Law], Staatsblad 1915 No. 732, Law No. 73 of 1958, Statement on the Enforceability of the Law No. 1 of 1946 concerning the Regulation of Criminal Law in Indonesia and Changing the Law on Criminal Law (Indon.) (part of the procedural law of anti-corruption in Indonesia).

b Law No. 28 of 1999 on The State Organizer Who is Free From Corruption, Collusion, and Nepotism (Indon.) (constituting a part of Indonesia's substantive law on anti-corruption).

c Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption (Indon.) (constituting a part of Indonesia's substantive law on anti-corruption).

d Law No. 20 of 2001 on the Amendment to Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption (Indon.) (constituting a part of Indonesia's substantive law on anti-corruption).

e Law No. 30 of 2002 on the Corruption Eradication Commission (Indon.) (constituting a part of Indonesia's procedural law on anti-corruption).

f Law No. 7 of 2006 on the Ratification of the UNCAC (Indon.) (constituting a part of Indonesia's substantive law on anti-corruption).

g Law No. 5 of 2009 on the Ratification of the UNTOC (Indon.) (constituting a part of Indonesia's substantive law on anti-corruption).

h Law No. 46 of 2009 on the Court of Acts of Corruption (Indon.) (constituting a part of Indonesia's procedural law on anti-corruption).

i Law No. 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering (Indon.) (constituting a part of Indonesia's substantive law on anti-corruption).

j Law No. 6 of 2011 on Immigration (Indon.) (constituting a part of Indonesia's substantive law on anti-corruption).

TABLE 1 National anti-corruption legal framework (*cont.*)

	11. Law Number 19 of 2019 concerning the Second Amendment of Law Number 30 of 2002 concerning the KPK.[k]
Governmental Regulation	1. Government Regulation Number 71 of 2000 concerning Procedures for Implementation of Public Participation in Prevention and Eradication of Corruption.[l] 2. Government Regulation Number 63 of 2005 concerning KPK's Human Resources Management System.[m] 3. Government Regulation Number 103 of 2012 concerning the Changes in Government Regulation Number 63 of 2005 on KPK's Human Resources Management System.[n] 4. Government Regulation Number 43 of 2018 concerning the Guideline of Civil Society's Participation and Awards in the Prevention and Eradication of Corruption.[o]

k Law No. 19 of 2019 on the Second Amendment to Law No. 30 of 2002 on the Corruption Eradication Commission (Indon.) (constituting a part of Indonesia's procedural law on anti-corruption).

l Government Regulation No. 71 of 2000 on Procedures for Implementation of Public Participation in Prevention and Eradication of Corruption (Indon.).

m Government Regulation No. 63 of 2005 on KPK's Human Resources Management System (Indon.).

n Government Regulation No. 103 of 2012 on the Changes in Government Regulation No. 63 of 2005 on KPK's Human Resources Management System (Indon.).

o Governmental Regulation No. 43 of 2018 concerning the Guideline of Civil Society's Participation and Awards in the Prevention and Eradication of Corruption (Indon.).

independent anti-corruption agency based on the fundamental principles of its legal system.[33] The agency must have the authority to prevent corruption by:

a. Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
b. Increasing and disseminating knowledge about the prevention of corruption.[34]

The State Party must also grant the agency the necessary independence to enable it to "carry out its or their functions effectively and free from any undue

33 UNCAC, *supra* note 2, art. 6(1).

34 *Id.*

influence."[35] Besides, the State Party must provide "[t]he necessary material resources and specialized staff, as well as the training" to ensure the effectiveness of the agency.[36]

The Indonesian legislative measures to implement Article 6 of UNCAC were inspired by the work of the Independent Anti-Corruption Agency (ICAC) of Hong Kong.[37] The ICAC Hong Kong is considered a role model for an anti-corruption agency based on its success in addressing corruption in Hong Kong.[38] The ICAC was designed to be independent of the police force and reported its works directly to the Governor of Hong Kong.[39] The initial design of KPK was on replication of ICAC Hong Kong. The stark similarity is the reliance on a three-pronged approach to combat corruption:[40] prevention of corruption, prosecution of corruption cases, and public education of anti-corruption.[41]

Law number 30 of 2012 followed the ICAC model. A comparison between Law Number 30 of 2002 concerning the KPK and Law Number 19 of 2019 shows several changes in the KPK structure and mandates related to the issue of corruption and human rights. These changes are found in Table 2.

Besides the changes mentioned in Table 2, other relevant changes of the KPK Law are:

(1) The elimination of KPK's authority to handle corruption cases that attract public attention that previously existed in Article 11 of Law number 30 of 2002.[42] This elimination aims to improve legal certainty because there was no standard being formulated to determine the case which attracts public attention.

(2) The clarification of the relationship between KPK and the Police and the Attorney General (AG) regarding case take-over. Article 10A(2) provides the requirements that have to be fulfilled for KPK to take over corruption

35 *Id.* art. 6(2).

36 *Id.*

37 Kevin E. Davis, Between Impunity and Imperialism: The Regulation of Transnational Bribery 29 (2019).

38 *Id.*

39 *Id.*

40 *Id.*; *About ICAC*, Indep. Commission Against Corruption (Apr. 8, 2019), https://www.icac.org.hk/en/about/struct/index.html.

41 *Id.*

42 Law No. 30 of 2002 on the Corruption Eradication Commission art. 11(b) (Indon.).

TABLE 2 The comparison of prior and post provisions amendment of KPK Law

Issues	Law number 30 of 2002	Law number 19 of 2019
Human rights	No provision about human rights. Article 5 stated the work principles of the KPK: a. legal certainty (*kepastian hukum*); b. openness (*keterbukaan*); c. accountability (*akuntabilitas*); d. public interest (*kepentingan umum*); e. proportionality (*proporsionalitas*).[a]	The principle of respect for human rights was introduced.[b]
The execution power of the KPK	Article 6 positioned KPK as the main institution to combat corruption in Indonesia. Its mandate is: a. coordination with the institution that has the mandate to eradicate corruption; b. supervision of the institution that has the mandate to eradicate corruption; c. to conduct pre-investigation, investigation, and prosecution of corruption; d. to take action to prevent corruption;	New Article 6 gives the KPK also the mandate to execute Courts' rulings.[c]

a Law No. 30 of 2002 on the Corruption Eradication Commission art. 5 (Indon.).

b Law No. 19 of 2019 on the Second Amendment to Law No. 30 of 2002 on the Corruption Eradication Commission (Indon.).

c Law No. 19 of 2019 on the Second Amendment to Law No. 30 of 2002 on the Corruption Eradication Commission art. 6 (Indon.).

TABLE 2 The comparison of prior and post provisions amendment of KPK Law (*cont.*)

Issues	Law number 30 of 2002	Law number 19 of 2019
	e. to monitor state governance.[d] The power to execute or enforce court order with the permanent ruling force was not regulated.[e]	
The legal status of KPK employees	KPK's employees are not civil servants. KPK recruits its employees without the constraint of civil apparatus law.	KPK employees are classified as civil servants.
The *Dewan Pengawas*/the supervisory organ	The highest authority in KPK bureaucratic structure was the KPK Commissioners as regulated in Article 26–37.[f]	Article 21 in connection with Chapter V of this law, establishes a supervisory organ named *Dewan Pengawas* with the mandate to monitor the implementation of tasks and authorities of the KPK; to

d Law No. 30 of 2002 on the Corruption Eradication Commission art. 6 (Indon.). In the subsequent provision, Article 7, it is emphasized that the role of coordination was bestowed upon the KPK. The KPK has the authority to:
   a. coordinate pre-investigation, investigation, and prosecution of corruption;
   b. establish a reporting system in the corruption eradication activity;
   c. solicit information concerning corruption eradication activity towards respective institution;
   d. conduct hearing or meeting with the respective institution that has the authority to eradicate corruption; and
   e. request institutional report concerning prevention of corruption.

   Overview of KPK, KPK: KOMISI PEMBERANTASAN KORUPSI (Jan. 22, 2018), https://www.kpk.go.id/en/about-kpk/overview-of-kpk.

e This became a problem because when conducting their work to combat corruption, in concrete cases, some KPK prosecutors executed criminal sanctions. This grey area was eliminated by the new provision of Article 6 of Law No. 19 of 2019 that gives the KPK power to execute and enforce the judicial decision.

f Law No. 19 of 2019 on the Second Amendment to Law No. 30 of 2002 on the Corruption Eradication Commission, arts. 26–37 (Indon.).

TABLE 2 The comparison of prior and post provisions amendment of KPK Law (*cont.*)

Issues	Law number 30 of 2002	Law number 19 of 2019
		issue permission concerning wiretapping, search and seizures; to formulate a code of conduct for Commissioners and employees of the KPK; to receive, examine and follow up reports from civil society concerning allegations of abuse of power by Commissioners and employees of the KPK or any other similar allegation; to conduct work evaluations of the Commissioners and employees of KPK annually.[g]

g *Id.* arts. 21, 29–37; News Desk, *KPK's New Code of Ethics Promotes Synergy with Other Institutions: Supervisory Council*, JAKARTA POST (Mar. 6, 2020, 6:14 AM), https://www.thejakartapost.com/news/2020/03/05/kpks-new-code-of-ethics-promotes-synergy-with-other-institutions-supervisory-council.html.

cases from the Police or AGO.[43] Article 10A(3) regulates the period of 14 days for the Police or AG to hand over suspects and all case materials to KPK after the receipt of KPK's request to take over the case.[44]

43 Law No. 19 of 2019 on the Second Amendment to Law No. 30 of 2002 on the Corruption Eradication Commission art. 10A(2) (Indon.).

44 Law No. 19 of 2019 on the Second Amendment to Law No. 30 of 2002 on the Corruption Eradication Commission art. 10A(3) (Indon.).

(3) In Article 12 of the new KPK Law, KPK can conduct the following measures only during the investigation and prosecution phases, before the amendment, KPK could conduct these measures also in the preliminary investigation phase:
   a. to instruct the relevant agency to issue a travel ban on certain individuals;
   b. to request banks or other financial institutions information about the financial situation of the accused;
   c. to instruct banks to block certain accounts allegedly used for money laundering;
   d. to instruct the supervisor of the suspect to suspend the suspect from his/her position;
   e. to request for the wealth and taxation data of the accused from the relevant agency;
   f. to temporarily halt financial transactions, trading, and other arrangements, or temporarily revoke the permit, license, and concession that is being conducted or owned by the suspect or defendant who is suspected based on the sufficient preliminary evidence that it is related to a criminal act of corruption under that investigation;
   g. to ask for help from Indonesian Interpol and overseas law enforcement agencies to conduct searches and arrests, and confiscate evidence abroad;
   h. to ask the police and other relevant agencies to make arrests, search, and confiscate evidence for corruption cases.[45]

(4) Under Article 40 of Law Number 19 of 2019, KPK has the power to halt the investigation or prosecution of a corruption case. This can be done under the pre-requisite circumstance when the case cannot be resolved in two years.[46] If the KPK wishes to use this power, the KPK Commissioner issues a warrant and reports it to the Supervisory Board within a week of the issuance. Besides, the KPK must publish a notice about the warrant. The KPK Commissioner can revoke the warrant when there is new evidence that has been found or a pre-trial ruling has been issued.[47]

---

45 Law No. 19 of 2019 on the Second Amendment to Law No. 30 of 2002 on the Corruption Eradication Commission art. 12(2) (Indon.).

46 Before the amendment, the KPK had no power to drop the investigation once a suspect had been named. The purpose of the previous design was to prevent the KPK officers from being bribed into dropping an investigation before trial. Simon Butt, Corruption and Law in Indonesia 2 (2012).

47 Law No. 19 of 2019 on the Second Amendment to Law No. 30 of 2002 on the Corruption Eradication Commission art. 40 (Indon.).

The promulgation of Law Number 19 of 2019 caused several massive demonstrations in Indonesia due to the fear that the amendment would hamper the power and authority of KPK in eradicating corruption.[48] This article continues with the analysis of whether the amendment of the KPK law hampers or strengthens its power and authority to eradicate corruption and how the changes of the KPK law contribute to the development of international anti-corruption law.

4 Incorporation of Human Rights into the Anti-corruption Strategy: An Ideal Anti-corruption Agency in the Making?

Placing human rights and anti-corruption within the same agenda can create competition between them. On one hand, human rights exist to respect, protect, and fulfill human dignity from unjustifiable interference while anti-corruption focuses on combating the crime of corruption within the crime control model. It has to be noted that corruption is a white-collar crime that typically involves highly sophisticated forms of crooked practices. Therefore, these complexities of corruption compel law enforcement agencies to adopt a strict, effective, and efficient approach to unveil and combat corruption cases. Arguably, human rights norms also operate at the level of law enforcement and criminal law, which means that in the fight against corruption, human rights law must be observed. Grand corruption cases, which include high-level public officials, are an example of how difficult it is for the law enforcement agencies to prosecute the perpetrators and bring justice to the people.[49] The

48 Syakriah, *supra* note 4; Buehler, *supra* note 4; Mcbeth, *supra* note 4; Ardila Syakriah, *Pro-Law Revision Riot Breaks Out in Front of KPK Building*, JAKARTA POST (Sept. 13, 2019, 5:11 PM), https://www.thejakartapost.com/news/2019/09/13/pro-law-revision-riot-breaks-out-in-front-of-kpk-building.html.

49 UNITED NATIONS OFFICE ON DRUGS AND CRIME, UNITED NATIONS HANDBOOK ON PRACTICAL ANTI-CORRUPTION MEASURES FOR PROSECUTORS AND INVESTIGATORS 23 (2004), https://www.unodc.org/documents/afghanistan/Anti-Corruption/Handbook_practical_anti-corruption.pdf; Adam Graycar, *Corruption: Classification and Analysis*, 34 POLICY & SOCIETY 87, 88 (2015); Elizabeth Dávid-Barrett & Mihály Fazekas, *Grand Corruption and Government Change: An Analaysis of Partisan Favoritism in Public Procurement*, 26 EUROPEAN JOURNAL ON CRIMINAL POLICY & RESEARCH 411, 411–30 (2020); Turid Hagene, *Grand Corruption in Mexico: The Convenient Disappearance of an Agrarian Community*, 108 EUROPEAN REVIEW OF LATIN AMERICAN & CARIBBEAN STUDIES 43, 43–64 (2019); *What Is Grand Corruption and How Can We Stop It?*, TRANSPARENCY INT'L (Sept. 21, 2016), https://www.transparency.org/en/news/what-is-grand-corruption-and-how-can-we-stop-it.

perpetrator is never willing to cooperate with the law enforcement agencies. They always fight back and use a myriad of possible measures to get away from the justice process.[50]

In general, Indonesia is still struggling to combat corruption that has the country in grip since its independence. Looking at the failure of the Old Order Government to eradicate corruption, and the enhanced and continued systemic corruption of the New Order Government, corruption continues to be a major problem in Indonesia.[51] Indonesia ranked 102 in the Corruption Perception Index (CPI) 2020 and the rank is relatively constant with past years. It shows that there is a significant corruption problem.[52]

An example of how difficult it is to bring a corruptor to justice is Setya Novanto's corruption case in 2018.[53] It is one of the most controversial corruption cases in Indonesia because of the magnitude of corruption, the track record of the perpetrator, and the trial process.[54] He was convicted guilty of corruption in 2018 and sentenced to 15 years of imprisonment due to his role in facilitating corruption within the procurement of the national identity card project.[55] Novanto was the House Speaker in the period of 2014–2015

---

50 *See* Government of Peru, Countering Grand Corruption, Paper submitted Nov. 4, 2019 from the Government of Peru to the Conference of the States Parties to the United Nations Convention Against Corruption Sixth Session, U.N. Doc. CAC/COSP/2015/CRP.9 (Nov. 4, 2015), https://www.unodc.org/documents/treaties/UNCAC/COSP/session6/V1507721e.pdf; Naomi Roht-Arriaza & Santiago Martínez, *Grand Corruption and the International Criminal Court in the 'Venezuela Situation'*, 17 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1057, 1057–82 (2019); Odd-Helge Fjeldstad & Jan Isaksen, *Anti-Corruption Reforms: Challenges, Effects and Limits of World Bank Support* 18 (Indep. Evaluation Grp., Working Paper No. 7, 2008); Mats Benestad, *Impunity for Grand Corruption – A Problem Too Big for International Community to Ignore*, TRANSPARENCY INT'L (Aug. 25, 2020), https://www.transparency.org/en/blog/impunity-for-grand-corruption-too-big-to-ignore-ungass-2021.

51 ADAM SCHWARZ, A NATION IN WAITING: INDONESIA'S SEARCH FOR STABILITY 110 (2009).

52 *Our Work in: Indonesia*, TRANSPARENCY INT'L, https://www.transparency.org/en/cpi/2020/index/idn (last visited May 25, 2021).

53 Kharishar Kahfi, *Setya Novanto Sentenced to 15 Years in Prison in E-ID Graft Case*, JAKARTA POST (Apr. 24, 2018, 2:38 PM), https://www.thejakartapost.com/news/2018/04/24/ex-house-speaker-sentenced-to-15-years-in-prison-in-e-id-graft-case.html; *Indonesia: Setya Novanto Sentenced to 15 Years for Corruption*, AL JAZEERA (Apr. 24, 2018), https://www.aljazeera.com/news/2018/04/indonesia-setya-novanto-sentenced-15-years-corruption-180424072152146.html; Agence France-Presse, *Indonesia's Former Speaker Setya Novanto Jailed for 15 Years on Graft Charges Stemming from Government ID Scheme*, S. CHINA MORNING POST (Apr. 24, 2018, 4:53 PM), https://www.scmp.com/news/asia/southeast-asia/article/2143113/indonesias-former-speaker-setya-novanto-jailed-15-years.

54 Pengadilan Negeri Jakarta Pusat [The District Court of Central Jakarta] Apr. 24, 2018, Decision No. 130/PID.SUS/TPK/2017/PN.JKT.PST., p. 1695–96, (Indon.).

55 *Id.*

and 2016–2017 and was allegedly involved in several corruption scandals in the past.[56] Presenting him at Court proved to be one of the most difficult processes in the Indonesian anti-corruption effort because his lawyer, Friedrich Yunadi, used various methods to prevent his client from appearing in Court. One of these was the creation of a minor traffic accident and the bribing of Dr. Sutarjo, a medical doctor at private hospital named Permata Medika Hijau, declaring Mr. Novanto unfit to attend the trial due to that minor traffic accident.[57] Both the lawyer and the doctor were found guilty under the charge of obstruction of justice by the Court.[58] Yunadi was sentenced to seven years imprisonment and Dr. Sutarjo was sentenced to four years imprisonment for deliberately obstructing justice in the law enforcement process towards Novanto.[59]

Gathii who studied anti-corruption measures in Kenya, explained that corrupt high-level government officials in Kenya use human rights claims to circumvent and avoid punishment and accountability.[60] He concluded that respecting human rights can help to combat corruption, but the corruptors are also more likely to seek and defend their rights in the process.[61] Based on experiences on the ground, therefore the lawmaker must consider the nexus between the civil and political rights and anti-corruption agency authority in proposing anti-corruption measures.

Indonesia acceded to the ICCPR in 2005 through Law number 12 of 2005.[62] Therefore, Indonesia is bound by the international legal obligation to respect,

---

56 Kanupriya Kapoor, *Indonesia Jails Former Parliament Speaker for 15 Years for Graft*, REUTERS (Apr. 24, 2018, 4:54 PM), https://www.reuters.com/article/us-indonesia-corruption/indonesia-jails-former-parliament-speaker-for-15-years-for-graft-idUSKBN1HV0MA; Adinda Normala, *Setya Novanto: Finally Sentenced After Decades of Scandals*, JAKARTA GLOBE (Apr. 29, 2018), https://jakartaglobe.id/news/setya-novanto-finally-sentenced-after-decades-of-scandals.

57 News Desk, *Setya's Doctor Jailed for Obstruction of Justice*, JAKARTA POST (July 16, 2018, 5:08 PM), https://www.thejakartapost.com/news/2018/07/16/setyas-doctor-jailed-for-obstruction-of-justice.html; *Hospital Nurse Unveils Setya Novanto's Staged Drama*, TEMPO.CO (Apr. 3, 2018, 6:50 AM), https://en.tempo.co/read/917212/hospital-nurse-unveils-setya-novantos-staged-drama.

58 *Bulletin*: *Fredrich Yunadi's Verdict*, INDON. CORRUPTION WATCH (July 18, 2018, 12:00 AM), https://antikorupsi.org/index.php/en/article/fredrich-yunadis-verdict.

59 *Id.*; Pengadilan Tinggi DKI Jakarta [The High Court of Jakarta] Oct. 25, 2018, Decision No. 26/Pid.Sus-TPK/2018/PT.DKI, p. 65 (Indon.).

60 MARTINE BOERSMA, CORRUPTION: A VIOLATION OF HUMAN RIGHTS AND A CRIME UNDER INTERNATIONAL LAW? 199 (2012).

61 *Id.*

62 *UN Treaty Body Database: Ratification Status for Indonesia*, OHCHR.ORG, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN (last visited Sept. 2, 2020).

protect, and fulfill civil and political rights. The competing interests of human rights and anti-corruption must be balanced. There are several rights of direct relevance for the anti-corruption agency authority, namely, Article 9 on the right to liberty and security of person, Article 14 on the right to equality before the law and fair trial, and Article 17 on the right to privacy of the ICCPR.

The first point to make is that the new KPK law ensures that there will be consideration of human rights impact in every action of the KPK. As mentioned in the previous subsection, the problem with human rights and anti-corruption is to strike the balance between the two compelling notions. There will be no legitimacy for anti-corruption measures if there is no respect for and protection of human rights. By including the human rights principle in the new KPK law, the lawmakers have made a clear choice to legally recognize that human rights as an important part of anti-corruption actions. Before the establishment of the new law, the KPK was often criticized for not respecting the human rights of the accused, with this new law, there is less space for arguments from the opposition side.[63]

In the past, the KPK had lost two pre-trial cases concerning the legality of an investigation that the KPK had conducted. The first case was the pre-trial case of Budi Gunawan and the second case was the pre-trial case of Setya Novanto. In both pre-trial cases, the judges ruled that KPK had not fulfilled procedural measures before proceeding to the trial phase. In the pre-trial case of Gunawan, who was accused of accepting gratification during his tenure as the Chief of Human Resources and Career Development at the National Police Headquarters from 2003–2006,[64] the legality of the Determination of Suspect Warrant of KPK was questioned based on the *rationale* of *Habeas Corpus* principle that an individual has the right to have his warrant be reviewed by a court of law.[65] Gunawan's lawyers emphasized the importance of Indonesia's

63 Office of Assistant to Deputy Cabinet Sec'y for State Document & Translation, *President Jokowi Has 4 Objections on KPK Law Revision*, CABINET SECRETARIAT REPUBLIC INDON. (Sept. 14, 2019), https://setkab.go.id/en/president-jokowi-has-4-objections-on-kpk-law-revision/; Reuters, *Indonesian Parliament Passes Controversial Revisions to Law on Anti-Graft Agency*, STRAITS TIMES (Sept. 17, 2019, 2:29 PM), https://www.straitstimes.com/asia/se-asia/indonesian-parliament-passes-controversial-revisions-to-law-on-anti-graft-agency; *Indonesia Puts Anti-Corruption Agency Under Supervisory Board*, AL JAZEERA (Sept. 17, 2019), https://www.aljazeera.com/ajimpact/indonesia-puts-anti-corruption-agency-supervisory-board-190917084614211.html.

64 Fatiyah Wardah, *Indonesian Judge Rules in Favor of Police Chief Nominee*, VOA (Feb. 16, 2015, 1:54 PM), https://www.voanews.com/east-asia/indonesian-judge-rules-favor-police-chief-nominee.

65 Pengadilan Negeri Jakarta Selatan [The District Court of South Jakarta] Feb. 16, 2015, Decision No. 04/Pid.Prap/2015/PN.Jkt.Sel., p. 3 (Indon.).

ratification of ICCPR as the legal guarantee that the Government must respect, protect, and fulfill the civil and political rights of their client.[66] Based on the pre-trial decision, the judges considered the grounds of the Order of Investigation Warrant from the KPK to Budi Gunawan. These were the status of Gunawan as a public official; the loss of the State's funds; and whether the case was a public concern.[67] The judges decided that those three elements were not satisfied and partially granted the request of Gunawan's lawyer.

In the pre-trial ruling of Novanto, his lawyer argued that the investigators of the KPK did not have the legal authority to investigate the case because they were employed by both the police or AG and the KPK.[68] Law number 31 of 2002 regulated the independence of the KPK investigators by requiring the KPK investigators who come from either the police or the AG must have their employment ended in that respective institution first before being employed as the KPK investigators. Novanto's lawyer argued that this was not be done in his client's case and thus requested a pre-trial.[69]

Another argument in that case, was the insufficient preliminary evidence for the determination of the suspect. Novanto's lawyer argued that the preliminary evidence for the suspect's determination by the KPK was unlawful because it was based on a Court's decision of another convicted person in the national identity card project corruption cases.[70] This was problematic because the determination of the suspect and the issuance of the Letter of Investigation Order (Sprindik No. Sprin.Dik-56/01/07/2017) came on the same day.[71] The logic behind the reasoning of Novanto's lawyer is the impossibility of the KPK to obtain two minimum preliminary pieces of evidence at the same time with the beginning of an investigation order.[72] The judge considered these matters as flaws during the process of the determination of the suspect and ruled in favor of Novanto.[73]

The following table further illustrates the clashes between the Civil and Political Rights and Anti-Corruption measures based on those two pre-trial cases above.

66 *Id.* at 13–15.

67 BOERSMA, *supra* note 82.

68 Pengadilan Negeri Jakarta Selatan [The District Court of South Jakarta] Sept. 29, 2017, Decision No. 97/Pid.Prap/2017/PN.Jkt.Sel., p. 19 (Indon.).

69 *Id.* at 18.

70 *Id.*

71 *Id.* at 9.

72 *Id.* at 245.

73 *Id.*

TABLE 3 Civil and political rights at the nexus of human rights and anti-corruption

Article	Civil and Political Rights	Clashes between the Civil and Political Rights and Anti-corruption Measures
9	The right to liberty and security of a person[a]	In the case of Gunawan's pre-trial, his defense team argued that Gunawan did not receive any information of charges against him from the KPK before the determination of the suspect was disclosed to the public.[b] In the case of Novanto, his defense team argued that the period between the determination of the suspect and the issuance of the Letter of Investigation Request, issued on the same day, does not fulfill the procedural laws. The right to liberty and security of person guarantees that every individual accused of a crime must be informed promptly about his/her charges and be summoned in the investigation phase.
14	The right to equality before the law[c]	In the case of Gunawan and Novanto, their defense teams argued that both individuals had the right to be treated equally before the law and with the presumption of innocence. The pre-trial decision stated that procedural laws matter in the determination of a suspect and when the procedural requirements to determine an individual as a suspect is not satisfied then the whole case must be dropped for the sake of justice.[d]
17	The right to privacy[e]	Although not a basis for pre-trial arguments in both cases, the use of wiretapping by the KPK has been

a International Covenant on Civil and Political Rights art. 9, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

b Pengadilan Negeri Jakarta Selatan [The District Court of Central South Jakarta] Feb. 16, 2015, Decision No. 04/Pid.Prap/2015/PN.Jkt.Sel., p. 3 (Indon.).

c ICCPR, *supra* note 96, art. 14.

d Pengadilan Negeri Jakarta Selatan [The District Court of Central South Jakarta] Feb. 16, 2015, Decision No. 04/Pid.Prap/2015/PN.Jkt.Sel., p. 3 (Indon.); Pengadilan Negeri Jakarta Selatan [The District Court of Central South Jakarta] Sept. 29, 2017, Decision No. 97/Pid.Prap/2017/PN.Jkt.Sel., p. 19 (Indon.).

e ICCPR, *supra* note 96, art. 17, ¶ 1.

TABLE 3 Civil and political rights at the nexus of human rights and anti-corruption (*cont.*)

Article	Civil and Political Rights	Clashes between the Civil and Political Rights and Anti-corruption Measures
		the object of discussion between legal experts in Indonesia. The Justice Minister explained that the new KPK Law will ensure that wiretapping will be utilized based on human rights regulations.[f] The interference to the right to privacy can only be done when it is being regulated by law as stated in General Comment Number 16 concerning the Right to Privacy.[g] Interference authorized by States can only take place based on law, which itself must comply with the provisions, aims, and objectives of the Covenant."[h]

f Heru Andriyanto, *Justice Minister Details Reasons Why KPK Needs New Law*, JAKARTA GLOBE (Sept. 21, 2019), https://jakartaglobe.id/news/justice-minister-details-reasons-why-kpk-needs-new-law.

g U.N. Hum. Rts. Committee, CCPR General Comment No. 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation at the Thirty-Second Session of the Human Rights Committee ¶ 1 (Apr. 8, 1988) [hereinafter CCPR General Comment No. 16].

h *Supra note* 63.

The determination of suspects based on the KPK system has to be decided based on the collective collegial principle. It means that all KPK Commissioners agree with the determination of the suspect. This will strengthen legal certainty and also prevent abuse of power that might lead to human rights violations of the suspect. Based on the Constitutional Court Decision on the collective collegiality principle of KPK Commissioners, the Court emphasized that the KPK is a super body that has the mandate to eradicate corruption as an extraordinary crime. Therefore, the KPK is weaponized with an extraordinary power beyond the traditional legal power of a law enforcement agency. This extraordinary power has to be guided with caution and due diligence and that becomes the reason why the determination of a suspect has to be decided by the collective collegial principle of the whole KPK Commissioners.[74] It is also the reason

74 *Id.*

why the KPK did not have the power to halt the investigation even though after amendment, the KPK Commissioners can issue the warrant to halt the investigation with the aims to ensure the right to a fair trial of the suspect.[75]

The second point revolves around the introduction of the *Dewan Pengawas* KPK as the supervisory organ of KPK. Based on the Weberian bureaucracy system,[76] the structure of *Dewan Pengawas* KPK fulfills the Weberian rational-legal principles for the bureaucratic system. Max Weber proposed the idea of ideal bureaucracy based on the rational-legal model,[77] in which, a bureaucracy consists of individuals with "professional, impersonal, passion-free, rational" behavior.[78] It must be "[h]ighly trustworthy, filled with professional experts selected within a system of meritocracy."[79] Rubinstein and Maravick observe that in the Weberian ideal conception of the rational-legal model, "[t]he guiding norm of bureaucratic authority is a strict hierarchy with a clear separation of tasks and functions following the principle of division of labor."[80]

Indonesia has a long history of a Weberian disaster due to a high level of corruption, collusion, and nepotism during the New Order era.[81] As a country that had been suffering from a pseudo-democratic regime for 32 years, Indonesia has a problem with ensuring peaceful leadership succession based on a meritocratic system. As a newly democratic country, specifically designed laws and policies to select leaders have to be formulated. This is important to ensure peaceful leadership succession. Otherwise, Indonesia will forever rely on the uncertain selection of charismatic leaders. The amendment of the KPK law is a step towards progress from a charismatic style of bureaucracy that depends on certain charismatic leadership to a rational-legal meritocratic bureaucracy.[82] Concretely, the law mandates that the selection

---

75 Pengadilan Negeri Jakarta Selatan [The District Court of Central South Jakarta] Feb. 16, 2015, Decision No. 04/Pid.Prap/2015/PN.Jkt.Sel., p. 3 (Indon.); Mahkamah Konstitusi [Indonesian Constitutional Court] Nov. 14, 2013, Decision No. 49/PUU-XI/2013 (Indon.).

76 William D. Rubinstein & Patrick von Maravic, *Max Weber, Bureaucracy, and Corruption*, *in* THE GOOD CAUSE: THEORETICAL PERSPECTIVES ON CORRUPTION 21, 26 (Gjalt de Graaf et al. eds., 2010) [hereinafter Rubinstein & Maravic].

77 Marcus Felson, *Corruption in the Broad Sweep of History*, *in* HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION 12, 12–17 (Adam Graycar & Russell G. Smith eds., 2013).

78 Rubinstein & Maravic, *supra* note 106, at 32.

79 *Id.*

80 *Id.* at 32–33.

81 Ross H. McLeod, *Soeharto's Indonesia: A Better Class of Corruption*, 7 AGENDA 99, 99–112 (2000).

82 Richard Mulgan & John Wanna, *Developing Cultures of Integrity in the Public and Private Sectors*, *in* HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION, 416, 416–28 (Adam Graycar & Russell G. Smith eds., 2013).

of first term *Dewan Pengawas* KPK be the prerogative right of the President. President Widodo selected six people whom he believes have fulfilled the requirements to become a member of *Dewan Pengawas* KPK. Those individuals are Tumpak Hatorangan Panggabean as the Chief of *Dewan Pengawas* KPK, Artidjo Alkostar, Syamsuddin Harris, Hardjono, and Albertina Ho.[83]

The *Dewan Pengawas* KPK acts as the protector of the due process system in anti-corruption proceedings. It ensures the check and balance model within the KPK. Before the amendment, the KPK's power was balanced by the classical *trias politica*, which are the executive, legislative, and judiciary. The executive is represented by the President, the legislative by Parliament, and the judicative by the judicial institutions. The classic *trias politica* is the external check and balance system but the existence of *Dewan Pengawas* KPK acts as the internal check and balance system.[84] It does not only act as the organ to prevent the abuse of power, but also to provide legality and legitimacy for KPK's decisions. For instance, the problems with the right to privacy and fair trial, when wiretappings are used, can be prevented by the existence of *Dewan Pengawas* KPK.

Concerning the right to a fair trial, *Dewan Pengawas* KPK becomes an organ that is responsible for ensuring that the right of the defendants is guaranteed because *Dewan Pengawas* KPK has the mandate to monitor the conduct and decisions of the KPK. Any conduct that might lead to a violation of a defendant's fair trial can be reported to the *Dewan Pengawas* KPK, and the question

83 Marchio Irfan Gorbiano, *Jokowi Inaugurates Five Members of Newly Formed KPK Supervisory Council*, JAKARTA POST (Dec. 20, 2019), https://www.thejakartapost.com/news/2019/12/20/jokowi-inaugurates-five-members-of-newly-formed-kpk-supervisory-council.html; Marchio Irfan Gorbiano, *Oversight Body Marks New KPK Dawn*, JAKARTA POST (Dec. 21, 2019), https://www.thejakartapost.com/news/2019/12/21/oversight-body-marks-new-kpk-dawn.html; "Tumpak Hatorangan Panggabean, who was acting KPK chairman between 2003 and 2007 and had a long track record in the judiciary, is set to lead the supervisory council. The members of the council include Artidjo Alkostar, a former Supreme Court justice who was known for handing down heavy sentences for corruption convicts. Jokowi also appointed deputy head of the Kupang High Court Albertina Ho. Albertina led the trial of former tax official Gayus Tambunan, who was found guilty of massive tax corruption. Former Election Organization Ethics Council (DKPP) chief Harjono, another former Constitutional Court justice, will also serve in the council along with Indonesian Institute of Sciences (LIPI) senior political researcher Syamsuddin Haris." *Anti-Graft Agency Gets Oversight Body*, STAR (Dec. 22, 2019), https://www.thestar.com.my/news/regional/2019/12/22/anti-graft-agency-gets-oversight-body.

84 *See also* Jakarta Statement on Principles for Anti-Corruption Agencies (Nov. 26–27, 2012), https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf (regarding the importance of internal accountability of anti-corruption agencies).

of whether such conduct will constitute a violation will be analyzed and if it does, such conduct can be stopped from the beginning. *Dewan Pengawas* KPK provides an important safeguard if analyzed objectively, suggested in many, often emotional reactions to the amendment, contrary to what has been, it will not weaken the power of KPK.

Concerning the right to privacy, the UN Human Rights Committee suggested that the existence of an organ to monitor the exercise of arbitrary lawful interference is mandatory. In paragraph 6, the Committee considered that a State party should report the creation of the authorities and organs set up within its legal system which is competent to authorize interferences allowed by the law.[85] There is also an obligation of the State Party to ensure that the information extracted from wiretapping activity will be kept with utmost security and caution to protect the right to privacy.[86] The existence of *Dewan Pengawas* KPK is directly fulfilling the requirements of the Committee because *Dewan Pengawas* KPK has the responsibility to assess and subsequently grant permission for the KPK to conduct wiretapping measures towards the suspect of corruption, as regulated in the Article 37 (B) of Law number 19 of 2019.

Before the amendment of Law number 31 of 2002, KPK's wiretapping was monitored by the collective collegial principle of the KPK Commissioners and if necessary, the KPK Commissioners could establish an ethical committee to assess if there was any ethical misconduct. The creation of *Dewan Pengawas* KPK is a step towards creating an anti-corruption agency with internal control over the execution of its powers. This is in conformity with the UNCAC in article 5, especially Article 5 b (3), which obliges the State Party to develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency, and accountability.[87] The State Party shall also endeavor to periodically evaluate relevant legal instruments and administrative measures to determine their adequacy to prevent and fight corruption.[88] International anti-corruption law progresses along three trajectories: international, regional, and national. The national challenges of domestic implementation of the UNCAC can be seen in Indonesia. The initial creation of the KPK modeled after the ICAC Hong Kong led to problems in law enforcement as exemplified in the cases of Gunawan and Novanto. Both pre-trial rulings showed that the old

85 CCPR General Comment No. 16, *supra* note 102, ¶ 6.
86 *Id.* ¶ 8.
87 UNCAC, *supra* note 2, art. 5.
88 *Id.*

KPK law had several flaws that required comprehensive solutions, *inter alia*, the creation of the *Dewan Pengawas* KPK to establish checks and balances and to provide assurances for human rights protection. These best-practices can be regarded as pivotal for the progression of international anti-corruption law in the future.

5 Conclusion

With the amendment, specific flaws within the previous KPK law have been repaired. The problem with the ambiguity of legal terms and potential abuse of power within the agency has been addressed with the new KPK law. This will be beneficial for the future of KPK, most importantly the KPK Commissioners and the employees within the agency. The previous problems such as the accusations of human rights violations during the law enforcement, ambiguity in legal terms, and the lack of an internal supervisory organ were covered by the new KPK law. The amendment also reduces the chances of human rights being manipulated by corruptors for their private gain during the justice process because human rights considerations are legally firmly embedded in the new KPK law. With hopes and optimism, the amendment will make the KPK able to carry on its mandate with robust legal certainty and continuous oversight to prevent any potential abuse of power from within the agency. This is the contribution of Indonesian anti-corruption law to the international anti-corruption law. The fear that the new KPK law would undermine corruption eradication in Indonesia was unwarranted. On the contrary, the specific legal and institutional changes have improved it. It is one important step, but continued reviews on the law and policy will be needed to make anti-corruption measures more effective.

Acknowledgements

The author would like to thank Professor Marcel Brus and Dr. Antenor Hallo de Wolf for their helpful advice and comments on this article. This research was fully funded by the Indonesia Endowment Fund for Education (LPDP).

Challenges in Ensuring the Rights of Vietnamese Migrant Workers in the Globalization Context – The Two Sides of the Development Process

*Nguyen Thi Hong Yen**

1 Introduction

In the current context of globalization, international migration is becoming a big issue that no nation alone can resolve on its own. It is attracting most countries' attention[1] due to its impacts on national socio-economic development and political stability.

The International Organization for Migration (IOM) estimates that there were approximately 214 million international migrants in mid-2010, compared to approximately 195 million five years earlier. It naturally excludes internal migration, which represents a higher figure. According to IOM, there will be around 405 million international migrants by 2050 (IOM, 2010). Political unrest, socio-economic instability, wars, natural disasters, and economic factors (such as low income, poverty, and the lack of employment opportunities and livelihood options) are the main motivating factors in making migration decisions. Inherent disparities in living standards, opportunities for well-paid employment and income within the country, and inequalities between rich and poor countries have motivated migrants to look for new, even temporary, opportunities abroad. "Migration for economic reasons is particularly prevalent, partly due to globalization".[2]

According to Vietnam Migration Profile 2016, the number of Vietnamese migrating to other countries is increasing for various reasons, of which, worker migration is one of the main reasons, and it is creating many challenges both for the Government and the migrants, as well as for their families. Vietnam joined the international labor market later than other countries in the region. Only from 2000 did the process strongly occur in host countries such as

* Lecturer & Researcher, Head of Public International Law Division, Hanoi Law University (HLU). Hanoi, Vietnam; Orcid iD: 0000-0003-2703-2363 at https://orcid.org/0000-0003-2703-2363.

1 Consular Dep't, Ministry of Foreign Affairs of Viet Nam, Review of Vietnamese Migration Abroad Migration Abroad 9 (2012), https://eeas.europa.eu/archives/delegations/vietnam/documents/eu_vietnam/vn_migration_abroad_en.pdf.

2 *Id.* at 9.

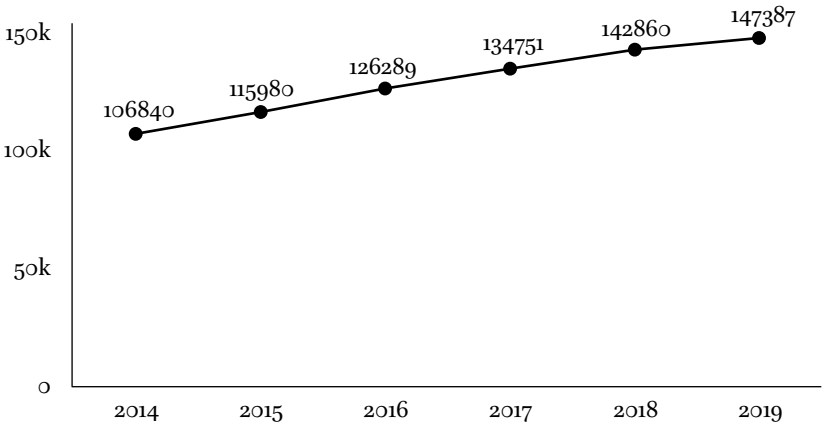

FIGURE 1 Number of Vietnamese workers abroad during the six years from 2014–2019
Note: Kim Anh, *VN sends 147,387 Workers Abroad in 2019*, SOCIALIST REPUBLIC VIET. ONLINE NEWSPAPER GOV'T (Jan. 2, 2020), http://news.chinhphu.vn/Home/VN-sends-147387-workers-abroad-in-2019/20201/38424.vgp.

Japan, Korea, China (Taiwan), Malaysia, North Africa, and the Middle East.[3] According to the latest report from the Ministry of Labor, Invalids and Social Affairs (MOLISA), there are currently 500,000 Vietnamese workers working in 40 countries and territories around the world with about 30 different occupations and sectors ranging from simple labor to technical work such as garments, electronics, domestic workers, nursing, and ship crew.[4]

According to migration data globally from the Population Division of the Department of Economic and Social Affairs (the United Nations) in 2019, the number of Vietnamese workers migrating abroad steadily increased from 28,100 to 76,100 over the past three decades, accounting for 0.1% of the number of migrants in the world. The number of female migrant workers accounted for nearly a quarter of the total number of migrant workers.[5] In 2018, 142,860 Vietnamese workers were working abroad.[6] In 2019, this number increased by 8,200 people to 152,530 workers working abroad, of which female

3 *Id.* at 15–17.

4 *Id.*

5 *International Migrant Stock 2019: Country Profiles – Viet Nam*, U.N. DEP'T ECON. & SOC. AFFS., https://www.un.org/en/development/desa/population/migration/data/estimates2/countryprofiles.asp (last visited July 23, 2020).

6 Kim Anh, *VN Sends 147,387 Workers Abroad in 2019*, SOCIALIST REPUBLIC VIET. ONLINE NEWSPAPER GOV'T (Jan. 2, 2020), http://news.chinhphu.vn/Home/VN-sends-147387-workers-abroad-in-2019/20201/38424.vgp.

workers accounted for approximately one-third of the total number of migrant workers (35.9% female).[7] Unfortunately, this data only shows the number of workers migrating through legal routes and does not include those migrating through non-traditional/illegal routes.

Many studies in the world and Vietnam have shown that labor migration mostly occurs due to economic reasons. The demand for labor and services overseas, coupled with income and living standard disparities between Vietnam and other countries in the region, has urged Vietnamese to migrate abroad. This trend has been reinforced by developments in information and communication technologies, as well as cheaper and more available international travel services, all of which allow people to contact each other, change jobs and travel more easily than ever before.[8] Migrants want to find better jobs with higher income compared to what they have in their home countries.[9] Also, according to MOLISA, Vietnamese workers' income is relatively stable and can be 2–3 times higher than the domestic income of the same profession and skill.[10] However, most Vietnamese migrant workers abroad are unskilled workers working in low-skilled occupations. Most of them come from rural areas with poor language capabilities and low skills. Therefore, they have limited career options.

Vietnamese migrant workers are one of the vulnerable groups. They have high risks of physical and mental abuse and have to face many challenges throughout the whole migration process to work abroad. When working abroad, Vietnamese workers have to encounter social stigma and discriminatory attitudes towards foreign workers and face difficulties in accessing legal remedies. They are sometimes exploited, beaten, and mistreated, especially the Vietnamese working unofficially, or by illegal migration, or by overstaying after the legal migration contract has expired. According to IOM, illegal migrants often do not have adequate living conditions and are physically or mentally abused, isolated, exploited, robbed, and even killed by criminal gangs or traffickers. Migrants do not or cannot leave, as they have to pay off the debt they took to cover for their journey. They also have to hide from the authorities due to their illegal residence status.[11] At the end of 2019, there are many cases,

7 Ministry of Labour – Invalids and Social Affairs, *Vietnam's Labour Market Update Newsletter*, 22 QUARTERLY LABOUR MARKET UPDATE NEWSLETTER 6, http://www.molisa.gov.vn/Upload/ThiTruong/LMU-S024-Q42019-Eng-final.pdf.

8 CONSULAR DEP'T, MINISTRY OF FOREIGN AFFAIRS OF VIET NAM, *supra* note 1, at 10.

9 *Id.* at 45.

10 *Id.* at 17.

11 Viet Anh, *British Expert Outlines Three Reasons Vietnamese Immigrants are Smugglers*, VNEXPRESS (Oct. 29, 2019), https://vnexpress.net/chuyen-gia-anh-neu-ba-ly-do-nguoi-viet-nhap-cu-lau-4003610.html.

such as the case of 39 Vietnamese workers found dead in a frozen container when attempting to enter the United Kingdoms illegally, or the Austrian police discovered bodies of 71 migrants in a cold container of an abandoned lorry on a highway near the Hungarian border in 2015 etc. that have rung an alarm for both the origin and destination countries on the cruelty of illegal immigration waves existing in our lives. With the dream of changing their lives quickly, these migrants had chosen for themselves a dangerous journey, even risking their lives, to reach the promising lands.

This issue has placed countries in a complex situation about how to protect the fundamental rights of their workers abroad while still upholding the principle of respecting the independence and sovereignty of the host countries? As one of the significant emigrating countries in the world, what challenges does Vietnam currently have to face in ensuring the rights of Vietnamese workers abroad? From this perspective, this study will focus on analyzing: (i) the international and Vietnamese legal framework on the rights of migrant workers, (ii) difficulties and challenges in ensuring the rights of Vietnamese workers who are currently working abroad, (iii) thence, providing specific solutions to better ensure the rights of Vietnamese workers abroad in the future.

2 International Legal Framework on the Rights of Migrant Workers

Migrant workers are one of the vulnerable groups based on psychological and physiological factors and on working and living environments. Although many international documents have been issued which mentioned both, directly and indirectly, the rights of migrant workers in the world. Furthermore, the protection and promotion of their rights remain a challenge for the international community in general and states' governments in particular. The United Nations (UN) and its specialized agencies, especially the International Labor Organization (ILO), have developed a fairly comprehensive system of international legal instruments and specific treaties on international migration. These organizations have also established implementation monitoring mechanisms on a global scale, which focus on the reporting duty of the State parties on the implementation of relevant international treaties.

2.1 *Core Human Rights Instruments of the United Nations*

In 1948, United Nations adopted the Universal Declaration of Human Rights (UDHR), which became a universal international document stating the basic standards for fundamental human rights. Although it is not a legally binding document, however, UDHR had been widely recognized and became the normative framework for the formation of later important documents on human

rights, especially the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – two of the fundamental international legal instruments on human rights in the world.

These documents recognize equality and non-discrimination as the most important principles in ensuring fundamental human rights while affirming all rights and freedom within these Covenants "without distinction of any kind, such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or another status".[12] Therefore, state parties are obliged to ensure the enjoyment of human rights and fundamental rights for all, including foreigners and migrants.[13]

The right to migrate is an important right recognized as "*a human right and an indispensable condition for the survival and development of individuals.*"[14] Under UN's core human rights conventions, freedom of migration is understood as a combination of freedom of movement and residence and the right to leave any country, including their own country, and return to their country. It has been clearly stated in Article 13 of UDHR: "*Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country.*"[15]

Article 12 of ICCPR also states that all individuals have the right to liberty of movement and freedom to choose their residence in the territory of a country, except for restrictions such as to protect national security or public order.[16] Furthermore, ICCPR also affirms that aliens residing in the territory of another country could only be expelled from that country pursuant to the law and for compelling reasons such as national security.[17] However, the right to freedom

12 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 2 (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, art. 2 (Dec. 16, 1966) [hereinafter ICESCR].

13 UN Human Rights Committee, Letter dated May 26, 2004 from the UN Human Rights Committee, U.N. Doc. C/21/Rev.1/Add.13 (May 26, 2004) ¶¶ 3–10 (stating that "... the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.").

14 Aining Zhang, *Predicaments and Countermeasures of the Protection of Migrant Workers' Human Rights*, 17 JOURNAL OF HUMAN RIGHTS 223, 226 (2018).

15 UDHR, *supra* note 12, art. 13.

16 ICCPR, *supra* note 12, art. 12.

17 *Id.* art. 13.

of movement and residence is not absolute. In this regard, the UN Human Rights Committee explained that: "*The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory*".[18] Furthermore, ICCPR also comprehensively outlined a set of common rights for everybody to enjoy, including people not citizens of a State.

Similarly, ICESCR also ensures all migrant workers, regardless of their gender and social status, enjoy economic, social, and cultural rights.[19] Countries are obliged to remove obstacles to *the "enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment, and health"*.[20] Besides, ICESCR also provides minimum legal protection to migrant workers by recognizing some fundamental rights such as the right to healthcare,[21] right to education,[22] right to housing,[23] right to work and right at the workplace,[24] etc., of which the right to work is an important economic right for migrant workers. ICESCR emphasizes that all individuals have the right to equal and favorable conditions of work and that State parties must ensure the right to work for everyone, including immigrants.[25]

Together with the UDHR, ICCPR and ICESCR form the international human rights laws and become the optimal legal shield for ensuring and promoting human rights in all countries, especially for countries that have not ratified specialized international conventions such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, CEDAW Convention, Convention on the Rights of Persons with Disabilities, etc.

---

18 OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, U.N. HUMAN RIGHTS COMM., CCPR GENERAL COMMENT NO. 15: THE POSITION OF ALIENS UNDER THE COVENANT ¶ 5 (1986), https://www.refworld.org/docid/45139acfc.html.

19 AMNESTY INT'L, LIVING IN THE SHADOWS: A PRIMER ON THE HUMAN RIGHTS OF MIGRANTS 21 (2006), https://www.amnesty.org/download/Documents/80000/pol330062006en.pdf.

20 OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, CERD GENERAL RECOMMENDATION XXX ON DISCRIMINATION AGAINST NON CITIZENS ¶29 (2002) [Hereinafter CERD].

21 ICESCR, *supra* note 12, art. 12.

22 *Id.* arts. 13, 14.

23 *Id.* art. 11.

24 *Id.* art. 6(1); AMNESTY INT'L, *supra* note 19, at 21–22.

25 ICESCR, *supra* note 11, art. 6(1).

2.1.1 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 – A Specialized International Legal Instrument on the Protection of Migrant Workers

Following ICCPR and ICESCR, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICMW) was identified as a specialized legal instrument designed to provide specific legal protection for migrant workers group. The adoption of ICMW marks an essential step in the development of international human rights law as well as the awareness of the international community on the importance of migrant workers to politics, economy, and society, at the same time identifies migrant workers and their families as an essential part of society.

In practice, migrant workers are generally unlikely to be welcomed and are not adequately protected in host countries. Therefore, ICMW aims to fill the legal gaps and is expected to become a truly effective legal instrument to "*provide minimum universal standards to protect migrant workers and members of their families*".[26] With these considerations, ICMW strives to expand its scope and subject of provisions to cover all migrant workers and their families, regardless of their statuses as documented or undocumented workers according to the standards stipulated in major human rights instruments.[27] However, due to certain limitations of undocumented migrant workers, the Convention only provides them with minimal legal protection to encourage all migrants and employers to respect and comply with the laws and procedures established by the countries.[28]

On the first important point of this Convention, it further identifies the definition of *a migrant worker* as mentioned in the ILO Convention No 97, 1949, and added the definition of *members of the family*. In addition, the Convention provides for a system of human rights of migrant workers that is quite comprehensive and specific. It is a very important basis for protecting the rights and interests of migrant workers in practice. It is arguably the Convention's most outstanding contribution to the protection of this group. Under the ICMW, migrant workers are understood as people who will, are, and have participated in an income-generating activity in a country where they are not citizens. In addition, the Convention also introduced the concept of "their family" as only

26 Shirley Hune & Jan Niessen, *The First UN Convention on Migrant Workers*, 9 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 130, 131–32 (1991).

27 *Id.* at 130, 135.

28 G.A. Res. 45/158, pmbl. (Dec. 18, 1990); James A.R. Nafziger & Barry C. Bartel, *The Migrant Workers Convention: Its Place in Human Rights Law*, 25 INTERNATIONAL MIGRATION REVIEW 771, 777 (1991).

those who are married to the migrant workers or have a similar relationship to marriage, as well as children and other dependents who are recognized as family members under applicable law and the signed agreements between the countries concerned. It means that they are only considered a member of migrant workers' families and protected the fundamental rights when they genuinely have a marriage relationship with a migrant worker.

Like other vulnerable groups such as women, children, ethnic minorities etc., rights specified in the ICMW take into account the circumstances and specific needs of this particular group. These particular rights are only applicable to migrant workers and not to any other social group.[29] The content of ICMW focuses on the rights of migrant workers in two main groups, namely: (i) the fundamental human rights of all migrants, whether documented or undocumented, and their family members must be guaranteed including rights in criminal proceedings, right to privacy, right to be treated equally as citizens of the host countries regarding working conditions, social security, right to transfer income and right to be informed, etc., and (ii) additional rights applicable to legal migrant workers and members of their families such as: right to temporary absence, right to freedom of movement, right to be treated equally as the citizens of the receiving country, other rights if the employer violates their contracts. In ICMW, non-discrimination is also referred to as the fundamental principle to avoid creating discrimination between migrant workers and citizens of the host country. However, like other international documents, ICMW has not yet explained specifically the content of this principle.

It should be noted that, according to the general principles of international human rights law, some of the above rights, including freedom of movement, freedom to reside within the territory of the country where there are employed, freedom of association, and unions, may be subject to statutory restrictions which are necessary to protect national security, public order, public health or morals or individual's rights, and freedom.[30] In addition, similar to other international human rights treaties, ICMW also regulates states' reporting and monitoring regime. Accordingly, member states will be required to submit national reports on the convention's implementation every five years and may also be required to submit Adhoc reports as required by the overseeing committee of the convention in case any serious problem arises. Besides, the convention provides the mechanism that allows a Member State to complain

29 The Vietnamese Lawyers Association, *The Protection of the Rights of Immigrant Workers*, INT'L, REGIONAL & NAT'L L. & PRAC., 2008, at 40–41, https://asean.org/storage/2016/08/V4_MWs-Rights-in-International-2008.pdf.

30 *Id.* at 51.

to the Convention Oversight Committee against the failure of another Member State to fulfil its obligations under the Convention (Article 76); and the mechanism that allows individuals to complain to the Supervisory Commission about the Government's failure to fulfil its obligations under the Convention (Article 77). However, up to now, all member states of the convention have reserved these two mechanisms above. It seems like the general situation of other international human rights conventions that a few member states accept the authority of the Convention Oversight Committee in receiving and resolving complaints from states and individuals.[31]

In fact, labor migration is becoming an increasingly complicated problem at the global level, however, according to several researchers, it seems that international conventions in this area have not indeed received attention from countries around the world. As of 19 January 2020, ICMW has 55 state parties, a relatively modest number compared to other international human rights treaties of the UN. The convention has placed too many responsibilities on the host countries while "ignoring" the origin states.[32] It makes the convention less "attractive" to countries. The harmony and balance of obligations and responsibilities between the receiving country and the country of origin must be considered and divided appropriately to avoid creating "distinct" obligations and considered a "burden" to receiving countries. However, it is undeniable that this convention has contributed to the completion of the legal framework for the protection of rights of migrant workers in the world, and it is still seen as one of the cores and specialized human rights instruments exclusively for migrant workers and members of their families. Shortly, people can expect those nations will properly appreciate the good values constructed by the Convention to accept the obligations more easily.

2.2 *ILO's Conventions on the Rights of Migrant Workers*

Being developed on the foundations of universal documents on human rights of the UN, Convention No. 97 concerning Migration for Employment (Revised 1949) and Convention No. 143 concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers (Supplementary Provisions) are core conventions of the ILO on the issues of migrant workers as they refer to problems that arise throughout the entire

31 *Id.*

32 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, U.N. HUM. RTS., OFF. HIGH COMMISSIONER, https://indicators.ohchr.org (last visited Apr. 24, 2021).

labor migration process, from the time the workers are in their countries of origin, during the employment in the host countries until their return.[33]

According to Convention No. 97 of ILO, a migrant worker is a person who migrates from one country to another to find employment, includes any person regularly admitted as a migrant for work. This definition does not include frontier workers, short-term entry of liberal professions and artists, and seamen (Article 11). This understanding is repeated in Convention No. 143. Still, the Convention adds two more groups which are (i) seamen, persons coming specifically for purposes of training and education, and (ii) employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period, and who are required to leave that country on the completion of their duties or assignments (Article 11).

The ILO's Conventions noted: "*all migrant workers are protected by these Conventions without distinction of the types of migrant workers as well as not based on the principle of reciprocity between countries*". To implement this provision, Convention No. 97 imposes an obligation on state parties to undertake the activities to (i) support and protect migrant workers such as: facilitating journey and reception of migrants for employment,[34] maintaining and providing adequate and free service to assist migrants for employment (Article 2), medical services and living conditions for migrants for employment and members of their families (Article 5), etc. (ii) equal treatment for migrant workers such as: apply national treatments with migrants for employment (Article 6), allow migrants for employment to transfer earnings and savings abroad (Article 9), etc.

To supplement for Convention No. 97, Convention No. 143 mentions aspects that Convention No. 97 had not mentioned, such as (i) requiring state members to determine whether there are illegally employed migrant workers on their territory and passing through their territory and whether migrant workers are employed illegally (Article 2); (ii) adopting necessary and appropriate measures to suppress clandestine movements of migrants for employment and illegal employment of migrants (Article 3); (iii) prosecuting authors of manpower trafficking (Article 5); (iv) taking necessary measures to facilitate

33 Labor and Soc. Publ'g House, International Law on the Rights of Vulnerable Groups 135 (2011).

34 International Labour Organization [ILO], *Migration for Employment Convention (Revised)*, art. 4, ILO Doc. C97 (July 1, 1949), https://www.refworld.org/docid/3ddb64057.html.

the reunification of the families of all migrant workers legally residing in its territory, etc.

In general, both of these Conventions affirm that migrant workers will enjoy the same fundamental human rights as native workers. The most significant limitation of these two Conventions is that they only mentioned the groups, which are legal migrant workers themselves but have yet to consider the right of illegal migrant workers and members of their families. Maybe, that is the reason why they also have a limited number of members. By 8 March 2021, Convention No. 143 (effective from 09 December 1978) only has 26 state parties[35] while Convention No. 97 (effective from 22 January 1952) has 51 state parties.[36]

Besides, at the regional level, Vietnam and ASEAN countries also strived to develop standard documents to address legal issues regarding migrant workers in the region, such as the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers adopted in Cebu in 2007 (Cebu Declaration in short), ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers 2017, etc. In general, these documents called on ASEAN countries to ensure the rights of migrant workers by implementing specific obligations such as protection of workers from abuse, discrimination, or violence; providing essential services for migrants such as necessary information about the receiving country, legal consulting services to resolve disputes or complaints etc.[37] In addition, ASEAN documents also call on countries to increase cooperation to solving issues related to migrant workers and members of their families, at the same time, to harmonize national law with ILO's basic laboring standards. Although there have been many efforts to legalize regulations on the rights of migrant workers, in practice, ASEAN has yet established binding rules and clear mechanisms to promote decent working conditions and basic laboring standards at the regional level. The Cebu Declaration is not a legally binding document, therefore, its effects on member states are still very limited.

35 *Ratifications of C143 – Migrant Workers* (*Supplementary Provisions*) *Convention, 1975* (*No. 143*), Int'l Lab. Org., https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288 (last visited May 21, 2021).

36 *Ratifications of C097 – Migration for Employment Convention* (*Revised*), *1949* (*No. 97*), Int'l Lab. Org., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO (last visited May 21, 2021).

37 The ASEAN Secretariat, ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers 18, 23 (2019), https://asean.org/storage/2019/01/3.-March-2018-ASEAN-Consensus-on-the-Protection-and-Promotion-of-the-Rights-of-Migrant-Workers.pdf.

3 The Rights of Migrant Workers in the Vietnamese Legal System – Current Situation and Challenges

3.1 *Vietnamese Legal Framework on the Rights of Migrant Workers*

Labor migration through labor export has made an outstanding contribution to Vietnam's economic development by "boosting the economy through remittances and improving Vietnam's skill base".[38] The Vietnamese Government also believes that overseas labor migration will create "better income and employment opportunities for Vietnamese workers, improving the livelihoods of the population, reducing poverty, stabilizing society and building a highly skilled and professional workforce".[39]

As mentioned above, Vietnam is now one of the significant emigrating countries in the world. Therefore, it is essential to recognize and secure the rights of Vietnamese migrant workers to ensure their legitimate rights and interests. At the same time, limit infringement of rights and risks that could make them victims of overseas trafficking crimes.

3.1.1 Rights of Vietnamese Migrant Workers under Contract

In Vietnamese law, the concept of 'workers working abroad' refers to those who go abroad to work under a contract. In comparison with the United Nations Convention on the rights of migrant workers and their family members, this category of objects falls under the category of 'documented migrant workers'. Thus, in terms of the connotation, the concept of 'workers working abroad' is narrower than the concept of migrant workers.[40]

Vietnam began sending unskilled workers abroad through licensed agencies from November 1991 based on Decree No. 370/HĐBT of the Council of Ministers dated November 9, 1991, on the promulgation of regulations on sending Vietnamese workers abroad to work for a definite time. The 7th National Party Congress in 1991 proposed the "Strategy for stability and socio-economic development up to 2000", in which the direction to solve the problem of employment is identified as: "... creating jobs ..., building infrastructure, expanding the service sector, labor export". This highest policy orientation

38 Ruth Bowen & Do Van Huong, Women in International Labour Migration from Vietnam: A Situation Analysis 23 (2012), https://asiapacific.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2013/women%20in%20international%20labour%20migration%20from%20viet%20nam%20a%20situation%20analysis.pdf?la=en.

39 Consular Dep't, Ministry of Foreign Affairs of Viet Nam, *supra* note 1 at 15.

40 Labor and Social Publ'g House, *supra* note 33, at 120.

allows the expansion of labor export activities in Vietnam in the new period.[41] Following that, Directive No. 41/CT-TW of the Politburo continues to affirm: "exporting labor and experts is a socio-economic activity contributing to the development of human resources, creating jobs, income and improving skills for workers, as well as increasing foreign currency revenues for the country. Furthermore, labor and expert export was an important and long-term strategy contributing to building a workforce for the Government to speed up industrialization and modernization.[42] From these policies, labor export activities were initially legalized in the Labor Code passed by the National Assembly on June 23, 1994, and its implementing documents. Since then, the law on migrant workers in Vietnam has continued to be strengthened and developed with a series of important documents built into the national legal system.

The 2013 Constitution clearly states that "*Citizens have the right to free movement and residence within the country, and the right to leave the country and to return home from abroad*".[43] Overseas Vietnamese are an inseparable part and a resource of the community of Vietnamese nationalities. The protection of the legitimate rights and interests of Vietnamese citizens and legal entities in foreign countries is extremely necessary, demonstrating the State's responsibility towards citizens ...[44] Under the 2013 Constitution, Vietnam has concretized the rights of Vietnamese workers abroad in some legal documents such as Law on Vietnamese Nationality 2008 (amended and supplemented in 2014); Law on Overseas Representative Offices of the Socialist Republic of Vietnam 2009; Law on Vietnamese workers working abroad under contracts 2006, Law on Human Trafficking Prevention and Control 2011, Penal Code 2015 (revised in 2017); etc. There are also agreements on regulations on land border management between Vietnam and bordering countries.

The primary legislative documents that govern migrant workers in Vietnam are the 2012 Labor Code and the 2006 Law on Vietnamese Guest Workers under Contract. The Labor Code 2012 stipulates the rights and obligations of

41 Đại hội đại biểu toàn quốc lần thứ XIII của Đảng [XIII Nat'l Cong. of the Party], *Chiến lược ổn định và phát triển kinh tế – xã hội đến năm 2000* [*Strategy for Socio-Economic Stability and Development to 2000*], ĐẠI HỘI ĐẠI BIỂU TOÀN QUỐC LẦN THỨ XIII CỦA ĐẢNG [DHD] (Aug. 17, 2020, 3:55 PM), https://daihoidang.vn/chien-luoc-on-dinh-va-phat-trien-kinh-te-xa-hoi-den-nam-2000/480.vnp.

42 *Chỉ thị 41/CT-TW Về Xuất Khẩu Lao động Và Chuyên Gia* [Directive No. 41 CT/TW on Labor Export and Experts], Ministry of Politics (Sept. 22, 1998).

43 HIẾN PHÁP [CONSTITUTION] art. 23 (2013).

44 *Nghị quyết số 36-NQ/TW về công tác đối với người Việt Nam ở nước ngoài* [Resolution No. 36-NQ/TW on overseas Vietnamese], Ministry of Politics (Mar. 26, 2004).

employees in labor relations. The State recognizes the importance of gender equality and the need to develop and implement equal policies on employment, insurance, and society to protect female workers, especially in recruitment and employment while pregnant or on maternity leave.[45] The State encourages enterprises, agencies, organizations, and individuals to seek and expand the labor market to create more jobs for Vietnamese workers abroad. At the same time, Vietnam affirms the importance of labor migration abroad under contract complying with the Vietnamese laws, the laws of the receiving countries, and international treaties (if any) between Vietnam and contracting states.[46]

The 2006 Law on Vietnamese Guest Workers under Contract also stipulates the rights and obligations of enterprises, non-business organizations sending Vietnamese workers to work abroad under contracts, and other relevant organizations and individuals. The scope of this Law is quite wide when trying to cover all subjects involved in international labor migration.[47] In addition, this Law also sets out requirements and conditions for enterprises to grant licenses for sending Vietnamese workers abroad; responsibility for employees in case employees die, suffer from occupational accidents, abuse, exploitation of their health, honor or dignity, infringed or harmed. In addition, the Government of Vietnam also requires Vietnamese employees to comply with the signed contractual agreements, the employer's labor regulations, the laws and regulations of Vietnam and the receiving countries, to actively participate in training courses, social insurance and maintain the values, good customs of Vietnam, and other responsibilities.[48]

In general, similar to the provisions of international laws, Vietnamese workers, when working abroad, firstly enjoy fundamental human rights such as the right to life, the right to health care, and the right to access information, etc. The organizations and individuals licensed to send workers abroad to work are obliged and responsible to strictly comply with the contents of the contracts with the employees, ensuring the correct procedures according to the provisions of the law and not allowed to take advantage of labor contracts to perform acts such as abusing activities of sending workers abroad to organize the sending of Vietnamese citizens abroad; sending workers abroad without registering contracts with competent state agencies under the 2006 Law on

45 *Bộ luật Lao Động* [Labor Code], No. 10/2012/QH13 art. 4(7) (June 18, 2012).

46 *Id.* art. 168.

47 *Luật Người Lao động đi Làm Việc ở Nước Ngoài Theo Hợp đồng* [Law on Vietnamese Guest Workers], No. 72/2006/QH11 art. 6 (Nov. 29, 2006).

48 *Id.* art. 45.

Vietnamese Guest Workers under Contract etc. In addition, as migrant workers, Vietnamese workers abroad also have some typical rights such as:

- The right to be informed about the policies and laws of Vietnam on the migrant workers; laws, customs, and practices of the host country; rights and obligations of the parties when going to work abroad. This right is especially important for workers preparing to work overseas to equip them with the knowledge to protect their interests, to avoid deception cases when committing to the rights and obligations in the contract. In addition, understanding the customs and practices of the host country will help workers integrate soon into life abroad.[49]
- The right to enjoy salaries, remunerations and other incomes, medical examination and treatment, social insurance and other benefits provided for in contracts, international treaties, and international agreements to which Vietnam is a party.
- The right to have his/her lawful rights and interests protected while working abroad by the enterprise, non-business organization, offshore-investing organization or individual and by the foreign-based Vietnamese diplomatic mission or consulate following the Vietnamese law, the law of the host country as well as the international law and practice; to be advised on and supported in the exercise of their rights and enjoyment of benefits stated in the labor contract or internship contract (Article 44 (3)).
- The right to transfer home his/her salary, remunerations, incomes, and other personal properties following the laws of Vietnam and the host country (Article 44(4)).
- The right to enjoy the benefits from the overseas employment support fund under the provisions of law (Article 44(5)). On August 31, 2007, the Prime Minister issued Decision No. 144/2007/ QĐ-TTg on the establishment, management, and use of the Overseas Employment Support Fund. Accordingly, the Overseas Employment Support Fund employees will support the employees working abroad to foster their skills, foreign languages, and knowledge; assist in solving risks.
- The right to lodge complaints or denunciations or initiate lawsuits against illegal acts in sending workers abroad (Article 44 (6)).

Concerning regulations exclusively for female migrant workers abroad, to ensure equal rights for them to work and access necessary legal services, the Government of Vietnam has also paid attention to develop their own rules.

49 Min Chen, *The Impact of Expatriates' Cross-Cultural Adjustment on Work Stress and Job Involvement in the High-Tech Industry*, Frontiers Psychol. (Oct. 9, 2019), https://www.frontiersin.org/articles/10.3389/fpsyg.2019.02228/full.

The Government issued and implemented the Law on Gender Equality in 2006, including equality in recruitment, working conditions, wages, social insurance, and other work-related conditions. On the other hand, the Government has identified a list of jobs where Vietnamese workers, especially female workers, are at high risk of labor exploitation and abuse, such as dancers, singers, and massages working at restaurants, hotels, or entertainment centers; jobs that must be in constant contact with explosives, noxious substances, frequent work in a place where there is a lack of air, high pressure (underground, ocean), et cetera.[50] By warning these jobs, the Government of Vietnam strives to extend protections for Vietnamese female workers while working abroad.

In addition to the above rights, Vietnamese workers working abroad under the contract are also entitled to the rights corresponding to the form of contract that sends them to work overseas. At the same time, their legitimate rights and interests are protected by the State of Vietnam. In addition, Vietnam has also developed a Code of Conduct to ensure a responsible and ethical recruitment process developed by the Vietnam Association of Manpower and Supply in 2010 (updated in 2018); and, the establishment of Vietnamese Labor Advisory Centers to work abroad has helped increase workers' access to information and justice. The role of trade unions in monitoring law implementation and protecting workers' rights is also promoted through cooperation with trade unions in the host countries.

Organizations and individuals that commit criminal violations in this field will be sanctioned under the 2015 Penal Code (amended in 2017) for crimes such as Human trafficking (Article 150), Trafficking of a person under 16 (Article 151). Administrative sanctions are also stipulated in the Law on Vietnamese Worker working abroad under contracts 2006 and Decree No. 28/2020/NĐ-CP dated 01/3/2020 of the Government regulating the sanctioning of administrative violations in labor, social insurance, sending Vietnamese workers to work abroad under the contract. Accordingly, depending on the behavior and the seriousness of the violation, the offender can be subject to a warning or a fine. In addition, it may be accompanied by one or several additional penalties.[51]

On November 13, 2020, the National Assembly of Vietnam passed the amended Law on Vietnamese workers working abroad under contracts, which

50 *Quy Định Chi Tiết VÀ Hướng Dẫn Luật Người Lao Động Việt Nam Đi Làm Việc Ở Nước Ngoài Theo Hợp Đồng* [Detailing and Guiding the Implementation of a Number of Articles of the Law on Vietnamese Laborers to Work Abroad Under the Contracts], 126/2007/ND-CP ¶ 2 (Aug. 1, 2007).

51 *Bộ Luật Hình Sự* [Criminal Code], No. 100/2015/QH13 art. 9 (Nov. 27, 2015).

will enter into force from January 1, 2022. Compared with the current law, the amended law has 31 new points belonging to 8 major content groups. It continues to regulate state policies on Vietnamese workers working abroad under contracts, as well as rights, obligations, and responsibilities of overseas workers, enterprises, public service providers, and related agencies, organizations. The law also promogulated the protection of the legitimate rights and interests of those workers. In particular, Article 7 of the new law explicitly states 17 prohibited acts, such as: enticing, seducing, promising, mistakenly advertising, providing false information or other tricks to deceive the employee; taking advantage of activities of sending workers abroad to organize illegal exit, trafficking, exploitation, forced labor or other illegal acts.

3.1.2 Rights of Undocumented Vietnamese Workers Abroad

Besides legal workers, the number of Vietnamese workers migrating abroad by informal channels is quite large, and there aren't complete statistics on this number. Illegal migrant workers have to live on the margins of society, so they are both vulnerable to exploitation and ideal for criminal gangs to take advantage of and manipulate.[52]

The law and guidance documents only regulate the employment relationship between workers working abroad through official channels. In contrast, although without officially available data, Vietnamese laborers working through informal ways is quite high. They may be migrants looking for work through informal routes or go by the official routes and then run away and do informal work, or those who do not return home when their contract is expired. In fact, undocumented workers face many risks when working "underground" in foreign countries. They are often mistreated, abused, or easily victimized by various crimes, including human trafficking.

In Vietnam, regulations related to ensuring the rights of undocumented migrant workers are still quite poor and are still being proposed for improvement. There are only a few relevant documents such as the 2011 Law on Human Trafficking Prevention and Control, and the 2015 Penal Code (amended in 2017) that recognizes crimes such as organizing, brokering the illegal entry, exit, or stay in Vietnam of another person (Article 348), organizing, brokering illegal emigration of another person (Article 349) …, Decision No. 17/2007/QĐ-TTg of the Prime Minister that promulgates a regulation on accepting and supporting community reintegration for women and children returned from overseas trafficking, etc.

52 Consular Dep't, Ministry of Foreign Affairs of Viet nam, *supra* note 1, at 47.

From an international perspective, Vietnam has also signed some Agreements on the return of Vietnamese citizens who are not allowed to reside abroad with several countries such as Germany, Poland, Canada, the UK, Switzerland, Norway, Czech, United States, Sweden, Belgium, France, etc.[53] All these agreements are identified based on the principle of reciprocity to cooperate in solving problems related to receiving citizens illegally residing in one of the State parties' territory to prevent the increase in illegal migration. Also, according to the provisions of these agreements, to be accepted to return, the returnee must prove their nationality through one of the documents such as passport, identity card, nationality certificate, etc. In general, the provisions of these documents are deemed to be limited to the general provisions on illegal immigration and the responsibilities of individuals and organizations sending workers abroad. Still, there are no regulations to protect the rights of illegal Vietnamese workers working abroad. It is a huge gap for all types of trafficking crimes.

In summary, Vietnam's legal system and policies on migration are still quite limited and are still being improved. Migrant workers, whether legal and documented or work illegally and undocumented, are still Vietnamese citizens, so they still need the State to ensure their fundamental rights in the Constitution. Therefore, there are some shortcomings such as the lack of regulations to ensure the legitimate rights and interests of Vietnamese citizens during the migration process (before leaving the country – while abroad – when repatriation and reintegration), or the incomplete legalization of regulations related to different types of Vietnamese citizens' migration abroad. This practice leads to poor enforcement and needs to be considered in time to ensure the full enjoyment of the rights of Vietnamese workers abroad.

3.2 *Specific Policies of the Vietnamese Government for Overseas Workers Returning Home Due to the COVID-19 Pandemic*

Since the beginning of 2020, the world economy has been on the brink of a recession in the aftermath of the COVID-19 pandemic. International organizations and financial institutions estimated that the global economy would witness the most severe economic depression in decades. The International Monetary Fund has accordingly lowered the global economic growth forecast

53 CONSULAR DEP'T, MINISTRY OF FOREIGN AFFAIRS OF VIET NAM, LIST OF TREATIES, BILATERAL AGREEMENTS ON GETTING BACK CITIZENSHIP 4 (2020), https://lanhsuvietnam.gov.vn/Lists/BaiViet/Bài%20viết/DispForm.aspx?List=dc7c7d75%2D6a32%2D4215%2Dafeb%2D47d4bee70eee&ID=138 (last visited Dec. 9, 2020).

by 1.9 percentage points compared to its former forecast in April 2020, to negative 4.9 %. Similarly, according to the World Bank, the global economic growth projection is negative 5.2%, which is the steepest decline since the Great Depression in the 1930s. According to the evaluation of the International Labor Organization, the economic and labor crisis which COVID-19 causes could add up to 25 million unemployed people globally.[54] After social distancing and lockdown orders from governments, many workers lost their jobs, which had a serious impact on their income. The countries need to have consistent and rapid coordination policies at both national and global levels on demonstrating multilateral cooperation to limit health crises for workers and their families as well as economic impacts from the COVID-19 pandemic.

Although there are specific achievements in the early stage of fighting the COVID-19, Vietnam's economy has been suffering considerable repercussions due to the pandemic. According to the preliminary statistics, to date, more than 5,000 Vietnamese workers working overseas have returned to Vietnam as a consequence of the COVID-19 pandemic. Almost all industries have been considerably impacted by the pandemic leading to a significant reduction in the labor force and a high unemployment rate. The country's Gross Domestic Product (GDP) recorded in the second quarter of 2020 showed a minimal increase of 0.36% compared to the previous year, which was the lowest increase within the 2011–2020 period. The labor force has decreased by more than 2 million people compared to the previous quarter in the same period of the former year. The unemployment rate of people at labor age in urban areas has been recorded as 4.46%, which is the highest in 10 years.

To support overseas Vietnamese workers returning home to overcome this crisis, the Government of Vietnam has introduced fast and practical response programs to best guarantee the rights of Vietnamese workers. According to the Joint Circular No. 16/2007/TTLT-BLDTBXH-BTP dated 4 September 2007, the employee is reimbursed the brokerage fee in case of force majeure (natural disaster, war, bankruptcy, etc.). If it is not the fault of the employee, the enterprise shall request the broker to refund employees a part of the brokerage according to the principle that the employee who has worked less than 50% of the time under the contract will receive 50% of the paid brokerage. The employee who has worked 50% of the time under the contract or more is not entitled to receive the brokerage fee. In case the broker cannot be claimed, the enterprise shall reimburse the employee according to the above principle

54 Press Release, Int'l Labor Org., Almost 25 Million Jobs Could Be Lost Worldwide as a Result of COVID-19, Says ILO (Mar. 18, 2020), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_738742/lang--en/index.htm.

and be accounted for reasonable expenses when calculating taxable income in accordance with Vietnam's Law on Corporate Income Tax.

In addition, for reimbursement service, according to Clause 3, Section III of the above Joint Circular, in case overseas workers returning home ahead of schedule due to force majeure or not due to the employee's fault, the enterprise is only allowed to collect the service fee according to the actual time (number of months) the employee was working abroad. In some special cases decided by the Minister of Labor, Invalids, and Social Affairs, overseas workers can receive a maximum of 5 million VND per case. Depending on the epidemic situation, the authorities shall support workers and enterprises if needed.[55]

Apart from those supporting measures, from February 2020, Vietnam has reviewed Vietnamese workers working abroad under contracts for infection and suspected COVID-19 infection.[56] Vietnamese workers must take the initial measures to prevent the COVID-19, strictly complying with the medical requirements of the Vietnamese authorities and host countries.[57] In addition, the Government advocates to simplify administrative procedures for businesses, reduce pre-check, increase post-check, strengthen online settlement (online) for contract registration, licenses for businesses, temporarily suspending periodic inspections of enterprises until the end of the second quarter of 2020. The Department of Overseas Labor, the Inspector of the Ministry of Labor, Invalids and Social Affairs, only conducts irregular inspections when having complaints and questions from employees, employees' relatives, and feedback from news agencies and newspapers.

In addition to material support, from February 2020, Vietnam has reviewed Vietnamese workers working abroad under contract who were confirmed or suspected of COVID-19 disease. In particular, the Government noted that, when it is necessary to leave Vietnam, Vietnamese workers must take steps to

---

55 Tú Giang, *Hỗ trợ lao động Việt Nam làm việc ở nước ngoài mất việc vì COVID-19* [*Support Vietnamese Workers Working Aboard Who Lose Their Jobs Due to the COVID-19*], DCVN (Apr. 1, 2020, 10:24 AM), https://dangcongsan.vn/xa-hoi/ho-tro-lao-dong-viet-nam-lam-viec-o-nuoc-ngoai-mat-viec-vi-covid-19-551614.html.

56 Minister of Labor, *Công điện số 01/CĐ-LDTBXH Về tăng cường các biện pháp phòng, chống dịch bệnh viêm đường hô hấp cấp do chủng mới của vi rút Corona gây ra* [*Affairs, Document No. 01/CĐ-LDTBXH on Strengthening Measures to Prevent and Control Acute Respiratory Infections Caused by New Strains of Corona Virus*], CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM (Feb. 2, 2020), http://www.molisa.gov.vn/Pages/tintuc/chitiet.aspx?tintucID=222250.

57 Ngan Anh, *Chưa có lao động Việt Nam làm việc ở nước ngoài theo hợp đồng bị nhiễm Covid-19* [*No Vietnamese Workers Abroad Under a COVID-19 Contract are Infected*], NHÂN DÂN (Feb. 13, 2020, 11:17 PM), https://nhandan.com.vn/tin-tuc-xa-hoi/chua-co-lao-dong-viet-nam-lam-viec-o-nuoc-ngoai-theo-hop-dong-bi-nhiem-covid-19-449451.

prevent themselves from the COVID-19, strictly comply with medical requirements of the authorities in receiving countries. On April 3, 2020, the Ministry of Labor, Invalids and Social Affairs issued a telegram on Strengthening the implementation of urgent measures to prevent and control the COVID-19 epidemic during the peak phase, whereby the Minister directed the Vietnamese labour-management abroad performs activities such as:

- Communicate with overseas workers to comply with the host country's regulations on COVID-19 prevention and control, limit to move to high-risk areas;
- Strengthen the management to protect overseas workers in case of being affected by COVID-19;[58]
- Setting up phone hotlines, contact points in the Vietnamese community in the host country to promptly grasp the situation of the overseas workers;
- Coordinate with the authorities of the host country to ensure that workers are tested, isolated, and treated in case of suspected or infected by COVID-19;
- Coordinate with the host country to claim for employees' wages on leave due to COVID-19, deal with foreign enterprises on the extension of stay, extending the contract, or ensure overseas workers return safely and legally in case of an exit.[59]

Thus, in the context of the complicated development process of COVID-19 in many countries, Vietnam, with very timely policies, has supported Vietnamese labor to work abroad. This is an important basis for Vietnamese authorities to continue implementing activities to protect citizens in foreign countries.

3.3 *Challenges in Ensuring the Rights of Vietnamese Migrant Workers*

3.3.1 Exacerbation of Illegal Labor Migration and Associated Legal Gaps

According to the IOM report, the annual number of Vietnamese workers working under contracts abroad is vast, but on the other hand, there are incomplete statistics on the number of Vietnamese workers that was illegally residing in a foreign country. Ha Tinh is one of the provinces with the largest number of workers working abroad in Vietnam, currently estimated to have nearly 68,000 people working in more than 60 countries and territories. This number of workers work mainly in Korea, Japan, Taiwan, Thailand, and Europe. If calculating the number of migrant workers who migrate abroad freely and do

58 *Về Tăng Cường Thực Hiện Các Biện Pháp Cấp Bách Phòng, Chống Dịch Covid-19 Trong đợt Cao điểm* [Promotion of Implementation of Measure for COVID-19 Prevention and Control of COVID-19 in High Peak], No. 02/CĐ-LDTBXH ¶ 3.1 (Apr. 3, 2020).

59 *Tiếp Tục Thực Hiện Các Biện Pháp Phòng, Chống Dịch Covid-19 Trong Tình Hình Mới* [Continues to Take Measures to Prevent and Control COVID-19 Epidemic in the New Situation], No. 1945/LDTBXH-QLLDNN (June 2, 2020).

not have a work permit of the host country, Ha Tinh has over 35,000 people.[60] In particular, during the Covid-19 epidemic outbreak, thousands of overseas Vietnamese workers returned home, among whom relatively large number of illegal workers showed deficiencies in current overseas workers' management.

There are many reasons for Vietnamese workers to migrate abroad illegally. According to the IOM, most of them accept migration because of economic pressure, forced by their families to migrate, wanting to escape domestic violence, divorce, indebtedness, or other problems. However, some people have become "successful" smuggled immigrants, sending money back to their families makes others want to follow this path, even though they have to take risks.[61] According to Dang Nguyen Anh, in addition to exporting unlicensed labor, one of the reasons that make workers choose unorthodox routes is the promises and temptations of individuals called brokerage agents in rural areas.[62] Besides, the procedure is cumbersome. The waiting time is long; document and recruitment costs, indirect costs incurred, and the lack of official information also lead to more workers looking for informal channels.

In addition, as analyzed above, Vietnamese law still has a lot of gaps related to illegal migrant workers. Although the Penal Code deals with crimes related to illegally sending Vietnamese workers abroad, sanctions and enforcement measures to prevent this situation are, in fact, not strong enough to prevent illegal "silent" flows of migrants from going abroad.

3.3.2 There Are Still Difficulties in Controlling the Activities of Labor Export Enterprises, Especially in Training and Retraining and Collecting Labor Fees

By the end of 2019, the number of labor export enterprises in Vietnam is about 421 (15 state-owned enterprises). According to the 2006 Law on Vietnamese Guest Workers under Contract and guidance documents, sending Vietnamese workers abroad is in a conditional business field. Only Vietnamese enterprises that meet conditions on capital, financial capacity, organizational

60 Phạm Trường, *Hơn 35.000 Người Hà Tĩnh Cư Trú Bất Hợp Pháp ở Nước Ngoài* [*More Than 35,000 Ha Tinh People Illegally Reside Overseas*], ZING NEWS (Dec. 15, 2019), https://zingnews.vn/hon-35000-nguoi-ha-tinh-cu-tru-bat-hop-phap-o-nuoc-ngoai-post1025568.html.

61 Viet Anh, *Chuyên Gia Anh Nêu Ba Lý Do Người Việt Nhập Cư Lậu* [*British Expert Mentioned Three Reasons Why Vietnamese People Illegally Immigrate*], VNEXPRESS (Oct. 29, 2019), https://vnexpress.net/chuyen-gia-anh-neu-ba-ly-do-nguoi-viet-nhap-cu-lau-4003610.html.

62 Nguyen Anh Dang, *Labour Migration From Vietnam: Issues of Policy and Practice* 12 (Int'l Labor Org., Working Paper No. 4, 2008).

apparatus, and facilities for this activity by current law may be considered for a license to send Vietnamese workers to work abroad under the contract. However, in reality, some enterprises do not meet the conditions prescribed by law but still recruit labor export, leading to a situation in which enterprises are not able to send workers abroad safely according to the Agreement. Then, enterprises that provide labor export services often do not concentrate or cannot control the workers' activities in the receiving country. Many enterprises open services without registration, do not directly recruit workers or do not seriously comply with training requirements and foster knowledge for employees. Some labor recruitment agencies pay little attention to equipping employees with sufficient awareness and understanding of their rights and obligations under labor contracts. The training courses are poorly planned and inadequate with the needs of workers with specific notices to migrant female workers, etc.

In addition, according to the provisions of this Law and Circular 21/2007/TT-BLDTBXH dated October 8, 2007, the recruitment of workers to work abroad must be done publicly, directly, and is not allowed to collect recruitment fees from employees.[63] However, the recruitment process for international migrant workers is often multifaceted, requiring the participation of many organizations and individuals.[64] To send labor to work abroad, the employees had to pay a huge amount of money to the labor export agents and brokers. Most of them have to rely on family members, banks, and labor suppliers to cover the cost of working abroad. Thus, in most cases, before going abroad to work, workers were heavily indebted to loans,[65] despite the State's efforts in providing financial support channels for them through funds and state banks from which workers can borrow money at low-interest rates.[66] A huge debt is another incentive for migrant workers to accept terminating their official jobs

63 *Luật Người Lao động đi Làm Việc ở Nước Ngoài Theo Hợp đồng* [Law on Vietnamese Guest Workers], No. 72/2006/QH11 art. 27.1(b) (Nov. 29, 2006); *Thông tư Hướng dẫn chi tiết một số điều của Luật Người lao động Việt Nam đi làm việc ở nước ngoài theo hợp đồng và Nghị định số 126/2007/NĐ-CP ngày 01 tháng 8 năm 2007 của Chính phủ quy định chi tiết và hướng dẫn một số điều của Luật Người lao động Việt Nam đi làm việc ở nước ngoài theo hợp đồng* [Detailing a Number of Articles of the Law on Vietnamese Guest Workers and Governments Decree No. 126/2007/ND-CP Dated August 1, 2007, Detailing and Guiding a Number of Articles of the Law on Vietnamese Guest Workers], No. 21/2007/TT-BLDTBXH ch. 5, art. 1 (Oct. 8, 2007).

64 Futaba Ishizuka, *International Labour Migration in Vietnam and the Impact of Receiving Countries' Policies* 6 (Inst. Developing Econs., Discussion Paper No. 414, 2013).

65 Dang, *supra* note 62, at 13.

66 Angie Ngoc Tran & Vicki Crinis, *Migrant Labour and State Power: Vietnamese Workers in Malaysia and Vietnam*, 13 Journal of Vietnamese Studies 27, 48 (2018).

and/or overstaying their home country to do other illegal jobs because "they are under pressure to earn more than they can legally pay off their debt".[67] This makes it difficult for the governments of Vietnam and receiving countries to protect migrant workers. With a desire to pay off outstanding debts and related expenses, some studies have shown that migrant workers have taken on other side jobs than they did in a formal job under a signed contract or even choose to unilaterally terminate the contract to do 'unrecognized, less empowered, less protected' jobs.[68]

3.3.3 Awareness of Workers and Their Families on Legal Provisions on Migrant Worker's Rights Remains Limited

Vietnamese workers abroad are mostly unskilled, mainly from rural areas, so they have limited foreign language, skills, and legal understanding. Therefore, their access to information on labor policies and laws, especially the labor market and employment, is incomplete or misleading, provided mainly by friends, family, and brokers.

In addition, when working abroad, a part of Vietnamese workers does not have a high sense of discipline, leading to violation of the law in the host country and the labor contract, thus facing legal issues such as contract termination or abuse. Moreover, some people have poor ability to integrate into the local community, leading to separate living and isolation.[69] When their rights are violated, they often keep quiet and cannot speak up because they do not have foreign language skills, fear losing their jobs, or fear deportation (undocumented workers). According to data from researchers, only 4% of Vietnamese migrants try to fight for compensation for the abuse they experienced.[70] In addition, due to illegal migration, victims hesitate to approach the host country's authorities to receive protection when they are abused. They are also hesitant to approach the Vietnamese diplomatic missions in that country for help. This mentality has created barriers for state agencies to resolve the issues and support them.

---

67 Dang, *supra* note 62, at 10.

68 Consular Dep't, Ministry of Foreign Affairs of Viet Nam, *supra* note 1, at 38.

69 Anthony Le Duc, *The Role of Social Media in Community Building for Illegal Vietnamese Migrant Workers in Thailand*, 10 Journal of Identity & Migration Studies 4, 13, 15 (2016).

70 Phúc Quân, *Cải thiện về pháp lý, giảm rủi ro cho lao động di cư* [*Improving the Legal Framework, Reducing Risks for Migrant Workers*], Nhân Dân (Nov. 4, 2019), https://nhandan.com.vn/cung-suy-ngam/cai-thien-ve-phap-ly-giam-rui-ro-cho-lao-dong-di-cu-375902/.

3.3.4 The Immigration Policies of Developed Countries Have Changed, Making It More Difficult for Vietnamese Workers to Find Jobs in These Countries

The political, economic, and social turmoil and the increase of crimes due to the "open door" policy have placed European countries on a reluctance to continue to accept migrant workers. Europe is no longer considered a peaceful land after a series of attacks were carried out in France, Germany, England etc., and the main culprits were immigrants. This situation deepens the disagreements between countries in the EU on the admission of immigrants. It is the driving force for European countries to reconsider their immigration policies to a more cautious and closed approach. This makes the path for Vietnamese migrant workers to legally move to the European countries or the United States more difficult, and the unofficial paths will have the opportunity to thrive when the demand of workers in these countries still exists. To overcome these difficulties, the Government needs to plan the necessary training policies to improve the workers' qualifications and skills and issue appropriate support policies to bring workers through the "narrow gate" to access the large labor markets legally. Of course, this is not easy and requires significant efforts from the State and the employees themselves.

4 Some Recommendations to Effectively Ensure the Rights of Vietnamese Workers Abroad

First of all, the Government should continue to review to improve policies and laws on migration towards the approach of direct access to the rights of migrant workers, and at the same time expanding legal access for migrant workers.

To improve the law on migrant workers, Vietnam needs to expand the protected groups to undocumented workers and supplement regulations related to the protection of female workers as they are the most vulnerable to abuse while working abroad. Vietnam needs to focus on legal approaches for migrant workers (especially female workers) regarding complaints mechanism when being abused to ensure fair and responsive measures. Besides reducing illegal labor migration, the Government also needs to issue policies to support workers, such as reducing labor export costs, supporting loans, etc.

In addition, the Government should pay attention and develop special policies for female workers when they go to work abroad and return home. Gender inequality and discrimination are important issues of human rights law. As for labor and employment, although there have been efforts to create equal rights for men and women to enjoy their right to work, however, due to

different reasons, gender discrimination still occurs. Female workers working abroad also face many risks of abuse, especially sexual abuse, exploitation of the labor force, harassment. However, when returning home, women also have difficulty reintegrating and accessing services, especially job support services. Because social stereotypes and gender concepts are still heavy, many people do not share their families and relatives in raising children while working abroad.

Policies and regulations on migrant workers should be approached in the direction of best conditions and support for workers during the process before, during, and after the return of overseas workers. In particular, the reintegration policy after migration is very important to help workers feel secure in life. Unfavorable return conditions are factors that influence migrant's decisions to continue to work by overstaying their contracts or circular migrants. The majority of Vietnamese migrant workers, when returning home, often return to unskilled labor jobs, the jobs they did before migration and not related to the skills and knowledge that they acquired abroad due to inability to apply those skills and working style to working conditions in Vietnam or to start up a business.[71]Therefore, they often fall into a confused, depressed mood and want to continue working abroad.

According to the IOM, the ILO, and the UN Women, to make the return of migrant workers meaningful, the State needs to consider implementing some solutions such as:[72]

(i) Standardizing documents to foster knowledge before going abroad to work;
(ii) Establish a specialized consular service for return and reintegration;
(iii) Establish a synchronized data collection system to capture all types of migration and return. Based on the collected data, it is possible to build profiles of returning migrants to develop programs to meet the needs of different target groups;
(iv) Improve social security;
(v) Develop a financial support program 'pay-on-return' in the form of sponsorships, loans, and other forms that can encourage return after contract termination without penalizing early returnees;
(vi) Develop skills development, career counselling, and personalized job placement programs, etc.

In addition, the State must continue to criminalize crimes related to illegal migration and build a stronger connection between the legal framework on labor and the criminal to prevent labor violations from developing into forced

71 INT'L ORG. FOR MIGRATION, MAKING THE RETURN OF MIGRANT WORKERS WORK FOR VIETNAM: AN ISSUE IN BRIEF 2 (2014).

72 *Id.* at 4–5.

labor and human trafficking.[73] It should also expand legal access to migrant workers, especially female workers, who often face more difficulties than men at home and abroad. The ability of migrant workers to access complaint mechanisms for abuse during recruitment and employment is critical to ensuring fair and responsive remedies are in place.[74]

Secondly, consider joining the ICMW Convention and other relevant ILO Conventions while strengthening international cooperation on migration to create a legal basis to protect Vietnamese workers' legitimate rights and interests abroad.

As analyzed in the first section, the ICMW Convention has been seen as an important basis for the protection of the rights and interests of migrant workers in practice because many important rights which are stated in this Convention has not been mentioned in the previous international documents, or only mentioned in the documents that are not binding legal obligations to states ('soft' documents).[75] The greatest contribution of this Convention is *to recognize and take into account the diversity of the origin of migrant workers*, which is reflected in the division of this group into two categories (with both documented and undocumented migrant workers) and give the necessary protection to their "*family members*". In addition, the Convention focuses on rights related to areas where migrant workers often have difficulties ('*migrant in trouble*' rights). Thus, from an international perspective, ICMW is becoming a comprehensive international document governing the rights of migrant workers and their family members, especially the rights of undocumented workers.

Although Vietnam is a major emigration country, it is also gradually becoming a market where foreign workers come to work. According to the Department of Employment (the Ministry of Labor, Invalids and Social Affairs), by the end of July 2019, 91,200 foreigners were working in Vietnam, of which 81,900 were subject to licensing.[76] Therefore, Vietnam has played a role as a sending country but also a receiving country in international labor relations, although the reception is still quite modest. So, the ratification of the ICMW Convention and other relevant ILO's conventions will create an important foundation for

73 Nhật Anh, *Quản trị tốt di cư lao động, thúc đẩy phát triển kinh tế* [*Good management of Labour Migration, Promoting Economic Development*], NHÂN DÂN (July 29, 2019), https://nhandan.com.vn/tin-tuc-xa-hoi/quan-tri-tot-di-cu-lao-dong-thuc-day-phat-trien-kinh-te-366144/.

74 Press Release, Int'l Labor Org., ILO: Di cư lao động nên là sự lựa chọn an toàn [ILO: Labor Migration Should be a Safe Choice] (Oct. 29, 2019).

75 INT'L, REGIONAL & NAT'L L. & PRAC., *supra* note 29, at 51.

76 Press Release, Ministry of Labor, War Invalids & Soc. Affairs, Lao động nước ngoài vào Việt Nam: Tăng sếp, giảm lao động kỹ thuật [Foreign Workers Entering Vietnam: Increase Boss, Reduce Technical Labor] (Aug. 23, 2019).

both strengthening the legal foundation to ensure the rights of migrant workers and addressing violations of the rights of Vietnamese workers abroad, especially for undocumented workers.

However, as analyzed above, the ICMW is also facing the "reservations" of states because, like the relevant ILO conventions, this convention also only defines "one-way responsibility" for receiving states, which almost ignores the role of sending states. In addition, the extension of the obligation to protect even relatives of migrant workers when present in the territory of the receiving country is also a challenge for states to consider signing this Convention. In addition, similar to other international conventions, the Government of Vietnam probably carefully considered becoming a member to ensure its implementation of obligations arising from the Convention. For that reason, perhaps at this time, Vietnam is not a member of the ICMW, however, the spirit of this Convention, as well as the provisions on ensuring human rights in general and the rights of Vietnamese workers Vietnam in particular, is always respected, recognized and ensured in good-faith. Therefore, entering the ICMW may be on a suitable path for Vietnam soon.

In an effort to have international cooperation on migration, on March 20, 2020, the Prime Minister issued Decision No. 402/QĐ-TTg on promulgating a Plan for the implementation of the Global Agreement on legal, safe, and orderly migration of the United Nations. It is the first inter-governmental migration agreement aiming at strengthening cooperation in global migration governance, protecting the rights and interests of migrants for the sustainable development of the 2030 Agenda. However, to effectively implement this Agreement, it is necessary to outline a detailed plan and develop a monitoring mechanism to ensure the effectiveness and feasibility of the Strategy in practice.

Thirdly, promote activities of propaganda and dissemination of the law on migration to all strata of the people to raise awareness of people about their rights and at the same time raise awareness against trafficking crimes.

Propaganda and dissemination of the law should focus on the provisions of international laws and Vietnamese laws to prevent human trafficking and safe migration. Communication methods should be specific, clear, and easy to understand. In addition, for workers preparing for legal migration, there should be a program to disseminate laws and customs of the host country to raise awareness of compliance with the law and a respectful attitude towards the communities where they work.

In addition, it is necessary to widely propagate among all strata of society about the Governmental policies to support migrant workers returning home to encourage, motivate and create confidence for them to start a business. In

addition, the Government also needs to develop a set of guidance documents on migration policies and laws for workers; provide legal advice, address, and support them in the whole process before, during, and after returning from abroad.

Significantly, the migrant workers themselves and their families need to change their mindset, to proactively access information on labor and employment on official channels of State instead of passively receive unofficial information provided by others. Workers need to equip themselves with basic knowledge about labor export as well as State policies and laws on labor export to ensure their legitimate interests and at the same time protect themselves in necessary cases.

Fourthly, improve the capacities and responsibilities of state management agencies on migrant workers; develop a mechanism of cooperation and information sharing among state agencies to manage better activities of sending Vietnamese workers to work abroad, promptly protect, provide relief, and evacuate workers when needed.

Although Vietnamese representative missions in foreign countries are responsible for managing migrant workers, this action has not been effective. These agencies should review applicable international migration policies and regulations and toward optimizing migration procedures to reduce costs, better serve the legitimate international migration needs of individuals, and at the same time create better conditions for immigration management through the electricity database. For example, it can be easily disaggregated according to basic criteria such as age, sex, destination, and migration purpose.

In addition, these agencies also need to strengthen the inspection and examination of the activities of labor export service providers to suspend ineligible enterprises or handle violations in a timely manner. Besides, it is necessary to properly advise the Government in the formulation or amendment of regulations that are not reasonable for labor export activities; proposing to create a focal point agency in building international migration databases of different types; periodically build migration profiles for management and development.[77]

Finally, promote cooperation between sending, transit, and receiving states to strengthen and secure legitimate migration options, especially for female workers, to ensure adequate employment needs.

77 Consular Dep't, Ministry of Foreign Affairs of Viet Nam, Viet Nam migration profile 2016, at 84 (2017).

The sending country will face many difficulties accessing the activities and policies for migrant workers of the receiving country if the parties do not have close cooperation activities. It is because of national sovereignty. According to Article 2 of the United Nations Charter, states have absolute and independent sovereignty in international relations. States are obliged to respect the independent sovereignty of another country. Therefore, the act of intentionally carrying out activities without the consent of the receiving state in their territory will be considered a violation of national territorial sovereignty. Therefore, the most legitimate way for countries is to increase international cooperation activities to create a two-way mechanism for both sending and receiving countries.

While waiting for a further step forward in joining international universal tools for migrant workers' rights, to ensure the protection of workers' human rights of Vietnamese migrants in the receiving countries, it is recommended to continue to promote the signing of bilateral cooperation agreements and measures to exchange immigration information with other countries to limit illegal migrants and human trafficking.[78] For countries that have not signed cooperation agreements, Vietnam still applies the principle of reciprocity with its commitment to give each other's migrant workers proper and fair treatment. Vietnam has signed international agreements related to labor export with some countries such as Japan, Korea, Germany, and some of the ASEAN countries. The labor market in which Vietnamese workers come to work is more and more open, not only at some of the above markets. Therefore, in the coming days, Vietnam needs to continue negotiating with other receiving countries to sign cooperation agreements to create a legal basis for ensuring the rights and interests of Vietnamese workers working abroad and vice versa.

5 Conclusion

The sending of workers abroad is a major policy of the Party and the State of Vietnam. The trend of international integration is in line with the current international migration tendency, based on equality, mutual benefit, and the interests of the nation and the people. However, the gaps and limitations of legal provisions related to illegal migration, or ineffectiveness in policies to support the reintegration of migrant workers, etc., are becoming a significant barrier for Vietnam in ensuring the migrant worker's rights in practice.

78 Dau Tuan Nam, *Managing Migration Crisis From the Perspective of International Cooperation for Vietnam*, 9 POLITICAL THEORY JOURNAL 115 (2017).

Migrant workers, whether legal or illegal, documented or undocumented, are themselves human beings and citizens of the country. Therefore, in addition to recognizing rights as a fundamental human being, there must be more specific provisions for migrants to limit any violation of rights against them in the migration process.

With the view that no one is left behind, Vietnam is also actively reviewing the policies and laws on migrant workers. The National Assembly of Vietnam has approved the Law of Vietnamese worker working abroad under the contract 2006 with new contents, that are more in line with the real situation of Vietnam. This shows the efforts of the Vietnamese Government in building a legal basis for protecting the rights and interests of Vietnamese workers working abroad. As a new generation of trade agreements with high requirements for labor and migrant workers, this Law becomes one of the important legal instruments for Vietnam to materialize the international commitments. With these efforts, it is possible to expect a complete, transparent, and unified legal framework on migration soon.

Legal Materials

∴

Participation in Multilateral Treaties

*Karin Arts**

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 2019. New data are preceded by a reference to the most recent previous entry in the multilateral treaties section of the *Asian Yearbook of International Law*. In case no new data are available, the title of the treaty is listed with a reference to the last Volume containing data on the treaty involved. For the purpose of this section, states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.

Note

- Where no other reference to specific sources is made, data were derived from *Multilateral Treaties Deposited with the Secretary-General*, https://treaties.un.org/pages/participationstatus.aspx or, when not available there, from the *United Nations Treaty Series Online*, https://treaties.un.org/pages/UNTSOnline.aspx?id=2&clang=_en
- Where reference is made to the Hague Conference on Private International Law (HccH), data were derived from https://www.hcch.net/en/instruments/conventions
- Where reference is made to the International Atomic Energy Agency (IAEA), data were derived from https://www.iaea.org/resources/treaties/treaties-under-IAEA-auspices
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from https://www.icao.int/secretariat/legal/Pages/TreatyCollection.aspx
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/

* Compiled by Dr. Karin Arts, Professor of International Law and Development, International Institute of Social Studies (ISS), The Hague, The Netherlands, part of Erasmus University Rotterdam.

- 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::NO:::
- Where reference is made to the International Maritime Organization (IMO), data were derived from https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from http://portal.unesco.org/en/ev.php-URL_ID=12024&URL_DO=DO_TOPIC&URL_SECTION=201.html
- Where reference is made to WIPO, data were derived from http://www.wipo.int/treaties/en
- Where reference is made to the Worldbank, data were derived from https://www.worldbank.org/en/about/leadership/members
- Reservations and declarations made upon signature or ratification are not included
- Sig. = Signature; Cons. = Consent to be bound; Eff. date = Effective date; E.i.f. = Entry into force; Rat. = Ratification or accession

Table of Headings

Antarctica

Antarctic Treaty, Washington, 1959: *see* Vol. 21 p. 237.

Commercial Arbitration

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
(Continued from Vol. 20 p. 194)

State	*Sig.*	*Cons.*
Papua New Guinea		17 Jul 2019

Cultural Matters

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 1949: *see* Vol. 7 pp. 322–323.
Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950: *see* Vol. 12 p. 234.
Convention concerning the International Exchange of Publications, 1958: *see* Vol. 6 p. 235.
Convention concerning the Exchange of Official Publications and Government Documents between States, 1958: *see* Vol. 6 p. 235.
International Agreement for the Establishment of the University for Peace, 1980: *see* Vol. 24 p. 32.
Regional Convention on the Recognition of Studies, Diploma's and Degrees in Higher Education in Asia and the Pacific, 1983: *see* Vol. 14 p. 227.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005
(Continued from Vol. 22 p. 306)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Uzbekistan		15 Nov 2019

Asia-Pacific Regional Convention on the Recognition of Qualifications in Higher Education, 2011
(Continued from Vol. 23 p. 177)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Mongolia		19 Mar 2019

Cultural Property

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954: *see* Vol. 24 p. 328.
Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954: *see* Vol. 24 p. 328.
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970: *see* Vol. 22 p. 306.
Convention concerning the Protection of the World Cultural and Natural Heritage, 1972: *see* Vol. 22 p. 306.
Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1999: *see* Vol. 24 pp. 328–329.
Convention for the Safeguarding of the Intangible Cultural Heritage, 2003: *see* Vol. 24 p. 329.

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: *see* Vol. 24 p. 329.

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
(Continued from Vol. 23, p. 179)

State	*Sig.*	*Cons.*
India		27 Sep 2019

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. 24 p. 331.
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971: *see* Vol. 12 p. 237.
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, as amended: *see* Vol. 7 p. 325.
Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil, 1973: *see* Vol. 6 p. 239.
Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1976: *see* Vol. 10 p. 269.

Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships 1978, as amended: *see* Vol. 15 p. 225.
Protocol to amend the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1982: *see* Vol. 13 p. 265.
Convention for the Protection of the Ozone Layer, 1985: *see* Vol. 15 p. 215.
Protocol on Substances that Deplete the Ozone Layer, 1987: *see* Vol. 16 p. 161.
Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987: *see* Vol. 13 p. 266.
Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989: *see* Vol. 22 p. 309.
International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990: *see* Vol. 23 p. 181.
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. 24 p. 331.
Protocol to Amend the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992: *see* Vol. 24 p. 332.
UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994: *see* Vol. 11 p. 247.
Amendment to the Montreal Protocol, 1997: *see* Vol. 19 p. 182.
Protocol to the Framework Convention on Climate Change, 1997: *see* Vol. 19 p. 182.
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998: *see* Vol. 19 p. 182.
Amendment to the Montreal Protocol, 1999: *see* Vol. 19 p. 182.
International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001: *see* Vol. 24 p. 332.
International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001: *see* Vol. 24 p. 332.
Amendment to Annex B of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2006: *see* Vol. 23 p. 182.
Paris Agreement, 2015: *see* Vol. 24 p. 333.

Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995
(Continued from Vol. 24 p. 331)
(Status as provided by IMO)
Entry into force: 5 December 2019

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000
(Continued from Vol. 19 p. 183)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
Uzbekistan		25 Oct 2019

Stockholm Convention on Persistent Organic Pollutants, 2001
(Continued from Vol. 19 p. 183)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
Uzbekistan		28 Jun 2019

International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004
(Continued from Vol. 24 p. 333)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
China	22 Oct 2018	22 Jan 2019

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010
(Continued from Vol. 24 p. 333)

State	*Sig.*	*Rat.*
Korea (DPR)		10 Oct 2019
Maldives		1 Jul 2019

Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 2010
(Continued from Vol. 24 p. 333)

State	*Sig.*	*Rat.*
Korea (DPR)		1 Oct 2019

Doha Amendment to the Kyoto Protocol, 2012
(Continued from: Vol. 23 p. 183)

State	*Sig.*	*Rat.*
Laos		23 Apr 2019
Mongolia		20 Feb 2019

Minamata Convention on Mercury, 2013
(Continued from Vol. 24 p. 333)

State	*Sig.*	*Rat.*
Korea (Rep.)	24 Sep 2014	22 Nov 2019

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 2016
(Continued from Vol. 23 p. 183)
Entry into force: 1 Jan 2019

State	*Sig.*	*Rat.*
Armenia		2 May 2019
Bhutan		27 Sep 2019
Vietnam		27 Sep 2019

Family Matters

Convention on the Recovery Abroad of Maintenance, 1956: *see* Vol. 11 p. 249.
Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: *see* Vol. 6 p. 244.
Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions, 1961: *see* Vol. 7 p. 327.
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962: *see* Vol. 8 p. 178.
Convention on the Law Applicable to Maintenance Obligations, 1973: *see* Vol. 6 p. 244.
Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993: *see* Vol. 22 p. 310.

Finance

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 7 p. 327.
Convention Establishing the Multilateral Investment Guarantee Agency, 1988: *see* Vol. 19 p. 184.

Health

Protocol Concerning the Office International d'Hygiène Publique, 1946: *see* Vol. 6 p. 245.

World Health Organization Framework Convention on Tobacco Control, 2003: *see* Vol. 19 p. 185.
Protocol to Eliminate Illicit Trade in Tobacco Products, 2012: *see* Vol. 24 p. 336.

Human Rights, Including Women and Children

Convention on the Political Rights of Women, 1953: *see* Vol. 10 p. 273.
Convention on the Nationality of Married Women, 1957: *see* Vol. 10 p. 274.
Convention against Discrimination in Education, 1960: *see* Vol. 22 p. 312.
International Covenant on Civil and Political Rights, 1966: *see* Vol. 16 p. 165.
International Covenant on Economic, Social and Cultural Rights, 1966: *see* Vol. 23 p. 186.
International Convention on the Elimination of All Forms of Racial Discrimination, 1966: *see* Vol. 23 p. 186.
Optional Protocol to the International Covenant on Civil and Political Rights, 1966: *see* Vol. 15 p. 219.
Convention on the Elimination of All Forms of Discrimination against Women, 1979: *see* Vol. 11 p. 250.
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: *see* Vol. 21 p. 245.
International Convention against Apartheid in Sports, 1985: *see* Vol. 6 p. 248.
Convention on the Rights of the Child, 1989: *see* Vol. 11 p. 251.
Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1989: *see* Vol. 18 p. 106.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990: *see* Vol. 18 p. 106.
Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1992, *see* Vol. 12 p. 242.
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999: *see* Vol. 7 p. 170.
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000: *see* Vol. 20 p. 202.
Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002: *see* Vol. 24 p. 337.
Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008: *see* Vol. 22 pp. 312–313.
International Convention for the Protection of All Persons from Enforced Disappearance, 2010: *see* Vol. 22 p. 313.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000
(Continued from Vol. 22 p. 312)

State	*Sig.*	*Cons.*
Myanmar	28 Sep 2015	27 Sep 2019

Convention on the Rights of Persons with Disabilities, 2008
(Continued from Vol. 22 p. 312)

State	*Sig.*	*Cons.*
Kyrgyzstan	21 Sep 2011	16 May 2019

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
(Continued from Vol. 24 p. 337)

State	*Sig.*	*Rat.*
Maldives	28 Feb 2012	27 Sep 2019

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
(Continued from Vol. 17 p. 171)
(status as provided by the ICRC)

State	*Sig.*	*Cons.*
Kyrgyzstan		25 Jan 2019

Intellectual Property

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979: *see* Vol. 24 p. 338.
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.
Convention Establishing the World Intellectual Property Organization, 1967: *see* Vol. 13 p. 188.
Convention for the Protection of Industrial Property, 1883 as amended 1979: *see* Vol. 23 p. 188.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 18 p. 109.
Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001: *see* Vol. 22 p. 314.
Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.
Trademark Law Treaty, 1994: *see* Vol. 15 p. 222.
Patent Law Treaty, 2000: *see* Vol. 24 p. 340.
Singapore Treaty on the Law of Trademarks, 2006: *see* Vol. 23 p. 189.

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971
(Continued from Vol. 18 p. 109)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Uzbekistan	25 Jan 2019	25 Apr 2019

Madrid Union Concerning the International Registration of Marks, Including the Madrid Agreement 1891 as amended in 1979, and the Madrid Protocol 1989
(Continued from Vol. 24 p. 339)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Malaysia	27 Sept 2019	27 Dec 2019

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as Amended in 1979
(Continued from Vol. 24 p. 339)
(Status as provided by WIPO)

State	*Party*	*Latest Act to which State is Party*
India	7 Sep 2019	Geneva

WIPO Performances and Phonograms Treaty, 1996
(Continued from Vol. 24 p. 339)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Uzbekistan	17 Apr 2019	17 Jul 2019

WIPO Copyright Treaty, 1996
(Continued from Vol. 24, p. 340)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Uzbekistan	17 Apr 2019	17 Jul 2019

Beijing Treaty on Audiovisual Performances, 2012
(Continued from Vol. 22 p. 315)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Cambodia	27 Mar 2019	

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 2013
(Continued from Vol. 24 p. 340)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Japan		1 Jan 2019
Philippines	18 Dec 2018	18 Mar 2019
Tajikistan	27 Feb 2019	27 May 2019

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. 24 p. 342.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956: *see* Vol. 14 p. 236.
Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: *see* Vol. 9 p. 289.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 6 p. 254.
Convention for the Suppression of Unlawful Seizure of Aircraft, 1970: *see* Vol. 8 p. 289.
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: *see* Vol. 8 p. 290.
International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: *see* Vol. 7 p. 331.
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973: *see* Vol. 14 p. 236.
International Convention Against the Taking of Hostages, 1979: *see* Vol. 20 p. 206.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol. 18 p. 111.
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988, *see* Vol. 12 p. 247.
International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: *see* Vol. 11 p. 254.

Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991: *see* Vol. 23 p. 191.
Convention on the Safety of United Nations and Associated Personnel, 1994: *see* Vol. 11 p. 255.
International Convention for the Suppression of Terrorist Bombings, 1997: *see* Vol. 20 p. 206.
International Convention for the Suppression of the Financing of Terrorism, 1999: *see* Vol. 17 p. 174.
United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 23 p. 191.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 21 p. 250.
Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, 2001: *see* Vol. 21 p. 250.
United Nations Convention Against Corruption, 2003: *see* Vol. 23 p. 191.

Statute of the International Criminal Court, 1998
(Continued from Vol. 16 p. 171)

State	*Notification Withdrawal*	*E.i.f*
Philippines	17 Mar 2018	17 Mar 2019

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. 23 p. 191)

State	*Sig.*	*Rat.*
Bangladesh		12 Sep 2019

International Convention for the Suppression of Acts of Nuclear Terrorism, 2005
(Continued from Vol. 23 p. 191)

State	*Sig.*	*Rat.*
Thailand	14 Sep 2005	2 May 2019

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005
(Continued from Vol. 18 p. 112)
(Status as provided by IMO)

State	*Cons.*	*E.i.f.*
Kazakhstan	3 May 2019	1 Aug 2019

International Representation

(*see also*: Privileges and Immunities)
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975: *see* Vol. 6 p. 257.

International Trade

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 17 p. 176.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 6 p. 257.
UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.
United Nations Convention on the Use of Electronic Communications in International Contracts, 2005: *see* Vol. 21 p. 251.

UN Convention on Contracts for the International Sale of Goods, 1980
(Continued from Vol. 21 p. 251)

State	*Sig.*	*Rat.*
Korea (DPR)		27 Mar 2019
Laos		24 Sep 2019

Judicial and Administrative Cooperation

Convention on Civil Procedure, 1954: *see* Vol. 20 p. 208.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: *see* Vol. 22 p. 319.
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 22 p. 319.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961
(Continued from Vol. 20 p. 343)
(Status as provided by HccH)

State	*Party*	*E.i.f.*
Philippines	12 Sep 2018	14 May 2019

Labour

Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 19 p. 192.
Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): *see* Vol. 22 p. 319.
Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 19 p. 193.
Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 22 p. 320.

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): *see* Vol. 19 p. 193.
Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111): *see* Vol. 22 p. 320.
Employment Policy Convention, 1964 (ILO Conv. 122): *see* Vol. 8 p. 186.
Minimum Age Convention, 1973 (ILO Conv. 138): *see* Vol. 23 p. 193.
Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182): *see* Vol. 19 p. 194.

Promotional Framework for Occupational Safety and Health Convention, 2006 (ILO Conv. 187)
(Continued from Vol. 22 p. 320)
(Status as provided by the ILO)

State	*Rat. Registered*
Philippines	17 Jun 2019

Narcotic Drugs

Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: *see* Vol. 6 p. 261.
Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: *see* Vol. 6 p. 261.
International Opium Convention, 1925, amended by Protocol 1946: *see* Vol. 7 p. 334.
Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.
Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the Protocol of 1946: *see* Vol. 6 p. 262.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 6 p. 262.

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: *see* Vol. 6 p. 262.
Single Convention on Narcotic Drugs, 1961: *see* Vol. 13 p. 276.
Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1975: *see* Vol. 21 p. 253.
Convention on Psychotropic Substances, 1971: *see* Vol. 13 p. 276.
Protocol amending the Single Convention on Narcotic Drugs, 1972: *see* Vol. 15 p. 227.
United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988: *see* Vol. 20 p. 210.

Nationality and Statelessness

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 17 p. 178.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: *see* Vol. 6 p. 265.
Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: *see* Vol. 8 p. 187.

Nuclear Material

Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 17 p. 179.
Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol. 24 p. 345.
Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1988: *see* Vol. 6 p. 265.
Convention on Early Notification of a Nuclear Accident, 1986: *see* Vol. 19 p. 196.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 19 p. 196.
Convention on Nuclear Safety, 1994: *see* Vol. 24 p. 345.
Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 16 p. 178.
Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997: *see* Vol. 24 p. 346.

Protocol to Amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 17 p. 180.
Amendment to the Convention on the Physical Protection of Nuclear Material, 2005: *see* Vol. 24 p. 346.
Amendment to the 1980 Convention on the Physical Protection of Nuclear Material, 2005: *see* Vol. 24 p. 346.

Outer Space

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967: *see* Vol. 16 p. 178.
Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: *see* Vol. 10 p. 284.
Convention on Registration of Objects launched into Outer Space, 1974: *see* Vol. 15 p. 229.

Privileges and Immunities

Convention on the Privileges and Immunities of the United Nations, 1946: *see* Vol. 19 p. 197.
Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.
Vienna Convention on Diplomatic Relations, 1961: *see* Vol. 19 p. 197.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol. 6 p. 269.
Vienna Convention on Consular Relations, 1963: *see* Vol. 19 p. 197.
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963: *see* Vol. 6 p. 269.
Convention on Special Missions, 1969: *see* Vol. 6 p. 269.
Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, 1969: *see* Vol. 6 p. 269.
United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004: *see* Vol. 15 p. 230.

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
(Continued from Vol. 12 p. 254)

State	*Sig.*	*Cons.*
Myanmar		26 Jun 2019

Convention on Road Signs and Signals, 1968
(continued from: Vol. 20 p. 213)

State	*Sig.*	*Cons.*
Myanmar		26 Jun 2019

Sea

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.
Convention on the High Seas, 1958: *see* Vol. 7 p. 339.
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.
Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.
United Nations Convention on the Law of the Sea, 1982: *see* Vol. 19 p. 198.

Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 19 p. 199.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (...) relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995: *see* Vol. 24 p. 348.

Sea Traffic and Transport

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 6 p. 273.
International Convention for the Safety of Life at Sea, 1960: *see* Vol. 6 p. 273.
Convention on Facilitation of International Maritime Traffic, 1965 as amended: *see* Vol. 12 p. 255.
International Convention on Load Lines, 1966: *see* Vol. 15 p. 230.
International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 15 p. 231.
Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.
Convention on the International Regulations for Preventing Collisions at Sea, 1972 as amended: *see* Vol. 19 p. 200.
International Convention for Safe Containers, as amended 1972: *see* Vol. 20 p. 215.
Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.
Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.
International Convention for the Safety of Life at Sea, 1974: *see* Vol. 15 p. 231.
Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 as amended 1978: *see* Vol. 12 p. 256.
UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 6 p. 276.
International Convention on Standards of Training, Certification and Watch-keeping for Seafarers, 1978 as amended 1978: *see* Vol. 19 p. 200.
Nairobi International Convention on the Removal of Wrecks, 2007: *see* Vol 23 p. 198.

Protocol Relating to the International Convention on Load Lines, 1988
(Continued from Vol. 24 p. 349)
(Status as provided by IMO)

State	*Cons.* (*dep.*)	*E.i.f.*
Myanmar	30 Oct 2019	not yet

Protocol Relating to the International Convention for the Safety of Life at Sea, 1988
(Continued from Vol. 24 p. 349)
(Status as provided by IMO)

State	*Cons.* (*dep.*)	*E.i.f.*
Myanmar	3 Jul 2019	3 Oct 2019

Social Matters

International Agreement for the Suppression of the White Slave Traffic, 1904, amended by Protocol 1949: *see* Vol. 6 p. 278.
International Convention for the Suppression of the White Slave Traffic, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.
Agreement for the Suppression of the Circulation of Obscene Publications, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.
International Convention for the Suppression of the Traffic in Women and Children, 1921: *see* Vol. 6 p. 277.
Convention for the Suppression of the Traffic in Women and Children, 1921, amended by Protocol in 1947: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, 1923, amended by Protocol in 1947: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women of Full Age, 1933: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended by Protocol, 1947: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.
Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.

International Convention against Doping in Sports, 2005
(Continued from Vol. 23 p. 198)

State	*Sig.*	*Cons.*
Timor Leste		11 Mar 2019

Telecommunications

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 13 p. 280.
Convention on the International Mobile Satellite Organization (INMARSAT), 1976 as amended: *see* Vol. 19 p. 202.
Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.
Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 8 p. 193.
Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: *see* Vol. 9 p. 298.
Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998: *see* Vol. 15 p. 232.
Amendments to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1999: *see* Vol. 10 p. 288.
Amendments to the Constitution of the Asia-Pacific Telecommunity, 2002: *see* Vol. 13 p. 280.

Treaties

Vienna Convention on the Law of Treaties, 1969: *see* Vol. 19 p. 203.
Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 6 p. 280.

Weapons

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: *see* Vol. 6 p. 281.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: *see* Vol. 6 p. 281.
Treaty on the Non-Proliferation of Nuclear Weapons, 1968: *see* Vol. 11 p. 262.
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: *see* Vol. 6 p. 282.
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: *see* Vol. 22 p. 327.
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 21 p. 259.
Convention on 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. 23 p. 201.
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1992: *see* Vol. 21 p. 259.
Comprehensive Nuclear Test Ban Treaty, 1996: *see* Vol. 24 p. 352.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997: *see* Vol. 23 p. 201.
Amendment of Article 1 of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 2001: *see* Vol. 23 p. 201.

Convention on Cluster Munitions, 2008
(Continued from Vol. 24 p. 352)

State	*Sig.*	*Cons.*
Maldives		27 Sep 2019
Philippines		3 Jan 2019

Arms Trade Treaty, 2013
(Continued from Vol. 23 p. 201)

State	*Sig.*	*Cons.*
Maldives		27 Sep 2019

Treaty on the Prohibition of Nuclear Weapons, 2017
(Continued from Vol. 24 p. 352)

State	*Sig.*	*Cons.*
Bangladesh	20 Sep 2017	26 Sep 2019
Kazakhstan	2 Mar 2018	29 Aug 2019
Laos	21 Sep 2017	26 Sep 2019
Maldives	26 Sep 2019	26 Sep 2019

State Practice of Asian Countries in International Law

Bangladesh

*Sumaiya Khair**

International Economic Law – International Convention on Biological Diversity – Agreement on Trade-Related Aspects of Intellectual Property Rights – International Convention on Plant Breeding for Food and Agriculture – Agricultural Development and Food Security – Intellectual Property Rights – WTO – TRIPS

Legislation

The Plant Variety Conservation Act 2019 (*Act. No.6 of 2019*)

Bangladesh passed this law under its obligation to (a) comply with its treaty obligations, specifically, under the TRIPS Agreement, 1995, the Convention on Biological Diversity (CBD), 1992 and the International Convention on Plant Breeding for Food and Agriculture; and to (b) protect the rights of breeders and farmers for agricultural development and food security. This law concerns the certification and protection of new plant varieties based on a central registration system, which would enable farmers and breeders to enjoy certain exclusive intellectual property rights. By adopting this law, Bangladesh has formally recognized the need to encourage, guide and assist the farmers for effective delivery of the benefits of plant research, variety development, seed production, use, distribution, marketing, export and breeding and conservation, not to mention the contribution of breeders and farmers in the conservation of plant resources in breed development and breeding activities in the public and private sectors.

The Act provides for a Plant Variety Conservation Authority (section 4), the functions of which include, inter alia, the determination, and publication of plant species and genus, registration, issuance, and cancellation of certification

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

of plant varieties, determination of the method for inspecting applications on plant varieties conservation, the exchange of information on plant species conservation and establishment of regional and international cooperation in this regard, determination of rights and limitations thereto or suspension or revocation of the same, enforcement of the rights of breeders and farmers, and recognition of contribution to breed innovation and development (section 6). Headed by a Chairman, who would be accountable to the Government, the Authority shall be a legal entity and as such, can sue and be sued in its own name (section 10). The management and administration of the Authority shall vest in a Board of Directors composed mainly of relevant government personnel and scientists.

For purposes of this Act, the Authority may, by official gazette notification, determine the species and species of plants (section 14). 'Plant' (the genus) here denotes plant varieties having agricultural, food, medicinal, nutritional, and economic value and which can be used to protect the environment. The procedure for registration of plant varieties is given in section 15, which states that an application for certification must be made to the Authority in the prescribed form and accompanied by the prescribed fee. After examining the application, the Authority shall, if deemed appropriate, issue a certificate of registration as a protected variety of plant. Varieties so registered shall be stored in a register book with the necessary information in both manual and digital forms.

Section 16 spells out the qualifications that are required to be met by applicants seeking conservation of plant species, namely, Bangladeshi citizens or legal persons or institutions; a citizen of any other country or a lawful person or any organization having an office in Bangladesh; a citizen of Bangladesh or a lawful person who has invented a new species of plant while working in a foreign country or foreign organization or by way of any other collaboration and who has applied for protection under this Act with the permission of that country or organization; citizens or organizations of partner countries which are party to international conventions or agreements to which Bangladesh is also a party; any farmer or farmers' association claiming to be the authorized representative or heir of the breeder; and any state-run institution or institute or university or authority. If more than one breeder invents a new plant species, anyone or all may submit an application for conservation of the breed. If more than one breeder jointly breed or invent a new species of plant and are interested in jointly conserving the species, they may submit an application for conservation of the joint species bearing signatures of all. Where an employee of an organization breeds a plant, the head of the concerned organization or any authorized employee may apply for its preservation unless

there is anything to the contrary in his/her employment contract. If any person, organization, association, organization, or institution contributes to the invention of any protected breed, the said person, organization, association, or institution may apply to the Authority for registration of the protected breed (section 24). If the breed is found to be solely registered in the name of the breeder, the aggrieved person, organization, institution, and association may claim compensation. The Authority may issue a Certificate in recognition of the contribution of any person, community, or organization to the conservation and development of plant species. If any plant species invented by a breeder as a new species is eligible for certification but he has not applied for its preservation, it will be regarded as a national asset (section 25).

A plant species may be preserved if it meets the following characteristics, namely, (a) novelty, (b) distinctiveness, (c) uniformity, and (d) stability (section 19). Each preserved variety shall be marked by a group name (section 20).

The Act protects the rights of local farmers and their traditional knowledge (section 23). These include, inter alia, the right to apply for preservation of newly invented plant varieties; right to benefits arising from protected plant genetic resources, if such resources are used by the breeders to develop new varieties; the right to recognition by farmers and farmers' associations of the preservation of traditional knowledge of plant breeds used in food, agriculture and medicine; the right to participate in decision-making processes related to conservation and sustainable use of plant resources; and the right to seek cancellation of registration for farmers' traditionally used plant varieties, if such varieties are registered by the Government or private breeders in their names. Notwithstanding these various rights, a farmer may produce, reproduce, preserve, use, reuse, exchange or sell seeds of preserved varieties but not for commercial purposes.

Section 21 provides a comprehensive list of fields for which a breeder will require permission. The Authority is entitled to revoke the approval if the circumstances based on which the approval was first given do not exist; in such a situation, the breeder (whether a person or an organization) shall not be allowed to produce, sell, distribute or import the reserved variety. The Authority may restrict the rights of breeders in the use of reserved varieties in the public interest, namely, (a) prevention of disease; (b) conservation of the environment and biodiversity; (c) prevention of misuse of unilateral trade i.e., if the price of seed is increased in the market by keeping the supply of preserved varieties intentionally insufficient compared to the demand, or if the

new plant variety is not marketed within 3 (three) years of registration; (d) any crisis related to state discipline; and (e) any other public welfare determined at the discretion of the Government [section 21(5)]. The Authority may also, with the approval of the Government, restrict the rights of breeders to the production, sale, distribution, import, or use of GMO varieties [section 21(6)].

The Authority may suspend or cancel the right given to breeder rights given under this Act on a number of grounds, namely, (a) if the variety lacked novelty or uniqueness at the time when certification was granted; (b) lack of acceptable limits or stability of homogeneity of plant species; (c) if the breeder fails to provide necessary information and materials within the prescribed time for verification of the maintenance of the plant species; (d) if the breeder fails to pay the registration fee within the prescribed time for the continuation of his rights; (e) if the name of a plant species is canceled after registration and the law does not offer any other suitable name within the stipulated time; (f) if the breeder does not pay the compensation related to any breed within the stipulated time; and (g) If the certificate of registration of reserved species has been issued to a person other than the one to whom it was to be given [section 22(3)]. However, before suspending or revoking the rights of a breeder, the Authority will give him notice stating the reasons thereof and direct him to submit a report on the activities performed by him within the period specified in the notice. The Authority scrutinizes the report and arrives at a decision, which shall be deemed final.

If a person falsely names a protected breed or voluntarily uses false information about a country or place, breeder, or his address during commercial use of a registered breed, it shall be deemed to be an offense for which he shall be liable for not more than 2 (two) years of imprisonment or a fine of a maximum of taka 5 (five) lakh or both. If a person produces, displays sells, trades any protected species by distorting information, he shall be punished with imprisonment for a term not exceeding 2 (two) years or a fine of taka 5 (five) lakh or both. If an offense under this Act is committed by a company, then its owner, director, manager, secretary, or any other official who was in charge of the business at the time the offense was committed, shall be held accountable, unless he can prove that the offense was committed without his knowledge or that he had tried his best to prevent the crime (section 26).

Human Rights – Workers' Rights – Terms of Service – Working Conditions – Industrial Relations

Bangladesh EPZ Labour Act 2019 (Act 2 of 2019)

This law was enacted with the purpose of regulating the employment of workers in the Export Processing Zones of Bangladesh and related matters, such as, the relationship between employers and workers, determination of minimum wages, payment of wages, compensation for workers' injuries caused by accidents at the workplace, health, safety, etc. of workers and the formation of EPZ workers' welfare society.

The Act explicitly states that recruitment of workers and other related matters shall be governed by this law; while an organization may well have its rules for recruitment (which require government approval), but they have to be aligned with the provisions of this law (section 4). Based on the type and nature of work, workers may be varyingly referred to as trainees, apprentices, temporary workers, and permanent workers (section 5). Definitions and tenures are prescribed for workers in each category. Appointment letters and identity cards must be given to all workers (section 6). Every employer is required to maintain a register of all workers for inspection by concerned authorities when necessary. No person shall be employed under compulsion or force (section 16). The Act promotes respect for women and prohibits indecent or obscene conduct towards females irrespective of the ranks in which they are employed (section 189).

The Act lays out concrete and extensive provisions on different aspects of the terms of service of workers and their working conditions. Key provisions are summarized below under selected heads for easy understanding.

Wages

Section 54 of the Act defines wages as (a) any bonus or other additional remuneration payable under the terms of employment; (b) any remuneration payable for leave, closure, or overtime; (c) any remuneration payable in lieu of a court order or any award or settlement between the parties; (d) any amount payable on account of termination, retrenchment, discharge, dismissal, removal, resignation or retirement as the case may be; and (e) any money payable due to lay-off or suspension. Every employer or authorized representative shall be liable to pay wages to all workers hired by him/her (section 55). Wages shall be payable on a monthly basis and must be paid within 7 (seven) working days after the expiry of the period for which the wages are to be paid (section 26).

All dues must be paid off within 15 (fifteen) working days following the separation of the worker from the employing entity (section 56). Except otherwise permitted by this Act, for example, by way of contribution to the provident fund and/or workers' welfare society and unauthorized absence from work, no deductions can be made from the basic wages of a worker (section 58).

In the event of death of a worker or if s/he goes missing, his/her wages shall be payable to his/her nominee; in the absence of a nominee or if for some reason the payment cannot be made to the nominee, the matter shall be referred to the EPZ Labour Court for action (section 59). A worker or his/her heirs or representative in interest may move the EPZ Labour Court for recovery of outstanding wages and dues in the event of delay or non-payment of wages or unjustified deductions, etc. in breach of the provisions of this Act (section 60). There can be no discrimination in terms of equal pay for workers for work of the same nature irrespective of their sex (section 197).

The Government may, with a view to fixing the minimum wage for workers, constitute the EPZ Minimum Wage Board (section 65) which will take into consideration the wage structures or minimum wages of industries outside of the EPZ in setting a minimum wage benchmark. No employer may pay any worker any wage less than the minimum rate so declared (section 71). Appropriate action shall be taken against an employer if he fails to comply with the minimum wage standard.

Working Hours

A worker shall not normally work or be employed in any organization for more than 8 (eight) hours daily (section 36) and not beyond 48 (forty-eight) hours in a week (section 40); however, s/he may work overtime but the total working hours shall not exceed 10 hours daily or 60 (sixty) hours in a week, and in any year it shall not exceed 56 (fifty-six) hours per week on the average. Exceptions will apply to special industries where adherence to the prescribed working hours may be relaxed for a maximum of 6 (six months) if the concerned authority is convinced of the necessity in the public interest or for economic development. Where a worker works overtime on any day or week, s/he shall be paid twice the amount of his/her basic wage, dearness allowance, and allowance for ad hoc work, as applicable (section 45).

The Act also prescribes rest periods that are proportionate to working hours, for example, no worker shall be obliged to work for more than 6 (six) hours daily unless s/he is allowed 1 (one) hour's break for rest and food; 5 (five) hours daily unless s/he is permitted 30 minutes break for food and rest, etc. (section 39). Where a worker works beyond midnight, s/he shall be entitled to a full 24 hours off at the end of his/her shift and the hours that

s/he worked past midnight shall be calculated with the working hours of the day before (section 43).

The Act prohibits a female worker from working between 8.00 PM and 6.00 AM unless she consents to it or she is permitted to do so by the Additional Inspector General of the concerned zone (section 46).

Leave and Holidays

The Act covers a wide range of leave that a worker shall be entitled to each calendar year. All leave shall be calculated according to the English calendar year. A worker may enjoy any general or special leave declared by the Government in addition to the leave s/he is entitled to. In addition, the employing authority may at any time declare a general holiday in an industrial establishment of any zone or at the same time in all industrial establishments of all zones, provided that this leave shall be deemed to be a normal working day and the employer shall pay the workers their due wages for the said leave. The procedure for leave and other matters related thereto shall be determined by the employing authority (section 9).

A worker shall be entitled 1 (one) day off every week and no deduction shall be made from his/her wages for such leave (section 41). Every worker shall be entitled to a casual leave of 10 (ten) days and a sick leave of 14 (fourteen) days with full pay each calendar year. In case s/he does not utilize the said leave, they will lapse and cannot be enjoyed in the following year (sections 50–51). Applicants for sick leave must be examined and declared sick by a registered physician before the leave is granted [section 51 (2)]. Every worker who has completed 1 (one) year of service shall be entitled to 1 (one) day of earned leave for every 18 (eighteen) days of work with wages (section 52). A worker may encash his/her unused earned leave in every calendar year in the manner prescribed by the employing authority [section 52 (2)].

Every worker shall be entitled to 11 (eleven) days of festival leave with wages in each calendar year (section 53). Every permanent worker shall be granted a festival bonus equivalent to 2 (two) months' basic wages on the eve of the relevant religious festival [section 53 (4)]. In case a worker is required to work during festival leave, s/he shall be granted compensatory leave with 2 days' wages within 30 (thirty days) from the date of work [section 53(3)].

Benefits

If a worker is entitled to provident funds including the employer's subscription, s/he cannot be deprived of this benefit due to his/her retrenchment, discharge, dismissal, removal, termination, retirement, or death (section 25). All workers,

other than temporary workers, shall receive a certificate of employment at the time of his/her retrenchment, discharge, dismissal, removal, termination, or retirement (section 26).

The Act has comprehensive provisions on maternity benefits. A female worker who is pregnant and entitled to maternity welfare benefits, shall notify the owner of her pregnancy and seek maternity welfare benefits in the prescribed manner (section 31). Maternity welfare benefits are to be paid daily, weekly, or monthly, as applicable, in full cash at the average wage rate (section 32). Every female worker shall be entitled to maternity leave of a total of 4 (months) of which she may avail of 8 (eight) weeks before the probable date of delivery of the child and 8 (eight) weeks immediately after the delivery (section 30). However, this entitlement will accrue to a female worker only if she has worked under her employer for at least 6 (six) months immediately before the delivery of her child. Besides, no female worker shall be entitled to maternity-related welfare benefits, if she has 2 (two) or more surviving children at the time of delivery, in which case she shall only be entitled to any leave.

Employers are prohibited from engaging any female worker within 8 (eight) weeks immediately after childbirth (section 29). No employer may employ a female worker to carry out difficult or laborious or work that requires her to stand for long hours or which may be detrimental to her health, if he has reason to believe or if the female worker has notified that she is expected to give birth within 10 (ten) weeks or has given birth in the past 10 (ten) weeks [section 29(3)]. In case a female worker entitled to maternity welfare benefits dies during childbirth or within 8 (eight) weeks after childbirth, the employer shall provide the welfare benefits to the person as prescribed by the regulations (section 33). If the female worker dies before delivery, the employers shall provide benefits for the duration preceding her death. A female worker shall not be deprived of maternity benefits even if the employer issues an order for her discharge, dismissal, removal, or termination of employment within 6 (six) months before childbirth or 8 (eight) weeks after childbirth (section 34).

Workplace Health and Safety

Section 35 of the Act prescribes specific measures to ensure workplace safety and a healthy working environment for workers. These include, inter alia, provisions for – maintenance of factory buildings and interiors; safe use, storage and transportation of goods and substances; protection against fire, toxic chemicals, gas, smoke, vapor, and dust; personal protective gear; first aid equipment; fire extinguishers; and appropriate training for workers on occupational health and safety measures. The Act requires the establishment of separate and

adequate number of toilets and laundry rooms for male and female workers in each establishment and provisions for the adequate supply of safe drinking water for all workers; preventive measures against potential physical injury, poisoning, or disease. In addition to these various measures, the Act calls for appropriate arrangements for the removal of production-related waste material; arrangements to ensure cleanliness, hygiene, and proper ventilation; machinery to help workers lift and hoist excess weight, etc. Every EPZ must have a medical center to attend to the health needs of the workers (section 37).

The owner of an establishment that employs at least 25 (twenty-five) permanent workers must introduce a group insurance scheme in addition to other entitlements prescribed by this Act (section 36). If any insurance claim is raised under this Act, it shall be settled by the insurance company and the owner jointly within 120 (one hundred and twenty) days.

Separation from the Organization/Industry

The Act covers different aspects whereby a worker may be separated from the employing establishment. Separation may occur by way of lay-off, retrenchment, discharge, termination, resignation, and retirement from work.

Lay-off/Retrenchment

A worker may be laid off from an organization when the number of workers exceeds the required necessity (section 19). When a worker who is included in the master roll of the establishment and who has completed at least 1 (one) year of service, is laid off, s/he shall be entitled to be compensated for the days s/he is laid off (section 15). When retrenching a worker who has been working continuously for at least (1) one year, s/he must be served a written notice explaining the reasons for his/her retrenchment or be paid wages in lieu of notice for the duration of the notice period. The owner must also pay the worker a compensation equivalent to 30 days' wages for every year of service so far rendered. A worker who has been laid off will be given priority in recruitment if s/he applies for re-employment.

Discharge

A worker may be discharged from the job due to physical or mental disability or continued ill-health, certified by the doctor of the medical center of the concerned zone or any registered physician (section 20). If the concerned worker has completed at 1 (one) year of uninterrupted service, s/he shall be entitled to 30 (thirty) days basic wage as compensation.

Termination

An employer can terminate any worker by giving 120 (one hundred and twenty) days' written notice in case s/he is a permanent worker and 60 (sixty) days of written notice in case of other workers (section 22). In the event of termination of the employment of a permanent worker, the employer shall pay him/her 30 (thirty) days' wages as compensation in addition to other benefits payable to the worker under this Act. If the employer wishes to terminate the worker without notice, he may do so, but in that case, the worker must be paid wages for the entire notice period, as applicable.

Dismissal

Notwithstanding anything contained in this Act regarding lay-off, retrenchment, discharge, and termination of employment, a worker may be dismissed without notice or in lieu of notice without pay, if he is penalized for committing a criminal offense or is convicted for misconduct (section 21). Where a worker has been accused of misconduct, unless the matter is pending before the EPZ Labour Court, s/he may be suspended during the investigation for a total period of 60 (sixty) days. During this time, s/he shall be entitled to half of his/her average wage, dearness allowance, half of ad hoc or interim wage, if applicable, as food allowance and other relevant allowances at the full rate.

Resignation

A permanent worker may resign from his/her job by giving 30 (thirty) days' written notice to the employer. A temporary or any other worker may do the same but by giving 15 days' written notice (section 23). In case the worker wishes to resign without notice, s/he may do so by paying the employer the same amount of wages for the applicable notice period.

When a permanent worker resigns from service, the employer shall compensate the worker for each full year of service by paying him/her (a) 15 (fifteen) days' wages if s/he has been working continuously for 5 (five) years or more, but less than ten years; (b) 30 (thirty) days' wages, if s/he has been employed continuously for 10 (ten) years or more time but less than 25 (twenty-five) years.

Retirement

A worker shall normally retire after completing 60 (sixty) years of service (section 24); however, s/he may choose to retire any time after completing 25 (twenty-five) years of service by giving 30 (thirty) days' written notice before

the probable date of retirement. When a permanent worker retires from service, s/he shall either be paid 45 (forty-five) days' wages as compensation for each full year of service, in addition to other benefits that s/he is entitled to receive under this Act or be paid dues as per the rules of the employing company.

Grievance

Any worker, including those who have lost their jobs due to lay-off, retrenchment, discharge, dismissal removal, or any other reason, has any grievance, s/he may seek redress by way of lodging a written complaint to the owner within 30 (thirty) days from the date when the cause of grievance became known to him/her (Section 28). The investigation and disposal of the complaint shall be guided by regulations.

Compensation

The Act has elaborate provisions on compensation in case of workplace injury. If a worker is injured in an accident while on the job, the employer shall compensate him/her in accordance with the provisions of this law, or as the case may be, the rules or regulations (section 73). However, a worker shall not be entitled to any compensation – if her/his performance is not fully or partially affected for more than 3 (three) days; or, if the worker was under the influence of drugs or alcohol at the time of the injury; or, if the injury occurred as a result of deliberate disregard or disrespect for explicitly stated safety rules and instructions; or if the injury resulted from deliberate removal of safety equipment or non-compliance with any other injury prevention technique.

A worker waives his/her right to compensation for injury if s/he has filed a suit in the civil court seeking compensation for such injury. However, no suit will lie in the civil court if the concerned worker has filed an application in the EPZ Labor Court seeking compensation for the said injury; or if there is an agreement between the owner and him/her concerning compensation for injury in accordance with the provisions of this law. The amount payable as compensation shall vary according to the degree of the injury, i.e., death, partial permanent disability, full permanent disability, or partial temporary disability (section 74).

Closure

In case of an emergency like a fire, epidemic, riots, power outage, or malfunction of equipment and machinery, the owner may at any time close down the establishment parts or branches thereof (section 11). While so doing, the owner shall notify the concerned authority and the workers about the closure.

Collective Bargaining

Subject to the provisions of this law, workers of any zone shall have the right to form and join a duly registered Workers' Welfare Association (section 93). The purpose of this Association will be to engage with employers/owners on matters pertaining to labor relations. The elected representatives of the Workers' Welfare Association shall be the collective bargaining agents representing workers' rights and interests in a given establishment (section 119). The collective bargaining agent can also declare strikes and give notice thereof.

Dispute Resolution

If an owner or collective bargaining agent foresees potential labour unrest, they shall inform each other in writing and prepare for discussions to contain the problem (section 124). They will seek the assistance of arbitrators, where necessary. If negotiations fail, the owner or workers can declare a lock-out or strike (section 131).

Environmental Law – Sustainable Development – Right to Life – Stockholm Declaration – Rio Declaration – World Commission on Environment and Development – Doctrine of Public Trust

Judicial Decisions

Human Rights and Peace for Bangladesh v. Government of Bangladesh and others, Writ Petition No. 13989/2016, High Court Division of the Supreme Court of Bangladesh (Special Original Jurisdiction), judgment delivered on 30.01.2019 and 02.02. 2019

A writ petition was lodged at the High Court Division of the Supreme Court of Bangladesh following a newspaper report on the illegal encroachment and construction on the river Turag. It was alleged that indifference and inertia of relevant government agencies in taking corrective action against the illegal activities of some vested quarters was fast destroying the river. In response to the writ, the Court issued a Rule Nisi calling upon the respondents to show cause as to why inaction on their part to stop the illegal encroachment and filling of the river Turag and construction thereon should not be declared illegal and without lawful authority and why the respondents should not be directed to take necessary measures to stop the alleged illegal activities and remove the earth fillings and structures at the cost of the encroacher. Based on

the findings of an investigation undertaken on the direction of the Court, the Court ordered the eviction of the encroachers. Some of the encroachers submitted an affidavit in opposition claiming that they had bought relevant parts of the land following due process and it would be unfair and unjust if they were evicted from their lands. In the absence of concrete evidence in support of the opponents' claims, the learned Court dismissed them.

In delivering its decision, the Court acknowledged various media reports that highlighted how different rivers and water bodies of Bangladesh, including the Turag river, were being polluted, illegally filled, and being used for illegal constructions by private sector business entities and powerful individuals with vested interests to the detriment of the environment. Recalling that water was the essence of life and how it impinged on people's lives and livelihoods and in turn, the economy of Bangladesh and recognizing the irreversible damage caused by pollution and illegal encroachment on the Turag river and the imminent threat to the very existence of the people, the learned Court, in a final bid to save the Turag river, declared it a "legal person" and opined that as of the date of this judgment, all other rivers would also be treated as legal entities. To this end, the Court issued orders and directives to ensure the effective execution of the judgment. In arriving at this decision, the Court extensively drew on, inter alia, the Doctrine of Public Trust, relevant provisions of the Stockholm Declaration and the Rio Declaration, Asian Human Rights Charter, Precautionary Principle, and Polluters Pay Principle.

The Court substantiated its arguments by referring to legal enactment on related matters by the Parliament of New Zealand, relevant provisions in the Constitution of Ecuador, and numerous case law from international jurisdictions, e.g., the Colombian Constitutional Court decision which declared the Atrato river as a "subject of rights", Uttarkhand in Mohd. Salim vs State of Uttarkhand and others [writ petition PIL No.126 of 2014], the Mono Lake case [39 Cal.3d. 419], Arnold vs Mundy [6N.J.L.1, (1821), 10 Am Dec. 356, 1Halst.1], Canadian Forest Products Ltd. vs Her Majesty the Queen in Right of the Province of British Columbia [2 S.C.R (2004) SCC 38 (CanL II], Municipal Corpn. of Mumbai vs Kohinoor CTNL Infrastructure Co. (pvt.) Ltd, [4 SCC (2014) 538], State (NCT of Delhi) vs Sanjay [9 SCC (2014) 772], Association for Environment Protection vs State of Kerala and others [7 SCC (2013) 226], Intellectuals Forum Tirupathi vs State of A.P. [AIR (2006) 1350], T.N. Godavarman Thirumulpad vs Union of India [AIR (S.C.) 2005, 4258], Gann vs Free Fishers of Whitstable [House of Lords, 3 March 1865, 11 ER 1305 (1865) 11 HL Cas.192], Kinlock vs Secretary of State for India [7 App. Cas. 619 (1882) 325–26, 630], Shri

Shachidanand Pandey and another vs State of West Bengal and Others [AIR (1978) (S.C.) Calcutta 1109], M.C. Mehta vs Kamal Nath [1 SSC (1997) 388], and K.M. Chinnappa vs Union of India and others [AIR 2003].

Human Rights – Women's Rights – Violence against Women – Best Interests of the Child – Family Unity – Ends of Justice

Md. Shafiqul Islam v. State and others, Criminal Miscellaneous Case No. 10085/2016, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 10. 04.2019

The petitioner moved the High Court Division seeking to quash the decision of the Women and Children Repression Suppression Tribunal, which found the petitioner guilty of repeated incidents of physical violence against his wife, often causing her grievous injury, for failing to fulfill his demands for dowry. He was sentenced to three years' rigorous imprisonment and taka 50,000 fine by the said Tribunal.

At one stage of the hearing of the petition at the High Court Division, the wife informed the Court by way of an affidavit, that during the ongoing case she has reconciled with her husband; they had settled their differences and have since been leading a happy married life. In the meantime, a son was born to them. In the circumstances, she prayed to the Court for amicable disposal of the matter.

The Court condemned the abusive behavior of the husband but recognized the social and economic repercussions of a broken family. Taking into consideration the overall situation, in particular, the best of interests of the child that was born to them in the meantime and who needed a stable family, and the fact that most of the offenses committed by the husband under the Women and Children Repression Suppression Act were compoundable, the Court went beyond "mechanical" application of the law, took a lenient view for the ends of justice and absolved the husband of his liability.

Bilateral Agreement/MOU

Promotion of Bilateral Cooperation between Bangladesh and Bhutan, Dhaka 13 April 2019

Bangladesh and Bhutan signed five bilateral agreements during a 4-day official visit of the Bhutanese Prime Minister to Bangladesh. These instruments are expected to enhance cooperation in respect of cargo transportation, health, agriculture tourism sectors, and Public Administration training centers of the two countries for exchange of faculty members as well as training and capacity building.

Government to Government and Private to Private Entity Cooperation in Selected Fields between Bangladesh and Brunei, Brunei Darussalam on 22 April 2019

Several Memorandums of Understanding (MoUs) were signed by Bangladesh and Brunei during the Bangladesh Premier's official visit to Brunei Darussalam on 21–23 April 2019. The MoUs were concluded between the two governments and between private sector entrepreneurs of the two countries.

The Government to Government MoUs were on cooperation in the fields of (i) Scientific and Technical Cooperation in Agriculture; (ii) Fisheries; (iii) Livestock; (iv) Supply of Liquefied Natural Gas (LNG); (v) Youth and Sports and (vi) Culture and Arts. In addition to the MoUs, both countries agreed on the Exchange of Notes on the "Visa Waiver" arrangement for diplomatic and official passports.

The private to private cooperation agreements included (i) collaboration between the National Chamber of Commerce and Industry Brunei Darussalam (NCCIBD) and the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI); (ii)Joint Collaboration for the Provision of Professional Skills Development and Training in Petroleum Geoscience between Dimension Strata SDN BHD and Green Power Limited Bangladesh and Environment Science, University of Dhaka; (iii) MoU between Ghanim International Cooperation SDN BHD and Taj Food Industries Limited, a subsidiary of the Nizam Group of Companies, for bilateral cooperation in the Halal Food Sector.

Bilateral Investments between Bangladesh and South Korea, Dhaka, 14 July 2019

Bangladesh and South Korea signed three instruments in Dhaka on 14 July 2019 to accelerate bilateral investment, cultural exchange, and capacity development of diplomats. The instruments included a (i) Memorandum of Understanding (MoU) on cooperation between the Korea National Diplomatic Academy of Ministry of Foreign Affairs and the Foreign Service Academy of the Ministry of Foreign Affairs of Bangladesh; (ii) Memorandum of Understanding (MoU) between the Korean Trade-Investment Promotion Agency of South Korea and Bangladesh Investment Development Authority on cooperation in the field of investment promotion; and (ii) Cultural exchange program between Bangladesh and South Korea for the years 2019–2023.

Statements at the United Nations

Sustainable Development – Agriculture – Food Security – Nutrition

Statement at the Second Committee Plenary during the adoption of the Resolution on "Natural Plant Fibres and Sustainable Development", 21 November 2019, Conference Room 2, UNHQs, New York.

Bangladesh reiterated the importance of the diverse range of natural plant fibers in providing farmers with a source of income and contributing to poverty eradication. Recognizing that the promotion of these fibers, particularly the lesser-known ones, such as Jute, Abaca, Coir, Kenaf, Sisal, Hemp and Ramie, would contribute to the achievement of the SDGs, Bangladesh articulated how it has adopted policies aimed at transforming the agriculture sector, promoting rural development, empowering the marginalized people and protecting smallholder farmers and small-scale producers to induce economic, social and environmental benefits. Bangladesh acknowledged the support of member states across the regions in its effort to raise the matter of natural plant fibers in a UN resolution as a development issue for the first time and hoped that this resolution would foster scientific research, development and cooperation at national, regional and global levels to ensure, in addition to its traditional use, value-added and innovative use of all lesser-known natural plant fibers.

Environmental Law – Climate Change – Paris Agreement – International Peace and Security – Sustainable Development

Statement at the Open Debate on "Addressing the impacts of climate-related disasters on international peace and security", 25 January 2019, UNSC Chamber, UNHQS, New York

Recognizing that disasters induced by global climate change have the potential to trigger major security concerns, Bangladesh reiterated the urgent need to limit global warming to avert grave risks to the survival of people and communities across the world. Recalling that it is amongst the countries that are worst affected by climate change, Bangladesh highlighted its plans for 'carbon budgeting', 'de-carbonization of manufacturing pathways', and 'low-carbon industrialization'. Bangladesh is committed to implementing its Nationally Determined Contributions in the framework of the Paris Agreement and has accordingly mainstreamed climate actions and disaster management in national planning and sustainable development strategy. The statement articulated how Bangladesh has been able to reduce casualties in incidents of natural disasters by bringing improvements in the early warning system, dissemination of information, the establishment of cyclone shelters, and active engagement of dedicated Cyclone Preparedness Program volunteers in preparedness and response activities. Bangladesh observed that tackling climate change and managing risks will largely depend on the implementation of the 2030 Agenda, the Paris Agreement, the Sendai Framework, and the Global Compact on Safe, Orderly and Regular Migration. Bangladesh stressed that the big emitters must aim for rapid mitigation of GHGs. In addition, financial resources and technology transfer to climate-vulnerable countries for supporting their adaptation efforts would address threats to international peace and security posed by climate change and related disasters, especially in some places, for example, Africa and SIDS countries.

Human Rights – International Peace and Security – Reconciliation – Transitional Justice

Statement at the UN Security Council Open Debate on "The Role of Reconciliation in Maintaining International Peace & Security," 19 November 2019, New York

Bangladesh observed that reconciliation was a useful instrument for sustaining peace and preventing the recurrence of conflicts, in both inter-State and intra-State settings. Appreciating that reconciliation involves a wide range of issues starting from ensuring the rule of law, accountability, and transitional justice; promoting sustainable economic growth, national ownership, social cohesion, gender equality, to the protection of human rights and fundamental freedoms, Bangladesh urged all concerned to work together to prevent the recurrence of conflict and promote durable peace and security – domestically, regionally, and globally. It shared its experience of reconciliation efforts in the Chittagong Hill Tracts to ensure sustainable peace and harmony amongst the ethnic minorities and mainstream populations. Drawing on domestic and international lessons, Bangladesh maintained that reconciliation was a powerful tool for resolving the Rohingya humanitarian crisis that has been plaguing Bangladesh for quite a while. In this regard, Bangladesh underpinned the need for clearly defined strategies for reconciliation to be implemented with transparency and objectivity, a mechanism to address core grievances including gross human rights violations, and active participation of women and young people in the reconciliation process.

Human Rights – Equality – Non-Discrimination – Social Justice – Inclusion

Statement On Agenda Item 68: "Elimination Of Racism, Racial Discrimination, Xenophobia, And Related Intolerance" Before The Third Committee, 74th UNGA, 30 October 2019, UNHQs, New York

Expressing its unequivocal stand against racial discrimination, Bangladesh stressed its zero-tolerance policy towards all forms of terrorism, violent extremism, and radicalization. Referring to its flagship General Assembly resolution on the "Culture of Peace", which receives overwhelming support every year, Bangladesh testified to its unrelenting commitment to the principle of inclusion

and peaceful co-existence of diverse groups. The statement highlighted the discrimination and deprivation experienced by the Rohingyas and called for effective implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Durban Declaration and Programme of Action for the elimination of racial discrimination. Bangladesh underscored that the 2030 Agenda for Sustainable Development also flags the necessity to build peaceful, just, and inclusive societies based on respect for human rights for all and called for collective efforts to create a society based on tolerance, inclusion, justice, equality, equity, and respect for human rights.

State Practice of Asian Countries in International Law

India

*V.G. Hegde**

Arbitration – Constitutional Validity of Section 87 of the Arbitration and Conciliation Act, 1996 – Its Consistency with the UNCITRAL Model Law on International Commercial Arbitration

Judicial Decisions

Hindustan Construction Company and Another v. Union of India and Others, Supreme Court of India, 27 November 2019

Facts

Petitioners challenged the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996. This provision was inserted as an amendment through an enactment known as Arbitration and Conciliation (Amendment) Act, 2019 (hereinafter '2019 Amendment Act'). Petitioners also challenged the repeal of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (with effect from 23.10.2015) through the 2019 Act. They also challenged various provisions of the Insolvency and Bankruptcy Code, 2016. All these changes, as contended by the Petitioners, resulted allegedly in discriminatory treatment to them. These amended provisions related to the further adjudication of the enforcement of an award given in favor of the petitioners in the courts of law. Petitioners were an infrastructure construction company involved in the business of construction of public utilities and projects like roads, bridges, hydropower and nuclear plants, tunnels, and rail facilities; mostly for government bodies.

Arbitration awards that were in favor of the Petitioner company were invariably challenged under Sections 34 and 37 of the Arbitration and Conciliation Act, 1996, and on average, more than 6 years were spent in defending these

* Professor, Centre for International Legal Studies, School of International Studies, Jawaharlal Nehru University, India.

challenges. The major problem in the way of the Petitioners was that the moment a challenge was made under Section 34, there was an 'automatic stay' of such awards under the Arbitration and Conciliation Act, 1996. Petitioners were then subjected to a double-whammy. Government bodies other than Government companies were exempt from the Insolvency Code because they were statutory authorities or government departments. Even if they could be said to be operational debtors – which was not the case – the moment a challenge was filed to an award under Section 34 and/or Section 37 of the Arbitration and Conciliation Act, 1996, such debt became a 'disputed debt' under the judgments of this Court, and proceedings initiated under the Insolvency Code at the behest of the Petitioner company, not being maintainable in any case, would be dismissed at the threshold. Huge sums of money were, therefore, due from all these companies/government/government bodies to the Petitioners. On the other hand, Petitioners continued to operate owing large sums to operational creditors for supplying men, machinery, and material for the projects. Petitioners, *inter alia*, argued that the Arbitration and Conciliation Act, 1996 was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. These changes and amendments, according to them, should be brought in tune with the UNCITRAL Model Law.

Judgment

The Court considered several of these issues taking into account its own earlier jurisprudence on the matter. It also referred to the work of some of the Committees and Commissions of the Government of India. The Court also considered the various provisions of the Arbitration and Conciliation Act, 1996 relating to the enforcement of awards and its possibilities to bring it to tune with the UNCITRAL Model Law.

Decision

The Court decided not to consider the constitutional validity challenge to Section 87 of the Arbitration and Conciliation Act based on its earlier decisions. It concurred with the argument of one of the petitioners that under the UNCITRAL Model Law, Articles 34 and 35 provided for two bites at the cherry: (i) in cases in which an award was sought to be set aside; and (ii) thereafter when not set aside, sought to be recognized and enforced in the same country in which it had been made. The Court agreed that the Indian Arbitration and Conciliation Act, 1996 did not follow the two bites at the cherry doctrine, for

the reason that when an award made in India became final and binding, it should straightaway be enforced under the Civil Procedure Code and in the same manner as if it were a decree of the Court.

Human Rights – Implementation of United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Scope of Power of the Supreme Court to Issue Directions to the Parliament under the Indian Constitutional Scheme

Dr. Ashwani Kumar v. Union of India and Another, Supreme Court of India, 05 September 2019

Facts

In this case, the applicant sought a direction from the Court to the Parliament to enact standalone and comprehensive legislation against custodial torture based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly and opened for signature, ratification, and accession on 10th December 1984. The applicant also referred to stands taken by various constitutional and legal authorities in this regard such as the Attorney General of India, Law Commission of India, and National Human Rights Commission along with a select Committee of the Parliament supporting the validity of the UN Convention under Article 21 of the Constitution. It was also noted that though India had signed this Convention on 14th October 1997, it had not ratified the same to date.

Judgment

The Court, after considering several of its earlier decisions on the issues concerning bringing in implementing legislation giving effect to an international convention clarified that the court would be deciding a very limited issue as to whether it should direct the Parliament to enact standalone and comprehensive legislation against custodial torture based on the UN Convention. It also further examined whether it could do that under the constitutional scheme and issue any such direction.

Decision

After considering its own jurisprudence on the matter, the Court noted that issuance of any such direction would virtually amount to a power which it did not 'possess' while exercising the power of judicial review. However, the court noted that in an appropriate matter and on the basis of pleadings and factual matrix before it, the court could issue appropriate guidelines/directions to elucidate, add and improve upon directions issued pursuant to earlier decisions concerning custodial torture. Since there was no prayer by the applicant to this effect, it could not issue any such directions. It, however, further clarified that notwithstanding the rejection of the prayer made by the applicant, its present decision would not in any way affect the jurisdiction of the courts to deal with individual cases of alleged custodial torture and pass appropriate orders and directions in accordance with the law.

Human Rights – Statement by India on Agenda Item 83 – The Rule of Law at the National and International Levels at the Sixth Committee of the 74th Session of the United Nations General Assembly on 11 October 2019

Other Relevant State Practice

India, while thanking the UN Secretary-General for his Report A/74/139 on Strengthening and coordinating United Nations rule of law activities, noted that the report highlighted the promotion of and respect for the rule of law, justice, and good governance and accorded high priority in guiding the activities of the United Nations and its Member states. India appreciated the continued support of the UN and its agencies to the Member States in developing domestic capacities to strengthen the Rule of Law, provided specifically at the request of Member States in alignment with their needs and priorities and consistent with the United Nations policy to promote gender equality and human rights in order to achieve a peaceful and inclusive society. India noted the UN initiative to strengthen accountability in the correction sectors with regard to legislative reforms in the areas of combating corruption; reinforcing the independence of the prosecution service; drafting of procedures to coordinate and respond effectively to child abuse.

According to India multilateralism was based on laws that governed interaction between states for greater collective welfare. However, it further noted, the uneven impacts of globalization, both within and among nations, were leading to a situation where the spirit of multilateralism appeared to be in retreat today, although the list of interconnected global challenges requiring collective action continued to grow. Referring to the basic tenets of the United Nations to prevent conflict among competing powers and bring about a greater rule of law to govern the behavior of nation-states, India pointed out that the UN Charter served as its ultimate guide that even prescribed use of force under specific conditions. India also referred to the principles of sovereign equality: regardless of power, under international law, all states had equal status.

India believed that the advancement of the rule of law at the national level was essential for the protection of democracy, human rights, and fundamental freedoms, as well as for socio-economic growth. Similarly, India pointed out, the rule of law at the international level was a *sine qua non* for ensuring peace and justice among States. Recalling various multilateral efforts to ensure universal adherence to and implementation of the rule of law at the national and international levels, India referred to a wide range of areas like trade, investment and intellectual property; transport and communications; use of global commons such as seas and oceans, environment, climate change, outer space, etc. to define rules of cooperation to prevent chaos brought about by rapid globalization driven by technology.

India also noted that there were areas where the international community had not been able to develop an international rule of law such as the rise in terrorism is one such alarming concern that impacted and required effective international collaboration. However, India noted that law-making on this issue continued to falter in view of narrow geopolitical interests. Ironically, India pointed out, often states hid behind legal concepts, designed for different contexts, to stop progress on this vital issue, including here at the UN in the context of a draft Comprehensive Convention on International Terrorism.

India also referred to other more complex areas such as transboundary aspects of waterways, where it was much more difficult to achieve consensus on general principles in view of strong sovereignty and situation-specific strategic concerns. According to India another area of concern was the complexity of issues relating to extraterritorial jurisdiction to plug any gaps in accountability for crimes committed in third countries.

India strongly believed that cooperative and effective multilateralism was the only answer to the range of interconnected challenges that we faced in

our interdependent world and that it pointed to the strong need for rule of law at an international level. Referring to its own challenges, India pointed out that it had always engaged actively in international efforts to develop norms, standards, and laws governing global interactions across various sectors. India also referred to its efforts to bring its national laws in consonance with its international obligations. It also referred to its continued partnership with fellow developing countries in capacity-building efforts on aspects such as electoral practices, drafting of legislation, and other law enforcement issues. Further, it noted that with one-sixth of the global population and being the world's largest democracy based on rule of law, it had emerged as the fastest-growing major economy. It also pointed out that in India the independence of the judiciary, legislature, and executive along with a free and vibrant media and civil society with strong traditions of electoral democracy were cherished and were the basis for the rule of law.

India recognized the important role played by international courts and tribunals including arbitral institutions in upholding rule of law and combating impunity. It also placed on record its appreciation for the important contribution made by the ILC in promoting respect for international law by progressive development on topics like "crimes against humanity", "peremptory norms of general international law (jus cogens)", "protection of the environment in relation to armed conflicts and "immunity of State officials from foreign criminal jurisdiction".

Referring to its domestic legal system, India noted that in the last year it had enacted nearly 20 new acts, ranging from legislation on medical, health, education, arbitration and conciliation, consumer protection, banking, wages, Muslim women (protection of rights on marriage), etc. India further noted that unjust or discriminatory laws that did not balance competing interests in a fair manner, or those designed and implemented by powers that were not representative, only fuel long-term conflict. According to India, laws continued to evolve according to changing circumstances, often brought forth by changes in society and prevailing technologies, leaving many old laws and regulations redundant. In this spirit of adapting to change, the Indian constitution, India noted, adopted seven decades ago, had seen over 120 amendments.

India concluded by pointing out that the global institutions must be fully reflective of contemporary realities and the rule of law norms to enable them to address the global challenges effectively.

JURISDICTION – STATEMENT BY INDIA ON AGENDA ITEM 84 – THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION AT THE SIXTH COMMITTEE OF THE 74TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY ON 17 OCTOBER 2019

While thanking the Secretary-General for his report A/74/144 on "The scope and application of the principle of universal jurisdiction" India noted that the principle of universal jurisdiction was a legal principle allowing a state to bring penal proceedings in respect of certain crimes irrespective of the place of the commission of a crime and the nationality of the perpetrator or the victim. It also noted that this principle was an exception to the general criminal law principle that required territorial or nationality link with the crime, the perpetrator, or the victim.

India further pointed out that under the concept of universal jurisdiction, a State claimed jurisdiction over an offense irrespective of the place of its commission or nationality of the offender or victim, and thus without any link whatsoever between that State and the offense/offender. This exception, India noted, was justified due to the grave nature of the crime which affected the international community as a whole, and thereby no safe havens were established for those who committed these grave crimes and escaped the criminal proceedings using the shortcomings in the procedural technicalities in the general criminal law.

India referred to crime of piracy as a classic example of universal jurisdiction and further noted that the principle of universal jurisdiction in relation to piracy had been codified in the UN Convention on the Law of the Sea, 1982, making piracy on the high seas the only one crime, over which claims of universal jurisdiction were undisputed under general international law. The international treaties, in respect of certain other serious crimes, India pointed out, had provided a legal basis for the exercise of universal jurisdiction, which was applicable as between the States parties to those treaties. As noted by India, they included, among others: 'genocide' as defined under the Convention on the Prevention and Punishment of the Crime of Genocide, 1948; 'war crimes' under the Four Geneva Conventions of 1949; and 'apartheid' as provided under the Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.

India reiterated that universal jurisdiction was applicable in the case of a limited set of crimes, like piracy on high seas and other specific serious crimes under the relevant treaties/ conventions that had been adopted and agreed

to by the States. Therefore, according to India, there is a need to avoid any misuse of the principle of universal jurisdiction in both criminal and civil matters, the concept and definition of which are not yet clear and agreed upon by the States.

While appreciating the contents of the report on the laws and practice of certain States concerning the exercise of universal jurisdiction in their domestic legal systems and their understanding of the concept of universal jurisdiction as useful, India noted that it contained a synopsis of issues raised by governments for possible discussion.

State Responsibility – Statement by India on Agenda Item 79 – Report of the International Law Commission on the Work of Its Seventieth Session at the Sixth Committee of the 74th Session of the United Nations General Assembly on 06 November 2019

India commenting on the third Report introduced by the Special Rapporteur on "Succession of States in respect of State Responsibility" noted that the topic dealt with rules that belonged to two areas of international law i.e. the law of state responsibility and the law of succession of States. In its view, the adoption of any of the draft articles on this topic should align with the relevant international conventions such as the 1978 Vienna Convention on Succession of States in respect of Treaties, 1983 Vienna Convention on Succession of States in respect of State Property, Archives, and Debts, etc.

Taking note of the draft articles contained in the third report India sought to address certain basic issues which *inter alia* included: the form of state responsibility in respect of succession of States when the predecessor State continued to exist; seeking reparation from the responsible state in case of merger of States, and also seeking reparation from responsible State in case of dissolution.

Further, commenting on the substantive issues, India was of the view that the draft Articles 12 to 14 provided for a situation where the injured predecessor State might request for reparation for the internationally wrongful act of another state if the predecessor State continued to exist. Similarly, India further noted, the successor State might also request reparations for internationally wrongful acts of responsible State in case of merging of two or more States. In either case, India pointed out, as provided in draft Articles 12 and 13, the Special Rapporteur needed to identify whether the draft Articles were intended to establish the procedural possibilities of claiming rights or substantive rights and obligations.

Referring to Draft Article 14 which referred to a situation of seeking reparation from responsible State in case of dissolution of States India pointed out that such claims for reparations were expected to take into consideration the link between the consequences of acts and the nationals of successor States on the basis of equitable proportion. It also sought further clarification as to how to distinguish the rights of a successor State from the potential right of an individual to claim reparations. As regards Article 15 it suggested that the Special Rapporteur might consider elaborating it further taking into account the language used in draft Articles on Diplomatic Protection while dealing with the cases of multiple nationalities.

Welcoming the first report of the Special Rapporteur on "General Principles of Law", India suggested for the study of other similar works undertaken by the Commission on various topics, such as the law of treaties, responsibilities of States for internationally wrongful acts, fragmentation of international law, and identification of customary international law, which might have a direct bearing on the study of the general principles of law.

Further, India was of the view that there was no hierarchy among the sources of international law under Article 38 of the Statute of the International Court of Justice. Accordingly, it opined that general principles of law should not be described as a subsidiary source or secondary source. Instead, it suggested considering the term "supplementary source" to qualify the sources of general principles of law.

India noted that the *travaux préparatoires* of Article 38 of the Statute of the Permanent Court of International Justice might suggest that the inclusion of general principles of law as a source of international law was driven by a concern to avoid findings of *non liquet*, and to limit judicial discretion in the determination of international law. However, according to India, too much focus on *travaux préparatoires* would narrow the importance of general principles of law and its contemporary relevance in practice. The draft conclusions should focus, India pointed out, on the evolution of general principles of law as a source over a period of time, rather than using *travaux préparatoires* for the evolution of general principles of law.

As regards the use of the term "civilized nations" under Article 38(1)(c), India agreed with the majority view that it was inappropriate and outdated. This term, India argued, should not be used in the context of the present draft conclusions. India also noted the suggestion to use the term "community of nations" as contained in Article 15(2) of the International Covenant on Civil and Political Rights.

Terrorism – Statement by India on Agenda Item 106 – Measures Eliminate International Terrorism at the Sixth Committee of the 74th Session of the United Nations General Assembly on 09 October 2019

Thanking the Secretary-General for his report A/74/151 on "Measures to Eliminate International Terrorism" India noted that the report included useful information on measures taken at the national and international levels based on the inputs provided by the governments and international organizations for the prevention and suppression of international terrorism. India also noted that Terrorism was the one of biggest scourges of our times and that it had emerged not only as a major destabilizing force but one that threatened the existence of the States and undermined the very foundations of the democratic political and social order. India condemned terrorism in all its forms and manifestations and noted that no cause whatsoever or grievance could justify terrorism, including State-sponsored cross-border terrorism.

Noting its various manifestations including state-sponsored terrorism and affecting the security of the international community India pointed out that the effective way to tackle it was by way of genuine collaboration among the States. India stated that it strongly believed that terrorism could be countered by combined international efforts and that the UN was best suited for developing this transnational effort. It also noted that the Global Counter-Terrorism Strategy (GCTS) being discussed by the UN General Assembly over the last decade had resulted in little impact on the ground. The Sanctions Committees, India further noted, established by the UN Security Council had become selective tools due to opaque working methods and politicized decision making. While noting the role of the United Nations General Assembly, India referred to the work done by the ad hoc committee established by the UN General Assembly for formulating international instruments against terrorism. Since its establishment 20 years ago in 1996, India noted that this ad hoc committee had negotiated texts resulting in the adoption of three sectoral treaties: 1997 International Convention for the Suppression of Terrorist Bombings; the 1999 International Convention for the Suppression of Financing of Terrorism; and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. India stated that it supported concerted international cooperation and efforts by way of extradition, prosecution, information exchange, and capacity building. It also pointed out that the major UN instruments relating to specific terrorist activities remained fundamental tools in the fight against terrorism and that India was a party to all of these instruments.

Further, India expressed its firm belief that a Comprehensive Convention against International Terrorism (CCIT) would provide a strong legal basis for the fight against terrorism and would be in the interest of all Member States to have a multilateral and collective dimension of counter-terrorism effort.

According to India the inability to agree on a Comprehensive Convention on International Terrorism remained one of the great gaps in the international legislative framework that would have strengthened efforts to destroy safe havens for terrorists, their financial flows, and their support networks. India emphasized the need to move forward in adopting the draft text of CCIT which was a balanced one and had emerged after long discussions.

India further stated that it stood committed in all efforts to counter terrorism by exchanging information, building capacities for effective border controls, preventing misuse of modern technologies, monitoring illicit financial flows, and cooperating in the investigation and judicial procedures. It also noted that the flow of resources meant to produce terror was required to be stopped by States for which collective inter-State efforts were required at regional and sub-regional levels. Financial Action Task Force (FATF), India noted, had a significant role in setting global standards for preventing and combating terrorist financing and the UN needed to increase cooperation with such bodies. India strongly condemned direct or indirect financial assistance given to terrorist groups or individual members thereof by States or their machineries, to pursue their activities, including in defending the criminal cases involving terrorist acts against them.

Concluding, India reiterated its strong support to the GA Resolution 73/125 of 20 December 2018 which, in para 24, recommended the Sixth Committee at the 74th Session to establish the "Working Group with a view to finalizing the process on the Draft Comprehensive Convention on International Terrorism".

United Nations – Statement by India on Agenda Item 76 – Criminal Accountability of UN Officials and Experts on Mission at the Sixth Committee of the 74th Session of the United Nations General Assembly on October 09, 2019

India while reiterating its concern regarding all crimes committed by United Nations officials and experts on mission during their work for the UN, underlined its continued support for the United Nations' zero-tolerance policy. It also noted that the listing of policies and procedures across the UN system

in this context and information received from member states regarding the establishment of jurisdiction over their nationals was a useful exercise.

According to India the issue of accountability had remained elusive because of the complexities of legal aspects relating to sovereignty and jurisdiction of Member States. It also noted the effect of invoking the 'legal personality' of the United Nations that provided essential immunity or privileges that were necessary for UN operations in a country. Further, India noted that the functional capacity or the willingness of member states to investigate and prosecute the accused had further complicated this issue. India also noted that the UN itself could only take some disciplinary measures and did not exercise any criminal jurisdiction. India also pointed out that it was unclear whether investigations conducted by the UN might be accepted as evidence in criminal law proceedings in the courts of a Member State. The immunity enjoyed by the United Nations from prosecution in national courts as an organization, according to India, should not be confused with the UN officials and experts not having any responsibility for their criminal acts or omissions.

India recognized that the primary responsibility to bring perpetrators to justice rested with the Member States. India noted that it was only through concerted action and cooperation between States and the United Nations that states could ensure criminal accountability. For this purpose, India further noted that the State of nationality of an alleged offender was promptly informed and consulted by the UN and that the State of nationality acted in a timely manner, established and exercised jurisdiction, investigated and prosecuted, where appropriate.

India suggested that member states that did not assert extra-territorial jurisdiction over crimes committed abroad by their nationals should be encouraged to provide appropriate assistance to update their national laws and regulations to provide for such jurisdiction and to prosecute any such misconduct of their nationals serving as UN officials on mission abroad. Such law should also provide, India reiterated, for international assistance for the investigation and prosecution of crimes committed. It was also noted by India that even though many countries had updated their jurisdiction to include a possibility to prosecute their nationals serving as UN officials in the host State, the first approach would be to ensure that all member States had jurisdiction needed to prosecute their nationals. India further suggested that the UN could compile a list of those Member States that had implemented the principle of nationality, and the question regarding potential jurisdictional gaps could then be answered.

Referring to its own internal legal regime, India pointed out that the Indian Penal Code and the Code of Criminal Procedure of India had provisions to deal

with extra-territorial offenses committed by Indian nationals and for seeking and providing assistance in criminal matters. The Indian Extradition Act 1962, India further pointed out, dealt with the extradition of fugitive criminals and related issues. India also pointed out that the Act allowed for extradition in respect of extraditable offenses in terms of an extradition treaty with another State and in the absence of a bilateral treaty, the Act also allowed an international convention to be used as the legal basis for considering an extradition request. India, in conclusion, reiterated its commitment to implement a policy of zero-tolerance against any criminal acts committed by UN personnel and hoped that such crimes go unpunished.

United Nations – Statement by India on Draft Resolution Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1995 at the United Nations General Assembly on 22 May 2019

India referring to the Declaration on Granting of Independence to Colonial Countries and Peoples adopted by the United Nations General Assembly (UNGA) on 14th December 1960 noted that this Resolution 1514 recognized the ardent desires of the world to end colonialism. The Declaration, India further noted, proclaimed the necessity of bringing colonialism to an end, speedily and unconditionally. As a result, India pointed out, more than 80 former colonies had taken their rightful place here in the UNGA.

According to India the support for the process of decolonization was, in historic terms, one of the most significant contributions that the United Nations had made towards the promotion of fundamental human rights, human dignity, and the cause of larger human freedom. However, India further noted, that nearly 59 years after the adoption of Resolution 1514, we were being advised by the International Court of Justice (ICJ), that having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago. India also referred to the advice of the ICJ that all Member States were under an obligation to cooperate with the United Nations to complete the decolonization of Mauritius.

Referring to its status as one of the few non-sovereign colonial territories to be a founding member of the United Nations and since its independence in

1947, India pointed out that it had remained steadfast to the ideals of decolonization. India recalled its stance as one of the co-sponsors of the landmark 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which had proclaimed the need to unconditionally end colonialism in all its forms and manifestations. India also recalled its election as the first chair of the Decolonization Committee (Committee of 24), in 1962, which was established to monitor implementation of the 1960 Declaration and to make recommendations on its application.

While reiterating its position to see an early end to this issue, India noted one of the conclusions of the ICJ that it did not consider that giving the opinion requested would have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State. India also shared with the international community security concerns relating to the Indian Ocean and the need for collective commitment towards ensuring the security and prosperity of this oceanic space. This issue, India noted, was a separate matter on which it sought the concerned government to reach a mutually agreeable understanding as soon as possible.

While noting that Mauritius as a fellow developing country from Africa with which it had age-old people-to-people bonds and having consistently supporting Mauritius in its quest for the restoration of sovereignty over the Chagos Archipelago, India extended its support to the draft resolution contained in document A/73/L.84.Rev.

State Practice of Asian Countries in International Law

Japan

*Kanami Ishibashi**

Law of the Sea – Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean

The Japanese Diet approved the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean on May 17, 2019, and it was promulgated on July 26, 2019. The Agreement aims to prevent adverse impacts on ecosystems due to unregulated fishing in the high seas portion of the central Arctic Ocean. The need for such regulations has been recognized due to the increasing impact of global warming on the Arctic Ocean, which has reduced the sea ice cover and increased the potential of the area as a fishing ground.[1]

In July 2015, the five Arctic coastal countries adopted the Declaration on the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, and in December 2015, Japan, China, South Korea, Iceland, and the European Union joined these five countries to discuss and negotiate the Agreement to prevent unregulated high seas fisheries in the Central Arctic Ocean. The agreement was adopted and signed in Ilulissat, Greenland on October 3, 2018. The Agreement provides its objective as prevention of "unregulated fishing in the high seas portion of the central Arctic Ocean through the application of precautionary conservation and management measures as part of a long-term strategy to safeguard healthy marine ecosystems and to ensure the conservation and sustainable use of fish stocks (Art. 2)." Parties shall permit vessels entitled to fly their flags to engage in commercial and experimental fishing only in accordance with conservation and management measures (Art. 3). The Parties shall facilitate cooperation in scientific activities and shall prepare a joint plan for scientific research and monitoring within two years of its entry into force (Art. 4). Parties shall consider, *inter alia*, whether to initiate

* Associate Professor, Tokyo University of Foreign Studies.

1 The Agreement states in the preamble as follows; "RECOGNIZING that until recently ice has generally covered the high seas portion of the central Arctic Ocean on a year-round basis, which has made fishing in those waters impossible, but that ice coverage in that area has diminished in recent years."

negotiations to establish regional fisheries management organizations for fisheries management (Art. 5).

For Japan, participation in this agreement has the advantage of conserving and securing Japan's fishing opportunities in the agreed seas. Since the Agreement will enter into force upon conclusion by all 10 countries and organizations participating in the negotiations, Japan's early approval and deposit of the Agreement was a contribution towards the early entry into force of the Agreement.

International Economic Law – U.S.-Japan Trade Agreement – U.S.-Japan Digital Trade Agreement

The U.S.-Japan Trade Agreement and the U.S.-Japan Digital Trade Agreement were approved by the Japanese Diet on December 4, 2019, with an effective date of January 1, 2020. The U.S.-Japan Trade Agreement eliminates or reduces tariffs on certain agricultural and industrial products in order to expand bilateral trade between the two countries, which account for about 30 percent of the world's GDP, in a strong, stable, and mutually beneficial manner. Specifically, the U.S. side will eliminate or reduce tariffs mainly on industrial products, while the Japanese side will eliminate or reduce tariffs on pork, beef, and other agricultural products and processed foods within the scope of the Trans-Pacific Partnership (TPP).

The U.S.-Japan Digital Trade Agreement establishes a high level of rules in the digital trade arena and demonstrates that Japan and the U.S. will continue to play a leading role in creating global rules for digital trade. The agreement will facilitate smooth, reliable, and free digital trade between Japan and the United States. Specifically, the agreement includes the following provisions, which are like those in the TPP, as well as new elements that strengthen the provisions of the TPP, such as the prohibition of requests for disclosure of algorithms and codes, and provisions on civil liability for service providers such as social networking services. There will be no tariffs between the parties on the transmission of digital products (e.g., software, music, video, e-books). Neither Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of the other Party than it accords to other like digital products (Art. 8.1). No less favorable treatment shall be accorded to digital products of the other Party than is

accorded to other digital products of the same kind. Localization of data shall not be required as a condition for doing business in the home country. There will be a prohibition on requests for the transfer of source code and algorithms.

For interactive computer services such as social networking services, measures that treat the provider as the originator of the information must not be adopted or maintained in determining liability for damages related to the distribution of information.

Environmental Law – Amendments to Act on Liability for Oil Pollution Damage (Act No. 95 of December 27, 1975) – Bunker Convention – Nairobi Convention

On May 31, 2019, Japan amended the Act on Liability for Oil Pollution Damage to implement the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) and the 2007 Nairobi International Convention on the Removal of Wrecks (Nairobi Convention).

The purpose of this Act is to protect victims and contribute to the sound development of marine transportation by clarifying the responsibility of the shipowner, etc. in case of ship oil pollution damage, and by establishing a system to guarantee the compensation for ship oil pollution damage. The Bunker Convention is designed to ensure the prompt payment of "appropriate and effective" compensation for pollution damage caused by spills and discharges of fuel oil from ships, and the Nairobi Convention is designed to ensure the payment of costs for the prompt removal of wrecks. By joining these conventions, Japan, one of the world's leading shipping nations, will be able to claim payment directly from victims to insurance companies.

Japan has been dealing with oil pollution caused by tankers, but with this amendment to the law, Japan is now able to deal with oil pollution caused by fuel oil from ships in general.

Environmental Law – Withdrawal from IWC – Resumption of Commercial Whaling

Japan withdrew from the International Whaling Commission (IWC) on June 30, 2019. As a result, Japan is no longer subject to IWC research catch limits, and commercial whaling of large whales was resumed on July 1 of the same year,

limited to Japan's territorial sea and exclusive economic zone (EEZ). A quota of 227 whales was set for the six months from July to the end of December 2019, including 52 minke whales, 150 Bryde's whales, and 25 sei whales.

Japan's research whaling had long been criticized for being conducted for commercial purposes. In 2014, the International Court of Justice (ICJ) ruled that the then ongoing Second Phase of the Whale Research Program in the Antarctic (JARPAII) could not be considered research for scientific purposes as permitted by the International Convention for the Regulation of Whaling (Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)).

Taking account of this Judgment, Japan decided to implement the newly formulated research plan, the New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A). However, such research whaling ended with Japan's withdrawal from the IWC.

Human Rights – Indigenous People – Ainu

Enactment of Act on the Promotion of Measures to Realize a Society in which the Pride of the Ainu People is Respected

On April 26, 2019, Japan enacted a new Ainu law (Act on the Promotion of Measures to Realize a Society in which the Pride of the Ainu People is Respected, Law No. 16). The law stipulates the following as its purpose:

> In light of the situation of the Ainu tradition and culture, which is a source of pride for the indigenous Ainu people in the northern part of the Japanese archipelago, particularly Hokkaido, and the international situation concerning indigenous peoples in recent years, this Act establishes the basic principles, the responsibilities of the State and others, the formulation of basic policies by the Government, and the management of facilities that constitute a symbolic space for the coexistence of the Ainu peoples, with regard to the promotion of Ainu policies. In view of the situation of the Ainu people and the recent international situation concerning indigenous peoples, the Government of Japan shall promote Ainu policies by providing for the basic principles, the responsibilities of the State, etc., the formulation of basic policies by the Government, measures for the management of facilities that constitute a symbolic space for the coexistence of the Ainu people, the preparation of regional plans for the promotion of Ainu policies by municipalities and their approval by

> the Prime Minister, special measures for projects based on such approved regional plans for the promotion of Ainu policies, and the establishment of the Headquarters for the Promotion of Ainu Policies. The purpose is to realize a society in which the Ainu people can live with pride and in which such pride is respected, and to contribute to the realization of a society in which all citizens can live together in mutual respect for each other's personality and individuality (Article 1).

The Act on the Promotion of Measures to Realize a Society in which the Pride of the Ainu People is Respected recognizes the Ainu people as an indigenous people of the northern part of the Japanese archipelago, particularly Hokkaido, and stipulates that the national government and local governments are responsible for promoting measures to realize a society in which the pride of the Ainu people is respected. It also stipulates that the government and local governments are responsible for promoting measures to realize a society that respects the pride of the Ainu people. In addition, when the government formulates a basic policy for the comprehensive and effective promotion of Ainu policies (Article 7.1), and municipalities prepare a plan for the promotion of Ainu policies within the area of the relevant municipality (Regional Plan for the Promotion of Ainu Policies) based on this basic policy and have it approved by the Prime Minister, the government shall be responsible for the costs of implementing projects based on this plan. If the plan is approved by the Prime Minister, the municipality is entitled to receive a grant for the expenses required to implement the project based on the plan (Article 15).

In addition to stipulating respect for the right to collect forest products to use national forest lands for Ainu rituals and other Ainu cultural promotion (Article 16.1), and consideration for salmon hunting (Article 17), it also stipulates the commissioning of the management of symbolic spaces for ethnic coexistence for the revival and development of Ainu culture.

In the Meiji era (1868–1912), the government changed the name of the island, which had been called "Ezochi" by the Japanese, to Hokkaido, and proceeded with assimilation policies such as banning traditional customs and practices, forcing the use of the Japanese language, and settling Hokkaido through large-scale immigration of Japanese people. In the past, the Ainu people tried to identify the owners of the land where they hunted, fished, and gathered, but at the time, very few Ainu understood the written language and there was no modern concept of individual ownership of land. As a result, few Ainu people acquired property rights. In addition, changes in the natural environment, such as rivers and forests, which were the basis of Ainu life, and restrictions on

trapping of birds and animals and river fishing, had a decisive impact on the lives and culture of the Ainu people.

In 1899, the government enacted the "Hokkaido Former Aborigines Protection Act," and implemented measures such as providing free land (agricultural land), livelihood assistance, tuition benefits, and the establishment of elementary schools. In some cases, land unsuitable for agriculture or undeveloped land was given to the Ainu, and little agricultural guidance was given, so the poverty of the Ainu people was not sufficiently improved.

In terms of education, the elementary schools established under this law (known as "native schools") gave priority to the Ainu children's learning of Japanese, but science and geography were not taught, and there were times when the schooling period was limited to four years (six years for the Japanese).

The Act on the Promotion of Ainu Culture, and Dissemination and Enlightenment of Knowledge about Ainu Tradition, etc. (Act No. 52 of May 14, 1997) enacted in 1997 replaced the "Hokkaido Former Aborigines Protection Act" and focused on the promotion of Ainu culture.

There has been a growing international movement to eliminate discrimination against indigenous peoples and minorities and to protect their uniqueness and culture. In September 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples. In response, in June 2008, the Diet unanimously adopted a resolution calling for the Ainu people to be recognized as indigenous people. In 2009, the Ainu Policy Promotion Council was established to study the development of new Ainu policies. This resulted in the passage of the "Act on the Promotion of Measures to Realize a Society in which the Pride of the Ainu People is Respected (the new Ainu law)".

However, even though the United Nations Committee on the Elimination of Racial Discrimination recommended in August 2018 that the Japanese government should protect Ainu rights related to land and resources, the new Ainu law did not include these rights.

State Practice of Asian Countries in International Law

Korea

*Buhm-Suk Baek**

Human Rights – Issuance of a Visa – Domestic Measures

Decision of the Supreme Court on 'Revocation of Disposition Rejecting the Issuance of a Visa'
Supreme Court Decision 2017Du38874 (*decided on July 11, 2019*)

Facts of the Case & Issues Presented

The Commissioner of the Military Manpower Administration requested the Minister of Justice to the following effect: "Party A, a singer, departed from the Republic of Korea for a concert by obtaining permission to travel overseas, and then subsequently acquired U.S. citizenship, thereby effectively evading mandatory military service. If Party A seeks to reenter the Republic of Korea with the status of overseas Korean, forbid him from engaging in for-profit business activities, for example, through either formal or informal employment as a singer. Where such measures are rendered impossible, do not admit Party A into the Republic of Korea[.]" Upon receiving the request, the Minister of Justice made a decision prohibiting Party A's entry into the Republic of Korea and entered the information into the intranet (immigration management system), not notifying Party A of such a decision. Then Party A submitted an F-4 (Overseas Korean) visa application to the head of an overseas diplomatic mission, but the head of the mission notified Party A's father of the rejection of the issuance of the visa via phone instead of presenting a dispositive document that indicated the grounds for the rejection.

Judgment & Comment

The Court decided that the disposition was flawed in that it violated Article 24(1) of the Administrative Procedures Act. Also, it ruled that the lower court should

* Professor, Kyung Hee University, Korea.

have examined whether it violated the principle of proportionality for the head of the diplomatic mission abroad to render a disposition rejecting the issuance of the visa on the sole ground of, and by being bound by the decision forbidding entry into the Republic of Korea which was made 13 years and seven months earlier.

However, the lower court found that the Defendant's disposition rejecting the issuance of the visa following the decision to forbid entry was justifiable, which is a misapprehension of the relevant legal principle due to the following reason: Relevant provisions allow an administrative agency to enjoy certain discretion in determining the requirements and effect of the disposition. However, it would be deemed as a failure to exercise discretion by the agency if it issued a disposition without weighing and balancing the public interest to be attained by disposition and the substance and degree of the disadvantage that may be suffered by the counterparty, misconceiving of its conferred power. In other words, the act itself is a reason for illegality and to revoke the pertinent disposition due to deviation or abuse of discretionary authority.

* Administrative Procedures Act [Act No. 5241 (Enforced 31 December 1996)] Article 24(1) (Method of Dispositions) *When administrative agencies render dispositions, the disposition shall be made in writing except for cases otherwise stipulated by other Acts and subordinate statutes: Provided, That in cases necessitating prompt action or cases of minor matters, the dispositions may be conducted by way of oral statement or other methods, and in such cases, if requested by parties, the documents concerning the disposition shall be delivered without delay.*

Treaties – Interpretation – Obligations

Decision of the Constitutional Court on the Omission of Dispute Settlement under Article III of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between the Republic of Korea and Japan

Constitutional Court Decision 2012Hun–Ma939 (*decided on December 27, 2019*)

Issues Presented

The Complainants are persons who permanently returned to the Republic of Korea after having been mobilized to Sakhalin for forced labor etc. under the Japanese colonial rule, and their family members, all of whom have the

nationality of the Republic of Korea. They have not received back the wages for their forced labor in places such as coal mines run by Japanese companies, which they had to compulsorily deposit in the form of postal savings or postal life insurance in Japan. The Complainants argued that the Respondent, being the Minister of Foreign Affairs of the Republic of Korea, was not fulfilling his duty to take action to resolve the dispute over the treaty interpretation in accordance with the procedures specified in Article III of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between the Republic of Korea and Japan (Treaty No. 172) in 1965 (hereafter "the Agreement"). Specifically, there exist different interpretations as to whether the Complainants have the right to claim for refund and damages against Japan have been extinguished by the Agreement; Japan holds that such claims have already been extinguished whereas the Republic of Korea does not believe so. Therefore, the Complainants filed a constitutional complaint on 23 November 2012, seeking confirmation that such omission by the Respondent infringed on their basic rights and thus violated the Constitution.

Judgment

First of all, the Court viewed that the Agreement is a treaty duly concluded and promulgated under the Constitution and holds the same effect as domestic law pursuant to Article 6 (1) of the Constitution. According to Article III of the Agreement governing dispute settlements, where a dispute between Korea and Japan arises over the interpretation of the Agreement, the respective governments shall settle it first through diplomatic channels and then through arbitration. In this regard, the Court first confirmed that there exists a dispute over the interpretation of the Agreement between Korea and Japan.

Next, the Court recognized the Respondent's duty to seek dispute settlement under Article III of the Agreement stems from a constitutional mandate, particularly in light of the Preamble, Article 2(2), and Article 10 of the Constitution. (Specifically, the Court viewed that such duties can be derived from the part of the Preamble of the Constitution which states that the People of Korea upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919. Since the state failed to protect the lives and security of its people and led to mobilization during Japanese colonial rule, the Court acknowledged that the current government is obligated to recover human dignity and values of the forced laborers and their unreturned property.) That is, the Respondent is obliged to assist and protect its people, whose human dignity and value had been seriously impaired by the organized and continued unlawful acts of Japan, exercise their rights of claim

over the unreturned property and damages caused by it. And the fundamental rights of the Complainants might be seriously infringed if the Respondent failed to perform this duty.

Lastly, the Court examined whether the Respondent fulfilled its duty under the Agreement. According to the records, the Respondent has endeavored to settle the issue of claims of Sakhalin Koreans through various diplomatic channels. Therefore, it is difficult to say that the Respondent did not carry out the duties, since the Respondent suggested the commencement of diplomatic consultation to the Japanese government through the verbal note on 3 June 2013 and the Respondent requested Japan to make a sincere response on several occasions. Even if the Respondent has not been as prompt and active in dealing with the Complainants' claims against Japan as expected, given that diplomatic acts occur in the international environment in which the values and laws of countries differ, the Court recognized that the Respondent enjoys considerable discretion over when and how to implement dispute settlement procedures. Having considered all the circumstances, the Court viewed that the Respondent failing to utilize the dispute settlement procedure under Article III of the Agreement hardly constitutes an omission. Therefore, the Court ordered that all requests for adjudication are unjustifiable and thus should be dismissed. This decision was rendered based on the consensus of all of the Justices except for the concurring opinion of Justice Lee Jong-seok.

Comment

Though the Court acknowledged that the duty to act includes taking diplomatic action, it viewed that the Respondent has not failed to fulfill its duty as it utilized various diplomatic channels attempting to settle the issue of claims. Furthermore, the Court maintained that the Respondent enjoys considerable discretion when it comes to taking diplomatic action, which may not produce enough tangible results as expected by the complainants.

* Article III paragraph 1 and 2 of the Agreement stipulates as below.

1. *Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels.*
2. *Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note*

requesting arbitration of the dispute, and the third arbitrator to be agreed upon by the two arbitrators so chosen within a further period of thirty days or the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the third arbitrator shall not be a national of either Contracting Part

Treaties – Constitution – Human Rights

Decision of the Constitutional Court on Announcement of the Agreement on the "Comfort Women" Issue

Constitutional Court Decision 2016Hun–Ma253 (*decided on December 27, 2019*)

Issues Presented & Judgment

On 27 March 2016, the Complainants filed a constitutional complaint requesting the confirmation of the unconstitutionality of the agreement announced at a joint press conference by the Foreign Ministers of the Republic of Korea and Japan on 28 December 2015, claiming that the details of the agreement infringe upon their human dignity and value.

A constitutional complaint is a legal instrument through which a person can seek relief when an exercise or non-use of governmental power infringes on one's fundamental rights guaranteed under the Constitution. However, as the Court previously confirmed in the case 2014Hun-Ma926 decided on 28 May 2015, the person would not be allowed to file a complaint, if the exercise of governmental power, being the subject of judgment, does not affect the legal status of the person who wishes to file a constitutional complaint, since neither the possibility nor the risk of infringement of rights can be said to exist. In the same vein, the Court reviewed the following issues.

First, a treaty is an international agreement between subjects of international law intended to produce legal effects and governed by international law. But, states can also agree upon non-legal or non-binding agreements. Such agreements, in many cases, are not concrete or too abstract in content to be legally binding, like a confirmation of a common goal or a declaration of principles, and they generally do not undergo formal treaty conclusion procedures. It, however, still can be used as grounds to criticize or protest non-adhering states since states expect the agreement to be respected. Additionally, one needs to comprehensively take into account not only its form but also its

substance when distinguishing a treaty from a non-binding agreement. If an agreement is deemed non-binding based on such considerations, the agreement will not affect the legal status of the individual. In other words, such agreements may not be subject to adjudication on a constitutional complaint.

It is evident in this case that the Agreement is an official commitment jointly announced by the Foreign Ministers of Korea and Japan, and then endorsed by the head of the two countries. However, whereas often treaties are generally concluded in written form, the Agreement is an oral agreement. According to the Ministry of Foreign Affairs website of the two countries, the Republic of Korea uses "press availability" and Japan, "announcement at the press occasion," both adopting a title different from that of any ordinary treaty. Also, the Agreement was presented in the form in which two countries state their position numbered as ①, ②, and ③, which is also not a form of provisions usually used in treaties. Moreover, although the statement does not expressly specify the non-binding nature of the Agreement as to its validity, it does not use any expression that the binding intent of the parties can be inferred, adopting vague and everyday language in general. In addition, while the Agreement addresses the issue of redressing harm inflicted upon "Comfort Women" victims, which involves a sharp conflict between Korea and Japan and also related to the people's fundamental rights, the Agreement did not undergo any treaty conclusion procedure under the Constitution, such as the deliberation process by the State Council or approval from the National Assembly. Also, neither a treaty number was granted to the Agreement nor was given notice like treaties effected by notice, which are treaties dealt in practice due to their simple content. The same is also true of Japan. Above all, it is unclear whether any specific rights and obligations for Korea and Japan have been created considering the content of the Agreement.

Overall, the Court determined that the Agreement can hardly be considered as a legally binding treaty. Moreover, there is no reason to believe that the Agreement deals with any relinquishment or disposal of the rights of claims for damage of the "Comfort Women" victims because the Agreement does not stipulate contents such as but not limited to the relinquishment of such rights or waiver of judicial proceedings or legal measures, which general lump-sum settlements often include. Furthermore, after the conclusion of the Agreement, the Respondent has stated that it will make every effort to do what the Government needs to do to restore the honor and dignity of the "Comfort Women" victims as well as to heal their psychological wounds and that it will seek victim-centered solutions. This clearly shows that the Respondent did not or had no intention to give up exercising diplomatic protection.

In light of the above, the legal status of the "Comfort Women" victims is hardly affected by the Agreement. It is therefore difficult to say that the Agreement can infringe on the fundamental rights of the victims, such as their rights of claims for damages. Thus, the request for adjudication on a constitutional complaint against the Agreement is non-justiciable.

Comment

In this case, the Court rejected a petition filed by a group of "Comfort Women" victims and their bereaved relatives who claimed that the controversial deal in 2015 with Japan to settle the matter is unconstitutional. Although the Court recognized that gathering of views from the victims was not sufficient in the process of reaching the Agreement, it confirmed that the Agreement was a political agreement and therefore not subject to the Constitutional Court's review.

Jurisdiction – Sovereign Immunity – Municipal Law

Seoul Administrative Court Decision on Sovereign Immunity and Employment Relationship

Seoul Administrative Court Decision 2018GuHap67909 (*Appeals*) (*decided on September 5, 2019*)

Issues Presented

The Defendant-Intervenor had worked in the Embassy of Finland in Korea as a Public Relations Officer for two years whose employment relationship has been terminated due to the expiration of the contract. The Intervenor applied for a remedy for unfair dismissal to the Seoul Regional Labor Relations Commission (hereafter "the Seoul Commission"), designating the Finnish Ambassador as the Respondent. The Seoul Commission approved the application considering the dismissal to be unfair as there were no reasonable grounds for the justification of the termination of the contract as it was done by communicating the expiration of the contract to the claimant. Accordingly, the Plaintiff filed a lawsuit challenging the decision of the Seoul Commission based on sovereign immunity and other grounds. The Court confirmed that, whereas states enjoy jurisdictional immunity over their sovereign acts according to customary international law, this is not applied to the case regarding

private actions. The Supreme Court of Korea also decided that the Court can exercise jurisdiction over the foreign state's private acts unless there are particular circumstances to take into account. The aforementioned legal principle: so-called jurisdictional immunity of foreign states, sovereign immunity, state immunity, or judicial immunity, has the character of customary international law. It is generally understood that this rule incorporates not only the jurisdiction to adjudicate but also the jurisdiction to prescribe and enforce.

Judgment

The Court reviewed that the adjudication system under the Labor Commission promotes a fast, economical, and flexible process for remedy requests, which helps avoid overly costly and unnecessarily complicated and delayed proceedings under the civil procedure. But at the same time, the system is essentially a procedure for remedy. Therefore, it can be applied to determine whether the Seoul Commission and the National Labor Relations Commission can exercise administrative jurisdiction over the Republic of Finland.

The Intervenor carried out duties such as observing and analyzing the Korean media, planning and assisting the public diplomacy activities of the Embassy and promotion of Finland, organizing and assisting cultural events, preparing for visits of Finnish personnel to Korea, and administering and contents planning for the Embassy website and the Social Network Service. However, it is difficult to view that such duties are directly related to the exercise of sovereignty. Moreover, considering all circumstances (such as the status and responsibilities of the Intervenor, sovereign activities of Finland, and the correlation between the two), the Court maintained that termination of a contract is an act conducted by the Plaintiff as a party to a private contract rather than a sovereign one. In other words, it is not to say that there is a concern of interfering with the sovereign acts of the Republic of Finland when the Seoul Commission and the National Labor Relations Commission exercise jurisdiction regarding the termination of contract disputed in this case. Therefore, the Court ruled that the argument on sovereign immunity cannot be upheld.

Human Rights – Racial Discrimination – Municipal Law

Decision of the Seoul Central District Court on Individual Communication on International Convention on the Elimination of All Forms of Racial Discrimination and National Compensation

Seoul Central District Court Decision 2018Ga–Dan5125207 (*decided on October 29, 2019*)

Facts of the Case & Issues Presented

The education superintendent requested the Plaintiff, an English assistant teacher from New Zealand, to submit medical examination records that include HIV testing results in the process of discussing contract renewal. Plaintiff failed to renew the contract because Plaintiff refused to submit the documents as requested. Therefore, the Plaintiff filed an individual communication to the Committee on the Elimination of All Forms of Racial Discrimination (hereafter "CERD"), and CERD expressed the view that it infringed on the Plaintiff's rights. Then the Plaintiff filed a claim for redress against Korea. Defendant, however, argued that it is not clear whether a Korean national can demand compensation for the damages against the Government of New Zealand. And if so, the conditions are not far off-balance compared to that of Korea by referring to Article 7 of the State Compensation Act, which stipulates that "This Act shall apply only in cases where a mutual guarantee with a corresponding nation exists if a victim is an alien." Overall, the Defendant challenged that Plaintiff's claim is unfounded under the mutual guarantee principle (so-called reciprocity rule) in the State Compensation Act.

Judgment

Article 7 of the State Compensation Act requires "a mutual guarantee with a corresponding nation if a victim is an alien" to invoke the right to state compensation. But the Court maintained that requiring the conditions in the respective country to be equivalent or more generous results in excessive restriction of the rights of aliens. It even goes against the current trend in which international exchange is active more than ever. Besides, the respective country may reciprocally refuse to protect the Korean nationals in the future. Therefore, it is reasonable to say the individual meets the requirements to exercise their right if the conditions to invoke the right to state compensation are not far off balance, and the terms of the respective country are not more onerous than that of Korea, having no actual difference between each other in essential points. The Supreme Court confirmed in its previous decisions mutual guarantee exists if the individual can expect the recognition of the invocation of the rights by the Court of the respective country, absence of a precedent. Also, a treaty is not required, but comparing the conditions provided by laws, cases, and customs is sufficient to prove the existence of the guarantee.

Crown Proceeding Act 1950 of New Zealand Part 1 (Substantive Law) Article 3 para 2 (b) and Article 6 stipulates in a way that the Government of New Zealand is liable in respect of torts committed by its servants or agents. Here, regardless of the nationality of the person, all people have the right to claim or demand compensation through the civil proceedings against the torts that the Government is liable. Since the requirements set by New Zealand are not far off balance, and the conditions are not more complicated than the State Compensation Act, it is expected that the Court of New Zealand would recognize the rights of state compensation of a Korean national. Therefore, the Defendant's argument cannot be upheld as there exists a mutual guarantee under Article 7 of the State Compensation Act between the Republic of Korea and New Zealand.

The Court also reviewed the completion of the extinctive prescription. Setting aside the validity of the views by the CERD or its legal effect, Plaintiff had access to the specifics and the background on this case only after the CERD made public of its views on June 12, 2015. That is, Plaintiff objectively had obstacles in exercising the rights to compensation before the date of release of the views of the CERD. Although Plaintiff suffered from damage such as departing Korea without contract renewal, he has continuously worked for the abolishment of such unlawful guidelines. Taking account of the circumstances, it is clear that at least the Plaintiff was not silent over the infringement of the rights. Therefore, the necessity of protecting the Plaintiff is significant. On the other hand, it seems that the Defendant had a thought that such a request is unjust as either the Defendant or the Ulsan Metropolitan Office of Education did not further request HIV test results to English assistant teachers from 2010, a year after the filing of this case. However, it is still far unjust to deny the fulfillment of obligation grounded on the completion of the extinctive prescription. Therefore, the Court ruled that the plead regarding the extinctive prescription cannot be upheld as it goes against the principle of good faith.

Environmental Law – Marine Space – Ocean Environment

Act on Marine Spatial Planning and Management (*Act No. 15607*)

Legislation and Administrative Regulations

The Republic of Korea's climate change response policies for the ocean are implemented under the Ministry of Ocean and Fisheries, and the Ministry of leads the integrated management of marine spaces as well as efforts to

strengthen the national management system for ocean environments. In this vein, the Act on Marine Spatial Planning and Management was entered into force on April 18, 2019 (which was newly enacted on April 18, 2018) for the integrated management of marine spaces.

With the growing demands for the development of marine space, the legally and scientifically sound system for efficient and effective management of ocean space is now in place based on this Act. Article 1 states that "[t]he purpose of this Act is to promote public welfare and establish a prosperous environment for the ocean by prescribing matters necessary for formulating, implementing, etc. of a plan for the sustainable use, development and conservation of marine space."

Under the plan, the Ministry of Ocean and Fisheries aims to formulate spatial plans (continuing an undertaking that started with the southern coast in 2018) up to the eastern coast in 2021 and all ocean areas by 2022. Climate change response policies for the ocean are also scheduled to be implemented in coordination with the Ministry of Ocean and Fisheries' integrated coast management.

State Practice of Asian Countries in International Law

Nepal

*Amritha V. Shenoy & Ravi Prakash Vyas**

Air Law – Civil Aviation Security Rules, 2019

Legislation Passed by the Parliament of Nepal in 2019

The First Amendment to Civil Aviation Security rules was published in Nepal Gazette on December 9, 2019. Nepal is a party to the Convention on Civil Aviation (ICAO) and a Member of the International Civil Aviation Organization.

Environment Law – Environment Protection Act, 2019

The Environment Protection Act was authenticated on October 13, 2019. It repealed the previous Environment Protection Act passed in 1997. One of the primary features introduced by the Act is to introduce an Environment Fund under Section 33 to protect the environment, national heritage, and control pollution. The Act attempts to fulfill the right to a clean environment ensured under Article 30 of the Constitution of Nepal, 2015. The Act is passed in the light of Nepal's participation in the United Nations Framework Convention on Climate Change (UNFFC), UN Convention to Combat Desertification (UNCCD), Convention on Biological Diversity (CBD), The Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Environmental Law – Forest Act, 2019

The Forest Act was authenticated on October 14, 2019. The purpose of the Act is to "manage the national forests as the Government managed forest, forest protection zone, community forest, partnership forest, lease-hold forest, and

* Assistant Professors at Kathmandu School of Law.

religious forest and to contribute to national prosperity by protecting, promoting and utilizing the wildlife, environment, watersheds, and biodiversity while promoting the private, public and urban forests" as described in the Preamble. The Act is comprehensive dealing with the aforementioned different types of forests. It promotes afforestation under Article 70. The Act is a reflection of Nepal's signature to the UN Convention to Combat Desertification and the Convention on Biological Diversity.

Environmental Law – Regulations to Regulate and Control International Trade in Endangered Wild Fauna and Flora, 2019

Regulations to regulate and control International Trade in Endangered Wild Fauna and Flora were authenticated on October 17, 2019. The regulations are passed according to the Act to Regulate and Control International Trade in Endangered Wild Fauna and Flora, 2017. The Act tries to fulfill Nepal's international obligation as a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973.

Human Rights – Children's Rights – Juvenile Justice Procedural Rules, 2019

Juvenile Justice Procedural Rules were published in Nepal Gazette on June 3, 2019. The rules were formulated for elucidating the adjudicatory procedure of cases filed against minors under the parent Act Relating to Children, 2018. The rules also ensure the rights of the child as mentioned in Article 39 of the Constitution of Nepal, 2015. Article 39(8) particularly ensures the right to juvenile-friendly justice. Nepal is a party to the United Nations Convention on the Rights of the Child and the two optional protocols to the Convention.

International Economic Law – The Foreign Investment and Technology Transfer Act, 2019

The Foreign Investment and Technology Transfer Act was enacted on March 27, 2019. The Act aims at easing the investment scenario in Nepal. Section 15 mentions the procedure of application by a foreign investor before the Foreign

Investment Approving Body. According to Section 17, the Body can approve an investment up to an amount of Nepalese Rupees Six Billion. A sum exceeding the amount shall be approved by the Investment Board under the Investment Board Act, 2011. Further, sharing of information with Nepal Rashtra Bank is provided under Section 16. Section 40 of the Act lays down a clear procedure for the settlement of disputes. Concerning international institutions, Nepal is a member of the World Trade Organisation. Nepal has accepted the UNCITRAL Model Law and endorsed the Convention on the Recognition & Enforcement of Foreign Arbitral Awards (the New York Convention) of 1958. Nepal is a party to various Bilateral Investment Treaties. The Act is to be read in consonance with Public-Private Partnership and Investment Act, 2019.

International Economic Law – The Safeguards, Anti-Dumping and Countervailing Act, 2019

The Safeguards, Anti-Dumping, and Countervailing Act, 2019 was authenticated on October 14, 2019. The Act empowers the Government of Nepal to impose Safeguard measures to protect the domestic industries from material injury or serious injury. The legislation is a result of Nepal's membership in the World Trade Organisation. It complies with the WTO agreements viz. (a) Agreement on Safeguards (b) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and (c) Agreement on Subsidies and Countervailing Duty.

International Economic Law – Asset (Money) Laundering Prevention Rules, 2019

The First Amendment to Asset (Money) Laundering Prevention Rules was published in Nepal Gazette on January 4, 2019. The amendment concerns technical aspects. Nepal has acceded to the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances that criminalizes money laundering.

Treaties Ratified by Nepal in 2019

Environmental Law – Amendments to Annexes II, VIII, and IX to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

Nepal signed the amendments to Annexes II, VIII, and IX to Basel Convention on May 10, 2019.

Environmental Law – Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer Relating to the Controlled Substances in Annex C, Group I, for Parties Not Operating under Paragraph 1 of Article 5

Nepal signed the adjustments on November 9, 2019. It entered into force on June 21, 2019.

Environmental Law – Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation to the Convention on Biological Diversity

Even though Nepal ratified the Nagoya Protocol on December 28, 2018, it entered into force on April 28, 2019.

Human Rights – Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

The Protocol was registered on July 16 2019 and acceded by Nepal a year later on July 16, 2020.

Treaties under Consideration in 2019

Two international treaties were taken under consideration by the House of Representatives of the Parliament in 2019. The Doha Amendment to Kyoto Protocol was registered in the House of Representatives on July 22, 2019. The Intergovernmental Agreement on Dry Ports was registered in the House of Representatives on July 21, 2019.

Human Rights – International Conference on Protection of Human Rights of Migrant Workers 2019

The International Conference on Protection of Human Rights of Migrant Workers was convened in November 2019. Sixty-two representatives from thirty States participated in the Conference. The government of Nepal provided financial assistance to organize the conference under the aegis of the International Labor Organization, International Organization on Migration, and the United Nations Development Program.

Universal Health Coverage and Climate Action Summit, 2019

Nepal participated in the Universal Health Coverage and Climate Action Summit in 2019.

Environmental Law – Environment Justice and Protection

Cases Related to International Law

Arjun Giri et al. v. Office of Prime Minister and Council of Minister et al. [*NKP 2076 Vol. 7 Decision No, dated January 17, 2019*]

Nepal's government published a notice in Nepal Gazette stating that the total life span for public vehicles shall be twenty years. Such vehicles shall be scrapped within two years as old vehicles increase environmental pollution and are not passenger-friendly. A similar notice was provided for electric vehicles and three-wheelers and microbus operated by gas. However, they were not

given a different life span. A notice published by the Transport Management Office stated that the petitioners were informed not to operate such vehicles. The petitioners filed the case mentioning that both the vehicles provided the same service and were environment friendly. Moreover, the decision and the published notice violated Article 18 (right to equality), and deprivation of the right to equality incurred deprivation of benefit from business as guaranteed in the fundamental right to property under Article.25 and right to employment under Article.33 of the Constitution of Nepal.

The issues highlighted before the court were whether electric vehicles and vehicles operated through gas are similar. Is there a difference in the amount of pollution caused by them? The court also had to decide if the decision violated the right to equality, right to property, and right to employment?

The court stated that the writ petitioner could not provide the authenticated facts to prove their claim that the gas-powered vehicle and electric vehicle's pollution were of the same level. It also stated that gas-powered vehicles are of a different nature than electric vehicles and various report have shown that gas-powered vehicles cause more pollution than electric vehicles. Court also expressed that setting standards for the use of public transport, taking into account public health and hazards, does not mean controlling employment and violating the right to employment. While Article 30 of the Constitution provides for the right to a clean environment and guarantees the right of every citizen to live in a clean and healthy environment, so necessary legal measures adopted to keep the environment clean and healthy to prevent any adverse effect on the environment and people should not be taken or interpreted in another way. It set out that to live dignified quality of life both means of earning and standard environment is equally important. In the absence of a standard environment, the applicant shall not be able to exercise the employment effectively. Notice published in the Gazette stipulates the maximum age of public transport 20 years. The government is not trying to restrict the employment of the applicants as it is only for 20 years old vehicles, rather it seems to be trying to reduce the adverse effects on the environment and wellbeing of people. The decision made keeping in view the safety, health, and environment of the general public and passengers and the information dated published in the Gazette did not seem unreasonable to stop its implementation.

The court stated that, as environmental protection is becoming a global concern today, the concept of environmental justice has been adopted by Nepal through the ratification of international treaties, the International Covenant on Economic, Social and Cultural Rights (1966), and the Nepal Commitment Declarations such as Stockholm Declaration (1972), Rio Declaration (1992).

Taking into consideration the national as well as international laws, the court found that the action was necessary for the implementation of the fundamental rights guaranteed by the constitution and was not illegal. Since the constitutional and legal rights of the writ petitioners have not been violated, the writ petition was quashed.

The court in its *ratio decidendi* held "Setting standards for the use of public transport, taking into account public health and hazards, does not mean controlling employment and violating the right to employment." The court also noted that "While it is the responsibility and obligation of the state to provide easy access and facilities to the citizens in the transport sector but if any action was taken in the name of providing access to transport to the public, adversely affect the environment, public health and if the government doesn't halt such action then it can't fulfill its responsibility in an effective manner towards the citizen and law and shall be contrary to the principle of sustainable development." It also observed that "The Government shall have the power to take necessary legal measures to reduce the risk to the life and health of the people, to set standards for the regulation of such vehicles and if necessary, can prohibit."

Environmental Law – Biological Heritage – Chitwan National Park

Advocate Ramchandra Simkhada et al. on behalf of Nepal Consumer Forum v. Nepal Government, Prime Minister and Council of Minister [*NKP 2076 Vol. 2, Decision No, 10204, dated February 13, 2019*]

Consumer rights are enshrined in the Universal Declaration of Human Rights 1948 and in International Covenant on Economic, Social and Cultural Rights 1966 and the UN has also set the United Nations Guidelines for Consumer Protection which has guarantee environmental rights as consumer rights. Following the publication of news of construction of road from Parsa district to Thori to Triveni of Nawalparasi passing through Chitwan National Park by exploiting the area and natural resources of Chitwan National Park through various media, the petitioners filed an application to the office of the respondent regarding the documents related to the construction of road from Parsa district Thori to Triveni of Nawalparasi passing through Chitwan National Park but the respected office hasn't made any response to it. Petitioners then filed a writ of certiorari on behalf of Nepal Consumer Forum regarding the exploitation of the Chitwan National Park area with the construction.

In the writ petition, the petitioner filed a petition based on Articles 12, 13, 16, 17 (3), 35 (5), 107 (2) of the Interim Constitution of Nepal, 2007, Articles 3, 4, 5, 7, 9, 10 of the Environment Protection Act, 1997. Additionally, the petition also referred to Article 9 of the Treaty Act, 1990 and other related international conventions Convention on Biological Diversity 1992, CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) 1973, Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971.

The pertinent issues that the court was to answer to were, what was the significance of Chitwan National Park in terms of natural, biological resources and with regards to environmental protection? What are the challenges in conserving the biological heritage and environment of Chitwan National Park? How these challenges should be viewed in the context of national and international challenges? And if the proposed Environment Impact Assessment Report of Road construction has addressed the environmental conservation challenges?

While addressing the question about the significance of Chitwan National Park in terms of natural, biological resources, the court recognized the significance and importance of Chitwan National Park. The park is rich in wildlife, flora and fauna, aquatic animals and other natural resources, its wetland are suitable habitats for the birds, wildlife and aquatic animals and 60% of foreign tourist visiting Nepal come to this park and it has been listed in World Heritage Site in 1984 by UNESCO with Outstanding Standing Universal Value.

The court identified direct and indirect challenges in conserving the biological heritage and environment of Chitwan National Park. The direct challenges include poaching, arson, deforestation and encroachment and of park areas, flooding of wild animals due to flood, cross border movement of wildlife due to the park connected to the Indian border, attack on farmers and their livestock and can create conflict between the public and the national park. Indirect challenges include political turmoil and transition, poverty, population growth, migration and urbanization, deforestation, pollution, and climate change. The other side of the challenge relates to the commitment made to Nepalese citizens through constitutional and legal frameworks and Nepal's commitment to the world community to abide by international treaties and agreements.

The court also took the notice of the replacement of the Interim Constitution by the Constitution of Nepal 2015 which further strengthened the rights enshrined in the Interim Constitution. Article 30 of the current constitution states the right to a clean environment, the right to be compensated for environmental pollution and degradation, and the responsibility to strike a balance

between environment and development. Implementation of the constitution is a major responsibility of the state, along with that as a responsible member of the world community Nepal must also abide by its international treaties. There are a large number of international conventions to which Nepal is a party, but the conventions mentioned by petitioners are particularly noteworthy in light of the controversy presented here.

Given that the Chitwan National Park is one of the World Heritage Site under the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, Nepal has the responsibility for its protection and preservation. Similarly, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971 is important as it incorporates Bishajari Taal for its protection which is located in Chitwan National Park. Convention on Biological Diversity 1992 in Article 14 has pointed out that the Environment Impact assessment should be carried out on any activity that has a significant adverse effect on biodiversity. Due to the provisions of Article 9 of the Treaty Act 1990, the provisions of the Conventions have acquired the status of Nepali law. Nepal cannot deviate from its legal obligation to abide by the provisions of the Conventions on the Protection of the Chitwan National Park.

The Environmental Impact Assessment submitted by the Office of the Attorney General only mentions Chitwan National Park as a World Heritage Site but it does not mention the studies conducted by UNESCO and IUCN, discussions and decisions made by the World Heritage Committee, or its follow-up or analysis of environmental heritage studies. The court notes that that the EIA is not just a formality. It was also stated that in a clear view of UNESCO that the widening and asphalting of Thori-Bharatpur road should not be done.

The court believed that the construction of a road in the area of the national park shall put it in danger. So, the court gave the decision that no further work shall be carried out for the construction of roads within the Chitwan National Park until Environmental Impact Assessment is carried out on the consultation and consent of UNESCO and Chitwan National Park Office established by law.

The *ratio decidendi* of the case is that "The government is not the owner of public property; it is only the trustee. Natural Resources or Heritage is for the benefit of all the people of Nepal, present and future generations so utilization of natural resource should be for benefit of citizen not for the personal benefit. The government needs to understand and reflect on the fact that natural resources are the property of all the people of the nation, present and future generations or even descendants." The case also highlights that "no work related to road construction should be carried out within the national park

unless the Environmental Impact Assessment conducted in consultation and agreement with the concerned bodies including UNESCO gives permission."

Human Rights – Procedural Fairness and Justice

Sudhir Basnet v. Kathmandu Metropolitan Police Range and Metropolitan Crime Division et al. [*NKP 2076 Vol. 5, Decision No. 10260* (*Habeas Corpus*), *dated April 15, 2019*]

The petitioner is the Director of Kohinoor Hill Housing Pvt. Ltd and Chairman of Oriental Cooperative Limited. Kohinoor Hill Housing Pvt. Ltd. had invested in various sectors, including land development, housing, apartments, while Oriental Co-operative Ltd. had been collecting and investing deposits to increase the cooperative's shareholders' income. The country's situation and then economic policy of Nepal Rastra Bank led to a market slump in business due to which the return and recovery could not be balanced as the depositors of the cooperatives demanded the return of the deposit at once. The petitioner was arrested based on the complaint of the depositor of the cooperative and a case of fraud was filed against him in the Kathmandu District Court. The petitioner was imposed with a fine; following the payment of the fine he was released from prison.

The petitioner was arrested and remanded in custody by the plainclothes police personnel from the Kathmandu Metropolitan Police Range and Metropolitan Crime Division as per the letter of the Problematic Cooperative Management Committee. Thus, the writ petition of Habeas Corpus was filed by the petitioner's mother on behalf of Sudhir Basnet to release Sudhir Basnet who was in illegal detention as the reason for the arrest wasn't disclosed.

The court had to decide whether the habeas corpus order will be issued as per the demand or not and whether the action taken by the respondents in arresting the petitioner is in accordance with the constitution, law, and the accepted principles of justice.

The court stated that the Cooperative Act, 1992 was in force when the dispute first began which later was repealed by Cooperative Act 2017 whose Article 114 provided remedial action for the crime committed under the Act and Article 122 of the Cooperative Act 2014 listed the crimes under the Act. The court recognizes that criminal law has no retrospective effect and has stated Article 11(2) of the Universal Declaration of Human Rights 1948 which provides:

> No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

The court makes mention of the right to justice under Article 20 of the Constitution of Nepal, 2015, sub-article (4), "no person shall be liable to punishment for any act which is not punishable by the prevailing law and no person shall be punished more than prescribed in law" and the sub-article (6) "No person shall be prosecuted more than once for the same offense in court and shall not be punished" while giving its decision. These subarticles under Article 20 prevents prosecution of any act that is not considered punishable by law when the crime was committed. The purpose of the previously mentioned provisions relates to any act that is not considered punishable by law when the crime was committed. In cases where the act was not punishable as crime under present legal instruments, the particular act shall not be punished by making new laws. Court also mentioned that procedural law might carry out according to the present law. However, substantive law shall not have a retrospective effect.

Despite no punishment for the offense imposed on the petitioner as per the Cooperatives Act, 1992, the petitioner was already punished for the crime of fraud in the case filed by depositors of Oriental Co-operative Limited. The court gave its decision by saying that there was no provision of punishment in the then prevailing Act, i.e. Cooperative Act 1992, when the crime was committed. However, the demand for re-punishment has been made based on the Cooperatives Act, 2017 issued after the date of the misdemeanor. Once the offense has been established and even punished according to the prevailing law, the offense based on amended law cannot be consistent with the legal system and principles. So the accusation made upon the chairperson shall attract Cooperative Act 1992 rather than the Cooperatives Act, 2017. As the chairperson has already been punished, the detention made according to the Cooperatives Act, 2017 is not consistent with the law.

The Court gave the decision based on constitutional and legal provisions, universal principles of criminal law and international treaties, court rulings, and the reports from the Commission of Inquiry. It relied on the fact that the petitioner has already paid imprisonment in a fraud case. The petitioners shall be released immediately from the respondent's illegal detention by issuing a writ of habeas corpus.

The *ratio decidendi* of the case is that "Once the offense has been established and punished in accordance with the prevailing law, sustaining the offense based on amended law cannot be consistent to legal system and principles."

Human Rights – Protecting the Rights of the Women

Sukum Thapa et al. v. Pitambar Thapa et al. [*NKP 2076 Vol. 9, Decision No. 10346, Dated July 7, 2019*]

The petitioners, in this case, are the wives and daughters of the respondent Pitambar Thapa. Among the petitioners, the first wife, Chitra Kumari Thapa, and third wife Sukum Thapa filed a property partition case against Pitamber Thapa. The Supreme Court decided that property owned by Pitamber Thapa's father Chudamani shall be divided to Pitamber Thapa's mother, Nanda Kumari, and Pitamber Thapa himself, and his property has been divided into 9 shares as there were 9 inheritors. However, Nanda Kumari passed away before the preparation of the partition document. Later, while preparing the partition document, Pitamber claimed half of the property on the basis of the deed of legacy (residual will) given to him by his mother. The partition document was made according to the respondent's claim. The District Court and Appellate court later revoked this. A writ petition was filed by the respondent where the Supreme Court dismissed the petition.

The respondent claimed that the shareholding decreased due to the marriage of the daughters. The respondents further claimed that the deed of legacy was passed to respondent Rakshya Thapa, the fourth wife respondent Pitamber Thapa and property of Nanda Kumari should be inherited by Rakshya Thapa. Thus, the petitioner filed the case claiming that the partition of property should be into nine shares, including the property of deceased Nanda Kumari, and the daughter should be a coparcener of the property.

The respondent's daughter Manisha and Nisha were married before Pitamber Thapa filed the petition. However, the Constitution of Nepal 2015 was already promulgated. Article 38 (1) had provided that every woman has equal lineage right without gender-based discrimination. As the respondent daughters were married earlier, the substantive rights essentially provided by Muluki Civil Code 2017 to have the right over parental property cannot be applied. Thus, the court had to decide whether the partition of property should be done into nine shares, including the property of deceased Nanda Kumari or not?

Pitamber claimed half of the property owned by his mother based on the deed of legacy/ residual will given to him by his mother. Rakshya Thapa did not raise any concern. However, the respondents again claim that the deed of legacy was passed to respondent Rakshya Thapa, the fourth wife respondent Pitamber Thapa and the property of Nanda Kumari should be inherited by Rakshya Thapa. In such a situation, the court stated that the then Muluki Ain Registration Chapter No. 34 cannot be applied by prioritizing an older document.

The court mentioned Article 38(1), 18(5), 18(3), and stated that the constitution of Nepal had given equal lineage rights to sons and daughters and equal rights in ancestral property. It also seems to prohibit discrimination between sons and daughters based on marital status.

The rights of independent individuals are related to the right to self-determination, marriage, family right, and property rights.

The court recognizes Article 1 of the Convention on Elimination of all Forms of Discrimination against the Women. The article states that "discrimination against women" shall mean any distinction, exclusion, or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, based on equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Nepal is a party to the Convention. In line with the provision, it presents that Article 1 of the CEDAW presents the discrimination based on marital status and also notes that excluding them or restricting their rights is also discrimination against men and women.

The court stated that there seems to be discrimination against women when choosing between getting married or inheriting ancestral property based on being a woman. Women's identity and property rights in ancestral property are not determined based on marriage. The right to ancestral property is a right created after birth and obtained after birth. Treating sons and daughters differently based on marital status is a form of discrimination. Different treatment can restrict a woman's access to the property and even exclude daughters from patrimonial property rights. The constitution and the law intended to give the daughter the same share in the son's ancestral property. The Supreme Court has already established the daughters as a coparcener. Even while preparing the partition document, the respondent recognized the daughters as a coparcener. Thus, the argument presented later by the respondent stating that daughters are not coparcener as they got married earlier cannot be undertaken.

By issuing the order of *mandamus*, the court decided that there should be a partition of property common to all the coparcener, including the property of

deceased Nandamaya, and daughters of the respondent are the coparcener of the property. The Supreme Court overturned the High Court's decision to exclude the daughter from coparcener through the order of certiorari. The court stated that the decision of the High Court was contrary to the Constitution, International Convention to which Nepal is party, and domestic law of Nepal.

The court promulgated, "To make a woman choose to get married or get ancestral property just based on being women is discriminatory. The right to ancestral property is a right created after birth and obtained after birth. Treating sons and daughters differently based on marital status is a form of discrimination. Different treatment can restrict a woman's access to the property and even exclude daughters from patrimonial property rights." The *ratio decidendi* for the case states that the constitution and the law intended to give the daughter the same share in the ancestral property as the son.

International Economic Law – Intellectual Property and Trademark

CA K.N. Modi on behalf of Tejram Dharampal Firm v. Pradip Kumar Aanchaliya on behalf of Ganapati Tobacco Private Limited [*NKP 2076 Vol. 7, Decision No. 10303, dated 24 June 2019*]

Ganapati Tobacco Private Limited, a company based in Nepal, Limited applied for the registration of the trademark 'RAJ NIWAS' of International Class 31 and 34 in the name of Ganapati Tobacco Private Limited. Terjram Dharampal Firm, a firm based in Delhi, Limited, applied for the registration of the trademark 'RAJ NIWAS' of International Class 31 and 34 in the name of Ganapati Tobacco Private Limited Limited applied for the registration of the trademark 'RAJ NIWAS' of International Class 31 and 34 in the name of Ganapati Tobacco Private Limited filed the application claiming the same trademark. Tejram Dharampal Firm ascertained that the RAJ NIWAS trademark product was registered in India and that video ads could be seen on YouTube.

The Department of Industry decided that although Ganapati Tobacco Private Limited first applied for the registration of trademark RAJ NIWAS, it has been proved that Tejram Dharampal Firm is the authorized owner, and trademark RAJ NIWAS shall be registered in the name of Tejram Dharampal Firm.

Ganapati Tobacco Private Limited filed an appeal in High Court Patan. The Deputy Registrar High Court ordered to stop the registration concerning the disputed trademark in the current situation in the name of Tejram Dharampal Firm. Later, both the parties filed the case in High Court Patan. The High Court then ordered not to carry out the act of registration unless

the trademark dispute is resolved and decided that trademark RAJ NIWAS shall be registered in the name of Ganapati Tobacco Private Limited. Following High Court Patan's decision, Tejram Dharampal Firm applied to quash the Supreme Court's decision. The application was filed based on Section 18 subsection (1) of The Patent, Design, and Trade Mark Act, 1965.

Both the parties brought their cases before the court, with claims to be observed by the court. Tejram Dharampal Firm stated that Nepal being a member of the WTO is bound to comply with the TRIPS fully. As Nepal has become a party to international treaties on protecting intellectual property, such as the Berne Convention, the Paris Convention, and the TRIPS under the WTO, Nepal must abide by those conventions' provisions under the Nepal Treaty Act, 1990. It was also stated that after becoming a member of the WTO, Nepal has committed to provide international protection to the industrial property by amending The Patented Design and Trade Mark Act, 1965 through the Act Made to Amend Some Nepal Acts Relating to Export and Import and Intellectual Property, 2006.

The primary claims raised were that the RAJ NIWAS trademark is registered in Tejram Dharampal Firm's name in UAE and Lebanon. It was also important to take note that the use of the trademark was being advertised. The registration process was in process in other countries and agreements were reached with Indian and Nepalese manufacturers to use trademarks. Thus, it was claimed that the Tejram Dharampal firm was the official user of the RAJ NIWAS brand. The party also states that it was registering the brand as its industrial property even in Nepal.

Ganapati Tobacco Private Limited claimed that Ganapati Tobacco Private Limited first applied to register trademark RAJ NIWAS. Also, as mentioned, RAJ NIWAS trademarks Class 31 and Class 34, Vijiayshree Food Products Pvt. Ltd has registered RAJ NIWAS trademarks in Sri Lanka, Bangladesh, Afghanistan, Pakistan, Iran, Iraq, Kenya, Uganda, Mozambique, South Africa, and Switzerland and applied for registration in some countries which was later handed over to Ganapati Tobacco Private Limited through Deed of Assignment. So, a document related to the registration of a trademark in countries party to the Paris Convention is provided. An excise duty of NRS 25,149,600 has been paid to the Inland Revenue Department. Thus, the court to decide on the following:

- What are the provisions in the law regarding the right to trademark? Moreover, under what conditions can a trademark registered in another country can be recognized in Nepal?
- In whose name should the trademark RAJ NIWAS be registered?

In deciding the case, the Supreme Court stated that the trademarks are considered an identifying mark of intellectual property and part of one's intellect. Supreme Court has recognized the definition of trademark given by Agreement On Trade-Related Aspects Of Intellectual Property Rights, Section 2 Article 15.

The court asserted that registration and use of trademarks are considered an important aspect to obtain trademark rights. These two bases seem to be the global basis for trademark registration so far. Just because a trademark is registered in one country, it is not automatically recognized in another. Each nation has its laws for trademark registration. Even well-known trademarks registered in other countries are eligible for acquisition in that country only after they have been registered under the concerned country's laws. Article 6(1) of the Paris Convention, to which Nepal is a party, states that "The Conditions for the filling and registration of trademarks shall be determined in each country of the Union by its domestic legislation."

While deciding in whose name the trademark RAJ NIWAS should be registered, the Supreme Court mentioned Section 21C of The Patent, Design, and Trade Mark Act, 2022 (1965), which provides that "the Department may register patents, designs, and trademarks registered in foreign countries without conducting any inquiries if an application is filed for their registration along with certificates of its registration in a foreign country." In this case, the court said that the applicant had filed the application after the respondent's application for the trademark registration. The claim made by the applicant was that the RAJ NIWAS trademark was registered in the name of Tejram Dharampal Firm in UAE and Lebanon, but evidence regarding the registration was only after the date of application for registration.

The court opined that even though the applicant claims that it has been producing goods and delivering them to different countries in the trademark of RAJ NIWAS and advertising it; it does not align with the Patent Design and Trademarks Act, 1965, where trademarks related to a product or advertisement can be registered based on product and advertisement alone. Nor does it appear in international intellectual property law that trademarks can be registered based on product and advertisement. Article 6 D of the Paris Convention also states that "No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin." Although the appellant claimed that 'RAJ NIWAS', under the trademark name, was being manufactured in India and was being advertised and promoted, the disputed trademark did not appear to have been registered in India (country of origin) when applied for in Nepal. Thus, the court noted that the trademark RAJ NIWAS could not be registered in Tejram Dharampal Firm's name.

The court decided that the trademark RAJ NIWAS should be registered in the name of Ganapati Tobacco Private Limited and not in the name of Tejram Dharampal Firm. It gave the decision based on factual details presented, the Paris Convention, The Patent Design and Trademarks Act, 1965, and judicial precedents.

The *ratio decidendi* propounded by the court stated, "any firm company or person to symbolically identify their creation, to distinguish it from others and to confirm that such product is their creation, the word, symbol or picture used or a combination of these three things is called a trademark." It further added that, "being in the trademark registration process and having a registration certificate are two different things. The law requires that a trademark be registered in another country. It must be with a certificate of registration and an application for registration in the Department of Industry. The mere mention in the application does not mean that such certificate was obtained without obtaining a trademark registration certificate from abroad." It highlighted that "the intent to recognize and register a trademark related to a product solely based on the product and advertisement does not appear to be in the provisions of Article 6 of the Patent Design and Trademark Act, 2022 and Article 6 of the Paris Convention."

Acknowledgements

We acknowledge the research support by research assistants Ms. Pranjali Kanel and Ms. Ritu Syangtam.

State Practice of Asian Countries in International Law

Philippines

*Jay L. Batongbacal**

Human Rights – Treaties and Covenants – Conduct of Law Enforcement

Judicial Decisions

Representative Edcel C. Lagman, et al v Executive Secretary Salvador C. Medialdea, et al [G.R. *No. 243522, February 19, 2019*]

On May 23, 2017, the members of the Maute Group and Abu Sayyaf Group violently took over the government and private facilities, causing numerous casualties, and started flying the flag of the Islamic State of Iraq and Syria (ISIS) in Marawi City. President Rodrigo Roa Duterte issued Proclamation No. 216 declaring a state of martial law and suspending the writ of *habeas corpus* for a period no exceeding sixty (60) days in the whole island of Mindanao, where Marawi City is located. Two days later, both Houses of Congress expressed full support to the Proclamation through Senate Resolution No. 388 and House Resolution No. 1050, finding no cause to revoke the same. Subsequently, upon the request of the President, the effectiveness of the declaration was extended until December 31, 2017, in a Resolution of Both Houses No. 2 issued in a Special Session on July 22, 2017. On December 8, 2017, the President again asked both the Senate and House of Representatives to extend the declaration of martial law and suspension of the privilege of the writ of habeas corpus for one year, from January 1, 2018, to December 31, 2018.

Before the expiration of the second extension of Proclamation No. 216, the President requested a third extension from January 1, 2019, to December 31, 2019, upon the recommendations of the Secretary of National Defense and the Chief of Staff of the Armed Forces of the Philippines citing their respective assessments of the need to eradicate local terrorist and other lawless armed groups, their foreign and local allies, and contain the rebellion in Mindanao and prevent it from escalating to other parts of the country, among other reasons.

* Associate Professor, University of the Philippines College of Law.

 | doi:10.1163/9789004501249_015

On December 12, 2018, the two Houses of Congress issued Joint Resolution No. 6, declaring the state of martial law and suspending the privilege of the writ of *habeas corpus* in the whole of Mindanao for another year.

As they had done with the first proclamation and with the previous extensions, the petitioners filed a petition assailing the sufficiency of the factual basis of the third extension of the declaration of martial law and suspension of the privilege of the writ. Among the arguments raised, such as the cessation of seizure of Marawi City and procedural issues regarding the manner of extension of the declaration, the petitioners asserted that allegations of human rights violations in the implementation of martial law in Mindanao were sufficient to warrant the nullification of its extension.

The Supreme Court dismissed the petition, finding that the declaration of martial law was justified by the existence and persistence of a state of rebellion in Mindanao, and public safety warranted the extension thereof. It also found that Congress had the prerogative to cause its extension and there were no restrictions on the period for which it could be extended. Specifically, on the issue of alleged human rights violations, the Court ruled that judicial and administrative remedies remained available despite the state of martial law, and that in relation to the international human rights principles established under the Universal Declaration of Human Rights (UDHR), the law enforcement officials were still guided by the principles and safeguards declared in the International Covenant on Civil and Political Rights. The Court also cited specific soft law instruments relevant to law enforcement as upholding the principles of legality, proportionality, necessity, and accountability in situations involving their use of force. These included the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF), Code of Conduct for Law Enforcement Officials (CCLEO), Standard Minimum Rules for the Treatment of Prisoners (SMR), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), and Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration).

Treaties – Binding Effect – Pacta Sunt Servanda

Commissioner of Internal Revenue v Interpublic Group of Companies, Inc. [G.R. *No. 207039, August 14, 2019*]

Interpublic Group of Companies, Inc. (IGC) is a non-resident foreign corporation that owns 30% of the outstanding and voting stock of McCann

Worldgroup Philippines, Inc. (McCann) a domestic corporation engaged in the general advertising business. In 2006, McCann declared cash dividends in favor of its stockholders, on which it withheld a Final Withholding Tax of 35%, in the amount of 21.6 Million PHP on IGC's cash dividends. IGC filed an administrative claim for refund or tax credit of 12.3 Million PHP representing alleged overpaid tax on its dividends, arguing that it was entitled to a preferential Final Withholding Tax rate of 15% received from a domestic corporation under the Tax Code. The Commissioner of Internal Revenue failed to act on the claim for refund, prompting the IGC to file a petition for review with the Court of Tax Appeals. The latter granted the petition and ordered the refund. The Commissioner of Internal Revenue brought a petition for review before the Supreme Court, arguing, among others, that the IGC was not entitled to a tax refund or credit on the ground that it failed to file a Tax Treaty Relief Application with the International Tax Affairs Division of the Bureau of Internal Revenue at least fifteen (15) days before it paid the tax on dividends in accordance with Revenue Memorandum Order (RMO) No. 1-2000.

The Supreme Court denied the petition. On the matter of IGC's failure to file a Tax Treaty Relief Application, the Court emphasized the binding effect of an international tax treaty pursuant to the principle of *pacta sunt servanda*, and its purpose of reconciling national fiscal legislation to eliminate international juridical double taxation, or the imposition of comparable taxes in two or more states on the same taxpayer in respect of the same subject matter and for identical periods. The Court noted that RMO No. 1-2000 should not operate to divest entitlement to the tax relief as it would constitute a violation of the duty of good faith compliance with the tax treaty. Since the Philippines-US Tax Treaty does not provide for any other prerequisite for availing of its benefits, the imposition of additional requirements such as the prior filing of an application would negate the availment of the reliefs provided by international agreement.

Human Rights – Universal Declaration of Human Rights – International Covenant on Economic, Social and Cultural Rights – Right to Education

Oscar B. Pimentel, et al v Legal Education Board, et al. [G.R. *No. 230642, September 10, 2019*]

The Legal Education Board (LEB), an executive agency created under Republic Act No. 7662 to regulate and improve legal education in the Philippines,

issued orders, circulars, resolutions, and other directives, which included the establishment of a nationwide uniform law school admission test known as the PhiLSAT, an aptitude test designed to measure the academic potential of the examinee to pursue the study of law. The LEB barred admission to law school to any applicant who did not take and pass the PhiLSAT. However, the implementation of the PhiLSAT from 2016 to 2018 was beset with a number of problems, leading the LEB to permit conditional admissions/enrollments that could be nullified, and the LEB imposed additional requirements for schools to be allowed conditional admissions/enrollments, lest they be administratively penalized. Before the holding of the fourth PhiLSAT, numerous petitioners, who included law schools, law professors, and law students, filed a petition for prohibition with the Supreme Court seeking to declare Republic Act No. 7662 unconstitutional and to invalidate the creation of the LEB together with all of its issuances, especially the PhiLSAT.

One of the issues raised by the petitions was the broad scope of LEB's exercise of powers and functions and its impact on the right to education recognized under the 1987 Constitution and international human rights law to which the Philippines is a signatory and concomitantly bound. The Court found that Article 13(2) of the ICESCR recognized the right to receive an education with the essential features of availability, accessibility, acceptability, and adaptability. It focused on accessibility as giving everyone access to educational institutions and programs without discrimination and having three dimensions of non-discrimination, physical accessibility, and economic accessibility. The Court nevertheless interpreted the right to receive higher education to be not absolute. It noted differences between Article 26(1) of the UDHR which provides that "technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit," while the ICESCR states that "higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular b the progressive introduction of free education." Thus, the Court declared that higher education is not generally available, but accessible only on the basis of capacity which should be assessed by reference to all their relevant expertise and experience.

With this understanding, the Court proceeded to rule on various issues concerning the validity of Republic Act No. 7662, the creation of the LEB, and its directives. It sustained the validity of the law and the LEB but declared several provisions and directives unconstitutional for either encroaching on the power of the Court to regulate the practice of law, or violative of the academic freedom of law schools, or being *ultra vires*. Concerning the PhiLSAT, which

petitioners argued transgresses the right to education, the Court stated that it was merely a minimum admission standard rationally related to the interest of the State in improving the quality of legal education, thus it could not be voided on the ground of violating the right to education. However, it was declared void for violating the institutional academic freedom on who to admit to law schools in prescribing the passing of the PhiLSAT as a prerequisite for admission to law schools and requiring them to admit only those who passed the test at least two years before commencement of law studies.

Treaties – Binding Effect – Pacta Sunt Servanda

Manila International Airport Authority v Commission on Audit [G.R. *No. 218388, October 15, 2019*]

The governments of the Philippines and Japan had an Exchange of Notes on August 16, 1993, which led to the execution of Loan Agreement No. PH-136 between the Government of the Philippines and the Overseas Economic Cooperation Fund, the implementing agency for loan aid of the Japanese Government. The Loan Agreement in turn financed an Agreement for Consulting Services for the NAIA Terminal 2 Development Project between the Manila International Airport Authority (MIAA) and the Aeroports de Paris-Japan Airport Consultants Inc. Consortium (Consultants) the following year. It covered 795 man-months of consulting services, spread over a project duration of 53 months that included 14-months of post-construction services. However, the duration of services was extended, and the number of man-months due to prolonged contracting procedures, delayed approvals, and numerous additional construction work. The extension was covered by three Supplementary Agreements. In 1999, the Commission on Audit (COA) disallowed the Agreement's remuneration and contingency costs for exceeding the project's original estimated costs and the National Economic Development Authority Guidelines which placed a ceiling of 5% for payments charged to a contingency; after reconsideration, it reversed its position on the remuneration cost but maintained that the contingency payments were excessive. After unsuccessful attempts to have the decision reconsidered and reversed, MIAA brought a petition for review before the Supreme Court. MIAA argued that the 5% ceiling for contingency payments did not apply since the agreement was an international agreement with an international financing institution, which normally provided for a 10% contingency. The COA countered that the 5% ceiling was

applicable in the absence of any provision that Philippine laws should not apply, and the Loan Agreement did not mention international laws, regulations, or practices concerning the payments.

The Supreme Court found merit in the petition and reversed the decision of the COA. It found that the case involved an international agreement, and as such, the parties' intention as to how payments should be charged to contingency should govern. It rejected the COA's argument that domestic law should apply in the absence of any reference to international law in the agreement, noting that as a loan agreement executed in conjunction with an Exchange of Notes between the Philippine government and a foreign government, it was an executive agreement whose interpretation and construction were governed by international law. The Philippines was found to faithfully comply with the provisions of the loan agreement in accordance with the doctrine of *pacta sunt servanda*. This extended to its accessory contracts, i.e., the Agreement for Consulting Services for the NAIA Terminal 2 Development Project and their Supplementary Agreements extending it. No express stipulation by the contracting parties was necessary. The COA's disallowance of disbursements for the extended contract period for exceeding the NEDA Guidelines 5% ceiling was therefore erroneous because it would contravene *pacta sunt servanda* and practically negate the government's accession to the executive agreements without any valid justification.

Treaties – Agreements Concurred in the Philippine Senate in 2019

In 2019, with the concurrence of the Senate, the Philippines ratified a treaty establishing a common exclusive economic zone boundary, an extradition treaty, and a treaty for mutual legal assistance.

Law of the Sea – Exclusive Economic Zone

Resolution concurring in the ratification of the Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia concerning the delimitation of the Exclusive Economic Zone boundary, Senate Resolution No. 1048

03 June 2019

The Senate concurred in the Agreement signed on 23 May 2014 delimiting the overlapping Exclusive Economic Zones between the Philippines and Indonesia, without prejudice to the delimitation of the continental shelf boundary.

Terrorism – Extradition – Extradition Treaties – Terrorism – International Cooperation

Resolution concurring in the ratification of the Treaty between the Republic of the Philippines and the Russian Federation on Extradition, Philippine Senate Resolution No. 34

18 December 2019

The Senate concurred in the ratification of the extradition treaty between the Philippines and Russian Federation signed on 13 November 2017, which obliges the parties to extradite to each other persons whom the authorities in the requesting State have charged with, or convicted of, an extraditable offense, citing it as an effective tool in the fight against criminality particularly terrorism and other transnational crimes.

Terrorism – Extradition – Procedure – International Cooperation

Resolution concurring in the ratification of the Treaty between the Republic of the Philippines and the Russian Federation on mutual legal assistance in criminal matters, Senate Resolution No. 35

18 December 2019

The Senate concurred in the ratification of the Treaty between the Philippines and the Russian Federation obliging the contracting States to grant each other comprehensive mutual legal assistance in criminal matters, especially where the request would involve compulsory processes for its execution such as freezing and confiscation of the proceeds of crimes, search and seizure, and enforcement of forfeiture orders, likewise citing it as a tool against criminality and the global war against terrorism and other transnational crimes.

Legislation and Administrative Regulations

In 2019, the Philippines enacted a law that directly references and implements international conventions.

An Act establishing the Philippine Space Development and Utilization Policy and creating the Philippine Space Agency, and for other purposes. Republic Act No. 11363

On August 8, 2019, the Philippine legislature enacted a law establishing for the first time a policy for the utilization and development of space science and technology for its many different applications, ensure the country's official representation, participation, and cooperation in space development, and ensure the Philippines abides by the various international space treaties and principles promulgated by the United Nations and international space community. It provides for the Philippine Space Development and Utilization Policy as a strategic roadmap to enable the country's central goal of becoming a space-capable and space-faring nation within the next decade, with a focus on national security and development, hazard management and climate studies, space research and development, space industry capacity building, space education and awareness, and international cooperation. The law created the Philippine Space Agency (PhilSA) with a mandate for primary policy, planning, coordination, implementation, and administration of the national space program, supported by a Philippine Space Development Fund that may draw on public and private sources, both local and foreign. The law specifically requires the maintenance of a National Registry of Space Objects in accordance with the UN Convention on the Registration of Objects Launched into Outer Space and directs the PhilSA to furnish the UN Office for Outer Space Affairs with the information required under the Registration Convention. It also acknowledges responsibility for damages caused by space objects registered in the National Registry of Space Objects in accordance with the UN Convention on International Liability for Damage Caused by Space Objects, which shall take effect immediately upon ratification of the Liability Convention and Registration Convention.

State Practice of Asian Countries in International Law

Singapore

Elisabeth Liang, Ong Kye Jing,** & Rachel Tan Xi'en****

Air Law – Treaty – Convention on International Civil Aviation (Chicago Convention)

Singapore amended the Air Navigation Act to align its implementing legislation with changes to Annex 6 of the Convention on International Civil Aviation (Chicago Convention) on the use of flight recorder and similar information on 4 November 2019. These changes took effect on 21 December 2019.

The Annex 6 changes require the Contracting States to provide for the protection of flight recorder information from disclosure, having regard to the effect disclosure may have on current or future collection and availability of air safety information. The Air Navigation Act was accordingly amended to empower the competent authority to make regulations that delineate permissible and impermissible uses of such information and curtail their admissibility as evidence in court (Section 3A). Criminal penalties for disclosure have also been increased (Section 4).

Arbitration – Legislation – Arbitrations Relating to Intellectual Property Rights

The Intellectual Property (Dispute Resolution) Act 2019 took effect partially on 21 November 2019, introducing the new Part IIA to the International Arbitration Act (and Part IXA to the Arbitration Act) which provides for the arbitration of IP-related disputes. This includes a dispute over *inter alia* enforceability, infringement, subsistence, validity, and ownership of a non-exhaustive list of intellectual property rights including patents, trademarks, geographical

* Associate, Drew & Napier LLC.

** Research Assistant, Singapore International Dispute Resolution Academy (Singapore Management University).

*** Research and Development Operations Lead, Singapore International Dispute Resolution Academy (Singapore Management University) and Associate Counsel, RevLaw LLC.

 | DOI:10.1163/9789004501249_016

indications, registered designs, and copyright. Notably, the resulting awards will only be enforceable *in personam* and not *in rem*. Provisions of the Act relating to the consolidation of civil IP disputes in the Singapore High Court (presently heard in the High Court, State Courts, or by the Intellectual Property Office of Singapore) have not come into force.

Arbitration – Significance of the Seat of an Arbitration – Investment Treaty Arbitration

The Court of Appeal in ***ST Group Co., Ltd. and ors v Sanum Investments Limited and anor*** [2019] SGCA 65 reiterated the significance of the seat of arbitration. It held that once an arbitration was wrongly seated, in the absence of a waiver, any ensuing award should not be recognized and enforced by other jurisdictions because such award had not been obtained in accordance with the parties' arbitration agreement. The fact that the correct seat and erroneously chosen seat may both be UNCITRAL Model Law on International Commercial Arbitration (Model Law) jurisdictions does not diminish the effect of this mistake, as Model Law jurisdictions may each choose to augment or reduce the grounds for setting-aside in their jurisdiction and approach arbitration-related applications in different ways.

A party seeking to resist enforcement of such ensuing award also need not prove actual prejudice arising from the erroneous seat, as it suffices that a different supervisory court would have been available to the parties had the arbitration been correctly seated.

Arbitration – Court's Power to Lift a Case Management Stay – International Commercial Arbitration & Litigation

In ***Rex International Holding Ltd and anor v Gulf Hibiscus Ltd*** [2019] SGCA 56, the appellants were previously granted a stay of court proceedings on the basis of a dispute resolution clause in a shareholders' agreement providing for arbitration between the appellants' subsidiary and the respondent, which the appellants were not a party to and unable to invoke on their own. The foregoing notwithstanding, the court granted parties the liberty to apply for a lift of the stay if the dispute resolution clause was not triggered and arbitration not commenced within a certain time. The respondent's application to lift the stay was upheld on appeal.

The Court of Appeal held that the stay should not have been granted in the first place. The respondent had no intention to commence an arbitration against the appellants' subsidiary and had instead sued the appellant pursuant to its right to choose its cause of action and sue the party it wished to sue in whichever forum it wished. The Judge below had not considered whether the court proceedings depended on the resolution of issues that might arise in the putative arbitration, beyond noting the overlap between factual issues of the putative arbitration and those in the court proceedings. Thus, the putative arbitration was in fact a largely illusory one.

Arbitration – Governing Law and Seat of Arbitration Agreement – International Commercial Arbitration

In ***BNA v BNB and anor*** **[2019] SGCA 84**, the Court of Appeal applied the three-stage framework set out by the High Court in *BCY v BCZ* [2017] 3 SLR 357 (which mirrors the framework in *Sulámerica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102), to determine the governing law of the arbitration agreement. The Court considered the question of whether there were any contrary indicia to displace the starting point that the law of the arbitration agreement would be the proper law of the underlying contract.

One of the factors considered was the seat of the arbitration. The Court held that the phrase "arbitration in Shanghai" was a reference to Shanghai as the seat, and not merely the venue, of the arbitration. The seat of arbitration was "*essential*" to arbitration law, in (among other things) identifying the State or territory whose laws will govern the arbitral process, and also fixing the jurisdiction in which the arbitral award is considered to have been "made" for the purposes of recognition and enforcement under the New York Convention. By contrast, the venue is far less important and it is uncommonly provided for specifically in arbitration agreements. Thus, where parties only specify one geographical location in their arbitration agreement, that is naturally construed as their choice of the arbitral seat.

The respondent was also precluded from relying on evidence of parties' pre-contractual negotiations in support of its position that the parties had desired a neutral seat that was not in Shanghai. That the evidence was not placed before the tribunal, and only before the Court in its *de novo* jurisdictional review, made "*all the difference*", and the proceedings were therefore not "*proceedings before an arbitrator*" excluded by the Evidence Act. The Court was bound by the parol evidence rule and its exceptions in the Evidence Act.

Finally, the Court did not consider the purported invalidating effect of PRC law on an arbitration agreement with a non-PRC seat to be relevant, or indicative that the parties must have intended for Shanghai as the seat such that there would be nothing displacing PRC law as the proper law of the arbitration agreement. To succeed in such an argument, the respondent should have adduced evidence showing that the parties were sensitive to the interplay between PRC law and selecting SIAC as the administering institution.

Arbitration – Strict Time Limit for Setting-Aside Applications – International Commercial Arbitration

The defendant's application to strike out the plaintiff's setting-aside application on the ground that it was out of time under Article 34(3) of the Model Law succeeded in ***BXS v BXT*** **[2019] SGHC(I) 10**. Anselmo Reyes IJ of the Singapore International Commercial Court (SICC), in the first arbitration-related judgment of the SICC since the extension of its jurisdiction to arbitration-related proceedings, held that the time limit of three months under Art 34(3) was a mandatory one, and not a "written law relating to limitation" which the Court had the power to extend under paragraph 7 of the First Schedule to the Supreme Court of Judicature Act. Furthermore, curial intervention is curtailed by Article 5 of the Model Law such that the court should not intervene with the time limit for setting aside through the invocation of a power extraneous to the Model Law. Therefore, once the strict time limit under Art 34(3) had expired, an arbitral party's right to apply to set aside the award is extinguished and cannot be revived.

Arbitration – Assignment of the Right to Arbitration – International Commercial Arbitration

In ***BXH v BXI*** **[2019] SGHC 141**, the plaintiff entered into a Distributor Agreement containing an arbitration agreement with the defendant's Parent Company, which the latter later novated to the defendant under an assignment and novation agreement. The defendant subsequently commenced arbitration against the plaintiff, who objected to the tribunal's jurisdiction and did not participate. The plaintiff then sought to set aside the resulting arbitral award on grounds that (among others) the defendant had no right to arbitrate in respect of the majority of the debt owed to it as the relevant invoices had been assigned or novated to third parties.

The Court held that once the debts had been assigned to the third party, the defendant had no right to arbitrate disputes in relation to those debts, as the assignment would have extinguished its legal cause of action and the defendant thereafter had no right to sue in its own name. The right to arbitrate a dispute in relation to a contractual right that had been assigned could not vest simultaneously in both the assignor and assignee; it would vest exclusively in the assignee.

However, the defendant was entitled to commence arbitration in October 2015 in respect of debts repurchased only later in December 2015, as the cause of action for the plaintiff's failure to pay those debts had already accrued by October 2015. The arbitration would only have been a nullity if the defendant was found not to have been the true owner of the debts as at October 2015, as then the defendant would not have any valid cause of action.

Arbitration – Non-Participant's Challenge of the Tribunal's Jurisdiction at Setting-Aside Stage – International Commercial Arbitration

The Court of Appeal in ***Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited*** [2019] SGCA 33 overturned the lower court's decision to find that a respondent is not precluded from applying to set aside the arbitral award under Article 34 of the Model Law for the tribunal's excess of jurisdiction, even if it had not earlier challenged the tribunal's jurisdiction under Article 16(3) of the Model Law read with Section 10(3) of the International Arbitration Act. The Court held that the preclusive effect of Art 16(3) does not extend to a justifiably non-participating respondent who has not contributed to any wastage of costs or the incurring of any additional costs that may have been prevented by a timely application under Art 16(3). To do otherwise would put an "innocent" respondent to the additional cost of resisting enforcement in potentially many jurisdictions without any opportunity to set aside the award.

Dispute – Settlement – Treaty – United Nations Convention on International Settlement Agreements Resulting from Mediation

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation) was opened for signature by all States on 7 August 2019. Singapore was one of 46

States that signed the Convention on 7 August 2019 – a group that includes some of the world's and region's largest economies, such as the United States, China, India, and South Korea. Another 24 States had attended the Signing Ceremony and Conference in Singapore to give their support to the Convention. The Convention will require three ratifications to come into force and came into force on 12 September 2020.

On the same day, Singapore and the United Nations also signed a Memorandum of Understanding to organize an UNCITRAL Academy in Singapore. Among other things, the Academy will organize future installments of the Singapore Convention Conference.

Playing a similar role as the New York Convention does for arbitration, the Convention is the first multilateral treaty to provide for the cross-border enforcement of international mediated settlement agreements, and will give businesses greater certainty that their international mediated settlement agreements can be relied upon in cross-border commercial dispute resolution. Singapore's role in the negotiations, drafting of the treaty, and as the host of the treaty signing serves to consolidate its position as a leading international dispute resolution center.

Human Rights – Treaty – United Nations Convention on the Elimination of Discrimination against Women

On 16 November 2019, Singapore submitted follow-up information to the United Nations Committee on the Elimination of Discrimination against Women on its Concluding Observations on Singapore's Fifth Periodic Report on the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) dated 21 November 2017.

In its submission, Singapore reiterated its full commitment to building an environment with equal opportunities for women and men to contribute to society and exercise fundamental freedoms, through a practical and outcomes-based approach that suits Singapore's national circumstances and aspirations. In response to the Committee's recommendations involving Article 4 of CEDAW, Singapore stressed ongoing efforts to support all manner of participation in public and political life and the economy, including policies on shared parental responsibility, flexible work arrangements, employment facilitation, and in January 2019, the formation of a Council for Board Diversity.

Human Rights – Treaty – United Nations Convention on the Rights of the Child

On 28 June 2019, the United Nations Committee on the Rights of the Child adopted its Concluding Observations on the combined Fourth and Fifth Periodic Report of Singapore.

The Committee welcomed Singapore's accession to the UN treaties on racial discrimination (CERD, in 2017) and persons with disabilities (CRPD, in 2013), along with its domestic implementation of the Convention on the Rights of the Child (CRC) through a range of legislative, institutional and policy measures. These included, among others, the Prevention of Human Trafficking Act 2014, the Protection from Harassment Act, and the third Enabling Masterplan (2017–2021). It also made specific recommendations on various matters, such as Singapore's CRC reservations, the definition of a "child", corporal punishment, and the administration of juvenile justice.

International Economic Law – Treaty – Free Trade Agreement – ASEAN and Hong Kong, China

The ASEAN-Hong Kong, China Free Trade Agreement (AHKFTA), which was signed on 12 November 2017, came into force on 11 June 2019 for Singapore, Hong Kong, and four other ASEAN Member States (Laos, Myanmar, Thailand, and Vietnam). This marks ASEAN's sixth FTA with external partners.

The AHKFTA contains 14 chapters, covering various areas of trade liberalization and facilitation such as Trade in Goods (Chapter 2), Rules of Origin (Chapter 3), Customs Procedures and Trade Facilitation (Chapter 4), Sanitary and Phytosanitary Measures (Chapter 5), Standards, Technical Regulations and Conformity Assessment Procedures (Chapter 6), Trade Remedies (Chapter 7), Trade in Services (Chapter 8), Economic and Technical Co-operation (Chapter 9), and Intellectual Property (Chapter 10). Consultations and Dispute Settlement are addressed in Chapter 13. Under the AHKFTA, Singapore grants tariff-free access and binds its customs duties at zero, as does Hong Kong, China.

An investment chapter is separately addressed through the ASEAN-Hong Kong, China Investment Agreement (AHKIA), which came into force on 17 June 2019 for the same six Parties, and Malaysia on 13 October 2019. The Agreement envisages separate and differential treatment for newer ASEAN Member States (Article 18), and establishes a Work Programme for the AHKFTA

Joint Committee to examine matters such as the definition of "natural person of a Party" and Investor-State Dispute Settlement (Article 22).

International Economic Law – Treaty – Free Trade Agreement – Singapore and the European Union

The EU-Singapore Free Trade Agreement (EUSFTA) and EU-Singapore Investment Protection Agreement (EUSIPA) were signed on 19 October 2018. The EUSFTA has since entered into force, following approval by the European Parliament in February 2019, and the Council of the EU on 8 November 2019. This was a significant move for bilateral trade relations, with the EU being Singapore's largest services trading partner and third-largest goods trading partner, and Singapore being the EU's largest services and goods trading partner in ASEAN.

The European Parliament has also consented to the conclusion of the EUSIPA on 13 February 2019. The accompanying non-legislative resolution welcomed the improved coherence the IPA is likely to bring, replacing existing bilateral investment treaties for 13 EU Member States while creating new rights for investor claims in the remaining 15. Before coming into force, the EUSIPA will need to be ratified by the regional and national parliaments of EU Member States – a process likely to take at least two years.

International Economic Law – Treaty – Free Trade Agreement Upgrade Protocol – Singapore and the People's Republic of China

The China-Singapore Free Trade Agreement (CSFTA) Upgrade Protocol was signed on 12 November 2018. It was ratified on 15 October 2019. The upgraded CSFTA took effect from 16 October 2019, except for the articles on Rules of Origin, which took effect from 1 January 2020. The 1985 China-Singapore BIT was also terminated on 16 October 2019.

International Economic Law – Treaty – Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Multilateral Instrument) came into force for Singapore on 1 April 2019. Its key benefits include minimum standards for preventing treaty abuse such as the adoption of the Principal Purpose Test, minimum standards for enhancing dispute resolution with assistance from the Inland Revenue Authority of Singapore, and mandatory binding arbitration provisions to provide certainty and specified timeframes for parties in treaty-related disputes.

International Economic Law – Treaty – Avoidance of Double Taxation – Various States

Singapore signed four new Avoidance of Double Taxation Agreements (DTAs) in 2019, with Korea (signed 13 May 2019), The Hellenic Republic (30 May 2019), Armenia (8 July 2019), and Turkmenistan (28 August 2019).

The Korea DTA also entered into force on 31 December 2019 and supersedes the earlier Singapore-Korea DTA from 1979. Among other changes, the new DTA lowers the withholding tax rate for royalties, and expands the scope of the capital gains tax exemption.

In addition, Singapore signed Amending Protocols to its DTA with Ukraine on 16 August 2019, and its DTA with Germany on 10 December 2019. The amendment to the Singapore-Ukraine DTA sought to bring the Exchange of Information Article in line with internationally agreed standards on information exchange on request. The Singapore-Germany DTA amendments are more expansive and include among others the lowering of withholding tax rates for dividends, interest, and royalties, and incorporation of internationally agreed minimum standards to counter treaty abuse.

Two DTAs signed before 2019 have also come into force: the Singapore-Ghana DTA entered into force on 12 April 2019 and the Singapore-Tunisia DTA entered into force on 17 December 2019.

International Economic Law – Treaty – Bilateral Investment Treaty – Singapore and Myanmar

Singapore and Myanmar signed the Singapore-Myanmar Bilateral Investment Treaty on 24 September 2019. This deepens existing economic relations between the two States, building upon the bilateral Double Taxation Treaty concluded in 1999, and other regional arrangements such as the ASEAN Comprehensive Investment Agreement. The move has particular significance as Singapore is Myanmar's largest foreign investor, with a cumulative investment of USD 22.1 billion (approximately SGD 30.5 billion, or 27% of the total permitted foreign investment in Myanmar) made as of August 2019.

The Treaty covers a wide range of investments and investors (Articles 1–2) and features several core BIT protections including the customary minimum standard of treatment (Article 3), national and most-favored-nation treatment (Articles 4–5), direct and indirect expropriation (Article 6, read with Annex II), compensation for losses owing to civil disturbance and similar situations (Article 7), free transfer of funds (Article 8, but subject to the balance of payments safeguards in Article 9), and subrogation (Article 10). Annex I subjects the national treatment standard to a negative list, excluding its application to certain transactions involving water or real estate in Singapore, and land in Myanmar.

Arbitration remains the envisaged mode of Investor-State Dispute Settlement (Articles 11–19), except for investors or investments in respect of tobacco or tobacco-related products. The Final Provisions (Chapter IV) contain a number of important provisions common to recent treaties, including a Denial of Benefits clause (Article 26), Transparency and Information Requirements (Articles 27–28), General and Security Exceptions (Articles 29–30), and modified treaty application for taxation measures (Article 31).

After the treaty is ratified and enters into force, it will remain in force for 10 years and continue in force unless terminated by either party (Article 32).

International Economic Law – Treaty – Free Trade Agreement – Singapore and Eurasian Economic Union

On 1 October 2019, Singapore signed three of seven envisaged agreements with the Eurasian Economic Union (EAEU) for the EAEU-Singapore Free Trade Agreement (EAEUSFTA). This is the EAEU's first comprehensive FTA since its establishment in 2015. The three Agreements include a Framework Agreement,

the Non-Services and Investment Agreement, and a Services and Investment (S&I) Agreement with Armenia. S&I policies remain within the jurisdictional competence of EAEU member States and are to be signed at the State-to-State level. Negotiations over S&I agreements with the remaining four EAEU member States – Belarus, Kazakhstan, Kyrgyzstan, and Russia – are ongoing.

The Non-Services and Investment Agreement includes key FTA chapters, including Trade in Goods (including Market Access, Trade Remedies, Rules of Origin, Customs Cooperation and Trade Facilitation, Technical Barriers to Trade, and Sanitary and Phytosanitary Measures), Competition, Customs Cooperation, E-Commerce, Environment, Government Procurement, and Intellectual Property. Upon entry into force, tariff reduction or elimination is expected for 90% of current exports to the EAEU, with further reductions being made over a 10 year period to 97%.

The Armenia-Singapore Agreement on Trade in Services and Investment contains dedicated chapters on cross-border services trade and investment, along with chapters on transparency, dispute settlement (with annexes specifying applicable arbitration rules and a code of conduct for arbitrators), and general provisions.

The EAEUSFTA is expected to enhance Singapore's trade with the EAEU, which came close to SGD 9 billion in 2018 (for trade in goods). It will build on existing bilateral agreements like DTAs (in force for Belarus, Kazakhstan, and Russia, and signed with Armenia) and BITs (in force for Belarus and Russia).

International Economic Law – Treaty – Free Trade Agreement Upgrade Protocol – Singapore and New Zealand

On 17 May 2019, Singapore and New Zealand signed the upgraded Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP). The upgraded ANZSCEP seeks to modernize and enhance the ANZSCEP – which had entered into force nearly two decades earlier on 1 January 2001 – and achieve greater convergence with other FTAs to which both Singapore and New Zealand are a party, such as the ASEAN Australia New Zealand FTA. The upgrade comprises a Protocol amending the original ANZSCEP, a Mutual Recognition Agreement on Conformity Assessment, and two non-binding side letters. It came into force on 1 January 2020.

The upgraded ANZSCEP contains some of the most flexible and trade facilitative Rules of Origin (Chapter 3) among Singapore's network of FTAs.

Businesses from sectors such as electronics, pharmaceuticals, chemicals, and processed food can now qualify more readily for preferential tariff treatment, through mechanisms such as self-certification (Article 3.18). Another notable change is in Customs Procedures and Trade Facilitation (Chapter 4), with 7 in 10 of the Chapter's articles being more facilitative than corresponding provisions in the WTO's Trade Facilitation Agreement. The Agreement also features some of the shortest release times among Singapore's FTAs, with goods to be released within 24 hours on arrival, and express consignments within 4 hours (Articles 4.7 and 4.8).

Other existing chapters have also undergone amendment, including those on Trade in Goods (Chapter 2), Sanitary and Phytosanitary Measures (Chapter 5), Technical Barriers to Trade (Chapter 6, along with new Mutual Recognition Agreements), Investment (Chapter 7), Services (Chapter 8), and Competition (Chapter 11, and which now expressly includes Consumer Protection). Several of these amendments drew inspiration from developments seen in other FTAs, such as the Trans-Pacific Strategic Economic Partnership and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Two new chapters addressing E-Commerce (Chapter 9) and Regulatory Cooperation (Chapter 13) have also been added, with further negotiation expected on topics such as Logistics and E-Invoicing.

International Labour Organisation – Treaty – International Labour Organisation Occupational Safety and Health Convention

On 11 June 2019, Singapore ratified the International Labour Organisation's Occupational Safety and Health Convention, 1981 (No. 155). It will come into force twelve months after. This follows Singapore's earlier ratification of the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) on 11 June 2012 and marks its 28th ratified international labor convention.

Jurisdiction – Legislation – Reciprocal Enforcement of Foreign Judgments

Singapore's statutory regime for the reciprocal enforcement of foreign judgments was previously bifurcated through two key Acts – the Reciprocal

Enforcement of Commonwealth Judgments Act (RECJA) for various Commonwealth countries, and the Reciprocal Enforcement of Foreign Judgments Act (REFJA). Singapore has moved to streamline and consolidate this regime under a single framework – REFJA – through two amendment Acts: (*i*) the Reciprocal Enforcement of Foreign Judgments (Amendment) Act 2019 (which amends REFJA and came into force on 3 October 2019), and (*ii*) the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 (which repeals RECJA and makes consequential amendments to REFJA, though not yet in force).

This forms part of a broader reform initiative to increase the scope of judgments eligible for recognition and enforcement (both foreign judgments locally and local judgments abroad), and facilitate Singapore's entry into new reciprocal enforcement arrangements. The amendments include substantive changes that (among other things) broaden the range of judgments capable of recognition and enforcement, to include certain non-money judgments, lower court judgments, interlocutory judgments, consent judgments, and compensation orders or judgments made in criminal proceedings. At the same time, the amendments make clear that recognition and enforcement under REFJA will be founded on substantial reciprocity of treatment.

Law of the Sea – Treaty – International Maritime Organisation Protocol to Amend the Convention on Limitation of Liability for Maritime Claims

On 30 September 2019, Singapore acceded to the International Maritime Organisation Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims (LLMC Protocol), denouncing on the same day the original 1976 LLMC. The Protocol entered into force for Singapore on 29 December 2019, while the effective date of denunciation for the 1976 LLMC was 1 October 2020. On the domestic plane, these changes were reflected in amendments to the Schedule of the Merchant Shipping Act on 29 December 2019.

The 1996 Protocol raises the liability limits of shipowners for covered maritime claims (Article 3) and introduces a tacit amendment procedure for future limit adjustments (Article 8). Further amendments have already been made on 19 April 2012 (IMO Resolution LEG.5(99)), which increased liability limits by about 51% across all Article 3 claims. As a maritime hub, Singapore's accession will ensure that its liability limitation regime remains compatible with the times and comparable to those of other Parties to the Protocol.

State Practice of Asian Countries in International Law

Thailand

*Kitti Jayangakula**

Criminal Law – Anti-Human Trafficking – Amendments to the Criminal Procedure Code (No. 33 & 34) B.E. 2562 (2019); Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019) and Labour Protection in Fisheries Act, B.E. 2562 (2019)

Treaties – Agreements Concurred by Thailand in 2019

In 2019, three additional laws that enhance the efficacy in preventing and suppressing human trafficking were enacted or revised, namely: Amendments to the Criminal Procedure Code (No. 33 & 34) B.E. 2562 (2019) to prevent spurious retributive charges by employers against workers and the defenders of their rights; Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019) to support Thailand's ratification of ILO Convention No. 29 on Forced Labour; and the Labour Protection in Fisheries Act, B.E. 2562 (2019) to support Thailand's ratification of ILO Convention No. 188 on Work in Fishing (C188). In addition, progress continued to be made in the consideration of the draft Labor Relations Act that would allow migrant workers to join as committee members of labor unions.

Criminal Law – Amendments to the Criminal Procedure Code (No. 33 & 34) B.E. 2562 (2019)

In 2019, the Royal Thai Government also enacted Amendments to the Criminal Procedure Code (No.33) B.E. 2562 (2019) indictment inquiry system was improved to reduce risks in afflicting innocent defendants. Previously, the evidence was to be presented only by the accuser, allowing high chances of the case being accepted by the Court and the defendants having to submit bail. The Amendment was made to Article 165/2 to ensure the defendant's right to

* Professor, Eastern Asia University, Thailand.

also submit a statement during the Court's preliminary hearing, presenting facts and significant laws that the Court may take into consideration to call the case unfounded and dismissed.

This Amendment was published in the Royal Gazette on February 19, 2019, and became effective the following day. The abovementioned amendments would help protect the workers and the defenders of their rights from the employers filing spurious retributive charges of defamation against them when they report the violation of their rights.

In addition, the Royal Thai Government also enacted Amendments to the Criminal Procedure Code (No. 34) B.E. 2562 (2019), amended Article 161/1 of the Criminal Procedure Code to prevent criminal prosecution in cases that are filed with distorted information or dishonest intent or to intimidate the defendants. In such cases, the Court has the power to immediately dismiss the case and the accuser will not be able to file for the case again. The amendment was published in the Royal Gazette on March 20, 2019, and became effective the following day.

Criminal Law – Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019)

The Royal Thai Government enacted Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019). This Emergency Decree was published in the Royal Gazette on February 19, 2019, and became effective on April 8, 2019, to support the implementation of Protocol to ILO Convention No. 29 on Forced Labour (C29). The decree defines offenses concerning forced labor or service in several provisions of the Act such as Section 6,[1]

1 Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019), Section 6 provides that:

"Any person who, for the purpose of exploitation, commits any of the following acts:
(1) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harbouring, or receipt of any person, by means of threat or use of force, abduction, fraud, deception, abuse of power, or giving money or benefits to a guardian or caretaker of the person to achieve the consent of the guardian or caretaker of such person to allow the offender to exploit the person under his or her control; or
(2) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harbouring, or receipt of a child;
If such act aims for exploitation of persons, such person commits an offence of human trafficking.

Section 6/1,[2] Section 6/2,[3] and Section 14/1 of the Act,[4] and also sets appropriate penalties to deter and eliminate forced labor and service in Section 52/1 of the Act.[5]

The exploitation under paragraph one means the exploitation of prostitution, the production or distribution of pornographic materials, the exploitation of other forms of sexual acts, slavery or practices similar to slavery, exploitation of begging, removal of organs for commercial purposes, forced labor or services under section 6/1, or any other similar forcible extortion regardless of such person's consent."

2 Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019), Section 6/1 provides that:

"Any person who compels another person to work or to provide services by one of the following means:

(1) threatening to cause injury to life, body, liberty, reputation or property of the person threatened or any other person;
(2) intimidating;
(3) using force;
(4) confiscating identification documents;
(5) using debt burden incurred by such person or any other person as the unlawful obligation;
(6) using any other means similar to the above acts if the act is committed to make another person to be in the situation where he or she cannot resist not to act accordingly, such person commits the offence of forced labor or services."

3 Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019), Section 6/2 provides that:

"The provisions of section 6/1 shall not apply to:

(1) work or services under the law on military service for the work under the official duties;
(2) work or services which is a part of the normal civic obligations or state government under the Constitution or under the law;
(3) work or services as a result of the Court judgment or work or services performed during the period of sentencing under the Court judgment;
(4) work or services for the purpose of disaster prevention or in the case of emergency situation or war or battle."

4 Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019), Section 14/1 provides that: "For the purpose of suppressing and preventing human trafficking, forced labor or services and protection of victims, the word "human trafficking" in Chapter III and Chapter IV shall include "forced labor or services".

The law on procedures for human trafficking cases shall apply to the procedures for forced labor or services cases mutatis mutandis."

5 Emergency Decree Amending the Anti-Human Trafficking Act, B.E. 2551 (2008), B.E. 2562 (2019), Section 52/1 provides that: "Any person commits an offence under section 6/1 shall be liable to imprisonment for a term of six months to four years or to a fine of fifty thousand to four hundred thousand Baht per one injured person or to both.

If the offence committed under paragraph one results in the victim being seriously injured or having a fatal disease, such person shall be liable to imprisonment for a term of eight years to twenty years and a fine of eight hundred thousand Bath to two million Baht or to life imprisonment.

It also provides measures to protect the welfare of victims of forced labor and ensures that the trial procedure is in line with human rights principles. This has resulted in better victim care and protection as well as remedies equivalent to those rendered to human trafficking victims.

International Economic Law – Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty)

On January 28, 2019, Thailand became the 49th country to join the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty) by depositing the instrument of accession with the World Intellectual Property Organization (WIPO). The Marrakesh Treaty will enter into force, with respect to the Kingdom of Thailand, on April 28, 2019.

The Marrakesh Treaty is intended to help the visually impaired access copies of printed materials by allowing "authorized entities" to create accessible versions of them without having to seek the prior agreement of or paying a royalty to, the copyright owner. It aims to improve the availability of printed works in accessible formats for visually impaired persons worldwide. Since amendments bringing the Thai Copyright Act into line with the treaty were adopted on 11 November 2018 (Copyright Act (No. 4) B.E. 2561 (2018)), the Act intends to pursue that goal by easing the circulation of the printed works to defined authorized entities and persons within Thailand and on the international market.

The most significant change in Copyright Act No. 4 pursuant to that goal is section 32/4, and the enabling secondary legislation under the Notification of the Ministry of Commerce B.E. 2562 (2019) issued on February 28, 2019, which together provide an exemption to copyright protections to enable access to published works by disabled readers (as defined in the Act).

If the offence committed under paragraph one results in the victim's death, such person shall be liable to life imprisonment or death penalty.

If the offence committed under paragraph one, two and three is the case where an ascendant forcing a descendant to work or provide services due to poverty or upon considering the offence or other ruthful circumstances, the Court may impose, against a defendant, a lesser sentence as provided by the law or may rule not to impose sentences on the defendant."

International Labour Organization's Fishing Convention, 2007 (No. 188)

On January 30, 2019, Thailand became the first country in Asia to ratify the International Labour Organization (ILO) Work in Fishing Convention, 2007 (No. 188) or C188, which protects living and working conditions of fishers onboard vessels. This is part of the country's move to tackle illegal, unreported, and unregulated (IUU) fishing since 2015. Thailand is fully committed to raising the standard of labor protection, for both Thai and migrant workers, to be in line with international standards in order to promote ethical fishing alongside good governance. The Royal Thai Government has continuously been making efforts in this regard, in parallel with combatting IUU fishing, intending to ensure Thailand's sustainable fisheries as the ultimate goal of the government.

The Work in Fishing Convention sets out binding requirements relating to the work onboard fishing vessels, including occupational safety and health, medical care at sea and ashore, rest periods, written work agreements, and social security protection. It also aims to ensure that fishing vessels provide decent living conditions for fishers on board.

The ratification of the Convention will elevate the standard of labor protection onboard fishing vessels to be in line with the international standard. It will also reduce the risk of labor falling into forced labor situations. This is attributed to the fact that C188 will ensure decent work for fishing workers, including setting the maximum working hours, ensuring the quality of accommodation, food, drinking water, and medical care, as well as carrying out inspections of working and living conditions on board the vessels. These measures will attract more workers into the fisheries sector, thus alleviating the shortage of labor in this sector.

International Labour Organisation – Labor Protection in Fisheries Act, B.E. 2562 (2019)

The Royal Thai Government enacted Labour Protection in Fisheries Act B.E. 2562 (2019), effective on November 18, 2019, to support the implementation of ILO Convention No. 188 on Work in Fishing (C188). The Act specifies duties of vessel owners and maritime labors to meet international standards in order to prevent forced labors in fisheries and protect the rights of fishery labors,[6] whose working conditions differ from those of general labors because of risks at sea and long working hours.[7] The Act also provides the protection measures for

6 Labor Protection in Fisheries Act B.E. 2562 (2019), Section 12 provides that:
"The vessel owner shall provide fishing laborers with such rights and benefits as regards health and welfare as prescribed in the Notification of the Minister of Labor. In this regard, this may be carried into effect through providing an insurance covering health and such welfare or any other method prescribed in the Notification of the Minister of Labor."

7 Labor Protection in Fisheries Act B.E. 2562 (2019), Section 6 provides that:
"In addition to compliance with the rules provided in this Act, vessel owners and fishing laborers shall comply with minimum requirements as regards work, the performance of duties, accommodation, food, the protection of safety and hygiene while at work on board a fishing vessel and the provision of welfare at work as provided in the law on labor protection, the law on job procurement and protection of job seekers, the law on navigation in Thai waters, the law on foreigners' working management, the law on fisheries, the law on compensation and the law on labor relations, unless specifically or otherwise provided by this Act.

There shall be included in a contract of employment terms and conditions or other arrangements in relation to fishing laborers' living and working conditions both on board a vessel and on a quay.

For the purpose of the execution of the law under paragraph one, it shall be deemed that a vessel owner is the employer and a fishing laborer is the employee.

An agency which is responsible for the law under paragraph one shall prepare a report on the amount of cases and operation results to be submitted to the Ministry of Labor and the Ministry of Labor shall gather information and prepare a report on situations, the amount of cases, operations of agencies concerned and directions for future operation in relation to the protection of labor in fishing work in line with international standards for submission to the Council of Ministers, in accordance with periods of time prescribed by the Minister of Labor."

fishery labors such as the protection under the incidents outside Thai waters or overseas (Section 9)[8] or providing the accommodation onboard (Section 13).[9]

8 Labor Protection in Fisheries Act B.E. 2562 (2019), Section 9 provides that:
"On the occurrence of the following incidences outside Thai waters or overseas, a fishing laborer has the right to request for a return to the place where the vessel owner has taken the fishing laborer into employment or the place agreed upon in the contract of employment:
(1) the duration of the contract of employment expires while the fishing laborer is working at a place other than the place for which the vessel owner has taken the fishing laborer into employment and no agreement is made for extension of the contract of employment;
(2) the vessel owner or fishing laborer terminates the contract of employment before the expiration of the duration of the contract of employment or the vessel owner alters terms and conditions of the contract of employment without consent of the fishing laborer;
(3) the fishing laborer is so sick as to be unable to perform duties;
(4) the fishing laborer is taken into residence overseas on account of any cause without the fishing laborer's fault.
Upon receipt of the request from the fishing laborer under paragraph one, the vessel owner shall expeditiously take action in repatriation of such fishing laborer to the place for which the vessel owner has taken the fishing laborer into employment or the place agreed upon in the contract of employment. During the time in which the repatriation is unable to be carried out on account of any cause not attributable to the vessel owner, the vessel owner shall provide the fishing laborer with accommodation on board the vessel or suitable accommodation as well as sufficient food for the living, provided that the vessel owner shall bear all costs.
In the case where the fishing laborer makes a request for the exercise of the right under (2), if the incidence in question results from the fishing laborer's fault or the fishing laborer terminates the contract of employment without reasonable cause, the fishing laborer shall bear costs incurred in the repatriation."

9 Labor Protection in Fisheries Act B.E. 2562 (2019), Section 13 provides that "A decked fishing vessel of three hundred gross tonnage upwards shall provide accommodation on board the fishing vessel in accordance with the rules prescribed in the law on navigation in Thai waters."

State Practice of Asian Countries in International Law

Vietnam

*Tran Viet Dung**

Criminal Law – Cybersecurity – Development of the Legal Framework for Cybersecurity in Vietnam

With the increasing cross-border cyber-attacks adversely affecting both public and private sectors, the development of a legal framework for cybersecurity has become a significant concern of governments around the world. Vietnam has been historically weak when it comes to cybersecurity and has been ranked among the bottom regionally. According to a report by the Report Global Cyber Security Index 2017 by the International Telecommunications Union, Vietnam ranked 101 out of 165 countries in terms of being vulnerable to cyber-attacks. To that end, in June 2018, the National Assembly of Vietnam passed the Law on Cybersecurity, which has taken effective as of 1 January 2019.

The Law on Cybersecurity covers all networks of IT infrastructure, telecommunication, internet, computer systems, databases, information processing, storage, and controlling systems, and regulates activities of every enterprise providing services in cyberspace and internet users including e-commerce, websites, online forums, social networking, and blogs. The Law applies to all agencies, organizations, and individuals involving in the cyberspace causing harm to national security, social order, and safety. In particular, it will apply to overseas organizations, which have users residing in Vietnam such as Google or Facebook. It is observed that the new law's provisions echoes recent aggressive moves conducted by the Europe Union's General Data Protections Regulation (GDPR) and China's cybersecurity law that dictate how foreign organizations can operate in their respective region's and how citizen information will be handled, processed, stored, and secured.

The Law on Cybersecurity prohibits five types of information that are prohibited in cyberspace, including information opposing the State of the Socialist Republic of Vietnam; information inciting others to cause disturbances or disrupt security and public order; information humiliating or slandering

* Associate Professor, Dean of International Law Faculty, Ho Chi Minh City University of Law, Vietnam.

others; information infringing upon the economic management order; and fabricated or untrue information causing public anxiety or harms to socio-economic activities or difficulties to operations of state agencies or on-duty persons or infringing upon lawful rights and interests of others. Domestic and foreign enterprises that provide services in telecommunications networks or the internet or provide added-value services in cyberspace in Vietnam have to prevent the sharing of the above-said information on their service platforms or information systems within 24 hours after receiving a request from competent authorities. In addition, they must refrain from providing or suspend the provision of telecommunications or internet-based services and other added-value services to organizations and individuals that publish in cyberspace such information when so requested by competent authorities.

In addition, the Law on Cybersecurity also imposes data localization requirements. Accordingly, "personal information", "data of relations of services users", "data created by service users" in Vietnam collected, analyzed, processed by either domestic or foreign enterprises providing services in the telecommunication network, internet, and value-added services in cyberspace in Vietnam must be stored in Vietnam. Vietnam's Ministry of Public Security, in a statement released on its website, explains that such requirements are needed in order to better manage and protect data on the cyber environment, especially in the context when data of local users have been rampantly used for commercial purposes and even abused to serve political plots or illegal activities.

United Nations – Foreign Affairs Activities – Vietnam's Election as a Security Council Non-Permanent Member for 2020–2021

On 7 June 2019, Vietnam was elected as a non-permanent member of the UN Security Council (UNSC) for the term 2020–2021 with a record-high number of 192 votes out of the 193 member countries and territories of the UN General Assembly.[1] As regulated, Vietnam would officially assume the role as a non-permanent member of the UNSC as of 1 January 2020.

This is the second time Vietnam has been elected to the United Nations Security Council, after its first term on the Council in 2008–2009. Vietnam's contributions and performance of the duties during the first time serving

1 Vietnam was the only representative of the Asian-Pacific region to run for the post, receiving the highest votes in favour (Nigeria and Tunisia both received 191 votes, Saint Vincent and the Grenadines 185 votes, and Estonia 132 votes).

on the UNSC have been widely recognized and appreciated, which certainly helped the nation obtain high confidence from other countries as Vietnam ran for the position for the second time which was evident by the landslide vote.

The election proves that after over three decades of reforms and integration, the credential and role of Vietnam in the global arena and within the United Nations have been increasing. The international community has recognized the contributions of the country in regional and international engagement in promoting cooperation and peaceful settlement of international disputes.

Vietnam has been implementing a foreign policy of peace and made contributions to addressing world conflicts and crises while backing peaceful negotiations and restriction of sanctions based on international law and principles of the UN Charter. According to UN Resident Coordinator in Vietnam Kamal Malhotra, with the election to the UNSC, Vietnam will have more opportunities to prove its ability and play an important role in regional and global events.

As a matter of fact, since 2010, Vietnam has demonstrated active participation in the activities of the UNSC. Apart from fully participating in over 1,500 meetings of the UNSC, the Vietnamese delegation became actively involved in all matters and at all stages of work on the Council, through making speeches, joining in negotiations, contributing to the drafting of resolutions and documents, and serving as chair and vice-chair of some subcommittees of the Council. In particular, Vietnam chaired the negotiations and compilation of the Council's resolution on women and security peace. As a representative of Southeast Asia, Vietnam pushed the peaceful settlement of regional issues as well as matters in other regions like Africa and the Middle East. In particular, Vietnam sent 172 military officers and staff to UN peacekeeping missions in the Central African Republic and South Sudan, as well as the Department of Peacekeeping Operations at UN headquarters. Vietnam has also signed nine memoranda of understanding on UN peacekeeping cooperation with various partner countries; namely, Australia, China, France, India, Japan, New Zealand, Russia, South Korea, and the United States. Vietnam was also able to flexibly handle its relations with powerful countries and those with common interests and traditional relations based on respecting and protecting the legitimate interests of stakeholders.

Becoming a UNSC non-permanent member for 2020–2021 is an important milestone in Vietnam's implementation of the 12th National CPV Congress Resolution which guides its multilateral diplomatic work to "proactively integrate into and promote the country's role in multilateral mechanisms, especially ASEAN and the UN". According to Deputy Prime Minister and

Minister of Foreign Affairs Pham Binh Minh, in its second term at the UNSC, Vietnam would stress the status of multilateralism and compliance with international law in addressing global challenges regarding peace and security in the world. In addition, as the chair of the ASEAN in 2020, Vietnam will seek to further enhance the cooperation between the UNSC and regional organizations, including ASEAN.

International Economic Law – Adoption of the New Labor Code in Line with International Law

The new Labor Code Amendment was passed by Vietnam's National Assembly (NA) on 20 November 2019 after multiple consultations with the public and discussions at the NA meetings since its first draft was introduced in late 2016 ("Labor Code 2019"). One of the main purposes of the adoption of the Labor Code 2019 is to ensure the effective implementation of the two important new generation free trade agreements of Vietnam, namely the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP) and the European Union–Vietnam Free Trade Agreement (EVFTA). These FTAs provide a separate chapter on labor, which requires the signing parties to undertake to comply with the International Labor Organization (ILO) Conventions on Fundamental Principles and Rights at Work and its Follow-up, adopted by the ILO Conference in 1998.

The ILO Conventions promote the development of a national legal framework on labor relationship to promote the protection of the employees, i.e. (i) the freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labor; (iii) the effective abolition of child labor; and (iv) the elimination of discrimination in respect of employment and occupation. The EFTA and CPTPP require the signatories to make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions. Vietnam has ratified six of the ILO Conventions with the remaining two – Convention 105 on forced labor and Convention 87 on freedom association – due to be ratified in 2020 and 2023.

The Labor Code 2019 creates an improved legal framework for employment relations, working conditions, and the representation of employers and workers. It also places greater emphasis on the use of voluntary collective negotiations, which are required for a modern socialist-oriented market economy in the process of deeper global integration. One of the most significant

changes in the Labor Code 2019 compared to previous versions is the ability of workers in enterprises in Vietnam to exercise their right to form or join a representative organization of their choosing, which does not have to be affiliated to Vietnam's General Confederation of Labor. Freedom of association of labor union helps to improve the collective bargaining process that enables workers to get a fairer share of the profits and enterprises to negotiate the productivity improvements necessary for them. This is also a requirement under Clause 19.3(a) of the CPTPP and Clause 13.4(a) of the EVFTA.

The progress can be also observed in new definitions for discrimination and harassment and new freedoms given to workers to leave their job upon the condition of giving appropriate notice. The law also provides clearer guidance relating to forced labor and minor workers, which makes it easier for employers to understand what is and is not permitted and should enhance the ability of labor inspectors to advise and enforce in these areas.

Together with freedom of association, eliminating discrimination, child labor, forced labor are the four principles set out in the eight ILO fundamental Conventions enshrined in the 1998 Declaration. The Labor Code 2019 shall pave the way for the move towards the full realization of the 1998 ILO Declaration in Vietnam as it provides a better legal framework for employment and industrial relations, and for equitable and sustainable growth. The adoption of the new Labor Code represents significant steps of Vietnam towards alignment to all the internationally recognized fundamental principles.

Law of the Sea – Treaties – Agreements Signed by Vietnam in 2019 – Protection of National Independence Sovereignty – Signing the Supplementary Treaty on the Delimitation of National Boundaries between Vietnam and Cambodia

On October 5, 2019, Vietnam and Cambodia signed the Supplementary Treaty to the 1985 Treaty on the Delimitation of National Boundaries and the Supplementary Treaty to the 2005 treaty (known as the 2019 Supplementary Treaty), and the protocol on land border demarcation and marker planting. This is the outcome of the effort and work of the joint working group on border gate issues on land border delimitation of the two countries over the last decade.

Deputy Prime Minister and Foreign Minister Pham Binh Minh described the signing of the 2019 Supplementary Treaty and the protocol as a major event

in the bilateral relationship and a historic milestone in the process of the settlement of land border issues between Vietnam and Cambodia after more than 36 years of negotiations.

The National Assembly also adopted the resolution on the ratification of the 2019 Supplementary Treaty at the eighth session in 2019. The resolution formed a solid legal framework for the management and development of the Vietnam–Cambodia borderline, ensuring the maintenance of security, national defense, and social order and safety in the border region. It is expected that Vietnam and Cambodia will conduct border management according to the results of demarcation and landmarks more intensively in accordance with the Treaty. To date, the two sides have demarcated about 1,045km of the border and built 2,047 markers at 4,553 positions in the field, i.e. around 84 percent of the workload along the entire border. These efforts have contributed to stabilizing and boosting socio-economic development, especially improving the economic, cultural, and social lives of border residents, creating a solid foundation for developing borderlines of peace, stability, friendship, cooperation, and sustainable development between Vietnam and Cambodia.

State Practice Notes on Korea

A Critical Study on the Violation of the Human Rights of the Residents of the Five Islands in the West Sea under the Fishing Vessel Safety and Fishing Act

*Chang Hun Cho**

1 Introduction

The five West Sea islands of Yeonpyeong Island, Baengnyeongdo, Daecheongdo, Socheongdo and U Island ("Five Islands") are the starting point of the Northern Limit Line (NLL) in the West Sea where the constant possibility of military conflict lingers near the border with North Korea. However, there is a harsh reality for the residents of these islands who risk their lives and property daily.

The problem of human rights violations among residents of the Five Islands is closely related to inter-Korean relations. Namely, the fundamental solution to the violation of human rights for those living on the Five Islands is to establish and consolidate a peace regime between the South and the North, and to achieve peaceful unification.

In the October 4th Joint Declaration between the two Koreas in 2007, both sides agreed to establish a peace and cooperation zone in the West Sea, and in the Panmunjom Declaration in April 2018, the two leaders agreed to "make the NLL a peace zone to prevent accidental military clashes and ensure safe fishing activities." However, this has yet to be realized.

Every citizen has the right of human worth, dignity and to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals. The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order or for public welfare. Furthermore, even when such restrictions are imposed, no essential aspect of the freedom or right should be violated.

The Korean government's neglect of the basic rights of the residents of the Five Islands for national security is tantamount to acquiescing in the infringement of their human rights beyond tolerable limits. Therefore, the Korean government must pay attention to the human rights issues of the residents of the Five Islands to faithfully fulfill its constitutional obligations. While the

* Third Year Graduate Law Student, Inha University Law School, Korea.

Korean government has implemented various policies in accordance with laws to support the Five Islands, their effectiveness remains questionable.

Therefore, to ensure the human rights of these residents, a careful consideration of the options by the Korean government must be discussed. It is necessary to pay attention to the various aspects of human rights violations of the residents of the Five Islands and propose realistic solutions.

First, it is necessary to clarify the legal standards before analyzing the human rights violations of the residents of the five islands in the West Sea. Various international human rights conventions guarantee human rights and fundamental freedoms declared in the Universal Declaration of Human Rights. They include the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

In particular, the expansion of fishing areas, the extension of fishing hours, and transfer of resident control to the private sector have been long-desired by the residents. Therefore, this note will analyze them based on the corresponding economic and civil rights, considering that fishing is only possible within a limited area due to the border area of North Korea, and that night fishing has been prohibited since 1964, and that free movement to and from has been restricted due to security reasons.

1.1 *Fishing as an Economic Right*

Households dependent on fishing account for about 30% of the population of Yeonpyeong-myeon, Baengnyeong-myeon, and Daecheong-myeon as of 2018 which demonstrates that the fishing industry is one of the most important sources of income for residents of these Five Islands.

In addition, the total catch of fishery products was 6,744.121 (M/T) in 2014, 4,330.768 (M/T) in 2015, 6,599.560 (M/T) in 2016, 7,170.950 (M/T) in 2017 and 6,661.379 (M/T) in 2018, which is similar to the last five years. However, it can be seen that the value of fishery products increased to 52,463,580,000 won in 2014, 38,227,984,000 won in 2015, 49,951,089,000 won in 2016, 48,765,328,000 won in 2017 and 64,717,090,000 won in 2018. In particular, in 2018, the total catch decreased compared to 2017, but the amount of income increased.

Meanwhile, night fishing on the Five Islands has been banned since 1964 due to the military confrontation between the two Koreas, and the fishing area of the Five Islands has been maintained at 1,614km^2 since the expansion of 280km^2 in 1992.[1] In other words, fishing rights as economic rights of residents of the Five Islands have been restricted for a long time because it is geographically

1 The area of this fishery is as follows for each administrative district. The area of Baengnyeong, Daecheong, and Socheong fishing ground is 368km^2. The case for Yeonpyeong fishing ground

adjacent to North Korea and the security issues of the Navy and the Coast Guard.

As the South and the North decided to create a peace zone near the NLL in the West Sea and take practical measures to ensure safe fishing activities through the Panmunjom Declaration in April 2019, the Pyongyang Joint Declaration in September of that year, and the military agreement between the two Koreas, the South Korean government partially lifted restrictions on fishing on the five islands after collecting opinions from various sources.

Night fishing, which had been banned so far, was allowed for 30 minutes each before and after sunrise, and the fishing area of the Five Islands was expanded by 245km^2 from 1,614km^2 to 1,859km^2. It expanded each 46km^2 and 44km^2 to the east and west of the existing Yeonpyeong fishing grounds, and expanded about 155km^2 to the east of the existing B fishing grounds. In particular, the expansion and the extended fishing times were not decided under agreement with North Korea, but was independently carried out by the South Korean government. At that time, the Minister of Oceans and Fisheries expected the catch of fish to increase by at least 10 percent due to the expansion of the fishing grounds.

Regarding the opinion that "there is still a lot of space left to the south of the NLL, and we may be able to expand a little more if we decide to," then Minister of Oceans and Fisheries Kim Young-choon replied, "the fishing ground most frequently requested by fishermen in Baengnyeong and Daecheong islands is between the NLL, but if we expand it, we will be too close to the NLL, and we cannot guarantee that peace settlement is complete." Furthermore, as to the issue of "whether the discussion on the joint fishing area between the two Koreas is under way," the minister replied, "there is no formation of a joint military committee to set up a joint fishing area yet." In particular, the minister stressed that overall, there must be limits to expansion due to restrictions on the safety of so-called fishing boats, the number of naval patrol boats and maritime police forces in the five islands of the West Sea.

However, the situation was different in the East Sea border of the NLL. The northernmost "Jeodo Fishing ground" in the East Sea was opened to allow entry from April to December every year. Despite the danger of crossing the border and kidnapping just 1.8 kilometers away from the NLL, fishing guidance ships and military and police vessels were deployed at all times during the opening period to conduct safety management of fishing boats.

---

is 815km^2. The area of A fishery grounds is 61km^2. The area of B fishing grounds is 232km^2 and C fishing grounds area is 138km^2.

Various circumstances, such as environmental and geographical differences between the East and West Seas, actual military conflicts, and the number of ships subject to management and protection, should be viewed together to determine whether discrimination is based on rational reasons. Nevertheless, issues regarding the differences between the West and East Seas have arisen.

1.2 *Freedom of Movement as a Civil Right*

After the artillery attack by North Korea on Yeonpyeongdo, military control over the daily lives of residents of the Five Islands has changed dramatically. This control is aimed to ensure the safety of residents from North Korean provocation or infiltration. At that time, residents in lodging businesses, travel and tourism industries thought it would be impossible to operate normally for at least half a year, and from November 23 to December 3 of that year, 879 of the 5,078 residents and 90 out of 227 military families left the island.

Until now, fishermen have been fined or assessed administrative measures if they violate various restrictions, such as crossing the fishing line or refusing to comply with the military authorities. Given these events, it is questionable whether the military's control of civilians can be justified. Currently, the South and the North are in a state of a truce, and though the Five Islands are closely located by the NLL but it is not a real war situation. Focusing on the fact that human rights are generally understood as the right not to experience undue governmental interference, the residents of the Five Islands also have the right to enjoy freedom in their living areas.

2 The Fishing Vessel Safety and Fishing Act

The Fishing Vessel Safety and Fishing Act was enacted as No. 16569 on Aug. 27, 2019, and took effect on August 28, 2020. The Act was enacted to contribute to the safe operation of fishing boats and the protection of people's lives and property from the risk of accidents caused by potential confrontation between South and North Korea in the waters off the Five Islands.

However, the law was enacted at a time when peace between the South and the North was in full bloom. It was said that the Act would degrade the purpose of the Panmunjom Declaration, the Pyongyang Joint Declaration, and the military agreement in April 2018 which would run counter to the direction of guaranteeing human rights for residents of the Five Islands. This note will examine the problematic clauses of the Fishing Vessel Safety and Fishing Act for human rights violations experienced by the residents of the Five Islands.

The Act defines the "fishing limit line", "specific sea area", "the fishing boat" and "the fishing-restricted area" in relation to fishing. Specifically, the fishing line is that area where Korean fishermen can operate from the northern line of the West Sea and East Sea. This is prescribed by Presidential Decree. The Enforcement Decree of the Act clearly specifies the starting point of the line. Furthermore, the Act prohibits fishing or navigation across this fishing line, but not in exceptional cases prescribed by the Presidential Decree.

The Act allows the Minister of Defense or the Chief of the Korea Coast Guard to restrict fishing or navigation, if he or she deems that fishing boats have a significant impact on safe fishing or navigation unless they immediately restrict fishing or navigation. Article 17 of the Act provided the legal basis for military control over civilians on the five islands in the West Sea by stipulating the scope of fishing grounds under the Presidential Decree among the border areas connected to the NLL. Additionally, Article 11 of the Enforcement Decree stipulates the scope of fishing grounds under the control of military units as Baekryeongdo, Daecheongdo, Socheongdo, Yeonpyeongdo, Ganghwa Island, and its surrounding waters.

Article 30 of the Act further stipulates that those who disobey such military control shall be sentenced up to one year in prison or fined up to 10 million won. The issue has been raised as to whether the Fishing Vessel Safety and Fishing Act, which was enacted to protect fishermen, has valid grounds for the criminal punishment of fishermen, but more importantly, in a situation when they fail to comply with military control only in the area of the Five Islands. In other words, criminal prosecution is only permitted in the area of the Five Islands as well as administrative disposition in case of violations of the law.

The enactment of the law has made it official for the military to manage operations in the areas of the Five Islands. Management is not undertaken by local governments or the Coast Guard. Park Tae-Won, the former head of a fishing village society on Yeonpyeong Island said that "if we leave the fishing zone, we will be sent to jail. Control is getting stronger than it was under the military regime." The government seems to have forgotten its promise to turn the Five Islands into a peace zone. Jang Tae-heon, the head of the fishing village fraternities of Baengnyeong Island also expressed his concern that "Baekryeong Island often crosses the fishing limit line due to its small fishing grounds, and if the law is enforced, fishing will be further reduced."

The Act has also been criticized for being completely opposed to measures to create a peace zone in the West Sea following the inter-Korean summit. The Minister of Oceans and Fisheries expanded the fishing area and fishing time of the Five Islands in the West Sea, and the Ministry of National Defense

also lifted the military facility protection zone 26 times the size of Yeouido, focusing on the border area. While the incumbent administration is working on measures to protect property rights and establish a peaceful atmosphere, the National Assembly passed a law that clamps down on the human rights of fishermen.

In addition, even before the Fishing Vessel Safety and Fishing Act, there were frequent fishing controls as military units conducted live fire training. However, after the law took effect, fishermen face criminal punishment if they fail to comply with the control over the entry and exit of fishing grounds by the head of a military unit. It follows that the control exercised by the commander of a military unit has resulted in a loss of fishing activities. The Supreme Court decided that the right to claim compensation for loss does not arise if the reason for fishing restrictions is pursuant to Article 34 (1) of the Fisheries Act which concurrently meet the requirements of "when deemed necessary for national defense" and the requirements of one of the industrial projects such as projects for defense and military affairs. The Supreme Court's position is likely to be the same for losses incurred by a fishermen's failure to engage in fishing activities due to the control of a military unit chief under the Fishing Vessel Safety and Fishing Act. In other words, as arbitrary control of the head of a military unit is legalized, infringement on the fishing rights of fishermen may intensify.

Even in the process of enacting the Fishing Vessel Safety and Fishing Act, criticism has been raised about the lack of democratic accountability in the collection of opinions from local residents. From the perspective of the residents of the Five Islands, a conflict has been escalating as they are excluded from the process of enacting laws as well as preparing for implementation. Kim Young-ho, the current head of Daecheong Island's fishing village society has said, "it does not make sense to implement the law without informing the parties, let alone not collecting any opinions." The Ministry of Oceans and Fisheries indicated that a public hearing was held, but confirmed that none of the representatives who attended the hearing were related to the Five Islands in the West Sea.

3 Overseas Cases of Fishery Control in Border Sea Areas

It is not easy to find examples abroad that are factually similar to this situation, as the Fishing Vessel Safety and Fishing Act reflects the division of the two Koreas. In response, this note will analyze overseas cases of fishermen control measures.

3.1 *United States of America*

The United States may inspect the movements of foreign or domestic vessels in U.S. territorial waters at any time and deploy patrol boats when it recognizes a national emergency. The control of the ship and its crew with the consent of the President is possible, if it is necessary to prevent damage to the ship, to prevent encroachment on the U.S. ports or territorial waters, or to comply with U.S. rights and obligations.

On this basis, rules were enacted for the Coast Guard to control all vessels sailing in U.S. territorial waters. The rules stipulate that the commander of the U.S. Coast Guard can control the movement of ships, and that if vessel fails to comply with the commander's control, the operator of the vessel will be sentenced to prison. A court can also impose a fine of up to $10,000 USD at its discretion.

3.2 *Taiwan*

Taiwan has experienced hostilities with China. Taiwan's "Kinmen Island," in particular, was the last line of defense for Chiang Kai-shek to stop the Chinese army from advancing towards the island. This led to the rapid military fortification, and political guides were dispatched to each village to monitor residents. After 8 PM, daily lives of residents were heavily restricted which included curfews and permission for movement. As a result, access to the coast was strictly controlled along with the maintenance of military-oriented economic activities such as services for soldiers. However, as economic development of the area was slowed due to security restrictions, traditional cultural assets were maintained which created tourism opportunities for the benefit of local residents.

4 Conclusion

4.1 *Non-Discriminatory Control of Residents by Military Commanders and Clarification of their Scope of Control*

Shirakusa's principle is that an individual's right of freedom should be restricted to non-discriminatory and minimum limits on the basis of law while taking into account the need for public interest and the principle of proportionality with the basic rights of the individual limited by the measure. First, under Article 30 of the Fishing Vessel Safety and Fishing Act, criminal punishment will be imposed on those who fail to comply with controls near the West Sea border. In the case of East Sea border, however, there is a different set of rules. Failure to implement control at the same border area will result

in human rights violations of residents of the Five Islands if discrimination is made without reasonable reasons.

In addition, the Protection of Military Bases and Installations Act stipulates that the designation of protected areas, civilian control lines, flight safety zones and anti-aircraft defense cooperation zones should be made within the minimum extent necessary for the protection of military bases and facilities, the smooth performance of military operations, and the flight safety of military aircraft. In addition, the scope of prohibited or restricted acts within a protected area is quite narrow, and the scope of criminal sanctions, such as imprisonment for up to three years and minimum confiscation, is wide depending on the type of violation.

While the Protection of Military Bases and Installations Act seems to be more strict in the imposition of criminal penalties stipulated in comparison to Article 30 of the Fishing Vessel Safety and Fishing Act, it more clearly sets the scope of the regulations by setting forth standards as specific as possible rather than simply providing for penalties.

4.2 *Limitations on When Military Control Is Required*

According to General Comment No. 29 adopted at the Seventy-Second Session of the Human Rights Committee, allowing measures to suspend human rights violations in special circumstances, such as a public emergency that threatens the existence of a nation beyond the general standard of limitations, is only possible in urgent public emergencies that threaten the existence of the country by law. In other words, the restriction must be exceptional, temporary and limited in scope.

However, Article 17 (1) of the Fishing Vessel Safety and Fishing Act only stipulates that the head of the military unit in charge of the area can control access to fishing grounds prescribed by Presidential Decree among the border areas connected to the NLL in the West Sea. In other words, residents of the Five Islands are allowed to control their entry and exit under the judgment of the commander of the military unit, not only during wartime circumstances, but also quasi-wartime situations involving a localized provocation. In the West Sea, where there is a possibility of a military conflict at all times under the ever-changing relations between the two Koreas, it is too burdensome for residents to be subject to control by the arbitrary judgment of the military commander.

4.3 *Mitigation of Sanctions for Non-Compliance*

The shift from administrative to criminal sanctions is severe. This also poses the risk of turning residents of the Five Islands into potential criminal perpetrators, not as human rights victims, which in turn creates a stigma for the residents.

Article 30 of the Fishing Vessel Safety and Fishing Act requires those who simply violate Article 17 of the same Act to be criminally punished without exception for refusing to comply with the control orders for the West Sea border area. If they cross the control line established by the military unit commander in waters where there still is no clear boundary established, they will be subject to criminal prosecution.

4.4 *Establish Procedures to Collect Public Opinion from Residents in the Process of Improving Legislation*

It is rather questionable whether the fishing boat safety law was based on consensus through social public discussion, including the opinions of the residents of the Five Islands. Furthermore, there was no in-depth consideration of whether such restrictions of basic civil rights were justified, even though there was a high possibility of infringement for violations that would be subject to criminal sanctions solely because non-compliance with the orders given by the military commanders in the waters bordering the West Sea.

The Office of the United Nations High Commissioner for Human Rights and the United Nations Secretary-General stress the importance of ensuring the participation of all affected people in determining the country's countermeasures and policies, especially the relevant experts who are free to speak and share information – which is particularly important to each other and with the public. Therefore, there will certainly be a need to reduce social conflict and friction caused by the enforcement of the law, by collecting and reflecting the opinions of actual residents, rather than legislating with any input from those who will be affected by the rules.

State Practice Notes on Korea

The Procedure for the Compulsory Execution of the Ruling on Nippon Steel to the Victims of Forced Mobilization during the Japanese Colonial Period

*Daehun Kim**

1 Introduction

On June 3, 2020, South Korea's Pohang Branch Court of the Daegu District Court (Pohang Branch Court) announced through the media that on June 1, it served Nippon Steel[1] by public notice documents of the court ruling. It included the seizure of the company's assets in order to compensate for damages caused to the Korean forced labor victims during the Imperial Japanese occupation.

Service by public notice is a process by which a party to a lawsuit gives an appropriate notice of legal action to another party, and the other party is presumed to have been served even if a fixed time on the service has elapsed. This is the first time a Korean court decided upon the service of process directly to a Japanese private company on the issue of reparation for damages to forced labor victims.

After one year and ten months since October 30, 2018, when the Supreme Court of South Korea rendered its *en banc* judgment acknowledging Nippon Steel's liability for reparation to victims of forced mobilization (Judgment on Forced Mobilization), the Pohang Branch Court's decision allowed the victims to begin the procedure for receiving substantial compensation for the harm they suffered. The 2018 Judgment on Forced Mobilization became a significant turnaround from the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (1965) (Claims Agreement) because it officially acknowledged the individual rights of the victims of forced-mobilization to claim reparations.

* Third Year Graduate Law Student, Inha University Law School, Korea.

1 The current Nippon Steel Corporation was formed with the merger (2012) of the original Nippon Steel (founded in 1970) and Sumitomo Metal Industries (founded in 1935), and the name of the merged company was changed from Nippon Steel & Sumitomo Metal Corporation to Nippon Steel Corporation in 2019. The original Nippon Steel originated in a war criminal company during the Imperial Japanese occupation. At present, Nippon Steel and POSCO, a Korean steelmaker, have strategic partnerships with each other, through the joint purchase of raw materials, joint R&D, and technological exchange, withholding 3.50% and 5.05% of the other company's shares, respectively.

Even though the Supreme Court rendered the judgment at that time, there were many hurdles to overcome. There were difficulties regarding the terms of diplomacy and international law and the actual procedure for financial reparation to the victims because the seized assets of Nippon Steel in South Korea could not be liquidated due to the lack of cooperation by the Japanese government.

However, as a result of the Pohang Branch Court's decision on the service by public notice upon Nippon Steel, the judiciary's judgment on the "issue of forced mobilization" by Japanese private companies has shifted from determining the right or wrong on "the issue of forced mobilization," to whether the Japanese companies' assets seized in South Korea can be liquidated to substantially compensate the victims. This problem has become a very important issue for domestic companies doing business with Japan, since, according to data released by the Prime Minister's Office in 2012, 299 companies connected with Japanese war crimes currently exist.

Therefore, this note aims to review the procedure for compulsory execution under South Korean law, focusing on the process that has developed after the Supreme Court's 2018 Judgment on Forced Mobilization.

2 The Status of Progress after the Supreme Court's 2018 Judgement on Forced Mobilization

On January 4, 2019, at the victims' request, a follow-up action after the Supreme Court's ruling on reparations for damages was established. In October 2018, the Pohang Branch Court ruled in favor of seizing Nippon Steel's shares in PNR,[2] a joint venture of Nippon Steel and POSCO, and on January 4, 2019, an order of seizure, and a copy of the ruling on stock seizure was served upon PNR. Finally, on January 10, 2019 the seizure became effective.[3]

Afterward, on January 22, 2019, the Pohang Branch Court requested the National Court Administration to serve the written stock-seizure decision of this case to Nippon Steel, and the National Court Administration sent to the

2 PNR (POSCO-Nippon Steel RHF Joint Venture, Co. Ltd.) is a joint venture established in association with Nippon Steel in January 2008 for the recycling of ferrous metallurgy byproducts.

3 Civil Execution Act, Article 227 (Seizure of Monetary Claim) (3) An order of seizure shall take effect upon a service on the garnishee.

Japanese Ministry of Foreign Affairs the "Request for the Service Abroad of Judicial and Extrajudicial Documents" dated January 25, 2019, which included the written stock-seizure decision of this case. However, while the Japanese Ministry of Foreign Affairs received the above Request for Service Abroad on February 7, 2019, it did not proceed with the procedure for serving the documents upon the head office of Nippon Steel for over five months and returned the Request for Service Abroad to South Korea's National Court Administration without specifying any reason. To this end, on August 6, 2019, counsel for the victims submitted to the Pohang Branch a written request asking for re-service of the documents.

On May 1, 2019, counsel filed in the Pohang Branch Court, a request for a sale order regarding the seized shares of Nippon Steel in PNR. Accordingly, on June 18, 2019, in the above case of compulsory execution (request for sale order), the Pohang Branch Court issued against Nippon Steel a written examination to the effect that the company should present an opinion, if any, in writing with regard to the request for sale order within 60 days from the arrival of that document; the court, however, did not receive any reply. On June 1, 2020, the Pohang Branch Court served upon Nippon Steel the documents of asset seizure for compensation to the Korean victims of forced mobilization.

Regarding the above process up to the court's service by notice, some criticized the court for the extended time and the complicated procedure required for the substantial reparation of the victims, despite the fact that Nippon Steel's liability for reparations had already been acknowledged in 2018. However, the court's process of execution is not an area for value judgement, but a practical area of administration that requires specific and elaborate rules to operate. Therefore, the criticism against the court should start with examining whether the court's process of execution was proper in view of the lower-level rules or the court's practical criteria for the decision, which are the grounds for the court's execution.

2.1 *Legal Review of the Process of the Court's Compulsory Execution*

Under South Korean law, the creditor's self-help against the party in default is not permitted. The creditor should file a lawsuit in a court to receive a final and conclusive judgment, or apply to an executing agency for execution by a notary deed with executory force. In the event of the creditor's application for execution, the court: first, seizes the garnishee's property to prevent its disposition; second, compulsorily liquidates the property by sale or by similar means if the debtor fails to perform its obligation; and finally, makes reimbursement to the creditor by distribution. The compulsory execution under Korean law

progresses in three stages, and is stipulated under the Civil Procedure Act, the Civil Execution Act, and detailed enforcement regulations.

The defendant, Nippon Steel, refused to make direct monetary compensation to the victims in compliance with the ruling of the Supreme Court. The victims' counsel chose to seize the shares of Nippon Steel in PNR, which is a joint venture formed by Nippon Steel, the Japanese company and debtor, and POSCO, a Korean company. From a legal point of view, the victims' counsel had no problem with the application of Korean domestic law, because the target of seizure was Nippon Steel's assets located in South Korea.

Nippon Steel, however, showed no response to the seizure at the first stage. The victims of forced mobilization filed in the competent Pohang Branch Court requested a sale order regarding the seized shares of Nippon Steel in PNR. The second stage of the procedure for compulsory execution, which is the encashment, is on the basis of the effect of the lawful seizure.

The request for sale order filed by the plaintiff corresponds to the method of special encashment.[4] The reason for this request is when there is difficulty in the collection because the shares of Nippon Steel in PNR to be liquidated are unlisted shares, which are not tradable in the market.

In principle, according to the Civil Execution Act, the court shall examine the debtor before rendering the ruling on permitting request for special encashment. However, although the competent court of the Judgment on Enforced Mobilization sent a written examination to the defendant, Nippon Steel, in order to hear its opinions according to the principle, it did not receive a reply.

Cases like this are treated as exceptional by the Civil Execution Act, where the examination (return of reply) may be dispensed with. The provision of Article 241(2) of the Civil Execution Act specifies, "Provided, that when the debtor stays in a foreign state or his/her whereabouts is unknown, such examination may be dispensed with." Therefore, the court can judge that the procedure for examination may be dispensed with respect to the case of Nippon Steel, a debtor that resides in a foreign country.

Considering the ruling on service by public notice made by the competent court of the Pohang Branch Court on January 6, 2020, it may be viewed as a

4 Article 241 (Method of Special Encashment) (1) of the Civil Execution Act stipulates, "When a seized claim is on a conditional basis or subject to time limit, is connected with a performance of a counter obligation, or is impracticable to be collected for other reasons, the court may issue any of the following orders, upon a motion of the creditor," and it may be said that unlisted shares like shares of PNR come under "when a seizure claim is impracticable to be collected for other reasons" of Article 241 (1).

decision based on the above legal review leading to the judgment that the procedure for examination may be dispensed with provided however, some additional review since the defendant is Nippon Steel a foreign, Japan-based corporation located in Korea.

2.2 *Review on Procedure for Service Prescribed by International Law*

2.2.1 General Law and Special Law Applicable to Service Perfected in a Foreign Country

The service by public notice refers to a system in regards to a specific situation if a junior administrative officer of a court keeps the document to be served, and posts the reasons on the court's bulletin board. The service can be otherwise perfected in such manners as prescribed by Supreme Court Regulations, the complaint is deemed as having been served upon the defendant, even though the complaint is not delivered to the defendant.

Within South Korean law, the Civil Procedure Act stipulates the principles of service by public notice. It specifies methods for effecting the service in a foreign country as well as in South Korea. First, in the case of service perfected in a foreign country, it shall be entrusted by the presiding judge of a Korean court to the Korean ambassador, minister or consul stationed in the relevant foreign country or the competent government authorities of the country. However, if it is impossible to comply with the provisions of Article 191, or deemed ineffective at least, even if the provisions are complied with because a junior administrative officer of a court may, either ex officio or upon request from the parties, make service by public notice. Moreover, if service by public notice is made in a foreign country under the provision, the service by public notice takes effect with the lapse of two months. Therefore, it may be said that service upon a corporation in a foreign country is permissible, if the provisions of service in the Civil Procedure Act are applicable. However, if there is any special law regarding the service to be perfected in a foreign country, the special law prevails over the general law, as the way it is with other laws and regulations.

Special laws regarding the service to be perfected in a foreign country are the Act on International Judicial Mutual Assistance in Civil Matters and its lower Regulations on International Judicial Mutual Assistance in Civil Matters. These special laws, however, are applicable only in case where are no treaties on service that have been concluded, and if there is any treaty on service between South Korea and another country, the treaty takes priority in application. Therefore, judgment about the legality of service by public notice perfected upon Nippon Steel by the court requires review based on the service treaty signed between South Korea and Japan.

2.2.2 Procedure for Service Based on the Hague Service Convention

Currently, South Korea and Japan are members of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention), and service in both countries are legally judged according to the Hague Service Convention.

The Hague Conference on Private International Law, which was created in 1893, has made efforts to unify the rules of private international law. As one such effort, the Hague Service Convention, one of Hague Civil Procedure Conventions, was concluded in 1965. South Korea also joined the Hague Service Convention in 2000, and it reflected service abroad procedures based on the Hague Service Convention in the Bylaws on International Judicial Mutual Assistance in Civil Matters.

In principle, the Hague Service Convention's entrustment should be made by the method of indirect implementation via a governmental agency of the entrusted country. Specifically, the procedure for service from South Korea to a foreign country is as follows: (1) domestic court of lawsuit; (2) president of court; (3) National Court Administration; (4) a central agency of the entrusted country (ministry of legal affairs, ministry of foreign affairs, etc. in the relevant country; and (5) a relevant court in the entrusted country.

Currently, Japan is also a member of the Hague Service Convention and complies with the convention. Therefore, in the Judgment on Forced Mobilization, service upon Nippon Steel progresses through the following stages: Pohang Branch Court to the President of Daegu District Court to the National Court Administration to the Japanese Ministry of Foreign Affairs to a Japanese court. However, the Japanese Ministry of Foreign Affairs delayed service. The question is whether there is any exception to avoid the delay and service of the documents upon Nippon Steel under the Hague Service Convention.

2.2.3 Whether Service Can Be Perfected by the Method of Direct Implementation

According to the Hague Service Convention, in principle, a foreign country's service should be made by the indirect implementation method. In certain cases, however, it is possible to effect service directly through consular agents in a foreign country because the Hague Service Convention explicitly permits each contracting state to effect service through its diplomatic or consular agents not only upon a national of the State in which the documents originate, but also upon other persons abroad. This is provided, however, that the Convention allows any State to declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

At the time of signing of the Hague Service Convention, South Korea declared its opposition under Article 8 of the Convention.[5] It blocked the way for another Contracting State to serve documents upon persons within the territory of South Korea other than a national of the State in which the documents originate.

There is no doubt that the Hague Service Convention does not prescribe the strict principle of reciprocity. However, given that reciprocity is the basis for international relations, it is viewed that service by the direct implementation method should be restricted to Korean nationals. Therefore, it is deemed difficult to excuse the Japanese Ministry of Foreign Affairs and adopt the method of direct service upon Nippon Steel.

3 Possibility of Domestic Ruling without Effecting Service

Service abroad will infringe upon the interests of the party abroad because it usually takes a long time. Therefore, Article 15 of the Hague Service Convention stipulates special rules connected with a case where no certificate of service has been received within a fixed period.

It provides that each Contracting State shall be free to declare, that even if no certificate of service or delivery has been received, the judge may give judgment if: (1) the document was transmitted by one of the methods provided for in the Hague Service Convention; (2) a period of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document; and (3) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

To examine the Judgment on Forced Mobilization case, it is deemed that the Korean court may give judgment under the Hague Service Convention's special rules because (1) the written examination was transmitted to Nippon Steel under the Hague Service Convention; (2) a period of more than six months has elapsed since June 18, 2019, the date of the transmission of the written examination; and (3) it seems that every reasonable effort has been made to obtain a certificate through the Japanese Ministry of Foreign Affairs. Therefore, it is

5 Article 8 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) states that "Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents. Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate."

judged that the Korean court's service by public notice upon Nippon Steel is lawful since it does not violate the Hague Service Convention.

4 The Future Prospects of Procedure for Execution

Given that the South Korean court's decision regarding service by public notice upon Nippon Steel was lawful, after midnight of August 1, when two months passed since the court decided that service by public notice upon the debtor Nippon Steel, documents relating to seizure were regarded as having been served upon Nippon Steel. The court will be able to decide on the sale of the seized shares of Nippon Steel in PNR. If there is no problem after that, the court seizure and sale of the shares usually and quickly provides the victim with compensation.

However, it is highly likely that the process that follows service by public notice will not be smooth. POSCO, another shareholder of PNR, can suspend the execution process by immediate appeal to the decision to sell Nippon Steel's PNR stake, and it will take a long time to liquidate the stock because the challenges of assessing the value of unlisted stock.

In case where there is no problem with the Compulsory Execution, during the period up to that time, the court will evaluate Nippon Steel-owned shares in PNR as preparation for deciding on their sale. If a result of the evaluation, the indemnity claim of enforced-mobilization victims and procedural expenses are found to be reimbursable with the proceeds of the sale to be seized, the court may give the order for sale two months after the service by public notice was perfected.

If the seized assets are sold, and an execution officer of the court receives the proceeds of the sale of the seized shares in PNR, it shall be deemed that Nippon Steel has paid damages to the victims of the forced mobilization at the time of receiving the proceeds. After that, the execution officer will present the proceeds of sale and the protocol of sale to the execution court, and when the proceeds of the sale are presented, the distribution procedure will be commenced by the execution court. Through this, the victims will be financially compensated.

4.1 *Possibility of POSCO's Immediate Appeal to the Decision to Sell the Nippon Steel's PNR Stake*

An immediate appeal means an application for non-compliance with a decision or order concerning the proceedings of a lawsuit and is only possible if it is prescribed by law. The sale of PNR shares follows the method of special

encashment. Moreover, the statute stipulates that an immediate appeal can be made for the decision to special encashment.

In general, an immediate appeal has the effect of suspending the execution. However, in the compulsory execution procedure, it does not have the effect of suspending the execution. Indiscriminately denying the suspension's validity could cause irreparable damage to the complainant, so the court acknowledges the effect of suspending the decision's validity by blocking the decision itself in the case of a trial in which it is valid only when confirmed in practice.

The order for special encashment of the stock at issue in this matter will only take effect if confirmed. Hence, an immediate appeal to the decision of special encashment will result in the suspension of execution without a separate suspension. The execution may be suspended if an immediate appeal is made within one week from the court's decision to allow the sale.

Commonly, a person who can make an immediate appeal to a special encashment order is the debtor. Currently, however, the debtor (Nippon Steel) has not responded to the South Korean court's action, so it is questionable who can make the immediate appeal. Based on the Supreme Court's precedent, the creditors can immediately appeal to reject the special encashment order. It can be interpreted that a person whose legitimate interests have been violated in consideration of the purpose and interests of the compulsory execution system can make an immediate appeal.

According to the interpretation of this precedent, POSCO, which established a joint venture with Nippon Steel, can immediately appeal to stop the compulsory execution. Because the forced sale of its business partner's (PNR) stake would force the company to change its business partner, resulting in severe damage to the development of new technologies and profit-making, it sought to obtain in cooperation with Nippon Steel. If the court cites POSCO's immediate appeal, the decision to sell the stock will be suspended, and if POSCO appeals the court's decision, the trial is likely to proceed for years again.

4.2 *The Possibility of a Prolonged Delay in the Sale of Unlisted Shares*

The PNR shares of Nippon Steel, which the victims of forced labor intend to seize and sell, are unlisted shares. It is challenging to assess the value of unlisted stocks because they do not have the market price of publicly traded listed shares. Therefore, the court will evaluate the value of unlisted shares with financial statements and evidence that show its financial position. However, even if the court assesses the value through this process, it is challenging for the shares to sell.

In general, the seized shares are sold at auction. However, most unlisted stocks have been auctioned off, continuing to lose value compared to the

original valuation because the investors who want to purchase shares think unlisted stocks are less reliable than listed shares.

Furthermore, the unlisted companies do not disclose all information transparently, which can cause significant losses and cause difficulties for investors to resell purchased shares. If it becomes challenging to sell the stock at auction, the victims may obtain a bond by taking over the shares and becoming a direct shareholder. However, it will take at least several years, making it difficult to compensate the victims quickly.

5 Conclusion

Through the *en banc* judgment on forced mobilization, the Korean judiciary seems to have consolidated its stance on the exclusion of compensation for Korean individuals from the 1965 Claims Agreement. It is thought that this stance will also be maintained in possible lawsuits against Japan to be filed by victims of forced mobilization in the future.

Further, the decision of service by public notice rendered by the court in 2020 is significant in that compulsory execution to substantially compensate the victims has become enforceable regardless of the attitudes of Japanese companies that refuse to give reparations to the Korean victims of forced mobilization during the Imperial Japanese occupation, and the refusal of the Japanese government to serve process to its companies. Nonetheless, the Korean court's decision took too much time to be processed. Because the period of the litigation for the victims has taken as long as 23 years, (including litigation in Japan) it is hard to predict how many more years it will take for full compensation for the victims if an immediate appeal is made for a suspension of compulsory execution. The sale of unlisted stocks will be inevitably delayed.

These dire consequences occurred because the South Korean judiciary prioritized political judgment, which considered diplomacy and domestic political relationships, over the realization of justice for the victims of forced mobilization and military sexual slavery during the Imperial Japanese occupation.

As a representative example, the *en banc* judgment for reparations was not established until 2018, five years after Nippon Steel appealed against the 2013 ruling on the reparation of victims of forced mobilization due to the Park Geun-Hye administration's pressure on the judiciary. During the period of delay of the court's judgment, as many as three of the four victims of forced mobilization died of old age.

After the Korean court decided upon service by public notice upon Nippon Steel, the Japanese government responded that it will review every option

available to it. Given that Japan's export restrictions on South Korea in 2019 were a disguised retaliation to the 2018 court ruling for compensation for Korean victims, it is likely that Japan will retaliate by similar means again.

However, it is believed that the judiciary judgment and decision should be made through a fair process based on the law, apart from political issues because it is the fundamental principle of the Korean Constitution. It clearly reflects its stance on the separation of powers, that political and diplomatic problems regarding a judgment rendered through a fair process should be settled by the administration and the legislature. It is hoped that the court's ruling on the service by public notice upon Nippon Steel will become a momentum to set right the foundation of the judiciary, that is, the realization of justice.

State Practice Notes on Korea

Korean Municipal Governments' Discrimination of Foreigners regarding COVID-19 Benefits: Decision of the National Human Rights Commission

*Min Jae Shin**

1 Introduction

The outbreak of COVID-19 has not only brought about a global healthcare crisis, but also brought about chaos in the everyday and financial lives of people. Many countries including South Korea have implemented an economic benefit regime as means to cope with the unprecedented threats.

Despite Korea's geographic proximity to China, it has experienced a relatively low mortality rate and rates of confirmed cases. South Korea has shown a rapid and wide-range of virus diagnostic capabilities and pioneered drive-through testing stations that have inspired others to follow suit. Transparent communication between the related authorities has also enabled the government to gain public trust. However, the virus revealed the government's lack of support for foreigners and immigrants. Recently, there was a complaint filed to South Korea's National Human Rights Commission against two municipal governments, Seoul City and Gyeonggi Province. As the global pandemic showed that developed countries were not ready to cope with the novel virus, it revealed the Korean government's insufficient understanding of human rights and international law. This note will focus mainly on the complaint filed against South Korean local governments over discriminatory treatment regarding the distribution of COVID-19 economic benefits.

2 Overview of the Decision

2.1 *Complaints*

Seven foreigners residing in Seoul City and Gyeonggi Province, including a married immigrant woman and a permanent resident, filed a complaint to the National Human Rights Commission. They argued that "in the face of the pandemic, there is no reason for cities to treat residing foreigners differently from Korean nationals." They requested the Commission to advise the mayor

* Third Year Graduate Law Student, Inha University Law School, Korea.

of Seoul City and the governor of Gyeonggi Province to supplement their relief fund policy. The petitioners stated:

> In an emergency situation like a pandemic, the livelihood of foreigners and immigrants are threatened as much as Korean nationals. They suffer from unemployment, layoffs, reduction of social relations and low health service accessibility like Korean nationals. Therefore, it is unreasonable to apply one's nationality, country of origin or family relations in the relief plan.

The relief plans of the Seoul City and Gyeonggi Province exclude foreign residents as beneficiaries, which is a discriminatory act violating human rights. In particular, the exclusion is a violation of human rights prohibited by the Constitution and the National Human Rights Commission Act.

2.2 *Local Governments' Statements*

The Seoul-type Basic Security Welfare system assists households below 100% of the median income. City officials stressed that their emergency checks are not for every citizen, but for lower income households. For emergency checks, it is important that it gets distributed to the needed households fast. To process applications and income investigations, the city needs to attain information via the national social security information system (Haengbok-e-eum). The city investigates the household's income level through the system, which is based on the resident's registration number. Since foreigners do not hold a registration card, but only individually registered by their address, it is difficult for city governments to identify the financial information for foreigners. Moreover, income investigation on foreigners through the social security system is impossible. The city tried to include some foreigners like married immigrants, to minimize discrimination while putting their best effort to support registered foreigners. For foreign students, the government provides transportation services to and from the airports, and necessary health support such as masks and some health care assistance.

The Gyeonggi provincial government announced their emergency benefit plan in the governor's briefing on 24 March 2020. To deal with the emergency urgently, the city decided to exclude foreigners. This is because the foreigners' conditions were impossible to check via the registration system. The Gyeonggi provincial government has admitted that their policy is insufficient to protect foreign residents' "right of equality and the right to lead a life worthy of human dignity." However, government responded as follows:

> It is hard to say that the basic rights protected by the Constitution are identically guaranteed regardless of one's citizenship. Even if the rights are acknowledged for foreigners, the beneficiary legislation gives the lawmaker freedom of legislation, and thus unless the violation is remarkably arbitrary, the legislation itself cannot be referred to as an unconstitutional measure.

Additionally, emergency basic income falls under the social security system that does not include foreigners. Thus, discrimination between nationals and foreigners is inevitable.

2.3 *Legal Analysis of the Commission's Decision*

The Commission analyzed the petitioner's legal status and rights under domestic and international law. It also reviewed the standards established by international human rights organizations regarding pandemic measures.

2.3.1 UN OHCHR COVID-19 Guidance

The UN OHCHR stressed in its COVID-19 Guidance that migrants and refugees often face obstacles in accessing health care due to language and cultural barriers, costs, lack of access to information, discrimination, and xenophobia. Thus, it recommended that states take specific actions to include these groups in national COVID-19 prevention and response. This should include ensuring equal access to information, testing, and health care for all migrants, IDPs, and refugees, regardless of their status. Additionally, a firewall to separate immigration enforcement activities from the ability of migrants and refugees to access health, food distribution, and other essential services should be guaranteed.

2.3.2 Possibility of International Law Violations

The Commission quoted the International Convention on the Elimination of All Forms of Racial Discrimination in its 2020 Decision. While the Convention casts possibilities of treating citizen and non-citizens differently in Article 1, Paragraph 2 as "this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens," the Committee on the Elimination of Racial Discrimination published its interpretation of the provisions in General Recommendations No. 11 (1993) and the General Recommendation No. 30 (2004). The 2020 Decision says that General Recommendation No. 11 states that "Article 1(2) shall not be interpreted in a way that would damage the rights and freedoms recognized and stated in other documents, in particular the

Universal Declaration of Human Rights, the Covenant on Social Rights and the Covenant on Freedom." Furthermore, General Recommendation No. 30 (2004) clarifies that "treatment differentiated by citizenship or immigrant status is discriminated if the criteria for this distinction do not comply with a legitimate purpose given the object and purpose of the Convention or are not proportional to the achievement of this purpose."

2.3.3 Review of Foreigner's Legal Status and Basic Rights

2.3.3.1 *Constitution of the Republic of Korea*

According to Article 6, the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea. International human rights law is based on the inherent equality of all people. However, it is debatable as to whether foreigners are also included as the subject of the basic rights ensured by the Constitution since Article 10 indicates "all citizens" shall be assured of human worth and dignity and have the right to the pursuit of happiness. In 1994, the 93 Hun-ma 120 decision of the Constitutional Court first declared that citizens (or foreigners at a similar status with citizens and private juristic person) possess fundamental rights. Many other decisions confirmed that if a certain right is admitted to be universal, it should be interpreted as a human right and applies to foreigners.

2.3.3.2 *Local Autonomy Act*

According to the Local Autonomy Act Article 12 (Qualification of Residents), persons who have a domicile within the jurisdiction of a local government shall be residents of such local government. Article 13 (Rights of Residents) also puts in paragraph 1 that residents shall have the right to use the property and public facilities of their local governments, and to benefit equally from the administration of their local governments as prescribed by statutes.

3 Analysis of the Decision

3.1 *Overview of COVID-19 Economic Benefits in South Korea*

Korean citizens receive economic benefits at two levels: the central government and the municipal government. Both benefits are to stabilize people's living status and to support the national economy. First of all, the central government's benefit is paid to each household based on a person's national health insurance premium. Single-member households get 400,000 won; two-member households get 600,000 won; three-member households get 800,000 won; and households of more than 4 people get 1,000,000 won.

Korean nationals residing abroad were excluded from the benefit since their living base is outside the nation and they are not paying health insurance or the residence tax.

On the other hand, the municipal government's economic aid varies depending on their financial status and local backgrounds. This note will make a comparison of three representative municipal governments: Seoul City, Gyeonggi Province, and Ansan City. These local governments differentiate foreign citizens from nationals. The details of the benefits are indicated in the table below:

	Seoul City	**Gyeonggi Province**	**Ansan City**
Amounts	1–2 member household: 300,000 won 3–4 member household: 400,000 won 5 or more member household: 500,000 won	100,000 won per citizen	100,000 won per nationals & 70,000 won per foreign citizen
Selection Criteria	Households below 100% of the median income	All citizens	All citizens
Inclusion of Foreigners	Marriage immigrants and refugees only	Limited. Permanent residents and marriage immigrants only	All foreign residents

When Gyeonggi Province first announced their benefit plan on 24 March, 2020, criticism arose from foreign residents. Consequently, Gyeonggi Province modified their plan and ordinance to include permanent foreign residents and married immigrants as beneficiaries.

It seems that the local government's overall foreign population and cultural and social context is important to the city's benefit plan. Ansan City is a good example of this. Ansan City decided to include all foreign residents in their relief plan from the beginning. This is due to the city's cultural and social background. Ansan City is the most prominent multicultural city in South Korea. About 10% of its residents are foreigners, which is the highest figure in the nation. Ansan City was designated as an "Intercultural City" by the Council of Europe for the first time in South Korea. An intercultural city refers to a city where various cultural backgrounds and nationalities are respected and

exchanged by the immigrants and natives. Ansan City announced their relief fund plan on 2 April, 2020 which noted that all residents including any registered foreigner who has registered an address in Ansan city on the date was entitled to benefit. The city decided to provide 70,000 won per foreigner and 100,000 won per national.

3.2 *COVID-19 Economic Relief Overseas – Central Governments*

Many countries including South Korea have implemented economic aid to deal with the pandemic. However, each country differs in the way of treating foreign residents and immigrants. The United States regulated federal stimulus funds by enacting S.3548–CARES Act (The Coronavirus Aid Relief and Economic Security). This includes foreigner who have a social security number. Any immigrant who earns below 75,000 dollars and has either a social security number or green card is paid $1,200 USD. One who is a resident based on tax law (who has resided in the United States more than 183 days per year for the past three years) also receives $1,200 USD. Plus, households with kids receive an extra $500 USD per child.

Japan also announced its payment plan on 20 April, 2020 to pay 100,000 Yen per citizen based on resident registration. Since foreigners who have a residence permit and reside more than three months in Japan are obliged to register as a resident, foreigners in Japan are beneficiaries of the Japanese government's economic aid plan.

In the case of Canada, it expanded the beneficiaries to the young and immigrants in need. Canada Emergency Response Benefit (CERB) gives financial support of $2,000 Canadian dollars for four weeks to people who are directly affected by COVID-19. This includes workers residing in Canada who are fifteen years old or over who have stopped working because of COVID-19, or are eligible for employment insurance or sickness benefits, have exhausted their employment insurance regular benefits or employment insurance fisher benefits. Those who had employment and/or self-employment income of at least $5,000 Canadian Dollars in 2019 or in the twelve months before the date of their application are eligible. The unemployed and quarantined can be paid for a maximum of 16 weeks. For students who are not eligible for the CERB may be eligible for the Canada Emergency Student Benefit (CESB). The CESB provides a payment to eligible students of $1,250 or $2,000 Canadian Dollars for every four weeks for maximum of 16 weeks. Foreigners, including international students and temporary foreign workers may also be beneficiaries when they meet the condition stipulated above.

3.3 *COVID-19 Economic Relief Overseas – Local Governments*

Berlin City's decided to give economic relief on 19 March, 2020 regardless of one's nationality. Anyone who has a tax payment serial number, including artists, freelancers, self-employed and small traders can get paid. Entrepreneurs who employ no more than five people receive 5,000 Euros and entrepreneurs who employ six to ten people get 15,000 Euros. Through a special announcement, the city also strengthened the policy that "related authorities should provide information in various languages since many small business owners in Berlin have migration backgrounds." They also promised to provide translation support required for the application process.

California's decision is even more forward-looking. The government of California provided financial support to undocumented immigrants impacted by COVID-19. California's $75 million Disaster Relief Fund supports undocumented Californians impacted by COVID-19, who are ineligible for unemployment insurance benefits and disaster relief, including the CARES Act, due to their immigration status. Approximately 150,000 undocumented adult Californians will receive a one-time cash benefit of $500 USD per adult with a cap of $1,000 USD per household to deal with the specific needs arising from the COVID-19 pandemic. It is the very first state attempt to help undocumented immigrants. "California is the most diverse state in the nation. Our diversity makes us stronger and more resilient. Every Californian, including our undocumented neighbors and friends, should know that California is here to support them during this crisis. We are all in this together," said Governor Newsom in a public release.

The policy was well received because undocumented workers devote themselves in many of the sectors deemed essential, and keeping the state afloat during the pandemic in areas including health care, agriculture, and food manufacturing and logistics. The governor even mentioned in his announcement that "about 10% of California's workforce is undocumented and although they paid over $2.5 billion in local and state taxes last year, they benefit from neither unemployment insurance nor the $2.2 trillion stimulus by the federal government."

From these examples, Korean local governments can learn a lesson on how to strengthen the importance of foreign immigrants to society so that the beneficiaries can be given with less opposition and to achieve social consensus.

3.4 *Analysis of Emergency Aid and Support Act*

According to the Emergency Aid and Support Act, Article 5 (Persons in Need of Emergency Aid) persons eligible to receive aid under this Act shall be limited to those who face critical situations and require urgent aid under

this Act. Article 5-2 (Special Cases of Foreigners) refers to foreigners. It says that foreigners specified by Presidential Decree are among those foreigners who sojourn in the Republic of Korea are eligible for emergency aid if they are under Article 5. The executive order says foreigners are those who are (i) married to a Korean citizen; (ii) one who is divorced from a Korean citizen and whose spouse is deceased and taking care of direct or lineal descendant; (iii) one who is admitted as a refugee; (iv) one who has been a victim of fire, crime, natural disaster; (v) anyone else admitted by the Minister of Health and Welfare to be in need because of an emergency is eligible to receive aid under the Act. Although, subparagraph (i) to (iii) limits the Act to foreigners who have an interrelation with a Korean citizen, subparagraph (iv) and (v) indicates that COVID-19 relief aid may apply to foreign residents.

As mentioned above, the central government of Korea excludes overseas Koreans for these reasons: (1) Emergency Relief Benefit is for the national economy while overseas Koreans' life base is outside the nation; (2) Overseas Koreans do not pay health insurance; and (3) Overseas Koreans do not pay the residence tax. Thus, it can be said that foreign residents who pay not only health insurance and residence tax, but also pay income tax should be included in as beneficiaries. Otherwise, the government's policy would be inconsistent.

4 Implications of the 2020 Decision

According to the National Human Right Commission Act, Article 25 (Recommendation of Improvement or Correction of Policies and Practices) the following should be complied with:

(1) The Commission may, if deemed necessary to protect and improve human rights, recommend related agencies, etc., to improve or correct specific policies and practices or present opinions thereon.
(2) The heads of related agencies, etc., receiving any recommendations under paragraph (1) shall respect and endeavor to implement the said recommendations.
(3) The heads of related agencies, etc., who receive any recommendation under paragraph (1) shall notify the Commission of the plan to implement such recommendation within 90 days from the date on which the recommendation is received.
(4) Where the heads of related agencies, etc., who has received any recommendation under paragraph (1) fail to implement such recommendation, they shall notify the Commission of the reasons.

Since the Commission's recommendations were made on 11 June, 2020, the heads of Seoul City and Gyeonggi Province had until 9 September, 2020 to notify the Commission of their plans to implement the recommendation. Practically, it is difficult for the cities to identify the income or household structure of foreign citizens residing in Korea. This is because, as stipulated in 11, except for foreigners who are married to native foreigners, they are not included on the national resident registration certificate. Rather, they are individually registered by one's address. Hence, it is almost impossible to identify the composition of their household.

Furthermore, according to the Immigration Act, Article 31, if an alien intends to stay in the Republic of Korea for more than 90 days from the date of entry, the alien shall file for alien registration with the head of the Regional Immigration Service having jurisdiction over his/her place of stay within 90 days from the date of entry. Moreover, their registration certificate gives them a registration number. Seoul City investigates the household's income level through the Social Security Information System (Haeng bok e-eum), which is based on the resident registration number. Since many foreigners do not have resident registration numbers, it is hard for cities to identify their exact income. Cases are similar in Gyeonggi Province. Therefore, it will take a significant time for the cities to establish an equal income investigation system.

There was an announcement by the mayor of Seoul city on 30 June 2020 that foreigners would be included in their 2020 Third Supplementary Budget Plan. The city revealed that they would give economic support to about 100,000 foreign households. City officials revealed their acceptance of the National Human Rights Commission's recommendation. The city government's economic support would be carried out based on the identical standards as Korean nationals. At the time, Gyeonggi Province did not reveal their acceptance of the recommendations.

5 Conclusion

According to research conducted by the National Human Rights Commission in 2020, due to the COVID-19 pandemic, Koreans' sensitivity to discrimination has increased. About 90% of Koreans who replied said that they recognized that no one is free from social discrimination during the pandemic, and even their own family members may face discrimination one day. Furthermore, the research indicated that 93.3% of Koreans believe that all people are equal. These results imply that general Korean public is against discrimination, and value the right of equality. Not only because of the National Human Rights

Commission recommendations but it is the common sense of Korean citizens to promote the right to equality and to protect foreigner residents living in Korea in the face of Covid-19. Moreover, the disproportionate effect of the relief fund on citizens may cause further problems. Nevertheless, it does seem difficult for municipal governments to grant further economic benefits for the care of foreigners. Rather, the central government should take steps to support foreigners and immigrants residing in Korea.

The Seoul metropolitan government indicated that municipal governments have already exhausted much of their funds for towards COVID-19 relief, and do not have enough resources to spare for foreigners. The financial status of local government also vary so that any relief money distributed may raise another issue of fairness among foreign residents. Therefore, the central government should be the one to carry forward the plan for foreigners. The central government has access to gather the relevant financial information including such general income tax details and foreign household information; the information need to create reasonable plans, make criteria, methods, and amounts of financial support.

In the case of the German government, they have announced a support plan through the "Emergency COVID-19 Support Program" at the end of April 2020. According to its announcement, support in seven areas including international cooperation would be implemented. The implementation of this plan was expected to require an additional 3 billion Euros in addition to the use of the existing budget of 1 billion Euros by the BMZ (Federal Economic Cooperation and Development). The U.K. government also announced it would raise about 740 million pounds of emergency funding. Not only that, the U.K. further announced that it would be funded by the International Monetary Fund (IMF) for debt relief in vulnerable countries with 150 million pounds. Meanwhile, in the case of the development of a diagnostic kit, it announced plans to produce in Senegal in a public-private partnership with a British private company and a Senegal infectious disease diagnosis laboratory. Likewise, developed countries are not only concentrating on their own pandemic issues, but they are also trying to cope with the pandemic as a global community. Korea can learn from the examples on how to approach the pandemic as a member of global society.

As UN OHCHR puts it, COVID-19 is a test of societies, governments, communities, and individuals. It is a time for solidarity and cooperation to resolve the pandemic, and to mitigate the effects. Discrimination and differentiation have no power in a universal emergency. Respect for human rights and domestic law will be important to the success of the health response and social recovery from the pandemic. In the midst of the pandemic, the Korean government's follow-up measures will raise attention from international and national society and whether Korea is ready to implement forward-looking policies will be put to the test.

Literature

∵

Book Review

∴

Craig Forrest. *Maritime Legacies and the Law: Effective Legal Governance of WWI Wrecks* (Edward Elgar, 2019) Hardcover: 336 pp.

The maritime losses from the World Wars, in particular the status of sunken warships have attracted the interest of not only individuals but also relevant states. The principles of international law are well-suited for the purpose of protecting gravesites *in situ*. It is therefore conceivable that states that suffered substantial maritime losses in the wars of the twentieth century may come to recognize international law's potential for affording protection to broad cultural values and not simply to what may be regarded as the rather esoteric values of "history and archaeology".

Interest in the subject of shipwrecks and underwater cultural heritage has grown enormously and a great deal has changed from a legal perspective, not least at the international level. The United Nations Convention on the Law of the Sea (UNCLOS) is now a mature treaty and is not too far from universal acceptance. The UNESCO Convention on the Protection of the Underwater Cultural Heritage (UCH Convention) is also in place. However, the UNESCO Convention was viewed by many as a failed initiative. Although it had succeeded in resolving a number of the core areas of contention – most notably those relating to the law of salvage and commercial exploitation – a resolution of the differences of view held by coastal states and flag states on two other crucial issues eluded negotiators.

Analyzing these interesting aspects, *Maritime Legacies and the Law: Effective Legal Governance of WWI Wrecks* by Craig Forrest of the TC Beirne School of Law, University of Queensland, Australia, covers topics in chapters ranging from "The War at Sea; The Legacy; The Legal Framework; Legacy Wrecks as Objects of Salvage; Legacy Wrecks as Threats; Legacy Wrecks as Historical and Archaeological Sites; Legacy Wrecks as Memorials and Maritime War Graves; The UK and the UCH Convention"; and "The Future".

The author begins his manuscript by reviewing the losses of war at sea. Using the great naval battles of WWI as the background, his chapter on "The War at Sea" provides a detailed overview of the geographical diversity of WWI

naval engagements, the belligerent states involved, the nature of the naval and merchant fleets and the rate and extent of losses, including the human death toll. Next, "The Legacy" introduces the physical legacy of WWI wrecks and the values they embody while "The Legal Framework" introduces the complex matrix of national and international law that currently governs WWI legacy wrecks.

The chapter on the "Legacy Wrecks as Objects of Salvage" begins by considering the legacy wrecks as objects of salvage. The author argues that salvage law poses the greatest threat to WWI wrecks. This is followed by "Legacy Wrecks as Threats" which considers the various threats legacy wrecks pose. This includes their ability to hinder the navigation of other ships as well as the dangers they pose to the marine environment and its biodiversity due to the nature of the cargo or munitions they carried at the time of their sinking. Next, the "Legacy Wrecks as Historical and Archaeological Sites" considers the value of legacy wrecks as historical and archaeological sites. Due to significant advancements in science and technology, access to historic wrecks is easier than ever before. Consequently, in recent decades there has been a marked increase in the amount of activity taking place at WWI wrecks.

The chapter on "Legacy Wrecks as Memorials and Maritime War Graves" focuses on the important role historic wrecks play in the memorialisation of WWI, oftentimes being the final resting place of those who lost their lives at sea. Next, the chapter on "The UK and the UCH Convention" provides a detailed overview of the UCH Convention, including its main set of archaeological principles and practices which are applied to all activities directed at underwater cultural heritage. Finally, the chapter on "The Future" provides a window into the past as it is essential for WWI wrecks to be protected and preserved for future generations.

This book makes for compelling reading. It offers a unique insight into this complex and niche area of international law. As there is a limited amount of literature on this topic, this book is a notable addition and one that will be of interest to practitioners, scholars, and students alike with a keen interest in the law of the sea, cultural heritage law, and marine issues.

Seokwoo Lee
Co-Editor-in-Chief

International Law in Asia: A Bibliographic Survey – 2019

*Sharad Sharma**

Introduction

This bibliography provides information on books, articles, notes, and other materials dealing with international law in Asia, broadly defined. Only English language publications that are newly published in 2019 or those that were previously published but had updated editions in 2019 are listed in this survey. Please refer to earlier editions of the Asian Yearbook of International Law for earlier bibliographies from earlier editions.

Most, if not all, of the materials, can be listed under multiple categories, but each item is listed under a single primary category. However, edited books may appear more than once if multiple chapters from the book are listed under different categories. Readers are advised to refer to all categories relevant to their research. The headings used in this year's bibliography are as follows:

1. General Theories and Asian Culture
2. Boundary Delimitation and Sovereignty
3. International Dispute Settlement
4. Arbitration
5. Development
6. Commercial Law
7. Economic and Business Law
8. Intellectual Property and Technology
9. Environmental Law
10. Human Rights
11. Migration and Refugees
12. International Humanitarian Law, Criminal Law, and Transnational Crime
13. Law of the Sea
14. Maritime Law
15. Watercourses

* Attorney (licensed in Washington, D.C., USA, and Nepal) and Ph.D. candidate, Handong Global University.

16. Cyber Law and Security
17. Air & Space and Nuclear
18. Miscellaneous

1 General Theories and Asian Culture

Walter C. Clemens Jr., *Violence and Nonviolence in South Asia*, 43(1) Asian Perspective 209–214 (2019).

Ritwick Dutta, *Reintroduction of the Asiatic Lion: Precedence of Politics over Rule of Law,* Economic and Political Weekly (2019).

Khagesh Gautam, *The Use of International Law in Constitutional Interpretation in the Supreme Court of India*, 55(1) Stanford Journal of International Law 27 (2019).

Gustavo Gozzi, *Transcivilizational International Law Against the System of International Relations: Onuma Yasuaki's Normative Choice*, 9(1) Asian Journal of International Law 170–176 (2019).

Vijay Kumar et al., *Book Review – History and Theory of International Law – Is International Law International? by Anthea ROBERTS*, 9(2) Asian Journal of International Law 392 (2019).

Christina Maags & Ioan Trifu, *When East Meets West: International Change and Effects on Domestic Cultural Institutions*, 47(2) Politics and Policy 326–380 (2019).

Lauri Malksoo, *Civilization Diversity as Challenge to the* (*False*) *Universality of International Law*, 9(1) Asian Journal of International Law 155–164 (2019).

Florian Counveinhes & Matsumoto, *The End of History of Liberalism and the Last 'Transcivilizations' Man? Onuma's Attempt to Define a 'New' International Law* 9(1) Asian Journal of International Law 185–193 (2019).

Satya Mouland, *Rethinking Adjudicative Jurisdiction in International Law*, 29(1) Pacific Rim Law and Policy Journal 173–206 (2019).

W. Michael Reisman & Tomo B. Takaki, *How Shall We Fashion International Legal Goals and Criteria for Appraisal in a World of Many Civilizations and Cultures? Review of Onuma Yasuaki's International Law in a Transcivilizational World*, 9(1) Asian Journal of International Law 177–184 (2019).

Eglantin Staunton & Jason Ralph, *The Responsibility to Protect Norm Clusters and the Challenge of Atrocity Prevention: An Analysis of European Union's Strategy in Myanmar*, 26(3) European Journal of International Relations 660–686 (2019).

2 Boundary Delimitation and Sovereignty

Sacha Bachmann & Martinus Prazauskas, *The Status of Unrecognized Quasi-States and Their Responsibilities Under the Montevideo Convention,* 52(3) The International Lawyer 393–437 (2019).

Natalie Klein, *The Timor Sea Conciliation and Lessons for Northeast Asia in Resolving Maritime Boundary Disputes*, 6(1) Journal of Territorial and Maritime Disputes 30–50 (2019).

Peter Kristensen, *States of Emergence, States of Knowledge: A Comparative Sociology of International Relations in China and India*, 25(3) European Journal of International Relations 772–799 (2019).

Tom Phuong Le, *Negotiating in Good Faith: Overcoming Legitimacy Problems in the Japan-South Korea Reconciliation Process*, 78(3) The Journal of Asian Studies 621–44 (2019).

Untalimile Mokoena & E. Lubaale, *Extradition in the Absence of State Agreements – Provisions in International Treaties on Extradition*, 2019(67) Sa Crime Quarterly 31–42 (2019).

Priyasha Saksena, *Jousting Over Jurisdiction: Sovereignty and International Law in Late Nineteenth-Century South Asia*, 38(2) Law and History Review 409–457 (2019).

Mohammad Shahabuddin, *Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar*, 9(2) Asian Journal of International Law 334–358 (2019).

Laura Southgate, Asean Resistance to Sovereignty Violation: Interests, Balancing and the Role of the Vanguard State (2019).

Katherine Hui-Yi Tseng, *Protect the Unprotected: The Escaping North Korean Issue and China's Dual Dilemma of Theoretical Enlightenment and Operational Trial,* 32(4) The Pacific Review 505–536 (2019).

3 International Dispute Settlement

Eunice Chua, *The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution,* 9(2) Asian Journal of International Law 195–205 (2019).

Md. Manjur Hasan & He Jian, Spratly Island Dispute in the South China Sea: Potential Solution, 12(1) Journal of East Asia and International Law 145–168 (2019).

Angela Semme Kim, *An End to the Korean War: The Legal Character of the 2018 Summit Declarations and Implications of an Official Korean Peace Treaty*, 9(2) Asian Journal of International Law 206–216 (2019).

Tom Phuong Le, *Negotiating in Good Faith: Overcoming Legitimacy Problems in the Japan-South Korea Reconciliation Process*, 78(3) The Journal of Asian Studies 621–644 (2019).

Lanchan McNamee & Anna Zhang, *Demographic Engineering and International Conflict: From China and Former USSR*, 73(2) International Organization 291–327 (2019).

TV Paul, *When Balance of Power Meets Globalization: China, India and The Small States of South Asia*, 39(1) Politics (Manchester, England) 50–63 (2019).

Quayle et al., *International Organizations and the Promotion of Effective Dispute Resolution*, AIIB Yearbook of International Law (2019).

Koichi Sato, *The Senkaku Island Dispute: Four Reasons of the Chinese Offensive – A Japanese View*, 8(1) Journal of Contemporary East Asia Studies 50–82 (2019).

Trina Vithayathil et al., *The Retreat to Method: The Aftermath of Elite Concession to Civil Society in India and Mexico*, 54(1) Studies in Comparative International Development 19–39 (2019).

4 Arbitration

Jason Ahniesszka, *Price Reviews and Arbitrations in Arbitrations in Asian LNG Markets*, Oxford Institute for Energy Studies (2019).

Chiann Bao, *Hong Kong Courts: International Arbitration Law in the Making*, 2 Belgian Review of Arbitration 615–628 (2019).

F.J.J. Espinella, *Judicial Fact-Finding Initiatives in the South China Sea Arbitration*, 9(1) Asian Journal of International Law 20–30 (2019).

Nur Emma Mustaffa et al., *Application of Direct Payment Clause 30A.0 of Asian International Arbitration Centre (AIAC)*, 6(1) International Journal of Built Environment and Sustainability 44–50 (2019).

F.A. Olorundami, *Should the Diaoyou/Senkaku Islands Be Classified as Islands or Rocks? An Examination in Light of the South China Sea Arbitration Award*, 34(2) The International Journal of Marine and Coastal Law 325–349 (2019).

Weiyi Tan, *Allowing the Exclusion of Set-aside Proceedings: An Innovative Means of Enhancing Singapore's Position as an Arbitration Hub.*, 15(2) Asian International Arbitration Journal 87–118 (2019).

Serafettin Yilmaz & Fu Kuo Liu, *The Evolving Geopolitical Landscape in the Post-Arbitration South China Sea*, 34(3) The Pacific Focus 317–344 (2019).

Judy Li Zhu, *Time to Loosen Up on Ad-Hoc Arbitration in China?* 15(1) Asian Asian International Arbitration Journal 43–53 (2019).

5 Development

John Draper & Joel Sawat *Selway, A New Dataset on Horizontal Structural Ethnic Inequalities in Thailand in Order to Address Sustainable Development Goal 10*, 141(1) Social Indicator Research Social Indicators Research 275–97 (2019).

Liu Junxia, *Investments in the Energy Sector of Central Asia: Corruption Risk and Policy Implications*, 133(C) Elsevier Journal of Energy Policy (2019).

Nagesh Kumar & Ojasvee Arora, *Financing Sustainable Infrastructure Development in South Asia: The Case of AIIB, 10*(4) Global Policy 619–24 (2019).

Debin Ma, *Financial Revolution Republic of China During 1900–37: A Survey and New Interpretation*, 59(3) Australian Economic History Review 242–262 (2019).

Helen E. S. Nesadurai, Transnational *Private Governance as a Developmental Driver in Southeast Asia: The Case of Sustainable Palm Oil Standards in Indonesia and Malaysia, 55*(9) The Journal of Development Studies 1892–908 (2019).

Saira Bano Orakzai, *Pakistan's Approach to Countering Violent Extremism (CVE): Reframing the Policy Framework for Peacebuilding and Development Strategies*, 42(8) Studies in Conflict and Terrorism 755–770 (2019).

Huaigao Qi, *Joint Development in the South China Sea: China's Incentives and Policy Choices*, 8(2) Journal of Contemporary East Asia Studies 220–239 (2019).

Abbas Rajabifard (Ed.), Sustainable Development Goals Connectivity Dilemma: Land and Geospatial Information for Urban and Rural Resilience (2019).

Bala Ramaswamy & Matthew C.H. Yeung, *China's One Belt One Road Initiative: The Impact of Trade Facilitation Versus Physical Infrastructure on Exports*, 42(6) World Economy 1673–1694 (2019).

Heng Wang, *China's Approach to the Belt and Road Initiative; Scope, Character and Sustainability*, 22(1) Journal of International Economic Law 29–55 (2019).

Yongliang Yan, *Maintaining Long-Term Sustainability of Outer Space Activities: Creation of Regulatory Framework to Guide the Asia-Pacific Space Cooperation Organization and Selected Legal Issues*, 47 Elsevier Journal of Space Policy 51–62 (2019).

6 Commercial Law

Bashir Ahmed & Mohammad Tarikul Islam, *Bangladesh–Nepal Trade Relations: Understanding the Influence of Economic Diplomacy*, 23(1) Jadavpur Journal of International Relations 105–19 (2019).

Randall Akee et al., *Unintended Consequences of China's New Labor Contract Law on Unemployment and Welfare Loss of the Workers*, 53 China Economic Review 87–105 (2019).

Garth Jody Bouwers, *Tacit Choice of Law in International Commercial Contracts – the Position in Indonesian, Malaysian and Singaporean Private International Law*, The Comparative and International Law Journal of South Africa 52(1) 109–125 (2019).

Debashis Chakraborty et al., *Is it Finally Time for India's Free Trade Agreements? The ASEAN 'Present' and the RCEP 'Future'*, 9(2) Asian Journal of International Law 259–391 (2019).

Sheetal Chhabria, *Book Review – Ocean of Trade: South Asian Merchants, Africa and the Indian Ocean by Johan MACHADO*, 30(1) Journal of World History 1780–1950 (2019).

Yuji Genda et al., *Employees Who Do Not Know Their Labour Contract Term and the Implications for Working Conditions: Evidence from Japanese and Spanish Microdata*, 49 Japan and the World Economy 95–104 (2019).

Fukunari Kimura, *Defending the Rule-Based Trading Regime: The Multilateral Trading System at Risk and Required Responses*, 18(3) Asian Economic Papers 78–87 (2019).

Kongzhong Liu & Julien Chaisse, The Future of Asian Trade Deals and IP (2019).

Shuzhong Ma et al., *Input Tariff Liberalisation and Servitization in Manufacturing: Evidence from China's WTO Accession*, 42(12) World Economy 3569–87 (2019).

Qilin Mao and Jiayun Xu, *Input Trade Liberalization, Institutions and Markup: Evidence from China's Accession to the WTO*, 42(12) World Economy 3537–68 (2019).

June Park & Troy Stangarone, *Trump's America First Policy in Global and Historical Perspectives: Implications for US–East Asian Trade*, 43(1) Asian Perspective 1–34 (2019).

Richard Pomfret, The Central Asian Economies in the Twenty-First Century: Paving a New Silk Road (2019).

Robert S Ross, *On the Fungibility of Economic Power: China's Economic Rise and the East Asian Security Order*, 25(1) European Journal of International Relations 302–327 (2019).

Jaivir Singh et al., *Factors Influencing the Decision to Hire Contract Labour by Indian Manufacturing Firms*, 47(4) Land Oxford Development Studies 406–19 (2019).

Chor Foon Tang & Salah Abosedra, *Logistics Performance, Exports, and Growth: Evidence from Asian Economies*, 78 Elsevier Journal of Research in Transportation Economics 100743 (2019).

Hans Tjio, *Merrill and Smith's Intermediate Rights Lying Between Contract and Property: Are Singapore Trusts and Secured Transactions Drifting Away from English Law Towards American Law?*, 19 Singapore Journal of Legal Studies 235–62 (2019).

Fuxi Wang et al., *China's Employment Contract Law: Does It Deliver Employment Security?* 30(1) The Economic and Labour Relations Review 99–119 (2019).

Liang Zhao, *FOB Seller Under Chinese Law and Privity of Contract in Carriage of Goods by Sea*, 27(2) Asia Pacific Law Review 286–305 (2019).

7 Economic and Business Law

Tim G. Andrew et al., Corruption *in Asia Pacific Business Organizations: Insight on Causes, Conditions, Consequences and Treatment*, 25(4) Asia Pacific Business Review 459–469 (2019).

Woo-Joo Byun, *Effects of CISG on the Principles of Asian Contracts Law*, 27 Dong A Journal of International Business Transaction Law 159–181 (2019).

Sea-Jin Chang, *When to Go It Alone: Examining Post Conversion Performance of International Joint Ventures*, 50(6) Journal of International Business Studies 998–1020 (2019).

Maura Dykstra, *Cross-Jurisdictional Trade and Contract Enforcement in Qing China*, 16(2) International Journal of Asian Studies 99–115 (2019).

Carlos Esplugues (Ed.), Foreign Investment and Investment Arbitration in Asia (2019).

Andrew Harding, Book Review – *The Business of Transition: Law Reform Development and Economics in Myanmar by Melissa CROUCH*, 41(1) Contemporary Southeast Asia 144–146 (2019).

Eugenia Heldt & Henning Schmidtke, *Explaining Coherence in International Regime Complexes: How the World Bank Shapes the Field of Multilateral Development Finance*, 26(6) Review of International Political Economy 1160–1186 (2019).

Nur Imamh et al., *Islamic Law, Corporate Governance, Growth Opportunities and Dividend Policy in Indonesia Stock Market*, 55 Pacific-Basin Finance Journal 110–126 (2019).

Petr Janský & M. Šedivý, *Estimating the Revenue Costs of Tax Treaties in Developing Countries*, 42(6) World Economy 1828–1849 (2019).

Wei Jiang et al., *Density of Local Cadres and Regional Economic Performance: Evidence from China*, 42(9) World Economy 2723–2744 (2019).

Michael Lang & Jeffrey Owens (Eds.), Removing Tax Barriers to China's Belt and Road Initiative (2019).

Kung-Chung Liu & Uday S. Racherla (Eds.), Innovation, Economic Development, and Intellectual Property in India and China: Comparing Six Economic Sectors (2019).

Junji Nakagawa, Asian Perspectives on International Investment Law (2019).

Uddhab Prasad Pyakurel, *The BRI, Nepal's Expectations, and Limitations on Nepal-China Border Relations*, 55(3), Issues and Studies: A Social Science Quarterly on China, Taiwan and East Asian Studies (2019).

Arvin Kristopher A Razon, *Cross Border Contracting for Consumer Software in the Philippines: Addressing Foreign Ownership Limitations and Consumer Protection Issues*, 6(1) Journal of International and Comparative Law 153–169 (2019).

Zabihollah Rezaee et al., Business Sustainability in Asia: Compliance, Performance, and Integrated Reporting and Assurance (2019).

Santanu Sarkar, *How Independent is India's Labour Law Framework from the State's Changing Economic Policies?*, 30(3) The Economic and Labor Relations Review 422–440 (2019).

Changyun Wang et al., *Social Trust, Rule of Law, and Economic Exchange: Evidence from China and Its Major Trading Partners*, 55(14) Emerging Markets Finance & Trade 3134–3150 (2019).

Barbara Haris White & Lucia Michelutti (eds.), The Wild East: Criminal Political Economies in South Asia (2019).

W. Van der Wolf et al. (Eds.), Philip Morris Asia Limited (Hong Kong) v. Commonwealth of Australia (2019).

Liang Zhao, *FOB Seller Under Chinese Law and Privity of Contract in Carriage of Goods by Sea*, 27(2) Asia Pacific Law Review 286–305 (2019).

Weiyhan Zhou, China's Implementation of the Rulings of the World Trade Organization (2019).

8 Intellectual Property and Technology

Bob Carbaugh & Chad Wassell, *Forced Technology and China*, 39(3) Economic Affairs: An International Journal of Liberal Political Economy 306–319 (2019).

Zhiyuyan Chen & Jei Zhang, *Types of Patents and Driving Forces Behind the Patent Growth in China*, 80 The International Journal of Theoretical and Applied Papers on Economic Modelling 294–302 (2019).

Qiaoling HE, *The Limits to Law: How Intellectual Properties Are Used and Protected in Chinese Industries*, 7 (2) Asian Journal of Law and Society 369–402 (2019).

Christopher Heath & Anselm Kamperman Sanders (Eds.), Intellectual Property and International Dispute Resolution (2019).

Christopher Heath & Atsuhiro Furuta (Eds.), Japanese Patent Law: Cases and Comments (2019).

David Jefferson & Kamalesh Adhikari, *Reimagining the Relationship Between Food Sovereignty and Intellectual Property for Plants: Lessons from Ecuador and Nepal*, 22(506) The Journal of World Intellectual Property 396–418 (2019).

KUNG CHUNG LIU & UDAY S. RACHERLA (EDS.), INNOVATION, ECONOMIC DEVELOPMENT, AND INTELLECTUAL PROPERTY IN INDIA AND CHINA (2019).

Lily Martinet, *Traditional Cultural Expressions and International Intellectual Property Law*, 47(1) INTERNATIONAL JOURNAL OF LEGAL INFORMATION 6–12 (2019).

Julia Ya Qin, *Forced Technology Transfer and the US-China Trade War: Implications for International Economic Law*, 22(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 743–762 (2019).

Seemantani Sharma, *RCEP and Trans-Pacific Intellectual Property Norms: Implications for India*, 22(5) THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 313–348 (2019).

Akinori Tomohar, *Migrant and Business Network Effects on Intellectual Property Trade: Evidence from Japan*, 62 ECONOMIC ANALYSIS AND POLICY 131–139 (2019).

C. BRADFORD BIDDLE (ED.), PATENT REMEDIES AND COMPLEX PRODUCTS: TOWARDS A GLOBAL CONSENSUS (2019).

9 Environmental Law

Naeem Abas et al., *Cooperative Control of Regional Transboundary Air Pollutants*, 8(1) ENVIRONMENTAL SYSTEMS RESEARCH 1–14 (2019).

Myanna Dellinger, *Trophy Hunting Under the Precautionary Principle of Law*, ANIMAL LAW 21 (2019).

Nikolaos Giannpoulos, *Global Environmental Regulation of Offshore Energy Production; Searching for Legal Standards in Ocean Governance*, 28(3) REVIEW OF EUROPEAN, COMPARATIVE & INTERNATIONAL ENVIRONMENTAL LAW 289–303 (2019).

Dileep Kumar et al., *From Precautionary Principle to Nationwide Ban on Endosulfan in India*, 4(2) BUSINESS AND HUMAN RIGHTS JOURNAL 343–49 (2019).

Tek Jung Mahat et al., *Climate Finance and Green Growth: Reconsidering Climate-Related Institutions, Investments, and Priorities in Nepal*, 31(1) ENVIRONMENTAL SCIENCES EUROPE 1–13 (2019).

Benoit Mayer, *Environmental Assessments in the Context of Climate Change: The Role of the UN Economic Commission for Europe*, 28(1) PL REVIEW OF EUROPEAN, COMPARATIVE & INTERNATIONAL ENVIRONMENTAL LAW 82–93 (2019).

Mostafa Mahmud Naser, *Climate Change, Migration and Human Rights in Bangladesh: Perspectives on Governance*, 60(2) ASIA PACIFIC VIEWPOINT 175–190 (2019).

Markus G Puder, *The Paris Climate Agreement and Bederman's Six Myths About International Law and International Legal Practice*, 52(2) THE INTERNATIONAL LAWYER 233–64 (2019).

Daniel F. Robinson et al. (Eds.), Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2019).

P.K. Sarker et al., *Regional Economic Regimes and The Environment: Stronger Institutional Design is Weakening Environmental Policy Capacity of the South Asian Association for Regional Cooperation*, 19(1) International Environmental Agreements: Politics, Law and Economics 19–52 (2019).

Arie Trouwborst, *Global Large Herbivore Conservation and International Law*, 28(14) Biodiversity and Conservation 3891–3914 (2019).

Amiel Ian Valdez, *Beyond the Arbitral Ruling: A Transboundary Environmental Impact Assessment in the South China Sea, 9*(2) Asian Journal of International Law 251–274 (2019).

10 Human Rights

N.K. Agyeman & A. Momodu, *Universal Human Rights Versus Cultural Relativism: The Meeting Role of Constitutional Rights* 12(1) African Journal of Legal Studies 23–46 (2019).

Solnara Aktar, *Transnational Feminism and Women's Activism: Strategies for Engagement and Empowerment in Bangladesh*, 25(2) Asian Journal of Women Studies 285–294 (2019).

Samantha Bradley, *The Case for Transformative Reparations for Conflict-Related Sexual Violence in Rakhine State at the ASEAN Intergovernmental Commission on Human Rights*, 20(2) Asia Pacific Journal on Human Rights and the Law 181–226 (2019).

Alan Brody, *Development Support Communication in Practice: Towards Realizing Child Rights through UNICEF*, 29(2) Asia Pacific media Educator 89–105 (2019).

Zachary Browning, *A Comparative Analysis: Legal and Historical Analysis of Protecting Indigenous Cultural Rights Involving Land Disputes in Japan, New Zealand and Hawaii*, 28(1) Pacific Rim Law and Policy Journal 207–242 (2019).

Yu-Je Chen, *China's Challenge to The International Human Rights Regime*, 51(4) New York University Journal of International Law & Politics 1179 (2019).

Srisombat Chokprajakchat, *Women Prisoners in North-Eastern Thailand: How Well Do They Meet International Human Rights Standards?*, 8(4) International Journal for Crime, Justice and Social Democracy 123–136 (2019).

Jerome A. Cohen et. al., Taiwan and International Human Rights: A Story of Transformation (2019).

Ross Holder, *On the Intersectionality of Religious and Racial Discrimination: A Case Study on the Applicability of ICERD with Respect to China's Uyghur Muslim Minority*, 2019(1) Religion and Human rights 1–30 (2019).

Carolyn E. Holmes, *Conventions, Courts, and Communities: Gender Equity, CEDAW and Religious Personal Law in India*, 54(7) Journal of Asian and African Studies (Leiden) 965–979 (2019).

Katharina Holzinger et al., *The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions, and Customary Law*, 52(12) Comparative Political Studies 1775–809 (2019).

Lily Johnson, *Commercial Surrogacy is the Sale of Children? An Argument that Commercial Surrogacy does not Violate International Treaties*, 19(1) Journal of Services Research, 701–726 (2019).

M.Y.A. Kadir, *Defining 'People' and 'Indigenous People' in International Human Rights Law and Its Application in Indonesia* 26(3) International Journal on Minority and Group Rights 373–408 (2019).

Mya Kadir & A. Murray, *Resource Nationalism in the Law and Policies of Indonesia: A Contest of State, Foreign Investors, and Indigenous Peoples*, 9(2) Asian Journal of International Law 298–333 (2019).

Gary Lilienthal et al., *The Treatment of Chinese Customary Law in British Colonial Hong Kong*, 45(4) Commonwealth Law Bulletin 636–59 (2019).

Siyu Liu et al., *The Death Penalty for Foreign Drug Offenders in China: Legal Protection and Equal Treatment*, 25(4) European Journal on Criminal Policy and Research 427–428 (2019).

Jane McPherson et al., *Translating Human Rights: Creating Culturally-specific Human Rights Measures for Social Work in Spain, Taiwan and the United States* 6(2) International Social Work: Sage Journals 944–949 (2019).

Uche T. Okpara et al., *Gender and Land Degradation Neutrality: A Cross-country Analysis to Support More Equitable Practices*, 30(11) Land Degradation and Development 1368–78 (2019).

Martin Ramsted, *Prospects of Pluralism in Indonesia Gauges from Legal Anthropological Perspective*, 47(3) Asian Journal of Social Science 309–339 (2019).

Schlund et al. (Eds.), The Subjects of Human Rights: Crises, Violations, and Asian/American Critique (2019).

Shobha Raghuram, *Inequalities, Caste and Social Exclusion: Dalit Women's Citizenship*, 62(1) Development: Palgrave Macmillan 660–686 (2019).

Andrew Francis Tan & Zheng Mu, *Racial Evolution: Understanding the Resurgence of Ethnic Minority Identity in Modern China*, 38(5) Population Research and Policy Review 733–769 (2019).

Aekje Teeuwen, *Juvenile Defendants' Right to be Tried Within a Reasonable Time in Cambodia: An International Human Rights Analysis*, 19(1) Youth Justice: Sage Journals 42–62 (2019).

Woldemariam et al., *Forced Human Displacement, the Third World and International Law: A TWAIL Perspective*, 20(1) Melbourne Journal of International Law 248–76 (2019).

M.A. Young et al., *Studying Country-Specific Engagements with the International Court of Justice*, 10(4) Journal of International Dispute Settlement 582–598 (2019).

Gina Zheng, *Reconciling Rights-Based Discourse with Pacific Culture and Way-of-Life: Re-Defining Our Understanding of Rights*, 44(3) Alternative Law Journal 243–49 (2019).

11 Migration and Refugees

Zahid Shahab Ahmed, *Managing the Refugee Crisis in South Asia: The Role of SAARC*, 28(2) Asian and Pacific Migration Journal 210–219 (2019).

G.S. Goodwin-Gill, *The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region*, 30(4) International Journal of Refugee Law 674–683 (2019).

Konrad Kalicki, *Japan's Liberal-Democratic Paradox of Refugee Admission*, 78(2) The Journal of Asian Studies 355–378 (2019).

Kirsten McConnachie, *Securitization and Community Based Protection Among Chinese Refugees in Kuala Lumpur*, 28(2) Social and Legal Studies: Sage Journals 158–178 (2019).

Antje Missbach, *Asylum Seekers' and Refugees' Decision-Making in Transit in Indonesia*, 175(4) Journals of the Humanities and Social Sciences of South-East Asia 419–445 (2019).

Atin Prabandari & Yunizar Adiputera, *Alternative Paths to Refugee and Asylum Seeker Protection in Malaysia and Indonesia*, 28(2) Asian and Pacific migration journal 132–154 (2019).

Anasuya Syam, *Patchwork of Archaic Regulations and Policies in India: A Breeding Ground for Discriminatory Practice Against Refugees*, 51(4) New York University Journal of International Law and Politics 1377–1390 (2019).

Tamara Tubakovix, *The Failure of Regional Refugee Protection and Responsibility Sharing: Policy Neglect in the EU and ASEAN*, 28(2) Asian and Pacific Migration Journal 183–200 (2019).

12 International Humanitarian Law, Criminal Law and Transnational Crime

Sukhshant Atti and Bonnie Arquilla, *International Humanitarian Law and Review of Recurrent Violations Including Chemical Weapons Use*, 34(1) Prehospital and Disaster Medicine s32–s32 (2019).

Dailey J Birkett, *Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of the National Implementing Legislation in Asia*, 18(2) Chinese Journal of International Law 353–392 (2019).

Marco Bocchese, *After Ratification: Predicting State Compliance with ICC Treaty Obligations*, 19(4) International Criminal Law Review 635–668 (2019).

Jonathan Broder, *U.S.-Iran Relations: Is a Military Conflict Inevitable?*, 29(41) The CQ Researcher 1–58 (2019).

Bina Burgess & John Braithwaite, *Cascades of Violence: War, Crime and Peacebuilding Across South Asia*, 53(3) Law & Society Review 935–938 (2019).

Ioannis Chapsos & Steve Hamilton, *Illegal Fishing and Fisheries Crime as a Transnational Organized Crime in Indonesia*, 22(3) Trends in Organized Crime 255–273 (2019).

Isabelle Desportes, *Getting Relief to Marginalized Minorities: The Response to Cyclone Komen in 2015 in Myanmar*, 4(1) Journal of International Humanitarian Action 1–16 (2019).

R. Goehrung, *Evaluating the Criminal Justice Approach to Human Trafficking in Taiwan*, 7(1) Journal of Human Trafficking 53–68 (2019).

Rohini J. Haar et al., *Documentation of Human Rights Abuses Among Rohingya Refugees from Myanmar*, 13(1) Conflict and Health 42–42 (2019).

Frank Jacob (Ed.), Genocide and Mass Violence in Asia (2019).

Kevin D. Lam, *Asian American Youth Violence as Genocide: A Critical Appraisal and Its Pedagogical Significance*, 52(2–3) Equity & Excellence in Education 255–70 (2019).

Ronan Lee, *Myanmar's Citizenship Law as State Crime: A Case for the International Criminal Court*, 8(2) State Crime Journal 241–279 (2019).

Adrian A. Lopez, *Transnational Links in Rhino Poaching and the Black-market Price of Rhino Horns*, 63(1) The Australian Journal of Agricultural and Resource Economics 95–115 (2019).

G. Mantella, *The Protagonism of the USSR and Socialist States in the Revision of International Humanitarian Law*, 2 Journals of the History of International Law 181–211 (2019).

Michael McKenzie, *Securitizing Transnational Crime: The Political Drivers of Police Cooperation Between Australia and Indonesia*, 29(3) Policing and Society: An International Journal of Research and Policy 338–348 (2019).

Shannu Narayan, *Anti-Money Laundering Law in India: A Glocalization Model*, 40(3) Statute Law Review 224–235 (2019).

Sergey Sayapin, *The General Principles of International Criminal Law in the Criminal Code of the Republic of Kazakhstan*, 9(1) Asian Journal of International Law 1–9 (2019).

Prabhakar Singh, *Of International Law, Semi-colonial Thailand and Imperial Ghosts*, 9(1) Asian Journal of International Law 46–74 (2019).

Raghavi Viswanath, *Elevating Cultural Rights Using International Criminal Law-The Asian Story*, 11(1) Asian Journal of International Law 1–12 (2019).

Sandra Wilson, *War Crimes Trials and the Politics of Justice: The Case of Kinoshita Eiichi*, 92(257) Historical Research (2019).

13 Law of the Sea

Sophie Gambardella, *The Stormy Emergence of Geoengineering in the International Law of the Sea*, 13(2) Carbon & Climate Law Review 122–129 (2019).

Michael Sheng-ti Gau, *The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique*, 50(1) Ocean Development and International Law 49–69 (2019).

Martijn Hoogeland, *Case Note: The South China Sea Dispute and the Role of UNCLOS in the Settlement of the Dispute*, Quebec Journal of International Law 93–116 (2019).

Mark Hoskin, *Have Great Britain and Other Nations Previously Taken a Stance Concerning the Islands in the South China Sea?*, 11(2) Australian Journal of Maritime and Ocean Affairs 132–145 (2019).

Danielle Kroon, *The End of Freedom of the Seas?: Grotius, Law of the Sea, and Island Building*, 52(2) The International Lawyer 299–325 (2019).

Zhen Lin, *Jurisdiction Over Underwater Cultural Heritage in the EEZ and on the Continental Shelf: A Perspective from the Practice of States Bordering the South China Sea*, 50(2–3) Ocean Development and International Law 170–189 (2019).

Deyi Ma, *Obligation to Exchange Views under Article 283 of the United Nations Convention on the Law of the Sea: An Empirical Approach for Improvement*, 12(2) Journal of East Asia and International Law 305–320 (2019).

Mark Bryan Manantan, *Pivot Toward China: A Critical Analysis of the Philippines' Policy Shift on the South China Sea Disputes*, 11(4) Asian Politics and Policy 643–662 (2019).

Napang et al., *Contesting Views of the Philippines and China over the Nine-Dash Line in the South China Sea*, 12(1) Journal of East Asia and International Law 180–92 (2019).

Fayokemi Ayodeji Olorundami, *Should the Diaoyu/Senkaku Islands Be Classified as Islands or Rocks? An Examination in Light of the South China Sea Arbitration Award*, 34(2) The International Journal Of Marine and Coastal Law 325–349 (2019).

Hao Duy Phan, *International Courts and State Compliance: An Investigation of the Law of the Sea Cases*, 50(1) Ocean Development and International Law 70–90 (2019).

Hui Gao Qi, *Joint Development in the South China Sea: China's Incentive and Policy Choices*, 8(2) Journal of Contemporary East Asia Studies 220–239 (2019).

Yoshifumi Tanaka, *Marine Spaces Under National Jurisdiction I: Territorial Sovereignty*, The International Law of the Sea 94–144 (3 ed. 2019).

Yong Wang, *Reasonable Restrictions on Freedom of High Seas by 'Marine Protected Areas on the High Seas': An Empirical Research*, 12(2) Journal of East Asia and International Law 245–268 (2019).

14 Maritime Law

P. Amarsinghe & S. Rajhans, *Law of the Sea – Islamic Law of the Sea: Freedom of Navigation and Passage Rights in Islamic Thought by Hassan S. KHALILIEH, 11(1)* Asian Journal of International Law 219–220 (2019).

Anmolam Farheen Ahmad, *Separation of the Chagos Archipelago from Mauritius*, Economic and Political Weekly (2019).

Carla P. Freeman, *An Uncommon Approach to the Global Commons: Interpreting China's Divergent Positions on Maritime and Outer Space Governance*, 241 The China Quarterly 1–21 (2019).

Youna Lyons et al., *Moving from MPAs to Area-Based Management Measures in the South China Sea* 35(2) The International Journal of Marine and Coastal Law 201–21 (2019).

Paul Rae, *Archipelagic Performance: Scenes from Maritime Southeast Asia*, 71(4) Theatre Journal 455–473 (2019).

M. Andrew Song et al., *'Blue Boats' and 'Reef Robbers': A New Maritime Security Threat for the Asia Pacific?*, 60(3) Asia Pacific Viewpoint 310–324 (2019).

Dirk J Steenberhen et al., *Governance Interactions in Small-Scale Fisheries Market Chains: Examples from the Asia-Pacific*, 20(4) Fish and Fisheries 697–714 (2019).

Rebecca Strating, *Maritime Disputes, Sovereignty and the Rules-Based Order in East Asia*, 65(3) The Australian Journal of Politics and History 449–465 (2019).

MA Xinmin, *China's Arctic Policy on the Basis of International Law: Identification, Goals, Principles and Positions*, 100 Elsevier Journal of Marine Policy 256–276 (2019).

Constantinos Yiallourides, Maritime Disputes and International Law: Disputes Waters and Seabed Resources in Asia and Europe (2019).

15 Watercourses

Meir Alkon et al., *Water Security Implications of Coal-Fired Power Plants Financed Through China's Belt and Road Initiative*, 132 Energy Policy 1101–1109 (2019).

T. Amjath-Babu et al., *Integrated Modelling of the Impacts of Hydropower Projects on the Water-Food-Energy Nexus in a Transboundary Himalayan River Basin*, 239 Elsevier Journal of Applied Energy 494–503 (2019).

Hyeyeong Choe & James H. Thorne, *Climate Exposure of East Asian Temperate Forest Suggests Transboundary Climate Adaptation Strategies are Neeses, 156(1)* Climate Change 51–67 (2019).

Sojeong Lee & S. Mitchell, Energy *Resources and the Risk of Conflict in Shared River Basins*, 56(3) Climate Journal of Peace Research 336–351 (2019).

David MacNabb, Global Pathways to Water Sustainability (2019).

Tasleem Malik, *Pak-Afghan Water Issue: A Case for Benefit Sharing*, 16(1) Pluto Journals 77–98 (2019).

Jianan Qin et al., *Asymmetric Bargaining Model for Water Resource Allocation over Transboundary Rivers*, 16(10) International Journal of Environmental Research and Public Health 1733 (2019).

Iain Watson & Juliette Schwank, *Water Security, Riparian Identity and Korean Nation Branding in the Mekong Subregion*, 34(2) Pacific Focus 153–182 (2019).

16 Cyber Law and Security

Jungbae An & Tae Yoo, *Internet Governance Regimes by Epistemic Community: Formation and Diffusion in Asia*, 25(1) Global Governances: A Review of Multilateralism and International Organizations 123–148 (2019).

Walter C. Clements, *Cyber and Other Powers in Asia*, 43(3) Asian Perspective: John Hopkins 585–592 (2019).

Leif Eric Easely & Sea Young Kim, *New North-Southeast Asia Security Links: Defending, Recentering, and Extending Regional Order*, 65(3) The Australian Journal of Politics and History 377–394 (2019).

Yang Feng, *The Future of China's Personal Data Protection Law: Challenges and Prospects*, 27(1) Asia Pacific Law Journal 62–82 (2019).

Tianru Guan, *Who are the Influential in China's Cyberspace and What Do They Say About Issue of Sino-Japanese Relations?*, 19(3) Journal of East Asian Studies 383–396 (2019).

Zhixiong Huang & Yao Hui Ying, *The Application of the Principle of Distinction in the Cyber Context: A Chinese Perspective*, 102(193) International Review of the Red Cross 335–365 (2019).

Rita Ismailova et al., *Cybercrime Risk Awareness Rate Among Students in Central Asia: A Comparative Study in Kyrgyzstan and Kazakhstan*, 28(4–5) Information Security Journal 127–135 (2019).

Nori Katagiri, *From Cyber Denial to Cyber Punishment: What Keeps Japanese Warriors from Active Defense Operations?* Asian Security 1–18 (2019).

Hai Thanh Luong et al. *Understanding Cybercrimes in Vietnam: From Leading-Point Provisions to Legislative System and Law Enforcement*, 13(2) International Journal of Cyber Criminology 290–308 (2019).

Hai Thanh Luong et al., *Understanding Cyber Crimes in Vietnam: From Leading-Point Provisions to Legislative System and Law Enforcement*, 13(2) International Journal of Cyber Criminology 290–308 (2019).

Hitoshi Nasu et al., The Legal Authority of ASEAN as a Security Institution (2019).

Elvin Ong, *Online Repression and Self-Censorship: Evidence from Southeast Asia*, 56(1) Government Opposition: An International Journal of Comparative Politics 1–22 (2019).

Muhammad Shaban Rafi, *Cyberbullying in Pakistan: Positioning the Aggressor, Victim and Bystander*, 34(3) Pakistan Journal of Psychological Research 601–620 (2019).

Asif Salim et al., *Contemporary Digital Age and Dynamics of E-jihad in the Muslim World: Case Study of Pakistan*, 11(4) Pakistan Journal of Criminology 102–114 (2019).

Ryan Shandler & Daphna Canetti, *A Reality of Vulnerability and Dependence: Internet Access as a Human Right*, 52(1) Israel Law Review 77–98 (2019).

17 Air and Space & Nuclear

Gawdat Bahgat, *Iran's Ballistic-Missile and Space Program: An Assessment*, 26(1) Middle East Policy 31–48 (2019).

Rajesh Basrur, *India and China: A Managed Nuclear Rivalry?* 42(3) The Washington Quarterly 151–170 (2019).

Noriko Behling et al., *Regulating Japan's Nuclear Power Industry to Achieve Zero-Accidents*, 127 Energy Policy 308–19 (2019).

Mark S. Bell, *Nuclear Opportunism: A Theory of How States Use Nuclear Weapons in International Politics*, 42(1) Journal of Strategic Studies 3–28 (2019).

Xiaowen Ding et al., *Policies on Water Resources Assessment of Coastal Nuclear Power Plants in China*, 128 Energy Policy 170–78 (2019).

David F. Von Hippel & Peter Hayes, *Regional Cooperation for Nuclear Spent Fuel Management in East Asia: Costs, Benefits and Challenges – Part II*, 2(1) Journal for Peace and Nuclear Disarmament 319–35 (2019).

Inwook Kim & Jung-Chul Lee, *Sanctions for Nuclear Inhibition: Comparing Sanction Conditions Between Iran and North Korea*, 43(1) Asian Perspective 95–122 (2019).

Mingyan Nie, *Asian Space Cooperation and Asia Pacific Space Cooperation Organization: An Appraisal of Critical Legal Challenges in the Belt and Road* Space Initiative Context, 47 Elsevier Journal of Space Policy 224–232 (2019).

Tom Sauer, *The Role of Informal International Organizations in Resolving the Iranian Nuclear Crisis (2003–15)*, 57(5) Journal of Common Market Studies 939–955 (2019).

Tatsujiro Suzuki & S. Hirose, *Report of Panel on Peace and Security of Northeast Asia (PSNA) 2018*, 2(1) Journal for peace and Nuclear Disarmament 378–386 (2019).

Yongliang Yan, *Maintaining Long-Term Sustainability of Outer Space Activities: Creation of Regulatory Framework to Guide the Asia-Pacific Space Cooperation Organization and Selected Legal Issues*, 47 Elsevier Journal of Space Policy 51–62 (2019).

Fumihiko Yoshida & Tatsujiro Suzuki, *The State of Nuclear Weapons in 2019: Conversations with Experts at the Carnegie International Nuclear Policy Conference*, 2(2) Journal of Peace and Nuclear Disarmament 612–26 (2019).

18 Miscellaneous

G. Ibrahim Aoude, *Conflict Over Oil and Gas in the Mediterranean: Israeli Expansionism in Lebanon*, 41(1) Arab Studies Quarterly: Pluto Journals 95–110 (2019).

Eugene Gholz, *Defensive Defense: A Better Way to Protect US Allies in Asia*, 42(4) The Washington Quarterly 171–189 (2019).

Kyoko Hatakeyama, *A Middle Power's Roles in Shaping East Asian Security Order: Analysis of Japan's Engagement from a Normative Perspective*, 65(23) The Australian Journal of Politics and History 466–481 (2019).

Zia Mian et al., *Nuclear Submarines in South Asia: New Risks and Dangers*, 2(1) Journal for Peace and Nuclear Disarmament 184–202 (2019).

T.J. Pempel, *Right Target; Wrong Tactics: The Trump Administration Upends East Asian Order*, 32(6) THE PACIFIC REVIEW 996–1018 (2019).

Huong Le Thu, *China's Dual Strategy of Coercion and Inducement Towards ASEAN*, 32(1) THE PACIFIC REVIEW 20–36 (2019).

Ketian Zhang, *Cautious Bully: Reputation, Resolve, and Beijing's Use of Coercion in the South China Sea*, 44(1) INTERNATIONAL SECURITY 117–159 (2019).

Qichao Zhu & Kun Long, *How Will Artificial Intelligence Impact Sino–US Relations?* 1(1) CHINA INTERNATIONAL STRATEGY REVIEW 139–151 (2019).

Wan Pun Lung, *International Law before the Courts of the Hong Kong Special Administrative Region of the People's Republic of China – Twenty Years On*, 9(1) ASIAN JOURNAL OF INTERNATIONAL LAW 10–19 (2019).

DILA Events

∵

2019 DILA 30th Anniversary International Conference and 2019 DILA Academy & Workshop

The Year 2019 marked the 30th anniversary of the Foundation for the Development of International Law in Asia (DILA). To commemorate the occasion, DILA co-hosted with Universitas Indonesia the 2019 DILA 30th Anniversary International Conference entitled "DILA at 30 – The Grand Anatomy of State Practice in International Law in Asia for the Last 30 Years: Past, Present, and Future" at the Indonesian Foreign Ministry on October 15 and 16 and the 2019 DILA Academy and Workshop on the "Encyclopedia of Public International in Asia" on October 17 and 18 at the Universitas Indonesia, Salemba Campus.

The conference opened in the morning of October 15 with welcome addresses by Edmon MAKARIM, Dean of the Faculty of Law, Universitas Indonesia; Damos Dumoli AGUSMAN, Director General of Legal and International Treaties, Ministry of Foreign Affairs, Indonesia; Muhammad ANIS, Rector of Universitas Indonesia; Hikmahanto JUWANA, Chairman of DILA and Professor of International Law, Faculty of Law, Universitas Indonesia; and Seokwoo LEE, Chairman of the Development of International Law in Asia-Korea (DILA-KOREA); Professor of International Law, Inha University Law School, Korea, and Co-Editor-in-Chief of the *Asian Yearbook of International Law*. This was followed by the keynote address given by the Minister of Foreign Affairs of Indonesia, Retno MARSUDI.

Session one of the conference was entitled "DILA At 30 and the *Asian Yearbook of International Law* – Past, Present, And Future. Presentations were made by Kevin YL TAN, Former Chairman of DILA and former, Co-Editor-in-Chief of the *Asian Yearbook of International Law*, and Adjunct Professor, Faculty of Law, National University of Singapore; Hikmahanto JUWANA, Chairman of DILA and Professor of International Law, Faculty of Law, Universitas Indonesia; Seokwoo LEE; and Hee Eun LEE, Associate Dean and Professor of Law of Handong International Law School, Korea and Co-Editor-in-Chief of the *Asian Yearbook of International Law*.

This was followed by a Special Speech on the Participation in Multilateral Treaties – A Historical and Personal Reflections by Karin ARTS, Professor of International Law and Development, International Institute of Social Studies, The Hague, The Netherlands.

Session two was entitled "Indonesia's Contribution to the Development of International Law." Presentations were made by Damos Dumoli AGUSMAN, Director General of Legal and International Treaties of the Ministry of Foreign

Affairs, Indonesia; Hasjim DJALAL, Indonesian Expert on the Law of the Sea; Eddy PRATOMO, former Ambassador and Professor of Universitas Diponegoro, Indonesia; and Sigit RIYANTO, Professor of Universitas Gadjah Mada, Indonesia.

Session three was entitled "Special Panel on Maritime Issues," and featured paper presentations by SETA Makoto, Professor of the Faculty of Law, Yokohama City University on "Japan's Involvement in the Implementation of ReCAAP in Asia"; Bebeb A.K.N. DJUNDJUNAN, Director of the Legal Affairs and Territorial Treaties, Ministry of Foreign Affairs, Indonesia on "Indonesia's Update on Maritime Delimitation"; and CUONG Nguyen Ba, Senior Researcher & Partner, Scientific Research Institute of Sea & Islands (SRISI), Vietnam on the "Legal Aspects of the Chinese Activities in the Vanguard Bank." The conclusion of session three marked the conclusion of Day 1 of the conference.

Day 2 of the conference (October 16), began with session 4 entitled "International Law Association (ILA) Study Group: Asian State Practice of Domestic Implementation of International Law (ASP-DIIL) – Part 1 which featured Seokwoo LEE on "Ocean and Territory"; Seryon LEE, Professor of the School of Law, Chonbuk National University, Korea on "Human Rights"; David ONG, Professor of International & Environmental Law, at Nottingham Trent University, UK on "Environment"; and RAVINDRAN Rajesh Babu, Professor of Public Policy and Management Group, Indian Institute of Management, Calcutta, India on "Trade and Investment".

Part 2 followed in Session 5 which featured presentations by Arie AFRIANSYAH, Senior Lecturer of the Faculty of Law, Universitas Indonesia on "The Challenges in Implementing UN Security Council Resolution in National Realm"; Tran Viet DUNG, Associate Professor and Dean of International Law Faculty of Ho Chi Minh City University of Law, Vietnam on "Vietnam's Experiences with International Investment Agreements Governance: Issues and Solutions"; Young Kil PARK, Director of the Law of the Sea Research Center, Korea Maritime Institute (KMI), on "Marine Scientific Research – Challenges and Prospects: From A Korean Perspective"; and Kanami ISHIBASHI, Professor of International Law, Tokyo University of Foreign Studies, on "Japanese Contribution to Environmental Protection in the Asian Region."

The last session of the Conference included commentary by Kevin YL TAN, Seokwoo LEE, Hikmahanto JUWANA, and Hee Eun LEE which was followed by a closing dinner which marked the end of the 2019 DILA 30th Anniversary International Conference.

The following day, on October 17, at the Academic Senate Room, Faculty of Medicine, Universitas Indonesia, Salemba Campus, the 2019 DILA Academy

and Workshop was held. The topic of discussion was the *Encyclopedia of Public International Law in Asia* (EPILA). Seokwoo LEE and Hee Eun LEE provided an overview of the EPILA project. As explained, EPILA was to provide a detailed description of the practice and implementation of international law in various Asian states and to be offered in three geographically-organized volumes – Northeast Asia, Southeast Asia, and Central and South Asia. EPILA is to provide valuable information for all those interested in the historical development, implementation, and application of international law in Asia.

The subsequent session occurring over October 17 and October 18 provided an opportunity to discuss the project among various state volume editors who were making contributions to EPILA. For Northeast Asia, this included Atsuko KANEHARA, Professor of the Faculty of Law, Sophia University, Japan; Dustin Kuan-Hsiung WANG, Professor of the Graduate Institute of Political Science, National Taiwan Normal University; Battogtokh JAVZANDOLGOR, Professor of International Law and Chairperson of the Department of International Relations of the School of Foreign Service and Public Administration, National University of Mongolia; Seokwoo LEE and Eon Kyung PARK, Adjunct Professor, Kyung Hee University Law School, Korea.

The next session on Southeast Asia, presentations were made by Hikmahanto JUWANA; Arie AFRIANSYAH; Kevin YL TAN; Rommel Jaen CASIS, Professor of the College of Law, University of the Philippines; Kitti JAYANGAKULA, Professor of International Law at Eastern Asia University, Thailand; and TRINH Hai Yen, Vice Dean of the Faculty of International Law at the Diplomatic Academy of Vietnam.

The final session on South and Central Asia included presentations by Muhammad Ekramul HAQUE, Professor of Law, Department of Law, University of Dhaka, Bangladesh; RAVINDRAN Rajesh Babu; Wasantha SENEVIRATNE, Professor of the Faculty of Law, University of Colombo, Sri Lanka; and Mir Shabiz SHAFEE, Assistant Professor of Shahid Beheshti University, Iran.

Kevin YL TAN and Hee Eun LEE then offered their final remarks and closed the 2019 DILA Academy and Workshop.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief