

2020
DILA INTERNATIONAL CONFERENCE [ONLINE]

2020 DILA INTERNATIONAL CONFERENCE [ONLINE]
**RESHAPING INTERNATIONAL LAW
IN THE ASIAN CENTURY**

DATE: FEBRUARY 25, 2021 (THURSDAY)

CO-HOSTED BY:

THE FOUNDATION FOR THE DEVELOPMENT OF INTERNATIONAL LAW IN ASIA (DILA)
THE DEVELOPMENT OF INTERNATIONAL LAW IN ASIA-KOREA (DILA-KOREA)
THE INSTITUTE FOR LEGAL STUDIES OF INHA UNIVERSITY, KOREA

HERE ARE THE ZOOM DETAILS:

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FEBRUARY 25, THURSDAY

13:00 - 13:10 WELCOME ADDRESSES AND OVERVIEW OF THE PROJECT

- **Seokwoo LEE** (Chairman, The Development of International Law in Asia-Korea (DILA-KOREA); Professor of International Law, Inha University Law School, Korea; Co-Editor-in-Chief, *The Asian Yearbook of International Law*)
leeseokwoo@inha.ac.kr
- **Hikmahanto JUWANA** (Chairman, The Foundation for the Development of International Law in Asia (DILA); Professor of International Law, Faculty of Law, Universitas Indonesia, Indonesia)
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13:10 – 14:10 SESSION 1: OCEAN AND TERRITORY

13:10 – 13:40 CHAIR AND COMMENTATOR:

- **Dustin Kuan-Hsiung WANG** (Professor, National Taiwan Normal University, Taiwan)
khwang.ac@gmail.com

SPEAKERS:

- **Arron N. HONNIBALL** (Research Fellow, Centre for International Law, National University of Singapore, Singapore)
: “Traditional Fishing Rights and a Customary Law Right of Access to Port: Arbitral Awards from Eritrea – Yemen to the South China Sea”
cilhan@nus.edu.sg
- **Ravi Prakash VYAS** (Assistant Professor, Kathmandu School of Law, Nepal)
: “China, Sovereignty and Changing International Legal Order – Implications for the Future”
rva1251@uni.sydney.edu.au

13:40 - 14:10 DISCUSSION

14:10 – 15:10 SESSION 2: ENVIRONMENT

14:10 – 14:40 CHAIR AND COMMENTATOR:

- **David ONG** (Professor of International and Environmental Law, Nottingham Law School, UK)
davidm.ong@ntu.ac.uk

SPEAKERS:

- **LE Thi Anh Dao** (Lecturer, Hanoi Law University, Vietnam)
: “Building an Agreement on BBNJ: Which Position for Asian States?”
anhdaole.hlu@gmail.com
- **Dyan Franciska Dumaris SITANGGANG** (Lecturer, Faculty of Law, Parahyangan Catholic University, Indonesia)
: “From Asia for the International Community: The Law on Waste Management in the Pursuit of Environmental Justice”
dyanfranciska@unpar.ac.id

14:40 – 15:10 DISCUSSION

15:10 – 16:10 SESSION 3: HUMAN RIGHTS

15:10 – 15:40 CHAIR AND COMMENTATOR:

- **Kevin YL TAN** (Former Chairman, The Foundation for the Development of International Law in Asia (DILA); Senior Consultant Editor, *The Asian Yearbook of International Law*; Adjunct Professor, Faculty of Law, National University of Singapore, Singapore)
kevin@equilibrium.com.sg, drkevintan@gmail.com

SPEAKERS:

- **NGUYEN Thi Hong Yen** (Head of Public International Law Division, Hanoi Law University, Vietnam)
: “Challenges in Ensuring the Human Rights of Vietnamese Laborers Migrating to Other Countries in the Globalization Background
- The Two Sides of the International Integration”
Hongyennyuyen.hlu@gmail.com
- **Amritha V. SHENOY** (Assistant Professor, Kathmandu School of Law, Nepal)
: “TNCs and International Law in History: A Case Study of English East India Company”
amy.shenoy@gmail.com

15:40 – 16:10 DISCUSSION

16:10 – 17:10 SESSION 4: TRADE, INVESTMENT, AND OTHER ISSUES

16:10 – 16:40 CHAIR AND COMMENTATOR:

- **RAVINDRAN Rajesh Babu** (Professor, Public Policy and Management Group, Indian Institute of Management Calcutta, India)
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SPEAKERS:

- **Shahrizal M ZIN** (Senior Lecturer, Faculty of Law, University Technology MARA (UiTM), Malaysia)
: “Reforming the Investor-State Dispute Settlement (ISDS) through Treaty Substantive Rules: The Case for Asia”
mzinshahrizal@yahoo.com
- **Ratna JUWITA** (Assistant Professor, Faculty of Law, Universitas Atma Jaya, Indonesia; Ph.D. Candidate, Department of Transboundary Legal Studies, Faculty of Law, University of Groningen, the Netherlands)
: “The New Anti-Corruption Law in Indonesia: The Contribution to the Development of International Anti-Corruption Law”
r.juwita@rug.nl

16:40 - 17:10 DISCUSSION

17:10 - 18:00 WRAP UP

- **Seokwoo LEE** (Chairman, The Development of International Law in Asia-Korea (DILA-KOREA); Professor of International Law, Inha University Law School, Korea; Co-Editor-in-Chief, *The Asian Yearbook of International Law*)
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SESSION 1

OCEAN AND TERRITORY

Arron N. HONNIBALL

Research Fellow, Centre for International Law, National University of Singapore, Singapore

“Traditional Fishing Rights and a Customary Law Right of Access to Port:
Arbitral Awards from Eritrea – Yemen to the South China Sea”

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INHA LAW SCHOOL

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

Arron N. Honniball

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

Abstract

The *South China Sea Arbitration Award* reaffirmed the longevity of historic fishing rights within the territorial sea. Historic fishing rights are not absolute and may be reasonably regulated by the coastal state. While the Arbitral Tribunal found it was ‘not necessary to explore the limits on the protection due in customary international law’, it may nonetheless be pertinent to review existing jurisprudence for examples of the limits thereof. The *Eritrea/Yemen Arbitration Award* provides an interesting example whereby fishers exercising historic fishing rights also had an ‘associated right’ of access to port. This article contextualises *Eritrea/Yemen Award* on access to port within the general international law on port state jurisdiction. Academic consensus currently holds that, bar the narrow *force majeure* or distress exception, there is no customary law right for vessels to access foreign ports. This article therefore demonstrates that at least a second customary law right of access to port operates as an exceptional limitation to the otherwise largely unfettered jurisdiction of port states in the law of the sea to regulate access to port. In short, the *Eritrea/Yemen Award* on access to port represents a unique –but largely overlooked– contribution to the scope of port state jurisdiction.

Keywords:

Historic fishing rights, associated rights, port state jurisdiction, port access, bilateral customary law.

1. Introduction

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

This article therefore proceeds with Section 2 first charting the lack of any generally applicable right of access to foreign ports in the law of the sea. The only widely accepted customary exception concerns vessels in distress, or a situation of *force majeure*, where access to port is necessary to preserve human life. Section 3 then introduces the scope of historic fishing rights post-UNCLOS, and more specifically the recognition of 'associated' rights in the case of *Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea (Eritrea/Yemen Award)*.¹ Importantly, an explicit example that shall refine the conclusions of Section 2 is the possible associated right of access to port for historic fishers. The conclusion places this finding within its wider international law context, namely as an affirmative example of bilateral or regional customary international law.

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

¹ The Eritrea-Yemen Arbitration, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), PCA Case No 1996-04 (1999).

apply. Further refinements beyond the scope of this article, such as international trade law or health regulations, may also apply.²

2. Foreign Vessels Access to Port in the International Law of the Sea³

A foreign vessel's right of access to port would operate as a limitation to the otherwise applicable jurisdiction of port states. A port state is a state which can or does exercise jurisdiction over foreign vessels visiting one of its ports. Analysing access rights therefore predicated a brief review of what 'port' encapsulates, as well as the port state jurisdiction potentially affected.

a. Ports

In common parlance ports are defined by synonyms or common features, such as a harbour, wharf, or seaport. Fishing ports are even more diverse, sometimes lacking any port facilities normally associated with shipping. For example, fishing ports may include beach landing spots. The *United Nations Convention on the Law of the Sea* (UNCLOS) refers to ports without definition.⁴ The *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (PSMA) defines ports as including analogous "offshore terminals and other installations"⁵ where port services are available. Therefore, ports are

² Immigration, customs, quarantine and health restrictions, TREATY BETWEEN AUSTRALIA AND THE INDEPENDENT STATE OF PAPUA NEW GUINEA CONCERNING THE MARITIME BOUNDARIES IN THE AREA BETWEEN THE TWO COUNTRIES, INCLUDING THE AREA KNOWN AS TORRES STRAIT, AND RELATED MATTERS, OPENED FOR SIGNATURE 18 DECEMBER 1978, 1985 ATS 4 (ENTERED INTO FORCE 15 FEBRUARY 1985), Article 16. Implemented since February 2020 in response to COVID-19, including restrictions on cross-border movement.

³ This part 2 builds on parts 1.2.1 and 4.2.1-4.2.3 of the author's PhD thesis; Arron N. Honniball, *Extraterritorial Port State Measures: The basis and limits of unilateral port state jurisdiction to combat illegal, unreported and unregulated fishing*, March 13, 2019, <http://dspace.library.uu.nl/handle/1874/375223>.

⁴ UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, OPENED FOR SIGNATURE 10 DECEMBER 1982, 1833 UNTS 3 (ENTERED INTO FORCE 16 NOVEMBER 1994), Articles 11, 18(1).

⁵ AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING, OPENED FOR SIGNATURE 22 NOVEMBER 2009, UNTS No 54133 (ENTERED INTO FORCE 5 JUNE 2016), Article 1(g).

simply locations equipped to enable vessels to visit a state and/or access port services. This definition is without prejudice to the existence of any specific infrastructure or port services.

For international lawyers this broad definition is sufficient. The term port in ‘access to port’ or ‘port state jurisdiction’ identifies the state with rights, responsibilities and limitations concerning the exercise of jurisdiction, regardless of the type of port or its facilities. In international trade law ports are comparable to land-based ports of entry.⁶ Concerning the law of the sea, ports “form a convenient point at which to exercise control over [visiting] vessels”.⁷

Ports are not a distinct maritime zone.⁸ Many ports are located in closed bays or rivers landward of the baselines.⁹ Internal waters are those waters landward “of the baseline of the territorial sea”.¹⁰ A port’s infrastructure may extend out to sea, in which case the “outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast”.¹¹ The PSMA likewise refers to a state’s territory as including its ports.¹² Ports (and foreign vessels therein) are therefore often located in a state’s territory or internal waters.¹³ Within its internal waters a coastal state has full sovereignty comparable to that exercised over its land territory.¹⁴

⁶ Erik J. Molenaar, *Port State Jurisdiction*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1 (2014).

⁷ BEVAN MARTEN, PORT STATE JURISDICTION AND THE REGULATION OF INTERNATIONAL MERCHANT SHIPPING 21 (2014).

⁸ *Id.* at 22–25.

⁹ Stuart Kaye, *The Proliferation Security Initiative in the Maritime Domain*, 81 INTERNATIONAL LAW STUDIES 141–164, 144 (2006); UNCLOS, *supra* note 4 Articles 9-10.

¹⁰ UNCLOS, *supra* note 4 Article 8(1). A closing line may also delimit internal waters within archipelagic waters, *Id.* Article 50.

¹¹ UNCLOS, *supra* note 4 Articles 11, 216(1)(c) loading occurs “within its territory [ports] or at its off-shore terminals.”

¹² PSMA, *supra* note 5 Preamble, Article 4(1)(b).

¹³ Gordon Earl Dunfee, *Territorial Status of Deepwater Ports*, 15 SAN DIEGO LAW REVIEW 603–622, 612–613 (1977).

¹⁴ UNCLOS, *supra* note 4 Article 2(1).

Ports may also be located in the territorial sea and presumably, if applicable, archipelagic waters.¹⁵ The territorial sea actually *extends* to roadsteads that would otherwise be wholly or partially located beyond the outer limit of the territorial sea.¹⁶ Subject to UNCLOS and other pertinent international law, a coastal state's full sovereignty extends to the territorial sea and archipelagic waters.¹⁷

Finally, UNCLOS recognises offshore loading and unloading points for exploration or exploitation of the exclusive economic zone (EEZ) or continental shelf.¹⁸ These offshore points, as well as other exceptional deep-water ports in the EEZ or the high seas are not used in historic fisheries. Nevertheless, the port state will limit the entry of vessels to those flag states for which a relevant bilateral agreement on conditions of access exists. These bilateral treaties provide analogous treaty-based jurisdiction to that exercised over territorial ports in customary international law.¹⁹

b. Port State Prescriptive Jurisdiction on Port Entry

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

¹⁵ *Id.* Articles 18(1)(a)-(b), 25(2). Off-shore terminals are treated alike, but are not part of the coast; *Id.* Articles 211(3), 216(1)(c), 218(1), 218(3), 219, 220(1).

¹⁶ UNCLOS, *supra* note 4 Article 12.

¹⁷ *Id.* Articles 2(1), 2(3) and 49 (subject to Part IV).

¹⁸ *Id.* Articles 56, 60, 80; Henrik Ringbom, *National Employment Conditions and Foreign Ships - International Law Considerations*, 456 SCANDINAVIAN INSTITUTE OF MARITIME LAW YEARBOOK 109–148, 139–142 (2015).

¹⁹ Flag states will share their exhaustive jurisdiction with the port state. MARTEN, *supra* note 7 at 22; GERO BRUGMANN, ACCESS TO MARITIME PORTS 57–58 (2003). Territorial argument, Dunfee, *supra* note 13.

This article concerns the regulation of access to port and port services which is best seen as a *domaine réservé* exception to the law of state jurisdiction. Contemporary port state practice, while universally accepted as legal among states, does not follow the nexus-based approach of state jurisdiction in international law. Port entry conditions may be prescribed concerning conduct wherever and whenever it occurs. This includes imposing conditions of extraterritorial conduct with no nexus to the port state, let alone a sufficient nexus to fulfil the requirements of applying the principles of objective or subjective territorial jurisdiction. This is analogous to the legal basis for prescribing conditions of entry for aliens into a state.²⁰

Countless multilateral instruments recognise a broad right to regulate entry into port or access to port services, including the *International Convention for the Safety of Life at Sea (SOLAS)*,²¹ *International Convention for the Prevention of Pollution From Ships (MARPOL)*,²² UNCLOS,²³ *International Convention on Salvage*,²⁴ *United Nations Fish Stocks Agreement (UNFSA)*,²⁵ PSMA,²⁶ *Hong Kong Convention*,²⁷ *Convention on Facilitation of International Maritime Traffic (FAL)*,²⁸ and *International Health Regulations (IHR)*.²⁹ Within fisheries law,

²⁰ Requirements may be prescribed without the need to fulfil any nexus threshold as required in state jurisdiction. “‘Illegal entry’ shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State” PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, 15 NOVEMBER 2000, 2241 UNTS 507 (ENTERED INTO FORCE 28 JANUARY 2004), Article 3(b).

²¹ INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, ADOPTED 1 NOVEMBER 1974, 1184 UNTS 3 (ENTERED INTO FORCE 25 MAY 1980), Chapter XI-2, Regulations 9.2.2, 9.2.5.4.

²² INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS, ADOPTED 2 NOVEMBER 1973, AS MODIFIED BY THE PROTOCOL OF 17 FEBRUARY 1978, 1340 UNTS 184; 1340 UNTS 61 (ENTERED INTO FORCE, 2 OCTOBER 1983), Article 5(3).

²³ UNCLOS, *supra* note 4 Articles 25(2), 211(3), 255.

²⁴ INTERNATIONAL CONVENTION ON SALVAGE, 28 APRIL 1989, 1953 UNTS 165 (ENTERED INTO FORCE, 14 JULY 1996), Article 9.

²⁵ AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982 RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS, ADOPTED 4 DECEMBER 1995, 2167 UNTS 3 (ENTERED INTO FORCE 11 DECEMBER 2001), Article 23.

²⁶ PSMA, *supra* note 5 Articles 4(1)(b), 7-9.

²⁷ HONG KONG INTERNATIONAL CONVENTION FOR THE SAFE AND ENVIRONMENTALLY SOUND RECYCLING OF SHIPS, 15 MAY 2009, IMO DOC SR/CONF/45 (NOT IN FORCE), Article 9(3).

²⁸ CONVENTION ON FACILITATION OF INTERNATIONAL MARITIME TRAFFIC, ADOPTED 9 APRIL 1965, 591 UNTS 265 (ENTERED INTO FORCE 5 MARCH 1967), Article V.

²⁹ INTERNATIONAL HEALTH REGULATIONS (2005), 23 MAY 2005, 2509 UNTS 79 (ENTERED INTO FORCE 15 JUNE 2007), Articles 28, 43.

port entry conditions may concern the manner of high seas fishing conducted by foreign vessels. For example, entry conditions may address whether the vessel's conduct is deemed by the port state to have undermined a conservation and management measure of a Regional Fisheries Management Organization or Arrangement (RFMO/A), or is deemed illegal, unreported, or unregulated (IUU) fishing.³⁰ The customary law breadth and basis of port state discretion over entry is evident in the lack of any treaty-based jurisdiction within these instruments and their application to non-contracting party vessels where flag state consent is therefore absent.³¹

c. Port State Enforcement Jurisdiction on Port Entry

The exceptional *domaine réservé*-based right to regulate access to port and port services is, in turn, limited in its enforcement to the denial of access to port or port services. The denial of entry to port or the denial of port services is seen as an enforcement measure.³² Other enforcement measures, such as fines, imprisonment or confiscation of catch and vessel would not fall within this *domaine réservé* exception and are thus reserved for validly prescribed port state offence (strand (2) in Subsection 2(b) above).³³

While the scope of a coastal state's enforcement jurisdiction significantly differs depending on the maritime zone in which enforcement occurs, a port state's enforcement jurisdiction is largely consistent regardless of where the port is located. Within internal waters no general

³⁰ E.g., WCPFC, CMM 2017-02 ON MINIMUM STANDARDS FOR PORT STATE MEASURES, 17 (2017).

³¹ Port state control regimes also apply instruments to vessels flying the flag of non-parties to the instrument, MEMORANDUM OF UNDERSTANDING ON PORT STATE CONTROL IN THE ASIA-PACIFIC REGION (18TH AMENDMENT), 6 NOVEMBER 2018 (IN EFFECT 1 DECEMBER 2018), <http://www.tokyo-mou.org/doc/Memorandum%20rev18.pdf>.

³² EUROPEAN COMMISSION, *Report to the Trade Barriers Regulation Committee: TBR proceedings concerning Chilean practices affecting transit of swordfish in Chilean ports* 32 (1999).

³³ Beyond the scope of this article, several examples of port state offences from the Asian region may be found in, Arron N. Honniball, *What's in a Duty? EU Identification of Non-cooperating Port States and Their Prescriptive Responses*, 35 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 19–54, 35–40 (2020).

right of navigation exists which would limit port state jurisdiction.³⁴ Within other maritime zone, the navigation rights that limit coastal state enforcement are inapplicable once the vessel requests entry into port, or enters a port therein.³⁵

Outside of the port limits, an inbound foreign vessel may exercise innocent passage in the territorial sea, but this is subject to the coastal state's measures necessary to enforce the conditions of port entry.³⁶ If it is demonstrable that a vessel is proceeding to port and a coastal state's measures are necessary and preventative, the vessel may be treated as "akin to vessels engaged in non-innocent passage" for the purposes of enforcement.³⁷ Concerning outbound vessels, enforcement jurisdiction remains at the coastal state's discretion.³⁸ For example, vessels violating port state measures could be subject to hot pursuit and enforcement measures at sea.³⁹

d. Access to Port by Foreign Vessels

The finding that a port state has an exceptional *domaine réservé*-based right to condition and deny access to port provides an unlimited jurisdictional basis in international law. However, beyond establishing a valid legal basis, a port state must, when exercising its jurisdiction, also comply with any other obligations assumed under international law. Where the law of the sea provides foreign vessels with a right of entry to port, the corresponding obligation for port

³⁴ UNCLOS, *supra* note 4 Article 18(1), innocent passage ends at the baselines, with no corresponding navigational rights within internal waters, *bar Id.*, Article 8(2). However, upon calling at port this limited exception would extinguish by analogy to port calls outside internal waters, *Id.* Article 18(1)(a).

³⁵ UNCLOS, *supra* note 4 Articles 18(1), 52. The right of archipelagic sea lanes passage is inapplicable as it is limited to vessels traversing *from and to* the EEZ/high seas, *Id.* Article 53(3).

³⁶ UNCLOS, *supra* note 4 Articles 25(2), 52(1), 211(3).

³⁷ Richard Barnes, *Article 25*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 222–226, 9 (Alexander Proelss ed., 2017).

³⁸ UNCLOS, *supra* note 4 Articles 27(2), 28(3).

³⁹ Richard Barnes, *Article 27*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 229–237, 18 (Alexander Proelss ed., 2017). UNCLOS, *supra* note 4 Articles 111(1), 111(8), anticipate hot pursuit commenced in internal waters. See 'vertical passage', NICHOLAS M. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 151–154 (2002).

states would limit port state jurisdiction. Other possible example beyond the scope of this article which may legally constrain the operation of an otherwise legal basis to deny access to port, include obligations under human rights instruments,⁴⁰ the *International Convention on Maritime Search and Rescue*, or the *Refugee Convention*.⁴¹

I. A General Right of Entry to Port

Port entry conditions, while validly prescribed, would be unenforceable through denial of entry if denial conflicted with a foreign vessel's right of access. Historically, a right of port entry was the subject of a lively debate.⁴² Commentators and state practice have largely concluded no such general right exists. Indeed, in fisheries law quite the opposite is apparent. Port states party to PSMA are obliged to deny a foreign fishing vessel access to port if sufficient evidence suggests the vessel has engaged in IUU fishing or fishing related activities in support of such fishing.⁴³

⁴⁰ Succinctly stating how law of the sea rights and human rights obligations interact; Efthymios Papastavridis, *European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?*, in *THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 115–146, 146 (Malgosia Fitzmaurice & Panos Merkouris eds., 2013).

⁴¹ See States' conflicting interpretations; FELICITY G. ATTARD, *THE DUTY TO RENDER ASSISTANCE AT SEA UNDER INTERNATIONAL LAW* 29–126 (2020); Valentin J. Schatz & Marco Fantinato, *Post-rescue Innocent Passage by Non-governmental Search and Rescue Vessels in the Mediterranean*, 35 *THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW* 740–771, 749 (2020); Richard Barnes, *The International Law Of The Sea And Migration Control*, in *EXTRATERRITORIAL IMMIGRATION CONTROL* 100–146, 119 (Bernard Ryan & Valsamis Mitsilegas eds., 2010); Richard L. Kilpatrick & Adam Smith, *Balancing the SAR Responsibilities of States and Shipmasters*, in *SECURITISING ASYLUM FLOWS* 81–101, 82–85 (Valsamis Mitsilegas, Violeta Moreno-Lax, & Niovi Vavoula eds., 2020); Seline Trevisanut & Salvatore Nicolosi, *Saving lives in the Mediterranean*, Feb *ARS AEQUI* 121–127, 122 (2019).

⁴² Discussing both sides; A. V. Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 *SAN DIEGO LAW REVIEW* 597–622 (1976); Louise de La Fayette, *Access to Ports in International Law*, 11 *INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW* 1–22 (1996); ANTHONY MORRISON, *PLACES OF REFUGE FOR SHIPS IN DISTRESS: PROBLEMS AND METHODS OF RESOLUTION* 53–74 (2012); BRUGMANN, *supra* note 19 at 123–124; Vasilios Tasikas, *The Regime of Maritime Port Access: A Relook at Contemporary International and United States Law*, 5 *LOYOLA MARITIME LAW JOURNAL* 1–44 (2007); BENJAMIN PARAMESWARAN, *THE LIBERALIZATION OF MARITIME TRANSPORT SERVICES: WITH SPECIAL REFERENCE TO THE WTO/GATS FRAMEWORK* 127–140 (2004); Ian J. Booth, *International ship pollution law: Recent developments at UNCLOS*, 4 *MARINE POLICY* 215–228, 225 (1980).

⁴³ PSMA, *supra* note 5 Article 9(4).

In fisheries law the debate on access occasionally resurfaces. In 2016 a proposal sought to amend an RFMO Conservation Measure by exempting certain vessels from submitting documentation as a port entry requirement. This was based upon the “right of a vessel to peaceful entry into port [a]s enshrined in international maritime law”.⁴⁴ Other states disagreed, and the proposal failed to gain support.⁴⁵ Equally unsuccessful have been attempts in domestic courts to argue an international law-based right to port access as a challenge to the legality of national port state measures.⁴⁶

In short, even the *presumption* of access being granted for peaceful and compliant merchant vessels,⁴⁷ does not extend to fishing vessels. In 1958, an arbitration tribunal in the *ARAMCO* case reasoned that “[a]ccording to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interest of the State so require”.⁴⁸ This reasoning has been overtaken by contrary practice,⁴⁹ and in any event did not stand for a general right.⁵⁰ Likewise the *Convention and Statute on the International Régime of Maritime Ports*, while sometimes argued as providing a right of port

⁴⁴ Delegation of Ukraine, *Proposal by Ukraine to Amend CCAMLR Conservation Measure 10-05 on the Dissostichus Catch Documentation Scheme*, CCAMLR Doc No CCAMLR-XXXV/29 (2016). Reference was also made to innocent passage, but as noted, this is inapplicable.

⁴⁵ E.g. Chile “could not agree to proposals that seek to undermine Port States’ rights to establish certain requirements for port access”, CCAMLR, *Report of the Thirty-Fifth Meeting of the Commission (Hobart, Australia, 17 to 28 October 2016)* 3.18-3.20 (2016). Other states also expressed reservation, *Id.* at 154–157.

⁴⁶ *Omunkete Fishing (Pty) Limited v Minister for Fisheries*, CIV 2008-485-1310, 60 (2008).

⁴⁷ Lowe, *supra* note 42 at 621–622; John T Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports*, 5 SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND BUSINESS 209–345, 214–215 (2009); Henning Jessen, *Sanctions Compliance Risks in International Shipping: Closure of Five Crimean Ports, the Sanctions Regime in Respect of Ukraine/Russia and Related Compliance Challenges*, in MARITIME LAW IN MOTION 289–309, 301 (Proshanto K. Mukherjee, Jr. Mejia Maximo Q., & Jingjing Xu eds., 2020).

⁴⁸ *Saudi Arabia v. Arabian American Oil Company (Aramco)*, Award, 27 ILR 117, 212 (1963).

⁴⁹ Subsequent case law upon no such right, arguments of the Swedish Environmental Protection Agency; Environmental Board of the Municipality of Helsingborg v HH-Ferries AB and Sundbusserne A/S, Svea Court of Appeal M 8471-03, ILDC 634, 67 (2006). Concluding no right of entry; HAVSMILJÖKOMMISSIONENS, *Havet - tid för en ny strategi* 268 (2003).

⁵⁰ ‘Vital interests’ are undefined and subject to national interpretation. Some argue *ARAMCO* only stood for non-discrimination, Kai Trümpler, *Article 8*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 84–96, 17–19 (Alexander Proelss ed., 2017).

entry, neither represents customary law nor provides a right of entry for contracting parties.⁵¹ In any event, fishing vessels were excluded from the reciprocity provided,⁵² and are often excluded or further qualified in bilateral access agreements which could limit enforcement.⁵³ Indeed, a vast collection of bilateral access agreements would be superfluous if a general right to port entry existed.⁵⁴

Other contemporary practice accepts the legality of closing ports to foreign vessels unless, as occurred with Ukraine's closure of five ports located in Russian-controlled Crimea, a dispute over territorial sovereignty exists.⁵⁵ The recent *Arctic Science Agreement* promotes territorial and port access, but via soft commitments of facilitating access through 'best efforts'.⁵⁶ This non-binding language, similar to that seen in FAL,⁵⁷ once again, highlights the lack of port access rights. Likewise, the IHR, with 196 States Parties,⁵⁸ provides for the *free pratique* of foreign vessels, including access to port, in the context of public health responses by contracting parties.⁵⁹ However, *free pratique* is limited to not *refusing* permission to enter port

⁵¹ CONVENTION AND STATUTE OF THE INTERNATIONAL REGIME OF MARITIME PORTS, ADOPTED 9 DECEMBER 1923, 58 LNTS 285 (ENTERED INTO FORCE 26 JULY 1926), Statute, Article 2, only provides for equality of treatment and is subject to reciprocity.

⁵² *Id.* Statute, Article 14.

⁵³ "Even when States do establish rights of entry under bilateral treaties, coastal States will usually retain the right to deny entry when vital interests are threatened" Barnes, *supra* note 41 at 118.

⁵⁴ Practice: Erik J. Molenaar, *Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage*, 38 OCEAN DEVELOPMENT & INTERNATIONAL LAW 225–257 (2007); Erik J. Molenaar, *Port and Coastal States*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 280–303 (Donald Rothwell et al. eds., 2015); Ted L McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 JOURNAL OF MARITIME LAW AND COMMERCE 305–322, 310–311 (1997); BRUGMANN, *supra* note 19; MARTEN, *supra* note 7 at 31–35; HAIJIANG YANG, JURISDICTION OF THE COASTAL STATE OVER FOREIGN MERCHANT SHIPS IN INTERNAL WATERS AND THE TERRITORIAL SEA 48–70 (2006).

⁵⁵ Jessen, *supra* note 47.

⁵⁶ AGREEMENT ON ENHANCING INTERNATIONAL ARCTIC SCIENTIFIC COOPERATION, 11 MAY 2017 (ENTERED INTO FORCE 23 MAY 2018), <https://oaarchive.arctic-council.org/handle/11374/1916>, Article 4.

⁵⁷ FAL, *supra* note 28 Articles I, V and Annex, Section 6 the 'facilitation' of traffic by 'reducing' requirements on port arrival and avoiding 'unnecessary' restrictions on port entry.

⁵⁸ Note, *Id.* Annex, Section 6.1, non-parties to IHR shall endeavour to apply the IHR to international shipping.

⁵⁹ IHR, *supra* note 29 Articles 1, 28. World Health Organization (WHO) and International Maritime Organization (IMO) called upon all states to respect *free pratique* during the COVID-19 pandemic; WHO & IMO, *A Joint Statement on the Response to the COVID-19 Outbreak* 1 (2020), https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/JointStatement_COVID-19.pdf.

‘for public health reasons’ and may still be subject to conditions of entry or specified ports.⁶⁰

Additional health measures, including denial of entry, may apply in response to “specific public health risks or public health emergencies of international concern”.⁶¹

The COVID-19 pandemic and the response of many port states to prohibit or severely restrict cruise vessels’ access has demonstrated the lack of any general right of port access.⁶²

Technological innovations and automation in shipping may result in further restrictions on access to ports, be it to promote a transition to marine autonomous surface ships (MASS) or because future autonomous ports may be ill-equipped to address non-MASS vessels.⁶³

II. A Force Majeure or Distress Related Right of Entry to Port

Nonetheless, one exception to Subsection 2(d)(I) above is a customary right of access to port, or another sheltered area, where vessels are in distress, or compelled by *force majeure*, to access port – if access is necessary to preserve human life.⁶⁴ This customary law right of entry to port is recognised in soft law instruments, such as the *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU).⁶⁵ It is vicariously

⁶⁰ IHR, *supra* note 29 Articles 28(1)-(3). See, e.g. decontamination practice, MPA, *Press Release: Crew member with COVID-19 (Coronavirus Disease 2019) Fully Recovers and Ship Resumes Normal Operations* (2020), <https://www.mpa.gov.sg/web/portal/home/media-centre/news-releases/detail/e7a16c6a-fe5c-47bb-b9ad-03538c6d9fa0>.

⁶¹ IHR, *supra* note 29 Article 43.

⁶² Natalie Klein, *International Law Perspectives on Cruise Ships and COVID-19*, aop JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 1–13 (2020).

⁶³ A prospect raised in, Henrik Ringbom, *Legalizing Autonomous Ships*, 34 OCEAN YEARBOOK ONLINE 429–460, 448 (2020).

⁶⁴ US Department of State, *Collection of sources on entry into port under force majeure*, in ARCHIVE (2009), <https://2001-2009.state.gov/s/l/2007/112701.htm>; MORRISON, *supra* note 42 at 75–126; Terje Lobach, *Advances in Port State Control Measures*, in FISH PIRACY: COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING 291–308, 296 (OECD ed., 2004); Alexander Proelss, *Rescue at Sea Revisited: What Obligations exist towards Refugees?*, in SCANDINAVIAN INSTITUTE OF MARITIME LAW YEARBOOK 1–39, 22–25 (2008); Aldo Chircop, *Assistance at Sea and Places of Refuge for Ships: Reconciling Competing Norms*, in JURISDICTION OVER SHIPS: POST-UNCLOS DEVELOPMENTS IN THE LAW OF THE SEA 140–163 (Henrik Ringbom ed., 2015). An explicit *force majeure* or distress exception for stopping during passage, UNCLOS, *supra* note 4 Articles 18(2), 39(1)(c), 45, 52(1), 54.

⁶⁵ FAO, INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER, AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING 54 (2001).

recognised in treaties, such as PSMA, which would, but for the situation of *force majeure* or distress, impose obligations on port states to deny access.⁶⁶ Other instruments also implicitly recognise this exceptional right of entry by limiting the port state’s obligations to concern those vessels “voluntarily in port”.⁶⁷ Similarly, treaties that enforce compliance with international standards through port state control will often exempt those vessels in port due to distress or *force majeure*.⁶⁸

This exception will limit the port state’s right to deny entry, although a place of refuge will not normally require port entry but rather a sheltered area along the coastline.⁶⁹ Requests for access to a place a refuge may arise in other contexts, such as a situation presenting an environmental hazard,⁷⁰ or economic considerations, such as the otherwise total loss of an abandoned vessel and cargo.⁷¹ However, in such cases, there is no obligation under international law for a coastal state to grant permission to enter a place of refuge, nor are places of refuge necessarily a port.⁷² Of course, states remain at liberty to grant broader rights of entry into port for vessels in distress than their customary law obligations require. For example, the *Convention concerning Fishing*

⁶⁶ PSMA, *supra* note 5 Article 10.

⁶⁷ FAO, CODE OF CONDUCT FOR RESPONSIBLE FISHERIES 8.3.2 (1995); UNFSA, *supra* note 25 Article 23(2).

⁶⁸ Fisheries; CONVENTION (NO. 188) CONCERNING WORK IN THE FISHING SECTOR, ADOPTED 14 JUNE 2007, I-54755 (ENTERED INTO FORCE 16 NOVEMBER 2017), Articles 4(2)(d), 43(2); TORREMOLINOS PROTOCOL RELATING TO THE 1977 TORREMOLINOS INTERNATIONAL CONVENTION FOR THE SAFETY OF FISHING VESSELS, ADOPTED 2 APRIL 1993, 2001 TRACTATENBLAD 168 (NOT IN FORCE), Article 5. Maritime; SOLAS, *supra* note 21 Article IV; further examples, Chircop, *supra* note 64 at 149–150.

⁶⁹ “a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment” IMO, *Guidelines On Places of Refuge for Ships in Need of Assistance*, RESOLUTION A.943(23), 1.19 (2004).

⁷⁰ *Id.* at 1.18.

⁷¹ “If safety of life is not a factor, then there is a widely recognized practice among maritime states to have proper regard to their own interest and those of their citizens in deciding whether or not to accede to any such [safe haven] request” ACT Shipping (Pte) Ltd v. Minister for the Marine and Others, 3 I.R. 406, 424–426 (1995). Some authors maintain other interests, including economic, remain in explaining the customary law rule of access to port or other places of refuge when in distress; John Noyes, *Places of Refuge for Ships*, 37 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 135–145, 138 (2008).

⁷² IMO, *supra* note 69 at 1.19, 3.12, fn. 3. At most one may raise a judicial review challenge in domestic law, but the decision to refuse access would have to have been patently unreasonable or irrational, ACT SHIPPING, *supra* note 71 at 428–434.

in the Black Sea provided contracting parties' vessels with access to designated ports of refuge "to shelter from bad weather or in case of damage".⁷³

In customary law, the state testing the necessity of the preservation of human life will balance the interests raised by the vessel's circumstances against those interests of the port/coastal state.⁷⁴ When granting humanitarian access further entry conditions may therefore be applied,⁷⁵ although illegal activity alone cannot be grounds for denial of entry.⁷⁶ A common example would be imposing financial security conditions on entry.⁷⁷ Decisions about the necessity of entry, or lack thereof, should be based on objective facts as balanced against the port state's interests.⁷⁸

Essentially, port states should exercise due diligence in reviewing, on a case by case basis, whether an entry right applies.⁷⁹ The port state determines whether *force majeure* or distress is demonstrated,⁸⁰ which domestic interests are threatened, the weight to be given to competing interests, and any decision upon entry and upon what conditions. For vessels granted an exceptional right of access to port, and acting in full compliance with the condition of entry imposed, the port services they can access are similarly limited. Subject to availability, the port

⁷³ CONVENTION CONCERNING FISHING IN THE BLACK SEA, SIGNED 7 JULY 1959, 377 UNTS 203 (ENTERED INTO FORCE 21 MARCH 1960), Articles 2-3.

⁷⁴ Jon M Van Dyke, *Safe Harbour*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4–6 (2010); IMO, *supra* note 69 Preamble; Henrik Ringbom, *You Are Welcome, But ... Places of Refuge and Environmental Liability and Compensation, with Particular Reference to the EU*, CMI YEARBOOK 208–233, 208 (2004); Noyes, *supra* note 71 at 140–142.

⁷⁵ Ringbom, *supra* note 74 at 210. Recognising the right to impose conditions; PSMA, *supra* note 5 Article 10; SOLAS, *supra* note 21 Article V(b); SALVAGE CONVENTION, *supra* note 24 Article 11.

⁷⁶ Eric Van Hooydonk, *The Obligation to Offer a Place of Refuge to a Ship in Distress*, CMI YEARBOOK 403–445, 408 (2003).

⁷⁷ Noyes, *supra* note 71 at 139.

⁷⁸ Van Hooydonk, *supra* note 76 at 407.

⁷⁹ Chircop, *supra* note 64 at 161–162.

⁸⁰ Proelss, *supra* note 64 at 25.

state is obligated to provide access to port services essential to health and safety.⁸¹ Beyond this, services are provided at the discretion of the port state.

Going forward, it may be that the right of refuge must also adapt to forthcoming technological revolutions. As Chircop highlights, unmanned vessels will likely raise distress cases involving serious transboundary environmental or economic threats, without any humanitarian concerns.⁸² A right of entry in distress cases may evolve to address these primarily environmental concerns, or simply fade away as remote operators move ashore and humanitarian concerns disappear.

e. Sub-Conclusion

It was seen that the jurisdiction to regulate access to port was legally valid without recourse to the principles of state jurisdiction. Port states have an exceptional *domaine réservé*-based jurisdiction to prescribe conditions of entry and enforce these through denial of access (Subsections 2(a)-(c)). Within the law of the sea, the principal restriction on this jurisdiction is those rare cases where a vessel in distress, or compelled by *force majeure*, requires access to port in order to preserve human life. In such cases a port state may condition but not outright prohibit port entry, and may condition but not outright prohibit access to port services that are essential to the health and safety of the crew and passengers (Subsection 2(d)).

A right of port entry therefore limits the port state's jurisdiction on port entry and services. However, it may also impact the wider port state jurisdiction to enforce port state offences.

⁸¹ PSMA, *supra* note 5 Articles 10, 11(2)(a), 18(2).

⁸² Aldo Chircop, *Testing International Legal Regimes: The Advent of Automated Commercial Vessels*, 60 GERMAN YEARBOOK OF INTERNATIONAL LAW 109–142 (2018).

Certain laws are inapplicable when *force majeure* or distress entry occurs.⁸³ While the scope of this limitation is unsettled, inapplicable laws would include those “in connection with actions to relieve the distress”.⁸⁴ For example, rules closely tied to the voluntary entry into a state, such as customs law, are therefore inapplicable to vessel in port due to *force majeure* or distress.⁸⁵ Enforcement of treaty-based extraterritorial jurisdiction under Article 218 of UNCLOS is also limited as instituting proceedings is conditional on “[w]hen a vessel is voluntarily within a port or at an off-shore terminal”.⁸⁶ Beyond these limited cases, comity may discourage the enforcement of other port state laws, but port states are not limited as a matter of international law.⁸⁷

3. Historic Fishing Rights and Associated Rights

Much like port state jurisdiction discussed above, the law on the acquisition and limits of historic fishing rights is found outside of UNCLOS and within the residual general international law.⁸⁸ As this article proposes that a second exceptional customary right of access to port can

⁸³ Ted L McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN AND COASTAL LAW JOURNAL 207–225, 210 (2000); ROBIN R. CHURCHILL & ALAN VAUGHAN LOWE, *THE LAW OF THE SEA* 68 (1988). Suggesting limitations may be relegated to comity; Dyke, *supra* note 74 at 12–14.

⁸⁴ US Department of State, *supra* note 64. Contra, no services required, Tang Jianye, *The Agreement on Port State Measures: A Commentary*, CHINA OCEANS LAW REVIEW 312–334, 324 (2009).

⁸⁵ YANG, *supra* note 54 at 66; DAVID J. DOULMAN & JUDITH SWAN, *A guide to the background and implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* 45 (2012); Oliver, *supra* note 47 at 292. Advocate General Tesauro distinguished the inapplicability of entry-related laws from the possible continued application of other territorial-based laws; Opinion of Advocate General Tesauro, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, CJEU C-286/90, ECR 6034–6047, 6046 (1992).

⁸⁶ UNCLOS, *supra* note 4 Articles 218(1), 218(3). Ho-Sam Bang, *Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea*, 40 JOURNAL OF MARITIME LAW & COMMERCE 291–313, 300 (2009); Doris König, *Article 218*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1487–1496, 7 (Alexander Proelss ed., 2017).

⁸⁷ Authors disagree on whether Article 220 of UNCLOS may limit port state jurisdiction by referring to vessel voluntarily in port. Contrast, ERIK J. MOLENAAR, *COASTAL STATE JURISDICTION OVER VESSEL-SOURCE POLLUTION* 187 (1998); Ahmed Adham Abdulla, *Flag, coastal and port state jurisdiction over the prevention of vessel source pollution in International Law: analysis of implementation by the Maldives*, 2011. Arguably, as the pollution incident occurred in the territorial sea or EEZ, unconnected to the compelled port entry, enforcement should not be limited.

⁸⁸ UNCLOS, *supra* note 4 Preamble. Specifically, in the territorial sea, *Id.* Article 2(3); *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award, PCA 2013-19, 808 (2016).

be found in the historic fishing rights doctrine, an overview of continuing historic fishing rights, post-UNCLOS, is necessary for context and scope.

a. Historic Fishing Rights⁸⁹

UNCLOS explicitly recognises several regimes of historic waters.⁹⁰ Historic waters involve “claims of sovereignty over maritime areas derived from historical circumstances”.⁹¹ Alternatively, and more limited, UNCLOS preserves existing traditional fishing rights in archipelagic waters and coastal states shall take into account historic fishing in the EEZ if and when allocating catch surplus to foreign states.⁹² UNCLOS is, however, silent on defining or elaborating the broader conception of historic rights and their acquisition.⁹³

The *South China Sea Arbitration (SCS Award)* reaffirms that historic waters and historic rights falling short of a claim to sovereignty, including historic fishing rights, fall under the same

⁸⁹ The author is indebted to xxx for sharing an advance draft of a historic fishing rights chapter, xxxx.

⁹⁰ UNCLOS, *supra* note 4 Articles 10(6), 15, 46, 298(1)(a)(i). “It seems clear that the matter continues to be governed by general international law which does not provide for a single ‘régime’ for ‘historic waters’ or ‘historic bays’, but only for a particular régime for each of the concrete, recognized cases of ‘historic waters’ or ‘historic bays’” Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982 18, 100 (1982).

⁹¹ SCS AWARD, *supra* note 88 at 226.

⁹² UNCLOS, *supra* note 4 Articles 47(6), 51(1) and 62(3). Agreements to implement Article 51(1) of UNCLOS may include associated rights of access to territories and resupply by historic fishing vessels, akin to port access. See, Indonesia and Malaysia agreed to enter into arrangements on the utilization of certain Indonesian islands for shelter and resupply by Malaysian traditional fishing vessels in distress or emergency; TREATY BETWEEN MALAYSIA AND THE REPUBLIC OF INDONESIA RELATING TO THE LEGAL REGIME OF ARCHIPELAGIC STATE AND THE RIGHTS OF MALAYSIA IN THE TERRITORIAL SEA AND ARCHIPELAGIC WATERS AS WELL AS IN THE AIRSPACE ABOVE THE TERRITORIAL SEA, ARCHIPELAGIC WATERS AND THE TERRITORY OF THE REPUBLIC OF INDONESIA LYING BETWEEN EAST AND WEST MALAYSIA, 25 FEBRUARY 1982, IN FORCE 25 MAY 1984, <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/publications/E.92.V.3.pdf>, Article 14(3).

⁹³ Seokwoo Lee & Lowell Bautista, *Historic rights, in* THE DEVELOPMENT OF THE LAW OF THE SEA CONVENTION 244–261, 244–245 (Øystein Jensen ed., 2020).

umbrella definition of historic rights.⁹⁴ While the thresholds of practice and consent may differ, the same process for the acquisition of historic rights applies:

“[H]istoric waters are merely one form of historic right and *the process is the same for claims to rights short of sovereignty* [...] historic rights are, in most instances, *exceptional rights*. They accord a right that a State would not otherwise hold, were it not for the operation of the *historical process* giving rise to *the right and the acquiescence of other States* in the process” (emphasis added).⁹⁵

The distinguishing factor between historic waters, historic fishing rights, and traditional fishing rights is the extent of exceptional right(s) claimed. Respectively, this extent ranges from a historic right to sovereignty (a defined area: encompassing all territorial sovereign rights); a historic right to fishing short of claiming sovereignty (a defined area and defined marine living resource(s): encompassing non-exclusive access and utilization); and a historic right to fishing short of claiming sovereignty and limited to traditional communities and/or methods (a defined area, defined marine living resource(s) and defined actors: encompassing non-exclusive access and utilization).⁹⁶ Artisanal fishing rights are, in turn, a more narrowly defined historic fishing right than traditional fishing rights.⁹⁷ In short, “the scope of a claim to historic rights depends

⁹⁴ SCS AWARD, *supra* note 88 at 224–225; citing previous recognition of the distinction between claims to historic fishing rights and the question of sovereignty over the area in which the fishery is located, Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports 2001 40, 236 (2001); CONTINENTAL SHELF (JUDGMENT), *supra* note 90 at 100. Furthermore, see comparison of historic rights to a servitude in property law, The Eritrea-Yemen Arbitration, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), PCA Case No 1996-04, 126 (1998).

⁹⁵ SCS AWARD, *supra* note 88 at 265–268.

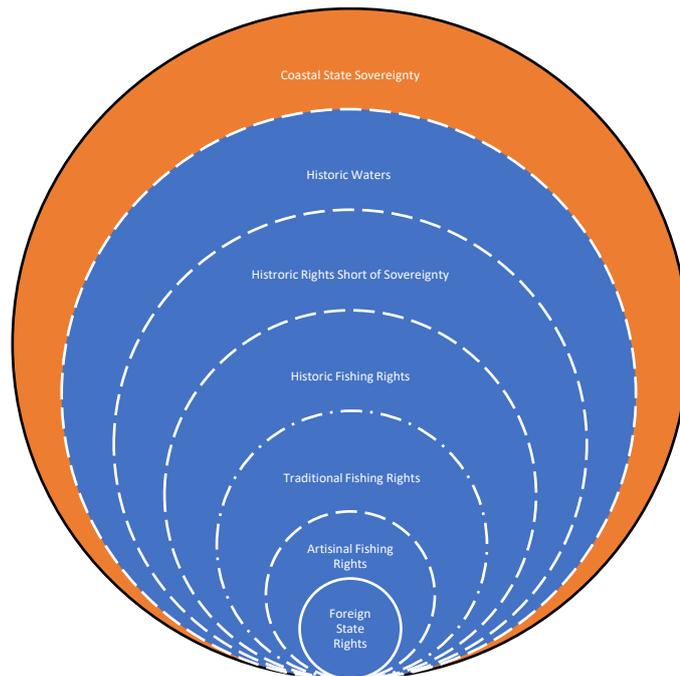
⁹⁶ *Id.* at 806.

⁹⁷ “In keeping with the fact that traditional fishing rights are customary rights, acquired through long usage, the Tribunal notes that the methods of fishing protected under international law would be those that broadly follow the manner of fishing carried out for generations: in other words, artisanal fishing in keeping with the traditions and customs of the region”, *Id.* at 806. If an artisanal fishing right is established, the extent of the historic fishing right excludes ‘industrial fishing’, *Id.* at 797. See a comparable discussion on ‘subsistence fishing’ in a river context, subsistence being defined by what is excluded; Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, ICJ Reports 2009 213, 141 (2009).

upon the scope of the acts that are carried out as the exercise of the claimed right” (Figure 1).⁹⁸

A coastal state’s acquiescence cannot be presumed for any fishing activities beyond the historic practices, and thus international law recognises diverse practice resulting in diverse historic rights.⁹⁹

Figure 1 Extent of Historic Right Exceptions to Coastal State Sovereignty



Historic fishing rights are ‘exceptional’. Exceptionalism mandates a continuous and effective (‘historic’) exercise of fishing, combined with the acquiescence of the coastal state who would otherwise exercises full sovereignty over the fishery. Post-UNCLOS, this requirement for exceptionalism significantly narrows the geographic scope of continuous historic fishing rights as only applicable in the internal waters, archipelagic waters or territorial sea of a foreign state.¹⁰⁰ As the *SCS Award* held, not only were historic fishing rights in the EEZ, continental

⁹⁸ SCS AWARD, *supra* note 88 at 266.

⁹⁹ E.g., in areas of overlapping entitlements, traditional pearl diving rights common to all coastal populations and regulated by the fishers’ state of nationality may develop; MARITIME DELIMITATION AND TERRITORIAL QUESTIONS (JUDGMENT), *supra* note 94 at 235–236.

¹⁰⁰ Contra, Sophia Kopela, *Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration*, 48 OCEAN DEVELOPMENT & INTERNATIONAL LAW 181–207, 192–196 (2017).

shelf, high seas, or the Area not expressly permitted in UNCLOS,¹⁰¹ Articles 56, 58, 62, 77 and 309 of UNCLOS illustrate that a continued claim to historic fishing rights in a foreign state's EEZ or continental shelf (without consent) would be incompatible with UNCLOS.¹⁰² Alternatively, high seas fishing is an exercise of the existing freedom of the high seas,¹⁰³ thus lacking any exceptionalism to establish historic rights.¹⁰⁴ Finally, the position of certain states in the ongoing BBNJ Agreement negotiations has brought uncertainty to the exclusion of fisheries from the Area's regime,¹⁰⁵ but for the purposes of this article former technological limitations meant historic fishing rights therein are highly unlikely.¹⁰⁶

b. Associated Rights and Access to Port

Historic fishing rights are not absolute. Reasonable regulation by the coastal state may apply and international courts and tribunals have emphasised the coastal state's environmental regulation.¹⁰⁷ The limits of protection due to historic fishing states is established on a case-by-cases basis.¹⁰⁸ However, the concept of 'associated rights' may offer further limitations on a coastal state regulating foreign vessels or persons exercising historic fishing rights. Associated rights were recognised and defined in the *Eritrea/Yemen Award*,¹⁰⁹ whereby the Tribunal held:

¹⁰¹ SCS AWARD, *supra* note 88 at 239.

¹⁰² *Id.* at 240–247, 254 and 261.

¹⁰³ UNCLOS, *supra* note 4 Articles 87(1)(e), 116.

¹⁰⁴ SCS AWARD, *supra* note 88 at 269; Robert Beckman, 'Deliberate Ambiguity' and the Demise of China's Claim to Historic Rights in the South China Sea, 1 ASIA-PACIFIC JOURNAL OF OCEAN LAW AND POLICY 164–182, 180–181 (2016).

¹⁰⁵ UNCLOS, *supra* note 4 Part XI.

¹⁰⁶ SCS AWARD, *supra* note 88 at 269.

¹⁰⁷ *Id.* at 809.; NAVIGATIONAL AND RELATED RIGHTS JUDGMENT, *supra* note 97 at 141.

¹⁰⁸ SCS AWARD, *supra* note 88 at 812. The Tribunal found it unnecessary to explore the limits of protection as the extended and complete prevention of the exercise of historic fishing rights was 'not compatible with the respect due under international law to the traditional fishing rights'.

¹⁰⁹ For literature discussing all aspects of the Award; Barbara Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 32 OCEAN DEVELOPMENT & INTERNATIONAL LAW 1–25 (2001); Constance Johnson, *Case Analysis: Eritrea – Yemen Arbitration*, 13 LEIDEN JOURNAL OF INTERNATIONAL LAW 427–446 (2000).

“In order that the entitlements be real and not merely theoretical, the traditional regime has also recognised certain associated rights”.¹¹⁰

What is more, the Tribunal then affirmed an associated right of access to port and port services for historic fishers in the Red Sea. First, Phase I of proceedings recognised that historic practices included both fishers’ access to islands as refuge from poor weather and fishers’ access to each state’s coastal markets without a need for authorization.¹¹¹ Second, Phase II then confirmed:

“There must be *free access to and from the islands* concerned – including unimpeded passage through waters in which, by virtue of its sovereignty over the islands, Yemen is entitled to exclude all third Parties or subject their presence to licence, just as it may do in respect of Eritrean industrial fishing. This free passage for artisanal fishermen has traditionally existed not only between Eritrea and the islands, but also between the islands and the Yemen coast. *The entitlement to enter the relevant ports, and to sell and market the fish there, is an integral element of the traditional regime.* [...] Eritrean artisanal fisherman fishing around the islands awarded to Yemen have had free access to Maydi, Khoba, Hodeidah, Khokha and Mocha on the Yemen coast, just as Yemeni artisanal fishermen fishing around the islands have had an entitlement to unimpeded transit to and access to Assab, Tio, Dahlak and Massawa on the Eritrean coast. Nationals of the one country have an *entitlement to sell on equal terms and without any discrimination in the ports of the other*” (emphasis added)¹¹²

¹¹⁰ ERITREA/YEMEN ARBITRATION AWARD, *supra* note 1 at 107.

¹¹¹ ERITREA/YEMEN ARBITRATION PHASE I, *supra* note 94 at 127–128.

¹¹² ERITREA/YEMEN ARBITRATION AWARD, *supra* note 1 at 107.

Historic fishing regimes may therefore have application beyond the maritime zone in which the fishery is located, including associated rights in the ports of foreign states.¹¹³ An associated rights to access foreign ports will be an exceptional restriction on the sovereignty of port states to otherwise oppose access by foreign vessels.¹¹⁴ Again, associated rights may also be subject to coastal state –or port state– regulation. This regulation may not however result in the denial of the right of access without the consent of the fishers’ state of nationality.¹¹⁵

International court and tribunals have not recognised any further explicit cases of historic access to port as an associated right.¹¹⁶ Interestingly, the *SCS Award* did distinguish access rights from fishing rights.¹¹⁷ If, as *SCS Award* reasons, a historic right of access to the territorial sea can limit a coastal state’s territorial sovereignty, there is no additional principle of international law that prevents a historic right of access to port as limiting port state sovereignty. Equally, if UNCLOS essentially preserves the historic territorial sea regime and its historic fishing rights,¹¹⁸ then associated rights of port entry are also preserved because UNCLOS did not introduce any novelties to the regime of internal waters.

¹¹³ “The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters *and ports*, to the extent and in the manner specified in paragraph 107” *Id.* at 109.

¹¹⁴ Recognizing this conditions state sovereignty, Nuno Sérgio Marques Antunes, *The 1999 Eritrea–Yemen Maritime Delimitation Award and The Development of International Law*, 50 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 299–344, 305 (2001).

¹¹⁵ ERITREA/YEMEN ARBITRATION AWARD, *supra* note 1 at 108. Concerns have been expressed over unreported catch in Eritrea heading to Yemen, contributing to a lack of effective assessment and management of artisanal fisheries; Iyob Tsehaye, Marcel A. M. Machiels & Leopold A. J. Nagelkerke, *Rapid shifts in catch composition in the artisanal Red Sea reef fisheries of Eritrea*, 86 FISHERIES RESEARCH 58–68, 59 (2007).

¹¹⁶ The ICJ has nonetheless recognized historic access and innocent passage rights in a shared historic bay, which should it be delimited, would then be internal waters subject to historic rights of innocent passage for the purposes of accessing the ports of the three coastal states. Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment 11 September 1992, ICJ Reports 1992 351, 412 (1992); CLIVE R. SYMMONS, HISTORIC WATERS AND HISTORIC RIGHTS IN THE LAW OF THE SEA: A MODERN REAPPRAISAL, 2ND EDITION 92 (2 ed. 2019).

¹¹⁷ “Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty” *SCS AWARD*, *supra* note 88 at 225.

¹¹⁸ Succulently stating the Tribunals reasoning, Joanna Mossop, *Can the South China Sea Tribunal’s Conclusions on Traditional Fishing Rights Lead to Cooperative Fishing Arrangements in the Region?*, 3 ASIA-PACIFIC JOURNAL OF OCEAN LAW AND POLICY 210–231, 220–222 (2018).

Nonetheless, an associated right is an additional historic right and therefore must independently meet the exceptionalism requirement. A sufficient degree of unhindered access to port by historic fishing vessels, demonstrative of the acquiescence of the port state, must have occurred. It is the very rejection of a general right of port entry (Subsection 2(d)) which allows for the possibility of a historic customary law right of port entry.

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

Looking ahead, exceptional rights have, by definition, a narrow future in international law. As customary historic fishing rights progressively extinguish,¹¹⁹ so too will any associated right of access to port.¹²⁰ Alternatively, historic customs of port entry could be incorporated into a treaty which, upon an extended period of exercising access to port under the framework of the treaty, would extinguish the custom.¹²¹ The exceptional historic consent to port entry would be replaced by the consent to access port established in the treaty.

¹¹⁹ E.g., concerning traditional fishing rights, Coastal states may assess “the scope of traditional fishing to determine, in good faith, the threshold of scale and technological development beyond which it would no longer accept that fishing by foreign nationals is traditional in nature” SCS AWARD, *supra* note 88 at 809.

¹²⁰ Conceptually, a historic right of access could develop as an independent historic right and not an associated right. In practice this possibility has not been reported.

¹²¹ See an example of treaty-based rights for foreign fishing vessels to continue landing for resupply, which is akin to granting port entry and service rights; MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDONESIA REGARDING THE OPERATIONS OF INDONESIAN TRADITIONAL FISHERMEN IN AREAS OF THE AUSTRALIAN EXCLUSIVE FISHING ZONE AND CONTINENTAL SHELF, 3(b) (1974); PRACTICAL GUIDELINES FOR IMPLEMENTING THE 1974 MEMORANDUM OF UNDERSTANDING, 5 (1989); reproduced in, Editors, *Law of the Sea*, 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 369–385.

An example from Australia may nonetheless be suggestive of a historic fishing right, which includes an associated customary right of access to port, may continue in parallel to treaty-based frameworks.¹²² The *Torres Strait Treaty* provides for a Protected Zone which seeks to protect the traditional way of life of traditional inhabitants.¹²³ Apart from preserving traditional fishing, the *Torres Strait Treaty* also protects freedom of movement in the area related to traditional activities, such as movement for the purposes of ‘barter and market trade’.¹²⁴ This is affirmed in Australia’s *Torres Strait Fisheries Act 1984* where an offence of unauthorised landing includes an exception for “fish that were taken in the course of traditional fishing and landed at that place for the purpose of the performance of traditional activities”.¹²⁵ The language of the *Torres Strait Treaty* suggests that the historic rights and obligations of each state and its nationals shall ‘continue’ and are not replaced by the *Torres Strait Treaty*.¹²⁶

4. Conclusion

One state’s historic right is another state’s restriction on sovereignty. Therefore, historic rights cannot be presumed,¹²⁷ but must fulfil the exceptionalism requirement most recently reaffirmed in the *SCS Award*. By examining historic fishing rights and associated rights from the perspective of port state jurisdiction, this article has sought to demonstrate that the current consensus on access to ports should be refined by an additional exception, namely, an ‘associated right’ of port entry for fishers exercising defined historic fishing rights. This is in

¹²² ILC, *Draft conclusions on identification of customary international law, with commentaries, 2018*, REPORT OF THE INTERNATIONAL LAW COMMISSION: SEVENTIETH SESSION 122–156 (2018) Conclusion 11. Mauritius, for one, claimed fishing rights in the Chagos Archipelago’s territorial sea under both the ‘Lancaster House Undertakings’ and as a historic customary right, but the Arbitral tribunal did not address the historic rights claim; Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, PCA 2011-03, 456 (2015).

¹²³ TORRES STRAIT TREATY, *supra* note 2 Article 10(3), traditional inhabitants, traditional fishing and traditional activities are defined in Article 1. See generally, Stuart B Kaye, *Jurisdictional patchwork: law of the sea and native title issues in the Torres Strait*, 2 MELBOURNE JOURNAL OF INTERNATIONAL LAW 381–413 (2001).

¹²⁴ TORRES STRAIT TREATY, *supra* note 2 Article 1(1)(k)(iv).

¹²⁵ TORRES STRAIT FISHERIES ACT 1984, ACT NO 23, 1984 (1984) Article 50(1).

¹²⁶ TORRES STRAIT TREATY, *supra* note 2 Articles 11-12.

¹²⁷ The Case of the S.S. Lotus (France v Turkey), Judgment, PCIJ Series A No 10, 18 (1927).

addition to –and distinct from– the customary law right of access to port, or another sheltered area, where vessels are in distress, or compelled by *force majeure*, to access port and access is necessary to preserve human life.

While the right of access for vessels in distress is a global custom, the right of access for historic fishers in *Eritrea/Yemen Award* is limited to governing the rights and obligations as between the port state and the fishers’ state of nationality. The latter case is therefore a concrete example of the concept of bilateral customary international law, first recognised in *Right of Passage over Indian Territory*.¹²⁸ Historic fishing rights, and thus associated rights, cannot generally be transferred to foreign states and their nationals.¹²⁹ The associated right of access to port and port services will therefore remain a bilateral custom.

Alternatively, while the *SCS Award* did not establish any rights of port entry it did recognise the possibility of historic fishing rights as regional customary law. The “Tribunal is of the view that Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities, including the Philippines, China (including from Taiwan), and Viet Nam”.¹³⁰ On comparable facts, a hypothetical associated right of access to port could also be a regional custom.

¹²⁸ Case concerning Right of Passage over Indian Territory (Merits), Judgment, ICJ Reports 1960 6, 37 (1960).

¹²⁹ W. Michael Reisman & Mahnoush H Arsanjani, *Some Reflections on the Effect of Artisanal fishing on Maritime Boundary Delimitation*, in LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES 628–665, 632 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007).

¹³⁰ SCS AWARD, *supra* note 88 at 805.

THE RIGHT OF ACCESS TO PORT AND THE IMPACT OF HISTORIC FISHING RIGHTS

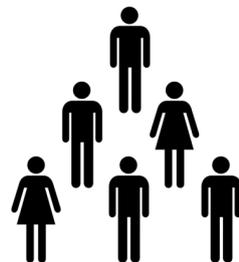
2020 DILA International Conference
25 February 2021

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TODAY'S OVERVIEW & ASSUMPTIONS

- Reshaping International Law In The Asian Century?
 - Not *all* historic norms of self-interest and dominance are challenged or subverted – equal assertion by Asian states.
 - However, established norms might be unrepresentative of Asian *nuances*.
- Doctrinal experiment:
 - Revisit a western-centric silo (access to ports) in context using an Asian-centric silo (historic fishing rights): Building upon and refining, not rewriting, international law.
- Overview:
 - Access to Port and Recognised Exceptions.
 - Historic Fishing Rights.
 - Associated Rights and Access to Port – a Further Exception.



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ACCESS TO PORT BY FOREIGN VESSELS

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- Port State Jurisdiction: 2 strands, (1) the regulation of access to port and port services and (2) the regulation of port offences.
- Strand 1: A *domaine réservé* exception to the law of state jurisdiction (not territorial and ‘sovereignty’ isn’t a principle of jurisdiction). Enforced via denial of entry/services.
- A right of entry would limit enforcement jurisdiction.
- Historic European debate: no general right of entry.
- Confirmed in recent practices, e.g. COVID-19 response. 2005 IHR ‘free pratique’ is **not** a general right of access to port.
- Exceptional rights of access to port:
 - distress, or compelled by *force majeure*, to access port – if access is necessary to preserve human life.
 - Bilateral Agreements (usually exclude fishing vessels).



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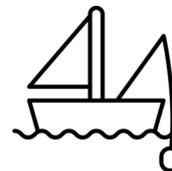


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HISTORIC FISHING RIGHTS

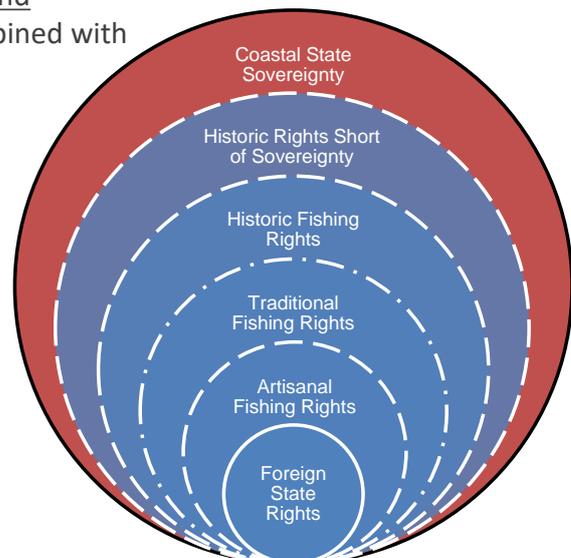


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- UNCLOS explicitly recognises historic waters, purposefully silent on any customary historic rights.
- *SCS Award*: **Exceptionalism** - a continuous and effective (‘historic’) exercise of fishing, combined with the acquiescence of the coastal state.
- *SCS Award*: Post-UNCLOS exceptionalism - internal waters or territorial sea only.
- Reiterated by Indonesia in May and June of 2020.
- The *SCS Award* did distinguish access rights from fishing rights, but principal focus of literature remains on fishing.

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ASSOCIATED RIGHTS: ACCESS TO PORT

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- *Eritrea/Yemen Award*: **Associated rights** - free access to islands and entitlement to enter relevant ports, and to sell and market the fish there.
- Access may be regulated, but not denied. Customary law basis.
- An associated right is an additional historic right and therefore must independently meet the **exceptionalism** requirement.
- Treaty-based 'historic' fishing in archipelagic waters (UNCLOS, Art 51(1)) – *Malaysia/Indonesia Agreement*, Art. 14(3), comparable associated access rights.
- Other treaties affirm existing (customary) - *Torres Strait Treaty* 'Protected Zone' associated freedom of movement for 'barter and market trade'. Includes landing of catch.



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THANK YOU

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- If established doctrinal norms are to be representative of Asian doctrinal nuances they should be built upon to take into account Asian practices not witnessed in the oft repeated conclusions of western-centric debate.
- The current consensus on access to ports should be refined by an additional exception, namely, an 'associated right' of port entry for fishers exercising defined historic fishing rights. This is in addition to –and distinct from– the customary law right of access to port, or another sheltered area, where vessels are in distress, or compelled by *force majeure*, to access port and access is necessary to preserve human life.
- Foreseen Critiques:
 - *SCS Award* and *Eritrea/Yemen* are functionalist findings on historic fishing practices to protect unique situations?
 - Long-established practices are an exception to custom and not bilateral custom?
- Unforeseen Critiques or Questions? cilhan@nus.edu.sg

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CHINA, SOVEREIGNTY AND CHANGING INTERNATIONAL LEGAL ORDER – IMPLICATIONS FOR THE FUTURE

- **Ravi Prakash Vyas**

Abstract

The paper aims to cover China's perceptions and understanding of international law and its influence on world legal order. It will seek to identify China's approach towards international law and assess the impact in the development and growth of international law and institutions. The scope and nature of research will be focused towards identifying the interaction and understanding of International Law by China through the study of issues such as its domestic law and politics, China's international legal behaviour, China's territorial and maritime disputes with other nations, Chinese practice on the law of treaties, the use of force, China's integration in the global trade and financial systems and Belt and Road initiatives.

The research will try to understand the complicated relationship between the international legal order and China's attitude as an emerging superpower that subscribes to a distinctive set of social, historical and cultural practices and narratives. The research will focus on China's approach towards conflicts of sovereignty and international legal order and how it will balance it? Will China continue to promote its domestic interests, or will there be a change instance? It is essential to do so because of China's growth and commitment of a shared future for the international community is bound to reshape the global legal structure. If, it happens, then what impact it will bring and how it is that countries would deal with it needs to be answered.

I. INTRODUCTION

Leading the varying discourse on the pinions of international law with its concepts and implications being rooted within a European context, China has had its own process changing the intellectual orientation of theories relating to international law and affairs by impressing on the west and east perspective in deliberations of the discipline.¹

Two persisting features marking this tradition include - First, international law has both a normative ideological dimension and a power-based or self-interest maximising dimension.

¹ Rune Svarverud, 'International Law as a World Order in Late Imperial China Translation, Reception and Discourse, 1846-1911' (Brill, 2007) Page 22

Second, the apparent close connection between the international order's character which includes its legal dimensions and the internal order of states.² While, the first echoes a long-standing dichotomy in occidental thinking, as famously characterised Western trope by E.H Carr as a clash between idealism and realism and has its roots in Thucydides that has been near ancient in contemporary perspectives of academic and policy debates no less impressive than the Chinese analogue.³

The second mainly resonates with strands of Western thought and practice of the discipline including contentions that the states' domestic orders that determine and shape the character of international order such as democratic peace, especially among liberal states, that international law and relations should differ from and between liberal and illiberal states. This also includes pertinent assertions that the international order has the ability to mould states' domestic orders like we see in the second image reversed theories and foreign policy prescriptions that have aimed to promote democracy, human rights and the rule of law globally.⁴

China's emerging status as a superpower and its economic-trade genius has been accompanied by challenges to the ideals of international law. Its primacy over the resolution of historical disputes has made understanding China's relationship with international law complex to understand, especially with the on-going territorial disputes where China has chosen rely on historical claims rather than abiding by established international standards. The paper seeks to decode China's history in defining its relationship with international law and states while analysing its further influence on contemporary issues relating to China. In Part II, two foundational principles defining said relationship – sovereignty and territorial integrity – provide perspective on the impact of

² Delisle Jacques, "China's Approach to International Law: A Historical Perspective." *Proceedings of The Annual Meeting (American Society of International Law)*, Vol. 94, 2000

³ E.H. Carr, 'The Twenty Years Crisis Neorealism and Neoliberalism (24 Ed. 1946)'; 'The Contemporary Baldwin Ed., 1993); Thucydides, *The Puloonnesian Wars* (Rex Warner Trans 1972)', 'New E Btonal Relations Theory (Michael W. Doyle & John Antony Eds 1997); Condoleezza Rice, *Promoting the National Interest*, *Foreign Affairs* 45 Jan-Feb. (2000)

⁴ Kenneth Waltz, *The State and War: An Analysis* (1959); Michael W. Doyle, 'Kant Liberal Legacies and Foreign Affairs', 12 *P & P EAST* 323-353; Peter A. Gourevitch, 'The Second Image Reversed International Sources of Domestic Politics', 32 *INT'L OJ* 1 (1978); Anne-Marie Slaughter, 'International Law in A World of Liberal States', 6 *ERJ. INTLL S0* (1995)

Chinese nationalism in evolving its acceptance and views on international law and relations.⁵ Part III examines the *status quo*, where the legal status of international law and treaty practice under the Chinese Constitution and further its recognition and application in the Courts of Law is elucidated upon. With this basis, Part IV relates the previous two parts to contemporary issues concerning China and its relationship with States and international law including human rights concerns, territorial and maritime disputes, transnational developmental initiatives etc., and finally putting to rest certain concerns, while highlighting concern over others.

II. STATE SOVEREIGNTY AT THE FOREFRONT: TRACING ITS ROLE IN SHAPING THE CHINESE PERSPECTIVE

A. The Principle of Sovereignty and its Evolution in Defining Chinese Relationship with International Law

The principle of sovereignty has been the core of the Chinese approach to International Law and Relations, both theoretically and practically.⁶ While this depicts a general practice among developing countries of conservatism of sorts, China has been able to benefit from the international legal order without introducing fundamental changes in domestic legislation.⁷ Guided by this policy, China's engagement with countries has been observed to have a state-state emphasis rather than relying on a higher unified international regulatory mechanism that influences the domestic law-making processes and politics.⁸

⁵ Daniel J. Hoffheimer, *China and the International Legal Order: An Historical Introduction*, 11 Case W. Res. J. Int'l L. 251 (1979) at Ch. 5

⁶ Judge Xue Hanqin, 'China Perspectives Part 3: Sovereignty' (10 Aug. 2011), *Denver Journal of International Law and Policy* < <https://djilp.org/chinese-perspectives-part-3-sovereignty/> >

⁷ Tim Rühlig, 'How China Approaches International Law: Implications for Europe', (Brussels: European Institute for Asian Studies, May 2018), <http://www.eias.org/wp-content/uploads/2016/03/EU_Asia_at_a_Glance_Ruhlig_2018_China_International_Law.pdf>; Vijay Gokhale, 'China Doesn't Want a New World Order. It Wants This One', *The New York Times*, (04 June 2020) <<https://www.nytimes.com/2020/06/04/opinion/chinaamerica-united-nations.html>>

⁸ Symposium on the Objects of Legal Study. Cheng-fa ven-chiu, No. 3, at 30-37 (961), tr. In 1 Chinese Law and Government, No. 2, 27 (1968) in which the Chinese debate the question of whether the object of legal study is law, the state, or both. Also see Wang Chia-fu, 'Certain Problems In the Company- Ing and Writing of The Theory of State and Law', Cheng la yon chiu, No. 1, 35-40 (13) in US. Joint Publications Research Service, NO. 15, 522 3-21 (Oct 1. 1962).

The deliberations on limited sovereignty attracted significant contentions by the Chinese considering that the principle went against laid down expectations of modern states to protect the sovereignty without limits or restrictions of any form. However, this did not imply conformation with absolute sovereignty because it would encourage encroachments to the sovereignty of others, only relatable with imperialistic aggression. The concept only gathered relevance after the acceptance of *western international law*, while interpreting international events. Such primacy over sovereignty and its evolution can be traced.

Through 1953-1954, the Chinese set out the Principles of Peaceful Co-existence that forms part of the present Constitution⁹ that includes - sovereignty and territorial integrity, mutual cooperation and non-interference in domestic affairs of a state provided candidly in the Preamble.¹⁰ Sticking true to its principles, China maintained its position throughout the cold war by not participating in the United Nations Security Council (UNSC) voting regarding peacekeeping and related UN missions.¹¹ With this, China focused its objectives towards economic development throughout the 1970s made the ideals of non-intervention and sovereignty more prominent under Den Xiaoping.

On the subject of humanitarian intervention, the official position of which was unsupportive towards such multilateral interventions, requiring that any actions should be on an invitational basis and further should only be resorted to after exhausting all other avenues of dispute resolution. However, even though China maintained a strict position regarding state sovereignty, Chinese leaders committed towards several multilateral peacekeeping operations that began changing the outlook of sovereignty from an international perspective, especially after the Kosovo crisis (1998-1999).¹²

Despite limited involvement, the Chinese participation in the UN operations has been seen to have had a transformative impact that has pictured China as a responsible member of the international

⁹ Jonathan Davis, From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era, 44 VAND. J. OF TRANSNAT'L L., 225 (2011).

¹⁰ Constitution of the People's Republic of China, 4 December 1982 (Preamble).

¹¹ Jonathan Davis, From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era, 44 VAND. J. OF TRANSNAT'L L., 225 (2011).

¹² Allen Carlson, 'Protecting Sovereignty, Accepting Intervention: The Dilemma of Chinese Foreign Relations in the 1990s', *National Commission on U.S.-China Relations*, China Policy Series No. 18 (Sept. 2002)

community, willing to gradually make compromises on the rigid perspectives relating to sovereignty and intervention.

B. Territorial Integrity and Acquisition

Extending the principle of sovereignty, citing concerns over territorial integrity provides nuance to the discussion, with the 'One China Policy' forming its core. The policy essentially denies any international recognition of states that claim independent sovereign status from the People's Republic of China (PRC) banner. So far, the policy has worked favourably towards Beijing in two aspects – firstly, the successful reintegration of Macao and Hong Kong recently much celebrated by the State Council,¹³ despite popular citizen-level dissent; and secondly, maintaining diplomatic pressure over countries and international organisations including the United Nations from openly recognising and interacting with these states.

Accordingly, relations with such states have led a confusing evolution, especially with the United States that has somehow managed to balance interests with China and Taiwan and, therefore, claims over aiming to resolve historical disputes by recovering what they perceive to be their territory, constantly requires countries around the world to make amends to its foreign policies over the subject of status of recognition and relations to maintain its interests with Mainland China. What is to be observed is the ability for the Beijing Government to accommodate generational changes that Hong Kong and Macao had been subjected to, notably much different from the ideals propagated in the PRC, over the coming times. Through this, China has actively reminded States to adhere to and abide by the One China principle.¹⁴

Unlike Tibet, for example, Taiwan garners more attention and coverage when the 'One China Policy' is discussed because of how astray Taiwan has moved from the PRC. Moreover, even though indirect, Taiwan has significant autonomy resulting from international recognition and

¹³ Taiwan Office and the Information Office of the State Council, 'White Paper – The One China Principle and the Taiwan Issue' (21 Feb. 2000) <<https://www.fmprc.gov.cn/ce/ceno/eng/ztxw/twwt/t110655.htm>>

¹⁴ Anirbhan Bhaumik, 'China asks India to adhere...' (Deccan Herald, 20 Oct. 2020) <https://www.deccanherald.com/national/china-asks-india-to-adhere-to-the-one-china-policy-not-to-enter-into-any-agreement-with-taiwan-904714.html>; Riyaz ul Kaliq, 'Abide by One China Policy, Beijing Tells U.S.' (AA.com, 16 Nov. 2020) <<https://www.aa.com.tr/en/americas/abide-by-one-china-policy-beijing-tells-us/2045832>>

diplomatic relations.¹⁵ Over the decades, the international community has become less shy in challenging the policy within a Taiwanese context. Prior to this, the U.S Government was observed to have publicly denounced the independence movements of the Taiwanese, while it maintained its strategic interest as a way of keeping the PRC in check, due its proximity with the mainland.¹⁶

III. INTERNATIONAL LAW, CHINESE DOMESTIC LEGISLATION AN JURISPRUDENCE – HOW DOES CHINA RECOGNISE AND APPLY IT?

A. Legal Status of International Treaties in Domestic Law

Under the Chinese Constitution and the Treaty Procedure Law, the Standing Committee of the National People's Congress (NPC) is solely responsible for deciding matters relating to the ratification and denunciation of treaties and significant agreements made with foreign States. Article 7 of the Treaty Procedure Law provides for "treaties and important agreements" that includes: friendship and cooperation treaties, peace treaties and other such treaties that are political in nature; treaties and agreements on territories and the delimitation of boundaries; treaties and agreements on judicial assistance and extradition; and treaties and agreements that have provisions inconsistent with national laws. Moreover, procedurally speaking, negotiation and conclusion of international treaties with foreign States needs to be approved by the State Council, or submitted to it for the purpose of maintaining record. In this regard, any case that requires an amendment or revision to domestic laws for a treaty purpose, the domestic prescribed legal process for ratifying or approving the treaty should be the same as the legal procedure for the relevant domestic legislation.

Even though the Chinese Constitution does not specifically elaborate on the relationship between the treaty-making power and the legislative power, the relevant provisions of the Constitution and

¹⁵ On unofficial diplomatic missions in Taiwan, the U.S. example; American Institute in Taiwan, 'U.S. – Taiwan Relations' <[¹⁶ Jue, Stanton. "The 'One China' Policy: Terms of Art." *American Journal of Chinese Studies*, vol. 13, no. 1, 2006, pp. 79–88. *JSTOR*, \[www.jstor.org/stable/44288816\]\(http://www.jstor.org/stable/44288816\)](https://www.ait.org.tw/our-relationship/policy-history/us-taiwan-relations/#:~:text=The%201979%20Taiwan%20Relations%20Act,maintaining%20its%20self%2Ddefense%20capability.&text=The%20American%20Institute%20in%20Taiwan,implementing%20U.S.%20policy%20toward%20Taiwan.></p>
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the Treaty Procedure Law have been established specifying statutory limits on the treaty-making power, both procedurally and substantively. Further, the nature and the subject of a treaty determine which body of the State is competent to conclude on treaties and provide for domestic legal procedure expected to be duly followed. However, Governmental departments do not have the authority to conclude treaties with foreign governments beyond their competence and the scope of their functions, provided that specific authorisation or approval has been by the State Council or any associated competent departments. This internal legal procedure for the conclusion of treaties determines the status and effects of treaties in domestic law, without which governmental departments cannot conclude treaties as treaty negotiations need to be conducted in accordance with the Treaty Procedure Law and follow the prescribed legal procedures at all stages. Therefore, the treaty-making power is strictly delimited by law.

The Legislation Law of 2000, establishes the hierarchy of Chinese domestic law where the Constitution is the law of the land, which is followed by orders by laws, administrative regulations and local regulation.¹⁷ It also includes provisions governing the legislative power and procedures of the legislative bodies, administrative organs and agencies at different levels. Article 5 (2) of the Constitution states that "*no laws or administrative or local rules and regulations may contravene the Constitution.*" Although the Legislation Law does not include any reference to the status of international treaties in the domestic legal system, it is generally accepted that treaties concluded between governmental departments should not contravene higher-level laws, and treaties concluded between governments or States should not contravene provisions of the Constitution or corresponding specific laws, unless the legislature has made appropriate amendments to the Constitution or the relevant laws.¹⁸

Under Article 8 of the Legislation Law, matters relating to certain important areas shall be governed exclusively by laws adopted by the NPC and the Standing Committee of the NPC. Such matters include, among others: national sovereignty; criminal offences and punishment;

¹⁷ Paler, L. (2005). China's Legislation Law and the Making of a More Orderly and Representative Legislative System. *The China Quarterly*, 182, 301-318. doi:10.1017/S0305741005000202

¹⁸ WANG Tieya, 'Status of Treaties in the Chinese Legal System', *Zhongguo Guojifa Niankan* [Chinese Yearbook of International Law] (1994); WANG Tieya, *Introduction to International Law* (Beijing University Press, 1998), 209.

fundamental rights of citizens; expropriation of non-state assets; or matters that are related to the legal systems on civil affairs, finance, taxation, customs and trade; judicial system and arbitration. Accordingly, any treaty that affects the above-mentioned matters shall be subject to the domestic legal procedure of the Standing Committee of the NPC for ratification or accession.

Therefore, for instance, China's ratification of the 1966 International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights, which entail necessary amendments to the relevant Chinese domestic laws, would require a decision on the part of the Standing Committee of the NPC. Further, substantive treaty obligations have domestic legal effect and become applicable in domestic law only through specific provisions of national legislation. However, this is quite different from cooperation agreements concluded between governmental agencies, which are primarily executed by the administrative departments and do not require national legislation for the purpose of implementation.

B. Direct Applicability of Treaties in Courts of Law – How treaties are recognised and cited in Chinese Courts

China has ratified several international human rights treaties, including six of the nine core human rights conventions, including the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention against Torture (CAT), Convention on the Rights of Children (CRC), International Covenant on Social, Economic and Cultural Rights (ICESCR) and Convention on the Rights of Persons with Disabilities (CRPD).¹⁹

Despite this, the 1982 Chinese Constitution itself has been silent on status of the international treaties and how it is adopted in the national legal system.²⁰ There has been a common school of thought attributing to automatic incorporation where treaties should prevail in cases of

¹⁹Congyan Cai, 'International Law, Domestic Courts and the Rise of China' < <https://www.iilj.org/wp-content/uploads/2016/09/CaiIILJColloq2015.pdf> >

²⁰ Cogyan Cai, 'International Law, Domestic Courts and the Rise of China' < <https://www.iilj.org/wp-content/uploads/2016/09/CaiIILJColloq2015.pdf> >

inconsistencies with Chinese Law, barring reservations that are made.²¹ This has been linked to the fact that the Chinese Constitution was significantly influenced by the 1936 Soviet Union's Constitution and further contributed by its hostility towards international law owing to the history relating to humiliation of the 'unequal treaties'.

China's representative had stated in April 1990 that,

*'...according to the legal system of China, as soon as the Chinese government approves or participate in any related international treaty it becomes effective in China and the Chinese Government will be responsible for the respective obligation. In other words, the Convention against Torture has become directly effective in China. Acts of tortures, as defined by the Convention, are strictly prohibited according to the laws of China.'*²²

More importantly, China accepted that the CAT could be invoked 'before the Chinese courts.'²³

Accordingly, in pursuance of Article 142 of the General Principles of the Civil Law and Article 238 of the Civil Procedure Law, Chinese courts have directly applied a number of international treaties in the context of adjudicating civil cases with foreign elements.²⁴

This has been exemplified through the judicial pronouncements made by the Chinese Courts:

1. In *Abdul Waheed v. China Eastern Airlines*²⁵ the court decided that the 1955 Hague Protocol and the 1961 Guadalajara Convention should apply in this case, because China and Pakistan were state parties to the treaties. Under the treaties, when a passenger has paid in full the air transport charges by buying a ticket, the airline carrier has a legal obligation to deliver the contracted

²¹ Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., *National Treaty Law and Practice*, Martinus Nijhoff Publishers, 2005, p.164.

²² UN Committee against Torture, 4th Session, Summary Record of the 51st meeting, Geneva, 27 April 1990, UN Doc.CAT/C/SR.51(4 May 1990), 2.

²³ Summary record of the 419th meeting: China, Poland. 12/05/2000 CAT/C/SR.419. (Summary Record), p.5.

²⁴ Sanzhuan Guo, 'Implementation of Human Rights Treaties by Chinese Courts', *Chinese Journal of International Law*, (2009) <

https://www.academia.edu/8186265/Implementation_of_Human_Rights_Treaties_by_Chinese_Courts_Problems_and_Prospects >

²⁵ Pu Min Yi Chu No. 12164, 2005

carriage service to the passenger. Under Article 19 of the Warsaw Convention, "*the carrier is liable for damage occasioned by delay in the carriage by air of passengers.*" Accordingly, the court decided that the defendant should compensate the plaintiff for the loss he had suffered.

2. *Yu Xiaohong v. Goodhill Navigation, S.A., Panama*²⁶ involved a dispute over compensation for personal injury of a ship's pilot. The Ningbo Admiralty Court found that the defendant failed to comply with the provisions of Regulation 17, Chapter V of the 1974 International Convention for the Safety of Life at Sea, which regulates the use of pilot ladders to help assure the pilot's safety when he is boarding the ship. As a result of the defendant's failure to comply with the regulations, the pilot ladder was broken and the plaintiff fell from the ladder. The plaintiff broke his spine and suffered permanent paralysis. The defendant could not prove that there was any fault or negligence on the part of the plaintiff. This resulted in the largest order for compensation awarded by a Chinese court relating to personal injury at sea.

3. *Trade Quicker Inc. Monrovia, Liberia v. the Golden Light Overseas Management S.A. Panama*,²⁷ in the court of Tianjin Admiralty, the plaintiff pleaded that one of its ships had collided with one of the defendant's ships. For this, the plaintiff sought for compensation resulting from the damage caused to the ship. The Tianjin Admiralty Court applying the relevant treaty found that the plaintiff liable for the major responsibility as the ship violated the provisions of Rule 5, Rule 8 (a), Rule 15, Rule 16 and Rule 34(a) of the 1972 Convention on the International Regulations for Preventing Collisions at Sea. Further, the court directed the defendant to bear minor responsibility as its ship had violated the provisions of Rule 5, Rule 7 (b) and Rules 34 (a) and (d) of the Convention. The court delivered a judgment regarding the amount of compensation that assessed the damages proportionate to fault.

C. Emphasising on Peaceful Settlement of International Disputes

China has considered peaceful settlement of disputes fundamental to international law. For this, there are typically two approaches to resolve a dispute – political or judicial. The former includes

²⁶ Yong Hai Shi Chu Zi No. 55, 1999

²⁷ Jin Hai Fa Shi Zi No. 4, 1990

negotiation and consultation,²⁸ while the latter comprises of an institution with an independent jurisdiction through litigation and/or arbitration. This is in consonance with Article 2 of the United Nations Charter that endorses peaceful settlement of international disputes and condones any non-peaceful measures that may be adopted. Further, China recognises that this is not a replacement to peacekeeping efforts undertaken by the United Nations with the support of its member countries but continues to stress for opposing excessive use of force and respecting the principles of sovereignty and non-intervention, with the exception of the crises.²⁹

In practice, China has always attempted to resolve its disputes through the peaceful mechanisms of negotiation and consultation. This is particularly apparent with the disputes and tensions that have arisen in the past between China and its neighbouring countries.³⁰ Historically, this approach towards dispute resolution has worked favourably and efficiently as seen in border agreements signed with Myanmar, Russia and Pakistan as a result of diplomatic negotiations.³¹ In this spirit, it has also contributed in resolving disputes as a mediator through its active participation with the United Nations.³² However, while negotiation and consultation preferred, China has a sense of distrust and refrains from appearing or participating in the proceedings of international courts. This is evident from when China strongly opposed referring the South China sea dispute to arbitration, reflective of its non-compliance habit with the tribunal rulings against China.³³

IV. THE INTERNATIONAL ORDER - TILTING THE BALANCE AS AN EMERGING SUPERPOWER

A. Territorial and Maritime Disputes

²⁸ J.G. Merrills, *International Dispute Settlement*, Cambridge, Cambridge University Press, 1998, pp. 1–8.

²⁹ Liu En-zhao, *The United Nations Peacekeeping Activities*, Law Press, 1999, pp. 252–254

³⁰ Qinjiang Kong & Xiaojuan Ping, 'International Law and International institutions: Implications for a rising China', *Chinese Journal of Global Governance*, 1 (2015) 157-173

³¹ Wang Tie-ya, *International Law*, Law Press, 1995, p. 610

³² Liu Ming, *International Intervention and National Sovereignty*, Chengdu, Sichuan People's Publishing House, 2000, pp. 191–192.

³³ *Law in Chinese Foreign Policy: Communist China and Selected Problems of International Law*, Dobbs Ferry, 1972.

With the largest number of neighbours covering 22,000 KM of border land, China shares its borders with fourteen neighboring countries.³⁴ In addition to this, six island nations neighbour China including the Philippines, Malaysia, Japan and Indonesia. Presently, China has territorial disputes with all of its neighbours, even with some of its closest allies like the Democratic People's Republic of Korea (DPRK).³⁵ These disputes have led to two of the significant wars with India in 1962³⁶ and the Soviet Union in 1969.³⁷

China's emergence as a military power has also contributed to global hesitance only increasing border tensions and making the borders highly sensitive pressure points. The 2020 Sino-Indian border tensions have surely reinforced that the idea of using military force is unwise.³⁸ While the rise of China has particularly made western powers uncomfortable, there has been a growing perception of its "aggression", often confused with "assertion". There could, without doubt, be naivety in only believing that China might not become a military expansionist power, however, its history and culture should equally engage deliberations on a peaceful rise of power. One cannot miss the fact that China has not engaged in any war since 1979 with Vietnam.³⁹ Further, despite the tragic events that took place on the Sino-India border in Galwan Valley, both the sides abided by Article VI of the 1996 agreement against the use of firearms.⁴⁰ Despite this, China has been observed to make territorial claims based on historical precedents, giving the impression that China conveniently invokes international law and decides not to conform on other occasions as we see in certain instances.

³⁴ Central Intelligence Agency, 'The World Factbook: China' <<https://www.cia.gov/library/the-world-factbook/geos/ch.html>> (2014)

³⁵ Daniel Gomà Pinilla, 'Border Disputes between China and North Korea', *China Perspectives* [Online], 52 (March-April 2004) <<http://journals.openedition.org/chinaperspectives/806>>; DOI: <https://doi.org/10.4000/chinaperspectives.806>>

³⁶ David R. Devereux, 'The Sino-Indian war of 1962 of Anglo-American Relations', 44 *J. Contemp. Hist.* 71,71-72 (2009)

³⁷ U.S. Dept of State, Director of Intelligence and Research, Intelligence Note, 'USSR/China: Soviet and Chinese Forces Clash on the Ussuri River' (04. Mar. 1969)

³⁸ Mahbubani, Kishore. "Is China Expansionist?" *PRISM*, vol. 9, no. 1, 2020, pp. 130–139. *JSTOR*, www.jstor.org/stable/26940164.

³⁹ Zhang, X. (2005), 'China's 1979 War with Vietnam: A Reassessment', *The China Quarterly*, 184, 851-874. doi:10.1017/S0305741005000536

⁴⁰ Agreement Between Govt. of India and Govt. of PRC on Confidence-Building Measures (29 Nov. 1996) <https://peacemaker.un.org/sites/peacemaker.un.org/files/CN%20IN_961129_Agreement%20between%20China%20and%20India.pdf>

Disputes of the Sea – South China Sea

The underlying issue relating to both the East and South China sea disputes relate to interpretation of the United National Convention on the Laws of the Sea (UNCLOS),⁴¹ contested within a historical context. The grounds on which China are based on historical evidences that they argue cannot be neglected as the treaty came into existence long after the Chinese claims made through the 'Nine Dash Line' also known as the 'U-shape' line, going as long back as 1947 which was formalised in 1951.⁴² The issue has only evolved into a more complex dispute comprising of claims and counter-claims. Further, among the countries protesting the Chinese theory, there is no clear agreement regarding jurisdictions in the South China sea region.⁴³ The growing realisation of the strategic and natural resource importance of South China sea is only adding to the already highly complicated scenario in the region.

From a strictly international legal perspective, China may not have a strong foundation for its arguments based on historical heritage.⁴⁴ However, this does not completely invalidate Chinese claims, since China faced no oppositions during the proclamation of such claims and that challenges to the nine-dash line or ten-dash line were only made after the adoption of the UNCLOS. These may be seen as impositions that are inconsistent with domestic policies, as clearly China does in the present times. There is a lot more clarity that the UNCLOS has to provide regarding the manner to approach disputes that arise from historical claims. Even though the arbitral tribunal ruled in against China in *Philippines V. China (South China Sea Arbitration)*⁴⁵ after it was found by the Court that China had violated Philippines' sovereign rights by interfering with fisherman and oil exploitation, China continues to refuse the decision and sticks to the nine-dash line theory to mark its jurisdiction.⁴⁶

⁴¹ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. Enacted as: entered into force as the “United Nations Convention on the Law of the Sea” on Nov.

⁴² Chakraborti, ‘The Territorial Claims in South China Sea’ 178

⁴³ Nalanda Roy, ‘The South China Seas Disputes: Past, Present and Future’ 12

⁴⁴ Carlyle A. Thayer, South China Sea Disputes; ASEAN and China, EAST ASIAN FORUM (July 14, 2011), <http://www.eastasiaforum.org/2011/07/14/south-china-sea-disputes-asean-and-china/>.

⁴⁵ PCA Case No. 2013-19

⁴⁶ The Guardian, ‘Beijing rejects tribunals’ ruling in South China sea case’ (12 Jul. 2016) <<https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>>

Further, the region has emerged into a highly sensitive zone with constant claims of concerns relating to sovereignty and national security being made by all parties involved. Patrolling by the parties including the U.S. ships that patrol the region challenging the nine-dash line contributes to escalating tensions.⁴⁷ The constant tussles between the U.S. along with its allies in the region and China do not seem to have any immediate chances of de-escalation. In the times to come the mode of dispute settlement whether political, judicial or military will be guided by energy, security and domestic challenge concerns.⁴⁸

B. Economics and International Trade – China's *forte*

China's emergence as a great power has not been a lonely one but rather one filled with strategic relationships and partnerships with countries across the globe through cooperative measures undertaken between the respective governments and business corporations. Today, it stands as the second largest economy⁴⁹ and it is estimated that China may become the largest by 2024.⁵⁰ With this, China has become deeply integrated into the world economy than the U.S. or the European Union (EU). As anticipated, China has tilted the balance of the international economic order by challenging the U.S. which is comparable to Germany in the 19th century and Japan and Germany again in the 20th century.⁵¹ Chinese economic reform from being product based to commodity based is credited to Deng Xiaoping who had applied Marxist dialectic and historic materialism while analysing the gap between China and the developed countries, where his modernisation plan essentially doubled China's Gross National Product (GNP) by the end of the century from 1980.⁵² China has realised that the real competition with the U.S. is going to be on economic grounds, just like the way the U.S. defeated the Soviet Union by outperforming their economy.⁵³

⁴⁷ Greg Torode & Idrees Ali, 'U.S. weighs more South China Sea patrols to confront 'new reality' to China' (03 Jun. 2018) < <https://www.reuters.com/article/us-asia-security-southchinasea/u-s-weighs-more-south-china-sea-patrols-to-confront-new-reality-of-china-idUSKCN1I203B>>

⁴⁸ Yuwa Wei, 'China and its Neighbours: Exasperating Territorial Disputes' (2014) Vol. 22:105

⁴⁹ World Bank, GDP World Current (US\$) < https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true> as of Jan. 2021

⁵⁰ World Economic Forum, 'China could overtake the US as the World's largest economy by 2024' (20 Jul. 2020) < <https://www.weforum.org/agenda/2020/07/largest-global-economies-1992-2008-2024/>>

⁵¹ C. Fred Bergsten & Chars Freeman & Nicholas, 'China's Rise: Challenges and Opportunities' *Peterson Institute of International Economics*

⁵² Gao Shanquan, 'China's Economic Reform' (1996)

⁵³ Mahubani, Kishore. "Is China Expansionist?" *PRISM*, vol. 9, no. 1, 2020, pp. 130–139. *JSTOR*, www.jstor.org/stable/26940164

This has provided China with significant influence over its partners especially in geo-political matters. More than economic implications, trade agreements have begun to have an apparent political dimension especially in regional development.⁵⁴ The U.S.-China trade wars under the Trump administration is the most recent notable example of the politicisation of international trade that is seen as a means of obtaining leverage.⁵⁵ While China, in this instance, has much more say than its partner countries in regional trade agreements, such trade wars put countries in an awkward position to choose between economic interest or otherwise. Two contributing aspects to this include: (a) trade in politically sensitive sectors such as energy;⁵⁶ and (b) trade deficits providing favorability towards China.

Global Reliance on trade with China and Changing Dynamics

Impressing on the trade deficit argument, there have been more vocal opinions regarding the dissatisfaction of the heavy reliance on China for trade purposes. Even though, economically Chinese firms benefit major corporations through their expertise and cheap labour, globally there has been a growing trend for self-reliance as strategic policy moves like in the U.S. and India.⁵⁷ These steps have not been seen to majorly effect trade with the Chinese, at least in the short-term. This is most evident with the coming of the COVID-19 pandemic, where countries realised their inability to respond adequately by producing healthcare supplies and protective care equipment.⁵⁸

However, the optics of the debate regarding the self-reliance by countries is certainly questionable to an extent. Such Chinese reliance exposes more about the respective governments' short-comings rather than a solely China related issue.

⁵⁴ Michael Sampson (2019): The evolution of China's regional trade agreements: power dynamics and the future of the Asia-Pacific, *The Pacific Review*, DOI: 10.1080/09512748.2019.1660397

⁵⁵ Minghao Li, Edward J. Balistreri, Wendong Zhang, The U.S.–China trade war: Tariff data and general equilibrium analysis, *Journal of Asian Economics*, Volume 69, 2020, 101216, ISSN 1049-0078, <https://doi.org/10.1016/j.asieco.2020.101216>.

⁵⁶ Michael Sampson (2019): The evolution of China's regional trade agreements: power dynamics and the future of the Asia-Pacific, *The Pacific Review*, DOI: 10.1080/09512748.2019.1660397

⁵⁷ Dept. of Industry and Internal Trade, 'Make in India' < <https://dipp.gov.in/programmes-and-schemes/industrial-promotion/investment-promotion>>

⁵⁸ Taiei Hoyama & Rintaro Hosokawa, 'Reliance on Chinese Protective gear soars in pandemic's wake', *Nikkei Asia*

Transnational Development Projects – The ambitions of BRI and its viability

With the vision of reviving the ancient *Silk-Road Economic Belt and Maritime Road for the 21st century*, the Belt and Road initiative (BRI) aims at connecting and strengthening economic cooperation between Eurasia, paving way for access to the European market by Asia.⁵⁹ For China, the BRI aims for mutual development more than creating partnerships for profit-generating purposes expanding to over 68 countries with investments as high as \$8 Trillion.⁶⁰ It can be concluded to have dual objectives – firstly, extending humanitarian aid and initiating new trade and investment opportunities for partner countries; and secondly, connecting partner countries not just economically but strengthening cooperation politically.⁶¹

Even though skepticism surrounding the initiative was not new, the COVID-19 pandemic introduced a new perspective towards the viability of BRI developmental projects⁶². Heavy reliance on Chinese public sector banks and enterprises may hinder China's attempt to encourage multi-lateralism for common development. So far, China's Non-Performing Assets (NPAs) stands at a valuation of \$146 billion⁶³ with loan extensions that may amount to \$1.2-1.3 billion by 2027,⁶⁴ making China the world's largest creditor⁶⁵ as a result of the initiative. Consequently, there has been a diminishing ability to take on further risks by the Chinese, affecting the viability of projects, many of which began even before the complications that COVID-19 introduced. China can mitigate most concerns by promoting trade and cooperation among BRI partners without Chinese reliance and the inclusion of non-Chinese banks to reduce the burden of financing.

⁵⁹ Yubaraj Sangroula, 'South Asia-China Geo-Economics' 355

⁶⁰ Hurley & Morris & Portelance, 'Examining the debt implications of the Belt and Road Initiative from a policy perspective' *Journal of Infrastructure, Policy and Development* (2019), Volume 3 Issue 1. DOI: 10.24294/jipd.v3i1.1123

⁶¹ Lauren A. Johnson, 'The Belt and Road Initiative: What is in it for China?' *Asia Pac Policy Stud.* 2019; 6:40–58.

⁶² Ritika Passi, 'The BRI and COVID-19: Tale of two crises' (28 May 2020) < <https://www.orfonline.org/expert-speak/bri-covid-19-tale-two-crises-66929/>>

⁶³ Bloomberg News, 'China's Big Banks Face Debt Woes...' (03 Nov. 2020) <<https://www.bloombergquint.com/global-economics/bocom-profit-drop-narrows-as-china-s-economy-stages-recover>>

⁶⁴ Morgan Stanley, 'Indiside China's Plan to Create a Modern Silk Road' (14 Mar. 2018) < <https://www.morganstanley.com/ideas/china-belt-and-road>>

⁶⁵ Horn & Reinhart & Trebesch, 'How Much Money Does the World Owe China?' (26 Feb. 2020) < <https://hbr.org/2020/02/how-much-money-does-the-world-owe-china>>

The major concern over the transnational infrastructural projects relates to national security arising out of the term debt trap diplomacy. The concern elaborates that China aims to control over the sovereign rights over host countries in exchange for writing-off debt, with the 99-year lease of the Sri Lankan Hambantota port being the face of the concern. The claims are held to not be devoid of any such evidence by the Chinese. The reasons for these concerns are – heavy centralisation of decision-making and financing by China, Chinese workforce requirements in BRI developmental projects, unaddressed concerns over national security and sovereignty with non-BRI partners, lack of any non-Chinese BRI cooperative initiatives and agreements and the contractual obligations relating to debt.

C. Human Rights - Differing Perspectives and Concerns

Setting forth a distinctive perspective to global human rights governance and its mechanisms, China introduced "human rights with Chinese characteristics" that made its first appearance in the 2013 Universal Periodic Review (UPR).⁶⁶ This can be traced back to the debate over the *bourgeois* and socialist systems of international law. The theory suggested that the international system was based on western notions that oppressed socialist perspectives over the subject, going against "Asian values".⁶⁷ This socialistic approach to international law has been observed to depend on the interpretation and agenda of the Chinese leadership through the course of time.⁶⁸ This perspective involves harmonising economic, social and cultural rights with development, providing a development-based perspective in its approach towards human rights and further that civil and political rights should be extended on the basis of overall development.⁶⁹

Additionally, the Chinese perspective comprises of two other aspects that are much different from traditional practices under international law. Firstly, the discouragement of international scrutiny of domestic human rights incidents by invoking the principles of sovereignty and non-interference which is quite contrarian to the general practices of international scrutiny for common realisation

⁶⁶ U.N. Doc. A/HRC/WG.6/31/CHN/1, at 2 (Aug. 20, 2018)

⁶⁷ Michael D. Barr, Lee Kuan Yew and the "Asian values" Debate, 24 ASIAN STUD. REV., no. 3, 2000, 309, at 314–15

⁶⁸ Yu-Jie Chen, 'China's Challenge to the International Human Rights Regime' (29 Jul. 2019) Seq: 1 13:35

⁶⁹ HRC Nat'l Rep. 2018, P 7 (stating that "[t]his is a road that takes development as the priority" when explaining the term "the concept and theoretical system of human rights with Chinese characteristics.").

of established objectives and standards.⁷⁰ Secondly, balancing unity of duties and rights that suggests that human rights should be conditioned to individual performance of duties. However, this discourse has not garnered much traction.⁷¹

Even though the fundamental aspects of the Chinese alternative perspective to international law may be recognised, there is ambiguity in the practical implications of its application in actual scenarios dealing with human rights and international mechanisms, along with the depiction of the socialistic perspective that does not have a middle ground with majorly accepted principles and practices of traditional international law. Citing sovereignty infringements during scrutiny made by fellow member nations over potential human rights violations, may be perceived to discourage such evaluations that are aimed towards achieving the ideals enshrined in the Universal Declaration of Human Rights 1948. With this, the Chinese challenge to the international law regime does indeed poke holes and highlight issues that need to be addressed in the current system but the shortcomings of the proposed theory cannot be ignored as well.

China's Human Rights Situation and the International Community

Celebrating its 70th founding anniversary, China claimed to have had a "splendid history of human rights protection" that aimed at seeking happiness for the people of its citizens.⁷² Indeed the economic rise was accompanied by significant progress in the area of human rights for the people of China. The most notable statistic to the effect is China's greatest achievement in uplifting 800 million people out of poverty, which has been coined as the greatest anti-poverty achievement in

⁷⁰ Katrin Kinzelbach, Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000–2010), 30 NETH. Q. HUM. RTS. 299 (2012) at 320-323

⁷¹ Katrin Kinzelbach, Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000–2010), 30 NETH. Q. HUM. RTS. 299 (2012) at 311

⁷² State Council Information Office, 'White Paper- Seeking Happiness for People: 70 Years of Progress on Human Rights in China' < <https://www.chinadailyhk.com/epaper/pubs//chinadaily/2019/09/23/10.pdf>>

history.⁷³ Accomplishing the vision of the Millennium Development Goals, China successfully reduced infant and mortality rates, improved nutrition and access to water.⁷⁴ Further, it has developed one of the best performing educational systems that has attracted people from across the world. These great strides were made in cooperation with its economic efforts and achieved in less than half a century.

China's economic rise has been a go-to success story which has not come without its criticisms, especially the attention it continues to garner for alleged human rights violations by the international community. As earlier stated, China is sensitive about international scrutiny over domestic affairs by relying on its adopted principles of sovereignty and non-interference. Presently, major human rights concerns expressed by the international community deals with – alleged persecution of minority communities and clamping down on the freedom of speech and expression.

The United Nations and its member countries have expressed concern over the mass detention of pro-democracy activists in Hong Kong that included lawyers, former legislators, councillors etc., restraining them from exercising their right to peaceful assembly, guaranteed under the International Covenant on Civil and Political Rights (ICCPR).⁷⁵ Further, 39 members expressed their discomfort regarding the human rights situation in Hong Kong to the United Nations General Assembly (UNGA) calling for abiding by the Commission on the Elimination of Racial Discrimination (CERD) 's recommendations⁷⁶ against arbitrary detention of members of the Uyghur community and respecting their human rights.⁷⁷ On the matter relating the Uyghur Muslims, the Chinese Government has been adamant in suggesting that claims of human rights violations against the community is being inaccurate and defends itself by claiming that millions

⁷³ United Nations, 'Helping 800 Million People Escape Poverty...' (26 Sept. 2019) <
<https://www.un.org/press/en/2019/sgsm19779.doc.htm>>

⁷⁴ State Council Leading Group on Poverty Alleviation, 'Millennium Development Goals: China's Progress' <
<http://conferences.ifpri.org/2020chinaconference/pdf/001MDG.pdf>>

⁷⁵ UN News, 'Hong Kong: UN Human Rights Office urges immediate release of arrested activists' (07 Jan. 2021) <
<https://news.un.org/en/story/2021/01/1081552>>

⁷⁶ CERD, 'Concluding Observations on the combined fourteenth to seventeenth periodic reports of China' (30 Aug. 2018) CERD/C/CHN/CO/14-17

⁷⁷ USM, 'Joint Statement on Human Rights Situation in Xinjiang...' (06 Oct. 2020) <
<https://usun.usmission.gov/joint-statement-on-the-human-rights-situation-in-xinjiang-and-the-recent-developments-in-hong-kong-delivered-by-germany-on-behalf-of-39-countries/>>

of workers have benefited from "education and vocational training" in the camps located in Xinjiang.⁷⁸

V. CONCLUSION

China's relationship with international law and relations is guided by the principles of sovereignty, territorial integrity, non-interference and mutual respect. Its socialistic perspective to international law challenges the traditional international legal order by relying on history to guide its claims rather than accepting international law mandates. This has exposed a significant discrepancy in the current legal framework's ability to resolve international disputes that include historical claims. The perspective has made conformity with established international standards through treaty frameworks more complicated, with China's rise as a great power, requiring countries to mend their foreign policies according to specific instances while keeping their interests with China in mind. The strict adherence to sovereignty regarding multilateral human rights interventions has gradually softened through UN peacekeeping operations. However, the same cannot be said with the international scrutiny of China's human rights situation by reminding its fellow members to maintain and respect the principles of sovereignty and non-interference in its domestic affairs.

Through its gradual acceptance and participation in international law and its mechanisms, China has developed an elaborate legal and regulatory framework to recognise and implement ratified treaties through domestic legislations and direct application of them by the Court of Law. China's approach toward resolving international disputes through negotiation and consultation is encouraging. It has not only called for resorting to such means but has successfully used diplomatic negotiation in resolving international disputes by leading this initiative through its participation with UN initiatives. It has relied on these means to resolve its territorial disputes with its neighbouring countries. Despite this, there is a great deal of uncertainty regarding the resolution of the highly complex and sensitive South China sea dispute that includes many parties having several claims and counter-claims. Further, the non-compliance with the international arbitral tribunal and its actions thereon has been seen as concerning to the South-East Asian countries

⁷⁸ BBC, 'Xinjiang: China defends 'education' camps' (12 Sept. 2020) <<https://www.bbc.com/news/world-asia-china-54195325>>

collectively as aggressive and potential expansionist in nature with the unfolding of the mischief reefs.

China has envisioned to share its economic success by entering into strategic economic agreements, especially with regional development groups for the promotion of trade and dialogue. With its growing influence in regional development through its trade agreements, people have had healthy scepticism over the implications and its obtained leverage while negotiating on geopolitical issues. The ambitions of the *Belt and Road Initiative* have begun to gain traction; however, there a need to re-examine contractual obligations and its relationship with BRI partners that might be hampering progress in developmental projects. China has not been able to adequately satisfy the concerns over national security and the growing notion of debt-trap diplomacy, without which the interests of countries like India, the U.S., Japan and Australia are unlikely.

The clashes between its perspective and the commonly accepted perspective towards international law have become only more apparent. China's unwelcome behaviour towards international scrutiny towards potential human rights violations prioritises domestic policy over accepting adherence to and with international obligations that China is bound being the state party to several international conventions. While the international legal order begins to disbalance, a middle ground on how the rest of the world can resolve disputes with China has to be a priority to maintain international peace and security in the decades to come.

2020 DILA INTERNATIONAL CONFERENCE [ONLINE]
**RESHAPING INTERNATIONAL LAW
IN THE ASIAN CENTURY**

SESSION 2

ENVIRONMENT

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“Building an Agreement on BBNJ: Which Position for Asian States?”

Dyan Franciska Dumaris SITANGGANG

Lecturer, Faculty of Law, Parahyangan Catholic University, Indonesia

“From Asia for the International Community: The Law on Waste Management in the Pursuit of Environmental Justice”



BUILDING AN AGREEMENT ON BBNJ: WHICH POSITION FOR ASIAN STATES?

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Abstract: Covering more than 70 percent of the Earth’s surface, the ocean contains a vast array of marine genetic resources, thereby commencing a “high seas race” among States. However, the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity (CBD) as well as the Nagoya Protocol do not provide for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ), which has led to the establishment of a Preparatory Committee, followed by the convening of the Intergovernmental Conference in the interests of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of BBNJ. During negotiations, complex and contentious issues have emerged, resulting in diverse positions of participating States. The aim of this article is to make a thorough analysis pertaining to the manifestation of the Asian States’ stance in the forthcoming agreement on BBNJ. 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.

Keywords: BBNJ, BBNJ agreement, Asian States, BBNJ Process, ABNJ, UNCLOS, CBD, biodiversity

Introduction

Biodiversity, to a large extent, embodies the essence of human progress and prosperity, as remarked by the United Nations (UN) Secretary General António Guterres at the 2020 Biodiversity Summit. Covering more than 70 percent of the Earth's surface, the ocean *per se* contains a vast array of marine genetic resources (MGRs), thereby commencing a “high seas race” among both coastal and landlocked States. However, the existing regime, which includes the UN Convention on the Law of the Sea (UNCLOS), and relevantly, the Convention on Biological Diversity (CBD) and the Nagoya Protocol, does not 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 bioprospecting¹, have not yet been regulated, 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, inasmuch as a UN-mandated Informal Working Group has been established with the purpose of assessing the status of conservation and sustainable use of BBNJ, as well as investigating the potential need for further international cooperation. The UN has then proceeded to conduct formal negotiations via a Preparatory Committee (hereinafter the ‘PrepCom’), followed by the convening of the Intergovernmental Conference (IGC) (collectively referred to as the ‘BBNJ Process’), in order to address four clusters in the package agreed in 2011, namely (i) 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

¹ Thea Lowry, *Protecting the Mysteries of the Deep: Conserving Biodiversity in Marine Areas Beyond National Jurisdiction*, 16 DALHOUSIE J. LEGAL STUD. 113, 116 (2007).

marine technology. During negotiations, complex and contentious issues have emerged, resulting in diverse positions of participating States.

The aim of this article is to make a thorough analysis pertaining to the manifestation of the Asian States' stance in the forthcoming agreement on BBNJ. In particular, the first part traces the need for the establishment of an international legally binding instrument on BBNJ, prior to providing an overview of both convergent and divergent opinions among participating States. The focus would then shift to Asia's current engagement in negotiations within the framework of the BBNJ Process, which is analyzed in the second part of the article. The extent of "position" therein is limited to views that the majority of Asian nations pursue, since there exists a divergence of opinions among Asian participants. Following the assessment of the Asian countries' position present in the final draft of the BBNJ agreement, 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.

1. Towards an Agreement on BBNJ

a. The Need for Establishing a New International Legal Framework for BBNJ

The conservation and sustainable use of BBNJ, as a matter of fact, has not been comprehensively governed by any specific regime at the global level. Two presently substantial international instruments relevant to marine biodiversity, in addition to access and benefit sharing of genetic resources include the UNCLOS, along with the CBD and the Nagoya Protocol. However, the BBNJ issue has created legal lacunae within these conventions (besides other relating international agreements such as the Antarctic Treaty, the Fish Stocks Agreement, or the Convention on Migratory Species), hence the establishment of a new legally binding international instrument on the conservation and sustainable use of BBNJ *ex necessitate*.

I. UNCLOS

Notwithstanding an umbrella treaty covering the utilization of the ocean, the UNCLOS has not explicitly regulated the BBNJ issue, possibly due to an unforeseen interest for States with regard to the exploration of such marine resources. Since the signing in 1982, the Convention has been the constitution for the global ocean governance, thereby setting forth the rights and obligations to protect and preserve the marine environment in various provisions. Nonetheless, the UNCLOS does not expressly refer to marine biodiversity; thus, to be silent on this matter triggers different interpretations of the UNCLOS, which encompass provisions respecting the high seas (Part VII), the Area (Part XI), coupled with marine scientific research (Part XIII), 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 in the internal waters of a State, or in the archipelagic waters of an archipelagic State”²; and (ii) “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”, designated as the Area³. 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.⁴ Meanwhile, the Area and *in situ* resources enjoy the status as “the common heritage of mankind”⁵, 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 the *in situ*

² UNCLOS, Art.86.

³ *Id.* at Art.1.1(1).

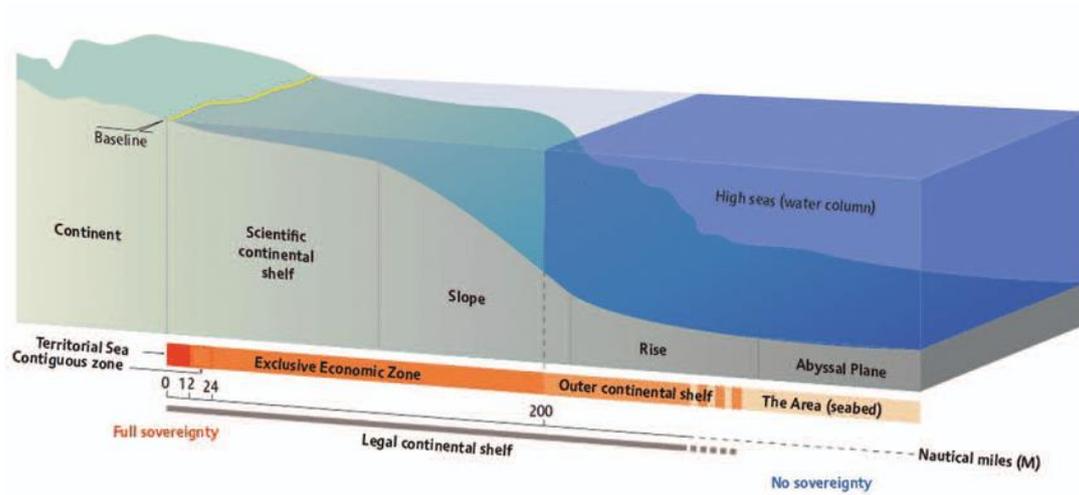
⁴ *Id.* at Art.87.1.

⁵ *Id.* at Art.136.

resources, nor may any part be appropriated by a State or natural or juridical person. All rights in the resources thereof are vested in mankind as a whole.⁶

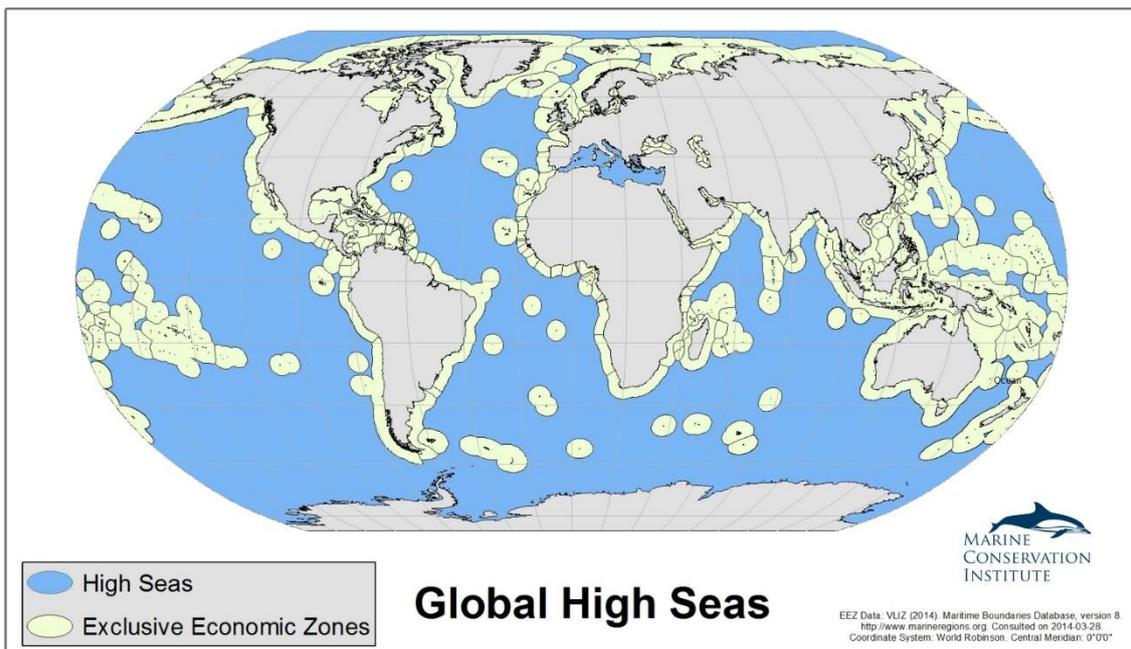
Picture 1

Maritime Zones under the UNCLOS⁷



Picture 2

The High Seas Map⁸



⁶ *Id.* at Arts. 137.1, 137.2.

⁷ Available at <https://www.researchgate.net/figure/Maritime-Zones-under-UNCLOS-12-Source-Riccardo-Pravettoni-GRID-Arendal-2010_fig2_330258892>.

⁸ Available at <<http://old.mpatlas.org/data/map-gallery/>>.

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 obvious 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. 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”.⁹ Due to the fact that Part XI merely refers to non-living resources, the benefit-sharing obligations thereunder, thus, does not directly apply to BBNJ.

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”. As a result, the legal status of activities involving access to BBNJ is not clearly determined, of which bioprospecting is a typical example. In practice, marine scientific research and bioprospecting are usually not considered to be similar. Furthermore, there are long-standing issues concerning the distinction between commercial (i.e. industrial) and non-commercial (i.e. pure) marine scientific research.¹⁰ 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.

II. 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

⁹ UNCLOS, Art.133(a).

¹⁰ 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 United Nations Convention on the Law of the Sea* (2010).

over flaws in the existing access and benefit-sharing mechanism. 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.¹¹ 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.¹²

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's 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".¹³ 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 parties and other States for the purpose of identification.¹⁴ 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.¹⁵

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

¹¹ Lee A. Kimball, *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*, 19 CBD TECHNICAL SERIES, available at <<https://www.cbd.int/doc/publications/cbd-ts-19.pdf>>, 10 (2005).

¹² CBD, Art.4.

¹³ *Decision UNEP/CBD/COP/DEC/VII/5*, adopted by the Conference of the Parties to the CBD at its Seventh Meeting, available at <<https://www.cbd.int/doc/decisions/cop-07/cop-07-dec-05-en.pdf>>, para.30 (2014).

¹⁴ *Id.* at para.56.

¹⁵ Lowry, *supra* note 1, at 119.

instrument is limited to areas within national jurisdiction.¹⁶ Therefore, access to BBNJ is currently open under the CBD, plus the Nagoya Protocol, without a formal benefit-sharing mechanism being provided.

Overall, it could be seen that the gaps within the current framework lie in the absence of BBNJ-related provisions and/or implementing provisions of both the UNCLOS and the CBD. 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.

b. 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 which establishes an Ad Hoc Open-ended Informal Working Group. This UN-mandated Informal Working Group aims to survey, examine and identify key issues with regard to the conservation and sustainable use of BBNJ, thereby proposing potential options and approaches for the international community.¹⁷ Ultimately, the Working Group has submitted unanimous recommendations on the scope, parameters and feasibility of an international instrument under the UNCLOS on the conservation and sustainable use of BBNJ to the General Assembly. This legally binding document must address a “package deal” of four elements comprised of (i) 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.¹⁸ The General Assembly, afterwards, has

¹⁶ *Nagoya Protocol*, Art.3.

¹⁷ *Resolution A/RES/59/24*, adopted by the General Assembly on 17 November 2004, available at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_59_24.pdf>, para.73 (2004).

¹⁸ *Resolution A/RES/69/292*, adopted by the General Assembly on 19 June 2015, available at <<https://undocs.org/en/A/RES/69/292>>, para.2 (2015).

decided to establish a PrepCom to produce substantive recommendations on the elements of a draft text of the aforementioned instrument¹⁹, prior to the convening of the IGC under Resolution 72/249. The IGC, under UN auspices, aims to scrutinize the recommendations of the PrepCom as published in Report A/AC.287/2017/PC.4/2 (hereinafter ‘Report 287/2017’), and to elaborate the text of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of BBNJ²⁰ in four sessions throughout 2018 and 2020.²¹ The work of the Conference is overseen by President Rena Lee, a Singaporean ambassador, along with a 15-member Bureau.²²

In advance of the first session of the IGC, the President has prepared an aid to discussions on the basis of the PrepCom’s report, which focuses on the four thematic clusters of the package, together with several related cross-cutting issues.²³ Throughout the three sessions up to now, the aid to discussions has been elucidated, with discrepancies in stance inevitably arising among States on the establishment of an international legal instrument covering BBNJ. Whilst the divergence of views in the IGC is closely akin to those listed in the PrepCom’s report, there are, however, issues, as indicated by the PrepCom, which “generated convergence among most delegations”.²⁴

I. Basic Elements Achieving Convergent Opinions

First and foremost, the Preamble would unarguably highlight 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

¹⁹ *Id.* at para.1(a).

²⁰ *Resolution A/RES/72/249*, adopted by the General Assembly on 24 December 2017, available at <<https://undocs.org/en/a/res/72/249>>, para.1 (2017).

²¹ The first and second sessions took place from 4 to 17 September 2018, and from 25 March to 5 April 2019, respectively. The third one was then convened from 19 to 30 August 2019. The fourth session was initially scheduled to occur in the first half of 2020 but later postponed by Decision 74/543 of 11 March 2020 due to the situation of the COVID-19. (Available at <<https://www.un.org/bbnj/>>)

²² Available at <<https://www.un.org/bbnj/content/officers>>.

²³ R. LONG & Z. SUN (Ed.), *WORKSHOP REPORT: BIODIVERSITY BEYOND NATIONAL JURISDICTION: TOWARDS THE DEVELOPMENT OF A BALANCED, EFFECTIVE AND UNIVERSAL INTERNATIONAL AGREEMENT* 24 (2020).

²⁴ *Report 287/2017*, available at <<https://undocs.org/A/AC.287/2017/PC.4/2>>, para.38(a) (2017).

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.²⁵

The instrument's scope of application would, furthermore, plainly narrow to ABNJ, and to all elements of the package deal. 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 government non-commercial service. Such reference has been mentioned in a number of textual proposals submitted by delegations, namely the Deep-Ocean Stewardship Initiative, the International Chamber of Shipping, and the Republic of Korea. 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.²⁶ 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, to some extent, could fall within the material scope of the proposed instrument.

²⁵ 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).

²⁶ *Article-by-Article Compilation of Textual Proposals for Consideration at the Fourth Session*, available at <<https://www.un.org/bbnj/content/fourth-substantive-session>>, 33 (2020).

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. It is also proposed that the instrument should be interpreted and applied in a manner which would not undermine existing relevant legal instruments and frameworks, as well as relevant global, regional, and sectoral bodies.²⁷

II. Divergent Opinions on Several Key Elements

While generic elements discussed above “generated convergence among most delegations”, there remains various overarching issues on which opinions among negotiating parties diverge markedly.

First of all, concerning *the principle of the common heritage of mankind*, Report 287/2017 vaguely notes that further discussions are required. This principle is applicable to the resources of the Area, in which all rights are vested in mankind as whole; however, resources, pursuant to Article 133 of the UNCLOS, only refer to mineral resources. MGRs *in situ* in the Area at 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.²⁸ Since the high seas are open to all States, “whoever acquires the genetic

²⁷ See Report 287/2017, *supra* note 24, at subsection II.4 under section III.A.

²⁸ In the 2016’s submission of views related to certain key issues under discussion at the second session of the PrepCom, the United States delegation has reasoned that:

“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).”

(Available at <https://www.un.org/depts/los/biodiversity/prepcom_files/USA_Submission_of_Views_Expressed.pdf>)

material in the deep sea could enjoy exclusive rights over whatever products they produce”.²⁹ 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, together with Japan.³⁰ In contrast, the principle of the common heritage of mankind would allow developing States, especially least developed countries, to likewise 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 binding instrument under the UNCLOS on the conservation and sustainable use of BBNJ, the G77 and China reaffirm that:

“the principle of common heritage of mankind must underpin the new regime governing MGRs of [ABNJ]. Given its crosscutting 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”.³¹

Besides the principle of the common heritage of mankind, opinion is divided on issues concerning *the nature of MGRs*. 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 designated as MGRs. While the former tends to recognize varieties of MGRs (which are

²⁹ Li Jing, *High Seas Treaty: Race for Rights to Ocean’s Genetic Resources*, available at <<https://chinadialogueocean.net/9644-high-seas-treaty-race-for-rights-to-oceans-genetic-resources/>>, (2019).

³⁰ Sophie Arnaud-Haond, et al., *Marine Biodiversity and Gene Patents*, 331 SCIENCE 1521 (2011).

³¹ *Written Submission of the Views of the G77 and China on the Elements of a Draft Text of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, available at <https://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Group_of_77_and_China.pdf>, 1 (2016).

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.³² 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.³³ 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. Similar to the relationship between MGRs and fish stocks, it is likewise debatable whether the definition of MGRs should be limited to *in situ* collection, or further include *ex situ* access, plus *in silico* analysis. Developed countries such as the United States crave to limit the application of access and benefit sharing regime to merely *in situ* collection³⁴, whilst developing countries pursue MGRs accessed not only *in situ*, but *ex situ* and *in silico* as well.³⁵

Another argument that has arisen during the BBNJ Process surrounds *the area-based management tool (ABMT) package*. Despite the proposed definition of “marine protected areas”

³² See CBD, Art.2.

³³ Leary, *supra* note 25, at 26.

³⁴ In the 2016’s submission of views related to certain key issues under discussion at the second session of the PrepCom, the United States recommend:

“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.”

(Available at <https://www.un.org/depts/los/biodiversity/prepcom_files/USA_Submission_of_Views_Expressed.pdf>)

³⁵ See Leary, *supra* note 25, at 27.

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]”. 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.³⁶ Therefore, ABMTs in ABNJ, including marine protected areas, are believed to be “central to the discussion”, as stated by Ocean Care at the negotiations.³⁷

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.³⁸ Defining cumulative impacts further gets mixed opinions, with the European Union preferring excluding “past, present or reasonably foreseeable activities” from the text of this definition, whilst the Republic of Korea is expressly against regulating cumulative impacts on grounds of a new obligation arising from the BBNJ agreement.

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

³⁶ See *Article-by-Article Compilation of Textual Proposals for Consideration at the Fourth Session*, supra note 26, at Art.1.

³⁷ 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).

³⁸ *Id.* at 241.

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, 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.

2. The Position of Asian States on the Final BBNJ Agreement

a. Asian States' Engagement in 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.”

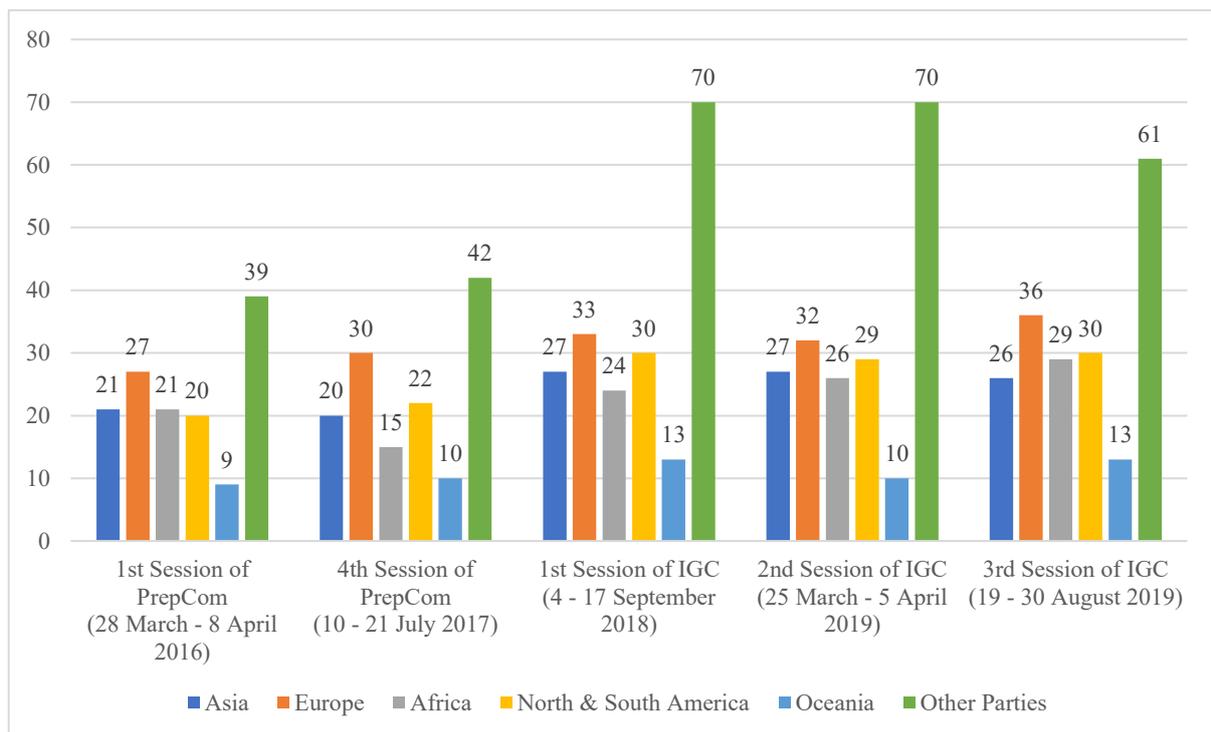
Indeed, the IGC convened under Resolution 72/249 is open to all States Members of the UN, members of the specialized agencies and parties to the UNCLOS.³⁹ This has, thus, provided both coastal as well as landlocked States with an unparalleled opportunity in the interests of addressing the current maritime issue respecting the conservation and sustainable use of BBNJ on an international level.

³⁹ *Resolution A/RES/72/249*, at para.8.

Bounded by the Arctic Ocean to the North, the Pacific Ocean to the East, coupled with the Indian Ocean to the South, Asia, in particular, has the longest coastline of any continent, which is 62,800 kilometers in length.⁴⁰ Consequently, Asia has a favorable geographical position for easy access to a vast array of marine resources, whether within or beyond national jurisdiction. Due to abundant benefits that such resources provide, Asian States have been actively participating in the BBNJ Process right from the outset with a view to promptly developing an international legally binding instrument under the UNCLOS on the conservation and sustainable use of BBNJ.

Figure

*The Number of Countries by Continent and Other Parties Participating in the BBNJ Process*⁴¹



⁴⁰ Available at <<https://www.britannica.com/place/Asia>>.

⁴¹ *Final List of Participants of the First Session of the PrepCom*, available at <https://www.un.org/Depts/los/biodiversity/prepcom_files/Final_List_of_Participants_BBNJ.pdf>; *List of Participants of the Fourth Session of the PrepCom*, available at <https://www.un.org/Depts/los/biodiversity/prepcom_files/Final_List_of_Participants_BBNJ_IV_Apr_2018.pdf>; *List of Participants of the First Session of the IGC*, available at <<https://undocs.org/en/A/CONF.232/2018/INF.3>>; *Final List of Participants of the Second Session of the IGC*, available at <<https://undocs.org/a/conf.232/2019/inf.3/rev.2>>; and *Final List of Participants of the Third Session of the IGC*, available at <<https://undocs.org/A/CONF.232/2019/INF/5/Rev.1>>.

Table*List of Asian Countries Participating in the BBNJ Process*

<i>No.</i>	<i>Country</i>	<i>Landlocked</i>	<i>First Session of PrepCom</i>	<i>Fourth Session of PrepCom</i>	<i>First Session of IGC</i>	<i>Second Session of IGC</i>	<i>Third Session of IGC</i>
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
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

The chart above 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. Overall, it is crystal 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.

As regards the Asian States' engagement in 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 the number of States of the European continent. Additionally, as from the fourth session of the PrepCom, America has surpassed Asia in the level of 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 Mrs. 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.⁴² 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. Asian States' concern over the development of an international legally binding

⁴² Available at <<https://www.un.org/bbnj/content/officers>>.

instrument under the UNCLOS on the conservation and sustainable use of BBNJ, therefore, is not distinctly inferior to that of other continents.

b. New Legal Order on BBNJ Reshaped by the Leading Role of Asian States

The rise of the East, especially China, has given Asian nations an arguably greater say in global affairs. This likewise 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.⁴³ The BBNJ instrument, for instance, does provide justification for the preceding 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 inasmuch as 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 carrier of MGRs”.⁴⁴ Thus, the focus herein would be on views that the majority pursue during the BBNJ Process.

Like other participants, Asian States Members are virtually unanimous in 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. Article 2 of the draft agreement on BBNJ, in fact, stipulates that: “The objective

⁴³ Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUROPEAN JOURNAL OF INTERNATIONAL LAW 945, 978 (2016).

⁴⁴ *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 United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, available at <https://www.un.org/depts/los/biodiversity/prepcom_files/streamlined/China.pdf>, 5 (2017).

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”. 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.⁴⁵ 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.⁴⁶

One of the key principles underlying the agreement on BBNJ that is widely supported by the States of Asia, namely China and developing countries is the common heritage of mankind. These States, as mentioned above, are of the opinion 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 benefit of MGRs”. 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. 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

⁴⁵ *Article-by-Article Compilation of Textual Proposals for Consideration at the Fourth Session*, supra note 26, at 4.

⁴⁶ *Draft Agreement on BBNJ*, Arts. 4.1, 4.2.

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”.⁴⁷

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 to conserve biological diversity is a common concern of humankind. The 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”.⁴⁸ 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. Whereas the BBNJ agreement applies to ABNJ, there is no reason for an alternative terminology.

As a matter of fact, the principle of the common heritage of mankind has been recognized in Article 5(c) of the draft agreement; 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. This could be deemed a clear demonstration of the Asian States’ stance on BBNJ regardless, with intent to reshape established norms in international law and more

⁴⁷ *Written Submission of the Views of the G77 and China on the Elements of a Draft Text of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, *supra* note 31.

⁴⁸ *International Treaty on Plant Genetic Resources for Food and Agriculture*, adopted by the Thirty-First Session of the Conference of the Food and Agriculture Organization of the UN on 3 November 2001, available at <<http://www.fao.org/3/a-i0510e.pdf>>, Preamble (2001).

importantly, to build new fair and equitable norms on the conservation and sustainable use of BBNJ under the UNCLOS.

Additionally, another view which is endorsed by Asian States is the objective to establish a system (or network) of ecologically representative marine protected areas. 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, should be conducted with due regard to the rights and legitimate interests of coastal States. Accordingly, Article 15.4 of the draft 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...”, which is akin to the approach as stipulated in Article 142.1 of the UNCLOS concerning activities in the Area.

c. How Asian States Could Confront the Divergence of Views in the Interest of the Final 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 most 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 multidimensional issue affecting the world as a whole,

along with the fact that the developing States' scientific and technological potential has not yet been able to fully undergo a marine scientific research within ABNJ vis-à-vis that of developed countries, consequently broaches a matter of *bonum et aequum*, 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 States of Asia in particular.

The aforementioned principle of the common heritage of mankind obviously 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 to recognize 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.⁴⁹

Additionally, in the light of the multidimensional nature of the BBNJ issue, Asian States should involve all stakeholders in formulating stance on the elements of the BBNJ instrument such as scholars, policymakers, or biomedical businesses. Such involvement would furnish all shades of opinion on how the future agreement on BBNJ would be negotiated.

⁴⁹ *Draft Agreement on BBNJ*, Art.9.2.

Conclusion

As yet, the two relevant substantial international instruments, which include the UNCLOS, along with the CBD and 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 clearly evident. This, coupled with the active participation in the BBNJ Process, has demonstrated the leading role of Asia 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 States of Asia 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.

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**SUSTAINABLE WASTE MANAGEMENT AND LESSONS LEARNED FROM ASIAN
COUNTRIES**

DILA 2020

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I Introduction

Waste generated from the significant usage of chemical intensive materials in industrial activities and unsustainable patterns of production and consumption should be, and rightfully so, a matter of global environmental concern. Some type of wastes such as plastic is particularly problematic for its durability that it would take hundreds of years to biodegrade. When it comes to disposal, wastes disposed in the landfill may generate methane and produce leachates that may contaminate surface and groundwater; and most plastic debris ends up in the oceans, harming marine wildlife and humans eventually. Incineration does not help as it pollutes the air through dust, greenhouse gases, metal salts, dioxins, and furans generated as the byproducts of such process. The contamination of the environment by waste is already beyond the capacity of the environment to naturally absorb it. With the economic growth, increasing trend in population growth, and urbanization and industrialization that are expected to increase every year, waste should be of serious concern and managed as such due to the threat it poses to ecosystems and human health.

Management of waste specifically needs to be done, first and foremost, by each State itself to provide legal apparatus designed to regulate waste and mechanism to enforce the law. However, mismanagement of waste, as well as most, if not all, environmental problems, is not something that occurs exclusively within a particular State's territory; it often goes beyond national boundaries and becomes trans-boundary issues. Moreover, as environmental issues are linked with ecological

interdependence,¹ mismanagement of waste in one country may have adverse effect on other countries' environment and ecosystems.

Unfortunately, instead of addressing the core issue of waste management, which is the generation of waste, the existing bilateral and multilateral international legal instruments available at the time have instead talked mostly about waste disposal² and flows.³ For example, there are instruments concerning waste disposal into the sea (*inter alia* Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 or commonly referred to as 'London Convention'), disposal into rivers and other freshwaters (*inter alia* Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992 (as amended) or commonly referred to as 'Water Convention'), prohibition of the incineration of wastes (*inter alia* Convention for the Protection of the Marine Environment of the North-East Atlantic 1992 or commonly referred to as OSPAR Convention which prohibits incineration done at sea; whereas prohibition of land-based incineration is by far can only be found in the legislations of the European Commission⁴), and limiting gaseous wastes disposal into the atmosphere (*inter alia* Paris Agreement to the United Nations Framework Convention on Climate Change 2015 or commonly referred to as 'Paris Agreement').

When it comes to regulating transboundary waste flows, the international environmental law provides, for example, Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal 1989 or commonly referred to as 'Basel Convention'. Although it was created as an attempt to control the movement of hazardous wastes, the existence of rules on waste trade shows how waste can and, as a matter of fact, is treated as valuable and tradable commodity. Although Basel Convention has required states to reduce their waste generation,⁵ there is not a lot of elaboration on how it specifically ought to be done; and by facilitating the circulation of wastes, albeit with certain pre-conditions,

¹ PHILIPPE SANDS, PRINCIPLE OF INTERNATIONAL ENVIRONMENTAL LAW 3 (2nd ed. 2003).

² *Id.* at 675, 684.

³ Olivier Barsalou and Michael Hennessy Picard, *International Environmental Law in an Era of Globalized Waste*, 17 CHINESE JOURNAL OF INTERNATIONAL LAW 887, 888 (2018).

⁴ SANDS, *supra* note 1, at 686-687.

⁵ Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, adopted Mar. 22, 1989, 1673 U.N.T.S. 57 (entered into force 5 May 1992), Art. 4(2)(a).

somehow it indirectly encourages more production of waste as it provides 'solution' for states to deal with the waste they produce. Of course, at times it is beneficial for the exporting and importing states and to the environment because the waste can be recycled and re-used, but it does nothing in hindering or slowing the growth of industrial production resulting in wastes.

Moreover, while Basel Convention attempts to discourage export of hazardous wastes, it is still legally possible for exports to take place with the requirement that it has to be 'reduced to minimum consistent with the environmentally sound and efficient management' of the wastes.⁶ For the reason that waste trade is not prohibited and that it is up to each state whether or not to accept waste imports, developed states continually dispatch their waste to other states, usually the less-developed ones, under the guise of waste trade arrangements in such a way more often than not harming the importing countries, especially those lacking environmentally sound facilities to recycle the waste but willing to import it for the revenue.⁷ The Convention also does not address how to control mixed waste and deal with the problems of corruption and bribery in the importation process,⁸ and the inappropriate disposal by the importing states as they lacked environmentally sound disposal sites which could result in environmental damages.⁹ The negative impacts include severe worker-community health impacts and environmental contamination aggravated by unsuitable sites, lack of adequate and environmentally sound technologies and facilities, untrained workers, illegal trade, secret dumping, deliberate mislabeling, and so on.¹⁰ Hazardous wastes can remain dangerous for decades, even centuries, threatening the future generations. Therefore, to avoid tons of waste within its own territory, states have to utilize their national import laws but it has to be accompanied with strict monitoring by government. For example, China, under its National Sword Policy, no longer accepts export of certain types of solid wastes into its territory and prescribes contamination

⁶ *Id.* at Art. 4(2)(d).

⁷ Mary Critharis, *Third World Nations Are Down in the Dumps: The Exportation of Hazardous Waste*, 16 BROOKLYN JOURNAL OF INTERNATIONAL LAW 311, 315 (1990).

⁸ Rosemary Rayfuse, *Principles of International Environmental Law Applicable to Waste Management* in KATHARINA KUMMER, ET AL. (EDS.), WASTE MANAGEMENT AND THE GREEN ECONOMY: LAW AND POLICY 19 (2016).

⁹ John Ovink, *Transboundary Shipments of Toxic Waste: The Basel and Bamako Conventions: Do Third World Countries Have a Choice?*, 13 DICKINSON JOURNAL OF INTERNATIONAL LAW 281, 287 (1995).

¹⁰ VED P. NANDA AND GEORGE (ROCK) PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY 464 (2nd ed. 2013).

standards for the imported recyclables.¹¹ On the brighter side, the Amendment to the Basel Convention (commonly referred to as ‘Basel Ban’) that seeks to ban exports of hazardous waste either for final disposal or recycling from the Annex VII of Basel Convention parties (European Union and OECD states and Lichtenstein) to non-Annex VII parties has entered into force in December 2019. Basel Ban itself was adopted in 1995, hence it bears noting that it takes around 24 years for it to finally enter into force, having at the moment 99 state parties.¹²

In the context of waste management and human rights, protection of environment is highly associated with the right to the highest attainable standard of health, and needless to say the protection of such right is an international obligation. States are responsible to provide their people with adequate system of health protection, and as such it is indispensable to have international legal regulation of waste management aiming first and foremost at the prevention of waste generation, and other aspects of waste management such as the segregation, collection, treatment, and resource recovery. This paper attempts to describe the situation relating to the status quo of the laws on waste management that will eventually lead to the construction of the said laws to better adapt with the challenges faced. Such attempt will be done through legal audit of the existing international law provisions, principles of international environmental law, and practices from Asian countries, hoping that it would be able to contribute in the making of a framework of law on waste management that is suitable for Asian countries as well.

II Principles of International Environmental Law in Waste Management

Principles of international environmental law known today, namely the principle of sovereignty over their natural resources and obligation not to cause transboundary environmental damage, the principle of preventive action, the principle of cooperation, the principle of sustainable development, the precautionary principle, the polluter-

¹¹ See MRA Consulting Group, *China National Sword: The Role of Federal Government*, Discussion Paper for the Australian Council of Recycling, 16th April 2018.

¹² Basel Convention, *Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, available at <http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>.

pays principle, and the principle of common but differentiated responsibility are derived from treaties, binding instruments of international organizations, widespread and uniform state practice, and states' adherence to soft laws.¹³ When it comes to waste management (from the prevention of waste generation to disposal), the first five principles are of particular relevance.¹⁴ Albeit the legal status of the principles is not as clear in comparison with the rules explicitly written within the legally binding instruments, these principles are important in providing guidance on how to interpret and apply certain rules within the realm of international environmental law.¹⁵ It also bears noting that the status of the principle of sovereignty over natural resources and obligation not to cause harm, the principle of preventive action, and the principle of cooperation have been acknowledged as enjoying the status of customary international law,¹⁶ therefore they are binding upon all states. The precautionary principle has also been recognized by the International Court of Justice (ICJ)¹⁷ and the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.¹⁸ The rest of the principles' legal status as customary international law is still debatable.

Principle of sovereignty over natural resources gives states freedom to conduct and/or authorize activities within their territories as they see fit, followed by the restriction in form of the responsibility to ensure that the activities conducted within their jurisdiction or control do not cause harm or damage to the environment of other states or areas beyond the limits of their national jurisdiction. In the context of waste management, according to this principle states are free to exploit their resources and be benefitted therefrom. Such activities may in the process generate wastes, but states are prohibited to dispose the waste in a manner that damages the environment of other states or areas beyond their own national jurisdiction. Inversely, in the context of waste trade, the notion of 'sovereignty' itself can also be claimed as the sovereign right for any state whether or not to accept import of waste. Therefore, it is important to emphasize that in the application of the sovereignty principle, states have to also

¹³ SANDS, *supra* note 1, at 231.

¹⁴ Rayfuse, *supra* note 8, at 11.

¹⁵ PATRICIA BIRNE, *ET AL.*, INTERNATIONAL LAW AND THE ENVIRONMENT 109 (3rd ed. 2009).

¹⁶ Rayfuse, *supra* note 8, at 15.

¹⁷ *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 I.C.J. Rep. 14, para. 164 (Judgment).

¹⁸ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 2011 ITLOS Case No. 17, para. 135 (Advisory Opinion).

adhere to the no-harm principle taking into account that mismanagement of waste, especially the hazardous ones, may cause environmental dangers and health problems likely to also have effects in another states or in areas beyond their national control.

The second principle is the principle of preventive action which obliges states to take measures in order to prevent environmental damage and to reduce, limit, or control activities which might cause such damage.¹⁹ Although closely related to the no-harm principle, there are two differences: first, the no-harm principle ensues in respect for the sovereignty principle, while preventive principle aims to minimize environmental damage in itself; and second, under this principle, states have an obligation to prevent environmental damage within its own jurisdiction by taking appropriate measures.²⁰ In the *Gabcikovo-Nagymaros* case, the ICJ stated that ‘in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage’,²¹ meaning that the preventive principle is to be applied at an early stage in order to minimize the damage, before it has taken place. As such, it is not an absolute obligation, but rather an obligation of due diligence that ‘entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators’.²² States are not obliged to guarantee that the perceptible harm is prevented; they are required to exert due diligence to prevent it.²³ In the context of waste management, this principle is highly related to the measures undertaken in preventing waste generation, as well reducing and minimizing waste. The proximity principle within Basel Convention can also be applicable.²⁴ Although not primarily intended as a way to reduce or minimize waste, by requiring states to manage and dispose waste close to its generation point, the environmentally harmful effects of the waste can be managed at source and as soon as

¹⁹ SANDS, *supra* note 1, at 246.

²⁰ *Id.*

²¹ *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. Rep. 7, para. 140 (Judgment).

²² *Pulp Mills*, *supra* note 16, para. 197.

²³ Pierre-Marie Dupuy, *Due Diligence in the International Law of Liability* in ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 370 (1977).

²⁴ Basel Convention, *supra* note 5, Art. 4(2)(b).

possible before they have spread and caused damage.

The third principle is the principle of cooperation, in which states are obliged to cooperate with each other in addressing the international environmental issues. This principle does not require specific outcome. According to Principle 14 of Rio Declaration on Environment and Development (commonly referred to as 'Rio Declaration'), 'states should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health',²⁵ and Principle 27 stated that 'States and people shall cooperate in good faith and in a spirit of partnership...'.²⁶ The 'effective' cooperation can be seen, for example, through the establishment of suitable common regimes, adequate information sharing and involvement in decision-making, also negotiation and implementation of obligations in good faith.²⁷ In the *Gabcikovo-Nagymaros* case, the ICJ had stated that according to the principle of good faith, state parties (of the 1977 Treaty) ought to apply the treaty 'in a reasonable way and in such a manner that its purpose can be realized'.²⁸ In the waste management context, it is important to emphasize that protection of human health and the environment is a shared responsibility, therefore any act relating to waste management especially those that are transboundary in nature has to take into account the potential and actual effects on human health and the environment and how to resolve the problems as members of international community, also the need and capabilities of states.

The fourth principle is the principle of sustainable development, whereas states have to ensure that the development and use of their natural resources are done in such a manner that is sustainable. In essence, it aims to reconcile economic development with environmental protection and to limit the manner of exploitation in order to ensure the enjoyment of the resources by the future generations. In the *Gabcikovo-Nagymaros* case, the ICJ stated that in contemplating new activities or continuing activities that has begun in the past, the new norms, including the principle

²⁵ Rio Declaration on Environment and Development, adopted Jun. 14, 1992, U.N. Doc. A/CONF.151/26 (Vol. I), 31 I.L.M. 874 (1992), Principle 14.

²⁶ *Id.*, at Principle 27.

²⁷ SANDS, *supra* note 1, at 250-1.

²⁸ *Gabcikovo-Nagymaros*, *supra* note 21, at para. 141-2.

of sustainable development, had to be taken into consideration.²⁹ The Court thus characterized sustainable development as the need to reconcile economic development and environmental protection. According to various international agreements, these four legal elements recurringly appear related to the principle of sustainable development, namely:

- (1) Preservation of natural resources for the future generations;
- (2) Exploitation of natural resources in a sustainable manner;
- (3) The equitable use of natural resources, which means that the use of natural resources by a state has to be done in consideration of the needs of other states; and
- (4) Integration of environmental considerations into economic and other development plans, programs, and projects, and *vice versa*.³⁰

In the waste management context, principle of sustainable development can be done, through the sustainable use of resources, waste reduction and minimization, and prevention of environmental damage arising from the management of hazardous or other wastes in order to pass on to future generations the resources as well as the clean and healthy environment for them to live in. The integration of environmental considerations into economic plans and *vice versa* is also perceptible in the concept of 'green economy' with the particular emphasize on recycling and reclamation of materials.

The fifth and final principle is the precautionary principle. This principle aims to provide guidance in the application of international environmental rules in times of scientific uncertainty. Principle 15 of Rio Declaration provides that: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.³¹ The similar wording can also be seen in the Convention on Biological Diversity: 'where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty

²⁹ *Id.*, at para. 140.

³⁰ See SANDS, *supra* note 1, at 253-66.

³¹ Rio Declaration, *supra* note 24, at Principle 15.

should not be used as a reason for postponing measures to avoid or minimize such a threat',³² albeit there is no specific provision referring to the precautionary principle. Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (commonly referred to as 'Bamako Convention') sets low threshold for precautionary action:

'the preventive, precautionary approach to pollution which entails, *inter alia*, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The parties shall cooperate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods.'³³

OSPAR Convention further provides the interlinkage between prevention and precaution, stating:

'(a) the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects'.³⁴

Besides the aforementioned, this principle is adopted in numerous environmental treaties. However, the meaning, threshold for the application, and effect of the principle are yet agreed by states as there is no clear and uniform understanding of it. In general interpretation, precautionary principle means that states have to act carefully when taking decisions that may adversely impact the environment, whereas the more focused interpretation held that activities and substances which may be harmful to the environment have to be regulated or even prohibited, even if there is no conclusive evidence to the harm or the likeliness of harm such activity or substance may cause to the environment.³⁵ Regardless as to the certainty of the principle,

³² Convention on Biological Diversity, adopted Jun. 5, 1992, 1760 U.N.T.S. 69 (entered into force 29 December 1993), Preamble.

³³ Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted Jan. 29, 1991, 2101 U.N.T.S. 177 (entered into force 22 April 1998), Art. 4(3)(f).

³⁴ Convention for the Protection of the Marine Environment the North-East Atlantic, adopted Sept. 22, 1992, 2354 U.N.T.S. 67 (entered into force 25 March 1998), Art. 2(2)(a).

³⁵ See SANDS, *supra* note 1, at 272-9.

needless to say the precautionary principle is closely related to the other principles. In essence, this principle is targeted in avoiding the irreversible effects of environmental damage, or in other words: potential damage or risk anticipation, and although at the moment the application is to be determined on a case-by-case basis (for example, taking into consideration the magnitude of harm, characteristics of sectoral policies, technical and political aspects)³⁶ some methods can be used such as bans and phase-outs, clean production and pollution prevention, alternatives assessment, pre-market or pre-activity testing, and so on.³⁷

This is also the case with waste management, including the risk of perpetual waste production. Before this principle was born, the activities with harmful effect to the environment such as waste disposal were viewed in light of the assimilative capacity of the environment. However, prior to its emergence, the view has changed because scientists have the capability to predict the environment's capacity to naturally absorb the waste and also the environmental damage that might occur, taking into account the society's technological capacity in addressing the potential damages once detected.³⁸ Therefore, for any act relating to waste management to be done in an 'environmentally sound manner' it has to take into account the potential environmental risks. Collaboration with experts is important, as well as the effective decision-making taking the risks into consideration in order to be prepared even in times of uncertainty.

III The Concept of 'Waste' in Waste Management

Unfortunately, there is no generally agreed definition for 'waste' within the realm of international law and international environmental law. The existing definitions from treaties differ one another and are often subject-specific according to the technical categories.³⁹ From the various forms and characterization, the most

³⁶ NICOLAS DE SADELEER, *ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES* 221 (2005).

³⁷ See Minna Pyhälä, *et al.*, *The Precautionary Principle*, in MALGOSIA FITZMAURICE, *ET AL.* (EDS.), *RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW* 218-20 (2010).

³⁸ William C.G Burns, *Introduction to Special Issue on the Precautionary Principle and its Operationalisation in International Environmental Regimes and Domestic Policymaking*, 5 *INTERNATIONAL JOURNAL OF GLOBAL ENVIRONMENTAL ISSUES* 1, 2 (2005).

³⁹ Barsalou, *supra* note 3, at 889.

commonly used are according to (1) the physical state: solid waste, liquid waste, and gaseous waste; (2) the source: household/domestic waste, industrial waste, agricultural waste, commercial waste, demolition and construction waste, and mining waste; and (3) the environmental impact: non-hazardous waste, hazardous waste, ultra-hazardous waste. Some classified waste into waste streams for the purpose of management. Each state also has their own classification of waste. As such, it is difficult to picture waste as a legal object and to directly apply the rules and principles of international environmental law into the management of waste due to the technicalities of the definitions.

The lack of general definition allows waste to also be defined according to its functionality. For some waste can be treated as disposable object, while for other waste can be a valuable resource for economic exploitations.⁴⁰ This is apparent in the Basel Convention, as wastes are defined by reference of their end use: a substance which is not to be disposed (possibly recycled or recovered) may not be a waste. The problem with this approach is that so many substances are potentially excluded from the categories of 'waste' if the holder treated the substances in other way than by disposal.⁴¹ This is problematic when it comes to the application of sustainable waste management. Waste minimization, the main point in waste management, concerns itself with three options, which are first, the prevention and/or reduction of the generation of waste at source; second, improvement of the quality of the generated waste (such as reducing the hazard); and third, encouraging re-use, recycling, and recovery.⁴² Defining waste according to how it is disposed is only effective in minimizing the amount of things people intend to dispose through re-use, recycling, and recovery; while the most important point of waste minimization is to prevent the waste from ever being created in the first place. The European Court of Justice also held that even when a substance is deemed to be 'goods' (product) does not alter its character as a 'waste',⁴³ meaning that the definition of waste is independent of its commercial value, possible market, geographical purposes, or the destination of waste.

⁴⁰ Nicolas de Sadeleer, *The Concept of Waste* in THOMAS ORMOND, *ET AL.* (EDS.), *ENVIRONMENTAL LAW AND POLICY AT THE TURN TO THE 21ST CENTURY – LIBER AMICORUM* BETTY GEBERS 243, 249-250 (2006).

⁴¹ SANDS, *supra* note 1, at 677.

⁴² See Jan Riemer and Merete Kristoffersen, *Information on Waste Management Practices: A Proposed Electronic Framework*, EUROPEAN ENVIRONMENTAL AGENCY (1999).

⁴³ Cases C-206/88 and C-207/88 (Vessoso and G. Zanetti), E.C.R. I-1461 (1990) (Judgment).

In order to support the reduction and minimization of waste, it is essential to define waste not by how it is disposed, but from the perspective of how it becomes waste instead.

It bears noting that the fact is the dispute surrounding definition of waste is mainly economic. If a material is defined as waste by its nature, it might face restriction in the transport, sale, and re-use, and adding financial burden of waste transfer for economic operators. While it is true that such restriction may become a barrier to the effort to recycle or re-use, but following the economic definition requalify waste as a commodity thus fails to address the initial problem which is the generation of waste. Furthermore, even when it comes to the transfer of hazardous waste, Basel Convention does not give precise definition of what is 'hazardous waste', giving room for each state party's discretionary interpretation. It means what is actually defined as hazardous in one state may become re-useable or recyclable in another. It bears noting that just because something can be re-used or recycled does not mean it is not harmful. This is a major loophole because it allows subjective interpretation of 'hazardous waste' and further exacerbates the global waste displacement and in itself waste mismanagement. It also doesn't help that in fact a lot of states are willing to take the risk of importing hazardous wastes for the revenue. Therefore, some form of agreed general definition is necessary for both regulatory purposes (for example, handling, treatment) and compliance to relevant international legal instruments.

IV Waste Management Situation in Asian Countries

The cities in Asia are experiencing incredible economic growth. In 2016, Asia is inhabited by more than 4,45 billion people. These two facts contributed to the huge amount of waste generation. Urbanization, moreover, will lead to almost the doubling of waste generation in Asia by 2025. The World Bank reported that waste generation from urban cities in Asia ranges from 450,000 to 760,000 tonnes per day and this trend is continually increasing. The World Bank stated that waste management is among the main sources of environmental degradation in Asia.⁴⁴

⁴⁴ DANIEL HOORNWEG AND PERINAZ BHADA-TATA, *WHAT A WASTE: A GLOBAL REVIEW OF SOLID WASTE MANAGEMENT*, URBAN DEVELOPMENT SERIES – KNOWLEDGE PAPERS NO. 15, WORLD BANK 8-12, 82 (2012).

According to the United Nations Environment Programme (UNEP)'s Asia Waste Management Outlook, the characteristics of waste and the volume are highly dependent on the country's socio-economics condition. For example, majority of high-income countries in Asia produces a higher percentage of inorganic wastes compared to organic waste. In Malaysia, for instance, the increased consumption of ready-to-eat food and ready-to-use products meaning that there is more packaging material ends up as waste.⁴⁵ The research also shows the strong correlation between per capita waste generation and the country's income level.

In the context of sustainable waste management, waste management hierarchy indicates an order of preference for the action to be taken in order reduce and manage waste. The first and most essential is the action on preventing the generation of waste, and then to reduce (for example, through re-use) waste generation. The next preferred action is recycling, followed by materials recovery and waste-to-energy. The final action is disposal either in landfills or through incineration without energy recovery,⁴⁶ meaning that disposal is the least preferred action in the hierarchy of sustainable waste management. This strategy is often abbreviated as the '3Rs' or 'Reduce, Re-use, and Recycle' showing the choices of action in order of preference. With this strategy, it helps reducing the consumption of virgin materials by making effective use of resources and also the costs of waste disposal. The hierarchy shows the progression of a material or product through stages of waste management and each stage offers opportunities for policy intervention: to reevaluate the need for the product, to redesign to minimize the waste potential, to modify or extend the use in order to reduce the waste potential, or to recover the resources within the said product or material.⁴⁷

Although disposal is the least preferred action, in Asia, the most common practice to deal with waste is landfilling resulting to high number of dumpsites (18 out of 50 largest dumpsites in the world are located in Asia) and most are unsafe leading to significant adverse impacts on health and environment. On the brighter note,

⁴⁵ UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP), *ASIA WASTE MANAGEMENT OUTLOOK* 28 (2017), available at <http://www.rrcap.ait.asia/publications/asia%20waste%20management%20outlook.pdf>.

⁴⁶ UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP), *GUIDELINES FOR NATIONAL WASTE MANAGEMENT STRATEGIES: MOVING FROM CHALLENGES TO OPPORTUNITIES* 18 (2013), available at https://cwm.unitar.org/national-profiles/publications/cw/wm/UNEP_UNITAR_NWMS_English.pdf.

⁴⁷ *Id.* at 19.

countries such as Japan, Singapore, and the Republic of Korea have implemented waste management in accordance with the 3Rs strategy. The Government of Japan has taken the holistic approach involving all stakeholders including waste generators, collectors, manufacturers, retailers, and so on. Japan has also introduced the 'Sound Material Cycle Society' aiming to achieve zero waste and is continually moving towards this goal. Singapore has also implemented 'Zero Waste Singapore' with the rewards-penalties strategies. In 2015, Singapore managed to achieve 60 per cent recycling.⁴⁸

The main priority in sustainable waste management is waste reduction and there are three strategies can be seen done by countries in Asia, which are green products, green procurement, and product stewardship and take-back mechanisms. Green products strategy increases the efficiency of resources and influence production, markets, prices, and available services towards sustainable consumption and patterns of production. For example, in Japan, products are being redesigned to be more sustainable and less hazardous, such as revamping PET bottles to contain less amount of resin resulting into thinner bottles, reducing the number of components in electronics, and the using of plastic debris collected from the oceans.⁴⁹ Green products are often designed to meet the eco-labels (such as environmental, resource-based, social inclusion-based, or carbon-based) certification requirements.

Green procurement is the purchase of products and services that minimizes environmental impacts through comparison of price, technology, quality, and the effect to the environment. Green procurement done by government contributes significantly to the economy and environmental sustainability due to government generally having the highest purchasing power in a given country. For instance, South Kalimantan, a province in Indonesia, has a regulation about green public procurement. It used to be on a voluntary basis, but since 2018 in South Kalimantan it has become mandatory. The green procurement in the regulation involves purchasing of goods, construction services, consulting and other services with environmental

⁴⁸ *Asia Waste Management Outlook*, *supra* note 45 at 54.

⁴⁹ Organisation for Economic Co-operation and Development (OECD) and Japan, *Ministry of Environment, Issues Paper: The State of Play on Extended Producer Responsibility (EPR): Opportunities and Challenges* (2014), available at <https://www.oecd.org/environment/waste/Global%20Forum%20Tokyo%20Issues%20Paper%200-5-2014.pdf>.

consideration.⁵⁰ The European Union has also launched a program called SWITCH-Asia to help Asian developing countries implementing sustainable consumption and production practices.⁵¹

Extended producer responsibility (EPR), product stewardship, and take-back mechanisms are cross-sector life cycle-based tools and these tools are still emerging in Asia. EPR and product stewardship considers that the responsibility to waste is more than an end-of-life matter. In EPR, the manufacturer or importer takes responsibility for the generated waste by their products across the life cycle, whereas in product stewardship the responsibilities are shared by all members of the chain of supply and how the responsibilities are to be respectively assigned is negotiable by parties themselves.⁵² The most common EPR method is done through take-back mechanisms. For example, in Thailand, Hewlett-Packard has shown its sustainability commitment by establishing a recovery facility of its products and has recycled more than 1.5 million tonnes of mostly computers and information-technology products through product return and recycling campaign. The used products are then resold and recycled.⁵³ Fuji Xerox also has remanufacturing, reuse, and recycling facilities in China, Japan, and Thailand, at which the company achieve over 99 per cent resource recovery from its products at the end of their life cycle.⁵⁴ Take-back mechanism is currently picking up amongst manufacturers in Asia due to pressure from regulators.

Although efforts regarding waste prevention and reduction have been taken, the implementation is still not widespread and consistent. In many cases, the 3Rs strategy in Asia is still limited to waste recycling and reuse—although Japan and the Republic of Korea have shown examples of the integration between waste reduction and the use of secondary materials regulated within their respective waste management framework—and even so the implementation the recycling and reuse are still ineffective owing to the problems of waste collection, segregation, and material recovery in most of Asian countries. Such problems are mainly because of the lack of

⁵⁰ South Kalimantan Governor Regulation Number 39 Year 2018 on Green Public Procurement in Support of Green Revolution in South Kalimantan.

⁵¹ *Asia Waste Management Outlook*, *supra* note 45 at 61.

⁵² See UNEP GUIDELINES FOR NATIONAL WASTE MANAGEMENT STRATEGIES, *supra* note 46.

⁵³ *Asia Waste Management Outlook*, *supra* note 45 at 61.

⁵⁴ See Fuji Xerox, *Sustainability Report (2017)* available at <https://assets.fujixerox.co.jp/files/2018-09/6a1903eff5a0994d2fcb6848604f77a4/2017e.pdf>.

collection and sorting equipment also material recovery facilities, and in most cases, sorting is done manually. In general, in implementing the 3Rs, lack of private sectors involvement and policies inconsistency between national and local government are also part of the challenge. For example, Indonesia has waste minimization and collection targets at the national level, but such targets are not well adopted in the policies of local governments.⁵⁵

When it comes to inclusion of waste-related strategies into national legal framework, only 3 out of 25 countries refer to the strategy of prevention, 8 to reduction, 9 to re-use, 11 to recycling, 7 to recovery, 8 to treatment, and 22 to disposal, showing the tendency of Asian countries in choosing disposal which should have been the least preferred action in realizing sustainable waste management.⁵⁶ There need to be adequate regulations on dematerialization, sustainable production and consumption, and responsibility of producers or manufacturers, accompanied with effective enforcement (compliance, allocation of liability, enforcement, licensing and permitting systems, offences, and penalties) and evaluation mechanism (for example, environmental and waste audits, and unfortunately only found in 8 per cent of Asian countries) of the regulations.

V Conclusion

Waste management indeed is a difficult issue to address within the national jurisdiction of a state, even more so internationally. However, the even worse problem is that it is evident how governments fail to understand that waste management is not only about managing the disposal and flow of waste, but first and foremost the reduction of waste production and its circulation at source. Focusing more to waste transfer instead of waste production will reduce the incentive to find and use another cleaner production methods.⁵⁷ Companies does not have incentive to involve in

⁵⁵ UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP), WASTE MANAGEMENT IN ASEAN COUNTRIES: SUMMARY REPORT 30 (2017), available at https://wedocs.unep.org/bitstream/handle/20.500.11822/21134/waste_mgt_asean_summary.pdf.

⁵⁶ *Asia Waste Management Outlook*, *supra* note 45 at 154.

⁵⁷ UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP), *GUIDANCE DOCUMENT ON TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES DESTINED FOR RECOVERY OPERATIONS* (1996), available at <https://www.unenvironment.org/resources/report/guidance-document-transboundary-movement-hazardous-wastes-destined-recovery>.

preventing pollution (non-generation of wastes, including the hazardous, at the outset) and minimization of waste (reduction of the amount and hazardousness of generated wastes) as long as they are provided with access to easy and cheap waste transfer. Consequently, transfer of waste is a form of cost externalization by which the true cost of production is not transmitted in the price, and it is the overseas communities that incur the disposal cost and the environmental and health damage associated with the product.⁵⁸ Jim Puckett of the Basel Action Network wrote:

‘We must realize that when we sweep things out of our lives and throw them away ... they don’t ever disappear, as we might like to believe. We must know that “away” is in fact a place. In a world where cost externalization is made all too easy by the pathways of globalization, “away” is likely to be somewhere where people are impoverished, disenfranchised, powerless and too desperate to be able to resist the poison for the realities of their poverty. “Away” is likely to be a place where people and environments will suffer for our carelessness, our ignorance or indifference.’⁵⁹

This paper has sought to briefly elaborate some of the challenges currently faced by states in the context of waste management, applicable principles of international environmental law, the concept of waste and waste management practices in Asian countries that conforms with the key objective of waste management which is the protection of human health and the environment against harmful effect caused by the production, collection, transfer, and treatment of waste. With the ever-growing economic and population, Asia becomes the largest waste-producing continent on earth. Learning from how the states within this continent are dealing with the waste problems, especially in preventing or minimizing waste generation, hopefully gives insight for what should be done to achieve sustainable waste management. Conclusively, it is suggested that states consider formulating the harmonized definition of waste in accordance with the principles of international environmental law and assign particular weighting to the waste prevention, reduction, and minimization, also to crystallize the environmentally sound waste management practices into provisions within international legal instruments, taking into account the challenges faced by countries in Asia. Although waste management is mostly done

⁵⁸ NANDA AND PRING, *supra* note 10.

⁵⁹ Jim Puckett, *A Place Called Away*, available at <https://resource-recycling.com/e-scrap/wp-content/uploads/sites/2/2016/09/AwayIsAPlaceEssayFINAL.pdf>.

within state's national jurisdiction, the establishment of international legal instrument governing waste management is essential as it can serve as guidance for the implementation at the national level and curbs international cooperation to manage waste sustainably.

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SESSION 3

HUMAN RIGHTS

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“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, Kathmandu School of Law, Nepal

“TNCs and International Law in History: A Case Study of English East India Company”



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CHALLENGES IN ENSURING THE RIGHTS OF VIETNAMESE WORKERS MIGRATING TO OTHER COUNTRIES IN THE GLOBALIZATION CONTEXT - THE TWO SIDES OF THE DEVELOPMENT PROCESS

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Abstract

As a result of the international integration process, international migration is receiving strong attention from countries around the world due to its impacts on national political stability and socio-economic development. In practice, apart from economic benefits, Vietnamese migrant workers have to face many difficulties in their host countries such as social stigma, discriminatory attitude towards foreign workers etc., especially illegal workers, who are considered social outcasts, with no legal protection and can easily be targeted by human trafficking criminal groups. In order to provide clarity on the legal and practical issues on the rights of migrant workers in general and Vietnamese migrant workers in particular, this article will focus on the international and Vietnamese legal frameworks on the rights of migrant workers, and subsequently will show the challenges that Vietnam has encountered in ensuring the rights of Vietnamese workers abroad as well as effective solutions to help the Government better protect workers' rights in the future.

Keywords: Migrant worker - worker's rights - human rights.

1. INTRODUCTION

In the current context of globalization, international migration is becoming a big issue that no nation alone can resolve on its own, and it is attracting the attention of most countries in the world due to its obvious impacts on national socio-economic development and political stability.

The International Organization for Migration (IOM) estimates that there were approximately 214 million international migrants in mid-2010, compared to approximately 195 million five years earlier¹. This naturally excludes internal migration, which represents a higher figure. According to IOM, there will be approximately 405 million international migrants by the year 2050 (IOM, 2010). Political unrest, socio-economic instability, wars, natural disasters and economic factors (such as low income, poverty, and the lack of employment opportunities and livelihood options) are the major motivating factors in making migration decisions. Inherent disparities in living standards, opportunities for well-paid employment and income within the country and inequalities between rich and poor countries have motivated migrants to look for new, even temporary, opportunities abroad. Migration for economic reasons is particularly prevalent, partly due to globalization¹.

According to Vietnam Migration Profile 2016, the number of Vietnamese migrating to other countries is increasing in various methods, of which, worker migration is one of the main method, and it is creating many challenges both for the Government and the migrants, as well as for their families. Vietnam joined the international labor market later than other countries in the region. Only from 2000 did the process strongly occurred to main countries such as Japan, Korea, China (Taiwan), Malaysia, North Africa – Middle East². According to the latest report from the Ministry of Labor, Invalids and Social Affairs (MOLISA), there are currently 500,000 Vietnamese workers working in 40 countries and territories around the world with about 30 different occupations and sectors ranging from simple labour to technical work such as garments, electronics, domestic workers, nursing, and ship crew. In which, there are about 300,000 workers working abroad under legal labour export organizations and companies, 100,000 workers finding jobs abroad on their own by travelling for tourism and then staying to work or by other methods³.

¹ CONSULAR DEPARTMENT, MINISTRY OF FOREIGN AFFAIRS OF VIET NAM, REVIEW OF VIETNAMESE MIGRATION ABROAD, SOCIO-LABOUR PUBLISHING, 7-9 (2012) at https://ceas.europa.eu/archives/delegations/vietnam/documents/eu_vietnam/vn_migration_abroad_en.pdf, accessed 30 August 2020

² Ibid 15-17

³ Ibid 17

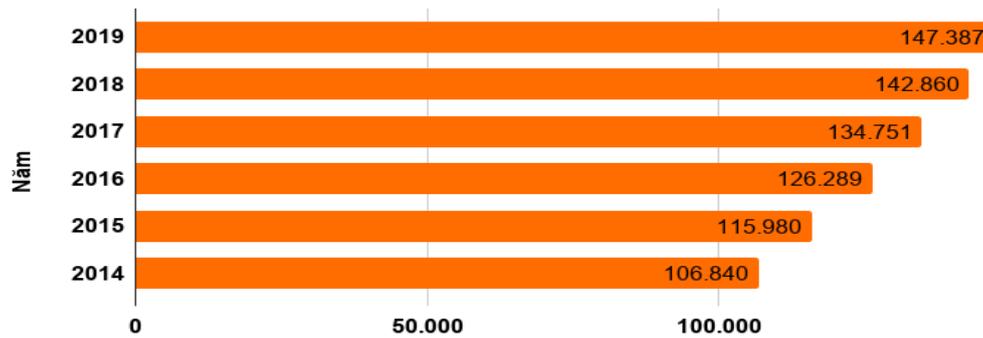


Figure: Number of Vietnamese workers abroad during the 6 years from 2014-2019⁴

Many studies in the world and in Vietnam have shown that labour migration mostly comes from economic reasons. The demand for labour and services in overseas, coupled with income and living standard disparities between Viet Nam and other countries in the region, has spurred Vietnamese nationals to migrate abroad. This trend has been reinforced by developments in information and communication technologies, as well as cheaper and more available international travel services, all of which allow people to contact each other, change jobs and travel more easily than ever before⁵. Migrants want to find better jobs with higher income in comparison to what they have in their home countries⁶. Also according to MOLISA, income of Vietnamese workers abroad is relatively stable, and can be 2-3 times higher than domestic income of the same profession and skill⁷. However, most Vietnamese migrant workers abroad are unskilled workers working in low-skilled occupations, most of them are coming from rural areas, with poor language capabilities and low skills, therefore, they have limited career options.

Vietnamese migrant workers are one of the vulnerable groups, they have high risks of physical and mental abuse, and have to face many challenges throughout the whole migration process to work abroad. When working abroad, Vietnamese workers have to encounter social stigma and discriminatory attitude towards foreign workers as well as

⁴ Vietnam labor export exceeds 100,000 for 6 consecutive years, retrieved from <http://kinhdothi.vn/bieu-do-nam-2019-hon-147-nghin-lao-dong-viet-nam-di-lam-viec-o-nuoc-ngoai-361608.html>, accessed 30 August 2020

⁵ CONSULAR DEPARTMENT, MINISTRY OF FOREIGN AFFAIRS OF VIET NAM, REVIEW OF VIETNAMESE MIGRATION ABROAD, SOCIO-LABOUR PUBLISHING, *supra* note 1, at 10

⁶ *Id.* at 79

⁷ CONSULAR DEPARTMENT, MINISTRY OF FOREIGN AFFAIRS OF VIET NAM, *supra* note 1, at 17

difficulties in accessing legal procedures. They are even being exploited, beaten and mistreated, especially for Vietnamese who are working unofficially, or by illegal migration or by overstaying after the legal migration contract has expired. According to IOM, illegal migrants often do not have adequate living conditions, and are physically or mentally abused, isolated, exploited, robbed, even killed by criminal gangs or traffickers. Migrants do not or cannot leave, as they have to pay off the debt they took to cover for their journey. They also have to hide from the authorities due to their illegal residence status⁸. At the end of 2019, 39 Vietnamese workers were found dead in a frozen container when attempting to illegally enter the UK, or Austrian police discovered bodies of 71 migrants in a cold container of an abandoned lorry on a highway near the Hungarian border in 2015 etc. has ring an alarm for all countries (both origin and destination countries) on the cruelty of illegal immigration waves existing in our lives. With the dream of changing their lives quickly, these migrants had chosen for themselves a dangerous journey, even had to pay with their lives, to reach the promising lands.

This issue has placed countries in a complex situation that how to protect basic rights of their workers abroad while still upholding the principle of respect to the independence and sovereignty of the host countries? As one of the major emigrating countries in the world, what challenges does Vietnam currently have to face in ensuring the rights of Vietnamese workers abroad? To partially address the above questions, this study will focus on analyzing: (i) the international and Vietnamese legal framework on the rights of migrant workers, (ii) difficulties and challenges in ensuring the rights of Vietnamese worker who are currently working abroad, (iii) thence, providing specific solutions to better ensure the rights of Vietnamese workers abroad in the future.

2. INTERNATIONAL LEGAL FRAMEWORK ON THE RIGHTS OF MIGRANT WORKERS

⁸ “Chuyên gia Anh nêu ba lý do người Việt nhập cư lậu”/British experts provided three reasons why Vietnamese people illegally immigrate, retrieved from <https://vnexpress.net/chuyen-gia-anh-neu-ba-ly-do-nguoi-viet-nhap-cu-lau-4003610.html>, accessed 30 August 2020

Migrant worker is one on the vulnerable groups based on psychological and physiological factors, and working and living environment. Until now, although many international documents had been issued, directly or indirectly mentioned the rights of migrant workers in the world, the protection and promotion of the rights of migrant workers remain a challenge for nations and the international community. The United Nations (UN) and specialized agencies, especially the International Labor Organization (ILO) had developed a fairly comprehensive system of international legal instruments and specific treaties on international migration. These organizations had also established implementation monitoring mechanisms on a global scale, which focus on the reporting duty of the State parties on the implementation of relevant international treaties.

a. Key documents of the United Nations

In 1948, United Nations adopted the Universal Declaration of Human Rights (UDHR) which became an international document stating the basic standards for the basic human rights. Although it is not a legally binding document, however, UDHR had been widely recognized and became the normative framework for the formation of later important documents on human rights, especially the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – two of the fundamental international legal instruments on human rights in the world.

These documents recognize equality and non-discrimination as the most important principles in ensuring basic human rights, while affirming the right to enjoy all rights and freedom within these Covenants “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”⁹. State parties are therefore obliged to ensure the

⁹ United Nation General Assembly, The Universal Declaration of Human Rights (UDHR) (adopted by 10 December 1948) art 2; United Nations General Assembly, International Covenant on Civil and Political Rights (ICCPR) (adopted by 16 December 1966, entry into force 23 March 1976) art 2(2); United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted by 16 December 1966, entry into force 3 January 1976) art 2(2).

enjoyment of human rights and fundamental rights for all, including foreigners or migrants.¹⁰

The right to migrate is an important right recognized as “*a human right and an indispensable condition for the survival and development of individuals*”.¹¹ In accordance with important human rights Conventions, freedom of migration is understood as a combination of freedom of movement and residence and the right to leave any country including their own country and return to their country. This has been clearly shown in Article 13 of UDHR: “*Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country*”.¹²

Article 12 of ICCPR also states that all individuals have the right to liberty of movement and freedom to choose his residence in the territory of a country, except for restrictions such as to protect national security or public order.¹³ Furthermore, ICCPR also affirms that, alien residing in the territory of another country could only be expelled from that country in pursuant to the law and for compelling reasons such as national security.¹⁴ However, the right to freedom of movement and residence is not absolute as the Covenant also allows states, based on their sovereignty, to make legitimate distinctions between citizens and aliens to ensure national security and public order. In this regard, the UN Human Rights Committee explained that: “*The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter*

¹⁰General comment no. 31 regarding the nature of the general legal obligation imposed on States Parties to the Covenant (ICCPR), the UN Human Rights Committee had explained : “*...the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party*” (para 3 and 10). Source: UN Human Rights Committee, ‘General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 10 <<https://www.refworld.org/docid/478b26ae2.html>> accessed 15 June 2020.

¹¹ Aining Zhang, *Predicaments and Countermeasures of the Protection of Migrant Workers’ Human Rights*, 17 *Journal of Human Rights* 223, 226 (2018).

¹² UDHR art 13.

¹³ ICCPR art 12.

¹⁴ *Id.* art 13.

for the State to decide who it will admit to its territory”¹⁵. Furthermore, ICCPR also comprehensively outlined a set of common rights for everybody to enjoy including people who are not citizen of a state such as the right to life¹⁶; the right to not be subjected to torture or to cruel, inhuman or degrading treatment¹⁷; freedom from slavery or servitude¹⁸; the right to not be imprisoned merely on the ground of inability to fulfil a contractual obligation¹⁹; etc.

Similarly, ICESCR also ensures all migrant workers, regardless of their gender and social status, to enjoy economic, social and cultural rights.²⁰ Countries are obliged to remove obstacles to the “*enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health*”.²¹ Besides, ICESCR also provides minimum legal protection to migrant workers by recognizing some fundamental rights such as right to healthcare²², right to education²³, right to housing²⁴, right to work and right at the workplace²⁵ etc., of which the right to work is an important economical right for migrant workers. Therefore, ICESCR emphasizes that all individuals have the right to equal and favorable conditions of work, and that State parties must ensure the right to work for everyone, including immigrants.²⁶

Thus, in comparison with other international conventions on human rights of the UN, ICCPR and ICESCR play an important role in ensuring universal access to fundamental human rights standards. Together with the UDHR, they form the international human

¹⁵ United Nations Human Rights Committee, ‘CCPR General Comment No. 15: The Position of Aliens Under the Covenant’ (11 April 1986) para 5 <<https://www.refworld.org/docid/45139acfc.html>> accessed 16 June 2020.

¹⁶ ICCPR art 6.

¹⁷ *Id.* art 7.

¹⁸ *Id.* art 8(1) and (2).

¹⁹ *Id.* art 11.

²⁰ Amnesty International, ‘Living in the Shadows – A primer on the human rights of migrants’ (Amnesty International, September 2006) 21 <<https://www.amnesty.org/download/Documents/80000/pol330062006en.pdf>> accessed 16 June 2020.

²¹ Committee on the Elimination of Racial Discrimination, ‘General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004)’ (2004) UN Doc CERD/C/64/Misc.11/rev.3 para 29 <<http://www2.ohchr.org/english/bodies/cerd/docs/cerd-gc30.doc>> accessed 17 November 2020.

²² ICESCR art 12.

²³ *Id.* arts 13 and 14.

²⁴ *Id.* art 11.

²⁵ ICESCR art 6(1); Amnesty International, *supra note 20*, at 21 – 22

²⁶ ICESCR art 6(1).

rights laws and became the optimal legal shield for ensuring and promoting human rights in all countries, especially for countries which have not ratified specialized international conventions such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, CEDAW Convention, Convention on the Rights of Persons with Disabilities etc..

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 – a specialized international legal instrument on the protection of migrant workers

Following ICCPR and ICESCR, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICMW) was identified as a specialized legal instrument designed to provide specific legal protection for migrant worker group. The adoption of ICMW marks an important step in the development of international human rights law as well as the awareness of international community on the importance of migrant workers to politics, economy and society, at the same time identifies migrant workers and their families as an important part of society.

In practice, migrant workers are generally unlikely to be welcomed and are not adequately protected in host countries. They even had been considered the reason for the multi-ethnic situation and unemployment of citizens of the host countries. Therefore, ICMW aims to fill the legal gaps and is expected to become a truly effective legal instrument to “*provide minimum universal standards to protect migrant workers and members of their families*”.²⁷ With these considerations, ICMW strives to expand its scope and subject of provisions to cover all migrant workers and their families, regardless of their statuses as documented or undocumented workers according to the standards stipulated in major human rights instruments.²⁸ However, due to certain limitations of undocumented migrant workers, the Convention is only providing them

²⁷ Shirley Hune and Jan Niessen, *The First UN Convention on Migrant Workers*, 9 *Netherlands Quarterly of Human Rights* 130, 131–132 (1991).

²⁸ *Ibid* 130, 135.

with minimal legal protection to encourage all migrants and employers to respect and comply with the laws and procedures established by the countries.²⁹

According to ICMW, migrant workers are understood as people who will, are, and have participated in an income-generating activity in a country where they are not citizens. In addition, the Convention also introduced the concept of their family as only those who are married to the migrant workers or have a similar relationship to marriage, as well as children and other dependents who are recognized as family members under applicable law and under bilateral and multilateral agreements between the countries concerned.

The content of ICMW focuses on the rights of migrant workers in two main groups, namely: (i) the basic human rights that all migrants have, regardless documented or undocumented and members of their family must all be guaranteed such as: fundamental freedom rights, rights in criminal proceedings, right to privacy, right to be treated equally as citizens of the host countries regarding working conditions, social security, right to transfer income and right to be informed etc., and (ii) additional rights applicable to legal migrant workers and members of their families such as: right to temporary absence, right to freedom of movement, right to be treated equally as the citizens of the receiving country, other rights if their contracts are violated by the employer. Particularly, in ICMW non-discrimination is also referred as the fundamental principle to avoid creating discrimination between migrant workers and citizens of the host country, however, like other international documents, ICMW has not yet been able to explain specifically the content of this principle.

Although the number of state parties is still limited³⁰, with the efforts to recognize a large number of human rights similar to those stated in the international human rights

²⁹ United Nations General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 01 July 2003) 2220 UNTS 3 (ICMW) preamble; Article: James A R Nafziger and Barry C Bartel, *The Migrant Workers Convention: Its Place in Human Rights Law*, 25 International Migration Review 771, 777 (1991).

³⁰ As of 19 January 2020, ICMW has in total 55 state parties. Source <https://indicators.ohchr.org> accessed 6 July 2020

laws and the expansion of the scope and subject of provisions, ICMW is still seen as one of the core and specialized human rights instruments exclusively for migrant workers and members of their families.

b. ILO documents on the rights of migrant workers

Being developed on the foundations of universal documents on human rights of the UN, Convention No. 97 concerning Migration for Employment (Revised 1949) and Convention No. 143 concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers (Supplementary Provisions) are core legal instruments of the ILO on the issues of migrant workers as they refer to issues that arise throughout the entire labor migration process, from the time the workers are in their countries of origin, during the employment in the host countries until their return³¹.

According to Convention No. 97 of ILO, migrant worker is a person who migrates from one country to another to find employment, includes any person regularly admitted as a migrant for employment. This definition does not include frontier workers, short-term entry of members of the liberal professions and artists, and seamen (Article 11). This understanding is repeated in Convention No. 143 but the Convention adds 2 more groups which are (i) seamen, persons coming specifically for purposes of training and education, and (ii) employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments (Article 11).

Similar to ICMW, both these two Conventions from ILO noted: *‘all migrant workers are protected by these Conventions without distinction of the types of migrant workers*

³¹ SCHOOL OF LAW, NATIONAL UNIVERSITY HANOI, INTERNATIONAL LAW ON THE RIGHTS OF VULNERABLE GROUPS, LABOR AND SOCIAL PUBLISHING HOUSE, 135 (2011)

as well as not based on principle of reciprocity between countries’. To implement this provision, Convention No. 97 imposes an obligation on state parties to undertake the activities to (i) support and protect migrant workers such as: facilitating journey and reception of migrants for employment³², maintaining and providing adequate and free service to assist migrants for employment (Article 2), medical services and living conditions for migrants for employment and members of their families (Article 5) etc. (ii) equal treatment for migrant workers such as: apply national treatments with migrants for employment (Article 6), allow migrants for employment to transfer earnings and savings abroad (Article 9) etc.

To supplement for Convention No. 97, Convention No. 143 mentions aspects that Convention No. 97 had not mentioned such as: (i) Requiring state members to determine whether there are illegally employed migrant workers on their territory and passing through their territory, and whether migrant workers are employed illegally (Article 2); (ii) Adopting necessary and appropriate measures to suppress clandestine movements of migrants for employment and illegal employment of migrants (Article 3); (iii) Prosecuting authors of manpower trafficking (Article 5); Taking necessary measures to facilitate the reunification of the families of all migrant workers legally residing in its territory etc.

In general, both of these Conventions affirm that migrant workers will enjoy the same fundamental human rights as native workers. The biggest limitation of these two Conventions is that they only mentioned the groups which are legal migrant workers themselves, but not yet taken into account the right of illegal migrant workers and members of their families.

In practice, migrant workers are becoming more and more complicated, however, according to several researchers, it seems that international conventions in this area have not truly received attention from countries around the world. Evidently, there are a

³² International Labour Organization (ILO), *Migration for Employment Convention (Revised)*, C97, 1 July 1949, C97, art 4 available at: <https://www.refworld.org/docid/3ddb64057.html> [accessed 9 December 2020]

number of countries which are hesitant to join and ratify these international conventions³³. Convention No. 143 (effective from 09 December 1978) currently only has 25 state parties³⁴. Convention No. 97 (effective from 22 January 1952) currently only have 50 state parties³⁵. As explained by experts, despite the humanity of the Conventions, the number of state parties are limited partly because their content imposes too many responsibilities for host countries while “ignoring” the responsibilities of sending countries³⁶. This makes the conventions less “attractive” to countries. The harmony and balance of obligations and responsibilities between the receiving country and the country of origin must be considered and divided appropriately, to avoid creating “distinct” obligations and considered as “burden” to receiving countries. However, it is undeniable that these international conventions have contributed to the completion of legal framework for the protection of rights of migrant workers in the world. In a near future, people can expect that the good values constructed by these Conventions will be properly appreciated by nations to accept the obligations more easily.

Besides documents adopted by UN and ILO, at regional level, Vietnam and ASEAN countries had also strived to develop common documents to address legal issues regarding migrant workers in the region such as: ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers adopted in Cebu in 2007 (Cebu Declaration in short), ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers 2017 etc. In general, these documents called on ASEAN countries to ensure the rights of migrant workers by implementing specific obligations such as:

³³ VIETNAM LAWYERS ASSOCIATION, PROTECTING THE RIGHTS OF MIGRANT WORKERS: INTERNATIONAL, REGIONAL AND NATIONAL LAW & PRACTICE, HONG DUC PUBLISHING HOUSE, 79-82 (2008)

³⁴ See Ratifications of C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288, accessed 24 June 2020

³⁵ See Ratifications of C097 - Migration for Employment Convention (Revised), 1949 (No. 97) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO, accessed 24 June 2020

³⁶ See Ratifications of C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288, accessed 24 June 2020; See Ratifications of C097 - Migration for Employment Convention (Revised), 1949 (No. 97) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO, accessed 24/6/2020; see ratifications of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 01 July 2003) 2220 UNTS 3 (ICMW) art 2(1), <https://indicators.ohchr.org>, accessed 24 June 2020

protection of workers from abuse, discrimination or violence; providing essential services for migrants such as: necessary information about the receiving country, legal consulting services to resolve disputes or complaints etc.³⁷ In addition, ASEAN documents also call on countries to increase cooperation to solving issues related to migrant workers and members of their families, at the same time, to harmonize national law with ILO's basic laboring standards. Although there have been many efforts to legalize regulations on the rights of migrant workers, in practice, ASEAN has yet established binding regulations and clear mechanisms to promote decent working conditions and basic laboring standards at the regional level. The Cebu Declaration in essence is not a legally binding document, therefore, its effects on member states are still very limited³⁸.

3. THE RIGHTS OF MIGRANT WORKERS IN THE VIETNAMESE LEGAL SYSTEM - CURRENT SITUATION AND CHALLENGES

a. Vietnamese legal framework on the rights of migrant workers

As mentioned above, Vietnam is now one of the major emigrating countries in the world. Therefore, it is essential to recognize and secure the rights of Vietnamese migrant workers to ensure their legitimate rights and interests, while at the same time, limit infringement of rights and risks that could make them victims of overseas trafficking crimes.

I. Vietnamese worker's rights to work abroad under contracts

Vietnam began sending unskilled workers abroad through licensed agencies in November 1991 on the basis of Decree No. 370/HĐBT of the Council of Ministers dated November 9, 1991 on the promulgation of regulations on sending Vietnamese workers abroad to work for a definite time. Since then, the law on migrant worker in Vietnam

³⁷ The ASEAN Secretariat, 'Đồng thuận ASEAN về bảo vệ và thúc đẩy quyền của người lao động di cư'/ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers' (in Vietnamese), at https://asean.org/storage/2012/05/ASEAN-Consensus_Vietnamese-FV.pdf, accessed June 24, 2020

³⁸ *Supra* note 31 at 92-94

has continued to be strengthened and developed with a series of important documents built in the national legal system.

The 2013 Constitution clearly states that “*Citizens have the right to free movement and residence within the country, and the right to leave the country and to return home from abroad*”³⁹. And “*Overseas Vietnamese is an inseparable part and a resource of the community of Vietnamese nationalities... The protection of the legitimate rights and interests of Vietnamese citizens and legal entities in foreign countries is extremely necessary, demonstrating the State's responsibility towards citizens...*”⁴⁰. To implement the 2013 Constitution, the issue of the rights of Vietnamese workers abroad was concretized in documents such as: Law on Vietnamese Nationality 2008 (amended and supplemented in 2014); Law on Overseas Representative Offices of the Socialist Republic of Vietnam 2009; Law on Vietnamese workers working abroad under contracts 2006, Law on Human Trafficking Prevention and Control 2011, Penal Code 2015 (revised in 2017); etc. there are also agreements on regulations on land border management between Vietnam and bordering countries.

Similar to the provisions of International laws, Vietnamese workers, when working abroad, firstly enjoy the full human rights such as the right to life, the right to health care, and the right to access information etc. The organizations and individuals licensed to send workers abroad to work are obliged and responsible to strictly comply with the contents of the contracts with the employees, ensuring the correct procedures according to the provisions of the law and not allowed to take advantage of labor contracts to perform acts such as: Abusing activities of sending workers abroad in order to organize the sending of Vietnamese citizens abroad; sending workers abroad without registering contracts with competent state agencies in accordance with the Law on Vietnamese Worker working abroad under contracts 2006.etc. In addition, as migrant workers, Vietnamese workers abroad also have some typical rights such as:

³⁹ The Constitution of the Socialist Republic of Vietnam, 2013, art. 23.

⁴⁰ Resolution on overseas Vietnamese, date issued Mar. 26, 2004, No. 36-NQ/TW.

- The right to be informed about the policies and laws of Vietnam on the migrant workers; laws, customs and practices of the host country; rights and obligations of the parties when going to work abroad. This right is especially important for workers preparing to work abroad in order to equip them with knowledge to protect their own interests, to avoid deception cases when making a commitment to the rights and obligations in the contract. In addition, understanding the customs and practices of the host country will help workers to integrate soon into the life abroad⁴¹.

- The right to enjoy salaries, remunerations and other incomes, medical examination and treatment, social insurance and other benefits provided for in contracts as well as international treaties, international agreements to which Vietnam is a party.

- The right to have his/her lawful rights and interests protected while working abroad by the enterprise, non-business organization, offshore-investing organization or individual and by the foreign-based Vietnamese diplomatic mission or consulate in accordance with the Vietnamese law, the law of the host country as well as the international law and practice; to be advised on and supported in the exercise of their rights and enjoyment of benefits stated in the labor contract or internship contract (Article 44 (3)).

- The right to transfer home his/her salary, remunerations, incomes and other personal properties in accordance with the laws of Vietnam and the host country (Article 44(4)).

- The right to enjoy the benefits from the overseas employment support fund under the provisions of law (Article 44(5)). On August 31, 2007, the Prime Minister issued Decision No. 144/2007/ QĐ-TTg on the establishment, management and use of the Overseas Employment Support Fund. Accordingly, the employees working abroad will be supported by the Overseas Employment Support Fund to foster their skills, foreign languages and knowledge; assist in solving risks.

- The right to lodge complaints or denunciations or initiate lawsuits against illegal acts in the sending of workers abroad (Article 44 (6)).

⁴¹ Bui Thi Hoa, Completing The Law on The Rights Of Migrant Workers In Vietnam (2014) (Master thesis, The School of Law, Hanoi National University) p.26-27.

In addition to the above rights, Vietnamese workers working abroad under the contract are also entitled to the rights corresponding to the form of contract that sends them to work abroad, and at the same time their legitimate rights and interests are protected by the State of Vietnam⁴². In addition, Vietnam has also developed a Code of Conduct to ensure a responsible and ethical recruitment process developed by the Vietnam Association of Manpower and Supply in 2010 (updated in 2018); at the same time, the establishment of Vietnamese Labor Advisory Centers to work abroad has helped increase workers' access to information and justice. The role of trade unions in monitoring law implementation and protecting workers' rights is also promoted through cooperation with trade unions in the host countries.

Organizations and individuals that commit criminal violations in this field will be sanctioned in accordance with the 2015 Penal Code (amended in 2017) for such crimes as: Human trafficking (Article 150), Trafficking of a person under 16 (Article 151) ... Administrative sanctions are also stipulated in the Law on Vietnamese Worker working abroad under contracts 2006 and Decree No. 28/2020/NĐ-CP dated 01/3/2020 of the Government regulating the sanctioning of administrative violations in the field of labor, social insurance, sending Vietnamese workers to work abroad under the contract. Accordingly, depending on the behavior and the seriousness of the violation, the offender can be subject to a warning or a fine, in addition, it may be accompanied by one or several additional penalties⁴³.

On November 13, 2020, the National Assembly of Vietnam passed the amended Law on Vietnamese workers working abroad under contracts, which will enter into force from January 1, 2022. Compared with the current law, the amended law has 31 new points belonging to 8 major content groups. In addition to continue to regulate state policies on Vietnamese workers working abroad under contracts; as well as rights, obligations and responsibilities of overseas workers, enterprises, public service providers and related agencies, organizations, the law also promogulated the protection

⁴² *Supra* note 37, at art. 17; *supra* note 39, at art. 5.

⁴³ Penal Code, amend. 2017, art. 3.

of the legitimate rights and interests of those workers. In particular, Article 7 of the new law explicitly states 17 prohibited acts, such as: enticing, seducing, promising, mistakenly advertising, providing false information or other tricks to deceive the employee; taking advantage of activities of sending workers abroad to organize illegal exit, trafficking, exploitation, forced labor or other illegal acts.

II. Rights of undocumented Vietnamese workers abroad

Currently, besides legal workers, the number of Vietnamese workers migrating abroad by means of informal channels is quite large and there is no complete statistics. Illegal migrant workers have to live on the margins of society, so they are both vulnerable to exploitation and ideal for criminal gangs to take advantage of and manipulate⁴⁴.

In fact, current Vietnamese law does not have direct provisions on Vietnamese workers working illegally in other countries. Currently, there are only a number of relevant documents such as the 2011 Law on Human Trafficking Prevention and Control, the 2015 Penal Code (amended in 2017) that recognizes crimes such as organizing, brokering the illegal entry, exit, or stay in Vietnam of another person (Article 348), organizing, brokering illegal emigration of another person (Article 349)..., Decision No. 17/2007/QĐ - TTg of the Prime Minister that promulgates a regulation on accepting and supporting community reintegration for women and children returned from overseas trafficking, etc.

From an international perspective, Vietnam has also signed a number of Agreements on the return of Vietnamese citizens who are not allowed to reside abroad with a number of countries such as Germany, Poland, Canada, the UK, Switzerland, Norway, Czech, United States, Sweden, Belgium, France,⁴⁵ etc. All these agreements identified, Vietnam and other countries, on the basis of the principle of reciprocity, would like to cooperate

⁴⁴ *Supra* note 1 at 60-61

⁴⁵ *List of treaties, bilateral agreements on getting back citizenship*, 4 (2020), at <https://lanhsuvietnam.gov.vn/Lists/BaiViet/Bài%20viết/DispForm.aspx?List=dc7c7d75%2D6a32%2D4215%2Dafeb%2D47d4bee70eee&ID=138>, accessed December 9, 2020.

in solving problems related to receiving citizens illegally residing in the territory of one of the State parties, in order to prevent the increase in illegal migration. Also according to the provisions of these agreements, to be accepted to return, the returnee must prove their nationality through one of the documents such as: passport, identity card, nationality certificate etc.

In general, the provisions of these documents just deemed to be limited at the general provisions on illegal immigration and the responsibilities of individuals and organizations sending workers abroad, but there are no regulations to directly protect the rights of illegal Vietnamese workers working abroad. This is a huge gap in the legal aspect and a hole for all types of trafficking crimes operating.

In summary, the legal system and policies of Vietnam on migration are still quite limited and are still being improved. Migrant workers, whether they are legal and documented or work illegally and undocumented, are still Vietnamese citizens, so they still need the State to ensure their basic rights in the Constitution. Therefore, there are some shortcomings such as the lack of regulations in order to ensure the legitimate rights and interests of Vietnamese citizens during the migration process (before leaving the country - while abroad - when repatriation and reintegration), or the incomplete legalization of regulations related to different types of Vietnamese citizens' migration abroad. This practice leads to poor enforcement effectiveness etc. and are the issues that need to be considered and completed in time to ensure the best enjoyment of the rights of Vietnamese workers abroad.

b. Supporting policies of Vietnamese Government for overseas workers returning home in the COVID-19 pandemic

Since the beginning of 2020, the world economy has been on the brink of a recession in the aftermath of the COVID-19 pandemic. International organizations and financial institutions estimated that the global economy would witness the most severe economic depression in decades. The International Monetary Fund has accordingly lowered the

global economy growth forecast by 1.9 percentage points compared to its former forecast in April 2020, to negative 4.9 %. Similarly, according to the World Bank, the global economic growth projection is negative 5.2%, which is the steepest decline since the Great Depression in the 1930s. According to the evaluation of the International Labor Organization, the economic and labor crisis which is caused by COVID-19 could add up to 25 million unemployed people globally.⁴⁶ After social distancing and lockdown orders from governments, million workers have lost jobs, that seriously impact to their income. To cope with this situation, countries need to have consistent and rapid coordination policies at both national and global level on demonstrating multilateral cooperation to limit health crisis for workers and their families as well as economic impacts from the COVID-19 pandemic.

Despite being considered “a bright star” in the fight against COVID -9, similar to other nations, Vietnam’s economy has been suffering considerable repercussions as a result of the pandemic. According to the preliminary statistics, until present, more than 5,000 Vietnamese workers working overseas must return to Vietnam as a consequence of the COVID-19 pandemic. Almost all industries and sectors have been considerably impacted by the pandemic, consequently leading to a significant reduction in labor force and a high rate of unemployment. The country’s Gross Domestic Product (GDP) recorded in the second quarter of 2020 showed a minimal increase of 0.36% compared to the same period of the previous year, meaning this was the lowest increase within the 2011-2020 period. The labor force has decreased by more than 2 million people compared to the previous quarter in the same period of the former year. The unemployment rate of people at labor age in urban areas has been recorded as 4.46%, which is the highest in 10 years.

To support overseas Vietnamese workers returning home to overcome this crisis, the Government of Vietnam has introduced fast and practical response programs to best guarantee the rights of Vietnamese workers.

⁴⁶ ILO, almost 25 million jobs could be lost worldwide as a result of COVID-19, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_738742/lang--en/index.htm, accessed December 9, 2020.

According to the Joint Circular No. 16/2007/TTLT-BLDTBXH-BTP dated September 4, 2007, the employee is reimbursed the brokerage fee in case of force majeure (natural disaster, war, bankruptcy, etc). In case no-fault of the employee, the enterprise shall request the broker to refund to employees a part of the brokerage according to the principle: the employee who has worked less than 50% of the time under the contract will receive 50% of the paid brokerage; and the employee who has worked 50% of the time under the contract or more is not entitled to receive the brokerage fee. In case the broker cannot be claimed, the enterprise shall reimburse the employee according to the above principle and be accounted into reasonable expenses when calculating taxable income in accordance with the Vietnam's Law on Corporate Income Tax.

In addition, for reimbursement service, according to Clause 3, Section III of the above Joint Circular, in case overseas workers returning home ahead of schedule due to force majeure or not due to the employee's fault, the enterprise is only allowed to collect the service fee according to the actual time (number of months) of the employee working abroad. In some special cases decided by the Minister of Labor, Invalids and Social Affairs, overseas workers can receive a maximum level of 5 million VND/case. Depending on the epidemic situation, the authorities shall support workers and enterprises if needed.⁴⁷

Apart from those supporting measures, from February 2020, Vietnam has carried out a review of Vietnamese workers working abroad under contracts for infection and suspected COVID-19 infection.⁴⁸ Vietnamese workers must take the initiative measures to prevent the COVID-19, strictly comply with the medical requirements of the

⁴⁷ Supporting Vietnamese workers working aboard who lost jobs due to the COVID-19 (Vietnamese edition), <https://dangcongsan.vn/xa-hoi/ho-tro-lao-dong-viet-nam-lam-viec-o-nuoc-ngoai-mat-viec-vi-covid-19-551614.html>, accessed December 9, 2020.

⁴⁸ Minister of Labor, Invalids and Social Affairs, Document No. 01/CĐ-LDTBXH on Strengthening measures to prevent and control acute respiratory infections caused by new strains of corona virus dated February 2, 2020 (Vietnamese edition), <http://www.molisa.gov.vn/Pages/tintuc/chitiet.aspx?tintucID=222250>, accessed December 9, 2020.

Vietnamese authorities and host countries.⁴⁹ In addition, Vietnamese government also requires relevant agencies and organizations to continue carrying out activities such as:

- Communicate overseas workers to comply the host country's regulations on COVID-19 prevention and control, limit to move to high-risk areas;
- Strengthen the management to protect overseas workers in case of being affected by COVID-19;⁵⁰
- Setting up phone hotlines, contact points in the Vietnamese community in the host country to promptly grasp the situation of the overseas workers.
- Coordinate with the authorities of the host country to ensure that workers are tested, isolated and treated in case of suspected or infected by COVID-19;
- Coordinate with the host country to claim for employees' wages on leave due to COVID-19, deal with foreign enterprises on extension of stay, extending contract, or to ensure overseas workers to return safely and legally in case of exit.⁵¹

c. Challenges in securing the rights of Vietnamese workers working abroad nowadays

Exacerbation of illegal labor migration and associated legal gaps

According to the IOM report, the annual number of Vietnamese workers working under contracts abroad is very large, but on the other hand, there are incomplete statistics on the number of Vietnamese workers that illegally residing in a foreign country. Ha Tinh is one of the provinces with the largest number of workers working abroad in Vietnam, currently estimated to have nearly 68,000 people working in more than 60 countries and territories. This number of workers work mainly in Korea, Japan, Taiwan, Thailand ... and some countries in Europe. In which, if calculating the number of migrant workers who migrate abroad freely and do not have a work permit of the host country, Ha Tinh

⁴⁹ Vietnam has not yet have workers working abroad infected with the COVID-19 (Vietnamese edition), <https://nhandan.com.vn/tin-tuc-xa-hoi/chua-co-lao-dong-viet-nam-lam-viec-o-nuoc-ngoai-theo-hop-dong-bi-nhiem-covid-19-449451>, accessed December 9, 2020.

⁵⁰ Minister of Labor, Invalids and Social Affairs, Document No. 02/CĐ-LDTBXH on Strengthening measures to prevent and control acute respiratory infections caused by new strains of corona virus dated April 3, 2020.

⁵¹ Minister of Labor, Invalids and Social Affairs, Official Letter No. 1945/LDTBXH-QLLDNN on Continuing implementation of measures to prevent and combat COVID-19 epidemic in the new situation, June 2, 2020.

has over 35,000 people⁵². In particular, during the Covid-19 epidemic outbreak, thousands of overseas Vietnamese workers returned home, of which the relatively large number of illegal workers showed deficiencies in current overseas workers management.

There are many reasons for Vietnamese workers to illegally migrate abroad, according to IOM, most of them accept migration because of economic pressure, forced by their families to migrate, wanting to escape domestic violence, divorce, indebtedness or other problems. However, the fact that some people have "successful" smuggled immigrants, sending money back to their families makes others want to follow this path, even though they have to take the risks⁵³. According to Dang Nguyen Anh, in addition to exporting unlicensed labor, one of the reasons that make workers choose unorthodox routes is due to the promises and temptations of individuals which called a brokerage agent in the rural areas⁵⁴. Besides, the procedure is cumbersome, the waiting time is long; document and recruitment costs, indirect costs incurred and the lack of official information also lead to more workers looking for informal channels.

In addition, as analyzed above, Vietnamese law still has a lot of gaps related to illegal migrant workers. Although the Penal Code deals with crimes related to illegally sending Vietnamese workers abroad, sanctions and enforcement measures to prevent this situation are in fact not strong enough to prevent illegal “silent” flows of migrants from going abroad.

Awareness of workers and their families on legal provisions on migrant worker’s rights remains limited.

⁵² Pham Truong, “Hơn 35000 người Hà Tĩnh cư trú bất hợp pháp tại nước ngoài”/More than 35,000 Ha Tinh people illegally reside overseas, 12 (2019), at <https://zingnews.vn/hon-35000-nguoi-ha-tinh-cu-tru-bat-hop-phap-o-nuoc-ngoai-post1025568.html>.

⁵³ Viet Anh, “Chuyên gia Anh nêu ba lý do người Việt nhập cư lậu”/British expert to mention three reasons why Vietnamese people illegally immigrate, 10 (2019), at <https://vnexpress.net/chuyen-gia-anh-neu-ba-ly-do-nguoi-viet-nhap-cu-lau-4003610.html>.

⁵⁴ DANG NGUYEN ANH, LABOUR MIGRATION FROM VIET NAM: ISSUES OF POLICY AND PRACTICE 12 (ILO ASIAN REGIONAL PROGRAMME ON GOVERNANCE OF LABOUR MIGRATION, WORKING PAPER No. 4, 2008).

Vietnamese workers abroad are mostly unskilled, mainly from rural areas, so they have limited foreign language, skills and legal understanding. Therefore, their access to information on labor policies and laws, especially the labor market and employment is incomplete or misleading, provided mainly by friends, family, and brokers.

In addition, when working abroad, a part of Vietnamese workers do not have a high sense of discipline, leading to violation of the law of the host country and the labor contract, so it is easy to face legal issues such as contract termination or abuse. Moreover, some people have poor ability to integrate into the local community, leading to separate living and isolation⁵⁵. When their rights are violated, they often keep quiet and can not speak up because they do not have foreign language skills or fear of losing their jobs or fear of deportation (for undocumented workers). According to data from researchers, only 4% of Vietnamese migrants try to fight for compensation for the abuse they experienced⁵⁶. In addition, due to illegal migration, victims hesitate to approach the authorities of the host country to receive protection when they are abused. They are also hesitant to approach the Vietnamese diplomatic missions in that country for help. It is this mentality that has created barriers for state agencies to access to resolve the issues and to support them.

The immigration policies of developed countries have changed, making it more difficult for Vietnamese workers to find jobs in these countries.

Political, economic, and social turmoil and the increase of crimes due to the "open door" policy have placed European countries on a reluctance to continue to accept migrant workers. Europe is no longer considered a peaceful land after a series of attacks were carried out in France, Germany, England ... but the main culprits are immigrants. This situation deepens the disagreements between countries in the EU on the admission of

⁵⁵ Anthony Le Duc, *The Role of Social Media in Community Building for Illegal Vietnamese Migrant Workers in Thailand*, *Journal of Identity and Migration Studies* 10 (2016).

⁵⁶ Phuc Quan, "Cải thiện về pháp lý giảm rủi ro cho lao động di cư"/Improving the legal framework, reducing risks for migrant workers, 11 (2019), at <https://nhandan.com.vn/cung-suy-ngam/cai-thien-ve-phap-ly-giam-rui-ro-cho-lao-dong-di-cu-375902/>, accessed September 9, 2020.

immigrants and is the driving force for European countries to reconsider their immigration policies in a more cautious and closed approach. This makes the path for Vietnamese migrant workers to legally move to the European countries or the United States more difficult, and the unofficial paths will have the opportunity to thrive when the demand of workers in these countries still exist. To overcome these difficulties, the Government needs to plan the necessary training policies to improve the qualifications and skills of the workers, as well as issue appropriate support policies to bring workers through the "narrow gate" to legally access the large labor markets. Of course, this is not easy and requires great efforts from the State and the employees themselves.

4. SOME RECOMMENDATIONS TO EFFECTIVELY ENSURE THE RIGHTS OF VIETNAMESE WORKERS ABROAD IN THE COMING TIME

First of all, the Government should continue to review to improve policies and laws on migration towards the approach of direct access to the rights of migrant workers, and at the same time expanding legal access for migrant workers.

In order to improve the law on migrant workers, Vietnam needs to expand the protected groups to undocumented workers and supplement regulations related to the protection of female workers as they are the most vulnerable to abuse while working abroad. Focus on legal approaches for migrant workers (especially female workers) regarding complaints mechanism when being abused to ensure the fair and responsive measures. Besides, in order to reduce illegal labor migration, the Government also needs to issue policies to support workers such as reducing labor export costs, supporting loans etc.

Policies and regulations on migrant workers should be approached in the direction of best conditions and support for workers during the process before, during and after the return of overseas workers. In particular, the reintegration policy after migration is very important to help workers feel secured in life. Unfavorable conditions of return are factors that influence migrant's decisions to continue to work by overstaying their

contracts or circular migrants. The majority of Vietnamese migrant workers, when returning home, often return to unskilled labor jobs, the jobs they did before migration and not related to the skills and knowledge that they acquired abroad due to inability to apply those skills and working style to working conditions in Vietnam or to start up a business⁵⁷. Therefore, they often fall into a confused, depressed mood and want to continue working abroad.

According to IOM, ILO and UN Women, to make the return of migrant workers meaningful, the State needs to consider implementing some solutions such as⁵⁸:

- (i) Standardizing documents to foster knowledge before going abroad to work;
- (ii) Establish a specialized consular service for return and reintegration;
- (iii) Establish a synchronized data collection system to capture all types of migration and return. Based on the collected data, it is possible to build profiles of returning migrants to develop programs to meet the needs of different target groups;
- (iv) Improve social security;
- (v) Develop a financial support program ‘pay-on-return’ in the form of sponsorships, loans and other forms that can encourage return after contract termination without penalizing early returnees.
- (vi) Develop skills development, career counseling and personalized job placement programs etc.

In addition, continue to criminalize crimes related to illegal migration and build a stronger connection between the legal framework on labor and the criminal to prevent labor violations from developing into forced labor and human trafficking⁵⁹.

Secondly, consider joining the ICMW Convention of the United Nations and other relevant ILO Conventions, while strengthening international cooperation on

⁵⁷ IOM, International Labour Organisation (ILO), UN Women, Making the return of migrant workers work for Vietnam: an issue in brief at https://vietnam.iom.int/sites/default/files/IOM_Files/Projects/Labour_Migration/PolicyRMW_eng.pdf, accessed June 24, 2020

⁵⁸ *Id* at 4-5

⁵⁹ Nhat Anh, “Quản trị tốt di cư lao động thúc đẩy kinh tế pháp triển”/Good governance of labor migration, promoting economic development, 7 (2019), at <https://nhandan.com.vn/tin-tuc-xa-hoi/quan-tri-tot-di-cu-lao-dong-thuc-day-phat-trien-kinh-te-366144/>, accessed 30 August 2020

migration to create a legal basis to protect the legitimate rights and interests of Vietnamese workers abroad.

The ratification of the ICMW Convention and other relevant ILO conventions will create an important foundation for both strengthening the legal foundation to ensure the rights of migrant workers, and addressing violations of the rights of Vietnamese workers abroad, especially for undocumented workers. In addition, it is recommended to continue to promote the signing of bilateral cooperation agreements and measures to exchange immigration information with other countries to limit illegal migrants and human trafficking⁶⁰.

In an effort to have international cooperation on migration, on March 20, 2020, the Prime Minister issued Decision No. 402/QĐ-TTg on promulgating a Plan for the implementation of the Global Agreement on legal, safe and orderly migration of the United Nations. This is the first inter-governmental migration agreement aiming at strengthening cooperation in global migration governance, protecting the rights and interests of migrants for the sustainable development of the 2030 Agenda. However, in order to effectively implement this Agreement, it is necessary to outline a detailed plan and develop a monitoring mechanism to ensure the effectiveness and feasibility of the Strategy in practice.

Thirdly, promote activities of propaganda and dissemination of the law on migration to all strata of the people in order to raise awareness of people about their rights and at the same time raise awareness against trafficking crimes.

Propaganda and dissemination of the law should focus on the provisions of international laws and Vietnamese laws on prevention of human trafficking and safe migration. Communication methods should be specific, clear and easy to understand. In addition, for workers preparing for legal export, there should be a program to disseminate laws

⁶⁰ Dau Tuan Nam, *Managing the migration crisis from an international cooperation perspective and experiences for Vietnam*, Political Theory Journal 9 (2020).

and customs of the host country in order to raise awareness of compliance with the law and a respectful attitude towards the communities where they work.

In addition, it is necessary to widely propagate among all strata of society about the Governmental policies to support migrant workers returning home to encourage, motivate and create confidence for them to start business. In addition, the Government also needs to develop a set of guidance documents on migration policies and laws for workers; provide legal advice addresses and support them in the whole process before, during and after returning from abroad.

Fourthly, improve the capacities and responsibilities of state management agencies on migrant workers such as the Ministry of Labor, Invalids and Social Affairs, Department of Overseas Labor and improve the governance system on labor migration; develop a mechanism of cooperation and information sharing among state agencies to better manage activities of sending Vietnamese workers to work abroad, promptly protect, provide relief and evacuate workers when needed.

Finally, workers themselves and their families need to change their mindset, to proactively access information on labor and employment on official channels of State instead of passively receive unofficial information provided by others. Workers need to equip themselves with basic knowledge about labor export as well as State policies and laws on labor export to ensure their legitimate interests and at the same time protect themselves in necessary cases.

5. CONCLUSION

The sending of workers abroad is a major policy of the Party and State of Vietnam in the trend of international integration, in line with the current international migration tendency, on the principle of equality, mutual benefit and for the interests of the nation and the people. However, the gaps and limitations of legal provisions related to illegal migration, or ineffectiveness in policies to support reintegration of migrant workers etc. is becoming a major barrier for Vietnam in the progress of ensuring the migrant worker's

rights in practice. Migrant workers, whether legal or illegal, documented or undocumented, are themselves human beings and citizens of the country, therefore, in addition to recognizing rights as a basic human being, it is imperative that there are more specific provisions for them as migrants in order to limit any violation of rights that may arise against them in migration process.

With the view that no one is left behind, Vietnam is also actively reviewing policies and laws on migrant workers, by the National Assembly of Vietnam has approved the Law of Vietnamese worker working abroad under the contract 2006 amend with new contents, more in line with the real situation of Vietnam, has shown the efforts of the Vietnamese Government in building a legal basis for protection the rights and interests of Vietnamese workers working abroad. As a member of the new generation of trade agreements with high requirements for labor and migrant workers, this Law becomes one of the important legal instruments for Vietnam to materialize the international commitments. With these efforts, it is possible to expect a complete, transparent and unified legal framework on migration in the near future.

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TNCS AND INTERNATIONAL LAW IN HISTORY: A CASE STUDY OF ENGLISH EAST INDIA COMPANY

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Structure of the Paper

- **Introduction**
- **Advent of European Trading Companies**
- **English East India Company: Trade to Aggrandisement**
- **Conflict of Sovereignty**
- **Proclamation of 1858**
- **Lessons from History**
- **Conclusion**

Research Questions

- Whether international law was recognised in relation between the Company and the Emperors?
- What doctrines of international law existed then? Do the doctrines formulated then, have any repercussions today (TWAIL II seeks to answer continuities of history to the present)?
- Is there a link between the history of transnational corporations and their accountability to present day discourse on business and human rights?

Advent of European Trading Companies

- Portuguese- First to visit and later, largely confined to Goa
- Dutch East India Company- Influence in the South without much impact
- French
- English East India Company- Laid foundations of Colonisation

English East India Company: Trade to Aggrandisement

- Initially aimed at trade
- Followed international law principles- Diplomacy and treaties with the Mughal rulers
- Gradual change due to Charters issued by the British Crown granted more powers
- Entered Political arena in 1757 after victory in Battle of Plassey

Conflict of Sovereignty

- Crown v. Company
- Reflected in Warren Hastings Corruption Trial
- Establishment of Supreme Court in Calcutta
- 1857 War of Independence

Proclamation of 1858

- English East India Company and its Board of Directors were replaced by the Secretary of State
- Secretary of State was made the Member of Parliament

Lessons From History

- TWAIL II on History of International Law-
 1. Learn from History
 2. Tracing Continuities of History of International Law
- Commercial to Political Aggrandisement
- Accountability of TNCs
- Current debate on Business and Human Rights
- Need for Strong Accountability Mechanisms

Conclusion

- Continuing Conflict of Sovereignty- State v. TNCs
- TNCs as subjects of International Law
- Strengthen Accountability Mechanisms

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**RESHAPING INTERNATIONAL LAW
IN THE ASIAN CENTURY**

SESSION 4

TRADE, INVESTMENT, AND OTHER ISSUES

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“Reforming the Investor-State Dispute Settlement (ISDS) through Treaty Substantive Rules:
The Case for Asia”

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“The New Anti-Corruption Law in Indonesia: The Contribution to the Development
of International Anti-Corruption Law”



Reforming the ISDS System through Treaty Substantive Rules in the Context of Asia

*Shahrizal M Zin**

1 Introduction

The rules of investment law which was crafted by the powerful colonial power to protect the interest of their capital exporters has crystallized what is known today as the ISDS regime. Since then, Investor-State arbitration has been under relentless attacks particularly when it came to light in the 90s. Among the opponents, it has been argued that the ISDS tends to favor an investor in a claim brought against State. The fiercest critics also assert that the existence of ISDS regime has a chilling effect on the State's regulatory prerogative thus dissuading State from enacting legislation that would address public interest matters. The ISDS regime features select few arbitrators to review and evaluate State's action even though they are largely unaccountable to the constituency that their decisions affect. Of late, the compensation awarded by the Investor-State arbitral tribunal to investor has come under great scrutiny. The high costs of defending a claim brought by investor against State has long been the primary concern associated with the ISDS regime. In view of this, ISDS has been perceived by many as giving investor too much leeway. This should not come as a surprise acknowledging the fact that ISDS originated from rules written to serve the benefit of colonial power. Question abounds, therefore, as to how the developing countries in Asia confronting the challenges posed by ISDS? In light with this background, the paper argues that reforming the ISDS regime is the key to level the playing field and ensuring transparency in the investment treaty arbitration. Therefore, reform must start from the drafting of investment treaty itself. This is to rebalance between State's interest and investment protection in the investment treaty notwithstanding that most developing countries in Asia are still very much depending on foreign direct investment (FDI) flowing from developed countries for economic growth. Reform on the treaty substantive rules must take place well before a dispute expand to a full scale in which the investment treaty tribunal will rely on treaty as the source of applicable law to determine issues affecting its jurisdiction as well as merits. The paper offers an analysis in relation to reform of the treaty substantive rules by examining the

recent trend featuring in the new generation of Bilateral Investment Treaty (BIT). While discussing the most recent development, the paper highlights attempt to rewrite the established investment law rules, that are, fair and equitable treatment (FET), expropriation and provision of host State's counter claim against the investor's claim. In short, the reform on these established rules of investment law is crucial not only for the interest of developing countries but also to rectify the deficiencies in the current ISDS regime. The rest of this paper proceeds as follows. Section 2 and 3 examines the inconsistency of interpretation concerning the substantive rules of expropriation and fair and equitable treatment (FET) respectively. Section 4 highlights the proposals for the ISDS reform to address inconsistency within Asia context and finally section 5 ends the paper with a conclusion.

2 Expropriation: The Conundrum of Expansionary Interpretation

The existing ISDS system has been widely criticized for its lack of inconsistency and predictability because of diverging decisions even though facts, parties, treaty provisions and applicable arbitration rules were identical. This is attributed to expansionary interpretation that are considered to disproportionately favour foreign investors to the detriment of the host state. In this context, the critics lament that arbitral tribunals do not feel any sense of accountability for the effects of their awards due to the nature of their appointments which is established on an ad hoc basis.

In most of the BITs, the treaty substantive protections consist of expropriation rule, FET, full protection and security (FPS), most-favoured-nation treatment (MFN) and national treatment. However, for the purpose of discussion within the paper's theme, the focus is confined to expropriation and FET. This is due to the close interwoven of both concepts which resemble each other when it comes to the determination of a violation of FET or of whether the state measures establish an expropriatory act.¹ In addition, the protection of 'legitimate expectation'

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¹ The tribunal in *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16 (Award of 28 September 2007) highlighted the similarities between FET and indirect expropriation but suggested that the scope of expropriation test is narrower than the scope of FET. In the words of the tribunal:

appears to be a crucial issue for both standards. Protection against uncompensated expropriation is the hallmark of international investment law reflecting its origin during great oil nationalization which began with Russia in 1920, Mexico 1938, Iran in 1951, Libya in 1971-74 and Venezuela in 1976. As such, provisions addressing direct or indirect expropriation appeared in all modern BITs.² Typically, a claim based on indirect expropriation is triggered by the adverse regulation imposed by State. In other words, indirect expropriation is an act whose effect is to substantially undermine the economic value of a protected investment. The tribunal in *Spyridon Roussalis v. Romania*³ provided an outline of the different types of indirect expropriation as follows:

...Indirect expropriation may occur when measures ‘result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor’ (UNCTAD Series on issues in international investment agreements, Taking of Property, 2000, p. 2)

On the other hand, in order to determine whether an indirect expropriation has taken place, the determination of the effect of the measure is the key question. Acts that create impediments to business do not by themselves constitute expropriation. In order to qualify as indirect expropriation, the measure must constitute a deprivation of the economic use and enjoyment, as if the rights related thereto, such as the income or benefits, had ceased to exist (*Tecmed v. Mexico*, Award, May 29, 2003, 43 ILM (2004) 133, para. 115). In *Telenor*, the Tribunal decided that: ‘[t]he conduct complained of must be such as to have a major adverse impact on the economic value, use of enjoyment of its investment’ (*Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006, 64-65).

It must also be kept in mind that on occasion the line separating the breach of the FET standard from an indirect expropriation can be very thin, particularly if the breach of the former is massive and long-lasting. In case of doubt, however, judicial prudence and deference to state functions are better served by opting for a determination in the light of FET standard. This also explains why the compensation granted to redress the wrong done might not be too different on either side of the line.

² Investment treaty practice has established quite clear prerequisites according to which the legality of an expropriation of a foreign investor is to be determined. For example, Article 6(1) of the US Model BIT stipulates:

Neither party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (‘expropriation’), except:

- (a) For a public purpose;
- (b) In a non-discriminatory manner;
- (c) On payment of prompt, adequate, and effective compensation; and
- (d) In accordance with due process of law

³ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/01, Award, 7 December 2011 (Hanotiau, Giardina, Reisman) paras 327-329.

Expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omission that, in sum, result in a deprivation of property rights. This is frequently characterized as a ‘creeping’ or ‘constructive’ expropriation. In the *Biloune* case the arbitration panel found that a series of governmental acts and omissions which ‘effectively prevented’ an investor from pursuing his investment project constituted a ‘constructive expropriation.’ Each of these actions, viewed in isolation, may not have constituted expropriation. But the sum of them caused an ‘irreparable cessation of work on the project’ (*Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction and Liability of October 27, 1989, 95 ILR 183, 209).

Under these broad concepts, claim of expropriation have succeeded in situations removed from the traditional conception of ‘takings’ of property. The scope of expropriation concept has been the subject of some controversies. Interpretation of treaty terms concerning expropriation has taken an expansionary route imputing obligations that state did not envisage at the time the treaty was concluded. In this regards, the expansion of expropriation concept caused the line separating expropriation and regulation appeared to be unclear. The emergence of controversy is further intensified by the question whether and to what extent ‘other factors’ should be taken into consideration besides the mere effects of the state measure. While some tribunals appear quite restrictive on this issue, others seem to favour a more comprehensive approach embracing factors such as the host state’s discriminatory intention, the foreign investor’s legitimate expectations, transparency, consistency and proportionality of the measures. Despite the fact that direct expropriation is no longer commonplace, the tide begins to turn on indirect expropriation or state measures that are ‘tantamount to expropriation’ or ‘having equivalent effect.’⁴

⁴ See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) at 101 on the meaning of indirect expropriation. According to these authors, ‘a claim on compensation is typically founded on State’s indirect expropriation which leaves the investor’s title untouched but deprives him of the possibility of utilising the investment in a meaningful way’. A question as to whether an indirect expropriation has taken place require a determination of the effect of the measure as the Tribunal in *Tecmed v. Mexico*, Award, May 29, 2003, 43 ILM (2004) 133, para 115 observed that ‘the measure must constitute a deprivation of the economic use and enjoyment, as if the right related thereto such as the income or benefit had ceased to exist’.

3 FET: Inconsistency of Interpretation

FET is the rule that protect the investor and its investment against the conduct of host State that do not fall within the ambit of expropriation. Most investment treaties contain clauses promising the host State to accord ‘fair and equitable’ treatment to the investor and its investment. Therefore, FET has become the most important standard in investment disputes. At the height of doctrinal dichotomy stand the question whether the concept of FET is limited to the international minimum standard of customary international law or whether it is to be constructed independently as a self-contain standard highlighting the plain meaning of ‘fair’ and ‘equitable’. Traditionally, the standard of FET is determined by customary international law based on *Neer* case.⁵ Among the proponents of customary international law, the argument is based on the historical context of international minimum standard.⁶ Nevertheless, with the emergence of modern BITs, shift begins to take place with more treaties develop its own FET standard. As for the opponent of customary international law, the argument is tied up to the context of investment dispute in which it is argued that the factual circumstances in *Neer* case is irrelevant to form an appropriate standard for FET in relation to economic regulation.

⁵ *L.F.H Neer and Pauline E. Neer (USA v. Mexico)*, General Claim Commission United States and Mexico Docket No. 136 (Award on 25 October 1926), at pp 60-1. The claim was presented by the United States on behalf of L. Fay. Neer, widow, and Pauline E. Neer, daughter of Paul Neer who at the time of his death was employed as superintendent of a mine in the vicinity of Guanacevi, State of Durango, Mexico. The relevant facts of the case were as follows. On November 16, 1924, about eight o'clock p.m., when he and his wife were proceeding on horseback from the village of Guanacevi to their home in the neighborhood, they were stopped by a number of armed men who engaged Neer in a conversation which Mrs. Neer did not understand, in the midst of which bullets seem to have been exchanged and Neer was killed. It is alleged that, on account of this killing, his wife and daughter who were the American citizens sustained damages in the sum of \$100,000.00; that the Mexican authorities show an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits and that the Mexican government ought to pay to the claimants the said amount.

⁶ The basis of international minimum standard of customary international law has its root in *L.F.H Neer and Pauline E. Neer (USA v. Mexico)*, General Claim Commission United States and Mexico Docket No. 136 (Award on 25 October 1926), at pp 60-1. The tribunal tried to formulate a standard that ‘the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standard that every reasonable and impartial man would readily recognise its insufficiency’. Since this formulation constituted a relatively high barrier to find a violation of international law, the tribunal consequently rejected the claim.

Divergent interpretation by the tribunals is rooted from the vagueness of FET language stipulated in investment treaties. In this context, UNCTAD⁷ has identified five (5) most widespread approaches to FET standard in treaty practice, namely:

- (i) No FET Obligation – Some of the treaties entered into in 1990s and early 2000s contained no FET clause, for example, Pakistan-Turkey BIT 1995. However, it has been revised by the Pakistan-Turkey BIT 2012 which include a rather descriptive FET clause.
- (ii) Unqualified/autonomous FET Clause – Many investment treaties use a simple unqualified formulation which does no more than stipulating an obligation of a host state to accord FET to protected investments.
- (iii) FET linked to international law – FET can be linked to international law in two formulations. First, that the state shall accord FET in accordance with international law and second, a treaty may provide that the state shall accord FET ... no less than that required by international law.
- (iv) FET linked to minimum standard under customary international law – An explicit link between the FET obligation and the minimum standard of treatment is used in these treaties to prevent over-expensive interpretations of the FET standard by arbitral tribunals.
- (v) FET with additional substantive content – This has been identified as an emerging trend in international investment agreements, which is a way to bring precision to the meaning of FET.

Over the years, the tribunals have identified certain essential features that may be termed as components of protection standard pursuant to FET clause under the BITs. These features include the following components:

⁷ See UNCTAD, *Fair and Equitable Treatment*, pp. 17-31, UNCTAD Series on Issues in International Investment agreements II, UNCTAD/DIAE/IA/2011/5 (2012), https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

3.1 Legitimate expectations

In *Tecmed v. Mexico*, the application to renew a licence to run the landfill operation was rejected and a programme for closure of the landfill was requested. The tribunal in *Tecmed* stated the obligation to provide FET means ‘to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.’⁸ Moreover, the tribunal in *International Thunderbird Gaming v. Mexico* explained, ‘the concept of legitimate expectation relates ... to a situation where a Contracting party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the state to honour those expectations could cause the investor (or investment) to suffer damages.’⁹

3.2 Protection against arbitrariness

In *CMS v. Argentina*, the claimant alleged that the value of its shares dropped by 92 per cent due to the respondent’s emergency measures. The *CMS* Tribunal held that ‘the standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness and discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted.’¹⁰

⁸ *Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2 (Award dated 29 May 2003) paras 152,156.

⁹ *International Thunderbird Gaming v. United Mexico States*, UNCITRAL/NAFTA, Arbitral Award of January 26, 2006, para 147.

¹⁰ *CMS Gas Transmission Co. v. Argentina*, Award on the Merits of 12 May 2005, ICSID ARB/01/8, ILM 44 (2005) para 290. See also *LG & E Corp. and Others v. Argentina*, ICSID Case No. ARB/02/01, Decision on Liability, 3 October 2006, para 162 and *Oxus Gold plc v. The Republic of Uzbekistan*, UNCITRAL (Final Award dated 17 December 2015), paras 323, 785.

3.3 Consistency and stability in regulatory measures

In *Mr Franck Charles Arif v. Republic of Moldova*, the claimant argued that the success of his investments had been obstructed by a series of government delays, unnecessary inspections and domestic judicial decisions that invalidated both the tender for the border stores and the lease agreement for the airport store. The tribunal held that ‘here is a direct inconsistency between the attitudes of different organs of the State to the investment. The Airport State Enterprise and the State Administration of Civil Aviation endorsed and encouraged the investment in the airport premises, while the courts found the same investment to be illegal. This type of direct inconsistency in itself amounts to a breach of the fair and equitable treatment standard’.¹¹

3.4 Transparency

In *Metalclad v. Mexico*, a dispute arose out of representations by government officials with regard to permits for the construction of a hazardous waste landfill. The tribunal found that the denial of the municipal construction permit, coupled with procedural and substantial deficiencies of the denial, was improper. The *Metalclad* tribunal has imputed transparency as an integral part of FET although it was not explicitly provided for in Article 1105. In the words of the tribunal:

Prominent in the statement of principles and rules that introduces the Agreement is the reference to ‘transparency’ (NAFTA Article 102(1)). The tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investment made, or intended to be made, under this agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly

¹¹ *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 9Award dated 8 April 2013) para 547. See *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB(AF)/11/12 (Award dated 4 April 2016) para 543 where the tribunal is of the opinion that ‘FET comprises, inter alia protection against arbitrary and discriminatory treatment, transparency and consistency’. Also see *Saluka Investments BV v. Czech Republic*, Partial Award of 17 March 2006 (UNCITRAL) and *MTD Equity Sdn Bhd And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, para 116.

determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.¹²

The *Metalclad* tribunal concluded that the acts of the state and the municipality were in violation of the FET standard under Article 1105 of NAFTA due to the failure by the Mexican Government to ensure a transparent and predictable framework for Metalclad's business planning and investment. The tribunal is of the view that 'the totality of these circumstances demonstrate a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA'.¹³

3.5 Good faith

The element of bad faith was once considered as a requirement on the part of the host state conduct. In *Alex Genin v. Estonia*,¹⁴ the Central Bank of Estonia had cancelled the license of the shareholders in a financial institution. The tribunal held that:

It is also relevant that the tribunal, having regard to the totality of the evidence, regards the decision by the Central Bank of Estonia to withdraw the license as justified. In light of this conclusion, in order to amount to a violation of the BIT, any procedural

¹² *Metalclad Corp v. Mexico*, Award of 30 August 2000, ICSID Case No. Arb (AF)/97/1, ILM 40 (2000) para 76. Also see *Maffezini v. Spain*, Award on the Merits, 13 November 2000; *Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2 (Award dated 29 May 2003) and *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, paras 864-870 (Award dated 11 December 2013).

¹³ At para 99. It bears noting that the *Metalclad* award was set aside in part by the Supreme Court of British Columbia on grounds that the tribunal had improperly based its award on transparency even though the principle is not contained in Chapter Eleven but in Chapter Eighteen of NAFTA.

¹⁴ *Alex Genin, Eastern Credit Ltd Inc. and AS Baltoil v. Estonia*, Award of 25 June 2001, ICSID Case No. ARB/99/2 para 371. Also see *Loewen Group, Inc. and Raymond L. Loewen v. USA*, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003. para 132; *Azurix Corp and others v. Argentina*, Award of 14 July 2006, ICSID Case No. ARB/01/12, paras 366, 372 and *CMS Gas Transmission Co. v. Argentina*, Award on the Merits of 12 May 2005, ICSID ARB/01/8, ILM 44 (2005), paras 274, 280. Except for *Alex Genin* case, the tribunals in *Loewen*, *Azurix* and *CMS* have all rejected any requirement of bad faith to prove a violation of FET. In this regards, procedural irregularity itself may be sufficient to establish a violation of FET clause. The *Azurix* tribunal has abandoned the requirement of bad faith on the part of the host state to establish a violation of FET. In the words of the tribunal at para 372:

To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous and egregious.

irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action. None of these are present in the case at hand. In sum, the tribunal does not regard the license withdrawal as an arbitrary act that violates the Tribunal's 'sense of judicial propriety.' Accordingly, the tribunal finds that the Bank of Estonia's actions did not violate Article 11(3)(b) of the BIT.

In light of the foregoing, the variations of the interpretation concerning FET clause display a troubling degree of inconsistency. The following section highlights some proposals to bring consistency of treaty interpretation within the context of Asia.

4 Proposals for the Reform of ISDS Substantive Rules within Asia Context

4.1 Specificity in treaties terms to describe expropriation and FET in a precise manner

The recent development show that the new generation of investment treaties have narrowed down the language of substantive principles to address the problem of inconsistency of interpretation. For example, the 2012 US Model BIT employs a three-prong test to determine indirect expropriation. Annex B para 4(a) says that:

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitute an indirect expropriation, requires a case-by-case, fact based inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.

The 2012 US Model BIT goes on to state in Annex B para 4(b) that 'except in rare circumstances,¹⁵ non-discriminatory regulatory action by a Party that are designed and applied to

¹⁵ It is interesting to observe that this 'rare circumstances' clause has also been adopted in the US's influenced treaty such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and reflected with some variations in the greater detail and specificity in China-Canada BIT Annex B.10 para. 3 and China-Japan-Korea TIT Protocol, para 2(c).

protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation’.

The recent attempt to rewrite the expropriation rule is illustrated in the Comprehensive Economic and Trade Agreement (CETA) between Canada and European Union.¹⁶ Annex 8-A spell out the meaning of expropriation as follows:

The Parties confirm their shared understanding that:

1. Expropriation may be direct or indirect:

- (a) direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure; and
- (b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitute an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:

- (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
- (b) the duration of the measure or series of measures of a Party;
- (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment – backed expectations; and
- (d) the character of the measure or series of measures, notably their object, context and intent.

3. For greater certainty, except in rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

It bears noting under both 2012 US Model BIT and CETA, the criteria for expropriation is subject to an important caveat that takings in pursuit of public welfare objectives such as health or environmental protection, do not, in most circumstances amount to indirect expropriations.

¹⁶ The CETA is a free trade agreement between the European Union and Canada. Negotiations were concluded in August 2014 and signed on 30 October 2016.

The above reform has also gained a traction in Asia through trade agreements concluded with non-Asian partners which reflected the consciousness of the drafters to keep abreast with the current trend. Annex 10A of the Singapore-Peru Free Trade Agreement, for example, provides that the determination of whether an act amounts to indirect expropriation should take into account: one, the economic impact of the government action; two, the extent to which the action interferes with distinct, reasonable investment-backed expectations; and three, the character of the government action. This is based on a similar provision in the 2012 US Model BIT.

A new shift of paradigm is evident in the NAFTA 2.0 or the United States-Mexico-Canada Agreement (USMCA)¹⁷ which restrict the investor's right to seek arbitration of claims involving direct expropriation (but not indirect expropriation). Under USMCA, direct expropriation occurs when 'an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure'.¹⁸

With respect to FET, the new generations of the BITs tend to employ a broad definition. According to Art. 5(2)(a) of the 2012 US Model BIT, 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'. This is also reflected, for example, in Art. 9.6(2)(a) of the CPTPP which states that:

For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concept of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:

- (a) 'fair and equitable treatment' includes the obligation not to *deny justice* in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of *due process* embodied in the principal legal systems of the world;

¹⁷ The United States-Mexico-Canada Free Trade Agreement (USMCA), signed 30 November 2018.

¹⁸ *Ibid.*, Annex 14-B (Expropriation), Art. 2.

The recognition of ‘denial of justice’ and ‘due process’ elements as an integral part of FET clause is a likely response to recent cases involving denial of justice particularly in *Saipem SpA v. Bangladesh*¹⁹ where Bangladeshi courts failed to enforce international commercial arbitral awards and *White Industries v. India*²⁰ where the tribunal found that India breached an obligation to provide ‘effective means of asserting claims and enforcing rights’ because White Industries faced severe delay in enforcement of an award in the Indian courts.

Going beyond the 2012 US Model BIT, Article 9.6(4) CPTPP additionally states that ‘for greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result’. In a more recent BIT such as CETA, the notion of FET has been confined only to specific ill-treatment and to do so in express terms. Art. 8.10 of CETA provides that:

1. A party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measure constitutes:
 - (a) denial of justice in criminal, civil or administrative proceedings;
 - (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
 - (c) manifest arbitrariness;
 - (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
 - (e) abusive treatment of investors, such as coercion, duress and harassment; or
 - (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

2. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and reasonable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

¹⁹ *Saipem S.p.A v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award dated June 30, 2009).

²⁰ *White Industries Australia Limited v. Republic of India* (Final Award dated November 30, 2009).

Based on the above ‘closed list’ FET clause, the EU’s approach seeks to provide more certainty in the definition of FET. CETA attempts to stipulate precisely what constitute a breach of an investor’s legitimate expectation. In this regards, the tribunal may take into consideration ‘a specific representation’ which ‘created legitimate expectation, and upon which the investor relied in deciding to maintain the covered agreement that the party subsequently frustrated.’²¹

A similar reform is currently reflected particularly in East Asia BITs. For instance, China-Canada BIT generally follows the US approach by referring to a minimum standard of treatment, under international law, which effectively means customary international law as defined in Article 38 of the Statute of the International Court of Justice (ICJ).²² China-Japan-Korea TIT also refers to international law but uses the term ‘generally accepted rules of international law’.²³ In other words, China-Japan-Korea TIT seem to adopt NAFTA approach by equating the FET standard to customary international law standard as a threshold. In contrast to EU’s approach, the US’ approach seeks to provide more flexibility with ‘open ended’ FET clause. It does not only refer to the international minimum standard to define FET but also make explicit reference to ‘denial of justice’ to demonstrate a breach of the standard. It remains to be seen if China will maintain the US’s approach or switch to the EU’s approach for the upcoming China-EU BIT.

²¹ Article 8.10(4) of the CETA provides that ‘when applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered agreement, that created a legitimate expectation, an upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

²² W. Shan and H. Chen, ‘China-US BIT Negotiation and the Emerging Chinese BIT 4.0’ in C.L. Lim (ed.) *Alternative Visions of the International Law on Foreign Investment* (Cambridge University Press, 2016) 223, 238.

²³ China-Japan-Korea TIT states in Article 5 that:

1. Each Contracting Party shall accord to investments of investors of another Contracting Party fair and equitable treatment and full protection and security. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not ipso facto establish that there has been a breach of this paragraph.

It is submitted that the second limb of the above article seeks to avoid the problem posed by *Metalclad* tribunal on ‘transparency’ requirement which is not indicated in the investment chapter but derived from NAFTA Chapter 18. Justice Tysoe in the judicial review of the *Metalclad* award dismissed the tribunal construction of Article 1105 of the NAFTA and found that the tribunal ‘misstated the applicable law to include transparency obligations, and it then made its decision on the basis of the concept of transparency’. Justice Tysoe substantiated this by observing that the transparency obligations were contained in NAFTA Chapter 18 and that the right to submit a claim to arbitration was limited to Chapters 11 and 15. He concluded that the tribunal ‘decided a matter beyond the scope of the submission to arbitration’ and hence set aside the award. See *the United Mexican States v. Metalclad Corporation* (2001) BCSC 664.

However, at the time of writing, China-EU BIT is still being negotiated. It is interesting to observe the trend as China is now becoming a capital exporting state than merely a capital importing state in the past. Therefore, there a need for China to balance between the right to preserve its regulatory space against the need to protect its investment abroad. In order to protect its outbound investment, China being a home (investor) state, seeks to attain a high level of legal and institutional protection for its national investor abroad.²⁴ Therefore, it is reasonable to expect that all of this national interest will be given a paramount consideration by the drafters of the future BITs.

In contrast, the India Model BIT 2016 which makes no mention of ‘fair and equitable treatment’ in Art. 3(1), but states that ‘Each party shall not subject Investment of Investors of the other Party to Measures which constitute: (i) Denial of justice under customary international law; (ii) Un-remedied and egregious violations of due process; or (iii) Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment’. On the downside, the Indian government decided to unilaterally denounce the investment treaty. The mass termination of BITs was undertaken in 2017 by the Modi governments as part of its new BIT policy to terminate investment treaties with around 60 countries.²⁵ The harsh policy on investment treaties were triggered by the Indian unpleasant experience dealing with ISDS claim in *White Industries Australia Limited v. Republic of India*²⁶ where the tribunal found that India breached an obligation to provide ‘effective means of asserting claims and enforcing rights’ because White Industries faced severe delay in enforcement of an award in the Indian courts. Moreover, India is currently battling around 20 disputes under different BITs with millions dollars of claims being at stake as damages.

²⁴ Shen Wei, ‘Evolution of Non-Discriminatory Standards in China’s BIT in the Context of EU-China BIT Negotiations’, *Chinese Journal of International Law* (2018), 799, 836.

²⁵ For example, India-China BIT stood terminated on 3 October 2018 due to India’s decision to unilaterally denounce the treaty. However, pursuant to Article 16(2) of the India-China BIT, in the event of unilateral termination, the treaty ‘shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.’ In other words, the BIT continues to protect the Chinese investment under international law, provided the investment was made before the treaty was terminated on 3 October 2018.

²⁶ *White Industries Australia Limited v. Republic of India* (Final Award dated November 30, 2009).

It may be reasonable to expect that more states in Asia will resort to greater specificity of such terms in their treaties. This is to ensure some degree of control over the manner in which the tribunal arrives at its award when dealing with future investment disputes.

4.2 Provision relating to the State's approve investment which limit the meaning of investor & investment

Incorporating a provision which subject the investor's investment to the host State's approval has proved to be an effective shield to defend against the investor's claim. States practice in Asia has displayed the attempt to limit the meaning of 'investments' and 'investors' that may fall within the ambit of investment treaties in question. For example, Article 11.1 of ASEAN Agreement for the Promotion and Protection of Investment of 1987²⁷ only applied to investment 'specifically approved in writing and registered by the host country'. In *Yaung Chi Oo v. Myanmar*,²⁸ a Singapore investor who brought arbitration proceedings against Myanmar for cancellation of his license to operate a brewery failed to demonstrate that its investment was expressly approved by the host State. As a result, the tribunal found that it did not have jurisdiction over the claim. Similarly, in *Phillipe Gruslin v. Malaysia*,²⁹ a Belgian national brought arbitration proceedings against Malaysia on the basis of the 1979 Intergovernmental Agreement between Malaysia and the Belgo-Luxemburg Economic Union for the imposition of exchange controls which allegedly resulted in the loss of his entire investment in securities listed in the Kuala Lumpur Stock Exchange. Nevertheless, his claim was dismissed due to his failure to show that the investment was an 'approved project' under the Intergovernmental Agreement. The 2012 ASEAN Comprehensive Investment Agreement or the ACIA which has succeeded the 1987 Agreement also contains similar provisions which links 'covered investment' as an investment that has been admitted according to laws, regulations, and national policies and where applicable, specifically approved in writing by the competent authority of a member State'.³⁰

²⁷ Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments Manila, 15 December 1987.

²⁸ *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar*, ASEAN ID Case No. ARB/01/1 (31 March 2003).

²⁹ *Phillipe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award (27 November 2000).

³⁰ See Article 4(a) Annex 1 of the ASEAN Comprehensive Investment Agreement (ACIA), (signed 26 February 2009, entered into force 29 March 2012).

4.3 Joint Statements of Treaty Interpretation

Efforts to guard against unduly expansive interpretation of the substantive clause have seen attempted to reclaim the authority to treaty interpretation.³¹ CETA, for example, have reaffirmed their right to regulate and to pursue legitimate public policy objectives to provide a precise definition of FET. This is to avoid wide interpretation and to guide the tribunals in arriving at its award within the intended meaning of the contracting parties. In addition, there is also a mechanism for the parties in CETA to issue binding interpretations on ‘what they originally meant in the agreement’ and to take part in arbitrations in relation to interpretation questions. The mechanism for the issuance of authoritative interpretation is something that the older boilerplate BITs lacked in their provisions. With the inclusion of joint statement of treaty interpretation, states would find an appropriate mechanism to keep a treaty interpretation within the context of its initial meaning.

4.4 Incorporating Exceptions Clause into the Investment Treaties

The recent trend has shown the increasing use of carve out or exception clause in the investment treaties. The carve out or exception clause serve to safeguard the host State regulatory power to regulate on matters related to public interest without being held accountable for indirect expropriation. For example, the preamble to the Comprehensive Economic Agreement between India and Singapore reaffirms the parties’ ‘right to pursue economic philosophies suited to their development goals and their right to regulate activities to realise their national policy objectives’.³² Some states have gone further to introduce general exception clauses to exclude certain regulatory measures from the ambit of investment treaties.³³ These clauses exclude

³¹ For instance, Article 15.21 of the Singapore–United States FTA provides for a joint committee composed of government officials of each party to issue binding interpretations of a provision of the agreement. This is to ensure a consistency of the outcome of disputes. See also Malaysia–New Zealand FTA and ASEAN–Australia–New Zealand FTA which also incorporate express provisions for tribunals to request joint decisions from the parties declaring their interpretation of any disputed provision.

³² Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (1 August 2005).

³³ Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments. Article 33 of China–Canada BIT states that ‘provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on

measures taken by the Contracting States in the fulfillment of their obligations relating to a variety of public interests. Some of those clauses expressly exclude measures to protect public health from application of the relevant treaty. Put differently, these exception clauses allow State to impose treaty-inconsistent measures without being held accountable for its action as long as the measures in question are not unjustifiably discriminatory. For example, Article 28.3(2)(b) of CETA contain exceptions allowing states to ‘take measures aimed at protecting human life or health,’ as long as they are not arbitrary or discriminatory, ‘without implying a breach of international law’. Article 9.11(4) of the China-Australia Free Trade Agreement 2015 goes further, providing that non-discriminatory measures implemented for ‘legitimate public welfare objectives... shall not be subject of a claim’.

Similar treaty language also appears in the recent BITs, for example, in the CPTPP.³⁴ Paragraph 9 of the CPTPP Preamble encompasses:

The Parties to this Agreement, resolving to:

Recognise their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.

Article 9.16: Investment and environmental, health and other regulatory objectives:

Nothing in this Chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting party from adopting or maintaining measures, including environmental measures: (a) necessary to ensure compliance with laws and regulations that are not consistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources is such measures are made effective in conjunction with restrictions on domestic production or consumption’. See also Article 17 of the ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 29 March 2012) which provides similar general exception that ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement by member States of measures necessary to protect, amongst other things, public morals, human, animal or plant life or health, provided the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between member States of their investors’.

³⁴The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which followed the Trans-Pacific Partnership Agreement (TPP12) after the withdrawal of the United States, was signed on 8 Mar. 2018 in Santiago, Chile by 11 participating countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

Further, Article 15.1 of Hong Kong-Chile BIT provides that ‘nothing in this Agreement shall be construed to prevent party from adopting, maintaining or enforcing measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its area is undertaken in a manner sensitive to environmental, health or other regulatory objectives’.³⁵

In short, all these new generation of BITs provide explicit provisions which recognize the right of State to regulate in areas related to public health objectives. Therefore, the exception clauses serve as a legitimate defence for State to shield against the investor’s claims. In short, these new generation of BITs provide an explicit provision, which recognizes the right of State to regulate in areas related to environmental concerns. As a result, it imposes an obligation on the investor to comply with the host State’s environmental regulations. In the event of non-compliance, it will give rise to form a legitimate cause of action to assert counterclaim which is the subject of following discussions.

4.5 Incorporating Counterclaim Clause

The integrity of the ISDS system depend on whether the host state respondent is granted equal access to justice to assert its claim against the investor. Much has been said that the ISDS tends to give investor too much leeway to bring claims against state without being held accountable for violating host state regulations or treaty obligations. In the past, the assertion of a host state’s counterclaim at ISDS is prone to crumble due to the lack of a clear language of BIT.³⁶ Hence,

³⁵ Hong Kong-Chile BIT, (signed 18 November 2016, entered into force 14 July 2019).

³⁶ See *Klockner Company v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision, 21 October 1982. See also earlier cases with respect to State’s asserted counterclaim in *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID, Decision, 6 January 1988 and *Atlantic Triton v. Government of Guinea*, ICSID, Award, 21 April 1986. More recent cases on counterclaim includes *Amco Asia Corporation and others v. Republic of Indonesia*, Resubmitted Case, Decision on Jurisdiction, 10 May 1988; ICSID Reports, vol. 132, 543; *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction Over the Czech Republic’s Counterclaim, 7 May 2004; *Sergei Paushok et al v. The Government of Mongolia*, UNCITRAL, Award, 28 April 2011; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB 06/1, 7 December 2011; *Antione Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/01/02, Award (21 June 2012); *Urbaser SA v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05, 7 February 2017; *David R. Aven and others v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, 18 September 2018 and *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6. The Award on Quantum dated 27 September 2019.

any BIT should expressly preserve the State's right to bring a counterclaim against the investor. Despite the existence of treaties that provide broadly for arbitration of 'all' or 'any' investment disputes, it often leads to confusion when there is distinguishing between 'claim' and 'counterclaim'. Therefore, a question arises regarding the intention of the drafters: Whether they intended to consent to arbitrate their claims as well as counterclaims. One way of circumventing this interpretation problem is to provide an express provision in the BIT that allows a State to assert counterclaims. By inserting an express provision on counterclaims, it will provide a legal certainty that affirms the State's right to bring a counterclaim.³⁷ By the same token, express provision for a counterclaim will ease the admissibility question during the jurisdiction phase of an arbitration. In this regard, the express provision will provide a legal basis for the tribunal to exercise its jurisdiction over a counterclaim. Therefore, the counterclaim will be heard at the merits stage without going through complicated arguments on its admissibility. It will potentially be a deterrent for an investor to challenge the state-asserted counterclaim on jurisdictional grounds, knowing that the tribunal will eventually derive its jurisdiction from the express provision in the treaty. In the end, it will enhance the efficiency of the process and provide cost-effective arbitration to the parties.

4.6 Restricted access to the ISDS

The recent USMCA has set a precedent which provide a restricted access for the investor to arbitrate under ISDS. Investor is now required to litigate claims 'before a competent court or administrative tribunal of the respondent'.³⁸ Claimant must litigate until a 'final decision from a court of last resort', or alternatively, thirty months have elapsed since local court proceedings were initiated.³⁹ There is an exception to this local litigation requirement 'to the extent recourse to domestic remedies were obviously futile or manifestly ineffective'.⁴⁰ This scheme is accompanied by a four-year statute of limitations for asserting any claim under USMCA.⁴¹ In a

³⁷ For further details on the discussion of counterclaim, see M Zin, Shahrizal., 'Reappraising Access to Justice in ISDS: A Critical Review on State Recourse to Counterclaim' in Alan Anderson and Ben Beaumont (eds) *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Wolters Kluwer October 2020) 225-244.

³⁸ See Agreement between the United States of America, the United Mexican States and Canada (signed 30 November 2018), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14_Investment.pdf (USMCA), Annex 14-D (Mexico-United States Investment Disputes), Art. 14.D.5 (Conditions and Limitations on Consent).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, Art. 14.D.5 (Conditions and Limitation on Consent).

departure from NAFTA, USMCA provides an ‘asymmetrical’ fork in the road provision.⁴² If during local court proceedings, an American investor alleged a breach of USMCA itself (as opposed to a breach of Mexican law), this will bar any right to arbitration under USMCA.⁴³ Given the key takeaway from the USMCA is the restricted access to arbitration in the ISDS, Annex 14-D restrict the types of claims that may be submitted. For instance, claims for direct expropriation may be submitted to ISDS but claims for indirect expropriation may not. In addition, claims for a breach of FET has also been excluded from ISDS.

Looking at the USMCA’s restricted access model, it is time for Asia to start reconsidering a departure from the ISDS arbitration. Nevertheless, mandatory litigation at the domestic courts or administrative tribunals might be over simplistic proposal given that not all Asian countries are ‘dualist’ when it comes to the direct application of international law principles or investment treaty on domestic plane. The reason why a domestic litigation is made mandatory between US and Mexico under USMCA because of the ‘monist’ approach of Mexico legal system where international treaties are automatically part of its domestic law (without the need for implementing legislation) and directly enforceable in its courts. Therefore, a prerequisite litigation at the domestic court do not augur well when states practice dualism because the court might be lacking jurisdiction without the implementing legislation to give effect to treaties. Moreover, domestic litigation does not bode well in certain notorious jurisdictions due to the issues concerning impartiality and independent of judiciary since investment disputes typically involved matters directly related to State or public interest. It is worth noting that the recently concluded Regional Comprehensive Economic Partnership (RCEP), unlike its CPTPP counterpart, does not contain any provision relating to the ISDS. With the absence of ISDS provision in RCEP, mediation may fill in the gap as an appropriate forum for dispute resolution between the contracting parties, to which the discussion now turns.

4.7 Mediation as a prerequisite for the ISDS

⁴² See Alexander Bedrosyan, *The Asymmetrical Fork-in-the-Road Clause in the USMCA: Helpful and Unique*, Kluwer Arbitration Blog (29 October 2018), <http://arbitrationblog.kluwerarbitration.com/2018/10/29/usmca/>.

⁴³ USMCA, supra n. 17, Annex 14-D (Mexico-United States Investment Dispute), Appendix 3.

With all the backlash against the ISDS, time has come for mediation to take a centre stage. The signing of Singapore Convention has given a new impetus for mediation as a legitimate public policy instrument to resolve cross border dispute. The recent trend has demonstrated some gradual efforts to empower mediation with legal credibility to overcome the limit of ISDS arbitration. For instance, the Energy Charter Treaty (ECT) Secretariat has come up with the Model Instrument on the Management of Investment Disputes on 23 December 2018 which has been adopted in the interim by several Member states.⁴⁴ In addition, ICSID has published its own investor state mediation rules to facilitate the parties when resorting to mediation for dispute resolution process. Of late, parties have already started to mediate their investment dispute as in *Dominican Republic and Odelbrecht*⁴⁵ where the matter was mediated under ICC Mediation rules and led to a settlement agreement between the parties. With increasing awareness on mediation and having sufficient pool of investment dispute mediators, the drafters of investment treaties should consider to make mediation a prerequisite before the commencement of ISDS arbitration or at least allow a concurrent process to take place.⁴⁶

5 Conclusion

After years of inconsistent ISDS jurisprudence, it is timely that reform should take place in the substantive rules governing the investment treaties. Within the context of Asian century which see more active participation of states in the region to conceive, launch and lead the free trade agreements such as the Belt and Road Initiative (BRI) or RCEP, having a well-balanced, certainty and predictability in the investment treaties will help to propel Asia forward as an important economic hub. In summary, a way forward to unlock the ISDS conundrum is possible, if from the outset of a treaty negotiation and drafting, the drafters are conscious to incorporate the following proposals. First, substantive treaty terms such as expropriation and FET are worded with specificity and sufficient clarity to avoid expansionary or divergent of

⁴⁴ Wolf von Kumberg, 'A Concept Paper: The Time for Investor State Mediation Has Come,' *International ADR Forum*, Vol 1 Issue 1 August 2020, 21.

⁴⁵ *Ibid.*, 25.

⁴⁶ See USMCA Art 14.D.2: Consultation and Negotiation. Article 14.D.2 provides that 'In the event of a qualifying investment dispute, the claimant and the respondent *'should'* initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation, or *mediation*.' By incorporating mediation as a prerequisite before the commencement to the ISDS arbitration or allowing it to run in parallel, it will improve the ISDS efficiency and thus providing a costs effective dispute resolution.

interpretations. Second, any investment should be made subject to the state authority's approval. Third, an investment treaty should have a provision on joint statements to provide a purposive interpretation within the initial intended meaning of terms. Fourth, any treaty should have exception clause to preserve the host state's regulatory power to regulate a variety of matters related to public interest. Fifth, incorporation of an express counterclaim clause in an investment treaty will enhance the host state access to justice in the ISDS and thus bind the investor to comply with its domestic legal obligations. Sixth, restricted access to ISDS on certain matters will mitigate the risk of excessive arbitration and finally, mediation should take place as a prerequisite to arbitration or at least allow a concurrent process to run together.

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The Amendment of Anti-Corruption Law in Indonesia: The Contribution to the Development of International Anti-Corruption Law¹

Abstract

The dilemma between human rights protection within the anti-corruption measures in Indonesia finds its culmination in the amendment of Law number 30 of 2002 concerning the *Komisi Pemberantasan Korupsi*/Corruption Eradication Commission (KPK) in 2019. The Indonesian Parliament passed Law number 19 of 2019 as the amendment of Law number 30 of 2002 with several important changes to the KPK's institutional structure. This research utilizes a legal doctrinal approach to analyze the changes of KPK law through the lens of human rights and anti-corruption strategies. Both human rights and anti-corruption legal instruments were studied as the foundation of the Indonesia's obligation to design and continually assess the independent anti-corruption agency's capacity to eradicate corruption. The General Comments of the respective human rights body were used to guide the analysis of State human rights obligations. The Indonesian pre-trial case laws were chosen to exemplify the conflict between human rights protection and anti-corruption measures. Based on the analysis, the changes are pivotal to improve the particular vague provisions of Law number 30 of 2002 and flaws within the KPK's institutional structure. The existence of Law number 19 of 2019 is the first step for the KPK to become a Weberian rational-legal institutional organ that internally strengthens the KPK to eradicate corruption in Indonesia. The development of the KPK law in Indonesia contributes to international anti-corruption law as an example of best practice under Article 5 of the United Nations Convention Against Corruption (UNCAC).

Keywords: human rights, anti-corruption, Indonesia, Law number 30 of 2002, Law number 19 of 2019.

I. Introduction

Corruption is categorized as an extraordinary crime that requires extraordinary measures to combat it.² Corruption evolves as a complex issue for civilized nations, therefore, international anti-

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² JULIO BACIO TERRACINO, THE INTERNATIONAL LEGAL FRAMEWORK AGAINST CORRUPTION: STATE'S OBLIGATIONS TO PREVENT AND REPRESS CORRUPTION 32-33 (2012); Lisa Ann Elges, *Identifying Corruption Risks in Public Climate Finance Governance* in HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION, 138-156 (Adam Graycar and Russel G. Smith ed., 2013); Larissa Gray, *Recovering Corruptly Obtained Assets*, in HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION, 359-377 (Adam Graycar and Russel G. Smith ed., 2013).

corruption law requires adaptability to combat corruption at domestic level. One of the adaptability issues is the balance between human rights protection and anti-corruption measures. Wiretapping, asset freeze, and revocation of the right to be elected are several examples of the intersection between anti-corruption measures and civil and political rights. The United Nations Convention Against Corruption (UNCAC) emphasized in Article 36 the necessity to establish a national independent anti-corruption agency to effectively combat corruption.³ As part of the commitment to the UNCAC, Indonesia is continuously reforming the national anti-corruption law. Most recently, in 2019, Indonesia reformed the *Komisi Pemberantasan Korupsi* (KPK) law in Indonesia. KPK is the specialized organ to eradicate corruption in Indonesia. The reformation of the KPK law focused on the institutional design of KPK.⁴ However, the changes in the law triggered social unrest when it was announced.⁵ The protesters argued that the new KPK law will weaken the power and authority of KPK to combat corruption. On the other hand, the Parliament argued that the reform is important to balance the protection of human rights and anti-corruption measures.⁶ To assess this debate, this research will analyze the change of every provision in the new KPK law and assesses the merits of both viewpoints. Subsequently, this research will investigate the coherence of the change with the UNCAC and the International Covenant on Civil and Political Rights (ICCPR)⁷ to provide a contribution of lessons learned to the development of

³ Article 36 is concerning the specialized authorities,

“Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.”, United Nations Convention Against Corruption (UNCAC), opened for signature Oct. 31, 2003, 2349 U.N.T.S. 41. Indonesia ratified UNCAC on 18 December 2003, available at <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>, accessed 13 February 2020.

⁴ Indonesia, the Law number 19 of 2019 concerning the Second Change of the Law number 20 of 2002, (2019); Al Jazeera, *Indonesia Puts Anti-corruption Agency under Supervisory Board*, Sept. 17, 2019, available at <https://www.aljazeera.com/ajimpact/indonesia-puts-anti-corruption-agency-supervisory-board-190917084614211.html>, accessed 13 February 2020.

⁵ Ardila Syakriah, *Majority of People Oppose KPK Law Revision, Support Student Protests, New Survey Reveals*, THE JAKARTA POST, Oct. 7, 2019, available at <https://www.thejakartapost.com/news/2019/10/07/majority-of-people-oppose-kpk-law-revision-support-student-protests-new-survey-reveals.html>, accessed 11 February 2020.; Michael Buehler, *Indonesia Takes A Wrong Turn in Crusade Against Corruption*, FINANCIAL TIMES, Oct. 2, 2019, available at <https://www.ft.com/content/048ecc9c-7819-3553-9ec7-546dd19f09ae>, accessed in 11 February 2020; John Mcbeth, *End of An Anti-Corruption Era in Indonesia*, ASIA TIMES, Jan. 7, 2020, available at <https://www.asiatimes.com/2020/01/article/end-of-an-anti-corruption-era-in-indonesia/>, accessed in 11 February 2020.

⁶ *Supra* note 4, consideration of explained that the synergy between law enforcement agencies (the National Police, Attorney General and KPK) has to be improved to effectively combat corruption based on the principles of equal authority and human rights protection. The consideration also mentioned that the enforcement of KPK tasks needs to be elevated continuously but mindful of the respect to human rights. See also, Reuters, *Indonesian Parliament Passes Controversial Revisions to Law on Anti-graft Agency*, REUTERS, Sept. 17, 2019, <https://www.euronews.com/2019/09/17/indonesian-parliament-passes-controversial-revisions-to-law-on-anti-graft-agency>, accessed 13 February 2020; South China Morning Post, *Indonesia Approves Controversial Revisions to Law Governing Anti-corruption Agency KPK*, SOUTH CHINA MORNING POST, Sept. 17, 2019, available at <https://www.scmp.com/news/asia/southeast-asia/article/3027626/indonesian-parliament-passes-controversial-revisions-law>, accessed 13 February 2020.

⁷ International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171.

international anti-corruption law, especially, to the intersection between human rights protection and anti-corruption measures.

This research analyzes the changes through the lens of the human rights and anti-corruption strategy with the aim to answer whether the change of KPK law in Indonesia will be beneficial to both human rights protection and anti-corruption measures. This research used a normative approach to answer the research question. The data is based mainly on legal sources, academic literature, and media reports. The two main conventions in this research are the UNCAC and ICCPR. Both treaties were chosen to study the coherence implementation of international law in the national law of Indonesia. The General Comments (GCs) from the Committee on Civil and Political Rights (the Committee) were taken into consideration.⁸ This research studied Indonesia as a single country study, focused on the anti-corruption law in Indonesia, considering both substantive and procedural aspects of the institutional design of KPK.

II. Anti-Corruption Legal Framework: From International to National Anti-Corruption Law and Policy

International anti-corruption law is continuously progressing throughout time. Historically, the creation of international anti-corruption law started at the domestic level in the United States of America (USA). The USA promulgated the Foreign Corrupt Practices Act (FCPA) in 1977 to combat international bribery.⁹ The FCPA was designated to target corporations under the USA jurisdiction, which commit bribery abroad.¹⁰ However, the problem with transnational bribery cannot be solved only by the domestic approach because of the nature of transnational corruption. The USA believe that an international approach to law-making was needed to create a strong and comprehensive anti-bribery convention.¹¹

In the Organization for Economic Cooperation and Development (OECD), international negotiations for an international anti-corruption instrument began under the leadership of the USA.¹² This eventually led to the creation of the International Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) in 1997. The OECD Anti-Bribery Convention entered into force in 1999 and became the first international anti-corruption convention.¹³ The problem with the OECD Anti-Bribery Convention is the limited number of State Parties, as it is only open to the members of the OECD.¹⁴ This hampers the enforcement of anti-corruption law in states which are not the members of the

⁸ The GCs are non legally binding instrument of the International Human Rights Institutions. The purpose of the GCs is to clarify and interpret the provisions of international human rights treaties.

⁹ The United States Department of Justice, Foreign Corrupt Practices Act, *available at* <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>, accessed 1 September 2020.

¹⁰ *Id.*

¹¹ Cindy Davids and Grant Schubert, *The Global Architecture of Foreign Bribery Control: Applying the OECD Bribery Convention*, in HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION, 319-399 (Adam Graycar and Russel G. Smith ed., 2013).

¹² FRITZ HEIMANN, CONFRONTING CORRUPTION 17-28 (2018).

¹³ PAUL H. COHEN AND ANGELA M. PAPALASKARIS, INTERNATIONAL CORRUPTION, International Corruption, 2nd EDITION 69 (2018).

¹⁴ OECD has 36 member states, *available at* <https://www.oecd.org/about/members-and-partners/>, accessed 20 October 2020.

OECD. Therefore, the next step was the negotiation of an international convention against corruption under the leadership of the United Nations.¹⁵

Before the negotiation for the UNCAC began, the issue of money laundering as a means of corruption had already been included within the United Nations Convention against Transnational Organized Crime (UNTOC) on 15 November 2000.¹⁶ The UNTOC entered into force in 2003 and it has three additional protocols, which are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea, and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition.¹⁷ Negotiating countries considered with optimism that the UNTOC would constitute an effective tool and a necessary legal framework for international cooperation in combating, *inter alia*, such criminal activities as money-laundering, corruption, etc.¹⁸

The UNCAC was adopted in October 2003 through General Assembly Resolution 58/4 and entered into force in 2005.¹⁹ The UNCAC is universally ratified by 187 countries and is considered as the umbrella treaty concerning anti-corruption on the international level.²⁰ The UNCAC established a set of provisions that ranged from prevention, enforcement, and inter-state monitoring of corruption. The UNCAC is the culmination of the previous international and regional law and policy to combat corruption as mentioned in the UNCAC preamble. The development of the anti-corruption legal and policy framework becomes even more progressive with the work of the

¹⁵ SOPE WILLIAMS-ELEGBE, *FIGHTING CORRUPTION IN PUBLIC PROCUREMENT, A COMPARATIVE ANALYSIS OF DISQUALIFICATION OR DEBARMENT MEASURES 1-2* (2012).

¹⁶ The Convention also considers the world concerns upon the negative economic and social implications related to organized criminal activities, therefore urges countries to strengthen cooperation to prevent and combat such activities more effectively at the national, regional and global level. UNTOC, 2000; Matti Joutsen, *The United Nations Convention Against Corruption*, in *HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION*, 303-318 (Adam Graycar and Russel G. Smith ed., 2013).

¹⁷ United Nations Convention Against Transnational Organized Crime, opened for signature in Nov. 15, 2000, 2225 U.N.T.S. 209, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&clang=_en, accessed 25 November 2020; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, opened for signature in Nov. 15, 2000, 2237 U.N.T.S. 319, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&clang=en and <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>, accessed 20 August 2020; Protocol to against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, opened for signature in Nov. 15, 2000, 2241 U.N.T.S. 507, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-b&chapter=18&clang=_en, accessed 25 November 2020; 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, opener for signature in May 31, 2001, 2326 U.N.T.S. 208, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&clang=_en, accessed 25 November 2020.

¹⁸ Cohen and Papalaskaris, *supra* note 13.

¹⁹ *Id.*, at 143-144.

²⁰ DAN HOUGH, *ANALYSING CORRUPTION* 107-126 (2017); UNODC, *Indonesia's ratification of the UNCAC*, available at <https://www.unodc.org/unodc/en/corruption/ratification-status.html>, accessed 1 September 2020 and UNTS, *Indonesia's Ratification of the UNCAC*, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&clang=_en, accessed 1 September 2020.

[International Centre for Asset Recovery](#) (ICAR) and the [Stolen Asset Recovery Initiative](#) (StAR), which are agents international technical anti-corruption cooperation between countries.²¹

On the regional level, each region has its particular regional anti-corruption laws. In Europe, regional anti-corruption law was created through the Council of Europe and the European Union. The Council of Europe adopted the Criminal Law Convention Against Corruption²² and its Additional Protocol,²³ as well as the Civil Law Convention Against Corruption.²⁴ The European Union approved a number of initiatives including the European Union Convention on the Protection of the European Communities Financial Interest,²⁵ the First and Second Protocol to the Convention on the Protection of the European Communities Financial Interest,²⁶ and Convention on the Fight Against Corruption Involving Officials of the EU Member States²⁷. The Organization of American States has its own Inter-American Convention Against Corruption,²⁸ as well as the African Union with its African Union Convention on Preventing and Combating Corruption.²⁹ The African region has two additional regional anti-corruption legal instruments which are the Southern African Development Community Protocol on the Fight Against Corruption,³⁰ and the Economic Community of the West African States Protocol on the Fight Against Corruption.³¹ The Asian region does not have a legally binding regional anti-corruption instrument. The only Asian quasi-legal document against corruption is the Asian Development Bank (ADB) Framework Policy on Anti-Corruption and Integrity that was created by the ADB.³²

²¹ ICAR, available at <https://www.baselgovernance.org/asset-recovery> and STAR, available at <https://star.worldbank.org/>; Philip Mason, *Twenty years with anticorruption. Part 10, Keeping the Vision Alive: New Methods, New Ambitions*, U4 Practitioner Experience Note 2020:10 2 (2020), available at <https://www.u4.no/publications/twenty-years-with-anti-corruption-part-10>, accessed 31 August 2020.

²² Criminal Law Convention on Corruption, opened for signature in Jan. 27, 1990, C.E.T.S. 173, 2216 U.N.T.S. 225.

²³ Additional Protocol to the Criminal Law Convention on Corruption, opened for signature in May 15, 2003, C.E.T.S. 191, 2466 U.N.T.S. 168.

²⁴ Civil Law Convention Against Corruption, opened for signature in Nov. 4, 1999, C.E.T.S. 174, 2246 U.N.T.S. 3.

²⁵ Convention Drawn Up on the Basis of Article K of the Treaty of the European Union on the Protection of the European Communities' Financial Interests, opened for signature in Jul. 26, 1995, 2007 E.T.S. 166.

²⁶ Protocol I to the Convention on the Protection of the European Communities' Financial Interests, opened for signature in Sep. 27, 1966, 2007 E.T.S. 169 and Protocol II to the Convention on the Protection of the European Communities' Financial Interests, opened for signature in Jun. 19, 1997, 2010 E.T.S. 8.

²⁷ Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union, opened for signature in May 26, 1007, Official Journal C 195/1.

²⁸ Inter-American Convention Against Corruption, opened for signature in Mar. 29, 1996, 35 I.L.M. 724; C. A. MANFRONI, INTER-AMERICAN CONVENTION AGAINST CORRUPTION, A COMMENTARY 1 (2003).

²⁹ African Union Convention on Preventing and Combating Corruption, opened for signature in Jul. 11, 2003, 43 I.L.M. 5.

³⁰ Southern African Development Community Protocol Against Corruption, opened for signature in Aug. 14, 2001, available at [https://www.sadc.int/documents-publications/show/#:~:text=Protocol%20Against%20Corruption%20\(2001\),the%20public%20and%20private%20sector](https://www.sadc.int/documents-publications/show/#:~:text=Protocol%20Against%20Corruption%20(2001),the%20public%20and%20private%20sector), accessed 5 September 2020.

³¹ Economic Community of the West African States Protocol on the Fight Against Corruption, opened for signature in Dec. 21, 2001, available at https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf, accessed 5 September 2020.

³² ADB and OECD Anti-Corruption Initiative for Asia and the Pacific, Combating Corruption in the New Millennium, Tokyo, signed in Nov. 31, 2001.

On the national level, Indonesia ratified the UNCAC in 2006 through Law number 7 of 2006.³³ Indonesia adopted a number of laws and regulations based on its obligations under the UNCAC. These can be found in Table 1:

Law	1. Law Number 8 of 1981 concerning the Code of Criminal Procedure. ³⁴
	2. Law Number 28 of 1999 concerning Good State Governance, Free of Corruption, Collusion, and Nepotism. ³⁵
	3. Law Number 31 of 1999 concerning Corruption Eradication. ³⁶
	4. Law Number 20 of 2001 concerning the Changes in Law Number 31 of 1999 on Corruption Eradication. ³⁷
	5. Law Number 30 of 2002 concerning the KPK. ³⁸
	6. Law Number 7 of 2006 concerning the Ratification of the UNCAC. ³⁹
	7. Law Number 5 of 2009 concerning the Ratification of the UNTOC. ⁴⁰
	8. Law Number 46 of 2009 concerning Corruption Court. ⁴¹
	9. Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crime. ⁴²
	10. Law Number 6 of 2011 concerning Immigration. ⁴³
	11. Law Number 19 of 2019 concerning the Second Amendment of Law Number 30 of 2002 concerning the KPK. ⁴⁴
Governmental Regulation	1. Government Regulation Number 71 of 2000 concerning Procedures for Implementation of Public Participation in Prevention and Eradication of Corruption. ⁴⁵

³³ *Supra* note 20, UNODC.

³⁴ Indonesia, *Wetboek van Strafrecht voor Nederlandsch-Indie, Kitab Undang-Undang Hukum Pidana*, Staatsblad 1915 Number 732, the Law Number 73 of 1958, Statement on the Enforceability of the Law number 1 of 1946 concerning the Regulation of Criminal Law in Indonesia and Changing the Law on Criminal Law (1958). This law is part of the procedural law of anti-corruption in Indonesia.

³⁵ Indonesia, Law Number 28 of 1999 concerning Good State Governance, Free of Corruption, Collusion, and Nepotism (1999). This law is part of the substantive law of anti-corruption in Indonesia.

³⁶ Indonesia, Law Number 31 of 1999 concerning Corruption Eradication (1999). This law is part of the substantive law of anti-corruption in Indonesia.

³⁷ Indonesia, Law Number 20 of 2001 concerning the Changes in Law Number 31 of 1999 on Corruption Eradication, (2001). This law is part of the substantive law of anti-corruption in Indonesia.

³⁸ Indonesia, Law Number 30 of 2002 concerning the KPK (2002). This law is part of the procedural law of anti-corruption in Indonesia.

³⁹ Indonesia, Law Number 7 of 2006 concerning the Ratification of the UNCAC (2006). This law is part of the substantive law of anti-corruption in Indonesia.

⁴⁰ Indonesia, Law Number 5 of 2009 concerning the Ratification of the UNTOC (2009). This law is part of the substantive law of anti-corruption in Indonesia.

⁴¹ Indonesia, Law Number 46 of 2009 concerning Corruption Court (2009). This law is part of the procedural law of anti-corruption in Indonesia.

⁴² Indonesia, Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crime (2010). This law is part of the substantive law of anti-corruption in Indonesia.

⁴³ Indonesia, Law Number 6 of 2011 concerning Immigration (2011). This law is part of the substantive law of anti-corruption in Indonesia.

⁴⁴ Indonesia, Law Number 19 of 2019 concerning the Second Amendment of Law Number 30 of 2002 concerning the KPK (2019). This law is part of the procedural law of anti-corruption in Indonesia.

⁴⁵ Indonesia, Government Regulation Number 71 of 2000 concerning Procedures for Implementation of Public Participation in Prevention and Eradication of Corruption (2000).

	2. Government Regulation Number 63 of 2005 concerning KPK's Human Resources Management System. ⁴⁶
	3. Government Regulation Number 103 of 2012 concerning the Changes in Government Regulation Number 63 of 2005 on KPK's Human Resources Management System. ⁴⁷
	4. Government Regulation Number 43 of 2018 concerning the Guideline of Civil Society's Participation and Awards in the Prevention and Eradication of Corruption. ⁴⁸

Table 1. National Anti-corruption Legal Framework

The national anti-corruption legal framework develops continually. The latest development was the amendment of the KPK law by Law number 19 of 2019. In sum, to comply with the UNCAC, Indonesia has established an independent anti-corruption agency, criminalized several acts of corruption as regulated under the UNCAC, and formulated laws to ensure the participation of whistleblowers and civil society in combating and eradicating corruption.

III. The (Presumed) Problems with the Amendment of Anti-Corruption Law in Indonesia: Prior and Post Institutional Design of the KPK

This section focuses on the designation of an independent anti-corruption agency. Article 6 of the UNCAC mandates that the State Party must design an independent anti-corruption agency based on the fundamental principles of its legal system.⁴⁹ The agency must have the authority to prevent corruption by:

- “a. Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
- b. Increasing and disseminating knowledge about the prevention of corruption.”⁵⁰

The State Party must also grant the agency the necessary independence to enable it to carry out its functions effectively and free from any undue influence.⁵¹ Besides, the State Party must provide the necessary material resources and specialized staff, as well as the training to ensure the effectiveness of the agency.⁵²

The Indonesian legislative measures to implement Article 6 UNCAC were inspired by the work of the Independent Anti-Corruption Agency (ICAC) of Hong Kong.⁵³ The ICAC Hong Kong is considered as a role model for an anti-corruption agency based on its success in addressing

⁴⁶ Indonesia, Government Regulation Number 63 of 2005 concerning KPK's Human Resources Management System, Jakarta (2005).

⁴⁷ Indonesia, Government Regulation Number 103 of 2012 concerning the Changes in Government Regulation Number 63 of 2005 on KPK's Human Resources Management System (2012).

⁴⁸ Indonesia, Governmental Regulation Number 43 of 2018 concerning the Guideline of Civil Society's Participation and Awards in the Prevention and Eradication of Corruption (2018).

⁴⁹ Article 6 of the UNCAC.

⁵⁰ Article 6 of the UNCAC.

⁵¹ *Id.*

⁵² *Id.*, Article 6 of the UNCAC.

⁵³ KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 29-30 (2019).

corruption in Hong Kong.⁵⁴ The ICAC was designed to be independent from the police force and reported its works directly to the Governor of Hong Kong.⁵⁵ The initial design of KPK was on replication of ICAC Hong Kong. The stark similarity is the reliance on a three pronged approach to combat corruption:⁵⁶ prevention of corruption, prosecution of corruption cases, and public education of anti-corruption.⁵⁷

Law number 30 of 2012 followed the ICAC model. A comparison between the Law Number 30 of 2002 concerning the KPK and the Law Number 19 of 2019 shows several changes in the KPK structure and mandates related to the issue of corruption and human rights. These changes are found in Table 2:

The Issues	Law number 30 of 2002	Law number 19 of 2019
Human rights	No provision about human rights. Article 5 stated the work principles of the KPK: a. legal certainty (<i>kepastian hukum</i>); b. openness (<i>keterbukaan</i>); c. accountability (<i>akuntabilitas</i>); d. public interest (<i>kepentingan umum</i>); e. proportionality (<i>proporsionalitas</i>). ⁵⁸	The principle of respect for human rights was introduced. ⁵⁹
The execution power of the KPK	Article 6 positioned KPK as the main institution to combat corruption in Indonesia. Its mandate is: a. coordination with the institution that has the mandate to eradicate corruption; b. supervision of the institution that has the mandate to eradicate corruption; c. to conduct pre-investigation, investigation, and prosecution of corruption; d. to take action to prevent corruption;	New Article 6 gives the KPK also the mandate to execute Courts' rulings. ⁶²

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*, available at <https://www.icac.org.hk/en/about/struct/index.html>, accessed 5 September 2020.

⁵⁷ *Id.*

⁵⁸ Article 5, Law number 30 of 2002 concerning the KPK.

⁵⁹ *Id.*

⁶² *Id.*

	e. to monitor of state governance. ⁶⁰ The power to execute or enforce court order with the permanent ruling force was not regulated. ⁶¹	
The legal status of KPK employees	KPK's employees are not civil servants. KPK recruits its employees without the constraint of civil apparatus law.	KPK employees are classified as civil servants.
The <i>Dewan Pengawas</i> /the supervisory organ	The highest authority in KPK bureaucratic structure was the KPK Commissioners as regulated in Article 26-37. ⁶³	Article 21 in connection with Chapter VA of this law, establishes a supervisory organ named <i>Dewan Pengawas</i> with the mandate to monitor the implementation of tasks and authorities of the KPK; to issue permission concerning wiretapping, search and seizures; to formulate a code of conduct for Commissioners and employees of the KPK; to receive, examine and follow up reports from civil society concerning allegations of abuse of power by Commissioners and employees of the KPK or any other similar allegation; to conduct work evaluations of the Commissioners and employees of KPK annually. ⁶⁴

⁶⁰ Article 6 of Law number 30 of 2002. In the subsequent provision, the Article 7, it is emphasized that the role of the coordinator was bestowed upon the KPK. The KPK has the authorities to:

- a. coordinating pre-investigation, investigation, and prosecution of corruption;
- b. establish a reporting system in the corruption eradication activity;
- c. solicit information concerning corruption eradication activity towards respective institution;
- d. conduct hearing or meeting with the respective institution that has the authority to eradicate corruption;
- e. request institutional report concerning prevention of corruption.

KPK, *About KPK, Overview*, available at <https://www.kpk.go.id/en/about-kpk/overview-of-kpk>, accessed 31 August 2020.

⁶¹ This became a problem because when conducting the works to combat corruption, in concrete cases, some KPK prosecutors executed criminal sanctions. This grey area is eliminated with the new provision in Article 6 of Law number 19 of 2019 that gives the KPK power to execute and enforce the judicial decision.

⁶³ Articles 26-37, the Law Number 19 of 2019.

⁶⁴ *Id.* The Jakarta Post, *KPK's new code of ethics promotes synergy with other institutions: Supervisory council*, Mar. 6, 2020, available at <https://www.thejakartapost.com/news/2020/03/05/kpks-new-code-of-ethics-promotes-synergy-with-other-institutions-supervisory-council.html>, accessed 5 September 2020.

Table 2. The Comparison of Prior and Post Provisions Amendment of KPK Law.

Besides the changes mentioned in Table 2, other relevant changes of the KPK Law are:

1. The elimination of KPK's authority to handle corruption cases which attract public attention that previously existed in Article 11 of the Law number 30 of 2002.⁶⁵ This elimination aims to improve legal certainty because there was no standard being formulated to determine the case which attracts public attention.

2. The clarification of the relationship between KPK and the Police and the Attorney General (AG) regarding case take-over. Article 10 A (2) provides the requirements that have to be fulfilled for KPK to take over corruption cases from the Police or AGO.⁶⁶ Article 10 A (3) regulates the period of 14 days for the Police or AG to hand over suspects and all case materials to KPK after the receipt of KPK's request to take over case.⁶⁷

3. In Article 12 of the new KPK Law, KPK can conduct the following measures only during the investigation and prosecution phases, before the amendment, KPK could conduct these measures also in the preliminary investigation phase:

- a. to instruct the relevant agency to issue a travel ban on certain individuals;
- b. to request banks or other financial institutions information about the financial situation of the accused and to instruct a bank to block certain accounts allegedly used for money laundering;
- c. to instruct the supervisor of the suspect to suspend the suspect from his/her position;
- d. to request for the wealth and taxation data of the accused from the relevant agency;
- e. to temporarily halt financial transactions, trading, and other arrangements, or temporarily revoke the permit, license, and concession that is being conducted or owned by the suspect or defendant who is suspected based on the sufficient preliminary evidence that it is related to a criminal act of corruption under that investigation;
- f. to ask for help from Indonesian Interpol and overseas law enforcement agencies to conduct searches and arrests, and confiscate evidence abroad;
- g. to ask the Police and other relevant agencies to make arrests, search, and confiscate evidence for corruption cases.”⁶⁸

4. Under Article 40 of Law number 19 of 2019, KPK has the power to halt the investigation or prosecution of a corruption case. This can be done under the pre-requisite circumstance when the case cannot be resolved in two years.⁶⁹ If the KPK wishes to use this power, the KPK Commissioner issues a warrant and reports it to the Supervisory Board within a week of the issuance. Besides, the KPK must publish a notice about the Warrant. The KPK Commissioner can

⁶⁵ Article 11 (b) the Law number 30 of 2002.

⁶⁶ Article 10 A (2) and Article 10 A (3). The Law Number 19 of 2019.

⁶⁷ Article 12, the Law Number 19 of 2019.

⁶⁸ Article 12 (2), the Law number 19 of 2019, the Author's translation.

⁶⁹ Before the amendment, the KPK had no power to drop the investigation once a suspect had been named. The purpose of the previous design is to prevent the KPK officers from being bribed to drop an investigation before trial. SIMON BUTT, *CORRUPTION AND LAW IN INDONESIA* 2 (2012).

revoke the warrant when there is new evidence that has been found or a pre-trial ruling has been issued.⁷⁰

The promulgation of Law Number 19 of 2019 caused several massive demonstrations in Indonesia due to the fear that the amendment would hamper the power and authority of KPK in eradicating corruption.⁷¹ This paper continues with the analysis of whether the amendment of the KPK law hampers or strengthens its power and authority to eradicate corruption and how the changes of the KPK law contributes to the development of international anti-corruption law.

IV. Incorporation of Human Rights into the Anti-Corruption Strategy: An Ideal Anti-Corruption Agency in the Making?

Placing human rights and anti-corruption within the same agenda can create a competition between them. On one hand, human rights exist to respect, protect, and fulfill human dignity from unjustifiable interference while anti-corruption focuses on combating the crime of corruption within the crime control model. It has to be noted that corruption is a white-collar crime that typically involves highly sophisticated forms of crooked practices. Therefore, these complexities of corruption compel law enforcement agencies to adopt a strict, effective, and efficient approach to unveil and combat corruption cases. Arguably, human rights norms also operate at the level of law enforcement and criminal law, which means that in the fight against corruption, human rights law must be observed. Grand corruption cases, which include high level public officials are an example of how difficult it is for the law enforcement agencies to prosecute the perpetrators and bring justice to the people.⁷² The perpetrator is never willing to cooperate with the law enforcement agencies, they always fight back and use a myriad of possible measures to get away from the justice process.⁷³

⁷⁰ *Id.*

⁷¹ *Supra* note 5; *Pro-Law Revision Riot Breaks Out In Front of KPK Building*, THE JAKARTA POST, Sept. 13, 2019, available at <https://www.thejakartapost.com/news/2019/09/13/pro-law-revision-riot-breaks-out-in-front-of-kpk-building.html>, accessed 3 September 2020.

⁷² United Nations Office on Drugs and Crime (UNODC), *United Nations Handbook on Practical Anti-corruption Measures for Prosecutors and Investigators*, Sept. 2004, 23-24, available at https://www.unodc.org/documents/afghanistan/Anti-Corruption/Handbook_practical_anti-corruption.pdf, accessed 25 November 2020; Adam Graycar, *Corruption: Classification and Analysis*, POLICY & SOCIETY 34, 87-96, (2015); Elizabeth Dávid-Barrett and Mihály Fazekas, *Grand Corruption and Government Change: An Analysis of Partisan Favoritism in Public Procurement*, EUROPEAN JOURNAL ON CRIMINAL POLICY AND RESEARCH 26, 411-430 (2020); Turid Hagene, *Grand Corruption in Mexico: The Convenient Disappearance of An Agrarian Community*, EUROPEAN REVIEW OF LATIN AMERICAN AND CARRIBEAN STUDIES 108, 43-64 (2019); Transparency International, *What Is Grand Corruption and How Can We Stop It?*, Sept. 21, 2016, available at <https://www.transparency.org/en/news/what-is-grand-corruption-and-how-can-we-stop-it>, accessed 25 November 2020.

⁷³ Conference of the State Parties of the UNCAC, *Countering Grand Corruption*, Paper Submitted by the Government of Peru, CAC/COSP/2015/CRP.9, 1-2, Nov. 4, 2015; Naomi Roht-Arriaza and Santiago Martínez, *Grand Corruption and the International Criminal Court in the 'Venezuela Situation'*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 17, 1057-1082 (2019); Odd-Helge Fjelstad and Jan Isaksen, *Anti-corruption Reforms: Challenges, Effects and Limits of World Bank Support, Background Paper to Public Sector Reform: What Works and Why, An IEG Evaluation of World Bank Support*, IEG Working Paper 2008/7, 18 (2008); Transparency International, *Impunity for Grand Corruption-A Problem Too Big for International Community to Ignore*, Aug. 25, 2020, available at

In general, Indonesia is still struggling to combat corruption that has the country in grip since its independence. Looking at the failure of the Old Order Government to eradicate corruption, and the enhanced and continued systemic corruption of the New Order Government, corruption continues to be a major problem in Indonesia.⁷⁴ Indonesia ranked 85 in the Corruption Perception Index (CPI) 2019 and the rank is relatively constant. It shows that there is a significant corruption problem.⁷⁵

An example of how difficult it is to bring a corruptor to justice is Setya Novanto's corruption case in 2018.⁷⁶ It is one of the most controversial corruption cases in Indonesia because of the magnitude of corruption, the track record of the perpetrator, and the trial process.⁷⁷ He was convicted guilty of corruption in 2018 and sentenced to 15 years of imprisonment due to his role in facilitating corruption within the procurement of the national identity card project.⁷⁸ Novanto was the House Speaker in the period of 2014-2015 and 2016-2017, and was allegedly involved in several corruption scandals in the past.⁷⁹ Presenting him at Court proved to be one of the most difficult processes in the Indonesian anti-corruption effort because his lawyer, Friedrich Yunadi, used various methods to prevent his client from appearing in Court. One of these was the creation of a minor traffic accident, and bribing of dr. Bimanesh Sutarjo, a doctor at private hospital Permata Medika Hijau, to declare him unfit to attend the trial due to that minor traffic accident.⁸⁰ Both the lawyer and the doctor were found guilty under the charge of obstruction of justice by the Court.⁸¹ Yunadi was sentenced to seven years imprisonment and dr. Sutarjo was sentenced to four

<https://www.transparency.org/en/blog/impunity-for-grand-corruption-too-big-to-ignore-ungass-2021>, accessed 25 November 2020.

⁷⁴ ADAM SCHWARZ, *A NATION IN WAITING*, 110 (2013).

⁷⁵ Transparency International, *Corruption Perception Index 2019, Indonesia*, (2019), available at <https://www.transparency.org/en/countries/indonesia>, accessed 4 September 2020.

⁷⁶ Kharishar Kahfi, *Setya Novanto Sentenced to 15 Years in Prison in e-ID Graft Case*, THE JAKARTA POST, Apr. 24, 2018, available at <https://www.thejakartapost.com/news/2018/04/24/ex-house-speaker-sentenced-to-15-years-in-prison-in-e-id-graft-case.html>, accessed 20 August 2020; Al Jazeera, *Indonesia: Setya Novanto Sentenced to 15 Years for Corruption*, Apr. 24, 2018, available at <https://www.aljazeera.com/news/2018/04/indonesia-setya-novanto-sentenced-15-years-corruption-180424072152146.html>, accessed 20 August 2020; Agence France-Presse, *Indonesia's former speaker Setya Novanto jailed for 15 years on graft charges stemming from government ID scheme*, SOUTH CHINA MORNING POST, Apr. 24, 2018, available at <https://www.scmp.com/news/asia/southeast-asia/article/2143113/indonesias-former-speaker-setya-novanto-jailed-15-years>, accessed 20 August 2020.

⁷⁷ The District Court of Central Jakarta, Decision Number 130/PID.SUS/TPK/2017/PN.JKT.PST, 1695-1696, Apr. 24, 2018.

⁷⁸ *Id.*

⁷⁹ Kanupriya Kapoor, *Indonesia jails former parliament speaker for 15 years for graft*, REUTERS, Apr. 24, 2018, available at <https://www.reuters.com/article/us-indonesia-corruption/indonesia-jails-former-parliament-speaker-for-15-years-for-graft-idUSKBN1HVOMA>, accessed 31 August 2020; Adinda Normala, *Setya Novanto: Finally Sentenced After Decades of Scandals*, THE JAKARTA GLOBE, Apr. 29, 2018, available at <https://jakartaglobe.id/news/setya-novanto-finally-sentenced-after-decades-of-scandals/>, accessed 6 September 2020.

⁸⁰ The Jakarta Post, *Setya's doctor jailed for obstruction of justice*, Jul. 16, 2018, available at <https://www.thejakartapost.com/news/2018/07/16/setyas-doctor-jailed-for-obstruction-of-justice.html>, accessed 31 August 2020; Tempo, *Hospital Nurse Unveils Setya Novanto's Staged Drama*, Apr. 3, 2018, available at <https://en.tempo.co/read/917212/hospital-nurse-unveils-setya-novantos-staged-drama>, accessed 31 August 2020.

⁸¹ Indonesia Corruption Watch, *Friedrich Yunadi's Verdict*, Jul. 18, 2018, available at <https://antikorupsi.org/index.php/en/article/fredrich-yunadis-verdict>, accessed 31 August 2020.

years imprisonment for deliberately obstructing justice in the law enforcement process towards Novanto.⁸²

Gathii explained that corrupt high-level government officials in Kenya use human rights claims to circumvent and avoid punishment and accountability.⁸³ He concluded that respecting human rights can help to combat corruption, but the corruptors are also more likely to seek and defend their rights in the process.⁸⁴ Based on experiences on the ground, therefore the law-maker must consider the nexus between the civil and political rights and anti-corruption agency authority.

Indonesia acceded to the ICCPR in 2016 through Law number 12 of 2005.⁸⁵ Therefore, Indonesia is bound by the international legal obligation to respect, protect, and fulfill civil and political rights. The competing interests of human rights and anti-corruption must be balanced. There are several rights of direct relevance for the anti-corruption agency authority, those are Article 9 on the right to liberty and security of person, Article 14 on the right to equality before the law and fair trial, and Article 17 on the right to privacy of the ICCPR.

A first point to make is that the new KPK law ensures that there will be consideration of human rights impact in every action of the KPK. As mentioned in the previous subsection, the problem with human rights and anti-corruption is to strike the balance between the two compelling notions. There will be no legitimacy for anti-corruption measures if there is no respect for and protection of human rights. By including human rights principle in the new KPK law, the lawmakers have made a clear choice to legally recognize that human rights as an important part of anti-corruption actions. Before the establishment of the new law, the KPK was often criticized for not respecting the human rights of the accused, with this new law, there is less space for arguments from the opposition side.⁸⁶

In the past, the KPK had lost two pre-trial cases concerning the legality of an investigation that the KPK had conducted. The first case is the pre-trial case of Budi Gunawan and the second case is the pre-trial case of Setya Novanto. In both pre-trial cases, the judges ruled that KPK had not fulfilled procedural measures before proceeding to the trial phase. In the pre-trial case of Gunawan, accused of accepting gratification during his tenure as the Chief of Human Resources and Career

⁸² *Id.*; Appeal Court of Jakarta, Decision Number 26/Pid.Sus-TPK/2018/PT.DKI under the name of the convicted Dr. Bimanesh Sutarjo, 65, Oct. 25 2018.

⁸³ MARTINE BOERSMA, CORRUPTION: A VIOLATION OF HUMAN RIGHTS AND A CRIME UNDER INTERNATIONAL LAW 199 (2012).

⁸⁴ *Id.*

⁸⁵ OHCHR, *available at* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN, accessed 2 September 2020.

⁸⁶ *President Jokowi Has 4 Objections on KPK Law Revision*, THE CABINET SECRETARIAT OF THE REPUBLIC OF INDONESIA, Sep. 14, 2019, *available at* <https://setkab.go.id/en/president-jokowi-has-4-objections-on-kpk-law-revision/>, accessed 5 September 2020; *Indonesian Parliament Passes Controversial Revisions to Law on Anti-Graft Agency*, THE STRAITS TIMES, Sep. 17, 2019, *available at* <https://www.straitstimes.com/asia/se-asia/indonesian-parliament-passes-controversial-revisions-to-law-on-anti-graft-agency>, accessed 5 September 2020; *Indonesia puts anti-corruption agency under supervisory board*, AL-JAZEERA, Sep. 17, 2019, *available at* <https://www.aljazeera.com/ajimpact/indonesia-puts-anti-corruption-agency-supervisory-board-190917084614211.html>, accessed 5 September 2020.

Development at the National Police Headquarters from 2003-2006,⁸⁷ the legality of the Determination of Suspect Warrant of KPK was questioned based on the *rationale* of *Habeas Corpus* principle that an individual has the right to have his warrant be reviewed by a court of law.⁸⁸ Gunawan's lawyers emphasized the importance of Indonesia's ratification of ICCPR as the legal guarantee that the Government must respect, protect, and fulfill the civil and political rights of their client.⁸⁹ Based on the pre-trial decision, the judges considered the grounds of the Order of Investigation Warrant from the KPK to Budi Gunawan. These were the status of Gunawan as a public official; the loss of the State's funds; and whether the case was a public concern.⁹⁰ The judges decided that those three elements were not satisfied and partially granted the request of Gunawan's lawyer.

In the pre-trial ruling of Novanto, his lawyer argued that the investigators of the KPK did not have the legal authority to investigate the case because they were employed by both the police or AG and the KPK.⁹¹ The Law number 31 of 2002 regulated the independence of the KPK investigators by obliging that KPK investigators who come from either the police or the AG must have their employment ended in that respective institution first before being employed as the KPK investigators. Novanto's lawyer argued that this was not be done in his client's case and thus requested a pre-trial.⁹²

Another argument in that case was the insufficient preliminary evidence for the determination of the suspect. Novanto's lawyer argued that the preliminary evidence for the suspect's determination by the KPK was unlawful, because it was based on a Court's decision of another convicted persons in the national identity card project corruption cases.⁹³ This was problematic because the determination of suspect and the issuance of the Letter of Investigation Order (Sprindik No. Sprin.Dik-56/01/07/2017) came on the same day.⁹⁴ The logic behind the reasoning of Novanto's lawyer is the impossibility of the KPK to obtain two minimum preliminary evidence at the same time with the beginning of an investigation order.⁹⁵ The judge considered these matters as flaws during the process of the determination of suspect and ruled in favor of Novanto.⁹⁶

The following table further illustrates the clashes between the Civil and Political Rights and Anti-Corruption measures based on those two pre-trial cases above.

The Article	The Civil and Political Rights	The Clashes between the Civil and Political Rights and Anti-Corruption Measures
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⁸⁷ Fatiyah Wardah, *Indonesian Judge Rules in Favor of Police Chief Nominee*, VOA NEWS, Feb. 16, 2015, available at <https://www.voanews.com/east-asia/indonesian-judge-rules-favor-police-chief-nominee>, accessed 2 September 2020.

⁸⁸ Argument of Budi Gunawan's lawyers team, The District Court of Central Jakarta, Decision number 04/Pid.Prap/2015/PN.Jkt.Sel, 3, Feb. 16, 2015.

⁸⁹ *Id.*, pp. 13-15.

⁹⁰ *Supra* note 83.

⁹¹ The District Court of Central Jakarta, Decision Setya Novanto, Decision Number 97/Pid.Prap/2017/PN.Jak.Sel, 19, Sep. 29, 2017.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*, p. 234.

⁹⁶ *Id.*

9	The right to liberty and security of a person ⁹⁷	In the case of Gunawan's pre-trial, his defense team argued that Gunawan did not receive any information of charges against him from the KPK before the determination of the suspect was disclosed to the public. ⁹⁸ In the case of Novanto, his defense team argued that the period between the determination of the suspect and the issuance of the Letter of Investigation Request, issued on the same day, does not fulfill the procedural laws. The right to liberty and security of person guarantees that every individual accused of a crime must be informed promptly about his/her charges and be summoned in the investigation phase.
14	The right to equality before the law ⁹⁹	In the case of Gunawan and Novanto, their defense teams argued that both individuals had the right to be treated equally before the law and with the presumption of innocence. The pre-trial decision stated that procedural laws matter in the determination of a suspect and when the procedural requirements to determine an individual as a suspect is not satisfied then the whole case must be dropped for the sake of justice. ¹⁰⁰
17	The right to privacy ¹⁰¹	Although not a basis for pre-trial arguments in both cases, the use of wiretapping by the KPK has been the object of discussion between legal experts in Indonesia. The Justice Minister explained that the new KPK Law will ensure that wiretapping will be utilized based on human rights regulations. ¹⁰² The interference to the right to privacy can only be done when it is being regulated by law as stated in General Comment Number 16 concerning the Right to Privacy. ¹⁰³ Interference authorized by States can only take place based on law, which itself must comply with the provisions, aims, and objectives of the Covenant." ¹⁰⁴

Table 3. The civil and political rights at the nexus of human rights and anti-corruption.

The determination of suspect based on the KPK system, has to be decided based on the collective collegial principle. It means that the all KPK Commissioners agree with the determination of the suspect. This will strengthen legal certainty and also prevent abuse of power that might lead to human rights violations of the suspect. Based on the Constitutional Court Decision of the collective collegiality principle of KPK Commissioners, the Court emphasized that the KPK is a super body

⁹⁷ ICCPR, Article 9.

⁹⁸ *Id.*

⁹⁹ *Id.*, § 30, p. 9.

¹⁰⁰ *Supra* note 84 and 88.

¹⁰¹ Article 17, ICCPR.

¹⁰² Heru Andriyanto, *Justice Minister Details Reasons Why KPK Needs New Law*, THE JAKARTA GLOBE, Sep. 21, 2019, available at <https://jakartaglobe.id/news/justice-minister-details-reasons-why-kpk-needs-new-law/>, accessed 4 September 2020;

¹⁰³ UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), 32nd Session, Apr. 8, 1988, §1.

¹⁰⁴ *Id.*, § 3.

that has the mandate to eradicate corruption as an extraordinary crime. Therefore, the KPK is weaponized with an extraordinary power beyond the traditional legal power of a law enforcement agency. This extraordinary power has to be guided with caution and due diligence and that becomes the reason why the determination of a suspect has to be decided by the collective collegial principle of the whole KPK Commissioners.¹⁰⁵ It is also the reason why the KPK did not have the power to halt the investigation even though after amendment, the KPK Commissioners can issue the warrant to halt the investigation with aims to ensure the right to a fair trial of the suspect.¹⁰⁶

The second point revolves around the introduction of the *Dewan Pengawas* KPK. Based on the Weberian bureaucracy system,¹⁰⁷ the structure of *Dewan Pengawas* KPK fulfills the Weberian rational-legal principles for the bureaucratic system. Max Weber proposed the idea of ideal bureaucracy based on the rational-legal model,¹⁰⁸ in which, a bureaucracy consists of individuals with professional, impersonal, passion-free, rational behavior.¹⁰⁹ It must be highly trustworthy, filled with professional experts selected in a system of meritocracy.¹¹⁰ Rubinstein and Maravick observe that in the Weberian ideal conception of the rational-legal model, the guiding norm of bureaucratic authority is a strict hierarchy with a clear separation of tasks and functions following the principle of division of labor.¹¹¹

Indonesia has a long history of a Weberian disaster due to a high level of corruption, collusion, and nepotism during the New Order era.¹¹² As a country that had been suffering from a pseudo-democracy regime for 32 years, Indonesia has a problem with ensuring peaceful leadership succession based on a meritocratic system. As a newly democratic country, specifically designed laws and policies to select leaders have to be formulated. This is important to ensure peaceful leadership succession, if not, then Indonesia will forever rely on the uncertain selection of charismatic leaders. The amendment of the KPK law is a step to progress from a charismatic style of bureaucracy that depends on certain charismatic leadership to a rational-legal meritocratic bureaucracy.¹¹³ Concretely, the law mandates that the selection of first term *Dewan Pengawas* KPK be the prerogative right of the President. President Widodo selected six persons whom he believes have fulfilled the requirements to become a member of *Dewan Pengawas* KPK. Those

¹⁰⁵ *Id.*, p. 80.

¹⁰⁶ The Decision of Budi Gunawan, *Supra* Note 83, Constitutional Court Decision Number 49/PUU-XI/2013, Nov. 14, 2013.

¹⁰⁷ William D. Rubinstein and Patrick Von Maravick, *Max Weber, Bureaucracy, and Corruption*, in *THE GOOD CAUSE: THEORETICAL PERSPECTIVE ON CORRUPTION* 21-35 (Gjalt de Graaf et al, 2010).

¹⁰⁸ Marcus Felson, *Corruption in the Broad Sweep of History*, in *HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION*, 12-17 (Adam Graycar and Russel G. Smith ed., 2013).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Ross H. Mc Leod, *Soeharto's Indonesia: A Better Class of Corruption?*, 7 *AGENDA: A JOURNAL OF POLICY ANALYSIS AND REFORM* 2, 99-112 (2000).

¹¹³ Richard Mulgan and John Wanna, *Developing Cultures of Integrity in the Public and Private Sectors*, in *HANDBOOK OF GLOBAL RESEARCH AND PRACTICE IN CORRUPTION*, 416-428 (Adam Graycar and Russel G. Smith ed., 2013).

individuals are Tumpak Hatorangan Panggabean as the Chief of *Dewan Pengawas* KPK, Artidjo Alkostar, Syamsuddin Harris, Hardjono, and Albertina Ho.¹¹⁴

The *Dewan Pengawas* KPK acts as the protector of the due process system in anti-corruption proceedings. It ensures the check and balance model within the KPK. Before the amendment, the KPK's power was balanced by the classical *trias politica*, which are the executive, legislative, and judiciary. The executive is represented by the President, the legislative by Parliament, and the judicative by the judicial institutions. The classic *trias politica* is the external check and balance system but the existence of *Dewan Pengawas* KPK acts as the internal check and balance system.¹¹⁵ It does not only act as the organ to prevent the abuse of power, but also to provide legality and legitimacy for KPK's decisions. For instance, the problems with the right to privacy and fair trial, when wiretappings are used, can be prevented by the existence of *Dewan Pengawas* KPK.

Concerning the right to a fair trial, *Dewan Pengawas* KPK becomes an organ that is responsible for ensuring that the right of the defendants is guaranteed because *Dewan Pengawas* KPK has the mandate to monitor the conduct and decisions of the KPK. Any conduct that might lead to a violation of a defendant's fair trial can be reported to the *Dewan Pengawas* KPK, and the question whether such conduct will constitute a violation will be analyzed and if it does, it can be stopped from the beginning. *Dewan Pengawas* KPK provides an important safeguard if analyzed objectively, suggested in many, often emotional reactions to the amendment, contrary to what has been, it will not weaken the power of KPK.

Concerning the right to privacy, the UN Human Rights Committee suggested that the existence of an organ to monitor the exercise of arbitrary lawful interference is mandatory. In paragraph 6, the Committee considered that a State party should report the creation of the authorities and organs set up within its legal system which are competent to authorize interferences allowed by the law.¹¹⁶ There is also an obligation of the State Party to ensure that the information extracted from wiretapping activity will be kept with utmost security and caution to protect the right to privacy.¹¹⁷ The existence of *Dewan Pengawas* KPK is directly fulfilling the requirements of the Committee

¹¹⁴ Marchio Irfan Gorbiano, *Jokowi Inaugurates Five Members of Newly Formed KPK Supervisory Council*, THE JAKARTA POST, Dec. 20, 2019, available at <https://www.thejakartapost.com/news/2019/12/20/jokowi-inaugurates-five-members-of-newly-formed-kpk-supervisory-council.html>, accessed 21 August 2020; Marchio Irfan Gorbiano, *Oversight Body Marks New KPK Dawn*, THE JAKARTA POST, Dec. 21, 2019, available at <https://www.thejakartapost.com/news/2019/12/21/oversight-body-marks-new-kpk-dawn.html>, accessed 21 August 2020. "Tumpak Hatorangan Panggabean, who was acting KPK chairman between 2003 and 2007 and had a long track record in the judiciary, is set to lead the supervisory council. The members of the council include Artidjo Alkostar, a former Supreme Court justice who was known for handing down heavy sentences for corruption convicts. Jokowi also appointed deputy head of the Kupang High Court Albertina Ho. Albertina led the trial of former tax official Gayus Tambunan, who was found guilty of massive tax corruption. Former Election Organization Ethics Council (DKPP) chief Harjono, another former Constitutional Court justice, will also serve in the council along with Indonesian Institute of Sciences (LIPI) senior political researcher Syamsuddin Haris."

¹¹⁵ See also the recommendation concerning the importance of internal accountability of Anti-Corruption Agencies § 1, based on UNODC, the Jakarta Statement on Principles for Anti-Corruption Agencies, Nov. 26-27, 2012, Jakarta, available at https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf, accessed 30 November 2020.

¹¹⁶ *Supra* note 99, § 6.

¹¹⁷ *Id.*, § 8.

because *Dewan Pengawas* KPK has the responsibility to assess and subsequently grant permission for the KPK to conduct wiretapping measures towards the suspect of corruption, as regulated in the Article 37 (B) of Law number 19 of 2019.

Before the amendment of Law number 31 of 2002, KPK's wiretapping was monitored by the collective collegial principle of the KPK Commissioners and if necessary, the KPK Commissioners could establish an ethical committee to assess if there was any ethical misconduct. The creation of *Dewan Pengawas* KPK is a step towards creating an anti-corruption agency with an internal control on the execution of its powers. This is in conformity with the UNCAC in article 5, especially Article 5 b (3), that obliges the State Party to develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency, and accountability.¹¹⁸ The State Party shall also endeavor to periodically evaluate relevant legal instruments and administrative measures to determine their adequacy to prevent and fight corruption.¹¹⁹ International anti-corruption law progresses along three trajectories: international, regional, and national. The national challenges of domestic implementation of the UNCAC can be seen in Indonesia. The initial creation of the KPK modeled after the ICAC Hong Kong led to the problems in law enforcement as exemplified in the cases of Gunawan and Novanto. Both pre-trial rulings showed that the old KPK law had several flaws that required comprehensive solutions, *inter alia*, the creation of the *Dewan Pengawas* KPK to establish checks and balances and to provide assurances for human rights protection. These best-practices can be regarded as pivotal for the progression of international anti-corruption law in the future.

V. Conclusion

With the amendment, specific flaws within the previous KPK law have been repaired. The problem with the ambiguity of legal terms and potential abuse of power within the agency has been addressed with the new KPK law. This will be beneficial for the future of KPK, most importantly the KPK Commissioners and the employees within the agency. The previous problems such as the accusations of human rights violations during the law enforcement, ambiguity in legal terms and the lack of an internal supervisory organ were covered by the new KPK law. The amendment also reduces of the chances that human rights can be manipulated by corruptors for their private gain during the justice process because human rights considerations are legally firmly embedded in the new KPK law. With hopes and optimism, the amendment will make the KPK able to carry on its mandate with robust legal certainty and continuous oversight to prevent any potential abuse of power from within the agency. This is the contribution of Indonesian anti-corruption law to the international anti-corruption law. The fear that the new KPK law would undermine corruption eradication in Indonesia was unwarranted. To the contrary, the specific legal and institutional changes have improved it. It is one important step, but continued reviews on the law and policy will be needed to make anti-corruption measures more effective.

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¹¹⁸ UNCAC, Article 5.

¹¹⁹ *Id.*

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

Ratna Juwita



The Amendment: The Death of KPK?



Link photo: [the Star](#),
4th November 2019

Outline of the Presentation

- › The specific changes of the law
- › The causal relationship between the amendment and strong refusal from the anti-amendment group
- › The institutional improvements
- › The contributions to the development of international anti-corruption law

The Controversial Changes

Human Rights (International Covenant on Civil and Political Rights/ICCPR): The Right to Fair Trial, Equality before the Law and the Right to Privacy

- The principle of respect for human rights was introduced

The *Dewan Pengawas*/The Supervisory Organ

- Stronger internal monitoring by the Supervisory Organ, example: the permission request for wiretapping suspect's communication

The Refusal from the Anti-Amendment Group

The lack of trust to the Government:
Historical approach

The lack of legal clarifications from the experts

Various hidden political interests from “invisible” actors to stir the conflict

Why the Amendment Will Improve KPK Institutionally?

Human Rights

- The importance of human rights in anti-corruption measures: two sides of a coin
- Case law example: the case of Gunawan, the case of Novanto (where KPK lost two pre-trials)

Internal Monitoring

- “Would it be more dangerous if KPK was weakened from the inside?”
- Increase checks and balances of the KPK Commissioners: the Supervisory Board
- The careful selection of the Supervisory Board by the President

Idealism

- The United Nations Convention Against Corruption/UNCAC, Article 5 (b) (3): Changes to Improve KPK
- Weberian rational legal model: the evolution from the Charismatic model to the Rational Legal model

