

INTERNATIONAL LAW ASSOCIATION (ILA)
STUDY GROUP (SG): ASIAN STATE PRACTICE OF DOMESTIC
IMPLEMENTATION OF INTERNATIONAL LAW (ASP-DIIL)

A FINAL REPORT

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Name	Title	Nationality/ ILA Branch
Seokwoo LEE	Co-Chair	Korea/ Korea
Kevin YL TAN	Co-Chair	Singapore/ Singapore
Hee Eun LEE	Rapporteur	US/ US
Daley J. BIRKETT	Member	UK/ Hong Kong
Warwick GULLETT	Member	Australia/ Australia
Kanami ISHIBASHI	Member	Japan/ Japan
Kitti JAYANGAKULA	Member	Thailand/ HQ
Ratna JUWITA	Member	Indonesia/ Netherlands
Seryon LEE	Member	Korea/ Korea
David ONG	Member	Malaysia/ UK
RAVINDRAN Rajesh Babu	Member	India/ India
Christine SIM	Member	Singapore/ Singapore & US
Otto SPIJKERS	Member	Netherlands/ Netherlands
Anastasia TELESITSKY	Member	US/ US
THIO Li-ann	Member	Singapore/ Singapore
Tetsuya TOYODA	Member	Japan/ Japan
TRINH Hai Yen	Member	Vietnam/ HQ
UMMI HANI Binti Masood	Member	Malaysia/ HQ
Dustin Kuan-Hsiung WANG	Member	Taiwan/ Taiwan

I. INTRODUCTION

The ILA Study Group of the Asian State Practice of Domestic Implementation of International Law was established to study ‘the development of international law through the domestic implementation of international law in the countries in Asia.’ The Study Group will ‘describe how these states are applying international law in their domestic legal systems and in their foreign relations’ and in particular, to determine whether there exists an Asian approach to international law that is distinct from that of other regions around the world, or was, at the very least, shared among states in Asia. The Study Group will attempt to draw some preliminary, tentative conclusions as to what might account for these similarities among Asian states.

The Study Group consists of nineteen (19) international law scholars, most of whom are based in Asia, including the co-chairs and rapporteur. Four key discrete areas of investigation were identified for study: (a) Ocean and Territory; (b) the Environment; (c) Human Rights; and (d) Trade and Investment. The Study Group was assisted in part by work done on a parallel research project on Asian State Practice for the

Encyclopedia of Public International Law in Asia (EPILA) which is unconnected with the ILA. Each sub-group held and organised its own meetings to work out the drafts of their reports and the coordinators held four plenary sessions to help coordinate the work of the entire Study Group.

The following report synthesizes the findings of the four sub-groups and record their respective observations and conclusions. Fuller versions of the four sub-group reports are available on the Study Group website. We began with the hypothesis that there might exist within Asia, a regional approach to the practice of international law that is distinct, or at least distinguishable from that of other states, especially in Europe and the Americas. Based on the research undertaken thus far, the following findings are observed. The areas identified for study are thought to be those where, due to the unique particularities and conditionalities of states in Asia, the Group thought would most likely yield differences in practice and approach.

II. OCEAN AND TERRITORY

A. Asia and UNCLOS

The main international convention on the law of the sea, the United Nations Convention on the Law of the Seas 1982 (UNCLOS), enjoys an enormous number of ratifications in Asia, with only a few non-parties (Cambodia, North Korea, Taiwan, and the Central Asian landlocked States of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan). Landlocked States, such as Laos, Mongolia and Nepal, have also recognised the benefits of treaty membership by becoming a Party to the UNCLOS. Indeed, Mongolia is noteworthy for having an international ship registry. A major achievement of the UNCLOS is that it affords special protection to landlocked States for rights to access the sea. However, there is a lack of specificity in the UNCLOS provisions on how this will be achieved. There are a significant number of landlocked States in Asia. Access for these States to marine resources, or the benefits of their exploitation, is critical.

Asian states were instrumental in successfully advocating for a number of concepts that were to become entrenched in UNCLOS. Most notably, during the 9 year-long drafting conference for the UNCLOS at the Third United Nations Conference for the Law of the Sea 1973–1982 (UNCLOS III), Indonesia, the Philippines and Fiji advocated the recognition of the special geographical circumstances of archipelagic states. Their advocacy resulted in global acceptance of the concept of ‘archipelagic states’ as enshrined in Articles 46–54 of UNCLOS. This represented a major change in the law given the initial rejection of Indonesia’s 1957 claim that seas between islands of such archipelagic states were not open or high seas but archipelagic seas with sovereign status. Indonesia’s persistent objection to the non-recognition of waters within a State constituted wholly by one or more archipelagos, supported in large measure by the Philippines, eventually led to a change in the law. Yet support was also provided by adjacent States Singapore and Malaysia which did not oppose the concept as vehemently as the major maritime powers and advocated successfully for a specific provision that would recognise a potentially wide range of existing maritime activities in areas that would be enclosed as archipelagic waters (Article 51).

Leadership in the making of the law of the sea include Malaysia and Singapore’s contribution to discussions on the new regime of ‘passage through straits used for international navigation (including safety of navigation)’; Malaysia’s advocacy for the

expansion of the contiguous zone; Singapore's contributions as part of the group of landlocked and geographically disadvantaged States at UNCLOS III; and Sri Lanka's contributions to highly technical matters concerning an appropriate exception to the methods in Article 76 for determining the continental shelf beyond 200 nautical miles from baselines as adopted as Annex II to the Final Act of the Conference entitled Statement of Understanding concerning a specific method to be used in establishing the outer edge of the continental margin.

Other Asian contributions to the development of the Law of the Sea come from the personal leadership of Asian diplomats in the law-making process, such as Singapore's Tommy Koh serving as President of UNCLOS III and Rena Lee serving as President of the UN's Intergovernmental Conference to develop a convention on conservation and sustainable use of marine biological diversity beyond national jurisdiction (2018-date). Singapore has also become of the Asian venue where the International Tribunal for the Law of the Sea (ITLOS) can hear disputes. Asian states have shown interest in benefitting from the process for confirming extended continental shelves with full or partial submissions to the Commission for the Limits of the Continental Shelf by (in order of first or only submission) Indonesia, Japan, Myanmar, Philippines, Pakistan, Malaysia together with Vietnam, Vietnam, Sri Lanka, India, Maldives, Bangladesh, China, and South Korea and Malaysia.

Asian states take maritime security matters seriously, and have adopted more exacting requirements for the exercise of innocent passage by warships and the ability of coastal States to preclude foreign military exercises in their exclusive economic zones. Nevertheless, a number of Asian states have not established contiguous zones (which provide a further security buffer 12–24 nautical miles beyond territorial sea baselines). Some State practice appears to be not as intended by the drafters of UNCLOS, such as Malaysia exercising contiguous zone powers without having claimed the zone and Iran utilises broader contiguous zone powers than that provided for in Article 33 of UNCLOS.

B. Territorial Disputes

Colonialism has cast a long shadow on the development of international law in the Asian states. Many colonial empires expanded into Asia through the signing of bilateral treaties, many of which were 'unequal'. For example, the unequal border treaties signed between Qing Dynasty and Tsarist Russia became the basis for the demarcation of the land boundary between China and Russia in the 1990s. For Japan, the first formal colony out of the 'inherent' territory was Taiwan. By the Treaty of Shimonoseki of 1895 between Japan and China (Qing Dynasty) after the Sino-Japanese War, China ceded Taiwan to Japan. Also, the effect of the Annexation Treaty of 1910 incorporated Korea to Japan.

Many former colonies have successfully become independent States. However, many disputes remain that existed under the shadow of the colonial period. Some territory disputes are still unresolved:

- Dokdo/Takeshima sovereignty dispute between Korea and Japan;
- Senkaku/Daiyu(tai) Islands sovereignty dispute between China, Japan and Taiwan;
- Nansha/Truong Sa/Kalayaan/Spratly Islands in the South China Sea sovereignty disputes between Brunei, China, Malaysia, the Philippines, Taiwan

and Vietnam;

- Legal status of North Borneo (Sabah) between the Philippines and Malaysia.

Legacies of the colonial era regarding territorial sovereignty and location of international borders are evident in South Korea, Indonesia, Timor Leste, Malaysia, Singapore, Bangladesh, India, Pakistan, with Thailand standing out as never having been colonized.

Some Southeast Asian states are strong advocates for the use of third-party dispute resolution mechanisms for law of the sea matters while there is virtually no example in Northeast Asia (discussed in part 3 below). Further, Asian states have been instrumental in adopting practical measures to put aside territorial disputes, such as the use of Joint Development Areas (discussed in part 4 below), with Malaysia and Vietnam cooperating to the extent of making a joint submission to the United Nation's Commission for the Limits of the Continental Shelf (CLCS).

C. Conclusion

Asian states have been active in the negotiation and making of the primary treaty governing the Law of the Seas – UNCLOS, and most of them have signed or acceded to and ratified this treaty. However, UNCLOS, does not concern itself with territorial disputes although it may rule on the matter tangentially where other UNCLOS-related matters arise, such as in the South China Sea Arbitration between the Philippines and China¹. Territorial disputes and claims in Asia have, nonetheless been subject to third-party adjudication, most notably in the cases involving the Temple of Preah Vihear,² the islands of Sipadan and Ligitan,³ and Pedra Branca,⁴ and the Bay of Bengal.⁵ However, of the remaining disputes highlighted above, Asian states appear to be much less prepared to submit to third-party adjudication, largely due to the high political investment and national pride in the dispute concerned. As noted above, formal dispute resolution mechanisms have not been initiated for disputes in Northeast Asia. In particular, China has emphasized its preference to resolve disputes by dialogue rather than compulsory binding third-party resolution. In some cases, Asian states have also demonstrated considerable capacity to settle maritime boundary disputes and jurisdictional issues peacefully including by way of cooperation. In disputes concerning joint development initiatives, Asian states have shown a willingness to temporarily set aside maritime boundary disputes in working out practical solutions through the development of 'joint development areas' (JDAs). Finally, with respect to innocent passage regimes, Asian practice is divided. The majority of Asian states would like to add various conditions for foreign warships exercising right of innocent passage in their territorial seas.

¹ PCA Case No 2013-19.

² *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Reports 1962, p.6.

³ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* ICJ Reports 2002, p.625.

⁴ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* ICJ Reports 2008, p.12.

⁵ *Delimitation of Maritime Boundary in the Bay of Bengal (Bangladesh/ Myanmar)*, Judgment, ITLOS Reports 2012, p.4.

III. THE ENVIRONMENT

A. Introduction

The Study Group examined issues concerning international environmental law under two main headings: (a) the implementation of environmental treaty regimes within Asian domestic legal systems; and (b) environmental rights and climate change-related litigation within Asian domestic legal systems. Each of these topics is, in turn, divided into two further sub-divisions. The first topic on *treaty implementation* is divided into: (i) biodiversity-related treaty regimes; and (ii) plastic waste management and trade regulation, while the second category on *climate change-related litigation* covers: (i) substantive and procedural environmental rights as well as environmental reform of judicial institutions; and (ii) a comparison between the actuality of European-based climate litigation, and the potential for similar Asian-based litigation, especially in China.

B. Implementation of Environmental Treaty Regimes

The rapporteurs reviewed national and regional state practice in the implementation of the Convention on International Trade in Endangered Species (CITES); the Convention on Biological Diversity (CBD); and the Ramsar Convention on Wetlands, with a particular focus on the implementation of CITES.

Historically, Asia has been a region with high biodiversity and a hub for trade in biodiversity and many Asian states are active major importers and exporters of endangered species. The enormity of this problem was highlighted in the CITES Secretariat's most recent (2014–2018) data set listing the top 10 importing and exporting countries for various trade items.⁶ China, Viet Nam, and Cambodia were ranked numbers 1, 2, and 3 respectively for exporting live mammals while China and Japan were ranked 2 and 3 for importing live mammals. Indonesia and Viet Nam were numbers 3 and 6 respectively for exporting live reptiles while Hong Kong SAR, China, and Japan ranked 1, 2, and 4 respectively for importing live reptiles. Indonesia ranked top in the export of live wild coral and raw wild coral while Japan and South Korea ranked 2 and 4 respectively as top importers of wild coral. Of particular concern is the trade in ivory. China, Japan and Viet Nam rank 1, 5 and 7 respectively in the import of elephant tusks while some of the top importers (Japan (3), China (4), Singapore (9) & South Korea (10)) and exporters (Japan (8) and Philippines (9)) of ivory carvings were all Asian states.

Asian parties initially adopted a 'wait and see' approach to ratifying/acceding to CITES. No Asian State was an original party to the treaty when it went into effect on 1 July 1975. Indeed, Asian states were relatively slow in acceding to CITES. Asian states have also generally been slow to adopt amendments to CITES such as the Bonn Amendment to review financial support for the CITES Secretariat and the Gaborone Amendment to permit accession by regional economic integration organizations to CITES. Domestic implementation of various components of CITES has also been slow. While each state in the region has adopted general legislation implementing CITES, species-specific legislation has, in general, only been adopted in the face of diplomatic pressure, threatened formal sanctions, or recommendations to suspend trade. International pressure through the United States' threat to apply trade sanctions under the US Pelly Amendment triggered more extensive implementation of CITES by

⁶ <https://dashboards.cites.org/global>

China, Singapore, South Korea, and Japan.⁷ In general, Asian states have been reactive and not proactive in species-specific CITES implementation. International reputation matters to many Asian states and domestic policies do change in response to international drivers.

In recent years, Asian states have sought to improve the domestic implementation of CITES through more extensive regional cooperative efforts supported by the work of intergovernmental organizations including regional development banks. The preference for regional implementation of international obligations is further reflected in the widespread adoption of other biodiversity conventions such as the Ramsar Convention. Implementation has been supported by networks for regional cooperation including government actors as well as NGOs, corporations, and local communities.

Cross-border cooperation and coordination is a mainstay of Asian implementation of international obligations. These include Northeast Asia's Subregional Programme for Environmental Cooperation (NEASPC) with members China, Japan, Mongolia, North Korea, South Korea, and the Russian Federation coordinating activities around, *inter alia*, nature conservation and marine protected areas;⁸ the South Asia Co-operative Environment Programme; the ASEAN Centre for Biodiversity (2005) to advance conservation, sustainable use of biodiversity, and equitable access and benefiting sharing arrangements;⁹ the Greater Mekong Sub-Region Biodiversity Conservation Corridors (Cambodia, Lao People's Democratic Republic, Viet Nam);¹⁰ the Heart of Borneo Initiative (Brunei Darussalam, Indonesia, and Malaysia);¹¹ and the Sulu-Sulawesi marine areas within the Coral Triangle (Indonesia, Malaysia, and the Philippines).¹²

States in Asia evince a strong propensity to approach implementation of international environmental obligations by building relationships with States within a region and by developing both formal iterative networks and less formal consultative institutions to achieve shared biodiversity objectives. These relationships tend to be sub-regionally based and focused on efforts within Northeast Asia, Southeast Asia, or South Asia. There is, however, less biodiversity cooperation across Asia's three major regions. While Asian states frequently ratify and accede to multilateral biodiversity-related international environmental agreements, implementation is often not realized until there is broader subregional effort invested in transboundary implementation.

A survey of plastic waste management in the Asian region reveals a trend towards using regional 'soft law' instruments initially, to build consensus for the formation of 'hard law' instruments. One way to control marine plastic debris is to regulate its

⁷ The Pelly Amendment to the US Fisherman's Protective Act of 1967 permits non-government organizations to petition the US Secretary of Interior to impose U.S. trade sanctions for continuing trade in illegal animal products.

⁸ <https://www.neaspec.org/>

⁹ <https://www.aseanbiodiversity.org/>

¹⁰ <https://www.adb.org/projects/40253-023/main>

¹¹ Declaration on the Heart of Borneo Initiative, https://www.panda.org/discover/knowledge_hub/where_we_work/borneo_forests/about_borneo_forests/declaration/

¹² <https://www.conservation.org/places/sulu-sulawesi-seascape>

import and export and properly manage plastic waste. Several Asian states export waste within the region. In 2018, Japan exported 1 million tons of plastic waste, the second largest amount in the world after the United States.¹³ Exports increased across Asia and to Asia after China adopted the 'Prohibition of Foreign Garbage Imports: The Reform Plan on Solid Waste Import Management' and ceased receiving plastic waste imports in July 2017. From 2018 onwards, Taiwan, South Korea, and certain Southeast Asian countries such as Malaysia, Viet Nam and Thailand became alternative destinations as China introduced import restrictions.

Asian states have adopted amendments to Annexes II, VIII and IX to the Basel Convention on May 10, 2019, at the 14th Conference of the Parties (CoP) to bring plastic waste that is unsuitable for recycling within the scope of this Convention.¹⁴ These amendments were effective from 1 January 2021 for most Asian countries.¹⁵ The amended annexes require an importing country to give prior consent to any state exporting plastic waste falling under the category of 'dirty plastic waste' in Annex II, or 'hazardous plastic waste' in Annex VIII. The CoP also established a Partnership on Plastic Waste. This partnership will provide practical technical and financial support in response to the amendments to the Annex/Convention, as well as collect information and raise awareness on the efforts to reduce plastic waste in each country and region.

Asian states have responded to the adoption of the Plastic Waste Amendments by refining existing laws. This has led to domestic legislative reform in South Korea, Malaysia, Viet Nam, Thailand, Laos, Bangladesh and the Philippines. In addition, certain Asian jurisdictions – eg Hong Kong, South Korea and Mongolia – have imposed bans or restrictions on the domestic manufacture, sale, and use of plastics.

The trend of plastic waste management in Asian countries has been to combine initial regulation through national laws, with international 'hard law' (for example, through the Basel Amendments) and 'soft law' (for example, through the ASEAN & G20) responses, as well as seeking new global instruments to harmonize these national and international responses. As Asia is the world's main source of plastic waste, a proactive Asian approach is required. There are signs that this is taking place.

¹³ Greenpeace, 'Survey of global waste plastic trade flows after China's import restrictions - 2018 exports by country', available at: <https://www.greenpeace.org/japan/sustainable/press-release/2019/05/20/8413/> (Japanese only).

¹⁴ The Basel Convention defines hazardous wastes and regulates their import and export and has been ratified by 180 parties. In Asia, 22 countries are Parties to the Basel Convention: Bangladesh, Bhutan, Brunei, Cambodia, China, Democratic People's Republic of Korea, India, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Pakistan, Philippines, South Korea, Singapore, Sri Lanka, Thailand, and Viet Nam.

See:

<http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx>

¹⁵ State parties include Bangladesh, Bhutan, Brunei, Cambodia, China, India, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Pakistan, Philippines, South Korea, Singapore, Sri Lanka, Thailand, and Viet Nam. See Status of Ratifications, available at: <http://www.basel.int/Countries/StatusofRatifications/PlasticWasteamendments/tabid/8377/Default.aspx>.

C. Environmental Rights & Climate Change-related Litigation

There is no Asian continental-wide instrument that incorporates the right to a healthy environment, nor is there a pan-Asian court or tribunal that can perform this role. The recent UN Human Rights Council resolution on the human right to a healthy environment also received abstentions from India, China and Japan.¹⁶ Moreover, the inclusion of a right to a healthy environment within Asian constitutions and/or primary legislation is thin on the ground, with less than 20 Asian states having done so,¹⁷ even though the constitutions of the Philippines (1987) and Viet Nam (2013) protect this right.¹⁸ That said, South and South-West Asia lay claim to some of the world's most innovative environmental rights jurisprudence,¹⁹ while North and Central Asia possess the region's greatest concentration of constitutions featuring environmental rights.²⁰

Seven West/Central Asian states are among 45 parties to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters;²¹ eleven countries from West Asia and the Arabian Peninsula are among 16 States parties to the Arab Charter on Human Rights;²² and ten States have adopted the non-binding Declaration on Human Rights of the Association of South-East Asian Nations (ASEAN). Moreover, the UN Rapporteur has highlighted at least 20 states world-wide (including the west/central Asian State of Azerbaijan) as having constitutions which guarantee the right of access to environmental information.²³ Moreover, 'in most States where the right to a safe, clean, healthy and sustainable environment is recognized in the Constitution, individuals and non-governmental organizations have standing to bring lawsuits based on the violation of this right or of environmental laws.'²⁴

Recently, there has been much interest in the potential of public interest litigation for the protection of the environment in China.²⁵ Modifications to the Chinese Civil Procedure Law (in 2012) and its Environmental Protection Law (in 2014) made it possible for environmental NGOs and the procuratorate to engage in environmental public interest litigation, including by initiating cases addressing air pollution in

¹⁶ Human Rights Council, 'The Human Right to a Clean, Healthy and Sustainable Environment', Resolution 48/13, adopted 8 Oct 2021, UN Doc A/HRC/RES/48/13.

¹⁷ See 'Annex II: Legal recognition of the right to a healthy environment', in UN report on 'Good Practices', *ibid.*, at 22–27.

¹⁸ *Ibid.*, at para 95.

¹⁹ *Ibid.*, at 342–3.

²⁰ Joshua Gellers & Chris Jeffords, 'Environmental Rights in the Asia Pacific Region: Taking Stock and Assessing Impacts' (2019) 22(2) *Asia Pacific Journal of Environmental Law* 190–206.

²¹ Namely, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan.

²² Namely, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Palestine, Qatar, Saudi Arabia, Syria, the UAE and Yemen.

²³ *Ibid.*, at para.14.

²⁴ UN 'Good Practices' report, *ibid.*

²⁵ See e.g., Lei Xie and Lu Xu, 'Environmental Public Interest Litigation in China: Findings from 570 Court Cases Brought by NGOs, Public Prosecutors and Local Government', in *Journal of Environmental Law*, Volume 34(1), 2022, pp. 53–81; Richard Zhang Qing and Benoit Mayer, 'Public Interest Environmental Litigation in China' (2017) 1 *Chinese Journal of Environmental Law* 202–228; Yina Liu, 'Friends of Nature and Public Interest Environmental Litigation' (2019) 3 *Chinese Journal of Environmental Law*, 225–232.

China.²⁶ Since the problématiques of air pollution and climate change are closely linked, this might open opportunities also for climate litigation *stricto sensu*.²⁷ However, China still lacks national climate legislation, making it difficult for local NGOs and others to ground climate litigation.²⁸ although it must be added that judges in China do find a way to overcome this hurdle.²⁹ There are continuing hurdles for climate litigation in China, and it is too early to draw meaningful conclusions as to whether there is an identifiably Chinese approach to climate litigation that is distinct from a so-called European approach.

D. Conclusion

For treaty-based environmental regimes, especially those related to trade, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the Basel Treaty Amendment on Plastic Waste, Asian states appear to prefer (mainly informal) regional arrangements to facilitate the domestic or municipal implementation of their treaty obligations. Several geographical coalitions and partnerships have been established to support the protection of regional biodiversity and plastic waste management. Possible reasons for the formation of these regional and sub-regional fora to facilitate national implementation of international environmental treaty obligations include: (a) notions of regional solidarity to develop or maintain a common position in the negotiation for international rules; (b) ensuring compatibility of implementation between neighbouring States within a region or sub-region through the development of common standards to ensure smooth implementation across different domestic markets, and thereby maintain market-competitive positions in relation to regional/sub-regional trading partners.

The emphasis on building regional coalitions to support the implementation of international obligations may result from Asian interpretations of the content of ‘common but differentiated responsibilities.’ However, all these hypotheses and propositions remain to be fully tested and proven (or falsified) by further empirical examination of the implementation of environmental treaty-based obligations within Asian national legal systems.

Second, the sub-section on recognition of human and natural environmental rights

²⁶ See e.g., Lei Xie and Lu Xu, ‘Environmental Public Interest Litigation in China: A Critical Examination’, in (2021) 10(3) *Transnational Environmental Law* 441–465.

²⁷ Yue Zhao, Wei Liu, Shuang Lyu, ‘Tort-Based Public Interest Litigation on Air Pollution in China: A Promising Pathway for Chinese Climate Change Litigation?’ in Jolene Lin and Douglas A Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, 2020) 394–415. In recent scholarship, the actual and potential role of the Chinese courts in promoting climate change friendly policies is sometimes approached more broadly, looking beyond climate litigation in the strict sense of the term. See e.g., Mengxing Lu and Michael Faure, ‘Does the Tiger Have Teeth? A Critical Examination of The Toolbox Approach of Environmental Law Enforcement in China’ (2021) 31(1) *Review of European, Comparative and International Environmental Law* (RECIEL) 89–102; Zhu Yan, ‘The Subordinate and Passive Position of Chinese Courts in Environmental Governance’ in Jolene Lin and Douglas A Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, 2020) 365–393.

²⁸ Tianbao Qin and Meng Zhang, ‘Climate Change and the Individual: A Perspective of China’, in Francesco Sindico and Makane Moïse Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer, 2021) 369–385.

²⁹ Mingzhe Zhu, ‘The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?’ (2021) 11(1) *Transnational Environmental Law* 119–139.

within individual Asian national legal systems evinces a combination of modernity, through the utilization of post-independence legal systems (usually bequeathed by former colonial powers) along with attempts to re-connect to traditional, pre-colonial notions of harmony and synergy between humankind and nature, including acceptance of cultural, and even spiritual, connections between local communities and significant natural objects such as rivers, mountains and forests/jungles. The culmination of such recognition of the ‘human-nature’ relationship is manifest in the following ways: (a) inclusion of substantive and procedural environmental rights within Asian national constitutions, laws and adjudicatory jurisprudence; and (b) reforms of Asian legal systems to inculcate better environmental awareness, for example, through establishment of environmental courts and tribunals, and even the provision of legal personality and standing for natural environmental objects to enhance their protection from degradation.

IV. HUMAN RIGHTS

A. Introduction

The universality and indivisibility of human rights norms are key tenets and the ‘International Bill of Rights’ is located in the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 Covenants on Civil and Political Rights (ICCPR) and Economic, Social, and Cultural Rights (ICESCR). Of the 22 Asian states surveyed in Table 1, 16 are parties to the ICCPR and 18 to the ICESCR. All 22 states are parties to the dedicated treaties on women and children’s rights and all Asian states have participated in the UN Universal Periodic Review process. UDHR norms have been invoked before Asian courts and certain norms are accepted as customary international law, e.g., the prohibition against torture.

Table 1

State	ICCPR	ICESCR	CRC	CEDAW
Bangladesh	Yes	Yes	Yes	Yes
Bhutan	No	No	Yes	Yes
Brunei	No	No	Yes	Yes
Cambodia	Yes	Yes	Yes	Yes
China	No	Yes	Yes	Yes
DPR Korea	Yes	Yes	Yes	Yes
India	Yes	Yes	Yes	Yes
Indonesia	Yes	Yes	Yes	Yes
Japan	Yes	Yes	Yes	Yes
Lao PDR	Yes	Yes	Yes	Yes
Malaysia	No	No	Yes	Yes
Mongolia	Yes	Yes	Yes	Yes
Myanmar	No	Yes	Yes	Yes
Nepal	Yes	Yes	Yes	Yes
Pakistan	Yes	Yes	Yes	Yes
Philippines	Yes	Yes	Yes	Yes
Rep. of Korea	Yes	Yes	Yes	Yes
Singapore	No	No	Yes	Yes
Sri Lanka	Yes	Yes	Yes	Yes
Thailand	Yes	Yes	Yes	Yes
Timor-Leste	Yes	Yes	Yes	Yes

Viet Nam	Yes	Yes	Yes	Yes
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‘Asia’ is a region of remarkable diversity, in terms of religions, cultures, colonial histories, political ideologies (socialism, communitarianism, liberal democracies), legal systems (civil and common law), government systems (presidential, parliamentary, hybrids, absolute monarchies) and levels of economic development. Asian states have at various times supported and resisted the development and deployment of human rights standards as criteria for evaluating government legitimacy, as where contested politicised norms are involved or where human rights fuelled critiques are seen to intrude in internal affairs or to oppose developmentalist imperatives.

The region produced the ‘Asian values’ discourse of the 1990s, driven by diplomats from China, Singapore and Malaysia which challenged the indivisibility of rights by emphasizing the importance of restraining civil-political rights (CPRs) in favour of securing political stability to attract foreign investment and trade, in the interest of promoting economic development and the better realization of socio-economic rights (SERs). This was also viewed as a cultural relativist challenge to universal human rights. The 1993 Bangkok Declaration,³⁰ the prelude to the World Conference on Human Rights, remains the leading collective human rights statement of Asian states. This underscores the contribution of Asian cultures and traditions, the commitment to the UDHR, the need to consider ‘the significance of national and regional particularities’, non-confrontational modes of promotion and the primacy of the national state in implementing human rights processes and remedies. While some Asian states may raise objections against human rights criticism on grounds of neo-colonial moral imperialism, this may be an apology for power; further, Asian indigenous peoples have criticized hardships suffered under Asian forms of colonialism, contrary to asserted rights to self-determination: Asian Indigenous Peoples Pact 1993 Declaration on the Rights of Asian Indigenous Peoples.

In regional terms, Asia alone lacks a regional human right system based on a human rights instrument establishing supervisory mechanisms, although this exists at a sub-regional level i.e. Association of Southeast Asian states (ASEAN) system which established the Intergovernmental Commission on Human Rights (2009) and adopted the Human Rights Declaration (2012). Both the 1993 and 2012 Declaration affirm the inalienability of the right to development, which is generally non-justiciable. Five of the surveyed Asian states³¹ are members of the 57-member Organisation of Islamic Conference (OIC), which adopted the 1990 Cairo Declaration on Human Rights in Islam³² which subjects human rights to the Islamic Shari’ah (art 24). This recognizes the equal rights but not equal dignity of men and women (arts 1, 6); certain Asian states have attached reservations to CEDAW to insulate domestic law from the operation of the gender egalitarian norms, in the realm of family, religious and personal law in relation to Muslim communities.³³ The 1990 Declaration does not contain a religious freedom guarantee as such, but proclaims the supremacy of Islam and the prohibition of converting a Muslim through force, or through poverty or ignorance, to another

³⁰ A/CONF.157/PC597.

³¹ Indonesia, Pakistan, Brunei, Bangladesh, Malaysia.

³² RES.No.49/19-P Annex.

³³ Bangladesh, Malaysia, Singapore.

religion (art 10). This informs the truncated religious freedom guarantees evident in Muslim-majority countries like Malaysia, which has legislation prohibiting the propagation of any faith to Muslims, and which maintains apostasy laws barring Muslim conversion out of Islam, contrary to freedom of conscience, as recognised under art 18, UDHR. A Muslim who renounces Islam may be liable to the death penalty under Brunei apostasy laws or religious rehabilitation under Malaysian state laws.

B. Implementation of Treaty Obligations

Human rights treaties provide a wide choice of means for the implementation of treaty obligations: in Asian practice, the entire range of means is evident, from constitutional amendment and legislation to ‘soft’ standards, educative and hortatory measures. Many Asian courts reference human rights in interpreting constitutional rights although judicial review over executive authority is constitutionally precluded in Brunei and Chinese constitutional rights are non-justiciable.

The domestic implementation of human rights in Asian states takes three primary forms, through: (a) actions of political actors like the legislative and executive branches of government; (b) establishment of independent institutions such as human rights ombudsman and national human rights institutions (NHRI); and (c) judicial review.

The domestic mainstreaming of human rights is accomplished through the constitutional recognition of state duties to guarantee human rights³⁴ and state efforts in incorporating human rights in national policies.³⁵ Some Asian states prefer to adopt comprehensive legislation incorporating international standards that subject private violators to administrative law sanctions and private violators to damages.³⁶ Others avoid legalistic approaches, preferring instead to adopt non-binding guidelines to implement human rights treaty obligations against the existing legal framework, and in championing resort to non-adversarial dispute resolution methods like conciliation and mediation, over litigation (eg Singapore).

NHRIs are established either by the constitution (eg Philippines, Thailand, Nepal) or through statute (eg Bangladesh, Malaysia, Mongolia, Myanmar, Indonesia, India, Republic of Korea, Sri Lanka, Timor-Leste), and their mandates may be pegged to rights contained in constitutions, the UDHR or human rights treaty obligations, although NHRIs have referenced human rights standards contained in instruments to which their state is not party. Additionally, some Asian states have resorted to diverse justice-seeking measures such as truth commissions (Republic of Korea, Sri Lanka, Timor-Leste) to investigate human rights abuses. Timor-Leste has, interestingly, established a human rights ombudsman within its constitutional framework.³⁷

Human rights are domestically implemented through judicial review when constitutional rights demand interpretation. Some constitutions expressly direct courts to interpret constitutional rights in accordance with human rights standards

³⁴ See, for example: art 31, Cambodia Constitution; and art 33, People’s Republic of China Constitution.

³⁵ China White Papers, available at: <http://chinahumanrights.org/html/PR/WP/>

³⁶ See for example, Philippines Magna Carta of Women (Republic Act No. 9710).

³⁷ Art 27, Timor-Leste Constitution.

such as those in the UDHR.³⁸ In common law and civil law constitutions generally, and as constitutionally provided,³⁹ treaties only become a source of domestic legal obligation where they are legislatively incorporated.⁴⁰ Common law jurisdictions affirm that customary international law (CIL) may apply within the municipal legal order without legislative intervention, provided they are judicially accepted and recognised. Nonetheless, the general practice is that received CIL norms operate at the level of a common law norm, ranked below statutory and constitutional provisions. In dualist jurisdictions like Singapore, even *jus cogens* norms are received as common law norms.⁴¹ In civil law jurisdictions, the Japan Constitution provides that the law of nations in the form of CIL and *jus cogens* are in principle inferior to the Constitution, but superior to other domestic laws. In the Republic of Korea, the Constitution's reference to 'generally recognized rules of international law' is largely interpreted to mean CIL such that Korea is a monist state where international law does not need to be translated into national law. Both treaties and CIL stand equal with Korean domestic legislation.

Asian courts have demonstrated variable attitudes towards 'soft law' instruments with contested content as well as towards privately authored instruments purporting to be an accurate statement of international law, but which contains contested norms, such as the Yogyakarta Principles on Sexual Orientation and Gender Identity (2006) (YP), which the Organisation of Islamic Conference-Independent Permanent Human Rights Commission (OIC) rejected as a radical interpretation of existing rights and attempt to introduce novel claims.⁴² Meanwhile, the Indian and Nepalese Supreme Courts⁴³ have cited YP provisions to buttress expansive readings of 'privacy' and 'equality'. The Philippines Supreme Court applied a more rigorous test in concluding that the YP did not satisfy the requirements of state practice and *opinio juris* and was not a binding CIL norm: it constituted a list of 'wants', noting the danger that proclaiming social desires as human rights would have 'the effect of diluting real human rights.'⁴⁴

C. Civil & Political Rights

Civil and political rights enjoy constitutional and legal guarantees in Asian states, many of whom are also state parties to the ICCPR,⁴⁵ though problems with effective implementation exist.

³⁸ See art 23, Timor-Leste Constitution; and Chapter II, Mongolia Constitution.

³⁹ For example art 10(25), Bhutan Constitution.

⁴⁰ See, for example, art 73, Japan Constitution; art 6, Republic of Korea Constitution; and art 10, Mongolia Constitution.

⁴¹ *Yong Vui Kong v PP* [2015] 2 SLR 1129.

⁴² Organisation of Islamic Conference-Independent Permanent Human Rights Commission Study on Sexual Orientation and Gender Identity in the Light of Islamic Interpretations and International Human Rights Framework, May 2017, Jeddah, paras 1-3, available at: <https://www.oic-iphrc.org/en/data/docs/studies/46303.pdf>

⁴³ *Navtej Singh Johar v Union of India*, *THR. Secretary and Ministry of Law and Justice* AIR 2018 SC 4321 at [84], [88]; *Sunil Babu Pant vs. Nepal Government* [2008] 2 NJA L.J. 261-2867.

⁴⁴ *Ang Ladlad LGBT Party v. Commission On Election* G.R. No. 190582 (2010).

⁴⁵ Taiwan, a non-UN member is also a party to the ICCPR. 4 Asian states in our survey (Mongolia, Nepal, Philippines, Republic of Korea) are parties to the First Optional Protocol, which Cambodia has signed but not ratified. 3 Asian states (Mongolia, Nepal, Philippines) are parties to the Second Optional Protocol.

1. Freedom of Speech

Article 19 of the ICCPR guarantees freedom of expression, which is widely recognised in Asian constitutions as a liberty important to all, regardless of culture and history.⁴⁶ This is subject to limitations in the form of public goods such as national security, the rights of others and reputational rights. Laws against blasphemy and sedition have been deployed to severely curtail expressive freedoms in Malaysia, Cambodia, Bhutan, and Brunei. After the 2006 Thai coup d'état, increasing resort to the draconian *lèse majesté* law under section 112, Thai Penal Code⁴⁷ was evident, deployed against political protesters; the chilling effect is evident in the disproportionate sentences involved, such as a 43-year imprisonment sentence against Anchan Preelert in 2021 for reposting video clips concerning the Thai monarchy.⁴⁸ In authoritarian socialist regimes like China and North Korea, free speech guarantees are in practice severely curtailed, as where political dissenters can end up in North Korean re-education prison camp.⁴⁹ Within the confines of government controlled forums, the Chinese government tolerates criticism insofar as this helps in monitoring social problems.⁵⁰

2. Death Penalty

Many Asian countries like China, Japan, India, Indonesia retain capital punishment, whether by hanging, firing squad, lethal injection, stoning or decapitation. In other Asian states, capital punishment has been constitutionally prohibited.⁵¹ Attempts to reinstate the death penalty has attracted widespread international criticism, as well as counter-allegations of intervention in internal affairs.⁵² Eight of the 41 sponsors delivering a February 2021 Joint Statement to the Human Rights Council declaring

⁴⁶ For example: Constitution of Bangladesh, Chapter III, Article 39; Constitution of the People's Republic of China, Article 35; Indian Constitution, Article 19; Constitution of the Islamic Republic of Iran Chapter 3, Article 27; Japanese constitution, Chapter III, Article 21 Constitution of the Kingdom of Thailand, Part 7, Article 45; or Indonesian Penal Code, Chapter 156a.

⁴⁷ Article 112 provides: 'Whoever defames, insults, or threatens the King, the Queen, the Heir-apparent, or the Regent, shall be punished with imprisonment of three to fifteen years.'

⁴⁸ OHCHR, Thailand: UN experts alarmed by rise in use of *lèse-majesté* laws, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26727&LangID=E>, accessed 10 July 2021.

⁴⁹ David Hawk, 'The Hidden Gulag: The Lives and Voices of "Those Who are Sent to the Mountains"' 2nd edition, (Washington DC: Committee for Human Rights in North Korea, 2012): 41-55, http://www.hrnk.org/uploads/pdfs/HRNK_HiddenGulag2_Web_5-18.pdf

⁵⁰ Congressional-Executive Commission on China, 'Freedom of Expression in China: A Privilege, Not a Right', <https://www.cecc.gov/freedom-of-expression-in-china-a-privilege-not-a-right>

⁵¹ Art 7(18), Bhutan Constitution (2008); Art 32, Cambodia Constitution (1993); Art 29(3), Timor Leste Constitution (2002). The Philippines (2007) Timor Leste (2003) and Mongolia (2012) ratified/acceded to the Second Optional Protocol, ICCPR in 2012. It was reported in 2018 that after the death penalty was abolished in 2017, the Mongolian President indicated plans to reinstate it for crimes of minor sexual abuse: 'Mongolian president to begin process to reinstate death penalty' *efe-epa*, 2 April 2018 at. Mongolian president to begin process to reinstate death penalty | World | English edition | Agencia EFE <last accessed 15 Nov 2021> See Roger Hood, 'Enhancing EU Action on the Death Penalty in Asia' Briefing Paper, European Parliament, Directorate-General for External Policies of the Union, EXPO/B/DROI/2011/22 (October 2012) at Enhancing EU action on the death penalty in Asia (europa.eu) <last accessed, 15 Nov 2021>.

⁵² Sri Lankan President Sirisena has accused the European Union of interference in Sri Lanka affairs by threatening tariffs if Sri Lanka proceeded with the execution of four drug convicts: 'Sri Lanka death penalty reinstatement 'extremely disturbing'', DW,Com, 1 July 2019 at Sri Lanka death penalty reinstatement 'extremely disturbing' | Asia | An in-depth look at news from across the continent | DW | 01.07.2019 <last accessed 15 Nov 2021. Tjalling HF Halbertsma, 'Abolition of the Death Penalty in Mongolia: Is 'Normative Power Europe' at Work? (2020) 21 Mongolian Journal of International Affairs 50-63

that whether the death penalty should be retained was a sovereign state prerogative, were Asian states.⁵³ As of 2021, some 88% of all recorded executions took place in China.⁵⁴

3. Religious Freedom

Many Asian constitutions manifest a strong affiliation with religion (Hinduism, Islam, Buddhism, Christianity), where ethnicity and religion are essential to the identity of their citizens.⁵⁵ The constitutions of Muslim and Buddhist majority societies (Malaysia, Brunei, Cambodia) officially recognize Islam and Buddhism. In many secular Asian states, religions play a significant role in the public sphere, where religious values inform the law-making process and conceptions of justice.⁵⁶ Religious freedom is limited in atheistic socialist states like China, where religious organisations, as ideological competitors, are subject to legal regulation.⁵⁷ The scope of religious freedom is shaped by constitutional arrangements,⁵⁸ legal institutions, judicial interpretation and social factors.⁵⁹ Religious freedom is truncated by restrictive apostasy laws in Malaysia⁶⁰ and anti-conversion laws in India, Sri Lanka, Nepal, Myanmar and Bhutan, where the politically dominant religious majority perceives religious minorities as a threat.⁶¹ Indian anti-propagation laws typically prohibit religious conversions by force, fraud or inducements. There is the tendency for these laws to be abused to further political agendas, for example, to serve Hindutva nationalism,⁶² undermining the freedom to impart religious information and seek to persuade others to belief. Such legislation may apply to general or specific sectors of the population, as in Malaysia where art 11(4) of the Federal Constitutions prohibits the propagation of other religious doctrine to Muslims,⁶³ while the federal

⁵³ Joint Statement of 23 Feb 2021, Biennial High-Level Panel Discussion on the Question of the Death Penalty, 23 Feb 2021, 46th Regular Session, Human Rights Council:

<https://www.mfa.gov.sg/Overseas-Mission/Geneva/Speeches-and-Statements--Permanent-Mission-to-the-UN/2021/02/Joint-Statement-on-the-Question-of-the-Death-Penalty-on-23-February-2021> <last accessed, 15 Nov 2021>

⁵⁴ Amnesty International, Death Penalty 2020: Facts and Figures at Death penalty in 2020: Facts and figures - Amnesty International

⁵⁵ Andrew Harding, 'Law, Religion, and Constitutionalism in Asia' (2018) 13 *Asian Journal of Comparative Law* 227

⁵⁶ Jaclyn L Neo et al (eds), *Regulating Religion in Asia: Norms, Modes, and Challenges* (Cambridge University Press 2019). For example in Muslim-majority Indonesia, Islam is influential in policy-making even where the Constitution does not recognize it as an official religion: Afitri, 'Religion and Constitutional practices in Indonesia: How Far Should the State Intervene in the Administration of Islam' (2018) 13 *Asian Journal of Comparative Law* 389

⁵⁷ Yang Fenggang, 'Regulating Religion under Communism' (2012) 8 *Chinese L & Religion Monitor* 8

⁵⁸ Malaysian Federal Constitution, art 11; Constitution of Singapore, art 15; 1945 State Constitution of the Republic of Indonesia art 29; Constitution of India, art 25-28; Constitution of Pakistan, art 20; Thailand's Constitution of 2017, s 31; Cambodia 1993 (rev. 2008) Constitution, art 43; Constitution of the Republic of the Philippines, art III s 5; Constitution of the Republic of Korea, art 20; Constitution of the People's Republic of China, art 36; Constitution of Japan, art 20

⁵⁹ Borhan Uddin Khan and Muhammad Mahbubur Rahman, 'Freedom of Religion in South Asia: Implications for Minorities' (2009) 8 *European Yearbook of Minority Issues* 367

⁶⁰ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 55 (FC)

⁶¹ Meghan G Fischer, 'Anti-Conversion Laws and the International Response' (2018) 6 *Penn State Journal of Law and International Affairs* 1.

⁶² Chauhan N, 'Religious Conversion and Freedom of Religion in India: Debates and Dilemmas,' (2017) 1 *ILJ Law Review* (Summer Issue) 126–136.

⁶³ Art 11(4) of Malaysia's Federal Constitution provides that federal law may restrict propagation of other religious doctrines to Muslims

government supports assimilationist efforts to propagate Islam to the indigenous peoples. The selective preferential treatment of a religion or religious sect is reflected in the criminalisation of Ahmadiyya religious beliefs under Pakistan law.⁶⁴

The manifestation of religious belief may be expressed by wearing religious symbols, which states have limited in public spaces like schools, to preserve social cohesion or national identity. The Malaysian Federal Court upheld the constitutionality of a regulation prohibiting male Muslim students from wearing the serban (Islamic turban), balancing religious freedom against national cohesion concerns, deferring to educational authorities and the fact wearing serban was considered not mandatory but an optional aspect of Islam.⁶⁵ It apparently applied a 'reasonableness' balancing approach, noting the ban was not absolute but applicable only within schools, that turbans could be worn in school prayer rooms, that there were schools which permitted serban wearing, and that the prohibition stemmed from a desire to promote multi-culturalism.

The right to manifest one's religion or belief is limited by various domestic laws, such as sedition⁶⁶ and the criminal offence of inciting religious or racial hatred or violence.⁶⁷ Malaysian courts have upheld national security restrictions on a Catholic publication utilizing the word 'Allah' to avoid disrupting the 'even tempo' of the life of the Malaysian community.⁶⁸ Blasphemy laws do not protect religious freedom, but rather, protect the majority or dominant religion,⁶⁹ often detrimentally exposing religious minorities to physical violence from a hostile majority e.g. Ahmadis in Pakistan and Indonesia.⁷⁰ Further, religious insult laws may sharply limit expressive freedoms, as where an Indonesian atheist was imprisoned in 2012 for stating 'God does not exist' on his Facebook page.⁷¹

4. Equality, Privacy and Homosexuality

The issue of non-discrimination and privacy claims, framed as LGBTQ rights, has achieved prominence in constitutional and international human rights discourse⁷² but

⁶⁴ Section 298 (b) and 298 (c) of Pakistan Penal Code.

⁶⁵ *Meor Atiquilrahman Bin Ishak & Ors v Fatimah Binti Sihi & Ors* [2006] 4 CLJ 1 FC

⁶⁶ *Tan Jye Yee & Anor v PP* [2015] 2 CLJ 745; *Lee May Ling v PP & Another Appeal* [2018] 10 CLJ 742

⁶⁷ Sri Lanka International Covenant on Civil and Political Rights Act, s 3(1); Brunei's Penal Code, s 298; Cambodia's Criminal Code, s 59, Indonesia's Penal Code, art 156; Malaysia's Penal Code, s 298 and s 298A, Myanmar's Penal Code, s 505; Singapore's Penal code, s 298 and s 298A; Vietnam's Criminal Code, s 87 and China's Criminal Law, s 251. See Li-ann Thio & Jaclyn Neo (eds), *Religious Offences in Common Law Asia: Colonial Legacies, Constitutional Rights and Contemporary Practice* (Hart, 2021).

⁶⁸ *Menteri Dalam Negeri & Or v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 8 CLJ 890

⁶⁹ Indonesia's Law Number 1/PNPS/1965 on the Prevention of Religious Abuse and/or Defamation, juncto Law Number 5 of 1969 on Statement of Various Presidential Stipulations and Presidential Regulations as Law; Pakistan Penal Code, s 295 C.

⁷⁰ Amnesty International, 'Prosecuting Beliefs: Indonesia's Blasphemy Laws', <<https://www.amnesty.org/download/Documents/8000/asa210182014en.pdf>> accessed 19 July 2021

⁷¹ 'Embrace of atheism put Indonesian in Prison' New York Times, 3 May 2014.

⁷² Michael T Tiu Jr, 'The Rainbow Flag among the Flags of Nations: Are LGBTQ Rights International Human rights?' (2020) 93 *Philippines Law Journal* 56

remains controversial globally and in Asia.⁷³ These implicate a range of issues, from attempts to decriminalize homosexual acts, campaigns to alter public sexuality education (which may conflict with the rights of others: articles 18, 19, 26(3) UDHR) and initiatives to have same-sex relations legally recognized. The state practice is decisively split and there is little or no consensus regarding these politically sensitive issues over contested rights claims.⁷⁴

Asian judicial attitudes on this issue is diverse: while the Indian Supreme Court held that the law against unnatural offences involving ‘carnal intercourse against the order of nature with any man, woman or animal’ was unconstitutional on grounds of equality and personal liberty⁷⁵ in affirming ‘the cult of egalitarian liberalism’⁷⁶, the Singapore Court of Appeal has upheld a related but distinct law prohibiting homosexual acts of gross indecency,⁷⁷ on the basis of public morality. Public floggings have been carried out in Aceh, Indonesia and in Malaysia where Islamic law prohibits sodomy and lesbianism.⁷⁸

Various Asian jurisdictions may recognize LGBTQ rights in relation to same-sex relations (Vietnam, Taiwan); the Thai House of Representatives is reviewing the possibility of recognising same-sex marriage and civil partnerships,⁷⁹ while a Japanese district court opined the prohibition against same-sex marriage was unconstitutional.⁸⁰ The prospect of such civil claims is impossible where homosexual conduct is criminalized, as in Singapore, Malaysia, Brunei and Bangladesh.⁸¹

D. Socio-Economic Rights

Of the 22 Asian states surveyed, only 4 are not party to the ICESCR. Only Mongolia has ratified the ICESCR Optional Protocol, while Timor-Leste has signed it. Only a modest 5 states (Bangladesh, Indonesia, the Philippines, Sri Lanka, and Timor-Leste) are party to the CMW, which Cambodia has also signed.

⁷³ Human Rights Council Resolution 30 June 2016 A/HRC/Res/32/2 (China, Indonesia, Maldives and Bangladesh voted against the resolution); General Assembly Resolution A/RES/69/182; ‘The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’ <<https://www.refworld.org/pdfid/48244e602.pdf>> accessed 19 July 2021

⁷⁴ For example, the privately authored Yogyakarta Principles on Gender identity and sexual orientation has been challenged by the OIC as a radical attempt to interpret human rights rather than an accurate statement of international law: OIC-IPHRC Study on Sexual Orientation and Gender Identity in the Light of Islamic Interpretations and International Human Rights Framework (May 2017), text available at <https://www.oic-iphrc.org/en/data/docs/studies/46303.pdf>. See Pierro A Tozzi, ‘Six Problems with the Yogyakarta Principles’, International Organizations Research Group Briefing Paper No 1, (2 April 2007) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551652;

⁷⁵ S377 Indian Penal Code,

⁷⁶ *Navtej Singh Johar v Union of India*, *THR. Secretary and Ministry of Law and Justice* AIR 2018 SC 4321; Writ Petition (Criminal) No. 76 of 2016 at [86]-[87]

⁷⁷ *Lim Meng Suang v AG* [2015] 1 SLR 26.

⁷⁸ Negeri Perlis Islamic Family Law Enactment 2006; Negeri Perlis Criminal Offences in the Syarak Enactment 1991, s 24, s 18, s11, s 5; Indonesia’s Aceh province publicly canes two gay men, Reuters, 29 Jan 2021

⁷⁹ Pichayada Promchertchoo, ‘Thailand’s Civil Partnership Bill Sparks Further Debate on Same-Sex Couple Rights’, CNA (4 February 2021)

⁸⁰ ‘Japan Court Finds Same-Sex Marriage Ban Unconstitutional’, BBC News (17 March 2021)

⁸¹ Malaysia’s Penal Code s 377; Bangladesh’s Penal Code, s 377; Brunei’s Penal Code, s 377, s377A, Singapore Penal Code

Table 2

State	SERs in Constitution	At Least One Justiciable SER
Bangladesh	Yes	Yes
Bhutan	Yes	No
Brunei	No	No
Cambodia	Yes	Yes
China	Yes	No
DPR Korea	Yes	No
India	Yes	Yes
Indonesia	Yes	Yes
Japan	Yes	Yes
Lao PDR	Yes	No
Malaysia	No	No
Mongolia	Yes	Yes
Myanmar	Yes	Yes
Nepal	Yes	Yes
Pakistan	Yes	Yes
Philippines	Yes	Yes
Rep. of Korea	Yes	No
Singapore	No	No
Sri Lanka	Yes	Yes
Thailand	Yes	Yes
Timor-Leste	Yes	Yes
Viet Nam	Yes	No

SERs are enshrined or read into the constitutions of all but three Asian states⁸² and are justiciable in 13 of the 19 states whose constitutions protect SERs.⁸³ The most frequently litigated SERs are the right to education⁸⁴ and the right to form or join a trade union,⁸⁵ with judicial recourse available in 10 Asian states. From a comparative perspective, the justiciability of SERs in Asian states is ‘substantially below the global average’,⁸⁶ even if Asian constitutions include SERs with the same regularity in comparative regional terms. The ICESCR Committee regularly recommends that states guarantee the direct applicability of all ICESCR rights within the domestic legal order.⁸⁷

The constitutions of South Asian countries (Bangladesh, India, Nepal, Pakistan, and Sri Lanka) all contain at least one justiciable SER, while practice in the ten ASEAN Member States varies considerably. Three ASEAN States contain no SERs in their

⁸² Brunei, Malaysia and Singapore.

⁸³ Malcolm Langford and Evan Rosevear, ‘Economic and Social Rights’, in DS Law, H Lau, & A Schwartz (eds.), *Oxford Handbook of Constitutional Law in Asia* (Oxford University Press, forthcoming) 4, noting that the ‘the average [number] of aspirational ESRs [per constitution] is the highest of any region’.

⁸⁴ Art 13, ICESCR.

⁸⁵ Art 8, ICESCR.

⁸⁶ Courtney Jung, Ran Hirschl, and Evan Rosevear, ‘Economic and Social Rights in National Constitutions’ (2014) 62(4) *American Journal of Comparative Law* 1043-1093, 1072.

⁸⁷ Ibid.

constitutions, with the Philippines and Timor-Leste providing for nine and twelve in their constitutions, respectively. Of the five Northeast Asian states, the Japan and Mongolia constitutions include five and seven SERs respectively, while China, DPR Korea, and the Republic of Korea only provide for many promotional commitments. This does not mean that Asian states' domestic courts fail to give effect to specific SERs. Langford and Rosevear adopt a tripartite classification of apex court approaches of certain Asian states towards the judicial enforcement of SERs: (i) expansive; (ii) restrictive; and (iii) incrementalist.⁸⁸ South Asian courts apply the most expansive approach; judges, especially in India, have effectively extended protection to SERs by expansively construing the article 21 right to life. Other Asian courts that adopt such an expansive approach include those of Taiwan, the Philippines and Sri Lanka. In the second category, are like those of China which take a more selective approach in the direct enforcement of SER. In the third category – where judiciaries adopt an 'incrementalist' approach to the justiciability of SER – are states like Indonesia, and Singapore.

V. TRADE AND INVESTMENT

A. Introduction

In this segment, we consider the domestic implementation of international economic law, including trade and investment law in the Asian states. In particular, we examine Asian states' compliance with obligations under the World Trade Organisation (WTO) system and its dispute settlement body's decisions; bilateral investment treaties ('BITs'); Free Trade Agreements ('FTAs') and multilateral regional investment protection agreements. In the field of Investor-State Dispute Settlement (ISDS), Asian states' approaches towards international trade disputes are generally uniform and consistent under the WTO dispute settlement system even though several Asian states have been openly critical of the bias in the current ISDS structure, its processes and outcomes.⁸⁹ However, there is greater variety in state practice in international investment law. We begin by considering the extent to which Asian states have signed and ratified the ICSID Convention. As the Convention provides an ISDS mechanism for the enforcement of Asian states' domestic implementation of their investment treaty obligations, this may provide an indication of Asian states' approaches to ISDS. Table 3 below shows the extent of accession and ratification to ICSID as well as to the Regional Comprehensive Economic Partnership (RCEP) and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). No pattern of practice among Asian states in the domestic implementation of international economic law may, however, be observed.

Table 3: Asian States That Have Signed/Ratified the ICSID Convention, RCEP and CPTPP

State	ICSID ⁹⁰	RCEP ⁹¹	CPTPP ⁹²	Observations
Brunei	Signed and	Member	Member	Parties to all 3

⁸⁸ Langford and Rosevear (n 97) 7-9.

⁸⁹ The following Asian Countries have made submissions to the UNCITAL Working Group III: Investor-State Dispute Settlement Reform: Indonesia, Thailand, Israel, Japan, Turkey, Republic of Korea, Bahrain, Kuwait, Kazakhstan.

⁹⁰ <https://icsid.worldbank.org/about/member-states/database-of-member-states>

⁹¹ <https://rcepsec.org/#>

⁹² <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>

Darussalam	Ratified	State	State (not yet in force)	Conventions.
Japan	Signed and Ratified	FTA Partner	Member State	
Malaysia	Signed and Ratified	Member State	Member State (not yet in force)	
Singapore	Signed and Ratified	Member State	Member State	
Cambodia	Signed and Ratified	Member State	-	Parties to ICSID and RCEP
China	Signed and Ratified	FTA Partner	-	
Indonesia	Signed and Ratified	Member State	-	
Korea, Republic of (South Korea)	Signed and Ratified	FTA Partner	-	
Philippines	Signed and Ratified	Member State	-	
Vietnam	Not Signed	Member State	Member State	Party to RCEP and CPTPP
Thailand	Signed but not Ratified	Member State	-	Party to RCEP and Signed to ICSID (but not ratified)
India	Not Signed	FTA Partner	-	Party to RCEP only.
Laos	Not Signed	Member State	-	
Myanmar (Burma)	Not Signed	Member State	-	
Afghanistan	Signed and Ratified	-	-	Signed and Ratified ICSID only.
Armenia	Signed and Ratified	-	-	
Azerbaijan	Signed and Ratified	-	-	
Bahrain	Signed and Ratified	-	-	
Bangladesh	Signed and Ratified	-	-	
Georgia	Signed and Ratified	-	-	
Iraq	Signed and Ratified	-	-	
Israel	Signed and Ratified	-	-	
Jordan	Signed and Ratified	-	-	

Kazakhstan	Signed and Ratified	-	-	
Kuwait	Signed and Ratified	-	-	
Lebanon	Signed and Ratified	-	-	
Mongolia	Signed and Ratified	-	-	
Nepal	Signed and Ratified	-	-	
Oman	Signed and Ratified	-	-	
Pakistan	Signed and Ratified	-	-	
Papua New Guinea	Signed and Ratified	-	-	
Qatar	Signed and Ratified	-	-	
Saudi Arabia	Signed and Ratified	-	-	
Sri Lanka	Signed and Ratified	-	-	
Syria/ Syrian Arab Republic	Signed and Ratified	-	-	
Timor-Leste/ East Timor	Signed and Ratified	-	-	
Turkey	Signed and Ratified	-	-	
Turkmenistan	Signed and Ratified	-	-	
United Arab Emirates	Signed and Ratified	-	-	
Uzbekistan	Signed and Ratified	-	-	
Yemen	Signed and Ratified	-	-	
Kyrgyzstan/ Kyrgyz Republic	Signed but not Ratified	-	-	Signed but not ratified ICSID
Russia/ Russian Federation	Signed but not Ratified	-	-	
Bhutan	Not Signed	-	-	Not a party to any of the Conventions
Iran	Not Signed	-	-	
Korea, North	Not Signed	-	-	
Maldives	Not Signed	-	-	
Tajikistan	Not Signed	-	-	

B. Trends in Treaty Provisions

There are no observable significant practices or trends in the treaty provisions of Asian states. First, unlike the WTO system, there is no single multilateral investment treaty to which all Asian states are signatories. Asian states are signatories to various multilateral treaties such as the ASEAN treaties which have been observed to provide fewer binding provisions and different regulatory standards than the CPTPP. While Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan are parties to the Energy Charter Treaty 1994 ('ECT'), no other Asian state has signed the ECT.

Second, there exists a wide variety of treaty provisions within each Asian state. For example, China has a wide variety of FTAs and BITs, perhaps to accommodate the counter-party's varying proposals and practices. Japan has negotiated clearer definitions of investment treaty provisions in various treaties such as fair and equitable treatment in the Japan-Kenya 2016 BIT and the most-favoured-nation clause in the Japan-Argentina 2018 BIT. Sri Lanka's BITs have been observed to provide for the greatest possible protection for foreign investors with minimal policy space to regulate foreign investments. Thai law contains limitations on foreign ownership and participation in businesses involving national security, natural resources, infant industries and cultural affairs.

Third, Asian states are also observed to have negotiated a wide variety of exceptions to their investment treaty obligations. These are implemented in domestic foreign investment laws. China has included national security reviews in approvals of foreign direct investment ('FDI'), restrictions on the trade of technology for the purpose of maintaining security, protecting human health or security, and rules relating to state owned enterprises. Japan has excluded specific industries such as broadcasting, aerospace, arms and explosive, electricity, gas, nuclear energy, and fisheries. Iran's BITs require that all investments are approved by the competent government authority and excludes any foreign ownership of land. Indonesia similarly requires that foreign investments are first approved by the investment coordinating board (BKPM) and places time limits on foreign ownership of shares in Indonesian companies.

C. Dispute Settlement Trends in Recent Regional FTAs

Most Asian states are party to the Washington Convention establishing the International Centre for Settlement of Investment Disputes (ICSID) 1965 and New York Convention on the enforcement of foreign arbitral Awards 1956. The ICSID process allows an investor to bring a dispute under the ICSID dispute settlement rules. In case of a finding of violation against the host state of its treaty obligations, the arbitration award can be enforced as if the award is a final judgment of the host state's courts. BITs and investment contracts often incorporate these mechanisms for settlement of disputes between the investor and the host state. However, few Asian states such as India, Thailand, Vietnam, etc., have been selective in their ratification of the ICSID Convention and have cited reservations.

In the recent decade, several Asian states have attempted to go beyond the US-style model BITs⁹³ and to tweak the rules in the recent BITs and FTA investment chapters.

⁹³ The US-style BITs was based originally on the 1993 North American FTA with provisions somewhat revised in later US FTAs and a Model BIT in light of experiences with NAFTA ISDS cases.

Annex B to this report reflects the currently available model text of dispute settlement provisions of Asian states. This may be an area worth future study, in the event that more Asian states negotiate treaties based on different model dispute settlement treaties. Asian states' future dispute settlement provisions should also be considered in conjunction with the EU's potential development of an appellate mechanism for investor state disputes. Vietnam has agreed to such appellate mechanism provisions. It thus remains to be seen whether such dispute resolution mechanisms may influence Asian states, or whether Asian states' newer treaties will reveal an alternative trend. These emerging trends, the consequence of which may be reflected in the Asian state practice in the decades to come, do not negate the predominant use of ISDS provisions in the current BITs. Thus, a second and related potential area of study would be whether Asian states will terminate their existing treaties and replace them with something else. India and Indonesia have taken the drastic step towards fundamentally altering their BITs because of several adverse ISDS claims and moved towards an approach that makes ISDS arbitration the least preferred option. The recently concluded RCEP has excluded the typical ISDS clause altogether and the many signatories to the CPTPP have side agreements to restrict ISDS. Asian states in general have cited several reasons for the moving away from the ISDS arbitration, including frivolous investor claims, regulatory chill, the creation of a parallel system of adjudication, concerns regarding consistency, coherence, predictability and correctness of arbitral decisions, and the lack of an appropriate mechanism to remedy or limit such inconsistencies, lack of independence and impartiality of arbitrators, the erosion of regulatory power on the host State, and non-recognition of public interest.⁹⁴ At least two Asian states – India and Indonesia – have taken the drastic step of terminating most of their old BITs.

D. Conclusion

While Asian states, in general, seem to acknowledge the problems and concerns regarding the ISDS, they continue to maintain liberal provisions on ISDS in their BITs. In other words, the old BITs model predominantly dominates the BITs ISDS provisions in practice among Asian states. At the same time, there is an underlining trend towards incorporating improved and/or restrictive versions of ISDS by some of the States in the recent BITs and regional FTAs. Such concrete state actions to moving away or improve the ISDS is restricted to a limited number of countries. As shown above, the conscious decision toward restricting the scope of ISDS in investment regimes is visible from the practice of India, Indonesia and to a certain extent, Vietnam. However, India seems to be the only country to have taken the concrete step towards this shift, which is evident from its Model BIT text and its recently concluded BITs. When one takes the Asia-Pacific region, Australia and New Zealand can also be included in the category of states who prefer to exclude or limit the scope of ISDS in their bilateral and multilateral engagements. If the trend from the negotiated outcome of RCEP is any indicator, the older BITs ISDS may gradually pave the way for a more reformed or modified versions of ISDS like recent EU initiatives.

Lastly, it may become particularly important to study whether Asian states sign and ratify recent multilateral treaties such as the RCEP and CPTPP, and in time, how these Asian states implement their international economic law obligations domestically. As

⁹⁴ Luke Nottage, et al (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, 2020).

these Asian states are bound by the same obligations under such multilateral agreements, some level of consistency is expected. However, it remains to be seen if Asian states will implement the provisions of RCEP, CPTPP, and other multilateral treaties in a consistent manner, or whether other trends will emerge.