Asian Yearbook of International Law

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Volume 26 (2020)

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

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

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

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

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 two-fold. First, to promote research, study and writing in the field of international law in Asia; and second, to provide an intellectual platform for the discussion and dissemination of Asian views and practices on contemporary international legal issues.

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

In keeping with DILA's commitment to encouraging scholarship in international law as well as in disseminating such scholarship, its Governing Board 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 2022 includes Senior Editors Daria Kukushkina (Editor-in-Chief), Peter Wonmo Kang (Managing Editor), Jiwon Chae, Mun Hwan Cho, and David Yoon; and Junior Editors Ye Gee Ahn, Seung Hwan Bae, Yeongshin Jang, Hanul Kang, Ju Young Kim, and Gloria Hai-Young Shin.

Contents

Literature

DILA Events

Editorial Note

Volume 26 of the *Asian Yearbook of International Law* begins with two main articles and is followed by 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 2020.

I Articles

The first main article is "Korea: From Norm Taker to Norm Maker in International Law," by Seokwoo Lee and Hee Eun Lee, of the Board of Editors. The second article is by Dr. Le Thi Anh Dao, chief lecturer at Hanoi Law University, and Vu Quoc Tuan, a government official at the Ministry of Foreign Affairs in Vietnam on "Building an Agreement on Biodiversity Beyond National Jurisdiction: What are the Positions of Asian States?"

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 Asia 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 2020 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 2020 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 start practice rapporteurs, listed in the table of contents, have undertaken the responsibility to report on the state practice of their respective countries during the 2020 calendar year. Their submissions describe how these states are applying international law in their domestic legal systems and in their foreign relations.

III Literature

1 *Book Review*

For this edition of the Yearbook, Bruno Savoie, an associate at Mayer Brown LLP, gives his review of *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Cheltenham, UK: Edward Elgar Publishing, 2021) by Luke Nottage.

2 *Bibliographic Survey*

Sharad Sharma, a Ph.D. candidate at Handong Global University 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 2020.

IV DILA Activities

The Yearbook concludes with a report on the activities undertaken by DILA in the year 2020, namely the 2020 International Conference which was originally scheduled for October 22 to 24, 2020, but postponed to February 25, 2021 due to the COVID-19 pandemic.

Seokwoo Lee
Co-Editor-in-Chief

Hee Eun Lee
Co-Editor-in-Chief

Articles

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Korea: From Norm Taker to Norm Maker in International Law

Seokwoo Lee and Hee Eun Lee***

1 Korea's Encounter with the Modern International Legal System

1.1 *Introduction of Western International Law into East Asia*

When international law of Western origin appeared in East Asia and it was asserted as the new international order in the region through the superior military power of Western states, it became inevitable that many matters of an international character should be rethought according to the newly introduced concepts of international law. One of the most important matters of review was the legal status of Korea. From the viewpoint of international law, Korea could be considered a vassal state whose suzerain state was China. This *prima facie* impression is totally understandable as Korea paid tribute to China and in many respects, Korea was not equal to China. The difference in the title of the respective rulers of each country could show that the two states were not sovereign equals. Therefore, it would have been natural for Westerners to inquire as to whether Korea was a sovereign independent state or a vassal state of China under the system of international law with which they were familiar with and which they wanted to adopt as regulating norms of the relations between East Asian states and Western states.

This was not a question of a solely theoretical nature but had practical significance. Depending on the answer to the question, Korea might or might not, for example, conclude treaties with Western states, send and receive diplomatic missions to and from the Western states and owe responsibility for the legal problems that occurred between her and Western states. Whether Korea could declare war was another question the answer to which might be varied according to the status of Korea under international law.

The following incidents are a few of the historical instances in which the international legal status of Korea became problematic. In March 1866, many Roman Catholics suffered persecution and the Korean government executed many Koreans and nine French priests. This incident was reported by the French

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Bishop Ridel to Admiral Roze, commander of the French fleet in China. France decided to dispatch troops to Korea and demand the conclusion of a trade treaty. One legal problem that emerged from this incident was determining which state, Korea or China, was responsible for the lives of the French priests. Faced with this problem, the Office of Foreign Affairs, *Zongli Yamen*, which was established as the initial organ in charge of diplomacy during the Qing dynasty, denied any Chinese responsibility. It said that Chosun was "entirely independent" in her relations with other states. France, for her part, was said to have sent an official letter to the Chinese government on July 13, 1866, in which France manifested her intent not to recognize any authority of China over Korea.

A similar problem was raised when the American warship, General Sherman, was burnt by the people of Pyeongyang and all the crew members were killed. At this time, China showed the same attitude that such matters were not under its jurisdiction, because all the domestic affairs of Chosun were put under the jurisdiction of Chosun since it enjoyed its own autonomy under the Sinocentric order. Prince Kung's reply to the inquiry of W. Williams, the acting US Minister to China at that time, shows the Chinese attitude with regard to Korean status under the Sinocentric order and the bearer of legal responsibility when this kind of incident occurs.

Another noticeable scene where the international legal status of Korea was questioned appeared when Korea was to conclude the Treaty of Amity and Commerce with the United States. Needless to say, this treaty was a treaty between Korea and the United States. However, on behalf of Korea, all the negotiations were led by China and Korea only signed the treaty without having had any direct negotiation with the United States. In mediating the conclusion of the treaty, China pursued two mutually paradoxical objectives. One was to let Korea conclude a treaty with the United States. The capacity to do so was only recognized to a sovereign independent state. The other was to keep her as a dependency of China and to maintain Chinese political influence upon it.

When Li Hongzhang, the Chinese Viceroy of Zhili and Minister of Beiyang, had a talk with Admiral Shufeldt, the US representative for the negotiations, he proposed a draft of the treaty composed of 10 articles. The first draft article provided that Korea was a *sokbang* in Korean and *shubang* in Chinese of China. This is the so-called "dependent country clause."

The meaning of *shu* is "to be of," "belonging to," "connected with," "pertaining to," "depending on," or "subordinate to." *Bang* means "a state," "a country" or "a nation." Therefore, "the position of a country such as Korea" as a shubang of China "can best be described as a 'belonging or dependent country.'" Translating it into terms like "vassal kingdom" or "fief" is "misleading, for the character *shu* carries with it the idea of kinship, not that of a merely legal relation." In that sense, *sokbang* or *shebang* can be best translated into "belonging

or dependent country." As a result, article 1 of the proposed draft is to be read as follows: "Korea is a 'dependent country' of China. However, the affairs of domestic politics and diplomacy may be constantly managed autonomously for the future."

China strongly argued the acceptance of this article by the US, a demand refused by Shufeldt. Compromise was reached at the third conference between Li and Shufeldt. Instead of inserting an article concerning Korean dependency upon China in the text of the treaty, they decided to make Korea send the Document of Reference which confirmed the traditional tributary relation between Korea and China. Two days after the conclusion of the treaty, on May 24, 1882, the Korean king handed the document to Shufeldt and it was translated into English by him and forwarded to the US government in Washington D.C. On June 26, 1882, United States minister to China, Holcombe, also translated the document and sent it to US Secretary of State Frelinghuysen. Holcombe's translation seemed to be more refined and was said to be accepted by China as the official translation:

> Cho-sen has been from ancient times a state tributary to China. Yet hitherto full sovereignty has been exercised by the Kings of Cho-sen in all matters of internal administration and foreign relations. Cho-sen and the United States, in establishing now by mutual consent a treaty, are dealing with each other upon a basis of equality. The King of Cho-sen distinctly pledges his own sovereign powers for the complete enforcement in good faith of all the stipulations of the treaty in accordance with international law.
>
> As regards the various duties which devolve upon Cho-sen as a tributary state to China, with these the United States has no concern whatever.
>
> Having appointed envoys to negotiate a treaty it appears to be my duty, in addition thereto, to make this preliminary declaration.

In the translation, Chosun is described as "a state tributary to China" and "a tributary state to China." However, at the same time, phrases such as "full sovereignty," "dealing with each other upon a basis of equality," and "the King of Chosen distinctly pledges his own sovereign powers" are used, which express Chosun as a sovereign state. A Chinese reading of the document would have focused on the words of "a state tributary to China" and interpreted them as expressing Chosun's traditional dependency to China. The US would have focused on other phrases which describe Chosun as a sovereign independent state. In this sense, the Document of Reference may be said to show the difficulty in attempting to harmonize a normative fact which has different meanings in two different international systems of order.

1.2 *Korea and the Chinese Tributary System*

After 676 CE, Korea was politically unified under Silla, but the dominant cultural influence remained Chinese. In its efforts to court China's favor, Silla had become increasingly sympathetic to the Chinese worldview. Although military and political differences forced the two apart, the cultural influence remained. Over the following centuries, Korea increased its cultural connection to China, a connection that culminated in Korea's formal inclusion in China's tributary system. The depth of their relationship allowed Korea to participate in the richness of Chinese culture and to take a privileged position under China's protective umbrella.

Confucianism and the Confucian understanding of authority lay at the heart of China's tributary system. For Confucius, political stability was grounded on a strong and morally upright center that provided a point of orientation for those in its political orbit. "He who exercises government by means of his virtue may be compared to the north polar star, which keeps its place and all stars turn towards it." For China and its tributaries, China was the middle kingdom, the stable center around which others turned. Political authority was also metaphorically modeled on China's paternalistic familial relations. "The duties are those between sovereign and minister, between father and son, between husband and wife, between elder brother and younger, and those belonging to the intercourse of friends." Korea, as a tributary state, was viewed as son or younger brother to China.

The success of the tributary system rested on the regular missions between China and its tributary states. The missions would take place at regular intervals, up to three times a year, and also for any special events such as the emperor's birthday, the winter solstice, the death of an emperor, or when a new Korean king was enthroned. "During the two and one-half centuries from 1637 to 1894, no less than 507 Korean missions came to Peking, while 169 Chinese missions went to Korea." During those missions, Korea presented local goods as a tribute to the Chinese emperor, and received goods from China in return. The missions also provided an important source of information, allowing Korean access to Chinese literary, artistic, and scientific advancements.

The mutual obligations that arose out of this tributary "imposed on both parties moral rather than legal obligations." Although trade ties were an important element to the missions, it was not their primary goal. Rather, Korea's acknowledgment of Chinese suzerainty provided China with an important affirmation of its self-understanding as the center of the world. At the same time, Chinese acknowledgment and reception of Korean leaders provided them with important certification of their legitimate claim to the thrown.

Much like a father's obligation to a child or an older brother's obligation to a younger brother, China also had a moral obligation to look after the welfare of its tributary states. That obligation was tested in 1592 when Japanese forces led by Toyotomi Hideyoshi invaded Busan on the Korean peninsula with an initial force of 52,000 troops. The Korean army was unable to resist, and the Korean court retreated to safety to the Chinese border. Ming dynasty China, recognizing a threat to both its tributary and its own sovereignty, responded by sending troops into Korea in January of 1593. The Chinese forces were assisted in this campaign by a Korean naval commander, Yi Sun-sin, who successfully designed and deployed "turtle battleship," the world's first ironclad ships. The combined forces drove the Japanese back but could not evict them from the country. The result was a stalemate until late 1598, when Hideyoshi died and Japanese forces withdrew.

The effort to protect its tributary state and its own border took its toll on the Ming. Less than twenty years later, a rising Manchu state on the northern border sensed Chinese weakness. In 1616, China was attacked by the Manchurian state and requested Korean assistance. The Korean king, Kwanghaegun, sent troops, but ordered them to remain neutral until it was clear which side was more likely to win. Enraged upon learning of the King's disloyalty, a coup was mounted by Korean forces loyal to the Ming and Kwanghaegun was overthrown.

In retrospect, Kwanghaegun's hesitation might have been the strategically better choice. The Manchurians were successful in their attempt to overthrow the Ming dynasty and declared themselves the new rulers of China. As punishment for Ming loyalty, the new Qing rulers invaded Korea in 1627, looting Pyeongyang. Korea, remained a tributary state to the Qing until the end of the nineteenth century. The Koreans were never fully comfortable with their professed loyalty to a Manchurian dynasty, however. They remained in the minds of many Koreans pretenders to a culture that they did not fully understand, little brothers, themselves, that had breached propriety and usurped the thrown. "As a result the idea came about among Koreans that since China was ruled by a dynasty of questionable legitimacy, and since its rulers were not fully civilized, Korea remained the last true bastion of civilization (that is, Confucian civilization)."

1.3 *The Fall of the Tributary System and the Rise of Treaty-Based Relations*

The tributary system served Korea well for most of its history. It allowed the small kingdom to exist in relative peace and obscurity without great interference from

its much larger neighbors. Although Korea paid tribute to China, it remained fully autonomous in relation to its internal and external affairs, choosing its own leaders and conducting its own trade. That autonomy began to collapse as Western powers weakened China's influence over the region, substituting nominal "sovereignty" for the practical autonomy that it had once enjoyed.

Western European nations forged the concept of national sovereignty at the Peace of Westphalia, in 1648, in order to end the religiously motivated Thirty Years War. At its foundation, the peace agreement established that there was no higher political authority than the nation-state, each nation-state was regarded as the political equal of any other, and each had absolute sovereignty within its own borders.

The mirage of political equality between greater and lesser powers held for a time in Europe but could not be maintained when Western industrialized powers contacted the non-industrialized nations of East Asia. When the Asian nation states refused to recognize the Westerners as equals, equality was forced upon them. The Treaty of Nanking, signed in 1842, is indicative of the treaties that opened Japan and China to the West. Ostensibly proclaiming equality between the powers, they, in fact, were treaties "imposed by the victor upon the vanquished at gunpoint, without the careful deliberation usually accompanying international agreements in Europe and America."

The new world order exposed Korea to forces that were well beyond its control. Compounding the problem, Korea's internal politics were in great flux. In 1864, the 25th king of Chosun died without having named an heir. The Queen dowager unexpectedly named an 11 year old son of Prince Hŭngsŏn, who was to control the reins of power until his son came of age. In honor of his new authority, Prince Hŭngsŏn was given the title of Taewŏn'gun, or Grand Prince. Taewŏn'gun was determined not to negotiate with the foreign powers, proclaiming that "To not fight against the invading Western barbarians and instead negotiate for peace is to sell the country."

The most immediate push for trade came from the East rather than the West, however. In 1875, two years after Taewŏn'gun stepped down from power and his son became King, the Japanese employed the same tactics against Korea that had been applied against the Japanese by Western powers. Having rapidly accepted Western technology, the Japanese were able to send a modern warship to the Korean-controlled Ganghwa Island, in order to provoke a fight and intimidate the new government. Fighting did, in fact, break out, as the warship *Unyokan* approached Korean defensive batteries. Japan retaliated by attacking Ganghwa Island as well as the harbor at Pusan, further demanding that Korea provide access to its ports as reparations for the injustice that Japan claimed it had suffered.

The new king, posthumously named King Kojong, was more amenable to Korea's participation in the new world order than his father, Taewŏn'gun, had been. Certainly intimidated by the Japanese show of force, he was also compelled by the new technology and the opportunities that it presented. On February 26, 1876, Korea signed the Ganghwa Treaty, opening three ports to unrestricted trade with Japan and, perhaps more significantly, declaring that Korea was "an autonomous state enjoying the same rights as Japan." For the first time, Korea had engaged in direct negotiations with a foreign power which resulted in a treaty based, at least in part, on the principles of Western sovereignty rather than on the more traditional relations between suzerain and tributary.

China was neither blind nor indifferent to Japan's expanding influence on the Korean peninsula. It felt threatened by a modernized Japan on its eastern border, but it no longer had the power to contain Japan on its own. In order to work around this strategic weakness, Li Hongzhang, a Viceroy of China and architect of nineteenth century Chinese foreign policy, devised the strategy of "using the barbarian to control the barbarian." Li Hongzhang hoped that by bringing Korea into treaty relationships with as many other foreign powers as possible, the Western nations would each have an interest in preventing any one of them from gaining exclusive control.

King Kojong was amenable to the strategy and interested in expanding Korea's Western contacts. On May 22, 1882, representatives of the United States and Korea signed and sealed the Treaty of Peace, Amity, and Commerce between the two nations. Similar treaties followed with Britain and Germany in 1883, Italy and Russia in 1884, and France in 1886. Each of these treaties contained an attachment that indicated Korea's ambivalent feelings to the new world order. For instance, the treaty with the United States had an attachment that stipulated that, "the king of Korea, as an independent monarch, distinctly undertakes to carry out the Articles contained in the Treaty, irrespective of any matters affecting the tributary relations subsisting between Korea and China, with which the United States has no concern." On the one hand, the treaty establishes Korean sovereignty in relation to Western powers, but on the other hand, it maintains its place in the Confucian world order, with which the West "has no concern."

The conflicting impulses found in the treaties' language were found in Korean society, as well. On the one hand, elements of Korean society wanted to push for a faster embrace of Western influence and modern technology. On the other hand, other more traditional Korean groups called for the complete rejection of these newly established foreign contacts. Parties on both sides of the rift led unsuccessful coups against Kojong in the tumultuous 1880s.

In 1879, Japan agreed to help Kojong train and equip a modern fighting force, which would generally be known by its Japanese title of *kunrentai*. This highly trained squadron quickly enlisted more than 1,000 men. The additional funds that the new soldiers received were taken from the support that had previously been provided to Korea's traditional army. The old guard resented their decreased support and resented the apparent pro-Japanese stance that the newly trained soldiers took. In 1882, the Korean army led a coup, adopting as their spiritual leader Taewŏn'gun, the isolationist, anti-Japanese father of Kojong that had been forced to retire in 1873.

In an expression of nationalism, the soldiers stormed the capital and burnt the Japanese legation, forcing the Japanese minister to flee Korea. The Japanese, in turn, wanted to invade Korea and abduct the Taewŏn'gun, who had become the symbol of the movement. The Chinese intervened, sending 4,500 troops to protect the Korean capital. The Chinese were also able to entice the Taewŏn'gun to their legation for protection, and eventually took him back to China. The soldiers' coup attempt resulted in the return of an enormous Chinese military presence to the Korean peninsula.

Following the soldier's attempted anti-Japanese coup, a group of young Korean reformers attempted a pro-Japanese coup two years later. The Kapsin coup, as it is known, was organized by a group of radical Korean officials who attempted to take advantage of a draw down in Chinese forces brought about by a French threat to Indochina. On December 4, 1884, the officials staged an intricate coup that expected Japanese military assistance which, in the end, did not materialize. The Chinese military that had remained in the capital were able to crush the resistance, and the coup leaders were exiled to Japan.

Both China and Japan recognized that Korea's internal struggles had come dangerously close to drawing the two powers into direct conflict with each other. Neither country was prepared for that, however. On April 18, 1885, China and Japan agreed to the Convention of Tianjin. The Convention stipulated a mutual withdrawal of Japanese and Chinese forces from the Korean peninsula, along with a promise that neither side would again send in troops without first notifying the other. It was a short-lived effort to cool the overheated tensions on the peninsula.

Within ten years, another, larger movement arose which threatened the stability of the Korean government more than either of the previous coup attempts had. The Tonghak religious movement was founded in the 1860s as a reaction to the increasing pervasiveness of foreign influence. "Tonghak" meant "Eastern learning," and the movement embraced a blend of Taoism, Buddhism, egalitarian reforms, and anti-foreign sentiment. Its founder, Ch'oe Cheu, was executed in 1864 for heresy against Neo-Confucianism. The religion grew after

his execution, leading to a demand for the founder's posthumous exoneration. By 1893, the pressure had grown so great that King Kojong agreed to the exoneration. He later had a change of heart and refused to exonerate Ch'oe Cheu, after all. The indignation felt by the Tonghak followers led to a successful rebellion in the southwestern province. In 1894, the Tonghak army defeated the government forces and occupied all of the major cities in the southwest including the provincial capital.

The Korean government requested assistance from China, once again. China agreed by sending 3,000 men to suppress the Tonghak rebellion. Before doing so, however, China notified Japan of its impending invasion, in accord with the terms of the Convention of Tianjin. Not willing to have an unchallenged Chinese military presence in Korea, Japan sent its own force of 7,000 troops. The Japanese army successfully suppressed the Tonghak rebellion, but it did not stop military operations until it had destroyed the Chinese army as well. The Sino-Japanese war was over almost as quickly as it started. In November 1895, China signed the Treaty of Shimonoseki, relinquishing all claims to Korea.

After 1895, Japan worked to secure its hold over the Korean peninsula against other foreign influence. In 1904, Japan crossed the Yalu River, Korea's northern border, moving against Russian forces that were stationed there. Simultaneously, Japan moved against ships in the Russian fleet that were moored at Port Arthur (today's Lüshun). In August 1905, the United States brokered a peace agreement between the two, the Portsmouth Agreement, in which Russia conceded Japanese dominion over the Korean peninsula.

Japan also worked to consolidate its control over Korean domestic policies through a series of agreements beginning in 1904, while the Russo-Japanese War was still underway. On August 22, 1904, Japan forced Korea to sign the First Japanese-Korean Agreement. That agreement required, among other things, that "The Korean Government shall first consult the Japanese Government before concluding treaties with foreign powers …" In effect, the First Japanese Korean Agreement made Korea a protectorate of Japan. That relationship was formalized with the 1905 Protectorate Treaty. Finally, the Kingdom of Korea was eliminated entirely on August 29, 1910, when Prime Minister Yi Wan-Yong signed the Treaty of Annexation, making Korea a part of Japan. With that treaty, Korea began a new phase of its existence and forever lost China as its older brother.

1.4 *History and Theoretical Approach of Korea in International Law*

The circumstances surrounding Korea's acquisition of knowledge on the European-oriented international law and Korea's acceptance of international law as a sovereign state are typically discussed altogether as part of history

of introduction and adoption of international law in Korea. While those two issues are closely related, they must be separately discussed.

It was Martin's translation and publication of Henry Wheaton's *Elements of International law* under the Chinese title of Wanguogongfa (Public Law of All Nations) in 1864 that had a huge impact on the discipline of West-oriented international law in East Asia. According to the record, Hanabusa Yoshitada, a Japanese envoy to Korea, brought two copies of books on international law to Cho Young Ha, the Minister of Culture and Education of Korea on December 17, 1877. One of the copies was called "Wanguogongfa," and the other was "Xingyaoxhiahan," another Chinese translation of literature by K von Martens. This instance explains one of the views on Korea's first encounter with international law.

However, there are widely divergent views on this issue. In fact, Korea sent envoys to China more than 23 times between the year of 1894 when Wanguogongfa was published and 1876 when the very first modern treaty known as "Treaty of Peace and Friendship between the Kingdom of Corea and the Empire of Japan" was concluded. Based on the number of diplomatic exchanges and relations with China and Japan at that time, it is highly probable that Korea's envoys to China brought home a copy of Wanguogongfa along with other Western literatures on international law.

Moreover, at the time the treaty between Korea and Japan was concluded in 1876, the report by Parkers, the British Minister to Japan revealed that Korean delegations had possessed a copy of Wanguogongfa and copies of treaties concluded by China with other foreign countries. Consequently, it can be reasonably presumed that Korea became acquainted to international law around the time of publication of Wanguogongfa or at least prior to 1876 when the first modern treaty with Japan was concluded.

Upon the introduction of international law from the West under the title of Wanguogongfa, Korean intellectuals generally showed three different attitudes toward international law. The first group of intellectuals argued that Korea must actively incorporate international law as a means to preserve its independence and to prevent wars. They had a great expectation for international law as the knowledge on international law began to be disseminated.

On the other hand, the second group kept a skeptical attitude toward international law. They argued that international law represents only the interests of powerful states even though the principle of justice operates along the line of international law on its face. This reflects the view that international law is of no use in the context of realities of international politics unless states invoking international law are empowered themselves with independence and autonomy.

Lastly, the third group maintained the view that Korea must utilize legal reasoning in international law to preserve its independence. This group emphasized the significance of complying with international law as weak states could invoke international law against powerful states as a legal basis.

The way international law came to be a norm and applied in Korea is different from how international law was disseminated in the country. The fact that Korea became governed by international law, therefore being part of the community of international law, is supported by a number of indications, such as: the application of traditional international law (law of war, maritime law), state recognition, the establishment of diplomatic relations and the conclusion of treaties.

In particular, the conclusion of treaties bears significance. International law governs laws or "acts" that directly relate to conclusion of treaties, and is equivalent to the international legal act of a state subject to international law. In this respect, the conclusion of treaties is a symbolic act, which indicates when a state is to be regulated by international law.

Accordingly, Korea's acceptance of international law as a binding norm is deemed to have begun with the conclusion of a Treaty of Peace and Friendship with Japan in 1876. Notably, while China and Japan concluded their first modern international treaty with Western countries such as Britain and the United States respectively, Korea signed its first international treaty with Japan, which concluded its first Treaty of Peace and Amity with the United States on March 31, 1854. Korea's first modern treaty with Japan is viewed as a reflection of Japan's influence regarding its experience of being forced to open its door to the West and sign an unequal treaty.

2 The Development of International Law in Korea

2.1 *In General*

The development of international law in Korea is traced back to the late 19th century when Korea was confronted with public international law introduced by Western imperial states and further influenced by Japanese colonialization from 1910 to 1945 and US military administration in the southern half of Korea from 1945 to 1948. The Republic of Korea was formally established in 1948 with the adoption of its first Constitution. The history and legacy of Korea play an important role in shaping the contours of Korea's legal system as well as Korea's international relations.

The legal system of Korea particularly underwent drastic changes during Japanese colonial rule as the Japanese government tried to apply their civil

law system, based on the continental European legal system, to Korea. Such legal changes imposed under colonial rule created challenges because Korea was faced with a conflict between its deep-rooted Confucian traditions and the newly incorporated European-oriented legal principles.

After Korea gained its independence in 1948, the issue of reconciling Confucianism and colonialism in Korean law was additionally intertwined with the novel principles of constitutionalism that came about due to the growing influence of the Anglo-American legal system in Korea.

Korea's approach to international law is explained through the interpretation of its Constitution which stipulates in relevant part that "treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." In accordance with this provision, international law has been generally accepted as Korean domestic law and incorporated into Korea's domestic legal system.

While the Constitution explicitly sets forth that treaties duly concluded are accorded with the same status as the domestic law of Korea, there is no specific mention of customary international law. The term 'generally recognized rules of international law' is largely interpreted to mean customary international law. Regarding the status of international law in Korea's domestic legal system, the prevailing view is that both treaties and customary international law stand equal with domestic legislations. While the treaties ratified with the consent of the National Assembly are deemed to have a status equal to statutes passed by the National Assembly, those simplified treaties without legislative consent are deemed to enjoy the same status as decrees issued by the President and various ministries or enforcement decrees under the statutes.

The tumultuous experiences of the Korean nation in the twentieth century within the context of international relations in Northeast Asia has had a significant impact on Korea's attitude towards and practice of public international law. Korea has many issues to be settled under international law. Such issues include, but not limited to, territorial disputes with neighboring countries, issues of transitional justice, and issues regarding delimitation of maritime boundaries and fisheries. As to adjudication as a means of dispute settlement, Korea has not recognized the compulsory jurisdiction of the International Court of Justice (ICJ).

However, Korea has accepted the compulsory jurisdiction of the ICJ for disputes arising out of the interpretation or application of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, as well as the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement

of Disputes. Korea, as a party to the UN Convention on the Law of the Sea (UNCLOS), submitted a declaration under UNCLOS Article 298 in 2006. Korea generally remains inactive in employing international adjudication as a means of dispute settlement. Moreover, Korea has not employed non-judicial means of dispute settlement such as inquiry, mediation or conciliation. The only bilateral agreement concluded for the very purpose of dispute settlement is the Exchange of Notes concerning the Settlement of Disputes concluded between Korea and Japan in 1965. One of the possible explanations for Korea's rather confined choice for dispute settlement is that most issues at stake are delicately related to territorial matters, which can never be easily left for a third-party decision.

As a full-fledged member of international community, Korea has been actively involved in a number of activities at international organizations and conferences. Korea particularly devoted to a multilateral diplomacy at the UN and gradually pursued bilateral diplomacy even in the multilateral forums such as the G20 Summit. Moreover, Korea utilized its UN diplomacy to extend the scope of its global participation in major global agendas including, but not limited to, human rights, environment, terrorism, and poverty. The hosting of major international forums such as the G-20 Seoul Summit, the 2012 Nuclear Security Summit, and the 4th High-Level Forum on Aid and Effectiveness in 2011 showed Korea's national capacity to serve not only as a global agenda setter, but more importantly as a bridge builder between developed and development countries. Korea's engagement with the international community extended to humanitarian and disaster-relief efforts through its participation in the UN peacekeeping missions.

2.2 *From Japanese Colonialism and a War-Torn Country to Become an Asian Power*

Korea's experience in international relation is rather unique in the sense that Korea emerged not only from Japanese colonialism, but also from a war-torn country to become an Asian power. Some significant international legal issues including those which resulted from the Japanese occupation of Korea as well as from the Korean War.

2.2.1 The Legacy of Colonialism

This historical fact that Japan ruled and controlled Korea from 1910 to 1945 caused many international law issues, some of which have still not been settled, between Korea and Japan. The most critical and fundamental question, among others, is whether the Japanese ruling over Korea was based on the grounds of international law.

In particular, the validity of the two treaties – the treaty of 1905 which deprived Korea of its diplomatic sovereignty and the annexation treaty of 1910 – have been the subject of much controversy. Upon Korea's signing the Treaty on Basic Relations with Japan in 1965 to normalize diplomatic relations, the two countries tried to solve unsettled legal issues by concluding additional treaties such as the Agreement on the Settlement of Problem concerning Property and Claims, Agreement concerning Cultural Assets and Cultural Cooperation, and Agreement concerning the Legal Status and Treatment of the Korean Residents in Japan.

Without any success, the issue on legality or legitimacy of Japan's ruling over Korea under international law was never solved and rather ended up with vague provisions in the treaty, which, in turn, raises a matter of interpretation until the present time. Another key issue arising out of the Japanese colonization of Korea is related to Dokdo, a group of small islets in the East Sea because the issue surrounding Dokdo is often raised in the context of Japanese imperialism and expansionism into Korea.

2.2.2 International Legal Issues Arising from the Korean War and Inter-Korean Relations

Armed conflicts occurred on the Korean Peninsula in the early 1950s has raised a number of important legal issues under international law. The Korean War poses many legal issues especially related to international humanitarian law such as the legal characteristic of the armed conflict, the applicability of the rules of engagement and legal meaning of a longstanding ceasefire. As North Korea launched an armed attack against South Korea on June 25, 1950, a series of the resolutions were adopted by the UN Security Council (UNSC Res. 82, UNSC Res. 83, UNSC Res. 84, UNSC Res. 85) and it was the first time the UN Security Council had authorized the use of force since its inception in 1945 and members of the United Nations acted collectively to repel aggression.

As a veto by then Soviet Union was frequently used to block numerous Security Council initiatives during the Korean War, the UN General Assembly adopted a resolution known as "Uniting for Peace" (UNGA Res 5/377), which stated that if the Security Council fails to exercise its primary responsibility to act as required to maintain international peace and security due to lack of unanimity of the permanent members, the General Assembly should take over to keep the impetus for peace.

While a Military Demarcation Line was drawn on land at the time the Inter-Korean Armistice Agreement was signed on May 27, 1953, such Demarcation Line did not extend into maritime areas. The seaward extension, known as the Northern Limit Line (NLL) which was drawn by UN Commander General

Mark Clarke in 1958, has remained contentious and caused confrontations between the two Koreas as the NLL was not officially part of the Armistice Agreement.

Some key Inter-Korean issues, among others, include statehood and recognition as well as legal characteristics of the agreements signed by the two Koreas. An issue arises from the provision of the Constitution of the Republic of Korea which stipulates that the territory of the Republic of Korea shall consist of the whole Korean Peninsula while the two Koreas were respectively admitted to the United Nations at the same time.

The UN membership issue raised a legal question as to whether the Republic of Korea recognized North Korea as a state. The issue gets more complicated as a question also arises as to the legal characteristic of the Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between the South and the North (known as the Inter-Korean Basic Agreement) signed in 1991, which recognizes that relationship between the two Koreas is not a relationship as between states, but rather as a special one constituted temporarily in the process of unification.

2.2.3 Law of the Sea

Situated at the center of the Northeast Asian Seas, the waters that surround three sides of Korea are important for economic, military and strategic concerns. Such concerns embrace a wide range of maritime issues including maritime delimitations and competition for marine resources. Korea has engaged in important legal matters pertaining to the Law of the Sea that are of vital importance especially in relation to maritime delimitation in the zones established by the UN Convention on the Law of the Sea. There remains the issue of maritime delimitation due to overlapping claims over the continental shelf with the neighboring countries such as between Korea and China in the West Sea and between Korea and Japan in the East Sea.

The contribution on the part of Korea in relation to maritime issues includes its active engagement in international efforts to protect marine safety and marine environment. Since Korea joined the Convention on the International Maritime Organization, Korea, as a member of the A category Council with the largest interest in providing international shipping services, has been leading the development of maritime technology such as e-navigation, eco-friendly vessels and autonomous vessels technology.

2.2.4 Democracy and International Human Rights Law

The development of human rights in Korea is closely related to the development of democracy in Korea achieved through the mass protest against

dictatorship and military regime from the 1960s to the 1980s. With the development of democracy in Korea since early 1990s, Korea began to accept major international human rights treaties, ratifying the International Covenant on Civil and Political Rights (ICCPR) and its Protocol in 1990, and the International Covenant on Economic, Social and Cultural Rights in 1990.

Since then, Korea became the party to major international human rights treaties such as the Convention on the Rights of the Child (1991), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995), the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict (2004), and the Convention on the Rights of Persons with Disabilities (2009). In 2001, the National Human Rights Commission was established as a national human rights advocacy institution along with several truth and reconciliation commissions to investigate human rights violations under previous authoritarian regimes.

One of the recent human rights issues include the right to conscientious objection to military service. Conscientious objection has been a topic of much debate in Korea for decades, especially in cases involving Jehovah's Witnesses. The Supreme Court and the Constitutional Court have consistently affirmed the punishment of conscientious objectors under Korea's Military Service Act. However, in 2018, the Constitutional Court held that the Korean law that did not recognize conscientious objection was not consistent with the Constitution. In the same year, the Supreme Court ruled that conscientious objection was justifiable under Military Service Act.

2.3 *Korea's Contribution to the Development of International Law*

Before 1948, Korea did not have a chance to contribute to the development of international law. At the time, the European-oriented international law began to regulate the inter-state relationship of East Asian nations which accepted international law. Western international law scholars questioned whether Korea was a member of the international community as a sovereign state, and other scholars did not recognize other East Asian countries aside from Japan as subjects of international law, such as Korea, China, and Siam.

Korea could not contribute to the development of international law under such circumstances, especially when the nation went under the colonial rule of Japan as soon as it opened its door to the West, resulting to the Japanese annexation. Upon gaining independence from Japan on August 15, 1945, Korea was finally placed in a position where it could contribute to the development of international law.

However, due to how armed conflicts between the two Koreas destroyed most of the economic systems in the country, Korea experienced hardship

which prevented it from participating in any meaningful activity to contribute towards the development of international law.

Under this difficulty, however, a noticeable Korean state practice in terms of developing international law emerged, namely, the "Declaration by the President on Sovereignty of Adjacent Ocean" (the so-called "Peace Line Declaration"). The declaration states that Korea has sovereignty over all the natural resources, minerals, as well as marine products within a certain distance of water, including ocean floors, and the continental shelf near the Korean peninsula.

The declaration also allocated maritime sovereignty to Korea far beyond the internationally recognized territorial limits. According to the order of international law at the time, unilateral declarations and measures by Korea could be understood as violation of international law by infringing right of fisheries in international waters.

Korea's such measures, however, can be viewed as pioneering, taking the lead to the changes of the maritime law, influenced by the United States president's Continental Shelf Declaration and High Sea Fishery Declaration and Latin American countries' contention on the expansion of the oceanic jurisdiction.

In the United Nations Law of the Sea Conference in Geneva in 1958, Korea, based on the purpose of the said Declaration, took a position emphasizing the special interests on fisheries of coastal states adjacent in international waters and stood against those countries that proposed freedom of fishing on the High Seas.

The Peace Line Declaration expanded the notion of Exclusive Fisheries Zone to Asian region and subsequently contributed to establishment of Exclusive Economic Zone. However, Korea's contention of sovereignty over the continental shelf was not accepted by international community.

Armed conflicts in Korea in the early 1950s also affected the development of international law. For example, the United Nations, with the absence of the Soviet Union, have jointly identified North Korea as an aggressor and implemented a resolution under the UN Security Council to provide assistance to South Korea. Due to the absence of the Soviet Union, the legal effect of the resolution was questioned based on the interpretation of Article 27 of the UN Charter. Since then, the UN has held that an absence or abstention of a permanent member of the UN Security Council does not have an effect on the approval of the resolution by the UN Security Council.

The UN General Assembly adopted a resolution (377(V) of 1950) of "Uniting for Peace" in order to avoid a Soviet Union's veto against a resolution as a response to the armed conflicts in the Korean peninsula. Through this resolution, the special session of the General Assembly, called 'Special Emergency

Session,' was formed and the Interim Committee established in 1947 became meaningless.

After the armistice agreement was concluded, the repatriation of prisoners of war became an issue, and the concerned parties handled this matter in a way that respects the individual wishes of each prisoner of war. Such practice led to the insertion of Article 118 of the Geneva Convention relative to the Treatment of Prisoners of War which prescribes that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities," which does not include the forced repatriation of prisoners of war who do not wish to be sent back to their country.

The Korea-Japan Agreement of Joint Southern Continental Shelf Development of 1974 was influenced by the 1969 decision of the International Court of Justice on North Sea Continental Shelf Cases that perceived the continental shelf as an extension of the dry land which enabled Korea and Japan to jointly explore and develop natural resources in surrounding waters where the claims of sovereignty between Korean and Japan have been overlapped.

This Agreement has been viewed as one of the most important attempts of a joint development by putting an end to an issue of sovereignty over disputed waters. The initiative was also a key example that contributed to the development of international law by creating an international model on a joint development in the continental shelf as the first example which derived a consensus on the joint development based on the recommendation of the International Court of Justice (ICJ) decision in 1969.

Furthermore, this Agreement is also viewed as putting great significance on the development of maritime law by setting a precedent of an implementation of the obligation to negotiate under general international law and a precedent of implementation of negotiation duties under Article 83(3) under the United Nations Convention on the Law of the Sea (UNCLOS). Other than this, the Agreement was a model of taking a tentative measure under the same Article, and being a model for a duty of cooperation under Article 123 of the UNCLOS.

As a full-fledged member of international community, Korea gives more statements and activities in meetings and forums related to international law, Korea's contribution to the development of international law became a common practice.

To give a couple of examples, during the meeting in Rome for establishment of the ICC, there were conflicting views as to the system of acceptance of ICC jurisdiction: one view was to adopt a method based on state's consent and the other view was to recognize automatic jurisdiction as to the crimes that fall under the universal jurisdiction. Amid this controversy, Korea suggested a

proposal that one or more of the countries from country of origin of crimes, country of detention, country of defendant's nationality, and country of plaintiff's nationality that is a state party to Regulation of ICC or accepts the ICC jurisdiction, the jurisdiction of the case be recognized. This proposal was not accepted in the ICC Statute, but was supported by many countries with an appraisal of an excellent compromise and evaluated as contributing to a final agreement to jurisdiction.

Another example is that, during the negotiation process of amending 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), Korea contributed to making an amended SUA Convention in line with the existing order under the international law of the sea. In particular, Korea has been appraised to draw a compromise of inserting to the final protocol understanding that the definition of "related material" contained in the UN Security Council resolution of 2004 can be used in relation to the meaning of dual-use material.

Other than these, it has been also pointed out that Korea has contributed, through civil organizations and the victims themselves to save victims of military sex slaves, to raising public awareness in international community that sexual violence during the war is an intolerable crime as massacre of prisoners of war or torture.

2.4 *The Status of International Law in the Domestic Legal System of Korea*

Article 6, paragraph 1 of the Korean Constitution stipulates that "treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." In accordance with this, international law has been generally accepted as domestic law and incorporated into the Korean legal system. This provision stipulates that treaties have the same effect as the domestic law of Korea. There is no specific reference to customary international law, but "generally recognized rules of international law" is generally understood to mean customary international law. Therefore, customary international law has also been incorporated into the domestic legal system under the provision of the Korean Constitution. In this sense, Korea is a monist state insofar as the incorporation of international law into domestic law is not required for international law to apply. Both treaties and customary international law, however, need to be self-executing or directly applicable in order for it to be applied in litigation.

The constitutional provision stipulates that treaties and customary international law have the same effect as the domestic laws of Korea, but it does not

explicitly identify the level of effect international law has within the domestic legal system. Due to this constitutional vagueness, the level of effect of international law within the domestic legal system has been left to theoretical interpretation. Article 5 of the Addenda of the Constitution stipulates that "… treaties in force at the time this Constitution enters into force, shall remain valid unless they are contrary to this Constitution." Thus, theories suggesting that a treaty is above or on the same level of the Constitution are very rare. The majority opinion is that both treaty and customary international law generally have the same effect as statutes as indicated by judicial decisions. Accordingly, treaties or customary international law that are contrary to the Constitution are invalid within the domestic legal system. In the event treaties or customary international law are in conflict with statutes, their validity is decided based on the principles of *lex posterior derogat legi priori* and *lex specialis derogat legi generali*.

Article 60, paragraph 1 of the Korean Constitution stipulates that consent to ratification by the National Assembly is required for "treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters." Based on this provision, some theories, which are supported by judicial decisions, suggest that treaties concluded with the consent to the ratification by the National Assembly have the same effect as statutes. However, treaties that are merely concluded by the executive branch only have the same effect as decrees which are lower than statutes.

2.5 *Treaty Making in Korea*

Under Article 73 of the Korean Constitution, treaty making is within the authority of the President. All working-level work for treaty making is carried out by the International Legal Affairs Bureau of the Ministry of Foreign Affairs and a procedure of consultations with various domestic institutions should be followed before the President is able to conclude and ratify treaties. From a procedural standpoint, there are three types of treaties that can be concluded in Korea: treaties requiring the consent to the ratification of the treaty by the National Assembly, treaties not requiring the consent to the ratification by the National Assembly, and the so-called "treaties by notification" made with a simple procedure through the Minister of Foreign Affairs.

The first step in the domestic procedure for treaty making is an examination made by the International Legal Affairs Bureau of the Ministry of Foreign Affairs. The International Legal Affairs Bureau reviews the wording of the treaty

texts, classifies the type of treaty, determines whether there are legal conflicts with other treaties or domestic laws, and whether a treaty would require the consent to the ratification by the National Assembly. With this step completed, the proposed treaty is then sent to the Ministry of Government Legislation for review. It is required under the Law of Government Organizations that the Ministry of Government Legislation reviews all proposed legislation before being sent to the State Council for deliberation. Treaties are treated as such. A review is made by the Ministry of Government Legislation to find out whether the proposed treaty is in conflict with existing domestic law. In addition, the Ministry of Government Legislation examines whether the proposed treaty requires the consent to ratification by the National Assembly as stipulated in Article 60, Paragraph 1 of the Constitution, and provides opinions on it.

When the review of the proposed treaty by the Ministry of Government Legislation is completed, the treaty is then submitted to the State Council. Article 89, paragraph 3 of the Constitution stipulates that the proposed treaty shall be referred to the State Council for deliberation. Before being sent to the State Council, the proposed treaty is reviewed by the Council of Vice-Ministers where practical discussions regarding the treaty text take place.

When the proposed treaty is reviewed and approved by the State Council, it is then sent for approval by the Prime Minister and finally by the President. With the completion of this procedure, the person appointed by the President with full powers signs the treaty that contains the treaty text that has already been approved. However, there are exceptional cases when the treaties are signed first and, then sent to the State Council for deliberation.

If a signed treaty requires ratification by the President, it must go through the ratification procedure again. However practically, a treaty concluded through the resolution by the State Council, approval of the Prime Minister and the President, they are ratified without the additional ratification procedure involving the President.

Article 60, paragraph 1 of the Constitution stipulates that the National Assembly shall have the right to consent to the conclusion and ratification of treaties. In other words, the consent by the National Assembly is certainly required for "treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters." The Administration submits to the National Assembly a motion for the consent to the ratification as a general item, not as a legislative bill. The National Assembly decides only on whether it consents to the ratification of the treaty which is ultimately

decided in the Assembly plenary session after going through an internal procedure of the National Assembly. The resolution is passed if more than half of all votes cast by more than one half of voters eligible vote in favor. Regardless of whether treaties are formal or informal or whether the consent to the ratification by the National Assembly is required or not, all treaties that become binding within Korea are promulgated domestically by being noticed in the Official Gazette.

In Korea, there are treaties that are signed and concluded with the full power of the Minister of the Foreign Affairs, without needing to go through the whole procedure of deliberation by the State Council; President's approval; or consent to the ratification by the National Assembly. These are referred to as *goshiryu joyak*, which can be put into "treaties by notification." These treaties refer to supplementary agreements concluded within the scope authorized by the treaty provisions in order for the implementation or execution of the original treaty, or a minor modification by an organizational resolution of a multilateral treaty provision adopted by an international organization.

The treaties that fall into this category are concluded by the Minister of Foreign Affairs in consultation with related ministries. Generally, treaties that are noticed in the Official Gazette (*Gwanbo*) as "treaty" and promulgated whereas treaties by notification are posted in *Gwanbo* as *Goshi* (notification) by the Ministry of Foreign Affairs. Pursuant to the Vienna Convention on the Law of Treaties Article 2(1)(a), there is no doubt that treaties by notification are considered treaties that are legally binding in Korea.

2.6 *Korea's Attitude towards Peaceful Settlement of International Disputes*

The obligation to settle international disputes by peaceful means, as stipulated in Article 2(3) of the UN Charter is deemed to be an established norm of customary international law. Korea has neither been in breach of this obligation nor actively engaged in dispute settlement mechanisms available under Article 33 of the UN Charter.

While said Article 33 enumerates the primary avenues for the peaceful settlement of international disputes such as negotiation, enquiry mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement or other peaceful means of member states' own choice as a means of resolving international disputes, Korea has seldom triggered any other means except for negotiation and the WTO dispute settlement mechanism when attempting to settle international disputes.

Korea has not employed non-judicial means of dispute settlement such as inquiry, mediation or conciliation. The only bilateral agreement concluded

for the very purpose of dispute settlement is the Exchange of Notes concerning the Settlement of Disputes concluded between Korea and Japan in 1965.

This Exchange of Notes provides that any dispute between the parties unless otherwise agreed, will be resolved primarily through diplomatic channels; if a dispute cannot be settled by diplomatic means, it should then be referred to conciliation by a procedure agreed upon by the parties. As of recently, Korea has yet to invoke this conciliation procedure to reach settlement.

With regards to arbitration, Korea has never joined an arbitral proceeding. Article 3 of the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation concluded between Korea and Japan in 1965 refers to diplomatic channels as the principal means of attempting to settle a dispute arising out of the interpretation or implementation of the Agreement; however, any dispute which cannot be settled through such diplomatic means must be referred to arbitration.

A decision concerning this agreement was rendered by the Korean Constitutional Court on August 30, 2011, regarding the issue of comfort women when the Court recognized, *inter alia*, the positive obligation requiring the Korean government to ensue dispute settlement procedures as provided in Article 3 of the said Agreement.

As to adjudication as a means of dispute settlement, Korea has not recognized the compulsory jurisdiction of the International Court of Justice (ICJ) under Article 36, paragraph 2 of the Statute of the Court. However, Korea has accepted the compulsory jurisdiction of the ICJ for disputes arising out of the interpretation or application of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, as well as the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes.

Korea, as a party to the UN Convention on the Law of the Sea (UNCLOS), has not submitted any written declaration to select a means of dispute settlement as specified in Article 287 of the UNCLOS. On April 18, 2006, Korea submitted a declaration in accordance with paragraph 1 of Article 298 of the UNCLOS, where Korea expressed that it would not accept the compulsory dispute settlement involving maritime delimitation, military activities, law enforcement activities on marine scientific research or fishery, and/or disputes in respect of which the UN Security Council is exercising its functions mandated by the UN Charter.

In sum, Korea has recently employed diplomatic means for the settlement of international disputes, though it has been an active participant of the WTO dispute system. One of the possible explanations for Korea's rather confined choice for dispute settlement is that most issues at stake are delicately related

to territorial matters, which can never be easily left for a third-party decision. Moreover, Korea's legal culture and tradition, as with other East Asian countries, prefers non-binding procedures as opposed to adversarial means of settlement.

2.7 *Judicial Decisions on International Law*

2.7.1 Direct Application of Treaties

Constitutional Court [97 Heon-ba 65] Decision issued November 26, 1998.

[Facts: Pursuant to the signing of the WTO Agreement, Korea's tariff rates changed, thereby increasing the criminal sentence of the Accused. The Defense asserted that the penalty increase based on a treaty and not a domestic legislation violated the principle of legality [*nullum crimen, nulla poena sine lege*] of the Constitution. The Constitutional Court held that even if a criminal sentence was to be increased by a treaty, this still had the same effect as an increase caused by domestic legislation. It was an example of recognition of direct application of treaties.]

The Claimant alleges that in order to increase the punishment of tariff violation, there must be an amendment of the tariff laws or the Act on Aggravated Punishment of Specific Crimes. Thus, he argues that increasing the punishment for tariff violation solely based on a treaty is a grave violation of fundamental rights and also runs counter to the principle of legality.

The Constitution states, in the latter sentence of article 12(1), "No person may be punished, placed under preventive restrictions, or subject to involuntary labor except as provided by law and through lawful procedures," thereby regulating criminal punishment through law and due process; while article 13(1) provides, "No citizen may be prosecuted for an act which does not constitute a crime under the law in force at the time it was committed," thereby prohibiting criminal punishment of an act not constituting a crime at the time of commission. Article 6(1) states, "Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea," providing that treaties duly concluded and promulgated have the same effect as domestic laws. The Marrakesh Agreement was duly concluded and promulgated thereby having the same effect as domestic laws; thus, even if crimes were to be created or punishments increased by this Agreement, it would be as if done so by domestic laws. In other words, even if the punishment for tariff violation were to be increased by the Marrakesh Agreement, it cannot be said that it was an unlawful criminal punishment or a punishment for an act that did not constitute a crime at the time of commission. Therefore, we cannot conclude that the

old Act on Aggravated Punishment of Specific Crimes article 6(2)(1) or the Act on the Marketing and Price Stabilization of Agricultural and Fishery Products article 10(3) either violates the principle of legality or the fundamental human rights and personal liberty of the Claimant.

2.7.2 Self-Executing Treaties

Supreme Court [96 Da 55877] Judgment issued March 26, 1999.

[Facts: The Plaintiff, while heading the Kumho Company Trade Union, was pronounced guilty for violating the article 13(2) of the Labor Dispute Adjustment Act prohibiting third-party intervention. After the conviction was affirmed by the Supreme Court (92 Do 70 Judgment), he became the first Korean to report this case to the Human Rights Committee (HRC) established under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) on July 7, 1992. On August 5, 1995, the HRC found that the punishment of Jong-Kyu Sohn violated the right to freedom of expression as provided in the Covenant; and the HRC, while stating that Jong-Kyu Sohn was entitled to an effective remedy, including appropriate compensation, further invited the Korean government to review article 13(2) of the Labor Dispute Adjustment Act (CCPR/C/54/D/518/1992). When the government did not carry out the decision of the HRC, Jong-Kyu Sohn brought a suit against the government for damages, pointing to article 2(3) of the ICCPR.]

Article 2(3) of the above international covenant provides for the obligation of states under international law to secure legal systems that would ensure effective remedy for persons whose rights or freedoms as recognized in the covenant are violated. Remedies such as compensation suits against the state can be claimed based on domestic law, e.g., State Compensation Act; therefore, the above provision does not individually create a special right for a person to claim remedies, e.g., compensation against a member state of the convention.

2.7.3 Effect of Treaties as Domestic Law

i. Constitutional Court [99 Heon-ma 139, 143, 156, 160 Consolidated] Decision issued March 21, 2001. (Affirming the unconstitutionality of the ratification of the Fisheries Agreement between Korea and Japan, etc.)

Article 6(1) of the Constitution states, "Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea." The Agreement at bar is a treaty "duly concluded and promulgated under the Constitution" regarding the fisheries between our country and Japan and therefore has the same effect as domestic "laws." Thus, as observed above,

a Constitutional Appeal can be made regarding a law in the exceptional circumstance of when a fundamental right is infringed by an ordinance that is not separately executed.

ii. Constitutional Court [2002 Heon-ma 611] Decision issued April 24, 2003. (Affirming the unconstitutionality of Medical Treatment Law article 5, etc.)

The Claimants allege that the provision regarding preliminary examination breaches the "Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific," thereby failing to recognize the education obtained abroad and thus additionally limiting the achievement of domestic licenses. Our country is a signatory of this Convention (Treaty no. 990, entered into effect Sept. 29, 1989); and though it has a legal effect, its status is not constitutional and therefore cannot be a criterion for the evaluation of the validity of the preliminary examination provision.

iii. Constitutional Court [2000 Heon-ba 20] Decision issued September 27, 2001. (Constitutional Appeal regarding the Articles of Agreement of the International Monetary Fund article 9(3))

Article 68(2) of the Constitutional Court Law provides that the object of trial shall be "law," which should be read as including "treaties." This court has earlier made a judgment on the text of a treaty on the grounds that a treaty having the same effect as domestic law can be subject to evaluation of its constitutional validity (Constitutional Court, 97 Heon-ga 14, Apr. 29, 1999, Casebook 11–1, p. 273). The article in this case was concluded and ratified by the National Assembly and therefore has the effect of domestic law pursuant to Article 6(1) of the Constitution, which would be equivalent to the effect of legislation. Because this particular article regards the immunity from jurisdiction, its nature of direct application would make it subject to evaluation of constitutional validity.

2.7.4 Precedence in the Application of Treaties as *Lex Specialis*

Supreme Court [82 Da-ka 1372] Judgment issued July 22, 1986.

As there has yet to be any domestic legislation concerning carriage by air, the legal relationship would be that it would be subject to the application of civil law, or *lex generalis*. Regarding international air transport, however, the government has declared the "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on October 12, 1929" (hereinafter "Hague Protocol") as Treaty no. 259, after having passed the resolution in the Cabinet Council and subsequently ratified by

the National Assembly on October 11, 1967. Article 23(2) of the Hague Protocol provides, "Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol[,]" while Article 19 states, "As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955*." Thus Korea's signing of the Hague Protocol gave it an effect equivalent to signing the "Convention for the Unification of Certain Rules Relating to International Carriage by Air" (hereinafter "Warsaw Convention") concluded on October 12, 1929 in Warsaw; and the Warsaw Convention, as amended by the Hague Protocol, now has the same effect as that of domestic laws of Korea. Therefore, regarding the laws of international carriage by air, the Warsaw Convention amended in the Hague in 1955 (Amended Warsaw Convention) shall have precedence in its application as *lex specialis* in the general body of civil law.

2.7.5 Harmonious Interpretation of Domestic and International Law

Constitutional Court [2004 Heon-ba 47] Decision issued April 24, 2008. Opinion of Judge Song, Doo-hwan Regarding Unconstitutionality

Further, Article 6(1) of the Constitution states, "Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea[,]" which makes clear the accommodation and respect for international law. Currently, our country is a party to most international human rights covenants, having been ratified by the National Assembly, and is a member of the International Labour Organization (ILO). Therefore, the interpretation of individual articles of the Constitution must be done in harmony with international norms set out by the UN, e.g., Universal Declaration of Human Rights, International Human Rights Covenants, ILO Agreement and recommendations, and etc. If domestic laws do not comply with these norms, though they may not immediately be declared unconstitutional, the above norms must be utilized as important standards in determining the constitutionality of such laws.

2.7.6 Whether Agreed Minutes Is a Treaty

Constitutional Court [99 Heon-ma 139, 142, 156, 160 Consolidated] Decision issued Mar. 21, 2001.

[Facts: The 1998 Fisheries Agreement between Korea and Japan was obtained through the consent of the National Assembly and was subsequently ratified,

but the government did not forward the annexed Agreed Minutes to the National Assembly for ratification. The following case is the decision of the Constitutional Court regarding the issue of whether the Agreed Minutes are subject to ratification of the National Assembly as a treaty.]

There seems to be no definite principle determining the legal effect of Agreed Minutes under international law. In order for Agreed Minutes to be considered a "treaty," its satisfaction of the legal characteristics of a treaty would provide important evidence. Treaties are not limited to those actually termed "treaties" but rather are "international agreement[s] concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Vienna Convention on the Law of Treaties art. 2(1)(a))."

The preamble of the Agreed Minutes states, "The government officials of the Republic of Korea and Japan have agreed to record the following regarding the relevant articles of the Fisheries Agreement between the Republic of Korea and Japan signed today." According to this, two legal actors, the Republic of Korea and the state of Japan, reached an "agreement" regarding certain matters. Whether such agreement amounts to an "international legal relationship" will be the dispositive factor determining whether the Agreed Minutes can be categorized as a "treaty."

Turning to the actual contents of the Agreed Minutes, paragraph 1 states that the governments of both countries shall closely cooperate to maintain good fisheries order in the East China Sea; paragraph 2 states that our government has intentions to cooperate with the governments of Japan and third countries not to damage fisheries relations; paragraph 3 states that the government of Japan has intentions to cooperate with governments of third countries with fisheries relations to make possible certain fishing activities by nationals and fishing vessels of the Republic of Korea in certain areas of the East China Sea; and paragraph 4 states that both countries have intentions to negotiate to maintain good fisheries order in the East China Sea on the basis of fisheries agreements concluded or to be concluded through the Korea-Japan Joint Fisheries Committee or other committees. These provisions show a declaration of intentions to cooperate towards a fisheries order, and it would be difficult to say that there is a purpose of reaching an immediately binding legal relationship. Article 14 of the Agreement further states that Annexes I and II form an indivisible part of the agreement, indicating that the annexes are integral elements of the agreement itself. However, considering that it does not provide for the Agreed Minutes, it would be difficult to say that the Minutes also form an integral part of the Agreement at hand that forms a treaty. Therefore, the assertions of the Claimants are without merit.

2.7.7 Legal Nature of the Joint Statement of ROK-US Ministers of Foreign Affairs

Constitutional Court [2006 Heon-ra 4] Decision issued March 27, 2008.

[Issue: On January 19, 2006, Korea and the United States issued a joint statement on the Launch of the Strategic Consultation for Allied Partnership which contained the following:

> The ROK, as an ally, fully understands the rationale for the transformation of the U.S. global military strategy, and respects the necessity for strategic flexibility of the U.S. forces in the ROK. In the implementation of strategic flexibility, the U.S. respects the ROK position that it shall not be involved in a regional conflict in Northeast Asia against the will of the Korean people.

The Claimant in this case (member of the National Assembly) asserts that while the US armed forces stationed in Korea under the ROK-US Mutual Defense Treaty is necessary for the defense of the Korean Peninsula, consent to strategic flexibility in the Joint Statement violates the defense treaty and ultimately alters its effect, which would naturally violate Claimant's rights by not obtaining National Assembly ratification pursuant to Article 60(1) of the Constitution. The following is the judgment of the Constitutional Court regarding the legal nature of this joint statement.]

Treaties are "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." While the consent of the National Assembly to the conclusion and ratification of treaties pertaining to important matters is required by law (Constitution art. 60(1)), the National Assembly is granted this right regarding particular treaties provided by law in Article 60(1) of the Constitution.

As the Joint Statement at bar only contains statements of respect, by Korea and the United States toward each others' position and contains nothing establishing legal rights or obligations, it cannot be regarded as a treaty. Even without having to consider whether it falls under the category of Article 60(1) treaties, we cannot hold that the National Assembly has the right to ratify this Joint Statement or that the Claimant, a congressman, holds the right of deliberation.

As this case is grounded on the belief that the Joint Statement is a treaty subject to the consent of the National Assembly on its conclusion and ratification, upon which the Claimant's right to deliberation is based, the case is improper for lack of subject matter.

2.7.8 Application of International Customary Law

Supreme Court [97 Da 39216] Judgment issued December 17, 1998.

[Facts: In this case regarding the scope of sovereign immunity, the Court issued a holding based on a theory of limited sovereign immunity. As Korea is not a party to any treaties nor has enacted domestic legislation regarding sovereign immunity, this decision can be seen as having been issued on the basis of international customary law.]

According to the trial court, the Plaintiff was hired by the United States Army and Air Force Exchange Service, a non-appropriated fund organization affiliated with the United States of America and was stationed at Camp Casey, 2nd Infantry Division until unreasonably dismissed on November 8, 1992. With the United States as Defendant, he sought to nullify the dismissal and to be compensated for the lost wages from the day of dismissal to his reinstatement. A state, under international law and custom, does not submit to the jurisdiction of another state. Unless an exception has been made through treaties or diplomatic privileges have been renounced, our courts cannot exercise jurisdiction over a foreign state as defendant. Because there is no evidence that the United States neither submitted to the jurisdiction of our courts through any treaty provisions nor renounced its diplomatic privileges, this case is illegitimate for lack of jurisdiction.

According to international customary law, while a sovereign act of a state is not subject to the jurisdiction of another state in principle, one cannot say that it is customary that even the judicial acts of a state are immune to the jurisdiction of another state. It thus follows that unless there are special circumstances, *e.g.*, a foreign judicial act done within the territory of the Republic of Korea could fall within our jurisdiction or is sufficiently related that the exercise of jurisdiction can unjustifiably interfere with the sovereign activities of the other state, our courts cannot exercise jurisdiction over judicial acts with this state as defendant. The decision of the Supreme Court that previously differed in this regard [74 Ma 281, Decision of May 23, 1975] shall be amended accordingly.

Thus the trial court ought to have determined whether our courts could exercise jurisdiction over the employment contract and dismissal based on the consideration of the overall circumstances, *e.g.*, duties and activities of by the United States Army and Air Force Exchange Service, the plaintiff's position and his assigned tasks, and sovereign activities of the United States and their relation to the Plaintiff's tasks, after which it should have considered the legal nature of the employment contract and dismissal at hand, as well as their relation to the sovereign activities. However, the trial court decision,

in holding that this case was illegitimate for lack of jurisdiction without having fully considered the nature of this employment contract and dismissal, shows a misunderstanding of the principles of law regarding the exercise of jurisdiction over foreign states and thus violated the law by not fully trying the case. There are reasons for pointing this out in particular among other issues of appeal.

3 The Legacy and Impact of Japanese Colonialism

3.1 *Introduction*

Following Commodore Matthew Perry's entry into Japanese ports and the subsequent signing of the Treaty of Kanagawa, Japan actively pursued Westernization and quickly engaged in treaty making, concluding one of friendly relations with Korea in 1876, also known as the Treaty of Ganghwa. In this newly introduced treaty regime, Japan became a signatory of the Geneva Conventions in 1886, followed by the signing of the Declaration of Paris the following year. This was the beginning of its entry into the "Family of Nations," as it was the one and only Asian country to do so at that period of time. The ultimate breakthrough occurred in 1894 with the signing of the Anglo-Japanese Treaty of Commerce and Navigation, only 16 days prior to Japan's declaration of war on China, which recognized the equal freedoms of residence, travel, property, trade, and navigation. Throughout the war with China, Japan appealed to the West through letters and writings of Japanese scholars, testifying to its "scrupulous observance of international law." In regards to Japan's civilized and law-abiding character, Sakayue Takahashi wrote that "the Japanese nation laid stress upon the law of war, even before they were confronted … [and] refrained from revenge." In a letter addressed to the *Japan Mail*, he also wrote:

> I have seen to-day in a copy of the *Japan Mail* that reached me, that Mr[.] Creelman, the war-correspondent of the *New York World*, wrote to that paper to the following effect: "Torpedo-boats were going through the waves, sinking junks loaded with men, women and children endeavouring to escape." … While regretting for the sake of Mr[.] Creelman, whose honour as a gentleman may be impaired by such absurd fabrications, I fear that the public might be led astray by what he has written, and therefore I feel constrained to refute the false statements made by him.

The Sino-Japanese War came to an end on April 17, 1895 with the conclusion of the Shimonoseki Treaty providing for, among others, the complete

independence of Korea and the cession of certain territories. The same year, Japan established a pro-Japanese cabinet in Korea, which was soon ousted by Queen Min. Japan immediately responded by brutally murdering the Queen, thereby angering not only the Korean people but also Russia, who went on to deploy units to assist Korea. Under a strong Russian influence, a new Korean Empire was established.

Having lost control of the Korean Peninsula, Japan began to ally itself more with the West, signing its first mutual defense treaty with England on January 30, 1902 and another on August 12, 1905. The latter recognized Japan's "guidance, management and protection" over Korea. Beginning in 1904, Japan forced Korea to sign a series of agreements including the 1905 Protectorate Treaty to consolidate its control. This culminated with Korea's signing of the Treaty of Annexation on August 29, 1910 which made Korea a part of Japan.

Around the same time in 1904, Japan moved against Russian forces by crossing the Yalu River, Korea's northern border, as well as the Russian fleet moored at Port Arthur. An important international legal issue in this case was whether a formal declaration of war had taken place – more specifically, if two diplomatic notes that were exchanged could be regarded as such a declaration. It is regarded that the Russo-Japanese War was significant in that "it was the first war in which both belligerents pledged to adhere to the international laws of war" signed at the 1899 Hague Convention. The following year in August 1905, the United States mediated the Portsmouth Agreement between the two, in which Russia conceded Japanese dominion over the Korean peninsula. Further, as all states involved equally claimed civilized statehood – with the exception of Korea and China, Japan was able to annex Korea with the diplomatic support of the United States and Britain and the indifference of other states. Also notable was Japan's interaction with the international community in proving itself impeccable in its adherence to international law. As one scholar notes:

> Many aspects of Japan's prosecution of the war were, so to speak, done by the book, and facilitated by the attachment of international legal advisors to each army in the field: Japanese treatment of prisoners of war was impeccable, and Japan received much praise for its creation of a bureau to manage prisoners – in the exact manner prescribed by the 1899 Hague Conference. Also praised by the international press was Japanese treatment of the sick, the wounded, and the dead, as well as Japanese Red Cross facilities, operations, and first aid. Japan's conduct of the siege and capitulation of Port Arthur was noteworthy for the care with which Japan protected Russian life and property there. The manner of the Japanese prosecution of the war was said to be a model of gentlemanly

> behavior – and this praise for Japan was of a piece with the otherwise distracting incidents examined in this article. With the Russo-Japanese War, Japan demonstrated a command of international law and a commitment to its principles. This mastery not only certified Japan's status as an equal among the civilized states but also invited Japan to participate in world affairs in the same manner as its fellows-by resorting to state will in situations defined by legal ambiguity or military necessity.

As mentioned above, by 1905, Japan had tacit recognition of Britain and the United States regarding its control over Korea despite the fact that both had signed treaties with Korea affirming its independence. Korea's fate was already evident, as stated by T.J. Lawrence: "I have no doubt that in the long run Korea will be annexed by one or the other of her powerful neighbors. It is the fate of small, weak, and corrupt states to fade out of the political map." Soon enough, Japan confirmed this in a treaty with Korea, which gave Japan control over "foreign relations and affairs of Korea." Such action went largely unchallenged, and vigorous protests of American missionaries and educators in Korea went unheeded by the United States and subsequently silenced by Japanese authorities. Finally, Korea was completely annexed on August 22, 1910 pursuant to the Japan-Korean Annexation Treaty.

3.2 *Annexation by Japan*

3.2.1 The Legality of the 1910 Annexation of Korea by Japan

From 1910 to 1945, Korea was annexed by Japan and thus fell under Japanese rule. The issue of how to comprehend and evaluate this historical fact forms the starting point and foundation of the bilateral relations of these two states. This is because the answers to the questions of whether Korea was a victim of Japanese rule, and, if it was a victim, depend upon an understanding and evaluation of the nature of that victimization and how Japan should take responsibility for its actions.

As this issue lies at the root of Korea-Japan relations, it was inevitably raised during the negotiations for the normalization of diplomatic relations between the two countries in the early 1960s. As the so-called "Kubota remark" demonstrated, the Japanese government once seemed to take the position that Japanese rule of Korea was not only legal under the international law of the time but also morally and politically justifiable. Currently, Japan admits that its rule over Korea was a morally unjustifiable act. However, from the days of the Korea-Japan normalization talks to the present, Japan's position that the annexation was legal under the international law of the time remains unchanged. In contrast, the Korean government has consistently maintained its position that

Japanese domination was not only a morally unjustifiable one but also illegal and devoid of any ground in international law. The two sides failed to bridge the differences in their positions during the diplomatic normalization process. It is well-known that Article 2 of the Treaty on Basic Relations between the Republic of Korea and Japan (1965) adopted an intentionally vague expression to evade a resolution of these differences, stating that the agreements signed by Korea and Japan on August 22, 1910 and prior to that "were already null and void."

3.2.2 Treaties under Examination

The issue of the legality of Japan's annexation of Korea can be traced to the validity of the 1910 Annexation Treaty. However, discussions about the legality of Japan's colonial domination of Korea are not confined merely to the 1910 Annexation Treaty alone but also include discussions about a number of other agreements that led up to Japan's formal annexation of Korea. This is because the 1910 Annexation Treaty is viewed as the result of a series of political steps developed with annexation in mind and the validity of the agreements that were concluded in this process is problematic. There are five agreements that are often questioned in discussions about the legality of the annexation. The following table summarizes the important contents of these five agreements and the reasons argued for their invalidity:

TABLE 1 Basis for invalidity

Date/Description	**Reasons for Invalidity**	**Procedural Defects**
February 23, 1904 Japan's interests in emergency situations were to be maintained and permission was given to the expropriation of property necessary for military use. (Article 4)	Conclusion of the treaty was forced by the stationing of five Japanese battalions on the Korean peninsula creating a state of military occupation.	The treaty was concluded unilaterally by Japan without negotiations with any Korean representatives. The original text of the treaty was drafted after the signing date.
August 22, 1904 Korea was required to utilize a Japanese financial advisor and a diplomatic advisor of foreign nationality was recommended by the Japanese government		An official Korean version of the agreement does not exist. The treaty was concluded unilaterally by Japan without negotiations with any Korean representatives.

TABLE 1 Basis for invalidity (*cont.*)

Date/Description	Reasons for Invalidity	Procedural Defects
who had the obligation to consult with the government.		Texts of the treaty were added and promulgated after the date of signing pursuant to the directives of the Japanese government. A draft was signed as a memorandum and later added to the agreement. The memorandum lacked the proper delegation of authority.
November 17, 1905 Japanese Ministry of Foreign Affairs was authorized to supervise and direct Korea's external relations. (Article 1)	The agreement was signed when Japanese troops surrounded the residence of the Korean Emperor. Japanese officials also entered the meeting room and intimidated Korean officials while heavily armed Japanese troops were present in major locations throughout Seoul.	The treaty lacks a name. Matters of great importance such as the power to handle foreign relations were transferred in a manner and form that lacked the regular formality of a treaty. The document that evidenced the delegation of signing authority to the representative of the government does not exist. The instrument of ratification does not exist. The Korean Foreign Minister was forced to sign and seal. The treaty was not ratified.
July 24, 1907 Korea was required to adhere to the directives of the Japanese Resident-General. (Article 1)	A mixed brigade was dispatched to assist Japanese troops stationed in Korea.	Full powers granted by the Korean Emperor and the instrument of ratification do not exist. The Korean Emperor's signature and seal are lacking.

TABLE 1 Basis for invalidity (*cont.*)

Date/Description	Reasons for Invalidity	Procedural Defects
The Japanese Resident-General had the power to approve Korean legislation and important administrative matters. (Article 2) Korea could not employ foreign advisors without the consent of the Japanese Resident-General. (Article 6)		
August 22, 1910 There is a concession to Japan of all rights of sovereignty over the entirety of Korea permanently and completely. (Article 1)		A royal edict proclaiming the annexation possessing the royal seal was not signed by Emperor Sunjong. The treaty was signed by the Japanese Resident-General acting as a representative of the Japanese government even though this post was created by the 1905 Treaty and put under the auspices of the Korean Emperor.

3.3 *Colonial Claims against Japan*

3.3.1 The 1965 Korea-Japan Claims Settlement Agreement and Individuals' Claims Rights

In 1965, Korea and Japan concluded "the Agreement on the Settlement of Problems Concerning Property and Claims and Concerning Economic Cooperation between the Republic of Korea and Japan" (1965 Claims Agreement) and settled the so-called "claims rights" problem between the two States. Namely, the Agreement provides in Article 2, paragraph 1, "The High Contracting Parties

confirm that the problems concerning the property, rights, and interests of the two signatories and their nationals (including juridical persons) and the claims rights between the High Contracting Parties and between their nationals … have been settled completely and finally." The plain meaning of the clause appears to mean that Korean nationals, as individuals, ceased to have any right to bring lawsuit against either Japanese people (including Japanese juridical persons) or the Japanese government. However, regardless of this clause, many Korean nationals have raised various kinds of "claims" in Japanese courts both against Japanese government and against Japanese companies. And recently, these "claims" even came to be raised in a Korean court and United States courts.

How can Korean nationals bring suits against the Japanese government and people? Were the individual rights to property, rights, interests and the claims rights of each state's nationals not waived by Article 2, paragraph 1 of the 1965 Claims Agreement, and therefore is it not impossible for Korean nationals to bring suits against the Japanese Government and companies? Or is it only the right of diplomatic protection by the state that was waived by the clause, and therefore is it still possible for the Korean nationals to bring such suits? It may be said that this question has been one of the main legal issues in the several cases before Japanese courts. However, they do not seem to have answered it clearly. Moreover, it would clearly be one of the most important legal points in the cases before the Korean court and United States courts.

3.3.2 International Law Concerning the Interpretation of Treaties

The question outlined above is a typical problem of treaty interpretation. Needless to say, the interpretation of treaties is regulated by international law. The current positive international law concerning this issue is "the Vienna Convention on the Law of Treaties" (hereinafter Vienna Convention on Treaties), concluded in 1969. Both Korea and Japan are signatories to this Convention, so it may appear to be applicable in interpreting the 1965 Claims Agreement. However, while the 1965 Claims Agreement was concluded and entered into force in 1965, the Vienna Convention on Treaties was concluded in 1969 and entered into force in 1980. Therefore, a problem of intertemporal law exists in applying the Vienna Convention to the 1965 Claims Agreement.

On this point, Article 4 of the Vienna Convention on Treaties states, "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States." This Article sets forth the principle of non-retroactivity for the

Convention. Therefore, in interpreting the 1965 Claims Agreement, it is necessary to ascertain the international laws pertaining to treaty interpretation that existed at the time when the Korean-Japan Agreement was concluded.

Before the Vienna Convention on Treaties was concluded in 1969, no rules of international law regulating interpretation of treaties existed in the form of a "treaty." Therefore, to the extent that such rules of international law were in effect, they would have existed as norms of customary international law. It is unclear whether in 1965, such norms of customary international law existed as to the issue of treaty interpretation, and even among scholars, the opinions were divided as between those who acknowledge that customary norms of treaty interpretation existed at the time and those who do not.

In this context, the various approaches to treaty interpretation argued at that time can be summarized as follows: (1) the subjective (or intent of the parties) approach, which regards ascertainment of the intentions of the parties to the treaty as the aim and goal of treaty interpretation, (2) the objective (or textual) approach, which seeks to ascertain the meaning of the text of a treaty, and (3) the teleological (or object and purpose) approach, which argues that those who interpret a treaty must first ascertain the object and purpose of the treaty and then interpret it to give effect to that object and purpose.

In attempting to ascertain the norms of customary international law which were in effect around the year 1965 – and if such norms were not in existence, to ascertain the appropriate principles of treaty interpretation from the point of view of jurisprudence – most representative works of international law scholars published around the year 1965 may be consulted. In Hans Kelsen's work, published in 1966, the primary purpose of the interpretation of treaties is deemed to be the determination of the intent of the parties. To effectuate this purpose, it is said that the historical circumstances behind the conclusion of a treaty – including the political or economic circumstances at the time – are to be considered. This methodology also incorporates interpretation according to its wording – the so-called logico-grammatical interpretation – as a method of interpreting treaties. At the same time, endorsing this method, Kelsen adds, "The wording of a legal instrument may not be in conformity with the ascertainable intentions of its authors. The wording may go beyond, or remain behind, their intentions." This point seems to be particularly relevant in interpreting the 1965 Claims Agreement.

Next, in his textbook of international law published in 1959, A. Verdross, on the basis of his review on prior case precedents and the works of international law scholars, presents 11 principles of treaty interpretation. Key portions of these principles are as follows: (1) The leading principle says that the true intention of the parties must be pursued because all international treaties are

negotia bonae fidei. (2) However, the intention of the parties must be found first of all from the treaty itself. Therefore, if a clear and plain meaning comes out from the context of a treaty, then it is only when the meaning leads to an absurd result, or when the fact that the parties wanted some other meaning is proved, that interpretation may deviate from the wording. (3) Ambiguous treaty norms are to be interpreted in the light of general international law, as well as the principles which regulate the material matters to which the treaty belongs. When dubious, the formulation history of the treaties (*travaux préparatoires*) can also be invoked. Because the treaties of contracting character are applied only to the specific relations which are within the sights of the treaties, an application of a treaty norm, by analogy, to similar cases is in principle allowable only to the treaties which include the *general* norms.

If one is to assume that the intentions of the parties to a treaty are reflected in the text of the treaty, then the subjective and objective approaches are in essence different expressions of the same methodology. The representative works of international law scholars can be said to have endorsed the position that the subjective and objective approaches must be utilized in the way of supplementing each other. And, if a teleological approach is added to them, the principles of treaty interpretation as described above may be said to be fully applicable in interpreting the 1965 Claims Agreement. In other words, Article 2, paragraph 1 of the 1965 Claims Agreement should be interpreted according to its purposes, by way of ascertaining the intent of the parties through making the meaning of the text clear. In the interpretation, the historical circumstances of the time when the 1965 Claims Agreement was concluded must be considered. And, if the text of the treaty is ambiguous, the preparatory materials of the treaty (*travaux préparatoires*) must also be used to aid the task of interpretation.

3.3.3 The Purpose of the 1965 Claims Agreement and Related Circumstances

The fundamental purpose of the Agreement was to normalize relations between the states and in doing so, to resolve the complicated issues of property rights between them. In order to accurately understand the purpose of the 1965 Claims Agreement, as well as the meaning of the Agreement's text and the intentions of the parties, it is necessary to review the circumstances that led up to the conclusion of the Agreement.

One of the main problems that needed to be resolved in normalizing relations between Korea and Japan was the issue of property rights and claims, namely the issue of Japanese property existing in Korea and property claims that might be thought to be held by the Japanese government or Japanese nationals

against the Korean government or Korean nationals, and conversely, the issue of Korean property existing in Japan and property claims that might be thought to be held by the Korean government or Korean nationals against the Japanese government or Japanese nationals. These issues existed because, in the process of ruling Korea as a colony, Japan often brought Japanese property into Korea or took Korean property to Japan. The nationals of each country also crossed into the other country to conduct economic activities there.

As to Japanese property existing in Korea, this property came to be vested in the Military Government in Korea through Ordinance No. 33, issued on December 6, 1945 by the Headquarters of the United States Army Forces in Korea. On September 11, 1948, it was then transferred to the Government of Korea pursuant to the "Initial Financial and Property Settlement between the Government of the Republic of Korea and the Government of the United States of America." At the time, Japan objected to such measures, claiming that they violated international law and were unlawful. However, the US took the position that Japan's property rights were extinguished by Article 4, paragraph 2 of the 1951 Peace Treaty and that Japan could not make valid claims as to those rights. The US notified both Korea and Japan of this position. Ultimately, Japan accepted the position of the US on December 31, 1957, and consequently, the only issue that remained between Korea and Japan was the problem of Korean property existing in Japan and property claims that might be thought to be held by the Korean government or Korean nationals against the Japanese government or Japanese nationals.

During the negotiations regarding the normalization of relations, Japan took the position that it would recognize only the "claims" having an irrefutable legal foundation and proof of facts. However, in light of the fact that during the war there had been heavy bombing and destruction in Japan, and that the Korean War erupted in 1950 and had lasted to 1953, substantiating the proof of facts or legal foundations for these claims was obviously difficult. As a result of these difficulties, the two states decided to resolve the problem through a "political agreement." It was under this circumstance that Article 2, paragraph 1 of the 1965 Claims Agreement was concluded.

It has been asserted that the 1965 Claims Agreement was concluded pursuant to the 1951 Peace Treaty between Japan and the Allied Powers, and specifically pursuant to Article 2 and Article 4 of this Treaty. However, it is axiomatic that a treaty is not binding on those states that are not parties to it. As Korea was not a party to the 1951 Treaty, it was not bound by any provision of that Treaty when it concluded the 1965 Claims Agreement. It makes clear, while the 1951 Treaty may have played a political role in sparking the Korea-Japan talks, it did not create the legal framework for the 1965 Claims

Agreement. It is crucial that a clear, legal distinction be made between peace treaties (like the 1951 Treaty) that seek to resolve postwar problems between belligerents, and agreements (like the 1965 Claims Agreement) that relate to the establishment of diplomatic relations between states together with the resolution of property disputes.

3.3.4 Intentions of the Governments

3.3.4.1 *Japanese Government*

When one examines accessible public records, it is easy to see that the Japanese government has clearly represented that Article 2, paragraph 1 of the 1965 Claims Agreement does not extinguish individual rights but only the state's right of diplomatic protection, leaving no room for question on this point. For example, when Mr. Ishibashi, a member of the House of Representatives of the Japanese Diet, inquired on November 5, 1965 at the "Special Committee on the Treaty between Japan and Korea" whether the treaty extinguished not only the right of diplomatic protection but also individual claims rights, Mr. Shiina, Minister of Foreign Affairs, responded, "In my view, the expression that the individual claims rights are extinguished is not proper … It is not that the government first took the individual claims rights to its hand, and then relinquished them. It is only that the government waived its right of diplomatic protection as to claims against Korea, meaning that as a result, even if Japanese people were to make claims individually [against the Korean Government or Korean people], Korea would not acknowledge such claims … If I have ever used the expression of 'waiver of them [individual claims rights],' I would like to take this opportunity to correct it." This statement by Foreign Minister Shiina was made in the consideration and ratification process of the 1965 Claims Agreement and as such, has a decisive importance on the interpretation of Article 2, paragraph 1 of the Agreement.

This position on the part of the Japanese government has been consistent, and was repeated on several occasions in response to the inquiries in the Diet. The most widely known example of this position came out from the Committee on Budget of the House of Councilors held on August 27, 1991. At the Committee, then government delegate Mr. Yanai stated, "By the so-called Japan-Korea Claims Agreement, the claims rights problem between the two states are settled finally and completely. The meaning of this is that all are settled including the claims rights of the nationals of both nations as existed before. However, this means waiving of the rights of diplomatic protection which both Japan and Korea possessed as States. Accordingly, this does not mean the extinguishments of so-called individual claims rights in the sense of domestic law. It only means that the Korean and Japanese governments,

as Governments, cannot raise problems regarding these claims by exercising their respective rights of diplomatic protection." This statement shows the Japanese Government's interpretation of the clause clearly.

Several records of Japanese Diet also support both Mr. Shiina's and Mr. Yanai's statements. On April 6, 1993, at the Committee on Foreign Affairs of the House of Councilors, Mr. Tanba, the Director-General of Treaties at Ministry of Foreign Affairs at the time, stated, "[Our] government has long been representing that the claims rights individuals may have are not waived directly by the effect of the Treaty." He also stated on May 26, 1993 at the Committee on Budget of the House of Representatives, "What is said in Article 2, paragraph 1 of the Treaty is only a relinquishment of the right of diplomatic protection, with regard to all the 'property, rights and interests' and 'claims rights.' In this point, things are just as you [Mr. Utsnomiya, a member of the House of Representatives] said."

On March 25, 1994, at the Committee on Cabinet of the House of Representatives, Mr. Takeuchi, Foreign Minister's Secretary, stated that "with regard to property claims issues between Japanese and Korean citizens, the right of diplomatic protection, which both states have as State, was waived … As we have stated before, the terms of the treaty itself does not extinguish individual property rights or their claims rights directly within the meaning of domestic law."

And as recently as March 14, 2000, Mr. Fukushima, a member of the House of Councilors, inquired, "What about Foreign Affairs Ministry's then Director General of Treaties Yanai's statement of August 27, 1991 that only the right of diplomatic protection was waived and that individual claims rights were not extinguished?" Mr. Hosokawa, Director-General of Civil Affairs of the Ministry of Justice, responded, "We are well aware of Mr. Yanai's answer, and we also agree with his statement."

In addition, in relation to the interpretation of Article 14(a)(2)(I) and Article 19(a) of the 1951 Peace Treaty, the Japanese government has consistently taken the position that the waiver of "rights to claims" encompassed only the state's right of diplomatic protection and did not extend to individual rights. Japan has also taken this position in relation to the interpretation of Article 6 of the "Joint Declaration of Japan and Union of Soviet Socialist Republics." On March 25, 1994, at the Committee on Cabinet of the House of Representatives, Mr. Nishida, Director of the Russia Division of the Europe-Asia Bureau, stated as follows: "In Article 6 of the Japan-USSR Joint Declaration which is currently in effect between Japan and Russia, the governments waived their rights to claims. As only the governments' own rights to claims and the so-called right of diplomatic protection are waived, claims of our citizens against Russia or against its citizens were not waived by the clause." Also, on March 4, 1997, at the First Sub-Committee of the Committee on Budget of the House of

Representatives, Foreign Minister's Secretary Togo stated, "Though all rights to claims were waived in Article 6, paragraph 2 of the Japan-USSR Joint Declaration, it does not mean that the Declaration prevents individuals from raising claims."

3.3.4.2 *Korean Government*

Immediately after the conclusion of the 1965 Claims Agreement, in regard of Article 2, paragraph 1 of the Agreement, the Korean government appears to have adopted a different interpretation from that of the Japanese government. The Korean government issued a publication on August 15, 1965, in which the government explains that all rights to property and claims rights on the part of both states and their nationals were extinguished by the 1965 Claims Agreement. However, if it is true that Korea intended to waive all property rights and claims rights through the Agreement, then there exists an unequivocal difference of intent between the two contracting parties.

The significance of this difference of intent is as follows: A treaty signifies, by definition, a manifest *agreement* of intentions of the contracting parties. If such an agreement of intentions did not occur in the conclusion of the 1965 Claims Agreement, Article 2, paragraph 1, then this would mean that the provision of the Agreement could not have become a treaty and is therefore null and void for that reason. If this is what really happened, Article 2, Paragraph 1 of the 1965 Claims Agreement could not have regulated the property issues as a valid treaty provision, and again the result would be that an invalid provision has been misconstrued as a valid one by both governments. However, this conclusion does not seem to be a logically reasonable one, especially since this provision has had a certain concrete regulatory force in the past. If good faith is to be maintained in interpreting a treaty provision, it must be interpreted in the way of making it meaningful and valid rather than making it meaningless and invalid.

One important fact to be taken note of is that the Korean government's position in relation to Article 2, paragraph 1 has not been consistent. As can be seen above, in its publication issued directly after the conclusion of the 1965 Claims Agreement, the Korean government took the position that all property, rights, and interests, and the claims rights of Korean nationals had been extinguished. However, the Korean government changed its attitude and has adopted the position that the Agreement did not extend to claims by individuals, and this position has been expressed repeatedly. In July 10, 1991, Minister of Foreign Affairs Sang Ok Lee stated in a response to a question in the Korean National Assembly, "At the governmental level, this issue [problems of the property, rights, and interest and claims rights] has been resolved by the Treaty Regarding

Claims and Economic Cooperation, concluded in 1965 during the normalization of relations between Korea and Japan." On September 20, 1995, Minister of Foreign Affairs No Myoung Kong stated in the Reunification and Foreign Affairs Committee of the Korean National Assembly, "From a governmental standpoint, I believe that our government has resolved the issue of monetary compensation from Japan." At the same meeting, he also stated, "The government acknowledges the claims rights of individuals." These statements clearly show that the Korean government is not of the opinion that individual rights were extinguished by the Agreement.

As recently as October 24, 2000, the Korean Ministry of Foreign Affairs and Trade responded to an inquiry by a member of National Assembly, Mr. Won Woong Kim, who inquired, "Is it the Korean government's position, as Japan asserts, that all claims for compensation have been extinguished by the 1965 Claims Agreement? If this is the government's position, what is the basis for this opinion? Are these claims extinguished only as to governmental claims, or as to individual claims as well? I request that the Korean government present its official position on this matter." Mr. Chung Bin Lee, Minister of Foreign Affairs and Trade, responded, "The Korean and Japanese governments, in order to resolve issues regarding claims such as forced laborers and forced military draftees, concluded 'The Agreement on the Settlement of Problems Concerning Property and Claims and Concerning Economic Cooperation between the Republic of Korea and Japan' in 1965. The claims problem was thereby settled as between the two governments … However, the Korean government's position is that the Agreement does not affect individuals' claims rights or their rights to bring lawsuits or other legal actions."

How can these contradictory pronouncements by the Korean government be analyzed and understood? The first possibility is to conclude that the government's position, as described in "The Explanation of the Treaty and Agreements between the Republic of Korea and Japan," did not express the true intentions of the Korean government. Alternatively, one could conclude that the intentions expressed after 1965, namely that the 1965 Claims Agreement did not extinguish individuals' claims rights, did not reflect the true intentions of the Korean government. The final possibility is to conclude that the intentions of the Korean government changed over time.

Among these three possible conclusions, the second seems to be the most unreasonable interpretation as Korean government's intentions expressed after 1965 have been repeated several times and also are recent ones. Therefore, the remaining possibilities of understanding these *prima facie* contradictory attitudes of the Korean government are either to regard the Korean government as having the opinion that individual claims were not extinguished

though there were discrepancy between its real intention and its expression, or to regard it as having changed its own opinion over time.

If the Korean government is seen to have changed its opinion, then the problems of the conclusion and validity of the treaty arise again. Taking this point into account, and considering the fact that Japan's position has remained remarkably consistent, the most reasonable interpretation that upholds the validity of the treaty seems to conclude that the parties agreed not to extinguish the rights of individuals.

3.3.5 Interpretation of the 1965 Claims Agreement

3.3.5.1 *Text of the Agreement and Its Interpretation*

Article 2, paragraph 1 of the 1965 Claims Agreement states, "[t]he problems concerning the property, rights and interests of the two signatories and their nationals (including juridical persons) and the claims rights between the High Contracting Parties and between their nationals … have been settled completely and finally." As is shown above, the Japanese government has consistently taken the position that this provision of the Agreement did not extinguish the claims rights of individuals; it only waived the rights of diplomatic protection as to those claims. The Korean government's position has been less consistent, but recent pronouncements, repeated over time, have expressed the position that individuals' claims rights were not extinguished. Japan's consistent position, repeated several times through communications to the Japanese Diet, has become a matter of public record. The Japanese government's interpretation also has the character of the "authoritative interpretation" of the text.

When all of these points are taken into consideration together, it is clear that the wording of the 1965 Claims Agreement cannot be interpreted simply as a complete waiver of all claims of the governments and their nationals. Here exists really a situation as pointed out by Kelsen, "The wording of a legal instrument may not be in conformity with the ascertainable intentions of its authors. The wording may go beyond, or remain behind their intentions." This is the reason why the 1965 Claims Agreement should be interpreted as having waived only the right of diplomatic protection.

3.3.5.2 *Meaning of "Property, Rights, Interests" and of "Claims Rights"*

If Article 2, paragraph 1 of the 1965 Claims Agreement only waived the right of diplomatic protection, then the next question is, "What kinds of rights were waived as a matter of diplomatic protection?" This is the problem of interpreting the words, "property, rights, and interests" and "claims rights."

Generally speaking, "property, rights, interests" seem to be the rights that can be realized under national law, and that "claims rights" seem to be the

rights that are recognizable under international law. However, when we review the way that these terms were used during the negotiations that led up to the 1965 Claims Agreement, it is apparent that the terms should not be understood in their "general ordinary meaning." As a matter of fact, the parties to the treaty, Korea and Japan, attributed specific meanings to those words.

It was accurately pointed out that "during the negotiations for the conclusion of the Agreement, the Korean government had used the term 'claims rights' as substantial rights that could be claimed against Japan on a clear legal foundation." The so-called "Eight Items," or the Outline of Claims which were argued by the Korean government during the treaty negotiations, were a kind of consolidated contents of those "claims rights." However, in the process of the codification of the Agreement, Japan also took the position that "claims rights" must mean only the legal status of being able to make claims, not the substantial rights. Article 2 was drafted in such a way as accepting this argument of Japan. And accordingly, the provision of section 2(a) was included in the Agreed Minutes annexed to the 1965 Claims Agreement, which states: "It is understood that the words 'Property, rights, and interests' mean all kinds of substantial rights of which the property values are recognized on the basis of law."

It is natural that the Japanese government understands the meaning of the terms, "property, interests, rights" and "claims rights" in this manner. The Director-General of the Treaties Bureau, Mr. Tanba, stated in a response to the Japanese Diet, "'Property, rights, and interests' mean all kinds of substantial rights which are recognized under law to be of property value. The term 'claims rights' referenced in the Claims Agreement, is not included in the concept of 'property, rights, and interests,' and refers to the legal status of being able to make claims for which the existence of legal rights itself is in question." The concrete examples of "property, rights, and interests" offered in the Japanese Diet included "creditor's rights, rights to collateral, and the right to demand payment of receivables," and the examples of "claims rights" included "claims for compensation for damages for which evidence is lacking, pain and suffering claims, wage claims, etc."

Therefore, the most significant difference between the terms "property, rights, and interests" and "claims rights" is that, while the former mean established rights with clear and solid legal foundations, the latter are unsettled rights for which the legal foundations can be disputed.

3.3.5.3 *Government's Capacity to Waive Individual Rights*

One of the main legal issues concerning the interpretation of Article 2, paragraph 1 of the 1965 Claims Agreement is "Whether a State can extinguish its nationals' individual rights through a treaty or not."

It is generally said that a state may compromise or release claims, leaving the individual or corporation concerned without any remedy. However, some international law scholars have different views on this problem. For example, a scholar argues on the 1965 Claims Agreement that a government may not waive individuals' property and rights, and another scholar argued that this is the common view. Therefore, there seems to be no settled opinion on this issue among the scholars of international law.

What is decisive, however, regarding the interpretation of Article 2, paragraph 1 of the 1965 Claims Agreement is whether Japan has, in real fact, extinguished individual rights or not. It does not automatically follow that, in concluding a treaty, states always do, in fact, what they are able to do in theory.

It would have been possible for the Japanese government to obtain the consent of the Korean government to extinguish the rights of the Korean and Japanese people by the terms of the treaty rather than by separate domestic measures. However, Japan did not actually do so. Japan did not extinguish the rights of the Japanese and Korean nationals by the Agreement, but only diplomatic protection of those rights. Thus, the rights of the citizens of the respective countries could not be extinguished without internal measures extinguishing them.

Even though the Japanese government could have secured a waiver of individuals' rights through the terms of the 1965 Claims Agreement, Japan in fact did not and could not seek such a clause. This is likely a result of the democratic controls over the treaty ratification procedure. Article 73 of the Japanese Constitution requires that the treaties negotiated by the Cabinet be first approved by the Diet, thereby institutionalizing democratic control over the treaty ratification process. The Japanese government likely was fully aware of the fact that a treaty extinguishing the individual rights of Japanese citizens would not have been approved by the Diet, in which case there would be no ratification and the treaty would not have entered into force. As already discussed above, at the Special Committee on the Treaty between Japan and Korea, Mr. Ishibashi as a member of the House of Representatives strongly challenged the government by asking whether the Treaty extinguished the rights of the Japanese citizens, and in response, Foreign Minister Shiina stated that the Treaty "only waives rights to diplomatic protection but not individual rights."

3.3.6 Domestic Measures in Korea and Japan

If Article 2, paragraph 1 of the 1965 Claims Agreement is interpreted as set forth above, then it can be said that only the state's right of diplomatic protection, not individuals' rights, was waived. If the meaning of "property, rights and interests" and also of "claims rights" is understood in this manner, then

we must ask, "What is the legal significance of the domestic legislation passed in Korea and Japan following the conclusion of the 1965 Claims Agreement?"

3.3.6.1 *Japan's Legislation No. 144*

In the same year that the 1965 Claims Agreement was concluded, Japan enacted on December 17 the "Law Regarding Measures to be Taken with Respect to the Property Rights of the Republic of Korea upon Enforcement of Article 11 of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea" (Law No. 144). Through this legislation, Japan attempted to extinguish the "property, rights and interests" of Korean nationals.

The specific rights of Korean nationals purportedly extinguished by Law No. 144 included the creditor's rights, rights to collateral, possessory rights, and rights related to securities. It is unquestionable that these rights correspond to the "property, rights and interests" provided in Article 2, paragraph 1 of the 1965 Claims Agreement. However, it is also beyond any question that Law No. 144 does not include rights which correspond to the "claims rights" under the 1965 Claims Agreement. The reason for this is that Law No. 144 contains no provisions relating to "claims rights." Moreover, the "claims rights" provided in the 1965 Claims Agreement refer to those claims that are not yet settled and therefore, cannot be extinguished by law. Therefore, the "claims rights" of Korean nationals have not been extinguished, even by Japanese domestic law, namely Law No. 144.

This point is again affirmed by the position of the Japanese government as expressed through its response to the Diet. Specifically, Director-General of Treaties, Mr. Tanba has stated, "In referring to the waiver of claims rights, the waiver does not also extinguish individuals' rights to bring suit in the other state's courts … How those courts decide cases brought by individuals, in this case Philippines or Korean nationals, is up to the Judiciary, and the Administration is paying close attention."

In addition, Secretary to the Minister of Foreign Affairs, Mr. Takeuchi also stated with regard to Article 2, paragraph 1 of the 1965 Claims Agreement, "Regarding our domestic legal treatment of matters, an individual's own government – in this case, Korea – cannot exercise, according to the built-in mechanism of the treaty, its right of diplomatic protection. With regard to an individual's claims right … an individual's right to bring a suit in court is not deprived by the treaty."

It may be argued that Law No. 144 is "the implementing legislation" of the 1965 Claims Agreement. However, if the Agreement is interpreted to be only a

waiver of the right of diplomatic protection, then it is impossible to adopt this view. The Agreement waives the right of diplomatic protection and therefore it is secured that Korea, on the governmental level, cannot submit any objection to Japan's domestic measures. It was on this basis that Japan enacted domestic legislation and attempted to unilaterally extinguish the property, rights, and interests of Korean nationals. The domestic legislation was not meant to implement the 1965 Claims Agreement. Rather, having secured the guarantee that Korea could not make any objection, Japan enacted the legislation to unilaterally extinguish individual rights of Korean nationals. Also of decisive importance is the fact that Law No. 144 contains no provisions regarding "claims rights," and therefore did not extinguish individual rights as to those claims.

Additionally, it is highly likely that Japan's attempt to extinguish individual rights of Korean nationals through Law No. 144 violates the Japanese Constitution. Article 29, section 1 of Japan's Constitution protects "the right to property" and prohibits the violation of that right. The intended beneficiaries of this provision are not specified in the Constitution, but can be interpreted as including foreign nationals. Therefore, Law No. 144 may be said to be null as it violates Article 29 of the Japanese Constitution.

Moreover, Article 29, section 3 of the Japanese Constitution states, "Private property may be taken for public use upon just compensation therefor." The rights of Korean nationals were *prima facie* extinguished by Japanese domestic legislation, but "just compensation" was never provided. Because this also is in violation of the Constitution, it can be said that Korean nationals' rights were not extinguished either by treaty or by Japanese domestic law.

3.3.6.2 *Korea's Domestic Measures*

In 1966, Korea enacted the "Legislation Concerning the Distribution and Management of the Claims Treaty Fund." In January 1971, Korea enacted the "Legislation Concerning Report of Individual Claims Against Japan," and began processing property claims of Korean nationals against Japan and Japanese nationals. In December 1974, Korea enacted the "Legislation Concerning Compensation of Individual Claims Against Japan." Under this legislation, Korea distributed compensation funds pursuant to the reported claims by Korean nationals according to the 1971 law. All these laws were repealed in December 31, 1982 as their objectives were deemed to be fulfilled.

It has been argued that after having received Japan's lump sum payment of funds under the 1965 Claims Agreement, the duty to compensate Korean nationals was transferred from the Japanese government to the Korean government, and that the latter carried out this duty by enacting domestic legislation.

However, this view seriously miscomprehends the fundamental objectives of Korea's domestic measures. The funds that were paid to Korea by Japan have no legal relationship to the "property, rights, interests" or the "claims rights," the diplomatic protection for which was waived pursuant to Article 2, paragraph 1 of the Agreement. The explanation of the Japanese government is clear on this point: "As Korea says, the $500,000,000 fund provided to Korea under Article 1 does not have the character of a debt or liability for the claims of Korea against Japan. This fund was provided solely for the purpose of economic cooperation."

As it is pointed out, the decision of whether or not to distribute the funds received pursuant to the Agreement was entirely assigned to Korea as a matter of domestic jurisdiction. The 1965 Claims Agreement did not create any obligations of international law, under which Korea was obligated to distribute the funds to its own nationals. On this point, the Agreement is fundamentally different from, for example, the Peace Treaty signed by Italy and the Allied Powers after the World War II. Articles 74(E), 76(2), and 79(3) of that Treaty impose obligations on Italy to provide compensation to its own nationals in relation to their claims against the Allied Powers. In contrast, Korea had no obligations under the 1965 Claims Agreement to provide compensation, on behalf of Japan, to Korean nationals.

The Korean government was of the intention to use the funds "to construct multi-purposed dams, to import vessels and equipment for fishing, to expand railroads and ports and other infra-structures, without using them for the specific individual, groups of individuals or region." The fact that Korea had no intention of distributing these funds to its nationals as compensation for the waiver of claims was unequivocally communicated to and understood by Japan during the negotiations for the conclusion of the Agreement. In consideration of the fact that the Korean government had given up the right of diplomatic protection, and that on this basis Japan had enacted legislation unilaterally extinguishing the individual rights possessed by Korean nationals, Korea provided through domestic legislation a remedy in the context that the exercise of rights or submission of claims by individuals had become, from a "practical" standpoint, quite difficult.

Even putting aside the legal analysis, if we assume that all "property, rights, interests" and "claims rights" of Korean nationals were waived by treaty and that the received funds represented compensation for those rights, then each of the approximately 1,700,000 victims would have received $176 each in compensation for their suffering. Some commentators view this to be a ridiculous result of such an interpretation.

3.3.7 Remaining Issue – Interpretations of Japanese Courts

As both Article 2, paragraph 1 of the 1965 Claims Agreement and Article 14(a)2(1) and Article 19(a) of the 1951 Peace Treaty waived Japanese nationals' property rights, these clauses seem to have some similarity. And the Japanese government interprets these clauses to waive only diplomatic protection and not individual rights. However, concerning the interpretation of Article 14(a)(2)(1) and Article 19(a) of the 1951 Peace Treaty, Japanese courts have rejected the government's view for the most part. In other words, contrary to the Japanese government's position, the majority of Japanese courts interpret the clauses to directly extinguish Japanese nationals' individual rights.

However, almost all of the judgments of Japanese domestic courts are about the 1951 Peace Treaty. The 1951 Peace Treaty and the 1965 Claims Agreement have two very different goals and objectives. Hence, the propriety of applying the same analysis used in the interpretation of the 1951 Peace Treaty to the 1965 Claims Agreement is highly questionable. The 1965 Claims Agreement is wholly different in its legal character from the Peace Treaty which settles war reparations by waiver of rights of a state and its citizens. In addition, not all Japanese courts have adopted this position. In interpreting Article 14(a)(2)(1) of the 1951 Peace Treaty, the Japanese Supreme Court found on July 4, 1969, that the clause "cannot be interpreted as disposing abroad properties belonging to Japanese nationals to fill up the amount of war reparations, on the basis of the exercise of autonomous exercise of governmental power to dispose properties of Japanese nationals. This is to be referred as only a promise not to exercise the right to make an objection or the right of diplomatic protection, which might be exercised in order to avoid disparate treatment of the property abroad by the foreign governments."

The Japanese Supreme Court's decision is consistent with its government's position that despite the fact that the 1951 Peace Treaty specifies a waiver of Japanese "*nationals*," only the diplomatic protection was waived by the Treaty. In addition, the various lower court decisions concluding otherwise, as numerous as they may be, remain lower court decisions, while this Supreme Court decision in agreement with the Japanese government is that of the highest court in Japan.

3.3.8 Conclusion

Based on the above examination it may be concluded as follows. First, Article 2, paragraph 1 of the 1965 Claims Agreement did not extinguish the "property, rights and interests" and "claims rights" of the nationals of one state against the government and nationals of the other. Rather, the Agreement only

extinguished the states' rights to provide diplomatic protection as to the rights of their nationals. This interpretation is supported by the Japanese government's own consistent position and the corresponding Korean government's positions.

Second, the fact that the two governments were only able to extinguish diplomatic protection but not individual rights is a result of the democratic controls that were placed over the treaty ratification procedures.

Third, because the 1965 Claims Agreement did not extinguish Korean nationals' "property, rights and interests" against Japan or its nationals, Japan attempted to extinguish those rights by a domestic measure, legislation of Law No. 144. During treaty negotiations, the Korean government agreed not to object to such legislation, which is precisely the type of diplomatic protection waived by the treaty. However, Legislation No. 144 was in violation of the Japanese Constitution because it did not provide any compensation in exchange for its unilateral waiver of rights.

Fourth, even if Law No. 144 is valid, it only waived Korean nationals' "property, rights and interests" against Japan and not their rights to "claims." This is so because a "claims rights" in the context of the 1965 Claims Agreement refers to the "status where, if the legal existence of a right is in dispute, the alleged holder may make a claim or bring suit." The claims rights of individuals cannot be extinguished until they are consolidated as rights.

Fifth, the Korean government's distribution of the amount of the funds received from Japan was not to fulfill its obligations under the 1965 Claims Agreement. Korea had never owed such an obligation.

In conclusion, Korean nationals' "property, rights and interests" against Japan and its nationals are *prima facie* extinguished pursuant to Japanese domestic law, and all corresponding diplomatic protection by Korea as a state has been waived. On the other hand, Korean nationals' "claims rights" against the Japanese government and Japanese nationals are not extinguished by Japanese domestic law or by the 1965 Claims Agreement, though the diplomatic protection of them by Korea has been waived. Thus, even under Japanese domestic law, "claims" or the right to seek adjudication of the existence of a legal right survives. Therefore, even under Japanese domestic law, Korean nationals may make "claims" and can bring suit to settle the existence of legal rights against both the Japanese government and Japanese nationals. As appropriately expressed by lawyer and Diet member Utsunomiya, "[The Agreement] provides that the Korean government will not say anything, but does not extend to provide that Korean nationals will not say anything either."

Needless to say, the above conclusion also applies to Japanese nationals' property, rights, and interests and their claim rights against the Korean

government and people. In other words, according to the above conclusion, their rights were not extinguished by the Japanese government in the 1965 Claims Agreement, and therefore they can institute lawsuits against the Korean government and people in spite of the Ordinance No. 33 of the Military Government in Korea, the "Initial Financial and Property Settlement between the Government of the Republic of Korea and the Government of the United States of America" and Japanese government's acceptance of these measures in 1957. If Japanese nationals begin to claim their own rights and bring lawsuits, the so-called problem will go back to the time before 1965. It goes without saying that this is the most undesirable situation for both States. Therefore, it is fully agreeable that the 1965 Claims Agreement should have settled completely and finally the problems concerning the property, rights, and interests and the claims rights of the nationals.

However, until now, no lawsuit has been brought by Japanese nationals against the Korean government or nationals, and it does not seem likely to happen in the future. What does this fact mean? This means that the so-called "after-war compensation claims" raised by Korean nationals are the result of not having liquidated the negative historical legacy between the two States, and those who have suffered from that are "Korean" nationals. And again, many seem to admit the interpretation that Article 2, paragraph 1 did not extinguish the individuals' claims rights. This may be the result of the request that the so-called after-war claims raised by Korean nationals should not be thwarted by a specific treaty clause.

3.4 *Comfort Women and Forced Labor*

3.4.1 The Korean Constitutional Court's Decision on Comfort Women for the Japanese Military Case

The Constitutional Court of Korea reached a decision (2006 Heonma 788 Decision [Gyeoljeong], issued August 30, 2011) concerning the issue of "Comfort Women for the Japanese Military," namely, that a dispute of interpretation existed between Korea and Japan as to whether the compensation claim of the comfort women was extinguished pursuant to the Agreement between the Republic of Korea and Japan Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation (Claims Agreement) Article 2(1), and held that failure of the Government (Ministry of Foreign Affairs) to resolve such dispute of interpretation pursuant to Article 3 of the above Agreement violated the Constitution.

The Supreme Court decision regarding "Compensation for Forced Labor" concerned the victims of forced labor who had been employed by Japanese munitions companies for the production of weapons during the colonial era.

The victims filed a damage suit against these companies for unlawful acts and for the payment of unpaid wages, for which the Supreme Court upheld their right to compensation and payment of wages.

This section describes the progress leading up to such decisions, discusses their significance, and evaluates the implications of judicial activism in the issues concerning past history.

3.4.1.1 *Background*

From the early 1930's until the defeat of Japan in the Second World War in 1945, the issue of comfort women who were taken to the battlefield and forced into sexual slavery by the Japanese government and its military has remained a "psychological thorn" in the Korea-Japan relations, a representative issue of the past that still needs to be dealt with.

Comfort stations were first installed by the Japanese navy as a preventive measure for mass rape that could result in venereal diseases and opposition of local people during the 1932 Shanghai Uprising. With a mass dispatch of its soldiers to China in the Sino-Japanese War starting in July 1937, the Japanese army began installing comfort stations in conquered areas, the number increasing after the Nanking Massacre of December 1937. Besides providing "mental consolation" to the soldiers, comfort stations were installed in order to pacify discontent and to stir up morale to prevent desertion from a war that dragged on. Their purpose also entailed the prevention of leaking classified information, done by "hiring" women from colonies who could not speak Japanese. From 1941 and during the course of the Asia-Pacific War, Japan installed comfort stations in their conquered territories in Southeast Asia and the Pacific. Regions where comfort stations were installed, as identified in official documents were areas invaded by Japan, i.e., Chosun, China, Hong Kong, Macau, and the Philippines. The number of comfort women is estimated to be between 80,000 and 100,000 with some estimations reaching 200,000, 80% of whom were Chosun women, while others also came from the Philippines, China, Taiwan, and the Netherlands.

The issue of comfort women was not easily discussed in public due to the nature of the crimes, but with the launching of the Korean Council for Women Drafted for Military Sexual Slavery by Japan in November 1990, the issue of comfort women was finally raised in earnest. Various activities continued among civil groups, the Korean government, and international human rights organizations; and the weekly Wednesday protests urging for the resolution of the issue before the Japanese Embassy in Korea hit the 1000 mark (1992.1.8 ~ 2011.12.7).

The Japanese government, however, denied the very existence of comfort women at first, until documents showing direct involvement of the Japanese government were uncovered in addition to the testimonies of the victims. On August 4, 1993, together with the second Government Report, it acknowledged the involvement of the Japanese military and authorities, as well as the forced drafting and fatigue duty; and Chief Cabinet Secretary Yohei Kono released a statement recognizing the grave violation of their human rights and expressing his apologies. However, Japan maintained that legal responsibility regarding these comfort women had been settled by the 1965 Claims Agreement and refused compensation.

3.4.1.2 *Decision of the Constitutional Court*

With regard to the interpretation of Article 2(1) of the Agreement, the Japanese government and judiciary were of the position that the reparations claim of Korean nationals including the comfort women against the state of Japan was encompassed by the Agreement in this case and, with its conclusion and implementation, were waived or compensation terminated. On the other hand, the Korean government declared through the decision of the joint government-civic committee of August 26, 2005 that issues concerning crimes against humanity such as that of the comfort women where state authorities were involved were not settled by the Agreement in this case and therefore, the Japanese government still bears liability. Consequently, the Court found that there was a difference between the two states in the interpretation of the Claims Agreement.

The Constitutional Court thus held that there clearly was a difference between Korea and Japan in the interpretation of Article 2(1) of the Agreement as to whether the reparations claim of the Comfort Women is included in the claim against Japan, and this fell under the meaning of "dispute" in Article 3.

Concerning the Dispute Resolution Procedure provided for in Article 3 of the Claims Agreement, the Court also found that these provisions, at the time of its conclusion, anticipated disputes in the interpretation and established dispute resolution principles and procedures, while setting the subject of these acts as the contracting states themselves and ruled that since the above dispute exists, the Respondent ought to resolve the issue through diplomatic channels pursuant to the dispute resolution procedures of Article 3; and it ought to submit the case to an arbitration panel after having attempted to reach settlement.

The core issue in the decision of the Constitutional Court was, in the midst of such dispute in interpretation, whether the nonfeasance of the Minister of Foreign Affairs in not pursuing such dispute resolution procedures provided

for in Article 3 of the Claims Agreement violated the fundamental rights of the Petitioners and was therefore unconstitutional. In other words, the issue was, where there is a dispute over the interpretation of a treaty, whether the government had a specific constitutional duty to pursue the dispute resolution procedures provided for in the treaty to resolve the issue. There was disagreement among the Constitutional Court justices concerning this issue.

3.4.1.3 *Majority Opinion*

Concerning the "Duty of the Korean government to pursue dispute resolution procedures," the majority opinion of the Constitutional Court stated that in light of the language of the Preamble, Article 2(2), and Article 10 of the Constitution and Article 3 of the Claims Agreement, the duty to take measures of dispute resolution pursuant to Article 3 is based on a constitutional demand to protect and to cooperate towards realizing the reparations claim of state nationals, whose human dignity and value were gravely violated by the systematic and continued criminal acts of the state of Japan. Without the performance of this duty, there is the possibility of Petitioners' fundamental rights being gravely violated; thus, the Respondent's duty to act is one deriving from the Constitution which is specifically provided for in the law.

The majority further held that the Korean government was also liable for the conclusion of the 1965 Claims Agreement, stating that though it had not done any acts to directly violate the fundamental rights of the comfort women, considering that the realization of the victims' reparations claim against the state of Japan and the restoration of their human worth and value has come to the current state of impairment because it has not clarified the substance of the claims but used a vague term of "all claims" in concluding the Claims Agreement in this case, it cannot be denied that the Korean government has the specific duty to act in order to remove the reason for malfunction.

Also holding that diplomatic measures neglecting the reparations claims of the victims do not fall within the scope of performance of its duties, the Court found that having Japan acknowledge its wrongdoing and bear legal liability is an issue altogether different from the Korean government providing funds for social security; and thus the provision of partial living support for the victims cannot be considered satisfying the duty to act.

Lastly, the Constitutional Court declared that the harm to comfort women, having been caused by the enforced mobilization and sexual slavery by the state of Japan and its military, is a unique harm, for which other precedents cannot be found. It thus held that the reparations claim that the comfort women have against Japan is not only a property right guaranteed by the Constitution, but its realization also signifies the *a posteriori* restoration of their dignity

and value, as well as their personal freedom that were ruthlessly and continuously violated.

The Court also noted the urgency of the need to remedy the violations of the fundamental right, as well as its possibility of remedy, as the current living comfort women have all advanced in age so that any further delay in time may make it impossible to restore this historical injustice and the violated human worth and value of the comfort women. In pursuing dispute resolution measures, the Court further stated that the government's reasons of "possibility of developing into exhaustive legal arguments" or "diplomatic tension" are vague and abstract, and that it cannot be considered valid grounds for neglecting the remedy for the victims or a national interest that must be seriously considered.

3.4.1.4 *Concurring Opinion of Justice Cho, Dae Hyeon*

Justice Cho, Dae Hyeon added to the majority opinion, stating that in this situation where the victims' claim to reparations was being hindered by the Claims Agreement, there definitely lies the duty to pursue diplomatic negotiations or arbitration procedures. Thus, the Court should also declare the Republic of Korea liable for complete compensation of the damage incurred by the Petitioners in being unable to exercise their reparations claim against the state of Japan. He reasoned that because it is highly unlikely that the obstacle to victims' exercise of their reparations claim against Japan will be removed by diplomatic negotiations or arbitration procedures, and while there is sincere concern that it will give them false hope resulting in pains of frustration and despair, it must be even more emphasized that the Republic of Korea bears the duty to completely compensate them for their reparations claim against Japan. Furthermore, because the victims have all advanced in age, the state's compensation measures for the victims must be urgently implemented.

3.4.1.5 *Dissenting Opinion of Justices Lee, Kang-Kook; Min, Hyeong-Ki; and Lee, Dong-Heub*

These three justices of the Constitutional Court, unlike those in the majority, held that they could not conclude under the wording of the Constitution and the Claims Agreement that "the Respondent has the duty to pursue dispute resolution measures under Article 3 of the Agreement in this case for the Petitioners."

The dissenting opinion further stated that no matter how grave or urgent the state of violation of the fundamental rights of the Petitioners is in this case, the interpretation of the law, namely Articles 10 and 2(2) and the Preamble of the Constitution as well as Article 3 of the Claims Agreement, alone cannot generate the Korean government's specific duty to pursue dispute resolution

procedures nor the people's right to petition for such a duty to act. Rather, the justices saw that the act of pursuing the dispute resolution procedure in Article 3 of the Agreement, in form and substance, a "discretionary act" of the two contracting parties. Thus, they held that the constitutional claim brought by the victims claiming that their fundamental rights were violated by the nonfeasance of the Korean government in failing to pursue the above dispute resolution procedures is illegitimate and must be rejected.

3.4.1.6 *Significance of the Decision of the Constitutional Court*

The majority's decision declaring the failure to act as unconstitutional is significant in that it is the first decision of the judiciary to order a positive act on the part of the government, especially in that the representative issue of comfort women requires urgent legal compensation.

The Constitutional Court held, in confirming that an interpretative dispute existed between Korea and Japan regarding the 1965 Claims Agreement, that actively protecting the right to claims of the victims whose human dignity and value were gravely violated by the systematic and continued criminal acts of the state of Japan was a positive duty of the government as required by the Constitution. This appears to be an aggressive attempt of the judiciary to pressure the government that has shown a passive stance in resolving the issue of comfort women.

In the decision, in particular, the Court saw the harm to comfort women, having been caused by the enforced mobilization and sexual slavery by the state of Japan and its military as "a unique harm, for which other precedents cannot be found" and ordered an active resolution of the issue in consideration of the fact that the current living comfort women have all advanced in age, so that any further delay in time may make it impossible to restore this historical injustice and the violation of human worth and value of the Comfort Women by realizing their reparations claim. Considering that nine more of the victims have passed away in the nine months following the decision of the Court, leaving behind approximately 60 survivors among the 234 victims registered with the government, the decision certainly has great implications.

Further, regarding the claim that the Korean government has taken necessary measures for the resolution of the comfort women issue in deciding to give financial support and compensation to the victims on its own rather than to demand monetary reparations from Japan, and to demand of the Japanese government instead a more important and fundamental issue of a thorough fact-finding, formal apology and display of regret, implementation of proper education of history, etc., in order to continually raise the comfort

women issue in international society, the Court found that the diplomatic and domestic measures of the Korean government towards Japan that neglected the victims' right to claims of the victims could not be considered performance of its duties that are at issue in this case. The Court thus held that the specific role of the government in principle was to diplomatically demand reparations for the victims and, should the dispute be unresolved, to submit to arbitrations pursuant to Article 3 of the Claims Agreement.

This appears to be a forceful reminder from the judiciary regarding the extremely passive stance the government has shown in its attempts to diplomatically resolve the comfort women issue – a lukewarm attitude to avoid diplomatic friction with Japan, and ordering a more determined attitude towards the issue including submission to arbitration.

Thus, this decision of the Constitutional Court established an unprecedented principle of law, namely the "unconstitutionality of the Government's failure to take diplomatic actions." This decision is significant in that while criticizing the passive attitude of the government that failed to actively resolve the compensation issue for the comfort women, the Court also held for the first time that the government efforts to resolve the issue of right to claims for the war crime victims was a duty required by the Korean Constitution and thus provided a specific solution, thereby demonstrating an ambitious attitude of the judiciary towards historical issues.

3.4.1.7 *Response of the Korean Government*

Following the decision of the Constitutional Court, MOFA established a Task Force for the Resolution of Comfort Women Issue pursuant to the Korea-Japan Claims Agreement (MOFA-TF) and proposed a bilateral meeting for the resolution of the issue on September 15, 2011, all the while urging for sincere measures on the part of Japan by summoning Deputy Ambassador Kanehara. When the Japanese government did not respond, it proposed a bilateral meeting again in November. At the Korea-Japan summit meeting held in Tokyo on December 18, 2011, President Lee, Myung-Bak stated, "Korea and Japan must become sincere partners for mutual prosperity of the two countries and regional peace and security. To this end, the military comfort women issue which forms a stumbling block must first be addressed, and this takes true courage." He also stated that "the comfort women issue is one that can immediately be resolved if perceived differently" and that "it is an emotional issue before a legal one," urging Japan to consider the issue from a broader perspective that would help address other issues between the two countries. Prime Minister Yoshihiko Noda replied that the Japanese position concerning

the comfort women issue was the same as before and that while "humanitarian efforts have been made, it would try to explore ideas from a humanitarian point of view."

Through this process, it can be observed that the Comfort Women issue is no longer buried under the theory of "future-oriented Korea-Japan relations" but has now become part of the Korea-Japan diplomatic agenda. More specifically, according to recent media reports, the MOFA-TF is already discussing how to constitute the arbitration committee. Further progress has yet to be made, but the significance is clearly in line with the aggressive decision of the Constitutional Court, the long entrenched and neglected issue of comfort women is finally being discussed with specific purpose and direction.

3.4.2 The Korean Supreme Court Decision on Forced Labor

3.4.2.1 *Background*

During the Japanese occupation of Korea, Japan began to run short of labor in the production of munitions as it fought the Sino-Japanese War and the Pacific War. On July 8, 1939, it legislated and promulgated the National Mobilization Law and in 1942 legislated and implemented the provision of mobilizing the Chosun people in order to procure a labor force from all regions of the Korean Peninsula through official arrangements. When the shortage of manpower and supplies continued, it implemented a *de facto* conscription of the Chosun civilian people under National Conscription Order beginning October 1944.

The victims of forced labor were either forcefully sent over to Japan with other conscripts pursuant to a conscription notice or were sent through their applications for employment in Japanese munitions company under deceitful job placements that guaranteed their return after their employment and training. These victims were then placed in companies such as Mitsubishi Heavy Industries and Nippon Steel Corporation, where they worked in three 8 hour shifts with one to two limited outings per month. Once their daily tasks were complete, they ate and slept at the quarters provided by the companies, where the quality and the amount of food provisions were severely insufficient and sleeping quarters cramped.

These quarters were also surrounded by barbed-wire fences that limited entry; and strict surveillance by military police during both working hours and holidays prevented the liberty of everyday life. The conscripts were subject to *de facto* forced labor, as any correspondence with family back in Korea was screened and censored and thus limited in content, and those caught escaping were severely beaten, and wages were not properly paid out.

When the Pacific War reached its peak and munitions facilities in Japan were destroyed by US military airstrikes, some of the conscripts also perished

at those facilities, and still others were exposed to radiation caused by the atomic bomb dropped on Hiroshima.

After liberation, compensation for forced laborers became an issue, and the governments of Korea and Japan discussed normalization of diplomatic relations and post-war compensation beginning in late 1952. Finally, on June 22, 1965, Treaty on Basic Relations between the Republic of Korea and Japan for the Normalization of Diplomatic Relations was concluded together with its annexed agreement of Agreement between the Republic of Korea and Japan Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation (Claims Agreement). Through this Claims Agreement, Japan agreed to provide Korea with 300 million dollars in grants over a period of 10 years and 200 million dollars in loans while confirming that the problem of claims was completely and finally settled.

According to the Agreed Minutes drafted during this process, the scope of the "Outline of the Property and Claims Settlement Agreement between Korea and Japan (8 items)" included the restitution of claims of Korean organizations or natural persons against Japan and its people of their government bonds, public bonds, Japanese bank notes, outstanding receivables of drafted Koreans and other claims. In other words, the Korean government included the compensation for the conscripted workers in its negotiation of the Claims Agreement with Japan; and the Japanese government thus claimed that all rights to claims of the victims of forced labor was extinguished pursuant to the Agreement.

3.4.2.2 *Suit against Mitsubishi Heavy Industries*

On December 11, 1995, the victims of forced labor at Mitsubishi Heavy Industries filed a suit against the Japanese government and Mitsubishi Heavy Industries at the Hiroshima District Court for unlawful acts and for violations of international law, demanding payment of outstanding wages, damages, and compensation.

The Hiroshima District Court found, concerning the conscription circumstances of the victims, that "the conscription of the Plaintiffs under the law at the time cannot be an unlawful act in itself, nor can the process of conscription pursuant to the law be called a violation of the law" and thus rejected the claim of forced conscription and forced labor made by the victims. While the court did recognize some of the claims of the victims as being true such as the Japanese munitions companies unlawfully driving them to forced labor unlike their prior explanations, failure to pay out wages properly, failure to implement safety precautions, it still held that the right to request compensation for such damages had already lapsed since the statute of limitations had

expired for the right to claim unpaid wages and, even if it had not, the rights were extinguished by the 1965 Claims Agreement between Korea and Japan.

The victims appealed to the Hiroshima High Court and while the case was still in progress, filed the same suit against Mitsubishi Heavy Industries before the Busan District Court of Korea on May 1, 2000. When the Hiroshima High Court also dismissed the case on January 19, 2005, the victims filed an appeal again, this time to the highest court of Japan.

On February 2, 2007, the Busan District Court ruled similarly, stating that the victims' right to compensation for damages and payment of wages was extinguished. The Supreme Court of Japan also dismissed the victims' case on November 1, 2007, thereby concluding the proceedings in Japan. Then, the victims appealed the decision of the district court to the Busan High Court, but the same dismissed the appeal on February 3, 2009 for reason of *res judicata* following the final decision in Japan.

3.4.2.3 *Suit against (New) Nippon Steel Corporation*

On December 24, 1997, the victims of forced labor at Nippon Steel Corporation filed a suit against the Japanese government and the New Nippon Steel Corporation at the Osaka District Court for unlawful acts and for violations of international law, demanding payment of outstanding wages, damages, and compensation.

The Osaka District Court dismissed the case on March 27, 2001 for the same reasons as the Hiroshima District Court. It further added that Nippon Steel Corporation for which the victims provided service at the time was dissolved pursuant to Japan's Emergency Corporate Accounting Measures Law and Corporation Reconstruction and Maintenance Law and ceased to exist. It held that the current New Nippon Steel Corporation is of independent legal personality from that of the previous Nippon Steel Corporation, on which legal responsibility does not transfer; and even if it did, the rights of the victims were extinguished pursuant to the 1965 Claims Agreement and thus declared the Plaintiffs' loss. The victims appealed to the Osaka High Court, but the appeal was dismissed on November 19, 2002, and the entire proceedings came to an end on October 9, 2003 when the Supreme Court rejected the case.

When the case closed in Japan, the victims filed the same claim before the Seoul Central District Court of Korea on February 28, 2005 against Nippon Steel Corporation. However, the Seoul Central District Court also dismissed the case on April 3, 2008 for the reason of *res judicata* pursuant to the final decision of Japanese courts. The victims appealed to Seoul High Court but were again denied for the same reason on July 16, 2009.

3.4.2.4 *Decision of the Supreme Court*

The Supreme Court stated, "In determining international jurisdiction, we must follow the basic principles of equity for both parties, fairness of trial, speed, and economy. More specifically, not only must individual interests be considered such as fairness, convenience and foreseeability for the parties to the litigation, but also state or judicial considerations of fairness, speed, efficiency, and effectiveness of trial. Among these various considerations, determining which interests need protection must be rationally determined by considering each individual case, practical relevance of the party to the forum, and the relevance between the forum and the issue at dispute as objective criteria." Based on this premise, the Court stated, "The damages claim resulting from unlawful acts in this case arises from the enforced mobilization of the previous Nippon Steel Corporation, together with the state of Japan, for the purpose of forced labor, because the act of putting such mobilized persons to forced labor is an unlawful act for which the Plaintiff is claiming that the Defendant bears the liabilities of the previous Nippon Steel Corporation. In consideration of the fact that Korea, together with Japan, was the *locus delicti* where part of the acts in a series of unlawful acts that occurred, the Plaintiff victims reside in Korea, and that the issues are intimately related to historical and political changes," the Court held that it had jurisdiction over the case because Korea had *de facto* connection with the parties and issues of this case.

3.4.2.5 *Decision Concerning the Extinction of Rights Pursuant to the 1965 Korea-Japan Claims Agreement*

In its decision, the Supreme Court found that the "1965 Claims Agreement was aimed not towards compensating for Japanese colonization but towards resolving the financial and civil debt/credit relationship between Korea and Japan based on Article 4 of the San Francisco Peace Treaty. The funds for economic cooperation, granted to the Korean government by the Japanese government pursuant to Article 1 of the Claims Agreement, neither resolves the issue of rights based on Article 2 nor have the effect of legal consideration. In the process of negotiating the Claims Agreement, the Japanese government fundamentally denied legal compensation for forced labor by refusing to acknowledge the illegality of colonization; and the two governments were unable to reach an agreement concerning the nature of Japan's rule over the Korean Peninsula. In this situation, it is difficult to conclude that the right to compensation for crimes against humanity that state power was directly involved in or crimes directly connected to colonization was included in the scope of application of the Claims Agreement. Therefore, the individual rights

to claim compensation for forced labor were not extinguished by the Claims Agreement, nor were Korea's rights to diplomatic protection of its nationals."

Further, the Supreme Court held, "For a state to be able to conclude a treaty which does not stop at abandoning diplomatic protection but goes on to directly extinguish the rights to claims of its nationals that have independent legal personality different from that of the state, without their consent, contradicts contemporary legal principles. Even if it were to be permissible under international law for a state to extinguish the rights of its nationals through treaties, considering that a state and its nationals are different legal persons, the people's rights cannot be deemed to have been extinguished unless specifically provided for in the treaty. Considering that there is not enough evidence to conclude that there was an agreement between the two governments regarding the extinguishing of individual rights to claims in the 1965 Claims Agreement, and that Japan's Property Measures Law – extinguishing the rights of Korean people against Japan and its people – enacted immediately following the conclusion of the Claims Agreement can only be understood on the premise that the Claims Agreement alone could not have extinguished the individual rights of the Korean people, even if the rights of the victims were included in the scope of application of the Claims Agreement, the individual rights themselves cannot be deemed to have been automatically extinguished by the Agreement." The Supreme Court thus vacated the decision of the High Court and remanded the case for retrial.

3.4.2.6 *Significance of the Supreme Court Decision*

Korea has been greatly influenced by Japan since the Japanese occupation up to present in its legal system, judicial administration, interpretation of the law and application of legal reasoning. Thus, there have been many instances in which the decisions of the Japanese courts have been acted as precedents accepted without question. Likewise in this case, the district and high courts accepted the effect of the decision of the Japanese courts because they supposedly did not violate the good morals and social order of Korea and dismissed the petitions of the victims.

The Supreme Court decision, however, is significant in that it aggressively and independently recognized the compensation rights of the victims based on the Preamble of the Constitution and other related laws concerning the issues already judged and decided in Japanese courts. It declared that the Preamble of the founding Constitution and the current Constitution of the Republic of Korea "uphold[s] the cause of the Provisional Republic of Korea Government born of the Independence Movement of 1 March 1919" and that Japan's rule over the Korean Peninsula during Japanese Occupation Period was nothing

more than an unlawful occupation by force from a normative perspective. The Supreme Court holding that the effect of the decisions of the Japanese courts premised on the legality of Japan's enforced annexation of Korea could not be recognized, as they squarely contravene with the Constitution of Korea, is significant as the aggressive and independent attitude of the judiciary concerning historical issues.

In judging the 1965 Claims Agreement in its decision, the Supreme Court restricted the Claims Agreement to one that resolved the financial and civil debt/credit relationship between Korea and Japan and found that the right to compensation for crimes against humanity that that the Japanese government was directly involved in or crimes directly connected to colonization was not included in the scope of application of the Claims Agreement. It thus held that neither the individual claims were extinguished nor diplomatic protection of Korea was abandoned. Such a holding squarely contradicts the official position of the Japanese government that claims that all legal compensation, including individual claims, was fulfilled by the 1965 Claims Agreement.

The Supreme Court decision, in particular, is a logical extension of the official position of the Korean government but takes a step further in its attitude towards the forced labor victims. While the Korean government had declared in 2005 through the decision of joint government-civic committee that compensation issues concerning comfort women, atomic bomb victims, and nationals in Sakhalin were not settled by the Claims Agreement, it had failed to similarly recognize the rights of forced labor victims. Rather, because such were not clearly recognized as forced labor victims, their claims were assumed to have been settled by the Claims Agreement. This was because the outline of the eight items indicated in the Agreed Minutes to the Agreement included the restitution of the claims of Korean persons against Japan and its people of the outstanding receivables of the conscripted Koreans and other claims.

In spite of this, the Supreme Court stated "Even if the right to claims was indeed included in the scope of application of the Claims Agreement, individual rights themselves cannot be deemed to have been extinguished by the Claims Agreement alone. Rather, the state's diplomatic protection of that right is abandoned by the Claims Agreement, so that even if such a right were to be extinguished within Japan due to domestic measures taken by Japan, the Korean government would no longer have the means to protect this diplomatically. Therefore, the Agreement cannot restrict the victims' exercise of rights in the Republic of Korea."

War crimes committed by the Japanese government during the occupation are certainly not limited to that of this case. According to a survey conducted by the Committee for the Survey and Support of Forced Labor Victims and

Casualties Abroad during Anti-Japan Resistance (Forced Labor Victim Survey Committee) under the Prime Minister, those recognized as victims of forced labor pursuant to the committee's analysis numbered 147,893 as of May 11, 2012. Their additional suits have already begun their countdown. Aside from forced labor, comfort women and victims of forced conscription into the Japanese military who they were victimized as soldiers or civilian employees, have yet to be properly compensated. Through the Supreme Court decision, compensation suits of war crime victims other than those engaged in forced labor can be actively reviewed.

Furthermore, similar issues can also be raised in other East Asian countries that were illegally occupied by Japan. If compensation for crimes committed during the Japanese occupation period would not be recognized up to present time pursuant to the logic of the government and courts of the state of Japan that caused harm, this Supreme Court decision expressly criticizes the decisions of the Japanese government and courts based on Japanese laws while also providing a reasoning that makes compensation possible for other victims. Therefore, this decision will also likely be viewed for its significance among other East Asian states.

3.4.2.7 *Conclusion*

Korea and Japan, having experienced a history of Japanese occupation in a relationship as an occupying power and its colony, cannot be free from the important historical issues of the past. From territorial disputes to historical understanding, cultural differences and economic cooperation, there are many challenges yet to be overcome. Some of these challenges can be peacefully overcome through diplomatic efforts from a future-oriented perspective on the part of both countries.

However, as for war crimes committed during the Japanese occupation period, avoiding legal responsibility will not settle the past as long as specific identifiable victims exist. As living witnesses and victims of history, sufficient compensation and a sincere apology would be the proper way to resolve the issue, and efforts toward this end would be the duty and reason for the existence of the state.

The Korean government cannot be free from criticism concerning their passive attitude towards the representative historical issues of comfort women and forced labor. More specifically, in negotiating post-war compensation following liberation, it hastily used an all-inclusive term "all claims" in concluding the 1965 Claims Agreement, thereby creating an obstacle to the realization of the victims' rights to claims. It also neglected the victims for a long time

without having taken initiative to remove these obstacles. In the meantime, many of the victims have passed away without having received compensation or an apology. Therefore, the intervention of the judiciary in these historical issues through affirmative decisions holds great significance.

Of course, there are concerns for the possible adverse effects that such an aggressive intervention by the judiciary may have on diplomatic relations. In order to resolve the complex issues within Korea-Japan relations, there needs to be a broad range of negotiations through various means; but with the severely limiting aspect of judicial intervention may make resolution even more difficult. According to recent media reports, there has been some progress in the matter, with the Japanese government directly issuing apologies concerning the comfort women issue through its Prime Minister, as well as talk about considering the possibility of compensating the victims directly. However, the firm position taken by the Korean government concerning comfort women pursuant to the Constitutional Court decision has made it difficult to find a point of contact, thereby vitiating these plans.

A further issue can be raised as to whether a treaty concluded between states as parties pursuant to international law can be invalidated *ex post facto* through the decision of its judiciary. As raised by those opposing the unconstitutionality decision, although one can understand the desperation of the victims, forcing a diplomatic resolution by overstepping previous constitutional interpretations does not adhere to the limits of the judiciary within the framework of separation of powers.

However, separation of powers alone cannot be an autotelic value in itself. Also, considering that the fundamental purpose of the separation of powers is to affirmatively guarantee the basic rights of the people, the aggressive role of the judiciary in guaranteeing the people's rights coincides with the substance of the principle of separation of powers. Furthermore, ruminating on the fact that the resolution of historical issues has been left to the executive branch alone and that the promotion of such issues have progressed and regressed repeatedly based on the will of the head of that branch of government, the positive implications of an active role of the judiciary in its recent decisions are great.

3.5 *The Status of the Provisional Government of the Republic of Korea under International Law and Continuity of the Republic of Korea as a Sovereign State*

The Choseon Dynasty, founded in 1392 succeeding the Goryeo Empire, changed its name to the Korean Empire during the years of King Gojong's rein.

Gojong, the 26th King of Choseon, ascended the throne as the first Emperor of the Korean Empire on October 12, 1897. According to the Constitution of the Korean Empire ('*Daehan Jeguk*' in Korean) enacted on August 17, 1899, the Korean Empire identified itself as an absolute monarchy.

The Korean Empire, as a victim of Japan's aggressive imperial policy, became a protectorate of Japan when it was stripped of its diplomatic sovereignty in 1905 and annexed by so-called "Annexation Treaty," whose effects under international law is debated.

Influenced by Wilson's concept of national self-determination, there was a widespread of the Independence Movement on March 1, 1911, eventually leading to the establishment on several provisional governments in and outside Korea. Among such provisional governments, one in Shanghai, China was declared as the Republic of Korea, a democratic government, by the Provisional Charter promulgated on April 11, 1919.

Since then, several provisional governments were unified as the Provisional Government of the Republic of Korea in Shanghai, China on September 11, 1911. On the same date, the Provisional Constitution, which included more detailed provisions based on the Provisional Charter of April 11, was promulgated. The current Constitution of the Republic of Korea stipulates in its preamble that the Republic of Korea upholds the cause of the Provisional Republic Korea Government born of the March 1st Independence Movement of 1911.

After that, the Republic of Korea was liberated from the Japanese rule by Japan's unconditional surrender and the North of the 38th parallel was occupied by Russia and the south by the United States. After going through complicated political situations, the Republic of Korea was finally established on August 15, 1948 in the South of the 38th parallel while the Democratic People's Republic of Korea was established in the North on September 9, 1948.

The issue regarding the identity of the Republic of Korea with the previous government dates back to the time of establishment of the Republic of Korea as explained above. If Japan's annexation of Korea in 1910 was valid under international law, it can be seen that the Korean Empire ceased to exist as a state in 1910 and the Republic of Korea was established as a new country based on the Provisional Government of Republic of Korea as its government. Another way to look at this issue is that the Republic of Korea was established as a new independent state on August 15, 1948.

On the other hand, in case the annexation treaty of 1910 was invalid as Korea claims, a state existed in the Korean Peninsula during the period of the Japanese rule over Korea. In this scenario, there are two possibilities in understanding the relations between the Korean Empire and the Republic of Korea established based on the Provisional Government of Republic of Korea.

One is that the Republic of Korea can be understood as a state that changed its name and identity. In such case, the Korean Empire and the Republic of Korea are the same state under international law. Another view is to regard the Republic of Korea as a new state unrelated to the Korean Empire, which raises the issue of state succession between the Republic of Korea and the Korean Empire.

In case one understands or claims that the present Republic of Korea is the state established in 1920 as a result of the March 1st Independent Movement, and not the newly established independent state along with the new government of 1948, the Republic of Korea as of 1919 becomes a questionable entity. In other words, the question is raised whether the Republic of Korea in 1919 had all elements for establishing a state – a territory, people, government and capacity to maintain diplomatic relations. Among them, the most crucial issue is whether the Provisional Government at that time can be regarded as a government under international law.

The Provisional Government of the Republic of Korea established in 1919 engaged in various diplomatic activities with the United States and European countries, and also military activities toward Japan, but it is difficult to say that the criteria of effectiveness as a government was fulfilled as required under traditional international law.

While there exists a record that the provisional governments were recognized as a government such as the French government in exile as well as by Estonia and the Soviet Union, it is unclear whether such records are fully substantiated. In this context, it can be inferred that the Provisional Government of Korea was not generally recognized as a government by the international community, which makes it difficult to theoretically claim the continuity of the Republic of Korea from the Korean Empire.

The Republic of Korea of today makes it clear through the preamble of its Constitution and other state practices that it identifies as a successor of the Republic of Korea established in 1919. There is no specific provision in the Korean Constitution mentioning the continuity between the Republic of Korea and the Korean Empire.

Despite this, Korea consistently asserts the invalidity of the annexation treaty of 1910, and this attitude has been maintained during the talks for the establishment of diplomatic relations between Korea and Japan. Thus, it can be understood that Korea takes a position that the Republic of Korea is identified as a successor of the Korean Empire.

The Korean government regards the following practices of international community as recognizing the continuity between the Republic of Korea and the Korean Empire. First of all, the secretariat of the Universal Postal Union,

which the Korean Empire joined on January 1, 1900, notified the Republic of Korea of the restoration of its membership of the Universal Postal Union as of December 17, 1949.

Secondly, in 1903, the Korean Empire joined the first Red Cross Convention adopted on August 22, 1864. Switzerland, as a depository, viewed that Geneva Convention of 1864 was being applied to Korea with other signatories until 1966 when Republic of Korea joined the first Geneva Convention of 1949.

The Korean government took a measure of confirming that the following three treaties to which the Korean Empire was a signatory in 1987 are effective for the Republic of Korea: Convention for the Exemption of Hospital Ships, in Time of War, from the Payment of All Dues and Taxes Imposed for the Benefit of the State, Convention with Respect to the Laws and Customs of War on Land (Hague II), and Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864 (Hague III). In relation to this, the Dutch government, the depository of the first two treaties aforementioned, treated the Republic of Korea as signatory by informing it of the treaty amendments in February, 1986.

3.6 *From the Wartime Declarations to the 1951 San Francisco Peace Treaty*

3.6.1 The Wartime Declarations

There was general agreement that the San Francisco Peace Treaty could only endorse the territorial agreements made at Cairo, Yalta, and Potsdam. In fact, the territorial dispositions of the San Francisco Peace Treaty followed the terms of these agreements and US studies and policy decisions relating to the implementation of these agreements.

The pertinent provisions of these agreements are: "Japan will … be expelled from all other territories which she has taken by violence and greed" in the Cairo Declaration on December 1, 1943; "The Kuril islands shall be handed over to the Soviet Union" in the Yalta Agreement of February 11, 1945; "Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as we determine" in the Potsdam Proclamation of July 26, 1945; and "[Japan] … accepts the provisions set forth in the [Potsdam Proclamation]" in the Japanese government's statement accepting US terms of surrender, dated August 14, 1945.

The Cairo Declaration referred specifically only to "the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores," although it did add "Japan will also be expelled from all other territories which she has taken by violence and greed." As to the words of the Cairo Declaration, there were harsh responses from Japan, for example, "the expulsion of Japan

from the territory which she took by violence and greed is difficult for the Japanese to understand, since all countries have acquired additional territory in such a way."

3.6.2 Interpretation of the Supreme Commander for the Allied Powers' Instructions

The General Headquarters of the Supreme Commander for the Allied Powers gave an instruction No. 677 entitled "Governmental and Administrative Separation of Certain Outlying Areas from Japan" on January 29, 1946, which stated, "The Imperial Japanese Government is directed to cease exercising, or attempting to exercise, governmental or administrative authority over any area outside of Japan, or over any government officials and employees or any other persons within such areas." It further stated, "For the purpose of this directive, Japan is defined to include the four main islands of Japan (Hokkaido, Honshu, Kyushu and Shikoku) and the approximately 1000 smaller adjacent islands ... and excluding ... (c) the Kurile (Chishima) Islands, the Habomai (Hapomaze) Island Group (including Suisho, Yuri, Aki-yuri, Shibotsu and Taraku Islands) and Shikotan Island."

This instruction has been considered one of the significant legal instruments deciding the destiny of the Kurile Islands especially favoring Russia. Russia continuously maintains that SCAPIN 677 decreed the cessation of Japanese administration over various non-adjacent territories, including the Kurile Islands, and this is a strong indication of what the Allied Powers desired. In response to this Russian claim, Japan argues that SCAPIN 677 suspended only Japanese administration of various island areas, including the Kurile Islands, and it did not preclude Japan from exercising sovereignty over this area permanently.

The United States recognized that the question of international sovereignty was outside SCAP's authority. As SCAPIN 677 itself stated, "Nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration." The United States also pointed out that in all SCAPINs to the Japanese Government regarding authorization of areas for Japanese fishing and whaling which were established under SCAP, there appeared a statement providing essentially that "the present authorization is not an expression of Allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area."

Therefore, it was the US position that SCAPIN 677 was an operational directive to the Japanese Government tentative in character and that specifically stated it was not an Allied policy determination of Japanese territory. In the

same vein, the SCAP General Order No. 1 merely stated that Japanese troops in Sakhalin and the Kurile Archipelago should surrender to the Commander of the Soviet Forces Far East, and it did not and was not intended to touch upon the final disposition of these islands.

There is also, however, a report, titled "Summaries of FEC Policy Statements and Certain SCAP Directives to the Japanese Government, with Proposals for Disposition in the Peace Settlement with Japan," regarding the relationship between territorial questions and SCAPIN 677, which "defines present area of Japanese jurisdiction and provides a starting point for decisions on details of territorial adjustments."

SCAPIN 677 further stated, "For the purpose of this directive, Japan is defined to include the four main islands of Japan ... and the approximately 1,000 smaller adjacent islands ... and excluding ... Liancourt Rocks...." This instruction is also considered one of the significant legal instruments that could decide the destiny of the Dokdo in favor of Korea. Korea continuously maintains that SCAPIN 677 decreed the cessation of Japanese administration over various non-adjacent territories, including the Dokdo, and this is a strong indication of what the Allied Powers desired to remove from Japanese jurisdiction. In response to this Korean claim, Japan argues that SCAPIN 677 suspended only Japanese administration of the various island areas, including the Dokdo, and it did not preclude Japan from exercising sovereignty over this area permanently, as the United States also opined in the same vein.

A later instruction, SCAPIN 1778 of September 16, 1947, designated the islets as a bombing range for the Far East Air Force and further provided that use of the range would be made only after notification through Japanese civil authorities to the inhabitants of the Oki Islands and certain ports on Western Honshu. The action of the US-Japan Joint Committee in designating these rocks as a facility of the Japanese Government is therefore justified according to Japanese interpretation. Again, SCAPIN 677 did not purport to express Allied policy as to the "ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area." SCAPIN 1033 of June 22, 1946, also provided that "Japanese vessels or personnel thereof will not approach closer than twelve (12) miles to Takeshima (37 [degrees] 15<prime> North Latitude, 131 [degrees] 53<prime> East Longitude) nor have any contact with said island.... The present authorization is not an expression of allied policy relative to ultimate determination of national jurisdiction, international boundaries or fishing rights in the area concerned or in any other area."

3.6.3 The 1951 San Francisco Peace Treaty

The San Francisco Peace Treaty, signed on 8 September 1951, provided the terms for terminating the state of war between Japan and the Allied Powers,

to "settle questions still outstanding as a result of the existence of a state of war between them," such as the status of the minor islands that were under Japanese sovereignty at the end of the war. In Article 2(a), "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet [Ullungdo]." Dokdo was not mentioned in the Treaty, but Korean commentators are quick to point out that "while the Peace Treaty only specified three among the total of 3,215 islands [belonging to Korea], they were listed merely to illustrate the status of the remaining outlying islands." Many other Korean islands are also not explicitly mentioned.

The intensity of the Korean War fighting helps explain why recognizing Korea's sovereignty over Dokdo might have seemed to be inconsistent with the strategic interests of the United States, but it is less clear why the United States declined to recognize the sovereignty of Japan over the islets. Why did the drafters of the San Francisco Peace Treaty choose to omit any reference to Dokdo when the inevitable result would be decades of international dispute between Korea and Japan?

Despite numerous attempts made during the drafting process to convince the United States to define Dokdo as Korean territory, US diplomats ultimately declined Korea's request. US leaders also excluded Korean delegates from the Peace Treaty signing ceremony in San Francisco in 1951, thus depriving Korea of its final chance to argue its position.

The United States had originally intended to invite Korea to the signing ceremony as a means of extending international legitimacy to the newly created Republic of Korea, but on 19 July 1951, Dulles met the Korean ambassador to the United States and reversed his position. Dulles claimed that Korea could not be a signatory to the treaty because "only those nations in a state of war with Japan and which were signatories of the United Nations Declaration of 1942 would sign the treaty."

Dulles probably had some other motive for excluding Korea, because Vietnam, Laos and other nations that were not signatories of the 1942 UN Declaration were included in the ceremony. John Price has suggested that the United States wanted to exclude Koreans living in Japan from the property benefits that allied civilians would receive under the treaty, explaining that "Dulles suggested that many of these Koreans were undesirables, being in many cases from North Korea and constituting a center for Communist agitation in Japan." Because of their desire to expel these Koreans from Japan, the United States and Japan agreed to prevent Korean delegates from signing the treaty.

A review of this early Cold War history reveals that the US approach towards Dokdo's sovereignty was based on geopolitical considerations rather than on an examination of Dokdo's history. US diplomats did not want to

shut the door on the possibility of using Dokdo for US military needs and had a substantial interest in having the San Francisco Peace Treaty signed quickly, to limit the possibility that Japan or Korea might fall under the Communist sphere of influence. These diplomats may also have realized the value of creating a buffer zone as well as a wedge issue between Japan and Korea, for insurance in the event of the collapse of the Korean government.

The decision to exclude any reference to Dokdo in the territorial clause of the San Francisco Peace Treaty was not based on an assessment of historical claims to Dokdo, but rather on the dynamics and tension of the emerging Cold War. Because these geopolitical considerations dominated the drafting of the ultimate text of the Treaty, and because the final Treaty text makes no reference to Dokdo, the Treaty cannot be viewed as a factor in determining sovereignty over Dokdo.

Also significant is the recognition that the final text of the Treaty was not designed to be comprehensive, and was not intended to resolve all disputes, but was written in a short form in order to enable Japan to consolidate itself against Communist threats, and to allow the United States to focus on the defense of the Korean peninsula from the Communist military activity. The omission of any reference to Dokdo cannot, therefore, be viewed as creating an ambiguity, because the Treaty did not purport to address all controversies.

3.7 *Events Subsequent to the 1951 San Francisco Peace Treaty*

Because the textual clause of the Peace Treaty makes no mention of Dokdo, the events that followed in the years after its signing are not "interpretive" evidence under Articles 32 and 33 of the Vienna Convention on the Law of Treaties. But these subsequent events are still of interest with regard to Dokdo's sovereignty, and the decisive and consistent actions taken by Korea to consolidate its possession of Dokdo certainly support Korea's claim of sovereignty over these islets.

The status of Dokdo remained controversial after the Peace Treaty was signed in September 1951. Five months later, on 18 January 1952, Korean President Syngman Rhee issued a presidential proclamation that created the "Peace Line," a territorial boundary averaging 60 miles off the coast of Korea, which explicitly identified Dokdo as a Korean territory. Japan protested this Peace Line and declared that it did not recognize Korea's claim to Dokdo.

Several months later, Japan issued a tacit protest through the US-Japan Security Treaty, which had designated Dokdo as an area for US military training. After receiving a similar protest from the Korean government, the US military announced on 27 February 1953 that Dokdo would be excluded from its training area. The United States sought to avoid any direct involvement in

this issue, but did publicize Dean Rusk's 10 August 1951 Note to the Korean Ambassador in Washington, DC, when the question was raised in 1953, and stated then that "[w]e have publicly declared our view that this Island belongs to Japan, but no one in Japan or elsewhere seriously expects US to take military action under the [US-Japan] Security Treaty to reclaim this Island for Japan." In May 1954, citizens of both Japan and Korea, under the protection of patrol boats from their respective governments, landed on Dokdo and proceeded to erect signs claiming sovereignty while dismantling the signs erected by the other nation.

3.7.1 1954–1965

After Korea erected a lighthouse on Dokdo in August 1954, the nature of the situation changed. With Korea physically possessing the island, Japan increased its mode of protest and in September 1954 proposed that the matter be submitted to the "authoritative" International Court of Justice (ICJ), but Korea rejected this proposal.

Between 1952 and 1960, Japan sent 24 notes to Korea on the Dokdo matter and Korea responded with 18 notes back to Japan. The matter was also raised again through diplomatic channels during the protracted negotiations that led to the signing of the 1965 Korea-Japan Treaty, but because of Korean resistance on this issue, from 1957 when the talks were resumed until the signing in 1965, the Dokdo problem was never adopted as an official agenda item, to be recorded in the minutes. There is absolutely no direct reference to Dokdo in the various documents of the Korea-Japan Treaty signed in 1965. Originally, Japan thought of writing down the problem in the Treaty or failing that, as planned in advance, in the instruments to be exchanged agreeing to take the case to the ICJ. However, the Korean side rejected both plans by arguing that Dokdo could not become an agenda item as it was Korea's inherent territory.

Korean Ambassador Jae-hee Oh, who was involved in these negotiations, explained that on the day scheduled for the signing of the 1965 Normalization Treaty, Japan offered language to be inserted in the dispute-resolution protocol that would say "Disputes such as Dokdo/Takeshima shall be resolved through a conciliation procedure." The Korean negotiators refused to consider this insertion. After an awkward hour had passed, the Japanese Prime Minister agreed to take out the reference to Dokdo, and the treaty was then signed.

According to the Japanese view of the negotiations, the general language that remained in the agreement covering all disputes, which says that they are to be resolved "through arbitration in accordance with the procedure agreeable to both countries," preserves their position on Dokdo. But Korea has rejected the idea that Dokdo is covered by this side agreement, referring to this

notion as "a far-fetched construction of the instruments," with Korean Foreign Minister Lee Dong-won stating that "since Takeshima/Tokdo was not an object of dispute, it could not be covered by the exchange document." Korea's position has always been that Dokdo is inherent Korean territory, and thus that the island cannot be viewed as an issue either in the treaty or before the ICJ.

3.7.2 Since 1965

In the decades that followed the 1965 Normalization Treaty, "Korea and Japan sought to avoid the controversial issue of Dokdo, with each side maintaining its own position on the matter." Japan stepped up its rhetoric in the mid-1990s, claiming an exclusive economic zone in 1996 and asserting its claim to Dokdo repeatedly. In 1999, Korea and Japan established a provisional fishing zone in the East Sea, which includes Dokdo, but this agreement was unpopular in Korea, and the Korean government "has unilaterally refused to promote the joint regulatory measures that had been agreed upon." On 26 February 2005, Japan's Shimane Prefecture promulgated "Takeshima Day," further exacerbating relations between the two countries. But Korea's possession of Dokdo has continued and has been unchallenged except through verbal protests. This long period of effective occupation, especially when coupled with Korea's strong historical claim to Dokdo, provides substantial support for Korea's claim of sovereignty over these islets.

Article 32 of the Vienna Convention on the Law of Treaties discourages the use of the negotiating history (*travaux preparatoires*) of a treaty to provide meaning to the Treaty unless the treaty's language "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable," but Article 31(3) allows evidence of the subsequent actions and agreements of the parties to be examined to provide guidance regarding the understanding of the treaty's terms. Relevant subsequent activities would seem to include the actions of Korea in gaining possession of Dokdo by 1954, the protests of Japan since then and the events surrounding the 1965 Normalization Treaty. The consistent approach of the ICJ and other international tribunals examining sovereignty disputes has been to focus on actual demonstrations of effective control, particularly in the past century. Korea's possession since the early 1950s would provide substantial support for Korea's claim to sovereignty to Dokdo. Japan's protests provide some support for Japan's claim, but a tribunal adjudicating this matter would have to determine whether they are adequate. Japan's willingness to enter into the 1965 Normalization Treaty with Korea without any reference to Dokdo would serve to undercut Japan's claim and could be viewed as having acquiesced to Korea's sovereignty, particularly

if a tribunal were to contrast this action by Japan with its refusal to normalize relations with Russia until the Northern Territories dispute is resolved.

The formal rules of interpretation found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties thus appear to support Korea's position on Dokdo. The 1951 San Francisco Peace Treaty makes no mention of Dokdo, and so an international tribunal would likely take that on face value, and conclude that the Peace Treaty has no relevance to Dokdo. If, on the other hand, the tribunal were to conclude that the Peace Treaty's failure to mention Dokdo creates an "ambiguity," then the tribunal could examine the *travaux preparatoires*, in which case it would find further ambiguity in the conflicting drafts and notes pointing in different directions. Perhaps the most important pre-1951 document is SCAPIN No. 677, which separated Dokdo from Japan, as well as SCAPIN No. 1778, authorizing bombing operations in and around the island. As one Korean scholar has explained, "because SCAPIN No. 677 specified that Dokdo was Korean territory, the Treaty of Peace with Japan would have had to explicitly overturn this stipulation in order to supersede the original designation."

If a tribunal were then to look at the subsequent events, as it is authorized to do under Article 31(3), it would probably focus on the actual Korean occupation of Dokdo and the Japanese acceptance of the 1965 Normalization Treaty without any reference to Dokdo, both of which provide support for Korea's position. Japan's protests are not irrelevant, but they would probably not be viewed as sufficient to overcome the acquiescence evidenced by the 1965 Treaty and Korea's continued occupation of the island.

4 International Legal Issues Arising from a Divided Nation

4.1 *Introduction*

Though Korea was liberated from Japanese colonialism at the conclusion of World War II, the Korean peninsula was in a precipitous state which eventually saw the division of the country. The immediate post World War II environment saw the rise of the Cold War period which pitted the Soviet Union and China against the United States in Northeast Asia. Following Japan's retreat, the US occupied Korea from 1945–1948, with objectives of "imposing their own vision of modernity … based on democratic principles, promoting Korean culture and nationalist ideology, and, most important, establishing a Korean political system compatible with the pursuit of America's international objectives." Finally, in August 1948, the Republic of Korea was established;

and although US troops were originally scheduled to depart in mid-1949, Korea ended up under US military influence following the Korean War.

While the Korean War was technically a civil war, not only was it fought out with foreign participation on both sides but it was also the first war fought under the flag of the United Nations. Estimated casualty for Korea is some 46,000 deaths and 100,000 wounded, while the figure for North Korea ranges around 215,000 killed, 303,000 wounded and over 101,000 captured or missing. The Chinese are estimated to have lost 400,000, 486,000 wounded, and over 21,000 captured. Still many more from other countries were killed, wounded or missing. Beyond these military casualties, the Korean War was one with the highest percentage of civilian death in any wars of the twentieth century with the lowest estimate at above two million. The war ended on July 27, 1953 with the signing of the armistice by the military commanders of both sides which sought to "insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved ..." That settlement has yet to be achieved. This armistice agreement recognized a Demilitarized Zone separating the two states at roughly the same shared boundary that had existed prior to the war.

Little progress has been made in negotiating future status between the two Koreas, because they are still technically at war and are deeply divided about many topics. Because many Koreans view reunification as inevitable, and thus do not accept the legitimacy of "two Koreas," it is difficult to examine the border from a dispassionate objective stance. But the Korean people have been divided into separate kingdoms and competing regions during many historical epochs, and it is possible that the current division of the Korean peninsula will continue. It is useful, therefore, to examine the international legal issues arising from a divided nation as means of reducing one area of tension between the North and South.

Is North Korea now a legitimate "state" or a rogue entity without international status? The constitutions of both North and South Korea each stipulates that it is the sole legitimate government for the entire Korean peninsula, and each has tried to envelop the other. The South's strategy in recent years has been to achieve unification gradually, by a policy of "construction first and unification later." By developing faster than the North, the South sought to become strategically more important to the world. The North, on the other hand, has proposed a confederated government, but the confederation "hinged on the complete change of the political and legal order of the ROK [Republic of Korea], which was tantamount to calling for the surrender of the ROK." These diplomatic strategies were reflected in the North and South's respective attempts to become members of the United Nations. The South wanted its own seat, while the North wanted a rotating seat shared by each nation. Neither country

supported the other's proposal, and each application was vetoed year after year by the ally of the other Korea on the Security Council. Finally, when it became clear that Korea was going to pursue a UN seat on its own, North Korea acquiesced and applied for separate membership to the United Nations as well, and on September 17, 1991, both North and South Korea were accepted separately as member nations of the United Nations.

Following UN admission, President Roh, Tae-Woo orchestrated North-South High-Level Talks and signed the Basic Agreement on Reconciliation, Non-Aggression, and Cooperation of Exchanges. In that agreement, signed December 13, 1991, the two parties recognized the existence of each other's governing bodies, acknowledged each other's different systems, and recognized each side's autonomy in domestic affairs, without recognizing each other as independent states.

Later, during the Sunshine Policy of President Kim, Dae-Jung, who was elected on December 18, 1997, the Korean government encouraged other nations to establish diplomatic ties with both North and South Korea, and today most countries have diplomatic relations with both Koreas. Realistically, therefore, the two Koreas have to be treated as separate international "states."

4.2 *International Law Issues Related to 'Korean War'*

4.2.1 UN Security Council Resolutions

On June 25, 1950, an armed conflict occurred on the Korean Peninsula when North Korea launched an armed attack against South Korea. When armed conflicts broke out, the United Nations, by immediately calling the Security Council, determined that the North Korean armed attack by forces on the Republic of Korea constituted a breach of the peace (UNSC Res. 82 (1950)) and adopted a resolution to recommend all members to furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area (UNSC Res.83 (1950)).

In particular, the UN Security Council resolution adopted on July 7, 1950 (UNSC Res.84) further recommended that all members provide military forces and other assistance to make them available to Unified Command under the United States of America. In accordance with this resolution, 16 member states dispatched assistance armed forces and 5 member states sent medical support units. As the North was driven back over the 38th Parallel by the Allied forces with Korean and US troops which reached Yalu River, Chinese forces crossed the border between China and North Korea and engaged in combat with a massive force in October 1950.

This armed conflict addresses various legal issues under international law. One of the important and fundamental legal issues under international law is related to the legal characteristic of the armed conflict. This armed conflict

is often called the 'Korean War,' however, there are different views about its legal characteristic. While some regard it as an inter-state war under international law, while others refer to the armed conflict as a civil war because they do not view the relation between South Korea and North Korea as two separate states.

The latter view was argued by North Korea whose intention was to make the intervention of the UN illegal. The member states, which entered the war based on the UN resolutions view their acts as part of enforcement measures taken by the UN to repel North Korea's aggression. Also, there is another view that it was a civil war until the UN Allies and the Chinese forces joined, however it escalated to a war at the international level with the intervention from outside.

The applicability of the rules of engagement depends on how the armed conflict is to be legally defined. In case of a civil war, the law of war under international law basically does not apply, and the captured soldiers during the armed conflicts of the member states that participated based on the UN resolution are not deemed as prisoners of war (POWs), but criminals under domestic laws.

When the armed conflicts broke out, South Korea and the North Korea were not parties to the four Geneva Conventions of 1949. The two Koreas, however, recognized applicability of the Geneva Convention relative to the Treatment of Prisoners of War to the armed conflict. Moreover, the two Koreas mutually recognized the applicability of the Convention (IV) respecting the Laws and Customs of War on Land of 1907, which is generally known as the "Hague Law."

This armed conflict came to be ceased on July 27, 1953 by the Armistice Agreement ("Korean Armistice Agreement between the Commander-in-Chief, United Nations Command, on one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, Concerning a Military Armistice in Korea").

This Agreement was signed by US General Mark W. Clark as Commander-in-Chief of the United Nations Command, the North General Commander, Kim, IL Sung and Chinese General Commander Peng Dehuai. This Agreement was drawn up equally in English, Korean, and Chinese all as authentic texts. The title of the Agreement in Korean is truce agreement whereas the title in English is armistice agreement. While opinions are divided over the legal characteristic of this agreement, it is generally understood as truce agreement in view of its substantive contents.

The question of identifying contracting parties to the agreement is also an important legal issue. North Korea contends that only North Korea and the US are the actual parties to the agreement on the grounds that it was signed by the

US General and the UN forces that were actually made up of the US military. This contention is understood as a political intention to limit North Korea and the US the concerned parties in the course of converting armistice agreement to peace agreement.

The prevailing scholarly view in Korea holds that the parties to the agreement include Korea and the 16 UN Member States along with China and North Korea as the US General's signed the agreement in a representative capacity of all 16 member states that participated in the armed conflict based on the resolution adopted by the UN Security Council. Others views on the matter include the UN, North Korea and China as the only contracting parties or otherwise, to include the UN, North Korea, China, and South Korea as the contracting parties.

The so-called 'Korean War' still poses many other legal issues such as its effect to the status as a traditional neutral state, legal meaning of a long-standing ceasefire, that is, whether the war (if it was a 'war') was terminated without the conventional peace treaty or whether the peace treaty is needed to terminate the war, repatriation of prisoners of war, responsibilities under international humanitarian law on civilian massacre committed during armed conflicts, excavation and transfer of remains of war dead.

4.2.2 Korean Armistice Agreement

When North Korea invaded South Korea on June 25, 1950, it was clear from a legal standpoint that a war had begun between the two nations. Large-scale hostilities in the peninsula lasted for three years and ended when the Korean Armistice Agreement was signed in 1953. The parties agreed to hold another conference at a later date to finalize a peace agreement and to abide until that time by the terms of the Armistice. Since the parties have thus far failed to finalize a peace settlement, the effect of the Armistice on the legal status of the conflict, and the applicability of the laws of war, are ambiguous.

The title of this agreement is "The Armistice," but many documents used the term "truce" and "cease-fire" as well throughout the negotiation. For example, a United Nations document written in a meeting in July 1951 used the expression "concrete arrangements for a cease-fire and armistice in Korea." The document named "Memorandum by the counselor Bohlen to the Secretary of State" written in October 1951 used the expression "truce talks." The Commander in Chief of United Nations Matthew B. Ridgway even used those three words without distinction. It is difficult to distinguish among those three terms and especially truce and armistice are almost used as a synonym.

Armistice is stipulated in Law and Customs of War on Land 1907 and Regulations concerning the Laws and Customs of War. Regulation Chapter 3

(Flags of Truce) utilized truce as the procedure to initiate negotiation while Regulation Chapter 5 (Armistices) utilized the armistice as the actual commitment of suspending the hostilities. Armistice, therefore, traditionally means suspending hostilities temporarily and provisionally, so that it cannot have an effect to put a termination to the war itself. Actually, the aforementioned treaties have the implications of a possible resumption of hostilities. Many scholars have defined the legal status – at war – of the Korean Peninsula based on this traditional approach of the armistice.

The Commander in Chief of the United Nations, Matthew B. Ridgway, sent a message about peace talks on June 30th in 1951. China and North Korea promptly replied that the central party allowed the suspension of the hostilities to occur and held a peace-making negotiation. This is an example of China and North Korea intentionally interpreting such an agreement to exceed the spectrum of the traditional approach of the armistice.

The preamble sent from the Commander in Chief, Ridgway to Chairman of the Joint of staffs of the United States stated, "A mutually agreeable agreement may be reached on the military terms for terminating the armed conflict in Korea." The objective of United Nations forces stipulated "a cessation of hostilities in Korea, an assurance against the resumption of fighting."

Also, the draft statement of policy proposed by the National Security Council on United States Objectives and Courses of Action in Korea stipulates that the United States objected to "terminate hostilities under appropriate armistice arrangements." Security Council also mentioned that it "Notes with approval the conclusion of an armistice in Korea and expresses its profound satisfaction that hostilities have been brought to an end on terms acceptable to the UN." Therefore, the Korean Armistice Agreement aims to complete the suspension of hostilities and arms conflict in Korea.

This is the point that can be distinguished from the traditional approach of the armistice. In other words, armistice perceived in traditional approach provides the room where hostilities may under certain prerequisites resume, whilst emerging views do not. The United Nations may have thought a completely new war be waged if the Communist Chinese army got a large-scale attack in violation of the armistice.

Furthermore, article 2(6) of South Korean criminal law stipulates that time at war is the duration of the declaration of war or taking hostilities against counterpart until the establishment of truce. Article 77 of the Constitution stipulates that President can declare martial law in cases of national emergency, but the previous presidents of many generations have not done so on usual circumstances. Consequently, it is not clear whether the current legal status of the Korean Peninsula is in a state of war or not. Anyhow, continuous tension in the Korean Peninsula has interfered with building peace regime.

4.2.3 The Inter-Korean Basic Agreement

It is unparalleled in history that the status which neither war nor peace continued for more than 60 years. The Korean Armistice Agreement in 1953 had made the war ended and then the Inter-Korean Basic Agreement on Reconciliation, non-Aggression, and exchanges and cooperation between the North and South in 1991 intended the peacebuilding in Korean Peninsula.

A joint declaration by North and South Korea in 1974 stated that Korea should pursue peaceful reunification and democratic system without interference by the third party. Inter-Korean Basic Agreement is the process towards peaceful reunification which is accomplishing the ethnic reconciliation through removing the state of political and military confrontation, avoiding armed aggression and hostilities, reducing tension, and ensuring peace.

The 25 clauses of the Inter-Korean Basic Agreement are subject to three categories that are reconciliation, non-aggression and exchanges and cooperation between two Koreas: firstly regarding reconciliation, to recognize and respect each other's system, not to interfere in each other's internal affairs and to transform the present state of armistice into a solid state of peace, and secondly regarding non-aggression, not to use force against each other and to resolve disputes peacefully through dialogue and negotiation and lastly regarding exchanges and cooperation, to promote free intra-Korean travel and contacts and to reconnect railroads and roads.

The way the agreement was adopted towards peaceful reunification is evident in the term "special interim relationship" of the Preamble in the Inter-Korean Basic Agreement. It means that the Korean questions are distinguished from other international relations issues in terms of ethnic unity and reunification.

But so far, the Supreme Court and Constitutional Court of South Korea have consistently denied the legally binding force of the Inter-Korean Basic Agreement with many reasons, for example, as a gentleman's agreement, intentional prevention of binding force upon draft, or the lack of domestic process for ratification.

North Korea also changed its approach to the agreement by denying the agreement's legally binding force. North Korea made a declaration nullifying the Inter-Korean Basic Agreement and its annex agreement related to NLL. It claimed that South Korea did not implement the June 15th declaration and October 4th declaration properly. It is unorthodox for the North and South to maintain the denial of the document's legal force while both Koreas had agreed on the form of a document about rights and obligations toward peaceful reunification.

Also, there are arguments that the Inter-Korean Basic Agreement needs to be ratified under the Constitution of South Korea article 60, paragraph 1. An

agreement of ratification in the National Assembly should be distinguished with the legally binding force of the Inter-Korean Basic Agreement. Even if the Inter-Korean Basic Agreement needs to be ratified in the National Assembly, reporting it in National Assembly makes it effective based on practice. Some argue that the Inter-Korean Basic Agreement is more likely an agreement in a simplified form such as an executive agreement in the United States.

Overall, both Koreas recognize each other as the enemy and special interim relationship at the same time. Therefore, atmospheres in Korea have frequently changed from intention to friendship and *vice versa*.

4.3 *International Law Issues Related to Reunification of Korea*

4.3.1 North Korea's Legal Status in the Republic of Korea

North Korea seems to fulfill four criteria for statehood stipulated in Article 1 of Convention on Rights and Duties of States of 1933, commonly known as Montevideo Convention. Also, North Korea joined international organizations such as the United Nations which confines its membership only to a state. As North Korea establishes diplomatic relations and concludes treaties with other states, it undoubtedly exists as a state under international law. However, the domestic law of the Republic of Korea does not recognize North Korea as a state within the meaning of international law.

The Korean Constitution stipulates in Article 3 that the territory of the Republic of Korea shall consist of the whole Korean peninsula, thereby including North Korea. This provision reflects the legal position of South Korea that only one state exists on the Korean peninsula. From the perspective of South Korea, it succeeded its legitimacy as a state from the Provisional Government of the Republic of Korea and there exists only one state in the whole peninsula of Korea.

Therefore, according to the Korea's jurisprudence, "no governmental organization that is in conflict with the sovereignty of the Republic of Korea shall be recognized" (Supreme Court's Ruling, September 28, 1961). From this perspective, North Korea is considered to be an anti-government organization or insurrection group. Several court cases confirmed such status of North Korea under Korean domestic law.

This legal position that North Korea is merely an anti-government organization and that the entire area of North Korea belongs to a territory of the Republic of Korea leads to following logical consequences: first, while the laws of the Republic of Korea obviously have the effect over North Korea, they are merely not applicable or executable at the moment; second, the North's aggression on June 25, 1950 is just a local riot, thereby leaving no room for the law of war to be applied; third, North Korean soldiers are not combatants of enemy

states so that they cannot be treated as prisoners of war, rather they should be punished in accordance with the domestic criminal law; forth, North Koreans are obviously people of the Republic of Korea, so those who come to the South are recognized as Korean nationals without the naturalization process; fifth, literary works created in North Korea are protected by the copyright law of the Republic of Korea. These are all confirmed by the court cases of the Republic of Korea.

South Korea and North Korea respectively became a member state of the United Nations at the same time in September, 1991. This fact raised a legal question of whether the Republic of Korea recognized North Korea as a state because only a state is qualified to become a member of the UN. In addition, South Korea and North Korea signed the 'Agreement on Reconciliation, Non-aggression, and Exchanges and Cooperation between the South and the North' (Inter-Korean Basic Agreement) on December 13, 1999.

As this Agreement is similar with a treaty in terms of its formality, some argue that the agreement is legally binding as a treaty. If the Republic of Korea does recognize the North's capacity to conclude a treaty, an issue will arise as to whether such recognition is equivalent to the recognition of North Korea as a state. Since then, the two Koreas held a summit meeting and adopted the joint communiqué along with the four addenda on economy. Furthermore, a great number of agreements were adopted between the South and the North including the Inter-Korean Shipping Agreement of 2004.

The domestic court decisions of the Republic of Korea confirm that the simultaneous joining of the multilateral treaty such as the UN Charter does not mean the South's recognition on the status of the North as a state. It is also inferred from the court cases that agreements made between the South and the North are not treaties, but rather have a character equivalent of communiqué or gentlemen's agreement, having no effect on the legal definition on the status of North Korea as anti-government organization as defined in Korean legal system.

The Korean Constitution stipulates in Article 4 that the Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.

Cooperation with the North is indispensable to peaceful unification. In Inter-Korean Basic Agreement of 1991, the two Koreas defined the South-North relation, "not as one that is between the two nations, but rather as a special one that has been formulated during the process aiming at unification," and pledged to "jointly press ahead with achieving peaceful unification." Reflecting this situation, the recent decisions of the Supreme Court or the Constitutional Court of Korea recognize the double status of North Korea both as a partner

for dialogue and cooperation for the peaceful unification of the country as well as an anti-government organization aiming to subvert the Republic of Korea.

4.3.2 The Two Korea's Joining the UN and the Issue of State Succession

Both South and North Korea tried to join the United Nations for a long time, but it was not realized due to vetoes by the Security Council member nations that support South Korea and North Korea respectively. With the end of the Cold War by the collapse of the Soviet Union, both South and North Koreas finally became member states at the same time of the UN on September 18, 1991.

According to Article 4(1) of the UN Charter, it limited its members to peace-loving 'states.' Thus, it raises the question of whether a certain country's being a member of the UN means the collective recognition of a state by the UN member states. The Republic of Korea does not recognize North Korea as a State, but rather sees it as an anti-government organization under the Korean domestic law. Also, there are UN member states including the US and Japan that do not recognize North Korea as a State. Conversely, North Korea does not recognize the Republic of Korea as a State, either. Thus, the issues of the status of the UN member states and recognition of a state were raised again by the simultaneous joining of the UN by both Koreas.

With regards to this question, there is a view that, theoretically, joining the UN effects recognition of states by all UN member states (for example, Kelsen). However, the practice under international law does not seem to be working in that way. In other words, recognition of states is a unilateral act of granting it by each state considering its own political situation, and so joining an international organization itself does not mean collective recognition of a state by all its member states, unless there is a special reason for it.

But, an argument that the member states who voted in favor impliedly gave recognition of a state unless they explicitly express reservations is being accepted as a convincing argument, and in fact, there are states that were recognized in that way (Japan's vote in favor for Mongolia and the Kingdom of Bhutan to join the UN). The two Korea's joining was unanimously approved by all 159 UN member states at that time without a vote at a general meeting of the UN, which means the US and Japan did not specifically express opposition to the North's joining and did not make reservation on the matter of recognition of a state, either.

This can raise a question of implied recognition of a state. However, it seems that the US and Japan do not treat North Korea as a state even after it joined the UN In that sense, it is difficult to say that the US or Japan recognized North Korea as a state by its UN membership. South Korea was not a member state to the UN at that time, and it did not have an opportunity to vote

for or against it. Even after the two Koreas' UN membership, South Korea's consistent practice shows that it did not recognize North Korea as a state, and *vice versa*.

4.3.3 Issues Related to Reunification of Korea

The most essential issue under international law relating to reunification of two Koreas is state succession. In particular, the succession of territorial border treaties that North Korea concluded with China and Russia is considered as important matters that act as a key variable in Northeast Asian security in the possible post-reunification era.

These matters are directly influenced by the process and the form of the unification. Solutions on various legal issues under international law will depend on answers to questions of whether unification would bring armed conflicts or it would be carried out by a peaceful means, and whether, in case of a peaceful unification, two Koreas would agree upon reunification on an equal footing or one side will absorb the other.

In case the two Koreas achieve reunification through a peaceful means on an equal footing, the matter of state succession would fall into the case of 'Uniting of States' in Article 31 of Vienna Convention on Succession of States in respect of Treaties of 1978 and Article 16, 29 and 39 of Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1983. South and North Koreas are not state parties to the Vienna Convention of 1978 and the Convention of 1983 is not in force. Also, there is a question regarding whether the provisions of these Conventions are established as customary international law. These provisions, however, will play a guiding role in state succession issues after reunification.

According to the Vienna Convention of 1978, South and North Korea respectively agreed to continue their commitments to the treaty even when they unify into one nation (Article 31(1)). Therefore, multilateral treaties to which the two Koreas are state parties and a number of bilateral treaties that both Koreas respectively concluded will continue in force in the unified Korea. However, when the unified Korea and other State parties otherwise agree, such treaties can be excluded in state succession (Article 31(1)(a)). Furthermore, in cases wherein it is apparent from the treaty that treaty application would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation, unified Korea may choose not to uphold treaties that each Korea concluded (Article 31(1)(b)). Treaties of a political nature, especially treaties of alliance, that South and North Koreas concluded are the examples of this provision, and it is highly probable that these treaties will not be succeeded. In case of state properties, archives, and debts, both South and

North's state properties, archives and debts deemed to pass to unified Korea in accordance with the provision of the Vienna Convention of 1983.

In case the South is absorbed to the North, or as a more probable assumption, the North is absorbed to the South, the German unification of 1990 can be one of the precedents and be referred to. The way applied to German unification, however, has not been established as customary international law. First of all, the framers of the Convention of 1978 viewed that Article 31 could also be applied to the case of absorption unification. However, the prevailing view is that this provision may not be applied to the absorption case for unification.

For an absorption unification, it is strongly argued that as far as treaties are concerned, the succession of treaties should be dealt with by applying the 'Principle of Moving Treaty Boundaries' prescribed by Article 15 of the Convention of 1978 as customary international law.

According to this view, the effect of North Korean treaties will be naturally extinguished and the South Korean treaties will be expanded to the territory of North Korea to take effect. However, treaty succession issues will not occur if, before the unification, North Korea decides to terminate its treaties. Similarly, there would be no issues if the other state parties in relation to North Korea decide to terminate their agreements. It is also possible for the unified Korea to discuss treaty succession issues with state parties that concluded treaties with North Korea and whether those treaties shall be succeeded or terminated.

For state properties, archives and debt, however, the provisions of the Uniting of States should be applied, rather than those of 'Transfer of part of the territory of a State' under the Convention of 1983 (Article 14, 27, and 37), since the whole territory of North Korea is to be absorbed into the Unified Korea.

Concerning boundary agreements, South Korea expressed its concerns regarding North Korea's boundary treaties with China and Russia and is contending that, after reunification, the Unified Korea should discuss the boundary issues of *Baekdusan* (*Mt. Baekdu*) with China. Similarly, South Korea proposes a discourse regarding the *Gando* Convention with Russia on the issue of *Noktundo*.

According to Article 11 of the Convention of 1978, however, it should be viewed in the way that the Unified Korea cannot disregard the treaties that North Korea has already concluded. Likewise, the Unified Korea has a succession obligation of territorial treaties that North Korea made with China and Russia regarding the use of the *Yalu* River (*Amnokgang*) or the *Tumen* River (*Doomangang*).

In case the two Koreas are reunified through a peaceful means on an equal footing, the Unified Korea is theoretically a new State. As such, it is deemed to be a new entity when joining international organizations. However, considering

the practice of the United Nations that the membership continues in such a case without a new membership in the organization, it is highly probable that the UN membership of the Unified Korea will be recognized in the same way as before.

In case of an absorption unification, the membership of all international organizations to which South Korea is a signatory will be maintained, but the membership of international organizations to which North Korea is a signatory should be specially dealt with: for example, North Korea can leave the organizations of its membership, South Korean may succeed North Korea's membership status through consultation with international organizations, and such. Since South Korea mostly joined the international organizations in which North Korea has membership, this issue is not considered a great concern.

4.4 *Human Rights Situations in North Korea*

4.4.1 From the Perspective of International Human Rights Law

It is difficult to get accurate information regarding the human rights situation in North Korea since it is a closed society. There are various sources, however, that provide reports of human rights violations in North Korea. According to the Annual Report of Amnesty International in 2012, North Koreans continue to suffer violations covering nearly the entire spectrum of their human rights. The biggest concern relating to North Korea's economic situation is the right to sustenance.

North Koreans are exposed to the danger of death by famine due to food shortages. Limited food is discriminately distributed according to social classes and regions. The right to adequate standard of living is also being infringed upon due to shortages of water and sanitary facilities. Additionally, the collapse of the North Korean medical system is causing a great predicament to the right of North Koreans to healthcare.

Individual freedom is seriously violated in all areas such as thought, conscience, religion, association, and expression. The North Korean government controls the flow of information and does not recognize free speech and expression. The nation infringes on rights on political freedom and censors the people's thoughts by operating many political prison camps. In these camps, human rights violations such as torture and forced labor are being committed on a daily basis. Capital punishment, which is related to the right to life, is also being conducted and public execution is carried out as well. North Koreans do not have a right to residence and movement and a private life is not protected. As to a personal liberty, the North Korean criminal procedure provides rules on arrest, imprisonment, and search and seizure, but there is no previous warrant system and laws and regulations are not generally observed.

The most serious problem concerning a right to equality among North Korea human rights issues is a classification system of North Koreans and discrimination in accordance with it. The people could be classified into three political groups: a "core class," a "wavering class," and a "hostile class" based on their origins and social status. The hostile class is poorly treated in every area of life including employment, education, residence and medical service. Cases of discrimination on the disabled proved to be serious, where their right to residence is restricted, and in particular, dwarves go through forced vasectomy and are separated from the public. There are many other human rights issues, such as severe punishment towards defectors, North Korean and Japanese abductees. There are also cases wherein South Korean Prisoners of Wars were not safely returned to South Korea.

Currently, North Korea is a state party to several important international human rights treaties including International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, and Convention on the Prevention and Punishment of the Crime of Genocide. It is needless to say that a system to implement these treaties will be an important means under international law to improve North Korean human rights situation. For example, North Korea submits reports required by each treaty to conform to a reporting system of these treaties.

North Korea once informed the UN Secretary-General of its withdrawal from the International Covenant on Civil and Political Rights on August 27, 1997. However, the nation went against its own withdrawal by submitting a regular report of ICCPR in March 2000. These reporting systems can have an effect on indirectly pressuring North Korea regarding its observance of human rights treaties.

However, North Korea did not accept the state-to-state Complaint of ICCPR (Article 4) and is not a party to the Optional Protocol to the International Covenant on Civil and Political Rights that prescribes the system of Individual Complaint of ICCPR. Furthermore, North Korea is not a state party to core treaties for the protection of human rights including International Convention on the Elimination of All Forms of Racial Discrimination (CEDAW), Second Optional Protocol to ICCPR, aiming at the abolition of the death penalty, Optional Protocol to CEDAW, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Optional Protocol to CAT, Optional Protocol to CRC on the involvement of children in armed conflict, Optional Protocol to CRC on the Sale of Children, Child Prostitution and Child Pornography, Convention on the Rights of Persons with Disabilities

(CRPD), Optional Protocol to CRPD, International Convention for the Protection of All Persons from Enforced Disappearance. This is a major factor limiting the improvement of North Korean human rights through international human rights treaties.

Since North Korea is a member state of the UN, its mechanisms for human rights protection can be useful means to improve North Korea's human rights situation. The UN Commission on Human Rights (UNCHR), a subsidiary body of the UN Economic and Social Council, which substituted the Human Rights Council, has been passing a resolution every year on North Korean human rights since 2003 when it first adopted a resolution on it. Also, the UNCHR passed a resolution in March 2012 with the title "Human Rights Situation in the Democratic People's Republic of Korea," which contains determination, urging, and a request (A/HRC/RES/19/13, 3 April 2012).

In addition, the UNCHR appointed Vitit Muntarbhorn as Special Rapporteur on the situation of North Korean human rights. He submitted reports twice to the UNCHR which functioned as a basis for resolution on North Korean human rights in General Assembly of the UN.

A national report system for the universal periodic review of the UN Human Rights Council can certainly contribute to the improvement of the human rights situation of North Korea. By submitting a report on human rights, North Korea may put effort into improving its human rights conditions. Also, through the mechanism of the universal periodic review, other countries can raise questions on North Korean human rights conditions, which can indirectly lead to North Korean efforts in improving human rights conditions.

Since 2005, the UN General Assembly has brought up an agenda on the North Korean human rights issue and adopted a resolution by voting. The resolution adopted most recently expresses serious concern at the persistence of continuing reports of systematic, widespread and grave violations of civil, political, economic, social and cultural rights in the Democratic People's Republic of Korea, and passed a resolution urging an immediate end to human rights violation, protection of its people and punishment of the person in charge of human rights violation, implementation of human rights related recommendations by the UN, in cooperation with the international community for human rights improvement and consideration for joining Conventions relating to human rights.

These resolutions reflect international communities' interests and concerns towards the North Korean human rights condition and can amount to pressure towards the North Korean authorities. North Korea, however, is responding with criticism to resolutions related to North Korean human rights passed by Human Rights Council or the UN General Assembly. The State

remains uncooperative in activities of the Special Rapporteur or Office of the High Commissioner for Human Rights.

4.4.2 North Korean Human Rights Act

Under Article 3 of the Constitution, it is possible to construe North Korean residents as natural citizens of South Korea, and the position of judicial precedents is concurrent. According to the reports submitted by international organizations including United Nations and other related transnational civil society groups on the human rights situation in North Korea, North Koreans are systemically repressed of their basic rights including civil and political rights as well as economic and social rights such as access to food, medicine, and other necessities.

Ironically, North Korea is a signatory state of five major international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

However, the signing of treaties remained as a mere ritual without sincere motivations or concrete actions. The implementation of the five treaties in North Korea is still open to question. So far, the results of tangible domestic practices have been vague. Furthermore, while North Korea has adopted or amended a number of domestic legislation consistent with the ratified human rights conventions especially in the areas of criminal law, criminal procedure and gender equality, it would appear to be on paper rather than in practice.

For over ten years, the United Nations General Assembly and the Human Rights Council have adopted resolutions aimed at addressing North Korea's gross human rights violations. The UN Special Rapporteurs, appointed to examine the situation of human rights in North Korea, have also called for the international community to pay greater attention to the worsening human rights conditions in the region. Despite the efforts made by the international community, the North Korean regime has been refusing to comply with the UN human rights mechanisms. It is argued that the North Korean case is one of the few that remains as an affront to the accountability norm. However, with the exception of North Korea, holding states accountable and punishing individuals responsible for massive human rights violations have become the rule in the international community with the development of international criminal law.

In this respect, it is noteworthy that there has been dramatic progress since the Commission of Inquiry was established by the Human Rights Council based on the recent resolution adopted in March 2013. The Commission intensively

investigated the situation in the region, with a view to ensuring full accountability in particular for violations that may amount to crimes against humanity. The COI completed its mandate by presenting a 400-page final report to the HRC in March 2014. The Commission confirmed that most of the human rights violations committed in the North and those that continue to take place in North Korea amount to crimes against humanity and recommends the international community to address the human rights situation in North Korea by taking actions based on the principle of Responsibility to Protect, including Security Council's referral of the case to the International Criminal Court or the establishment of an *ad hoc* international criminal tribunal.

In the same vein, South Korea adopted the North Korean Human Rights Act on March 3, 2016, and enforced on September 4, the same year. The Act intends to protect and promote the full enjoyment of human rights and fundamental freedoms of North Koreans by laying the institutional foundation to draw up and carry out consistent and systematic North Korean human rights policies. Overall, the purpose of this Act is to contribute to the protection and improvement of 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 conventions on human rights as stipulated in Article 1 of the Act.

In addition to efforts to protect and promote the human rights of North Koreans, this Act highlights that the State shall also endeavor to improve North-South relations and to establish peace on the Korean Peninsula. At the same time, the Government shall promote inter-Korean human rights dialogue on important matters for the improvement of human rights in North Korea based on Article 7. In order to provide advice on policies related to the improvement of human rights in North Korea, there is hereby established a North Korean Human Rights Advisory Committee in the Ministry of Unification.

In providing North Korean authorities or agencies with any humanitarian assistance for North Koreans to promote human rights in North Korea, the State shall endeavor to ensure that the following matters are complied with, firstly assistance shall be delivered transparently under internationally recognized delivery standards and secondly, assistance shall be provided preferentially for vulnerable social groups, such as pregnant women and infants.

Furthermore, to investigate the actual status of human rights in North Korea and to engage in research, policy development, etc. related to the improvement of human rights in North Korea, including inter-Korean dialogue on human rights and humanitarian assistance, the Government shall establish a North Korean Human Rights Foundation based on this Act. It, however, has not been set-up until today. Lastly, to collect and record information on the status of

North Korean human rights and information for the improvement of human rights in North Korea, there is hereby a Center for North Korean Human Rights Records in the Ministry of Unification based on Article 13.

4.5 *Maritime Order with North Korea*

4.5.1 Northern Limit Line

The United Nations Command and the North Korean army established a Military Demarcation Line on land at the time they signed the Inter-Korean Armistice Agreement on May 27, 1953, but did not extend it into maritime areas. The seaward extension, which became known as the Northern Limit Line (NLL), was drawn by UN Commander General Mark Clarke on August 3, 1958, and is a line that is roughly equidistant between the North Korean coastline and five tiny South Korean islands (*Paengnyongdo*, *Taechongdo*, *Sochongdo*, *Yongpyo-Yolto*, and *Udo*, which, taken together, contain five square miles of land) that hug the North Korean coast but are controlled by and claimed by South Korea.

Its purpose was to prevent a clash between military vessels and aircraft of both sides, and seems originally to have been designed to prevent South Korean naval vessels and aircraft from going north. It has been challenged by North Korea ever since, because it was declared unilaterally and because North Korea views the line as an infringement on its sovereignty and its legitimate access to the sea. Because the NLL is not mentioned in the Armistice Agreement itself, its status and that of the waters around it remain contentious.

South Korea acknowledges that the NLL declaration was not officially part of the agreement that marked the cessation of hostilities between the two countries, but argues that the NLL has become the *de facto* border because (1) North Korea did not object to the NLL until October 1973; (2) North Korea implicitly recognized the NLL several times; and (3) the 1991 Basic Agreement stipulates (in Article 11) that "the South-North demarcation line and areas for non-aggression shall be identical with areas that have been under the jurisdiction of each side until the present time" and that the Protocol on Non-Aggression states (in Article 10) that "the South-North sea non-aggression demarcation line shall continue to be discussed in the future. Until the sea non-aggression demarcation has been settled, the sea non-aggression zones shall be identical with those that have been under the jurisdiction of each side until the present time."

South Korea thus argues that the NLL cannot be unilaterally challenged or discussed except in a comprehensive agreement to bring permanent peace to the Korean peninsula, and South Korean conservatives view alterations to the NLL as a violation of the Korean Constitution which requires the government to maintain the integrity of the nation's borders.

South Korean resistance to creating a joint development zone encompassing territory on both sides of the NLL is based partially on the concern that such an agreement would nullify the line and cede territory to North Korea. The United States concurs that the 1992 Basic Agreement between North and South Korea stipulates that both Koreas must respect the line until a new agreement can be reached.

North Korea counters that when the NLL was drawn, the UN command did not inform Pyongyang, which neither acknowledged nor accepted it. It argues that the NLL illegally restricts its access to the open sea and should be redrawn further to the south to more closely reflect the land demarcation between the two countries.

North Korea asserts that it has challenged the line on many occasions during the past 55 years, particularly as the value of the blue crab catch in the area has become more apparent. It also argues that its vessels have regularly fished in the waters claimed by the South, and that since March 1955 it has claimed under customary international law a 12-nautical-mile territorial sea from its coast, which extends well south of the NLL. Because the NLL hugs the North Korean coastline, Pyongyang claims that it unfairly gives too much ocean space to South Korea.

4.5.2 The Armistice Agreement and International Maritime Law

To properly understand the waters of the Five Islands in the West Sea, one must re-recognize the Korea Armistice Agreement. The Armistice Agreement which regulates war and peace on the Korean Peninsula, is a product of the Korean War, but it is the way to end the war and move towards peace. The basic purpose of the Agreement is to prevent hostile acts and promote peace. It is stipulated in the Agreement that the Five Islands in the West Sea and the Han River estuary, unlike the Demilitarized Zone on land, are open for public access. We tend to forget this point.

The Armistice Agreement divides the border between the two Koreas into three zones: the DMZ, the Han River Estuary, and the Five Islands in the West Sea. The DMZ, defined as a military buffer zone that strictly controls civilian access and traffic, is facing directly against the Military Demarcation Line. On the other hand, the Han River Estuary does not have a Military Demarcation Line but is open to navigation by private vessels from both South and North Korea. However, the Military Armistice Commission and the UN Command have jurisdiction over ship registration and civil administration.

Moreover, the Five Islands in the West Sea have no military demarcation line or designated waters under the jurisdiction of UN Command. South and North Korea have only declared the principle of respect for territorial waters.

Therefore, in principle, vessels from third countries are allowed to use the waters in accordance with international maritime law unless they intrude upon territorial waters.

In principle then, just as South Korean fishing vessels can sail through the Yangtze River basin in China, it is also possible to enter the offshore area of the Nampo Sea of North Korea. Likewise, North Korean fishing vessels can also carry out fishing activities in Gyeonggi Bay of South Korea. According to the Armistice Agreement, South and North Korean fishing vessels can freely sail up and down and operate as long as they do not intrude the adjacent coasts. No one including UN Command, can interfere with such practice. The idea that a military demarcation line should be drawn in waters as it does on land, merely reflects the unconsciousness of national division. At the time the Armistice Agreement was concluded, the principle of freedom of the high seas ("*mare liberum*") was established under international law. Also, the UN Convention on the Law of the Sea, which stipulates 12 nautical miles of territorial waters and 200 nautical miles of the Exclusive Economic Zone (EEZ), was not in existence then. Therefore, it was impossible to even think of drawing a 'cease-fire line' separating the sea from the North and South.

However, North Korea, with its weak naval power, was not satisfied with the said principle of 'freedom of the high seas' and a '3 nautical mile' territorial waters. North Korea referred to a maritime military demarcation line from the beginning of the Armistice talks. After the Armistice Agreement was signed, the Military Armistice Commission also claimed an extension of the land military demarcation line or an extension of the Yellow Sea and Gyeonggi Islands as the maritime military demarcation line.

Since then, as the development of the international maritime law has led to the claim of a 12 nautical mile of territorial sea as well as a 200 nautical mile EEZ, North Korea has declared its Military Sea Boundary as well as a maritime border in the waters of the Five Islands in the West Sea. In response, South Korea also declared a 12 nautical mile territorial sea and a 200 nautical mile EEZ. South Korea has secured the Northern Limit Line as a maritime military demarcation line.

Thus, the waters of the Five Islands in the West Sea that overlaps the EEZ of the two Koreas have become an area of conflict and hostility. The original spirit of the Armistice Agreement, which incorporated the principle of the freedom of the high seas to be applicable for both South and North Korea to share its waters except for the 3 nautical mile territorial waters has now disappeared. Tensions in the West Sea eventually led to a series of military clashes between the two Koreas, starting with the Battle of Yeonpyong in 1999. We hope that South and North Korea will find a peaceful solution by upholding the spirit

of the Armistice Agreement. The solution is to identify a 3 nautical mile EEZ in the contiguous zone of the West Sea, and the seas beyond those areas should be used as shared waters for peace and cooperation by the two Koreas. It will be the first step towards a peace agreement on the Korean Peninsula.

4.5.3 Flexible Approach Needed for Maritime Delimitation of the Five Islands in the West Sea

The UN Convention on the Law of the Sea, signed in 1982, establishes a legal framework for all activities in the ocean, and establishes a maritime zone that can be claimed as territorial. The general rules for determining territorial waters are set out in Article 15, which states that the boundary between two countries is set as the median line. However, the Convention does not specify how the EEZ should be delimited. The delimitation of the EEZ between States with opposite or adjacent coasts is stipulated in Article 74, which states that "the delimitation … shall be effected by agreement on the basis of the international law … in order to achieve an equitable solution."

Accordingly, the laws and regulations related to the delimitation of a maritime boundary are generally developed and crystallized by the cases decided by international courts. In the case of maritime delimitation of the Black Sea between Romania and Ukraine in 2009, the International Court of Justice applied the so-called "three-step approach" to decide the maritime boundary. This approach is recognized as a common practice in delimitation of maritime boundary through subsequent rulings.

The 'three-step approach' consists of the following: first, setting the provisional equidistant and median line; second, considering whether there are factors that require adjustment of the equidistant line or median-line to achieve equitable results; and third, checking to make sure that the adjusted boundary does not produce unequal results due to the serious imbalance between the ratio of the length of each country's coastline and the ratio of the relevant sea area that will belong to each country.

What then would happen to the final delimitation of the maritime boundary of the Five Islands in the West Sea when applying this three-step approach? While it is not certain as to how the hypothetical medial line in the first step will be changed through the second and third stages and finalized at the end, this issue will be clarified if South and North Korea take the case to an international court. Even if the two Koreas try to resolve the dispute through bilateral negotiations, the three-step approach is likely to be invoked due to the predictability of the outcome.

However, the problem is that the waters of the Five Islands in the West Sea are not just a matter for South and North Korea, but it is an area where

the jurisdictions of three countries, Korea, China and Japan overlap to some extent. Any change in the legal status of the maritime order between South and North Korea could affect the establishment of the maritime order between South Korea and China, and North Korea and China, as no agreement on a maritime boundary has been made between these countries. Consequently, it is necessary to take a flexible approach to the traditional approach, which centered on securing jurisdiction and establishing maritime boundaries, and simultaneously seek ways to manage and find proper means of dispute settlement in the waters concerned.

The UN Convention on the Law of the Sea divides the sea into territorial waters, contiguous zones, EEZs, and international waters and functionally confers rights to coastal and non-coastal countries. The waters of the Five Islands in the West under national jurisdiction should be minimized. It is also important to seek ways to manage the water in an integrated manner while coordinating the interests of both South and North Korea.

Furthermore, except the North Continental Shelf Boundary Agreement between Korea and Japan in 1974, the current maritime order, which has no maritime boundary with neighboring countries, should be considered as a product of the dynamic relations between these neighboring maritime powers. In addition, if South Korea is to secure at least some leading position in the Korean Peninsula, it is critical that the maritime order between South and North Korea should be managed in a stable way.

It is necessary to raise awareness of marine spatial planning and utilization in the Five Islands in the West Sea in order to stabilize the maritime order on the Korean Peninsula and establish a peace regime through an accurate understanding of the maritime border as originated from the Armistice Agreement.

4.5.4 West Sea Special Zone for Peace and Cooperation between South Korea and North Korea

The Northern Limit Line (NLL), drawn up in the coastal waters of Incheon since 1953, has caused continuous military confrontations between the two Koreas for more than half a century. To reduce tensions and deter conflict over the NLL, an agreement to create a "Special Peace and Cooperation Zone in the West Sea" (West Sea Special Zone) in the coastal waters of Incheon was reached during the Second Inter-Korean Summit Meeting on October 2007.

Among other things, the Special Zone envisioned the creation of (1) a joint fishing and peace zone, (2) the Haeju special economic zone, (3) joint utilization of Haeju harbor, (4) direct passage for civilian vessels to Haeju through the NLL, and (5) joint use of the Han River estuary. Following the Summit,

several high-level meetings were held between the Koreas in order to iron out the details and implement the October 4 agreement.

Numerous mutual benefits were envisioned by the establishment of the West Sea Special Zone. For example, a joint fishing zone in the West Sea would help prevent illegal fishing by Chinese fishing boats, increase the income of fishermen by expanding the fishing grounds, and deter naval conflicts between the South and the North.

It was also expected that the development of Haeju Port would stimulate the Haeju Special Economic Zone and the Gaeseong Industrial Complex (GIC) by establishing a maritime distribution network, and that the mass transport of sand and gravel excavated in the western areas such as the Bay of Haeju would contribute to the stable distribution of domestic resources.

Furthermore, direct passage for civilian vessels to Haeju would dramatically shorten the time it takes to travel to Haeju harbor, reducing maritime distribution costs and thereby encouraging active maritime exchanges between the two Koreas.

Although the project has been in limbo since the change in South Korea's administration in early 2008 and the subsequent chilling of inter-Korean relations, interest in establishing the West Sea Special Zone has survived. The port city of Incheon, in particular, has a special interest in the establishment of the Special Peace and Cooperation Zone. In addition to being located on the west coast near the NLL, Incheon experienced the bombing of Yeonpyeong Island in 2010 by North Korea. Thus, for Incheon, it is extremely important to prevent further civilian and economic losses due to conflicts over the NLL.

Young-gil Song, ex-mayor of Incheon, stressed in his 2011 New Year's address that the area around the five small islands near the NLL in the West Sea should be established as the West Sea Special Zone. This declaration by Mayor Song was in line with the provisions agreed to in the Second Inter-Korean Summit in 2007 that addressed the creation of the West Sea Special Zone. The hope is that joint efforts could bring stability, peace, and mutual economic benefit to both Koreas in an area commonly referred to as a "powder keg."

Furthermore, the ex-President of South Korea, Park, Geun-hye, indicated that she was more open to the possibility of joint economic projects with the North than her predecessor, former President Lee, Myung-bak. President Park's North Korean "*trustpolitik*" doctrine and alignment policy aimed to be both "tough" and "flexible," not giving into North Korean provocations while being open for dialogue. She also viewed joint economic projects and trade between the Koreas as part of the trust-building process. Unfortunately, joint economic projects between the Koreas, such as the GIC and Mount Geumgang tours, were on hold and inter-Korean relations had been especially tense since

early 2013 up until new president of South Korea, Moon, Jae-in was elected. The need for establishing a West Sea Special Zone remains and it is in the interest of both Koreas to actively cooperate and resume efforts at creating the Special Zone at the earliest possibility.

4.6 *Judicial Decisions*

4.6.1 Is the UN Membership of ROK and DPRK a Mutual, Tacit Consent?

Constitutional Court [95 Heon-ga 2] Decision issued October 4, 1996.

Following the decisions of this court in 89 Heon-ga 113 (Decision of April 2, 1990) and 90 Heon-ga 11 (Decision of June 25, 1990), Republic of Korea (Korea) and the Democratic People's Republic of Korea (North Korea) simultaneously joined the United Nations (UN) on September 17, 1991. The two governments, on December 13 of the same year, signed the Inter-Korean Basic Agreement, which subsequently entered into force. Taking into consideration their effect on the above decisions, the simultaneous membership cannot be deemed to have given effect to the mutual acknowledgement of statehood of South and North Korea. Neither does the conclusion and entry into force of the Inter-Korean Agreement indicate an abandonment on the part of the North of its plans of communist revolution towards the South; and as provocations along these lines continue to this day, the mere situational changes mentioned above do not evidence a fundamental change of logical or realistic circumstances upon which the decisions were reached. Even today, no other changes calling for a different conclusion can be acknowledged.

4.6.2 Legal Nature of the Inter-Korean Basic Agreement

Constitutional Court [89 Heon-ma 240] Decision issued January 16, 1997.

On December 13, 1991, Government officials of South and North Korea signed the Inter-Korean Basic Agreement (Agreement towards Reconciliation, Non-Aggression, Exchange and Cooperation between South and North Korea), which entered into force on February 19, 1992. However, as this Agreement was concluded "[r]ecognizing that their relationship, not being a relationship between states, is a special one constituted temporarily in the process of unification (preamble)," the Agreement has the nature of a Joint Statement or Gentlemen's Agreement that promises to faithfully carry out the agreements between the authorities of South and North Korea (*See* Supreme Court [98 Doo 14525] Judgment issued July 23, 1999).

4.6.3 Territorial Clause of the Constitution and the Status of North Korea

Supreme Court [90 Do 1451] Judgment issued September 25, 1990.

Article 3 of the Constitution states, "The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands." Under law, no other state agencies in conflict with the sovereignty of the Republic of Korea can be recognized (Judgment issued by this court on Sept. 28, 1961, 4292 Hyeong-sang 48). Though North Korea exists as an independent sovereign state in international society, and our Government has used the title of North Korean Head of State to propose summit meetings with the North, this is not evidence that North Korea is not an anti-government organization violating the territorial sovereignty of the Republic of Korea …

4.6.4 Status of North Korea's Military Government

Military Supreme Court [4281 Heong-sang 10] Judgment issued March 24, 1948.

It is obvious that two legal systems cannot exist within the territory of one nation; and even if a part of the territory is temporarily occupied by the military of another state, or that the state in its entirety is occupied by two or more military groups, this does not mean that the country becomes divided into two or more independent states. Therefore, even though our country has been conquered by the US and USSR, and the South and the North now have differing legal systems, this is not evidence that the North is not part of our homeland. Thus it follows that the Soviet army note as forced currency in North Korea is regarded as a banknote under Criminal Act article 149, and the Claimant's arguments are unacceptable.

5 The Making of International Law in Korea

The development of international law in Korea is traced back to the late 19th century when Korea was confronted with public international law introduced by Western imperial states and further influenced by Japanese colonialization from 1910 to 1945 and US military administration in the southern half of Korea from 1945 to 1948. The Republic of Korea was formally established in 1948 with the adoption of its first Constitution. The history and legacy of Korea play an important role in shaping the contours of Korea's legal system as well as Korea's international relations.

The legal system of Korea particularly underwent drastic changes during Japanese colonial rule as the Japanese government tried to apply their civil law system, based on the continental European legal system, to Korea. Such legal changes imposed under colonial rule created challenges because Korea was faced with a conflict between its deep-rooted Confucian traditions and the newly incorporated European-oriented legal principles. After Korea gained its independence in 1948, the issue of reconciling Confucianism and colonialism in Korean law was additionally intertwined with the novel principles of constitutionalism that came about due to the growing influence of the Anglo-American legal system in Korea.

Korea's approach to international law is explained through the interpretation of its Constitution which stipulates in relevant part that "treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea."

In accordance with this provision, international law has been generally accepted as Korean domestic law and incorporated into Korea's domestic legal system. While the Constitution explicitly sets forth that treaties duly concluded are accorded with the same status as the domestic law of Korea, there is no specific mention of customary international law. The term 'generally recognized rules of international law' is largely interpreted to mean customary international law. Regarding the status of international law in Korea's domestic legal system, the prevailing view is that both treaties and customary international law stand equal with domestic legislations. While the treaties ratified with the consent of the National Assembly are deemed to have a status equal to statutes passed by the National Assembly, those simplified treaties without legislative consent are deemed to enjoy the same status as decrees issued by the President and various ministries or enforcement decrees under the statutes.

The tumultuous experiences of the Korean nation in the twentieth century within the context of international relations in Northeast Asia has had a significant impact on Korea's attitude towards and practice of public international law. Korea has many issues to be settled under international law. Such issues include, but not limited to, territorial disputes with neighboring countries, issues of transitional justice, and issues regarding delimitation of maritime boundaries and fisheries.

As to adjudication as a means of dispute settlement, Korea has not recognized the compulsory jurisdiction of the International Court of Justice (ICJ). However, Korea has accepted the compulsory jurisdiction of the ICJ for disputes arising out of the interpretation or application of the Optional Protocol to the

Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, as well as the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes. Korea, as a party to the UN Convention on the Law of the Sea (UNCLOS), submitted a declaration under UNCLOS Article 298 in 2006. Korea generally remains inactive in employing international adjudication as a means of dispute settlement. Moreover, Korea has not employed non-judicial means of dispute settlement such as inquiry, mediation or conciliation. The only bilateral agreement concluded for the very purpose of dispute settlement is the Exchange of Notes concerning the Settlement of Disputes concluded between Korea and Japan in 1965. One of the possible explanations for Korea's rather confined choice for dispute settlement is that most issues at stake are delicately related to territorial matters, which can never be easily left for a third-party decision.

As a full-fledged member of international community, Korea has been actively involved in a number of activities at international organizations and conferences. Korea particularly devoted to a multilateral diplomacy at the UN and gradually pursued bilateral diplomacy even in the multilateral forums such as the G20 Summit.

Moreover, Korea utilized its UN diplomacy to extend the scope of its global participation in major global agendas including, but not limited to, human rights, environment, terrorism, and poverty. The hosting of major international forums such as the G-20 Seoul Summit, the 2012 Nuclear Security Summit, and the 4th High-Level Forum on Aid and Effectiveness in 2011 showed Korea's national capacity to serve not only as a global agenda setter, but more importantly as a bridge builder between developed and development countries. Korea's engagement with the international community extended to humanitarian and disaster-relief efforts through its participation in the UN peacekeeping missions.

Korea's experience in international relation is rather unique in the sense that Korea emerged not only from Japanese colonialism, but also from a war-torn country to become an Asian power. Some significant international legal issues including those which resulted from the Japanese occupation of Korea as well as from the Korean War are highlighted as follows:

5.1 *The Legacy of Colonialism*

This historical fact that Japan ruled and controlled Korea from 1910 to 1945 caused many international law issues, some of which have still not been settled, between Korea and Japan. The most critical and fundamental question, among others, is whether the Japanese ruling over Korea was based on the grounds of international law. In particular, the validity of the two treaties – the treaty of

1905 which deprived Korea of its diplomatic sovereignty and the annexation treaty of 1910 – have been the subject of much controversy.

Upon Korea's signing the Treaty on Basic Relations with Japan in 1965 to normalize diplomatic relations, the two countries tried to solve unsettled legal issues by concluding additional treaties such as the Agreement on the Settlement of Problem concerning Property and Claims, Agreement concerning Cultural Assets and Cultural Cooperation, and Agreement concerning the Legal Status and Treatment of the Korean Residents in Japan. Without any success, the issue on legality or legitimacy of Japan's ruling over Korea under international law was never solved and rather ended up with vague provisions in the treaty, which, in turn, raises a matter of interpretation until the present time. Another key issue arising out of the Japanese colonization of Korea is related to Dokdo, a group of small islets in the East Sea because the issue surrounding Dokdo is often raised in the context of Japanese imperialism and expansionism into Korea.

5.2 *International Legal Issues Arising from the Korean War and Inter-Korean Relations*

Armed conflicts occurred on the Korean Peninsula in the early 1950s has raised a number of important legal issues under international law. The Korean War poses many legal issues especially related to international humanitarian law such as the legal characteristic of the armed conflict, the applicability of the rules of engagement and legal meaning of a longstanding ceasefire.

As North Korea launched an armed attack against South Korea on June 25, 1950, a series of the resolutions were adopted by the UN Security Council (UNSC Res. 82, UNSC Res. 83, UNSC Res. 84, UNSC Res. 85) and it was the first time the UN Security Council had authorized the use of force since its inception in 1945 and members of the United Nations acted collectively to repel aggression. As a veto by then Soviet Union was frequently used to block numerous Security Council initiatives during the Korean War, the UN General Assembly adopted a resolution known as "Uniting for Peace" (UNGA Res 5/377), which stated that if the Security Council fails to exercise its primary responsibility to act as required to maintain international peace and security due to lack of unanimity of the permanent members, the General Assembly should take over to keep the impetus for peace. While a Military Demarcation Line was drawn on land at the time the Inter-Korean Armistice Agreement was signed on May 27, 1953, such Demarcation Line did not extend into maritime areas. The seaward extension, known as the Northern Limit Line (NLL) which was drawn by UN Commander General Mark Clarke in 1958, has remained contentious

and caused confrontations between the two Koreas as the NLL was not officially part of the Armistice Agreement.

Some key Inter-Korean issues, among others, include statehood and recognition as well as legal characteristics of the agreements signed by the two Koreas. An issue arises from the provision of the Constitution of the Republic of Korea which stipulates that the territory of the Republic of Korea shall consist of the whole Korean Peninsula while the two Koreas were respectively admitted to the United Nations at the same time.

The UN membership issue raised a legal question as to whether the Republic of Korea recognized North Korea as a state. The issue gets more complicated as a question also arises as to the legal characteristic of the Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between the South and the North, (known as the Inter-Korean Basic Agreement) signed in 1991, which recognizes that relationship between the two Koreas is not a relationship as between states, but rather as a special one constituted temporarily in the process of unification.

5.3 *Law of the Sea*

Situated at the center of the Northeast Asian Seas, the waters that surround three sides of Korea are important for economic, military and strategic concerns. Such concerns embrace a wide range of maritime issues including maritime delimitations and competition for marine resources. Korea has engaged in important legal matters pertaining to the Law of the Sea that are of vital importance especially in relation to maritime delimitation in the zones established by the UN Convention on the Law of the Sea.

There remains the issue of maritime delimitation due to overlapping claims over the continental shelf with the neighboring countries such as between Korea and China in the West Sea and between Korea and Japan in the East Sea. The contribution on the part of Korea in relation to maritime issues includes its active engagement in international efforts to protect marine safety and marine environment. Since Korea joined the Convention on the International Maritime Organization, Korea, as a member of the A category Council with the largest interest in providing international shipping services, has been leading the development of maritime technology such as e-navigation, eco-friendly vessels and autonomous vessels technology.

5.4 *Democracy and International Human Rights Law*

The development of human rights in Korea is closely related to the development of democracy in Korea achieved through the mass protest against

dictatorship and military regime from the 1960s to the 1980s. With the development of democracy in Korea since early 1990s, Korea began to accept major international human rights treaties, ratifying the International Covenant on Civil and Political Rights (ICCPR) and its Protocol in 1990, and the International Covenant on Economic, Social and Cultural Rights in 1990.

Since then, Korea became the party to major international human rights treaties such as the Convention on the Rights of the Child (1991), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995), the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict (2004), and the Convention on the Rights of Persons with Disabilities (2009). In 2001, the National Human Rights Commission was established as a national human rights advocacy institution along with several truth and reconciliation commissions to investigate human rights violations under previous authoritarian regimes. One of the recent human rights issues include the right to conscientious objection to military service. Conscientious objection has been a topic of much debate in Korea for decades, especially in cases involving Jehovah's Witnesses. The Supreme Court and the Constitutional Court have consistently affirmed the punishment of conscientious objectors under Korea's Military Service Act. However, in 2018, the Constitutional Court held that the Korean law that did not recognize conscientious objection was not consistent with the Constitution. In the same year, the Supreme Court ruled that conscientious objection was justifiable under Military Service Act.

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Building an Agreement on Biodiversity beyond National Jurisdiction: What Are the Positions of Asian States?

Le Thi Anh Dao and Vu Quoc Tuan***

1 Introduction

The existing international regime, which includes the 1982 United Nations Convention on the Law of the Sea (UNCLOS); the 1992 Convention on Biological Diversity (CBD); the 1995 United Nations (UN) Agreement for the Implementation of the Provisions of the UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter the 'UN Fish Stocks Agreement'); and the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the CBD (hereinafter the 'Nagoya Protocol'), does not explicitly provide for the conservation and sustainable use of marine "biodiversity in areas beyond national jurisdiction" (BBNJ). In other words, human exploitation and research activities involving BBNJ, such as deep-sea bottom fisheries, illegal, unregulated, and unreported fishing, marine scientific research, along with bioprospecting,[1] have been regulated by inadequate stipulations, hence the requirement for strengthening the global regime to better address the issue.

The conservation and sustainable use of BBNJ, accordingly, has become the focus of attention within the international community since 2004, when a UN-mandated Informal Working Group was established to assess the status of conservation and sustainable use of BBNJ, as well as investigating the potential need for further international cooperation.[2] The UN then proceeded to conduct formal negotiations via a Preparatory Committee (hereinafter the 'PrepCom'), followed by the convening of the Intergovernmental Conference

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1 Théa Lowry, *Protecting the Mysteries of the Deep: Conserving Biodiversity in Marine Areas Beyond National Jurisdiction*, 16 Dalhousie Journal of Legal Studies 113, 116 (2007).

2 Press Release, General Assembly, General Assembly, Concerned About World's Marine Ecosystems, Adopts Texts on Law of Sea, Sustainable Fisheries, U.N. Press Release GA/10299 (Nov. 17, 2004).

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(IGC)[3] (collectively referred to as the 'BBNJ Process'), in order to address four clusters in the package agreed in 2011, namely (i) marine genetic resources (MGRs), including questions on the sharing of benefits; (ii) measures such as area-based management tools, including marine protected areas; (iii) environmental impact assessments; and (iv) capacity-building and the transfer of marine technology; plus other cross-cutting issues.[4] During negotiations, complex and contentious issues have emerged, resulting in diverse positions of participating States.[5]

Bounded by the Arctic Ocean to the North, the Pacific Ocean to the East, and the Indian Ocean to the South, Asia has the longest coastline of any continent – 62,800 kilometers in length.[6] Consequently, Asia has a favorable geographical position for easy access to a vast array of marine resources, whether within or beyond national jurisdiction. It is, thus, indispensable for Asian countries to be "embroiled" in negotiations over the BBNJ instrument. In fact, there have been 34 States of Asia (including transcontinental countries such as Egypt and Turkey) that have participated in at least one session within the BBNJ Process.[7] Moreover, several BBNJ-related issues that concern most Asian States are, for instance, whether the principle of the common heritage of mankind would underlie the final text of the BBNJ instrument or the obligation to transfer marine technology.

In light of Asia's geopolitical influence on maritime issues, this article aims to make a selected analysis about the manifestation of the Asian States' stance in the forthcoming agreement on BBNJ. Following the first part, which traces the need for the establishment of an international legally binding instrument on BBNJ, both the current engagement in negotiations and the position of Asia

3 Chair of the Preparatory Committee Established by G.A. Res. 69/292 [Chair of PrepCom], Chair's Overview of the First Session of the PrepCom, ¶ 2, https://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair%27s_Overview.pdf.

4 *Id.* ¶ 3.

5 *Id.* ¶¶ 19, 20. *See* Chair of PrepCom, Chair's Overview of the Second Session of the PrepCom, https://www.un.org/depts/los/biodiversity/prepcom_files/Prep_Com_II_Chair_overview_to_MS.pdf. *See also* Chair of PrepCom, Chair's Overview of the Third Session of the PrepCom, https://www.un.org/depts/los/biodiversity/prepcom_files/Chair_Overview.pdf (discussing complex issues emerged at the PrepCom sessions).

6 Aleksandr M. Ryabchikov, *Asia*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Asia (last visited Apr. 13, 2022).

7 Intergovernmental Conference on an International Legally Binding Instrument Under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction [BBNJ Intergovernmental Conference], *Fourth Report of the Credentials Committee*, ¶ 7, U.N. Doc. A/CONF.232/2022/3 (Mar. 15, 2022).

will be analyzed in the second part of the article. The extent of the "position" therein is limited to views that the majority of Asian nations pursue since there exists a divergence of opinions among Asian participants. The article further endeavors to address the question of how the States of Asia could confront the divergence of views expressed during the BBNJ Process in order to reshape established norms in international law and to build new fair and equitable norms on BBNJ under the UNCLOS.

2 Towards an Agreement on BBNJ

2.1 *The Need for Establishing a New International Legal Framework for BBNJ*

Biodiversity, to a large extent, embodies the essence of human progress and prosperity, as remarked by the UN Secretary-General António Guterres at the 2020 Biodiversity Summit.[8] Covering more than 70 percent of the Earth's surface,[9] the ocean *per se* contains a vast array of MGRs, thereby commencing a "high seas race" among coastal and landlocked States.

Though the high seas and the ocean floor underneath could be considered the least explored areas on Earth,[10] these environments are "high in biodiversity," for several million species could perhaps be sheltered.[11] The real significance of biodiversity has been appreciated by the international community since countries have expressly raised the awareness of "the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components," in addition to the importance "for evolution and for maintaining life-sustaining systems of the biosphere."[12] With the purpose of fully enjoying such benefits derived from biodiversity, States, by exercising sovereignty and sovereign rights, promulgate policies and conduct the

8 UN Secretary-General, Secretary-General's Remarks to UN Biodiversity Summit, para. 10, (Sept. 30, 2020), https://www.un.org/sg/en/content/sg/statement/2020-09-30/secretary-generals-remarks-united-nations-biodiversity-summit-delivered.

9 Water Science School, *How Much Water Is There on Earth?*, USGS para. 1 (Nov. 13, 2019), https://www.usgs.gov/special-topics/water-science-school/science/how-much-water-there-earth.

10 UN Secretary-General, *Oceans and the Law of the Sea, Addendum*, ¶ 58, U.N. Doc. A/60/63/Add.1 (July 15, 2005).

11 *Id.* ¶ 13.

12 Convention on Biological Diversity, Preamble, June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993) [hereinafter CBD].

exploitation of biodiversity under national jurisdiction.[13] Nevertheless, due to climate change and human over-exploitation, biodiversity is being impaired or at risk of severe decline, especially marine biodiversity.[14] Since environmental impacts are at the global level, international cooperation, in lieu of a national approach, is required.[15]

From a legal perspective, marine biodiversity in areas within national jurisdiction is covered by not only national legislation, but international law as well.[16] Besides fundamental principles of international law (for instance, the principle of sovereign equality), two presently substantial international instruments relevant to marine biodiversity, including access and benefit-sharing of genetic resources, are (i) the UNCLOS and (ii) the CBD and the Nagoya Protocol.[17] However, the conservation and sustainable use of BBNJ have not been comprehensively governed by any specific regime at the global level, let alone the regional level.[18] In other words, the BBNJ issue has created legal lacunae within the above conventions, hence the establishment of a new legally binding international instrument on the conservation and sustainable use of BBNJ *ex necessitate*.

2.1.1 UNCLOS

Since the signing in 1982, the Convention has been the constitution for global ocean governance, thereby setting forth the rights and obligations to protect and preserve the marine environment.[19] Thus, the UNCLOS could be interpreted, albeit implicitly, to include the BBNJ issue. Different interpretations of the UNCLOS involve provisions respecting the high seas (Part VII),[20] the Area

13 *Id.* at art. 3.

14 *See* Helmut Hillebrand et al., *Climate Change: Warming Impacts on Marine Biodiversity*, *in* HANDBOOK ON MARINE ENVIRONMENT PROTECTION 353 (Markus Salomon & Till Markus eds., 2018) (discussing the impact of climate change on marine environment); *See generally* Juergen P. Kropp et al., *Marine Overexploitation: A Syndrome of Global Change*, *in* MULTIPLE DIMENSIONS OF GLOBAL ENVIRONMENTAL CHANGE 257 (Sangeeta Sonak ed., 2006) (discussing negative impact of overexploitation on marine environment).

15 CBD, *supra* note 12, at art. 5.

16 *Id.* at art. 3.

17 Laura E. Lallier et al., *Access to and Use of Marine Genetic Resources: Understanding the Legal Framework*, NATURAL PRODUCT REPORTS, (Mar. 26, 2014), https://pubs.rsc.org/en/content/articlelanding/2014/np/c3np70123a.

18 BBNJ Intergovernmental Conference (General Assembly Resolution 72/249), *Background*, https://www.un.org/bbnj/content/background (last visited Apr. 16, 2022).

19 UN Convention on the Law of the Sea, art. 192, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

20 *Id.* at arts. 86–115.

(Part XI),[21] coupled with marine scientific research (Part XIII)[22] in order to cover the issue of BBNJ.

Pursuant to the UNCLOS, areas beyond national jurisdiction (ABNJ) include: (i) the high seas, which are defined as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a State, or in the archipelagic waters of an archipelagic State;"[23] and (ii) "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction," designated as the Area.[24] The UNCLOS stipulates that the high seas are open to all States, whether coastal or land-locked, with the *Mare Liberum* principle comprising freedoms of navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands and other installations permitted under international law, fishing, as well as scientific research.[25] Meanwhile, the Area and its resources enjoy the status as "the common heritage of mankind,"[26] which means that no State has the right to claim and/or exercise either sovereignty or sovereign rights over any part of the Area or its resources, nor may any part be appropriated by a State or natural or juridical person.[27] All rights in the resources of the Area are vested in mankind as a whole.[28]

On the one hand, the exploration and exploitation of BBNJ could be argued to be stipulated under Article 87 of the UNCLOS that provides a non-exhaustive list of activities entitled to enjoy freedoms of the high seas; however, it is evident that a specific mechanism for the access to and the sharing of benefits derived from the utilization of BBNJ is not provided in any relevant articles. On the other hand, BBNJ is not even covered by the regime established under Part XI of the UNCLOS regulating the Area.[29] Resources of the Area are defined as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules."[30] Due to the fact that Part XI merely refers to non-living resources, the benefit-sharing obligations thereunder, thus, do not directly apply to BBNJ.

21 *Id.* at arts. 133–91.
22 *Id.* at arts. 238–65.
23 *Id.* at art. 86.
24 *Id.* at art. 1.1(1).
25 *Id.* at art. 87.1.
26 *Id.* at art. 136.
27 *Id.* at art. 137.1.
28 *Id.* at art. 137.2.
29 *Id.* at arts. 133–91.
30 *Id.* at art. 133(a).

Additionally, provisions on marine scientific research in Part XIII may not be applicable to the acquisition of BBNJ since the Convention does not contain a definition of "marine scientific research."[31] As a result, the legal status of activities involving access to BBNJ is not clearly determined, of which bioprospecting is a typical example.[32] In practice, marine scientific research and bioprospecting are usually not considered similar.[33] Furthermore, there are long-standing issues concerning the distinction between commercial (i.e., industrial) and non-commercial (i.e., pure) marine scientific research.[34] However, as new technologies drive transformative changes in where, how, and by whom marine scientific research could be conducted, the boundary between pure and industrial scientific research would be progressively blurred. This raises complex governance questions for research activities, with respect to BBNJ especially, that embody both non-commercial and commercial features.[35]

In addition to the provisions mentioned above, another instrument developed under the framework of the UNCLOS which could partly cover the BBNJ issue is the UN Fish Stocks Agreement.[36] The objective of this Agreement, as stipulated under Article 2, is to "ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the [UNCLOS]."[37] The UN Fish Stocks Agreement applies to ABNJ, with exceptions due to the application of the precautionary approach[38] and the compatibility of conservation

31 *Id.* at art. 143.

32 Fran Humphries & Harriet Harden-Davies, *Practical Policy Solutions for the Final Stage of BBNJ Treaty Negotiations*, MARINE POLICY, Dec. 2020, at 1.

33 *See* Robin Warner, *Protecting the Diversity of the Depths: Environmental Regulation of Bioprospecting and Marine Scientific Research Beyond National Jurisdiction*, OCEAN YEARBOOK ONLINE, Jan. 1, 2008, at 412, https://doi.org/10.1163/22116000 8X00172.

34 *See* UN DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, MARINE SCIENTIFIC RESEARCH: A REVISED GUIDE TO THE IMPLEMENTATION OF THE RELEVANT PROVISIONS OF THE UNCLOS, ¶ 10, U.N. Sales No. E.10.V.12 (2010).

35 Harriet Harden-Davies, *Deep-Sea Genetic Resources: New Frontiers for Science and Stewardship in Areas Beyond National Jurisdiction*, 137 DEEP SEA RESEARCH PART II: TOPICAL STUDIES IN OCEANOGRAPHY 504, 504 (2017).

36 Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 2167 U.N.T.S. 88, 34 I.L.M. 1542 (entered into force Dec. 11, 2001) [hereinafter UN Fish Stocks Agreement].

37 *Id.* at art. 2.

38 *Id.* at art. 6.

and management measures.[39] Nonetheless, the UN Fish Stocks Agreement is only applicable to a specific object within the content of BBNJ, which is straddling fish stocks and highly migratory fish stocks.

2.1.2 CBD and the Nagoya Protocol

Owing to the developed countries' financial and technological superiority over developing ones in terms of access and utilization of BBNJ, major concerns have been raised over flaws in the existing access and benefit-sharing mechanism.[40] Most notably, the CBD is complementary to the UNCLOS regarding the conservation and sustainable use of marine biological diversity, in which signatories are required to implement the CBD consistently with the rights and obligations under the UNCLOS.[41] However, within ABNJ, the CBD's provisions only apply to processes and activities carried out under a contracting party's jurisdiction or control that may inflict damage to biodiversity in lieu of biodiversity residing there. This is contrary to the case of areas within the limits of a party's national jurisdiction on the ground that the CBD directly applies to components of biological diversity in such areas.[42]

Cooperation among States and/or relevant parties for the purpose of conservation and sustainable use of BBNJ is, therefore, of the essence. In fact, the 2014 Conference of the Parties to the CBD has acknowledged the "urgent need for international cooperation and action to improve conservation and sustainable use of biodiversity in marine areas beyond the limits of national jurisdiction."[43] Since each party is obligated to duly apply the Convention to processes and activities carried out under the jurisdiction or control of such party that may be detrimental to BBNJ, the Conference has thereby invited

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39 *Id.* at art. 7.

40 BBNJ Intergovernmental Conference, Informal Working Group on Marine Genetic Resources, Including Questions on the Sharing of Benefits, *Oral Report of the Facilitator to the Plenary*, at 2–4 (Sept. 14, 2018), https://www.un.org/bbnj/sites/www.un.org.bbnj/files/facilitators_draft_report_on_mgrs_to_facilitator_for_interpreters.pdf.

41 Lee A. Kimball, CBD Technical Series No. 19, The International Legal Regime of the High Seas and the Seabed Beyond the Limits of National Jurisdiction and Options for Cooperation for the Establishment of Marine Protected Areas (MPAs) in Marine Areas Beyond the Limits of National Jurisdiction 10 (2005), https://www.cbd.int/doc/publications/cbd-ts-19.pdf.

42 CBD, *supra* note 12, at art. 4.

43 Conference of the Parties to the CBD [COP], *Decision Adopted by the Conference of the Parties to the CBD at Its Seventh Meeting*, ¶ 30, UNEP/CBD/COP/DEC/VII/5 (Apr. 13, 2004), https://www.cbd.int/doc/decisions/cop-07/cop-07-dec-05-en.pdf.

parties and other States for the purpose of identification.[44] Nevertheless, this is merely a reiteration of the CBD's provisions, such as cooperation and identification of risky activity, instead of formulating a particular implementation strategy.[45]

In addition, though the fair and equitable sharing of benefits arising from the utilization of genetic resources is implemented by the Nagoya Protocol, the geographical scope of the instrument is limited to areas within national jurisdiction.[46] Therefore, access to BBNJ is currently open under the CBD, in addition to the Nagoya Protocol, without a formal benefit-sharing mechanism being established.

Overall, the above biodiversity-related international instruments implicitly (or partly) provide for the conservation and sustainable use of BBNJ. These lacunae have consequently turned BBNJ into one of the most critical oceanic issues and environmental challenges today, thereby requiring legal and governance improvements – *de lege ferenda* – in the conservation and sustainable use of BBNJ on a global scale in response. Nonetheless, existing stipulations have provided a crucial legal framework for the establishment of a BBNJ agreement, as States have an obligation to protect the marine environment as well as conserving biological diversity.

2.2 *Overview of Discussions in the BBNJ Process*

In order to strengthen the global regime to better address the conservation and sustainable use of BBNJ, the General Assembly has adopted Resolution 59/24 establishing an Ad Hoc Open-ended Informal Working Group, which has produced unanimous recommendations on the scope, parameters, and feasibility of an international instrument under the UNCLOS on the conservation and sustainable use of BBNJ,[47] hence the subsequent convening of the IGC under Resolution 72/249.[48] The work of the Conference, overseen by President Rena Lee, a Singaporean ambassador, along with a 15-member Bureau,[49] focuses on the five thematic clusters of the package comprised of (i) MGRs, including questions on the sharing of benefits; (ii) measures such as area-based

44 *Id.* ¶ 56.

45 Lowry, *supra* note 1, at 119.

46 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biologial Diversity, opened for signature* Feb. 2, 2011, art. 3 (entered into force Oct. 12, 2014) [hereinafter Nagoya Protocol].

47 G.A. Res. 59/24 (Nov. 17, 2004).

48 G.A. Res. 72/249 (Dec. 24, 2017).

49 BBNJ Intergovernmental Conference, *Draft Report of the BBNJ Intergovernmental Conference*, ¶¶ 8–9, U.N. Doc. A/CONF.232/2022/L.3 (Mar. 16, 2022).

management tools, including marine protected areas; (iii) environmental impact assessments; (iv) capacity-building and the transfer of marine technology; and (v) related cross-cutting issues. Throughout the three sessions up to now, the above five elements have been elucidated, with discrepancies in stances inevitably arising among States on the establishment of an international legal instrument covering BBNJ, whilst concurrently there were issues that "generated convergence among most delegations."[50]

2.2.1 Basic Elements Giving Rise to Convergent Opinions

First and foremost, the Preamble unarguably highlights the significance of a comprehensive universal regime for the conservation and sustainable use of BBNJ by referencing, for instance, the background to the convention, the need to enhance cooperation and coordination among States, the interests of developing countries, in addition to an affirmation that general principles of international law continue to be applicable to matters not regulated by the proposed convention and/or other agreements.[51]

The instrument's scope of application would, furthermore, plainly narrow to ABNJ[52] and to all elements of the package deal.[53] Nonetheless, it is noteworthy that the BBNJ Process has raised a question on whether the reference to sovereign immunity as stipulated in Article 236 of the UNCLOS should be included in the proposed instrument. Article 236, particularly, provides that the provisions of the UNCLOS regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels, or aircraft owned or operated by a State and used, for the time being, only on non-commercial government service.[54] Such reference has been mentioned in a number of textual proposals submitted by delegations, namely the Deep-Ocean Stewardship Initiative,[55] the International Chamber

50 *Id.* ¶ 2.

51 David Leary, *Agreeing to Disagree on What We Have or Have Not Agreed on: The Current State of Play of the BBNJ Negotiations on the Status of Marine Genetic Resources in Areas Beyond National Jurisdiction*, 99 MARINE POLICY 21, 22 (2019).

52 *Id.*

53 *Id.* at 23.

54 *Id.*

55 BBNJ Intergovernmental Conference, *Textual Proposals Submitted by Delegations by 20 February 2020, for Consideration at the Fourth Session of the BBNJ Intergovernmental Conference (the Conference), in Response to the Invitation by the President of the Conference in Her Note of 18 November 2019 (A/CONF.232/2020/3)*, at 34, U.N. Doc. A/CONF.232/2022/INF.1 (Apr. 15, 2020) [hereinafter Article-by-Article Compilation of Textual Proposals].

of Shipping,[56] and the Republic of Korea.[57] Meanwhile, the Core Latin American Group opines that the reference to sovereign immunity is unnecessary due to the UNCLOS and other oceanic regimes having already recognized this jurisdictional immunity, in addition to the fact that the BBNJ instrument provides for a broader material application than the framework of environmental provisions in the UNCLOS.[58] Notwithstanding whether or not these arguments could justify the need for further discussion during the fourth session, this matter of the content does not cause considerable controversy *vis-à-vis* the complex issue relating to the distinction between bioprospecting and pure marine scientific research, which could fall within the material scope of the proposed instrument.

Apparently, as a complement to the UNCLOS and the existing legislation, the agreement on BBNJ is not intended to prejudice the rights, jurisdiction, and duties of States under the UNCLOS and should be interpreted and applied in the context of and in a manner consistent with the UNCLOS.[59] It is also proposed that the instrument should be interpreted and applied in a manner that would not undermine relevant legal instruments and frameworks, as well as relevant global, regional, subregional and sectoral bodies.[60]

2.2.2 Divergent Opinions on Several Key Elements

While generic elements discussed above "generated convergence among most delegations," there remain various overarching issues on which opinions among negotiating parties diverge markedly.[61]

First of all, concerning *the principle of the common heritage of mankind*, a preliminary remark vaguely notes that "further discussions are required".[62] This principle is applicable to the resources of the Area, in which all rights are

56 *Id.* at 35.

57 *Id.* at 36.

58 *Id.* at 33.

59 BBNJ Intergovernmental Conference, *Revised Draft Text of an Agreement Under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, at art. 4.1, U.N. Doc. A/CONF.232/2020/3, annex (Nov. 18, 2019).

60 *Id.* at art. 4.3.

61 PrepCom, Report of the PrepCom: Development of an International Legally Binding Instrument Under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, ¶ 38(a), U.N. Doc. No. A/AC.287/2017/PC.4/2 (July 31, 2017) [hereinafter Report of the PrepCom 2017].

62 *Id.* at 17.

vested in mankind as a whole;[63] however, resources, pursuant to Article 133 of the UNCLOS, only refer to mineral resources.[64] MGRs *in situ* in the Area on or beneath the seabed, therefore, are not under the administration of the International Seabed Authority, whereby how the utilization of these resources is monitored remains unknown. Meanwhile, it has been argued that MGRs in the water column above the Area are subject to the *Mare Liberum* principle. The United States, as an illustration, opposes the applicability of the principle of the common heritage of mankind to MGRs in ABNJ by the high seas reasoning.[65] Since the high seas are open to all States, "whoever acquires the genetic material in the deep sea could enjoy exclusive rights over whatever products they produce."[66] This "high seas race" would, thus, cause inequalities between developed countries and developing ones on the ground that marine gene patents are predominantly in possession of developed countries, with 70 percent belonging to the United States, Germany, and Japan.[67] In contrast, the principle of the common heritage of mankind would allow developing States, especially least developed countries, to enjoy the benefits of the MGRs of ABNJ. In fact, the stance on the common heritage of mankind principle is adopted by, including but not limited to, the Group of 77 (G77) and China. In the 2016's submission on the elements of a draft text of an international legally

63 UNCLOS, *supra* note 19, at art. 137.2.

64 *Id.* at art. 133(b).

65 Views Expressed by the U.S. Delegation Related to Certain Key Issues Under Discussion at the Second Session of the PrepCom on the Development of an International Legally Binding Instrument Under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity, at 1 (Sept. 9, 2016) [hereinafter Views by the US Delegation], https://www.un.org/depts/los/biodiversity/prepcom_files/USA_Submission_of_Views_Expressed.pdf.

"There is no legal gap in regard to marine genetic resources in [ABNJ]. Rather, these resources fall under the high seas regime of international law as reflected in the Law of the Sea Convention (LOSC). Marine genetic resources (MGR) in [ABNJ] are not covered by the provisions pertaining to the International Seabed Authority or the Area (Part XI), except as part of the marine environment that must be protected in connection with 'activities in the Area' (which are defined as activities of exploration for and exploitation of the resources of the Area; in the context of the Area, 'resources' are expressly defined to include only mineral resources)."

66 Li Jing, *High Seas Treaty: Race for Rights to Ocean's Genetic Resources*, China Dialogue Ocean (Aug. 7, 2019), https://chinadialogueocean.net/9644-high-seas-treaty-race-for-rights-to-oceans-genetic-resources/.

67 Sophie Arnaud-Haond et al., *Marine Biodiversity and Gene Patents*, 331 SCIENCE 1521, 1521 (2011).

binding instrument under the UNCLOS on the conservation and sustainable use of BBNJ, the G77 and China reaffirmed that:

> the principle of common heritage of mankind must underpin the new regime governing MGRs of [ABNJ]. Given its cross-cutting nature, the principle should be at the core of the new instrument. The Group is of the view that the principle of the common heritage of mankind provides the legal foundation for a fair and equitable regime of conservation and sustainable use of [BBNJ], including the access and sharing of benefit of MGRs.[68]

The principle of the common heritage of mankind is, indeed, a vital negotiating issue from the outset of the BBNJ Process. Having been reinserted into the revised draft prepared for the fourth session of the IGC, this principle would again raise the question of sufficiency, as the inclusion, if accepted, would produce various outcomes that would "meet significant resistance," such as that benefit sharing must be mandatory and conducted in an equitable manner among all States, and/or an international regime to govern activities of exploration or exploitation with respect to MGRs in ABNJ.[69] Nevertheless, whether or not the principle of the common heritage of mankind would be explicitly enshrined in the final draft, provisions on the sharing of benefits should ensure a fair and equitable distribution of proceeds arising from the access and utilization of MGRs of ABNJ among all parties to the BBNJ agreement, especially the developing and least developed economies.

Besides the principle of the common heritage of mankind, opinion is divided on issues concerning *the nature of MGRs*.[70] Presently, there are two options proposed that (i) "either any material of marine plant, animal, microbial or other origin, [found in or] originating from ABNJ and containing functional units of heredity with actual or potential value of their genetic and biochemical properties," or (ii) "marine genetic material of actual or potential value" would be

68 Development of an International Legally Binding Instrument Under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (A/RES/69/292), Group of 77 and China's Written Submission, in letter dated Dec. 5, 2016 from the Chairman of the Permanent Mission of Thailand to the United Nations addressed to the Division of Ocean Affairs and the Law of the Sea, ¶ 1, U.N. Doc. No. N-136/2016 (Dec. 5, 2016).

69 Vito De Lucia, *A Very Quick Look at the Revised Draft Text of the New Agreement on Marine Biodiversity in Areas Beyond National Jurisdiction*, EJIL: Talk! (Jan. 23, 2020), https://www.ejilalk.org/a-very-quick-look-at-the-revised-draft-text-of-the-new-agreement-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/.

70 Report of the PrepCom 2017, *supra* note 61, at 17.

designated as MGRs. While the former tends to recognize varieties of MGRs (which are derived from the term "genetic material" as stipulated in the CBD), the latter is an open-ended approach comparable to the definition of "genetic resources" under the CBD.[71] Both alternatives, however, do not clarify the relationship of MGRs and fish stocks. Accordingly, the United States, Canada, Jamaica, the European Union and Member States, coupled with Argentina have called for a distinction between "fish as a commodity" and "fish valued for their genetic properties," and thereby argued that "fish as a commodity" should not be regulated under the access and benefit sharing regime.[72] This is contrary to the view expressed by several developing countries, which is concerned with the potential depletion of fish stocks in ABNJ. Russia, Norway, Japan, Iceland, and New Zealand, besides, endorse provisions that would not apply to the use of fish and other biological resources as a commodity.[73] Similar to the relationship between MGRs and fish stocks, it is likewise debatable whether applicable MGRs should be limited to *in situ* and *ex situ* collection, or further include *in silico* analysis.[74] Developed countries such as the United States crave to limit the application of access and benefit sharing regime to merely *in situ* collection,[75] whilst developing countries pursue MGRs accessed not only *in situ*, but *ex situ* and *in silico* as well.[76]

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71 CBD, *supra* note 12, at art. 2.

72 Leary, *supra* note 51, at 26.

73 IISD Reporting Services, Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19–30 August 2019 No. 218, *in* 25 EARTH NEGOTIATIONS BULLETIN 7 (Sept. 2, 2019).

74 Draft Agreement on BBNJ, *supra* note 59, at art. 8.

75 Views by the US Delegation, *supra* note 65, at 2.

In the 2016's submission of views related to certain key issues under discussion at the second session of the PrepCom, the United States recommended:

"… we should refer to information taken from MGR by its proper name: genetic sequence data, or GSD, and not use the term *in silico*. GSD is information and its sharing can promote uses of GSD in research and development. If GSD is included, and a decision were made to attempt to trace the downloading and use of such information, how would that work? We struggle to envision a scenario that could be workable. How could we manage benefit-sharing (and promote compliance) if data, something that is freely and openly shared as part of research best-practices, were included in it?

It is best to limit the definition of MGR to in situ collection. Including ex situ samples and procedures in the definition of MGR would introduce a range of complex variables, such as how materials are collected, transported, and stored. These would dramatically complicate the operation of BBNJ benefit-sharing and move us farther away from achieving our objectives."

76 Leary, *supra* note 51, at 27.

Another argument that has arisen during the BBNJ Process surrounds *the area-based management tool* (*ABMT*) *package*.[77] Despite the proposed definition of "marine protected areas" being nearly unanimous, to define ABMT is contentious. For discussions in the forthcoming session, the draft text of the BBNJ agreement provides that: "["ABMT"] means a tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives [and affording higher protection than that provided in the surrounding areas]."[78] On the one hand, the European Union emphasizes that ABMT is a spatial management tool; the International Union for Conservation of Nature, on the other hand, deems ABMT a management measure. Moreover, several participants in the BBNJ Process demand to include a marine protected area, namely the European Union and the Member States, the Republic of Korea, and the United States, while Indonesia, Monaco, and Turkey propose the opposite.[79] Therefore, ABMTs in ABNJ, including marine protected areas, are believed to be "central to the discussion," as stated by Ocean Care at the negotiations.[80]

Deliberations on *environmental impact assessment* (*EIA*) additionally reflect divergent views among parties. Specifically, along with alternative definitions of EIA, the establishment of a scientific committee attached to a global body in order to review the EIAs is the subject of much debate between developing and developed States.[81] Furthermore, to include a definition of cumulative impacts gets mixed opinions. Whilst the Republic of Korea is expressly against regulating cumulative impacts on grounds of a new obligation arising from the BBNJ agreement, the inclusion of a definition on cumulative impacts is fully supported by South Africa, or partly by the European Union, the International Union for Conservation of Nature and OceanCare with alterations to the wording of this definition.[82]

Additionally, *the transfer of marine technology* has been of considerable concern in virtue of the disparity in countries' technological capabilities. Notwithstanding the fact that negotiating States support the undertaking to transfer marine technology with the purpose of assisting States Parties, in

77 Report of the PrepCom 2017, *supra* note 61, at 17.

78 Draft Agreement on BBNJ, *supra* note 59, at art. 1.3.

79 Article-by-Article Compilation of Textual Proposals, *supra* note 56, at art. 1.

80 Rachel Tiller, et al., *The Once and Future Treaty: Towards a New Regime for Biodiversity in Areas Beyond National Jurisdiction*, 99 MARINE POLICY 239–240 (2019).

81 *Id.* at 241.

82 Article-by-Article Compilation of Textual Proposals, *supra* note 55, at art. 1.

particular developing States Parties, in implementing the BBNJ agreement to achieve the stated objectives,[83] pertinent questions concerning marine technology and the transfer of marine technology remain unanswered. For instance, the current revised draft provides definitions of "marine technology" and "transfer of marine technology" within brackets.[84] The European Union, the Republic of Korea, and the United States, as expressed in proposals for consideration at the fourth session of the IGC, request to omit both definitions from the proposed agreement.[85] It is, moreover, debatable whether the transfer of marine technology would be provided on a mandatory and/or voluntary basis, with the views of countries differing markedly, from the inclusion of both "mandatory" and "voluntary" (the Core Latin American Group and Indonesia); only "mandatory" (Senegal); only "voluntary" (Israel and the Republic of Korea) within the text of the article; to the exclusion of both which is endorsed by the European Union and the United States.[86]

Besides the aforementioned issues, other relevant considerations are likewise taken into account. Intellectual property rights, *inter alia*, exemplify variations of the stance adopted by each country. Whilst most countries agree on an article concerning intellectual property rights consistent with relevant agreements, Israel, the Republic of Korea, and the United States have requested to exclude the article on the grounds that such inclusion might "cause fragmentation and overlap with other existing intellectual property agreements."[87]

In general, the content of the BBNJ instrument, as well as the BBNJ Process, is reasonably comprehensive in terms of issues on the conservation and sustainable use of BBNJ, whereas the oceanic regime is presently open. Though participants could not indubitably avoid conflicts of interest, hence divergences of views during negotiations, this does clarify, in a pragmatic manner, the stance on the establishment of a legally binding international instrument on the conservation and sustainable use of BBNJ that each party to the BBNJ Process has been pursuing.

83 Draft Agreement on BBNJ, *supra* note 59, at art. 42 (a).
84 *Id.* at art. 1.
85 *See* Article-by-Article Compilation of Textual Proposals, *supra* note 55, at art. 1.
86 *Id.* at art. 44.
87 *See id.* at art. 12.

3 The Position of Asian States on the Final BBNJ Agreement

3.1 *Engagement of Asian States with the BBNJ Process*

At the organizational meeting of the IGC in 2018, Mr. Miroslav Lajčák, President of the 72nd session of the General Assembly remarked that:

> From the [UNCLOS], negotiated over 40 years ago – to the task that we face now – an agreement on an Internationally legally binding instrument under the [UNCLOS] on the Conservation and Sustainable Use of marine biological diversity of [ABNJ], multilateralism is the common thread.
>
> This conference will see all Member States and States Parties sitting in a room, listening to one another and engaging in a dialogue. We are all working towards one important goal: to develop a treaty to protect our marine biodiversity. This is multilateralism in action.[88]

Indeed, the IGC convened under Resolution 72/249 is open to all States Members of the UN, members of the specialized agencies, and parties to the UNCLOS.[89] This has, thus, provided both coastal as well as landlocked States with an unparalleled opportunity in the interests of addressing the current maritime issue respecting the conservation and sustainable use of BBNJ on an international level.

Thanks to a favorable geographical location, which is bounded by the Arctic, Pacific, and Indian Oceans, plus the longest coastline of any continent, Asian States can easily access marine resources in areas within and even beyond national jurisdiction. Due to the abundant benefits that such resources provide, Asian States have been actively participating in the BBNJ Process from the outset with a view to developing an international legally binding instrument under the UNCLOS on the conservation and sustainable use of BBNJ.

Objectively, the chart below gives the breakdown of data concerning the number of participants in the BBNJ Process, which is categorized into five groups, namely Asia, Europe, Africa, North and South America, Oceania, along with other parties; meanwhile, the table provides the level of participation of each Asian country in five sessions.

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88 Miroslav Lajčák, President of the 72nd Session of the UN General Assembly, Statement at the Organizational Meeting of the Intergovernmental Conference on an International Legally Binding Instrument Under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas (Apr. 16, 2018).

89 G.A. Res. 72/249, *supra* note 48, ¶ 8.

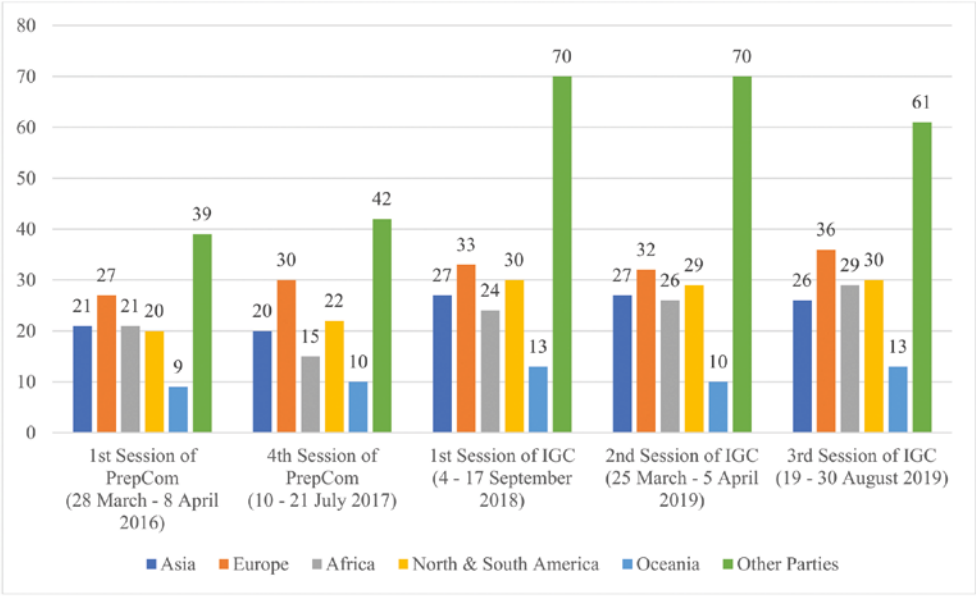

FIGURE 1 The number of countries by continent and other parties participating in the BBNJ process
Note: *See* PrepCom, Final List of Participants, First Session (Apr. 21, 2016), https://www.un.org/Depts/los/biodiversity/prepcom_files/Final_List_of_Participants_BBNJ.pdf; PrepCom, Final List of Participants, Fourth Session (July 10–21, 2017), https://www.un.org/Depts/los/biodiversity/prepcom_files/Final_List_of_Participants_BBNJ_IV_Apr_2018.pdf; BBNJ Intergovernmental Conference, List of Participants, First Session, U.N. G.A. Res. 69/292 (Sept. 28, 2018); BBNJ Intergovernmental Conference, Final List of Participants, Second Session, U.N. Doc. A/CONF.232/2019/INF.3/REV.2 (Apr. 26, 2019); BBNJ Intergovernmental Conference, Final List of Participants, Third Session, U.N. Doc. A/CONF.232/2019/INF/5/REV.1 (Oct. 23, 2019).

TABLE 1 List of Asian countries participating in the BBNJ process

No.	Country	Landlocked	First Session of PrepCom	Fourth Session of PrepCom	First Session of IGC	Second Session of IGC	Third Session of IGC
1	Azerbaijan				x	x	
2	Bangladesh		x	x	x	x	x
3	Bhutan	x					x
4	Brunei Darussalam			x	x	x	
5	China		x	x	x	x	x
6	Egypt			x	x	x	x

TABLE 1 List of Asian countries participating in the BBNJ process (*cont.*)

No.	Country	Landlocked	First Session of PrepCom	Fourth Session of PrepCom	First Session of IGC	Second Session of IGC	Third Session of IGC
7	Georgia						x
8	India		x	x	x	x	
9	Indonesia		x		x	x	x
10	Iran		x	x	x	x	x
11	Iraq		x		x	x	x
12	Israel		x	x	x	x	
13	Japan		x	x	x	x	x
14	Kuwait					x	x
15	Laos	x				x	x
16	Lebanon		x		x		
17	Malaysia		x	x	x	x	x
18	Maldives				x	x	x
19	Mongolia	x		x		x	
20	Myanmar		x	x	x	x	x
21	Nepal	x	x	x	x	x	x
22	Oman			x	x		x
23	Pakistan			x			
24	Philippines		x	x	x	x	x
25	Republic of Korea		x		x	x	x
26	Saudi Arabia		x		x	x	x
27	Singapore		x	x	x	x	x
28	Sri Lanka		x	x	x	x	x
29	Thailand		x	x	x	x	x
30	Timor-Leste				x	x	x
31	Turkey		x	x	x	x	x
32	United Arab Emirates		x		x		
33	Vietnam		x	x	x	x	x
34	Yemen						x

Overall, it is clear that the BBNJ Process, as above mentioned, entails countries of nearly all continents except Antarctica, as well as diverse organizations, whether governmental or non-governmental. Furthermore, geographical limitations could not hinder landlocked States Members from contributing towards an international legally binding sea-related instrument, with four Asian landlocked countries, for instance, participating in at least one session within the BBNJ Process.

Regarding the engagement of Asian States with the BBNJ Process, Asia accounted for about 15 percent of all participants in the two sessions of the PrepCom, prior to falling below 14 percent during the three sessions of the IGC. Specifically, the first session of the PrepCom in 2016 observed the attendance of 21 Asian States, accounting for approximately 21.4 percent of all participating countries. By comparison, the participation rate of Asia slightly reduced in the fourth session of the PrepCom. The number of States Members of the Asian continent, afterwards, increased to 27 and remained unchanged until the third session in August 2019 which witnessed a decrease to 26 countries.

Notwithstanding the longest coastline of any continent, the number of Asian States which have participated in each session has never exceeded that of the European continent. Additionally, as from the fourth session of the PrepCom, America has surpassed Asia in participation in the BBNJ process. Nevertheless, the active participation of Asia in the two phases of the BBNJ Process is irrefutable. In regard to the position of officer within the framework of the IGC, Asian States have three elected representatives, one of which is Rena Lee, Ambassador for Oceans and Law of the Sea Issues and Special Envoy of the Minister for Foreign Affairs of Singapore, who was elected President at the organizational meeting of the Conference. The other two are Vice Presidents to the Bureau of the IGC, who are of Chinese and Japanese nationalities.[90] Moreover, in terms of participants, the total number of States Members of the Asian continent involved with the BBNJ Process is 34 countries, with 13 (more than one-third) of those countries attending all five sessions discussed above. Participants in three and four out of the five sessions are four and seven, respectively. In other words, 70 percent of participating Asian States have attended at least three sessions within the BBNJ Process.

Nonetheless, not all Asian signatories to the UNCLOS along with the CBD are participating in the BBNJ Process, thereby obstructing the universal participation in accordance with Resolution 72/249.[91] In principle, countries have the

90 Draft Report of the BBNJ Intergovernmental Conference, *supra* note 49, at ¶¶ 8–9.

91 G.A. Res. 72/249, *supra* note 48, ¶ 9.

right to decide on the participation in the development of international law, in addition to the subsequent signing and accession. This, however, does not preclude the possibility that such States are still indirectly involved in negotiations via an intergovernmental organization. As an illustration, Bahrain, Cambodia, and Qatar are all signatories to the UNCLOS, CBD, plus members of the G77. In a certain sense, to formulate the G77's views on the elements of the BBNJ instrument might also involve the participation of the above countries, which is different from the inclusion of national stance. In other words, the views of an intergovernmental organization do not necessarily include members' stance. By taking an explicit position, either consistent or inconsistent with those views, States members are thereby considered indirectly participating in negotiations. Apart from exercising the rights of an international law actor as a justification for Asian States not participating in the BBNJ Process, there is further objective evidence, namely regional tensions. Ultimately, the level of participation in establishing an international legal instrument depends on the relevance to the interests of States.

3.2 *New Legal Order on BBNJ Reshaped by the Leading Role of Asian States*

International law is inevitably the product of concessions among countries due to the coexistence of interests of each nation and the public interest in international affairs. The BBNJ Process is no exception, especially in regard to the manifestation of Asian States' stance on the conservation and sustainable use of BBNJ. In the light of the Asian region, to reach a compromise on stance is discernible, since most countries border the sea, as well as having a developing economy.[92] The protection of marine environment and marine resources are, furthermore, beneficial to all. Thus, the unification of views is favorable to the Asian States, apart from the significance of establishing a new legally binding international instrument on the conservation and sustainable use of BBNJ.

The rise of the East, as a matter of fact, has given Asian nations an arguably greater say in global affairs. It also illustrates a more prominent role of Asian States in international institutions, which has taken the form of greater engagement and increasing levels of participation in international forums.[93] The BBNJ instrument, for instance, does provide justification for the preceding

92 *See World Economic Situation and Prospects* (2020) (showing country classification by its development and region) https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf.

93 Simon Chesterman, *Asia's Ambivalence About International Law and Institutions: Past, Present and Futures*, 27 EUROPEAN JOURNAL OF INTERNATIONAL LAW 945, 977 (2016).

statement. Presently, a draft BBNJ instrument has been prepared for further discussion in the forthcoming session of the IGC, with the views of Asian countries initially being reflected within this draft agreement. However, it is evident that an apparent contradiction exists among Asian nations since there is a discrepancy in interests relating to BBNJ, especially between developed and developing countries. As an illustration, the fact that China and the G77, which includes Asian developing countries, mostly share convergent views on BBNJ notwithstanding, there are still divergent ones, such as the distinction between "fish as a commodity" and "fish as a carrier of MGRs."[94] Thus, the focus herein would be on views that the majority of Asian States pursue during the BBNJ Process.

Like other participants, Asian States are virtually unanimous on generic elements of the BBNJ instrument. It is stressed that first and foremost, the agreement must demonstrate fundamental principles of international law, such as the respect for the sovereignty, territorial integrity, and political independence of all States, as well as enhanced international cooperation.[95] Article 2 of the draft agreement on BBNJ, in fact, stipulates that: "The objective of this Agreement is to ensure the [long-term] conservation and sustainable use of [BBNJ] through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination."[96] The Philippines further proposes an additional phrase "Emphasizing the need to enhance cooperation to address marine environmental degradation and climate change-related impacts on marine biodiversity" in the Preamble.[97] Besides, there is a common consensus that the BBNJ agreement shall be interpreted and applied in the context of and in a manner consistent with the UNCLOS, plus that the rights and jurisdiction of coastal States in all areas under national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone, shall be respected in accordance with the UNCLOS.[98]

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94 Written Submission of the Government of the People's Republic of China on Elements of a Draft Text of an International Legally Binding Instrument Under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, in letter dated Apr. 21, 2017 from the Permanent Mission of the People's Republic of China to the United Nations addressed to the Division of Ocean Affairs and the Law of the Sea, ¶ 11, U.N. Doc. No. CML/45/2017 (Apr. 20, 2017).

95 Draft Agreement on BBNJ, *supra* note 59, at Preamble.

96 *Id.* at art. 2.

97 Nagoya Protocol, *supra* note 46, at 4.

98 Draft Agreement on BBNJ, *supra* note 59, at art. 4.

One of the key principles underlying the agreement on BBNJ that is widely supported by many Asian States, including China, is the common heritage of mankind. These States believe that "the principle of the common heritage of mankind" – instead of the freedom of the high seas – "provides the legal foundation for a fair and equitable regime for the conservation and sustainable use of [BBNJ], including the access and sharing of the benefit of MGRs."[99] The inclusion of this principle is justified by the fact that environmental issues are usually of transnational nature, which affects not only waters under national jurisdiction but ABNJ as well. Furthermore, in the context of the implementation of the 2030 Agenda for Sustainable Development, all countries are obligated to conserve and sustainably use oceans and marine resources for the benefit of both today and future generations.[100] To fully safeguard the marine environment, thus, requires a well-established regime of access to and sharing of benefits derived from ABNJ, in terms of which *bonum et aequum* should be taken into consideration. "The principle of common heritage of humankind will," according to the written submission of the views of the G77 and China, "contribute to the realization of the said objective as, through the application of this principle, the interests and needs of humankind as a whole, especially those of developing countries will be fairly addressed and taken care of."[101]

However, there are occasions in which another terminology in lieu of the "common heritage of mankind" is adopted. Most notably, the Preamble of the CBD provides that conserving biological diversity is a common *concern* of humankind.[102] The 2001 International Treaty on Plant Genetic Resources for Food and Agriculture, in harmony with the CBD, also recognizes plant genetic resources for food and agriculture as "a common concern of all countries."[103] The fact that the above international agreements refer to the "common concern of humankind" or "common concern of all countries" instead is due to the scope of "biodiversity" under the CBD being limited to areas within national jurisdiction, which is subject to state sovereignty, whilst the principle of the common heritage of mankind precludes any acts of claiming or exercising sovereignty or sovereign rights, or appropriation.[104] Whereas the BBNJ agreement applies to ABNJ, there is no reason for an alternative terminology.

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99 Written Submission of the Group of 77 and China, *supra* note 68, ¶ 1.

100 G.A. Res. 70/1, ¶ 33 (Sept. 25, 2015).

101 Written Submission of the Group of 77 and China, *supra* note 68, ¶ 1.

102 CDB, *supra* note 12, at Preamble.

103 International Treaty on Plant Genetic Resources for Food and Agriculture, *adopted in* 2001 (entered into force June 29, 2004), https://www.fao.org/3/i0510e/i0510e.pdf.

104 CDB, *supra* note 12, at art. 4.

As a matter of fact, the principle of the common heritage of mankind has been recognized in Article 5(c) of the draft BBNJ agreement;[105] meanwhile, the freedom of the high seas is not even mentioned. The agreement on BBNJ would, thereby, be underpinned by, *inter alia*, the principle of the common heritage of mankind if participants achieved a consensus in the forthcoming session. Such consensus could be deemed a clear demonstration of the Asian States' stance on BBNJ regardless, with the intent to reshape established norms in international law and, more importantly, to build new fair and equitable norms on the conservation and sustainable use of BBNJ under the UNCLOS.

Additionally, another view that is endorsed by many Asian States is the objective to establish a system (or network) of ecologically representative marine protected areas. It is noteworthy that several marine protected areas in the high seas have been established by regional organizations and multilateral fishing bodies, yet there has not been a regulated process for establishing marine protected areas in ABNJ. Under the current regime, details and management issues of each newly proposed marine protected areas would be decided anew.[106] Thus, the establishment of ABMTs stipulated by the future instrument would be pivotal to the environmental objective in the high seas. The establishment of ABMTs, including marine protected areas should not undermine the existing regime, in addition to the interests of coastal States. Specifically, establishing ABMTs in the high seas, especially in areas above the extended continental shelf (beyond 200 nautical miles), should be conducted with due regard to the rights and legitimate interests of coastal States. Accordingly, Article 15.4 of the draft BBNJ agreement provides that: "Measures adopted in accordance with this Part shall not undermine the effectiveness of measures adopted by coastal States in adjacent areas within national jurisdiction and shall have due regard for the rights, duties and legitimate interests of all States, as reflected in relevant provisions of the Convention…,"[107] which is akin to the approach as stipulated in Article 142.1 of the UNCLOS concerning activities in the Area.

Many Asian States are, furthermore, unanimous in how to define EIA, which is a process for assessing the potential effects of planned activities, carried out in ABNJ, under the jurisdiction or control of States Parties that may cause substantial pollution of, or significant and harmful changes to, the marine

105 Draft Agreement on BBNJ, *supra* note 59, at art. 5(c).

106 Kirsten Selvig, *Expensive Freedom: Establishing Marine Protected Areas on the Open Ocean Requires an End to the Freedom of the Seas*, 22 MINNESOTA JOURNAL OF INTERNATIONAL LAW 35, 49–50 (2013).

107 Draft Agreement on BBNJ, *supra* note 59, at art. 15.4.

environment. Integrating strategic and cumulative assessments within the proposed instrument would be vital for safeguarding the interests of future generations besides the conventional EIA approach. However, the inclusion of definitions on both cumulative impacts and strategic environmental assessment (SEA) is not supported by the Republic of Korea on the grounds of a new obligation arising from the BBNJ agreement.

In addition, most Asian countries uphold the opinion to specify the obligation to transfer marine technology under the proposed instrument, notwithstanding opposing views on whether the transfer of marine technology should be provided on a mandatory or voluntary basis. To stipulate such an obligation under the BBNJ agreement could, thereby, provide an appropriate implementing mechanism for benefit sharing, as well as providing developing States and least developed ones with opportunities to access advanced marine technologies for managing MGRS.

3.3 *How Can Asian States Confront Their Divergent Views on the BBNJ Instrument*

It is unquestionable that the BBNJ Process has initially represented a solid achievement in establishing a new international legally binding instrument under the UNCLOS on the conservation and sustainable use of BBNJ; however, as the fourth session of the IGC is approaching, the divergence of views among participants over key issues of the proposed agreement, including but not limited to the nature of MGRS, ABMT, and EIA, remains unresolved. The divisive debate is, indubitably, derived from national interests, with the contradiction between developed and developing countries being evident. In essence, it would, thus, be vital for participants to desist from political will and further champion the public interest. The nature of BBNJ as a multifaceted issue affecting the world as a whole, along with the fact that developing States' scientific and technological potential has not yet been able to fully undergo marine scientific research within ABNJ *vis-à-vis* that of developed countries, consequently broaches a matter of *bonum et aequum* (what is right and just) with multilateralism being the common thread throughout the BBNJ Process. Accordingly, both the instrument and negotiations on the conservation and sustainable use of BBNJ should be oriented to the harmonization of interests among participating States in general, as well as the Asian States in particular.

The aforementioned principle of the common heritage of mankind exemplifies the division among participants over how MGRS in ABNJ should be approached. It is noteworthy that this is still open for discussion in the fourth session, albeit present in the draft agreement. As a stronghold of the common

heritage of mankind precept, Asian States should call for the support of other participants in the BBNJ Process on the ground that recognizing this principle within the instrument would provide a basis for other provisions, coupled with the harmonization of interests among States. For instance, in cases where MGRs of ABNJ are also found in areas within national jurisdiction, activities with respect to those resources would be conducted with due regard for the rights and legitimate interests of coastal States under the jurisdiction of which such resources are found.[108]

In order to call for the support, either explicitly or implicitly, of other participants in the BBNJ Process concerning the principle of the common heritage of mankind as well as other unresolved issues, Asian countries could take advantage of existing relevant mechanisms, which include but are not limited to two bodies established under the UNCLOS: the International Seabed Authority (ISA) and the Commission on the Limits of the Continental Shelf (CLCS); or more diplomatically, the Group of Friends on the UNCLOS, the Asia-Pacific Economic Cooperation (APEC), along with other relevant international and regional organizations such as the Association of South East Asian Nations (ASEAN). These could serve as forums for common Asian stance on BBNJ issues that most concern Asian States to be formulated. Besides, Asian States could opt for the exchange of diplomatic notes since there has been a precedent for exchanging notes amongst Asian countries to settle maritime issues. The exchange of diplomatic notes not only expresses national stance on the BBNJ agreement but serves as a political tool to persuade other negotiating countries as well.

Additionally, in the light of the multidimensional nature of the BBNJ issue, Asian States should involve all stakeholders in formulating a stance on the elements of the BBNJ instrument, such as scholars, policymakers, or biomedical businesses. While the law of the sea might traditionally be of an inter-state character, non-State actors still play an important role, especially in the interest of environmental objectives.[109] The involvement of other stakeholders apart from States and non-governmental organizations would furnish all shades of opinion on how the future agreement on BBNJ would be negotiated.

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108 Draft Agreement on BBNJ, *supra* note 59, at art. 9.2.

109 Pascale Ricard, *Marine Biodiversity Beyond National Jurisdiction: The Launch of an Intergovernmental Conference for the Adoption of a Legally Binding Instrument Under the UNCLOS*, 4 Maritime Safety and Security Journal 84, 92 (2019).

4 Conclusion

As yet, the two relevant substantial international instruments, which include the UNCLOS and the CBD (along with the Nagoya Protocol), do not comprehensively cover marine biodiversity of all parts of the ocean, hence the establishment of a new legally binding international instrument on the conservation and sustainable use of BBNJ *ex necessitate*. The process is approaching the final phase; however, the divergence of views on various key issues of the BBNJ instrument among negotiating parties remains unresolved. Nonetheless, the manifestation of the Asian States' stance in the forthcoming agreement on the conservation and sustainable use of BBNJ is evident. This stance, coupled with the active participation in the BBNJ Process, has demonstrated the leading role of Asian States in reshaping the established regime under the UNCLOS. Whereas the road to the final instrument is presently blocked by the divisive debate among participants, the Asian States should call for the support of others in a leading capacity, plus involving all stakeholders in formulating stance on the elements of the BBNJ instrument with the purpose of achieving a common consensus over the proposed agreement. By doing so, the final instrument would promptly constitute a major achievement in addressing legal lacunae with regard to the conservation and sustainable use of BBNJ within the UNCLOS and other international treaties.

Legal Materials

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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 2020. 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 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/Lists/Current%20lists%20of%20parties/AllItems.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/

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- 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 https://en.unesco.org/about-us/legal-affairs/instruments/conventions
- 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; Min. Age Spec. = Minimum Age Specified; 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. 189 and corrected from Vol. 25 p. 189)

State	*Sig.*	*Cons.*
Maldives		17 Sep 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: *see* Vol. 25 pp. 189–190.

Asia-Pacific Regional Convention on the Recognition of Qualifications in Higher Education, 2011
(Continued from Vol. 25 p. 190)
(Status as provided by UNESCO)

State	*Sig.*	*Cons.*
Afghanistan		7 Dec 2020

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 p. 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: *see* Vol. 25, p. 191.

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 Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995: *see* Vol. 25 p. 193.
Amendment to the Montreal Protocol, 1997: *see* Vol. 19 p. 182.
Protocol to the Framework Convention on Climate Change, 1997: *see* Vol. 19 p. 182.
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998: *see* Vol. 19 p. 182.
Amendment to the Montreal Protocol, 1999: *see* Vol. 19 p. 182.
Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000: *see* Vol. 25 p. 193.
Stockholm Convention on Persistent Organic Pollutants, 2001: see Vol. 25 p. 193.
International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004: *see* Vol. 25 p. 193.
Amendment to Annex B of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2006: *see* Vol. 23 p. 182.
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: *see* Vol. 25 p. 194.
Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 2010: *see* Vol. 25 p. 194.
Doha Amendment to the Kyoto Protocol, 2012: *see* Vol. 25 p. 194.

International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001
(Continued from Vol. 24 p. 332).
(Status provided by IMO)

State	*Cons.*	*E.i.f.*
Korea (DPR)	21 Aug 2020	21 Nov 2020

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
(Continued from Vol. 24 p. 332)
(Status provided by IMO)

State	*Cons.*	*E.i.f.*
Japan	1 Jul 2020	1 Oct 2020

Minamata Convention on Mercury, 2013
(Continued from Vol. 25 p. 194)

State	*Sig.*	*Rat.*
Pakistan	10 Oct 2013	16 Dec 2020
Philippines	10 Oct 2013	8 Jul 2020

Paris Agreement, 2015
(Continued from Vol. 24 p. 333)

State	*Sig.*	*Rat.*
Kyrgyzstan	21 Sep 2016	18 Feb 2020

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 2016
(Continued from Vol. 25 p. 195)

State	*Sig.*	*Rat.*
Bangladesh		8 Jun 2020
Kyrgyzstan		8 Sep 2020
Malaysia		21 Oct 2020
Turkmenistan		31 Aug 2020

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 on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000: *see* Vol. 25 p. 197.
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002: *see* Vol. 24 p. 337.
Convention on the Rights of Persons with Disabilities, 2008: *see* Vol. 25 p. 197.
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 a Communications Procedure, 2011: *see* Vol. 25 p. 197.

Humanitarian Law in Armed Conflict

International Conventions for the Protection of Victims of War, I–IV, 1949: *see* Vol. 11 p. 252.
Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1977: *see* Vol. 18 p. 107.

Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977: *see* Vol. 12 p. 244.
Protocol III Additional to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem, 2005: *see* Vol. 25 p. 198.

Intellectual Property

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979: *see* Vol. 24 p. 338.
Madrid Union Concerning the International Registration of Marks, including the Madrid Agreement 1891 as amended in 1979, and the Madrid Protocol 1989: *see* Vol. 25 p. 199.
Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as amended in 1979: *see* Vol. 25 p. 199.
Convention Establishing the World Intellectual Property Organization, 1967: *see* Vol. 13 p. 188.
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 25 p. 199.
Convention for the Protection of Industrial Property, 1883 as amended 1979: *see* Vol. 23 p. 188.
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.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961
(Continued from Vol. 18 p. 109)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Turkmenistan	31 Aug 2020	30 Nov 2020

WIPO Performances and Phonograms Treaty, 1996
(Continued from Vol. 25 p. 200)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Afghanistan	9 Nov 2020	

WIPO Copyright Treaty, 1996
(Continued from Vol. 25, p. 200)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Afghanistan	9 Nov 2020	

Beijing Treaty on Audiovisual Performances, 2012
(Continued from Vol. 22 p. 315)
(Status as provided by WIPO)
Entry into force: 28 April 2020

State	*Party*	*E.i.f.*
Cambodia	27 Mar 2019	28 Apr 2020
China	9 Jul 2014	28 Apr 2020
Indonesia	28 Jan 2020	28 Apr 2020
Japan	10 Jun 2014	28 Apr 2020
Korea (DPR)	19 Feb 2016	28 Apr 2020
Korea (Rep)	22 Apr 2020	22 Jul 2020

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 2013
(Continued and corrected from Vol. 25 pp. 200–201)
(Status as provided by WIPO)

State	*Party*	*E.i.f.*
Indonesia	28 Jan 2020	28 Apr 2020
Thailand	28 Jan 2019	28 Apr 2019
Turkmenistan	15 Oct 2020	

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.
Statute of the International Criminal Court, 1998: *see* Vol. 25 p. 202.
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.
International Convention for the Suppression of Acts of Nuclear Terrorism, 2005: *see* Vol. 25 p. 203.
Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005: *see* Vol. 25 p. 203.

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. 25 p. 202)

State	*Sig.*	*Rat.*
Brunei		30 Mar 2020
Nepal		10 Jun 2020

International Representation

(*see also*: Privileges and Immunities)
Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975: *see* Vol. 6 p. 257.

International Trade

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 17 p. 176.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 6 p. 257.
UN Convention on Contracts for the International Sale of Goods, 1980: *see* Vol. 25 p. 204.
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
(Continued from Vol. 21 p. 251)

State	*Sig.*	*Rat.*
Mongolia		3 Dec 2020

Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific
Bangkok, 19 May 2016
Entry into force: not yet

State	*Party*	*E.i.f.*
Bangladesh	29 Aug 2017	
Cambodia	29 Aug 2017	13 Oct 2020
China	29 Aug 2017	22 Nov 2020
Iran	29 Sep 2017	29 May 2020
Philippines		23 Dec 2019

Judicial and Administrative Cooperation

Convention on Civil Procedure, 1954: *see* Vol. 20 p. 208.
Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: *see* Vol. 25 p. 204.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965
(Continued from Vol. 22 p. 319)
(Status as provided by HccH)

State	*Party*	*E.i.f.*
Philippines	4 Mar 2020	1 Oct 2020

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970
(Continued from Vol. 22 p. 319)
(Status as provided by HccH)

State	*Party*	*E.i.f.*
Vietnam	4 Mar 2020	3 May 2020

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.
Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 22 p. 320.
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.
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): *see* Vol. 25 p. 204.

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98)
(Continued and corrected from Vol. 19 p. 193)
(Status as provided by ILO)

State	*Rat. Registered*
Vietnam	5 Jul 2019

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105)
(Continued from Vol. 19 p. 193)
(Status as provided by ILO)

State	*Rat. Registered*
Vietnam	14 Jul 2020

Minimum Age Convention, 1973 (ILO Conv. 138)
(Continued from Vol. 23 p. 193)
(Status as provided by ILO)

State	*Rat. Registered*	*Min. Age. Spec.*
Myanmar	8 June 2020	14

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, 1948: *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 Signs and Signals, 1968: *see* Vol. 25 p. 208.

Convention on Road Traffic, 1968
(Continued from Vol. 12 p. 254)

State	*Sig.*	*Cons.*
Thailand		1 May 2020

Sea

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.
Convention on the High Seas, 1958: *see* Vol. 7 p. 339.
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.
Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.
United Nations Convention on the Law of the Sea, 1982: *see* Vol. 19 p. 198.
Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 19 p. 199.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (...) Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995
(Continued from Vol. 24 p. 348)

State	*Sig.*	*Cons.*
Cambodia		6 Mar 2020

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.
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: *see* Vol. 19 p. 200.
Protocol Relating to the International Convention for the Safety of Life at Sea, 1988: *see* Vol. 25 p. 209–210.

Convention on Facilitation of International Maritime Traffic, 1965 as amended
(Continued from Vol. 12 p. 255 and corrected from Vol. 25 p. 209)
(Status as provided by IMO)

State	*Cons.* (*dep.*)	*E.i.f.*
Malaysia	10 Apr 2019	9 Jun 2019

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	3 Jan 2020

Nairobi International Convention on the Removal of Wrecks, 2007
(Continued from Vol 23 p. 198)
(Status as provided by IMO)

State	*Cons.* (*dep.*)	*E.i.f.*
Indonesia	14 Dec 2020	
Japan	1 Jul 2020	1 Oct 2020

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: *see* Vol. 25 p. 211.

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

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, 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: *see* Vol. 25 p. 212.

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Warfare, 1925
(Continued from Vol. 6 p. 281 and corrected from Vol. 25 p. 212)
(Status as provided by ICRC)

State	*Sig.*	*Cons.*
Kazakhstan		20 Apr 2020
Kyrgyzstan		29 Jun 2020
Tajikistan		15 Nov 2019
Uzbekistan		15 Oct 2020

Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects (Protocol IV on Blinding Laser Weapons), 1995
Vienna, 13 October 1995
Entry into force: 30 July 1998

State	*Sig.*	*Cons.*
Afghanistan		9 Aug 2017
Bangladesh		6 Sep 2000
Cambodia		25 Mar 1997
China		4 Nov 1998
India		2 Sep 1999
Japan		10 Jun 1997
Kazakhstan		8 Jul 2009
Maldives		7 Sep 2000
Mongolia		6 Apr 1999
Pakistan		5 Dec 2000
Philippines		12 Jun 1997
Sri Lanka		24 Sep 2004
Tajikistan		12 Oct 1999
Uzbekistan		29 Sep 1997

Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices, as amended, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, 1996
Geneva, 3 May 1996
Entry into force: 3 December 1998

State	*Sig.*	*Cons.*
Afghanistan		9 Aug 2017
Bangladesh		6 Sep 2000
Cambodia		25 Mar 1997
China		4 Nov 1998
India		2 Sep 1999
Japan		10 Jun 1997
Korea (Rep.)		9 May 2001
Maldives		7 Sep 2000
Pakistan		9 Mar 1999
Philippines		12 Jun 1997
Sri Lanka		24 Sep 2004
Tajikistan		12 Oct 1999
Turkmenistan		19 Mar 2004

Protocol (V) on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, 2003
Geneva, 28 November 2003
Entry into force: 12 November 2006

State	*Sig.*	*Cons.*
Afghanistan		9 Aug 2017
Bangladesh		26 Sep 2013
China		10 Jun 2010
India		18 May 2005
Korea (Rep.)		23 Jan 2008
Laos		2 Feb 2012
Pakistan		3 Feb 2009
Tajikistan		18 May 2006
Turkmenistan		23 Jul 2012

Arms Trade Treaty, 2013
(Continued from Vol. 25 p. 213)

State	*Sig.*	*Cons.*
Afghanistan		29 Jul 2020
China		6 Jul 2020

Treaty on the Prohibition of Nuclear Weapons, 2017
(Continued from Vol. 25 p. 213)

State	*Sig.*	*Cons.*
Malaysia	20 Sep 2017	30 Sep 2020

Note on the State Practice Section

Starting from volume 26, the Editors decided to make a number of changes to the state practice section to expand the depth and breadth of the reporting on Asian state practice. Historically, only one to two international legal scholars were appointed as state practice correspondents to document the state practice of their country for a particular calendar year. However, given the proliferation of international law in and among Asian countries, it was recognized that it would be very challenging for only one scholar to document comprehensively a country's application and implementation of international law for a specific year. Additionally, while the Yearbook's national correspondents are experts in their particular fields of international law, because international law has become more and more specialized, areas and topics not within their purview were largely neglected from coverage.

Inspired by the work we undertook in publishing the *Encyclopedia of Public International Law in Asia* (EPILA), we saw the benefit of having a team of legal scholars for each Asian country represented in the Yearbook to work collectively to report on the state practice of their country. The EPILA project allowed us to tap into the resources of those scholars who worked with us on EPILA to now also contribute to the Yearbook. Also, the list of international law subjects that were identified and utilized by EPILA could be employed by the Yearbook. Moreover, the numbering system created for EPILA could be applied to the Yearbook so that readers of both would be able to cross-reference the subject numbers which would be consistent between both publications.

Buoyed by the success of EPILA, we proposed the following for the Yearbook state practice section:

a. Each state practice report would attempt to cover as many of the subjects that tracked EPILA. They are as follow:

The State in International Law

1. History and Theoretical Approach of [The State] in International Law
2. Statehood & Sovereignty
3. Territory & Jurisdiction
4. Sovereign/State Immunity
5. State Responsibility
6. Relationship between International & Domestic Law

Institutional Relations

7. Treaties
8. Diplomatic & Consular Relations
9. International & Regional Organisations
10. Individuals & Non-State Actors
11. International Relations & Cooperation
12. Settlement of Disputes

Particular International Law Subjects

13. International Economic Law
14. International Environmental Law
15. Law of the Sea
16. Air Law & Law of Outer Space
17. Human Rights
18. International Humanitarian Law
19. International Criminal Law
20. Use or Threat of Force

While we are aware that not every state has issues that cover all of the subjects every year, we wanted to see broad coverage of the important international law subjects.

b. Further, each state rapporteur would identify a group of international law scholars/practitioners who would be able to participate in drafting parts of the state practice report to ensure wide coverage of the subjects.

c. Lastly, each state report was to be approximately 5,000 words. The Editors realized that the length of the state report would depend on the number of subjects and sub-topics that were addressed and that in some years, the reports might be less than 5,000 words if there were fewer issues that were dealt with by a country in a particular calendar year.

The purpose of these changes was to fill in as many gaps in the state practice reporting as possible to give the readership of the Yearbook a more complete picture of the practice of international law among Asian states.

State Practice of Asian Countries in International Law

Bangladesh

Sumaiya Khair, State Practice Rapporteur
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International Relations & Co-operation

India-Bangladesh Bilateral Relations 2020

The year 2020 witnessed high level engagements at the political and official levels between Bangladesh and India. Some of the areas of engagement are highlighted below:

Territory and Jurisdiction – Security and Border Management

Talks between the border forces of both countries, namely, Border Security Force (BSF) of India and the Border Guard Bangladesh (BGB) were held on 22–26 December 2020 in Guwahati, India. These were Director General Level Talks (DGLT). Border coordination conferences between Regional Commanders of BGB and the Frontier Inspectors General of BSF were also held to discuss management and security of the 4096.7 km of the India-Bangladesh land border.

Territory and Jurisdiction – Connectivity

Bangladesh and India are implementing various measures to restore the pre-1965 rail links and other connectivity links that had existed between India and Bangladesh. The Prime Ministers of both countries jointly inaugurated the newly restored railway link between Chilahati (Bangladesh) and Haldibari (India) on 17 December 2020 to enhance people-to-people contacts. The frequency of two passenger trains, i.e., Maitree Express and Bandhan Express, was increased from 4 days a week to 5 days a week and from one day a week to two days a week, respectively, from February 2020. Both countries have also started to use side-door containers and parcel trains to maintain uninterrupted supply chains during the COVID-19 pandemic. The Government of India handed over 10 broad gauge diesel locomotives as part of its grant assistance to Bangladesh Railways in a virtual event on 27 July 2020.

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The two countries signed the second addendum to the Protocol on Inland Water Transit and Trade (PIWTT) in May 2020 for including two new India-Bangladesh Protocol Routes (Sonamura-Daudkandi on river Gomti and extension of Dhulia to Godagiri up to Aricha on river Padma), five new ports of call and two extended ports of call. Sonamura-Daudkandi Protocol Route opened for operations in September 2020. The trial run of trans-shipment of Indian goods from Kolkata to Agartala via Chattogram was successfully conducted in July 2020.

Defense Cooperation

A number of defense cooperation events took place in 2020, which included the second edition of India-Bangladesh CORPAT 'Bangosagar' exercise on 03–05 October 2020, the Regional Commanders meeting of Coast Guards on 19 October 2020, and the third Annual Defense Dialogue on 02 November 2020. The Indian Army has gifted trained horses and dogs to the Bangladesh Army in November 2020.

Economic and Commercial

Bilateral trade between India and Bangladesh has grown steadily over the last decade contributing to increased exports between the two countries. To promote cooperation on bilateral trade, an India-Bangladesh CEO's Forum was launched in December 2020 to provide inputs at the policy level in various areas of trade and investment and to facilitate exchanges among the business communities of both the countries. The first meeting of the India-Bangladesh Textile Industry Forum was held in February 2020 to foster cooperation and collaboration in the textile sector.

International Economic Law

Implementing International Economic Law – Business, Sale, Contract, Tax, Competition Law – Responsibility of Google, YouTube, Facebook, and Amazon to Pay Applicable Tax in Bangladesh

Humayun Kabir and Others vs Government of Bangladesh and Others **[Writ petition no. 5227/2018, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 8 November 2020]**

The petitioner filed a writ before the High Court Division of the Supreme Court of Bangladesh for the collecting tax from different foreign online service

providers by the Government of Bangladesh. The court ordered the government to collect appropriate tax and revenue from the internet giants like, Google, Facebook, Amazon, Yahoo, YouTube, etc., that are providing and selling their services in Bangladesh. The court added that all these entities incorporated in different countries cannot make profit by giving services to the people without paying appropriate taxes to the government.

Preferential Trade Agreement (PTA)/Free Trade Agreements (FTA) Protocols Set for Adoption

Committed to revising its guidelines on preferential trade agreements (PTAs) and free trade agreements (FTAs), Bangladesh prepared the Policy Guidelines for Preferential Trade Agreement (PTA)/Free Trade Agreement (FTA)-2020, which consider evolving global and domestic economic and trade patterns. While the earlier guidelines focused on goods and services, the revised protocols address several emerging issues in areas of intellectual property rights, technology, and the environment. This initiative rides on Bangladesh's attempts to accelerate its trade agreements to mitigate the impact of leaving the United Nation's LDC category in 2024, which would result in the loss of many of its current duty-free export privileges.

Preferential Trade Agreement between Bangladesh and Bhutan, 6 December 2020 (Signed Virtually)

Bangladesh signed a preferential trade agreement with Bhutan on 6 December 2020 through a virtual ceremony owing to the COVID-19 pandemic. This came in the wake of Bangladesh's efforts to graduate out of the LDC status by 2024 and to boost its export earnings by emphasizing on bilateral preferential trade agreements (PTA) and free trade agreements (FTA). Indeed, this is the first ever bilateral preferential trade agreement that Bangladesh has signed with any country since its independence in 1971. The signing of the Agreement on 6 December held another significance for the two countries as on this day in 1971, Bhutan was the first country to have recognized Bangladesh as a sovereign state. Under this agreement, some 100 Bangladeshi products would get duty-free access to Bhutan, whereas 34 Bhutanese products will make its way into the Bangladeshi market without any duty. The number of items is expected to increase gradually based on consultation between the two countries.

Tripartite Memorandum of Understanding with the Serum Institute of India (SII) and Beximco Pharmaceuticals Ltd., Bangladesh, 5 November, 2020

Bangladesh signed a tripartite memorandum of understanding (MoU) with the Serum Institute of India (SII) and Beximco Pharmaceuticals Ltd to procure

30 million doses of the Oxford-AstraZeneca SARS-CoV-B2, AZD1222 vaccine. Under the MOU, the vaccines would be provided free of cost.

Bangladesh and India Sign Several MoUs and Agreements (at a Virtual Summit), 17 December 2020

The Prime Ministers of India and Bangladesh held a virtual summit on 17 December 2020 to discuss the different aspects of their bilateral relations and exchanged views on regional and international issues, during which they signed seven MOUs and agreements. The agreements include a framework of understanding in the hydrocarbon sector, a framework agreement on High Impact Community Development Project (HICDP), a protocol on transborder elephant conservation, an MoU for the supply of equipment and improvement of garbage and solid waste disposal, an MoU in the field of agriculture, and an MoU between National Museum Delhi and Bangabandhu Sheikh Mujibur Rahman Memorial Museum in Dhaka and Terms of Reference for creating an India-Bangladesh CEO forum. Amongst the various MOUs signed, the High Impact Community Development Project (HICDP) focuses on education, health and sanitation, water-treatment, and cultural heritage to enhance socio-economic development of local communities. In the field of energy, both countries agreed to promote a two-way investment, technology transfer, joint studies, and capacity building in hydrocarbons. They also agreed to establish a high-level CEO forum comprising of the top CEOs from both the countries to provide policy level inputs for enhancing bilateral trade and investment and boost export to third countries. Textiles, Pharmaceuticals, Leather, Agriculture and Food processing value chains, Automobiles, and Services sector would be the major focus areas.

International Environmental Law

Protection of Wetlands – The Convention on Wetlands of International Importance Especially as Waterfowl Habitat

Bangladesh Environmental Lawyers Association (BELA) vs Government of Bangladesh and Others [Writ petition no. 1683/2014, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 2 December 2020]

The petitioner filed a writ of petition before the High Court Division of the Supreme Court of Bangladesh seeking the declaration of nullity of the filling of wetlands in a local district in view of the destruction these activities

caused to the environment. The court declared the filling of wetlands to be illegal and observed that all wetlands are public trust properties which none can destroy. In deciding the case, the court relied on both national and international laws regarding the protection of wetlands. The court also directed the government to adopt necessary laws to give effect to its obligations under the Convention on Wetlands of International Importance, especially the Waterfowl Habitat (Ramsar Convention) to which Bangladesh acceded in 1992.

Law of the Sea

State Legislation on Maritime Zones, Rights & Obligations

The Marine Fisheries Act, 2020

The Parliament enacted the Marine Fisheries Act on 26 November 2020 invalidating the earlier legislation in the same field, the Marine Fisheries Ordinance 1983. The 2020 Act defines "deep sea" as international sea territory beyond the territorial sea and Exclusive Economic Zone (EEZ) (section 2(4)). 'Bangladesh Sea Fisheries Waters' include territorial waters as determined by any law of Bangladesh, contiguous zones as determined by article 33 of the United Nations Convention on Law of the Sea 1982 (UNCLOS) and Exclusive Economic Zones (EEZ) as determined by article 55 of the UNCLOS or any other territories under the law of Bangladesh or international conventions (section 2(10)). Such determinations imply that the territorial sea is 12 NM from the baseline according to section 3 of the Territorial Waters and Maritime Zones Act 1974, and the contiguous zone is 24 NM according to article 33 of the UNCLOS. Article 57 of the UNCLOS has settled the maximum limit of the EEZ area, which is 200 NM from the baseline, and the Act of 2020 refers to that provision to determine the limits of its EEZ. Although all three zones are covered in both the Territorial Waters and Maritime Zones Act 1974 and the UNCLOS, it is unclear why the territorial sea should be measured by national laws while the other two zones are measured under UNCLOS.

Section 3 of the law empowers the government to declare the 'Bangladesh Sea Fisheries Waters' as fishing area based on the depth of the sea or any internationally recognized system. The government may also determine the kind of vessel with which fishing can be conducted. The government may also prohibit the fishing of all or any species of fish in the fishing area necessary to preserve the fish resource. Punitive measures are in place for violation of this prohibition. The Act permits the government to classify both the vessel and number of vessels, for the purpose of granting a fishing license (section 4).

These provisions enable the government to limit the scope of fishing pursuant to international standards towards sustainable use of fish resources. The Director-General of the Fisheries Department of Bangladesh is responsible to determine the "allowable catch" and also to monitor, control and conduct surveillance to ensure "maximum sustainable yield," which is in accordance with article 61 of the UNCLOS (section 5). However, the Act makes no reference to article 61 of the UNCLOS, which provides some key factors in determining the allowable catch which include, e.g., considering the best scientific evidence available, nor does it incorporate any guidelines on how the allowable catch shall be determined. The inclusion of such a provision would have ensured that the living resources in the exclusive economic zone is not endangered by over-exploitation.

This law empowers the government to, inter alia, declare an area in 'Bangladesh Sea Fisheries Waters' as mariculture area to expand the blue economy (section 6). Given that the government has been exploring ways to tap into untapped maritime resources for sustainable development, such a provision shall benefit the national economy. However, nobody can conduct fishing in the declared fishing area without a license (section 7). The only exception is that foreign vessels shall not be subjected to such conditions in deep waters, as resources in deep waters are common resources of mankind under article 136 of the UNCLOS. However, both national and foreign owners of vessels can apply for permission to the Director of the Fisheries Department (section 8).

Article 62 of the UNCLOS stipulates that the coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone and when a coastal state lacks the ability to harvest the whole allowable catch, it shall grant other States access to the surplus of the allowable catch through agreements or other arrangements subject to terms, conditions, laws, and regulations including those related to licensing of fishermen, fishing vessels and equipment and authorizing fisheries research programmes. The Act of 2020 allows foreign individuals to get licenses for fishing and research purposes. Section 22 of the Act entitles the government to deny licenses to any foreign vessel with or without showing any cause. Section 23 prohibits the arrival of any foreign vessel in 'Bangladesh Sea Fisheries Waters' without license. However, section 23(2) provides some exceptions to which any foreign vessel can claim the transit passage. Such exceptions are in line with article 38 of the UNCLOS whereby a foreign vessel can have the 'freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.' Moreover,

by providing this exception, the law gives latitude to vessels or crews which are in danger and need assistance. The exception also extends to the right of innocent passage the definition of which, under the Act, is the definition provided in the UNCLOS. Sections 24 and 25 make it an offense for any foreign ships to enter, fish, load and offload in the 'Bangladesh Sea Fish Waters' without any license. Section 26 restricts the scope of giving immunity to any foreign ship from tax, immigration, health, and seaworthiness-related laws. However, such immunity can be granted to the vessel having received a license to conduct research activities.

Section 27 of the Act prohibits the use of explosives, toxins, and other harmful substances during fishing. In line with Article 194 of the UNCLOS, which obliges states to take measures against the pollution of the marine environment, Section 27 of the Act would help prevent pollution of the marine environment. Section 28 of the Act penalizes the use of prohibited nets, equipment, etc. The government can declare protected areas in the 'Bangladesh Sea Fisheries Waters' in which the living species are at risk of becoming extinct or are gradually disappearing (section 29). Section 30 prohibits the catching of fish, dredging, throwing polluted materials, and constructing any building in the protected area.

Section 35 of the Act authorizes officials to exercise the right of hot pursuit against a vessel beyond the 'Bangladesh Sea Fisheries Waters,' if such vessel does not stop in response to any signal and code transmitted to it by the authorized officials while in the 'Bangladesh Sea Fisheries Waters.' This is in line with Article 111 of the UNCLOS, which grants the coastal states the right of hot pursuit if it believes that a vessel has violated the laws and regulations of that State.

Statement by Bangladesh under Agenda Item 76: 'Oceans and Law of the Sea,' 75th Session of the United Nations General Assembly, 08 December 2020

Recalling how the COVID-19 pandemic seriously impacted the ocean economy and acknowledging the Secretary-General's report A/75/70 reflecting on the adverse impact of sea level rise and its mitigation measures; and his report A/75/157 on the impact of bottom fishing on the deep sea vulnerable marine ecosystem and its fish stock, Bangladesh stressed on the importance of making environment-friendly deep-sea fishing technology accessible to the developing countries.

Bangladesh informed that it was at the final stage of enacting the Maritime Zones Act, to ensure efficient utilization, conservation, and scientific management of its marine resources. Further, it has recently lodged an amended

submission to the Commission on Limits of the Continental Shelf (CLCS) for determination of its outer continental shelf in the Bay of Bengal. The amendment has been made to give effect to the judgment of the ITLOS and the award of the Annex VII Arbitral Tribunal in the maritime delimitation proceedings with its neighboring countries. The determination of outer continental shelf would enable Bangladesh to explore the natural resources, which is critical for achieving the country's development agenda.

The statement recognized that the common future would be determined by the oceanic resources and services if they are conserved, developed, and utilized. In this regard, it is critical to address the climate induced sea-level rise by timely and effective implementation of the various provisions of the UNCLOS, the United Nations Framework Convention on Climate Change and the Paris Agreement. The statement emphasized on the early conclusion of the international legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) to ensure a balance between the equitable and efficient utilization and conservation of ocean resources, and the protection and preservation of the marine environment.

The statement called for increased international cooperation to address the continued threats to maritime security including those caused by large movements of refugees and migrants by sea, mostly in perilous situations. In this regard, Bangladesh urged States to comply with their obligations for search and rescue at sea, and to address the root causes of irregular movements. Bangladesh recognized the significance of capacity building and technical assistance, especially for developing economies, for the implementation of legal and policy framework for the oceans and seas. Bangladesh sought integrated cooperation and coordination at the international, regional, and local levels, especially in supporting developing and small island states, and coastal communities to recover from the impacts of the impacts of COVID-19.

Ocean Science and Sustainable Development – Statement by Bangladesh at the High-Level Meeting (Virtual) to Present the Draft ISA Marine Scientific Research Action Plan in Support of the UN Decade of Ocean Science for Sustainable Development, 17 November 2020

Lauding the draft Action Plan on Marine Scientific Research by ISA as a good beginning towards supporting the UN Decade of Ocean Science for Sustainable Development, Bangladesh conceded that this initiative would help to institutionalize scientific research in the deep sea and responsible management of ocean resources. The statement emphasized the importance of

strategic partnerships among relevant stakeholders, including sub regional, regional, and global organizations, for enforcing the Action Plan to maximize the full potentials of the Blue Economy through equitable share of marine resources. The statement reiterated Bangladesh's commitment to build strategic partnership with other entities for conducting advanced scientific research in the deep sea. In this context, the Statement pointed out the need for capacity building of, and technical assistance to developing countries in advancing marine scientific research in the deep sea, so that no one is left behind, especially those with limited or no access to the deep-sea resources. This would also require adequate, predictable, and innovative financing. The statement noted that gender parity in the field of marine scientific research was critical from the inclusivity perspective. Pursuant to UNCLOS provisions, Bangladesh called for the protection of the integrity of the marine environment and its biodiversity when conducting research in the deep sea.

Air Law & Law of Outer Space

Carriage by Air (Montreal Convention) Act, 2020

The Parliament enacted the Carriage by Air (Montreal Convention) Act on 26 November 2020 to implement the rules of the Montreal Convention, 1999 (1999 Convention) regarding carriage by air which Bangladesh has signed (Preamble). The incorporation of the 1999 Convention rules into the domestic laws of Bangladesh would facilitate the ratification of the Montreal Convention by Bangladesh. The Act has not repealed the other laws in this field entirely, such as, the Carriage by Air Act, 1934, the Carriage by Air (International Convention) Act, 1966 and the Carriage by Air (Supplementary Convention) Act, 1968 (Act No. V of 1968), except those parts which are inconsistent with the present Act.

This law states that the Convention shall be tantamount to any other laws in Bangladesh with regards to the right and obligations of the passengers, transporters, consignors, and consignees (section 3). Such direct and wholesale incorporation of an international convention into a domestic law is quite rare. Section 4 of the Act states that all the parties to the Convention will be regarded as legal persons with regard to the filing of court cases. It also provides that the Code of Civil Procedure, 1908 will apply in the determination of the procedures. Section 5 allows the family of any passengers who die in an accident to file case for compensation in the court. The compensation shall be determined based on the Special Drawing Rights (SDR) in accordance with the Convention, then converted into Bangladeshi Taka and delivered to the entitled victims.

Alternatively, under section 6, the family of the victim can apply for compensation to the carrier itself. The family members must apply to the court for inheritance certificate so that the compensation amount could be distributed to the family members according to the ratio specified in the certificate. Any person authorized by the government may inspect and examine the documents and records of any carrier, its representative and any other related person, in such a manner as may be prescribed by the rules (section 9). The Act includes in its schedule the whole Montreal Convention 1999 which shall have the effect of being a law of Bangladesh. This Act, thus, acknowledges the superiority of this Convention over the Warsaw Convention, Hague protocol, Guadalajara Convention, Guatemala City Convention, and the Montreal Protocol.

Responsibility of Airline under the Carriage by Air (International Convention) Act, 1966 – Liability of the Carrier for Passenger – International Civil Aviation Organization (icao) Human Rights – Cruel Treatment-Liability of the Carrier

Tanjin Brishti vs Government of Bangladesh and Others
[Writ petition no. 6049/2011, High Court Division of the Supreme Court of Bangladesh, Judgment Delivered on 8 October 2020]

The petitioner and her mother purchased tickets to Canada from the Dhaka office of Etihad Airlines. On 28 June 2011, the petitioner and her mother went to Hazrat Shahjalal International Airport and received two boarding passes from the Etihad Airlines' counter. Out of the two boarding passes, one was for the Dhaka-Abu Dhabi flight EY253, the other for the Abu Dhabi-Toronto flight EY141. The petitioner and her mother boarded the EY 253 flight and reached Abu Dhabi the next morning. Their next flight from Abu Dhabi (Abu Dhabi-Toronto) was scheduled to depart at 10:00 PM. At the aforementioned time, the petitioner and her mother stood in line to board the Toronto-ward EY 141 flight. After the security check, the petitioner was led into the waiting room for boarding the flight, but her mother was not allowed to do the same on the ground that her boarding pass did not have a stamp. The officials of the aforementioned Etihad flight compelled the petitioner and her mother to buy tickets back to Bangladesh, and travel back on those tickets. Upon return to Dhaka on the 30 June 2011, the petitioner filed a General Diary (GD) at the Airport Police Station. The incident made the news in a national daily on the 2 July 2011, following which the petitioner filed a complaint to the

International Civil Aviation Authority via e-mail and to the country manager of Etihad at its Dhaka office. Finally, the petitioner filed a writ before the High Court Division of the Supreme Court of Bangladesh.

The government formed an inquiry committee, which found clearly that the actions of the Etihad officials were wrong, rude, negligent, and unprofessional. Instead of fixing the stamp issue, they proceeded to wrongfully send the petitioner and her mother back to Bangladesh.

After careful consideration of relevant evidence, information, and the report of the inquiry committee, the court opined that Etihad committed an arbitrary, malafide and unreasonable act manifest in negligent and rude behaviour of the airlines' officials. Their acts included harassment, forceful unloading of their baggage from the plane, the compulsion to purchase return tickets to Bangladesh and the denial of allow entry onto the plane bound to Toronto. These acts by the airlines were deemed to be in violation of the principles of natural justice, illegal and without jurisdiction. The court awarded compensation to the petitioner and her mother. Etihad Airlines paid the compensation under The Carriage by Air (International Convention) Act, 1966 (Para 1, Article 22, Chapter 3), which was enacted to give effect 'to the Convention concerning international carriage by air known as "the Warsaw Convention as amended at The Hague, 1955,"' and to enable the rules contained in that Convention to be applied.

Human Rights

Implementation of Human Rights Treaties

The Women and Child Repression Prevention (Amendment) Act, 2020

Enacted on 26 November 2020, the Women and Child Repression Prevention (Amendment) Act has increased the severity of the penalty for rape. Anybody convicted of rape now faces either life imprisonment or the death penalty, whereas previously, only life imprisonment was applicable (section 9(1)). Similarly, section 9(4)(A) has been amended to enhance the penalty for attempting to murder or injure after rape from life imprisonment to the death sentence. These amendments have been brought in an attempt to restrict the escalation of violence against women and in line with the General Recommendation No. 19 (1992) of the Committee on the Elimination of Discrimination against Women in its general recommendation no. 19 (1992) which urged states to ensure that laws prohibiting domestic violence and abuse, rape, sexual assault,

and other forms of gender-based violence adequately protect all women and to take all legal and other measures necessary to provide effective protection for women against gender-based violence, including effective legal measures, including penal sanctions, civil remedies, and compensatory provisions.

The Usage of Information and Communication Technology by Court Act, 2020

The Supreme Court of Bangladesh remained closed since 24 March 2021 due to the COVID-19 pandemic. Consequently, the President exercised his ordinance-making power under article 93(1) of the Constitution to enact the 'Usage of Information and Communication Technology by Court Ordinance 2020' for the virtual operation of the judiciary of Bangladesh during the pandemic. The High Court Division of the Supreme Court started hearing petitions virtually from 12 May 2021. The ordinance was then enacted as a law by the Parliament on 9 July 2020 titled "The Usage of Information and Communication Technology by Court Act 2020." The Act enabled the court to conduct the court proceedings with the virtual presence of the parties, lawyers and witnesses following the practice directions provided by the Supreme Court under section 5 of the same Act. Section 4 of the Act states that virtual presence would be presumed as physical presence under both civil and criminal proceedings.

This initiative reflects compliance with international law, which guarantees access to justice. For instance, article 2(3) of the International Covenant on Civil and Political Rights asks State Parties to ensure that any person whose rights or freedoms as recognized herein are violated has an effective remedy, regardless of whether the violation was committed by persons acting in an official capacity, and to ensure that any person claiming such a remedy has his right to it determined by competent judicial, administrative, or legislative authorities. Article 8 of the Universal Declaration of Human Rights 1948 (UDHR) states that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' Article 10 of the UDHR further states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

Specific Human Rights Incidents or Cases

Human Rights – Children in Detention – Children in Conflict with the Law – Convention on the Rights of the Child – Due Process – Child's Right to Be Heard

State vs Ministry of Law, Justice and Parliamentary Affairs, Government of Bangladesh, Represented by Its Secretary **[Suo-Moto Rule No. 07 of 2019, Judgment Delivered on 11 March 2020]**

The Prothom Alo, a national daily, covered a news on 31 October 2019 about the detention of 121 children in child development centers at Tongi, Gazipur and Pooler Hat, Jashore. The children were held in detention pursuant to orders of conviction and sentence passed by the Executive Magistrates of Mobile Courts under the Mobile Court Act 2009. Mr. Abdul Halim, who heads a child welfare organization, brought the news to the attention of the Court stating that although the Children Act 2013, a special law, provided special procedures for the trial of child offenders, some Mobile Courts have convicted and sentenced the said 121 and other children in different cases without jurisdiction. The Court issued a Suo-moto Rule calling upon the concerned Ministries and departments of the government, the Rapid Action Battalion (RAB), and the concerned executive magistrates to show cause as to why the trials, conviction, sentences, and detention of these 121 children, or any other children, by the Mobile Courts in Bangladesh, should not be declared to be without lawful authority and of no legal effect.

At the time of issuing the Rule, the Court passed an ad-interim order directing the authorities of the respective detention centers to immediately release all children under the age of 12 whom they had detained pursuant to the said orders of conviction and sentence. By the same order, the Court granted bail to children who were aged between 12–18 years for a period of 6 (six) months, to the satisfaction of the Children Courts of the districts concerned. The Court also asked the special force, RAB, and the concerned Executive Magistrates to create separate files of cases in which they had convicted and sentenced the said 121 children or any other children and send them to the Court. The detention centers and the Executive Magistrates complied with the Court orders, but RAB remained silent.

However, the principal respondent in this case, namely, the Ministry of Law, filed an affidavit stating that some of the children were convicted under the Narcotics Control Act 2018 in conjunction with the Mobile Court Act of 2009. The affidavit alluded to section 57 of the Narcotics Control Act, which empowers the Mobile Courts to summarily convict and sentence offenders. The

affidavit also pointed out that this provision overrides provisions of the said Act including section 52, which provides for the application of the Children Act 2013 in case of child offenders. As such, in so far as conviction and sentence of the said children under the Narcotics Control Act were concerned, no illegality has been committed.

The learned counsel for the children, in his affidavit-in-reply, stated that the said children, some of whom were below 12 years of age, were convicted on the basis of confessional statements extorted from them, which violated some of the provisions of the Penal Code. He further added that some of the allegations against the children were that of robbery, which was punishable under the Penal Code, and as such, was outside the jurisdiction of the Mobile Court's jurisdiction. Nonetheless, they convicted and sentenced the children by framing charges against them under the Penal Code. The learned counsel informed the Court that the way confessions of the said children were recorded violated the safeguards provided by the Code of Criminal Procedure. Interestingly, the same sets of witnesses were used while recording confessional statements of the said children; for example, in one particular case, one of the Executive Magistrates, recorded confessional statements of 23 children in two cases regarding occurrences at two different places within a period of 32 (thirty-two) minutes only, which clearly suggests that the cases were, in all certainty, prepared in the office of the said Executive Magistrate and that he had never actually visited the places of the occurrences. The counsel for the children contended that since the Children Act 2013 provides special procedures for dealing with children in conflict with the law in line with the UN Convention on the Rights of the Children (CRC), the Mobile Courts did not have any jurisdiction to convict and sentence the children for any offence.

The Attorney General representing the State responded by reiterating that the children between 12 and 18 years of age in this country are found to be repeatedly engaged in various offences and gang activities that include drug peddling, extortion, kidnapping, and murder. He submitted that these crimes cannot be stopped unless Mobile Courts are allowed to intervene instantaneously. He referred to successful drives of the Mobile Courts against adulterated food, hoardings, etc., which received appreciation from the public.

After hearing both sides and assessing the merit and facts of the case, the Court referred to the fundamental rights guaranteed by the Constitution for all citizens to enjoy the protection of law and to be treated in accordance with law and only in accordance with law, and that no action detrimental to the life, liberty, body, reputation, or property of any person may be taken except in accordance with law (article 31). The Constitution further guarantees the personal liberty of all persons, except in accordance with the law (article 32). Every

person has the right to consult and be defended by a practitioner of his choice (article 33), and if arrested, to be produced before a judicial magistrate within 24 hours of arrest (article 34). Besides, an accused has the right to a public trial by an independent and impartial court or tribunal (article 35). Questioning the violation of the fundamental rights of the children in the way they were tried, convicted, and sentenced, the Court was convinced that the Executive Magistrates ignored the substantive penal law provision which declares that children under 12 years of age cannot commit any offence, unless proven to have sufficient maturity to understand the nature and consequences of his/her act during their trials. Indeed, there was nothing on record to prove that the Executive Magistrates did anything to understand the state of the children's minds. As such, the convictions of the children under 12 years were a nullity in the eye of law.

The Court observed that the nature of Mobile Court procedures is such that it denied the children the necessary safeguards when extracting confessions from them and deprived them of the opportunity to exercise the right to counsel, all of which violated the Constitution. Questioning the credibility of the confessions, the Court recognized that they were given under severe compulsion. In addition, the trial, conviction and sentencing by Executive Magistrates were tantamount to prosecution by the state and as such, was neither independent nor impartial, as required by the Constitution. Referring to the extensive provisions in the Children Act 2013 on the trial, conviction and sentencing of children in conflict with the law, the Court maintained that the Mobile Courts had no jurisdiction to try children, as the special law, which was promulgated after the Mobile Courts Act, prevails over all other laws, including the Mobile Courts Act 2009. Similarly, the Mobile Courts are not empowered to try any narcotics-related offences; sections 44 and 45 of the Narcotics Control Act 2018 provide that the narcotic-related offences shall be triable only by the Special Tribunals established by the Government, and judges of the rank of the Additional District Judge. Until such tribunals are established, the Government may confer such powers on an Additional District Judge or a Sessions Judge. That said, when narcotics-related offences are committed by children, they will be dealt with under the Children Act 2013.

Taking everything into consideration, the Court declared the conviction and sentencing of the concerned children to be null and void ab initio and without any lawful authority. It ruled that the children in question would not bear any consequences, legal or factual, of such conviction and sentences in their future life. Accordingly, there shall not be any criminal records against the said children in so far as these cases were concerned. With these observations, the Suo-moto Rule was made absolute.

Migrants' Right to Health – Statement by Bangladesh at the Joint IFRC/IOM Briefing 'Advancing Migrant's Access to Healthcare in the Time of COVID-19,' Virtual Event, 10 December 2020, Organized by IFRC and IOM, The Friends of Migration Group

Referring to the deep nexus between migration and health and the significance of ensuring inclusive access to health care, regardless of migration status during the COVID-19 pandemic, Bangladesh co-led a Joint Statement on the Impact of COVID-19 on Migrants, which was eventually supported by 103 member states. Recalling the contribution of migrants to the socio-economic progress of both host and sending countries and the increased vulnerability of migrants in the wake of the pandemic, the statement called upon States to incorporate the health needs of migrants in national and local health care policies and plans. To overcome this situation, global solidarity and cooperation were essential. The call of the Global Network on Migration to suspend forced returns during the pandemic to protect the health of migrants and communities and to uphold the human rights of all migrants, regardless of status was welcomed here. Bangladesh lauded the initiatives taken by some countries, e.g., Portugal, Canada, and Italy, to remove barriers and facilitate migrants' access to the labour market, social protection, temporary citizenship, and basic services. For example, Portugal has temporarily granted all migrants and asylum seekers citizenship rights. The statement offers some pragmatic recommendations for ensuring the health concerns of all migrants, which include:

- the integration of the health of migrants and their families in the global discourse of Universal Health Coverage with increased investments, with the aim of developing a unified agenda and global common principles for the health of migrants, including those who are in irregular situations;
- the need for international support and cooperation in ensuring the availability of affordable vaccines, medicines, and equipment for migrants in vulnerable situations;
- the need to harness the development potentials of migration by the host countries to further integrate migrants and mobile populations into their national health systems; and
- the need to foster global solidarity to combat rising racism, xenophobia and intolerance against migrants by exerting a strong political to ensure the rights, well-being, and dignity of migrants during this unprecedented crisis.

Rights of Persons with Disabilities – Statement by Bangladesh at the 13th Conference of the State Parties to the CRPD, 30 November 2020 (Submitted as E-Statement)

As one of the early signatories to the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol, Bangladesh reiterated its

deep commitment to implement the CRPD and uphold the rights of persons with disabilities, with particular emphasis on the unprecedented challenges faced by them during the COVID-19 pandemic. The statement highlighted the programmes and policy and legislative measures that Bangladesh undertook till date in line with its obligations under the CRPD and how NGOs, civil society and the private sector were partnering with government efforts to address the special needs of this vulnerable group. Alluding to life-changing stories of persons with disabilities in Bangladesh who have benefited from different programmes and opportunities, Bangladesh concluded by stressing the need for an inclusive and innovative approach, supplemented by access to affordable and assistive technology, for meaningful development of persons with disabilities.

Safe, Orderly and Regular Migration – Statement by Bangladesh at the High-Level Launch of Secretary-General's Report on the Global Compact for Safe, Orderly and Regular Migration, 01 December 2020

Bangladesh observed how the COVID-19 pandemic underpinned the need for enhanced collaboration for migration management and of the potentials of the Compact for Safe, Orderly and Regular Migration. The statement acknowledged the daunting challenges triggered by the pandemic which resulted in job losses, salary cuts, and lack of access to social security, not to mention the added problem of managing returnee migrants, dipping remittances and the overall shrinking of the overseas labour market. The statement outlined a few policy priorities for effective implementation of the Compact:

- Enhance international cooperation by adopting a comprehensive 360-degree approach to benefit from the knowledge and experiences from all relevant stakeholders, at the national, regional, and global levels.
- Ensure strong political will to ensure the rights, well-being, and dignity of migrants during the pandemic situation and to that end, foster global solidarity to combat rising xenophobia and intolerance, and discrimination against migrants.
- Harness the development potentials of migration and strive to further integrate migration issues with the 2030 Agenda.
- Adopt a holistic approach in dealing with the post-pandemic job market, with special emphasis on imparting new skills, providing capital for small businesses, exploring inter-agency collaboration, as well as developing partnerships with the private sector.
- Tap into innovative approaches of international cooperation in migration governance, focusing on strengthening pathways for enhanced regular migration, skills development, and institutional capacity building, as well as safeguarding decent work of migrants.

International Humanitarian Law

Sexual Violence during Conflicts – Statement by Bangladesh at the Security Council Open Debate on Conflict Related Sexual Violence: Turning Commitments into Compliance, 17 July 2020

Expressing concern about the continued occurrence of sexual violence in conflict zones, with virtually no redress, Bangladesh recalled its own experience of conflict-related sexual violence (CRSV) during its war of liberation in 1971 and the more recent experience of the forcibly displaced Rohingya women, most of whom had suffered sexual violence in Myanmar, before their flight to Bangladesh. Bangladesh emphasized that the international community must persuade Myanmar to cooperate with relevant UN bodies to hold the perpetrators accountable for the atrocities committed to the Rohingya women.

Referring to the National Action Plan on Women, Peace and Security, which Bangladesh recently adopted, Bangladesh highlighted some of the measures it has taken to prevent and redress conflict-related sexual violence, particularly during humanitarian crisis to ensure implementation of Security Council resolutions in respect of women, peace, and security (WPS). Bangladesh called for, inter alia:

- Full implementation of the compliance framework recommended by SC resolutions, including Resolution 2467, with particular emphasis on regular monitoring and actions for prevention;
- Greater synergies between the mandated UN entities and the Committee on the Elimination of all forms of Discrimination against Women (CEDAW) to ensure compliance of the General Recommendation 30 of CEDAW, which obliges its 189 States parties to report on the resolutions related to conflict-related sexual violence;
- Strengthening accountability and justice mechanisms in the conflict and post conflict contexts to ensure redress and stop impunity;
- Stronger implementation of mechanisms for Security Council's WPS agenda at the national, regional and global levels;
- The internalization of the CRSV commitments by the entire UN system, including at the ground level by the Resident Coordinators and other UN agencies in the country teams, to better address capacity gaps in the security sector, in the justice systems and in the overall political process for increasing women's participation at all levels of the peace process.
- The addressment of the root causes of conflict, as discrimination, persecution and subjugation weaken vulnerable and marginalized communities and reduce their ability to prevent incidents of sexual violence by parties to the conflict.

Use of Force

Use or Threat of Force – International Terrorism

Statement by Bangladesh on the Agenda Item No: 114 "Measures to Eliminate International Terrorism," 07 October 2020

Recognizing that terrorism is a serious threat to international peace and security and to the achievement of the Sustainable Development Goals, Bangladesh reiterated its support to various counter-terrorism initiatives undertaken by the UN. The statement highlighted Bangladesh's policy of 'zero tolerance' towards terrorism and violent extremism. Bangladesh is a party to all international counter-terrorism instruments and as part of its treaty obligations, has been investing heavily in national capacity-building including awareness-raising, community engagement and resilience, in a 'whole-of-society' approach to combat terrorism.

While highlighting some issues for consideration by the United Nations in its efforts to eliminate terrorism, the statement emphasised on generating the global discourse and action on counter-terrorism in a more robust manner and observed that continued exchange of information and intelligence-sharing among nations is critical in this regard. Bangladesh recommended that national capacity building and training of counter-terrorism personnel in developing countries should receive top priority in the UN agenda to assist in the implementation of obligations under the UN Global Counter Terrorism Strategy. The statement affirmed that since women and children are disproportionately affected by terrorism, efforts must seek to integrate the gender dimension in national and international campaigns against terrorism and violent extremism. Overall, respect for human rights and for the rule of law should essentially shape the anti-terrorism agenda. The statement cautioned that the COVID-19 pandemic may potentially divert attention of governments away from terrorism and violent extremism, which could be disastrous as restricted mobility and online education could trigger the emergence of innovative terrorist activities.

State Practice of Asian Countries in International Law

Central Asia

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History and Theoretical Approach of Central Asian States in International Law

This contribution describes the recent developments in Central Asian States (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan) pertaining to international law and foreign policy in 2020. Since Central Asia is featured in the Yearbook's State Practice Section for the first time, relevant developments immediately preceding 2020 are occasionally discussed as well, by way of introduction.

Kazakhstan

On 6 March 2020, the President of Kazakhstan approved a Foreign Policy Concept for 2020–2030 by Decree No. 280 (for the text of the Concept (in Russian), see: https://www.akorda.kz/ru/legal_acts/decrees/o-koncepcii-vneshnei-politiki-respubliki-kazahstan-na-2020-2030-gody). The Concept discusses, in a comprehensive manner, Kazakhstan's prospective approaches to modern challenges such as (see Chapter 1 of the Concept):

> a crisis of confidence and an increase in conflict, including as a result of a decrease in the functionality of multilateral institutions for security and dialogue, the low effectiveness of preventive diplomacy and conflict resolution mechanisms;
>
> erosion of the fundamental principles of international law, a clash on a global scale of two main trends – globalism and nationalism, which creates serious risks for medium and small states;
>
> exacerbation of traditional challenges and threats to security, such as terrorism, extremism, the arms race, including missile, nuclear and space, climate change and a number of others;
>
> the emergence of new factors of influence on geopolitics and geoeconomics, including those related to the development of information

and communication technologies, the phenomena of hybrid and cyber wars;

erosion of the modern model of globalization and the international trading system, an increase in the gap in economic and technological development between countries and regions, the vulnerability of the global financial system, the tightening of trade and currency wars, sanctions confrontation.

In view of the above challenges, Kazakhstan's foreign policy priorities are grouped in four thematic areas (Chapter 5 of the Concept). To contribute to the maintenance of international peace and security, Kazakhstan focuses, *inter alia*, on the promotion of the Principles and Purposes of the United Nations (para. 1.1), nuclear disarmament (para. 1.3), arms control (para. 1.4), combating international terrorism and extremism (para. 1.6), and cyberthreats (para. 1.7). In the area of economic diplomacy, priorities include a structural transformation of national economy (para. 2.1), the attraction of foreign investments (para. 2.2), the digitalization of economy (para. 2.3), "green economy" (para. 2.4), and the contribution to an efficient functioning of the international trade system (para. 2.12). In the area of human rights involving humanitarian diplomacy and protection of the environment, Kazakhstan is determined to combat illegal migration and human trafficking (para. 3.4), continue concluding bilateral agreements on mutual legal aid (para. 3.6), improve the legal regulation of the use of transboundary water resources (para. 3.17), and respond to the consequences of the desertification of the Aral Sea (para. 3.18). As far as priorities in the area of regional and multilateral diplomacy are concerned, these include enhancing cooperation, in appropriate formats, with the Russian Federation, China, the United States, the States of Central Asia, the European Union (EU), and its individual Members (para. 4.2), the Commonwealth of Independent States (para. 4.4); ensuring compliance with the Convention on the Legal Status of the Caspian Sea (para. 4.6); reinforcing relations with the nations of East, Southeast, and Southeast Asia, Near and Middle East, North Africa (para. 4.8), North and South America, the Caribbean and Africa (para. 4.9), and developing interaction with international and regional economic and financial institutions (para. 4.10). Obviously, the role of international law in the realization of these priorities will be crucial, and although formally external to the country, these processes will also have profound effects on the situation within the country.

On 16 March 2020, President Kassym-Jomart Tokayev introduced a state of emergency due to the COVID-19 pandemic, which was to remain in force until

11 May 2020. The state of emergency was based on a relevant domestic law, including nationwide quarantine measures and restricted international travel. The restrictive sanitary measures continued beyond the state of emergency.

On 7 May 2020, the President of Kazakhstan made a statement on behalf of the Group of Landlocked Developing Countries (LLDC). He called on the international community to "gear up their effort to address the growing external debt of developing countries, debt relief, enhancing food security, and transition to green and modern agrotechnology, among other measures" (Zh. Shayakhmetova, "Major Events and Headlines in Kazakhstan That Shaped 2020," The Astana Times, 30 December 2020, available at: https://astanatimes.com/2020/12/major-events-and-headlines-in-kazakhstan-that-shaped-2020/).

On 25 May 2020, the Law "On the Procedure for Organising and Holding Peaceful Assemblies in Kazakhstan" was adopted. Although the new Law represents a development in comparison with its first edition (1995), it was still criticized by national and international human rights groups for not fully complying with the International Covenant on Civil and Political Rights (ICCPR). Amendments on electoral legislation were also enacted, with a view to further developing a multi-party system.

Kyrgyzstan

The current Foreign Policy Concept of the Kyrgyz Republic was enacted by the President's Decree UP No. 37 of 11 March 2019 (for the text of the Concept (in Russian), see: http://cbd.minjust.gov.kg/act/view/ru-ru/430045). Fairly concise, the Concept is "a fundamental political document in the field of foreign policy of the Kyrgyz Republic, which contains a system of views on the content, principles and main directions of the foreign policy of the state, determines its key priorities" (see para. 1 of Section 1). The foreign policy of Kyrgyzstan rests upon "the Constitution of the Kyrgyz Republic, generally recognized principles and norms of international law, the Law of the Kyrgyz Republic 'On the Interaction of State Bodies in the Field of Foreign Policy of the Kyrgyz Republic,' the National Development Strategy of the Kyrgyz Republic for 2018–2040 and other regulatory legal acts of the Kyrgyz Republic, as well as treaties that have entered into force in accordance with the procedure established by law, to which the Kyrgyz Republic is a party" (see para. 2 of Section 1). Chapter 2 of the Concept lays down the principles of Kyrgyzstan's foreign policy as follows:

> The Kyrgyz Republic pursues a pragmatic, balanced, open, multi-vector and consistent foreign policy.
>
> A pragmatic foreign policy is focused on creating favorable external conditions and opportunities for achieving the strategic goals of the State's development.

> The Kyrgyz Republic maintains a reasonable balance in interaction with external partners, taking into account national interests, and consistently implements its inalienable right to development.
>
> Building an open multi-vector foreign policy, the Kyrgyz Republic develops cooperation with all member states of the United Nations and international organizations on the basis of goodwill, mutual understanding and mutual respect of interests.
>
> Pursuing a consistent foreign policy, the Kyrgyz Republic stands for the conscientious fulfillment of the obligations assumed by all subjects of international law.
>
> International cooperation is carried out on the basis of generally recognized principles and norms of international law, enshrined in the Charter of the United Nations and other international documents to which the Kyrgyz Republic is a party, including the sovereign equality of states, non-use of force and threat of force, non-interference in internal affairs, respect for territorial integrity and the settlement of international disputes by peaceful means.
>
> The Kyrgyz Republic stands for strengthening international cooperation based on the principles of multipolarity, ensuring equal rights and opportunities for all United Nations Member States in the areas of international politics, security, economics, trade and other areas.

The specific priorities of Kyrgyzstan's foreign policy are listed under three headings: Political; Finance, Economy, Ecology; and Cultural and Humanitarian Area. With respect to the political area, the Concept states, in particular, that "[…] in the context of globalization, the importance of close cooperation of the Kyrgyz Republic with the world and regional powers, associations and active players in the international arena is increasing. The foreign policy of the Kyrgyz Republic is aimed at broad, multifaceted and mutually beneficial cooperation with the main centers of international politics on the principles of mutual understanding and respect for interests and the maximum use of the achievements and resources of the world economy" (see para. 3 of Section 4). Further, a timely and constructive observation with respect to the United Nations is offered: "The United Nations, as the only global universal organization, plays a key role in ensuring peace and international security. In order to strengthen the consolidating role of the United Nations and adapt its activities to modern realities, the Kyrgyz Republic stands for taking the necessary measures to improve the United Nations Security Council, which will take into account the interests of the vast majority of the world's states and be based on the principles of universality, efficiency and broad geographical representation" (see para. 5 of Section 4). The Concept also emphasizes the role of universal and

regional international organizations: "In order to promote national interests, assist in ensuring national and regional security and solving socio-economic problems, the Kyrgyz Republic actively cooperates within the framework of the United Nations, the Eurasian Economic Union, the Collective Security Treaty Organization, the Shanghai Cooperation Organization, the Commonwealth of Independent States, the Security Organization and cooperation in Europe, the Organization of Islamic Cooperation, the Cooperation Council of Turkic Speaking States, the Economic Cooperation Organization and other international organizations" (see para. 6 of Section 4).

In the area of finance, economy, and ecology, "[t]aking into account national interests, the Kyrgyz Republic follows the strategic course of regional and international economic integration for the sustainable development of the country and improving the living standards of the population" (see para. 10 of Section 4). The Concept calls, among other things, for a modernization of national economy, further liberalization of international trade, further integration in the international transport and communication networks, ensuring the nation's food security and its commitment to "green economy" (see para. 12 of Section 4). The protection of the environment is another important priority (see paras. 16–17 of Section 4):

> In order to ensure environmental safety, preserve biodiversity and a favorable environment, the Kyrgyz Republic cooperates with foreign States and international organizations to take effective measures to adapt to climate change and mitigate its consequences. The environmental security of the country also includes the preservation of the zone of formation of water resources, the solution of the problems of uranium tailings on its territory, the prevention and elimination of emergency situations, natural and man-made disasters.

Ensuring the country's water and energy security is a priority in foreign policy. Water and energy diplomacy of the Kyrgyz Republic is aimed at promoting dialogue, forming an international legal framework and developing a mutually beneficial economic mechanism for the integrated and rational use of water and energy resources in the region.

In the cultural and humanitarian area, the Kyrgyz Republic makes it a priority "to make full use of international cooperation to strengthen cultural, educational, scientific and human potential, the healthcare system, improve the quality of medical services, as well as to develop high technologies and innovations" (see para. 20 of Section 4). Kyrgyzstan is proud of its nomadic heritage stating that "The Kyrgyz Republic, being the founder of the World

Nomad Games, will continue to contribute to the revival and preservation of the culture, identity and way of life of the nomadic peoples of the world" (see para. 24 of Section 4). Kyrgyzstan also intends to capitalize on the diversity of its education market as "[o]ne of the most important foreign policy priorities of the Kyrgyz Republic is positioning the country as a regional educational center on the Eurasian continent" (see para. 26 of Section 4).

On 5 October 2020, popular protests began in the country, in response to allegations of vote rigging in the recent parliamentary election. On 10 October, Mr. Sadyr Japarov was nominated as acting Prime Minister, and on 15 October, he also became acting President. On 10 January 2021, Mr. Japarov was elected President of Kyrgyzstan. Early in his tenure, the country's third Constitution since 1991 was adopted. Article 6(3) formulates the monist perspective on international law as follows:

> The generally recognized principles and norms of international law, as well as treaties that have entered into force in accordance with the legislation of the Kyrgyz Republic, are an integral part of the legal system of the Kyrgyz Republic.
>
> The procedure and conditions for the application of treaties and generally recognized principles and norms of international law are determined by law.

It is notable that in two paragraphs, the "generally recognized principles and norms of international law" and "treaties" are listed in different sequences. In the first paragraph, the generally recognized principles and norms are mentioned before treaties, which might suggest that these principles and norms are primary, or superior, with respect to treaties. The fact that "treaties" are mentioned after the conjunction "as well as" reinforces this first impression. The concept of "generally recognized principles and norms of international law" is widespread in the post-Soviet doctrine of international law but its precise content allows for at least four interpretations. First, the concept could mean "general international law" – that is, in the words of Grigoriy Tunkin (1906–1993), "law recognized by all States and regulating relations between them" (G. Tunkin, *Teoriya mezhdunarodnogo prava* [Theory of International Law] (Zertsalo, 2000), p. 16). Second, the concept could mean international custom "as evidence of a general practice accepted as law," in the language of Article 38(1)(b) of the ICJ Statute. Third, in the words of Igor Lukashuk (1926–2007), the concept refers to the "main principles of international law" as "the most general norms of international law, which determine its main content and characteristic features, [and] possess the supreme political, moral,

and legal authority" (I.I. Lukashuk, *Mezhdunarodnoye pravo: Obshchaya chast* [International Law: General Part] (Wolters Kluwer, 2008), p. 296). These "main principles" include those listed in Article 2 of the UN Charter, the 1970 Friendly Relations Declaration, and the Declaration of Principles in the 1975 Helsinki Final Act. Finally, the concept could well mean the peremptory norms of general international law (*jus cogens*) in the sense of the second sentence of Article 53 of the Vienna Convention on the Law of Treaties. It appears that the relative vagueness of the concept might complicate its practical application.

In the second paragraph of Article 6(3) of the current Constitution of the Kyrgyz Republic, treaties precede the "generally recognized principles and norms of international law," since the "procedure and conditions for the application of treaties" are much easier to lay down in a law than for "generally recognized principles and norms of general international law," especially given that the content of the latter concept allows for multiple interpretations. As for the rest of the second paragraph of Article 6(3), it probably implies that the application of individual "generally recognized principles and norms of international law" is regulated by relevant domestic legislation (for example, the Criminal Code, relevant laws on human rights, use of force, etc.).

Tajikistan

The Legal Policy Concept of the Republic of Tajikistan for 2018–2028 was enacted by the President's Decree No. 1005 of 6 February 2018 (for the text of the Concept (in Russian), see: https://online.zakon.kz/Document/?doc_id=35835910). The Concept contains numerous references to international law. After a general observation to the effect of Tajikistan's "active participation in various international organisations, in international economic, social, political and cultural relations" (para. 9), the Concept makes a key statement on the relationship between international and domestic law (in para. 12):

> [...] Along with the inclusion of international normative legal acts in the national legal system, the most important problem is their correlation and alignment. The correct resolution is determined with due regard to the actual relationship between them in the course of applying international and national legal norms. [One is obliged] in the legislative activity of the country to pay attention to some basic specifics and principles of the Anglo-Saxon, continental, Muslim legal system and the legal system of the Commonwealth of Independent States, which differ from each other. At the same time, the adoption of international normative legal acts without their full analysis can lead to contradictions, inconsistencies and shortcomings of the legislation and, as a result, have a negative

> impact on the quality of laws[, s]ince the legislation of the Republic of Tajikistan as a national legal system is in interaction and under the influence of other legal systems. This situation requires their convergence, including coordination, unification and implementation of the norms of one legal system into the norms of another legal system.

Among the priority areas of domestic law requiring further development in accordance with Tajikistan's commitments under international law, the Concept specifically mentions international trade and taxation law (para. 20), customs law (para. 22), criminal law (para. 26), criminal procedure (para. 29), energy law (para. 38), tourism (paras. 47–48), civil procedure (para. 53), and the fair trial standards (para. 57). With these commitments, Tajikistan intends to train "highly qualified legal personnel ready for legal activities in the context of expanding and intensifying international relations, improv[e] educational policy in the field of training legal personnel; increas[e] the level of study of international law, taking into account the prospect of resolving legal disputes in international courts, advanced training after receiving a higher professional legal education" (para. 60).

Section 6 of the Concept is entitled "International Legal Policy," and reflects, in a detailed manner, Tajikistan's approaches to the role of international law as a foreign policy tool. Para. 70 singles out the following "national goals and interests":

> protection and strengthening of the State independence of Tajikistan and ensuring its national security at the international level;
>
> creation of a zone of security and good neighborliness along the borders of the country;
>
> development of trusting relations, friendship and cooperation with all countries of the world on the basis of mutual interests;
>
> creation of favorable conditions for economic, social, cultural development and gradual improvement of people's living standards, ensuring the economic security of the country;
>
> ensuring the energy security of Tajikistan, achieving food security and leading the country out of the communication impasse through the establishment of international cooperation;
>
> ensuring and protecting the rights and freedoms, authority and interests of citizens of Tajikistan abroad;
>
> strengthening the external image of Tajikistan in the world as a democratic, legal and secular State;

> assistance to the creative and legal activities of the societies of Tajiks and compatriots in other countries.

Para. 73 emphasizes further that "[t]he foreign policy of Tajikistan is based on unconditional respect for international law and is aimed at achieving [the above] goals and national interests." In accordance with para. 74, "[d]iscrepancies between the norms of national law and international law, economic and social threats, international conflicts, proliferation of nuclear, chemical and biological weapons, international terrorism, extremism, separatism, transnational organized crimes, imperfect guarantees of world and regional security, mismatch of interests of superpowers, non-settlement of conflicts between countries, the clash of civilizations, the unresolved disputes related to water in the region and the world, disrespect for democracy and the infringement of human rights negatively affect the effectiveness of international legal policy." In fairness, it appears that "discrepancies between the norms of national law and international law" do not pose the same level of danger as the other factors listed in para. 74. In fact, international law – duly implemented in the domestic legal order – is capable of contributing to mitigating those other threats, provided the following comprehensive measures are taken (para. 75):

> to determine the real situation of national legislation in accordance with the process of development of relations between international public and private law;
>
> constantly, accurately analyze and eliminate contradictions between national legislation and acts of international law recognized by Tajikistan;
>
> make wider use of the right to express reservations and their forms in the process of giving consent to the conclusion of multilateral international treaties, in particular in the economic, social and cultural spheres;
>
> to create a healthy competitive environment for national companies in the implementation of foreign economic activity by organizing transnational companies of Tajikistan in the fields of energy and drinking water supply;
>
> expand international legal relations, taking into account the interests and risks of the merger of the world economy in conjunction with regional and interregional cooperation, the strong preservation of identity, national self-consciousness and self-knowledge;
>
> expand bilateral and multilateral mutually beneficial cooperation in the use of water resources, including the implementation of the provisions of the resolution of the United Nations General Assembly on the International Decade for Action "Water for Sustainable Development 2018–2028";

to promote the creation and entry into new economic unions in order to create a single market, free movement of people, free delivery of goods, works and services;

to expand bilateral and multilateral international legal cooperation in combating international offences, including international terrorism, extremism, separatism, transnational organized crime, etc.;

improve the activities of consular offices in foreign countries, including the consular agency at airports and railway stations of countries in which or in the neighborhood of which armed conflicts occur, in order to prevent the entry of citizens of the country into extremist groups;

expand international legal cooperation with the International Nuclear Energy Agency, the European Union and other international organizations and institutions to solve environmental problems, including the neutralization and destruction of radioactive waste in the country;

intensify bilateral and multilateral international legal cooperation on climate change issues, including preventing the melting of the country's glaciers;

expand international legal cooperation in the field of labor migration, with due regard to the protection of the rights of Tajik migrants in foreign countries.

Turkmenistan

The most recent amendments to the Constitution of Turkmenistan (1992) were enacted on 25 September 2020 (for the text of the Constitution (in Russian), see: https://online.zakon.kz/Document/?doc_id=31337929). The Constitution is unique in Central Asia in that it makes a direct mention of the United Nations to reaffirm Turkmenistan's status as a permanently neutral State. Article 2 of the Constitution of Turkmenistan stipulates "Turkmenistan has the status of permanent neutrality, recognized by the world community and secured by law."

The United Nations in the Resolutions of the General Assembly "Permanent Neutrality of Turkmenistan" of 12 December 1995, as well as of 3 June 2015, recognizes and supports the status of permanent neutrality proclaimed by Turkmenistan, calls on the Member States of the United Nations to respect and support this status of Turkmenistan, respecting also its independence, sovereignty and territorial integrity. The permanent neutrality of Turkmenistan is the basis of its domestic and foreign policy.

Given that resolutions adopted by the UN General Assembly are normally not binding (cf. Articles 10–14 of the UN Charter), one may question the legal force of the respective resolutions of 12 December 1995 and 3 June 2015. It should, however, be recalled that both resolutions were adopted without a

vote, which means they reflect a consensus among all UN Members (see: "How Decisions are Made at the UN," https://www.un.org/en/model-united-nations/how-decisions-are-made-un). It may therefore be argued that the permanent neutrality of Turkmenistan derives its legal force from this consensus, and is part of general international law.

The role of international law in the legal system of Turkmenistan is regulated by Article 9 of the Constitution:

> Turkmenistan, being a full-fledged subject of the world community, adheres in foreign policy to the principles of permanent neutrality, non-interference in the domestic affairs of other countries, refusal to use force and participation in military blocs and alliances, promoting the development of peaceful, friendly and mutually beneficial relations with the countries of the region and all states of the world.

Turkmenistan recognizes the priority of generally recognized norms of international law. The first paragraph of Article 9 is undoubtedly dualist in that it emphasizes the role of the specified principles in Turkmenistan's *foreign policy* only. The principles mentioned in the paragraph (non-interference, prohibition of the use of force, and the promotion of friendly relations) were selectively implemented from Articles 1 and 2 of the UN Charter. In turn, the principle of permanent neutrality is the basis of both the domestic and foreign policy of Turkmenistan (cf. the third paragraph of Article 2 of the Constitution).

Further, the second paragraph of Article 9 reads that "Turkmenistan recognizes the priority of generally recognised norms of international law." This provision does not specify that this priority extends to the domestic legal order. It should therefore be concluded from the context of Article 9 that its second paragraph is also meant to apply only in the context of international relations. Unlike Article 6(3) of the Constitution of Kyrgyzstan, the second paragraph of Article 9 of the Constitution of Turkmenistan makes no mention of "principles" but only refers to generally recognized "norms" of international law. It may be assumed that the superior status of "principles" is accorded only to the rules specifically listed in the first paragraph of Article 9, whereas all other rules of international law are meant to be simple "norms," even if they are "generally recognized."

Article 11 pertains to the legal status of foreigners in Turkmenistan and states: "Foreign citizens and stateless persons enjoy rights and freedoms, perform duties in the same way as citizens of Turkmenistan, in accordance with the laws and treaties of Turkmenistan." Turkmenistan, in accordance with the

generally recognized norms of international law, provides asylum to foreign citizens and stateless persons in the manner prescribed by law.

Notably, Articles 15 and 16 emphasize the significance of international cooperation in two areas. In accordance with the third paragraph of Article 15, "[t]he state promotes the development of international cooperation in the field of culture, education, sports and tourism." In turn, pursuant to the first paragraph of Article 16, "[t]he state promotes the development of science, engineering and technology, and also supports international cooperation in these areas." Finally, Article 25 stipulates that "[i]n Turkmenistan, the rights and freedoms of man and citizen are recognized in accordance with the generally recognized norms of international law and are guaranteed by this Constitution and laws."

Uzbekistan

On 19 May 2020, the President of Uzbekistan promulgated a Decree "On Measures to Further Improve the Activities of Bodies and Institutions of Justice in the Implementation of State Legal Policy" (for the text of the Decree (in Russian), see: https://lex.uz/docs/4820075). The broad aim of the Decree is "further improvement of the activities of the bodies and institutions of justice for the qualitative organization of a unified state legal policy, including rule-making activities, forming consistent and uniform law enforcement practice, ensuring the effectiveness of the public administration system, improving the legal culture of the population, providing qualified legal assistance to citizens andbroadly implementing digital technologies in the field" (see the Decree's Preamble). The attached Concept deals with numerous aspects of international law. Thus, paragraph 4 stresses the importance of:

> Ensuring the implementation of tasks to fulfill obligations under treaties in the field of intellectual property, to which the Republic of Uzbekistan has joined.
>
> Studying the issues of accession the Republic of Uzbekistan to other treaties in the field of intellectual property and preparing proposals for joining them in the future.

Further, paragraph 7 explicitly refers to "[t]aking measures for a phased introduction of international standards in the field of human rights protection." Importantly, paragraph 8 entitled "Development and further strengthening of international legal cooperation, ensuring legal protection of the interests of the Republic of Uzbekistan in international and foreign organizations" lists

pragmatic measures related to international law and cooperation in every sentence:

> Activating cooperation with representative offices of international organizations in the Republic of Uzbekistan and relations with foreign donors through the implementation of joint projects.
>
> Strengthening work on organizing foreign internship, seminars and training courses for employees of bodies and institutions of justice with the participation of international experts.
>
> Studying the issue of expanding the legal base of the Ministry with the relevant authorities of foreign countries and establishing cooperation with international legal organizations.
>
> Taking measures for the timely, efficient and high-quality consideration of appeals and requests for international legal assistance with the definition of the competence of authorized bodies.
>
> Intensifying work to increase the level of legal awareness of the international community about ongoing reforms in all spheres of public and state life, positive trends in the protection of human rights and freedoms.
>
> Establishing close and constructive cooperation with international ranking agencies, in particular ranking agencies in the legal field.
>
> Establishing strong partnerships with international ranking and index organizations assigned to the Ministry, such as the World Bank Development Research Group, The World Justice Project, The Economist Intelligence Unit (UK).
>
> Establishing the practice of evaluating legal acts in terms of their impact on the position of the Republic of Uzbekistan in international rankings and indices.
>
> Implementing international standards (in particular, ISO 37001 (anti-bribery management system) and others) in the area of activity of the Ministry in order to strengthen international prestige and trust.
>
> Establishing the practice of periodic advanced training of employees of the Ministry involved in the process of considering citizens' complaints about violations of their rights and freedoms received from international organizations, including the UN Human Rights Committee, by organizing advanced training in relevant organizations.
>
> Using the process of developing agreements (contracts) aimed at attracting investments, alternative mechanisms for resolving disputes in pre-trial order, including ensuring measures for the enforcement of obligations in accordance with the Uniform Rules for Demand Guarantees

(URDG) of the International Chamber of Commerce, as well as achieving dispute resolution through the institution of mediation.

Expanding the scale of international legal forums held in the country, in particular the International Legal Forum "Tashkent Law Spring," increasing their prestige and attractiveness.

Assisting the formation of a new generation of the expert community, capable of objectively assessing the progress and results of the reforms being implemented in the country.

Establishing a unified procedure for organizing activities to protect the interests of Uzbekistan in international arbitrations and courts of foreign states.

The Concept also discusses, in paragraph 9, ways to improve the quality of secondary and higher education in the area of law, among other things, by developing and publishing quality textbooks, involving local and foreign law practitioners in the process of education, strengthening the potential of local law schools, and establishing branches of foreign ones. The ambitious character of the proposed measures is truly impressive. Their outcomes may already be seen in a mid-term perspective.

State Practice of Asian Countries in International Law

India

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Introduction

This report brings out current trends in state practice and domestic implementation of international law in India. The report mainly focuses on the interpretation and application of international law by the domestic courts, primarily the Supreme Court of India. The report also reflects some of the major developments and engagements of India in the context of international law, most importantly, treaties that India entered into during the relevant period. While international law has been referred to in a large number of judgments by the Supreme Court of India, this report includes only those judgments in which the court has engaged with or applied the relevant international law norms and rules that are reflective of India's state practice.

Relationship between International & Domestic Law

Treatment of International Law by Domestic Courts – Treaties, Custom

Union of India and Others vs Agricas LLP and Others
(Supreme Court of India, Transfer Petition (Civil) Nos. 496–509 of 2020, Decided on 26 August 2020)

The issue of the relationship between international law and domestic law came up for interpretation before a full bench of the Supreme Court of India regarding the power of the Central Government to impose quantitative restrictions under Section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (FTDR Act). One of the issues raised by the importers of the subject goods against the impugned Central Government notifications was in violation of

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Article XI of the GATT, *i.e.*, the general prohibition on quantitative restrictions, which was reflected in Section 3 of the FTDR Act.

The Court, while upholding the power of the Central Government, reflected on the applicability of GATT 1994 in domestic law and observed that an international convention must go through an "act of transformation" into municipal law before it is enforceable. Accordingly, the Court found that Article XI of the GATT had not been statutorily made a subject of "act of transformation" and incorporated in the domestic legislation either under Section 3 or 9A of the FTDR Act (para 20).

The Court provided a detailed analysis of the relationship between international law and domestic law as practiced in India on two aspects relevant in the present case:

(i) the applicability of an international treaty in domestic law, and
(ii) the 'invocability' of a treaty in municipal law and before the municipal courts

On the applicability of an international treaty in domestic law, the Court noted that:

> 7. ... the States as signatories to the international treaty are under an obligation to act in conformity and bear responsibility for breaches, be it as a consequence of legislative enactment, executive action or even judicial decisions. The State cannot plead and rely upon domestic law including judicial decisions as a defence to a claim for breach of an international obligation. Acts of legislation, executive measures and judicial decisions are not treated as third party acts for which the State is not responsible. Rather, the national law, executive mandate and action and the decisions of the domestic courts are facts which express the will and constitute activities of the State. In international law, municipal laws cannot prevail over treaties as internal actions must comply with the international obligation. Such acts may constitute a breach of a treaty.
>
> 8. Thus, a breach of a stipulation in international law cannot be justified by the State by referring to its domestic legal position. This rule of international law is unexceptionable and prosaic, as the contra view would permit the international obligations to be evaded by the simple method of domestic legislation, executive action or judicial decision. Contracting States are under an obligation to act in conformity with the rules of international law and bear responsibility for breaches whether committed by the legislature, executive or even judiciary. In a way, therefore, international treaties are constraints on sovereign activity, albeit voluntarily agreed.

At the same time, the Court noted that "failure to enact an internal domestic law in conformity with the international obligation is not a breach of international law, unless there is such requirement and obligation created by the international treaty. In the absence of any such binding clause, a breach arises only when the State concerned fails to observe its obligation on a specific occasion" (para 9).

The Court further draws a distinction between 'direct application' of treaties in domestic law and national legal systems that mandate and require 'act of transformation' for an international treaty to be applied and be a part of domestic law.

> 'Direct application' means and mandates that the treaty norms, either wholly or to some extent, are directly treated as norms of domestic law and enjoy the statutory law status by default in the domestic legal system. The term 'direct application' will also cover situations in which government or different levels of government utilise treaty norms as part of domestic jurisprudence and is not limited to situations in which private parties can sue on the basis of the treaty norms. As explained below, there is a distinction between direct application and 'invocability.' The 'act of transformation' principle means and implies that an international treaty is not directly applicable in the domestic law system and requires provision in the domestic rules before it is applied. 'Transformation' is a word of wide amplitude and does not refer to mere implementation as it includes the right of the country to adopt, amend or modify the treaty language into domestic jurisprudence. *The 'act of transformation' is different from 'direct application' as with the former, the treaty is not received and treated as part of domestic jurisprudence until it is published and made part of the domestic jurisdiction in the same manner as other law*.
>
> emphasis added

The Court elaborates on the principle of "invocation" of a treaty in municipal law and before the municipal courts and the legal effect of international treaties in the domestic law in India by simply referring to "justiciability; admissibility of a claim before the national courts" (para 14).

> In case where an 'act of transformation' is required, treaties may partially or entirely become part of the domestic law. Where the treaty or portion thereof becomes a part of the domestic law by 'act of transformation,' it is obvious that only the part incorporated or transformed into domestic law is invocable and justiciable and not the parts that are not codified into

> domestic law. However, invocability can embrace several ideas which are intertwined and is of specific concern in cases of constitutions allowing direct application. *Here 'invocability' is a generic term which means to embrace a small inventory of means of judicial control over the use in a particular law suit of the direct applicability of the treaty*.
>
> para 14, emphasis added

Reiterating its decision in *Jolly George Varghese and Anr v. The Bank of Cochin*, the Court held that "even though India is a signatory of an international treaty, Article 51(c) of the Constitution obligates the State to 'foster respect for international law and treaty obligations in the dealings of organised people with one another.' Moreover, the provisions of the international covenant is to be applied by an Indian Court when there is a specific provision in the Indian law. The positive commitment in the international agreement ignites legislative action at home but does not automatically make the covenant an enforceable part of the corpus juris of India" (AIR 1980 SC 470). The Court noted:

> The international conventional law must go through the process of transformation into municipal law before the international treaty can become an internal law. The Court, dealing with the enforceability of international law at the domestic level, observed that the remedy for breaches of international law, in general, is not to be found in the law courts of the State because international law per se or proprio vigore does not have the force or authority of civil law, unless under its inspirational impact actual legislation is undertaken. The individual citizens, therefore, cannot complain about their breach in the municipal courts even if the country concerned has adopted the covenants and ratified the operational protocol.
>
> para 20

The Court noted that a distinction has to be drawn between the "need for 'act of transformation' to be a part of domestic law, which confers a right to invocability" and the decision of "interpreting domestic law after the 'act of transformation' consequent to which portions of GATT-1994 stand enacted thereby conferring right of invocability to parties." (para 21).

The Court noted that the correct approach to the construction of a statute (domestic law) made in response to international treaty obligation is to give effect to international obligations. The Court reiterated its earlier 2015 division bench decision and acknowledged the principles that (i) rules of international law which are not contrary to domestic law can be followed by the courts; (ii) an international treaty can be relied on as a legitimate aid to the construction of

vague or ambiguous provisions of a statute adopted pursuant to that treaty; and (iii) a purposive rather than a narrow literal construction of such statute is preferred; and (iv) if there be any differences between the language of the statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty to ensure that international treaty as a uniform international code of law be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations (*Commnr. of Customs, Bangalore vs M/s. G.M. Exports & Ors on 23 September, 2015*, para 23).

The Supreme Court observed that while interpreting the domestic law enshrining human rights and environment issues, the Court on some occasions has relied on international conventions and treaties of which the terms of any legislation are absent, not clear or are reasonably capable of more than one meaning.

> In such cases, where there are statutes, rules etc., the meaning which in consonance with the treaties can be relied upon, *for there is a prima facie presumption that the Parliament did not intend to act in breach of international law, including State's treaty obligations*. Part-III of the Indian Constitution *a-priori* incorporates and recognises human rights, and consequently recourse to international conventions can be made to interpret and borrow explicit terminologies and nuances to bailiwick Human Right jurisprudence.
>
> para 27, emphasis added

The Court, however, differentiated between the decisions on human rights by the Courts *vis-à-vis* economic treaties. The Court noted that the present case is about economic and fiscal legislation or rather economic policy decision taken by the Union of India and, therefore, the decisions on human rights would not be of much assistance (para 27).

In the context of this case, the Court further engaged with the question as to what extent the FTDR Act has transformed GATT 1994 into domestic law. The Court held that the entire GATT-1994 does not stand transposed and enacted by way of statutory law or delegated legislation. It also concluded that "Section 9A is not a provision which incorporates or transposes paragraph (1) of Article XI into the domestic law either expressly or by necessary implication." (paras 41, 42). Thus, the Court cannot enforce or find violation of Article XI:1 of GATT-1994 in the domestic courts in India unless the said Article has been expressly or by necessary implication incorporated and transposed in the domestic law, that is, the FTDR Act.

Treaties

During the year 2020, some of the important international agreements signed by India are the following:

- Investment Cooperation and Facilitation Treaty between Brazil and India (25 January 2020) (signed not in force)
- Agreement on Social Security Between India and Brazil (Date of Signature and entry into force 25 January 2020)
- Bilateral Investment Treaty between India and Belarus (signed on 5 March 2020) (date of enforcement)[1]
- Agreement between India and Chile for the Elimination of Double Taxation and the Prevention of Fiscal Evasion and Avoidance with Respect to Taxes on Income (date of signature 9 March 2020)
- Investment Cooperation and Facilitation Treaty between Brazil and India (signed on 25 March 2020) (not in force)
- Agreement Between India and Brazil on Mutual Legal Assistance in Criminal Matters (25 March 2020)
- Framework Arrangement on Cyber and Cyber-Enabled Critical Technology Cooperation Between India and Australia (signed on 4 June 2020)
- Specific Cooperation Agreement Between India and the United Mexican States on Forest Fire Management Using EO Data and Capacity Building (signed and entered into force on 28 October 2020)

In addition, India has entered into Memorandums of Understanding with several countries which are available online.[2]

Terminated Bilateral Investment Treaties

India made fundamental changes in its investment policy framework and adopted a new Model Bilateral Investment Treaty (BIT) in 2015. India had sent termination notices to 57 partner countries with which it had BITs, some of which have already expired or will expire. India has also proposed signing joint interpretative statements (JIN) to clarify ambiguities in the treaty texts. In 2020, the following BITs stood terminated:

- BIT between India and Mozambique (terminated on 21 March 2020)
- BIT between India and Serbia (terminated on 22 March 2020)
- BIT between Brunei Darussalam and India (terminated on 27 March 2020)
- BIT between India and Myanmar (terminated on 28 March 2020)

1 Bilateral Investment Treaties (BITs)/Agreements, Department of Economic Affairs, <https://dea.gov.in/bipa?page=4>.

2 Treaty/Agreement, Ministry of External Affairs, <https://www.mea.gov.in/TreatyList.htm?1>.

- BIT between India and Jordan (terminated on 16 June 2020)
- BIT between India and Syrian Arab Republic (terminated on 20 June 2020)

Settlement Of Disputes

***Government of India v. Vedanta Limited and Others* (Supreme Court of India, 2020)**

The Supreme Court in *Government of India v. Vedanta Limited and Others* settled two critical issues pertaining to the enforcement of foreign arbitral awards in India (Supreme Court Civil Appeal No. 3185 of 2020 (SLP (civil) No. 7172 of 2020)).

Period of Limitation for Filing an Application for Enforcement of a Foreign Award

The Indian Arbitration and Conciliation Act, 1996, Part II Section 43 provides that the Limitation Act, 1963 shall apply to arbitrations, but it does not contain any provisions prescribing a period of limitation for filing an application for the enforcement or execution of a foreign award under Section 47. Because of this lack of clarity, several High Courts had interpreted the period of limitation for enforcement of foreign arbitral awards differently from 3 years (under Section 137of the Limitation Act 1963) to 12 years (under Section 136 of the Limitation Act 1963). Section 137 of the Limitation Act, 1963 prescribes a period of three years for "any other application for which no period of limitation is provided elsewhere in this Division." Section 136 of the Limitation Act, 1963 prescribes a period of twelve years for the execution of any decree or order of any civil court.

The Supreme Court of India clarified that Section 136 of the Limitation Act(1963) only applies to the decrees of a civil court in India (foreign awards are not decrees of an Indian civil court) and the enforcement of a foreign award would fall under the residuary provision, *i.e.*, Section 137 of the Limitation Act, which prescribes a period of three years from when the right to apply accrues.

The Court noted that as far as domestic arbitration award is concerned, Section 36 of the Arbitration Act (1996) creates a statutory fiction for the limited purpose of enforcement of a 'domestic award' as a decree of the court, even though it is as such not a decree passed by a civil court (p. 32). However, this legal fiction does not extend to foreign decrees and foreign arbitral awards. The Court noted that the omission of reference to "foreign decrees" under Section 136 of the Limitation Act by the legislature is to confine to the decrees

of a civil court in India. Accordingly, the "application for execution of a foreign decree would be an application not covered under any other sections of the Limitation Act, and would be covered by Article 137 of the Limitation Act," which provided for a three year period.

The Supreme Court, however, allowed those who did not act within the three-year period to seek condonation of delay in filing application for the enforcement of the award and has expounded that the ambiguity on the issue of limitation period is a sufficient ground to condone delays.

Enforceability of Foreign Arbitral Awards Contrary to the Public Policy of India

The Supreme Court in *Government of India v. Vedanta Limited and Others* (Civil Appeal No. 3185 of 2020 (SLP (civil) No. 7172 of 2020)) reiterated its decision in *Renusagar Power v. General Electric Co.* (1994 Supp (1) SCC 644). The defence of public policy should be construed narrowly and the enforceability of a foreign arbitral award should be restricted only if the award violates or is contrary to (i) Indian fundamental policy; (ii) Indian interest; and (iii) justice or morality.

The Court also referred to the 2016 amendment to the Arbitration and Conciliation Act that modified Section 48 to make the definition of "public policy" narrower than the *Renusagar* judgment by taking out the clause "interests of India." The newly inserted Explanation 2 to Section 48 provided that the examination of whether the enforcement of an award is in conflict with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. However, the court noted that this amendment does not have retrospective effect, and thus not applicable in the present case.

Scrutinizing the condition under which foreign award was contrary to the public policy of India in the context of the *Renusagar* judgment, the Court held that "the public policy defence should apply only where enforcement of the award would violate the basic notions of morality and justice of the forum state." Enforcement of an award may be refused only if it violates the enforcing State's most basic notions of morality and justice "which has been interpreted to mean that there should be great hesitation in refusing enforcement, unless it is obtained through 'corruption or fraud, or undue means.'"

The Court also held that Section 48(2)(b) does not permit reviewing foreign arbitral awards on merits and noted that:

> it is not open for the Appellants to impeach the award on merits before the enforcement court. The enforcement court cannot re-assess or re-appreciate the evidence led in the arbitration. Section 48 does not

> provide a *de facto* appeal on the merits of the award. The enforcement court exercising jurisdiction under Section 48, cannot refuse enforcement by taking a different interpretation of the terms of the contract.

This judgement assumes importance in the context of another 2020 judgement *NAFED vs Alimenta SA* (Supreme Court Civil Appeal No. 667 of 2012 decided on 22 April, 2020), wherein the Supreme Court had refused enforcing a foreign award on the account of it being in violation of public policy. The Supreme Court had in this case, extensively reviewed the merits of the case and the terms of the contract, which was considered impermissible under Section 48(2)(b).

International Environmental Law

Influence on Domestic Environmental Law

State of Madhya Pradesh v. Centre for Environment Protection Research and Development and Ors. ((2020)9 SCC 781)

In this case concerning the power of the National Green Tribunal directing the state governments to order mandatory display of 'Pollution Under Control' certificate on vehicles in order to be eligible to fill the fuel, the Supreme Court underlined the link between international environmental law and the development of environmental law in India. The Court underlined India's response to its commitments at the international level by highlighting the adoption of two important environmental legislation in India – the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act (1986).

Khodiyar Animal Welfare Trust and Ors. v. Ministry of Environment Forest and Climate Change (High Court of Delhi, MANU/DE/1955/2020)

The High Court of Delhi dealt with the nature and extent of India's international law obligations. This case is related to an advisory issued by the Ministry of Environment, Forests and Climate Change of Government of India for dealing with the Import of Exotic Live Species in India and declaration of stock. The petitioner challenged the narrow application of the Advisory to only those exotic species that are mentioned in Appendices I, II and III of the Convention on International Trade in Endangered Species on Wild Fauna and Flora (1973) (CITES). While discussing the matter, the High Court of Delhi discussed the nature and extent of India's obligations under international law, in general and

CITES specifically. It was underlined that the specific obligations prescribed under an international treaty is the minimum standard under international law and India is not obliged to stick to the minimum. It was held:

> In view of the aforesaid observation of the Hon'ble Supreme Court [*Indian Handicrafts Emporium & Ors. v. Union of India & Ors.*, (2003) 7 SCC 589], the respondents are not obliged to make laws only in terms of CITES and can widen the scope of restrictions, having regard to the local conditions and circumstances
>
> para 24

Human Rights

Women's Rights

Nisha Priya Bhatia v Union of India (*UOI*) *and Ors.* ((2020)13 SCC 56 decided on 24 April 2020)

In this case concerning the allegation of sexual harassment of a women employee of the Research and Analysis Wing of Government of India, the Supreme Court of India referred to the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) to underline the right of women employees to have a non-hostile working environment. Regarding a delay from the part of the concerned agency of the State to initiate the investigation, the Supreme Court explicitly referred to the CEDAW (along with a relevant statute and a previous judgment of the Supreme Court) and observed that:

> a non-hostile working environment is the basic limb of a dignified employment. The approach of law as regards the cases of sexual harassment at workplace is not confined to cases of actual commission of acts of harassment, but also covers situations wherein the woman employee is subjected to prejudice, hostility, discriminatory attitude and humiliation in day to day functioning at the workplace. Taking any other view would defeat the purpose of the law. A priori, when inaction or procrastination (intentionally or otherwise) is meted out in response to the attempt of setting the legal machinery in motion, what is put to peril is not just the individual cries for the assistance of law but also the foundational tenets of a society governed by the Rule of law, thereby threatening the larger public interests. The denial of timely inquiry and by a competent forum, inevitably results in denial of justice and violation of fundamental right.
>
> para 102

Rana Nahid and Ors. v. Sahidul Haq Chisti (2020) 7SC C 657

In this case concerning Muslim divorced women's right to maintenance before a two-judge bench of the Supreme Court of India, Justice Indira Banerjee referred to certain key international human rights instruments including treaties to underline the right of women to equal protection of law irrespective of their religions. In this regard, the Supreme Court referred to the Universal Declaration of Human Rights (1948) and the International Covenant for Civil and Political Rights (1966). The Supreme Court further relied on the Convention on the Elimination of All Forms of Discrimination against Women (1979) to underline the basic right of women to equality irrespective of religion and the duty of State Parties to ensure a woman-friendly legal system and woman-friendly policies and practices.

In addition, the Supreme Court reiterated the interpretative tool of reading statutes in India by taking into consideration India's obligations under international law (*e.g.*, the Convention on the Elimination of All Forms of Discrimination (1979)) in order to clarify ambiguities in law. In this regard, the Supreme Court stated that:

> as a signatory to the CEDAW, India is committed to adopt a woman friendly legal system and woman friendly policies and practices. The 1986 Act for Muslim Women [The Muslim Women (Protection of Rights on Divorce) Act, 1986], being a post CEDAW law, this Court is duty bound to interpret the provisions of the said Act substantively, liberally, and purposefully, in such a manner as would benefit women of the Muslim community (Para 58) … this Court is duty bound to clear the ambiguity by interpreting the law in consonance with the fundamental rights conferred Under Articles 14 and 15 of the Constitution, and the country's commitments under International Instruments and Covenants such as the CEDAW …
>
> para 88

Right to Equality

Dheeraj Mor v. Hon'ble High Court of Delhi (Supreme Court of India, Civil Appeal No. 1698 of 2020)

In this case regarding appointments in the subordinate judiciary under Article 233 of the Constitution of India, the Supreme Court responded to an allegation on the violation of equal opportunity based on the experiences of an advocate and a judge. The Court declared that the appointment process was in conformity with international human rights law. More specifically, the Court underlined the rights of everyone to all the rights and freedoms under

the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Further, the Supreme Court explicitly answered the question whether the appointment process in question was in conformity with the key principles of international human rights law and declared non-violation of any principles of the above-mentioned key instruments of international human rights law.

Restriction/Suspension of Human Rights

Amish Devgan v Union of India and Ors. (2020) 7 SCC 401

In this case, a TV anchor was charged with the offence of hate speech. While considering the question of reasonability of restrictions on the freedom of speech and expression on the ground of 'hate speech,' the Supreme Court referred to a report by the Law Commission of India which relied on several multilateral and regional human rights instruments and judgments to describe the concept of 'hate speech.'

> The Law Commission report analysed the legal standards under various instruments of international law that lay down the regime for controlling and preventing hate speech, which we will encapsulate. Article 20(2) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) prohibits 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.' Similarly, Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD), prohibits 'dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin....' The Human Rights Council's Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, in the context of internet content, states that freedom of expression can be restricted on grounds like hate speech (to protect rights of affected communities), defamation (to protect the rights and reputation of individuals against unwarranted attacks), and 'advocacy' of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others). Article 10 of the European Convention of Human Rights guarantees the right to freedom of expression, subject to certain 'formalities, conditions, restrictions or penalties' in the interest of ... public safety, for the prevention of disorder or crime ... for the protection of the reputation or rights of others....'

> Further, Article 17 of the Convention prohibits abuse of the right by 'any State, group or person.' The Council of Europe's Committee of Ministers to Member States on Hate Speech has defined 'Hate Speech' as 'covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.' The Law Commission report notes that pluralism, tolerance, peace and non-discrimination have been termed non-derogatory values by the European Court of Human Rights in ascertaining the extent of free speech allowed under the Convention; speech propagating religious intolerance, negationism, homophobia etc. has been excluded from the ambit of Article 10 of European Convention of Human Rights and the importance of responsible speech in a multicultural society has been stressed by the court in several cases. The Law Commission report has noted that in recent years, the European Court of Human Rights has moved from a strictly neutral approach, wherein not every offensive speech was considered illegitimate, by holding that interference is not to be solely judged on legitimate aim test but also whether such interference was necessary in a democratic society. This moderation takes into account that affording protection to all kinds of speech, even offensive ones, many times vilifies the cause of equality.
>
> para 17

Further, the Supreme Court drew upon the meaning of the term 'tolerance' from the Declaration of Principles of Tolerance by the Member States of the United Nations Educational, Scientific and Cultural Organisation. The Court provides that:

> The expression 'tolerance' is, therefore, important, yet defining it is problematic as it has different meanings. We need not examine the philosophies or the meanings in detail, and would prefer to quote Article 1 from the Declaration of Principles of Tolerance by the Member States of the United Nations Educational, Scientific and Cultural Organisation adopted in its meeting in Paris at the 28th session of the General Conference, which reads as under:
>
> Article 1 – Meaning of tolerance
>
> 1.1 Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being

> human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience and belief. Tolerance is harmony in difference. It is not only a moral duty, but it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace.
>
> 1.2 Tolerance is not concession, condescension or indulgence. Tolerance is, above all, an active attitude prompted by recognition of the universal human rights and fundamental freedoms of others. In no circumstance can it be used to justify infringements of these fundamental values. Tolerance is to be exercised by individuals, groups and States.
>
> 1.3 Tolerance is the responsibility that upholds human rights, pluralism (including cultural pluralism), democracy and the Rule of law. It involves the rejection of dogmatism and absolutism and affirms the standards set out in international human rights instruments.
>
> 1.4 Consistent with respect for human rights, the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one's convictions. It means that one is free to adhere to one's own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are. It also means that one's views are not to be imposed on others.
>
> para 59

Similarly, in *Anuradha Bhasin and Ors. v. Union of India and Ors.* ((2020) 3 SCC 637), concerning the issue of shutting down telecom services including the Internet in Jammu and Kashmir, the Supreme Court discussed the scope of using 'public emergency' as a reason for suspending internet services under the Indian Telegraph Act (1885). The Court used the International Covenant on Civil and Political Rights (1966) and the European Convention on Human Rights (1950) to explain the threshold required to invoke the reason of 'public emergency' to restrict or suspend fundamental rights guaranteed under the Constitution of India. The Court, thus, supported the idea of using a higher threshold, that is 'public emergency' of a serious nature, to restrict the fundamental freedoms in the light of the treaties mentioned above and held that:

> The word 'emergency' has various connotations. Everyday emergency, needs to be distinguished from the type of emergency wherein events which involve, or might involve, serious and sometimes widespread risk

> of injury or harm to members of the public or the destruction of, or serious damage to, property. Article 4 of the International Covenant on Civil and Political Rights, notes that '[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed….' Comparable language has also been used in Article 15 of the European Convention on Human Rights which says-"In time of war or other public emergency threatening the life of the nation." We may only point out that the 'public emergency' is required to be of serious nature, and needs to be determined on a case-to-case basis.
>
> para 93

Refugees and Principle of Non-Refoulement

Babul Khan and Ors. v. State of Karnataka and Ors. (High Court of Karnataka, MANU/KA/2159/2020)

In this case, while examining the definition of 'illegal immigrants,' the High Court of Karnataka underlined India's approach to the principle of non-refoulement in international law for the protection of refugees:

> 18. Therefore, according to Indian law, illegal migrants are not actually refugees. Since India is not a signatory to the 1951 Refugee Convention, the United Nations principles of non-refoulement and impediment to expulsion does not apply in India. Illegal migrants are denied impediment to expulsion if they do not fall within the host country's legal definition of a lawful refugee. Illegal migrants are those people who migrate to a country in violation of the immigration laws, and who have not acquired the citizenship of India, or continued their residence without any sort of legal right to live in our country.
>
> para 18

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State Practice of Asian Countries in International Law

Indonesia

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Relationship between International & Domestic Law

Combatting of Corruption: Mutual Legal Assistance (MLA) in Criminal Matters between the Republic of Indonesia and the Swiss Confederation

The Treaty on Mutual Legal Assistance (MLA) in Criminal Matters between the Republic of Indonesia and The Swiss Confederation has entered into force after Indonesia ratified the law through Law No. 5 of 2020. Switzerland has also completed its domestic ratification process.

This bilateral agreement regulates legal aid cooperation, which is expected to strengthen the tracking, freezing, and confiscating of assets resulting from crimes. This broad scope of mutual criminal assistance is essential for supporting the criminal law process in the requesting state. The MLA agreement between Indonesia and Switzerland is critical considering that Switzerland is the world's financial center and is known as a country that vigorously protects the confidentiality of people who keep their assets in Switzerland.

The MLA agreement can also combat crimes in the fiscal sector, including tax fraud or other tax crimes committed by Indonesian citizens or legal entities. Another critical aspect of the Republic of Indonesia – The Swiss Confederation MLA Agreement – is the application of the retroactive principle that allows requests for mutual legal assistance to be made against criminal acts whose legal process begins before the entry into force of this Agreement. Applying this principle will undoubtedly benefit the Government of the Republic of Indonesia to recover assets or state losses more optimally from the proceeds of criminal acts placed in Switzerland. It is alleged that many perpetrators of criminal acts from Indonesia have hidden their assets in Switzerland.

Gregorius Sri Nurhartanto

Indonesia and the World Bank Sign Milestone Agreement on Emission Reductions

Indonesia's Ministry of Environment and Forestry and the World Bank's Forest Carbon Partnership Facility signed a revolutionary agreement on 27 November 2020. Based on the agreement concerning emission reduction payments, Indonesia will receive payments based on 22 million tonnes of CO2 emission reductions in East Kalimantan. Reducing emissions in the region is essential in helping countries reach their climatic and environmental goals. This agreement is a testament to Indonesia's continued efforts to reduce deforestation and protect forests. This program builds a positive movement and provides opportunities for governments, civil society organizations, communities and businesses to work together. Although fieldwork takes place in the state, the work on the ground will occur in one province. The results of the Indonesia program will help achieve the goal of reducing deforestation and forest degradation and maintaining Indonesia's keeps in tract with green development.

Indonesia's emission reduction program in East Kalimantan, with a population of approximately 3.5 million, aims to reduce deforestation on rainforests and 12.7 million hectares of biodiversity-rich land. This initiative also supports many endangered species by helping improve land management and local livelihoods, improving forest licenses, increasing the number of small plantations, promoting community-based planning, protecting the habitat.

According to the World Bank: "Indonesia has committed to cutting up to 41 percent of its greenhouse gas emissions with international support by 2030, as well as accelerating sustainable development in its national development plan. This agreement will provide unprecedented support to achieve these ambitious goals." (The World Bank, "Indonesia and the World Bank Sign Milestone Agreement on Emission Reductions," Press Release, (8 December 2020), https://www.worldbank.org/en/news/press-release/2020/12/08/indonesia-and-the-world-bank-sign-milestone-agreement-on-emission-reductions.)

Sri Wartini

Coral Triangle Center (CTC) Renews MoU with Indonesia's Ministry of Marine Affairs and Fisheries

The CTC has extended its Memorandum of Understanding (MoU) with the Republic of Indonesia's Ministry of Marine Affairs and Fisheries (MMAF) for the next five years. With the signing of the agreement, the CTC has pledged to continue to support the Government of Indonesia in strengthening the management of Marine Protected Areas (MPAs) and sustainable fisheries and building capacity for staff and organizations. The MoU was signed on 21 December 2020 by CTC Rili Djohani's Managing Director and Antam Novambar, MMAF Secretary-General of the Republic of Indonesia. This document is part of the CTC. At least five types of support mentioned their commitment to MMAF. Support for the Coral Triangle Initiative (CTICFF) on Indonesian coral reefs, fisheries, and food security, and establishing and managing effective MPAs and MPA networks.

In addition, the CTC will develop the capacity of key stakeholders involved in the establishment and management of MPAs, the capacity development of local fisheries advisors on marine conservation and sustainable fisheries management in Indonesia and enhance Fisheries Control Area (WPP). The Fisheries Management Institutions in the Indonesian Fisheries Management Areas (LPP WPPNRI) oversees this matter. Specifically, CTC's support for MMAF in the Republic of Indonesia will be concentrated in the seven provinces of Lampung, West Java, Bali, West Nusa Tenggara, East Nusa Tenggara, Maluku and North Maluku. CTC has actively supported numerous activities related to establishing MPAs, capacity building of MPA staff and organizations, and sustainable fisheries in almost every state of Indonesia. Since 2010, CTC has helped restore 387,000 acres of critical marine habitat by establishing five community-based MPAs in the Nusa Penida Islands in Bali, Ay-Rhun, Lease, and Buano islands Maluku, and the Sula Islands in North Maluku.

To facilitate this partnership, both CTC and MMAF have agreed to monitor and evaluate activities at least annually regularly. Therefore, both parties

can thoroughly assess their overall annual activity, gather experience, and best practices, and then decide on actions that need to be continued or further improved. Following the MoU's signature, the CTC has signed detailed joint agreements with the Directorate General of Marine Spatial Planning (*Ditjen PRL*), the Bureau of Research and Human Resources (BRSDM) and the Bureau of Research and Human Resources (*Ditjen PT*) of MMAF. Through cooperation, CTC is expected to contribute to Indonesia's coastal and marine conservation and biodiversity.

Sri Wartini

Treaties

Indonesia's Ratification of the Nairobi International Convention on the Removal of Wrecks

Indonesia has three sea lanes rights of archipelagic called *Alur Laut Kepulauan Indonesia* (ALKI), regulated in Government Regulation No. 37 of 2002 on the Rights and Obligations of Foreign Ships and Aircraft in carrying out the island's sea lanes through the Archipelago Sea lanes that were set aside. ALKI is an international shipping lane based on the recognition of an archipelagic state regime stipulated in Articles 52–53, Chapter IV of the 1982 Convention on the Law of the Sea. Moreover, Indonesia is one of the archipelagic states between India and the Pacific oceans known to be one of the busy sea lanes and is widely passed by international shipping. Such conditions increase the possibility of ship accidents that can interfere with the safety of the marine environment, both for the marine environment and human security.

Accordingly, the Government of Indonesia ratified the Nairobi International Convention on the removal of wrecks (2007) by Presidential Regulation No. 80 of 2020 on the Ratification of the Nairobi International Convention on the Removal of Wrecks (2007)2007 as a commitment to improve the safety and security of shipping and protection of sea voyages. This convention addresses the dangers posed by ship skeletons that threaten shipping safety and the marine environment and provide legal certainty to the arrangement of responsibility and compensation for the removal of ship skeletons. The remains of the shipwreck will cause dangers and disruption for coastal countries, including their economy, such as fishery activities, tourist activities, and dangers to the marine health ecosystem. The dangers posed by ship skeletons may also cause accidents to other transportation as well. The Nairobi International

Convention on the Removal of Wrecks explains how state parties should act when the accident occurred.

On the other hand, the Government of Indonesia, prior to the ratification of the Nairobi Convention already had a law regulating the shipwrecks which is stipulated in Law No. 17 of 2008 on Shipping, Articles 203 (1) and 32. Law No. 17 of 2008 explains in more details on how the shipowner must be responsible when an accident occurs. The ratification of this Convention aims at Indonesia's participation in international relations and Indonesia's goodwill in the shipping safety and marine environment.

Rehulina

International Economic Law

Indonesia/Australia – Comprehensive Economic Partnership Agreement / IA-CEPA

The IA-CEPA is a comprehensive agreement between the Government of Indonesia and Australia based on existing multilateral and regional agreements, including the ASEAN-Australia-New Zealand Free Trade Area Development Agreement (AANFTA), which came into force on 5 July 2020.

The IA-CEPA covers goods trade agreements covering tariff and non-tariff aspects, provisions on the origin of goods, customs procedures and trade facilities, technical barriers to trade, sanitation and phytosanitary. In addition, trade-in services covered by the IA-CEPA includes employment, financial services, telecommunications, and professional services, such as investment, electronic commerce, competitiveness policies, economic cooperation, and institutional arrangements and frameworks.

Indonesia has ratified the agreement through the issuance of Law Number 1 of 2020 concerning Ratification of the Indonesia-Australia Comprehensive Economic Partnership Agreement (Indonesia-Australia Comprehensive Economic Partnership Agreement) on 28 February 2020, which is recorded in the State Gazette of the Republic of Indonesia of 2020 Number 67 and also in an additional Sheet Republic of Indonesia Number 6476.

Three implementing rules support the IA-CEPA: (1) the Regulation of the Minister of Trade Number 63 of 2020 concerning Provisions on Origin of Indonesian Goods and Provisions for Issuance of Certificate of Origin for Goods of Indonesian Origin in the Comprehensive Economic Partnership between Indonesia and Australia; (2) the Regulation of the Minister of Finance

Number 81/PMK.10/2020 concerning the Determination of Import Duty Tariffs in the Context of Approval of the Indonesia-Australia Comprehensive Economic Partnership; and (3) Minister of Finance Regulation Number 82/PMK.04/2020 concerning Procedures for Imposing Import Duty Tariffs on Imported Goods Based on the Indonesia-Australia Comprehensive Economic Partnership Agreement. The IA-CEPA consists of a Preamble, 21 Chapters (including 15 appendices), 2 Appendices, 2 Memorandums of Understanding, and 5 Side Letters.

Akbar Kurnia Putra

Indonesia/South Korea – Comprehensive Economic Partnership (IK-CEPA)

The IK-CEPA is a comprehensive agreement between the Government of Indonesia and the Government of South Korea, which came into force on 5 July 2020. The signing of the cooperation was carried out on the sidelines of the High-Level Conference Commemorating the 30th Anniversary of the ASEAN-South Korea Partnership (ASEAN-RoK Commemorative Summit).

The IK-CEPA negotiations consist of six working groups: trade in goods, services, investment, provisions of origin of goods, customs procedures and trade facilities, cooperation and capacity building, and institutional and legal issues.

From this agreement, Indonesia will gain market access for industrial, fishery, and agricultural products in the South Korean market. On the other hand, Indonesia will provide market access for industrial raw materials to facilitate South Korean investment in Indonesia. South Korea will open job opportunities for Indonesian professionals and experts in the service sector. Meanwhile, Indonesia will provide increased market access for the construction, distribution, online games and health services sectors.

Moreover, South Korea will eliminate up to 95.54% of its tariff posts for trade in goods while Indonesia will eliminate 92.06% of its tariff posts. Based on this agreement, the two parties will agree on reducing tariffs and other various trade facilities as well as mutually beneficial partnerships. Indonesia and Korea also agreed to activate the IK-CEPA based on the main principles, namely ensuring that the agreement will provide the best, mutually beneficial, and comprehensive results including trade in goods and services as well as in other fields. This initiative signifies the strong determination of the two governments to create a conducive environment for expanding two-way trade and investment, as well as maximizing the potential of economic partnerships.

Some Indonesian products which tariffs will be eliminated on are raw materials for lubricating oil, stearic acid, t-shirts, blockboard, dried fruits, and

seaweed. Meanwhile, Indonesia will also eliminate tariffs for several products such as gearboxes of vehicles, ball bearings, paving, wall tiles, and unglazed. Through this agreement, Indonesia will also provide tariff preferences to facilitate South Korean investment in Indonesia for 0.96% of tariff posts of Indonesia's total imports from South Korea. Likewise, South Korea will eliminate tariffs for 97.3% of its imports from Indonesia, while Indonesia will eliminate tariffs for 94% of its imports from Korea.

With in-services trade, Indonesia and South Korea are committed to opening more than 100 sub-sectors, including the construction sector, postal and courier services, franchises, computer-related services, as well as facilitating the movement of intra-corporate transferees (ICTs), Business visitors (BVs), and Independent Professionals (IPs).

In order to regulate the implementation of the IK-CEPA, the Government of Indonesia has issued several related regulations, including the following: (1) the Presidential Regulation of the Republic of Indonesia Number 11 of 2007 concerning Ratification of the Framework Agreement on Comprehensive Economic Co-Operation Among the Government of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea; (2) the Minister of Finance Regulation No. 75/PMK.011/2007 dated 3 July 2007 regarding the determination of import duty rates in the ASEAN-Korea Free Trade Area framework, effective 1 July 2007; (3) the Minister of Finance Regulation No. 131/PMK.011/ 2007 dated 30 October 2007 concerning Amendments to Regulation of the Minister of Finance Number 75/PMK.011/2007 concerning Stipulation of Import Duty Tariffs within the framework of the ASEAN-Korea Free Trade Area which has retroactive effect since 1 July 2007; (4) the Minister of Finance Regulation N. 41/PMK. 011/2008 dated 3 March 2008 concerning Stipulation of Import Duties within the ASEAN-Korea Free Trade Area framework which has retroactive effect since 1 January 2008; and (5) the Regulation of the Minister of Finance Number 236/PMK.011/2008 dated 23 December 2008 concerning Tariffs of Import Duty in the ASEAN-Korea Free Trade Area effective 1 January 2009.

Akbar Kurnia Putra

Indonesia/Chile – Comprehensive Economic Partnership Agreement (IC-CEPA)

The IC-CEPA Agreement was signed on 14 December 2017 between the Minister of Trade of the Republic of Indonesia and the Minister of Foreign Affairs of Chile. The purpose of this agreement is to promote equitable economic growth and development by creating new opportunities for workers and businesses as

well as improving the living standards of the people of the two countries, stimulating business actors to target non-traditional markets, and making Chile a hub for Indonesian export products in Latin America.

On 19 February 2019, the IC-CEPA ratification process was completed. On 10 August 2019, following the entry into force of the agreement on 11 June 2019, the IC-CEPA Instrument of Ratification (IoR) exchange was carried out. For Indonesia, this agreement process was carried out through Presidential Regulation of the Republic of Indonesia Number 11 of 2019 concerning the Ratification of the Comprehensive Partnership Agreement between the Republic of Indonesia and the Government of the Republic of Chile.

Accordingly, Chile will remove tariffs on 7,669 products, and Indonesia will remove tariffs on 9,308 products. The Indonesian products that receive a 0% tariff on the Chilean market are agricultural products, fishery products, and manufactured products. Meanwhile, Chilean products that receive a 0% tariff on the Indonesian market are agricultural and fishery products, mining products, and industrial products.

Through the Ministry of Trade and the Ministry of Finance, Indonesia issued implementing regulations ranging from procedures for issuing certificates of origin for Indonesian goods to the stipulation of special import duties for imports from Chile. The regulation in question is Regulation of the Minister of Trade Number 59 of 2019 concerning Provisions and Procedures for Issuing Certificates of Origin for Goods from Indonesia. The regulation governing the making of an IC-CEPA (SKA) or Certificate of Origin Form (COO) is required so that Indonesian exporters have guidelines for obtaining IC-CEPA preferential tariffs. SKA can be obtained from SKA issuing agencies spread across Cities, regencies, and provinces in Indonesia, which can be seen on its homepage (http://e-ska.kemendag.go.id/home.php/home/ipska page). The regulations launched by the Ministry of Finance are Minister of Finance Regulation Number 105/PMK.010/2019 concerning the Determination of Import Duty Tariffs in the context of IC-CEPA and PMK Number 109/PMK.04/2019 concerning Procedures for Imposing Import Duty Tariffs on Imported Goods Based on Agreements. or International Agreement.

Akbar Kurnia Putra

Indonesia and Mozambique – Preferential Trade Agreement (PTA)

The Preferential Trade Agreement between Indonesia and Mozambique is the Indonesian government's first Preferential Trade Agreement (PTA) with an African region country, a free trade agreement with non-traditional partner countries. Negotiations were carried out on the side events of the IORA (Indian Ocean Rim Association) meeting in March 2017.

The agreement process was completed after three rounds of negotiations. The PTA with Mozambique is not only limited in terms of reducing tariffs but can strengthen south-south cooperation. One of the urgencies of this agreement is to increase the competitiveness of Indonesian products in the Mozambique market and strengthen the domestic industry. With PTA, Indonesia's main export products will get a preference for lower import duty rates, which will increase Indonesia's competitiveness. In addition, Indonesia can make Mozambique a liaison country in the East and South African region.

Indonesia's trade agreement with Mozambique is still a PTA, which only regulates a limited number of agreements expected to foster mutual trust and business certainty between the two countries. PTA is a trade agreement that is limited to trade in goods and covers some of the potential products of the two countries. PTA is expected to provide rapid economic benefits and impact and increase trade between the two countries. This collaboration is the realization and a follow-up of the meeting between Indonesian President Joko Widodo and Mozambique President Filipe Jacinto Nyusi on the sidelines of the 2017 Indian Ocean Rim Association Summit in Jakarta.

With the PTA, Mozambique will give tariff preference for 217 tariff posts to Indonesia, while Indonesia will commit to 242 tariff posts. Mozambique's tariff posts will receive tariff preferences such as palm oil products, margarine, rubber soap, paper products, footwear, furniture, and agricultural products. Meanwhile, Indonesia's products include cotton, nuts, sunflower seeds, aluminum seeds, cotton, fishery products and vegetables.

After the PTA is signed, the next stage is ratifying the international agreement (ratification) in accordance with the domestic provisions of each country so that they can be enforced. For Indonesia, the ratification process is completed when the Law or Presidential Regulation (Perpres) concerning the ratification of PTA and the Regulation of the Minister of Finance has been issued. After the ratification is complete, the two countries will send a diplomatic note informing each other that the ratification process has been completed. The PTA is valid for 60 days as of the exchange of diplomatic notes.

Akbar Kurnia Putra

Indonesia / The United Arab Emirates – Comprehensive Economic Partnership Agreement (*IUAE-CEPA*)

On 2 September 2021, Indonesia began negotiations on a partnership agreement with the United Arab Emirates. The Minister of Trade of Indonesia and the Minister of Foreign Trade of the United Arab Emirates started the negotiations by signing a joint statement regarding the launch of the IUAE-CEPA negotiations. The first round of negotiations will be scheduled for 2–4 September 2021.

The CEPA is important to Indonesia and the UAE for three major reasons. First, historically, CEPA is Indonesia's first negotiation with a country in the Gulf Region and this is the first negotiation for the UAE with trading partners in Asia. Second, Indonesia and the UAE, as the two leading economic powers, need to strengthen cooperation so that they can complement each other, especially during this challenging pandemic when breakthroughs are needed to encourage the two countries' economies. Third, CEPA is expected to be a partnership or cooperation between the government (G to G), between business actors (B to B) and the people of the two countries.

The IUAE-CEPA aims to increase the economic growth of the two countries by increasing market access for trade in goods, services, and investment. This partnership will treat each other as good partners based on mutual respect, taking into account each other's sensitivities and different levels of development in negotiations.

Indonesia cooperates with the United Arab Emirates because the UAE, as a member of the Gulf Cooperation Council (GCC), is one of the non-traditional export markets that serves as an international trade hub to the Middle East, Africa and European market destinations.

Indonesia targets to complete a comprehensive economic partnership agreement in less than a year. This trade agreement will be dominated by metal commodities, gold jewellery, and automotive cars. Indonesia also has attractive products, such as palm oil, cloth, and paper. In addition, products for food security at the regional level maintain food production with a sustainable supply through regional agriculture. This agreement will make Indonesia more connected to world trade.

Akbar Kurnia Putra

Indonesia – Job Creation Law – Omnibus Law

Job Creation Law was validated on 5 October 2020 by The House of Representatives and promulgated on 2 November 2020 to create job opportunities and to serve as a medium of invitation for foreign and domestic investment by cutting short the requirements and regulations for business permit and land acquisition. Since the Job Creation Law is only 1.187 pages long, it has also been included as the Omnibus Law. Including the Job Creation Law into the Omnibus Law made it possible for its prior 80 Laws and more than 1.200 articles to be revised.

Hence, the revision eradicates ineffective articles. This breakthrough is required to fix the business climate, reconstruct horizontal and vertical policies that clash, develop Indonesia's regulation index, overcome the hyper-

regulation phenomenon and inefficient policies, and the sectoral laws often not synchronized. The primary purpose of the Job Creation Law is to encourage investments, accelerate economic transformation, coordinate capital-region policies, administer convenience in business, tackle regulation problems that overlap each other, and diminish the sectoral ego.

Indonesia has envisioned becoming one of the 5 top countries with the most robust global economy and having a Gross Domestic Product (GDP) of Rp.27 million per capita per month by 2045. The Job Creation Law aims to create a conducive investment climate. In addition, it will absorb more labour force so that unemployment will decrease, create a high potential for economic growth, and boost the worker's productivity.

The Job Creation Law has some strategic policies. Those policies endorse the investment ecosystem and business activities, protection and welfare of workers, convenience, empowerment, and protection of Micro, Small, and Medium Enterprises (*UMKM*). Apart from those, the other policy focuses on sustaining governmental investments and national strategic projects. As a result, the Investment Coordinating Board registered the realization of investment in the period of January–September 2020 reaches Rp 611.6 trillion, where it has met 74.8% of the 2020 target, which is Rp 817.2 trillion. With that achievement, investment realization has created jobs for 861.581 Indonesian Workforce from 102.276 investment projects.

Amid the current COVID-19 pandemic, the global economy, without excluding Indonesia, is experiencing contraction up to a recession. This condition results in surge numbers of unemployment all over Indonesia. The number of the available workforce – from Aceh to Papua – who is currently inquisitive for job employment is around 7 million. The batch of job opportunities per year is approximately 2.9 million, not to mention the COVID-19 pandemic that has impacted the workers' circumstances. The Ministry of Manpower of the Republic of Indonesia database shows that 3.5 million workforces received a Termination of Employment. On the other hand, the Indonesian Chamber of Commerce and Industry recorded that around 5 million people had obtained Termination of Employment. Therefore, as the data illustrates, the sum of jobs that the government should prepare is around 15 million.

Alongside, the government has implemented the Online Single Submission (OSS) system, which is managed by *the Central One-Stop Integrated Service* in Investment Coordinating Board. All permits will be integrated through this OSS system to minimize any overlapping dossier between the central and other regions. With the reinforcement of the OSS system, it is speculated to reduce Indonesia's Incremental Capital Output Ratio (ICOR), which will extend to the proliferating of Indonesia's economic competitiveness. At the moment, Indonesia's ICOR is at level 6.8. With Omnibus Law on Job Creation, it is deduced that there will be shrinkage in ICOR to a level below 4.

The preconditions for investments were remodelled to be more practical with the assistance of the Job Creation Law. The first and foremost is to determine the business sector capital investment, which is utilized for advertising and pushing the investment. The investment criteria cover technology upon its satisfactory qualities, enormous investment, digital-based platforms, and formulation of creation. Secondly, the business activities of *UMKM* are offered to associate with the foreign capital cohort. Thirdly, Foreign Capital Investment status is merely linked to the boundary of foreign ownership. Last but not least, a minor precondition is deleting the requirement provision in the Sector Law because the Presidential Regulation will systemize it on Investment Business Activity.

Upon the Job Creation Law, which the government validated, it is contemplated that propelling positive quality investments would affect the absorption of the workforce and intensify the economic growth in Indonesia. The article that regulates foreign capital investment has been revised based on the Job Creation Law draft.

Job Creation Law delivers innovations that enhance the possibility of stimulating investments that have become more liberal for Indonesia's megaproject. As a brand-new policy that was fundamentally caused by the global COVID-19 pandemic circumstances, which was comprehending the economic recession, its flow of foreign investments is surmised to have the capability of helping Indonesia to accomplish the megaproject realization of constructing infrastructures for Indonesia in advance of 2024.

M. Reza Syariffudin Zaki
Siti Halimah Indrani Anwar

Indonesia and Regional Comprehensive Economic Partnership (RCEP)

The Regional Comprehensive Economic Partnership (RCEP) is a trade agreement between ASEAN countries and its FTA partner countries. RCEP holds several superiorities, such as providing colossal business opportunities for the East Asia region to conceive "The World Largest Trading Bloc." These countries are distinguished by exhibiting almost half of the world's population and contributing approximately 29% of the world trade. Fifteen of those countries are China, Japan, South Korea, Australia, New Zealand, Brunei Darussalam, Cambodia, Indonesia, Laos, Singapore, Malaysia, Myanmar, Philippines, Thailand and Vietnam. Furthermore, RCEP cultivates the competitiveness front, trading network and more prominent market access for the countries contributing to this agreement. The RCEP agreement will be officially enforced if at least six

ASEAN and 3 ASEAN trade partner countries have conveyed their ratification document to the ASEAN secretary-general or ASEAN secretariat.

The RCEP agreement came into effect on 1 January 2022. RCEP, introduced in 2011, was Indonesia's notion that erupted whilst entrusted with the obligation as ASEAN's leader throughout 2011. The initiative emerged as a response to the insistence from the Dialogue Partners on a Free Trade Agreement (FTA), particularly the People's Republic of China and Japan. Equally eager as that of the ASEAN members, both partners demanded that ASEAN embody an FTA that promptly involves all its FTA partners. In 2011, Indonesia managed to persuade and ensure other members of ASEAN to officialize the RCEP concept as an ASEAN initiative and overture the proposal to all its Dialogue Partners of FTA in November 2011, which was at the cusp of Indonesia's led administration in ASEAN.

Through comprehensive and intensive discussions in 2012, the ASEAN country leaders and its 6 FTA partners announced that 10 ASEAN countries and 6 of its FTA Partners, formally including India which has now exited from the partnership, would commence the discussion of RCEP in 2013. Accordingly, all of those countries vouched for the Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership as the reference in holding the RCEP negotiation. The first negotiation was held on May 2013, in Brunei Darussalam, then held several times until November 2020. Indonesia led and participated in the negotiations, to be precise, represented by the General Director of Negotiation and International Trade, Ministry of Trade. Indonesia was appointed by the other 15 participating countries as the Head of the RCEP Negotiation Committee and was obliged to be the ASEAN coordinator. Protracted negotiations that consumed time, energy and thoughts finally reached an agreement on 15 November 2020. Unfortunately, because India decided to recant at the end of the negotiations, the signing was solely accomplished by 15 countries.

The denouement of the RCEP negotiations yielded an agreement with 14.367 pages, divided into 20 chapters, 17 annexes and 54 schedule commitments that bind 15 country members without a side letter. The final agreement regulates the following: Initial Provisions and General Definitions (Chapter 1), Trade in Goods (Chapter 2), Rules of Origin (Chapter 3), Customs Procedure 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), Temporary Movement of Natural Persons (Chapter 9), Investment (Chapter 10), Intellectual Property (Chapter 11), Electronic Commerce (Chapter 12), Competition (Chapter 13), Small and Medium Enterprises (Chapter 14), Economic

and Technical Cooperation (Chapter 15), Government Procurement (Chapter 16), General Provisions and Exceptions (Chapter 17), Institutional Provisions (Chapter 18), Dispute Settlement (Chapter 19), and Final Provisions (Chapter 20) as the closing policy.

Implementation of RCEP in Indonesia will certainly bring forth a challenge because of its regulatory burden. Post-RCEP ratification, Indonesia has to implement RCEP policies into its national law. In the execution of RCEP, Indonesia granted commitment to 11 out of 12 WTO service sectors. One of the sectors covers trade in goods and services, including financial services, telecommunication, professional service, investment, economic and technical collaboration, intellectual property, rivalry, dispute resolution, e-commerce, small and medium business, and other technical fields.

Indonesia has possessed an act related to trade in goods and services. For instance, Indonesia passed the following laws: Law No. 36 of 1999 about telecommunication and Law No. 36 of 2014 about Health Workers in professional services. Indonesia constitutes a liberalization commitment for 104 sub-sectors from 11 committed service sectors. Liberalization commitment is dominantly constructed with the limitations under rules over service sectors committed. Among the abundance of service sectors viewed as vital are Health, Tourism, Construction, Transportation, and Telecommunication. These service sectors that are considered vital can be demonstrated from two dimensions: first, the ones that are strong by the offensive. The service business actors are considered capable of competing with other businesses from other countries in the international market. For example, in the construction sector, tourism and transportation, the business actors are more than qualified and able to compete in the international market. The second dimension is the defensive dimension, where the business actors may not yet be prepared to compete in the international market. However, the actors assents able to compete domestically. For the second dimension, health, as well as telecommunication, may fall under this category. may become an example.

Nevertheless, what about the sectors that are not considered "vital" yet are still included as the components of Indonesia's commitment to the RCEP? First, a little paradigm clarification is essential where service sector liberalization does not instantly permit the holistic service sector to be enterprised commercially without limitations. Liberalization adjusts all service stakeholders to initiate the game's rules, enabling them to assure and protect interested parties, be it the government or business actors. Moreover, the consumers would feel the secured impact unequivocally. Further, with such a framework, the government, as the authority and the negotiator in the RCEP negotiations, has prepared commitments to protect sector business actors on domestic services.

Thus, if the sector is not adequate to compete, the commitment for the sector will be directed to strengthen other sectors that have been in the commitment. The sectors are obligated to form partnerships with local business actors or perhaps other speciality preferences specific regions in Indonesia.

One of the benefits of using a positive list approach or GATS style in the scheduling commitment is that the Party receives laxity to set specific sectoral boundaries without referring to the existing domestic rules applied. As a result, a positive list approach in giving service sectors commitment has become the standard practice for developing and underdeveloped countries, which generally have not possessed a stable domestic rules framework. Indonesia also implemented this, keeping in mind that not all committed service sectors have already acquired domestic rules. Therefore, the absence of domestic laws for several specific service sectors is because the service sector is still unfamiliar to Indonesia.

The commitment scheduling in a non-conforming measures approach or negative list is composed of maintaining the commitment level as accomplished in the positive list approach. So that even if some service sectors still have no domestic rules, the committed service sectors are already enclosed by boundaries stated in the commitment. Indonesia's strategy to realize the liberalization of RCEP services by regulation may not need further preparation other than the ratification process. It is then decided in the hands of the individuals who practice the service businesses to develop the opportunity they have obtained to utilize RCEP commitment, whether for domestic market protection concerns or the expansion of Indonesia's service products market. Indonesia's commitment shall always refer to the applicable domestic rules. One of the functions of domestic law is to protect domestic service suppliers from foreign suppliers. One of which is related to the natural person, immigration rules, transfer policies in knowledge/technology, and positions for foreigners.

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Indonesia Investment Authority – Government Regulation of the Republic of Indonesia No. 74 of 2020

The contemporary direction of Indonesia's investment policy is increasingly convincing with the establishment of the Investment Management Institute. This institution that functions as an investment accelerator and strengthens the economy was established according to the Government Regulation No. 74 of 2020 concerning Investment Management Institutions. Government

Regulation No. 74 of 2020 is a derivative of Law No. 11 of 2020 concerning Job Creation, which stipulates a Government Regulation on Investment Management Agencies. The Investment Management Institute is an Indonesian legal entity entirely owned by the government and is responsible to the President. As stipulated in the Government Regulation, the Investment Management Institute is also known as the Indonesia Investment Authority (INA).

INA is an institution given unique authority in managing Central Government Investment as referred to in the Job Creation Law. INA can place funds in financial instruments, handle asset management activities, cooperate with other parties – including trust fund entities – determine potential investment partners, provide and receive loans, and/or administer assets. Additionally, the main objective of INA is to improve and optimize the value of investments that are managed in the long term to support sustainable development. As Indonesia's Sovereign Wealth Fund (SWF), INA is a financial vehicle that the state may use to regulate public funds. Through the investments made by SWF in state-owned funds, Indonesia expects that economic stabilization will be progressed.

The main challenge for INA is strengthening the foundation of the national economy, which is also Indonesia's vision for 2045. This vision aims to make Indonesia a country with high economic growth and one of the world's great economic powers. This vision is achievable with the support of four pillars: the development of human resources and mastery of science and technology, sustainable economic development, equitable development, and national resilience and governance. There are challenges and a need for collaboration in realizing the existence of sustainable economic development. One solution is by focusing on economic growth. However, to achieve economic growth, funding is needed, which the government cannot fully meet. Therefore, investment from the public and the private sector is needed to close the gap between the development needs and the government's fiscal capacity.

The INA also has a primary objective in fulfilling funding capacity. As the various available investment schemes and the limited funding capacity of the business world or state-owned enterprises are suspected of causing the stalling in the funding scheme, the, INA will develop investments in various sectors, such as toll roads, airports, ports, and others. Therefore, it is to be questioned whether governmental policies regarding investment have not been effective so far. The government has implemented various alternative schemes to encourage the participation of the community and business entities, such as the implementation of the Government and Business Entity Cooperation's scheme and other creative financing schemes. However, in the reality, the scheme still faces many obstacles and challenges.

Based on these issues, it is necessary to fulfil national development financing that involves investors from abroad, primarily through Foreign Direct Investment (FDI). However, based on the World Bank data, Indonesia's FDI fluctuates every year, and the amount in the last five years was stagnate. In addition, the percentage of Indonesia's FDI to Gross Domestic Product is also still far below other ASEAN countries. The management and ranks of INA are required to have great solutions and innovations. The presence of INA is devoired to respond to the revenues and advantage of Indonesia's abundant wealth. Of course, this is an added value and concrete promotion for world investors. INA can take the opportunity to attract world investors to participate in national projects, such as using a joint venture scheme, cooperation in the field of mutual funds, collective investment contracts and others. Seeing the noble purpose of establishing INA, it is necessary to balance the aspects of good governance, also known as good corporate governance and transparency. Specifically, audits at INA are merely performed by public accountants registered with the Audit Board and the Financial Services Authority. This issue, of course, raises the fundamental question of why the Audit Board and the Financial Services Authority did not participate or provide room for the continuity of the audit process at INA. We all know that Audit Board and the Financial Services Authority is a high state institution in the Indonesian constitutional system which has the authority to examine the management and responsibility of state finances.

In terms of ideal governance, INA is requisite to avoid any behavior lacking transparency due to the insufficiency of space for public participation in its implementation. Furthermore, the issue of corruption in the public service sector and the complexity of the bureaucratic process must be litigated without exception. Next is the investment of assets and the transfer of state capital. Government Regulation No. 74 of 2020 reiterates that state assets and state-owned enterprise assets can be transferred to INA and executed precisely and transparently in the transfer process. This is a concern because state assets are often lost after transfer. To minimize or even avoid the risk of losing the State assets, Article 46 of the Government Regulation No. 74 of 2020 accounts for such a risk by making sure that assets are evaluated periodically. For INA to optimize its functions – to forestall issues that perhaps erupted, precisely in terms of assets – all assets transferred shall be remedied first. If it is optimal in terms of asset superintendence and management, INA is inevitably able to accommodate enormous amounts of funds and generate liquidity for national development.

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Plan of Action for the Indonesia-Australia Comprehensive Strategic Partnership (2020–2024)

The Government of Australia and the Government of the Republic of Indonesia signed the "Plan of Action for The Indonesia-Australia Comprehensive Strategic Partnership (2020–2024)" in Canberra on 10 February in the year 2020. The two states agreed to implement a comprehensive Indonesian-Australia strategic partnership, in accordance with the applicable national laws, regulations and policies of both states, intensive bilateral economic development, and political and security cooperation. Both states are determined to implement the Indonesia-Australia Comprehensive Strategic Partnership. Building on Indonesia and Australia 2017 Joint Declaration on Maritime Cooperation. Furthermore, the two states also agreed to carry out the Plan of Action to implement the Joint Declaration on Maritime Cooperation. It was signed on 16 March 2018 to realize mutual economic and security benefits in the maritime domain, maritime security and safety, connectivity, and the sustainable management of marine resources and improve information sharing to understand the region's full range of maritime security challenges.

There are five pillars of the CSP that have been agreed upon. The five pillars are: Enhancing our economic and development partnership; connecting people; Securing our and the region's shared interests; Maritime cooperation; and contributing to Indo-Pacific stability and prosperity. However, in this study the fourth pillar regarding Maritime Cooperation will only be discussed. Maritime cooperation is critical for both states to shared strategic, security, safety, environmental and economic interests. Priority areas include supporting a rules-based maritime order, strengthened by international law; maritime security architecture and border protection; information sharing to combat transnational organized crime at sea; regional and coastal interconnectivity; reliability, safety, and efficiency of shipping in the region; protection of the marine environment; and sustainable management of marine resources including efforts to combat illegal, unreported, and unregulated (IUU) fishing.

In addition, the plan of action is also aimed to promote and implement maritime security, freedom of navigation, free trade, the exercise of self-control, failure, or threat of use of force, and peaceful resolution of conflicts based on international law, particularly the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the relevant standards and instruments of the International Maritime Organization (IMO). Furthermore, the cooperation highlighted the need to develop mutual trust and confidence, practice self-restraint in activities, avoid actions that may affect a situation, and avoid actions. The plan of action also enhanced further bilateral and regional commitment with critical regional partners Indonesia-Australia-India trilateral involvement in

maritime cooperation through the Extended ASEAN Maritime Forum (EAMF) and the Indian Ocean Rim Association (IORA).

Notably, the maritime security cooperation agreement agreed upon between the two states can be presented as follows: Promotion of regional maritime cooperation through existing regional architectures such as regional action plans to promote responsible fishing practices and to combat Unreported and Unregulated Fishing in the Region (RPOA-IUU), signed in 2007 and Strengthening maritime security cooperation through intensive cooperation between relevant maritime law enforcement authorities to combat cross-border crimes. Regional cooperation by strengthening bilateral cooperation in the fight against IUU fishing and strengthening regional cooperation is to address cross-border challenges, including crime in the fishing sector, conducted by IORA members. Moreover, it is also to promote maritime safety and security in the region by strengthening regional cooperation to address trans-boundary challenges, including crimes in the fisheries sector; to improve capacity building on maritime awareness, predominantly in regard to maritime security, through information sharing, technical training and exchanges and to conduct coordinated patrols and maritime security desktop exercises between *Badan Keamanan Laut Republik Indonesia* (BAKAMLA), the Indonesian Coast Guard (IDNCG) and the Australian Border Force, as well as between Tentara Nasional Indonesia (TNI) and the Australian Defence Force (ADF); To enhance cooperation and coordination among law enforcement agencies and other related government agencies in combating the illicit production, manufacturing and trafficking of drugs in the region; Enhance naval engagement in regional and multilateral forums to promote shared maritime interests and commitments; Enhance and promote maritime cooperation through various regional and multilateral fora, such as the Heads of Asian Coast Guards Agencies Meeting.

Sri Wartini

Human Rights

The Right to Health Implementation during Pandemic Era

Presidential Decrees No. 10 and No. 11 of 2020 determined the spread of Corona Virus Disease 2019 (COVID-19) as both a public health emergency and a non-natural disaster. To address the pandemic, the government reiterates its observance of the International Health Regulation and World Health Organizations' recommendations that imply the concern for the right to health.

Moreover, Indonesia is also a state party to the International Covenant on Economic, Social, and Cultural Rights, which recognizes the right to health, and its inherent meaning, including availability as an essential element in addition to accessibility, acceptability, and quality (GC CESCR No. 14).

A judicial review was submitted before the Constitutional Court of the Republic of Indonesia requesting some provisions covered in Law No. 4 of 1984 concerning Outbreak of Infectious Diseases (Law 4/1984) and Law No. 6 of 2018 concerning Health Quarantine (Law 6/2018) to be declared against the 1945 Constitution of the Republic of Indonesia (1945 Constitution) and subsequently to be decided null and void. The petitioner argues that Art. 9 (1) of Law 4/1984 determines that certain officers who carry out countermeasures' outbreaks may be given appreciation for the risks borne in carrying out their duties. According to the petitioner, this article hindered the government's obligation to ensure that those officers are entitled to get the appreciation. The petitioner also argues that Art. 6 of Law 6/2018 that determines the responsibility of central and regional governments for the availability of the necessary resources in the implementation of Health Quarantine must be interpreted differently. The law includes the availability of personal protective equipment for all health workers on duty; incentives for medical and non-medical personnel on duty who work with COVID-19 patients; compensation for families of Health Workers who died while on duty; and COVID-19 screening resources for the entire society with fast check flow.

In the Decision No. 36/PUU-XVIII/2020, dated 12 November 2020, the Constitutional Court considered that Law 4/1984 has a broad scope that gives flexibility for policymakers to create implementing rules according to the characteristics or impacts of the outbreak. The flexibility is implied in issuing several Minister of Health decrees concerning granting incentives and death compensation for health workers handling the pandemic. The Court also considers that the petition on Law 6/2018 will narrow and create legal uncertainty due to redundancy with health quarantine resources, particularly health quarantine facilities and supplies, as provided in Articles 71 to 78, in particular Article 72 paragraph (3) of the Law. Therefore, the Court rejected the Petitioners' petition due to the lack of legal reasoning.

I Made Budi Arsika

Reporting of the Implementation of International Human Rights Treaties and Mechanisms

The Decree of Coordinating Minister for Political, Legal, and Security Affairs No. 99 of 2020 establishes a Working Group for the Reporting of International Human Rights Main Instruments and Mechanisms that involve relevant

ministries and institutions. The decree was issued to improve several delays in submitting periodic reports on implementing main international human rights treaties. The working group is assigned to coordinate the planning, preparation, implementation, and submission of Indonesia's reports on critical international human rights instruments and mechanisms to address this concern. They are conducted by taking into consideration the national interests and organizing dissemination, technical guidance, monitoring, and evaluation of the implementation of the report. The working group focuses on four thematic issues, i.e. civil and political rights; economic, social, and cultural rights; the rights of vulnerable groups; and International Human Rights Mechanisms.

I Made Budi Arsika

International Humanitarian Law

International Humanitarian Law in Papua

Indonesia has ratified the twin international covenants of human rights, which are the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights through Law No. 11 of 2005 and Law No. 12 of 2005. In the process of ratifying the two twin covenants, Indonesia has made a reservation on Article 1 of both Covenants. Therefore, Indonesia does not recognize the right of self-determination for the tribes or territories of the Unitary State of the Republic of Indonesia to separate and become independent from Indonesia. This phenomenon also applies to the Papua region that wants to separate itself from Indonesia, especially by the Free West Papua Organization. According to Indonesia, the United Nations officially recognized the Papua region as part of Indonesia's territory through the Free Act Choice in 1969.

The Free Act Choice was a poll held from 14 July to 12 August 1969 to determine the status of the western Papua Island, which belonged to the Netherlands or Indonesia. The United Nations recognized the results of the Act itself in Resolution 2504 (XXIV) of the United Nations General Assembly. The UN envoy, the Australian envoy, and the Dutch envoy all witnessed the implementation of the Act of Free Choice. Based on the Act of Free Choice results, the people of West Papua wanted to join the Unitary State of the Republic of Indonesia. The results of the Act of Free Choice were brought to the UN General Assembly and on 19 November 1969, the UN General Assembly accepted and approved the results of the Free Act Choice. However, there are parties, even today, who oppose the Act's legitimacy.

For those Papuans who want to separate themselves involving armed conflict, the Indonesian government has designated them as groups participation in acts of terrorism. This statement was conveyed by the Coordinating Minister for Political, Legal and Security Affairs Mahfud MD, on 29 April 2021, who emphasized that the government had categorized the Papuan Armed Criminal Group and all organizations and people who were members of it and who supported the movement as terrorists.

Gregorius Sri Nurhartanto

Management of National Resources for National Defense in Indonesia

To implement the national defense system, the Government of the Republic of Indonesia has issued Government Regulation of the Republic of Indonesia Number 3 of 2021 concerning Implementing Regulations of Law Number 23 of 2019 concerning Management of National Resources for National Defense. National Defense is all efforts by the Government to defend the sovereignty of the state, the territorial integrity of the Republic of Indonesia, and the safety of the entire nation from threats and disturbances to the integrity of the nation and state.

The main component for implementing the national defense system is the Indonesian Army Forces which is ready to carry out defense tasks. The reserve component is a national resource that has been prepared to be deployed through mobilization to enlarge and strengthen the powers and capabilities of the main component. The supporting component comprised of national resources will increase the power and capability of principal components and reserve components. Management of supporting components includes structuring and coaching activities involving the Defense Ministry in collaboration with ministries/agencies and local governments.

The form of guidance in fostering State Defense Awareness is all efforts, actions, and activities carried out in providing knowledge, education, and/or training to citizens to develop attitudes and behavior and instill the fundamental value of state defense. The Government of the Republic of Indonesia is concerned with the trained citizens program, meaning the citizens who are trained and organized in government institutions or non-governmental institutions in accordance with the needs and objectives of the organization who are ready to become components of the national defense. Of course, this does not contradict the contents of the 1949 Geneva Conventions, which the Government of Indonesia has ratified through Law Number 59 of 1958 and the basic principles of international humanitarian law.

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Relationship between International & Domestic Law

Implementation of Human Rights Treaties – Judicial Decision – The Custody of a Disabled Adult and the Convention on the Rights of Persons with Disabilities

Ms. R versus Mr. V.* (*Case No. 9809981527400283*), *Appeal Court of Mazandaran Province, 23 September 2020

Pursuant to Article 9 of the Iranian Civil Code, international treaties concluded among Iran and other States have the force of law in Iran. Despite this express legal provision, until very recently, Iranian judges were reluctant to rely on international treaties or instruments in their reasoning. However, in the past few years, Iranian judges have leaned toward relying on international treaties to solve civil and non-litigious disputes. In particular, they often rely on international human rights treaties or instruments alongside applicable domestic rules. The case reported below is one of those judgments wherein the judge used an international convention to decide a case. To protect the identity of the parties and the child in the case, the names of individuals have been redacted from the text of the decision.

Mr. V. sought the custody of his child, who was suffering from severe mental disability, autism, convulsions, and genetic eye disease from the court of first instance. The applicant claimed that the respondent (Ms. R., the child's mother and guardian) has been convicted by the courts for committing several crimes. In addition, the applicant claimed that the respondent does not pay enough attention to the child's hygiene. On the other hand, the respondent argued that the applicant has no proper house or salary for taking care of their child and added that the applicant himself also suffers from the same genetic eye disease that their child does. The Court of First Instance gave custody to the applicant based on the content of domestic rules, *inter alia*, Article 1069 of the Iranian Civil Code. The respondent sought an appeal of the judgment.

The Court of Appeal held that the Court of First Instance erred in law by applying Article 1069 of the Iranian Civil Code, since that rule is only applicable to minor children while the child in this case was 24 years old. Having found that the domestic rules are silent regarding the proper person for the custody of disabled adults, the Court of Appeal relied on various international rules to decide that the mother is more suitable for taking custody of the child. First, the Court of Appeal noted that the Convention on the Rights of Persons with Disabilities ('CRPD'), which has the force of law in Iran according to Article 9 of the Iranian Civil Code, requires States to adopt all appropriate measures

for implementing the rights recognized in the Convention, and obligates States to refrain from engaging in any act or practice that is inconsistent with that Convention. Hence, the Court of Appeal applied the Convention to decide the case. The Court of Appeal noted paragraph 10 of the preamble of the CRPD, which recognizes the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support. According to the Court of Appeal, the mother could provide better intensive support to her disabled female child. Moreover, the Court added that under General Comment No. 1 (2014) adopted by the Committee on the Rights of Persons with Disabilities, substitute decision-making regime that decides on disabled adults' cases must pay special consideration to the best interests of the child. Taking all these considerations together, the Court of Appeal ruled that the best interests of the child will be better secured if the child lives with her mother because, first, her mother can better address the special female needs of her disabled child and second, the father also suffers from an eye disease that makes him an unsuitable person for the custody of the child.

Nasim Zargarinejad

International & Regional Organisations

Admission, Membership, and Participation in International Organisations

Iran's Statement, UN General Assembly, 13 October 2020

Every member of international organizations and institutions including Iran enjoys the privileges of membership. The enjoyment of such privileges depends on the continuation of voting rights and membership, which in turn depends on payment of the relevant contribution to the organization, as non-payment would in many cases entail loss of voting rights and ultimately, suspension or termination of membership. The sanctions imposed against Iran in the last two decades have had an adverse effect on the payment of such contributions by Iran to international organizations in two different ways: first, by reducing the country's revenue, and second, by creating obstacles to the payment of contributions via banking systems.

The most recent example of depriving a nation of the exercise of such rights is the US imposition of financial and banking sanctions against Iran, which were the main obstacle to transferring Iran's financial resources to

pay its dues to the UN. As a result, Iran lost its voting rights in the UN, as the Secretary-General had asked the president of the General Assembly to suspend the voting rights of 10 States in the UNGA under Article 19 of the UN Charter.

Iran was unable to pay its dues to the United Nations to enjoy its legitimate rights until recently, even though the UN-imposed sanctions against Iran were lifted in 2015 through United Nations Security Council Resolution 2231. It should be noted that South Korea paid Iran's dues to the UN, using $18 million of frozen Iranian assets.

In fact, as Iran's delegation to the General Assembly noted in this regard at its 75th session on 13 October 2020, unilateral coercive measures are a 'virus that affected countries' economies and required a common solution' (A/C.5/75/SR.2, para. 13) that enables nations to enjoy their legitimate rights without facing unlawful unilateral coercive measures.

Khalil Rouzegari Agbalag

Individuals & Non-State Actors

Naturalization

Regulations on Naturalization of Children Born to Iranian Women Married to Foreign Men, 20 May 2020

Discrimination against maternal lineage in granting citizenship in the Iranian legal system had led to setbacks for children resulting from marriage between Iranian women and foreign men. To address this issue, an act was passed in 2006 to naturalize children born to Iranian women married to foreign men in Iran. The 2006 Act was not welcomed in practice due to very strict conditions and restrictions. Therefore, it was amended in 2019, and the executive regulations of this Act were approved in 2020.

According to paragraph 2 of Article 976 of the Iranian Civil Code, granting of Iranian citizenship is possible only through paternal descent. Iranian civil law does not provide a place for maternal descent in naturalization. With the approval of the 2006 Act, it was held that: 'Children born to Iranian women married to foreign men born in Iran, or born in Iran up to one year after the adoption of this law, can apply for Iranian citizenship after reaching the age of eighteen.' These individuals will be accepted as Iranian citizens if they do not have a criminal or security record and have rejected non-Iranian

citizenship. The main difficulty with this Act was that the age for granting Iranian citizenship had been raised to the age of 18, while children needed Iranian citizenship from birth in order to enjoy legal residence, free education, and health services. As a result, the Act was amended in 2019 and its executive regulations were adopted a year later.

According to the 2019 Nationality Act: 'Children of Iranian women religiously married to non-Iranian men, whether they were born or are born before or after the passage of this law, before reaching the age of eighteen, at the request of an Iranian mother if they do not have security problems […], become an Iranian citizen. The above-mentioned children can apply for Iranian citizenship after reaching the age of eighteen, provided that the Iranian mother did not apply. If they do not have a security problem, they will be accepted as Iranian citizens. The response to the security inquiry must be completed within a maximum of three months and the police are obliged to issue a residence permit to a non-Iranian father if he does not have a security problem.'

The 2019 Act along with 2020 Regulations grant Iranian nationality to the child of an Iranian woman subject to certain conditions. The first condition is that the marriage of the Iranian mother to a foreign father does not have to be a lawful marriage, and a sharia marriage will be sufficient. However, the Regulations require that the marriage must be legal and registered. The second condition is that the granting of Iranian citizenship is possible after the birth of the child, upon the request of the Iranian mother. The third condition is that there must not be a security problem to naturalization. The second and third requirements indicate that there is a possibility of the Iranian government opposing the mother's request. As a result, the citizenship bestowed pursuant to this Act is an acquired citizenship, while citizenship is granted by birth to a child born to an Iranian father is an original citizenship. Lack of a clear definition of a security problem can also present many challenges in naturalization.

Despite the existing restrictions, this Act is a positive step in eliminating differences between maternal and paternal descent in granting citizenship. With the passage of this Act and its Regulations, many children born to Iranian women and foreign men, especially illegal immigrant men, can benefit from Iranian citizenship. Having Iranian citizenship, these children will benefit from the right of residence, free health care, and education under the Iranian legal system.

Mahin Sobhani

Settlement of Disputes

International and Regional Dispute Resolution Mechanisms – Iran-United States Claims Tribunal

Islamic Republic of Iran v. United States of America, Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, 10 March 2020

To provide some background, Iran and the United States concluded the Algiers Accords in 1981, thereby constituting the Iran-United States Claims Tribunal ('IUSCT' or 'Tribunal') at The Hague, The Netherlands in order to resolve certain individual and governmental claims. The Tribunal is composed of nine members – three chosen by Iran, three chosen by the United States, and three so-called 'third-country' arbitrators.

On 10 March 2020, the IUSCT rendered Partial Award No. 604-A15 (II:A)/A26 (IV)/(B43-FT), ordering the United States to pay Iran over USD 29 million in damages, including decades of interest, and to return several tangible properties of a non-military nature that had been frozen by the United States following the seizure of the US Embassy in Tehran in 1979.

The Algiers Accords – the General Declaration in particular – set out obligations for the two disputing States, which, *inter alia*, consisted of the release of the US personnel by Iran and the return of the Iranian assets blocked in the United States.

On 25 October 1982, Iran submitted that the United States had failed to arrange for the transfer of all Iranian properties located in the United States to Iran as required by Paragraph 9 of the General Declaration. This provision requires the United States to 'arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of *all Iranian properties* which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.' (Emphasis added)

In this respect, Iran requested the Tribunal to clarify which assets were to be considered as 'Iranian properties' under Paragraph 9 of the General Declaration. As a result, Partial Award No. 529 was issued in 1992, wherein the Tribunal, *inter alia*, found that the obligation of the United States with respect to tangible properties was limited to properties that were owned by the government of Iran or its controlled entities. Moreover, the Tribunal held that United States regulations that 'excluded from the transfer direction properties which were owned solely by Iran but as to which Iran's right to possession was contested by the holders of such properties on the basis of any liens, defences, counterclaims, set-offs or similar reasons, were inconsistent with the obligations of the United States under the General Declaration.' Consequently, the

Tribunal concluded that the United States had the obligation to compensate Iran for those properties that had not been transferred. Most importantly, in this Award, the IUSCT deferred any determinations concerning specific properties and possible damages to the second phase of the proceedings, which resulted in Partial Award No. 604.

In Partial Award No. 604, the Tribunal found that Partial Award No. 529 had determined the meaning of the term 'Iranian properties' to be properties 'solely owned by Iran.' The Tribunal concluded that the standard for determining Iranian properties was ownership, and that title was the key criterion in determining whether specific properties were solely owned by Iran: 'The Tribunal concludes that title to property is therefore the objective means by which to determine the question of ownership over the property claimed and to conclude whether the property falls within the scope of Paragraph 9.' (Award No. 604, para. 131.) In order to identify the properties which Iran had title to, the Tribunal found that general public international law did not provide any applicable rules, and thus referred to the general principles of private international law to determine which national law should be applied to define title to the properties in question. Deciding that the most generally accepted principle is *lex rei sitae* – meaning the law of the place where the goods are located at the time of their transfer – the Tribunal decided to apply US law to define which properties were owned by Iran and had to be transferred under the General Declaration.

In other words, in determining which properties the United States had transferred to Iran, the Tribunal – having concluded that there are no public international law rules on property – grappled with identifying the law governing property rights in the framework of a treaty-based inter-state arbitration. Against this backdrop, the Tribunal applied international private law principles to identify the national law applicable to questions of ownership. Contrariwise, dissenting arbitrators were of the opinion that the underlying dispute was a matter of treaty interpretation and thus required a *public* international law analysis in light of the canons of interpretation under the Vienna Convention on the Law of Treaties.

Islamic Republic of Iran v. United States of America, Decision No. DEC 137-A15 (II:A)/A26 (IV)/B43-FT, Correction to Award and Decision on Request for Correction and Additional Award, 27 November 2020

Following the issuance of Award No. 604 on 10 March 2020, explained above, on 9 April 2020, the United States sought corrections to certain aspects of the Tribunal's Award, as well as an additional award on a defence that the Tribunal had allegedly failed to address.

On 27 November 2020, the Tribunal issued its decision upon the request of the United States. The Tribunal accepted some of the corrections suggested by the United States, while denying others. The Tribunal's decision resulted in a total reduction of less than USD 14,000 out of the roughly USD 29 million decided in Award No. 604.

The United States also requested an additional award to the Partial Award in connection with the defence raised by the United States concerning Article I of the Claims Settlement Declaration, which, allegedly was presented in the arbitral proceedings but omitted from the Partial Award. The Parties disagreed fundamentally about whether the scope of a request for an additional award under Article 37 (1) of the Tribunal Rules was limited to *claims* presented but omitted from the award, as Iran contended, or whether such a request may also concern an omitted *defence*, as the United States contended. Article 37 (1) of the Tribunal Rules provides:

> Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

According to the Tribunal, the text of the provision expressly limited the scope of a request for an additional award to omitted 'claims.' In the Tribunal's view, it was doubtful that the term 'claims' in the provision may have been interpreted as also encompassing the term 'defences' or, relatedly, terms such as 'arguments' or 'issues.'

Further, the Tribunal noted that it had considered all significant arguments raised by the Parties, whether explicitly mentioned in the Partial Award or not, including the United States' defence. Consequently, the Tribunal dismissed the United States' Request for Additional Award.

Vahid Rezadoost

International and Regional Dispute Resolution Mechanisms – International Court of Justice

Certain Iranian Assets (*Islamic Republic of Iran v. United States of America*)

On 14 June 2016, the Islamic Republic of Iran filed in the Registry of the International Court of Justice ('Court') an Application instituting proceedings against the United States of America with regard to a dispute concerning its

alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights of 1955. On 1 July 2016, the Court fixed 1 February 2017 and 1 September 2017 for the filing of a Memorial by Iran and a Counter-Memorial by the United States, respectively. The Memorial of Iran was filed on 1 February 2017. On 1 May 2017, in accordance with Article 79 of the Rules, the United States presented preliminary objections to the admissibility of the Application and the jurisdiction of the Court. Consequently, by an Order of 2 May 2017, the President of the Court fixed 1 September 2017 as the time-limit within which Iran could present a written statement of its observations and submissions on the preliminary objections raised by the United States. Iran filed such a statement within the prescribed time-limit, moving the case forward for a hearing in respect of the preliminary objections. The relevant public hearings were held from 8 to 12 October 2018, at which the Court heard oral arguments and replies. The Court issued its judgment on preliminary jurisdiction on 13 February 2019. The Court, while accepting one of the objections of the United States, rejected the rest and as such decided that, subject to certain conditions, the Court has jurisdiction, and Iran's Application is admissible. Subsequently, the Court, through an order dated 15 November 2019, set 17 August 2020 as the deadline for the filing of the Reply of the Islamic Republic of Iran and 17 May 2021 as the deadline for filing of the Rejoinder of the United States of America in this case. Iran filed its Reply in 2020. This reply is not yet public.

Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (*Islamic Republic of Iran v. United States of America*)

On 16 July 2018, the Islamic Republic of Iran filed in the Registry of the Court an Application instituting proceedings against the United States of America with regard to alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights of 1955. Upon the request of Iran, by an Order dated 3 October 2018, the Court indicated certain provisional measures. Subsequently, Iran filed its Memorial on 24 May 2019. On 23 August 2019, in accordance with Article 79, paragraph 1, of the Rules of Court, the United States raised certain preliminary objections and accordingly, the President of the Court decided that the proceedings on the merits would be suspended and requested that Iran present its written statement of its observations and submissions on the preliminary objections raised by the United States. Iran filed its written statement on 23 December 2019, and the relevant public hearings were held through video link from 14 to 21 September 2020, at which the Court heard the oral arguments and replies of the United States and Iran.

During the oral proceedings of the preliminary objections, the United States requested that the Court uphold its preliminary objections set forth in

its written submission at this hearing and decline to entertain the case. Specifically, the United States requested that the Court: (a) dismiss Iran's claims in their entirety as outside the Court's jurisdiction; (b) dismiss Iran's claims in their entirety as inadmissible; (c) dismiss Iran's claims in their entirety as precluded by Article XX, paragraph 1 (b) of the Treaty of Amity; (d) dismiss Iran's claims in their entirety as precluded by Article XX, paragraph 1 (d) of the Treaty of Amity; and (e) dismiss as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on third country measures. In response, Iran requested that the Court: (a) reject and dismiss the Preliminary Objections of the United States of America; and (b) adjudge and declare: (i) that the Court has jurisdiction over the entirety of the claims presented by Iran; and (ii) that Iran's claims are admissible.

The Court issued its judgment on the preliminary objections on 3 February 2021 and: (1) unanimously rejected the preliminary objection to its jurisdiction raised by the United States according to which the subject-matter of the dispute does not relate to the interpretation or application of the Treaty of Amity, Economic Relations, and Consular Rights of 1955; (2) unanimously rejected the preliminary objection to its jurisdiction raised by the United States relating to measures concerning trade or transactions between the Islamic Republic of Iran (or Iranian nationals and companies) and third countries (or their nationals and companies); (3) by fifteen votes to one rejected the preliminary objection to the admissibility of the Application raised by the United States; (4) by fifteen votes to one (Judge *ad hoc* Brower) rejected the preliminary objection raised by the United States of America on the basis of Article XX, paragraph 1 (b), of the Treaty of Amity, Economic Relations, and Consular Rights of 1955; (5) unanimously rejected the preliminary objection raised by the United States of America on the basis of Article XX, paragraph 1 (d), of the Treaty of Amity, Economic Relations, and Consular Rights of 1955; and (6) by fifteen votes to one (Judge *ad hoc* Brower) found, consequently, that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955, to entertain the Application filed by the Islamic Republic of Iran on 16 July 2018, and that the said Application is admissible.

Iran's Observations on the Report of the International Court of Justice of 2020 (A/75/PV.20, *3 November 2020*)

Mr. Takht Ravanchi, Iran's Representative, in his statement on the report of the Court's activities in 2020 (A/75/4) referred to the following points:

- The International Court of Justice has a pivotal role in the recognition and application of international law through its judicial work. The consensual basis of the Court's jurisdiction is not a deficiency; rather, it is in fact the

strength of the Court, which upholds the rule of law in the international legal order at the core of which is the sovereign equality of States as one of the fundamental principles of international law.

- Iran has always believed in the authority and integrity of the Court and considers it as an important means for the peaceful resolution of disputes between States.
- In response to wrongful acts, carried out in contravention of the Treaty of Amity, Economic Relations, and Consular Rights of 1955, the Charter of the United Nations, and international law, the Islamic Republic of Iran instituted proceedings against the United States in the International Court of Justice on 16 July 2018. Regrettably, the United States has not only failed to comply with the Court's order but, by imposing new rounds of sanctions, has also deliberately defied that order. In that context, in line with the Court's order and Security Council resolution 2231 (2015), Member States are expected to stand against the United States' lawless policy of intimidation and pressure. Any action to the contrary would amount to disregarding the Court's order and be tantamount to providing assistance to the transgressor. As a result, the Islamic Republic of Iran brought such non-compliance to the Court's attention in more than one case.

Seyed Hossein Sadat Meidani

International and Regional Dispute Resolution Mechanisms – Enforcement of Arbitral Awards and Economic Sanctions

Ministry of Defence and Support and Armed Forces of the Islamic Republic of Iran v. International Military Services Ltd., Court of Appeal of London [2020] *EWCA Civ 145, 12 February 2020*

Prior to the Iranian revolution of 1979, the Iranian Ministry of Defence and Support for Armed Forces entered into two contracts with International Military Services, Ltd., a corporation owned by the UK Ministry of Defence and HM Treasury. The subject of the contracts was the supply of Chieftain tanks and armoured recovery vehicles to the Iranian party. The value of the contracts amounted to GBP 650 million and the British supplier received an advance payment.

However, during the turmoil of the revolution, the contracts were terminated on 6 February 1979. By that time, only a few of the agreed upon number of tanks had been delivered, and the remainder of the supplier's obligations remained outstanding. Thus, the parties were left in dispute as to the balances

payable. The Iranian purchaser initiated an arbitration case against the British supplier before the International Chamber of Commerce in 1990, and the British supplier started an arbitration case against the Iranian purchaser in 1996. The ICC arbitration tribunal issued final awards in both arbitrations on 2 May 2001, concluding that the British defendant was a debtor and therefore liable to pay the Iranian claimant an amount exceeding GBP 100 million plus interest. The interest determined by the arbitral tribunal was at LIBOR rate plus 0.5% to be calculated from 28 July 1984 until the date of full payment.

On 30 July 2001, the Iranian party applied to the High Court of London to enforce the awards. On 31 July 2001, the High Court granted leave to enforcement, following the dismissal of the application to set aside the orders and the challenge to the awards in The Netherlands (the seat of arbitration) were determined. Therefore, the High Court decided to adjourn the enforcement proceedings pending the supplier's challenge in The Netherlands and, more significantly, such adjournment was conditional on the British supplier paying the amount of the award plus the accruing interest into the Court Funds Office by way of security.

On 24 April 2009, the challenge procedure was finalized in The Netherlands when that nation's Supreme Court upheld the Court of Appeal's decision, which found that the arbitral awards were valid. However, the Dutch Court of Appeal had reduced a minor portion of the debt amount included in the arbitral award.

By then, the Iranian purchaser was designated a sanctioned entity under EU Council Regulation 423/2007 (replaced by Regulation 267/2012), taking effect from 24 June 2008. On this basis, the debtor took the position that the amount of the award and interest was not payable to the Iranian party. In a convoluted procedure before the High Court, the hearing was adjourned several times.

At the hearings which were fixed for 21 and 22 May 2019, two significant questions were to be decided: (i) whether the award is enforceable in England, given sanction Regulation 267, and (ii) what will be the terms of the awards.

In order to determine the issues before the Court, a full examination of Articles 38 and 42 of Regulation 267 was carried out. The High Court judgment was rendered on 24 July 2019. According to the judgment, as to the first issue, the supplier challenged only the enforcement of the interest component of the final award, invoking Regulation 267. In this respect, the Court found that the interest component of the Award during the period that the purchaser was a designated entity was precluded by Article 38 of Regulation 267 and could not be enforced. As to the second issue, the Court concluded that the total quantum due in respect of the Awards should be recalculated.

The Iranian purchaser appealed from the decision of the High Court before the Court of Appeal (Civil Division). The hearing session was held on 22–23 January 2020, and the appeal judgment was rendered on 12 February 2020. The same issues were brought before the Court of Appeal, namely, whether the 2012 Regulation operates to deprive the Iranian purchaser of any right to interest during the period which it has been subject to the EU's sanctions regime. The Court of Appeal, having thoroughly examined the reasoning of the High Court, found in its judgment that the decision of the latter was in accord with both the language and the purpose of the relevant provisions of the 2012 Regulation, leaving the High Court's decision impeccable. The Court of Appeal also shed light on the position of English Law as to the meaning of 'any contract and transaction' incorporated in Article 31(1), emphasizing that the parties' obligation to enforce an arbitral award is of a contractual nature and stems from the parties' commitment to enforce any resulting final award (as replicated in the ICC Arbitration Rules as well). This affirms the Court's view that the enforcement of an arbitral award, in cases where one party is a designated entity under Regulation 267, falls within Article 38 of the Regulation. Thus, the appeal was rejected, and the Iranian purchaser was recognized to be entitled to the principal amount of the award plus interest for the period during which it was not a designated entity.

Mojtaba Asgharian

Diplomatic Solution of Disputes – JCPOA-Related Events

The Joint Comprehensive Plan of Action ('JCPOA') is an agreement reached on 14 July 2015 between Iran and the P5 + 1 (the US, Germany, France, the UK, China, and Russia). According to the agreement, multilateral sanctions against Iran were lifted in exchange for placing Iran's nuclear program within the framework of the International Atomic Energy Agency ('IAEA'). Furthermore, some restrictions were imposed on Iran's nuclear program, including research and development, production and level, and extent of nuclear enrichment. The sanctions of the United Nations Security Council ('UNSC') and unilateral sanctions of the US and EU were gradually suspended or terminated on the basis of a timetable framework established in Resolution 2231 and the JCPOA.

Following the inauguration of former president Donald Trump in 2017, the policy of the new US administration was to criticize the JCPOA and the Obama administration for concluding an agreement in favour of Iran's nuclear program. After several threats of non-cooperation and withdrawal from the

JCPOA, on 8 May 2018, Trump announced his official decision to withdraw from the JCPOA. To confront the US withdrawal, in accordance with paragraphs 36 and 37 of the JCPOA preamble, Iran took five remedial steps from 18 May 2019 to reduce its JCPOA commitments. It should be noted that the possibility of a gradual reduction of commitments is foreseen in JCPOA itself, and any dispute arising from its implementation may be discussed through the Joint Commission as a special mechanism embedded in paragraphs 36 and 37. The steps taken by Iran are as follows:

TABLE 2 Iran's remedial steps

First step	8 May 2019	Failure to comply with the restrictions on 'storage of enriched uranium reserves' (300 kg) and 'heavy water reserves' (130 tons)
Second step	7 July 2019	Failure to comply with the 3.67% limit on uranium enrichment
Third step	4 September 2019	Failure to comply with research and development restrictions in the field of new centrifuges
Fourth step	5 November 2019	Gas injection into centrifuges at Fordow nuclear facilities
Fifth step	5 January 2020	Failure to observe the limit on the number of centrifuges

The reaction of the remaining participants in the JCPOA has always been to express their concern about this issue and request Iran to abide by its commitments. In response to Iran's gradual reduced adherence to its JCPOA commitments, the High Representative of the EU and the Foreign Ministers of France, Germany, and the UK issued several joint statements. Following these measures, the above states announced on 14 January 2020 that they had begun the process of returning the sanctions (known as the trigger or snapback mechanism) in accordance with Resolution 2231. This action was in the process of being drafted by the States in the Joint Commission of the JCPOA but was suspended later in anticipation of the results of the 2020 US presidential election.

At the same time, on 20 August 2020, while the Trump administration made efforts to effectively restore UNSC sanctions against Iran by launching the snapback mechanism, it was met with outright opposition from the remaining

JCPOA participants, as well as members of the UNSC other than the Dominican Republic. The US submitted a letter requesting the return of sanctions on Iran to the President of the UNSC, but the president did not put it on the UNSC agenda for 25 August 2020, given the other members' opposition. As a result, despite the Trump administration's claim that all UNSC sanctions returned on 19 September 2020, few States around the world were willing to side with the US.

Another important issue was the termination of restrictions categorised in Resolution 2231 on 18 October 2020. The Iran's arms embargo and some Iranian individuals and legal entities were removed from the UNSC sanctions list.

According to Resolution 2231, as a general matter, restrictions on Iran's nuclear program were to expire over time. The arms embargo and the ban on the movement of sanctioned persons will likewise end five years after the adoption of the JCPOA.

Even in the final days of the Trump administration, the US attempted to fund the revival of the Iran Sanctions Committee in the UNSC, known as the 1737 Committee, in the 2021 UN budget, which was an attempt accompanied by another US defeat in the UN General Assembly vote. In November 2020, Joe Biden defeated Trump by a significant margin in the presidential election. President Biden had promised in his election campaign that he would return to the JCPOA if he won. Accordingly, negotiations to return to the JCPOA have been going on since November 2021.

It is worth mentioning as to the implementation of the JCPOA that on 2 December 2020, a 9-article Act was adopted by Iran's parliament, the Islamic Consultative Assembly (Majlis), titled 'Strategic Action for Sanctions and Protection of the Iranian Nation.' The Act, going beyond the five aforesaid remedial steps taken by Iran's Government, calls for the lifting of all restrictions and sanctions imposed on Iran in the fields of 'nuclear, military and human rights and the like.' According to Article 6, '[T]he Government of the Islamic Republic of Iran is obliged in case of non-fulfilment of the obligations of the state parties, including the P4 + 1 countries (Germany, France, UK, China, and Russia) towards Iran and normalization of banking relations and complete removal of barriers to export and full sale of Iranian petroleum products and the full and rapid return of foreign exchange from the proceeds of such sales, two months after the entry into force of this Act, to halt inspection beyond the Safeguards Agreement [between Iran and the IAEA], including the voluntary implementation of the Additional Protocol [to the Safeguards Agreement].' In accordance with this Act, Iran renounced the Additional Protocol on 23 February 2021.

Abdollah Abedini

International Environmental Law

Environmental Protection

Law on Judicial and Insurance Protection of Officers of the Environmental Protection and Forestry Unit, 11 June 2020

In the field of internal laws and regulations, on 11 June 2020, the Law on Judicial and Insurance Protection of Officers of the Environmental Protection and Forestry Unit was approved. According to this law, the government is obliged to carry out its duties and responsibilities in accordance with the law in relation to death, incurable disease, disability, and the amount of compensation for loss of life, and to provide full insurance against other accidents.

Ali Mashhadi

Human Rights

Rights of the Child – Adoption of Child and Adolescent Protection Act

Children and Adolescents Protection Act, 12 May 2020

On 12 May 2020, the Iranian Parliament ('Majlis'), adopted a new Children and Adolescents Protection Act ('Act'). The new law replaced the former protective law of 2002. The law is based on the distinction between children and adolescents. Since Iran is a Member State of the UN Convention on the Rights of the Child ('CRC') and has declared its reservation to the convention, the new law contains important aspects. In its reservation, Iran declared that it is not bound by any provisions that are incompatible with Islamic law and enforced national laws. Specifically, under Article 1 of the Act, a child is every person under the Sharia age of maturity, which is 9 years for girls and 15 for boys, but protection is provided for any person who is under 18 years of age.

The Act provides for public intervention when a child or adolescent is endangered, even by his or her parents. Dangerous situations are any situations that risk victimization or damage to the physical, mental, social, moral, safety, or educational position of the child. Article 3 lists some kinds of dangerous situations, including continuous domestic violence, failure to register the birth or obtaining identity documents without a valid excuse, dropping out of school, physical or mental disability, development of certain diseases

or sexual identity disorders, breach of criminal law by a child or the commission of a crime by a juvenile or their use in criminal activities, the entry of a child or juvenile into activities such as begging and trafficking, as well as their addiction to drugs, psychotropic substances, or alcohol, any harmful situation resulting from extreme poverty, displacement, asylum, migration or statelessness, abuse or exploitation of other children or adolescents, and exploitation of the child or adolescent.

The Act establishes the Child and Adolescent Protection Office in the judiciary and obliges some government organs to take certain protective measures. The Act criminalizes some acts and omissions. Article 9 of the Act extends protection to children against domestic violence and abuse and determines fines and punishments when the child is harmed because of the parents' neglect or failures. The Act also criminalizes some acts such as preventing education, promoting or threatening escape from home or school, sexual assault, child trafficking, promoting or facilitation of child suicide, economic exploitation, and revealing the secrets of children at risk.

Under Article 30, the child has a right to seek preventive measures. All crimes under this Act have a public aspect and the consent of the victim cannot stop investigations or proceedings.

Amir Maghami

International Humanitarian Law

Protection of Individuals under International Humanitarian Law

Resolutions and Statements

Statement by the Ministry of Defence on the Occasion of the International Day on Mine Awareness and Assistance in Mine Action, 4 April 2020

The Islamic Republic of Iran is still suffering from unexploded landmines in its five western provinces as a result of the 1980–1988 war with Iraq. Although Iran has not yet acceded to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 1997, it has regularly announced its commitment to humanitarian demining and mine awareness, which is coordinated by the Iranian Mine Action Center.

Application of Hague & Geneva Conventions

Resolutions and Statements

Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security, First and Second Submission by the Islamic Republic of Iran, and Preliminary Reflection by the Islamic Republic of Iran on the Initial 'Pre-Draft' of the Report of the OEWG on Developments in the Field of Information and Telecommunications in the Context of International Security, April 2020

Iran, as the target of a major cyber-attack (Stuxnet) against its critical nuclear facilities, participates actively in discussions at the Open-ended Working Group established by General Assembly Resolution 73/27 of 5 December 2018. Regarding the application of international law, and in particular international humanitarian law, Iran's main position is that 'any language which gives an impression, explicitly or implicitly, that the ICT [Information Communication Technologies] environment, particularly the internet, constitutes a new battlefield' should be avoided. For this reason, Iran has objected to any reference in the drafts prepared by the OEWG recognizing ICT military applications and applying international humanitarian law, which in its view is exclusively for armed conflicts and is inconsistent with 'emerging consensus on the imperative of the peaceful nature of the ICT environment.'

Statement by the Representative of the Islamic Republic of Iran before the Sixth Committee of the 75th Session of the United Nations General Assembly on 'Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts' (Agenda Item 83), New York, 4 November 2020

Iran adopted the 1949 Geneva Conventions in 1949 and is a signatory to the Additional Protocols of 1977. The establishment of Iran's National Committee on Humanitarian Law in 1999 within the Iranian Red Crescent Society has been a significant step towards incorporating the rules of IHL into Iranian domestic law. Iran 'fully recognizes the indispensable role of international humanitarian law, especially the provisions of the four Geneva Conventions, in minimizing the negative impact of armed conflicts. As such, cognizant of the horrible consequences of IHL violations, the Islamic Republic of Iran has made consistent efforts in promoting, publicizing and disseminating the knowledge of IHL norms, including among its armed forces.'

Katayoun Hosseinnejad

The Use or Threat of Force

Responses to Threats and Attacks

The Attack against Major General Soleimani, 3 January 2020

Following the attack by the armed forces of the United States against Major General Qasem Soleimani, the Commander of the Quds Force of the Islamic Republic of Iran, and his companions on 3 January 2020 at Baghdad International Airport, in a letter (S/2020/13, 3 January 2020) to the United Nations Security Council ('UNSC'), Iran condemned this attack in the 'strongest possible terms' and while mentioning that 'it is incumbent upon the Security Council to uphold its responsibilities and condemn this unlawful criminal act, …' stressed that 'the Islamic Republic of Iran reserves all of its rights under international law to take necessary measures in this regard, in particular in exercising its inherent right to self-defence.'

In response to statements by Iranian officials condemning the attack at Baghdad Airport, the President of the United States declared that the US had identified 52 Iranian sites including some very important to Iranian culture, and was ready to destroy them. Iran called this threat a gross violation of the peremptory norms of international law as well as the very fundamental principles enshrined in the Charter of the United Nations, particularly Article 2(4), which clearly prohibits the threat or use of force (S/2020/16, 8 January 2020).

In the early morning hours of 8 January 2020, the Iranian armed forces targeted an American airbase in Iraq. In its letter to the UNSC, Iran mentioned that: 'in exercising our inherent right to self-defence in accordance with Article 51 of the Charter of the United Nations, the armed forces of the Islamic Republic of Iran took and concluded a measured and proportionate military response targeting an American airbase in Iraq from which the cowardly armed attack against General Soleimani was launched. The operation was precise and targeted military objectives, thus leaving no collateral damage to civilians and civilian assets in the area' (S/2020/19, 8 January 2020).

The government of Iraq, which had already condemned the attack by the US forces, also reacted to Iran's operation, calling it a violation of its territory (S/2020/26, 10 January 2020). In response, Iran stated: 'Iran's act on 8 January 2020 was a measured and proportionate response, in exercising its inherent right to self-defence, against an American airbase from which the cowardly armed attack against General Soleimani – who was in Baghdad upon the invitation of the Government of Iraq – was launched. The relevant Iraqi authorities were informed, in advance, that our act of self-defence was aimed only at the American airbase' (S/2020/44, 16 January 2020).

Assassination of Mr. Mohsen Fakhrizadeh, 7 November 2020

On 7 November 2020, in the city of Absard in Tehran Province, Mr. Mohsen Fakhrizadeh, a prominent Iranian scientist, was assassinated. Iran condemned this attack and warned against 'any adventurist measures by the United States and Israel' and stressed that 'the Islamic Republic of Iran reserves its rights to take all necessary measures to defend its people and secure its interests.' (S/2020/1148, 30 November 2020).

Before this attack, on 29 September 2020, the Prime Minister and Defence Minister of Israel threatened Iran with a 'pre-emptive strike' and stated 'we are not ruling out a preliminary strike.' (https://sputniknews.com/middleeast/202009292910806089 77-netanyahu-not-ruling-out-preemptive-strike-against-iran/).

Iran called these statements 'inconsistent with the purposes of the United Nations and a blatant violation of Article 2(4) of the Charter of the United Nations, which prohibits the threat or use of force.' (S/2020/989, 8 October 2020).

Declaration of the General Staff of the Armed Forces of the Islamic Republic of Iran Regarding International Law Applicable to Cyberspace, 20 July 2020s

On 20 July 2020, the General Staff of the Iranian Armed Forces released a declaration on applicable law in cyberspace (https://www.aldiplomasy.com/en/?p=20901). This document, as mentioned in its introduction, clarifies the concepts, macro policies, and framework of the activities of the armed forces against the various and increasing threats of cyberspace. In accordance with Article 1.3 of this declaration: '... a wide range of general principles of current international law, including equality of sovereignty of states, the prohibition against the use of force and act of aggression may apply to the use of cyberspace.' As laid down in Article 11.3 of this document: 'Any intentional use of cyber-force with tangible or non-tangible implications which is or can be a threat to the national security or may, due to political, economic, social, and cultural destabilization, result in destabilization of national security constitutes a violation of the sovereignty of the state.' Article IV of the Declaration under the title of 'Use of Force and Cyber Attack from the View-point of the Armed Forces of the Islamic Republic of Iran' stipulates that: '1. Armed forces of the Islamic Republic of Iran believe that certainly, those cyber operations resulting in material damage to property and/or persons in the widespread and grave manner and or it logically is probable to result in such implications constitutes use of force. Should such operations affect the vital national infrastructures, including defensive infrastructures- whether owned by the public or private sector- they shall violate the principle of the non-use of force; 2. Armed forces of the Islamic Republic of Iran, also, believe that their right to

self-defence shall be reserved if the gravity of the cyber operation against the vital infrastructure of the state is reached in the threshold of the conventionally armed attack.'

Pouria Askari

Conflicting Views with Respect to Iran's Ballistic Missile Activities

Following the conclusion of the Joint Comprehensive Plan of Action ('JCPOA') on 14 July 2015 and its endorsement by UNSC Resolution 2231 on 20 July 2015, Iran began testing ballistic missiles and launching satellites, which have since been the subject of numerous arguments between the JCPOA participant states over the (il)legality of Iran's ballistic missile activities under Resolution 2231. On the one hand, the US, France, Germany, and the UK asserted that Iran's actions violated the provisions of paragraph 3 of the second annex to Resolution 2231, and on the other hand, Iran and Russia contended that Iran's missile activities had nothing to do with this paragraph. The said paragraph states: '[I]ran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology, until the date eight years after the JCPOA Adoption Day or until the date on which the IAEA submits a report confirming the Broader Conclusion, whichever is earlier.' The main arguments advanced by some of these states through correspondence with the UNSC regarding Iran's ballistic missile activities are as follows:

In a letter to the UNSC on 20 May 2020 (S/2020/428), the US stated that the launch of a military satellite by Iran violated Iran's obligations under paragraph 3 of the second annex to Resolution 2231. The US, as in its previous letters on Iran's missile activities, contended that such missiles are classified as ballistic missiles by the criteria of the Missile Technology Control Regime ('MTCR').

On the other hand, Russia opposed the position of the US in its letter to the UNSC of 28 May 2020 (S/2020/454). As with its previous stance on Iran's missile activities, Russia believed that Iran has the right to peaceful use of space under international law. Treaties or customary international law do not prohibit such activities. In addition, Iran does not intend to use nuclear warheads in ballistic missiles and therefore was not in breach of paragraph 3 of the second annex to Resolution 2231.

Iran also reiterated its previous positions in a letter dated 26 May 2020 (https://undocs.org/en/S/2020/443), in response to letters from the US and Israel regarding Iran's launch of military satellites and missile activities. In Iran's view, its ballistic missiles are not designed to be used to launch nuclear

warheads. From Iran's point of view, the third paragraph of the second annex to Resolution 2231 does not express an obligation for Iran. Iran's basic argument has been laid out in its previous letters to the UNSC. For example, in a letter to the UNSC (S/2018/1062) in response to the views of the UK, Germany, and France, Iran maintained that the views expressed in the joint letter of the three European States were not in accordance with paragraph 3 of second Annex to Resolution 2231 because of differences in the wording of provision related to the issue of Iran's ballistic missile program indicated in Resolution 1929 of 2010 and Resolution 2231 of 2015. This change in the wording is meaningful in the use and addition of the term 'designed to be' to the phrase 'capable of delivering nuclear weapons' because the intention was to show that in practice, Iran's missiles are designed to carry only a conventional warhead and not a nuclear warhead, and the third paragraph never sought to limit Iran's conventional ballistic missile program. Moreover, this prohibition does not exist in international law. Additionally, the language and expression of the third paragraph are not mandatory. Iran is not seeking a nuclear weapon, will not possess a nuclear weapon in the future, and is fully committed to the Nuclear Non-Proliferation Treaty and the UNSC. In addition, the letter of the three countries refers to the MTCR, while in Resolution 2231, there is no implicit or explicit reference to this regime or its definitions and criteria. Therefore, none of the criteria can be used in the interpretation of the third paragraph. The regime is the product of a political agreement between 35 member states exporting ballistic missile equipment based on the commercial and political interests of its members and is unrelated to Resolution 2231.

The UK, Germany, and France on the other hand are of the view (S/2018/1062) that because Iran's ballistic missile activities fall within the definition of ballistic missiles under the MTCR, it is contrary to the provisions of paragraph 3 of the second annex to Resolution 2231. The first part of the regime states that if a missile system is capable of carrying a warhead of at least 500 kilograms and has a range of 300 kilometres, it will also be able to carry nuclear weapons.

Russia also wrote a letter (S/2018/967) to the UNSC in response to the above letter stating that the first part of the MTCR was merely a means of restricting the export of certain missile technology items and that the purpose of Resolution 2231 was not to ensure that missiles designed under Resolution 2231 comply with the regime's criteria.

Abdollah Abedini

State Practice of Asian Countries in International Law

Japan

Kanami Ishibashi, State Practice Rapporteur
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History and Theoretical Approach of Japan in International Law

Japanese Human Contribution to the International Community

In November 2020, Judge Yuji Iwasawa of the International Court of Justice was reelected by 169 votes in the UN General Assembly and 15 votes in the Security Council to serve a nine-year term beginning February 2021. Judge Iwasawa was elected in June 2018, when he was a professor at the University of Tokyo, to fill the vacancy caused by the resignation of Japanese-born Judge Hisashi Owada. Following the re-election, Japan's Ministry of Foreign Affairs issued the below statement:

> As the ICJ is playing an increasingly prominent role in achieving peaceful settlement of international disputes, electing the best qualified judges to the Court is essential for maintaining and reinforcing the confidence of the international community in the ICJ. The re-election of Judge IWASAWA is the testament to the international community's high appreciation of his exceptional qualification and the achievements that he has delivered as a judge of the ICJ, as well as the international community's support for Japan's stance of placing great importance on the ICJ.
>
> Japan intends to continue to support the activities of the ICJ and make proactive contributions to the promotion of the rule of law in the international community.

International Economic Law

International and Regional Trade Treaties and Bodies – Signing of the RCEP

On 15 November 2020, Japan signed the Regional Comprehensive Economic Partnership Agreement (RCEP), an economic partnership agreement among

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the 10 ASEAN member countries (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam) and its FTA parties (Australia, China, Japan, New Zealand, and South Korea). The agreement entered into force on 1 January 2022 for Japan, China, Australia, New Zealand, Thailand, Cambodia, Singapore, Brunei, Vietnam, and Laos. This was followed by Korea on 1 February 2022, and Malaysia on 18 March 2022.

The RCEP covers about 30% of the world's GDP, trade, and population, making it one of the world's largest economic partnership agreements. For Japan, the RCEP is very significant in that it is the first economic partnership agreement between Japan and China, and between Japan and Korea. In addition, Japan has very high expectations for the RCEP framework where the Trans-Pacific Partnership Agreement (TPP) framework in the Asia-Pacific region has stalled due to the withdrawal of the United States. India has been involved in the negotiations from the beginning, but ultimately did not join the RCEP. At the 4th RCEP Leaders' Meeting, Prime Minister Suga stated, "It is regrettable that India did not sign the RCEP Agreement today, but India is an essential player in the regional economic framework, and Japan is determined to continue to play a leading role in India's future return to this agreement (Prime Minister Suga's Remarks at the 4th RCEP Summit on 15 November 2020)." He lobbied for the further promotion of the RCEP.

Japan-U.S. Trade Agreement and Japan-U.S. Digital Trade Agreement

On 1 January 2020, the Trade Agreement between Japan and the United States of America (Japan-U.S. Trade Agreement) and the Trade Agreement between Japan and the United States of America concerning Digital Trade (Japan-U.S. Digital Trade Agreement) entered into force.

The Japan-U.S. Trade Agreement provides for the mutual elimination or reduction of tariffs on trade in goods between the United States and Japan. For Japan, TPP11 entered into force at the end of 2019 and the EU-Japan EPA (Economic Partnership Agreement) in March 2020. On the other hand, since its withdrawal from the TPP, the United States has been extremely reluctant to participate in the multilateral free trade regime. Against this background, both agreements were concluded and entered into force very smoothly.

Under the agreement, Japan eliminated or reduced tariffs on pork, beef, and other agricultural products, as well as processed foods. Regarding tariffs on Japanese agricultural products: (1) Japan obtained an exemption from the elimination of tariffs on rice, the staple food of the Japanese people, as requested by Japan, (2) the items for which tariffs will be reduced or eliminated will be the same as those in the TPP, (3) tariffs on beef will be eliminated in the same manner as those in the TPP, (4) tariff elimination or reduction

was achieved for individual items such as soy sauce, potatoes, cut flowers, and persimmons. However, Japan's export quota will be secured within the total of 65,005 tons of quotas granted to multiple countries, instead of the previous quota allocated to Japan alone.

On the other hand, no agreement was reached on the elimination or reduction of tariffs on automobiles and automobile parts, and it was decided that further negotiations would be conducted. As for other industrial goods, it was decided to eliminate tariffs on air conditioner parts and other products.

The Japan-U.S. Digital Trade Agreement aims to promote smooth, reliable, and free digital trade between Japan and the U.S. The agreement does not impose tariffs on the transmission of digital products (e.g., software, music, video, e-books) between the parties (Article 7) and does not provide less favorable treatment to digital products of the other party than it provides to other digital products of the same kind (Article 8). However, the agreement prohibits and restricts the cross-border transfer of data as a condition for conducting business in the home country (Article 11) as well as prohibits demands for the transfer of source code and algorithms (Article 17). As for interactive computer services such as SNS, the agreement does not hold the provider liable for damages related to information distribution, etc. (Article 18). The scope covered by the Japan-U.S. Digital Trade Agreement is more comprehensive than that of the TPP's e-commerce.

The Japan-UK Comprehensive Economic Partnership Agreement (the Japan-UK EPA)

The Japan-UK Comprehensive Economic Partnership Agreement (the Japan-UK EPA) was signed on 23 October 2020, approved by the Diet on 4 December 2020, and entered into force on 1 January 2021.

The Japan-UK EPA establishes new rules for trade and investment as the UK will leave the EU and will no longer be covered by the Japan-EU EPA. The agreement consists of 24 chapters, annexes, and etc. Compared to the Japan-EU EPA, the same content was maintained in principle for imports from the UK to Japan, but for exports from Japan to the UK, the immediate elimination of tariffs was secured for auto parts and other items. In e-commerce, the Japan-UK EPA stipulated the prohibition of restrictions on the cross-border transfer of information, the prohibition of installation requirements for computer-related equipment, and the addition of algorithms to the scope of the prohibition of source code disclosure requirements. In addition, economic empowerment of women was newly stipulated, which was not included in the Japan-EU EPA. Thus, the Japan-UK EPA is designed to further develop trade and investment while maintaining the economic relationship between the UK and Japan that existed under the Japan-EU EPA.

After leaving the EU, the UK has been trying to strengthen its economic relationship with the Asia-Pacific region, starting with Japan and then moving on to conclude FTAs with Canada, Mexico, Vietnam, Australia, New Zealand, India, and others, and is aiming to join TPP11. Regarding this trend in the UK, Japanese Foreign Minister Mogi has stated, "Japan welcomes the UK's interest in joining the TPP" (Press Conference by Foreign Minister MOTEGI Toshimitsu on 23 October 2020).

International Environmental Law

Ocean Discharge of Treated Water from TEPCO's Fukushima Daiichi NPP: Submission of Report (Report of the Subcommittee on the Handling of Treated Water from the Multi-Nuclide Removal Facilities, etc.) and the Response of IAEA

On 10 February 2020, a report (Report of the Subcommittee on the Handling of Treated Water from the Multi-Nuclear Decommissioning Facilities) was submitted to promote the ocean discharge of treated water from the Fukushima Daiichi Nuclear Power Plant on the grounds that it is most practical to dilute the treated water and discharge it into the ocean. Based on this report, the government is considering ocean discharge in the future.

At TEPCO (Tokyo Electronic Power Company)'s Fukushima Daiichi Nuclear Power Station, water is constantly poured into the reactor buildings of Units 1–3 to cool the melted-down nuclear fuel, but this water is contaminated with 63 types of radioactive materials, including cesium, strontium, and tritium. The volume of this contaminated water is expanding due to the inflow of groundwater. The contaminated water is passed through a "cesium removal system" to reduce the concentration of cesium and strontium, which account for most of the radiation, and then further concentrated before being passed through a "multinuclear removal system (Advanced Liquid Processing System (ALPS))." The concentration of all nuclides except tritium, which is difficult to remove, will be removed, and the concentration will be reduced to below the legal limit (notified concentration) that allows the release of such nuclides into the environment. The nuclear material is then stored in tanks on the site, but due to the limitations of these tanks, ocean discharge is being considered.

The IAEA has expressed its support for ocean discharge. On 26 February 2020, IAEA Director General Grossi visited TEPCO's Fukushima Daiichi Nuclear Power Plant and stated that (1) the oceanic release (and steam release) that Japan is considering is technically feasible and in line with international practice, (2) the IAEA is prepared to provide monitoring and other support for its

implementation, and (3) the IAEA is prepared to support Japan in the implementation of such a plan. On 2 April 2020, the IAEA issued a review titled "IAEA Follow-up Review of Progress Made on Management of ALPS Treated Water and the Report of the Subcommittee on Handling of ALPS treated water at TEPCO's Fukushima Daiichi Nuclear Power Station" to the same effect, acknowledging that no tritium separation technology is currently available, and stating that a decision on the disposal of treated water should be made urgently with the involvement of all stakeholders, while taking safety into consideration.

However, ocean discharge is strongly opposed, especially by neighboring countries. For example, on 22 September 2020, South Korea told the International Atomic Energy Agency (IAEA) General Assembly that the discharge of treated water into the ocean would "raise concerns about the impact on environmental safety," and that "the Japanese government should not be allowed to decide on the disposal method [of treated water] before it decides how to dispose of it. The Japanese government has an important obligation to communicate transparently with the international community, including South Korea, before deciding how to dispose of the treated water," he said, calling for the IAEA's active involvement (Yomiuri Shinbum, 23 September 2020 "South Korea concerned about Discharging Treated Water from Fukushima Daiichi Nuclear Power Plant into the Ocean … at IAEA General Meeting").

Law of the Sea

Japan Joins the Bunker Convention and the Nairobi Convention

On 1 July 2020, Japan deposited with the International Maritime Organization (IMO) Headquarters in London its written accession to the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) and the Nairobi International Convention on the Removal of Wrecks (Nairobi Convention). Both treaties took effect on October 1, three months after the date of deposit of the accession.

Japan had required ships to conclude insurance policies under the Act on Insurance Coverage for Oil Pollution Damage (Act No. 95 of 1975) to cover pollution damage caused by fuel oil spilled from ships and the costs incurred in removing wrecks of stranded ships and other vessels. However, in recent years, there have been cases where insurance payments have not been made. After concluding the Bunker Convention and the Nairobi Convention, the Act for Partial Revision of the Act on Liability for Oil Pollution Damage Caused by Ships (Act No. 18 of 2019) was formulated as a legal reform to implement these treaties and came into effect on 1 October 2020.

The Bunker Convention calls for ensuring appropriate and effective payment of compensation for pollution damage caused by spills or discharges of bunker oil from ships, and the Nairobi Convention calls for ensuring prompt and effective removal of wrecks and payment of their costs. Japan, one of the world's leading shipping nations, has joined these treaties, which will further protect victims by allowing them to file claims directly with insurance companies, and will also contribute to the safety of navigation and the preservation of the marine environment.

Maritime Claims – China's Survey Activities in the EEZ Area around Okinotori-shima Island

In July 2020, the Taiyo, Chinese research vessel, conducted the several unauthorized surveys in the EEZ around Okinotori-shima Island by inserting wires into the sea from the ships(Japan times, 18 July 2020). Japan protested this, but Hua Chunyin, Press Secretary of the Chinese Ministry of Foreign Affairs, stated that, according to the UN Convention on the Law of the Sea, Okinotori-shima reef is a "rock" and not an "island" and therefore "should not have an exclusive economic zone or continental shelf." She further stated that the survey by Chinese vessels "is the fulfillment of the right of survey in the high seas and does not require prior permission from Japan" (TV Asahi news, 18 July 2020).

In 2012, Japan applied to the UN Commission on the Limits of the Continental Shelf for the extension of the continental shelf based on Okinotori-shima. However, the decision on this application has been postponed due to opposition from China and other countries that claim Okinotori-shima as a "rock."

Maritime Disputes and Overlapping Claims – Stranding Incident off the Coast of Mauritius

The Wakashio, chartered by Japan's Mitsui O.S.K. Lines and owned by Nagashiki Kisen ran aground off the coast of Mauritius in the Indian Ocean, spilling a large amount of fuel oil (about 1,000 tons) from a cracked fuel tank. The area is home to mangrove forests and coral, and there are concerns about the environmental impact. The vessel was registered in Panama and had crew members of three nationalities on board: Filipino, Indian, and Sri Lankan.

Following the accident, the Mauritian government declared a state of emergency. The police authorities in Mauritius arrested the captain and two co-captains on suspicion of failing to navigate safely. The Mauritian government also announced that it intends to file a claim for compensation with the ship's owner, Nagashiki Kisen, and the insurance association contracted by the company.

The maximum amount of compensation is set by the Convention on Limitation of Liability for Marine Claims. Mauritius is a signatory to the 1976 Convention on the Limitation of Liability for Marine Claims and Japan is a signatory to the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims. Therefore, there is a question as to which of the two conventions is applicable to the upper limit, but normally the treaty ratified by the country is followed. In this case, it is estimated to be approximately 1.9 billion yen.

Japan is not a flag state in this case and therefore has no obligations under UNCLOS and IMO-related conventions. Moreover, Japan is not responsible for compensation for marine pollution damage, which is handled under the civil liability system for compensation for marine pollution damage. However, Article 10 of the International Convention on Civil Liability for Bunker Oil Pollution Damage imposes an obligation to recognize foreign judgments. Although the Bunker Convention was not in force in Japan at the time of the accident (Japan joined the Bunker Convention on 1 July 2020, the accident occurred on 25 July 2020 and the Bunker Convention entered into force on 1 October 2020), according to Article 18 of the Vienna Convention on the Law of Treaties (obligation not to defeat the object and purpose of a treaty prior to its entry into force), Japan has the obligation to recognize the domestic court judgment of Mauritius, if recognition of such judgment is requested.

Since Japan has no legal responsibility, the government has indicated that, although it does not intend to provide compensation, it does intend to provide assistance to Mauritius in the form of aid to developing countries to restore the original state of environmental damage and tourism. The Mitsui O.S.K. Line, the charterer of the vessel, also has no legal responsibility, but it cooperated in the investigation of the accident and initiated environmental restoration and social contribution activities with the cooperation of local NGOs.

Human Rights

Specific Human Rights Incidents or Cases – Report on Two Long-Term Detainees in Immigration Detention Facilities: Opinion of the UN Human Rights Council Working Group on Arbitrary Detention and Japan's Response

The UN Human Rights Council was notified of two foreigners (Deniz Yengin and Heydar Safari) who were detained long-term in immigration detention facilities in Japan. Deniz Yengin came to Japan in 2007, fleeing threats and violence in Turkey because of his Kurdish ethnicity, his belief in alehism, his

Muslim identity, and his political opinions. His wife is a Japanese citizen, but he has not been able to obtain residency rights in Japan; he has been ordered deportation in 2008 and has since been detained at the East Japan Immigration Center, where he was repeatedly and provisionally released and reincarcerated. Some of the periods of incarceration lasted up to three years and two months. As a result of the incarceration, he lost weight during hunger strikes, attempted suicide, and developed mental disorders due to stress.

Heydar Safari, an Iranian national who has been in Japan for 30 years since 1991, had his legal status revoked in 1992, filed numerous refugee applications, was issued a deportation order in 2010, and has been repeatedly detained and provisionally released. One of the longest periods of his detention was three years. During his incarceration, he protested with hunger strikes and lost a lot of weight. At one point, he even refused to drink water. He was taking antidepressants and sleeping pills for his mental disorder.

The UN Human Rights Council Working Group on Arbitrary Detention found the detention of these two persons to be contrary to Articles 2, 3, 8, 9, and 14 of the Universal Declaration of Human Rights and Articles 2, 9, and 26 of the International Covenant on Civil and Political Rights.

The Working Group considers that deprivation of liberty occurs in the following five categories (A/HRC/WGAD/2020/58).

Category I: When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her);

Category II: When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant;

Category III: When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character;

Category IV: When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy;

Category V: When the deprivation of liberty constitutes a violation of international law on grounds of discrimination based on birth, national,

> ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings.

In the case of Deniz Yengin and Heydar Safari of Japan, the deprivation of liberty was found to be arbitrary, falling under the above categories I, II, IV, and V. On 28 September 2020, the Working Group sent an Opinion to the Government of Japan stating that the measures taken in Japan against two foreign nationals, to whom deportation orders had been issued, amounts to arbitrary detention, and the Opinion was subsequently released. The content of the Opinion is as follows:

1) The detention falls under Category I arbitrary detention. The detentions of these two individuals were arbitrary "lacking a legal basis." The term "lacking legal basis" should not be equated with "contrary to law." It is understood that even if a detention is authorized by law, if it lacks reasonableness, necessity, and proportionality, it is a detention lacking legal basis.

   The two individuals were repeatedly detained and were not given a reason for their detention or the length of time they were detained. Their bail for provisional release was also high. The fact that they had lived in Japan for 13 and 30 years, respectively, was not taken into account. They were also not allowed to bring a court case to challenge the legality of their detention.
2) The detention falls under Category II arbitrary detention. The deprivation of liberty is based on the exercise of human rights stipulated in the Universal Declaration of Human Rights, and etc. The two men sought asylum, which is a universal human right enshrined in Article 14 of the Universal Declaration of Human Rights. Nevertheless, they were repeatedly detained without being given a reason for their detention nor granted asylum. It is clear that this was not for legitimate purposes such as entry records or identification.
3) The detention falls under Category IV arbitrary detention. The two individuals have been detained indefinitely.
4) The detention falls under Category V arbitrary detention. There is a pattern of adopting a discriminatory attitude towards individuals seeking asylum in Japan. Accordingly, the detention of the two individuals, due to their immigration status, violates Article 26 of the International Covenant on Civil and Political Rights and constitutes arbitrary detention.

On 27 March 2021, the Government of Japan filed an objection to the Working Group on Arbitrary Detention, arguing that the detention of the two individuals was based on a proper assessment of their compliance with conditions and individual circumstances during their provisional release and that they were provided with an opportunity for judicial review and redress.

Constitutionality of Selective Surname Segregation: References to the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Discrimination against Women

Hiroshima High Court, 16 September 2020

On 2 March 2008, the appellant and A filed a marriage notification, claiming that the appellant would take the appellant's name and A would take the A's name, respectively. However, the marriage certificate was not accepted on the grounds that it violated Article 750 of the Civil Code (Act No. 89 of 1896) and Article 74(1) of the Family Registration Law (Act No. 224 of 1947) (hereinafter referred to as "the respective provisions"). The facts of this case are as follows: The appellant and A got married in September 1983, and a few months later, they decided to use A as their married name and submitted the marriage certificate. However, the appellant felt that she could no longer use her maiden name as her common name and filed for divorce from A on 13 January 1990. However, this divorce was a formality so that appellant could use her maiden name, and appellant continued to live with A as husband and wife thereafter.

In the present case, the appellant claims that the respective provisions is against Article 14(1), Article 24(1) and (2) of the Constitution, and Article 2(1) and (3)(b), Article 3, Article 17(1), and Article 23 of the International Covenant on Civil and Political Rights and Articles 2, 16(1)(b) and (g) of the International Convention on the Elimination of All Forms of Discrimination against Women. Therefore, she claims that the failure to amend or abolish the respective provisions and to create a new option of separate married couples' names in addition to the same-sex married couples' name system is considered illegal in terms of Article 1, paragraph 1 of the State Redress Act (Act No. 125 of 1947) under which she claims damages to the government to pay 500,000 yen as compensation. The claim was also dismissed at the first instance (Hiroshima District Court, 19 November 2019).

As for the Court's rationale, both the first instance and the appellate court refers to (1) the applicability of the International Covenant on Civil and Political Rights (ICCPR) and (2) the applicability of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Regarding the applicability of the ICCPR, the first instance court acknowledged the applicability of the Covenant and held that "it cannot be said to be contrary to the respective provisions." Regarding the applicability of CEDAW, the court denied the applicability of the International Convention on the Elimination of All Forms of Discrimination against Women as it has no automatic enforcement power. Therefore, the claim was dismissed on the grounds that the above legislative omission was not subject to the evaluation of illegality in terms of the application of Article 1(1) of the State Redress Act.

The Court of Appeal in this case held as follows:

(1) Articles 17(1), 23(1), 23(2), 23(3), 23(3), and 23(4), Article 2(1), Article 2(3), and Article 2(3)(b) of the International Covenant on Civil and Political Rights

None of these provisions explicitly refer to the retention of the use of the premarital surname of each spouse, and it cannot be said that these provisions specifically stipulate that each spouse is guaranteed the right to retain the use of his or her premarital surname. Therefore, the fact that changing the name of one of the spouses is a formal requirement for marriage does not immediately constitute a violation of the above provisions of the International Covenant on Civil and Political Rights. In addition, the General Comments of the Human Rights Committee on Articles 3 and 23(4) of the International Covenant on Civil and Political Rights, which refer to the retention of the premarital surname of each spouse, may serve as a guideline or supplementary means of interpretation of the Covenant. However, they are not considered to have the effect of legally binding the interpretation of the Covenant by the domestic organs of the State Parties, and therefore they do not have the effect of legally binding the interpretation of the Covenant by the courts of Japan.

(2) Articles 17(2)(a), and 16(1)(b)(g) of the International Convention on the Elimination of All Forms of Discrimination against Women

A treaty is, in principle, an agreement between States in written form that creates rights and obligations under international law among the contracting States and does not directly regulate the rights and obligations between each contracting State and its individual nationals.

Even if a treaty contains provisions to guarantee individual rights, this does not naturally enable individual nationals to claim the rights provided by the treaty against the Contracting Party to which they belong.

In some cases, the exercise of rights becomes possible only when the Contracting Parties are obliged to mutually take measures to guarantee the rights

of individual nationals belonging to their respective countries and when measures are taken under domestic laws to give concrete form to the content of such measures.

In order for the provisions of a treaty to be directly applied in Japan in its original form as guaranteeing the rights of individual citizens without taking any measures under domestic laws to embody the contents of the treaty and to have judicial normative force, the following two requirements must be satisfied.

1) The intention of the Contracting Parties to the treaty to directly determine the rights and obligations of individual citizens through its promulgation must be confirmed.

2) The rights and obligations of individual citizens are clearly and completely stipulated in the provisions of the treaty, and the content of the treaty does not need to be supplemented and embodied in other laws and regulations.

With regard to Articles 17(2)(a), and 16(1)(b)(g) of the International Convention on the Elimination of All Forms of Discrimination against Women, none of the provisions take the form of a commitment by the State Party to take or commit to take appropriate measures to ensure each right. The clauses do not directly confer rights on individual citizens, but rather declare that the States Parties have a political responsibility to promote positive measures for the realization of those rights. It can be said that the State Parties are expected to secure such rights through the development of domestic laws. In this light, even if some of the provisions in this case do not conform to the provisions of the International Convention on the Elimination of All Forms of Discrimination against Women, the provisions in this case cannot be said to be illegal immediately.

After this decision, a decision of the Third Petty Bench of the Supreme Court on 22 March 2022 dismissed the case as alleging a mere violation of the law or as lacking the premise for such a violation, or lacked the premise of a mere violation of the law and dismissed the case. However, two judges expressed the view that it violated Article 24 of the Constitution.

As for precedents concerning elective conjugal surnames, so far, including this case, they have repeatedly ruled that it is constitutional (see the 2015 the Supreme Court Grand Chamber decision of 16 December 2015, and the 2021 Supreme Court Decision of 23 June 2021).

Fuji Housing Hate Harassment Case – Denial of Direct Application of the International Convention on the Elimination of All Forms of Racial Discrimination to Conflicts between Private Individuals

A third-generation Korean woman resident in Japan who has worked for Fuji Housing (a real estate company with about 1,000 employees) in Osaka since 2002, sought damages from the company and its founder and chairman for distributing documents containing ethnically discriminatory expressions, claiming that the company had acted unlawfully. On 2 July 2020, the Sakai Branch of the Osaka District Court, the court of first instance, awarded damages of 1.1 million yen.

Fuji Housing had continuously and massively distributed newspapers, magazines, books, pamphlets, Internet distribution, videos, daily business reports, business reports, management philosophy impressions, and other documents to all employees, some of which included the phrase "*Zainichi* (author's note: Japanese, meaning Korean residents in Japan) should die." In addition, the chairman engaged in political activities, such as participating in textbook exhibitions and encouraging the submission of questionnaires, in order to have junior high school textbooks adopted that were in line with his own historical perceptions, ideology, and beliefs. The plaintiff, through his attorney, requested that these activities be stopped, but was denied, so she filed a petition for human rights relief with the Osaka Bar Association. In addition, the plaintiff met with her supervisor because she continued to be emotionally upset and was having a hard time, and she received a recommendation to resign, which led to the filing of the lawsuit. Subsequently, Fuji Housing had other employees write criticisms of the filing of the lawsuit and other matters, and continued to distribute the documents.

The plaintiff argued that the distribution of the document was illegal as it infringed on the plaintiff's rights or legal interests because it was discriminatory speech or behavior that contained racial or ethnic discrimination or encouraged racial or ethnic discrimination as defined by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behaviour against Persons Originating from Outside Japan (Hate Speech Elimination Act) (Act No. 68 of 2016) . However, both the first instance and the appellate court denied direct application of the International Convention on the Elimination of All Forms of Racial Discrimination to conflicts between private individuals. The first instance court held that the distribution of the documents violated the plaintiff's personal interests that should have been protected under the labor contract, and the appellate court held that the distribution of the documents fostered discriminatory ideas in

the workplace and violated the defendant's duty of care for the work environment, awarding damages (1.1 million yen in the first instance, 1.32 million yen in the appellate court).

Regarding the application of the International Convention on the Elimination of All Forms of Racial Discrimination, the first instance court stated:

> Even though the International Convention on the Elimination of All Forms of Racial Discrimination has domestic legal effect as a form of national law, in light of its provisions, it provides the international responsibility of States and, like Articles 13 and 14(1) of the Constitution, regulates the relationship between public authorities and individuals. Accordingly, it does not directly regulate the relationship between private individuals such as the plaintiff and the defendants in this case, nor does it apply or analogically apply to the relationship between private individuals. Therefore, it is understood that the purpose should be realized in harmony with other constitutional principles and the principle of private autonomy through the interpretation and application of individual provisions such as Article 709 of the Civil Code.

Regarding the application of the ICERD, the Appellate court stated:

> As a presupposed legal framework, Japan is a party to the International Convention on the Elimination of All Forms of Racial Discrimination, and "racial discrimination" includes any distinction, exclusion, restriction or preference based on ethnic origin (Article 1, paragraph 1).
>
> Based on Article 4 of the Convention, Japan "commits itself to take prompt and active measures aimed at eradicating all incitement to or acts of racial discrimination," and Articles 4(a) and (b) of the Convention confirm that States Parties are obligated to "make any dissemination of ideas based on racial superiority or hatred, and organized propaganda activities that promote and incite racial discrimination a crime punishable by law."
>
> However, it cannot be said that the provisions of the ICERD, in light of their wording, oblige the States Parties to the Convention to directly apply the provisions of the Convention as judicial norms to relationship between private individuals in Japan. However, Japan, under its international legal obligations toward other State Parties, is obligated to implement the purpose of each provision domestically through legislation or any other method it deems appropriate. In joining the ICERD,

Japan has not enacted any special implementing legislation, because it is understood that the provisions of existing domestic laws within the Constitution (including various provisions on unlawful acts) can guarantee domestic implementation of the Convention. Therefore, in interpreting and applying domestic private laws to disputes concerning racial discrimination between private parties, it is necessary to ensure that domestic implementation of the Convention is properly carried out based on the interpretation of the International Convention on the Elimination of All Forms of Racial Discrimination.

The International Convention on the Elimination of All Forms of Racial Discrimination imposes on States Parties the obligation to prohibit and end racial discrimination by any person, group or organization and to suppress any movement that would reinforce racial divisions (Article 2(1)(d) and (e)). In considering the duty of care for the work environment owed by the defendants to the plaintiff and the nature of her legally protected interests, … the perspective of domestic implementation of the Convention must also be considered. It is not enough to prohibit discriminatory words and actions based on ethnic origin in the workplace; defendants have an obligation to ensure that discriminatory ideas that lead to such words and actions are not fostered in the workplace through their own actions or the actions of others; and that racial divisions are not strengthened. Ethnic origin is a matter that concerns an individual's personality and the plaintiff has a personal interest in working in a workplace where discriminatory thoughts related to her ethnic origin are not being fostered. This interpretation is In line with the purpose of the International Convention on the Elimination of All Forms of Racial Discrimination. In the event that the defendants themselves engage in acts that foster discriminatory ideas in the workplace, or leave discriminatory ideas unchecked despite the fact that they are being fostered, they are in breach of their duty to consider the workplace environment and are liable for tortious acts or default on their obligations as having infringed the plaintiffs' personal interests.

Judgment on the Constitutionality of the Osaka City Hate Speech Ordinance: Reference to the Recommendations of the Committee on the Elimination of Racial Discrimination

Osaka District Court, 17 January 2020

This is a case in which the constitutionality of the Osaka City Hate Speech Ordinance (Osaka City Ordinance on Dealing with Hate Speech, enacted on

15 January 2016) was challenged in a residents' lawsuit from the perspective of restrictions on freedom of expression.

The ordinance defines hate speech (Article 2) and requires the mayor to publicize, in principle, "the fact that the activity constitutes hate speech, a summary of the content of the expression, the measures taken to prevent its spread, and the name or names of the person who engaged in the activity, as well as the name and other details" for activities that constitute hate speech (Article 5, Paragraph 1), and if the Board finds that there is a possibility that the activity constitutes hate speech, the Board's opinion must, in principle, be obtained in advance (Article 6, Paragraph 1).

A person residing in the Kansai region (hereinafter referred to as "the person concerned") shot a video of a demonstration activity that took place in Osaka City on 24 February 2013, and posted it on a video-sharing website. In the said video, the person concerned recorded words and deeds of contempt and slander with the aim of hating and despising *Zainichi* Koreans and eliminating them from society. When the examination procedure was initiated against the person concerned based on the Hate Speech Ordinance, he/she deleted the video, but the mayor of Osaka City published the handle name of the person concerned as equivalent to his or her name. In response, eight residents of Osaka City filed a residents' lawsuit, claiming that this would "delegitimize freedom of expression."

The court ruled that the restrictions based on the said ordinance did not violate Article 21, Paragraph 1 of the Constitution. The reason given was that "the purpose of the restriction is reasonable and justifiable." As one of the grounds for the decision, the court referred to the recommendation of the Committee on the Elimination of Racial Discrimination as follows:

> In September 2014, the Government of Japan received a recommendation from the Committee on the Elimination of Racial Discrimination in accordance with Articles 1 and 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, requesting to endure that 1) victims of racial discrimination may obtain appropriate legal redress, 2) expressions of hatred and racism, racist violence and incitement to hatred at demonstrations and assemblies are addressed, and 3) appropriate measures to address hate speech in the media including the Internet are adopted.
>
> In addition, even after the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behaviour against Persons Originating from Outside Japan (Hate Speech Elimination Act) (Act No. 68 of 2016)

> came into effect, in August 2018, the Committee continued to recommend that Japan have to deal with the elimination of hate speech and violence in Japan through assemblies that engage in violent hate speech against ethnic minorities such as Koreans and Koreans living in Japan (CERD/C/JPN/CO/10–11).

After this judgement, this ordinance was also declared constitutional by the Court of Appeal (Osaka High Court, 26 November 2021) and the Supreme Court (Supreme Court, 15 February 2022).

***Implementation of Human Rights Treaties – Adoption of Action Plan on Business and Human Rights* (2020–2025)**

In order to implement the Guiding Principles on Business and Human Rights adopted by the UN Human Rights Council in 2011 (A/HRC/17/31), each country is required to formulate a national action plan, and which many countries have already responded. The Action Plan on Business and Human Rights (2020–2025) was finally formulated in Japan on 16 October 2020 as a national action plan.

Japan's national action plan follows the three pillars of the UN Guiding Principles: (1) the obligation of states to protect human rights, (2) the responsibility of corporations to respect human rights, and (3) access to remedies. For example, in category (1) providing the obligation of states to protect human rights, it states that in the area of development cooperation, JICA (Japan International Cooperation Agency)'s Guidelines for Environmental and Social Considerations will be implemented effectively to ensure that they are consistent with internationally established human rights standards. In category (3), the plan is to enhance human rights due diligence, including the use of IT in civil court procedures, promotion of the use of alternative dispute resolution procedures, and promotion of the operation of an objection system for non-compliance with the Guidelines in the field of development cooperation. Besides, as matters to be addressed in a cross-sectional manner, the report states that protection of the rights of workers, including foreign workers, children, women, and persons with disabilities, and protection of new human rights in connection with the development of the Internet and AI, will be addressed.

The UN Guiding Principles on Business and Human Rights not only stipulate the obligation of states to respect human rights, but also stipulate the responsibility of corporations to respect human rights. In Japan, however, responsibility of corporations to respect human rights and recognition of such

responsibility has not been sufficient. Even in this country report, category (2), which indicates efforts to address the responsibility of corporations, it only aims to raise awareness and educate corporations about human rights due diligence. Nevertheless, the fact that Japan was finally able to submit a national report after the UN Guiding Principles were formulated is a significant step forward for Japan.

State Practice of Asian Countries in International Law

Korea

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Relationship between International & Domestic Law

Treatment of International Law by Domestic Courts – Treaties

Decision of Seoul District Court Decision on Damage Claims (Seoul District Court Decision, 2019Ga-Dan5063405, Decided on 17 June 2020)

The plaintiff signed a global air transport contract with the Defendant that provides a flight departing from the Philippines Clark International Airport and arriving at Incheon Airport on the same day. However, the aircraft had technical problems while preparing for its departure. The Defendant immediately underwent maintenance as the aircraft was not adequately fueled. The original flight was cancelled. As a result, the Plaintiff was only able to deliver the package approximately 19 hours after the expected time using an alternative flight provided by Defendant. Following the incident, the Defendant replaced the fuel moderator and the fuel pump of the original aircraft. South Korea is a state party of the Convention for the Unification of Certain Rules for International Carriage by Air, also known as the Montreal Convention. The Convention stipulates that it "applies to all international carriage of persons, baggage or cargo performed by aircraft for reward (Article 1 paragraph 1)." International carriage refers to "any carriage in which the place of departure and the place of destination, whether or not there be a break in the carriage or transshipment, are situated either within the territories of two States parties, or within the territory of a single State party if there is an agreed stopping place within the territory of another State, even if that State is not a State party" (Article 1 paragraph 2).

The court found that it is well-grounded to believe that the Plaintiff suffered from distress due to the shipment delay, which arrived 19 hours after the expected time. Since the Defendant has adopted follow-up measures only

after the accident, the court found it difficult to uphold that the accident was unavoidable even if the Defendant had entirely performed its maintenance obligations. Also, there was no evidence to authenticate the Defendant's arguments that it is exempted from liability. Therefore, the court decided that the Defendant is liable to pay compensation for the psychological and material damage caused by the delay under Article 19 of the Montreal Convention, absence of circumstances justifying the exemption. In this case, the court confirmed that the Convention prevails over civil law and commercial law when one State party transports international carriages to another State party. This principle is applicable as both the Republic of Korea and the Philippines are State parties to the Montreal Convention.

** Article 19 of the Montreal Convention stipulates that "the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for them to take such measures."*

Treatment of International Law by Domestic Courts – Treaties

***Decision of the Constitutional Court on Former Customary Law Constitutional Complaint* (*Constitutional Court Decision en banc, 2017Hun-Ba208, Decided Constitutional on 29 October 2020*)**

Though not being the mainstream issue, the court confirmed in this case that legal instruments such as treaties having force equivalent to an Act could also be referred for constitutional review, which is a meaningful contribution to the discourse on the domestic status of international law in Korea. The court held that Article 111 of the Constitution of the Republic of Korea and Article 41 of the Constitutional Court Act stipulate 'law(statute)' is subject to constitutional complaint. Law in this context does not only mean legislation enacted by the National Assembly but also mean legal instruments like international treaties having the same effect as Acts. Therefore, customary law is also subject to the constitutional complaint as the meaning of law does not limit itself only to the formal sense of an Act.

** Article 111 of the Korean Constitution stipulates that "Constitutional Court shall have **jurisdiction over the constitutionality of a law** upon the request of the courts and Constitutional complaint as prescribed by Act."* (*emphasis added*)

Diplomatic & Consular Relations

Consular Assistance to Protect Overseas Nationals

Act On Consular Assistance of Protecting Overseas Korean Nationals (*Act No. 16221*)

The Act on Consular Assistance for the Protection of Overseas Korean Nationals was proclaimed on 16 January 2019 and entered into force on 16 January 2021. The Act stipulates the full range of matters pertaining to consular assistance offered by the state to overseas Korean nationals to protect their lives, bodies, and properties and to promote their safe residency, stays and visits abroad. With the Act providing the details regarding the Constitution-stipulated duty to protect overseas Korean nationals, the Korean nationals involved in incidents or accidents abroad are expected to be provided with a legally-based and a more systematic and better consular assistance.

Individuals & Non-State Actors

Nationality and Birth Registration

Decision of the Supreme Court on the Confirmation of Birth Registration of the Biological Child, (*Supreme Court Decision, 2020Seu575, Decided on 8 June 2020*)

The Applicant is a national of the Republic of Korea (acquired Korean nationality by obtaining naturalization permission on 5 June 2013). He entered a common-law marriage with the non-applicant, a national of the People's Republic of China (hereafter, "China"), around August 2013. The couple gave birth to a female child. The Applicant immediately registered the birth of his daughter at the local community service center by submitting her birth certificate with the registration document. However, the center returned the application on the following grounds: the mother had to register the baby's birth as she was born out of wedlock; where the mother is a foreigner, the mother needed to file the birth report to the embassy of her land of citizenship; or if the father were to register the child's birth, additional documents like marriage certificates were required. But in this case, he did not submit such records. According to the local community service center, the Japanese authorities recognized the refugee status of the non-applicant after the Chinese authorities denied the renewal of her passport in 2009. She entered Korea with the travel certificate issued by the Japanese government, not with her Chinese Passport and thus could not submit the necessary documents

needed for her marriage registration. However, the center contended that the non-applicant did not have to submit documents proving her refugee status instead of a marriage certificate when registering the baby's birth. So, he filed a suit for confirmation in the first instance court (Cheongju District Court) since the Applicant sought to register his biological child's birth under Article 57 paragraph 2 of the Act on Registration of Family Relations (hereafter, "Family Relation Registration Act"). The Applicant appealed after the court dismissed his claims.

The Supreme Court confirmed that "a baby whose father or mother is a national of the Republic of Korea at birth shall be a national of the Republic of Korea" (Article 2 paragraph 1 of the Nationality Act). Accordingly, the court decided that it is an infringement of human dignity, the right to the pursuit of happiness, and personal rights by depriving the child of an opportunity to acquire social status if either the State does not accept the birth registration of a child born with Korean nationality or the procedure is prolonged or complicated that it can be considered equivalent to disapproving the birth registration. The court maintained that Korean nationals enjoy "the right to birth registration immediately after birth," which is a right to be recognized as a human before the law and is a fundamental right that guarantees all other fundamental rights. In other words, it cannot be restricted or violated even by the Act (Article 37, paragraph 2 of the Constitution of the Republic of Korea). Furthermore, the court emphasized the rights prescribed in Article 7, paragraph 1 of the Convention on the Rights of the Child, ratified by the Korean government. It then held that empowerment of the rights of individuals, family, and children need to be respected even when interpreting and applying the civil law and Family Relations Registration Act, which regulate registration concerning the legal relationship of family life and its establishment and changes.

Overall, the court held that the Applicant should be allowed to register the baby's birth by obtaining simple confirmation from the Family Court. The baby would be considered a biological daughter based on the DNA results, even if the mother failed to prepare the necessary documents as the Chinese authorities suspended the effect of her passport. Therefore, the Supreme Court reversed and remanded the judgment of the lower court for review.

** Article 57(2) of the Act on Registration of Family Relations (Recognition of Report of Birth) stipulates that "Where a place of registration and resident registration number are unverifiable, a report specified in paragraph (1) may be filed by obtaining confirmation from the Family Court having jurisdiction over the father's place of registration or address."*

Dual-Nationality and Nationality Act

Decision of the Constitutional Court on Constitutionality of Article 12 Paragraph 2 of the National Act. (*Constitutional Court Decision, 2016Hun-Ma889, Decided on 24 September 2020*)

The Complainant holds dual nationality (the U.S. and the Republic of Korea) as he was born to an American father and a Korean mother in 1999. Under Article 12, paragraph 2 and Article 14, paragraph 1 of the Nationality Act, the Complainant had to choose one nationality in the year that he turned 18 within three months, which was 31 March 2017 in his case, as prescribed in the Military Service Act. When the designated period elapses, one cannot declare the renunciation of his Korean nationality unless and until he was relieved of his military service obligation. Under Article 12 (1)(1) of the Enforcement Rule of the Nationality Act and considering state practice, if one wishes to declare the renunciation of his Korean nationality, he needs to provide his identification certificate, family relation certificate, and parents' identification certificates. However, only a member under the family relations register can issue these documents. Although the Complainant had acquired Korean nationality by birth, he did not have his birth registered in Korea. Therefore, he was unable to submit additional documents needed to renounce his Korean nationality. Accordingly, the Complainant filed a constitutional complaint on 13 October 2016, arguing that the very clause infringed his fundamental rights, prohibiting him from renouncing his Korean nationality within three months from the date of enlistment.

The court clarified that the legislative purpose of the provision of the Nationality Act at dispute is to acquire fairness of implementing military service duty by limiting the renunciation of Korean nationality to evade his obligations. Therefore, under prevailing social norms, the court pointed out that there can be circumstances legitimately justifying the failure of a person with multiple nationalities to declare renunciation of Korean nationality within the prescribed period, such as one's country of residence or experience of staying or sojourning in Korea. The majority opinion was that rather than limiting the renunciation of Korean nationality outright, there should be measures to exceptionally permit the person to renounce his Korean nationality in the abovementioned circumstances. Specifically, such exceptions can be acceptable only when it is difficult to hold the person accountable for failing to declare the renunciation and objectively does not go against the spirit of the legislation of securing fairness in implementing military duties.

Overall, the court decided on 24 September 2020 by 7 to 2 a constitutional nonconformity decision. In other words, the court held that the text

of Article 12, paragraph 2 of the Nationality Act is unconstitutional, and the legislature needs to make amendments to remove the unconstitutional elements by 30 September 2022 at the latest. Such may include a clause adding requirements and procedure for those who have justifiable grounds for failure to renounce their Korean nationality within the designated period. If no amendment is made by designated period, the provision will be null and void as of 1 October 2022. Two Justices have dissented and criticized the majority opinion. They contended that the disputed provision seeks to achieve the equal military service burden enshrined in the Constitution. Also, the provision does not deprive persons with multiple nationalities of their right to renounce nationality but restricts it partly. The provision of the Act at issue is the result of the legislature's coordinating and balancing the interests of the constitutional values of national defense and equal burden-sharing of military duty on one side, and the individual fundamental value of renunciation of nationality on the other side, avoiding unilateral discrimination on both sides. The Justices argued that without establishing a well-defined standard based on social consensus, an exception to such application must not be rashly permitted just because individuals may have inevitable circumstances for having failed to declare such renunciation within the prescribed period.

** Article 12(2) of the Nationality Act stipulates that "[…] a person assigned to the preliminary military service under Article 8 of the Military Service Act shall choose one nationality either within three months from the date of enlistment, or within two years from the date he or she falls under any subparagraph of paragraph (3): Provided, That if a person intends to choose the nationality of the Republic of Korea under Article 13, he or she may do so even before he or she falls under any subparagraph of paragraph (3)." Article 14(1) of the Nationality Act stipulates that "Provided,* ***that anyone prescribed in the main sentence of Article 12(2) or paragraph (3) of the same Article may make such declaration within the relevant period or only after the relevant grounds arise.*** *" (emphasis added).*

International Environmental Law

State Responsibility for Environmental Pollution and Damage

Decision of the Seoul District Court on Damage Claims (Seoul District Court Decision, 2017GaHap23139, Decided on 11 December 2020)

The Plaintiffs claimed that even though the Chinese air pollution is severe and the pollutants from China affect more than 32% of the air contamination

in Korea, the People's Republic of China, the Defendant of this case, is buck-passing and reluctant to disclose or share information regarding the air pollution. The plaintiffs also alleged that the Defendant violated the 'No Harm Rule,' a generally recognized rule of international law confirmed by the 2001 UN International Law Commission (ILC) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Therefore, the Plaintiffs claimed that the Defendant and the Republic of Korea, a co-defendant of the case, are also jointly liable to pay consolation money for non-economic damages to Plaintiffs and the appointed parties.

The Court found that China enjoys jurisdictional immunity even considering the evasion of responsibility by China over fine dust, non-disclosure, and refusal to share information, as it is closer to *acta jure imperii* than an *acta jure gestionis* in nature. Therefore, the Court ruled that it cannot exercise jurisdiction over the case. In addition, the Court did not uphold the claim that the No Harm Rule is a "generally recognized rule of international law" under Article 6 (1) of the Constitution of the Republic of Korea due to insufficient evidence. Yet, it is interesting to note that the Court considered whether the rule falls under 'the generally recognized rule of international law,' though it is a matter to be reviewed in the merits stage.

International Humanitarian Law

Decision of Seoul District Court on Damage Claims (*Seoul District Court Decision, 2016GaDan5235506, Decided on 7 July 2020*)

The Plaintiffs are Prisoners of Wars (hereafter, "POWs") who escaped from the Democratic People's Republic of Korea (hereafter, "North Korea"). They claimed that non-repatriation of POWs following the repatriation procedures of POWs violates Article 51 of the 1953 Korean War Armistice Agreement and various provisions under the 3rd Geneva Convention of 1949 that prohibits inhuman treatments of all kinds against POWs. The Court affirmed that the Convention has the effect of domestic law under Article 6(1) of the Constitution of the Republic of Korea. Moreover, both the Republic of Korea and North Korea acceded to the Convention in 1966 and 1957, respectively. Accordingly, the Court ruled that the Defendant is liable for the damages caused by the acts of refusing to repatriate the POWs, forced labor, and around 50 years of detention, constituting illegal acts under the Convention. The Court also ruled that the act of imposing forced labor by the Defendant to the Plaintiff violates customary international law and the Forced Labour Convention of the International Labour Organization (ILO), also having the same effect as the domestic laws under Article 6(1) of the Constitution of the Republic of Korea. Also, the

act constitutes a tort under Article 750 of the Civil Act, violating numerous domestic provisions, namely the personal liberty clause in the Constitution of the Republic Korea and Article 7 of the Labor Standards Act. Overall, the Court ruled that North Korea was liable to pay the plaintiffs, two former South Korean POWs (an 85-year-old man surnamed Han and a 91-year-old man surnamed Noh) twenty-one million won each in damages for non-repatriation.

** The full name of the 1953 Korean War Armistice Agreement is "Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's volunteers, on the other hand, concerning a military armistice in Korea." The Agreement was signed on 27 July 1953. Article 51 of the Agreement reads as follows: 51. The release and repatriation of all prisoners of war held in the custody of each side at the time this armistice agreement becomes effective shall be effected in conformity with the following provisions agreed upon by both sides prior to the signing of this armistice agreement.*

State Practice of Asian Countries in International Law

Malaysia

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Malaysia in 2020

As a progressive, modern and moderate Muslim country, Malaysia advanced the policy of 'prosper-thy-neighbour' in the pursuit of regional and global peace and security through the Global Movement of the Moderates initiative and membership in the UN Security Council (2015–2016). The ASEAN Community was established in 2015 during Malaysia's Chairmanship. Its role in the decade ahead is envisioned as a rule-based and people-centered entity. (The ASEAN 2025: Forging Ahead Together. See Ministry of Foreign Affairs, Strategic Plan 2016–2020.) Malaysia was supposed to attain a developed nation status by

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2020, but that dream was postponed as Malaysia, like the rest of the world, was hit by the global pandemic caused by the COVID-19 virus and its variants.

In 2020, Malaysia was immersed in controlling the spread of the COVID-19 virus while trying to stimulate a sustainable economy through resilience and self-reliance, even as the shipping industry and the seafarers who are the frontliners in the global supply chain were economically affected. However, the Ministry of Foreign Affairs (*Wisma Putra*) as the custodian of the nation's foreign policy, recognised that 2020 was a critical phase in Malaysia's development trajectory towards realising its aspiration as an advanced economy and an inclusive nation with the impetus from the whole governmental apparatus focused on attaining this objective. (Ministry of Foreign Affairs, Strategic Plan 2016–2020)

Wisma Putra's Strategic Plan for the period 2016 to 2020, that has charted the path of the nation's external relations and foreign policy in the lead up to 2020, (Ministry of Foreign Affairs, Strategic Plan 2016–2020) focused on (1) strengthening the bilateral and multilateral relations, (2) strengthening ASEAN as the cornerstone of its foreign policy, (3) enhancing public diplomacy, and (4) providing more efficient and effective services to the Ministry's stakeholders and clients. In 2020, as the world economy was challenged, Malaysia's private sector was encouraged to remain bold and find new business ventures and partnerships that had not been fully explored by Malaysia. (Message from the Ministry of Foreign Affairs, Malaysia, Speech by Dato' Sri Muhammad Shahrul Ikram Yaakob, Secretary General, Ministry of Foreign Affairs, Malaysia) During the pandemic, there was also some political upheaval in the country, and together both events, it may be said, led to passing certain emergency ordinances concerning civil and political rights during the pandemic. State practice of international law in Malaysia in 2020 is etched around these developments.

Mary George

Territory & Jurisdiction

Authority and Sovereignty over Territory

Government of Malaysia v Nurhima Kiram Fornan & Ors [2020] *MLJU 425*

The Malaysian High Court Judge in *Government of Malaysia v Nurhima Kiram Fornan & Ors* [2020] MLJU 425, on 17 March 2020, granted an anti-arbitration injunction to restrain foreign arbitration proceedings taken by the current heirs

of Sultan Sulu in Spain on the basis of sovereign immunity alongside other reasons. The dispute in the case related to a cession deed dated 22 January 1878 between the Sultan of the Sulu and Baron Gustavus de Overbeck and Alfred Dent relating to a Deed of Cession over lands that were part of the then Sabah (formerly known as North Borneo), which is now part of Malaysia. The deed had a clause averred to be an arbitration clause.

The court, however, held that on construction that there was no arbitration agreement that was binding. The court also held that even if there was an arbitration agreement, the party referred to was no longer in existence. The Sultan of Sulu had, in any event, waived any recourse to arbitration by reason that the Sultan of Sulu had in 1939 commenced a court action in relation to cession monies that the court decided in his favour. In the current matter, the court held that the current sovereign Malaysia had sovereign immunity. The customary international law principle of sovereign immunity is given domestic effect in Malaysia through case law. There is no equivalent statutory provision on State Immunity Act as in Singapore. As such, under domestic case law, Malaysia had sovereign immunity from foreign judicial and arbitration proceedings unless waived or if the dispute falls within the *acta jure gestionis* exception to the rule.

It was the judgment of the court that the Deed of Cession did not deal with trading nor was commercial in nature. Rather, the deed concerned cession of land by a prior sovereign which is the predecessor of the current sovereign state of Malaysia. There has been no waiver by the Malaysian current sovereign government to the absolute immunity that could be asserted to disclaim the jurisdiction of the Spanish proceedings that appointed the arbitrator. The court held also that the dispute related to territorial rights over Sabah that was held to be non-arbitrable.

The court was also of the view that it was the natural and proper forum to adjudicate on the dispute as the successor to the former state of North Borneo. Additionally, the fact that defendant had submitted previously to the jurisdiction of the court gave the parties liberty to apply to the court for any dispute arising therefrom. The Spanish government Madrid Protocol of 1885 ("Protocol") had the effect of renunciation of the Spanish Government of all claims of sovereignty over the territories in the State of North Borneo making Spain not the natural forum to decide the dispute. Hence, in this case, despite the absence of the defendants who were duly served, the court decided the case on merits to allow the injunction sought by the plaintiff to restrain the arbitration proceedings.

Usharani Balasingam

Sovereign/State Immunity

The United States of America v Menteri Sumber Manusia Malaysia & Ors [2020] MLJU 779

This case involved the application of judicial review by the applicant to the High Court with regard to the decision of the Minister of Human Resources for referring a case to the Industrial Court for adjudication. The said case involved a security guard's representation that he was unfairly dismissed by the American Embassy in Kuala Lumpur pursuant to the contract of employment.

The main issue and point of interest here was whether the dismissal of security guard by the American Embassy in Kuala Lumpur was an act in the course of performing its sovereign action and thus the US Embassy was immune from the jurisdiction of the industrial court.

As such, the court had to determine whether the guard was performing a governmental and sovereign function of the United States of America in protecting its embassy and its occupants and property from any form of threat or attack; and whether the doctrine of sovereign immunity applied to deny the jurisdiction of Industrial Court over embassy's action in dismissing guard.

The High Court allowed the judicial review application and set aside the decision of the Minster of Human Resource on the grounds that the Minister's decision to refer the Security Guard's representation to the Industrial Court suffered infirmities of error of law and irrationality. The guard was employed directly by the embassy and not by any private security company. The Court further added that a security guard's duty was integral to the sovereign activity of the state and its embassy, in that his duty was not only to provide security but also to maintain the inviolability of the embassy's premises.

In this case, the Court reaffirmed the practice of the restrictive doctrine of state immunity in Malaysia. The restrictive doctrine recognises state immunity only in respect of acts done by a state in the exercise of sovereign authority (*jure imperii*), as opposed to acts of a private law nature (*jure gestionis*).

Izura Masdina Mohamed Zakri
Su Wai Mon

Treaties

Ratification of the Treaty on the Prohibition of Nuclear Weapons (TPNW)

Malaysia ratified the Treaty on the Prohibition of Nuclear Weapons (TPNW) on 30 September 2020 and became the 46th nation to ratify the Convention.

The Minister of Foreign Affairs, Hishammuddin Hussein, signed the instrument of ratification for the landmark disarmament treaty at a ceremony in the nation's capital, Kuala Lumpur, on 30 September 2020.

The TPNW was adopted on 7 July 2017 with the purpose of prohibiting all activities related to nuclear weapons, including, its development, testing, manufacturing, acquisition, possession, stockpiling, use and stationing. Malaysia signed the TPNW as soon as it was opened for signature on 20 September 2017. The ratification of the TPNW showed Malaysia's effort to support nuclear disarmament leading to the total elimination of nuclear weapons.

Izura Masdina
Su Wai Mon

International & Regional Organisations

Admission, Membership and Participation in Regional Organisations

Signing of ASEAN Regional Comprehensive Economic Partnership (RCEP)

On 15 November 2020, a virtual meeting of the 4th Regional Comprehensive Economic Partnership (RCEP) Summit as held. Malaysia, represented by Dato' Seri Mohamed Azmin Ali, Senior Minister of International Trade and Industry, signed the mega-regional trading arrangement of the RCEP Agreement with non-ASEAN states which consists of Australia, China, Japan, Korea, and New Zealand. The RCEP agreement consists of 20 Chapters, 17 Annexes, and 54 schedules of commitments covering market access, rules and disciplines, and economic and technical cooperation. The areas of concern include trade in goods, rules of origin, customs procedures and trade facilitation, sanitary and phytosanitary measures, standards, technical regulations, and conformity assessment procedures, trade remedies, trade in services, temporary movement of natural persons, investment, intellectual property, electronic commerce, competition, small and medium enterprises, economic and technical cooperation, government procurement and dispute settlements. The objectives of RCEP are to establish a modern, comprehensive, high-quality, and mutually beneficial economic partnership framework to facilitate the expansion of regional trade and investment contribute to global economic growth and development; progressively liberalise and facilitate trade in goods among the signatory Parties, progressively liberalise trade in services among the Parties with substantial sectoral coverage to achieve substantial elimination

of restrictions and discriminatory measures with respect to trade in services among the Parties and create a liberal, facilitative, and competitive investment environment in the region.

ASEAN Online Business Code of Conduct

In February 2020, ASEAN Committee on Consumer Protection (ACCP) published a Code of Conduct for online businesses in ASEAN to guide the online business to act responsibly and fairly towards consumers. The code consists of 15 Commitments for online businesses: Commitment 1 treats consumers fairly; Commitment 2 upholds responsibilities; Commitment 3 complies with laws and regulations; Commitment 4 conforms to local standards; Commitment 5 ensures quality and safety; Commitment 6 communicates honestly and truthfully; Commitment 7 provides transparency of costs; Commitment 8 keeps proper records of purchases; Commitment 9 offers options for cancellation; Commitment 10 takes consumer complaints seriously; Commitment 11 provides private information to be kept private; Commitment 12 makes sure online payments are safe; Commitment 13 avoids online spamming; Commitment 14 prohibits the production of fake online reviews and Commitment 15 educates consumers about the (online) risk.

ASEAN Consumer Empowerment Index 2020

ASEAN Committee on Consumer Protection (ACCP) produced the Report of ASEAN Consumer Empowerment Index 2020 Pilot Project (ACEI 2020). The ACEI is a composite index, calculated at the country level via questionnaire-based surveys, to benchmark the national level of consumer empowerment in each ASEAN Member States against that of the entire ASEAN region. The ACEI is based on a set of indicators that are categorised according to three main domains/components: (i) Consumer Awareness or Knowledge; (ii) Consumer Skills or Competencies; and (iii) Consumer Behaviours or Assertiveness. Malaysia of ACEI as Moderately Empowered with 94.48 out of 130 in total, Malaysia consumers scored 33.03 in the domain of consumer awareness, 31.01 in consumer behaviours, and 30.44 in the domain of consumer skills. The index will be used to assist in formulating policies, legislation, and regulations as well as consumer advocacy programs towards enhancing consumer empowerment in Malaysia.

Ong Tze Chin

Settlement of Disputes

Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v Sundra Rajoo a/l Nadarajah Decided the Case on 6 October 2020. **[2021] 2 MLJ 787**

The Court of Appeal in *Menteri Hal Ehwal Luar Negeri, Malaysia & Ors v Sundra Rajoo a/l Nadarajah* decided the case on 6October 2020. [2021] 2 MLJ 787. The decision of the Court of Appeal reversing the High Court judgment was in turn overturned by the Federal Court on 9 June 2021. This update relates to the 2020 Court of Appeal decision. The respondent was a former director of the Asian International Arbitration Centre (Malaysia) (AIAC). The respondent was arrested on 20 November 2018 and held overnight while he was still the Director. The respondent subsequently resigned. A remand order for seven days was sought but denied. The learned magistrate dismissed the remand application having heard arguments from the counsel for the respondent on the ground of the respondent's immunity. The respondent acted and commenced the judicial review action to seek *inter alia* a declaration that he has immunity for actions done within his official capacity and to restrain any charge or action against him for anything done in his capacity of Director of AIAC.

The appellant appealed against the decision of the High Court which allowed the respondent application for judicial review of the decision of the Attorney General to commence the action. The question raised was whether a former director as a former High Officer of AIAC was immune from criminal prosecution, whether the question of immunity should be tested in the criminal court and not by way of judicial review and whether the decision of the Attorney General to charge the defendant was subject to judicial review. The Court construed *inter alia* the provision of the International Organisation (Privileges and Immunities) Act 1992. It held that after resignation the respondent no longer had the status of a diplomatic agent for actions taken during his time in office and had no absolute immunity from criminal action. The provision of Article 31 was not applicable in the present case. The former High Officer is only entitled to immunity to acts done by him in his capacity as a High Officer and not for acts committed in his personal capacity. Such acts or things done should be tested in a criminal proceeding and not by judicial review as only then it is possible to determine if act was done in capacity as High Officer. Finally, under Article 145 (3) of the Federal Constitution, the Court held that the Attorney General's decision to institute or not to institute criminal proceedings was not justifiable or amendable to judicial review.

Usharani Balasingam

Human Rights

Accession and Reservations to International Human Rights Treaties and Organizations

Human Rights – Malaysia, Member of the United Nations Human Rights Council

Malaysia bid for a spot on the United Nations Human Rights Council (UNHRC) for the 2022–2024 term. Traditionally, between four and five Asia-Pacific states are elected to the council each term, and the last time Malaysia was on the council was for the 2010–2013 term. Malaysia was first elected to the council for the 2006–2009 term. Malaysia had also been selected by the Office of the United Nations High Commissioner for Human Rights (OHCHR) as one of six model countries for its study on good practices emerging from their universal periodic review (UPR).

Human Rights – Freedom of Movement

Prevention and Control of Infectious Diseases (*Measures Within the Infected Local Areas*) *Regulations 2020*

Following a sharp increase in the number of persons infected by the COVID-19 virus, the Government of Malaysia has gazetted the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020 ("Regulations"). The Regulations were to have effect from 18 March 2020 to 31 March 2020 ("Restriction Period"). This followed the announcement by the Prime Minister's Office ("PMO") on 16 March 2020 of a Movement Control Order, which according to the announcement, will be enforced under the Prevention and Control of Infectious Diseases Act 1988 ("PCID Act") and the Police Act 1967 ("Police Act").

The Regulations were issued subsequent to the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020, which declared all states and federal territories of Malaysia as infected local areas ("Declaration Order").

According to Regulation 3 of the Regulations, no person shall make any journey from one place to another within any infected local area except for the following purposes:

- to perform any official duty;
- to make a journey to and from any premises providing essential services;
- to purchase, supply or deliver food or daily necessities;

- to seek healthcare or medical services; or
- such other special purposes as may be permitted by the Director General of Health.

Further, the Regulations also restrict movement between one infected area to another, unless a prior written permission of a police officer is obtained.

Haezreena Begum

Human Rights – Right to Be Heard – Freedom of Speech and Expression

Islamic Renaissance Front Bhd* v *The Minister Of Home Affairs* [2020] *5 MLJ 399

The Court of Appeal in *Islamic Renaissance Front Bhd* v *The Minister Of Home Affairs* [2020] 5 MLJ 399, considered the above issue under the Printing Presses and Publications Act 1964 and the Federal Constitution.

The Court of Appeal (Putrajaya), Abdul Karim, Nor Bee Ariffin and Abu Bakar Jais Jjca, Civil Appeal No W-01(A)-242-05 of 2019, Judgment Date: 23 June 2020

The respondent (The Minister of Home Affairs) had issued three orders prohibiting the publication, printing, importation, production, reproduction, sale, issuance, circulation, distribution, and possession of three books published by the appellant (Islamic Renaissance Front Bhd) on the ground they were likely to prejudice public order, alarm public opinion and prejudice public interest. The respondent informed the appellant that the orders were issued after consideration of reports from the Jabatan Kemajuan Islam Malaysia ('Jakim') and the Publication and Quranic Text Control Division ('the Division') which, inter alia, stated that the publications contained matters which deviated from the teachings of Islam as practised in Malaysia. The appellant applied to the High Court by way of judicial review to, inter alia, quash the respondent's orders. For the purpose of the hearing, the appellant applied for, and was granted, an order for discovery of the reports from Jakim and the Division. The respondent supplied the appellant with the full reports from Jakim in respect of only two of the orders while the report for the third order was incomplete. The Division's reports were not supplied at all.

The High Court dismissed the judicial review application holding, inter alia, that the court would not, without good reason, disturb the respondent's exercise of his discretion under s 7(1) of the Printing Presses and Publications Act

1984 to issue the orders. The court also dismissed the appellant's complaint that it had not been heard since there was no procedural requirement giving the appellant the right to be heard before the orders were issued and given the reason that the respondent had to issue the orders expeditiously to protect public order and national security.

The appellant appealed to the Court of Appeal to set aside the High Court's decisions. During the appeal, the appellant submitted that not only was it his right to be heard is fundamental and not dependent on whether any statutory provision gave him that right, but the respondent had also disobeyed the order of court relating to the discovery of the documents requested. The respondent submitted that any right to be heard had to take second place where national security and public order were involved. The respondent further submitted that freedom of speech and expression as stipulated in the Federal Constitution is not absolute. Therefore, the Federal Constitution provides that such freedom could be restricted by imposition of relevant laws.

However, the Court of Appeal allowed the appeal and quashed the respondent's orders. The Court of Appeal (inter-alia) decreed that:

(i) The non-production of the documents covered by the order for discovery raised doubt as to the real reason for the issuance of the orders and also raised suspicion that the respondent was concealing material evidence that was unfavourable to him. The respondent had to show that his exercise of discretion to issue the orders was real and that those documents really existed.

(ii) The failure to give the appellant the right to be heard rendered the respondent's orders indefensible. The High Court wrongly found that if there was no statutory provision granting a right of hearing, such right could generally be denied. A right of hearing was basic and fundamental and was always available even though a statute did not provide for it. Only if the respondent had given the appellant a right to be heard and had considered what the appellant had to say would the requirements of natural justice have been fulfilled. In any event, the Printing Presses and Publications Act 1964 did not deny the appellant of a right to be heard.

(iii) There was no evidence that the respondent had even considered giving the appellant a right of hearing and then decided not to accord such right on grounds of national security. It did not matter that that right was not given eventually. What was important was for the respondent to have shown evidence that he had, in fact, considered giving the appellant the right to be heard. The respondent's contention that a right of hearing would always come secondary to national security was incorrect. The argument that the right of hearing had to be denied because

the respondent had to act immediately or urgently to issue the orders was also untenable on the facts and circumstances of the case given that the books in question had been in circulation for a few years before the orders banning them were issued.

Haezreena Begum

Human Rights – Right to Life – Equality – Jurisdiction of the court – United Nations Convention against Torture

Letitia Bosman v Public Prosecutor and Other Appeals (No 1) [2020] ***MLJU 1186;*** [2020] ***5 MLJ 277, Judgment Date: 13/8/2020***

The first three appellants herein were separately charged, convicted, and sentenced to death by the High Court for trafficking in dangerous drugs contrary to s 39B of the Dangerous Drugs Act 1952 ('the DDA') while the fourth appellant was convicted and sentenced to death for committing murder contrary to s 302 of the Penal Code ('the Code'). At the time the appellants were convicted, the only punishment that was prescribed under s 39B of the DDA and s 302 of the Code ('the impugned provisions') was the mandatory death penalty. All four appellants lost their appeals against their convictions and sentence before the Court of Appeal ('COA'). In their instant appeals against the COA's decision, a common ground of appeal was that the mandatory death penalty prescribed in the impugned provisions was unconstitutional as it violates arts 5 (right to life and liberty of a person), 8 (equality) and 121 (judicial power of federation) of the Federal Constitution ('FC').

The appellants mounted their challenge on three counts: (a) that it was part of judicial power to determine the measure of punishment and that by prescribing a mandatory death sentence and removing the court's discretion to impose any other sentence appropriate for a given case, Parliament had usurped judicial power under art 121 of the FC thereby violating the doctrine of separation of powers; (b) that the mandatory death penalty violated an accused's right to a fair trial under art 5(1) of the FC by effectively denying him of the opportunity to make a plea in mitigation for an appropriate sentence to be imposed; and (c) that the mandatory death penalty was arbitrary, cruel and barbaric and violated the proportionality principle housed in the 'equal protection' limb of art 8(1) of the FC. This was because despite the great variance between cases in the facts and circumstances which caused a person to be convicted of murder or for drug trafficking, they were all equally subjected

to the death penalty regardless of the existence of varying degrees of moral culpability and/or mitigating factors.

Based on all the aforesaid grounds, the appellants submitted that the impugned provisions had to be struck down as being unconstitutional, namely, that pursuant to art 4(1) (the supreme law of the federation) of the FC, s 39B was void to the extent of its inconsistency with the provisions of the FC. In the case of s 302, being a pre-Merdeka (independence) law, the court was duty-bound under art 162(6) (temporary and transitional provisions) of the FC to modify s 302 so as to bring it into accord with the provisions of the FC. In response to the appellants' submissions, the respondent contended, inter alia, that: (i) Parliament had the prerogative to prescribe the punishment for a particular offence even if involves mandatory death penalty on the grounds of the nation's interest and, in the process, the rights guaranteed under arts 5 and 8 of the FC could be validly eroded if not wholly taken away; (ii) the court's duty was to impose the punishment prescribed by Parliament; (iii) the jurisdiction and powers of the courts was as conferred upon them by federal law; and (iv) the matter of policy for the Legislature to consider and decide upon based on all the circumstances that prevailed at any given time depended on whether or not a penalty under law was harsh, cruel, or inhumane.

The four appeals against the constitutionality of the impugned provisions was dismissed by a majority of 8–1. Azahar Mohamed CJ (Malaya) (majority) decreed:

(i) The impugned provisions were valid and binding and did not infringe the appellants' guaranteed rights under the FC. The appellants failed to show that the impugned provisions were inconsistent with arts 5, 8 and 121 of the FC.

(ii) Where the death penalty was the only sentence Parliament had prescribed for the commission of an offence, a mitigation plea from the accused played no role in the sentencing process as the court had no power to impose a different or lesser sentence. The fact that the court had no alternative but to pass the death sentence did not make that sentence unconstitutional or result in the accused being denied of the right to a fair trial (for the reason that he had been deprived of a right to make a plea in mitigation) because the constitutional rights guaranteed under art 5(1) of the FC could be taken away in accordance with law. In other words, a law that provided for the deprivation of a person's life or personal liberty was valid and binding as long as it was validly passed by Parliament.

(iii) The 'equal protection' clause in art 8(1) of the FC is not concerned with equal punitive treatment for equal moral blameworthiness but with equal punitive treatment for similar legal guilt. The mandatory death penalty

satisfied the test of reasonable classification, and hence was not unconstitutional vis-à-vis art 8(1) of the FC. The mandatory death penalty for the offences of drug trafficking and murder was an intelligible differentia that bore a rational relation to a valid social object. There was no discrimination against the appellants as the impugned provisions applied to that class of persons who, respectively, offended the provisions relating to drug trafficking under the DDA and murder under the Code.

(iv) That there was nothing unusual or arbitrary in a death sentence being made mandatory because the legislature was well aware of the objectives and purpose before enacting such mandatory provisions, and hence could not be considered arbitrary.

(v) The appellants were relying on the decisions of Courts in other jurisdictions to argue that art 5(1) of the FC prohibited the mandatory death penalty. The argument that the death penalty was a cruel and inhumane punishment and an arbitrary deprivation of life could not stand because all the authorities that the appellants had relied upon were from countries whose respective Constitutions provided that no person 'shall be subjected to torture, cruel, inhumane or degrading punishment' or of similar phrases as a result of their ratification of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which Malaysia is not a party to. Those countries are in a different position from Malaysia which had never acceded to UNCAT or any other international treaty to that effect. Thus, the FC had no equivalent provision prohibiting 'torture or inhumane or degrading punishment or treatment.' Until incorporated into domestic legislation, international treaty obligations do not form part of domestic law. Malaysia was not a party to the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The fact that the Executive had chosen not to sign, accede to or ratify them clearly suggested that those international principles ought not to be considered applicable in the Malaysian legal context. Since there was no inconsistency between s 302 of the Code and arts 5, 8 and 121 of the FC, there was no necessity to modify s 302 under art 162(6) of the FC to achieve the purpose stated in that article.

Nallini Pathmanathan FCJ (dissenting) decreed:

(i) The imposition of a mandatory death penalty as the sole punishment for trafficking under the DDA and for murder under s 302 did not allow for (a) the imposition of a penalty that commensurate with the circumstances of commission of the offences in question (b) an opportunity for the accused to be heard as to why the death penalty was not warranted in the particular circumstances of the case, and (c) any other

mitigating circumstances. To that extent, the impugned provisions did not satisfy the constitutional safeguards in arts 5(1) and 8(1) of the FC.

(ii) The situations and circumstances that caused a person to be found guilty of either trafficking in dangerous drugs or for murder varied greatly from case to case. Hence, there was no rational basis to classify all such cases together either under trafficking or murder for the purpose of punishing them equally with the same death penalty. Such classification was irrational, arbitrary, and capricious. The mandatory death penalty as the sole punishment for those offences was a disproportionate punishment to meet the varied circumstances under which those offences were committed, and the different degrees of involvement and culpability of the offenders concerned.

(iii) Section 39B of the DDA had to be struck down for unconstitutionality since the imposition of a single mandatory death penalty on all manner of persons found to be trafficking in dangerous drugs contravened the doctrine of proportionality housed in art 8(1) of the FC. Consequently, the pre-1983 status of the DDA had to be restored conferring upon the Court the discretion to either sentence the offender to life imprisonment to suffer the death penalty. For the same reason, s 302 of the Code had to be struck down for being unconstitutional and pursuant to art 162(6) of the FC, s 302 had to be modified such that the Court had the option to sentence the offender to life imprisonment instead of passing the sentence of death.

(iv) While Parliament could provide for a mandatory penalty for an offence, if a challenge was taken that it was unconstitutional, it was the judiciary's function and duty under art 4 of the FC to ensure that such provision was consonant with, and did not transgress, the FC as the supreme law of the land. The FC required the judiciary to exert a check and balance in relation to, inter alia, the laws enacted by Parliament under the doctrine of separation of powers enshrined in art 4. It was simply not sufficient to state that it was for Parliament to legislate on punishment and for the Courts to execute the same.

Shad Saleem Faruqi
Haezreena Begum

Use or Threat of Force

Responses to Threats and Attacks

In *Mustaza bin Abdul Rahman* v *Public Prosecutor* [2020] MLJU 217. 7 September 2020, the Court of Appeal (Putrajaya), considered the offence of terrorism under the Penal Code.

The appellant has committed the offences when he suggested in a Telegram chat group named 'Amanah (Phb) v Pas' ('the chat group') that an attack be carried out on gambling establishments after the administrator of the chat group 'AkhiWandy' announced that a night club known as Kelab Movida in Puchong was bombed. He had also posted an oath of allegiance known as 'Baiah' in Arabic pledging loyalty to the 'Ikhwah Anshar Daulah Islamiyah' group on the chat group. The conversations in the chat group were given to the police as evidence by the prosecution. The trial court granted 'protected witness' status to ST1 under Section 6 of the Security Offences (Special Measures) Act 2012 ('the SOSMA'). In relation to the 'Baiah,' the expert witness testified that the said 'Baiah' was valid, but the appellant challenged this evidence. In relation to this issue, it has been stated that the oath was not valid as it was not made in person before a representative of the Caliph. He claimed trial to all three charges. The trial was conducted under the Security Offences (Special Measures) Act 2012 (Act 747). At the end of the trial, the appellant was convicted on all three charges. The appellant was charged with committing three offences relating to terrorism under ss 130J(1)(b) ('the first charge'), 130M ('the second charge') and 130J(1)(a) ('the third charge') of the Penal Code. Having due regard to the discussions and the facts and circumstances of the case, the conviction on the first charge and the third charge was affirmed with the sentence of imprisonment of 12 years being reduced to 12 years on the first charge and the third charge. The conviction on the second charge was set aside.

Pardis Moslemzadeh Tehrani

State Practice of Asian Countries in International Law

Mongolia

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International Relations & Co-operation

Ulaanbaatar Dialogue (*UBD*)

Mongolia first proposed the idea of creating a regional security dialogue in Northeast Asia in the early 1980's. At that time, Mongolia called for an all-Asian convention prohibiting the use of force to prevent conflicts. In 2000, Mongolia started studying the possibility of a new official dialogue which led to a conference under the theme "Security Perspectives of Central and Northeast Asia: Ulaanbaatar as a New Helsinki" organized by the Mongolian Institute for Strategic Studies in 2008. Conceived by the President of Mongolia, Tsakhiagiin Elbegdorj, the Ulaanbaatar Dialogue on Northeast Asia Security Initiative (UBD) was publicly announced during the VII Ministerial Conference of the Community of Democracy in Ulaanbaatar on 29 April 2013. Mongolia enjoys friendly relations with all countries of Northeast Asia, namely, the Russian Federation, the People's Republic of China, Japan, the Democratic People's Republic of Korea, the Republic of Korea as well as the United States of America. Mongolia has no territorial disputes with any of its neighboring countries. The country has played an active role in international multilateral mechanisms including the UN, the Asia-Europe Meeting (ASEM) and the

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Organization for Security and C-Operation in Europe (OSCE). The importance of the Ulaanbaatar Dialogue lies in the implementation of a dialogue mechanism in NEA.

UBD Overall Goals

1. Building confidence in NEA: As confidence-building measures are increasingly important aspects in the prevention and reduction of military tensions between nations, UBD aims to build resilient confidence and diminish deeply-rooted mistrust through open discussions in Northeast Asia.
2. Fostering mutual understanding and promoting regional cooperation: To achieve mutual trust, parties need to understand the perspective of others. In this regard, intercultural events such as NEA Mayors Forum and NEA Youth Symposium were held as part of UBD to encourage a wide range of cooperation in the region.
3. Setting up an institutional mechanism of dialogue: UBD aims to reach long term goals of regional peace by setting up institutional mechanisms of dialogue in Northeast Asia. The ultimate goal of the Initiative is to defuse tensions on the Korean Peninsula and help promote confidence building and peacemaking in Northeast Asia.

UBD Principles

Mongolia invites regional partners to engage in dialogue and debate on region-wide issues of common interest. Mongolia understands that the ties that bind all interested sides can bring peace building and stability on the Korean Peninsula as well as in the region. To reach its goals, UBD prioritizes common interests, mutual respects, mutual trust, multilateral talks, and openness and transparency as its main principles.

UBD Parties

Mongolia, the Russian Federation, the People's Republic of China, Japan, the Democratic People's Republic of Korea, the Republic of Korea and the United States of America are the major partners of the initiative. Other parties from international organizations as well as non-regional countries are always welcome to participate in the process.

UBD Forms

Recognizing that Track 1 discussions are official, wherein diplomats and government delegates usually express and justify their official positions, the UBD

is designed to focus mainly on Track 1.5 and Track 2 efforts, since UBD intends to avoid overlapping or competing with other forms of dialogues. Track 1.5 and Track 2 channels are the most effective instruments for promoting mutual understanding. Officials and politicians get together with academics and talk about security issues under the Chatham House rule which contribute to mutual understanding and greater confidence. The outcome of UBD should be formal and practical security cooperation and consultation.

UBD Priority Areas

The UBD is designed to resolve or mitigate those issues that affect regional stability. To that end, this forum seeks to enhance security and cooperation in the following fields: traditional security issues, non-traditional security issues, energy connectivity, infrastructural development, environmental protection.

UBD Achievements

Within the "Ulaanbaatar Dialogue Initiative," Mongolia has hosted a series of events focused on Northeast Asia that aimed to promote confidence building among the regional states. For example, the International Conference "Ulaanbaatar Dialogue on Northeast Asian Security issues," "Northeast Asian Women Parliamentarians meeting" (25 November 2013), "The Northeast Asian City Mayor's forum" (18–19 August 2014), Conference on Northeast Asian Energy Connectivity (17–18 March 2015), Northeast Youth Symposium for Regional Cooperation (20 May 2015) respectively took place in Ulaanbaatar.

The International Conference "Ulaanbaatar Dialogue on Northeast Asian Security" has been held annually since 2014. The conference is now evolving into an open and inclusive mechanism, bringing together representatives from all countries in the sub-region. The discussion topics cover a broad range of issues including security, energy, infrastructure, green development, opportunities of humanitarian cooperation and others. Each Conference was attended by more than 200 international and national delegates and representatives of the government entities, the United Nations and other international organizations and academia. The Government invitees to the conference include not only the Northeast Asian countries – China, the ROK, the DPRK, Japan, Russia and Mongolia, but also officials from other continents, including Canada, Germany, the Netherlands, Sweden, Switzerland, the United States, the European Union and others. Since 2017, the conference upgraded to 1.5 levels gathering together both government delegates, whereas diplomats and officials usually express and justify their official positions on Track 1 and academia on Track 2.

The Trilateral Summit

The trilateral summit among the presidents of Mongolia, China, and Russia on the sideline of the Shanghai Cooperation Organization is a mechanism that maximizes the profits and benefits of a three-state economic cooperation that has been directed by Mongolia's effort to establish a permanent institution, which supports a trilateral dialogue. In this sense, Mongolia's initiation of researching it's two neighbor states' policies and stances in the region as well as on global issues and Mongolia's attempt to coherently explain it's policies and positions in order to gain support was crucial in building the aforementioned structure. The Three-State-Relations has reached a new structure and subjects based on Mongolia's tireless pursuit of the successful initiation of the trilateral dialogue mechanism. This can be observed from the 2014 Dushanbe (Tajikistan), 2015 Ufa (Russia), 2016 Tashkent (Uzbekistan), 2018 Qingdao (China), 2019 Bishkek (Kyrgyzstan) summits.

The Trilateral Meeting

"The Third Neighbor Policy" is a hallmark product of the active, independent and multilateral (multifaceted) foreign policy principles that Mongolia implemented, aimed at neutralizing its relations with its neighbors based on its historical lessons and the disadvantageous geographical context, starting from the 90s. "The Third Neighbor Policy" proves the unique characteristic of the Mongolian mindset, which can be described as: limitless and without any boundaries, overcoming all obstacles by seeking everything that is new. "The Third Neighbor Policy" has been deeply embedded in the foreign policy of Mongolia through the significant and essential decisions reflected on both "The National Security Framework of Mongolia" as well as "The Foreign Policy Framework of Mongolia" starting from 1990, which now has become a new aim for a government policy and theoretical-practical international relations' research studies. The former framework declares that "By following the Third Neighbor Policy, Mongolia will develop a bilateral as well as a multilateral relations regarding social, cultural, economical, and political cooperation with highly developed democratic countries" in 2010. The revised version of the latter framework emphasizes that "On a policy level, for the first time, Mongolia has decided to widen and develop a cooperative partnership relations with the western-eastern nations and associations, the EU, Japan as well as the USA within the structure of The Third Neighbor Policy" in 2011. The US, Japan and Mongolia trilateral meeting is a Mongolian base medium as to exchange perspectives on the regional as well as the multilateral cooperation and integration with regards to the third-neighbors of Mongolia, starting from 2015. Trilateral

meeting held in 2015 in New York (USA), in 2017 in Ulaanbaatar (Mongolia), in 2018 in Tokyo (Japan), 2020 in Washington (USA).

Baasankhuu G

International Economic Law

Convention on Mutual Administrative Assistance in Tax, Law on Ratification (3 January 2020)

On 3 January 2020, the Parliament of Mongolia adopted a law on the ratification of the Convention on Mutual Administrative Assistance in Tax. The Parliament of Mongolia sets certain limitations to apply the Convention on Mutual Administrative Assistance in Tax.

According to subparagraph 1 (a) Article 30 of the Convention, Mongolia enjoys the right to not provide any form of assistance in relation to taxes of other parties in any of the categories listed in subparagraph 1 of Article 2, including:

- Taxes on income, profits, capital gains or net wealth which are imposed on behalf of political subdivisions or local authorities of a Party,
- Compulsory social security contributions payable to general government or to social security institutions established under public law,
- Taxes in other categories, except customs duties, imposed by one of the Parties, namely:
  - Estate, inheritance or gift taxes;
  - Taxes on immovable property;
  - General consumption taxes, such as value added or sales taxes;
  - Specific taxes on goods and services such as excise tax;
  - Taxes on the use or ownership of motor vehicles;
  - Taxes on the use or ownership of movable property other than motor vehicles;
  - Any other taxes.

The law specifies that Mongolia is not entitled to provide any administrative assistance in relation to the payment of taxes as defined in the Article 2.1 of the Convention, resolution of any debts invoiced based on single or several tax meanings or payment of any penalty.

***United Nations Convention on the Use of Electronic Communications in International Contracts, Law on Ratification* (*15 May 2020*)**

The Parliament of Mongolia has passed legislation to accede to the UN Convention on the Use of Electronic Communications in International Contracts. This is an important consideration for Mongolia, a landlocked transit country, seeking to broaden and deepen its trade linkages so as to fully benefit from the country's participation in regional and global value chains. The legal environment that facilitates seamless processes for domestic and cross-border trade is an important element in reducing trade costs.

***Financing Agreement for Capital City Cable Transport Project, Law on Ratification* (*14 May 2020*)**

On 14 May 2020, the Parliament of Mongolia passed a bill on ratifying the Financing Agreement for Capital City Cable Transport Project signed between the Government of the French Republic and the Government of Mongolia. The overall purpose of the Cable Car project is to improve public transport service and increase their variety and accessibility, develop tourism, and reduce traffic congestion and air pollution.

Financing Agreements for Projects

Financing agreements for development projects that were approved by the International Development Association and ratified by the Parliament of Mongolia in 2020 are as follows:

1. Livestock Commercialization Project concurred on 10 April 2020. The objective of the Livestock Commercialization Project is to improve livestock health, productivity, and commercialization of targeted value chains in project locations and to provide immediate and effective response in the event of an eligible crisis or emergency;
2. Additional Financing to Ulaanbaatar Clean Air Project concurred on 10 April 2020. The objective of the Ulaanbaatar Clean Air Project is to enable consumers in ger areas to access heating appliances producing less particulate matter emissions and to further develop selected medium-term particulate matter abatement measures in Ulaanbaatar in coordination with development partners;
3. Additional Financing to Third Sustainable Livelihoods Project concurred on 14 May 2020. The objective of the Third Sustainable Livelihoods Project is to improve governance and community participation for the planning and delivery of priority investments in rural areas of Mongolia;

4. Ulaanbaatar Heating Sector Improvement Project concurred on 14 May 2020. The objective of the Ulaanbaatar Heating Sector Improvement Project is to enable access to and improve efficiency of district heating in selected project areas; and
5. Emergency Relief and Employment Support Project concurred on 29 October 2020. The objective of the Emergency Relief and Employment Support Project is to provide jobseekers and micro-entrepreneurs in Mongolia with improved access to labour market opportunities and to provide temporary relief to eligible workers in response to COVID-19 crisis.

Financial Support for COVID-19

The Government of Mongolia is responding proactively to manage the negative impacts of COVID-19, yet the country remains vulnerable to the pandemic. Limited diversification of Mongolia's economy also makes it particularly vulnerable to exogenous shocks, such as the COVID-19 pandemic, triggering a severe economic slowdown.

The Parliament of Mongolia has passed legislations ratifying the following agreements to mitigate the adverse health, social and economic impacts caused by the pandemic and to alleviate poverty:

1. the Agreement for COVID-19 Crisis Response Emergency Support Loan signed by the Government of Mongolia and the Japan International Cooperation Agency (JICA) ratified on 03 December 2020;
2. the Loan Agreement for COVID-19 Rapid Response Program signed by the Government of Mongolia and the Asian Infrastructure Investment Bank ratified on 29 October 2020; and
3. the Financing Agreement for COVID-19 Emergency Response and Health System Preparedness Project approved by the International Development Association ratified on 23 April 2020.

Asia-Pacific Trade Agreement (APTA)

On 12 December 2019, the State Great Khural (the parliament) ratified the Asia-Pacific Trade Agreement. This agreement came into force in Mongolia on 1 January 2021 and this is the first time that Mongolia joined a regional free trade pact. This shall be an uplift for the country's participation in the integration of international trade and economics. However, due to the difficulties in international transportation because of the worldwide pandemic, Mongolia is also facing major difficulties at its major border port, Erlian – Zamyn Uud through which the country receives its imports from most of the countries. In particular, there has been a halt at this border port following the implementation of China's strict measures to keep the domestic infections under

control regarding the Winter Olympic Games that took place in February 2022. Authorities of both countries are actively working on solving the issue.

Law on Intellectual Property and Copyright

The Intellectual Property Law was newly adopted on 23 January 2020 and came into force on 1 December 2020. Previously, Mongolia had separate laws in copyright, patent, trademark and geographical indications. However, these laws replicated with each other in some areas as well as had conflicts in certain regulations. Therefore, the lawmakers eliminated these shortcomings by consolidating the common relations that are repeated in these laws into one uniform law to make application and compliance with the laws simpler and to prevent conflicts and loopholes between the laws. In line with the newly adopted Intellectual Property Law, the Copyright Law was renewed on 6 May 2021.

Investor-State Dispute Settlement

1. In February 2021, WM Mining LLC (registered in the U.S.) submitted a claim against Mongolia to the International Center for Settlement Disputes (ICSID) regarding its gold exploration projects. Currently, the case is at its initial stage of the legal proceedings. The source of law for this dispute is the Treaty between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment (1994). This is the second legal dispute at this arbitration centre to which Mongolia is a party. The first case was opened in 2004 by the claim of Alstom Power Italia SpA (an Italian company) and Alstom SpA (an Italian company) against Mongolia, however, the Tribunal issued an order taking note of the discontinuance of arbitration upon the parties' settlement.
2. In 2010, China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. collectively submitted a claim against the Government of Mongolia for the restoration of its mining license (to conduct mining) of an iron ore deposit. The arbitration award was rendered on 30 June 2017 and the Tribunal ruled that it had no jurisdiction to hear the Claimants' claims according to article 8.3 of the Agreement between the Government of the People's Republic of China and the Government of the Mongolian People's Republic Concerning the Encouragement and Reciprocal Protection of Investments. Article 8.3 of the Agreement reads "If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in

paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in paragraph 2 of this Article." The claimant pursued to the United States District Court for the Southern District of New York in 2019, and to the appellate court in 2021, requesting the courts to vacate the arbitration award. However, their claim was rejected by the decision rendered on 24 August 2021.

Baigal Enkh-Amgalan

International Criminal Law

Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression and War Crimes, Law on Ratification (31 January 2020)

On January 31, the Parliament supported a bill ratifying the 2010 Amendment of the Rome Statute of the International Criminal Court, which Mongolia signed in 2000 and ratified in 2002. In 2010, States Parties agreed to make amendments to the Statute adding the definition of the crimes and the conditions for the exercise of jurisdiction over these crimes.

Agreement on the Privileges and Immunities of the International Criminal Court, Law on Ratification (17 December 2020)

The ratification of the Agreement on the Privileges and Immunities of the International Criminal Court is significant for Mongolia to fulfill its obligations under the Rome Statute of the ICC and implement the recommendations of the UN Human Rights Council.

The Agreement between Mongolia and the Macao Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters, Law on Ratification (24 April 2020)

The Parliament of Mongolia concurred with the agreement between Mongolia and the Macao Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters signed between Mongolia and the Macao Special Administrative Region of the People's Republic of China on 26 June 2019. Mongolia has a bilateral treaty on mutual legal

assistance in civil and criminal matters with the People's Republic of China; however, this treaty is not effective in the Special Administrative Regions of China. Therefore, the agreement on mutual legal assistance in criminal matters was established with the Special Administrative Regions. The establishment of the agreement will ensure legislative bodies of the parties to collaborate in investigation, judicial proceedings, and other prosecution actively.

***Treaty between Mongolia and the Socialist Republic of Vietnam on Extradition, Law on Ratification* (*24 April 2020*)**

The treaty between Mongolia and the Socialist Republic of Vietnam on Extradition serves as a legal framework for the two countries' law enforcement agencies to cooperate in arresting and extraditing fled criminals.

***Inter-American Convention on Serving Criminal Sentences Abroad, Law on Ratification* (*8 May 2020*)**

The Parliament of Mongolia adopted a law on the ratification of the Inter-American Convention on Serving Criminal Sentences Abroad which was adopted by the 23rd Session of the General Assembly of the Organization of American States and entered into force on 12 April 1996.

J. Battogtokh
B. Sosorbaram

Use or Threat of Force

***Intergovernmental Agreement between Mongolia and Socialist Republic of Vietnam in Defense Sector, Law on Ratification* (*17 December 2020*)**

The Intergovernmental Agreement between Mongolia and Socialist Republic of Vietnam in Defense Sector is significant to intensify mutual understanding at the regional level and to strengthen the capacity of armed forces of the two countries. The Agreement provides a legal environment for developing cooperation in the defense sector and expands United Nations Peacekeeping training, interns, military hospital, military training, scientific research and defense industry.

J. Battogtokh
B. Sosorbaram

International Environmental Law

Cooperation Agreement between the Government of Mongolia and the Green Climate Fund, Law on Ratification (24 April 2020)

The Cooperation Agreement is essential for the successful implementation of seven projects by Mongolia with investment from the Green Climate Fund to reduce greenhouse gas emissions.

J. Battogtokh
B. Sosorbaram

Other Topics

Cooperation Agreement on Social Protection between Mongolia and the Czech Republic, Law on Ratification (24 April 2020)

The ratification of the Cooperation Agreement on Social Protection between Mongolia and the Czech Republic allows Mongolian expats in the Czech Republic to receive their old-age pension in the country or have their years of service in the Czech Republic included in the calculation of their entitlement after returning to their home country.

The 2010 Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, Law on Ratification (17 December 2020)

The Manila amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers were adopted on 25 June 2021, marking a major revision of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. The 2021 amendments entered into force on 1 January 2012 under the tacit acceptance procedure with the aim of bringing the Convention up to date with developments since its initial adoption and to address issues that are anticipated to emerge in the foreseeable future.

J. Battogtokh
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State Practice of Asian Countries in International Law

Nepal

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Territory & Jurisdiction

Acquisition or Disposition of Territory

In May of 2020, Nepal maintained its claim (MOFA, 2020) over the Lipu Lekh territory following India's inauguration (Nepal-China Relations, MOFA) of a Link Road through Nepal's territory. Nepal and India both claimed sovereignty over the land in question – Lipu Lekh – as a part of their territory. The dispute has raised concerns over the subject matter of the Sugauli Treaty and the subject of the acquisition of territory among international law enthusiasts.

Diplomatic & Consular Relations

Establishment of Diplomatic and Consular Relations

Nepal established diplomatic relations with Saint Lucia and Ghana in the fiscal year 2019/20. As of 15 July 2020, Nepal established diplomatic relations with 168 countries (MOFA, 2020). In the fiscal year 2020/21, Nepal established formal diplomatic relations with three countries – Commonwealth of Dominica, the Gambia, and Sierra Leone, increasing Nepal's diplomatic relations to 171 countries (MOFA, 2021).

International & Regional Organisations

Admission, Membership, and Participation in International Organizations (*e.g., UN & WTO*)

Although Nepal did not seek membership in any international organization, in the year 2020, it continued to engage in different activities with

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the international organizations of which it is a member to. Also, Nepal was re-elected as a member of the United Nations Human Rights Council (KRC) for 2021–2023. Nepal has been serving as a member of the Council since 2018 (MOFA, 2021).

In the 31st Special Session of the United Nations General Assembly (UNGA) in response to COVID, Nepal asserted its position to align the rebuilding efforts following COVID. Nepal stated that the rebuilding efforts need to be in line with the 2030 Sustainable Development Agenda and the Paris Agreement with additional effort in the investment of health care, social protection, infrastructure, and creation of jobs.

In addition to its engagement with UN-related activities, Nepal also participated in the 12th meeting of the Joint Commission between Nepal and the European Union (EU). The virtual conference discussed a wide range of issues of mutual interest, which was reported to be cordial, candid, and constructive.

Admission, Membership, and Participation in Regional Organizations (*e.g., SAARC, ASEAN*)

Nepal celebrated the 36th Charter Day of the South Asian Association for Regional Cooperation (SAARC). It also participated in the Annual Ministerial Meeting of the Non-Aligned Movement (NAM). At the meeting, Nepal highlighted the impacts of COVID-19 on the vulnerable counties and people. It also called for greater international collaboration to reinvigorate the recovery from the aftermath of COVID. The meeting adopted a Political Declaration and a Special Declaration upon its conclusion.

International Relations & Co-operation

Bilateral/Multilateral Aid and Disaster Relief; Technical & Development Assistance

COVID-19 Cooperation (MOFA, 2021)

Bilateral and multilateral relationships were a matter of priority in coping with the COVID-19 pandemic in Nepal. For example, India supplied 1 million doses of Covishield vaccines to Nepal on a grant basis in January 2021. The People's Republic of China announced an additional grant of medical supplies worth 5 million RMB to help Nepal fight against the pandemic. Before this, the preparatory meeting of the Foreign Secretaries of the participating countries was virtually held on 10 November 2020. Bangladesh also extended generous medical support to Nepal that included 10,000 vials of Remdesivir and 450,000 units of surgical masks to fight the COVID-19 pandemic under the

SAARC COVID-19 Emergency Fund. Pakistan supported Nepal's fight against the pandemic by contributing USD 369,460. The Government of Pakistan also provided 30 ventilators and 30 CPAP breathing equipment to Nepal under SAARC COVID-19 Emergency Fund. Under the same fund, Nepal contributed a total of NPR 10 Crores.

The President, the Prime Minister, the foreign minister, and the Foreign Secretary remained closely engaged with their respective counterparts worldwide through various means aiming to generate international support during the COVID-19 crisis. The President wrote letters to the Presidents of the United States and the Russian Federation and the Queen of Great Britain requesting support in the battle against COVID-19, including vaccine support. The Prime Minister and Foreign Minister sent messages to their respective counterparts, making similar appeals. The Prime Minister wrote an op-ed piece in The Guardian appealing to the international community to urgently provide essential medical items, lifesaving drugs, and vaccines.

Specific Bilateral Relations Issues

India

Nepal continued maintaining its bilateral relations with India in 2020. Some of the major highlights of its relationship with India were:

Joint Steering Committee (JSC) and Joint Working Group (JWG) on Power Sector Cooperation

The Eighth Meeting of Nepal-India Joint Steering Committee (JSC) on Cooperation in Power Sector was held on 11 December 2020 through video-conferencing. The meeting reviewed the progress made in the last five years and expressed satisfaction over the timely completion of the Muzaffarpur-Dhalkebar cross border 400 kV transmission line, agreement on funding modality for Gorakhpur-Butwal 400 kV line, and the progress on the 900 MW Arun-III Hydro Electric project. The Meeting reaffirmed the commitment to further strengthening the power sector cooperation between the two countries, including developing an integrated grid, building more cross-border transmission lines, and enhancing investment in Nepal's hydropower and solar power projects.

Boundary Demarcation Works (MOFA, 2020)

After India published its new political map in 2019, depicting Nepal's LipuLekh, Kalapani and Limipiadhura areas in its map, Nepal maintained that these territories belonged to Nepal according to the Treaty of Sugauli signed between the two. When India inaugurated a link road to LipuLekh via Nepali territory,

Nepal called upon India to refrain from carrying out such activities. Since India did not rectify the map, Nepal published its new administrative and political map depicting the Nepali territories of LipuLekh, Kalapani, and Limpiadhura within it.

China

Nepal continued to maintain its bilateral relationship with China in the year 2020. 2020 was marked by the state visit of the Chinese President Xi Jing Ping. The two leaders agreed to continue the momentum of high-level visits and intensify the implementation of the MOU on Cooperation under the Belt and Road Initiative (BRI) within the overarching framework of the Trans-Himalayan Multidimensional Connectivity Network. In addition, during the review year, China continued to remain Nepal's second-largest trade partner with a total bilateral trade volume of NPR 183 billion (MOFA, 2020).

United Kingdom

Nepal-UK 5th Bilateral Consultation Mechanism: The delegations of both the Governments exchanged views over their two-centuries-old friendship and cooperation and reviewed the progress made in various aspects of the bilateral ties, including development cooperation, the British Gurkha matters, cultural relations, people-to-people contacts, and educational cooperation. The two Governments renewed their commitment to collaborating on various matters of common interest at multilateral forums. Both sides will work together to advance the agenda of addressing the impacts of climate change with their substantive engagements in the COP26 and *Sagarmatha Sambaad* (MOFA Press Release, 2020).

Denmark

Nepal-Denmark Bilateral Consultation Mechanism: The meeting discussed bilateral relations and cooperation at the regional and multilateral levels between Nepal and Denmark. They stressed the importance of exchanging high-level visits while encouraging economic partnerships, including trade, investment, technology transfer, renewable energy, and tourism sectors. The two sides would continue to enhance cooperation in culture, education, and people-to-people contact.

Regional Cooperation Initiatives

Annual Ministerial Meeting of the Non-Aligned Movement (NAM)

The Prime Minister reaffirmed Nepal's trust in the Bandung Principles at the 18th NAM Summit. (MOFA, 2020) While highlighting the impacts of COVID-19 on the poorest and most vulnerable countries and peoples, the Prime Minister called for greater international collaboration and support in their recovery efforts.

South Asian Association for Regional Cooperation (SAARC)

In the wake of the COVID-19 pandemic, the SAARC leaders held a video conference on 15 March 2020 to "chalk out a regional strategy to combat the spread of coronavirus and mitigate its impact." (MOFA, 2020) As an immediate response, the leaders agreed to create a SAARC COVID-19 Emergency Fund through voluntary contributions from the Member States. The amount in the consolidated fund has reached USD 21.6 million, with Nepal's contribution of NPR 10 Crores.

Nepal organized a virtual Meeting of the SAARC Ministers of Education/ Higher Education on 'Education sector's response to COVID-19' on 08 October 2020. The meeting assessed the disruption caused in the education sector by the COVID-19 pandemic and depicted the SAARC countries' governments' response to it. Importantly, the meeting deliberated and marked the need for alternative resources and methods to revitalize the sector (MOFA, 2020).

Furthermore, on 24 September 2020, Nepal hosted a virtual Informal Meeting of the SAARC Council of Ministers on the sidelines of the 75th session of the United Nations General Assembly.

This meeting was marked by Nepal's emphasis and urge to the other member states on the need to make SAARC an effective and result-oriented regional organization capable of bringing visible changes in the lives of the peoples of South Asia.

Settlement of Disputes

Following the claims over the land of the Nepali territories of LipuLekh, Kalapani, and Limpiadhura in 2020, Nepal maintained that "boundary issues should be resolved through negotiation based on the treaty, historical documents, facts, and maps" (MOFA, 2020).

International Economic Law

The Asian Development Bank (ADB)

ADB is one of the major financing and development partners of projects running in Nepal. Starting in the year 2020, the Ministry of Finance has been funded by the ADB to analyze the gap in the customs related to international standards and implement a risk-based customs clearance system (2020/2, 2020).

The World Bank (WB)

The World Bank is currently one of the development partners of the ongoing project – the Nepal-India Regional Trade and Transport Project – slated to end in October 2021 (2020/2, 2020).

The International Monetary Fund (IMF)

The IMF was the third-highest disbursing development partner in the reporting year, with disbursements totaling 214 million USD. This amount was provided to the financial reform sector (2020/2, 2020).

Human Rights

Specific Human Rights Incidents

The introduction of the Information Technology Bill in the Parliament of Nepal raised scrutiny and concerns over restricting the enjoyment of freedom of expression (Amnesty International, Nepal, 2020). This is specially sensitized by the arrest of popular artists and the government's intervention in journalists' artistic process and jurisdiction under the pretext of curbing hate speech and defamation.

The year 2020 saw an increment in crimes related to sexual violence. With women and people of different ages being sexually violated, Nepal's human rights discourse took a turn while discussing the obligation to protect the right to live with dignity with the public's outcry of the need for the death penalty (Kamdar, 2020) for severe sexual criminals in Nepal.

State Practice of Asian Countries in International Law

Philippines

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International & Regional Organisations

ILO Convention No. 187: Promotional Framework for Occupational Safety and Health Convention, 17 June 2020

The convention aims to promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases, and deaths by the development, in consultation with the most representative organizations of employers and workers, of a national policy, national system, and national programme.

Each member shall undertake to formulate a national policy to promote a healthy working environment. This shall be done through consultations with organizations of employers and workers.

Joint Ship Manning Group Inc., Petitioner, v. Social Security System, Respondent [***G.R. No. 247471. 7 July 2020***]

The petitioners assailed the constitutionality of Section 9-B of Republic Act No. 11199, (RA 11199), otherwise known as the "Social Security Act of 2018," which mandates compulsory Social Security System (SSS) coverage for overseas Filipino workers (OFWs) on the ground that it violates due process and the equal protection of rights of manning agencies. The Supreme Court denied the petition ruling that Section 9-B of RA 11199 was passed into law to fulfill the country's existing treaty and contractual obligations. The Court noted that in 2006, the International Labor Organization adopted the Maritime Labour Convention (2006 MLC) to establish the minimum working living standards for all seafarers. It provides for the labor rights of a seafarer, including social protection, and the implementation and enforcement of these rights. The Court also noted that the 74th Maritime Session of the International Labor Organization held on 24 September to 9 October 1987, which was participated in by the Philippines, stated that there shall be social security protection for seafarers, including those serving in ships flying flags other than those of their own country. The Court further cited provisions of the 2006 MLC, to which the Philippines is a party, which states that the members therein must provide social security protection to all seafarers.

ASEAN

Five Association of Southeast Asian Nations (ASEAN) agreements entered into force for the Philippines in 2020. One is a new framework agreement, another is a protocol to implement a package of commitments on Air Transport Services, and the other three are amendatory protocols.

The ASEAN Framework Agreement on the Facilitation of Cross Border Transport of Passengers by Road Vehicles intends to promote and develop tourism, investment, trade, and culture exchanges among the ASEAN Member States by facilitating the transport of passengers via road vehicles. The aim of this Agreement is to simplify and harmonize transport, customs, immigration, and quarantine procedures to facilitate the transport of passengers by road vehicles. The implementing protocol is the Protocol to Implement the Ninth Package of Commitments on Air Transport Services under the ASEAN Agreement on Services. With the effectivity of this Protocol, States are duty-bound to accord preferential treatment in air transport services to one another on a Most-Favoured Nation Basis subject to each one's Schedules of Specific Commitments and the Lists of Most-Favoured Nation Exemptions.

The three amendatory Protocols which took effect in 2020 are as follows: the Protocol to Amend ASEAN Trade in Goods Agreement (ATIGA), the Second

Protocol to Amend the ASEAN Comprehensive Investment Agreement (ACIA), and the Third Protocol to Amend the ACIA.

In the First Protocol to Amend ASEAN Trade in Goods Agreement (ATIGA), Article 38 of ATIGA was amended, accepting a good as eligible for preferential tariff agreement which is to be supported by a Proof of Origin in accordance with the Operational Certification Procedures. This amendment addresses simplifying the Operational Certification Procedure for Rules of Origin.

The ASEAN Comprehensive Investment Agreement (ACIA)'s Second Protocol to Amend revised the definition of "Natural Person" (Article 4 subparagraph g). Pursuant to this amendment, paragraph 6 of ACIA Headnote for the List of Reservations is deleted. ACIA's Third Protocol to Amend deleted a reservation made by Thailand under paragraph 8 of the ACIA Headnote for the List of Reservations.

Celeste Ruth L. Cembrano-Mallari

International Relations & Co-operation

Agreement between the Government of the Republic of the Philippines and the Government of the United States of America on Scientific and Technological Cooperation, 3 June 2020

The Agreement will promote scientific collaboration, build relationships between the Philippines' and United States' respective scientific institutions and communities, and provide opportunities for capacity-building and exchange of ideas and information on emerging topics in science and technology, especially in the areas of public health, marine sciences, environmental protection, disaster risk resilience, climate change, renewable energy, and Science, Technology, Engineering, and Mathematics (STEM) education. This serves as the new agreement between the two Governments following the expiration of the 2012 PH-US Agreement on Science and Technology in 2015.

The Parties shall encourage cooperation through appropriate means, including exchanges of scientific and technical information; exchanges, training, and education of scientists and technical experts; the convening of joint seminars and meetings; the conduct of joint research projects; access to scientific and technical facilities; and such other forms of scientific and technological cooperation as may be mutually agreed upon.

Service of Judicial and Extrajudicial Documents

Convention in the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (*Service Convention*), *15 November 1965

The convention aims to create appropriate means to ensure that judicial and extrajudicial documents are brought to the addressee's notice in sufficient time.

The contracting states shall have a designated Central Authority which will receive requests for service coming from other contracting states. The Central Authority of each contracting state shall serve the document or shall arrange to have it served by an appropriate agency either pursuant to its local laws or by a particular method requested by the applicant (unless it is incompatible with the contracting state's local laws).

Rommel J. Casis

International Economic Law

Intellectual Property

Zuneca Pharmaceutical, Akram Arain and/or Venus Arain, M.D. and Style of Zuneca Pharmaceutical, Petitioners, vs. Natrapharm, Inc., Respondent [G.R. No. 211850. 8 September 2020]

Respondent Natrapharm filed a complaint against Petitioner Zuneca, alleging that Zuneca's "ZYNAPS" is confusingly similar to its registered trademark, "ZYNAPSE," and that the confusion is dangerous because these medical drugs are intended for different types of illnesses. Zuneca countered that it has been selling the medical drug under the mark "ZYNAPS" since 2004 and that it was impossible that Natrapharm was unaware of its existence before the latter had registered the name "ZYNAPSE" because Natrapharm and Zuneca had advertised its products in the same publications and conventions. Finally, Zuneca argued that as the prior user, it is the owner of the mark "ZYNAPS."

The Supreme Court held that Natrapharm is the lawful registrant of the "ZYNAPSE" but petitioners are considered prior users in good faith and may continue to use "ZYNAPS." The Court discussed that the lawmakers' intent for the Intellectual Property Code (hereafter "IPC") was to adopt a system of acquiring rights over marks wherein the mode of acquiring ownership is registration. The Court explained that the legislative intent behind the IPC is to abandon the rule that ownership of a mark is acquired through use and

that the country's adherence to treaties brought about this shift to a new system. The Court quoted from legislative records which stated that:

> the Philippines adhered to the Lisbon Act of the Paris Convention for the Protection of Industrial Property (Paris Convention). This obliged the country to introduce a system of registration of marks of nationals of member-countries of the Paris Convention which is based not on use in the Philippines but on foreign registration.

Rommel J. Casis

International Financial Institutions

Memorandum of Understanding between the Anti-Money Laundering Council (AMLC), the Financial Intelligence Unit of the Republic of the Philippines and the Ministry of Finance, Financial Crimes Investigation Board (MASAK) of the Republic of Turkey Concerning Cooperation in the Exchange of Financial Intelligence Related to Money Laundering and Financing of Terrorism, 16 November 2012 and 20 December 2012

The MOU aims at promoting cooperation between the competent authorities of both countries to gather, develop, and analyze information and documents in their possession concerning financial transactions suspected of being related to money laundering or criminal activities connected to money laundering and financing of terrorism, which may be relevant to their investigation and prosecution and subject to their respective national legislations.

Authorities of both Parties will exchange, spontaneously or upon request, available financial intelligence that may be relevant to the investigation by the authorities into financial transactions related to money laundering and financing of terrorism and the persons or companies involved, subject to the requirements for their respective national legislation.

Rommel J. Casis

International Environmental Law

Minamata Convention on Mercury, 2 June 2020

The convention aims to protect human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds.

The parties shall not allow the establishment of new mercury mines and shall phase out existing ones. The parties shall also enact measures to phase out and phase-down mercury use in a number of products and processes; control measures on emissions to air and on releases to land and water; and regulate the informal sector of artisanal and small-scale mining.

Cecilia Therese T. Guiao

Law of the Sea

Fisheries Administrative Order No. 266

Under the Fisheries Administrative Order No. 266, s. 2020 (FAO 266), the Philippines adopted new rules and regulations on the implementation of vessel monitoring systems (VMS) and electronic reporting systems (ERS) for Philippine-flagged commercial fishing vessels. FAO 266 replaced an earlier issuance that dealt with the same matter (FAO 260, s. 2018) and implemented a key provision in the Fisheries Code that requires all vessels to comply with the monitoring, control, and surveillance measures implemented by the Department of Agriculture – Bureau of Fisheries and Aquatic Resources (DA-BFAR). The issuance of these new and more stringent rules on VMS is meant to help the country fulfill its international legal commitments under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western Central Pacific Ocean, and to the regional fisheries management organizations (RFMOs) to which it is a party – the Western Central Pacific Fisheries Commission (WCPFC), the Indian Ocean Tuna Commission (IOTC), and the International Commission for the Conservation of Atlantic Tunas (ICCAT).

One of the objectives of FAO 266 is to "enhance law enforcement to regulate the capture fisheries sector towards achieving long-term sustainability." (Sec. 1(b), FAO 266). It does so by establishing a system that allows government regulators to have as much information as possible on vessel behavior, location, and catch in order to provide the basis for enforcement actions. Thus, FAO 266 requires the phased installation of VMS on all catcher fishing vessels operating in Philippine waters. (Sec. 3, FAO 266) Compliance with this rule is now made a condition for the issuance of fishing vessel licenses or for their renewal. (Sec. 10, FAO 266) A tamper-proof Automatic Location Communicator (ALC) or Mobile Transceiver Unit (MTU) must be installed on board which automatically transmits to the DA-BFAR's Fisheries Monitoring Center the vessel's

identity and position course, speed, and status of the vessels a minimum of 24 times a day. (Secs. 19 and 20, FAO 266) With this information, the DA-BFAR will be able to detect if a vessel is behaving in a suspicious manner warranting further investigation.

No Philippine-flagged fishing vessel will be allowed to engage in any fishing activity without complying with the VMS requirement. Failure to comply with the regulations or tampering with the ALC/MTU will result in the imposition of administrative and criminal penalties under the amended Fisheries Code (Sec. 24, FAO 266).

VMS data acquired under the provisions of the Fisheries Code as implemented by FAO 266 are classified as sensitive technical information subject to rules of strict access. Only authorized DA-BFAR personnel can process the VMS data, and data breaches or unauthorized sharing of the transmitted information can result in serious penalties for the disclosing entity. (Sec. 127, R.A. 10654) However, disclosure of the VMS data to domestic law enforcement agencies and to RFMOs is permitted. FAO 266 also allows the Protected Area Offices and local government units to have jurisdiction over relevant national Marine Protected Areas.

Jacqueline F. Espenilla

Human Rights

Implementation of Human Rights Treaties (*e.g., Domestic Laws and Institutions*)

During the Forty-Fifth session of the United Nations Human Rights Council from 14 September to 7 October 2020, the Philippines authored and sponsored a resolution entitled Technical Cooperation and Capacity-Building for the Promotion and Protection of Human Rights in the Philippines (U.N. Doc. A/HRC/45/L.38), co-sponsored by Nepal and a number of non-member states, [t]aking note of the Philippine Human Rights Situationer which set out the Philippine Government's account of the situation of human rights in the Philippines, including policy measures and responses to key allegations of human rights violations. The resolution also requested the Office of the High Commissioner on Human Rights, with a view to improving the situation of human rights in the Philippines, to provide support for the country through technical assistance and capacity-building in its continued fulfilment of its international human rights obligations and commitments.

Protection under International and Domestic Law

Anacleto Ballaho Alanis Hi, Petitioner, vs. Court of Appeals, Cagayan De Oro City, and Hon. Gregorio Y. De La Pena III, Presiding Judge, Br. 12, Regional Trial Court of Zamboanga City, Respondents [G.R. No. 216425. 11 November 2020]

Petitioner filed a Petition before the Regional Trial Court (hereafter "RTC") of Zamboanga to change his name on his birth certificate, using his mother's maiden name, "Ballaho," in place of his father's surname, "Alanis III." The Supreme Court held that as the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), an international convention to which the Philippines is a party, ensures and protects the fundamental equality between women and men before the law, the petitioner should be allowed to use his mother's maiden name. The Court quoted Articles 2(f) and 5 of CEDAW:

> (f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women;
>
> To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.] (Article 5)

The Court also noted that non-discrimination against women is also an emerging customary norm. Thus, the Court said that the State has the duty to actively modify what is in its power to modify and to ensure that women are not discriminated against.

Specific Human Rights Incidents or Cases – The Rights of Persons Deprived of Liberty during the COVID-19 Pandemic

***Almonte v. People* [G.R. No. 252117. 28 July 2020]**

In the case of *Almonte v. People* (G.R. No. 252117, 28 July 2020), the petitioners who were deprived of their liberty filed a petition asking the Supreme Court to exercise its "equity jurisdiction" and to provide temporary liberty on humanitarian grounds considering the COVID-19 pandemic. They alleged that they are at a greater risk of contracting the illness because they belong to the elderly,

sick, and pregnant population. Additionally, they petitioned to the Court to establish a Prisoner Release Committee to conduct a study and implement the release of prisoners in congested penal facilities.

The Supreme Court ultimately decided that the petition was one for bail, and denied the petition. It held that petitioners were not entitled to bail, as a matter of right, because they were charged with offenses punishable by *reclusion perpetua*. A key point of consideration in the decision and opinions of the Justices of the Supreme Court involved the applicability of the United Nations Standard Minimum Rules for the Treatment of Prisoners or The Nelson Mandela Rules (Mandela Rules) since petitioners were invoking their rights provided by the Mandela Rules. Three Associate Justices of the Supreme Court posited that local laws had expressly adopted the Rules. Justices Estela Perlas-Bernabe, Benjamin Caguioa, and Mario Victor MVF Leonen gave particular attention to the language found in the enabling statute of the Bureau of Corrections, which stated that the safekeeping of inmates shall be in "compliance with established United Nations standards." Justice Leonen went so far as to argue that the principles espoused by the rules have attained the status of *jus cogens* norms. Justice Edgardo Delos Santos, however, took a different view. He argued that the Rules need to be transformed clearly and unequivocally since "compliance with United Nations standards" was worded in such a generic manner that it is silent as to its interpretation.

Michael T. Tiu, Jr.

International Humanitarian Law

Protection of Individuals under International Humanitarian Law

Having an extensive history of armed local resistance and secessionist movements, the Philippines is not a stranger to armed conflict. In recent decades, the Philippines has experienced a rise in incidents involving terrorist groups affiliated with and/or backed by larger, international terrorist organizations. While these terrorist groups often have unclear and inconsistent objectives, their acts frequently involve violence against civilians and state forces, including kidnapping for ransom and murder.

In 2007, the Philippines enacted the Human Security Act (hereafter "HSA"), the country's first legal counterterrorism framework that attempted to address terrorism in a manner consistent with the international community's approach. The HSA, however, proved unable to sufficiently respond to the evolving nature of terrorism, failing its biggest test in 2017 when a local terrorist group began a

five-month-long siege of Marawi City, located in the southern Philippines. Recognizing that terrorism requires a more effective and comprehensive approach that integrates the law with policies addressing the socio-economic drivers of conflict and terrorism, the Philippines in 2020 repealed the HSA and enacted the Anti-Terrorism Act (hereafter "ATL").

Terrorism under the ATL includes acts intended to cause death or serious bodily injury to any person or endangers a person's life; extensive damage or destruction to a government or public facility, public place, or private property; or extensive interference with, damage or destruction to critical infrastructure, with the purpose of intimidating the general public or a segment thereof, to create an atmosphere or spread a message of fear, to provoke or influence by intimidation the government or any international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety (Section 4). It specifically excludes advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety (Section 4).

Unlike the HSA, the ATL specifically provides a Humanitarian Exemption – a mechanism recognized under international security that facilitates the delivery of humanitarian assistance in areas affected by armed conflict, natural disasters, or other forms of emergency. Under Section 13 of the ATL, humanitarian activities of the International Committee of the Red Cross, the Philippine Red Cross, and other state-recognized impartial humanitarian partners or organizations in conformity with International Humanitarian Law, do not fall within the scope of "providing material support to terrorists" as penalized under Section 12. The humanitarian exemption provision also requires "state recognition" on the part of the humanitarian aid provider. While the provision appears to be broad enough to encompass known organizations engaged in providing humanitarian assistance, critics argue that the "state recognition" qualification restricts the ability of less known but bona fide groups to respond to urgent humanitarian crises. This restriction has two potential implications – the risk of principled humanitarian action qualifying as "material support" solely due to non-recognition of the humanitarian actor and the unnecessary restriction on legitimate movement and distribution of provisions to affected communities.

Joan Paula A. Deveraturda

International Criminal Law

Criminal Law; Adoption of a New Definition of Terrorism

On 3 July 2020, the Republic Act No. 11479, entitled "An Act to Prevent, Prohibit and Penalize Terrorism, Thereby Repealing Republic Act No. 9372, Otherwise Known as the 'Human Security Act of 2007'" (Anti-Terrorism Act of 2020), was enacted.

Upon the law's enactment, the Philippines, in Section 4 of the law, adopted a new definition of terrorism as

> an offense committed by any person who engages in acts intended to cause: (a) death or serious bodily injury to any person, or endangers a person's life; (b) extensive damage or destruction to a government or public facility, public place or private property; or (c) extensive interference with, damage or destruction to critical infrastructure; or develops, manufactures, possesses, acquires, transports, supplies or uses weapons, explosives or of biological, nuclear, radiological or chemical weapons; and or by a person who releases dangerous substances, or causing fire, floods or explosions.

Moreover, under the Anti-Terrorism Act of 2020, for an act to constitute terrorism, the

> purpose of such act, by its nature and context, [must be] to intimidate the general public or a segment thereof, create an atmosphere or spread a message of fear, to provoke or influence by intimidation the government or any international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety.

This definition adopts elements of the offense defined in Article 2(1)(b) of the 1999 International Convention for the Suppression of the Financing of Terrorism. Similarly, it mirrors the elements of terrorism provided in Article 2 of the Draft Comprehensive Convention Against International Terrorism, which also contemplates conduct, the purpose of which should be "to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."

This purpose-driven approach changes the results-oriented analysis in the repealed Human Security Act of 2007, otherwise known as the Human Security Act, which provided that the predicate crimes of piracy, rebellion,

murder, coup d'etat, kidnapping, and serious illegal detention, and crimes involving destruction should have been committed and resulted in "sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand."

Criminal Law – International Criminal Court – Preliminary Examination of the Office of the Prosecutor

On 14 December 2020, the Office of the Prosecutor of the International Criminal Court (ICC OTP) released its Report on Preliminary Examination Activities, which included a discussion on preliminary examination of the situation in the Philippines opened by the ICC OTP on 8 February 2018.

In its report, the ICC OTP expressed that it is "satisfied that information available provides a reasonable basis to believe that the crimes against humanity of murder (article 7(1)(a)), torture (article 7(1)(f)) and the infliction of serious physical injury and mental harm as other inhumane Acts (article 7(1)(k)) were committed on the territory of the Philippines." According to the ICC OTP, the information it has gathered and collected revealed the killings of thousands of individuals since the launch of the anti-drug campaign on 1 July 2016, purportedly for reasons related to their alleged involvement in the use or selling of drugs.

The report recalled that on 17 March 2018, the Government of the Philippines deposited, through a Note Verbale, a written notification of withdrawal from the Rome Statute of the International Criminal Court with the UN Secretary-General. Thereafter, in accordance with article 127 of the Rome Statute, the withdrawal took effect on 17 March 2019. This withdrawal, however, does not halt the preliminary examinations of the ICC OTP because the Rome Statute provides that a withdrawing state shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute, and that such withdrawal shall not affect any cooperation with the ICC in connection with criminal investigations and proceedings which were commenced prior to the date on which the withdrawal became effective.

In this context, the ICC OTP is paying close attention to the announcement of Secretary of Justice Menardo Guevarra that an inter-agency panel to reinvestigate deaths that occurred in 5,655 anti-illegal drugs operations has been created. The establishment of this panel, posted on the Department of Justice's website as an article entitled Statement on the Enhanced Interactive Dialogue on Human Rights in the Philippines at the On-Going 44th Session of the United

Nations Human Rights Council in Geneva, Switzerland, was announced during the enhanced interactive dialogue on human rights in the Philippines at the Forty-Fourth Session of the United Nations Human Rights Council in Geneva, Switzerland.

Michael T. Tiu, Jr.

Treaty between the Republic of the Philippines and the Russian Federation on Mutual Legal Assistance in Criminal Matters, 12 March 2020

The objectives of the treaty are to strengthen the legal foundation of providing mutual legal assistance in criminal matters and to improve the effectiveness of activity of both Contracting States in combating crimes, including crimes related to terrorism, through cooperation and mutual legal assistance in criminal matters.

Legal assistance shall be provided in accordance with this Treaty if the offense, in connection with which the request was made is criminally punishable according to the laws of both Contracting States. The Requested State may, upon its own consideration, grant legal assistance even in the case the offense, in connection with which the request was made, is not criminally punishable under its laws. Where a request is made for a search and seizure of evidence, restraint, or confiscation of the proceeds of a crime, the Requested State may render assistance in accordance with its domestic laws.

Legal assistance shall also be granted in connection with investigations or proceedings relating to criminal offenses concerning taxation, customs, and similar duties, international transfer of financial assets, including the ones which to the Requesting State appears to be furthering organized criminal activity and crimes concerning public security.

Treaty between the Republic of the Philippines and the Russian Federation on Extradition, 12 March 2020

The objective of the treaty is to provide for more effective cooperation between the Contracting States in the suppression of crimes by concluding a treaty on the reciprocal extradition of criminal offenders on the basis of mutual respect for sovereignty, equality, non-intervention in the internal affairs of the Contracting States, and for mutual benefit.

The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State have charged with, or convicted of, an extraditable offense.

Rommel J. Casis

State Practice of Asian Countries in International Law

Singapore

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History and Theoretical Approach of Singapore in International Law

Notable Appointments

On 8 May 2020, Darren Tang of Singapore was appointed as the Director-General of the World Intellectual Property Organization (WIPO).

International Relations and Co-operation

Singapore-Indonesia

Singapore and Indonesia signed an Updated Double Taxation Treaty on 4 February 2020. Singapore, Chile and New Zealand signed a Digital Economy Partnership Agreement on 12 June 2020 and Singapore and Australia signed a Digital Economy Partnership Agreement on 6 August 2020.

Singapore's Contribution to International Co-operation on COVID-19

Singapore has been active in international efforts to address the COVID-19 pandemic. Its initiatives include contributing to regional efforts like the COVID-19 ASEAN Response Fund in November 2020; issuing a statement on behalf of ASEAN at the 75th session of the UN General Assembly in October 2020; increasing its assessed contributions to the World Health Organization (WHO) and doubling its voluntary contributions to support WHO health emergencies programs and help strengthen its capacities in the Southeast Asia region; making a contribution to the WHO's Strategic Preparedness and Response Plan for COVID-19 in March 2020; and contributing to the COVAX Advance Market Commitment mechanism to help low and lower-middle income countries to access 2 billion doses of COVID-19 vaccines by the end of 2021 (Gianna Amul and Tikki Pang, COVID-19 and Singapore's Health Diplomacy,' Civil Service College, 29 June 2021).

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Settlement of Disputes

Treaties – The Singapore Mediation Convention

The *United Nations Convention on International Settlement Agreements Resulting from Mediation*, also known as the Singapore Convention on Mediation, was adopted on 20 December 2018, ratified by Singapore on 25 February 2020, and entered into force on 12 September 2020. The Singapore Mediation Convention is the first UN treaty to be named after Singapore after a signing ceremony for the Convention was held in Singapore on 7 August 2019. Singapore worked with the United Nations Commission on International Trade Law and other member States to develop this instrument. The Convention offers a uniform and efficient framework for the enforcement and invocation of international settlement agreements resulting from mediation.

Legislation – Singapore Convention on Mediation Act 2020

The Singapore Parliament passed the Singapore Convention on Mediation Act 2020 on 4 February 2020 which was commenced on 12 September 2020, the same day the Singapore Convention on Mediation entered into force. The Act implements Singapore's obligations under the Singapore Convention on Mediation. The Act permits international mediated settlement agreements to be recorded by the High Court as a court order for enforcement or invocation. The Supreme Court of Judicature (Singapore Convention on Mediation) Rules 2020, a piece of subsidiary legislation that sets out the procedural framework for applications and matters under the Singapore Convention on Mediation, also commenced on 12 September 2020.

Legislation – Amendments to the International Arbitration Act (Cap 143A)

On 5 October 2020, the Singapore Parliament passed a bill to amend the International Arbitration Act (Cap143A) and on 1 December 2020, the International Arbitration (Amendment) Act 2020 came into force. The amendments relate to (1) the powers to enforce confidentiality obligations; and (2) the introduction of a default mode of appointment of arbitrators in multiparty situations.

The amendments reflect Singapore's efforts to continue to cement Singapore as an international arbitral hub.

International Economic Law

Treaties – International Investment Agreement

The Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments signed on 24 September 2019, entered into force on 9 October 2020. The Agreement between the Government of the Republic of Singapore and the Government of Rwanda on the Promotion and Protection of Investments signed on 14 June 2018, entered into force on 16 October 2020.

World Trade Organization

Singapore is one of the 17 World Trade Organization (WTO) Members that has agreed in March 2020 to put into place a Multi-Party Interim Appeal Arbitration Agreement as an alternative system for resolving WTO disputes that are appealed by a Member in the absence of a functioning and staffed WTO appellate body.

Treaties – Free Trade Agreements

The Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP) which came into force on 1 January 2001, was updated on 1 January 2020 with an Upgrade Protocol addressing qualifications for duty-free treatment in certain sectors, streamlining of administrative procedures on release of goods, and improved market access.

Treaties – Regional Free Trade Agreements

Under the ASEAN-Japan Comprehensive Economic Partnership (AJCEP), the trade in services chapter and the investment agreement chapter entered into force on August 2020 (only for Japan, Singapore, Thailand, Lao PDR, Myanmar and Vietnam).

The ASEAN Trade in Services Agreement was signed on 7 October 2020 in Manilla, Philippines. The Agreement deepens the integration of the services sectors and creates a more liberal, stable and predictable environment for service suppliers in the region.

The Regional Comprehensive Economic Partnership (RCEP) Agreement was signed on 15 November 2020. It is a free trade agreement between 15 countries including Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam, Australia, China, Japan, Republic of Korea and New Zealand. RCEP is the world's largest FTA, comprising approximately 30% of the global GDP and about a third of the world's population.

International Environmental Law

Climate Change

On 31 March 2020, Singapore submitted its enhanced Nationally Determined Contribution (NDC) and Long-Term Low-Emissions Development Strategy document to the UN Framework Convention on Climate Change. Singapore's enhanced NDC in 2020 was the first time Singapore adopted an absolute emission target since it submitted its Nationally Appropriate Mitigation Action in 2009. In the 2020 NDC, Singapore, *inter alia*, agreed to enhance its 2030 NDC to peak emissions at 65MtCO2e around 2030; expand the scope of the country's pledge to include a seventh greenhouse gas, nitrogen triflouride within the peak emissions ceiling; and halve emissions from its peak to 33MtCO2e by 2050 with a view to achieving net zero emissions as soon as viable in the second half of the century (Melissa Low and Eric Bea, Singapore's Enhanced 2030 Nationally Determined Contribution and Mid-Century Strategy, Energy Studies Institute, Policy Brief 35, 18 March 2020).

Hazardous Waste

On 1 April 2020, the provisions of the Hazardous Waste (Control of Export, Import and Transit) (Amendment) Act 2020, aimed at improving the administration and enforcement of the Hazardous Waste (Control of Export, Import and Transit) Act, came into force. The 2020 Act gives effect to amendments to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (which takes effect on 1 January 2021). The 2020 Act, *inter alia*, improves the administration and enforcement procedures in the Act and also introduces controls on plastic waste.

Law of the Sea

Model Agreement for the Provision of Facilities for ITLOS

In 2020, Singapore and the International Tribunal for the Law of the Sea (ITLOS) signed a Model Agreement for the Provision of Facilities for ITLOS (the Model Agreement). The Model Agreement, the first of its kind, establishes the terms and conditions under which the Singaporean government shall provide appropriate facilities for ITLOS or a Chamber of ITLOS, to sit or otherwise exercise its functions in Singapore.

State Practice of Asian Countries in International Law

Taiwan

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Territory & Jurisdiction

Authority and Sovereignty over Territory

MOFA Reiterates South China Sea Islands are Part of ROC territory; ROC is Entitled to All Rights over South China Sea Islands and Their Relevant Waters in Accordance with International Law and Law of the Sea

On 24 April 2020, the Ministry of Foreign Affairs of the Republic of China (Taiwan) expressed strong protest and concern over recent unilateral and imprudent actions and statements by countries in the region pertaining to the South China Sea. The ROC government reiterates that the South China Sea Islands are part of the territory of the ROC. It is indisputable that the ROC is entitled to all rights over the South China Sea Islands and their relevant waters in accordance with international law and the law of the sea.

The ROC government urged all parties concerned to exercise restraint and refrain from taking unilateral actions that could elevate tensions in the region. It also solemnly protests and calls for an immediate stop to any actions that infringe upon ROC sovereignty over the South China Sea Islands.

The ROC government maintained that disputes in the South China Sea should be resolved by setting aside differences and promoting joint development. The ROC is willing and able to participate in related consultation mechanisms. Based on the four principles and five actions outlined by President Tsai Ing-wen with regard to the South China Sea, and through negotiations conducted on the basis of equality, the ROC is willing to work with other countries concerned to advance openness, peace, and stability and jointly uphold the freedom of navigation and overflight in the South China Sea.

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The Ministry of Foreign Affairs of the Republic of China (Taiwan) States the Following Position Related to ROC Sovereignty over the South China Sea Islands

On 14 July 2020, The Ministry of Foreign Affairs of the Republic of China (Taiwan) states the following position related to ROC sovereignty over the South China Sea Islands:

1. The South China Sea Islands are part of the territory of the Republic of China. That the ROC is entitled to all rights over the South China Sea Islands and their relevant waters in accordance with international law and the law of the sea is beyond dispute. On July 19, 2016, President Tsai Ing-wen outlined four principles and five actions to deal with South China Sea issues together with the international community.

MOFA hereby reiterates the aforementioned four principles:

   1.1 Disputes in the South China Sea should be settled peacefully in accordance with international law and the law of the sea, including the United Nations Convention on the Law of the Sea (UNCLOS);
   1.2 The ROC should be included in multilateral mechanisms aimed at resolving disputes;
   1.3 States concerned have an obligation to uphold the freedom of navigation and of overflight in the region; and
   1.4 Disputes should be resolved by setting aside differences and promoting joint development. Through negotiations conducted on the basis of equality, the ROC is willing to work with other States concerned to advance peace and stability, as well as protect and develop resources in the region.

2. The government's position concerning sovereignty over the South China Sea Islands and its commitment to peaceful settlement of disputes remain unwavering. We firmly oppose any attempt by a claimant state to resolve disputes in the South China Sea by means of intimidation, coercion, or force.
3. MOFA welcomes statements issued by relevant states adherent to that claims over the South China Sea should be in conformity with international law and norms – including the 1982 UNCLOS – and emphasizing that any claim inconsistent with international law should not be accepted. MOFA also encourages States concerned to include Taiwan in multilateral mechanisms aimed at resolving disputes, jointly safeguarding peace and stability in the region.

Diplomatic & Consular Relations

Establishment of Diplomatic and Consular Relations

On 1 January 1979, the United States government switched its diplomatic recognition from the Republic of China (Taiwan) to the People's Republic of China. Despite the change in diplomatic recognition, the long-standing friendship between the peoples of the United States and the ROC has been maintained and the two countries have attempted to maintain close commercial, cultural and other substantive ties. The Taiwan Relations Act (TRA, H.R. 2479 – 96th Congress (1979–1980)), signed into law by then President Jimmy Carter on 10 April 10 1979, serves as cornerstone of the vital relationship between Taiwan and the United States has continued to the present day.

The enactment of the TRA reaffirmed Taiwan as an important strategic partner of the United States and a linchpin of United States policy in Asia. It clearly states that United States political, security and economic interests are linked to peace and stability in the Western Pacific area. It stipulates that the United States will supply Taiwan with necessary defense articles so that Taiwan can maintain sufficient self-defense capability. The TRA also states that the United States will consider "any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States." (TRA, Section 2.(b)(4)) Under the TRA, if such a scenario were to occur, the United States President would be obliged to immediately notify Congress so that it may determine an appropriate response together with the administration.

In addition to these security elements, the TRA requires that Taiwan be treated as a country under United States law. Specifically, the Act declares that "whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." (TRA, Section 4.(b)(1)) The TRA also enables both countries to set up offices in the territory of the other to handle substantive relations between the two sides. As a result, the United States established the American Institute in Taiwan, which is headquartered in Arlington, Virginia and maintains offices in Taipei and Kaohsiung, Taiwan. For its part, the ROC government established the Coordination Council for North American Affairs (CCNAA), with its main representative office in Washington, D.C. It currently has 12 other offices in Atlanta, Boston, Chicago, Denver, Honolulu, Guam, Houston, Los Angeles, Miami, New York, San Francisco and Seattle. These offices were tasked with performing most of the functions that had previously been carried out by the ROC embassy and

consulates-general. Following the United States' Taiwan Policy Review of 1994, the name of the CCNAA office in Washington, D.C. was changed to the "Taipei Economic and Cultural Representative Office" (TECRO), while the names of all other CCNAA offices in the United States were changed to "Taipei Economic and Cultural Office" (TECO) (TECRO, Taiwan-U.S. Relations).

However, even the United States approach to the relations with Taiwan has remained consistent across decades and administrations. The United States has a longstanding One China Policy, which is guided by the Taiwan Relations Act, the three US-China Joint Communiques (Joint Communiqué of the United States of America and the People's Republic of China (also known as the Shanghai Communiqué, 1972), the Joint Communiqué on the Establishment of Diplomatic Relations of 1 January 1979, and the third communiqué of 17 August 1982 (also known as the August 17th communiqué)), and the Six Assurances which include:

1. The United States would not set a date for termination of arms sales to Taiwan.
2. The United States would not alter the terms of the Taiwan Relations Act.
3. The United States would not consult with China in advance before making decisions about U.S. arms sales to Taiwan.
4. The United States would not mediate between Taiwan and China.
5. The United States would not alter its position about the sovereignty of Taiwan which was, that the question was one to be decided peacefully by the Chinese themselves, and would not pressure Taiwan to enter into negotiations with China.
6. The United States would not formally recognize Chinese sovereignty over Taiwan.

Under such situation, the United States opposes any unilateral changes to the status quo from either side; we do not support Taiwan independence; and we expect cross-Strait differences to be resolved by peaceful means. The United States continues to have an abiding interest in peace and stability across the Taiwan Strait. Consistent with the Taiwan Relations Act, the United States makes available defense articles and services as necessary to enable Taiwan to maintain a sufficient self-defense capability – and maintains the capacity to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of Taiwan (US Department of State, US Relations with Taiwan).

Under such unique diplomatic relations framework, both sides reached another agreement on establishing office in Guam, which is to promote economic and trade cooperation between them. On 3 July 2020, the Ministry of Foreign Affairs of the Republic of China (Taiwan), after consultations with

the United States, announces its decision to reestablish the Taipei Economic and Cultural Office (TECO) in Guam. Preparations are currently underway for the official opening.

The government, due to budget and personnel considerations, deemed it necessary in 2017 to temporarily halt the operation of TECO in Guam. However, MOFA's budget has risen steadily since 2018, Taiwan and the United States have forged an increasingly strong global partnership, and the strategic importance of the Pacific region has continued to grow. Thus, MOFA has decided to reestablish TECO in Guam this year.

The Pacific region has seen key strategic shifts in recent years. In 2018, the United States launched its Indo-Pacific strategy, followed by the Indo-Pacific Strategy Report in 2019, in which the US Department of Defense highlights the strategic importance of the Indian and Pacific Oceans. That same year, the US Department of State published A Free and Open Indo-Pacific: Advancing a Shared Vision. In addition to reiterating the strategic importance of the Pacific Ocean, the report also aligns with Taiwan's New Southbound Policy, which aims to strengthen the comprehensive development of cultural and commercial connections in the Indo-Pacific region. Reestablishing TECO in Guam will facilitate economic and trade cooperation and exchanges between Taiwan and the greater western Pacific region, deepen Taiwan's relations with its Pacific allies, and increase multilateral exchanges.

The government and parliament of Guam, as well as the Taiwan community in Guam, have called on the Taiwan government to reestablish TECO. In 2017 and 2018, then Governor of Guam Eddie Calvo led delegations to Taiwan and conveyed his support for reestablishing TECO to President Tsai Ing-wen, with the view to strengthen bilateral tourism and economic exchanges.

Taiwan's economic and trade relations with Guam have remained steady. Taiwan enterprises, including Lih Pao Construction, Chung Kuo Insurance, First Commercial Bank, Asia Cement Corporation, and China Airlines, have all invested in Guam. Medical tourism from Guam to Taiwan has also gained momentum. Bilateral medical ties have been further enhanced by cooperation between Taiwan's medical institutions, such as Taiwan Adventist Hospital and China Medical University Hospital in Taiwan, and their counterparts in Guam. TECO in Guam will further facilitate bilateral trade and people-to-people exchanges, and provide necessary aid, as well as complete consular services, to ROC citizens traveling to or residing in the territory.

The government of Taiwan currently maintains US offices in Washington, DC, New York, Boston, San Francisco, Los Angeles, Atlanta, Seattle, Houston, Chicago, Honolulu, Denver, and Miami; TECO in Guam will be the 13th office. The reestablished TECO in Guam will help boost bilateral cooperation and

exchanges in fields such as trade, investment, tourism, culture, and education, to the mutual benefit of Taiwan and the United States.

Individuals & Non-State Actors

A Group of 7874 Plaintiffs (Vietnamese Nationals)-Versus-Formosa Plastic Group and Others, the Supreme Court Civil Ruling 109 Tai-Kang-1084, Judgement Delivered on November 11th, 2020

The case was brought by a group of Vietnamese victims against a Taiwan-based multinational corporation, Formosa Plastic Group (FPG). It is also the first case filed against a Taiwan-based multinational corporation for causing massive environmental impact outside the territories of Taiwan. The Vietnamese victims alleged that toxic spills infringe their right to hearth, right to work and right to life of their spouses. The questions of whether Taiwan's courts have jurisdiction to hear the case and whether the Taiwan-based company should be accountable for the said marine pollution in Vietnam are at heart of this case.

In 2016 Formosa Ha Tinh Steel Corporation (FHS), a subsidiary of Formosa Plastic Group (FPG), was accused of discharging toxic waste causing a massive fish kill and marine pollution along the coastal areas of the central province of Ha Tinh in Vietnam. The Vietnamese Department of Labor estimated that the toxic spill had affected the livelihoods of approximately 263,000 people. The marine pollution had jeopardized the fishing and tourism industries in the area. Nearly 40,000 people lost their jobs and a lot of them were forced to leave their hometown to make a living. A significant number of people felt ill due to the consumption of contaminated seafood. FHS admitted its responsibilities for the toxic discharge and later paid the Vietnamese government 500 million in compensation. Nevertheless, very few victims received compensation distributed from the government and some received a small amount of compensation. Their claims for compensation had also been rejected by the Vietnamese court. Meanwhile, protests had been suppressed and activists had been jailed.

After several failure attempts to seek remedies through Vietnamese legal system, a group of representatives of nearly 8000 Vietnamese victims, with the help of several NGOs, took the case to Taiwan and filed a civil tort action against the parent company, Formosa Plastic Group, in 2019. The plaintiffs claimed that the marine pollution damaged their right to health, right to work and right to life based on Vietnamese laws.

On October 5th, 2019, Taipei District court dismissed the case on ground of lack of international jurisdiction (Ruling 108-Chung-Su-674). The court first

explained that the case was considered as a private international civil litigation because it involved foreign elements, Vietnamese nationals and Vietnamese marine areas. Current Taiwan's private international law (Act Governing the Choice of Law in Civil Matters Involving Foreign Elements) does not contain any articles regarding jurisdiction matters, the court hence had to apply Taiwan Code of Civil Procedure by analogy to decide if the court has jurisdiction to hear the case. Second, Article 15(1) of the Taiwan Code of Civil Procedure states that a tort action may be initiated in the court for the location where the tortious act occurred. Article 20 further states that the court for the location of a co-defendant's domicile has jurisdiction over all codefendants except where a court can obtain jurisdiction over the action in accordance with Article 4 through Article 19. In the present case, the court explained that since the tortious act occurred in Vietnam and thus the Vietnam court shall have jurisdiction over the case based on above articles. Third, based on the most significant relationship principle in private international law, the court explained that the case had only a weak relationship with Taiwan except several of the codefendants' business domiciles locate in Taiwan because the accident in fact occurred in Vietnam and the victims were all Vietnamese nationals. In sum, the court decided that Taiwan's court had no international jurisdiction over the case.

The case was then appealed to Taiwan High Court. On March 16th, 2020, the High Court again dismissed the case citing the same reasoning of lack of jurisdiction (Ruling 108-Kang-1466). The plaintiffs re-appealed the ruling to Taiwan Supreme Court. On November 11th, 2020, the Supreme Court held that the High Court erred in the analogy application of Art 20 of the Taiwan Code of Civil Procedure in deciding international jurisdiction of the case and rescind its decision (Ruling 109 Tai-Kang-1084). The case was then reversed and remanded to the High Court awaiting further consideration.

Human Rights

The Organic Act of the Control Yuan National Human Rights Commission

The Organic Act of the Control Yuan National Human Rights Commission was promulgated on January 8, 2020 and effective from May 1, 2020. Article 1 of the Act requires the Control Yuan to establish a National Human Rights Commission for the purpose of implementing constitutional protections of the people's rights, laying a foundation for the promotion and protection of human rights, ensuring the realization of social justice and fairness, and

complying with international human rights standards by adopting universal human rights values and norms. The Taiwan National Human Rights Commission (hereinafter NHRC) was later formally established and began its operation on August 1, 2020.

According to Article 2 of the Act, the NHRC's functions and powers include the followings:

1. To investigate incidents involving torture, human rights violations, or various forms of discrimination in accordance with its authority or in response to petition from the general public, and to handle them and provide remedy according to the law.
2. To study and review national human rights policies and make recommendations.
3. To publish thematic reports on major human rights issues or annual reports on the state of human rights in the nation to understand and assess the domestic human rights situation.
4. To assist government agencies in the signing or ratification of international human rights instruments and their incorporation, and to ensure the conformity of domestic laws, regulations, directives, and administrative measures with international human rights norms.
5. To conduct systematic studies of the Constitution and legal statutes based on international human rights standards in order to propose necessary and feasible recommendations to amend the Constitution, legislation and laws.
6. To monitor the effectiveness of government agencies in promoting human rights education, enhancing human rights awareness, and handling matters involving human rights.
7. To cooperate with domestic institutions and civic groups, international organizations, national human rights institutes, and non-governmental organizations to promote the protection of human rights.
8. To provide independent opinions for national reports submitted by the government in accordance with the provisions of international human rights treaties.
9. Other matters related to the protection and promotion of human rights.

The major task of the NHRC is to ensure all government branches operate in compliance with international human rights requirements, and to prevent government policies or actions from infringing upon human rights. NHRC is also authorized to provide suggestions to the executive, legislative, and judicial branches for their references.

The NHRC consists of 10 members including the president of the Control Yuan and the 7 members of the Control Yuan who qualifies as a researcher

of or person devoted to human rights protection with outstanding reputation, or a person with practical experience related to civil society organizations involved in the promotion and protection of human rights as ex-officio members. The president of the Control Yuan appoints the rest of the 2 members from the members of the Control Yuan. Furthermore, Article 7 the Act entitles the NHRC to establish three divisions to carry out its tasks: Research and Planning Division; Enquiries and Investigation Division; Education and Promotion Division.

Article 6 of the Act stipulates that all NHRC resolutions on matters shall be discussed and deliberated through the NHRC meeting. If the discussions or deliberations involve the scope and the nature of human rights or government obligations regarding human rights, members may refer to the United Nations human rights conventions and other related instruments when necessary.

Taiwan National Action Plan on Business and Human Rights

Taiwan adopted its National Action Plan on Business and Human Rights (NAP) on 10 December 2020. The adoption of the NAP made Taiwan the second country in Asia to take such a measure.

The NAP centers on three main aspects including the government's responsibility to protect human rights, companies' responsibility to respect human rights and access to remedy. The most important actions taken and actions planned are as follows.

The State Duty to Protect Human Rights

In order to ensure the consistency of its human rights policy the government has begun to establish various human rights commission or office at different levels of the government. Even though Taiwan is not yet a member of the United Nations, Taiwan has actively and voluntarily signed and ratified the "International Covenant on Civil and Political Rights," the "International Covenant on Economic, Social and Cultural Rights," the "Convention on the Elimination of All Forms of Discrimination against Women," the "Convention on the Rights of the Child," the "Convention on the Rights of Persons with Disabilities," the "Convention against Corruption," into domestic legislation. Additionally, Taiwan has incorporated the above international conventions into its domestic legislation and prepare national implementation reports for review periodically. Taiwan also works closely with other countries to implement the protection of human rights through international cooperation for the past years. The EU and Taiwan have begun to hold annual consultations on human rights to exchange views on their respective human rights situations and policies and discuss issues of mutual concern since 2018. Taiwan will

continue to adopt international human rights conventions and cooperate with other countries.

The Corporate Responsibility to Respect Human Rights

Taiwanese government has encouraged Taiwanese corporations to adopt internationally recognized corporate social responsibility standards, such as The UN Guiding Principles on Business and Human Rights (UNGPS), the International Labor Organization (ILO) Conventions and the OECD Guidelines for Multinational Enterprises. Since 2014, Listed Companies are required to submit Corporate Social Responsibility (CSR) reports annually. The government will continue to encourage Taiwanese corporations to expand the scope of CSR reports and disclose information regarding environmental, social and governance topics by providing tools and guidance. The government has also pledged to consider the feasibility of enacting new legislations to enhance the protection of human rights and to impose duties on Taiwan-based corporations to the protection of international and domestic human rights.

Access to Remedy

Current Code of Civil Procedure and the Consumer Protection Act offer the mechanism of class action lawsuits to individual victims with affordable channels to seek relief via the judicial system. Several environmental regulations, such as the Basic Environmental Act or Air Pollution Control Act, also allow citizen lawsuits brought against government agencies. With respect to human rights violations outside the territories of Taiwan, currently Article 5 of Taiwan Criminal Code or Article 11 of the Anti-Corruption Act have allowed certain types of human rights infringements to be subject to Taiwan's jurisdiction. Additionally, the Regulation Governing the Handling of Companies' Overseas Investments requires Taiwanese government to review the applicant companies' records of investment activities. If the applicant companies have the records of international treaty violations, the government shall deny the investment applications. In order to offer better access to remedy for foreign victims harmed by Taiwan-related corporations, Taiwan government pledges to work on the questions of extraterritorial jurisdiction regarding the matters of human rights violations and environmental destructions.

State Practice of Asian Countries in International Law

Thailand

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International Relations & Co-operation

Vienna Convention on Road Traffic, 1968

On 1 May 2020, Thailand has become an official party to the Convention on Road Traffic 1968 by ratifying the Convention after having become a signatory party to the Convention on 1 November 1968.

The 1968 Convention on Road Traffic is one of the six core road safety-related UN legal instruments namely: (1) 1968 Convention on Road Traffic; (2) 1968 Convention on Road Signs and Signals; (3) 1958 Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment, and Parts which can be Fitted and/or be Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these United Nations Regulations; (4) 1997 Agreement concerning the Adoption of Uniform Conditions for Periodical Technical Inspections of Wheeled Vehicles and the Reciprocal Recognition of such Inspections; (5) 1998 Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles; and 1957 Agreement concerning the International Carriage of Dangerous Goods by Road (ADR). Apart from the 1968 Convention on Road Traffic, Thailand has signed the 1968 Convention on Road Signs and Signals on 1 November 1968, and also acceded to the 1958 Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts on 3 March 2006.

The 1968 Convention of Road Traffic aims at increasing road safety through internationally agreed on traffic rules and the reciprocal recognition of documents issued in conformity with those rules. The Convention provides rules on all aspects of international road traffic and safety and serves as a reference for national legislation. It also describes all road user behaviour, such as what drivers and pedestrians must do at crossings and intersections, and promotes safe road user behaviour.

According to Article 52 of the Convention, it provides that "Any dispute between two or more Contracting Parties which relates to the interpretation or application of this Convention arid which the Parties are unable to settle by negotiation or other means of settlement may be referred, at the request of any of the Contracting Parties concerned, to the International Court of Justice for decision." Upon ratification, Thailand has made one reservation to this article stating that "The Government of the Kingdom of Thailand [...] declares that in accordance with paragraph 1 of Article 54 of the Convention, the Kingdom of Thailand does not consider itself bound by Article 52 of this Convention."

Kitti Jayangakula

International Economic Law

On 3 June 2020, Thailand signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention) and it became the 137th jurisdiction to join the Convention. This movement manifests the participation in international efforts against tax evasion and avoidance.

This Convention was developed jointly by the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe in 1988 and amended by Protocol in 2010. The Convention enables jurisdictions to engage in a wide range of mutual assistance in tax matters such as exchange of information on request, spontaneous exchange, automatic exchange, tax examinations abroad, simultaneous tax examinations, and assistance in tax collection.

Additionally, the Convention facilitates international cooperation for a better operation of national tax laws while respecting the fundamental rights of taxpayers. It provides for all possible forms of administrative cooperation between states in the assessment and collection of taxes. This cooperation ranges from the exchange of information, including automatic exchanges to the recovery of foreign tax claims. Moreover, it guarantees extensive safeguards for the

protection of taxpayers' rights. It is the primary instrument for swift implementation of the Standard for Automatic Exchange of Financial Account Information in Tax Matters (CRS).

Kitti Jayangakula

Human Rights

Practical Issues in Protecting the Rights to Social Security of Thai Employees during the First Outbreak of COVID-19

Thailand voted to support the Universal Declaration of Human Rights (UDHR) and acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 5 September 1999. Article 22 of the UDHR and Article 9 of the ICESCR recognize the right of everyone to social security, including social insurance. Due to these obligations, it is necessary to provide legal measures to protect 'the rights to social security for Thai employees' in accordance with these two international instruments. However, during the first outbreak of COVID-19 in March 2020, it is difficult to say whether the government provides adequate support to Thai employees in every sector or whether it needs a viable solution for some groups of employees, in particular a group of daily wage worker, freelancers, and platform digital workers.

As the International Labour Organization (ILO) states, 'the right to social security' comprises of four essential aspects: availability, adequacy, affordability, and accessibility. In terms of availability and affordability, the Social Security Office, under the supervision of the Ministry of Labour, plays a vital role in guaranteeing insurance-based schemes for all employees. The Social Security Act B.E. 2537 (1994) requires both employers and employees to contribute to the Social Security Fund on a monthly basis. The maximum rate of contribution is 750 Baht for employees who earn from 15,000 baht per month However, adequacy and accessibility are open to question because there is no clear risk plan for immediate financial assistance to unemployed people and for them to claim their accumulated contribution. Apart from this, freelancers and platform digital workers are needed to register as insured people under the Act. If they are not registered as insured people, they will not be entitled to claim for any contribution.

Thus, Thailand needs to revise both its feasible policy and legal measures to ensure additional support to employees. Policy decisions need to be adapted to future emerging issues. It is necessary to create short and long-term concrete

mechanisms for redress and compensation. At least, all employees should be guaranteed to receive adequate contributions and equal access to the social security system.

Pataramon Satarak

Srisamai Chueachat [Constitutional Court, Decision No. 4/2563, 19 February 2020]

Srisamai Chueachat, a pro-abortion activist, submitted her petition before the Constitutional Court, based on the amended abortion provisions under the Thai penal code. She also claimed that the provisions that criminalize abortion violate the fundamental rights of the women recognized by the Constitution of the Kingdome of Thailand, B.E. 2560 (2017).

According to the petition, Somsamai claimed that Section 301 of the Penal Code, which provides that "Any woman, causing herself to be aborted or allowing the other person to procure the abortion for herself, shall be imprisoned not out of three years or fined not out of six thousand Baht, or both" would violate Section 27 and 28 of the 2017 Constitution, which recognizes the rights and liberties of the people.

Section 27 recognizes that all persons are equal before the law, and shall have rights and liberties and be protected equally under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of differences in origin, race, language, sex, age, disability, physical or health condition, personal status, economic and social standing, religious belief, education, or political view which is not contrary to the provisions of the Constitution or on any other grounds, shall not be permitted. While Section 28 provides that a person shall enjoy the right and liberty in his or her life and person.

In addition, she also alleges that Section 305 of the Penal Code, which provides that: "If the offence mentioned in Section 301 and Section 302, be committed by a medical practitioner, and: (1) It is necessary for the sake of the health of such woman; or (2) The woman is pregnant on account of the commission of the offence as provided in Section 276, Section 277, Section 282, Section 283 or Section 284 the offender is not guilty" (offences relating to sexuality) would also violate Section 28 and Section 77 of the 2017 Constitution, which provide that State should revise laws that are no longer necessary or unsuitable to the circumstances, or are obstacles to livelihoods or engagement in occupations, without delay, so as to abstain from the imposition of burdens upon the public. The State should also undertake to ensure that the public has

convenient access to the laws and are able to understand them easily in order to correctly comply with the laws.

The Constitutional Court delivered its decision on 19 February 2020 by ruling that the abortion law provisions under Sections 301 and 305 of the Penal Code were unconstitutional. Under Section 301 of the Penal Code which deals with abortion, women who seek an abortion face up to three years imprisonment and a fine of up to six thousand Baht, or both. The Constitutional Court ruled that this Section of the Penal Code violates Sections 27 and 28 of the 2017 Constitution which guarantees equal rights for men and women, as well as the right and liberty of everyone to his or her life and person. The court ordered that the provision under Section 301 be invalidated within 360 days of its ruling (no later than 13 February 2021).

While the Court ruled that Section 305 of the Penal Code, the anti-abortion law, that allowed for legal abortion when the pregnancy involves offences relating to sexuality such as rape or endangers a mother's physical health, did not violate the 2017 Constitution, it ordered the amendment of both Sections 301 and 305 in accordance with the realities of the current situation in the country.

Moreover, Thailand is a party to the International Covenant on Civil and Political Rights (ICCPR) and the decision of the Constitutional Court, in this case, reconfirms the implementation of the obligations recognized by the ICCPR which are to respect, protect and fulfill the private right of pregnant women.

As a result, after the ruling of the Constitutional Court, on 17 November 2020, the Government submitted a bill amending the two sections of the Penal Code. According to the new provisions of Section 301, a woman who aborts a fetus that is older than 12 weeks shall be liable to no more than six months in prison and/or a fine of one thousand Baht. Furthermore, the new provisions of Section 305 of the Penal Code provide more situations of legal pregnancy termination such as when the pregnancy puts the mother at risk physically or psychologically; the baby faces a significant risk of developing a physical or mental disorder or disability; the woman has been impregnated due to rape; the mother-to-be is convinced there is no other option; the abortion of a foetus that is older than 12 weeks but not exceeding 20 weeks is approved by a doctor or other health professionals as approved by the Ministry of Public Health.

Kitti Jayangakula

The Enforcement of the Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 (2005)

The government of Thailand, under General Prayuth Chan-Ocha's premiership, declared a state of emergency and promulgated the Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 in response to the transmission of COVID-19 disease on 2 March 2020. COVID-19, a disease leading to a global pandemic crisis, arrived to Thailand in February 2020. The Thai government viewed the spread of disease as an emergency situation to be managed and solved by tightening state measures. They enacted this draconian emergency law for giving them more power to prevent and protect people from the pandemic crisis. The emergency law was then approved to have status as a legal act by the Parliament on 29 July 2005.

The Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 had been enacted on 16 July 2005 by the government under Prime Minister Thaksin Shinawatra for responding to insurgencies in far-southern provinces of Thailand, in parallel with Martial Law Act, B.E. 2457 (1914). This decree has been enacted many times after that incident, including during the COVID-19 crisis.

The Emergency Decree gives the prime minister unchecked power, arbitrarily, restricting the fundamental rights of the people with impunity. Section 5, paragraph 1, provides the prime minister is empowered to declare an emergency situation under the approval of the Council of Ministers if he considers that, under that emergency situation, it is appropriate to use the force of state officers to prevent, suppress and withhold the situation. In addition, section 12, paragraph 1, empowers the competent officials to arrest and detain suspected persons for up to 30 days in secret custody, search private buildings, prohibit people from leaving and forcibly deport aliens out of the country. Under section 18, officials are not under criminal, civil, and administrative liability for the performance of their functions violating people's rights in an emergency situation. This provision leads to the impunity of state officers.

The Emergency Decree prevails over other laws having milder restrictions. It is reflected in section 3(6) of the Public Assembly Act, B.E. 2558 (2015). This section provides that this Act shall not be applied to the public assemblies while the State of Emergency is declared or while the Martial Law is applied.

The rules of The Emergency Decree on Public Administration in Emergency Situation, B.E. 2548, by nature, emphasize the restriction of freedom of expression and assembly. This has been used as the pretext for curbing political assembly protesting against the government rather than imposing measures for limiting the spread of the COVID-19 virus. There were often violent crackdowns

on political demonstrations. Officials disproportionately used less-lethal weapons, such as water cannons, tear gas, and rubber bullets, against unarmed protestors. The protestors were arrested and charged with numerous criminal offenses. Their petitions for bail were often revoked by the court.

The Emergency Decree was extended until the end of the year 2020. The Thai government raises the continuous and chronic situation of the COVID-19 crisis as the justification for the extension of this law. However, although the figures for new cases are very low and the countrywide lockdown is relaxed, they still extend this law for justifying the suppression of political rights.

The Emergency Decree results in violations of rights under the International Covenant on Civil and Political Rights (ICCPR), which Thailand has become a state party since 1997. For example, it restricts people's rights with no regard to necessity and proportionality for achieving purposes and also deprives people of their rights to political participation, freedom of expression, and political assembly. Moreover, it leads to violation of other rights, *e.g.* rights to justice, rights not to be subjected to arbitrarily arrest and detention, rights not to be tortured, rights not to be arbitrarily deported, etc.

Nattawat Krittayanawat

The Dissolution of the Future Forward Party

On 21 February 2020, the constitutional court of Thailand dissolved the Future Forward Party, after accepting the complaint of the Election Committee in 2019, through Decision No. 5/2563. The court ruled violations of the Organic Act on Political Parties, B.E. 2560 (2017) concerning receiving illegal donations from Thanathorn Juangroongruangkit, the party's leader. As a consequence, the Future Forward Party ceased to have political party status and its executives have been banned from political participation for 10 years.

The Future Forward Party was founded in 2018 by politically progressive people, such as Thanathorn Juangroongruangkit and Piyabutr Saengkanokkul. The policy of the party is to eradicate military dictatorship, decentralize state mechanisms and improve socio-economic equality. In the 2019 election, the party won 81 parliamentary seats and became at the forefront of challenging the government under Prime Minister Prayuth Chan-O-Cha. The Election Committee brought the case to the Constitutional Court, contending that the 181.3 million baht funds loaned to the party were over the legal limit of 10 million baht per year and violated Section 66 of the Organic Act on Political Parties, B.E. 2560 (2017). The party was not allowed to present evidence in the court's proceedings, which means that the court ruled the case through insufficient evidence.

The Dissolution of the Future Forward Party violated rights to freedom of expression, association, peaceful assembly, and political participation guaranteed by the International Covenant on Civil and Political Rights (ICCPR), which Thailand has become a party since 1997. Moreover, it violated the right to justice. This court ruling caused the impetus for people to check and balance public policy and administration of government through the parliament mechanism. It is clearly contrary to democratic rule and leaves the government easily using its unchecked power to suppress people. In addition, the court ruling reflects the violation of the right to a fair trial.

Nattawat Krittayanawat

State Practice of Asian Countries in International Law

Vietnam

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Introduction*

The world today stands amid old and new challenges. The escalation of tension in various places in the world threatens regional and international security. Natural disasters and rising sea level continue to raise alarms about climate change. Most notably, the outbreak of the COVID-19 pandemic has put the world at an unprecedented crisis of health and economics. On the bright side, however, new opportunities for cooperation at multiple levels has also arisen.

Against this background, a number of remarkable international legal issues have been drawing attention in Vietnam. In terms of the Law of the Sea, Vietnam continued to promote the negotiation of the South China Sea Code of Conduct (COC), participated in the exchange of submissions to the Commission on the Limits of the Continental Shelf (CLCS) in the South China Sea and issued a number of legal instruments in response to IUU fishing. Regarding Investment and Trade Law, Vietnam has recently joined several bilateral and multilateral free trade agreements with the EU, the United Kingdom and other key partners. Concerning human rights, the issue arises as to whether the measures taken by Vietnam to prevent and control the pandemic conform with its international human rights obligations. The newly adopted Circular on Vietnam's honorary consular officers will also be discussed from an international law viewpoint.

* The opinions expressed in this article are solely those of the authors. They do not purport to reflect the opinions or views of any institution they might be affiliated with.

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Diplomatic & Consular Relations

Law on Consular Relations

On 6 February 2020, the Minister of Foreign Affairs of Vietnam has issued Circular No. 01/2020/TT-BNG on Vietnamese honorary consular officers (Circular 01/2020), which further consolidates the legal framework on Vietnam's honorary consular officers. In accordance with the 1963 Vienna Convention on Consular Relations (1963 Vienna Convention) and the 2009 Law on Overseas Representative Missions of the Socialist Republic of Vietnam, Circular 01/2020 elaborates on the conditions for appointing Vietnam's honorary consular officers, the appointment procedures, their functions and responsibilities.

The 1963 Vienna Convention does not provide a definition of "honorary consular officers," but only distinguishes them from "career consular officers." In that sense, Article 15 of Circular 01/2020 sets out the conditions for appointing Vietnam's honorary consular officers: (1) being a national of Vietnam, the receiving state or a third state; (2) having residence in the receiving state; (3) being socially reputable and financially competent; (4) having clear judicial record; (5) having knowledge about Vietnam and the receiving state; (6) not being governmental officials, public employees of Vietnam or any country and does not receive remunerations taken from the governmental budget of Vietnam or any country.

The first condition on nationality is consistent with Article 22 of the 1963 Vienna Convention, which stipulates that consular officers may have the nationality of the receiving state or a third state with the express consent of the receiving state. The requirement of consent is met through the appointment procedures provided under Article 17 of Circular 01/2020, accordingly the "candidate" must be approved by the Ministry of Foreign Affairs of the receiving state via a diplomatic note.

The functions of Vietnamese honorary consular officers are provided in Articles 7–14 of Circular 01/2020. Accordingly, honorary consular officers may only carry out functions assigned by the Minister of Foreign Affairs, in accordance with the law of Vietnam, the law of the receiving state, and international treaties that the two states are members of and international law. These functions may include issuing Vietnam's passports and travel documents, helping and assisting Vietnamese nationals, acting as notary and civil registrar, etc. – similar to those specified in Article 5 of the 1963 Vienna Convention.

Aside from consular functions, Vietnam's honorary consular officers may exercise professional and commercial activities in the receiving state on the condition that these activities must not interfere with their functions and

responsibilities (Article 4, Circular 01/2020). This is consistent with Articles 57 and 65 of the 1963 Vienna Convention, which implicitly allows honorary consular officers to undertake "for personal profit any professional or commercial activity in the receiving State."

The issuance of Circular 01/2020 is expected to serve as a foundation for the effective appointment and operation of Vietnam's honorary consular officers abroad. Since 1994, Vietnam has appointed 44 honorary consuls in various regions of the world, among whom 32 are still currently active.

International Economic Law

Investment & Trade Law

The most notable recent developments in the investment and trade realm in Viet Nam are the ratification of the EU-Vietnam Investment Protection Agreement (EVIPA) and the entry into force of the EU-Vietnam Free Trade Agreement (EVFTA). After both Parties signed the EVFTA and the EVIPA on 30 June 2019, the former entered into force on 1 August 2020, requiring ratification by Viet Nam and the EU. The latter was subject also to the ratification of all EU member states. The benefits and opportunities envisaged in the EVFTA, therefore, have been offered in the jurisdictions of the parties including eliminating almost all tariffs, reducing regulatory barriers and overlapping red tape, ensuring protection of geographical indications, providing market access to services, public procurement and enforceable mechanisms for the EVFTA rules. The Agreement also promotes responsible trade policy by integrating rules on environmental and labor protection, human rights in the relation with trade issues, transparency and inclusiveness in the decision-making process.

Although the EVFTA's objective is to liberalize and facilitate trade and investment between the parties (Article 1.2), the EVIPA deals separately with protection rules and investment dispute settlement due to the distinct ratification requirements on the side of the EU and its member states.

The EVIPA has been approved at the EU, ratified by Viet Nam and eight out of 27 EU member states. The long negotiation process slowed down the internal approval process in the majority of the EU countries given the general limitation in their regulatory powers and exposure to suits by foreign investors. Nonetheless, the EVIPA represents a more cautious investment deal compared to recent treaties to which Viet Nam has been a party such as the 2019 Comprehensive and Progressive Agreement for Trans-Pacific Partnership

(CPTPP) and 2020 Regional Comprehensive Economic Partnership Agreement (RCEP), especially in terms of the most invoked standard, fair and equitable treatment clause.

Secondly, the RCEP, combining both trade and investment in its scope, having entered into force on 1 January 2022, applies in the jurisdictions of the ten ASEAN countries plus Australia, China, Japan, New Zealand and South Korea. Regarding investment protection, the RCEP overlaps with and thus, mirrors the rules of the ASEAN intra-investment agreement, ASEAN Comprehensive Investment Agreement (ACIA), and those between ASEAN and the all other RCEP parties, except for Japan. Trade liberalization significance of this Agreement lies mainly with converged rules of origins for all the parties and its scope covering China, Japan and South Korea, which have not succeeded in concluding a deal among themselves since the first initiative in 2002.

Thirdly, as a consequence of the UK's exit from the EU, the United Kingdom and Viet Nam signed a bilateral trade agreement on 29 December 2020 – the UKVFTA, which aims to ensure the continuity of the EVFTA and thus replicates the EVFTA rules. The two parties are applying their FTA provisionally from 1 January 2021 pending its entry into force.

Law of the Sea

Progress on the South China Sea Code of Conduct (COC)

The negotiation of the COC continues to be a priority of Vietnam's concern. In 2020 and 2021, the COC negotiation process was affected by COVID-19. However, Vietnam still made efforts to promote and maintain the COC negotiation process. On 12 November 2020, under the Chairmanship of Vietnam, ASEAN leaders agreed to issue the Chairman's Statement of the 37th ASEAN Summit, referring to the South China Sea issue and the COC negotiation process, emphasizing cooperation for "the progress of the substantive negotiations towards the early conclusion of an effective and substantive Code of Conduct in the South China Sea (COC) consistently with international law, including the 1982 UNCLOS within a mutually-agreed timeline." In June 2021, at the Special ASEAN-China Foreign Ministers' Meeting in Celebration of the 30th Anniversary of the Dialogue Relations, the Vietnamese Foreign Minister and his counterparts affirmed building an effective and efficient COC in accordance with international law and UNCLOS. In September 2021, Vietnam and China held the 13th meeting of the Steering Committee for bilateral cooperation between the two States. The Prime Minister of Vietnam emphasized the importance of the COC, promoting the negotiation of a substantive and

effective COC in the South China Sea, in compliance with international law, especially the 1982 United Nations Convention on the Law of the Sea.

In 2022, when the COVID-19 epidemic situation improves, the parties can speed up the negotiation process and reach consensus on differences between the parties regarding the legal nature, geographical scope of application of COC and the roles of countries outside the region.

Extended Continental Shelf Submissions in the South China Sea

The South China Sea is a semi-enclosed sea with diversity in natural resources. In addition, the continental shelf of the South China Sea is a potential resource of oil and gas reserves. The states have competing claims over territory sovereignty over the islands in the South China Sea including: Brunei, China, Malaysia, the Philippines, and Vietnam. One of the main issues in the South China Sea is that the continental shelf claims of states are not clearly defined. In 2009, Malaysia and Viet Nam tried to clarify their continental shelf claims. On 6 May 2009, Vietnam and Malaysia submitted a joint submission to the CLCS relating to the continental shelf in the southern part of the South China Sea. On 7 May 2009, Vietnam submitted a separate submission to the CLCS concerning the continental shelf in the northern part of the South China Sea. The submissions from Vietnam and Malaysia were objected by China and the Philippines by invoking Article 5(a) of Annex I Rules of Procedures of the CLCS. Therefore, the CLCS could not continue reviewing their submission.

After ten years, in December 2019, Malaysia continued submitting its partial submission regarding the South China Sea. Immediately, the submission received objection from China. In Note Verbal No. CML 14/2019 dated 12 December 2019, China requested the CLCS not to consider the submission by invoking Article 5(a) of Annex I. The Philippines also opposed the submission of Malaysia by Note Verbal No. 000192-2020 dated 06 March 2020. It seems that, like the scenario in 2009, the CLCS will not review the submission.

By the Note Verbal No. 22/HC-2020 dated 30 March 2020, unlike China and the Philippines, Vietnam does not object to the CLCS's consideration of Malaysia's submission, however Vietnam opposes China's claims in the South China Sea mentioned in Note Verbal No. CML 14/2019 dated 12 December 2019 and Note verbal No. CML 11/2020 dated 23 March 2020 of China. Vietnam affirms that "the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides the sole legal basis for and defines in a comprehensive and exhaustive manner the scope of their respective maritime entitlements in the East Sea." Other countries also expressed their positions related to China's note verbals, including, the Philippines, Indonesia, Malaysia, the United States, Australia, the UK, France, Germany, Japan and New Zealand.

Responses to Illegal, Unreported and Unregulated Fishing (IUU Fishing)

IUU fishing (illegal, unreported and unregulated fishing) is one of the non-traditional security issues facing Vietnam. In this context, Vietnam has issued resolutions and strategies on sustainable development of the marine economy in association with ensuring defense and security; has implemented many undertakings and policies to support and protect fishermen who legally catch and exploit seafood in the waters under Vietnam's sovereignty as well as prevent Vietnamese fishing boats from violating foreign waters. Accordingly, Vietnam approved the following:

(1) Directive No. 45/CT-TTg dated 13 December 2017 on a number of urgent tasks and solutions to overcome the warning of the European Commission on combating illegal, unreported and unregulated fishing;
(2) Directive No. 17/CT-TTg dated 24 June 2021 of the Prime Minister on inter-sectoral coordination mechanism between departments, ministries, branches and People's Committees of 28 coastal provinces and cities in exchanging and processing information in order to prevent and eventually put an end to the situation of Vietnamese fishing vessels violating regulations on combating illegal, unreported and unregulated fishing in foreign waters;
(3) Decision No. 78/QD-TTg dated 16 January 2018 approving the National Action Plan to prevent, reduce and eliminate illegal, unreported and unregulated fishing by 2025; etc.

Moreover, the Navy, Fisheries Surveillance, Coast Guard, Border Guard, and Directorate of Fisheries of Viet Nam regularly exchange and coordinate with coastal localities in investigating and verifying information on the number of fishing vessels violating foreign waters in order to take measures to manage them according to the law and contributing to improving the effectiveness and efficiency of state management over fishing activities and protecting aquatic resources of Vietnam.

Human Rights

Human Rights in the Context of the Pandemic

Since December 2019, the world has been paralyzed by the COVID-19 virus, causing nearly 400 million cases worldwide and over 5.5 million deaths, according to statistics from the World Health Organization. In preventing and controlling the pandemic, states have enforced various measures, from lockdowns and quarantines to compulsory vaccination. The adoption of restrictive

measures is undoubtedly necessary given the highly contagious nature of the virus, and is consistent with Article 12.2(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which obliges state parties to "take steps … for … the prevention, treatment and control of epidemic … and other diseases."

However, these measures have also called into question several human rights issues. This section will examine the conformity of two measures taken by the Vietnamese government to prevent and control the disease: social distancing and vaccination with its international human rights obligations, in particular under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Social Distancing

Since the outbreak of the pandemic, the Vietnamese government has implemented nationwide social distancing three times, by virtue of the Prime Minister's Directives No. 15/CT-TTg (on March 27, 2020), 16/CT-TTg (on March 31, 2020) and 19/CT-TTg (on April 24, 2020), albeit at different levels of strictness according to the situation in each particular local province.

The application of social distancing arguably interferes with people's civil and political rights as well as with their economic, social and cultural rights. In terms of civil and political rights, social distancing may restrict the right to freedom of movement (Article 12 ICCPR), right of peaceful assembly and freedom of association (Articles 21, 22 ICCPR), right to freedom of conscience and religion (Article 18 ICCPR) with the suspension of religious activities in public. However, these rights may be subject to restrictions necessary to protect certain legitimate public interests, including public health (Articles 12.3, 21 and 22.2 ICCPR). In Vietnam, social distancing is implemented for the legitimate objective of protecting public health.

Regarding socio-economic and cultural rights, social distancing severely affects the livelihoods of the people, threatening their rights to work (Article 6 ICESCR) and their adequate standard of living (Article 11 ICESCR). The right to education is also arguably affected as schools were forced to close (Article 13 ICESCR). However, as noted by the UN Economic and Social Council (ECOSOC) in their Statement on the coronavirus disease (COVID-19) pandemic dated 6 April 2020, the abovementioned rights could be limited by emergency measures taken to combat the public health crisis posed by COVID-19, as long as these measures are "necessary," "reasonable and proportionate," and "be lifted as soon as they are no longer necessary for protecting public health." Firstly, social distancing was necessary and has indeed been proven effective in controlling the disease; the measure was also proportionate as it was enforced only

to the extent necessary for controlling the pandemic, and was lifted as soon as the caseloads and mortality rate were in control. Secondly, the restriction caused by social distancing was alleviated by the use of technology that allowed remote work and education.

Furthermore, as a state party to the ICESCR, Vietnam is only obliged to "[take steps], individually and through international assistance and co-operation, [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means" (Article 2.1 ICESCR). In the context of the pandemic, this obligation means that states "must make every effort to mobilize the necessary resources to combat COVID-19 in the most equitable manner, in order to avoid imposing a further economic burden on [the] marginalized groups" (ECOSOC Statement of 6 April 2020). In the case of Vietnam, a rescue package of approximately USD 2.6 billion was issued in the framework of its National COVID-19 Response Plan to support the most vulnerable and workers who have lost jobs and impacted enterprises with low interest credit to pay workers' salaries.

The measure of social distancing was part of Vietnam's "zero-COVID" strategy during the first and second waves of the pandemic. However, with the complicated developments of COVID-19 and the dual goals of containing the pandemic and promoting economic growth, Vietnam has gradually shifted to a more flexible policy of re-opening and "adaptati[ng] to the new normal" through an intensive nationwide vaccination campaign.

Vaccination

Despite the initial shortage of vaccines, Vietnam has risen to become among the six countries with the highest vaccination coverage in the world thanks to its vigorous "vaccine diplomacy." To date, over 99 percent of the 18-and-over-year-old population have received at least one shot of vaccine and 90 percent of them have received two doses.

Article 12 of the ICESCR envisages "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." To achieve the full realization of this right, member states are required to take measures necessary for "the prevention, treatment and control of epidemic, endemic, occupational and other diseases." Vaccination, as a proven effective measure for the prevention and control of the COVID-19 pandemic, is undoubtedly in compliance with this Article.

Furthermore, the right to the enjoyment of the highest attainable standard of health contains "the right to control one's health and body, [...], and the right to be free from interference, such as the right to be free from torture,

non-consensual medical treatment and experimentation" (ECOSOC, General Comment No. 14 dated 11 August 2000). Consent for medical treatment is thus an aspect of the right to health.

The vaccination campaign in Vietnam fully complies with this requirement. Unlike a number of countries that apply strict "compulsory vaccination" or "vaccination pass," Vietnam does not implement obligatory vaccination for the whole population, despite its ambitious vaccination goal and active implementation. According to the procedure of vaccination issued by the Vietnam's Minister of Health (Decision No. 3588/QD-BYT of the Minister of Health dated 26 July 2021), people must be advised about the side effects of vaccines and express their consent in writing before being inoculated. This practice guarantees the consent of the subject before the treatment is given.

Conclusion

The overview of the above international legal issues, though far from complete, shows the significant role that international law plays in Vietnam. It serves as both as a means and a foundation for Vietnam in its international integration and cooperation, while protecting its national sovereignty, the rights and interests of the state itself and of its people. Furthermore, as a responsible member of the international community, Vietnam has been actively participating in the construction of international law, at the national, regional and international level, in addressing issues of common interest. This is expected to be the stance that Vietnam will take in the years to come.

Literature

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Book Review

Luke Nottage, *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Cheltenham, UK: Edward Elgar Publishing, 2021) 407 pp.

This book is a collection of previously published articles, discussion papers and book chapters on international commercial and investment arbitration in Japan and Australia. The monograph is bookended by introductory and concluding chapters, both of which are original. Each chapter has been updated by their author, Professor Luke Nottage, who is a Professor of Comparative and Transnational Business Law at Sydney Law School, and is a well-known English-speaking scholar of Japanese and Asia-Pacific international commercial and investor-State arbitration. The choice of the two jurisdictions thus arises from Prof. Nottage's expertise and provides an opportunity to explore the similarities and differences between these two jurisdictions at the "periphery" of international arbitration.

The chapters are tied together around two overarching themes which serve as a barometer to measure the evolution of international arbitration. These themes or tensions are (1) globalization versus local/national idiosyncrasies, and (2) formalization versus informalization, which Prof. Nottage calls glocalisation and (in)formalization, respectively. Throughout the book, the author's concern for reducing costs and delays in international arbitration also provides a further indicator by which to gauge developments and potential reforms, as Prof. Nottage takes the view that they would be reduced by a more global and informal approach.

The aim of this book is to trace the trajectory of both international commercial arbitration and investor-state arbitration, focusing on Japan and Australia in their regional and global contexts. This book is divided into three parts, comprising a total of 12 chapters, addressing in turn (1) international commercial arbitration in Japan and Australia, (2) crossovers between commercial and investor-state arbitration, and (3) investor-state arbitration and investment treaties.

In Chapter 1, Prof. Nottage posits that although international arbitration was first quite informal and global, it became increasingly formalized under the

influence of the common law tradition, following which there was pushback towards more informal and faster arbitration in the 1990s, while we have seen in the past 10–15 years a resurgence of costs and delays. In his view, the growing influence in international arbitration of large US law firms in the 1970s and UK law firms in the 1980s has been and remains a leading cause of increased formalization, costs and delays.

The author takes an analytical, historical and sociological approach in Chapters 2 and 3, exploring the interactions between international arbitration and the *lex mercatoria*. The author also considers a dozen of the most important issues or "pressure points" in international arbitration, from the use of Arb-Med and the practice of caucusing, to *ex parte* interim measures.

Chapter 4 is dedicated to Japan's Arbitration Law of 2003. Prof. Nottage notes that the impetus for Japan's new Arbitration Law, which applies to both domestic and international arbitrations seated in Japan, was mainly domestic. The author reports that it came about as part of a revamp of the civil and criminal justice landscape around 2001–2004, aiming to move from *ex ante* regulation by public authorities towards more indirect socio-economic ordering through *ex post* relief. Accordingly, the 2003 Arbitration Act had little direct impact on the number of arbitrations in Japan. Prof. Nottage reports that the Japanese court decisions on arbitration are generally internationalist and demonstrate a pro-arbitration spirit, and thus are not in his opinion a reason for the low number of arbitrations seated in Japan. Rather, Prof. Nottage points to ongoing structural and institutional barriers, including a comparative lack of dynamism of key arbitration centres, especially in their international engagement, rather than some general "cultural" aversion to formal dispute resolution and confrontation. In addition, he considers that the Japanese government was comparatively unenthusiastic about arbitration throughout the 1990s compared to other Asian countries. Prof. Nottage also reports that when Japanese companies include an arbitration clause in their contracts, they have historically chosen to seat their arbitrations outside of Japan. These arbitrations are thus administered pursuant to the rules of arbitral institutions situated within the "centre" of international arbitration which continue to benefit from their first mover advantage, i.e. the ICC in Paris, the LCIA in London, and the AAA in New York, as well as economies of scale and other practical advantages. Ultimately, Prof. Nottage fears that the renewed interest in promoting international arbitration in Japan since 2017 may be too little, too late, not unlike other jurisdictions on the "periphery," noting that Korea is a strong contender within the region.

In Chapter 5, the author examines the 2010 reforms of Australia's International Arbitration Act, which incorporated most of the 2006 revisions to the UNCITRAL Model Law, as well as other reforms aimed at better positioning

Australia as an arbitral venue in the Asia-Pacific region. Prof. Nottage identifies certain areas for potential reforms, but also argues that Australia will need to work particularly hard to gain back the ground that has been lost to other regional venues, in particular Singapore and Hong Kong. He also finds it disappointing that the number of cases being contested across Australian courts has remained quite high. The author concludes that although Australian legislation and case law have gradually become more internationalist and pro-arbitration, the approach of law reformers and various Australian courts remains quite conservative and reveals the enduring influence of some ambivalence towards international arbitration.

Chapters 6 and 7 turn to the topic of investor-state arbitration. Prof. Nottage explores its evolution and recounts that although investment arbitration cases grew in the second half of the 1990s, especially under Chapter 11 of NAFTA, the real explosion of cases was around 2000, arising from a dramatic increase in worldwide foreign direct investment since the fall of the Berlin Wall and from the conclusion of many free trade agreements and bilateral investment treaties. Fierce criticism raged in Australia following Philip Morris Asia's challenge to tobacco plain packaging legislation. Although concerns over delays and costs also apply to commercial arbitration, investor-state dispute settlement (ISDS) bears the brunt of the criticism given the policy decisions and public interests involved, as well as what the author describes as greater transparency in comparison to commercial arbitration. Prof. Nottage makes a counter-intuitive suggestion that treaty-based investor-state arbitration may eventually exert some counterbalancing influence through its increased transparency, while it also risks promoting further formalization. These chapters illustrate the use of Prof. Nottage's framework of globalization and formalization in advancing the scholarship on Japan's policy, practices and approaches to ISDS, which remains limited.

Chapter 8 focuses on the tension between confidentiality and transparency. Prof. Nottage asserts that confidentiality is particularly important in Asia, even though it is not automatically provided for in Japan's Arbitration Law. This lacuna is however easily remedied by the use of an arbitral institution's rules, such as the JCAA's arbitration rules. Among others, the author argues that we should not simply transpose the transparency available in investor-state arbitration to commercial arbitration. This is because while confidentiality has the disadvantage of exacerbating information asymmetry, among others making it harder for clients to assess specific arbitrators and lawyers, confidentiality conversely allows arbitrators to be more firm in managing proceedings.

In Chapter 9, the author discusses Australia's policy shift away from investor-state arbitration in 2011–2013, when Australia announced that it would no longer include in future treaties, even with developing countries, clauses which

allow investors to initiate arbitration claims directly against host states for illegally interfering with cross-border investments. This was then reversed following the Gillard government's loss of Australia's elections in 2013. Prof. Nottage posits that a large shift away from investor-state dispute settlement would indicate a more idiosyncratic, nation-centric rather than global approach. Moreover, the author opines that a domino effect from Australia's policy would undermine the 'bottom-up' or 'step-by-step' approach towards developing a harmonized framework for protecting cross-border investment, which had been slowly emerging after 'top-down' multilateral initiatives foundered in the late 1990s.

Chapters 10 and 11 focus mainly on Australia and address in turn the lack of an investor-state arbitration clause in the Japan-Australia Free Trade Agreement, as well as ISDS policy and practice in Australia since 2011.

In the last chapter, Prof. Nottage reflects on the impact of COVID-19 and discusses potential ways to foster cooperation, bilaterally and regionally, between all stakeholders of international arbitration. With regard to its impact on arbitral seats in the Asia-Pacific region, Prof. Nottage suggests that certain seats may become more popular if their local courts are capable of holding virtual hearings and managing proceedings remotely. Prof. Nottage values collaboration as a way of promoting informal and global approaches to arbitration, and identifies among others that there is a place for greater collaboration among judges to continue promoting internationalist interpretations of arbitration statutes based on the UNCITRAL Model Law, in particular with a view to promote interpretations that would help reduce costs and delays to restore a more informal approach to arbitration. By way of example, Prof. Nottage reports that Japanese judges are less prone to speak at or attend major international arbitration conferences, in comparison to Australian judges. Prof. Nottage concludes the book by suggesting that in the event that key regional venues within Asia would be displaced or eclipsed, especially given the geopolitical tensions around Hong Kong, more remote venues such as Japan and Australia would have a new opportunity to become attractive hubs for international arbitration.

Despite the drawbacks inherent in compiling previous publications dating back twenty years, which may have overlap or be unevenly amenable to being updated, the depth of Prof. Nottage's knowledge of arbitration in Japan and Australia is impressive and draws on decades of academic research, involvement in the field and experience. By bringing together in a coherent framework and updating these peer-reviewed publications, Prof. Nottage continues his contribution to the Western-language academic scholarship on the evolution of Japanese commercial and investor-state arbitration.

While each chapter can be perused individually, reading the book from cover to cover offers a helpful panorama of some of the most important dynamics in international arbitration. Beyond the two jurisdictions, Prof. Nottage also makes normative arguments of general application, including on the potential influence of investor-state arbitration on commercial arbitration. This book will be valued by academics, lawyers and policy makers with an interest in the evolution of Japanese or Australian arbitration law and policy in their regional, global, historical, political, and sociological contexts, as a treasure trove of information presented in a useful doctrinal and interdisciplinary framework.

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International Law in Asia: A Bibliographic Survey – 2020

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 2020 or those that were previously published but had updated editions and were republished in 2020 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. Sovereignty and Decolonisation
3. International Dispute Settlement
4. Arbitration
5. Development
6. Corporate Law and Competition Law
7. Investment Law and Insolvency Law
8. Laws on Intellectual Property and Technology
9. Environmental Law
10. Human Rights
11. Migration, Refugees and Refugee Law
12. International Humanitarian Law, Criminal Law, and Transnational Crime
13. Law of the Sea
14. Maritime Law
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DILA Events

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2020 DILA International Conference and 2020 DILA Academy & Workshop

The 2020 DILA International Conference entitled "Reshaping International Law in the Asian Century" was originally to be held on October 22 to 24, 2020 in Jeonju, Korea. However, due to the COVID-19 pandemic, the conference was postponed to February 25, 2021 and held online.

The conference opened with welcome addresses by Seokwoo Lee, Chairman of DILA-Korea and Professor of International Law at Inha University Law School, and Hikmahanto Juwana, Chairman of The Foundation for the Development of International Law in Asia (DILA) and Professor of International Law, Faculty of Law of the Universitas Indonesia.

Session one of the conference was entitled "Ocean and Territory" and was chaired by Dustin Kuan-Hsiung Wang, Professor at National Taiwan Normal University. The first presenter was Arron N. Honniball, Research Fellow at the Centre for International Law, National University of Singapore, who discussed his paper "Traditional Fishing Rights and a Customary Law Right of Access to Port: Arbitral Awards from Eritrea – Yemen to the South China Sea." The second presenter was Ravi Prakash Vyas, Assistant Professor at Kathmandu School of Law who presented on "China, Sovereignty and Changing International Legal Order – Implications for the Future."

Session two was on the "Enviroment" and chaired by David Ong, Professor of International and Environmental Law at Nottingham Law School. Le Thi Anh Dao, Lecturer at Hanoi Law University, delivered a presentation on "Building an Agreement on BBNJ: Which Position for Asian States?" Afterwards, Dyan Franciska Dumaris Sitanggang, Lecturer at the Faculty of Law, Parahyangan Catholic University shared on the topic of "From Asia for the International Community: The Law on Waste Managemen in the Pursuit of Environmental Justice."

Kevin YL Tan, former Chairman of DILA and Adjunct Professor at the Faculty of Law, National University of Singapore chaired session three on "Human Rights." The first presenter was Nguyen Thi Hong Yen, Head of Public International Law Division at Hanoi Law University, who shared on "Challenges in Ensuring the Human Rights of Vietnamese Laborers Migrating to Other Countries in the Globalization Background – The Two Sides of the International Integration." Amritha V. Shenoy, Assistant Professor at Kathmandu School of Law, followed with a presentation on "TNCs and International Law in History: A Case Study of the English East India Company."

The final session on "Trade, Investment, and Other Issues" was chaired by Ravindran Rajesh Babu, Professor at the Indian Institute of Management Calcutta. The first presenter, Shahrizal M Zin, who is Senior Lecturer at the Faculty of Law, University Technology MARA (UiTM), discussed "Reforming the Investor-State Dispute Settlement (ISDS) through Treaty Substantive Rules: The Case for Asia." This was followed by a presentation by Ratna Juwita, Ph.D. Candidate in the Department of Transboundary Legal Studies, Faculty of Law, University of Groningen, who presented on "The New Anti-Corruption Law in Indonesia: The Contribution to the Development of International Anti-Corruption Law."

The conference came to a close with final remarks and wrap up by Hikmahanto Juwana and Seokwoo Lee and Hee Eun Lee, Associate Dean and Professor at Handong International Law School.

Seokwoo Lee
Co-Editor-in-Chief

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Co-Editor-in-Chief